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\*\*E-Filed 7/27/2010\*\*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

BERTHA ROMERO, et al.,

Plaintiff,

v.

COUNTRYWIDE BANK, N.A., COUNTRY  
WIDE HOME LOANS, INC., and DOES 7 through  
10 inclusive,

Defendants.

Case Number C 07-4491 JF (PVT)

ORDER<sup>1</sup> GRANTING  
COUNTRYWIDE DEFENDANTS'  
MOTION TO DISMISS

[re: docket no. 95]

**I. BACKGROUND**

**A. The Loan Documents**

Between June 1, 2005 and December 7, 2006 Plaintiffs Bertha Romero, James Ruiz, Margarita Castro, Teresa Aguilera, Gilbert Gomez, Edward Tenorio, and Donna Tenorio applied for primary residence mortgages through First Magnus.<sup>2</sup> Third Amended Complaint (“TAC”) ¶¶ 2-6. In each instance, the parties’ obligations are governed by a Note and a Truth-in-Lending

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<sup>1</sup> This disposition is not designated for publication in the official reports.

<sup>2</sup> First Magnus has filed a Chapter 11 petition in the United States Bankruptcy Court for the District of Arizona. Accordingly, First Magnus no longer is a defendant in this action.

1 Disclosure Statement (“TILDS”) (collectively, the “Loan Documents”). Plaintiffs allege that  
2 First Magnus provided them with the Loan Documents, but that Defendants Countrywide Bank,  
3 N.A. (“Countrywide Bank”) and Countrywide Home Loans, Inc. (“CHL”) (collectively, “the  
4 Countrywide Defendants”) “dictated the terms of, selected, pre-approved, and/or drafted” them.  
5 *Id.* ¶54(e). The TAC states that after closing, Plaintiffs’ Adjustable Rate Mortgages (“Option  
6 ARM loans”) were sold to the Countrywide Defendants. *Id.* ¶ 7.

7 With respect to each Option ARM loan, the Note states “I will make a payment every  
8 month” and “I will make these payments every month until I have paid all the Principal and  
9 Interest and any other charges described below that I may owe under this Note.” *Id.*, Exs. 1-5 ¶  
10 3(A).<sup>3</sup> Plaintiffs claim that the TILDS contains an annual percentage rate (“APR”) that they  
11 anticipated would be the interest rate for the life of the loan, and also provided a payment  
12 schedule that purported to reflect the amounts due each month under the loan terms. *See* TAC  
13 Exs. 1-5 (“Your payment schedule will be”). However, Plaintiffs allege that in fact the payment  
14 schedule was not based upon or related to the APR listed in their TILDS but rather was based  
15 upon a rate specified in the Note that would apply only for the first thirty days. *Id.* ¶ 74-76.  
16 Plaintiffs also assert that the only payment amount reflected in the Note was one based upon this  
17 “teaser rate.” *Id.* ¶ 22, Exs. 1-5, ¶ 3(B).

18 Plaintiffs allege that after the first thirty days, the applicable interest rate for their loans  
19 increased so dramatically that the monthly payments they made pursuant to the payment schedule  
20 were not even sufficient to cover the monthly interest. *Id.* ¶¶ 23, 26-27, 78. This led to negative  
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22 <sup>3</sup> The Court may consider, under the incorporation by reference doctrine, documents that  
23 are connected to the loan transaction at issue as to which both Plaintiffs and the Countrywide  
24 Defendants make unopposed requests for judicial notice. For purposes of a motion to dismiss  
25 under Rule 12(b)(6), the pleadings are deemed to include “documents whose contents are alleged  
26 in a complaint and whose authenticity no party questions, but which are not physically attached  
27 to the pleading.” *See Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *cert. denied*, overruled  
28 on other grounds by *Galbraith v. City of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002); *see also In re Stac Elcs. Sec. Litig.*, 89 F. 3d 1399, 1405 n.4 (9th Cir. 1996) (noting that complete copies of documents whose contents are alleged in the complaint may be considered in connection with a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6)). Accordingly, the Court takes judicial notice of the copies of Plaintiffs’ Loan Documents which are attached to the TAC as exhibits one through five.

1 amortization. *Id.* ¶¶ 23-25.

2           The TAC claims that the Loan Documents failed to disclose clearly and conspicuously  
3 that negative amortization was certain to occur under the terms of the loans, indicating instead  
4 that the “Minimum Payment could be less” than the full amount of monthly interest owed. *Id.* ¶¶  
5 23-24, 31, Exs. 1-5 ¶3(E). Along with this allegedly inconspicuous disclosure, the initial  
6 monthly payment in the Note and the payment schedule in the TILDS were premised upon a  
7 minimum payment that would guarantee negative amortization. Plaintiffs allege that the  
8 combined effect of these misleading statements has resulted in their stated principal balances  
9 increasing substantially over time, despite the fact that they have made all of their required  
10 payments. *Id.* ¶ 24.

11           **B. Countrywide’s alleged role in the option arm loan origination process**

12           The TAC asserts that “Countrywide is in the business of...securitizing home mortgage  
13 loans by packaging those loans into trusts or other vehicles in order to sell bonds to investors  
14 based on the income to be derived from those loans.” *Id.* ¶ 54(a). Plaintiffs allege that the  
15 Countrywide Defendants developed a plan to have third-party originators such as First Magnus  
16 sell loans on their behalf in order to increase the number of loans they could securitize. *Id.* ¶  
17 54(b). The TAC alleges that First Magnus agreed with the Countrywide Defendants that it would  
18 sell certain Option ARM loans to homeowners and that First Magnus funded those Option ARM  
19 loans using monies available to it through its warehouse lines of credit (often provided by the  
20 Countrywide Defendants) or through other means. The Countrywide Defendants then would  
21 purchase the loans from the originators. *Id.* ¶ 54(d). Plaintiffs allege that pursuant to this  
22 arrangement, First Magnus would collect fees from the homeowners to whom it sold the Option  
23 ARM loans as well as from the Countrywide Defendants, while the Countrywide Defendants  
24 would collect revenues through the securitization process and in connection with servicing rights  
25 they retained on the loans after the loans were securitized. *Id.*

26           Plaintiffs allege that the Countrywide Defendants dictated the terms of, selected, pre-  
27 approved, and/or drafted the Loan Documents at issue in this case with the intention that First  
28 Magnus would utilize and provide them to Plaintiffs and putative class members in conjunction

1 with originating and selling the Option ARM loans. *Id.* ¶ 54(e). The TAC asserts that the  
2 Countrywide Defendants and First Magnus jointly approved the characteristics of the Option  
3 ARM loans First Magnus sold to Plaintiffs and that the use of these Loan Documents by First  
4 Magnus was a precondition the Countrywide Defendants imposed for purchasing the loans. *Id.*  
5 Plaintiffs allege that it was only by using the Loan Documents prepared by and/or pre-approved  
6 by the Countrywide Defendants that First Magnus could be assured that it would be able to resell  
7 quickly the Option ARM loans it issued to Plaintiffs. *Id.* ¶ 54(g).

### 8 **C. Procedural History**

9 Plaintiff Romero filed her original class action complaint on August 30, 2007, asserting  
10 claims under the Truth in Lending Act (“TILA”) and California law against First Magnus and  
11 Does one through ten. First Magnus did not answer or otherwise respond to the complaint. On  
12 October 11, 2007, Romero filed a first amended complaint (“FAC”) against First Magnus and  
13 Does one through ten asserting the same claims. On December 10, 2007, before First Magnus  
14 responded to the FAC, Romero filed a Notice of Bankruptcy Filing by First Magnus. Thereafter,  
15 on September 22, 2008, Romero moved for leave to file a second amended complaint (“SAC”),  
16 asserting, upon information and belief, that the Countrywide Defendants purchased Plaintiffs’  
17 mortgage loans and “serviced or currently services” the mortgage loans of Romero, Castro and  
18 the Tenorios. The Court granted the motion.

