Case No. 11-55423

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARGARET CARSWELL
Plaintiffs/Appellants,

v.

JPMORGAN CHASE BANK, N. A., CALIFORNIA RECONVEYANCE
Defendants/Appellees.

ANSWERING BRIEF OF DEFENDANTS-APPELLEES JPMORGAN CHASE BANK, N. A. AND CALIFORNIA RECONVEYANCE COMPANY

On Appeal from the United States District Court for the Central District of California, Los Angeles
Case No. 2:10-CV-0152-GW (PLA)

The Honorable George H. Wu, Judge Presiding

THEODORE E. BACON (CA Bar No. 115395)
MICHAEL B. TANNATT (CA Bar No. 117113)

ALVARADOSMITH
A Professional Corporation
633 W. Fifth Street, Suite 1100
Los Angeles, California 90071
Tel: (213) 229-2400
Fax: (213) 220-2499

Attorneys for Defendants/Appellees
JPMORGAN CHASE BANK, N. A. and CALIFORNIA RECONVEYANCE COMPANY.

ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

FEDERAL RULE OF APPELLATE PROCEDURE 26.1

Pursuant to Federal *Rule of Appellate Procedure* 26.1, appellees JPMorgan Chase Bank, N.A. and California Reconveyance Company (collectively, "Appellees") provide the following Corporate Disclosure Statement:

Defendant/Appellee JPMorgan Chase Bank, National Association is a wholly owned subsidiary of The Bear Stearns Companies, LLC, which is a wholly owned subsidiary of JPMorgan Chase & Co., which is a publicly traded corporation. No publicly held corporation owns ten percent (10%) or more of JPMorgan Chase & Co.'s stock as of August 21, 2009.

Defendant/Appellee California Reconveyance Company is a California Corporation.

DATED: October 21, 2011

Respectfully submitted,

ALVARADOSMITH
A Professional Corporation

By: /s/ Michael B. Tannatt
THEODORE E. BACON
MICHAEL B. TANNATT
Attorneys for Appellees,
JPMORGAN CHASE BANK, N. A. and
CALIFORNIA RECONVEYANCE
COMPANY

STATEMENT OF RELATED CASES

CIRCUIT RULE 28-2.6

In compliance with *Ninth Circuit Court of Appeals Rule* 28-2.6, Defendants/Appellees are unaware of any related case pending in this Court.

DATED: October 21, 2011

Respectfully submitted,

ALVARADOSMITH
A Professional Corporation

By: /s/ Michael B. Tannatt
THEODORE E. BACON
MICHAEL B. TANNATT
Attorneys for Appellees,
JPMORGAN CHASE BANK, N.A. and
CALIFORNIA RECONVEYANCE
COMPANY

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I. JURISDICTIONAL STATEMENT

Pursuant to *Federal Rule of Appellate Procedure* 28(b)(1), and *Circuit Rule* 28-1, appellees JPMorgan Chase Bank, N.A. and California Reconveyance Company (collectively, "Appellees") respectfully submit the following jurisdictional statement.

A. Basis of the District Court's Jurisdiction

The District Court properly exercised jurisdiction over the underlying action pursuant to 28 U.S.C. §§ 1331 and 1337. The District Court had supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(a).

B. Basis of Appellate Jurisdiction

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, which provides, in pertinent part, that "[t]he courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States...." *See* 12 U.S.C. § 1291. The District Court entered an order of dismissal on February 15, 2011. *See* February 15, 2011, Final Ruling on Defendants' Motion To Dismiss, ER, vol. 1, pg. 6. The Notice of Appeal was filed on March 14, 2011. *See* ER, vol. 1, pg. 4. Thus, the appeal is timely under *Federal Rule of Appellate Procedure* 4.

II. STATEMENT OF ISSUES PRESENTED

1. Whether the U. S. District Court properly granted the Motion of Appellees to Dismiss the First Amended Complaint ("FAC") as to the first claim for "Wrongful Foreclosure"; third claim for "Unjust Enrichment"; fourth claim for "RESPA and TILA Violations"; fifth claim for "No Contract"; sixth claim for "Fraud and Concealment"; seventh claim for "Quiet Title"; eighth claim for "Declaratory and Injunctive Relief"; ninth claim for "Slander of Title"; and tenth claim for "Intentional Infliction of Emotional Distress" with prejudice for the failure to state a claim or to offer any proof that Plaintiff had the ability to state a claim. Carswell has elected not to appeal the second claim for "Violation of Civil Code § 2923.5".

III. STATEMENT OF THE CASE

Carswell initiated this action in the District Court asserting several federal and state law claims related to the origination, servicing and foreclosure proceedings regarding the residential loan that she obtained on or about December 28, 2006 from Washington Mutual Bank ("WaMu") ("Subject Loan"), secured by real property located at 845 Sea Ranch Drive, Santa Barbara, California APN 047-103-04-00 ("Subject Property"). Carswell filed suit alleging that WaMu failed to disclose "material facts" during the Subject Loan origination. Carswell also alleges that Appellees are not entitled to initiate the foreclosure proceedings in this case.

Carswell sought damages and to rescind the Subject Loan documents based upon her contention that the party to initiate non-judicial foreclosure proceedings must be in possession of the original promissory note. *See* ER, vol. 2, pg. 67 (FAC, ¶ 18).

Appellees filed a Motion to Dismiss the Complaint, contending that the FAC failed to state facts sufficient to state a claim under *Federal Rule of Civil Procedure* 12(b)(6). *See* ER, vol. 1, pgs 11 - 14. The District Court agreed and ruled that Carswell failed to state facts sufficient to demonstrate she had actionable claims. *See* ER, vol. 1, pgs 11-14 (Court's Ruling on Motion To Dismiss FAC). The District Court allowed Carswell to file an Offer of Proof as to the First Amended Complaint and the Court thereafter would rule as to whether an amendment would be allowed thereafter. *See* ER, vol. 1, pg. 22 (Last page of District Court's Tentative Ruling"). Carswell filed her Offer of Proof. *See* ER, vol. 2, pgs. 149 to 158. On February 15, 2011, the District Court granted the Motion To Dismiss without leave to amend. *See* ER, vol. 1, pgs 8 – 9 (Final Ruling On Motion To Dismiss FAC).

IV. STATEMENT OF FACTS

A. Factual Allegations

In December, 2006, Carswell obtained the Subject Loan, which was for the principal amount of $2,500,000.00 from WaMu secured by the Subject Property. *See* ER, vol. 2, pgs. 71 and 161 - 168, and 190 – 211 (FAC, ¶ 38 and copies of recorded deed of trust ("DOT") and the Adjusted Rate Note ("Note"). Carswell signed the Note and DOT. *See* ER, vol. 2. pgs. 64, 142 and 161 - 168 (FAC, ¶ 9 and Declaration of Margaret Carswell ("Carswell Decl."), ¶ 3), filed with the Court on July 14, 2010 and a copy of the Note.) Plaintiff received the amount of $2,500,000.00 and the DOT was recorded on December 28, 2006. *See* ER, vol. 2, pgs. 145 and 190 (Carswell Decl., last sentence of ¶ 16 and copy of recorded DOT).

