Appeal No. 09-17678

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID MERRITT and SALMA MERRITT,

Appellants,

vs.

COUNTRYWIDE FINANCIAL CORPORATION, a Delaware corporation, et al.,

Respondents.

On Appeal From the United States District Court
for the Northern District of California, San Jose
Hon. James Ware
Case No. 5:09-CV-01179-JW

APPELLANTS' REPLY BRIEF

REPLACEMENT BRIEF

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I. INTRODUCTORY STATEMENT

Countrywide's brief cannot conceal the numerous legal errors that led the district court to dismiss a *pro se* complaint with prejudice. Perhaps in recognition of the difficulty of its task, Countrywide devotes great effort to new arguments that it did not present to the district court and evidence that the district court did not have the opportunity to consider. Not only are these arguments improper – they are baseless. All of Countrywide's arguments are based on a misconception of Plaintiffs' burden at the pleading stage, which is merely to provide fair notice of their legal claims and the circumstances surrounding them.

This case concerns discriminatory lending practices in the home mortgage market. Countrywide's business strategy was to target African-American markets with subprime loans that Defendant Mozilo described as "poison." Countrywide Request for Judicial Notice ("CFC RJN") Ex. A, Ex. 37¶49. Countrywide also engaged in a pattern and practice of discrimination based on race by allowing its employees to vary loan fees and place applicants in subprime loans based on factors other than the borrower's credit risk. As a result, Plaintiffs were steered from a conventional loan with low fees into a loan that Mozilo stated was "the most dangerous product in existence and there can be nothing more toxic." *Id*. at ¶48. This action seeks redress for discriminatory practices that denied Plaintiffs

equal treatment and resulted in the loss of their life savings to hundreds of thousands of dollars of interest only payments.

This matter is before the Court on appeal from a motion to dismiss, not following a summary judgment ruling. In dismissing with prejudice claims made by the *pro se* Plaintiffs, the district court imposed an improper pleading standard and unjustifiably failed to consider whether their predatory lending allegations provided Countrywide with fair notice. The district court's order violates the standard established by the Supreme Court, the Second and Seventh Circuit, and this Court's recent decision in *Starr v. Baca*, 2011 U.S. App. LEXIS 15283 (9th Cir. 2011). Countrywide barely mentions *Starr*, but it is the controlling law of this Circuit.

The district court also erred on important legal issues, including the question of whether statutory tolling applies under the Real Estate Settlement Procedures Act ("RESPA"). It did not consider this Court's jurisprudence that provides for tolling under a statute with nearly identical text, the Truth in Lending Act ("TILA"), and failed to consider that a jurisdictional bar would interfere with the remedial consumer protection purposes of RESPA. And the district court misapplied this Court's jurisprudence in barring Plaintiffs' rescission action under TILA and improperly resolving disputed issues of fact to conclude that Plaintiffs' allegations were insufficient to support tolling of their TILA damages claims.

For the reasons detailed below, this Court should reverse the dismissal of Plaintiffs' TILA, RESPA, and discrimination claims. This Court should also reverse the dismissal with prejudice of Plaintiffs' racketeering and false advertising causes of action. This Court should then remand the matter for further proceedings pursuant to correct legal rulings concerning TILA, RESPA, and the proper standard for pleading racial discrimination claims under Rule 8.

II. ARGUMENT

A. Countrywide Misapprehends The Role Of This Court On Appeal

1. Countrywide Improperly Raises Numerous New Arguments

In an implicit recognition of the unjustifiable nature of the district court's decision, Countrywide focuses on raising new arguments on appeal that were not presented to the district court and purportedly support the result.[1] Countrywide's contention that this Court can affirm on any ground supported by the record, even if the district court did not rely on the ground, ignores that "the U.S. Supreme Court cautions: 'It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.'" *New Mexico States Investment Council v. Ernest & Young, LLP*, 641 F.3d 1089, 1092 fn. 1 (9th Cir. 2011) (*citing Singleton v. Wulff*, 428 U.S. 106, 120 (1976)).

[1] Plaintiffs refer to the Countrywide-affiliated defendants simply as "Countrywide." To the extent that individual defenses may exist to Plaintiffs' claims, they were not considered by the district court and no such issues are pertinent on appeal.

Countrywide contravenes this basic principle by presenting arguments that are the opposite of the positions it took before the district court, presenting new arguments that the district court did not have the opportunity to consider, and seeking to expand the record. This is improper. *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1319-21 (9th Cir. 1998).

B. The TILA Claims

1. The TILA Rescission Claim

a. The HELOC Is Subject To Rescission

Countrywide contends for the first time on appeal that the HELOC is not subject to rescission and urges reversal of the district court's decision that "[a] Home Equity Line of Credit is, however, subject to rescission under TILA." ER125 at 4. Countrywide waived its ability to argue on appeal that the HELOC cannot be rescinded because it argued to the district court that "the HELOC is subject to rescission." ER69 at 8:28-9:6.

Countrywide's position in the district court was also correct because Plaintiffs used the HELOC as "their principal form of banking and bill payment system" and did not use it solely to purchase their home. ER59¶156; *Watts v. Decision One Mortg. Co.*, LLC, 2009 U.S. Dist. LEXIS 54784 at *9 (S.D. Cal. June 11, 2009) ("[H]ome equity loans . . . could be amenable to rescission.").

