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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LYUDVIG DANILYUK, et al.,

Plaintiffs,

v.

JP MORGAN CHASE BANK, N.A.,
et al.,

Defendants.

CASE NO. C10-0712JLR

ORDER ON JP MORGAN
CHASE BANK, N.A.’S
MOTION TO DISMISS

I. INTRODUCTION

This matter comes before the court on Defendant JP Morgan Chase Bank, N.A.’s (“Chase”) motion to dismiss (Dkt. # 6). Having reviewed the motion, as well as all submissions filed in support and opposition, and deeming oral argument unnecessary, the court GRANTS in part and DENIES in part the motion to dismiss (Dkt. # 6).

II. BACKGROUND

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2 Plaintiffs Lyudvig Danilyuk and Yekaterina Danilyuk, husband and wife, reside at
3 2437 South Morgan Street in Seattle, Washington. (Compl. (Dkt. # 2-2) ¶ III.A-B.) In
4 2007, the Danilyuks contacted Defendant Washington Loan Center (“WLC”), a mortgage
5 broker, to refinance their mortgage. (*Id.* ¶ III.D.) WLC representatives assisted the
6 Danilyuks in refinancing their loan through a loan program offered by Defendant
7 Washington Mutual Bank (“Washington Mutual”). (*Id.* ¶ III.F.)

8 During the course of negotiations, WLC representatives allegedly led the
9 Danilyuks to believe that they would receive a fixed-rate loan with no prepayment
10 penalty. (*Id.* ¶ III.J.) The Danilyuks, however, ended up with a negative amortization
11 adjustable rate mortgage instead. (*Id.* ¶ III.K.) Moreover, according to the Danilyuks,
12 WLC representatives failed to timely or properly notify them that this was the type of
13 loan they were receiving (*id.*); WLC representatives intentionally overstated the
14 Danilyuks’ income and assets to mislead Washington Mutual into believing that they
15 qualified for the loan program (*id.* ¶ III.Q); and both WLC and Washington Mutual knew,
16 or should have known, the Danilyuks’ true income and assets (*id.*).

17 In addition, WLC allegedly failed to provide the Danilyuks with the required
18 disclosures to properly and adequately inform them of their right to rescind under the
19 Truth in Lending Act (“TILA”). (*Id.* ¶ III.M.) Specifically, the notices of the right to
20 rescind delivered to Mr. Danilyuk were not properly completed and Mrs. Danilyuk did
21 not receive two copies of the notice. (*Id.*) The Danilyuks further allege that Washington
22 Mutual’s disclosures were deceptively confusing and failed to properly advise the

1 Danilyuks of the interest rate they were being charged. (*Id.* ¶ III.O.) Despite these
2 alleged deficiencies, on December 8, 2009, the Danilyuks transmitted what they
3 characterize as a notice of rescission and qualified written request but allegedly did not
4 receive a response. (*Id.* ¶ III.P.)

5 On August 22, 2007, following the closing of the Danilyuks' refinance transaction,
6 Washington Mutual went out of business and was closed. (*Id.* ¶ III.I.) The Office of
7 Thrift Supervision ("OTS") appointed the Federal Deposit Insurance Corporation
8 ("FDIC") as receiver for Washington Mutual. (*See* Stines Decl. (Dkt. # 7-2) at 3.) Soon
9 after, Chase acquired by assignment certain assets from Washington Mutual, including
10 the note and deed of trust evidencing and securing the Danilyuks' loan. (*See* Compl. ¶
11 III.I; Resp. (Dkt. # 12) at 5.)

12 On April 20, 2010, the Danilyuks filed this lawsuit in King County Superior
13 Court. In their complaint, the Danilyuks assert nine causes of action against Chase for:
14 (1) rescission under TILA; (2) violations of TILA; (3) violations of the Real Estate
15 Settlement Procedure Act ("RESPA"); (4) violations of Washington's Consumer
16 Protection Act ("CPA"); (5) breach of fiduciary duties; (6) fraud; (7) intentional infliction
17 of emotional distress; (8) unjust enrichment; and (9) injunctive relief. Chase removed
18 this action to federal court.

19 III. ANALYSIS

20 Chase moves to dismiss all nine claims, arguing that the Danilyuks' claims are
21 premised on the mistaken assumption that Chase assumed all of Washington Mutual's
22 liabilities when the FDIC transferred Washington Mutual's assets to Chase. (Mot. (Dkt.

