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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

PAVEL BEZVERKHOV and YELENA  
BEZVERKHOVA,

Plaintiffs,

v.

No. 2:09-cv-01880-MCE-KJM

MEMORANDUM AND ORDER

CAL-WESTERN RECONVEYANCE  
CORPORATION; JP MORGAN CHASE  
BANK, N.A.; CHASE HOME  
FINANCE, LLC. (Ohio); CHASE  
HOME FINANCE, LLC.;  
CONSOLIDATED CAPITAL MORTGAGE;  
and DOES 1-10,

Defendants.

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Presently before the Court is a Motion by Defendants JP  
Morgan Chase Bank, N.A. ("JP Morgan") and Chase Home Finance LLC  
("Chase Finance") (collectively "Defendants") to dismiss the  
Complaint of Plaintiffs Pavel Bezkerhov and Yelena Bezkerhova  
("Plaintiffs") for failure to state a claim upon which relief may  
be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).  
For the reasons set forth below, Defendants' Motion is granted.

1 **BACKGROUND<sup>1</sup>**

2  
3 Through the present lawsuit Plaintiffs allege a litany of  
4 federal and state law violations in connection with the  
5 refinancing of their home mortgage and the subsequent non-  
6 judicial foreclosure of the mortgaged property.

7 In June 2007, Plaintiffs refinanced their home securing a  
8 \$290,000 mortgage loan from JP Morgan, brokered by Consolidated  
9 Capital Mortgage (CC Mortgage). In pursuing the loan, Plaintiffs  
10 allege that the loan officer for JP Morgan and/or CC Mortgage  
11 misled them into believing this was the only creditor that would  
12 approve of Plaintiffs' loan. At the closing, JP Morgan and CC  
13 Mortgage allegedly failed to explain the terms of the documents  
14 presented for signature. At no point was a Real Income Analysis  
15 conducted, nor was there verification of Plaintiffs' ability to  
16 pay.

17 Plaintiffs eventually defaulted, and a Notice of Default and  
18 Election to Sell was recorded on December 19, 2008. The Notice  
19 identified Defendant Chase Finance as the assignee-beneficiary of  
20 the trust. On March 12, 2009, Plaintiffs, pursuant to the Real  
21 Estate Settlement Procedures Act, sent a Qualified Written  
22 Request ("QWR") to Chase Finance requesting a) information as to  
23 whether the Plaintiffs were properly furnished with the mandated  
24 disclosure documents; b) copies of the signed and dated  
25 disclosures and other loan documents, accompanied by a  
26 verification of actual delivery;

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<sup>1</sup> The factual assertions in this section are based on the  
allegations in Plaintiffs' Complaint unless otherwise specified.

1 c) copies of the promissory note and Deed of Trust; and  
2 d) information on the loan payment applications and other charges  
3 to the account. Chase Finance failed to respond to Plaintiffs'  
4 request.

5 Trustee's sale of the property was originally scheduled for  
6 April 9, 2009, but then postponed to July 10, 2009. On July 9,  
7 2009, the day prior to the sale, Plaintiffs filed the underlying  
8 complaint, including a request for a Temporary Restraining Order  
9 to stop the sale, which was denied. The Plaintiffs' nine  
10 remaining causes of action still stand including allegations of  
11 violation of the federal Truth In Lending Act ("TILA"), violation  
12 of the federal Real Estate Settlement Procedures Act ("RESPA"),  
13 breach of the Covenant of Good Faith and Fair Dealing, breach of  
14 Fiduciary Duty, and Fraud. Defendants also request declaratory  
15 relief, declaration of nullity of documents, quiet title, and  
16 injunctive relief.

17  
18 **STANDARD**  
19

20 On a motion to dismiss for failure to state a claim under  
21 Rule 12(b)(6), all allegations of material fact must be accepted  
22 as true and construed in the light most favorable to the  
23 nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336,  
24 337-38 (9th Cir. 1996). Rule 8(a)(2) requires only "a short and  
25 plain statement of the claim showing that the pleader is entitled  
26 to relief" in order to "give the defendant fair notice of what  
27 the...claim is and the grounds upon which it rests."

