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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 cloud upon COX's title thereto; and does 1-100 inclusive, Defendants.	Case No. CV174201 Case Filed: 05/24/2012 PLAINTIFF KIMBERLY COX'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HER OPPOSITION TO 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.; and BANK OF AMERICA CORPORATION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO SECOND AMENDED COMPLAINT OF COX Date: 11/02/2012 Time: 8:30 a.m. Dept: 4

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INTRODUCTION

Defendants have objected to plaintiff Kimberly Cox's ("Plaintiff") Second Amended Complaint by filing a demurrer itemizing eight grounds. No. 1 Alleges Plaintiff lacks standing to bring her entire Complaint erroneously citing Cal. Code of Civ. Procedure ("CCP") ¶ [sic] 430.10(a) and (b); No. 2 Defendants allege Plaintiff's entire complaint is barred by "the doctrine of issue preclusion or res judicata" (not stating which doctrine is alleged [they are different[1]] ;) stating Plaintiff's "claims have previously been denied before the United States Bankruptcy Court" which is untrue. Defendants again erroneously cite CCP ¶ [sic] 430.10(a) and (b) neither of which relates in any way to issue preclusion or res judicata; in Nos. 3-7 Defendants claim identical grounds for alleged failure to state facts sufficient to constitute a cause of action pursuant to CCP § 430.10(e) against Plaintiff's first through fifth causes of action; and in No. 8 Defendants claim all Plaintiff's causes of action fail for Plaintiff failing to offer tender, stating that tender "is mandatory in any action to cancel a foreclosure action" which is also untrue.

Defendants' Memorandum of Points and Authorities in Support of their Demurrer ("P&A") is replete with the mistakes; allegations; false, conclusory and misleading statements; hearsay; citing statutes and cases that are inapposite and/or unrelated to the arguments made and most not relevant or binding authority in the instant case. Defendants are attempting to improperly re-litigate a bankruptcy case in a State Court demurrer hearing.

Plaintiff denies each and every fact, claim, assertion, allegation, statement and legal conclusion made in Defendants' Demurrer and supporting P&As.

As shall be shown herein, Defendants' Demurrer and P&A in support are without merit.

STATEMENT OF FACTS

Re: Defendants' § I. Introduction

Plaintiff objects to and denies Defendants' wrongful assertions: (a) that any purported "note and deed of trust" were "executed," exist or are valid if existing (P&A p.1:2-3); (b) that there is or was a "loan of $544,000.00" or that Plaintiff "admittedly borrowed" same; (c) that

[1] See footnote 19 below.

lacking standing to file Plaintiff's adversary proceeding in Bankruptcy, causes any defect in Plaintiff's instant Action in State Court; (d) that "issue preclusion" has any bearing on this case; (e) that Plaintiff's causes of action fail to state sufficient facts; and/or (f) Plaintiff's causes of action are invalid for any reason.

Defendants' claim that Plaintiff "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 Bankruptcy Judge is an abject false statement. (P&A p.1:9-12)

Defendants' statement that the bankruptcy Court held "any prepetition claims - such as these - became property of the estate" (P&A p.1: 13-21) is absolutely false. Defendants and their attorney continually mischaracterize "having a claim" and "making a claim" (or simply "claims") as being the same. They are not. These variations on the word "claim" have completely different meanings and are wrongfully misleading absent adequate qualification.

Re: Defendants § II. "STATEMENT OF FACTS" (P&A p.1:22-p.4:1)

Re: Defendants § II A. The "Loan and Deed of Trust" (P&A p.1:23-p.2:22)

