

2012 WL 3276256 (C.D.Cal.) (Trial Motion, Memorandum and Affidavit)  
United States District Court, C.D. California.  
Eastern Division

Ok Mi HO, Plaintiff,

v.

CITIMORTGAGE, INC.; Citigroup, Inc.; Nationstar Mortgage; and Does 1 to 500, inclusive, Defendants.

No. EDCV 11-1292-MWF (SPx).  
June 27, 2012.

**Defendant Nationstar Mortgage's Notice of Motion and Motion to Dismiss Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6); Memorandum of Points and Authorities in Support**

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Hearing Date: July 9, 2012

Time: 10:00 a.m.

Courtroom: 1600

Complaint Date: December 10, 2010

Trial Date: February 26, 2013

**NOTICE**

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE** that on Monday, July 9, 2012, at 10:00 a.m., or as soon thereafter as counsel may be heard in Courtroom 1600 of the above-titled court located at 312 N. Spring Street, Los Angeles, California 90012, Defendant Nationstar Mortgage (“Nationstar”) will, and hereby does, move to dismiss pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) the following claims in Plaintiff Ok Mi Ho's Complaint:

- (1) First Claim for **Elder Financial Abuse**;
- (2) Second Claim for **Elder Abuse** With Resulting Physical Harm, Pain, and Suffering;
- (3) Fourth Claim for Intentional Breach of Consumer Confidential Data;
- (4) Fifth Claim for Common Law Theft;
- (5) Sixth Claim for Conversion;
- (6) Seventh Claim for Trespass to Personal Property;

- (7) Eighth Claim for Fraudulent Business Practices;
- (8) Ninth Claim for Breach of the Covenant of Good Faith and Faith and Fair Dealing;
- (9) Tenth Claim for Violation of Mortgage Impound Account Law;
- (10) Eleventh Claim for Voiding Promissory Note, Deed of Trust, and Assignment of Deed of Trust; and
- (11) Twelfth Claim for Declaratory and Injunctive Relief.

This motion is made following the attempted conference of counsel pursuant to Central District Local Rule 7-3 which took place on May 31, 2012. On May 31, 2012, Nationstar's counsel spoke to plaintiff's counsel by telephone and then, at plaintiff's counsel's request, sent an e-mail concerning the contemplated motion to dismiss. Nationstar's counsel then telephoned plaintiff's counsel again later on May 31, 2012 to discuss the motion to dismiss further and left a voicemail message for plaintiff's counsel to contact Nationstar's counsel. By the time of filing this motion to dismiss, Nationstar has not had any response from plaintiff's counsel.

The motion to dismiss is based on this notice and motion, the accompanying memorandum of points and authorities, the Complaint and all other records on file in this action, and any further briefs, evidence, authorities, or argument presented before or at the hearing of this motion.

DATED: June 7, 2012

SEVERSON & WERSON

A Professional Corporation

By: <<signature>>

Mary Kate Sullivan

Attorneys for Defendant

NATIONSTAR MORTGAGE

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## I. INTRODUCTION

Plaintiff Ok Mi Ho (“Plaintiff”) obtained a residential loan from Citimortgage, Inc. (“Citimortgage”) on June 8, 2005. (Complaint “Compl.” ¶23.) Citimortgage transferred its interest in the loan to Nationstar Mortgage (“Nationstar”) in October 2010. (Compl. ¶ 49.) Upon receiving an interest in the loan, Nationstar allegedly withdrew the amount of Plaintiff’s monthly mortgage payment directly from Plaintiff’s bank account. (Compl. ¶ 58.) This withdrawal allegedly caused the Plaintiff’s bank account to become overdrawn. (*Id.*)

Plaintiff has since filed this civil action against Nationstar and Citimortgage. Plaintiff asserts twelve causes of action: (1) **Elder Financial Abuse**; (2) **Elder Abuse** With Resulting Physical Harm, Pain, and Suffering (3) Intentional Infliction of Mental Distress and Physical Pain; (4) Intentional Breach of Consumer Confidential Data; (5) Common Law Theft; (6) Conversion; (7) Trespass to Personal Property; (8) Fraudulent Business Practices; (9) Breach of the Covenant of Good Faith and Faith and Fair Dealing; (10) Violation of Mortgage Impound Account Law; (11) Voiding Promissory Note, Deed of Trust, and Assignment of Deed of Trust; and (12) Declaratory and Injunctive Relief.

