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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE
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9 Attorneys for Defendants CAL-WESTERN RECONVEYANCE CORPORATION and
10 U.S. BANK, N.A. TRUSTEE FOR LEHMAN BROTHERS - BNC MORTGAGE 2007-
11 2 [formerly named herein as Doe 1].

12 **SUPERIOR COURT OF CALIFORNIA**
13 **COUNTY OF RIVERSIDE**

14 CHRISTOPHER GARCIA,
15 Plaintiff,
16 v.
17 CAL-WESTERN RECONVEYANCE
18 CORPORATION, DOE 1, AND does 1-
19 20, inclusive,
20 Defendants.

Case No. RIC497721
Assigned to Judge Michael Donner
**DEFENDANT U.S. BANK, N.A.
TRUSTEE FOR LEHMAN
BROTHERS - BNC MORTGAGE
2007-2'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF ITS DEMURRER TO
PLAINTIFF'S COMPLAINT**
Complaint Filed: April 22, 2008
Trial Date: None
Date: *January 5, 2009*
Time: *8:20 AM*
Dept.: 4

21 Defendant U.S. BANK, N.A. TRUSTEE FOR LEHMAN BROTHERS - BNC
22 MORTGAGE 2007-2 ("Defendant") respectfully submits the following memorandum of
23 points and authorities in support of its demurrer to Plaintiff's complaint.

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1 **I. INTRODUCTION AND BACKGROUND**

2 This litigation is one of the serial lawsuits initiated by M.W. Roth P.L.C., in
3 partnership with the joint venture United First Foreclosure Relief¹, on behalf of a
4 borrower who has defaulted on his home loan. Similar to the hundreds of other identical
5 complaints filed by M.W. Roth P.L.C. in California courts, the instant complaint alleges
6 that the entity foreclosing on Plaintiff's property has no legal right to do so because it is
7 not the "holder" of the promissory note. The instant complaint, like all the others, is a
8 flagrant attempt to delay a foreclosure sale and buy enough time to try and strong-arm the
9 lender into either selling the note to United First, modifying the loan terms, or entering
10 into some other nuisance settlement. Meanwhile, under the guise of protecting consumer
11 rights and ensuring that the foreclosing beneficiary has "standing" to foreclose, the
12 prosecution of each litigation is delayed as long as possible to ensure that United First
13 collects the maximum number of monthly fees from the very borrowers they claim to be
14 protecting. Indeed, these serial lawsuits are maintained even *after* the lenders informally
15 produce copies of the original promissory note, as well as combinations of other evidence
16 confirming their right to foreclose (i.e., the deed of trust, the loan payment history, prior
17 breach letters sent to the borrowers, loan payoff quotes, loan reinstatement quotes, etc.).

18 Against this backdrop, Defendant brings the instant demurrer. Like all the others,
19 this complaint doesn't dispute that the Plaintiff signed the note or defaulted on the loan.
20 Nor does it allege any actual facts in support of its numerous legal conclusions. For this
21 reason, the Defendant's demurrer to the complaint, and each purported cause of action
22 therein, should be sustained.

23 **II. STATEMENT OF FACTS**

24 Plaintiff executed a promissory note dated January 24, 2007 in the original
25 principal amount of \$513,000 in favor of the originating lender, BNC Mortgage, Inc.
26 That obligation was secured by a deed of trust in favor of Mortgage Electronic
27

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¹ <http://www.u1stforeclosurerelief.com>

1 Registration Systems, Inc. as nominee for the lender and its successors and assigns. The
2 deed of trust encumbers the property located at 410 Termino Avenue, Corona, CA 92879
3 (“Subject Property”) and was recorded in the Official Records of Riverside County on
4 January 30, 2007. A copy is attached to Defendant’s Request for Judicial Notice as
5 **Exhibit A**. The loan is being serviced by Chase Home Finance, which is not a party to
6 this litigation.

