



1 In her First Amended Complaint (“FAC”), Plaintiff alleges that the Truth-in-Lending  
2 Disclosure provided to her upon entering into the loan fails to disclose the index used to  
3 calculate the first 24 months of payments. (FAC ¶ 13.) Plaintiff further alleges that she was  
4 never provided a final closing statement, Credit Report Disclosure, or “Privacy Pledge”  
5 disclosure. (FAC ¶¶ 14-15.) In addition, Plaintiff “is informed and believes, that, Defendants  
6 [sic], HOME CAPITAL’S, employed notary signed and notarized Plaintiffs loan documents  
7 in her absence and without her prior authorization, and did so as part of a scheme to conceal  
8 from Plaintiff that the 30 year ‘fixed rate’ Mortgage she was induced into, was actually a 3  
9 year Adjustable Rate Mortgage, (ARM).” (FAC ¶ 22.)

10 Plaintiff alleges that none of Defendants has the right to initiate foreclosure under the  
11 security instrument. (FAC ¶ 18.) Plaintiff states that Defendants have not shown that they  
12 are in possession of the original note and, therefore, are proceeding with their non-judicial  
13 foreclosure without any right under law. (FAC ¶¶ 19, 30.) Plaintiff also claims that  
14 Defendants added costs and charges to the payoff amount of the note that were not justified  
15 under the terms of the note and/or state and federal law. (FAC ¶ 31.)

16 Plaintiff asserts the following causes of action: (1) violation of the Truth In Lending Act  
17 (“TILA”), 15 U.S.C. § 1601 et seq.; (2) unfair debt collection practices; (3) predatory lending  
18 practices; (4) fraud - violation of Cal. Bus. & Prof. Code § 17200; and (5) declaratory relief.  
19 The FAC also includes a section titled “Application for Temporary Restraining Order and  
20 OSC Re Preliminary Injunction.”

## 21 22 **II. STANDARD**

23 Under Fed. R. Civ. P. 8(a)(2), the plaintiff is required only to set forth a “short and plain  
24 statement” of the claim showing that plaintiff is entitled to relief and giving the defendant fair  
25 notice of what the claim is and the grounds upon which it rests. Conley v. Gibson, 355 U.S.  
26 41, 47 (1957). A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should  
27 be granted only where a plaintiff's complaint lacks a "cognizable legal theory" or sufficient  
28 facts to support a cognizable legal theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696,

1 699 (9th Cir. 1988). When reviewing a motion to dismiss, the allegations of material fact in  
2 plaintiff's complaint are taken as true and construed in the light most favorable to the plaintiff.  
3 See Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). Although  
4 detailed factual allegations are not required, factual allegations "must be enough to raise a  
5 right to relief above the speculative level." Bell Atlantic v. Twombly, 550 U.S. 544, 127 S.Ct.  
6 1955, 1965 (2007). "A plaintiff's obligation to prove the 'grounds' of his 'entitle[ment] to  
7 relief' requires more than labels and conclusions, and a formulaic recitation of the elements  
8 of a cause of action will not do." Id.

### 10 **III. DISCUSSION**

11 Countrywide moves to dismiss Plaintiff's FAC for failure to state a claim. As discussed  
12 below, the Court grants Countrywide's motion as to all of Plaintiff's claims with the exception  
13 of Plaintiff's claim for rescission under the Truth In Lending Act ("TILA").

#### 15 A. TILA claims

16 Although the title of Plaintiff's first cause of action is "TILA Rescission [sic]," Plaintiff  
17 actually seeks damages in addition to rescission. (FAC ¶ 38.)

18 Plaintiff has not stated a claim for damages under the TILA because Plaintiff has not  
19 pled detrimental reliance, an element of a TILA claim for actual damages. In re Smith, 289  
20 F.3d 1155, 1157 (9th Cir. 2002). Plaintiff has not alleged that she would have sought and  
21 obtained a better interest rate. See Villasenor v. American Signature, Inc., 2007 WL 2025739  
22 (N.D. Ill. July 9, 2007) (explaining that plaintiff was required to allege facts suggesting that  
23 he would have sought and obtained a lower price but for the allegedly inaccurate TILA  
24 disclosure). Therefore, Countrywide's motion to dismiss is granted as to Plaintiff's TILA claim  
25 for damages.

26 However, Plaintiff has sufficiently stated a claim for rescission under the TILA. The  
27 TILA requires that creditors make certain disclosures in connection with closed-end  
28 consumer credit transactions. 15 U.S.C. § 1638(a). Among other things, creditors must

1 disclose the annual percentage rate of interest and finance charge. 15 U.S.C. § 1638(a)(3).  
2 Regulation Z provides that a creditor subject to the TILA who extends credit with a varying  
3 annual percentage rate must disclose the circumstances under which the rate may increase.  
4 12 C.F.R. § 226.18(f).

