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Michelle L. Cabras and Leticia Edillo

ENDORSED FILED
Clerk of the Superior Court

SEP 29 2009

BY K. KRUMPEN

DEPUTY CLERK

7
8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **IN AND FOR THE COUNTY OF SOLANO**

10
11 MICHELLE L. CABESAS
12 and LETICIA EDILLO,

13 Plaintiffs,

14 V.

15 LEHMAN BROTHERS BANK, FSB;
16 MORTGAGE ELECTRONIC REGISTRATION
17 SYSTEMS, INC.; ROBERT E. WEISS, INC.;
18 FEDERAL NATIONAL MORTGAGE
19 ASSOCIATION;

and DOES 1 through 50 inclusive

20 Defendants.

CASE NO. FCS034204

Points and authorities in support of
motion to consolidate (filed concurrent
with Notice of Motion and Motion to
Consolidate)

Date: 2-19-2010

Time: 9:00 am

Place: 2

✓
Caf

21
22 **POINTS AND AUTHORITIES**

23 **I Background**

24 **A LIMITED CASE IS NOT THE CORRECT VENUE**
25 **WHERE AS HERE, THE DAMAGES EXCEED THE**
26 **JURISDICTIONAL LIMITS OF THE COURT**
27

28 Plaintiff is seeking monetary damages arising from the fraudulent foreclosure of their
personal residence valued in excess of \$1,000,000. Additionally, plaintiff is seeking punitive

Motion to Consolidate

1 damages for fraud, as against all defendants for violation of an agreement to refinance the Subject
2 Property in order to reduce monthly payments, and to forebear and/or delay a foreclosure
3 proceeding. In addition the Defendants after failing to honor their agreement failed to abide by the
4 requirements of Cal. Civ. Code Section 2932.5 which provides in Black Letter law a requirement
5 of an assignee of a Trust Deed and Note, 2932-5 creates a mandatory condition precedent to
6 initiating the foreclosure, an assignee, MUST ACKNOWLEDGE AND RECORD THE
7 ASSIGNMENT PRIOR TO COMMENCING THE PROCEDURE LEADING TO THE
8 FORECLOSURE. Cal. Civ. Code Section 2932.5 states:

9
10 2932.5. Where a power to sell real property is given to a
11 mortgagee, or other encumbrancer, in an instrument intended to secure
12 the payment of money, the power is part of the security and vests in
13 any person who by assignment becomes entitled to payment of the
14 money secured by the instrument. The power of sale may be exercised
15 by the assignee if the assignment is duly **acknowledged and recorded**.
16 (emphasis added)

17
18 In the case before the court defendants failed to record their assignment prior to
19 commencing the foreclosure and the sale was taken by Fraud.

20
21 The Fourth District Court of Appeal stated in Asuncion v. Superior Court of the City of
22 San Diego (1980) 108 Cal.App.3d 141, 144, 166 Cal.Rptr. 306, 308, in pertinent part: Stated

23
24 “It is generally recognized the summary unlawful detainer action is not a suitable vehicle
25 to try complicated ownership issues involving assertions of fraud and deceptive practices such as
26 the Asuncions allege here”.

27
28 In the Instant matter Plaintiffs entered into a loan agreement with LEHMAN BROTHERS
BANK on or about January 19, 2007 by monthly payment. The Adjustable Rate Note was based
upon a “LIBOR” six-month adjustable rate.

Plaintiff alleges that Defendants and each of them neither explained the workings of the
rate, how it is computed nor its inherent volatility.

Further, on information and belief, Plaintiff alleges that the Defendants charged and

1 obtained improper fees for the placement of her loan as "sub-prime" when she qualified for a
2 prime rate mortgage which would have generated less in fees and interest.

3
4 Additionally ROBERT E. WEISS foreclosed on Plaintiff's property without a recorded
5 assignment as required by Cal. Civ. Code Section 2932.5, in addition to the fraud actually
6 committed by the Trustee who alleged on the Notice of Default:

7 That by reason thereof of the present Beneficiary under such deed of
8 Trust has executed and delivered to said duly appointed Trustee a
9 written Declaration of Default and Demand for Sale and has
10 deposited with said duly appointed Trustee such Deed of Trust and
11 all documents evidencing obligations secured thereby and has
12 declared and does hereby declared all sums secured thereby
13 immediately due and payable and has elected and does hereby elect
14 to cause the trust property to be sold to satisfy the obligations served
15 thereby.

