No. 14-56755

In the

United States Court Of Appeals

For the

Ninth Circuit

DONALD M. LUSNAK,

Plaintiff-Appellant,

v.

BANK OF AMERICA, N.A.,

Defendant-Appellee.

Appeal from a Final Judgment of the United States District Court
for the Central District of California in
Lusnak v. Bank of America, N.A.,
D.C. No. 2:14-cv-01855-GHK-AJW

EXCERPTS OF RECORD, VOL. 1

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 14-1855-GHK (AJWx)	Date	October 29, 2014
Title	*Donald M. Lusnak v. Bank of America, N.A.*		

Presiding: The Honorable	**GEORGE H. KING, CHIEF U.S. DISTRICT JUDGE**	
Beatrice Herrera	N/A	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: **(In Chambers) Order re:** Defendant's Motion to Dismiss [Dkt. 26]

This matter is before us on Defendant Bank of America, N.A.'s ("Defendant") Motion to Dismiss ("Motion"). We have considered the papers filed in support of and in opposition to this Motion and deem this matter appropriate for resolution without oral argument. L.R. 7-15. As the Parties are familiar with the facts, we will repeat them only as necessary. Accordingly, we rule as follows:

I. Factual Background

On March 12, 2014, Plaintiff Donald Lusnak ("Plaintiff") filed this consumer fraud class action against Bank of America, N.A. ("Defendant") based on Defendant's alleged per se violation of California Civil Code Section 2954.8, which requires financial institutions that "receive[] money in advance for payment of taxes and assessments on . . . property, for insurance, or for other purposes relating to the property" to pay the borrower interest of at least 2 percent per year. Cal. Civ. Code § 2954.8(a). Plaintiff seeks to represent a class of "mortgage loan customers of Bank of America (or its subsidiaries), whose mortgage loan is for a one-to-four family residence located in California, and who paid Bank of America money in advance for payment of taxes and assessments on the property, for insurance, or for other purposes relating to the property, and did not receive interest on the amount held by Bank of America." (FAC at ¶ 21.) Plaintiff's First Amended Complaint ("FAC")[1] alleges the following underlying facts:

Plaintiff purchased a home in 2008 and entered into a mortgage agreement with Countrywide Financial, which later merged with Defendant. (*Id.* at ¶ 15.) In 2009, "Plaintiff entered into a refinance

[1] On June 25, 2014, we vacated the hearing on Defendant's first Motion to Dismiss and approved the Parties' Stipulation to grant Plaintiff leave to file a FAC, [Dkt. 21], because a FAC "could potentially streamline the litigation and further judicial economy by voluntarily eliminating challenged causes of action." (*See* June 20, 2014 Stipulation, at 2, Dkt. 19.) Plaintiff filed his FAC on June 27, 2014. [Dkt. 22.]

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agreement with Countrywide (which by that time had been acquired by [Defendant]), pursuant to which Plaintiff's original 2008 loan agreement with Countrywide was extinguished and a new loan was issued with a new applicable interest rate and other revised terms." (Opp'n at 5; *see also* Supp. RJN, Ex. E.[2]) In 2011, Defendant provided Plaintiff with a loan modification. (FAC at ¶ 15.) From 2008 to present, Plaintiff "has been required to make $250 in monthly payments to [Defendant] . . . for the pre-payment of property tax and insurance on the property" and never received interest on these prepaid funds. (*Id.* at ¶¶ 15-16.) Plaintiff's loan agreements with Defendant expressly provide that Defendant "would comply with applicable state and federal law." (*Id.* at ¶ 38.)

In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). This law allegedly made "explicit that Congress['s] intent was [to] permit states to enact and enforce laws that require mortgage lenders to pay interest on impound accounts." (*Id.* at ¶ 8.) Wells Fargo Bank, N.A., Defendant's "chief competitor and the largest mortgage originator in the U.S." pays interest on borrowers' escrow accounts. (*Id.* at ¶ 2.)

Based on these alleged facts, Plaintiff's FAC asserts two claims: (1) violation of California's Unfair Competition Law ("UCL"), California Business & Professions Code Section 17200, and (2) breach of contract. On July 31, 2014, Defendant filed this Motion, arguing that both of Plaintiff's claims rely on Section 2954.8, which is preempted by the National Bank Act ("NBA"). Plaintiff opposes this Motion.

Along with their submissions, both Parties request that we take judicial notice of several mortgage-related documents. Although review under Rule 12(b)(6) is generally limited to the contents of the complaint, we may "consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). Thus, "[e]ven if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the . . . document forms the basis of the plaintiff's claim." *Id.* This "incorporation by reference doctrine" has been extended "to situations in which the plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint." *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). We **GRANT** Defendant's Request as to Exhibit A, Plaintiff's 2008 mortgage agreement, as it is a public record and is generally appropriate for judicial notice, and Plaintiff does not object. We also **GRANT** Defendant's Request as to Exhibits B through D because these documents help form the basis of Plaintiff's Complaint, and Plaintiff does not challenge them. We **DENY** Plaintiff's Request for Judicial

[2] On September 12, 2014, Defendant filed a Supplemental Request for Judicial Notice asking us to also take notice of this 2009 loan agreement. [*See* Dkt. 31.] Plaintiff apparently does not disagree inasmuch as he states that "[t]he FAC inadvertently did not include reference to the 2009 agreement." (Opp'n at 5.) Defendant's Supplemental Request is **GRANTED**.

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Notice of the closing documents for his 2009 loan refinance agreement. [Dkt. 29.] Plaintiff asks us to take notice of these documents only as evidence of his 2009 agreement. (*See* Opp'n at 5.) As we take notice of his 2009 mortgage agreement, these closing documents are superfluous and need not be considered.

II. Motion to Dismiss

A. Legal Standard

To survive dismissal for failure to state a claim, a complaint must set forth "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). It must contain factual allegations sufficient to "state a claim to relief that is plausible on its face." *Id.* at 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). Although we must accept the allegations of the complaint as true and construe them in the light most favorable to the plaintiff, we need not accept as true legal conclusions "cast in the form of factual allegations." *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). "In sum, 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).

B. Discussion

Plaintiff's UCL and breach of contract claims are both premised upon Defendant's alleged violations of California Civil Code § 2954.8 and 15 U.S.C. § 1639d.[3] (*See* FAC at ¶ 32 (Defendant committed "per se violations" of both laws); ¶ 38 ("Defendant failed to perform the express terms . . . that stated Defendant would comply with applicable state and federal law . . . .").) Defendant claims that since Section 2954.8 and Section 1639d do not apply to its transaction with Plaintiff, Plaintiff's FAC must be dismissed. Accordingly, we analyze the applicability of each statute in turn.

1. California Civil Code § 2954.8

Defendant argues that we should dismiss Plaintiff's FAC because "Plaintiff's attempt to force Bank of America to comply with Section 2954.8 is preempted by the National Bank Act." (Mot. at 1.) The relevant portion of Section 2954.8 is as follows:

[3] Plaintiff's FAC also cites 12 U.S.C. § 5551 and Housing and Urban Development ("HUD") Handbook as evidence that Defendant is violating federal law. (*See* FAC at ¶ 9.) But, as Defendant notes, Plaintiff failed to respond to Defendant's arguments on these subjects and thus, seems to have abandoned his related claims. *See Stichting Pensioenfonds ABP v. Countrywide Fin. Corp.*, 802 F. Supp. 2d 1125, 1132 (C.D. Cal. 2011) ("[F]ailure to respond in an opposition brief to an argument put forward in an opening brief constitutes waiver or abandonment in regard to the uncontested issue.").

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> (a) Every financial institution that makes loans upon the security of real property containing only a one- to four-family residence and located in this state . . . and that receives money in advance for payment of taxes and assessments on the property, for insurance, or for other purposes relating to the property, shall pay interest on the amount so held to the borrower. The interest on such amounts shall be at the rate of at least 2 percent simple interest per annum. . . .

Plaintiff's argument that Section 2954.8 is not preempted primarily hinges on his assertion that Dodd-Frank "created a new statutory framework governing the standards applicable to determining whether state consumer financial laws are preempted by the NBA and other federal banking laws." (Opp'n at 7.) The Parties agree that, in light of Plaintiff's 2011 loan modification agreement, Dodd-Frank supplies the relevant preemption standard here. (*See* Opp'n at 8; Reply at 4.) But, the Parties dispute the extent to which Dodd-Frank changed the NBA preemption standard that existed before 2010. (*See* Mot. at 13-14, Opp'n at 7.)[4]

a. Dodd-Frank's Impact on the NBA Preemption Analysis

"The NBA was enacted to establish a national banking system and to protect banks from intrusive state regulation." *Robinson v. Bank of Am., N.A.*, 2011 WL 5870541, at *2 (C.D. Cal. Oct. 19, 2011). Before the passage of Dodd-Frank, courts typically found that the usual presumption against preemption of state laws by federal law did not apply to national banks. *See, e.g.*, *Bank of Am. v. City & Cnty. of San Francisco*, 309 F.3d 551, 559 (9th Cir. 2002) ("[B]ecause there has been a 'history of significant federal presence' in national banking, the presumption against preemption of state law is inapplicable."); *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 956 (9th Cir. 2005) ("[T]he usual presumption against federal preemption of state law is inapplicable to federal banking regulation."). Courts frequently struck down state laws that in any way encroached upon national banks' banking activities or authority. *See, e.g.*, *Monroe Retail, Inc. v. RBS Citizens, N.A.*, 589 F.3d 274, 283 (6th Cir. 2009) ("[T]he level of 'interference' that gives rise to preemption under the NBA is not very high.").

Section 1044 of Dodd-Frank, codified at 12 U.S.C. § 25b, clarified the relevant NBA preemption standard:

> State consumer financial laws are preempted, only if—

[4] Plaintiff also seems to waver on this point. At times, Plaintiff alleges that Dodd-Frank "changed the landscape" and "created a new statutory framework" for NBA preemption. (*See* FAC ¶ 5; Opp'n at 7.) But, Plaintiff also argues that under "pre-Dodd-Frank preemption standards . . . the result would be the same because . . . the focus of an NBA conflict preemption analysis [prior to Dodd-Frank] was [also] on congressional intent." (Opp'n at 17.)

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(A) application of a State consumer financial law would have a discriminatory effect on national banks, in comparison with the effect of the law on a bank chartered by that State;

(B) in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in *Barnett Bank of Marion County, N. A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (1996), the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers; and any preemption determination under this subparagraph may be made by a court, or by regulation or order of the Comptroller of the Currency on a case-by-case basis, in accordance with applicable law; or

(C) the State consumer financial law is preempted by a provision of Federal law other than title 62 of the Revised Statutes.[5]

12 U.S.C. § 25b(b)(1)

To the extent that Plaintiff asserts that Dodd-Frank significantly changed the relevant NBA preemption standard, he is mistaken.[6] (*See* Opp'n at 7.) Dodd-Frank only made significant changes in the Home Owners' Loan Act ("HOLA") preemption analysis, stating that HOLA no longer occupies the entire field of lending regulation. *See Settle v. World Sav. Bank, F.S.B.*, 2012 U.S. Dist. LEXIS 4215, at *13 (C.D. Cal. Jan. 11, 2012) ("The Dodd-Frank Act provides that HOLA does not occupy the field in any area of state law and that preemption is governed by the standards applicable to national banks."). But, with regards to the NBA, Dodd-Frank simply affirmed that *Barnett Bank* is the appropriate standard for courts and the Office of the Comptroller of the Currency ("OCC")[7] to apply to NBA preemption decisions. *See* S. Rep. No. 111-176, at 175 (2010) (emphasis added) ("Section 1044 amends the National Bank Act to clarify the preemption standard relating to State consumer financial laws as applied to national banks . . . ."); *see also U.S. Bank Nat. Ass'n v. Schipper*, 812 F. Supp. 2d 963, 968

[5] "[T]itle 62 of the Revised Statutes" includes the majority of the NBA.

[6] The only case Plaintiff cites for this proposition, *Ascher v. Grand Bank for Sav., FSB*, 2014 U.S. Dist. LEXIS 33763 (N.D. Ill. Mar. 14, 2014), does not specifically reference the NBA, and instead, focuses on Home Owners' Loan Act ("HOLA") preemption before and after Dodd-Frank.

[7] The OCC is "the agency charged by Congress with supervision of the NBA [and] oversees the operations of national banks and their interactions with customers." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 6 (2007). "To carry out this responsibility, the OCC has the power to promulgate regulations and to use its rulemaking authority to define the 'incidental powers' of national banks beyond those specifically enumerated in the [NBA]." *Martinez v. Wells Fargo Home Mortg.*, 598 F.3d 549, 555 (9th Cir. 2010).

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n.1 (S.D. Iowa 2011) (finding Dodd-Frank did not "raise[] the standard for NBA preemption"); *Cline v. Bank of Am.*, N.A., 823 F. Supp. 2d 387, 396 (S.D. W.Va. 2011) ("The recent [Dodd-Frank] amendments are better understood as clarifications of the law as opposed to substantive changes thereof.").

Dodd-Frank also helped clarify the level of deference we should give OCC regulations regarding NBA preemption. Congress made clear that courts need not use *Chevron* deference for OCC decisions regarding NBA preemption. *See* 12 U.S.C. § 25b(b)(5) ("A court reviewing [OCC] determinations . . . regarding preemption of a State law by title 62 of the Revised Statutes or section 371 of this title shall assess the validity of such determinations, depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision."); *see also* 12 U.S.C. § 25b(b)(5) ("No [OCC] regulation or order . . . prescribed under subsection (b)(1)(B), shall be interpreted or applied so as to invalidate, or otherwise declare inapplicable to a national bank, the provision of the State consumer financial law, unless substantial evidence, made on the record of the proceeding, supports the specific finding regarding the preemption of such provision in accordance with" *Barnett Bank*). But, even this directive does not seem entirely new, as courts do not typically wholly rely on agency preemption determinations when deciding whether a state law is preempted. *See, e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 576 (2009) (deciding to perform "its own conflict determination, relying on the substance of state and federal law and not on agency proclamations of pre-emption"); *Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 744 (1996) (assuming (without deciding) that the "question of whether a statute is pre-emptive . . . must always be decided de novo by the courts").

The biggest change Dodd-Frank made to the NBA preemption analysis involved new directives for the OCC's NBA preemption determinations. In part, Section 25b was Congress' attempt to undo "broader [preemption] standards adopted by rules, orders, and interpretations issued by the OCC in 2004." S. Rep. No. 111-176, at 175; *see also* H.R. Rep. No. 111-517 (2010) (Section 25b "revises the standard the OCC will use to preempt state consumer protection laws"). All future OCC NBA preemption determinations must now be made on a "case-by-case basis" and according to the guidelines Section 25b sets out. 12 U.S.C. § 25b(b)(1)(B); *see also* 12 U.S.C. § 25b(b)(3)(A) (defining "case-by-case basis" as only "concerning the impact of a particular State consumer financial law" or "the law of any other State with substantively equivalent terms").

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b. Preemption of Section 2954.8(a)[8] Under *Barnett Bank*

As a preliminary matter, it is clear that Section 2954.8 is not preempted under Section 25b(b)(1)(A) as having a "discriminatory effect on national banks." Section 2954.8 applies to "[e]very financial institution," state-chartered and national banks alike. *See* Cal. Civ. Code. § 2954.8(a). Defendant also does not argue that the law is preempted by anything other than the NBA or its related regulations. Thus, Section 25b(b)(1)(C), which permits preemption by federal laws besides the NBA, is inapplicable here. The relevant question is whether Section 2954.8 is preempted under the legal standard set out by the Supreme Court in *Barnett Bank*. *See* 12 U.S.C. § 25b(b)(1)(B).

Barnett Bank requires us to determine whether the federal and state statutes here are in "irreconcilable conflict." *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 31 (1996). This can occur when complying with both laws is a "physical impossibility"[9] or the state law "stand[s] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (internal quotation marks removed). The preemption question "is basically one of congressional intent." *Id.* at 30; *Aguayo v. U.S. Bank*, 653 F.3d 912, 918 (9th Cir. 2011) ("Regardless of the name attached to the type of preemption, the dispositive issue in any federal preemption question remains congressional intent."). As Congressional intent is not always explicit, we must assume that "normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted." *Barnett Bank*, 517 U.S. at 33. In this context, "[l]egislative grants of both enumerated and incidental 'powers' to national banks historically have been interpreted as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Id.* at 32. But, "[t]o say this is not to deprive States of the power to regulate national banks, where . . . doing so does not prevent or significantly interfere with the national bank's exercise of its powers." *Id.* at 33.

[8] Section 2954.8(b) prohibits financial institutions from charging escrow account fees that would cause a borrower to receive less than 2 percent interest. Cal. Civ. Code. § 2954.8(b). Defendant claims that Section 2954.8(b) is also preempted because it impedes national banks' power under 12 C.F.R. § 7.4002(a) to charge "non-interest charges and fees." (Mot. at 10.) But, Plaintiff insists that his claims are not derived from Section 2954.8(b). (Opp'n at 16.) Even though Plaintiff included language from Section 2954.8(b) in the FAC (*see* FAC at ¶ 1) and accused Defendant of violating the entire statute, not just Section 2954.8(a) (*see* FAC at ¶ 32), we take Plaintiff at his word that he has abandoned any possible claim under Section 2954.8(b).

[9] Plaintiff argues that Wells Fargo's alleged payment of interest on its escrow accounts demonstrates that complying with both state and federal law is not impossible here. (Opp'n at 11.) This may be true. But, the relevant question here is whether allowing California to *force* a national bank to pay interest on escrow accounts would significantly interfere with any of its banking powers under *Barnett Bank*.

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Here, we must ask: would imposing this escrow account interest payment requirement on national banks "prevent or significantly interfere" with national bank powers explicitly granted by Congress?

i. Whether Escrow Accounts are Part of a National Bank's Lending Power[10]

12 U.S.C. § 371 gives banks the power to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate." 12 U.S.C. § 24 (Seventh) allows national banks to exercise "all such incidental powers as shall be necessary to carry on the business of banking" including "by loaning money on personal security." A bank's "incidental powers" are activities that are "convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act." *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 960 (9th Cir. 2005).

The OCC has issued several informal opinions that national banks' "incidental powers" include providing and servicing escrow accounts for collecting real estate taxes and insurance. As a preliminary matter, the OCC has "discretion to authorize activities beyond those specifically enumerated" in 12 U.S.C. § 24 (Seventh) and OCC regulations that interpret the NBA have the same force of law as the statute itself.[11] *NationsBank of N. Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258 n.2 (1995); *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153-54 (1982) (finding that regulations interpreting federal banking laws are "subject to judicial review only to determine whether [the OCC] has exceeded [its] statutory authority or acted arbitrarily"). But, we can defer to informal OCC interpretations, like the letters Defendant relies on here, only "to the extent that those interpretations have the 'power to persuade.'" *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *see also Bank of Am.*, 309 F.3d at 563 (internal quotation marks omitted) (finding that if OCC informal position is "reasonable" it is "entitled to great weight").

[10] Plaintiff does not challenge Defendant's arguments that maintaining and servicing escrow accounts are incidental national bank powers. Instead, Plaintiff argues that Section 2954.8(a) does not significantly interfere with this (or any other) national bank power.

[11] Dodd-Frank's impact on OCC regulations is limited to the OCC's preemption determinations and does not apply to OCC regulations clarifying the meaning of the NBA's provisions. *See* 12 U.S.C. § 25b(b)(5)(B) (beyond review of OCC preemption decisions, "nothing in this section shall affect the deference that a court may afford to the Comptroller in making determinations regarding the meaning or interpretation" of the NBA); *see also* 12 U.S.C. § 25b(b)(1)(b); *Smiley*, 517 U.S. at 743-44 (distinguishing regulations that interpret the substantive meaning of statutes from those that opine on statutes' preemptive effects).

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Here, we are persuaded by the OCC's reasoning regarding escrow services. In deciding that "national banks are authorized to provide . . . escrow services to their loan or title policy customers as activities that are part of or incidental to the business of banking," the OCC reviewed judicial precedent and found that "three general principles" should guide whether activities fall within the "business of banking." OCC, Corporate Decision No. 99-06, 1999 WL 74103, at *1-2 (Jan. 29, 1999). The OCC asks: "(1) is the activity functionally equivalent to or a logical outgrowth of a recognized banking activity; (2) would the activity respond to customer needs or otherwise benefit the bank or its customers; and (3) does the activity involve risks similar in nature to those already assumed by banks?" *Id.* In the case of escrow services, "[n]ational banks have long been permitted to service the loans that they make and servicing frequently entails the assurance that local real estate taxes are paid on time." OCC, Conditional Approval No. 276, 1998 WL 363812, at *9 (May 8, 1998). Escrow services are "also of benefit to the borrowers as [they] relieve [borrowers] of the tasks of paying such regular tax and insurance obligations in a lump sum." *Id.* These OCC letters persuade us that escrow accounts are logically related to the provision of real estate loans and are often a necessary and beneficial part of national banks' services in this arena. Thus, national banks are empowered to offer and service escrow accounts.

