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28UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

WALTER L. JOHNSON, SR., et al.,

Plaintiffs,

v.

GREAT WESTERN FUNDING, et al.,

Defendants.

No. C 09-2301 PJH

**ORDER GRANTING MOTIONS  
TO DISMISS**

Before the court is the motion to dismiss of defendant JPMorgan Chase Bank, N.A., as acquirer of certain assets and liabilities of Washington Mutual Bank from the Federal Deposit Insurance Corporation acting as receiver ("JPMorgan"). Also before the court is the motion to dismiss of defendant First American Title Company ("First American"). Plaintiffs filed no opposition to the motions by the date set by Civil Local Rule 7-3. Having read defendants' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby GRANTS the motions.

Plaintiffs Walter L. Johnson, Sr., and Gaynell T. Johnson obtained two loans on May 21, 2005 – one in the amount of \$774,000 and one in the amount of \$186,000. Each of the loans was secured by a deed of trust on real property located at 4108 Fairway Avenue, Oakland, California. As of May 2008, plaintiffs failed to make the loan payments. A notice of default was recorded with the Alameda County Recorder on December 18, 2008. A notice of trustee's sale was recorded with the Alameda County Recorder on May 7, 2009.

Plaintiffs filed this action on May 22, 2009, against Great Western Funding ("Great Western"), Washington Mutual Bank ("Washington Mutual," not JPMorgan), GMAC, First American, and Atefa Samadi ("Samadi"). Plaintiffs allege that Samadi was a mortgage

1 broker, and agent acting on behalf of Great Western, the loan originator (broker). Plaintiffs  
2 allege further that both Washington Mutual (now JPMorgan) and GMAC are loan servicers  
3 and each “is believed to be a successor in interest to Great Western Funding.” Finally,  
4 plaintiffs allege that First American is in the business of providing title services in the  
5 mortgage industry.

6 Plaintiffs allege that defendants failed to disclose the terms of a home refinance  
7 loan. They allege six causes of action – violation of the Truth in Lending Act (“TILA”), 15  
8 U.S.C. § 1635(a) and Regulation Z § 226.23(b); unconscionability - predatory lending;  
9 unfair and deceptive practices, in violation of California Civil Code § 1570, et seq.; breach  
10 of fiduciary duty; fraud; and breach of contract and breach of the implied covenant of good  
11 faith and fair dealing. Plaintiffs seek rescission, declaratory and injunctive relief, and  
12 damages, including punitive damages.

13 At the time the complaint was filed, plaintiffs did not request the clerk to issue  
14 summons. The initial case management conference was held on September 3, 2009, but  
15 plaintiffs did not appear. The court issued an order to show cause re dismissal.

16 On September 17, 2009, the clerk issued a notice re plaintiffs’ counsel’s failure to e-  
17 file or register as an e-filer, and directing plaintiffs to submit a .pdf version of the complaint  
18 within 10 days.

19 Also on September 17, 2009, the court held the hearing on the order to show cause,  
20 at which time the court discharged the order to show cause, and granted plaintiffs’ request  
21 for an additional 30 days to serve defendants. The court directed that the proof of service  
22 as to all defendants be filed no later than October 19, 2009. The court set a further case  
23 management conference for December 10, 2009, and directed that the joint case  
24 management conference statement be filed no later than December 3, 2009.

25 On October 14, 2009, plaintiffs for the first time requested the clerk to issue  
26 summons. On October 19, 2009, plaintiffs filed proof of service of the summons and  
27 complaint on First American and on Washington Mutual (now JPMorgan). No proof of  
28 service has been filed as to Great Western, GMAC, or Samadi.

1           On October 26, 2009, the court issued an order re failure to e-file, directing plaintiffs  
2 to e-mail a .pdf version of the complaint within ten days of the date of the order, in  
3 accordance with General Order 45. The court further advised that “[f]ailure to comply with  
4 this order may result in the imposition of monetary or other sanctions on a daily basis until  
5 the failure to comply with the General Order has been remedied.” To date, plaintiffs have  
6 not complied with the October 26, 2009 order.

7           On November 4, 2009, First American filed the present motion to dismiss the  
8 complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), or in the alternative, a  
9 motion pursuant to Federal Rule of Civil Procedure 12(e) for a more definite statement. On  
10 November 6, 2009, JPMorgan filed the present motion to dismiss pursuant to Rule  
11 12(b)(6). The motions were noticed for hearing on December 16, 2009. As noted above,  
12 plaintiffs filed no opposition to the motions.

