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7 **SUPERIOR COURT OF CALIFORNIA**
8 **FOR THE COUNTY OF LOS ANGELES**

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10)
11) **PLAINTIFF'S OPPOSITION TO**
12) **DEFENDANTS U.S. BANK AND**
13) **BARCLAYS CAPITAL REAL ESTATE'S**
14) **DEMURRER TO PLAINTIFF'S FOURTH**
15) **AMENDED COMPLAINT**
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PLAINTIFF,
vs.
U.S. BANK N.A. AS TRUSTEE UNDER
POOLING AND SERVICING
AGREEMENT, BARCLAYS CAPITAL
REAL ESTATE, INC. DBA HOMEQ
SERVICING, LIME FINANCIAL
SERVICES, LTD., LEGEND MORTGAGE
CORPORATION, ANTHONY WARE,
CREDIT SUISSE, OLD REPUBLIC
NATIONAL TITLE INSURANCE
COMPANY, and DOES 1-10, INCLUSIVE,
DEFENDANTS.

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23 Plaintiff hereby submits his Opposition to Defendants Barclays Capital Real Estate, Inc.
24 d/b/a HomeEq Servicing and U.S. Bank National Association as Trustee under Pooling and
25 Servicing Agreement dated as of May 1, 2007 MASTR Asset Backed Securities Trust 2007-
26 HE1 Mortgage Pass-Through Certificates Series 2007-HE1's Demurrer as follows:
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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Defendants simply fail to comprehend the allegations of the Fourth Amended Complaint. Specifically, as fully set forth therein, U.S. Bank purchased the Subject Property through a credit bid based on the fact that it was allegedly the foreclosing beneficiary. However, U.S. Bank was not at the time of the auction, and never was, a beneficiary under the Deed of Trust or Note. Therefore, the credit bid purchase of the Subject Property was fraudulent and in violation of California law. Therefore, the foreclosure sale was void. Accordingly, quieting title of the Subject Property is appropriate to cure the wrongful conduct of Defendants.

II.

**THE DOCTRINES OF COLLATERAL ESTOPPEL AND RES JUDICATA DO NOT
APPLY TO ANY OF PLAINTIFF’S CAUSES OF ACTION**

First, Defendants argue that because a default judgment was entered against Plaintiff in the unlawful detainer action regarding the Subject Property, he is precluded from bringing the claims in this action against Defendant U.S. Bank. However, prior litigation by the same parties has a collateral estoppel effect only as to those issues litigated and determined in the prior action. Landeros v. Pankey (1995) 39 Cal. App. 4th 1167, 1171 (citing 7 Witkin, Cal. Proc. (3d ed. 1985) Judgment, § 253, p. 691). Additionally, the party asserting collateral estoppel has the burden to show from the record of the prior action that the asserted issue was previously litigated and determined. Vella v. Hudgins (1977) 20 Cal.3d 251, 257-258, 142 Cal.Rptr. 414, 572 P.2d 28.) Defendants fail to sustain that burden here

1 In support of their argument that Plaintiff's prior unlawful action bars him from pursuing
2 the claims in this action, Defendants rely upon a distinguishable California appellate opinion
3 from 1954 (Freeze v. Salot) instead of the most recent case on point from the appellate district of
4 this court. Specifically, in Landeros, supra, the Second District Court of Appeal (Division Four)
5 held that a stipulated judgment in an unlawful detainer action does not collaterally estop the
6 tenant from bringing a later civil action. The court acknowledged that:

7 "[p]erhaps defendant Dana Pankey believed when the unlawful detainer
8 stipulated judgment was executed it resolved all claims between the parties and
9 permanently ended their relationship. But the stipulated judgment contain[ed] no
10 language of comprehensive settlement, no releases of all claims, no waivers
11 under Civil Code section 1542 typically found in settlement documents. Under
12 the law of collateral estoppel, [the Court of Appeal was] compelled to conclude
13 that the prior judgment, arrived at by stipulation with no issues actually litigated,
14 [did] not preclude [a subsequent] action, because the face of the judgment [did]
15 not show the parties so intended. Landeros v. Pankey, 39 Cal. App. 4th 1167,
16 1174 (1995).

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19 Additionally, in Pelletier v. Alameda Yacht Harbor, 188 Cal. App. 3d 1551, 1553 (1986),
20 the court reached the same result when it held that a stipulated judgment of unlawful detainer
21 had no collateral estoppel effect as to a subsequent cause of action for retaliatory eviction. The
22 Court of Appeal explained that unlawful detainer actions are summary proceedings and,
23 therefore, do not preclude subsequent litigation:
24

25 "Because an unlawful detainer action is a summary procedure involving only
26 claims bearing directly upon the right of immediate possession, a judgment in
27 unlawful detainer has very limited res judicata effect. **Legal and equitable**
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1 *claims-such as questions of title and affirmative defenses-are not conclusively*
2 *established unless they were fully and fairly litigated in an adversary hearing.*

3 Here, the unlawful detainer action was resolved by stipulated judgment which
4 made no mention of a relinquishment by the Pelletiers of claims arising from a
5 retaliatory eviction. The retaliation defense was not fully and fairly litigated in
6 an adversary hearing, and thus has not conclusively established.” (emphasis
7 added)

8
9 Pelletier, 188 Cal. App. 3d at 1557.

