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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CARMEN R. NARANJO, an individual,

Plaintiff,

vs.

JPMORGAN CHASE BANK, N.A.; U.S. BANK, N.A. AS TRUSTEE FOR WAMU MORTGAGE PASS-THROUGH CERTIFICATES WMALT SERIES 2006-AR4 TRUST; and Does 1 – 10, inclusive,

Defendants.

Case No. 11CV2229 L (WVGx)

OPPOSITION TO DEFENDANTS' JPMORGAN CHASE BANK'S AND U.S. BANK, N.A.S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

Date: April 2, 2012
Time: 10:30 AM
Courtroom: 14
Judge: Hon. M. James Lorenz

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I. INTRODUCTION

Defendants' Motion to Dismiss (hereinafter "Motion") Plaintiff Carmen Naranjo's (hereinafter "Ms. Naranjo" or "Plaintiff") First Amended Complaint ("FAC") ignores the well-pled specific factual allegations supporting Ms. Naranjo's claims and attempts to misstate her allegations in an effort to dismiss her claims. Through the instant lawsuit, Ms. Naranjo will establish that Defendants JPMorgan Chase Bank, N.A. (hereinafter "**JPMorgan**") and U.S. Bank, N.A. as Trustee for the WAMU Pass-Through Certificates WMALT Series 2006-AR4 Trust (**"U.S. Bank"**) (collectively hereinafter the "Defendants"), are not her true creditors and as such have no legal, equitable, or pecuniary right in this debt obligation secured by the real property located at 5331 Calumet Avenue, La Jolla, California 92037 (hereinafter "Property").

Defendants' Motion fails, ***not only because the First Amended Complaint sets forth sufficient allegations, both legal and factual, to establish a statement of the claims for which relief can be granted.*** Plaintiff has sufficiently pleaded both plausible factual allegations, as well as legal claims, to enable their First Amended Complaint to move forward. This is not the phase in litigation to resolve the contest between the facts or on the merits of the case. In reviewing the sufficiency of the claims asserted, the issue ***is not*** whether Plaintiff will ultimately prevail, but whether the Plaintiff is entitled to offer evidence to support the claims asserted. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

II. STATEMENT OF FACTS

To begin, on January 24, 2006, Plaintiff executed a promissory note ("Note") in favor of SBMC Mortgage ("**SBMC**"), secured by a deed of trust ("Deed of Trust") (Note and Deed of Trust collectively "Loan") for the finance of the Property. The Deed of Trust identified T.D. Service Co. as Trustee and Mortgage Electronic Registration Systems, Inc. ("MERS") as both nominee and beneficiary under the security instrument. Plaintiff alleges that shortly after origination SBMC sold her Loan to an entity or entities that is not U.S. Bank.

On or around May 26, 2010, Defendants or their agents caused an Assignment of Deed of Trust ("Assignment") to be recorded in the San Diego County Recorder's

Office which was purportedly executed May 25, 2010 by "Colleen Irby" as purported "Officer" of Mortgage Electronic Registration Systems Inc. ("MERS"). The Assignment recites that "for value received" MERS transferred to U.S. Bank, National Association as trustee for WAMU Mortgage Pass Through Certificate for WMALT 2006-AR4 Trust all beneficial interest in Plaintiff's Deed of Trust together with Plaintiff's Note. *See* Defendants' RJN Exhibit "B." Plaintiff alleges no such transfer ever occurred based on the following:

1. While MERS purports to act as nominee and beneficiary, it is clear that MERS has no ownership interest in the Note or Deed of Trust and cannot assign an interest in property. Moreover, long-standing law in the state of California automatically renders null and void, any assignment involving an interest in real property by an agent that fails to disclose its principal. *Fisher v. Salmon,* 1 Cal. 413 (1851)[1] Here, the Assignment signature block merely indicates "Colleen Irby" is signing the instrument as "Officer" of MERS without indicating on whose behalf MERS is purporting to transfer its interest. The Assignment is void.
2. "Colleen Irby" lacked personal knowledge and corporate authority to sign the Assignment on behalf of MERS since "Colleen Irby" is not an employee of MERS, but rather a "LS Section Manager" at California Reconveyance Company. *See* **Exhibit "A,"** attached hereto is a true and correct copy of "Colleen Irby's" LinkedIn profile. LinkedIn is a social networking website geared towards companies and industry professionals looking to make new business contacts or keep in touch with previous co-workers, affiliates, and clients. Within LinkedIn, members can create customizable profiles that detail employment history, business accomplishments, and other professional accolades.[2] "Colleen Irby's" LinkedIn profile reveals that she has worked as an "LS Section Manager" for California Reconveyance Company since March, 1984, over 27 years.

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[1] *See Cal. Civ. Code* section 1095

[2] http://www.hudsonhorizons.com/Our-Company/Internet-Glossary/LinkedIn.htm

Also, her profile indicates she currently holds the "LS Section Manager" position with California Reconveyance Company. Finally, MERS is based out of Virginia, yet "Colleen Irby" as its purported "Officer" signed the Assignment in Los Angeles County, California. Notably, however, California Reconveyance Company is based out of Chatsworth, California. These facts lend further support to Plaintiff's position that "Colleen Irby" is not an employee of MERS, but an Employee of California Reconveyance Company.

On or around May 26, 2010 Defendants or their agents recorded a Substitution of Trustee ("Substitution") in the San Diego County Recorder's Office, which was purportedly executed May 25, 2010. Interestingly, the Assignment and Substitution of Trustee-were recorded the exact same day at the exact same time. Astonishingly, the Substitution was also signed by "Colleen Irby" but this time as "Officer" of U.S. Bank, National Association as trustee for WAMU Mortgage Pass through Certificate for WMALT 2006-AR4 Trust by JPMorgan Chase Bank, National Association, as attorney-in-fact. Assuming the contents of the Assignment and Substitution are true (which Plaintiff disputes) on May 25, 2010 "Colleen Irby" was "Officer" of MERS and "Officer of Defendant "JPMorgan Chase Bank, National Association." The Substitution purports that U.S. Bank substitutes T.D. Service Co. for California Reconveyance Company. *See* Defendants' RJN Exhibit "C." Although Ms. Irby works for California Reconveyance, she purports to also work for two other companies in an executive role. Ms. Irby does not hold these titles and has signed these documents without any personal knowledge of the facts therein or the actual corporate authority required to sign the same. Like the Assignment, Plaintiff alleges that no such Substitution ever occurred based on the following:

1. U.S. Bank, National Association as trustee for WAMU Mortgage Pass through Certificate for WMALT 2006-AR4 Trust is purporting to substitute the Trustee under Plaintiff's Deed of Trust, yet U.S. Bank had not yet acquired its purported interest in Plaintiff's Note and Deed of Trust as the Assignment *supra* was executed and recorded the same day as, but not prior

to, the Substitution. Thus, U.S. Bank did not yet have the ability or authority under the Deed of Trust to substitute the Trustee.