19 Romero filed her SAC on November 17, 2008, adding Ruiz, Castro, Aguilera, Gomez  
20 and the Tenorios as plaintiffs, deleting First Magnus as a defendant, and naming the Countrywide  
21 Defendants, Homecomings Financial LLC, Washington Mutual Bank, Aurora Loan Services, and  
22 Does six though ten as additional defendants. On March 9, 2009, Plaintiffs moved for leave to  
23 file a third amended complaint. After receipt of that motion, Defendants’ counsel advised  
24 Plaintiffs’ counsel of certain deficiencies in the proposed pleading. On April 20, 2009, Plaintiffs  
25 withdrew their motion for leave to file the then-proposed third amended complaint. On July 10,  
26 2009, Plaintiffs filed a new motion for leave to file a revised third amended complaint, asserting,  
27 upon information and belief, that First Magnus had sold Plaintiffs’ mortgage loans to the  
28 Countrywide Defendants. The Court granted that motion on August 21, 2009. Finally, the

1 operative TAC was filed on September 14, 2009 against the Countrywide Defendants and Does  
2 seven through ten, alleging violations of TILA and California’s Unfair Competition Law  
3 (“UCL”), Bus. & Prof. Code § 17200 *et seq.*, as well as a fraudulent omissions claim. The  
4 Countrywide Defendants, who are the only remaining named defendants, move to dismiss for  
5 failure to state a claim upon which relief may be granted.

## 6 **II. LEGAL STANDARD**

7 “Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a  
8 cognizable legal theory or sufficient facts to support a cognizable legal theory.” *Mendiondo v.*  
9 *Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). For purposes of a motion to  
10 dismiss, the plaintiff’s allegations are taken as true, and the court must construe the complaint in  
11 the light most favorable to the plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421, 89 S.Ct. 1843,  
12 23 L.Ed.2d 404 (1969). “To survive a motion to dismiss, a complaint must contain sufficient  
13 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ A claim  
14 has facial plausibility when the plaintiff pleads factual content that allows the court to draw the  
15 reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, ---  
16 U.S. ----, ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009), *Bell Atl. Corp. v. Twombly*, 550  
17 U.S. 544, 556, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Thus, a court need not accept as  
18 true conclusory allegations, unreasonable inferences, legal characterizations, or unwarranted  
19 deductions of fact contained in the complaint. *Clegg v. Cult Awareness Network*, 18 F.3d 752,  
20 754-755 (9th Cir.1994).

21 Leave to amend must be granted unless it is clear that the complaint’s deficiencies cannot  
22 be cured by amendment. *Lucas v. Dep’t of Corr.*, 66 F.3d 245, 248 (9th Cir.1995). When  
23 amendment would be futile, however, dismissal may be ordered with prejudice. *Dumas v. Kipp*,  
24 90 F.3d 386, 393 (9th Cir.1996).

## 25 **III. DISCUSSION**

### 26 **A. General deficiency of Plaintiffs’ claims**

27 The Countrywide Defendants contend that all of Plaintiffs’ claims are insufficiently pled  
28 because the only allegations that even attempt to connect them to Plaintiffs’ loans are: “that

1 CHL, Countrywide Bank *and/or* one or more of the four unnamed Doe defendants subsequently  
2 became a ‘purchaser and/or assignee’ of the Loans (TAC ¶¶ 9, 12, 16), and . . .CHL *and/or*  
3 Countrywide Bank ‘selected, preapproved, and/or drafted’ some unidentified ‘loan and disclosure  
4 documents’ First Magnus purportedly provided to its borrowers at some unidentified time (*id.* ¶  
5 54).” Countrywide Defendants’ Motion to Dismiss (“MTD”) at 6.

6 However, this is not an entirely accurate characterization of Plaintiffs’ allegations. The  
7 TAC also contains a general allegation that *all* defendants, including Countrywide Banks, CHL,  
8 and Does seven through ten, subsequently became a purchaser and/or assignee of the loans and  
9 that *all* defendants, including Countrywide Banks, CHL and Does seven through ten “selected,  
10 preapproved, and/or drafted” some unidentified “loan and disclosure documents.” TAC ¶¶ 54,  
11 56. While these allegations claim that Defendants generally performed these bad acts, they do  
12 not, as the Countrywide Defendants contend, fail to allege any cognizable wrongdoing at all.

13 At the same time, Plaintiffs’ allegations that *all* Defendants “selected, preapproved,  
14 and/or drafted” the Loan Documents that govern the mortgage transactions in dispute are  
15 insufficient to meet the “showing” requirement of Rule 8. Treating disparate parties identically  
16 without explanation, as Plaintiffs do throughout the TAC, deprives each individual party of a fair  
17 and meaningful opportunity to defend itself. *Twombly*, 550 U.S. at 553-55.

18 The same pleading deficiencies also infect Plaintiffs’ allegations of “selection, pre-  
19 approval, and/or drafting” of unspecified “loan and disclosure documents.” These allegations are  
20 vague and conclusory in nature. Plaintiffs never specify if the Countrywide Defendants became  
21 purchasers or assignees of the loans, when or whether the purchase or assignment occurred, or  
22 what rights or loan documents were purportedly sold. The Countrywide Defendants also point  
23 out that in their SAC, Plaintiffs alleged that Homecomings, Washington Mutual and Aurora were  
24 assignees of Plaintiffs loans. SAC ¶¶ 12-14. Plaintiffs do not dispute that the TAC is  
25 inconsistent with their previous representations as to which entities purportedly had a post-  
26 closing connection to their loans.

27 Plaintiffs must plead their factual allegations with enough particularity to put the  
28 Countrywide Defendants on notice of the claims asserted against them, and the facts alleged must

1 be specific enough to be more than speculation. *Twombly*, 550 U.S. at 535-55; *Iqbal*, 129 S.Ct.  
2 at 1949. Because Plaintiffs may be able to cure these pleading deficiencies by amendment, the  
3 Court turns to the Countrywide Defendants’ motion as it applies to each of the individual claims.

4 **B. TILA**

5 Plaintiffs allege that the Loan Documents violate TILA because they failed to disclose  
6 clearly and conspicuously 1) the certainty of negative amortization if only the minimum  
7 payments were made; 2) the interest rate underlying the payment schedule; 3) that the initial  
8 interest rate was discounted; and 4) the actual interest rate.

9 **1. Disclosure of the certainty of negative amortization**

10 Plaintiffs allege that the Countrywide Defendants violated 12 C.F.R. § 226.19(b) by  
11 failing to disclose that negative amortization was *certain* to occur if they made only the minimum  
12 payments shown in their payment schedules. § 226.19 requires that a lender disclose “[a]ny rules  
13 relating to changes in the index, interest rate, payment limitations, negative amortization, and  
14 interest rate carryover.” 12 C.F.R. § 226.19(b)(2)(vii). In addition, with respect to variable-rate  
15 loans with payment caps, such as Plaintiffs’ loans, the Commentary states that “[i]f a consumer is  
16 given the option to cap monthly payments that may result in negative amortization, the creditor  
17 *must* fully disclose the rules relating to the option, including the effects of exercising the option  
18 (*such as [the fact that] negative amortization will occur and the principal loan balance will*  
19 *increase*).” 12 C.F.R. Pt. 226, Supp. I. ¶ 19(b)(2)(vii)-2 (emphasis added).

20 The Countrywide Defendants argue that the requirements of § 226.19 apply exclusively to  
21 the Disclosure, and not to the Note, TILDS or any other document provided in connection with  
22 the loan transaction. See Def.’s Mot. to Dismiss at 9-10. The TAC does not allege any defects in  
23 the Disclosure<sup>4</sup>, but rather asserts that the certainty of the negative amortization is not properly  
24 disclosed in the TILDS. TAC ¶ 70. While the Countrywide Defendants’ reading of the

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25  
26 <sup>4</sup> Plaintiffs’ Program Disclosures contain all of the required disclosures concerning  
27 negative amortization. For example, Romero’s Adjustable Rate Mortgage Program Disclosure  
28 states, “If you pay less than the Full Payment, then the payment may not be enough to cover the  
interest due, and any difference will be added to your principle balance. This means the balance  
of your loan could increase. This is known as ‘negative amortization.’” MTD at 12 n. 1, Exs. D-  
F.

