

## IN THE UNITED STATES DISTRICT COURT

## FOR THE NORTHERN DISTRICT OF CALIFORNIA

VERONICA NEWBECK and JOHN J.  
FORD, III,

No. C 09-1599 CW

Plaintiffs,

ORDER GRANTING  
DEFENDANTS' MOTIONS  
TO DISMISS  
(Docket Nos. 37 and  
39)

v.

WASHINGTON MUTUAL BANK and PLAZA HOME  
MORTGAGE, INC.,

Defendants.

Plaintiffs Veronica Newbeck and John J. Ford, III charge Defendants Washington Mutual Bank and Plaza Home Mortgage, Inc. with failing to disclose information in violation of federal and state law. JP Morgan Chase, N.A., as receiver of Washington Mutual's assets and liabilities, and Plaza Home move separately to dismiss Plaintiffs' Amended Complaint. (Docket Nos. 37 and 39.) Plaintiffs oppose the motions. The motions were decided on the papers. Having considered all of the papers submitted by the parties, the Court GRANTS Chase's<sup>1</sup> and Plaza Home's motions.

BACKGROUND

Because the Court's Order of January 19, 2010 (Docket No. 32) explains the facts of this case in sufficient detail, Plaintiffs'

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<sup>1</sup> Although Chase has succeeded to Washington Mutual's assets and liabilities, because Plaintiffs name Washington Mutual as a Defendant, the Court refers to the conduct as that of Washington Mutual, not Chase.

1 allegations will not be repeated here in their entirety. In sum,  
2 Plaintiffs allege that Plaza Home and Washington Mutual engaged in  
3 unlawful conduct in connection with a loan, secured by property at  
4 230 Cordova Street in San Francisco, California. Plaintiffs  
5 maintain that Plaza Home and Washington Mutual perpetrated fraud in  
6 the loan origination process and that they lacked standing to  
7 foreclose on the property.

8 On January 19, 2010, the Court granted Defendants' first  
9 motions to dismiss. (Docket No. 32.) Plaintiffs were granted  
10 leave to amend their complaint to cure the deficiencies identified  
11 in the Court's Order. Plaintiffs filed an amended complaint on  
12 February 2, 2010.

## LEGAL STANDARD

14 A complaint must contain a "short and plain statement of the  
15 claim showing that the pleader is entitled to relief." Fed. R.  
16 Civ. P. 8(a). When considering a motion to dismiss under Rule  
17 12(b)(6) for failure to state a claim, dismissal is appropriate  
18 only when the complaint does not give the defendant fair notice of  
19 a legally cognizable claim and the grounds on which it rests.  
20 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). In  
21 considering whether the complaint is sufficient to state a claim,  
22 the court will take all material allegations as true and construe  
23 them in the light most favorable to the plaintiff. NL Indus., Inc.  
24 v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, this  
25 principle is inapplicable to legal conclusions; "threadbare  
26 recitals of the elements of a cause of action, supported by mere  
27 conclusory statements," are not taken as true. Ashcroft v. Iqbal,  
28 \_\_\_ U.S. \_\_\_, 129 S. Ct. 1937, 1949-50 (2009) (citing Twombly, 550

1 U.S. at 555).

2 DISCUSSION

3 Plaintiffs' opposition does not directly respond to  
4 Defendants' motions to dismiss. Plaintiffs merely state, "The  
5 arguments have been made. They will not be repeated . . . ."  
6 Opp'n at 2. They then refer to the argument, already rejected by  
7 the Court, that Plaza Home and Washington Mutual lacked standing to  
8 foreclose on the Cordova Street property.

9 Plaintiffs do not appear to have amended their complaint in  
10 any material way. For the reasons stated below, the Court  
11 dismisses their claims against Defendants with prejudice.