1 # 6) at 2.) Rather, as Chase argues, when the OTS closed Washington Mutual and
2 appointed the FDIC as receiver, the FDIC succeeded to all Washington Mutual’s assets
3 and liabilities. (*Id.*) On September 25, 2008, the FDIC transferred the bulk of
4 Washington Mutual’s assets to Chase pursuant to a purchase and assumption agreement
5 (“P&A Agreement”). (*Id.*) Article 2.5 of the P&A Agreement provides that Chase did
6 not assume Washington Mutual’s potential liabilities associated with claims of
7 borrowers. (*Id.*) Thus, Chase contends that the Danilyuks’ claims, which it characterizes
8 as arising out of the Danilyuks’ capacity as borrowers of Washington Mutual, cannot be
9 maintained against Chase. (*Id.*)

10 **A. Motion to Dismiss Standard**

11 To survive a motion to dismiss pursuant to Federal Rule of Civil Procedure
12 12(b)(6), “a complaint must contain sufficient factual matter, accepted as true, to ‘state a
13 claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct.
14 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). It is
15 not enough for a complaint to “plead[] facts that are ‘merely consistent with’ a
16 defendant’s liability.” *Id.* (quoting *Twombly*, 550 U.S. at 557). Rather, “[a] claim has
17 facial plausibility when the plaintiff pleads factual content that allows the court to draw
18 the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*
19 “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more
20 than a sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting *Twombly*,
21 550 U.S. at 556). Although a court considering a motion to dismiss must accept all of the
22 factual allegations in the complaint as true, the court is not required to accept as true a

1 legal conclusion presented as a factual allegation. *Id.* at 1949-50 (citing *Twombly*, 550
2 U.S. at 556). In the event the court finds that dismissal is warranted, the court should
3 grant the plaintiff leave to amend unless amendment would be futile. *Eminence Capital,*
4 *LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

5 **B. Judicial Notice of the P&A Agreement**

6 Chase requests that the court take judicial notice of the P&A Agreement. (Mot. at
7 3.) As a general rule, “a district court may not consider any material beyond the
8 pleadings in ruling on a Rule 12(b)(6) motion.” *Lee v. City of Los Angeles*, 250 F.3d 668,
9 688-89 (9th Cir. 2001) (quoting *Branch v. Tunnel*, 14 F.3d 449, 453 (9th Cir. 1994)). A
10 district court may, however, “look beyond the complaint to matters of public record and
11 doing so does not convert a 12(b)(6) motion to one of summary judgment.” *Mack v.*
12 *South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986); *see also Disabled Rights*
13 *Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 866 n.1 (9th Cir. 2004). Other
14 courts have taken judicial notice of the P&A Agreement between the FDIC and Chase.
15 *See, e.g., Allen v. United Fin. Mortgage Corp.*, 660 F. Supp. 2d 1089, 1093-94 (N.D. Cal.
16 2009); *Molina v. Wash. Mut. Bank*, No. 09-CV-00894-IEG (AJB), 2010 WL 431439, at
17 *3 (S.D. Cal. Jan. 29, 2010). Here, the court takes judicial notice of the P&A Agreement
18 because it is a public record and not the subject of reasonable dispute.

19 **C. Chase’s Liability Under the P&A Agreement**

20 There is no dispute that the FDIC had the authority to transfer certain Washington
21 Mutual liabilities to Chase through the P&A Agreement while retaining others. Article
22

1 2.5 of the P&A Agreement expressly provides that the FDIC retained Washington
2 Mutual's potential liabilities associated with borrowers' claims:

3 Notwithstanding anything to the contrary in this Agreement, any liability
4 associated with borrower claims for payment of or liability to any borrower
5 for monetary relief, or that provide for any other form of relief to any
6 borrower, whether or not such liability is reduced to judgment, liquidated or
7 unliquidated, fixed or contingent, matured or unmatured, disputed or
8 undisputed, legal or equitable, judicial or extrajudicial, secured or
unsecured, whether asserted affirmatively or defensively, related in any
way 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.

9 (Stines Decl. Ex. 2 at 15.) A range of federal courts have held that the P&A Agreement
10 relieves Chase of liability for borrowers' claims against Washington Mutual. These
11 courts reason that Chase became a successor to Washington Mutual by executing the
12 P&A Agreement; the P&A Agreement governs the status of Chase as successor; and
13 Article 2.5 of the P&A Agreement establishes that Chase did not assume liability for
14 borrowers' claims related to loans made by Washington Mutual prior to September 25,
15 2008.

16 District courts have repeatedly dismissed TILA and RESPA claims brought
17 against Chase because the P&A Agreement specifies that Chase did not assume liability
18 for such claims. In *Molina v. Washington Mutual Bank*, No. 09-CV-00894-IEG (AJB),
19 2010 WL 431439 (S.D. Cal. Jan. 29, 2010), for example, the district court dismissed
20 TILA and RESPA claims against Chase that were based on actions committed during the
21 course of loan negotiations. 2010 WL 431439, at *4. The *Molina* court reasoned as
22 follows:

1 On September 25, 2008 . . . [Chase] acquired certain assets and liabilities of
2 [Washington Mutual] pursuant to the Purchase and Assumption Agreement.
3 This provision establishes that [Chase] has expressly not assumed
4 [Washington Mutual's] liabilities relating to borrower claims. . . .
Accordingly, any of Plaintiffs' claims arising out of [Chase's] alleged
status as successor in interest to Plaintiffs' borrower claims against
[Washington Mutual] must fail.

