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United States District Court  
For the Northern District of California

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

MARTIN VRABEL, SOPHIE VRABEL,  
Plaintiffs,  
v.  
JP MORGAN CHASE BANK, N.A. et al.,  
Defendants

No. C-C-09-1278 MMC

**ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS; DENYING AS  
MOOT DEFENDANTS' MOTION TO  
STRIKE; VACATING HEARING**

Before the Court are defendants JP Morgan Chase Bank, N.A. ("Chase"),<sup>1</sup> and California Reconveyance Company's ("CRC") motion to dismiss plaintiffs' amended complaint ("AC"), and defendants' motion to strike, both filed June 24, 2009. Plaintiffs Martin and Sophie Vrabel have not filed opposition to either motion.<sup>2</sup> Having read and considered the papers filed in support of the motions, the Court deems the matters suitable for decision on the moving papers, VACATES the hearing scheduled for August 14, 2009, and rules as follows.

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<sup>1</sup>Defendant JP Morgan Chase Bank, N.A., has appeared herein "for itself" and as "an acquirer of certain assets and liabilities of Washington Mutual Bank from the Federal Deposit Insurance Corporation acting as receiver." (See Defs.' Mot. to Dismiss at 1:8-11.)

<sup>2</sup>Under the Local Rules of this District, plaintiffs' response was due no later than July 24, 2009. See Civil L.R. 7-3(a) (providing opposition "must be served and filed not later than 21 days before the hearing date").

1 **A. Motion to Dismiss**

2 The AC includes three causes of action arising under federal law, three causes of  
3 action arising under state law, and a cause of action titled “injunctive relief” by which  
4 plaintiffs appear to seek a remedy under both federal and state law. Defendants argue  
5 that each of plaintiffs’ causes of action is subject to dismissal.

6 **1. Federal Claims**

7 **a. First Cause of Action (“Violation of RESPA”)**

8 In their First Cause of Action, plaintiffs allege defendants violated the Real Estate  
9 Settlement Procedures Act (“RESPA”), by “failing to make and provide the required written  
10 disclosures” and by “making and collecting prohibited charges.” (See AC ¶ 39).

11 Defendants argue plaintiffs’ RESPA claim is barred by the statute of limitations. The  
12 Court agrees. Plaintiffs filed their initial complaint on March 24, 2009. Although the AC  
13 does not state when defendant failed to make disclosures, or “ma[de] and collect[ed]”  
14 improper charges (see id.), the AC alleges the loans on the subject real property were  
15 made in 1991 (see AC ¶¶ 17, 18), which events necessarily set the time of any violations  
16 alleged to have occurred in connection with the settlement. See 12 U.S.C. § 2601(b)  
17 (providing purpose of RESPA is “to effect certain changes in the settlement process for  
18 residential real estate”). Because the longest statute of limitations available under RESPA  
19 is three years, see 12 U.S.C. § 2614, plaintiffs’ RESPA claims were barred well over a  
20 decade before plaintiffs filed their initial complaint in March 2009.

21 As noted, plaintiffs have failed to file opposition and, as a result, have not shown  
22 how they could amend to cure the above-referenced deficiency.<sup>3</sup> Nor is there any  
23 indication from the face of the AC how plaintiffs could allege a timely claim based on any  
24 violations of RESPA occurring in connection with loans settled in 1991.

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27 <sup>3</sup>By order filed earlier in the action, plaintiffs were afforded leave to amend to cure  
28 the deficiencies noted in their initial complaint, which order gave rise to the instant  
amended pleading. (See Order Dismissing Complaint with Leave to Amend, filed April 28,  
2009.)

1           Accordingly, the First Cause of Action is subject to dismissal without leave to  
2 amend.

3                           **b. Second Cause of Action (“Violation of 15 USC Section 1692”)**

4           In their Second Cause of Action, plaintiffs allege defendants violated certain  
5 provisions of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p (“FDCPA”)

6           Defendants argue plaintiffs have failed to state a claim under any of the sections of  
7 the FDCPA referenced in the AC. The Court agrees.

8           First, the AC alleges defendants violated § 1692e(11) by “failing to provide a  
9 validation notice.” (See AC ¶ 46.a.) Specifically, plaintiffs allege that defendants have not  
10 provided plaintiffs with “evidence” that defendants have an interest secured by plaintiffs’  
11 real property. (See AC ¶¶ 15, 30, 32-34.) Section 1692e(11), however, is not implicated  
12 by plaintiffs’ allegation. Section 1692e(11) prohibits the failure of a debt collector to  
13 disclose “in the initial written [or oral] communication with [a] consumer” that the debt  
14 collector is “attempting to collect a debt and that any information obtained will be used for  
15 that purpose,” see 15 U.S.C. § 1692e(11); the AC does not allege any defendant failed to  
16 make a disclosure required by § 1692e(11). Moreover, plaintiffs do not allege that any  
17 defendant has attempted to collect a debt. Although the AC alleges that Chase has  
18 “schedul[ed] [plaintiffs’ real property] for [a] trustee sale” (see AC ¶ 13), foreclosing on a  
19 mortgage does not constitute an attempt to collect a debt for purposes of the FDCPA. See  
20 Trent v. Mortgage Electronic Registration Systems, Inc., 618 F. Supp. 2d 1356, 1360-61  
21 (M.D. Fla. 2007) (citing cases).