7 Plaintiff eventually breached his payment obligations under the loan. Plaintiff
8 failed to cure the default on the loan, so Cal-Western recorded a Notice of Default on
9 January 3, 2008. At that time, the amount necessary to cure the default on the loan was
10 \$27,114.78. See **Exhibit B** to Defendant’s Request for Judicial Notice. Defendant CAL-
11 WESTERN RECONVEYANCE CORPORATION was substituted as the trustee under
12 the deed of trust on December 31, 2008 and that Substitution was recorded on February
13 13, 2008. A copy is attached to Defendant’s Request for Judicial Notice as **Exhibit C**.
14 After Cal-Western was named as the current trustee, the deed of trust *and* the note that it
15 secured, were assigned to Defendant U.S. BANK, N.A. TRUSTEE FOR LEHMAN
16 BROTHERS - BNC MORTGAGE 2007-2. The assignment was recorded on March 25,
17 2008 and is attached to Defendant’s Request for Judicial Notice as **Exhibit D**. Plaintiff
18 still failed to cure the default, so Cal-Western recorded a Notice of Trustee’s Sale on
19 April 8, 2008, which scheduled a sale date of April 24, 2008. A copy of the recorded
20 Notice of Trustee’s Sale is attached to Defendant’s Request for Judicial Notice as **Exhibit**
21 **E**.

22 III. ADDITIONAL PROCEDURAL FACTS

23 Plaintiff initiated the instant litigation against Defendants on April 22, 2008, but
24 neglected to name the foreclosing beneficiary under the deed of trust as a defendant in the
25 litigation. The only named defendant was the foreclosure trustee, Cal-Western
26 Reconveyance Corporation. On April 23, 2008 Plaintiff obtained a temporary restraining
27 order from the Court on April 23, 2008. See **Exhibit F** to Defendant’s Request for
28 Judicial Notice. The only defendant in the litigation, Cal-Western Reconveyance

1 Corporation, filed a Declaration of Non-Monetary Status on April 30, 2008 in accordance
2 with *Civil Code* § 2924l since it had a good faith belief that it was only named in the
3 litigation due to its capacity as the trustee under the deed of trust. Plaintiff did not file an
4 objection to Cal-Western's Declaration, therefore Cal-Western ceased to be an active
5 defendant in the litigation. Thereafter, on May 6, 2008 the Court issued a preliminary
6 injunction preventing the foreclosure sale from going forward pending the outcome of the
7 litigation. See **Exhibit G** to Defendant's Request for Judicial Notice.

8 IV. LEGAL STANDARD

9 A demurrer may be sustained where the pleading does not state facts sufficient to
10 constitute a cause of action. *Code of Civil Procedure* § 431.10(e). Additionally, a
11 complaint is subject to demurrer when the pleading is uncertain, ambiguous, or
12 unintelligible. *Civil Code* § 430.10(f). In ruling on a demurrer, the Court looks to the
13 face of the complaint, and upon matters of which the Court may take judicial notice.
14 *Franz v. Blackwell*, (1987) 189 Cal. App. 3d 91, 94. A complaint's material factual
15 allegations are presumed to be true, but this presumption may be rebutted or contradicted
16 by attached documents or facts of which the Court may take judicial notice. *Code of Civil*
17 *Procedure* § 430.10(a). Documents recorded with the County Recorder's Office may be
18 judicially noticed by the Court. *Evans v. California Trailer Court, Inc.*, (1994) 28 Cal.
19 App. 4th 540 and *Maryland Casualty Co. v. Reeder*, (1990) 221 Cal. App. 3d 961.
20 Additionally, although the allegations are presumed to be true, the Court does not accept
21 bare legal conclusions as true for purposes of ruling on a demurrer. *Serrano v. Priest*,
22 (1971) 5 Cal. 3d 584, 591.