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1 Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1964 (2007) (quoting  
2 Conley v. Gibson, 355 U.S. 41, 47 (1957)). While a complaint  
3 attacked by a Rule 12(b)(6) motion to dismiss does not need  
4 detailed factual allegations, a plaintiff's obligation to provide  
5 the "grounds" of his "entitlement to relief" requires more than  
6 labels and conclusions, and a formulaic recitation of the  
7 elements of a cause of action will not do. Id. at 1964-65  
8 (internal citations and quotations omitted). Factual allegations  
9 must be enough to raise a right to relief above the speculative  
10 level. Id. at 1965 (citing 5 C. Wright & A. Miller, Federal  
11 Practice and Procedure § 1216, pp. 235-36 (3d ed. 2004) ("The  
12 pleading must contain something more...than...a statement of  
13 facts that merely creates a suspicion [of] a legally cognizable  
14 right of action")).

15 "Rule 8(a)(2)...requires a 'showing,' rather than a blanket  
16 assertion of entitlement to relief. Without some factual  
17 allegation in the complaint, it is hard to see how a claimant  
18 could satisfy the requirements of providing not only 'fair  
19 notice' of the nature of the claim, but also 'grounds' on which  
20 the claim rests." Twombly, 550 U.S. 556 n.3. A pleading must  
21 contain "only enough facts to state a claim to relief that is  
22 plausible on its face." Id. at 570. If the "plaintiffs...have  
23 not nudged their claims across the line from conceivable to  
24 plausible, their complaint must be dismissed." Id.  
25 Nevertheless, "[a] well-pleaded complaint may proceed even if it  
26 strikes a savvy judge that actual proof of those facts is  
27 improbable, and 'that a recovery is very remote and unlikely.'"  
28 Id. at 556.

1           When a claim for fraud is raised, Federal Rule of Civil  
2 Procedure 9(b) provides that "a party must state with  
3 particularity the circumstances constituting fraud." "A pleading  
4 is sufficient under Rule 9(b) if it identifies the circumstances  
5 constituting fraud so that the defendant can prepare an adequate  
6 answer from the allegations." Neubronner v. Milken, 6 F.3d 666,  
7 671-672 (9th Cir. 1993) (internal quotations and citations  
8 omitted). "The complaint must specify such facts as the times,  
9 dates, places, benefits received, and other details of the  
10 alleged fraudulent activity." Id. at 672.

11           A court granting a motion to dismiss a complaint must then  
12 decide whether to grant leave to amend. A court should "freely  
13 give" leave to amend when there is no "undue delay, bad faith[,]  
14 dilatory motive on the part of the movant,...undue prejudice to  
15 the opposing party by virtue of...the amendment, [or] futility of  
16 the amendment...." Fed. R. Civ. P. 15(a); Foman v. Davis, 371  
17 U.S. 178, 182 (1962). Generally, leave to amend is denied only  
18 when it is clear the deficiencies of the complaint cannot be  
19 cured by amendment. DeSoto v. Yellow Freight Sys., Inc., 957  
20 F.2d 655, 658 (9th Cir. 1992).

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1 **ANALYSIS**

2 **A. TILA Claim as Asserted Against JP Morgan<sup>2</sup>**

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4 The purpose of TILA is "to assure a meaningful disclosure of  
5 credit terms so that the consumer will be able to compare more  
6 readily the various credit terms available to him and avoid the  
7 uninformed use of credit..." 15 U.S.C. § 1601(a). Plaintiffs  
8 allege that under TILA provisions JP Morgan was required to  
9 deliver two validly executed copies of the notice of the right  
10 rescind, but instead delivered only one properly executed Right  
11 to Cancel Notice for each borrower. JP Morgan argues that  
12 Plaintiffs' claim for TILA violations is time-barred because  
13 civil penalties under TILA are subject to a one-year statute of  
14 limitations.

