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

MARTIN GUERRERO, et al.,

CASE NO. CV F 08-1878 LJO GSA

Plaintiffs,

**ORDER ON DEFENDANTS’ F.R.Civ.P. 12  
MOTION TO DISMISS  
(Doc. 9.)**

vs.

CITI RESIDENTIAL LENDING,  
INC., et al,

Defendants.

**INTRODUCTION**

Defendants<sup>1</sup> seek to dismiss as time barred and lacking necessary elements plaintiffs Martin Guerrero and Sara Guerrero’s (collectively “plaintiffs”) rescission and damages claims under the Truth in Lending Act (“TILA”), 15 U.S.C. §§ 1601, et seq., and its implementing regulations 12 C.F.R. §§ 226, et seq. (“Reg. Z”). Defendants further seek to dismiss plaintiffs’ state law unfair competition claim as conclusory and unsubstantiated. Plaintiffs filed no timely papers to oppose dismissal of their claims. This Court considered defendants’ F.R.Civ.P. 12(b)(6) motion to dismiss on the record and VACATES the April 16, 2009 hearing, pursuant to Local Rule 78-230(c), (h). For the reasons discussed below, this Court DISMISSES this action.

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<sup>1</sup> Defendants are Citi Residential Lending, Inc. (“Citi”), U.S. Bank National Association as trustee of CitiGroup Mortgage Loan Trust Inc. (“US Bank”), and CR Title Services, Inc. (“CR Title”) and will be referred to collectively as “defendants.”

1 **BACKGROUND**

2 **Plaintiffs' Home Loan And Default**

3 Plaintiffs are married and on April 12, 2006 executed a \$328,000 promissory note payable to  
4 Quick Loan Funding, Inc. to refinance their Newman, California residence ("property"). Plaintiffs  
5 executed a Deed of Trust ("DOT") to secure the loan with the property and which was recorded on April  
6 21, 2006.<sup>2</sup> By a Substitution of Trustee recorded on November 25, 2008, CR Title substituted as trustee  
7 under the DOT. Pursuant to a July 21, 2008 Limited Power of Attorney between US Bank and Citi, Citi  
8 was appointed servicer for plaintiffs' loan. The DOT was assigned to US Bank as a trustee of CitiGroup  
9 Mortgage Loan Trust Inc.

10 Plaintiffs are in default on their loan and subject to foreclosure. Defendants note that they neither  
11 were involved in nor originated plaintiffs' loan in that: (1) US Bank was assigned the DOT more than  
12 two years after the DOT's origination; (2) Citi merely services, or collect payments for, the loan; and  
13 (3) CR Title merely is the foreclosure trustee and processes foreclosure documents.

14 **Plaintiffs' Claims**

15 Plaintiffs filed this action on December 5, 2008 and appear to complain chiefly that loan  
16 disclosure documents failed to disclose "the true nature and cost" of plaintiffs' loan. Plaintiffs'  
17 complaint ("complaint") alleges:

- 18 1. A (first) TILA rescission cause of action that plaintiffs are entitled to rescind their loan  
19 for "failure to provide proper *material* disclosures";
- 20 2. A (second) TILA violation cause of action for damages arising from failure to make  
21 required TILA and Reg. Z disclosures; and
- 22 3. A (third) California Business and Professions Code, §§ 17200, et seq.,<sup>3</sup> cause of action  
23 that failure to deliver material TILA and Reg. Z disclosures constitutes unlawful and  
24 fraudulent business practices to violate the UCL.

25 The complaint seeks to rescind plaintiffs' loan, a return of plaintiffs' money or property, statutory

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<sup>2</sup> All documents regarding plaintiffs' loan and default were recorded with the Stanislaus County Recorder.

27 <sup>3</sup> California Business and Professions Code, §§ 17200, et seq., will be referred to as "UCL" ["Unfair  
28 Competition Law"].

1 damages, an injunction of foreclosure, and attorney fees.

2 **DISCUSSION**

3 **F.R.Civ.P. 12(b)(6) Motion Standards**

4 Defendants seek F.R.Civ.P. 12(b)(6) dismissal of plaintiffs' claims on grounds that they are  
5 insufficiently pled and time barred.