23 It is not up to the judge to figure out how the complaint can be amended to state a
24 cause of action. The burden is on the plaintiff to show in what manner he or she can
25 amend the complaint, and how that amendment will change the legal effect of the
26 pleading. *Goodman v. Kennedy*, (1976) 18 Cal. 3d 349. Furthermore, leave to amend
27 should be denied where the facts are not in dispute and the nature of the claim is clear, but
28 no liability exists under substantive law. *Lawrence v. Bank of America*, (1985) 163 Cal.

1 App. 3d 431.

2 **V. ARGUMENT**

3 The Court should sustain Defendant's demurrer to Plaintiff's complaint because
4 (A) the complaint is uncertain; (B) possession of the original promissory note is not a
5 prerequisite to foreclosure (C) even if possession of the original note was required, facts
6 of which the Court may take judicial notice show that Defendant is the holder of the
7 promissory note; (D) Plaintiff has no standing due to his failure to tender; and (E) there
8 are insufficient facts alleged to support each purported cause of action in the complaint.

9 **A. PLAINTIFF'S COMPLAINT IS UNCERTAIN AND VIOLATES**
10 **RULE OF COURT 2.112**

11 A complaint is subject to demurrer when the pleading is uncertain, ambiguous, or
12 unintelligible. *Civil Code* § 430.10(f). Similarly, *Rule of Court* 2.112 requires Plaintiff to
13 separately state each purported cause of action, its number, its nature, and the parties to
14 whom it is directed. A plaintiff must allege the essential facts with reasonable precision
15 and with particularity sufficient to acquaint a defendant with the nature, source and extent
16 of his causes of action. *Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal. App.
17 4th 592, 608. Additionally, a demurrer for uncertainty may lie if the failure to label the
18 parties and claims renders the complaint so confusing defendant cannot tell what he or
19 she is supposed to respond to. *Williams v. Beechnut Nutrition Corp.*, (1986) 185 Cal.
20 App. 3d 135, 139.

21 Here, Plaintiff's complaint is entirely pleaded in generalities and legal conclusions.
22 For example, "DOE 1 has no present right to initiate foreclosure under the security
23 instrument" (Page 2, ¶ 8) and "Defendants and each of them, in the taking [SIC] the
24 actions aforementioned, have violated provisions of California's Rosenthal Fair Debt
25 Collection Practices Act" (Page 2, ¶ 11). The complaint is uncertain because it fails to
26 state how Defendants allegedly committed these offenses. Indeed, buried amongst the
27 complaint's numerous legal conclusions is an admission that the complaint itself lacks
28 sufficient facts:

1 "Chase Home Finance has engaged in predatory lending practices with
2 respect to Plaintiff, *the specifics of which are unknown*, but which are
3 subject to discovery and with respect to which the specifics will be alleged
4 by amendment to this complaint when ascertained." (Page 3, ¶ 14).

5 There are simply insufficient facts pleaded to understand what precisely Plaintiff
6 believes Defendant did to cause his alleged injuries, better yet sufficient facts pleaded to
7 actually support his various theories of liability. For this reason, the demurrer should be
8 sustained.

9 **B. THE COMPLAINT FAILS BECAUSE POSSESSION OF THE
10 ORIGINAL PROMISSORY NOTE IS NOT A PREREQUISITE TO
11 FORECLOSURE.**

12 Plaintiff doesn't dispute that he signed the promissory note, nor does he challenge
13 the existence of the debt or its enforceability. The sole factual allegation raised in the
14 complaint in support of each purported cause of action appears to be that "DOE 1 is not
15 the holder of the note identified in the security instrument that is identified in Exhibit 1,
16 nor is it entitled by law in this State to initiate foreclosure." See Complaint at page 2, ¶ 7.

