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7 Attorneys for Defendants,
 8 JPMORGAN CHASE BANK, N.A., individually and
 successor by merger to CHASE HOME FINANCE LLC,
 9 erroneously sued as CHASE HOME MORTGAGE LLC,
 and FEDERAL NATIONAL MORTGAGE
 10 ASSOCIATION

11 **UNITED STATES DISTRICT COURT**
 12 **EASTERN DISTRICT OF CALIFORNIA – SACRAMENTO DIVISION**

13
 14 FLOYD KNAPP,

15 Plaintiff,

16 v.

17 JP MORGAN CHASE BANK, N.A.; CHASE
 HOME MORTGAGE LLC; FEDERAL
 18 NATIONAL MORTGAGE ASSOCIATION aka
 FANNIE MAE and DOES 1 to 100,

19 Defendants.
 20
 21
 22
 23

CASE NO.: 10-CV-02889-KJM-GGH

JUDGE: Hon. Gregory G. Hollows

**NOTICE OF MOTION AND MOTION TO
 DISMISS FIRST AMENDED
 COMPLAINT; MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 SUPPORT; PROPOSED ORDER**

DATE: July 21, 2011
TIME: 10:00 a.m.
CRTRM: “9, 13th Floor”

Action Filed: September 27, 2010

24
 25 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

26 **PLEASE TAKE NOTICE THAT** on July 14, 2011 at 10:00 a.m., or as soon thereafter as
 27 the matter may be heard in Courtroom “9, 13th Floor” of the above-entitled Court located at 501 I
 28 Street, Suite 4-200, Sacramento, California, defendants JP Morgan Chase Bank, N.A., individually

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 ATTORNEYS AT LAW
 SANTA ANA

1 and as successor by merger to Chase Home Finance LLC, erroneously sued as Chase Home
2 Mortgage LLC (“JPMorgan”), and Federal National Mortgage Association (“Fannie Mae,”
3 collectively as “Defendants”), will move the Court to dismiss the action pursuant to Federal Rules of
4 Civil Procedure (“FRCP”) 12(b)(6) on the grounds that the First Amended Complaint (“FAC”) of
5 Floyd Knapp (“Plaintiff”) fails to state a claim upon which relief can be granted.

6 This Motion is based on the following grounds:

- 7 1. The first claim for “Breach of Contract” fails to state facts sufficient to constitute a
8 claim for relief pursuant to FRCP 12(b)(6);
- 9 2. The second claim for “Quiet Title“ fails to state facts sufficient to constitute a claim
10 for relief pursuant to FRCP 12(b)(6).

11 The motion will be based on this Notice of Motion, the Memorandum of Points and
12 Authorities filed herewith, the Request for Judicial Notice, and the pleadings and papers filed herein.

13 DATED: June 17, 2011

ALVARADOSMITH
A Professional Corporation

14 By: /s/ S. Christopher Yoo

15 JOHN M. SORICH
16 S. CHRISTOPHER YOO
CHRISTOPHER J. DONEWALD
Attorneys for Defendants
17 JPMORGAN CHASE BANK, N.A., individually
18 and successor by merger to CHASE HOME
FINANCE LLC, erroneously sued as CHASE
19 HOME MORTGAGE LLC, and FEDERAL
NATIONAL MORTGAGE ASSOCIATION

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Defendants JP Morgan Chase Bank, N.A., individually and as successor by merger to Chase
3 Home Finance LLC, erroneously sued as Chase Home Mortgage LLC (“JPMorgan”), and Federal
4 National Mortgage Association (“Fannie Mae,” collectively as “Defendants”), submit the following
5 Memorandum of Points and Authorities in support of their Motion to Dismiss the First Amended
6 Complaint ("FAC") of Plaintiff Floyd Knapp (“Plaintiff”).

7 **I. SUMMARY OF ARGUMENT**

8 Plaintiff’s FAC is based entirely on the assertion that Defendants breached contract by failing
9 to modify his loan. However, Plaintiff also admits in the FAC that no contract was ever formed.
10 Further, Plaintiff fails to allege the material terms of the contract, and does not attach a copy of the
11 alleged contract to his FAC. Taken as pleaded, Defendants are left to guess at what contract they
12 allegedly breached and how. Plaintiff also seeks to quiet title to the Subject Property. However, the
13 recorded Trustee’s Deed Upon Sale submitted in support of this Motion demonstrates conclusively
14 that Plaintiff no longer holds title to the Subject Property and cannot assert any claim to title.
15 Further, Thus, Plaintiffs fail to allege any fact as to how Defendants could be liable to Plaintiff under
16 any of the alleged claims.

17 **II. SUMMARY OF RELEVANT FACTS**

18 The following are the relevant allegations in the FAC and judicially noticeable facts set forth
19 in the documents included in the Request for Judicial Notice (“RJN”):

- 20 • The real property that is the subject of this dispute is located at 2921 Roc Road,
21 Placerville, California 95667 (“Subject Property”). See FAC, ¶ 1. See also, RJN, Exhibit
22 1.
23 • Plaintiffs obtained a residential loan in the sum of \$151,000.00 (“Loan”). The Loan was
24 secured by a deed of trust (“DOT”) encumbering the Subject Property that was recorded
25 on or about October 21, 2002, with the El Dorado County Recorder’s Office as
26 instrument number 2002-0080159-00. The DOT identifies Washington Mutual Bank,
27 FA, as the lender and beneficiary, California Conveyance Company (“CRC”) as trustee,
28 and Plaintiff as the borrower. See, RJN, Exhibit 1.
• Plaintiff defaulted under the terms of his mortgage Loan. A Notice of Default and
Election to Sell (“Notice of Default”) was recorded in connection with the DOT on July
1, 2009, with the El Dorado County Recorder’s Office as instrument number 2009-
0032441-00. According to the NOD, Plaintiff was \$5,415.71 in arrears as of June 30,
2009. See RJN, Exhibit 2.

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- A Substitution of Trustee (“SOT”) was recorded in connection with the DOT on August 13, 2009, with the El Dorado County Recorder’s Office as instrument number 2009-0041435-00. The SOT memorialized the substitution of Quality Loan Service Corporation as the new trustee under the terms of the DOT in place of CRC. *See* RJN, Exhibit 3.
- A Notice of Trustee’s Sale was recorded in connection with the DOT on October 5, 2009, with the El Dorado County recorder’s Office as instrument number 2009-0050010-00. *See* RJN, Exhibit 4.
- An Assignment of the DOT was recorded in connection with the DOT on August 19, 2009, with the El Dorado County Recorder’s Office as instrument number 2010-0038335-00. The Assignment identifies Federal National Mortgage Association as the new beneficiary under the terms of the DOT. *See* RJN, Exhibit 5.
- Plaintiff failed to cure the default on his mortgage Loan. The Subject Property was sold at public auction on August 13, 2010. A Trustee’s Deed Upon Sale was recorded in connection with the Subject Property on August 19, 2010, with the El Dorado County Recorder’s Office as instrument number 2010-0038336-00. *See* RJN, Exhibit 6.

III. STANDARD FOR A MOTION TO DISMISS

A motion to dismiss under Federal Rule of Civil Procedure (“FRCP”) Rule 12(b)(6) may be brought when a plaintiff fails to state a claim upon which relief can be granted. While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of a cause of action’s elements will not do. *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1959 (2007). “Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint’s allegations are true.” *Id.*

IV. PLAINTIFF’S CLAIM FOR BREACH OF WRITTEN CONTRACT/WRONGFUL FORECLOSURE FAILS

A. Plaintiff Fails to Allege the Elements of a Breach of Contract Claim

The elements for breach of contract are: (1) The existence of a [valid] contract between the parties; (2) Plaintiff’s performance, [unless excused]; (3) Defendant’s [unjustified] [or] [unexcused] failure to perform; and (4) Damages to Plaintiff caused by the breach. *Careau & Co. v. Security Pacific Business Credit, Inc.*, 222 Cal.App.3d 1371, 1388 (1990), BAJI No. 10.85 (8th ed.).

Here, Plaintiff fails to allege the requisite elements of a cause of action for breach of contract/wrongful foreclosure. Plaintiff fails to allege that there is a contract between Defendants

1 and Plaintiff. Plaintiff fails to allege the material terms of the contract and does not attach a copy of
2 the signed and executed contract to the FAC. *See Otworth v. Southern Pacific Transp. Co.*, 166
3 Cal.App. 452, 458-459 (1985) (complaint pleading breach of contract must indicate on its face
4 whether contract is written, oral, or implied by conduct and if action is based on written contract,
5 terms must be set out verbatim in body of complaint or a copy of written instrument must be
6 attached and incorporated by reference). Plaintiff's claim fails on this basis alone.

7 While it appears from the FAC that Plaintiff and Defendants were in discussions regarding a
8 possible loan modification, Plaintiff admits that no contract was ever formed with any of the named
9 Defendants. *See* FAC, ¶ 19. Interestingly, Plaintiff appears to admit that no contract was ever
10 formed but that Defendants were nonetheless contractually obligated to modify his loan. *Id.*
11 Regardless, although the Court must construe the facts in the light most favorable to the non-moving
12 party, "conclusory allegations of law and unwarranted inferences are not sufficient to defeat a
13 motion to dismiss." *Associated Gen. Contrs. of Am. v. Metropolitan Water Dist.*, 159 F.3d 1178,
14 1181 (9th Cir. 1998). "[T]he court is not required to accept legal conclusions cast in the form of
15 factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v.*
16 *Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). Indeed, "the pleading standard Rule 8
17 announces does not require 'detailed factual allegations,' but it demands more than an unadorned,
18 the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009).

19 Because Plaintiff fails to plead the existence of a valid contract between Plaintiff and
20 Defendants, Plaintiff cannot maintain a cause of action for breach of contract and the Motion to
21 Dismiss should be granted without leave to amend.

22 **B. Without a Valid Written Agreement, Plaintiff's Claim Fails for Violating**
23 **California's Statute of Frauds**

24 Further, an agreement by which a lender agrees to forbear from exercising the right to
25 foreclose upon a deed of trust securing an interest in real property comes within the statute of frauds,
26 and therefore must be in writing. *See, e.g., Secrest v. Security National Mortgage Loan Trust 2002-*
27 *2*, 167 Cal.App.4th 544, 547 (2008); *see also* Cal. Civ. Code § 1698(a); *Stafford v. Russell*, 117
28 Cal.App.2d 326, (1953) (oral agreement to postpone payment on note and deed of trust until pending

1 litigation was completed must be in writing to be enforceable); *Karlsen v. American Savings And*
2 *Loan Association*, 15 Cal.App.3d 112, 121 (1971) (oral agreement to postpone trustee's sale must
3 be in writing to be enforceable).

4 In this case, Plaintiff has not alleged a valid, signed contract with any of the named
5 Defendants giving rise to a breach of contract claim. Without that, any agreement to postpone the
6 foreclosure sale or "permanently modify" Plaintiff's loan comes within the statute of frauds because
7 it is an agreement for an interest in real property, and therefore must have been in writing. *See,*
8 *Secrest*, 167 Cal.App.4th at 547. Numerous California courts have refused to recognize oral
9 agreements to modify loan agreements, for lack of consideration and/or a writing in the promissory
10 note and deed of trust context. *Stafford v. Clinard*, 87 Cal.App.2d 480, 481 (1948) (alleged
11 agreement to defer payment on property until pending litigation regarding property is resolved
12 unenforceable absent a written modification, as required by California Civil Code Section 1698);
13 *Stafford v. Russell*, 117 Cal.App.2d 326, (1953) (oral agreement to postpone payment on note and
14 deed of trust until pending litigation was completed must be in writing to be enforceable); *Karlsen v.*
15 *American Savings And Loan Association*, 15 Cal.App.3d 112, 121 (1971) (oral agreement to
16 postpone trustee's sale must be in writing to be enforceable); *Hunt v. Smyth*, 25 Cal.App.3d 807,
17 819-822 (1972) (past acceptance of lower payments is not enough to establish oral modification of
18 written payment terms of promissory note); *Stroud v. Thomas*, 139 Cal. 274, 276 (1903) (agreement
19 to extend time for payment on promissory note for one year unenforceable as lacking consideration
20 because debtor merely agreed to pay the note which he was already obligated to do); *Henehan v.*
21 *Hart*, 127 Cal. 656, 658 (1900) (alleged oral agreement to extend time for payments on promissory
22 note unenforceable because such agreement must be in writing); *Columbia Cas. Co. v. Lewis*, 14
23 Cal.App.2d 64, 76 (1936) (alleged oral agreement to modify terms of promissory note unenforceable
24 as lacking consideration because performance under original and alleged oral modification was the
25 same); *Smith v. Paroier Winery*, 7 Cal.App.2d 357, 360-361 (1935) (oral agreement to extend time
26 for payment on promissory note unenforceable as lacking consideration because debtor merely
27 agreed to pay the note which it was already obligated to do); *Henry H. Cross Co. of California v.*
28 *Prentice*, 137 Cal.App. 497, 500 (1934) (oral agreement to extend time for payment of indebtedness

