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BANK OF AMERICA, N.A.

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
**FOR THE COUNTY OF LOS ANGELES**

ROBERT LEE LOCKETT, an individual;  
LORRAINE LOCKETT, an individual,  
  
Plaintiffs,  
  
v.  
  
BANK OF AMERICA, a national banking  
association; 5921 SOUTH RIMPAU BLVD.,  
LOS ANGELES, CA 90043 real property, *in*  
*rem*, and DOES 1 through 50, INCLUSIVE,  
  
Defendants.

Case No. BC491093  
  
Assigned for all purposes to the Honorable  
Abraham Kahn  
  
**NOTICE OF RULING ON DEFENDANT  
BANK OF AMERICA, N.A.'S  
DEMURRER TO FIRST AMENDED  
COMPLAINT AND MOTION TO  
STRIKE PORTIONS OF FIRST  
AMENDED COMPLAINT**  
  
Date: April 3, 2013  
Time: 9:00 a.m.  
Dept.: 51  
  
Complaint Filed: August 29, 2012  
FAC Filed: January 7, 2013



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1 Dated: April 4, 2013

Respectfully submitted,

2 **BRYAN CAVE LLP**

3 Richard C. Ochoa

4 Timothy L. Hayes

5 By: 

6 Timothy L. Hayes

7 Attorneys for Defendant

8 BANK OF AMERICA, N.A.

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# EXHIBIT A

# 7

*Superior Court of California*  
*County of Los Angeles*  
*Department 51*  
Honorable Abraham Khan

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LOCKETT,

Plaintiff(s),

v.

BANK OF AMERICA,

Defendant(s).

Case No.: BC491093

Hearing Date: 4/3/13

**[TENTATIVE] RULING RE:**  
DEFENDANT BANK OF AMERICA, N.A.'S  
DEMURRER TO FIRST AMENDED  
COMPLAINT; MOTION THEREOF TO  
STRIKE PORTIONS OF FIRST AMENDED  
COMPLAINT.

The demurrer is sustained, without leave to amend, only as to the Fourth and Fifth claims for fraud, and is otherwise overruled.

The motion is granted, without leave to amend, as to punitive damages, and denied, as to attorney fees.

Judicial notice is denied.

Twenty days to answer the surviving causes of action and remedies.

Regarding declaratory relief, the pleading sufficiently alleges that promissory note was invalidly assigned to one claiming a right to payments based upon the loan transaction, to state an actual controversy.

1  
2 As for quiet title, defendant's adverse "interest," based upon a deed of trust, is alleged (e.g., First  
3 Amended Complaint, ¶34). This opinion cited in the reply distinguishably did not address quiet  
4 title: *Lupertino v. Carbahal* (1973) 35 Cal.App.3d 742. Also, a ruling cited in the reply, is a  
5 non-binding one from a federal trial judge, and errs in its reasoning, because only an adverse  
6 interest is required, not an adverse claim to title. *See Vega v. JPMorgan Chase Bank, NA.* (E.D.  
7 Cal. 2009) 654 F. Supp. 2d 1104, 1120 -1121.

8 With regard to fraud, actionable representations of entitlement to enforce the deed of trust are not  
9 pled with sufficient particularity, including as to identities, times and methods, and knowledge at  
10 the time of a forged assignment (e.g., First Amended Complaint, ¶¶61-66), and many alleged  
11 nondisclosures are not supported by any case-recognized duty, such as the alleged duty to  
12 disclose splitting the note from the deed of trust that is merely legal conduct (*id.* at ¶44), or to  
13 disclose changes in loan character to an investment that are simply legal transactions (e.g., *id.*  
14 at ¶¶45-49, 67).

15 Further, California law has never recognized a cause of action for fraud based upon a forged  
16 assignment or a scheme of conduct, but instead defines actionably fraud claims as being  
17 misrepresentations, concealment, promissory fraud or fraudulent inducement of contracting.

18 With respect to an accounting, the pleading sufficiently alleges unknown payments to one not  
19 entitled to the funds (e.g., First Amended Complaint, ¶¶22-23, 91-92).

20 Regarding a tender, an exception applies, based on allegations that Defendant lacks any  
21 beneficial interest in order to conduct a future foreclosure sale-- here due to an alleged forgery.

22 Concerning cancellation, the Plaintiff sufficiently alleges a void assignment of a deed of trust,  
23 based upon a forgery (e.g., First Amended Complaint, ¶40).

24 As to punitive damages, fraud, oppression or malice are not alleged, except by conclusions about  
25 Defendant's past fraudulent intent in pursuing a forged assignment and claims for debts.

1  
2 Attorneys' fees are not subjected to any minimal pleading standard, under California law.