15 Specifically the TILA statute of limitations, codified at  
16 15 U.S.C. § 1640(e), states that, "Any action under this section  
17 may be brought in any United States district court, or in any  
18 other court of competent jurisdiction, within one year from the  
19 date of occurrence of the violation." The "date of occurrence"  
20 is the date the transaction is consummated, which in a mortgage  
21 loan case is when the plaintiff closed on the loan. See Walker  
22 v. Washington Mutual Bank FA, 63 F. App'x. 316, 317 (9th Cir.  
23 2003). Plaintiffs' loan closed on July 13, 2007, triggering a  
24 TILA statute of limitations period that expired July 13, 2008.

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25  
26 <sup>2</sup> Specifically, Plaintiffs' Complaint identifies each cause  
27 of action as being against either "JP Morgan & CC Mortgage" or  
28 "All Defendants." However, for the purposes of this Order, this  
court will refer only to JP Morgan and Chase (together referred  
to as "Defendants") unless otherwise indicated.

1 Plaintiffs, however, did not file suit until July 9, 2009, nearly  
2 a year after the prescribed period. In most cases, an expiration  
3 of the statute of limitations would mandate dismissal of the  
4 claim.

5       However, to save their claim Plaintiffs argue that equitable  
6 tolling should apply to suspend the one-year statute of  
7 limitations. The Ninth Circuit has held that "the doctrine of  
8 equitable tolling may, in appropriate circumstances, suspend the  
9 limitations period until the borrower discovers or had reasonable  
10 opportunity to discover the fraud or nondisclosures that form the  
11 basis of the TILA action." King v. State of California, 784 F.2d  
12 910, 915 (9th Cir. 1986). While the general rule may be that the  
13 limitations period starts at the consummation of the transaction,  
14 the "district courts may evaluate specific claims of equitable  
15 tolling to determine if the general rule would be unjust or  
16 frustrate the purpose of the Act and adjust the limitations  
17 period accordingly." Id.

18       In determining justifiable application of the equitable  
19 tolling doctrine, a court "focuses on excusable delay by the  
20 plaintiff." Johnson v. Henderson, 314 F.3d 409, 414 (9th Cir.  
21 2002). Excusable delay by the plaintiff is defined as whether a  
22 reasonable plaintiff would not have known of the existence for a  
23 possible claim within the limitations period. Lukovsky v. City &  
24 County of San Francisco, 535 F.3d 1044, 1051 (9th Cir. 2008).

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1 To establish excusable delay, the plaintiff must show "fraudulent  
2 conduct by the defendant resulting in concealment of the  
3 operative facts, failure of the plaintiff to discover the  
4 operative facts that are the basis of its cause of action within  
5 the limitations period, and due diligence by the plaintiff until  
6 discovery of those facts." Federal Election Com'n v. Williams,  
7 104 F.3d 237, 240-41 (9th Cir. 1996).

8 Here, the only explanation that Plaintiffs provide to invoke  
9 this equitable protection is that Plaintiffs are "ordinary  
10 citizen[s], unschooled in the intricacies and technicalities of  
11 the mortgage loan process." They claim that they "discovered the  
12 fraud and/or non-disclosures only recently after consultation  
13 with their lawyer." This explanation is hardly an excusable  
14 delay sufficient to invoke this Court's application of equitable  
15 tolling. Entertaining such justification would open the  
16 floodgates, allowing endless TILA suits to be filed under the  
17 guise that one's lawyer "recently discovered the nondisclosure".

18 Plaintiffs have failed to show any concealment of facts by  
19 the Defendant or even a scintilla of due diligence on their own  
20 part. The excuses provided are not grounds upon which the Court  
21 can equitably rescue Plaintiffs' claim from late filing.

22 This Court will not institute a rule in which hiring an  
23 attorney becomes the touchstone upon which tolling of the statute  
24 of limitations may be granted. Rather than preventing the  
25 frustration of the purposes of the TILA, the application of  
26 equitable tolling in this case would undermine congressional  
27 intent in instituting a statute of limitations at all.

