THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Warner E. & Patricia Lassiter, Bella Homes, LLC, a Delaware Limited Liability Company, Plaintiff, v. JPMorgan Chase Bank, N.A., John Doe, Attorneys for JPMorgan Chase Bank, N.A. Defendants.	)	CIVIL ACTION FILE NO. 1:11-cv-02815-JEC-GGB

JPMORGAN CHASE BANK, N.A.'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Pursuant to Rule 12 of the Federal Rules of Civil Procedure, Plaintiffs Warner E. Lassiter, Patricia Lassiter and Bella Homes LLC (collectively, "Plaintiffs") and Defendant JPMorgan Chase Bank, N.A. ("Chase") move to dismiss Plaintiffs' Verified Complaint for Wrongful Foreclosure and Damages ("Complaint") with prejudice in its entirety. None of Plaintiffs' claims are actionable as a matter of law, requiring dismissal for failure to state a claim upon which relief may be granted. As Plaintiffs' Complaint fails to assert any cognizable claim for relief, it must be dismissed with prejudice in its entirety pursuant to Rule 12(b)(6).

I. FACTUAL AND PROCEDURAL HISTORY

On or about February 5, 2003, Plaintiffs entered into a mortgage loan transaction (the "Loan") with Washington Mutual Bank, F.A. ("WaMu").[1] (*See* Ex. A and Compl. ¶ 6.) In connection with the Loan, Plaintiffs executed a promissory note ("Note") and a security deed ("Deed") in favor of WaMu, secured by real property located at 2943 Crosswyke Forest Circle, Atlanta, Georgia 30319 ("Property"). (*Id.*)

On September 25, 2008, WaMu was declared insolvent, and the Federal Deposit Insurance Corporation was appointed Receiver for WaMu ("FDIC-Receiver"). Pursuant to a Purchase and Assumption Agreement ("P&A Agreement") dated September 25, 2008, the FDIC-Receiver transferred to Chase

[1] A certified copy of the Deed is attached hereto as Exhibit A. The Court may take judicial notice of the Deed because it is a public record and is referred to in – and central to – Plaintiffs' Complaint. *See Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1278 (11th Cir. 1999); *Brooks v. Blue Cross and Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997); *Hennington v. Greenpoint Mortg. Funding, Inc.*, Nos. 1:09cv676, 1:09cv962, 2009 WL 1372961, *4 (N.D. Ga. May 15, 2009).

"all right, title, and interest of the Receiver in and to all of the assets" of WaMu.[2] (P&A Agmt. Art. II § 2.1, Art III § 3.1 in Doc.; Doc. 3-2, Ex. 2 at 15-16.) Thereby, Chase acquired WaMu's interest in the Deed.

After Plaintiffs defaulted on their obligations under the Note, Defendants initiated foreclosure proceedings against Plaintiffs pursuant to the Note and Deed. Plaintiffs inconceivably contend (without submitting any proof thereof) that they have transferred their interest in the Property to Bella Homes, LLC ("Bella Homes"). Indeed, Defendants contest Bella Homes' standing to bring the instant litigation, as there is no evidence that it possesses an interest in the Property. Moreover, on April 8, 2011, the Georgia Department of Banking and Finance has issued an "Order to Cease and Desist" against Bella Homes, indicating that Bella

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[2] The FDIC, as receiver, "steps into the shoes of [WaMu], and operates as its successor … . The FDIC then has broad powers to allocate assets and liabilities, such as through a Purchase and Assumption Agreement." *Miller v. Cal. Reconvenyance Co.,* No. 10-cv-421, 2010 WL 2889103, *2 (S.D. Cal. July 22, 2010) (citations and internal punctuation omitted); 12 U.S.C. §§ 1811-1832(d). A true copy of the P&A Agreement is attached hereto as Exhibit B. The P&A Agreement is a public record as it is available to the general public on the FDIC's website at www.fdic.gov/about/freedom/Washington_Mutual_P_and_A.pdf and also has been filed in numerous other civil actions. The authenticity of the P&A Agreement is undisputed. Accordingly, the Court may take judicial notice of thee P&A Agreement. *See Hintz v. JPMorgan Chase Bank,* Civ. No. 10-119, 210 WL 422048, *3 (D. Minn. Oct. 20, 2010) (taking judicial notice of P&A Agreement and citing other cases doing the same); *White v. Chase Bank USA, NA,* No. 3:10-cv-21, 2010 WL 3782399. *1 n.1 (S.D. Ohio, Sept. 28, 2010).

Homes was in violation of the Georgia Residential Mortgage Act, O.C.G.A. § 7-1-1000,*et. seq.*[3] This Order became final on May 8, 2011. (*See* Ex. C.)

