IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Docket No. 11-55423

MARGARET CARSWELL
Plaintiff-Appellant

vs.

JPMORGAN CHASE BANK, N.A., CALIFORNIA RECONVEYANCE CO.
Defendants-Appellees

On Appeal from an Order of the United States District Court
for the Central District of California – Los Angeles
Case No. 2:10-cv-05152-GW-PLA

BRIEF OF APPELLANT

DOUGLAS GILLIES (SBN 53602)
3756 Torino Drive,
Santa Barbara, CA 93105
(805) 682-7033

Attorney for Appellant, MARGARET CARSWELL

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No.: 11-55423

Short Caption: Margaret Carswell v. JPMorgan Chase Bank

(1) The full name of every party the attorney represents in the case:

Margaret Carswell

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Douglas Gillies, attorney

(3) If the party or amicus is a corporation

i) Identify all of its parent corporations

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: /s/_____ Date: 9/22/11
Attorney's Name: Douglas Gillies

Please indicate if you are Counsel of Record for the above listed parties pursuant to Cir. Rule 3(c). Yes.

Address: Douglas Gillies, attorney, 3756 Torino Drive, Santa Barbara CA 93105

Phone Number: 805-682-7033 Email: douglasgillies@gmail.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

This appeal arises from an order granting a Fed. R. Civ. P. 12(b)(6) motion to dismiss the First Amended Complaint ("FAC"), which was brought by defendant-appellees JPMorgan Chase Bank N.A. and California Reconveyance Co. Excerpts of Record ("EOR") pp. 10 (i.e. Minute Order granting Defendants' motion to dismiss).

The District Court did not enter a final judgment of dismissal. However, the court's minute order of dismissal did not include leave to amend (EOR p. 8), which is mandatory "unless amendment would be futile." *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3rd 979, 983 (9th Cir. 2000). Under such circumstances, such an order of dismissal itself can be considered to be a sufficiently final disposition of the case for appellate purposes.

This appeal is timely. The District Court entered its final order of dismissal on February 15, 2011. EOR p. 8. Margaret Carswell filed her notice of appeal on March 14, 2011 –27 days later. EOR p. 4 (Notice of Appeal); Fed. R. App. P. 4(a)(1)(A).

ISSUE PRESENTED

Did the District Court err by ruling that Margaret Carswell's Complaint, First Amended Complaint, declarations, and Offer of Proof did not raise a basis for any viable cause of action against the Defendants?

STATEMENT OF THE CASE

On July 14, 2010, plaintiff Margaret Carswell filed a complaint in the federal District Court for the Central District of California to enjoin Defendants JPMorgan Chase ("Chase") and California Reconveyance Co. ("CRC") from selling her real property at a Trustee's Sale. Plaintiff requested that Defendants' efforts to sell her property be declared illegal on the grounds that they were not the Lender, Beneficiary, or authorized agent of the Lender or Beneficiary according to the terms of Plaintiff's promissory note and deed of trust, and that the underlying loan transaction be declared void *ab initio* as a result of misrepresentations, fraud, concealment, and predatory loan practices.

Plaintiff also alleged non-compliance with the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. §2601 et seq, including Defendants' failure to respond to properly submitted Qualified Written Requests in order to conceal TILA and RESPA violations and to conceal the identity of the owner and beneficiary of the loan. She asked that defendants make restitution for payments made to Chase, and for a judgment that she is the owner in fee simple and defendants have no interest in the property.

Plaintiff sued on the basis of diversity of citizenship pursuant to 28 U.S.C. §1332(a) and subject matter jurisdiction pursuant to 28 U.S.C. §1331 because the case involves a federal question regarding interpretation and proper application of RESPA. EOR p. 70 (First Amended Complaint).

On August 9, 2010, Defendants filed a motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) on the grounds that Plaintiff failed to state facts sufficient to constitute a claim for relief. EOR p. 54 (Docket #15). The Court issued a tentative ruling and then granted Defendants' Motion to Dismiss with leave to amend on September 30, 2010. EOR p. 15 (Minute Order).

Plaintiff filed her First Amended Complaint on October 18, 2011. EOR p. 61. Defendants moved to Dismiss, EOR p. 55 (Docket #26), and the Court issued a tentative ruling on January 6, 2011, granting the Motion to Dismiss, EOR p. 10, but giving Plaintiff an opportunity to submit an offer of proof as to whether to permit her leave to amend. EOR p. 10 (Minute Order Jan. 6, 2011).

Plaintiff filed her Offer of Proof on January 28, 2011. EOR pp. 149-158. The Court granted Defendants' Motion to Dismiss without leave to amend on February 15, 2011. EOR p. 8 (Minute Order).

On March 14, 2011, Margaret Carswell filed this timely appeal.

STATEMENT OF FACTS

Plaintiff/Appellant Margaret Carswell refinanced her home in December 2006. Her loan application was submitted to Washington Mutual Bank ("WaMu") by a mortgage broker. EOR p. 64 (FAC ¶8). She signed the mortgage documents on December 20, 2006 at home alone with a notary public. She was not given an opportunity to review the documents. EOR pp. 64-65 (FAC ¶9).

Plaintiff did not see a copy of her loan application for three more years. When she received a copy in November 2009, she

discovered that the application misstated that her income was $50,300.00 per month and her business, Earth First Construction, a nonprofit entity, had a net worth of $1,000,000. Plaintiff did not provide these fictitious figures to the broker or the bank. EOR p. 65 (FAC ¶10).

Within days of receiving Plaintiff's loan documents, WaMu securitized Plaintiff's mortgage through Washington Mutual Mortgage Securities Corp., as evidenced by a registration statement filed with the SEC: "Supplement to Prospectus dated January 11, 2007, WaMu Mortgage Pass-Through Certificates, Series 2007-OA1 Trust." This investment trust was terminated on October 15, 2010, after the beneficiary was paid in full. EOR p. 65 (FAC ¶12).