2. Even assuming U.S. Bank had been effectively assigned the interest in Plaintiff's Deed of Trust before the Substitution (which it did not) clearly "Colleen Irby" is not an employee of JPMorgan and therefore lacks the personal knowledge and corporate authority as U.S. Bank's attorney-in-fact to execute and effectuate the Substitution. In this case alone, on the same day, "Colleen Irby" has executed title documents in two different capacities for two different companies. Plaintiff alleges "Colleen Irby" is not an employee of either MERS or JPMorgan, but rather a "LS Section Manager" at California Reconveyance Company. *See* **Exhibit "A."**

The foregoing gives rise to the plausibility that U.S. Bank was never assigned the beneficial interest in Plaintiff's Note and Deed of Trust and the plausibility that the T.D. Service Co. was never substituted as Trustee under the Deed of Trust. Plaintiff alleges Defendants recorded the foregoing invalid documents in the San Diego County Recorder's office to give the imminent foreclosure the appearance of propriety. Notably, it was ultimately California Reconveyance Company who proceeded to initiate the foreclosure process on the Property. More than coincidentally, "Colleen Irby" who signed both the Assignment and the Substitution, in two different capacities and for two different companies is actually an employee of California Reconveyance Company. *See* **Exhibit "A."** This fact lends significant support to Plaintiff's position and gives rise to the plausibility that the recorded documents are invalid and nothing more than attempt to carry out the foreclosure of Plaintiff's Property under the guise of legality.

Further corroborating Plaintiff's claim that the Assignment was void, Plaintiff's forensic loan audit has determined that her Loan is being tracked as a receivable of the WAMU Mortgage Pass through Certificate for WMALT 2006-AR4 Trust ("WAMU Trust"). According to the audit, the Trust Agreement governing the creation and administration of the WAMU Trust -- the Pooling and Servicing Agreement ("PSA") -- her Loan was not, and is not, part of the WAMU Trust res as a matter of law because there was a failure to comply with numerous requirements of the PSA, in violation of governing New York Trust Law. (FAC ¶¶ 1, 17-21.)

In light of the foregoing, Plaintiff's overarching question is simple: Who is the true owner of her Note and Deed of Trust?

III. STANDARD FOR DISMISSAL UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

Motions to dismiss for failure to state a claim under Federal Rules of Civil Procedure, Rule 12(b)(6) are viewed with disfavor, and, accordingly, dismissals for failure to state a claim are "rarely granted." *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (citation omitted). The standard for dismissal under Rule 12(b)(6) is a stringent one. "[A] First Amended Complaint should not be dismissed for failure to state a claim unless it appears ***beyond doubt*** that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 811 (1993) *(quoting Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Cervantes v. City of San Diego*, 5 F.3d 1273, 1274 (9th Cir. 1993) (emphasis added). The purpose of a motion under Federal Rule 12(b)(6) is to test the formal sufficiency of the statement of the claim for relief in the First Amended Complaint. *See Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987). The First Amended Complaint must be construed in the light most favorable to the nonmoving party and its allegations taken as true. *See Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974). It is *not* a procedure for resolving a contest about the facts or the merits of the case. In reviewing the sufficiency of the First Amended Complaint, the issue is not whether the Plaintiff will ultimately prevail, but whether the Plaintiff is entitled to offer evidence to support the claims asserted. *See Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). Furthermore, more recently, the U.S. Supreme Court has held that to survive a motion to dismiss, a First Amended Complaint must contain sufficient factual matter, accepted as true, would "state a claim to relief that is plausible on its face." *See Bell Atlantic Corp. v. Twombly*, 55 US 544 (2007).

IV. JUDICIAL NOTICE IS PROCEDURALLY CORRECT AS TO THE EXISTENCE OF DOCUMENTS, BUT NOT AS TO THEIR CONTENTS

Plaintiff specifically disputes the contents of the documents contained in Defendants' Request for Judicial Notice. Even though the Court may "take judicial notice of matters of public record outside the pleadings and consider them for purposes of the motion to dismiss," the Court may *only* take judicial notice of their existence, not

as to their contents. "Taking judicial notice of a document is not the same as accepting the truth of its contents or accepting a particular interpretation of its meaning." *Joslin v. H.A.S. Ins. Brokerage*, 184 Cal. App. 3d 369, 374 (1986). While it is true that the acts of the county recorder *may be* subject to judicial notice, Defendants' compilation of such acts and the deductions that they proffer in that regard *are not* appropriate subjects for judicial notice. Without any sort of foundation as to the personal knowledge of the person making the statements contained in the documents, these are just records of acts from which nothing may be properly deduced.

> **"[T]he taking of judicial notice of the official acts of a governmental entity does not in and of itself require acceptance of the truth of factual matters which might be deduced there from**, since in many instances what is being noticed, and thereby established, is no more than the existence of such acts and not, without supporting evidence, what might factually be associated with or flow there from." (citations omitted).

Mangini v. R. J. Reynolds Tobacco Co., 7 Cal. 4th 1057, 1062 (1994) (emphasis added). While courts can take judicial notice of public records, they do not take notice of the truth of matters stated therein. *Love v. Wolf*, 226 Cal. App. 2d 378, 403 (1964). In addition, "when judicial notice is taken of a document … the truthfulness and proper interpretation of the document are disputable." *StorMedia, Inc. v. Superior Court*, 20 Cal.4th 449, 457, fn. 9 (1999).

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

> "[T]he fact [that] a court may take judicial notice of a recorded deed or similar document, does not mean it may take judicial notice of factual matters stated therein. For example, the First Substitution recites that Shanley 'is the present holder of beneficiary interest under said Deed of Trust.' By taking judicial notice of the First Substitution, the court does not take judicial notice of this fact because it is hearsay and it cannot be considered not reasonably subject to dispute."

Id. at 1117 (citations omitted). Therefore, the truthfulness of the contents of the recorded documents still remains subject to dispute. *See StorMedia*, supra 20 Cal.4th at 457, fn. 9.

In the instant case, Defendants rely on several exhibits attached to their Request for Judicial Notice ("RJN"), filed concurrently with their Motion to Dismiss, to support factual contentions which they seek to inject into the pleadings. For instance, Defendants rely on Exhibit "B" to support their position that Defendant U.S. Bank was actually assigned Plaintiff's Note and Deed of Trust. (Motion, p. 1:26-28.) However, Plaintiff specifically disputes the validity and veracity of this document. Plaintiff not only specifically disputes this proposition and the validity of this document, but also this is the precise type of hearsay that cannot be considered in the context of Defendants' Motion. *Poseidon Development*, 152 Cal. App. 4th, at 1117. Pursuant to Rule 12, the Court is required to convert Defendants' 12(b)(6) Motion into one for Summary Judgment, which requires providing Plaintiff the opportunity to conduct discovery and present material evidence.

