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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

WALTER BALDAIN, JR.,  
MICHAEL BALDAIN,

NO. CIV. S-09-0931 LKK/GGH

Plaintiffs,

v.

O R D E R

AMERICAN HOME MORTGAGE  
SERVICING, INC., OPTION ONE  
MORTGAGE CORPORATION,  
QUALITY LOAN SERVICE CORP.,  
OLYMPIC MORTGAGE & INVESTMENT  
COMPANY, INC., PHILLIP RUBLE  
and TIMOTHY ALAN SMITH and  
DOES 1-20, inclusive,

Defendants.

\_\_\_\_\_ /

This case addresses the foreclosure of plaintiffs' mortgage. His First Amended Complaint ("FAC") names six defendants and enumerates ten causes of action. Two defendants--American Home Mortgage Servicing, Inc. ("American Home") and Sand Canyon Corporation, formerly known as Option One Mortgage Corporation. ("Option One")-- move to dismiss all claims against them, or in the alternative, for a more definite statement. For the reasons stated

1 below, the motion to dismiss is granted in part and the motion for  
2 a more definite statement is denied.<sup>1</sup>

### 3 I. BACKGROUND

4 American Home and Option One initially filed a motion to  
5 dismiss on June 9, 2009. This motion was set to be heard on August  
6 17. On July 31, before plaintiffs' opposition or statement of non-  
7 opposition to this motion was due, plaintiffs filed an amended  
8 complaint. The court denied the motion to dismiss without  
9 prejudice as moot. Defendants' renewed motion is before the court.  
10 A hearing on this motion was set for September 14, 2009, but  
11 plaintiffs' counsel failed to appear. After defense counsel agreed  
12 that oral argument was not necessary, the court took the matter  
13 under submission.

#### 14 A. Initial Refinancing Loan<sup>2</sup>

15 In October of 2006, defendant Smith told plaintiffs that he  
16 was a loan officer for defendant Olympia Mortgage. Smith solicited  
17 plaintiffs to refinance their residence, informing them that he  
18 could secure the "best deal" and "best interest rates" available  
19 on the market. FAC ¶¶ 20, 22. Smith indicated that this loan  
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21 <sup>1</sup> The court notes that plaintiffs' counsel has filed numerous  
22 other actions before this court using nearly identical complaints.  
23 For a more extensive discussion of a similar complaint, see  
24 Champlaie v. BAC Home Loans Servicing, LLP, No. S-09-1316, 2009  
U.S. Dist. LEXIS 102285, 2009 WL 3429622 (E.D. Cal. Oct. 22, 2009).  
This case, however, raises several issues not discussed in the  
cited order from Champlaie.

25 <sup>2</sup> These facts are taken from the allegations in the FAC unless  
26 otherwise specified. The allegations are taken as true for  
purposes of this motion only.

1 would be a fixed rate loan. FAC ¶ 23. However, the loan actually  
2 offered to and purchased by plaintiffs was an adjustable rate loan.  
3 Id. Smith also represented to plaintiffs that if the loan became  
4 unaffordable, Smith would refinance the loan. Id. Smith knew or  
5 should have known that these representations would induce  
6 plaintiffs to accept the loan to their detriment. Id.

7 The loan closed on or about December 5, 2006. FAC ¶ 27.  
8 Plaintiffs were not given copies of loan documents prior to  
9 closing. At closing, plaintiffs were given only a few minutes to  
10 sign the various documents, with no explanation as to what they  
11 were, and plaintiffs were not allowed to review the documents. At  
12 that time, plaintiffs did not receive the various disclosures  
13 mandated by the Truth In Lending Act and other statutes, including  
14 the notice of right to cancel and statement of when the rescission  
15 period would expire. FAC ¶¶ 25, 34.

16 The loan was secured by a deed of trust, which effectively  
17 mortgaged plaintiffs' home.<sup>3</sup> Plaintiffs allege this deed  
18 identified defendant Option One as the lender, FAC ¶ 32 and Premier  
19 Trust Deed Services, who is not a party in this suit, as the  
20 trustee. FAC ¶ 27.

21 Option One paid commissions to brokers and loan officers based  
22 on the volume of loans they sold to consumers, and such a  
23 commission was paid in connection with plaintiffs' loan. FAC ¶ 29.

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24  
25 <sup>3</sup> Under California law, a deed of trust is formally distinct  
26 from, but similar to, a mortgage. See Yulaeva v. Greenpoint Mortg.  
Funding, Inc., No. S-09-1504, 2009 U.S. Dist. LEXIS 79094, \*3-5  
(E.D. Cal. Sept. 3, 2009).

1 As a result, borrowers, including plaintiffs, were encouraged to  
2 take loans with terms unfavorable to them. Id.

3 **B. Foreclosure**

4 At some point, plaintiffs ceased making loan payments. On May  
5 15, 2008, Quality Loan<sup>4</sup> filed a notice of default on the loan and  
6 deed of trust in Yuba County. FAC ¶ 37. Quality Loan sent  
7 plaintiffs a notice of trustee sale on August 16, 2008. FAC ¶ 38.

8 Plaintiffs contend that through Quality Loan's actions,  
9 defendants are attempting to obtain title to the property without  
10 having established that they are entitled to enforce the deed of  
11 trust, and that defendants in fact are not the real parties in  
12 interest on the deed and do not have the power to enforce it. FAC  
13 ¶¶ 28, 30. Defendants argue that these allegations are legal  
14 conclusions which the court should disregard.

15 Plaintiffs further allege on information and belief that  
16 "Defendants misrepresented material facts with the intent of  
17 forcing Plaintiffs to either pay large sums of money to the  
18 Defendants, to which they were not entitled, or to abandon the  
19 Property to a foreclosure sale, resulting in profit for the  
20 Defendants." FAC ¶ 43.

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22  
23 <sup>4</sup> Quality Loan was named in the original complaint, but  
24 plaintiffs then dismissed Quality Loan without prejudice pursuant  
25 to Fed. R. Civ. P. 41 on June 27, 2009. Doc. No. 18. Plaintiffs'  
26 FAC, filed on July 31, 2009, again names Quality Loan as a  
defendant. The docket does not indicate that Quality Loan has been  
served with the FAC, and Quality Loan has not stated an appearance  
in this case. Even if Quality Loan is properly a party to this  
suit, it is not party to the present motion.

1 **C. Other Activities**

2 Plaintiffs additionally allege that Option One, American Home,  
3 and Quality Loan threatened to "collect[] on a debt not owed to  
4 [defendants], mak[e] false reports to credit reporting agencies,  
5 foreclos[e] upon a void security interest, foreclos[e] upon a Note  
6 of which they were not in possession not otherwise entitled to  
7 payment, falsely stat[e] the amount of a debt, increas[e] the  
8 amount of a debt by including amounts that are not permitted by law  
9 or contract, and us[e] unfair and unconscionable means in an  
10 attempt to collect a debt." FAC ¶ 63. The FAC provides no  
11 indication as to when these activities occurred.

