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8	UNITED STATES DISTRICT COURT
9	EASTERN DISTRICT OF CALIFORNIA
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11	JULIE AND DANIEL BURTOVOY, No. 2:10-cv-02497-MCE-JFM
12	Plaintiffs,
13	v. <u>MEMORANDUM AND ORDER</u>
14	JP MORGAN CHASE N.A., AMERICAN MORTGAGE NETWORK INC.,
15	WACHOVIA MORTGAGE CORPORATION, NDEX WEST LLC, STEWART TITLE
16	COMPANY,
17	Defendants.
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20	Plaintiffs Julie and Daniel Burtovoy ("Plaintiffs") seek
21	redress from Defendants JP Morgan Chase N.A., American Mortgage
22	Network Inc., Wachovia Mortgage Corporation, Ndex West LLC, and
23	Stewart Title Company ("Defendants") based on alleged violations
24	of the Truth in Lending Act ("TILA") and other various state law
25	claims.
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Presently before the Court are Defendants JP Morgan Chase N.A.
("Chase") and Wachovia Mortgage Corporation's ("Wachovia")
Motions to Dismiss Plaintiffs' Complaint for failure to state a
claim upon which relief may be granted, pursuant to Federal Rule
of Civil Procedure 12(b)(6).<sup>1</sup> For the reasons set forth below,
Defendants' Motions to Dismiss are both granted.<sup>2</sup>

## BACKGROUND<sup>3</sup>

10 This action stems from a set of two residential mortgage 11 loans on a single residential property. Plaintiffs had two loans 12 on their property, at least one of which was issued through 13 Chase. On October 1, 2007, a deed of trust was recorded against 14 the property through Defendant Ndex West LLC ("Ndex"). Plaintiff 15 contends that Ndex refused any tender of arrearage on at least 16 one of their mortgages. Plaintiffs' home was foreclosed upon.

Plaintiffs allege the foreclosure was invalid because they had notified the lender of their right to rescind the mortgage, pursuant to TILA, prior to the foreclosure sale, however do not specify which lender they contacted, or which mortgage is even at issue.

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<sup>24</sup> <sup>1</sup> All further references to "Rule" or "Rules" are to the Federal Rules of Civil Procedure unless otherwise noted.

<sup>2</sup> Because oral argument will not be of material assistance, the Court deemed this matter suitable for decision without oral argument. E.D. Cal. Local Rule 230 (g).

<sup>3</sup> The factual assertions in this section are based on the allegations in Plaintiffs' Complaint unless otherwise specified.

It is also unclear which mortgage and lender Plaintiffs claim is 1 2 in violation of TILA.<sup>4</sup> Because the property has been sold, leaving Wachovia with no interest, Plaintiffs request that 3 Defendant Wachovia be dismissed without prejudice. However, 4 Plaintiffs re-assert that Chase indicated its interest and intent 5 to foreclose on the property in a notice mailed to Plaintiffs in 6 December 2009. 7

Wachovia and Chase have each filed a timely Motion to 8 Dismiss. Chase contends it has no involvement in either loan, 9 10 never had a recorded interest in the property. (Mot. To Dismiss 1.) Both Motions to Dismiss contend that Plaintiffs' 11 claims against each fail to state facts sufficient to show any 12 alleged misconduct. 13

### STANDARD

On a motion to dismiss for failure to state a claim under 17 18 Rule 12(b)(6), all allegations of material fact must be accepted 19 as true and construed in the light most favorable to the nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 20 337-38 (9th Cir. 1996). Rule 8(a)(2) requires only "a short and 21 22 plain statement of the claim showing that the pleader is entitled 23 to relief," to "give the defendant fair notice of what the...claim is and the grounds upon which it rests." 24

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<sup>&</sup>lt;sup>4</sup> Wachovia, in their Motion to Dismiss, asserts that Plaintiffs' TILA claim is most likely against the first mortgage 27 on the home that was originally assigned to Chase. According to Wachovia, this first mortgage was the one foreclosed upon, and 28 therefore they have no involvement in the matter.