Nationstar moves to dismiss all of the above claims with the exception of the claim for intentional infliction of emotional distress. The bases for Nationstar’s motion to dismiss are that plaintiff’s claims fail to sufficiently allege any facts that would support liability against Nationstar. For example, plaintiff makes two claims under California’s **elder abuse** law but she fails to sufficiently allege that she is an **elder**. Further, plaintiff sues for alleged breach of confidential date, theft and violation of the Mortgage Impound Account Law but she does not have a private right of action to do so. The remaining claims lack facts that Nationstar did anything wrong to plaintiff.

As the complaint lacks any law or facts that sufficiently allege liability as to Nationstar, the motion to dismiss should be granted

## II. STANDARD FOR DISMISSAL

When considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court must accept as true only well pleaded factual allegations in the complaint, but is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot be reasonably drawn from the facts alleged. *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994); *Spreewell v. Golden State Warriors*, 26 F.3d 979, 988 (9th Cir. 2001). As recently explained by the Supreme Court, “the tenet that a court must accept as true all of the allegations of a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory allegations, do not suffice.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009).

The complaint must do more than allege mere “labels and conclusions” or “a formulaic recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). A pleading does not “suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’ ” *Iqbal*, 129 S.Ct. at 1949 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Rather, it must give the defendant fair notice of the nature of the claim and the grounds upon which it rests. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002). In the absence of such factual allegations, a district court must dismiss the pleading because “the tenet that a court must accept a complaint’s allegations as true is inapplicable to threadbare recitals of a cause of action’s elements, supported by mere conclusory statements.” *Iqbal*, 129 S.Ct. at 1940 (citing *Twombly*, 550 U.S. at 555).

The Court, however, may consider facts of which judicial notice may be taken. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986). The Court may also consider documents outside the pleadings on a Rule 12(b)(6) motion to dismiss if the documents are referred to in the complaint and are central to the plaintiff’s claims. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) overruled on other grounds by *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1127 (9th Cir. 2002). Under this “incorporation by reference” doctrine, even documents that are not explicitly alleged in the complaint may be attached to a Rule 12(b)(6) motion to dismiss and considered by the court without converting the motion to one for summary judgment under Rule 56. See *Knieval v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005); see also *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998).

## III. STATEMENT OF FACTS

Plaintiff, entered into a residential loan with Citigroup on June 8, 2005. (Compl. ¶ 22.) With this loan, Plaintiff acquired ownership of the real property located at 34931 Acacia Ave., Yucaipa, California. (*Id.*) The loan was subsidized by the United States Department of Housing and Urban Development (“HUD”). (Compl. ¶ 20, 24.) The logistics of how HUD subsidized this loan are unknown. (Compl. ¶ 24.) However, Citimortgage, either directly or indirectly received government funds from HUD for the benefit of the Plaintiff. (*Id.*)

Citimortgage transferred an interest in the residential loan to Nationstar Mortgage in October 2010. (Compl. ¶ 49.) After receiving its interest in the loan, Nationstar withdrew the monthly mortgage payment from Plaintiff’s bank account. (Compl. ¶ 58.) The Plaintiff did not have enough money in her account to pay the entire monthly mortgage payment, and the withdrawal caused the account to become overdrawn. (*Id.*)

Plaintiff then filed this Complaint in December of 2010. Citigroup removed the case to federal court on August 12, 2011 on the basis of diversity of citizenship and federal question. Nationstar was served with this Complaint on April 17, 2012.