12 I. Liability of Chase on Plaintiffs' Claims

13 For the first time in this litigation, Chase contends that it  
14 cannot be held liable on Plaintiffs' claims. Chase asserts that,  
15 when it agreed to purchase and assume Washington Mutual's assets  
16 and liabilities from the Federal Deposit Insurance Corporation  
17 (FDIC), it did not assume any liability for any claims by borrowers  
18 related to loans made or held by Washington Mutual. Chase's  
19 agreement with the FDIC provides,

20 Notwithstanding anything to the contrary in this  
21 Agreement, any liability associated with borrower claims  
22 for payment of or liability to any borrower for monetary  
23 relief, or that provide for any other form of relief to  
24 any borrower, whether or not such liability is reduced to  
25 judgment, liquidated or unliquidated, fixed or  
26 contingent, matured or unmatured, disputed or undisputed,  
27 legal or equitable, judicial or extra-judicial, secured  
or unsecured, whether asserted affirmatively or  
defensively, related in any way to any loan or commitment  
to lend made by the Failed Bank prior to failure, or to  
any loan made by a third party in connection with a loan  
which is or was held by the Failed Bank, or otherwise  
arising in connection with the Failed Bank's lending or  
loan purchase activities are specifically not assumed by  
the Assuming Bank.

28

1 Chase's Request for Judicial Notice (RJN),<sup>2</sup> Ex. 7 § 2.5. Based on  
2 this provision, courts have held that the FDIC, not Chase, is the  
3 real party in interest concerning borrowers' claims arising from  
4 loans made or held by Washington Mutual. See, e.g., Yeomalakis v.  
5 FDIC, 562 F.3d 56, 60 (1st Cir. 2009); Hilton v. Wash. Mut. Bank,  
6 2009 WL 3485953, at \*2-\*3 (N.D. Cal.). Plaintiffs did not respond  
7 to this argument.

8 Because Plaintiffs' claims are related to a loan that was held  
9 by Washington Mutual, Chase's agreement with the FDIC requires  
10 dismissal of Plaintiffs' claims against it. Even if Chase were an  
11 appropriate Defendant or Plaintiffs had sued the FDIC, their claims  
12 would nevertheless fail for the reasons detailed below.

13 II. TILA Claims

14 Plaintiffs assert that Plaza Home and Washington Mutual  
15 violated TILA by failing to disclose information regarding the  
16 loan's interest rate and the potential for negative amortization.  
17 Plaintiffs seek rescission of the loan and statutory damages.

18 As noted in the Court's prior Order, because Plaintiffs'  
19 property has already been sold, they no longer have a right to  
20 rescission. 15 U.S.C. § 1635(f). Even if they had such a right, a  
21 debtor seeking rescission must "tender the property to the creditor  
22 . . . or its reasonable value." Id. § 1635(b). Plaintiffs have  
23 not plead that they are able to do so. Thus, Plaintiffs are not

24 \_\_\_\_\_  
25 <sup>2</sup> Chase asks the Court to take judicial notice of documents  
related to the subject loan and its acquisition of the assets and  
liabilities of Washington Mutual. Plaintiffs do not oppose this  
request. Because the documents contain facts "capable of accurate  
and ready determination by resort to sources whose accuracy cannot  
reasonably be questioned," the Court grants Chase's request. Fed.  
R. Evid. 201(b).

1 entitled to the rescission of their loan.

2 Plaintiffs' claim for damages is untimely. The subject loan  
3 was obtained on December 17, 2006. Under the relevant statute of  
4 limitations, Plaintiffs must have filed suit for damages by  
5 December 17, 2007. 15 U.S.C. § 1640(e). In their amended  
6 complaint, Plaintiffs appear to seek equitable tolling of the  
7 limitations period for damages. See Am. Compl. at 30:23-25  
8 (stating that the statute of limitations on their claim for damages  
9 begins to "run when the violation occurs, or when the borrower  
10 discovers that a violation has occurred . . . .") (emphasis in  
11 original). Plaintiffs do not, however, plead facts to show that  
12 equitable tolling is warranted. They do not aver that they were  
13 prevented from discovering, in the exercise of reasonable  
14 diligence, the information necessary to bring these damages claims  
15 within the one-year limitations period. See, e.g., Meyer v.  
16 Ameriquest Mortgage Co., 342 F.3d 899, 902 (9th Cir. 2003); Linqad  
17 v. Indymac Fed. Bank, 682 F. Supp. 2d 1142, 1147 (E.D. Cal. 2010)  
18 (rejecting equitable tolling at pleading stage when "plaintiff  
19 fails to allege any facts demonstrating that the TILA violations  
20 alleged could not have been discovered by due diligence") (citing  
21 Meyer). Indeed, their amended pleading is devoid of any averments  
22 concerning the discovery of the alleged non-disclosures. As a  
23 result, Plaintiffs are not entitled to equitable tolling.

