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REHEARING ORDER

MEMORANDUM* OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (NOVEMBER 18, 2021)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE BANK OF NEW YORK MELLON, FKA The Bank of New York, as Trustee for the Certificate Holders CWALT, Inc. Alternative Loan Trust 2006-OC8 Mortgage Pass-Through Certificates, Series 2006-OC8,

Plaintiff-counter-defendant-Appellee,

v.

ALAN DAVID TIKAL, as Trustee of the KATN Revocable Living Trust; CAA, INC., a Nevada Corporation,

Defendants,

and

MARGUERITE DESELMS, Individually, and as Trustee of the Circle Road Revocable Living Trust Dated November 11, 2010,

Defendant-counter-claimant-Appellant.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

No. 20-55993

D.C. No. 5:18-cv-01044-PSG-MRW

Appeal from the United States District Court
for the Central District of California
Philip S. Gutierrez, Chief District Judge, Presiding

Submitted November 16, 2021**
San Francisco, California

Before: FERNANDEZ, SILVERMAN, and NGUYEN, Circuit Judges.

Marguerite DeSelms appeals pro se from the district court's judgment in favor of Bank of New York Mellon (BONY) on BONY's claims for cancellation of a 2010 Substitution of Trustee and Full Reconveyance document, and for a declaration that a 2006 deed of trust (the First Deed of Trust) was valid and reflected BONY's senior lien on a property DeSelms had purchased in San Bernardino, California (the Property). DeSelms also appeals the district court's award of attorney's fees to BONY.[1] BONY brought this action in its capacity as trustee for the certificateholders of CWALT, Inc., Alternative Loan Trust 2006-OC8, Mortgage Pass-Through Certificates, Series 2006-OC8. We affirm.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[1] The district court granted summary judgment to BONY on DeSelms' counterclaims as well, but DeSelms has not challenged that aspect of the judgment on appeal. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999).

Reviewing de novo,[2] we conclude that the district court did not err in entering summary judgment on BONY's claims. Although DeSelms contended that the 2010 Substitution of Trustee and Full Reconveyance extinguished BONY's interest in the Property, there was no genuine issue of material fact that BONY was entitled to cancellation of that document. *See id.* BONY presented evidence that the document was invalid because: it stated that the KATN Trust was the beneficiary of the First Deed of Trust, even though the KATN Trust had no interest therein; and BONY suffered pecuniary loss because it was unable to foreclose on the Property. *See* Cal. Civ. Code §§ 3412-13; *U.S. Bank Nat'l Ass'n v. Naifeh*, 205 Cal. Rptr. 3d 120, 128 (Ct. App. 2016). For the same reason, the district court correctly determined that declaratory judgment was appropriate because there was a substantial controversy between the parties regarding the validity of the First Deed of Trust, and the evidence showed that document was valid. *See Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 272-73, 61 S. Ct. 510, 512, 85 L. Ed. 826 (1941).

None of DeSelms' arguments to the contrary are persuasive. BONY had standing to challenge the 2010 Substitution of Trustee and Full Reconveyance because that document purported to extinguish BONY's interest in the First Deed of Trust. *See* Cal. Civ. Code § 3412; *cf. Yhudai v. IMPAC Funding Corp.*, 205 Cal. Rptr. 3d 680, 683 (Ct. App. 2016). BONY was the proper party[3] to bring this action, was not required

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[2] *Evon v. Law Offs. of Sidney Mickell*, 688 F.3d 1015, 1023-24 (9th Cir. 2012).

[3] *See Moeller v. Superior Court*, 947 P.2d 279, 283 n.3 (Cal. 1997); Fed. R. Civ. P. 17(b)(3).

to register in California,[4] and provided sufficient evidence of its existence. DeSelms' bare assertion that BONY's documents were forged does not create a genuine issue of material fact in that regard. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). Moreover, the district court correctly determined that DeSelms presented no competent evidence supporting her contentions regarding the purported separation of the note from the deed of trust, the purported assignment of the loan into a closed trust, and the purported payment of her mortgage debt from other sources. *See id.*

We further conclude that the district court did not abuse its discretion in awarding BONY $77,777.50 in attorney's fees pursuant to Federal Rule of Civil Procedure 54(d)(2). *See Stetson v. Grissom*, 821 F.3d 1157, 1163 (9th Cir. 2016); *see also United States v. Hinkson*, 585 F.3d 1247, 1261-63 (9th Cir. 2009) (en banc); *MRO Commc'ns, Inc. v. Am. Tel. & Tel. Co.*, 197 F.3d 1276, 1281 (9th Cir. 1999). The valid First Deed of Trust explicitly provides for attorney's fees in these circumstances,[5] and the district court's lodestar calculation was well-supported by the record. *See Caudle v. Bristow Optical Co., Inc.*, 224 F.3d 1014, 1028-29 (9th Cir. 2000).

AFFIRMED.

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[4] *See* Cal. Corp. Code § 191(d); *see also id.* § 2105(a).

[5] *See Port of Stockton v. W. Bulk Carrier KS*, 371 F.3d 1119, 1121 (9th Cir. 2004); Cal. Civ. Proc. Code § 1021.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (OCTOBER 27, 2020)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE BANK OF NEW YORK MELLON, FKA The Bank of New York, as Trustee for the Certificate Holders CWALT, Inc. Alternative Loan Trust 2006-OC8 Mortgage Pass-Through Certificates, Series 2006-OC8,

Plaintiff-counter-defendant-Appellee,

v.

ALAN DAVID TIKAL, as Trustee of the KATN Revocable Living Trust; CAA, INC., a Nevada Corporation,

Defendants,

and

MARGUERITE DESELMS, Individually, and as Trustee of the Circle Road Revocable Living Trust Dated November 11, 2010,

Defendant-counter-claimant-Appellant.

No. 20-55993

D.C. No. 5:18-cv-01044-PSG-MRW
Central District of California, Riverside

The district court's judgment was entered on August 28, 2020. Appellant filed a notice of appeal of the August 28, 2020 judgment on September 24, 2020. On September 22, 2020, the district court received appellant's filing titled as "defendant's opposition to plaintiff's motion for attorneys fees and motion to strike and motion to alter or vacate the judgment Rule 60(b)." Appellant's September 22, 2020 filing may, in part, constitute one of the motions listed in Federal Rule of Appellate Procedure 4(a)(4). Proceedings in this court will be stayed until the district court determines whether appellant's September 22, 2020 filing includes a motion listed in Federal Rule of Appellate Procedure 4(a)(4) and, if so, whether the motion should be granted or denied. *See* Fed. R. App. P. 4(a)(4); *Leader Nat'l Ins. Co. v. Indus. Indem. Ins. Co.*, 19 F.3d 444, 445 (9th Cir. 1994).

Within 21 days after the district court's decision, appellant must notify this court in writing of the decision and state whether she wishes to move forward with this appeal.

To challenge the decision on the post-judgment motion, appellant must file an amended notice of appeal within the time set by Federal Rule of Appellate Procedure 4. *See* Fed. R. App. P. 4(a)(4).

A copy of this order will be sent to the district court.

FOR THE COURT:

Molly C. Dwyer
Clerk of Court

By: Delaney Andersen
Deputy Clerk
Ninth Circuit Rule 27-7

MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (JANUARY 4, 2022)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE BANK OF NEW YORK MELLON,
as Trustee for the Certificate Holders CWALT, Inc. Alternative Loan Trust 2006-OC8 Mortgage Pass-Through Certificates, Series 2006-OC8, FKA The Bank of New York,

Plaintiff-counter defendant-Appellee,

v.

ALAN DAVID TIKAL, as Trustee of the KATN Revocable Living Trust and CAA, INC., a Nevada corporation,

Defendants,

and

MARGUERITE DESELMS, Individually, and as Trustee of the Circle Road Revocable Living Trust Dated November 11, 2010,

Defendant-counter claimant-Appellant.

No. 20-55993

D.C. No. 5:18-cv-01044-PSG-MRW
U.S. District Court for Central California, Riverside

The judgment of this Court, entered November 18, 2021, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

Molly C. Dwyer
Clerk of Court

By: Nixon Antonio Callejas Morales
Deputy Clerk
Ninth Circuit Rule 27-7

THE COURT GRANTS PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND COSTS (NOVEMBER 12, 2020)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES–GENERAL

THE BANK OF NEW YORK MELLON,

v.

MARGUERITE DESELMS, ET AL.

No. EDCV 18-1044 PSG (MRWx)

Before: Philip S. GUTIERREZ,
United States District Judge.

Before the Court is a motion for attorneys' fees and costs filed by Plaintiff The Bank of New York Mellon ("Plaintiff"). *See* Dkt. # 110 ("*Mot.*"). Defendant Marguerite DeSelms ("Defendant") opposed, *see* Dkt. # 119 ("*Opp.*"), and Plaintiff replied, *see* Dkt. # 122 ("*Reply*"). The Court finds the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. After considering the moving, opposing, and reply papers, the Court GRANTS Plaintiff's motion for attorneys' fees and costs.

I. Background

The Court has provided extensive factual background in this case in its previous orders and reiterates the relevant portions of the background here.

In 2006, DeSelms entered into a mortgage agreement with Bondcorp Realty Services, Inc., ("Bondcorp") as lender and Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee beneficiary for Bondcorp. *See August 26, 2020 Summary Judgment Order*, Dkt. # 103 ("*SJ Order*"), at 1. Pursuant to the mortgage agreement, Bondcorp loaned DeSelms $340,000 to purchase real property located at 3489 Circle Road in San Bernardino, California (the "Property"). *Id.* In connection with the loan, DeSelms executed a promissory note in favor of Bondcorp. *Id.* A deed of trust ("First DOT") securing that note in favor of Bondcorp was recorded with the San Bernardino County Recorder on August 14, 2006. *Id.*

Three years later, around August of 2009, DeSelms defaulted on her mortgage. *Id.* at 2. A few months later, DeSelms requested recordation of a document in the County of San Bernardino that substituted KATN Trust as the foreclosure trustee and released the First DOT ("First DOT Reconveyance Attempt"), supposedly on the authority of the beneficiary of the First DOT. *Id.* That same day, DeSelms requested recordation of a grant deed, which purported to transfer title from herself to the Circle Road Trust, and requested recordation of a deed of trust in favor of Alan David Tikal, trustee of the KATN Trust, as beneficiary. *Id.* Despite the First DOT Reconveyance Attempt, DeSelms admitted under oath in bankruptcy proceedings one year later that she owed $340,000 under the First DOT. *Id.*

On September 14, 2011, the beneficial interest in the First DOT was assigned to BONY ("BONY Assignment"), and this assignment was recorded with the San Bernardino County Recorder on October 7, 2011. *Id.*

Between 2014 and 2017, DeSelms attempted to obtain a loan modification from her loan servicers. *Id.* When these efforts failed, BONY instituted foreclosure proceedings against the property. *Id.* In doing so, BONY discovered the First DOT Reconveyance Attempt, and cancelled the foreclosure sale. *Id.*

In 2018, BONY filed suit in this Court against DeSelms, both individually and in her capacity as trustee of the Circle Road Trust, as well as against Alan David Tikal, as trustee of the KATN Revocable Living Trust, and CAA, Inc.,[1] asserting three causes of action, only two of which are relevant here:

> First Cause of Action: Cancellation of Written Instrument, seeking to have the Court adjudge the First DOT Reconveyance Attempt void and cancelled.
>
> Third Cause of Action: Declaratory Relief, seeking to have the Court declare the First DOT as a valid and enforceable senior lien against the Property.

Id. at 3.

On August 26, 2020, the Court awarded BONY summary judgment on its own claims and against DeSelms' counterclaims. *See generally id.* Consistent

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[1] BONY's claims against Defendant CAA, Inc., were dismissed by the Court without prejudice for failure to serve within 90 days, as required by Federal Rule of Civil Procedure 4. *See* Dkt. # 28.

with its Order, the Court entered a judgment in BONY's favor, under which BONY is entitled to recover attorneys' fees and costs pursuant to the provisions of the First DOT. *See generally August 27, 2020 Judgment,* Dkt. #104 ("*Judgment*").[2] BONY now moves to recover its attorneys' fees and costs. *See generally Mot.*

II. Legal Standard

Under the "American Rule," each party to a lawsuit is generally responsible for its own attorneys' fees. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). However, under Federal Rule of Civil Procedure 54(d)(2), a party may move for an award of attorneys' fees within fourteen days of the entry of judgment. The motion must "specify the judgment and the statute, rule, or other grounds entitling the movant to the award," as well as "state the amount sought or provide a fair estimate of it." Fed. R. Civ. P. 54(d)(2)(B)(ii)–(iii).

If a fee award is appropriate, the court must then ensure that the amount requested is reasonable. *See Hensley*, 461 U.S. at 433–34. Reasonableness is generally determined using the "lodestar" method, where a court considers the work completed by the attorneys and multiplies "the number of hours reasonably expended on the litigation by the reasonable hourly rate." *Gracie v. Gracie*, 217 F.3d 1060, 1070 (9th Cir. 2000) (internal citations omitted); *Hensley*, 461 U.S. at 433. The moving party has the burden to produce evidence that the rates and hours worked are reason-

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[2] While the Court's judgment is dated August 27, 2020, it was not entered until August 28, 2020.

able. *See Intel Corp. v. Terabyte Int'l, Inc.*, 6 F.3d 614, 622–23 (9th Cir. 1983). "The party opposing the fee application has a burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and reasonableness of the hours charged or the facts asserted by the prevailing party in its affidavits." *Gates v. Deukmejian*, 987 F.2d 1392, 1397–98 (9th Cir. 1992).

III. Discussion

A. Jurisdiction to Rule on the Instant Motion

As an initial matter, DeSelms argues that BONY's motion for attorneys' fees and costs is premature because her appeal of the Court's summary judgment ruling is currently pending in the Ninth Circuit. *Opp.* 3:14–17, 4:14–16. The Court disagrees.

In *Masalosalo by Masalosalo v. Stonewall Ins. Co.*, 718 F.2d 955 (9th Cir. 1983), the issue before the Ninth Circuit was "whether a district court acts beyond its jurisdiction in awarding attorneys' fees after a notice of appeal has been filed and before [the circuit] has issued its mandate." *Id.* at 956. The Court agreed with other circuits that, in such circumstances, "an appeal from the merits does not foreclose an award of attorneys' fees by the district court." *Id.*

Accordingly, the Court rejects DeSelms's argument that BONY's fee motion is premature.

B. Requirements of Rule 54(d)(2)

As mentioned above, under Rule 54(d)(2), BONY's motion for attorneys' fees (1) must have been filed within fourteen days after entry of judgment, (2) must specify the judgment and grounds entitling it to

the award, and (3) must state the amount sought. Fed. R. Civ. P. 54(d)(2)(B)(i)–(iii).

First, the Court entered judgment in BONY's favor on August 28, 2020. *See generally Judgment.* Although the judgment is dated August 27, it was not entered until August 28. *Id.* Therefore, BONY argues that its motion on September 11—fourteen days after August 28—was timely. *Reply* 8:4–6. DeSelms counters that BONY's motion is untimely because, due to an error in its original fee motion, BONY filed an amended version of its motion on September 14—*i.e.*, more than fourteen days after the Court entered judgment. *Opp.* 4:17–5:5; *Reply* 8:6–14. BONY responds that its filing of an amended motion "did nothing to prejudice DeSelms" because the original motion erroneously contained approximately thirty more hours than were actually billed, resulting in fees that were roughly $7,000 too high. *Reply* 8:8–14; Dkt. # 109. Because (1) BONY's original motion was timely, (2) BONY's amendment relates only to a calculation error, and (3) the amendment actually favors DeSelms because it requests approximately $7,000 less in fees, the Court accepts the amended motion as timely filed under Rule 54(d)(2)(B)(i).

Second, BONY requests the award as authorized by the Court's judgment and the First DOT. *Mot.* 10:10–28; *Reply* 8:22–28. This satisfies Rule 54(d)(2)(B)(ii).

Third, BONY requests its lodestar fees in the amount of $77,777.50. *Mot.* 14:23–25. This satisfies Rule 54(d)(2)(B)(iii).

Accordingly, the Court finds that BONY has met the procedural requirements of Rule 54(d)(2). The Court

must now consider whether the fee award is substantively appropriate and reasonable under the circumstances.

C. Attorneys' Fees Are Appropriate Under the First DOT

The Court's judgment "awarded [BONY] costs of suit and reasonable attorneys' fees as to DeSelms as permitted by the provisions of the Deed of Trust." *Judgment* ¶ 4. Therefore, the Court must now determine whether BONY is entitled to its requested fees under the First DOT.

Section 9 of the First DOT states:

> Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: . . . (b) appearing in court; and (c)

> paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. . . .
>
> Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

Declaration of Joshua M. Bryan, Dkt. # 106-1 ("*Bryan Decl.*"), Ex. B ("*Fee Provision*"), § 9.

BONY argues that DeSelms's fraudulent reconveyance and attempt to divest BONY of its security interests violated the covenants of the First DOT, and therefore that it is entitled to attorneys' fees under the First DOT's Fee Provision. *Mot.* 13:17–26. The closest that DeSelms comes to challenging this argument is her bald conclusory statement that "[t]here is no agreement requiring [her] to pay the fees," *Opp.* 18:7, possibly because she continues to assert that the First DOT is a forgery, *id.* 4:1–3, or because "[t]here is no original signed agreement by [DeSelms] for fees," *id.* 13:20–14:7. In its summary judgment ruling, the Court already rejected such assertions. *SJ Order* at 7; *Judgment* ¶ 2 (finding that DeSelms is bound by the First DOT). Therefore, the Court finds that DeSelms conceded this argument by failing to meaningfully address it in her opposition brief. *See Tapia v. Wells Fargo Bank, N.A.*, No. CV 15-03922 DDP (AJWX), 2015 WL 4650066, at *2 (C.D. Cal. Aug. 4, 2015) (arguments

to which no response is supplied are deemed conceded); *Silva v. U.S. Bancorp*, No. 5:10-cv-01854-JHN-PJWx, 2011 WL 7096576, at *3 (C.D. Cal. Oct. 6, 2011) (same).

Accordingly, BONY is entitled to its fees under the First DOT. As such, BONY is entitled to its requested fees if they are reasonable.

D. Reasonableness of the Requested Fees

The Court must now determine whether BONY's requested fees are reasonable. BONY requests its lodestar fees in the amount of $77,777.50. *Mot.* 14:23–25.

The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Caudle v. Bristow Optical Co.*, 224 F.3d 1014, 1028 (9th Cir. 2000) (citing *Hensley*, 461 U.S. at 424). Unless some exceptional circumstances justify deviation, the lodestar is presumed reasonable. *Quesada v. Thomason*, 850 F.2d 537, 539 (9th Cir. 1988). After computing the lodestar, the district court is to assess whether additional considerations, enumerated in *Kerr v. Screen Extras Guild. Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), require the court to adjust the lodestar figure. *Caudle*, 224 F.3d at 1028.

i. Lodestar Calculation—Reasonableness of Hourly Rate

The Court must first determine whether BONY's requested rate of $265 per hour is reasonable. *See Caudle*, 224 F.3d at 1028.

The reasonable hourly rate is the rate prevailing in the community for similar work. *See Gonzalez v. City of Maywood*, 729 F.3d 1196, 1200 (9th Cir. 2013) ("[T]he court must compute the fee award using an hourly rate that is based on the prevailing market rates in the relevant community." (citation omitted)); *Viveros v. Donahue*, CV 10-08593 MMM (Ex), 2013 WL 1224848, at *2 (C.D. Cal. Mar. 27, 2013) ("The court determines a reasonable hourly rate by looking to the prevailing market rate in the community for comparable services."). The relevant community is the community in which the court sits. *See Schwarz v. Sec'y of Health & Human Servs.*, 73 F.3d 895, 906 (9th Cir. 1995). A court can rely on the declaration of a prevailing plaintiff's attorney regarding the prevailing fees in the community. *See United Steelworkers of Am. v. Ret. Income Plan For Hourly-Rated Employees of ASARCO, Inc.*, 512 F.3d 555, 565 (9th Cir. 2008) (district court properly relied on a declaration from plaintiff's counsel to establish prevailing fees in ERISA case).

BONY seeks an hourly rate of $265. *Mot.* 16:8–9. BONY submits a declaration of counsel including a description of the attorney's experience and credentials. *Bryan Decl.* ¶ 9. Counsel has seventeen years of general litigation experience and has represented mortgage lenders and servicers in suits related to secured interests to mortgaged property for ten years. *Id.*

The Court also consults the *2018 Real Rate Report: The Industry's Leading Analysis of Law Firm Rates, Trends, and Practices* ("Real Rate Report") as a resource for analyzing BONY's request. *See Eksouzian v. Albanese*, No. CV 13-728 PSG (AJWx), 2015 WL 12765585, at *4–*5 (C.D. Cal. Oct. 23, 2015). The Real

Rate Report identifies attorney rates by location, experience, firm size, areas of expertise and industry, as well as specific practice areas, and is based on actual legal billing, matter information, and paid and processed invoices from more than eighty companies. *See Hicks v. Toys 'R' Us-Del., Inc.*, No. CV 13-1302 DSF JCG, 2014 WL 4670896, at *1 (C.D. Cal. Sept. 2, 2014).

The Real Rate Report lists the median hourly rate for all types of real estate associates as between $225 and $330. *See Real Rate Report* at 17. Additionally, it lists the median hourly rate for finance and securities associates working with "Investments and Other Financial Instruments" and "Loans and Financing" as between $310 and $644. *See id.* at 13. Therefore, the requested rate of $265 falls squarely within a reasonable range for counsel's services.

