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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARGARET CARSWELL, Plaintiff, v. JP MORGAN CHASE BANK N.A., CALIFORNIA RECONVEYANCE CO., and DOES 1-150, inclusive, Defendants.	Case No. CV 10-5152-GW (PLAx) JUDGE: HON. GEORGE H. WU PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS FIRST AMENDED COMPLAINT DATE: January 6, 2011 TIME: 8:30 AM CRTRM: 10

Plaintiff MARGARET CARSWELL respectfully submits the following Memorandum of Points and Authorities in opposition to Defendants' Motion to Dismiss Plaintiff's First Amended Complaint.

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MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION

Defendants seek to dismiss Plaintiff's First Amended Complaint (FAC) claiming that her ten causes of action are not supported by sufficient facts. Chase and CRC assert, "the entire FAC consists of nothing but boilerplate conclusions of law and facts." Boilerplate is text that can be reused in new contexts or applications without being changed much from the original. It means standardized, commonplace, stereotyped, unvaried. Perhaps when Defendants see so many lawsuits raising the same issues of fraud, lack of standing, forgery, perjury, etc., they all start to look alike. Chase seeks to harvest millions of houses across America without producing any paper from its vaults that would support its claims.

Here are some of the "boilerplate" facts from numbered paragraphs in Plaintiff's First Amended Complaint that Chase characterizes as commonplace and unvaried:

> 9. Plaintiff signed the mortgage documents on December 20, 2006 at her home alone with BRUCE CUSTER a notary public. She was not given an opportunity to review the documents. After she signed, the notary took all the documents and told Plaintiff that WaMu or Alliance Title Company would forward the finalized documents to her. Plaintiff never received any documents from WaMu or Alliance, including disclosures required by the Truth in Lending Act and Notice of Right to Cancel.
>
> 10. When Plaintiff finally received a copy of her loan application from Chase in November 2009, she discovered that the application stated her income to be $50,300.00 per month and her "business," a nonprofit entity she had formed called Earth First Construction, to have a net worth of $1,000,000. Plaintiff did not provide these fictitious figures to the broker or bank.
>
> 11. Plaintiff has not received notice that WaMu's beneficial interest has been transferred to Chase.

12. WaMu securitized Plaintiff's single-family residential mortgage loan through Washington Mutual Mortgage Securities Corp., evidenced by Supplement to Prospectus dated January 11, 2007, WaMu Mortgage Pass-Through Certificates, Series 2007-OA1 Trust. Plaintiff is informed and believes that the trust was terminated on October 15, 2010, and that the lawful beneficiary has been paid in full.

16. WaMu retained no beneficial interest in the loan that could be transferred to Chase in a Purchase and Assumption Agreement dated September 25, 2008. On September 1, 2009, Deborah Brignac, Vice President of Chase, Vice President of CRC, and "robo-signer" whose name and variant signatures have attested to the truth of facts recited in declarations and affidavits in hundreds of thousands of foreclosures, executed an Assignment of Deed of Trust granting to Bank of America all beneficial interest in Plaintiff 's Deed of Trust.

17. Neither WaMu, CRC, Chase, nor anyone else has recorded a transfer of a beneficial interest in the Note or any other interest in the Property to Chase. If Chase is a beneficiary, CRC has breached its fiduciary duty to Plaintiff under the DOT by not recording the alleged transfer of the beneficial interest and/or servicing duty from WaMu to Chase, by not indicating on the Notice of Default that Chase is the alleged beneficiary, and by not recording a substitution of trustee indicating that commencing on September 25, 2008, it was a trustee for Chase rather than WaMu.

22. 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.

23. On October 1, 2010, California Attorney General Jerry Brown sent a letter to Chase (Exhibit 10) and ordered Chase to halt all foreclosures in California. A copy of the letter is posted on the Attorney General's website…. Mr. Brown wrote, "JP Morgan Chase has now admitted that employees assigned

> to handling foreclosures signed affidavits without first personally reviewing the contents of borrowers' loan files. Thus, borrowers suffered the foreclosure of their homes based on affidavits which JP Morgan Chase had not confirmed to be accurate. This admission strongly suggests that any purported verification by JP Morgan Chase that it complied with section 2923.5 before commencing a foreclosure in California is similarly suspect.

And the FAC goes on. Boilerplate? Commonplace? Sadly, it appears to be so. The Congressional Oversight Panel released a report on November 16, 2010. Plaintiff requests that the Court take Judicial Notice of the COP report. It casts this lawsuit and similar lawsuits in a different light than anything confronting the legal system in the past.

> In the fall of 2010, reports began to surface alleging that companies servicing $6.4 trillion in American mortgages may have bypassed legally required steps to foreclose on a home. Employees or contractors of Bank of America, GMAC Mortgage, and other major loan servicers testified that they signed, and in some cases backdated, thousands of documents claiming personal knowledge of facts about mortgages that they did not actually know to be true.
>
> Allegations of "robo-signing" are deeply disturbing and have given rise to ongoing federal and state investigations. At this point the ultimate implications remain unclear. It is possible, however, that "robo-signing" may have concealed much deeper problems in the mortgage market that could potentially threaten financial stability and undermine the government's efforts to mitigate the foreclosure crisis.
>
> If documentation problems prove to be pervasive and, more importantly, throw into doubt the ownership of not only foreclosed properties but also pooled mortgages, the consequences could be severe. Clear and uncontested property rights are the foundation of the housing market. If these rights fall into question,

that foundation could collapse. Borrowers may be unable to determine whether they are sending their monthly payments to the right people (COP Report, Nov. 16, 2010, pp. 4-5).

GMAC Mortgage, a subsidiary of current TARP recipient Ally Financial, announced on September 24, 2010 that it had identified irregularities in its foreclosure document procedures that raised questions about the validity of foreclosures on mortgages that it serviced. Similar revelations soon followed from Bank of America, a former TARP recipient, and others. Employees of these companies or their contractors have testified that they signed, and in some cases backdated, thousands of documents attesting to personal knowledge of facts about the mortgage and the property that they did not actually know to be true.