In their Complaint, Plaintiffs make the wholly conclusory allegation that Defendants do not hold the Note and the Deed and, thus, are not the proper party to foreclose. Amongst other nonactionable claims, Plaintiffs also claim that the Loan was not appropriate for Plaintiffs, and thus they have been the victim of predatory lending. As demonstrated herein, Plaintiffs fail to meet the applicable pleading requirements and, regardless, Plaintiffs' claims simply are not actionable under Georgia law and based on the publicly-available documents. Accordingly, Defendants respectfully request that this Court dismiss the Complaint in its entirety with prejudice.

II. ARGUMENT AND CITATION OF AUTHORITY

A. Plaintiffs' Claims Fail To Meet The Requisite Pleading Standard And Must Be Dismissed

1. Rule 8 Pleading Standard

As the United States Supreme Court recently held, for a complaint to survive a motion to dismiss pursuant to Rule 12(b)(6):

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[3] A true and correct copy of the Order to Cease and Desist is attached hereto as Exhibit C. The Court may take judicial notice of this public record. *See* note 1 *supra.*

> Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we "are not bound to accept as true a legal conclusion couched as a factual allegation.") Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.

Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)) (emphasis added; citations omitted).

While the Federal Rules adopt a flexible pleading policy, every complaint must "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555. The Supreme Court has stated that "[w]ithout some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." *Id.* at 555 n.3.

Further, while the Court must construe the pleadings in the light most favorable to Plaintiffs, "legal conclusions need not be taken as true merely because they are cast in the form of factual allegations." *Id.* at 555. A claim may proceed only where a plaintiff pleads "*factual content* [that] allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal* at 1949 (emphasis added).

Here, Plaintiffs' Complaint relies on wholly conclusory allegations and conclusions of law. There are vague statements and claims, but no factual allegations in support of the claims. For example, Plaintiffs claim that the Georgia Fair Lending Act ("GFLA") has purportedly been violated (Compl. ¶ 13), however, they completely fail to assert how GFLA has been violated, or even what provision of GFLA Plaintiffs are alleging was violated.[4] Plaintiffs' "naked assertion[s] devoid of further factual enhancement" are wholly insufficient to state a claim for relief under Rule 8. *Iqbal,* 129 S. Ct. at 1949. Accordingly,

[4] Similarly, Plaintiffs' assertions that the assignment to Chase was "robo-signed," (Compl. ¶ 9) and that the Fair Trade Commission Act ("FTC Act") was purportedly violated (Compl. ¶ 20) fall far short of meeting the requisite pleading standard of Rule 8. Moreover, there was no assignment to Chase, as Chase acquired the Loan via the P&A Agreement. Regardless, an assignment of an interest in real property is simply a business record. The authorized signers are therefore not required to have, nor do they attest to having, personal knowledge of the accuracy of the information contained in the business record they are signing. To the extent "robo-signing" could even be an issue, it would only be relevant with respect to documents requiring the signee to have personal knowledge of the accuracy of the document's contents. Additionally, there is no private right of action under the FTC Act. *Days Inn of America Franchising, Inc. v. Windham,* 699 F. Supp. 1581, 1582 (N.D. Ga. 1988); *see also Diessner v. MERS,* 618 F. Supp. 2d 1184, 1191 (D. Ariz. 2009), *aff'd,* No. 09-16497, 2010 WL 2464899 (9th Cir. June 17, 2010).

Defendants request that Plaintiffs' Complaint be dismissed pursuant to Rule 12(b)(6) for failure to state any claim upon which relief may be granted.[5]

2. Rule 9 Pleading Standard

In addition to failing to meet the Rule 8 pleading standards, Plaintiffs have similarly failed to meet the pleading requirements of Rule 9(b). Rule 9(b) requires that fraud and mistake be pled with particularity. Fed. R. Civ. P. 9(b). To satisfy the pleading requirements of particularity under Rule 9(b), a complaint must allege: 1) precisely what statements were made in what documents or oral representations or what omissions were made, and 2) the time and place of each such statement and the person "responsible for making (or, in the case of omissions, not making) same", and 3) the content of such statements and the manner in which they misled [defendants], and 4) what [plaintiff] obtained as a consequence of the fraud. *Am. Gen. Life & Acc. Ins. Co. v. Ward*, 530 F. Supp. 2d 1306, 1309-10 (N.D. Ga. 2008); *U.S. ex rel. Digiovanni v. St. Joseph's/Candler Health Sys., Inc.*, No. CV 404-190, 2008 WL 395012, at *2-3 (S.D. Ga. Feb. 8,

[5] Should the Court find dismissal on this ground is not warranted, Defendants request, pursuant to Rule 12(e), that the Court require Plaintiffs to amend their pleadings with a more definite statement of the specific facts upon which each asserted claim rests.