10 With regard to the default judgment, Defendants have wholly failed to carry their burden
11 of proof that the unlawful detainer action involved the litigation and determination of the same
12 issues here. See Vella, supra. It is insufficient for the unlawful detainer court to adjudicate an
13 issue by implication as suggested by Defendants.

14 Moreover, only one of the Defendants herein (U.S. Bank) which was a party to the
15 unlawful detainer action. Thus, as to Barclays, there can be no collateral estoppel or res judicata
16 because it was not a party to the unlawful detainer action. See Landeros, supra, 39 Cal. App. 4th
17 at 1171. Therefore, Defendants’ demurrer on res judicata grounds should be overruled in its
18 entirety.
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20 **III.**

21 **PLAINTIFF HAS PROPERLY PLEAD A QUIET TITLE CAUSE OF ACTION**

22 In Defendants’ Demurrer, they attempt to establish that its foreclosure of the Subject
23 Property was proper. However, at the very least, Defendants’ own documents establish that
24 there is a triable issue of fact as to whether it had the right to foreclose on the Subject Property.
25 Specifically, Defendants’ Request for Judicial Notice fails to attach a copy of the actual Note.
26 Instead, Defendants request judicial notice of the Deed of Trust and an Interest Only Period
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1 Fixed/Adjustable Rate Rider (“Rider”), both of which reference a separate Note, the original of
2 which apparently has not been assigned to and is not in the possession of Defendants.

3 Accordingly, the foreclosure of the Subject Property was improper and in violation of applicable
4 law.

5 Specifically, under California law, an “instrument” such as a secured note, may only be
6 enforced by the “holder” of the note. Cal. Comm. Code § 3301(a). To qualify as a holder of a
7 note, the person must be in possession of the note and the note must be payable to that person.
8 Cal. Comm. Code § 1201(20). The payee of a note may negotiate it by indorsing and delivering
9 it to another person who then becomes its holder and is entitled to enforce it. Cal. Comm. Code
10 §§3201, 3203.

12 Here, the Rider and Deed of Trust at issue in this case are both dated January 22, 2007,
13 and the Rider (and presumably the Note too) are made payable to Lime Financial Services Ltd.
14 (“Lime”). The Deed of Trust lists Stewart Title of California, Inc. as “Trustee,” and Mortgage
15 Electronic Registration Systems, Inc. (“MERS”) as “a separate corporation that is acting solely
16 as a nominee for Lender and Lender’s successors and assigns. MERS is the beneficiary under
17 this Security Instrument.”

19 An Assignment of the Deed of Trust which was allegedly made on January 12, 2009,
20 allegedly transferred all beneficial interest of the Deed of Trust from MERS, in its own capacity
21 and not in a limited capacity as “nominee” for Lime, to U.S. Bank. Although U.S. Bank also
22 claims that the Note was assigned to it as well, there is no evidence of any such assignment as
23 there is no Note attached to the Demurrer. Consequently, the Assignment was invalid and Lime
24 remained the beneficiary thereafter.

26 Moreover, the Assignment of the Deed of Trust was improper because MERS never had
27 a beneficial interest in the property to transfer. A nominee of a beneficiary is not the same as
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1 being the beneficiary. In re Mitchell, US Bk Ct.Nev. Case No. BK-S-07-16226 (August 19,
2 2008), at p. 6. The deed of trust in Mitchell contained a similar statement, namely that MERS is
3 the nominee and beneficiary of Fremont. This statement does not mean that MERS *is the*
4 *beneficiary*. The Mitchell court held that a “beneficiary” is defined as “one designated to benefit
5 from an appointment, deposition or assignment or to receive something as a result of a legal
6 arrangement or instrument.” Id. (citing Blacks Law Dictionary).

7
8 No showing has been made that MERS had any financial interest in the Note or Deed of
9 Trust. MERS was not the "lender." Only parties who have a financial interest are beneficiaries
10 and entitled to assign the note and deed of trust. Thus, the assignment of the Deed of Trust by
11 MERS is ineffective for all purposes. MERS had no interest to assign. The Note was not
12 payable to MERS and MERS was not entitled to receive payments.