Moreover, DeSelms does not specifically challenge the requested rate as unreasonable, although she does state that the "entire motion is a sham" because "[t]here is no affidavit in support of fees; no attorney fee bill; [and] no breakdown in the fees or costs." *Opp.* 24:4–7. To the extent that DeSelms's argument is relevant at all, it is meritless because there is a declaration in support of the fee request, and it explains the requested award and lodestar calculation. *See generally Bryan Decl.*

Accordingly, the Court accepts the requested rate of $265 as reasonable.

ii. Lodestar Calculation—Reasonableness of Hours Expended

"The fee applicant bears the burden of documenting the appropriate hours expended in the litigation

and must submit evidence in support of those hours worked." *United States v. $28,000.00 in U.S. Currency*, 802 F.3d 1100, 1107 (9th Cir. 2015) (quoting *Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9th Cir. 1992)). "The district court . . . should exclude from this initial fee calculation hours that were not reasonably expended." *Hensley*, 461 U.S. at 434 (cleaned up). Hours not reasonably expended are those that are "excessive, redundant, or otherwise unnecessary." *Id.* A district court may reduce hours by either conducting an hour-by-hour analysis or by making an across-the-board percentage cut. *See $28,000.00 in U.S. Currency*, 802 F.3d at 1106.

BONY seeks compensation for 293.50 hours of work. *Mot.* 16:22–24; *Bryan Decl.* ¶¶ 10–11. Among other things, these hours were spent on "filing and serving the Complaint, responding to DeSelms's Counterclaim and Amended Counterclaim, extensive law and motion practice on the pleadings, substantial discovery, extensive communications with Defendant in pro per, drafting the motion for Summary Judgment and related briefing, trial preparation and drafting the instant Motion." *Mot.* 16:9–14. BONY argues that, due to DeSelms's *pro se* status, she "often filed lengthy and convoluted motions and pleadings, most of which required a response, and [ ] raised a discovery dispute as to nearly every response to written discovery provided by BONY," which bolsters the reasonableness of the hours its attorneys expended on this matter. *Id.* 16:14–18. Moreover, BONY chose not to include in its request 117.4 hours billed by three other attorneys in this matter. *Mot.* 14:27–28; *Bryan Decl.* ¶ 11.

DeSelms argues that BONY's request "is so outlandish . . . that it should be denied entirely." *Opp.*

17:8–9. However, besides her conclusion that the request "for this case[,] which terminated at such an unreasonably early juncture[,] is outrageous," DeSelms does not explain why the number of hours requested is unreasonable. *Id.* 16:9–12. Therefore, the Court finds that DeSelms conceded this point by failing to meaningfully address it in her opposition brief. *See Tapia*, 2015 WL 4650066 at *2; *Silva*, 2011 WL 7096576 at *3. Moreover, the Court agrees with BONY that it justifiably devoted substantial resources to litigating this case through summary judgment. *Mot.* 16:9–18. This dispute has been extensively litigated for more than two years, and the parties have engaged in multiple rounds of motion practice. Additionally, BONY only seeks to recover a portion of its fees—declining to include 117.4 hours of billed time—which reinforces the reasonableness of the request. Accordingly, the Court finds that the number of hours BONY requests is reasonable.

In sum, the Court concludes that the rates and hours described above are reasonable, for a total lodestar amount of $77,777.50.

E. DeSelms's Miscellaneous Opposition Arguments

The Court now considers DeSelms's various opposition arguments, which tangentially address the issues in BONY's motion (at best). *See Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 923 n.4 (9th Cir. 2011) (the Court "liberally construe[s]" *pro se* filings, holding them to a less stringent standard than documents drafted by experienced lawyers (quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (2007))).

First, DeSelms raises claims that the Court explicitly rejected in its summary judgment motion, such as that BONY does not exist, lacks standing to sue, lacks the capacity to sue, that the First DOT was forged or is otherwise invalid, and more. *See Opp.* 5:7–12:16, 14:4–16:4; *see generally SJ Order*. Having previously rejected these conclusory (and largely frivolous) arguments, the Court does not reconsider them here.

Second, DeSelms argues that "[t]here is no original signed agreement by [DeSelms] for fees" and that BONY has not filed proof of a retainer agreement. *Opp.* 13:20–14:7. As discussed above, BONY seeks attorneys' fees under the Court's judgment and the First DOT. As established in the Court's judgment, DeSelms is bound by the terms of the First DOT, which encumbers the Property. *Judgment* ¶ 2. Therefore, because BONY can seek its fees under the First DOT, there is, in fact, an agreement signed by DeSelms that requires her to pay BONY's fees.

Separately, to the extent that DeSelms argues that, under Rule 54(d)(2)(B)(iv), BONY was required to disclose the terms of its retainer agreement, she is incorrect. Subsection (iv) only applies "if the court so orders," and the Court never ordered BONY to disclose the terms of its fee agreement. *See* Fed. R. Civ. P. 54(d)(2)(B)(iv). Nor did DeSelms move or otherwise request that the Court issue such an order. Accordingly, the Court rejects these arguments.

Finally, DeSelms argues that the Court should deny BONY's motion because BONY failed to meet and confer. *Opp.* 19:18–23:12. The Court disagrees that BONY failed to do so.

Based on the copies of the emails in DeSelms's opposition, BONY sought to schedule a phone call to discuss the case multiple times, *see Opp.* 23:1–6, 21:26–22:4, but DeSelms never provided times that she was available, *see id.* 22:21–27, 21:17–24. Instead, DeSelms repeated her previously rejected contentions that the trust at issue does not exist and that it is not licensed to do business in California, and she demanded to see proof of a retainer agreement and proof that the requested fees were paid. *See id.* Therefore, it was DeSelms, herself, who thwarted BONY's attempt to meet and confer by making meritless demands and refusing to provide her availability for such a meeting.

IV. Conclusion

Because DeSelms raises no valid arguments against BONY's motion, and because BONY's requested lodestar fees are reasonable, the Court GRANTS BONY's motion for attorneys' fees. BONY is entitled to $77,777.50 in attorneys' fees under the First DOT.

IT IS SO ORDERED.

THE COURT DENIES THE MOTION TO VACATE ITS SUMMARY JUDGMENT ORDER (OCTOBER 29, 2020)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES–GENERAL

THE BANK OF NEW YORK MELLON,

v.

MARGUERITE DESELMS, ET AL.

No. CV 18-1044 PSG (MRWx)

Before: Philip S. GUTIERREZ,
United States District Judge.

On August 27, 2020, this Court awarded The Bank of New York Mellon ("BONY") summary judgment on its own claims and against Marguerite DeSelms's ("DeSelms") counterclaims. See Dkt. # 103. On August 28, the Court entered a judgment to that effect. *See* Dkt. # 104.

On September 11, BONY filed a motion in the District Court for attorneys' fees, as authorized by the Court's judgment. *See* Dkts. # 106, 110. On September 22, DeSelms opposed BONY's motion and also requested that the Court vacate its prior judgment in favor of BONY under Federal Rule of Civil Procedure 60(b). *See* Dkt. # 119.

Meanwhile, two days later, DeSelms appealed the Court's prior judgment to the Court of Appeals for the Ninth Circuit. *See* Dkt. # 116. On October 26, the Ninth Circuit ordered this Court to "determine[ ] whether [DeSelms's] September 22, 2020 filing includes a motion listed in Federal Rule of Appellate Procedure 4(a)(4) and, if so, whether the motion should be granted or denied." *See* Dkt. # 123.

Construing DeSelms's *pro se* motion liberally, *see Estelle v. Gamble*, 429 U.S. 97, 106 (1976), the Court accepts it as properly filed. Therefore, her Rule 60(b) motion, filed 25 days after judgment, satisfies Federal Rule of Appellate Procedure 4(a)(4)(vi). However, because DeSelms's motion merely reiterates arguments that the Court previously rejected, the Court DENIES her motion on its merits.

IT IS SO ORDERED.

JUDGEMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (AUGUST 28, 2020)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE BANK OF NEW YORK MELLON, FKA The Bank of New York, as Trustee for the Certificate Holders CWALT, Inc. Alternative Loan Trust 2006-OC8 Mortgage Pass-Through Certificates, Series 2006-OC8,

Plaintiff,

v.

MARGUERITE DESELMS, Individually, and as Trustee of the Circle Road Revocable Living Trust Dated November 11, 2010, ALAN DAVID TIKAL, as Trustee of the KATN Revocable Living Trust; and CAA, INC., a Nevada corporation,

Defendants,

No. 5:18-cv-1044-PSG-MRW

Courtroom: 6A

Before: Philip S. GUTIERREZ, United States District Judge.

Pursuant to this Court's Order granting Plaintiff The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificate Holders CWALT, Inc. Alternative Loan Trust 2006-OC8 Mortgage Pass-Through Certificates, Series 2006-OC8's ("BONY" or "Plaintiff") Motion for Summary Judgment, and for good cause shown, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The Substitution of Trustee and Full Reconveyance (hereafter the "Fake First DOT Reconveyance") recorded on November 17, 2010 as document number 2010-0476655 in the official records of San Bernardino County is hereby void and cancelled.

2. It is hereby judicially declared that (i) the Fake First DOT Reconveyance recorded on November 17, 2010 as document number 2010-0476655 is void and cancelled; (ii) the First Deed of Trust recorded on August 14, 2006 as document number 2006-0552510 is valid and encumbers the property commonly known as "3489 Circle Road, San Bernardino, California 92405 ("Property"); and (iii) BONY is the beneficiary under the First Deed of Trust with all rights and interest secured therein including the right to non-judicial foreclosure.

3. A permanent injunction is hereby issued such that Defendants shall not execute or record any further documents which purport to modify, amend, or extinguish the First Deed of Trust, BONY's interest in the Property, or any ongoing non-judicial foreclosure proceedings.

4. BONY is hereby awarded costs of suit and reasonable attorneys' fees as to DeSelms as permitted by the provisions of the Deed of Trust (recorded with

the San Bernardino County Recorder on August 14, 2006 as document number 2006- 0552110) executed by DeSelms with respect to the Property and in accordance with applicable law as to DeSelms.

5. BONY may have this Judgment recorded with the San Bernardino County Recorder's Office.

IT IS FURTHER ADJUDGED AND DECREED that:

1. Defendant Marguerite DeSelms ("DeSelms") shall take nothing by way of her operative First Amended Counterclaim.

2. DeSelms shall take nothing as to Plaintiff.

3. Judgment shall be entered in favor of Plaintiff and against DeSelms on each and every claim contained in DeSelms's First Amended Counterclaim.

4. Plaintiff may recover costs and attorneys' fees from DeSelms as permitted by law.

/s/ Phillip S. Gutierrez
United States District Judge

Dated: August 27, 2020

THE COURT GRANTS PLAINTIFF/COUNTER-DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (AUGUST 27, 2020)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES–GENERAL

THE BANK OF NEW YORK MELLON,

v.

MARGUERITE DESELMS, ET AL.

No. EDCV 18-1044 PSG (MRWx)

Before: Philip S. GUTIERREZ,
United States District Judge.

Before the Court is Plaintiff/Counter-Defendant The Bank of New York Mellon's ("BONY") motion for summary judgment. *See* Dkt. # 82 ("*Mot.*"). Defendant/ Counterclaimant Marguerite Deselms ("DeSelms") opposes the motion, *see* Dkt. # 102 ("*Opp.*"), and Plaintiff replied, *see* Dkt. # 97 ("*Reply*"). The Court finds the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. After considering the moving, opposing, and reply papers, the Court GRANTS Plaintiff's motion for summary judgment.

I. Factual Background[1]

In 2006, DeSelms entered into a mortgage agreement with Bondcorp Realty Services, Inc., ("Bondcorp") as lender and Mortgage Electronic Registration Systems, Inc., ("MERS") as nominee beneficiary for Bondcorp. *See Statement of Uncontroverted Facts*, Dkt. # 82-1 ("*SUF*") ¶¶ 1, 4. Pursuant to the mortgage agreement, Bondcorp loaned DeSelms $340,000 to purchase real property located at 3489 Circle Road in San Bernardino, California (the "Property"). *Id.* In connection with the loan, BONY executed a promissory note in favor of Bondcorp. *Id.* ¶ 2. A deed of trust ("First DOT") securing that note in favor of Bondcorp was recorded with the San Bernardino County Recorder on August 14, 2006. *Id.* ¶ 3.

Three years later, around August of 2009, DeSelms defaulted on her mortgage. *Id.* ¶ 5. A few months later, DeSelms requested recordation of a document in the County of San Bernardino that substituted KATN Trust as the foreclosure trustee and released the First DOT ("First DOT Reconveyance Attempt"), supposedly on the authority of the beneficiary of the First DOT. *Id.* ¶ 6. That same day, DeSelms requested recordation of a grant deed, which purported to transfer title from herself to the Circle Road Trust, *see id.* ¶ 7, and requested recordation of a deed of trust in favor of Alan David Tikal, trustee of the KATN Trust, as

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[1] Although the Court must take the facts in the light most favorable to DeSelms, for the reasons set forth in the discussion section of this Order, DeSelms has not demonstrated a genuine, material dispute regarding BONY's proffered statement of undisputed facts. Therefore, because BONY has cited evidence supporting its statements of fact, which DeSelms has not successfully refuted, the operative facts in this case are undisputed.

beneficiary, *see id.* ¶ 8. Despite the First DOT Reconveyance Attempt, DeSelms admitted under oath in bankruptcy proceedings one year later that she owed $340,000 under the First DOT.[2] *Id.* ¶¶ 9 10.

On September 14, 2011, the beneficial interest in the First DOT was assigned to BONY ("BONY Assignment"), and this assignment was recorded with the San Bernardino County Recorder on October 7, 2011. *Id.* ¶¶ 11 12.

Between 2014 and 2017, DeSelms attempted to obtain a loan modification from her loan servicers. *Id.* ¶ 14. When these efforts failed, BONY instituted foreclosure proceedings against the property. *Id.* ¶ 15. In doing so, BONY discovered the First DOT Reconveyance Attempt, and cancelled the foreclosure sale. *Id.* ¶ 16. This case concerns BONY's and DeSelms's rights and obligations regarding the Property.

II. Procedural Background

In 2018, BONY filed suit in this Court against DeSelms, both individually and in her capacity as trustee of the Circle Road Trust, as well as against Alan David Tikal, as trustee of the KATN Revocable

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[2] BONY has submitted a Request for Judicial Notice, requesting that the Court take notice of various documents related to DeSelms's bankruptcy petition. *See Request for Judicial Notice*, Dkt. # 85 ("*RJN*"). Because such matters of public record are proper subjects of judicial notice, the Court GRANTS the request. *See* Fed. R. Evid. 201; *Schweitzer v. Scott*, 469 F. Supp. 1017, 1020 (C.D. Cal. 1979) ("[T]he Court is empowered and does take judicial notice of court files and records."); *United States ex rel. Dingle v. BioPort Corp.*, 270 F. Supp. 2d 968, 972 (W.D. Mich. 2003) ("Public records and government documents are generally considered 'not to be subject to reasonable dispute.'").

Living Trust, and CAA, Inc.,[3] *see Complaint* Dkt. # 1 ("*Compl.*"), asserting three causes of action, only two of which are relevant here:

> First Cause of Action: Cancellation of Written Instrument, seeking to have the Court adjudge the First DOT Reconveyance Attempt void and cancelled. *Id.* ¶¶ 26 33.
>
> Third Cause of Action: Declaratory Relief, seeking to have the Court declare the First DOT as a valid and enforceable senior lien against the Property. *Id.* ¶¶ 46 50.

DeSelms moved to dismiss BONY's Complaint under Federal Rule of Civil Procedure 12(b)(1), arguing that (1) BONY had no interest in the First DOT, (2) its claims were barred by a settlement agreement between DeSelms and another party in an earlier case, (3) its claims should have been brought as compulsory counterclaims by Bank of America in another action that she was litigating, and (4) its claims should be dismissed due to unclean hands. *See* Dkt. # 21 at 3.

The Court denied DeSelms's motion, finding that (1) BONY had adequately established standing by pleading that it had an interest in the First DOT and supporting that allegation with the recorded BONY Assignment, (2) BONY was not bound by the settlement agreement merely because it retained the same counsel that represented the party that DeSelms litigated against in an earlier case, (3) BONY was not a party to the Bank of America lawsuit and

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[3] BONY's claims against Defendant CAA, Inc., were dismissed by the Court without prejudice for failure to serve within 90 days, as required by Federal Rule of Civil Procedure 4. *See* Dkt. # 28.

therefore could not have pled its claims there, and (4) it was premature to decide the issue of unclean hands at that stage of the proceedings. *See id.* at 7 9.

Next, the Court granted DeSelms's motion for leave to file counterclaims. *See generally* Dkt. # 37. She asserted twelve, *see* Dkt. # 48 at 2 3, and BONY moved to dismiss them all, *see id.* at 1; Dkt. # 39. The Court dismissed six of DeSelms's counterclaims with prejudice. *See* Dkt. # 48 at 11 12. However, it granted DeSelms leave to amend (1) her extortion claim, (2) her Fair Debt Collection Practices Act claim, (3) her California Unfair Competition Law claim, and (4) her unjust enrichment and accounting claims. *See* Dkt. # 48 at 12. The Court denied BONY's motion regarding DeSelms's other two counterclaims one for intentional infliction of emotional distress ("IIED") and the other for quiet title. *Id.* at 6, 9. DeSelms filed a First Amended Counterclaim ("FACC"), which asserts only IIED and quiet title counterclaims *i.e.*, the claims that had already survived BONY's motion. *See* Dkt. # 50 ¶¶ 64, 70. To the extent that DeSelms now attempts to revive any of her counterclaims that were either (a) dismissed with prejudice or (b) dismissed with leave to amend, but not included in her FACC, those claims are not properly before the Court, and it will not consider them.

BONY now moves for summary judgment on its first and third causes of action and DeSelms's two counterclaims. *See generally Mot.* For the reasons set forth below, the Court grants BONY's motion for summary judgment.

III. Legal Standard

"A party may move for summary judgment, identifying each claim or defense or the part of each claim or defense on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the nonmoving party will have the burden of proof at trial, the movant can prevail by pointing out that there is an absence of evidence to support the moving party's case. *See id.* If the moving party meets its initial burden, the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, "specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence. Rather, it draws all reasonable inferences in the light most favorable to the nonmoving party. *See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 31 (9th Cir. 1987). The evidence presented by the parties must be capable of being presented at trial in a form that would be admissible in evidence. *See* Fed. R. Civ. P. 56(c)(2). Conclusory, speculative testimony in

affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *See Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

IV. Evidentiary Objections

As a preliminary matter, BONY asserts evidentiary objections along with its reply. *See* Dkt. # 99. To the extent that the Court relies on objected-to evidence, it relies only on admissible evidence and, therefore, the objections are overruled. *See Godinez v. Alta-Dena Certified Dairy LLC*, No. CV 15-01652 RSWL (SSx), 2016 WL 6915509, at *3 (C.D. Cal. Jan. 29, 2016).

V. Discussion

BONY argues that it is entitled to summary judgment on its first cause of action for cancellation of the First DOT Reconveyance Attempt and its third cause of action for a declaratory judgment that the First DOT is a valid, enforceable senior lien against the Property. *See Mot.* 14:10 19:2. It also argues that it is entitled to summary judgment on DeSelms's counterclaims for IIED and quiet title. *See id.* 19:3 22:13. The Court agrees. Each claim is addressed in turn.

A. First Cause of Action: Cancellation of First DOT Reconveyance Attempt

Under California Civil Code § 3412, a plaintiff can seek cancellation of a written instrument if "there is reasonable apprehension that[,] if left outstanding[,] [the instrument] may cause serious injury to a person against whom it is void or voidable." To prevail on such a claim, a plaintiff must prove that (1) the instrument is apparently valid on its face, but that it is act-

ually invalid, *see* Cal. Civ. Code § 3413; *Ephraim v. Metro. Tr. Co. of Ca.*, 28 Cal. 2d 824, 834 (1946); (2) the instrument is void or voidable due to, for example, fraud, *see Turner v. Turner*, 167 Cal. App. 2d 636, 641 (1959); and (3) there is a reasonable apprehension of serious injury, including pecuniary loss, *see id.*

BONY argues (1) that the First DOT Reconveyance Attempt is apparently valid "because, without examining the balance of the public record, it purports that Tikal is the trustee of the First DOT and purports to reconvey the interest in the First DOT to DeSelms," but that it is actually invalid because BONY never granted DeSelms, Tikal, or anyone else authority to reconvey its interest, *see Mot.* 17:14 21; *SUF* ¶¶ 6 8, 21 25; (2) for those same reasons, the First DOT Reconveyance Attempt was fraudulent and unauthorized, *see Mot.* 15:3 13; and (3) the First DOT Reconveyance Attempt has impeded its ability to foreclose on the Property notwithstanding DeSelms's 10-year default on her mortgage, causing it pecuniary loss, *see Mot.* 17:22 26; *SUF* ¶¶ 26 31.

DeSelms does not directly counter this argument, which is supported by competent evidence in the record. However, DeSelms makes numerous assertions throughout her opposition that attempt to dispute BONY's facts and claims and could seemingly be relevant to all of BONY's arguments. The Court addresses all of DeSelms's blanket arguments here and will refer back to this section in the subsequent parts of this Order.