Countrywide's NRC recognizes "a legal right under federal law to cancel the security interest applicable to the remainder of funds available in your account

("the Nonpurchase Portion")." ER69-2, Ex. G at 53. The NRC also states that "[t]he Nonpurchase Portion of your line includes any funds from the Purchase Portion that you subsequently repay and then use again for some other purpose." *Id*. Plaintiffs are entitled to rescind the "Nonpurchase Portion" of the HELOC because they repayed part of the Purchase Portion and subsequently drew on the HELOC. ER59¶156; Plaintiffs' Request For Judicial Notice ("Pls. RJN"), Ex. 4; ER69-2, Ex. I at 60.

Countrywide's cases are inapposite because they did not consider HELOC's that were used both for housing acquisitions and other purchases. CFC Br. at 15 (*citing Rivera v. BAC Home Loans Servicing*, L.P., 756 F. Supp. 2d 1193, 1199 (N.D. Cal. 2010) and *Ng. v. HSBC Mortg. Corp.*, 2010 WL 889256 *8 n.11 (E.D.N.Y. 2010)). Here, the NRC is clear that Plaintiffs' rescission "will apply only to the Nonpurchase Portion and to the security interest resulting from that portion." ER69-2, Ex. G at 53.

b. Plaintiffs Are Not Required To Allege Tender

Countrywide does not defend the district court's erroneous conclusion that Plaintiffs were required to tender the value of the HELOC "when they sought rescission." Instead, Countrywide contends that this Court should extend its summary judgment decision in *Yamamoto v. Bank of New York*, 329 F.3d 1167 (9th Cir. 2003) to bar cases at the pleading stage.

Countrywide does not address the arguments in Plaintiffs' opening brief that imposing a tender requirement at the pleading stage is inconsistent with Rule 8, unworkable in practice, and unsupported by *Yamamoto*. Pls. Br. at 24-27. Countrywide argues that "district courts regularly dismiss TILA claims" in this situation, but courts that have engaged in a more careful analysis of *Yamamoto* have declined to follow the unpublished decisions cited by Countrywide. *Lonberg v. Freddie Mac*, 776 F. Supp. 2d 1202, 1207-08 (D. Or. 2011) (declining to follow unpublished decision in *Edelman* and noting that "numerous district courts have rejected defendant's notion that tender is necessary to survive a Rule 12(b)(6) motion."); Pls. Br. at 24-27 (collecting cases).

Countrywide contends that "trial of a rescission claim would be meaningless and wasteful," but the record does not support that conclusion. In August 2008, Plaintiffs decided to stop making payments because they realized that they had been trapped in a "toxic" subprime loan with exorbitant interest only fees. ER59¶175. This was an entirely rational decision not only because of the reduction in Mrs. Merritt's disability payments – an eventuality that Plaintiffs expected, and disclosed to Countrywide prior to the loan – but also because Countrywide representatives told Plaintiffs that they could not receive a loan modification to the conventional loan they were promised unless they ceased payments. Pls. RJN, Ex 6.

None of these facts establish that Plaintiffs lack the financial resources to rescind the HELOC in 2012. Plaintiffs ability to tender is appropriately addressed through discovery and summary judgment. *Lonberg*, 776 F. Supp. 2d at 1208; *Botelho v. U.S. Bank, N.A.*, 692 F. Supp. 2d 1174, 1180-81 (N.D. Cal. 2010). [2]

c. Plaintiffs' Rescission Claim Is Timely

Countrywide contends that Plaintiffs' rescission claim is not timely because they only had three days to rescind, but the statute provides a three year statute of limitations when the "required notice or material disclosures or not delivered." 15 U.S.C. §1635(a), (f); 12 C.F.R. §226.23(a); *Semar v. Platte Valley Federal Savings & Loan Association*, 791 F.2d 699 (9th Cir. 1986). Plaintiffs are entitled to the three year period to rescind because they received a "blank copy of the right to rescind HELOC" and did not receive material disclosures. ER59¶¶141, 147.

The evidence supporting Plaintiffs' allegations is overwhelming. The documents attached to the state court complaint omit, *inter alia*, the opening date of their account, the amount of payments, the annual percentage rate, the finance charges, total payment, amount financed, and variable rate features. CFC RJN, Ex. A, Exs. 3(a) (blank Pay Option ARM Note), 4(a) (blank HELOC agreement), 5(a) (blank first deed of trust), 6(a) (blank HELOC deed), 27(a) (blank notice of the

[2] Illustrating the conclusory nature of the district court's opinions, it made no findings regarding the "value" of the HELOC before deciding that Plaintiffs could not afford to tender. ER125 at 4-5.

right to cancel), and 28(a) (blank TILA disclosure). Plaintiffs' unanswered letters seeking their documents also substantiates their allegations. ER117-3, 117-4, 117-5, 117-6; CFC RJN, Ex. A, Exs. 15-24.

2. TILA Damage Claims

a. Section 1635(b)

Countrywide does not dispute that the district court erred in failing to consider whether Plaintiffs' section 1635(b) claim was timely. Countrywide contends that Plaintiffs asserted this damage claim for the "first time" on appeal, but Plaintiffs' complaint requests damages because Countrywide "improperly ignored notice" of their rescission request. ER59¶329. Plaintiffs' opposition to Countrywide's motion to dismiss also explicitly made this argument. ER93 at 18:28-19:5.

Countrywide itself contends for the first time on appeal that its loan modification offer was a sufficient response to Plaintiffs' rescission request. This is an improper attempt to expand the record. It is also unsupported by law because TILA requires that the lender return money and terminate its security within twenty days of receiving a rescission request. 15 U.S.C. § 1635(b); 12 C.F.R. § 226.23; *Velazquez v. HomeAmerican Credit, Inc.*, 254 F. Supp. 2d 1043, 1044-47 (N.D. Ill. 2003). It is undisputed that Countrywide did neither.