## IV. ARGUMENT

## A. The First and Second Claims Based on Alleged Violation of California's Elder Abuse Statutes Fail Because Plaintiff Does Not Sufficiently Allege That She is an “Elder” as Defined by the Elder Abuse Statutes

Plaintiff alleges in her first and second claims for relief that she is an **elder** and that Nationstar is liable for alleged violation of California's **Elder Abuse** statutes codified at [California Welfare and Institutions Code sections 15600 et seq.](#) (the “**Elder Abuse** Law”).

To be an “**elder**” under the **Elder Abuse** law, the plaintiff must be a California resident over the age of 65 years old. *See Cal. Welf. & Inst. Code § 15610.27*. The fundamental problem with plaintiff's claims based on the **Elder Abuse** Law is that she does not clearly allege that she is an “**elder**.” Plaintiff only alleges that she is “an ‘**elder**’ as defined by [the **Elder Abuse** Law]...” *See* Compl., ¶ 3. This is not enough. Under the *Iqbal* standards for adequate pleading, plaintiff must allege *facts* to support her claims.

The problem with plaintiff's claims under the **Elder Abuse** Law is further compounded because she alleges that, in addition to being an “**elder**,” she is also a “developmentally disabled person” as defined by [California Welfare and Institutions Code section 15610.25](#). *See* Compl., ¶ 2. [California Welfare and Institutions Code section 15610.23](#) defines a “dependent adult” as one who may have developmental disabilities. But a “dependent adult” may only be a person between the ages of 18 and 64 years old. Hence, plaintiff may only either be an **elder** or a dependent adult, but not both.

In her complaint, plaintiff sues under the **Elder Abuse** Laws for alleged violations based on her status as both an **elder** and as a dependent adult. *See* Compl., ¶¶ 77, 84. The distinction as to whether plaintiff is an **elder** or a dependent adult is important as it will determine, among other things, the scope of discovery as to plaintiff's **elder** or dependent adult status.

## B. The Fourth Claim for Relief for Intentional Breach of Consumer Confidential Data Fails

The fourth claim for intentional breach of consumer confidential data fails as plead. Plaintiff bases her claim for intentional breach of consumer confidential data on the fact that Citigroup shared Plaintiff's bank account information with Nationstar when Nationstar acquired its interest in the Plaintiff's loan. This claim is vague as Plaintiff does not identify which statute or law the claim is based on. Nationstar assumes that the claim is based on the California **Financial** Information Privacy Act (“CFIPA”) as it is the only applicable statute. ([Fin. Code, §4050-4060](#).) However, Plaintiff's claim fails under this statute for two reasons.

### 1. The CFIPA does not create a right of action for individual consumers

First, CFIPA does not grant individual consumers, like Plaintiff, a private right of action. Instead, the sole remedy provided in the act is a civil penalty collectible only in an action by the Attorney General or the appropriate **financial** regulatory agency. ([Cal. Fin. Code, §4057\(a\), \(e\)](#).) Since the act creates a new statutory right, grants an explicit remedy only to regulators, and does not otherwise evince any legislative intent to create a private cause of action, none may be implied. (*See, e.g., Animal Legal Defense Fund v. Mendes*, 160 Cal.App.4th 136, 142-144 (2008).) Therefore, because Ok Mi Ho is an individual, she has no claim for relief under CFIPA and her fourth claim for relief fails.

### 2. **Financial** institutions may share confidential information for the purposes of debt collection

Second, while the CFIPA aims to prevent the unnecessary and wrongful sharing of consumers' **financial** information, it also carves out exceptions for situations when the sharing of such information is necessary for business transactions. One such exception states that **financial** institutions may release nonpublic consumer information to persons holding a legal or beneficial interest relating to the consumer, including for the purposes of debt collection. ([Fin. Code, §4056\(b\)\(3\)\(d\)](#).)

