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JPMORGAN CHASE BANK, N.A.,

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

DARYOUSH JAVAHERI,

Plaintiff,

v.

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

Defendant.

CASE NO.: CV-10-8185 ODW (FFMx)

JUDGE: Hon. Otis D. Wright II

NOTICE OF MOTION AND MOTION BY DEFENDANT JPMORGAN BANK, N.A., TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

{Request for Judicial Notice Efiled and Proposed Order Submitted Concurrently Herewith}

Courtroom: 11
DATE: June 6, 2011
TIME: 1:30 P.M.

Trial Date: **None Set**
Action Filed: October 29, 2010

TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

NOTICE IS GIVEN that on June 6, 2011, at 1:30 P.M., in Courtroom 11, of the above-entitled court located at 312 N. Spring Street, Los Angeles, California 90012, Defendant JPMorgan Chase Bank, N.A., ("JPMorgan") will move the Court to dismiss the action without leave to amend, pursuant to Federal Rule of Civil

Procedure ("FRCP") §12(b)(6) on the grounds that the Second Amended Complaint of plaintiff Daryoush Javaheri ("Plaintiff") fails to state a claim upon which relief can be granted. This motion is based on the following grounds:

1. The first cause of action for "Violation of California Civil Code §2923.5" fails to state facts sufficient to constitute a claim for relief pursuant to FRCP 12(b)(6).

2. The second cause of action for "Wrongful Foreclosure " fails to state facts sufficient to constitute a claim for relief pursuant to FRCP 12(b)(6).

3. The third cause of action for "Quasi Contract" fails to state facts sufficient to constitute a claim for relief pursuant to FRCP 12(b)(6).

4. The fourth cause of action for "No Contract" fails to state facts sufficient to constitute a claim for relief pursuant to FRCP 12(b)(6).

5. The fifth cause of action for "Quiet Title" fails to state facts sufficient to constitute a claim for relief pursuant to FRCP 12(b)(6).

6. The sixth cause of action for "Declaratory and Injunctive Relief" fails to state facts sufficient to constitute a claim for relief pursuant to FRCP 12(b)(6).

7. The seventh cause of action for "Intentional Infliction of Emotional Distress" fails to state facts sufficient to constitute a claim for relief pursuant to FRCP 12(b)(6).

The motion will be based on this Notice of Motion, the Memorandum of Points and Authorities, the Request for Judicial Notice, and the pleadings and papers filed.

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Counsel for JPMorgan "met and conferred" with Plaintiff's counsel on April 21, 2011, via letter. Therefore, Defendant has met the requirements of Local Rule 7-3. *See*, Local Rule 7-3.

Respectfully submitted,

DATED: April 28, 2011

ALVARADOSMITH
A Professional Corporation

By: /s/ Frances Q. Jett
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FRANCES Q. JETT
Attorneys for Defendant
JPMORGAN CHASE BANK, N.A.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF ARGUMENT

On March 24, 2011, this Court granted defendant JPMorgan Chase Bank, N.A.'s ("JPMorgan" or "Defendant") Motion to Dismiss Plaintiff Daryoush Javaheri's First Amended Complaint ("FAC") as to all claims with leave to amend. In so doing, the Court specifically addressed the deficiencies in each and every of Plaintiff's claims.

Plaintiff has now filed a Second Amended Complaint ("SAC") which not only fails to cure any of the deficiencies in the FAC, but also succeeds in creating a whole new set of deficiencies.

Plaintiff's SAC against defendant JPMorgan Chase Bank, N.A., fails primarily because JPMorgan is not the same entity as Washington Mutual Bank ("WaMu") and did not assume its liabilities when it acquired WaMu's assets from the Federal Deposit Insurance Corporation ("FDIC").

The crux of Plaintiff's entire SAC remains that he believes he is entitled to rescind a $2.6 million loan he received from WaMu on or about November 14, 2007, to refinance a house located at 10809 Wellworth, Los Angeles California, ("Subject Property") without having to tender anything back to the lender because of the alleged bad acts of the WaMu at the loan origination, because of alleged discrepancies in the acquisition of the loan by JPMorgan from the FDIC, and due to alleged improprieties in the non-judicial foreclosure process. Plaintiff's SAC fails simply because it does not establish any facts to support his claims and is not supported by the law.

