



1 response to the allegedly erroneous statement, plaintiffs sought documents from EMC. The  
2 documents EMC provided to plaintiffs with the higher interest rates indicated are dated April 24,  
3 2007, and appear to contain plaintiffs' signatures but plaintiffs assert they are forgeries because  
4 they only signed one set of documents on March 13, 2007. In the complaint, plaintiffs allege,  
5 *inter alia*, on information and belief, that all of the defendants intentionally and knowingly  
6 forged plaintiffs signatures on the new documents in a conspiracy to defraud the plaintiffs.  
7 (Compl., ¶34.) Plaintiffs also allege on information and belief, "JPMorgan is the beneficiary  
8 and/or assignor [sic] of the Deed of Trust" and "EMC is servicer and/or beneficiary and/or  
9 assignee of Deed of Trust . . . ." (Compl., ¶¶ 2, 3.)

10 Plaintiffs filed the present complaint on December 23, 2009, against defendants<sup>2</sup> alleging  
11 the following causes of action: violation of the Truth in Lending Act, breach of written contract,  
12 breach of the implied covenant of good faith and fair dealing, negligence, fraud, conspiracy to  
13 defraud, forgery, unjust enrichment, and negligent misrepresentation. The complaint also seeks  
14 declaratory judgment and rescission/cancellation of the current mortgage loan.

## 15 **B. Legal Standard**

16 A plaintiff must "plead a short and plain statement of the claim showing that the pleader  
17 is entitled to relief." FED. R. CIV. P. 8(a)(2). This statement must be sufficient to "give the  
18 defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley*  
19 *v. Gibson*, 355 U.S. 41, 47 (1957). Rule 12(b)(6) provides that a complaint may be dismissed for  
20 "failure to state a claim upon which relief may be granted." FED. R. CIV. P. 12(b)(6). A  
21 complaint may be dismissed as a matter of law if it lacks a cognizable legal theory or states  
22 insufficient facts under a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749  
23 F.2d 530, 534 (9th Cir.1984).

24 The factual allegations of a complaint must be "enough to raise a right to relief above the  
25 speculative level." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007). A plaintiff  
26 must plead more than conclusory allegations to show "plausible liability" and avoid dismissal.  
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28 <sup>2</sup> Defendant Equipoint has been dismissed with prejudice from this action.

1 *Id.* at 1966 n. 5. The pleading standard of Rule 8 “demands more than an unadorned,  
2 the-defendant-unlawfully-harmed-me accusation” and a complaint does not suffice “if it tenders  
3 ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Ashcroft v. Iqbal*, 129 S. Ct. 1937,  
4 1949 (2009) (quoting *Twombly*, 127 S. Ct. at 1966).

5 In determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond  
6 the complaint for additional facts, *e.g.*, facts presented in plaintiff’s memorandum in opposition  
7 to a defendant’s motion to dismiss or other submissions. *United States v. Ritchie*, 342 F.3d 903,  
8 908 (9th Cir. 2003); *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998); *see also* 2  
9 MOORE’S FEDERAL PRACTICE, § 12.34[2] (Matthew Bender 3d ed.) (“The court may not . . . take  
10 into account additional facts asserted in a memorandum opposing the motion to dismiss, because  
11 such memoranda do not constitute pleadings under Rule 7(a).”).

12 A court may, however, consider items of which it can take judicial notice without  
13 converting the motion to dismiss into one for summary judgment. *Barron v. Reich*, 13 F.3d  
14 1370, 1377 (9th Cir. 1994). Judicial notice may be taken of facts “not subject to reasonable  
15 dispute” because they are either “(1) generally known within the territorial jurisdiction of the  
16 trial court or (2) capable of accurate and ready determination by resort to sources whose  
17 accuracy cannot reasonably be questioned.” FED. R. EVID. 201. Additionally, a court may take  
18 judicial notice of “‘matters of public record’ without converting a motion to dismiss into a  
19 motion for summary judgment.” *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001)  
20 (quoting *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986)). Under the  
21 incorporation by reference doctrine, courts may also consider documents “whose contents are  
22 alleged in a complaint and whose authenticity no party questions, but which are not physically  
23 attached to the [plaintiff’s] pleading.” *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 986  
24 (9th Cir.1999) (quoting *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) (alteration in  
25 original)); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