The district court granted a motion to dismiss Plaintiff's First Amended Complaint and denied Plaintiff's motion for leave to amend on the ground that amendment would be futile. Plaintiff appeals.

SUMMARY OF ARGUMENT

Chase claims that it acquired the right to collect payments from Plaintiff and sell the Property at a nonjudicial sale if she did not pay. Plaintiff brings this action against Chase and CRC for attempting to

sell the Property at a trustee's sale without any lawful claim to the Property. Plaintiff introduced a verified First Amended Complaint, three declarations and twenty exhibits. Chase offered a Purchase & Assumption Agreement. The court ruled that Plaintiff's facts were conclusions and ten causes of action did not state a single claim. The Purchase & Assumption Agreement said nothing about Plaintiff's property and whether it was an asset of WaMu when it failed.

STANDARD OF REVIEW

The federal rules require that a complaint include a "short and plain statement" showing the plaintiff is entitled to relief. Fed. R. Civ. P. 8(a)(2). The statement must "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 55 (2007). However, only plausible claims for relief will survive a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937, 1950 (2009). A claim is plausible if its factual content "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. at 1949. The factual allegations pled in the complaint must be taken as true and reasonable inferences drawn from them must be construed in favor of the nonmoving party.

Moreover, "in reviewing a Rule 12(b)(6) motion, a court must construe the complaint in the light most favorable to the plaintiff and must accept all well-pleaded factual allegations as true." *Shwarz v. United States*, 234 F.3rd 428, 435 (9th Cir. 2000). A court should freely give leave to amend when justice so requires. Fed. R. Civ. P. 15(a)(2). An amendment would be "futile" if no set of facts can be proved which would constitute a valid claim or defense. *Miller v. Rykoff-Sexton, Inc.,* 845 F.2d 209, 214 (9th Cir. 1988).

ARGUMENT

Plaintiff expected that she would borrow money from WaMu and then she would pay WaMu back. WaMu expected that Plaintiff would sign a Note and Deed of Trust for a loan that she could not afford, WaMu would immediately sell the note to an investment trust and collect the balance on the note, then WaMu would earn servicing fees for the loan until Plaintiff inevitably defaulted. It was so unruly and unprecedented that courts and regulators hesitated to intervene.

On September 2, 2011, the Federal Housing Finance Agency (FHFA), as Conservator for the Fannie Mae and Freddie Mac, filed a complaint against JPMorgan Chase and Washington Mutual

Mortgage Securities Corp. in United States District Court, *Federal Housing Finance Agency v. JPMorgan Chase, et al*, Case 1:11-cv-06188-PKC (SDNY). The complaint describes the banks' actionable conduct in connection with the offer and sale of residential mortgage-backed securities to Fannie Mae and Freddie Mac. FHFA alleges the securities were sold pursuant to registration statements that contained false or misleading statements and omissions. Defendants falsely represented that the underlying mortgage loans complied with certain underwriting guidelines and standards and significantly overstated the ability of the borrowers to repay their mortgage loans. These representations were misleading to Fannie Mae and Freddie Mac, as reasonable investors, and their falsity violated §§11, 12(a)(2), and 15 of the Securities Act of 1933, 15 U.S.C. §77a.

Paragraph 2 of the FHFA complaint alleges that between September 2005 and September 2007, Fannie Mae and Freddie Mac purchased over $33 billion in residential mortgage-backed securities issued in connection with 103 securitizations sponsored by J.P. Morgan Acquisition and Washington Mutual Bank, which are listed in Table 1 of the complaint. Table 1 includes the investment trust in

which Plaintiff/Appellant's mortgage was bundled: WaMu Pass-Through Certificates, Series 2007-OA1 Trust.

The FHFA complaint describes in paragraph 4 that for each securitization, a prospectus and prospectus supplement were filed with the SEC as part of the Registration Statement for that Securitization. "The Registration Statements contained statements about the origination and underwriting practices used to make and approve the loans. Such statements were material to a reasonable investor's decision to invest in mortgage-backed securities. Unbeknownst to Fannie Mae and Freddie Mac, these statements were materially false, as significant percentages of the underlying mortgage loans were not originated in accordance with the represented underwriting standards and origination practices, and had materially poorer credit quality than was represented in the Registration Statements." The complaint in *Federal Housing Financing Authority v. JPMorgan Chase, et al,* Case 1:11-cv-06188-PKC (SDNY) is posted on the FHFA website.

Plaintiff's loan was issued as part of the biggest financial bubble in history, which occurred when WaMu and other banks abandoned underwriting practices and ignited a frenzy of real estate speculation

that ultimately lowered property values in the United States by 30 to 50%. Banks issued millions of predatory loans knowing that the borrowers would default and lose their homes. Those loans were packaged and sold to investment trusts that suffered the losses while banks insulated themselves from financial risk and harvested billions of dollars in fees. Kerry Killinger, CEO of Washington Mutual, took home more than $100 million during the seven years that he steered WaMu into the ground. As a direct result of fraudulent bank practices, millions of families are burdened with foreclosure. While institutional investors and government agencies sue the responsible banks to recover billions of dollars in losses, millions of homeowners are moved out of their homes.

Defendant and Respondent JP MORGAN CHASE BANK, N.A., ("Chase"), acquired certain assets and liabilities of WAMU from the Federal Deposit Insurance Corporation ("FDIC") acting as receiver in September 2008. EOR p. 63 (FAC ¶2), but WaMu had sold Plaintiff's loan to the WaMu Mortgage Pass-Through Certificates, Series 2007-OA1 Trust in January 2007. Chase has offered no proof that it is the holder of the note, a beneficiary, or a servicer of the loan that is the subject of this complaint. It stands on a platform of infallibility

without offering any evidence that it has possession of the note, is a Lender, or is authorized by the Lender to foreclose.

