

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

ELI TORRES *et al.*,  
Plaintiffs,  
v.  
WASHINGTON MUTUAL BANK *et al.*,  
Defendants.

Civil No. 10cv465-L(JMA)  
**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT JP MORGAN CHASE BANK, N.A.’S MOTION TO DISMISS**

In this mortgage foreclosure action Defendant JP Morgan Chase Bank, N.A. (“JP Morgan”) filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiff did not file an opposition. For the reasons which follow, the motion is **GRANTED IN PART AND DENIED IN PART.**

According to the complaint, Plaintiffs were owners of their primary residence located on 1587 Via Otano in Oceanside, California (“Property”). On or about September 12, 2006 they refinanced their mortgage with Defendant Washington Mutual Bank (“WaMu”). The new loan was secured with a deed on trust on the Property. Plaintiffs claim that WaMu failed to make the requisite disclosures to them before they entered into the transaction, issued a loan which substantially differed from WaMu’s representations, and failed to provide Plaintiffs with loan documents in their native language. Although the loan was not suitable for Plaintiffs given their income level, Plaintiffs were current on their loan obligation when they filed this action.

1 On or about September 25, 2008 the United States Office of Thrift Supervision seized  
2 WaMu and placed it into receivership with the Federal Deposit Insurance Corporation (“FDIC”),  
3 which immediately sold WaMu assets to JP Morgan. In June 2009 Plaintiffs contacted JP  
4 Morgan and requested loan modification; however, JP Morgan offered no options to Plaintiffs  
5 and refused to review their account. Plaintiffs claim that this will result in the loss of their  
6 Property.

7 Plaintiffs filed a complaint in this court basing subject matter jurisdiction on 28 U.S.C.  
8 Section 1331 over claims arising under federal law, and 28 U.S.C. Section 1367 over related  
9 state law claims. They alleged eight causes of action against WaMu and JP Morgan for  
10 intentional misrepresentation, fraudulent concealment and breach of fiduciary duty arising from  
11 WaMu’s representations in connection with the September 12, 2006 refinance; violations of the  
12 Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* (“TILA”) arising from failure to make the  
13 requisite disclosures at the time of the refinance transaction; violations of the Real Estate  
14 Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.* (“RESPA”) arising from WaMu’s actions at  
15 the time of the refinance as well as JP Morgan’s actions after acquiring WaMu; for violation of  
16 California Civil Code Section 1632 at the time of the refinance; breach of the Commitment to  
17 Purchase Financial Instrument and Servicer Participation Agreement for the Home Affordable  
18 Modification Program under the Emergency Economic Stabilization Act of 2008 (“Agreement”)  
19 entered into between JP Morgan and Federal National Mortgage Association (“Fannie Mae”);  
20 and unlawful and unfair business practices pursuant to the Unfair Competition Law, Cal. Bus. &  
21 Prof. Code § 17200 *et seq.* (“UCL”). Plaintiffs seek damages and rescission of the refinance  
22 loan.

23 JP Morgan filed a motion to dismiss for failure to state a claim upon which relief can be  
24 granted. A Rule 12(b)(6) motion tests the sufficiency of the complaint. *Navarro v. Block*, 250  
25 F.3d 729, 732 (9th Cir. 2001). Dismissal is warranted under Rule 12(b)(6) where the complaint  
26 lacks a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th  
27 Cir. 1984); *see Neitzke v. Williams*, 490 U.S. 319, 326 (1989) (“Rule 12(b)(6) authorizes a court  
28 to dismiss a claim on the basis of a dispositive issue of law”). Alternatively, a complaint may be

1 dismissed where it presents a cognizable legal theory yet fails to plead essential facts under that  
2 theory. *Robertson*, 749 F.2d at 534. “While a complaint attacked by a Rule 12(b)(6) motion to  
3 dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds  
4 of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation  
5 of the elements of a cause of action will not do. Factual allegations must be enough to raise a  
6 right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555  
7 (2007) (internal quotation marks, brackets and citations omitted). In reviewing a motion to  
8 dismiss under Rule 12(b)(6), the court must assume the truth of all factual allegations and must  
9 construe them in the light most favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins.*  
10 *Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). Legal conclusions need not be taken as true merely  
11 because they are cast in the form of factual allegations. *Roberts v. Corrothers*, 812 F.2d 1173,  
12 1177 (9th Cir. 1987); *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). Similarly,  
13 “conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion  
14 to dismiss.” *Pareto v. Fed. Deposit Ins. Corp.*, 139 F.3d 696, 699 (9th Cir. 1998).

15 JP Morgan argues that pursuant to the Purchase and Assumption Agreement it entered  
16 into with FDIC for the WaMu assets, it is not liable for actions undertaken by WaMu. The  
17 argument is based entirely on the Purchase and Assumption Agreement, which is not attached to  
18 the complaint.

