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9 UNITED STATES DISTRICT COURT  
10 CENTRAL DISTRICT OF CALIFORNIA  
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13 DONALD M. LUSNAK, on behalf of  
himself and all others similarly situated,

14 Plaintiffs,

15 v.

16 BANK OF AMERICA, N.A.; and DOES  
17 1 through 10, inclusive,

18 Defendants.  
19  
20

Case No.: 14-cv-01855-GHK (AJW)

**FIRST AMENDED COMPLAINT -  
CLASS ACTION**

- 1. **Violation of the California Unfair Competition Law (Cal. Bus. & Prof. Code § 17200, et seq.);**
- 2. **Breach of Contract**

**DEMAND FOR JURY TRIAL**

Complaint Filed: March 12, 2014  
Hon. George H. King

**I**

**INTRODUCTION AND STATEMENT OF FACTS**

25 1. This consumer fraud class action is based on Defendant Bank of America,  
26 N.A.’s (“Defendant” or “BofA”) direct, *per se* violation of California laws requiring a  
27 mortgage lender making loans secured by property located in California, to pay the  
28

1 borrower a minimum of 2% simple interest for money received in advance from the  
2 borrower for tax and insurance . BofA, like many mortgage lenders, require a large  
3 percentage of their borrowers to maintain an impound escrow account in connection with  
4 their mortgage. BofA collects in advance from their borrowers' money to pay the  
5 property tax and insurance on the property and places it in the escrow account. BofA  
6 then directly pays the property tax and insurance from the escrow account when it  
7 becomes due. These additional and significant deposits made by the mortgagor to  
8 maintain the escrow account, are the borrowers' funds in which mortgage lenders have  
9 use of the funds for investment, and therefore, California law requires that the mortgage  
10 lenders, including BofA pay at least 2% interest on the monies to the borrowers. Civil  
11 Code §2954.8(a) mandates that:

12 *Every financial institution that makes loans upon the security*  
13 *of real property* containing only a one- to four-family residence  
14 and located in this state or purchases obligations secured by  
15 such property and that receives money in advance for payment  
16 of taxes and assessments on the property, for insurance, or for  
17 other purposes relating to the property, *shall pay interest on the*  
18 *amount so held to the borrower. The interest on such amounts*  
19 *shall be at the rate of at least 2 percent simple interest per*  
20 *annum.* Such interest shall be credited to the borrower's  
21 account annually or upon termination of such account,  
22 whichever is earlier.

23 ....

24 *No financial institution subject to the provisions of this*  
25 *section shall impose any fee or charge* in connection with the  
26 maintenance or disbursement of money received in advance for  
27 the payment of taxes and assessments on real property securing  
28 loans made by such financial institution, or for the payment of  
insurance, or for other purposes relating to such real property,  
*that will result in an interest rate of less than 2 percent per*  
*annum being paid on the moneys so received.*

(Emphasis added.)

2. However, Defendant systematically and uniformly has adopted a policy to  
violate California law by refusing to pay the mandated interest to borrowers, thereby

1 enriching itself on the free use of borrowers’ escrow funds that Defendant earns interest  
2 on. This decision and policy is at odds with other mortgage lenders, such as Wells Fargo  
3 Bank, N.A. – BofA’s chief competitor and the largest mortgage originator in the U.S. –  
4 which does comply with California law and pays interest on impounded escrow money:

5 **“Does Wells Fargo pay interest on Escrow?”**

6 Yes. Wells Fargo pays interest on escrow in accordance with the Real  
7 Estate Settlement Procedures Act (RESPA) **and applicable state laws.**”  
8 (Ex. 1; Wells Fargo’s “Understand Your Escrow Account”, emphasis added.)  
9

10 3. When Plaintiff questioned the legality of BofA not paying interest in light of  
11 explicit California law prior to bringing the lawsuit, BofA seemed to rely on the  
12 operation of expired federal regulations for a position that this California law was  
13 preempted and unenforceable. For many years, some national banks have relied on the  
14 preemptive effects of regulations of the Office of Thrift Supervision, set forth in 12  
15 C.F.R. § 560.2(b)(6), and the Office of the Comptroller of Currency, set forth in 12  
16 C.F.R. §34.4(a)(6), which concluded generally that state laws were preempted for a  
17 number of banking devices, including “escrow accounts, impound accounts, and similar  
18 accounts”.

