



1 on July 13, 2006.<sup>1</sup> The DOT names Jeffrey M. Henschel as trustee and Mortgage Electronic Systems,  
2 Inc. (“MERS”) as nominee beneficiary for First NLC.

3 After plaintiffs fell nearly \$20,000 in arrears on promissory note payments, a Notice of Default  
4 and Election to Sell Under Deed of Trust was recorded on July 2, 2008. Pursuant to a Substitution of  
5 Trustee recorded on November 21, 2008, defendant Old Republic Default Management Services (“Old  
6 Republic”) substituted as the DOT trustee. On November 21, 2008, Old Republic recorded a Notice of  
7 Trustee’s sale to schedule a December 10, 2008 sale of the property.

### 8 **Plaintiffs’ Claims**

9 Plaintiffs filed this action on February 10, 2009 and complain generally that loan disclosure  
10 documents failed to disclose “the true nature and cost” of their loan and failed to satisfy requirements  
11 under the Truth in Lending Act (“TILA”), 15 U.S.C. §§ 1601, et seq., and its implementing regulations,  
12 12 C.F.R. §§ 226, et seq. (“Reg. Z”). Plaintiffs’ operative complaint alleges:

- 13 1. A (first) TILA rescission cause of action that plaintiffs are entitled to rescind their loan  
14 for “failure to provide proper *material* disclosures” under TILA and Reg. Z (italics in  
15 original);
- 16 2. A (second) apparent TILA violation cause of action for damages arising from failure to  
17 make required TILA and Reg. Z disclosures; and
- 18 3. A (third) California Business and Professions Code, §§ 17200, et seq.,<sup>2</sup> cause of action  
19 that TILA and Reg. Z violations constitute unfair competition and unfair and fraudulent  
20 business practices under UCL.

21 The complaint seeks to rescind plaintiffs’ loan, a return of plaintiffs’ money or property, statutory  
22 damages, an injunction of foreclosure, and attorney fees.

### 23 **DISCUSSION**

#### 24 **F.R.Civ.P. 12(b)(6) Motion Standards**

25 Defendants seek F.R.Civ.P. 12(b)(6) dismissal of plaintiffs’ claims on grounds that they are

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26 <sup>1</sup> All documents pertaining to plaintiffs’ loan and default were recorded with the Merced County Recorder.

27 <sup>2</sup> California Business and Professions Code, §§ 17200, et seq., will be referred to as “UCL” [“Unfair  
28 Competition Law”].

1 “wholly unsupported by fact, defective as a matter of law,” and time barred.

2 A F.R.Civ.P. 12(b)(6) motion to dismiss is a challenge to the sufficiency of the pleadings set  
3 forth in the complaint. “When a federal court reviews the sufficiency of a complaint, before the reception  
4 of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not  
5 whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to  
6 support the claims.” *Scheurer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683 (1974); *Gilligan v. Jamco*  
7 *Development Corp.*, 108 F.3d 246, 249 (9<sup>th</sup> Cir. 1997). A F.R.Civ.P. 12(b)(6) dismissal is proper where  
8 there is either a “lack of a cognizable legal theory” or “the absence of sufficient facts alleged under a  
9 cognizable legal theory.” *Balisteri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9<sup>th</sup> Cir. 1990); *Graehling*  
10 *v. Village of Lombard, Ill.*, 58 F.3d 295, 297 (7<sup>th</sup> Cir. 1995).