17 Plaintiff mistakenly believes that a foreclosing beneficiary must establish that it is
18 the "holder" of the note prior to foreclosing. The "holder" terminology used by Plaintiff
19 arises from *Commercial Code* § 3301 *et. seq.*, which relates to the laws of negotiable
20 instruments. In fact, the Commercial Code doesn't apply in the instant case because
21 California non-judicial foreclosure sales are comprehensively regulated by *Civil Code* §
22 2924 *et. seq.*. The *Civil Code* provides a comprehensive statutory framework regarding
23 the conduct of the sale, that is intended to be exhaustive. *Residential Capital v. Cal-*
24 *Western Reconveyance Corp.* (2003) 108 Cal. App.4th 807, 821. There are no factual
25 allegations in the complaint stating why the completion of a non-judicial foreclosure sale
26 would be governed by the California Commercial Code rather than California's non-
27 judicial foreclosure statutes - which specifically set forth the rights and obligations of the
28 parties to a deed of trust. Indeed, prior case law confirms that physical possession of the
original note is not a prerequisite to proceeding with a foreclosure sale. See *California
Trust Company v. Smead Investment Company*, (1935) 6 Cal. App. 2d 432, 435 ("it is our

1 conclusion that manual delivery of the note and deed of trust was not necessary-symbolic
2 delivery was sufficient.”) and *Neal v. Juarez*, 2007 WL 2140640, 8 (“the allegation that
3 the trustee did not have the original note or had not received it is insufficient to render the
4 foreclosure proceeding invalid.”). In any event, a deed of trust is not a negotiable
5 instrument since it doesn’t fall within the definitional criteria set forth in *Commercial*
6 *Code* § 3104 - a deed of trust is not a promise to pay. Rather, it is the security for an
7 obligation to pay. In fact, “Civil Code sections 2924 through 2924k provide a
8 **comprehensive** framework for the regulation of a nonjudicial foreclosure sale pursuant to
9 a power of sale contained in a deed of trust. The purposes of this **comprehensive** scheme
10 are threefold: (1) to provide the creditor/beneficiary with a quick, inexpensive and
11 efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from
12 wrongful loss of the property; and (3) to ensure that a properly conducted sale is final
13 between the parties and conclusive as to a bona fide purchaser.” *Moeller v. Lien*, (1994)
14 25 Cal. App. 4th 822, 830 (citing 4 Miller and Starr, *Cal. Real Estate* (2d ed. 1989) §§
15 9:121, p. 388, 9:154, pp. 505, 516)(emphasis added). There is simply no mandate in the
16 California non-judicial foreclosure statutes, which are comprehensively regulated, that a
17 foreclosing beneficiary demonstrate possession of the original promissory note.

18 Nor is there any reason to add such a requirement - in enacting *Civil Code* § 2924
19 *et. seq.*, the California legislature reached a balance among the competing rights of the
20 lender, the trustee, and the trustor. The Court in *I.E. Associates v. Safeco Title Insurance*
21 *Company*, (1985) 39 Cal. 3d 281, 288 stated:

22 “There are, moreover, persuasive policy reasons which militate
23 against a judicial expansion of those duties. The nonjudicial
24 foreclosure statutes - an alternative to judicial foreclosure - reflect a
25 carefully crafted balance of the interests of beneficiaries, trustors,
26 and trustees. Beneficiaries, of course, want quick an inexpensive
27 recovery of amounts due under the promissory notes in default.
28 Trustors, on the other hand, need protected against forfeiture of
valuable property rights. Trustees, the middlemen, need to have
clearly defined responsibilities to enable them to discharge their
duties efficiently and to avoid embroiling the parties in time-
consuming and costly litigation. ***In taking all these concerns into
account, the statutes strike an overall balance favoring the
protection of trustors.***” (Emphasis added).

1 Moreover, the Courts have previously rejected similar efforts to add new
2 requirements to California's non-judicial foreclosure statutes. *See Moeller v. Lien*, (1994)
3 25 Cal. App. 4th 822, 834 ("It would be inconsistent with the comprehensive and
4 exhaustive statutory scheme regulating nonjudicial foreclosure sales to incorporate
5 another unrelated cure provision into statutory nonjudicial foreclosure proceedings.") and
6 *Ostayan v. Serrano*, (2000) 77 Cal. App. 4th 1411, 1419 (declining to add a duty to
7 explain the nature and extent of existing encumbrances on property to bidders at a sale).
8 Because the California's comprehensive and exhaustive nonjudicial foreclosure statutes
9 "occupy the entire field," *I.E. Associates, supra* at 285, and there is no contrary authority
10 indicating that foreclosure sales would be governed by the Commercial Code, Plaintiff's
11 complaint cannot state a claim against Defendant based on possession of the original note.