5 Plaintiff alleges that the Truth-in-Lending Disclosure did not disclose the index used  
6 to calculate the first 24 months of payment. Countrywide does not dispute that a lender's  
7 failure to disclose the index used to calculate a variable interest rate could constitute a  
8 violation of the TILA. Instead, Countrywide argues that the Truth-in-Lending Disclosure did  
9 in fact disclose the index calculations. However, the Court cannot determine upon a motion  
10 to dismiss whether the Truth-in-Lending Disclosures submitted by Countrywide are the  
11 Disclosures that were given to Plaintiff.

12 Countrywide also contends that Plaintiff's TILA claim is barred by the applicable  
13 statute of limitations. 15 U.S.C. § 1640(e) provides: "Any action under this section may be  
14 brought in any United States district court, or in any other court of competent jurisdiction,  
15 within one year from the date of the occurrence of the violation." Countrywide argues that the  
16 date of the occurrence of the violation is no later than the date Plaintiff entered into the loan  
17 agreement (August 2005) and that more than two years passed before Plaintiff filed this suit.

18 However, under Ninth Circuit law, section 1640(e)'s one year limitations period may  
19 be equitably tolled in circumstances where the borrower was reasonably ignorant of the  
20 lender's fraud or nondisclosures. King v. State of California, 784 F.2d 910, 915 (9th Cir.  
21 1986). Thus, in Plascencia v. Lending 1st Mortgage, 2008 WL 4544357 (N.D. Cal. Sept. 30,  
22 2008), the district court held that the plaintiffs were potentially entitled to equitable tolling  
23 because their complaint alleged that they did not discover the TILA violations until they  
24 began receiving statements and realized that the amount of their principal was increasing  
25 over time.

26 Here, Plaintiff claims that sometime after the consummation of the loan, she  
27 discovered that based on the applicable index, she was overpaying interest by .099%. (FAC  
28 ¶ 13.) Because Plaintiff allegedly did not find out what the index was until sometime after

1 the loan was consummated, it is possible that the statute of limitations was tolled. Whether  
2 the facts of this case support equitable tolling is best left for a motion for summary judgment.

3 Finally, Countrywide argues that Plaintiff's claim for rescission fails because Plaintiff  
4 has not tendered the principal balance, less interest and costs. Countrywide cites Yamamoto  
5 v. Bank of New York, 329 F.3d 1167 (9th Cir. 2003), for the proposition that the concurrent  
6 tender of the principal balance, less interest and costs, is a prerequisite for rescission.  
7 Countrywide misconstrues Yamamoto. In Yamamoto, the Ninth Circuit explained that a trial  
8 judge has the *discretion* to condition rescission on tender by the borrower of amounts  
9 advanced by the lender, and that whether a decree of rescission should be conditional  
10 depends upon the equities of the particular case before the court. Tender by the borrower  
11 is not always a precondition to rescission and does not have to be pled to state a claim for  
12 rescission.

13 Accordingly, Plaintiff's motion to dismiss is granted as to Plaintiff's claim for damages  
14 under the TILA, but is denied as to Plaintiff's claim for rescission under the TILA.

15  
16 B. Unfair Debt Collection Practices

17 Plaintiff generally alleges that Defendants "violated provisions of the Federal Fair Debt  
18 Collections [sic] [Practices] Act, 15 U.S.C. Title 41, Subchapter V, §§ 1692 et seq., and the  
19 Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. §§ 2601-2617." (FAC ¶ 40.)

20 Plaintiff does not specify what specific provision(s) of the RESPA was violated, nor  
21 does Plaintiff state what each Defendant allegedly did in violation of the statute. In the "Fact"  
22 section of the FAC, Plaintiff alleges that no final closing statement, Credit Report Disclosure,  
23 or Credit Score Disclosure were provided to Plaintiff as required by the RESPA, 12 U.S.C.  
24 § 2603. Under 12 U.S.C. § 2603 and Regulation X, 24 C.F.R. § 3500 et seq., settlement  
25 agents are required to complete the HUD-1 Form settlement statement "in every settlement  
26 involving a federally related mortgage loan in which there is a borrower and a seller." 24  
27 C.F.R. § 3500.8(a). Regulation X also requires that lenders provide mortgage applicants  
28 with a "good faith estimate" of "each charge which . . . the borrower will normally pay or incur

1 at or before settlement based upon common practice in the locality of the mortgaged  
2 property.” 24 C.F.R. 3500.7(c)(2). It is unclear whether Plaintiff is alleging that Home Capital  
3 failed to provide the HUD-1 settlement statement and/or good faith estimate.<sup>2</sup> It is also  
4 unclear whether Plaintiff intends to allege violations of other provisions of the RESPA.

