

**SUPERIOR COURT, STATE OF CALIFORNIA  
COUNTY OF SANTA CLARA**

**Department 1, Honorable James P. Kleinberg Presiding**

Paula Bastian, Courtroom Clerk

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**To contest the ruling, call (408) 808-6856 before 4:00 P.M.**

**LAW AND MOTION TENTATIVE RULINGS**

**DATE: 11/17/09      TIME: 9 A.M.**

**PREVAILING PARTY SHALL PREPARE THE ORDER**

(SEE [RULE OF COURT 3.1312](#))

<b>LINE #</b>	<b>CASE #</b>	<b>CASE TITLE</b>	<b>RULING</b>
<a href="#">LINE 1</a>	109CV137564	DHL Express v Carpenter	Order of Examination
<a href="#">LINE 2</a>	108CV127232	Conway v Half Moon Bay First Mortgage	Click on LINE 2 for ruling
<a href="#">LINE 3</a>	109CV148256	Monet v Chase Home Finance	Click on LINE 3 for ruling
<a href="#">LINE 4</a>	107CV094297	Khazaeli v SOHOWare	Motion to be relieved as counsel unopposed and GRANTED
<a href="#">LINE 5</a>	108CV122539	Smedley v Macias	Motion to be relieved as counsel unopposed and GRANTED
<a href="#">LINE 6</a>	109CV140109	Kang v Kim	Motion re: deposit and discharge of stakeholder unopposed and GRANTED
<a href="#">LINE 7</a>	109CV152636	National City Commercial v Advanced Industrial	Plaintiff's applications for prejudgment remedies DENIED for lack of proof of service
<a href="#">LINE 8</a>	106CV063762	County of Santa Clara v Heredia	Claim of exemption
<a href="#">LINE 9</a>	109CV133729	Worldwide Asset v Nguyen	Click on LINE 9 for ruling
<a href="#">LINE 10</a>	109CV144634	CACH, LLC v Cognetti	Plaintiff's discovery motion unopposed and GRANTED; requests for admissions deemed admitted; monetary sanctions of \$365 to be paid to Plaintiff's counsel within 30 calendar days
<a href="#">LINE 11</a>	702CV424021	United Auto Credit v Martinez	Claim of exemption
<a href="#">LINE 12</a>	104CV021702	Rad v Golpour	Continued to November 23, 2009
<a href="#">LINE 13</a>	106CV062084	Simper Investments v Hodges	Order of examination

**Calendar line 1**

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## Calendar line 2

**Case Name:** *Timothy M. Conway, et al. v. Half Moon Bay First Mortgage Investors, L.P., et al.*

**Case No.:** 1-08-CV-127232

The demurrer of defendants Half Moon Bay First Mortgage Investors, L.P., and Carl Edward Lindros (“Defendants”) to the first through fourth causes of action in the second amended complaint (“SAC”) of plaintiffs Timothy M. Conway, and Steven D. McVay (“Plaintiffs”) on the ground of uncertainty is **OVERRULED**. The SAC provides sufficient information regarding the subject contract, alleged breaches, and related misconduct alleged against the Defendants in order to allow them to properly respond. (See *Houry v. Maly’s of California* (1993) 14 Cal.App.4th 612, 616.)

The demurrer to the first cause of action for breach of contract is **SUSTAINED** with 10 days’ leave to amend. This cause of action does not allege that defendant Carl Lindros (“Lindros”) was a party, an intended beneficiary, or an assignee of the promissory note. This cause of action only alleges that Lindros serviced the account, and improperly took money. Further, the SAC alleges that the contract was entered into by Plaintiffs and Half Moon Bay, and the promissory note which is attached as Exhibit B to the SAC does not reference Lindros. Additionally, a cause of action for breach of contract has also not been stated against Half Moon Bay since it has not been alleged that Plaintiffs complied with the guidelines for presentation of payment requests from the construction reserve accounts pursuant to paragraph 12 of the promissory note. Therefore, Plaintiffs have not alleged that they have complied with their contractual obligations, and that Defendants failure to pay the second construction bid constituted a breach.

The demurrer to the second cause of action for breach of fiduciary duty is **SUSTAINED** with 10 days’ leave to amend. The SAC does not allege sufficient facts to establish a fiduciary relationship between Plaintiffs and Defendants. The alleged relationship between the Plaintiffs and Half Moon Bay was that of a lender-borrower. Further, Lindros is only alleged to have been a servicing agent for the loan Plaintiffs had with Half Moon Bay. (See *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.) Finally, the alleged relationship does not include the Defendants’ exercise of control over the project, making of decisions regarding the manner in which the funds were disbursed, or advice or other means of control over the project. (*Id.* at p. 979, 980.)

