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Co-Counsel for Plaintiff/Counterclaim Defendant Bank of America, N.A. and Counsel for Third-Party Defendants Federal National Mortgage Association and Mortgage Electronic Registration Systems Inc.

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	:
	: SUPERIOR COURT OF NEW JERSEY
	: CHANCERY DIVISION
	: WARREN COUNTY
	:
BANK OF AMERICA, N.A.,	:
	: DOCKET NO.: F-003595-17
Plaintiff	:
	:
	: <u>CIVIL ACTION</u>
v.	:
	: ORDER
JOSEPH H. LAU AND RAQUEL R. LAU, et al.	:
	:
Defendant(s).	:
	:
	:
	:
	:
	:
	:
_____	X
	:
JOSEPH H. LAU AND RAQUEL R. LAU, et al.	:
	:
Third-Party Plaintiffs.	:
v.	:
	:
	:
KML LAW FIRM, FEDERAL NATIONAL	:
MORTGAGE ASSOCIATION (FNMA),	:
MERSCORP HOLDINGS, INC./MERS, et al.	:
	:
Third-Party Defendants.	:
	:
	:
_____	X

THIS MATTER, being opened to the Court by Winston & Strawn LLP, attorneys for Plaintiff/Counterclaim Defendant Bank of America, N.A. (“BANA”) and Third-Party

Defendants Federal National Mortgage Association (“FNMA”) and Mortgage Electronic Registration Systems Inc. (“MERS”, and together with BANA and FNMA, “Counterclaim/Third Party Defendants”), by way of a Motion to Dismiss the Counterclaims and Third-Party Complaint of Defendants/Counterclaimants/Third-Party Plaintiffs Joseph and Raquel Lau (“Defendants”) for failure to state a claim upon which relief may be granted; and the Court having considered the papers submitted in support of, and opposition to, said motion; and for good cause shown,

IT IS on this __26th____ day of ___May_____, 2017,

ORDERED, as follows:

1. Counterclaim/Third Party Defendants’ Motion to Dismiss is hereby granted.
2. Defendant’s Counterclaims and Third-Party Complaint are hereby dismissed with prejudice.
3. A copy of this Order shall be served on all Counsel within seven (7) days of the date hereof.

/S/ YOLANDA CICCONE, A.J.S.C.

Hon. Yolanda Ciccone, A.J.S.C.

Please see attached letter opinion.

RECORD NOTATION

X	On _____, 2017, oral findings of fact and conclusions of law were made by this Court.
	On __May 26, 2017, written findings of fact and conclusions of law were made by this Court.

The Court did not make oral or written findings. The Court concluded that no explanation is necessary or appropriate.

The Court did not make oral or written findings. Appended hereto is a written statement of reasons by the Court for the entry of this Order.

This motion was opposed.

This motion was unopposed.

The written form of Order is submitted pursuant to R. 1:6–2(a) and R. 4:42–1(c).

**SUPERIOR COURT OF NEW JERSEY
SOMERSET, HUNTERDON & WARREN COUNTIES
VICINAGE 13**

**YOLANDA CICCONE
ASSIGNMENT JUDGE**



**SOMERSET COUNTY COURT HOUSE
P.O. BOX 3000
SOMERVILLE, NEW JERSEY 08876
(908) 231-7069**

May 26, 2017

Ms. Heather Saydah, Esq.
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Mr. Joseph H. Lau
472 State Route 173
Stewartsville, NJ 08886

**RE: Bank of America, N.A. v. Lau
Docket No.: SOM-F-3595-17**

Dear Counsel,

This letter represents this Court's Opinion of its May 26, 2017, Order granting Third Party Defendant's MERSCORP Holdings Inc.'s Motion to Dismiss the Third-Party Complaint of Defendants/Third-Party Plaintiffs Joseph and Raquel Lau with Prejudice for Failure to State a Claim. Please serve a copy of this letter upon all parties within seven (7) days of receipt.

