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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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BERENICE THOREAU DE LA SALLE, ) Case No. 2:09-cv-02701-MCE-KJM  
)  
Plaintiff, ) Sacramento, California  
) Wednesday, February 10, 2010  
vs. ) 10:04 A.M.  
)  
AMERICA'S WHOLESALE LENDER, ) Hearing re: defendant's motion  
et al., ) to dismiss.  
)  
Defendants. )  
\_\_\_\_\_)

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE KIMBERLY J. MUELLER  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For Plaintiff: BERENICE THOREAU DE LA SALLE  
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Court Recorder: (UNMONITORED)  
U.S. District Court  
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1        SACRAMENTO, CALIFORNIA, WED., FEBRUARY 10, 2010, 10:04 A.M.

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3                    (Call to order of the Court.)

4                    THE CLERK:    Calling Civil Case 09-2701-MCE-KJM, De La

5    Salle v. America's Wholesale Lender.    This matter is on for

6    defendant's motion to dismiss, Your Honor.

7                    THE COURT:    Good morning.    Appearances please.    If

8    you could state your name for the record?

9                    MS. DE LA SALLE:    Yes.    Berenice Thoreau De La Salle,  
10    plaintiff.

11                    THE COURT:    Good morning.

12                    MS. MOSTAJELEAN:    Good morning, Your Honor.    Bahareh  
13    Mostajelean on behalf of defendants.

14                    THE COURT:    Good morning.    I have reviewed the  
15    parties' filing in this matter.

16                    In this case I have no particular questions.    What I  
17    would allow is each side to argue briefly if they believe  
18    something is not fully covered by the papers, or if in response  
19    to the reply, Ms. De La Salle, you have something else you'd  
20    like to say.    But I'm going to start with the movant. I'm just  
21    kind of making clear the ground rules.

22                    MS. DE LA SALLE:    That's fine.

23                    THE COURT:    And then if I have questions based on  
24    what you say, I'll let you know.

25                    So, Ms. Mostajelean?

1 MS. MOSTAJELEAN: Your Honor, do you have a  
2 preference on whether I come to the podium, or stay at the  
3 table?

4 THE COURT: You can stay at the table.

5 MS. MOSTAJELEAN: Thank you, Your Honor.

6 Your Honor, we don't really have much to add that  
7 hasn't already been briefed, but I would just like to reiterate  
8 that we request that this Court grant our motion to dismiss  
9 simply because plaintiff's eleven causes of action, the  
10 majority of them are premised on an untenable legal theory that  
11 these defendants do not have the right to foreclose.

12 The loan documents that plaintiff signed establish  
13 that, in fact, they all do. The deed of trust which was signed  
14 in 2005 states that the lender is AWL, the trustee is  
15 Recontrust and the beneficiary is MERS.

16 On page 3, it grants to the trustee, Recontrust, the  
17 power of sale of the subject property, and on page 12 it  
18 specifically states that the note or the interest can be sold  
19 along with the security interest without prior notice to the  
20 borrower.

21 So this -- these agreements, the plaintiff agreed to  
22 are the basis for the defendant's right to non-judicially  
23 foreclose, and defendant has not, as plaintiff has not been  
24 current on her loan. She is currently in default.

25 These are -- the defendant's are pursuing remedies

1 that were specifically provided for in their agreements. As  
2 such, each of her claims that is premised on this argument  
3 failed as a matter of law.

4 Her other claims, as we had discussed, I won't --  
5 there's no need to go into them, we've discussed it in our  
6 motion to dismiss, and also in our reply, also fail for reasons  
7 that we've stated.

8 If Your Honor has further questions, I'm happy to  
9 answer them, but for the reasons that we've stated in our  
10 motion to dismiss, we request that you grant it without leave  
11 to further amend.

12 THE COURT: All right. Ms. De La Salle?

13 MS. DE LA SALLE: Your Honor, the issue before us was  
14 decided 138 years ago in the U.S. Supreme Court case of  
15 Carpenter v. Longan, and the cite for that case is 16 Wall 271;  
16 83 U.S. 271, 1872.