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1 **C. Discussion**

2 **1. TILA**

3 **a. Liability Under TILA**

4 Liability under TILA applies to creditors and their assignees. See 15 U.S.C. §§ 1640,  
5 1641. Loan servicers cannot be held liable under TILA unless they owned the loan obligation at  
6 some point. 15 U.S.C. § 1641(f)(1) (“A servicer of a consumer obligation arising from a  
7 consumer credit transaction shall not be treated as an assignee of such obligation for purposes of  
8 this section unless the servicer is or was the owner of the obligation.”); *see also Mulato v. WMC*  
9 *Mortg. Corp.*, 2009 WL 3561536 \*6 (N.D. Cal., Oct. 27, 2009) (“As a loan servicer that has not  
10 been alleged to own Plaintiff’s mortgage notes, Chase cannot be held liable for TILA  
11 violations.”).

12 As noted above, plaintiffs allege that JP Morgan and EMC are the beneficiary or assignee  
13 of the Deed of Trust, with EMC also acting as the loan servicer. Both defendants assert that  
14 neither has ever had any interest in the loan or Deed of Trust as demonstrated by the recorded  
15 instruments. (Reply at 2.) The Court cannot consider defendants’ own representations at the  
16 motion to dismiss stage.

17 In their complaint, plaintiffs point to Exhibit G as forming the basis for their assertion that  
18 Bear Stearns and ultimately JP Morgan owned the note. Exhibit G is the first statement plaintiffs  
19 received from EMC dated May 7, 2007. Because Exhibit G is attached to the complaint, the  
20 Court may consider it as incorporated into the complaint. The May 7, 2007 Statement includes a  
21 small, set off section entitled “Important Messages” and states “Why wait? **Start saving today**  
22 with a Bear Stearns Residential Mortgage Refinance. Call us at **1-866-658-BEAR** today!” (Exh.  
23 G to the 1. (emphasis in original)) This statement cannot be read as anything other than an  
24 advertisement or solicitation for business. It does not suggest or imply that plaintiffs’ loan with  
25 Equipoint had been transferred, sold or assigned to Bear Stearns. To suggest otherwise is  
26 implausible. Plaintiffs cannot reasonably argue that at the time of filing the complaint JP Morgan  
27 and EMC were the owners of the obligation based upon Exhibit G.

28 Although the Court accepts all allegations of material fact in the complaint as true and

1 construes them in the light most favorable to the non-moving party, the Court is “not required to  
2 accept as true conclusory allegations which are contradicted by documents referred to in the  
3 complaint,” and does “not ... necessarily assume the truth of legal conclusions merely because  
4 they are cast in the form of factual allegations.” *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d  
5 1136, 1139 (9th Cir. 2003) (citations and quotation marks omitted). Further, Rule 11(b) requires  
6 that reasonable inquiry be made prior to the filing of a complaint, and only those factual  
7 allegations that have evidentiary support or are likely to have evidentiary support should be  
8 included. Here, plaintiffs would have known that the EMC May 7, 2007 Statement was not a  
9 notice of assignment or sale of their loan to Bear Stearns.

10 In their opposition to defendants’ motion, plaintiffs contend they need to perform  
11 discovery to determine whether EMC and JP Morgan were the assignees or purchasers of the  
12 loan. (Opp. at 3.) But an attorney certifies when presenting a pleading that a reasonable inquiry  
13 has already occurred with respect to factual contentions such as who the holder of the note is.  
14 Exhibit G does not provide a reasonable basis for the challenged position that Bear Stearn and  
15 subsequently JP Morgan is the owner of the obligation. Accordingly, defendants’ motion to  
16 dismiss the TILA cause of action against JP Morgan and EMC based on the alleged assignment  
17 of the loan is granted. The claim is dismissed without prejudice because it is not absolutely clear  
18 from the pleadings that given the opportunity they cannot show EMC and JP Morgan were  
19 assignees of the note from Equipoint, the originating lender. *See In re Daou Systems, Inc.*, 411  
20 F.3d 1006, 1013 (9th Cir.2005) (explaining that dismissal for failure to state a claim is generally  
21 without prejudice, unless it is clear the complaint could not be saved by amendment). Plaintiffs  
22 must however meet the requirements of Rule 11 if they intend to go forward with this action  
23 against these defendants.

