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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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CARL T. RAMOS,  
Plaintiff,  
v.  
CITIMORTGAGE, INC.,  
Defendant.

NO. CIV. 08-02250 WBS KJM

MEMORANDUM AND ORDER RE:  
MOTION TO DISMISS AND MOTION  
FOR A MORE DEFINITE STATEMENT

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Plaintiff Carl T. Ramos brought this lawsuit against Citimortgage Inc. alleging violations of federal and state law relating to a loan he obtained from a third party. Defendant now moves to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted or, in the alternative, for a more definite statement pursuant to Federal Rule Civil of Procedure 12(e).

I. Factual and Procedural Background

On September 15, 2005, plaintiff obtained a loan from Beneficial California Inc. ("Beneficial") in the amount of

1 \$270,762.90 that was secured by his residence in North Highlands,  
2 California. (Compl. ¶¶ 9, 12.) After consummating the loan,  
3 Beneficial allegedly failed to provide plaintiff with certain  
4 forms required by the Truth in Lending Act ("TILA"), 15 U.S.C. §  
5 1635(a), informing him of his right to rescind the loan. (Id. ¶  
6 26.)

7 Subsequently, defendant purchased plaintiff's loan from  
8 Beneficial. (Id. ¶ 69.) Defendant then proceeded to report  
9 incorrect information about plaintiff to several credit reporting  
10 agencies. (Id. ¶ 62.) Plaintiff notified defendant that the  
11 information was incorrect, and defendant acknowledged the errors  
12 in a July 29, 2006 letter and stated that it would correct them.  
13 (Id.) However, plaintiff alleges that defendant continues to  
14 report false information to these agencies. (Id. ¶ 63.)

15 In August and September 2006, plaintiff negotiated with  
16 defendant regarding a modification of his loan to remove a  
17 prepayment penalty. (Id. ¶¶ 71-72.) Defendant allegedly  
18 represented that it would remove the prepayment provision, but  
19 the parties' subsequent Loan Modification Agreement effectively  
20 retained the penalty. (Id. ¶¶ 72-77, 91-92; id. Ex. I at 4.) As  
21 a result, when plaintiff sought a "payoff quote" in December  
22 2006, defendant informed him that he would be subject to a  
23 prepayment penalty of \$8656.50. (Id. Ex. J.)

24 After entering into the Loan Modification Agreement,  
25 plaintiff alleges that defendant may have sold the loan to  
26 another party and become the servicer of the loan. (Id. ¶ 69.)  
27 Alternatively, plaintiff alleges that defendant may still own the  
28 loan as an assignee. (See id. ¶¶ 33, 67, 85-87.)

1           As a loan servicer, defendant allegedly acted as a debt  
2 collector for the loan's new owner. (Id. ¶ 42.) In a letter  
3 plaintiff sent to defendant dated August 11, 2008, plaintiff  
4 stated, "[W]e are asserting our rights under . . . the Fair Debt  
5 Collection Practices Act in that we are advising you that we have  
6 no intent on paying on the debt any further and we wish that all  
7 communications cease." (Id. ¶ 46.) Despite this notification,  
8 plaintiff alleges that defendant "repeatedly called plaintiff  
9 attempting to collect the debt." (Id. ¶ 47.)

10           In the August 11, 2008 letter, plaintiff also expressed  
11 his belief that defendant was no longer the "true note holder"  
12 and demanded information pertaining to the note holder's identity  
13 in the form of a Qualified Written Request pursuant to the Real  
14 Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. §§  
15 2601-2617. (Id. ¶¶ 21, 33.) He also asserted his right to  
16 rescind the loan agreement pursuant to TILA, 15 U.S.C. § 1635(b),  
17 in light of Beneficial's failure to provide him with the  
18 requisite notice of his right to rescind the loan. (Id. ¶¶ 34-  
19 38.) Defendant did not comply with plaintiff's Qualified Written  
20 Request or his demand for rescission. (Id. ¶¶ 32, 38.)