12 **C. EVEN IF POSSESSION OF THE NOTE WAS REQUIRED, FACTS**
13 **OF WHICH THE COURT MAY TAKE JUDICIAL NOTICE**
14 **CONFIRM THAT THE FORECLOSING BENEFICIARY HOLDS**
15 **THE RIGHTS UNDER THE PROMISSORY NOTE.**

16 Although there is no authority for Plaintiff's argument that the Commercial Code
17 governs nonjudicial foreclosure sales rather than *Civil Code* § 2924 *et. seq.*, the
18 Complaint would still be subject to demurrer if the Commercial Code were applied.
19 **Exhibit D** to Defendant's Request for Judicial Notice confirms that the deed of trust,
20 together with the note, were assigned to the beneficiary of record. "Such a form of
21 assignment operates as an assignment of both the note and the deed of trust." *Domarad v.*
22 *Fisher & Burke, Inc.* (1969), 270 Cal. App. 2d 543, 553 (citing *Seidell v. Tuxedo Land*
23 *Co.*, (1932) 216 Cal. 165, 170). Thus, the public record confirms that the foreclosing
24 beneficiary had the rights under the promissory note at the time Defendant completed the
25 non-judicial sale.

26 **D. PLAINTIFF HAS NO STANDING TO PURSUE THE PURPORTED**
27 **CAUSE OF ACTION IN THE COMPLAINT DUE TO HIS FAILURE**
28 **TO TENDER.**

29 Nowhere in the Complaint does Plaintiff allege that he attempted or completed a
30 tender of the full amount owed on the note. There is a maxim in the context of

1 foreclosure sales known as the "tender rule." If a borrower who has defaulted on his/her
2 payments requests the Court to exercise its equitable powers to stop or set aside
3 foreclosure proceedings, the borrower must first do equity himself/herself. *Arnolds*
4 *Mgmt. Corp. v. Eishen*, 158 Cal. App. 3d 575, 577 (1984); *Meetz v. Mohr*, 141 Cal. 667,
5 673 (1904) ("One who seeks equity must do equity"). Without having "done equity" by
6 tendering the obligation in full, Plaintiff lacks standing to stop or set aside the foreclosure
7 sale.

8 More importantly, California courts have expanded the application of the tender
9 rule to "any cause of action" that is based upon allegations of wrongful foreclosure or that
10 seeks redress from foreclosure. *Abdallah v. United Sav. Bank*, 43 Cal. App. 4th 1101,
11 1109 (1996) (in affirming sustaining of demurrer without leave to amend, the court
12 explained that the tender rule applies to "any cause of action for irregularity in the sale
13 procedure"); *United States Cold Storage v. Great W. Sav. & Loan Ass'n*, 165 Cal. App. 3d
14 1214, 1225 (1985) (affirming judgment of nonsuit); *Arnold Mgmt. Corp.*, 158 Cal. App.
15 3d at 579 (affirming sustaining of demurrer without leave to amend on claims of
16 wrongful foreclosure, fraud, and negligence relating to defective notice not foreclosure
17 sale). The tender rule is strictly applied (*Nguyen v. Calhoun*, 105 Cal. App. 4th 428, 439
18 (2003)), and, absent an alleged and actual tender, the Complaint in its entirety fails to
19 state a cause of action. *Karlsen v. Am. Sav. & Loan Ass'n.*, 15 Cal. App. 3d 112 (1971);
20 *Abdallah*, 43 Cal. App. 4th at 1109; *Miller & Star, Cal. Real Estate* (3d ed.), Deeds of
21 Trust, § 10:212, pp. 653-54.