5 As with the RESPA claim, Plaintiff generally alleges the FDCPA was violated without  
6 specifying what provision of the FDCPA was violated and what each Defendant did to violate  
7 it. Moreover, Plaintiff has not alleged facts suggesting that Countrywide is a “debt collector”  
8 within the meaning of the statute. The definition of “debt collector” does not include an  
9 assignee of the debt as long as the debt was not in default at the time it was assigned. 15  
10 U.S.C. § 1692a(6)(F). See also Perry v. Stewart Title Co., 756 F.2d 1197, 1208 (5th Cir.  
11 1985). Plaintiff does not allege that the loan was in default at the time it was assigned to  
12 Countrywide.

13 Therefore, Countrywide’s motion to dismiss is granted with respect to Plaintiff’s claims  
14 under the RESPA and the FDCPA.

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16 C. Predatory Lending Practices

17 In her second cause of action, Plaintiff alleges:

18 Plaintiff is informed and believes, and upon such information and belief alleges  
19 that Defendants, HOME CAPITAL, and, COUNTRYWIDE, have engaged in  
20 deceptive practices with respect to Plaintiffs in violation of the Home  
21 Ownership and Equity Protection Act, (“HOEPA”), 15 U.S.C. § 1637, and the  
22 Federal Trade Commission Act (“FTC Act”) 15 U.S.C. §§ 41-58, the specifics  
of which are unknown, but are subject to discovery and with respect to which  
the specifics will be alleged by amendment to this Complaint when fully  
ascertained.

23 (FAC ¶ 43.)

24 Plaintiff essentially admits that she does not know of any facts supporting a claim  
25 under HOEPA or the FTC Act. Plaintiff’s vague allegations are insufficient to state a claim.  
26 Furthermore, there is no private right of action under the FTC Act. See Carlson v. Coca-Cola

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27 <sup>2</sup> The Court notes that it is questionable whether there is even a private right of action  
28 under 12 U.S.C. § 2603. See Morrison v. Brookstone Mortgage Co., Inc., 415 F. Supp. 2d  
801 (S.D. Ohio 2005) (holding that no private right of action exists under § 2603). However,  
the Court does not reach this issue at this time.

1 Co., 483 F.2d 279 (9th Cir. 1973); Alfred Dunhill Ltd. v. Interstate Cigar Co., Inc., 499 F.2d  
2 232, 237 (2d Cir. 1974).

3  
4 D. Fraud - Violation of Cal. Bus. & Prof. Code § 17200

5 Plaintiff alleges that Defendants Home Capital and Countrywide engaged in fraudulent  
6 business practices by misrepresenting to consumers that mortgages were “fixed rate”  
7 mortgages when they were actually variable rate loans. (FAC ¶ 46.)

8 Plaintiff has failed to allege fraud with specificity as required by Fed. R. Civ. P. 9(b).  
9 Under the heightened pleading standard of Rule 9(b), “[a]verments of fraud must be  
10 accompanied by the who, what, when, where, and how of the misconduct charged.” Vess  
11 v. Ciba-Geigy Corp., USA, 317 F.3d 1097, 1106 (9th Cir. 2003). Plaintiff does not allege who  
12 made the representations that her loan was a fixed rate loan or when those representations  
13 were made. Therefore, Plaintiff’s § 17200 claim is dismissed.

14  
15 E. Declaratory Relief

16 Plaintiff’s declaratory relief claim is premised on Plaintiff’s contention that Defendants  
17 do not have a legal right to foreclose on Plaintiff’s Trust Deed because they cannot produce  
18 the original note.

19 California Civil Code §§ 2924-2924k provide a “comprehensive framework for the  
20 regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed  
21 of trust.” Moeller v. Lien, 25 Cal. App. 4th 822, 830 (1994). Within this framework,  
22 nonjudicial foreclosure proceedings can be instituted by “the trustee, mortgagee, or  
23 beneficiary, or any of their authorized agents” by filing a notice of default with the office of the  
24 recorder. Cal. Civ. Code § 2924(a)(1). No less than three months after the filing of the  
25 notice of default, a notice of sale may be given by “the mortgagee, trustee, or other person  
26 authorized to take the sale.” Cal. Civ. Code § 2924(a)(3). There is no requirement that the  
27 original note be in possession of or produced by the party filing the notice of default or giving  
28 the notice of sale.