24 **b. Statute of Limitation for Damages Under TILA**

25 Even if plaintiffs have properly brought a TILA claim against defendants, a plaintiff’s  
26 cause of action for damages under TILA is subject to a one-year statute of limitations, 15 U.S.C.  
27 § 1640(e), which runs from the time the loan transaction is consummated. *King v. State of*  
28 *California*, 784 F.2d 910, 915 (1986). Plaintiffs allege they closed on the loan on March 13,

1 2007. By bringing this action on December 23, 2009, plaintiffs TILA damages claim is time  
2 barred.

3 Even if plaintiffs' claim did not arise until May 7, 2007, the date they received the first  
4 statement for the loan from EMC that plaintiffs contend erroneously stated the interest rate on  
5 the loan, the principle balance and the minimum payment on the loan, the one-year limitation  
6 period has long expired.

7 But the Ninth Circuit has held equitable tolling of civil damages claims brought under  
8 TILA may be appropriate "in certain circumstances" such as when a borrower might not have  
9 had a reasonable opportunity to discover the nondisclosures within the one-year period. *King v.*  
10 *State of California*, 784 F.2d 910, 915 (9th Cir. 1986); *Nava v. VirtualBank*, 2008 WL 2873406  
11 at \*3 (E.D. Cal. 2008). Courts have discretion to "adjust the limitations period accordingly." *Id.*  
12 Depending on the facts of the transaction, certain disclosures might not have been discovered  
13 within the one-year time period.

14 Although damage claims may be susceptible to equitable tolling, plaintiffs do not plead  
15 facts supporting application of tolling. Plaintiffs' allegations do not explain how they were  
16 prevented from discovering, in the exercise of reasonable diligence, the information necessary to  
17 bring their damages claims within the one-year limitations period. *See, e.g., Meyer v. Ameriquest*  
18 *Mortgage Co.*, 342 F.3d 899, 902 (9th Cir.2003); *Lingad v. Indymac Fed. Bank*, 682 F.Supp.2d  
19 1142, 1147 (E.D. Cal.2010) (rejecting equitable tolling at pleading stage when "plaintiff fails to  
20 allege any facts demonstrating that the TILA violations alleged could not have been discovered  
21 by due diligence") (citing *Meyer* ). Indeed, plaintiffs' assertion that they knew on May 7, 2007  
22 that the interest rate was incorrect works against the application of equitable tolling. Thus,  
23 plaintiffs' claim for damages under TILA will be dismissed.

24 **c. Tender for Rescission Claim under TILA**

25 Assuming the timely filing of the complaint provides notice to the creditors and/or  
26 assignees of the intent to rescind the transaction, the Court has discretion to require plaintiffs to  
27 plead their ability to tender in order to maintain a rescission claim under TILA. *See Yamamoto v.*  
28 *Bank of New York*, 328 F.3d 1167, 1173 (9th Cir. 2003). Requiring a plaintiff to "allege either

1 the present ability to tender the loan proceeds or the expectation that they will be able to tender  
2 within a reasonable time” is appropriate because “[i]t makes little sense to let the instant  
3 rescission claim proceed absent some indication that the claim will not simply be dismissed at  
4 the summary judgment stage after needless depletion of the parties' and the Court's resources.”  
5 *Romero v. Countrywide Bank, N.A.*, 2010 WL 2985539 (N.D. Cal. July 27, 2010); *see also*  
6 *Garza v. American Home Mortgage*, 2009 WL 188604 at \*5 (E.D. Cal. January 27, 2009).

7 Here plaintiffs have failed to allege *any* facts relating to their ability to tender the loan  
8 proceeds, or that they in fact ever tendered the loan proceeds. The TILA rescission claim will be  
9 dismissed without prejudice on this basis.

## 10 **2. Breach of Contract and Breach of the Implied Covenant of Good Faith and** 11 **Fair Dealing**

12 As discussed above, plaintiffs have not alleged any contractual relationship between  
13 themselves and EMC and/or JP Morgan which is a necessary prerequisite to a breach of contract  
14 or breach of the implied covenant of good faith and fair dealing claim. Accordingly, these causes  
15 of action will be dismissed without prejudice.