Further, other courts have concluded that bank services and activities with more attenuated connections to banks' lending powers can still be classified as "incidental powers." For example, some courts have held that account fee disclosures are part of a bank's deposit-taking powers. *See, e.g.*, *Robinson v. Bank of Am., NA*, 525 Fed. Appx. 580, 582 (9th Cir. 2013). Other courts consider credit card disclosures and offers to be part of a bank's lending activities. *See, e.g.*, *Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032, 1034 (9th Cir. 2008); *Am. Bankers Ass'n v. Lockyer*, 239 F. Supp. 2d 1000, 1016 (E.D. Cal. 2002). Only services with no logical connection to national banks' enumerated powers, like "operating a general travel agency," have not qualified. *See, e.g.*, *Arnold Tours, Inc. v. Camp*, 472 F.2d 427 (1st Cir. 1972). These cases help affirm the reasonableness of the OCC's interpretation that escrow accounts fall within the scope of a national bank's powers.

ii. Whether Section 2954.8(a) Significantly Impairs This Power

As escrow services qualify as a national banking power, the next inquiry under *Barnett Bank* is whether Section 2954.8(a) significantly interferes with this power.[12] Defendant argues it does because under Section 2954.8(a), Defendant could offer escrow accounts only if it paid "at least 2 percent interest on . . . escrow account balance[s]." (Mot. at 10.) Defendant further argues that Plaintiff's

[12] The only case law about preemption of state laws regarding escrow accounts analyzes the issue under pre-Dodd-Frank HOLA field preemption, which is not analogous. *See, e.g.*, *Flagg v. Yonkers Sav. & Loan Ass'n, FA*, 396 F.3d 178 (2d Cir. 2005) (internal quotation marks removed) (concluding that having "occupie[d] the entire field of lending regulation for federal savings associations" state laws that required lenders to pay interest on escrow accounts were preempted); *First Fed. Sav. & Loan Ass'n of Boston v. Greenwald*, 591 F.2d 417, 425 (1st Cir. 1979) (same).

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"Complaint seeks to impose state-law conditions on the circumstances under which banks may extend mortgage credit." (Mot. at 12.) This is because banks treat an escrow account as a "term of credit" and may begin to refuse loans without the security such accounts provide. (*Id.*)[13]

We find that Section 2954.8(a) constitutes a significant interference. Requiring Defendant to pay all of its borrowers 2 percent interest would allow a state to impose "costly operational and administrative burdens on national banks' lending activities" and would jeopardize a helpful (and free) service that Defendant provides its real estate borrowers. *See Am. Bankers Ass'n*, 239 F. Supp. 2d at 1016 (finding costly California credit card disclosure requirements are preempted as to national banks)[14]; *see also Schipper*, 812 F. Supp. 2d at 973 (finding state law preempted under *Barnett Bank* partly because it required national banks to reimburse certain fees to state banks). Further, Section 2954.8(a)'s rigid 2 percent requirement does not take changing prevailing interest rates into account. Thus, it would interfere with a national bank's ability to make loans given evolving and potentially fluid market conditions. The NBA was passed to "protect banks from intrusive state regulation." *Robinson*, 2011 WL 5870541, at *2. Forcing Defendant to comply with Section 2954.8(a) is contrary to that intent. Finally, as Defendant points out, holding otherwise might subject Defendant to different interest rate requirements in the 49 other states in which it operates. (Reply at 5.) "Diverse and duplicative superintendence of national banks' engagement in the business of banking" is exactly what "the NBA was designed to prevent." *Watters*, 550 U.S. at 13-14.

Plaintiff's FAC is not an attempt to subject a national bank to a state law of general applicability, which would be permissible. *See id.* at 11 ("Federally chartered banks are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or the general purposes of the NBA."). In other words, Section 2954.8 does not require of Defendant what it would of all businesses—"to refrain from fraudulent, unfair, or illegal behavior." *See Martinez v. Wells Fargo Home Mortg.*, 598 F.3d 549, 555 (9th Cir. 2010); *Cabrera v. Countrywide Home Loans,*

[13] To support its preemption arguments, Defendant also points to 12 C.F.R. § 34.4, the OCC's regulation announcing the categories of state laws preempted by the NBA. Specifically, 12 C.F.R. § 34.4(a)(6) states that national banks need not follow "state law limitations concerning . . . [e]scrow accounts, impound accounts, and similar accounts [and] terms of credit." Plaintiff argues that we cannot defer to this regulation because: (1) it does not involve a case-by-case evaluation of state laws and (2) under Dodd-Frank, we need not defer to the OCC's preemption decisions. But, even without relying on Section 34.4, we conclude that Section 2954.8(a) is preempted as applied here.

[14] Plaintiff claims that we cannot use pre-Dodd-Frank cases to inform our preemption analysis. (*See* Opp'n at 15.) We do not agree. As discussed above, Dodd-Frank merely clarified that *Barnett Bank* is the appropriate standard. Thus, where courts have looked beyond OCC regulations and "ruled consistently with *Barnett Bank*, the end result after the Dodd-Frank Act will not change." *See* Debra Lee Hovatter, *Preemption Analysis Under the National Bank Act: Then and Now*, 67 Consumer Fin. L.Q. Rep. 5, 11 (2013).

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 14-1855-GHK (AJWx)	Date	October 29, 2014
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Inc., 2013 U.S. Dist. LEXIS 47801, at *21-23 (N.D. Cal. Apr. 2, 2013) (unfair foreclosure claim). Instead, Plaintiff seeks to directly impede Defendant's authority under the NBA to provide and service its escrow accounts as it sees fit.

iii. Impact of Section 1639d on Preemption Analysis

Plaintiff claims that "Congress's enactment of 15 U.S.C. § 1639d(g)(3) . . . expressly signaled that, as of that time, Congress viewed the application of Cal. Civ. Code § 2954.8(a) and similar state laws to national banks as being consistent with national banks' powers." (Opp'n at 12.) We disagree. Section 1639d of the Truth in Lending Act ("TILA") requires "creditors"[15] "in connection with the consummation of a consumer credit transaction secured by a first lien on the principal dwelling of the consumer" to establish escrow accounts for the payment of taxes and insurance in certain specified circumstances. 15 U.S.C. § 1639d. Section 1639d(g)(3) provides rules for the administration of these "mandatory escrow or impound accounts," including the payment of interest. 15 U.S.C. § 1639d(g)(3). Specifically, "[i]f prescribed by applicable State or Federal law, each creditor shall pay interest to the consumer on the amount held in any impound, trust, or escrow account that is subject to this section in the manner as prescribed by that applicable State or Federal law." *Id.* In situations where a mandatory escrow account is not required, Section 1639d clarifies that parties may still voluntarily agree to establish escrow accounts "on terms mutually agreeable to the parties to the loan." 15 U.S.C. § 1639d(f)(1).

It is unlikely that Congress would be so subtle in requiring national banks to comply with state laws that would otherwise significantly interfere with their banking powers. *See Barnett Bank*, 517 U.S. at 34; *United States v. Locke*, 529 U.S. 89, 106-07 (2000) ("We think it quite unlikely that Congress would use a means so indirect . . . to upset the settled division of authority" between federal and state governments). The statute in question must "contain language from which it can be reasonably inferred that Congress intended to disrupt other federal laws including the National Bank[] Act by an implicit reservation of the power to administratively regulate banks to the states." *Bank of Am.*, 309 F.3d at 565 n.9.

This is not the case here. While Section 1639d does impose additional federal requirements on "creditors" (including national banks like Defendant), it contains no language from which we can "reasonably infer" that Congress intended to limit NBA preemption.[16] First, the context in which

[15] TILA's definition of the term "creditor" is broad enough to include national banks like Defendant. *See* 15 U.S.C. § 1602 (g) (a "creditor" "both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit . . . and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable . . .").

[16] Defendant argues that "[t]wo Ninth Circuit decisions illustrate the difficulty Plaintiff faces in showing how provisions codified in Title 15 of the Unites States Code contain the necessary 'explicit

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CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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Congress passed Section 1639d demonstrates that it should have no impact on preemption under the NBA. "Congress is presumed to be familiar with the background of existing law when it legislates." *Abebe v. Gonzales*, 493 F.3d 1092, 1101 (9th Cir. 2007); *see also Cannon v. University of Chicago*, 441 U.S. 677, 699 (U.S. 1979) ("[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with . . . important precedents . . . and that it expected its enactment to be interpreted in conformity with them."). Here, where Congress wanted to make changes to existing NBA preemption standards, it did so explicitly by eliminating HOLA field preemption and clarifying the appropriate standard for OCC and federal court preemption review going forward. *See* 12 U.S.C. § 25b. Section 1639d does not mention national banks, the NBA, or preemption. Further, Section 1639d is located in a different Title of the United States Code and as part of a different statutory scheme. Thus, it lacks sufficient logical connection to the NBA to demonstrate Congressional intent to change the NBA's preemptive scope in this arena.

Further, Section 1639d's plain language does not support Plaintiff's interpretation. Under Section 1639d(g)(3)'s terms creditors must pay interest on the accounts under this section only "if" required by "applicable State or Federal law." 15 U.S.C. § 1639d(g)(3). There is no "applicable" state law because Section 2954.8(a) is preempted by the NBA, and therefore is not capable of being applied to national banks. *See Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716, 724 (2011) (defining "'applicable' as 'capable of being applied: having relevance' or 'fit, suitable, or right to be applied: appropriate'"). Congress's use of conditional terms such as "if" and "applicable" demonstrates that Section 1639d was not meant, in and of itself, to override established rules of preemption in a different statutory scheme. If anything, Congress recognized that such laws might not always "apply" to certain creditors under certain circumstances and made no affirmative changes to when this would occur. The inclusion of such conditional language also means that Congress did not need to explicitly "exclude national banks from this requirement" as Plaintiff suggests. (Opp'n at 12.) Accordingly, 1639d does not alter our preemption analysis.

2. Plaintiff's Section 1639d Claims

Plaintiff also claims that Defendant has committed per se violations of 15 U.S.C. § 1639d(g)(3). (Opp'n at 18.) But, Section 1639d does not apply to Defendant in this case. First, as discussed above,

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statement' of Congress's intent to subject a national banking power to state law restrictions." (Reply at 8.) But, these cases are insufficiently analogous to inform our decision here. Granted, both cases held that savings clauses in specific Titles of the United States Code cannot trump preemption under the federal banking laws. *See Silvas v. E*Trade Mortgage*, 514 F.3d 1001, 1007 (9th Cir. 2008); *Bank of Am.*, 309 F.3d at 565. But, this was because the savings clauses involved explicitly limited their anti-preemptive effect to the subchapter in question. *See id.* Here, Plaintiff is effectively arguing that Section 1639d is a savings clause because it allegedly carves out a preemption exception for state laws requiring interest charges on escrow accounts. As 1639d includes no similar subchapter limitation, the cases Defendant cites are largely unhelpful.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 14-1855-GHK (AJWx)	Date	October 29, 2014
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Section 1639d requires Defendant to make interest payments only if required by "applicable" state law, which is not the case here, as Section 2954.8(a) is preempted. *See Wolf v. Reliance Standard Life Ins. Co.*, 71 F.3d 444, 448 (1st Cir. 1995) ("ERISA preemption . . . would dictate the applicable law."); *Atl. Richfield Co. v. Brown*, 1985 WL 3316, at *7 (N.D. Ill. Oct. 21, 1985) ("Because of . . . preemption, only the [federal law] is applicable law."). Second, this provision applies only to "an escrow . . . account subject to this section." 15 U.S.C. § 1639d(g)(2). Section 1639d requires the establishment of escrow accounts for certain types of loans made after January 21, 2013, the statute's effective date.[17] 15 U.S.C. § 1639d(a) ("a creditor, in connection with the consummation of a consumer credit transaction secured by a first lien on the principal dwelling of the consumer . . . shall establish, before the consummation of such transaction, an escrow or impound account . . . ."). As Plaintiff's account was established prior to Section 1639d's effective date, and Congress has expressed no intent that Section 1639d shall apply retroactively, his account is not subject to the requirements of this section. Thus, Plaintiff cannot state a claim under Section 1639d.

3. Impact of Preemption on Plaintiff's UCL and Contract Claims

As discussed above, Defendant has not violated state or federal law in not paying interest on Plaintiff's escrow accounts. Since Plaintiff's UCL claim is premised on these alleged violations, it must be dismissed.

Plaintiff's breach of contract claim also hinges on his allegations that Defendant violated "applicable law." (*See* FAC at ¶ 10 (agreement provides it would pay interest on escrow accounts if "Applicable Law requires interest to be paid").) The Parties' 2009 agreement defines "Applicable Law" as "all *controlling* applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions." (Supp. RJN, Ex. E, at § J (emphasis added).) Neither Section 2954.8 nor Section 1639d is controlling on Plaintiff's loan agreements. Defendant has complied with "applicable law" in not paying interest on Plaintiff's escrow account. Accordingly, Plaintiff's breach of contract claim must also be dismissed.

III. Conclusion

Based on the foregoing, we **DISMISS** Plaintiff's FAC with prejudice.

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[17] *See* Pub. L. 110-203, § 1400(c)(3) (providing that any section of Title XIV of Dodd-Frank for which no regulations have been issued shall take effect "on the date that is 18 months after the designated transfer date"); Bureau of Consumer Financial Protection, *Escrow Requirements Under the Truth in Lending Act (Regulation Z)*, Fed. Reg. 4726-01 (Jan. 22, 2013) ("The Dodd-Frank Act requirements to be implemented by the Title XIV Rulemakings generally will take effect on January 21, 2013 . . . .").

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 14-1855-GHK (AJWx)	Date	October 29, 2014
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IT IS SO ORDERED.

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FILED: 10/29/14

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

Donald M. Lusnak, **Plaintiff,** **v.** ***Bank of America, N.A.,*** **Defendant.**	**CASE NO. CV 14-1855-GHK (AJWx)** **JUDGMENT**

Pursuant to the Court's October 29, 2014 Order, IT IS HEREBY ADJUDGED that Plaintiff's First Amended Complaint is **DISMISSED with prejudice**. Plaintiff shall take nothing by this Complaint.

IT IS SO ORDERED.

DATED: October 29, 2014

GEORGE H. KING
Chief United States District Judge

No. 14-56755

In the

United States Court Of Appeals

For the

Ninth Circuit

DONALD M. LUSNAK,

Plaintiff-Appellant,

v.

BANK OF AMERICA, N.A.,

Defendant-Appellee.

Appeal from a Final Judgment of the United States District Court
for the Central District of California in
Lusnak v. Bank of America, N.A.,
D.C. No. 2:14-cv-01855-GHK-AJW

EXCERPTS OF RECORD, VOL. 2

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Excerpts of Record
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DONALD M. LUSNAK, on behalf of himself and all others similarly situated,

Plaintiff,

v.

BANK OF AMERICA, N.A.; and DOES 1 through 10, inclusive,

Defendants.

Case No. 2:14-cv-01855-GHK (AJW)

PLAINTIFF'S NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[ACCOMPANYING DOCUMENTS: ORDER GRANTING DEFENDANT'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT; JUDGMENT; PLAINTIFF'S REPRESENTATION STATEMENT]

Notice is hereby given that DONALD M. LUSNAK, the plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order granting Defendant's Motion to Dismiss the First Amended Complaint ("Order") entered in this action on October 29, 2014 [Doc. No. 33], and the Judgment issued on October 29, 2014 [Doc. No. 34].

Attached hereto as Exhibit A is a true and correct copy of the above Order issued in this action. Attached hereto as Exhibit B is a true and correct copy of the Judgment in this action.

Pursuant to Federal Rules of Appellate Procedure 12(b) and Ninth Circuit Rule 3-2(b) Plaintiff's Representation Statement is attached hereto as Exhibit C.

Dated: November 4, 2014

Respectfully submitted,

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DONALD M. LUSNAK, on behalf of himself and all others similarly situated,

Plaintiffs,

vs.

BANK OF AMERICA, N.A.; and DOES 1 through 10, inclusive,

Defendants.

Case No. 2:14-CV-01855-GHK-AJW

DEFENDANT BANK OF AMERICA, N.A.'S SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

Hon. George H. King

Date: September 29, 2014
Time: 9:30 a.m.
Courtroom: 650

Defendant Bank of America, N.A. ("Bank of America") previously asked the Court to take judicial notice of Plaintiff's Deed of Trust dated June 27, 2008, (the "2008 Mortgage Agreement"), a Commitment to Modify Mortgage dated 2011 (the "Modified Mortgage Agreement"), a Notice Concerning Your Escrow Account dated June 27, 2008 ("First Escrow Notice"), and a Notice Concerning Your Escrow Account dated March 25, 2009. *See* Doc. 27. Plaintiff has not opposed this request.

Plaintiff has admitted that his claims do not arise out of the 2008 Mortgage Agreement, as he alleged in the Complaint. *See* Doc. 28 at 5 & n.1. Instead, Plaintiff now asserts that his claims arise out of a *separate* 2009 loan agreement with a Bank of America subsidiary, and that the Modified Mortgage Agreement modified this 2009 loan. *See id.* Plaintiff further asks the Court to take judicial notice of two documents: the Note Plaintiff executed in connection with his 2009 loan, Doc. 29-1 at 1-4, and closing documents purporting to show that the proceeds of the 2009 loan were used to pay off the 2008 loan, *see* Doc. 29-1 at 5. While Bank of America does not oppose this request for judicial notice, the documents that are the subject of Plaintiff's request for judicial notice do not contain the relevant provisions regarding the payment of interest on Plaintiff's escrow account.

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Accordingly, and in light of Plaintiff's clarifications, Bank of America supplements its existing request for judicial notice and asks this Court to also take judicial notice of Plaintiff's Deed of Trust dated March 25, 2009 (the "2009 Mortgage Agreement"). The 2009 Mortgage Agreement is a public record that is "not subject to reasonable dispute because it … can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). Judicial notice may be taken of mortgages and deeds of trust because such documents are public records. *See Grant v. Aurora Loan Servs, Inc.*, 736 F. Supp. 2d 1257, 1263-64 (C.D. Cal. 2010). As such, the Court should take judicial notice of Plaintiff's 2009 Mortgage Agreement, a true and correct copy of which is attached hereto as Exhibit E.

DATED: September 12, 2014

REED SMITH LLP

COVINGTON & BURLING LLP

By: /s/ Peter J. Kennedy
Marc A. Lackner
Peter J. Kennedy

Keith Noreika
Andrew Soukup

Attorneys for Defendant
BANK OF AMERICA, N.A.

EXHIBIT E

04/10/2009
20090522265

Recording Requested By:
W. SCHNIEDERS

Recording requested By & Return To:
Chicago Title-ServiceLink Division
4000 Industrial Blvd.
Aliquippa, PA 15001 1840848

Prepared By:
WENDY LUBE

[Space Above This Line For Recording Data]

LAP444463549265 [Case #] | 1840848 [Escrow/Closing #] | 00020300468103009 [Doc ID #]

DEED OF TRUST

MIN 1001337-0003606830-5

NOTICE: THIS LOAN IS NOT ASSUMABLE WITHOUT THE APPROVAL OF THE DEPARTMENT OF VETERANS AFFAIRS OR ITS AUTHORIZED AGENT.

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) **"Security Instrument"** means this document, which is dated MARCH 25, 2009, together with all Riders to this document.
(B) **"Borrower"** is
DONALD M LUSNAK, A MARRIED MAN AS HIS SOLE & SEPARATE PROPERTY

Borrower's address is
2645 GREENWOOD CT, PALMDALE, CA 93550
Borrower is the trustor under this Security Instrument.

CASE #: LAP444463549265 DOC ID #: 00020300468103009

(C) "Lender" is
COUNTRYWIDE BANK, FSB
Lender is a FED SVGS BANK
organized and existing under the laws of THE UNITED STATES.
Lender's address is
1199 North Fairfax St. Ste.500, Alexandria, VA 22314

(D) "Trustee" is
RECONTRUST COMPANY, N.A.
225 W HILLCREST DRIVE, MSN: TO-02, THOUSAND OAKS, CA 91360

(E) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument. MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.

(F) "Note" means the promissory note signed by Borrower and dated MARCH 25, 2009. The Note states that Borrower owes Lender
TWO HUNDRED TWO THOUSAND EIGHT HUNDRED NINETEEN and 00/100

Dollars (U.S. $ 202,819.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than APRIL 01, 2039.

(G) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."

(H) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

(I) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

☐ Adjustable Rate Rider	☒ Condominium Rider	☐ Second Home Rider
☐ Balloon Rider	☐ Planned Unit Development Rider	☐ 1-4 Family Rider
☒ VA Rider	☐ Biweekly Payment Rider	☐ Other(s) [specify]

(J) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(K) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(L) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(M) "Escrow Items" means those items that are described in Section 3.

(N) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(O) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(P) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(Q) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. Section 2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(R) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

CASE #: LAP444463549265 DOC ID #: 00020300468103009

TRANSFER OF RIGHTS IN THE PROPERTY

The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS. This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in the

COUNTY of LOS ANGELES ;
[Type of Recording Jurisdiction] [Name of Recording Jurisdiction]

SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF.