24 Accordingly, Plaintiffs' claims for rescission and damages  
25 under TILA are dismissed with prejudice. Any right to rescission,  
26 assuming one existed, expired upon the sale of Plaintiffs'  
27 property. Plaintiffs were required to file a damages claim by  
28 December 17, 2007, one year from the date the loan documents were

1 | signed.

2 III. Claim under California Business and Professions Code § 17200  
3 California's Unfair Competition Law (UCL) prohibits any  
4 "unlawful, unfair or fraudulent business act or practice." Cal.  
5 Bus. & Prof. Code § 17200. The UCL incorporates other laws and  
6 treats violations of those laws as unlawful business practices  
7 independently actionable under state law. Chabner v. United Omaha  
8 Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000). Violation of  
9 almost any federal, state or local law may serve as the basis for a  
10 UCL claim. Saunders v. Superior Court, 27 Cal. App. 4th 832, 838-  
11 39 (1994). In addition, a business practice may be "unfair or  
12 fraudulent in violation of the UCL even if the practice does not  
13 violate any law." Olszewski v. Scripps Health, 30 Cal. 4th 798,  
14 827 (2003).

15 Plaintiffs continue to base their UCL claim on Plaza Home's  
16 and Washington Mutual's alleged violations of TILA and California  
17 Financial Code section 22302 and on their alleged "unfair and  
18 fraudulent"<sup>3</sup> business practices. In its January 19 Order, the  
19 Court concluded that the Home Owners' Loan Act of 1933 and

<sup>3</sup> Although Plaintiffs also label Plaza Home's and Washington Mutual's conduct as "unfair," their allegations only refer to fraudulent conduct. See, e.g., Am. Compl. ¶ 106 (stating that Plaza Home and Washington Mutual engaged in marketing in a "false or deceptive manner"); id. ¶ 110 (alleging that Plaza Home failed to disclose information). The Court therefore understands Plaintiffs to plead the fraud prong of the UCL, not the unfair prong. Even if Plaintiffs intended to plead the unfair prong, they have not alleged facts to support such a claim. To allege an unfair practice under the UCL, a plaintiff must plead that "(1) the consumer injury is substantial, (2) the injury is not outweighed by any countervailing benefits to consumers or competition, and (3) the injury is one that consumers themselves could not reasonably have avoided." Morgan v. AT&T Wireless Svcs., Inc., 177 Cal. App. 4th 1235, 1254-55 (2009) (citation omitted). Plaintiffs do not make such allegations.

1 regulations promulgated by the Office of Thrift Supervision preempt  
2 Plaintiffs' UCL claim to the extent that it is based on alleged  
3 violations of TILA and "unfair and fraudulent" business practices  
4 related to non-disclosure and the terms of the loan. Because  
5 Plaintiffs' UCL claim, insofar as it is based on this theory, was  
6 already dismissed with prejudice, the Court does not consider it  
7 here.

8 Plaintiffs also base their UCL claim on a violation of  
9 California Financial Code section 22302, which prohibits  
10 unconscionable loan contracts. The Court previously dismissed this  
11 claim, but granted Plaintiffs leave to amend to clarify whether  
12 they complained of an inability to review the loan documents or the  
13 substantive terms of the loan. Plaintiffs have not amended their  
14 vague allegations concerning this theory. Because their complaint  
15 lacks factual allegations that show procedural or substantive  
16 unconscionability, they cannot maintain their UCL claim on a  
17 violation of California Financial Code section 22302.