On July 31, 2006, Defendant Joseph Lau executed to Countrywide Bank, N.A. a note for a loan in the amount of \$304,000.00. To secure payment on the Note, Defendants Joseph and Raquel Lau executed to MERS, as mortgagee solely in its capacity as nominee for Countywide, a mortgage dated July 31, 2006, on the property located at 472 State Route 173 Stewartsville, New Jersey. The Mortgage was duly recorded on August 7, 2006 in the Office of the Clerk of Warren County in Book 4480, Page 248 of Mortgages for said County.

On December 3, 2012, the Mortgage was assigned by MERS, solely as nominee for Countrywide to Bank of America, N.A. successor by merger to BAC Home Loan Servicing, LP f/k/a Countrywide Home Loans Servicing, LP. The Assignment was recorded on December 12, 2012 in the Office of the Clerk of Warren County, in Book 775, Page 206.

On January 1, 2010, Defendants defaulted on the Note by failing to make the required regularly schedule monthly payment. Pursuant to the terms of the Note and Mortgage, BANA commenced judicial foreclosure proceedings by filing this action in the Superior Court of New Jersey on February 13, 2017. On March 21, 2017, Defendants filed the Counterclaims/Third Party Complaint asserting causes of action for failure to comply with the New Jersey Fair Foreclosure Act, violations of the Fair Debt Collection Practices Act, violations of Truth in Lending Act, Real Estate Settlement Procedures Act, Consumer Fraud Act, and quiet title.

Defendants' claims have also been the subject of other actions in various federal courts. On October 6, 2009, Defendants filed for bankruptcy relief under Chapter 13 in the United States Bankruptcy Court for the District of New Jersey. On August 19, 2014, Defendants filed an action in the Superior Court of New Jersey. Less than a month later, on September 8, 2014, Defendants filed an adversary complaint in the Bankruptcy Proceeding. Both the Adversary Proceeding and the State Court Action alleged, *inter alia*, fraud, perjury, slander of titled, and sought quiet title to the Property.

On October 30, 2014, the state court issued an opinion dismissing without prejudice all causes of action in the State Court, on comity grounds, leaving the Bankruptcy Court to decide the Adversary Complaint. On August 10, 2015, the Bankruptcy Court issued an order dismissing the Adversary Proceeding, with prejudice. Defendants appealed, and the District Court affirmed the Bankruptcy Court's ruling on February 5, 2016. Defendants appealed the District Court's ruling and the Third Circuit Court of Appeals affirmed the District Court's ruling on March 27, 2017.

MERSCORP submits the Third-Party Complaint as to MERSCORP should be dismissed because it fails to state a legally cognizable claim against MERSCORP because MERSCORP is not a proper defendant – it is an entity with no ties to the Loan.

MERSCORP contends it is not a proper third-party Defendant in this action. MERS and MERSCORP are two separate and distinct entities. See Smith v. Bank of Am., N.A., 2013 WL 4735632, *3 (W.D. Mo. Sept. 3, 2013). MERSCORP indicates while MERS generally serves as mortgagee in the land records and served, at one time, as mortgagee of the relevant mortgage, MERSCORP never held an interest in the relevant mortgage or loan at issue. In fact, MERSCORP is not a party to any agreement with the Laus nor does MERSCORP appear as a party on the assignment.

MERSCORP argues the Laus present no basis for any recovery against MERSCORP in the Third-Party Complaint. MERS is a wholly-owned subsidiary of MERSCORP Holdings, Inc., a private stock corporation whose shareholders and the users of MERS System include originating lenders and secondary market investors that use its services. MERSCORP Holdings, Inc. owns and operates the MERS System. Thus, MERSCORP submits while

MERS was a party to the mortgage instrument, MERSCORP was not. MERSCORP contends the Laus cannot demonstrate they are entitled to any relief against MERSCORP because it never had any rights in the mortgage, never assigned the mortgage, never received an assignment of the mortgage, never filed nor were a party in any document identified in the Third-Party Complaint, nor did MERSCORP in any way participate in the foreclosure. Thus, MERSCORP contends all claims against it must be dismissed.

