

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MARY AMARAL, et al.,
Plaintiffs,
v.
WACHOVIA MORTGAGE CORP., et
al.,
Defendants.

1:09-cv-00937-OWW-GSA

MEMORANDUM DECISION AND ORDER
REGARDING DEFENDANTS' MOTIONS
TO DISMISS (Docs. 77, 84),
WACHOVIA'S MOTION TO STRIKE
(Doc. 86), AND PLAINTIFFS'
MOTION TO AMEND (Doc. 97)

I. INTRODUCTION.

Plaintiffs Mary Amaral, Joe Amaral, and Danny Amaral ("Plaintiffs") proceed with an action for damages and declaratory relief against Defendants Wachovia Mortgage, FSB ("Wachovia") and Carrington Mortgage Services, LLC ("Carrington"). Plaintiffs' filed a First Amended Complaint ("FAC") on August 23, 2010. (Doc. 73).

Carrington and Wachovia filed motions to dismiss the FAC on September 9, 2010 and September 13, 2010, respectively. (Docs. 77, 84). Plaintiffs filed opposition to the motions to dismiss on November 1, 2010. (Docs. 91, 92). Carrington and Wachovia filed replies to Plaintiffs' opposition November 8, 2010. (Docs. 94, 95).

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1 Rather, there must be "enough facts to state a claim to relief that
2 is plausible on its face." *Id.* at 570. In other words, the
3 "complaint must contain sufficient factual matter, accepted as
4 true, to state a claim to relief that is plausible on its face."
5 *Ashcroft v. Iqbal*, --- U.S. ----, ----, 129 S.Ct. 1937, 1949, 173
6 L.Ed.2d 868 (2009) (internal quotation marks omitted).

7 The Ninth Circuit has summarized the governing standard, in
8 light of *Twombly* and *Iqbal*, as follows: "In sum, for a complaint to
9 survive a motion to dismiss, the nonconclusory factual content, and
10 reasonable inferences from that content, must be plausibly
11 suggestive of a claim entitling the plaintiff to relief." *Moss v.*
12 *U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir.2009) (internal
13 quotation marks omitted). Apart from factual insufficiency, a
14 complaint is also subject to dismissal under Rule 12(b)(6) where it
15 lacks a cognizable legal theory, *Balistreri*, 901 F.2d at 699, or
16 where the allegations on their face "show that relief is barred"
17 for some legal reason, *Jones v. Bock*, 549 U.S. 199, 215, 127 S.Ct.
18 910, 166 L.Ed.2d 798 (2007).

19 In deciding whether to grant a motion to dismiss, the court
20 must accept as true all "well-pleaded factual allegations" in the
21 pleading under attack. *Iqbal*, 129 S.Ct. at 1950. A court is not,
22 however, "required to accept as true allegations that are merely
23 conclusory, unwarranted deductions of fact, or unreasonable
24 inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988
25 (9th Cir.2001). "When ruling on a Rule 12(b)(6) motion to dismiss,
26 if a district court considers evidence outside the pleadings, it
27 must normally convert the 12(b)(6) motion into a Rule 56 motion for
28 summary judgment, and it must give the nonmoving party an

1 opportunity to respond." *United States v. Ritchie*, 342 F.3d 903,
2 907 (9th Cir. 2003). "A court may, however, consider certain
3 materials-documents attached to the complaint, documents
4 incorporated by reference in the complaint, or matters of judicial
5 notice-without converting the motion to dismiss into a motion for
6 summary judgment." *Id.* at 908.

