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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

PETER DYACHISHIN AND GALINA  
DYACHISHIN,

Case No. 2:09-CV-02639-JAM-GGH

ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS

Plaintiffs,

v.

AMERICA'S WHOLESALE LENDERS;  
COUNTRYWIDE FINANCIAL  
CORPORATION; RECONTRUST  
COMPANY; BANK OF AMERICA  
CORPORATION; WASHINGTON MUTUAL  
BANK; MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC. and  
DOES 1-50 inclusive,

Defendants.

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This matter comes before the Court on Defendants  
Countrywide Home Loans d/b/a America's Wholesale Lenders  
("AWL"), Countrywide Financial Corporation ("CFC"), Recontrust  
Company ("Recon"), Bank of America Corporation ("BofA"), and  
Mortgage Electronic Registration Systems, Inc. ("MERS"),

1 ("Defendants'") Motion to Dismiss Plaintiffs' Peter Dyachishin  
2 and Galina Dyachishin ("Plaintiffs'") Complaint ("Complaint"),  
3 for failure to state a claim pursuant to Federal Rule of Civil  
4 Procedure 12(b)(6). (Doc. #11). Plaintiffs oppose the motion.<sup>1</sup>  
5 (Doc. #27).  
6

7 Pro se Plaintiffs filed an opposition to Defendants' Motion  
8 to Dismiss. (Doc. #14). After Defendants replied to the  
9 opposition (Doc. #20), pro se litigants hired an attorney (Doc.  
10 #24), who filed a second opposition. (Doc. #27). This second  
11 opposition also appears to be directed at Defendants. Defendants  
12 replied to this opposition as well. (Doc. #29). Though the court  
13 would not typically allow Plaintiffs to file two oppositions,  
14 because they filed the first opposition pro se and are now  
15 represented, the court will only consider the second opposition  
16 filed by their attorney.  
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#### 20 I. FACTUAL AND PROCEDURAL BACKGROUND

21 In February 2007, Plaintiffs obtained a mortgage loan to  
22 refinance their residential property located at 8280 Mariposa  
23 Avenue, Citrus Heights, CA 95610 ("subject property"). The terms  
24 of the loan were memorialized in the promissory Note which was  
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28 <sup>1</sup>This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g).

1 secured by a Deed of Trust on the subject property. The lender  
2 was AWL.

3 In July 2007, Plaintiffs obtained a Home Equity Line of  
4 Credit on the subject property. The terms of the loan were  
5 memorialized in the promissory Note which was secured by a Deed  
6 of Trust on the subject property. JPMorgan, not a party to this  
7 motion, was the lender. Plaintiffs allege that they did not  
8 understand the terms of the loan, and that Defendants misled  
9 them. Plaintiffs bring the present lawsuit alleging violations  
10 of state and federal law.  
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## 13 II. OPINION

### 14 A. Legal Standard

15 A party may move to dismiss an action for failure to state  
16 a claim upon which relief can be granted pursuant to Federal  
17 Rule of Civil Procedure 12(b)(6). In considering a motion to  
18 dismiss, the court must accept the allegations in the complaint  
19 as true and draw all reasonable inferences in favor of the  
20 plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1975),  
21 overruled on other grounds by Davis v. Scherer, 468 U.S. 183  
22 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). Assertions that  
23 are mere "legal conclusions," however, are not entitled to the  
24 assumption of truth. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950  
25 (2009) (citing Bell Atl. Corp v. Twombly, 550 U.S. 544, 555  
26 (2007)). To survive a motion to dismiss, a plaintiff needs to  
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1 plead "enough facts to state a claim to relief that is plausible  
2 on its face." Twombly, 550 U.S. at 570. Dismissal is appropriate  
3 where the plaintiff fails to state a claim supportable by a  
4 cognizable legal theory. Balistreri v. Pacifica Police Dep't,  
5 901 F.2d 696, 699 (9th Cir. 1990).  
6

