MARK JOSEPH KENNEY (State Bar No. 87345)
DAVID E. PINCH (State Bar No. 124851)
dep@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 Defendant
RECONTRUST COMPANY, N.A.; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK AS TRUSTEE FOR THE BENEFIT OF THE CERTIFICATEHOLDERS CWMBS, INC. CHL MORTGAGE PASS-THROUGH TRUST 2005-2 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-2; COUNTRYWIDE HOME LOANS, INC.; BANK OF AMERICA CORPORATION

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CRUZ

KIMBERLY COX,

Plaintiff,

vs.

RECONTRUST COMPANY, N.A.; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK AS TRUSTEE FOR THE BENEFIT OF THE CERTIFICATEHOLDERS CWMBS, INC. CHL MORTGAGE PASS-THROUGH TRUST 2005-2 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-2; COUNTRYWIDE HOME LOANS, INC.; BANK OF AMERICA CORPORATION; all persons known or unknown claiming any legal or equitable right, title, estate, lien or interest in the property described in this Complaint adverse to COX's title or any could upon COX's title thereto; and Does 1-100, inclusive,

Defendants.

Case No. CV174201

RECONTRUST COMPANY, N.A.; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK AS TRUSTEE FOR THE BENEFIT OF THE CERTIFICATEHOLDERS CWMBS, INC. CHL MORTGAGE PASS-THROUGH TRUST 2005-2 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-2; COUNTRYWIDE HOME LOANS, INC.; BANK OF AMERICA CORPORATION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO SECOND AMENDED COMPLAINT OF COX

****TELEPHONE APPEARANCE****

Date: October 22, 2012
Time: 8:30 a.m.
Dept.: 4

Action Filed: May 24, 2012
Trial Date: None Set

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

I. INTRODUCTION

This is Plaintiff Kimberly Cox's third attempt to have this court determine that her executed note and deed of trust against her property are void, a nullity and of no effect. She has not repaid her loan of $544,000.00 that she admittedly borrowed. Recontrust Company, N.A., demurred to the original complaint. Prior to the hearing on that demurrer, Cox filed this First Amended Complaint as a matter of right. Plaintiff now brings five causes of action: (1) Declaratory Relief; (2) Violation of Unfair Business Practices Act; (3) Quasi-Contract; (4) Slander of Title; and, (5) Quiet Title.

However, Cox has not cured the basic defect in her complaint: she has previously been adjudicated as lacking standing to file any cause of action with respect to any claims involving her real estate loan by the United States Bankruptcy Judge for the Northern District of California. This has not changed.

Cox has already tried to accomplish these same or similar allegations during her bankruptcy filing as adversary proceeding, but was denied the right to bring suit because of a lack of standing. The bankruptcy court held that having filed bankruptcy any pre-petition claims – such as these – became property of the estate and only the Chapter 7 Trustee had standing to prosecute. As will be shown below, Cox cannot escape this problem simply by filing in the state court. She has no standing to file these causes of action and she is prohibited by the doctrine of issue preclusion from litigating that finding here.

Even if the bankruptcy had never been filed none of Cox's causes of action state facts sufficient to sustain a cause of action as they are invalid as a matter of both law and equity.

II. STATEMENT OF FACTS

A. The Loan And Deed Of Trust

On or about December 10, 2004, Plaintiff Kimberly Cox entered into the subject loan to refinance her property. Pursuant to the note evidencing the loan, Plaintiff promised to pay $544,000.00 to the lender, American's Wholesale Lender. (SAC ¶ 25, Exs. 1 and 2.) By signing the note, Plaintiff agreed that, "I understand that Lender may transfer this Note. Lender or anyone who takes this Note by transfer and who is entitled to receive payment under this Note is called

the "Note Holder." (SAC ¶25, Ex. 1.)