7 **IV. Discussion**

8 **A. Carrington's Motion to Dismiss**

9 **1. The FAC's RESPA Claim Against Carrington**

10 The FAC alleges that Carrington violated RESPA by failing to
11 give notice to Plaintiffs of the transferring of services of the
12 Subject Loans from Plaintiffs' initial lender, Fremont, to
13 Carrington. In dismissing Plaintiffs' RESPA claim against
14 Carrington pled in the original complaint, the court held:

15 As Carrington correctly notes, there are no allegations
16 in the complaint suggesting that Plaintiffs suffered
17 actual damages as a result of Carrington's alleged
18 violation of § 2605(c). Absent factual allegations
19 suggesting that Plaintiffs suffered actual damages,
20 Plaintiffs' RESPA claim is insufficiently pled and
21 subject to dismissal. *Molina v. Washington Mutual Bank*,
22 No. 09-CV-00894-IEG (AJB), 2010 WL 431439, at *7 (S.D.
23 Cal. Jan. 29, 2010) (concluding that a RESPA claim was
24 infirm because the plaintiffs "failed to sufficiently
25 plead pecuniary loss"); *Lemieux v. Litton Loan Servicing*,
26 LP, No. 2:09-cv-02816-JAM-EFB, 2009 WL 5206641, at *3
27 (E.D. Cal. Dec. 22, 2009) ("Plaintiffs have not pled
28 facts showing they suffered actual damages. Their failure
to do so defeats their RESPA claim."); *Garcia v. Wachovia
Mortgage Corp.*, ___ F. Supp. 2d ___, 2009 WL 3837621, at
*10 (C.D. Cal. 2009) (dismissing RESPA claim because
Plaintiff "failed to allege damages under Section 2605").

25 (Doc. 43 at 9-10). Carrington repeats its argument that the FAC
26 does not allege damages. Plaintiffs identify the following
27 allegations which they contend are sufficient to allege damages:(1)
28 Due to Carrington's failure to provide the required notice,

1 Plaintiffs authorized Wachovia to wire payments to Freemont rather
2 than Carrington (2) Plaintiffs received a Notice of Intent to
3 Foreclose which stated that Carrington was going to charge
4 Plaintiffs late fees; (3) Plaintiffs believe their credit rating
5 has been negatively effected, which has limited their ability to
6 obtain further financing; (4) Plaintiffs have suffered emotional
7 distress as a result of a pending Notice of Trustee's Sale; (5)
8 Plaintiffs have incurred legal fees.

9 With respect to Plaintiffs' first damages argument, Carrington
10 correctly responds that Plaintiffs do not allege a causal link
11 between its purported failure to provide notice and any damages
12 suffered by Plaintiffs. The FAC does not allege that Wachovia
13 mistakenly wired any payments to Freemont instead of Carrington.
14 With respect to Plaintiffs' second argument, the FAC does not
15 allege that Carrington actually charged Plaintiffs any late fees or
16 that Plaintiffs paid late fees.

17 With respect to Plaintiffs' third, fourth, and fifth
18 arguments, the FAC does not allege facts sufficient to support a
19 causal link between Carrington's alleged failure to provide notice
20 and the damages Plaintiffs complain of. The FAC concedes that
21 Plaintiffs did not make payments in April 2008 or May 2008.
22 Plaintiffs' knowledge of the transfer of servicing was immaterial
23 to Plaintiffs' failure to make payments in April and May. It was
24 Plaintiffs failure to make payments in April and May that was a
25 default that caused any damage to Plaintiffs' credit and led to the
26 recording of the Notice of Default.

27 Plaintiffs' RESPA claim against Carrington is deficient for
28 the same reasons identified in the order dismissing Plaintiffs'

1 original complaint. The RESPA claim is DISMISSED WITH PREJUDICE.

2 **2. FAC's Claim Under California Civil Code section 2937**

3 Carrington argues that, to the extent section 2937 provides a
4 private right of action, Plaintiffs fail to establish a claim
5 because the FAC's allegations do not establish that Plaintiffs are
6 within the class of persons the statute is designed to protect. In
7 a related argument, Carrington argues that the FAC does not allege
8 damages resulting from the purported violation of section 2937.