V. LEGAL ARGUMENTS

A. Plaintiff Is Not Pleading an "Owner of the Note" or "Original Note" Theory and *Gomes* is Inapplicable

Like so many other lenders, Defendants in this case have seized on the recent ruling in *Gomes v. Countrywide Home Loans*, 192 Cal.App.4th 1149 (2011) by improperly expanding its application to mean that no homeowner can challenge a foreclosure or his purported creditor's right to enforce the Deed of Trust and downplay the allegations in Plaintiff's FAC in attempt to morph it into a "show me the note" or "original note" case. This is not what *Gomes* holds and this is not what Plaintiff pleads. *Gomes* held that California Civil Code § 2924(a)(1)[3] does not provide for a judicial action to determine whether the person initiating the foreclosure process is indeed authorized. *Id.* at 1155. But the issue in *Gomes* was not whether the **wrong** entity had initiated foreclosure; rather, the issue was whether the company selling the property in the nonjudicial foreclosure sale (MERS) was authorized to do so by the owner of the

[3] Cal. Civ. Code § 2924(a)(1) allows a "trustee, mortgagee, or beneficiary, or any of their authorized agents" to initiate the foreclosure process.

promissory note (emp. added). *Id.* at 1155 (rejecting the argument that a plaintiff may test whether the person initiating the foreclosure as the authority to do so; "[t]he recognition of the right to bring a lawsuit to determine a nominee's authorization to proceed with foreclosure on behalf of the noteholder would fundamentally undermine the nonjudicial nature of the process and introduce the possibility of lawsuits filed sole for the purpose of delaying valid foreclosures"). Notably, the *Gomes* court explicitly distinguished *Weingartner*[4], *Castro*[5], *and Ohlendorf*[6] all cases where, "the plaintiff alleged wrongful foreclosure on the ground that assignments of the deed of trust had been improperly backdated, and thus the wrong party had initiated the foreclosure process. No such infirmity is alleged here." *Id.* Thus, Gomes explicitly avoided the scenario pled here, in which the "plaintiff's complaint identified a *specific factual basis* for alleging that the foreclosure was not initiated by the correct party (emp. in original)." *Id.* at 1156. *Gomes* is therefore inapposite. *See Tamburri v. Suntrust Mortgage, Inc., et al.,* 2011 WL 6294472 (N.D.Cal. Dec. 5, 2011).

In *Weingartner v. Chase Home Finance, LLC*, 702 F.Supp.2d 1276, (D.Nev.2010) the court "allowed a plaintiff's claim for injunctive relief to proceed when he produced evidence that the trustee that initiated the foreclosure was not in fact the trustee at the time and thus could not proceed under Nevada law." *Id.* at 1155. Citing to *Weingartner, Castro,* and *Ohlendorf*, the *Gomes* court made clear that its ruling *did not* speak to whether one could bring a suit to determine whether the specific party who initiated the foreclosure process was the proper party or not. Similarly, in distinguishing the facts before the court to those involved in *Ohlendorf v. Am. Home Mortgage Servicing,* the *Gomes* court noted that its decision did not involve facts concerning whether an "assignment[...] of the deed of trust had been improperly backdated, and thus the wrong

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[4] *Weingartner v. Chase Home Finance, LLC* (D.Nev.2010) 702 F.Supp.2d 1276.

[5] *Castro v. Executive Trustee Services, LLC* (D.Ariz.2009, Feb. 23, 2009, No. CV-08-2156-PHX-LOA) 2009 WL 438683, 2009 Lexis 14134.

[6] *Ohlendorf v. Am. Home Mortgage Servicing,* (E.D. Cal.2010, Marc. 31, 2010, No. CIV.S-09-2081 LKK/EFB) 3010 U.S. Dist. Lexis 31098.

party had initiated the foreclosure process." *Id.* at 1155. Importantly, unlike this case, the *Gomes* Court held that "no such infirmity [was] alleged" by the plaintiff.

As in *Ohlendorf*, Ms. Naranjo alleges that the "Substitution of Trustee and Assignment of Deed of Trust," (Defendants' RJN Exhibits "B" and "C") the document purporting to grant U.S. Bank, as Trustee, the beneficial interest in Plaintiff's Note and Deed of Trust purporting to substitute T.D. Service Co. for California Reconveyance Company are invalid and have no force or effect. *See* Section II *supra*. Plaintiff alleges that "Colleen Irby" executed these documents the same day in two different capacities for two different entities with no personal knowledge or corporate authority to do so. Further, unlike *Gomes*, Plaintiff alleges that the interest in her Mortgage was never assigned to U.S. Bank, and that U.S. Bank has no pecuniary or beneficial interest in her Note and Deed of Trust.

In fact, other courts have acknowledged this important distinction noting *Gomes*, "concluded the 'comprehensive' statutory framework regulating nonjudicial foreclosure, Civil Code sections 2924 through 2924k, did not require the agent of a beneficial owner, such as MERS, to demonstrate that it was authorized by the owner before proceeding with foreclosure, at least in the absence of a factual allegation suggesting the agent lacked authority." *Fontenot v. Bank of New York Bank, N.A.*, 2011 WL 3506177 (Cal. App. 1 Dist.), (*citing Gomes v. GreenPoint Home Loans, Inc.*, 192 Cal. App. 4th 1149, 1155-1156 (2011); *see also Tamburri v. Suntrust Mortgage, Inc. et al.* No. C-11-2899 EMC (N.D. Cal. Dec. 15, 2011) ("Gomes explicitly avoided the scenario pled here, in which the plaintiff's complaint identified a specific factual basis for alleging that the foreclosure was not initiated by the correct party."); *Sacchi v. Mortgage Electronic Registration Systems, Inc.*, No. CV 11-1658 AHM, 2011 WL 2533029 at *13-14 (C.D. Cal June 24, 2011) ("Not only is *Gomes* distinguishable on its facts, the *Gomes* court actually suggested that a cause of action for wrongful foreclosure might service if the "plaintiff's complaint identified a specific factual basis for alleging that the foreclosure was not initiated by the correct party.")

Contrary to Defendants' argument, Plaintiff is not alleging that Defendants must prove their right to foreclose in a court of law. Rather, Plaintiff alleges that U.S. Bank and JPMorgan, as its purported agent, lacked authority to collect her payments, let alone foreclose because they do not own an interest in her Note and Deed of Trust and failed to properly substitute California Reconveyance Company as foreclosing Trustee under the Deed of Trust. Unlike *Gomes*, Plaintiff alleged that Defendants do not have any legal right to either collect on the debt or enforce the underlying security interest. She has clearly made factual allegations in her FAC that are both plausible and sufficient to support U.S. Bank lacks authority to enforce a security interest when she challenges U.S. Bank's ability to enforce that interest throughout the FAC. Thus, Defendants' Motion to Dismiss on this ground should be denied.

