MARK D. LONERGAN (State Bar No. 143622)
mdl@severson.com
THOMAS N. ABBOTT (State Bar No. 245568)
tna@severson.com
BRIAN S. WHITTEMORE (State Bar No. 241631)
bsw@severson.com
SEVERSON & WERSON
A Professional Corporation
One Embarcadero Center, Suite 2600
San Francisco, California 94111
Telephone: (415) 398-3344
Facsimile: (415) 956-0439

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

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN MATEO

REGINA MANANTAN,

Plaintiff,

vs.

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

Defendants.

Case No. CIV 535902

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO PLAINTIFF'S SECOND AMENDED COMPLAINT

[Filed concurrently with Notice of Demurrer and Demurrer; Request for Judicial Notice; [Proposed] Order]

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

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

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I. INTRODUCTION

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

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

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

II. STATEMENT OF RELEVANT FACTS

The Loan and Refinance. On January 30, 2007, Plaintiff borrowed $760,000 from Residential Mortgage Capital ("Residential") in a loan refinance secured by real property located at 911 Haddock Street, Foster City, CA 94404. (RJN, Ex. 1.) The deed of trust designates Alliance Title as the trustee and MERS as nominee and was recorded on February 6, 2007. (*Id.*)

NDEx West, L.L.C. ("NDEX") recorded a Notice of Default on May 11, 2009. (RJN, Ex. 2.) MERS, as nominee for Residential Mortgage Capital, then recorded as Assignment of Deed of Trust ("Assignment") in favor of 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 Mortgage Stanley Mortgage Loan Trust 2007-7AX ("U.S. Bank as Trustee"). (RJN, Ex. 3.)

Wells Fargo Bank, N.A. as attorney in fact for U.S. Bank as Trustee, recorded a Substitution of Trustee on July 9, 2009. (RJN, Ex. 4.) Thereafter, NDEX recorded a Notice of Rescission of Notice of Default on November 12, 2009. (RJN, Ex. 5.)

Loan Modification. Wells Fargo recorded a loan modification agreement, as between Plaintiff and Wells Fargo, on December 10, 2009. (RJN, Ex. 6.)

Less than a year later, Quality Loan Servicing Corp ("Quality") recorded a Notice of Default on November 29, 2010. (RJN, Ex. 7.) Quality recorded a Notice of Default on February 3, 2011. (RJN, Ex. 8.) Thereafter, Wells Fargo Bank, N.A., as servicing agent for 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 Mortgage Stanley Mortgage Loan Trust 2007-7AX, recorded a Substitution of Trustee, substituting Quality as the trustee under the Deed of Trust, on June 23, 2011. (RJN, Ex. 9.) Quality recorded a Notice of Trustee's Sale on May 18, 2011. (RJN, Ex. 10.)

Quality recorded a Rescission of Notice of Default on February 4, 2011. (RJN, Ex. 11.)

Then, on June 23, 2011, Quality recorded a Notice of Default. (RJN, Ex. 12.) Quality recorded a Notice of Trustee's Sale on September 28, 2011, setting a sale date of October 24, 2011. (RJN, Ex. 13.)

Grant Deed. On October 24, 2011, the date of the noticed sale, Plaintiff recorded a Grant Deed, granting the property to Regina B. Manantan, a married woman as her sole and separate property, Gianne Patrice M. Vizconde and Trisha Ainne M. Vizcode, unmarried women, as joint tenants. (RJN, Ex. 14.)

Quality recorded a Notice of Trustee's Sale on December 28, 2012, setting a sale date for

January 30, 2013. (RJN, Ex. 15.) Quality recorded a Notice of Trustee's Sale on August 8, 2014. (RJN, Ex. 16.) Quality recorded a Notice of Trustee's Sale on September 9, 2015. (RJN, Ex. 17.)

Grant Deed. On September 25, 2015, Plaintiff recorded a Grant Deed in favor of Regina B. Manantan and Patrick Vizconde, husband and wife, Maria Victoria Manuel, unmarried women and Harry Manuel, unmarried man, as joint tenants. (RJN, Ex. 18.)

Trustee's Sale. The trustee's deed upon sale, recorded October 15, 2015, indicates that Quality, in its capacity as trustee, sold the Property to MOAB Investment Group LLC on October 2, 2015. (RJN, Ex. 19.) The property sold for $1,080.000.00. (*Id.*)

Lis Pendens. Plaintiff recorded a Lis Pendens on October 27, 2015. (RJN, Ex. 20.)