Instead, Countrywide threatened to institute foreclosure proceedings "right away" unless Plaintiffs agreed to a loan modification with unfavorable terms. ER65 at 19¶¶29-32. Although Plaintiffs "signed the modification documents under duress of being homeless," they refused to provide consideration because of its terms and the risk that it would compromise their legal claims against Countrywide. ER65 at 19¶30; Pls. RJN Ex. 6. The modification was not consummated and Countrywide never responded to the rescission request.

b. Equitable Tolling Applies To Plaintiffs' Damage Claims Regarding Disclosures

On appeal, Countrywide argues that providing blank TILA documents at closing cannot toll the statute, but Countrywide misapprehends Plaintiffs' damages claim. Plaintiffs' "allegations in support of equitable tolling are sufficient at this early stage to the extent that [they] allege[] TILA violations within the loan documents as opposed to a violation for failure to provide the loan documents." *Foster v. SCME Mortg. Bankers, Inc.*, 2011 U.S. Dist. LEXIS 39031 at *8-9 (E.D. Cal. April 11, 2011).

Plaintiffs seek to toll the statute based on different wrongdoing (the failure to deliver in 2006) from the wrongdoing on which the TILA violation is premised (the violations within the 2009 documents). Countrywide does not dispute that the 2009 documents violated TILA because they (1) contradicted Colyer's oral

disclosures and (2) incorrectly calculated the amount financed and amount of the finance charge. Pls. Br. at 33-35.

Unlike this Court's decision in *Cervantes*, where the plaintiffs possessed all necessary loan documents and failed to review them, Countrywide refused to provide Plaintiffs with their loan documents until 2009. *Cf. Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1045-46 (9th Cir. 2011). Countrywide's request for judicial notice substantiates Plaintiffs' claims that they received blank copies of the material disclosures. CFC RJN, Ex. A, Exs. 3(a), 4(a), 5(a), 6(a), 27(a), and 28(a).

While Plaintiffs were on notice that Countrywide delivered blank documents in 2006, they could not in the exercise of reasonable diligence until 2009 discover the TILA violations contained within the documents in Countrywide's possession. *Nunez v. Aurora Loan Servs.*, 2011 U.S. Dist. LEXIS 123312 at *8-9 (S.D. Cal. Oct. 25, 2011) (Plaintiff entitled to tolling where "one of the documents Plaintiff would need to compare, i.e., the TILA disclosure he signed, was not available to him until [after closing].").

Alternatively, Plaintiffs are entitled to tolling based on Countrywide's independent acts of misconduct in refusing to provide Plaintiffs with loan documents in 2006, 2007, and 2008. ER59¶¶192, 303. After Plaintiffs concluded that Colyer was not going to refinance in 2007, other Countrywide representatives

"led Plaintiffs on as if they were really going to resolve their loan problems . . . and each year [from 2006-2008] made false or misrepresented statement[s] to Plaintiffs." ER59¶217; Pls. RJN, Ex. 6.

Assuming, *arguendo*, that Plaintiffs were on notice that they would not be refinanced, Plaintiffs are still entitled to tolling because they "repeatedly requested [loan documents] throughout 2006, 2007, and 2008, [they] were told it was being sent and yet never was." ER59¶303.

"Whether Plaintiff[s] should have done more sooner presents a disputed question of fact." *Bassett v. Ruggles*, 2009 U.S. Dist. LEXIS 83349 at *32-33 (E.D. Cal. Sept. 14, 2009).

c. Plaintiffs Alleged Damages

Countrywide argues on appeal that Plaintiffs failed to allege damages, but is Plaintiffs alleged actual damages, statutory damages, and costs. ER59¶¶329, 331, at 67-68. Plaintiffs are entitled to obtain statutory damages because Countrywide improperly calculated the amount financed and understated the amount of the finance charge. Pls. Br. at 34-35; 15 U.S.C. §1638(a)(2), (3); 1640(a)(2)(A)(i). Plaintiffs are also entitled to statutory damages for Countrywide's failure to respond to Plaintiffs' rescission notice. 15 U.S.C. § 1635(g); 1640(a).

Plaintiffs sufficiently pled deterimental reliance by alleging that Countrywide "fail[ed] to deliver to Plaintiffs any filled in copies of their right to

rescind because they knew they would not have accepted the loan if the true terms and conditions were disclosed." ER59¶328; *Smith v. Gold Country Lenders (In re Smith)*, 289 F.3d 1155 (9th Cir. 2000).

Plaintiffs are entitled to costs. 15 U.S.C. §1640(a)(3); ER59 at 68¶12.

C. Plaintiffs' RESPA Claims

1. The District Court Erred In Holding That RESPA Did Not Allow For Equitable Tolling

a. Equitable Tolling Is Available Under RESPA

Plaintiffs demonstrated in their opening brief that superior principles of statutory interpretation support the availability of tolling under RESPA. Pls. Br. at 46-41. Countrywide argues that this Court should follow *Hardin v. City Title & Escrow Co.*, 797 F.2d 1037, 1040 (D.C. Cir. 1986), but fails to discuss recent Supreme Court jurisprudence, *King v. California*, 784 F.2d 910 (9th Cir. 1986), and district court decisions in this Circuit. Pls. Br. at 40-41 (collecting cases). Rather than narrowly considering whether "Congress placed the RESPA statutes of limitation in the section creating federal and state court jurisdiction," *see* CFC Br. at 25, the "basic inquiry is whether tolling the statute in certain situations will effectuate the congressional purpose." *King*, 784 F.2d at 914-15.