9 Carrington's argument is well taken. The FAC alleges that
10 Plaintiffs did not make payments in April or May of 2008.

11 Regardless of whether Carrington had provided notice of the
12 servicing change, the damages of which Plaintiff complains - damage
13 to their credit ratings, emotional distress resulting from the
14 Notice of Trustees Sale, and the legal fees incurred due to the
15 status of their loan-would have resulted in any event due to
16 Plaintiffs' conscious decision not to make mortgage payments in
17 April and May 2008. The FAC fails to allege that Plaintiffs
18 suffered damages as a result of Carrington's alleged statutory
19 violation. Plaintiffs' claim is DISMISSED WITH PREJUDICE. See,
20 *e.g., Faria v. San Jacinto Unified School District*, 50 Cal. App.
21 4th 1939, 1947 (Cal. Ct. App. 1996) ("the violation of a statute
22 gives to any person within the statute's protection a right of
23 action to recover *damages caused by its violation*") (emphasis
24 added).

25 **B. Wachovia's Motion to Dismiss**

26 **1. Section 2937 Claim**

27 The caption of the section 2937 cause of action purports to
28 advance the claim against "all defendants." As discussed above,

1 the FAC does not assert a viable claim under section 2937.
2 Further, Plaintiff concedes it has no section 2937 claim against
3 Wachovia. The section 2937 claim is DISMISSED WITH PREJUDICE as to
4 Wachovia.

5 **2. State Law Tort Claims**

6 The court dismissed Plaintiffs' state law tort claims (fraud
7 and conversion) alleged in the original complaint on the grounds
8 that such claims were preempted by the federal Home Owners Loan Act
9 ("HOLA'). (See Doc. 43 at 17-21). With respect to the fraud
10 claim, the Court held:

11 Plaintiffs allege Wachovia "made material false
12 representations to plaintiffs that their refinance loan
13 was approved by Wachovia, that all loan documents had
14 been processed, and that plaintiff had incurred an
15 obligation to make monthly payments to Wachovia to repay
16 the refinance loan." (Doc. 24- 2 at 8.) This fraud claim
17 concerns lending and revolves around the "processing,
18 origination [and/or] servicing" of a mortgage. As
19 applied, this fraud claim is a type of state law
20 contemplated in § 560.2(b)(10) and is preempted.

21 Plaintiffs' fraud claim also alleges that "[t]here was no
22 documents indicating the Wachovia loan had been processed
23 or approved, or that plaintiffs had any obligation to pay
24 any money to Wachovia." (Doc. 24-2 at 8.) This fraud
25 allegation fits squarely
26 within § 560.2(b)(10), and likely within § 560.2(b)(9),
27 which deals with information in "credit-related
28 documents," and § 560.2(b)(11), which deals with
"repayments."

Finally, Plaintiffs' fraud claim alleges that Wachovia
"made false representations with the intent to induce
plaintiffs to make monthly mortgage payments to
Wachovia." (Doc. 24-2 at 8.) As applied, this claim is
also within § 560.2(b)(10) as it is based on,
and seeks to impose liability for and regulate, alleged
false statements made in connection with the
"[p]rocessing, origination [and/or] servicing . . . of,
. . . or participation in," a mortgage. Because
Plaintiffs' fraud claim, as applied, bears on lending
activities expressly contemplated by § 560.2(b), it is
preempted. No further analysis is necessary.

1 (Doc. 43 at 20-21). With respect to the conversion claim, the
2 court held:

3 The conversion claim alleges "Wachovia converted the
4 personal property of plaintiffs, in the form of mortgage
5 payments made on a fraudulent and non-existent loan, to
6 its own use or control." (Doc. 24-2 at 8.) This claim, as
7 applied, also fits within § 560.2(b). The alleged
8 wrongful conversion of Plaintiffs' "mortgage payments"
9 made on a "fraudulent loan" is a state law claim that is
10 based on alleged wrongful conduct in the "processing,
11 origination [and/or] servicing" of a mortgage, §
12 560.2(b)(10), and also concerns "repayment[]," §
13 560.2(b)(11). Because Plaintiffs' conversion claim, as
14 applied, would regulate lending activities expressly
15 contemplated by § 560.2(b), it is preempted, and no
16 further analysis is necessary.

