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SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

, 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, CREDIT SUISSE, OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, and DOES 1-10, INCLUSIVE, DEFENDANTS.	Case No: Honorable: **PLAINTIFF'S OPPOSITION TO DEFENDANTS U.S. BANK AND BARCLAYS CAPITAL REAL ESTATE'S DEMURRER TO PLAINTIFF'S THIRD AMENDED COMPLAINT** **Time: 8:30 a.m.** **Date:** **Dept.:**

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

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I. INTRODUCTION

In a classic take-the-money-and-run scheme, Defendants, individually and collectively, caused Plaintiff ("Plaintiff") to suffer damages as a result of being oversold a "no money down," adjustable rate, subprime loan which they knew or reasonably should have known he likely could not repay. After falsely representing to Plaintiff that he could refinance the loan in six months to obtain one with more favorable terms, Defendants then immediately sold and resold the loan in a whirlwind scheme of financial transactions that not only prevented Plaintiff from being able to refinance the loan, but from even being able to reasonably ascertain with whom he was supposed to be dealing with. Inevitably and predictably, Plaintiff lost his home through non-judicial foreclosure.

As a consequence of the wrongful conduct and predatory lending practices of the Defendants, individually and acting in concert, Plaintiff was deprived of his ability to purchase a home that he *could* afford and obtain a loan that he *could* repay, in the process ruining his credit standing by way of a non-judicial foreclosure which will take him years to repair, thereby effectively preventing Plaintiff from being able to purchase a home of his own for the foreseeable future.

The means and mechanism by which this result was accomplished by the various Defendants proceeded by way of a complicated scheme involving fraud, misrepresentation, civil conspiracy, and breaches of the general negligence duties of due care and due diligence, the fiduciary duty of trust and confidence existing between financial institutions and their customers, the duties of good faith and fair dealing that underlie all contractual relationships in the State of California, as well as violation of a number of statutory and regulatory duties imposed by the California Civil and Business & Professions Codes.

While the schemes of the Defendants, derived solely for their own financial benefit, were convoluted and complicated, the gravamen of Plaintiff's Complaint is simple. He contends that he was induced by the machinations and manipulation by Defendants to take out a "no money down," adjustable rate subprime home loan which they knew or reasonably should have known, by exercising due diligence, he likely could not repay. When the inevitable and predictable result of that overreaching, unscrupulous conduct then came to pass, Defendants refused to deal with him fairly and in good faith, and, in the process, trampled upon a litany of duties imposed by statute, regulation, and well-established case law.

II. STATEMENT OF FACTS

In and before 2007, Defendant Lime Financial Services, Ltd. ("LIME"), a subsidiary of Defendant Credit Suisse ("CS"), engaged in a business practice of marketing predatory, high interest, subprime adjustable rate ("ARM") home loans targeted at less affluent potential homebuyers who historically had been shunned by conventional lenders. The business plan of LIME/CS was to quickly bundle the loans in pools and unload them to investors on international securities markets as high interest, "mortgage-backed securities." To put this scheme into effect, LIME/CS cultivated a cadre of mortgage brokers with established ties in minority and lower income communities. Among them were LEGEND MORTGAGE CORPORATION and its agents/brokers ("LEGEND"). LIME/CS also developed relationships with banks and loan servicers who would bundle the loans into mortgage-backed securities so that the loans would be impossible to trace and, thus, allegedly limit liability once the loans became toxic which was inevitable.

In early January 2007, Plaintiff responded to solicitations by LEGEND to engage its services to procure a home loan in connection with his interest in a property located at 5148 7th Avenue, Los Angeles, California 90043 (the "Subject Property"). LEGEND directed him to

sign a mortgage application that it submitted to LIME on January 5, 2007. What LEGEND proposed was no money down, 100% financing consisting of an 80% first Trust Deed/Mortgage and a piggybacked 20% second Trust Deed/Mortgage. While the sale and loan application were pending, LEGEND made material misrepresentations and omitted material facts from its sales pitch. Among other things, Plaintiff was not told that taking out a 100% loan with a three year pre-payment penalty would prevent him from refinancing his loan during that period unless there was a substantial increase in the market value of the property. To the contrary, LEGEND told him that he could refinance the property at a lower fixed rate within six months after the loan papers were signed, that the prepayment penalty would not be a problem, and that this would avoid the rate adjustment after two years and result in much lower interest on the loans.

