

1 DOUGLAS GILLIES, ESQ. (CA 53602)
2 douglasgillies@gmail.com
3 3756 Torino Drive
4 Santa Barbara, CA 93105
5 (805) 682-7033

6 Attorney for Plaintiff
7 MARGARET CARSWELL

8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

11 MARGARET CARSWELL,)	Case No. CV 10-5152-GW (PLAx)
12 Plaintiff,)	
13 v.)	OFFER OF PROOF
14 JP MORGAN CHASE BANK N.A.,)	DATE: February 7, 2011
15 CALIFORNIA RECONVEYANCE CO.,)	TIME: no hearing scheduled
16 and DOES 1-150, inclusive,)	ROOM: 10
17 Defendants.)	JUDGE: Hon. GEORGE H. WU
)	
)	
)	

19 _____
20
21 Plaintiff respectfully submits this Offer of Proof as to the First Amended
22 Complaint pursuant to the Court's Order on January 6, 2011. The allegations in the
23 First Amended Complaint (FAC) and this Offer of Proof are based upon information
24 and belief, except those allegations that pertain to MARGARET CARSWELL,
25 which are based on personal knowledge. Allegations stated on information and
26 belief are likely to have evidentiary support after a reasonable opportunity for further
27 investigation and discovery. An offer of proof ordinarily follows discovery and oral
28 examination of witnesses. It is challenging to make an offer of proof at the outset,

1 before the Defendants have filed an answer or responded to any request. Defendants
2 did not even reply to Plaintiff's Qualified Written Request (Plaintiff's **Exhibit 5**).

3
4 **The Promissory Note and Deed of Trust define the rights of the parties.**

5 In California, an obligation arises either from the contract of the parties or by
6 operation of law. Cal. Civ Code §1428; Cal. Code Civ Proc. §26. A mortgage is a
7 contract. Civ. Code §2920(a). A power of sale is conferred on the mortgagee,
8 trustee, or other person *by the mortgage*. Civ. Code §2924.

9 The Adjustable Rate Note attached to Plaintiff's First Amended Complaint as
10 **Exhibit 1** identifies Washington Mutual Bank as the Lender in Paragraph 1, which
11 then says, "The Lender or anyone who takes this Note by transfer and who is entitled
12 to receive payments under this Note is called the "Note Holder."

13 The Note states in paragraph 7(C):

14 Notice of Default. If I am in default, the Note Holder may send me a
15 written notice telling me that if I do not pay the overdue amount by a
16 certain date, the Note Holder may require me to pay immediately the full
17 amount."

18 So the Note gives the right to collect, if timely payments are not made, to the
19 Lender and anyone who takes the Note by transfer. This does not include a servicer
20 who is not the holder of the Note.

21 Plaintiff's Deed of Trust, dated 12/20/2006, ("DOT") is attached hereto as
22 **Exhibit 12**. The "Lender" identified in the DOT is WASHINGTON MUTUAL
23 BANK, FA (page 1, paragraph C). The "Trustee" is California Reconveyance
24 Company. (page 2, paragraph D).

25 Consistent with the language of the Note, only the Lender is authorized under
26 the DOT to accelerate the loan:

27 "Lender shall give notice to Borrower prior to acceleration following
28 Borrower's breach of any covenant of agreement in this Security

1 Instrument...

2 "If Lender invokes the power of sale, Lender shall execute or cause
3 Trustee to execute a written notice of the occurrence of an event of
4 default and of Lender's election to cause the Property to be sold. Trustee
5 shall cause this notice to be recorded in each county in which any part of
6 the Property is located." (DOT page 13, paragraph 22).

7 Washington Mutual Bank remained the Lender for no more than a few days until
8 it sold the loan. Thereafter, it was a servicer of the loan. The Note Holder was
9 presumably the investment trust that put up the money.

10 "Lender, at its option, may from time to time appoint a successor Trustee
11 to any Trustee appointed hereunder by an instrument executed and
12 acknowledged by Lender and recorded in the office of the Recorder of the
13 county in which the Property is located." (DOT page 13, paragraph 24).

14 Defendants ask the Court's blessing to proceed with foreclosure of Plaintiff's
15 property even though they cannot tell the Court who the Lender might possibly be.

17 **Evidence of Wrongful Foreclosure**

18 On September 2, 2009, CRC recorded an Assignment of Deed of Trust
19 (Plaintiff's **Exhibit 2**, attached hereto) by which JPMorgan Chase, as successor in
20 interest to Washington Mutual, transferred all beneficial interest in Plaintiff's Deed
21 of Trust to Bank of America.