A Deed of Trust ("DOT") describing plaintiff's Property was recorded in Santa Barbara County on December 28, 2006. Plaintiff is named as Trustor. Washington Mutual Bank, FA is identified as "Lender." EOR p. 190 (Deed of Trust).

On April 1, 2010, Defendant CALIFORNIA RECONVEYANCE COMPANY ("CRC") recorded a Notice of Default ("NOD") with instructions that Plaintiff contact JPMORGAN CHASE BANK, NATIONAL ASSOCIATION to stop the foreclosure. EOR pp. 175-178 (Notice of Default).

A "Declaration of Compliance (Cal Civil Code §2923.5(b)" was attached to the NOD signed by Clement J. Durkin, identified as a CRC employee (with no job title). It described JPMorgan Chase Bank as, "The undersigned mortgagee, beneficiary or authorized agent." EOR pp. 65-66 (FAC ¶14); EOR p. 178 (Notice of Default 3/31/2010)

On July 1, 2010, Defendant CRC recorded a Notice of Trustee's Sale ("NOTS") stating that the Property would be sold at public auction on July 22, 2010. The NOTS included a declaration of compliance with Cal. Civil Code 2923.5 bearing the forged signature

of robo-signer Deborah Brignac. EOR p. 214 (Notice of Trustee's Sale). Various renditions of Brignac's signature on recorded documents are presented in Plaintiff's Exhibits 13-17. EOR pp. 212-236 (Plaintiff's Offer of Proof). The sale was postponed from month to month starting on July 22, 2010. No foreclosure has taken place.

Plaintiff alleged the following causes of action in her FAC:

1. WRONGFUL FORECLOSURE

After WaMu originated the loan, it transferred all beneficial interest in the loan through Washington Mutual Mortgage Securities Corp., evidenced by Prospectus Supplement to Prospectus dated January 11, 2007, WaMu Mortgage Pass-Through Certificates, Series 2007-OA1 Trust. WaMu retained no beneficial interest in the loan that could be transferred to Chase on September 25, 2008 when Chase acquired from the FDIC certain assets and liabilities pursuant to a Purchase and Assumption Agreement (P&A). EOR pp. 63, 66 (FAC ¶¶ 2, 16*)*. All subsequent holders of the Note took possession subject to any claims and defenses that Plaintiff had against WaMu when the note was sold because WaMu sold its beneficial interest at

least twenty months before the Purchase and Assumption Agreement was negotiated.

On September 1, 2009, Deborah Brignac, Vice President of Chase, Vice President of CRC, and a "robo-signer" whose name and variant signatures have attested to the truth of facts recited in declarations and affidavits filed in thousands of foreclosures, executed an Assignment of Deed of Trust as Vice President of Chase granting to Bank of America all beneficial interest in Plaintiff 's Deed of Trust, "together with the note or notes therein described and secured thereby, the money due or to become due thereon, with interest, and all rights accrued or to accrue under said Deed of Trust..." EOR p. 169 (Assignment of Deed of Trust, Plaintiff's Offer of Proof, Exhibit 2). Since WaMu's beneficial interest was transferred to the investment trust in January 2007, there was nothing for Deborah Brignac to assign to Bank of America. Plaintiff spoke to the manager of a Santa Barbara branch of Bank of America and was told that Bank of America had no interest in her property. EOR p. 145 (Declaration of Margaret Carswell ¶17). A variety of Brignac's signatures on recorded documents were submitted to the court as part of Plaintiff's

Offer of Proof. Plaintiff's Exhibits 13-17. EOR pp. 212-236 (Offer of Proof).

Neither WaMu, CRC, nor Chase recorded a transfer of a beneficial interest in the Note or any other interest in the Property to Chase. If the evidence were to show that Chase is somehow a beneficiary, CRC breached its fiduciary duty to Plaintiff under the DOT by not recording the transfer of the beneficial interest and/or servicing duty to Chase, by not indicating on the Notice of Default that Chase is the beneficiary, and by not recording a substitution of trustee indicating that CRC was a trustee for Chase rather than WaMu. Paragraph 24 of the DOT states:

> 24. Substitute Trustee. Lender, at its option, may from time to time appoint a successor trustee to any Trustee appointed hereunder by an instrument executed and acknowledged by Lender and recorded in the office of the Recorder of the county in which the property is located. The instrument shall contain the name of the original Lender, Trustee and Borrower, the book and page where this Security Instrument is recorded and the name and address of the successor trustee. Without reconveyance of the property, the

> successor trustee shall succeed to all the title, powers and duties conferred upon the Trustee herein and by Applicable Law. This procedure for substitution of trustee shall govern to the exclusion of all other provisions for substitution.
>
> EOR p. 202 (Deed of Trust ¶24).

Plaintiff alleged that Chase does not have standing to enforce the Note because Chase is not the owner of the Note, Chase is not a holder of the Note, and Chase is not a beneficiary under the Note. Only a Lender under the DOT has the capacity to exercise a power of sale. EOR p. 202 (Deed of Trust ¶22). In ¶7 of the Note, this power vests in the "Noteholder." EOR p. 164 (Note ¶ 7c). Chase does not claim to be a holder of the note or a beneficiary. Chase describes itself as a servicer in the Notice of Trustee's Sale. If Chase can prove that it is a servicer, as it asserts without proof, Chase cannot foreclose on Plaintiff's property without joining the owner of the note because an action must be prosecuted in the name of the real party in interest under Fed. R. Civ. P. 17. EOR p. 67 (FAC ¶18).