Parcel ID Number: 3018031066 which currently has the address of

2645 GREENWOOD CT, PALMDALE
[Street/City]

California 93550 ("Property Address"):
[Zip Code]

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property." Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges. Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim

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which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. Application of Payments or Proceeds. Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. Funds for Escrow Items. Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

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4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 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.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee and Borrower further agrees to generally assign rights to insurance proceeds to the holder of the Note up to the amount of the outstanding loan balance. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee and Borrower further agrees to generally assign rights to insurance proceeds to the holder of the Note up to the amount of the outstanding loan balance.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim,

then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. Occupancy. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. Preservation, Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. Borrower's Loan Application. Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. 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 for 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: (a) paying any sums secured by a lien which has priority over this Security Instrument; (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. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

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.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and

retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

(b) Any such agreements will not affect the rights Borrower has - if any - with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

12. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

13. Joint and Several Liability; Co-signers; Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

14. Loan Charges. Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice

in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

16. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. Borrower's Copy. Borrower shall be given one copy of the Note and of this Security Instrument.

18. Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. Sale of Note; Change of Loan Servicer; Notice of Grievance. The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time

period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. Hazardous Substances. As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If Lender invokes the power of sale, Lender shall execute or cause Trustee to execute a written notice of the occurrence of an event of default and of Lender's election to cause the Property to be sold. Trustee shall cause this notice to be recorded in each county in which any part of the Property is located. Lender or Trustee shall mail copies of the notice as prescribed by Applicable Law to Borrower and to the other persons prescribed by Applicable Law. Trustee shall give public notice of sale to the persons and in the manner prescribed by Applicable Law. After the time required by Applicable Law, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Trustee may postpone sale of all or any parcel of the Property by public announcement at the time and place of any previously scheduled sale. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's and attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

23. Reconveyance. Upon payment of all sums secured by this Security Instrument, Lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security

CASE #: LAP444463549265 DOC ID #: 00020300468103009

Instrument to Trustee. Trustee shall reconvey the Property without warranty to the person or persons legally entitled to it. Lender may charge such person or persons a reasonable fee for reconveying the Property, but only if the fee is paid to a third party (such as the Trustee) for services rendered and the charging of the fee is permitted under Applicable Law. If the fee charged does not exceed the fee set by Applicable Law, the fee is conclusively presumed to be reasonable.

24. Substitute Trustee. Lender, at its option, may from time to time appoint a successor trustee to any Trustee appointed hereunder by an instrument executed and acknowledged by Lender and recorded in the office of the Recorder of the county in which the Property is located. The instrument shall contain the name of the original Lender, Trustee and Borrower, the book and page where this Security Instrument is recorded and the name and address of the successor trustee. Without conveyance of the Property, the successor trustee shall succeed to all the title, powers and duties conferred upon the Trustee herein and by Applicable Law. This procedure for substitution of trustee shall govern to the exclusion of all other provisions for substitution.

25. Statement of Obligation Fee. Lender may collect a fee not to exceed the maximum amount permitted by Applicable Law for furnishing the statement of obligation as provided by Section 2943 of the Civil Code of California.

The undersigned Borrower requests that a copy of any Notice of Default and any Notice of Sale under this Security Instrument be mailed to the Borrower at the address set forth above. A copy of any Notice of Default and any Notice of Sale will be sent only to the address contained in this recorded request. If the Borrower's address changes, a new request must be recorded.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Donald M. Lusnak (Seal)
DONALD M. LUSNAK -Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

CASE #: LAP444463549265 DOC ID #: 00020300468103009

State of California

County of Los Angeles

On 3-26-09 before me, MAUREEN A. O'Neill - Notary Public,
personally appeared Donald M. Luznak

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ (Seal)

MAUREEN A. O'NEILL
NOTARY PUBLIC - CALIFORNIA
COMMISSION # 1763984
LOS ANGELES COUNTY
My Comm. Exp. July 24, 2011

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Attorneys for Plaintiff and the Putative Class

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DONALD M. LUSNAK, on behalf of himself and all others similarly situated,

Plaintiffs,

v.

BANK OF AMERICA, N.A.; and DOES 1 through 10, inclusive,

Defendants.

Case No. 2:14-cv-01855-GHK (AJW)

PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE

Date: September 29, 2014
Time: 9:30 a.m.
Judge: Hon. George H. King

Pursuant to Federal Rule of Evidence 201, Plaintiff Donald M. Lusnak ("Plaintiff") hereby requests that the Court take judicial notice of closing documents regarding Plaintiff's 2009 loan refinance agreement, true and correct copies of which are attached hereto as Exhibit 1. Such materials are properly within the scope of documents for which the Court may take judicial notice because they are "not subject to reasonable dispute because [they] can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2).

Dated: August 29, 2014

Respectfully submitted,

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

By: */s/ Michael W. Sobol*
Michael W. Sobol

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Attorneys for Plaintiff and the Putative Class

1193224.1

EXHIBIT 1

Prepared by: WENDY LUBE
CASE #: LAP444463549265

LOAN #: 203004681

NOTE

NOTICE: THIS LOAN IS NOT ASSUMABLE WITHOUT THE APPROVAL OF THE DEPARTMENT OF VETERANS AFFAIRS OR ITS AUTHORIZED AGENT.

MARCH 25, 2009 [Date] | [City] | CALIFORNIA [State]

2645 GREENWOOD CT, PALMDALE, CA 93550
[Property Address]

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. $ 202,819.00 (this amount is called "Principal"), plus interest, to the order of the Lender. The Lender is
COUNTRYWIDE BANK, FSB
I will make all payments under this Note in the form of cash, check or money order.

I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

2. INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of 4.500 %.

The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 6(B) of this Note.

3. PAYMENTS

(A) Time and Place of Payments

I will pay principal and interest by making a payment every month.

I will make my monthly payment on the FIRST day of each month beginning on MAY 01, 2009 . I will make these payments every month until I have paid all of the Principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on APRIL 01, 2039 , I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at
P.O. Box 10219, Van Nuys, CA 91410-0219
or at a different place if required by the Note Holder.

(B) Amount of Monthly Payments

My monthly payment will be in the amount of U.S. $ 1,027.65 .

4. BORROWER'S RIGHT TO PREPAY

I have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a "Prepayment." When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under this Note.

I may make a full Prepayment or partial Prepayments without paying a Prepayment charge. A partial Prepayment must be in an amount not less than the next monthly principal payment or $100, whichever is less. The Note Holder will use my Prepayments to reduce the amount of Principal that I owe, but may first apply the Prepayment to any accrued and unpaid interest. A full Prepayment will be credited on the date received by the Note Holder and no interest will be charged after that date. A partial Prepayment will be credited by the next payment due date or 30 days after the Prepayment is received by the Note Holder, whichever is earlier.

5. LOAN CHARGES

If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (a) any such loan charge will be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from me which exceeded permitted limits will be refunded to me. The Note Holder may choose to make this refund by reducing the Principal I owe under this Note or by making a direct payment to me. If a refund reduces Principal, the reduction will be treated as a partial Prepayment.

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6. BORROWER'S FAILURE TO PAY AS REQUIRED

(A) Late Charge for Overdue Payments

If the Note Holder has not received the full amount of any monthly payment by the end of FIFTEEN calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 4.000 % of my overdue payment. I will pay this late charge promptly but only once on each late payment .

(B) Default

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

(C) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

(D) No Waiver By Note Holder

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

(E) Payment of Note Holder's Costs and Expenses

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

7. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address.

Any notice that must be given to the Note Holder under this Note will be given by delivering it or by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if I am given a notice of that different address.

8. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note.

9. WAIVERS

I and any other person who has obligations under this Note waive the rights of Presentment and Notice of Dishonor. "Presentment" means the right to require the Note Holder to demand payment of amounts due. "Notice of Dishonor" means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.

10. UNIFORM SECURED NOTE

This Note is a uniform instrument with limited variations in some jurisdictions. In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of those conditions are described as follows:

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

CASE #: LAP444463549265 LOAN #: 203004681

11. DEPARTMENT OF VETERANS AFFAIRS GUARANTEED LOAN AUTHORITY

If my loan is approved for a guaranty under Title 38, Part 36 of the Code of Federal Regulations in effect on the date of my loan, the rights, duties, and liabilities of the parties to this Note are governed by those regulations. Any provision of this Note inconsistent with the regulations is amended and supplemented to conform with the regulations.

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED.

_____ (Seal)
DONALD M. LUSNAK - Borrower

_____ (Seal)
- Borrower

_____ (Seal)
- Borrower

_____ (Seal)
- Borrower

[Sign Original Only]

CASE #: LAP444463549265 LOAN #: 203004681

CLOSING INSTRUCTIONS

Prepared by: WENDY LUBE
Date and Time: 03/25/2009 15:19:27

Settlement Agent: SERVICE LINK CLOSING DISBURSE	**Lender:** COUNTRYWIDE BANK, FSB
Address: 4000 INDUSTRIAL ALIQIPPA, PA 15001	**Address:** Office #: 0001173 1300 EASTMAN AVE, SUITE 100 VENTURA, CA 93003
Attn: WESTERN TEAM	**Attn:**
File No. 1840848	**Loan No.** 203004681
Phone No.	**Phone No.** (805)650-2400
Fax No.	**Fax No.** (805)654-8646

Borrower:
DONALD M. LUSNAK

Seller: Refinance	**Sales Price:** N/A
Loan Type: VA	**Loan Amount:** 202,819.00
Lien Position: FIRST	**Draw Amount (HELOC and Construction Only):** 0.00
Property Address: 2645 GREENWOOD CT PALMDALE, CA 93550	**Anticipated Closing Date:** 03/25/2009
Initial Payment (excluding impounds): 1,027.65	**Anticipated Funding Date:** 03/30/2009
Loan Term (months): 360	☐ **ARM Loan:**
Initial Interest Rate: 4.500	**Index:** **Margin:** **Periodic Cap:** 0.000 **Ceiling:** 0.000 **Floor:** **Interest Rate Change Date:** **Payment Change Date:**
First Payment Date: MAY 01, 2009	
Maximum Principal Balance: 0.00	☐ **Buydown Loan:** ☐ **Negative Amortization:**

Wiring Instructions (except for any portion of an unwanted HELOC draw):
The Bank of New York
48 Wall Street
New York, NY
ABA# 021000018
Countrywide Home Loans
Acct# 8900404639
Reference: 203004681
Attn: Treasury Department

23981

2030046810000001C086

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Attorneys for Defendant
BANK OF AMERICA, N.A.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DONALD M. LUSNAK, on behalf of himself and all others similarly situated,

Plaintiffs,

vs.

BANK OF AMERICA, N.A.; and DOES 1 through 10, inclusive,

Defendants.

Case No. 2:14-CV-01855-GHK-AJW

DEFENDANT BANK OF AMERICA, N.A.'S REQUEST FOR JUDICIAL NOTICE AND REQUEST FOR CONSIDERATION OF CERTAIN INCORPORATED DOCUMENTS IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

Hon. George H. King

Date: September 29, 2014
Time: 9:30 a.m.
Courtroom: 650

Defendant Bank of America, N.A. ("Bank of America") hereby requests the Court to consider in connection with Bank of America's Motion to Dismiss Plaintiff's First Amended Complaint (the "Complaint") true and correct copies of the following documents.

Bank of America first requests that the Court take judicial notice in accord with Federal Rule of Evidence 201 of Plaintiff's June 27, 2008 Mortgage Agreement because it is a public record that is "not subject to reasonable dispute because it … can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). Judicial notice may be taken of mortgages and deeds of trust because such documents are public records. *See Grant v. Aurora Loan Servs, Inc.*, 736 F. Supp. 2d 1257, 1263-64 (C.D. Cal. 2010). As such, the Court should take judicial notice of Plaintiff's Mortgage Agreement, a true and correct copy of which is attached hereto as Exhibit A.

Second, Bank of America requests that the Court consider certain documents that are incorporated by reference in the Complaint in connection with Bank of America's Motion to Dismiss. A court may consider, in ruling on a motion to dismiss, documents that are incorporated by reference in the complaint. Even if a document is not attached to the complaint, "it may be incorporated by reference into a complaint if the … document forms the basis of the plaintiff's claim." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). The incorporation by reference doctrine has been extended "to situations in which the plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint." *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005); *see also Ovieda v. Sodexo Operations, LLC*, 2013 WL 3887873, at *1-2 (C.D. Cal. July 3, 2013) (King, J.).

Here, the allegations in the Complaint relate to escrow accounts in connection with Plaintiff's mortgage, specifically the escrow account in which funds were deposited pursuant to Plaintiff's mortgage contract. *See* First Am. Compl. ¶¶ 10, 15-16. These obligations were modified by a home loan modification that Plaintiff received in 2011. As such, the Commitment to Modify Mortgage ("Modified Mortgage Agreement") that Plaintiff entered into in 2011 may be properly considered by the Court in connection with Bank of America's Motion to Dismiss. A true and correct copy of the Modified Mortgage Agreement is attached hereto as Exhibit B.

The Court should also consider two notices regarding Plaintiff's escrow account because they relate directly to Plaintiff's escrow-related claims: they notify Plaintiff that federal law did not require the payment of interest on his escrow account. The first Notice Concerning Your Escrow Account, which is dated June 27, 2008 ("First Escrow Notice") – the same date that Plaintiff executed the Mortgage Agreement, *see* Ex. A at 12 – is attached hereto as Exhibit C. The second Notice Concerning Your Escrow Account, which is dated March 25, 2009 ("Second Escrow Notice") – issued after Bank of America acquired Plaintiff's mortgage from Countrywide Financial and before Bank of America agreed to modify Plaintiff's mortgage – is attached hereto as Exhibit D.

DATED: July 31, 2014

REED SMITH LLP

COVINGTON & BURLING LLP

By: /s/ Peter J. Kennedy
Marc A. Lackner
Peter J. Kennedy

Keith Noreika
Andrew Soukup

Attorneys for Defendant
BANK OF AMERICA, N.A.

EXHIBIT A

RECORDING REQUESTED BY:
FIRST AMERICAN TITLE COMPANY
NATIONAL HOMEBUILDER SERVICES
SUBDIVISION DEPARTMENT

Recording Requested By:
M. COWLES

07/01/08
20081167031

After Recording Return To:

MS SV-79 DOCUMENT PROCESSING
P.O. Box 10423
Van Nuys, CA 91410-0423
Prepared By:
NEHEMIAH JOKIMAN

OR:30372SO [Space Above This Line For Recording Data]

LAP444463545020 [Case #] | 3037250 [Escrow/Closing #] | 00019214044406008 [Doc ID #]

APN:3018-031-066
TRA:06969

DEED OF TRUST

MIN 1001337-0003289038-9

NOTICE: THIS LOAN IS NOT ASSUMABLE WITHOUT THE APPROVAL OF THE DEPARTMENT OF VETERANS AFFAIRS OR ITS AUTHORIZED AGENT.

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) **"Security Instrument"** means this document, which is dated JUNE 27, 2008, together with all Riders to this document.
(B) **"Borrower"** is
DONALD M LUSNAK, A MARRIED MAN AS HIS SOLE & SEPARATE PROPERTY

Borrower's address is
127 HEARTHSTONE, IRVINE, CA 92606
Borrower is the trustor under this Security Instrument.

APN:3018-031-066

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OR:30372SO

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(C) "Lender" is
Countrywide KB Home Loans, LLC
Lender is a LIMITED LIABILITY CORPORATION
organized and existing under the laws of DELAWARE
Lender's address is
27001 Agoura Road, Suite 200, Calabasas Hills, CA 91301
(D) "Trustee" is
RECONTRUST COMPANY
225 WEST HILLCREST DRIVE, MSN TO-02, THOUSAND OAKS, CA 91360
(E) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument. MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.
(F) "Note" means the promissory note signed by Borrower and dated JUNE 27, 2008 . The Note states that Borrower owes Lender
ONE HUNDRED NINETY SEVEN THOUSAND SEVEN HUNDRED EIGHTY NINE and 00/100

Dollars (U.S. $ 197,789.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than JULY 01, 2038 .
(G) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."
(H) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.
(I) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

☐ Adjustable Rate Rider	☒ Condominium Rider	☐ Second Home Rider
☐ Balloon Rider	☐ Planned Unit Development Rider	☐ 1-4 Family Rider
☒ VA Rider	☐ Biweekly Payment Rider	☐ Other(s) [specify]

(J) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.
(K) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.
(L) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.
(M) "Escrow Items" means those items that are described in Section 3.
(N) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.
(O) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.
(P) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.
(Q) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. Section 2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.
(R) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

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TRANSFER OF RIGHTS IN THE PROPERTY

The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS. This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in the

COUNTY of LOS ANGELES :
[Type of Recording Jurisdiction] [Name of Recording Jurisdiction]

SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF.

Parcel ID Number: 3018-031-066 which currently has the address of
2645 GREENWOOD COURT, PALMDALE ,
[Street/City]
California 93550 ("Property Address"):
[Zip Code]

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property." Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. **Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges.** Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim

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which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. Application of Payments or Proceeds. Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. Funds for Escrow Items. Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

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4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 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.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee and Borrower further agrees to generally assign rights to insurance proceeds to the holder of the Note up to the amount of the outstanding loan balance. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee and Borrower further agrees to generally assign rights to insurance proceeds to the holder of the Note up to the amount of the outstanding loan balance.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim,

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then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. Occupancy. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. Preservation, Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. Borrower's Loan Application. Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. 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 for 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: (a) paying any sums secured by a lien which has priority over this Security Instrument; (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. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

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.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and

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retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

(b) Any such agreements will not affect the rights Borrower has - if any - with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

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in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

16. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. Borrower's Copy. Borrower shall be given one copy of the Note and of this Security Instrument.

18. Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. Sale of Note; Change of Loan Servicer; Notice of Grievance. The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time

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If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

12. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

13. Joint and Several Liability; Co-signers; Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

14. Loan Charges. Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice

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period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. Hazardous Substances. As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If Lender invokes the power of sale, Lender shall execute or cause Trustee to execute a written notice of the occurrence of an event of default and of Lender's election to cause the Property to be sold. Trustee shall cause this notice to be recorded in each county in which any part of the Property is located. Lender or Trustee shall mail copies of the notice as prescribed by Applicable Law to Borrower and to the other persons prescribed by Applicable Law. Trustee shall give public notice of sale to the persons and in the manner prescribed by Applicable Law. After the time required by Applicable Law, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Trustee may postpone sale of all or any parcel of the Property by public announcement at the time and place of any previously scheduled sale. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's and attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

23. Reconveyance. Upon payment of all sums secured by this Security Instrument, Lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security

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Instrument to Trustee. Trustee shall reconvey the Property without warranty to the person or persons legally entitled to it. Lender may charge such person or persons a reasonable fee for reconveying the Property, but only if the fee is paid to a third party (such as the Trustee) for services rendered and the charging of the fee is permitted under Applicable Law. If the fee charged does not exceed the fee set by Applicable Law, the fee is conclusively presumed to be reasonable.

24. Substitute Trustee. Lender, at its option, may from time to time appoint a successor trustee to any Trustee appointed hereunder by an instrument executed and acknowledged by Lender and recorded in the office of the Recorder of the county in which the Property is located. The instrument shall contain the name of the original Lender, Trustee and Borrower, the book and page where this Security Instrument is recorded and the name and address of the successor trustee. Without conveyance of the Property, the successor trustee shall succeed to all the title, powers and duties conferred upon the Trustee herein and by Applicable Law. This procedure for substitution of trustee shall govern to the exclusion of all other provisions for substitution.

25. Statement of Obligation Fee. Lender may collect a fee not to exceed the maximum amount permitted by Applicable Law for furnishing the statement of obligation as provided by Section 2943 of the Civil Code of California.

The undersigned Borrower requests that a copy of any Notice of Default and any Notice of Sale under this Security Instrument be mailed to the Borrower at the address set forth above. A copy of any Notice of Default and any Notice of Sale will be sent only to the address contained in this recorded request. If the Borrower's address changes, a new request must be recorded.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Donald M. Lusnak (Seal)
DONALD M. LUSNAK -Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

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State of California

County of Orange

On June 27, 2008 before me, Connie L. Borras, Notary public,

personally appeared Donald ~~Maxwell~~ CB M. Lasnak,

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Connie L. Borras (Seal)

Notary public

CONNIE L. BORRAS
Commission # 1733995
Notary Public - California
Orange County
My Comm. Expires Apr 22, 2011

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EXHIBIT "A"
LEGAL DESCRIPTION

Order Number: NHBO-3037250 (jh)
Page Number: 7

LEGAL DESCRIPTION

Real property in the City of Palmdale, County of Los Angeles, State of California, described as follows:

UNIT 59 OF TRACT NO. 52806

PARCEL 1:

AN UNDIVIDED FEE SIMPLE INTEREST AS A TENANT IN COMMON IN AND TO THE COMMON AREA WITHIN THE MODULE IN WHICH THE RESIDENTIAL UNIT DESCRIBED BELOW IS LOCATED, EQUAL TO THE RECIPROCAL OF THE NUMBER OF RESIDENTIAL UNITS LOCATED WITHIN SUCH MODULE, AS SHOWN ON THE CONDOMINIUM PLAN FOR THE VINEYARDS RECORDED OCTOBER 27, 2006 AS INSTRUMENT NO. 06-2388949, AS AMENDED BY THAT CERTAIN FIRST AMENDMENT TO THE VINEYARDS CONDOMINIUM PLAN RECORDED NOVEMBER 13, 2006 AS INSTRUMENT NO. 06-2500603, BOTH OF OFFICIAL RECORDS OF LOS ANGELES COUNTY, CALIFORNIA (COLLECTIVELY, THE "CONDOMINIUM PLAN"), WHICH IS LOCATED WITHIN LOT 1 OF TRACT NO. 52806, AS SHOWN ON A MAP RECORDED IN BOOK 1316, PAGES 40 TO 42 INCLUSIVE, OF MAPS, RECORDS OF SAID LOS ANGELES COUNTY, CALIFORNIA.

