LAW OFFICES OF TIMOTHY L. MCCANDLESS
Timothy L. McCandless, Esq., SBN 147715
26875 Calle Hermosa, Suite A
Capistrano Beach, California 92624

Telephone: (925) 957-9797 / (949) 388-7779
Facsimile: (925) 957-9799
E-mail: legal@prodefenders.com
legalsync@gmail.com

Attorneys for Plaintiff(s): Regina Manantan

BY FAX

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

SOUTHERN BRANCH - HALL OF JUSTICE & RECORDS

REGINA MANANTAN,

Plaintiff(s),

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,

Defendant(s).

Case No.: CIV535902

PLAINTIFF'S OPPOSITION TO DEFENDANTS WELLS FARGO BANK, N.A., D/B/A AMERICA'S SERVICING COMPANY AND 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'S DEMURRER, AND QUALITY LOAN SERVICE CORPORATION'S JOINDER TO PLAINTIFF'S SECOND AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

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

[JURY TRIAL DEMANDED]

Complaint Filed: October 20, 2015
1st Amended Filed: February 1, 2016
2nd Amended Filed: May 6, 2016
Trial Date: Not Assigned

LAW OFFICES OF TIMOTHY L. MCCANDLESS
26875 Calle Hermosa, Suite A
Capistrano Beach, California 92624
Telephone (925) 957-9797 / (949) 388-7779
Facsimile (925) 957-9799

LAW OFFICES OF TIMOTHY L. MCCANDLESS
26875 Calle Hermosa, Suite A
Capistrano Beach, California 92624
Telephone (925) 957-9797 / (949) 388-7779
Facsimile (925) 957-9799

Plaintiff, REGINA MANANTAN, ("Plaintiff") hereby files her opposition to Defendants WELLS FARGO BANK, N.A., D/B/A AMERICA'S SERVICING COMPANY, ("WELLS FARGO"), 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, ("U.S. BANK), and QUALITY LOAN SERVICE CORPORATION's, ("QUALITY") by Joiner in Defendants WELLS FARGO and U.S. BANK's, (collectively "Defendants") Demurrer to Second Amended Complaint, ("SAC") for failure to state sufficient facts to constitute any cause of action ("COA") against Defendants.

Plaintiff's SAC follows an invalid foreclosure process of Plaintiff's property, with an invalid Notice of Default and Notice of Trustee Sale, which utterly failed to comply with the statutory requirements of California law.

Defendants' Demurrer is an attempt to dissuade the Court from the real issues at stake, that is, whether Defendants complied with the strict requirements of a non-judicial proceeding.

Plaintiff opposes the Demurrer on the grounds that the SAC does state valid causes of action, and that the Demurrer of Defendants is without merit.

The Opposition shall be based on this Opposition, the attached Memorandum of Points and Authorities, and the complete files and records of this action and on such other oral and/or documentary evidence as may be presented at the hearing on the motion.

Plaintiff respectfully requests for an order denying Defendants' Demurrer of the Plaintiff's SAC as to all or any of the counts.

Respectfully submitted,

DATED: June 15, 2016

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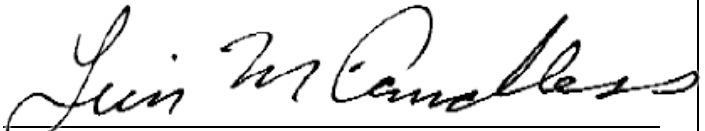

Timothy L. McCandless, Esq.
Attorney for Plaintiff(s): Regina Manantan

LAW OFFICES OF TIMOTHY L. MCCANDLESS
26875 Calle Hermosa, Suite A
Capistrano Beach, California 92624
Telephone (925) 957-9797 / (949) 388-7779
Facsimile (925) 957-9799

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LAW OFFICES OF TIMOTHY L. MCCANDLESS
26875 Calle Hermosa, Suite A
Capistrano Beach, California 92624
Telephone (925) 957-9797 / (949) 388-7779
Facsimile (925) 957-9799

TABLE OF AUTHORITIES
COURT CASES

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LAW OFFICES OF TIMOTHY L. MCCANDLESS
26875 Calle Hermosa, Suite A
Capistrano Beach, California 92624
Telephone (925) 957-9797 / (949) 388-7779
Facsimile (925) 957-9799

STATUTES

LAW OFFICES OF TIMOTHY L. MCCANDLESS
26875 Calle Hermosa, Suite A
Capistrano Beach, California 92624
Telephone (925) 957-9797 / (949) 388-7779
Facsimile (925) 957-9799

SECONDARY SOURCES

LAW OFFICES OF TIMOTHY L. MCCANDLESS
26875 Calle Hermosa, Suite A
Capistrano Beach, California 92624
Telephone (925) 957-9797 / (949) 388-7779
Facsimile (925) 957-9799

LAW OFFICES OF TIMOTHY L. MCCANDLESS
26875 Calle Hermosa, Suite A
Capistrano Beach, California 92624
Telephone (925) 957-9797 / (949) 388-7779
Facsimile (925) 957-9799

MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF ARGUMENT

Defendants have objected to Plaintiff's SAC by filing a demurrer itemizing eight identical grounds for alleged failure to state facts sufficient to constitute a COA, pursuant to Cal. Civ. Proc. § 430.10(e),(f). Defendants claim that Plaintiff's COAs fails for Plaintiff failing to offer tender, stating that tender "is mandatory in any action to cancel a foreclosure action" is also untrue.

Plaintiff brings this SAC after Defendants repeated violations of the newly enacted Homeowners Bill of Rights, ("HBOR") and related causes of action. The essence of Plaintiff's Complaint is, as was clearly shown by the allegations presented in the SAC, that Foreclosing Parties damaged Plaintiff by unilaterally modifying her Deed of Trust during the process of selling her loan into the MORGAN STANLEY MORTGAGE LOAN TRUST 2007-7AX, ("TRUST 2007-7AX"), (SAC at ¶26, and ¶¶ 56-63). These modifications created a conflict of interest by the servicers of Plaintiff's loan whereby they had a strong financial incentive to NOT modify Plaintiff's loan and, furthermore, prevented Plaintiff from knowing and negotiating directly with the beneficial owner of her loan.