2008) (Moore, C.J.). Dismissal is warranted where the plaintiff's complaint fails to comply with these requirements. *See id.*

The burden imposed by Rule 9(b) is substantial. Courts have held that even where an allegation of fraud is clear "from reading the Complaint as a whole" the claim may be dismissed if it does not "state with particularity the specific situation involved, i.e., who, what, when, where, and how." *See Mathis v. Velsicol Chem. Corp.*, 786 F. Supp. 971, 976 (N.D. Ga. 1991); *Flynn v. Merrick*, 881 F. 2d 446, 449 (7th Cir. 1989) (quoting *Hayduk v. Lanna*, 775 F.2d 441, 444 (1st Cir. 1985)). Instead, a complaint must plead the "who, what, when, where, how and why" of the purported fraud or the fraud claim will be dismissed. *See Digiovanni*, 2008 WL 395012, at *3; *New Century Commc'ns Corp. v. Ellis*, 171 F. Supp. 2d 1374, 1379 (N.D. Ga. 2001).

Here, Plaintiffs have wholly failed to comply with the pleading requirements of Rule 9(b). Plaintiffs merely make the blanket assertions, without any facts in support thereof, that they "contend[] that the Defendants perpetrated a fraudulent loan transaction," and that "Defendants knowingly and intentionally concealed material information from Plaintiff." (Compl. ¶¶ 25, 60.) Plaintiffs wholly fail to assert who misled them; how they were misled; what Defendants gained, or; how Plaintiffs purportedly were harmed by the alleged fraud. Indeed, Plaintiffs do not

allege any facts in support of their "fraud" allegations. This is wholly insufficient to meet the pleading requirements of Rule 9(b), and accordingly, to the extent Plaintiffs' Complaint asserts any claim for fraud, any such claim must be dismissed.[6]

B. **Chase Has Authority to Foreclose Upon the Property**

1. The Publicly Available Documents Belie Plaintiffs' Allegations

Plaintiffs' allegation that Defendants lack authority to foreclose on the Property is factually unsupported. (*See* Compl. generally.) As previously stated, Plaintiffs entered into a mortgage loan refinance transaction with WaMu on February 5, 2003. (*See* Ex. A and Compl. ¶ 6.) Upon WaMu's failure on September 25, 2008, the FDIC as Receiver for WaMu transferred all interest in the subject Note and Deed to Chase. (*See* Ex. B.) Accordingly, Chase acted properly when it initiated foreclosure proceedings.[7]

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[6] Furthermore, as described in below, Plaintiffs have not and cannot allege the elements required for a fraud claim based on nondisclosure. *See, e.g., Ali v. Fleet Fin., Inc. of Ga.*, 500 S.E.2d 914, 915 (Ga. App. 1998) (affirming summary judgment on fraud claim because party had no duty to disclose); *McWhorter v. Ford Consumer Fin. Co.*, 33 F. Supp. 2d 1059, 1072 (N.D. Ga. 1997); *Bogle v. Bragg*, 548 S.E.2d 396, 401 (Ga. App. 2001) (finding nondisclosure actionable as fraud only where party had duty to disclose).

[7] Additionally, Plaintiffs' assertion that the FDIC-Receiver was required to record an assignment in the real property records is without merit. The FDIC as receiver for WaMu has the express authority under federal law to transfer property without

Accordingly, Plaintiffs' allegations that Chase lacks authority to foreclose are clearly belied by the real property records and any "claim" that may be interpreted from these allegations should be dismissed with prejudice

2. *Plaintiffs' Are Not Entitled to Production of the Original Loan Documents*

Throughout their Complaint, Plaintiffs assert that they are entitled to "verif[ication of] the existence of the original Promissory Note," and without "proving who retains [the promissory note's] ownership at this time." (Compl. ¶¶ 29, 30.) This argument, frequently referred to as the "produce the note" argument, fails under Georgia law. In fact, Georgia is a nonjudicial foreclosure state and does not require the original note to be produced prior to or as a predicate to foreclosure. *See, e.g.,* O.C.G.A. §§ 9-13-140, *et seq.*, §§ 9-13-160, *et seq.*, §§ 44-14-160, *et seq.*, § 23-2-114. Indeed, Georgia courts have repeatedly and uniformly rejected complaints of an alleged failure to produce the original note. *See, e.g., Hill v. Saxon Mortgage Servs., Inc.*, 1:09-CV-1078, 2009 WL 2386057, *1 (N.D. Ga. May 14, 2009) (rejecting plaintiff's demand that lender produce original promissory note); *Wright v. Home Loan Servs., Inc.*, No. 2009CV164104 (Ga.

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an assignment of record. 12 U.S.C. § 1821 (d)(2)(G)(i)(II) (FDIC – Receiver has authority to transfer and, at its discretion, may "transfer any asset or liability of the institution in default. . . without any approval, assignment, or consent with respect to such transfer.")

Super. Ct. June 11, 2009). Accordingly, Defendants are not required to produce documentation to Plaintiffs proving their security interest prior to any nonjudicial foreclosure. The originally-executed Deed and P&A Agreement are publicly-available documents and clearly evidence that Chase is the party with full right to foreclose.