28 ///



1 Equitable tolling will not be applied, and thus the statute  
2 of limitations period has run. Defendants' motion to dismiss  
3 Plaintiffs' TILA claim is GRANTED.

4  
5 **B. RESPA Claim as Asserted Against JP Morgan**

6  
7 Plaintiffs contend that JP Morgan violated RESPA by failing  
8 to disclose the yield spread premiums<sup>3</sup> ("YSP") as required by  
9 RESPA guidelines codified at 12 U.S.C. § 2607.<sup>4</sup> However, JP  
10 Morgan argues that the statute of limitations has run on the  
11 RESPA claim as well. Because RESPA mandates a one-year statute  
12 of limitations on claims arising under § 2607, see 12 U.S.C.  
13 § 2614, Plaintiffs' RESPA claim should have been filed by  
14 July 13, 2008, a year after their loan closed. Instead,  
15 Plaintiffs did not file until July 9, 2009, well after the  
16 statute of limitations has expired. Again, Plaintiffs call for  
17 an application of equitable tolling to save their claim.

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21 <sup>3</sup> Specifically, Plaintiffs allege that JP Morgan failed to  
22 "disclose the nature of the YSP on the Good Faith Estimate,"  
23 which itself was never provided. The RESPA requirement that  
24 lenders provide a Good Faith Estimate is codified at 12 U.S.C.  
§ 2604. However, RESPA does not authorize a private right of  
action for violations of § 2604, therefore JP Morgan's alleged  
failure to provide the GFE is not addressed here. See Bloom v.  
Martin, 865 F. Supp. 1377, 1383-1385 (N.D. Cal. 1994); see also  
Collins v. FMHA-USDA, 105 F.3d 1366, 1366-67 (11th Cir. 1997).

25 <sup>4</sup> Although the language of the statute does not directly  
26 address whether the payment of a YSP to a mortgage broker is a  
27 violation of RESPA, the Ninth Circuit has treated such claims as  
28 falling under 12 U.S.C. § 2607. See Geraci v. Homestreet Bank,  
347 F.3d 749, 751 (9th Cir. 2003) (relying on HUD's Statements of  
Policy, Lender Payments to Mortgage Brokers, 64 Fed. Reg. 10080  
(Dep't of Housing & Urban Dev., March 1, 1999)).

1 For RESPA claims, the Ninth Circuit has not yet addressed  
2 whether equitable tolling will apply. However, several district  
3 courts have found the doctrine to be available in appropriate  
4 circumstances. See Ferrari v. U.S. Bank, N.A., 2009 WL 3353028,  
5 at \*2 (N.D. Cal. Oct. 16, 2009); Brewer v. Indymac Bank, 609 F.  
6 Supp. 2d 1104, 1118 (E.D. Cal. 2009); Marcelos v. Dominguez, 2008  
7 WL 1820683, at \*6 (N.D. Cal. April 21, 2008). The most common  
8 factor in determining applicability seems to be whether the  
9 plaintiff has plead some level of due diligence in investigating  
10 their RESPA claim. See Bassett v. Ruggles, 2009 WL 2982895, at  
11 \*12 (E.D. Cal. Sept. 14, 2009) (Equitable tolling applied where  
12 Plaintiff contacted the company to which they paid the loans and  
13 asked if there was a yield spread premium, yet the company  
14 refused to confirm); Yulaeva v. Greenpoint Mortg. Funding, Inc.,  
15 2009 WL 2880393, at \*15 (E.D. Cal. Sept. 3, 2009) (Court held  
16 equitable tolling could not apply where plaintiff did not plead  
17 any facts regarding her reasonable diligence to discover the  
18 information); Rosal v. First Federal Bank of California, 2009 WL  
19 2136777, at \*6-8 (N.D. Cal. July 15, 2009) (Court held that  
20 plaintiff failed to show excusable delay because the plaintiff  
21 could have compared his loan documents with TILA and RESPA  
22 statutory requirements. Therefore equitable tolling was not  
23 warranted.).

