

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MARIE POTTER,

Plaintiff,

v.

AMERICA'S SERVICING COMPANY, et  
al.,

Defendants.

CASE NO. C13-1129RAJ

ORDER

**I. INTRODUCTION**

This matter comes before the court on a motion to dismiss from Defendant America's Servicing Company ("ASC") and another motion to dismiss from Defendant WMC Mortgage LLC ("WMC"). No one has requested oral argument, and the court finds oral argument unnecessary. For the reasons stated herein, the court GRANTS both motions to dismiss. Dkt. ## 23, 24. The court DISMISSES this action with prejudice and directs the clerk to enter judgment for Defendants.

**II. BACKGROUND**

The court has already dismissed this case once, in a February 3, 2014 order (Dkt. # 20) that reluctantly permitted Plaintiff Marie Potter to amend her complaint. In the amended complaint, Plaintiff abandoned claims against every Defendant except ASC, and named a new Defendant, WMC.

ORDER – 1

1 In February 2006, Ms. Potter borrowed \$414,000 from WMC's corporate  
2 predecessor, securing the loan with a deed of trust to her residential property in Brier,  
3 Washington. The original loan carried a 9.25% variable interest rate, but that rate was  
4 subject to adjustment beginning in March 2008. Ultimately, depending on fluctuations in  
5 the London Interbank Offered Rate ("LIBOR"), the interest rate could rise as high as  
6 15.75% per year. Ms. Potter alleges that WMC promised her that she could repay that  
7 loan, and also promised her that she could receive a fixed rate loan "shortly after [she]  
8 signed her initial variable rate loan," but that WMC never followed through with this  
9 promise. Amend. Compl. ¶ 44.

10 Interest rates rose, and Ms. Potter had difficulty making payments. She filed for  
11 bankruptcy protection and faced foreclosure.

12 At some point, Plaintiff negotiated with ASC, the loan's servicer, for a  
13 modification of her loan. She signed a loan modification agreement in November 2010,  
14 which named Wells Fargo Bank, N.A., as her lender. The modification agreement made  
15 several changes to her original note. It changed the maturity date from March 2036 to  
16 June 2046. It increased her principal balance to just over \$512,000, stating that this  
17 amount "include[d] all amounts and arrearages that w[ould] be past due as of the  
18 Modification Effective Date," which was July 2010. It decreased her interest rate to 2%  
19 for the first five years of the loan, with a gradual increase to 4.84% for the final 29 years  
20 of the 36-year modified loan. The agreement expressly "supersed[ed] the terms of any  
21 modification, forbearance, Trial Period Plan or Workout Plan" between the parties.

22 As was the case with WMC and the original loan, Plaintiff alleges that ASC made  
23 misrepresentations about the modified loan. She alleges that ASC never told her that it  
24 would raise her principal amount by \$100,000. She attaches to her complaint an  
25 "accounting" that ASC allegedly prepared, that shows her principal balance climbing  
26 from about \$412,000 on February 9, 2011 to \$512,000 on February 10, 2011. She  
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1 contends that there was no basis for this leap, and that ASC told her that her principal  
2 amount would not increase at all in the modified loan.

3 From these allegations, she purports to state three causes of action against WMC  
4 and three against ASC. She alleges that WMC's promises that she was entering a loan  
5 that she would be able to repay and that it would soon provide her with a fixed-rate loan  
6 make it liable for promissory estoppel. She contends that the loan was substantively  
7 unconscionable. She also contends that WMC breached its agreement to provide her with  
8 a new loan, or at least violated its duty of good faith and fair dealing. She alleges that  
9 ASC engaged in "Unconscionable Behavior" by increasing her principal balance by  
10 \$100,000, that the same act violated the Washington Consumer Protection Act ("CPA")  
11 as did ASC's false promise that her principal would not increase in her modified loan,  
12 and that her reliance on that false promise gives her a claim for promissory estoppel.

13 Both Defendants filed motions to dismiss, contending that Ms. Potter has not  
14 stated a claim against them.

### 15 III. ANALYSIS

16 Defendants invoke Fed. R. Civ. P. 12(b)(6), which permits a court to dismiss a  
17 complaint for failure to state a claim. The rule requires the court to assume the truth of  
18 the complaint's factual allegations and credit all reasonable inferences arising from its  
19 allegations. *Sanders v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007). The plaintiff must  
20 point to factual allegations that "state a claim to relief that is plausible on its face." *Bell*  
21 *Atl. Corp. v. Twombly*, 550 U.S. 544, 568 (2007). If the plaintiff succeeds, the complaint  
22 avoids dismissal if there is "any set of facts consistent with the allegations in the  
23 complaint" that would entitle the plaintiff to relief. *Id.* at 563; *Ashcroft v. Iqbal*, 556 U.S.  
24 662, 679 (2009) ("When there are well-pleaded factual allegations, a court should assume  
25 their veracity and then determine whether they plausibly give rise to an entitlement to  
26 relief."). The court typically cannot consider evidence beyond the four corners of the  
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1 complaint, although it may rely on a document to which the complaint refers if the  
2 document is central to the party's claims and its authenticity is not in question. *Marder v.*  
3 *Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). The court may also consider evidence subject  
4 to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

