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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF LOS ANGELES**

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| , | **CASE NO.** |
| PLAINTIFFS, | **PLAINTIFFS' OPPOSITION TO DEFENDANTS' DEMURRER TO PLAINTIFFS' FIRST AMENDED COMPLAINT** |
| vs. | |
| NEW PENN FINANCIAL, LLC dba SHELLPOINT MORTGAGE COMPANY, a Delaware corporation; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation; THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWMBS, INC., CHL MORTGAGE PASS-THROUGH TRUST 2004-HYB7, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2004-HYB7, ITS ASSIGNEES AND/OR SUCCESSORS IN INTEREST; LAW OFFICES OF LES ZIEVE, A PROFESSIONAL CORPORATION, a California professional corporation; and DOES 1-50, inclusive, | |
| Defendants. | |

TO THIS HONORABLE COURT, DEFENDANTS AND THEIR ATTORNEYS OF RECORD HEREIN:

Plaintiffs hereby submit the following Opposition to Defendants NEW PENN FINANCIAL, LLC DBA SHELLPOINT MORTGAGE SERVICING ("Shellpoint"); THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK ("BONY" or "Trustee"), AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWMBS, INC., CHL MORTGAGE PASS-THROUGH TRUST 2004-HYB7, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2004-HYB7, ITS ASSIGNEES AND/OR SUCCESSORS IN INTEREST (the "Trust"); and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. ("MERS") (collectively referred to herein as "Defendants") Demurrer to Plaintiffs' First Amended Complaint ("FAC").

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## I.

## INTRODUCTION

This action arises out of the improper handling of Plaintiffs' application for a loan modification and Defendants' wrongful initiation and continuation of foreclosure proceedings against Plaintiffs' property. For the reasons set forth below, Plaintiffs have properly alleged each and every cause of action in the FAC. Thus, Defendants' Demurrer should be overruled.

## II.

## PLAINTIFFS HAVE PROPERLY ALLEGED A CAUSE OF ACTION FOR VIOLATIONS OF THE HBOR

### A. PLAINTIFFS HAVE PROPERLY ALLEGED VIOLATIONS OF THE "DUAL TRACKING" PROVISIONS IN THE HBOR

Section 2923.6(c) provides, in pertinent part, that "[i]f a borrower submits a complete application for a first lien loan modification . . ., a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or notice of sale, or conduct a trustee's sale, while the complete first lien loan modification application is pending. . ." Scheduling and refusing to postpone a sale is considered to be "conducting" a sale pursuant to the HBOR. Foronda v. Wells Fargo, 14-CV-03513-LHK, at *12 (N.D. Cal. Nov. 26, 2014). Moreover, serving a notice of trustee's sale on a borrower is also deemed to be "conducting" a sale. Copeland v. Ocwen Loan Servicing, LLC, CV-13-05708, at *6 (C.D. Cal. Jan. 3, 2014); see also Young v. Deutsche Bank Nat'l Trust Co., 2013 WL 3992710, at *2 (E.D. Cal. Aug. 2, 2013) (allowing borrowers leave to amend their complaint to include a dual tracking claim even though servicer had voluntarily postponed the sale and was negotiating a modification with borrowers).

There is no dispute that Defendants "conducted" a sale pursuant to Section 2923.6(c). The only issue is whether Plaintiffs' application was "complete" and, therefore, pending when they conducted a sale. Specifically, on or about April 12, 2016, Plaintiffs applied for a loan modification by submitting the required application and financial documents, as set forth in

Shellpoint's application packet, i.e., the Uniform Borrower Assistance Form, IRS Form 4206-T, most recent tax returns, bank statements and profit and loss reports, and the Dodd-Frank certification form. FAC, at ¶ 31.

Thereafter, Shellpoint wrote to Plaintiffs and confirmed several times that it had received Plaintiffs' "complete" application for a loan modification. FAC, at ¶¶ 33, 43, 54, and 57, and Exhibits "L," "U," "BB" and "EE" attached thereto. Shellpoint stated that it had "received [Plaintiffs'] complete request for a loss mitigation program. We are currently reviewing the package to determine if the referenced loan qualifies for one of our programs. We will contact you if we need additional information . . ." Id. At that point, Plaintiffs' application was "complete" for purposes of Section 2923.6(c). McKinley v. CitiMortgage, Inc., 2014 WL 651917, at *3-4 (E.D. Cal. Sept. 3, 2014) (holding that the fact that the servicer "may hypothetically request additional information in the future" does not render the application incomplete); see also Hestrin v. CitiMortgage, Inc., No. 14-cv-9836, 2015 WL 847132, at *3 (C.D. Cal. Feb. 25, 2015) (concluding plaintiff submitted a complete application despite the fact that the loan servicer later informed plaintiff that his application was incomplete).