11 In resolving a F.R.Civ.P. 12(b)(6) motion, the court must: (1) construe the complaint in the light  
12 most favorable to the plaintiff; (2) accept all well-pleaded factual allegations as true; and (3) determine  
13 whether plaintiff can prove any set of facts to support a claim that would merit relief. *Cahill v. Liberty*  
14 *Mut. Ins. Co.*, 80 F.3d 336, 337-338 (9<sup>th</sup> Cir. 1996). Nonetheless, a court is “free to ignore legal  
15 conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in  
16 the form of factual allegations.” *Farm Credit Services v. American State Bank*, 339 F.3d 765, 767 (8<sup>th</sup>  
17 Cir. 2003) (citation omitted). A court need not permit an attempt to amend a complaint if “it determines  
18 that the pleading could not possibly be cured by allegation of other facts.” *Cook, Perkiss and Liehe, Inc.*  
19 *v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9<sup>th</sup> Cir. 1990). “While a complaint attacked by a  
20 Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to  
21 provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a  
22 formulaic recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550  
23 U.S. 544, 127 S. Ct. 1955, 1964-65 (2007) (internal citations omitted). Moreover, a court “will dismiss  
24 any claim that, even when construed in the light most favorable to plaintiff, fails to plead sufficiently  
25 all required elements of a cause of action.” *Student Loan Marketing Ass'n v. Hanes*, 181 F.R.D. 629,  
26 634 (S.D. Cal. 1998).

27 Moreover, a limitations defense may be raised by a F.R.Civ.P. 12(b)(6) motion to dismiss.  
28 *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9<sup>th</sup> Cir. 1980); see *Avco Corp. v. Precision Air Parts*,

1 *Inc.*, 676 F.2d 494, 495 (11<sup>th</sup> Cir. 1982), *cert. denied*, 459 U.S. 1037, 103 S.Ct. 450 (1982). A  
2 F.R.Civ.P. 12(b)(6) motion to dismiss may raise the limitations defense when the statute’s running is  
3 apparent on the complaint’s face. *Jablon*, 614 F.2d at 682. If the limitations defense does not appear  
4 on the complaint’s face and the trial court accepts matters outside the pleadings’ scope, the defense may  
5 be raised by a motion to dismiss accompanied by affidavits. *Jablon*, 614 F.2d at 682; *Rauch v. Day and*  
6 *Night Mfg. Corp.*, 576 F.2d 697 (6<sup>th</sup> Cir. 1978).

7 For a F.R.Civ.P. 12(b)(6) motion, a court generally cannot consider material outside the  
8 complaint. *Van Winkle v. Allstate Ins. Co.*, 290 F.Supp.2d 1158, 1162, n. 2 (C.D. Cal. 2003).  
9 Nonetheless, a court may consider exhibits submitted with the complaint. *Van Winkle*, 290 F.Supp.2d  
10 at 1162, n. 2. In addition, a “court may consider evidence on which the complaint ‘necessarily relies’  
11 if: (1) the complaint refers to the document; (2) the document is central to the plaintiff’s claim; and (3)  
12 no party questions the authenticity of the copy attached to the 12(b)(6) motion.” *Marder v. Lopez*, 450  
13 F.3d 445, 448 (9<sup>th</sup> Cir. 2006). A court may treat such a document as “part of the complaint, and thus  
14 may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6).” *United*  
15 *States v. Ritchie*, 342 F.3d 903, 908 (9<sup>th</sup> Cir.2003). Such consideration prevents “plaintiffs from  
16 surviving a Rule 12(b)(6) motion by deliberately omitting reference to documents upon which their  
17 claims are based.” *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9<sup>th</sup> Cir. 1998). A “court may disregard  
18 allegations in the complaint if contradicted by facts established by exhibits attached to the complaint.”  
19 *Sumner Peck Ranch v. Bureau of Reclamation*, 823 F.Supp. 715, 720 (E.D. Cal. 1993) (citing *Durning*  
20 *v. First Boston Corp.*, 815 F.2d 1265, 1267 (9<sup>th</sup> Cir.1987)). Moreover, “judicial notice may be taken  
21 of a fact to show that a complaint does not state a cause of action.” *Sears, Roebuck & Co. v.*  
22 *Metropolitan Engravers, Ltd.*, 245 F.2d 67, 70 (9<sup>th</sup> Cir. 1956); *see Estate of Blue v. County of Los*  
23 *Angeles*, 120 F.3d 982, 984 (9<sup>th</sup> Cir. 1997). As such, this Court may consider plaintiffs’ pertinent loan  
24 and foreclosure documents.