In particular, Plaintiff's first and second claim for wrongful foreclosure, as well as the fifth claim for quiet title, allege that Defendants have no right to foreclose, because they do not own the note, but as the SAC itself alleges and the documents attached to Defendant's Request for Judicial Notice ("RJN") confirm, JPMorgan acquired the Loan from the FDIC when the FDIC was appointed receiver for WaMu.

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Exhibit 2 to the FAC also shows full compliance by Defendants with California Civil Code §2923.5.

The third claim for "quasi contract" is not a legal claim. The fourth claim of "No Contract" claim is essentially a rescission claim which fails, because there is no mistake or fraud alleged and no offer to restore the consideration Plaintiff obtained. The sixth claim for declaratory and injunctive relief mirrors the prior claims and fails for the reasons set forth above. The seventh claim for intentional infliction of emotional distress fails to allege virtually all the elements of that claim.

Accordingly, as none of Plaintiff's claims against JPMorgan are properly pled and cannot be amended, the SAC must be dismissed.

II. SUMMARY OF FACTS

Plaintiff obtained a mortgage loan in the amount of $2,660.000.00 ("Loan") secured by a Deed of Trust ("DOT") encumbering the Subject Property. SAC, ¶¶ 12, 13, Exhibits 3, 4. The DOT was recorded on or about November 30, 2007, with the Los Angeles County Recorder's Office as instrument number 20072634177. The DOT identifies Washington Mutual Bank, FA ("WaMu") as the lender beneficiary, and the FAC confirms California Reconveyance Company ("CRC") is the current trustee of the DOT. SAC, ¶ 13, Exhibit 4.

The Office of Thrift Supervision ("OTS") assumed control of WaMu on September 25, 2008. RJN, Exhibit A. On that same day, JPMorgan acquired WaMu's banking operations from the FDIC, including the interest in the Loan on the Subject Property, under the Purchase and Assumption Agreement ("P&A Agreement") between the FDIC and JPMorgan dated September 25, 2008. *See* RJN, Exhibit B.

Plaintiff failed to comply with the Loan obligations and Notice of Default was recorded May 14, 2010, and confirms that $141,558.18 is in arrears. Exhibit 9. The SAC does not deny this amount is due and owing as of May 13, 2010. On August 16,

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2010, a Notice of Trustee's sale was recorded with the Los Angeles County Recorder's Office. SAC, ¶ 17, Exhibit 10.

III. STANDARD FOR A MOTION TO DISMISS

A motion to dismiss under FRCP 12(b)(6) may be brought when a plaintiff fails to state a claim upon which relief can be granted. While a complaint attacked by a FRCP § 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do. *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1959 (2007). "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." *Id.*

On a motion to dismiss, a court may take judicial notice of matters of public record in accordance with Federal Rules of Evidence ("FRE") 201 without converting the motion to dismiss to a motion for summary judgment. *Lee v. City of Los Angeles*, 250 F.3d 668, 688-689 (9th Cir. 2001) (citing *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986)). Courts may take judicial notice of documents outside of the complaint that are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. FRE 201(d); *Wietschner v. Monterey Pasta Co.*, 294 F. Supp. 2d 1117, 1109 (N.D. Cal. 2003). Courts can take judicial notice of such matters when considering a motion to dismiss. *Id.*; *MGIC Indem. Corp. v. Weisman*, 803 F. 2d 500, 504 (9th Cir. 1986). The Court may take judicial notice of a matter that is data stored on-line at a federal agency's website. *See Molina v. Wash. Mut. Bank*, 2010 U.S. Dis. LEXIS 8056 (W.D. Cal. Jan. 29, 2010) (taking judicial notice of data on web sites of federal agencies).

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IV. PLAINTIFF'S FIRST, SECOND, AND FIFTH CLAIMS FAIL SINCE JPMORGAN HAD THE RIGHT TO FORECLOSE AND COMPLIED WITH STATE LAW

A. JPMorgan Acquired the Loan from the FDIC

JPMorgan obtained its rights under the Loan from the FDIC. *See* RJN, Exhibit B, Complaint ¶2. In his SAC Plaintiff continues to assert that JPMorgan "has not recorded its claim of ownership of the purported mortgage" and "does not have standing to enforce the Note because Chase is not the owner of the Note, Chase is not the holder of the Note, and Chase is not a beneficiary under the Note." SAC, ¶¶ 15, 30. However, this is contrary to the Court's specific ruling on the Motion to the Dismiss the FAC whereby the Court specifically noted that "the transfer of interest to JPMorgan, however, is evidenced in documents of which the Court has already taken judicial notice – namely, the OTS Order and P&A Agreement." RJN, Exhibit C, p. 3. Further this Court has already found that "Plaintiff's claims based on the allegation that JPMorgan does not own he note are without merit." RJN, Exhibit C, p. 4. This confirms that JPMorgan had the right to foreclose on default and had the right to appoint CRC as the trustee in commencing foreclosure.