Citigroup shared the Plaintiff's bank account information with Nationstar when Nationstar acquired an interest in the loan from Citimortgage. (Compl. ¶¶53, 54, 58.) Nationstar, who as of the date of a transfer, held a legal interest related to Plaintiff's loan, used the bank account information for the purpose of collecting on Plaintiff's debt to Nationstar. As such, because Plaintiff's bank account information was shared so that Nationstar could exercise its rights as the holder of the loan to collect on the underlying debt, the sharing of the information falls under the exception listed in §4056(b)(1), and Plaintiff's claim fails.

### **C. The Fifth Claim For “Common Law Theft” Fails Because Plaintiff Has No Private Right Of Action To Sue For A Crime**

Plaintiff's fifth claim is for theft. Theft is codified in [California Penal Code section 484\(a\)](#) as a crime. There is no private right of action to sue for an alleged criminal violation. See [Animal Legal Def. Fund v. Mendes](#), 160 Cal. App. 4th 136, 142 (2008); [Miller v. Countrywide Home Loans](#), 747 F.Supp.2d 947, 963 (S.D. Ohio 2010) (granting motion to dismiss, with prejudice, as to mortgagor's claim for mail fraud).

Plaintiff's fifth claim for common law theft fails as a matter of law.

### **D. Plaintiff's Sixth Claim For Conversion Fails Because The Claim Is Not Sufficiently-Pleaded**

Plaintiff's sixth claim is for conversion based on Nationstar's alleged withdrawal of her bank account funds. Plaintiff does not state exactly how much was allegedly taken from the bank account.

“To establish a conversion, plaintiff must establish an actual interference with his ownership or right of possession.... Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion.” [Moore v. Regents of Univ. of California](#), 51 Cal. 3d 120, 136 (1990) (citation omitted). “Money cannot be the subject of a cause of action for conversion unless there is a specific, identifiable sum involved...” [PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP](#), 150 Cal. App. 4th 384, 395 (2007).

Plaintiff's conversion claim fails because she failed to identify exactly the sum of money that was allegedly taken from her. Having failed to do so, the conversion claim fails as a matter of law.

### **E. Plaintiff's Seventh Claim For Trespass To Personal Property Fails Because It Is Insufficiently-Pleaded**

“[T]he tort of trespass to chattels allows recovery for interferences with possession of personal property “not sufficiently important to be classed as conversion, and so to compel the defendant to pay the full value of the thing with which he has interfered.” [Intel Corp. v. Hamidi](#), 30 Cal. 4th 1342, 1350 (2003). “In modern American law generally, [t]respass remains as an occasional remedy for minor interferences, resulting in some damage, but not sufficiently serious or sufficiently important to amount to the greater tort’ of conversion.” See *id.*

Plaintiff's claim for trespass to personal property fails because she alleges that Nationstar has taken her account funds and has refused to return them to plaintiff. See Compl., ¶¶ 61, 62. Thus, as alleged, plaintiff may have a claim for conversion (once her complaint is sufficiently-pleaded). But, a trespass claim is only for a minor interference with the personal property. As plaintiff has alleged that Nationstar has taken her property and refuses to return any portion of it, then a trespass theory fails because trespass is only concerned with a minor interference to property - not a complete taking of the property.

### **F. Plaintiff's Eighth Claim for Violation of California's Unfair Competition Law Fails Because Plaintiff Fails To Allege A Predicate Violation Of Any Other Law And Nationstar Cannot Be Liable For Another Defendant's Conduct**

Under [California Business and Professions Code section 17200](#) (“Section 17200”), unfair competition is defined as “any unlawful, unfair or fraudulent business act or practice” and “unfair, deceptive, untrue or misleading advertising.” See [Cal. Bus. & Prof. Code § 17200](#). An act is “unlawful” under [Section 17200](#) if it violates an underlying state or federal statute or common law. See [Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.](#), 20 Cal. 4th 163, 180 (1999). An act is “unfair” if the act “threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law.” *Id.* at 187. A practice is “fraudulent” if members of the public are likely to be deceived. See [Committee on Children's Television, Inc. v. Gen'l Foods Corp.](#), 35 Cal. 3d 197, 211 (1983).

