THEODORE E. BACON (CA Bar No. 115395)
tbacon@adorno.com
AMY L. MORSE (CA Bar No. 92135)
amorse@adorno.com
MICHAEL B. TANNATT (CA Bar No. 117133)
mtannatt@adorno.com
ADORNO YOSS ALVARADO & SMITH
A Professional Corporation
633 W. Fifth Street, Suite 1100
Los Angeles, CA 90071
Tel: (213) 229-2400
Fax: (213) 229-2499

Attorneys for Defendant
JPMORGAN CHASE BANK, N.A., an acquirer of certain assets and liabilities of Washington Mutual Bank from the Federal Deposit Insurance Corporation acting as receiver and CALIFORNIA RECONVEYANCE COMPANY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARGARET CARSWELL,

Plaintiff,

v.

JPMORGAN CHASE BANK, N.A., CALIFORNIA RECONVEYANCE COMPANY and DOES 1 – 150

Defendants.

CASE NO.: CV 10-5152 GW (PLAx)

JUDGE: Honorable George H Wu

NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES

[REQUEST FOR JUDICIAL NOTICE FILED CONCURRENTLY HEREWITH]

TELEPHONIC APPEARANCE

DATE: November 29, 2010
TIME: 8:30 a.m.
CRTRM: 10

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on November 15, 2010 at 8:30 p.m., or as soon thereafter as the matter may be heard in Courtroom "10" of the above-entitled court, defendant JPMorgan Chase Bank, N.A. ("JPMorgan"), an acquirer of certain assets and

ADORNO YOSS ALVARADO & SMITH
ATTORNEYS AT LAW

liabilities of Washington Mutual Bank ("WaMu") from the Federal Deposit Insurance Corporation ("FDIC") acting as receiver and California Reconveyance Company ("CRC") (collectively refrenced hereinafter as ("Defendants") will move the Court to dismiss the action pursuant to Federal Rules of Civil Procedure 12(b)(6) on the grounds that all seven of the claims of plaintiff Margaret Carswell ("Plaintiff") fails to state a claim upon which relief can be granted. Specifically, Defendants will move the Court as follows:

1. Plaintiff's first claim for "Wrongful Foreclosure" fails to state facts sufficient to constitute a claim for relief pursuant to Federal Rule of Civil Procedure 12(b)(6);
2. Plaintiff's second claim for "Violation of Civil Code § 2923.5" fails to state facts sufficient to constitute a claim for relief pursuant to Federal Rule of Civil Procedure 12(b)(6);
3. Plaintiff's third claim for "Unjust Enrichment" fails to state facts sufficient to constitute a claim for relief pursuant to Federal Rule of Civil Procedure 12(b) (6).
4. Plaintiff's fourth claim for "RESPA Violations and TILA" fails to state facts sufficient to constitute a claim for relief pursuant to Federal Rule of Civil Procedure 12(b) (6).
5. Plaintiff's fifth claim for "No Contract" fails to state facts sufficient to constitute a claim for relief pursuant to Federal Rule of Civil Procedure 12(b) (6).
6. Plaintiff's sixth claim for "Fraud and Concealment" fails to state facts sufficient to constitute a claim for relief pursuant to Federal Rule of Civil Procedure 12(b) (6).
7. Plaintiff's seventh claim for "Quiet Title" fails to state facts sufficient to constitute a claim for relief pursuant to Federal Rule of Civil Procedure 12(b) (6).
8. Plaintiff's eighth claim for "Declaratory and Injunctive Relief" fails to state facts sufficient to constitute a claim for relief pursuant to Federal Rule of Civil Procedure 12(b) (6).
9. Plaintiff's ninth claim for "Slander of Title" fails to state facts sufficient to constitute a claim for relief pursuant to Federal Rule of Civil Procedure 12(b) (6).