1 unenforceable as lacking consideration because debtor merely agreed to pay the indebtedness which
2 it was already obligated to do); *Middlecamp v. Zumwalt*, 100 Cal.App. 715, 721,723 (1929) (oral
3 agreement to extend time for payment of promissory note unenforceable because it must be in
4 writing, and lacked consideration because debtor merely agreed to pay the promissory note which it
5 was already obligated to do); *Rottman v. Hevener*, 54 Cal.App. 474, 478 (1921) (oral agreement to
6 extend payment for promissory note unenforceable because it must be in writing); *Dean v. Sedan*
7 *Milling Co.*, 19 Cal.App. 28, 34-35 (1912) (extension of time for payment on promissory note
8 unenforceable as lacking consideration because debtor merely agreed to pay the promissory note
9 which it was already obligated to do).

10 Thus, as a matter of law, Plaintiff cannot state a claim for breach of contract based upon the
11 purported breach of an alleged agreement by Defendants (collectively) to provide a loan
12 modification because such agreement must be in writing. Accordingly, this claim is subject to
13 dismissal.¹

14 **V. PLAINTIFF FAILS TO STATE A CLAIM FOR QUIET TITLE**

15 Plaintiff's claim to "Quiet Title" also fails. In order to successfully allege a cause of action
16 for quiet title, the complaint must be verified and allege: (1) a legal description of the property and
17 its street address or common designation; (2) the title of the Plaintiff and the basis of the title; (3) the
18 adverse claims to the title of the Plaintiff; (4) the date as of which the determination is sought; and
19 (5) a prayer for the determination of the title of the Plaintiff against the adverse claims. *Cal. Civ.*
20 *Proc.* § 761.020.

21 As a preliminary matter, Plaintiff fails to allege the date as of which the determination is
22 sought. *See* FAC, ¶¶ 29-32. On this ground alone, Plaintiff's claim fails. Second, Plaintiff fails to
23 allege his own basis for title to the Subject Property – nor can he. The foreclosure sale has already
24 taken place and Defendant Fannie Mae holds title to the Subject Property. *See* RJN, Exhibit 6. Last,
25 the right of the beneficiary to invoke the power of sale contained in the deed of trust was expressly
26

27 ¹ To the extent that Plaintiff attempts to plead a claim for wrongful foreclosure, that claim is wholly
28 dependent on the existence and breach of a contract. For the same reasons Plaintiff cannot state a
claim for breach of contract, the Court should dismiss any possible claim for wrongful foreclosure.

1 agreed to by Plaintiff when he signed the deed of trust in 2002. *See* RJN, Exhibit 1. Thus, Plaintiff
2 cannot state the elements of a claim to quiet title.

3 Moreover, the action to determine adverse claims is an equitable action, and, generally,
4 equitable principles apply. *Thomson v. Thomson*, 7 Cal. 2d 671 (1936); *Perkins v. Wakeham*, 86
5 Cal. 580 (1890); *Medeiros v. Medeiros*, 177 Cal. App. 2d 69 (3d Dist. 1960). Based on such
6 equitable principals, a quiet title claim may be denied where a borrower does not offer to reimburse
7 the lender for the unpaid debt in seeking to quiet title against the lender's security interest. *Aguilar*
8 *v. Bocci*, 39 Cal.App.3d 475 (1974); *see Dool v. The First National Bank Of Calexico*, 207 Cal. 347,
9 351-352 (1929) (affirming decision of court to require reimbursement of monies advanced by bank
10 to deceased, incompetent mortgagor under a deed of trust in an action to quiet title); *O'Brien v.*
11 *O'Brien*, 197 Cal. 577, 585 (1925) (finding that, in an action to quiet title, a mortgagor may be
12 required to reimburse the mortgagee for the unpaid debt based upon a purportedly invalid mortgage).
13 Similarly, Plaintiff should be required to tender the amount of the Loan.