13 Additionally, the Notice of Default recorded on July 14, 2008 was wholly improper and
14 invalid. It was recorded by Old Republic “as agent for the Beneficiary” which is again listed as
15 MERS. As set forth above, MERS was not the beneficiary of note on July 14, 2008, or at any
16 other time. Therefore, the Notice of Default and the Assignment to U.S. Bank were invalid and
17 the foreclosure sale was void. Alternatively, whether MERS was truly the beneficiary of
18 Plaintiff’s Note and Deed of Trust with the right to assign them is a triable issue of fact which
19 cannot be resolved on demurrer.
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21 **IV.**

22 **THE TENDER RULE DOES NOT APPLY HERE**

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24 Defendants cite several cases for the proposition that Plaintiff is required to tender the
25 amount due on the loan that he allegedly had with Defendants. However, said cases are
26 distinguishable as Plaintiff is not a junior lienholder but rather the trustor. Moreover, in Munger
27 v. Moore (1970) 11 Cal. App. 3d 1, 7, the court held that that “a trustee or mortgagee may be
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1 liable to the trustor or mortgagor for damages sustained where there has been an illegal,
2 fraudulent or wilfully oppressive sale of property under a power of sale contained in a mortgage
3 or deed of trust.” Similarly, Plaintiff alleges that the sale of his property was illegal and
4 fraudulent. The court in Munger made no mention of any tender requirement for the borrower to
5 bring a claim against the trustor or mortgagor. As Munger is on point and Defendants’ cases are
6 factually distinguishable, Munger governs this case.

7
8 Moreover, tender may not be required where it would be inequitable to do so, Onofrio v.
9 Rice (1997) 55 C.A.4th 413, 424, and if the tender rule does apply, it is to set aside a
10 VOIDABLE sale. Karlsen v. American Savings & Loan Assn. (1971) 15 Cal.App.3d 117. The
11 cases known to counsel for Plaintiff which require tender are for maintaining an action for
12 irregularity in the procedure of a trustee’s sale. Here, Plaintiff alleges that the foreclosure sale is
13 VOID, not voidable. Additionally, California recognizes that: "Equity does not wait upon
14 precedent which exactly squares with the facts in controversy, but will assert itself in those
15 situations where right and justice would be defeated but for its intervention." Bisno v. Sax
16 (1959) 175 Cal. App. 2d 714, 728. Finally, Plaintiff has alleged its willingness to tender.
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18 Complaint, at Para. 61. Thus, this issue is moot.

19 V.

20 **PLAINTIFF’S SLANDER OF TITLE CAUSE OF ACTION IS PROPERLY PLEAD**

21 Plaintiff’s amended complaint which alleges slander of title is proper as the court
22 allowed for amendment with regard to Plaintiff’s title causes of action but not the causes of
23 action for fraud, unfair business practices and similar claims. If Plaintiff misunderstood the
24 court’s ruling, he will withdraw this claim.

25
26 With regard to Defendants’ argument that Plaintiff has failed to allege intent or malice,
27 said argument lacks merit. Specifically, in the cause of action, Plaintiff clearly alleges that Old
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1 Republic wrongfully and without privilege recorded the Notice of Default, Notice of Trustee's
2 Sale and Trustee's Deed Upon Sale and other documents and was acting as the agent of the
3 beneficiary which was allegedly U.S. Bank. Moreover, US Bank acted intentionally when it
4 foreclosed on the Subject Property and caused the Trustee's Deed Upon Sale to be recorded
5 when it knew that it was not the beneficiary with the right to foreclose for the reasons set forth
6 above. Accordingly, Plaintiff has properly alleged intent, wrongfulness and malice.

7 Alternatively, If the court does not believe that it has been properly alleged, Plaintiff respectfully
8 requests leave of court to further allege intent and malice with regard to Defendants within this
9 cause of action.
10

11 **VI.**

12 **CONCLUSION**

13 For all of the foregoing reasons, Plaintiff respectfully requests that this Court
14 overrule Defendants' Demurrer to Plaintiff's Fourth Amended Complaint in its entirety.
15 Alternatively, if the Court finds that one or more of Plaintiff's causes of action have not
16 been properly pled, Plaintiff respectfully requests leave of court to amend his complaint.
17

18 DATED: April 20, 2010

LAW OFFICES OF CAMERON H. TOTTEN

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20 By: _____

21 Cameron H. Totten
22 Attorney for Plaintiff
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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 620 N. Brand Blvd., Ste. 405, Glendale, CA 91203.

On Tuesday, April 20, 2010, I served the foregoing document described as:

PLAINTIFF JAMES BRANSFORD’S OPPOSITION TO DEFENDANTS U.S. BANK AND BARCLAYS CAPITAL REAL ESTATE’S DEMURRER TO PLAINTIFF’S FOURTH AMENDED COMPLAINT

on interested parties in this action by serving the parties below in the manner set forth below:

Charles Tony Piccuta, Esq.
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FACSIMILE – I transmitted such document(s) to the fax number(s) listed above. The transmission was complete and without error.

US MAIL – I deposited the sealed envelope with the U.S. Postal Service on that same day with postage thereon fully prepaid at Glendale, California in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 20, 2010, in Glendale, California.

Cameron H. Totten