This Court finds Third Party Defendant's MERSCORP Holdings Inc.'s Motion to Dismiss the Third-Party Complaint of Defendants/Third-Party Plaintiffs Joseph and Raquel Lau with Prejudice is granted.

Pursuant to R. 4:6-2:

Every defense, legal or equitable, in law or fact, to a claim for relief in any complaint, counterclaim, cross-claim, or third-party complaint shall be asserted in the answer thereto, except that the following defenses may at the option of the pleader be made by motion, with briefs: (a) lack of jurisdiction over the subject matter, (b) lack of jurisdiction over the person, (c) insufficiency of process, (d) insufficiency of service of process, (e) failure to state a claim upon which relief can be granted, (f) failure to join a party without whom the action cannot proceed, as provided by R. 4:28-1. If a motion is made raising any of these defenses, it shall be made before pleading if a further pleading is to be made. No defense or objection is waived by being joined with one or more other defenses in an answer or motion.

PRESSLER & VERNIERO, Current N.J. COURT RULES (GANN).

The standard governing a motion to dismiss pursuant to R. 4:6-2(e) is to examine the legal sufficiency of the facts alleged on the face of the complaint. See Rieder v. Department of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987). The test for determining the adequacy of a pleading is whether a cause of action is suggested by the facts. Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988). On motion made pursuant to R. 4:6-2(e), the inquiry is confined to a consideration of the legal sufficiency of the alleged facts apparent on the face of the challenged claim. The Court may not consider anything other than whether the complaint states a cognizable cause of action. For this purpose, all facts alleged in the Complaint and legitimate inferences drawn there from are deemed admitted. Rieder, supra, 221 N.J. Super. at 552. Therefore, every reasonable inference is to be granted in favor of the non-moving party, and such motions are normally granted without prejudice. F.G. v. MacDonnell, 150 N.J. 550, 556 (1997). Additionally, if the motion to dismiss for failure to state a claim raises matters outside the pleading, the motion shall then be treated as one for summary judgment and disposed of as provided by R. 4:46.

When considering a motion to dismiss, all well pleaded allegations of the Complaint are accepted as true and the matter is to be resolved based on the pleadings themselves. Holmin v. TRW, Inc., 330 N.J. Super. 30 (App. Div. 2000), aff'd, 167 N.J. 205. While legitimate inferences are to be drawn in favor of the plaintiff, court need not credit a complaint's bald assertions or legal conclusions when deciding a motion to dismiss. Novack v. Cities Services Oil Co., 149 N.J. Super. 542 (Law Div. 1977), aff'd, 159 N.J. Super. 400 (App. Div.), certif. denied, 78 N.J. 396 (1978); see also, Rieder, supra, 221 N.J. Super. at 552. Furthermore, dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted. Id.

The Court finds that based upon the positions espoused by the Third-Party Defendant MERSCORP in this matter that the Defendant's Third Party Complaint will be dismissed.

The uncontradicted facts before the Court indicate that MERS and MERSCORP are two separate and distinct entities. MERS is a wholly owned subsidiary of MERSCORP Holdings, Inc., a private stock corporation whose shareholders and the users of MERS System include originating lenders and secondary market investors that use its services. MERSCORP Holdings, Inc. owns and operates the MERS System. In effect, MERSCORP Holdings and MERS operates in a parent-subsidary relationship.

A parent-subsidary relationship generally is, by itself, insufficient to impute liability to the parent for alleged actions of its subsidiary. See e.g., United States v. Bestfoods, 524 U.S. 51, 61-63 (1998). This Court finds Defendants' allegations regarding actions taken by MERS are insufficient to establish liability as to MERSCORP. Moreover, this Court highlights that MERSCORP never had any rights in the mortgage, never assigned the mortgage, never received an assignment of the mortgage, never filed nor were a party in any document identified in the Third-Party Complaint, nor did MERSCORP in any way participate in the foreclosure. Thus, MERSCORP is not a proper Defendant in this matter. Accordingly, Third Party Defendant MERSCORP Holdings' Motion to Dismiss the Third Party Complaint of Defendants/Third-Party Plaintiffs Joseph and Raquel Lau is granted.