Instead, Shellpoint argues that when it uses the word "complete" in their letters, it does not have the same meaning as it is used in Section 2923.6(c). Based on Shellpoint's interpretation, an application is never "complete" as long as the servicer reserves its right to request additional documents. Thus, Shellpoint's interpretation renders Section 2923.6(c) meaningless as it can always get around the statute by requesting additional documents while it continues with foreclosure proceedings. See McKinley, supra, at *4 ("[T]he court finds unavailing Defendant's contention that the application was not complete because the letter it drafted did not explicitly state that the application was complete. This would essentially render Section 2923.6 toothless as it would excuse any lender from complying with the statute by merely omitting the word "complete" from any letter acknowledging receipt of an application.").

Moreover, any ambiguity in Shellpoint's letters must be construed against it. See McKinley, supra, at *4 ("Defendant cannot hide behind the document it drafted to demonstrate that the application was not complete."); see also Kunin v. Benefit Trust Life Ins. Co., 910 F.2d

534, 539 (9th Cir.1990) ("The rule is based upon the principle of contract construction that when one party is responsible for the drafting of an instrument, absent evidence indicating the intention of the parties, any ambiguity will be resolved against the drafter."). Here, the only reasonable interpretation that is consistent with Section 2923.6(c) is that the application was deemed "complete" when Shellpoint confirmed receipt of all of the documents required by the initial packet. Otherwise, the statute is meaningless as applied to Shellpoint as it would allow it to proceed with foreclosure as long as it continued to request documents, which it did here. See FAC, at ¶¶ 34, 36, 37, 42, 44, 45, 50, 51, 52, 54, 55, 57, 58, 61, 63, 69, 71 and 74, and Exhibits "M," "N," "O," "T," "V," "W," "Z," "BB," "CC," "EE," "HH," and "JJ." Nevertheless, Plaintiffs complied with all of Shellpoint's additional requests and, thus, the application was complete under any interpretation. See Flores v. Nationstar, 2014 WL 304766, at *4 (C.D. Cal. January 6, 2014) (holding that borrower had successfully alleged he submitted a "complete" application by complying with servicer's additional document requests over the course of two months).

Amazingly, as the trustee's sale date neared in August 2016, Shellpoint refused to consider any allegedly additional documents requested by it because of the fact that a trustee's sale date had been set. FAC, at ¶¶ 53 and 54 and Exhibits "AA" and "BB" attached thereto. This type of wrongful conduct is exactly what the legislature intended to prohibit through the HBOR. Cal. Civ. Code 2923.4(a) ("The purpose of the [HBOR] . . . is to ensure that, as part of the nonjudicial foreclosure process, borrowers are considered for, and have a meaningful opportunity to obtain, available loss mitigation options, if any, offered by or through the borrower's mortgage servicer, such as loan modifications or other alternatives to foreclosure."). If allowed, servicers would be able to simply claim that an application is not "complete" because additional documents are required, set a trustee's sale date and then refuse to consider any additional documents because a trustee's sale had been set. Borrowers would have no meaningful opportunity to obtain a loan modification under Shellpoint's interpretation of Section 2923.6(c). Accordingly, Shellpoint's demurrer to Plaintiffs' first cause of action should be overruled.

**B. PLAINTIFFS HAVE PROPERLY ALLEGED VIOLATIONS OF THE "SINGLE POINT OF CONTACT" PROVISION IN THE HBOR**

Section 2923.7 provides that a "servicer promptly establish a single point of contact ["SPOC"]" and provide the borrower with a "direct means of communication" with that SPOC. The SPOC is responsible for all of the following:

> "(1) Communicating the process by which a borrower may apply for an available foreclosure prevention alternative and the deadline for any required submissions to be considered for these options.
> (2) Coordinating receipt of all documents associated with available foreclosure prevention alternatives and notifying the borrower of any missing documents necessary to complete the application.
> (3) Having access to current information and personnel sufficient to timely, accurately, and adequately inform the borrower of the current status of the foreclosure prevention alternative.
> (4) Ensuring that a borrower is considered for all foreclosure prevention alternatives offered by, or through, the mortgage servicer, if any.
> (5) Having access to individuals with the ability and authority to stop foreclosure proceedings when necessary." Cal. Civ. Code § 2923.7(b).

