

1 JOHN M. SORICH (CA Bar No. 125223)  
jsorich@adorno.com  
2 CHRISTOPHER YOO (CA Bar No. 169442)  
cyoo@adorno.com  
3 ADORNO YOSS ALVARADO & SMITH  
A Professional Corporation  
4 1 MacArthur Place, Suite 200  
Santa Ana, California 92707  
5 Tel: (714) 852-6800  
Fax: (714) 852-6899

6 Attorneys for Defendant  
7 AMERICA'S SERVICING COMPANY

8 **UNITED STATES BANKRUPTCY COURT**  
9 **NORTHERN DISTRICT OF CALIFORNIA**

10 In re

11 AIDA AGUSTINA SANCHEZ aka AIDA  
12 A. VARELA and WUOLFRAN JULIO  
13 SANCHEZ,

14 Debtor.

15  
16 AIDA AGUSTINA SANCHEZ and  
17 WUOLFRAN JULIO SANCHEZ,

18 Plaintiff,

19 v.

20 AMERICA'S SERVICING COMPANY and  
21 LENOX FINANCIAL MORTGAGE  
CORPORATION.

22 Defendants.  
23  
24

Case No.: 08-41999 EDJ-13

Adversary Case No. 08-04226

(Chapter 13)

**MOTION TO DISMISS COMPLAINT;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT**

Date: January 5, 2009

Time: 10:00 a.m.

Crtrm: 215

25 **TO THE HONORABLE EDWARD D. JELLEN, UNITED STATES BANKRUPTCY JUDGE,**  
26 **PLAINTIFF, PLAINTIFFS' ATTORNEY OF RECORD, AND ALL INTERESTED**  
27 **PARTIES:**

1 Defendant America's Servicing Company ("ASC") submits the following Motion to Dismiss  
2 the Complaint for Failure to State a Claim for Relief ("Motion") against plaintiffs Aida Agustina  
3 Sanchez And Wuolfran Julio Sanchez (collectively "Plaintiffs").

4 **I. SUMMARY OF MOTION**

5 In the Adversary Complaint filed under Chapter 13, Plaintiffs essentially seek a  
6 determination that the entirety of a second lien against the property located at 3225 Oso Grande  
7 Way, Antioch, California ("Subject Property") should be stripped on the grounds that the fair market  
8 value of the Subject Property is less than the first lien against the Property.

9 Plaintiffs assert two causes of action against ASC for "Declaratory Relief to Determine an  
10 Interest in Property" and "Declaratory Relief to Determine Status of Claim." Both causes of action  
11 for Declaratory Relief asserted against ASC fail for one basic reason: ASC holds no interest, nor  
12 does it assert a claim, in the second deed of trust securing the Subject Property. Thus, there is no  
13 controversy between ASC and Plaintiffs, and the Motion to Dismiss must be granted without leave  
14 to amend.

15 **II. SUMMARY OF RELEVANT FACTS**

16 Plaintiffs obtained two loans secured by deeds of trust encumbering the Subject Property.  
17 Plaintiffs obtained a first loan in the amount of \$568,000.00 ("First Loan"), which is secured by a  
18 deed of trust ("First DOT") encumbering the Subject Property that was recorded with the Contra  
19 Costa County Recorder's Office on or about March 20, 2006 as instrument number 2006-0084418-  
20 00. *See*, Request for Judicial Notice ("RJN"), Exhibit 1. Lenox Financial Mortgage Corp. ("Lenox")  
21 is identified as the Lender, LSI is identified as the Trustee, and Mortgage Electronic Registration  
22 Systems, Inc. ("MERS") is identified as the Beneficiary. *Id.*

23 Plaintiffs obtained a second loan in the amount of \$142,000.00 ("Second Loan"), which is  
24 also secured by a deed of trust ("Second DOT") encumbering the Subject Property that was recorded  
25 with the Contra Costa County Recorder's Office on or about March 20, 2006 as instrument number  
26 2006-0084419-00. *See*, RJN, Exhibit 2. Lenox is identified as the Lender, LSI is identified as the  
27 Trustee, and MERS is identified as the Beneficiary. *Id.*

1 **III. THE STANDARD FOR A MOTION TO DISMISS**

2 A motion to dismiss pursuant to Rule 7012(b)(6) of the Federal Rules of Bankruptcy  
3 Procedure (“FRBP”) tests the legal sufficiency of the claim alleged in the complaint. Thus, a motion  
4 to dismiss under may be brought where a plaintiff fails to state a claim upon which relief can be  
5 granted. Federal Rules of Civil Procedure (“FRCP”) Rule 12(b)(6). While a complaint attacked by  
6 a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a Plaintiffs' obligation  
7 to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a  
8 formulaic recitation of a cause of action's elements will not do. *Bell Atlantic Corp. v. Twombly*, 127  
9 S.Ct. 1955, 1959 (2007). The “[f]actual allegations must be enough to raise a right to relief above  
10 the speculative level on the assumption that all of the complaint's allegations are true.” *Id.*