A plaintiff alleging unfair business practices under [Section 17200](#) must state with reasonable particularity the facts supporting the statutory elements of the violation. See [Silicon Knights, Inc. v. Crystal Dynamics, Inc.](#), 983 F. Supp. 1303, 1316 (N.D. Cal. 1997) (quoting [Khoury v. Maly's of California](#), 14 Cal. App. 4th 612, 619 (1993)).

An “unfair practices claim under [section 17200](#) cannot be predicated on vicarious liability because a defendant's liability must be based on his personal ‘participation in the unlawful practices’ and ‘unbridled control’ over the *practices that are found to violate section 17200 or 17500.*” [Emery v. Visa Int'l Serv. Ass'n](#), 95 Cal.App.4th 952, 960 (2002); [Morfin v. Accredited Home Lenders, Inc.](#), 2010 WL 391838, at \*7 (S.D. Cal. Jan. 26, 2010). Thus, plaintiff cannot simply lump all defendants together without identifying which defendant is responsible for her alleged injuries. See [Fortaleza v. PNC Fin. Services Group, Inc.](#), 642 F. Supp. 2d 1012, 1019-20 (N.D. Cal. 2009).

Further, to sufficiently allege a [Section 17200](#) claim, plaintiff “must have suffered an ‘injury in fact’ and ‘lost money or property as a result of such unfair competition.’” [Hall v. Time Inc.](#), 158 Cal. App. 4th 847, 849 (2008); [Ruiz v. Gap, Inc.](#), 540 F.Supp.2d 1121, 1127 (N.D. Cal. 2008).

Where the underlying claims are deficient, a UCL claim must also fail. See [Singh v. Wells Fargo Bank, N.A.](#), 2009 WL 2365881, \*5 (N.D. Cal. 2009) (dismissing a mortgage borrower's claim under [Section 17200](#) where that claim was derivative of a deficient fraud claim that was also dismissed); [Hutson v. Am. Home Mortg. Servicing, Inc.](#), 2009 WL 3353312, \*15-16 (N.D. Cal. 2009) (dismissing a UCL claim predicated on other failed claims); [Beall v. Quality Loan Serv. Corp.](#), 2011 WL 1044148, at \*5 (S.D. Cal. Mar. 21, 2011) (same).

Plaintiff's [Section 17200](#) claim fails against Nationstar because plaintiff has failed to allege the violation of any other statutory law. Without such specific allegations, the [Section 17200](#) claim fails.

Second, Nationstar cannot be liable for any alleged conduct committed by any of the other co-defendants. Plaintiff specifically alleged in her complaint that defendants CitiMortgage and CitiGroup failed to provide her with an accounting regarding her escrow account. See Compl., ¶¶ 33 to 47. There are absolutely no allegations that Nationstar failed to respond to plaintiff's request for escrow information until Nationstar was lumped together with the Citi Defendants in the [Section 17200](#) claim. As plaintiff failed to allege specific facts regarding Nationstar's alleged conduct, the [Section 17200](#) claim fails against Nationstar.

#### **G. Plaintiff's Ninth Claim For Breach Of The Implied Covenant Of Good Faith And Fair Dealing Fails Because The Tort Does Not Apply To A Lender-Borrower Relationship**

The “implied covenant tort” is not available to parties of an ordinary commercial transaction where the parties deal at arms' length, such as in a common lender/borrower relationship. See [Mitsui Mfrs. Bank v. Superior Court](#), 212 Cal. App. 3d 726, 730-31 (1989). California courts do not invoke a special relationship between a lender and borrower. See [Kim v. Sumitomo Bank](#), 17 Cal. App. 4th 974, 979 (1993) (“the relationship of a bank-commercial borrower does not constitute a special relationship for the purposes of the covenant of good faith and fair dealing”).