1 regulations is not unreasonable, this Court concludes, as it did in *Amparan v. Plaza Home*  
2 *Mortg., Inc.*, 678 F.Supp.2d 961, 969-70 (N.D. Cal. 2008) and *Ralston v. Mortgage Investors*  
3 *Group, Inc.*, 2009 WL 688858, at \*4 (N.D. Cal. Mar. 16, 2009), that § 226.19 also applies to the  
4 TILDS. The Staff Commentary to Regulation Z makes clear that *no* disclosure may cause  
5 another disclosure to be obscured or made ambiguous. See 12 C.F.R. Pt. 226, Supp. I, ¶  
6 17(a)(1)-1. In addition, at least three circuit courts have held that TILA prohibits conflicting or  
7 inconsistent disclosures, including situations in which the inconsistency arises from statements in  
8 multiple documents. *See, e.g., Handy v. Anchor Mortgage Corp.*, 464 F.3d 760, 764 (7th Cir.  
9 2006) (noting that where a lender provided a borrower with both a correct and an incorrect  
10 disclosure, the disclosure was unclear in violation of TILA); *Roberts v. Fleet Bank*, 342 F.3d  
11 260, 267-68 (3d Cir. 2003) (holding that in determining whether a required disclosure is clear, a  
12 court may consider other information that the lender provided to the borrower); *Shroder v.*  
13 *Suburban Coastal Corp.*, 729 F.2d 1371, 1381 (11th Cir. 1984) (stating that description of loan  
14 terms in TILA disclosure statement that conflicts with description of loan terms contained in note  
15 violates TILA).

16 District courts therefore have applied the requirements of § 226.19 to loan documents  
17 beyond the actual Disclosure, such as note agreements. *See, e.g., Plascencia v. Lending 1st*  
18 *Mortgag*, No. C 07-4485 CW, 2008 WL 1902698, at \*4-6 (N.D. Cal. Apr. 28, 2008) (*Plascencia*  
19 *D*) (denying motion to dismiss § 226.19 claim predicated on alleged lack of clarity in note  
20 agreement with respect to disclosure of APR and possibility of negative amortization); *Pham v.*  
21 *T.J. Fin., Inc.*, No. CV 08-275 ABC, 2008 WL 3485589, at \*2 (C.D. Cal. Aug.11, 2008)  
22 (denying motion to dismiss with respect to claim for failure to disclose negative amortization  
23 because the “note suggests that negative amortization was a ‘possibility’ ... but Plaintiff alleges  
24 that, under the note, negative amortization was certain to occur”).

25 The Countrywide Defendants also contend that Plaintiffs’ negative amortization  
26 allegations are belied by the actual terms of Plaintiffs’ loans and by the disclosures and Notes  
27 provided by First Magnus. Plaintiffs allege that the Notes treat negative amortization as a mere  
28 possibility when in fact it was a certainty if they followed the TILDS Payment Schedule.



1 However, the Countrywide Defendants contend that nothing in TILA requires disclosure of that  
2 consequence because whether negative amortization occurred would depend on the payment  
3 option Plaintiffs selected.<sup>5</sup> Moreover, they argue that the Notes disclosed expressly that negative  
4 amortization would occur *only* if Plaintiffs elected to pay the minimum payment, as opposed to  
5 the interest-only or 15- or 30-year amortizing payment. TAC Exs. 1-5, ¶ 3(C), (H). The  
6 Countrywide Defendants argue that it was entirely accurate for First Magnus to disclose that the  
7 possibility of negative amortization was just that – a possibility. In a similar action, the court in  
8 *Carroll v. Homecomings Financial LLC*, CV 07-3775 AHS (FMOx) slip op. at 3 (C.D. Cal. Mar.  
9 23, 2009) dismissed Plaintiffs claim predicated on a lender’s alleged non-disclosure of the  
10 certainty of negative amortization, observing that the lender’s statement “is technically accurate  
11 because plaintiffs could have elected a different payment option which would eliminate negative  
12 amortization.”

13 However, in almost identical factual scenarios in *Amparan* and *Ralston*, this Court  
14 concluded that while the defendant’s disclosures might be accurate in the abstract, “there was  
15 never a possibility that the payments listed on the Payment Schedule would cover all of the  
16 interest at the rate required to repay the loan. Accordingly, Plaintiff may be able to show that the  
17 certainty of negative amortization during the first year of the loan, based on the Payment  
18 Schedule, rendered Defendant's disclosures incomplete or misleading.” *Amparan*, 678 F.Supp.2d  
19 at 972; *see also Ralston*, 2009 WL 688858, at \*6 (“A number of courts have recognized the  
20 viability of claims for failure clearly and conspicuously to disclose the certainty of negative  
21 amortization”), citing *Mincey v. World Savings Bank*, 614 F.Supp.2d 610, 636-38 (D.S.C.

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22  
23 <sup>5</sup> The Countrywide Defendants point to multiple places in the Loan Documents where the  
24 possibility of negative amortization is indicated: (1) the first paragraph of the Note states, in all  
25 capital letters, that “the principal amount to repay could be greater than the amount originally  
26 borrowed;” (2) paragraph (3)(c) of the Notes discloses that, “[i]f the minimum payment is not  
27 sufficient to cover the amount of the interest due then negative amortization will occur;” TAC,  
28 Ex, 1-5, ¶ 3(c); and (3) a provision in the Notes entitled, “Additions to My Unpaid Principal  
Balance,” states, “my Minimum Payment could be less than...the amount of the interest portion  
of the monthly payment that would be sufficient to repay the unpaid Principal I owe at the  
monthly payment date...For each month that my monthly payment is less than the interest  
portion, the Note Holder will subtract the amount of my monthly payment from the amount of  
the Interest portion and will add the difference to my unpaid Principal.” *Id.*, ¶ 3(E).

1 Aug.15, 2008); *Plascencia I*, 2008 WL 1902698, at \*5-6.

## 2 **2. The Payment Schedule**

3 Plaintiffs allege that the Loan Documents violated § 226.17(c) by failing to disclose  
4 clearly and conspicuously the interest rate upon which the payment schedule is based, as the  
5 payments for the first four to five years of the loan are based not on the APR in the TILDS but  
6 rather on an interest rate listed in the Note that Defendants knew would apply to Plaintiffs' loans  
7 only for thirty days. TAC ¶¶ 73-76. § 226.17, which governs the form and content of disclosures,  
8 states that “[t]he disclosures shall reflect the terms of the legal obligation between the parties,”  
9 12 C.F.R. § 226.17(c)(1), meaning “the credit terms to which the parties are legally bound as of  
10 the outset of the transaction,” Commentary, 12 C.F.R. Pt. 226, Supp. I, ¶ 17(c) (1)-1. “The legal  
11 obligation normally is presumed to be contained in the note or contract that evidences the  
12 agreement.” 12 C.F.R. Pt. 226, Supp. I, ¶ 17(c)(1)-2. More specifically, “[t]he Payment Schedule  
13 should reflect all components of the finance charge,” *id.* ¶ 18(g)-1, and “in a variable rate  
14 transaction with ... a discounted or premium rate, disclosure should not be based solely on the  
15 initial terms,” *id.* ¶ 17(c)(1)-8 (emphasis added). Plaintiffs have alleged adequately that the  
16 Statement contains a payment schedule basing several years of payments on the initial low  
17 interest rate and thus does not reflect clearly the legal obligation evidenced by the Note.

## 18 **3. Disclosures that the initial rate was discounted**

19 Plaintiffs allege that the Loan Documents violated TILA by failing to disclose that the  
20 initial interest rate was discounted. TAC ¶¶ 77-78 (“Rather than disclose that the interest rate  
21 would increase after only one month, the Loan Documents stated that the initial payment was  
22 based on a ‘yearly rate’ of 1-3.5%.”) A “discounted” rate is one “that is not determined by the  
23 index or formula used to make later interest rate adjustments.” 12 C.F.R. Pt. 226, Supp. I, ¶  
24 19(b)(2)(v)-1. “If the initial interest rate will be a discount or a premium rate, creditors must alert  
25 the consumer to this fact.” *Id.* Such a disclosure must be “clear[ ] and conspicuous[ ].” 12  
26 C.F.R. § 266.17(a)(1). Again, in *Ralston* and *Amparan*, this Court addressed identical claims  
27 against lenders. *Ralston*, 2009 WL 688858, at \*5, *Amparan*, 678 F.Supp.2d at 971. As the Court  
28 concluded in those cases, Plaintiffs here may be able to prove that Defendants' disclosures, taken

1 as a whole, obscured the nature of the discount.

2 For example, Paragraph 2(A) of Romero’s Note states: “I will pay interest at a yearly rate  
3 of 1.500%. The interest rate I will pay *may* change.” TAC, Ex. 1, ¶ 2(A) (emphasis added).

