

1 **\*\* E-filed December 3, 2010 \*\***

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7 NOT FOR CITATION

8 IN THE UNITED STATES DISTRICT COURT

9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 SAN JOSE DIVISION

11 THAO N. PHAM,

No. C10-02613 HRL

12 Plaintiff,

13 v.

14 BANK OF AMERICA, N.A., et al.,

15 Defendants.

**ORDER (1) GRANTING IN PART  
AND DENYING IN PART  
DEFENDANTS' REQUEST FOR  
JUDICIAL NOTICE AND (2)  
GRANTING DEFENDANTS' MOTION  
TO DISMISS**

16 \_\_\_\_\_/ **[Re: Docket No. 17]**

17 This case arises out of a \$600,000 home loan in 2004 involving plaintiff Thao N. Pham  
18 ("Pham") and defendants Bank of America, N.A. ("Bank of America"), BAC Home Loans  
19 Servicing, LP ("BAC"), ReconTrust Company N.A. ("ReconTrust"), and Wells Fargo Bank, N.A.  
20 as Trustee for the Certificateholders of Bank of America Mortgage Securities, Inc. Mortgage Pass-  
21 Through Securities, Series 2004-4 ("Wells Fargo") (collectively, "Defendants").

22 Pham initially sued Defendants in state court alleging fraud and conspiracy to commit fraud,  
23 violation of California Civil Code § 2923.5, "Predatory Lending/Violation of Truth in Lending,"  
24 unlawful and fraudulent business practices in violation of California Business & Professions Code §  
25 17200, defamation, false light, and violation of the Fair Credit Reporting Act ("FCRA"), and  
26 seeking declaratory and injunctive relief. Defendants timely removed the case to federal court.  
27 (Docket No. 1.) On motion, the Court dismissed Pham's complaint without prejudice and allowed  
28 him to file an amended complaint within 14 days. (Docket No. 13.) Pham did so, but this time

1 alleged violations of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 et seq.  
2 (“RESPA”), violation of due process, and breach of contract and breach of the covenant of good  
3 faith and fair dealing. (Docket No. 15 (“First Amended Complaint” or “FAC”).)

4 Defendants now move the Court to dismiss Pham’s First Amended Complaint and to take  
5 judicial notice of three documents. (Docket No. 17.) Pham, who retained counsel after he filed the  
6 First Amended Complaint, filed a “response,” rather than an opposition, to Defendants’ motion  
7 which requests leave to amend the complaint once again “to present a clear picture of the facts and  
8 legal theories for relief.” (Docket No. 22 (“Opp’n”) at 1.)

9 Pursuant to Civil Local Rule 7-1(b), the Court finds the matter suitable for determination  
10 without oral argument, and the December 7, 2010 hearing is vacated.<sup>1</sup>

### 11 LEGAL STANDARD

12 On motion, a court may dismiss a complaint for failure to state a claim. FED. R. CIV. P.  
13 12(b)(6). The federal rules require that a complaint include a “short and plain statement” showing  
14 the plaintiff is entitled to relief. FED. R. CIV. P. 8(a)(2). The statement must “raise a right to relief  
15 above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 55 (2007). Yet only  
16 plausible claims for relief with survive a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. \_\_\_, 129  
17 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009). A claim is plausible if its factual content “allows the  
18 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at  
19 1949. A plaintiff does not have to provide detailed facts, but the pleading must include “more than  
20 an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Id.* at 1950.

21 In deciding a motion to dismiss, the court is ordinarily limited to the face of the complaint.  
22 *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002). The factual  
23 allegations pled in the complaint must be taken as true and reasonable inferences drawn from them  
24 must be construed in favor of the nonmoving party. *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336,  
25 337-38 (9th Cir. 1996); *Mier v. Owens*, 57 F.3d 747, 750 (9th Cir. 1995) (citing *Usher v. City of Los*  
26 *Angeles*, 828 F.2d 556, 561 (9th Cir. 1987)). However, the court cannot assume that “the [plaintiff]

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28 <sup>1</sup> Pursuant to 28 U.S.C. § 636(c) and Federal Rule of Civil Procedure 73, all parties have expressly  
consented that all proceedings in this matter may be heard and finally adjudicated by the  
undersigned.

1 can prove facts which [he or she] has not alleged.” *Associated General Contractors of California,*  
2 *Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983). “Nor is the court required  
3 to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or  
4 unreasonable inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)  
5 (citing *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994)), *amended on other*  
6 *grounds by* 275 F.3d 1187 (9th Cir. 2001).

7 “A court should freely give leave [to amend] when justice so requires.” FED. R. CIV. P.  
8 15(a)(2). “Four factors are commonly used to determine the propriety of a motion for leave to  
9 amend. These are: bad faith, undue delay, prejudice to the opposing party, and futility of  
10 amendment.” *Ditto v. McCurdy*, 510 F.3d 1070, 1079 (9th Cir. 2007) (internal citations omitted).  
11 “Futility of amendment can, by itself, justify the denial of a motion for leave to amend.” *Bonin v.*  
12 *Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). An amendment would be “futile” if there is no set of  
13 facts can be proved which would constitute a valid claim or defense. *See Miller v. Rykoff-Sexton,*  
14 *Inc.*, 845 F.2d 209, 214 (9th Cir. 1988).

## 15 DISCUSSION

### 16 A. Defendants’ Request for Judicial Notice

17 Defendants request that the Court take judicial notice of three documents related to Pham’s  
18 mortgage loan and property: (1) the Adjustable Rate Note; (2) the Deed of Trust; and (3) the  
19 Substitution of Trustee and Assignment of Deed of Trust. (Docket No. 17-1.)

20 In deciding a motion to dismiss, the court is ordinarily limited to only “allegations contained  
21 in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice.”  
22 *Swartz v. KPMG, LLP*, 476 F.3d 756, 763 (9th Cir. 2007). A court may take judicial notice of facts  
23 that are not subject to reasonable dispute. FED. R. EVID. 201. Such facts include matters of public  
24 record. *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001).

25 The Deed of Trust and the Substitution of Trustee and Assignment of Deed of Trust were  
26 recorded with the Santa Clara County Recorder’s Office and thus may be judicially noticed since  
27 they are in the public record.

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1           The Adjustable Rate Note is not in the public record, though, and may not be judicially  
2 noticed. Defendants cite to the Ninth Circuit case *Branch v. Tunnell* for the rule that while a court  
3 generally may not consider matters beyond the pleadings on a Rule 12(b)(6) motion, “a document is  
4 not ‘outside’ the complaint if the complaint specifically refers to the document and if its authenticity  
5 is not questioned.” *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir.1994), *overruled on other grounds*  
6 *by Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir.2002). But while *Branch* is good  
7 law on this point, it does not provide an independent basis for judicial notice. Thus, because the  
8 authenticity of this document is not questioned, the Court will consider it for purposes of  
9 Defendants’ motion to dismiss but will deny Defendants’ request for the Court to take judicial  
10 notice of it. *See Curcio v. Wachovia Mortg. Corp.*, No. 09-cv-2927 BTM (RBB), 2010 WL  
11 2836828, at \*7 n.1 (S.D. Cal. July 19, 2010) (denying defendants’ request to take judicial notice of  
12 documents under *Branch* but considering the documents for purposes of a motion to dismiss).

13 B. Defendants’ Motion to Dismiss

14           Pham’s original complaint was dismissed largely because he presented no factual allegations  
15 to support his conclusory statements. (*See* Docket No. 13.) His First Amended Complaint, which  
16 alleges a completely new set of claims, is similarly deficient. (*See generally*, FAC.) Its pages are  
17 filled with inapposite descriptions of the recent spate of foreclosures throughout the country rather  
18 than specific allegations to support Pham’s particular claims. Not surprisingly, then, rather than  
19 oppose Defendants’ motion on its merits, Pham’s recently-retained counsel asks the Court for leave  
20 to file another amended complaint.

21           While Defendants urge the Court to dismiss Pham’s First Amended Complaint with  
22 prejudice because further amendment would be futile, the Court is, at least at this point, unwilling to  
23 do so because the utter lack of factual content in the First Amended Complaint makes it impossible  
24 for the Court to say with certainty that further amendment would be futile. As such, the Court will  
25 dismiss Pham’s First Amended Complaint without prejudice and allow him to file a Second  
26 Amended Complaint.

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**CONCLUSION**

Based on the foregoing, the Court GRANTS Defendants' motion and dismisses Pham's First Amended Complaint without prejudice. Pham may file a Second Amended Complaint within 14 days of this order.

**IT IS SO ORDERED.**

Dated: December 3, 2010



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HOWARD R. LLOYD  
UNITED STATES MAGISTRATE JUDGE

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**C10-02613 HRL Notice will be electronically mailed to:**

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