In order to secure the note, Plaintiff took out a Deed of Trust against the real property commonly known as 131 Sutphen St., Santa Cruz, CA 95060-1939 ("Property"). (SAC., Ex. 2.) Plaintiff signed the Deed of Trust of her own accord. (*Id.*) The Deed of Trust was recorded on December 21, 2004. (*Id.*) Pursuant to the deed of trust, the beneficiary under the Deed of Trust was Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for lender America's Wholesale Lender and its successors and assigns. (*Id.*) Pursuant to the Deed of Trust, CTC Real Estate Services was the original trustee. (*Id.*) The Deed of Trust specifically granted MERS, as nominee for lender and its successor and assigns, the right to foreclose and sell the Property. (*Id.*)

On November 13, 2009, MERS, as Nominee for America's Wholesale Lender, executed a Substitution of Trustee and Assignment of Deed of Trust. (SAC, Ex. 9.) This document substituted defendant Recontrust Company as the new trustee on the Deed of Trust. The document also assigned the Deed of Trust to defendant The Bank of New York Mellon. (*Id.*) The Substitution of Trustee and Assignment of Deed of Trust was recorded on December 7, 2009. (*Id.*)

Plaintiff had defaulted on her loan obligation and on November 13, 2009, and concurrent with the execution of the Substitution of Trustee and Assignment of Deed of Trust, Recontrust Company recorded a Notice of Default. The Notice of Default contained the Notice of Default Declaration pursuant to California Civil Code § 2923.5 and all the documents were recorded on November 24, 2009. (SAC, Ex. 7 and 13.)

On April 12, 2012, a Notice of Trustee's sale was issued by Recontrust Company. The foreclosure sale was to occur on May 7, 2012. The Notice of Trustee's Sale was recorded on April 16, 2012. (SAC, ¶10.)

B. The Chapter 7 Bankruptcy

On November 12, 2010, Plaintiff filed for Chapter 7 Bankruptcy in this Court, Case No. 5:10-bk-61716. Plaintiff's schedules list the Property as owned in "Fee Simple" on her Schedule A (SAC, Ex. 3, RJN Ex. A); instead she listed the debt as unsecured in Schedule F and did not list any lawsuit or related claims as an asset of her estate in Schedule B. (*Id.*) The schedules do not list this lawsuit as an asset. (*Id.*) The trustee has filed a no asset report and no

notice of assets was filed. (First Amended Complaint, Ex. 8, RJN Ex. B.) No proof of claims have been filed.

On April 12, 2011, Cox filed an adversary action in the Bankruptcy Court as Adversary No. 11-05106 against Mortgage Electronic Registration Systems, Inc., the Bank of New York Mellon fka The Bank of New York as Trustee for the Benefit of the Certificateholders CWMBS, Inc. CHL Mortgage Pass-through Trust 2005-2 Mortgage Pass-through Certificates Series, America's Wholesale Lender, Countrywide Home Loans Servicing, LP, BAC Home Loans Servicing, L.P. (the "Adversary"). Under the Adversary, Cox sought to determine (1) the Validity, Extent, Interest and Secured Status of Lien; (2) to disallow debt and cancel security instrument; (3) for declaratory relief; and (4) quiet title. (RJN, Ex. C Adversary Complaint.) These are relatively the same causes of action here. (*Id.*)

The bankruptcy court denied the claims and dismissed the action (RJN, Ex. D) with prejudice, holding:

> The claims for relief were not listed on the Debtors' bankruptcy schedules. While the trustee has filed a no-asset report – the Chapter 7 trustee has filed a no-asset report, these claims are not as a result of the filing of that no-asset report, deemed to be abandoned to the Debtor. I agree with the Defendants' analysis of Bankruptcy Code Section 554 which is abandonment. Property not listed on the schedules is never administered and thus never abandoned. Since these claims arise from pre-petition events, Mr. Tim (sic), they are pre-petition claims which are property of the bankruptcy estate. Only the Chapter 7 trustee has standing to assert claims which are property of the bankruptcy estate. I also note for the record that the Court declined to sign the abandonment order submitted by the Debtor/the Plaintiff.
>
> So the extent that these claims haven't been abandoned, only the Chapter 7 trustee has the authority to assert these claims, so on that ground, your client doesn't have standing if these claims haven't been abandoned.

(RJN Ex. E, certified transcript of hearing on motion to dismiss, page 4, line 25 to page 5, line 20).

To bring this into perspective, the claims that the Court found to belong strictly to the Chapter 7 Trustee were from a complaint styled as "Complaint to Determine the Validity, Extent, Interest, and Secured Status of Alleged Lien and Associated Debt; to Disallow Claims as Secured and Cancel Security Instrument; for Declaratory Relief; for Injunctive Relief to Stop Foreclosure;

and, to Quiet Title." (See RJN, Ex. C "Adversary Complaint").

