

1 THEODORE E. BACON (CA Bar No. 115395)  
tbacon@alvaradosmith.com  
2 AMY L. MORSE (CA Bar No. 92135)  
amorse@alvaradosmith.com  
3 MICHAEL B. TANNATT (CA Bar No. 117133)  
mtannatt@alvaradosmith.com  
4 ALVARADOSMITH  
A Professional Corporation  
5 633 W. Fifth Street, Suite 1100  
Los Angeles, CA 90071  
6 Tel: (213) 229-2400  
Fax: (213) 229-2499  
7

8 Attorneys for Defendant  
JPMORGAN CHASE BANK, N.A., an acquirer of  
certain assets and liabilities of Washington Mutual  
9 Bank from the Federal Deposit Insurance  
Corporation acting as receiver and CALIFORNIA  
10 RECONVEYANCE COMPANY

11 **UNITED STATES DISTRICT COURT**  
12 **CENTRAL DISTRICT OF CALIFORNIA**

13 MARGARET CARSWELL,  
14 Plaintiff,

15 v.

16 JPMORGAN CHASE BANK, N.A.,  
17 CALIFORNIA RECONVEYANCE  
COMPANY and DOES 1 – 150  
18 Defendants.  
19

CASE NO.: CV 10-5152 GW (PLAx)

JUDGE: Honorable George H Wu

DEFENDANTS' RESPONSE TO  
PLAINITFF'S OFFER OF PROOF

DATE: February 7, 2011

TIME: No hearing date

CRTRM: 10

Judge: Honorable George H. Wu

20  
21 **MEMORANDUM OF POINTS AND AUTHORITIES**

22 Defendants respectfully submit the following response to Plaintiff's Offer of Proof  
23 as to the First Amended Complaint ("FAC").

24 **I. PLAINTIFF'S EVIDENCE DOES NOT ESTABLISH THAT A WRONGFUL**  
25 **FORECLOSURE HAS OCCURRED**

26 Plaintiff's Offer of Proof ("OP") is based on an erroneous contention that  
27 Defenants lack the legal capacity to foreclose on the Subject Loan because of the  
28 recording of an Assignment of Deed of Trust to Bank of America as trustee for WaMu

1 Mortgage Pass Through Certificate Series 2007-0A1 Trust ("BofA"). See OP, p. 3. ll.  
2 18 to 21.

3 However, even if California Reconveyance Company ("CRC") transferred a  
4 beneficial interest to BofA under the deed of trust, it is provided under Civil Code §  
5 2924, subsection (a) (1), that in order to initiate the foreclosure proceedings, "the  
6 trustee, mortgagee, or beneficiary, or **any of their authorized agents**" (emphasis  
7 added) shall first file the notice of default and election to sell." In this case, both  
8 JPMorgan, as the purchaser under § 3.2 of the P & A Agreement of WaMu's servicing  
9 rights in the Subject Loan and CRC, as the trustee, had the statutory right to act as the  
10 representative of any beneficiary under the DOT to institute the foreclosure  
11 proceedings by mailing by certified mail and recording the NOD and NOTS pursuant  
12 to Civil Code § 2924.

13 Consequently, the OP provides no basis to allow Plaintiff to file a further  
14 amended complaint.

15 **II. PLAINTIFF'S EVIDENCE DOES NOT ESTABLISH THAT ANY**  
16 **ACTIONABLE FRAUD HAS OCCURED**

17 In support of her fraud claim, Plaintiff attaches Exhibits 13 to 17, all of which  
18 are signed in the name of Deborah Brignac, a vice-president of CRC. These  
19 documents include the Notice of Trustee Sale, recorded on July 1, 2010, (Exhibit 13),  
20 Notice of Trustee's Sale, recorded on December 7, 2009 (Exhibit 14), Notice of  
21 Trustee's Sale, recorded on October 1, 2009 (Exhibit 15), Notice of Trustee's Sale,  
22 recorded on October 6, 2009 (Exhibit 16), and Notice of Trustee's Sale, recorded on  
23 October 7, 2009 (Exhibit 17). Only Exhibits 13 and 14 are Notices of Trustee Sale  
24 Sale pertaining to the Subject Loan. The other notices pertain to loans for borrowers  
25 other than Plaintiff.

26 Contrary to what is contended at line 28, page 6 of the OP, none of these  
27 signatures is related to a declaration. Furthermore, there is no provision in Civil Code  
28 § 2924f, subdivision (b) (1) that provides that the signature of an officer for the

1 trustee, which in this case was Deborah Brignac, cannot be signed by the officer's  
2 staff. In each case, the initials of the employee signing the notice is placed in  
3 abbreviated form next to Ms. Brignac's signature. In fact, Civil Code 2924f does not  
4 provide that any signature be required on a Notice of Trustee's Sale.

5 Additionally, Plaintiffs OP is flawed because, as a matter of law, an attempt to  
6 premise a fraud cause of action based on the recording and service of an Notice of  
7 Default or Notice of Trustee's Sale fails because any statements made in the Notice of  
8 Default and Notice of Trustee Sale are privileged pursuant to California Civil Code § 47.  
9 See *Wilton v. Mountain Wood Homeowners Association, Inc.*, 18 Cal. App.4<sup>th</sup> 565,  
10 569 (1993) (California Civil Code Section 47 privilege applies to homeowners'  
11 assessment liens whether or not enforced by a judicial foreclosure or private power of  
12 sale). Furthermore, California Civil Code Section 2924, subsection (d) provides that  
13 "[t]he mailing, publication, and delivery of notices as required, and the performance  
14 of the procedures set forth in this article, **shall constitute privileged communications**  
15 **within [CCP] Section 47.**" (Emphasis added).