B. California Reconveyance Company is not the Trustee Under Plaintiff's Deed of Trust

Defendants further argue the foreclosure process in this case is proper because U.S Bank is the beneficiary in Plaintiff's Deed of Trust and, as such, properly substituted California Reconveyance Company as Trustee under the Deed of Trust. As a result, Defendants contend, California Reconveyance Company has the authority to utilize the California non-judicial foreclosure framework to notice a default and foreclosure sale. Again, Defendants seek to fall back on the recorded documents contained in their RJN to support the contention California Reconveyance Company was properly substituted as Trustee under the Deed of Trust and the underlying Assignment to U.S. Bank is valid.

Defendants' argument ignores the very lifeblood of Plaintiff's case. The very specific factual allegations demonstrate California Reconveyance Company was never substituted as trustee under the Deed of Trust because: 1) the Assignment to U.S. Bank was invalid and as such U.S. Bank did not have the authority to substitute California Reconveyance Company as Trustee under the Deed of Trust and 2) alternatively, even if the Assignment was valid, California Reconveyance Company was never substituted as

Trustee under Plaintiff's Deed of Trust because the Substitution was invalid.

1. The Assignment is Invalid

The Assignment was executed and notarized after the Closing Date of the WAMU Trust. (FAC ¶ 21, Exhibit "B.") The Assignment's failure to comply with the PSA is a sufficient basis for pleading its invalidity. *See Vogan v. Wells Fargo et al.*, No. 11-cv-2098-JAM-KJN, 2011 WL 5826016, at *7 (N.D. Cal. Nov. 11, 2011) ("Plaintiffs alleged that the recorded assignment was executed well after the closing date of the [trust] to which it was allegedly sold, giving rise to a plausible inference that at least some part of the recorded assignment was fabricated.").

What is more, as set forth in Section II *supra*, on or around May 26, 2010, Defendants or their agents caused the Assignment to be recorded in the San Diego County Recorder's Office which was purportedly executed May 25, 2010 by "Colleen Irby" as purported "Officer" of Mortgage Electronic Registration Systems Inc. ("MERS"). The Assignment recites that "for value received" MERS transferred to U.S. Bank, National Association as trustee for WAMU Mortgage Pass Through Certificate for WMALT 2006-AR4 Trust all beneficial interest in Plaintiff's Deed of Trust together with Plaintiff's Note. *See* Defendants' RJN Exhibit "B." Plaintiff alleges no such transfer ever occurred based on the following:

a. *MERS did not have an Assignable Interest in the Deed of Trust*

Longstanding law in the state of California automatically renders null and void, any assignment involving an interest in real property by an agent that fails to disclose its principal. *Fisher v. Salmon,* 1 Cal. 413 (1851). In the matter of *In Re: Walker*, the court held that MERS, acting "only as a nominee" for the loan originator, under the deed of trust, had no interest in a note to assign when there was no evidence that the promissory note had been transferred to MERS. *In Re: Walker*, No. 10-21656-E-11, 2010 Bankr. LEXIS 3781 (E.D. Cal. May 20, 2010). The court stated ",[S]everal courts have acknowledged that MERS is not the owner of the underlying note and therefore could not transfer the note, the beneficial interest in the deed of trust, or foreclose upon the property secured by the deed." *Id.* (citing *In re Foreclosure Cases*, 521 F. Supp. 2d 650, 653 (S.D. Oh. 2007); *In re Vargas*, 396 B.R. 511, 520 (Bankr. C.D. Cal. 2008);

Landmark Nat'l Bank v. Kesler, 289 Kan. 528, 216 P.3d 158 (Kan. 2009); *LaSalle Bank v. Lamy*, 12 Misc. 3d 1191A, 824 NY.S.2d 769 (N.Y. Sup. Ct. 2006)). The court in *In re Walker* held, "Since no evidence of MERS' ownership of the underlying note has been offered, and other courts have concluded that MERS does not own the underlying notes, this court is convinced that MERS had no interest it could transfer to Citibank." *Id.* Thus, the court ruled that without any evidence of MERS' ownership of the underlying note, MERS' attempt to transfer the beneficial interest of a trust deed without ownership of the underlying note is void under California law.

MERS' lack of ownership interest in a promissory note is a matter of decided case law based on a record stipulation of MERS' own lawyers. Specifically, in *MERS v. Nebraska*, 270 Neb. 529 (2005), MERS filed a petition requesting a declaratory order that MERS is not a "mortgage banker" under the Nebraska Mortgage Bankers and Licensing Act, and therefore not subject to the license and registration requirements of the Act. In describing MERS' function in the mortgage industry, MERS' counsel expressly stated:

> Mortgage lenders hire MERS to act as their nominee for mortgages, which allows the lenders to trade the mortgage note and servicing rights on the market without recording subsequent trades with the various register of deeds throughout Nebraska.
>
> To execute a MERS Mortgage, the borrower conveys the mortgage to MERS, who is acting as a contractual nominee. MERS becomes the recorded grantee, however, the lender retains the note and servicing right. The lender can then sell that note and servicing rights on the market and MERS records each transaction electronically on its files. When the mortgage loan is repaid, MERS, as agent grantor, conveys the property to the borrower. MERS represents that this system saves the lender and the consumer the transaction costs that would be associated with manually recording every transaction.

Id. at 534. "Subsequently, counsel for MERS explained that MERS does not take applications, underwrite loans, make decisions on whether to extend credit, collect mortgage payments, hold escrows for taxes and insurance, or provide any loan servicing functions whatsoever. MERS merely tracks the ownership of the lien and is paid for its services through membership fees charged to its members." *Id.*

Additionally, MERS, by its own admission, in the elements of its own contract between MERS and its members entitled "Terms and Conditions," (which Plaintiffs can amend to include if deemed necessary) expressly affirms "MERS shall have no rights whatsoever to any payments made on account of such mortgage loans, to any servicing rights related to such mortgage loans, or to any mortgaged properties securing such mortgage loans." The "Terms and Conditions" further state that:

> MERS and the Member agree that: (i) the MERS system is not a vehicle for creating or transferring beneficial interests in mortgage loan, (ii) transfers of servicing interests reflected on the MERS System are subject to the consent of the beneficial owner of the mortgage loans, and (iii) membership in MERS or use of the MERS system shall not modify or supersede any agreement between or among the members having interests in mortgage loans registered on the MERS System.

In addition, MERS covenants that "MERS shall at all times comply with the instructions of the holder of mortgage loan promissory notes. In the absence of contrary instructions from the note holder, MERS shall comply with instructions from the Servicer shown on the MERS System in accordance with the Rules and Procedures of MERS."

The Court in *Fontenot v. Wells Fargo Bank* likewise recognized that MERS cannot transfer an interest in property:

> **While it is true MERS had no power in its own right to assign the note**, since it had no interest in the note to assign, MERS did not purport to act for its own interests in assigning the note. Rather, the assignment of deed of trust states that MERS was acting as nominee for

> the lender, which did possess an assignable interest. A "nominee" is a person or entity designated to act for another in a limited role—in effect, an agent. (Born v. Koop (1962) 200 Cal.App.2d 519, 528 [19 Cal.Rptr. 379]; Cisco v. Van Lew (1943) 60 Cal.App.2d 575, 583-584 [141 P.2d 433].)