After six months, Plaintiff asked LEGEND about refinancing. He was then told that LIME was out of business. He explored options with other lenders, but then learned that the 80% first and 20% second precluded his ability to refinance, particularly in light of the prepayment penalties in effect for the first three years of the loans. He thus was trapped into two high-interest rate loans that could not be refinanced as promised, and found himself unable to afford his monthly payments with the result that he lost his home at a non-judicial foreclosure when the Defendants refused to work with him in a good faith attempt to modify the loans.

In accordance with the overall scheme, the moving Defendants, BARCLAY'S CAPITAL REAL ESTATE, INC. ("BARCLAY'S") dba HOMEQ SERVICING ("HOMEQ") and U.S. BANK, N.A ("U.S. BANK") (collectively referred to herein as "Defendants"), became, respectively, the servicing agent for the loans and the Trustee of them as part of Pooling and Servicing Agreement Dated May 1, 2007, MASTR Asset Backed Securities Trust 2007-HE1 Mortgage Pass Through Certificates Series 2007-HE-1. It is presently unknown to Plaintiff whether the non-judicial foreclosure upon his home was prosecuted by HOMEQ or U.S.BANK.

In Defendants' Demurrer, it attempts to establish that its foreclosure of the Subject Property was proper. However, at the very least, Defendants' own documents establish that there is a triable issue of fact as to whether it had the right to foreclose on the Subject Property. Specifically, Defendants' Request for Judicial Notice fails to attach a copy of the actual Note. Instead, Defendants request judicial notice of the Deed of Trust and an Interest Only Period Fixed/Adjustable Rate Rider, both of which reference a separate Note, the original of which apparently has not been assigned to and is not in the possession of Defendants. Accordingly, the foreclosure of the Subject Property was improper and in violation of applicable law.

Defendant U.S. BANK ultimately purchased the Property for $268,000. Meanwhile, Defendants made a substantial amount of money as a result of the above scheme and Plaintiff lost his entire investment in the property. Moreover, as a result of his damaged credit, Plaintiff will not be able to purchase another home for a very long time. Through this action, Plaintiff, on behalf of himself and the public at large, seeks to hold every member of the scheme liable for their conduct which has wreaked havoc on the United States economy in the last two years.

III. ARGUMENT

A. PLAINTIFF HAS ADEQUATELY PLEAD EACH AND EVERY CAUSE OF ACTION

1. Plaintiff Has Stated Causes of Action for Relief for Negligence, Fraud and Breach of the Implied Covenant of Good Faith and Fair Dealing against Defendants

With regard to Plaintiff's causes of action for negligence, fraud and breach of the implied covenant of good faith and fair dealing, Defendants essentially argue that they cannot be held liable for any acts of the other Defendants because they had no direct contact with Plaintiff. However, Defendants' argument ignores the allegations of Plaintiff's complaint and governing

law regarding civil conspiracy and joint ventures. Specifically, in paragraph 12, Plaintiff alleges that

> "Each of the Defendants named herein are believed to, and are alleged to have been acting in concert with, as employee, agent, co-conspirator or member of a joint venture of, each of the other Defendants, and are therefore alleged to be jointly and severally liable for the claims set forth herein, except as otherwise alleged."

With regard to civil conspiracy, the California Supreme Court has held that the elements of an action for civil conspiracy are

> "the formation and operation of the conspiracy and damage resulting to plaintiff from an act or acts done in furtherance of the common design . . . [and that] [i]n such an action the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity.'"

Doctors' Co. v. Superior Court (1989) 49 Cal.3d 39, 44, 260 Cal. Rptr. 183, 775 P.2d 508 (citing *Mox Incorporated v. Woods* (1927) 202 Cal. 675, 677-678, 262 P. 302).

Additionally, a joint venture is an undertaking by two or more persons jointly to carry out a single business transaction for profit. *Davis v. Kahn* (1970) 7 Cal. App. 3d 868, 86 Cal. Rptr. 872. A joint venture exists where there is an agreement between the parties under which they have a community or joint interest in a common business undertaking, an understanding as to the sharing of profits and losses, and a right of joint control. *Bank of California v. Connolly* (1973) 36 Cal. App. 3d 350, 111 Cal. Rptr. 468. Whether a joint venture exists is primarily a factual question to be determined by the trier of fact. *Id.* Accordingly, the issue cannot be adjudicated through this demurrer.