19 4. But with the passage of the Dodd-Frank Wall Street Reform and Consumer  
20 Protection Act (“the Act”) and its new federal preemption provision, the federal agencies  
21 and regulators must now make “case-by-case” analyses of a state’s laws (or substantively  
22 equivalent state laws) on a particular banking practice and their “impact on any national  
23 bank that is subject to that law” before issuing regulations preempting the state law. *See*  
24 12 U.S.C. § 25b(b). To the extent that federal regulators seek to preempt multiple states’  
25 laws, the regulators must also first consult with the Consumer Financial Protection  
26 Bureau (“Bureau”). *Id.* Congress has established an arduous path for the making of  
27 preemption determinations in an effort to discourage the OCC from making a large  
28 number of those determinations on an overbroad scale, in order to better protect the

1 interests of states and consumers. However, upon information and belief, the federal  
2 regulatory agencies have not issued such case-by-case analyses nor have they consulted  
3 with the Bureau to issue regulations mandating a blanket preemption of multiple states'  
4 laws. Therefore, national banks cannot rely on these antiquated and expired regulations,  
5 and the attempts of the agencies to reaffirm its prior broad preemption regulations  
6 without complying with the Act are unenforceable.

7 5. The fact that the Dodd-Frank Act had changed the landscape for all  
8 preemption regulations and that BofA could not rely on these prior regulations was made  
9 clear by a Department of Treasury letter to the OCC on June 27, 2011, which stated:

10 The notion that the new standard does not have any effect runs  
11 afoul of basic canons of statutory construction; it is also  
12 contrary to the legislative history, which states that Congress  
13 sought to “*revise[e]* the standard the OCC will use to preempt  
state consumer protection laws.”

14 6. Furthermore, a “State consumer financial law”, as defined by the preemption  
15 provision of the Act is one that “directly or indirectly discriminate[s] against national  
16 banks.” 12 U.S.C. § 25b(a)(2). However, the state law at issue here cannot be said to  
17 directly or indirectly discriminate against national banks, as it applies to all financial  
18 institutions that issue mortgages, whether organized under California or federal laws.  
19 Therefore, the state law cannot be deemed to be preempted.

20 7. Furthermore, this California statute cannot be said to prevent or significantly  
21 interfere with BofA ability to offer mortgages to borrowers. The fact that a large number  
22 of mortgage lenders, including the market leader Wells Fargo pays interest, supports that  
23 the payment of interest on these escrow accounts does not rise to the level of preventing  
24 or significantly interfering with BofA’s ability to offer mortgages to borrowers.

25 8. Moreover, the Dodd-Frank Act further directly and specifically expresses a  
26 policy that consumers should retain the interest gained on their escrow accounts.  
27 Congress has mandated that “[i]f prescribed by applicable State or Federal law, each  
28 creditor shall pay interest to the consumer on the amount held in any impound, trust, or

1 escrow account that is subject to this section in the manner as prescribed by that  
2 applicable State or Federal law.” 15 U.S.C. § 1639d(g)(3). This provision makes explicit  
3 that Congress intent was permit states to enact and enforce laws that require mortgage  
4 lenders to pay interest on impound accounts.

5 9. This requirement is in line with regulations of the United States Department  
6 of Housing and Urban Development (“HUD”), which state that: “[w]here escrow funds  
7 are invested, the net income derived from this investment must be passed on to the  
8 mortgagor in the form of interest... in compliance with any state and/or regulatory  
9 agency requirements governing the handling and/or payment of interest earned on a  
10 mortgagor’s escrow account.” HUD Handbook 4330.1, Rev-5, §2-5. As the Act does  
11 not preempt state laws that afford “greater protection” than federal finance laws (12  
12 U.S.C. § 5551(a)), BofA is now required to comply with California law.