Accordingly, Plaintiffs' allegation that Defendants are required to produce proof of authority to foreclose fails as a matter of law and must be dismissed with prejudice pursuant to Rule 12(b)(6).

3. Plaintiffs' "Split the Note" Assertion Fails

Plaintiffs further allege that due to purported "bifurcation of splitting of the security interest... Defendants" lack authority to foreclose upon the Property. (Compl.¶ 9.) While Chase does not admit that this action has occurred, the Supreme Court of Georgia has recognized that severance of notes and security deeds is common – notes and security deeds securing residential mortgages are often executed in favor of different parties, and are often subsequently assigned to investors. *See Taylor, Bean & Whitaker Mortgage Corp. v. Brown*, 583 S.E.2d 844, 845–46 & n.1 (Ga. 2003); *see also LaCosta*, 2011 WL 166902 at *5-6 (finding Georgia law does not preclude holder of security deed from proceeding with foreclosure sale if it does not also hold note); *Brown v. Federal Nat'l*

Mortgage Ass'n, No. 1:10-cv-03289-TWT, 2011 WL 1134716, *6 (N.D. Ga. Feb. 28, 2011) (finding "split the note" argument fails to support wrongful foreclosure claim).

Accordingly, Plaintiffs' allegation that Chase lacks authority to foreclose because the Note and Deed have purportedly been separated fails as a matter of law. Even assuming *arguendo* that the Note and Deed were "bifurcated," it would in no way impact Chase's ability to foreclose on the Property upon Plaintiffs' default.

4. Plaintiffs' Wrongful Foreclosure Assertion Fails Because Chase Has Authority to Foreclose

To the extent Plaintiffs are attempting to assert a claim for wrongful foreclosure, which is not at all clear from the face of the Complaint, Plaintiffs cannot sustain such a claim. First and foremost, the Property has not been foreclosed upon. Thus, Plaintiffs cannot, as a matter of law, state a claim for wrongful foreclosure. *Williams v. South Central Farm Credit, ACA*, 452 S.E.2d 148, 151 (Ga. App. 1994) (finding wrongful foreclosure claim requires showing of inadequate price **obtained at sale**). Accordingly any claim of wrongful foreclosure is not ripe and should be dismissed pursuant to Rule 12(b)(1).

Moreover, even if the property *had* been foreclosed upon, Plaintiffs have failed to meet the requisite pleading standard. To state a claim for wrongful

foreclosure, Plaintiffs must show how the foreclosure was not conducted regularly and how it was out of accord with both Georgia law and the terms of the Security Deed. *McCarter v. Bankers Trust Co.* 543 S.E.2d 755, 758 (Ga. App. 2000). "'Georgia law requires a plaintiff asserting a claim of wrongful foreclosure to establish a legal duty owed to it by the foreclosing party, a breach of that duty, a causal connection between the breach of that duty and the injury it sustained, and damages.'" *DeGolyer v. Green Tree Servicing, LLC*, 291 Ga. App. 444, 448 (2008) (quoting *Heritage Creek Dev. Corp. v. Colonial Bank*, 268 Ga. App. 369, 371 (2004). Thus, there is a breach of duty if the foreclosing party violates provisions of the loan instruments and/or Georgia law. *See Heritage Creek Dev. Corp.*, 268 Ga. App. at 374; *McCarter v. Bankers Trust Co.*, 247 Ga. App. 129, 132 (2000) (noting violation of Georgia foreclosure statute is necessary to state claim for wrongful foreclosure). Plaintiff has not met these pleading requirements.

Indeed, the only foreclosure statute even mentioned in Plaintiffs' Complaint is O.C.G.A. § 44-14-162(b). Plaintiffs contend that O.C.G.A. § 44-14-162(b) has purportedly been violated (Compl. ¶¶ 23, 69); this assertion is factually unsupported. Indeed, O.C.G.A. § 44-14-162(b) mandates only that a secured creditor record the document evidencing their interest in the property prior to foreclosure. *See* O.C.G.A. § 44-14-162(b). First and foremost, the Property has

not been foreclosed upon. Accordingly, Chase is not yet required to record its security interest in the real property records. Moreover, as shown *supra*, the FDIC as receiver for Wamu has the express authority under federal law to transfer property without an assignment of record. 12 U.S.C. § 1821 (d)(2)(G)(i)(II).