16 NO documents were provided to the trustee that evidenced the ownership of the
17 Deed of Trust and Note in the Name of ROBERT E. WEISS and FEDERAL NATIONAL
18 MORTGAGE ASSOCIATION, in short there was No original Note provided to the Trustee which
19 showed the endorsements on the note to the Defendants who
20 foreclose.

21 You may have the right to cure the default hereon and reinstate the
22 one obligation secured by such Deed of Trust above described.
23 Section ... permits certain defaults to be cured upon the Payment of
24 the amounts required by that statutory section without requiring
25 payment of that portion of principal and interest which would not be
26 due had no default occurred. Where reinstatement is possible, if the
27 default is not cured within 35 days following the recording and
28 mailing of this Notice to Trustor or Trustor's successor in interest,
the right of reinstatement will terminate and the property may
thereafter be sold.

29 NONE of these defendants including ROBERT E. WEISS and FEDERAL NATIONAL
30 MORTGAGE ASSOCIATION own these loans and courts all across the Country are beginning to

1 take a second look at the Defendants in particular with a view to Fraud. ROBERT E. WEISS and
2 FEDERAL NATIONAL MORTGAGE ASSOCIATION has bluffed their way through the
3 foreclosure because under Cal. Civ. Code Sec 2924 the parties foreclosing on a Note and Trust
4 Deed are not required to prove to anyone that they have a right to foreclose. This has allowed a
5 flurry of fraudulent foreclosures to occur. This foreclosure was accomplished by deception, as
6 none of these defendants had the Note including «Parties», nor did any of them have an
7 endorsement to them for that Note and did not pay any consideration for that note.

8 "Fraud" and "dishonesty" are closely synonymous, and "fraud" may consist in
9 misrepresentation or concealment of material facts or statement of fact made with the
10 consciousness of its falsity. Fort v. Board of Medical Quality Assurance of State of Cal. (1982)
11 136 Cal.App.3d 12, 185 Cal.Rptr. 836.

12 The law is well settled that 'representations made to one person with intention that they
13 will be repeated to another and acted upon by him and which are repeated and acted upon to his
14 injury gives the person so acting the same right to relief as if the representations had been made to
15 him directly. . . No reason appears why this same rule should not be applicable to nondisclosures
16 as well as misrepresentations. Massei v. Lettunich (1967) 56 Cal.Rptr. 232, 235.

17 A duty of disclosure in a fraud context is one which may exist when one party to a
18 transaction has sole knowledge or access to material facts and knows that such facts
19 are not known to or reasonably discoverable by the other party. Goodman v. Kennedy (1976) 18
20 Cal.3d 335, 134 Cal.Rptr. 375.

21 A duty to disclose arises, even in absence of a fiduciary or confidential relationship, if
22 material facts are known only to defendant and defendant knows that plaintiff does not know or
23 cannot reasonably discover undisclosed facts. Karoutas v. HomeFed Bank (1991) 232 Cal.App.3d
24 767, 283 Cal.Rptr. 809.

25 In Asuncion supra., the Fourth District Court of Appeal further stated in pertinent
26 part at page 146: As we see it, after the eviction is transferred to the superior court, a number of
27 procedural devices exist to facilitate accommodating the eviction action with the fraud action
28

1 which the Asuncions separately filed. A possibility, which we understand is frequently utilized in
2 other counties, is for the superior court to stay the eviction proceedings until trial of the fraud
3 action, based on the authority of Code of Civil Procedure section 526 which permits a preliminary
4 injunction to preserve the status quo on such grounds as irreparable injury, multiplicity of legal
5 actions, or unconscionable relative hardship. . . We hold only, the Asuncions are entitled to
6 defend this eviction action based on the claims of fraud and related causes which they have
7 asserted, and accordingly the action necessarily exceeds the jurisdiction of the municipal court and
8 cannot be tried there.

