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WELLS FARGO BANK, N.A. dba AMERICA'S SERVICING COMPANY and U.S. BANK, N.A. AS TRUSTEE SUCCESSOR BY MERGER TO LASALLE BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR MORGAN STANLEY MORTGAGE LOAN TRUST 2007-7AX

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ORIGINAL

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN MATEO

REGINA MANANTAN,

Plaintiff,

vs.

WELLS FARGO BANK, N.A., D/B/A AMERICA'S SERVICING COMPANY, U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR-IN-INTEREST TO BANK OF AMERICA, NATIONAL ASSOCIATION AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR MORGAN STANLEY MORTGAGE LOAN TRUST 2007-7AX, QUALITY LOAN SERVICE CORPORATION, MOAB, INVESTMENT GROUP, LLC, and DOES 1 through 50, inclusive,

Defendants.

Case No. CIV 535902

REPLY IN SUPPORT OF DEMURRER TO PLAINTIFF'S SECOND AMENDED COMPLAINT

Date: July 5, 2016
Time: 9:00 a.m.
Dept.: Law & Motion

Action Filed: October 20, 2015
Trial Date: None Set

I. INTRODUCTION

Plaintiff REGINA MANANTAN ("Plaintiff") filed the instant action in an attempt to forestall a lawfully noticed foreclosure sale of the real property located at 91 Haddock Street, Foster City, California 94404 (the "Property").

The Second Amended Complaint ("SAC") was filed in advance of defendants demurrer to the First Amended Complaint. Here again, the SAC remains vulnerable to demurrer as it contains irrelevant factual allegations and legal theories that are generally contrary to California law, none of which even come close to meeting minimum pleading requirements with respect to Defendants WELLS FARGO BANK, N.A. dba AMERICA'S SERVICING COMPANY and U.S. BANK, N.A. AS TRUSTEE SUCCESSOR BY MERGER TO LASALLE BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR MORGAN STANLEY MORTGAGE LOAN TRUST 2007-7AX (hereinafter "Moving Defendants").

As discussed below, Plaintiff's legal theories as to the effect of the securitization process have been rejected by California Court of Appeal. Moreover, Plaintiff's Homeowners' Bill of Rights ("HBOR") claims, now embedded within the second cause of action for wrongful foreclosure instead of separately pleaded are each defective because (1) they represent and improper attempt to apply the HBOR retroactively; (2) they are conclusory such that they do not state a cognizable claim against Moving Defendants; and (3) they each overlook the fact that Plaintiff received a loan modification in 2009 and failed to plead facts that she underwent a material change in financial circumstances to justify further modification review. The Opposition fails to cure the deficiencies discussed below and more fully in the moving papers. Accordingly, Moving Defendants respectfully request the Court sustain their demurrer.

II. LEGAL ARGUMENT

A. Plaintiff Lacks Standing to Challenge the Assignment Based on the "Closing Date" of the Securitized Trust

Plaintiff further challenges the foreclosure process based upon the assignment of deed from MERS to US Bank on June 12, 2009. (SAC ¶ 60.) This theory is likewise contrary to California law, which holds that a borrower lacks standing to challenge an assignment. In the moving

papers, Defendants cite to *Saterbak,* which is the mos recent appellate case criticizing the *Glaski* decsion. The *Saterbak* Court held that *Glaski v. Bank of America, N.A.* (2013) 218 Cal.App.4th 1079 is wrong: a post-closing-date transfer of a loan into a New York securitized trust is voidable, not void, so the borrower has no standing to challenge it. (*Saterbak v. JP Morgan Chase Bank, N.A.* (2016) 2016 DAR 2565.) Plaintiffs' opposition fails to address *Saterbak.*

As stated in that case, "As stated in that case, "*Yvanova* recognized borrower standing only where the defect in the assignment renders the assignment void, rather than voidable. (*Saterbak, 245* Cal.App. 4th at 815.) Accordingly, *Yvanova* does not assist Plaintiff unless she can show that the alleged defects which rendered the assignment of her note or deed of trust void under New York law, which she claims governs. Plaintiff states no such disabling defect and relies upon *Glaski v. Bank of America* (2013) *218* Cal.App.4th 1079, for the contrary position.