On September 25, 2008, the Office of Thrift Supervision ("OTS") directed the Federal Deposit Insurance Corporation ("FDIC") to be the receiver of WaMu ("OTS Order"). Supplemental Excerpt of Record ("SER"), pg. 2 (Copy of the OTS Order was attached as Exhibit "2" to the Request for Judicial Notice ("RJN"), filed concurrently with the Motion To Dismiss the FAC).

On September 25, 2008, JPMorgan acquired certain assets and liabilities of WaMu from the FDIC acting as receiver, pursuant to the Purchase and Assumption Agreement (“P & A Agreement”) between the FDIC and JPMorgan dated

September 25, 2008. *See* SER, pgs. 4 – 47 (Copy of the P & A Agreement attached as Exhibit "3" to the RJN).

As successor in interest to WaMu, JPMorgan had the Assignment recorded on September 2, 2009, which transferred all beneficial interest under the deed of trust to Bank of America, N.A., as successor by merger to "LaSalle Bank NA as trustee for WaMu Mortgage Pass-Through Certificate Series 2007-)A1 Trust" ("Bank of America"). *See* ER, vol. 2, pgs. 170 – 171 (copy of the recorded Assignment).

Until December, 2009, Carswell made regular payments on the Subject Loan, but on or about this date, she decided to stop making payments when "the research that [she] had begun two months earlier started to reveal non-disclosed securitization of [her] mortgage and many irregularities from usual mortgage procedure." *See* ER, vol. 2, pgs 143 – 144 (Carswell Decl., ¶ 10).

On April 1, 2010, a Notice of Default and Election To Sell ("NOD") was recorded. *See* ER, vol. 2, pgs. 65 and 176 – 178 (FAC, ¶ 13 and copy of recorded DOT).

On July 1, 2010, a Notice of Trustee's Sale ("NOTS") was recorded, notifying that that trustee's sale was set for July 22. 2010. *See* ER, vol. 2, pgs. 213 and 186 – 187 (FAC, pg. 66, ll. 4 – 7 and copy of recorded NOTS).

B. Procedural History

On July 14, 2010, Carswell filed her Complaint. *See* ER, pg. 53 (Court's Docket, entry 1).

On August 9, 2010, Appellees filed a Motion To Dismiss to the Complaint. *See* ER, vol. 1, pg. 54 (Court's Docket, entry 15). On January 6, 2011, the Court granted the Motion To Dismiss with leave to amend. *See* ER, pg. 56 (Court's Docket, entry 37).

On October 18, 2010, Carswell filed the FAC, containing ten causes of action. *See* ER, vol. 2, pgs. 61 to 82 (FAC). On October 27, 2010, Appellees filed the Motion To Dismiss to the FAC. *See* ER, vol. 1, pg. 55 (Court's Docket, entry 26). The Court granted the Motion To Dismiss the FAC, providing Carswell the opportunity to File An Offer of Proof as to whether leave to amend the FAC should be granted. *See* ER, vol. 1, pgs. 16 – 22 and 14. (District Court' Ruling on Motion To Dismiss FAC and District Court's Civil Minutes, dated January 6, 2011.) Carswell filed her Offer of Proof. *See* ER, vol. 2, pgs. 149 to 295 (Offer of Proof). On February 15, 2011, the District Court issued its Final Ruling on the Motion To Dismiss FAC, granting the motion as to all causes of action without leave to amend. *See* ER, pgs. 8 – 9 (District Court's Final Ruling on the Motion to Dismiss the FAC).

This appeal followed. *See* ER. vol. 1, pg. 4 (Notice of Appeal).

V. STANDARD ON REVIEW

An order granting a motion to dismiss a complaint and an entry of judgment thereon is reviewed de novo. *See Williams v. Gerber Products Co.*, 552 F.3d 934, 937 (9th Cir. 2008). "It is well established that an appellate court will not reverse a district court on the basis of a theory that was not raised below." *See Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 546, n.15 (9th Cir. 1991); *see also Youakim v. Miller*, 425 U.S. 231, 234 (1976). The only inquiry to be made is whether the District Court properly exercised its authority in granting the Appellees' Motion to Dismiss the Complaint pursuant to *Federal Rule of Civil Procedure* 12(b)(6) and dismissing the federal claims with prejudice.

Under *Federal Rule of Civil Procedure* 12(b)(6), a defendant may move to dismiss a complaint for failure to state a claim upon which relief can be granted. Under *Rule* 8(a)(2), the complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *See Fed. R. Civ. Proc.* 8(a)(2). A plaintiff must state "enough facts to state a claim to relief that is plausible on its face." *See Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007). A claim has "facial plausibility" if the plaintiff pleads facts that "allow [] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1940 (2009).

Rule 8 does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Id.* at 1949. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Id.* Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." The review is context specific, but "where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (Internal quotations omitted).

In this matter, the District Court properly concluded that Carswell failed to meet even this minimal standard.

VI. SUMMARY OF ARGUMENT

Carswell premises her FAC on the contentions that the Subject Loan should be declared "void ab initio" because WaMu transferred the beneficial interest under the Subject Loan to Bank of America and because Appellees did not have standing to initiate and conduct non-judicial foreclosure proceedings because they were not in possession of the original promissory note. *See* ER, vol. 2. pgs. 63 - 79 (FAC, ¶¶ 1 – 75).

The District Court properly ruled that the FAC's ten claims contained insufficient allegations to afford Plaintiff the equitable relief and monetary damages that Carswell sought.

No wrongful foreclosure has occurred because JPMorgan acquired all of WaMu's servicing rights when it purchased WaMu's assets from the FDIC. CRC is the trustee under the DOT. Consequently, under the California Civil Code, Appellees were entitled to initiate and conduct the foreclosure.

No unjust enrichment has occurred because any monthly payments that Carswell claims she paid to WaMu or JPMorgan were to pay off her debt under the Subject Loan in the principal amount of $2,500,000.00.

Carswell is not entitled to damages for TILA violations because JPMorgan was not the originating lender, WaMu was. Furthermore, the one year statute of limitations for damages has expired. No claim under RESPA has been alleged because Plaintiff has alleged no damages because JPMorgan purportedly failed to properly respond to her qualified written response.

The "no contract" claim is without merit because Carswell alleged that she signed the Note and DOT and received $2,500,000.00, most of which has not been repaid. Because Carswell fails to allege that she can repay the amounts owing under the Subject Loan, none of the allegations support her request to have the Subject Loan declared "void ab initio."

The claim for "fraud and concealment" fails because Appellees are not alleged to have made any misrepresentations to Carswell; nor did they have any duty to disclose any of the purported facts that Carswell claims were allegedly not disclosed.

No claim for "quiet title" has been stated because Carswell does not properly allege the adverse claims to the Subject Property's title, and to the extent that she seeks to rescind the security interest under the DOT, she has failed to allege that she has the ability to tender the amount owing under the Subject Loan.

No claim for "declaratory relief/injunctive relief" has been stated because no controversies are alleged that have not been raised in Carswell's previous non-meritorious causes of action.

No "slander of title" is stated because the foreclosure proceedings were justified; furthermore, under California Civil Code § 2924 (d), the proceedings were privileged.

No "intentional infliction of emotional distress" has been stated because no outrageous conduct has been alleged.