7       Upon granting a motion to dismiss, a court has discretion  
8 to allow leave to amend the complaint pursuant to Federal Rule  
9 of Civil Procedure 15(a). "Dismissal with prejudice and without  
10 leave to amend is not appropriate unless it is clear . . . that  
11 the complaint could not be saved by amendment." Eminence  
12 Capital, L.L.C. v. Aspeon, Inc., 316 F. 3d 1048, 1052 (9th Cir.  
13 2003).  
14

15       Generally, the Court may not consider material beyond the  
16 pleadings in ruling on a motion to dismiss for failure to state  
17 a claim. Sherman v. Stryker Corp., 2009 WL 2241664 at \*2 (C.D.  
18 Cal. Mar. 30, 2009) (internal citations omitted). There are two  
19 exceptions: when material is attached to the complaint or relied  
20 on by the complaint, or when the court takes judicial notice of  
21 matters of public record, provided the facts are not subject to  
22 reasonable dispute. Id. Here, Defendants request judicial notice  
23 of the loan documents in connection with the first mortgage and  
24 the Deed of Trust. Plaintiffs do not dispute the authenticity of  
25 these documents, all of which are either matters of public  
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1 record or relied on by the Complaint. Accordingly, the Court  
2 takes judicial notice as requested.  
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5 B. Federal Law Claims

6 I. Violation of the Truth in Lending Act ("TILA")

7 In the Opposition to the Motion to Dismiss, Plaintiffs  
8 raise the argument that Defendant violated the Truth in Lending  
9 Act, ("TILA"), 15 U.S.C. §1601 et seq., thereby seeking  
10 rescission and damages. "The focus of any Rule 12(b)(6)  
11 dismissal. . . is the complaint. This precludes the  
12 consideration of new allegations that may be raised in  
13 plaintiff's opposition to a motion to dismiss brought pursuant  
14 to Rule 12(b)(6)." Cordell v. Tilton, 515 F. Supp. 2d 1114, 1128  
15 (S.D. Cal. 2007)(internal citations omitted). Because the TILA  
16 allegation was first raised in the Opposition, the Court will  
17 not consider this cause of action.  
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21 II. Violation of the Real Estate Settlement Procedures Act  
22 ("RESPA")  
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24 Within the fourth and fifth causes of action, Plaintiffs  
25 allege that Defendants violated RESPA, 12 U.S.C. §§2601-17, by  
26 failing to comply with disclosure requirements and engaging in  
27 predicate unlawful business acts. In the Opposition, Plaintiffs  
28 merely restate that Defendants failed to comply with RESPA.

1 Plaintiffs' broad and conclusory allegation that Defendants  
2 failed to comply with RESPA is without merit. Without stating  
3 specific sections that Defendants violated or any facts to  
4 support the allegation, the Court cannot analyze this cause of  
5 action. Accordingly, the RESPA claim is dismissed, with  
6 prejudice.  
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9 C. State Law Claims

10 I. Quiet Title

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12 To allege a cause of action to quiet title, the complaint  
13 must state (1) a legal description of the property; (2) the  
14 title of the plaintiff and the basis of the title; (3) the  
15 adverse claims to the title of the plaintiff; (4) the date as of  
16 which the determination is sought; and (5) a prayer for the  
17 determination of the title of the plaintiff against the adverse  
18 claims. Cal. Code Civ. Proc. § 761.020. "The purpose of a quiet  
19 title action is to establish one's title against adverse claims  
20 to real property. A basic requirement of an action to quiet  
21 title is an allegation that plaintiffs are the rightful owners  
22 of the proper, i.e., that they have satisfied their obligations  
23 under the Deed of Trust. A mortgagor cannot quiet his title  
24 against the mortgagee without paying the debt secured." Santos  
25 v. Countrywide Home Loans, 2009 WL 3756337, at \*4 (E.D. Cal.  
26 Nov. 6, 2009).  
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1 Here, Plaintiffs' claim fails because Plaintiffs have not  
2 paid the debt secured on the loan, nor have they alleged their  
3 ability to repay the loan. Accordingly, the claim for quiet  
4 title is dismissed, with prejudice.  
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7 II. Rescission Based on Violation of Cal. Civ. Code § 1632