6 A F.R.Civ.P. 12(b)(6) motion to dismiss is a challenge to the sufficiency of the pleadings set  
7 forth in the complaint. "When a federal court reviews the sufficiency of a complaint, before the reception  
8 of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not  
9 whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to  
10 support the claims." *Scheurer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683 (1974); *Gilligan v. Jamco*  
11 *Development Corp.*, 108 F.3d 246, 249 (9<sup>th</sup> Cir. 1997). A F.R.Civ.P. 12(b)(6) dismissal is proper where  
12 there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a  
13 cognizable legal theory." *Balisteri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9<sup>th</sup> Cir. 1990); *Graehling*  
14 *v. Village of Lombard, Ill.*, 58 F.3d 295, 297 (7<sup>th</sup> Cir. 1995). F.R.Civ.P. 12(b)(6) dismissal is proper  
15 when "plaintiff can prove no set of facts in support of his claim which would entitle him to relief."  
16 *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102 (1957).

17 In resolving a F.R.Civ.P. 12(b)(6) motion, the court must: (1) construe the complaint in the light  
18 most favorable to the plaintiff; (2) accept all well-pleaded factual allegations as true; and (3) determine  
19 whether plaintiff can prove any set of facts to support a claim that would merit relief. *Cahill v. Liberty*  
20 *Mut. Ins. Co.*, 80 F.3d 336, 337-338 (9<sup>th</sup> Cir. 1996). Nonetheless, a court is "free to ignore legal  
21 conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in  
22 the form of factual allegations." *Farm Credit Services v. American State Bank*, 339 F.3d 765, 767 (8<sup>th</sup>  
23 Cir. 2003) (citation omitted). A court need not permit an attempt to amend a complaint if "it determines  
24 that the pleading could not possibly be cured by allegation of other facts." *Cook, Perkiss and Liehe, Inc.*  
25 *v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9<sup>th</sup> Cir. 1990). "While a complaint attacked by a  
26 Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to  
27 provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a  
28 formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 127

1 S. Ct. 1955, 1964-65 (2007) (internal citations omitted). Moreover, a court “will dismiss any claim that,  
2 even when construed in the light most favorable to plaintiff, fails to plead sufficiently all required  
3 elements of a cause of action.” *Student Loan Marketing Ass'n v. Hanes*, 181 F.R.D. 629, 634 (S.D. Cal.  
4 1998).

5 Moreover, a limitations defense may be raised by a F.R.Civ.P. 12(b)(6) motion to dismiss.  
6 *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9<sup>th</sup> Cir. 1980); *see Avco Corp. v. Precision Air Parts,*  
7 *Inc.*, 676 F.2d 494, 495 (11<sup>th</sup> Cir. 1982), *cert. denied*, 459 U.S. 1037, 103 S.Ct. 450 (1982). A  
8 F.R.Civ.P. 12(b)(6) motion to dismiss may raise the limitations defense when the statute’s running is  
9 apparent on the complaint’s face. *Jablon*, 614 F.2d at 682. If the limitations defense does not appear  
10 on the complaint’s face and the trial court accepts matters outside the pleadings’ scope, the defense may  
11 be raised by a motion to dismiss accompanied by affidavits. *Jablon*, 614 F.2d at 682; *Rauch v. Day and*  
12 *Night Mfg. Corp.*, 576 F.2d 697 (6<sup>th</sup> Cir. 1978).

13 For a F.R.Civ.P. 12(b)(6) motion, a court generally cannot consider material outside the  
14 complaint. *Van Winkle v. Allstate Ins. Co.*, 290 F.Supp.2d 1158, 1162, n. 2 (C.D. Cal. 2003).  
15 Nonetheless, a court may consider exhibits submitted with the complaint. *Van Winkle*, 290 F.Supp.2d  
16 at 1162, n. 2. In addition, a “court may consider evidence on which the complaint ‘necessarily relies’  
17 if: (1) the complaint refers to the document; (2) the document is central to the plaintiff’s claim; and (3)  
18 no party questions the authenticity of the copy attached to the 12(b)(6) motion.” *Marder v. Lopez*, 450  
19 F.3d 445, 448 (9<sup>th</sup> Cir. 2006). A court may treat such a document as “part of the complaint, and thus  
20 may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6).” *United*  
21 *States v. Ritchie*, 342 F.3d 903, 908 (9<sup>th</sup> Cir.2003). Such consideration prevents “plaintiffs from  
22 surviving a Rule 12(b)(6) motion by deliberately omitting reference to documents upon which their  
23 claims are based.” *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9<sup>th</sup> Cir. 1998). A “court may disregard  
24 allegations in the complaint if contradicted by facts established by exhibits attached to the complaint.”  
25 *Sumner Peck Ranch v. Bureau of Reclamation*, 823 F.Supp. 715, 720 (E.D. Cal. 1993) (citing *Durning*  
26 *v. First Boston Corp.*, 815 F.2d 1265, 1267 (9<sup>th</sup> Cir.1987)). Moreover, “judicial notice may be taken  
27 of a fact to show that a complaint does not state a cause of action.” *Sears, Roebuck & Co. v.*  
28 *Metropolitan Engravers, Ltd.*, 245 F.2d 67, 70 (9<sup>th</sup> Cir. 1956); *see Estate of Blue v. County of Los*