Glaski did hold that § 7-2.4 voids a post-closing date transfer of a loan into a New York securitized trust. (*Id. at* 1097.) However, *Yvanova* expressly refrained from endorsing that holding. Indeed, virtually every other court has disagreed with *Glaski* on this point. Notably, after a careful review of New York state court decisions under § 7-2.4, the Second Circuit concluded that *Glaksi* misinterpreted New York law, and it held that under § 7-2.4 an ultra vires transfer is *voidable* by the trust beneficiaries only, not *void* or subject to attack by borrowers. (*See Rajamin,* 757 F.3d at 88-90.) After *Yvanova,* a California Court of Appeal agreed with *Rajamin,* pointing out that the only New York decision that *Glaski* had relied upon had since been reversed. (*Saterbak,* 245 Cal.App. 4th at 815 & n. 5.)

Saterbak held that even applying held that even applying *Yvanova's* new rule, the borrowers lacked standing to allege a wrongful foreclosure claim because the alleged post-closing date assignments of their loans were merely voidable, not void. (*Saterbak, 245* Cal. App. 4th at 815.) Because the supposedly defective transfer of the loan was at most voidable rather than void, Plaintiff lacks standing to challenge it even under *Yvanova.* Hence, the demurrer to Plaintiff's SAC is properly sustained.

The Opposition alternatively argues that the Homeowners Bill of Rights grants standing to a borrower to challenge an assignment. However, the most recent foreclosure of the property at

issue in this case began with the recordation of the Notice of Default on June 23, 2011. (RJN, Ex. 12.) Thus, the foreclosure began well in advance of the enactment of the HOBR and that statute is not retroactive such that Plaintiffs can challenge an assignment recorded in June 2009. (RJN, Ex. 3.) Here, the statute does not apply because the HOBR was not effective until January 1, 2013. This is fatal to the claim, even if Plaintiff had standing because of the strong presumption against retroactivity in the absence of such express language. (See, e.g., Civ. Code, § 3; Cal. Code Civ. Pro. § 3.) "Generally, '[t]he presumption is very strong that a statute was not meant to act retrospectively, [wherein] [i]t ought not receive such a construction unless the words used are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.' " (*Yoshioka v. Superior Court* (1997) 58 Cal.App.4th 972, 980, quoting *U.S. Fidelity Co. v. Struthers Wells Co.* (1908) 209 U.S. 306, 314.)

Indeed, the presumption against retroactive application is especially strong when retroactive application would "increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." (*Landgraf v. USI Film Products* (1994) 511 U.S. 244, 280.) Accordingly, the demurrer is properly sustained without leave to amend.

B. Plaintiff's First Cause of Action for Breach of Security Instrument Must fail

Plaintiff's first cause of action alleges a breach of the Deed of Trust and fails for at least two reasons: (1) the contract claim does not plead the essential terms of the contract' and (2) the cause of action fails to plead damages. The opposition erroneously states that defendants do not contest they failed to send required notice; however, this evidence may not be submitted on a demurrer challenge.

Rather, at the pleadings stage, Defendants assert that Plaintiffs cause of action states a purported *irregularity in the foreclosure process* without showing requisite prejudice as required. . "We also note a plaintiff in a suit for wrongful foreclosure has generally been required to demonstrate the alleged imperfection in the foreclosure process was prejudicial to the plaintiff's interests. (*Melendrez v. D & I Investment, Inc., supra,* 127 Cal.App.4th at p. 1258, 26 Cal.Rptr.3d 413; *Knapp v. Doherty,* (2004) 123 Cal.App.4th at p. 86, fn. 4.)