PARCEL 2:

RESIDENTIAL UNIT NO. 59, AS SHOWN AND DEFINED ON THE CONDOMINIUM PLAN.

PARCEL 3:

A NON-EXCLUSIVE EASEMENT FOR ACCESS, INGRESS AND EGRESS ON, OVER, THROUGH AND ACROSS ENTRY MODULE A AND ENTRY MODULE B, AS SAID ENTRY MODULES ARE SHOWN ON THE CONDOMINIUM PLAN.

PARCEL 4:

A NON-EXCLUSIVE EASEMENT, IN COMMON WITH OTHER OWNERS, FOR INGRESS, EGRESS, USE AND ENJOYMENT, OVER, IN, TO AND THROUGHOUT THE ASSOCIATION PROPERTY SHOWN ON THE CONDOMINIUM PLAN AND OVER, IN, TO AND THROUGHOUT THE ASSOCIATION PROPERTY OF THE OTHER PHASES OF THE PROPERTY DESCRIBED IN THE DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS OF THE VINEYARDS ("DECLARATION") RECORDED OCTOBER 30, 2006 AS INSTRUMENT NO. 06-2397250 AND THE SUPPLEMENTARY DECLARATION OF THE VINEYARDS ("SUPPLEMENTARY DECLARATION") RECORDED FEBRUARY 12, 2007 AS INSTRUMENT NO. 20070299197, BOTH OF OFFICIAL RECORDS OF LOS ANGELES COUNTY, CALIFORNIA, WHICH EASEMENTS ARE APPURTENANT TO PARCEL 1 DESCRIBED ABOVE. THIS EASEMENT SHALL BECOME EFFECTIVE AS TO EACH OF SAID OTHER PHASES, RESPECTIVELY, UPON (I) RECORDATION OF A SUPPLEMENTARY DECLARATION, DECLARING SUCH PHASES, RESPECTIVELY, TO BE SUBJECT TO THE DECLARATION, AND (II) CONVEYANCE OF THE FIRST CONDOMINIUM IN EACH RESPECTIVE PHASE TO AN OWNER UNDER A FINAL SUBDIVISION PUBLIC REPORT. THE ASSOCIATION PROPERTY REFERRED TO HEREIN AS TO EACH OF SUCH PHASES SHALL BE AS SHOWN AND DESCRIBED ON THE CONDOMINIUM PLAN COVERING EACH SUCH PHASE RECORDED IN THE OFFICE OF THE COUNTY RECORDER OF LOS ANGELES COUNTY, CALIFORNIA.

First American Title

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PARCEL 5:

AN EASEMENT FOR ACCESS ON, OVER, UNDER, ALONG AND ACROSS THE AREA DELINEATED ON THE DECLARATION OR SUPPLEMENTAL DECLARATION AS SIDEYARD EASEMENT AREA APPURTENANT TO THE ABOVE-REFERENCED UNIT ("SIDEYARD EASEMENT AREA") FOR THE PURPOSES OF (A) MAINTAINING THE EXTERIOR OF THE RESIDENCE SITUATED WITHIN THE ABOVE-REFERENCED RESIDENTIAL UNITS, OR REPAIRING, REPAINTING AND REPLACING SUCH RESIDENCE, (B) MAINTAINING ANY ROOF OVERHANGS, EAVES, STUCCO OR ARCHITECTURAL FEATURES THAT MAY EXTEND OR ENCROACH ONTO THE ADJACENT RESIDENTIAL UNITS, (C) DRAINAGE FROM THE ABOVE-REFERENCED RESIDENTIAL UNIT, AND (D) MAINTAINING ANY FOOTINGS FROM ANY FENCING OR STRUCTURES SITUATED ON THE BOUNDARY BETWEEN THE RESIDENTIAL UNITS.

APN: 3018-031-066

EXHIBIT B

100 Beecham Drive Suite 104
Pittsburgh, PA 15205

Notice Date: January 25, 2011

DONALD M LUSNAK

2645 GREENWOOD CT
PALMDALE, CA 93550

Account No.: 203004681
Property Address:
2645 GREENWOOD CT
PALMDALE, CA 93550

ABOUT YOUR LOAN

COMMITMENT TO MODIFY MORTGAGE

Account Number:	203004681
Property Address:	2645 GREENWOOD CT PALMDALE, CA 93550
Original Note Amount:	$202,819.00
Date of original mortgage:	1st day of April, 2009
(The foregoing is called the "Mortgage")	

WHAT THIS MEANS

This letter constitutes a commitment to modify the Mortgage (identified above), subject to the terms and conditions stated below. This letter contains our offer, and it permits you to accept this offer. When signed by you, this letter will constitute your agreement to these terms and conditions.

Our records indicate the Mortgage is currently in default. Although we are willing to modify the loan as described in this letter, please be advised that we will continue to pursue collection action. This action may include foreclosure. Upon completion of the modification process, which means all of the terms of this Commitment will have been met, your loan will be deemed current and we will cease collection activity on your loan. However, if you fail to sign this commitment or if you fail to perform as required in this commitment, we will complete our collection action, including foreclosure if necessary.

WHAT YOU NEED TO DO

If you want to accept this commitment, you must sign this commitment and deliver it to BAC Home Loans Servicing, LP, a subsidiary of Bank of America, N.A. by February 4, 2011. Failure to do so will result in the automatic withdrawal by BAC Home Loans Servicing, LP, a subsidiary of Bank of America, N.A. of the offer to modify without further notice.

OFFER FOR MODIFIED MORTGAGE **Acct. No.: 203004681**

We hereby offer to modify the Mortgage as follows. It will be called the "Modified Mortgage":

Section A. Delinquent Balance.

The following shows your current delinquent balance as of the 1st day of March, 2011. This reflects the total amount needed to bring your loan current. The proposed modification will cure the below delinquency and bring your loan current; however, it may also increase your monthly payment.

Delinquent Interest accrued from October 1, 2010 to March 1, 2011	$3,698.02
Fees and Costs:	$0.00
Delinquent Escrow:	$1,516.73
Total Amount to be added to your Principal Balance:	$5,214.75

The NEW FIXED interest rate will be: 4.500%
The new modified principal balance will be: $203,016.58

The first regular monthly payment on the Modified Mortgage will begin on April 1, 2011 and the new payment amount will be $1,324.59. All other terms and conditions of the Mortgage will remain the same for the Modified Mortgage, including but not limited to provisions for late fees and BAC Home Loans Servicing, LP, a subsidiary of Bank of America, N.A.'s right to pursue collection action for the default amount (including foreclosure). Please note that your total monthly payment is still subject to vary if your total monthly escrow payment increases subject to the terms of the mortgage.

The executed documents must be in our office on or before February 4, 2011, or such other date as we may choose at our sole discretion. In order to modify the Mortgage on that date, you must send the executed documents to: 100 Beecham Dr., Ste 104-HRM Pittsburgh, PA 15205, If you have questions, Loan consultants are standing by from 8:00 AM until 9:00 PM CT Monday through Friday, and 8:00 AM until 3:00 PM CT on Saturday except holidays at 1-877-345-6431 Ext 2379.

All borrowers, guarantors, endorsers or sureties on the original Mortgage must sign the Modified Mortgage and any other documents that we require. Any co-owner who was not a borrower on the original loan must sign the Modified Mortgage to consent to the modification, but will not become liable for repayment of the loan due to this consent.

Section B. Contingencies. This offer is contingent on the following: BAC Home Loans Servicing, LP, a subsidiary of Bank of America, N.A.'s offer to modify your mortgage is contingent upon BAC Home Loans Servicing, LP, a subsidiary of Bank of America, N.A.'s verification that the title to the subject property is free from any defect, encumbrance, unauthorized conveyance or any other irregularity. A title search of the subject property will be initiated by BAC Home Loans Servicing, LP, a subsidiary of Bank of America, N.A. upon your return of the executed Commitment to Modify Mortgage and the Modification Agreement. In the event the title search, or any other information, indicates any title irregularity, including but not limited to any unauthorized conveyance, or any superior or subordinate lien(s), whether voluntary or involuntary, the Commitment to Modify Mortgage and the Modification Agreement and their terms shall not be effective, binding, or enforceable against BAC Home Loans Servicing, LP, a subsidiary of Bank of America, N.A., and BAC Home Loans Servicing, LP, a subsidiary of Bank of America, N.A.'s offer to modify your mortgage shall be immediately revoked without further notice. Upon notification of a filing for protection under a Bankruptcy Stay, this Agreement will be terminated. This includes the filing by any party that has or may have interest in the property.

Section C. Remit the First Payment Due under the modified terms in the amount $1,324.59 in CERTIFIED CHECK OR MONEY ORDER. Please use the enclosed self addressed envelope to provide payment.

First New Monthly Payment:	$1,324.59
Interest:	$3,698.02
Fees:	$0.00
Escrow	$1,516.73
Total Amount Due with Executed Agreement:	$1,324.59

If you want to accept the offer for a Modified Mortgage upon the terms and conditions above, you must agree by signing the enclosed Modification Agreement which follows this commitment. Please note that the Modification Agreement must be properly notarized. The acceptance must be signed by each borrower and must be returned to us by February 4, 2011, otherwise, the offer will expire.

THANK YOU FOR YOUR BUSINESS

BAC Home Loans Servicing, LP, a subsidiary of Bank of America, N.A. appreciates all your efforts and cooperation in this matter. If you have questions, Loan consultants are standing by from 8:00 AM until 9:00 PM CT Monday through Friday, and 8:00 AM until 3:00 PM CT on Saturday except holidays at 1-877-345-6431 Ext 2379.

ACCEPTANCE OF OFFER FOR MODIFIED MORTGAGE **Acct. No.: 203004681**

We(I) are the borrower(s) on the Mortgage identified above. We agree to or acknowledge the following:

We accept all of the terms and conditions stated in the offer. We have failed to pay the Mortgage in accordance with its terms, and are now in default on the Mortgage. We acknowledge that this commitment for Modified Mortgage, even when signed by BAC Home Loans Servicing, LP, a subsidiary of Bank of America, N.A. and us, will not prevent or prohibit BAC Home Loans Servicing, LP, a subsidiary of Bank of America, N.A. from continuing collection action. Therefore, in the event we sign this commitment, but fail to fulfill any or all of its terms and conditions, then BAC Home Loans Servicing, LP, a subsidiary of Bank of America, N.A. may complete any collection action already commenced without further notice to us, including foreclosure. This commitment will not be considered a waiver of or defense to lender's right to commence or continue any collection action. The terms of the Modified Mortgage will be as stated in Section A above. We will sign any documents necessary to complete the Modified Mortgage. We acknowledge that this commitment is contingent as provided in Section B and Section C of BAC Home Loans Servicing, LP, a subsidiary of Bank of America, N.A.'s offer. BAC Home Loans Servicing, LP, a subsidiary of Bank of America, N.A. shall determine whether the contingencies have been satisfied. If the new principal amount of the Modified Mortgage is more than the existing principal balance of the Mortgage, then we understand that amounts due such as unpaid interest, taxes, insurance or expenses have been added to the principal amount under the Modified Mortgage. The date for signing the documents and paying the amounts due will be February 4, 2011, or such other date that BAC Home Loans Servicing, LP, a subsidiary of Bank of America, N.A. may select. All representations made by us pursuant to our request for the Modified Mortgage are true and have been and will be relied upon to BAC Home Loans Servicing, LP, a subsidiary of Bank of America, N.A., and any breach of the representations will give BAC Home Loans Servicing, LP, a subsidiary of Bank of America, N.A. the right to terminate this commitment and could result in the pursuit of other right and remedies by BAC Home Loans Servicing, LP, a subsidiary of Bank of America, N.A.

I/We am/are now occupying the property as my/our primary place of residence. We have had the opportunity to consult with legal and/or tax counsel prior to agreeing to the foregoing, and have willingly agreed to these terms and conditions whether or not we elected to retain such counsel.

As evidenced by the signature below, the Borrower and the Lender agree to the foregoing:

Donald M. Lusnak

DONALD M LUSNAK

02/03/2011

Date

_____

Date

203004681+USC+GOVTMOD.S+8769K

Recording Requested by
BAC Home Loans Servicing, LP, a subsidiary of Bank of America, N.A.
WHEN RECORDED MAIL TO:

BAC Home Loans Servicing, LP, a subsidiary of Bank of America, N.A.
7105 Corporate Drive
(PTX-B-36)
Plano, TX 75024
DocID#: 0652030046817105A

Space Above for Recorder's Use

LOAN MODIFICATION AGREEMENT

This Loan Modification Agreement (the "Agreement"), made on January 25, 2011 between DONALD M LUSNAK (the "Borrower(s)") and BAC Home Loans Servicing, LP, a subsidiary of Bank of America, N.A. ("Lender"), amends and supplements that certain (Mortgage/Deed of Trust) (the "Security Instrument") dated the 1st day of April, 2009 which covers the real and personal property described in the Security Instrument and defined therein as the 'Property', located at 2645 GREENWOOD CT, PALMDALE, CA 93550.

The real property described being set forth as follows:

SAME AS IN SAID SECURITY INSTRUMENT

In consideration of the mutual promises and agreements exchanged, the parties hereto agree to modify the Security Instrument as follows:

The fifth [and sixth] sentence[s] of the first paragraph of the Security Instrument is[are] hereby amended to read in its[their] entirety as follows:

Borrower owes Lender the principal sum of two hundred three thousand sixteen and 58/100, (U.S. Dollars) ($203,016.58). This debt is evidenced by Borrower's note dated the same date as the Security Instrument, as amended and restated as of the date herewith ("Note"), which provides for monthly payments, with the full debt, if not paid earlier, due and payable on March 1, 2041.

The Borrower[s] shall comply with all other covenants, agreements and requirements of the Security Instrument. Nothing in this Agreement shall be understood or construed to be a satisfaction or release in whole or in part of the Security Instrument. Except as otherwise specifically provided in this Agreement, the Security Instrument shall remain unchanged, and the Borrower[s] and BAC Home Loans Servicing, LP, a subsidiary of Bank of America, N.A. shall be bound by, and comply with all of the terms and provisions thereof, as amended by this Agreement, and the Security Instrument shall remain in full force and effect and shall continue to be a first lien on the above-described property. All capitalized terms not defined herein shall have the same meanings as set forth in the Security Instrument.

SIGNED AND ACCEPTED THIS 3rd DAY OF Feb. 2011
BY

Donald M. Lusnak
DONALD M LUSNAK

LUIS S. BUENFIL
Commission # 1762654
Notary Public - California
Los Angeles County
My Comm. Expires Aug 20, 2011

(ALL SIGNATURES MUST BE ACKNOWLEDGED)

State of California, County of Los Angeles On this 3rd day of Feb. 2011 before me the undersigned, a Notary Public in and for said State, personally appeared

Donald M. Lusnak

known to me, or proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the foregoing instrument and acknowledged that _____ executed the same.

Witness my hand and official seal.

Signature _____

Luis S. Buenfil
Name (typed or printed)

My commission expires: Aug 20, 2011

As evidenced by their signatures below, the Co-Owner(s) consent to this Modification of the Mortgage.

CO-OWNER(S)

_____ Dated: _____
Co-Owner(s) Signature

_____
Co-Owner(s) Name (typed or printed)

STATE OF _____

COUNTY OF _____

On _____ before me, _____

Notary Public, personally appeared _____

_____
personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signatures(s) on the instrument the person(s), or entity upon behalf of which the person(s) acted, executed the instrument.
WITNESS my hand and official seal.

Signature _____

Bank of America

Home Loans
BAC Home Loans Servicing, LP
100 Beecham Drive Suite 104
Pittsburgh, PA 15205

Notice Date: January 25, 2011

DONALD M LUSNAK
2645 GREENWOOD CT
PALMDALE, CA 93550

Account No: 203004681
VA Case No.: 444463549265

Property Address:
2645 GREENWOOD CT
PALMDALE, CA 93550

AMENDED AND RESTATED NOTE
State of California

Origination Date: 1st day of April, 2009

1. PARTIES
"Borrower" means each person signing at the end of this Note, and the person's successors and assigns.
"Lender" means BAC Home Loans Servicing, LP and its successors and assigns.

2. BORROWER'S PROMISE TO PAY INTEREST
In return for a loan received from Lender, Borrower promises to pay the principal sum of two hundred three thousand sixteen and 58/100 (Dollars U.S.) $203,016.58 plus interest, to the order of Lender. Interest will be charged on unpaid principal, from the date of disbursement of the loan proceeds by Lender, at the rate of four and 50/100, (4.500%) per year until the full amount of principal has been paid.

3. PROMISE TO PAY SECURED
Borrower's promise to pay is secured by a mortgage, deed of trust or similar security instrument that is dated the same date as this Note and called the "Security Instrument." The Security Instrument protects the Lender from losses which might result if Borrower defaults under this Note.

4. MANNER OF PAYMENT
(A) Time
Borrower shall make a payment of principal and interest to Lender on the first day of each month beginning on April 1, 2011. Any principal and interest remaining on the March 1, 2041 will be due on that date, which is called the "Maturity Date."

(B) Place
Payment shall be made to Payment Processing PO Box 10219 Van Nuys, CA 91410, or at such place as Lender may designate in writing by notice to Borrower.

(C) Amount
Each monthly payment of principal and interest will be in the amount of U.S. 1,028.66. This amount will be part of a larger monthly payment required by the Security Instrument that shall be applied to principal, interest and other items in the order described in the Security Instrument.

(D) Allonge to this Note for payment adjustments
If an allonge providing for payment adjustments is executed by Borrower together with this Note, the covenants of the allonge shall be incorporated into and shall amend and supplement the covenants of this Note as if the allonge were a part of this Note. [Check applicable box]

☐ Graduated Payment Allonge ☐ Growing Equity Allonge ☐ Other [specify]

5. BORROWER'S RIGHT TO PREPAY

Borrower has the right to pay the debt evidenced by this Note, in whole or in part, without charge or penalty, on the first day of any month. Lender shall accept prepayment on other days provided that Borrower pays interest on the amount prepaid for the remainder of the month to the extent required by Lender and permitted by regulations of the Secretary. If Borrower makes a partial prepayment, there will be no changes in the due date or in the amount of the monthly payments unless Lender agrees in writing to those changes.

6. BORROWER'S FAILURE TO PAY

(A) Late Charge for Overdue Payments

If Lender has not received the full monthly payment required by the Security Instrument, as described in Paragraph 4(C) of this Note, by the end of fifteen calendar days after the payment is due, Lender may collect a late charge in the amount of 4.00% of the overdue amount of each payment.

(B) Default

If Borrower defaults by failing to pay in full any monthly payment, then Lender may, except as limited by regulations of the Secretary in the case of payment defaults, require immediate payment in full of the principal balance remaining due and all accrued interest. Lender may choose not to exercise this option without waiving its rights in the event of any subsequent default. In many circumstances, regulations issued by the Secretary will limit Lender's rights to require immediate payment in full in the case of payment defaults.

This Note does not authorize acceleration when not permitted by HUD regulations. As used in this Note, "Secretary" means the Secretary of Housing and Urban Development or his or her designee.

(C) Payment of Costs and Expenses

If Lender has required immediate payment in full, as described above, Lender may require Borrower to pay costs and expenses including reasonable and customary attorneys' fees for enforcing this Note to the extent not prohibited by applicable law. Such fees and costs shall bear interest from the date of disbursement at the same rate as the Principal of this Note.

7. WAIVERS

Borrower and any other person who has obligations under this Note waive the right of presentment and notice of dishonor. "Presentment" means the right to require Lender to demand payment of amounts due. "Notice of dishonor" means the right to require Lender to give notice to other persons that amounts due have not been paid.

8. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to Borrower under this Note will be given by delivering it or by mailing it by first class mail to Borrower at the property address above or at a different address if Borrower has given Lender a notice of Borrower's different address. Any notice that must be given to Lender under this Note will be given by first- class mail to Lender at the address stated in Paragraph 4(B) or at a different address if Borrower is given a notice of that different address.

9. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. Lender may enforce its rights under this Note against each person individually or against all signatories together. Any one person signing this Note may be required to pay all of the amounts owed under this Note.

BY SIGNING BELOW, borrower accepts and agrees to the terms and covenants contained in this Note.

10. GROUNDS FOR ACCELERATION OF DEBT

(A) Default. Lender may, except as limited by regulations issued by the Secretary in the case of payment defaults, require immediate payment in full of all sums secured by the Security Instrument and due under this Note if:

(i) Borrower defaults by failing to pay in full any monthly payment required by this Note and the Security Instrument prior to or on the due date of the next monthly payment, or (ii) Borrower defaults by failing, for a period of thirty days, to perform any other obligations contained in the Security Instrument securing this

Note.