11 **IV. PLAINTIFFS' CLAIMS FOR DECLARATORY RELIEF ASSERTED AGAINST**  
12 **ASC MUST BE DISMISSED BECAUSE ASC HAS NO INTEREST IN THE**  
13 **SUBJECT PROPERTY**

14 Plaintiffs assert two claims for declaratory relief against ASC. In the first claim for relief,  
15 Plaintiffs seeks a declaration of the "actual rights and obligations of the parties" and concerning the  
16 "validity, nature and extent of Defendants' interest in the Property." *See*, Complaint, ¶ 20. In the  
17 second claim for relief, Plaintiffs seek a determination "as to whether Defendants' claim against  
18 Plaintiffs shall be allowable as secured or unsecured." *See*, Complaint, ¶ 26. Both causes of action  
19 fail as asserted against ASC because ASC holds no interest in the First DOT or Second DOT  
20 encumbering the Subject Property. *See*, RJN, Exhibits 1-2.

21 Section 1060, of the *Code of Civil Procedure*, sets forth the requirements for declaratory  
22 relief and states in relevant part:

23 “Any person interested under a written instrument, excluding a will or a  
24 trust, or under a contract, or who desires a declaration of his or her rights or  
25 duties with respect to another, ..., may, in cases of actual controversy  
26 relating to the legal rights and duties of the respective parties, bring an  
27 original action or cross-complaint in the superior court for a declaration of

1           his or her rights and duties in the premises...” (Emphasis added.)

2           The court can refuse to issue a judicial declaration in a case in which a judicial determination  
3 or declaration is not necessary or proper. CCP § 1061. Thus, an essential element of a cause of  
4 action for declaratory relief is that the parties have “rights or duties” with respect to property and the  
5 existence of an actual and present controversy must be pleaded specifically. General statements  
6 about controversy are useless. *Alturas v. Gloster*, 16 Cal.2d 46, 48 (1940). An actual controversy  
7 involving justiciable questions relating to the rights or obligations of a party must exist. *See*,  
8 *Tiburon v. Northwestern Pacific Railroad Co.*, 4 Cal.App.3d 160, 170 (1970); *Wilson v. Transit*  
9 *Authority*, 199 Cal.App.2d at 723-724 (1962).

10           In both causes of action for declaratory relief, Plaintiffs essentially seek declaratory relief as  
11 to the duties and obligations with regard to the Second Loan. *See*, Complaint ¶¶ 16-17; 25-26.

12           A declaration concerning the purported duties and obligations between ASC and Plaintiffs  
13 regarding the Second Loan is neither necessary nor proper for one simple reason: ASC does not  
14 have, nor does it claim, an interest in the Subject Property. As the recorded documents indicate,  
15 ASC is not the lender, beneficiary, or trustee pursuant to the Second DOT, and therefore had no  
16 interest in the Second Loan or Second DOT. *See*, RJN, Exhibits 1-2. Indeed, a review of the Second  
17 DOT indicates that the lender is Lenox, the trustee is LSI, and the beneficiary is MERS. *Id.* As  
18 such, no controversy exists between ASC and Plaintiffs necessitating a determination or declaration  
19 of the duties and obligations arising from the Second Loan.

20  
21  
22  
23  
24  
25 ///  
26 ///  
27 ///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

V. CONCLUSION

For the foregoing reasons, ASC respectfully requests that the Court grant the Motion to Dismiss the Complaint in its entirety.

DATED: November 14, 2008

ADORNO YOSS ALVARADO & SMITH  
A Professional Corporation

By: /s/ S. Christopher Yoo  
JOHN M. SORICH  
CHRISTOPHER YOO  
Attorneys for Defendant  
AMERICA'S SERVICING COMPANY

1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF ORANGE**

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

5 On November 14, 2008, I served the foregoing document described as **MOTION TO  
6 DISMISS COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES** on the  
interested parties in this action.

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

9 **SEE ATTACHED SERVICE LIST**

10  **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.

11 I am "readily familiar" with the firm's practice of collection and processing correspondence  
12 for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary  
13 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.

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

16  **BY FACSIMILE MACHINE:** I Tele-Faxed a copy of the original document to the above  
facsimile numbers.

17  **BY OVERNIGHT MAIL:** I deposited such documents at the Overnite Express or Federal  
18 Express Drop Box located at 1 MacArthur Place, Santa Ana, California 92707. The envelope  
was deposited with delivery fees thereon fully prepaid.

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

20  (State) I declare under penalty of perjury under the laws of the State of California that the  
21 foregoing is true and correct.

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

24 Executed on November 14, 2008, at Santa Ana, California.

25   
26 Rhonda K. White

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**SERVICE LIST**

Marlene G. Weinstein, Esq.  
Law Office of Marlene G. Weinstein  
1111 Civic Drive, Suite 380  
Walnut Creek, CA 94596

(925) 942-5100-telephone  
(925) 933-3801-facsimile

**Attorneys for Plaintiffs,  
Aida A. Sanchez and Wuolfran J. Sanchez**