Prejudice is not presumed from "mere irregularities" in the process. (*Fontenot v. Wells*

Fargo Bank, N.A. (2011) 198 Cal.App.4th 256, 272.) In addition, as the sale was completed, Plaintiff must also plead tender in order to have standing to set aside the sale. She does not.

Based on the foregoing, Moving Defendants' demurrer to the first cause of action is properly sustained.

C. Plaintiff's Second Cause of Action For Wrongful Foreclosure Fails

Plaintiff's Second Cause of Action for Wrongful Foreclosure is impermissibly conclusory as to Moving Defendants but generally premised on the application of California's Homeowners' Bill of Rights ("HBOR"). The Complaint alleges that the Notice of Default was statutorily deficient under HBOR. As argued both in the moving papers and above, the Notice of Default in connection with the foreclosure was recorded on June 23, 2011, well before HBOR was enacted in January 2013. (RJN, Ex. 12.)

As for the HBOR claims substantively, they are entirely boilerplate and conclusory as to Moving Defendants.

In her second cause of action, Plaintiff alleges, in conclusory fashion, that she submitted a complete loan modification to Wells Fargo long before the recordation of the NOTS. (SAC ¶ 82.) This conclusory statement is insufficient to state a claim without factual support. As stated in the moving papers, and not discussed in the opposition, Plaintiff's bald allegation that she submitted a "complete" loan modification – without any supporting factual allegations – is a conclusory statement, and the Court does not rely on such assertions in evaluating the sufficiency of Plaintiff's Complaint." (*Woodring v. Ocwen Loan Servicing, LLC,* 2013 WL 3558716 (C.D. Cal. July 18, 2014); *Stokes v. Citimortgage, Inc.*, 2014 WL 4359193 (C.D. Cal. Sept. 3, 2014.) Wells Fargo is not obligated to provide a written determination on a loan modification application unless the application is "complete". (Civ. Code § 2923.6(c).)

The opposition also fails to address the fact that Wells Fargo and Plaintiff did sign a loan modification December 2009. (RJN, Ex. 6.) Here, Plaintiff's borrower's prior loan modification triggers Civil Code Section 2923.6(g), which states as follows:

> (g) In order to minimize the risk of borrowers submitting multiple applications for first lien loan modifications for the purpose of delay, the mortgage servicer shall not be obligated to evaluate applications from borrowers who have already been

> evaluated or afforded a fair opportunity to be evaluated for a first lien loan modification prior to January 1, 2013, or who have been evaluated or afforded a fair opportunity to be evaluated consistent with the requirements of this section, unless there has been a material change in the borrower's financial circumstances since the date of the borrower's previous application and that change is documented by the borrower and submitted to the mortgage servicer.

However, Plaintiff does not disclose that she received a loan modification in December 2009 and was afforded a fair opportunity to be evaluated for a first lien modification. Based on the foregoing, Moving Defendants' demurrer to the second cause of action is properly sustained.

As with the 2923.6 theory, Plaintiff's allegations of wrongful foreclosure based on violation of Civil Code Section 2923.7 must fail as it is impermissibly conclusory. The cause of action simply alleges the requirements of the code section, but then alleges no facts to suggest who, how, or when Moving Defendants purportedly violated the requirements of Civil Code Section 2923.7. The HOBR claims are impermissibly boilerplate and conclusory as to Moving Defendants and the demurrer is properly sustained on that ground.

D. Plaintiff's Third Cause of Action for Fraud Must Fail

Plaintiff's third cause of action once again challenges the foreclosure based on (1) fraudulent inducement at origination and (2) on false mortgage assignment. The opposition reveals a fundamental misunderstanding of the mortgage servicing process. For example, the opposition's argument that "Wells Fargo never disclosed that they were not the lender authorized to grant a loan modification nor that in order to grant one they would have to purchase Plaintiffs' loan from the Trust 2007-7AX, at a financial loss" misses the point.