The facts alleged in this case and those subject to judicial notice establish that the Loan was an asset of WaMu when the P&A Agreement went into effect on September 25, 2008. *See, e.g.*, RJN, Exhibit B. Consequently, the Loan was one of the "deeds" and "mortgages" that was "assigned, transferred, conveyed and delivered to JPMorgan pursuant to the P&A Agreement. JPMorgan's rights under the DOT derives from the terms and conditions of the P&A Agreement with the FDIC, which transferred to JPMorgan the ownership of the beneficial and servicing rights, and all other interests that WaMu owned and possessed on September 25, 2008. *Id*. Thus, JPMorgan's power to exercise the power of sale under the DOT derives from the P&A Agreement with the FDIC acting as receiver and pursuant to its federal powers.

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Accordingly, JPMorgan properly acquired the rights to the DOT from the FDIC when WaMu was placed into receivership, so the claim that Defendant does not have the right to foreclose is without merit.

B. JPMorgan Complied with State Law

As to the alleged violations of California Civil Code §2923.5, the law is clear that foreclosure can be commenced by the trustee, mortgagee or beneficiary or any of their authorized agents and a person authorized to record the notice of default or the notice of sale. (*See* California Civil Code §§ 2924(a)(1) and 2924b(b)(4).)

Plaintiff continues to claim that JPMorgan violated § 2923.5, because the person who signed the declaration attesting to compliance with § 2923.5 did not have personal knowledge of the facts. SAC, ¶ 26. However, again, the Court has already addressed this allegation and found that "nothing in this statute requires that a declaration be signed by a person with personal knowledge." RJN, Exhibit C, pp.4-5. Moreover, *Mabry v. Superior Court*, 185 Cal.App.4th 208 (2010) makes it clear that §2923.5 does not require one individual having personal knowledge of all facts in the declaration:

> 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 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. *Id*, 234, 110 Cal. Rptr. 3d 201, 220.

In an obvious last ditch effort to salvage his claims of wrongful foreclosure, Plaintiff tries something new in his SAC by asserting that the Substitution of Trustee was "forged" and therefore cannot be used to facilitate the subject foreclosure. SAC, ¶¶ 36-39.

First and foremost, the so-called exhibits Plaintiff has attached to his SAC as evidence that Ms. Brignac's signature is forged have nothing whatsoever to do with Plaintiff or the subject Loan. See, Exhibits 11, 12, 13 to SAC. These exhibits clearly concern entirely different properties and loans and have no relevance whatsoever to the claims at issue. Moreover, the signatures which Plaintiff has cited examples of the so-called forgery each clearly have initials of someone other than Ms. Brignac after the signature – indicating that there was no actual forgery involved, but rather as clearly indicated, that these (irrelevant) documents were signed with Ms. Brignac's authority.

Accordingly, Plaintiff's effort to salvage his claim clearly fails.

Finally, Plaintiff's insistence that JPMorgan does not have standing to enforce the DOT, because there is no recorded assignment, is without any legal support. Any assignment of a deed of trust **may be recorded,** but it is not required to be recorded in order to provide constructive notice of the contents of the deed of trust. See California Civil Code § 2934 and *Santens v. Los Angeles Finance Co.*, 91 Cal.App.2d 197, 201-202 (1949) :

> Defendant argues that since the assignment of the note and trust deed to Graham was not recorded that defendant was a bona fide purchaser at the execution sale and is not bound by the assignment. He relies on the provision of section 2934 of the Civil Code that 'any assignment of the beneficial interest under a deed of trust may be recorded, and from the time the same is filed for record operates as constructive notice of the contents thereof to all persons.' **We see nothing in the wording of the section which would operate to defeat the title to Graham of the note and trust deed as the transfer of the note carried with it the security and the trust deed is a mere incident of the debt and could only be foreclosed by the owner of the note.** *Santens, supra* 91 Cal.App.2d at 201-202.
>
> (Emphasis added.) See also *Adler v. Sargent,* 109 Cal. 42 (1895) .