12 **II. STANDARD**

13 **A. Standard for a Fed. R. Civ. P. 12(b)(6) Motion to Dismiss**

14 A Fed. R. Civ. P. 12(b)(6) motion challenges a complaint's  
15 compliance with the pleading requirements provided by the Federal  
16 Rules. In general, these requirements are provided by Fed. R. Civ.  
17 P. 8, although claims that "sound[] in" fraud or mistake must meet  
18 the requirements provided by Fed. R. Civ. P. 9(b). Vess v.  
19 Ciba-Geigy Corp., 317 F.3d 1097, 1103-04 (9th Cir. 2003).

20 **1. Dismissal of Claims Governed by Fed. R. Civ. P. 8**

21 Under Fed. R. Civ. P. 8(a)(2), a pleading must contain a  
22 "short and plain statement of the claim showing that the pleader  
23 is entitled to relief." The complaint must give defendant "fair  
24 notice of what the claim is and the grounds upon which it rests."  
25 Twombly, 550 U.S. at 555 (internal quotation and modification  
26 omitted).

1 To meet this requirement, the complaint must be supported by  
2 factual allegations. Iqbal, 129 S. Ct. at 1950. "While legal  
3 conclusions can provide the framework of a complaint," neither  
4 legal conclusions nor conclusory statements are themselves  
5 sufficient, and such statements are not entitled to a presumption  
6 of truth. Id. at 1949-50. Iqbal and Twombly therefore prescribe  
7 a two step process for evaluation of motions to dismiss. The court  
8 first identifies the non-conclusory factual allegations, and the  
9 court then determines whether these allegations, taken as true and  
10 construed in the light most favorable to the plaintiff, "plausibly  
11 give rise to an entitlement to relief." Id.; Erickson v. Pardus,  
12 551 U.S. 89 (2007).

13 "Plausibility," as it is used in Twombly and Iqbal, does not  
14 refer to the likelihood that a pleader will succeed in proving the  
15 allegations. Instead, it refers to whether the non-conclusory  
16 factual allegations, when assumed to be true, "allow[] the court  
17 to draw the reasonable inference that the defendant is liable for  
18 the misconduct alleged." Iqbal, 129 S.Ct. at 1949. "The  
19 plausibility standard is not akin to a 'probability requirement,'  
20 but it asks for more than a sheer possibility that a defendant has  
21 acted unlawfully." Id. (quoting Twombly, 550 U.S. at 557). A  
22 complaint may fail to show a right to relief either by lacking a  
23 cognizable legal theory or by lacking sufficient facts alleged  
24 under a cognizable legal theory. Balistreri v. Pacifica Police  
25 Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

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1           **2. Dismissal of Claims Governed by Fed. R. Civ. P. 9(b)**

2           A Rule 12(b)(6) motion to dismiss may also challenge a  
3 complaint's compliance with Fed. R. Civ. P. 9(b). See Vess, 317  
4 F.3d at 1107. This rule provides that "In alleging fraud or  
5 mistake, a party must state with particularity the circumstances  
6 constituting fraud or mistake. Malice, intent, knowledge, and  
7 other conditions of a person's mind may be alleged generally."  
8 These circumstances include the "time, place, and specific content  
9 of the false representations as well as the identities of the  
10 parties to the misrepresentations." Swartz v. KPMG LLP, 476 F.3d  
11 756, 764 (9th Cir. 2007) (quoting Edwards v. Marin Park, Inc., 356  
12 F.3d 1058, 1066 (9th Cir. 2004)). "In the context of a fraud suit  
13 involving multiple defendants, a plaintiff must, at a minimum,  
14 'identif[y] the role of [each] defendant[] in the alleged  
15 fraudulent scheme.'" Id. at 765 (quoting Moore v. Kayport Package  
16 Express, 885 F.2d 531, 541 (9th Cir. 1989)). Claims subject to  
17 Rule 9(b) must also satisfy the ordinary requirements of Rule 8.

18           **B. Standard for a Fed. R. Civ. P. 12(e)**

19           "If a pleading to which a responsive pleading is permitted is  
20 so vague or ambiguous that a party cannot reasonably be required  
21 to frame a responsive pleading, the party may move for a more  
22 definite statement before interposing a responsive pleading." Fed.  
23 R. Civ. P. 12(e). "The situations in which a Rule 12(e) motion is  
24 appropriate are very limited." 5A Wright and Miller, Federal  
25 Practice and Procedure § 1377 (1990). Furthermore, absent special  
26 circumstances, a Rule 12(e) motion cannot be used to require the

1 pleader to set forth "the statutory or constitutional basis for his  
2 claim, only the facts underlying it." McCalden v. California  
3 Library Ass'n, 955 F.2d 1214, 1223 (9th Cir. 1990). However, "even  
4 though a complaint is not defective for failure to designate the  
5 statute or other provision of law violated, the judge may in his  
6 discretion . . . require such detail as may be appropriate in the  
7 particular case." McHenry v. Renne, 84 F.3d 1172, 1179 (9th Cir.  
8 1996).

### 9 **III. ANALYSIS**

10 The present motion concerns ten causes of action. Four claims  
11 are brought against both Option One and American Home, for  
12 negligence, fraud, and violations of California's Rosenthal Act and  
13 Unfair Competition Law. Five claims are brought solely against  
14 Option One, for breach of contract, breach of the implied covenant  
15 of good faith and fair dealing, breach of fiduciary duty, and  
16 violations of TILA and RESPA. Finally, plaintiffs' claim for  
17 wrongful foreclosure is brought as to American Home but not Option  
18 One.

#### 19 **A. Claims against Both Option One and American Home**

##### 20 **1. Rosenthal Act**

21 California's Rosenthal Fair Debt Collection Practices Act  
22 prohibits creditors and debt collectors from making false,  
23 deceptive, and misleading representations in an effort to collect  
24 a debt. Cal. Civ. Code §§ 1788, et seq. Plaintiffs allege that  
25 defendants violated the Rosenthal Act by:

26 ////



1 threaten[ing] to take actions not permitted by  
2 law, including but not limited to: collecting  
3 on a debt not owed to [them], making false  
4 reports to credit reporting agencies,  
5 foreclosing upon a void security interest,  
6 foreclosing upon a Note of which they were not  
7 in possession nor otherwise entitled to  
8 payment, falsely stating the amount of a debt,  
9 increasing the amount of a debt by including  
10 amounts that are not permitted by law or  
11 contract, and using unfair and unconscionable  
12 means in an attempt to collect a debt.

13 FAC ¶ 63.<sup>5</sup> Defendants argue that these allegations fail to satisfy  
14 the applicable pleading requirements, and that this claim is barred  
15 by the Rosenthal Act's one year statute of limitations. Cal. Civ.  
16 Code § 1788.30(f).