3  
4 Judicial notice of an assignment of the deed of trust would be error, where the pleading very  
5 specifically alleges that it is a forgery (e.g., First Amended Complaint, ¶13).

6 Effective January 1, 2013, legislation named "The California Homeowner Bill of Rights,"  
7 precludes loan servicers from foreclosing until after pre-modification and pre-foreclosure notices  
8 and reviewing loan-modification applications.

9 A published opinion indicates that the California Homeowners Bill of Rights helps to shape  
10 judicial policy, even in areas and for times falling outside of its express application. Specifically,  
11 an opinion indicates that courts should increase minimum standards for banks dealing with  
12 borrowers, in order to follow the lead of new legislation, as follows:

13  
14       Granted, these ameliorative efforts have been directed primarily at aiding resident  
15 homeowners at risk of losing their homes. (Civ. Code, §§ 2923.5, subd. (f);  
16 Assem. Bill No. 278, § 18, adding Civ. Code, § 2924.15.) We also understand  
17 there is no express duty on a lender's part to grant a modification under state or  
18 federal loan modification statutes. And until the new legislation takes effect, no  
19 private right of action for damages is granted under the statutes. (See *Hamilton v.*  
20 *Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1616 [126 Cal.  
21 *Rptr. 3d 174*]; *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 214 [110  
22 *Cal. Rptr. 3d 201*]; *Pantoja v. Countrywide Home Loans, Inc.* (N.D.Cal.2009) 640  
23 *F.Supp.2d 1177, 1188.*) We do not cite any of these legislative measures in  
24 reliance upon their provisions, nor do we suggest their provisions were violated in  
25 the present case. Rather, we refer to the existence—and recent strengthening—of  
these legislative measures because they demonstrate a rising trend to require  
lenders to deal reasonably with borrowers in default to try to effectuate a  
workable loan modification. In short, these measures indicate that HN16 courts

1 should not rely mechanically on the “general rule” that lenders owe no duty of  
2 care to their borrowers.

3  
4 Existing state statutes relating to loan modifications will soon be supplemented by  
5 stiffer restrictions on the conduct of lenders and loan servicers during the loan  
6 modification process. Even as this case has been pending before us, on July 2,  
7 2012, the California Legislature passed Assembly Bill No. 278 and Senate Bill  
8 No. 900, which have since been signed into law by the Governor. These  
9 provisions address more pointedly the foreclosure crisis in our state through even  
10 greater encouragement to lenders and loan servicers to engage in good faith loan  
11 modification efforts.

12 Jolley v. Chase Home Finance, LLC (2013) \_ Cal.App.4th \_, \_, 2013 Cal. App. LEXIS  
13 107, 22, 61 - 63.

14 However, a federal trial judge indicated that the bill is not retroactive. The California  
15 Homeowner Bill of Rights, Civil Code Section 2924 went into effect January 1, 2013, has not  
16 been applied retroactively. McGough v. Wells Fargo Bank, N.A. (N.D.Cal., 2012) 2012 WL  
17 5199411, 5 n.4.

18 Additionally, there is no authority providing for a homeowner’s court action seeking a *presale*  
19 *determination* as to whether the party initiating foreclosure was authorized to do so. Gomes v.  
20 Countrywide Home Loans, Inc. (2011) 192 Cal.App.4th 1149,1154. Instead, borrowers  
21 legitimately can seek to enjoin trustees’ sales, or to set aside past sales. Robinson v.  
22 Countrywide Home Loans, Inc. (2011) 199 Cal.App.4th 42, 46 n.5 (demurrer properly  
23 sustained, without leave to amend, as to claims for “wrongful initiation of foreclosure,” and  
24 “declaratory relief,” where based on allegations that MERS lacked authority to initiate  
25 foreclosure).



1 However, a District Court judge intelligently distinguished *Gomes, supra* (disapproving presale,  
2 declaratory relief allegations as to foreclosure authority), in reasoning that declaratory relief  
3 could be actionable where the parties are not facing foreclosure, but are disputing whether the  
4 promissory note was properly assigned to one demanding payments based upon the loan  
5 transaction. See Mata v. Citimortgage, Inc. (C.D.Cal. 2011) 2011 WL 4542723, 2.

6 Distinguishably, as to claims of wrongful foreclosure, based upon illegal assignments, borrowers  
7 must allege and show prejudice. Fontenot v. Wells Fargo Bank, N.A. (2011) 198 Cal.App.4th  
8 256, 272 (noting that it is difficult to conceive how borrowers could show prejudice from an  
9 unauthorized transfer, because borrowers must anticipate the legal possibility of note transfers to  
10 different creditors, defaults in payments on the note cause any prejudice via foreclosure, and  
11 original lenders would be the ones prejudiced by an unauthorized loss). Accord Herrera v. Fed.  
Nat'l Mort. Assoc. (2012) \_ Cal.App.4th \_, \_, 2012 WL 1726950, \_.