Plaintiffs' wrongful foreclosure "claim," to the extent one can be interpreted from the Complaint, is not ripe. Moreover, Plaintiffs cannot show that Georgia's foreclosure statutes have been violated in any way, and Plaintiffs have wholly failed to plead the prerequisites required for a wrongful foreclosure claim. Such claim should therefore be dismissed.[8]

C. **Plaintiffs' Loan Was Legally Formed**

1. Plaintiffs Unfair and Deceptive Business Practices Act Claim Fails As A Matter Of Law

Plaintiffs purport to bring an action for violation of the "Unfair Deceptive Business Act Practices," or "UDAP." (Compl. ¶¶ 42-45.) No such Act exists in Georgia. To the extent Plaintiffs intend to allege by way of this non-existent action

[8] Further, to the extent Plaintiffs' allegations can be interpreted to assert a claim for wrongful attempted foreclosure, this claim also fails. *See, e.g., Hauf v. HomeQ Servicing Corp.*, No. 405-cv-109-CDL, 2007 WL 486699, *6 (M.D. Ga. Feb. 9, 2007) (citing *Aetna Fin. Co. v. Culpepper*, 320 S.E.2d 228, 232 (Ga. App. 1984)). The absence of any allegations in Plaintiffs' Complaint that Plaintiffs have allegedly suffered any special damages precludes recovery for a purported claim for wrongful attempted foreclosure as a matter of law. *Aetna Fin. Co. v. Culpepper*, 320 S.E.2d 228, 232 (Ga. App. 1984).

a violation of the Georgia Fair Business Practices Act ("GFBPA"), O.C.G.A. § 10-1-390 *et seq.* (*see Zinn v. GMAC Mortg.*, 1:05 CV 01747 MHS, 2006 WL 418437 (N.D. Ga. Feb. 21, 2006) (interpreting a UDAP claim as a GFBPA claim in circumstances nearly factually identical to the instant case)), Plaintiffs fail, as that Act "does not apply to residential mortgage transactions," and all of Plaintiffs' allegations are directed at Chase's purported conduct in connection with the origination of a residential loan.[9] (*See* Compl. generally.) *Zinn*, 2006 WL 418437 at *4 (dismissing GFBPA claims against bank on virtually identical facts). Furthermore, even assuming Plaintiffs could state a claim for violation of the GFBPA, their conclusory allegations in their Complaint are clearly insufficient to do so. Accordingly, this Court should dismiss Count IV of Plaintiff's Complaint pursuant to Rule 12(b)(6).

2. *Plaintiffs' Predatory Lending and Conversion Claims Fail As A Matter of Law*

As an initial matter, Plaintiffs' claims for predatory lending fail to satisfy the pleading requirements of *Iqbal* and *Twombly*. Plaintiffs fail to cite a statute that would provide them relief for the alleged conduct and have not cited any facts that

[9] Moreover, Plaintiffs fail to plead that they have satisfied all the conditions precedent to the maintenance a GFBPA claim. O.C.G.A. § 10-1-399; *Lynas*, 216 Ga. App. at 436.

would support these claims. Such is fatal to Plaintiffs' claims, even assuming *arguendo* that a cause of action for "predatory lending" even exists under Georgia law. *Hill v. Saxon Mortg. Services, Inc.*, No. 1:09-cv-1078-RLV, 2009 WL 2386057, *1 (N.D. Ga. May 14, 2009); *Cheryl Stone Trust v. BAC Home Loans Servicing, LP*, No. 1:11-cv-0494-RWS, 2011 WL 2214672, *1 (N.D. Ga. June 7, 2011). For this reason alone, Counts III and VII should be dismissed pursuant to Rule 12(b)(6). Additionally, Plaintiffs' "predatory lending" and conversion claims suffer from fatal substantive defects that cannot be remedied with repleading and thus should be dismissed with prejudice.

a. Plaintiffs' Claims Based on Alleged "Nondisclosures" Fail As a Matter of Georgia Law

Plaintiffs cannot state a claim for "predatory lending," conversion or even fraud based on Plaintiffs' allegations that the loan was not appropriate for Plaintiffs and that Defendants should have made certain disclosures about the Loan. In Georgia, a mortgage transaction is an arm's-length transaction. *Dollar v. NationsBank of Ga., N.A.,* 534 S.E.2d 851, 853 (Ga. App. 2000); *Russell v. Barnett Banks, Inc.*, 527 S.E.2d 25, 26-27 (Ga. App. 1999); *see also Watkins v. Farmers & Merchants Bank*, 5:08-CV-259 CAR, 2010 WL 1257719, *6-7 (M.D. Ga. Mar. 26, 2010) (applying Georgia law). As a matter of law, there is no confidential relationship between lender and borrower in a mortgage transaction because "they

are creditor and debtor with clearly opposite interests." *Pardue v. Bankers First Fed. Savs. & Loan Ass'n*, 334 S.E.2d 926, 927 (Ga. App. 1985); *Saffar v. Chrysler First Bus. Credit Corp.*, 450 S.E.2d 267, 270 (Ga. App. 1994). The lender's "primary duty [in mortgage transactions] is to protect its interest in the security of the mortgage." *Dollar*, 534 S.E.2d at 853.