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(In a case where neither the note nor deed of trust had been recorded by the true assignee, California Supreme Court held that a mortgage, being a mere incident to the debt, belongs to the holder of the collateral note, and can be foreclosed only by him.)[1]

Accordingly, even in the absence of a recorded assignment and/or substitution of trustee, Plaintiff's wrongful foreclosure claims fail.

In short, the first, second and fifth claims have no merit and should be dismissed.

V. THERE IS NO LEGAL BASIS FOR THE THIRD CLAIM OF "QUASI CONTRACT"

Plaintiff has amended his FAC in part by replacing his previously dismissed claim for "restitution" with a claim for "quasi contract". However, the end result sought by Plaintiff in this "new" claim remains the same – "restitution." SAC, ¶ 44. In fact, Plaintiff asserts that "the equitable remedy of restitution when unjust enrichment has occurred in an obligation created by the law without regard to the intention of the parties." SAC, ¶ 42. Plaintiff's third claim for quasi contract is essentially a claim for unjust enrichment and as such it fails because "unjust enrichment is not a cause of action." *Jogani v. Superior Court of Los Angeles County*, 165 Cal. App. 4th 901, 911(2008), *citing Melchior v. New Line Productions, Inc.*, 106 Cal. App. 4th 779, 793 (2003) ("[T]here is no cause of action in California for unjust enrichment."). "Unjust enrichment is a general principle, underlying various legal doctrines and remedies, rather than a remedy itself." *Melchior v. New Line*

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[1] Generally, only certain documents have no legal effect until recorded. See, for example, California Civil Code § 1216, which requires that revocation of a power of attorney to convey or execute instruments must be recorded to be effective: "No power contained in an instrument to convey or execute instruments affecting real property which has been recorded is revoked by any act of the party by whom it was executed, unless the instrument containing such revocation is also acknowledged or proved, certified and recorded, in the same office in which the instrument containing the power was recorded."

Productions, Inc., 206 Cal. App. 4th 779, 793 (2003) , *citing Dinosaur Development, Inc. v. White*, 216 Cal. App. 3d 1310, 1315 (1989) (internal citations omitted). Even if it were a claim, Plaintiff pleads no facts indicating how JPMorgan's mere receipt of payments from Plaintiff on the Subject Loan – a debt he voluntarily incurred – is somehow unjust. Additionally, Plaintiff does not and cannot plead that CRC as trustee under the DOT, respectively, were unjustly enriched in any way.

VI. THERE IS NO CLAIM ALLEGED FOR "NO CONTRACT"

In support of his claim for "No Contract", which is essentially a claim for fraud, Plaintiff continues to assert conclusory allegations with regard to WaMu's alleged fraudulent scheme. SAC, ¶¶ 47, 51, 56. In fact, Plaintiff specifically alleges that his "participation is the mortgage contract was procured by overt and covert misrepresentations and nondisclosures." SAC, ¶ 56. This Court has already ruled that Plaintiff must meet the standards for pleading fraud found in Federal Rule of Civil Procedure Rule 9(b). See, RJN Exhibit C, p. 6. Plaintiff has not cured this deficiency in his SAC. Accordingly, this claim is subject to dismissal.

Plaintiff also continues to allege that he is not seeking rescission (SAC, ¶ 58), but he cannot escape the fact that he received $2.6 million dollars and, in order to void the agreement, must still offer tender in the FAC. A borrower is required to make a tender offer to pay the lender what he or she received in the original mortgage transaction (minus interest, finance charges, etc). *See*, *Yamamoto v. Bank of New York*, 329 F.3d 1167, 1172 (9th Cir. 2003); *see, e.g.*, *Bustamante v. First Fed. Sav. & Loan Ass'n*, 619 F.2d 360, 365 (5th Cir. 1980) (creditor's TILA obligations were not triggered until obligor tendered repayment); *In re Wepsic*, 231 B.R. 768, 776 (S.D. Cal. 1998) (conditioning rescission on borrower's tender of "her duty of repayment under the statute."). Moreover, as was held by the *Yamamoto* court, rescission may not be enforced unless there is a determination that a borrower can also comply with his rescission obligations. *See*, *Yamamoto*, 329 F.3d at 1173. That is, the borrower

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must show that he or she has the capacity to pay back what he received from the lender, because rescission is a remedy that restores the *status quo ante*. *Id*.