22 No subsequent assignments have been recorded since September 2, 2009. CRC
23 transferred all of its beneficial interest to Bank of America on September 2, 2009, so
24 it was not authorized to initiate foreclosure against Plaintiff on March 31, 2010,
25 when it recorded the Notice of Default (Plaintiff's **Exhibit 4**), and it was not acting
26 for the Lender when it filed the Notice of Trustee's Sale on July 1, 2010 (**Exhibit 6**).

27 The language of the Assignment of Deed of Trust (Ex. 2) is identical to an
28 assignment considered by the Massachusetts Supreme Court in the recent case of

1 *U.S. Bank National Association vs. Ibanez* Case No. SJC-10694 (January 6, 2011).
2 The DOT in *Ibanez* was assigned with the following language: "FOR VALUE
3 RECEIVED, the undersigned hereby grants, assigns and transfers to _____ all
4 beneficial interest under that certain Mortgage..." (*Ibanez* fn. 11). Plaintiff's Exhibit
5 2 reads, "FOR VALUE RECEIVED, the undersigned hereby grants, assigns and
6 transfers to Bank of America...all beneficial interest under that certain Deed of
7 Trust..." The only difference was the blank assignment presented in *Ibanez*.

8 The identical language of the assignments of these two mortgages points to a
9 dichotomy in the field of securitization and pooling of mortgage-backed securities.
10 Promissory notes and mortgages are governed by the real estate laws of 50 states,
11 but securities questions tend to be subject to the laws of the state of New York,
12 where most issuing trusts are domiciled and conduct their business. *Ibanez* rejected
13 the use of blank assignments of interests in real property and noted that in
14 Massachusetts, a non-judicial state, "one who sells under a power of sale must
15 follow strictly its terms. If he fails to do so there is no valid execution of the power,
16 and the sale is wholly void." *Moore v. Dick*, 187 Mass. 207, 211 (1905). The power
17 of sale contained in a mortgage "must be executed in strict compliance with its
18 terms." *Roche v. Farnsworth*, 106 Mass. 509, 513 (1871).

19 *Ibanez* continued, "Where mortgage loans are pooled together in a trust and
20 converted into mortgage-backed securities, the underlying promissory notes serve as
21 financial instruments generating a potential income stream for investors, but the
22 mortgages securing these notes are still legal title to someone's home or farm and
23 must be treated as such...A judge is entitled to ask for proof that the foreclosing
24 entity was the mortgage holder at the time of the notice of sale and foreclosure, or
25 was one of the parties authorized to foreclose...

26 "We agree with the (trial) judge that the plaintiffs, who were not the original
27 mortgagees, failed to make the required showing that they were the holders of the
28 mortgages at the time of foreclosure. As a result, they did not demonstrate that the

1 foreclosure sales were valid to convey title to the subject properties, and their
2 requests for a declaration of clear title were properly denied."

3 In *Dexia Holdings v. Countrywide Financial Corp*, No. 650185, New York State
4 Supreme Court (Manhattan), filed on January 24, 2011, Bank of America,
5 Countrywide, and former Countrywide CEO Angelo Mozilo are charged by a dozen
6 institutional investors with massive fraud for misleading investors about mortgage-
7 backed securities.

8 The 194-page *Dexia* complaint alleges:

9 H. Countrywide Failed To Ensure That Title To The Underlying Loans
10 Was Effectively Transferred

11 146. An essential aspect of the mortgage securitization process is that the
12 issuing trust for each MBS offering must obtain good title to the mortgage
13 loans comprising the pool for that offering. This is necessary in order for the
14 MBS holders to be legally entitled to enforce the mortgage loans in case of
15 default. Two documents relating to each mortgage loan must be validly
16 transferred to the trust as part of the securitization process – a promissory note
17 and a security instrument (either a mortgage or a deed of trust).

18 147. The rules for these transfers are governed by the law of the state
19 where the property is located, by the terms of the pooling and servicing
20 agreement (“PSA”) for each securitization, *and by the law governing the*
21 *issuing trust* (with respect to matters of trust law). Generally, state laws and the
22 PSAs require the promissory note and security instrument to be transferred by
23 indorsement, in the same way that a check can be transferred by indorsement,
24 or by sale. In addition, state laws generally require that the trustee have
25 physical possession of the original, manually signed note in order for the loan
26 to be enforceable by the trustee against the borrower in case of default.

27 150. The applicable state trust law generally requires strict compliance
28 with the trust documents, including the PSA, so that failure to comply strictly

1 with the timeliness, indorsement, physical delivery, and other requirements of
2 the PSA with respect to the transfers of the notes and security instruments
3 means that the transfers would be void and the trust would not have good title
4 to the mortgage loans.