Plaintiffs were not assigned to a "team" of SPOCs but instead were wrongfully shuffled through numerous individual SPOCs. See Cortez v. Citimortgage Inc., 2014 WL 7150050, at *6 (C.D. Cal. Dec. 11, 2014) (holding that shuffling of SPOCs prohibited by statute, noting that borrower did not allege she was reassigned to "different members of a team which comprised her SPOC; she alleges that the SPOCs themselves changed."). None of the SPOCs performed the above duties satisfactorily. FAC, at ¶¶ 30, 32, 41, 49, 50, 51, 52, 53, 59, 60, 62 and 70, and Exhibits "K," "Z," "AA," "CC," "FF," "GG," "II" and "KK" attached thereto. Instead, the SPOCs provided false information regarding the status of the foreclosure (FAC, at ¶¶ 49-51 and Exhibit "Z" attached thereto), gave Plaintiffs the same list of additional documents that were allegedly required but were not able to explain why the documents that were already submitted were allegedly not adequate (FAC, at ¶¶ 50, 52), rarely returned phone calls or responded to letters (FAC, at ¶¶ 49, 51, 55, 60, and 62, and Exhibits "Z," "CC," "GG" and "II" attached thereto) and, ultimately, were not able to guide Plaintiffs through the end of the process.

Shellpoint appears to concede that their SPOCs did not satisfy all five of the above referenced requirements. Rather, Shellpoint argues that Plaintiffs did not suffer any damages as

a result of their violations of Section 2923.7. However, Plaintiffs have suffered tremendous damage from the mishandling of their loan modification application. Specifically, they had to file this action to stop a foreclosure of their home. Additionally, there is a pending foreclosure sale scheduled for March 30, 2017, and Defendants have still not denied or granted Plaintiffs' request for a permanent loan modification even though this process started approximately eleven months ago. Had Defendants assigned a competent SPOC to guide Plaintiffs through the process, Plaintiffs likely would have had a permanent loan modification by now without the necessity of filing for injunctive relief under the HBOR. Thus, Defendants' violations were material. See Segura v. Wells Fargo Bank, N.A., 2014 WL 4798890 (C.D. Cal. Sept. 26, 2014). ("The failure to assign a SPOC, and the alleged wrongful foreclosure, therefore, deprived them of the opportunity to obtain the modification. Had they obtained a modification, they may have been able to keep their house and lower their mortgage payments"); see also Rizk v. Residential Credit Solutions, Inc., 2015 WL 573944, at *12 (C.D. Cal. Feb. 10, 2015) (holding that recording a notice of trustee's sale is a material violation under the HBOR). Moreover, materiality is a factual question that should not be resolved at the pleading stage. See Hestrin v. Citimortgage, Inc., 2015 U.S. Dist. LEXIS 23547, at *8 n.4 (C.D. Cal. Feb. 25, 2015). Accordingly, Shellpoint's demurrer should be overruled.

## III.

## PLAINTIFFS HAVE PROPERLY ALLEGED CAUSES OF ACTION FOR WRONGFUL FORECLOSURE, CANCELLATION OF INSTRUMENTS, QUIET TITLE, DECLARATORY RELIEF AND INJUNCTIVE RELIEF

In support of their demurrer to Plaintiffs' wrongful foreclosure, cancellation of instruments, quiet title, declaratory relief and injunctive relief causes of action, Defendants argue that: (1) Plaintiffs cannot "preemptively" challenge a foreclosure sale; (2) Plaintiffs do not have "standing" to challenge the PSA; (3) the deed of trust ("DOT") was properly assigned to the Trust; and (4) Plaintiffs failed to allege tender of the loan balance. Essentially, Defendants assert that a clearly forged note and void assignment of the DOT cannot be challenged. For the reasons set forth below, Defendants arguments lack merit.