Finally, the District Court properly granted judicial notice of the OTS Order and the P & A Agreement because these are public records available from a reliable source on the internet. They have routinely been judicially noticed in federal district cases that are too many to list.

VII. ARGUMENT

A. The District Court Properly Concluded That Carswell Failed to State A Claim For "Wrongful Foreclosure"

In her Appellant's Brief, at p. 11, first full paragraph, Carswell challenges JPMorgan's authority to foreclose on the Subject Loan based on her allegation that JPMorgan "does not have standing to enforce the [Promissory] Note because [JPMorgan] is not the owner of the [Promissory Note]." *See* ER, vol. 2, pg. 67 (FAC, ¶ 18). This contention, however, is contrary to California Law. *See Caravantes v. California Reconveyance Co.*, 2010 WL 4055560, 9 (S.D.Cal., 2010) ("Caravantes"), which holds:

> California Commercial Code § 3301 provides that a "person entitled to enforce" an instrument includes "the holder of the instrument" as well as "a nonholder in possession of the instrument who has the rights of a holder." In California, the instrument most commonly used to secure a promissory note given for a real property loan is a deed of trust, which effectively gives the creditor a lien on the secured property to satisfy the obligation under the note if it is not paid. *Alliance Mortg. Co. v. Rothwell*, 10 Cal.4th 1226, 1235, 44 Cal.Rptr.2d 352, 900 P.2d 601 (Cal.1995). California law specifically authorizes the trustee, beneficiary, *or any of their authorized agents* to record the notice of default or the notice of sale under a deed of trust. Cal. Civ.Code §§ 2924(a)(1), 2924b(b) (4). Accordingly, as a servicer of the subject loan in this case, JPMorgan had the authority to record the Notice of Default and to enforce the power of sale under the Deed of Trust. Accordingly, the Court GRANTS the motion to dismiss in this regard and DISMISSES WITH PREJUDICE Plaintiff's fifteen cause of action.

In this case, as in *Caravantes, supra*, JPMorgan obtained WaMu' servicing interests in the Subject Loan pursuant to the P & A Agreement with the FDIC. *See* P & A Agreement"), Supplemental Excerpt of Record ("SER"), pgs. 4 – 47 (P & A Agreement ¶ 3.2 at pg. 9). Section 3.1 of the P & A Agreement specifically provides that JPMorgan (referenced as the Assuming Bank) "specifically purchases all mortgage servicing rights and obligations of the Failed Bank" (referencing WaMu). In the FAC, Carswell alleges that WaMu was the originating lender. *See* ER, vol. 2, pgs. 64 - 65 (FAC, at ¶¶ 8, 11) and ER, vol. 2, pgs. 161 -168 (copy of Note) and DOT, ER, vol. 2, pgs 190 – 211 (copy of recorded DOT). Consequently, the documents establish that JPMorgan has acquired the servicing rights to the Subject Loan from the FDIC.

Furthermore, the FAC alleges that CRC is the trustee named on the DOT. *See* ER, pgs. 63 - 64 and 190 - 211 (FAC, ¶ 3 and DOT).

Consequently, the FAC and its exhibits establish that JPMorgan and CRC as the servicer and trustee, under California Civil Code §§ 2924(a)(1) and 2924b(b)(4), as the trustee and the authorized agent of the beneficiary were authorized to initiate the foreclosure proceedings in this case.1 The beneficiary in

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[1] The Court is requested to note that Carswell erroneously cites at p. 11 of her Appellant's Brief the Federal Rule of Civil Procedure ("FRCP"), Rule 17 for the proposition that "Chase cannot foreclose on Plaintiff's property without joining the

this case is Bank of America. *See* ER, vol. 2, pg. 170 (Assignment of Deed of Trust ("Assignment")). Accordingly, contrary to Carswell's allegations, JPMorgan and CRC have properly initiated and conducted the foreclosure proceedings in regard to the Subject Loan.

Furthermore, as set forth in the District Court's ruling on the Motion To Dismiss the FAC, the authorities are virtually unanimous that California law does not require the production of the Note as a condition to proceeding with a nonjudicial foreclosure proceeding, citing by example *Pajarilo v. Bank of America*, 2010 U.S. Dist. LEXIS 115227 (S.D. Cal. Oct. 28, 2010) (citing cases). *See* ER, vol. 1, pg. 12. In addition to this case, *see also Neal v. Juarez*, 2007 WL 2140640 (S. D. Cal.); *Nool v. Homeq Servicing*, 2009 U. S. Dist. LEXIS 80640; *Sicairos v. NDEX West, LLC*, 2009 WL 385855, *3 (S.D.Cal.2009) “Under Civil Code section 2924, no party needs to physically possess the promissory note.” (citing Cal. Civ.Code, § 2924(a)(1)); *Spencer v. DHI Mortg. Co., Ltd.* 642 F.Supp.2d 1153, 1166 (E.D.Cal., 2009) and *Hafiz v. Greenpoint Mortg. Funding, Inc.*, 652 F.Supp.2d 1039, 1043 (N.D.Cal., 2009).

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owner of the note because an action must be prosecuted in the name of the real party in interest." However, the foreclosure in this case is a California non judicial foreclosure subject to the California Civil Code, not a federal civil action, subject to the FRCP. Consequently, the Court is requested to disregard this entire argument as being erroneously asserted.

In support of her argument, Carswell also appears to rely on *DeMucha v. Wells Fargo Home Mortg. Inc.*, 2011 WL 2612835, 3 (Cal.App. 5th Dist., 2011) ("DeMucha"), an unpublished opinion, which under California Rules of Court, Rule 8.1115, "must not be cited or relied on by a court or party in any other action." In *DeMucha*, the California Court of Appeal specifically did not address the issue of whether possession of the original [note] is a requirement for initiating non-judicial foreclosure, acknowledging that numerous federal district court cases have held that such possession is not a requirement.

> Numerous federal district courts have held in recent years that possession of the original is not a requirement for initiating non-judicial foreclosure. (*Nool v. Home Servicing* (E.D.Cal. 2009) 653 F.Supp.2d 1047, 1053; *Castaneda v. Saxon Mortgage Services, Inc.* (E.D.Cal.2009) 687 F.Supp.2d 1191, 1201; and *Jensen v. Quality Loan Service Corp.* (E.D.Cal.2010) 702 F.Supp.2d 1183, 1189.) Because appellant's first amended complaint can survive a demurrer without that allegation, we need not address or resolve this issue in our decision.

DeMucha, *supra*, 2011 WL 2612835, 3.

In sum, the District Court correctly granted the Motion To Dismiss and its ruling should be affirmed.

B. The District Court Properly Concluded That Carswell Failed to State A Third Claim For "Unjust Enrichment"

Carswell's third claim fails because "unjust enrichment is not a cause of action." *Jogani v. Superior Court of Los Angeles County*, 165 Cal. App. 4th 901, 911 (2008), *citing Melchior v. New Line Productions, Inc.*, 106 Cal. App. 4th 779, 793 (2003) ("[T]here is no cause of action in California for unjust enrichment."). "Unjust enrichment is a general principle, underlying various legal doctrines and remedies, rather than a remedy itself." *Melchior*, 206 Cal. App. 4th at 793, *citing Dinosaur Development, Inc. v. White*, 216 Cal. App. 3d 1310, 1315 (1989) (internal citations omitted).