III. GROUND TO SUSTAIN DEMURRER

A. Legal Standard For A Demurrer

Code of Civil Procedure ("C.C.P.") §§ 430.30(a) and 430.50(a) authorize a response to a complaint by demurrer. (See C.C.P. §§ 430.30(a) and 430.50(a).) C.C.P. § 430.30(a) supports the sustaining of a demurrer when the grounds for the objection appears on the face of the complaint. (See C.C.P. § 430.30(a).) The grounds for the objection include the failure of the complaint to state facts sufficient to constitute a cause of action. (See C.C.P. § 430.10(e), (f).)

For the purposes of testing the sufficiency of the pleadings, the demurrer must admit the truth of all material facts properly pleaded but not the truth of "contentions, deductions or conclusions of law." (See *Aubry v. Tri-City Hosp. Dist.* (1992) 2 Cal.4th 962, 967.) Conclusory averments and conclusions of law do not constitute a statement of fact upon which relief may be granted. (See *Davaloo v. State Farm Ins. Co.* (2005) 135 Cal.App.4th 409, 415; *Smith v. Busniewski* (1952) 115 Cal.App.2d 124.) Allegations referring generally to "defendants" do not state a claim. (See *Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 829.)

Furthermore, "facts appearing in exhibits attached to the complaint will also be accepted as true and, if contrary to the allegations in the pleading, will be given precedence." (*Dodd v. Citizens Bank of Costa Mesa* (1990) 222 Cal.App.3d 1624, 1627; *Holland v. Morse Diesel Int'l Co.* (2001) 86 Cal.App.4th 1443, 1447 ("If facts appearing in the exhibits contradict those alleged, the facts in the exhibits take precedence.").)

IV. PLAINTIFF'S ENTIRE COMPLAINT FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE ANY CAUSE OF ACTION

A. Plaintiff Lacks Standing

Plaintiff's complaint is barred in its entirety by the doctrine of judicial estoppel or claims preclusion. In this case, the Bankruptcy Court has already determined that Cox waived the right to bring this action. The claims (which were never scheduled) belong exclusively to the estate through the Chapter 7 trustee. Section 554(d) of Title 11 of the United States Code provides that

> Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate.

Plaintiff filed her Chapter 7 Case on November 12, 2010. Plaintiff has failed to properly schedule this action as an asset in her Bankruptcy Schedules. (RJN, Ex. C page 5, lines 6-16.) Plaintiff did exempt this action. As the Bankruptcy Court determined, Cox's claims arose out of pre-petition loans and are property of the estate. Property of the estate that is not abandoned or administered in the case remains property of the estate. (11 U.S.C. § 554(d).) The Chapter 7 trustee has not abandoned or administered the asset and Cox's motion to force abandonment was denied. With respect to actions that are property of the estate, the Chapter 7 trustee is the real party in interest and Cox lacks standing to pursue the claims on her own behalf. (*In re Lopez* (9th Cir. BAP 2002) 283 B.R. 22, 28.) More importantly, the United States Bankruptcy Court through the Honorable Charles Novack has already found this to be true. Ms. Cox has no standing to litigate these claims.

Abandonment pursuant to § 554(c) requires that the property to be abandoned is properly scheduled under § 521(l). (*Vreugdenhill v. Navistar Int'l Transp. Corp.* (8th Cir. 1991) 950 F.2d 524, 526 (unless formally scheduled, property is not abandoned at the close of the estate, even if the trustee knew of the existence of the property when the case was closed); *In re Harris* (Bankr. S.D. Fla. 1983) 32 B.R. 125, 127 (property not scheduled was not deemed abandoned and remained property of the estate); *In re Medley* (Bankr. M.D. Tenn. 1983) 29 B.R. 84, 86-87 (an unscheduled asset was not deemed abandoned and trustee could reopen case to administer the asset to creditors). Plaintiff never scheduled this asset of the estate. (See RJN, Ex. A, Schedule B No. 21 "X None".)

Plaintiff is not saved by the entry of her discharge or by the filing of this action in state court rather in Bankruptcy Court. The Plaintiff's claims should be dismissed because she is estopped from pursuing the instant claims because she failed to list this purported action as assets in her bankruptcy schedules. (*Hamilton v. State Farm Fire & Cas. Co.* (9th Cir. 2001) 270 F.3d 778, 783.) When Cox filed for bankruptcy, she neither listed the claims asserted in her Complaint as assets of her estate nor exempted this action or the Property in her bankruptcy schedules. (RJN,

Ex. B.; *Harris v. St. Louis Univ.* (M.D. Mo. 1990) 114 B.R. 647, 648 (holding that a Chapter 7 debtor may assert a pre-petition cause of action only if the Chapter 7 Trustee has abandoned it).)