4 Paragraph 2(B) then states that “[t]he interest rate I will pay may change on the 1st day of May,  
5 2006, and on that day every month thereafter.” *Id.* ¶ 2(B). That section of the Note goes on to  
6 state that “[e]ach date on which my interest rate could change is called an “Interest Rate Change  
7 Date.” *Id.* The following paragraph, ¶ 2(C), states that “[b]eginning with the first Interest Rate  
8 Change Date, my adjustable interest rate will be based on an Index.” *Id.* ¶ 2(C). Finally,  
9 paragraph ¶ 2(D) states that “[b]efore each Interest Rate Change Date, the Note Holder will  
10 calculate my new interest rate by adding THREE AND 450/1000THS percentage point(s)  
11 3.450% (“Margin”) to the Current Index.” *Id.* ¶ 2(D).

12 Because the language of ¶ 2(A) states that the yearly interest rate will be 1.500%, the  
13 average consumer might well take this to mean that the 1.500% rate actually would apply for a  
14 year or term of years. The language of ¶ 2(B) reinforces this notion, stating that the 1.500%  
15 yearly rate “may” or “could” change after a month. Only if one carefully parses the language of ¶  
16 2 does one realize that Defendants are calling the first day of each month an “Interest Rate  
17 Change Date,” and that on the first such “Interest Rate Change Date” – after the 1.500% rate has  
18 been in place for only one month – the rate *will* increase to an “Index” plus “Margin” of 3.450%.  
19 Nowhere does the Note, the Disclosure or any of the other loan documents state clearly that “I  
20 will pay interest at a yearly rate of 1.500%” actually means “I will pay interest at a discounted  
21 yearly rate of 1.500% for one month and after that will pay interest at a significantly higher rate.”  
22 Accordingly, the Court concludes that Plaintiffs may be able to prove that they were not  
23 informed in clear and conspicuous terms that the initial interest rate disclosed in their Note was a  
24 discounted rate.

#### 25 **4. Disclosure of the actual interest rate**

26 Plaintiffs claim that the Countrywide Defendants violated TILA by failing to disclose the  
27 true interest rate of their loans. TAC ¶¶ 79-94. 15 U.S.C. § 1638(a)(4) requires lenders to  
28 disclose the cost of a loan to the borrower “as an ‘annual percentage rate’ using that term.” 15

1 U.S.C. § 1638(a)(4). TILA defines the term “APR” as the “cost of your credit as a yearly rate.”  
2 12 C.F.R. § 226.18(e). Where, as here, a loan's initial interest rate subsequently is adjusted, the  
3 APR must “reflect a composite annual percentage rate based on the initial rate for as long as it is  
4 charged and, for the remainder of the term, the rate that would have been applied using the index  
5 or formula at the time of consummation.” Commentary, 12 C.F.R. Pt. 226.17(C)-6. Section  
6 1638(a)(8) requires lenders to provide a brief “descriptive explanation[ ]” of the APR. *See also*  
7 12 C.F.R. § 226.18(e). The disclosure and explanation of the cost of the loan as an annual  
8 percentage rate must be clear and conspicuous. Commentary, 12 C.F.R. Pt. 226.17(a)(1)-1.

9 Plaintiffs contend that material information was obscured because the APR in each of  
10 their Notes conflicted with the APR in the TILDS. Romero’s Note, for example, states “I will  
11 pay interest at a yearly rate of 1.500%.” TAC, Ex. 1. The TILDS states that the APR was  
12 7.505%, describing this figure as the “[t]he cost of your credit as a yearly rate.” However, the  
13 Note itself states: “I will pay interest at a yearly rate of 1.500%.” Note ¶ 2(A). Plaintiffs claim  
14 that this inconsistency renders the disclosure of the actual APR unclear and violates § 226.19.  
15 Several courts have permitted similar claims. *See, e.g., Amparan*, 678 F.Supp.2d at 970-71;  
16 *Plascencia I*, 2008 WL 1902698, at \*4; *Pham*, 2008 WL 3485589, at \*4.

17 The Countrywide Defendants nonetheless contend that Plaintiffs’ non-disclosure claim is  
18 untenable based upon detailed interest rate disclosures in their Notes that were not addressed  
19 specifically by this Court in *Amparan* and *Ralston*. Indeed, the Notes bear the title,  
20 “ADJUSTABLE RATE NOTE” and contain, in their first paragraph, an express disclosure by  
21 First Magnus, in bold-faced, all capital letters, that “THIS NOTE CONTAINS PROVISIONS  
22 THAT WILL CHANGE THE INTEREST RATE AND THE MONTHLY PAYMENT.” Exs. 1-5  
23 at 1. In Paragraph 2(A), the Notes disclose (1) the yearly “Interest Rate” the borrower will pay  
24 “until the full amount of Principal has been paid,” and (2) that the disclosed interest rate is  
25 subject to change. *Id.*, ¶ 2(A). In Paragraphs 2(B)-(D), the Notes disclose the adjustable rate  
26 features of Plaintiffs’ loans, including the fact that the interest rate set forth in Paragraph 2(A) is  
27 subject to change monthly beginning after the second month of the loan term. *Id.*, ¶2(B)-(D).

28 However, while the Court did not cite these provisions specifically in *Amparan* or

1 *Ralston*. the same or similar terms in fact were included in the notes at issue in those cases. As  
2 the Court concluded in *Amparan* and *Ralston*, Plaintiffs successfully allege a material  
3 inconsistency in the disclosures and other language in the Note, making the above cited  
4 disclosures unclear in violation of § 226.19.<sup>6</sup>

### 5 **5. Assignee Liability**

6 TILA provides for assignee liability if the violation is “apparent on the face of the loan  
7 documents.” *Ortiz v. Accredited Home Lenders, Inc.*, 639 F.Supp.2d 1159, 1163 (S.D. Cal.  
8 2009), citing 15 U.S.C. § 1641(a) (assignee liability lies “only if the violation ... is apparent on  
9 the face of the disclosure statement...”) “Although the Ninth Circuit does not appear to have  
10 addressed this question, TILA's assignee liability provision has been interpreted by other courts  
11 as meaning that a TILA claim may be asserted against an assignee only for ‘violations that a  
12 reasonable person can spot on the face of the disclosure statement or other assigned documents.’”  
13 *White v. Homefield Financial, Inc.*, 545 F.Supp.2d 1159, 1168 (W.D. Wash. 2008), quoting  
14 *Taylor v. Quality Hyundai, Inc.*, 150 F.3d 689, 694 (7th Cir. 1998). The Countrywide  
15 Defendants contend that Plaintiffs have failed to plead factual allegations sufficient to implicate  
16 assignee liability, but rather plead the opposite – that the purported violations are not of the type  
17 that would be apparent to a reasonable person. The TAC alleges:

18 For the Defendants who are in the business of making, purchasing and securitizing  
19 loans, the violations of TILA and Regulation Z described in this Complaint are  
20 objectively and reasonably apparent on the face of the Loan Documents provided  
21 to Plaintiffs and Class Members, because the Loan Documents provided can be  
22 determined to be incomplete and inaccurate by a comparison among the Loan  
23 Documents.

24 TAC ¶ 94. The Countrywide Defendants argue that Plaintiffs thus effectively concede that the

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25 <sup>6</sup> All of the information provided to Plaintiffs must be considered in assessing whether  
26 the disclosures were clear, conspicuous, and complete. *See, Handy*, 464 F.3d at 764. Viewed in  
27 isolation, many of the Countrywide Defendants’ disclosures were accurate. However, the  
28 information must be viewed in context of how it was disclosed to Plaintiffs. The Ninth Circuit’s  
holding in *Hauk v. JP Morgan Chase*, 552 F.3d 114, 1121 (9th Cir. 2009) is not to the contrary.  
*Hauk* held that a disclosure cannot be rendered misleading by the existence of other information  
that was neither disclosed nor required by TILA to be disclosed. Here, as discussed above, the  
information at issue – negative amortization, the payment schedule, that the interest rate was  
discounted, and the actual interest rate – was required by TILA to be disclosed.

1 alleged disclosure violations could not “reasonably... [be] discovered. . .” by a reasonable person.  
2 *Id.* ¶ 125. The Court agrees.