## A. PLAINTIFFS' ACTIONS ARE NOT "PREEMPTIVE" AND THEY HAVE "STANDING" TO BRING THEM

As Defendants noted, the California Supreme Court in Yvanova v. New Century Mortgage Corp., 62 Cal. 4th 919, 199 Cal. Rptr. 3d 66 (2016), declined to rule on the issue of whether pre-foreclosure actions are proper. However, the Court's ruling in Yvanova as well as the ruling in Gomes v. Countrywide Home Loans, Inc., 192 Cal. App.4th 1149 (2011), lead to the conclusion that they should and must be allowed in limited circumstances. See Lundy v. Selene Fin., LP, 2016 WL 1059423, at *13 (N.D. Cal. Mar. 17, 2016) (finding a specific factual basis for the plaintiff's contention that defendants lacked authority to initiate the foreclosure where the plaintiff alleged the Assignment underlying the foreclosure was void); Reed v. Wilmington Trust, N.A., No. 16cv1933-JSW, 2016 WL 3124611, at *4 (N.D. Cal. June 3, 2016) (holding that plaintiff alleged a specific factual basis for claim that assignment was void and, therefore, had standing to challenge before foreclosure occurred).

In Lundy, the court applied Yvanova's reasoning to the pre-foreclosure context. Specifically, the court explained that: "The prejudice in the post-foreclosure context is, of course, more obvious than in pre-foreclosure, since a plaintiff has suffered the definable injury of the loss of her property. But it is clear that Yvanova's prejudice analysis does not depend on the existence of a completed foreclosure sale — rather, it focuses more broadly on the unfairness of requiring a plaintiff to be subjected to foreclosure proceedings by an entity that has no right to initiate those proceedings. For this reason, the Court concludes that Yvanova's reasoning applies just as strongly to pre-foreclosure plaintiffs." Lundy, supra, at *10-13. The court appreciated the comprehensive scheme for nonjudicial foreclosures in California but concluded that only allowing claims that have a "specific factual basis" would not disturb it. Id.

In support of their argument, Defendants cite to Saterbak v. JP Morgan Chase Bank, N.A., 245 Cal. App. 4th 808 (2016), and Jenkins v. JP Morgan Chase Bank, N.A., 216 Cal. App. 4th 497 (2013). Both cases rely heavily on Gomes and all three case stand generally for the proposition that borrowers are barred from bringing preemptive challenges to a nonjudicial foreclosure. However, all three are distinguishable.

In Gomes, the plaintiff alleged, based "on information and belief," that the foreclosing entity, which was assigned the deed of trust from MERS, was not entitled to foreclose. However, the plaintiff offered no factual support for this belief. Gomes, supra, 192 Cal. App. 4th at 1152. The court emphasized this point and distinguished it from other cases in which the complaints "identified a specific factual basis for alleging that the foreclosure was not initiated by the correct party." Id. at 1155-56. The court noted that "Gomes has not asserted *any* factual basis to suspect that MERS lacks authority to proceed with the foreclosure. He simply seeks the right to bring a lawsuit to find out *whether* MERS has such authority. No case law or statute authorizes such a speculative suit." Id. at 1156 (emphasis in original). Accordingly, the Gomes court concluded that allowing a borrower to pursue such an action, absent a specific factual basis, a speculative lawsuit to determine whether an entity has the right to foreclose would unnecessarily "interject the courts into [the] comprehensive nonjudicial scheme" created by the Legislature. Id. at 1154. Jenkins and Saterbak relied heavily on Gomes in reaching the same conclusion. Jenkins, supra, at 512. Satarbak, supra, at 814-15.

Additionally, in Siliga v. Mortgage Elec. Registration Sys., Inc., 219 Cal. App. 4th 75, 82 (2013), disapproved of on other grounds by Yvanova, the court followed Jenkins and Gomes in holding that a plaintiff may not bring a "preemptive" action to challenge the authority of a foreclosing beneficiary or agent but also defined "preemptive" action. Specifically, the court stated that a "preemptive" action is one in which "the plaintiff alleges no 'specific factual basis' for the claim that the foreclosure was not initiated by the correct person." Id. Similar to Gomes and Jenkins, the Siliga court concluded that "[a]bsent a specific factual basis, this claim amounts to a preemptive claim seeking to require the foreclosing party to demonstrate in court its authority to initiate a foreclosure. Such a claim is invalid and subject to demurrer." Id. (citing Jenkins, 216 Cal. App. 4th at 511-13); see also Rossberg v. Bank of America, N.A., 219 Cal. App. 4th 1481, 1493 (2013) ("Allowing a judicial action to prevent a nonjudicial foreclosure without specific factual allegations showing a lack of authority "would unnecessarily 'interject the courts into [the] comprehensive nonjudicial scheme' created by the Legislature." (quoting Jenkins, 216 Cal. App. 4th at 512 and citing Gomes, at 1154-56)).