The demurrer to the third cause of action for wrongful foreclosure is **SUSTAINED** with leave to amend. Defendants’ argument that this cause of action does not allege a proper tender of the secured obligation is well taken. A claim for wrongful foreclosure based on an alleged failure to properly notice a trustee’s sale requires the trustor to allege tender of the entire amount of the secured indebtedness. (*Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1109.) Therefore, Plaintiffs must allege a tender of the secured indebtedness in order to maintain this cause of action for wrongful foreclosure. The cases cited by Plaintiffs in their opposition brief are both distinguishable.

The demurrer to the fourth cause of action for conversion is **OVERRULED**. The SAC alleges that Plaintiffs were still the beneficial owners of the funds in the construction reserve account on January 25, 2009, Defendants took the funds from the construction reserve account and

converted them for their own use, and Plaintiffs have suffered damages. (See SAC, paragraphs 49-53.) The argument raised by Defendants regarding their entitlement to apply the remaining construction reserve account funds to the delinquency is beyond the scope of this demurrer. The issue of whether the remaining funds could be applied to satisfy the delinquency goes beyond the SAC, and necessarily requires the resolution of several factual issues.

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### Calendar line 3

**Case Name:** *Monet v. Chase Home Finance LLC*

**Case No.:** 1-09-CV-148256

The demurrer to the first cause of action is SUSTAINED with 20 days leave to amend. Plaintiff's breach of contract claim is based on the breach of a Servicing Disclosure Statement, which the complaint alleges is contained in the attached Exhibit B. However, Exhibit B does not contain the Servicing Disclosure Statement. "[T]o the extent the factual allegations conflict with the content of the exhibits to the complaint, we rely on and accept as true the contents of the exhibits and treat as surplusage the pleader's allegations as to the legal effect of the exhibits." (*Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4<sup>th</sup> 500, 505, citing *Weitzenkorn v. Lesser* (1953) 40 Cal.2d 778, 785-786.) Thus, the allegations regarding the purported Servicing Disclosure Statement's terms are treated as surplusage and the first cause of action fails to state facts sufficient to constitute a breach of contract claim.

The demurrer to the second cause of action is SUSTAINED with 20 days leave to amend. The complaint fails to allege facts sufficient to constitute a negligent misrepresentation claim as to Chase. (See *Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4<sup>th</sup> 513, 519.) Further, the complaint fails to allege facts with the requisite particularity for a negligent misrepresentation claim. (See *Lazar v. Super. Ct. (Rykoff-Sexton, Inc.)* (1996) 12 Cal. 4<sup>th</sup> 631, 645.)

The demurrer to the third cause of action is SUSTAINED with 20 days leave to amend. In his opposition, Plaintiff asserts that the third cause of action is "based on the duties Defendant owes to him under the terms of the contract." (Pl.'s memorandum in opposition to demurrer, p.5:2-3.) However, the complaint does not allege facts demonstrating a contractual duty owed to Plaintiff by Chase or act which entitles Plaintiff to some relief. (See *Lectrodryer v. SeoulBank* (2000) 77 Cal.App.4<sup>th</sup> 723, 726; see also *Michaelian v. State Compensation Ins. Fund* (1996) 50 Cal. App. 4<sup>th</sup> 1093, 1114.)

The demurrer to the fourth cause of action is SUSTAINED with 20 days leave to amend. The complaint does not allege facts that show that "members of the public are likely to be deceived" by Chase. (See *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4<sup>th</sup> 1134, 1151, quoting *Bank of the West v. Super. Ct. (Industrial Indemnity Co.)* (1992) 2 Cal.4<sup>th</sup> 1254, 1267; see also *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 211 (superseded by statute on other grounds).)

The demurrer to the fifth cause of action is SUSTAINED with 20 days leave to amend. A claim for injunctive relief must demonstrate a likelihood to prevail on the merits, and the complaint does not otherwise sufficiently state facts sufficient to constitute a claim. (See *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69.)

The motion to strike is GRANTED as to the punitive damages allegations in paragraph 2 of the prayer of the complaint with 20 days leave to amend. (Cal. Code. Civ. Proc. § 436, subd. (a).) The motion to strike is DENIED as to the request for attorney's fees in paragraph 4 of the prayer of the complaint. (Cal. Rule of Court 3.1322, subd. (a).)



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**Case Name:** *Worldwide Asset Purchasing v. Nguyen*

**Case No.:** 1-09-CV-133729

Plaintiff's Motion to Compel answers and responses to Special Interrogatories (Set One), Form Interrogatories – Economic (Set One ) and Request for Admissions (Set One) GRANTED.

Defendant shall serve verified, code compliant answers and responses within 20 calendar days of order.

Objections are deemed waived and Plaintiff's Requests for Admissions are deemed admitted.

Plaintiff's Motion for monetary sanctions is GRANTED. Defendant shall

pay \$290 to counsel for Plaintiff within 30 calendar days of order.

Plaintiff to prepare Order.

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