Plaintiff was never notified of transfers of her Note to different lenders, in violation of Federal Truth in Lending laws. She was further damaged by never being able to identify the actual beneficial owner of her note in order to negotiate a loan modification with the real party in interest, but was forced to negotiate with loan servicers who had a clear conflict of interest. WELLS FARGO reviewed Plaintiff's loan modification application based on their own financial interest NOT as agents for the benefit of the beneficiary.

The botched securitization casts a cloud in the title that is detrimental to the mortgagor because it renders the property securing the mortgage loan unmarketable with the title fatally defective. Also, in the event of a mortgage default, as in this case, the mortgagor never had the opportunity to negotiate a reasonable loan modification with the true party in interest to avoid the foreclosure of her property.

For many California homeowners, it was unclear who owned their loans, because those loans supposedly had been sold to investment trusts. In many cases, servicers and investment

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26875 Calle Hermosa, Suite A
Capistrano Beach, California 92624
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Facsimile (925) 957-9799

trusts took actions that led borrowers to believe that even these entities did not know who owned a particular loan. In this instant action U.S. BANK claimed to hold power of sale by the "*void*" Assignment Deed of Trust. Here MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., ("MERS"), supposedly assigned Plaintiff's loan to TRUST 2007-7AX in 2009, two years after the trust was closed. Therefore, the Foreclosing Parties lacked standing to initiate foreclosure process and the chain of title relied upon by the Foreclosing Parties contains breaks or defects. *Glaski v. Bank of America*, (2013) 218 Cal.App.4th 1079, 1094–1095, 160 Cal.Rptr.3d 449; *Yvanova v. New Century Mortg. Corp.*, (2016) 199 Cal.Rptr.3d 66.

In *Glaski*, Court determined that borrowers are permitted to *"pursue questions regarding the chain of ownership,"* a position the Court stated was supported by *Herrera v. Deutsche Bank National Trust Co.*, (2011) 196 Cal.App.4th 1366, 1375, in which Deutsche's motion for summary judgment was denied based on the failure of Deutsche, *"to establish it was the beneficiary under that deed of trust."*

Securitization is merely the framework that was used by Defendants to implement a complex real estate and financial scheme that allowed them to defraud both investors and homeowners for their own financial gain. It is the consequences of how this scheme affected a real estate transaction, not the securitization itself that has caused the damages to Plaintiff. Plaintiff's allegations are supported when viewed in the context of violations of California law for real estate transactions, independent of any securitization issues.

Despite that facts that the Plaintiff has a substantial evidentiary support for her claims (which were put before the Court in the SAC), all that is issue in the instant Demurrer is whether or not Plaintiff has properly plead facts sufficient to state a claim for each of her eight COAs. The Plaintiff has easily met this standard for all of her COAs.

II. FACTUAL BACKGROUNG

On or about January 30, 2007, Plaintiff refinanced the Property, by executing a Promissory Note and DOT in favor of RESIDENTIAL MORTGAGE CAPITAL, ("RESIDENTIAL"), (FAC at ¶¶ 22-24). The DOT and Note were then securitized and split, so that the Note went one way and the DOT into an investment trust. However, the DOT was not transferred prior to the trust's closing

date and therefore not within the time period required by law, (SAC at ¶¶ 56-63).

The DOT was a Fannie-Mae conforming loan which contained Paragraph 22, providing certain legal obligations on the part of the lender prior to acceleration of the Note and the DOT.

Plaintiff alleged and submitted that Paragraph 22 of the DOT constitutes condition precedent to the recordation of the Notice of Default, ("NOD") and the allegations in the SAC are quite clear that Defendants, and each of them, failed in several regards to comply with Paragraph 22 prior to the recordation of the NOD, (SAC at ¶¶28-32, and ¶¶69-73).

Due to the changes in Plaintiff's circumstances, on or about May 31, 2015, she applied for the Loan Modification with WELLS FARGO, (SAC at ¶33) by providing complete loan modification package which included Plaintiff's tax, banking and financial information. Plaintiff was never provided with the letter of the acknowledgment for the submitted loan modification package, nor single point of contact as requested, (SAC at ¶¶34-37), and despite ongoing loan modification review, Defendants on or about September 9, 2015 recorded Notice of Trustee's Sale, ("NOTS"), (SAC at ¶38). Plaintiff was never provided with written notice of denial for the loan modification with specific reason for denial pursuant California Civil Code Section 2923.6(f), instead Plaintiff was requested to resubmit new package, while the sale of the Subject Property will be placed on hold, (SAC at ¶¶39-44).

Despite the ongoing negotiations between, the WELLS FARGO and the Plaintiff, with the loan modification process, Defendants sold the Subject Property, on or about October 2, 2015, without any notice to the Plaintiff, without the notice regarding the decision of the loan modification application, and without notice of the new sale date, (SAC at ¶¶45-46).

In a nut shell Defendants demurred SAC on the grounds that (1) Defendants conducts were privileged; (2) Plaintiff has failed to make a valid and unambiguous offer of tender; and (3) Plaintiff's all COAs are fatally defective, that the provisions of HBOR cannot be applied retroactive, despite the facts that NOTS were executed and recorded in 2015.

Contrary to the assertions of Defendants, Plaintiff's SAC pleads several, compelling and colorable COAs, sufficient to support the relief requested therein.

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Capistrano Beach, California 92624
Telephone (925) 957-9797 / (949) 388-7779
Facsimile (925) 957-9799

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26875 Calle Hermosa, Suite A
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Telephone (925) 957-9797 / (949) 388-7779
Facsimile (925) 957-9799

LAW & ARGUMENT

III. LEGAL STANDARD

The Court must tentatively accept Plaintiff's allegations as facts. With the purpose of testing the sufficiency of the COA's, a Demurrer admits the truth of all material facts properly pleaded. *Aubry v. Tri-City Hosp. Dist.*, (1992) 2 Cal.4th 962, 966-967. Accordingly, Plaintiff's allegations must be accepted as true for the purpose of ruling on a Demurrer. *Del E Webb Corp. v. Structural Materials Co.*, (1981) 123 Cal.App.3d 593, 604. The statutory rule requires that a Complaint be construed "liberally ...with a view to substantial justice between the parties" when passing on a Demurrer. Cal. Code. Civ. Proc. § 452; *Dale v. City of Mountain View*, (1976) 55 Cal.App.3d 101; *Amacorp Indus Leasing Co. v. Robert C Young Associates, Inc.*, (1965) 237 Cal.App.2d 724; *Wilson v. Transit Authority of City of Sacramento*, (1962) 199 Cal.App.2d 716; *Stevens v. Superior Court*, (1999) 75 Cal.App4th 594, 601; *Domino v. Mobley*, (1956) 144 Cal.App.2d 24; *Penziner v. West American Finance Co.*, (1933) 133 Cal.App. 578. Plaintiff's ability to prove the allegations is of no concern in ruling on a Demurrer. *Alcorn v. Anbro Eng'g, Inc.*, (1970) 2 Cal.3d 493, 496. As a result, to overrule a Demurrer, Plaintiff need only plead facts showing that she may be entitled to some relief. *Vanoni v. Western Airlines*, (1967) 247 Cal.App.2d 793, 795. Accordingly, the Demurrer will be overruled when the necessary facts are shown to exist, although inaccurately or ambiguously stated; or appearing only by necessary implication; or are intermingled with irrelevant matters; or the Plaintiff has demanded relief to which he is not entitled. Cal. Code. Civ. Proc. § 452; 49A Cal. Jur. Pleading § 150 (3d ed. 2009); *Gresley v. Williams*, (1961) 193 Cal.App.2d 636, 639.

IV. LEGAL ARGUMENT

A. Defendant QUALITY's reliance on Cal. Civ. Code § 47 is Misplaced; Defendant Violated its Basic Trustee Duties.

Defendant is mistaken in its reliance on Cal. Civ. Code § 47. The gist of Defendants' argument appears to be that even though the initiated foreclosure process was wrongful, there was nothing intentional in its acts, it did not act with malice but was merely negligent in good faith. A recent Court of Appeal case cited in the demurrer held that, "[l]ogic and and the purposes of the

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26875 Calle Hermosa, Suite A
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Telephone (925) 957-9797 / (949) 388-7779
Facsimile (925) 957-9799

statutory scheme suggest that the common interest privilege (§47, subd. (c)(1)), not the absolute privileges for communications in judicial or official proceedings (§47, subd. (b)(2), (3)), applies to non-judicial foreclosure." *Kachlon v. Markowitz*, (2008) 168 Cal. App. 4th 316, 339.

The *Kachlon* Court also noted that "[t]he overall balance of interests reflected in the statutory scheme, however, favors protection of trustors' property rights, thus suggesting ***that trustors should not be entirely deprived of the ability to vindicate their property rights if wrongfully violated by the trustee***. Granting absolute immunity from such wrongdoing would wholly sacrifice the trustor's interest in favor of the trustee. The qualified common interest privilege, on the other hand, would provide a significant level of protection to trustees, leaving them open to liability only if they act with malice. At the same time, it preserves the ability of trustors to protect against the wrongful loss of property caused by a trustee's malicious acts." (emphasis added). *Ibid.*

Thus, the privilege afforded by Section 47 as claimed by the Defendant has its admitted limit - namely, when the Defendant commits its acts with malice intent - then privilege is defeated. Such is the case here. Plaintiff directly and plainly plead the maliciousness of the Defendant actions.

Plaintiff furthermore clearly allege that the Declarations of Due Diligence attached to this NOD, executed by NICOLE MILES-TODD, a Beneficiary or Beneficiary's Authorized Agent for the WELLS FARGO/ASC, was nothing more than a clear falsification and outrageous distortion of the reality, (SAC at ¶¶28-29).

Defendant QUALITY according to the allegations of the SAC was by no means an innocent participant as it attempts to present in the Joinder - it was very much an active participant who contributed to the fraud committed against Plaintiff.

As is plainly stated and supported in the SAC, Defendant willfully entered into a civil conspiracy for purpose of foreclosing on the Plaintiff's primary residence.

QUALITY wrongfully moved forward with the foreclosure process despite the lack of any compliance with Civ. Code § 2923.5 and the lack of any notice in the form of a NOD, and any other foreclosure related notices.

LAW OFFICES OF TIMOTHY L. MCCANDLESS
26875 Calle Hermosa, Suite A
Capistrano Beach, California 92624
Telephone (925) 957-9797 / (949) 388-7779
Facsimile (925) 957-9799

B. Plaintiff Has Sufficiently Stated a Claim For Lack Of Standing and the Disagreement of Courts Does Not Preclude Plaintiff's Claim.

1) Plaintiff May Challenge Defendants Standing to Foreclose.

Defendants reference and cite *Jenkins v. JP Morgan Chase Bank, N.A.*, (2013) 216 Cal.App.4th 497, 515, (Demurrer at p. 4) in support of their contention that Plaintiff lacks standing to challenge an assignment of the Note and Deed of Trust to which the borrower was neither a party nor a third party beneficiary. *Jenkins*, 216 Cal.App.4th at 512-513, relied on *Gomes v. Countrywide Home Loans, Inc*., (2011) 192 Cal App. 4th 1149, to justify its conclusion that a borrower could never challenge an invalid assignment of a loan. Yet, *Gomes* never went that far. *Gomes* ruled that a Plaintiff can attack the authority of a party to conduct a foreclosure if his complaint "identified a specific factual basis for alleging the foreclosure was not initiated by the correct party." *Jenkins*' rule may hold as to claimed defects that would make the assignment merely voidable, but not as to alleged defects rendering the assignment absolutely void. *Wilson v. HSBC Mortgage Servs., Inc., supra,* 744 F.3d at p. 9; *Reinagel, supra*, 735 F.3d at pp. 224–225; *Woods v. Wells Fargo Bank, N.A.* (1st Cir. 2013) 733 F.3d 349, 354; *Culhane, supra,* 708 F.3d at pp. 289–291; *Miller v. Homecomings Financial, LLC, supra,* 881 F.Supp.2d at pp. 831–832; *Bank of America Nat. Assn. v. Bassman FBT, LLC, supra,* 981 N.E.2d at pp. 7–8; *Pike v. Deutsche Bank Nat. Trust Co.* (N.H. 2015) 121 A.3d 279, 281; *Mruk v. Mortgage Elec. Registration Sys., Inc., supra,* 82 A.3d at pp. 534–536; *Dernier v. Mortgage Network, Inc.* (Vt. 2013) 87 A.3d 465, 473.

However, under *Glaski v. Bank of America, N.A.*, decided after *Gomes,* the California Court of Appeal held "[w]e conclude that a borrower may challenge the securitized trust's chain of ownership by alleging the attempts to transfer the deed of trust to the securitized trust (which was formed under New York law) occurred after the trust's closing date." *Glaski v. Bank of America, N.A.*,(2013) WL 4037310 (Cal. App. 5 Dist.), 218 Cal. App. 4th 1079.

Moreover, the *Glaski* Court (the same which decided *Gomes)* distinguished *Gomes.* Because the Plaintiff in *Glaski* "alleged that the entity claiming to be the note holder was not the true owner of the note", and because the Plaintiff alleged "specific grounds for his theory that the foreclosure was not conducted at the direction of the correct party", the *Glaski* Court "[did] not

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26875 Calle Hermosa, Suite A
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Telephone (925) 957-9797 / (949) 388-7779
Facsimile (925) 957-9799

interpret [*Gomes*] as barring claims that challenge a foreclosure based on specific allegations that an attempt to transfer the deed of trust was void." *Glaski v. Bank of America, N.A.* (2013) 218 Cal. App. 4th 1079, 1099. Here, Plaintiff has made similar allegations as those in *Glaski,* that the transfer of the DOT occurred after the trust closing date, (FAC at ¶ 70, and ¶¶ 87 through 88).

Siliga v. Mortgage Electronic Registration Systems, Inc., (2013) 219 Cal.App.4th 75, 85, which Defendants also cite, erred in finding borrower standing to challenge an assignment as void. *Siliga,* similarly, followed *Jenkins* in disapproving a preemptive lawsuit. (*Siliga, supra,* 219 Cal.App.4th at p. 82.). The *Siliga* court also held the borrower Plaintiffs failed to show any prejudice from, and therefore lacked standing to challenge, the assignment of their deed of trust to the foreclosing entity. (*Siliga*, at p. 85.). The prejudice analysis misses the mark in the wrongful foreclosure context. When a property has been sold at a trustee's sale at the direction of an entity with no legal authority to do so, the borrower has suffered a cognizable injury.

2) The Homeowners Bill of Rights (or "HBOR") Grants Standing to a Borrower to Challenge an Invalid Assignment of her Loan.

The HBOR includes Section 2924(a)(6) to the Civ. Code, which provides:

> "No entity shall record or cause a notice of default to be recorded or otherwise initiate the foreclosure process unless *it is the holder of the beneficial interest under the mortgage or deed of trust,* the original trustee or the substituted trustee under the deed of trust, or the designated agent of the holder of the beneficial interest. No agent of the holder of the beneficial interest under the mortgage or deed of trust, original trustee or substituted trustee under the deed of trust may record a notice of default or otherwise commence the foreclosure process except when acting within the scope of authority designated by the holder of the beneficial interest. (Italics added.)"

To enforce the command of Section 2924 (a)(6), the HBOR amends Section 2923.55 of the Civ. Code. Before a lender or loan servicer can even begin the foreclosure process, it must tell the borrower he can demand evidence the foreclosing entity has the power to foreclose.

Another section of the HBOR makes plain that California law allows a foreclosure only if the party initiating the process has the power to foreclose. Civ. Code § 2924.17(b) commands:

> "Before recording or filing any of the documents described in subdivision (a), a mortgage servicer *shall* ensure that it has reviewed competent and reliable evidence to substantiate the

> borrower's default *and the right to foreclose,* including the borrower's loan status and loan information." (Italics added.)

The documents listed in Subsection (a) of Section 2924.17 include "a notice of default, notice of sale, assignment of a deed of trust, or substitution of trustee recorded by or on behalf of a mortgage servicer in connection with a foreclosure subject to the requirements of Section 2924, or a declaration or affidavit filed in any court relative to a foreclosure proceeding...."

Sections 2924 (a), 2923.55 and 2924.17 lay down a strong public policy - a party that initiates a foreclosure must have the power to foreclose. It must, in short, own the homeowner's loan and have a legal assignment of the DOT. These statutes must be interpreted according to their plain language. *People v. Cook*, (1997) 16 Cal.4th 1210, 1215; *Pineda v. Williams-Sonoma Stores, Inc.*, (2011) 51 Cal.4th 524, 530. A Court cannot "under the guise of construction, rewrite the law or give words an effect different from the plain and direct import of the terms used." *Dicampli-Mintz v. County of Santa Clara*, (2012) 55 Cal.4th 983, 992.

As explained above, lenders and servicers read *Jenkins v. JPMorgan Chase Bank, N.A.*, 216 Cal.App.4th at 514-515, and related cases to hold that borrowers have no "standing" to argue a loan has not been properly transferred into an investment trust. Whatever else may be said about *Jenkins* and like cases, the HBOR has overruled them. The HBOR, and especially Civ. Code §§ 2924 (a)(6), 2924.17 and 2923.55, have established the policy that only entities with the power to foreclose - i.e., only entities who actually own the loan - can authorize a foreclosure.

4) Plaintiff may Challenge the Foreclosure and is Not Required to Allege Tender.

Plaintiff contends that the case currently before the Court is unique in many ways, including that Defendants have failed to cite cases concerning tender, that adequately address the tender argument, with respect to a securitized mortgage.