Even if it were a cause of action, Carswell alleges no facts indicating that JPMorgan's mere receipt of payments from Carswell on the Subject Loan – a debt she voluntarily incurred – is somehow unjust. *See* Appellant's Brief, pg. 18. As set forth above, JPMorgan acquired all of WaMu's servicing rights from the FDIC pursuant to ¶ 3.1 of the P & A Agreement. Consequently, there is no merit that JPMorgan was not entitled to receive Carswell's monthly statement due and owing under the terms and obligations set forth in Note and DOT. Furthermore , as the District Court set forth in its rulings regarding the Motion To Dismiss the FAC,

> if the Court were theoretically to allow such a claim, it would require Plaintiff to plead the elements of "receipt of a benefit and unjust retention of the benefit at the expense of another," *Lectrodryer*, 77 Cal.App.4th at 726,

> which she has not done. For the reasons previously described, there is no basis for concluding that JPMorgan's receipt of mortgage payments from Plaintiff is unjust.

See ER, vol. 1, pg. 3.

In sum, Carswell has failed to provide any meritorious basis to support that JPMorgan's receipt of Carswell's monthly payments was unjust. Accordingly, the District Court was correct when it granted the Motion To Dismiss as to this third claim and its ruling should be affirmed.

C. The District Court Properly Concluded That Carswell Failed to State A Fourth Claim For "RESPA and TILA Violations"

1. Carswell's Claim for TILA Violations Fails Because JPMorgan Did Not Originate The Subject Loan and Because Any Claim Under TILA Is Time-Barred

In her Appellant's Brief at pg. 19, Carswell repeats the allegations in her FAC, ¶ 31, whereby she contends that WaMu and its agents violated the Truth In Lending Act, 15 U.S.C. § 1601, et. seq. ("TILA") when "it made material misrepresentations and omissions with respect to the terms of Plaintiff's loan".

However, JPMorgan did not originate the Subject Loan; WaMu did. *See* ER, vol. 2, pg. 70 (FAC, ¶ 31). Carswell's contentions ignore that JPMorgan should not have any liability for WaMu's actions pursuant to Article 2.5 of the P &

A Agreement. *See Caravantes v. California Reconveyance Co., 2010* WL 4055560, 3 -4 (S.D. Cal., 2010) ("*Caravantes*"), which holds as follows:

> In this case, the Office of Thrift Supervision closed WaMu on September 25, 2008 and appointed the FDIC as WaMu's receiver. On the same day, JPMorgan acquired certain assets and liabilities of WaMu pursuant to a P & A Agreement. *See* RJN, Ex. 4. Section 2.5 of the agreement provides: "any liability associated with borrower claims ... related in any way to any loan or commitment to lend made by the Failed Bank [WaMu] prior to failure ... are specifically not assumed by the Assuming Bank." [FN1] *See id.* Accordingly, Section 2.5 establishes that JPMorgan has expressly not assumed WaMu's liabilities relating to borrower claims. *See Yeomalakis v. FDIC,* 562 F.3d 56, 62 (1st Cir.2009) (finding that Section 2.5 of JPMorgan's agreement with the FDIC retained for the FDIC "any liability associated with borrower claims"); *Hilton v. Wash. Mut. Bank.,* 2009 WL 3485953, at *2 (N.D. Cal., October 28, 2009) (same); *Cassese v. Wash. Mut. Bank,* 2008 WL 7022845, at *2-3 (E.D.N.Y. Dec.22, 2008) (same).
>
> FN1. Section 2.5 states in full: Borrower Claims. Notwithstanding anything to the contrary in this Agreement, any liability associated with borrower claims for payment of or liability to any borrower for monetary relief, or that provide for any other form of relief to any borrower, whether or not such liability is reduced to judgment, liquidated or unliquidated, fixed or contingent, matured or unmatured, disputed or undisputed, legal or equitable, judicial or extrajudicial, secured or unsecured, whether asserted affirmatively or defensively, related in any way to any loan or commitment to lend made by the Failed Bank prior to failure, or to any loan made by a third party in connection with a loan which is or was held by the Failed Bank, or otherwise arising in connection with the Failed Bank's lending or loan purchase activities are specifically not assumed by the Assuming Bank.
>
> *4 To the extent that Plaintiff's claims relate to the origination of the loan, Plaintiff's claims against JPMorgan fail. Accordingly, the Court **DISMISSES WITH PREJUDICE** Plaintiff's first, third and sixteenth causes of action (asserting violations of the Truth in Lending

> Act ("TILA"), Home Ownership and Equity Protection Act ("HOEPA"), and breach of fiduciary duty).

Caravantes, supra, 2010 WL 4055560, 3 -4 (S. D. Cal., 2010)

Furthermore, Carswell's contentions ignore that no action for TILA violations can be brought because the statute of limitations for any damages recoverable under TILA are subject to the one year statute of limitations—15 U.S.C. § 1640. The one year period begins to run from the date of the occurrence of the TILA violation for damages. *See King of State of California*, 784 F.2d. 910 (9th Cir. 1986) (TILA's one year statute runs from the date of the consummation of the transaction). Carswell refinanced in 2006 (*see* ER, vol. 2, pg. 64/FAC, ¶ 8) and the action was filed 2010. Consequently, Carswell's claim for any damages under TILA is now time-barred and dismissal of this claim should be affirmed.

2. Carswell's Claim for RESPA Violations Also Fails Because No Damages Are Alleged

Carswell's arguments in regard to the Real Estate Procedures Act, 12 U.S.C. § 2601 ("RESPA") are also without merit. *See* Appellant's Brief, pgs. 18 to 20. Carswell contends that "[d]efendants have engaged in a practice of non-compliance with RESPA, including failing to respond to properly submitted [qualified writing response ("QWR")]. Appellant's Brief, pg. 19.

> RESPA § 2605(e)(1)(A) provides that:
>
> "If any servicer of a federally related mortgage loan receives a qualified written request from the borrower… for information relating to the servicing of such loan, the servicer shall provide a

> written response acknowledging receipt of the correspondence within 20 days (excluding legal public holidays, Saturdays, and Sundays) unless the action requested is taken within such period."

(Emphasis added).

However, a claim fails for violation of RESPA unless the breach results in actual damages:

> "Plaintiffs must, at a minimum, also allege that the breach resulted in actual damages. *See* 12 U.S.C. § 2605(f)(1)(A) ("Whoever fails to comply with this section shall be liable to the borrower ... [for] any actual damages to the borrower as a result of the failure."); *Cortez v. Keystone Bank*,… (a claimant under 12 U.S.C. § 2605 must allege a pecuniary loss attributable to the alleged violation)."