(B) Sale Without Credit. Lender shall, if permitted by applicable law (including section 341 (d) of the Garn- St Germain Depository Institutions Act of 1982, 12 U.S.C. 1702j-3(d) and with the prior approval of the Secretary, require immediate payment in full of all the sums due under this Note and secured by the Security Instrument if:

(i) All or part of the Property, or a beneficial interest in a trust owning all or part of the Property, is sold or otherwise transferred (other than by devise or descent), and (ii) The Property is not occupied by the purchaser or grantee as his or her principal residence, or the purchaser or grantee does so occupy the Property but his or her credit has not been in accordance with the requirements of the Secretary.

(C) No Waiver. If circumstances occur that would permit Lender to require immediate payment in full, but Lender does not require such payment, Lender does not waive its right with respect to subsequent events.

(D) Regulations of HUD. In many circumstances regulations issued by the Secretary will limit Lender's rights in the case of payment defaults to require immediate payment in full and foreclosure if not paid. This Note and the Security Instrument do not authorize acceleration of foreclosure if not permitted by regulations of the Secretary.

(E) Mortgage Not Insured. Borrower agrees that should the Security Instrument and this Note secured thereby not be eligible under the National Housing Act within 60 days from the date hereof, Lender may, at its option and notwithstanding anything in paragraph 10, require immediate payment in full of all sums secured by the Security Instrument. A written statement of any authorized agent of the Secretary dated subsequent to 60 days from the date thereof, declining to insure the Security Instrument and this Note secured thereby, shall be deemed conclusive proof of such ineligibility. Notwithstanding the foregoing, this option may not be exercised by lender when the unavailability of insurance is solely due to Lender's failure to remit mortgage insurance premium to the Secretary.

BY SIGNING BELOW, borrower accepts and agrees to the terms and covenants contained in this Note.

Donald M. Lusnak (Seal) Dated 02/03/2011
DONALD M LUSNAK

203004681+USC+GOVTMODS+8769K

CALIFORNIA NOTARY ACKNOWLEDGMENT

(For use by California Notary, if applicable.)

STATE OF CALIFORNIA
COUNTY OF Los Angeles

On Feb. 3, 2011 before me, Luis S. Buenfil (Notary Public)
(insert name and title of the officer)

personally appeared Donald M Lusnak
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____

LUIS S. BUENFIL
Commission # 1762654
Notary Public - California
Los Angeles County
My Comm. Expires Aug 20, 2011

NOTARY SEAL

THIS CERTIFICATE MUST BE ATTACHED TO THE DOCUMENT DESCRIBED AT RIGHT

Document: Loan Modification Agreement
Number of Pages:
Date of Document:
Signer(s) Other Than Named Above: _____

8192 09/09

EXHIBIT C

Prepared by: NEHEMIAH JOKIMAN

Countrywide KB Home Loans, LLC

DATE: 06/27/2008
BORROWER: DONALD M. LUSNAK
CASE NO: LAP444463545020
LOAN NO: 192140444
PROPERTY: 2645 GREENWOOD COURT
PALMDALE, CA 93550

Office #: 0004854
1440 BRIDGE GATE DRIVE #385
DIAMOND BAR, CA 91765
Phone: (866)880-5429
Office Fax No.: (866)267-0136

NOTICE CONCERNING YOUR ESCROW ACCOUNT

Your loan was originated by Countrywide Bank, FSB ("Countrywide"). As a federally chartered savings bank, Countrywide is subject to federal law and the Office of Thrift Supervision regulations, and in most cases is not subject to state laws that regulate or otherwise affect its credit activities. The federal law and regulations that Countrywide is subject to do not require the payment of interest on escrow accounts. Accordingly, you will not receive interest on your escrow account even if your state has a law concerning the payment of interest on escrow accounts.

23991

19214044400000 1E942

EXHIBIT D

Prepared by: WENDY LUBE

COUNTRYWIDE BANK, FSB

DATE: 03/25/2009
BORROWER: DONALD M. LUSNAK
CASE NO: LAP444463549265
LOAN NO: 203004681
PROPERTY: 2645 GREENWOOD CT
PALMDALE, CA 93550

Office #: 0001173
1300 EASTMAN AVE, SUITE 100
VENTURA, CA 93003
Phone: (805)650-2400
Office Fax No.: (805)654-8646

NOTICE CONCERNING YOUR ESCROW ACCOUNT

Your loan was originated by an operating subsidiary of Bank of America, N.A. ("Bank of America"). As a federally chartered bank, Bank of America is subject to federal law and the Office of the Comptroller of the Currency regulations, and in most cases is not subject to state laws that regulate or otherwise affect its credit activities. The federal law and regulations that Bank of America is subject to do not require the payment of interest on escrow accounts. Accordingly, you will not receive interest on your escrow account even if your state has a law concerning the payment of interest on escrow accounts.

Marc A. Lackner (SBN 111753)
mlackner@reedsmith.com
Peter J. Kennedy (SBN 166606)
pkennedy@reedsmith.com
REED SMITH LLP
355 South Grand Avenue, Suite 2900
Los Angeles, CA 90071-1514
Telephone: (213) 457-8000
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Washington, DC 20004
Telephone: (202) 662-6000
Facsimile: (202) 778-5066

Attorneys for Defendant
BANK OF AMERICA, N.A.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DONALD M. LUSNAK, on behalf of himself and all others similarly situated,

Plaintiffs,

vs.

BANK OF AMERICA, N.A.; and DOES 1 through 10, inclusive,

Defendants.

Case No. 2:14-CV-01855-GHK-AJW

DEFENDANT BANK OF AMERICA, N.A.'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

Hon. George H. King

Date: September 29, 2014
Time: 9:30 a.m.
Courtroom: 650

TO THE ABOVE-NAMED COURT AND TO THE PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 29, 2014, at 9:30 a.m. in Courtroom 650 of the above-titled court at 255 E. Temple Street, Los Angeles, CA 90012, Defendant Bank of America, N.A. ("Bank of America") will and hereby does move to dismiss the First Amended Complaint filed by Plaintiff Donald Lusnak pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that the Complaint fails to state a claim upon which relief can be granted as follows:

1. Plaintiff's claim that Bank of America violated Cal Civ. Code § 2954.8 is preempted by the National Bank Act.

2. Plaintiff cannot state a claim based on federal law because no federal law requires the payment of interest on escrow accounts.

3. Plaintiff cannot state a claim for breach of contract because no provision of the Mortgage Agreement requires the payment of interest on escrow accounts.

This motion is made following the conference of counsel pursuant to Local Rule 7-3, which took place on May 8, 2014. The Motion is based on this Notice of Motion, the Memorandum of Points and Authorities filed herewith, and the pleadings and papers filed herein, including Bank of America's Request for Judicial Notice.

DATED: July 31, 2014

REED SMITH LLP

COVINGTON & BURLING LLP

By: /s/ Peter J. Kennedy
Marc A. Lackner
Peter J. Kennedy

Keith Noreika
Andrew Soukup

Attorneys for Defendant
BANK OF AMERICA, N.A.

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Attorneys for Defendant
BANK OF AMERICA, N.A.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DONALD M. LUSNAK, on behalf of himself and all others similarly situated,

Plaintiffs,

vs.

BANK OF AMERICA, N.A.; and DOES 1 through 10, inclusive,

Defendants.

Case No. 2:14-CV-01855-GHK-AJW

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT BANK OF AMERICA, N.A.'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

Hon. George H. King

Date: September 29, 2014
Time: 9:30 a.m.
Courtroom: 650

DC: 5396480-2

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INTRODUCTION

Defendant Bank of America, N.A. ("Bank of America") is a national bank chartered under the National Bank Act. The National Bank Act gives Bank of America broad authority to make mortgage loans and to provide escrow account services. Under this grant of authority, Bank of America establishes for mortgage-loan customers, including Plaintiff, escrow accounts from which tax and insurance payments are made.

No federal law requires Bank of America to pay interest on these escrow account balances. In addition, any state law that would "prevent or significantly interfere" with Bank of America's power to set the terms and conditions for mortgage loans and escrow accounts is preempted by the National Bank Act. *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 33 (1996).

Plaintiff nevertheless filed this Complaint to prevent Bank of America from offering escrow accounts to mortgage customers in California unless it first complies with a state-law requirement to pay interest on those account balances. According to Plaintiff, Cal. Civ. Code § 2954.8 requires Bank of America to pay him an above-market rate of at least 2 percent interest on his escrow account balance. Plaintiff also claims that Bank of America contractually agreed to comply with Section 2954.8.

For several reasons, Plaintiff's claims lack merit, and the First Amended Complaint (the "Complaint") should be dismissed. *First*, Plaintiff's attempt to force Bank of America to comply with Section 2954.8 is preempted by the National Bank Act. A state-law requirement to pay interest "prevents or significantly interferes" with Bank of America's powers under the National Bank Act to offer mortgages and establish escrow accounts. Federal regulations confirm this conclusion: 12 C.F.R. § 34.4 provides that state laws relating to "[t]he terms of credit" and "escrow accounts" are preempted. 12 C.F.R. § 34.4(a)(4), (6). Plaintiff acknowledges that preemption applied until recently, but claims that Dodd-Frank somehow abrogated this preemption. First Am. Compl. ¶¶ 3-4. Yet none of the changes created by Dodd-

Frank applies to the preemption analysis here. Any claims that rely on Section 2954.8 should therefore be dismissed.

Second, Plaintiff's assertion that federal law requires Bank of America to pay interest lacks merit. While the Complaint cites HUD Handbook 4330.1, that Handbook has no legal force, and it actually undermines Plaintiff's position by observing that "HUD regulations neither forbid nor require that escrow accounts earn interest." HUD Handbook 4330.1, Rev-5, § 2-5(C). Plaintiff's reliance on 15 U.S.C. § 1639d(g) is similarly misplaced. That statute took effect nearly two years after Plaintiff modified his mortgage agreement and does not apply to Plaintiff's escrow account. Moreover, Section 1639d(g) only requires interest payments if those payments are otherwise required "by *applicable* State or Federal law." 15 U.S.C. § 1639d(g)(3) (emphasis added). No such *applicable* laws exist here. Therefore, any claims based on federal law should therefore be dismissed.

Third, Plaintiff's breach-of-contract claim depends on the assertion that Bank of America voluntarily agreed to pay interest on Plaintiff's escrow account balance. No such agreement was made. As Plaintiff admits, the mortgage agreement specifies that Bank of America "shall not be required to pay [Plaintiff] any interest on earnings on the Funds" unless "Applicable Law" required otherwise. First Am. Compl. ¶ 10. Since no "Applicable Law" required Bank of America to pay interest on escrow account balances, Plaintiff's breach of contract claim should therefore be dismissed.

BACKGROUND

A. The Parties.

Plaintiff is a California resident who obtained a mortgage in July 2008, which Plaintiff modified in "early 2011." First Am. Compl. ¶ 15.

Defendant Bank of America is a national bank chartered under the National Bank Act. *See id.* ¶ 17. Bank of America's predecessor originated Plaintiff's mortgage, Bank of America agreed to modify Plaintiff's mortgage in early 2011, and

Bank of America currently owns and services Plaintiff's mortgage and related escrow account. *See id.* ¶¶ 15-17.

B. Bank of America's Federal Authority To Make Mortgages and Provide Escrow Account Services.

National banks are empowered by the National Bank Act to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate." 12 U.S.C. § 371(a). National banks are also authorized to exercise "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24(Seventh). For nearly 40 years, the Office of the Comptroller of the Currency ("OCC") – the primary federal regulator of national banks – has recognized that these grants of authority permit national banks to "provid[e] escrow services in a variety of contexts." OCC Interp. Ltr. 1041, 2005 WL 3629258, at *2 (Sept. 28, 2005) (citing, among other authorities, Interp. Ltr. (May 13, 1975)).

Under an escrow account like the one at issue in the Complaint, a certain percentage of a customer's monthly mortgage payment is set aside to pay tax and insurance bills. *See, e.g.*, First Am. Compl. ¶¶ 11, 15, 17. This service provides a "benefit to the borrowers as it relieves them of the tasks of paying such regular tax and insurance obligations in a lump sum." OCC, Conditional Approval No. 276, 1998 WL 363812, at *9 (May 8, 1998). Escrow accounts are also often required by national banks making mortgage loans in order to protect their security interests.

No federal law requires national banks to pay interest on these escrow account balances. Instead, federal law closely regulates the circumstances when a national bank may require an escrow account and the maximum balance that may be held in that account. *See, e.g.*, 12 U.S.C. §§ 2605, 2609. Federal law also authorizes national banks to make real estate loans "without regard to state law limitations concerning … [t]he terms of credit" and "escrow accounts, impound accounts, and similar accounts." 12 C.F.R. § 34.4(a)(4), (6).

C. Plaintiff's Mortgage and Related Escrow Account.

Plaintiff alleges that he entered into a mortgage contract with Countrywide Financial ("Countrywide") in 2008,[1] and that the mortgage is now owned by Bank of America. First Am. Compl. ¶ 15. Plaintiff admits that, in exchange for obtaining a mortgage, Plaintiff agreed that a portion of his monthly mortgage payment would be set aside into an escrow fund that would be used to pay "taxes and assessments and other items which can attain priority over [the mortgage] as a lien or encumbrance on the property" and "premiums for any and all insurance required." Mortgage Agreement § 3;[2] *see also* First Am. Compl. ¶ 10. Plaintiff also acknowledged that the Mortgage Agreement provided that Bank of America "shall not be required to pay [Plaintiff] any interest on earnings on the Funds" unless "Applicable Law" required otherwise.[3] First Am. Compl. ¶ 10; *see also* Mortgage Agreement § 3.

Plaintiff was repeatedly notified that he would not receive interest on funds deposited in his escrow account. For example, on the same day that Plaintiff obtained his mortgage from Countrywide, he was provided a "Notice Concerning Your Escrow Account" that informed Plaintiff:

> The federal law and regulations that Countrywide is subject to do not require the payment of interest on escrow accounts. Accordingly, you will not receive interest on your escrow accounts even if your state has a law concerning the payment of interest on escrow accounts.

---

[1] Like Bank of America, Countrywide was a federally chartered depository institution – specifically, a federal savings association chartered under the Home Owners' Loan Act of 1933 ("HOLA").

[2] A copy of the "Deed of Trust" dated June 27, 2008, which is referred to herein as the "Mortgage Agreement," is attached to Bank of America's Request for Judicial Notice and Request for Consideration of Certain Incorporated Documents ("Request for Judicial Notice") at Exhibit "A."

[3] The Mortgage Agreement defines "Applicable Law" as "all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions." *See* Mortgage Agreement, Definitions, § (J).

First Escrow Notice.[4] Similarly, after Bank of America acquired Plaintiff's mortgage, Bank of America provided Plaintiff with a similar notice that stated:

> As a federally chartered bank, Bank of America is subject to federal law and the Office of the Comptroller of the Currency regulations, and in most cases is not subject to state laws that regulate or otherwise affect its credit activities. The federal law and regulations that Bank of America is subject to do not require the payment of interest on escrow accounts. Accordingly, you will not receive interest on your escrow account even if your state has a law concerning the payment of interest on escrow accounts.

Second Escrow Notice.[5]

In 2011, after Plaintiff had fallen behind on his mortgage payments, Plaintiff and Bank of America agreed to modify the terms of Plaintiff's 2008 mortgage. *See* First Am. Compl. ¶ 15; *see also* Modified Mortgage Agreement at 2.[6] The Modified Mortgage Agreement changed Plaintiff's monthly payment requirements (including the amount that would be deposited in Plaintiff's escrow account), but it did not change any other terms of the mortgage. *See*, *e.g.*, Modified Mortgage Agreement at 2 (besides the monthly payment terms, "[a]ll other terms and conditions of the Mortgage will remain the same for the Modified Mortgage").

D. The Allegations In the First Amended Complaint.

Although Plaintiff's escrow funds have been deposited in a non-interest-bearing account since 2008, Plaintiff now contends that state law requires Bank of America to pay him at least 2 percent interest on his escrow funds. *See*, *e.g.*, First Am. Compl.

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[4] A copy of the "Notice Concerning Your Escrow Account" dated June 27, 2008, which is referred to herein as the "First Escrow Notice," is attached to the Request for Judicial Notice at Exhibit "C."

[5] A copy of the "Notice Concerning Your Escrow Account" dated March 25, 2009, which is referred to herein as the "Second Escrow Notice," is attached to the Request for Judicial Notice at Exhibit "D."

[6] A copy of the "Commitment To Modify Mortgage" dated January 25, 2011, which is referred to herein as the "Modified Mortgage Agreement," is attached to the Request for Judicial Notice at Exhibit "B."

¶ 1. Count I asserts claims under Cal. Bus. & Prof. Code § 17200 based on the theory that Cal. Civil Code § 2954.8, HUD Handbook 4330.1, and 15 U.S.C. § 1693d(g)(3) require interest payments on Plaintiff's escrow account balance. First Am. Compl. ¶ 32. Count II asserts a common-law claim for breach of contract, which likewise rests on the theory that Bank of America agreed to "comply with applicable state and federal law" that allegedly mandates interest payments on escrow account balances.[7] *Id.* ¶ 38.

Plaintiff effectively concedes that he has no claim under Cal. Bus. & Prof. Code § 17200 for conduct that occurred before Dodd-Frank's effective date. *See* First Am. Compl. ¶ 3 (alleging that national banks refused to pay interest on escrow account balances because of "the preemptive effects of regulations of … the Office of the Comptroller of the Currency"). Plaintiff instead alleges that Dodd-Frank changed the legal landscape and that Bank of America is now required to comply with Section 2954.8's requirement to pay above-market interest on escrow account balances. *E.g.*, First Am. Compl. ¶ 4. Although Plaintiff admits that the OCC has "reaffirm[ed] its prior broad preemption regulations" in the wake of Dodd-Frank, Plaintiff nevertheless claims that these regulations are "unenforceable." *Id.*

PROCEDURAL STANDARD

A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the claims alleged. *See Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). To avoid dismissal, 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). Conclusory allegations or allegations that merely state a legal conclusion "are not entitled to the assumption of truth." *Id.* at 679. A complaint that offers mere "labels and conclusions," a "formulaic recitation of the

[7] Although Plaintiff's original Complaint asserted claims for declaratory relief, unjust enrichment, money had and received, and negligence, Plaintiff has abandoned those claims in the First Amended Complaint.

elements," "naked assertions," or "unadorned, the-defendant-unlawfully-harmed me accusation[s]" will not be sufficient to state a claim upon which relief can be granted. *Id.* at 678 (citations and internal quotation marks omitted). Claims that are preempted may be dismissed under Rule 12(b)(6). *See, e.g., Whistler Invs., Inc. v. Depository Trust & Clearing Corp.*, 539 F.3d 1159, 1163 (9th Cir. 2008) (affirming Rule 12(b)(6) dismissal based on preemption).

When ruling on a motion to dismiss under Rule 12(b)(6), this Court is not limited to the allegations in a complaint. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). Instead, without converting a Rule 12(b)(6) motion into one for summary judgment, this Court may consider both matters on which a court "may take judicial notice" and documents that "are not physically attached to the complaint," but whose "authenticity is not contested and the plaintiff's complaint necessarily relies on them." *Id.* at 688-89 (internal punctuation omitted). Here, Bank of America has asked this Court to take judicial notice of the Mortgage Agreement and to consider the Modified Mortgage Agreement, the First Escrow Notice, and the Second Escrow Notice. *See, e.g.*, Request for Judicial Notice.

ARGUMENT

I. THE NATIONAL BANK ACT PREEMPTS PLAINTIFF'S STATE-LAW STATUTORY CLAIM.

In Count I, Plaintiff claims that Bank of America violated Cal. Civ. Code § 2954.8 by failing to pay interest on Plaintiff's escrow account balance. However, the National Bank Act preempts state laws that "prevent or significantly interfere with [a] national bank's exercise of its powers." *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 33 (1996); *see also Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 13 (2007) (state law preempted if it would "curtail or hinder a national bank's efficient exercise of any … power, incidental or enumerated"). As explained below, Plaintiff's attempt to force Bank of America to comply with a state-law requirement to pay interest on his escrow account balance is preempted because Section 2954.8

would "prevent or significantly interfere" with Bank of America's power to set the terms and conditions for mortgage loans and escrow accounts.

A. The Usual Presumption Against Preemption Does Not Apply To The National Bank Act.

For more than a hundred years, the Supreme Court has recognized that a grant of federal authority under the National Bank Act preempts state-law restrictions on the exercise of that authority. *See generally Watters*, 550 U.S. at 1-13. This "history of significant federal presence" in the regulation of national banks gives the National Bank Act a preemptive force that other federal laws do not enjoy. *Bank of Am. v. City & Cnty. of San Francisco*, 309 F.3d 551, 559 (9th Cir. 2002) (internal quotation and citation omitted). The strong preemptive force of the National Bank Act is necessary to prevent the "[d]iverse and duplicative superintendence of national banks' engagement in the business of banking" that would result from the application of state laws with their individual "limitations and restrictions." *Watters*, 550 U.S. at 13-14; *see also Robinson v. Bank of Am., N.A.*, 2011 WL 5870541, at *2, 6 (C.D. Cal. Oct. 19, 2011) (King. J.) (accepting magistrate judge's finding and recommendation that "[t]he [National Bank Act] was enacted to establish a national banking system and to protect banks from intrusive state regulation"), *aff'd*, 525 F. App'x 580 (9th Cir. 2013).