The Bankruptcy Code provides three means for a Chapter 7 Trustee to abandon the property of the estate. First, the Trustee may formally abandon the property after noticed motion. (11 U.S.C. § 554(a).) Second, the Trustee may, under some circumstances, be ordered by the Bankruptcy Court to abandon the property. (11 U.S.C. § 554(b).) Third, the Trustee may abandon the property by operation of law, provided it has been "scheduled" and "not otherwise administered at the time of the closing of the case." (11 U.S.C. § 554(c).) Here, Plaintiff has neither alleged nor demonstrated that the Trustee has abandoned the property. Plaintiff therefore lacks standing to pursue this action because the Trustee remains the real party in interest and this action should be dismissed. (*In re Lopez*, 283 B.R. at 28; *Haley v. Dow Lewis Motors, Inc.* (1999) 72 Cal.App.4th 497, 511, 85 Cal.Rptr.2d 352.)

The bankruptcy court's judgment has preclusive *res judicata* effect as to whether Cox or the Chapter 7 trustee has standing to assert the causes of action raised in this complaint. When a federal judgment is involved, the federal rule concerning finality of a judgment on appeal for purposes of *res judicata* differs from the state rule. Under the federal rule, a judgment or order, once rendered, is final for purposes of *res judicata* until it is reversed on appeal, or modified or set aside in the court of rendition. (*Calhoun v. Franchise Tax Bd.* (1978) 20 Cal.3d 881, 887, 143 Cal.Rptr. 692, 574 P.2d 763, cert. denied, 439 U.S. 872; *Abdallah v. United Sav. Bank* (1996) 43 Cal.App.4th 1101, 1110, 51 Cal. Rptr. 2d 286, cert. denied, 519 U.S. 1081 (1997) (plaintiffs' cause of action untenable in state court action in light of earlier action that had been dismissed with prejudice in federal district court; although appeal from that judgment was pending, judgment is final for *res judicata* purposes until reversed and doctrine of *res judicata* precludes litigation of any claim that could have been raised in federal action.).)

B. Plaintiff Is Judicially Estopped from Asserting Her Causes of Action

Cox is judicially estopped from asserting these causes of action. In the underlying bankruptcy case, Plaintiff's bankruptcy schedules filed on February 10, 2011, did not list the causes of action asserted in this Complaint as a Personal Property asset in Schedule B. (RJN,

Ex. A.) Relying upon the schedules, the Chapter 7 trustee issued a Report of No Distribution on September 12, 2011. (RJN, Ex. D.) The Court entered a discharge in favor of Plaintiff on October 12, 2011. (RJN, Ex. E.) "In the bankruptcy context, a party is judicially estopped from asserting causes of action not raised in a reorganization plan or otherwise mentioned in the debtor's schedules or disclosure statements." (*Hamilton*, 270 F.3d at 783.)

In *Hamilton*, the Court of Appeals for the Ninth Circuit judicially estopped a plaintiff from pursuing claims post-discharge because (1) the debtor clearly asserted inconsistent positions as she failed to list her claims against State Farm as assets on her bankruptcy schedules, and later sued State Farm on the same claims; (2) the bankruptcy court accepted the debtor's prior assertions in that the bankruptcy court granted the debtor a discharge; and (3) Hamilton obtained an unfair advantage by obtaining all the benefits of her Chapter 7 bankruptcy without complying with her affirmative duty to disclose all assets. (*Id.* at 784-85.)

The facts here parallel the *Hamilton* case and support judicial estoppel. Plaintiff filed her Chapter 7 Petition on November 12, 2010. She did not list her pre-petition claims against Defendants as assets in her bankruptcy schedules. Relying on those schedules, the Chapter 7 Trustee issued a Report of No Distribution, and the Plaintiff received her discharge from the Bankruptcy Court. Cox attempted to bring these claims in her Adversary but was denied because they were unabandoned assets belonging to the trustee. Now Cox asserts an inconsistent position. She failed to properly schedule the claims against Defendants as an asset of her bankruptcy estate, received the benefit of the Trustee's Report and a Discharge and now is pursuing the claims against Defendant post-petition and post-discharge. For the same reason set forth in *Hamilton*, Plaintiff is judicially estopped from pursuing claims she did not disclose to her creditors in her bankruptcy schedules and the Complaint should be dismissed.