The trial court stated in the tentative ruling on January 6, 2011, which was adopted as the court's final ruling on February 15:

> Furthermore, it is well-settled that California law does not require production of the note as a condition to proceeding with a nonjudicial foreclosure proceeding. See, e.g. *Pajarillo v Bank of Am.*, 2010 U.S.Dist. LEXIS 115227 (S.D. Cal. Oct. 28, 2010) (citing cases). EOR p. 12 (Ruling on Motion to Dismiss FAC, p. 2).

In *Pajarillo v Bank of Am.*, Fidel Pajarillo, appearing pro se with his wife Rosalinda, sued Bank of America to stop a foreclosure. The cases cited by the District Court in support of the "well-settled" proposition consist of three unreported federal District Court cases: *Harrington v. Home Capital Funding, Inc.*, 2009 WL 514254, at *4 (S.D. Cal. 2009); *Quintos v. Decision One Mortg. Co.*, 2008 WL 5411636, at *3 (S.D. Cal. 2008); and, *Tina v. Countrywide Home Loans*, 2008 WL 4790906, at *7 (S.D. Cal. 2008).

In *Harrington,* a *pro se* plaintiff sued to save his home from foreclosure. The court stated, "There is no requirement that the original note be in possession of or produced by the party filing the notice of default or giving the notice of sale."

In *Quintos* and in *Tina*, two unreported cases before the same judge in San Diego District Court, where pro se homeowners faced off against lawyers for the banks, the court wrote:

> Cal. Civ.Code § 2924 outlines the requirements for nonjudicial foreclosures in California, and does not include providing the original note prior to the sale. Additionally, under California law, an "allegation that the trustee did not have the original note or had not received it is insufficient to render the foreclosure proceeding invalid." *Neal v. Juarez*, 2007 WL 2140640 (S.D.Cal. 2007) (citing *R.G. Hamilton Corp. v. Corum*, 218 Cal. 92, 97, 21 P.2d 413 (1933) and *Cal. Trust Co. v. Smead Inv. Co.*, 6 Cal.App.2d 432, 435, 44 P.2d 624 (1935)".

The earliest case, *R.G. Hamilton Corp. v. Corum* (1933) does not discuss the issue of the production of the note because the existence of the note was not an issue. In *Cal. Trust Co. v. Smead,* the note was known to be held by a third party at the time of the foreclosure. The court of appeal held, "manual delivery of the note and deed of trust was not necessary – symbolic delivery was sufficient. There is no claim by the defendant that harm or prejudice

resulted to him from the symbolic delivery. An irregularity, even if one has occurred, is not sufficient to invalidate a trustee's sale in the absence of a claim that the irregularity operated to the injury of the owner." *Cal. Trust Co.* suggests that if the irregularity (failure to produce the note as proof that the foreclosing party is entitled to do so) caused injury to the owner, such as loss of his home to a pretender lender, symbolic delivery of the note would not be sufficient. Manual delivery would be necessary.

In *Neal v. Juarez*, 2007 WL 2140640 (S.D.Cal. 2007) another unreported District Court case (S.D. Cal. 2007), the court held that "the allegation that the trustee did not have the original note or had not received it is insufficient to render the foreclosure proceeding invalid," again citing *Hamilton* and *Cal. Trust Co.*, neither of which stands for that proposition.

Judge Wu's ruling also cited *Nool v. Homeq Servicing*, 2009 U.S. Dist. LEXIS 80640 (E.D. Cal. 2009) at *12, "(t)here is no requirement that the party initiating foreclosure be in possession of the original note." *Nool* based its authority on two unreported District cases, *Candelo v. NDEX West,* 2008 WL 5382259 (E.D.Cal. 2008) and *Putkkuri v. Recontrust,* 2009 WL 32567 (S.D.Cal. 2009). Neither

case cited any case authority to support this statement. *Putkkuri* cites only Cal. Civ.Code § 2924(a). *Putkkuri* merely says, "No requirement exists under the statutory framework to produce the original note to initiate non-judicial foreclosure."

This is scant authority upon which to build a foundation of "well-settled" law - unreported District Court decisions which repeat the same statement interpreting Civ. Code § 2924 without citing any case that weighed the issue or even had two lawyers in the courtroom.

Demucha v. Wells Fargo, Cal. Court of Appeals, Case No. F059476 (5th Dist. July 5, 2011) is a recent unpublished opinion that addresses this issue:

> The parties have a great deal to say about whether Wells Fargo must "possess the note" or "produce the note" in order to enforce the note. We see nothing in the statutes governing nonjudicial foreclosure (see Civ. Code, §§ 2924 through 2924k; and *Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830-832) expressly mentioning possession of or production of a note as a prerequisite for initiating foreclosure. At the beginning of the nonjudicial foreclosure process, "[t]he trustee, mortgagee, or beneficiary, or any of their authorized agents shall first file for

> record, in the office of the recorder of each county wherein the mortgaged or trust property or some part of parcel thereof is situated, a notice of default." (Civ. Code, § 2924, subd. (a)(1).) According to the first amended complaint, however, Wells Fargo is not a trustee, mortgagee or beneficiary. Wells Fargo is, according to the pleading, an entity which "falsely and fraudulently claim[s] to hold title to and/or the right to enforce the note.

The *Demucha* court challenged the assumption of so many courts that a bank is a beneficiary simply because it calls itself one.

Plaintiff Margaret Carswell's FAC alleged that "Chase is not the owner of the Note, Chase is not a holder of the Note, and Chase is not a beneficiary under the Note. Only a noteholder or beneficiary under the DOT has the capacity to exercise a power of sale. Chase does not claim to be a holder of the note or a beneficiary, EOR p. 67 (FAC ¶18), and, "none of the defendants is the holder of the Promissory Note, none of them can prove any interest in the Note, and none of them can prove that the Note is secured by the DOT...". EOR p. 77 (FAC ¶ 58).