As a result, and contrary to Plaintiffs' conclusory allegations, a lender has no duty under Georgia law to educate the borrower as to the type of loan being offered or to educate the borrower as to the risks associated therewith. *See, e.g.*, *Dollar*, 534 S.E.2d at 853 (borrower was not entitled to rely on lender's determination as to whether property was in a flood hazard zone); *Pardue*, 334 S.E.2d at 927 ("even if the bank had undertaken to advise [borrowers] on their tax liability and had misled [borrowers], they would not be entitled to rely on any such representation"); *Zeeman v. Black*, 273 S.E.2d 910, 916 (Ga. App. 1980) ("claimant is not entitled to recover if he had an equal and ample opportunity to ascertain the truth but failed to exercise proper diligence to do so"). Instead, the borrower has a duty to exercise ordinary diligence to protect his own interests. *Dollar*, 534 S.E.2d at 853; *Pardue*, 334 S.E.2d at 927; *Zeeman*, 273 S.E.2d at 916.

Plaintiffs' predatory lending and conversion claims are premised solely on Defendants' purported nondisclosure – in violation of an alleged duty – of certain

aspects of the loan provided to Plaintiffs. (*See* Compl. generally.) As no such duty exists under Georgia law, Plaintiffs' predatory lending and conversion claims, as well as any other purported claims premised on this nondisclosure assertion, fail as a matter of law.[10] Plaintiffs' predatory lending and conversion claims, therefore, should be dismissed with prejudice.

b. Plaintiffs' Claims Based on Alleged "Nondisclosures" Are Time-Barred

Even assuming *arguendo* that Plaintiffs could state a claim for nondisclosure, such claim would be fatally barred by the applicable statute of limitations. Claims for nondisclosure and/or fraud are subject to a four-year statute of limitations under Georgia law. *See* O.C.G.A. § 9-3-31; *Anthony v. Am. Gen. Fin. Services, Inc.*, 626 F.3d 1318 (11th Cir. 2010) (applying four-year statute of limitations on borrowers' purported fraud claim); *Majeed v. Randall*, 632 S.E.2d 413, 416 (Ga. App. 2006). As discussed, Plaintiffs' claims for "predatory lending" and conversion are based on purported "nondisclosures" by Defendants. Those

[10] Absent contractual or statutory disclosure requirements, the lender does not owe a duty to make disclosures to the borrower. *See Dollar*, 534 S.E.2d at 853 (holding that lender's "primary duty is to protect its interest in the security of the mortgage.") Here, Plaintiffs have alleged no contractual or statutory provision that would require Defendants to make the disclosures of which Plaintiffs appear to complain. As such, Plaintiffs simply cannot, as a matter of law, establish the duty element of a fraud claim under Georgia law. Accordingly, any purported fraud claim must be dismissed with prejudice pursuant to Rule 12(b)(6).

alleged "nondisclosures" stem from the loan origination. (*See* Compl. generally.) Plaintiffs admit that the subject Loan originated on or about February 5, 2003. (Compl. ¶ 6.) Plaintiffs did not file the instant litigation until July 25, 2011 – more than seven years after the alleged fraud. Accordingly, Plaintiffs' claims based on alleged "nondisclosure" are time-barred and must be dismissed with prejudice.[11]

D. **Plaintiff's Breach Of The Covenant Of Good Faith And Fair Dealing Claim Fails As A Matter Of Law**

The well-settled rule in Georgia is that "breach of the implied covenant of good faith and fair dealing cannot be asserted and does not survive independent of a claim for breach of contract." *See U.S. Faucets, Inc. v. Home Depot U.S.A. Inc.*, No. 1:03-cv-1572-WSD, 2006 WL 1518887, *5 (N.D. Ga. May 31, 2006); *Stuart Enters. Int'l, Inc. v. Peykan, Inc.*, 252 Ga. App. 231, 234, 555 S.E.2d 881, 884 (2001); *see also Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1429 (11th Cir. 1990) ("AA sought to set the implied covenant up as an independent term in its contracts, subject to breach apart from any other. The district court

[11] Moreover, Plaintiffs do not (and cannot) contend that Chase was involved in the transaction between the Plaintiffs and WaMu. Accordingly, Chase is not liable to Plaintiffs for any purported impropriety in the formation of the Loan. Indeed, he P&A Agreement expressly provides that Chase did not acquire or assume any liability to WaMu's borrowers for any acts of WaMu arising out of WaMu's lending activities. Thus, Plaintiffs cannot maintain any claims against Chase for the alleged wrongdoing of WaMu and Plaintiffs' claims must therefore be dismissed (*See* P&A Agreement § 2.5.)

rejected this attempt, and rightly so, for the 'covenant' is not an independent contract term.") Here, Plaintiffs' Complaint does not contain a breach of contract claim (nor does it contain facts that would support such a claim).[12] As such, Plaintiff's claim for breach of the covenant of good faith and fair dealing must be dismissed as matter of law.[13]

E. **Plaintiffs Cannot Maintain A Claim Under the Uniform Commercial Code, and Therefore Plaintiffs' Unconscionability Claim Fails As A Matter of Law**

Plaintiffs claim that the Loan was purportedly unconscionable due to purported violations of the Uniform Commercial Code ("UCC"). (Compl. ¶¶ 46-49.) The UCC, however, is not applicable to real estate. Indeed, Article 2 of the UCC covers only the sale of goods – not real estate. (*See* UCC Article 2 generally). Similarly, Article 3 of the UCC applies to negotiable instruments, however, the Note is not a negotiable instrument because is not payable on demand

[12] As explained in Section II(D)(2)(a), Plaintiffs cannot allege that Chase owed Plaintiffs any fiduciary duty.