Hutchinson v. Delaware Savings Bank FSB, 410 F.Supp.2d 374, 383 (D.N.J. 2006) (emphasis added). *See also Copeland v. Lehman Brothers Bank* FSB, 2011 WL 9503 (S.D.Cal., 2011), which held on a Motion To Dismiss, that conclusory allegations of damages were insufficient to state a claim under RESPA:

> "Numerous courts have read Section 2605 as requiring a showing of pecuniary damages to state a claim." *Molina v. Wash. Mut. Bank*, No. 09cv894, 2010 WL 431439, at *7 (S.D.Cal. Jan. 29, 2010) (collecting cases); *see also Eronini v. JP Morgan Chase Bank NA*, No. 08-55929, 2010 WL 737841, at *1 (9th Cir. Mar.3, 2010) ("The district court properly dismissed the action because Eronini suffered no damages as a result of the alleged RESPA violation."). "This pleading requirement has the effect of limiting the cause of action to circumstances in which plaintiff can show that a failure to respond or give notice has caused them actual harm." *Shepherd v. Am. Home Mortg. Servs., Inc.*, No. 09-1916, 2009 WL 4505925, at *3 (E.D.Cal. Nov. 20, 2009) (citation omitted). Courts "have interpreted this requirement liberally." *Yulaeva v. Greenpoint Mortg. Funding, Inc.*, No. 09-1504, 2009 WL 2880393, at *15 (E.D.Cal. Sept. 9, 2009)

> (plaintiff sufficiently pled actual damages where plaintiff alleged she was required to pay a referral fee prohibited under RESPA).
>
> Plaintiff alleges that "[a]s a proximate result of the negligent conduct of Defendants and their failure [ ] [to respond to the qualified written request], Plaintiff sustained damages, including monetary loss, medical expenses, emotional distress, loss of employment, loss of credit, loss of opportunities, and other damages to be determined at trial." (Doc. # 26 ¶ 41). Even reading the First Amended Complaint liberally, Plaintiff fails to plead non-conclusory factual allegations indicating how she was damaged by the alleged failure to fully respond to the QWR. *Cf. Allen v. United Fin. Mortg. Corp.*, 660 F.Supp.2d 1089, 1097 (N.D.Cal.2009) ("Allen only offers the conclusory statement that 'damages consist of the loss of plaintiffs home together with his attorney fees.' He has not actually attempted to show that the alleged RESPA violations caused any kind of pecuniary loss (indeed, his loss of property appears to have been caused by his default)."). The Court concludes that Plaintiff's RESPA claim for actual damages for failure to respond to the QWR is insufficiently pled.

Likewise, to recover statutory damages, a plaintiff must plead more than conclusions of law and fact supporting that a pattern or practice of noncompliance with RESPA exists. *See* 12 U.S.C. § 2605(f)(1)(b). *Copeland v. Lehman Brothers Bank FSB*, 2011 WL 9503 (S.D. Cal.,2011):

> Plaintiff alleges that he is entitled to statutory damages (Doc. # 26 ¶ 41), but he does not allege facts which would plausibly show a pattern and practice of RESPA violations by Defendants. *See Lal v. Am. Home Mortg. Servicing*, 680 F.Supp.2d 1218, 1223 (E.D. Cal., 2010) (RESPA claim deficient because "Plaintiffs flatly claim a pattern of noncompliance but state no facts other than the assurance that at trial they will present other customers who also did not receive QWR responses from Defendant."); *see also Garvey v. Am. Home Mortg. Servicing, Inc.*, No. CV-09-973, 2009 WL 2782128, at *2 (D.Ariz. Aug. 31, 2009) (same). The Court concludes that Plaintiff's RESPA

claim for statutory damages for failure to respond to the QWR is insufficiently pled.

In this case Carswell has only alleged conclusory and speculative damages, not actual damages. Carswell claims that the purported failure to comply with RESPA precluded her from identifying "the owner or the beneficiary of the Note." *See* Appellant's Brief, pg. 19. However, this contention ignores that the Assignment transferring all beneficial interest to Bank of America was attached as Exhibit "2" to her FAC. *See* ER, vol. 2, pg. 82 (Carswell's List of Exhibits attached to the FAC). This claim is without merit and the District Court was correct when it granted the Motion To Dismiss as to this fifth claim; accordingly, its ruling should be affirmed.

D. The District Court Properly Concluded That Carswell Failed to State A Fifth Claim For "No Contract"

Carswell's Fifth Claim for "No Contract" is not supported by the allegations. As alleged in her FAC, Carswell signed the Promissory Note and DOT (*see* ER, vol. 2, pg. 64 (FAC, ¶ 9) and she received the funds of $2,500,000.00 and the DOT was recorded on December 28, 2006. *See* ER, 145 (Carswell Decl., ¶ 16). *See* ER, vol. 2, pgs. 161 to 168 (Note).

Despite having received $2,500,000.00, Plaintiff contends that the Note and DOT should be declared "void ab initio". *See* Appellant's Brief , pg. 24. However, there are no alleged facts to support that Carswell is entitled to this remedy.

The FAC is devoid of any facts to support that Carswell has sustained any serious injury that would justify the Note and DOT being declared "void ad initio." Again, the only basis for this claim is that the beneficial interest in the Subject Loan was sold shortly after the Subject Loan closed. *See* Appellant's Brief at pg. 24 and ER, vol. 2, pg. 71 (FAC, ¶ 38). However, Federal Courts have uniformly rejected that securitization of a mortgage is unlawful:

> To the extent that Plaintiffs contend that the note has been "bundled with other notes [and] sold as a mortgage-backed security," Plaintiffs fail to explain why this is a legal basis that entitles them to relief. (*See* Dkt. # 10 at 2.) Plaintiffs do not point to any law indicating that securitization of a mortgage is unlawful. *See Colonial Savings, FA v. Gulino*, 2010 WL 1996608, at *4 (D. Ariz., May 19, 2010) (rejecting a breach of contract claim premised on a lending institution's decision to securitize and cross-collateralize a borrower's loan). And while Plaintiffs appear to allege that Defendants committed fraud when they securitized the note without Plaintiffs' consent, Plaintiffs fail to set forth facts suggesting that Defendants ever indicated that they would not bundle or sell the note in conjunction with the sale of mortgage-backed securities.

Steiniger v. Gerspach, 2010 WL 2671767, 2 (D.Ariz.) (D.Ariz.,2010)

Additionally, in order to obtain rescission of contract, even one induced by fraudulent misrepresentations, a plaintiff must restore everything of value that he received from the defendant in the transaction. *See Loud v. Luse*, 214 Cal. 10, 12 (1931); *Star Pacific Investments, Inc. v. Oro Hills Ranch, Inc.*, 121 Cal.App.3d 447, 457-58 (1981); *Fleming v. Kagan*, 189 Cal.App.2d 791, 796 (1961). The FAC does not allege any offer to restore the loan proceeds. *See* ER. vol. 2, pgs. 71

to 74 (FAC, ¶¶ 37 to 49). This omission is fatal to the this claim. *See Andrade v. Wachovia Mortgage*, 2009 U.S. Dist. LEXIS 34872, *13 (S.D. Cal., Apr. 21, 2009).

In sum, Carswell cannot seek equitable relief because Carswell has not done equity. *Williams v. Koenig*, 219 Cal. 656, 660 (1934). Accordingly, Plaintiff's fifth claim to have the Subject Loan Agreement to be declared "void ab initio" fails; the District Court was correct when it granted the Motion To Dismiss as to this fifth claim; accordingly, its ruling should be affirmed.