17 THE COURT: And you have cited that in your papers?

18 MS. DE LA SALLE: I do cite it in the papers.

19 THE COURT: Yeah. Again, I have reviewed the papers,  
20 so --

21 MS. DE LA SALLE: I understand.

22 THE COURT: -- you don't need to review everything in  
23 the papers.

24 MS. DE LA SALLE: I won't, and I will be very brief.  
25 But being that counsel for the defendant has reiterated her

1 position, I would like to reiterate --

2 THE COURT: Absolutely.

3 MS. DE LA SALLE: -- just a key point.

4 At page 274 of the U.S. Supreme Court decision, the  
5 Court says, and I quote,

6 "The note and the mortgage are inseparable. The  
7 former as essential, the latter as an incident. An  
8 assignment of the note carries the mortgage with it. An  
9 assignment of the latter is a nullity."

10 MERS, Your Honor, has corrupted this basic black  
11 letter law of mortgages that makes a split of the security  
12 instrument from the note impermissible.

13 First, it names itself as the beneficiary of the deed  
14 of trust, thus splitting the deed of trust from the note, and  
15 then it attempts to rectify the split by stating that it is  
16 acting in some form of restricted agency relationship solely as  
17 the nominee for the lender.

18 In doing this, MERS attempts to do two things that  
19 are inconsistent at the same time, and it is this ambiguous  
20 contradictory language that fails the title. Why?

21 First, because as the beneficiary of the deed of  
22 trust, MERS has suffered no default. Only the current holder  
23 of the note has suffered a default, and only the current holder  
24 can enforce the note.

25 And secondly, even if it could be argued that MERS is

1 the agent for the original lender, America's Wholesale  
2 Lender -- and Your Honor, it is important to note that within  
3 the four corner of the document, within the four corners of the  
4 deed of trust, there is nothing that establishes that agency  
5 relationship.

6 But again, even if you argue that it exists, there's  
7 nothing that establishes an agency relationship between MERS  
8 and the alleged current owner of the note according to the bank  
9 servicer, Bank of America; U.S. Bank as trustee for the  
10 structured adjustable rate mortgage, 19 excess 2005. They are  
11 apparently, allegedly, they are the current holder of the note.

12 Yet, MERS takes the position that through the deed of  
13 trust all of these agency relationships are implied, and that  
14 it can go forward based upon these implications and foreclose  
15 even though the four corners of that document, of the deed of  
16 trust, carries only one signature, mine, not the signatures of  
17 MERS, nor its principals.

18 They seem to contend that with this implied agency  
19 agreement that is in violation of the statute of fraud that the  
20 U.S. Supreme Court ruling of Carpenter v. Longan prohibiting  
21 the splitting of a mortgage from the note can somehow be  
22 ignored.

23 Your Honor, it cannot. It cannot be ignored without  
24 the U.S. Supreme Court going back and reversing Carpenter v.  
25 Longan.

1 I'd like to make two other points, and that is  
2 throughout the procedures, counsel for the defendant has used  
3 the ad hominem arguments that question my motives by stating  
4 that in filing this lawsuit I am merely attempting to delay the  
5 inevitable foreclosure, that this is a delay tactic and that my  
6 motives are, or should be questioned.

7 Although an ad hominem remark is not something that  
8 the Court should consider, I feel that it is important to  
9 address it.

10 On three occasions I have attempted to have this loan  
11 modified in compliance with the intent and the spirit of the  
12 legislature, and on three attempts I have not been given an  
13 answer as to why it should be denied. I fall within the  
14 guidelines of a loan modification. I am not attempting to  
15 avoid a debt.

16 But Your Honor, if counsel for the defendants can  
17 argue that there is no private right of action as a result of  
18 HAMP and as a result of the spirit and the intent of the  
19 legislature, then conversely I certainly can argue that I have  
20 the right to avoid an illegal sale.

21 Moreover, being that the sale is illegal, being that  
22 the deed of trust has no force and effect, the tender law, the  
23 tender rule which counsel cites is not necessary. It is  
24 inappropriate. There are cases from the California Supreme  
25 Court, Humboldt Savings v. McCloerty, which clearly state that

1 if a sale can be avoided legally, that the tender law, and the  
2 need for redemption is not necessary.

3 That is all that I have to say, Your Honor, and I  
4 respectfully request that this motion be denied.

5 THE COURT: All right. Thank you. Ms. Mostajelean,  
6 can you respond to the refusal to modify the loan?

7 MS. MOSTAJELEAN: Your Honor, I can only state what I  
8 know as of right now, and that based on the statute, it does  
9 not require that a modification be provided. There's no duty  
10 to provide a modification if a plaintiff cannot afford such  
11 modification.

12 The plaintiff has attached exhibits to her complaint,  
13 and one of those is the denial of this loan modification. I  
14 cannot state exactly the reasons why. I'd be happy to ask the  
15 client to look into that and provide supplemental briefing if  
16 you so desire.

17 However, based on the documents, her loan  
18 modification was reviewed and it was denied, most likely on the  
19 grounds that a modification could not solve her indebtedness  
20 issues.

21 THE COURT: I'll let you know if I need supplemental  
22 briefing.

23 MS. MOSTAJELEAN: Okay.

24 THE COURT: Right now, I don't think I do.

25 MS. DE LA SALLE: Your Honor, may I respond to that?

1 THE COURT: Wait. Let her finish.

2 MS. DE LA SALLE: Okay.

3 MS. MOSTAJELEAN: Your Honor, as we stated in our  
4 opening motion to dismiss, and in our reply brief on page 7,  
5 MERS does have an interest in this, and MERS does have standing  
6 to pursue this foreclosure.

7 Moreover, loan services and trustees like BAC Home  
8 Loan Services, and Recontrust, they have standing to enforce  
9 these loan obligations despite the fact that they do not  
10 currently -- that they are not the owners of the note, they do  
11 have standing to pursue the remedies that are provided for  
12 explicitly in the deed of trust, and that the deed of trust on  
13 page 8, and that she has attached as Exhibit 2, I believe,  
14 pages 2 and 3, and 12, they all create this right to pursue  
15 non-judicial foreclosure in the event of a default, which is  
16 what plaintiff is facing at this time.

17 Your Honor, for these reasons, and the reasons stated  
18 in our papers, we do request that this -- our motion be granted  
19 in its entirety.

20 THE COURT: You had another point? Ms. Mostajelean  
21 will still have the chance to respond, but if there's something  
22 you wanted to clarify?

23 MS. DE LA SALLE: Yes, I'd like to clarify her remark  
24 that the loan modification has been denied because I can  
25 allegedly not afford it. Your Honor, that is not the case. My

1 net income last year was \$78,000. I can afford a loan  
2 modification. I've made that clear to the bank servicer, but  
3 the problem here is not whether or not I can afford it.

4 The problem here is that there is a conflict of  
5 interest between the bank servicer, and the current owner of  
6 the note, and I will put your attention to a treatise which I  
7 cite in my opposition papers, which is entitled, "Why Servicers  
8 Foreclose When They Should Modify and Other Puzzles of Servicer  
9 Behavior."

10 And in that treatise, it explains that the bank  
11 servicer collects the late fees and makes money in the event of  
12 foreclosure. The bank servicer, however, loses money in the  
13 event of a loan modification. And therefore, even though the  
14 loan modification may be in the interest of the holder of the  
15 note, bank servicers are not providing loan modifications.

16 They hold the power. Your Honor, eight percent, only  
17 eight percent of all loan modifications today have been  
18 approved and that's since the inception of HAMP. There's a  
19 reason, and the reason is money.

20 THE COURT: Just help me understand, the -- is  
21 the -- you've sought modification from Countrywide?

22 MS. DE LA SALLE: I've sought modification three  
23 times. The first time I sought modification from Countrywide  
24 before Bank of America had bought it. I then sought  
25 modification on two additional occasions, again from Bank of

1 America. I went through an attorney the first time. It was a  
2 bogus law firm which is now being sued by the Federal Trade  
3 Commission.

4 I went the second time through a nonprofit  
5 organization which has done nothing more than the bogus law  
6 firm.

7 And I've gone a third time on my own.

8 THE COURT: And is the party from whom you've sought  
9 modification named as a defendant in this case?

10 MS. DE LA SALLE: No.

11 THE COURT: All right.

12 MS. DE LA SALLE: No.

13 THE COURT: All right. Ms. Mostajelean, any further  
14 reply?

15 MS. MOSTAJELEAN: Just very briefly, Your Honor.

16 Based on the statute, and based on the fact that there is no  
17 private right of action, and the fact that plaintiff is not  
18 entitled -- that defendants do not have any duty to guarantee  
19 plaintiff a loan modification, and the plaintiff's own exhibit  
20 states that she was requesting a \$150,000 haircut on her loan,  
21 there is no guarantee that she should -- she's entitled to a  
22 loan modification.

23 Regardless, the law as it is states that she has no  
24 right of action to bring that claim, no private right of  
25 action, and moreover, to claim that these defendants do not

1 have standing to initiate the non-judicial foreclosure  
2 is -- it's false. It's incorrect. The law is what it is. She  
3 has an agreement. She entered into this agreement in 2005.  
4 She has failed to meet her obligations and as such, these  
5 defendants are allowed to pursue their remedies, which is non-  
6 judicial foreclosure.

7 Thank you very much. For those reasons, Your Honor,  
8 we request that you grant out motion in its entirety.

9 Thank you.

10 THE COURT: All right. I have no further questions  
11 regarding the motion. One more thing?

12 MS. DE LA SALLE: Yes, I have one more comment, Your  
13 Honor.

14 THE COURT: All right.

15 MS. DE LA SALLE: Counsel for defendant points out  
16 that I'm requesting a \$150,000 haircut. A haircut, Your Honor,  
17 is in accordance with the loan modification process, and  
18 with -- more importantly, with the current market values,  
19 according to HAMP, if one's loan can be reduced to 95 percent  
20 of the current market value of the property, that the loan  
21 modification should go forward.

22 Now, I did not bring on this real estate crisis. It  
23 can be argued that the very institutions that are attempting to  
24 stop the loan modification process in the interest of profit,  
25 profit center for themselves, that those institutions created

1 the mess that we're in, and yet counsel argues that given the  
2 current market values, that I should not be able to benefit  
3 from the loan modification, and the amount of the loan  
4 modification which has been stipulated to by the legislature.

5 Clearly, I think that that is unfair.

6 THE COURT: But just so -- you're not arguing that  
7 any of this counsel's clients are specifically denying  
8 modification.

9 MS. DE LA SALLE: Well, yes, Your Honor, I am. I  
10 believe that this counsel's clients are denying modification.

11 THE COURT: All right.

12 MS. DE LA SALLE: Bank of America Home Loan Servicing  
13 bought Countrywide, and it is the defendant and they have  
14 denied --

15 THE COURT: They have denied -- okay. So when I  
16 asked you earlier if you had named as a defendant --

17 MS. DE LA SALLE: Oh, yes, of course.

18 THE COURT: So that's the BAC Home Loans.

19 MS. DE LA SALLE: Yes, yes, I have named them as a  
20 defendant.

21 THE COURT: All right.

22 MS. DE LA SALLE: I misunderstood. I thought you  
23 meant have I named the bogus law firm that --

24 THE COURT: No.

25 MS. DE LA SALLE: No. Yes, I have named Bank of

1 America, absolutely.

2 THE COURT: All right. Final word. Given that Ms.  
3 De La Salle is proceeding on her own, I'm just making sure we  
4 have a complete record

5 MS. MOSTAJELEAN: Sure. No, that's totally  
6 understandable, Your Honor.

7 Just -- the final word is the claim for a loan  
8 modification as I mentioned previously, there is no private  
9 right of action, there is no duty to provide a loan  
10 modification, and unfortunately, that's what the law says, and  
11 the law holds in favor of our -- of the defendants in this  
12 matter.