5 151. The Offering Documents for each offering of the Certificates
6 represented in substance that the issuing trust for that offering had obtained
7 good title to the mortgage loans comprising the pool for the offering. In
8 reality, however, Countrywide routinely failed to comply with the
9 requirements of applicable state laws and the PSAs for valid transfers of the
10 notes and security instruments to the issuing trusts.

11
12 The authority to foreclose against Plaintiff Margaret Carswell was assigned by
13 CRC to Bank of America and the assignment was recorded on September 9, 2009.
14 Almost a year later, CRC recorded a Notice of Default followed by a Notice of
15 Trustee's Sale against Plaintiff's Property. Defendants offer no evidence that they
16 were authorized by the Lender or the Note Holder to initiate foreclosure, as required
17 by the Deed of Trust. Plaintiff's search of the Santa Barbara County Records reveals
18 no Assignment of Deed of Trust from Bank of America to CRC, and her interview
19 of Bank of America manager, Jason MOUNTZOGLU, revealed that Bank of America
20 has no interest in Plaintiff's mortgage or Note.

21 22 **Evidence of Fraud**

23 CRC recorded a Notice of Trustee's Sale ("NOTS") on July 1, 2010 (FAC ¶14).
24 The NOTS, attached hereto as **Exhibit 13**, includes a declaration of compliance with
25 Cal. Civil Code 2923.5 bearing a signature of Deborah Brignac, Vice President,
26 California Reconveyance Co.

27 Attached hereto as **Exhibit 14** is a NOTS describing Plaintiff's Property
28 recorded seven months earlier on December 7, 2009. The declaration bears a

1 distinctly different signature of Deborah Brignac, Vice President, California
2 Reconveyance Co. At least one of the signatures is a forgery.

3 Three other NOTS are attached hereto announcing sales of other properties in
4 Santa Barbara County. All of Deborah Brignac's signatures are obviously different:

- 5 - **Exhibit 15** recorded Oct. 1, 2009 by CRC re: Trustee Sale No. 735164CA
- 6 - **Exhibit 16** recorded Oct. 6, 2009 by CRC re: Trustee Sale No.236466CA
- 7 - **Exhibit 17** recorded Oct. 7, 2009 by CRC re: Trustee Sale No.436468CA

8 Each of Deborah Brignac's signatures appears to be a forgery. It is possible, but
9 not likely, that one of them is authentic. Plaintiff offers certified copies of the above
10 exhibits and is prepared to introduce fourteen other certified copies of notices of
11 trustee's sales recorded against various properties in Santa Barbara County with
12 attached declarations bearing differing signatures of Deborah Brignac. The evidence
13 suggests that defendants were running a criminal enterprise involving fraudulently
14 manufactured recorded documents to speed the foreclosure process. Plaintiff offers
15 Exhibits 13-17 as evidence that the pending foreclosure of her Property is illegal.

16 17 **Unjust Enrichment**

18 After finding the Assignment of Deed of Trust to Bank of America, signed on
19 September 1, 2009 (Plaintiff's **Exhibit 2**) in the County Records, Plaintiff googled
20 "WaMu Mortgage Pass Through Certificates Series 2007-OA1 Trust" in 2010 and
21 found evidence that the Trust was terminated on October 15, 2010. The first item in
22 the Google search results, attached hereto as Plaintiff's **Exhibit 18**, states: "Wamu
23 Mortgage Pass Through Certificates, Series 2007-OA1. Termination Date: October
24 15, 2010. Unrealized Appreciation, \$4626 ..."

25 Attached hereto as Plaintiff's **Exhibit 19** are excerpts of Form 8-K, the Pooling
26 and Service Agreement (PSA) filed with the Securities and Exchange Commission
27 by WaMu Asset Acceptance Corp. for WaMu Mortgage Pass-Through Certificates
28 Series 2007-OA1 Trust. WaMu Mortgage Pass-Through Certificates Series 2007-

1 OA1 Trust is a Real Estate Mortgage Investment Conduit ("REMIC Trust"). This
2 lengthy document of 226 pages is available at the SEC website. Exhibit 19 includes:

3 (1) the first two pages;

4 (2) a page from the Table of Contents indicating that ARTICLE IX –
5 TERMINATION consists of §§ 9.01-9.03 on pages 122-125; and

6 (3) the complete text of Article IX, §§ 9.01-9.03.