The Panel emphasizes that mortgage lenders and securitization servicers should not undertake to foreclose on any homeowner unless they are able to do so in full compliance with applicable laws and their contractual agreements with the homeowner (COP Report, Nov. 16, 2010, p. 6).

If document irregularities prove to be pervasive and, more importantly, throw into question ownership of not only foreclosed properties but also pooled mortgages, the result could be significant harm to financial stability – the very stability that the TARP was designed to protect. In the worst case scenario, a clear chain of title – an essential element of a functioning housing market – may be difficult to establish for properties subject to mortgage loans that were pooled and securitized. Rating agencies are already cautious in their outlook for the banking sector, and further blows could have a significant effect (COP Report, Nov. 16, 2010, p. 7).

If irregularities in the foreclosure process reflect deeper failures to document properly changes of ownership as mortgage loans were securitized, then it is possible that Treasury is dealing with the wrong parties in the course of the

> Home Affordable Modification Program (HAMP). This could mean that borrowers either received or were denied modifications improperly. Some servicers dealing with Treasury may have no legal right to initiate foreclosures, which may call into question their ability to grant modifications or to demand payments from homeowners, whether they are part of a foreclosure mitigation program or otherwise. The servicers' tendency to cut corners may also have affected the determination to modify or foreclose upon individual loans.
>
> Many of the entities implicated in the recent document irregularities, including Ally Financial, Bank of America, and JPMorgan Chase, are current or former TARP recipients (p. 8).

Chase wants to take real property without offering any proof that might tend to show who holds a beneficial interest in the promissory note on the grounds that it is a big bank in the third year of negotiating a Purchase and Assumption Agreement with FDIC. It is no wonder that all those lawsuits are beginning to look so much alike.

In Santa Barbara County, the Grantor-Grantee Index lists 10,844 Notices of Default recorded between January 1, 2007 and December 1, 2010, and 8,423—78%—resulted in a Notice of Trustee's Sale. With a population of 400,000, one in ten residents have faced foreclosure since the foreclosure crisis began. In the preceding three and a half years, 2,816 Notices of Default were recorded, resulting in 1,130 Notices of Trustee's Sale—40%. The number of Notices of Trustee's Sale recorded in Santa Barbara County in the past 12 months was 2,438; only 116 were recorded during a comparable period in 2005. There was a 21-fold increase in Trustee's Sales in four years.

Nationally, RealtyTrac.com reports 2,188,585 million homes in foreclosure. Over 6 million people currently anticipate they will be escorted out of their homes by a Sheriff. The Center for Responsible Lending reports 6.6 million foreclosures since 2007. It forecasts up to 12 million more during the next five years, resulting in eighteen

million foreclosures, a total of sixty million homeowners on the street. One in nine homeowners is seriously delinquent on their mortgage, and one in four homeowners owe more than the value of their property[1]. The American Dream is becoming a nightmare. Business-as-usual is a formula for collapse of our social and economic institutions.

The report of the Congressional Oversight Panel continues on page 25:

> If it is unclear who owns the mortgage, clear title to the property itself cannot be conveyed. If, for example, the trust were to enforce the lien and foreclose on the property, a buyer could not be sure that the purchase of the foreclosed house was proper if the trust did not have the right to foreclose on the house in the first place. Similarly, if the house is sold, but it is unclear who owns the mortgage and the note and, thus, the debt is not properly discharged and the lien released, a subsequent buyer may find that there are other claimants to the property. In this way, the consequences of foreclosure documentation irregularities converge with the consequences of securitization documentation irregularities: in either situation, a subsequent buyer or lender may have unclear rights in the property.
>
> These irregularities may have significant bearing on many of the participants in the mortgage securitization process:
>
> Sponsors, Servicers, and Trustees – Failure to follow representations and warranties found in PSAs can lead to the removal of servicers or trustees and trigger indemnification rights between the parties. Failure to record mortgages can result in the trust losing its first-lien priority on the property. Failure to transfer mortgages and notes properly to the trust can affect the holdings of the trust. If transfers were not done correctly in the first place and cannot be corrected, there is a profound implication for mortgage securitizations: it would mean that the improperly transferred loans are not trust assets and MBS are in

[1] responsiblelending.org/mortgage-lending/research-analysis/snapshot-of-a-foreclosure-crisis.html

> fact not backed by some or all of the mortgages that are supposed to be backing them. This would mean that the trusts would have litigation claims against the securitization sponsors for refunds of the value given by the trusts to the sponsors (or depositors) as part of the securitization transaction. If successful, in the most extreme scenario this would mean that MBS trusts (and thus MBS investors) could receive complete recoveries on all improperly transferred mortgages, thereby shifting the losses to the securitization sponsors. Borrowers/Homeowners may have several available causes of action.
>
> They may seek to reclaim foreclosed properties that have been resold. They may also refuse to pay the trustee or servicer on the grounds that these parties do not own or legitimately act on behalf of the owner of the mortgage or the note. In addition, they may defend themselves against foreclosure proceedings on the claim that robosigning irregularities deprived them of due process.

2. STATEMENT OF FACTS

Discovery has not commenced. Chase holds all the cards. They have vast resources and privileged access to millions of documents that were in WaMu's possession when FDIC was appointed receiver of WaMu on September 25, 2008. Yet all Chase offers the Court as proof of their asserted claim to take Plaintiff's Property is a Purchase & Assumption Agreement they are negotiating with FDIC. They offer no proof that Plaintiff's loan was an asset on the books of WaMu on the effective date of the P & A Agreement. This may seem like a commonplace matter to a bank, but if they have proof, let's see it.

Defendants' Memorandum of Points and Authorities closely follows their memo of Points and Authorities filed on August 9 in support of their first motion to dismiss. However, they added a paragraph to their Statement of Facts on page 2:

> 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.