The Supreme Court has "downplayed the importance of" the placement of the statute of limitations provision in holding that "the fact that the right and limitation are written into the same statute does not indicate a legislative intent as

to whether or when the statute of limitations should be tolled." *Ramadan v. Chase Manhattan Corp.*, 156 F.3d 499, 502-03 (3d Cir. 1998) (quoting *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 427 (1965)); *see also Lawyers Title Ins. Corp. v. Dearborn Title Corp.*, 118 F.3d 1157, 1166 (7th Cir. 1997) (following the Sixth and Ninth Circuits in concluding that the statute of limitations period "is not jurisdictional even though the limitations period is found in the same section as the provision conferring jurisdiction on the federal courts to enforce the Act.").[3]

This Court recently recognized that "[l]ast Term, the Supreme Court reminded us that the word 'jurisdiction' has been used by courts to convey many, too many, meanings and cautioned against profligate use of the term." *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 868 (9th Cir. 2011) (*citing Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 130 S. Ct. 584, 596 (2009) (internal citations and alliterrations omitted). The Supreme Court clarified "that time prescriptions, however emphatic, are not properly typed jurisdictional." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006). In light of *Arbaugh*, even district courts in the D.C. Circuit are questioning whether *Hardin* remains good law. *Hughes v. Abell*, 794 F. Supp. 2d 1, 13-14 (D.D.C.

[3] Countrywide attempts to manufacture a conflict between the Seventh Circuit's decision in *Lawyer's Title* and this Court's precedent, but both similarly conclude that limitations periods are sometimes, but not always, jurisdictional in situations of sovereign immunity. *Aloe Vera of Am., Inc. v. United States*, 580 F.3d 867, 871 (9th Cir. 2009).

2010); *Bowen v. New Century Mortg. Corp.*, 2010 U.S. Dist. LEXIS 26715 at *4-5 (D.D.C. 2010).

Implictly recognizing the tenuous relevance of *Hardin*, and the conflict between *Hardin* and this Circuit's decision in *King*, Countrywide argues that there is no need for tolling under RESPA because it does not contain provisions regarding recoupment or an ongoing wrong for interest rate charges.[4] But the court in *King* did not rely on those TILA provisions and instead concluded that "inflexible rule" barring tolling frustrates the remedial consumer protection purposes of TILA because "there may be situations in which a borrower consummates his loan and passes a year without knowing of" the violation. *King*, 784 F.2d at 914-15.

The same is true for RESPA. Since kickback schemes, markups, and other conduct prohibited by the statute are frequently not transparent to the borrower, an inflexible limitations bar would be contrary to its remedial purpose and undermine its deterrent effects. This Court should construe RESPA to allow for tolling in order to further the purpose of the statute.

[4] Countrywide's attempt to distinguish TILA and RESPA directly contradicts the sole authority upon which it relies, *Hardin*, which concluded that "Section 2614 is identical in all material respects to 15 U.S.C. § 1640(e), the time limitation applicable to the Truth in Lending Act, 15 U.S.C. § 1601, et seq." *Hardin*, 797 F.2d at 1039.

2. Countrywide's Arguments Regarding The Section 8 and 9 Claims Are New On Appeal And Incorrect

Perhaps recognizing the weakness of the district court's position that RESPA does not provide for tolling, Countrywide devotes much of its brief to advancing new appellate arguments regarding why "[t]his Court need not reach th[e] issue [of whether RESPA allows tolling], because of the independent grounds for dismissal . . . and because . . . the SAC alleges nothing to justify tolling." CFC Br. at 25. But in the district court, Countrywide solely contended that Plaintiffs Section 8 and 9 claims were barred by a one year limitations period that could not be tolled. ER69 at 9:14-24. Countrywide's "newly minted arguments" are waived because it did not dispute that Plaintiffs had stated Section 8 and 9 claims in the district court, and did not address whether Plaintiffs had sufficiently alleged tolling. ER69 at 9:14-24; *Peterson*, 140 F.3d at 1319-21.

This Court has reversed and remanded in similar cases where the court below erroneously concluded that tolling was not available. *Lucchesi v. Bar-O Boys Ranch*, 353 F.3d 691, 696 (9th Cir. 2003); *Donoghue v. County of Orange*, 848 F.2d 926, 931 (9th Cir. 1987); *King*, 784 F.2d at 915. The Court should do the same here.

a. Tolling Of The Section (8)(a) Claim

(i) Plaintiffs State A Section 8(a) Claim

Countrywide contends for the first time on appeal that Plaintiffs cannot obtain damages for their Section 8(a) claim because they did not pay for their appraisal, but Countrywide is mistaken about the facts. Though the settlement charge is not listed on the GFE or HUD-1 that Countrywide would have this Court judicially notice, it also seeks to judicially notice the appraisal report which proves that Benson was "PAID IN FULL" by Plaintiffs through their broker "AT Associates." CFC RJN, at Exh. E, 31. In fact, Plaintiffs' checking records establish that they paid Benson directly for the appraisal. Pls. RJN, Ex. 1.