The comprehensive statutory framework established by Cal. Civ. Code §2924 to govern nonjudicial foreclosure sales is intended to be exhaustive." *Moeller v. Lien*, 25 Cal.App.4th 822, 834 (1994). "Moreover, the language of the statute is expressly applicable only as between parties to a contract." Chase makes no claim that it is a party to a contract with Plaintiff.

The Civil Code need not specify that the foreclosing party must possess the promissory note because the terms of the mortgage contract spell out the process to be followed.

Cal. Civil Code §2920(a) states that a mortgage is a contract:

> Cal. Civ. Code §2920.
>
> (a) A mortgage is a contract by which specific property, including an estate for years in real property, is hypothecated for the performance of an act, without the necessity of a change of possession.
>
> (b) For purposes of Sections 2924 to 2924h, inclusive, "mortgage" also means any security device or instrument, other than a deed of trust, that confers a power of sale affecting real property or an estate for years therein, to be exercised after breach of the obligation so secured, including a real property

sales contract, as defined in Section 2985, which contains such a provision.

The contract consists of a promissory note and the security instrument which supports it, usually a Deed of Trust. These two instruments define the creation and the termination of the mortgage and in particular they determine the process of foreclosing on a mortgage.

Paragraph 7(c) of Margaret Carswell's Note states that if the Borrower is in default, the Note Holder may require the Borrower to pay the full amount of the Principal. EOR p. 150 (Plaintiff's Offer of Proof, Exhibit 1). Paragraph 1 of the Note states that the Lender under the Note "or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the Note Holder."

Paragraph 16 of Margaret Carswell's Deed of Trust states that the Deed of Trust "shall be governed by federal law and the law of the jurisdiction in which the property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or

implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract." EOR p. 200 (Plaintiff's Offer of Proof, Exhibit 12, Deed of Trust).

Paragraph 22 of the Deed of Trust empowers only the Lender to initiate a foreclosure: "If Lender invokes the power of sale, Lender shall execute or cause Trustee to execute a written notice of the occurrence of an event of default and of Lender's election to cause the property to be sold." This does not authorize any and every national bank to foreclose against any and every house it fancies, and then to brush the homeowner aside in federal court with a motion to dismiss.

Paragraph 23 states, "Upon payment of all sums secured by this Security Instrument, Lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Instrument to Trustee." EOR p. 202 (Deed of Trust ¶¶ 22-23).

If a party writes a check and signs it, and the payee endorses the check and writes, "pay to the order of John Doe," neither the payee nor John Doe can take a photocopy of the check to the bank and cash the check. The bank won't give them a cent. So how can a bank take

somebody's house when they don't possess, or refuse to produce, the original negotiable instrument?

The party seeking to foreclose must show that it is authorized to foreclose by the Lender. The Lender can only prove that it has that capacity by producing the original note in its possession.

2. VIOLATION OF CAL CIV. CODE §2923.4

Plaintiff is not pursuing this cause of action on appeal in light of *Mabry v. Aurora Loan Services*, 185 Cal.App.4th 208 (2010).

3. UNJUST ENRICHMENT

If Chase had no beneficial interest that entitled it to collect Plaintiff's mortgage payments, then Plaintiff's payments to Chase in the sum of $107,766.23 constituted unjust enrichment. Chase was merely pretending to hold a beneficial interest while possessing documents showing that the Carswell loan was not listed as an asset in WaMu's ledger when the P&A was negotiated between FDIC and Chase in September 2008. EOR p. 70 (FAC ¶28).

The DOT states that all secured sums must be paid. That obligation was fulfilled when WaMu received the balance on the Note as proceeds of sale through securitization of the loan and the investment trust terminated. EOR p. 70 (FAC ¶29). If WaMu was, and Chase now is merely a servicer, only the lender can authorize a trustee's sale under the DOT. EOR p. 202 (DOT ¶23).

The DOT states in paragraph 23:

23. Reconveyance. Upon payment of all sums secured by this Security Instrument, lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Instrument to trustee. Trustee shall reconvey the Property without warranty to the person or persons legally entitled to it...

4. RESPA and TILA VIOLATIONS

Plaintiff's loan is a mortgage loan subject to the provisions of the Real Estate Settlement and Procedures Act (RESPA), 12 U.S.C. §2605 et. seq., and Cal. Financial Code §50505.

WaMu and its agents made material misrepresentations and omissions with respect to the terms of Plaintiff's loan in violation of

the Truth in Lending Act ('TILA"). Plaintiff is informed and believes that WaMu concealed the terms of the loan with the intention of inducing Plaintiff to refrain from investigating and challenging the disclosures until the period for rescinding the loan expired. Plaintiff did not receive any documents from WaMu after her meeting to sign documents with the Notary Public on December 20, 2006. She did not receive any of the disclosures required by the Truth in Lending Act or a Notice of Right to Cancel. EOR p. 70 (FAC ¶31).

On April 30, 2010, Plaintiff sent Defendant CRC and Washington Mutual Bank a Qualified Written Request ("QWR") pursuant to §6 of the Real Estate Settlement Procedures Act . EOR p. 180 (Qualified Written Request, Offer of Proof, Exhibit 5). On May 10, 2010, Plaintiff received a letter from Chase Home Finance LLC stating, "We are investigating your issues and will work to provide you with a complete and accurate response." Plaintiff received no other response to the QWR, a violation of federal law. EOR p. 70 (FAC ¶33).

Defendants engaged in a practice of non-compliance with RESPA, including failing to respond to properly submitted QWR's. Plaintiff alleged that this practice was designed to conceal TILA and

RESPA violations and to conceal the identity of the owner and true beneficiary of the loan. EOR p. 180 (FAC ¶ 34). As a result of Defendants' failure to comply with RESPA, Plaintiff was unable to ascertain the basis for Defendants' claims to her property, she could not identify the owner or the beneficiary of the Note, she could not determine whether her payments to Chase in excess of $100,000 were converted by Chase or paid to the beneficiary, and she had no evidence upon which to conclude that Defendants were acting in good faith with lawful authority in their attempts to foreclose the Property. EOR p. 71 (FAC ¶ 35).