The first notice printed on that Assignment of Deed of Trust, Plaintiff's Exhibit 2, is so significant it is printed above the title to the document. The Assignment begins:

IMPORTANT NOTICE

NOTE: After having been recorded, this Assignment should be kept with the Note and the Deed of Trust hereby assigned.

ASSIGNMENT OF DEED OF TRUST

Plaintiff's Note was never in the possession of Bank of America. Bank of America disclaims any interest in Plaintiff's mortgage. The Declaration of Margaret Carswell, attached to her First Amended Complaint as Exhibit 2, states at paragraph 17:

> I did a search at the County Recorder's Office that led to the discovery of an Assignment of Deed of Trust to Bank of America concerning "WaMu Mortgage Pass-Through Certificates Series 2007-OA1Trust". On January 29, 2010, I visited the manager of our local BofA, who informed me unequivocally that BofA had no interest in my mortgage.

That one paragraph contains more relevant evidence than all the evasive posturing that fills hundreds of pages of documents filed by Defendants in this case so far. Inasmuch as the Assignment of Deed of Trust is evidence of a break in the chain of title, it raises a triable issue of fact. BofA says they have no interest and no record in their database describing Plaintiff's Property, supporting Plaintiff 's contention that Defendants have no interest in her Property.

Defendants cite *Yeomalakis v. FDIC*, 562 F.3d 56 (C.A. 1, Apr. 3, 2009).

Yeomalakis sued WaMu for charging penalties retroactively to a credit card prior to the bank's demise on September 25, 2008. The District Court held that the borrower's claims were preempted and that Yeomalakis failed to state his claims in a way that avoided the presumption of preemption. The subject matter of the lawsuit, an illegal penalty tacked on to a credit card, was obviously a liability of WaMu. In Carswell, there is no liability claim. Plaintiff alleges that WaMu did not have any interest in Plaintiff's property when its assets were assumed by Chase. Chase now asserts it can prove that WaMu was a servicer. If they succeed, then the question for the court will be whether WaMu's role as a servicer transformed Plaintiff's Property into an asset.

The material allegations in the First Amended Complaint are teeming with triable issues. A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the complaint's sufficiency. *North Star Int'l v. Arizona Corp. Comm'n,* 720 F.2d 578, 581 (9th Cir. 1983). All material allegations in the complaint, "even if doubtful in fact," are assumed to be true. The court must assume the truth of all factual allegations and must "construe them in a light most favorable to the nonmoving party." *Gompper v. VISX, Inc.,* 298 F.3d 893, 895 (9th Cir. 2002); *Walleri v. Fed. Home Loan Bank of Seattle*, 83 F.3d 1575, 1580 (9th Cir. 1996). The court must accept as true all reasonable inferences to be drawn from the material allegations in the complaint. *Barker v. Riverside County Office of Education*, 584 F.3d 821, 824 (9th Cir. 2009).

The Complaint alleges facts in support of Plaintiff's contention that Chase cannot prove it is authorized to take her home, and CRC is under a duty to reconvey the Deed of Trust to Plaintiff.

3. WRONGFUL FORECLOSURE – FIRST CAUSE OF ACTION

Chase has not attempted to prove to this Court that it acquired any interest in Plaintiff's residence. Only Chase knows whether plaintiff's loan was on the books as an asset of WaMu on September 25, 2008, when Chase "acquired certain assets." If it was not, then Chase did not acquire any beneficial interest in Plaintiff's loan.

Defendants allege in their Memorandum, "JPMorgan obtained WaMu' servicing interests in the Subject Loan pursuant to P & A Agreement with the FDIC." (Defendants' Memorandum of Points and Authorities 7:5-6). This is an evidentiary fact that cannot be proven in argument supporting a Motion to Dismiss. There is nothing is the P & A Agreement that shows whether WaMu had any servicing interest in Plaintiff's loan on September 25, 2008. If the proposition alleged by defense counsel is not true, then the next fact alleged in their Memorandum must also not be true: "Accordingly, contrary to Plaintiff's allegations, JPMorgan and CRC have properly initiated the foreclosure proceedings in regard to the Subject Property." (7:7-8).

Where factual findings or the contents of the documents are in dispute, those matters of dispute are not appropriate for judicial notice. *Caravantes v. California Reconveyance Co.*, 2010 WL 4055560, 9 (SD.Cal. 2010), citing *Darensburg v. Metropolitan Transp. Comm'n*, 2006 WL 167657, at *2 (N.D.Cal. Jan.20, 2006).

WaMu did not form a contract with Plaintiff because WaMu intended that Plaintiff would breach. WaMu sold its beneficial interest in Plaintiff's property, receiving no less than the balance on Plaintiff's note, and retained merely a duty to service the loan. Chase claims that it obtained WaMu' servicing interests. Therefore, Chase acquired no beneficial interest in Plaintiff's loan and has no right to sell her property unless it can prove that the beneficiary is getting its share of the proceeds. A servicer is not a black hole.

There was a time, not long ago, when servicers were trusted. Times have changed. People no longer trust the institutions they once revered. Stated in the Congressional Oversight Panel's report at page 14:

> Effective transfers of real estate depend on parties being able to answer seemingly straightforward questions: who owns the property? how did they come to own it? can anyone make a competing claim to it? The irregularities have the potential to make these seemingly simple questions complex. As a threshold matter, a party seeking to enforce the rights associated with the

> mortgage must have standing in court, meaning that a party must have an interest in the property sufficient that a court will hear their claim and can provide them with relief. *See* Stephen R. Buchenroth and Gretchen D. Jeffries, *Recent Foreclosure Cases: Lenders Beware* (June 2007; *Wells Fargo v. Jordan*, 914 N.E.2d 204 (Ohio 2009) ("If plaintiff has offered no evidence that it owned the note and mortgage when the complaint was filed, it would not be entitled to judgment as a matter of law."); Christopher Lewis Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, University of Cincinnati Law Review, Vol. 78, No. 4, at 1368-1371 (Summer 2010); *MERSCORP, Inc. v. Romaine*, 861 N.E. 2d 81 (N.Y. 2006) (URL's redacted per local rule). Accordingly, a second set of problems relates to the chain of title on mortgages and the ability of the foreclosing party to prove that it has legal standing to foreclose. While these problems are not limited to the securitization market, they are especially acute for securitized loans because there are more complex chain of title issues involved.