## 16 **3. Negligence**

17 Under California Code of Civil Procedure 335.1, an action for negligence must be  
18 brought within two years. Because this action was brought more than two years after the cause  
19 of action accrued, it must be dismissed.

20 Further, neither EMC nor JP Morgan owe a duty of care to plaintiffs because neither was  
21 involved with the origination of plaintiffs' loan. But even if defendants were lenders by  
22 assignment of the note, a financial institution does not owe a duty of care to a borrower “when  
23 the institution’s involvement in the loan transaction does not exceed the scope of its  
24 conventional role as a mere lender of money.” *Nymark v. Heart Federal Savings and Loan*  
25 *Assn.*, 231Cal. App.3d 1089, 1096 (1991). Plaintiffs have provided no facts to suggest anything  
26 other than the existence of a conventional lender relationship.

## 27 **4. Fraud and Negligent Misrepresentation**

28 Defendants contend that the plaintiffs' fraud and negligent misrepresentation claims fail

1 to meet pleading standard of Rule 9(b) of the Federal Rules of Civil Procedure. The Court  
2 concurs.

3 Rule 9(b) requires that “circumstances constituting fraud or mistake . . . be stated with  
4 particularity.” FED. R. CIV. P. 9(b). A plaintiff asserting fraud must allege facts supporting the  
5 following elements: (1) a misrepresentation, (2) knowledge of falsity (or scienter), (3) intent to  
6 defraud, *i.e.*, to induce reliance, (4) justifiable reliance, and (5) resulting damage. *In re Estate of*  
7 *Young*, 160 Cal. App.4th 62, 79 (2008) (quoting *Lazar v. Superior Court*, 12 Cal.4th 631, 638  
8 (1996)). In order to satisfy Rule 9(b)'s particularity requirement, a plaintiff must state “the time,  
9 place and specific content of the false representations as well as the identities of the parties to the  
10 misrepresentation.” *Alan Neuman Prods., Inc. v. Albright*, 862 F.2d 1388, 1393 (9th Cir. 1988).  
11 When a plaintiff alleges fraud against multiple defendants, he or she “must provide each and  
12 every defendant with enough information to enable them ‘to know what misrepresentations are  
13 attributable to them and what fraudulent conduct they are charged with.’” *Pegasus Holdings v.*  
14 *Veterinary Centers of America, Inc.*, 38 F. Supp.2d 1158, 1163 (C.D. Cal.1998) (quoting *In re*  
15 *Worlds of Wonder Sec. Litig.*, 694 F. Supp. 1427, 1433 (N.D. Cal. 1998)). “Rule 9(b) does not  
16 allow a complaint to merely lump multiple defendants together but require[s] plaintiffs to  
17 differentiate their allegations when suing more than one defendant ... and inform each defendant  
18 separately of the allegations surrounding his alleged participation in the fraud.” *Swartz v. KPMG*  
19 *LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007) (internal quotations omitted).

20 Plaintiffs' complaint falls far short of providing the allegations necessary for stating a  
21 fraud claim. Neither defendant is alleged to have provided a misstatement or omitted information  
22 during the origination of the loan or at any time thereafter. Further, plaintiffs fail to allege any  
23 facts demonstrating the requisite state of mind for fraud. The fraud and negligent  
24 misrepresentation claims will be dismissed without prejudice.

## 25 **5. Conspiracy to Defraud**

26 Plaintiffs state that defendants “entered into a conspiracy and agreement to defraud  
27 Plaintiffs” and “rel[ied] on Defendants [sic] misrepresentations . . . . (Compl., ¶¶ 75, 76 .) Other  
28 than this assertion, plaintiffs have failed to provide any facts that would show plausible liability



1 with respect to the formation and operation of a conspiracy. Accordingly, this claim must also be  
2 dismissed without prejudice.

3 **6. Forgery Under California Code of Civil Procedure § 749(a)**

4 Plaintiffs allege that all the defendants forged the Deed of Trust as part of a conspiracy to  
5 defraud the plaintiffs. This “naked assertion” fails to meet the pleading standard of Rule 8 and  
6 consequently, Rule 12(b)(6). *Iqbal*, 129 S. Ct. at 1949.