III. LEGAL ARGUMENT

A. Grounds for a Demurrer

A demurrer tests the legal sufficiency of a pleading as to whether the plaintiffs have adequately pled the alleged causes of action. Pursuant to California Code of Civil Procedure ("CCP") §430.30, a demurrer is proper when any ground for an objection to the pleading "appears on the face thereof, or from any matter of which the court is required to or may take judicial notice." Conclusory averments and conclusions of law do not constitute a statement of fact upon which relief may be granted. (*Davaloo v. State Farm Ins. Co.* (2005) 135 Cal.App.4th 409, 415; *Smith v. Busniewski* (1952) 115 Cal.App.2d 124.)

The Court in *Blank v. Kirwan*, (1985) 39 Cal.3d 311, 318, held that "[w]e treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." (*citing, Serrano v. Priest* (1971) 5 Cal.3d 584, 591). Additionally, a complaint that refers generally to "defendants" does not state a claim. (*Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 829.) The instant complaint fails to plead facts to state a single cause of action against Moving Defendants. In addition, Plaintiff lacks standing to bring her equitable claims, such as to set aside foreclosure and quiet title., as she has not alleged compliance with the tender rule. (*See, Abdallah v. United Sav. Bank* (1996) 43 Cal.App.4th 1101, 1109 [(borrowers) required to allege tender of the amount of [lender's] secured indebtedness in order to maintain any cause of action for

irregularity in the sale procedure].)

The SAC alleges eight causes of action as follows: (1) Breach of Security Instrument; (2) Wrongful Foreclosure –Violation of Civil Codes §2924, et. seq., (3) Fraud; (4) Violation of Business and Professions Code § 17200; (5) Intentional Infliction of Emotional Distress; (6) Setting Aside Trustee's Sale; (7) Slander of Title; and (8) Quiet Title. As discussed more fully below, Plaintiff failed to plead facts sufficient to state a cause of action against Moving Defendants.

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

Plaintiff further challenges the foreclosure process based upon the assignment of deed from MERS to US Bank on June 12, 2009. (SAC ¶ 60.) This theory is likewise contrary to California law, which holds that a borrower lacks standing to challenge an assignment. "However, even if the asserted improper securitization (or any other invalid assignments or transfers of the promissory note subsequent to her execution of the note on Mar. 23, 2007) occurred, the relevant parties to such a transaction were the holders (transferors) of the promissory note and the third party acquirers (transferees) of the note. "Because a promissory note is a negotiable instrument, a borrower must anticipate it can and might be transferred to another creditor. As to plaintiff, an assignment merely substituted one creditor for another, without changing her obligations under the note." (*Jenkins v. JP Morgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 514-15.)

In the most recent appellate court case dealing with this issue, the *Saterbak* Court held that *Glaski v. Bank of America, N.A.* (2013) 218 Cal.App.4th 1079 is wrong: a post-closing-date transfer of a loan into a New York securitized trust is voidable, not void, so the borrower has no standing to challenge it. (*Saterbak v. JP Morgan Chase Bank, N.A.* (2016) 2016 DAR 2565.)

Thus, Plaintiff's attempt to set aside the foreclosure by challenging the securitization process must fail.

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

Plaintiff's first cause of action alleges a breach of the Deed of Trust and fails for at least two reasons: (1) the contract claim does not plead the essential terms of the contract' and (2) the

cause of action fails to plead damages.

Plaintiff alleges that Moving Defendants recorded a Notice of Default without performing a condition precedent contained in Section 22 of the Deed of Trust. (SAC. ¶ 69.)

In actual fact, Plaintiff pleads an *irregularity in the foreclosure process* and therefore must plead facts to show prejudice. Tellingly, Plaintiff does not plead that she was, in fact, current on her loan obligation so prejudice has not been pled in this case. "We also note a plaintiff in a suit for wrongful foreclosure has generally been required to demonstrate the alleged imperfection in the foreclosure process was prejudicial to the plaintiff's interests. (*Melendrez v. D & I Investment, Inc., supra,* 127 Cal.App.4th at p. 1258, 26 Cal.Rptr.3d 413; *Knapp v. Doherty,* (2004) 123 Cal.App.4th at p. 86, fn. 4, 20 Cal.Rptr.3d 1 ["A nonjudicial foreclosure sale is presumed to have been conducted regularly and fairly; one attacking the sale must overcome this common law presumption 'by pleading and proving an improper procedure *and the resulting prejudice* ' "], italics added; *Lo v. Jensen* (2001) 88 Cal.App.4th 1093, 1097–1098, 106 Cal.Rptr.2d 443 [collusion resulted in inadequate sale price]; *Angell v. Superior Court* (1999) 73 Cal.App.4th 691, 700, 86 Cal.Rptr.2d 657 [failure to comply with procedural requirements must cause prejudice to plaintiff].) Prejudice is not presumed from "mere irregularities" in the process. (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 272.) In addition, as the sale was completed, Plaintiff must also plead tender in order to have standing to set aside the sale. She does not.

