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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA  
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11 PETER DYACHISHIN AND GALINA  
12 DYACHISHIN,

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

13 Plaintiffs,

ORDER GRANTING DEFENDANT'S  
MOTION TO DISMISS

14 v.

15 AMERICA'S WHOLESALE LENDERS;  
16 COUNTRYWIDE FINANCIAL  
17 CORPORATION; RECONTRUST  
18 COMPANY; BANK OF AMERICA  
19 CORPORATION; WASHINGTON MUTUAL  
20 BANK; MORTGAGE ELECTRONIC  
21 REGISTRATION SYSTEMS, INC. and  
22 DOES 1-50 inclusive,

23 Defendants.  
24 \_\_\_\_\_/

25 This matter comes before the Court on Defendant JPMorgan  
26 Chase Bank, N.A., an acquirer of certain assets and liabilities  
27 of Washington Mutual Bank, ("Defendant's"), Amended Motion to  
28 Dismiss Plaintiffs' Peter and Galina Dyachishin's  
("Plaintiffs'") Complaint ("Complaint") for failure to state a

1 claim pursuant to Federal Rule of Civil Procedure 12(b)(6).  
2 (Doc. #18). Plaintiffs oppose the motion.<sup>1</sup> (Doc. #27).

3 Multiple defendants in this case filed motions to dismiss.  
4 (Doc. #11, #18). Plaintiffs filed one opposition. (Doc. #27). It  
5 is unclear to which defendants motion this opposition was  
6 intended to oppose. On the docket, Plaintiffs filed this as an  
7 opposition to Defendant's amended motion to dismiss. (Doc. #27).  
8 Thus, the court will treat it as such.  
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#### 10 11 12 I. FACTUAL AND PROCEDURAL BACKGROUND

13 In February 2007, Plaintiffs obtained a mortgage loan to  
14 refinance their residential property located at 8280 Mariposa  
15 Avenue, Citrus Heights, CA 95610 ("subject property"). The terms  
16 of the loan were memorialized in the promissory Note which was  
17 secured by a Deed of Trust on the subject property. The lender  
18 was America's Wholesale Lenders ("AWL"), not a party to this  
19 motion.  
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21 In July 2007, Plaintiffs obtained a Home Equity Line of  
22 Credit on the subject property. The terms of the loan were  
23 memorialized in the promissory Note which was secured by a Deed  
24 of Trust on the subject property. Defendant was the lender.  
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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 Plaintiffs did not understand the terms of the loan and allege  
2 that Defendant misled them.

3 On or about February 21, 2008, Plaintiffs deeded their  
4 interest in the subject property to Andrey Dyachishin and  
5 Tatyana Dyachishin. Plaintiffs now bring the present lawsuit  
6 alleging violations of state and federal law.  
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## 8 9 II. OPINION

### 10 A. Legal Standard

11 A party may move to dismiss an action for failure to state  
12 a claim upon which relief can be granted pursuant to Federal  
13 Rule of Civil Procedure 12(b)(6). In considering a motion to  
14 dismiss, the court must accept the allegations in the complaint  
15 as true and draw all reasonable inferences in favor of the  
16 plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1975),  
17 overruled on other grounds by Davis v. Scherer, 468 U.S. 183  
18 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). Assertions that  
19 are mere "legal conclusions," however, are not entitled to the  
20 assumption of truth. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950  
21 (2009) (citing Bell Atl. Corp v. Twombly, 550 U.S. 544, 555  
22 (2007)).  
23

24 To survive a motion to dismiss, a plaintiff needs to plead  
25 "enough facts to state a claim to relief that is plausible on  
26 its face." Twombly, 550 U.S. at 570. Dismissal is appropriate  
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1 where the plaintiff fails to state a claim supportable by a  
2 cognizable legal theory. Balistreri v. Pacifica Police Dep't,  
3 901 F.2d 696, 699 (9th Cir. 1990).

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

12  
13 Generally, the Court may not consider material beyond the  
14 pleadings in ruling on a motion to dismiss for failure to state  
15 a claim. There are two exceptions to this rule: when material is  
16 attached to the complaint or relied on by the complaint, or when  
17 the court takes judicial notice of matters of public record,  
18 provided the facts are not subject to reasonable dispute.

19  
20 Sherman v. Stryker Corporation, 2009 WL 2241664 at \*2 (C.D. Cal.  
21 Mar. 30, 2009) (internal citations omitted). Here, Defendant  
22 requests judicial notice of the loan documents in connection  
23 with the first mortgage and HELOC, and the Grant Deed ("Grant  
24 Deed") to Andrey Dyachishin and Tatyana Dyachishin. Plaintiffs  
25 do not dispute the authenticity of these documents, all of which  
26 are either matters of public record or relied on by the  
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1 Complaint. Accordingly, the Court takes judicial notice as  
2 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 Defendant violated RESPA, 12 U.S.C. §§2601-17, by  
26 failing to comply with disclosure requirements and engaging in  
27 unlawful business acts. Defendant argues that Plaintiffs failed  
28 to state a claim under RESPA because the Complaint does not