Countrywide also contends that "Plaintiffs' allegation that the appraisal is inflated is conclusory" because "Plaintiffs' state court complaint attaches comparables and a county assessment." CFC Br. 22 fn. 5. But Benson did not consider other condominiums in the complex, which were worth at least $70,000 less than his appraisal, making it inherently suspect. Pls. RJN, Ex. 2. Correspondence from Chen also indicates that he provided Benson with the "comparables" that Benson relied on for his appraisal. ER59¶¶96-106; CFC RJN, Ex. A, Ex. 35 (dkt. 78-9 at 26, 35, 37, dkt. 78-10 at 5), Ex. E at 16.

Countrywide also references a County assessment from 2008 that was "based on defendants false inflated appraisal." CFC RJN, Ex. A¶274. Plaintiffs' property in 2006 was valued at $679,396, or $60,000 *below* Benson's appraisal of $740,000. Pls. RJN, Ex. 2.

Plaintiffs' allegations are sufficient to state a claim against Benson for giving an inflated appraisal in exchange for a referral of business in violation of Section (8)(a). 12 U.S.C. §2608(a); *Spears v. Washington Mutual, Inc.*, 2009 U.S. Dist. LEXIS 21646 at *9-10 (N.D. Cal. March 9, 2009). Defendant Benson answered below and did not file a brief on appeal. ER58.

Countrywide contends that it is not liable because it was Defendant Chen[5] who initially referred business to Benson. Plaintiffs do not dispute this point, but allege that Countrywide had a policy of only using certain appraisers who were willing to inflate home values; Benson was such a "preferred appraiser"; Defendant Colyer was required to, and did, ultimately approve Chen's selection of Benson as this loan's appraiser; and Countrywide "received" the benefit of the inflated appraisal because the loan could not close without it. ER59¶¶96-106. Since Plaintiffs allege that Colyer was the ultimate decisionmaker who approved Benson's selection, he had "the effect of affirmatively influencing [Benson's] selection." 24 C.F.R. §3500.14(f)(1).[6]

[5] Plaintiffs have voluntarily dismissed Defendant Chen pursuant to settlement during the pendency of this appeal.

[6] While Countrywide contends that the appraisal was completed on the "effective date" of March 6, it is unclear whether that is correct because Plaintiffs did not hire Benson until March 6, Chen did not provide Colyer with the "comparables" until March 10, and the date of the appraisal report is March 24. CFC RJN, Ex. A, Exs. 25, 35. This presents a disputed issue of fact.

Plaintiffs' allegations that Countrywide engaged in a practice and pattern of referring business to Colyer in exchange for "the receipt of the thing of value" (*e.g.*, inflated appraisals) constitutes sufficient evidence that the inflated appraisal was made "pursuant to an agreement or understanding for the referral of business." 24 C.F.R. § 3500.14(b). It was the inflated apparaisal that was the centerpiece of Countrywide's business model because it allowed it to make – and then sell in the secondary market – loans that it otherwise could not have made. ER59¶¶218-32; *Gaudie v. Countrywide Home Loans, Inc.*, 683 F. Supp. 2d 750, 756-57 (N.D. Ill. 2010).

Countrywide's contention that it had no involvement with the inflated appraisal is also suspect in light of Defendant Colyer's statement that "he would use an appraiser who was certain to meet the value [Plaintiffs] needed for refinancing." ER65 at 18¶¶15-17.

(ii) Tolling Of Plaintiffs' Section 8(a) Claim

Countrywide contends on appeal that the limitations period should not be tolled because Plaintiffs "could have hired [another] appraiser" to check the initial appraisal. But dismissal is only appropriate if the complaint, liberally construed, fails to allege "facts showing the potential applicability of the equitable tolling doctrine." *Cervantes v. City of San Diego*, 5 F.3d 1273, 1277 (9th Cir. 1993). The fact that Plaintiffs "could" have hired another appraiser does not demonstrate that there was a lack of due diligence in failing to do so.

Unlike the cases cited by Countrywide, where plaintiffs had in their possession the loan documents that disclosed the basis of their claims, here there was no way that Plaintiffs, in the exercise of reasonable diligence, could discover that their appraisal was fraudulently inflated by over $60,000 at closing.

Whether Plaintiffs should have hired a second appraiser presents a disputed issue of fact. *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206 (9th Cir. 1995); *Bassett*, 2009 U.S. Dist. LEXIS 83349 at *32-33.

b. Tolling Of The Section (8)(b) Claim

(i) Plaintiffs' State A Section 8(b) Claim

Countrywide argues that Plaintiffs' Section 8(b) claim is insufficient because it involves "overcharges." CFC Br. at 22-23 (*citing Martinez v. Wells Fargo Home Mortg., Inc.*, 598 F.3d 549 (9th Cir. 2010)). But Plaintiffs don't allege an "overcharge," they allege that there were "mark up costs for various items in the loan" and that since "those charges cost Defendants significantly less, they passed on charges which falls within the definition of 'markups.'" ER59¶¶127, 336. *Martinez* relied on *Kruse v. Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49, 57-61 (2d Cir. 2004), which concluded markups were actionable under Section 8(b). *See also Santiago v. GMAC Mortg. Group, Inc.*, 417 F.3d 384, 390 (3d Cir. 2005).

Countrywide provided Plaintiffs with a March 14 GFE that showed a $20 tax service fee and $0 flood check fee. CFC RJN Ex A, Ex. 10. In 2009,

Countrywide provided an accurate March 27 GFE and HUD-1 that showed an $80 tax service fee and $26 flood tax fee, all paid to third party affiliates of Countrywide Home Loans, Inc. CFC RJN Exs. C, D.

