

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF ORANGE  
CENTRAL JUSTICE CENTER

MINUTE ORDER

DATE: 12/09/2013

TIME: 11:34:00 AM

DEPT: C25

JUDICIAL OFFICER PRESIDING: Thierry Patrick Colaw

CLERK: P. Rief

REPORTER/ERM: None

BAILIFF/COURT ATTENDANT: Edwin Hong

CASE NO: **30-2013-00651662-CU-OR-CJC** CASE INIT.DATE: 05/23/2013

CASE TITLE: **Lucas vs. Meridian Foreclosure Service**

CASE CATEGORY: Civil - Unlimited      CASE TYPE: Other Real Property

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EVENT ID/DOCUMENT ID: 71856341

EVENT TYPE: Under Submission Ruling

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**APPEARANCES**

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DEMURRER BY DEFENDANTS DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE OF THE INDYMAC INDX MORTGAGE LOAN TRUST 2007-AR11, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-AR11 UNDER THE POOLING AND SERVICING AGREEMENT DATED APRIL 1, 2007; ONEWEST BANK, FSB; AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS INC.

There are no appearances by any party.

The court, having taken the above-entitled matter under submission on 12/06/2013 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

**NOTICE OF RULING**

Defendants Deutsche Bank National Trust Company, as Trustee, OneWest Bank, FSB, and Mortgage Electronic Registration Systems Inc.'s Demurrer to the First Amended Complaint is SUSTAINED in part and is OVERRULED in part, with 21 days leave to amend.

**The Demurrer to the 1st cause of action (Declaratory Relief) as to all Defendants is OVERRULED.**

Plaintiffs are not merely challenging the foreclosure process under *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149 and/or based on issues with the securitization of the loan and violation of the PSA. Rather, Plaintiffs allege that the loan never made it into the trust pursuant to *Glaski v. Bank of America, National Association* (2013) 218 Cal.App.4th 1079. (See, First Amended Complaint, at ¶¶ 41-47.) Defendants have failed to sufficiently establish that the factual allegation is insufficient as a

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Page 1  
Calendar No.

matter of law. In addition, federal district court cases are not binding on this court. The parties should move forward with discovery to determine whether the loan was transferred to a securitized trust, when it was transferred, and which state's trust laws apply.

Further, Defendants contend that Plaintiffs are improperly seeking to adjudicate past wrongs and not future rights. Here, the foreclosure sale has not yet occurred. Rather, the parties are in the foreclosure process. Thus, it appears that Plaintiffs are seeking to adjudicate future rights (*i.e.*, whether Defendants can proceed with the foreclosure sale).

**The Demurrer to the 2nd cause of action (Violation of Civil Code § 2924.12) as to all Defendants is OVERRULED.**

Defendants contend that the wrongdoing alleged in the First Amended Complaint occurred in 2012, and therefore the Homeowner's Bill of Rights (effective January 1, 2013) does not apply. Here, the Notice of Default attached to the First Amended Complaint reflects that the document was executed on 3/28/13 and recorded on 3/29/13. Thus, Defendants have failed to sufficiently establish as a matter of law that the revised Homeowner's Bill of Rights does not apply.

**The Demurrer to the 3rd cause of action (Negligent Misrepresentation) as against OneWest is SUSTAINED with 21-days leave to amend.**

Plaintiffs have failed to plead fraud with sufficient specificity. Plaintiffs are required to plead specific facts showing how, when, where, to whom, and by what means the representations were tendered. In addition, Plaintiffs are required to allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written.

**The Demurrer to the 4th cause of action (Fraudulent Inducement) as against OneWest is SUSTAINED with 21-days leave to amend.**

Plaintiffs have failed to plead fraud with the requisite specificity. Specific pleading requires facts that clearly allege every element of fraud. (*Starfield v. Starkey* (1990) 220 Cal.App.3d 59, 73.) The facts alleged do not plead justifiable reliance and resulting damages with sufficient specificity.