5. NO CONTRACT

Plaintiff alleged that WaMu routinely approved predatory real estate loans to unqualified buyers in 2006 and implemented unlawful lending practices by encouraging brokers and loan officers to falsify borrowers' income and assets to meet underwriting guidelines when borrowers were not qualified. EOR p. 71 (FAC ¶ 37). (Note FDIC suit against Killinger)

Plaintiff alleged that WaMu pre-sold Plaintiff's mortgage and immediately after she signed the Note transferred all of its interest in

the Note to an investment bank that bundled Plaintiff's Note with other residential mortgages into residential mortgage-backed securities ("RMBS") which were structured into synthetic collateralized debt obligations ("CDOs") and sold to investors. EOR p. 71 (FAC ¶ 39).

The portfolio of RMBS underlying the synthetic CDOs were selected by a hedge fund with economic interests directly adverse to borrowers and investors. The hedge fund and the investment bank intended to short the portfolio it helped to select by entering into credit default swaps to buy protection against the almost certain event that the promissory notes would default. WaMu expected that Plaintiff would not have the ability to repay the loan. It was not a matter of being unconcerned with a possible outcome that Plaintiff would default. They knew. EOR p. 72 (FAC ¶ 40).

Washington Mutual Bank, the sponsor of the securitization package, was a wholly owned subsidiary of Washington Mutual Inc. Securitization of mortgage loans was an integral part of Washington Mutual Inc.'s management of its capital. It engaged in securitizations of first lien single-family residential mortgage loans through Washington Mutual Mortgage Securities Corporation, as depositor,

beginning in 2001. WaMu acted only as a servicer of Plaintiff's loan. WaMu failed to disclose to Plaintiff that its economic interests were adverse to Plaintiff and that WaMu expected to profit when Plaintiff found it impossible to perform and defaulted on her mortgage. EOR p. 72 (FAC ¶¶ 41-42).

A necessary element in the formation of an enforceable contract under the common law is a *meeting of the minds*. Two or more parties must share an expectation that a future event will occur. Plaintiff expected that she would borrow money from WaMu, she would pay it back, and then she would own the Property. WaMu expected that Plaintiff would borrow money, she would not be able to pay it back, and then WaMu or the investors would take the Property. EOR p. 72 (FAC ¶ 43). Since there was no shared expectation—no meeting of the minds—no contract was formed between Plaintiff and WaMu.

Consent of the parties is one of the requisites of a valid contract for the sale of realty. Ussery v. Jackson, 78 Cal. App. 2d 355 (1947). It is essential to the creation of such a contract that there be a meeting of the minds of the parties and a mutual agreement on the terms of the contract. *Holland v. McCarthy*, 173 Cal. 597 (1916); *German Sav.*

& Loan Soc. v. McLellan, 154 Cal. 710 (1908) ; *Lonergan v. Scolnick*, 129 Cal. App. 2d 179 (1954); *Cook v. Mielke*, 3 Cal. App. 2d 736 (1935).

The writing must evince a free and mutual understanding of the parties and show that they both agreed on the same thing in the same sense, *Estes v. Hardesty*, 66 Cal. App. 2d 747 (1944), or the writing has no binding effect on either. *Patterson v. Clifford F. Reid, Inc.*, 132 Cal. App. 454 (1933); Scott v. Los Angeles Mountain Park Co., 92 Cal. App. 258 (1928). When the writing shows that there was no meeting of the minds on the material terms of the proposed agreement, no contract exists, no obligation to convey rests on the vendor, and the purchaser is under no duty to accept the property or pay for it. *Burgess v. Rodom*, 121 Cal. App. 2d 71 (1953); Salomon v. Cooper, 98 Cal. App. 2d 521 (1950). In such a case it is immaterial that the signature of the party charged, Patterson v. Clifford F. Reid, Inc., 132 Cal. App. 454 (1933), or of both parties, is affixed. *Morton v. Foss*, 48 Cal. App. 2d 117 (1941).

It is indispensable to a valid memorandum of an agreement to sell and convey land that it be complete evidence of the terms to which the parties have assented. If it establishes that there was in fact

no contract, if it discloses that upon essential and material terms the minds of the parties did not meet and that such terms were left open for future settlement, then there is no binding obligation upon the seller to convey or the buyer to accept and pay for the land. It will be regarded as merely an inchoate effort. Implications will not be indulged. *Salomon v. Cooper*, 98 Cal.App.2d 521, 522-523 (1950).

An action for damages for breach of contract for the purchase or sale of real property will not lie unless the writing contains the essential terms and material elements of such an agreement without recourse to parole evidence of the intention of the contracting parties. *Dillingham v. Dahlgren*, 52 Cal.App. 322, 326-327 (1921). The law does not provide a remedy for breach of an agreement to agree in the future, and the court may not speculate upon what the parties will agree. *Autry v. Republic Productions, Inc.*, 30 Cal.2d 144, 151, 152 (1947).

"If no meeting of the minds has occurred on the material terms of a contract, basic contract law provides that no contract formation has occurred. If no contract formation has occurred, there is no settlement agreement to enforce pursuant to (C.C.P.) section 664.6 or

otherwise." *Weddington Productions, Inc. v. Flick*, 60 Cal.App.4th 793, 801 (1998).

David Horton wrote in the UCLA Law Review this year, "The perception that adherents (to standard form contracts) did not read and could not understand fine-print terms made it difficult to identify the requisite 'meeting of the minds' or 'mutual assent' of contract formation." David Horton, "The Shadow Terms: Contract Procedure and Unilateral Amendments," 57 UCLA Law Review 605 (February, 2010).