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1 Here, Plaintiffs, in support of their request for equitable  
2 tolling, urge this court to look to a sister court ruling which  
3 noted that "The Ninth Circuit has cautioned against resolving  
4 equitable tolling issues on a 12(b)(6) motion unless the  
5 assertions of the complaint read with required liberality would  
6 not permit the plaintiff to prove that the statute was tolled."  
7 Velazquez v. GMAC, 605 F. Supp. 2d 1049, 1060 (C.D. Cal. 2008)  
8 (citing Jablon v. Dean Witter Co., 614 F.2d 677, 682 (9th Cir.  
9 1980)). However here the "proof" that the Plaintiffs offer as to  
10 why the equitable tolling should be afforded is that they had not  
11 yet consulted with a lawyer. They fail to allege any due  
12 diligence outside of hiring a lawyer. Even when read with  
13 "required liberality," for the reasons set forth above this is  
14 not sufficient to justify tolling of statute of limitations.

15 The RESPA claim is therefore time-barred, and Defendants'  
16 motion to dismiss the RESPA claim is GRANTED.

17  
18 **C. Claims for Declaratory Relief and Declaration of**  
19 **Nullity of Documents as Asserted Against Defendants**

20 Declaratory relief is an equitable proceeding. Generally,  
21 declaratory judgment actions are justiciable if "there is a  
22 substantial controversy, between parties having adverse legal  
23 interests, of sufficient immediacy and reality to warrant the  
24 issuance of a declaratory judgment." Maryland Casualty Co. v.  
25 Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941).

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1 Declaratory relief is appropriate when (1) the judgment will  
2 serve a useful purpose in clarifying and settling the legal  
3 relations in issue, and (2) the judgment will terminate and  
4 afford relief from the uncertainty, insecurity, and controversy  
5 giving rise to the proceeding. Eureka Federal Sav. & Loan Asso.  
6 v. American Casualty Co., 873 F.2d 229, 231 (9th Cir. 1989)  
7 (citations and quotations omitted).

8 Plaintiffs seek judicial declaration that Defendants do not  
9 have a right to foreclose on the property because they do not  
10 have possession of the original note. However, pursuant to  
11 Section 2924(a)(1) of the California Civil Code, the trustee of a  
12 Deed of Trust has the right to initiate the foreclosure process.  
13 Cal. Civ. Code § 2924(a) (authorizing the trustee, mortgagee, or  
14 beneficiary, or any of their authorized agents the right to  
15 record a notice of default.) Production of the original note is  
16 not required to proceed with a non-judicial foreclosure. Id.;  
17 see also Putkkuri v. Recontrust Co., 2009 WL 32567, at \*2  
18 (S.D.Cal. Jan. 5, 2009); Pagtalunan v. Reunion Mortgage Inc.,  
19 2009 WL 961995, at \*2 (N.D. Cal. Apr.8, 2009).

20 Furthermore, Plaintiffs seek judicial declaration nullifying  
21 the Substitution of Trustee, Notice of Default, and Notice of  
22 Trustee's Sale. They do so on the basis that the power of sale  
23 in the original note no longer applies because JP Morgan does not  
24 have possession of the note, and therefore the documents that  
25 flowed from that power are void.

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1 However, just as California statutes do not require possession of  
2 the original note to institute foreclosure proceedings, the power  
3 of sale authorizing the documents Plaintiffs seek to nullify is  
4 not disrupted by securitization of the note. See Cal. Civ. Code  
5 § 2924(a) ("a power of sale is conferred upon the mortgagee,  
6 trustee, or any other person, to be exercised after a breach of  
7 the obligation for which that mortgage or transfer is a  
8 security").

9 Accordingly, because Plaintiffs' allegations as to  
10 Defendants' lack of authority are insufficient as a matter of  
11 law, there is no actual controversy between the parties  
12 warranting declaratory judgment.

13 Defendants' Motions to Dismiss Plaintiffs' request for  
14 Declaratory Relief and Declaration of nullity of documents are  
15 GRANTED.