### 3 **6. TILA Rescission Claim**

#### 4 **a. Ability to Tender**

5 The Countrywide Defendants contend that Plaintiffs' TILA rescission claims are  
6 insufficient because Plaintiffs do not plead an ability to tender. 12 C.F.R. § 226.23(d)(3).  
7 Although the Ninth Circuit has not addressed the issue directly, it has held that a court may  
8 require a borrower seeking rescission of a mortgage transaction under TILA to demonstrate the  
9 ability to tender the loan proceeds. *Yamamoto v. Bank of New York*, 329 F.3d 1167, 1168 (9th  
10 Cir. 2003) (holding that it is within a district court's "discretion to condition rescission on tender  
11 by the borrower of the property he had received from the lender") (internal quotation marks and  
12 citation omitted).

13 District courts within the circuit are split. A number of them have extended *Yamamoto* to  
14 hold that a claim for rescission under TILA is subject to dismissal at the pleading stage if the  
15 borrower fails to allege a present ability to tender the loan proceeds. *See, e.g., Garcia v.*  
16 *Wachovia Mortg. Corp.*, 676 F.Supp.2d 895, 901-905 (C.D. Cal. 2009); *Del Valle v. Mortg. Bank*  
17 *of California*, No. CV-F-09-1316 OWW/DLB, 2009 WL 3786061, at \*8 (E.D. Cal. Nov. 10,  
18 2009); *ING Bank v. Korn*, No. C09-124Z, 2009 WL 1455488, at \*1 (W.D. Wash., May 22,  
19 2009); *Garza v. American Home Mortg.*, No. CV F 08-1477 LJO GSA, 2009 WL 188604, at \*5  
20 (E.D. Cal. Jan. 27, 2009) (granting motion to dismiss TILA rescission claim in light of  
21 complaint's failure to allege ability to tender, since "[r]escission is an empty remedy without  
22 [plaintiff]'s ability to pay back what she has received"). However, other courts have held that  
23 failure to allege ability to tender is not fatal to a TILA rescission claim. *See, e.g., Botelho v. U.S.*  
24 *Bank*, 692 F.Supp.2d 1174, 1180-81 (N.D. Cal. 2010); *Singh v. Washington Mut. Bank*, No.  
25 C-09-2771 MMC, 2009 WL 2588885, at \*4 (N.D. Cal. Aug. 19, 2009) ("Notably, *Yamamoto*  
26 does not hold that a claim for rescission cannot survive a motion to dismiss until the right to  
27 rescind is adjudicated in the plaintiff's favor."); *ING Bank v. Ahn*, No. C 09-995 THE, 2009 WL  
28 2083965, at \*2 (N.D. Cal. July 13, 2009) (noting that "*Yamamoto* did not hold that a district

1 court must, as a matter of law, dismiss a case if the ability to tender is not pleaded. Rather, all of  
2 these cases indicate that it is within the trial court's discretion to choose to dismiss where the  
3 court concludes that the party seeking rescission is incapable of performance."); *Pelayo v. Home*  
4 *Capital Funding*, No. 08-CV-2030 IEG (POR), 2009 WL 1459419, at \*7 (S.D. Cal. May 22,  
5 2009) (rejecting argument that, under *Yamamoto*, claim for rescission was subject to dismissal  
6 where plaintiff "failed to offer tender in the complaint of the funds she borrowed"); *Harrington v.*  
7 *Home Capital Funding, Inc.*, No. 08cv1579 BTM (RBB), 2009 WL 514254, at \*3 (S.D. Cal.  
8 Mar. 2, 2009) (holding "[t]ender by the borrower is not always a precondition to rescission and  
9 does not have to be pled to state a claim for rescission"); *Burrows v. Orchid Island TRS, LLC*,  
10 No. 07CV1567-BEN (WMC), 2008 WL 744735, at \*6 (C.D. Cal. Mar.18, 2008) (rejecting, on  
11 motion to dismiss, defendant's argument that "there [was] no evidence" that plaintiff could return  
12 loan proceeds).

13 This Court finds the second line of cases more persuasive in that they appear to be more  
14 consistent with the liberal pleading standard of Fed. R. Civ. P. 8. However, the Court agrees  
15 with the reasoning of the first line of cases that "it was not the intent of Congress to reduce the  
16 mortgage company to an unsecured creditor," *Del Valle*, 2009 WL 3786061 at \*8, and that  
17 "[r]escission is an empty remedy without [plaintiff]'s ability to pay back what she has received,"  
18 *Garza*, 2009 WL 188604 at \*5. Accordingly, the Court will exercise the discretion conferred  
19 upon it by *Yamamoto* to require that Plaintiffs allege either the present ability to tender the loan  
20 proceeds or the expectation that they will be able to tender within a reasonable time.<sup>7</sup> At the end  
21 of the day, Plaintiffs "will not be entitled to rescission" unless they can tender the principal  
22 balance of their loans. See *Clemens v. J.P. Morgan Chase Nat. Corporate Services, Inc.*, No.  
23 09-3365 EMC, 2009 WL 4507742, at \*5 (N.D. Cal. Dec. 1, 2009). It makes little sense to let the  
24 instant rescission claim proceed absent some indication that the claim will not simply be

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25  
26 <sup>7</sup> For example, a TILA plaintiff might be able to allege that while she lacks the liquidity  
27 to tender the loan proceeds at the time she files the rescission claim, she has sufficient equity in  
28 the home and a willingness to sell that would render it likely that she could tender the loan  
proceeds if given a reasonable period of time.

1 dismissed at the summary judgment stage after needless depletion of the parties' and the Court's  
2 resources.

### 3 **b. “Material Disclosure” Violation**

4 The Countrywide Defendants also argue that the TAC does not allege any defects in First  
5 Magnus’ “material” disclosures – a prerequisite to a TILA rescission claim. 12 C.F.R. §  
6 226.23(a)(3). The material disclosures include, “the annual percentage rate, the finance charge,  
7 the amount financed, the total of payments, the payment schedule, and the disclosures and  
8 limitations referred to in §§ 226.32(c) and (d) and 226.35(b)(2).” *Id.* Consistent with the  
9 foregoing discussion, *see supra* III.B.1-4, the Court concludes that this element of Plaintiffs’  
10 claim is alleged sufficiently.

### 11 **7. Ruiz’s TILA Damages Claim**

12 The applicable limitations period for a TILA damages claim is one year, *see* 15 U.S.C. §  
13 1640(e). Plaintiffs concede that any TILA claims for civil damages by Romero, Aguilera,  
14 Gomez and the Tenorios are time-barred, but they contend that Ruiz’s TILA damages claim is  
15 viable. TAC ¶ 104. However, the Countrywide Defendants were not named as defendants in this  
16 action until November 17, 2008, and Ruiz’s argument that the claim relates back to the filing of  
17 the original complaint is unpersuasive.

18 Whether a proposed amendment to a complaint relates back to a previous complaint is  
19 governed by Fed. R. Civ. P. 15(c). Rule 15(c)(1) provides that an amended complaint naming a  
20 new party relates back to the filing date of the original complaint only if:

- 21 (A) the law that provides the applicable statute of limitations allows relation back;
- 22 (B) the amendment asserts a claim or defense that arose out of the conduct,  
transaction, or occurrence set out—or attempted to be set out—in the original  
pleading; or
- 23 (C) the amendment changes the party or the naming of the party against whom a  
claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided  
24 by Rule 4(m) [120 days] for serving the summons and complaint, the party to be  
brought in by amendment:
  - 25 (i) received such notice of the action that it will not be prejudiced in  
defending on the merits; and
  - 26 (ii) knew or should have known that the action would have been brought  
against it, but for a mistake concerning the proper party's identity.

27 Fed. R. Civ. P. 15(c)(1).

28 While the Countrywide Defendants do not contend that Ruiz has failed to satisfy Rule



1 15(c)(1)(A) or (B), they do argue persuasively that Ruiz has failed to satisfy either requirement of  
2 Rule 15(c)(1)(C).

3 **a. Notice**

4 The TAC alleges no facts tending to show that the Countrywide Defendants actually  
5 received notice of Ruiz's claim within the 120-day period specified by Rule 4(m). Instead Ruiz's  
6 theory is premised entirely on an alleged pooling and servicing agreement covering the sale of  
7 Ruiz's loan to Countrywide in which First Magnus was required to inform Countrywide of the  
8 instant lawsuit when it was served with the FAC. TAC ¶ 103. This allegation fails to satisfy  
9 Rule 15(c)(1)(C).