In addition, Cox is trying to profit by at least $544,000 by having her debt deemed cancelled which retaining her property free and clear after being discharged and having eliminated all unsecured debts.

Plaintiff also lacks standing to challenge whether the Trust could in fact accept an assignment of the loan, as she does at ¶36 of her SAC. Under California law, a plaintiff "cannot

assert a claim for a breach of contract against one who is not a party to the contract." (*Tri-Continent Int'l Corp. v. Paris Sav. & Loan Ass'n* (1993) 12 Cal.App.4th 1354, 1359.) This is precisely why, even if the securitization was somehow improper, the "overwhelming authority does not support a cause of action based upon improper securitization." (*Rodenhurst v. Home Loan Servs., Inc.* (D. Minn. Sept. 21, 2010) 2010 WL 3749243, at *4 ("Plaintiffs do not have standing to bring their challenge regarding the securitization of the mortgage" because "Plaintiffs are not a party to the Pooling and Servicing Agreement.").)

In *Bescos v. Federal Home Loan Mortgage Corp.* (C.D. Cal. July 22, 2011) 2011 WL 3157063, the plaintiff claimed that the assignee to the pooling agreement securitizing the loan violated the agreement, and thus it had no authority to foreclose on his property. (*Id.* at *6.) The Court granted a motion to dismiss reasoning that "Plaintiff has no standing to challenge the validity of the securitization of the loan as he is not an investor of the loan trust." (*Id.*)

Cox seems to challenge the authority of the Defendants, as assignees[1], to enforce the obligation under the note and deed of trust—as did the plaintiff in *Bescos*. Cox has not established herself as an investor in the trust and has no standing to challenge the document because she cannot establish any prejudice to her.

Even if Cox were correct in her assertion that Bank of New York could not have purchased her loan under the trust, Cox has failed to show any prejudice to her. The Court of Appeals in *Fontenot v. Wells Fargo Bank* (2011) 198 Cal.App.4th 256 clarified the requirement that plaintiffs must show prejudice to challenge the authority to enforce the obligations under a deed of trust securing a promissory note. Just as Cox does here, the plaintiff in *Fontenot* challenged the assignment of the interest in the deed of trust and note; however, the Court held that the plaintiff could not show prejudice. The Court explained:

> Even if MERS lacked authority to transfer the note, it is difficult to conceive how plaintiff was prejudiced by MERS's purported assignment.... 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

[1] Note U.S. Bank, the current assignee, is not a party to this lawsuit.

> creditor for another, without changing her obligations under the note.... If MERS indeed lacked authority to make the assignment, the true victim was not plaintiff but the original lender, which would have suffered the unauthorized loss of a $1 million promissory note.

(*Id.* at 272.)

Accordingly, because Cox has not suffered any prejudice—i.e. she owes a balance to some creditor—she has no basis or standing to proceed with this breach of contract action.

C. The First Cause of Action for Failure to Establish Declaratory Relief is Insufficient to Constitute a Cause of Action.

1. The Assertion that AWL Could Not Make a Loan is Without Merit

Plaintiff's first allegation is that "the Note was made to a non-existent entity." (SAC ¶41.) The Note lists the initial Lender as "America's Wholesale Lender" ("AWL"). (FAC, Ex. 1.) Plaintiff alleges that AWL did not exist when the loan was granted and therefore could not have entered into the contract. (SAC, ¶¶16, 41, Exs. 1, 2.) Plaintiff asserts that it was not a corporation under New York law until December 16, 2008. (SAC, Ex. 6.)

At the time the loans were made, AWL was a registered fictitious business name of Countrywide Home Loans. A certified copy of that fictitious business name as filed with the County Clerk for the County of Santa Cruz shows that AWL was the fictitious business name of Countrywide Home Loans, a New York Corporation. (RJN, Ex. F certified copy.)