Moreover, a complete bar on pre-foreclosure challenges "would mean that even if a plaintiff offers plausible support for the claim that the entity foreclosing on her property lacks any authority to do so, that plaintiff would nevertheless have to sit by idly until an allegedly improper foreclosure sale was completed before bringing her otherwise valid challenge in court." Lundy, 2016 WL 1059423, at *13.

With regard to "standing," Defendants again cite Jenkins which was overruled on this issue by the California Supreme Court in Yvanova. Specifically, the Court concluded that "Glaski, supra, 218 Cal.App.4th 1079, was correct to hold a wrongful foreclosure plaintiff has standing to claim the foreclosing entity's purported authority to order a trustee's sale was based on a void assignment of the note and deed of trust. Jenkins, supra, 216 Cal.App.4th 497, spoke too broadly in holding a borrower 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." Yvanova, supra, at 939. Thus, Plaintiffs have standing to challenge the validity of the Note, DOT and its assignment to the Trust. The only issue is whether Plaintiffs' have alleged a "specific factual basis" for their claims.

**1. Plaintiffs Have Properly Alleged a Specific Factual Basis in Support of Their Pre-Foreclosure Causes of Action**

Unlike the plaintiffs in Gomes, Jenkins and Saterbak, Plaintiffs have properly alleged a specific factual basis to establish, at the very least, an issue of fact that the Trust does not and did not have the authority to initiate or continue with the foreclosure proceedings at issue. With regard to the initiation of foreclosure proceedings, "[w]hile it is the trustee who formally initiates the nonjudicial foreclosure, by recording first a notice of default and then a notice of sale, the trustee may take these steps only at the direction of the person or entity that currently *holds the note* and the beneficial interest under the deed of trust—the original beneficiary or its assignee—or that entity's agent." Yvanova, supra, at 927 (citing Cal. Civ. Code § 2924(a)(1)) (emphasis added); see also Santens v. Los Angeles Finance Co., 91 Cal. App. 2d 197, 202 (1949) (holding that only a person entitled to enforce the note can foreclose on the deed of trust).

"The deed of trust, moreover, is inseparable from the note it secures, and follows it even

without a separate assignment." Yvanova, supra, at 928 (citing Cal. Civ. Code § 2936; Cockerell v. Title Ins. & Trust Co., 42 Cal.2d 284, 291 (1954); and U.S. v. Thornburg, 82 F.3d 886, 892. (9th Cir. 1996)). Thus, the Trust is not entitled to initiate foreclosure proceedings unless it holds the note or is entitled to enforce it. See Ohlendorf v. Am. Home Mortg. Servicing, 279 F.R.D. 575, 583 (E.D.Cal.2010) ("[D]efendants need not offer proof of possession of the note to legally institute non-judicial foreclosure proceedings against plaintiff, although, of course, they must prove that they have the right to foreclose."). Moreover, "[i]f a purported assignment necessary to the chain by which the foreclosing entity claims that power is absolutely void, meaning of no legal force or effect whatsoever [citations omitted], the foreclosing entity has acted without legal authority by pursuing a trustee's sale, and such an unauthorized sale constitutes a wrongful foreclosure." Yvanova, supra, at 935 (citing Barrionuevo v. Chase Bank, N.A., 885 F. Supp. 2d 964, 973-4 (N.D. Cal. 2012). As set forth below, Plaintiffs have properly alleged that the Trust is not the holder of the note and does not hold the beneficial interest of the DOT.

**a. Plaintiffs Have Properly Alleged that the Trust is Not the Holder of the Note**

Here, Plaintiffs have properly alleged that the Trust is not the holder of the note as a result, inter alia, of the forgery. Specifically, Plaintiffs were provided with two separate and distinct copies of the "original" note in 2016. FAC, at ¶ 17 and Exhibits "A" and "B" attached thereto. The first note ("Note") contains a stamp which states "Certified to be a true & correct copy of the original" on all four pages of it but does not contain any endorsement on it. FAC, at ¶ 17 and Exhibit "A" attached thereto. The second note ("Forged Note") contains the "Certified" stamp only on the first page and contains an endorsement allegedly signed by "David A. Spector" on the signature page. FAC, at ¶ 17 and Exhibit "B" attached thereto.