The only relationship between plaintiff and Nationstar is the loan for the Property that was assigned to Nationstar. Thus, Nationstar's relationship to plaintiff is that of a lender/creditor to a borrower/debtor. Such a relationship cannot give rise to a claim for breach of the implied covenant of good faith and fair dealing.

#### **H. Plaintiff's Tenth Claim For Violation Of The Mortgage Impound Account Law Fails Because No Allegations Exist That Nationstar Violated The Statute And The Statute Does Not Provide For A Private Right Of Action**

Plaintiff alleges a violation of the "Mortgage Impound Account Law" codified at [California Civil Code section 2954](#) ("Section 2954"). In this claim, plaintiff alleges that the Citi Defendants violated the Real Estate Settlement Procedures Act and [Section 2954](#) by erroneously stating the terms of her escrow account.

This claim fails against Nationstar for two reasons. First, the claim only specifically alleges that the Citi Defendants violated [Section 2954](#) and the complaint repeatedly names the Citi Defendants in this claim. *See* Compl., ¶¶140 to 152. Inexplicably, having failed to allege that Nationstar engaged in any such conduct, plaintiff nevertheless alleges that Nationstar should be liable for this claim. *See* Compl., ¶¶ 153, 154. Under the *Iqbal* standards for pleading, this is simply not enough. If there are no alleged facts that Nationstar violated [Section 2954](#), then Nationstar cannot be liable under the claim.

Second, the claim fails because it does not provide for a private right of action. Plaintiff is suing under [Section 2954\(b\)](#) because defendants allegedly failed to provide an accurate accounting to her. [Section 2954\(b\)\(3\)](#) provides that "[e]very person who willfully or repeatedly violates this subdivision shall be subject to punishment by a fine of not less than fifty dollars (\$50) nor more than two hundred dollars (\$200)." Because the only remedy for failing to provide an accounting is a fine and no private right of action exists for this violation, plaintiff cannot sue under [Section 2954\(b\)](#).

#### **I. The Eleventh Claim for Relief for Voiding the Promissory Note, Deed, of Trust, and Assignment of Deed of Trust Fails**

To plead a cancellation of instrument claim for relief, Plaintiff must show that he or she will be injured or prejudiced if the instrument is not cancelled and that the instrument is void or voidable. Cal. Code Civ. Proc., § 3412. [Civil Code section 3412](#) provides that:

A written instrument, in respect to which there is reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled.

Notes and deeds of trust may be cancelled, for example, where fraud makes the instruments void or voidable. (*Fleming v. Kagan*, 189 Cal.App.2d 791, 796-97 (1961).) Further, "[i]n obtaining rescission or cancellation, the rule is that the complainant is required to do equity, as a condition to his obtaining relief, by restoring to the defendant everything of value which the plaintiff has received in the transaction." (*Id.* at 796.)

In this claim for relief, Plaintiff incorporates by reference the preceding thirty-five pages of the Complaint. (Comp. ¶ 155.) While throughout the Complaint, Plaintiff alleges wrongful conduct on behalf of Citimortgage and Nationstar, Plaintiff never asserts any facts to illustrate that she would be injured or prejudiced if the instrument was not cancelled. Additionally, she bases her claim for relief on "sufficient fraud and deception, and other violations of the law by Defendants." (Compl. 156.) This illustrates that Plaintiff is requesting this relief based on conduct that occurred in the past, and not on any injury or prejudice she will experience if the loan documents are not voided. Additionally, she pleads no facts to suggest that the loan documents are void or voidable in anyway.

Lastly, the claim to void the deed of trust is based on equity. Here, plaintiff is essentially seeking to obtain the Property free and clear of any loan obligations because Nationstar withdrew a loan payment from plaintiff's bank account. Plaintiff will not be able to establish how equity would support such a windfall for plaintiff. Further, if plaintiff seeks to cancel the deed of trust, she *must* return everything of value that she received from the loan. Plaintiff has not alleged her ability or desire to do so.

As there are absolutely no facts supporting why the note, deed of trust and assignment should be voided, this claim for relief fails.

## **J. The Twelfth Claim for Relief for Declaratory and Injunctive Relief Fails Because They are Not Causes of Action**

In Plaintiff's twelfth claim for relief, she requests both declaratory and injunctive relief. This claim for relief fails because declaratory relief and injunctive relief are not independent claims for relief. Additionally, declaratory and injunctive relief are not appropriate.

### **1. Injunctive Relief**

A cause of action must exist before an injunction may be issued, *but an injunction is not a cause of action*. *Major v. Miraverde Homeowners Ass'n*, 7 Cal.App.4th 618, 623 (1992) (“injunctive relief is not, in itself, a cause of action.”); *Korean Am. Legal Advocacy Found. v. City of Los Angeles*, 23 Cal.App.4th 376, 397 (1994). For this reason alone, Plaintiff's twelfth “cause of action” should be dismissed.

Moreover, injunctive relief may only be granted when the moving party has demonstrated there is an inadequate remedy at law. *Meridian Mut. Ins. Co. v. Meridian Ins. Group, Inc.* (1997) 128 F.3d 1111, 1114. Plaintiff incorporates each and every paragraph of the Complaint into her claim for relief. (Compl. ¶ 157.) However, through the Complaint, Plaintiff repeatedly refers to both Nationstar and Citimortgage collectively, making it difficult for Nationstar to ascertain which conduct is alleged as the basis for an injunction. (See example, Compl. ¶ 159 “Defendants failed to properly account for mortgage escrow funds...”) The main allegation throughout the Complaint made exclusively against Nationstar is that Nationstar made an improper withdrawal from Plaintiff's bank account. If Plaintiff is able to establish her claim for this alleged conduct, legal damages would undoubtedly be an adequate legal remedy and therefore, injunctive relief would not be properly granted.

Accordingly, Plaintiff's request for Injunctive Relief is improper, and this claim for relief should be dismissed.

### **2. Declaratory Relief.**

Plaintiff's declaratory relief claim is neither necessary nor proper. See Cal. Civ. Proc. § 1061 (“The court may refuse to exercise the power granted by this [declaratory relief] chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances”); *Meyer v. Sprint Spectrum, L.P.*, 45 Cal.4th 634, 648 (2008). “[A]n action in declaratory relief will not lie to determine an issue which can be determined in the underlying [] action.” *Cal. Ins. Guar. Ass'n v. Superior Court*, 231 Cal.App.3d 1617, 1623 (1991). “The object of [declaratory relief] is to afford a new form of relief where needed and not to furnish a litigant with a second cause of action for the determination of identical issues.” *Id.* at 1623-24 quoting *Gen. of Am. Ins. Co., v. Lilly*, 258 Cal.App.2d 465, 470 (1968). Plaintiff's declaratory relief claim merely restates Plaintiff's other unsupported claims and is not necessary. (See Compl. ¶ 157-167.)

Where the “relief a plaintiff seeks is entirely commensurate with the relief sought through other causes of action . . . [the] declaratory relief claim is duplicative and unnecessary.” *Camillo v. Washington Mut. Bank, F.A.*, 2009 WL 3614793, \*13 (E.D. Cal. 2009); *Pagtalunan v. Reunion Mortg., Inc.*, 2009 WL 961995, \*6 (N.D. Cal. 2009); *Putkkuri v. erconTrust Co.*, 2009 U.S. Dist. LEXIS 32, \*5 (S.D. Cal. 2009). Here, Plaintiff simply re-alleges all of the wrongful conduct alleged earlier in her Complaint, and as such her cause of action for declarative relief should be dismissed.

**V. CONCLUSION**

Plaintiff's Complaint fails to state a cause of action with regard to the causes of action addressed above. The Complaint should be dismissed on the merits, without leave to amend.

DATED: June 7, 2012

SEVERSON & WERSON

A Professional Corporation

By: <<signature>>

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