8 Plaintiffs allege that Defendants provided loan documents  
9 in the English language, in spite of the fact that Plaintiffs'  
10 primary language is Slavic. Civil Code § 1632 requires that "any  
11 person engaged in a trade or business who negotiates primarily  
12 in Spanish, Chinese, Tagalog, Vietnamese, or Korean, ... in the  
13 course of entering into any of the following, shall deliver to  
14 the other party to the contract ... a translation of the  
15 contract or agreement in the language in which the contract or  
16 agreement was negotiated ..." This includes "loan[s] ... secured  
17 other than by real property." Cal. Civ. Code § 1632(b)(2). Thus,  
18 Section 1632 generally does not apply to loans secured by real  
19 property.  
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22 Moreover, Section 1632 does not require Defendants to  
23 translate documents into Slavic. Thus, Plaintiffs fail to state  
24 a claim under Section 1632. Accordingly, the claim for  
25 rescission based on Section 1632 is dismissed, with prejudice.  
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1 III. Rescission Based on Fraud (Non-Disclosure)

2 Plaintiffs allege that their loan should be rescinded due  
3 to fraud. A contract may be rescinded if the consent of the  
4 party rescinding was obtained through fraud or mistake. Cal.  
5 Civ. Code § 1689(b)(1). "In all averments of fraud or mistake,  
6 the circumstances constituting fraud or mistake shall be stated  
7 with particularity. Malice, intent, knowledge and other  
8 condition of mind of a person may be averred generally." Fed.  
9 R. Civ. Proc. 9(b). A claim of fraud must have the following  
10 elements: "(a) a misrepresentation (false representation,  
11 concealment, or nondisclosure); (b) knowledge of falsity (or  
12 'scienter'); (c) intent to defraud, i.e., to induce reliance;  
13 (d) justifiable reliance; and (e) resulting damage." In re  
14 Estate of Young, 160 Cal. App. 4th 62, 79 (2008) (quoting Lazar  
15 v. Superior Court, 12 Cal. 4th 631, 638 (1996) (internal  
16 quotation marks omitted). The Ninth Circuit has "interpreted  
17 Rule 9(b) to mean that the pleader must state the time, place  
18 and specific content of the false representations as well as the  
19 identities of the parties to the misrepresentation. Alan Neuman  
20 Productions, Inc. v. Albright, 862 F. 2d 1388, 1393 (9th Cir.  
21 1988).

22 Plaintiffs have not alleged fraud with the required  
23 particularity to state a plausible claim for relief. Nowhere in  
24 the Complaint do Plaintiffs describe the facts of the alleged  
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1 fraud, other than making vague legal conclusions that they were  
2 mislead regarding the loan terms. Accordingly, the fraud claim  
3 is dismissed, with prejudice.  
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6 IV. Unfair Debt Collection Practices

7 Plaintiffs allege that Defendants violated the Rosenthal  
8 Fair Debt Collection Practices Act ("RFDCPA"). The RFDCPA limits  
9 debt collection agencies and creditors' ability to collect  
10 debts. Cal. Civ. Code § 1788, et seq. Plaintiffs allege that  
11 Defendants, through their actions, violated the RFDCPA. These  
12 allegations are mere legal conclusions. Plaintiffs do not allege  
13 specific actions by Defendants that amount to threats to collect  
14 debt.  
15