DeSelms argues that (1) BONY lacks standing to seek cancellation because it does not exist, it was not a party to the First DOT Reconveyance Attempt, and there is a break in the chain of assignments or

substitution of trustees, *see Opp.* 10, 15, 19; (2) BONY does not physically possess the original mortgage and note and it is not licensed to do business in California, *see id.*; (3) the mortgage documents that BONY relies on are not the originals and are forged, *see id.* 6; and (4) her mortgage payments were extinguished either (a) because BONY was paid via private mortgage insurance, which was required under "the pooling and servicing agreement," *see id.*, or (b) by a settlement agreement to which she was not a party, *see id* 13 14.[4] The Court rejects each of these arguments in turn.

i. "Standing"

DeSelms's argument that BONY does not exist appears to be based on her belief that "the trust," presumably meaning the trust for which BONY is acting in its trustee capacity, closed when it securitized her mortgage into it. *See Opp.* 46. Other than bald, conclusory statements similar to this, DeSelms has not offered actual evidence or legal support for her position (a) that the trust is closed or (b) that such a closure of the trust would strip BONY of its ability to recover. Moreover, BONY has provided evidence that it does, in fact, currently exist. *See Reply* 11:11 24.

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[4] The Court does not address arguments it has previously rejected or the innumerable seemingly unsupported assertions in DeSelms's opposition. *See Albrechtsen v. Bd. of Regents of Univ. of Wis. Sys.*, 309 F.3d 433, 436 (7th Cir. 2002) ("Judges are not like pigs, hunting for truffles buried in the record."); *see also Standing Order* ¶ 6(c) ("Because summary judgment motions are fact-dependent, parties should prepare papers in a fashion that will assist the court in absorbing the mass of facts (*e.g.*, generous use of tabs, tables of contents, headings, indices, etc.)").

Nor does DeSelms explain why BONY does not have standing to challenge her fraudulent reconveyance of its interest in the Property merely because it was not a party to the First DOT Reconveyance Attempt. To be sure, it would make fraudulent reconveyances fairly easy to accomplish if the Court accepted such an argument. However, the reality is that BONY was not a party to the reconveyance because DeSelms sought to secretly deprive BONY of its interest in the Property. Because DeSelms has not provided any relevant legal support for her position, and the Court finds it counterintuitive (at best), the Court rejects her argument.

Finally, DeSelms's argument about an alleged break in the chain of title fails. Although it is not entirely clear, it appears that the break in the chain of title that DeSelms points to is the "break" she caused by the First DOT Reconveyance attempt. *See Opp.* 15 (asserting that there has never been a valid substitution of trustee to replace "the last substituted trustee," which presumably refers to the First DOT Reconveyance Attempt). Again, she offers no reason why her own fraudulent conduct should block BONY from challenging the reconveyance.

ii. Possession and License

The Court rejects DeSelms's claim that BONY lost its interest in the Property because it lacks physical possession of the original note and mortgage. California courts seem to have rejected that proposition. *See Debrunner v. Deutsche Bank Nat'l Trust Co.*, 204 Cal. App. 4th 433, 440 (2012) ("We [ ] see nothing in the applicable statutes that precludes foreclosure when the foreclosing party does not possess the original

promissory note."). And, under California Corporations Code § 191(d), BONY is not required to be licensed in California because it is engaged in activities that are excluded from the definition of transacting "intrastate business." *See id.* § 191(d)(3) (owning and enforcing loans); *id.* § 191(d)(4) (modifying, renewing, extending, transferring, or selling loans); *id.* § 191(d)(6) (acquiring title to real property covered by mortgage or deed of trust via trustee or judicial sale or foreclosure); *Castaneda v. Saxon Mortg. Servs., Inc.*, 687 F. Supp. 2d 1191, 1195 n.3 (E.D. Cal. 2009).

iii. Forged or Fake Documents

While DeSelms claims the documents BONY relies on are fake or forged, she never disputes that original copies of those documents exists, nor that the substance of the "fake" documents is any different from the originals. Even if she had disputed the substance of the documents provided here, she has no evidence supporting her assertion that they are, in fact, forged, and her bald allegation is contradicted by her bankruptcy petition, which acknowledges the existence of her debt under the First DOT and was filed under penalty of perjury. *See FAC* ¶¶ 9 10; *RJN* Ex. 2 (Schedule D). Accordingly, DeSelms has failed to create a genuine issue of material fact regarding the authenticity of any of BONY's documents, and even if she had, she has not demonstrated a genuine factual dispute regarding the accuracy of the substance BONY's documents. *See Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) ("[T]his court has refused to find a 'genuine issue' where the only evidence presented is 'uncorroborated and self-serving' testimony.").

iv. Extinguishment of Mortgage

Finally, DeSelms does not provide any evidence that (1) BONY possessed mortgage insurance covering her loan, (2) what "pooling and servicing agreement" she is referring to, (3) the amount of money that BONY allegedly received from such insurance, or (4) why BONY's receipt of insurance would extinguish her mortgage obligation. And even if she had done so, she has not contended why this would render the First DOT Reconveyance Attempt permissible (instead of fraudulent).

Nor does she explain why the settlement agreement that she attached to her opposition extinguished her mortgage obligation. The agreement was reached between Bank of America (among others) and BONY in its trustee capacity for certain securitized loan trusts. *See Reply* 7:9 20; Dkt. # 100 at 56 142. The settlement was reached so that BONY, in its trustee capacity for those loan trusts, would release potential claims against Bank of America and the other parties related to certain representations and warranties made to BONY by those parties. *See id.* The agreement explicitly states that "[n]o Person not a Party to this Settlement Agreement shall have any third-party beneficiary or other rights under this Settlement Agreement," *see Reply* 14:9 13; Dkt. # 100 at 90, and DeSelms provides no explanation why a settlement of potential breach of contract claims between BONY and these other parties affect her whatsoever, let alone why any such settlement agreement could have absolved her of her obligation to pay her personal debts.

In sum, none of DeSelms's arguments create a genuine issue of material fact or suggest that BONY

is otherwise not entitled to summary judgment. Accordingly, because BONY has produced undisputed evidence establishing a claim for cancellation of the First DOT Reconveyance attempt, it is entitled to summary judgment on its first cause of action.

B. Third Cause of Action: Declaration that the First DOT is Valid

The Declaratory Judgment Act ("DJA") provides that "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such a declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). A "case of actual controversy" is one in which "there is [1] a substantial controversy, [2] between parties having adverse legal interests," which is "[3] of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

Here, there is a substantial controversy between BONY and DeSelms over the Property. BONY claims that it is owed over 10 years of mortgage payments, worth over $500,000, and that it will be unable to recover that money absent a declaration of its rights. *Reply* 17:21 24. Therefore, the Court agrees that a declaratory judgment is appropriate because there is an actual, immediate controversy between the parties.

While DeSelms never specifically addresses BONY's request for a declaratory judgment in her opposition, some of her arguments that the Court addressed above could logically apply to BONY's declaratory judgment claim. However, as mentioned in the previous section, none of DeSelms's arguments

create a genuine dispute regarding BONY's status as the senior lienholder of the Property. Because (1) BONY was assigned all of the beneficial interest in the Property that was originally held by Bondcorp and secured by the First DOT, (2) the First DOT Reconveyance attempt was unauthorized and invalid, and (3) BONY has never relinquished its interest in the property, *see SUF* ¶¶ 1 4, 11 13, 20 25, the Court finds that BONY possesses a first priority security interest in the Property pursuant to the terms of the First DOT. BONY is therefore entitled to summary judgment on this claim.

C. First Counterclaim: Intentional Infliction of Emotional Distress

To plead a claim for IIED under California law, a claimant must allege that the accused "(1) engaged in extreme and outrageous conduct with the intention of causing, or reckless disregard of the probability of causing, severe emotional distress . . . ; (2) the [claimant] actually suffered severe or extreme emotional distress; and (3) the outrageous conduct was the actual and proximate cause of the emotional distress." *Ross v. Creel Printing & Publ'g Co.*, 100 Cal. App. 4th 736, 744 45 (2002). "To be outrageous, conduct must be 'so extreme as to exceed all bounds of that usually tolerated in a civilized community.'" *Id.* at 745 (quoting *Cervantez v. J.C. Penny Co.*, 24 Cal. 3d 579, 593 (1979)).

California courts have noted that debt collection "by its very nature often causes the debtor to suffer emotional distress" because creditors often "intentionally seek[ ] to create concern and worry in the mind of a debtor in order to induce payment." *Id.* Recognizing that these tactics can be legitimate in some circum-

stances, they have found that "[s]uch conduct is only outrageous if it goes beyond all reasonable bounds of decency." *Id.* (cleaned up). Accordingly, courts have held that "[t]he act of foreclosing upon someone's home (absent other circumstances) is not the kind of extreme conduct that supports an intentional infliction of emotional distress claim." *Quinteros v. Aurora Loan Servs.*, 750 F. Supp. 2d 1163, 1172 (E.D. Cal. 2010). This is true even when the creditor fails to give proper notice of foreclosure, *see id.*, or when one of the creditor's employees told the plaintiff that the sale would not occur, but the house was sold anyway, *see Mehta v. Wells Fargo Bank, N.A.*, 737 F. Supp. 2d 1185, 1204 (S.D. Cal. 2010).

When considering BONY's motion to dismiss DeSelm's counterclaims, the Court found that these cases were distinguishable because they "addressed conduct by a creditor who had a legal right to foreclose," whereas DeSelms "allege[d] that BONY intentionally fabricated documents in order to foreclose on her property when it lacked legal authority to do so." *See* Dkt. # 48 at 6. Accordingly, the Court denied BONY's motion to dismiss. *See id.*

Now, BONY argues that it is entitled to summary judgment because there is no evidence supporting DeSelms' allegation that BONY intentionally fabricated documents to foreclose on her property. *Mot.* 20:1 23. The Court agrees. DeSelms relies on all of the arguments previously addressed as evidence that BONY fabricated such documents. For the same reasons explained above, DeSelms's unsubstantiated, self-serving declaration that BONY forged documents is insufficient to raise a triable issue of fact on this counterclaim. *See Villiarimo*, 281 F.3d at 1061.

Accordingly, the Court awards summary judgment to BONY on DeSelms's IIED claim.

D. Second Counterclaim: Quiet Title

To prevail on a quiet title cause of action, a claimant must provide (1) a "description of the property that is the subject of the action," (2) the "title of the [claimant] as to which a determination under this chapter is sought and the basis of the title," (3) the "adverse claims to the title of the [claimant] against which a determination is sought," (4) the "date as of which the determination is sought," and (5) a "prayer for the determination of the title of the [claimant] against adverse claims." Cal. Code Civ. Proc. § 761.020 (a)(e). However, under California law, equitable principles generally provide that "a mortgagor of real property cannot, without paying his debt, quiet his title against the mortgagee." *Miller v. Provost*, 26 Cal. App. 4th 1703, 1707 (1994).

It its motion to dismiss DeSelms's counterclaims, BONY argued that DeSelms failed to allege that she could tender the balance owed on her loan, and therefore her quiet title claim should be dismissed. Dkt. # 48 at 9. The Court disagreed that the tender rule applied at that stage of the proceedings because DeSelms alleged that the assignment of her mortgage to BONY was void. *Id.*

Now, on summary judgment, BONY first renews its argument that DeSelms's quiet title claim fails as a matter of law because she has not alleged that she has tendered the outstanding balance owed on her loan. *Mot.* 21:24 26. Second, BONY asserts that DeSelms cannot establish the fifth requirement of a quiet title claim that her claim to title should prevail over BONY's

because the undisputed facts prove that (a) DeSelms did not pay off her loan, (b) BONY did not release the lien, and (c) DeSelms and Tikal had no authority to release BONY's interest by fraudulently recording the First DOT Reconveyance Attempt. *See id.* 22:5 9; *SUF* ¶¶ 1 12, 21 31. The Court agrees on both grounds.

First, DeSelms merely relies on the allegations in the FACC that she is ready, willing, and able to tender, but has not provided any evidence substantiating that assertion. *See Opp.* 22. This is insufficient to survive summary judgment. *See Nationstar Mortg., LLC v. Maplewood Springs Homeowners Ass'n*, 238 F. Supp. 3d 1257, 1266 (D. Nev. 2017) ("[T]he opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial."). Moreover, other assertions in her opposition actually suggest that she is not ready, willing, or able to tender, for example when she states that "it is impossible" to tender, *see Opp.* at 23, and potentially "lethal" to do so, *see id.* at 8. DeSelms also argues she is not required to allege that she can tender because BONY has no beneficial interest in the property, *see id.* at 21, but, as discussed in the preceding sections of this Order, the Court has found the opposite to be true.

Second, the Court has declared that BONY has a valid, enforceable first priority security interest in the Property under the terms of the First DOT, and therefore DeSelms cannot establish that her claim to title should prevail over BONY's (*i.e.*, the fifth element of a quiet title claim). DeSelms's claim does not prevail over BONY's because she defaulted on her mortgage, which was secured by the Property.

Accordingly, BONY is entitled to summary judgment on DeSelms's quiet title counterclaim.

VI. Conclusion

For the foregoing reasons, the Court GRANTS BONY's summary judgment motion in its entirety. This Order closes the case.

IT IS SO ORDERED.

ORDER CONTINUING TRIAL, PRE-TRIAL CONFERENCE AND RELATED DEADLINE (AUGUST 5, 2020)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE BANK OF NEW YORK MELLON, FKA The Bank of New York, as Trustee for the Certificate Holders CWALT, Inc. Alternative Loan Trust 2006-OC8 Mortgage Pass-Through Certificates, Series 2006-OC8,

Plaintiff,

v.

MARGUERITE DESELMS, Individually, and as Trustee of the Circle Road Revocable Living Trust Dated November 11, 2010; ALAN DAVID TIKAL, as Trustee of the KATN Revocable Living Trust; CAA, INC., a Nevada Corporation,

Defendants,

No. 5:18-cv-1044-PSG-MRW

Trial: Date: September 8, 2020, Time: 9:00 AM
Courtroom: 6A

Pre-Trial Conference: Date: August 24, 2020, Time: 2:30 PM Courtroom: 6A

Before: Philip S. GUTIERREZ, United States District Judge.

Good cause appearing, and pursuant to the stipulation of the parties, it is hereby ORDERED that the dates set forth in the in the Court's Orders of December 11, 2019 which include the Civil Minutes Order "Vacating Scheduling Conference" (hereafter "Scheduling Order") and "Order for Jury Trial (hereafter "Trial Order") are modified as follows:

1. The trial date is hereby continued to November 10, 2020.
2. The pre-trial conference is continued to October 26, 2020.
3. All pre-trial and pre-trial conference submission deadlines set forth in the Trial Order shall be continued in accordance with and follow the new trial date and pre-trial conference date.

IT IS SO ORDERED.

/s/ Phillip S. Gutierrez
United States District Judge

Dated: 8/5/2020

ORDER TO STRIKE
ELECTRONICALLY FILED DOCUMENT
(JUNE 18, 2020)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE BANK OF NEW YORK MELLON,

Plaintiff(s),

v.

MARGUERITE DESELMS, ET AL.,

Defendant(s),

No. 5:18-cv-1044 PSG-MRW

Before: Philip S. GUTIERREZ,
United States District Judge.

The Court hereby ORDERS the documents listed below be STRICKEN for failure to comply with the Court's Local Rules, General Orders, and/or Case Management Order, as indicated:

Date Filed: 6/16/20, Doc. No.: 72
Title of Document:
Motion in Support of Motion for Summary Jgmt

☑ Hearing information is missing, incorrect, or not timely

☑ Other: The hearing date selected is set on a Friday. *See* Calendars > Motion Calendar when noticing a hearing for motions.

/s/ Phillip S. Gutierrez
U.S. District Judge

Dated: 6/18/2020

MINUTE ORDER
RE: SETTLEMENT PROCEEDINGS
(MAY 27, 2020)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES–GENERAL

BONY MELLON

v.

DESELMS

No. EDCV 18-1044 PSG (MRWx)

Before: Hon. Michael R. WILNER,
United States Magistrate Judge.

1. Judge Gutierrez referred this civil action to Judge Wilner for settlement proceedings. Those proceedings must occur by July 10. (Docket# 58.) To that end, Judge Wilner spoke at length with the parties and set an in-person settlement conference for June 15. (Docket# 60, 61.)

2. However, the coronavirus crisis will not allow that conference to happen. The federal courthouses in Los Angeles are closed for civil matters. While it may be possible to conduct a virtual settlement meeting using videoconferencing, Judge Wilner will need to learn more about the parties' positions. Therefore, the in-person hearing scheduled for June 15 is VACATED.

3. Instead, by June 8, both BONY and Ms. Deselms will e-mail confidential settlement submissions to Judge Wilner. The e-mails should briefly highlight the best admissible evidence supporting the parties' claims and defenses, and candidly assess the likelihood of a trial victory or loss. Each party should also explain the parameters of reasonable settlement proposals for the action that all parties could plausibly accept.

4. Judge Wilner will not share the information in these e-mails with the opposing parties or Judge Gutierrez unless the parties authorize such a disclosure. The submissions may not exceed 500 words in length. E-mail this information to Judge Wilner at MRW_Chambers@cacd.uscourts.gov.

5. After reviewing the submissions, Judge Wilner may solicit further information, contact the parties separately, or set further joint proceedings as appropriate to comply with Judge Gutierrez's schedule.

Failure to comply with this order may result in the imposition of financial or litigation sanctions, or a recommendation that the action or certain claims be dismissed pursuant to Federal Rule of Civil Procedure 41(b). Applied *Underwriters, Inc. v. Lichtenegger*, 913 F.3d 884 (9th Cir. 2019).

ORDER DENYING DISCOVERY MOTION (APRIL 23, 2020)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES–GENERAL

BONY MELLON

v.

DESELMS

No. EDCV 18-1044 PSG (MRWx)

Before: Hon. Michael R. WILNER,
United States Magistrate Judge.

1. Defendant Deselms filed a motion to compel discovery in this civil quiet title action. (Docket# 64.) The motion suffers from numerous procedural and substantive defects. Even with an eye toward accommodating a self-represented litigant, there is no basis for enforcing Defendant's voluminous and chaotically-pled discovery demands. As a result, the motion is DENIED.[1]

[* * *]

2. As an initial matter, Defendant failed to comply with the Local Rules of Court that require joint preparation of discovery motions. L.R. 37-1, 37-2. The

[1] No hearing is warranted on this motion. Local Rule 7-15.

Court need not consider any motion filed in violation of those rules unless it is accompanied by an appropriate declaration describing the reason for the one-sided submission. L.R. 37-2.4. A pro se litigant in federal court "is subject to the same rules of procedure and evidence" as other parties "who are represented by counsel." *United States v. Merrill*, 7 46 F.2d 458, 465 (9t h Cir. 1984).

3. The Deselms motion violates these rules. The mot ion was not filed jointly, nor did it contain a compliant declaration explaining why. When prompted by the Court to explain this failure (Docket # 66), she explained in her reply that she "did not believe she needed a formal stipulation because during the conference call [the Court spoke with the parties in February to discuss settlement proceedings] with the court, the court ordered her to file a motion to compel." (Docket# 69 at 1.)

4. That's not true. Based on Judge Wilner's review of his notes of the call, Ms. Deselms certainly complained about the discovery she'd received from the bank during the action. And she was certainly informed that she could file a motion to compel further responses or other relief. But the Court neither "ordered" her to file such a motion nor did it relieve her of the important. obligations imposed by the joint filing rules. (Docket # 61.)

5. Indeed, the fact that Defendant engaged in some type of meet-and-confer session with bank—with her portion of the discovery motion—shortly before filing the improper motion suggests that she was aware of her obligation under the Local Rules. (Docket # 64 at 38, 74.) Even so, she filed it without waiting to obtain her adversary's section. That violates the

accepted practice in this district. (She also violated the rule requiring a table of contents for large briefs (L.R. 11-8, 37-2.1), which makes her submission exceptionally difficult to read. However, the Court will not enforce this rule under the circumstances.)

[* * *]

6. Alternatively, on the merits, Defendant's discovery motion is virtually frivolous, not understandable and wanders far afield from the issues remaining in this action. The scope of acceptable discovery in this case encompasses the limited claims and defenses that have advanced past the pleading stage. Fed. R. Civ. P. 26(b). Per District Judge Gutierrez's previous ruling, the claims in this action are essentially limited to the parties' various quiet title and mortgage transfer assertions regarding Ms. Deselm's home. (Docket # 48 at 9.)

7. Ms. Deselms bears the burden of demonstrating that the discovery she seeks is proportional to the needs of the case. Factors relevant to that assessment are "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit" Fed. R. Civ. P. 26(b)(1). A district court's ruling on a discovery motion, including issues regarding the proportionality component of Rule 26(b)(1), "are ordinarily reviewed for abuse of discretion." *Stevens v. Corelogic. Inc.*, 899 F.3d 666, 676 (9th Cir. 2018). A key component of exercising discretion is for the court to understand the basis of the discovery request and how it relates to the underlying action.

8. Defendant's moving papers and reply brief make no effort to explain how the discovery she seeks is proportional to this quiet title action. She also does not show how the bank's responses interfere with the proportionality analysis.[2] Rather, the bulk of her papers (other than unclear legal arguments that relate to state law topics (Docket # 64 at 14)) presses her arguments about the validity of various "trusts" in this action. Those contentions are far afield from any request. for proportional discovery directly related to her personal quiet title claims.

9. And directly put, her ancillary contentions about the resolution of another settled lawsuit or the veracity of the attestor to the discovery responses are unclear, illogical, and unrelated to issues in this limited federal action. (Docket # 69 at 5 *et seq.*) Defendant's litigation conduct prevents the Court from exercising its discretion in her favor in this discovery dispute.

10. For the foregoing reasons, the motion to compel is DENIED. An award of fees against Ms. Deselms under Rule 37(a)(5) might be warranted given the nature of the discovery motion and the violation of the Court's Local Rules. However, the Court concludes that the circumstances of the matter make an award of expenses unjust at present.

