

1 2010. After certain delays (also discussed in more detail below), the Habigs' home was
2 sold at a trustee's sale on July 14, 2010.

3 **B. The 2010 Action (CV10-2500)**

4 On October 15, 2010, the Habigs filed an action in Maricopa County Superior
5 Court effectively seeking to unwind the trustee's sale. Most of the Habigs' causes of
6 action relied on variants of the show-me-the-note theory. They also alleged predatory
7 lending practices in violation of the Home Ownership and Equity Protection Act and the
8 Truth in Lending Act, without factual specifics. JPMorgan removed to this Court and the
9 matter was assigned to Judge Bolton. (*See Habig v. FDIC et al.*, CV10-2500.)

10 JPMorgan then moved to dismiss primarily on the authority of A.R.S. § 33-
11 811(C), which states:

12 The trustor, its successors or assigns, and all persons to whom
13 the trustee mails a notice of a sale under a trust deed pursuant
14 to section 33-809 shall waive all defenses and objections to
15 the sale not raised in an action that results in the issuance of a
16 court order granting relief pursuant to rule 65, Arizona rules
17 of civil procedure, entered before 5:00 p.m. mountain
standard time on the last business day before the scheduled
date of the sale.

18 Because the Habigs did not obtain such a court order, JPMorgan argued that the Habigs
19 had waived all challenges to the trustee's sale. JPMorgan also asserted that the show-me-
20 the-note theory fails as a matter of law, and that the Habigs' predatory lending claims
21 were impermissibly vague and time-barred in any event. (*See CV10-2500, Doc. 6.*)

22 The Habigs' response in opposition to JPMorgan's motion made little argument,
23 instead relying heavily on case law regarding the court's obligation to assume well-
24 pleaded facts as true when resolving a motion to dismiss. The Habigs also elaborated on
25 their claims factually. They explained that as the recent recession set in, they were
26 looking for ways to lower expenses. Having heard about government-sponsored plans to
27 modify home loans, the Habigs asked a loan officer at Washington Mutual whether they
28 would qualify for such modification. The loan officer told them that only delinquent

1 loans would be considered for modification. The Habigs therefore stopped making
2 payments in early 2009 and submitted a modification application a few months thereafter.
3 The application process took several months, during which time the trustee's sale was
4 noticed on the Habigs' house. However, in January 2010, the Habigs received
5 instructions to make three reduced trial payments. The Habigs made those payments in
6 January, February, and March 2010.

7 The Habigs' narrative did not describe what happened between April 2010 and the
8 trustee's sale on July 14, 2010. The Habigs alleged, however, that they received three
9 different letters from JPMorgan during the week of the trustee's sale, with each letter
10 offering them a loan modification on different terms. They were not aware that the
11 trustee's sale was nonetheless going forward. (*See* CV10-2500, Doc. 14 at 3–4.)

12 While JPMorgan's motion to dismiss was still pending, the Habigs filed a motion
13 for leave to amend their complaint, attaching a proposed amended complaint. The
14 proposed amendment stated two causes of action — one for “wrongful foreclosure” based
15 on the show-me-the-note theory, and another for predatory lending practices. As to that
16 second cause of action, the Habigs included factual allegations about the origination of
17 their loan. Specifically, they alleged that someone had fraudulently filled out their
18 residential loan application, listing their monthly income as almost \$10,000, as opposed
19 to their real monthly income at that time of about \$4,500. They also alleged that, one
20 year after closing, Washington Mutual offered them a \$125,000 home equity loan based
21 on a “drive-by” appraisal valuing their home at more than \$100,000 more than its market
22 value at closing. (*See* CV10-2500, Doc. 17-1.) The Habigs' proposed amended
23 complaint did not contain any of the details asserted in their response to the motion to
24 dismiss regarding their loan modification negotiations.

25 Judge Bolton granted JPMorgan's motion to dismiss on numerous grounds. Judge
26 Bolton primarily relied on JPMorgan's A.R.S. § 33-811(C) waiver argument, reasoning
27 that the statute's plain language bars all of the Habigs' claims, regardless of whether they
28 could have known about those claims ahead of time. Judge Bolton also agreed with

1 JPMorgan that the show-me-the-note theory fails as a matter of law, and that the
2 predatory lending claims were time-barred. Judge Bolton then denied the Habigs' motion
3 for leave to amend, finding that amendment would be futile in light of A.R.S. § 33-
4 811(C) and show-me-the-note's nonviability. The Habigs' action was therefore
5 dismissed with prejudice. Judge Bolton's order says nothing about the Habigs' loan
6 modification allegations asserted in their response to the motion to dismiss.