16 Moreover, Plaintiffs have failed to provide support  
17 demonstrating that the RFDCPA applies to the Defendants in this  
18 case, as it is impossible to support a claim under the RFDCPA  
19 based on foreclosure of a residential mortgage. See Fuentes v.  
20 Duetsche Bank, 2009 WL 1971610 (S.D. Cal. July 8, 2009)  
21 (granting defendant's motion for judgment on the pleadings  
22 "[s]ince a residential mortgage is not a debt and a home  
23 foreclosure is not debt collection within the meaning of the  
24 statute"); Gamboa v. Trustee Corps, 2009 WL 656285 (N.D. Cal.  
25 Mar. 12, 2009). Accordingly, the claim for unfair debt  
26 collection practices is dismissed, with prejudice.  
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2 V. Unfair Business Practices

3           The California Business & Professions Code § 17200  
4 prohibits unfair competition including any "unlawful, unfair or  
5 fraudulent business act or practice and unfair, deceptive,  
6 untrue or misleading advertising." This statute has a "broad  
7 scope that allows for 'violations of other laws to be treated as  
8 unfair competition that is independently actionable' while also  
9 'sweep[ing] within its scope acts and practices not specifically  
10 proscribed by any other law.'" Hauk v. JP Morgan Chase Bank  
11 USA, 552 F.3d 1114, 1122 (9th Cir. 2009) (quoting Kasky v. Nike,  
12 Inc., 27 Cal. 4th 939, 949 (2002)). While the statute is broad  
13 in scope, Plaintiffs must still plead their claim so as to  
14 establish a violation of the "other law" or unfair practice in  
15 question. See Constantini v. Wachovia Mortg. FSB, No. 09-406,  
16 2009 WL 1810122 at \*3 (E.D. Cal. June 24, 2009) (citing Walker  
17 v. Countrywide Home Loans, Inc., 98 Cal. App. 4th 1158, 1169-70  
18 (2002)).

19           Here, Plaintiffs allege unfair competition based on failure  
20 to comply with disclosure requirements of California Civil Code  
21 § 1632, RFDCPA, and RESPA. As mentioned above, Plaintiffs have  
22 failed to state a claim for any of these causes of action.  
23 Accordingly, Plaintiffs' cause of action for unfair business  
24 practices is dismissed, with prejudice.  
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2 VI. Breach of Fiduciary Duty

3 "The elements of a cause of action for breach of fiduciary  
4 duty are: 1) the existence of a fiduciary duty; 2) a breach of  
5 the fiduciary duty; and 3) resulting damage." Pellegrini v.  
6 Weiss, 165 Cal. App. 4th 515, 524 (2008). In the lending  
7 context, "financial institutions owe no duty of care to a  
8 borrower when the institution's involvement in the loan  
9 transaction does not exceed the scope of its convention role as  
10 a mere lender of money." Nymark v. Heart Fed. Sav. & Loan  
11 Ass'n, 231 Cal. App. 3d 1089, 1096 (1991). Although California  
12 law imposes a fiduciary duty on a mortgage broker, no such duty  
13 is imposed on a lender. Price v. Wells Fargo Bank, 213 Cal.  
14 App. 3d 465, 476 (1989).

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18 Plaintiffs do not state a claim for breach of fiduciary  
19 duty. AWL was the "mere lender of money" in this case and holds  
20 no fiduciary duty towards Plaintiffs. Plaintiffs also fail to  
21 establish any fiduciary relationship with the other defendants,  
22 CFC, Recon, BofA and MERS. As such, without the existence of a  
23 fiduciary relationship, there can be no claim for relief against  
24 Defendants. Accordingly, Plaintiffs' claim for breach of  
25 fiduciary duty is dismissed, with prejudice.  
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1 VII. Breach of Written Contract, Breach of Implied Covenant of  
2 Good Faith and Fair Dealing, Violation of HOEPA: Seventh,  
3 Eighth, Ninth Causes of Action  
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5 Plaintiffs only allege these causes of action against  
6 Defendant CFC.