10 First, Plaintiffs do not allege *at all* that the Countrywide Defendants had notice of the  
11 lawsuit. Second, the TAC does not allege facts to support a finding that a "community of  
12 interest" existed between the Countrywide Defendants and First Magnus. The Ninth Circuit has  
13 held that notice to a named defendant will be imputed to an unnamed defendant where there is a  
14 "community of interest" between the parties. *G.F. Co. v. Pan Ocean Shipping Co., Ltd.*, 23 F.3d  
15 1498, 1502-03 (9th Cir. 1994); *see also Bailey v. U.S.*, 289 F.Supp.2d 1197, 1208 (D. Haw.  
16 2003). However, such a community, or identity, of interest exists between two companies only  
17 when "the parties are so closely related in their business operations or other activities that the  
18 institution of an action against one serves to provide notice of the litigation to the other." *Brink*  
19 *v. First Credit Res.*, 57 F.Supp.2d 848, 854 (D. Ariz. 1999), quoting *G.F.*, 23 F.3d at 1053  
20 (citations omitted). As the court in *Brink* noted, "[t]hat definition applies to a situation in which  
21 notice to a subsidiary is imputed to a parent corporation." *Id.*

22 Plaintiffs do not allege that there is a parent-subsiary or other similarly close business  
23 relationship between the Countrywide Defendants and First Magnus. Instead, Plaintiffs contend  
24 that the requisite identity of interest exists because the securitized lending at the heart of this suit  
25 was possible only with the support and funding of subsequent assignees that also profited from  
26 the improperly originated loans. This conclusory statement is insufficient to support a finding of  
27 a community of interest. Plaintiffs do not attach the purported agreement between First Magnus  
28 and the Countrywide Defendants to the TAC, do not allege which Countrywide Defendant was a

1 party to that agreement, do not allege the date of the agreement, and do not identify the terms of  
2 the agreement that allegedly required First Magnus to notify an unspecified “Countrywide” entity  
3 of Ruiz’s claim. See TAC ¶¶ 96-104.

4 **b. Mistake**

5 Even if he could satisfy the requirements of Rule 15(c)(1)(C)(i) regarding notice, Ruiz  
6 still would have to satisfy subsection (ii), which requires that the unnamed defendant or  
7 defendants “knew or should have known that the action would have been brought against it, but  
8 for a mistake concerning the proper party’s identity.” Fed. R. Civ. P. 15(c)(1)(C)(ii). Plaintiff  
9 fails to allege this requirement adequately as well, stating only that knowledge of the identity of  
10 the Countrywide Defendants was “exclusively within the control of First Magnus.” TAC ¶ 102.

11 Even assuming that Ruiz was not *aware* of the Countrywide Defendants’ potential  
12 liability for alleged violations of TILA, lack of knowledge is not a mistake of the kind required  
13 by Rule 15(c)(1)(C)(ii), formerly Rule 15(c)(3)(B). *Brooks v. ComUnity Lending, Inc.*, No.  
14 5:07-cv- 04501-JF (slip op.) at 10 (N.D. Cal. Sept. 29, 2009), *Butler v. Robar Enters., Inc.*, 208  
15 F.R.D. 621, 623-24 (C.D. Cal. 2002); see also *Jacobsen v. Osborne*, 133 F.3d 315, 321 (5th Cir.  
16 1998) (“[F]or a ‘John Doe’ defendant, there was no ‘mistake’ in identifying the correct  
17 defendant; rather, the problem was not being able to identify that defendant.”) As the TAC  
18 contains no other alleged mistake, it fails to meet this requirement for relation back.<sup>8</sup>

19  
20 <sup>8</sup> Plaintiffs contend that the Court should abandon its holding in *Brooks* and adopt the  
21 reasoning in *Abels v. JBC Legal Group, P.C.*, 229 F.R.D. 152, 159 (N.D. Cal. 2005). In that  
22 case, the court held that “because plaintiff did not make a tactical choice to exclude defendants,  
23 and because defendants ‘failed to provide the information sooner’, the plaintiff was entitled to  
24 amend the complaint to add new defendants.” *Id.*, citing *Brink v. First Credit Res.*, 57 F.Supp.2d  
25 848, 853 (D. Ariz. 1999). However, in *Abels*, the mistakenly unnamed defendant was the true  
26 owner of plaintiff’s debt. Thus, it was clear to the court that plaintiff had intended to name the  
27 true owner of the debt since the commencement of the action. The facts of the instant action are  
28 distinguishable. Here, Plaintiffs originally sued First Magnus, the party with whom they entered  
into mortgage transactions. Plaintiffs claim that they learned later that the Countrywide  
Defendants prepared and/or drafted the Loan Documents and are purchasers and/or assignees of  
the loans. These alleged new facts may have given rise to Plaintiffs’ current litigation theory that  
the Countrywide Defendants prepared the documents, but they do not show that Plaintiffs were  
mistaken as to the identity of the owner of their loan. As discussed previously, Plaintiffs also fail  
to allege facts that would support a finding that the Countrywide Defendants are assignees of the  
loans.

1  
2 **8. The Tenorios' TILA claim for rescission**

3 The Countrywide Defendants contend that the Tenorios' TILA rescission claim also  
4 should be dismissed because it is time-barred. The limitations period for a TILA rescission claim  
5 is three years. 15 U.S.C. § 1635(f). Although the Tenorios' loan closed on June 1, 2005, they  
6 were not named as plaintiffs in this case until November 17, 2008. Plaintiff Romero's initial  
7 class action complaint was filed on August 30, 2007, and it contained a rescission claim on  
8 behalf of all class members. Complaint at 29. However, the Countrywide Defendants were not  
9 named in that pleading, but were added at the same time as the Tenorios on November 17, 2008.

10 The parties dispute whether Romero's initial complaint tolled the statute of limitations for  
11 the Tenorios as members of the putative class. In *American Pipe & Construction Co. v. Utah*,  
12 414 U.S. 538, 554 (1974), the Supreme Court held that "commencement of a class action  
13 suspends the applicable statute of limitations as to all asserted members of [the] class who would  
14 have been members had the suit been permitted to proceed as a class action." However, "[c]ourts  
15 are in uniform agreement that rescission may not be sought on a class-wide basis." *Amparan v.*  
16 *Plaza Home Mortg., Inc.*, 678 F.Supp.2d 961, 979 (N.D. Cal. 2008), citing *Andrews v. Chevy*  
17 *Chase Bank*, 545 F.3d 570, 571 (7th Cir.2008) (holding that "the rescission remedy prescribed by  
18 TILA is procedurally and substantively incompatible with the class-action device" and "may not  
19 be pursued on a class basis"); see also *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d  
20 418, 427 (1st Cir.2007); *James v. Home Constr. Co. of Mobile, Inc.*, 621 F.2d 727, 728 (5th  
21 Cir.1980). Accordingly, the Tenorios could not have been members of a purported rescission  
22 class tolling the three year statutory time-period. Moreover, the Ninth Circuit has recognized that  
23 "§ 1635 is a statute of repose, depriving the courts of subject matter jurisdiction when a § 1635  
24 claim is brought outside the three year limitation period." See *Miguel v. Country Funding Corp.*,  
25 309 F.3d 1161, 1164 (9th Cir. 2002). Accordingly, the Tenorios' rescission claim will be  
26 dismissed without leave to amend.<sup>9</sup>

27  
28 <sup>9</sup> Finding in favor of the Tenorios on this point would allow for, "a complaint that was never served on Countrywide, was abandoned by Plaintiffs, and that did not even name the

1           **C. The Countrywide Defendants’ liability for fraudulent omissions in the Loan Documents**

2           The Countrywide Defendants contend that Plaintiffs’ fraudulent omissions and UCL  
3 claims must be dismissed because the Countrywide Defendants had no duty to disclose  
4 information about loans made by another entity, and Plaintiffs do not allege they acted in reliance  
5 on the Countrywide Defendants’ alleged conduct. Plaintiffs argue that a duty existed because the  
6 Countrywide Defendants aided and abetted the alleged misconduct of First Magnus.