For these reasons, the "usual presumption against federal preemption of state law is inapplicable to federal banking regulation." *Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032, 1037 (9th Cir. 2008) (internal quotation and citation omitted). Instead, the "enumerated and incidental powers" granted to national banks under the National Bank Act "ordinarily pre-empt[] contrary state law." *Barnett Bank*, 517 U.S. at 32 (quotation marks omitted). In other words, "where Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, the Court has ordinarily found that no such condition applies." *Id.* at 34.

B. National Banks Have Federal Authority To Set Terms And Conditions For Their Mortgage Loans, To Offer Escrow Accounts, And To Charge Fees.

Plaintiff's attempt to force Bank of America to comply with Section 2954.8 implicates three banking powers: the power to offer mortgages, the power to offer escrow accounts, and the power to charge fees.

First, 12 U.S.C. § 371 empowers national banks to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate." 12 U.S.C. § 371(a).[8] This power to offer mortgages includes the right to set the terms and conditions of mortgages. To protect against the risk that the property secured by a mortgage may become subject to a lien, banks often include as a "term" of a mortgage that a borrower make tax and insurance payments into an escrow account. While banks could charge higher interest rates as compensation for this risk, escrow accounts provide an alternative way for a bank to mitigate the risk that the loan security might face from the borrower's failure to pay taxes or have the property properly insured. Banks often refuse to make or acquire secured mortgage loans without these escrow accounts. *See* OCC, Conditional Approval No. 276, 1998 WL 363812, at *9 (May 8, 1998) (observing that "the secondary mortgage market typically requires the establishment of escrow accounts").

Second, federal law empowers national banks to establish escrow accounts. 12 U.S.C. § 24(Seventh) authorizes national banks to exercise "all such incidental powers as shall be necessary to carry on the business of banking." The power conferred by Section 24(Seventh) includes the power to engage in any conduct that "is convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act." *Wells Fargo*

[8] 12 U.S.C. § 371 is not part of Title 62 of the Revised Statutes. *See* 12 U.S.C. § 21 historical & statutory note (listing provisions of the United States Code that were part of Title 62 of the Revised Statutes). Instead, 12 U.S.C. § 371 was enacted in 1913 as Section 24 of the Federal Reserve Act. *See* Pub. L. 63-43, § 24.

Bank N.A. v. Boutris, 419 F.3d 949, 960 (9th Cir. 2005) (internal quotation marks omitted). It has long been recognized that the grants of authority in 12 U.S.C. § 371 and § 24(Seventh) include the power to provide "escrow services in the context of collecting real estate taxes." OCC Interp. Ltr. 1041, 2005 WL 3629258, at *2 (Sept. 28, 2005).[9]

Finally, federal law empowers national banks to charge "non-interest charges and fees." 12 C.F.R. § 7.4002(a). This power includes the power to charge fees for servicing an escrow account. *See Bank of Am.*, 309 F.3d at 562 (national banks have "authority to collect fees for provision of authorized services"). Pursuant to this grant of authority, the Mortgage Agreement gives Bank of America the right to charge Plaintiff a fee if Plaintiff receives interest on his escrow account balance. *See* Mortgage Agreement § 3.

C. The National Bank Act And Accompanying OCC Regulations Preempt Plaintiff's Claims.

For three reasons, the National Bank Act preempts Plaintiff's attempt to force Bank of America to comply with Section 2954.8. *See, e.g., Monroe Retail, Inc. v. RBS Citizens, N.A.*, 589 F.3d 274, 283 (6th Cir. 2009) ("[T]he level of 'interference' that gives rise to preemption under the [National Bank Act] is not very high.").

First, the Complaint seeks to impose state-law conditions on the exercise of a national bank's power to provide escrow account services. Plaintiff seeks to prohibit Bank of America from exercising its federal authority to offer escrow accounts unless the national bank first agrees to comply with a state law requiring the payment of at least 2 percent interest on that escrow account balance. However, it is black-letter law

[9] *See also* OCC, Corporate Decision No. 99-06, 1999 WL 74103, at *2 (Jan. 29, 1999) ("[N]ational banks are authorized to provide … escrow services to their loan … customers as activities that are part of or incidental to the business of banking."); OCC, Conditional Approval No. 276, 1998 WL 363812, at *9 (May 8, 1998) ("National banks have long been permitted to service the loans that they make and servicing frequently entails the assurance that local real estate taxes are paid on time, particularly when such loans involve tax and insurance escrow accounts.").

that a state may not condition a national bank's exercise of any enumerated or incidental power upon compliance with state law. *See Barnett Bank*, 517 U.S. at 34 ("[W]here Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, the Court has ordinarily found that no such condition applies").

OCC regulations confirm that Section 2954.8 "prevents or significantly interferes" with Bank of America's exercise of its power to offer escrow accounts.[10] In particular, 12 C.F.R. § 34.4 provides that national banks may exercise their mortgage-lending authority "without regard to state law limitations concerning … [e]scrow accounts, impound accounts, and similar accounts." 12 C.F.R. § 34.4(a)(6). Courts have likewise agreed that federal law preempts state laws requiring federally chartered banks to pay interest on escrow account balances. *See Flagg v. Yongers Sav. & Loan Ass'n*, 396 F.3d 178, 181-85 (2d Cir. 2005);[11] *First Fed. Sav. & Loan Ass'n of Boston v. Greenwald*, 591 F.2d 417, 425-26 (1st Cir. 1979). *Cf. Hayes v. Wells Fargo Bank, N.A.*, 2014 WL 3014906, at *5-6 (S.D. Cal. July 3, 2014) (federal law preempted California claim challenging manner in which national bank serviced escrow accounts); *Wis. League of Fin. Insts. v. Galecki*, 707 F. Supp. 401, 404-06 (W.D. Wis. 1989) (federal law preempted state-law attempts to regulate escrow-related disclosures).

[10] OCC regulations that interpret and apply the National Bank Act have the same preemptive force as the National Bank Act itself. *See, e.g., Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (federal regulations "have no less preemptive effect than federal states"). Congress has entrusted the OCC with "primary responsibility for surveillance of the 'business of banking' authorized by § 24 Seventh," *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995), and the OCC has "authority to displace contrary state regulation," *Boutris*, 419 F.3d at 962.

[11] *Flagg* involved 12 C.F.R. § 560.2(b), which preempts "state laws purporting to impose requirements regarding … escrow accounts, impound accounts, and similar accounts." 12 C.F.R. § 560.2(b)(6). Because the preemption regulation in 12 C.F.R. § 34.4(a) is "almost identical to" the preemption regulation in 12 C.F.R. § 560.2(b), "the preemption analysis remains the same." *Zlotnick v. U.S. Bankcorp*, 2009 WL 5178030, at *6 (N.D. Cal. Dec. 29, 2009).

Second, the Complaint seeks to impose state-law conditions on the circumstances under which banks may extend mortgage credit. As a condition of underwriting a mortgage, banks often require a consumer to establish an escrow account as a "term of credit" to ensure that funds remain available to pay taxes and keep the property secured by the mortgage free of liens. A bank that is unable to require such a provision might refuse to make the mortgage loan in light of the heightened risk to its security interest from the borrower's failure to pay taxes or to properly insure the property. Indeed, Plaintiff acknowledges that his escrow account was one of "the express terms of the [mortgage] contracts." First Am. Compl. ¶ 10; *accord id.* ¶ 16. Section 2954.8 undermines national banks' mortgage-lending powers by prohibiting banks from having a term in mortgage loans requiring an escrow account unless the bank first pays interest on that account balance. *Barnett Bank* specifically prohibits this result. *See* 517 U.S. at 34.

Again, 12 C.F.R. § 34.4 confirms this conclusion. 12 C.F.R. § 34.4(a)(4) provides that banks may exercise their mortgage-lending authority without regard to state laws relating to the "terms of credit." An escrow account is a "term of credit" because it affects the payment a borrower must pay each month, and the nature of the security that the borrower has given to the bank on the loan note, to ensure the borrower does not default on the loan. The Ninth Circuit has consistently recognized the broad preemptive force of Section 34.4. *See, e.g.*, *Deming v. Merrill Lynch & Co.*, 528 F. App'x 775, 777 (9th Cir. 2013); *O'Donnell v. Bank of Am., N.A.*, 504 F. App'x 566, 568 (9th Cir. 2013); *Gutierrez v. Wells Fargo Bank, N.A.*, 704 F.3d 712, 726 (9th Cir. 2012); *Martinez v. Wells Fargo Home Mortgage, Inc.*, 598 F.3d 549, 556-57 (9th Cir. 2010).

Third, the Complaint seeks to restrict the amount of fees national banks may charge in connection with their lending authority. If Bank of America elects to pay interest on Plaintiff's escrow account – which it has not done in this case – the Mortgage Agreement gives Bank of America the right to charge a fee for servicing the

escrow account. *See* Mortgage Agreement § 3. However, Section 2954.8(b) limits the amount of any fee Bank of America may charge by providing that the amount of any escrow-related fee may not reduce the interest paid to the escrow account balance below 2 percent. Given current interest rates, Section 2954.8 simultaneously requires Bank of America to pay an above-market interest rate and prohibits Bank of America from charging *any* fees.[12] Courts have repeatedly rejected comparable attempts to limit a bank's right to exercise its federal power to charge similar fees. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 739-47 (1996) (preempting limits on late fees); *Martinez*, 598 F.3d at 556 (preempting limits on underwriting fees); *Monroe*, 589 F.3d at 283-84 (preempting limits on garnishment fees); *Bank of Am.*, 309 F.3d at 563-64 (preempting limits on ATM fees).[13]

D. The Dodd-Frank Act Does Not Affect The Preemption Analysis.

The Complaint effectively concedes that before Dodd-Frank was enacted, state requirements like Section 2954.8 would have been preempted by the National Bank Act and OCC regulations. *See* First Am. Compl. ¶¶ 2-3. In his Complaint, Plaintiff instead asserts that the Dodd-Frank Wall Street Reform and Consumer Protection Act,

[12] The actual interest rate on FDIC-insured deposit accounts is well less than 2 percent. *See, e.g.*, http://bankrate.com/compare-rates.aspx#tab=3 (last viewed on July 24, 2014) (national average for 1-year CD is 0.91%).

[13] As the successor-in-interest to the federal savings association, Countrywide, that originated Plaintiff's mortgage, Bank of America also benefits from the same field preemption that Countrywide enjoyed. *See, e.g., Kho v. Wells Fargo & Co.*, 2012 WL 3240041, at *4 n.2 (C.D. Cal. Aug. 6, 2012). At the time Countrywide originated Plaintiff's mortgage, Countrywide was a federal savings association chartered under HOLA. And at the time the mortgage was made, federal savings associations enjoyed field preemption. *See* 12 C.F.R. § 560.2(a) (HOLA "occupie[d] the entire field of lending regulation."). Regulations promulgated under HOLA specifically preempted "state laws purporting to impose requirements regarding … [t]he terms of credit, … [l]oan-related fees, … [and e]scrow accounts, impound accounts, and similar accounts." 12 C.F.R. § 560.2(b)(4), (5), (6); *accord Flagg*, 396 F.3d at 181-85 (Section 560.2(b)(6) preempted state law requiring payment of interest on escrow account balances); *Hayes*, 2014 WL 3014906, at *5-6 (Section 560.2(b)(6) preempted state law claims challenging national bank's servicing of escrow account). Dodd-Frank specifically preserved these field preemption regulations as applied to contracts like the Mortgage Agreement, which were "entered into on or before" July 21, 2010. Pub. L. 111-203, § 1043; *accord Copeland-Turner v. Wells Fargo Bank*, 800 F. Supp. 2d 1132, 1138 (D. Or. 2011).

Pub. L. 111-203, altered the preemption analysis to now require national banks to comply with Section 2954.8. *See* First Am. Compl. ¶¶ 4-6. For several reasons, Plaintiff is mistaken.

Although Dodd-Frank contains provisions addressing the preemption of state law under the National Bank Act, *see* 12 U.S.C. § 25b(b)(1), those provisions do not affect the preemption analysis discussed above. As numerous courts have recognized, Dodd-Frank merely codified the preemption framework set forth in *Barnett Bank* and applied above. *See, e.g.*, *Baptista v. JPMorgan Chase Bank, N.A.*, 640 F.3d 1194, 1197 (11th Cir. 2011); *U.S. Bank N.A. v. Schipper*, 812 F. Supp. 2d 963, 968 n.1 (S.D. Iowa 2011) ("the Dodd-Frank Act did not materially alter the standard for preemption"). The applicable statutory framework instructs courts to apply "the legal standard for preemption in the decision of the Supreme Court of the United States in *Barnett Bank*" and preempt state laws that "prevent[] or significantly interfere[] with the exercise by the national bank of its powers." 12 U.S.C. § 25b(b)(1)(B). As explained above, Section 2954.8 is preempted because it "prevents or significantly interferes with the exercise by [a] national bank of its powers" to offer mortgages, to offer escrow accounts, and to charge fees.

12 C.F.R. § 34.4 continues to reflect the OCC's agreement that state laws like Section 2954.8 prevent or significantly interfere with a national bank's power to offer escrow account services. After Dodd-Frank was enacted, the OCC reexamined its preemption regulations, including 12 C.F.R. § 34.4, and "confirm[ed] that the specific types of laws cited in the rules are consistent with the standard for conflict preemption in the Supreme Court's *Barnett* decision." OCC, *Dodd-Frank Act Implementation*, 76 Fed. Reg. 43,549, 43,557 (July 21, 2011). For example, the OCC concluded that laws that "affect the ability of national banks to underwrite and mitigate credit risk" and "manage credit risk exposures" interfere with banks' powers "in the lending arena." *Id.* With respect to escrow accounts, the OCC specifically concluded that

> state laws that would affect the ability of national banks to … manage loan-related assets, such as laws concerning … escrow standards … would meaningfully interfere with fundamental and substantial elements of the business of national banks and with their responsibilities to manage that business and those risks.

Id. The Ninth Circuit has continued to recognize the preemptive force of Section 34.4 even after Dodd-Frank. *See Deming*, 528 F. App'x at 777; *O'Donnell*, 504 F. App'x at 568; *Gutierrez*, 704 F.3d at 726.

Plaintiff's arguments to the contrary rely on distortions or misrepresentations of Dodd-Frank. They should all be rejected.

For example, Plaintiff claims that 12 C.F.R. § 34.4 has no force here because the OCC failed to make a "case-by-case" analysis of a state's law before making a preemption determination, *see* First. Am. Compl. ¶ 4, but this is irrelevant for four reasons. *First*, preemption here rests independently on the fact that Section 2954.8 prevents or significantly interferes with Bank of America's exercise of its federal *statutory* banking powers under 12 U.S.C. § 371 and § 24(Seventh); Section 34.4 is not necessary to reach this conclusion. *Second*, Section 34.4 was promulgated under 12 U.S.C. § 371,[14] which is not part of Title 62 of the Revised Statutes, *see supra* at 9 n.8, and therefore is not subject to any case-by-case requirement. *See* 12 U.S.C. § 25b(b)(1)(C). *Third*, regulations such as Section 34.4, which were "in effect prior to the effective date[,] are not subject to the case-by-case requirement." 76 Fed. Reg. at 43,557.[15] *Fourth*, only the OCC is subject to Dodd-Frank's case-by-case requirement; "any preemption determination" under Dodd-Frank may still be made by "a court"

[14] *See, e.g.*, OCC, *Bank Activities & Operations; Real Estate Lending & Appraisals*, 69 Fed. Reg. 1904, 1908-1910, 1911 (Jan. 13, 2004).

[15] Dodd-Frank's preemption provisions "bec[a]me effective on the designated transfer date," Pub. L. 111-203, § 1048, which was July 21, 2011, Bureau of Consumer Financial Protection, *Designated Transfer Date*, 75 Fed. Reg. 57,252 (Sept. 20, 2010).

regardless of whether the OCC has conducted a case-by-case inquiry. 12 U.S.C. § 25b(b)(1)(B).

Plaintiff also argues that the National Bank Act does not preempt state laws that provide "'greater protection' than federal finance laws," First Am. Compl. ¶ 9, but this argument has no applicability here. Plaintiff's argument rests on 12 U.S.C. § 5551, which was originally enacted as Section 1041 of Dodd-Frank and was intended to save some, but not all, state laws from preemption. *See* Pub. L. 111-203, § 1041. Specifically, Section 1041 provides that Title X of Dodd-Frank,

> *other than sections 1044 through 1048*, may not be construed as annulling, altering, or affecting, or exempting any person subject to the provisions of this title from complying with the statutes, regulations, orders, or interpretations in effect in any State, except to the extent that any such provision of law is inconsistent with the provisions of this title ….[16]

Pub. L. 111-203, § 1041(a)(1) (emphasis added). Here, however, preemption rests on Section 1044 of Dodd-Frank – later codified at 12 U.S.C. § 25b – which is expressly carved out from Section 1041's savings clause. In other words, a state law that provides greater protection to consumers as compared to federal law nevertheless is still preempted if the state law "prevents or significantly interferes" with Bank of America's exercise of its federal banking powers. 12 U.S.C. § 5551 therefore has no applicability here.[17]

Finally, Plaintiff has argued that 15 U.S.C. § 1639d(g)(3) is a separate savings clause that overrides the National Bank Act's preemptive force. But Section 1639d is

[16] Section 1041(a)(2) goes on to provide that a state law "is not inconsistent with the provisions of this title if the protection that" state law "affords to consumers is greater than the protection provided under this title." Pub. L. 111-203, § 1041(a)(2).

[17] Plaintiff appears confused about whether Section 2954.8 is a "State consumer financial law," *see* First Am. Compl. ¶ 6, but this is irrelevant. State laws that are not "State consumer financial laws" are still preempted under the general preemption principles of *Barnett Bank* applied above. State laws that are "State consumer financial laws" are subject to the preemption framework in 12 U.S.C. § 25b(b), which simply instructs courts to apply the preemption principles of *Barnett Bank*.

not a "savings clause," and it says nothing about preemption. *See infra* at 18-19 (further discussing 15 U.S.C. § 1639d). To the contrary, Section 1639d is not part of the National Bank Act, and it does not even appear in the same title as Dodd-Frank's preemption provisions. *See* Pub. L. 111-203, § 1461 (enacting 15 U.S.C. § 1639d). This Court should therefore decline Plaintiff's invitation to interpret Section 1639d to save state laws from preemption when Section 1639d does not even mention preemption in the first place. *See, e.g., United States v. Locke*, 529 U.S. 89, 106 (2000) ("We decline to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law."); *Bank of Am.*, 309 F.3d at 565-65 (express anti-preemption provision in Title 15 of the United States Code did not override the preemptive force of the National Bank Act provisions that appear in Title 12 of the Code).

II. PLAINTIFF FAILS TO STATE A CLAIM BASED ON FEDERAL LAW.

Count I also seeks relief on the theory that HUD Handbook 4330.1 and 15 U.S.C. § 1639d(g)(3) require Bank of America to pay Plaintiff interest on Plaintiff's escrow account balance. *See* First Am. Compl. ¶ 32. As explained below, neither provision imposes such a requirement.

A. The HUD Handbook Does Not Require National Banks To Pay Interest On Escrow Account Balances.

Plaintiff alleges that HUD Handbook 4330.1 requires national banks to pay interest. *See* First Am. Compl. ¶¶ 9, 32. Plaintiff's argument is contradicted by the Handbook itself, which observes that "HUD regulations neither forbid nor require that escrow accounts earn interest." HUD Handbook 4330.1, Rev-5, § 2-5(C). In fact, the HUD Handbook reflects the Department of Housing and Urban Development's longstanding position that it lacks "legal authority to require payment of interest on escrow accounts." HUD, *Real Estate Settlement Procedures Act (Regulation X): Escrow Accounting Procedures*, 59 Fed. Reg. 53,890, 53,891 (Oct. 26, 1994).

Even if the HUD Handbook addressed interest payments on Plaintiff's escrow accounts – and it does not – "the Handbook is neither a statute nor a regulation," and "HUD has not promulgated the Handbook such to give it the force of law." *In re Mortgage Escrow Deposit Litig.*, 1995 WL 59238, at *3 (N.D. Ill. Feb. 9, 1995); *see also Rank v. Nimmo*, 677 F.2d 692, 698-99 (9th Cir. 1982) ("[N]umerous decisions of other courts … have held agency handbooks … [are] unenforceable."); *Roberts v. Cameron-Brown Co.*, 556 F.2d 356, 361 (5th Cir. 1997) ("HUD has chosen not to publish the Handbook, thus prohibiting it from having the force and effect of law."). The HUD Handbook therefore does not establish a federal requirement to pay interest on Plaintiff's escrow account balance.