19 Generally, a court may not consider material beyond the complaint in ruling on a Rule  
20 12(b)(6) motion. *Intri-Plex Tech., Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9th Cir.  
21 2007); *see also* Fed. R. Civ. Proc. 12(d). However, the court may take judicial notice of and  
22 consider “materials incorporated into the complaint or matters of public record.” *Coto*  
23 *Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010) (citations omitted). The doctrine  
24 of incorporation by reference has been extended to “consider documents in situations where the  
25 complaint necessarily relies upon a document . . . , the document’s authenticity is not in question  
26 and there are no disputed issues as to the document’s relevance.” *Id.* (citations omitted).  
27 Accordingly, even where the complaint does not explicitly refer to the document, but the  
28 document is integral to the complaint and the document’s authenticity is not disputed, the

1 document may be considered. *Id.* The complaint references JP Morgan’s purchase of WaMu’s  
2 assets from FDIC (Compl. at 2), and depends on it for almost all the claims asserted against JP  
3 Morgan. Plaintiffs do not dispute the relevance or authenticity of the Purchase and Assumption  
4 Agreement attached to JP Morgan’s request for judicial notice as Exhibit 2. The agreement will  
5 therefore be considered for purposes of this motion.

6 Pursuant to Paragraph 2.5 of the Purchase and Assumption Agreement, JP Morgan did  
7 not assume WaMu’s potential liabilities for borrowers’ claims:

8 2.5 Borrower Claims.

9 Notwithstanding anything to the contrary in this Agreement, any liability  
10 associated with borrower claims for payment of or liability to any borrower for  
11 monetary relief, or that provide for any other form of relief to any borrower,  
12 whether or not such liability is reduced to judgment, liquidated or unliquidated,  
13 fixed or contingent, matured or unmatured, disputed or undisputed, legal or  
14 equitable, judicial or extra-judicial, secured or unsecured, whether asserted  
15 affirmatively or defensively, related in any way to any loan or commitment to lend  
16 made by the Failed Bank prior to failure . . . , or otherwise arising in connection  
17 with the Failed Bank’s lending . . . activities are specifically not assumed by the  
18 Assuming Bank.

15 (Req. for Jud. Notice Exh. 2.)

16 To the extent Plaintiffs assert claims against JP Morgan arising from Plaintiffs’ refinance  
17 transaction with WaMu prior to September 25, 2008, when WaMu was seized and sold to JP  
18 Morgan, JP Morgan’s motion to dismiss is **GRANTED**. Accordingly, the following claims are  
19 **DISMISSED** to the extent they are asserted against JP Morgan: first cause of action for  
20 intentional misrepresentation, second cause of action for fraudulent concealment, third cause of  
21 action for breach of fiduciary duty, fourth cause of action for TILA violations, and sixth cause of  
22 action for violation of California Civil Code Section 1632. The remaining causes of action are  
23 based at least in part on JP Morgan’s own conduct after the Purchase and Assumption  
24 Agreement, and therefore cannot be dismissed on this ground.

25 In the second cause of action for RESPA violations, Plaintiffs alleged two violations  
26 based on JP Morgan’s conduct after it purchased WaMu. As a servicer of Plaintiffs’ loan, it  
27 allegedly violated 12 U.S.C. 2605(b) (Compl. at 17, 18), which requires “[e]ach servicer of any  
28 federally related mortgage loan [to] notify the borrower in writing of any assignment, sale, or

1 transfer of the servicing of the loan to any other person.” In addition, it allegedly violated 12  
2 U.S.C. Section 2605(e) by failing to respond to Plaintiffs’ qualified written request sent on  
3 September 9, 2009. (Compl. at 17.) In all other respects, JP Morgan’s motion to dismiss  
4 Plaintiffs’ second cause of action is **GRANTED** based on Paragraph 2.5 of the Purchase and  
5 Assumption Agreement.

6 With respect to the remainder of the second cause of action, JP Morgan argues it should  
7 be dismissed as time barred. Pursuant to 12 U.S.C. Section 2614, a three-year statute of  
8 limitations applies to violations of section 2605. The statute runs “from the date of the  
9 occurrence of the violation.” 12 U.S.C. § 2614. The earliest time for violation of section  
10 2605(b) is September 25, 2008, when JP Morgan acquired WaMu, including “all mortgage  
11 servicing rights and obligations of the Failed Bank.” (Purchase and Assumption Agreement, ¶  
12 2.1.) Because the complaint was filed on March 3, 2010, this claim is not time barred. JP  
13 Morgan allegedly violated section 2605(e) after September 9, 2009. This claim was therefore  
14 timely as well. Based on the foregoing, to the extent the second cause of action alleges JP  
15 Morgan violated 12 U.S.C. Section 2605(b) and (e), its motion to dismiss is **DENIED**.

16 In the seventh cause of action Plaintiffs alleged they were third party beneficiaries of  
17 agreements WaMu and JP Morgan each made with Fannie Mae, and that WaMu and JP Morgan  
18 each breached its respective agreement. (Compl. at 5-6, 18.) To the extent the seventh cause of  
19 action is based on WaMu’s breach, JP Morgan’s motion to dismiss is **GRANTED** based on  
20 Paragraph 2.5 of the Purchase and Assumption Agreement.