1 *Angeles*, 120 F.3d 982, 984 (9<sup>th</sup> Cir. 1997). As such, this Court may consider plaintiffs’ pertinent loan  
2 documents.

3 **TILA Damages Claim**

4 ***Citi And CR Title***

5 Citi and CR Title argue that they are not liable for TILA damages in that they are not creditors  
6 under TILA or Reg. Z., were not involved in the origination of plaintiffs’ loan, and are not linked to a  
7 TILA violation. As such, Citi and CR Title conclude they are not liable under the complaint’s (second)  
8 TILA damages cause of action.

9 15 U.S.C. § 1641 addresses TILA liability for assignees of loans and provides in pertinent part:

10 (f) Treatment of servicer

11 (1) In general

12 A servicer of a consumer obligation arising from a consumer credit  
13 transaction shall not be treated as an assignee of such obligation for purposes of this  
section unless the servicer is or was the owner of the obligation.

14 15 U.S.C. § 1602(f) limits the term “creditor” to “a person who both (1) regularly extends,  
15 whether in connection with loans, sales of property or services, or otherwise, consumer credit which is  
16 payable by agreement in more than four installments or for which the payment of a finance charge is or  
17 may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is  
18 initially payable on the face of the evidence of indebtedness or, if there is no such evidence of  
19 indebtedness, by agreement.”

20 Citi points out that it merely serviced plaintiffs’ loan by collecting payments and thus is not a  
21 creditor subject to TILA liability. CR Title explains that as the DOT trustee, it is not a creditor, has  
22 never had a beneficial interest in the DOT, and does not extend consumer credit. An “ordinary trust deed  
23 conveys the legal title to the trustee only so far as may be necessary to the execution of the trust.”  
24 *Lupertino v. Carbahal*, 35 Cal.App.3d 742, 748, 111 Cal.Rptr. 112 (1973). A deed of trust “carries none  
25 of the incidents of ownership of the property, other than the right to convey upon default on the part of  
26 the debtor in the payment of his debt.” *Lupertino*, 35 Cal.App.3d at 748, 111 Cal.Rptr. 112 (quoting  
27 *Bank of Italy etc. Assn. v. Bentley*, 217 Cal. 644, 656, 20 P.2d 940 (1933)). The California Court of  
28 Appeal has explained a deed of trust trustee’s limited authority:

1 The trustee under a deed of trust “is not a true trustee, and owes no fiduciary  
2 obligations; [it] merely acts as a common agent for the trustor and beneficiary of the deed  
3 of trust. [The trustee's] only duties are: (1) upon default to undertake the steps necessary  
4 to foreclose the deed of trust; or (2) upon satisfaction of the secured debt to reconvey the  
5 deed of trust.” (*Vournas v. Fidelity National Title Ins. Co.* (1999) 73 Cal.App.4th 668,  
6 677, 86 Cal.Rptr.2d 490.) Consistent with this view, California courts have refused to  
7 impose duties on the trustee other than those imposed by statute or specified in the deed  
8 of trust. As our Supreme Court noted in *I.E. Associates v. Safeco Title Ins. Co.* (1985)  
9 39 Cal.3d 281, 216 Cal.Rptr. 438, 702 P.2d 596, “The rights and powers of trustees in  
10 nonjudicial foreclosure proceedings have long been regarded as strictly limited and  
11 defined by the contract of the parties and the statutes.... [¶] ... [T]here is no authority for  
12 the proposition that a trustee under a deed of trust owes any duties with respect to  
13 exercise of the power of sale beyond those specified in the deed and the statutes.” ( *Id.*  
14 at pp. 287-288, 216 Cal.Rptr. 438, 702 P.2d 596.)