B. 15 U.S.C. § 1639d Does Not Require National Banks To Pay Interest On Escrow Account Balances.

Plaintiff also claims that 15 U.S.C. § 1639d(g)(3) requires national banks to pay interest on escrow account balances. *See* First Am. Compl. ¶¶ 8, 32. Here, too, Plaintiff is mistaken.

As a threshold matter, Section 1639d did not take effect until January 21, 2013 – nearly two years after Plaintiff alleges that he modified his mortgage. *See* Pub. L. 110-203, § 1400(c)(3) (providing that any section of Title XIV of Dodd-Frank for which no regulations have been issued shall take effect "on the date that is 18 months after the designated transfer date"); Bureau of Consumer Financial Protection, *Designated Transfer Date*, 75 Fed. Reg. 57,252 (Sept. 20, 2010) (transfer date was July 21, 2011). Section 1639d therefore cannot apply to Plaintiff's escrow account. *See Patton v. Ocwen Loan Servicing LLC*, 2011 WL 3236026, at *4 (M.D. Fla. July 28, 2011) (requirements imposed by Title XIV of Dodd-Frank do not apply to conduct occurring after Dodd-Frank enacted but before Title XIV's effective date).

Nor can Section 1639d be retroactively applied to Plaintiff's mortgage agreement. Applying a provision that took effect in January 2013 to a contract made in 2008 and modified in 2011 would violate a well-established "presumption against

retroactive legislation" that "is deeply rooted in our jurisprudence." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). Under Plaintiff's interpretation, Section 1639d would "impose new duties with respect to transactions already completed." *Id.* at 280. Section 1639d therefore may not be applied retroactively because there is no "clear congressional intent favoring such a result." *Id*.

Even if Section 1639d applied to Plaintiff's mortgage agreement – and it does not – Section 1639d(g)(3) does not independently require interest payments as a matter of federal law. Rather, that statute simply requires interest payments "[i]f prescribed by *applicable* State or Federal law." *Id.* (emphasis added). The preemptive force of the National Bank Act, coupled with the absence of any federal requirement to pay interest, means that no *applicable* law requires Bank of America to pay interest on Plaintiff's escrow account balance.

Moreover, the provisions of Section 1639d(g) dealing with interest payments on escrow account balances only apply to "an escrow … account subject to this section," but Plaintiff's escrow account is not "subject to" Section 1639d. An escrow account is only "subject to" Section 1639d if that Section imposes an obligation on a borrower to maintain an escrow account. *See, e.g.*, 15 U.S.C. § 1639d(a). Plaintiff does not allege that Section 1639d required him to establish an escrow account as a condition of obtaining a mortgage. Nor could he, considering that Section 1639d did not take effect until nearly five years after Plaintiff obtained his mortgage. Rather, Plaintiff alleges that his escrow account was established "based on the express terms of the [mortgage] contracts." First Am. Compl. ¶ 10; *accord id.* ¶ 16. Escrow accounts like Plaintiff's, which are established as a matter of "the contract between the lender … and the borrower," are not subject to Section 1639d. 15 U.S.C. § 1639d(f)(2). Section 1639d(g)(3) simply has no impact here.

III. PLAINTIFF FAILS TO STATE A CLAIM FOR BREACH OF CONTRACT.

In Count II, Plaintiff claims that Bank of America breached the terms of the Mortgage Agreement because it refused to pay interest on Plaintiff's escrow account balance. *See* First Am. Compl. ¶ 38. A cursory review of the Mortgage Agreement confirms that this claim lacks merit and should be dismissed.

Nothing in the Mortgage Agreement required Bank of America to pay interest on Plaintiff's escrow account. To the contrary, the Mortgage Agreement specifically provides that Bank of America "shall not be required to pay [Plaintiff] any interest on earnings on the Funds." Mortgage Agreement § 3; *see also* First. Am. Compl. ¶ 10. In addition, Plaintiff was repeatedly notified that "federal law and regulations … do not require the payment of interest on escrow accounts" and that Plaintiff "will not receive interest on your escrow account even if your state has a law concerning the payment of interest on escrow accounts." First Escrow Notice; Second Escrow Notice. These provisions remained operative after Plaintiff modified his mortgage. *See* Modified Mortgage Agreement at 2.

Plaintiff cannot argue that Bank of America nevertheless agreed to pay interest on his escrow account balance because such an obligation was imposed by "Applicable Law." The Mortgage Agreement defines "Applicable Law" as "all *controlling* applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions." Mortgage Agreement, Definitions, § (J) (emphasis added). As explained above, no federal law imposes a requirement to pay interest on escrow account balances. *See supra* at 17-19. Moreover, state law cannot constitute "Applicable Law" because it is preempted. *See supra* at 7-17.

Nor has Bank of America voluntarily agreed to comply with Section 2954.8. In arguing to the contrary, the Complaint cites the Mortgage Agreement's choice-of-law provision, which simply provides that

> This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in the Security Instrument are subject to any requirements and limitations of Applicable Law.

Mortgage Agreement § 16; *see also* First. Am. Compl. ¶ 10. The U.S. Supreme Court has held that a choice-of-law provision in a California deed of trust that is indistinguishable from the Mortgage Agreement did not require a federally chartered depository institution to comply with a preempted state or local law. *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 157 n.12 (1982) (choice-of-law provision specified that deed of trust "is to be governed by the 'law of the jurisdiction' in which the property is located"). Following *de la Cuesta*, courts have repeatedly held that language nearly identical to the Mortgage Agreement's choice-of-law provision does not incorporate state-law provisions that require the payment of interest on escrow account balances. *See, e.g., Flagg v. Yonkers Sav. & Loan Ass'n*, 307 F. Supp. 2d 565, 583 (S.D.N.Y. 2004) ("A general choice-of-law clause is, however, insufficient as a matter of law to incorporate by reference preempted state laws as the terms of a contract."), *aff'd* 396 F.3d at 186 ("While contracts may incorporate particular laws as contract terms, the contract must do so with specificity."); *Cassese v. Wash. Mut., Inc.*, 2008 WL 8652499, at *8-9 (E.D.N.Y. Jun. 27, 2008) ("the choice-of-law provisions here would only allow for the application of state law to the extent permitted by federal law"). This conclusion is confirmed by the escrow notices, in which Plaintiff was informed at the time he signed his mortgage documents that he "will not receive interest on your escrow account even if your state has a law concerning the payment of interest on escrow accounts." First Escrow Notice; Second Escrow Notice.

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CONCLUSION

For the foregoing reasons, this Court should grant Bank of America's motion to dismiss. Because Plaintiff has already amended his Complaint once, and because the deficiencies in the First Amended Complaint cannot be cured with an amendment, this Court should dismiss the First Amended Complaint with prejudice.

DATED: July 31, 2014

REED SMITH LLP

COVINGTON & BURLING LLP

By: /s/ Peter J. Kennedy
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Attorneys for Plaintiff and Putative Class

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DONALD M. LUSNAK, on behalf of himself and all others similarly situated,

Plaintiffs,

v.

BANK OF AMERICA, N.A.; and DOES 1 through 10, inclusive,

Defendants.

Case No.: 14-cv-01855-GHK (AJW)

FIRST AMENDED COMPLAINT - CLASS ACTION

1. **Violation of the California Unfair Competition Law (Cal. Bus. & Prof. Code § 17200, *et seq.*);**
2. **Breach of Contract**

DEMAND FOR JURY TRIAL

Complaint Filed: March 12, 2014
Hon. George H. King

I

INTRODUCTION AND STATEMENT OF FACTS

1. This consumer fraud class action is based on Defendant Bank of America, N.A.'s ("Defendant" or "BofA") direct, *per se* violation of California laws requiring a mortgage lender making loans secured by property located in California, to pay the

borrower a minimum of 2% simple interest for money received in advance from the borrower for tax and insurance . BofA, like many mortgage lenders, require a large percentage of their borrowers to maintain an impound escrow account in connection with their mortgage. BofA collects in advance from their borrowers' money to pay the property tax and insurance on the property and places it in the escrow account. BofA then directly pays the property tax and insurance from the escrow account when it becomes due. These additional and significant deposits made by the mortgagor to maintain the escrow account, are the borrowers' funds in which mortgage lenders have use of the funds for investment, and therefore, California law requires that the mortgage lenders, including BofA pay at least 2% interest on the monies to the borrowers. Civil Code §2954.8(a) mandates that:

> ***Every financial institution that makes loans upon the security of real property*** containing only a one- to four-family residence and located in this state or purchases obligations secured by such property and that receives money in advance for payment of taxes and assessments on the property, for insurance, or for other purposes relating to the property, ***shall pay interest on the amount so held to the borrower. The interest on such amounts shall be at the rate of at least 2 percent simple interest per annum.*** Such interest shall be credited to the borrower's account annually or upon termination of such account, whichever is earlier.
>
> ….
>
> ***No financial institution subject to the provisions of this section shall impose any fee or charge*** in connection with the maintenance or disbursement of money received in advance for the payment of taxes and assessments on real property securing loans made by such financial institution, or for the payment of insurance, or for other purposes relating to such real property, ***that will result in an interest rate of less than 2 percent per annum being paid on the moneys so received***.

(Emphasis added.)

2. However, Defendant systematically and uniformly has adopted a policy to violate California law by refusing to pay the mandated interest to borrowers, thereby

enriching itself on the free use of borrowers' escrow funds that Defendant earns interest on. This decision and policy is at odds with other mortgage lenders, such as Wells Fargo Bank, N.A. – BofA's chief competitor and the largest mortgage originator in the U.S. – which does comply with California law and pays interest on impounded escrow money:

> **"Does Wells Fargo pay interest on Escrow?**
>
> Yes. Wells Fargo pays interest on escrow in accordance with the Real Estate Settlement Procedures Act (RESPA) **and applicable state laws**."

(Ex. 1; Wells Fargo's "Understand Your Escrow Account", emphasis added.)

3. When Plaintiff questioned the legality of BofA not paying interest in light of explicit California law prior to bringing the lawsuit, BofA seemed to rely on the operation of expired federal regulations for a position that this California law was preempted and unenforceable. For many years, some national banks have relied on the preemptive effects of regulations of the Office of Thrift Supervision, set forth in 12 C.F.R. § 560.2(b)(6), and the Office of the Comptroller of Currency, set forth in 12 C.F.R. §34.4(a)(6), which concluded generally that state laws were preempted for a number of banking devices, including "escrow accounts, impound accounts, and similar accounts".

4. But with the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("the Act") and its new federal preemption provision, the federal agencies and regulators must now make "case-by-case" analyses of a state's laws (or substantively equivalent state laws) on a particular banking practice and their "impact on any national bank that is subject to that law" before issuing regulations preempting the state law. *See* 12 U.S.C. § 25b(b). To the extent that federal regulators seek to preempt multiple states' laws, the regulators must also first consult with the Consumer Financial Protection Bureau ("Bureau"). *Id.* Congress has established an arduous path for the making of preemption determinations in an effort to discourage the OCC from making a large number of those determinations on an overbroad scale, in order to better protect the

interests of states and consumers. However, upon information and belief, the federal regulatory agencies have not issued such case-by-case analyses nor have they consulted with the Bureau to issue regulations mandating a blanket preemption of multiple states' laws. Therefore, national banks cannot rely on these antiquated and expired regulations, and the attempts of the agencies to reaffirm its prior broad preemption regulations without complying with the Act are unenforceable.

5. The fact that the Dodd-Frank Act had changed the landscape for all preemption regulations and that BofA could not rely on these prior regulations was made clear by a Department of Treasury letter to the OCC on June 27, 2011, which stated:

> The notion that the new standard does not have any effect runs afoul of basic canons of statutory construction; it is also contrary to the legislative history, which states that Congress sought to "*revise[e]* the standard the OCC will use to preempt state consumer protection laws."

6. Furthermore, a "State consumer financial law", as defined by the preemption provision of the Act is one that "directly or indirectly discriminate[s] against national banks." 12 U.S.C. § 25b(a)(2). However, the state law at issue here cannot be said to directly or indirectly discriminate against national banks, as it applies to all financial institutions that issue mortgages, whether organized under California or federal laws. Therefore, the state law cannot be deemed to be preempted.

7. Furthermore, this California statute cannot be said to prevent or significantly interfere with BofA ability to offer mortgages to borrowers. The fact that a large number of mortgage lenders, including the market leader Wells Fargo pays interest, supports that the payment of interest on these escrow accounts does not rise to the level of preventing or significantly interfering with BofA's ability to offer mortgages to borrowers.

8. Moreover, the Dodd-Frank Act further directly and specifically expresses a policy that consumers should retain the interest gained on their escrow accounts. Congress has mandated that "[i]f prescribed by applicable State or Federal law, each creditor shall pay interest to the consumer on the amount held in any impound, trust, or

escrow account that is subject to this section in the manner as prescribed by that applicable State or Federal law." 15 U.S.C. §1639d(g)(3). This provision makes explicit that Congress intent was permit states to enact and enforce laws that require mortgage lenders to pay interest on impound accounts.

9. This requirement is in line with regulations of the United States Department of Housing and Urban Development ("HUD"), which state that: "[w]here escrow funds are invested, the net income derived from this investment must be passed on to the mortgagor in the form of interest…. in compliance with any state and/or regulatory agency requirements governing the handling and/or payment of interest earned on a mortgagor's escrow account." HUD Handbook 4330.1, Rev-5, §2-5. As the Act does not preempt state laws that afford "greater protection" than federal finance laws (12 U.S.C. § 5551(a)), BofA is now required to comply with California law.

10. Plaintiff Donald M. Lusnak ("Plaintiff") entered into mortgage contracts with Defendant, wherein, based on the express terms of the contracts, he was required to deposit funds into an escrow account and BofA would be required to pay interest on the escrow if applicable laws so required. The boilerplate, adhesive and nonnegotiable terms of the mortgage agreements drafted by Defendant included the following:

> **4. Escrow Account**…. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items.… Unless…Applicable Law requires interest to be paid on the [escrow] Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds.
>
> ….
>
> **17. Governing Law; Severability; Rules of Construction.** This security shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law…. In the event that any provisions of this Security Instrument or the Note conflicts with Applicable Law, such conflicts shall not

affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

The home loan modification he received in 2011 modified the amount of his escrow account requirements, but the obligations that the parties must comply with state and federal law remains.

11. Therefore, Plaintiff has continuously deposited funds into his escrow account which are due every month in an amount that was often more than $250. But he has never received the interest accrued on his funds maintained in the escrow account back from Defendant, and Defendant has expressly refused to pay Plaintiff interest on these funds as demanded by Plaintiff prior to his filing the lawsuit.

12. Therefore, Plaintiff, for himself and all others similarly situated (*i.e.*, the members of the Plaintiff Class described and defined within this Complaint), brings this action for restitution and reimbursement, equitable injunctive relief and declaratory relief, pursuant to the California Unfair Competition Laws ("UCL"), California Business and Professional Code §17200, *et seq.*; and breach of contract. For this purpose, Plaintiff herein alleges as follows:

II

JURISDICTION AND VENUE

13. This Court has personal jurisdiction over the Defendant because Defendant has conducted and continues to conduct business in the State of California, and because Defendant has committed the acts and omissions complained of herein in the State of California.

14. Venue as to Defendant is proper in this judicial district. BofA is one of the largest mortgage lenders operating in this district, has branches throughout this district, and many of Defendant's acts complained of herein occurred in this district.

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III

THE PARTIES

15. Plaintiff Donald M. Lusnak is a resident and citizen of the city of Palmdale, California. He purchased a new house in Palmdale on or about July 2008, and simultaneously entered into a home loan agreement with Countrywide Financial, prior to its purchase by Bank of America Corporation, and being renamed BAC Home Loans Servicing, LP, which has since merged into Defendant Bank of America, N.A., its successor. As he served as a member of the United States Army, he received a Veterans Administration Home Loan Guarantee as part of the mortgage. In early 2011, he entered into a new mortgage contract with BofA through a home loan modification of the first mortgage contract. Throughout the time that Plaintiff entered into the first mortgage contract and the second modified mortgage contract, he has been required to make $250 in monthly payments to BofA, in addition to the regular monthly mortgage payment, for the pre-payment of property tax and insurance on the property. Based on information and belief, Defendant has use of those funds at all times between when received from Plaintiff to the time when Defendant made tax and insurance payments on Plaintiff's property.

16. However, Plaintiff has never received from Defendant interest on the monies pre-paid by Plaintiff and held by Defendant for the payment of the taxes and insurance. While the agreements drafted by BofA in the original mortgage and the subsequent modified home loan required the creation of escrow accounts and that Plaintiff deposit funds into these escrow accounts, there was no contractual agreement that BofA would be permitted to withhold the interest accrued on these accounts, and instead required that this handling of the interest would be pursuant to applicable state and federal laws. California Civil Code §2954.8(a) is an applicable state law. Therefore, BofA is obligated to comply with this state law, as discussed above, in performing its obligations under the agreements and therefore pursuant to its own contract as well as the specific California law must pay interest on Plaintiff's impound escrow account.

17. Defendant Bank of America, N.A., is one of the largest national banks and one of the largest mortgage lenders in the country, even more so following its acquisition of Countrywide Financial. Defendant is incorporated in the state of Delaware and has its principal place of business in and is a citizen of North Carolina. Its dedicated mortgage arm subsidiary BAC Home Loans Servicing, LP, formerly known as Countrywide Home Loan Servicing, LP, has since been merged into Bank of America, N.A. Through numerous branches throughout California and the U.S., Defendant enters into mortgage agreements with customers for finance of their homes, and upon information and belief, requires a large percentage of it customers in California and many other states to maintain escrow accounts, into which customers deposit significant funds for the payment of property tax and insurance on the property. However, Defendant has systematically and uniformly failed and continues to refuse to pay interest on those funds, in direct, *per se* violation of state and federal laws.

18. The true names and capacities of the defendants sued herein as DOES 1 through 10, inclusive, are currently unknown to Plaintiff, who therefore sues such defendants by such fictitious names. Each of the defendants designated herein as a DOE is legally responsible in some manner for the unlawful acts referred to herein. Plaintiff will seek leave of Court to amend this Complaint to reflect the true names and capacities of the Defendants designated herein as DOES when such identities become known.

19. Based upon information and belief, Plaintiff alleges that at all times mentioned herein, each and every defendant was acting as an agent and/or employee of each of the other defendants, and at all times mentioned was acting within the course and scope of said agency and/or employment with the full knowledge, permission, and consent of each of the other defendants. In addition, each of the acts and/or omissions of each defendant alleged herein were made known to, and ratified by, each of the other defendants.

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IV

CLASS ACTION ALLEGATIONS

20. Plaintiff brings this action on his own behalf, and on behalf of the following classes, pursuant to FED. R. CIV. P. 23(a), 23(b)(2), and/or 23(b)(3).

21. Plaintiff proposes a California class, as defined as follows:

> All mortgage loan customers of Bank of America (or its subsidiaries), whose mortgage loan is for a one-to-four family residence located in California, and who paid Bank of America money in advance for payment of taxes and assessments on the property, for insurance, or for other purposes relating to the property, and did not receive interest on the amount held by Bank of America.

Excluded from the above class is any entity in which Defendant has a controlling interest, and officers or directors of Defendant.

22. Plaintiff reserves the right under Rule 23 to amend or modify the Class descriptions with greater specificity or further division into subclasses or limitation to particular issues, based on the results of discovery.

23. **Numerosity of the Class** – The members of the Class are so numerous that their individual joinder is impracticable. The number of mortgages held by Defendant number in the hundreds of thousands or more throughout California, which is a reflection of the number of putative Class members in this action. Inasmuch as the class members may be identified through business records regularly maintained by Defendant and its employees and agents, and through the media, the number and identities of class members can be ascertained. Members of the Class can be notified of the pending action by e-mail, mail, and supplemented by published notice, if necessary;

24. **Existence and Predominance of Common Question of Fact and Law** – There are questions of law and fact common to the Class. These questions predominate over any questions affecting only individual class members. These common legal and factual issues include, but are not limited to:

a. Whether Defendant has systematically engaged in a conduct that is a *per se* violation of state and federal laws with respect to the disbursement of the interest accrued on escrow accounts back to the customers;

b. Whether Defendant's conduct breached the mortgage agreements with customers;

c. Whether Defendant must provide damages, restitution and/or reimbursement to borrowers in the amount of unpaid interest on funds held in impound escrow accounts based on the causes of action asserted herein; and

d. Whether injunctive relief is appropriate to prohibit Defendant from engaging in this conduct in the future

25. **Typicality** – The claims of the representative Plaintiff are typical of the claims of each member of the Class. Plaintiff, like all other members of the Class, has sustained damages arising from Defendant's violations of the laws, as alleged herein. The representative Plaintiffs and the members of the Class were and are similarly or identically harmed by the same unlawful, deceptive, unfair, systematic, and pervasive pattern of misconduct engaged in by Defendant.

26. **Adequacy** – The representative Plaintiff will fairly and adequately represent and protect the interests of the Class members and have retained counsel who are experienced and competent trial lawyers in complex litigation and class action litigation. There are no material conflicts between the claims of the representative Plaintiff and the members of the Class that would make class certification inappropriate. Counsel for the Class will vigorously assert the claims of all Class members.