Plaintiff alleged that WaMu purchased credit default insurance so that WaMu would receive the balance on the Note when Plaintiff defaulted, in addition to any money WaMu received when it securitized the note. EOR p. 73 (FAC ¶ 44).

Not only did WaMu dispense with conventional underwriting practices in 2006, it also paid premium fees and other incentives to mortgage brokers who signed up the riskiest borrowers. Fueled by spiraling profits to Chase and WaMu, common law principles of contract formation, customary underwriting practices, and statutory procedures for transferring interests in real property, including the recordation of transfers of interests in real property, disintegrated

and the system collapsed. EOR p. 73 (FAC ¶ 45). The phony numbers inserted into Plaintiff's loan application were considered part of standard banking practice during this moral meltdown.

WaMu expected that Plaintiff would not perform as one victim in a scheme in which:

(1) WaMu's fees as servicer would be greater as the number of loans increased;

(2) WaMu's fees as servicer would be greater as the balances of loans increased;

(3) WaMu would recover the unpaid balance of Plaintiff's loan through credit default insurance when Plaintiff inevitably defaulted; and

(4) All risk of loss in the event of Plaintiff's default would be borne by investors, not WaMu as the servicer. EOR p. 73 (FAC ¶ 46).

Plaintiff's participation in the mortgage contract was procured by overt and covert misrepresentations and nondisclosures. The parties did not share a single expectation with respect to any of the terms of the mortgage contract and therefore the contract was void *ab initio*. Had Plaintiff known that WaMu intended to sell her mortgage and engage in all the securitizations and collateralizations, she would

never have entered into a mortgage contract with WaMu. EOR p. 73 (FAC ¶ 47).

The only evidence Chase offers to support its claim against Plaintiff is a Purchase and Assumption Agreement drafted by FDIC and signed on September 25, 2008. Since no enforceable contract was formed between Plaintiff and WaMu, her DOT and Promissory Note were not assets of WaMu that could be acquired or assumed by Chase from the Federal Deposit Insurance Corporation (FDIC) as receiver after WaMu was closed by the Office of Thrift Supervision on September 25, 2008. EOR p. 74 (FAC ¶ 48).

6. FRAUD AND CONCEALMENT

Chase concealed from Plaintiff material facts in its possession which were requested in her QWR that would enable her to ascertain whether her payments to WaMu and Chase were received by the owner or beneficiary of the Note:

(1) a copy of the Final Loan Application, including notations by underwriters;

(2) the contract, duly signed by an officer of the corporation, which committed WaMu to lend funds to Plaintiff;

(3) a ledger statement of WaMu showing: (a) the account and the source of the funds loaned to Plaintiff, and (b) entry in WaMu's books of the Note as an asset or cash item;

(4) the identity and contact information of the current owner of the Note and the holder of the Note, and whether that entity or entities filed for bankruptcy;

(5) an authenticated copy of the front and the back sides of the original Promissory Note showing a complete chronological chain of all endorsements and assignments;

(6) the names and addresses of each and every individual or entity that has received an assignment of the Note;

Nine additional items of information were requested in Plaintiff's QWR, attached to FAC as Exhibit 5. EOR p. 180 (QWR); EOR pp. xx (FAC ¶ 52).

As a result of Chase's fraudulent concealment, Plaintiff faced the constant threat of a trustee's sale of the Property, which could happen at any time without prior notification to her, and in addition to her emotional distress, she suffered irreparable injury. EOR p. 76 (FAC ¶ 53)

7. QUIET TITLE

Plaintiff sued to quiet title against the claims of Defendants pursuant to Cal Code Civil Procedure §760.020. Plaintiff holds a Grant Deed dated October 15, 1992, attached to the FAC as Exhibit 9. EOR p. 76 (FAC ¶ 56).

As stated above, WaMu securitized Plaintiff's note through Washington Mutual Mortgage Securities Corp. The WaMu Mortgage Pass-Through Certificates, Series 2007-OA1 Trust was terminated on October 15, 2010, and the lawful beneficiary was paid in full. CRC owes a duty under the DOT to reconvey the DOT to Plaintiff. Plaintiff demanded full reconveyance in her letter to CRC on March 17, 2010. EOR p. 173 (FAC, Exhibit 3); EOR p. 76 (FAC ¶ 57)

The DOT states in paragraph 23:

> 23. Reconveyance. Upon payment of all sums secured by this Security Instrument, lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Instrument to trustee. Trustee shall reconvey the Property without warranty to the person or persons legally entitled to it.

The DOT does not state that Plaintiff must make full payment, only that all secured sums must be paid. Plaintiff alleged that the obligations owed to WaMu under the DOT were fulfilled and the loan was fully paid when WaMu received funds as proceeds of sale through securitization of the loan and insurance proceeds from Credit Default Swaps. EOR p. 77 (FAC ¶57).

Neither of the defendants is a holder of the Note, or can prove any interest in the Note, or can prove that the Note is secured by the DOT. Defendants have no right, title, estate, lien, or interest in the Property. Therefore, Plaintiff requested a judicial declaration that the title to the subject property is vested solely in Plaintiff and that Defendants have no right, title, estate, lien, or interest in the Property. EOR p. 77 (FAC ¶¶ 58-59).

8. DECLARATORY AND INJUNCTIVE RELIEF

If WaMu sold Plaintiff's note to an investment trust in 2007 that was terminated in 2010, the same trust that FHFA alleges was fraudulently passed off to Fannie Mae or Freddie Mac, then Chase cannot be the holder in due course or beneficiary of the Note executed by Plaintiff. Plaintiff alleged that Defendants were not real parties in

interest, did not have standing, and were not entitled to sell the Property because they were not a beneficiary or authorized agent of beneficiaries under the Note. Therefore, Plaintiff requested a judicial determination of her rights and duties as to the validity of the Promissory Note and DOT. Plaintiff alleged that Defendants' conduct would cause great irreparable injury to Plaintiff as the value of the residence declined under threat of foreclosure and Plaintiff faced the prospect of eviction from her residence. Plaintiff designed and built the home herself. She raised her three children there. The property is unique and cannot be replicated. By contrast, if the foreclosure sale were to be enjoined, the burden to Defendants would be minimal. EOR p. 18 (FAC ¶¶ 61-65).