13           As an initial matter, JPMorgan seeks dismissal of all claims asserted against it on  
14 the ground that it was not the original lender. The original lender, Washington Mutual Bank  
15 (“Washington Mutual”), was closed by the Office of Thrift Supervision on September 25,  
16 2008. According to JPMorgan, the Federal Deposit Insurance Corporation (“FDIC”) was on  
17 the same date appointed as receiver for Washington Mutual, and the bulk of Washington  
18 Mutual’s assets were transferred to JPMorgan pursuant to a Purchase and Assumption  
19 Agreement entered into between FDIC-Receiver, the FDIC in its corporate capacity, and  
20 JPMorgan. The Agreement provided that JPMorgan did not assume the potential liabilities  
21 of Washington Mutual associated with claims of borrowers.

22           It appears that JPMorgan’s position is correct. Given the absence of any opposition  
23 by plaintiffs, the court is inclined to grant the motion on this basis. However, the court will  
24 give plaintiffs an opportunity to amend the complaint, as indicated in the conclusion of this  
25 order.

26           The court finds further that any claim for TILA violations is time-barred. See 15  
27 U.S.C. § 1640(e). To the extent that plaintiffs seek rescission, that claim is barred as well  
28 because plaintiffs have not alleged that they have the capacity to tender what was received

1 in the original loan transaction. See Yamamoto v. Bank of New York, 329 F.3d 1167, 1171  
2 (9th Cir. 2003). Thus, the first cause of action must be dismissed.

3 The second cause of action for predatory lending is evidently directed at defendants  
4 Great Western and Samadi, as plaintiffs allege that these two defendants used “their  
5 superior positions as lender and broker with knowledge of all the facts relating to the  
6 transaction,” to take advantage of plaintiffs. See Cplt ¶ 41. However, plaintiffs failed to file  
7 a proof of service of the summons and complaint on those defendants by October 19,  
8 2009, as previously ordered by the court. Accordingly, Great Western and Samadi are  
9 dismissed from the case without prejudice.

10 Further, plaintiffs seek in this cause of action to “void” the transaction, which is  
11 another way of saying “rescind” the transaction. However, plaintiffs cannot assert a viable  
12 rescission claim until they validly allege that they have the capacity to tender the loan  
13 proceeds. See Fleming v. Kagan, 189 Cal. App. 2d 791, 796-97 (1961).

14 The fraud claims (third and fifth causes of action) must be dismissed for failure to  
15 plead fraud with particularity, as required by Federal Rule of Civil Procedure 9(b). See In re  
16 GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1547 (9th Cir. 1994). Plaintiffs allegations lack the  
17 specificity required to state a viable fraud claim, and thus these causes of action must be  
18 dismissed.

19 The fourth cause of action for breach of fiduciary duty is asserted against Great  
20 Western and Samadi. As indicated above, these two defendants are dismissed.

21 The sixth cause of action for breach of contract and breach of the implied covenant  
22 of good faith and fair dealing must be dismissed because it constitutes an attempt to plead  
23 around the requirements of TILA. Plaintiffs allege that JPMorgan and GMAC “as  
24 successors in interest to the loan contracts were bound by the duty of good faith and fair  
25 dealing implied in every contract,” and that they “breached this duty by failing to fully  
26 disclose Plaintiffs’ rights under TILA and failing to provide notice requirements under TILA.”  
27 Accordingly, the sixth cause of action is dismissed for the same reasons as the first cause  
28 of action. In addition, GMAC is dismissed from the case, without prejudice, because

1 plaintiffs failed to file a proof of service of the summons and complaint on GMAC by the  
2 deadline set by the court.

3 Finally, all claims against First American are dismissed, as plaintiffs allege no  
4 wrongdoing by First American. In particular, they plead no facts showing that First  
5 American had any involvement in the arranging, brokering, processing, or making of the  
6 Great Western loans. Because each cause of action in the complaint is premised on the  
7 conduct of the broker(s) and lender in allegedly inducing plaintiffs to refinance and enter  
8 into loans that they could not afford, by failing to make required disclosures, it does not  
9 appear that plaintiffs can cure the deficiency as to First Amendment by amending the  
10 complaint. Accordingly, the claims against First American are dismissed with prejudice. In  
11 accordance with the foregoing, the complaint is dismissed. In addition, as stated above,  
12 First American is dismissed with prejudice. Great Western, GMAC, and Samadi are  
13 dismissed without prejudice, for failure to serve.

14 The dismissal of JPMorgan is with leave to amend, to allege facts showing that  
15 JPMorgan is liable as the successor to Washington Mutual. In addition, plaintiffs may  
16 amend the rescission claims only if they are able to allege a present ability to tender the  
17 proceeds of the loans. The fraud claims are dismissed with leave to amend to plead the  
18 elements of fraud with particularity. Any amended complaint must be filed no later than  
19 January 4, 2010.

20 In addition, if plaintiffs fail to e-file the present complaint (as ordered on October 26,  
21 2009) by December 10, 2009, the case will be dismissed in its entirety.

22 The date for the hearing on the present motions, previously set for December 16,  
23 2009, is VACATED.

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25 **IT IS SO ORDERED.**

26 Dated: December 4, 2009

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PHYLLIS J. HAMILTON  
United States District Judge