27. **Predominance and Superiority** – This suit may be maintained as a class action under because questions of law and fact common to the Class predominate over the questions affecting only individual members of the Class and a class action is superior to other available means for the fair and efficient adjudication of this dispute. The damages suffered by individual class members are small compared to the burden and

expense of individual prosecution of the complex and extensive litigation needed to address Defendant's conduct. Further, it would be virtually impossible for the members of the Class to individually redress effectively the wrongs done to them. Even if Class members themselves could afford such individual litigation, the court system could not. In addition, individualized litigation increases the delay and expense to all parties and to the court system resulting from complex legal and factual issues of the case. Individualized litigation also presents a potential for inconsistent or contradictory judgments. By contrast, the class action device presents far fewer management difficulties; allows the hearing of claims which might otherwise go unaddressed because of the relative expense of bringing individual lawsuits; and provides the benefits of single adjudication, economies of scale, and comprehensive supervision by a single court.

28. The Class Plaintiff contemplates the eventual issuance of notice to the proposed Class members setting forth the subject and nature of the instant action. Upon information and belief, Defendant's own business records and electronic media can be utilized for the contemplated notices. To the extent that any further notices may be required, the Class Plaintiffs would contemplate the use of additional media and/or mailings.

29. In addition to meeting the prerequisites of a Class Action, this action is properly maintained as a Class Action pursuant to Rule 23(b) of the Federal Rules of Civil Procedure, in that:

a. Without class certification and determination of declaratory, injunctive, statutory and other legal questions within the class format, prosecution of separate actions by individual members of the Class will create the risk of:

i. Inconsistent or varying adjudications with respect to individual members of the Class which would establish incompatible standards of conduct for the parties opposing the Class; or

ii. Adjudication with respect to individual members of the Class which would as a practical matter be dispositive of the interests of the other members not

parties to the adjudication or substantially impair or impede their ability to protect their interests;

b. The parties opposing the Class have acted or refused to act on grounds generally applicable to each member of the Class, thereby making appropriate final injunctive or corresponding declaratory relief with respect to the Class as a whole; or

c. Common questions of law and fact exist as to the members of the Class and predominate over any questions affecting only individual members, and a Class Action is superior to other available methods of the fair and efficient adjudication of the controversy, including consideration of:

i. The interests of the members of the Class in individually controlling the prosecution or defense of separate actions;

ii. The extent and nature of any litigation concerning controversy already commenced by or against members of the Class;

iii. The desirability or undesirability of concentrating the litigation of the claims in the particular forum;

iv. The difficulties likely to be encountered in the management of a Class Action.

FIRST CAUSE OF ACTION
(Violation of California Business & Professions Code Sections 17200, *et seq.* – Unfair Business Practices Act)

30. Plaintiff incorporates by reference and re-alleges all paragraphs previously alleged herein.

31. The Unfair Business Practices Act defines unfair business competition to include any "unfair," "unlawful," or "fraudulent" business act or practice. The Act also provides for injunctive relief, restitution, and disgorgement of profits for violations.

32. Defendant's unlawful, unfair, and fraudulent business acts and practices are described throughout this Complaint and include, but are not limited to the following. Defendant has and continues to engage in a practice of failing to pay interest to its borrowers on impound escrow account, as required by the laws of California, and other

states, thereby illegally profiting from the use of interest free funds in hundreds of thousands of mortgage accounts. This is a *per se* violation California Civil Code §2954.8 and 15 U.S.C. §1639d(g), and contravenes the declared legislative policy espoused in the HUD regulations as set forth in HUD Handbook 4330.1, Rev-5, §2-5.

33. Defendant's practice is also unfair since it has no utility and, even if it did, any utility is outweighed by the gravity of harm to Plaintiff and the Class members. Defendant's practice is also immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its benefits.

34. Plaintiff and the Class members, and each of them, have been damaged by said practices. Pursuant to California Business and Professions Code §§ 17200 and 17203, Plaintiff, on behalf of himself and all others similarly situated, seek relief as prayed for below.

SECOND CAUSE OF ACTION
(Breach of Contract)

35. Plaintiff incorporates by reference and re-alleges all paragraphs previously alleged herein.

36. Defendant was bound by the mortgage agreements with Plaintiff and the Class, and was signatories thereto.

37. Plaintiff, and all others similarly situated, did all, or substantially all, of the significant things that the agreements required them to do.

38. Meanwhile, Defendant failed to perform the express terms of the agreements that stated Defendant would comply with applicable state and federal law, which included the state and federal law that mandated Defendant pay interest to borrowers for funds collected on an impound escrow account. As such and as set forth above, Defendant breached an express term of the agreements.

39. As a result, Plaintiff and the Class members have been harmed by Defendant's breach of contract.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and the members of the Class, demands judgment against and general and special relief from Defendant as follows:

1. An order certifying that the action may be maintained as a Class Action as defined herein and appointing Plaintiff and his counsel of record to represent the defined Class;

2. An order enjoining Defendant under California Business and Professions Code §§ 17203:

   a. To cease such acts and practices declared by this Court to be an unlawful, fraudulent, or an unfair business act or practice, a violation of laws, statutes, or regulations, or constituting unfair competition;

   b. To disgorge all profits and compensation improperly obtained by Defendant as a result of such acts and practices declared by this Court to be an unlawful, fraudulent, or unfair business act or practice, a violation of laws, statutes, or regulations, or constituting unfair competition; and

3. For damages under the causes of action for breach of contract;

4. For reasonable attorney's fees and costs, pursuant to California Code of Civil Procedure § 1021.5, and other statutes as may be applicable, as well as provided by the contracts;

5. For prejudgment interest to the extent allowed by law;

6. For costs of suit incurred herein;

7. For such other and further relief as the Court deems appropriate.

DATED: June 20, 2014.

McCUNEWRIGHT LLP

By: */s/Richard D. McCune*
Richard D. McCune
Attorneys for Plaintiff

DEMAND FOR JURY TRIAL

Plaintiff, and all others similarly situated, hereby demands a trial by jury herein.

DATED: June 20, 2014.

MCCUNEWRIGHT LLP

By: */s/Richard D. McCune*
Richard D. McCune
Attorneys for Plaintiff

EXHIBIT “1”

Understand Your Escrow Account

Feedback | Print this page

When we open an escrow account for your mortgage, we use it to make payments for real estate taxes and homeowners insurance on your behalf. To make those payments, we collect escrow funds as part of your monthly mortgage payment. This ensures that your bills are paid in full and on time, without you having to budget for these large payments separately.

Use the information below as a guide to understanding how escrow accounts work, what happens when we analyze your account, how we determine your escrow payments, and what you'll find on your statement.

Escrow Basics | Escrow Analysis | Escrow Payments | Escrow Statements

How escrow accounts work

▼ What bills are paid from an escrow account?

We collect funds in an escrow account to pay:

- Real estate taxes
- Premiums for insurance required to protect the property, such as homeowners insurance

We do not collect funds in an escrow account to pay:

- Interim tax bills
- Homeowners association fees
- Premiums for non-required insurance policies, such as separate personal property insurance
- Special or added tax assessments
- Other fees that are not included in your real estate tax bill
- Supplemental tax bills, except in California

► Do I need to send you my real estate tax bill each time it's due?

▼ Does Wells Fargo pay interest on escrow?

Yes. Wells Fargo pays interest on escrow in accordance with the Real Estate Settlement Procedures Act (RESPA) and applicable state laws.

► After I've paid off my mortgage in full, will you refund the money in my escrow account?

► Where can I find more information about my escrow account?

ACCO,(AJWx),APPEAL,CLOSED,DISCOVERY

UNITED STATES DISTRICT COURT for the CENTRAL DISTRICT OF CALIFORNIA (Western Division - Los Angeles)
CIVIL DOCKET FOR CASE #: 2:14-cv-01855-GHK-AJW

Donald M Lusnak v. Bank of America, N.A. et al
Assigned to: Judge George H. King
Referred to: Magistrate Judge Andrew J. Wistrich
Case in other court: 9th Circuit, 14-56755
Cause: 28:1332 Diversity-Breach of Contract

Date Filed: 03/12/2014
Date Terminated: 10/29/2014
Jury Demand: Plaintiff
Nature of Suit: 190 Contract: Other
Jurisdiction: Diversity

Plaintiff

Donald M Lusnak
on behalf of himself and all others similarly situated

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V.

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Defendant

Does
1 through 10, inclusive

Date Filed	#	Docket Text
03/12/2014	1	COMPLAINT Receipt No: 0973-13501585 - Fee: $400, filed by Plaintiff Donald M Lusnak.(Attorney Jae Kook Kim added to party Donald M Lusnak(pty:pla)) (Kim, Jae) (Entered: 03/12/2014)
03/12/2014	2	CIVIL COVER SHEET filed by Plaintiff Donald M Lusnak. (Kim, Jae) (Entered: 03/12/2014)
03/12/2014	3	Certificate of Interested Parties filed by Plaintiff Donald M Lusnak, identifying Defendant Bank of America, N.A.. (Kim, Jae) (Entered: 03/12/2014)
03/12/2014	4	Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 filed by Plaintiff Donald M Lusnak. (Kim, Jae) (Entered: 03/12/2014)
03/12/2014	5	NOTICE OF ASSIGNMENT to District Judge Otis D. Wright, II and Magistrate Judge Andrew J. Wistrich. (ghap) (Entered: 03/12/2014)
03/12/2014	6	NOTICE TO PARTIES OF COURT-DIRECTED ADR PROGRAM filed. (ghap) (Entered: 03/12/2014)
03/12/2014	7	21 DAY Summons Issued re Complaint (Attorney Civil Case Opening) 1 as to Defendant Bank of America, N.A. (ghap) (Entered: 03/12/2014)
03/13/2014	8	ORDER TO REASSIGN CASE due to self-recusal pursuant to General Order 08-05 by Judge Otis D. Wright, II. Case transferred from Judge Otis D. Wright, II to the calendar of Judge George H. King for all further proceedings. Case number now reads as CV 14-01855 GHK(AJWx). (rn) (Entered: 03/13/2014)
03/14/2014	9	NOTICE VACATING ADR REFERRAL by Judge George H. King: Notice is given to the parties that the reference to the Alternative Dispute Resolution Pilot Program, General Order 02-07 is vacated. All further settlement procedures in this action shall be pursuant to Local Rule R 16-14. (shb) (Entered: 03/14/2014)
03/24/2014	10	ORDER RE: CASE MANAGEMENT (REVISED AS OF MAY 2012) READ IMMEDIATELY. This case has been assigned to the calendar of Chief Judge George H. King. The court fully adheres to Rule 1 of the Federal Rules of Civil

		Procedure, which requires that the Rules be "construed and administered to secure the just, speedy and inexpensive determination of every action and proceeding."Counsel shall also be guided by the following special requirements, some of which are more specific than those set out in the Local Rules. (jp) (Entered: 03/24/2014)
04/18/2014	11	PROOF OF SERVICE Executed by Plaintiff Donald M Lusnak, upon Defendant Bank of America, N.A. served on 4/4/2014, answer due 4/25/2014. Service of the Summons and Complaint were executed upon CT Corporation System-Authorized Agent for Service of Process in compliance with California Code of Civil Procedure by service on a domestic corporation, unincorporated association, or public entity. Original Summons returned. (Kim, Jae) (Entered: 04/18/2014)
04/22/2014	12	STIPULATION Extending Time to Answer the complaint as to Bank of America, N.A. answer now due 5/16/2014, re Complaint (Attorney Civil Case Opening) 1 filed by Defendant Bank of America, N.A..(Attorney Peter J Kennedy added to party Bank of America, N.A.(pty:dft))(Kennedy, Peter) (Entered: 04/22/2014)
05/07/2014	13	APPLICATION for attorney Keith A. Noreika to Appear Pro Hac Vice(PHV Fee of $325 receipt number 0973-13776423 paid.) filed by Defendant Bank of America, N.A.. (Attachments: # 1 Proposed Order)(Kennedy, Peter) (Entered: 05/07/2014)
05/07/2014	14	APPLICATION for attorney Andrew J. Soukup to Appear Pro Hac Vice(PHV Fee of $325 receipt number 0973-13776482 paid.) filed by Defendant Bank of America, N.A.. (Attachments: # 1 Proposed Order)(Kennedy, Peter) (Entered: 05/07/2014)
05/09/2014	15	ORDER by Judge George H. King: granting 13 Application to Appear Pro Hac Vice by Attorney Keith A. Moreika on behalf of Defendant Bank of America, designating Peter J. Kennedy as local counsel. (lt) (Entered: 05/12/2014)
05/12/2014	16	ORDER by Judge George H. King: granting 14 Application to Appear Pro Hac Vice by Attorney Andrew J. Soukup on behalf of Defendant Bank of America, designating Peter J. Kennedy as local counsel. (lt) (Entered: 05/12/2014)
05/16/2014	17	NOTICE OF MOTION AND MOTION to Dismiss Case filed by Defendant Bank of America, N.A.. Motion set for hearing on 7/14/2014 at 09:30 AM before Judge George H. King. (Attachments: # 1 Memorandum, # 2 Request for Judicial Notice, # 3 Exhibit A to Request for Judicial Notice, # 4 Exhibit B to Request for Judicial Notice, # 5 Exhibit C to Request for Judicial Notice, # 6 Exhibit D to Request for Judicial Notice)(Kennedy, Peter) (Entered: 05/16/2014)
05/16/2014	18	*Certification and* NOTICE of Interested Parties filed by Defendanta Bank of America, N.A., identifying none. Bank of America Corporation does not have a parent corporation and no publicly traded corporation owns ten percent (10%) or more of the stock in Bank of America Corporation. (Kennedy, Peter) (Entered: 05/16/2014)
06/20/2014	19	STIPULATION to Vacate Hearing on Defendant's Motion to Dismiss MOTION to Dismiss Case 17 *AND FOR LEAVE FOR PLAINTIFF TO FILE A FIRST AMENDED COMPLAINT* filed by Plaintiff Donald M Lusnak. (Attachments: # 1 Exhibit "1" [Proposed First Amended Complaint], # 2 Proposed Order)(Kim, Jae) (Entered: 06/20/2014)

06/23/2014	20	OPPOSITION to MOTION to Dismiss Case 17 filed by Plaintiff Donald M Lusnak. (Kim, Jae) (Entered: 06/24/2014)
06/25/2014	21	ORDER GRANTING STIPULATION TO VACATE THE HEARING ON DEFENDANT'S MOTION TO DISMISS AND FOR LEAVE FOR PLAINTIFF TO FILE A FIRST AMENDED COMPLAINT 19 by Judge George H. King. It is hereby ordered as follows: 1. The hearing on Defendant Bank of America, N.A.'s Motion to Dismiss Plaintiff's Complaint Pursuant to FRCP 12(B)(6) 17 which is currently set for July 14, 2014, at 9:30 a.m., is VACATED. That Motion is denied as moot. 2. Plaintiff shall file the the First Amended Complaint, which is attached to the stipulation as a stand alone document within 7 days hereof. Defendant retains all rights to challenge the allegations and causes of action contained in the First Amended Complaint in its responsive pleading. Defendant is deemed having received notice and service of the First Amended Complaint, and the deadline for Defendant's responsive pleading is July 31, 2014. (lom) (Entered: 06/25/2014)
06/27/2014	22	FIRST AMENDED COMPLAINT against Defendant Bank of America, N.A. amending Complaint (Attorney Civil Case Opening) 1 , filed by Plaintiff Donald M Lusnak (Attachments: # 1 Exhibit 1)(Kim, Jae) (Entered: 06/27/2014)
07/02/2014	23	Notice of Appearance or Withdrawal of Counsel: for attorney Michael W Sobol counsel for Plaintiff Donald M Lusnak. Adding Michael W. Sobol as attorney as counsel of record for Donald M. Lusnak for the reason indicated in the G-123 Notice. Filed by Plaintiff Donald M. Lusnak. (Attorney Michael W Sobol added to party Donald M Lusnak(pty:pla))(Sobol, Michael) (Entered: 07/02/2014)
07/02/2014	24	Notice of Appearance or Withdrawal of Counsel: for attorney Michael W Sobol counsel for Plaintiff Donald M Lusnak. Adding Roger N. Heller as attorney as counsel of record for Donald M. Lusnak for the reason indicated in the G-123 Notice. Filed by Plaintiff Donald M. Lusnak. (Sobol, Michael) (Entered: 07/02/2014)
07/02/2014	25	Notice of Appearance or Withdrawal of Counsel: for attorney Michael W Sobol counsel for Plaintiff Donald M Lusnak. Adding Nicole D. Sugnet as attorney as counsel of record for Donald M. Lusnak for the reason indicated in the G-123 Notice. Filed by Plaintiff Donald M. Lusnak. (Sobol, Michael) (Entered: 07/02/2014)
07/31/2014	26	NOTICE OF MOTION AND MOTION to Dismiss Case *** *Notice of Motion and Motion to Dismiss Plaintiff's First Amended Complaint*** filed by Defendant Bank of America, N.A.. Motion set for hearing on 9/29/2014 at 09:30 AM before Judge George H. King. (Attachments: # 1 Memorandum)(Kennedy, Peter) (Entered: 07/31/2014)
07/31/2014	27	REQUEST FOR JUDICIAL NOTICE *and Request for Consideration of Certain Incorporated Documents in Support of Its Motion to Dismiss Plaintiff's First Amended Complaint* filed by Defendant Bank of America, N.A.. (Attachments: # 1 Exhibit A)(Kennedy, Peter) (Entered: 07/31/2014)
08/29/2014	28	MEMORANDUM in Opposition *to Motion to Dismiss* filed by Plaintiff Donald M Lusnak. (Heller, Roger) (Entered: 08/29/2014)
08/29/2014	29	REQUEST FOR JUDICIAL NOTICE filed by plaintiff Donald M Lusnak. (Attachments: # 1 Exhibit 1)(Heller, Roger) (Entered: 08/29/2014)

09/12/2014	30	REPLY *Memorandum of Points and Authorities in Support of Defendant Bank of America, N.A.'s Motion to Dismiss Plaintiffs First Amended Complaint* filed by Defendant Bank of America, N.A.. (Kennedy, Peter) (Entered: 09/12/2014)
09/12/2014	31	REQUEST FOR JUDICIAL NOTICE * *Defendant Bank of America, N.A.'s Supplemental Request for Judicial Notice in Support of its Motion to Dismiss Plaintiff's First Amended Complaint* * filed by Defendant Bank of America, N.A.. (Attachments: # 1 Exhibit E)(Kennedy, Peter) (Entered: 09/12/2014)
09/24/2014	32	MINUTES (IN CHAMBERS): ORDER by Judge George H. King. On the court's own motion, Defendants Motion to Dismiss First Amended Complaint 26 , noticed for hearing on OCTOBER 6, 2014, is TAKEN OFF CALENDAR and will be taken UNDER SUBMISSION without oral argument on that date pursuant to Local Rule 7-15. No appearance by counsel shall be necessary. The hearing date is vacated. Further briefing, if any, shall be filed in accordance with Local Rules as if the noticed hearing date had not been vacated. (lom) (Entered: 09/24/2014)
10/29/2014	33	MINUTES (IN CHAMBERS) ORDER by Judge George H. King: granting 26 Motion to Dismiss First Amended Complaint with prejudice. (shb) (Entered: 10/30/2014)
10/29/2014	34	JUDGMENT by Judge George H. King. IT IS HEREBY ADJUDGED that Plaintiffs First Amended Complaint is DISMISSED with prejudice. Plaintiff shall take nothing by this Complaint. (MD JS-6, Case Terminated). (shb) (Entered: 10/30/2014)
11/04/2014	35	NOTICE OF APPEAL to the 9th CCA filed by Plaintiff Donald M Lusnak. Appeal of Judgment 34 , Order on Motion to Dismiss Case 33 (Appeal fee of $505 receipt number 0973-14728571 paid.) (Attachments: # 1 Exhibit "A" - Order, # 2 Exhibit "B" - Judgment, # 3 Exhibit "C" - Plainitff's Representation Statement)(Kim, Jae) (Entered: 11/04/2014)
11/04/2014	36	NOTIFICATION by Circuit Court of Appellate Docket Number 14-56755, 9th Circuit regarding Notice of Appeal to 9th Circuit Court of Appeals 35 as to Plaintiff Donald M Lusnak. (mat) (Entered: 11/06/2014)
12/03/2014	37	NOTICE re Non-Designation of Reporter's Transcript for Appeal filed by Plaintiff Donald M Lusnak. (Sobol, Michael) (Entered: 12/03/2014)
12/16/2014	38	NOTICE of Change of Attorney Business or Contact Information: for attorney Keith A Noreika counsel for Defendant Bank of America, N.A.. Changing Address to One CityCenter, 850 Tenth Street NW, Washington, DC 20001. Filed by Defendant Bank of America. (Noreika, Keith) (Entered: 12/16/2014)
12/16/2014	39	NOTICE of Change of Attorney Business or Contact Information: for attorney Andrew J Soukup counsel for Defendant Bank of America, N.A.. Changing Address to One CityCenter, 850 Tenth Street NW, Washington, DC 20001. Filed by Defendant Bank of America, N.A.. (Soukup, Andrew) (Entered: 12/16/2014)

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