Fontenot v. Wells Fargo Bank, N.A., 198 Cal. App. 4th 256, 270 (2011) (emphasis added). Here, MERS purports to assign the Note to U.S. Bank. (FAC ¶ 34.) MERS does not identify its principal. As it cannot act on its own, the Assignment is therefore invalid.

b. *"Colleen Irby" Lacked the Requisite Personal Knowledge and Corporate and Legal Authority to Execute the Assignment*

"Colleen Irby" is not an employee of MERS, but rather a "LS Section Manager" at California Reconveyance Company. *See* **Exhibit "A,"** attached hereto is a true and correct copy of "Colleen Irby's" LinkedIn profile. LinkedIn is a social networking website geared towards companies and industry professionals looking to make new business contacts or keep in touch with previous co-workers, affiliates, and clients. Within LinkedIn, members can create customizable profiles that detail employment history, business accomplishments, and other professional accolades.[7] "Colleen Irby's" LinkedIn profile reveals that she has worked as an "LS Section Manager" for California Reconveyance Company since March, 1984, over 27 years. Also, her profile indicates she currently holds the "LS Section Manager" position with California Reconveyance Company. Because "Colleen Irby" lacked the personal knowledge and corporate authority to execute it, the Assignment is also factually impossible.

2. Substitution is Invalid

Also, around May 26, 2010 Defendants or their agents recorded a Substitution of Trustee ("Substitution") in the San Diego County Recorder's Office, which was purportedly executed May 25, 2010. Interestingly, the Assignment and were recorded

[7] http://www.hudsonhorizons.com/Our-Company/Internet-Glossary/LinkedIn.htm

the exact same day at the exact same time. Astonishingly, the Substitution was also signed by "Colleen Irby" but this time as "Officer" of U.S. Bank, National Association as trustee for WAMU Mortgage Pass through Certificate for WMALT 2006-AR4 Trust by JPMorgan Chase Bank, National Association, as attorney-in-fact. Assuming the contents of the Assignment and Substitution are true (which Plaintiff disputes) on May 25, 2010 "Colleen Irby" was "Officer" of MERS and "Officer of Defendant "JPMorgan Chase Bank, National Association." The Substitution purports that U.S. Bank substitutes T.D. Service Co. for California Reconveyance Company. *See* Defendants' RJN Exhibit "C." Plaintiff alleges that no such Substitution ever occurred based on the following:

1. U.S. Bank, National Association as trustee for WAMU Mortgage Pass through Certificate for WMALT 2006-AR4 Trust is purporting to substitute the Trustee under Plaintiff's Deed of Trust, yet U.S. Bank had not yet acquired its purported interest in Plaintiff's Note and Deed of Trust as the Assignment *supra* was executed and recorded the same day as, but not prior to, the Substitution. Thus, U.S. Bank did not yet have the ability or authority under the Deed of Trust to substitute the Trustee.
2. Even assuming U.S. Bank had been effectively assigned the interest in Plaintiff's Deed of Trust before the Substitution (which it did not) clearly "Colleen Irby" is not an employee of JPMorgan and therefore lacks the personal knowledge and corporate authority as U.S. Bank's attorney-in-fact to execute and effectuate the Substitution. In this case alone, on the same day, "Colleen Irby" has executed title documents in two different capacities for two different companies. Plaintiff alleges "Colleen Irby" is not an employee of either MERS or JPMorgan, but rather a "LS Section Manager" at California Reconveyance Company. *See* **Exhibit "A."**

The foregoing gives rise to the plausibility that U.S. Bank was never assigned the beneficial interest in Plaintiff's Note and Deed of Trust and the plausibility that the T.D. Service Co. was never substituted as Trustee under the Deed of Trust. Plaintiff alleges Defendants recorded the foregoing invalid documents in the San Diego County Recorder's office to give the imminent foreclosure the appearance of propriety.

Notably, it was ultimately California Reconveyance Company who proceeded to initiate the foreclosure process on the Property. More than coincidentally, "Colleen Irby" who signed both the Assignment and the Substitution, in two different capacities and for two different entities is actually an employee of California Reconveyance Company. *See* **Exhibit "A."** This fact lends significant support to Plaintiff's position and gives rise to the plausibility that the recorded documents are invalid and nothing more than attempt to carry out the foreclosure of Plaintiff's Property under the guise of legality.

C. Plaintiff has Sufficiently Alleged an Actual Controversy Among the Parties Sufficient to Maintain a Claim for Declaratory Relief

The foundation of Plaintiff's FAC is a request that the Court determine the rights and obligations of the parties relative to the Property. Section 2201(a) of Title 28 of the United States Code expressly permits a party to bring a cause of action for Declaratory Relief: "In a case of actual controversy within its jurisdiction, … any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

As to a controversy to invoke declaratory relief, the question is whether there is a "substantial controversy, between parties having adverse legal rights, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941). The United States Supreme Court further explained:

> A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot…The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests…It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 240-241, 57 S.Ct. 461, 464 (1937) (citations omitted). Here, Plaintiff has alleged an actual case and controversy in connection with Defendants' actions that are present, ongoing and undoubtedly will continue in the immediate future. *See Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401, 1405 (9th Cir. 1996) ("A declaratory judgment offers a means by which rights and obligations may be adjudicated in cases brought by any interested party involving an actual controversy that has not reached a stage at which either party may seek a coercive remedy and in cases where a party who could sue for coercive relief has not yet done so.") Therefore, Plaintiff has pled a "real and substantial" controversy between the parties warranting declaratory relief.

D. Plaintiff has Sufficiently Plead a Negligence Claim Because Defendants' Loan Modification Activities Exceeded Those of a Conventional Lender

Defendants correctly contend that under California law, it is a general rule that "a financial institution owes no duty of care to a borrower...." *Nymark v. Heart Fed. Savings & Loan Assn.*, 231Cal.App.3d 1089, 1096 (1991). However, *Nymark* is limited in its application. "A lender may owe a duty of care sounding in negligence to a borrower when the lender's activities exceed those of a conventional lender...." *Osei v. Countrywide Home Loans*, 692 F.Supp.2d 1240, 1249 (2010). One such instance is when the lender goes, "...beyond its role as a silent lender and loan servicer to offer an opportunity to plaintiffs for loan modification and to engage with them concerning [a] trial period plan." *Ansanelli v. JP Morgan Chase Bank, N.A.*, 2011 WL 1134451 at *7 (N.D. Cal.).