18 Accordingly, Plaintiffs' UCL claim is dismissed with  
19 prejudice.

20 IV. Fraud Claim

21 Plaintiffs allege that Plaza Home's and Washington Mutual's  
22 failure to disclose information constituted fraud under California  
23 law. To state a claim for fraud, a plaintiff must plead  
24 "'(a) misrepresentation; (b) knowledge of falsity (or  
25 scienter); (c) intent to defraud, i.e., to induce reliance;  
26 (d) justifiable reliance; and (e) resulting damage.'" In re  
27 Napster, Inc. Copyright Litig., 479 F.3d 1078, 1096 (9th Cir. 2007)  
28 (quoting Small v. Fritz Cos., Inc., 30 Cal. 4th 167, 173 (2003));

1 see generally Cal. Civ. Code §§ 1709-10. In relevant part, deceit  
2 is defined as the "suppression of a fact, by one who is bound to  
3 disclose it, or who gives information of other facts which are  
4 likely to mislead for want of communication of that fact." Cal.  
5 Civ. Code § 1710.

6 "In all averments of fraud or mistake, the circumstances  
7 constituting fraud or mistake shall be stated with particularity."  
8 Fed. R. Civ. Proc. 9(b). The allegations must be "specific enough  
9 to give defendants notice of the particular misconduct which is  
10 alleged to constitute the fraud charged so that they can defend  
11 against the charge and not just deny that they have done anything  
12 wrong." Semege v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985).  
13 Statements of the time, place and nature of the alleged fraudulent  
14 activities are sufficient, id. at 735, provided the plaintiff sets  
15 forth "what is false or misleading about a statement, and why it is  
16 false." In re GlenFed, Inc., Secs. Litiq., 42 F.3d 1541, 1548 (9th  
17 Cir. 1994). Scienter may be averred generally, simply by saying  
18 that it existed. Id. at 1547; see Fed. R. Civ. Proc. 9(b)  
19 ("Malice, intent, knowledge, and other condition of mind of a  
20 person may be averred generally."). Allegations of fraud based on  
21 information and belief usually do not satisfy the particularity  
22 requirements of Rule 9(b); however, as to matters peculiarly within  
23 the opposing party's knowledge, allegations based on information  
24 and belief may satisfy Rule 9(b) if they also state the facts upon  
25 which the belief is founded. Wool v. Tandem Computers, Inc., 818  
26 F.2d 1433, 1439 (9th Cir. 1987).

27 In its January 19 Order, the Court dismissed with leave to  
28 amend Plaintiffs' fraud claim because they failed to satisfy the

1 heightened pleading requirement of Rule 9(b). Plaintiffs do not  
2 appear to have amended their allegations concerning fraud. They  
3 still do not identify "'the who, what, when, where, and how'" of  
4 the alleged fraud. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097,  
5 1106 (9th Cir. 2003) (quoting Cooper v. Pickett, 137 F.3d 616, 627  
6 (9th Cir. 1997)). Nor do they identify any of Plaza Home's and  
7 Washington Mutual's employees who allegedly perpetrated the fraud.  
8 And, as noted above, they do not even allege Washington Mutual's  
9 role in the origination of the loan.

10 As the Court stated in its prior Order, Plaintiffs cannot base  
11 their fraud claim solely on language in their loan documents and  
12 conclusory allegations that these statements were deceptive. On  
13 their face, these statements disclose the loan's terms. For  
14 instance, the documents state the potential for negative  
15 amortization. Selden Decl., Exs. D-E at 1. Plaintiffs have not  
16 plead how a fraud was perpetrated, despite the language contained  
17 in the disclosure documents.

18 Plaintiffs' fraud claim is therefore dismissed with prejudice.  
19 Plaintiffs have not plead fraud with particularity, nor have they  
20 alleged Washington Mutual's role in the alleged fraud.

21 V. Request to "Set Aside Foreclosure Sale"

22 Plaintiffs reassert their request that the Court set aside  
23 Washington Mutual's foreclosure sale of their property. As noted  
24 above, they repeat their argument concerning Washington Mutual's  
25 standing to foreclose on the property, which the Court rejected in  
26 its January 19 Order.