9 *Heritage Oaks Partners v. First American Title Ins. Co.*, 155 Cal.App.4th 339, 345, 66 Cal.Rptr.3d 510  
10 (2007).

11 Citi and CR Title demonstrate their lack of liability for TILA damages. This Court construes  
12 plaintiffs’ lack of opposition as their concession that Citi and CR Tile are not liable for TILA damages.  
13 As such, dismissal of the (second) TILA damages cause of action against Citi and CR Title is  
14 appropriate.

#### 15 ***Limitations Period***

16 Defendants contend that the complaint’s (second) TILA damages cause of action is barred by the  
17 one-year limitations period of 15 U.S.C. § 1640(e), which provides that an action for a TILA violation  
18 must proceed “within one year from the date of the occurrence of the violation.” The limitations period  
19 runs from the date of a transaction’s consummation which is the time that a consumer becomes  
20 contractually obligated on a credit transaction. *Monaco v. Bear Stearns Residential Mortgage Corp.*,  
21 554 F.Supp.2d 1034, 1039 (C.D. Cal. 2008).

22 Defendants contend that the limitations period started on April 12, 2006 when plaintiffs signed  
23 their loan documents and that a December 5, 2008 filing of the complaint renders their TILA damages  
24 claim untimely. Defendants point to *Meyer v. Ameriquest Mortgage Co.*, 342 F.3d 899, 902 (9<sup>th</sup> Cir.  
25 2003):

26 The failure to make the required disclosures occurred, if at all, at the time the loan  
27 documents were signed. The [plaintiffs] were in full possession of all information  
28 relevant to the discovery of a TiLA violation and a § 1640(a) damages claim on the day  
the loan papers were signed.

1 Defendants further argue that plaintiffs are not entitled to equitable tolling of the one-year  
2 limitations period in the absence of allegations that defendants actively mislead plaintiffs to lull plaintiffs  
3 to sit on their rights of redress. *See Hubbard v. Fidelity Federal Bank*, 91 F.3d 75, 79 (9<sup>th</sup> Cir. 1996) (no  
4 evidence suggested that lender concealed its alleged breach). Defendants note that alleged loan  
5 disclosure errors would have put “any reasonable person on notice” at the time of the April 12, 2006 loan  
6 closing. “Equitable tolling may be applied if, despite all due diligence, a plaintiff is unable to obtain  
7 vital information bearing on the existence of his claim.” *Santa Maria v. Pacific Bell*, 202 F.3d 1170,  
8 1178 (9<sup>th</sup> Cir. 2000). “If a reasonable plaintiff would not have known of the existence of a possible  
9 claim within the limitations period, then equitable tolling will serve to extend the statute of limitations  
10 for filing suit until the plaintiff can gather what information he needs.” *Santa Maria*, 202 F.3d at 1178.

11 Nothing in the complaint hints that plaintiffs were prevented to compare their loan documents  
12 and disclosures with TILA statutory and regulatory requirements. Once again, this Court construes lack  
13 of timely opposition as plaintiffs’ concession that their TILA damages claim is time barred to warrant  
14 dismissal of it. The complaint’s face reveals as much.

### 15 TILA Rescission

### 16 *Citi And CR Title*

17 \_\_\_\_\_ Citi and CR Title contend that they are not subject to the complaint’s (first) TILA rescission  
18 cause of action in that they are neither the original creditor for plaintiffs’ loan nor an assignee under the  
19 DOT. *See* 15 U.S.C. § 1641(f)(1). Under 15 U.S.C. § 1641(c), a “consumer who has the right to rescind  
20 a transaction under section 1635 of this title [15]<sup>4</sup> may rescind the transaction as against any assignee  
21

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22 <sup>4</sup> 15 U.S.C. § 1635(a) addresses disclosure of right to rescind and provides:

23 Except as otherwise provided in this section, in the case of any consumer credit transaction  
24 (including opening or increasing the credit limit for an open end credit plan) in which a security interest,  
25 including any such interest arising by operation of law, is or will be retained or acquired in any property  
26 which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the  
27 right to rescind the transaction until midnight of the third business day following the consummation of the  
28 transaction or the delivery of the information and rescission forms required under this section together with  
a statement containing the material disclosures required under this subchapter, whichever is later, by  
notifying the creditor, in accordance with regulations of the Board, of his intention to do so. The creditor  
shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a  
transaction subject to this section the rights of the obligor under this section. The creditor shall also  
provide, in accordance with regulations of the Board, appropriate forms for the obligor to exercise his right

1 of the obligation.” Citi and CR Title are correct that plaintiffs may not pursue TILA rescission relief as  
2 to them.