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal 1 2 citations and quotations omitted). Though "a complaint attacked by a Rule 12(b)(6) motion" need not contain "detailed factual 3 allegations, a plaintiff's obligation to provide the 'grounds' of 4 his 'entitlement to relief' requires more than labels and 5 conclusions, and a formulaic recitation of the elements of a 6 cause of action will not do." Id. at 555 (quoting Papasan v. 7 Allain, 478 U.S. 265, 2869 (1986)). A plaintiff's "factual 8 9 allegations must be enough to raise a right to relief above the speculative level." Id. (citing 5 C. Wright & A. Miller, Federal 10 Practice and Procedure § 1216 (3d ed. 2004) ("[T]he pleading must 11 12 contain something more...than...a statement of facts that merely creates a suspicion [of] a legally cognizable right of 13 action.")). 14

Further, "Rule 8(a)(2)...requires a 'showing,' rather than a 15 blanket assertion, of entitlement to relief. Without some 16 17 factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirements of providing...grounds on 18 which the claim rests." Twombly, 550 U.S. at 555 n.3 (internal 19 citations omitted). A pleading must then contain "only enough 20 facts to state a claim to relief that is plausible on its face." 21 Id. at 570. If the "plaintiffs...have not nudged their claims 22 23 across the line from conceivable to plausible, their complaint 24 must be dismissed." Id.

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1 Once the court grants a motion to dismiss, they must then 2 decide whether to grant a plaintiff leave to amend. Rule 15(a) authorizes the court to freely grant leave to amend when there is 3 no "undue delay, bad faith, or dilatory motive on the part of the 4 movant." Foman v. Davis, 371 U.S. 178, 182 (1962). 5 In fact, leave to amend is generally only denied when it is clear that the 6 deficiencies of the complaint cannot possibly be cured by an 7 See DeSoto v. Yellow Freight Sys., Inc., 8 amended version. 9 957 F.2d 655, 658 (9th Cir. 1992); Balistieri v. Pacifica Police Dept., 901 F. 2d 696, 699 (9th Cir. 1990) ("A complaint should 10 not be dismissed under Rule 12(b)(6) unless it appears beyond 11 doubt that the plaintiff can prove no set of facts in support of 12 his claim which would entitle him to relief.") (internal 13 citations omitted). 14

### ANALYSIS

Plaintiffs allege violations of state and federal law and 18 19 request relief accordingly. However, the issue before the Court 20 is not the substance of these various claims, but whether 21 Plaintiff has plead enough facts on the federal claim as a 22 general matter, for any to stand. While the complaint does not 23 need detailed factual allegations, it must still provide 24 sufficient facts alleged under a cognizable legal theory. See 25 supra. 111

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## A. TILA Claim

Plaintiffs appear to assert violations of TILA, though the Complaint does not clearly assert against which Defendant the claim is asserted. Further, Plaintiffs do not specifically assert whether they are seeking civil damages or rescission under TILA. Plaintiffs also do not assert the grounds upon which they are owed relief under TILA, other than regarding the nature of the original loan documents.

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# 1. Wachovia's Motion to Dismiss

13 Wachovia asserts it is not clear what declaratory relief Plaintiffs are seeking from it as a Defendant, or if the TILA 14 15 violation is even targeted toward Wachovia at all. Wachovia alleges the TILA violation is only related to the first mortgage 16 17 in the Complaint since this was the mortgage that Plaintiffs 18 defaulted on, which commenced foreclosure proceedings. Since Wachovia has no interest in the first mortgage, Wachovia's Motion 19 20 asserts the TILA violation does not appear to be directed toward 21 it as a Defendant. Nowhere in the complaint do Plaintiffs assert facts showing any violation by Wachovia, or assert that the 22 second loan is in violation of TILA. 23

Plaintiffs have not asserted enough facts or asserted a claim with enough specificity to put Defendant Wachovia on notice of a cognizable issue. First, it is unclear if the claimed TILA violations are directed toward defendant Wachovia. Second, what relief Plaintiffs seek under TILA is not stated with specificity.