Furthermore, the tender argument posed by Defendants is irrelevant because only a legally proper and rightful Subject Property "Lender" is entitled to tender. There are no Defendants in this case that are able to prove themselves to be the legal, proper and rightful Subject Property "Lender". The cases cited by Defendants, in support of their tender argument, do not involve securitized mortgages and therefore the tender argument is unreasonable, unsubstantiated and

LAW OFFICES OF TIMOTHY L. MCCANDLESS
26875 Calle Hermosa, Suite A
Capistrano Beach, California 92624
Telephone (925) 957-9797 / (949) 388-7779
Facsimile (925) 957-9799

unjust.

Courts have consistently held that where a foreclosure is challenged not only for procedural irregularities, but on the grounds that the initiating party was not authorized, no tender is required. *See Cedano v. Aurora Loan Services, LLC (In re Cadano),* 470 B.R. 522, 530 (9th Cir. BAP 2012) ("[T]o the extent the Debtor alleged that the foreclosure was substantially defective because unauthorized persons initiated the procedure, rendering the sale void, he has met one of the exceptions to the requirement of tender."); *Glaski v. Bank of America*, 218 Cal. App. 4th 1079, 1100 (Cal. App. 5th Dist. 2013) ("Tender is not required where the foreclosure sale is void, rather than voidable, such as when a plaintiff proves that the entity lacked the authority to foreclose on the property." Citing *Lester v. J.P. Morgan Chase Bank,* (N.D.Cal., Feb.20, 2013), 2013 WL 633333, at p. *8]; 4 Miller & Starr, Cal. Real Estate (3d ed. 2003) Deeds of Trust, § 10:212, p. 686.)

C. Plaintiff's COA for Breach of Security Instrument is Sufficiently Pled.

Plaintiff's breach of contract claim rests on Defendants' failure to give to the Plaintiff notice related to her default as required by Section 22 of the Deed of Trust, ("DOT"). (SAC at ¶30-32).

Defendants do not contest that they failed to send the required notice.

In California, "[c]ausation of damages in contract cases, as in tort cases, requires that the damages be proximately caused by the Defendant's breach, and that their causal occurrence be at least reasonably certain." *Vu v. California Commerce Club, Inc.*, (1997) 58 Cal.App.4th 229, 233. "The test for causation in a breach of contract ... action is whether the breach was a substantial factor in causing the damages." *US Ecology, Inc. v. State*, (2005) 129 Cal.App.4th 887, 909. "The term 'substantial factor' has no precise definition, but 'it seems to be something which is more than a slight, trivial, negligible, or theoretical factor in producing a particular result." *Id*. (quoting *Espinosa v. Little Co. of Mary Hospital*, (1995) 31 Cal.App.4th 1304, 1314). Failure to give contractually required notice before beginning foreclosure proceedings has been found to be a "substantial factor" in causing damages. *Siquieros v. Federal Nat. Mortg. Ass'n*, (C.D. Cal. June 27, 2014) 2014 WL 3015734, at *4.

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26875 Calle Hermosa, Suite A
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In *Siquieros*, the Plaintiff's deed of trust also contained a notice requirement clause. *Id*. The defendants foreclosed on Plaintiff's property without giving Plaintiff notice. *Id*. at *1 Defendants argue that *Siquieros* is distinguishable because the Plaintiff was notified her property was in foreclosure after the foreclosure sale was completed, while in this case Plaintiff was aware before. However, while the foreclosure sale had not occurred in this case, Defendant - like the Defendants in *Siquieros* - took an action harmful to Plaintiff's interest without notice to her; here, Defendants accelerated the repayment of the loan. If Defendants had complied with Section 22, Plaintiff would have had the opportunity to cure her initial default before acceleration suddenly made the entire amount of the loan due. Furthermore, if Plaintiff has been notified as required under the contract, she may have been able to mitigate damages, even if she was not able to forestall foreclosure completely. Thus, Plaintiff sufficiently alleged facts to allow the Court to infer Defendants' failure to send the required notice was more than a slight or trivial factor in producing Plaintiff's damages.

D. Plaintiff's COA for Wrongful Foreclosure Process, Violation of HBOR is Sufficiently Pled.

As an initial matter, there are only two ways that a lender may comply with Cal. Civ. Code § 2923.5: either speaking with a borrower at least 30 days, in person or by telephone, *prior* to recording a NOD, or exercising "*due diligence*" in attempting to contact a borrower to explore their options to avoid foreclosure. For the "*contact*" requirement, the precise language used in the statute provides: "(2) A mortgagee, beneficiary, or authorized agent shall contact the borrower in person or by telephone in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure." Section 2923.5(2). In order to satisfy the "*contact*" requirement, a lender *must* discuss the traditional ways that a borrower may "*avoid*" foreclosure with a borrower, such as a loan modification, a forbearance agreement, or a repayment plan. *Marby v. Superior Court*, (2010) 185 Cal.App.4th 208, 210. In *Mabry*, the lender filed a Declaration of Compliance virtually identical to the one filed by the defendants in the situation at bar. 185 Cal.App.4111 at 216. In its opinion, the Court ruled that it was permissible for a Declaration of Compliance to contain form language (as the one did in that case), but remanded

LAW OFFICES OF TIMOTHY L. MCCANDLESS
26875 Calle Hermosa, Suite A
Capistrano Beach, California 92624
Telephone (925) 957-9797 / (949) 388-7779
Facsimile (925) 957-9799

the case to the Trial Court to determine whom was telling the truth. *Id.* at 235. Consequently, it is apparent that simply attaching a Declaration of Compliance to a NOD does not conclusively prove that the Defendant actually contacted the borrower. *Id.* at 235.

Alternatively, a lender *must* use "*due diligence*" to attempt to contact a borrower to explore their options. In order to satisfy this prong of the statute, a lender *must* meet *all* of the laundry list of requirements outlined in the statute.