Moreover, members of a joint venture are liable for the torts committed in furtherance of the joint enterprise. *See Knight v. Cook* (1963) 212 Cal. App. 2d 613, 28 Cal. Rptr. 273 (holding that where a joint venture exists, negligence of one joint venturer is imputable to others). Thus, where one joint venturer, acting within the scope of the joint venture, and in furtherance of its

agreed purpose, is guilty of fraud in procuring benefits that are retained by the joint venturers, all are liable for the fraud in compensatory damages under the principles of agency. *Rickless v. Temple* (1970) 4 Cal. App. 3d 869, 84 Cal. Rptr. 828.

Here, Defendants are at the tail end of the joint venture/conspiracy. However, Plaintiff has alleged that they have obtained the benefits of the joint venture/conspiracy and directly participated. Therefore, they are not immune from liability. *See Brewer v. IndyMac Bank*, 609 F. Supp. 2d 1104 (E.D. Cal. 2009) (holding that borrowers stated claim against lender breach of fiduciary duty and fraud). Consequently, Plaintiff's common law claims for relief against Defendants are proper and should not be dismissed.

2. Plaintiff Has Properly Alleged Causes of Action Based on Defendants' Violations of California Civil Code Sections 2923.5

Defendants concede that Plaintiff was not given the 30 day notice as required by Section 2923.5(a). However, Plaintiff argues that said provision does not apply and that Section 2923.5(c) applies instead. However, assuming, *arguendo*, that Defendants are correct in their analysis regarding which provision of Section 2923.5 applies to this matter, the matter is irrelevant because Plaintiff has alleged claims for relief under Section 2923.5(c) as well.

Section 2923.5(c) provides, in pertinent part, that:

> "(c) If a mortgagee, trustee, beneficiary, or authorized agent had already filed the notice of default prior to the enactment of this section and did not subsequently file a notice of rescission, then the mortgagee, trustee, beneficiary, or authorized agent shall, as part of the notice of sale filed pursuant to Section 2924f, include a declaration that either:
>
> (1) States that the borrower was contacted to assess the borrower's financial situation and to explore options for the borrower to avoid foreclosure.
>
> (2) Lists the efforts made, if any, to contact the borrower in the event no contact was made."

Defendants seem to argue that the above statute only requires that a declaration be filed and that

the truth of the statements contained therein is irrelevant. Such interpretation is absurd.

Here, Plaintiff has clearly alleged that Defendants did not comply with either provision of Section 2923.5. That is, Defendants did not negotiate a loan modification in good faith and did not assess Plaintiff's financial situation and explore options to avoid disclosure. See Plaintiff's Third Amended Complaint, at paragraph 37. Therefore, as all of Plaintiff's claims for relief are based, in whole or in part, on Plaintiff's proper allegations of Defendants' violation of Section 2923.5, Defendants' Motion to Dismiss must be denied in its entirety as Plaintiff has properly alleged a violations of Section 2923.5. Alternatively, Plaintiff respectfully requests leave of court to amend the complaint to further allege Defendants' statutory violations.

3. Plaintiff Has Properly Alleged Causes of Action Based on Defendants' Violations of California Civil Code Sections 2923.6

With regard to Section 2923.6, Defendants amazingly argue that it is settled law that no duties are owed, and no private cause of action is allowed, in connection with Sections 2923.5 and 2923.6 even though there is no appellate case on point. Needless to say, none of the cases cited by Defendants is binding authority on this court.

Section 2923.6 was specifically created to address the foreclosure crisis and help borrowers. As noted in Sections 1 and 10 of the Legislative Intent behind the Statute,

> "SECTION 1. The Legislature finds and declares all of the following:
>
> "(a) California is facing an unprecedented threat to its state economy and local economies because of skyrocketing residential property foreclosure rates in California…
>
> (g) This act is necessary to avoid unnecessary foreclosures of residential properties and thereby provide stability to California's statewide and regional economies and housing market by requiring early contact and communications between mortgagees, beneficiaries, or authorized agents and specified borrowers to explore options that could avoid foreclosure and by facilitating the modification or restructuring of loans in appropriate circumstances."
>
> SECTION 10. (a) This act is an urgency statute necessary for the immediate

> preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into **immediate** effect. The facts constituting the necessity are:
>
> In order to stabilize and protect the state and local economies and housing market at the earliest possible time, it is necessary for this act to take effect immediately." SB 1137.

The forgoing clearly illustrates that the California Legislature was specifically looking to curb foreclosures and provide modifications to homeowners in their statement of intent.