Plaintiff objects to and denies Defendants' false statements: (a) that Plaintiff "entered into the subject loan;" (b) there is a "note evidencing he loan;" (c) that Plaintiff "promised to pay $544,000.000 to the lender, American's [sic] Wholesale Lender" (there was no such lender); (d) that Plaintiff signed "the note;" (e) that "Lender" was authorized to transfer the "Note" (the "Lender" did not exist); (f) that anyone took the "Note" by "transfer" who was entitled to receive payment thereunder whether or not "called the "Note Holder";" (g) that "Plaintiff took out a Deed of Trust against the real property" the subject of this Action; (h) that "Plaintiff signed the Deed of Trust of her own accord;" (i) that the "beneficiary" under the purported "Deed of Trust" ("DOT") was "Mortgage Electronic Registration Systems, Inc. ("MERS")," who could not possibly be a Nominee for America's Wholesale Lender (or the "beneficiary" under the purported "DOT") because America's Wholesale Lender as listed in the purported "DOT" a CORPORATION, organized and existing under the laws of NEW YORK, did not exist; (j) that the "DOT" granted MERS "the right to foreclose and sell the Property;" (k) that MERS was authorized or validly executed the purported "Substitution of Trustee and

Assignment of Deed of Trust;" ("SOT") (l) that the purported "SOT" validly "substituted defendant Recontrust Company" ("RECON") as the "new trustee on the Deed of Trust;" (m) that the purported "SOT" validly "assigned the Deed of Trust to defendant The Bank of New York Mellon" ("BONYM"); (n) that "Plaintiff had defaulted on her loan obligation;" (o) that "RECON" validly recorded the purported "Notice of Default;" (p) that the recorded CCC § 2923.5 was valid; or (q) that any purported "Notice of Trustee's Sale" was validly recorded.

These untrue statements are triable issues of fact not grounds to sustain Defendants' Demurrer.

Re: Defendants § II B. "The Chapter 7 Bankruptcy" (P&A p.2:23-p.4:1)

This State Court Superior Court does not have jurisdiction to re-litigate Plaintiff's bankruptcy as Defendants are attempting to do here. Defendants continually utilize dogma in the bankruptcy court transcript rather than the Bankruptcy Court electing not to exercise **subject matter** jurisdiction[2] for its order. No claims for relief (which Defendants improperly call "claims," "causes of action," or "property" depending what suits their argument) were adjudicated.

Notwithstanding the foregoing, Plaintiff objects to, and denies Defendants' assertion that Plaintiff was required to, or "listed" any "debt" as unsecured "instead" of anything else. The purported "debt," if it existed, was at best, unsecured and discharged in bankruptcy.

The term "fee simple" is a title term having nothing to do with anything Defendants assert or infer. Defendants' statement(s) in p.2:25-27 are unintelligible.

Plaintiff did not list "any lawsuit or related claims as an asset;" or "this law suit" in the schedules because **this lawsuit did not exist until after the bankruptcy discharge and no claims were made prior to filing for bankruptcy**.

Defendants' statement that the bankruptcy court "denied the claims and dismissed the action with prejudice" is untrue and along with all the other misrepresentation of the court's ruling warrants a motion from the Court[3], and order to show cause why Defendants' attorney has not violated CCP § 128.7(b). The continued misrepresentation of the Bankruptcy Court's Ruling must cease[4].

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[2] See, p.4:12-13 herein below.
[3] CCP § 128.8(c)(2)
[4] Violations of Cal. Bus. & Prof. Code §§ 6068(d), 6013 and Cal. Rule of Prof. Conduct 5-200(C).

The term "claim" or "claims" continues to be misrepresented by Defendants' in an apparent attempt to mislead this honorable Court. Bankruptcy Title 11 U.S.C. § 101 states:

> (5) The term "claim" means—
> (A) **right to payment**, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
> (B) **right to an equitable remedy for breach of performance if such breach gives rise to a right to payment**, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured. (emphasis added)

Once again, having made a claim versus having a claim available, are very different and important distinctions Defendants never clarify when mentioning "claims" in their averments.

Absent adequate clarification or qualification as to what the term "claim" or "claims" mean(s) any such term in statements made by Defendants should be ignored and treated as an attempt to mislead the Court remaining a triable issue of fact not suitable for determination at the demurrer stage of the proceedings.

Defendants continue to mislead the Court by misquoting the Bankruptcy Court's Order. What "claims for relief" were; meaning "claims available" v. "claims made" are important distinctions conspicuously absent. Further, Defendants conveniently left out the relevant and important dispositive portions of the transcript and actual reason for the order:

> "**this Court does not have** – or **does not intend to exercise subject matter jurisdiction over these claims**." (Emphasis added.) See Exhibit E p.5:22-p.6:1 of Defendants Request for Judicial Notice[5] ("RJN.")