13 10. Plaintiff Donald M. Lusnak (“Plaintiff”) entered into mortgage contracts  
14 with Defendant, wherein, based on the express terms of the contracts, he was required to  
15 deposit funds into an escrow account and BofA would be required to pay interest on the  
16 escrow if applicable laws so required. The boilerplate, adhesive and nonnegotiable terms  
17 of the mortgage agreements drafted by Defendant included the following:

18 **4. Escrow Account...** Borrower shall pay Lender the Funds  
19 for Escrow Items unless Lender waives Borrower’s obligation  
20 to pay the Funds for any or all Escrow Items....

21 Unless...Applicable Law requires interest to be paid on the  
22 [escrow] Funds, Lender shall not be required to pay Borrower  
any interest or earnings on the Funds.

23 ....

24 **17. Governing Law; Severability; Rules of Construction.**

25 This security shall be governed by federal law and the law of  
26 the jurisdiction in which the Property is located. All rights and  
27 obligations contained in this Security Instrument are subject to  
28 any requirements and limitations of Applicable Law.... In the  
event that any provisions of this Security Instrument or the  
Note conflicts with Applicable Law, such conflicts shall not

1 affect other provisions of this Security Instrument or the Note  
2 which can be given effect without the conflicting provision.

3 The home loan modification he received in 2011 modified the amount of his escrow  
4 account requirements, but the obligations that the parties must comply with state and  
5 federal law remains.

6 11. Therefore, Plaintiff has continuously deposited funds into his escrow  
7 account which are due every month in an amount that was often more than \$250. But he  
8 has never received the interest accrued on his funds maintained in the escrow account  
9 back from Defendant, and Defendant has expressly refused to pay Plaintiff interest on  
10 these funds as demanded by Plaintiff prior to his filing the lawsuit.

11 12. Therefore, Plaintiff, for himself and all others similarly situated (*i.e.*, the  
12 members of the Plaintiff Class described and defined within this Complaint), brings this  
13 action for restitution and reimbursement, equitable injunctive relief and declaratory relief,  
14 pursuant to the California Unfair Competition Laws (“UCL”), California Business and  
15 Professional Code §17200, *et seq.*; and breach of contract. For this purpose, Plaintiff  
16 herein alleges as follows:

17 **II**  
18 **JURISDICTION AND VENUE**

19 13. This Court has personal jurisdiction over the Defendant because Defendant  
20 has conducted and continues to conduct business in the State of California, and because  
21 Defendant has committed the acts and omissions complained of herein in the State of  
22 California.

23 14. Venue as to Defendant is proper in this judicial district. BofA is one of the  
24 largest mortgage lenders operating in this district, has branches throughout this district,  
25 and many of Defendant’s acts complained of herein occurred in this district.

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**III**  
**THE PARTIES**

15. Plaintiff Donald M. Lusnak is a resident and citizen of the city of Palmdale, California. He purchased a new house in Palmdale on or about July 2008, and simultaneously entered into a home loan agreement with Countrywide Financial, prior to its purchase by Bank of America Corporation, and being renamed BAC Home Loans Servicing, LP, which has since merged into Defendant Bank of America, N.A., its successor. As he served as a member of the United States Army, he received a Veterans Administration Home Loan Guarantee as part of the mortgage. In early 2011, he entered into a new mortgage contract with BofA through a home loan modification of the first mortgage contract. Throughout the time that Plaintiff entered into the first mortgage contract and the second modified mortgage contract, he has been required to make \$250 in monthly payments to BofA, in addition to the regular monthly mortgage payment, for the pre-payment of property tax and insurance on the property. Based on information and belief, Defendant has use of those funds at all times between when received from Plaintiff to the time when Defendant made tax and insurance payments on Plaintiff's property.

16. However, Plaintiff has never received from Defendant interest on the monies pre-paid by Plaintiff and held by Defendant for the payment of the taxes and insurance. While the agreements drafted by BofA in the original mortgage and the subsequent modified home loan required the creation of escrow accounts and that Plaintiff deposit funds into these escrow accounts, there was no contractual agreement that BofA would be permitted to withhold the interest accrued on these accounts, and instead required that this handling of the interest would be pursuant to applicable state and federal laws. California Civil Code §2954.8(a) is an applicable state law. Therefore, BofA is obligated to comply with this state law, as discussed above, in performing its obligations under the agreements and therefore pursuant to its own contract as well as the specific California law must pay interest on Plaintiff's impound escrow account.