**The Demurrer to the 5th cause of action (Violation of Bus. & Prof. Code § 17200) as against OneWest and MERS is OVERRULED.**

First, Plaintiffs have alleged sufficient facts showing that they have suffered an injury in fact, and therefore have standing to sue. In addition, Plaintiffs have alleged an "unlawful" business act with sufficient particularity (*i.e.*, the facts alleged in support of the declaratory relief and violation of Civil Code § 2924.12 causes of action are all incorporated into this cause of action).

**The Demurrer to the 6th cause of action (Intentional Infliction of Emotional Distress) as against all Defendants is SUSTAINED, with 21-days leave to amend.**

Plaintiffs have failed to sufficiently allege an "outrageous" conduct by Defendants that is so extreme as to exceed all bounds of that usually tolerated in a civilized community.

**The Demurrer to the 7th cause of action (Quiet Title) as against Defendants is OVERRULED.**

Defendants contend that Plaintiffs have failed to allege their ability and willingness to tender. Although the moving papers alleges that the property has been foreclosed on, there is no judicially noticeable document (*i.e.*, the Trustee's Deed Upon Sale) reflecting the same. In addition, the four-corners of the First Amended Complaint do not reflect that the trustee's sale has taken place. Rather, Plaintiffs allege that their home is in the foreclosure process.

It is questionable whether tender is required in this case. First, this is a pre-foreclosure sale case. Second, the cases cited to by Defendants are factually distinguishable in that they are not pre non-judicial foreclosure sale cases. Third, Plaintiffs are challenging the validity of Defendants' authority to foreclose under *Glaski*. The Court of Appeal in *Glaski* stated: "Tender is not required where the foreclosure sale is void, rather than voidable, such as when a plaintiff proves that the entity lacked the authority to foreclose on the property." (*Glaski v. Bank of America, National Association* (2013) 218 Cal.App.4th 1079, 1100; *see also, Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 112 and *Arnolds Management Corp. v. Eischen* (1984) 158 Cal. App. 3d 575, 579.) Thus, Plaintiffs are alleging that the foreclosure sale in this case is void as a matter of law pursuant to *Glaski*, and that tender is therefore not required.

#### **Defendants' Request for Judicial Notice:**

The court GRANTS judicial notice of: (1) the Master Purchasing Agreement (Exhibit 1); (2) the fact that the Office of Thrift Supervision closed Indymac Bank, F.S.B. as published on the FDIC's website; and (3) an uncertified copy of the recorded Substitution of Trustee (Exhibit 2).

The court may take judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Ev.C. § 452(h).) However, the court will not take judicial notice of hearsay allegations stated therein. (*Herrera v. Deutsche Bank Nat. Trust Co.* (2011) 196 Cal.App.4th 1366; *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117.)

With respect to the Office of Thrift Supervision Order and Purchase and Assumption Agreement, judicial notice of both documents may be taken pursuant to Evidence Code § 452(h), as both are matters of public record, not reasonably subject to dispute, and are capable of immediate and accurate determination. (*Khast v. Washington Mutual Bank*, 2010 WL 5115094 at \*2 fn. 1 (S.D. Cal. 2010) ["The Court takes judicial notice of the P & A Agreement between JPMorgan Chase and the FDIC, attached as Exhibit 5 to Defendants' opposition, because this agreement is a matter of public record whose accuracy cannot reasonably be questioned."]; *Javaheri v. JPMorgan Chase Bank, N.A.*, 2011 WL 97684 at \*2 (N.D. Cal. 2011) ["Government reports and publications, including information on the Department of the Treasury and the FDIC's official websites are judicially noticeable".])

The clerk shall give notice.

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE**

Central Justice Center  
700 W. Civic Center Drive  
Santa Ana, CA 92702

**SHORT TITLE:** Lucas vs. Meridian Foreclosure Service

**CLERK'S CERTIFICATE OF SERVICE BY MAIL**

CASE NUMBER:  
**30-2013-00651662-CU-OR-CJC**

I certify that I am not a party to this cause. I certify that a true copy of the Minute Order dated 12/09/2013 was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The mailing and this certification occurred at Santa Ana, California, on 12/09/2013.

Clerk of the Court, by: \_\_\_\_\_

*ppuf*

, Deputy

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**CLERK'S CERTIFICATE OF SERVICE BY MAIL**