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[2] She makes a valid point about the impropriety of "blanket" or "form" objections. (Docket # 64 at 6.) Such objections have no real significance in this Court's analysis unless a responding party makes clear that "materials are being withheld on the basis of that objection." Fed. R. Civ. P. 34(b)(2)(C). However, Defendant's papers don't allow the Court to easily determine whether the bank asserted and relied upon such a denominated objection.

ORDER RE: DISCOVERY MOTION
(MARCH 20, 2020)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES–GENERAL

BONY MELLON

v.

DESELMS

No. EDCV 18-1044 PSG (MRWx)

Before: Hon. Michael R. WILNER,
United States Magistrate Judge.

1. The hearing on Defendant's discovery motion (Docket# 64) presently set for April 8 is VACATED due to the Court's closure during the coronavirus outbreak.

2. The Court received and reviewed Plaintiffs opposition submission. (Docket #65.) Ms. Deselms's optional reply submission will be due by April 3. Her reply should address Plaintiffs contentions regarding her noncompliance with Local Rule 37-1 *et seq.*

3. If appropriate, Judge Wilner may set the matter for a further telephone or video conference at a later date.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
ORDER FOR JURY TRIAL
(DECEMBER 11, 2019)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE BANK OF NEW YORK MELLON,

Plaintiff(s),

v.

MARGUERITE DESELMS, ET AL.,

Defendant(s),

Case No. ED CV-18-01044-PSG (MRWx)

Final Pretrial Conference: August 24, 2020 at 2:30 p.m.

Jury Trial Date: September 8, 2020 at 9:00 a.m.

Before: Philip S. GUTIERREZ,
United States District Judge.

UNLESS OTHERWISE ORDERED BY THE COURT, THE FOLLOWING RULES SHALL APPLY:

SCHEDULING

1. In General

All motions to join other parties or to amend the pleadings shall be filed and served by the cut-off date specified in the Scheduling Order.

2. Motions for Summary Judgment or Partial Summary Judgment

Motions for summary judgment or partial summary judgment shall be filed as soon as practical, however, in no event later than the motion cut-off date.

3. Discovery Cut-Off

The Court has established a cut-off date for discovery in this action. All discovery shall be complete by the discovery cut-off date specified in the Scheduling Order. This is not the date by which discovery requests must be served; it is the date by which all discovery is to be completed.

In an effort to provide further guidance to the parties, the Court notes the following:

a. Depositions

All depositions shall be scheduled to commence sufficiently in advance of the discovery cut-off date to permit their completion and to permit the deposing party enough time to bring any discovery motion concerning the deposition prior to the cut-off date.

b. Written Discovery

All interrogatories, requests for production of documents, and requests for admission shall be served

sufficiently in advance of the discovery cut-off date to permit the discovering party enough time to challenge (via motion practice) responses deemed to be deficient.

c. Discovery Motions

Whenever possible, the Court expects the parties to resolve discovery problems among themselves in a courteous, reasonable, and professional manner. The Court expects that counsel will strictly adhere to the Civility and Professional Guidelines adopted by the United States District Court for the Central District of California in July 1995.

Discovery matters are referred to a United States Magistrate Judge. Any motion challenging the adequacy of responses to discovery must be filed timely, and served and calendared sufficiently in advance of the discovery cut-off date to permit the responses to be obtained before that date, if the motion is granted.

Consistent resort to the Court for guidance in discovery is unnecessary and will result in the appointment of a Special Master at the joint expense of the parties to resolve discovery disputes.

4. Mandatory Settlement Conference

Pursuant to Local Rule 16-15, the parties in every case must select a settlement procedure. The final meeting with the parties' settlement officer must take place no later than 45 days before the Final Pretrial Conference.

FINAL PRE-TRIAL CONFERENCE ("PTC")

This case has been placed on calendar for a Final Pre-Trial Conference pursuant to Fed. R. Civ. P. 16

and 26. Unless excused for good cause, each party appearing in this action shall be represented at the Final Pre-Trial Conference, and all pre-trial meetings of counsel, by the attorney who is to have charge of the conduct of the trial on behalf of such party.

STRICT COMPLIANCE WITH THE REQUIREMENT OF FED. R. CIV. P. 16.26 AND LOCAL RULES ARE REQUIRED BY THE COURT. Therefore, carefully prepared Memoranda of Contentions of Fact and Law, a Joint Witness List, and Joint Exhibit List shall be submitted to the Court. The Joint Witness List shall contain a brief statement of the testimony for each witness, what makes the testimony unique from any other witness testimony, and the time estimate for such testimony. The Joint Exhibit List shall contain any objections to authenticity and/or admissibility to the exhibit(s) and the reasons for the objections.

The Memoranda of Contentions of Fact and Law, Witness List, and Exhibit List are due twenty-one (21) days before the Final Pre-Trial Conference.

FINAL PRETRIAL CONFERENCE ORDER ("PTCO")

The proposed PTCO shall be lodged seven calendar days before the PTC. Adherence to this time requirement is necessary for in-chambers preparation of the matter. The form of the proposed PTCO shall comply with Appendix A to the Local Rules and the following:

1. Place in "all caps" and in "bold" the separately numbered headings for each category in the PTCO (*e.g.*, "1. THE PARTIES" or "7. CLAIMS AND DEFENSES OF THE PARTIES").

2. Include a table of contents at the beginning.

3. In specifying the surviving pleadings under section 1, state which claims or counterclaims have been dismissed or abandoned, *e.g.*, "Plaintiffs second cause of action for breach of fiduciary duty has been dismissed." Also, in multiple party cases where not all claims or counterclaims will be prosecuted against all remaining parties on the opposing side, please specify to which party each claim or counterclaim is directed.

4. In specifying the parties' claims and defenses under section 7, each party shall closely follow the examples set forth in Appendix A of the Local Rules.

5. In drafting the PTCO, the court also expects that the parties will attempt to agree on and set forth as many non-contested facts as possible. The court will usually read the uncontested facts to the jury at the start of trial. A carefully drafted and comprehensively stated stipulation of facts will reduce the length of trial and increase jury understanding of the case.

6. In drafting the factual issues in dispute for the PTCO, the parties should attempt to state issues in ultimate fact form, not in the form of evidentiary fact issues. The issues of fact should track the elements of a claim or defense on which the jury will be required to make findings.

7. Issues of law should state legal issues on which the court will be required to rule during the trial and should not list ultimate fact issues to be submitted to the trier of fact.

TRIAL PREPARATION FOR JURY TRIAL MOTIONS, INSTRUCTIONS AND EXHIBITS

1. Motions *in Limine*

All motions *in limine* must be filed and served a minimum of forty-five (45) days prior to the scheduled trial date. Each motion should be separately filed and numbered. All opposition documents must be filed and served at least twenty-five (25) days prior to the scheduled trial date. All reply documents must be filed and served at least ten (10) days prior to the scheduled trial date.

All motions *in limine* will be ruled upon on or before the scheduled trial date.

2. Jury Instructions/Special Verdict Forms

Thirty-five (35) days before trial, plaintiff shall serve plaintiff's proposed jury instructions and special verdict forms on defendant. Twenty-eight (28) days before trial, defendant shall serve on plaintiff defendant's objections to plaintiff's instructions together with any additional instructions defendant intends to offer. Twenty-one (21) days before trial, plaintiff shall serve on defendant plaintiff's objections to defendant's instructions. Twenty-one (21) days before trial, counsel are ordered to meet and confer to attempt to come to agreement on the proposed jury instructions. The parties shall make every attempt to agree upon the jury instructions before submitting them to the Court. It is expected that counsel will agree on the substantial majority of jury instructions.

Sixteen (16) days before trial, counsel shall file with the Court a JOINT set of jury instructions on

which there is agreement. Defendant's counsel has the burden of preparing the joint set of jury instructions. At the same time, each party shall file its proposed jury instructions which are objected to by any other party, accompanied by points and authorities in support of those instructions.

When the parties disagree on an instruction, the party opposing the instruction must attach a short statement (one to two paragraphs) supporting the objection, and the party submitting the instruction must attach a short reply supporting the instruction. Each statement should be on a separate page and should follow directly after the disputed instruction.

The parties ultimately must submit one document, or if the parties disagree over any proposed jury instructions, three documents. The three documents shall consist of: (1) a set of Joint Proposed Jury Instructions; (2) Plaintiffs Disputed Jury Instructions; and (3) Defendant's Disputed Jury Instructions. Any disputed Jury Instructions shall include the reasons supporting and opposing each disputed instruction in the format set forth in the previous paragraph.

The Court directs counsel to use the instructions from the *Manual of Model Jury Instructions for the Ninth Circuit* where applicable. Where California law is to be applied and the above instructions are not applicable, the Court prefers counsel to use the California Jury Instructions in CACI. If none of these sources is applicable, counsel are directed to use the instructions in Devitt, Blackmar and Wolff, *Federal Jury Practice and Instructions.*

Modifications of instructions from the foregoing sources (or any other form instructions) must specif-

ically state the modification made to the original form instruction and the authority supporting the modification.

Each requested instruction shall be set forth in full; be on a separate page; be numbered; cover only one subject or principle of law; not repeat principles of law contained in any other requested instructions; and cite the authority for a source of the requested instruction. In addition to the foregoing, each party shall file with the Courtroom Deputy on the first day of trial a "clean set" of the aforesaid requested duplicate jury instructions in the following form: Each requested instruction shall be set forth in full; be on a separate page with the caption "COURT'S INSTRUCTION NUMBER ___"; cover only one subject or principle of law; and not repeat principles of law contained in any other requested instruction. The "clean set" shall not cite the authority for a source of the requested instruction. Counsel shall also provide the Court with a CD in WordPerfect format containing the proposed jury instructions.

An index page shall accompany all jury instructions submitted to the Court. The index page shall indicate the following:

- the number of the instruction;
- a brief title of the instruction;
- the source of the instruction and any relevant case citation; and
- the page number of the instruction.

Example:

No.	5
Title	Evidence for Limited Purpose

Source 9th Cir. 1.5

Page No. 9

During the trial and before argument, the Court will meet with counsel and settle the instructions. Strict adherence to time requirements is necessary for the Court to examine the submissions in advance so that there will be no delay in starting the jury trial. Failure of counsel to strictly follow the provisions of this section may subject the non-complying party and/or its attorney to sanctions and SHALL CONSTITUTE A WAIVER OF JURY TRIAL in all civil cases.

3. Trial Exhibits

Counsel are to prepare their exhibits for presentation at the trial by placing them in binders which are indexed by exhibit number with tabs or dividers on the right side. Counsel shall submit to the Court an original and one copy of the binders. The exhibits shall be in a three-ring binder Labeled on the spine portion of the binder as to the volume number and contain an index of each exhibit included in the volume. Exhibits must be numbered in accordance with Fed. R. Civ. P. 16, 26 and the Local Rules.

Exhibit list shall indicate which exhibits are objected to, the reason for the objection, and the reason it is admissible. Failure to object will result in a waiver of objection.

The Court requires that the following be submitted to the Courtroom Deputy Clerk on the first day of trial:

- The original exhibits with the Court's exhibit tags shall be stapled to the front of the exhibit on the upper right-hand corner with the case number, case name, and exhibit number placed on each tag. Exhibit tags may be printed using G-14A and G14-B forms on the Court's web-site.
- One bench book with a copy of each exhibit for use by the Court, tabbed with numbers as described above. (Court's exhibit tags not necessary.)
- Three (3) copies of exhibit lists.
- Three (3) copies of witness lists in the order in which the witness may be called to testify.
- Counsel are ordered to submit a short joint statement of the case seven (7) days before trial that the Court may read to the prospective panel.
- All counsel are to meet no later than ten (10) days before trial and to stipulate so far as is possible as to foundation, waiver of the best evidence rule, and to those exhibits which may be received into evidence at the start of trial. The exhibits to be so received will be noted on the copies of the exhibit lists.
- Counsel may, but need not, submit brief proposed voir dire questions for the jury seven (7) calendar days before the Pretrial Conference. The Court will conduct its own voir dire after considering any proposed voir dire submitted by counsel.

- Any items that have not been admitted into evidence and are left in the courtroom overnight without prior approval will be discarded.

/s/ Phillip S. Gutierrez
United States District Judge

Dated: December 11, 2019

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA VACATING SCHEDULING CONFERENCE (DECEMBER 11, 2019)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES–GENERAL

THE BANK OF NEW YORK MELLON,

v.

MARGUERITE DESELMS, ET AL.

Case No. ED CV-18-01044-PSG (MRWx)

Before: Philip S. GUTIERREZ,
United States District Judge.

On the Court's own motion, the Scheduling Conference set for hearing on December 16, 2019 is VACATED, and the following dates are hereby set. Please review the Court's trial order for further details.

Last Day to Add Parties &Amend Pleadings
(Doe defendants are dismissed as of cut-off to add parties

January 16, 2020

Discovery Cut-Off:

June 21, 2020

Last Day to File Motion:

June 16, 2020

Opening Expert Witness Disclosure [*See* F. R. Civ. P. 26(a)(2)]

June 9, 2020

Rebuttal Expert Witness Disclosure:

July 7, 2020

Expert Discovery Cut-Off:

July 28, 2020

Final Pretrial Conference (2:30 p.m.):

August 24, 2020

Jury Trial (9:00 a.m.):

September 8, 2020

Estimated Length:

4 Days

Initials of Preparer WH

ORDER REFERRAL TO ADR
(DECEMBER 11, 2019)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE BANK OF NEW YORK MELLON,

Plaintiff(s),

v.

MARGUERITE DESELMS, ET AL.,

Defendant(s),

Case No. ED CV-18-1044-PSG (MRWx)

Before: Philip S. GUTIERREZ,
United States District Judge.

The Court, having reviewed the parties' Request: ADR Procedure Selection (Form ADR-01), the Notice to Parties of Court-Directed ADR Program, or the report submitted by the parties pursuant to Fed. R. Civ. P. 26(f) and L.R. 26-1, hereby:

ORDERS this case referred to:

ADR Procedure No. 1:

This case is referred to

☒ the magistrate judge assigned to the case

IT IS FURTHER ORDERED:

The ADR proceeding is to be completed by: July 10, 2020.

The parties shall file a joint report no later than seven (7) days after the ADR proceeding regarding the progress of settlement discussions.

/s/ Phillip S. Gutierrez
United States District Judge

Dated: 12/10/19

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
NOTICE OF FILING DISCOVERY
(JULY 10, 2019)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE BANK OF NEW YORK MELLON,

v.

MARGUERITE DESELMS

Case No. ED CV-18-1044-PSG (MRWx)

Before: Michael R. WILNER,
United States Magistrate Judge.

NOTICE OF DOCUMENT DISCREPANCIES

To: U.S. Magistrate Judge Michael R. Wilner
From: Veronica Piper, Deputy Clerk
Date Received: July 8, 2019
Case No. EDCV-18-1044-PSG (MRWx)
Document Entitled: Notice of Filing of Discovery

Upon the submission of the attached document(s), it was noted that the following discrepancies exist:

☒ The request for discovery should be sent to Plaintiff. The Court does not need a copy.

File 5(d)–No Document Filings

IT IS HEREBY ORDERED:

The document is NOT to be filed, but instead REJECTED, and is ORDERED returned to counsel.* Counsel shall immediately notify, in writing, all parties previously served with the attached documents that said documents have not been filed with the Court.

/s/ Michael R. Wilner
U.S. Magistrate Judge

Date: 7/9/2019

* The term "counsel" as used herein also includes any prose party. *See* Local Rule 1-3.

NOTICE OF FILING OF DISCOVERY

Defendant MARGUERITE DESELMS hereby gives notice to the Court of the filing of her first request for discovery, including requests for production of documents, requests for admissions, and interrogatories.

Respectfully submitted on this 5th day of July, 2019

/s/ Marguerite DeSelms
PO Box 3301
Redondo Beach, CA 90277
310 427-1008 cell
margDeSelms@gmail.com
Plaintiff In Pro Per

ORDER OF THE UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA SETTING SCHEDULE CONFERENCE (MAY 2, 2019)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE BANK OF NEW YORK MELLON,

Plaintiff(s),

v.

MARGUERITE DESELMS, ET AL.,

Defendant(s),

Case No. 5:18-CV-18-01044-PSG-MRW

Before: Philip S. GUTIERREZ,
United States District Judge.

This matter is set for a scheduling conference on December 16, 2019 at 02:00 PM. The Conference will be held pursuant to F. R. Civ. P. 16(b). The parties are reminded of their obligations to disclose information and confer on a discovery plan not later than 21 days prior to the scheduling conference, and to file a joint statement with the Court not later than 14 days after they confer, as required by F.R. Civ. P. 26 and the Local Rules of this Court. In their F. R. Civ. P. 26(f) Report, the parties shall indicate whether they have agreed to participate in the Court's ADR Program,

to private mediation or, upon a showing of good cause, to a Magistrate Judge for a settlement conference. Failure to comply may lead to the imposition of sanctions.

IT IS SO ORDERED.

/s/ Phillip S. Gutierrez
United States District Judge

Dated: May 2, 2019

ORDER GRANTING IN PART AND DENYING IN PART THE BANK OF NEW YORK MELLON'S MOTION TO DISMISS MARGUERITE DESELMS'S COUNTERCLAIMS (MARCH 25, 2019)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES–GENERAL

THE BANK OF NEW YORK MELLON,

v.

MARGUERITE DESELMS, ET AL.

No. EDCV 18-1044 PSG (MRWx)

Before: Philip S. GUTIERREZ,
United States District Judge.

Before the Court is Plaintiff/Counter-Defendant The Bank of New York Mellon's ("BONY") motion to dismiss Defendant/Counter-Claimant Marguerite DeSelms's ("DeSelms") counterclaims. *See* Dkt. # 39 ("*Mot.*"). DeSelms has opposed this motion, *see* Dkt. # 42 ("*Opp.*"), and BONY replied, *see* Dkt. # 45 ("*Reply*").[1]

[1] DeSelms's brief in opposition is 66 pages long, well in excess of the 25 pages permitted by this Court's Standing Order. *See Standing Order*, Dkt. # 11, § 5(c) ("Memoranda of points and authorities in support of or in opposition to motions shall not exceed 25 pages."). DeSelms's pro se status does not excuse her from her obligation to comply with the Court's rules. BONY

The Court finds the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. Having considered the moving papers, the Court GRANTS the motion in part and DENIES it in part.

I. Background

In 2006, DeSelms entered into a mortgage agreement with Bondcorp Realty Services, Inc. ("Bondcorp") as lender and Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee beneficiary for the lender, whereby Bondcorp loaned Defendant $340,000 to purchase real property located at 3489 Circle Road in San Bernardino, California (the "Property"). *See Complaint*, Dkt. # 1 ("*Compl.*"), ¶¶ 8–9. In connection with the loan, Plaintiff executed a promissory note in favor of Bondcorp. *Id.* ¶ 9, Ex. A. A deed of trust securing that note in favor of Bondcorp was recorded with the San Bernardino County Recorder on August 14, 2006. *Id.* ¶ 10, Ex. B.

This case presents the question of whether BONY now has a valid interest in that deed of trust in its capacity as Trustee for the Certificate Holders CWALT, Inc. Alternative Loan Trust 2006-OC8 Mortgage Pass-Through Certificates, Series 2006-OC8. *See id.* ¶¶ 1, 21. BONY alleges that it was

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asks the Court to strike DeSelms's brief. *See Reply* 1:22–2:25. However, while the raw page length of the brief exceeds the Court's page limits, it is written in a large font and contains much less than the standard 28 lines per page, so it appears unlikely that it contains many more words than it would have had it been formatted properly. In the interest of expeditiously resolving BONY's motion to dismiss on the merits, the Court will not strike the brief in this instance. However, DeSelms is admonished that all of her filings must comply with the Court's rules and that any future non-compliant filings will be stricken.

assigned all beneficial interest in the deed of trust on September 14, 2011 and that the assignment was recorded with the San Bernardino County Recorder. *See id.* ¶¶ 21–22. It filed this case against DeSelms, alleging that she had improperly attempted to extinguish the deed of trust by making a series of fraudulent conveyances. *See generally id.* At the time it filed its complaint, BONY was attempting to foreclose on DeSelms's property. *See id.* ¶ 23.

However, on December 5, 2018, it rescinded the Notice of Default and Election to Sell that it had previously filed, and therefore there is no active notice of default on the property. *See Request for Judicial Notice*, Dkt. # 40-1, Ex. A ("*Notice of Rescission*")[2]; *Mot.* 5:11–15.

DeSelms has now responded with counterclaims. *See Counterclaims*, Dkt. # 34. While difficult to follow at times, the crux of her allegations appears to be that the assignment of the deed of trust to BONY was void from the outset because the trust that BONY was a trustee of was closed at the time of the assignment. *See id.* ¶ 49. DeSelms asserts twelve causes of action:

> First Counterclaim: Violation of California's security first rule, Cal. Civ. Proc. Code § 726. *Id.* ¶¶ 66–72.
>
> Second Counterclaim: Wrongful foreclosure. *Id.* ¶¶ 73–104.
>
> Third Counterclaim: Intentional infliction of emotional distress ("IIED"). *Id.* ¶¶ 105–110.

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[2] The Court takes judicial notice of the Notice of Rescission, which was recorded by the San Bernardino County Recorder's office.

Fourth Counterclaim: Extortion. *Id.* ¶¶ 111–18.

Fifth Counterclaim: Violation of the Fair Debt Collection Practices Act ("FDCPA"), 18 U.S.C. § 1692.[3] *Id.* ¶¶ 119–24.

Sixth Counterclaim: Violation of the Rosenthal Fair Debt Collection Practices Act ("Rosenthal Act"), Cal. Civ. Code §§ 1788 et seq. *Id.* ¶¶ 125–32.