1           17. Defendant Bank of America, N.A., is one of the largest national banks and  
2 one of the largest mortgage lenders in the country, even more so following its acquisition  
3 of Countrywide Financial. Defendant is incorporated in the state of Delaware and has its  
4 principal place of business in and is a citizen of North Carolina. Its dedicated mortgage  
5 arm subsidiary BAC Home Loans Servicing, LP, formerly known as Countrywide Home  
6 Loan Servicing, LP, has since been merged into Bank of America, N.A. Through  
7 numerous branches throughout California and the U.S., Defendant enters into mortgage  
8 agreements with customers for finance of their homes, and upon information and belief,  
9 requires a large percentage of its customers in California and many other states to maintain  
10 escrow accounts, into which customers deposit significant funds for the payment of  
11 property tax and insurance on the property. However, Defendant has systematically and  
12 uniformly failed and continues to refuse to pay interest on those funds, in direct, *per se*  
13 violation of state and federal laws.

14           18. The true names and capacities of the defendants sued herein as DOES 1  
15 through 10, inclusive, are currently unknown to Plaintiff, who therefore sues such  
16 defendants by such fictitious names. Each of the defendants designated herein as a DOE  
17 is legally responsible in some manner for the unlawful acts referred to herein. Plaintiff  
18 will seek leave of Court to amend this Complaint to reflect the true names and capacities  
19 of the Defendants designated herein as DOES when such identities become known.

20           19. Based upon information and belief, Plaintiff alleges that at all times  
21 mentioned herein, each and every defendant was acting as an agent and/or employee of  
22 each of the other defendants, and at all times mentioned was acting within the course and  
23 scope of said agency and/or employment with the full knowledge, permission, and  
24 consent of each of the other defendants. In addition, each of the acts and/or omissions of  
25 each defendant alleged herein were made known to, and ratified by, each of the other  
26 defendants.

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1 IV

2 CLASS ACTION ALLEGATIONS

3 20. Plaintiff brings this action on his own behalf, and on behalf of the following  
4 classes, pursuant to FED. R. CIV. P. 23(a), 23(b)(2), and/or 23(b)(3).

5 21. Plaintiff proposes a California class, as defined as follows:

6 All mortgage loan customers of Bank of America (or its subsidiaries), whose  
7 mortgage loan is for a one-to-four family residence located in California,  
8 and who paid Bank of America money in advance for payment of taxes and  
9 assessments on the property, for insurance, or for other purposes relating to  
10 the property, and did not receive interest on the amount held by Bank of  
America.

11 Excluded from the above class is any entity in which Defendant has a controlling interest,  
12 and officers or directors of Defendant.

13 22. Plaintiff reserves the right under Rule 23 to amend or modify the Class  
14 descriptions with greater specificity or further division into subclasses or limitation to  
15 particular issues, based on the results of discovery.

16 23. **Numerosity of the Class** – The members of the Class are so numerous that  
17 their individual joinder is impracticable. The number of mortgages held by Defendant  
18 number in the hundreds of thousands or more throughout California, which is a reflection  
19 of the number of putative Class members in this action. Inasmuch as the class members  
20 may be identified through business records regularly maintained by Defendant and its  
21 employees and agents, and through the media, the number and identities of class  
22 members can be ascertained. Members of the Class can be notified of the pending action  
23 by e-mail, mail, and supplemented by published notice, if necessary;

24 24. **Existence and Predominance of Common Question of Fact and Law** –  
25 There are questions of law and fact common to the Class. These questions predominate  
26 over any questions affecting only individual class members. These common legal and  
27 factual issues include, but are not limited to:

- 1 a. Whether Defendant has systematically engaged in a conduct that is a *per*  
2 *se* violation of state and federal laws with respect to the disbursement of  
3 the interest accrued on escrow accounts back to the customers;  
4 b. Whether Defendant's conduct breached the mortgage agreements with  
5 customers;  
6 c. Whether Defendant must provide damages, restitution and/or  
7 reimbursement to borrowers in the amount of unpaid interest on funds  
8 held in impound escrow accounts based on the causes of action asserted  
9 herein; and  
10 d. Whether injunctive relief is appropriate to prohibit Defendant from  
11 engaging in this conduct in the future