Here, Plaintiffs FAC contains factual allegations demonstrating the efforts Defendants undertook to assist and process numerous loan modification applications from Plaintiff. Specifically, on or around May, 2009, Ms. Naranjo went to JPMorgan's corporate office in downtown San Diego to see about modifying her Loan. (FAC ¶ 23.) There Ms. Naranjo met with a representative named "Eric" who supplied her with

paperwork for a loan modification application and instructed her complete the application and return it to JPMorgan. *Id.* Ms. Naranjo did as she was instructed, but when she followed up with the status of the application JPMorgan informed her it had been lost and that she would need to resubmit. (FAC ¶ 23.) What she thought would be a short modification review process dragged on for 19 months as Ms. Naranjo desperately tried to get a loan modification so that she may keep her home by submitting and resubmitting applications countless times. (FAC ¶¶ 26-28.) Nearly, a year later, JPMorgan caused an appraiser to visit Ms. Naranjo's home to assess its value. (FAC ¶ 28.) Yet, Ms. Naranjo was never afforded a modification.

As a result of JPMorgan's negligent handling of her loan modification applications Ms. Naranjo was never offered a loan modification for which she qualified. Ultimately, she was forced to file bankruptcy to save her home from foreclosure. By way of the foregoing, Plaintiff has alleged that Defendants went beyond their role as a conventional, silent lender and loan servicer to offer an opportunity to Plaintiff for loan modification. "This is precisely beyond the domain of a usual money lender." *See Anaselli* at *7 (internal quotations omitted). As a result, Plaintiff's factual allegations demonstrate sufficient active participation to create a duty of care to Plaintiffs to support a claim for negligence. *Id.* Thus, Defendants' Motion to Dismiss this claim should be denied.

E. Plaintiff has Sufficiently Pled a Quasi Contract Claim

California courts agree that if Plaintiff has alleged that Defendants were unjustly enriched to their detriment they are allowed to seek restitution under a Quasi Contract claim. "[I]t is clear that California courts consistently permit a party to seek restitution under a variety of theories, including quasi-contract and constructive trust." *See McKell v. Washington Mut., Inc.,* 142 Cal. App. 4th 1457, 1490 (2006). *Louiseau v. VISA USA Inc.*, WL 4542896 (S.D. Cal. 2010). "Under the law of restitution, "[a]n individual is required to make restitution if he or she is unjustly enriched at the expense of another. [Citations.] A person is enriched if the person receives a benefit at another's expense.

[Citation.]" *McBride v. Boughton*, 123 Cal. App. 4th 379, 389 (citing *First Nationwide Savings v. Perry* (1992) 11 Cal.App.4th 1657, 1662).

Defendants were unjustly enriched at Plaintiff's expense by accepting payments that they had no authority to collect. The elements of an unjust enrichment claim are the "receipt of a benefit and [the] unjust retention of the benefit at the expense of another." *Peterson v. Cellco Partnership*, 164 Cal. App. 4th 1583, 1592 (citing *Lectrodryer v. SeoulBank*, 77 Cal. App. 4th 723, 726 (2000)). Plaintiff alleges that she was not paying her true creditor because there was no valid assignment that allowed the Defendant U.S. Bank, or Defendant JPMorgan on its behalf, to collect on her debt obligation. (FAC ¶¶ 60-64.) As such, the Defendants collected mortgage payments that they were not entitled to at the expense of Plaintiff. Therefore, under the unjust enrichment theory, Plaintiff has pled sufficient facts that Defendants are required to make restitution as a result of collecting their mortgage payments when they had no authority to do so.

F. Plaintiff has Sufficiently Pled a Claim for Violation of 15 U.S.C. § 1692e ("FDCPA")

Despite the roundabout argument, Defendants essentially contend Plaintiff's FDCPA claim fails because they are not "debt collectors." Importantly, Plaintiff is not arguing that foreclosure is "debt collection" under the FDCPA. Quite simply, U.S. Bank Trustee has violated the FDCPA in attempting to collect Plaintiff's debt. The term 'debt collector' means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692(a)(6). Here, U.S. Bank as Trustee, is in the business where its principal purpose is to collect Plaintiff's debt for the benefit of the investors of the WAMU Trust. Further, Plaintiff alleges that U.S. Bank Trustee attempted to collect payments. (FAC ¶¶ 1, 68-69.) These collection activities fall squarely within the FDCPA. 12 U.S.C. § 1692e(2)(A)(5). Plaintiff is not advancing a highly technical argument about the timing or nature of the debt collection activities;

rather, Plaintiff's claims are based on the most based requirement under the FDCPA: that a creditor collecting payment must be a true creditor entitled to collect payment. Here, Plaintiff has alleged that U.S. Bank Trustee is not her true creditor and thus has no legal authority to demand payment or take any other action. As a result, Defendants' Motion to Dismiss this claim should be denied.

G. Plaintiff has Sufficiently Pled a Claim for Violation of 12 U.S.C. § 2605 (RESPA)

Defendants first argue Plaintiff failed to send a Qualified Written Request ("QWR") as defined by 12 U.S.C. § 2605. This argument ignores Plaintiff's QWR (FAC Exhibit "C.") A QWR is a "written request from the borrower (or agent of the borrower) for information relating to the servicing of such loan." 12 U.S.C. § 2605(e)(1)(A). A QWR must include a "statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower." 12 U.S.C. § 2605(e)(1)(B)(ii). Here, on August, 8, 2011, Plaintiff sent her QWR to JPMorgan via U.S. Post Certified Mail. (FAC ¶ 84.) Plaintiff's QWR explicitly stated information allowing JPMorgan to identify the name and account of the borrower including the loan number, client name, and property address. (FAC ¶ 85.) Plaintiff indicated she believed her account was in error because of JPMorgan's deceptive servicing practices. *Id.* Plaintiff specifically requested: 1) a complete life of loan transactional history; 2) the transaction codes for the software platform of the servicer; 3) the code definitions; 4) the Key Loan Transaction history; 5) contact information for the holder in due course; 5) copies of all collection notes; 6) itemized statement of the amount needed to fully reinstate his Loan; 7) non-privileged communication regarding Plaintiff's account; and 8) P-309 screen shots of the system accounts. *Id.* Because this was a request from Plaintiff borrower indicating her belief that her account was in error providing detailed statements of the information sought, it is a QWR under 12 U.S.C. § 2605.

In conformity with Dodd-Frank JPMorgan acknowledged receipt of the QWR

within five days, but failed to provide a meaningful, substantive response within 30 days. (FAC ¶¶ 86, 87.) Thus, Defendant JPMorgan is in violation of RESPA.

Defendants next argue Plaintiff's RESPA claim fails because she fails to plead actual damages as a result of JPMorgan's RESPA violation. In direct contradiction, Plaintiff has pled that as a direct and proximate result of Defendants' violation of 12 U.S.C. § 2605, Plaintiff has suffered pecuniary damages, including over calculation and overpayment of interest on her Loan, the costs associated with removing the cloud on her property title, and attorneys' fees and costs. (FAC ¶¶ 90-93.) Moreover, 12 U.S.C. § 2605(f)(1)(A) states: "Whoever fails to comply with any provision of this section shall be liable to the borrower for each such failure in the following amounts...an amount equal to the sum of- any actual damages to the borrower as a result of the failure." Thus, Plaintiff has sufficiently alleged damages.