No attempts to contact the Plaintiff as required by this section has been made and any argument to the contrary is not proper at the Demurrer stage as at it is an improper attempt to argue merits of the case. There is nothing "remarkable" in the allegations that no contact was made as required by this section because requirements of Section 2923.5 are fairly technical and clearly do not require borrowers to contact lenders, but require exactly opposite - lenders to contact borrowers. This section also clearly does not authorize filing of falsified off-the-shelf declarations of compliance by servicers. Unless Defendants can produce evidence of compliance, Plaintiff's allegations stand true. QUALITY was under the obligation to at least make sure that the declaration was legitimate. Last, but not least, contrary to what is asserted in the Demurrer, the Plaintiff clearly alleged in the SAC that QUALITY indeed breached its statutory duties in improperly recording NOD and NOTS.

Pursuant to the Cal. Civ. Code § 2924.17 mortgage servicer is charged with "ensuring that it has reviewed competent and reliable evidence to substantiate the borrowers' default and the right to foreclose, including the borrowers' loan status and loan information."

In this instant case the NOTS, and the sale of the Subject Property itself, failed to comply with the provisions of Cal. Civ. Code § 2914.17. The status of this loan was in active loan modification review when the NOTS was recorded and the sale executed.

In reality, the SAC does not allege - nor need it allege - that California's new HBOR is retroactive. Rather, the SAC alleges that Plaintiff is entitled to relief enjoining any foreclosure after January 1, 2013.

Under § 2924. 17, Defendant cannot escape liability merely because they recorded a NOD before January 1, 2013. Any new foreclosure related notices issued or relied upon after HBOR

took effect must also conform to HBOR requirements. Civil Code section 2924.17. Thus, any actions in 2013 or 2014, after recording the NOD's early, must conform to section 2924.17.

At the very least, Plaintiff has a valid claim under Cal. Civ. Code § 2924.17, which requires a loan servicer to determine the beneficial owner of a note before recording documents.

The HBOR must be read in its entirety to establish compliance. HBOR requires a Single Point of Contact ("SPOC"). The SPOC is supposed to instruct the borrower in the loan modification process, Plaintiff requested from WELLS FARGO for a single point of contact but no further contact was facilitated by Defendant WELLS FARGO concerning their request. The failure of the SPOC to do this constitutes a breach of the servicer's obligation under Cal. Civ. Code § 2923.6(c)(1).

Here Defendant clearly violated § 2923.7 in that the SPOC did not perform all of the duties that were required of it.

Cal. Civ. Code § 2924.10 provides "When a borrower submits a complete first lien modification application or any document in connection with a first lien modification application, the mortgage servicer shall provide written acknowledgment of the receipt of the documentation within five business days of receipt." Defendants do not contest that they failed to send the required acknowledgments.

Plaintiffs demand civil penalties against Defendants, and demand damages in an amount to be determined at trial.

E. Plaintiff's Fraud Claim and Claim for Intentional Infliction of Emotional Distress are Valid.

Plaintiff's fraud claims are not based on the securitization of her loan, but rather on the effect that the securitization had on the actions and motivation of the loan servicer, WELLS FARGO. Plaintiff has clearly stated the elements of fraudulent misrepresentation on the part of Defendants: (a) 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 Plaintiff's loan from the TRUST 2007-7AX, at a financial loss; (b) WELLS FARGO was clearly aware of this falsity; (c) WELLS FARGO clearly intended to defraud Plaintiff as evidenced by their failure to

LAW OFFICES OF TIMOTHY L. MCCANDLESS
26875 Calle Hermosa, Suite A
Capistrano Beach, California 92624
Telephone (925) 957-9797 / (949) 388-7779
Facsimile (925) 957-9799

offer a modification to which Plaintiff was entitled; (d) Plaintiff justifiably relied on Defendants' misrepresentation; and (e) suffered damages in the form of higher mortgage payments.

1. Plaintiff's Mortgage Payments Are Not Time Barred.

Plaintiff's loan originated in 2007, but it was not until October of 2015 that Plaintiff conducted the research necessary to understand why she was not granted a loan modification. At no time did WELLS FARGO/ASC inform Plaintiff that her loan had been sold and that as a consequence of this sale they would have to incur a financial loss by repurchasing her note from the TRUST 2007-7AX, in order to grant a loan modification. Plaintiff, as a normal consumer exercising reasonable care and diligence, could not be expected to understand the complex financial process whereby her lender sold her Note to a TRUST 2007-7AX, and thereby modified her initial DOT without her consent by restricting the ability of the servicer to offer a modification and hiding the identity of the beneficial owner of her Note.

This research revealed the conflict of interest and the motivations of WELLS FARGO that caused them to refuse a loan modification that would actually benefit the TRUST 2007-7AX that owned the loan and the Plaintiff, but would not benefit the servicers of the TRUST 2007-7AX, the Defendant WELLS FARGO.

2. The Fraud Is Not Based On The Occurrence Of A Future Event.

Plaintiff's representations are based on past and existing facts, not on predictions about future events. It is a fact that WELLS FARGO sold Plaintiff's note to the TRUST 2007-7AX; it is a fact that the terms of Plaintiff's DOT were modified without her knowledge or consent by the agreement between the TRUST 2007-7AX and Defendants; it is a fact that Defendants were required by the TRUST 2007-7AX, to repurchase Plaintiff's note at full value in order to provide a modification.

3. Plaintiff Has Suffered Damages Caused By Defendants Actions.

Plaintiff has suffered financial damages, directly caused by Defendants fraudulent representations regarding the beneficial owner of Plaintiff's Note and their failure to disclose the conflict of interest on the part of WELLS FARGO, since to offer a reasonable modification, WELLS FARGO would have to purchase Plaintiff's note from the TRUST 2007-7AX, and incur a

LAW OFFICES OF TIMOTHY L. MCCANDLESS
26875 Calle Hermosa, Suite A
Capistrano Beach, California 92624
Telephone (925) 957-9797 / (949) 388-7779
Facsimile (925) 957-9799

LAW OFFICES OF TIMOTHY L. MCCANDLESS
26875 Calle Hermosa, Suite A
Capistrano Beach, California 92624
Telephone (925) 957-9797 / (949) 388-7779
Facsimile (925) 957-9799

loss. The terms that were offered to Plaintiff in 2007 did not reflect the realities of the real estate market at that time, were designed solely to insure that Defendants would not have to repurchase Plaintiffs loan from the TRUST 2007-7AX, and thus suffer a financial loss.