17 Among these allegations, the allegation that defendants  
18 "threatened to . . . us[e] unfair and unconscionable means in an  
19 attempt to collect a debt," without any indication as to what those  
20 means were, is plainly conclusory.

21 The allegations regarding foreclosure identify conduct that  
22 is not prohibited by the Rosenthal Act. Foreclosure on a property  
23 is not debt collection activity encompassed by the Rosenthal Act,  
24 and as such, the threat of foreclosure is not prohibited. Cal.  
25 Civ. Code §§ 1788.13, 2924(b); Champlaie, No. Civ. S-09-1316 at 42,  
26 2009 U.S. Dist. LEXIS 102285 at\*55-\*56, 2009 WL 3429622 at \*18.

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<sup>5</sup> In the FAC, plaintiffs allege that American Home, Option One, and Quality Loan each engaged in these acts. In opposing the instant motion, plaintiffs state that these acts were performed by American Home, and that "As such, Defendant Option One, in concert with other [American Home], was engaging in collection of an unjust and fraudulent debt against Plaintiffs' Property." Opp'n at 17. This disparity is not pertinent to the court's resolution of this motion.

1           The remaining allegations are that defendants "falsely  
2 stat[ed] the amount of a debt," "increas[ed] the amount of a debt  
3 by including amounts that are not permitted by law or contract  
4 collecting on a debt not owed to [them]," and "[made] false reports  
5 to credit reporting agencies." These allegations satisfy the  
6 minimum pleading requirements imposed by Fed. R. Civ. P. 8. See  
7 Champlaie, 2009 U.S. Dist. LEXIS 102285 at \*57-58.

8           Defendants argue that these allegations should nonetheless be  
9 dismissed on statute of limitations grounds, because plaintiffs  
10 have not alleged that the conduct occurred within the limitations  
11 period. The statute of limitations is an affirmative defense, Fed.  
12 R. Civ. P. 8(c), and complaints do not ordinarily need to allege  
13 the non-availability of affirmative defenses. United States v.  
14 Northern Trust Co., 372 F.3d 886, 888 (7th Cir. 2004).  
15 Nonetheless, the statute of limitations may be raised in a motion  
16 to dismiss "[w]hen the running of the statute is apparent from the  
17 face of the complaint." Conerly v. Westinghouse Elect. Corp., 623  
18 F.2d 117, 119 (9th Cir. 1980), Suckow Borax Mines Consol., Inc. v.  
19 Borax Consol., Ltd., 185 F.2d 196, 204 (9th Cir. 1950); see also  
20 Supermail Cargo v. United States, 68 F.3d 1204, 1206 (9th Cir.  
21 1995) ("A motion to dismiss based on the running of the statute of  
22 limitations period may be granted only if the assertions of the  
23 complaint, read with the required liberality, would not permit the  
24 plaintiff to prove that the statute was tolled.") (internal  
25 quotation omitted).

26 ////

1           Here, plaintiffs have not alleged when these forms of unfair  
2 debt collection occurred. Although a complaint must provide some  
3 notice as to when the challenged conduct allegedly occurred, the  
4 complaint is not required to allege dates with the specificity  
5 necessary to determine the applicability of the statute of  
6 limitations. Even when a complaint does not specify date of  
7 occurrence, complaint suffices where it puts defendant "on notice  
8 of the time frame in question." Dickens v. District of Columbia,  
9 502 F. Supp. 2d 90, 94 (D.D.C. 2007); see also Castillo v. Norton,  
10 219 F.R.D. 155, 162 (D. Ariz. 2003) ("Rule 8(a) does not require  
11 [the complaint] to identify the . . . the dates of the alleged  
12 discrimination . . . ."), Supreme Wine Co. v. Distributors of New  
13 England, Inc., 198 F. Supp. 318, 320 (D. Mass. 1961), Kuenzell v.  
14 United States, 20 F.R.D. 96, 99 (N.D. Cal. 1957). Federal Rule of  
15 Civil Procedure 9(f), which provides that "[a]n allegation of time  
16 or place is material when testing the sufficiency of a pleading,"  
17 "does not have the effect of requiring allegations of time and  
18 place, but merely operates to make such allegations, if made,  
19 material for the purposes of testing the sufficiency of the  
20 pleading as against, for example, a motion to dismiss." Kuenzell,  
21 20 F.R.D. at 99. I have previously explained that the rules do not  
22 require a complaint to specify the exact date of alleged  
23 misconduct, and that "[t]his is exactly the sort of information  
24 which should be obtained through the discovery process." Famolare,  
25 Inc. v. Edison Bros. Stores, Inc., 525 F. Supp. 940, 949 (E.D. Cal.  
26 1981) (Karlton, J.) (denying a Fed. R. Civ. P. 12(e) motion for

1 more definite statement); see also Supreme Wine Co., 198 F. Supp.  
2 at 320 (failure to allege specific dates not grounds for dismissal  
3 because discovery is appropriate method for "obtain[ing] the full  
4 information needed to prepare the[] defense," including dates of  
5 misconduct).<sup>6</sup>

6 In this case, plaintiffs' allegations provide notice of the  
7 general time period at issue, namely, the period after plaintiffs  
8 defaulted on the loan. While these allegations do not conclusively  
9 demonstrate the applicability or non-applicability of the statute  
10 of limitations, they provide sufficient notice to defendants that  
11 the statute of limitations may be at issue, and thereby allow  
12 defendants to formulate an answer. Pension Ben Guaranty Corp. v.  
13 Greene, 87 F.R.D. 483, 484 (W.D. Pa. 1980). In cases such as this,  
14 the statute of limitations defense cannot be resolved on a motion  
15 to dismiss, and may instead be raised on a motion for summary  
16 judgment. Harris v. City of New York, 186 F.3d 243, 250 (2d Cir.

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17  
18 <sup>6</sup> I note that not all courts have joined in this view of Rule  
19 12(e). The Middle District of Pennsylvania has denied a motion to  
20 dismiss brought on statute of limitations grounds where "[t]he  
21 plaintiffs do not aver in their complaint when the alleged  
22 overcharges were made and, therefore, the complaint on its face  
23 does not show that the statute has run," only to require plaintiffs  
24 to make a more definite statement, under Fed. R. Civ. P. 12(e), as  
25 to when these charges occurred. O'Malley v. Wyoming Nat'l Bank,  
26 15 F.R.D. 457, 458 (M.D. Pa. 1954). Several other courts have  
granted Rule 12(e) motions compelling plaintiffs to provide  
specific dates. Intermedics v. Ventritex, Co., 775 F. Supp. 1258,  
1266 (N.D. Cal. 1991) (invoking facts specific to that case),  
International Harvester Co. v. General Ins. Co., 45 F.R.D. 4, 7 (D.  
Wis. 1968), Buchholtz v. Renard, 188 F. Supp. 888, 892 (S.D.N.Y.  
1960). In addition, Supreme Wine Co. held that this information  
may, in certain circumstances, be available through a motion for  
a more definite statement. 198 F. Supp. at 320.