9
10 In the Asuncion Matter, supra. the Asuncions in 1971 obtained a purchase money
11 mortgage on the property of \$19,800 with monthly payments of \$149. In 1978 they executed a
12 second trust deed on an obligation of \$3,500, with payments of \$64.84, they missed two payments
13 on the second trust deed in June and July 1979. The beneficiary of the second trust deed filed a
14 notice of default to commence foreclosure on July 12. On July 19 representatives of Financial
15 contacted the Asuncions. The Asuncions signed papers on that date which they were told were
16 necessary to prevent foreclosure on their home. The legal effect of those papers was, among other
17 things, to grant title to the property to Financial, subject to a 45-day option to reacquire the
18 property by executing in Financial's favor a \$12,000 promissory note at 18 percent "or more"
19 payable in three years. Financial in return, promised to retire a furniture company debt in the sum
20 of \$1,126.36 and to pay the second trust deed of approximately \$3,500. Financial recorded the
21 grant deed immediately after its execution on July 19. On October 15, 1979, it commenced the
22 unlawful detainer action alleging expiration of the option on September 3, 1979, resulting in
23 ownership of the property in Financial.

24 The net effect of the parties' dealings is, financial has loaned the Asuncions about \$4,800
25 for 45 days, in return for real property having an equity in excess of \$20,000. Plaintiff alleged that
26 such a loan may be usurious, as well as fraudulent and in violation of a number of laws, both state
27 and federal.
28

1 The amount in controversy exceeds the jurisdictional limits of the Municipal Court, now
2 the limited court, of \$25,000, in that Plaintiff is seeking recovery of damages exceeding \$25,000,
3 and the imposition of punitive damages in a substantially greater amount.

4 California Code of Civil Procedure section 86 provides in pertinent part as follows:

5 (a) The following civil cases and proceedings are limited civil
6 cases:

7 (1) Cases at law in which the demand, exclusive of interest, or
8 the value of the property in controversy amounts to twenty-five
thousand dollars (\$25,000) or less.

9 (4) Proceedings in forcible entry or forcible or unlawful detainer
10 where the whole amount of damages claimed is twenty-five thousand dollars
11 (\$25,000) or less.

12 (5) Actions to enforce and foreclose liens on personal property where
13 the amount of the liens is twenty-five thousand dollars
(\$25,000) or less.

14 Thus, the Limited Court lacks subject matter jurisdiction, where as here, the
15 amount is controversy exceeds \$25,000, to wit, \$500,000 in quantifiable compensatory damages.

16 California Code of Civil Procedure 85 provides:

17 An action or special proceeding shall be treated as a limited civil case if all of the following
18 conditions are satisfied, and, notwithstanding any statute that classifies an action or special
19 proceeding as a limited civil case, an action or special proceeding shall not be treated as a limited
20 civil case unless all of the following conditions are satisfied: (a) The amount in controversy does
21 not exceed twenty-five thousand dollars (\$25,000). As used in this section, "amount in
22 controversy" means the amount of the demand, or the recovery sought, or the value of the
23 property, or the amount of the lien, that is in controversy in the action, exclusive of attorneys' fees,
24 interest, and costs. (b) The relief sought is a type that may be granted in a limited civil case. (c)
25 The relief sought, whether in the complaint, a cross-complaint, or otherwise, is exclusively of a
26 type described in one or more statutes that classify an action or special proceeding as a limited
27 civil case or that provide that an action or special proceeding is within the original jurisdiction of
28 the municipal court. Thus any action which is based on the same facts and issues whether as a
Claim or counterclaim would require the Limited Court of to transfer Jurisdiction and for the
unlimited court to assume Jurisdiction.

A court has no jurisdiction to hear or determine a case where type of proceeding or
amount in controversy is beyond jurisdiction defined for that particular court by statute or

1 constitutional provision. Workmen's Compensation Appeals Bd. v. Small Claims Court of
2 Alameda County (1973) 35 Cal.App.3d 643, 111 Cal.Rptr. 6.

3 Therefore, the Municipal Court is devoid of jurisdiction to continue and the matter
4 must be transferred to the Superior Court.