17 (Id. at 21).

18 During oral argument on Wachovia's first motion to dismiss,
19 Plaintiffs requested an opportunity to amend the complaint to
20 establish that Wachovia did not actually issue them a loan.
21 Plaintiffs averred that to the extent no loan was issued, there
22 state law tort claims are not subject to HOLA preemption. The
23 court expressed doubt concerning Plaintiffs' argument:

24 Even if Plaintiffs amend their complaint, as requested,
25 **to allege that Wachovia never issued a loan to**
26 **Plaintiffs**, it is not clear that this would impact the
27 preemption analysis. One stated purpose for the
28 regulatory preemption provision is to ensure "a uniform
federal scheme of regulation" for federal savings
associations. 12 C.F.R. § 560.2(a). Under Plaintiffs'
analysis, however, in any given situation, the lending
activities of federal savings associations would be
subject to both federal and state regulations so long as
no loan is ultimately issued to the borrower.
Nevertheless, supplemental briefing is requested to
properly analyze this preemption issue.¹

(Doc. 43 at 23) (emphasis added).

¹ Analysis of the parties' supplemental briefing is unnecessary in light of the factual deficiencies of the FAC, which warrant dismissal of Plaintiffs' fraud and conversion claims with prejudice.

1 Despite the guidance provided in the memorandum decision, the
2 FAC not only contains the same allegations that led the court to
3 dismiss the fraud and conversion claims alleged in the original
4 complaint, it fails to allege that Wachovia never issued a loan to
5 Plaintiffs. In fact, with respect to the conversion claim, the
6 FAC is worse than the original complaint: the original complaint
7 suggested payments were made on a "non-existing loan," the FAC
8 alleges that Wachovia converted Plaintiffs property "in the form of
9 payments made on a purported refinancing loan." (FAC at 10).

10 Even more troubling are allegations contained in a separate
11 state court complaint Plaintiffs filed on September 9, 2010, *after*
12 the issuance of the Memorandum Decision dismissing Plaintiffs'
13 complaint in this action. In that complaint, which does not allege
14 fraud against Wachovia, Plaintiffs' allegations represent that
15 Wachovia did in fact issue a loan. *Inter alia*, the complaint filed
16 in state court on September 9, 2010 alleges: **(1)** "Vasquez advised
17 Plaintiffs that a Wachovia refinance loan had been issued" (Comp.
18 at 3);² **(2)** "Vasquez provided a copy of a receipt for deposit
19 showing that LandAmerica Commonwealth Title Company received the
20 refinance loan proceeds from Wachovia and were credited to
21 Fremont's account" (id.); **(3)** "Wachovia...presented Plaintiffs with
22 documentation showing that Plaintiffs' refinance loan had been
23 approved" (id.); **(4)** "Plaintiffs received statements from Wachovia
24 reflecting payments due on the refinance loan" (id.); **(5)** "Wachovia
25 refused to provide Plaintiffs with any information regarding the
26 refinance loan" (id. at 4); **(6)** "Plaintiffs reasonably believed

27
28 ² (Case 10-cv-01661; Doc. 2-1)

1 that the First Loan had been satisfied when Wachovia wired the
2 refinance loan proceeds to Fremont on April 30, 2008" (id.).³ The
3 complaint Plaintiffs filed in state court on September 9, 2010 also
4 asserts a claim for Quiet Title against Wachovia and avers that
5 Wachovia "claims an interest in the subject property." (Id. at 9).

6 Plaintiffs' failure to comply with the court's explicit
7 instructions in the memorandum decision as to what was required to
8 escape HOLA preemption justifies dismissal of Plaintiffs' fraud and
9 conversion claims with prejudice. The Memorandum Decision's
10 analysis applies with equal force to the fraud claim pled in the
11 FAC, and with *more* force to the FAC's conversion claim.