ADORNO YOSS ALVARADO & SMITH
ATTORNEYS AT LAW

10. Plaintiff's tenth claim for "Intentional Infliction of Emotional Distress" fails to state facts sufficient to constitute a claim for relief pursuant to Federal Rule of Civil Procedure 12(b) (6).

The motion will be based on this Notice of Motion, the Memorandum of Points and Authorities, Request for Judicial Notice and the pleadings and papers filed in this action. This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on October 27, 2010.

DATED: October 27, 2010

ADORNO YOSS ALVARADO & SMITH
A Professional Corporation

By: /s/ Michael B. Tannatt
THEODORE E. BACON
AMY L. MORSE
MICHAEL B. TANNATT
Attorney for Defendant
JPMORGAN CHASE BANK, N.A., an acquirer of certain assets and liabilities of Washington Mutual Bank from the Federal Deposit Insurance Corporation acting as receiver and CALIFORNIA RECONVEYANCE COMPANY

ADORNO YOSS ALVARADO & SMITH
ATTORNEYS AT LAW

TABLE OF CONTENTS

ADORNO YOSS ALVARADO & SMITH
ATTORNEYS AT LAW

TABLE OF AUTHORITIES

Page

Cases

ADORNO YOSS ALVARADO & SMITH
ATTORNEYS AT LAW

TABLE OF AUTHORITIES

Page

ADORNO YOSS ALVARADO & SMITH
ATTORNEYS AT LAW

TABLE OF AUTHORITIES

Page

ADORNO YOSS ALVARADO & SMITH
ATTORNEYS AT LAW

TABLE OF AUTHORITIES

Page

Statutes

ADORNO YOSS ALVARADO & SMITH
ATTORNEYS AT LAW
SANTA ANA

MEMORANDUM OF POINTS AND AUTHORITIES

Defendants respectfully submit the following Memorandum of Points and Authorities in support of their Motion to Dismiss Plaintiff's First Amended Complaint ("FAC").

I. SUMMARY OF ARGUMENT

Plaintiff is in default on a loan that she obtained on or about December 28, 2006 from Washngton 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"). In regard to these facts, Plaintiff has now brought ten claims[1] for Failure to Contract, Unjust Enrichment, Violations of the Real Estate Settlement Procedures Act ("RESPA") and Truth In Lending (TILA) Violations, No Contract, Fraud and Concealment, Quiet Title, and Declaratory Relief and Injuntive Relief, Slander of Title, and Intentional Infliction of Emotional Distress. Defendants move to dismiss the ten claims on the ground that these claims are not supported by sufficient facts to state a clam against Defendants. Like the former Complaint, the entire FAC consists of nothing but boilerplate conclusions of law and facts. Because there are insufficient allegations of any wrongdoing against JPMorgan or CRC, JPMorgan and CRC request the Court to grant their Motion To Dismiss.

II. STATEMENT OF FACTS

Stated below are facts relevant to this motion which are either alleged in the Complaint or set forth in matters of which the Court is requested to take judicial notice:

On or about December 28, 2006, Plaintiff obtained the Subject Loan,which is for the principal amount of $2,500,000.00 from WaMu secured by the Subject Property. See Complaint, ¶¶ 3, 8 and 12. Plaintiff signed the Promissory Note and Deed of Trust ("DOT"). See Complaint, ¶ 9 and Declaration of Margaret Carswell ("Carswell Delaration"), ¶ 3, filed with the Court on July 14, 2010 and Exhibit "1" to the FAC, the

---

[1] The original Complaint had a modest seven causes of action.

Adjustable Rate Note. The Carswell Declaration is attached as Exhibit "1" to the Request for Judicial Notice ("RJN"), filed concurrently herewith. Plaintiff received the amount of $2,500,000.00 and the deed of trust ("DOT") was recorded on December 28, 2006. See original Compliant, ¶ 12 and Carswell Declaration, ¶ 15.

On September 25, 2008, the Office of Thrift Supervision ("OTS") directed the FDIC to be the receiver of WaMu ("OTS Order"). A copy of the OTS Order is attached as Exhibit "2" to the Request for Judicial Notice ("RJN"), filed concurrently herewith.