5
6 **PLAINTIFF FILED AN ANSWER TO THE UNLAWFUL DETAINER COMPLAINT**
7 **CHALLENGING THE SUFFICIENCY OF TITLE**

8 Plaintiff filed an answer in the action, and a complaint in the Superior Court which wholly
9 challenged the lawfulness of Defendant's claim to title in the unlawful detainer complaint and the
10 procedures utilized in the non-judicial foreclosure action.

11 Given such actions on the part of defendant, movant assumes Defendant has abandoned
12 this issue entirely.

13
14 **THE LIMITED COURT LACKS JURISDICTION TO**
15 **RENDER A JUDGMENT AS TO THE LAWFULNESS**
16 **OF CLAIMS TO TITLE BY DEFENDANT**

17 Defendant contends that if the Limited Court lacks jurisdiction given the amount in
18 controversy, that is, the sum over \$25,000 plus punitive damages, then the court lacks jurisdiction
19 over any issues therein.

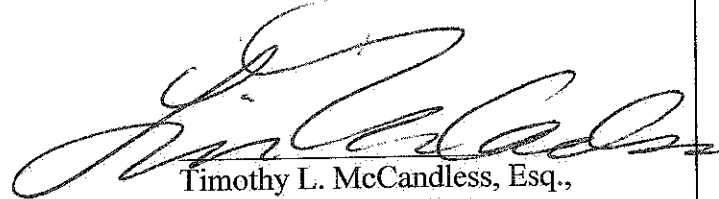
20 As set forth in the Asuncion matter, supra, the traditional approach in these cases, is given
21 the allegations of fraud being made by Defendant, to transfer the matter to Superior Court and for
22 the higher court to impose a stay of the unlawful detainer action pending resolution of the fraud
23 issues. Lacking jurisdiction over the present issues by virtue of the amount in controversy, the
24 Limited court must and should order the instant matter to be transferred to Superior Court.

25
26 **CONCLUSION**

27 For all pleadings filed in this matter, the memorandum of points and authorities, and other
28 and further oral and documentary evidence to be adduced at the hearing of this matter, Defendant

1 respectfully requests that the court grant the motion and Consolidate the Limited case with this
2 case

3 Dated September 23, 2009



Timothy L. McCandless, Esq.,
Attorney for Plaintiff (s),
Michelle L. Cabelas
and Leticia Edillo

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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
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11
12 MICHELLE L. CABESAS
13 and LETICIA EDILLO,
14 Plaintiffs,

15 V.

16 LEHMAN BROTHERS BANK, FSB;
17 MORTGAGE ELECTRONIC REGISTRATION
18 SYSTEMS, INC.; ROBERT E. WEISS, INC.;
19 FEDERAL NATIONAL MORTGAGE
20 ASSOCIATION;
21 and DOES 1 through 50 inclusive

22 Defendant (s),
23

Case No. FCS034204

NOTICE OF MOTION AND
MOTION TO CONSOLIDATE (Filed
Concurrently with Memorandum of
points and authorities)

Date of Hearing: 2-19-2010

Time of Hearing: 9:00am

Department: 2

24 Notice of Motion


25 TO THE HONORABLE JUDGE/COMMISSIONER OF THE SUPERIOR COURT
26 AND ALL PARTIES IN INTEREST:

27 **YOU AND EACH OF YOU PLEASE TAKE NOTICE THAT** on the date and time above, or
28 as soon thereafter as the matter can be heard, in above Department, of the above-entitled Court,

1 Michelle L. Cabras and Leticia Edillo ("Plaintiff (s)"), will appear pursuant to **California Code**
2 **of Civil Procedure Section 1048(a)** to move the Court for an order Consolidating the case before
3 the Limited court with this case. This motion will be made on the grounds that the Complaint
4 filed by Plaintiff herein, and the defense of Plaintiff in the Unlawful detainer require that both
5 cases be consolidated for trial. This Motion is further made and based on the ground that the facts
6 of the one case and the defenses of the other are similar and dependant on each other including (1)
7 the identity of the issues, procedures and parties before the Court; (2) the convenience of the Court
8 and the parties; (3) judicial economy, and (4) the avoidance of duplicative and possibly
9 inconsistent adjudications. (5) The lack of this courts Jurisdiction to hear and consider Plaintiff's
10 Claim of Fraud in the foreclosure itself, and as a defense to this Unlawful Detainer, and the
11 damages that Defendant is seeking in the Unlimited Superior Court Case, which exceeds the
12 Jurisdictional limit of the Limited Court.