21           Plaintiff filed his Complaint on September 24, 2008,  
22 alleging fraud, fraudulent concealment, breach of contract,  
23 unconscionability, breach of the implied covenant of good faith  
24 and fair dealing, and violations of TILA, 15 U.S.C. §§ 1601-  
25 1667f; the Fair Debt Collection Practices Act ("FDCPA"), 15  
26 U.S.C. §§ 1692a-1692p; the Rosenthal Fair Debt Collection  
27 Practices Act ("RFDCPA"), Cal. Civ. Code §§ 1788.1-1788.33; the  
28 Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681a-1681x; and

1 California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof.  
2 Code §§ 17200-17509. Presently before the court are defendant's  
3 motion to dismiss the Complaint pursuant to Federal Rule of Civil  
4 Procedure 12(b)(6) and motion for a more definite statement  
5 pursuant to Federal Rule of Civil Procedure 12(e).

## 6 II. Discussion

### 7 A. Legal Standard

8 On a motion to dismiss, the court must accept the  
9 allegations in the complaint as true and draw all reasonable  
10 inferences in favor of the plaintiff. Scheuer v. Rhodes, 416  
11 U.S. 232, 236 (1974), overruled on other grounds by Davis v.  
12 Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322  
13 (1972). To survive a motion to dismiss, a plaintiff needs to  
14 plead "only enough facts to state a claim to relief that is  
15 plausible on its face." Bell Atl. Corp. v. Twombly, 127 S. Ct.  
16 1955, 1974 (2007). Dismissal is appropriate, however, where the  
17 plaintiff fails to state a claim supportable by a cognizable  
18 legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696,  
19 699 (9th Cir. 1990); see also Conley v. Gibson, 355 U.S. 41, 47  
20 (1957) (complaint must "give the defendant fair notice of what  
21 the plaintiff's claim is and the grounds upon which it rests"),  
22 abrogated on other grounds by Twombly, 127 S. Ct. at 1968.

23 In general, the court may not consider materials other  
24 than the facts alleged in the complaint when ruling on a motion  
25 to dismiss. Anderson v. Angelone, 86 F.3d 932, 934 (9th Cir.  
26 1996). The court may, however, consider additional materials if  
27 the plaintiff has alleged their existence in the complaint and if  
28 their authenticity is not disputed. See Branch v. Tunnell, 14

1 F.3d 449, 454 (9th Cir. 1994), overruled on other grounds by  
2 Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir.  
3 2002). Here, plaintiff has provided the court with his Loan  
4 Summary and Loan Repayment and Security Agreement (Compl. Ex. C);  
5 his Loan Modification Agreement (id. Ex. I); an August 31, 2006  
6 letter from defendant (id. Ex. H); and defendant's response to  
7 his request for a "payoff quote" (id. Ex. J). Plaintiff has  
8 alleged the existence of these documents in his Complaint (id. ¶¶  
9 69, 72-74), and no party has questioned their authenticity.  
10 Accordingly, the court will consider these documents in deciding  
11 defendant's motion to dismiss.

12 B. TILA Claims

13 1. Timeliness of Rescission Claim

14 In a consumer credit transaction where the creditor  
15 acquires a security interest in the borrower's principal  
16 dwelling, TILA provides the borrower with "a three-day  
17 cooling-off period within which [he or she] may, for any reason  
18 or for no reason, rescind" the transaction. McKenna v. First  
19 Horizon Home Loan Corp., 475 F.3d 418, 421 (1st Cir. 2007)  
20 (citing 15 U.S.C. § 1635). A creditor must "clearly and  
21 conspicuously disclose" this right to the borrower along with  
22 "appropriate forms for the [borrower] to exercise his right to  
23 rescind." 15 U.S.C. 1635(a).