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. A copy of the P & A Agreement is attached as Exhibit "3" to the RJN.

As successor in interest to WaMu, JPMorgan had recorded an Assignment of Deed of Trust 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". A copy of the Assignment is attached as Exhibit "2" to the FAC.

Until December, 2009, Plaintiff declares that she made regular payments on the Subject Loan, but on or about this date, Plaintiff 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." Carswell Declaration, ¶ 10.

On April 1, 2010, a Notice of Default an Election To Sell ("NOD") was recorded. FAC, ¶ 13 Exhibit "2" to the FAC.

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. Complaint, ¶ 15 and Exhibit "6" to the FAC.

III. THE STANDARD FOR A MOTION TO DISMISS

A motion to dismiss under Federal Rule of Civil Procedure, Rule 12(b) (6) may be brought when a plaintiff fails to state a claim upon which relief can be granted. The

ADORNO YOSS ALVARADO & SMITH
ATTORNEYS AT LAW
SANTA ANA

federal rules require that a complaint include a "short and plain statement" showing plaintiff is entitled to relief. Federal Rule of Civil Procedure, Rule 8(a) (2). Yet, only plausible claims for relief will survive a motion to dismiss. *Ashcroft v. Iqbal*, 77 U.S. 4387, 129 S. Ct. 1937, 1950 (2009) ("*Iqbal*"). 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. Accordingly, the complaint must "raise a right to relief above the speculative level." *Bell Atlantic Corporation. v. Twombly*, 555 U.S. 544, 555, 127 S. Ct. 1955 (2007) ("*Bell Atlantic Corporation.*") A plaintiff does not have to provide detailed facts, but the pleading must "include more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Iqbal,* 129 S. Ct. at 1950. General allegations or simply tracking statutory language is therefore insufficient to properly raise a claim for relief. *Bell Atlantic Corporation*, 127 S. Ct. at 1959, ("Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true.")

IV. JPMORGAN HAS NO LIABILITY FOR ACTIONS TAKEN BY WAMU IN REGARD TO THE SUBJECT LOAN PRIOR TO SEPTEMBER 25, 2008

JPMorgan is not a successor of WaMu with respect to any alleged liability for WaMu's purported acts related to the Subject Loan prior to JPMorgan's entering into the P & A Agreement with the FDIC on September 25, 2008.

As established by documents of which this Court is asked to take judicial notice, on September 25, 2008, the Office of Thrift Supervision determined that WaMu had failed, took over the bank, and appointed the FDIC as receiver for the purpose of liquidating WaMu pursuant to section 5(d)(2) of the Home Owners' Loan Act, 12 U.S.C. §1464(d)(2) and section 11(c)(6)(B) of the Federal Deposit Insurance Act, 12 U.S.C. §1821(c)(6)(B). (*See* RJN, where the OTS Order is attached as Exhibit "2".)

When the FDIC is appointed as receiver, it succeeds to "all rights, titles, powers and privileges of" the failed institution, and may "take over the assets of and operate" the failed institution with all of the powers thereof. 12 U.S.C. §§ 1821(d)(2)(A)(i),

ADORNO YOSS ALVARADO & SMITH
ATTORNEYS AT LAW
SANTA ANA

1821(d)(2)(B)(i). One of the policies behind the creation of the FDIC is to promote the stability of and confidence in the banking system. *Gunter v. Hutcheson*, 674 F.2d 862, 865, 870 (11th Cir. 1982), *overruled on other grounds*, *Langley v. F.D.I.C.*, 484 U.S. 86 (1987) ("*Gunter*"). Thus, Congress has granted the FDIC the power to act as a receiver, along with broad discretion to transfer, or retain, any liabilities of a defaulting institution. The FDIC-Receiver's powers under the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA") include the power to transfer assets and liabilities of the failed institution through purchase and assumption agreements. *See id.* § 1821(d)(2)(G)(i).