12 Plaintiffs' advancement of conflicting factual allegations and
13 legal theories against Wachovia by initiating a separate action in
14 state court concerning the same operative facts underlying the FAC
15 justifies application of judicial estoppel to bar Plaintiffs' state
16 law tort claims. Plaintiffs' conduct also violates applicable
17 standards of professional conduct and Federal Rule of Civil
18 Procedure 11.

19 Although detailed analysis of the pleading deficiencies that
20 plague the FAC's fraud and conversion claims is unnecessary in
21 light of Plaintiffs' failure to plead around HOLA preemption and
22 attempt to avoid preemption by an excursion to state court, a
23 cursory review of the complaint reveals that the claims do not meet
24 the federal pleading standards of Federal Rule of Civil Procedure
25 9(b).

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28 ³ The state court complaint later alleges that Plaintiffs' attorney was unable to confirm whether Wachovia actually wired the funds. (Id. at 5).

1 **C. Plaintiff's Motion to Amend**

2 Plaintiffs seek to amend the FAC "to include claims for relief
3 for negligent hiring and supervision, breach of contract, and tort
4 of another against Wachovia, and for quiet title as to all
5 Defendants and to name as additional defendants Freemont, MTC, and
6 Vasquez." (Doc. 98, Amended Motion to Amend at 6).⁴

7 With respect to all state law tort claims against Wachovia,
8 Plaintiffs claims appear to be preempted for the same reasons
9 applicable to the FAC's fraud and conversion claims; Plaintiffs'
10 motion offers no analysis or authority to the contrary. Amendment
11 to add such claims would be futile.

12 The proposed amended complaint attached to Plaintiffs' motion
13 seeks to include Freemont as a Defendant under Plaintiffs' claims
14 under RESPA and California Civil Code section 2937. These claims
15 are untenable as discussed above and thus amendment to add Freemont
16 would be futile.

17 With respect to MTC, the motion to amend seeks to add a claim
18 against MTC for (1) declaratory relief regarding the validity of
19 the Notice of Default, which allegedly contains at least two
20 materially false facts, and (2) Quiet title. Amendment appears to
21 be appropriate. With respect to Vasquez, the amendment appears to
22 be appropriate. However, Plaintiffs must comply with Federal Rule
23 of Civil Procedure 9(b) where applicable.

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27 ⁴ The proposed second amended complaint attached as exhibit 1 to Plaintiffs'
28 motion also includes a claims for unjust enrichment and breach of the implied
covenant of good faith against Wachovia, although the motion does not request
leave to include such claims.

1 **D. Wachovia's Motion to Strike**

2 As the FAC is dismissed, Wachovia's Motion to Strike is DENIED
3 AS MOOT.

4 **ORDER**

5 For the reasons stated, IT IS ORDERED:

6 1) Plaintiffs' RESPA claim against Defendant Carrington is
7 DISMISSED WITH PREJUDICE;

8 2) Plaintiffs' claims under California Civil Code section 2937
9 are DISMISSED WITH PREJUDICE;

10 3) Plaintiffs' state law tort claims against Wachovia are
11 DISMISSED WITH PREJUDICE;

12 4) Plaintiffs' motion to amend is GRANTED with respect to MTC
13 and Vasquez only and DENIED with respect to all other
14 requests;

15 5) Wachovia's Motion to Strike is DENIED AS MOOT;

16 6) Plaintiffs shall file an amended complaint within fourteen
17 (14) days of service of the Memorandum Decision. Defendants
18 shall file a response within ten (10) days of service of the
19 amended complaint; and

20 7) Defendants shall submit a form of order consistent with
21 this Memorandum Decision within five (5) days following
22 electronic service of this decision.

23 IT IS SO ORDERED.

24 **Dated: February 7, 2011**

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE