

1 WRITTEN DECISION - NOT FOR PUBLICATION

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5 JUL 31 2009

6 CLERK, U.S. BANKRUPTCY COURT

7 SOUTHERN DISTRICT OF CALIFORNIA

8 BY 144 DEPUTY

9 UNITED STATES BANKRUPTCY COURT

10 SOUTHERN DISTRICT OF CALIFORNIA

11 In re ) Case No. 08-01125-B7

12 BRENDA and JAMES SLOAN, ) Adv. No. 08-90164

13 ) MEMORANDUM DECISION

14 Debtors. )

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15 BRENDA SLOAN, )

16 Plaintiff, )

17 v. )

18 BNC MORTGAGE INC.; CHARTER )

19 FUNDING OF HAWAII; CHASE )

20 HOME MORTGAGE; US BANK; et al, )

21 Defendants. )

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22 Plaintiff filed a complaint against the current holder of a

23 note and deed of trust on her residence, as well as the original

24 lender. The complaint includes a cause of action for violation

25 of the Real Estate Settlement Procedures Act (RESPA). The

26 current holder of the note and deed of trust and the servicer

1 have moved to dismiss the complaint on multiple grounds,  
2 including that the RESPA claims are preempted by the Bankruptcy  
3 Code. The Court took the matter under submission to consider  
4 that issue. The Court finds that because the RESPA claim against  
5 Chase arose prepetition, if at all, it is not preempted. The  
6 remainder of the issues raised in the motion to dismiss are  
7 addressed below as well.

8 This Court has subject matter jurisdiction pursuant to 28  
9 U.S.C. § 1334 and General Order No. 312-D of the United States  
10 District Court for the Southern District of California. This is  
11 alleged to be a core proceeding under 28 U.S.C. § 157(b)(2)(A),  
12 (B), (C) & (K).

#### 13 DISCUSSION

14 Plaintiff owns real property located at 7214 Gatewood Lane,  
15 San Diego, California (Property). In December 2005, Plaintiff  
16 obtained a refinancing loan from BNC Mortgage, Inc., (BNC) in the  
17 amount of \$400,000 (Loan). The Loan was secured by a deed of  
18 trust which was recorded on December 22, 2005 (Deed of Trust).  
19 Chase Home Finance LLC (Chase) is the current servicer of the  
20 Loan. Plaintiff defaulted under the terms of the Note, and on  
21 October 29, 2007, a Notice of Default was recorded. A Notice of  
22 Trustee's Sale was recorded on February 1, 2008.

23 On February 14, 2008, Plaintiff and James Sloan filed a  
24 petition under chapter 7.

25 The Deed of Trust was assigned to U.S. Bank National  
26 Association, Trustee for Lehman Brothers Structured Asset

1 Investment Loan Trust SAIL 2006-BNC1 (USBank) pursuant to an  
2 assignment recorded on February 29, 2008.

3 Plaintiff filed a complaint against BNC, Charter Funding of  
4 Hawaii, Chase and USBank, asserting multiple causes of action,  
5 including one for violation of the Real Estate Settlement  
6 Procedures Act (RESPA). Chase and USBank (collectively Moving  
7 Defendants) have moved for dismissal of Plaintiff's First Amended  
8 Complaint (FAC) on the ground that it fails to state a claim upon  
9 which relief can be granted under Rule 12(b)(6). Moving  
10 Defendants raised several arguments, but one in particular  
11 required additional briefing and consideration - whether  
12 Plaintiff's RESPA claims are preempted by the Bankruptcy Code.<sup>1</sup>  
13 The Court has reviewed the supplemental briefs and the  
14 authorities cited and finds that Plaintiff's RESPA claims are not  
15 preempted by the Bankruptcy Code.

#### 16 **RESPA Claims**

17 Courts have addressed the issue of whether RESPA claims are  
18 preempted by the Bankruptcy Code and come to divergent  
19 conclusions. The courts in In re Laskowski, 384 B.R. 518, 528  
20 (Bankr.N.D.Ind. 2008), In re Holland, 374 B.R. 409, 443  
21 (Bankr.D.Mass. 2007) and In re Payne, 387 B.R. 614 (Bankr.D.Kan.  
22 2008), held that RESPA claims were not preempted. Each case  
23 specifically rejected In re Nosek, 354 B.R. 331 (D.Mass. 2006),  
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25 <sup>1</sup> Moving Defendants had also alleged that Plaintiff lacked standing to pursue these claims  
26 as they were property of the bankruptcy estate. That objection was nullified by the August 13, 2008  
order of this Court approving the transfer of the estate's interest in the action to the Plaintiff.

1 in which the Court held that the RESPA claims involved therein  
2 were preempted. The court in Nosek based its ruling in part upon  
3 the Ninth Circuit's holding in Walls v. Wells Fargo Bank, N.A.,  
4 276 F.3d 502, 510 (9<sup>th</sup> Cir. 2002) (holding that the Fair Debt  
5 Collections Practices Act was preempted in part by Bankruptcy  
6 Code § 524). The Court finds Walls inapplicable to this RESPA  
7 issue because in this case, the alleged qualified written request  
8 was made to Chase prepetition. If it was properly made, and if  
9 Chase failed to timely respond, any claim plaintiff might have  
10 would be a prepetition claim and it would not conflict with the  
11 Bankruptcy Code, in contrast to Nosek.

12 Plaintiff's complaint also alleges other violations of  
13 RESPA. See FAC at ¶¶ 24(a)-(f) & 71-76 . The Court finds no  
14 overlap or conflict between these provisions and the Bankruptcy  
15 Code. Thus, there is no cause to hold that they are preempted by  
16 the Code. The motion is denied with respect to the remaining  
17 alleged violations of RESPA.

#### 18 **Other Claims**

19 As mentioned above, the motion also sought dismissal of the  
20 other non-RESPA causes of action.

21 The Court grants the motion as to the claims for intentional  
22 and negligent misrepresentation as the FAC fails to allege any  
23 representations whatsoever by either of the Moving Defendants.

24 As to Plaintiff's cause of action for negligence, the motion  
25 is denied. The bulk of the "negligent" acts asserted in the FAC  
26 are attributable on their face to defendants other than the

1 Moving Defendants. However, the FAC does contain an allegation  
2 that unlawful, post-transfer late fees were charged. See FAC at  
3 ¶ 63. This is apparently directed to Moving Defendants. It is  
4 possible that Moving Defendants will be able to establish that  
5 their involvement "did not exceed the scope of [their]  
6 conventional role as a mere lender of money..." and thus they  
7 owe no duty to Plaintiff. Nymark v. Heart Federal Savings and  
8 Loan Assn., 231 Cal.App.3d 1089, 1096 (1991). However, based  
9 upon the allegations in the FAC, which the Court accepts for the  
10 purposes of this Rule 12(b)(6) motion, the Court cannot find, as  
11 a matter of law, that Moving Defendants did not have a greater  
12 involvement. Accordingly, the motion is granted in large part as  
13 to the alleged negligence, but denied as to alleged post-transfer  
14 late fees.

15 With respect to Plaintiff's cause of action for violation of  
16 the Truth In Lending Act (TILA), 15 U.S.C. § 1601 et seq., the  
17 motion is granted in part and denied in part. The motion is  
18 granted as to Chase. Liability for damages under TILA is limited  
19 to the original creditor and assignees. 15 U.S.C. §§ 1640(a) &  
20 1641(a). Chase, as servicer of the Loan, is neither. See 15  
21 U.S.C. § 1641(f). With respect to USBank, the bulk of the acts  
22 which Plaintiff alleges violated TILA cannot be attributed to  
23 USBank. However, the FAC does contain the allegation that the  
24 transfer of the obligation was not properly disclosed to  
25 Plaintiff under 15 U.S.C. § 1641(g)(1) (requiring a transferee to  
26 notify the borrower of an assignment of a mortgage loan.) See

1 FAC at ¶ 67. Moving Defendants argue that the claim is barred by  
2 the one-year statute of limitations of 15 U.S.C. § 1640.  
3 However, the transfer which USBank allegedly failed to disclose  
4 occurred in February of 2008. The complaint was filed on April  
5 18, 2008, well within the one-year window.

6 The motion is denied with respect to the cause of action for  
7 violation of Business and Professions Code § 17200, et seq.  
8 Moving Defendants' argument is that this cause of action falls  
9 with the causes of action under TILA and RESPA. Since, however,  
10 some TILA and RESPA claims survive with respect to the Moving  
11 Defendants, this cause of action survives the Rule 12(b)(6)  
12 motion as well.

13 The motion is granted as to the claim for unjust enrichment  
14 as to the Moving Defendants. The FAC contains no allegation of a  
15 benefit received and retained by Moving Defendants.

16 Finally, the motion is granted with respect to the cause of  
17 action for quiet title. See FAC at ¶¶ 85-86. California Code of  
18 Civil Procedure § 761.020 provides the pleading requirements for  
19 a quiet title action:

20 The complaint shall be verified and shall include all  
of the following:

21 (a) A description of the property that is the subject  
22 of the action. In the case of tangible personal  
23 property, the description shall include its usual  
24 location. In the case of real property, the description  
shall include both its legal description and its street  
address or common designation, if any.

25 (b) The title of the plaintiff as to which a  
26 determination under this chapter is sought and the  
basis of the title. If the title is based upon adverse  
possession, the complaint shall allege the specific

1 facts constituting the adverse possession.

2 (c) The adverse claims to the title of the plaintiff  
3 against which a determination is sought.

4 (d) The date as of which the determination is sought.  
5 If the determination is sought as of a date other than  
6 the date the complaint is filed, the complaint shall  
7 include a statement of the reasons why a determination  
8 as of that date is sought.

9 (e) A prayer for the determination of the title of the  
10 plaintiff against the adverse claims.

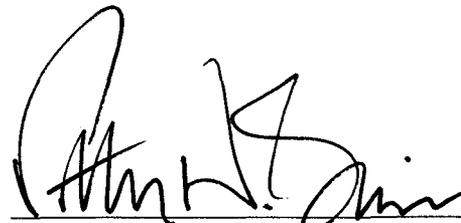
11 Plaintiff's FAC is not verified. It does not include a legal  
12 description of the Property. It also fails to set forth  
13 Plaintiff's claim to title. Further, it fails to allege any  
14 interest Chase claims in the Property. Plaintiff did not oppose  
15 the motion as to this cause of action.

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**CONCLUSION**

As set forth above, the motion is granted in part and denied  
in part. Moving Defendants may lodge an order consistent  
herewith. Further, Plaintiff is granted thirty (30) days leave  
to further amend her complaint consistent with the foregoing and  
to allege with specificity each act or omission Plaintiff asserts  
results in liability of Chase and/or USBank, moving defendants  
herein.

IT IS SO ORDERED.

DATED: JUL 31 2009



PETER W. BOWIE, Chief Judge  
United States Bankruptcy Court