Chase argues that it acquired the right to sell Plaintiff's property when it acquired WaMu's assets through the Purchase and Assumption Agreement. Chase could only acquire what WaMu owned in September 2008. At that time, WaMu no longer owned Plaintiff' mortgage, if indeed it ever did. Perhaps the identity of the beneficiary can be proven, but it remains unknown.

Even if Chase does have possession of the original Note, which is unlikely given their strategy, there has still been a break in the chain of title. The Transfer of the Deed of Trust to Bank of America (Plaintiff's Exhibit 2 attached to First Amended Complaint) was recorded on September 2, 2009, when Defendants filed their first Notice of Default. Therefore the transfer was done after the fact. The Assignment of Deed of Trust was subscribed by Debora Brignac, a robo-signer whose signature is probably a forgery. Plaintiff has obtained certified copies of documents showing

sixteen different signatures with the name Deborah Brignac, which were recorded in Santa Barbara County.

Under the terms of Plaintiff's Deed of Trust, Section 24, an assignment can only be accomplished by the lender, which Chase is not. It claims to be a servicer.

> 24. Substitute Trustee. Lender, at its option, may from time to time appoint a successor trustee to any Trustee appointed hereunder by an instrument executed and acknowledged by Lender and recorded in the office of the Recorder..."

Bank of America did not become the owner of the Note when it acquired LaSalle Bank's trustee duties under the Certificate Trust. The Trust has been terminated and no record of it appears in the IRS records for first quarter filings 2010. BofA may have a "beneficial interest" under the DOT, pursuant to a faulty Assignment of Deed of Trust, but it is not the owner or holder of the Note. The Declaration of Margaret Carswell, attached to Defendants' motion as Exhibit 1, states at paragraph 17:

> 17. I did a search at the County Recorder's Office that led to the discovery of an Assignment of Deed of Trust to Bank of America concerning "WaMu Mortgage Pass-Through Certificates Series 2007-OA1Trust". On January 29, 2010, I visited the manager of our local BofA, who informed me unequivocally that BofA had no interest in my mortgage. Subsequent research into this "Trust" revealed that my Note was bundled along with thousands of other mortgage notes on or before January 1, 2007, securitized by Pacific Investment Management Company and listed with at least two companies, Transamerica Funds and Allianz Global Investors. Several of the mortgages contained in the Trust have already been foreclosed.

Chase cannot foreclose on Plaintiff's property without joining the owner of the note because Chase is not a real party in interest. *In re Foreclosure Cases*, 521 F.Supp. 3d 650, 653 (S.D. Ohio).

Defendants argue that Chase assumed no *liability* for actions taken by WaMu prior

to September 25, 2008 in regard to the subject loan. This obscures the issue. Plaintiff alleges that Chase acquired no *asset* that authorizes it to proceed with foreclosure of Plaintiff's property as a result of actions taken by WaMu prior to September 25, 2008. Plaintiff does not base her complaint on a liability of WaMu that might have been assumed by FDIC during the liquidation of WaMu and the pending transfer of its assets and liabilities to Chase. Plaintiff alleges that WaMu did not have any interest in Plaintiff's residence on September 25, 2008. Her property was not an asset of WaMu. WaMu did not hold any beneficial interest in Plaintiff's property, and therefore Chase could not, did not, and will not acquire any interest in Plaintiff's residence under the pending P & A Agreement. This is not a liability case.

Chase seems to assert that it can foreclose on any residence in the world by authority of the P & A Agreement on the grounds that WaMu might have had some interest in the property at some time, even in the absence of a contract with the owner, or even if WaMu had sold its interest in the loan several times to investors.

Plaintiff alleges in ¶59 of her FAC that WaMu securitized plaintiff's single-family residential mortgage loan through Washington Mutual Mortgage Securities Corp., evidenced by Prospectus Supplement to Prospectus dated January 11, 2007, WaMu Mortgage Pass-Through Certificates, Series 2007-OA1 Trust. If WaMu retained no beneficial interest in the promissory note when it brokered the deal, Chase cannot acquire what WaMu never had.

If WaMu transferred all of its beneficial interest in the note at the inception of the loan and never entered it in its books as an asset, and entered no corresponding reserve on its ledger as a liability in the event of Plaintiff's default, then Chase could not acquire ownership of the note by purchasing WaMu's assets because WaMu had nothing to sell. This is a question of fact. Plaintiff alleges in ¶19 of the FAC that Chase does not have standing to sell plaintiff's property because Chase is not the holder of the Note and Chase did not pay any consideration to plaintiff. Chase does not own the loan and cannot identify the owner of the loan. Chase did not purchase the loan for value

when it took over WaMu in September 2008.

Chase has no beneficial interest in the note and can only proceed if it proves that it is the servicer and joins the owner of the note in this action. To dismiss this lawsuit before ascertaining the truth of these allegations would be unjust. Chase could produce the evidence in its files, but it prefers that Plaintiff be denied her day in court.

In *Saxon Mortgage v. Hillery*, Case No. C-08-4357 (N.D. Cal. 2008), the court ruled that the foreclosing party, Consumer, must demonstrate that it is the holder of the deed of trust and the promissory note. The *Saxon* court cited *In re Foreclosure Cases*, 521 F.Supp.2d 650, 653 (S.D. Ohio, 2007), which held that to show standing in a foreclosure action, the plaintiff must show that it is the holder of the note and the mortgage at the time the complaint was filed.

For a valid assignment, there must be more than just assignment of the deed alone; the note must also be assigned. "The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity." *Carpenter v. Longan*, 83 U.S. 271, 274 (1872).