It is inconceivable that both are copies of the original note that the Trust allegedly received when the mortgage was alleged transferred to it. It is also plausible that the endorsement was "photoshopped" after the fact because the Trust never received the original or that a third party has possession of the original and the right to enforce it. Regardless of the

assignment of the DOT to the Trust, if a third party holds the note, it may have the exclusive right to foreclose on it through the power of sale in the DOT. Defendants' have provided no explanation with regard to the inconsistencies of the notes alleged in the FAC. Instead, they rely solely on technicalities and procedural issues. Nevertheless, at the very least, there is a factual issue as to the Trust's status as the holder of the note or an entity entitled to enforce it. Thus, this is not a theoretical case in which Plaintiffs seek a determination as to whether, e.g., a MERS assignment is proper. Plaintiffs have alleged specific facts which directly relate to the Trust's right to foreclose on Plaintffs' property.

**b. Plaintiffs Have Properly Alleged that the Trust Lacks the Authority to Foreclose Based on the Void Assignment of the DOT to It**

Additionally, the Trust lacks standing to foreclose based on its admission that the DOT was not assigned to it before it closed. Specifically, on or about June 30, 2016, Defendants provided the following history of the assignments of the DOT: "Reviewing the original agreement indicates that the loan originated with Mortgage Electronic Registration Systems (MERS) as the nominee of the lender and the lender's successors and/or assigns. When MERS is the nominee, a written assignment reflecting the transfers in ownership of the loan may not be issued. **However, the loan was later assigned out of MERS to [the Trust] by way of the enclosed Assignment of the Deed of Trust**." FAC, at ¶ 45 and Exhibit "W" attached thereto (emphasis added). The "enclosed Assignment" was dated April 4, 2011. Id. Thus, MERS did not assign the DOT to the Trust until April 4, 2011, approximately seven (7) years after the Trust closed in 2004. Accordingly, Plaintiffs have properly alleged that the assignment is void. Glaski v. Bank of America, 218 Cal. App. 4th 1079, 1097 (2013) (holding 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 occurred after the trust's closing date).

**2. Plaintiffs Do Not Have to Allege Tender of the Loan Balance**

While the tender requirement may apply to causes of action to set aside a foreclosure sale, numerous courts have held that it does not apply to actions seeking to enjoin a foreclosure sale. Sciarratta v. U.S. Bank Nat'l Ass'n, 247 Cal. App. 4th 552, 568 (Cal. Ct. App. 2016)

(holding that tender was not required to state a cause of action for quiet title and cancellation of instruments because the plaintiff properly alleged the foreclosure was void); Glaski, supra, 218 Cal.App.4th at 1100 (holding that homeowner not required to allege tender in causes of action for wrongful foreclosure, cancellation of instruments, and quiet title where the foreclosure sale is void rather than voidable); Intengan v. BAC Home Loans Servicing LP, 214 Cal.App.4th 1047, 1053 (2013) (holding that tender not required where injunctive relief sought prior to foreclosure sale); Pfeifer v. Countrywide Home Loans, Inc., 211 Cal.App.4th 1250, 1255, 1280 (2012) (holding that tender unnecessary where declaratory relief sought when "lender has not yet foreclosed and has allegedly violated laws related to avoiding the necessity for a foreclosure"); Mabry v. Superior Court, 185 Cal.App.4th 208, 225, 110 Cal.Rptr.3d 201 (2010) (holding that borrower not required to tender full amount of indebtedness in seeking to enjoin foreclosure sale based on alleged failure to comply with Civ.Code, § 2923.5); Barrionuevo, supra (holding that tender not required where foreclosure sale had not yet occurred).

Also, courts have held that it would be inequitable to apply the tender rule in HBOR cases. Medrano v. Caliber Home Loans, 2015 WL 848347, at *4-5 (C.D. Cal. Feb. 26, 2015) (holding that tender excused when borrowers bring statutory causes of action); Stokes v. Citimortgage, 2014 WL 4359193, at *9 (C.D. Cal. Sept. 3, 2014) (holding that tender not required at pleading stage because it is unknown whether requiring tender based on HBOR causes of action is inequitable without more facts); Bingham v. Ocwen Loan Servicing, LLC, 2014 WL 1494005, at *6 (N.D. Cal. Apr. 16, 2014) (holding that a plaintiff may seek injunctive relief under HBOR "regardless of tender"). Accordingly, it would be wholly inequitable to require tender given that no sale has been conducted and Plaintiffs have brought valid claims under both statutory and common law causes of action challenging Defendants right to go forward with the foreclosure sale.