3 ***U.S. Bank***

4 Defendants argue that the complaint fails to establish a TILA rescission claim against U.S. Bank  
5 in the absence of inaccurate or ineffective disclosures. Defendants note that as a creditor assignee and  
6 substitute beneficiary under the DOT, U.S. Bank is subject to a TILA rescission claim “only if the  
7 violation for which such action or proceeding is brought is apparent on the face of the disclosure  
8 statement.” 15 U.S.C. § 1641(a). Defendants fault the complaint’s absence of attached “relevant  
9 disclosures suggesting any apparent violation on the face of any of the pertinent documents.”  
10 Defendants note the complaint’s allegation that plaintiffs received “Notices of Right to Cancel” and  
11 absence of facts “to establish any defects within those Notices.”

12 Defendants correctly note the absence of sufficient allegations to pursue a TILA rescission claim  
13 against US Bank. Plaintiffs offer nothing to support their TILA rescission claim to warrant its dismissal.

14 ***Plaintiffs’ Notice of Rescission And Failure To Offer To Tender***

15 The complaint notes that plaintiffs give “effective notice to rescind” their loan. Defendants  
16 characterize plaintiffs’ rescission attempt as untimely and argue that the complaint fails to establish  
17 plaintiffs’ proper notice of rescission.

18 TILA's “buyer's remorse” provision allows borrowers three business days to rescind, without  
19 penalty, a consumer loan that uses their principal dwelling as security. *Semar v. Platte Valley Federal*  
20 *Sav. & Loan Ass’n*, 791 F.2d 699, 701 (9<sup>th</sup> Cir. 1986); 15 U.S.C. § 1635(a). As defendants note, TILA  
21 rescission may be extended up to three years if a lender fails to comply with TILA disclosure  
22 requirements. *Semar*, 791 F.2d at 701-702; 15 U.S.C. § 1635.

23 \_\_\_\_\_ Defendants fault plaintiffs’ TILA rescission claim based on plaintiffs’ inability to tender loan  
24 proceeds. The “voiding of a security interest may be judicially conditioned on debtor’s tender of amount  
25 due under the loan.” *American Mortgage Network, Inc. v. Shelton*, 486 F.3d 815, 821 (4<sup>th</sup> Cir. 2007).

26 The complaint alleges that based on plaintiffs’ exercise of their rescission right, defendants have

27 \_\_\_\_\_  
28 to rescind any transaction subject to this section.



1 20 days to “refund or credit the alleged account all monies paid and to void the security interest, or seek  
2 judicial guidance.”

3 15 U.S.C. § 1635(b) governs the return of money or property when a borrower exercises the right  
4 to rescind:

5 . . . Within 20 days after receipt of a notice of rescission, the creditor shall return to the  
6 obligor any money or property given as earnest money, downpayment, or otherwise, and  
7 shall take any action necessary or appropriate to reflect the termination of any security  
8 interest created under the transaction. If the creditor has delivered any property to the  
9 obligor, the obligor may retain possession of it. Upon the performance of the creditor's  
10 obligations under this section, the obligor shall tender the property to the creditor, except  
11 that if return of the property in kind would be impracticable or inequitable, the obligor  
12 shall tender its reasonable value. Tender shall be made at the location of the property or  
13 at the residence of the obligor, at the option of the obligor. If the creditor does not take  
14 possession of the property within 20 days after tender by the obligor, ownership of the  
15 property vests in the obligor without obligation on his part to pay for it. The procedures  
16 prescribed by this subsection shall apply except when otherwise ordered by a court.

12 C.F.R. § 226.23(d) address rescission effects and provides:

13 (2) Within 20 calendar days after receipt of a notice of rescission, the creditor  
14 shall return any money or property that has been given to anyone in connection with the  
15 transaction and shall take any action necessary to reflect the termination of the security  
16 interest.