[13] Plaintiffs do not (and cannot) contend that Chase has breached the Deed. Additionally, to the extent Plaintiffs contend that Chase is bound by any purported agreement to modify the loan, such claim fails due to the Statute of Frauds. *See Allen v. Tucker Fed. Bank*, 236 Ga. App. 245, 246 (1998); *Jarman v. Westbrook*, 134 Ga. App. 19, 67 S.E. 403, 404 (1910) ("[T]he statute of frauds requires that a contract for the sale of an interest in lands shall be in writing, and any modification of a written contract required by law to be in writing must also be in writing to be valid.").

or at a set time. *See* UCC §§3-104, 3-108. For this reason alone, Plaintiffs' "unconcionability" claim fails.

Additionally, "[i]n deciding claims of unconscionability, Georgia courts generally consider a variety of factors, which have been divided into procedural and substantive elements." *Jenkins v. First Am. Cash Advance of Georgia, LLC*, 400 F.3d 868, 875 (11th Cir. 2005). Here, Plaintiffs fail to identify any facts whatsoever in support of their allegations, and instead relying entirely upon on wholly conclusory allegations. For this additional reason, Plaintiffs' unconscionability claim should be dismissed. *See Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1261 (11th Cir. 2009).

Because Plaintiffs' unconscionable claim entirely fails to state a viable cause of action under any state or federal law, this Court should dismiss such claim pursuant to Rule 12(b)(6).

F. **Plaintiffs Cannot Maintain A Claim for Promissory Estoppel**

In order to state a claim for promissory estoppel in Georgia, Plaintiffs must allege facts that would tend to show that Chase "(1) made certain promises, (2) should have expected that Plaintiffs would rely on such promises, (3) the Plaintiff did in fact rely on such promises to his detriment, and (4) injustice can be avoided only by enforcement of the promises." *Canterbury Forest Ass'n v. Collins*, 532

S.E.2d 736, 739 (Ga. App. 2000) (internal quotations omitted); *see also* O.C.G.A. §13-3-44 (same); *see also Balmer v. Elan Corp.*, 599 S.E.2d 158, 162 (Ga. App. 2004) (granting motion to dismiss because Plaintiff could not plead elements of promissory estoppel as matter of law). Under Georgia law, "[p]romissory estoppel does not apply to a promise that is vague, indefinite, or of uncertain duration." *Mariner Healthcare, Inc. v. Foster*, 634 S.E.2d 162, 168 (Ga. App. 2006) (emphasis added); *Voyles v. Sasser*, 472 S.E.2d 80 (Ga. App. 1996).

In *Mariner Healthcare*, the promise upon which plaintiff allegedly relied was "that the terms and conditions of the lease would continue as long as [plaintiff] paid rent and continued to negotiate." 634 S.E.2d at 168. According to the plaintiff, it was injured in reliance on that promise in that it "continued to occupy the facilities; . . . increased its rent payments; . . . made each rent payment to [defendant]; and . . . undertook negotiations with [defendant] for a new lease." *Id.* In holding that the alleged promise was unenforceable for lack of definiteness, the court reasoned that "the alleged promise, even when viewed in the light most favorable to [plaintiff] was for an indefinite time. It was also vague, as the parties did not attempt to define what would constitute continuing to negotiate." *Id.* (dismissing promissory estoppel claim).

Like *Mariner Healthcare*, Plaintiffs here – at best – alleges only vague, indefinite, and ultimately unenforceable promises. Plaintiffs appear to allege that WaMu (prior to acquisition by Chase) promised to grant Plaintiffs a loan modification, but he fails to describe the purported terms of an alleged modification agreement. (*See* Compl. generally.) Further, Plaintiffs' description of the alleged promises that are the subject of his promissory estoppel claim is far from clear and unequivocal. Quite the opposite, the "terms" of any purported modification are entirely undefined. (*See* Compl. generally.) There is simply no description of the alleged terms and conditions of the promise forming the basis of Plaintiffs' promissory estoppel claim, and it therefore fails as a matter of law.