Seventh Counterclaim: Violation of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2605. *Id.* ¶¶ 133–37.

Eighth Counterclaim: Claim that the statute of limitations has expired. *Id.* ¶¶ 138– 42.

Ninth Counterclaim: Violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 et seq. *Id.* ¶¶ 143–54.

Tenth Counterclaim: Quiet title. *Id.* ¶¶ 155–60.

Eleventh Counterclaim: Request for a permanent injunction. *Id.* ¶¶ 161–79.

Twelfth Counterclaim: Unjust enrichment and accounting. *Id.* ¶¶ 180–189.

BONY now moves to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that each counterclaim

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[3] The counterclaims mistakenly label both the extortion and FDCPA claims as the "Fourth Cause of Action." Consequently, every cause of action after extortion claim is misnumbered (for example, the Rosenthal Act claim is listed sixth but is labeled the "Fifth Cause of Action."). The Court has numbered the causes of action based on the order in which they are listed in the counterclaims rather than by the labels DeSelms has given them.

fails to state a claim upon which relief can be granted.[4] *See generally Mot.*

II. Legal Standard

To survive a motion to dismiss under Rule 12 (b)(6), a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In assessing the adequacy of the complaint, the court must accept all pleaded facts as true and construe them in the light most favorable to the plaintiff. *See Turner v. City & Cty. of San Francisco*, 788 F.3d 1206, 1210 (9th Cir. 2015); *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). The court then determines whether the complaint "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. However, "[t]hreadbare recitals

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[4] DeSelms argues that BONY's motion should be denied for failure to comply with Local Rule 7-3, which requires a party seeking to file a motion to contact the opposing party at least seven days before filing to discuss the substance of the motion and any potential resolution. *See Opp.* 6:16–7:24. However, it appears that BONY made several attempts to contact DeSelms beginning nine days before the motion was filed, and the parties eventually were able to connect by phone on January 21, 2019, two days before the filing of the motion. *See Declaration of Sheri Guerami*, Dkt. # 46, ¶¶ 2–9. The parties also exchanged emails discussing the issues raised by the motions. *Id.*, Exs. A–D. While DeSelms contends that BONY did not take her arguments seriously, *see Opp.* 7:8–20, it appears to the Court that BONY made a good faith attempt to convey its position but that the parties were ultimately unable to agree upon an informal resolution. Accordingly, it concludes that BONY complied with the requirements of Local Rule 7-3.

of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Accordingly, "for a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (internal quotation marks omitted).

III. Discussion

The Court discusses each of DeSelms's twelve counterclaims in turn.

A. Violation of the Security First Rule

California's "security first" rule "require[s] a secured creditor to proceed against the security before enforcing the underlying debt." *Sec. Pac. Nat. Bank v. Wozab*, 51 Cal. 3d 991, 999 (1990); *see also* Cal. Civ. Proc. Code § 726 (codifying the rule). A creditor who sues on the debt rather than seeking foreclosure of the security is deemed to have "made an election of remedies" and therefore to have waived any right to foreclose. *See In re Prestige Ltd. P'ship-Concord*, 234 F.3d 1108, 1114 (9th Cir. 2000).

DeSelms's theory of how BONY violated the security first rule is difficult to follow. She appears to allege that *Bank of America* violated the rule when it failed to return funds that DeSelms had paid to Countrywide Financial, and that these actions somehow voided *BONY's* right to foreclose under the deed of trust. *See Counterclaims* ¶¶ 66–72.

BONY has moved to dismiss the security first rule cause of action for failure to state a claim, and

DeSelms has offered no arguments in opposition. Arguments to which no response is supplied are deemed conceded. *See, e.g.*, *Tapia v. Wells Fargo Bank, N.A.*, No. CV 15-03922 DDP (AJWX), 2015 WL 4650066, at *2 (C.D. Cal. Aug. 4, 2015); *Silva v. U.S. Bancorp*, No. 5:10-cv-01854-JHN-PJWx, 2011 WL 7096576, at *3 (C.D. Cal. Oct. 6, 2011). Accordingly, the Court GRANTS BONY's motion to dismiss the claim for violation of the security first rule.

B. Wrongful Foreclosure

To succeed on a claim for wrongful foreclosure under California law, a plaintiff must show that the defendant "caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust." *Miles v. Deutsche Bank Nat. Tr. Co.*, 236 Cal. App. 4th 394, 408 (2015). BONY argues that DeSelms's wrongful foreclosure claim must be dismissed because the property at issue has not been sold. *See Mot.* 6:12–13. DeSelms appears to concede that the actual sale of the property is "a necessary element of a wrongful foreclosure claim." *See Opp.* 48:10–13. And she does not dispute that the property has not been sold; instead she asks for leave to amend in the event "the sale transpires." *Id.* 48:19–21.

But it is premature to speculate about whether the property will be sold in the future, especially given that BONY has rescinded its Notice of Default and Election to Sell. *See Rescission Notice.* Because DeSelms has not, and cannot, allege that her property has been sold at foreclosure, she cannot state a claim for wrongful foreclosure. Accordingly, the Court GRANTS

BONY's motion to dismiss the wrongful foreclosure claim.

C. Intentional Infliction of Emotional Distress ("IIED")

To plead a claim for IIED under California law, a plaintiff must allege that "(1) the defendant engaged in extreme and outrageous conduct with the intention of causing, or reckless disregard of the probability of causing, severe emotional distress to the plaintiff; (2) the plaintiff actually suffered severe or extreme emotional distress; and (3) the outrageous conduct was the actual and proximate cause of the emotional distress." *Ross v. Creel Printing & Publ'g Co.*, 100 Cal. App. 4th 736, 744–45 (2002). "To be outrageous, conduct must be 'so extreme as to exceed all bounds of that usually tolerated in a civilized community.'" *Id.* at 745 (quoting *Cervantez v. J. C. Penny Co.*, 24 Cal. 3d 579, 593 (1979)).

California courts have noted that debt collection "by its very nature often causes the debtor to suffer emotional distress" because creditors often "intentionally seek[ ] to create concern and worry in the mind of a debtor in order to induce payment." *Id.* Recognizing that these tactics can be legitimate in some circumstances, they have found that "[s]uch conduct is only outrageous if it goes beyond all reasonable bounds of decency." *Id.* (cleaned up). Accordingly, courts have held that "[t]he act of foreclosing upon someone's home (absent other circumstances) is not the kind of extreme conduct that supports an intentional infliction of emotional distress claim." *Quinteros v. Aurora Loan Servs.*, 740 F. Supp. 2d 1163, 1172 (E.D. Cal. 2010). This is true even when the creditor fails

to give proper notice of foreclosure, *see id.*, or when one of the creditor's employees told the plaintiff that the sale would not occur, but the house was sold anyway, *see Mehta v. Wells Fargo Bank, N.A.*, 737 F. Supp. 2d 1185, 1204 (S.D. Cal. 2010).

BONY argues that under these cases, its attempted foreclosure cannot constitute outrageous conduct sufficient to form the basis for an IIED claim. *See Mot.* 7:13–8:8. However, the cases discussed above addressed conduct by a creditor who had a legal right to foreclose. *See Mehta*, 737 F. Supp. 2d at 1204. Here, DeSelms alleges that BONY intentionally fabricated documents in order to foreclose on her property when it lacked legal authority to do so. *See Counterclaims* ¶ 107. DeSelms pointed this out in her opposition, *see Opp.* 27:24–30:10, and BONY offered no response in its reply brief. At this stage, the Court must take DeSelms's allegations as true, and it believes that if BONY did in fact intentionally fabricate documents to carry out a foreclosure that it knew it had no legal right to conduct, this could constitute extreme and outrageous conduct that "exceeds all bounds of that usually tolerated in a civilized community." *Ross*, 100 Cal. App. 4th at 745. Accordingly, the Court DENIES BONY's motion to dismiss the IIED claim.

D. Extortion

Courts have divided over whether California recognizes a civil cause of action for extortion. *Compare Hisamatsu v. Niroula*, No. C-07-4371-JSW (EDL), 2009 WL 4456392, at *5 (N.D. Cal. Oct. 22, 2009) ("California has long recognized a claim of 'civil extortion.'"), *with Arista Records v. Sanchez*, No. CV 05-7046 FMC (PJWx), 2006 WL 5908359, at *2 (C.D.

Cal. Mar. 1, 2006) ("[T]here is no private right of action for 'extortion.'"). Those that have recognized a civil extortion claim have held that it is based on the same elements as criminal extortion. *See Levitt v. Yelp! Inc.*, No. C-10-1321 EMC, 2011 WL 5079526, at *9 n.5 (N.D. Cal. Oct. 26, 2011). Accordingly, a plaintiff alleging extortion must show that the defendant "obtain[ed] the property or consideration from another, with his or her consent, . . . induced by a wrongful use of force or fear." *See* Cal. Penal Code § 518(a).

Even assuming for the sake of argument that a civil cause of action for extortion exists, DeSelms's complaint fails to state a claim because it does not allege that BONY actually obtained property from her. While she alleges that BONY "institute[ed] a non-judicial foreclosure without any lawful right to do so and demand[ed] money," *see Counterclaims* ¶ 113, she has not alleged that this demand resulted in BONY obtaining money from her. Accordingly, the Court GRANTS BONY's motion to dismiss the extortion claim.

E. FDCPA Claim

The FDCPA regulates actions taken by "debt collectors." In relevant part, the term "debt collector" is defined by the statute as a person who "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). The statue specifically that provides the term does not include a person who attempts to collect a debt that was originated by that same person or a "debt which was not in default at the time it was obtained by [the debt collector]." *Id.* § 1692a(6)(F)(ii)–(iii). Accordingly, "[t]he law is well

settled that the FDCPA's definition of debt collector does not include the consumer's creditors, a mortgage servicing company, or any assignee of the debt." *Lal v. Am. Home Servicing Inc.*, 680 F. Supp. 2d 1218, 1224 (E.D. Cal. 2010) (cleaned up).

In her opposition, DeSelms argues that the exemption from the FDCPA's debt collector definition for persons who obtain a debt that "was not in default at the time it was obtained" does not apply because "at the time of the purported acquisition, BONY claimed that an arrears already existed from Bank of America." *See Opp.* 35:24–27. However, she does not cite to where this allegation is made in her counterclaims, and the Court did not find any allegation on this point in its own review. Accordingly, the Court concludes that DeSelms has failed to adequately plead that BONY is a debt collector within the meaning of the FDCPA. It therefore GRANTS BONY's motion to dismiss the FDCPA claim.

F. Rosenthal Act

DeSelms's claims under California's Rosenthal Act also fail. BONY argues that attempts to collect on a mortgage loan do not fall within the scope of the Rosenthal Act, citing to cases that have reached this conclusion. *See Mot.* 9:22–10:21; *Pittman v. Barclays Capital Real Estate, Inc.*, No. 09 CV 241 JM (AJB), 2009 WL 1108889, at *3 (S.D. Cal. Apr. 24, 2009) ("[A] residential mortgage loan does not qualify as 'debt' under the statute."); *Castaneda v. Saxon Mortg. Servs., Inc.*, 687 F. Supp. 2d 1191, 1197 (E.D. Cal. 2009) (collecting cases). DeSelms's opposition provides no response to this argument. *See Opp.* 38:4–39:23. Accordingly, the Court deems it conceded, *see Tapia*, 2015 WL

4650066, at *2, and GRANTS BONY's motion to dismiss the Rosenthal Act claim.

G. RESPA

DeSelms alleges that BONY violated RESPA by failing to respond to requests she made about her account that were "qualified written requests" ("QWRs") within the meaning of the statute. *See Counterclaims* ¶¶ 133–37. BONY argues that the claim must be dismissed because RESPA only imposes a duty on loan *servicers* to respond to QWRs, and BONY was the beneficial owner of the deed of trust, not a servicer. *See Mot.* 11:1–6; *see also Phillips v. Bank of Am. Corp.*, No. 10-CV-4561-LHK, 2011 WL 132861, at *3 (N.D. Cal. Jan. 14, 2011) ("Absent any allegation that Bank of America is Plaintiff's loan servicer, as opposed to just the mortgage lender and beneficiary of a deed of trust, Plaintiff cannot state a claim under RESPA.").

In her counterclaim, DeSelms alleges that "BONY claim [sic] to be the holder and owner of the subject mortgage, or claim they [sic] are servicers or agents for servicers of a federally related mortgage loan within the meaning of [RESPA]." *Counterclaim* ¶ 134. This allegation does not state that BONY is a servicer; at best, it expresses uncertainty over what BONY *claims* to be. Further, as BONY points out, DeSelms attached a document reflecting the 2011 assignment of the deed of trust to her counterclaim, and that document, which was recorded by the San Bernardino Country Recorder, lists BONY as the beneficial owner of the deed of trust, not as a loan servicer. *See Exhibits to Counterclaims*, Dkt. # 35, Ex. 9. For these reasons, the Court concludes that DeSelms has failed

to plausibly allege that BONY was a loan servicer and therefore GRANTS BONY's motion to dismiss the RESPA claim.

H. Statute of Limitations

DeSelms's Eighth Cause of Action alleges that the statute of limitations has already run on the claims BONY brought against her in this case. *See Counterclaims* ¶¶ 139–42. However, while the statute of limitations may provide DeSelms with an affirmative defense to BONY's claims, it does not supply an independent cause of action. Accordingly, the Court GRANTS BONY's motion to dismiss the statute of limitations claim.

I. UCL

To state a claim for violation of the UCL, a plaintiff must allege that she has "suffered injury in fact and has lost money or property as a result of unfair competition." Cal. Bus. & Prof. Code § 17204; *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 322 (2011) ("[A] party must . . . establish a loss or deprivation of money or property sufficient to qualify as injury in fact, *i.e.*, economic injury. . . . ").

BONY contends that DeSelms's UCL claim must be dismissed because she does not allege that she has lost money or property. *See Mot.* 11:25–12:3. DeSelms's opposition does not respond to this argument, *see Opp.* 57:20–59:9, nor does it appear from the facts alleged in the counterclaims that she can allege economic injury because her property has not been foreclosed on. Accordingly, the Court GRANTS BONY's motion to dismiss the UCL claim.

J. Quiet Title

Under California law, equitable principles generally provide that "a mortgagor of real property cannot, without paying his debt, quiet his title against the mortgagee." *Miller v. Provost*, 26 Cal. App. 4th 1703, 1707 (1994). BONY argues that DeSelms's quiet title claim must be dismissed because she has not alleged that she could tender the balance owed on her loan. *See Mot.* 12:18–13:1.

However, DeSelms points out that several courts have held that a plaintiff does not need to tender the loan balance when her claim is that any foreclosure would be void because the defendant lacks authority to foreclose.[5] *Opp.* 24:19–27:20. Indeed, the California Court of Appeal recently held that a plaintiff alleging that the assignment of his mortgage was void did not need to tender the debt owed in order to bring a quiet title claim. *Sciaratta v. U.S. Bank Nat'l Ass'n*, 247 Cal. App. 4th 552, 568 (2016). BONY has provided no response to this argument, and the rule excusing tender appears to apply here because DeSelms alleges that the assignment of her mortgage to BONY was void. Accordingly, the Court DENIES BONY's motion to dismiss the quiet title claim.

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[5] DeSelms also argues in her opposition that she has alleged that she is willing to tender the loan balance. *See Opp.* 27:1–8. She purports to cite to an allegation reading: "Plaintiff has offered to and is ready willing and able to unconditionally tender her obligation." *Id.* However, this allegation is nowhere to be found in the counterclaims themselves, and therefore the Court cannot consider it on a motion to dismiss.

K. Permanent Injunction, Unjust Enrichment, and Accounting

DeSelms's Eleventh Cause of Action is a request for a permanent injunction, and her Twelfth Cause of Action asks for unjust enrichment and an accounting. *See Counterclaims* ¶¶ 161–89.

An injunction and an accounting are remedies, not causes of action. *See Ivanoff v. Bank of Am., N.A.*, 9 Cal. App. 5th 719, 734 (2017); *Batt v. City and County of San Francisco*, 155 Cal. App. 4th 65, 82 (2007). Because DeSelms could be entitled to an injunction if she succeeds on her quiet title claim, the Court construes her injunction cause of action as a request for that remedy. As for the request for an accounting, an accounting is only available when there is a special relationship between the plaintiff and defendant and "some balance is due the plaintiff that can only be ascertained by an accounting." *Jolley v. Chase Home Fin., LLC*, 213 Cal. App. 4th 872, 910 (2013). There is no need for an accounting unless the amount allegedly due to the plaintiff is "so complicated that it cannot be determined in a legal action for damages." *Id.* Here, DeSelms has not explained why any amount she is allegedly due is so complicated that it cannot be determined in a legal action for damages. Accordingly, the Court DISMISSES her request for an accounting.

Finally, as for DeSelm's unjust enrichment claim, while there is no cause of action under California law for unjust enrichment, *see McKell v. Wash. Mut., Inc.*, 142 Cal. App. 4th 1457, 1490 (2006), courts have construed unjust enrichment claims as claims that the defendant "has been unjustly conferred a benefit through mistake, fraud, coercion, or request" such that

the plaintiff is entitled to restitution. *See Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015) (internal quotation marks omitted); *McKell*, 142 Cal. App. 4th at 1490 ("[U]njust enrichment is a basis for obtaining restitution based on quasi-contract or imposition of a constructive trust."). Consequently, to state a claim, Plaintiff must plausibly allege that she conferred some benefit on BONY that would be unjust for BONY to retain. But the counterclaims do not allege that she paid any money to BONY. Her opposition argues only that BONY demanded money from her, not that any money was actually paid. *See Opp.* 64:17–22. Accordingly, the Court concludes that DeSelms has failed to state a claim for unjust enrichment. Therefore it GRANTS BONY's motion to dismiss the unjust enrichment claim.

L. Summary

For the reasons set forth above, the Court GRANTS BONY's motion to dismiss the security first rule, wrongful foreclosure, extortion, FDCPA, Rosenthal Act, RESPA, statute of limitations, UCL, and unjust enrichment claims, as well as DeSelms's request for an accounting. The Court DENIES the motion to dismiss the IIED and quiet title claims. Finally, the Court construes DeSelms's cause of action for a permanent injunction as a request that a permanent injunction be entered if she is successful on her surviving claims.

IV. Leave to Amend

Whether to grant leave to amend rests in the sound discretion of the trial court. *See Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). Courts

consider whether leave to amend would cause undue delay or prejudice to the opposing party, and whether granting leave to amend would be futile. *See Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir. 1996). Generally, dismissal without leave to amend is improper "unless it is clear that the complaint could not be saved by any amendment." *Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir. 2003).

The Court addresses leave to amend for each of DeSelms's dismissed claims in turn.

Security First Rule—DeSelms entirely failed to respond to BONY's argument that her claim based on California's security first rule should be dismissed. Further, nothing in her counterclaims indicates that she could successfully plead this claim. Accordingly, leave to amend the security first claim is DENIED and the claim is DISMISSED WITH PREJUDICE.

Wrongful Foreclosure—The Court concludes that DeSelms's wrongful foreclosure claim cannot be saved by amendment because all parties appear to agree that her property has not been sold at foreclosure. Accordingly, leave to amend the wrongful foreclosure claim is DENIED and the claim is DISMISSED WITH PREJUDICE.

Extortion—While the Court is skeptical that DeSelms will be able to allege that BONY received money or property from her, it cannot say definitively at this point that amendment would be futile. Accordingly, the Court GRANTS leave to amend the extortion claim.

FDCPA—Because DeSelms could potentially allege facts sufficient to show that BONY is a debt collector, the Court GRANTS her leave to amend her FDCPA claim.

Rosenthal Act—The Court concluded that DeSelms's Rosenthal Act claims fail as a matter of law because attempts to collect on a mortgage loan do not fall within the scope of the statute. DeSelms provided no response to this argument. Accordingly, leave to amend the Rosenthal Act claim is DENIED and the claim is DISMISSED WITH PREJUDICE.

RESPA—The Court believes that the RESPA claims cannot be saved by amendment because it is clear from documents provided by DeSelms herself that BONY is the beneficial owner of the deed of trust, not a loan servicer. Accordingly, leave to amend the RESPA claim is DENIED and the claim is DISMISSED WITH PREJUDICE.

Statute of Limitations—DeSelms's statute of limitations claim cannot be saved by amendment because the statute of limitations provides an affirmative defense, not a cause of action. Accordingly, leave to amend the statute of limitations claim is DENIED and the claim is DISMISSED WITH PREJUDICE.

UCL—While the Court is skeptical that DeSelms will be able to allege that she lost money or property because of unfair actions by BONY, it cannot say definitively at this point that amendment would be futile. Accordingly, the Court GRANTS leave to amend the UCL claim.

Unjust Enrichment and Accounting—Because the Court cannot say definitively at this point that it would be futile to allow DeSelms to amend her claim for unjust enrichment and request for an accounting, the Court GRANTS leave to amend this claim.

In summary, the Court GRANTS DeSelms leave to amend only her extortion, FDCPA, UCL, unjust

enrichment, and accounting claims. Any amended counterclaims must be filed no later than April 30, 2019. Failure to file amended counterclaims by this date will result in these claims being dismissed with prejudice.

Leave to amend the security first rule, wrongful foreclosure, Rosenthal Act, RESPA, and statute of limitations claims is DENIED, and these claims are DISMISSED WITH PREJUDICE.

V. Conclusion

For the foregoing reasons, the Court GRANTS BONY's motion to dismiss the security first rule, wrongful foreclosure, extortion, FDCPA, Rosenthal Act, RESPA, statute of limitations, UCL, and unjust enrichment claims, as well as DeSelms's request for an accounting. The Court DENIES the motion to dismiss the IIED and quiet title claims.