E. The District Court Properly Concluded That Carswell Failed to State A Sixth Claim For "Fraud and Concealment"

> "[T]he elements of a cause of action for fraud based on concealment are: ' "(1) 510 the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage. [Citation.]" [Citation.]' [Citation.]" (*Kaldenbach v. Mutual of Omaha* Life Ins. Co. (2009) 178 Cal.App.4th 830, 850, 100 Cal.Rptr.3d 637 (*Kaldenbach*); accord *Levine v. Blue Shield of California* (2010) 189 Cal.App.4th 1117, 1126–1127, 117 Cal.Rptr.3d 262.)

Bank of America Corp. v. Superior Court, 130 Cal.Rptr.3d 504, 510, (2011) ("*Bank of America Corp*.")

"To state a cause of action for fraudulent concealment, the defendant must have been under a duty to disclose some fact to the plaintiff." *Hahn v. Mirda*, 147

Cal.App.4th 740, 745 (2007). "In transactions which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three instances: (1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff; (3) the defendant actively conceals discovery from the plaintiff." *Warner Construction Corp. v. City of Los Angeles*, 2 Cal.3d 285, 294 (1970); *Linear Technology, Corp. v. Applied Materials, Inc.*, 152 Cal.App.4th 115, 132 (2007). However, absent involvement by a lender that exceeds the scope of a money lender, no duty exists to inform the Plaintiff that she does not qualify for a loan. *Cross v. Downey S&L Ass'n*, 2009 U.S. Dist. LEXIS 17946, *14 (C.D. Cal. Feb. 23, 2009); *Oaks Management Corp. v. Superior Court*, 145 Cal.App.4th 453, 466 (2006); *Nymark v. Heart Federal Savings & Loan Association*, 231 Cal.App.3d 1989, 1096 (1991) and the recent case of *Perlas v. GMAC Mortgage, LLC*, 187 Cal.App.4th 429 (2010).

In this case, Carswell alleges that when WaMu originated the Subject Loan, "WaMu [concealed material facts from plaintiff, including that the bank would not follow sound underwriting practices, that she would not be able to refinance the interest-only negative amortization ARM, and that her loan would be resold and

securitized to unknown third parties." *See* ER, vol. 2, pg. 71 (FAC, ¶ 38). However, as set forth above, JPMorgan did not originate the Subject Loan, WaMu did. *See* ER, vol. 2, pg. 70 (FAC, ¶ 31). Consequently, Carswell's contentions ignore that JPMorgan should not have any liability for WaMu's actions pursuant to Article 2.5 of the P & A Agreement. *See Caravantes v. California Reconveyance Co.* 2010 WL 4055560, 3 -4 (S.D. Cal., 2010).

Furthermore, Carswell has failed to allege that WAMU's conduct exceeded a typical money lender and thus fails to state a claim. See also *Bank of America Corp. v. Superior Court*, 198 Cal. App. 4th 862, 130 Cal.Rptr.3d 504, 510 (2011) ("*Bank of America Corp*."), where the gravamen of the Complaint was as follows:

> The gravamen of the fraudulent concealment claim is that the defendants failed to disclose to plaintiffs/borrowers that defendants "knowingly pooled their secretly risky loans into pools they sold above fair value, defrauding their investors." The " unraveling of the Defendants' fraudulent scheme has materially depressed the price of real estate throughout California, including the real estate owned by Plaintiffs[.]" (Italics added.)

The California Court of Appeal held that the defendant bank had no duty to disclose of its purported intent to sell loans to mortgage pools at inflated prices:

> Guided by the above, we conclude that while Countrywide had a duty to refrain from committing fraud, it had no independent duty to disclose to its borrowers its alleged intent to defraud its investors by selling them mortgage pools at inflated values.

Bank of America Corp., supra, 198 Cal. App. 4th, 862, 130 Cal. Rptr. 504, 511

Furthermore, the fifteen "undisclosed" facts that are alleged in this claim (*see* ER, vol. 2, pgs. 74 – 75/FAC, ¶ 52) are not facts required to be disclosed by any statute or alleged contract. The purported "non-disclosure" claim has already been asserted in Carswell's non-meritorious fourth claim for RESPA Violations. *See* ER, vol. 2, pgs. 70 to 71 (FAC, ¶¶ 33 – 35).

Furthermore, in order to state a claim for fraud or non-disclosure, the Plaintiff must allege that damages were sustained as a result of the non-disclosure. However, Plaintiff fails to allege any damages resulting from the purported non-disclosures. See ER, vol. 2, pg. 76 (FAC, ¶ 53).

Consequently, there is no alleged basis that JPMorgan had any duty to disclose any of the purported 15 items of information listed in the FAC.

Accordingly, the District Court was correct when it granted the Motion To Dismiss as to this sixth claim and its ruling should be affirmed.

F. The District Court Properly Concluded That Carswell Failed to State A Seventh Claim For "Quiet Title"

Under California law, a claim for quiet title must be in a verified complaint and include: (1) a description of the property that is the subject of the action, (2) the title of the plaintiff as to which a determination under this chapter is sought and the basis of the title, (3) the adverse claims to the title of the plaintiff against which

a determination is sought, (4) the date as of which the determination is sought, and (5) a prayer for the determination of the title of the plaintiff against the adverse claims. *See* Cal. Code of Civ. Proc. § 761.020.

Further, a "mortgagor of real property cannot, without paying his debt, quiet his title against the mortgagee." *Nool v. Homeq Servicing*, 2009 U.S. Dist. LEXIS 80640, *20 (E.D. Cal. Sept. 3, 2009) ("*Nool*"); *Miller v. Provost*, 26 Cal. App. 4th 1703, 1707 (1994) ("*Miller*"). That is, "a trustor/borrower is unable to quiet title without discharging his debt. The cloud upon his title persists until the debt is paid." *Coyotzi v. Countrywide Fin. Corp.*, 2009 U.S. Dist. LEXIS 91084, *54 (E.D. Cal. Sept. 15, 2009) ("*Coyotzi*"); *Pagtalunan v. Reunion Mortg., Inc.*, 2009 U.S. Dist. LEXIS 34811, *14 (N.D. Cal. April 8, 2009) ("*Pagtalunan*").

Carswell's claim contains multiple fatal flaws. First, the FAC's allegations do not sufficiently address the nature of the adverse interests claimed by each of the Appellees. *See* Cal. Code of Civ. Proc. § 761.020(c). The Court is asked to take note that a security interest does not even constitute an adverse claim in real property. *See Lupertino v. Carbahal*, 35 Cal.App.3d 742, 748 (A deed of trust "carries none of the incidents of ownership of the property, other than the right to convey upon default on the part of the debtor in payment of his debt.") Furthermore, whether a notice of default or a notice of trustee sale has been recorded on the subject property does not affect Plaintiff's ownership right in the

subject property. *See Ernesto and Araceli Ortiz v. Accredited Home Lenders, Inc., et. al.* 639 F.Supp.2d 1159 (Cal. 2009) ("Plaintiffs are still the owners of the Property. The recorded foreclosure Notices do not affect Plaintiffs' title, ownership, or possession in the Property.")