As a general rule, a debtor cannot set aside the foreclosure based on *irregularities in the sale* without also alleging tender of the amount of the secured debt. (Emphasis added.)(*Karlsen v. American Sav. & Loan Assn.* (1971) 15 Cal.App.3d 112, 117 ["A valid and viable tender of payment of the indebtedness owing is essential to an action to cancel a voidable sale under a deed of trust"]; see *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1109[sustaining demurrer for lack of tender of amounts due and owing under the loan].) "The rationale behind the rule is that if [the borrower] could not have redeemed the property had the sale procedures been proper, any irregularities in the sale did not result in damages to the [borrower]." (*FPCI RE–HAB 01 v. E & G Investments, Ltd.* (1989) 207 Cal.App.3d 1018, 1022; *Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 112; *Shuster v. BAC Home Loans Servicing, LP* (2012) 211 Cal.App.4th 505,

512.) Here, Plaintiff fails to plead tender and the demurrer is properly sustained.

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

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

Plaintiff's Second Cause of Action for Wrongful Foreclosure is impermissibly conclusory as to Moving Defendants but generally premised on the application of California's Homeowners' Bill of Rights ("HBOR"). The Complaint alleges that the Notice of Default was statutorily deficient under HBOR. However, the Notice of Default in connection with the foreclosure was recorded on June 23, 2011, well before HBOR was enacted in January 2013. (RJN, Ex. 12.) The statute is not retroactive.

This is fatal to the claim, the subsequent HBOR claims and all claims that are predicated on violation of the HBOR, because of the strong presumption against retroactivity in the absence of such express language. (See, e.g., Civ. Code, § 3; Cal. Code Civ. Pro. § 3.) "Generally, '[t]he presumption is very strong that a statute was not meant to act retrospectively, [wherein] [i]t ought not receive such a construction unless the words used are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.' " (*Yoshioka v. Superior Court* (1997) 58 Cal.App.4th 972, 980, quoting *U.S. Fidelity Co. v. Struthers Wells Co.* (1908) 209 U.S. 306, 314.)

Indeed, the presumption against retroactive application is especially strong when retroactive application would "increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." (*Landgraf v. USI Film Products* (1994) 511 U.S. 244, 280.) Plaintiff's allegations related to the Notice of Default must fail as it was recorded before the HBOR was enacted.

1. The Civil Code Section 2923.6 Theory Incorporated in the Second COA Fails

In her second cause of action, Plaintiff alleges, in conclusory fashion, that she submitted a complete loan modification to Wells Fargo long before the recordation of the NOTS. (SAC ¶ 82.) This conclusory statement is insufficient to state a claim without factual support. Section 2923.6(c) provides that if a borrower submits a *complete* loan modification application, the

servicer is obligated to postpone the sale until the servicer makes a written decision and the borrower's time to appeal has expired. Here, Plaintiff cannot state a Section 2923.6 claim because she does not plead sufficient facts that the application was ever *complete.* "Nevertheless, whether a loan modification is "complete" is a legal determination that must be made by considering the mandates of section 2923.6(h). Plaintiff's bald allegation that she submitted a "complete" loan modification – without any supporting factual allegations – is a conclusory statement, and the Court does not rely on such assertions in evaluating the sufficiency of Plaintiff's Complaint." (*Woodring v. Ocwen Loan Servicing, LLC,* 2013 WL 3558716 (C.D. Cal. July 18, 2014); *Stokes v. Citimortgage, Inc.*, 2014 WL 4359193 (C.D. Cal. Sept. 3, 2014.) Here, Plaintiff makes no specific allegation with regard to the completeness of their purported loan modification application. Because Plaintiff never allege sufficient supporting facts that the loan modification was complete, she cannot state a "dual tracking" claim based on the allegation that Wells Fargo has not provided a written determination. Wells Fargo is not obligated to provide a written determination on a loan modification application unless the application is "complete". (Civ. Code § 2923.6(c).)