#### 16 17 **D. Fraud Claim as Asserted Against JP Morgan**

18  
19 In California the required elements of fraud are  
20 "a) misrepresentation; b) knowledge of falsity; c) intent to  
21 defraud, i.e., to induce reliance; d) justifiable reliance; and  
22 e) resulting damage." In re Estate of Young, 160 Cal. App. 4th  
23 62, 79 (2008) (citation omitted). A claim for fraud requires a  
24 heightened pleading standard in which the allegations must be  
25 "specific enough to give defendants notice of the particular  
26 misconduct which is alleged to constitute the fraud charged so  
27 that they can defend against the charge and not just deny that  
28 they have done anything wrong."

1 Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985).  
2 Statements of the time, place and nature of the alleged  
3 fraudulent activities are sufficient, id. at 735, provided the  
4 plaintiff sets forth "what is false or misleading about a  
5 statement and why it is false." In re GlenFed, Inc., Securities  
6 Litigation, 42 F.3d 1541, 1548 (9th Cir. 1994).

7 Here, that standard has not been met. Plaintiffs allege  
8 that JP Morgan committed fraud by failing to disclose to  
9 Plaintiffs that their income would be insufficient to repay the  
10 loan. However, this is contrary to their previous allegation  
11 that their income was never verified and that no Real Income  
12 analysis was conducted. If Defendants were not properly aware of  
13 Plaintiffs' income then they could not have misrepresented with  
14 knowledge of falsity Plaintiffs' ability to repay. Such  
15 contradictory pleading by the Plaintiffs is insufficient to place  
16 JP Morgan on clear notice of its alleged wrongdoing.

17 Furthermore Plaintiffs allege that they were misled by "the  
18 statement of the representative of JP Morgan and/or CC Mortgage  
19 that CC Mortgage and JP Morgan are the only ones that could give  
20 and approve the Plaintiffs the loan." The fact that Plaintiffs  
21 could not indicate *which* Defendant is responsible for the  
22 statement is highly problematic under the heightened pleading  
23 standard for a fraud claim. The use of "and/or" does not provide  
24 the specificity necessary to place Defendants on notice.  
25 Plaintiffs do not attempt to explain why they are unable to  
26 identify the proper defendant, nor do they identify a time,  
27 place, or circumstances under which these statements were made.

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1 Instead they amorphously point to a vague wrongdoing committed by  
2 one of two potential defendants.

3 Plaintiffs' fraud claim falls well short of the necessary  
4 pleading requirements. Therefore Defendants' Motion to dismiss  
5 Plaintiffs' Fraud claim is GRANTED.

6  
7 **E. Breach of Covenant of Good Faith and Fair Dealing as**  
8 **Asserted Against Defendants**

9 The implied covenant of good faith and fair dealing rests  
10 upon the existence of some specific contractual obligation.  
11 Foley v. Interactive Data Corp., 7 Cal. 3d 654, 683-684, (1988).  
12 The covenant of good faith is read into contracts in order to  
13 protect the express covenants or promises of the contract, not to  
14 protect some general public policy interest not directly tied to  
15 the contract's purpose. Id. at 690. "In essence, the covenant  
16 is implied as a supplement to the express contractual covenants,  
17 to prevent a contracting party from engaging in conduct which  
18 frustrates the other party's rights to the benefits of the  
19 contract." Love v. Fire Ins. Exchange, 221 Cal. App. 3d 1136,  
20 1153 (1998).

21 Under California law, recovery for breach of the covenant  
22 "is available only in limited circumstances, generally involving  
23 a special relationship between the contracting parties." Bionghi  
24 v. Metro. Water Dist., 70 Cal. App. 4th 1358, 1370 (1999).  
25 California courts have rejected the argument that the doctrine,  
26 which traditionally extends only to unique fiduciary like  
27 relationships, should encompass normal commercial banking  
28 transactions.