As for duties arising from the statute, Section 2923.6(a) specifically references a new duty "owed to all parties" in the loan pool:

> "(a) The Legislature finds and declares that any duty servicers may have to maximize net present value under their pooling and servicing agreements is owed to all parties in a loan pool, not to any particular parties,…."

Consequently, Section 2923.6, which was in effect at the time of the foreclosure at issue, provides that servicing agents for loan pools owe a duty to all parties in the pool so that a workout or modification is in the best interests of the parties if the loan is in default or default is reasonably foreseeable, and the recovery on the workout exceeds the anticipated recovery through a foreclosure based on the current value of the property.

Thus, California Civil Code 2923.6(a) specifically creates a new duty not previously addressed in pooling and servicing agreements. It states that such a duty not only applies to the particular parties of the loan pool, but to all parties. Therefore, under the text of the statute, if a duty exists in the pooling and servicing agreement to maximize net present value between particular parties of that pool then those same duties extend to all parties in the pool.

Defendants attempt to mislead the Court in stated that "Federal Courts throughout California have held that 'nothing in § 2923.6 imposes a duty on servicers of loans to modify the terms of the loans or creates a private right of action for borrowers.'" Defendants' Demurrer at 4:9-11. Indeed, this is not the case. Defendants cite to only two California cases, *Farner v.*

Countrywide Home Loans, 2009 WL 189025 (S.D.Cal., 2009), and *Connors v. Home Loan Corp*., 2009 WL 1615989 (S.D.Cal.,2009)("*Connors*"), both from San Diego County. Of course, these are Federal District Court cases, which are not binding upon this court.

Moreover, the reasoning of the cases, *Connors* in particular, suffers from a serious flaw. Both *Farner* and *Connors* conclude that section 2923.6 does not create a private right of action for borrowers. The *Connors* court goes on to conclude that the Legislature did not intend to create such a private right because "[a] statute creates a private right of action only if the enacting body so intended." *Connors, supra*, 2009 WL 1615989 at *8. However, in this context, such an assertion by the *Connors* court effectively results in judicial nullification.

As a private right of action is the only reasonable enforcement of the statute, it is difficult to imagine that the California Legislature had not intended a private right of action for borrowers. Such a judicial proclamation, without clear legislative intent to support it, renders the statute toothless. It cannot be what the legislature had intended. Indeed, it is not what the legislative intent cited above indicates. The Legislature intended that "requiring early contact and communications between mortgagees, beneficiaries, or authorized agents and specified borrowers to explore options that could avoid foreclosure and by facilitating the modification or restructuring of loans in appropriate circumstances." SB 1137, Section 1, subd. (g). Thus, a private right of action exists under Section 2923.6. Alternatively, as Plaintiff's claims for relief are only based on violations of Sections 2923.5 and 2923.6 and are not direct actions under either statute, the analysis is irrelevant. Accordingly, Plaintiff's allegations and claims for relief based on Defendants' violations of Sections 2923.5 and 2923.6 are proper.

4. Plaintiff Has Properly Alleged Causes of Action Pursuant to California Business and Professions Code Section 17200 and 17500

No California appellate case has addressed the application of California Business and

Professions ("B&P") Code Section 17200, *et seq*., to the business practices of subprime mortgage lenders and servicers at issue here. However, in *Commonwealth v. Fremont Investment & Loan* (2008) 452 Mass. 733 (2008) ("*Fremont*"), the Massachusetts Supreme Court recently undertook a thorough and persuasive analysis of its consumer protection statutes closely paralleling California's Section 17200 in the context of a mortgage lending scheme virtually identical to that involved here. B&P §17200 provides in full as follows:

> "As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive untrue or misleading advertising..."

Bus. & Professions Code, § 17200.

The California state courts have repeatedly held that all that is necessary to establish a violation of B&P § 17200 *et seq*., is to show that the defendant is a business engaged in acts or practices that are unlawful, fraudulent or unfair. Thus, "there are three varieties of unfair competition: practices which are unlawful, unfair or fraudulent." *Daugherty v. American Honda Motor Co., Inc.* (2006) 144 Cal. App. 4th 824, 837 (2006). The unlawful practices prohibited by the statute are any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court made. *Saunders v. Superior Court* (1994) 27 Cal. App. 4th 832, 838-39. It is not necessary that the predicate law provide for private civil enforcement. "Unfair," as used in the statute, simply means any practice whose harm to the victim outweighs its benefits. "Fraudulent," as used in the statute, does not refer to the common law tort of fraud but only requires a showing that members of the public are likely to be deceived. *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267.