Leave to amend is GRANTED as to the extortion, FDCPA, UCL, unjust enrichment, and accounting claims only. Any amended counterclaims must be filed no later than April 30, 2019. Failure to file amended counterclaims by this date will result in these claims being dismissed with prejudice.

Leave to amend is DENIED as to the security first rule, wrongful foreclosure, Rosenthal Act, RESPA, and statute of limitations claims, and these claims are DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

ORDER GRANTING DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT (JANUARY 2, 2019)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES–GENERAL

THE BANK OF NEW YORK MELLON,

v.

MARGUERITE DESELMS, ET AL.

No. EDCV 18-1044 PSG (MRWx)

Before: Philip S. GUTIERREZ,
United States District Judge.

Before the Court is Defendant Marguerite DeSelms's ("Defendant") motion to set aside the default entered against her on the complaint, *see* Dkt. # 32 ("*Default Mot.*"), and motion for leave to file an answer and counterclaims, *see* Dkt. # 34 ("*Mot. for Leave*"). Plaintiff The Bank of New York Mellon ("Plaintiff") has opposed these motions. *See* Dkt. # 36 ("*Opp.*"). Defendant has not filed a reply. The Court finds the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. Having considered the moving papers, the Court GRANTS Defendant's motions.

I. Background

In this case, Plaintiff alleges that Defendant fraudulently conveyed her interest in a parcel of real property in order to prevent Plaintiff from exercising its right to foreclose on it. *See generally Complaint*, Dkt. # 1. Defendant filed a motion to dismiss for lack of standing and failure to state a claim, which the Court denied on August 16, 2018. *See August 16, 2018 Order*, Dkt. # 22 ("*Aug. 16 Order*"). Defendant failed to answer the complaint within 14 days after the motion to dismiss was denied, as is required by Federal Rule of Civil Procedure 12(a)(4)(A). Accordingly, on September 28, 2018, the Court ordered the parties to show cause no later than October 12, 2018 why the case should not be dismissed for lack of prosecution. *See September 28, 2018 Order*, Dkt. # 29. It noted that Defendant filing an answer to the complaint or Plaintiff filing a request for entry of default would constitute an appropriate response to the Order to Show Cause. *See id.*

Defendant failed to file an answer by the October 12, 2018 deadline in the Order to Show Cause. On October 11, Plaintiff asked the clerk to enter default against Defendant, and default was entered that same day. *See* Dkts. # 30, 31. On November 1, 2018, Defendant filed the current motions to set aside the default and for leave to file an answer and counterclaims. *See Default Mot.; Mot. for Leave.*

II. Legal Standard

Federal Rule of Civil Procedure 55 permits a court to set aside an entry of default for "good cause." Fed. R. Civ. P. 55(c). "To determine 'good cause', a court must 'consider[ ] three factors: (1) whether [the party

seeking to set aside the default] engaged in culpable conduct that led to the default; (2) whether [it] had [no] meritorious defense; or (3) whether reopening the default judgment would prejudice' the other party." *United States v. Signed Pers. Check No. 730 of Yubran S. Mesle*, 615 F.3d 1085, 1091 (9th Cir. 2010) (quoting *Franchise Holding II, LLC v. Huntington Rests. Grp., Inc.*, 375 F.3d 922, 925–26 (9th Cir. 2004)) (alterations in original). This standard is disjunctive, "such that a finding that any one of these factors is true is sufficient reason for the district court to refuse to set aside the default." *Mesle*, 615 F.3d at 1091. However, the choice to set aside default even if one or more of the factors is met is within the court's discretion. *See Brandt v. Am. Bankers Ins. Co. of Fla.*, 653 F.3d 1108, 1111?12 (9th Cir. 2011) ("A district court may exercise its discretion to deny relief to a defaulting defendant based solely upon a finding of defendant's culpability, but need not.").

The Ninth Circuit has cautioned that "judgment by default is a drastic step appropriate only in extreme circumstances; a case should, whenever possible, be decided on the merits." *Mesle*, 615 F.3d at 1091 (quoting *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984)).

III. Discussion

The Court turns to the three factors articulated by the Ninth Circuit. Because Plaintiff does not argue that it would be prejudiced if the default is set aside, the Court will address only whether Defendant engaged in culpable conduct and whether she has a meritorious defense.

A. Culpable Conduct

"[A] defendant's conduct is considered culpable if he has received actual or constructive notice of the filing . . . and intentionally failed to answer." *City of Colton v. Am. Promotional Events*, No. EDCV 09-1864 PSG (SSx), 2014 WL 12740640, at *2 (C.D. Cal. Aug. 15, 2014) (cleaned up). However, "intentional" in the context of a motion to set aside a default means something different than how the word is often used colloquially. The Ninth Circuit has made clear that "a movant cannot be treated as culpable simply for having made a conscious choice not to answer; rather, to treat a failure to answer as culpable, the movant must have acted with bad faith, such as an intention to take advantage of the opposing party, interfere with judicial decisionmaking, or otherwise manipulate the legal process." *Mesle*, 615 F.3d at 1092 (cleaned up). Accordingly, courts have generally found culpable conduct only "where there is no explanation of the default inconsistent with a devious, deliberate, willful, or bad faith failure to respond." *Id.*

Plaintiff argues that Defendant engaged in culpable conduct by failing to file an answer on two occasions: (1) after the Court denied her motion to dismiss and (2) after the Court issued the Order to Show Cause. *See Opp.* 3:1–17. But while this might be enough to show that Defendant was on notice of her obligation to answer, it does not show that her failure to answer was necessarily an intentional decision made in bad faith. Indeed, the fact that Defendant filed a motion to set aside the default, with a proffered answer, only three weeks after default was entered is consistent with the possibility that her failure to file a timely answer was a product of care-

lessness rather than malice. Accordingly, the Court finds that Defendant has not demonstrated that Plaintiff engaged in culpable conduct.

B. Meritorious Defense

"The burden for satisfying the 'meritorious defense' requirement is minimal." *Colton*, 2014 WL 12740640, at *3. Defendant must only "allege sufficient facts that, if true, would constitute a defense." *Mesle*, 615 F.3d at 1094. That is because "the question whether the factual allegation is true is not to be determined by the court when it decides the motion to set aside the default. Rather, that question would be the subject of the later litigation." *Id.* (cleaned up).

Defendant's defenses to Plaintiff's claims are essentially that the conveyance at issue in this case was legitimate, rather than fraudulent, and, among other things, that Plaintiff has unclean hands because it failed to follow state recording procedures. *See generally Mot.* Because these would constitute valid defenses if they are ultimately proven, the Court concludes that Defendant has adequately shown that she has a meritorious defense. Plaintiff argues that the Court rejected Defendant's defenses in its order denying Defendant's motion to dismiss. *See Opp.* 3:22–4:4. But this misunderstands the order. In ruling on the motion to dismiss, the Court found only that Plaintiff had plausibly alleged facts sufficient to show that it had standing and that it could state a claim for relief. *See generally Aug. 16 Order*. It did not reject Defendant's defenses on the merits. In fact, it specifically declined to rule on Defendant's unclean hands defense, finding that the "fact-bound inquiry" needed to evaluate it was premature. *See id.* at 9.

Defendant has adequately shown that she has potential meritorious defenses. Whether they are valid will be "the subject of the later litigation." *See Mesle*, 615 F.3d at 1094.

IV. Conclusion

"The court's discretion is especially broad where, as here, it is entry of default that is being set aside, rather than a default judgment." *Mendoza v. Wight Vineyard Mgmt.*, 783 F.2d 941, 945 (9th Cir. 1986). Because the three factors to be considered support setting aside the default, and because the Ninth Circuit has frequently reiterated that litigation is best settled on the merits, the Court GRANTS Defendant's motion to set aside the entry of default. The default is ordered set aside.

The Court further GRANTS Defendant's motion for leave to file an answer and counterclaims. The answer and counterclaims proffered by Defendant, *see* Dkt. # 34, are deemed filed as of this date.

IT IS SO ORDERED.

ORDER TO SHOW CAUSE RE: LACK OF PROSECUTION (SEPTEMBER 28, 2018)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES–GENERAL

THE BANK OF NEW YORK MELLON,

v.

MARGUERITE DESELMS, ET AL.

No. EDCV 18-1044 PSG (MRWx)

Before: Philip S. GUTIERREZ, United States District Judge.

Plaintiff The Bank of New York Mellon ("Plaintiff") brings this case against Defendant Marguerite DeSelms and Defendant Alan Tikal, in his capacity as trustee of the KATN Revocable Living Trust.[1] *See* Complaint, Dkt. # 1.

Defendant DeSelms filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), which the Court denied on August 16, 2018. *See* Dkt. # 21. Federal Rule of Civil Procedure 12(a)(4)(A) requires

[1] Plaintiff also initially brought claims against Defendant CAA, Inc. However, the Court ordered these claims dismissed on September 21, 2018 for failure to serve within 90 days as required by Federal Rule of Civil Procedure 4(m). *See* Dkt. # 28.

defendants to file an answer within 14 days after the denial of a motion to dismiss under Rule 12. More than 14 days have elapsed since the Court denied Defendant DeSelms's motion, but she has yet to file an answer.

Defendant Tikal was personally served on July 13, 2018. *See* Proof of Service, Dkt. # 23. Defendants are required to file a responsive pleading within 21 days after being served. Fed. R. Civ. P. 12(a)(1)(A)(I). More than 21 days have elapsed since Defendant Tikal was served, but he has yet to file a responsive pleading.

Accordingly, the parties are hereby ORDERED TO SHOW CAUSE in writing no later than October 12, 2018 why this action should not be dismissed for lack of prosecution. Failure to respond in writing by this date may result in dismissal of the entire action.

The Court will consider the filing of either of the following as an appropriate response to the Order to Show Cause: Defendants filing the appropriate responses to the complaint OR Plaintiff filing a Request for Entry of Default.

Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7.15, oral argument will not be heard in this matter unless so ordered by the Court. Pursuant to Local Rule 5-4.5, one mandatory chambers copy of every electronically filed document must be delivered no later than 12:00 p.m. on the following business day. Further, the mandatory chambers copy shall comply with Local Rule 11-3.

IT IS SO ORDERED.

ORDER DISMISSING THE CLAIMS AGAINST DEFENDANT CAA, INC. (SEPTEMBER 21, 2018)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES–GENERAL

THE BANK OF NEW YORK MELLON,

v.

MARGUERITE DESELMS, ET AL.

No. EDCV 18-1044 PSG (MRWx)

Before: Philip S. GUTIERREZ,
United States District Judge.

This is the final chapter in the story of Plaintiff The Bank of New York Mellon's ("Plaintiff") failure to properly serve Defendant CAA, Inc. ("Defendant").

On August 16, 2018, the Court ordered Plaintiff to show cause why its claims against Defendant should not be dismissed for failure to serve within 90 days as required by Federal Rule of Civil Procedure 4(m). *See* Dkt. # 22. On August 26, 2018, Plaintiff's counsel filed a declaration stating that Plaintiff had been unable to locate the registered agent for Defendant, a Nevada corporation. *See First Declaration of Sheri Guerami*, Dkt. # 25, ¶ 7. Counsel indicated that the complaint and summons had been served on the

Nevada Secretary of State, without providing the Court with any legal authority for why this action would constitute sufficient service on Defendant. *Id.* ¶ 8.

The Court concluded that Plaintiff's service of the summons and complaint on the Nevada Secretary of State was inadequate because it failed to comply with California's procedure for service on the Secretary of State when a registered agent for a corporation cannot be located. *See Order Continuing OSC*, Dkt. # 26. This procedure, found in California Corporations Code § 1702(a), requires the service to be made "by delivering by hand to the Secretary of State, or a person employed in the Secretary of State's office in the capacity of assistant or deputy, one copy of the process for each defendant to be served, together with a copy of the order authorizing such service." Plaintiff did not comply with this procedure because it did not deliver a copy of the order authorizing service on the Secretary of State—nor could it have because the Court had not yet issued such an order. Plaintiff also did not represent that it served the Secretary of State by hand. *See* Cal. Corp. Code § 1702(a).

On August 30, 2018, the Court issued the requisite order authorizing service on the Nevada Secretary of State. *See Order Continuing OSC.* It ordered Plaintiff to either "serve [Defendant] through the Nevada Secretary of State, pursuant to the requirements of § 1702(a) of the California Corporations Code" or to "provide the Court with authority demonstrating that its earlier service was legally sufficient." *Id.* Plaintiff was ordered to either provide the proof of service or submit legal authority to the Court no later than September 20, 2018. *Id.*

That date has passed, and Plaintiff has done neither of those things. It has not made any further attempt to serve the Nevada Secretary of State pursuant to the procedures of California Corporations Code § 1702(a). And it has not submitted any legal authority to the Court justifying its earlier attempted service. Instead, Plaintiff's counsel has submitted another declaration reiterating its inability to locate Defendant's registered agent and restating that it had previously served the complaint, summons, and affidavit of due diligence on Nevada Secretary of State on August 24, 2018. *See Second Declaration of Sheri Guerami*, Dkt. # 27, ¶¶ 5–8. Counsel also informed the Court that "Plaintiff is requesting an order from the Court, if [its previous service] is not deemed sufficient, to re-serve the Secretary of State with the Complaint, Summons, Affidavit of Due Diligence, and the Order authorizing such service." *Id.* ¶ 9.

But the Court already ordered Plaintiff to re-serve Defendant through the Nevada Secretary of State by following the procedures in California Corporations Code § 1702(a). *Order Continuing OSC.* And it informed Plaintiff that the failure to do so by September 20, 2018 would result in dismissal of the claims against Defendant. The Court finds that Plaintiff failed to comply with the Court's order.

Accordingly, Plaintiff's claims against Defendant CAA, Inc. are DISMISSED without prejudice for failure to serve within 90 days as required by Federal Rule of Civil Procedure 4(m). Plaintiff may proceed on its claims against Defendants Marguerite DeSelms and Alan Tikal, who have been properly served.

IT IS SO ORDERED.

ORDER DISCHARGING IN PART AND CONTINUING IN PART THE ORDER TO SHOW CAUSE (AUGUST 30, 2018)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES-GENERAL

THE BANK OF NEW YORK MELLON

v.

MARGUERITE DESELMS ET AL.

Case No. EDCV 18-1044 PSG (MRWx)

Before: Philip S. GUTIERREZ, United States District Judge.

On August 16, 2018, the Court ordered Plaintiff The Bank of New York Mellon ("Plaintiff") to show cause why the claims against Defendants Alan Tikal and CAA, Inc. ("CAA") should not be dismissed for failure to serve within 90 days as required by Federal Rule of Civil Procedure 4(m). *See* Dkt. # 22 ("OSC").

In response, Plaintiff filed a proof of service for Defendant Tikal, indicating that he was personally served on July 13, 2018. *See* Dkt. # 23. Accordingly the OSC is DISCHARGED as to Defendant Tikal.

As to CAA, a Nevada corporation, Plaintiff's counsel filed a declaration stating that Defendant's status

with the Nevada Secretary of State is "Permanently Revoked" and that Plaintiff has attempted to locate the registered agent for CAA, Inc. but has been unsuccessful. *See Declaration of Sheri Guerami*, Dkt. # 25 ¶¶ 7-8. Plaintiff's counsel advised the Court that it had served the Nevada Secretary of State with the complaint and summons. *Id.* ¶ 8. However, Plaintiff has not provided the Court with any legal authority supporting this method of service.

Under California law, if a corporate agent "cannot with reasonable diligence be found" the Court may authorize the plaintiff to serve the corporation by "delivering by hand to the Secretary of State . . . one copy of the process for each defendant to be served, together with a copy of the order authorizing such service." Cal. Corp. Code § 1702(a). Plaintiff cannot have complied with this procedure because, until today, the Court had not issued an order authorizing service on the Secretary of State.

The Court now finds that CAA's corporate agent cannot with reasonable diligence be found, and therefore it authorizes Plaintiff to serve CAA by delivering a copy of the process and a copy of this order by hand to the Nevada Secretary of State pursuant to the requirements of § 1702(a) of the California Corporations Code.

Accordingly, the Order to Show Cause as to CAA is CONTINUED. Plaintiff is directed to serve CAA through the Nevada Secretary of State, pursuant to the requirements of § 1702(a) of the California Corporations Code, and to provide proof of service to the Court no later than September 20, 2018. Alternatively, Plaintiff may, no later than that date, provide the Court with authority demonstrating that its earlier

service was legally sufficient. Failure to respond by that date will result in the Court dismissing CAA from the action without prejudice.

IT IS SO ORDERED.

ORDER TO SHOW CAUSE
RE: TIME LIMIT FOR SERVICE
(AUGUST 16, 2018)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES-GENERAL

THE BANK OF NEW YORK MELLON

v.

MARGUERITE DESELMS, ET AL.

Case No. EDCV 18-1044 PSG (MRWx)

Before: Philip S. GUTIERREZ,
United States District Judge.

On May 14, 2018, Plaintiff The Bank of New York Mellon ("Plaintiff") filed this action in this Court against Defendants Marguerite DeSelms, individually and as trustee of the Circle Road Revocable Living Trust, Alan Tikal, as trustee of the KATN Revocable Living Trust, and CAA, Inc.

While the motion to dismiss filed by Defendant DeSelms, *see* Dkt. # 15, indicates that she has been served, from a review of the docket, it does not appear that Defendants Tikal and CAA, Inc. have been served within the 90 days required under Federal Rule of Civil Procedure 4(m).

The Court therefore orders Plaintiff to show cause by August 27, 2018 why claims against Defendants Tikal and CAA, Inc. should not be dismissed without prejudice under Federal Rule of Civil Procedure 4(m). Failure to respond by this date will result in the Court dismissing these Defendants from the action without prejudice.

IT IS SO ORDERED.

ORDER OF THE UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA DENYING DEFENDANT'S MOTION TO DISMISS (AUGUST 16, 2018)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES-GENERAL

THE BANK OF NEW YORK MELLON

v.

MARGUERITE DESELMS, ET AL.

Case No. EDCV 18-1044 PSG (MRWx)

Before: Philip S. GUTIERREZ,
United States District Judge.

Before the Court is a motion to dismiss filed by Defendant Marguerite DeSelms ("Defendant").[1] *See* Dkt. # 15. Plaintiff The Bank of New York Mellon ("Plaintiff") opposes the motion. *See* Dkt. # 19. The Court finds the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. Having considered the moving papers, the Court DENIES Defendant's motion.

[1] Co-Defendants Alan Tikal, as trustee of the KATN Revocable Living Trust, and CAA, Inc. have not joined Defendant's motion.

I. Background

This case presents the question of whether Plaintiff has a valid interest in a mortgage issued by Defendant in conjunction with a purchase of real property, such that Plaintiff is entitled to foreclose on the property. Defendant asserts that Plaintiff has no interest in the property because the deed of trust securing the mortgage loan has been extinguished. She argues here that because Plaintiff has no interest, it lacks standing to bring this case, and further that Plaintiff's claims are barred alternatively by the doctrine of unclean hands, by a settlement agreement in a different case, or because they should have been brought as compulsory counterclaims in even another case.

In 2006, Defendant entered into a mortgage agreement with Bondcorp Realty Services, Inc. ("Bondcorp") as lender and Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee beneficiary for the lender, whereby Bondcorp loaned Defendant $340,000 to purchase real property located at 3489 Circle Road in San Bernardino, California (the "Property"). *See Complaint*, Dkt. # 1 ("*Compl.*") ¶¶ 8-9. In connection with the loan, Plaintiff executed a promissory note in favor of Bondcorp. *Id.* ¶ 9, Ex. A. A deed of trust securing that note in favor of Bondcorp was recorded with the San Bernardino County Recorder on August 14, 2006 (the "First Deed of Trust"). *Id.* ¶ 10, Ex. B.

Plaintiff alleges that on September 14, 2011, it was assigned all beneficial interest in the First Deed of Trust in its capacity as Trustee for the Certificate Holders CWALT, Inc. Alternative Loan Trust 2006-OC8 Mortgage Pass-Through Certificates, Series 2006-OC8. *Id.* ¶¶ 1, 21. The assignment was recorded with

the San Bernardino County Recorder on October 7, 2011, and Plaintiff asserts that it is currently the holder of the promissory note and the beneficiary of the First Deed of Trust. *Id.* ¶¶ 21-22.

Plaintiff alleges that Defendant defaulted on her repayment obligations under the promissory note and First Deed of Trust around August 1, 2009. *Id.* ¶ 12. Between 2014-17, Defendant allegedly communicated with the loan servicer responsible for servicing the loan in an attempt to obtain a loan modification. *Id.* ¶ 23. When talks broke down, Plaintiff, through its loan servicer, began foreclosure proceedings against the Property. *Id.*

In connection with the foreclosure proceedings, Plaintiff discovered that in 2010, Defendant purported to extinguish the First Deed of Trust by making a series of conveyances. *Id.* ¶¶ 13-16, 23. First, Defendant recorded a grant deed transferring title to the Property from herself to the Circle Road Revocable Living Trust. *Id.* ¶ 13. Second, Defendant recorded a deed of trust in favor of Defendant Alan David Tikal, trustee of the KATN Revocable Living Trust (the "Third Deed of Trust").[2] *Id.* ¶ 14. Third, Plaintiff alleges that Defendant recorded a "Substitution of Trustee and Full Reconveyance purporting to nominate the KATN Trust as trustee under the First Deed of Trust and reconvey all interest therein to the Circle Road Trust" (the "Allegedly False Reconveyance"). *Id.* ¶ 15.