12 As for fraud, the requirements of particular pleading, applicable generally, likewise apply to  
13 complaints related to foreclosures. "Each element in a cause of action for fraud ... must be  
14 factually and specifically alleged. [Citation.]" Perlas v. GMAC Mortg., LLC (2010) 187  
15 Cal.App.4th 429, 434 (addressing alleged home-loan fraud). In one case, plaintiffs failed to  
16 allege fraudulent forbearance representations, where the allegations entirely failed to specify who  
17 said what, to whom, and how the statements caused harm. Hamilton v. Greenwich Investors  
18 (2011) 195 Cal.App.4th 1602, 1614.

19 The following allegations were not sufficiently specific for pleading fraud:

20  
21 "Plaintiff had specific discussions with employees of JPMorgan Chase prior to the time  
22 JPMorgan Chase acquired the certain assets and liabilities of Washington Mutual from  
23 the FDIC in which the representatives and employees of JPMorgan Chase, both prior to  
24 its acquisition of Washington Mutual from the FDIC and subsequent to its acquisition of  
25 Washington Mutual, made representations that if plaintiff spent his own funds to bring  
the house to the point of obtaining a final building inspection, JPMorgan Chase would  
provide reimbursement of the balance of the construction funds and permanent financing.

1 As a result of those representations, plaintiff did expend in excess of \$400,000.00 of his  
2 personal funds, including, but not limited to, borrowing from his pension plan to comply  
3 with the conditions set forth by JPMorgan Chase.”

4  
5 Scott v. JPMorgan Chase Bank, N.A. (2013) \_ Cal.App.4th \_, \_, 2013 Cal. App. LEXIS 211, 45.  
6

7  
8 In contrast, these described allegations were adequate for pleading fraud:

9 West met that specificity requirement. She alleged quite specifically that Chase Bank  
10 made misrepresentations in the Trial Plan Agreement, in the April 5, 2010 letter, and in  
11 telephone conferences on April 8 and May 24, 2010. Both the Trial Plan Agreement and  
12 the April 5 letter were attached to the third amended complaint. The Trial Plan  
13 Agreement was sent to West on July 24, 2009 by a Washington Mutual loan workout  
14 specialist identified as Russell Buelna.

15 West alleged that, in the April 5, 2010 letter, Chase Bank falsely represented that it would  
16 reevaluate her case and send her the NPV input data if she so requested within 30 days.  
17 The April 5 letter is from the Chase Fulfillment Center and, though the letter does not  
18 identify the preparer, West did not have to plead that information because it was uniquely  
19 within Chase Bank's knowledge....

20 West alleged that on April 8, 2010, she spoke with a supervisor in the loan modification  
21 department of Chase Bank, and, on May 24, 2010, spoke with someone in that  
22 department. She specifically described the misrepresentations allegedly made during  
23 those conferences and alleged the misrepresentations were communicated by telephone.  
24 She alleged that, in a telephone call on May 24, 2010, a Chase Bank representative told  
25 her she “could resubmit her updated financial data for re-evaluation for HAMP  
(Boldface & underscoring omitted.) Her allegation of the persons who made the alleged

1 misrepresentations was sufficient to give notice to Chase Bank of the charges. The  
2 identification of the Chase Bank employees who spoke with West on those dates is or  
3 should be within Chase Bank's knowledge.  
4

5 West v. JPMorgan Chase Bank, N.A. (2013) \_ Cal.App.4th \_, \_, 2013 Cal. App. LEXIS 207, 18-  
6 19.

7  
8 Regarding a claim for concealment, a bank duty to notify a borrower, “ ‘may be directly imposed  
9 by statute or other prescriptive law; it may be voluntarily assumed by contractual undertaking; it  
10 may arise as an incident of a relationship between the defendant and the plaintiff; and it may  
11 arise as a result of other conduct by the defendant that makes it wrongful for him to remain  
12 silent.’ ” SCC Acquisitions Inc. v. Central Pacific Bank (2012) 207 Cal.App.4th 859, 864.

13 Further, a tender is not required, “when the lender has not yet foreclosed and has allegedly  
14 violated laws related to avoiding the necessity for a foreclosure.” Pfeifer v. Countrywide Home  
15 Loans (2012) \_ Cal.App.4th \_, \_, 2012 Cal. App. LEXIS 1265, 61 (complaint sufficiently  
16 alleged lenders' failure to comply with the HUD regulations that could avoid a foreclosure).