In *In re Nosek*, 2008 WL 1899845 (Bkrtcy.D.Mass. 2008), the court awarded Rule 9011 sanctions against a lender for falsely representing that it was holder of the note and mortgage, when the lender had sold the note and mortgage five days after closing.

In re Foreclosure Cases involved 27 foreclosure actions filed in the Southern District of Ohio, in which the court questioned whether the plaintiff lenders had standing when the foreclosure complaint was filed and whether the court had subject matter jurisdiction to hear the cases at the time the foreclosure complaint was filed. Judge Thomas M. Rose wrote, [This Court] "will not tolerate a lender's or servicer's disregard for the rules that govern litigation, including contested matters, in the federal courts. It is the creditor's responsibility to keep a borrower and the Court informed as to who owns the note and mortgage and is servicing the loan, not the borrower's or the Court's responsibility to ferret out the truth." *In re Foreclosure Cases*, 521 F.Supp.2d

650, 652 (S.D. Ohio, 2007).

If WaMu transferred its beneficial interest in Plaintiff's loan through a Pooling and Service Agreement, Chase cannot foreclose against Plaintiff without joining the Real Party in Interest and showing that it is acting with that party's knowledge and blessing.

4. CAL CIVIL CODE §2923.5 – SECOND CAUSE OF ACTION

Defendants cite *Mabry v. Aurora Loan Services*, 185 Cal.App.4th 208 (2010) in support of the proposition that the NOD satisfies the requirements of Cal. Civil Code §2923.5 since it recites the form language of the statute, regardless of whether or not it includes a declaration under penalty of perjury. However, this misses the point of the statute. §2923.5 requires contact with the borrower, not form language stapled to a form. If the party sending the Notice does not attach a declaration under penalty of perjury, the NOD has no evidentiary value in proving compliance with the notice requirements.

The Court of Appeal ruled in *Mabry* that a borrower has a private right of action under § 2923.5 and is not required to tender the full amount of the mortgage as a prerequisite to filing suit, since that would defeat the purpose of the statute. Under the court's narrow construction of the statute, §2923.5 merely adds a procedural step in the foreclosure process. Since the statute is not substantive, it is not preempted by federal law. The declaration specified in §2923.5 does not have to be signed under penalty of perjury, and if the notice is defective, the borrower's remedy is limited to getting a postponement of a foreclosure while the lender files a new notice of default that complies with §2923.5.

On remand from the Court of Appeal, the *Mabry* trial court found on November 23, 2010, that the Notice of Default did contain the statutorily required form language stating that the lender contacted the borrower, tried with due diligence to contact the borrower, etc. However, the declaration on the Notice of Default was not signed under penalty of perjury, and therefore it had no evidentiary value in proving whether or not

the defendants satisfied the notice requirements of section 2923.5. After considering declarations of the parties in an evidentiary hearing, the court found that defendant did not make the necessary contacts as required by §2923.5 and granted Mabry's application for a preliminary injunction to stay foreclosure proceedings until the defendant complied with the requirements of Civil Code §2923.5. As a decision of the California Superior Court, the Mabry ruling may not be precedent, but the court's logic is persuasive. Defendants cannot satisfy the requirements of §2923.5 by stamping the statutory language on the Notice of Default. They must prove that they made the necessary contacts required by the statute, and an unsigned or unsworn declaration has no evidentiary value. Therefore, to show compliance with the notice requirements of the statute, an evidentiary hearing is necessary.

5. UNJUST ENRICHMENT – THIRD CAUSE OF ACTION

Defendants argue that Plaintiff pleads no facts indicating that JPMorgan's mere receipt of payments from Plaintiff on the Subject Loan is somehow unjust. The FAC alleges:

After WaMu originated the loan, it transferred all beneficial interest in the loan (¶16). WaMu retained no beneficial interest in the loan that could be transferred to Chase in a Purchase and Assumption Agreement (¶16). Neither WaMu, CRC, Chase, nor anyone else has recorded a transfer of a beneficial interest in the Note or any other interest in the Property to Chase. (¶17). Chase does not have standing to enforce the Note because Chase is not the owner of the Note, Chase is not a holder of the Note, and Chase is not a beneficiary under the Note. Only a noteholder or beneficiary under the DOT has the capacity to exercise a power of sale. Chase does not claim to be a holder of the note or a beneficiary. Chase merely describes itself as a servicer in the Notice of Trustee's Sale (¶19). Chase has no interest in Plaintiff's mortgage (¶28).

It is not the receipt of payments that makes the payments unjust, but rather the lack of entitlement to the payments coupled with the repeated written, published, and

recorded threat of foreclosure and eviction.

Chase may or may not have a servicing interest, depending on facts under Chase's control. If Chase can show that it obtained "servicing interests" in Plaintiff's loan, then perhaps Chase can also show whether it actually forwarded payments of $107,766.00 from plaintiff to the beneficial owner of the loan. If Chase kept the money, it has been unjustly enriched at plaintiff's expense. In what republic could any bank, regardless of size, presume the right to take money without naming the beneficiary or accounting for its disbursement, then seize a private house when the homeowner asks where the payments are going?

6. RESPA AND TILA VIOLATIONS – FOURTH CAUSE OF ACTION

No one should be compelled to pay money to a party to whom the money is not owed. During the past year Plaintiff has requested documents from Chase, both in correspondence and through a Qualified Written Request under RESPA sent on April 30, 2010 (attached to FAC as Exhibit 5). Chase has refused to produce any relevant material. Plaintiff cannot ascertain the facts to prove her case if Chase refuses to respond with information in its possession. This is not an isolated incident. Chase and other big banks are systematically blocking efforts of borrowers to obtain information as part of a cover-up. They are ignoring virtually everyone's QWR and seeking the blessing of the courts to shield them from disclosure under RESPA and during discovery.

Chase asserts that Plaintiff has not been harmed by its statutory violations. Chase cites *Eronini v. JP Morgan Chase Bank, NA*, No. 08-55929, 2010 WL 737841 (9th Cir Mar.3, 2010) in support of its assertion that Plaintiff must allege damages to support of a RESPA claim. The 9th Circuit court stated in *Enronini*, "This disposition is not appropriate for publication and is not precedent."