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[2] Plaintiff refers to the deed of trust in favor of Tikal as the Third Deed of Trust because there was a preceding deed of trust securing a home equity line that Bondcorp gave to Defendant at the same time as the original mortgage ("the Second Deed of Trust"). *See Compl.* ¶ 11. The Second Deed of Trust is not at issue in this case.

According to Plaintiff, Defendant asserts that as a result of these conveyances, she holds title to the Property (in her capacity as trustee of the Circle Road Trust) free and clear of the lien created by the First Deed of Trust. *Id.* ¶¶ 16, 25. She further asserts that because she holds clear title, Plaintiff has no right to foreclose on the Property. Plaintiff asserts that the Allegedly False Reconveyance was fraudulent, and therefore void, because neither the KATN Trust nor Defendant Tikal had authority to convey any interest in the First Deed of Trust, and because Defendant had no authority to record the Allegedly False Reconveyance. *Id.* ¶ 44. Consequently, Plaintiff alleges that the conveyances did not extinguish the First Deed of Trust and therefore it remains the beneficiary of the First Deed of Trust under the September 14, 2011 assignment. *Id.* ¶ 22.

On May 14, 2018, Plaintiff brought suit against Defendant, both individually and in her capacity as trustee of the Circle Road Trust, as well against Co-Defendants Alan David Tikal as trustee of the KATN Revocable Living Trust and CAA, Inc, asserting three causes of action:

> First Cause of Action: Cancellation of Written Instrument. *Id.* ¶¶ 26-33.
>
> Second Cause of Action: Reformation of Written Instrument. *Id.* ¶¶ 34-45.
>
> Third Cause of Action: Declaratory Relief. *Id.* ¶¶ 46-50.

Plaintiff seeks a declaration from the Court that the Allegedly False Reconveyance was fraudulent and is therefore void, or in the alternative, asks the Court to reform the Allegedly False Reconveyance to

refer only to the Third Deed of Trust. *Id.* 8:23-28. It further asks that the Court enjoin all defendants from executing any further documents that purport to modify, amend, or extinguish the First Deed of Trust. *Id.* 9:12-15.

Defendant DeSelms now moves to dismiss, arguing that Plaintiff lacks standing under Federal Rule of Civil Procedure 12(b)(1) because it has no interest in the First Deed of Trust, that Plaintiff's claims are barred by a settlement between Defendant and Capital Management Services, LP ("Capital Management") in an earlier case, that Plaintiff's claims should have been brought as compulsory counterclaims by Bank of America in another action that Defendant is litigating, and finally that Plaintiff's claims should be dismissed under the doctrine of unclean hands. *See generally Mot.*

II. Legal Standard

A. Rule 12(b)(1)

Federal courts have limited jurisdiction and therefore only possess power authorized by Article III of the United States Constitution and statutes enacted by Congress. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). Thus, federal courts cannot consider claims for which they lack subject matter jurisdiction. *See Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1415 (9th Cir. 1992).

Federal Rule of Civil Procedure 12(b)(1) provides for a party, by motion, to assert the defense of "lack of subject-matter jurisdiction." Fed. R. Civ. P. 12(b)(1). This defense may be raised at any time, and the Court is obligated to address the issue sua sponte. *See*

Fed. R. Civ. P. 12(h)(1) (providing for waiver of certain defenses but excluding lack of subject matter jurisdiction); *Grupo Dataflux v. Atlas Glob. Grp.*, 541 U.S. 567, 571 (2004) ("Challenges to subject-matter jurisdiction can of course be raised at any time prior to final judgment."); *Moore v. Maricopa Cty. Sheriff's Office*, 657 F.3d 890, 894 (9th Cir. 2011) ("The Court is obligated to determine *sua sponte* whether it has subject matter jurisdiction."). The plaintiff bears the burden of establishing that subject matter jurisdiction exists. *See United States v. Orr Water Ditch Co.*, 600 F.3d 1152, 1157 (9th Cir. 2010). If the Court finds that it lacks subject matter jurisdiction at any time, it must dismiss the action. *See* Fed. R. Civ. P. 12(h)(3).

A plaintiff must "have 'standing' to challenge the action sought to be adjudicated in the lawsuit." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). The "irreducible constitutional minimum" of Article III standing has three elements: (1) "the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent"; (2) "there must be a causal connection between the injury and the conduct complained of"; and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotation marks omitted). The plaintiff, as the party invoking federal jurisdiction, has the burden of establishing these elements. *See id.* at 561. Article III standing bears on the court's subject matter jurisdiction and is therefore subject to challenge under Fed-

eral Rule of Civil Procedure 12(b)(1). *See Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011).

A Rule 12(b)(1) jurisdictional attack may be facial or factual. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). In a facial attack, the challenging party asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction. *See id.*

B. Rule 12(b)(6)

To survive a motion to dismiss under Rule 12(b)(6), a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In assessing the adequacy of the complaint, the court must accept all pleaded facts as true and construe them in the light most favorable to the plaintiff. *See Turner v. City and County of San Francisco*, 788 F.3d 1206, 1210 (9th Cir. 2015); *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). The court then determines whether the complaint "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Accordingly, "for a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly

suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (internal quotation marks omitted).

III. Judicial Notice

"Generally, the scope of review on a motion to dismiss . . . is limited to the contents of the complaint." *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006); *see also Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002) ("Ordinarily, a court may look only at the face of the complaint to decide a motion to dismiss."). Courts may also, however, consider "attached exhibits, documents incorporated by reference, and matters properly subject to judicial notice." *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1051 (9th Cir. 2014). Such material includes "notice of proceedings in other courts, whether in the federal or state systems." *Duckett v. Godinez*, 67 F.3d 734, 741 (9th Cir. 1995); *see also Schweitzer v. Scott*, 469 F. Supp. 1017, 1020 (C.D. Cal. 1979) ("[T]he Court is empowered to and does take judicial notice of court files and records.").

Under Federal Rule of Evidence 201, the court "can take judicial notice of '[p]ublic records and government documents available from reliable sources on the Internet,' such as websites run by governmental agencies." *Gerritsen v. Warner Bros. Entm't Inc.*, 112 F. Supp. 3d 1011, 1033 (C.D. Cal. 2015) (quoting *Hansen Beverage Co. v. Innovation Ventures, LLC*, No. 08-CV-1166-IEG-POR, 2009 WL 6598891, at *2 (S.D. Cal. Dec. 23, 2009)); *see also L'Garde, Inc. v. Raytheon Space & Airborne Sys.*, 805 F. Supp. 2d 932, 937-38 (C.D. Cal. 2011) (noting that public records from the Internet are "generally considered not to be subject to reason-

able dispute") (internal quotation marks omitted). Further, "[p]ublic records and government documents are generally considered 'not to be subject to reasonable dispute.'" *United States ex rel. Dingle v. BioPort Corp.*, 270 F. Supp. 2d 968, 972 (W.D. Mich. 2003) (citing *Jackson v. City of Columbus,* 194 F. 3d 737, 745 (6th Cir. 1999)).

Defendant asks the Court to take judicial notice of documents relating to two other Central District proceedings: the first amended complaint in *DeSelms v. Bank of America, N.A.*, No. CV 18-703 PSG (MRWx) (C.D. Cal.), *see* Dkt. # 16-1 Ex. 1 ("*Bank of America Complaint*"), and an agreement settling the claims brought in *DeSelms v. Capital Management Services LP*, No. CV 12-8756 JAK (FFMx) (C.D. Cal), *see* Dkt. # 16-1 Ex. 3 ("*Capital Management Settlement*"). Plaintiff asks the Court to take judicial notice of the original promissory note involving Bondcorp, MERS, and Defendant; the First Deed of Trust; and the assignment from MERS to Plaintiff. *See* Dkt. # 20.

Neither party has opposed the other's request for judicial notice. Under Local Rule 7-12, a failure to oppose a request may be deemed consent to granting it. *See* L.R. 7-12. Accordingly, the Court GRANTS both Defendant's and Plaintiff's requests for judicial notice.

IV. Discussion

Defendant moves to dismiss on the grounds that Plaintiff lacks standing because it has no interest in the Property, that Plaintiff's claims are barred by a settlement agreement between Defendant and Capital Management, that Plaintiff's claims should have been brought as compulsory counterclaims by Bank of

America in a separate action, and that Plaintiff's claims should be dismissed under the doctrine of unclean hands. The Court addresses each argument in turn.

A. Standing

Defendant argues that Plaintiff lacks standing to bring this case because it has no interest in the First Deed of Trust. *Mot.* 10:11-14. Defendant asserts that even if the Allegedly False Reconveyance was ruled invalid, Bank of America, rather than Plaintiff, would be the beneficiary of the First Deed of Trust. However, Plaintiff has pleaded that it "is currently the holder of the First Promissory Note and the beneficiary of the First Deed of Trust and entitled to all beneficial interests therein including the right to nonjudicial foreclosure of the Property." *Compl.* ¶ 22. Because Defendant disputes the truth of Plaintiff's allegation rather than its adequacy, her standing argument is properly categorized as a factual, rather than a facial, attack. *See Safe Air*, 373 F.3d at 1039.

In resolving a factual attack on standing, the Court "need not presume the truthfulness of [Plaintiff's] allegations" and "may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Id.* However, "a jurisdictional finding of genuinely disputed facts is inappropriate when 'the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits' of an action." *Id.* (quoting *Sun Valley Gasoline, Inc. v. Ernst Enters., Inc.*, 711 F.2d 138, 139 (9th Cir. 1983) (alterations omitted).

Here, Defendant's standing attack is completely intertwined with the merits of the case such that it would be "inappropriate" for the Court to resolve the disputed facts at the motion to dismiss stage. *See id.* Defendant's standing argument turns entirely on whether Plaintiff has a valid interest in the First Deed of Trust. *See Mot.* 10:11-18, 15:8-24. But that is the precise issue that Plaintiff seeks to have resolved in this case. *See Compl.* Plaintiff has adequately pleaded that it has an interest in the First Deed of Trust and has supported that allegation with evidence of a recorded assignment in its favor. *See Compl.* ¶ 22, Ex. G. The Court concludes that this is sufficient to establish standing.

B. The Settlement Agreement

Defendant argues Plaintiff's claims are barred by a settlement agreement she entered into with Capital Management in January 2013. *See Mot.* While Plaintiff was not a party to that settlement agreement, *see Capital Management Settlement*, Defendant's principal argument appears to be that Plaintiff is nevertheless bound by it because its counsel, Yu Mohandesi LLP, represented Capital Management in the proceedings that produced the settlement agreement. *See Mot.* 2:13-16, 3:18-21.

However, an entity is not bound by a settlement agreement involving a third party just because it retains the same counsel that represented the third party. As Plaintiff aptly points out, "it is not Yu Mohandesi that is suing DeSelms, but rather [Plaintiff]." *Opp.* 6:9-10. Because Plaintiff was not a party to the settlement agreement with Capital Management Services, and Defendant has provided no reason for

why Plaintiff should be bound by it beyond the fact that Plaintiff and Capital Management share counsel, the Court concludes that the agreement does not bar Plaintiff's claims.

C. Compulsory Counterclaims

In a separate action, Defendant has brought suit against Bank of America and MTC Financial Inc., alleging claims under the Fair Debt Collection Practices Act and Truth in Lending Act, as well as other state law claims. *See Bank of America Complaint.* She argues that the claims Plaintiff brings in this case should have been brought as counterclaims by Bank of America in the other action. *See Mot.* 17:5-18. She further argues that because they were compulsory counterclaims, they cannot now be brought here. *See Mot.* 9:15-20.

Federal Rule of Civil Procedure 13(a)(1) provides that "[a] pleading must state as a counterclaim any claim that . . . the pleader has against an opposing party if the claim . . . arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." "[I]f a party fails to plead a compulsory counterclaim, he is held to waive it and is precluded by res judicata from ever suing upon it again." *Luis v. Metro. Life Ins. Co.*, 142 F. Supp. 3d 873, 878 (N.D. Cal. 2015) (quoting *Local Union No. 11, Int'l Bhd. Of Elec. Workers, AFL-CIO v. G.P. Thompson Elec., Inc.*, 352 F.2d 181, 184 (9th Cir. 1966)).

The obvious problem with Defendant's argument is that Rule 13(a)(1) applies to claims "the pleader has against an opposing party." Fed. R. Civ. P. 13 (a)(1) (emphasis added). Plaintiff is not a party to the lawsuit against Bank of America and therefore cannot be considered a "pleader" in it. *See Bank of America*

Complaint. Defendant attempts to get around this obstacle by arguing that Bank of America is "the party with the real interest in the outcome," apparently based on Defendant's assertion that Bank of America would be the beneficiary of the First Deed of Trust if the Allegedly False Reconveyance was ruled invalid. *See Mot.* 15:18-24, 17:5-19. But Plaintiff has pleaded that it is "currently the holder" of the promissory note and First Deed of Trust. *See Compl.* ¶ 22. At the motion to dismiss stage, the Court must take this allegation as true. Treating it as true, it is clear that the claims are Plaintiff's to bring, not Bank of America's. Therefore, the Court concludes that Plaintiff's claims are not compulsory counterclaims that should have been brought in the Bank of America suit, and consequently, Plaintiff is not barred from bringing them here.

D. Unclean Hands

Defendant argues that Plaintiff has no right to seek equitable relief because it comes to the case with unclean hands, having allegedly "commit[ed] a series of violations of state law in executing and recording the assignments" as well as violations of the Fair Debt Collection Practices Act. *See Mot.* 13:5-17.

Unclean hands is an affirmative defense. Under California law, when assessing the applicability of the defense, "[t]he focus is the equities of the relationship between the parties, and specifically whether the unclean hands affected the transaction at issue." *Biller v. Toyota Motor Corp.*, 668 F. 3d 655, 667 (9th Cir. 2012). In other words, evaluating an unclean hands defense requires the Court to examine evi-

dence about the relationship between the parties and the effect of the alleged wrongful actions.

The Court concludes that such a fact-bound inquiry is premature. At the motion to dismiss stage, the Court's focus is on the pleadings. Nothing in the complaint suggests that Plaintiff has unclean hands, and Defendant makes only sparse and conclusory allegations in support of her argument. *See Mot.* 13:5-17. Without further factual development, the Court lacks the information necessary to evaluate Defendant's unclean hands defense. Therefore, Defendant's motion to dismiss based on unclean hands is DENIED.

V. Conclusion

For the foregoing reasons, the Court DENIES Defendant's motion to dismiss.

IT IS SO ORDERED.

ORDER RE: APPLICATION FOR PERMISSION FOR ELECTRONIC FILING (JULY 10, 2018)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE BANK OF NEW YORK MELLON,

Plaintiff(s),

v.

MARGUERITE DESELMS ET AL.,

Defendant(s).

Case Number 5:18-cv-01044-PSG-MRW

Before: Philip S. GUTIERREZ, United States District Judge.

IT IS ORDERED that the Application for Permission for Electronic Filing by Marguerite Deselms, Defendant is hereby:

DENIED

/s/ Philip S. Gutierrez
United States District Judge

Dated: 7/10/18

STANDING ORDER REGARDING NEWLY ASSIGNED CASES (MAY 23, 2018)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE BANK OF NEW YORK MELLON,

Plaintiff(s),

v.

MARGUERITE DESELMS, ET AL.,

Defendant(s).

Case Number 5:18-cv-01044-PSG-MRW

Before: Philip S. GUTIERREZ, United States District Judge.

READ THIS ORDER CAREFULLY. IT CONTROLS THIS CASE.

This action has been assigned to the calendar of Judge Philip S. Gutierrez. The responsibility for the progress of litigation in the Federal Courts falls not only upon the attorneys in the action, but upon the Court as well. "To secure the just, speedy, and inexpensive determination of every action," Fed. R. Civ. P. 1, all counsel are hereby ordered to familiarize themselves with the Fed. R. Civ. P., particularly Fed. R. Civ. P. 16, 26, the Local Rules of the Central District of

California, this Court's Order for Jury Trial, and this Court's Order for Court Trial.[1]

UNLESS OTHERWISE ORDERED BY THE COURT, THE FOLLOWING RULES SHALL APPLY:

1. Service of the Complaint

The Plaintiff(s) shall promptly serve the Complaint in accordance with Fed. R. Civ. P. 4 and file the proofs of service pursuant to Local Rule. Any Defendant(s) not timely served shall be dismissed from the action without prejudice. Any "DOE" or fictitiously–named Defendant(s) who is not identified and served within 120 days after the case is filed shall be dismissed pursuant to Fed. R. Civ. P. 4(m).

2. Removed Actions

Any answers filed in state court must be refiled in this Court as a supplement to the petition. Any pending motions must be re–noticed in accordance with Local Rule. If an action is removed to this Court

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[1] Copies of the Local Rules are available on our website at "http://www.cacd.uscourts.gov" or they may be purchased from one of the following:

Los Angeles Daily Journal
915 East 1st Street
Los Angeles, CA 90012

West Group
610 Opperman Drive
Post Office Box 64526
St. Paul, MN 55164-0526

Metropolitan News
210 South Spring Street
Los Angeles, CA 90012

that contains a form pleading, *i.e.*, a pleading in which boxes are checked, the party or parties utilizing the form pleading must file an appropriate pleading with this Court within thirty (30) days of receipt of the Notice of Removal. The appropriate pleading referred to must comply with the requirements of Fed. R. Civ. P. 7, 7.1, 8, 9, 10 and 11.

3. Presence of Lead Counsel

The attorney attending any proceeding before this Court, including all status and settlement conferences, must be the lead trial counsel.

4. Discovery

All discovery matters have been referred to a United States Magistrate Judge to hear all discovery disputes. (The Magistrate Judge's initials follow the Judge's initials next to the case number.) All documents must include the words "DISCOVERY MATTER" in the caption to ensure proper routing. Counsel are directed to contact the Magistrate Judge's Courtroom Deputy Clerk to schedule matters for hearing. Please do not deliver mandatory chambers copies of these papers to this Court.

The decision of the Magistrate Judge shall be final, subject to modification by the District court only where it has been shown that the Magistrate Judge's order is clearly erroneous or contrary to law. Any party may file and serve a motion for review and reconsideration before this Court. The moving party must file and serve the motion within ten (10) days of service of a written ruling or within ten (10) days of an oral ruling that the Magistrate Judge states will not be followed by a written ruling. The motion must specify

which portions of the text are clearly erroneous or contrary to law, and the claim must be supported by points and authorities. Counsel shall deliver a conformed copy of the moving papers and responses to the Magistrate Judge's clerk at the time of filing.

5. Motions – General Requirements

a. Time for Filing and Hearing Motions:

Motions shall be filed in accordance with Local Rules 6 and 7. This Court hears motions on Mondays, beginning at 1:30 p.m. If the motion date selected is not available, the Court will issue a minute order striking the motion. (Counsel are advised to check the availability of a selected date immediately prior to filing the motion.) Opposition or reply papers due on a holiday must be filed the preceding Friday—not the following Tuesday—and must be hand—delivered or faxed to opposing counsel on that Friday. Professional courtesy dictates that moving parties should, whenever possible, avoid filing motions for which opposition papers will be due the Friday preceding a holiday. Such a filing is likely to cause a requested continuance to be granted.

Adherence to the timing requirements is mandatory for Chambers' preparation of motion matters.

b. Pre–filing Requirement:

Counsel must comply with Local Rule 7-3, which requires counsel to engage in a pre-filing conference "to discuss thoroughly . . . the substance of the contemplated motion and any potential resolution." Counsel should discuss the issues to a sufficient degree that if a motion is still necessary, the briefing

may be directed to those substantive issues requiring resolution by the Court. Counsel should resolve minor procedural or other non-substantive matters during the conference. The *pro per* status of one or more parties does not negate this requirement.

c. Length and Format of Motion Papers:

Memoranda of points and authorities in support of or in opposition to motions shall not exceed 25 pages. Replies shall not exceed 12 pages. Only in rare instances and for good cause shown will the Court grant an application to extend these page limitations.

Pursuant to Local Rule, either a proportionally spaced or monospaced face may be used. A proportionally spaced face must be 14-point or larger, or as the Court may otherwise order. A monospaced face may not contain more than 101/2 characters per inch. These typeface requirements apply to footnoted material.

d. Citations to Case Law:

Citations to case law must identify not only the case cited, but the specific page referenced.

e. Citations to Other Sources:

Statutory references should identify with specificity the sections and subsections referenced (*e.g.*, Jurisdiction over this cause of action may appropriately be found in 47 U.S.C. § 33, which grants the district courts jurisdiction over all offenses of the Submarine Cable Act, whether the infraction occurred within the territorial waters of the United States or on board a vessel of the United States outside said waters). Statutory references that do not specifically indicate the appropriate section and subsection (*e.g.*,

Plaintiffs allege conduct in violation of the Federal Electronic Communication Privacy Act, 18 U.S.C. § 2511, et seq.) are to be avoided. Citations to treatises, manuals, and other materials should include the volume, section, and pages being referenced.

f. Oral Argument:

If the Court deems a matter appropriate for decision without oral argument, the Court will notify the parties in advance.

6. Specific Motion Requirements

a. Motions Pursuant to Rule 12:

Many motions to dismiss or to strike can be avoided if the parties confer in good faith (as required under Local Rule 7-3), especially for perceived defects in a complaint, answer, or counterclaim that could be corrected by amendment. *See Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996) (where a motion to dismiss is granted, a district court should provide leave to amend unless it is clear that the complaint could not be saved by any amendment). Moreover, a party has the right to amend the complaint once as a matter of course within twenty-one (21) days of serving it or "if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is greater." Fed. R. Civ. P. 15(a)(1). Even after a complaint has been amended or the time for amending it as a matter of course has run, the Federal Rules provide that leave to amend should be "freely given when justice so requires." Fed. R. Civ. P. 15(a). The Ninth Circuit requires that

this policy favoring amendment be applied with "extreme liberality." *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990).