24 If a creditor fails to provide the borrower with the  
25 required notice of the right to rescind, the borrower has three  
26 years from the date of consummation to rescind the transaction.  
27 Id. § 1635(f); 12 C.F.R. § 226.23(a)(3) ("If the required notice  
28 or material disclosures are not delivered, the right to rescind

1 shall expire 3 years after consummation."). The borrower's right  
2 to rescind, moreover, applies equally against the original  
3 creditor and subsequent assignees. 15 U.S.C. § 1641(c); see  
4 Boles v. Merscorp, Inc., No. 08-1989, 2008 WL 5225866, at \*3  
5 (C.D. Cal. Dec. 12, 2008) ("Where the loan has been assigned, the  
6 borrower still maintains the right to 'rescind against an  
7 assignee to the full extent it would be able to rescind against  
8 the original creditor.'" (quoting Rowland v. Novus Fin. Corp.,  
9 949 F. Supp. 1447, 1458 (D. Haw. 1996))).<sup>1</sup>

10 To exercise the right to rescind, a borrower must  
11 "notify the creditor of the rescission by mail, telegram or other  
12 means of written communication." 12 C.F.R. § 226.23(a)(2).  
13 Notice is deemed effective "when mailed, when filed for  
14 telegraphic transmission or, if sent by other means, when  
15 delivered to the creditor's designated place of business." Id.  
16 If a creditor then refuses to cancel the loan, the borrower has  
17 one year from the refusal to file suit for damages pursuant to 15  
18 U.S.C. § 1640. Miguel v. Country Funding Corp., 309 F.3d 1161,  
19 1165 (9th Cir. 2002) (citing 15 U.S.C. § 1640(e)). However, if  
20 the borrower files his or her suit over three years from the date  
21 of a loan's consummation, a court is powerless to grant

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23 <sup>1</sup> Citimortgage argues that Beneficial, as the assignor of  
24 plaintiff's loan, is the party against which plaintiff's claims  
25 should have been brought. In turn, counsel for plaintiff  
26 suggests that he might seek to amend the Complaint in order to  
27 allege some of his claims against Beneficial. In this Order,  
28 however, the court has examined the sufficiency of the Complaint  
solely with respect to its allegations against defendant  
Citimortgage Inc. Accordingly, any claim surviving the instant  
motion is sufficient as to Citimortgage Inc. and is not  
contingent upon the prospect of plaintiff adding Beneficial as a  
party.

1 rescission. Id. at 1164 (“[S]ection 1635(f) represents an  
2 ‘absolute limitation on rescission actions’ which bars any claims  
3 filed more than three years after the consummation of the  
4 transaction. (quoting King v. California, 784 F.2d 910, 913 (9th  
5 Cir. 1986)); accord Beach v. Ocwen Fed. Bank, 523 U.S. 410, 412  
6 (1998) (“[Section] 1635(f) completely extinguishes the right of  
7 rescission at the end of the 3-year period.”); see also Cazares  
8 v. Household Fin. Corp., 2005 U.S. Dist. LEXIS 39222, at \*24-25  
9 (C.D. Cal. 2005) (concluding that “[i]f certain Plaintiffs did  
10 exercise their rights to rescind[] prior to the expiration of the  
11 three-year limitation period,” such facts “would only entitle  
12 Plaintiffs to damages, not rescission” (citing 15 U.S.C. §  
13 1640(a); Belini v. Wash. Mut. Bank, FA, 412 F.3d 17 (1st Cir.  
14 2005))).

15 Here, plaintiff alleges that Beneficial did not provide  
16 him with the required notice of his right to rescind. (Compl. ¶  
17 34). Therefore, plaintiff had three years from the consummation  
18 of his loan to seek rescission. 15 U.S.C. § 1635(f). Plaintiff  
19 further alleges that he notified defendant by mail that he was  
20 exercising his right to rescind on August 11, 2008, which is less  
21 than three years from the date of consummation, September 15,  
22 2005. (Compl. ¶¶ 9, 34-38.) Upon defendant’s refusal to rescind  
23 the loan, plaintiff subsequently filed this action on September  
24 24, 2008. (Docket No. 1.)

25 As alleged, plaintiff provided defendant with a valid  
26 notice of rescission within the requisite time period under 15  
27 U.S.C. § 1635(f), and defendant refused to comply. Therefore,  
28 plaintiff’s Complaint states a claim for damages pursuant to 15

1 U.S.C. § 1640. See Buick v. World Sav. Bank, No. 07-1447, 2008  
2 WL 2413172, at \*5 (E.D. Cal. June 12, 2008) (citing Belini v.  
3 Wash. Mut. Bank, FA, 412 F.3d 17, 25 (1st Cir. 2005)). However,  
4 because plaintiff filed his Complaint over three years from the  
5 date on which he consummated his loan, the court is without  
6 jurisdiction to consider his claim for rescission under TILA.  
7 Miguel, 309 F.3d at 1164. Accordingly, the court must grant  
8 defendant's motion to dismiss with respect to this claim.