17 “In order to survive a motion to strike an allegation of punitive damages, the ultimate facts  
18 showing an entitlement to such relief must be pled by a plaintiff.” Clauson v. Sup. Ct. (1998) 67  
19 Cal. App. 4th 1253, 1255. Accord Spinks v. Equity Residential Briarwood Apartments (2009)  
20 171 Cal. App. 4th 1004, 1055; Blegen v. Sup. Ct. (1981) 125 Cal.App.3d 959, 962.

21 As for punitive damages, complainants must allege and prove an underlying tortious act, and a  
22 cognizable recovery. McLaughlin v. National Union Fire Ins. Co. (1994) 23 Cal.App.4th 1132,  
23 1164. *See also* Bosetti v. U.S. Life Ins. Co. in City of N.Y. (2009) 175 Cal.App.4th 1208, 1242  
24 (“As U.S. Life is entitled to summary adjudication on all ... tort causes of action, her claim for  
25 punitive damages must fail as well.”).

1 Next, even wholly unsupported attorneys' fees allegations need not be stricken pursuant to a  
2 motion to strike, since later discovery may reveal a basis for their recovery. Camenisch v. Sup.  
3 Ct. (1996) 44 Cal.App.4th 1689, 1699. "There is no requirement that a party plead that it is  
4 seeking attorney fees, and there is no requirement that the ground for a fee award be specified in  
5 the pleadings." Yassin v. Solis (2010) 184 Cal.App.4th 524, 533. *Accord* Snatchko v.  
6 Westfield LLC (2010) 187 Cal.App.4th 469, 497 (error to strike attorney fees sought under Code  
7 of Civil Procedure Section 1021.5, because there is no pleading requirement involved.); Chinn  
8 v. KMR Property Management (2008) 166 Cal.App.4th 175, 194 ("We agree that the complaint  
9 need not include a prayer for attorney fees, and that due process is satisfied by notice to the  
10 opposing party of the motion for attorney fees.").

11 Finally, judicial notice of the contents of a declaration of compliance with Civil Code Section  
12 2923.5 (regarding diligence to contact borrowers to explore foreclosure alternatives), could not  
13 be taken, where the complaint alleged that the declaration is false, and the facts asserted in the  
14 declaration are reasonably subject to dispute. *See* Intengan v. Bac Home Loans Servicing LP  
15 (2013) \_\_ Cal.App.4th \_\_, \_\_, 2013 Cal. App. LEXIS 225, 18-19, 25 (order sustaining the demurrer  
16 reversed as to cause of action for wrongful foreclosure based on allegations of noncompliance  
17 with Section 2923.5).

18  
19 Dated: 4/3/13

20  
21 \_\_\_\_\_  
22 Hon. Abraham Khan  
23 Superior Court Judge  
24  
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**PROOF OF SERVICE**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 120 Broadway, Suite 300, Santa Monica, California 90401-2386.

On April 4, 2013, I served the foregoing document, described as:

**NOTICE OF RULING ON DEFENDANT BANK OF AMERICA, N.A.'S DEMURRER TO FIRST AMENDED COMPLAINT AND MOTION TO STRIKE PORTIONS OF FIRST AMENDED COMPLAINT**

on each interested party in this action, as follows:

*Attorney for Plaintiffs*

Barry S. Fagan, Esq.  
P.O. Box 1213  
Malibu, CA 90265-1213  
Phone (310) 717-1790  
pendinglawsuit@yahoo.com

(BY MAIL) I placed a true copy (or original) of the foregoing document in a sealed envelope addressed to each interested party as set forth above. I placed each such envelope, with postage thereon fully prepaid, for collection and mailing at Bryan Cave LLP, Santa Monica, California. I am readily familiar with Bryan Cave LLP's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, the correspondence would be deposited in the United States Postal Service on that same day in the ordinary course of business.

(BY FEDEX) I deposited in a box or other facility maintained by FedEx, an express carrier service, or delivered to a courier or driver authorized by said express carrier service to receive documents, a true copy of the foregoing document, in an envelope designated by said express service carrier, with delivery fees paid or provided for.

(BY FAX) I caused a true copy of the foregoing document to be served by facsimile transmission from sending facsimile machine telephone number (310) 576-2200 to each interested party at the facsimile number set forth above. Each transmission was reported as complete and without error. A transmission report was properly issued by the sending facsimile machine for each interested party served.

(BY E-MAIL) I caused a true copy of the foregoing document to be served by e-mail at the e-mail address set forth above. Each e-mail was complete and no reports of error were received.

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

Executed on April 4, 2013, at Santa Monica, California.



Chereese Campbell