### 25 TILA Rescission

#### 26 *Plaintiffs’ Rescission Notice And Failure To Offer To Tender*

27 The complaint notes that plaintiffs give “effective notice to rescind” their loan and surrender the  
28 property “or its equivalent in value determined by application of all proceeds since origination.”

1 TILA's "buyer's remorse" provision allows borrowers three business days to rescind, without penalty, a  
2 consumer loan that uses their principal dwelling as security. *Semar v. Platte Valley Federal Sav. & Loan*  
3 *Ass'n*, 791 F.2d 699, 701 (9<sup>th</sup> Cir. 1986); 15 U.S.C. § 1635(a). TILA rescission may be extended up to  
4 three years if a lender fails to comply with TILA disclosure requirements. *Semar*, 791 F.2d at 701-702;  
5 15 U.S.C. § 1635.

6 \_\_\_\_\_ Saxon attacks plaintiffs' TILA rescission claim for "lack of a valid tender" in absence of  
7 indication that the complaint's allegation to surrender the property is unconditional, made in good faith  
8 to benefit the creditor and based on plaintiffs' ability and willingness to perform. Saxon notes that the  
9 property likely "is worth less than the debt owed." The "voiding of a security interest may be judicially  
10 conditioned on debtor's tender of amount due under the loan." *American Mortgage Network, Inc. v.*  
11 *Shelton*, 486 F.3d 815, 821 (4<sup>th</sup> Cir. 2007).

12 15 U.S.C. § 1635(b) governs the return of money or property when a borrower exercises the right  
13 to rescind:

14 . . . Within 20 days after receipt of a notice of rescission, the creditor shall return to the  
15 obligor any money or property given as earnest money, downpayment, or otherwise, and  
16 shall take any action necessary or appropriate to reflect the termination of any security  
17 interest created under the transaction. If the creditor has delivered any property to the  
18 obligor, the obligor may retain possession of it. Upon the performance of the creditor's  
19 obligations under this section, the obligor shall tender the property to the creditor, except  
20 that if return of the property in kind would be impracticable or inequitable, the obligor  
shall tender its reasonable value. Tender shall be made at the location of the property or  
at the residence of the obligor, at the option of the obligor. If the creditor does not take  
possession of the property within 20 days after tender by the obligor, ownership of the  
property vests in the obligor without obligation on his part to pay for it. The procedures  
prescribed by this subsection shall apply except when otherwise ordered by a court.

21 12 C.F.R. § 226.23(d) address rescission effects and provides:

22 (2) Within 20 calendar days after receipt of a notice of rescission, the creditor  
23 shall return any money or property that has been given to anyone in connection with the  
24 transaction and shall take any action necessary to reflect the termination of the security  
interest.

25 (3) If the creditor has delivered any money or property, the consumer may retain  
26 possession until the creditor has met its obligation under paragraph (d)(2) of this section.  
27 When the creditor has complied with that paragraph, **the consumer shall tender the**  
28 **money or property to the creditor** or, where the latter would be impracticable or  
inequitable, tender its reasonable value. At the consumer's option, tender of property may  
be made at the location of the property or at the consumer's residence. Tender of money  
must be made at the creditor's designated place of business. If the creditor does not take

1 possession of the money or property within 20 calendar days after the consumer's tender,  
2 the consumer may keep it without further obligation. (Bold added.)