16 Consequently, the OP provides no basis to allow Plaintiff to file a further  
17 amended complaint.

18 **III. PLAINTIFF'S EVIDENCE DOES NOT ESTABLISH THAT ANY**  
19 **UNJUST ENRICHMENT HAS OCCURED**

20 Plaintiff fails to add any offer of proof that any unjust enrichment has occurred. As  
21 has already been set forth to the Court, on or about December 28, 2006, Plaintiff obtained  
22 the Subject Loan, which is for the principal amount of \$2,500,000.00 from WaMu secured  
23 by the Subject Property. See prior Complaint, ¶¶ 3, 8 and 12. Plaintiff signed the  
24 Promissory Note and Deed of Trust ("DOT"). See prior Complaint, ¶ 9 and Declaration of  
25 Margaret Carswell ("Carswell Declaration"), ¶ 3, filed with the Court on July 14, 2010 and  
26 Exhibit "1" to the FAC, the Adjustable Rate Note ("Note"). The Carswell Declaration is  
27 attached as Exhibit "1" to the Request for Judicial Notice ("RJN"), filed concurrently  
28 herewith. Plaintiff received the amount of \$2,500,000.00 and the deed of trust ("DOT")

1 was recorded on December 28, 2006. See original Complaint, ¶ 12 and Carswell  
2 Declaration, ¶ 15.

3 In the Notice of Trustee's Sale that is attached as Exhibit 13 to the OP, it evidences  
4 that the amount of the unpaid balance and other charges attributed to the Subject Loan on  
5 July 1, 2010 was estimated to be \$2,734,584.06. Nothing in OP provides any proof that  
6 this debt is not now due and owing and in fact has since substantially increased since July  
7 1, 2010. Plaintiff makes no offer of proof that she has been making any payments since the  
8 Notice of Trustee's Sale was recorded.

9 In light of the immense debt that is now owing from Plaintiff, Plaintiff has provide  
10 no offer of proof that either JPMorgan and CRC have been unjustly enriched.

11 Consequently, for this final reason, the OP provides no basis to allow Plaintiff  
12 to file a further amended complaint.

13 **IV. CONCLUSION**

14 Because the OP is devoid of any reasons supporting that Plaintiff should be given  
15 further leave to amend, Plaintiff's request for further leave should be denied.

16 DATED: January 31, 2011

ADORNO YOSS ALVARADO & SMITH  
A Professional Corporation

17  
18  
19 By: /s/ Michael Tannatt  
20 THEODORE E. BACON  
21 AMY L. MORSE  
22 MICHAEL B. TANNATT  
23 Attorneys for Defendant  
24 JPMORGAN CHASE BANK, N.A..  
25  
26  
27  
28

**PROOF OF SERVICE**

**UNITED STATES DISTRICT COURT, CENTRAL DISTRICT**  
*Margeret Carswell v. JPMorgan Chase Bank, et. al.*  
Case No. CV 10-5152 GW (PLAx)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is **ALVARADOSMITH, 633 W. Fifth Street, Suite 1100, Los Angeles, CA 90071.**

On February 1, 2011, I served the foregoing document described as **DEFENDANT'S RESPONSE TO PLAINTIFFS' OFFER OF PROOF** on the interested parties in this action.

by placing the original and/or a true copy thereof enclosed in (a) sealed envelope(s), addressed as follows:

**SEE ATTACHED SERVICE LIST**

**BY REGULAR MAIL:** I deposited such envelope in the mail at 633 W. Fifth Street, Suite 1100, Los Angeles, California 90071. The envelope was mailed with postage thereon fully prepaid.

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

**BY THE ACT OF FILING OR SERVICE, THAT THE DOCUMENT WAS PRODUCED ON PAPER PURCHASED AS RECYCLED**

**BY FACSIMILE MACHINE:** I Tele-Faxed a copy of the original document to the above facsimile numbers.

**BY OVERNIGHT MAIL:** I deposited such documents at the Overnite Express or FedEx Drop Box located at 633 W. Fifth Street, Los Angeles, California 90071. The envelope was deposited with delivery fees thereon fully prepaid.

**BY PERSONAL SERVICE:** I caused such envelope(s) to be delivered by hand to the above addressee(s).

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

(Federal) I declare that I am employed in the office of a member of the Bar of this Court, at whose direction the service was made.

Executed on February 1, 2011, at Los Angeles, California.

  
\_\_\_\_\_  
Judy Toa

1  
2 **SERVICE LIST**  
3 *Margaret Carswell v. JPMorgan Chase Bank, et. al.*  
4 Case No. CV 10-5152 GW (PLAx)

5 Attorney for Plaintiff:  
6 DOUGLAS GILLIES, ESQ.  
7 3756 Torino Drive  
8 Santa Barbara, CA 93105  
9 (805) 682-7033  
10 douglasgillies@gmail.com  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28