

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ULLA LUNDGREN, dba A STEP FORWARD SHOES,

Plaintiff,

v.

BANK OF AMERICA, N.A., a National Banking Association; BANK OF AMERICA CORPORATION, a Delaware Corporation,

Defendants.

No. C 11-00758 CW

ORDER GRANTING IN PART BANK OF AMERICA'S MOTION TO DISMISS AND DENYING IT IN PART (Docket No. 4)

United States District Court
For the Northern District of California

Defendants Bank of America, N.A. and Bank of America Corporation (collectively, Bank of America) move pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss Plaintiff Ulla Lundgren's complaint. Docket No. 4. Plaintiff opposes the motion. Having considered all of the parties' submissions and oral argument, the Court GRANTS IN PART Bank of America's motion to dismiss, and DENIES IT IN PART.

BACKGROUND

Plaintiff has alleged causes of action based on the following facts.

In 2003, Plaintiff opened a checking account at a branch of Bank of America located in Oakland, California. The deposits in the account stood to Plaintiff's credit, for her use and benefit, and were governed by the terms and conditions set forth in the passbook and a signature card contract. Withdrawals were

1 permitted from the account only by check or other order bearing
2 Plaintiff's signature. Also in 2003, Plaintiff hired Catherine
3 Bullard as a bookkeeper for her business. From about 2005 through
4 2010, Bullard prepared checks without Plaintiff's knowledge and
5 authorization payable to various vendors from which Plaintiff
6 purchased inventory. The checks were not made in response to
7 invoices from said vendors and were not intended by Bullard to be
8 paid to the vendors. The checks were never tendered to the
9 vendors. Instead, Bullard deposited the checks into her own
10 personal account or that of others, using Bank of America's ATM
11 machines. Many of these forged checks lacked an endorsement. The
12 forged checks, including those without endorsements, were paid by
13 Bank of America. Although the number of forged checks and their
14 total amount is not alleged, Plaintiff believes that she was
15 defrauded of at least \$250,000. Plaintiff alleges that Bank of
16 America acted both as the payor and depository bank¹ with respect
17 to the forged checks.
18

19
20 In or about early 2009, Plaintiff discovered the forged
21 checks and demanded that Bank of America replace and re-credit to
22 her account the total sum of all of the forged checks. Bank of
23 America, however, credited to Plaintiff's account only certain
24

25 ¹ The "payor bank" is the bank which has the check writer's
26 checking account from which the check is to be paid. In re
27 McMullen Oil Co., 251 B.R. 558, 566 (C.D. Cal. 2000). The
28 "depository bank" is the "first bank to take an item even though
it is also the payor bank, unless the item is presented for
immediate payment over the counter." Cal. Com. Code § 4105(2).

1 checks, totaling \$2,300, and refused to restore the remaining
2 amount. Plaintiff does not specifically allege the date when she
3 reported the forged checks to Bank of America, but the Court
4 assumes that she reported them in early 2009, when she discovered
5 them.

6 On or about May 31, 2009, Plaintiff submitted a complaint
7 against Bullard, although not against Bank of America, to the
8 Comptroller of the Currency, Administrator of National Banks,
9 regarding the forged checks. The Comptroller assigned a case
10 number, but, as of the date this action was filed, the
11 administrative complaint had not been resolved.

12 On December 30, 2010, Plaintiff filed this suit in Alameda
13 County Superior Court. Bank of America removed the action to
14 federal court on February 18, 2011. Essentially, through this
15 action, Plaintiff seeks to recover from Bank of America the
16 amounts Bullard allegedly stole from her. Plaintiff seeks to
17 recover the amounts paid through the forged checks, as well as
18 general damages, not less than \$1,000,000, resulting from her
19 inability to pay her creditors, injury to her reputation and
20 difficulty in obtaining credit.

21 Plaintiff's complaint alleges four causes of action. The
22 first cause of action is asserted against the Bank of America, as
23 payor bank, to recover payments charged to Plaintiff's account
24 based on the forged checks. The first cause of action refers to
25 California Uniform Commercial Code sections 3401, 3403 and 4401.
26
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1 Plaintiff's second cause of action, alleged against Bank of
2 America as depository bank, seeks recovery based on the bank's
3 failure to exercise ordinary care in accepting for deposit into
4 Bullard's account checks that were not made out to her and were
5 not endorsed. This cause of action cites California Uniform
6 Commercial Code sections 3103(a)(7), 3404(d), 3405(b) and 4401.

7
8 Plaintiff's third cause of action is for "negligence per se"
9 against Bank of America, both as the payor and the depository
10 bank. The claim cites California Evidence Code section 669 and
11 incorporates the provisions of the California Uniform Commercial
12 Code referred to in the first and second causes of action.
13 Finally, Plaintiff alleges a fourth cause of action for a
14 constructive trust.

15
16 LEGAL STANDARD

17 A complaint must contain a "short and plain statement of the
18 claim showing that the pleader is entitled to relief." Fed. R.
19 Civ. P. 8(a). On a motion to dismiss under Rule 12(b)(6) for
20 failure to state a claim, dismissal is appropriate only when the
21 complaint does not give the defendant fair notice of a legally
22 cognizable claim and the grounds on which it rests. Bell Atlantic
23 Corp. v. Twombly, 550 U.S. 544, 555 (2007). In considering
24 whether the complaint is sufficient to state a claim, the court
25 will take all material allegations as true and construe them in
26 the light most favorable to the plaintiff. NL Indus., Inc. v.
27 Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, this
28

1 principle is inapplicable to legal conclusions; "threadbare
2 recitals of the elements of a cause of action, supported by mere
3 conclusory statements," are not taken as true. Ashcroft v. Iqbal,
4 129 S.Ct. 1937, 1949-50 (2009) (citing Twombly, 550 U.S. at 555).

5 DISCUSSION

6 I. Untimeliness and Preclusion of Plaintiff's Claims

7 Bank of America argues that two statutory provisions bar
8 Plaintiff's claims based on untimeliness and issue preclusion.

9 A. California Code of Civil Procedure § 340(c)

10 First, Bank of America contends that the statute of
11 limitations set forth in California Code of Civil Procedure
12 section 340(c) applies to all of Plaintiff's claims. Section
13 340(c) establishes a one year statute of limitations for an action
14 by a depositor against a bank for the payment of a forged check.
15 The one year limitations period under section 340(c) begins to run
16 when the bank furnishes to its customer a bank statement
17 addressing the check at issue and the cancelled check. Mac v.
18 Bank of America, 76 Cal. App. 4th 562, 565 (1992).

19 Plaintiff counters that the three year statute of limitations
20 period established by California Uniform Commercial Code § 4111
21 applies to all of her claims. Section 4111 applies to disputes
22 between banks and their depositors in connection with the
23 collection and payment of items.
24

25 Whether the enactment of section 4111 abrogated the earlier
26 established one year limitations period set forth in section
27
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1 340(c) is addressed in Chatsky and Associates v. Superior Court,
2 117 Cal. App. 4th 873, 880 (2004). Chatsky reasoned that nothing
3 in the language or history of section 4111 indicated that the
4 legislature intended to repeal section 340(c), and the provisions
5 were reconcilable because section 4111 generally applies to
6 actions arising between banks or a bank and its customers "to
7 enforce an obligation, duty, or right," whereas section 340(c)
8 expressly concerns an action by a depositor against its bank for
9 the payment of a forged check. Id. at 878-879.

11 Plaintiff also asserts the doctrine of equitable tolling to
12 argue that the statute of limitations on her claims should be
13 tolled as of May 31, 2009, the approximate date when she initiated
14 her administrative complaint against Bullard with the
15 Comptroller's office. Plaintiff represents that the Comptroller
16 advised her not to file a civil action during the administrative
17 investigation because the administrative complaint would enable
18 her to seek restitution from Bullard. She does not represent that
19 the Comptroller advised her not to file suit against the bank.

21 The doctrine of equitable tolling generally focuses on a
22 plaintiff's excusable ignorance of the limitations period and on a
23 lack of prejudice to the defendant. Naton v. Bank of California,
24 649 F.2d 691, 696 (9th Cir. 1981). Equitable tolling may also
25 apply "'[w]hen an injured person has several legal remedies and,
26 reasonably and in good faith, pursues one.'" Daviton v.
27 Columbia/HCA Healthcare Corp., 241 F.3d 1131, 1136 (9th Cir. 2001)

1 (citing Elkins v. Derby, 12 Cal. 3d 410, 414 (1974)). Bank of
2 America responds that equitable tolling is unwarranted in the
3 present case. It contends that equitable tolling for pursuit of
4 an alternative remedy requires that the plaintiff seek the
5 alternative remedy against the same defendant as named in the
6 second proceeding. In Cervantes v. City of San Diego, 5 F.3d
7 1273, 1276 n.3 (1993), the Ninth Circuit stated that, although
8 several of the defendants in the federal action were not parties
9 to the plaintiff's prior administrative proceeding, there was a
10 sufficiently close relationship between them and the party named
11 in the prior proceeding that a "kind of evidentiary privity would
12 justify overlooking their nominal absence" for purposes of
13 determining whether equitable tolling was warranted. Id. Here,
14 however, there does not appear to be a close relationship between
15 Bullard and the Bank of America. Equitable tolling does not
16 apply.
17

18
19 Because Plaintiff concedes that her first cause of action is
20 a claim to recover for the bank's payment of forged checks, under
21 Chatsky, the one year limitations period in section 340(c) governs
22 that cause of action. Accordingly, Plaintiff may not recover on
23 her first cause of action for checks which Bank of America
24 included in a statement before December 30, 2009, one year before
25 the date she filed this lawsuit.
26

27 As noted above, Bank of America also contends that section
28 340(c) applies to Plaintiff's second cause of action against it as

1 depository bank, for accepting for deposit checks not made out to
2 Bullard and unendorsed. The Bank relies on Mac, 76 Cal. App. 4th
3 at 565; Roy Supply, Inc. v. Wells Fargo Bank, 39 Cal. App. 1051,
4 1064, 1065 (1995); and Union Tool Company v. Farmers' & Merchants'
5 National Bank, 192 Cal. 40, 51 (1923). The Bank's authorities are
6 unavailing because these cases involved claims against payor banks
7 for payment of checks on forged signatures and endorsements, as
8 opposed to claims for depositing checks with no endorsement.
9

10 Bank of America argues that forgery is defined to include
11 checks deposited without endorsements. It cites Uniform
12 Commercial Code sections 1-201(41) and 3-403(b), and comment ¶ 4
13 to § 3-403(b), in support of this proposition. The California
14 Uniform Commercial Code sections analogous to these provisions do
15 not define forgery, but rather establish that forgeries are
16 included within the California Uniform Commercial Code's
17 definition of unauthorized signature, and address authorized
18 signatures in the context of checks requiring more than one
19 signature to authorize payment. These sections do not define
20 unendorsed checks as forgeries.
21

22 Bank of America also relies on California Uniform Commercial
23 Code section 3404, which assigns liability to payor and depository
24 banks that fail to exercise ordinary care with respect to a check
25 issued to a fictitious payee. This provision likewise does not
26 define an unendorsed check as a forgery for purposes of bringing
27 it within the scope of section 340(c).
28

1 Thus, section 340(c) does not apply to a claim for a bank's
2 negligence in accepting for deposit checks without an endorsement
3 into an account held by a person or entity other than the payee
4 named on the check. Instead, the three year statute of
5 limitations of California Uniform Commercial Code section 4111
6 applies to Plaintiff's second cause of action for negligence.²
7
8 Section 4111 bars Plaintiff's second claim with respect to checks
9 negligently deposited by Bank of America where the checks were
10 deposited, and the claim accrued, more than three years prior to
11 the date this lawsuit was filed, that is, December 30, 2007.

12 B. California Uniform Commercial Code § 4406

13 Bank of America also argues that California Uniform
14 Commercial Code sections 4406 (d) and (f) preclude Plaintiff's
15 first and second causes of action. Section 4406, under certain
16 circumstances, bars a customer's assertion of claims against a
17 bank for payment of an unauthorized item. Section 4406(a)
18 provides that a bank issuing an account statement to a customer
19 showing items paid from the account shall provide information in
20 the statement sufficient to allow the customer reasonably to
21 identify the items paid. Cal. Com. Code. § 4406(a). Section
22
23

24 ² Plaintiff also appears to argue that a three year statute
25 of limitations period applies based on section 338 of the
26 California Code of Civil Procedure. Plaintiff relies on Sun 'n
27 Sand v. United California Bank, 21 Cal. 3d 671 (1978). However,
28 that case is not authority establishing that the limitations
period in section 338 governs Plaintiff's negligence claim. Roy
Supply, 39 Cal. App. at 1070 n.20.

1 4406(c) states that, if a bank issues an account statement
2 pursuant to subdivision (a), the customer is obliged to examine
3 the statement promptly to determine whether any payment was not
4 actually authorized. Cal. Com. Code § 4406(c). In the event that
5 a customer fails to comply with subdivision (c), the customer is
6 precluded by section 4406(d)(2) from asserting against the bank

7 [t]he customer's unauthorized signature or alteration
8 . . . on any item paid in good faith by the bank if
9 the payment was made before the bank received notice
10 from the customer of the unauthorized signature or
11 alteration and after the customer had been afforded a
12 reasonable period of time, not exceeding 30 days, in
13 which to examine the item or statement of account and
14 notify the bank.

15 Cal. Com. Code § 4406(d)(2).

16 Plaintiff argues that her claims are not precluded by
17 section 4406(d)(2) due to section 4406(e). Section 4406(e)
18 states,

19 If subdivision (d) applies and the customer proves
20 that the bank failed to exercise ordinary care in
21 paying the item and that the failure contributed to
22 loss, the loss is allocated between the customer
23 precluded and the bank asserting the preclusion
24 according to the extent to which the failure of the
25 customer to comply with subdivision (c) and the
26 failure of the bank to exercise ordinary care
27 contributed to the loss. If the customer proves that
28 the bank did not pay the item in good faith, the
preclusion under subdivision (d) does not apply.

29 Cal. Com. Code § 4406(e). Espresso Roma Corporation v. Bank of
30 America explained that preclusion under section 4406(d) may be
31 avoided "by establishing that the bank failed to exercise ordinary
32 care in paying the item and that the failure contributed to the

1 loss." 100 Cal. App. 4th 525, 528 (2002) (internal quotation
2 marks and alterations omitted). Although Plaintiff received
3 regular monthly statements and failed to detect the fraud for over
4 six years, Bank of America would still be liable for a portion of
5 the loss if it also failed to exercise ordinary care in making
6 payment and that failure contributed to Plaintiff's loss.
7 Plaintiff's complaint alleges that Bank of America's payment of
8 the checks was contrary to the duty of care it owed to her.
9 Compl. at ¶¶ 15, 22 & 28. Therefore, section 4406(d) does not
10 preclude any of Plaintiff's claims at the pleading stage.
11

12 Bank of America also cites section 4406(f) for its preclusive
13 effect. In contrast to subdivision (d), section 4406(f) states,
14 "Without regard to the care or lack of care of either the customer
15 or the bank," a customer who does not, within one year after the
16 statement is issued pursuant to subdivision (a), discover and
17 report the unauthorized signature is precluded from asserting the
18 signature against the bank. Cal. Com. Code § 4406(f).
19

20 Plaintiff first appears to argue that Espresso Roma Corp.
21 stands for the proposition that section 4406(e) trumps section
22 4406(f). This is unpersuasive given the plain language of both
23 provisions. In addition, Espresso Roma Corp. did not address the
24 defendant bank's section 4406(f) arguments because the court
25 resolved the appeal based on sections 4406(d) and (e). 100 Cal.
26 App. 4th at 528 n.2.
27
28

1 Plaintiff also appears to rely upon Sun 'n Sand v. United
2 California Bank, 21 Cal. 3d 671 (1978), for the proposition that
3 section 4406(f) does not apply to her claims. Indeed, Sun 'n Sand
4 held that section 4406(4), the precursor to section 4406(f),³ "did
5 not suffice to displace the three-year statute of limitations
6 ordinarily applicable" to the plaintiff's negligence claim. 21
7 Cal. 3d at 700. The court in Roy Supply agreed with this holding,
8 39 Cal. App. 4th at 1069, but distinguished the negligence claim
9 against the depositary bank in Sun 'n Sand from the negligence
10 claim before it, which alleged that the payor bank had negligently
11 made payment of certain checks over a forged signature, id. at
12 1068-70. Although Roy Supply did not decide the applicability of
13 section 4406(f) to claims based on missing endorsements, it noted
14 that "any claim that is not dependent upon proof of forgery will
15 not be precluded by section 4406[f], although the customer will
16 still be precluded from asserting forgery in pursuing that claim."
17 39 Cal. App. 4th at 1073.

20 Bank of America incorrectly asserts that all of Plaintiff's
21 claims rely on the existence of a forgery, and that checks
22 deposited with missing endorsements should be treated as forged or
23 otherwise unauthorized checks. However, as noted earlier, the
24 provisions cited by Bank of America, California Uniform Commercial
25

26 ³Section 4406(4)'s renumbering as section 4406(f) in 1993 did
27 not materially change the provision. Roy Supply, 39 Cal. App. at
28 1064 n.13.

1 Code sections 1201(b) (41) and 3403(b), do not establish a broad
2 enough definition of forgery or unauthorized signature to
3 encompass Plaintiff's claims against Bank of America as a
4 depository bank for depositing checks without endorsements.

5 Thus, section 4406(f) precludes Plaintiff from asserting
6 against Bank of America forgeries which were not discovered and
7 reported to the bank within one year after the bank statement or
8 items were otherwise made available to Plaintiff. As noted
9 earlier, Plaintiff has not alleged the precise date when she
10 reported the forged checks to Bank of America, but presumably she
11 reported them in early 2009 when she discovered them. Thus,
12 section 4406(f) precludes Plaintiff from asserting forged checks
13 paid by Bank of America prior to early 2008. This preclusion is
14 likely moot in light of the one year statute of limitations
15 addressed above.
16

17
18 However, section 4406(f) does not apply to Plaintiff's second
19 cause of action alleging negligence independent of the bank's
20 payment of forged checks and based instead on the bank's deposit
21 of checks without any endorsement.

22 II. Negligence Per Se

23 Plaintiff's third cause of action alleges a claim for
24 "negligence per se." Bank of America argues that the California
25 Uniform Commercial Code broadly precludes common law claims for
26 negligence per se alleged against banks in relation to payment and
27 collection of fraudulent checks.
28

1 The third cause of action cites California Evidence Code
2 section 669. Under section 669, it is presumed that a person has
3 failed to exercise due care if he or she has violated a statute,
4 ordinance or regulation. Cal. Evid. Code § 669(a)(1).

5 Plaintiff's claim incorporates citations to California Uniform
6 Commercial Code sections 3401, 3403, 3404 and 3405. Plaintiff
7 invokes the evidentiary presumption to establish negligence based
8 on Bank of America's alleged statutory violations--specifically,
9 its payment of Bullard's forged checks, and its failure to
10 exercise ordinary care in accepting for deposit checks without
11 endorsements that were not made out to Bullard.

12
13 The California Uniform Commercial Code does preempt claims
14 for negligence against Bank of America as a payor bank for paying
15 forged checks. Roy Supply held that the California Uniform
16 Commercial Code precluded common law claims for negligent payment
17 of forged checks, brought in that case against the payor bank by
18 owners of the account from which the payments were drawn. 39 Cal.
19 App. 4th at 1058.

20
21 To the extent Bank of America argues that the California
22 Uniform Commercial Code preempts Plaintiff's negligence claim in
23 her second cause of action, that argument fails. The bank cites
24 Gil v. Bank of America, N.A., 138 Cal. App. 4th 1371, 1377-78
25 (2006). Gil does not apply to Plaintiff's claim. There the court
26 found that California Uniform Commercial Code section 3420,
27 authorizing a claim for conversion, preempted a negligence claim
28

1 by a payee against a depository bank for accepting a check without
2 an endorsement. However, Plaintiff in this case was not the payee
3 on the checks; she is the owner of the account from which the
4 checks were drawn.

5 Instead, this case is analogous to Joffe v. United California
6 Bank, 141 Cal. App. 3d 541 (1993). In Joffe, the California Court
7 of Appeal reversed the trial court's dismissal of the plaintiffs'
8 cause of action for negligence. The plaintiffs were owners of the
9 account from which the check at issue was drawn, and alleged their
10 negligence claim against the depository bank for acceptance of a
11 check in which the named payee on the check differed from the
12 endorsement and name of the account into which the check was
13 deposited. The court held that sections 1103 and 3406 of the
14 California Uniform Commercial Code did not preempt the claims, and
15 that the claim was cognizable. Id. at 556-57. See also E.F.
16 Hutton & Co. v. City Nat. Bank, 149 Cal. App. 3d 60, 69 (1982)
17 (holding that plaintiff's claim for negligence against a
18 collecting bank was not preempted by California Uniform Commercial
19 Code section 3405).