Secondly, Carswell has failed to allege that she has paid or can pay off the debt in the amount of $2,500,000.00 owed on the Subject Property under the DOT. Unless an allegation of tender is made, no quiet title claim is stated. *See Coyotzi*, 2009 U.S. Dist. LEXIS 91084 at *54; *Nool*, 2009 U.S. Dist. LEXIS 80640 at *19; *Pagtalunan*, 2009 U.S. Dist. LEXIS 34811 at *14; *Miller*, 26 Cal.App.4th at 1707. Indeed, Plaintiff claims that "that the obligations owed to WaMu under the DOT were fulfilled and the loan was fully paid when WaMu received funds in excess of the balance on the Note as proceeds of sale through securitization(s) of the loan and insurance proceeds from the Credit Default Swaps." *See* ER, vol. 2, pg 76 (FAC, ¶ 57). It is unclear how this allegation has any bearing on Plaintiff's obligation to repay the amount owing under the Subject Loan in the amount of $2,500,000.00, an amount that she does not dispute that she has received. *See* ER, vol. 2, pg. 145 (Carswell Decl., ¶ 16).

Furthermore, Carswell's allegations that "none of the defendants is the true holder of the Promissory Note" (*see* ER, vol. 2, pg. 77/FAC, ¶ 58) are without merit. Whether or not the Defendant is or is not a holder of the original note is

irrelevant as "[t]here is no requirement that the party initiating foreclosure be in possession of the original note." *Nool, supra*, 2009 U.S. Dist. LEXIS 80640, *12 (E.D. Cal. Sept. 3, 2009); *Pagtalunan, supra*, 2009 U.S. Dist. LEXIS 80640, *6 (N.D. Cal. Apr. 8, 2009) and *Caravantes, supra*. Nor is there any legal authority alleged in the Appellant's Brief that in anyway supports that Carswell should be entitled to a windfall of $2,500,000.00. *See* Appellant's Brief, pgs. 26 to 27.

Accordingly, the District Court correctly decided that the seventh claim should be dismissed and its ruling should be affirmed.

G. The District Court Properly Concluded That Carswell Failed to State An Eighth Claim For "Declaratory and Injunctive Relief"

Under Federal law, "Declaratory relief is appropriate when (1) the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. *Guerra v. Sutton*, 783 F.2d 1371, 1376 (9th Cir. 1986). A Federal court may decline to address a claim for declaratory relief where "the relief [a] plaintiff seeks is entirely commensurate with the relief sought through [his] other causes of action. . .[the] declaratory relief claim is duplicative and unnecessary." *Mohammed Adhavein v. Argent Mortgage Co.*, 2009 U.S. Dist. LEXIS 61796, *14 (N.D. Cal. July 17, 2009) ("*Mohammed*"); *Mangindin v. Washington Mutual Bank*, 2009 U.S. Dist. LEXIS 51231, *13-*14

(N.D. Cal. June 18 2009). Furthermore, declaratory relief is not appropriate where the controversy is hypothetical or where the actual controversy has become moot." *Pagtalunan v. Reunion Mortg., Inc.*, 2009 U.S. Dist. LEXIS 34811 (N.D. Cal. Apr. 8, 2009) (quoting *Seelers v. Regents of the University of California,* 432 F.2d 493, 499-500 (9th Cir. 1990)) ("*Pagtalunan*").

Here, the basis for the declaratory relief claim is "that Chase is not the present holder in due course or beneficiary of a Promissory Note executed by Plaintiff". *See* ER, vol. 2, pgs. 77 to 78 (FAC, ¶ 61). However, as set forth above, whether or not the Appellees are a holder of the original note is irrelevant as "[t]here is no requirement that the party initiating foreclosure be in possession of the original note." *Nool, supra*, 2009 U.S. Dist. LEXIS 80640, *12 (E.D. Cal. Sept. 3, 2009); *Pagtalunan, supra*, 2009 U.S. Dist. LEXIS 80640, *6 (N.D. Cal. Apr. 8, 2009) and *Caravantes, supra*."

Furthermore, the claims that Carswell seeks to have adjudicated are redundant of her other alleged causes of action and are therefore unnecessary. *See Mohammed, supra*, 2009 U.S. Dist. LEXIS 61796 at *14. In addition, as set forth above, the FAC's previous claims are without merit. Consequently, Carswell's declaratory relief claims also similarly fail along with their corresponding or encompassed causes of action. *See Pagtalunan*, 2009 U.S. Dist. LEXIS 34811 at *6-*7. Consequently, the FAC fails to allege any basis for contending that

declaratory relief would be necessary or useful. *See Sanchez United States Bancorp*, 2009 U.S. Dist. LEXIS 87952 at *20 (S.D. Cal., Aug, 4, 2009); *Ricon v. Reconstruction Trust*, 2009 U.S. Dist. LEXIS 67807 at *16 (S.D. Cal., Aug, 4, 2009); *Mohammed, supra*, 2009 U.S. Dist. LEXIS 61796 at *14; *Pagtalunan*, 2009 U.S. Dist. LEXIS 34811 at *6 -*7.

The Appellant's Brief at pgs. 27 to 28 does not add any contentions to those that were alleged in the FAC. Accordingly, no declaratory relief has been stated and the District Court's ruling should be affirmed.

H. The District Court Properly Concluded That Carswell Failed to State A Ninth Claim For "Slander Of Title"

The elements for slander of title are: (1) Publication; (2) Absence of justification; (3) Falsity; and (4) Direct pecuniary loss. *Seeley v. Seymour*, 190 Cal.App.3d 844, 858 (1987); *Howard v. Schaniel*, 113 Cal.App.3d 256, 263-264 (1980).

The FAC fails to allege any supporting facts of any matters that were untrue. *See* ER, vol. 2, pg. 79 (FAC, ¶¶ 68 – 71). The FAC alleges that Carswell entered into the Subject Loan, received $2,500,000.00 and has defaulted on the Subject Loan. Consequently, there are no facts to support that the NOD or NOTS were not justifiably recorded. Because no "absence of justification" has been alleged or can be alleged, this claim was properly dismissed.

Furthermore, unless a disparaging statement causes damages, it is not actionable. *Burkett v. Griffith*, 90 Cal. 537 (1891). Consequently, facts must be alleged showing that damages have been suffered. *Neville v. Higbie*, 130 Cal.App. 669 (1933). In this regard, for a property owner to obtain damages for slander of title, the owner must show that the purported alleged loss was proximately caused by the slander. *See Frank Pisano & Associates v. Taggart*, 29 Cal.App.3d 1, 25 (1972). The FAC alleges no facts supporting any damages that have been incurred. *See* ER, vol. 2, pg. 79 (FAC, ¶ 71).

Finally, the noticing of the NOD and NOTS were privileged under Civil Code § 47. *See Caravantes v. Cal Reconveyance Co.*, 2010 U.S. Dist. LEXIS 109842 at 15-16) ("Pursuant to California Civil Code § 2924 (d), mailing, publication, delivery of notices, and performance of procedures related to and necessary to perform a non-judicial foreclosure sale are privileged. Defendants' conduct in connection with recording the Notice of Default and Notice of Sale cannot constitute a basis for slander of title claims.").

Carswell alleges no facts (only conclusions of law and fact) to support that any publications "were unjustified and without privilege". *See* ER, pg. 79 (FAC, ¶ 70). Nor does Carswell's Appellant's Brief at pg. 28 address this pleading failure. Thus, this claim is without merit and the District Court's dismissal of this claim should be affirmed.