1 allege any facts to support this claim. In the Opposition,  
2 Plaintiffs merely restate that Defendant failed to comply with  
3 RESPA.  
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5 Plaintiffs' broad and conclusory allegation that Defendant  
6 failed to comply with RESPA is without merit. Without stating  
7 specific sections that Defendant violated or any facts to  
8 support the allegation, the Court cannot analyze this cause of  
9 action. Accordingly, the RESPA is dismissed, with prejudice.  
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#### 11 12 C. State Law Claims

##### 13 I. Quiet Title

14 To allege a cause of action to quiet title, the complaint  
15 must state (1) a legal description of the property; (2) the  
16 title of the plaintiff and the basis of the title; (3) the  
17 adverse claims to the title of the plaintiff; (4) the date as of  
18 which the determination is sought; and (5) a prayer for the  
19 determination of the title of the plaintiff against the adverse  
20 claims. Cal. Code Civ. Proc. § 761.020.  
21

22 Here, Plaintiffs' claim fails because Plaintiffs do not  
23 have title to the subject property. Plaintiffs deeded their  
24 entire interest in the subject property to Andrey Dyachishin and  
25 Tatyana Dyachishin in February 2008. Therefore, Plaintiffs  
26 cannot allege title to the subject property. The claim for quiet  
27 title is dismissed, with prejudice.  
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2 II. Rescission Based on Violation of Cal. Civ. Code § 1632

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

25 Plaintiffs allege that their loan should be rescinded due  
26 to fraud. A contract may be rescinded if the consent of the  
27 party rescinding was obtained through fraud or mistake. Cal.  
28 Civ. Code § 1689(b)(1). "In all averments of fraud or mistake,

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

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

2 Plaintiffs allege that Defendant violation the Rosenthal  
3 Fair Debt Collection Practices Act ("RFDCPA"). The RFDCPA limits  
4 debt collection agencies and creditors' ability to collect  
5 debts. Cal. Civ. Code § 1788, et seq. Plaintiffs allege that  
6 Defendant, through its actions, violated the RFDCPA. These  
7 allegations are mere legal conclusions. Plaintiffs do not allege  
8 specific actions by Defendant that amount to threats to collect  
9 debt.  
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12 Moreover, Plaintiffs have failed to provide support  
13 demonstrating that the RFDCPA applies to the Defendant in this  
14 case, as it is impossible to support a claim under the FDCPA  
15 based on foreclosure of a residential mortgage. See Fuentes v.  
16 Duetsche Bank, 2009 WL 1971610 (S.D. Cal. July 8, 2009)  
17 (granting defendant's motion for judgment on the pleadings  
18 "[s]ince a residential mortgage is not a debt and a home  
19 foreclosure is not debt collection within the meaning of the  
20 statute"); Gamboa v. Trustee Corps, 2009 WL 656285 (N.D. Cal.  
21 Mar. 12, 2009). Accordingly, the claim for unfair debt  
22 collection practices is dismissed, with prejudice.  
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26 V. Unfair Business Practices

27 The California Business & Professions Code § 17200  
28 prohibits unfair competition including any "unlawful, unfair or

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

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

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

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17 Plaintiffs do not state a claim for breach of fiduciary  
18 duty. Defendant is the "mere lender of money" in this case and  
19 holds no fiduciary duty towards Plaintiffs. Accordingly,  
20 Plaintiffs' claim for breach of fiduciary duty is dismissed,  
21 with prejudice.

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24 VII. Declaratory Relief

25 Plaintiffs' tenth cause of action requests declaratory  
26 relief in order for Plaintiffs to ascertain their right under  
27 the contract and to determine Defendant's right to proceed with  
28 the non-judicial foreclosure.

1 "Declaratory relief is only appropriate (1) when the  
2 judgment will serve a useful purpose in clarifying and settling  
3 the legal relations in issue, and (2) when it will terminate and  
4 afford relief from the uncertainty, insecurity, and controversy  
5 giving rise to the proceeding." Guerra v. Sutton, 783 F.2d 1371,  
6 1376 (9th Cir. 1986) (citations omitted).

8 Plaintiffs have failed to state a claim to meet these  
9 criteria. Accordingly, Plaintiffs' tenth cause of action for  
10 declaratory relief is dismissed, with prejudice.  
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#### 12 13 VIII. Injunctive Relief

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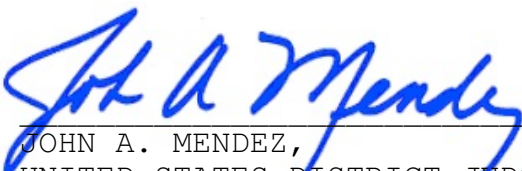
1 above. Accordingly, Plaintiffs' tenth cause of action for  
2 injunctive relief is dismissed, with prejudice.  
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6 III. ORDER

7 For the reasons set forth above, Defendant's Motion to  
8 Dismiss is hereby GRANTED, WITH PREJUDICE.  
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10 IT IS SO ORDERED.

11 Dated: April 14, 2010

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14 JOHN A. MENDEZ,  
15 UNITED STATES DISTRICT JUDGE  
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