Here, Defendants engaged in a complicated scheme designed purely for their own financial benefit. As part of this scheme, and to induce Plaintiff to obtain the loans, Defendants proceeded by way of fraud, deceit, misrepresentation, civil conspiracy, and breaches of the

general negligence duties of due care and due diligence, the fiduciary duty of trust and confidence existing between financial institutions and their customers, the duties of good faith and fair dealing that underlie all business dealings in the State of California, as well as violation of a number of statutory and duties imposed by the California Civil Code. Thus, by design, Defendants' practices are highly "likely to deceive."

The "unfair" prong of section 17200 intentionally provides courts with broad discretion to prohibit new schemes to defraud. *Motors, Inc. v. Times-Mirror Co*. (1980) 102 Cal. App. 3d 735, 740. An unlawful business practice or act is "unfair" when it "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. *People v. Casa Blanca Convalescent Homes, Inc*. (1984) 159 Cal. App. 3d 509, 530. "[T]he court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *State Farm Fire & Casualty Co. v. Superior Court* (1996) 45 Cal. App. 4th 1093, 1104. Defendants' business acts and practices, including: (1) inducing Plaintiff to obtain a risky no money down, high-interest rate, subprime loan they knew or should have known that he could not afford; (2) fraudulently misrepresenting to Plaintiff that he could refinance his loan within six months to secure a lower interest rate and affordable monthly payment; and (3) immediately buying, selling and reselling the loan in a whirlwind scheme of financial transactions offends established public policy and is immoral, unethical, oppressive, unscrupulous and substantially injurious to consumers. Plaintiff has properly alleged that Defendants engaged in deceptive, unfair and fraudulent conduct under both the "unlawful" and "unfairness" prongs of B&P § 17200.

Also, when B&P § 17200 is applied to the complicated and convoluted subprime mortgage lending scheme by which Plaintiff was victimized, precisely the same determination of "unfairness" reached by the Massachusetts Supreme Court in applying its own corollary to B&P

§ 17200 to the nearly identical scheme at issue in Fremont, *supra*, should produce a parallel conclusion here. Beyond that, however, Plaintiff alleges a valid claim under the "unlawful" prong of § 17200 as well as the "unfairness" prong.

Because the Fremont facts are identical to the facts at hand, it is worth evaluating them in detail:

> "Fremont is an industrial bank chartered by the State of California. Between January, 2004, and March, 2007, Fremont originated 14,578 loans to Massachusetts residents secured by mortgages on owner-occupied homes…. After funding the loan, Fremont generally sold it on the secondary market, which largely insulated Fremont from losses arising from borrower default."

Fremont, supra, at pp. 735-736.

The *Fremont* court went on to hold that:

> "In originating loans, Fremont did not interact directly with the borrowers; rather, mortgage brokers acting as independent contractors would help a borrower select a mortgage product, and communicate with a Fremont account executive to request a selected product and provide the borrower's loan application and credit report. If approved by Fremont's underwriting department, the loan would proceed to closing and the broker would receive a broker's fee.
>
> Fremont's subprime loan products offered a number of different features to cater to borrowers with low income. A large majority of Fremont's subprime loans were adjustable rate mortgage (ARM) loans, which bore a fixed interest rate for the first two or three years, and then adjusted every six months to a considerably higher variable rate for the remaining period of what was generally a thirty year loan. Thus, borrowers' monthly mortgage payments would start out lower and then increase substantially after the introductory two-year or three-year period. To determine loan qualification, Fremont generally required that borrowers have a debt-to-income ratio of less than or equal to fifty per cent -- that is, that the borrowers' monthly debt obligations, including the applied-for mortgage, not exceed one-half their income. However, in calculating the debt-to-income ratio, Fremont considered only the monthly payment required for the introductory rate period of the mortgage loan, not the payment that would ultimately be required at the substantially higher "fully indexed" interest rate. As an additional feature to attract subprime borrowers, who typically had little or no savings, Fremont offered loans with no down payment. Instead of a down payment, Fremont would finance the full value of the property, resulting in a "loan-to-value ratio" approaching one hundred per cent. Most such financing was accomplished through the provision of a first mortgage providing eighty per cent financing and an additional "piggy-back loan" providing twenty per cent."