That a servicer is not the entity that actually grants a loan modification does not mean it is not the proper entity to review and process a loan modification on behalf of the investor. Indeed, loss mitigation activities are a common servicer activity. Thus, the argument that Wells Fargo would need to purchase the loan back from the trust in order to process a loan modification simply reveals a misunderstanding of the process. It does not state a claim for fraud. This flawed argument is also insufficient to toll the clear statute of limitations bar. The assignment in this case was recorded on June 26, 2009. (RJN, Ex. 3.) Accordingly, any purported fraud related to the assignment is barred by the applicable ***three year*** statute of limitations. [Code of Civil

Procedure section 338, subdivision (d) three-year] limitations period," governing fraud..] (*Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 607.)

Moving defendants accept the Opposition's argument that their fraud claim is not premised on the securitization of the loan. As stated in the moving papers, this theory would fail in any event.

The opposition fails to address the obvious flaw with the fraud claim – that Plaintiff agreed that the loan could be sold when she executed the deed of trust.

> **20. Sale of Note; Change of Loan Servicer; Notice of Grievance.** The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

(RJN, Ex. 1, ¶ 20.) Based on the foregoing, Plaintiff's fraud claim premised on the sale or assignment of the loan is simply contrary to California law and without legal merit. As Plaintiff agreed to this term as a condition to obtaining the loan, the Opposition's premise that the loan was somehow "modified" because it was transferred is without merit. Accordingly, the demurrer to the fraud claim is properly sustained.

E. The Fourth Cause of Action for Violation of Business and Professions Code § 17200

Plaintiff's UCL claim is based wholly on her other failed theories. Since those theories are simply wrong under California law, Plaintiff's UCL claim should be dismissed as well. (*Glenn K. Jackson Inc. v. Roe* (9th Cir. 2001) 273 F.3d 1192, 1203 [where a plaintiff's UCL claims are predicated on the viability of another claim—as they are here—if the underlying claims fail, so does the UCL claim]; *Castaneda v. Saxon Mortg. Servs, Inc.* (2010) 09-01124, 2010 WL 726903, at *7 [dismissing UCL claim "entirely derivative of the previously claim in the complaint"].) Plaintiff fails to state a predicate claim to animate the UCL. Here, as discussed above, each of the causes of action upon which the UCL claim might rely, are contrary to California law or deficiently pleaded. Accordingly, Plaintiff has not pleaded a predicate claim upon which her UCL

theory might rely. The Opposition's argument that defendants deliberately deceived Plaintiff by not revealing it had a conflict of interest in negotiating a loan modification is meritless. Simply because an investor chooses to delegate servicing responsibilities to another entity does not mean a conflict of interest exists between the servicer and the investor. Relatedly, that a servicer processes a loan modification application on behalf of an investor, does not mean that a loan modification will not ultimately be approved by the investor. Thus, the arguments presented in the opposition appear to reveal a fundamental misunderstanding of the role of a loan servicer. Simple misunderstanding of an entities role is insufficient to create a cause of action.

The remainder of the arguments presented in the opposition lack factual support and go beyond the scope of the Second Amended Complaint. Based on the foregoing authorities, the demurrer is properly sustained.

F. The Fifth Cause of Action for Intentional Infliction of Emotional Distress Fails

The SAC fails to allege Moving Defendants' outrageous conduct to support an IIED claim. Further, the SAC points to no conduct of Moving Defendants, other than the rejected, generalized and conclusory theories discussed herein. Plaintiff's theory that defendants had no right, title or interest in the property is premised upon the flawed assignment theory and is properly rejected. In addition, the SAC identifies no severe emotional distress which Plaintiff allegedly suffered that was proximately caused by Moving Defendants. The demurrer is properly sustained as a result.

G. Plaintiff's Sixth Cause of Action to Set Aside Trustee's Sale Fails

As a general rule, a debtor cannot set aside the foreclosure based on irregularities in the sale without also alleging tender of the amount of the secured debt. [Citations.]" (*Shuster v. BAC Home Loans Servicing, LP* (2012) 211 Cal.App.4th 505, 512.) In the opposition, Plaintiff argues the sale should be set aside because of purported fraud. However, the arguments in the demurrer address Plaintiffs deficient and conclusory fraud theories.

Moreover, as discussed throughout, California law rejects Plaintiff's contention that the sale is void, as alleged. (SAC ¶ 147.) The court should properly disregard this contention, which is central to the allegations running through the entire SAC. Based on the foregoing, the demurrer is properly sustained.

H. The Seventh Cause of Action for Slander of Title Fails

California Civil Code section 47's privilege "bars all tort causes of action except malicious prosecution." (*Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 960.) In particular, the privilege bars a slander of title claim based on the recordation of the privileged document. (*Albertson v. Raboff* (1956) 46 Cal.2d 375, 378-81.) Under Civil Code section 2924(d), the act on which the Plaintiff bases her slander of title claim is privileged under section 47. Here, Plaintiff alleges no facts raising any inference of malice.[1] In fact, the cause of action again appears based Plaintiff's erroneous theory that the foreclosure process was flawed because of the assignment and that the subsequent sale of the property was void as a result. These allegations are simply contrary to California law as explained herein. Plaintiff has not pled malice simply by asserting a conclusory violation of California Civil Code Section 2923.5. As Plaintiff has no standing to challenge the assignment, the slander of title theory must also fail. Accordingly, the slander of title cause of action states no claim on which relief may be granted and the demurrer is properly sustained.

I. Plaintiff's Eighth Cause of Action for Quiet Title Fails

"It is settled in California that a mortgagor cannot quiet his title against the mortgagee without paying the debt secured." (*Shimpones v. Stickney*, (1934) 219 Cal. 637, 649; see *Mix v. Sodd*, (1981) 126 Cal.App.3d 386, 390.) The opposition does not address this cause of action an and the court may presume it abandoned

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[1] *Kachlon v. Markowitz*, 168 Cal.App.4th 316 (2008) holds that recordation of the notices of default and sale are fall within only the conditional privilege of Civil Code § 47(c), not the absolute privilege of §47(b). A *factually supported* averment of malice is sufficient to avoid dismissal based on privilege.

III. CONCLUSION

Plaintiff's SAC fails to state a cause of action as against Moving Defendants for all of the reasons discussed above. Moreover, each claim is independently deficient and subject to a demurrer. For the foregoing reasons, Moving Defendants' demurrer should be sustained and judgment entered in favor of Moving Defendants.

DATED: June 27, 2016

SEVERSON & WERSON
A Professional Corporation

By: _____
Brian S. Whittemore

Attorneys for Defendants
WELLS FARGO BANK, N.A. dba AMERICA'S SERVICING COMPANY and U.S. BANK, N.A. AS TRUSTEE

PROOF OF SERVICE
Regina Manantan v. Wells Fargo Bank, N.A., et al.
San Mateo County Superior Court Case No. CIV 535902

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is One Embarcadero Center, Suite 2600, San Francisco, CA 94111.

On June 27, 2016, I served true copies of the following document(s):

REPLY IN SUPPORT OF DEMURRER TO PLAINTIFF'S SECOND AMENDED COMPLAINT

on the interested parties in this action as follows:

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Nancy Lee, Esq. McCarthy & Holthus, LLP 1770 4th Avenue San Diego, CA 92101	Attorneys for Defendant Quality Loan Service Corporation Telephone: (619) 685-4800 Email: nll@mccarthyholthus.com