1 Under the <u>Twombly</u> standard, while a complaint need not contain 2 detailed factual allegations, it must contain enough facts to 3 state a claim and raise a right to relief above a speculative 4 level. <u>See supra</u>. Plaintiffs have not pled enough facts to nudge 5 the claim over the line to sustainable. Accordingly, Wachovia's 6 Motion to Dismiss is granted.

7 In addition, in Plaintiffs' Response in Opposition to the Motion to Dismiss, Plaintiffs request dismissal without prejudice 8 9 of Defendant Wachovia, as the sale of the property left Wachovia with no interest. See ECF No. 12. An action may be dismissed at 10 the plaintiff's request by court order, on terms that the court 11 12 considers proper according to Rule 41(a)(2). A plaintiff is generally permitted to dismiss an action without prejudice, so 13 long as any defendant will not be prejudiced by such action. See 14 15 Stevedoring Services of America v. Armilla Intern. B.V., 889 F.2d 919, 921 (9th Cir. 1989). No Defendant has filed any opposition 16 17 to the Plaintiffs' request to release Wachovia as a Defendant 18 without prejudice, and no Defendant will be prejudiced by such 19 action. Accordingly Plaintiffs' request to release Wachovia as a 20 Defendant is granted.

2. Chase's Motion to Dismiss

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Chase believes it was erroneously sued, stating that it does not currently have, and never has had, a recorded interest in the property. Chase Home Finance was assigned all beneficial interest in the first loan on October 1, 2007. (<u>See</u> Mot. Diss. ECF No. 8, Ex. 4.)

Chase Home Finance also sent a notice of intent to foreclose to
 the Plaintiffs. However, it is unclear from the record the
 relationship between JP Morgan Chase and Chase Home Finance.

Further, Plaintiffs have not asserted enough facts or 4 asserted a claim with enough specificity to put Defendant Chase 5 on notice of a cognizable issue. Again it is unclear if the 6 claimed TILA violations are directed toward Defendant Chase. 7 The Complaint merely asserts that Defendant improperly conducted the 8 9 sale due to violations of TILA regarding the nature of the 10 original loan documents. While Chase apparently was the assigned beneficiary of the deed of trust related to the foreclosure, it 11 12 is unclear here exactly who Plaintiffs are alleging violated 13 TILA. Further no facts supporting the allegation that a Defendant violated TILA are given, except the vague statement 14 that the lender was notified regarding the right of rescission by 15 the Plaintiffs. Again no specific lender is named, and no 16 17 reference or facts are given surrounding this apparent 18 communication. Under the Twombly standard, while a complaint 19 need not contain detailed factual allegations, it must contain 20 enough facts to state a claim and raise a right to relief above a 21 speculative level. See supra. Plaintiffs have not pled enough 22 facts to nudge the claim over the line to sustainable. 23 Accordingly, Chase's Motion to Dismiss is granted. 24 | | |

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#### в. Plaintiffs' Remaining Causes of Action

3 Plaintiffs' federal claim presently dismissed, the Court declines to exercise supplemental jurisdiction over the remaining state cause of action. The Court need not address the merits of 5 Defendants' Motions to Dismiss with respect to the remaining 6 state law causes of action, as those issues are now moot.

## CONCLUSION

For the reasons stated above, Defendants Wachovia and Chase's Motions to Dismiss (ECF Nos. 6 and 8, respectively) are GRANTED with leave to amend. Defendant Wachovia is DISMISSED without prejudice. Plaintiffs have not demonstrated any bad faith or other malicious conduct, and therefore may file an amended complaint not later than twenty (20) days after the date this Memorandum and Order is filed electronically. If no amended complaint is filed within said twenty (20)-day period, without further notice, Plaintiffs' claims will be dismissed without leave to amend.

IT IS SO ORDERED.

Dated: December 2, 2010

MORRISON С. ENGLAND UNITED STATES DISTRICT JUDGE

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