13 Regardless, aside from the loan modification issue,  
14 her other claims fail as a result, in fact, that these parties  
15 are entitled to foreclose, and to initiate the non-judicial  
16 foreclosure.

17 And again, as we stated earlier, we request that this  
18 Court dismiss plaintiff's complaint without further leave to  
19 amend. Thank you, Your Honor.

20 THE COURT: All right. So my job on this motion is  
21 to resolve the motion based on the law. Here's my question,  
22 given some of what I've heard this morning, and some of what  
23 was alluded to in the papers, that -- is there any possibility  
24 that the parties are willing to take advantage of one of the  
25 court sponsored mediation or settlement programs? Is that a

1 possibility here? There's something called voluntary dispute  
2 resolution where a veteran attorney is available, or a judge,  
3 either this magistrate judge, or another judge drawn by random  
4 assignment could sit as a settlement judge.

5 That would only happen if both of you wanted to go  
6 there. Your clients, Ms. Mostajelean and Ms. De La Salle. Is  
7 that a possibility? You just used the word "unfortunately,"  
8 and it made me feel comfortable asking that.

9 MS. MOSTAJELEAN: Sure. And I'm not signaling how  
10 I'm going to resolve the motion. I'm going to do that based on  
11 the law if I need to, and I'm happy to do that.

12 MS. MOSTAJELEAN: Your Honor, that's something that  
13 I'm going to have to discuss with my clients to determine how  
14 they would like to proceed. As of right now, I cannot say that  
15 they would be willing to enter into that, but it's something  
16 that I will discuss with them, and I can let you know in the  
17 future.

18 THE COURT: All right. Ms. De La Salle? Do you have  
19 any initial reaction? I can give the parties till the end of  
20 the week to let me know, and they could contact Mr. Caspar and  
21 let him know if they want to take advantage of our court  
22 sponsored settlement.

23 MS. DE LA SALLE: Your Honor, my initial reaction is  
24 in the negative, and that is because of the NAF debacle, the  
25 National Association of Arbitration which was proven to be

1 corrupt, and it ended up being sued by these --

2 THE COURT: Well, this is not with any outside  
3 organization, it's with a judge of this Court, or an attorney  
4 whose been selected to be a member of a panel that the court  
5 itself has convened. So there's no outside separate  
6 organization that I would be referring the matter to.

7 MS. DE LA SALLE: I would like to reflect upon that  
8 possibility also

9 THE COURT: All right. So I'll give the parties  
10 until Friday, close of business, so that would be at this point  
11 4:00 o'clock to let Mr. Caspar know if they want to be referred  
12 to some kind of settlement. And if you could let Mr. Caspar  
13 know regardless. If one or both of you say no, then the matter  
14 is submitted, and I'll resolve the motion on the loan.

15 MS. MOSTAJELEAN: Your Honor, again, if I may?

16 THE COURT: All right.

17 MS. MOSTAJELEAN: Generally I know that -- I believe  
18 our client likes to have the pleadings closed first and have  
19 you decide, but I will -- we will let Mr. Caspar know by the  
20 end of the week regardless.

21 THE COURT: All right. Thank you. The matter is  
22 submitted as of Friday at 4:00.

23 MS. MOSTAJELEAN: Thank you, Your Honor.

24 MS. DE LA SALLE: Thank you, Your Honor.

25 (Whereupon the hearing in the above-entitled matter was

1 adjourned at 10:28 a.m.)

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CERTIFICATE

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I certify that the foregoing is a correct transcript from  
5 the electronic sound recording of the proceedings in the above-  
6 entitled matter.

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March 3, 2010

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Patricia A. Petrilla, Transcriber

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