Also on September 25, 2008, the bulk of WaMu's assets were transferred to JPMorgan pursuant to a P &A Agreement. (*See* RJN, Exhibit. "3".) To avoid the significant problems with liquidation, the FDIC typically employs a "purchase and assumption" transaction in which it arranges for another bank to purchase the failed bank and reopen it without interrupting banking operations and with no loss to the depositors. A purchase and assumption involves three entities: the receiver of the failed bank, the purchasing bank, and the FDIC as insurer. *Gunter*, 674 F.2d at 865. In most cases, the FDIC is appointed receiver by the appropriate banking authority and acts both as receiver and as insurer. *Gunter*, 674 F.2d at 865 (*citing F.D.I.C. v. Ashley*, 585 F.2d 157, 160 (6th Cir. 1978); 12 U.S.C. § 1821(c), (e)). The FDIC then solicits bids from other banks for the purchase of the failed bank and assumption of its liabilities. *Gunter*, *supra*, 674 F.2d at 865.

A purchase and assumption usually must be consummated with great speed, often overnight, in order to preserve the going concern value of the failed bank and avoid an interruption in banking services. *Gunter*, *supra*, 674 F.2d at 865. Because the time constraints often prohibit a purchasing bank from fully evaluating its risks, as well as to make a purchase and assumption an attractive business deal, the purchase and assumption agreement generally provides that the purchasing bank need purchase only those assets which are of the highest banking quality. *Id.*

ADORNO YOSS ALVARADO & SMITH
ATTORNEYS AT LAW
SANTA ANA

In addition, the FDIC and the acquiring bank can negotiate so that the FDIC retains certain liabilities for itself rather than pass those liabilities on to the acquiring institution. *See id.* By retaining these liabilities, the FDIC is able to attract a purchaser, and the acquiring institution is then shielded from liability for claims of an unknown magnitude.

Thus courts enforce FDIC purchase and assumption agreements that shield the acquiring institution from liability retained by the FDIC. See *West Park Assocs. v. Butterfield Sav. & Loan Ass'n.*, 60 F.3d 1452 (9th Cir. 1995) and *Payne v. Security Savings & Loan Association*, 924 F.2d 109, 111 (7th Cir. 1991) ("absent an express transfer of liability . . . and an express assumption of liability by [the transferee institution], FIRREA directs that the [receiver] is the proper successor to the liability at issue here").

Article 2.5 of the P & A Agreement expressly provides that JPMorgan did not assume the potential liabilities *of any* kind associated with claims of borrowers arising out of *any lending or loan purchase activities of Washington Mutual*. (*Id.*) That Article provides:

> **2.5 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 extra-judicial, 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.**

Id. at page 9 of the Agreement. (Emphasis added.)

Under the express terms of the P & A Agreement, JPMorgan did not assume any liability for monetary claims arising out of WaMu's residential mortgage loans and home equity lines of credit made prior to September 25, 2008.

ADORNO YOSS ALVARADO & SMITH
ATTORNEYS AT LAW
SANTA ANA

The P & A Agreement in this case has been addressed by the Federal Courts. These courts have held that the FDIC retained liability for borrower claims relating to the WaMu loans and lending activities. In denying a plaintiff's motion to substitute JPMorgan as a party in a lawsuit originally brought against WaMu, the U.S. Court of Appeals for the for the First Circuit held that the FDIC was the real party in interest:

> When Washington Mutual failed, JP Morgan acquired many assets but its agreement with the FDIC retains for the FDIC 'any liability associated with borrower claims for payment or any liability to any borrower for monetary relief, or that provide for any other form of relief to any borrower's.' Thus, the FDIC was and remains the appropriate party in interest.

Yeomalakis v. FDIC, 562 F.3d 56, 60 (1st Cir. 2009)

Accordingly, Plaintiffs' Fourth Claim for TILA Violations and Tenth Claim for Fraud and Concealment are all barred by the Purchase and Assumption Agreement as to JPMorgan because these three claims are based on WaMu's alleged conduct that occurred prior to September 25, 2008. Thus, these claims, to the extent they are still viable, perhaps may be brought against the FDIC-Receiver in regard to WaMu's alleged actions.

V. PLAINTIFF FAILS TO TO STATE A FIRST CLAIM FOR WRONGFUL FORECLOSURE

Plaintiff's first claim is 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 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

ADORNO YOSS ALVARADO & SMITH
ATTORNEYS AT LAW
SANTA ANA

> 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. Accordingly, contrary to Plaintiff's allegations, JPMorgan and CRC have properly initiated the foreclosure proceedings in regard to the Subject Property. This claims should be dismissed.

VI. PLAINTIFF FAILS TO TO STATE A SECOND CLAIM FOR VIOLATION OF CALIFORNIA CIVIL CODE § 2923.5

Plaintiff's only claim that Defendants have violated the provisions of Civil Code § 2923.5 is that

> Plaintiff is informed and believes that declarant Clement Durkin did not have personal knowledge of the matters described in his declaration, which purported to describe attempts by Chase to contact Plaintiff as required by § 2923.5. The NOD must include a declaration from one of three entities showing it contacted the borrower or tried with due diligence to contact the borrower.

FAC, ¶ 22.

The California Court of Appeal has held that § 2923.5 doesn not require the NOD to include a declaration under oath of perjury or that the declarant making the declaration is required to have to have personal knowledge of each of the facts set forth in the NOD regarding compliance with NOD. Specifically, the California Cour of Appeal has held:

> And, finally-back to our point about the inherent individual operation of the statute-the very structure of subdivision (b) belies any insertion of a penalty of perjury requirement. The way section 2923.5 is set up, too many people are necessarily involved in the process for any one person to likely be in the position where he or she could swear that all three requirements of the declaration required by subdivision (b) were met. We note, for example, that subdivision (a)(2) requires any one of three

ADORNO YOSS ALVARADO & SMITH
ATTORNEYS AT LAW
SANTA ANA

> entities (a "mortgagee, beneficiary, or authorized agent") to contact the borrower, and such entities may employ different people for that purpose. And the option under the statute of no contact being required (per subdivision (h) [FN18]) further involves individuals who would, in any commercial operation, probably be different from the people employed to do the contacting. For example, the person who would know that the borrower had surrendered the keys would in all likelihood be a different person than the legal officer who would know that the borrower had filed for bankruptcy.

Mabry v. Superior Court, 185 Cal.App.4th 208, 233-234 (2010)

In light of the multiplicity of persons involved in the foreclosure process, the Court of Appeal merely requires that the declaration in the NOD track the language of § 2923.5:

> In light of what we have just said about the multiplicity of persons who would necessarily have to sign off on the precise category in subdivision (b) of the statute that would apply in order to proceed with foreclosure (contact by phone, contact in person, unsuccessful attempts at contact by phone or in person, bankruptcy, borrower hiring a foreclosure consultant, surrender of keys), and the possibility that such persons might be employees of not less than three entities (mortgagee, beneficiary, or authorized agent), there is no way we can divine an intention on the part of the Legislature that each notice of foreclosure be custom drafted.
>
> To which we add this important point: By construing the notice requirement of section 2923.5, subdivision (b), to require only that the notice track the language of the statute itself, we avoid the problem of the imposition of costs beyond the minimum costs now required by our reading of the statute.

Mabry, 185 Cal. *App*.4th 208 at 235

In this case, the language in the NOD does track § 2923.5 as required. See Exhibit "4" to the FAC, where the Declaration of Compliance is attached.

For these reasons, this claim is without merit and should be dismissed.

VII. PLAINTIFF FAILS TO ALLEGE SUFFICIENT FACTS TO STATE A THIRD CLAIM FOR UNJUST ENRICHMENT

Plaintiff's third cause of action fails because "unjust enrichment is not a cause of action." *Jogani v. Superior Court of Los Angeles County*, 165 Cal. App. 4th 901,

ADORNO YOSS ALVARADO & SMITH
ATTORNEYS AT LAW
SANTA ANA

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, Plaintiff pleads no facts indicating that JPMorgan's mere receipt of payments from Plaintiff on the Subject Loan – a debt she voluntarily incurred – is somehow unjust. JPMorgan and CRC's motion to dismiss to Plaintiff's third cause of action for unjust enrichment should, accordingly, be granted.

VIII. PLAINTIFF STILL FAILS TO TO STATE A FOURTH CLAIM FOR RESPA AND TITLA VIOLATIONS

A. Plaintiff's Claim for TILA Violaitons Fails Because She JPMorgan Did Not Originate The Subject Loan and Because Any Claim Under TILA Is Time-Barred

Plaintiffs's claims under TILA seek damages under TILA due to purported violations of TILA. See FAC, ¶ 31. However, JPMorgan did not originate the Subject Loan, WaMu did. See FAC, ¶ 31. Consquently, JPMorgan should not have any liability for WaMu's actions pursuant to Article 2.5 of the P & A Agrrement See Cacres, 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.*

ADORNO YOSS ALVARADO & SMITH
ATTORNEYS AT LAW
SANTA ANA

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 v. California Reconveyance Co. L 4055560, 3 -4 (S.D.Cal.,2010)

Furthermore, 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). Plaintiff refinanced in 2006 (FAC, ¶ 8) and the action was filed 2010. Consequently, Plaintiffs' claim for any damages under TILA is now time-barred.

///

///

///

ADORNO YOSS ALVARADO & SMITH
ATTORNEYS AT LAW
SANTA ANA

B. Plaintiff's Claim for RESPA Violations Fails Because She Still Does Not Set Forth Any Damages

Plaintiff also alleges that "[p]laintiffs (sic) have engaged in a practice of non-compliance with RESPA, including failing to respond to properly submitted [qualified writing response ("QWR")]. Complaint, ¶ 36.

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, Plaintiff has alleged no claim for violation of RESPA because:

> "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 L 2817173, 3 -4 (S.D.Cal.,2010), 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

ADORNO YOSS ALVARADO & SMITH
ATTORNEYS AT LAW
SANTA ANA

> *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 he 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 L 2817173, 3 -4 (S.D.Cal.,2010):

> 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.

The FAC still contains no supporting facts whatsoever that any pecuniary loss resulted from any purported failure by JPMorgan to respond to a purported QWR or that

ADORNO YOSS ALVARADO & SMITH
ATTORNEYS AT LAW
SANTA ANA

any pattern of noncompliance with RESPA has occurred . See Complaint, ¶¶ 14 and 35 to 36 and FAC, 35. Accordingly, the claim should be dismissed.

IX. PLAINTIFF STILL FAILS TO TO STATE A FIFTH CLAIM FOR NO CONTRACT

Plaintiff's Fifth Claim for "No Contract", as stated in support of the last motion, is not supported by Plaintiff's own allegations. As alleged in her former Complaint, Plaintiff signed the Promissory Note and DOT (¶ 9) and she received the funds of $2,500,000.00 and the DOT was recorded on December 28, 2006 (¶ 12). A copy of the Adjustable Rate Note is attached as Exhibit "1" to the FAC.

As in her previous Complaint, which was ruled to be without merit, Plaintiff again alleges that the Adjustable Rate Note and DOT should be declared void ab initio. See FAC, ¶ 49. However, there are no alleged facts to support that Plaintiff is entitled to this remedy.

As in her previous Comlaint, Plaintiff has failed to allege what serious injury that Plaintiff may sustain that would render the Adjustable Rate Note and DOT "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 FAC, ¶ 38. However, as indicated in the previous motion to the former Complaint, 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)

ADORNO YOSS ALVARADO & SMITH
ATTORNEYS AT LAW
SANTA ANA

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). Plaintiff still does not allege any offer to restore the loan proceeds. See Complaint, ¶¶ 17 to 23 and FAC, ¶¶ 37 to 49. This omission is fatal to the first claim. See *Andrade v. Wachovia Mortgage*, 2009 U.S. Dist. LEXIS 34872, *13 (S.D. Cal. Apr. 21, 2009).

Plaintiff claims that she should not make any tender because "[s]he alleges that the contract was void ab initio". However, there is no alleged basis for this conclusion of fact and law in either the original Complaint (already deemed without merit) or in the FAC.

In sum, Plaintiff cannot seek equitable relief because Plaintiff has not done equity herself. *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 and the Motion To Dismiss should be granted.

X. PLAINTIFF STILL FAILS TO TO STATE A SIXTH CLAIM FOR FRAUD AND CONCEALMENT

"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*

ADORNO YOSS ALVARADO & SMITH
ATTORNEYS AT LAW
SANTA ANA

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, Plaintiff 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 ununkown third parties." See Complaint, ¶ 38. However, Plaintff has failed to allege that WAMU's conduct exceeded a typical money lender and thus fails to state a claim.

Furthermore, the fifteen "undisclosed" facts are that alleged in ¶ 52 of the FAC are not facts that are allegedly required to be disclosed are any statutory or contractual disclosures.

Accordingly, the claim should be dismissed.

XI. PLAINTIFF STILL FAILS TO ALLEGE SUFFICIENT FACTS 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 Civ. Proc. § 761.020.

ADORNO YOSS ALVARADO & SMITH
ATTORNEYS AT LAW
SANTA ANA

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*").

Here, multiple problems continue to exist. Although Plaintiff has now verified the FAC is verified, the allegations still do not sufficiently address the nature of the adverse interests claimed by each of the Defendants. See Cal. Code Civ. Pro. § 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.")

Second, Plaintiff still and probably cannot not allege that she has payed or can pay the debt in the amount of $2,500,000 owed on the Subject Property under the DOT. 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

ADORNO YOSS ALVARADO & SMITH
ATTORNEYS AT LAW
SANTA ANA

securitization(s) of the loan and insurance proceeds from the Credit Default Swaps." See 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 reeived.

Furthermore, Plaintiff's allegations that "none of the defendants is the true holder of the Promissory Note" (Complaint, ¶ 44 and FAC, ¶ 58) are still without merit. That none of the Defendants 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*.

Accordingly, the seventh claim should be dismissed.

XII. PLAINTIFF STILL FAILS TO STATE AN EIGHTH CLAIM FOR DECLARATORY RELIEF 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).

Here, the bases for the declaratory relief, as in the last Complaint is "that Chase is not the present holder in due course or beneficiary of a Promissory Note executed by Plaintiff". See Complaint, ¶ 47 and FAC, ¶ 61. However, as set forth above and in the previous motion to dismiss, whether or not the Defendants are a holder of the

ADORNO YOSS ALVARADO & SMITH
ATTORNEYS AT LAW
SANTA ANA

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 Plaintiff seeks to adjudcicated continue to be redundant of her other alleged causes of action and are therefore unnecessary. See *Mohammed*, supra, 2009 U.S. Dist. LEXIS 61796 at *14. Further, as set forth above, the previous causes of action are without merit. Consequently, Plaintiff's declaratory relief claims also similarly fail along with their corresponding or encompassed causes of action. See *Pagatalunan*, 2009 U.S. Dist. LEXIS 34811 at *6-*7. Consequently, Plaintiff still 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); *Mohammad*, *supra*, 2009 U.S. Dist. LEXIS 61796 at *14; *Pagtalunan*, 2009 U.S. Dist. LEXIS 34811 at *6 -*7.

Accordingly, this cause of action should be dismissed.