14 Although Plaintiff alleges that "he is willing able [sic] to tender all amounts due under the
15 Note[,]"² that allegation is simply insufficient to plead tender adequately. Plaintiff must allege facts
16 supporting his present ability to tender all amounts owing under the Loan. In *Karlsen v. American*
17 *Savings & Loan Association*, 15 Cal. App. 3d 112 (1971), the Court stated that "a valid and viable
18 tender of payment of the indebtedness owing is essential to an action to cancel a voidable sale under
19 a deed of trust. [] *A tender of payment is of no effect if the offerer does not have the present ability*
20 *to make the tender good.*" (Emphasis added.) The reason why the Subject Property was foreclosed
21 on is precisely because Plaintiff defaulted on his payment obligations. Unless Plaintiff alleges how
22 he intends immediately to tender all amounts owing under the Loan, it would be an exercise in
23 futility to allow his quiet title claim to proceed.³

24 Finally, the statutory quiet title remedy is cumulative of other equitable remedies to remove a
25 cloud on title. Code Civ. Proc., § 760.030(a); *see, e.g., Marra v. Aetna Const. Co.*, 15 Cal. 2d 375

26 _____
27 ² See FAC, ¶ 34.

28 ³ To be sure, Plaintiff has not alleged that he, in fact, has attempted to tender all amounts due under
the Loan.

1 (1940); *Ephraim v. Metropolitan Trust Co. of Cal.*, 28 Cal. 2d 824 (1946). While a quiet title action
2 may be brought in conjunction with another equitable action, it too should fail if the underlying
3 theory of relief, or other equitable claims, is not properly pled. Thus, since Plaintiff fails to plead an
4 underlying theory of relief in his breach of contract claim, Plaintiff's claim for quiet title fails.

5 For these reasons, the quiet title claim is subject to dismissal without leave to amend.

6 **VI. CONCLUSION**

7 For the foregoing reasons, Defendants respectfully request that the Court grant the motion to
8 dismiss without leave to amend as to all claims asserted.

9
10 DATED: June 17, 2011

ALVARADOSMITH
A Professional Corporation

By: /s/ S. Christopher Yoo

11 JOHN M. SORICH
12 S. CHRISTOPHER YOO
13 CHRISTOPHER J. DONEWALD
Attorneys for Defendants
14 JPMORGAN CHASE BANK, N.A., individually
15 and successor by merger to CHASE HOME
16 FINANCE LLC, erroneously sued as CHASE
HOME MORTGAGE LLC, and FEDERAL
17 NATIONAL MORTGAGE ASSOCIATION
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

Floyd Knapp v. JPMorgan Chase Bank, N.A., et al.,

USDC Case No.: 10-CV-02889-FCD-GGH

I am employed in the County of Orange, State of California. I am over the age of 18 years and not a party to the within action. My business address is **ALVARADOSMITH, 1 MacArthur Place, Santa Ana, CA 92707.**

ON JUNE 17, 2011, I SERVED THE FOREGOING DOCUMENT DESCRIBED AS NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT; PROPOSED ORDER ON THE INTERESTED PARTIES IN THIS ACTION.

by placing the original and/or a true copy thereof enclosed in (a) sealed envelope(s), addressed as follows:

SEE ATTACHED SERVICE LIST

BY REGULAR MAIL: I deposited such envelope in the mail at 1 MacArthur Place, Santa Ana, California. The envelope was mailed with postage thereon fully prepaid.

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

BY THE ACT OF FILING OR SERVICE, THAT THE DOCUMENT WAS PRODUCED ON PAPER PURCHASED AS RECYCLED.

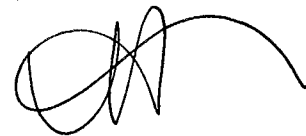
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BY PERSONAL SERVICE: I caused such envelope(s) to be delivered by hand to the above addressee(s).

(Federal) I declare that I am employed in the office of a member of the Bar of this Court, at whose direction the service was made.

Executed on June 17, 2011, at Santa Ana, California.



MICHELLE E AULT

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SERVICE LIST

Floyd Knapp v. JPMorgan Chase Bank, N.A., et al.,
USDC Case No.: 10-CV-02889-FCD-GGH

Floyd Knapp
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Placerville, CA 95667

In Pro Per

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