22 Here, Plaintiff is challenging the validity of the pending foreclosure sale on the
23 basis that the foreclosing beneficiary is not in possession of the original note -
24 unquestionably a mere procedural challenge to the sale. Notwithstanding this allegation,
25 he has not tendered, nor has he offered to tender, the full amount owing on the loan.
26 Without such a payment, or even alleging such a payment, Plaintiff has no standing to
27 challenge the foreclosure sale. Accordingly, the Court should sustain Defendant's
28 demurrer to the complaint.

1 **E. PLAINTIFF'S FIRST PURPORTED CAUSE OF ACTION FOR**
2 **INJUNCTIVE RELIEF FAILS TO STATE A CLAIM.**

3 A cause of action must exist before an injunction may be issued, but an injunction
4 is not a cause of action. *Korean American Legal Advocacy Foundation v. Los Angeles*,
5 (1994) 23 Cal. App. 4th 376, 397. See also *Slauson Partnership v. Ochoa*, 112 Cal.
6 App.4th 1005, 1019 (2003). Moreover, Plaintiff cannot obtain an injunction without first
7 proving the elements of a cause of action involving the wrongful act sought to be
8 enjoined, and the specific grounds for equitable relief. *San Diego Unified Port District v.*
9 *Gallagher*, (1998) 62 Cal. App. 4th 501, 503.

10 Here, Plaintiff is requesting the Court to issue a remedy, without first alleging any
11 facts that would enable the Court to take such action. The sole allegation that appears to
12 be the basis for each cause of action is that "DOE 1 is not the holder of the note identified
13 in the security instrument in Exhibit 1" and that it is not "entitled by law in this State to
14 initiate foreclosure." See Complaint at page 2, ¶ 7. *However, that allegation is*
15 *contradicted by the documents contained in the public record.* The deed of trust *and*
16 *the note that it secured*, were assigned to Defendant U.S. BANK, N.A. TRUSTEE FOR
17 LEHMAN BROTHERS - BNC MORTGAGE 2007-2. The assignment was recorded on
18 March 25, 2008 and is attached to Defendant's Request for Judicial Notice as **Exhibit D**
19 Because Plaintiff has failed to allege sufficient facts that would amount to an actual cause
20 of action, there is no basis for awarding the remedy of injunctive relief.

21 **F. PLAINTIFF'S SECOND PURPORTED CAUSE OF ACTION FOR**
22 **UNFAIR DEBT COLLECTION PRACTICES FAILS TO STATE A**
23 **CLAIM.**

24 Plaintiff fails to state a claim for unfair debt collection practices because (1) there
25 are no actual facts alleged in the complaint relating to the unfair collection of debts by
26 Defendant; (2) Plaintiff gave Defendants consent to foreclose by executing the deed of
27 trust; and (3) foreclosing on a deed of trust is not debt collection activity.

27 ///

28 ///

1 **1. Plaintiff Fails To Allege Any Facts in Support of This Purported**
2 **Cause of Action.**

3 In support of Plaintiff's assertion that Defendant has engaged in "unfair debt
4 collection practices," Plaintiff makes the bare legal conclusions in paragraph 11 of the
5 complaint that Defendant has violated California's Rosenthal Fair Debt Collection
6 Practices Act and the federal Fair Debt Collection Practices Act ("FDCPA"). Apart from
7 Plaintiff's failure to even allege that Defendant is a debt collector within the meaning of
8 the California Rosenthal Fair Debt Collection Practices Act or the FDCPA (or that any of
9 its conduct falls within the purview of those statutes), Plaintiff fails to even reference
10 what conduct Defendant allegedly performed that implicates either of these statutes. In
11 order to state a claim for violation of these statutes, Plaintiff must at least allege that
12 Defendant falls within the purview of each Act. Further, Plaintiff doesn't state which
13 sections of these Acts, if any, Defendant allegedly violated. There are no allegations that
14 Defendant engaged in any harassment, abuse, or threats as defined by 15 U.S.C. § 1692d,
15 that it used false, deceptive, or misleading representations in collecting the purported debt
16 as defined by 15 U.S.C. § 1692e, or that it used any "unfair or unconscionable" means to
17 collect the purported debt as defined by 15 U.S.C. § 1692f. Indeed, Plaintiff cannot in
18 good faith make such allegations. In fact, the only apparent basis for this cause of action
19 is Plaintiff's claim that "DOE 1 is not the holder of the note." See Plaintiff's Complaint
20 at page 2, ¶ 7. Indeed, Plaintiff makes that allegation on information and belief only.