1 Mitsui Mfrs. Bank v. Superior Court, 212 Cal. App. 3d 726, 729  
2 (1989).

3 Plaintiffs allege that the covenant of good faith and fair  
4 dealing was breached when, inter alia, 1) Defendants failed to  
5 verify the Plaintiffs' income and ability to pay; 2) Defendants  
6 failed to disclose that the loan provided to Plaintiffs was not  
7 the best loan available and the terms were not in Plaintiffs'  
8 best interest; and 3) Defendants foreclosed on the property  
9 without having possession of the promissory note.

10 As a preliminary matter, Defendants are not beholden, under  
11 any canon of contract law to provide the best possible loan or  
12 terms. The wrongs Plaintiffs complain of do not stand in the way  
13 of the express terms of the contract, but instead seem to touch  
14 on public policy concerns regarding the mortgage lending process.  
15 However, redress for such concerns is not available under the  
16 good faith doctrine. Nor is there a "unique fiduciary  
17 relationship" between parties such that application of the  
18 doctrine is warranted. Instead, the alleged breach arises out of  
19 a normal commercial transaction, a mortgage loan, and the  
20 California courts have declined to extend the doctrine to such  
21 transactions.

22 Accordingly, Defendants' Motion to dismiss Plaintiffs' claim  
23 for breach of the Covenant of Good faith and fair dealing is  
24 hereby GRANTED.

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1           **F. Breach of Fiduciary Duty as Asserted Against Defendants**

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3           The elements of a cause of action for breach of fiduciary  
4 duty are 1) the existence of a fiduciary duty, 2) the breach of  
5 that duty; and 3) damage proximately caused by the breach. Under  
6 California law, “[a]s a general rule, a financial institution  
7 owes no duty of care to a borrower when the institution’s  
8 involvement in the loan transaction does not exceed the scope of  
9 its conventional role as a mere lender of money.” Nymark v.  
10 Heart Federal Savings and Loan Assn., 231 Cal. App. 3d 1089, 1096  
11 (1991); see also Price v. Wells Fargo Bank, 213 Cal. App. 3d 465,  
12 476 (1989). Unless there is a finding of a joint venture or  
13 special circumstances, a lender does not owe a borrower a  
14 fiduciary duty. Resolution Trust Corp. v. BVS Development Inc.,  
15 42 F.3d 1206, 1214 (9th Cir. 1994). Similarly, a trustee under a  
16 deed also does not have a fiduciary duty to the borrower because  
17 its role is merely to be a common agent for the trustor and  
18 beneficiary and of a deed of trust. Heritage Oaks Partners v.  
19 First American Title Ins. Co., 155 Cal. App. 4th 339, 345 (2007).  
20 The trustee does not owe any duty to the borrower beyond what is  
21 specified in the deed and statutes. Id.

22           Plaintiffs allege that Defendants breached a fiduciary duty  
23 by not acting in Plaintiffs’ best interests. However JP Morgan,  
24 as a mere lender of money, and Chase Finance, as a trustee, owed  
25 no fiduciary duty to Plaintiffs.

26           Therefore, Defendants’ Motion to dismiss Plaintiffs’ claim  
27 for breach of fiduciary duty is GRANTED.

28 ///

1           **G.    Claim for "Quiet Title" as Asserted Against Defendants**

2  
3           California Code of Civil Procedure § 760.010 provides for a  
4 quiet title action "to establish title against adverse claims to  
5 real or personal property or any interest therein." To state a  
6 cause of action for quiet title, a plaintiff must plead: (1) a  
7 legal description of the property that is the subject of the  
8 action; (2) the title of the plaintiff and the basis upon which  
9 such title is asserted; (3) the adverse claims to the title of  
10 the plaintiff against which a determination is sought; (4) the  
11 date as of which the determination is sought; and (5) a prayer  
12 for the determination of the title of the plaintiff against the  
13 adverse claims. Cal. Civ. Proc. Code § 760.020. The complaint  
14 in an action to quiet title must be verified, unless plaintiff is  
15 a public entity. Id. In addition, if the quiet title action is  
16 based on the defendant's fraud in obtaining record title, the  
17 plaintiff must plead the factual basis for fraud specifically.  
18 Moss Estate Co. v. Adler, 41 Cal. 2d 581, 583 (1953) ("[T]he  
19 general rule that fraud must be specifically pleaded applies  
20 particularly to quiet title actions." Strong v. Strong, 22  
21 Cal. 2d 540, 545-46 (1943)). In an action to quiet title, the  
22 plaintiff must stand on the strength of his or her own title and  
23 not the weaknesses of the defendant's title. Millard v. Faus,  
24 268 Cal. App. 2d 76, 82 (1968).