12 25. **Typicality** – The claims of the representative Plaintiff are typical of the  
13 claims of each member of the Class. Plaintiff, like all other members of the Class, has  
14 sustained damages arising from Defendant's violations of the laws, as alleged herein.  
15 The representative Plaintiffs and the members of the Class were and are similarly or  
16 identically harmed by the same unlawful, deceptive, unfair, systematic, and pervasive  
17 pattern of misconduct engaged in by Defendant.

18 26. **Adequacy** – The representative Plaintiff will fairly and adequately represent  
19 and protect the interests of the Class members and have retained counsel who are  
20 experienced and competent trial lawyers in complex litigation and class action litigation.  
21 There are no material conflicts between the claims of the representative Plaintiff and the  
22 members of the Class that would make class certification inappropriate. Counsel for the  
23 Class will vigorously assert the claims of all Class members.

24 27. **Predominance and Superiority** – This suit may be maintained as a class  
25 action under because questions of law and fact common to the Class predominate over  
26 the questions affecting only individual members of the Class and a class action is superior  
27 to other available means for the fair and efficient adjudication of this dispute. The  
28 damages suffered by individual class members are small compared to the burden and

1 expense of individual prosecution of the complex and extensive litigation needed to  
2 address Defendant's conduct. Further, it would be virtually impossible for the members  
3 of the Class to individually redress effectively the wrongs done to them. Even if Class  
4 members themselves could afford such individual litigation, the court system could not.  
5 In addition, individualized litigation increases the delay and expense to all parties and to  
6 the court system resulting from complex legal and factual issues of the case.

7 Individualized litigation also presents a potential for inconsistent or contradictory  
8 judgments. By contrast, the class action device presents far fewer management  
9 difficulties; allows the hearing of claims which might otherwise go unaddressed because  
10 of the relative expense of bringing individual lawsuits; and provides the benefits of single  
11 adjudication, economies of scale, and comprehensive supervision by a single court.

12 28. The Class Plaintiff contemplates the eventual issuance of notice to the  
13 proposed Class members setting forth the subject and nature of the instant action. Upon  
14 information and belief, Defendant's own business records and electronic media can be  
15 utilized for the contemplated notices. To the extent that any further notices may be  
16 required, the Class Plaintiffs would contemplate the use of additional media and/or  
17 mailings.

18 29. In addition to meeting the prerequisites of a Class Action, this action is  
19 properly maintained as a Class Action pursuant to Rule 23(b) of the Federal Rules of  
20 Civil Procedure, in that:

21 a. Without class certification and determination of declaratory, injunctive,  
22 statutory and other legal questions within the class format, prosecution of separate actions  
23 by individual members of the Class will create the risk of:

24 i. Inconsistent or varying adjudications with respect to individual  
25 members of the Class which would establish incompatible standards of conduct for the  
26 parties opposing the Class; or

27 ii. Adjudication with respect to individual members of the Class  
28 which would as a practical matter be dispositive of the interests of the other members not

1 parties to the adjudication or substantially impair or impede their ability to protect their  
2 interests;

3 b. The parties opposing the Class have acted or refused to act on grounds  
4 generally applicable to each member of the Class, thereby making appropriate final  
5 injunctive or corresponding declaratory relief with respect to the Class as a whole; or

6 c. Common questions of law and fact exist as to the members of the Class  
7 and predominate over any questions affecting only individual members, and a Class  
8 Action is superior to other available methods of the fair and efficient adjudication of the  
9 controversy, including consideration of:

10 i. The interests of the members of the Class in individually  
11 controlling the prosecution or defense of separate actions;

12 ii. The extent and nature of any litigation concerning controversy  
13 already commenced by or against members of the Class;

14 iii. The desirability or undesirability of concentrating the litigation  
15 of the claims in the particular forum;

16 iv. The difficulties likely to be encountered in the management of a  
17 Class Action.