Chase's assertion that damages must be asserted to state a cause of action for violation of a statutory requirement to furnish information, where the bank has refused

to provide information requested in a Qualified Written Request, is like insisting that a party pursuing discovery specify its damages when seeking a discovery order after interrogatories have been ignored. Such a rule would invite mayhem. How does a party with dramatically inferior access to information prove damages when a party with $2 trillion dollars in assets and thousands of lawyers under contract ignores a QWR and refuses to respond to discovery?

Paragraph 35 of the FAC alleges damages. "As a direct and proximate result of Defendants' failure to comply with RESPA, Plaintiff has suffered and continues to suffer actual damages in that she is unable to ascertain the basis for Defendants' claims to her property, she cannot identify the owner of the beneficiary of the Note, she cannot determine whether her payments to Chase in excess of $100,000 were converted by Chase or paid to the beneficiary, and she has no evidence upon which to conclude that Defendants are acting in good faith with lawful authority in their attempts to foreclose the Property."

A mobster holds a gun to a woman's head and says, "Gimme all your dough." Her heart races. A cop comes along. The gunman shrugs and says, "What's the harm? I was just kidding."

Defendants argue that Chase should not have any liability under TILA for WaMu's actions, citing Cacres (9:15-19). "Cacres" is not defined in Defendants' Memo of Points and Authorities.

7. NO CONTRACT – FIFTH CAUSE OF ACTION

No contract was formed between WaMu and Plaintiff because there was no meeting of the minds and no shared expectation. A contract is not simply words on paper. WaMu did not disclose to Plaintiff that it committed underwriting fraud by altering Plaintiff's loan application to satisfy underwriting requirements for the loans. WaMu's intent was evidenced by WaMu's failure to provide Plaintiff with copies of documents as required by Section 17 of the Deed of Trust and provisions of TILA.

Chase asserts that the one-year Statute of Limitations has expired, but the failure of WaMu to provide documents at closing, a clear violation of federal law, serves another evidentiary purpose. It shows that WaMu had a motive. WaMu didn't fund the mortgage from its own assets, but rather brokered the loan with funds provided by PIMCO, which obtained the funds from institutional investors. WaMu did not provide the borrower with a copy of the loan application it forged because it didn't want to alert the borrower to the fact that it was manufacturing toxic waste for unsuspecting investors to consume. This is not a question of whether Chase assumed a liability in the P & A Agreement with FDIC. It shows that Plaintiff and WaMu never came to a mutual understanding.

Between December 28 and 31, 2006, WaMu transferred Plaintiff's Promissory Note to the Custodian of the Certificate Trust for WaMu Mortgage Pass-Through Certificates Series 2007-OA1 Trust, otherwise known as the Depositor. This entity was named WaMu Asset Acceptance Corp. WaMu did not assign the Deed of Trust at the time it transferred the Note to the Custodian, thereby causing a break in the chain of title. The Certificate Trust was a Real Estate Mortgage Investment Conduit (REMIC), a complex pool of mortgage securities created for the purpose of acquiring collateral in which the base was divided into varying classes of securities backed by mortgages with different maturities and coupons. Pursuant to the terms of the Pooling and Servicing Agreement, the REMIC could not own the mortgages for tax reasons.

Chase did not acquire the Custodian's assets through the Purchase & Assumption Agreement. Chase only acquired the assets of Washington Mutual Bank.

Some recent decisions have suggested that lenders do not have a duty to ascertain the ability of borrowers to repay home loans. The failure of some big banks to follow traditional underwriting practices during the past decade has received the approval of some courts, but not others, in the early rounds of the foreclosure debacle. If lenders have no duty to weigh the likelihood that borrowers can demonstrate even a remote ability to repay bank loans, then our time-tested system governing transfers of interest

in real estate is collapsing.

Evaporation of the duty of the lender to follow commonly accepted underwriting practices does not settle an even more troubling issue raised by the current economic crisis. It was not just that banks didn't care if the homeowners could pay back their loans that crippled our economy. They made loans knowing that the unsophisticated borrowers could never possibly pay them back. That is how the law of contract came tumbling down. If one party enters into an agreement knowing full well that the other party will default, there is no contract. It doesn't rise to a question of duty or liability. There is no contract because there is no shared expectation.

They made loans to dead guys. They made home loans for empty lots without looking at the property. They fired loan officers who asked questions such as, "How can a short-order cook making $16,000 a year pay for a $800,000 home?" They made up numbers and typed them on loan applications for borrowers to sign without giving them an opportunity to read the application. Plaintiff signed a blank application and was not shown a copy of the completed form. Twenty-something year-old MBAs on Wall Street referred to these "products" as "toxic assets" as they rated them triple-A and sold them to unsuspecting investors. It was unprecedented. Congress did not foresee it, so there were no statutes regulating this unruly behavior. There is no legal precedent, so the courts must turn to Common Law principles.

Income figures were written on Plaintiff's loan application without her knowledge after she signed the papers. The notary came to her home at 8:00 PM on the winter solstice to get her signature on the final documents—at home, alone, at night, four days after the sudden, unexpected death of her mother. (See Declaration of Margaret Carswell, page 2, filed July 13, 2010).

Meeting of the minds is a necessary element in the formation of a contract, a notion that dates back to the origins of contract law. Consent of the parties is one of the requisites of a valid contract for the sale of realty. *Ussery v. Jackson*, 78 Cal. App. 2d 355 (1947). It is essential to the creation of such a contract that there be a meeting of

the minds of the parties and a mutual agreement on the terms of the contract. *Holland v. McCarthy*, 173 Cal. 597 (1916); *German Sav. & Loan Soc. v. McLellan*, 154 Cal. 710 (1908); *Lonergan v. Scolnick*, 129 Cal. App. 2d 179 (1954); *Cook v. Mielke*, 3 Cal. App. 2d 736 (1935).