25           In their claim for quiet title, Plaintiffs simply allege  
26 that Defendants have no title, lien, or interest in the subject  
27 property because Defendants are not the holder of the promissory  
28 note.

1 As explained above, under California law actual possession of the  
2 note is not necessary to institute foreclosure proceedings nor  
3 does it nullify Defendants' security interest. Plaintiffs  
4 generalized statements as to the lack of authority in Defendants  
5 are not sufficient to warrant a judicial declaration quieting  
6 title in Plaintiffs.

7 Accordingly, Defendants' Motion to dismiss Plaintiffs'  
8 request to quiet title is GRANTED.

9  
10 **H. Plaintiff's Claim for Injunctive Relief**

11  
12 Plaintiffs seek to enjoin Defendants during the pendency of  
13 this action, and permanently thereafter, from instituting  
14 foreclosure proceedings or trustee's sale on the property.

15 A preliminary injunction is an extraordinary remedy, and  
16 Plaintiffs have the burden of proving the propriety of such a  
17 remedy by clear and convincing evidence. See Granny Goose Foods,  
18 Inc. v. Teamsters, 415 U.S. 423, 442 (1974). In order to warrant  
19 issuance of such relief, Plaintiffs must demonstrate either: 1) a  
20 combination of probable success on the merits and a likelihood of  
21 irreparable injury; or 2) that serious questions are raised and  
22 the balance of hardships tips sharply in favor of granting the  
23 requested injunction. Stuhlbarq Int'l Sales Co., Inc. v. John D.  
24 Brush & Co., Inc., 240 F.3d 832, 839-40 (9th Cir. 2001); Winter  
25 v. Natural Resources Defense Council, 129 S. Ct. 365, 375 (2008)  
26 (likelihood rather than possibility of success on the merits  
27 required for issuance of preliminary injunctive relief).

28 ///

1           Despite their several causes of action, Plaintiffs have  
2 failed to show a likelihood of success on the merits of any of  
3 their claims, making issuance of a preliminary injunction  
4 improper. Plaintiffs base their entitlement to an injunction on  
5 the securitization of the note however, again, Defendants are not  
6 required to possess the note in order to foreclose. At this  
7 time, none of Plaintiffs claims are of sufficient weight to  
8 survive the challenge of a Rule 12(b)(6) Motion to Dismiss, much  
9 less meet the burden necessary to afford the extraordinary remedy  
10 of injunctive relief.

11           Therefore, Defendants' Motion to dismiss Plaintiffs' request  
12 for injunctive relief is hereby GRANTED.

13

14

**CONCLUSION**

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16           For the reasons set forth above, Defendants' Motion to  
17 Dismiss Plaintiffs' Complaint is GRANTED with leave to amend.<sup>5</sup>  
18 (Docket No. 20).

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27           <sup>5</sup> Because oral argument will not be of material assistance,  
28 the Court orders this matter submitted on the briefs. E.D. Cal.  
Local Rule 78-230(h).

1 Plaintiffs may file an amended complaint not later than  
2 twenty (20) days after the date this Memorandum and Order is  
3 filed electronically. If no amended complaint is filed within  
4 said twenty (20)-day period, without further notice, Plaintiffs'  
5 remaining claims will be dismissed without leave to amend.

6 IT IS SO ORDERED.

7 Dated: December 10, 2009

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10 MORRISON C. ENGLAND, JR.  
11 UNITED STATES DISTRICT JUDGE  
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