**3. Plaintiffs Have Properly Alleged Causes of Action for Cancellation of Instruments, Quiet Title, Declaratory Relief and Injunctive Relief**

As Plaintiffs' cancellation of instruments and quiet title causes of action are based primarily on Defendants not having the legal authority to foreclose and that the assignment of

the DOT is void, they have also been property alleged. As fully set forth above, Plaintiffs have properly alleged that Defendants do not have the legal authority to foreclose and that the DOT and assignment of the DOT are void. Glaski, supra, 218 Cal. App. 4th at 1101 (holding that borrower stated causes of action for quiet title and cancellation of instruments based on void assignment of deed of trust).

Moreover, based on the above, there is an actual controversy regarding Defendants' right to foreclose and enforce the note and DOT. As there is a pending foreclosure sale set for March 30, 2017, irreparable harm will result if injunctive relief is not granted. Accordingly, Plaintiffs have properly alleged causes of action for declaratory relief and injunctive relief as well.

## IV.

## PLAINTIFFS HAVE PROPERLY ALLEGED A CAUSE OF ACTION FOR BREACH OF CONTRACT

Generally, a complaint must be pleaded with enough specificity so that the defendant will know the nature, source, and extent of the plaintiff's cause of action. Youngman v. Nevada Irrigation Dist., 70 Cal. 2d 240, 245 (1969). The degree of specificity required depends on the extent to which the defendant, in fairness, needs detailed information that can be conveniently provided by the plaintiff. Less specificity is required when the defendant may be assumed to have knowledge of the facts equal to the plaintiff. Jackson v. Pasadena City Sch. Dist., 59 Cal. 2d 876, 879 (1963).

Here, Defendants have equal knowledge as the basis for this cause of action are the charges which Defendants placed on its payoff statement (FAC, at Exhibit "R") that were not reasonably related to protecting Defendants' interests as required by the DOT which is also attached to the FAC (Exhibit "C"). As Plaintiffs have been residing in the property continuously and were in the process of applying for a loan modification, it was unnecessary and in no way protecting Defendants' interests to engage in the numerous "property inspections," "door knock assessment fees," etc. Whether the fees were improper and/or excessive are questions of fact. Accordingly, Defendants' demurrer to Plaintiffs' breach of contract cause of action should be overruled.

## V.

## PLAINTIFFS HAVE PROPERLY ALLEGED A CAUSE OF ACTION FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

The implied covenant of good faith and fair dealing that neither party will do anything that will have the effect of impairing, destroying, or injuring the rights of the other party to receive the fruits and benefits of their agreement is included within any loan agreement between a lender and a borrower. Wyatt v. Union Mortgage Co., 24 Cal. 3d 773, 783, 157 Cal. Rptr. 392, 598 P.2d 45 (1979). Additionally, a claim for breach of the implied covenant has been allowed in cases regarding loan modifications. See Lueras v. BAC Home Loans Servicing, LP, 221 Cal. App. 4th 49, 71–75, 163 Cal. Rptr. 3d 804 (4th Dist. 2013) (holding that lender may be liable for breach of the implied covenant for failing to consider and work with the borrower in good faith to evaluate and implement a permanent solution; the discretionary power of the lender must be exercised in good faith); Bushell v. JPMorgan Chase Bank, N.A., 220 Cal. App. 4th 915, 928–929, 163 Cal. Rptr. 3d 539 (3d Dist. 2013) (holding that borrowers adequately pleaded a claim for lender's breach of the implied covenant of good faith and fair dealing by failing to offer a good faith permanent modification plan after the borrowers performed the TPP, based on the lender's conduct in stringing the borrowers along through a "bureaucratic maze" of modification applications without confirming or denying a permanent modification).

Contrary to Defendants' assertion, Plaintiffs breach of the implied covenant cause of action is not based solely on its breach of contract claim. It is also based on Defendants' HBOR violations and their wrongful initiation and continuation of foreclosure proceedings, all of which have deprived Plaintiffs of the benefits of the agreement. Accordingly, Plaintiffs have adequately alleged a cause of action for breach of the implied covenant and Defendants' demurrer should be overruled.