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

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

An action for damages for breach of contract for the purchase or sale of real property will not lie unless the writing contains the essential terms and material elements of such an agreement without recourse to parole evidence of the intention of the contracting parties. *Dillingham v. Dahlgren*, 52 Cal.App. 322, 326-327 (1921). The law does not provide a remedy for breach of an agreement to agree in the future,

and the court may not speculate upon what the parties will agree. *Autry v. Republic Productions, Inc.,* 30 Cal.2d 144, 151, 152 (1947).

"Plaintiff's evidence does not establish the indispensable 'meeting of the minds' regarding the material terms of this transaction and, therefore, the existence of an enforceable contract." *Martin Deli v. Schumacher*, 52 N.Y.2d 105, 109, 436 N.Y.S.2d 247, 417 N.E.2d 541 (1981).

"If no meeting of the minds has occurred on the material terms of a contract, basic contract law provides that no contract formation has occurred. If no contract formation has occurred, there is no settlement agreement to enforce pursuant to (C.C.P.) section 664.6 or otherwise." *Weddington Productions, Inc. v. Flick*, 60 Cal.App.4th 793, 801 (1998).

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

William R. Hubbard wrote in 2009, "Contracts enjoy substantial communication advantages over patents. One advantage with contracts is that the parties to a contract dispute are typically the same parties involved in the contract's formation. For example, the core of a contract is the parties' *meeting of the minds*, which both parties will want to memorialize clearly. If a dispute arises regarding the meaning of a contract term, both parties can provide evidence regarding the *meeting of the minds*. "Efficient Definition and Communication of Patent Rights: the Importance of Ex Post, Santa Clara Computer and High Technology Law Journal (January, 2009).

8. FRAUD AND CONCEALMENT – SIXTH CAUSE OF ACTION

Chase quotes *Hahn v. Mirda,* 147 Cal.App.4th 740, 745 (2007). "To state a cause of action for fraudulent concealment, the defendant must have been under a duty to

disclose some fact to the plaintiff." Let's start with Plaintiff's loan application, which was filled in with fraudulent figures by WaMu's agents. No documents were given to Plaintiff, in violation of statutory duties spelled out in TILA. Defendants' argument continues, "Plaintiff has failed to allege that WaMu's conduct exceeded a typical money lender and thus fails to state a claim." So *everybody* was doing it. Plaintiff can only hope and pray that Chase Bank and CRC make this argument in front of the jury.

9. QUIET TITLE – SEVENTH CAUSE OF ACTION

Defendants argue that tender of the full amount of the debt is necessary, citing *Nool, Pagtalunan, Miller*, and *Caravantes*. However, if Chase has no enforceable claim to the Property, and cannot produce any evidence that it acquired or possesses any rights to the property, then full tender would be an absurd requirement to stop their frivolous claim. Anyone could maliciously file a Notice of Trustee's Sale and evict a homeowner. If a lack of resources to tender the outstanding balance on the loan prevented the homeowner from having his day in court, how would that tend to prove that the crook had a legitimate claim? *Mabry* is correct that a requirement of tender defeats the purpose of the statute.

The core issue in this case is to ascertain who is the mortgagee. Plaintiff did not borrow money from Chase. Plaintiff's pre-discovery inquiries indicate that WaMu did not own the loan on September 25, 2008, and therefore Chase is not the mortgagee. This issue cannot be brushed aside on the pretense that California is a non-judicial state. Non-judicial does not mean *outlaw*. If Chase is not the mortgagee, it would be unjust to dismiss the complaint and allow Chase to seize Plaintiff's home. She has a grant deed (FAC Exhibit 9). Chase has a hotly contested Purchase and Assumption Agreement that generates millions of dollars in lawyers' fees per month.

Plaintiff acknowledges that she received the funds. She is ready, willing and able to resume monthly payments to the owner of the note. Is Chase legally entitled to repayment of these funds from Plaintiff? Chase must produce the original promissory

note and show that Chase is the beneficiary of the note, or that it is working on behalf of the beneficiary with the beneficiary's blessing. Plaintiff is informed and believes that Chase cannot produce the necessary instruments. She will show at trial that the promissory note was bundled into a presold "Trust" which was then securitized and offered for investment many times over. In other words, the note was "atomized" and no longer exists as an enforceable mortgage document.

Chase can only have acquired from WaMu assets that were owned by WaMu. Plaintiff asserts on information and belief that the funds received by Plaintiff were not recorded in the accounting ledgers of WaMu. She further asserts that Chase is unable to produce any proof that these funds were properly accounted for in WaMu's ledger. Chase does not have any legal right to demand payment or sell the property for failure to pay.

Defendant quotes *Nool v. Homeq Serving*, "The cloud upon his title persists until the debt is paid." But the question is, paid to whom? Plaintiff didn't borrow money from Chase. If Plaintiff could identity the owner of the note, she would pay the mortgagee until the debt was paid and then the Deed of Trust would be reconveyed to her. She requests that her title be quieted because the purported debt has been spread over a multitude of unidentifiable investors unknowingly involved in her mortgage during that chaotic decade when the system was broken by the banks.

> Multiple banks may attempt to foreclose upon the same property. Borrowers who have already suffered foreclosure may seek to regain title to their homes and force any new owners to move out. Would-be buyers and sellers could find themselves in limbo, unable to know with any certainty whether they can safely buy or sell a home. If such problems were to arise on a large scale, the housing market could experience even greater disruptions than have already occurred, resulting in significant harm to major financial institutions. For example, if a Wall Street bank were to discover that, due to shoddily executed paperwork, it still owns millions of defaulted mortgages that it thought it sold off years ago, it

could face billions of dollars in unexpected losses. (COP Report, Nov. 16, 2010, pp. 4-5)

10. DECLARATORY/INJUNCTIVE RELIEF – EIGHTH CAUSE OF ACTION

Plaintiff's home has been scheduled by Defendant CRC to be sold on the Santa Barbara Courthouse steps every thirty days since 07-22-2010. A Trustee's Sale of Plaintiff's home is currently scheduled for January 3, 2011. There is clearly a significant and grueling controversy brewing between the parties and a pressing need for a judicial determination of the parties' rights and duties concerning the validity of the Promissory Note and Deed of Trust and Defendants' rights to proceed with a sale of the Property.