7           To establish an aiding and abetting claim, Plaintiffs must allege that the Countrywide  
8 Defendants “[1] *kn[e]w* the other’s conduct constitute[d] a breach of a duty and [2] *g[a]ve*  
9 substantial assistance or encouragement to the other to so act.” *In re First Alliance Mortg.*  
10 *Comp.*, 471 F.3d 977, 993 (9th Cir. 2006) (emphasis in original), quoting *Casey v. U.S. Bank*  
11 *National Assn.*, 127 Cal. App. 4th 1138, 1144, 26 Cal. Rptr. 3d 401 (2005) (citation omitted).  
12 Thus, Plaintiffs must plead factual allegations that each of the Countrywide Defendants knew of  
13 First Magnus’ alleged misconduct in advance, knew that the alleged misconduct constituted a  
14 breach of duty owed by First Magnus to Plaintiffs, and gave substantial assistance or  
15 encouragement to First Magnus to engage in the alleged misconduct as to each of their loans.

16           The TAC does not specify which Countrywide entity prepared and/or reviewed the  
17 unspecified loan documents at issue or which Countrywide entity purchased and/or was assigned  
18 Plaintiffs’ loans. Such speculative, non-specific allegations are insufficient. *Twombly*, 550 U.S.  
19 at 553-55. Plaintiffs also argue that the Countrywide Defendants should be liable for First  
20 Magnus’ alleged misconduct and omissions as a subsequent assignee. However, for the reasons  
21 discussed above, Plaintiffs fail to allege facts that would support a claim of assignee liability  
22 against the Countrywide Defendants. These defects may be curable, provided that Plaintiffs can  
23 address them consistent with Fed. R. Civ. P. 11.<sup>10</sup>

24 \_\_\_\_\_  
25 Tenorios as plaintiffs [to] somehow constitute a proper notice of rescission for them under the  
26 statute.” Reply at 10.

27           <sup>10</sup> In *Plascencia II*, 583 F.Supp.2d at 1099-1100, Judge Wilken upheld plaintiffs’  
28 fraudulent omissions claim against EMC, the assignee of plaintiff’s Option ARM loan:  
                  [T]he complaint...alleges that EMC was engaged in a fraudulent scheme with  
                  Lending 1<sup>st</sup> pursuant to which loans with unfavorable terms were sold to

1 The Countrywide Defendants also contend that Plaintiffs have failed to plead actual  
2 reliance. To plead and prove reliance, a plaintiff need only “establish a complete causal  
3 relationship between the alleged [fraudulent omission] and the harm claimed to have resulted  
4 therefrom.” *Mirkin v. Wasserman*, 5 Cal.4th 1082, 1092 (1993). “It is not necessary that [a  
5 plaintiff’s] reliance upon the truth of the fraudulent misrepresentation be the sole or even the  
6 predominant or decisive factor in influencing his conduct...It is enough that the representation  
7 has played a substantial part, and so has been a substantial factor in influencing his decision.”  
8 *Engalla v. Permanente Med. Group*. 15 Cal.4th 951, 976-77 (1997). Plaintiffs can demonstrate  
9 reliance by showing that “had the omitted information been disclosed, [they] would have been  
10 aware of it and behaved differently.” *Mirkin*, 5 Cal.4th at 1093.

#### 11 **D. UCL Claim**

12 California’s UCL prohibits “any unlawful, unfair or fraudulent business act or practice  
13 and unfair, deceptive, untrue or misleading advertising.” Cal. Bus. & Prof. Code § 17200.  
14 Accordingly, “[a]n act can be alleged to violate any or all of the three prongs of the  
15 UCL—unlawful, unfair, or fraudulent.” *Berryman v. Merit Prop. Mgmt., Inc.*, 152 Cal. App. 4th  
16 1544, 1554 (2007).

17 For an action based upon an allegedly unlawful business practice, the UCL “borrows  
18 violations of other laws and treats them as unlawful practices that the unfair competition law  
19 makes independently actionable.” *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel.*  
20 *Co.*, 20 Cal. 4th 163, 180 (1999); *see also Farmers Ins. Exchange v. Superior Court*, 2 Cal. 4th  
21 377, 383 (1992). However, such allegations “must state with reasonable particularity the facts

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22  
23 customers without those terms being properly disclosed. EMC then bought,  
24 serviced and securitized those loans. In *In re First Alliance Mortgage Co.*, 471  
25 F.3d 977, 994-95 (9<sup>th</sup> Cir. 2006), the Ninth Circuit upheld a jury verdict finding a  
26 secondary lender liable for fraud based on the “substantial assistance” it provided  
27 to a fraudulent scheme by virtue of its role in the securitization of loans that were  
28 originated fraudulently. Although EMC’s liability for fraud will ultimately turn  
on the exact nature of its involvement in the allegedly unlawful lending practices,  
the allegations in the complaint are sufficient to withstand dismissal at this early  
stage of the proceedings.

While the Court agrees with this reasoning, it concludes that the allegations of the TAC are too  
speculative to establish liability by way of substantial assistance.

1 supporting the statutory elements” of the alleged violation. *Silicon Knights, Inc. v. Crystal*  
2 *Dynamics, Inc.*, 983 F. Supp. 1303, 1316 (N.D. Cal. 1997), quoting *Khoury v. Maly’s of Cal.,*  
3 *Inc.*, 14 Cal. App. 4th 612, 619 (1993). Plaintiffs’ allegations are insufficient to support this  
4 claim for the reasons provided above. *See supra* III.A, B, C.

5 Plaintiffs also allege a UCL claim accusing Defendants of unfair business practices. TAC  
6 ¶¶ 132-135. “[A] practice may be deemed unfair even if not specifically proscribed by some  
7 other law.” *Cel-Tech*, 20 Cal. 4th at 180. Plaintiffs argue that their allegations satisfy the  
8 elements of an unfair business practices claim under *Camacho v. Automobile Club of Southern*  
9 *California*, 142 Cal. App. 4th 1394 (2006), in which the court stated that a viable claim for relief  
10 may exist if the following conditions are met: “(1) the consumer injury must be substantial; (2)  
11 the injury must not be outweighed by any countervailing benefits to consumers or competition;  
12 and (3) it must be an injury that consumers themselves could not reasonably have avoided.” *Id.*  
13 at 1403. However, the allegations of the TAC with respect to the role of the Countrywide  
14 Defendants in creating the alleged omissions and misleading terms in the Loan Documents are  
15 speculative. Because the TAC does not distinguish between the Countrywide Defendants, the  
16 allegations of reliance upon their actions are insufficient as well.

17 Finally, Plaintiffs allege that the Countrywide Defendants violated the UCL’s fraud  
18 prong. These allegations must meet the heightened pleading standards of Rule 9(b), which apply  
19 to all actions sounding in fraud, including UCL actions. *See Kearns v. Ford Motor Co.*, 567 F.3d  
20 1120, 1125 (9<sup>th</sup> Cir. 2009). Accordingly, for the same reasons that the Court found their  
21 allegations of fraudulent omissions too speculative and insufficiently specific, Plaintiffs’  
22 allegations with respect to their UCL fraud claim also fall short under Rule 9(b). Plaintiffs do  
23 not allege the time, place, and/or specific content of any alleged false representations, nor do they  
24 indicate which Countrywide Defendant allegedly made which false statements. *Glen Holly*  
25 *Entm’t, Inc. v. Tektronic, Inc.*, 100 F.Supp.2d 1086, 1095 (C.D. Cal. 1999) (“Mere conclusory  
26 allegations of fraud are insufficient. Statements of time, place, and nature of the fraudulent  
27 activities are required, so that defend[ant] can prepare an adequate answer to the allegations.”),  
28 citing *Wool v. Tandem Computers Inc.*, 818 F.2d 1433, 1439 (9th Cir.1987).

1           **E. Preemption of state law claims**

2           Plaintiffs’ common-law fraud and UCL claims both are predicated on the Countrywide  
3 Defendants’ alleged failure to meet their disclosure obligations under TILA. Defendants disagree  
4 strenuously with the holding of this Court and numerous other district courts that TILA does not  
5 necessarily preempt state-law claims predicated on violations of TILA. *See, e.g., Amparan v.*  
6 *Plaza Home Mortgage, Inc.*, 678 F.Supp.2d at 97-76. Defendants argue that Plaintiffs’ state-law  
7 claims are preempted both because they conflict with TILA's substantive requirements and  
8 because they “supplement” TILA by providing a more generous limitations period and additional  
9 remedies. In propounding these arguments, Defendants rely on *Nava v. Virtualbank*, No. 08-069,  
10 2008 WL 2873406 (E.D. Cal. July 16, 2008), in which the district court concluded that  
11 TILA-based UCL claims are preempted (1) by 12 C.F.R. § 560.2<sup>11</sup> because that regulation  
12 preempts the entire field and (2) by TILA itself because such UCL claims “supplement”  
13 impermissibly TILA's remedial scheme. As explained below, Defendants do not argue that 12  
14 C.F.R. § 560.2 applies in the instant case, and properly pled claims for violations of TILA also  
15 may serve as the basis for UCL claims, as such claims are inherently consistent with TILA. To  
16 the extent that *Nava* holds that TILA preempts UCL claims that “supplement” TILA's remedial  
17 scheme, this Court respectfully disagrees, as “supplementation” is forbidden only in the context  
18 of field-preemptive statutes and not in connection with conflict-preemptive statutes such as  
19 TILA.