5 *Id.* Similarly, in *Federici v. Monroy*, No. C09-4025 PVT, 2010 WL 1345276 (N.D. Cal.
6 Apr. 6, 2010), the court dismissed all claims against Chase, which were predicated on
7 allegations that Washington Mutual negligently prepared loan documents and made
8 negligent misrepresentations. The court emphasized that because "all of the claims
9 against [Chase] are based on [Washington Mutual's] lending activities, the liability for
10 which was explicitly *not* assumed by [Chase] in its purchase of [Washington Mutual's]
11 assets, the [complaint] does not state any claims upon which relief could be granted
12 against [Chase]." 2010 WL 1345276, at *2 (emphasis in original).

13 Other federal courts have similarly interpreted the P&A Agreement, holding that
14 Chase did not assume Washington Mutual's liability arising from borrowers' claims.
15 *See, e.g., Yeomalakis v. F.D.I.C.*, 562 F.3d 56, 60 (1st Cir. 2009); *Johnson v. Wash. Mut.*
16 *Bank*, No. 1:09-CV-929 AWI DLB, 2010 WL 682456, at *4 (E.D. Cal. Feb. 24, 2010);
17 *Grealish v. Wash. Mut. Bank*, No. 2:08-CV-763 TS, 2009 WL 2170044, at *2 (D. Utah
18 July 20, 2009); *Cassese v. Wash. Mut. Bank*, No. 05 CV 2724 (ADS) (ARL), 2008 WL
19 7022845, at *6 (E.D.N.Y. Dec. 22, 2008); *cf. Payne v. Sec. Sav. & Loan Ass'n*, 924 F.2d
20 109, 111 (7th Cir. 1991) (holding that the receiver of assets, not the subsequent purchaser
21 of the assets, retained all liabilities not specifically enumerated in a similar purchase and
22 assumption agreement).

1 Here, the court agrees that Article 2.5 of the P&A Agreement relieves Chase of all
2 liability for borrowers' claims relating to loans made by Washington Mutual prior to
3 September 25, 2008.

4 1. Damages Claims for Violations of TILA, RESPA, and the CPA, Breach of
5 Fiduciary Duties, Intentional Infliction of Emotional Distress, and Unjust
6 Enrichment

7 In light of the P&A Agreement, the court concludes that the Danilyuks have not
8 alleged facts sufficient to support claims for damages against Chase for violations of
9 TILA, RESPA, and the CPA, breach of fiduciary duties, intentional infliction of
10 emotional distress, and unjust enrichment. As alleged in the complaint, these claims all
11 stem from a loan transaction that occurred prior to September 25, 2008. (*See* Compl. ¶
12 III.I.) Under the P&A Agreement, Chase did not assume liability for borrowers' claims
13 against Washington Mutual relating to loans made prior to September 25, 2008. The
14 Danilyuks' claims seek to hold Chase liable solely based on its status as assignee of
15 Washington Mutual's assets; the Danilyuks do not allege facts relating to actions taken
16 by Chase outside its role as assignee. Without more, the court dismisses these claims
17 with leave to amend.¹

18 2. TILA Rescission Claim and Injunctive Relief

19 In a credit transaction in which a security interest is retained in a consumer's
20 principal dwelling, each consumer whose ownership interest is subject to the security

21 ¹ The court notes that amendment may be futile, particularly with respect to the TILA and
22 RESPA damages claims. Nevertheless, the court is persuaded that the Danilyuks should be
permitted an opportunity to amend at this early stage of the proceedings.

1 interest has a right to rescind the transaction. *See* 12 C.F.R. § 226.23(a)(1). The
2 consumer may exercise the right to rescind until midnight of the third business day
3 following delivery of notice of the right to rescind, or of all material disclosures,
4 whichever occurs last. *See* 12 U.S.C. § 226.23(a)(3). If, however, the required notice or
5 material disclosures are not delivered, the right to rescind will be extended from three
6 business days to three years. *See id.* Notices of the right to rescind shall “clearly and
7 conspicuously” disclose (1) the retention of a security interest in the consumer’s principle
8 dwelling; (2) the consumer’s right to rescind the transaction; (3) how to exercise the right
9 to rescind; (4) the effects of rescission; and (5) the date the rescission period expires. *See*
10 12 U.S.C. § 226.23(b)(1)(i)-(v). In addition, the creditor shall deliver two copies of the
11 notice of the right to rescind to each consumer entitled to rescind. 12 U.S.C. §
12 226.23(b)(1).