5 **A. Plaintiff's Claims Against WMC**

6 All of Ms. Potter's claims against WMC are time-barred. The court first considers  
7 her claims based on WMC's oral promises. There is no allegation that the parties ever  
8 reduced to writing WMC's promise that Ms. Potter would be able to repay her original  
9 loan or its promise that it would provide her a new fixed-rate loan. WMC allegedly made  
10 those promises at or before the time she entered her new loan, which was in February  
11 2006. She did not name WMC as a Defendant in this case until she filed her amended  
12 complaint in February 2014. Even if her claims against WMC somehow related back to  
13 her original complaint in this action, that complaint came in July 2013. Washington  
14 actions based on a breach of oral promises, including promissory estoppel actions, must  
15 commence within three years of breach. RCW 4.16.080(3); *Cent. Heat, Inc. v. Daily*  
16 *Olympian, Inc.*, 443 P.2d 544, 548 (Wash. 1968). Ms. Potter attempts to claim that she  
17 did not discover her claims based on WMC's oral promises until more recently, but her  
18 complaint puts those allegations to rest. By November 2010, more than three years  
19 before she sued WMC, she had extinguished her loan from WMC by entering the  
20 modified loan with Wells Fargo. She could not have discovered WMC's alleged breach  
21 of its promises after that time. She has no timely claims based on WMC's oral promises.

22 Her claim that the original loan was substantively unconscionable is subject to a  
23 six-year statute of limitations, RCW 4.16.040(1), but it accrued the moment she entered  
24 the loan. She cannot plausibly argue that she discovered the allegedly unconscionable  
25 terms of the loan after she signed the loan agreement in February 2006, and she did not  
26 sue WMC until February 2014.

1 Even if Ms. Potter's claims were timely, they would not withstand WMC's motion  
2 to dismiss. Unless WMC promised to pay Ms. Potter's loan for her, an allegation that  
3 appears nowhere in her complaint, a promise that Ms. Potter would be able to repay her  
4 loan is not a promise on which she could justifiably rely. She was responsible for  
5 repaying her loan, and the terms of repayment were plainly set forth in the loan itself. If  
6 she was unable to repay her loan, she could not have reasonably relied on WMC's alleged  
7 promise to the contrary.

8 As to WMC's promise to provide her a new fixed-rate loan, her complaint  
9 contains no allegation that she demanded a fixed-rate loan from WMC. The promise  
10 WMC allegedly made was that "she could receive a fixed rate loan shortly after she  
11 signed her initial variable rate loan," Amend. Compl. ¶ 44, not that WMC would  
12 unilaterally offer such a loan. Absent any allegation that she demanded the loan, she has  
13 no claim against WMC premised on its alleged promise to provide it.

14 As to Ms. Potter's allegation that the loan was substantively unconscionable, the  
15 analysis underlying the court's conclusion that the modified loan was not unconscionable  
16 from the February 3 order applies equally here. The terms of the original loan do not  
17 shock the conscience.

#### 18 **B. Plaintiff's Claims Against ASC**

19 With one exception, which the court will soon consider, Ms. Potter raises no claim  
20 or argument against ASC that the court did not address in the February 3 order. That  
21 order applies with equal force to Ms. Potter's renewed attempt to assert a promissory  
22 estoppel claim against ASC and any CPA claim or bad faith claim premised on ASC's  
23 promise that it would not increase her principal. As the court noted in its prior order,  
24 whatever promises ASC allegedly made to bring her to the bargaining table with respect  
25 to her modified loan, she cannot overcome the simple fact that the modified loan  
26 agreement plainly states that her principal balance had increased by about \$100,000. She  
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1 was not compelled to sign that loan agreement, which dispelled all of ASC's allegedly  
2 false promises.

3 Ms. Potter's amended complaint adds substantially more detail about her claim  
4 that the modified loan is substantively unconscionable because it increased her principal  
5 balance by \$100,000 without reason. The problem with that claim is that she did not  
6 enter the loan with ASC, she entered it with Wells Fargo Bank, N.A. She has not sued  
7 that entity, and she cannot sue ASC over a loan to which ASC is not a party.

8 The court observes, moreover, that ASC has provided evidence that is neither in  
9 Ms. Potter's complaint nor subject to judicial notice that plausibly explains why Ms.  
10 Potter's loan principal increased by \$100,000. The evidence suggests that the increase  
11 was because of unpaid interest and other charges that accrued as Ms. Potter was in  
12 foreclosure proceedings. The court suggests no opinion on the validity of that evidence,  
13 because the court cannot do so to resolve a Rule 12(b)(6) motion. Ms. Potter should,  
14 however, consider the possibility that she would be sanctioned via Federal Rule of Civil  
15 Procedure 11 if she attempted to sue Wells Fargo over the allegedly unconscionable  
16 terms of her modified loan without mentioning that evidence or considering its impact on  
17 her claim that Wells Fargo had no basis to increase the principal balance of her loan.

#### 18 IV. CONCLUSION

19 For the reasons previously stated, the court GRANTS Defendants' motions to  
20 dismiss. Dkt. ## 23, 24. Plaintiff could not salvage her claims if the court granted her an  
21 additional opportunity to amend her complaint, and the court accordingly DISMISSES  
22 this action with prejudice. The clerk shall enter judgment for Defendants.

23 DATED this 23rd day of July, 2014.

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25  
26 The Honorable Richard A. Jones  
27 United States District Court Judge