20                           **1. TILA-based state-law claims are consistent with TILA's substantive**  
21                           **provisions**

22           Following *Silvas v. E\*Trade Mortg. Corp.*, 514 F.3d 1001, 1006 (9th Cir. 2008), *Nava*  
23 concluded that TILA-based UCL claims are preempted by 12 C.F.R. § 560.2, a regulation issued  
24 by the Office of Thrift Supervision (“OTS”) pursuant to the Home Owner's Loan Act (“HOLA”).  
25 *Nava*, 2008 WL 2873406, at \*7. In *Silvas*, the Ninth Circuit considered whether certain types of  
26 UCL claims premised on alleged TILA violations are preempted by HOLA. 514 F.3d at 1006.  
27 HOLA gives the OTS broad authority to issue regulations governing thrifts, and the OTS has

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          <sup>11</sup> As discussed below, 12 C.F.R. § 560.2 is a regulation separate from TILA.

1 exercised that authority to declare the “entire field of lending regulation for federal savings  
2 associations” preempted. 12 C.F.R. § 560.2(a). The OTS also has provided a list of specific  
3 types of state laws that are preempted. See 12 C.F.R. § 560.2(b). *Silvas* applied the preemption  
4 framework contained in the OTS regulations, which calls initially for a determination as to  
5 whether the state law in question is among those considered preempted expressly by the  
6 regulations. See *Silvas*, 514 F.3d at 1005, citing OTS, Final Rule, 61 Fed.Reg. 50951, 50966-67  
7 (Sept. 30, 1996). *Silvas* concluded that disclosure-based UCL claims are preempted expressly by  
8 12 C.F.R. § 560.2(b). *Id.* at 1006. Here, because the OTS regulations are not at issue,  
9 Defendants argue that Plaintiff's state-law claims are preempted not by OTS regulations but by  
10 TILA itself.

11 TILA's savings clause states expressly that TILA does not preempt any state law unless  
12 that law is inconsistent with TILA. 15 U.S.C. § 1610(b).<sup>12</sup> *Silvas* did not conclude that TILA  
13 based state-law claims are preempted by a conflict with TILA 's substantive provisions, and this  
14 proposition has been rejected by the majority of district courts that have considered it. In  
15 *Plascencia*, the court concluded that UCL claims premised on TILA violations are not  
16 necessarily preempted because “[t]he UCL does not, on its face, relate to the disclosure of  
17 information in connection with credit transactions, let alone impose disclosure requirements that  
18 are different than TILA's in any way.” *Plascencia v. Lending 1st Mortgage*, 583 F.Supp.2d 1090,  
19 1099 (N.D. Cal. 2008) (“*Plascencia IP*” ) (holding that because “[t]he UCL does not mandate  
20 additional disclosures that are substantively inconsistent with TILA's, [it] does not bring the UCL  
21 within the scope of TILA's preemption provision”). Similarly, in *Quezada v. Loan Center of*  
22 *California, Inc.*, No. CIV. 08-177 WBS KJM, 2008 WL 5100241, at \*4 (E.D. Cal. Nov.26,

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23  
24 <sup>12</sup> TILA's preemption clause states that “[e]xcept as provided in subsection (e) of this  
25 section, this part and parts B and C of this subchapter do not annul, alter, or affect the laws of any  
26 State relating to the disclosure of information in connection with credit transactions, except to the  
27 extent that those laws are inconsistent with the provisions of this subchapter and then only to the  
28 extent of the inconsistency.” 15 U.S.C. § 1610(a)(1) (emphasis added). Subsection (e) contains  
provisions inapplicable in the instant case.



1 2008), the court explained that while “plaintiff’s UCL claims are predicated upon TILA  
2 violations[,] she does not contend that the UCL required defendants to ‘make disclosures’ or use  
3 ‘term[s] or form[s]’ that would contradict TILA’s requirements.” *See also Black v. Financial*  
4 *Freedom Senior Funding Corp.*, 92 Cal.App.4th 917, 936, 112 Cal.Rptr.2d 445 (2001) (“[A]n  
5 inconsistency or contradiction with federal law does not exist merely because the state requires  
6 disclosures in addition to those required by and under TILA.” (emphasis in the original)).

## 7 **2. TILA-based state-law claims may supplement TILA’s framework**

8 Defendants’ argument regarding the “supplementation” of TILA’s framework rests on a  
9 misapplication of *Silvas* and conflates field and conflict preemption. Several district courts have  
10 recognized that enforcement of TILA through the UCL may well supplement TILA’s framework.  
11 *See, e.g., Plascencia II*, 583 F.Supp.2d at 1099 (“[T]he fact that the UCL allows a claim to be  
12 brought within four years or may provide remedies not available under TILA ... provides an  
13 additional level of protection for consumers.”); *In re First Alliance Mortgage Co.*, 280 B.R. 246,  
14 250-51 (C.D. Cal. 2002) (“Additional penalties ... provide greater protection to consumers. [The  
15 UCL] does not provide inconsistent disclosure requirements.”); *Quezada*, 2008 WL 5100241, at  
16 \*5 (concluding that TILA did not preempt the plaintiff’s disclosure-based UCL claims). *Nava*  
17 reasons that “plaintiff’s UCL claim based on violation of TILA is also preempted by federal law  
18 since its application would supplement TILA by changing TILA’s framework,” 2008 WL  
19 2873406, at \*7, citing *Silvas*, 514 F.3d at 1007 n. 3, but the prohibition on supplementing federal  
20 statutory schemes with state law applies only to areas in which Congress has occupied the field,  
21 *Silvas*, 514 F.3d at 1007 n. 3 (“When federal law preempts a field, it leaves ‘no room for the  
22 States to supplement it.’” (emphasis added and citation omitted)). Unlike the OTS regulations,  
23 TILA was not intended to occupy any field. *See, e.g., In re First Alliance Mortg. Co.*, 280 B.R. at  
24 250 (“TILA neither expressly nor impliedly occupies the whole field of regulation.”); *Heastie v.*  
25 *Community Bank of Greater Peoria*, 690 F.Supp. 716, 720 (N.D. Ill. 1988) (“Congress did not  
26 intend to fully occupy the field regulating such transactions.”); *Black*, 92 Cal.App.4th at 937, 112  
27 Cal.Rptr.2d 445 (“TILA preempts only ‘inconsistent’ state laws, thus implicitly negating  
28 occupation of the field.”). Indeed, outside of the shadow cast by HOLA, the Ninth Circuit has

1 held with respect to UCL claims predicated on TILA that the “vitality of [plaintiffs'] claim under  
2 the Truth In Lending Act gives vitality as well to their state claim.” *Jones v. E\*Trade Mortg.*  
3 *Corp.*, 397 F.3d 810, 813 (9th Cir. 2005).

4 If through their fraudulent omissions and UCL claims Plaintiffs ultimately seek to impose  
5 requirements that are inconsistent or contradictory to TILA, the claims indeed will be preempted  
6 by TILA. *See Rubio v. Capital One Bank*, 572 F.Supp.2d 1157, 1168 (C.D. Cal. 2008)  
7 (concluding that disclosures that comply with TILA may not serve as the basis for UCL claims).  
8 However, the claims as currently pled are predicated on facts that, if proved, could support a  
9 conclusion that Defendants' disclosures did not comply with TILA because they were misleading.

10 **IV. ORDER**

11 Good cause therefor appearing, the motion to dismiss is GRANTED, with leave to amend  
12 except as to the Tenorios' TILA rescission claim. Any amended complaint shall be filed within  
13 thirty (30) days of the date this order is filed.

14 **IT IS SO ORDERED.**

15 Dated: 7/27/2010

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18 JEREMY FOGEL  
19 United States District Judge  
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