9. SLANDER OF TITLE

Having no claim to the property, defendants published matters which were untrue and disparaging to Plaintiff. The publications were unjustified and without privilege and cast doubt on Plaintiff's right to title in her property, which caused damage to Plaintiff. As a result of the publications, Plaintiff suffered loss of money, credit, real property value, and reputation. EOR p. 79 (FAC ¶¶ 68 - 71).

Plaintiff has pled that she suffered an injury as a direct result of Defendants' actions. Defendants have cratered the market value of Plaintiff's Property and caused her extreme emotional distress. To say there is no damage as a result of Defendants' public humiliation of Plaintiff would be calloused. See *Sullivan v. Wash. Mut. Bank, FA*, 2009 WL 3458300, at *4-5 (N.D.Cal. Oct.23, 2009) (concluding that the initiation of foreclosure proceedings put the plaintiff's interest in her property sufficiently in jeopardy to allege an injury under § 17200); *Rabb v. BNC Mortgage, Inc.*, 2009 WL 3045812, at *2 (C.D.Cal. Sept.21, 2009) (same).

10. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

There is no privilege that insulates an imposter who asserts a false claim to real property. Defendants engaged in extreme and outrageous conduct either intentionally or with reckless disregard of the effect on Plaintiff. As a result, Plaintiff suffered severe emotional distress. The court dismissed this count by merely stating, "Also newly added is Plaintiff's Tenth Claim for Relief for Intentional Infliction of Emotional Distress. None of its elements are plausibly pleaded." However, the complaint specifies each of the necessary

elements to state a cause of action for Intentional Infliction of Emotional Distress. EOR p. 79 (FAC ¶¶ 73 - 75).

When somebody who has no right to your house tries to sell it on the courthouse steps, it can be very upsetting.

JUDICIAL NOTICE

Defendants asked the court to take judicial notice of the Purchase and Assumption Agreement as the sole basis for their claim. Judicial notice may not be taken of any matter unless authorized or required by law. Cal. Evid. Code § 450. Matters that are subject to judicial notice are listed in Cal. Evid. Code §§451 - 452. A matter ordinarily is subject to judicial notice only if the matter is reasonably beyond dispute. *Fremont Indemnity Co. v. Fremont General Corp.* 148 Cal.App.4th 97, 113 (2007).

Taking judicial notice of a document is not the same as accepting the truth of its contents or accepting a particular interpretation of its meaning. *Herrera v. Deutsche Bank National Trust Company*, ___ Cal.App4th ___, No. C065630 (3d Dist. June 28, 2011), *Joslin v. H.A.S. Ins. Brokerage,* 184 Cal.App.3d 369, 374 (1986). While courts take judicial notice of public records, they do not

take notice of the truth of matters stated therein. *Love v. Wolf*, 226 Cal.App.2d 378, 403 (1964). When judicial notice is taken of a document, the truthfulness and proper interpretation of the document are disputable. *StorMedia, Inc. v. Superior Court,* 20 Cal.4th 449, 457 (1999).

A California court considered the scope of judicial review of a recorded document in *Poseidon Development, Inc. v. Woodland Lane Estates*, LLC, 152 Cal.App.4th 1106 (2007).

> [T]he fact a court may take judicial notice of a recorded deed, or similar document, does not mean it may take judicial notice of factual matters stated therein. For example, the First Substitution recites that Shanley `is the present holder of beneficial interest under said Deed of Trust.' By taking judicial notice of the First Substitution, the court does not take judicial notice of this fact, because it is hearsay and it cannot be considered not reasonably subject to dispute." (Id. at p. 1117.)
>
> The same situation is present here. The Substitution of Trustee recites that the Bank "is the present beneficiary under" the 2003 deed of trust. As in *Poseidon*, this fact is hearsay and disputed; the trial court could not take judicial notice of it. Nor

> does taking judicial notice of the Assignment of Deed of Trust establish that the Bank is the beneficiary under the 2003 deed of trust. The assignment recites that JPMorgan Chase Bank, "successor in interest to WASHINGTON MUTUAL BANK, SUCCESSOR IN INTEREST TO LONG BEACH MORTGAGE COMPANY" assigns all beneficial interest under the 2003 deed of trust to the Bank. The recitation that JPMorgan Chase Bank is the successor in interest to Long Beach Mortgage Company, through Washington Mutual, is hearsay. Defendants offered no evidence to establish that JPMorgan Chase Bank had the beneficial interest under the 2003 deed of trust to assign to the Bank. The truthfulness of the contents of the Assignment of Deed of Trust .0remains subject to dispute (*StorMedia*, supra, 20 Cal.4th at p. 457, fn. 9), and plaintiffs dispute the truthfulness of the contents of all of the recorded documents.

While the court may take judicial notice of the existence of the Purchase and Assumption Agreement, which is the only "fact" offered to the court by Chase, that does not mean it may take judicial notice of factual matters stated therein.

CONCLUSION

For all of the above-stated reasons, Margaret Carswell requests the district court's order of dismissal be reversed.

Date: September 22, 2011

s/_____
DOUGLAS GILLIES
Attorney for
MARGARET CARSWELL

STATEMENT OF RELATED CASES

Plaintiff-Appellant Margaret Carswell is not aware of any related case pending in this Court, pursuant to Ninth Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NO. 11-55423

I certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 8048 words.

September 22, 2011

/s/_____
Douglas Gillies
Attorney for MARGARET CARSWELL