The obligation to rescind has not been triggered, because Plaintiff has failed to make a tender offer in the FAC. Plaintiff has made no claim that he can pay the amount borrowed pursuant to the mortgage transactions. *See generally,* FAC. The statutory obligation to rescind will only be triggered when, and only when, this Court renders a decision that Plaintiff is entitled to rescission, and Plaintiff proves that he has the capacity to pay back what he received under the Loan. For the foregoing reasons, the motion to dismiss Plaintiff's "no contract" claim must be granted.

VII. THERE IS NO BASIS FOR EQUITABLE RELIEF

In pleading the sixth cause of action for declaratory relief, the Plaintiff must specifically allege (1) whatever "rights or duties" the parties have with respect to the property and (2) the existence of an actual and present controversy. General statements about a controversy are unavailing. *Alturas v. Gloster*, 16 Cal.2d 46, 48 (1940). An actual controversy involving justiciable questions relating to **the rights or obligations of a party must exist**. *See Tiburon v. Northwestern Pacific Railroad Co.*, 4 Cal.App.3d 160, 170 (1970). Thus, it is axiomatic that a cause of action for declaratory relief serves the purpose of adjudicating ***future*** rights and liabilities between parties who have some sort of relationship, either contractual or otherwise. *See Cardellini v. Casey*, 181 Cal.App.3d 389 (1986); *Bachis v. State Farm Mutual Auto. Ins. Co.*, 265 Cal.App.2d 722 (1968). The sixth claim also seeks injunctive relief based on the allegations of improper foreclosure.

The sixth claim simply incorporates the prior causes of action and seeks equitable relief on the same flawed claims. Consequently, for the same reasons set forth in regard to the prior causes of action, Defendants request that the sixth claim be dismissed without leave to amend.

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VIII. PLAINTIFF FAILS TO PLEAD OUTRAGEOUS CONDUCT

Plaintiff fails to state a claim for "Intentional Infliction of Emotional Distress" against JPMorgan. The elements of the tort of intentional infliction of emotional distress are: "(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*, 54 Cal.3d 868, 903 (1991).

A claim for intentional infliction of emotion distress requires a showing of "outrageous" conduct which is "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). A plaintiff must plead and prove with great specificity acts that are "outrageous." Outrageous conduct has been defined as conduct so "extreme as to exceed all bounds of that usually tolerated in a civilized community." *Ricard v. Pacific Indemnity Co.*, 132 Cal.App.3d 886, 894 (1982) (emphasis added). Conduct will be found to be actionable only where the "recitation of the facts to an average member of the community would arouse his resentment against the actor, and leave him to exclaim, 'Outrageous!'" *KORV-TV, Inc. v. Sup. Ct.*, 31 Cal.App.4th 1023, 1028 (1995).

In the SAC, Plaintiff seeks recovery for emotional distress; however, he fails to plead any of the elements of the emotional distress claim. Instead, Plaintiff pleads conclusions of law and damages. Indeed, there are absolutely no allegations of "outrageous" conduct anywhere in the FAC with respect to JPMorgan.

Moreover, the only conduct that can be asserted against JPMorgan is the enforcement of the payment of the Loan and foreclosure for Plaintiff's failure to comply with his payment obligation under the Loan, and his failure to make all required payments. *See generally*, SAC. An assertion of legal rights in pursuit of one's own economic interests does not qualify as "outrageous" under this standard. *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). Assuming that the "outrageous" conduct Plaintiff refers to against JPMorgan is the foreclosure of the Subject Property, such activities were simply done in the pursuit of the economic interests of the lender in enforcing the security instrument encumbering the Subject Property. *See Kruse,* 202 Cal.App.3d at 67 (no claim for intentional infliction of emotional distress where lender simply attempted to collect debt due under security interest). Thus, a foreclosure sale cannot be considered "outrageous" and cannot support an action for intentional infliction of emotional distress.

Because Plaintiff fails to plead any of the elements of the claim for intentional infliction of emotional distress, and activities in the pursuit of one's own economic interest do not qualify as "outrageous," the seventh claim must be dismissed without leave to amend.

IX. CONCLUSION

Based on the foregoing reasons, JPMorgan respectfully requests that the Court grant this motion to dismiss in its entirety.

Respectfully submitted,

DATED: April 28, 2011

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