Plaintiffs allege that the higher costs charged by Countrywide at closing constitute markups. ER59¶¶127, 336. This allegation is sufficient at the pleading stage. *Blaylock*, 504 F. Supp. 2d at 1108.

(ii) Tolling Of Plaintiffs' Section 8(b) Claim

Plaintiffs could not identify the markups until 2009 because they were not provided with the relevant disclosures at closing. ER59¶¶141, 145-47, 166-68, 334; ER 93 at 19:1-5; ER 117-3, 117-4, 117-5, 117-6; *Newsom v. Countrywide Home Loans, Inc.*, 714 F. Supp. 2d 1000, 1009 (N.D. Cal. 2010).

Countrywide argues that Plaintiffs should have obtained documents from the title company, but the title company failed to provide documents at closing and told Plaintiffs to "contact their loan agent" at Countrywide. ER 59¶141; CFC RJN, Ex. A¶¶228-29. Whether Plaintiffs could or should have done more presents a fact issue. *Bassett*, 2009 U.S. Dist. LEXIS 83349 at *32-33.

Finally, Countrywide repeats its contention that Plaintiffs were aware that Defendant Colyer would not refinance in 2007, but this is not relevant to Plaintiffs' allegations that they continued to receive assurances that they would receive their loan documents. CFC RJN, Ex. A, Ex. 20.

3. Plaintiffs' Section 6 Claim

Countrywide contends that none of Plaintiffs' written requests for information constituted a QWR, but the authority relied upon by Countrywide was considered and rejected in a recent well reasoned decision by the Seventh Circuit. *Catalan v. CMAC Mortgage Corp.*, 629 F.3d 676, 686-7 (7th Cir. 2011) (declining to follow cases cited by Countrywide).

The Seventh Circuit concluded that "RESPA does not require any magic language," "[t]he language of the provision is broad and clear," and that "any request for information made with sufficient detail is enough under RESPA to be a qualified written request." *Id*. at 687.

Plaintiffs' letters constitute QWR's and related to the "servicing of their loan" because they were "disputing why their payments were not being applied to the principle of the loan." ER59¶338; 12 U.S.C. §2605(i)(3). Their request for information was made with "sufficient detail" because they repeatedly requested loan documents and information explaining why their principle was not decreasing. *Moon v. GMAC Mortg. Corp.*, 2009 U.S. Dist. LEXIS 91933 at *13 (W.D. Wash. Oct. 2, 2009); ER59¶338; ER117-5; CFC RJN Ex. A, Ex. 19, Ex. 22, Ex. 23.

Countrywide's contention that Plaintiffs' letters were not QWR's because they lacked "account numbers" is incorrect because (1) their name and address "otherwise enable[d]" Countrywide to identify their account number; and (2) many

letters did include account numbers. 12 U.S.C. § 2605(e)(1)(B)(i); ER 117-5; CFC RJN Ex. A, Exs. 19, Ex. 22, 23. Countrywide's contention that QWR's need to be sent to the customer service address is canvassed in Plaintiffs' Opening Brief. Pls. Br. at 44-48.

4. RESPA Damages

Countrywide contends for the first time on appeal that Plaintiffs failed to allege damages under Section 6 of RESPA,[7] but Plaintiffs stated a claim for actual emotional distress damages. ER59 at 68¶7; *Moon*, 2009 U.S. Dist. LEXIS 91933 at *15; *Carter v. Countrywide Home Loans, Inc.*, 2009 U.S. Dist. LEXIS 31446 at *7-8 (E.D. Va. April 14, 2009). The failure of Countrywide to credit payments to the principal of the loan led them to pay greater interest payments. ER59¶¶174, 184.

Plaintiffs also stated damages for a pattern or practice of noncompliance. ER59¶338; 12 U.S.C. §2605(f)(1)(B); *Moon*, 2009 U.S. Dist. LEXIS 91933 at *15-16. Plaintiffs are entitled to costs. 12 U.S.C. §2605(f)(3); ER59 at 68¶12.

D. Plaintiffs' Racial Discrimination Claim

Plaintiffs included "all that [they] needed to put in the complaint" because they identified the particular events giving rise to their claim and alleged that Countrywide intentionally discriminated against them on the basis of their race in

[7] Countrywide does not dispute that Plaintiffs are entitled to damages for their Section 8 claims. 12 USCS §2607(d); ER59 at 68 ¶¶ 10, 12.

connection with their March 26, 2006 home loan. *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404-06 (7th Cir. 2010); *Boykin v. KeyCorp*, 521 F.3d 202, 213-16 (2d Cir. 2008) (Sotomayor J.).

Countrywide relies on decisions in the summary judgment context[8] for the proposition that Plaintiffs must additionally plead "a prima facie case of discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973). However, Countrywide does not mention or cite to the Supreme Court's controlling decision in *Swerkiewicz*. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510-15 (2002); *Maduka v. Sunrise Hosp.*, 375 F.3d 909, 912 (9th Cir. 2004); *Boykin*, 521 F.3d at 212.