## VI.

## PLAINTIFFS HAVE PROPERLY ALLEGED A CAUSE OF ACTION FOR NEGLIGENCE

The cases cited by Defendants in support of their demurrer to Plaintiffs' negligence

cause of action are outdated and no longer good law. Instead, recent case law establishes that mortgage servicers can be held liable for negligence to borrowers. Specifically, in Alvarez v. BAC Home Loans Servicing, 228 Cal. App. 4th 941 (2014), the court found that, though a servicer is not obligated to initiate the modification process or to offer a modification, once it agrees to engage in that process with the borrower, it owes a duty of care not to mishandle the application or negligently conduct the modification process. Id. at 945-50.

Alvarez marked a "sea change of jurisprudence on this issue." MacDonald v. Wells Fargo Bank, N.A., No. 14-CV-04970-HSG, 2015 WL 1886000, at *5 (N.D. Cal. Apr. 24, 2015). After Alvarez, numerous courts have held that a servicer owed a duty of care on substantially similar facts. See Medrano v. Caliber Home Loans, 2014 WL 7236925, at *11 (C.D. Cal. Dec. 19, 2014) (following Alvarez and holding that servicer breached its duty of care by losing one application and wrongfully denying a second for missing documents while simultaneously acknowledging that application was "complete"); Gilmore v. Wells Fargo Bank, 75 F. Supp. 3d 1255, 1266-68 (N.D. Cal. 2014) (following Alvarez and holding that servicer breached its duty of care by recording a notice of trustee's sale while a complete application was pending); Shapiro v. Sage Point Lender Services, 2014 WL 5419721, at *8-10 (C.D. Cal. Oct. 24, 2014) (following Alvarez and holding that borrower stated a cause of action for negligence where servicer allegedly mishandled borrower's application by telling borrower both that documents were missing and that his application was complete); Rijhwani v. Wells Fargo Home Mrtg., Inc., 2014 WL 890016, at *14 (N.D. Cal. Mar. 3, 2014) (holding that plaintiff stated a claim for negligence based on servicer's SPOC violations). Plaintiffs have made substantially similar allegations as the plaintiffs in Medrano, Gilmore, Shapiro, and Rijhwani, supra. Accordingly, Plaintiffs' negligence cause of action has been properly plead and Defendants' demurrer should be overruled.

## VII.

## PLAINTIFFS HAVE PROPERLY ALLEGED A CAUSE OF ACTION FOR UNFAIR BUSINESS PRACTICES

California courts have repeatedly held that all that violations of the HBOR as well as

common law causes of action can serve as predicates to establish a violation of California Business and Professions Code Section 17200, *et seq*., ("Section 17200") cause of action. See Foronda v. Wells Fargo, 2014 WL 6706815, at *10 (N.D. Cal. Nov. 26, 2014) (holding that allegation of dual tracking also states a claim under Section 17200); McGarvey v. JP Morgan Chase Bank, N.A., 2013 WL 5597148, at *8-9 (E.D. Cal. Oct. 11, 2013) (holding that a viable negligence claim can serve as a basis for an "unlawful" prong Section 17200 cause of action); Vogan v. Wells Fargo Bank, N.A., 2011 WL 5826016, at *6-7 (E.D. Cal. Nov. 17, 2011) (allowing a Section 17200 claim where borrowers alleged that assignment was executed after the closing date of the securitized trust, "giving rise to a plausible inference that at least some part of the recorded assignment was fabricated."); Susilo v. Wells Fargo Bank, N.A., 796 F.Supp.2d 1177, 1196 (C.D.Cal.2011) (holding that plaintiff's wrongful foreclosure claims served as predicate violations for her UCL claim). Moreover, Plaintiffs have standing to bring this cause of action because they have suffered actual economic injury in the form of, among other things, damaged credit, attorney's fees and costs, and improper and excessive fees and charges as a result of Defendants' actions. See Corral v. Select Portfolio Servicing, Inc., 2014 WL 3900023, at *6 (N.D. Cal. Aug. 7, 2014) (holding that initiation of foreclosure, damaged credit, and attorney costs constitute adequate damages for Section 17200 standing). Accordingly, Plaintiffs' have properly alleged a Section 17200 cause of action and Defendants' demurrer should be overruled.

## VIII.

## CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that Defendants' Demurrer be overruled in its entirety. Alternatively, if the Court finds that the one or more causes of action are not properly plead, Plaintiff respectfully requests leave of court to amend the complaint, including, but not limited to, verification of Plaintiffs' quiet title cause of action.

DATED: March 6, 2017

LAW OFFICES OF CAMERON H. TOTTEN

By: _____

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