The Defendants oppose the Plaintiff's ration by attacking various exhibits that seem to be provided to indicate that MERSCORP in fact (1) exists as an entity; (2) is an entity authorized to do business in New Jersey; and (3) that no foreclosure action can be filed in the name of MERS. The Defendants did not present any brief or certification (certified facts) in support of their position. Nor is any certification provided to authenticate or provide a basis for the submission of the various random and unidentified documents provided by the Defendants.

Even if the Court were to ignore the significant procedural deficiencies in the Defendants' submission, the information that is provided by the Defendants does not alter the result. First, MERSCORP does not deny that it is an entity,

but the basis for its Motion is that it is not an entity that is a proper Defendant in this case. The Court agrees.

Second, the fact that MERSCORP may be authorized to do business in New Jersey is also not material to the issue in this case.

Third, with regards to any prohibition of MERS to be a plaintiff in a foreclosure action, (1) the document provided by Defendants is unidentified and has no legal effect in the context of this Motion; (2) MERSCORP is not a Plaintiff in this matter in any event, so the (apparent) allegation is immaterial.

Fourth, any affirmative claim that the Laus may have against MERSCORP is not germane to this foreclosure action.

Pursuant to R. 4:64-5, only “germane” claims, which include such actions as those challenging the validity of the Mortgage and the Note, see Bank of New York v. Ukpe, No. 1710-09, 2009 WL 4895253 at *7 (D.N.J. Dec. 9, 2009), and claims “arising out of the mortgage transaction,” Leisure Technology-Northeast, Inc. v. Klingbeil Holding Co., 137 N.J. Super. 353, 356 (App. Div. 1975), may be brought as counterclaims in a foreclosure action. Joining other claims in a foreclosure action that do not specifically arise out of the mortgage transaction is not permitted as the claims are not “germane”. Great Falls v. Pardo, 263 N.J. Super. 388 (Ch. Div. 1993); Thomas & Cheryl Kziol, Inc. v. LaSalle Nat. Bank, A-3818-07T2, 2010 WL 1189300 at *3 (App. Div. March 29, 2010).

To be “germane”, the claims contained within the Counterclaims should be “closely akin” to and arising out of the transactions that gave rise to the foreclosure cause of action. Our Rules recognize that as a general rule that foreclosure matters should not be joined with matters that are not germane to the foreclosure transaction itself. R. 4:64-5. The Rule specifically provides that the entire controversy doctrine does not apply to non-germane claims since they may not be joined with the foreclosure action. The cases that interpret germane and non-germane claims suggest that the term “germane” should be rather narrowly construed so as to allow foreclosure actions to proceed as a streamlined and specialized cause of action that is based upon narrow issues that are not to be encumbered by other disputes between the parties. See Family Sav. Bank v. De Vincentis, 284 N.J. Super. 503, 512 (App. Div. 1995) (non-germane claims include claims on the instrument of obligation evidencing the debt); RTC v. Berman Industries, 271 N.J. Super. 56 (Law Div. 1993) (non-germane claims include claims arising out of guarantees of mortgage note); Sun NLF Ltd. Partnership v. Sasso, 313 N.J. Super. 546 (App. Div.), certif. den. 156 N.J. 424 (1998) (allegation of bank's breach of material term of transaction may constitute a germane claim). See also, illustrative of the entire controversy doctrine's inapplicability, Luppino v. Mizrahi, 326 N.J. Super. 182, 184-185 (App. Div. 1999) (since a claim for unpaid rent cannot be joined in a mortgage foreclosure action, a later suit for rent is not barred by the entire controversy doctrine).

For all of the reasons set forth above, Third Party Defendant MERSCORP Holdings Inc.'s Motion to Dismiss the Third Party Complaint of Defendant/Third Party Plaintiffs pursuant to R. 4:6-2(e) is hereby **GRANTED**.

Very Truly Yours

/S/ YOLANDA CICCONE, A.J.S.C.
HON. YOLANDA CICCONE, A.J.S.C.