1 N.Y. 1999).

2 Accordingly, plaintiffs' Rosenthal Act claim is dismissed,  
3 except insofar as it is predicated upon allegations that defendants  
4 "falsely stat[ed] the amount of a debt," "increas[ed] the amount  
5 of a debt by including amounts that are not permitted by law or  
6 contract collecting on a debt not owed to [them]," and "[made]  
7 false reports to credit reporting agencies."

8 **2. Negligence**

9 Under California law, the elements of a claim for negligence  
10 are "(a) a legal duty to use due care; (b) a breach of such legal  
11 duty; and (c) the breach as the proximate or legal cause of the  
12 resulting injury." Ladd v. County of San Mateo, 12 Cal. 4th 913,  
13 917 (1996) (internal citations and quotations omitted); see also  
14 Cal Civ Code § 1714(a). Plaintiffs argue that American Home and  
15 Option One acted negligently when they:

16 failed to maintain the original Mortgage Note,  
17 failed to properly create original documents,  
18 . . . failed to make the required disclosures to  
19 the Plaintiffs[,] . . . took payments to which  
20 they were not entitled, charged fees they were  
not entitled to charge, and made or otherwise  
authorized negative reporting of Plaintiffs  
creditworthiness to various credit bureaus  
wrongfully.

21 FAC ¶¶ 70-71.

22 California courts have stated that "as a general rule, a  
23 financial institution owes no duty of care to a borrower when the  
24 institution's involvement in the loan transaction does not exceed  
25 the scope of its conventional role as a mere lender of money."  
26 Nymark v. Heart Fed. Savings & Loan Assn., 231 Cal. App. 3d 1089,

1 1096 (1991). Nymark does not apply when the lender's activities  
2 exceed those of a conventional lender. Id. at 1096-97. Even when  
3 a lender acts within the scope of its traditional role, Nymark  
4 announced only a "general" rule. Id. at 1098 (applying Biakanja  
5 v. Irving 49 Cal. 2d 647, 320 P.2d 16 (1958)). This court recently  
6 evaluated Nymark's application to a fundamentally similar  
7 complaint.

8       The first type of purportedly negligent activity is Option  
9 One's failure to make the disclosures required by TILA.<sup>7</sup> The  
10 factors provided by Biakanja, 49 Cal. 2d at 650 and Bily v. Arthur  
11 Young & Co., 3 Cal. 4th 370, 399-405 (1992) support finding a duty  
12 of care as to these disclosures. Champlaie, 2009 U.S. Dist. LEXIS  
13 102285 at \*75. Defendants have not argued that TILA's statute of  
14 limitations preempts a negligence claim brought on this ground.  
15 Insofar as the statute of limitations and preemption are defenses,  
16 the court will not address this issue sua sponte.

17       Plaintiffs next argue that defendants were negligent in  
18 directing plaintiffs into a loan they did not qualify for. Option  
19 One, as a lender, does not owe a duty to a borrower in this regard.  
20 Wagner, 101 Cal. App. 3d at 35. Plaintiffs have not alleged that  
21 American Home participated in steering plaintiffs to the loan.  
22 "Directing" plaintiffs into a loan therefore cannot support a  
23

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24       <sup>7</sup> Plaintiffs argue that Option One failed to make disclosures  
25 required by RESPA as well, but as explained below, the court  
26 concludes that these allegations are conclusory in that they fail  
to identify which disclosures were inadequate. Plaintiffs have not  
alleged that American Home failed to make any required disclosures.

1 negligence claim.

2 As to the allegation that defendants negligently prepared the  
3 loan documents, plaintiffs have provided no indication as to any  
4 defect other than inadequate disclosure in these documents.  
5 Plaintiffs have provided no authority for the proposition that  
6 defendants had an obligation sounding in negligence to preserve the  
7 original documents, nor have plaintiffs explained how a failure to  
8 do so caused harm to plaintiffs.

9 Plaintiffs finally allege that defendants generally "took  
10 payments to which they were not entitled, charged fees they were  
11 not entitled to charge, and made or otherwise authorized negative  
12 reporting of Plaintiffs creditworthiness to various credit bureaus  
13 wrongfully," FAC ¶ 71. Plaintiffs contend that defendants were not  
14 entitled to receipt of these payments because the loan was itself  
15 invalid. Plaintiffs have not provided any authority, however, for  
16 the view that the loan was void ab initio.

17 Accordingly, plaintiffs have stated a claim for negligence  
18 based on Option One's failure to make disclosures required by TILA.  
19 Plaintiffs have not otherwise stated a claim for negligence as to  
20 Option One or American Home.

21 **3. Fraud**

22 Defendants argue that plaintiffs have failed to adequately  
23 allege the substantive elements of a claim for fraud under  
24 California law or to meet the pleading standard imposed by Fed. R.  
25 Civ. P. 9(b). The elements of a claim for intentional  
26 misrepresentation under California law are: (1) misrepresentation

1 (a false representation, concealment or nondisclosure), (2)  
2 knowledge of falsity, (3) intent to defraud (to induce reliance),  
3 (4) justifiable reliance, and (5) resulting damage. Agosta v.  
4 Astor, 120 Cal. App. 4th 596, 603 (2004). The FAC's allegations  
5 supporting the claim for fraud are that:

6 Defendants, and each of them, have made  
7 several representations to Plaintiffs with  
8 regard to material facts. [¶] These  
9 representations made by Defendants were false.  
10 [¶] Defendants knew that these material  
11 representations were false when made, or these  
12 material representations were made with  
reckless disregard for the truth. [¶]  
Defendants intended that Plaintiffs rely on  
these material representations. [¶] Plaintiffs  
reasonably relied on said representations. [¶]  
As a result of Plaintiffs' reliance, they were  
harmed and suffered damages.

13 FAC ¶¶ 91-95. These allegations are the paragon of conclusory  
14 allegations, and they fail to provide the specificity required by  
15 Fed. R. Civ. P. 9(b). They refer to no specific conduct, and give  
16 defendants absolutely no indication as to what conduct, if any,  
17 underlies the fraud claims.

18 Without attempting to defend these general allegations,  
19 plaintiffs contend that their claim nonetheless satisfies Rule 9(b)  
20 because it incorporates by reference all other allegations in the  
21 complaint, and that certain of these incorporated allegations,  
22 identified in plaintiffs' opposition memorandum, satisfy the  
23 applicable requirements. Contrary to plaintiffs' contentions,  
24 these incorporated allegations are also inadequate to demonstrate  
25 fraud by Option One and American Home. Paragraph 41 alleges that  
26 "Defendants fraudulently added costs and charges to the payoff



1 amount of the note," but fails to identify particular defendants  
2 or representations. Paragraph 43 alleges that "Defendants  
3 misrepresented material facts," without identifying particular  
4 defendants, particular facts, or particular representations  
5 thereof.

6 The FAC includes other allegations that identify other  
7 defendants' representations with somewhat greater specificity.  
8 However, plaintiffs have not identified Option One and American  
9 Home's roles, if any, in the alleged fraud by these defendants, as  
10 required by Swartz, 476 F.3d at 765. Accordingly, plaintiff's  
11 fraud claim is dismissed as to defendants Option One and American  
12 Home.

#### 13 **4. Unfair Competition**

14 California's Unfair Competition Law, Cal. Bus. & Prof. Code  
15 § 17200, ("UCL") proscribes "unlawful, unfair or fraudulent"  
16 business acts and practices. Plaintiffs' sole allegation  
17 specifying the conduct underlying the UCL claim alleges that  
18 "Plaintiffs are informed and believe that Defendants['] acts as  
19 alleged herein constitute unlawful, unfair, and/or fraudulent  
20 business practices, as defined in the California Business and  
21 Professions Code § 17200 et seq." FAC ¶ 99. Thus, as with the  
22 fraud claim, plaintiffs' UCL claim merely conclusorily alleges the  
23 barest elements of an UCL claim, and directs defendants to scour  
24 the remainder of the complaint to determine which, if any,  
25 allegations incorporated by reference plaintiffs intend as the  
26 basis for this claim.

1           The incorporated allegations fail to state a UCL claim based  
2 on fraudulent or unfair business practices. As to fraud, Fed. R.  
3 Civ. P. 9(b) applies to UCL claims sounding in fraud, and  
4 plaintiffs have failed to meet this standard. As to unfair  
5 business practices, plaintiffs fail to provide defendants with any  
6 notice as to which acts by which defendants, if any, are alleged  
7 to have constituted such practices.

8           Nonetheless, plaintiffs have adequately alleged unlawful  
9 business practices. As explained elsewhere in this order, the  
10 court denies defendants' motion to dismiss as to plaintiffs'  
11 negligence, TILA rescission, unfair debt collection, and wrongful  
12 foreclosure claims. These claims provide "unlawful" predicate  
13 activity that may support a UCL claim.<sup>8</sup> Although the court also  
14 denies the motion as to plaintiff's breach of contract and good  
15 faith claims, a breach of contract or the implied covenant of good  
16 faith is not itself "unlawful" activity for purposes of the UCL.  
17 Puentes v. Wells Fargo Home Mortgage, Inc., 160 Cal. App. 4th 638,  
18 645 (2008) (citing Watson Laboratories, Inc. v. Rhone-Poulenc Rorer  
19 178 F. Supp. 2d 1099, 1117 n.12 (C.D. Cal. 2001)). An act that

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20  
21           <sup>8</sup> An individual unlawful act may give rise to a UCL claim.  
22 Defendants erroneously argue that plaintiff's unfair competition  
23 claim fails because plaintiffs have not alleged a "pattern of  
24 behavior" or a "course of conduct" constituting a business  
25 practice. In 1992, the California Legislature amended section  
26 17200 to expand the definition of unfair competition to include  
"any unlawful, unfair, or fraudulent business act or practice."  
(emphasis added). Pursuant to this amendment, a single act may  
give rise to UCL liability. United Farm Workers of America, AFL-  
CIO v. Dutra Farms, 83 Cal. App. 4th 1146, 1163 (2000) (citing Stop  
Youth Addiction, Inc. v. Lucky Stores, Inc., 17 Cal. 4th 553, 570  
(1998)).

1 breaches a contract may serve as the predicate for a UCL claim only  
2 if it is independently unfair, fraudulent, or unlawful, and no such  
3 separate allegation appears here. Id.; see also Smith v. Wells  
4 Fargo Bank, N.A., 135 Cal. App. 4th 1463, 1483 (2005).

5 Accordingly, the court dismisses the UCL claim as to Option  
6 One and American Home except insofar as the claim is predicated  
7 upon the unlawful acts of negligence, wrongful foreclosure or  
8 violation of TILA found to be adequately alleged by this order.

9 **B. Claims against Option One**

10 **1. TILA**

11 Plaintiffs bring TILA claims for damages and for rescission.  
12 Option One argues that the claim for damages is barred by the  
13 statute of limitations, and that the rescission claim should be  
14 dismissed because plaintiffs have not alleged that they may tender  
15 the consideration offered for the loan.

16 **a. Civil Damages: Statute of Limitations**

17 TILA provides a one-year statute of limitations for claims for  
18 civil damages. 15 U.S.C. § 1640(e). Here, plaintiffs' TILA claim  
19 arises solely out of failure to make required disclosures at the  
20 time the loan was entered, which was on or around December 5, 2006.  
21 FAC ¶ 54. The limitations period began to run at that time, King  
22 v. California, 784 F.2d 910, 914 (9th Cir. 1986); see also Lukovsky  
23 v. City & County of San Francisco, 535 F.3d 1044, 1051 (9th Cir.  
24 2008) (in the employment context, claim accrues when plaintiff  
25 learns of adverse employment action, regardless of whether  
26 plaintiff has reason to suspect a "legal wrong" at that time). The

1 limitations normally would have expired in December of 2007.

2 This does not end the inquiry, because even though the claim  
3 accrued at that time, the running of the limitations period may be  
4 equitably tolled, King, 784 F.2d at 915, and subject to equitable  
5 estoppel, Ayala v. World Sav. Bank, FSB, 616 F. Supp. 2d 1007 (C.D.  
6 Cal. 2009). Plaintiffs argue that one or both doctrines apply  
7 here, because plaintiffs did not have "reasonable opportunity to  
8 discover" the facts underlying the claim. Under Ninth Circuit  
9 authority, a motion to dismiss made on statute of limitations  
10 grounds must be denied if the complaint "adequately alleges facts  
11 showing the potential applicability of the equitable tolling  
12 doctrine." Cervantes v. City of San Diego, 5 F.3d 1273, 1277 (9th  
13 Cir. 1993); Huynh v. Chase Manhattan Bank, 465 F.3d 992, 1003-04  
14 (9th Cir. 2006).

15 Here, nothing indicates that plaintiffs were prevented from  
16 bringing an earlier TILA claim based upon the complained-of  
17 conduct. For example, one basis for plaintiffs' TILA damages claim  
18 is their allegation that they were prevented from reviewing loan  
19 documents prior to closing. Nothing indicates that, at the time  
20 of closing, plaintiffs were unaware of the fact that they had been  
21 prevented from reviewing these documents, or that plaintiffs were  
22 somehow unable to bring a claim based on this purported wrongdoing.  
23 Similarly, a failure to make disclosures does not itself prevent  
24 a borrower from learning that the disclosures should have been

25  
26

1 made, and plaintiffs have not alleged any further impediment.<sup>9</sup>  
2 Moreover, insofar as plaintiffs rely on equitable estoppel rather  
3 than equitable tolling, the Ninth Circuit has repeatedly held that  
4 equitable estoppel requires "conduct by the defendant 'above and  
5 beyond the wrongdoing upon which the plaintiff's claim is filed,'"  
6 and plaintiffs make no such allegation here. Lukovsky, 535 F.3d  
7 at 1052 (quoting Guerrero v. Gates, 442 F.3d 697, 706 (9th Cir.  
8 2006) and Santa Maria v. Pacific Bell, 202 F.3d 1170, 1176 (9th  
9 Cir. Cal. 2000)) (emphasis omitted). Lukovsky upheld a grant of  
10 a motion to dismiss on this basis. Id. For this reason, the court  
11 grants defendants' motion to dismiss plaintiffs' TILA claim insofar  
12 as this claim seeks civil damages.

13 **b. Rescission: Tender**

14 While TILA provides a one-year statute of limitations for  
15 claims for civil damages, TILA provides a three-year limitations  
16 period for claims for rescission. 15 U.S.C. §§ 1635(a) and (f),  
17 15 C.F.R. § 226.23(b)(5). This period has not expired.

18 Defendants argue that plaintiffs' TILA claim for rescission  
19 should nonetheless be dismissed because plaintiffs have not alleged  
20 that they are able to tender the amount borrowed. No binding  
21 authority addresses this issue, and district courts in this circuit  
22 are divided as to whether such an allegation is required. See,  
23 e.g., Valdez v. America's Wholesale Lender, No. C 09-02778, 2009

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24  
25 <sup>9</sup> In this case, unlike in Champlaie, 2009 U.S. Dist. LEXIS  
26 102285, plaintiffs do not allege that defendants provided  
disclosures with inaccurate information; plaintiffs solely allege  
that the information was omitted or untimely.

1 U.S. Dist. LEXIS 118241, \*14 (N.D. Cal. Dec. 18, 2009) (collecting  
2 cases), Singh v. Wash. Mut. Bank, No. C-09-2771, 2009 U.S. Dist.  
3 LEXIS 73315 \*9-11 (N.D. Cal. Aug. 19, 2009) (same).

4 The effect of rescission is to undo the transaction. TILA  
5 provides that when a borrower provides notice of rescission, the  
6 creditor must cancel any security interest and return any money or  
7 property (such as earnest money) to the borrower. 15 U.S.C. §  
8 1635(b). Once the creditor has done so, the borrower "shall tender  
9 the property to the creditor, except that if return of the property  
10 in kind would be impracticable or inequitable, the [borrower] shall  
11 tender its reasonable value." Id. TILA provides the court with  
12 discretion to alter these procedures. Id. The borrower is "not  
13 liable for any finance or other charge." Id. See also 12 C.F.R.  
14 § 226.23 (implementing 15 U.S.C. § 1635(b)).

15 The Ninth Circuit interpreted this provision in Yamamoto v.  
16 Bank of N.Y., 329 F. 3d 1167 (9th Cir. 2003). Yamamoto concerned  
17 the timing of termination of the security interest, namely, whether  
18 the security interest is terminated before or after the borrower's  
19 tender. Under the statute's default procedure, the security  
20 interest terminates prior to tender. Yamamoto held that in most  
21 cases the court *should* exercise its discretion to modify the  
22 rescission procedure, making rescission conditional on the  
23 borrower's tender, such that the security interest persists until  
24 tender is complete. Id. at 1172. However, it may be that in some  
25 cases this modification impedes a borrower's ability to tender the  
26 amount borrowed. For example, termination of the security may

1 facilitate the borrower's efforts to sell or refinance the property  
2 offered as security, and thereby to complete tender. Id. at 1173  
3 (noting, on summary judgment, that plaintiff had offered no  
4 evidence that the continuing security interest had such an  
5 effect).<sup>10</sup>

6 Yamamoto thus held that the district court had discretion to  
7 require the borrower to make a tender prior to rescission, and that  
8 the courts should ordinarily impose this requirement. 329 F.3d at  
9 1170, 1172. The Ninth Circuit further held that the district  
10 courts may determine whether to modify rescission procedures before  
11 determining whether rescission is otherwise warranted. Id. at  
12 1173. Thus, the district court permissibly exercised its  
13 discretion in granting summary judgment to the lender when "it  
14 [was] clear from the evidence that the borrower lack[ed] capacity  
15 to pay back what she ha[d] received (less interest, finance  
16 charges, etc.)." Id.

17 Yamamoto did not concern a motion to dismiss, and did not  
18 discuss whether ability to tender must be alleged in a claim for

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19  
20 <sup>10</sup> Tender is ultimately required under both the default  
21 procedure and the modified procedure suggested by Yamamoto.  
22 Plaintiffs dispute this, arguing that restitution of the borrowed  
23 funds may not be required, citing Pedro v. Pacific Plan, 393 F.  
24 Supp. 315 (N.D. Cal. 1975). Contrary to plaintiff's  
25 characterization of that case, Pedro held that the borrower had an  
26 equitable obligation to tender the borrowed funds, notwithstanding  
the lender's failure to comply with the rescission procedures. Id.  
at 324. Pedro in turn relied upon Sosa v. Fite, 498 F.2d 114, 119  
(5th Cir. 1974), which held that when a lender refuses to return  
the borrower's property or otherwise comply with the rescission  
procedure, it may be impossible for the borrower to make a tender.  
Neither Sosa nor Pedro has any bearing here, where the lender  
contests rescission, such that the lender has not yet incurred an  
obligation to return property under 15 U.S.C. section 1635(b).

1 rescission under TILA. Numerous district courts have held that  
2 because rescission "should" normally be conditioned upon tender,  
3 a plaintiff must allege either ability to tender or the existence  
4 of equitable circumstances that make it inappropriate to condition  
5 rescission upon tender. See, e.g., Mangindin v. Wash. Mut. Bank,  
6 637 F. Supp. 2d 700, 706 (N.D. Cal. 2009). "It makes little sense  
7 to let the instant rescission claim proceed absent some indication  
8 that the claim will not simply be dismissed at the summary judgment  
9 stage after needless depletion of the parties' and the Court's  
10 resources." Valdez, 2009 U.S. Dist. LEXIS 118241 at \*16-17. Other  
11 courts have held that no such allegation is required, postponing  
12 the exercise of discretion discussed in Yamamoto until a later  
13 stage of litigation. See, e.g., ING Bank v. Ahn, No. C 09-995,  
14 2009 U.S. Dist. LEXIS 60004 (N.D. Cal. July 13, 2009). Relatedly,  
15 at least one court has held that the court could infer that the  
16 borrower would be able to tender by selling or refinancing the  
17 property purchased with a loan in the event that rescission was  
18 found to be appropriate, such that no specific allegation of  
19 ability to tender was required. Burrows v. Orchid Island TRS, LLC,  
20 No. 07-CV-1567, 2008 U.S. Dist. LEXIS 21120, \*18, 2008 WL 744735,  
21 \*6 (C.D. Cal. Mar. 18, 2008).

22 Mindful of the obligation to construe the allegations and  
23 facts in the light most favorable to the plaintiffs at this stage,  
24 the court declines to require plaintiffs to allege an ability to  
25 tender or the existence of special circumstances. Defendants'  
26 motion to dismiss is denied as to plaintiffs' TILA claim for



1 rescission. Plaintiffs are cautioned, however, that Yamamoto  
2 directs this court to require tender prior to rescission in the  
3 majority of cases, and that plaintiffs will need to meet this  
4 standard at subsequent stages.

5 **2. RESPA**

6 Defendants' primary challenge to plaintiffs' RESPA claim is  
7 that it does not contain specific factual allegations. Plaintiffs  
8 concisely allege that "Defendant Option One violated RESPA at the  
9 time of closing on the sale of the Property by failing to correctly  
10 and accurately comply with the disclosure requirements provided  
11 therein." FAC ¶ 76; see 12 U.S.C. § 2601. This allegation is  
12 conclusory in that it fails to identify what information, if any,  
13 CHL failed to disclose or CHL inaccurately disclosed.<sup>11</sup>

14 Although this resolves the motion with respect to the RESPA  
15 claim, two other issues warrant discussion. In opposing this  
16 motion, plaintiffs argue as though the RESPA claim is brought  
17 against both Option One and American Home. However, the FAC  
18 alleges that this claim is only brought as to certain defendants,  
19 not including American Home. Nor does the FAC allege any conduct  
20

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21 <sup>11</sup> Plaintiffs argue that this allegation constructively  
22 identifies specific information that should have been disclosed,  
23 because "the only disclosures mandated under RESPA at the time of  
24 closing[] are those pertaining to escrow costs." Amended Opp'n,  
25 32. Of the two citations plaintiffs provide in purported support  
26 of this argument, 12 U.S.C. § 2601 is a statement of purpose  
containing no requirements, and 12 C.F.R. § 3500.2(b) is not a  
valid citation. Moreover, nothing in the complaint specifies that  
plaintiffs seek to hold defendants accountable solely for conduct  
occurring at the time of closing; indeed, it appears that  
plaintiffs argue that these defendants are liable under RESPA for  
other conduct as well.

1 by American Home as the basis for the RESPA claim. While  
2 plaintiffs' opposition argues that the American Home violated RESPA  
3 by failing to respond to a qualified written request, this  
4 allegation does not appear in the FAC's RESPA claim. Thus, the FAC  
5 fails to plead a RESPA claim against American Home. If plaintiffs  
6 chose to file an amended complaint, they may allege a RESPA claim  
7 as to American Home.

8 Similarly, plaintiffs' opposition argues that "it remains  
9 unclear whether Defendants named in this lawsuit, AHMSI and Option  
10 One included, received "kickbacks" or referral fees disproportional  
11 to the work performed, which is prohibited under 12 U.S.C. §  
12 2607(a)." Opp'n at 22. No such allegation appears in the  
13 complaint. Plaintiffs may choose to add such an allegation in an  
14 amended complaint, provided that they may do so while complying  
15 with Fed. R. Civ. P. 11.

### 16 **3. Fiduciary Duty**

17 Plaintiffs allege that Option One owed them a fiduciary duty,  
18 and that Option One breached this duty. "[A]bsent special  
19 circumstances . . . a loan transaction is at arm's length and there  
20 is no fiduciary relationship between the borrower and lender."  
21 Oaks Management Corporation v. Superior Court, 145 Cal. App. 4th  
22 453, 466 (2006) (collecting cases); Nymark, 231 Cal. App. 3d at  
23 1093 n.1.

24 Plaintiffs concede that lenders do not ordinarily owe  
25 fiduciary duties, but argue that in this case, Option One entered  
26 into agency relationships with the brokers, and therefore became

1 subject to the broker's fiduciary duties. While plaintiffs allege  
2 that Option One provided incentives to the brokers, plaintiffs have  
3 not alleged that Option One exercised control over the brokers'  
4 conduct, or that the brokers had actual or apparent authority to  
5 act on Option One's behalf. Accordingly, plaintiffs have not  
6 alleged facts from which the court may plausibly infer either an  
7 employment or an agency relationship. See Metropolitan Water Dist.  
8 v. Superior Court, 32 Cal. 4th 491, 512 (2004) (following the  
9 Restatement Second of Agency (1958), § 220), Cal. Civ. Code §§  
10 2299, 2300; J.L. v. Children's Institute, Inc., 177 Cal. App. 4th  
11 388, 403-404 (2009). Absent an indication that Option One owed a  
12 fiduciary duty a to plaintiffs, Option One cannot be liable for  
13 civil conspiracy to breach that fiduciary duty. Applied Equipment  
14 Corp. v. Litton Saudi Arabia Ltd., 7 Cal.4th 503, 511, 514 (1994),  
15 Champlaie, 2009 U.S. Dist. LEXIS 102285 at \*62-65.

### 16 **3. Breach of Contract**

17 Plaintiffs allege that "Plaintiffs entered into an agreement  
18 with Defendants Option One, Smith, and Ruble, whereby Defendants  
19 promised to provide Plaintiffs with an affordable loan," FAC ¶ 104,  
20 that "Plaintiffs fully performed their duties under the contract  
21 with Defendants Smith, Ruble, and Option One," FAC ¶ 105, and that  
22 defendants, including Option One, breached this agreement in a  
23 variety of ways, including by failing to secure the promised  
24 payment and interest rates, FAC ¶ 106.

25 Defendants argue that this claim should be dismissed because  
26 "Under long-standing, California law, a Plaintiff pleading breach

1 of contract must either attach a copy of the contract to the  
2 complaint or set forth the relevant contract terms verbatim." Mem.  
3 Supp. Mot. Dismiss at 22. Defendants cite Campbell v. Allstate  
4 Ins. Cos., No. 95-1171, 1995 WL 376926, at \*2 (C.D. Cal. May 17,  
5 1995) for both this rule of California law and for the conclusion  
6 that the rule applies in federal court. However, as a court of  
7 this district recently explained, California pleading rules do not  
8 apply in federal court, and in any event, it is not clear that  
9 Campbell accurately stated California law. See Wang & Wang LLP v.  
10 Banco Do Brasil, S.A., No. S-06-00761, 2007 WL 915232, \*3 (E.D.  
11 Cal. March 26, 2007) (citing Constr. Protective Servs., Inc. v. TIG  
12 Specialty Ins. Co., 29 Cal. 4th 189, 198-99 (2002)). For the  
13 reasons provided in Wang & Wang, the court declines to follow  
14 Campbell.