California law requires that if a corporation is registered but is doing business under a fictitious business name, then the corporation must file a fictitious business name statement in its principal place of business. (Cal. Bus. & Prof. Code § 17915.) AWL was therefore authorized to do business in 2004 when the loan was executed—it was a fictitious name for Countrywide Home Loans, Inc. AWL was the registered fictitious business name of Countrywide Home Loans, a New York Corporation, and there is no conflict or misrepresentation that sometime later another corporation chose that name in the State of New York as its business name. AWL was Countrywide Home Loans at the time the subject loan was made.

Furthermore, even if AWL was not licensed to do business in California, it would not invalidate the loan. Plaintiff has pled that America's Wholesale Lender is a licensed New York

Corporation. (SAC, ¶16.) The penalty for failure of a foreign corporation to register in California is that it consents to personal jurisdiction in the state and that it may not bring suit in the state.[2] (Cal. Corp. Code § 2203.) Neither provision has any effect on this lawsuit.

Finally, Cox has previously admitted to having received at least the amount necessary to satisfy her prior deed of trust on the property in her First Amended Complaint because her prior Deed of Trust was reconveyed after it was paid off by this—now contested—loan. (See FAC, Ex. 31 "Deed of Reconveyance".) Cox wants the benefit of her agreement without any burden.

Cox alleges that MERS could not validly transfer the Note and Deed of Trust. First, the issue has been decided by the State of California that MERS is authorized to act on behalf of the beneficiary if so stated in the Deed of Trust. (*Gomes v. Countrywide Home Loans Inc.* (2011) 192 Cal.App.4th 1149) (Gomes agreed in the deed of trust that MERS was authorized to initiate a foreclosure proceeding).)

Even if there was a legal basis for an action to determine whether MERS has authority to initiate a foreclosure proceeding, the deed of trust—which Cox has attached to her Complaint—establishes as a factual matter that hers claims lack merit. As stated in the deed of trust, Cox agreed by executing that document that MERS has the authority to initiate a foreclosure.

In addition, Cox's claim that Recontrust could not record a notice of default without first having recorded a substitution of trustee is an incorrect legal conclusion. Only an agent of the beneficiary need record the Notice of Default. Civil Code section 2924, subdivision (a)(1), which states that a trustee, mortgagee, or beneficiary, or an agent of any of them, may initiate foreclosure, does not include a requirement that an agent demonstrate authorization by its principal. (*Fontenot*, 198 Cal.App.4th at 268-69.)

D. Plaintiff's Second Cause of Action for Violation of Unfair Business Practices Fails.

Plaintiff's second cause of action for violation of California's Business and Professions Code § 17200 ("UCL") identifies a California Penal Code under mortgage fraud as the applicable statute. As shown above, the recordings made by Recontrust were in compliance with law and

[2] A monetary penalty may also be assessed.

therefore this alleged violation is without merit.

Moreover, recording a notice of default or sale is a privileged act which will support no tort claim other than malicious prosecution. 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 default and sale are required by section 2924(a)(1) and (3); hence, giving those notices is privileged conduct under Civil Code section 47. In addition, damages are not recoverable under the UCL and Cox has not sought any kind of injunctive relief.[3]

Because no independent factual allegations are made that can sustain any wrongful actions this cause of action should be dismissed.

E. Plaintiff's Third Cause of Action for Quasi Contract is Contradictory

Cox claims that Bank of America, N.A., and Countrywide Home Loans were "servicers" and as such could not accept payments on behalf of the Lender. (SAC, ¶61.) But this is nonsense. That is the role of a servicer. Moreover, Cox's claim that Bank of America, N.A., and Countrywide Home Loans could not be servicers because AWL never existed has already been refuted above.

F. Plaintiff's Fourth and Fifth Causes of Action for Slander of Title and Quiet Title Fail for Similar Reasons.

Cox requests that this Court clear title to her property without any basis for alleging why this Court should nullify the lien on the Property. As Cox has failed to allege any reason why the encumbrance is not proper, this cause of action must fail.

Cox seems to be claiming that title should be cleared due to the fact that she claims that the original instruments are void—even though she got the money necessary to pay off her existing lien. For the reasons cited above this is simply not true. No other basis is given for the Quiet Title

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[3] See Cal. Bus. & Prof. Code, § 17203; *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1144 ("[a] UCL action is equitable in nature; damages cannot be recovered"); *Madrid v. Perot Sys. Corp.* (2005) 130 Cal.App.4th 440, 452.

action and the Cause of Action must fail.