20 Plaintiff's third cause of action is dismissed and leave to
21 amend is unwarranted. A negligence claim as to the forged checks
22 paid by Bank of America is statutorily preempted, and a claim as
23 to the negligent deposit of the unendorsed checks, although not
24 preempted, is duplicative of Plaintiff's second cause of action.
25
26
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28

1 III. Constructive Trust

2 Plaintiff's fourth cause of action seeks to impose a
3 constructive trust on Bullard's account. "A constructive trust is
4 an equitable remedy to compel a person who has property to which
5 he is not justly entitled to transfer it to the person entitled
6 thereto." Weiss v. Marcus, 51 Cal. App. 3d 590, 600 (1975).
7
8 California Code of Civil Procedure section 2223 provides, "One who
9 wrongfully detains a thing is an involuntary trustee thereof, for
10 the benefit of the owner." Cal. Code Civ. Proc. § 2223.

11 Originally Plaintiff alleged that Bullard had an account at
12 Bank of America. At the hearing on the present motion, Bank of
13 America represented that Bullard's account had been closed.
14 Accordingly, Plaintiff withdrew her constructive trust claim
15 because it was apparently moot.

16
17 IV. Conversion

18 Plaintiff seeks to add a claim for conversion against Bank
19 of America. Gil, 138 Cal. App. 4th at 1377, addresses a
20 negligence claim by the payee against a depository bank for
21 acceptance of checks with missing endorsements. After ruling that
22 the common law claim was precluded by the California Uniform
23 Commercial Code, Gil held that section 3420 of the Code, providing
24 that the law applicable to conversion of personal property also
25 applies to negotiable instruments, permits an action for
26 conversion based on the acceptance for deposit of checks without
27 endorsements. In addition, In re McMullen Oil Co., 251 B.R. 558,
28

1 569 (C.D. Cal. 2000), states, "A bank may be liable for conversion
2 when it permits the deposit of a check into a third party's
3 account without the indorsement of the payee." Bank of America
4 does not object to allowing Plaintiff to amend her complaint to
5 add a cause of action for conversion.

6
7 CONCLUSION

8 Bank of America's motion to dismiss is GRANTED in part.
9 Plaintiff's first claim, to the extent that it is based on Bank of
10 America's payment of forged checks, is barred under section 340(c)
11 with respect to forged checks which were furnished and reported in
12 a bank statement before December 30, 2009, one year prior to the
13 date this lawsuit was filed. Further, section 4406(f) precludes
14 Plaintiff from asserting forged checks paid by Bank of America,
15 where Plaintiff did not discover and report the forgeries to the
16 bank within one year after the related bank statement was issued.
17 Cal. Com. Code § 4406(f).

18 Plaintiff's second claim, alleging Bank of America's
19 negligent deposit of checks without endorsements, is subject to a
20 three-year statute of limitations. Accordingly, Plaintiff may not
21 recover on her second cause of action for checks negligently
22 deposited by Bank of America where the claim accrued more than
23 three years prior to the date this lawsuit was filed, that is,
24 prior to December 30, 2007. Section 4406(f) does not preclude
25 this claim.

26 The third claim, for negligence per se, is dismissed. To the
27 extent the third cause of action is a common law negligence claim
28 against Bank of America as a payor bank for paying forged checks,

1 the claim is preempted by the California Uniform Commercial Code.
2 To the extent that the cause of action is a common law claim
3 against Bank of America for negligently accepting for deposit
4 checks missing endorsements and payable to payees other than
5 Bullard, the claim is dismissed because it is duplicative of
6 Plaintiff's second cause of action.

7 Plaintiff's fourth cause of action, for constructive trust,
8 is dismissed as moot. Pursuant to the parties' agreement,
9 Plaintiff may amend her complaint to state a claim for conversion.

10 Plaintiff must file her amended complaint within fourteen
11 days from the date of this order. Bank of America shall submit an
12 answer or motion to dismiss within twenty-one days from the date
13 Plaintiff files her amended complaint. In the event a second
14 motion to dismiss is filed, the hearing shall be noticed for the
15 first Thursday the Court is available, at least thirty-five days
16 after the opening brief has been submitted. The Clerk will
17 schedule a case management conference for the date the motion is
18 heard. The parties shall appear for a case management conference
19 on November 29, 2011 at 2:00 pm if no further motion to dismiss is
20 filed. A joint case management statement is due seven days prior
21 to the case management conference.

22
23 IT IS SO ORDERED.

24 

25 Dated: 10/4/2011

26 CLAUDIA WILKEN
27 United States District Judge
28