13
14
15 This motion will be based on this Notice of Motion and Motion for consolidation
16 the supporting Statement of Facts and Memorandum of Points and Authorities, the court records in
17 this case, and such other and further evidence that shall be presented at the time of the hearing.
18 **NOTICE- IF YOU FAIL TO FILE A WRITTEN RESPONSE OR OPPOSITION TO THIS**
19 **MOTION WITH THIS COURT BEFORE THE TIME SET FOR THE HEARING, IT IS**
20 **LIKELY THAT THE COURT WILL GRANT ALL THAT THE DEFENDANT HAS**
21 **REQUESTED HEREIN.**

22
23 Dated September 23, 2009

24
25 
26 Timothy L. McCandless, Esq.,
27 Attorney for Plaintiff (s),
28 Michelle L. Cabras
and Leticia Edillo

<p>ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): LAW OFFICES OF TIMOTHY MCCANDLESS Timothy L. McCandless, Esq. (SBN 144715) 13240 Amargosa Road Victorville, California 92392 TELEPHONE NO.: 760-951-3663 FAX NO. (Optional): E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): PLAINTIFF</p>	<p style="text-align: center; font-size: small;">FOR COURT USE ONLY</p> <p style="text-align: center; font-size: x-large; opacity: 0.5;">ENDORSED</p> <p style="text-align: center; font-size: small;">Clerk of the Superior Court</p> <p style="text-align: center; font-size: x-large;">SEP 29 2009</p> <p style="text-align: center;">By K. KRUMPEN DEPUTY CLERK</p>
<p>SUPERIOR COURT OF CALIFORNIA, COUNTY OF SOLANO</p> <p>STREET ADDRESS: 321 Tuolumne St.</p> <p>MAILING ADDRESS: SAME</p> <p>CITY AND ZIP CODE: Vallejo 94590</p> <p>BRANCH NAME:</p>	<p>CASE NUMBER: FCS034204</p> <p>JUDICIAL OFFICER:</p>
<p>PLAINTIFF/PETITIONER: MICHELLE L. CABESAS and LETICIA EDILL</p> <p>DEFENDANT/RESPONDENT: LEHMAN BROTHERS BANK, FSB; MORTGA</p>	<p>DEPT.: 2</p>
<p>NOTICE OF RELATED CASE</p>	

Identify, in chronological order according to date of filing, all cases related to the case referenced above.

1. a. Title: **FANNIE MAE v. MICHELLE CABESAS; LETICIA EDILLO**
 - b. Case number: **VCM106610**
 - c. Court: same as above
 other state or federal court (name and address): **Solano Justice Center; Vallejo**
 - d. Department:
 - e. Case type: limited civil unlimited civil probate family law other (specify): **unlawful detai**
 - f. Filing date: **August 4, 2009**
 - g. Has this case been designated or determined as "complex?" Yes No
 - h. Relationship of this case to the case referenced above (check all that apply):
 - involves the same parties and is based on the same or similar claims.
 - arises from the same or substantially identical transactions, incidents, or events requiring the determination of the same or substantially identical questions of law or fact.
 - involves claims against, title to, possession of, or damages to the same property.
 - is likely for other reasons to require substantial duplication of judicial resources if heard by different judges.
 - Additional explanation is attached in attachment 1h
 - i. Status of case:
 - pending
 - dismissed with without prejudice
 - disposed of by judgment
2. a. Title: **MICHELLE L. CABESAS and LETICIA EDILLO v. LEHMAN BROTHERS BANK, FSB; MOR**
 - b. Case number: **FCS034204**
 - c. Court: same as above
 other state or federal court (name and address):
 - d. Department:

PLAINTIFF/PETITIONER: MICHELLE L. CABESAS and LETICIA EDIL	CASE NUMBER:
DEFENDANT/RESPONDENT: LEHMAN BROTHERS BANK, FSB; MORTG	FCS034204