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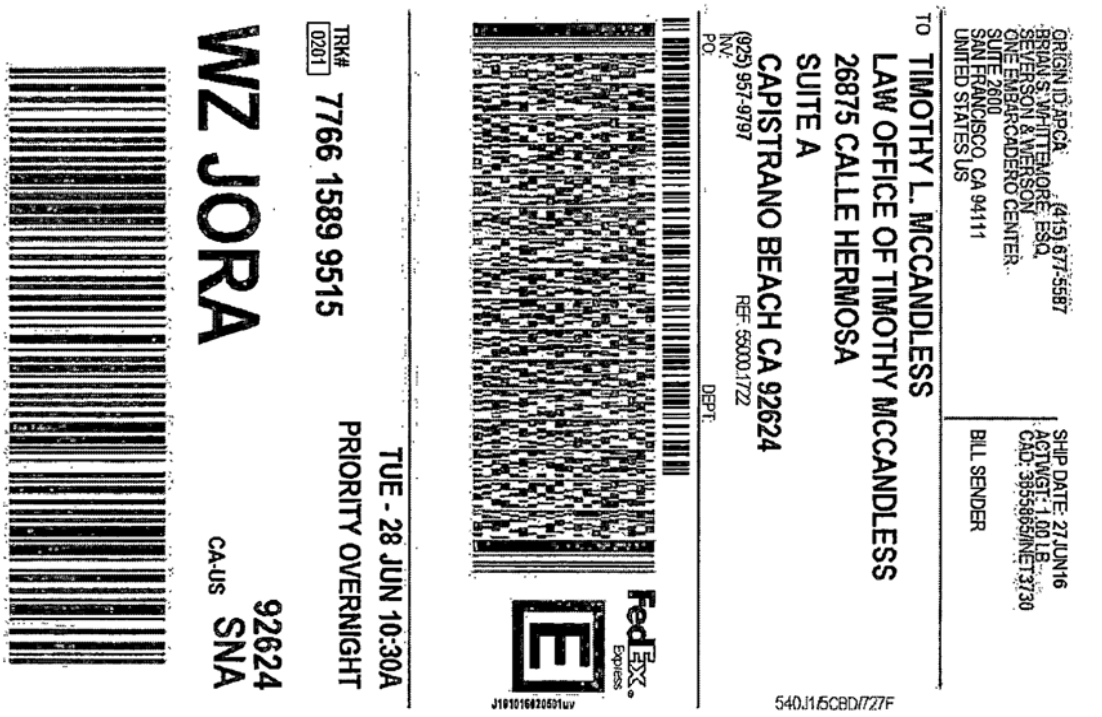
Executed on June 27, 2016, at San Francisco, California.

Chilaren L. Kada



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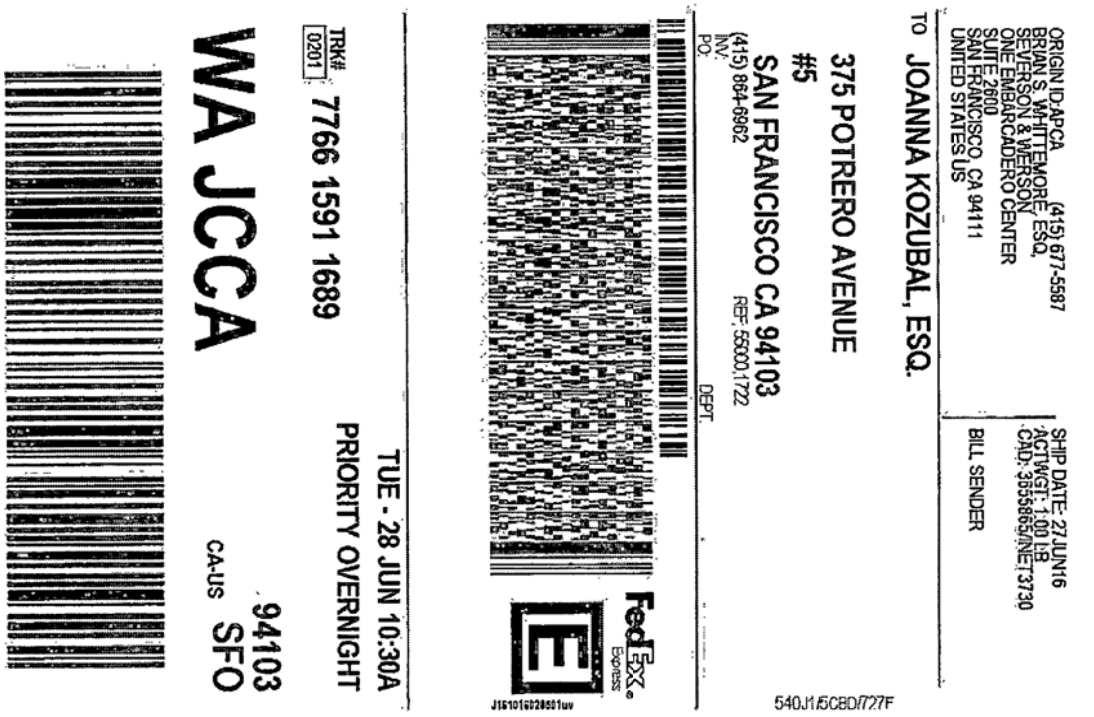