16 (3) If the creditor has delivered any money or property, the consumer may retain  
17 possession until the creditor has met its obligation under paragraph (d)(2) of this section.  
18 When the creditor has complied with that paragraph, **the consumer shall tender the**  
19 **money or property to the creditor** or, where the latter would be impracticable or  
20 inequitable, tender its reasonable value. At the consumer's option, tender of property may  
21 be made at the location of the property or at the consumer's residence. Tender of money  
22 must be made at the creditor's designated place of business. If the creditor does not take  
23 possession of the money or property within 20 calendar days after the consumer's tender,  
24 the consumer may keep it without further obligation. (Bold added.)

21 Although 15 U.S.C. § 1635(b) “provides for immediate voiding of the security interest and return  
22 of the money within twenty days of the notice of rescission, we believe this assumes that the notice of  
23 rescission was proper in the first place.” *In re Groat*, 369 B.R. 413, 419 (Bankr. 8<sup>th</sup> Cir. 2007). The  
24 Ninth Circuit Court of Appeals has explained that prior to ordering rescission based on a lender’s alleged  
25 TILA violations, a court may require borrowers to prove ability to repay loan proceeds:

26 As rescission under § 1635(b) is an on-going process consisting of a number of  
27 steps, there is no reason why a court that may alter the sequence of procedures after  
28 deciding that rescission is warranted, may not do so before deciding that rescission is  
warranted when it finds that, assuming grounds for rescission exist, rescission still could  
not be enforced because the borrower cannot comply with the borrower's rescission

1 obligations no matter what. Such a decision lies within the court's equitable discretion,  
2 taking into consideration all the circumstances including the nature of the violations and  
3 the borrower's ability to repay the proceeds. If, as was the case here, it is clear from the  
4 evidence that the borrower lacks capacity to pay back what she has received (less interest,  
5 finance charges, etc.), the court does not lack discretion to do before trial what it could  
6 do after.

7 *Yamamoto v. Bank of New York*, 329 F.3d 1167, 1173 (9<sup>th</sup> Cir. 2003) (affirming summary judgment for  
8 lender in absence of evidence that borrowers could refinance or sell property); *see American Mortgage*,  
9 486 F.3d at 821 (“Once the trial judge in this case determined that the [plaintiffs] were unable to tender  
10 the loan proceeds, the remedy of unconditional rescission was inappropriate.”); *LaGrone v. Johnson*,  
11 534 F.2d 1360, 1362 (9<sup>th</sup> Cir. 1974) (under the facts, loan rescission should be conditioned on the  
12 borrower’s tender of advanced funds given the lender’s non-egregious TILA violations and equities  
13 heavily favoring the lender).<sup>5</sup>

14 The complaint alleges that the obligation within 20 days to “refund or credit the alleged account  
15 all monies paid” is a “condition precedent” to plaintiff’s “duty to tender.” The complaint’s prayer seeks  
16 this Court’s order that plaintiffs have no duty to tender if defendants “fail to further respond lawfully”  
17 to plaintiffs’ “valid rescission notice.” The prayer seeks an alternative order “for Defendants to accept  
18 tender on reasonable terms and over a reasonable period of time.”

19 Plaintiffs fail to establish that their complaint is a timely, valid rescission notice. The complaint  
20 acknowledges plaintiffs’ inability to tender the loan proceeds to entitle plaintiffs to rescission. “Clearly  
21 it was not the intent of Congress to reduce the mortgage company to an unsecured creditor or to simply  
22 permit the debtor to indefinitely extend the loan without interest.” *American Mortgage*, 486 F.3d at 820-  
23 821. Defendants raise a valid point that if plaintiffs were unable to make their mortgage payments,  
24 “what possible facts do they have to meet the requirement that they tender the net amounts advanced?”

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25 <sup>5</sup> The Fourth Circuit Court of Appeals agrees with the Ninth Circuit that 15 U.S.C. § 1635(b) does not  
26 compel a creditor to remove a mortgage lien in the absence of the debtor’s tender of loan proceeds:

27 Congress did not intend to require a lender to relinquish its security interest when it is now known that the  
28 borrowers did not intend and were not prepared to tender restitution of the funds expended by the lender  
in discharging the prior obligations of the borrowers.

*Powers v. Sims & Levin*, 542 F.2d 1216, 1221 (4<sup>th</sup> Cir. 1976).