21 **2. Defendant Consented to the Foreclosure Sale by Executing the**
22 **Deed of Trust.**

23 Significantly, Plaintiff doesn't even dispute that he signed the note, incurred the
24 debt, and breached his payment obligations. This too renders his purported causes of
25 action for unfair debt collection practices fatal. The foreclosure notices issued by
26 Defendant cannot possibly be used as a basis for an alleged violation of the FDCPA or the
27 Rosenthal Act because Plaintiff himself gave Defendant prior consent to allow the trustee
28 to prepare and record such notices - he executed the deed of trust that encumbers the

1 property (see **Exhibit A** to Defendant's Request for Judicial Notice, page 13, ¶ 22).
2 Under the FDCPA, a debt collector cannot communicate with third parties in connection
3 with the collection of any debt "without the prior consent of the consumer given directly
4 to the debt collector." 15 U.S.C. 1692c(b). Here, that prior consent was granted by
5 Plaintiff.

6 3. Foreclosing On a Deed of Trust is Not Debt Collecting Activity

7 In any event, the majority of Courts that have addressed the issue of whether
8 foreclosing on a deed of trust is "debt collection" activity under the FDCPA have
9 properly concluded that it is not. The 9th Circuit stated:

10 "Foreclosing on a trust deed is distinct from the collection of the
11 obligation to pay money. The FDCPA is intended to curtail
12 objectionable acts occurring in the process of collecting funds from a
13 debtor. **But, foreclosing a trust deed is an entirely different path.
14 Payment of funds is not the object of the foreclosure action.
15 Rather, the lender is foreclosing its interest in the property.**" *Hulse*
v. Ocwen Federal Bank, (D.Or. 2002) 195 F. Supp. 2d 1188, 1204
(emphasis added).

15 See also *Heinemann v. Jimm Walter Homes, Inc.* (N.D.W. Va. 1998) 47 F. Supp.
16 2d 716, 722 ("Since the trustees were not collecting on the debt at that time but were
17 merely foreclosing on the property pursuant to the deed of trust, these activities do not fall
18 within the terms of the FDCPA."), *Jordan v. Kent Recovery Services, Inc.* (D. Del. 1990)
19 731 F. Supp. 652, 658 ("the evil sought to be regulated by the FDCPA, *i.e.*, harassing
20 attempts to collect money which the debtor does not have due to misfortune, is not
21 implicated by the actions of an enforcer of a security interest with a 'present right' to the
22 secured property."), and *Rosado v. Taylor* 324 F. Supp. 2d 917, 924 (N.D. Ind. 2004)
23 ("Security enforcement activities fall outside the scope of the FDCPA because they aren't
24 debt collection practices").

25 Although it appears that California Courts have not yet taken a position on the
26 issue, there would appear to be even greater justification for aligning with the current
27 majority since California itself doesn't treat non-judicial foreclosures as a debt-collection
28 activity under its own Fair Debt Collection Practices statute. *Civil Code* § 2924(b). For

1 these reasons, the Court should follow the current majority and hold that foreclosing
2 under a deed of trust is not "debt collection activity" under the FDCPA as a matter of law.
3 Alternatively, the Court should sustain the demurrer as to this cause of action on the
4 grounds that Plaintiff has failed to allege sufficient facts identifying the specific acts of
5 Defendant that amount to unfair debt collection practices, when those alleged acts
6 occurred, and which sections of the statute are alleged to have been violated.