22           Second, the AC alleges defendants violated § 1692e(10) by using “false or  
23 misleading representations or deceptive means to collect or attempt to collect a debt” (see  
24 AC ¶ 46.b), and that defendants violated § 1692f by using “unfair or unconscionable means  
25 to collect or attempt to collect [a] debt (see AC ¶ 46.c). As defendants point out, however,  
26 the AC fails to identify any alleged wrongdoing by a defendant in connection with an  
27 attempt to collect a debt. The Court agrees. As discussed above, plaintiffs’ allegation that  
28 Chase has scheduled a trustee sale is, as a matter of law, insufficient to plead such a

1 claim.

2 Again, as noted, plaintiffs have not filed opposition to the instant motion, and, as a  
3 result, have failed to show how they could cure the above-referenced deficiencies.  
4 Moreover, because a foreclosure is not an attempt to collect a debt, further leave to provide  
5 additional facts concerning any attempt(s) to foreclose would be futile.

6 Accordingly, the Second Cause of Action is subject to dismissal without leave to  
7 amend.

8 **c. Seventh Cause of Action (“Violation of 15 USC Section 1611”)**

9 In their Seventh Cause of Action, plaintiffs allege defendants violated 15 U.S.C.  
10 § 1611, which provides criminal penalties for certain violations of the Truth in Lending Act  
11 (“TILA”). Plaintiffs, however, cannot seek to recover criminal penalties in a civil action.

12 Defendants, who assume plaintiffs are seeking to recover civil penalties available for  
13 a violation of TILA, see 15 U.S.C. § 1640(a) (providing private cause of action against  
14 “creditor” for violation of TILA), argue plaintiffs cannot establish that any defendant is a  
15 “creditor” for purposes of TILA. The Court agrees.

16 A “creditor,” for purposes of TILA, must be “the person to whom the debt arising  
17 from the consumer credit transaction is initially payable.” See 15 U.S.C. § 1602(f). Here,  
18 plaintiffs allege that the loans at issue herein were initially made by “Great Western Savings  
19 Bank” in 1991 (see AC ¶¶ 17, 18); consequently, plaintiffs are not entitled to relief under  
20 TILA against any of the named defendants.

21 Accordingly, the Seventh Cause of Action is subject to dismissal without leave to  
22 amend.

23 **d. Fourth Cause of Action (“Injunctive Relief”)**

24 In their Fourth Cause of Action, plaintiffs seek an order prohibiting a “non-judicial  
25 sale” of plaintiffs’ real property that was scheduled by defendants for June 8, 2009. (See  
26 AC ¶ 52.) As it is not clear that such claim has become moot, the Court will address its

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1 merits.<sup>4</sup> Plaintiffs allege they are entitled to an injunction prohibiting the foreclosure in light  
2 of defendants' "wrongful conduct." (See AC ¶ 53.) As discussed above, however, plaintiffs  
3 have failed to state any federal claim against defendants and have failed to show their  
4 entitlement to further amend their federal claims. Consequently, plaintiffs have failed to  
5 allege sufficient facts to establish their entitlement to any relief, let alone an injunction,  
6 under federal law.

7 Accordingly, to the extent the Fourth Cause of Action is based on the above-  
8 referenced alleged violations of federal law, the Fourth Cause of Action is subject to  
9 dismissal without leave to amend.

## 10 **2. State Law Claims**

11 Plaintiffs' Third, Fifth, and Sixth Causes of Action arise under state law, as does their  
12 Fourth Cause of Action to the extent said cause of action is based on alleged violations of  
13 state law. Plaintiffs allege the Court has supplemental jurisdiction over their state law  
14 claims. (See AC ¶ 1.)

15 Where, as here, all claims over which a district court has original jurisdiction have  
16 been dismissed, a court may decline to exercise supplemental jurisdiction over the  
17 remaining claims. See 28 U.S.C. § 1367(c)(3). Here, in light of the relatively early stage of  
18 the proceedings, the Court declines to exercise supplemental jurisdiction over plaintiffs'  
19 state law claims, and, accordingly, will dismiss the state law claims without prejudice to  
20 plaintiffs' refiling such claims in state court.

## 21 **B. Motion to Strike**

22 In their motion to strike, defendants seek an order striking plaintiffs' prayer for  
23 punitive damages and for an award of attorney's fees. In light of the dismissal of the AC,  
24 defendants' motion to strike will be denied as moot.

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28 <sup>4</sup>As noted, defendants filed the instant motion on June 24, 2009. Defendants do not  
state therein whether the foreclosure proceeded as scheduled on June 8, 2009.

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**CONCLUSION**

For the reasons stated above:

1. Defendants' motion to dismiss is hereby GRANTED, as follows:


a. The First, Second, and Seventh Causes of Action, as well as the Fourth Cause of Action to the extent it is based on federal law, are hereby DISMISSED without leave to amend.

b. The Third, Fifth, and Sixth Causes of Action, as well as the Fourth Cause of Action to the extent it is based on state law, are hereby DISMISSED without prejudice to plaintiffs' refiling said claims in state court.

2. Defendants' motion to strike is hereby DENIED as moot.

**IT IS SO ORDERED.**

Dated: August 6, 2009

  
MAXINE M. CHESNEY  
United States District Judge