Finally, Plaintiffs' promissory estoppel claim also fails because "estoppel applies to representation of past or present facts and not to promises concerning the future, especially where those promises concern unenforceably vague future acts." *Voyles*, 472 S.E.2d at 82. Here, the promises allegedly made by WaMu relate to future loan modification and other future actions, and as such, the doctrine of promissory estoppel does not apply. For all of the foregoing reasons, Plaintiffs'

promissory estoppel claim fails, and should be dismissed pursuant to Rule 12(b)(6).[14]

G. Plaintiffs are Not Entitled to Injunctive Relief Pursuant to the Federal Rules of Civil Procedure

1. Plaintiffs Do Not Have Standing to Seek an Injunction

Plaintiffs do not have standing because they have not alleged – and indeed cannot allege – that they have paid the full amount due on the loan. *See Taylor v. Wachovia Mortg. Corp.*, No. 1:07-cv-2671-TWT, 2009 WL 249353 at *5 n.6 (N.D. Ga. Jan 30, 2009) ("Plaintiff has not provided any evidence showing that he tendered the full amount of the loan or any portion thereof. Thus, under Georgia law, plaintiff has no standing to bring an action to enjoin the foreclosure sale.") The absence of this requisite tender is fatal to Plaintiffs' request for an injunction.

[14] Moreover, the *D'Oench, Duhme* Doctrine precludes Chase from liability for the alleged promises of WaMu. *Caires v. JP Morgan Chase Bank*, 745 F. Supp. 2d 40, 51 (D. Conn. 2010) ("The *D'Oench, Duhme* doctrine …invalidates certain agreements made between a bank's representatives and borrowers, prior to the FDIC's appointment as a receiver for that failed institution, to modify the terms of a promissory note, unless the agreement meets certain requirements, including being reduced to writing."); *see also D'Oench, Duhme & Co. v. FDIC,* 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942).

2. Plaintiffs Have Failed to Meet The Requirements of Federal Rule of Civil Procedure 65

Even assuming *arguendo* that Plaintiffs have standing to seek an injunction, which Chase contests, Plaintiffs have wholly failed to plead the prerequisites required by Federal Rule of Civil Procedure 65 for the relief they request. Specifically, a party seeking injunctive relief must establish four prerequisites to be entitled to such relief: (1) that there is a substantial likelihood plaintiff will prevail on the merits; (2) that there is a substantial threat plaintiff will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to the plaintiff outweighs the threatened harm the injunction may do to the defendant; **and** (4) that granting the preliminary injunction will not disserve the public interest. *Suntrust Bank v. Houghton Mifflin Co.*, 252 F.3d 1165, 1166 (11th Cir. 2001) (citations omitted; emphasis in original); *Bass v. City of Forsyth, Ga*, 5:06-CV-278HL, 2007 WL 4564154, *1 (M.D. Ga. Dec. 21, 2007); *see also* Fed. R. Civ. P. 65. The moving party has the burden on each of these elements and the failure "to sustain this burden with regard to **any** one of the prerequisites is fatal" to a plaintiff's request for a preliminary injunction. *Cash Inn of Dade, Inc. v. Metro. Dade County*, 706 F. Supp. 844, 846 (S.D. Fla. 1989) (emphasis in original).

As set forth *supra*, Plaintiffs' Complaint fails to set forth any actionable claim against Chase whatsoever, and thus Plaintiffs cannot, as a matter of law, establish a likelihood of success on the merits. (*See* Compl. generally.) Thus, Plaintiffs fail to establish the first element necessary for the grant of injunctive relief. Moreover, while Plaintiffs make wholly conclusory statement addressing the elements of the relief they request, they have failed to set forth any facts in support of these conclusory statements. Accordingly, Plaintiffs should be denied injunctive relief, as they have wholly failed to plead the prerequisites to the relief they request. *See Bass v. City of Forsyth, Ga*, 2007 WL 4564154 (M.D. Ga. 2007).

III. CONCLUSION

For the foregoing reasons, Chase respectfully requests that Plaintiffs' Complaint be dismissed with prejudice in its entirety.

Respectfully submitted this 3rd day of October, 2011.

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RULE 7.1(D) CERTIFICATE

The undersigned counsel certifies that this document has been prepared with one of the font and point selections approved by the Court in Local Rule 5.1(B).

Respectfully submitted this 3rd day of October, 2011.

/s/ Lindsay A. Warren
LINDSAY A. WARREN

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Warner E. & Patricia Lassiter, Bella Homes, LLC, a Delaware Limited Liability Company, Plaintiff, v. JPMorgan Chase Bank, N.A., John Doe, Attorneys for JPMorgan Chase Bank, N.A. Defendants.	)	CIVIL ACTION FILE NO. 1:11-cv-02815-JEC-GGB

CERTIFICATE OF SERVICE

I hereby certify that I have on this day filed electronically via CM/ECF a true copy of the foregoing **JPMORGAN CHASE BANK, N.A.'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT** in the United States District Court for the Northern District of Georgia, with notice of same being electronically served by the CM/ECF system, addressed to the following:

Stephen M. Maurillo, Esq.
Stephen M. Maurillo & Associates, LLC
1400 Market Place Blvd, Suite 133
Cumming, GA 30041

This 3rd day of October, 2011.

/s/ Lindsay A. Warren
Lindsay A. Warren