21 With respect to the remainder of the seventh cause of action, JP Morgan’s alleged breach  
22 of its own agreement with Fannie Mae, JP Morgan argues it should be dismissed because  
23 Plaintiffs were not party to the agreement. This argument is based on a misunderstanding of the  
24 allegations in the complaint. Plaintiffs alleged they were entitled to relief as third party  
25 beneficiaries. (Compl. at 18.) JP Morgan does not address this legal theory in its motion.  
26 Accordingly, to the extent the seventh cause of action is based on JP Morgan’s breach of its own  
27 agreement with Fannie Mae, the motion to dismiss is **DENIED**.

28 In the eighth cause of action, Plaintiffs alleged that Defendants violated the Unfair

1 Competition Law (Compl. at 19), which prohibits unlawful, unfair or fraudulent business acts or  
2 practices. Cal. Bus. & Prof. Code § 17200. “[I]t establishes three varieties of unfair competition  
3 - acts or practices which are unlawful, or unfair, or fraudulent.” *Cal-Tech. Commc’ns, Inc. v.*  
4 *Los Angeles Cellular Tel. Co.*, 20 Cal.4th 163, 180 (1999). “An unlawful business practice  
5 under section 17200 is an act or practice, committed pursuant to a business activity, that is at the  
6 same time *forbidden by law.*” *Progressive W. Ins. Co. v. Yolo County Super. Ct. (Preciado)*, 135  
7 Cal. App. 4th 263, 287 (2006) (emphasis in original). Plaintiffs alleged that Defendants’  
8 practices or acts were “unlawful” because they violated the law as stated in the preceding seven  
9 causes of action. (Compl. at 19.) To the extent the eighth cause of action is based on WaMu’s  
10 alleged wrongdoing, JP Morgan’s motion to dismiss is **GRANTED**.

11 To the extent the eighth cause of action is based on JP Morgan’s own wrongdoing as  
12 alleged in the second and seventh causes of action, it is sufficient, at a minimum, to state a claim  
13 for unlawful practices and therefore avoid dismissal. JP Morgan argues, however, that the claim  
14 should be dismissed on the alternative ground that Plaintiffs did not sufficiently allege standing.  
15 Pursuant to California Business and Professions Code Section 17204, an individual may bring a  
16 UCL claim if he or she “has suffered injury in fact and has lost money or property as a result of  
17 the unfair competition.” Plaintiffs alleged that JP Morgan breached its agreement with Fannie  
18 Mae, which allegedly was intended to benefit Plaintiffs by providing for loan modification.  
19 (Compl. at 5-6, 18.) They further alleged that JP Morgan’s breach “will result in the loss of  
20 Plaintiffs’ home.” (*Id.* at 18.) This is a sufficient allegation of standing to survive a Rule  
21 12(b)(6) motion to dismiss.

22 Plaintiffs did not request leave to amend if the motion to dismiss is granted in any part.  
23 Nevertheless, the court must consider whether a motion to dismiss should be granted with leave  
24 to amend. *See Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th  
25 Cir. 2004). Rule 15 advises the court that leave to amend shall be freely given when justice so  
26 requires. Fed. R. Civ. P. 15(a). “This policy is to be applied with extreme liberality.” *Eminence*  
27 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (internal quotation marks and  
28 citation omitted).

1 In the absence of any apparent or declared reason -- such as undue delay, bad faith  
2 or dilatory motive on the part of the movant, repeated failure to cure deficiencies  
3 by amendments previously allowed, undue prejudice to the opposing party by  
virtue of allowance of the amendment, futility of amendment, etc. -- the leave  
sought should, as the rules require, be "freely given."

4 *Foman v. Davis*, 371 U.S. 178, 182 (1962). Dismissal with prejudice and without leave to  
5 amend is not appropriate unless it is clear that the complaint could not be saved by amendment.  
6 *Id.* Based on the provisions of the Purchase and Assumption Agreement, it does not appear that  
7 Plaintiffs could amend any of the dismissed claims so as to allege them against JP Morgan.

8 Based on the foregoing, Defendant JP Morgan Chase Bank, N.A.'s motion to dismiss is  
9 **GRANTED IN PART AND DENIED IN PART** as follows:

10 1. The first cause of action for intentional misrepresentation, second cause of action for  
11 fraudulent concealment, third cause of action for breach of fiduciary duty, fourth cause of action  
12 for TILA violations, and sixth cause of action for violation of California Civil Code Section  
13 1632 are **DISMISSED WITH PREJUDICE** to the extent they are alleged against Defendant JP  
14 Morgan Chase Bank, N.A. only.

15 2. To the extent the second cause of action for RESPA violations, seventh cause of action  
16 for breach of contract, and eighth cause of action for UCL violations are alleged against  
17 Defendant JP Morgan Chase Bank, N.A., they are **DISMISSED WITH PREJUDICE IN**  
18 **PART**, as stated more fully above.

19 3. This order has no effect on the claims to the extent they are alleged against Defendant  
20 Washington Mutual Bank.

21 **IT IS SO ORDERED.**

22  
23 DATED: May 23, 2011

24  
25   
M. James Lorenz  
United States District Court Judge

26 COPY TO:

27 HON. JAN M. ADLER,  
UNITED STATES MAGISTRATE JUDGE

28 ALL PARTIES/COUNSEL