7 **C. The Forcible Detainer Action (CV10-2047)**

8 On August 23, 2010, JPMorgan instituted a forcible detainer action against the
9 Habigs in Superior Court. The Habigs then removed to this Court, with the undersigned
10 presiding. (*See JPMorgan Chase Bank v. Heckenlaible-Habig*, CV10-2047.) This Court
11 issued an order requiring the Habigs to show cause

12 why this action should not be remanded to the Superior Court
13 for lack of removal jurisdiction (1) because the amount in
14 controversy, which is the value of the possessory right during
15 the interim, not the entire value of the house or the mortgage,
16 is less than \$75,000, 28 U.S.C. 1332, and (2) because
17 Defendant is "a citizen of the State in which such action is
brought," 28 U.S.C. 1441(b), provided that Plaintiff moves to
remand on this ground within 30 days of the removal.

18 (CV10-2047, Doc. 7 at 1–2.) The Habigs filed no response to this order and the Court
19 remanded the case to Superior Court on October 29, 2010.

20 **D. This Action**

21 On March 6, 2012, the Habigs filed a new action in Maricopa County Superior
22 Court, which JPMorgan has since removed to this Court. The Habigs' new complaint
23 alleges three causes of action. The first cause of action reasserts the predatory lending
24 claims, without citation to legal authority (such as the Truth in Lending Act) but
25 otherwise alleging the facts they had previously alleged in the proposed amended
26 complaint submitted in their previous lawsuit — *i.e.*, that some party falsely inflated their
27 income on their mortgage application, and that Washington Mutual gave them a home
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1 equity loan with essentially no underwriting. The third cause of action reasserts the
2 show-me-the-note theory.

3 The Habigs' second cause of action, however, contains some material previously
4 asserted and also some new material. The first part of this cause of action is a general
5 reassertion the facts regarding the loan modification process, as originally put forth in
6 their response to JPMorgan's motion to dismiss their previous action, but with certain
7 additional details. The second part of the second cause of action turns on events in the
8 ongoing Superior Court forcible detainer action. The Habigs managed to remain in their
9 home through at least February 2012, at which point they approached counsel for
10 JPMorgan with a cash offer to buy the property and thereby settle the case. JPMorgan
11 allegedly

12 gave [the Habigs] reason to believe that the offer would be
13 accepted but indicated that signing a stipulation as to the
14 allegations against them [*i.e.*, consent to a stipulated judgment
15 of forcible detainer] and an agreement to vacate said property
16 was a requirement before [JPMorgan] would accept the offer.
17 [The Habigs,] under abnormal pressure and duress[,]
18 consented to the Stipulation based on this premise. [After the
19 Superior Court entered the stipulated judgment], [JPMorgan]
20 refused the offer based on "bank policy" which upon best
21 belief and knowledge was known to [JPMorgan] at the time
22 [the Habigs] offer was made and such "bank policy" could
23 have or should have been communicated to [the Habigs] prior
24 to them entering into the stipulated judgment.

21 (Doc. 1-1 at 11.) The Habigs therefore claimed that they had been deceived into signing
22 the consent to the stipulated judgment.

23 JPMorgan has now moved to dismiss all causes of action. As to the Habigs' claim
24 that JPMorgan deceived them into consenting to judgment and the forcible detainer
25 action, JPMorgan has submitted Superior Court records showing that the Habigs moved
26 to void that judgment, the Superior Court denied that motion, and the Habigs have filed a
27 notice of appeal. JPMorgan therefore argues that this Court has no jurisdiction over that
28 dispute. As to the remaining claims, JPMorgan contends that all are barred by the

1 doctrines of *res judicata* and collateral estoppel. JPMorgan represents in its motion that
2 the Habigs have not yet been evicted from their house.

3 **II. ANALYSIS**

4 The Habigs first and third causes of action are barred by *res judicata*:

5 Simply put, the doctrine of *res judicata* provides that when a
6 final judgment has been entered on the merits of a case, it is a
7 finality as to the claim or demand in controversy, concluding
8 parties and those in privity with them, not only as to every
9 matter which was offered and received to sustain or defeat the
10 claim or demand, but as to any other admissible matter which
11 might have been offered for that purpose. The final judgment
puts an end to the cause of action, which cannot again be
brought into litigation between the parties upon any ground
whatever.

12 *Nevada v. United States*, 463 U.S. 110, 129–30 (1983) (internal quotation marks and
13 citations omitted; alterations incorporated). The Habigs first and third causes of action
14 substantially duplicate the causes of action they brought in the action before Judge
15 Bolton. That action has been reduced to a final judgment and the Habigs did not appeal.
16 That judgment is therefore final.

17 The portion of the Habigs’ second cause of action concerning JPMorgan’s alleged
18 actions during the loan modification process was not presented in the action before Judge
19 Bolton in precisely the same way as it is presented now, but *res judicata* still applies.
20 That previous action was the Habigs’ opportunity to bring whatever arguments they had
21 against the propriety of the trustee’s sale and the process leading up to it. The factual
22 matter about the loan modification process was “admissible matter which might have
23 been offered for that purpose.” *Nevada*, 463 U.S. at 130. Indeed, the Habigs partially
24 proffered it in their response to the motion to dismiss. Although Judge Bolton did not
25 address it directly, her ruling reduced that case to final judgment and the Habigs did not
26 appeal. Thus, any cause of action based on JPMorgan’s actions during the loan
27 modification process is now barred.

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