3 Although 15 U.S.C. § 1635(b) “provides for immediate voiding of the security interest and return  
4 of the money within twenty days of the notice of rescission, we believe this assumes that the notice of  
5 rescission was proper in the first place.” *In re Groat*, 369 B.R. 413, 419 (Bankr. 8<sup>th</sup> Cir. 2007). The  
6 Ninth Circuit Court of Appeals has explained that prior to ordering rescission based on a lender’s alleged  
7 TILA violations, a court may require borrowers to prove ability to repay loan proceeds:

8 As rescission under § 1635(b) is an on-going process consisting of a number of  
9 steps, there is no reason why a court that may alter the sequence of procedures after  
10 deciding that rescission is warranted, may not do so before deciding that rescission is  
11 warranted when it finds that, assuming grounds for rescission exist, rescission still could  
12 not be enforced because the borrower cannot comply with the borrower's rescission  
13 obligations no matter what. Such a decision lies within the court's equitable discretion,  
taking into consideration all the circumstances including the nature of the violations and  
the borrower's ability to repay the proceeds. If, as was the case here, it is clear from the  
evidence that the borrower lacks capacity to pay back what she has received (less interest,  
finance charges, etc.), the court does not lack discretion to do before trial what it could  
do after.

14 *Yamamoto v. Bank of New York*, 329 F.3d 1167, 1173 (9<sup>th</sup> Cir. 2003) (affirming summary judgment for  
15 lender in absence of evidence that borrowers could refinance or sell property); *see American Mortgage*,  
16 486 F.3d at 821 (“Once the trial judge in this case determined that the [plaintiffs] were unable to tender  
17 the loan proceeds, the remedy of unconditional rescission was inappropriate.”); *LaGrone v. Johnson*,  
18 534 F.2d 1360, 1362 (9<sup>th</sup> Cir. 1974) (under the facts, loan rescission should be conditioned on the  
19 borrower’s tender of advanced funds given the lender’s non-egregious TILA violations and equities  
20 heavily favoring the lender).<sup>3</sup>

21 The complaint merely alleges that “[a]ll conditions precedent have been performed or have  
22 occurred.” The complaint’s prayer seeks this Court’s order that plaintiffs have no duty to tender if

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23 <sup>3</sup> The Fourth Circuit Court of Appeals agrees with the Ninth Circuit that 15 U.S.C. § 1635(b) does not  
24 compel a creditor to remove a mortgage lien in the absence of the debtor’s tender of loan proceeds:

25 Congress did not intend to require a lender to relinquish its security interest when it is now known that the  
26 borrowers did not intend and were not prepared to tender restitution of the funds expended by the lender  
in discharging the prior obligations of the borrowers.

27 *Powers v. Sims & Levin*, 542 F.2d 1216, 1221 (4<sup>th</sup> Cir. 1976).

1 defendants “fail to further respond lawfully” to plaintiffs’ “valid rescission notice.” The prayer seeks  
2 an alternative order “for Defendants to accept tender on reasonable terms and over a reasonable period  
3 of time.”

4 Plaintiffs fail to establish that their complaint is a timely, valid rescission notice. The complaint  
5 acknowledges plaintiffs’ inability to tender the loan proceeds to entitle plaintiffs to rescission. “Clearly  
6 it was not the intent of Congress to reduce the mortgage company to an unsecured creditor or to simply  
7 permit the debtor to indefinitely extend the loan without interest.” *American Mortgage*, 486 F.3d at 820-  
8 821. Saxon correctly notes that without plaintiffs’ tender, “rescission under TILA is an empty remedy,  
9 not capable of being granted.” The absence of a sufficiently alleged notice of rescission and tender of  
10 loan proceeds dooms plaintiffs’ TILA rescission claim to warrant its dismissal.

### 11 ***Conclusory Allegations***

12 Saxon further challenges plaintiffs’ TILA rescission claim as conclusory. Saxon points to the  
13 complaint’s conclusory, speculative allegations that:

- 14 1. Loan disclosure documents did not satisfy TILA because they failed to disclose to  
15 plaintiffs “in a form and manner required by applicable statute and regulation, the true  
16 nature and cost of this transaction”;
- 17 2. The Good Faith Estimate regarding settlement service fees and charges for the  
18 promissory note differed from the “actual settlement service fees and charges” incurred;  
19 and
- 20 3. The HUD-1 Settlement Statement “identifies additional charges deducted from the  
21 ‘Amount Financed’ that are actually ‘Finance Charges.’”