Conspicuously absent from the facts presented in the SAC is the judicially noticeable loan modification signed between Wells Fargo and Plaintiff in December 2009. (RJN, Ex. 6.) Here, Plaintiff's borrower's prior loan modification triggers Civil Code Section 2923.6(g), which states as follows:

> (g) In order to minimize the risk of borrowers submitting multiple applications for first lien loan modifications for the purpose of delay, the mortgage servicer shall not be obligated to evaluate applications from borrowers who have already been evaluated or afforded a fair opportunity to be evaluated for a first lien loan modification prior to January 1, 2013, or who have been evaluated or afforded a fair opportunity to be evaluated consistent with the requirements of this section, unless there has been a material change in the borrower's financial circumstances since the date of the borrower's previous application and that change is documented by the borrower and submitted to the mortgage servicer.

However, Plaintiff does not disclose that she received a loan modification in December 2009 and was afforded a fair opportunity to be evaluated for a first lien modification. In addition, she fails to plead that there was a material change in her financial circumstances, and that the material change was documented and submitted to Wells Fargo, such that Wells Fargo was under obligation to consider her second request for a modification. Based on the foregoing, Moving

Defendants' demurrer to the second cause of action is properly sustained.

2. The Civil Code Section 2923.7 Theory Incorporated in the Second COA Fails

Section 2923.7 obligates the servicer to provide a SPOC "upon request." (Civ. Code § 2923.7(a).) Here, Plaintiff makes no allegation that she ever requested a SPOC, which is fatal to the claim. Indeed, courts have read § 2923.7 to "require a borrower to request a SPOC before the servicer is required to establish one." (*Carbajal v. Wells Fargo Bank, N.A.*, 2015 WL 245054, at *7 (C.D. Cal. April 10, 2015); *Hatton v. Bank of Am., N.A.*, 2015 WL 4112283, at *6. (E.D. Cal. July 8, 2015.) As with the 2923.6 theory, Plaintiff's allegations of wrongful foreclosure based on violation of Civil Code Section 2923.7 must fail as it is impermissibly conclusory. The cause of action simply alleges the requirements of the code section, but then alleges no facts to suggest who, how, or when Moving Defendants purportedly violated the requirements of Civil Code Section 2923.7. Plaintiff " must allege when the request was made, who made the request, who received the request, and in what manner the alleged request was made. Without this additional information there is no way to determine whether Wells Fargo actually violated the statute, or whether [Plaintiffs] are simply pleading a naked, formulaic claim." (*Major v. Wells Fargo Bank, N.A.* (2014) 2014 WL 4103936, at *5.) The *Major* Court's reasoning is equally applicable to this cause of action. Here, the conclusory claim cannot reasonably be interpreted as an explicit request for a SPOC and there are no facts pleaded to suggest that Moving Defendants violated the statute. Accordingly, the demurrer is properly sustained.

3. The Tender Rule Applies

California law rejects Plaintiff's allegation that the foreclosure sale was void under the facts pleaded. (SAC ¶ 99.) *Yvanova* expressly offers no opinion as to whether, under New York law, an untimely assignment to a securitized trust made after the trust's closing date is void or merely voidable. (*Id.* at pp. 940–941, 199 Cal.Rptr.3d 66, 365 P.3d 845.) ***We conclude such an assignment is merely voidable.*** (Emphasis added.) (See *Rajamin v. Deutsche Bank Nat'l Trust Co.* (2d Cir.2014) 757 F.3d 79, 88–89 ["the weight of New York authority is contrary to plaintiffs' contention that any failure to comply with the terms of the PSAs rendered defendants' acquisition of plaintiffs' loans and mortgages void as a matter of trust law"; "an unauthorized act by the

trustee is not void but merely voidable by the beneficiary"].)[5] Consequently, Saterbak lacks standing to challenge alleged defects in the MERS assignment of the DOT to the 2007–AR7 trust. (*See, Saterbak v. JPMorgan Chase Bank, N.A.*, (Cal. Ct. App., Mar. 16, 2016, No. D066636) 2016 WL 1055062, at *4.) Accordingly, Plaintiff's contention that the tender rule is not applicable because the foreclosure sale is "void" is simply contrary to California law. Based on the foregoing, the demurrer is properly sustained.