H. Plaintiff has Sufficiently Pled a Claim for Violation of Bus. and Prof. Code Section 17200, et seq. ("UCL")

First, Plaintiff has sufficiently alleged injury in order to have standing to bring her UCL claim. Specifically, Plaintiff alleges she has suffered tangible injuries: her credit has been damaged because of Defendants' failure to properly maintain Plaintiff's mortgage accounts; Plaintiff is unable to refinance or sell her home; and the title to her Property has been rendered unmarketable. (FAC ¶ 123.) Moreover, Plaintiff's allegations call into question whether U.S. Bank Trustee has any right or authority to collect Plaintiff's mortgage payments. These injuries have caused Plaintiff monetary damages and will result in the imminent loss of her Property. Had Plaintiff been able to identify her true creditor, the payments she made would have been properly credited to her account, and she could have negotiated with her creditor instead of wasting time negotiating with a party that does not hold any interest in his Note and Deed of Trust. Plaintiff has suffered monetary and property loss as a result of Defendants' violations under the Business and Professions Code and is therefore entitled to the remedies sought. The Unfair Competition Law (UCL) is codified in California Business and

Professions Code section 17200. The UCL prohibits any unlawful,[8] unfair, or fraudulent[9] business practice. The UCL is written in the disjunctive, which means a business act or practice can be alleged to be all or any of the three prongs. *Berryman v. Merit Property Management, Inc.*, 152 Cal.App. 4th 1544, 1554 (2007).

Here, Plaintiff alleges Defendants have engaged in practices that are: (1) unfair, (2) likely to deceive, and (3) unlawful. (FAC ¶¶ 98-112.) Defendants conduct is ongoing. (FAC ¶ 113.) Defendants have collected Plaintiffs' payments with no right to do so. Furthermore, Plaintiffs have sufficiently stated facts constituting unlawful business practices. Plaintiffs allege that Defendants engaged in an unlawful business practices by violating FDCPA and RESPA. Defendants' aforementioned conduct is unlawful and thus satisfies the "unlawful" prong of Cal. Bus. and Prof. Code section 17200.

Defendants also engaged in "fraudulent" business practices. To state a claim for a fraudulent business practice under section 17200, Plaintiffs need only demonstrate that "members of the public are likely to be deceived." *Bank of the West v. Sup. Ct.*, 2 Cal.4th 1254, 1267 (1992) *citing* to *Chern v. Bank of America*, 15 Cal.3d 866, 876 (1976). Defendants' business pattern, collecting on a debt they have no right to, is extremely likely to deceive both Plaintiffs and the public.

I. Plaintiff is Owed an Accounting

"A cause of action for an accounting requires a showing that a relationship exists between the plaintiff and defendant that requires an accounting, and that some balance is due the plaintiff that can only be ascertained by an accounting." *Teselle v. McLoughlin*, 173 Cal. App. 4th 156, 179 (2009).

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[8] The violation of any federal, state or local law can serve as the predicate for violation of the unlawful prong of the UCL. *Munson v. Del Taco, Inc.* 46 Cal. App. 4th 661, 676 (2009).

[9] The fraudulent prong of the UCL is premised on whether the public is likely to be deceived. *Progressive West Ins. Co. v. Yolo County Superior Court* 125 Cal. App. 4th 263, 284 (2005). It is unlike common law fraud or deception. *Id.* The UCL's focus is on the defendant's conduct, rather than Plaintiff's damages, in service of the statute's larger purpose of protecting the general public against unscrupulous business practices. *In re Tobacco II,* 46 Cal.4th 298, 311 (2009).

Defendants in this case have held themselves out to be Plaintiff's true creditor(s) and mortgage servicer. As a result of this purported relationship with Plaintiff, Defendant has a fiduciary duty to Plaintiff to properly account for the payments made by Plaintiff.[10] Because of Defendants' aforementioned fraudulent conduct, Plaintiff has paid Defendants her mortgage payments even though Defendants have no legal, equitable, or pecuniary right to an interest in the Property. For that reason, these monies are due to be returned to Plaintiff in full.

The amount of the money due from Defendants to Plaintiff is unknown to Plaintiff and cannot be ascertained without an accounting of the receipts and disbursements of the aforementioned transactions. The amount due to Plaintiff is to be determined through discovery and proven at trial. Due to Defendants' fraudulent behavior and misrepresentations, Plaintiff paid money to Defendants that was not owed to them. Plaintiff stands to lose all of the money. Thus, at this preliminary stage of the proceedings, Plaintiff has sufficiently alleged a cause of action for accounting. As such, Defendants Motion to Dismiss this claim should be denied.

J. Plaintiff has Sufficiently Alleged Claims for Both Breach of Contract and Breach of the Implied Covenant of Good Faith and Fair Dealing

With regard to the Breach of Contract claim, Defendants argue that because Plaintiff has not set out in detail which payments were incorrectly applied or why, she cannot maintain her breach of contract claim. Yet, Plaintiff has set forth "a short and plain statement of the claim" under Fed. R. Civ. P. 8(a)(2), by alleging, in the alternative, should the Court find that Defendants have a beneficial interest in Plaintiff's Note and Deed of Trust, that Defendants breached the Deed of Trust by failing to credit payments made by Plaintiff in the order of priority set forth in section 2 of the Deed of Trust and attach the Deed of Trust as an Exhibit . (FAC ¶ 133; FAC Exhibit "E.")

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[10] *Chasnik v. BAC Home Loans Servicing LP, et al.* No. CV 11-01324 DMG/JCGx (C.D. Cal., October 26, 2011) (denying motion to dismiss claim for Accounting and finding that "plaintiff alleges that Defendants have a relationship with her because they 'held themselves out to be plaintiff's true creditor and mortgage servicer' and accepted her loan payments for approximately 36 months when they were not entitled to such payments. These allegations, accepted as true, establish a relationship that would support an accounting. Plaintiff further alleges that she cannot ascertain the amount of money that Defendants owe her without an accounting, thus satisfying the second prong."

Nothing more is required. Defendants argument that Plaintiff needs to include facts of precisely which payment and when was not properly apportioned is unavailing; especially in light of the fact Plaintiff has yet had the opportunity to engage in discovery to reveal such factual matters.

Thus, under the applicable legal standard, Plaintiff has alleged a short plain statement of the claim. These factual allegations will be further developed through the discovery process. At this point, the Court should accept Plaintiff's existing factual allegations as true and allow this claim to proceed.