7 **G. PLAINTIFF'S THIRD PURPORTED CAUSE OF ACTION FOR**
8 **PREDATORY LENDING PRACTICES FAILS TO STATE A**
9 **CLAIM.**

10 Plaintiff's predatory lending claims must be dismissed as to Defendant because
11 there is no authority recognizing a cause of action for "predatory lending." If Plaintiff is
12 attempting to rely on a specific state or federal statute in this cause of action, it must be
13 specified so Defendant knows what wrongdoing it allegedly committed, and what
14 defenses might apply. In short, Plaintiff doesn't even alleged that Defendant has engaged
15 in these unstated predatory lending practices - the complaint simply makes the legal
16 conclusion that Chase Home Finance, a non-party to this litigation, has engaged in
17 "predatory lending practices." See Complaint at page 3, ¶ 14. For these reasons, the
18 Court should sustain Defendant's demurrer to the Plaintiff's third purported cause of
19 action.

20 **VI. CONCLUSION**

21 Plaintiff has attempted to plead theories of liability against Defendant without
22 alleging actual facts to support those claims, and most of those claims have already been
23 rejected by well-established statutory and case authority. For this reason, Defendant
24 respectfully requests the Court to sustain the demurrer without leave to amend.

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1 Dated: October 31, 2008

PITE DUNCAN, LLP

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Attorneys for Defendants CAL-WESTERN
RECONVEYANCE CORPORATION and U.S.
BANK, N.A. TRUSTEE FOR LEHMAN
BROTHERS - BNC MORTGAGE 2007-2

2
3 **DECLARATION OF SERVICE**

4 I, the undersigned, declare: I am, and was at the time of service of the papers herein referred
5 to, over the age of 18 years, and not a party to this action. My business address is 1820 E. First
Street, Suite 420, Santa Ana, California 92705.

6 On November 6, 2008, I served the following document(s): **DEFENDANT U.S.**
7 **BANK, N.A. TRUSTEE FOR LEHMAN BROTHERS - BNC MORTGAGE 2007-2'S**
8 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS DEMURRER**
9 **TO PLAINTIFF'S COMPLAINT** on the parties in this action addressed as follows:

8 Mitchell W. Roth, Esq.
9 M.W. ROTH, PLC
10 13541 Rand Drive
11 Sherman Oaks, CA 91423-4740
(818) 990-0430; fax (323) 372-3547
Attorneys for Plaintiff, Christopher Garcia

Mitchell W. Roth, Esq.
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13245 Riverside Drive, Suite 320
Sherman Oaks, CA 91423
(818) 989-7888; fax (323) 372-3547
Attorneys for Plaintiff, Christopher Garcia
- COURTESY COPY -

12
13 X **BY MAIL:** I placed a true copy in a sealed envelope addressed as indicated above. I am
14 readily familiar with the firm's practice of collection and processing correspondence for
15 mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course
16 of business. I am aware that on motion of party served, service is presumed invalid if postal
cancellation date or postage meter date is more than one day after date of deposit for mailing
in affidavit.

17 **BY CERTIFIED MAIL:** I placed a true copy in a sealed envelope addressed as indicated
above via certified mail, return receipt requested.

18 **BY FACSIMILE:** I personally sent to the addressee's facsimile number a true copy of the
19 above-described document(s). I verified transmission with a confirmation printed out by the
20 facsimile machine used. Thereafter, I placed a true copy in a sealed envelope addressed and
mailed as indicated above.

21 **BY FEDERAL EXPRESS:** I placed a true copy in a sealed Federal Express envelope
22 addressed as indicated above. I am familiar with the firm's practice of collection and
processing correspondence for Federal Express delivery and that the documents served are
deposited with Federal Express this date for overnight delivery.

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

25 Executed on November 6, 2008, at Santa Ana, California.

26
27 
ERIC P. GUIPIERREZ