Plaintiff sufficiently pled the COA for intentional infliction of emotional distress. Conduct is extreme and outrageous when it exceeds all bounds of decency usually tolerated by a civilized society and is of a nature that is especially calculated to cause, and does cause, mental distress. *Molko v. Holy Spirit Ass'n*, (1988) 46 Cal.3d 1092, 1122. Although mere insults, indignities, and threats do not alone constitute outrageous conduct [*ibid*], they may be a part of an outrageous course of conduct that will subject the defendant to liability. *Newby v. Alto Riviera Apartments*, (1976) 60 Cal.App.3d 288, 298.

Unprivileged conduct that subjects another to economic ruin has been considered outrageous. *Sanchez-Correa v. Bank of America*, (1985) 38 Cal.3d 892, 908-909; *Kruse v. Bank of America*, (1988) 202 Cal.App.3d 38, 67.

It is a common saying and feeling, that "a man's home is his castle" and in the United States it is most people's major asset. This destruction of Plaintiff's livelihood through chicanery and deceit constitutes outrageous conduct and subjects Defendants to liability for the intentional infliction of emotional distress. Thus, Defendants' demurrer should be overruled.

F. Plaintiff has stated a Claim for Violation of Bus. & Prof. Code § 17200.

California Bus. & Pro. Code § 17200, et seq., prohibits acts of unfair competition, which means and includes any "fraudulent business act or practice ..." and conduct which is "likely to deceive" and is "fraudulent" within the meaning of Section 17200.

As more fully described above, Defendants' acts and practices are likely to deceive, constituting a fraudulent business act or practice. This conduct is ongoing and continues to this date.

First, under the fraud prong of the UCL, Plaintiff has clearly alleged in the FAC that Defendants deliberately deceived Plaintiff by not revealing that they had a conflict of interest in negotiating a loan modification and that they were not the beneficial owners of Plaintiff's Note. Under the unfair prong of the UCL, defendants clearly violated public policy in their practices of

promising to consider a borrower for a useful or beneficial loan modification while never having the intention of doing so. This claim is supported by the Consent orders signed by major banks, with the Office of the Comptroller of the Currency, in which they admitted to the above practices. When institutions engage in complex schemes designed to obtain huge profits for themselves which as a consequence damage the victims of these schemes, discussion of the process that they used is relevant. The Federal Reserve Bank of Chicago has published a paper showing how such actions has damaged borrowers' ability to modify their loans.

A claim under the unlawful prong of the UCL is justified because Defendants have engaged in the unlawful conduct of breach of contract, whereby they have unilaterally modified a contract for their own benefit without disclosure to the other party to the contract.

The specific deceptive, unlawful and unfair actions in which Defendants have engaged, as stat in Plaintiff's complaint, are clearly provable using Defendants' own documents as filed with the Securities and Exchange Commission and recorded public documents. These actions include: a) Executing and recording false and misleading documents; b) Executing and recording documents without the legal authority to do so; c) Failing to disclose the principal for which documents were being executed and recorded in violation of Cal. Civ. Code § 1095; d) Failing to record Powers of Attorney in connection with other recorded documents in violation of Cal. Civ. Code § 2933; e) Violating the Security First Rule; f) Demanding and accepting payments for debts that were non-existent; g) Acting as beneficiaries and trustees without the legal authority to do so; h) Failing to comply with the HAMP guidelines.

G. Plaintiff's COAs Seeking an Order to Set Aside the Trustee's Sale, for Slander of Title and Quit Title are Properly Pled.

Setting aside the foreclosure sale, also known as equitable estoppel, is necessary in this case. Defendant WELLS FARGO led Plaintiff to believe that relief was forthcoming and that WELLS FARGO postponed the sale of the Subject Property while it was reviewing Plaintiff's loan modification application. Instead, in breach of its postponement agreement, WELLS FARGO and QUALITY sold Plaintiff's home to MOAB without any notice to Plaintiff.

The Court in *Lueras* held that while a lender does not have a duty to a borrower to offer or

LAW OFFICES OF TIMOTHY L. MCCANDLESS
26875 Calle Hermosa, Suite A
Capistrano Beach, California 92624
Telephone (925) 957-9797 / (949) 388-7779
Facsimile (925) 957-9799

LAW OFFICES OF TIMOTHY L. MCCANDLESS
26875 Calle Hermosa, Suite A
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Facsimile (925) 957-9799

approve a loan modification, "a lender does owe a duty to a borrower to not make material misrepresentations about the status of an application for a loan modification or about the date, time, or status of a foreclosure sale." *Alvarez, supra*, 228 Cal.App.4th 941, quoting *Lueras v. BAC Home Loans Servicing, L P.*, (2013) 221 Cal.App.4th 49. "The decision on Plaintiff's loan modification application would determine whether or not he could keep him home. [¶] The potential harm to Plaintiff from mishandling the application processing was readily foreseeable: the loss of an opportunity to keep his home was the inevitable outcome... [¶] The injury to Plaintiff is certain, in that he lost the opportunity of obtaining a loan modification and ... his home was sold." *Alvarez, supra*, 228 Ca1.App.4th 49. Therefore, the trustee's sale should be set aside in the interests of justice.

The purpose of a Quiet Title action is to establish title against adverse claims to real property or any interest in the property. Code Civ. Proc. §760.020(a). Defendants are asserting entitlement to conduct a trustee sale if and when Plaintiff defaults. This is the adverse claim that Plaintiff seeks to quiet. It is that simple.

In this case, Defendants claim that Plaintiff's quiet title action should fail. Defendants first argue that Plaintiff has not satisfied her obligations under the DOT because she has defaulted. Second, Defendants argue that Plaintiff cannot prevail under a quiet title claim without paying the debt secured. Defendants' arguments could be successful if this case involved a straightforward real estate transaction where fraud did not occur. See *Warren v. Merrill*, (2006) 143 Cal.App.4th 96 (the Court held that quiet title was a proper remedy because there was enough evidence to show fraud and breach of fiduciary duty). In other words, if this was a standard contract action then the fact that Plaintiff defaulted on his performance under the Note by failing to make the monthly payments required may indeed have presented a material impediment to a quiet title action. *Id*. But this is not such a case. In this case, an action arose to rectify Defendants' unlawful breach of their duties and their fraudulent procurement of legal title.