Finally, there is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." *Comunale v. Traders & General Ins. Co.*, 50 Cal. 2d 654, 658 (1958) (internal citation omitted). However, the implied covenant of good faith and fair dealing supplements "the express contractual covenants, to prevent a contracting party from engaging in conduct that frustrates the other party's rights to the benefits of the agreement." *Waller v. Truck Ins. Exchange, Inc.*, 11 Cal.4th 1, 36, 44 Cal.Rptr.2d 370, 900 P.2d 619 (1995). The covenant thus prevents a contracting party from taking an action which, although technically not a breach, frustrates the other party's right to the benefit of the contract. *Love v. Fire Ins. Exchange,* 221 Cal.App.3d 1136, 1153, 271 Cal.Rptr. 246 (1990)."

Plaintiff alleges that there exists the covenant of good faith and fair dealing implied in every contract. To the extent that Plaintiff establishes that Defendants breached the Deed of Trust by misapplying their payments, Plaintiff intends to establish that such misapplication was done with the intent to frustrate the purpose of the contract. Namely, one of the benefits of the contract was Plaintiff's right to gain equity in the Property through mortgage payments that were to be applied according to section 2 of the Deed of Trust. Instead, Defendants practice of applying improper fees and taxes to Plaintiff's Loan caused their principle balance to grow and to over-accrue interest. (FAC ¶¶ 144-145.) To the extent Plaintiff is able to prove that Defendants acted in "bad faith," they may be entitled to punitive damages, emotional distress and attorneys' fees. *Archdale v. American Internat. Specialty Lines Ins. Co.*, 154 Cal.App.4th 449, 467, fn.

19 (2007). Here, Plaintiff's detailed First Amended Complaint contains fact-specific allegations showing in painstaking detail that Defendants' wrongfully sought to foreclose on her home without having an enforceable security interest and when challenged, have resorted to relying on an invalid Assignment of Deeds of Trust and Substitution of Trustee. Further, Plaintiff has alleged that Defendants applied her payments in violation of Section 2 of the Deed of Trust, falsely causing their principle and interest to over-accrue. Plaintiff has therefore alleged sufficient facts to support a claim for Breach of the Implied Covenant of Good Faith and Fair Dealing.

VI. OPPOSITION TO MOTION TO STRIKE ATTORNEY FEES

Under Federal Rule of Civil Procedure Rule 12(f), "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Motions to strike are regarded with disfavor because of the policy favoring resolution on the merits. *See e.g. RDF Media Ltd. v. Fox Broadcasting Co.*, 372 F.Supp.2d 556, 566 (C.D. Cal 2005); *see also Bureerong v. Uvawas*, 922 F.Supp.1450, 1478 (C.D. Cal 1996).

Here, Defendants move to strike Plaintiff's request for attorneys' fees because "Plaintiff requests an award of attorney's fees without alleging an contractual or statutory basis for such an award." (Motion, p. 18:2-3.)

Given that Motions to Strike under Fed. R. Civ. P. 12(f) are to be utilized to strike from the pleadings "an insufficient defense or any redundant, immaterial, impertinent or scandalous matter" Defendants have failed to establish their Motion to Strike on any of the statutorily enumerated grounds. Also, Plaintiff's First Amended Complaint contains fact specific allegations showing that Defendants violated 12 U.S.C. § 2605 ("RESPA"). (FAC ¶¶ 81-93.) 12 U.S.C. § 2605(f) plainly provides:

> "Whoever fails to comply with any provision of this section shall be liable to the borrower for each such failure in the following amounts:
> (3) Costs
> In addition to the amounts under paragraph (1) or (2), in the case of any successful action under this section, the costs of the

> action, together with any **attorneys fees** incurred in connection with such action as the court may determine to be reasonable under the circumstances (emphasis added)."

Therefore, contrary to Defendants' argument, it is clear that the factual allegations contained in Plaintiff's First Amended Complaint provide a statutory basis for attorneys' fees. As such, Defendant Motion to Strike Plaintiff's claim for attorneys' fees should be denied.

VII. CONCLUSION

Plaintiff's First Amended Complaint is well-plead and allows the Court to infer more than the mere possibility of misconduct; in fact, when the Court accepts the factual allegations as true the Court can make a "reasonable inference" that Defendants are liable for the misconduct. Although Defendants do allege "factual" disputes in their Motion, this is not sufficient to support this motion to dismiss. Therefore, Plaintiff respectfully requests that the Court DENY Defendant's Motion in its entirety. To the extent the Court dismisses any claim or allegation, Plaintiff requests the opportunity to amend the First Amended Complaint to cure any deficiency, add additional causes of action or rename any causes of action.

Respectfully Submitted,

Dated: March 12, 2012

PROSPER LAW GROUP, LLP

By: /s/ Deborah P. Gutierrez
Gordon F. Dickson
Deborah P. Gutierrez
Attorneys for Plaintiff,
Carmen Naranjo

PROOF OF SERVICE

Carmen Naranjo v. SBMC Mortgage, et al.
United States District Court- Southern District of California case no. 11CV2229 L (MVGx)

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Prosper Law Group, LLP, 6100 Center Drive, Suite 1050, Los Angeles, CA 90045. On March 12, 2012, I served the following document(s) by the method indicated below:

OPPOSITION TO DEFENDANTS' JPMORGN CHASE BANK'S AND U.S. BANK, N.A.S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

[ ] by transmitting via facsimile on this date the documents listed above to the facsimile numbers set forth below. The transmission was completed before the close of business and was reported complete and without error.

[ ] by placing the document(s) listed above in a sealed envelope via U.S. mail with postage thereon fully prepaid, in the United States Office at Los Angeles, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date on postage meter date is more than one day after the date of deposit in this Declaration.

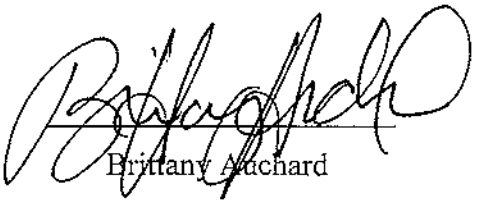
[X] BY CM/ECF ELECTRONIC DELIVERY: In accordance with the registered case participants and in accordance with the procedures set forth at the United States District Court, Central District of California website https://ecf.cacd.uscourts.gov.

[ ] by placing the document(s) listed above in a sealed envelope(s) and consigning it to an express mail service for guaranteed delivery on the next business day following the date of consignment to the address(es) set forth below. A copy of the consignment slip is attached to this proof of service.

(See attached service list)

I declare under penalty of perjury under the laws of the United States that the above is true and correct.

Executed on March 12, 2012, Los Angeles, California.



Brittany Auchard

Service List

Carmen Naranjo v. SBMC Mortgage, et al.
United States District Court- Southern District of California case no. CV11-2229 L (MVGx)

Attorney for Defendant JPMorgan Chase and U.S. Bank N.A. As Trustee for WAMU Mortgage Pass-Through Certificates WMALT Series 2006-AR4 Trust

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