9 2. Failure to Disclose the "True Note Holder"

10 Defendant contends that the Loan Modification Agreement  
11 attached to the Complaint demonstrates that it is an assignee of  
12 plaintiff's loan, not a loan servicer, and therefore it cannot be  
13 liable under 15 U.S.C. § 1641(f). See 15 U.S.C. § 1641(f)(2)  
14 ("Upon written request by the [borrower], the servicer shall  
15 provide the [borrower], to the best knowledge of the servicer,  
16 with the name, address, and telephone number of the owner of the  
17 obligation or the master servicer of the obligation.").

18 In the Complaint, however, plaintiff alternatively  
19 alleges that, subsequent to the Loan Modification Agreement,  
20 defendant "resold [the loan] to parties unknown and now services  
21 it." (Compl. ¶ 69.) Thereafter, defendant allegedly failed to  
22 comply with plaintiff's Qualified Written Request for the  
23 identity of the "true note holder." (Id. ¶ 32.) Under Federal  
24 Rule of Civil Procedure 8(d), alternative allegations are  
25 permitted, and the attached Loan Modification Agreement is not  
26 inconsistent with plaintiff's allegations under 15 U.S.C. §  
27 1641(f). Accordingly, the court must deny defendant's motion to  
28 dismiss with respect to this aspect of plaintiff's TILA claim.



1 C. FDCPA and RFDCPA Claims

2 The FDCPA provides, "If a consumer notifies a debt  
3 collector in writing that the consumer refuses to pay a debt or  
4 that the consumer wishes the debt collector to cease further  
5 communication with the consumer, the debt collector shall not  
6 communicate further with the consumer with respect to such debt .  
7 . . ." 15 U.S.C. § 1692c(c). Plaintiff alleges that defendant  
8 received a letter from plaintiff dated August 11, 2008, which  
9 stated, "[W]e are asserting our rights under . . . the Fair Debt  
10 Collection Practices Act in that we are advising you that we have  
11 no intent on paying on the debt any further and we wish that all  
12 communications cease." (Compl. ¶ 46.) Subsequently, plaintiff  
13 alleges that defendant "repeatedly called . . . attempting to  
14 collect the debt." (Id. ¶ 47.)

15 Under the liberal pleading requirements of Federal Rule  
16 of Civil Procedure 8(a), plaintiff's allegations are sufficient  
17 to state a claim under the FDCPA. In addition, since a violation  
18 of 15 U.S.C. § 1692c(c) constitutes a violation of the RFDCPA,  
19 see Cal. Civ. Code § 1788.17, plaintiff's allegations also state  
20 a claim under the RFDCPA. Accordingly, the court must deny  
21 defendant's motion to dismiss with respect to plaintiff's FDCPA  
22 and RFDCPA claims.

23 D. FCRA Claim

24 The FCRA provides that "[a] person shall not furnish  
25 information relating to a consumer to any consumer reporting  
26 agency if . . . the person has been notified by the consumer . .  
27 . that specific information is inaccurate" and "the information  
28 is, in fact, inaccurate." 15 U.S.C. § 1681s-2. Plaintiff

1 alleges that defendant reported incorrect information to several  
2 credit reporting agencies, and that after he notified defendant  
3 of the errors, defendant sent him a letter stating that the  
4 errors had been corrected. (Compl. ¶¶ 60-62.) Plaintiff  
5 alleges, however, that defendant continues to report inaccurate  
6 information to these agencies. (Id. ¶ 63.)

7           Although defendant contends that it has "made any  
8 necessary and applicable corrections" with the major credit  
9 reporting agencies (Mot. to Dismiss 8-9), the court must "accept  
10 factual allegations in the complaint as true" when ruling on a  
11 motion to dismiss. Manzarek v. St. Paul Fire & Marine Ins. Co.,  
12 519 F.3d 1025, 1031 (9th Cir. 2008). Accordingly, since  
13 plaintiff's allegations otherwise comply with Federal Rule of  
14 Civil Procedure 8(a), the court must deny defendant's motion to  
15 dismiss with respect to plaintiff's FCRA claim.

16           E. Fraud Claims

17           To state a claim of fraud under California law, a  
18 plaintiff must allege (1) a misrepresentation (false  
19 representation, concealment, or non-disclosure), (2) knowledge of  
20 falsity, (3) intent to induce reliance, (4) justifiable reliance,  
21 and (5) resulting damages. Small v. Fritz Companies, Inc., 30  
22 Cal. 4th 167, 173 (2003); accord In re Napster, Inc. Copyright  
23 Litig., 479 F.3d 1078, 1096 (9th Cir. 2007).

24           Plaintiff alleges that defendant knowingly failed to  
25 disclose the identity of the note holder in response to his  
26 Qualified Written Request under RESPA. (Compl. ¶ 54.) As  
27 alleged, plaintiff was aware of defendant's non-disclosure, and  
28 there is no allegation that plaintiff relied on it to his

1 detriment. (Id. ¶¶ 21, 24.) Indeed, the only damages plaintiff  
2 alleges with respect to defendant's non-disclosure is the need  
3 "to file this litigation at great expense and engage in discovery  
4 to obtain the information." (Id. ¶ 54.) Accordingly, the court  
5 must grant defendant's motion to dismiss with respect to  
6 plaintiff's first claim of fraudulent concealment.

7           Plaintiff also alleges that, in an August 31, 2006  
8 letter, defendant knowingly misrepresented that it would remove a  
9 prepayment penalty from his loan through a loan modification.  
10 (Id. ¶¶ 70-74, 90-91.) A subsequent Loan Modification Agreement  
11 drafted by defendant provided for the "Borrower's Right to  
12 Prepay," but the terms of this provision effectively retained the  
13 prepayment penalty of the original loan. (See id. Ex. I at 4  
14 ("Borrower has the right to make payments of principal at any  
15 time before they are due. A payment of principal only is known  
16 as a 'prepayment.' When Borrower makes a prepayment, Borrower .  
17 . . will pay to Lender any prepayment penalty or fee provided in  
18 the Note or Security Instrument, if any.")) Now plaintiff has  
19 "lost the opportunity to refinance his loan and has been forced  
20 to pay [defendant] at a much higher rate of interest." (Id. ¶  
21 75.)

22           In its motion to dismiss, defendant contends that this  
23 fraud claim fails to satisfy the heightened pleading requirements  
24 of Federal Rule of Civil Procedure 9(b). See Fed. R. Civ. P.  
25 9(b) ("In alleging fraud or mistake, a party must state with  
26 particularity the circumstances constituting fraud or mistake.").  
27 A plaintiff satisfies Rule 9(b) if his or her allegations are  
28 "specific enough to give defendants notice of the particular

1 misconduct which is alleged to constitute the fraud charged so  
2 that they can defend against the charge and not just deny that  
3 they have done anything wrong." Neubronner v. Milken, 6 F.3d  
4 666, 671 (9th Cir. 1993) (quoting Semegen v. Weidner, 780 F.2d  
5 727, 731 (9th Cir. 1985)).

6 Here, plaintiff identifies the communication alleged to  
7 be fraudulent, the date of the communication, the identity of the  
8 speaker, and the manner in which the communication constituted a  
9 misrepresentation. (See Compl. ¶ 71; id. Exs. H, I.) These  
10 allegations are sufficient to satisfy Rule 9(b). See Neubronner,  
11 6 F.3d at 671-72 ("A pleading is sufficient under Rule 9(b) if it  
12 identifies the circumstances constituting fraud so that the  
13 defendant can prepare an adequate answer from the allegations."  
14 (quoting Gottreich v. S.F. Inv. Corp., 552 F.2d 866, 866 (9th  
15 Cir. 1977)) (internal quotation marks omitted)). Accordingly,  
16 the court will deny defendant's motion to dismiss with respect to  
17 plaintiff's second fraud claim.

18 F. UCL Claim

19 The UCL prohibits "any unlawful, unfair or fraudulent"  
20 business practice. Cal. Bus. & Prof. Code § 17200. The statute  
21 "encompasses anything that can properly be called a business  
22 practice which at the same time is forbidden by law." Leonel v.  
23 Am. Airlines, Inc., 400 F.3d 702, 714 (9th Cir. 2005) (citing  
24 Cal. Bus. & Prof. Code § 17200). Thus, the UCL "permits  
25 violations of other laws to be treated as unfair competition that  
26 is independently actionable." Id. (quoting Kasky v. Nike, Inc.,  
27 27 Cal. 4th 939, 949 (2002)). Since plaintiff's Complaint  
28 sufficiently alleges a claim of fraud, violations of TILA, and

1 violations of the FDCPA, RFDCPA, and FCRA, it also states a claim  
2 under the UCL. Accordingly, the court will deny defendant's  
3 motion to dismiss with respect to plaintiff's UCL claim.

4 G. Breach of Contract and Breach of the Implied Covenant  
5 of Good Faith and Fair Dealing

6 Plaintiff alleges that defendant breached the loan  
7 contract by enforcing the prepayment provision. (Compl. ¶ 85.)  
8 As plaintiff alleges, however, his original loan with Beneficial  
9 had a prepayment provision, and the terms of his subsequent  
10 modification with defendant did not remove it. (Id. ¶¶ 70-73,  
11 77, 84, 86, 90-91, 104; see id. Ex. C at 2, 4; id. Ex. I at 4.)  
12 Therefore, defendant's alleged enforcement of a contract term,  
13 without more, cannot constitute a breach of contract. See, e.g.,  
14 Borel Bank & Trust Co. v. Aubain, No. 95-20538, 1995 WL 743724,  
15 at \*3 (N.D. Cal. Nov. 30, 1995) ("[Plaintiffs] cannot maintain an  
16 action for breach of contract without alleging that [defendant],  
17 in some manner, violated the terms of the note."). Accordingly,  
18 the court must grant defendant's motion to dismiss with respect  
19 to plaintiff's breach of contract claim.

20 Plaintiff also alleges that defendant's adherence to  
21 the prepayment provision breached the implied covenant of good  
22 faith and fair dealing. "Every contract imposes upon each party  
23 a duty of good faith and fair dealing in its performance and its  
24 enforcement." Marsu, B.V. v. Walt Disney Co., 185 F.3d 932, 937  
25 (9th Cir. 1999) (quoting Carma Developers, Inc. v. Marathon Dev.  
26 Cal., Inc., 2 Cal. 4th 342, 371 (1992)). "A typical formulation  
27 of the burden imposed by the implied covenant of good faith and  
28 fair dealing is 'that neither party will do anything which will

1 injure the right of the other to receive the benefits of the  
2 agreement.'" Andrews v. Mobile Aire Estates, 125 Cal. App. 4th  
3 578, 589 (2005) (quoting Gruenberg v. Aetna Ins. Co., 9 Cal.3d  
4 566, 573 (1973)).

5           Although adherence to the terms of a contract does not  
6 insulate a party against a claim of breach of the implied  
7 covenant of good faith and fair dealing, Marsu, 185 F.3d at 937,  
8 compliance with a contractual term cannot serve as the very basis  
9 for such a claim, see Carma Developers, Inc., 2 Cal. 4th at 373  
10 ("It is universally recognized [that] the scope of conduct  
11 prohibited by the covenant of good faith is circumscribed by the  
12 purposes and express terms of the contract."); see also Gerdlund  
13 v. Elec. Dispensers Int'l, 190 Cal. App. 3d 263, 277 (1987)  
14 ("There cannot be a valid express contract and an implied  
15 contract, each embracing the same subject, but requiring  
16 different results." (quoting Shapiro v. Wells Fargo Realty  
17 Advisors, 152 Cal. App. 3d 467, 482 (1984))). Accordingly, since  
18 defendant's adherence to the contract cannot itself constitute  
19 bad faith, the court will grant defendant's motion to dismiss  
20 with respect to plaintiff's claim of breach of the implied  
21 covenant of good faith and fair dealing.

#### 22           H. Unconscionability

23           When a contract is alleged to be unconscionable, "the  
24 parties shall be afforded a reasonable opportunity to present  
25 evidence as to its commercial setting, purpose, and effect to aid  
26 the court in making the determination." Cal. Civ. Code § 1670.5.  
27 Section 1670.5 of the California Civil Code reflects "legislative  
28 recognition that a claim of unconscionability often cannot be

1 determined merely by examining the face of the contract, but will  
2 require inquiry into its setting, purpose, and effect." Comb v.  
3 PayPal, Inc., 218 F. Supp. 2d 1165, 1174 (N.D. Cal. 2002)  
4 (quoting Stirlen v. Supercuts, Inc., 51 Cal. App. 4th 1519, 1536  
5 (1997)). Accordingly, consideration of plaintiff's claim that  
6 his loan is unconscionable is premature at this stage in the  
7 litigation, and the court must deny defendant's motion to dismiss  
8 with respect this aspect of the Complaint. See Cazares v. Pac.  
9 Shore Funding, No. 04-2548, 2006 WL 149106, at \*6 n.4 (C.D. Cal.  
10 Jan. 3, 2006) ("A determination of whether a contract is  
11 unconscionable requires a consideration of facts that are beyond  
12 the scope of a motion to dismiss. For this reason alone,  
13 [defendants] cannot obtain a dismissal.").

14 I. Attorney's Fees

15 Defendant contends that the Complaint provides no legal  
16 basis for the recovery of attorney's fees. Since the FDCPA and  
17 RFDCPA expressly provide for the recovery of attorney's fees,  
18 defendant's argument is without merit. See 15 U.S.C. §  
19 1692k(a)(3); Cal. Civ. Code § 1788.30(c).

20 J. Motion for a More Definite Statement

21 "A party may move for a more definite statement of a  
22 pleading to which a responsive pleading is allowed but which is  
23 so vague or ambiguous that the party cannot reasonably prepare a  
24 response." Fed. R. Civ. Pro. 12(e). As to plaintiff's remaining  
25 claims, the allegations in the Complaint are sufficient to allow  
26 defendant to ascertain their nature. Accordingly, the court will  
27 deny defendant's motion for a more definite statement. See  
28 Advanced Microtherm, Inc. v. Norman Wright Mech. Equip. Corp.,

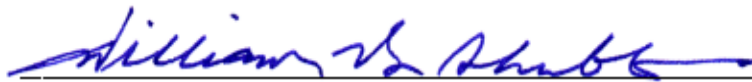
1 No. 04-02266, 2004 WL 2075445, at \*12 (N.D. Cal. Sept. 15, 2004)  
2 ("Motions for more definite statement are proper only where a  
3 complaint is so indefinite that the defendant cannot ascertain  
4 the nature of the claim being asserted."); see also Sagan v.  
5 Apple Computer, Inc., 874 F. Supp. 1072, 1077 (C.D. Cal. 1994)  
6 ("Motions for a more definite statement are viewed with disfavor  
7 and are rarely granted because of the minimal pleading  
8 requirements of the Federal Rules. Parties are expected to use  
9 discovery, not the pleadings, to learn the specifics of the  
10 claims being asserted.").

11 IT IS THEREFORE ORDERED that defendant's motion to  
12 dismiss plaintiff's Complaint be, and the same hereby is, GRANTED  
13 with respect to plaintiff's claim under TILA for rescission and  
14 his claims of fraudulent concealment, breach of contract, and  
15 breach of the implied covenant of good faith and fair dealing;  
16 and DENIED with respect to all other claims; and

17 IT IS FURTHER ORDERED that defendant's motion for a  
18 more definite statement be, and the same hereby is, DENIED.

19 Plaintiff has thirty days from the date of this Order  
20 to file an amended complaint, if he can do so consistent with  
21 this Order.

22 DATED: January 7, 2009

23  
24 

25 WILLIAM B. SHUBB  
26 UNITED STATES DISTRICT JUDGE  
27  
28