13 TILA provides that a consumer with a right to rescind “may rescind the
14 transaction as against any assignee of the obligation.” 15 U.S.C. § 1641(c). At least one
15 district court has held that the P&A Agreement does not insulate Chase from a rescission
16 claim because “TILA’s rescission remedy is exercisable against the holder of the asset,
17 not the retainer of the liability.” *King v. Long Beach Mortgage Co.*, 672 F. Supp. 2d 238,
18 246 (D. Mass. 2009); *see also Wilbourn v. Advantage Fin. Partners, LLC*, No. 09-CV-
19 2068, 2010 WL 1194950, at *6 (N.D. Ill. Mar. 22, 2010) (holding that TILA rescission
20 claim could be brought against a subsequent assignee of the plaintiff’s mortgage). In
21 *King*, the plaintiff sought to rescind a mortgage finance loan made by Washington
22 Mutual, arguing that TILA violations committed by Washington Mutual extended his

1 right to rescind. *King*, 672 F. Supp. 2d at 241. Chase, as successor to Washington
2 Mutual, moved for summary judgment and argued that under the P&A Agreement the
3 FDIC retained liability for the plaintiff’s rescission claim. *Id.* at 242. The court
4 disagreed, concluding that Chase was an assignee for purposes of a TILA rescission
5 claim:

6 A transaction is an assignment even if related duties or liabilities are not
7 transferred. Just because liabilities are retained by the transferor does not
8 mean the transferee is not an assignee. Under TILA, it is the assignee who
9 is subject to the consumer’s statutory right to rescind loan transactions.
10 Section 1641(c) expressly states that the rescission right is available against
“any assignee of the obligation.” Having acquired the rights to the loan
transaction, Chase is the current “assignee” of the promissory note and
mortgage for the purposes of 15 U.S.C. § 1641(c). The fact the FDIC has
retained the related liabilities does not alter Chase’s status.

11 *Id.* at 248 (citations omitted). The court further emphasized that it would be contrary to
12 congressional intent to allow a consumer’s rescission right to be contracted away by the
13 FDIC, the original assignee, and Chase, the subsequent assignee, without the consumer’s
14 consent or input. *Id.*

15 In this case, the Danilyuks allege that the notices of the right to rescind that were
16 delivered did not properly or adequately inform them of their rescission right, that they
17 transmitted a request for rescission, and that they are entitled to rescission as a remedy.
18 (See Compl. ¶¶ III.M, III.P.) Chase does not address the merits of the Danilyuks’
19 rescission claim in depth, arguing simply that “this claim is without merit as plaintiffs do
20 not allege facts sufficient to support rescission under TILA.” (Reply (Dkt. # 18) at 2.)
21 Chase does not elaborate further. Without more, the court declines to evaluate the
22 viability of the Danilyuks’ rescission claim. Chase has presented no argument to suggest

1 that the P&A Agreement bars the Danilyuks' rescission claim, and it is not the
2 responsibility of the court to make Chase's arguments for it. The court therefore denies
3 Chase's motion to dismiss with respect to the Danilyuks' rescission claim.

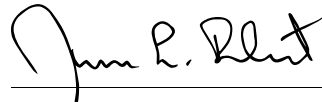
4 In addition, the court denies Chase's motion to dismiss the Danilyuks' request for
5 injunctive relief. The court is mindful that the Danilyuks have not filed a motion for a
6 temporary restraining order in federal court seeking to restrain a possible nonjudicial
7 foreclosure sale, although they did so in state court prior to removal.² The court also
8 expresses skepticism that this claim constitutes a separate cause of action. Nevertheless,
9 Chase has not shown that injunctive relief is unavailable here. On this record, the court
10 denies Chase's motion to dismiss with respect to the Danilyuks' request for injunctive
11 relief.

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22 ² Pursuant to Local Rules W.D. Wash. CR 101(c), "[i]f a motion is pending and
undecided in the state court at the time of removal, it will not be considered unless and until the
moving party notes the motion on this court's calendar in accordance with CR 7(d)."

1 **IV. CONCLUSION**

2 For the foregoing reasons, the court GRANTS Chase's motion to dismiss (Dkt. #
3 6) with respect to the Danilyuks' damages claims for violations of TILA, RESPA, and the
4 CPA, breach of fiduciary duties, intentional infliction of emotional distress, and unjust
5 enrichment. The court DISMISSES these claims without prejudice and with leave to
6 amend. The court DENIES Chase's motion to dismiss with respect to the Danilyuks'
7 rescission claim and request for injunctive relief.

8 Dated this 2nd day of July, 2010.

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12 JAMES L. ROBERT
13 United States District Judge
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