18 **FIRST CAUSE OF ACTION**  
19 **(Violation of California Business & Professions Code Sections 17200, *et seq.* –**  
20 **Unfair Business Practices Act)**

21 30. Plaintiff incorporates by reference and re-alleges all paragraphs previously  
22 alleged herein.

23 31. The Unfair Business Practices Act defines unfair business competition to  
24 include any “unfair,” “unlawful,” or “fraudulent” business act or practice. The Act also  
25 provides for injunctive relief, restitution, and disgorgement of profits for violations.

26 32. Defendant’s unlawful, unfair, and fraudulent business acts and practices are  
27 described throughout this Complaint and include, but are not limited to the following.  
28 Defendant has and continues to engage in a practice of failing to pay interest to its  
borrowers on impound escrow account, as required by the laws of California, and other

1 states, thereby illegally profiting from the use of interest free funds in hundreds of  
2 thousands of mortgage accounts. This is a *per se* violation California Civil Code §2954.8  
3 and 15 U.S.C. §1639d(g), and contravenes the declared legislative policy espoused in the  
4 HUD regulations as set forth in HUD Handbook 4330.1, Rev-5, §2-5.

5 33. Defendant's practice is also unfair since it has no utility and, even if it did,  
6 any utility is outweighed by the gravity of harm to Plaintiff and the Class members.  
7 Defendant's practice is also immoral, unethical, oppressive or unscrupulous and causes  
8 injury to consumers which outweighs its benefits.

9 34. Plaintiff and the Class members, and each of them, have been damaged by  
10 said practices. Pursuant to California Business and Professions Code §§ 17200 and  
11 17203, Plaintiff, on behalf of himself and all others similarly situated, seek relief as  
12 prayed for below.

13 **SECOND CAUSE OF ACTION**  
14 **(Breach of Contract)**

15 35. Plaintiff incorporates by reference and re-alleges all paragraphs previously  
16 alleged herein.

17 36. Defendant was bound by the mortgage agreements with Plaintiff and the  
18 Class, and was signatories thereto.

19 37. Plaintiff, and all others similarly situated, did all, or substantially all, of the  
20 significant things that the agreements required them to do.

21 38. Meanwhile, Defendant failed to perform the express terms of the agreements  
22 that stated Defendant would comply with applicable state and federal law, which  
23 included the state and federal law that mandated Defendant pay interest to borrowers for  
24 funds collected on an impound escrow account. As such and as set forth above,  
25 Defendant breached an express term of the agreements.

26 39. As a result, Plaintiff and the Class members have been harmed by  
27 Defendant's breach of contract.  
28

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff, on behalf of himself and the members of the Class, demands judgment against and general and special relief from Defendant as follows:

1. An order certifying that the action may be maintained as a Class Action as defined herein and appointing Plaintiff and his counsel of record to represent the defined Class;
2. An order enjoining Defendant under California Business and Professions Code §§ 17203:
  - a. To cease such acts and practices declared by this Court to be an unlawful, fraudulent, or an unfair business act or practice, a violation of laws, statutes, or regulations, or constituting unfair competition;
  - b. To disgorge all profits and compensation improperly obtained by Defendant as a result of such acts and practices declared by this Court to be an unlawful, fraudulent, or unfair business act or practice, a violation of laws, statutes, or regulations, or constituting unfair competition; and
3. For damages under the causes of action for breach of contract;
4. For reasonable attorney’s fees and costs, pursuant to California Code of Civil Procedure § 1021.5, and other statutes as may be applicable, as well as provided by the contracts;
5. For prejudgment interest to the extent allowed by law;
6. For costs of suit incurred herein;
7. For such other and further relief as the Court deems appropriate.

DATED: June 20, 2014.

MCCUNEWRIGHT LLP

By: /s/Richard D. McCune  
Richard D. McCune  
Attorneys for Plaintiff

**DEMAND FOR JURY TRIAL**

Plaintiff, and all others similarly situated, hereby demands a trial by jury herein.

DATED: June 20, 2014.

MCCUNEWRIGHT LLP

By: /s/Richard D. McCune  
Richard D. McCune  
Attorneys for Plaintiff

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