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

Plaintiff's third cause of action once again challenges the foreclosure based on (1) fraudulent inducement at origination and (2) on false mortgage assignment.

Plaintiff appears to allege that defendant Residential committed fraud be securitizing the loan – there is no allegation that Moving Defendants were involved in the sale of the loan, so this cause of action fails as to Moving Defendants. Even if Moving Defendants had been involved in origination, Plaintiff's claim must nevertheless fail because she lacks standing to bring a fraud claim premised upon the purported assignment of the loan into a securitized trust.

> *Yvanova* recognizes borrower standing only where the defect in the assignment renders the assignment *void,* rather than *voidable*. (*Yvanova v. New Century Mortg. Corp.* (2016) 62 Cal. 4th 919, 942–943.) "Unlike a voidable transaction, a void one cannot be ratified or validated by the parties to it even if they so desire." (*Id.* at p. 936.) *Yvanova* expressly offers no opinion as to whether, under New York law, an untimely assignment to a securitized trust made after the trust's closing date is void or merely voidable. (*Id.* at pp. 940–941.) We conclude such an assignment is merely voidable. (See *Rajamin v. Deutsche Bank Nat'l Trust Co.* (2d Cir.2014) 757 F.3d 79, 88–89 ["the weight of New York authority is contrary to plaintiffs' contention that any failure to comply with the terms of the PSAs rendered defendants' acquisition of plaintiffs' loans and mortgages void as a matter of trust law"; "an unauthorized act by the trustee is not void but merely voidable by the beneficiary"].)[5] Consequently, Saterbak lacks standing to challenge alleged defects in the MERS assignment of the DOT to the 2007–AR7 trust.
>
> (*Saterbak v. JPMorgan Chase Bank, N.A.* (Cal. Ct. App., Mar. 16, 2016, No. D066636) 2016 WL 1055062, at *4.)

In addition, Plaintiff agreed that the loan could be sold when she executed the deed of trust. (RJN, Ex. 1.) "The authority to exercise all of the rights and interests of the lender necessarily includes the authority to assign the deed of trust." (*Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75, 84, disapproved on other grounds in

Yvanova, supra, 62 Cal.4th at p. 939, fn. 13, 199 Cal.Rptr.3d 66; see *Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, 1504 [interpreting language identical to Saterbak's DOT to give MERS "the right to assign the DOT"], disapproved on other grounds in *Yvanova,* at p. 939, fn. 13, 199 Cal.Rptr.3d 66.) The federal court adjudicating Saterbak's parallel case against her loan servicer cited the above-quoted language in the DOT to reject the same securitization theory proffered here. (*Saterbak v. National Default Servicing Corp.* (S.D.Cal. Oct. 1, 2015, Civ. No. 15–CV–956–WQH–NLS) 2015 WL 5794560, at *7.) (*Saterbak v. JPMorgan Chase Bank, N.A.* (Cal. Ct. App., Mar. 16, 2016, No. D066636) 2016 WL 1055062, at *4.) Based on the foregoing, Plaintiff's fraud claim premised on the sale or assignment of the loan is simply contrary to California law and without legal merit.

Even if it were not, it is subject to applicable statute of limitations. The assignment in this case was recorded on June 26, 2009. (RJN, Ex. 3.) Accordingly, any purported fraud related to the assignment is barred by the applicable ***three year*** statute of limitations. [Code of Civil Procedure section 338, subdivision (d) three-year] limitations period," governing fraud..] (*Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 607.)

Plaintiff's additional allegations, related to alleged fraudulent conduct of Moving Defendants, involve allegations that Moving Defendants processed Plaintiff's loan modification "even though they knew that the Trustee was prohibited from accepting assets into the Trust 2007-7AX after its closing date of April 30, 2005. (SAC ¶ 115.) However, as discussed above, ["the weight of New York authority is contrary to plaintiffs' contention that any failure to comply with the terms of the PSAs rendered defendants' acquisition of plaintiffs' loans and mortgages void as a matter of trust law"; "an unauthorized act by the trustee is not void but merely voidable by the beneficiary"].)[5] Consequently, Saterbak lacks standing to challenge alleged defects in the MERS assignment of the DOT to the 2007–AR7 trust." (*Saterbak, supra,* *4.) Based on the foregoing, the third cause of action must fail as to Moving Defendants.