27 A plaintiff seeking to set aside a foreclosure sale must first  
28 allege tender of the amount of the secured indebtedness. Abdallah

1       v. United Sav. Bank, 43 Cal. App. 4th 1101, 1109 (1996) (citing  
2       FPCI RE-HAB 01 v. E & G Investments, Ltd., 207 Cal. App. 3d 1018,  
3       1021-22 (1989)); Smith v. Wachovia, 2009 WL 1948829, at \*3 (N.D.  
4       Cal.). Without pleading tender or the ability to offer tender, a  
5       plaintiff cannot state a cause of action to set aside a foreclosure  
6       sale. Karlsen v. Am. Sav. & Loan Ass'n, 15 Cal. App. 3d 112, 117  
7       (1971) (citing Copsey v. Sacramento Bank, 133 Cal. 659, 662  
8       (1901)); Smith, 2009 WL 1948829, at \*3 (citing Karlsen).

9              Plaintiffs have not alleged facts that warrant setting aside  
10         the foreclosure sale. Even if they had, Plaintiffs do not allege  
11         tender or the ability to offer tender. Plaintiffs' claim to set  
12         aside the foreclosure sale is dismissed with prejudice.

13 VI. Claim for Declaratory Relief

14              The Declaratory Judgment Act (DJA) permits a federal court to  
15         "declare the rights and other legal relations" of parties to "a  
16         case of actual controversy." 28 U.S.C. § 2201; see Wickland Oil  
17         Terminals v. Asarco, Inc., 792 F.2d 887, 893 (9th Cir. 1986). The  
18         "actual controversy" requirement of the Declaratory Judgment Act is  
19         the same as the "case or controversy" requirement of Article III of  
20         the United States Constitution. Am. States Ins. Co. v. Kearns, 15  
21         F.3d 142, 143 (9th Cir. 1993).

22              Plaintiffs' declaratory judgment claim fails because they have  
23         not alleged facts showing that there is an actual case or  
24         controversy. The foreclosure sale has already been completed, and  
25         this operates as a final adjudication of the rights among the  
26         parties. Accordingly, the Court dismisses Plaintiffs' declaratory  
27         judgment claim with prejudice.

28

1 VII. Mr. Ford's Standing in this Action

2 Plaza Home renews its argument that, because Mr. Ford was not  
3 a party to the mortgage, he lacks standing to bring the claims  
4 asserted in this action. Plaintiffs' amended complaint pleads that  
5 Mr. Ford has standing to bring the asserted claims as "a co-owner  
6 in the property and a signatory to the deed of trust." Am. Compl.  
7 ¶ 15. Further, some loan documents bear Mr. Ford's signature and  
8 the deed of trust names Mr. Ford as a "borrower." See, e.g., RJN,  
9 Ex. 1. However, Mr. Ford did not sign the amended complaint,<sup>4</sup> so  
10 it is not clear that he intends to join this lawsuit.

11 The Court need not resolve this issue because, as noted above,  
12 all claims asserted in the amended complaint are dismissed with  
13 prejudice.

14 CONCLUSION

15 For the foregoing reasons, the Court GRANTS Defendants'  
16 Motions to Dismiss. (Docket Nos. 37 and 39.) Because Plaintiffs  
17 had an opportunity to amend their complaint and did not cure the  
18 defects identified by the Court, their claims are dismissed with  
19 prejudice. Hearns v. San Bernardino Police Dep't, 530 F.3d 1124,  
20 1130-31 (9th Cir. 2008). The Clerk shall enter judgment and close  
21 the file. All parties shall bear their own costs.

22 IT IS SO ORDERED.

23  
24 Dated: August 13, 2010



25  
26 CLAUDIA WILKEN  
27 United States District Judge

28  
29 \_\_\_\_\_  
30 <sup>4</sup> Although the amended complaint filed in the public record  
31 does not contain Ms. Newbeck's signature, it appears on the copy  
32 lodged with the Court.

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

VERONICA NEWBECK, et al.,

Case Number: CV09-01599 CW

Plaintiffs,

**CERTIFICATE OF SERVICE**

v.

WASHINGTON MUTUAL BANK, et al.,

Defendants.

/

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on August 13, 2010, I SERVED a true and correct copy of the attached, by placing said copy in a postage paid envelope addressed to the person hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy into an inter-office delivery receptacle located in the Clerk's office.

Veronica Newbeck  
230 Cordova Street  
San Francisco, CA 94112

Dated: August 13, 2010

Richard W. Wieking, Clerk  
By: MP, Deputy Clerk