I. The District Court Properly Concluded That Carswell Failed to State A Tenth Claim For "Intentional Infliction of Emotional Distress"

To state a claim for intentional infliction of emotional distress, a Plaintiff must allege facts showing "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." *Christensen v. Superior Court*, (1991) 54 Cal.3d 868, 903 (1991).

Further, the "extreme and outrageous conduct" must be "so extreme as to exceed all bounds of that usually tolerated in a civilized community." *Davidson v. City of Westminster*, 32 Cal.3d 197, 209 (1982). Carswell's claim consists entirely of conclusions of facts and law. *See* ER, vol. 2, pgs. 63-79 (FAC, ¶¶ 1 through 75).

Moreover, the pursuit of an economic interests does not qualify as "outrageous" conduct. *See Trerice v. Blue Cross of California*, 209 Cal.App.3d 878, 883 (1989); *Kruse v. Bank of America*, 202 Cal.App.3d 38, 67(1988) (no claim for intentional infliction of emotional distress where lender simply attempted to collect debt due under security interest); *see also Francis v. Dun & Bradstreet*,

Inc., 3 Cal.App.4th 535, 540 (1992) (credit reporting could not support a cause of action for intentional infliction of emotional distress).

In Appellant's Brief at pg. 29, Carswell does not attempt to controvert the legal authorities set forth in the Defendants' Motion To Dismiss and cites no authorities in support of this claim. Accordingly, the District Court's dismissal of the tenth cause of action should be affirmed.

J. The District Court Properly Granted Judicial Notice of the OTS Order and the P & A Agreement

In support of its Motion To Dismiss, JPMorgan requested judicial notice of the OTS Order and the P & A Agreement. Although Carswell addresses these two documents in her Appellant's Brief at pgs. 29 to 31, she has not included these documents in her Appellant's Excerpts of Record. Accordingly, JPMorgan has included the Request for Judicial Notice in a supplemental excerpt of record.

In ruling on a motion to dismiss for failure to state a claim, "a court may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (citation omitted). Federal Rule of Evidence 201(b) states that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by

resort to sources whose accuracy cannot reasonably be questioned." The Ninth Circuit has explained that "on a motion to dismiss a court may properly look beyond the complaint to matters of public record and doing so does not convert a Rule 12(b)(6) motion to one for summary judgment." *Mack v. South Bay Beer Distribs.*, 798 F.2d 1279, 1282 (9th Cir. 1986), abrogated on other grounds by *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 111 (1991). On appeal, a district court's decision to take judicial notice is reversed only for abuse of discretion. *Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 458 (9th Cir.1995) and *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Circ.2001).

In this case, no abuse of discretion has occurred.

Judicial notice may be taken of documents available on government websites. *Laborers' Pension Fund v. Blackmore Sewer Constr., Inc.*, 298 F.3d 600, 607 (7th Cir. 2002) (taking judicial notice of information from FDIC's official website); *United States ex rel. Dingle v. BioPort Corp.*, 270 F.Supp.2d 968, 972 (W.D. Mich. 2003) ("Public records and government documents are generally considered not to be subject to reasonable dispute. . . . This includes public records and government documents available from reliable sources on the Internet.") (citation omitted).

Because the OTS Order and the P & A Agreement are public records available from a reliable source on the internet, federal district court cases have

routinely taken judicial notice of these documents. *See Molina v. Washington Mut. Bank* 2010 WL 431439, 3 (S.D. Cal., 2010), which granted judicial notice of the Purchase and Assumption Agreement and OTS Order:

> Defendants also request judicial notice of (1) the Purchase and Assumption Agreement among Federal Deposit Insurance Organization, Receiver of Washington Mutual Bank, Henderson, Nevada ("FDIC") and JPMorgan, dated September 25, 2008, available on the FDIC's website, and (2) the Order from the Office of Thrift Supervision ("OTC") appointing the FDIC as Receiver of Washington Mutual Bank, available on OTC's website. The Court grants Defendants' request for judicial notice of these documents. Information on government agency websites has often been treated as properly subject to judicial notice." *Paralyzed Veterans of Am. v. McPherson*, 2008 U.S. Dist. LEXIS 69542, at *5 (N.D. Cal., Sept. 8, 2008); *see also United States ex rel. Dingle v. BioPort Corp.*, 270 F.Supp.2d 968, 972 (W.D. Mich., 2003) ("Public records and government documents are generally considered 'not to be subject to reasonable dispute.' This includes public records and government documents available from reliable sources on the Internet.") (*citing Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir.1999)).

See also Yeomalakis, *supra*, 562 F.3d 56, 60, fn. 2, *Rosenfeld v. JPMorgan Chase Bank*, N.A. 732 F.Supp.2d 952, 959 (N.D. Cal., 2010), *Miller v. California Reconveyance Co.*, 2010 U.S. Dist. LEXIS 74290 (S.D. Cal., July 22, 2010) (“The Court will take judicial notice of the P & A Agreement between JPMorgan and the FDIC ... because this agreement is a matter of public record whose accuracy cannot reasonably be questioned.”); *Jarvis v. JP Morgan Chase Bank, N. A.*, 2010 U.S. Dist. LEXIS 84958 *4-5, 2010 WL 2927276 (C.D. Cal.) (Chase did not assume

liability for borrower claims arising out of lending activities by WaMu); *Lemperle v. Washington Mut. Bank*, 2010 WL 3958729, 4 (S.D. Cal., 2010).

Carswell cites no federal cases in support of her arguments that judicial notice cannot be taken of these documents, only state court cases. Furthermore, Carswell cites no California cases in which the P & A Agreement and OTS Order, both of which are public records and government documents, were not judicially considered. Consequently the holdings in Carswell's cited cases are unavailing as to whether the District Court properly took judicial notice of the OTS Order and the P & A Agreement when it ruled on the Motions to Dismiss in this case. Clearly, numerous federal district courts have taken judicial notice of the OTS Order and the P & A Agreement, and the District Court's granting of such judicial notice in this case should be confirmed.

VIII. CONCLUSION

For the foregoing reasons, Appellees' Motion to Dismiss was properly granted and the District Court did not abuse its discretion in dismissing the

Carswell's claims with prejudice. The Appellees therefore respectfully request that this Court *affirm* the decision of the District Court in its entirety.

DATED: October 21, 2011

Respectfully submitted,

ALVARADOSMITH
A Professional Corporation

By: /s/ Michael B. Tannatt
THEODORE E. BACON
MICHAEL B. TANNATT
Attorneys for Appellees,
JPMORGAN CHASE BANK, N.A. and
CALIFORNIA RECONVEYANCE
COMPANY

CERTIFICATE OF COMPLIANCE

***CIRCUIT RULE* 32(a)(7)(B)**

Counsel of Record certifies that pursuant to *Federal Rule of Appellate Procedure* 32, this brief is proportionately spaced, has a typeface of 14 point or more and contains 9,145 words, which is less than the 14,000 words permitted by the rule. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: October 21, 2011

Respectfully submitted,

ALVARADOSMITH
A Professional Corporation

By: /s/ Michael B. Tannatt
THEODORE E. BACON
MICHAEL B.TANNATT
Attorneys for Appellees,
JPMORGAN CHASE BANK, N.A. and
CALIFORNIA RECONVEYANCE
COMPANY

9th Circuit Case Number(s) 11-55423

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****

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