XIII. PLAINTIFF FAILS 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).

Plaintiff's cause of action fails to allege any suffporting facts of any matters that were untrue. Plaintiff alleges that she entered into the Subject Loan, received $2,500,000 and has defaulted on the Subject Loan. Consequently, there are no facts to support that the NOD or NOTS were not justibiably recorded. Because no "absence of justification" has been alleged or can be alleged, this cause of action is totally without merit.

///

ADORNO YOSS ALVARADO & SMITH
ATTORNEYS AT LAW
SANTA ANA

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). Furthermore, 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). Plaintiff alleges no facts supporting any damages that have been incurred. See FAC, ¶ 71.

Finally, the noticing of the NOD and NOTS were privileged under Civil Code § 47. Plaintiff claims that that such publications "were unjustified and without privivilige (FAC, ¶ 70), but offer no facts in support of her legal conclusions.

This claim is without merit and should be dismissed.

XIV. PLAINTIFF FAILS TO STATE A TENTH CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

To state a claimf 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). Plaintiff fails to provide any facts showing such extreme outrageousness. See 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

ADORNO YOSS ALVARADO & SMITH
ATTORNEYS AT LAW
SANTA ANA

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).

Accordingly, the tenth cause of action should be dismissed.

XV. CONCLUSION

For the foregoing reasons, Defendant JPMorgan and CRC respectfully request that the Court grant its Motion to Dismiss in its entirety.

DATED: October 27, 2010

ADORNO YOSS ALVARADO & SMITH
A Professional Corporation

By: /s/ Michael Tannatt
THEODORE E. BACON
AMY L. MORSE
MICHAEL B. TANNATT
Attorneys for Defendant
JPMORGAN CHASE BANK, N.A., an acquirer of certain assets and liabilities of Washington Mutual Bank from the Federal Deposit Insurance Corporation acting as receiver

ADORNO YOSS ALVARADO & SMITH
ATTORNEYS AT LAW
SANTA ANA

PROOF OF SERVICE

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT

Margeret Carswell v. JPMorgan Chase Bank, et. al.

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is **ADORNO YOSS ALVARADO & SMITH, 633 W. Fifth Street, Suite 1100, Los Angeles, CA 90071**.

On October 27, 2010, I served the foregoing document described as **NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action.

☒ by placing the original and/or a true copy thereof enclosed in (a) sealed envelope(s), addressed as follows:

SEE ATTACHED SERVICE LIST

☒ **BY REGULAR MAIL:** I deposited such envelope in the mail at 633 W. Fifth Street, Suite 1100, Los Angeles, California 90071. The envelope was mailed with postage thereon fully prepaid.

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

BY THE ACT OF FILING OR SERVICE, THAT THE DOCUMENT WAS PRODUCED ON PAPER PURCHASED AS RECYCLED

☐ **BY FACSIMILE MACHINE:** I Tele-Faxed a copy of the original document to the above facsimile numbers.

☐ **BY OVERNIGHT MAIL:** I deposited such documents at the Overnite Express or FedEx Drop Box located at 633 W. Fifth Street, Los Angeles, California 90071. The envelope was deposited with delivery fees thereon fully prepaid.

☐ **BY PERSONAL SERVICE:** I caused such envelope(s) to be delivered by hand to the above addressee(s).

☐ (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

☒ (Federal) I declare that I am employed in the office of a member of the Bar of this Court, at whose direction the service was made.

Executed on October 27, 2010, at Los Angeles, California.

Mark Zappala

ADORNO YOSS ALVARADO & SMITH
ATTORNEYS AT LAW
SANTA ANA

SERVICE LIST
Margaret Carswell v. JPMorgan Chase Bank, et. al.

Attorney for Plaintiff:
DOUGLAS GILLIES, ESQ.
3756 Torino Drive
Santa Barbara, CA 93105
(805) 682-7033
douglasgillies@gmail.com

ADORNO YOSS ALVARADO & SMITH
ATTORNEYS AT LAW
SANTA ANA