Fremont, supra, at pp. 735-739.

Under Massachusetts G.L. c. 93A § 2, the trial court found, and the Supreme Judicial Court confirmed that the business practices at hand were indeed "unfair." The court stated: "the record here suggests that Fremont made no effort to determine whether borrowers could 'make the scheduled payments under the terms of the loan.'" *Fremont, supra*, at pp. 745-746. Rather, as the judge determined, loans were made with the understanding that they would have to be refinanced before the end of the introductory period. Thus, Fremont's actions were "unreasonable, and unfair to the borrower…"

The same is true here. Defendants' scheme was, not only unlawful; it was "unreasonable" and "unfair." It is in violation of the law, the harm to Plaintiff outweighs any benefit to Defendants, and it was likely to deceive. Defendants argue that they are immune from liability because they did not make the actual misrepresentations to Plaintiff. However, Defendants cannot avoid liability under B&P 17200 because Plaintiff has properly alleged a scheme which includes not just the individual broker who made the representations but all of the entities that aided and abetted, profited, benefited and participated in the joint venture and conspiracy. *See In re Countrywide Financial Corporation*, 601 F. Supp. 2d 1201, 1220 (S.D. Cal. 2009).

Thus, Defendants conduct constitutes a violation of B&P § 17200 pursuant to the unlawful, unfair, and fraudulent prongs, and they can be held liable for said conduct. Moreover, as set forth above, the violations of Sections 2923.5 and 2923.6 also provide a basis for a claim for relief based on violation of B&P § 17200. Accordingly, Plaintiff's claim should not be dismissed.

5. Plaintiff Has Properly Alleged a Cause of Action for Quiet Title Based on the Invalidity of the Foreclosure Sale

Plaintiff has alleged that the original promissory note and the trust deeds were separated at some point in Defendants' unlawful scheme. While Plaintiff does not currently know who held

the respective documents when, Plaintiff alleges that he is informed and believes that the prosecution of the foreclosure of the first trust deed was carried out without the original note. Under the recent Kansas Supreme Court decision in *Landmark National Bank v. Kesler*, 40 Kan. App. 2d 325 (2008) ("*Landmark*"), the Court explained that "in the event that a mortgage loan somehow separates interests of the note and the deed of trust, with the deed of trust lying with some independent entity, the mortgage may become unenforceable. The Court went on to state:

> "The practical effect of splitting the deed of trust from the promissory note is to make it impossible for the holder of the note to foreclose, unless the holder of the deed of trust is the agent of the holder of the note. [Citation omitted.] Without the agency relationship, the person holding only the note lacks the power to foreclose in the event of default. The person holding only the deed of trust will never experience default because only the holder of the note is entitled to payment of the underlying obligation. [Citation omitted.] The mortgage loan becomes ineffectual when the note holder did not also hold the deed of trust. Bellistri v. Ocwen Loan Servicing, LLC, 284 S.W.3d 619, 623 (Mo. App. 2009)."

Landmark, supra, 40 Kan. App. 2d 325 (2008) (internal quotation marks omitted.)

Thus, for there to be a valid assignment, there must be more than just assignment of the deed alone; the original promissory note must also be assigned. Because this is not the case here, the foreclosure sale is invalid and, therefore, Plaintiff's quiet title cause of action is proper and should not be dismissed.

6. <u>The Tender Rule Does Not Apply Here</u>

Defendants cite several cases for the proposition that Plaintiff is required to tender the amount due on the loan that he allegedly had with Defendants. However, said cases are distinguishable as Plaintiff is not a junior lienholder but rather the trustor. Moreover, in *Munger v. Moore* (1970) 11 Cal. App. 3d 1, 7, the court held that that "a trustee or mortgagee may be liable to the trustor or mortgagor for damages sustained where there has been an illegal, fraudulent or wilfully oppressive sale of property under a power of sale contained in a mortgage or deed of trust." Similarly, Plaintiff alleges that the sale of his property was illegal and

fraudulent. The court in *Munger* made no mention of any tender requirement for the borrower to bring a claim against the trustor or mortgagor. As *Munger* is on point and Defendants' cases are factually distinguishable, *Munger* governs this case. Therefore, the tender rule does not apply.

IV. CONCLUSION

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

DATED: January 4, 2010 LAW OFFICES OF CAMERON H. TOTTEN

By:_____
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Attorney for Plaintiff