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

Plaintiff's UCL claim is based wholly on her other failed theories. Since those theories are simply wrong under California law, Plaintiff's UCL claim should be dismissed as well. (*Glenn K.*

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

Second, the facts constituting an alleged violation of section 17200 must be "state[d] with reasonable particularity." (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 619; *see also Schwartz v. IndyMac Federal Bank* (E.D. Cal. 2010) 2010 WL 2985480 at *4.) Here, Plaintiff lacks the requisite predicate violation, stated in the required level of specificity, for such a cause of action to survive.

Third, Plaintiff lacks standing to bring such this claim. A private party may bring an action under section 17200 *et seq.* only if they have suffered injury in fact and have lost money or property as a result of unfair competition. (Cal. Bus. & Prof. Code § 17204; *R & B Auto Ctr., Inc. v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327, 360.) Plaintiffs' allegations under section 17200 fail to establish the necessary standing. Nowhere in Plaintiffs' FAC do they assert any harm that they suffered through any specific action or inaction on the part of Moving Defendants.

Finally, Plaintiff fails to allege any fact showing the key factor of dollar loss to herself—an idea which defies probability, because in order to be damaged Plaintiff must have somehow repaid defendants the $760,000 which she borrowed. This is an assertion which Plaintiff could easily make if it were true, but which Plaintiff does not make. But in any case there is no allegation of the key material facts—and that is what is required. Based on the foregoing authorities, the demurrer is properly sustained.

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

The elements of an IIED claim are: (1) defendant's outrageous conduct; (2) defendant's intention to cause, or reckless disregard of the probability of causing, emotional distress; (3)

plaintiff's suffering severe or extreme emotional distress; and (4) an actual and proximate causal link between the tortious (outrageous) conduct and the emotional distress. (*Nally v. Grace Community Church of the Valley* (1988) 47 Cal.3d 278, 300; *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 155, n. 7.) The "[c]onduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Davidson v. City of Westminister* (1982) 32 Cal.3d 197, 209)(quoting *Cervantez v. J.C. Penney Co.* (1979) 24 Cal.3d 579, 593.) "In the context of debt collection, courts have recognized that the attempted collection of a debt by its very nature often causes the debtor to suffer emotional distress." (*Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th 736, 745)(citing *Bundren v. Superior Court*, (1983) 145 Cal.App.3d 784, 789.) "Frequently, the creditor intentionally seeks to create concern and worry in the mind of the debtor in order to induce payment." (*Bundren*, 145 Cal.App.3d at 789.) Such conduct is only outrageous if it goes beyond "all reasonable bounds of decency." (*Bundren*, 145 Cal.App.3d at 789.) Based on these authorities, the demurrer is properly sustained without leave to amend.

"The assertion of an economic interest in good faith is privileged, even if it causes emotional distress." (*Ross*, 100 Cal.App.4th at 745, n. 4.; citing *Fletcher v. Western National Life Ins. Co.*, (1970) 10 Cal.App.3d 376, 395; *Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 888.) The SAC fails to allege Moving Defendants' outrageous conduct to support an IIED claim. Further, the SAC points to no conduct of Moving Defendants, other than the rejected, generalized and conclusory theories discussed herein. Plaintiff's theory that defendants had no right, title or interest in the property is premised upon the flawed assignment theory and is properly rejected. In addition, the SAC identifies no severe emotional distress which Plaintiff allegedly suffered that was proximately caused by Moving Defendants. The demurrer is properly sustained as a result.

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

As a general rule, a debtor cannot set aside the foreclosure based on irregularities in the sale without also alleging tender of the amount of the secured debt. [Citations.]" (*Shuster v. BAC Home Loans Servicing, LP* (2012) 211 Cal.App.4th 505, 512; accord, *Arnolds Management Corp.*

v. Eischen, (1984) 158 Cal.App.3d at p. 578 ["an action to set aside a trustee's sale for irregularities in sale notice or procedure should be accompanied by an offer to pay the full amount of the debt for which the property was security"]; *Chavez v. Indymac Mortgage Services* (2013) 219 Cal.App.4th 1052, 1063 [if the sale is facially valid but there is some procedural irregularity in notice procedures, it is voidable requiring tender].)