15 The pleading here provides less detail than the one found  
16 adequate in Wang & Wang, in that it fails to specify plaintiffs'  
17 obligations under the purported contract. The allegations  
18 nonetheless satisfy the liberal pleading standard under Fed. R.  
19 Civ. P. 8. A plaintiff may plead a contract claim by setting for  
20 the contract's "legal effect." Fed. R. Civ. P. Official Form 3,  
21 12; see also Federal Rule of Civil Procedure 84 (declaring these  
22 forms to be sufficient). Plaintiffs have met this standard.

23 **4. Breach of the Implied Covenant of Good Faith and Fair**  
24 **Dealing**

25 Plaintiffs allege that defendants, including Option One,  
26 breached the duty of good faith and fair dealing by "failing to pay

1 at least as much regard to Plaintiffs' interests as to Defendants'  
2 interests," "Failing to disclose . . . the true nature of the loan  
3 that is the subject of this action," "Failing to give Plaintiffs'  
4 the requisite notice and disclosures," and "failing to comply with  
5 all applicable laws, including notice requirements, before  
6 foreclosure." FAC ¶¶ 112-113.

7 Defendants argue that this claim should be dismissed because  
8 it is predicated upon the existence of an underlying contract.  
9 However, as noted above, the court denies the motion to dismiss the  
10 breach of contract claim.

11 Nonetheless, plaintiffs have failed to state a claim for  
12 *tortious* breach of the implied covenant of good faith and fair  
13 dealing. A good faith claim sounds in tort only when there is a  
14 "special relationship" between the contracting parties, such as the  
15 relationship between an insurer and an insured in an insurance  
16 contract. See, e.g., Jonathan Neil & Assoc. v. Jones, 33 Cal. 4th  
17 917, 932 (2004). Plaintiffs have not alleged any facts which, if  
18 true, would demonstrate the existence of such a relationship here.  
19 Furthermore, California courts have specifically held that at least  
20 as between lenders and commercial borrowers, there is ordinarily  
21 not a special relationship giving rise to tortious bad faith  
22 liability. Kim v. Sumitomo Bank, 17 Cal. App. 4th 974, 979 (1993)  
23 (citing Careau & Co. v. Security Pacific Business Credit, Inc., 222  
24 Cal. App. 3d 1371, 1399, n.25 (1990)). Because there is no such  
25 special relationship, Option One is not required to pay as much  
26 regard to plaintiffs' interests as to its own. Plaintiffs' good

1 faith and fair dealing claim is dismissed in insofar as it seeks  
2 tort damages. The claim may proceed insofar as it sounds in  
3 contract.

4 **C. Claims against AHMSI - Wrongful Foreclosure**

5 The only claim alleged against defendant American Home but not  
6 Option One is for wrongful foreclosure. Defendants argue that this  
7 claim suffers three faults: plaintiffs fail to attach the relevant  
8 documents, plaintiffs failed to specify whether foreclosure has  
9 occurred, and plaintiffs fail to specify American Home's specific  
10 role.

11 Just as the federal rules do not require attachment of  
12 contracts to a complaint for breach of contract, the rules do not  
13 require attachment of documents in a wrongful foreclosure action.

14 Defendants argue that the complaint must specify whether  
15 foreclosure has already occurred, but provide no authority on this  
16 issue (or for any other argument for dismissal of this claim).  
17 Here, the claim challenges conduct prior to foreclosure, and  
18 foreclosure itself may not be relevant. In at least some  
19 circumstances, California courts have allowed wrongful foreclosure  
20 claims to proceed even when there was not actual foreclosure.  
21 Garretson v. Post, 156 Cal. App. 4th 1508, 1514 (2007).<sup>12</sup> Absent  
22 argument by defendants, the court declines to examine whether the  
23 instant case should be distinguished from Garretson.

24

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25 <sup>12</sup> Plaintiffs cite Munger v. Moore, 11 Cal. App. 3d 1, 6  
26 (1970) as another such case, but contrary to plaintiff's  
characterization of the case, the claim at issue there was filed  
after a trustee's sale.

1           Finally, defendants argue that the complaint fails to specify  
2 American Home's specific conduct giving rise to a wrongful  
3 foreclosure claim. The complaint contains specific allegations,  
4 namely that American Home and Quality Loan together "failed to  
5 properly record and give notice of the Notice of Default, which  
6 apparently occurred on or about May 15, 2008," FAC ¶ 121; that  
7 American Home failed to reply to a qualified written request sent  
8 to American Home by plaintiffs pursuant to RESPA; FAC ¶ 122; and  
9 that American Home failed to suspend foreclosure activities during  
10 a period in which it was required to do so pursuant to federal  
11 guidelines promulgated on March 4, 2009 under the Emergency  
12 Economic Stabilization Act of 2008. FAC ¶¶ 124-126. Thus, the  
13 complaint identifies specific conduct. Absent further argument by  
14 defendants, the court will not engage in a sua sponte evaluation  
15 as to whether this alleged conduct supports a wrongful foreclosure  
16 action.

17 **D. Motion for a More Definite Statement**

18           Defendants have offered no separate argument in support of  
19 their motion for a more definite statement, instead merely  
20 incorporating by reference their arguments for dismissal. The  
21 motion for a more definite statement is denied.

22 **IV. CONCLUSION**

23           For the reasons stated above, the court GRANTS IN PART  
24 defendants Option One and American Home's motion to dismiss (Doc.  
25 No. 23). Defendants' incorporated motion for a more definite  
26 statement is DENIED.

1 The court DISMISSES WITHOUT PREJUDICE the following claims as  
2 to defendants Option One and American Home:

- 3 1. Plaintiffs' first claim, under TILA, insofar as it seeks  
4 civil damages.
- 5 2. Plaintiffs' fourth claim, under RESPA.
- 6 3. Plaintiffs' fifth claim, for breach of fiduciary duty
- 7 4. Plaintiffs' sixth claim, for fraud.


8 The court DENIES defendants' motion as to the following claims,  
9 which may proceed to the extent consistent with the order above.

- 10 1. Plaintiffs' first claim, insofar as it seeks rescission  
11 under TILA.
- 12 2. Plaintiffs' second claim, under California's Rosenthal  
13 Act.
- 14 3. Plaintiffs' third claim, for negligence.
- 15 4. Plaintiffs' seventh claim, for violation of California  
16 Bus. & Prof. Code § 17200.
- 17 5. Plaintiffs' eighth claim, for breach of contract.
- 18 6. Plaintiffs' ninth claim, for breach of the implied  
19 covenant of good faith and fair dealing.
- 20 7. Plaintiffs' tenth claim, for wrongful foreclosure.

21 Plaintiffs are granted twenty days from the date of this order in  
22 which to file an amended complaint.

23 IT IS SO ORDERED.

24 DATED: January 5, 2010.

25   
26 LAWRENCE K. KARLTON  
SENIOR JUDGE  
UNITED STATES DISTRICT COURT