22 Saxon correctly notes deficiencies of these and similar allegations which attempt to support TILA  
23 violations but lack sufficiency to do so. Plaintiffs’ conclusory TILA rescission claims are subject to  
24 dismissal.

### 25 **TILA Damages**

26 The complaint’s second cause of action appears to seek TILA damages. Saxon argues that a  
27 TILA damages claim fails for “lack of factual allegations to support its contentions and failure to  
28 factually assert tender or ability to tender.” Saxon further contends that a TILA damages claim is barred

1 by the one-year limitations period of 15 U.S.C. § 1640(e), which provides that an action for a TILA  
2 violation must proceed “within one year from the date of the occurrence of the violation.” The  
3 limitations period runs from the date of a transaction’s consummation which is the time that a consumer  
4 becomes contractually obligated on a credit transaction. *Monaco v. Bear Stearns Residential Mortgage*  
5 *Corp.*, 554 F.Supp.2d 1034, 1039 (C.D. Cal. 2008). “Therefore, as a general rule the limitations period  
6 starts at the consummation of the transaction.” *King v. State of Cal.*, 784 F.2d 910, 915 (9<sup>th</sup> Cir. 1986).

7 Saxon contends that the limitations period started no later than July 13, 2006, the date on which  
8 the complaint alleges that the mortgage transaction “closed” and that a February 10, 2009 filing of the  
9 complaint renders a TILA damages claim untimely. In *Meyer v. Ameriquest Mortgage Co.*, 342 F.3d  
10 899, 902 (9<sup>th</sup> Cir. 2003), the Ninth Circuit Court of Appeals explained:

11 The failure to make the required disclosures occurred, if at all, at the time the loan  
12 documents were signed. The [plaintiffs] were in full possession of all information  
13 relevant to the discovery of a TiLA violation and a § 1640(a) damages claim on the day  
14 the loan papers were signed.

15 Defendants further argue that the complaint lacks allegations of “rare circumstance where the limitations  
16 period may be tolled.” *See Hubbard v. Fidelity Federal Bank*, 91 F.3d 75, 79 (9<sup>th</sup> Cir. 1996) (no  
17 evidence suggested that lender concealed its alleged breach).

18 Nothing in the complaint hints that plaintiffs were prevented to compare their loan documents  
19 and disclosures with TILA statutory and regulatory requirements. This Court construes lack of timely  
20 opposition as plaintiffs’ concession that their TILA damages claim is time barred to warrant dismissal  
21 of it. The complaint’s face reveals as much.

#### 21 UCL Claim

22 Saxon attacks the complaint’s (third) UCL cause of action as preempted by TILA in that it “is  
23 solely premised on purported violations of TILA.”

24 “[B]ecause there has been a history of significant federal presence in national banking, the  
25 presumption against preemption of state law is inapplicable.” *Bank of America v. City and County of*  
26 *S.F.*, 309 F.3d 551, 559 (9<sup>th</sup> Cir. 2002), *cert. denied*, 538 U.S. 1069, 123 S.Ct. 2220 (2003). In *Silvas*  
27 *v. E\*Trade Mortgage Corp.*, 421 F.Supp.2d 1315 (S.D. Cal. 2006), *aff’d*, 514 F.3d 1001 (9<sup>th</sup> Cir. 2008),  
28 a fellow district court held that the Home Owners Loan Act (“HOLA”), 12 U.S.C. §§ 1461, et seq.,