These principles require that plaintiff's counsel carefully evaluate defendant's contentions as to the deficiencies in the complaint. In most instances the moving party should agree to any amendment that would cure the defect.

b. Motions to Amend:

In addition to the requirements of Local Rule 15-1, all motions to amend pleadings shall: (1) state the effect of the amendment; (2) be serially numbered to differentiate the amendment from previous amendments; and (3) state the page and line number(s) and wording of any proposed change or addition of material.

The parties shall deliver to Chambers a "redlined" version of the proposed amended pleading indicating all additions and deletions of material.

c. Summary Judgment Motions:

Parties need not wait until the motion cutoff to bring motions for summary judgment or partial summary judgment. Moreover, the court expects that the party moving for summary judgment will strictly observe the timing requirements of the Local Rules and this Standing Order. A motion under Rule 56 must be filed at least forty-nine (49) days prior to the date on which the motion is noticed for hearing. The opposition is due not later than twenty-one (21) days before the date designated for the hearing of the motion, and the reply not later than fourteen (14) days before the date designated for the hearing of the

motion. Because summary judgment motions are fact-dependent, parties should prepare papers in a fashion that will assist the court in absorbing the mass of facts (*e.g.*, generous use of tabs, tables of contents, headings, indices, etc.). The parties are to comply precisely with Local Rule 56-1 through 56-4.

No party may file more than one motion pursuant to Fed. R. Civ. P. 56, regardless of whether such motion is denominated as a motion for summary judgment or summary adjudication, without leave from the Court.

1. Statement of Undisputed Facts and Statement of Genuine Issues:

The separate statement of undisputed facts shall be prepared in a two– column format. The left hand column sets forth the allegedly undisputed fact. The right hand column sets forth the evidence that supports the factual statement. The factual statements should be set forth in sequentially numbered paragraphs. Each paragraph should contain a narrowly focused statement of fact. Each numbered paragraph should address a single subject as concisely as possible.

The opposing party's statement of genuine issues must be in two columns and track the movant's separate statement exactly as prepared. The left hand column must restate the allegedly undisputed fact, and the right hand column must state either that it is undisputed or disputed. The opposing party may dispute all or only a portion of the statement, but if disputing only a portion, it must clearly indicate what part is being disputed, followed by the opposing party's evidence controverting the fact. The court will not wade through a document to determine whether a fact really is in dispute. To demonstrate that a fact

is disputed, the opposing party must briefly state why it disputes the moving party's asserted fact, cite to the relevant exhibit or other piece of evidence, and describe what it is in that exhibit or evidence that refutes the asserted fact. No legal argument should be set forth in this document.

The opposing party may submit additional material facts that bear on or relate to the issues raised by the movant, which shall follow the format described above for the moving party's separate statement. These additional facts shall continue in sequentially numbered paragraphs and shall set forth in the right hand column the evidence that supports that statement.

2. Supporting Evidence:

No party shall submit evidence other than the specific items of evidence or testimony necessary to support or controvert a proposed statement of undisputed fact. For example, entire deposition transcripts, entire sets of interrogatory responses, and documents that do not specifically support or controvert material in the separate statement shall not be submitted in support of opposition to a motion for summary judgment. The court will not consider such material.

Evidence submitted in support of or in opposition to a motion should be submitted either by way of stipulation or as exhibits to declarations sufficient to authenticate the proffered evidence, and should not be attached to the memorandum of points and authorities. The court will accept counsel's authentication of deposition transcripts, written discovery responses and the receipt of documents in discovery if the fact that the document was in the opponent's possession is of

independent significance. Documentary evidence as to which there is no stipulation regarding foundation must be accompanied by the testimony, either by declaration or properly authenticated deposition transcript, of a witness who can establish authenticity.

3. Objections to Evidence:

If a party disputes a fact based in whole or in part on an evidentiary objection, the ground of the objection, as indicated above, should be stated in a separate statement but not argued in that document.

7. Proposed Orders

Each party filing or opposing a motion or seeking the determination of any matter shall serve and lodge a proposed order setting forth the relief or action sought and a brief statement of the rationale for the decision with appropriate citations.

8. Mandatory Chambers Copies:

Mandatory chambers copies of all filed pleadings must be delivered to Judge Gutierrez's mail box outside the Clerk's Office on the 4th floor of the 1st Street Courthouse not later than 12:00 noon the following business day. For security reasons, mandatory chambers copies should be removed from envelopes or folders before placing them in the box.

9. Telephonic Hearings

The Court does not permit appearances or arguments by way of telephone conference calls.

10. Ex Parte Applications

The Court considers ex parte applications on the papers and does not usually set these matters for hearing. If a hearing is necessary, the parties will be notified. Ex parte applications are solely for extraordinary relief and should be used with discretion. Sanctions may be imposed for misuse of ex parte applications. *See Mission Power Engineering Co. v. Continental Casualty Co.*, 883 F. Supp. 488 (C.D. Cal. 1995).

Counsel's attention is directed to Local Rules. The moving party shall serve the opposing party by facsimile transmission and shall notify the opposition that opposing papers must be filed not later than 3:00 p.m. on the first business day following such facsimile service. If counsel does not intend to oppose an ex parte application, he or she must inform the Courtroom Deputy Clerk at (213) 894-8899.

11. TROs and Injunctions

Parties seeking emergency or provisional relief shall comply with Rule 65 and Local Rule 65. The Court will not rule on any application for such relief for at least twenty-four hours after the party subject to the requested order has been served, unless service is excused. Such party may file opposing or responding papers in the interim.

12. Continuances

This Court has a strong interest in keeping scheduled dates certain. Changes in dates are disfavored. Trial dates set by the Court are firm and will rarely be changed. Therefore, a stipulation to continue the

date of any matter before this Court must be supported by a sufficient basis that demonstrates good cause why the change in the date is essential. Without such compelling factual support, stipulations continuing dates set by this Court will not be approved. Counsel requesting a continuance must lodge a proposed stipulation and order including a detailed declaration of the grounds for the requested continuance or extension of time. Failure to comply with the Local Rules and this Order will result in rejection of the request without further notice to the parties. Proposed stipulations extending scheduling dates do not become effective unless and until this Court so orders. Counsel wishing to know whether a stipulation has been signed shall comply with the applicable Local Rule.

13. Communications with Chambers

Counsel shall not attempt to contact the Court or its staff by telephone or by any other ex parte means. Counsel may contact the Courtroom Deputy Clerk with appropriate inquiries only. Counsel shall not contact the Courtroom Deputy regarding status of ex parte application/ruling or stipulation/ruling. If counsel desires a conformed copy of any proposed order submitted to the Court, counsel shall provide an extra copy of the document, along with a self-addressed, stamped envelope. Counsel should list their facsimile transmission numbers along with their telephone numbers on all papers to facilitate communication with the Courtroom Deputy.

14. Order Setting Scheduling Conference

Pursuant to Fed. R. Civ. P. 16(b), the Court will issue an Order setting a Scheduling Conference as

required by Fed. R. Civ. P. 26 and the Local Rules of this Court. Strict compliance with Fed. R. Civ. P. 16 and 26 is required.

15. Alternative Dispute Resolution (ADR)

This Court participates in the Court-Directed ADR Program. If counsel have received a Notice to Parties of Court-Directed ADR Program (ADR-08), the case will be presumptively referred to the Court Mediation Panel or to private mediation at the time of the initial scheduling conference. *See* General Order 11-10, § 5.1. Counsel should include their shared or separate views regarding a preference for the Court Mediation Panel or private mediation, and when the mediation should occur, in the written report required by Fed. R. Civ. P. 26(f) and Civil L.R. 26-1. This Court generally does not refer settlement conferences to magistrate judges. For information about the Court's ADR Program, the Mediation Panel, and mediator profiles, visit the "ADR" page of the Court website.

16. Notice of this Order

Counsel for plaintiff or plaintiff (if appearing on his or her own behalf) shall immediately serve this Order on all parties, including any new parties to the action. If this case came to the Court by a Petition for Removal, the removing defendant(s) shall serve this Order on all other parties.

IT IS SO ORDERED.

/s/ Philip S. Gutierrez
United States District Judge

Dated: May 23, 2018

ORDER RE: TRANSFER PURSUANT TO GENERAL ORDER 16-05 (MAY 22, 2018)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE BANK OF NEW YORK MELLON,

Plaintiff(s),

v.

MARGUERITE DESELMS ET AL.,

Defendant(s).

Case Number 5:18-cv-01044 RGK (KKx)

Before: Philip S. GUTIERREZ,
United States District Judge.

CONSENT

I hereby consent to the transfer of the above-entitled case to my calendar, pursuant to General Order 16-05.

/s/ Philip S. Gutierrez
United States District Judge

Dated: 5/21/18

REASON FOR TRANSFER
AS INDICATED BY COUNSEL

Case 5:18-cv-00703 PSG(MRWx) and the present case:

A. Arise from the same or closely related transactions, happenings or events; or

B. Call for determination of the same or substantially related or similar questions of law and fact; or

C. For other reasons would entail substantial duplication of labor if heard by different judges; or

NOTICE TO COUNSEL FROM CLERK

Pursuant to the above transfer, any discovery matters that are or may be referred to a Magistrate Judge are hereby transferred from Magistrate Judge Kato to Magistrate Judge Wilner.

On all documents subsequently filed in this case, please substitute the initials PSG(MRWx) after the case number in place of the initials of the prior judge, so that the case number will read 5:18-cv-01044 PSG(MRWx). This is very important because the documents are routed to the assigned judges by means of these initials

STANDING ORDER REGARDING NEWLY ASSIGNED CASES (MAY 17, 2018)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE BANK OF NEW YORK MELLON,

Plaintiff(s),

v.

MARGUERITE DESELMS, ET AL.,

Defendant(s).

Case Number 5:18-cv-01044-RGK-KK

Before: R. Gary KLAUSNER, United States District Judge.

READ THIS ORDER CAREFULLY. IT CONTROLS THIS CASE.

This action has been assigned to the calendar of Judge R. Gary Klausner. The responsibility for the progress of litigation in the Federal Courts falls not only upon the attorneys in the action, but upon the Court as well. "To secure the just, speedy, and inexpensive determination of every action," Federal Rule of Civil Procedure 1, all counsel are hereby ordered to familiarize themselves with the Federal Rules of Civil Procedure, particularly Federal Rules of Civil Procedure 16, 26, the Local Rules of the

Central District of California, this Court's Order for Jury Trial, and this Court's Order for Court Trial.[1]

UNLESS OTHERWISE ORDERED BY THE COURT, THE FOLLOWING RULES SHALL APPLY:

1. Service of the Complaint

The Plaintiff(s) shall promptly serve the Complaint in accordance with Fed. R. Civ. P. 4 and file the proofs of service pursuant to Local Rule. Any Defendant(s) not timely served shall be dismissed from the action without prejudice. Any "DOE" or fictitiously-named Defendant(s) who is not identified and served within 90 days after the case is filed shall be dismissed pursuant to Federal Rule of Civil Procedure 4(m).

2. Removed Actions

Any answers filed in state court must be refiled in this Court as a supplement to the petition. Any pending motions must be re-noticed in accordance with Local Rules. If an action is removed to this Court

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[1] Copies of the Local Rules are available on our website at "http://www.cacd.uscourts.gov" or they may be purchased from one of the following:

Los Angeles Daily Journal
915 East 1st Street
Los Angeles, CA 90012

West Group
610 Opperman Drive
P.O. Box 64526
St. Paul, MN 55164-0526

Metropolitan News
210 South Spring Street
Los Angeles, CA 90012

that contains a form pleading, *i.e.*, a pleading in which boxes are checked, the party or parties utilizing the form pleading must file an appropriate pleading with this Court within thirty (30) days of receipt of the Notice of Removal. The appropriate pleading referred to must comply with the requirements of Federal Rules of Civil Procedure, Rules 7, 7.1, 8, 9, 10 and 11.

3. Petitions Under 18 U.S.C. Section 983(f)

Petitioner(s) shall file and serve within 3 days of the date of this order an ex parte application requesting a hearing on the Petition to ensure prompt resolution of the Petition in compliance with section 983(f)'s deadlines.

4. Presence of Lead Counsel

The attorney attending any proceeding before this Court, including all status and settlement conferences, must be the lead trial counsel.

5. Discovery

All discovery matters have been referred to a United States Magistrate Judge to hear all discovery disputes. (The Magistrate Judge's initials follow the Judge's initials next to the case number.) All documents must include the words "DISCOVERY MATTER" in the caption to ensure proper routing. Counsel are directed to contact the Magistrate Judge's Courtroom Deputy Clerk to schedule matters for hearing. Please do not deliver courtesy copies of these papers to this Court.

The decision of the Magistrate Judge shall be final, subject to modification by the District court only where it has been shown that the Magistrate Judge's

order is clearly erroneous or contrary to law. Any party may file and serve a motion for review and reconsideration before this Court. The moving party must file and serve the motion within ten (10) days of service of a written ruling or within ten (10) days of an oral ruling that the Magistrate Judge states will not be followed by a written ruling. The motion must specify which portions of the text are clearly erroneous or contrary to law, and the claim must be supported by points and authorities. Counsel shall deliver a conformed copy of the moving papers and responses to the Magistrate Judge's clerk at the time of filing.

6. Motions

Motions shall be filed and set for hearing in accordance with Local Rule 6-1, except that this Court hears motions on Mondays commencing at 9:00 a.m. If Monday is a national holiday, this Court will hear motions on the succeeding Tuesday. If the date the motion was noticed for hearing is not available, the Court will issue a minute order resetting the date. Any opposition or reply papers due on a holiday are due the preceding Friday, not the following Tuesday. Memoranda of Points and Authorities in support of or in opposition to motions shall not exceed 20 pages. Replies shall not exceed 10 pages. Only in rare instances and for good cause shown will the Court agree to extend these page limitations.

Pursuant to Local Rule 11-3.1.1, either a proportionally spaced or monospaced font may be used. A proportionally spaced font must be 14-point or larger, or as the Court may otherwise order. A monospaced font may not contain more than 101/2 characters per inch.

Motions, Oppositions, and Replies shall be electronically filed only. Parties shall not file courtesy copies. With the exception of physical exhibits, all documents supporting the motion, opposition, or reply (*e.g.*, declarations, exhibits, statements of undisputed or disputed facts, judicial notices) shall also be electronically filed only, and filed as attachments to the corresponding brief. Furthermore, each supporting document shall be filed as an individual attachment, such that each document can be accessed by its own individual link. Each attachment shall be designated by the title of the document. *Example (Docket Entry for Defendant's Notice of Motion and Motion for Summary Judgment):*

Document Selection Menu

Select the document you wish to view.

Document Number: 100 23 pages 150 kb

Attachment	Description
1	Separate Statement of Undisputed Facts 10 pages 50 kb
2	Declaration of Bob Smith 4 pages 30 kb
3	Exhibit A-Purchase Agreement 5 pages 1.2 kb
4	Exhibit B-Jones Deposition 10 pages 0.9 kb
5	Exhibit C-Thomas Declaration 3 pages 23 kb
6	Proposed Order 2 pages 20 kb

Within the parties' briefs, any reference to information or evidence contained in the supporting documents shall contain the documents' specific docket entry numbers in the citation. *Example: Plaintiff and Defendant executed the Purchase Agreement on January 2, 2010. (Purchase Agreement, Smith Decl., Ex. A at p.5, Docket Entry 100-3.)*

Motions for Summary Judgment: Without prior permission from the Court, no party may file more than one motion pursuant to Fed. R. Civ. P. 56 regardless of whether such motion is denominated as a motion for summary judgment or summary adjudication.

Motions to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6): Where a defendant has filed a Rule 12(b)(6) motion, and in lieu of filing an opposition, the plaintiff intends to file an amended complaint, the plaintiff shall file either the Amended

Complaint or a Notice of Intent to File Amended Complaint prior to the date on which the opposition is due. Failure to do so may result in sanctions.

7. Proposed Orders

Each party filing or opposing a motion or seeking the determination of any matter (*e.g.*, ex parte applications, stipulations, and general requests) shall electronically file and lodge a proposed order setting forth the relief or action sought and a brief statement of the rationale for the decision with appropriate citations.

8. Preparation of Documents/PDF

Counsel shall adhere to Local Rule 5-4.3.1 with respect to the conversion of all documents to a PDF

so that when a document is electronically filed, it is in the proper size and format that is PDF searchable.

9. Telephonic Hearings

The Court does not permit appearances or arguments by way of telephone conference calls.

10. Ex Parte Applications

The Court considers ex parte applications on the papers and does not usually set these matters for hearing. If a hearing is necessary, the parties will be notified. Ex parte applications are solely for extraordinary relief and should be used with discretion. Sanctions may be imposed for misuse of ex parte applications. *See Mission Power Engineering Co. v. Continental Casualty Co.*, 883 F.Supp. 488 (C.D. Cal. 1995).

Counsel's attention is directed to the Local Rules. The moving party shall serve the opposing party and shall notify the opposition that opposing papers must be filed not later than 3:00 p.m. on the first business day following service. If counsel does not intend to oppose an ex parte application, he or she must inform the Courtroom Deputy Clerk at (213) 894-2649.

11. Continuances

This Court has a strong interest in keeping scheduled dates certain. Changes in dates are disfavored. Trial dates set by the Court are firm and will rarely be changed. Therefore, a stipulation to continue the date of any matter before this Court must be supported by a sufficient basis that demonstrates good cause why the change in the date is essential. Without such compelling factual support, stipulations continuing dates set by this Court will not be approved.

Counsel requesting a continuance must file a stipulation and lodge a proposed order including a detailed declaration of the grounds for the requested continuance or extension of time. *See* Local Rules. Failure to comply with the Local Rules and this Order will result in rejection of the request without further notice to the parties. Proposed stipulations extending scheduling dates do not become effective unless and until this Court so orders. Counsel wishing to know whether a stipulation has been signed shall comply with the applicable Local Rule.

12. Communications with Chambers

Counsel shall not attempt to contact the Court or its staff by telephone or by any other ex parte means. Counsel may contact the Courtroom Deputy Clerk with appropriate inquiries only. Counsel shall not contact the Courtroom Deputy regarding status of ex parte application/ ruling or stipulation/ruling.

13. Order Setting Scheduling Conference

Pursuant to Federal Rule of Civil Procedure 16(b), the Court will issue an Order setting a Scheduling Conference as required by Federal Rule of Civil Procedure 26 and the Local Rules of this Court. Strict compliance with Federal Rules of Civil Procedure 16 and 26 is required.

14. Notice of This Order

Counsel for plaintiff or plaintiff (if appearing on his or her own behalf) shall immediately serve this Order on all parties, including any new parties to the action. If this case came to the Court by a Petition for

Removal, the removing defendant(s) shall serve this Order on all other parties.

15. Courtesy Copies

Courtesy copies are not required with documents traditionally filed over the intake counter. Courtesy copies shall be submitted for the following electronically filed documents: (1) Stipulations; (2) Ex Parte Applications; and (3) the following Final Pre-Trial Documents: Motions in Limine, Memoranda of Contention of Fact and Law, Witness Lists, Joint Succinct Statement of the Case, Voir Dire Questions (if the parties choose to submit any), and Jury Instructions. These courtesy copies shall be delivered to the judge's courtesy copy drop box located outside of the Clerk's Office, Room 181L, no later than the following business day after the electronic filing. Courtesy copies shall not be submitted for any other electronically filed documents.

XVI. Applications to File Documents Under Seal

For detailed instructions and information on the procedures for filing documents under seal, please refer to Local Rule 79–5 *Confidential Court Records-Under Seal.* With regard to Under-seal Documents in Non-sealed Civil Cases (L.R. 79-5.2.2), the filing party shall not provide a chambers or courtesy copy of the Application or any associated documents. Please bear in mind that all applications must (1) indicate which portions of the documents to be filed under seal are confidential; and (2) provide reason(s) as to why the parties' interest to file the document(s) under seal outweighs the public's right to access. If a party submits an application to file under seal pursuant to a protective order only (*i.e.*, no other reason is

given), the Court will automatically deny the application if the party designating the material as confidential does not file a declaration pursuant to L.R. 79-5.2.2(b)(i). This declaration shall be entitled: "DESIGNATING PARTY'S DECLARATION IN SUPPORT OF APPLICATION TO FILE UNDER SEAL PURSUANT TO PROTECTIVE ORDER".

IT IS SO ORDERED.

/s/ R. Gary Klausner
United States District Judge

Dated: May 17, 2018

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC (DECEMBER 27, 2021)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE BANK OF NEW YORK MELLON, FKA
The Bank of New York, as Trustee for the Certificate Holders CWALT, Inc. Alternative Loan Trust 2006-OC8 Mortgage Pass-Through Certificates, Series 2006-OC8,

Plaintiff-Counter-Defendant-Appellee,

v.

ALAN DAVID TIKAL, as Trustee of the KATN Revocable Living Trust; CAA, Inc., a Nevada corporation,

Defendants,

and

MARGUERITE DESELMS, Individually, and as Trustee of the Circle Road Revocable Living Trust Dated November 11, 2010,

Defendant-Counter-Claimant-Appellant.

No. 20-55993

D.C. No. 5:18-cv-01044-PSG-MRW
Central District of California, Riverside

Before: FERNANDEZ, SILVERMAN, and NGUYEN, Circuit Judges.

The panel has unanimously voted to deny Appellant's petition for rehearing. The petition for rehearing en Banc was circulated to the judges of the court, and no judge requested a vote for en Banc consideration.

The petition for rehearing and the petition for rehearing en Banc are DENIED.

SUPREME COURT
PRESS