7 In California, "[a] cause of action for breach of contract  
8 requires proof of the following elements: (1) existence of the  
9 contract; (2) plaintiff's performance or excuse for  
10 nonperformance; (3) defendant's breach; and (4) damages to  
11 plaintiff as a result of the breach." CDF Firefighters v.  
12 Maldonado, 158 Cal. App. 4th 1226, 1239 (2008).  
13

14 "To establish a breach of an implied covenant of good faith  
15 and fair dealing, a plaintiff must establish the existence of a  
16 contractual obligation, along with conduct that frustrates the  
17 other party's rights to benefit from the contract." Fortaleza  
18 v. PNC Fin. Servs. Group, Inc., 2009 U.S. Dist. LEXIS 64624, at  
19 \*\*15-16 (N.D. Cal. July 27, 2009).  
20

21 To state a claim under Home Ownership and Equity Protection  
22 Act ("HOEPA"), plaintiff must allege that defendant extended  
23 credit without regard to the consumer's ability to pay. 15  
24 U.S.C. § 1639(h).  
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26 Plaintiffs fail to state a claim for relief against CFC  
27 under any of these causes of action. Plaintiffs base all these  
28 claims on the underlying contract. However, that contract is

1 between Plaintiffs and AWL, not CFC. Any negotiations or  
2 obligations under the contract do not involve CFC. Thus, without  
3 the existence of a contract, Plaintiffs cannot state a claim for  
4 relief against CFC. Accordingly, the claims for breach of  
5 contract, breach of implied covenant of good faith and fair  
6 dealing and HOEPA are dismissed, with prejudice.  
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10 VIII. Declaratory Relief

11 Plaintiffs' tenth cause of action requests declaratory  
12 relief in order for Plaintiffs to ascertain their right under  
13 the contract and to determine Defendant's right to proceed with  
14 the non-judicial foreclosure.

15 "Declaratory relief is only appropriate (1) when the  
16 judgment will serve a useful purpose in clarifying and settling  
17 the legal relations in issue, and (2) when it will terminate and  
18 afford relief from the uncertainty, insecurity, and controversy  
19 giving rise to the proceeding." Guerra v. Sutton, 783 F.2d 1371,  
20 1376 (9th Cir. 1986) (citations omitted).  
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22 Plaintiffs have failed to state a claim to meet these  
23 criteria. Accordingly, Plaintiffs' tenth cause of action for  
24 declaratory relief is dismissed, with prejudice.  
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1 IX. Injunctive Relief

2 Plaintiffs' tenth cause of action also requests injunctive  
3 relief in the form of a preliminary injunction for the sale of  
4 the subject property and permanent injunction preventing  
5 Defendant from engaging in wrongful conduct in the future.  
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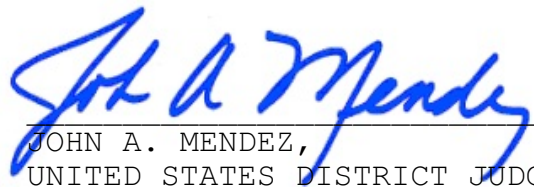
7 "It is appropriate to deny an injunction where there is no  
8 showing of reasonable probability of success, even though the  
9 foreclosure will create irreparable harm, because there is no  
10 justification in delaying that harm where, although irreparable,  
11 it is also inevitable." Jessen v. Keystone Savings & Loan  
12 Ass'n., 142 Cal. App. 3d 454, 459 (1983). Here, Plaintiffs have  
13 not paid the debt secured on the loan, nor have they shown a  
14 reasonable probability of success on the merits, as indicated  
15 above. Accordingly, Plaintiffs' tenth cause of action for  
16 injunctive relief is dismissed, with prejudice.  
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21 III. ORDER

22 For the reasons set forth above, Defendant's Motion to  
23 Dismiss is hereby GRANTED, WITH PREJUDICE.

24 IT IS SO ORDERED.

25 Dated: April 14, 2010

26   
27 JOHN A. MENDEZ,  
28 UNITED STATES DISTRICT JUDGE