It is well-settled that when legal title has been acquired through fraud, the fraudulent party acquires bare legal title, which the law of equity views as title held by Defendants as a constructive trustee for Plaintiff, and as a result, Plaintiff would be viewed as holding superior title

LAW OFFICES OF TIMOTHY L. MCCANDLESS
26875 Calle Hermosa, Suite A
Capistrano Beach, California 92624
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to Defendants. See, e.g., *Newport v. Hatton*, (1925) 195 Cal. 132, 145 (because the Defendants acquired title to the property through fraud and coercion the Plaintiff held paramount title unaffected by the Defendants' collusive and fraudulent dealings).

Accordingly, when legal title has been acquired through fraud, a myriad of remedies will be available and appropriate. *Newport v. Hatton*, (1925) 195 Cal. 132. These remedies may include: quieting title, cancellation, reconveyance, or establishing or enforcing trusts, or determining the priorities of opposing equities. See *De Leonis v. Hammel*, (1905) 1 Cal.App. 390; See, e. g., *Newport v. Hatton*, (1925) 195 Cal. 132, 153 ("Any appropriate remedies required upon equitable considerations and justified by the pleadings and proof may be had in such a case.").

In the complaint, Plaintiff has alleged various instances of fraud. During the entire time Plaintiff attempted to obtain a loan modification from Defendants, they concealed the identity of the beneficial owner of Plaintiff's note and concealed the conflict of interest that prevented them from offering a reasonable loan modification.

Defendants argue that the equitable principle of tender is relevant in this case. Tender is misapplied here by Defendants, since a trustee sale has not taken place and, as a result, tender is not required. *Pfeifer v. Countrywide Home Loans, Inc.*, (Cal. App. 1st Dist. 2012) 211 Cal. App. 4th 1250.

V. CONCLUSION

Defendant alleges that Plaintiff seek a windfall, which clearly is not what she is looking for at all, nor does she seek a "free house" but merely wish to regain title of her property for which the wrongfully foreclosure process commenced.

What Plaintiff wants to do is consistent with California law and the DOT she signed. It also is consistent with California public policy. Plaintiff's DOT expressly gives her standing to bring an action raising any defense she has against foreclosure. California public policy going back decades gives him standing.

For the foregoing reasons, Plaintiff respectfully requests that the Court overrule Defendants' Demurrer in its entirety.

///

Respectfully submitted,

DATED: June 15, 2016

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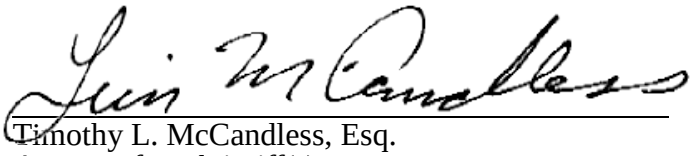

Timothy L. McCandless, Esq.
Attorney for Plaintiff(s): Regina Manantan

LAW OFFICES OF TIMOTHY L. MCCANDLESS
26875 Calle Hermosa, Suite A
Capistrano Beach, California 92624
Telephone (925) 957-9797 / (949) 388-7779
Facsimile (925) 957-9799

LAW OFFICES OF TIMOTHY L. MCCANDLESS
26875 Calle Hermosa, Suite A
Capistrano Beach, California 92624
Telephone (925) 957-9797 / (949) 388-7779
Facsimile (925) 957-9799

MANANTAN *vs.* WELLS FARGO BANK
SAN MATEO SUPERIOR COURT / Case No.: CIV535902

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF ORANGE

I am resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is LAW OFFICES OF TIMOTHY L. MCCANDLESS, 26875 Calle Hermosa, Suite A, Capistrano Beach, California 92624.

On the date set forth below, I served the following document(s) described as:

- **PLAINTIFF'S OPPOSITION TO DEFENDANTS WELLS FARGO BANK, N.A., D/B/A AMERICA'S SERVICING COMPANY AND 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'S DEMURRER, AND QUALITY LOAN SERVICE CORPORATION'S JOINDER TO PLAINTIFF'S SECOND AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

On the interested parties in this action by placing true copies thereof enclosed in sealed envelopes and/or packages addressed as follows:

- **SEE ATTACHED SERVICE LIST**

☒ (OVERNIGHT DELIVERY) I deposited in a box or other facility regularly maintained by Federal Express, an express service carrier, or delivered to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document in sealed envelopes or packages designated by the express service carrier, addressed as stated above with fees for overnight delivery paid or provided for.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (Federal) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on June 15th, 2016, at Capistrano Beach, Orange County, California.

Bernardina Kimmerle

SERVICE LIST

- **Mark D. Lonergan, Esq.**
  Thomas N. Abbott, Esq.
  Brian S. Whittemore, Esq.
  SEVERSON & WERSON, A.P.C.
  One Embarcadero Center, Suite 2600
  San Francisco, California 94111

  ***Attorney(s) for Defendant(s)*: Wells Fargo Bank, N.A. D/B/A America's Servicing Company; and 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**

- **Melissa Coutts, Esq.**
  Nancy Lee, Esq
  MCCARTHY & HOLTHUS, LLP
  1770 4th Avenue
  San Diego, California 92101

  ***Attorney(s) for Defendant(s)*: Quality Loan Service Corporation**

- **Joanna Kozubal, Esq.**
  375 Potrero Avenue, #5
  San Francisco, California 94103

  ***Attorney(s) for Defendant(s)*: MOAB Investment Group, LLC**

LAW OFFICES OF TIMOTHY L. MCCANDLESS
26875 Calle Hermosa, Suite A
Capistrano Beach, California 92624
Telephone (925) 957-9797 / (949) 388-7779
Facsimile (925) 957-9799