1 preempted claims under the UCL if the UCL claims were predicated on TILA. *See Reyes v. Downey*  
2 *Saving & Loan Ass'n*, 541 F.Supp.2d 1108, 1115 (C.D. Cal. 2008). The court reasoned that “when  
3 federal law preempts a field, it does not leave room for the states to supplement it.” *Silvas*, 421  
4 F.Supp.2d at 1319 (citing *Rice v. Santa Fe Elev. Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447  
5 (1947)). States may not avoid preemption by adopting federal laws and adding supplemental remedies.  
6 *Reyes*, 541 F.Supp.2d at 1115; *see Public Util. Dist. No. 1 of Grays Harbor Cty. Wash. v. IDACOR, Inc.*,  
7 379 F.3d 641, 648-49 (9th Cir.2004). “Plaintiffs’ use of the UCL as predicated on TILA is preempted.”  
8 *Reyes*, 541 F.Supp.2d at 1115; *see Nava v. Virtual Bank*, 2008 WL 2873406, at \*7 (E.D. Cal. 2008)  
9 (“[F]or the same reason that plaintiff’s UCL claim based on unfair or fraudulent business practices is  
10 preempted by federal law, plaintiff’s UCL claim based on violation of TILA is also preempted.  
11 Moreover, plaintiff’s UCL claim based on violation of TILA is also preempted by federal law since its  
12 application would supplement TILA by changing TILA’s framework.”)

13 In addition, if a TILA damages claim is time barred, a UCL claim based on TILA violations  
14 likewise fails. “A court may not allow plaintiff to ‘plead around an absolute bar to relief simply by  
15 recasting the cause of action as one for unfair competition.’” *Chabner v. United of Omaha Life Ins. Co.*,  
16 225 F.3d 1042, 1048 (9th Cir.2000); *see Rubio v. Capital One Bank (USA)*, 572 F.Supp.2d 1157, 1168  
17 (C.D. Cal. 2008) (since plaintiff’s TILA claim failed, plaintiff’s UCL claim predicated on TILA likewise  
18 failed).

19 The (third) UCL cause of action is premised on TILA and alleges that defendants’ acts and  
20 practices violate TILA and Reg. Z. The UCL cause of action makes repeated references to TILA to  
21 render it preempted. The time bar of plaintiffs’ TILA damages claim bolsters dismissal of their UCL  
22 claim to prevent circumvention on the one-year TILA limitations period.

23 In addition, Saxon’s points that the complaint fails to meet UCL pleading requirements are well  
24 taken and further support dismissal of the UCL claim. Furthermore, Saxon correctly notes that it is not  
25 subject directly or vicariously to a UCL claim in that First NLC, not Saxon, originated the promissory  
26 note to render First NLC responsible for TILA disclosures.

27 Based on dismissal of plaintiffs’ claims, this Court need not address Saxon’s alternative requests  
28 for a more definite statement and to strike the UCL claim and related relief.

1 CONCLUSION AND ORDER

2 For the reasons discussed above, this Court:

- 3 1. DISMISSES with prejudice this action against defendant Saxon Mortgage Services, Inc.;
- 4 2. DIRECTS the clerk to enter judgment in favor of defendant Saxon Mortgage Services,
- 5 Inc. and against plaintiffs Ezequiel Carlos and Luz Carlos; and
- 6 3. ORDERS plaintiffs' counsel, no later than 12 p.m. on May 15, 2009, to file papers to
- 7 show cause why this Court should not dismiss this action against defendants Ocwen
- 8 Loan Servicing, LLC, Old Republic Default Management Services, and First NLC
- 9 Financial Services, Inc.

10 **This Court ADMONISHES plaintiffs and their counsel that this Court will dismiss this**

11 **action against defendants Ocwen Loan Servicing, LLC, Old Republic Default Management**

12 **Services, and First NLC Financial Services, Inc. if plaintiffs' counsel fails to comply with this**

13 **order and fails to file timely papers to show cause why defendants Ocwen Loan Servicing, LLC,**

14 **Old Republic Default Management Services, and First NLC Financial Services, Inc. should not**

15 **be dismissed.**

16 IT IS SO ORDERED.

17 Dated: May 8, 2009

/s/ Lawrence J. O'Neill  
UNITED STATES DISTRICT JUDGE