7 Exhibit 19 states on the cover sheet that the Pooling and Servicing Agreement
8 that established the REMIC Trust was dated January 1, 2007. The pool was closed
9 on or before January 25, 2007, the date of the 8-K Report. Plaintiff's Note was
10 therefore transferred to the REMIC Trust before January 25, 2007. Her Deed of
11 Trust was not transferred until September 1, 2009. Exhibit 2 begins, above the
12 document title:

13 **IMPORTANT NOTICE**

14 **NOTE:** After having been recorded, this Assignment should be kept with the
15 Note and the Deed of Trust hereby assigned.

16
17 The Note and the Deed of Trust were separated from the outset of the loan.

18 §§ 9.01-9.03 states that the REMIC Trust shall terminate upon:

19 (i) the Distribution Date immediately following the exercise by the
20 Servicer of its purchase option set forth in the first paragraph of this Section
21 9.01(a), or

22 (ii) the later of the final payment or other liquidation (or any advance with
23 respect thereto) of the last Mortgage Loan owned by the trust...and the
24 payment to the Certificateholders (sic) of all amounts required to be paid to
25 them hereunder.

26
27 So the trust terminates when the Certificate holders are paid. Exhibit 18 tends to
28 show that the Certificates Series 2007-OA1 Trust has terminated, a matter which

1 must be explored in discovery, since Chase holds all the cards and has offered
2 nothing but a purchase and assumption agreement to justify taking money and real
3 property. If the lenders have been paid, then Chase has no basis for taking money
4 from Plaintiff and cannot foreclose on her home. Chase is a servicer, it has never
5 claimed to be the Lender, and their services appear to be no longer needed.

6 A cause of action for unjust enrichment in California is not based on, and does
7 not arise out of, a written contract. Rather, unjust enrichment is a common law
8 obligation implied by law based on the equities of a particular case and not on any
9 contractual obligation. *McBride v. Boughton* (2004) 123 Cal.App.4th 379, 388-389.
10 Whether termed unjust enrichment, quasi-contract, or quantum meruit, the equitable
11 remedy of restitution when unjust enrichment has occurred "is an *obligation* (not a
12 true contract) created by the law without regard to the intention of the parties, and is
13 designed to restore the aggrieved party to his or her former position by return of the
14 thing or its equivalent in money." 1 *Witkin, Summary of Cal. Law* (10th ed. 2005)
15 Contracts, § 1013, p. 1102. "The so-called 'contract implied in law' in reality is not a
16 contract. 'Quasi-contracts, unlike true contracts, are not based on the apparent
17 intention of the parties to undertake the performances in question, nor are they
18 promises. They are obligations created by law for reasons of justice.'" *Weitzenkorn*
19 *v. Lesser* (1953) 40 Cal.2d 778, 794.

20 WaMu received the balance on Plaintiff's Note when it securitized the loan
21 within days of its inception. (FAC ¶29). Chase describes itself in the NOTS as a
22 servicer, not the Lender. The "Lender" appears to be the investment trust identified
23 in the Assignment of Deed of Trust (Exhibit 2) as WaMu Mortgage Pass-Through
24 Certificates, Series 2007-OA1 Trust. If the trust has been terminated, the lender has
25 been paid in full (FAC ¶57). Discovery is necessary to uncover the identity of the
26 Lender in order to determine whether Chase has been authorized by the Lender to
27 foreclose. If the lender has been paid, whether by government bailout or other
28 means, payments by Plaintiff to Chase in excess of \$100,000 constitute unjust

1 enrichment. If Chase was not entitled to the money, it has to give it back—and no
2 technicality can change that. Breaking with tradition, in millions of foreclosures the
3 banks have put on masks and turned into robbers, but those days are numbered.

4 An individual may be required to make restitution if he is unjustly enriched at
5 the expense of another. A person is enriched if he receives a benefit at another's
6 expense. The term 'benefit' denotes any form of advantage. When a person has
7 received a benefit from another, he is required to make restitution if the
8 circumstances of its receipt or retention are such that, as between the two persons, it
9 is unjust for him to retain it. *FDIC v Dintino* (2008) 167 Cal. App. 4th 333, 347.

10 Florida Attorney General Pam Bondi released a Powerpoint presentation in
11 January, 2011, explaining the legal issues surrounding the foreclosure crisis. The
12 presentation illustrates examples of fraud, describes the process of securitization,
13 and lays out some of the missteps major financial institutions have made. Portions of
14 the Attorney General's presentation are included in Plaintiff's **Exhibit 20**, an offer of
15 proof in graphic form to illustrate the complicated journey that Plaintiff's mortgage
16 and note have followed down the rabbit hole of securitization through various
17 pooling and servicing agreements.

18
19
20 Respectfully submitted,

21
22 /s/ _____

23 Douglas Gillies
24 Attorney for Plaintiff Margaret Carswell
25 January 28, 2011
26
27
28