Countrywide is thus wrong that Plaintiffs are required to allege facts sufficient to prove the elements of "qualification," "similarly situated," and "racial animus." *Maduka*, 375 F.3d at 912; *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1061-62 (9th Cir. 2003); *Boykin*, 521 F.3d at 215 (*citing Phillip v. Univ. of Rochester*, 316 F.3d 291, 298-99 (2d Cir. 2003). Plaintiffs' complaint satisfies the requirements of Rule 8 because it gives Countrywide fair notice of the particular events and dates giving rise to their claim and alleges that they were treated less

[8] Notably, the Seventh Circuit in *Swanson* reversed the district court after it "relied heavily" on *Latimore v. Citibank Federal Sav. Bank*, 151 F.3d 712, 715-16 (7th Cir. 1998). *Swanson*, 614 F.3d at 403.

favorably because of their race, just as the plaintiffs did in *Swanson* and *Boykin*. *Swanson*, 614 F.3d at 405, 406; *Boykin*, 521 F.3d at 215.

1. Countrywide's Contention That Plaintiffs' Claims Are Conclusory Does Not Render Them Implausible

Countrywide contends that Plaintiffs' claims are not plausible because they "offer no specific factual allegations," but "both *Twombly* and *Erickson* explicitly disavow that Rule 8(a) requires any plaintiff – let alone a *pro se* plaintiff – to plead 'specific facts.'" *Boykin*, 521 F.3d at 215 (*citing Bell Atlantic v. Twombly*, 127 S. Ct. 1955, 1973-74 (2007); *Erickson v. Pardus*, 127 S. Ct. 2197 (2007)); *see also Maduka*, 375 F.3d at 912.

Plaintiffs' factual allegations go beyond reciting the elements of the claim and are entitled to a presumption of truth. *Starr*, 2011 U.S. App. LEXIS 15283 at *37. At the core of the complaint is a simple and plausible factual story:

- African-American borrowers from Countrywide paid higher fees and costs. ER59¶¶51, 83, 346-47;
- African-American borrowers from Countrywide were more likely to be steered into an expensive and risky subprime loans. ER59¶¶51, 83; 346-47; ER65 at 11:15-17;
- Countrywide's business strategy intentionally targeted African-American communities. ER59¶¶310, 342, 344, 347; ER93 at 21:2-7, 22:1-17;
- Countrywide's its discretionary pricing policy enabled discrimination in loan pricing because it allowed its employees to vary a loan's fees and place a loan applicant in a subprime loan based on factors other than credit risk. ER59¶¶92, 125-26, 137, 233, 312;

- Plaintiffs were originally offered an FHA 5% down, but were steered at closing into a subprime loan. ER59¶¶ 88-89; CFC RJN Ex. A, Ex. 10, Ex. C; ER69-2, Ex. E at 32;

- The true reason that Countrywide provided Plaintiffs with a subprime loan and higher fees is because of their race. ER59 ¶¶ 83, 312, 342-44, 346-47; ER 93 at 20-23.

2. Plaintiffs' "Admissions" Do Not Support A Plausible Alternative Explanation

Countrywide argues that Plaintiffs' "admissions" support a plausible alternative explanation that it was motivated by profit and Plaintiffs received worse loan terms because of credit risk rather than race. But "*Rule 8(a) does not impose a probability requirement at the pleading stage*" and if there are "two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6)." *Starr*, 2011 U.S. App. LEXIS 15283 at *39-40.

a. Plaintiffs' "Admissions" Do Not Render Their Ability To Qualify For A Conventional Loan Implausible

Countrywide asserts that Plaintiffs "admit they lacked the $36,000 required to make a 5% down payment," but cites Plaintiffs' allegation that they were "willing to secure money from family and themselves in order to provide five or ten percent down payment." CFC Br. at 34 (citing ER59 ¶90); ER59¶¶86-87; Pls. RJN, Ex. 5. Countrywide's underwriting report does state that Plaintiffs "had only

$25,075 in verified assets," but Colyer told them not to submit full documentation. ER59¶¶298-99; 256-57.

Countrywide contends that Plaintiffs' credit scores disqualified them from a prime loan, but Plaintiffs were told by Colyer "that Plaintiffs scored in a 'good' credit range, making them eligible for Prime, not subprime loan." ER59¶¶117-18. Plaintiffs had credit scores of 692 and 670. CFC RJN Ex. A, Exs. 26, 3¶21.

This is not a case about reckless borrowers who took advantage of easy credit to purchase a home they could not afford. This is a case about minority first time homebuyers who could afford a conventional loan, but were steered into "the most dangerous product in existence." CFC RJN Ex. A, Ex. 37 ¶¶48-51. Plaintiffs' allegations that they would not have been approved for their subprime loan without underwriting exceptions is not an "admission" that Plaintiffs could not have qualified for a prime loan; the underwriting exceptions relate to the fact that Countrywide steered them into a loan where they had no initial equity.

Plaintiffs' allegations that they paid "more than $200,000" towards a $739,000 loan in approximately two and a half years constitutes the most compelling indicia of Plaintiffs' assets. ER59¶169; Pls. RJN, Exs. 3-4. Plaintiffs' payments are far in excess of anything that would have been required if they had received a 5% down conventional loan and suggest that they could have afforded a conventional loan even after Mrs. Merritt's disability payments were reduced.

Finally, Plaintiffs allege "another lender was willing to put them in a 30 year conventional loan which would require them to pay approximately $2,200 per month." ER59¶88. Colyer also approved Plaintiffs for an even cheaper conventional loan, which "baited" them into closing with Countrywide. ER59¶88-89; CFC RJN Ex. A, Ex. 10.

b. Countrywide's Exploitation Of Other Disadvantaged Groups Does Not Render Their Discrimination Claim Implausible

Countrywide argues that Plaintiffs' racial discrimination claim is implausible because Plaintiffs note that Countrywide also targeted Hispanics, the elderly, women, and uneducated Whites. But the fact that the effects of Countrywide's predatory lending policies did not exclusively impact African-Americans is "in the very nature of the theory upon which plaintiffs have proceeded." *De La Cruz v. Tormey*, 582 F.2d 45, 57 (9th Cir. 1978). As such, it does not provide a basis to dismiss Plaintiffs' discrimination claims:

> Challenges which rely upon disparate impact inevitably will involve consequences which are not restricted in their operation to one group or another. The essence of this sort of legal attack is imbalance and disproportionality. The lack of pure [racial]-specificity is no bar . . .