"The rationale behind the rule is that if [the borrower] could not have redeemed the property had the sale procedures been proper, any irregularities in the sale did not result in damages to the [borrower]." (*FPCI Re–Hab 01 v. E & G Investments, Ltd.* (1989) 207 Cal.App.3d 1018, 1022, 255 Cal.Rptr. 157.) As noted above, section 2924 provides that, where the trustee delivers a deed to the buyer at the foreclosure sale, and the deed recites that all procedural requirements for the default notice and sale notice have been satisfied, there is a statutory rebuttable presumption that such notice requirements have been fulfilled; as to a BFP, this presumption is conclusive. (§ 2924; *Homestead Savings v. Darmiento,* (1991) 230 Cal.App.3d 424, 432, 281 Cal.Rptr. 367; *Napue v. Gor–Mey West, Inc.* (1985) 175 Cal.App.3d 608, 620–621, 220 Cal.Rptr. 799.) Here, there are no facts presented to suggest that the purchases, MOAB, is not a bona fide purchaser.

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

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

The seventh cause of action for slander of title must fail as recordation of a notice of default and a notice of sale are absolutely privileged acts on which no tort claim of any sort, other than malicious prosecution, may be based. California Civil Code section 2924(d)(1) provides that "[t]he mailing, publication, and delivery of notices as required by this section" "constitute privileged communications pursuant to Section 47." Notice of sale and default are required by section 2924(a)(1) and (3); hence, giving those notices is privileged conduct under Civil Code section 47. Reinforcing that conclusion, Civil Code section 2924(d)(2) provides that

"[p]erformance of the procedures set forth in this article"[1] also "constitute privileged communications pursuant to Section 47."

Civil Code section 47's privilege "bars all tort causes of action except malicious prosecution." (*Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 960.) In particular, the privilege bars a slander of title claim based on the recordation of the privileged document. (*Albertson v. Raboff* (1956) 46 Cal.2d 375, 378-81.) Under Civil Code section 2924(d), the act on which the Plaintiff bases her slander of title claim is privileged under section 47. Here, Plaintiff alleges no facts raising any inference of malice.[2] In fact, the cause of action again appears based Plaintiff's erroneous theory that the foreclosure process was flawed because of the assignment and that the subsequent sale of the property was void as a result. These allegations are simply contrary to California law as explained above in Part D-III, and throughout the demurrer..

As Plaintiff has no standing to challenge the assignment, the slander of title theory must also fail. Accordingly, the slander of title cause of action states no claim on which relief may be granted and the demurrer is properly sustained.

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

"It is settled in California that a mortgagor cannot quiet his title against the mortgagee without paying the debt secured." (*Shimpones v. Stickney*, (1934) 219 Cal. 637, 649; see *Mix v. Sodd*, (1981) 126 Cal.App.3d 386, 390 ("a mortgagor in possession may not maintain an action to quiet title, even though the debt is unenforceable"); *Aguilar v. Bocci*, (1974) 39 Cal.App.3d 475, 477, (trustor is unable to quiet title "without discharging his debt"); see also, *Hamilton v. Bank of Blue Valley*, (E.D. Cal. 2010) 746 F.Supp.2d 1160). Thus, an action to Quiet Title is similarly barred by the tender rule.

Plaintiff's eighth cause of action is generally barred by the tender rule and also because

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[1] Section 2924 is part of Title 14, Chapter 2, Article 1 of the California Civil Code, which begins with section 2920 and ends with section 2944.5.

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

Plaintiff failed to state facts supporting a claim against Moving Defendants. The purpose of a quiet title action is to determine "all conflicting claims to the property in controversy and to decree to each such interests or estate therein as he may be entitled to." (*Neman v. Cornelius* (1970) 3 Cal.App.3d 279, 284). A quiet title action must include: (1) a description of the property in question; (2) the basis for plaintiff's title; and (3) the adverse claims to plaintiff's title. Cal. Code Civ. Proc. § 761.020.

Plaintiff has not alleged that she is the rightful owner of the property, i.e. that she has satisfied her obligations under the Deed of Trust. Nor that she pled any facts to establish any of the myriad and duplicative claims alleged above. In dismissing a Quiet Title claim based on a purported flawed assignment theory, the *Debrunner* Court stated, "[t]o the extent that his position depends on the invalidity of the assignment, it falls with the cause of action for declaratory relief, as he did not show title free and clear of the first deed of trust." (*Debrunner v. Deutsche Bank Nat. Trust Co.* (2012) 204 Cal.App.4th 433, 444.) The same rationale applies to this case and the demurrer is properly sustained.

IV. CONCLUSION

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

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SEVERSON & WERSON
A Professional Corporation

By: _____
Brian S. Whittemore

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