Furthermore, Cox lacks standing to challenge the foreclosure sale because she has not tendered the undisputed obligation in full. Tender of the amount owed is a condition precedent to any claim of wrongful foreclosure or any challenge to the regularity or the validity of a foreclosure sale. The tender rule is strictly applied. (See *Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 439.)

As Miller & Starr explain,

> [a] challenge to the validity of the trustee's sale is an attempt to have the sale set aside and to have the title restored. The action is in equity, and a trustor seeking to set the sale aside is required to do equity before the court will exercise its equitable powers. Therefore, as a condition precedent to an action by the trustor to set aside the trustee's sale ... the trustor must pay, or offer to pay, the secured debt .... Without an allegation of such a tender in the complaint that attacks the validity of the sale, the complaint does not state a cause of action.

(4 Miller & Starr, Cal. Real Estate § 10:212, pp.686-87 (3d ed. 2003) (fns. omitted).)

"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." "[A]n action to set aside the sale, unaccompanied by an offer to redeem, would not state cause of action which a court of equity would recognize." The rationale behind the tender offer rule is that if the plaintiff could not have redeemed the property had the sale procedures been proper, then any irregularities did no harm to the plaintiff. Here Cox has not alleged that she is willing or able to tender the money owed. Therefore, she lacks standing to challenge the foreclosure sale.

This mandate holds true whether the foreclosure has been completed or is in process. "When a debtor is in default of a home mortgage loan, and a foreclosure is either pending or has taken place, the debtor must allege a credible tender of the amount of the secured debt to maintain any cause of action for wrongful foreclosure." (*Alicea v. GE Money Bank* (N.D. Cal. July 19, 2009) 2009 WL 2136969, at *3 ("Plaintiffs contend, without citing any supporting authority, that the tender rule applies only where the foreclosure sale already has taken place—not before. Such an argument elevates form over substance.... Plaintiffs have not alleged their willingness to tender or their ability to do so. Unless and until they properly allege a willingness to tender,

Plaintiffs cannot seek rescission of the loan or Deed of Trust.").) The tender requirement applies to any claim "implicitly integrated" with the foreclosure sale—not merely claims that challenge the sale, but also those that seek damages related to the sale. (*Arnolds Mgmt. Corp. v. Eischen* (1984) 158 Cal.App.3d 575, 579.)

Here Cox seeks damages for breach of contract for wrongful foreclosure upon how her loan was sold to a third-party lender (First Cause of Action), damages for Unfair Business Practices (Second Cause of Action), for Quasi Contract (Third Cause of Action) and damages for Slander of Title and Quiet Title based upon the same allegations of wrongful foreclosure (Third Cause of Action). Thus, all of her claims require that she make an unambiguous tender of the loan balance. Because she has not alleged that she is both willing and able to tender the amounts due, all of her claims fail.

V. CONCLUSION

Based on the foregoing, Cox's Complaint fails to state facts sufficient to constitute any of her causes of action against Defendants. Therefore, Defendants respectfully request that the Court sustain their Demurrer in its entirety without leave to amend.

DATED: September 18, 2012

SEVERSON & WERSON
A Professional Corporation

By: _____
David E. Pinch

Attorneys for Defendant
RECONTRUST COMPANY, N.A.; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK AS TRUSTEE FOR THE BENEFIT OF THE CERTIFICATEHOLDERS CWMBS, INC. CHL MORTGAGE PASS-THROUGH TRUST 2005-2 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-2; COUNTRYWIDE HOME LOANS, INC.; BANK OF AMERICA CORPORATION

PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is One Embarcadero Center, Suite 2600, San Francisco, CA 94111.

On September 18, 2012, I served true copies of the following document(s):

RECONTRUST COMPANY, N.A.; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK AS TRUSTEE FOR THE BENEFIT OF THE CERTIFICATEHOLDERS CWMBS, INC. CHL MORTGAGE PASS-THROUGH TRUST 2005-2 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-2; COUNTRYWIDE HOME LOANS, INC.; BANK OF AMERICA CORPORATION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO SECOND AMENDED COMPLAINT OF COX

on the interested parties in this action as follows:

Ronald H. Freshman Law Offices of Ronald H. Freshman 45050 Casas de Mariposa Indian Wells, CA 92210 Phone: 858.756.8288 Fax: 206.424.0744	Attorney for Plaintiff, Kimberly Cox

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Severson & Werson's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on September 18, 2012, at San Francisco, California.

Imelda E Hernandez