Id.

While Plaintiffs' allegations span a number of disadvantaged groups, they allege that the epicenter of discriminatory activity was the intentional targeting and disparate treatment of African-Americans. ER-93 at 20-23. The fact that

Countrywide may have also targeted other historically disadvantaged groups does not contradict Plaintiffs' allegation that it targeted African-Americans with deceptive subprime loans and exploited them with higher fees. ER59¶¶51, 83; ER93 at 18:18-27 ; *Diaz v. Bank of Am. Home Loan Servicing*, 2010 U.S. Dist. LEXIS 143885 (C.D. Cal. Dec. 16, 2010.

While Plaintiffs' complaint is admittedly less artful than a formal pleading drafted by lawyers, it should be read as intending to express their recognition of the obvious point that it is not solely African-Americans who have lost homes to foreclosure as a result of Countrywide's predatory lending practices. *Erickson*, 551 U.S. at 94; *Hebbe v. Pliler*, 611 F.3d 1202, 1205 (9th Cir. 2010).

This is particularly true because Plaintiffs' obligation at the pleading stage is only to provide fair notice. *Maduka*, 375 F.3d at 912. "The fact that [Plaintiffs] included other, largely extraneous facts in [their] complaint does not undermine the soundness of [their] pleading." *Swanson*, 614 F.3d at 405.

Plaintiffs allege that they were treated differently because of their race, as distinct from being treated differently because of other noninvidious characteristics that may be correlated with race. ER59 ¶83; ER65 at 11:13-18; ER93 at 22:9-17. That is an entirely plausible scenario, whether or not Countrywide may have discriminated against different borrowers based on considerations other than race.

c. Countrywide's Defense That It Was Motivated By Profit Does Not Render Plaintiffs' Discrimination Claim Implausible

Countrywide contends that it treated racial minorities different because of "unfortunate socio-economic factors" that lead "members of certain minorities [to] suffer from an income and asset gap that can create a greater credit risk." But this contention does not render Plaintiffs' claims implausible at the pleading stage because Plaintiffs' contend that Countrywide disparately impacted African-American borrowers *even after controlling for credit risk*. ER59¶¶83, 312.

Countrywide's contention that it was motivated by profit is not a defense to a discrimination claim because "[t]he primacy or exclusiveness of an invidious purpose need not be proved." *De La Cruz*, 582 F.2d at 58. Countrywide's acts of discrimination may have been motivated by their desire for profit, but that does not make them any less discriminatory. *Village of Bellwood v. Dwivedi*, 895 F.2d 1521 1531 (7th Cir. 1990); *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 331 (7th Cir. 1974).

3. Plaintiffs Sufficiently Alleged Damages

Countrywide contends that its acts of discrimination did not cause any loss, but Plaintiffs allege that they would not have pursued a loan with Countrywide if they had not been induced by a discriminatory bait and switch strategy. Plaintiffs

also allege that they paid received more costly subprime loan terms, and received higher fees and costs associated with their loans. ER59¶¶51, 83, 125.

E. The District Court Erred In Denying Leave To Amend

Countrywide contends that the district court's denial of leave to amend was correct because "the District Court granted them an opportunity to amend." Countrywide is incorrect because Plaintiffs' prior amendments were "not in response to an order of dismissal." *Yu v. Southland Taste Restaurant, Inc.*, 2007 U.S. Dist. LEXIS at *4 (N.D. Cal. Nov. 6, 2007). Nor did Plaintiffs seek leave to file an amended complaint *after* Defendants moved to dismiss; Plaintiffs were not filing electronically and their stipulation to file the second amended complaint was docketed on the same day Defendants' moved to dismiss the first amended complaint. ER51.[9]

Countrywide misapprehends the proper standard: leave to amend should only be denied if it is "clear" the claims cannot be saved by amendment. *Eminence Capital*, 316 F.3d at 502. Plaintiffs could allege their ability to tender. *Cf. Yamamoto*, 329 F.3d at 1169-70. Leave to amend is also appropriate if this Court determines Plaintiffs' claims are deficient for any other reason.

In regards to their racketeering claim, the California Court of Appeals recent decision in *Merritt v. Wells Fargo Bank, N.A.*, 2011 Cal. App. Unpub. LEXIS 9649

[9] Plaintiffs moved to file documents through ECF on June 22, 2009. Docket at 62.

(Dec. 19, 2011) is instructive. The appellate court reversed the decision to sustain Wells Fargo's demurrer with prejudice. *Id*. at *56. If provided leave to amend, Plaintiffs could include significantly greater detail regarding the financial relationship between Countrywide and Wells Fargo for the purposes of alleging a racketeering claim against both parties.[10]

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the district court's decision.

Dated: January 25, 2012

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[10] Wells Fargo's brief on appeal contends at length that Plaintiffs' complaint failed to state a claim against Wells Fargo, but ignores that Plaintiffs' Opening Brief does not appeal the dismissal of the claims against Wells Fargo and solely requests that the Court reverse the dismissal with prejudice.

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