Documentation irregularities could also have major effects on Treasury's main foreclosure prevention effort, the Home Affordable Modification Program (HAMP). Some servicers dealing with Treasury may have no legal right to initiate foreclosures, which may call into question their ability to grant modifications or to demand payments from homeowners. The servicers' use of "robo-signing" may also have affected determinations about individual loans; servicers may have been more willing to foreclose if they were not bearing the full costs of a properly executed foreclosure. Treasury has so far not provided reports of any investigation as to whether documentation problems could undermine HAMP. It should engage in active efforts to monitor the impact of foreclosure irregularities, and it should report its findings to Congress and the public.

The housing market and the broader economy remain troubled and thus vulnerable to future shocks. In short, even as the government's response to the financial crisis is drawing to a close, severe threats remain that have the potential to damage financial stability (COP Report, Nov. 16, 2010, pp. 5-6).

Plaintiff requests a Temporary Restraining Order and Preliminary Injunction restraining defendants from conducting a Trustee's Sale of the Property during the pendency of this action.

11. SLANDER OF TITLE – NINTH CAUSE OF ACTION

Defendants make a closing argument when they state that a disparaging remark must cause damages to be actionable. Causation is not an element that can be proven before the Court in a motion to dismiss. Plaintiff has adequately pled that she suffered an injury as a direct result of Defendants' actions. Defendants have cratered the market value of Plaintiff's Property and caused her extreme emotional distress. To say there is no damage as a result of Defendants' public humiliation of Plaintiff is calloused. See *Sullivan v. Wash. Mut. Bank, FA*, 2009 WL 3458300, at *4-5 (N.D.Cal. Oct.23, 2009) (concluding that the initiation of foreclosure proceedings put the plaintiff's interest in her property sufficiently in jeopardy to allege an injury under § 17200); *Rabb v. BNC Mortgage, Inc.,* 2009 WL 3045812, at *2 (C.D.Cal. Sept.21, 2009) (same). To assert that defamatory, damaging publications are protected by a privilege justifying dismissal of Plaintiff's claim at the pleading stage is untenable. No one can record a groundless Notice of Default and publish a Notice of Trustee's Sale against an unsuspecting neighbor and then hide behind a privilege under California law—not even Chase Bank. Plaintiff can prove that her drop in property value was proximately caused by the NOD and NOTS.

12. INTENTIONAL EMOTIONAL DISTRESS – TENTH CAUSE OF ACTION

"The pursuit of economic interests does not qualify as 'outrageous' conduct," argue Defendants, citing *Trerice v. Blue Cross,* 209 Cal.App3d 878 (1989)

Times have changed since 1989. It would be difficult to find three people on the street who would not agree that the mortgage meltdown of the past decade was outrageous. Defendants' conduct as alleged in the First Amended Complaint was so

outrageous that it exceeded all bounds tolerated in a civilized society. Forged documents, systemic perjury, underwriting fraud, selling worthless junk to unsuspecting retirement funds in order to make a buck. Criminal.

Defendants conclude by citing *Kruse v. Bank of America*, 202 Cal.App.3d 38, 67 (1988), which states there is no claim for intentional infliction of emotional distress where lender simply attempted to collect a debt due under a security interest. Depends on who's the lender, and that is why this motion to dismiss must be denied.

Public Faith in Due Process Could Suffer. If the public gains the impression that the government is providing concessions to large banks in order to ensure the smooth processing of foreclosures, the people's fundamental faith in due process could suffer (COP Report, Nov. 16, 2010, p. 84)[2].

13. CONCLUSION

For the foregoing reasons, Plaintiff Margaret Carswell respectfully requests that the Court deny Defendants' Motion to Dismiss in its entirety. If any claims are insufficiently plead, Plaintiff requests leave to amend.

Date: December 3, 2010

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[2] **About the Congressional Oversight Panel.**
In response to the escalating financial crisis, on October 3, 2008, Congress provided Treasury with the authority to spend $700 billion to stabilize the U.S. economy, preserve home ownership, and promote economic growth. Congress created the Office of Financial Stability (OFS) within Treasury to implement the TARP. At the same time, Congress created the Congressional Oversight Panel to "review the current state of financial markets and the regulatory system." The Panel is empowered to hold hearings, review official data, and write reports on actions taken by Treasury and financial institutions and their effect on the economy (COP Report, Nov. 16, 2010, p. 124)

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Attorney for Plaintiff
MARGARET CARSWELL

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARGARET CARSWELL,

Plaintiff,

v.

JP MORGAN CHASE BANK N.A., CALIFORNIA RECONVEYANCE CO., and DOES 1-150, inclusive,

Defendants.

Case No. CV 10-5152-GW (PLAx)

PROOF OF SERVICE BY MAIL

I declare that I am over the age of 18 years, employed in the County of Santa Barbara, State of California, and not a party to the above-entitled action.

On December 3, 2010, I served a true copy of the foregoing document described as **Plaintiff's Opposition to Motion to Dismiss First Amended Complaint and Request for Judicial Notice in Opposition to Motion to Dismiss First Amended Complaint** by placing it in a sealed Priority Mail envelope and depositing it in the U.S. Post Office postage prepaid addressed to the following:

Michael B. Tannatt
Adorno Yoss Alvarado & Smith
633 W. Fifth Street, Suite 1100
Los Angeles, CA 90017

Place of Mailing: Santa Barbara, CA. Executed on: December 3, 2010 in Santa Barbara, CA.

I hereby certify that I am a member of the Bar of the United States District Court, Central District of California, and that the foregoing is true and correct.

Douglas Gillies