2. (continued)

e. Case type: limited civil unlimited civil probate family law other (specify):

f. Filing date 9-23-2009

g. Has this case been designated or determined as "complex?" Yes No

h. Relationship of this case to the case referenced above (check all that apply):

- involves the same parties and is based on the same or similar claims.
- arises from the same or substantially identical transactions, incidents, or events requiring the determination of the same or substantially identical questions of law or fact.
- involves claims against, title to, possession of, or damages to the same property.
- is likely for other reasons to require substantial duplication of judicial resources if heard by different judges.
- Additional explanation is attached in attachment 2h

i. Status of case:

- pending
- dismissed with without prejudice
- disposed of by judgment

3. a. Title:

b. Case number:

c. Court: same as above
 other state or federal court (name and address):

d. Department:

e. Case type: limited civil unlimited civil probate family law other (specify):

f. Filing date:

g. Has this case been designated or determined as "complex?" Yes No

h. Relationship of this case to the case referenced above (check all that apply):

- involves the same parties and is based on the same or similar claims.
- arises from the same or substantially identical transactions, incidents, or events requiring the determination of the same or substantially identical questions of law or fact.
- involves claims against, title to, possession of, or damages to the same property.
- is likely for other reasons to require substantial duplication of judicial resources if heard by different judges.
- Additional explanation is attached in attachment 3h

i. Status of case:

- pending
- dismissed with without prejudice
- disposed of by judgment

4. Additional related cases are described in Attachment 4. Number of pages attached: _____

Date: 9/23/09

Timothy L. McCandless, Esq.

(TYPE OR PRINT NAME OF PARTY OR ATTORNEY)



(SIGNATURE OF PARTY OR ATTORNEY)

PLAINTIFF/PETITIONER: MICHELLE L. CABESAS and LETICIA EDIL	CASE NUMBER:
DEFENDANT/RESPONDENT: LEHMAN BROTHERS BANK, FSB; MORTG	FCS034204

**PROOF OF SERVICE BY FIRST-CLASS MAIL
NOTICE OF RELATED CASE**

(NOTE: You cannot serve the Notice of Related Case if you are a party in the action. The person who served the notice must complete this proof of service. The notice must be served on all known parties in each related action or proceeding.)

1. I am at least 18 years old and **not a party to this action**. I am a resident of or employed in the county where the mailing took place, and my residence or business address is (specify):

13240 Amargosa Road, Victorville, CA 92392

2. I served a copy of the *Notice of Related Case* by enclosing it in a sealed envelope with first-class postage fully prepaid and (check one):

- a. deposited the sealed envelope with the United States Postal Service.
- b. placed the sealed envelope for collection and processing for mailing, following this business's usual practices, with which I am readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.

3. The *Notice of Related Case* was mailed:

- a. on (date): 9-25-2009
- b. from (city and state): Rancho Cucamonga, CA

4. The envelope was addressed and mailed as follows:

- a. Name of person served: Edward A. Treder
Attorneys For Fannie May
Street address: 917 S. Village Oaks Dr.
City: Covina 255 200
State and zip code: CA. 91724
- c. Name of person served: Law Office of Christie Lee
Street address: 1313 W. Robinhood Dr. # A-8
City: Stockton
State and zip code: CA. 95207

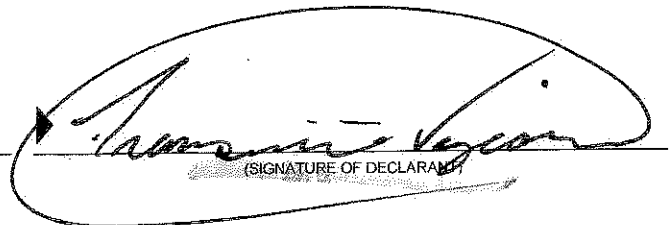
- b. Name of person served:
Street address:
City:
State and zip code:
- d. Name of person served:
Street address:
City:
State and zip code:

Names and addresses of additional persons served are attached. (You may use form POS-030(P).)

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

Date: 9/25/2009

Francisco Vizcarra
(TYPE OR PRINT NAME OF DECLARANT)


(SIGNATURE OF DECLARANT)