7 **7. Unjust Enrichment**

8 Like plaintiffs’ other claims, plaintiffs’ allegations concerning unjust enrichment fail to  
9 provide facts showing that plaintiffs are entitled to relief. The conclusory allegations plaintiffs’  
10 provide do not show “plausible liability” with respect to this claim and it will be dismissed  
11 without prejudice. *Twombly*, 127 S. Ct. at 1965.

12 **8. Declaratory Judgment**

13 Plaintiffs seek declaratory relief pursuant to 28 U.S.C. § 2201. Under 28 U.S.C. § 2201,  
14 “any court of the United States, upon the filing of an appropriate pleading, may declare the rights  
15 and other legal relations of any interested party seeking such declaration, whether or not further  
16 relief is or could be sought.” Declaratory relief, however, may be unnecessary where an  
17 adequate remedy exists under some other cause of action. *See Mangindin v. Wash. Mut. Bank*,  
18 637 F.Supp.2d 700, 707 (N.D. Cal.2009). A claim for declaratory relief “rises or falls with [the]  
19 other claims.” *See Surf & Sand, LLC v. City of Capitola*, 2008 WL 2225684, at \*2 n. 5 (N.D.  
20 Cal. May 28, 2008). Plaintiffs' request for declaratory relief is redundant in the face of the other  
21 causes of action, and it does not appear to be useful in clarifying the legal relations between the  
22 parties. Because plaintiffs have not alleged any causes of action that would support declaratory  
23 relief, the Court will dismiss this claim.

24 **9. Rescission/Cancellation Under California Civil Code § 1689**

25 Under California law, “[i]n obtaining rescission or cancellation, the rule is that the  
26 complainant is required to do equity, as a condition to his obtaining relief, by restoring to the  
27 defendant everything of value which the plaintiff has received in the transaction.” *Fleming v.*  
28 *Kagan*, 11 Cal.Rptr. 737, 740 (Ct. App.1961); *see also Karlsen v. Am. Sav. & Loan Assn.*, 92

1 Cal.Rptr. 851, 854 (Ct. App. 1971) ("A valid and viable tender of payment of the indebtedness  
2 owing is essential to an action to cancel a voidable sale under a deed of trust.") "The rule applies  
3 although the plaintiff was induced to enter into the contract by the fraudulent representations of  
4 the defendant." *Fleming*, 11 Cal. Rptr. at 740.

5 As noted above, plaintiffs have not alleged their ability to tender payment of the loan or  
6 that they have tendered the loan proceeds. Accordingly, this cause of action will be dismissed  
7 without prejudice.

#### 8 **D. Leave to Amend the Complaint**

9 Plaintiffs' complaint will be dismissed in its entirety; however, they will be granted leave  
10 to file an amended complaint as to all claims. Counsel is reminded, however, that "Rule 11  
11 authorizes a court to impose a sanction on any attorney, law firm, or party that brings a claim for  
12 an improper purpose or without support in law or evidence." *Sneller v. City of Bainbridge*  
13 *Island*, 606 F.3d 636, 638-39 (9th Cir. 2010). Under Rule 11, "the attorney has a duty prior to  
14 filing a complaint not only to conduct a reasonable factual investigation, but also to perform  
15 adequate legal research that confirms whether the theoretical underpinnings of the complaint are  
16 warranted by existing law or a good faith argument for an extension, modification or reversal of  
17 existing law. One of the fundamental purposes of Rule 11 is to reduce frivolous claims, defenses  
18 or motions and to deter costly meritless maneuvers, thereby avoiding delay and unnecessary  
19 expense in litigation." *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir.2002) (quotation  
20 and citations omitted).

#### 21 **E. Conclusion**

22 Based on the foregoing, **IT IS ORDERED:**

23 1. Defendants JP Morgan and EMC's motion to dismiss is **GRANTED without**  
24 **prejudice**; and

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1           2.       Plaintiffs are **GRANTED** leave to file a First Amended Complaint. If plaintiffs  
2 intend to file a FAC, they shall do so no later than **February 28, 2011**.

3           **IT IS SO ORDERED.**

4 DATED: February 14, 2011

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6   
M. James Lorenz  
United States District Court Judge

7 COPY TO:

8 HON. WILLIAM McCURINE, JR.  
9 UNITED STATES MAGISTRATE JUDGE

10 ALL PARTIES/COUNSEL

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