1 The absence of a sufficiently alleged notice of rescission and tender of loan proceeds dooms plaintiffs'  
2 TILA rescission claim to warrant its dismissal.

### 3 UCL Claim

4 Defendants attack the complaint's (third) UCL cause of action as conclusory and lacking  
5 sufficient specificity. Although defendants raise valid points, federal preemption is a more fundamental  
6 ground to dismiss the UCL claim.

7 "[B]ecause there has been a history of significant federal presence in national banking, the  
8 presumption against preemption of state law is inapplicable." *Bank of America v. City and County of*  
9 *S.F.*, 309 F.3d 551, 559 (9<sup>th</sup> Cir. 2002), *cert. denied*, 538 U.S. 1069, 123 S.Ct. 2220 (2003). In *Silvas*  
10 *v. E\*Trade Mortgage Corp.*, 421 F.Supp.2d 1315 (S.D. Cal. 2006), *aff'd*, 514 F.3d 1001 (9<sup>th</sup> Cir. 2008),  
11 a fellow district court held that the Home Owners Loan Act ("HOLA"), 12 U.S.C. §§ 1461, et seq.,  
12 preempted claims under the UCL if the UCL claims were predicated on TILA. *See Reyes v. Downey*  
13 *Saving & Loan Ass'n*, 541 F.Supp.2d 1108, 1115 (C.D. Cal. 2008). The court reasoned that "when  
14 federal law preempts a field, it does not leave room for the states to supplement it." *Silvas*, 421  
15 F.Supp.2d at 1319 (citing *Rice v. Santa Fe Elev. Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447  
16 (1947)). States may not avoid preemption by adopting federal laws and adding supplemental remedies.  
17 *Reyes*, 541 F.Supp.2d at 1115; *see Public Util. Dist. No. 1 of Grays Harbor Cty. Wash. v. IDACOR, Inc.*,  
18 379 F.3d 641, 648-49 (9<sup>th</sup> Cir.2004). "Plaintiffs' use of the UCL as predicated on TILA is preempted."  
19 *Reyes*, 541 F.Supp.2d at 1115; *see Nava v. Virtual Bank*, 2008 WL 2873406, at \*7 (E.D. Cal. 2008)  
20 ("[F]or the same reason that plaintiff's UCL claim based on unfair or fraudulent business practices is  
21 preempted by federal law, plaintiff's UCL claim based on violation of TILA is also preempted.  
22 Moreover, plaintiff's UCL claim based on violation of TILA is also preempted by federal law since its  
23 application would supplement TILA by changing TILA's framework.")

24 In addition, since plaintiffs' TILA damages claim is time barred, their UCL claim based on TILA  
25 violations likewise fails. "A court may not allow plaintiff to 'plead around an absolute bar to relief  
26 simply by recasting the cause of action as one for unfair competition.'" *Chabner v. United of Omaha*  
27 *Life Ins. Co.*, 225 F.3d 1042, 1048 (9<sup>th</sup> Cir.2000); *see Rubio v. Capital One Bank (USA)*, 572 F.Supp.2d  
28 1157, 1168 (C.D. Cal. 2008) (since plaintiff's TILA claim failed, plaintiff's UCL claim predicated on

1 TILA likewise failed).

2 The (third) UCL cause of action is premised on TILA and alleges that defendants' acts and  
3 practices violate TILA and Reg. Z. The UCL cause of action makes repeated references to TILA to  
4 render it preempted. The time bar of plaintiffs' TILA damages claim bolsters dismissal of their UCL  
5 claim to prevent circumvention on the one-year TILA limitations period.

6 Based on dismissal of plaintiffs' claims, this Court need not address defendants' request to strike  
7 the complaint's prayer to enjoin foreclosure of the property.

8 **CONCLUSION AND ORDER**

9 For the reasons discussed above, this Court:

- 10 1. DISMISSES with prejudice this action; and  
11 2. DIRECTS the clerk to enter judgment in favor of defendants Citi Residential Lending,  
12 Inc., U.S. Bank National Association as trustee of CitiGroup Mortgage Loan Trust Inc.,  
13 and CR Title Services, Inc. and against plaintiffs Martin Guerrero and Sara Guerrero and  
14 FURTHER DIRECTS the clerk to close this action.

15 IT IS SO ORDERED.

16 **Dated:** April 3, 2009

/s/ Lawrence J. O'Neill  
UNITED STATES DISTRICT JUDGE

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