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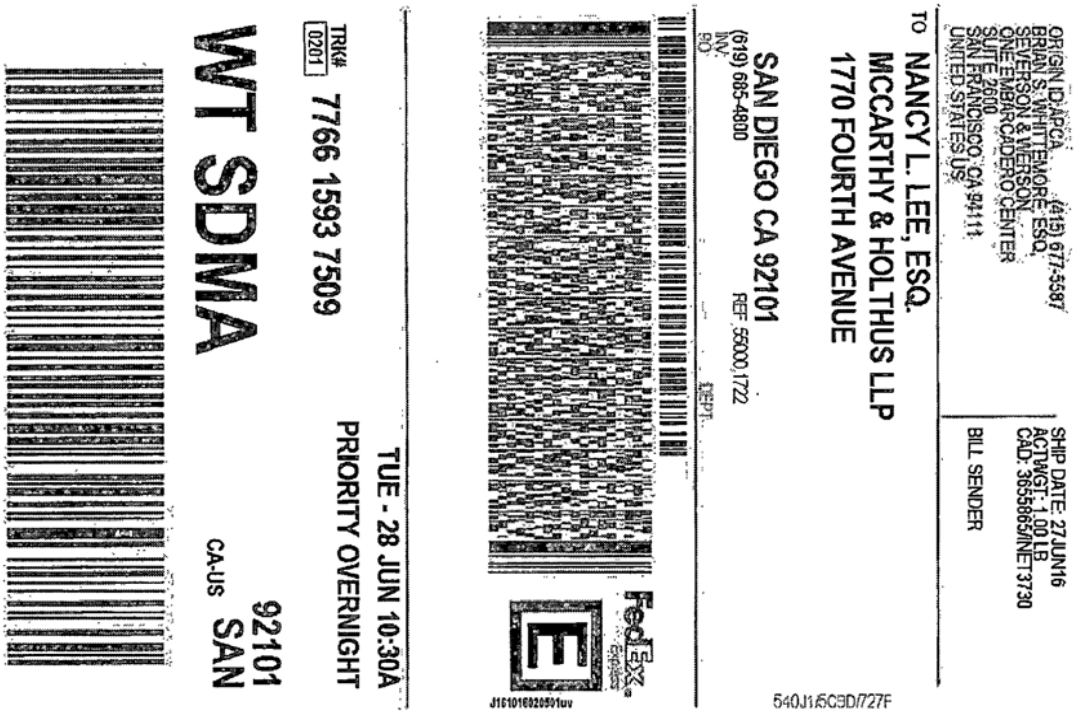

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