The Bankruptcy Court's ruling was based merely on procedural grounds, not on any subject matter in the claims for relief. The Complaint was never heard on its merits.

Defendants' state themselves in their previous Motion:

> "None of the causes of action arise in or under Title 11…**they could be brought in any Court of law, in nonbankruptcy Court**[6];" and "The sole recognized cause of action is for Quiet Title, a state law claim. As this is a no asset Chapter 7 liquidation, **there is no reason for this Court to hear this matter** and **the Court should allow it to be heard in state court**.[7]" (emphasis added)

[5] Or see, Exhibit 1 incorporated herein by this reference.
[6] See, p.2:16-18 of Exhibit 2 incorporated herein by this reference.
[7] See p.2:24-p.3:2 of Exhibit 2.

Defendants continue to mislead this Court misrepresenting that "the claims" were found by the Bankruptcy Court to "belong strictly to the Chapter 7 Trustee." Nothing could be further from the truth. Once again Defendants mix and match the term "claims" to suit their own unqualified definition rather properly explaining what the term means and in doing so, misleads this Court as to how the Bankruptcy Court ruled, which was on procedural grounds, not on the merits of any "causes of action" or claims for relief in the Complaint. The bankruptcy Court elected not to exercise **subject matter** jurisdiction[8].

Re: Defendants' § III. "GROUND TO SUSTAIN DEMURRER" (P&A p.4:2-20)

Re: Defendants § III A. "Legal Standard For A Demurrer" (P&A p.4:3-20)

Defendants' own section on the purported legal standards for a demurrer demonstrates how Defendants' Demurrer lacks merit.

The citations quoted by Defendants themselves indicate their Demurrer can only be sustained when the "grounds for objection appears on the **face** of the complaint.[9]" (emphasis added) "The demurrer must admit the truth of all material facts properly pleaded[10]."

No matter how unlikely or improbable, **plaintiff's allegations must be accepted as true for the purpose of ruling on the demurrer**[11].

Whether the plaintiff will be able to prove the pleaded facts is irrelevant to ruling upon the demurrer[12].

1. The Standard for Ruling on a Demurrer is Liberal Construction.

Code of Civil Procedure, Section 452 sets forth the legal standard for ruling on a demurrer - liberal construction with a view to substantial justice between the parties[13].

It has also been held that, in the context of a demurrer, complaints must be liberally construed[14].

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[8] See, p.4:12-13 herein above.
[9] See, P&A p.4:4-7 and CCP § 430.30(a) Defendants cite.
[10] See, P&A p.4:9-15 citing *Aubry v. Tri-City Hosp. Dist.* (1992) 2 Cal.4th 962, 967.
[11] *Del E. Webb Corp. v. Structural Materials Co.*, (1981) 123 Cal.App.3d 593, 604.
[12] *Stevens v. Superior Court*, (1986) 180 Cal. App. 3d 605, 609-610.
[13] See, *Stevens v. Sup. Ct. (API Auto Ins. Services)* (1999) 75 Cal.App.4th 594, 601.
[14] *Buss v. J.O. Martin Co.*, (1st Dist. 1966) 241 Cal.App.2d 123, 133-34.

2. Defendants Bear A Heavy Burden On A General Demurrer.

In California, **the Court is required to accept the allegations of a Complaint as true when ruling on a demurrer**[15].

A complaint states facts sufficient to constitute a cause of action if it appears the plaintiff is entitled to **any** relief[16] and it is error to sustain a demurrer if it appears that the plaintiff is entitled to **any** relief under the circumstances pleaded[17].

It has also been held that "a Plaintiff need not plead facts with specificity where the facts are within the knowledge and control of the defendant and are unknown to Plaintiff.[18]"

All facts are to be construed in the light least favorable to defendant[19].

The facts are more than sufficient to constitute each and every cause of action pled in Plaintiff's Complaint. Defendants' Demurrer cannot be sustained under required legal standards.

Re: Defendants' § IV. "PLAINTIFF'S ENTIRE COMPLAINT FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE ANY CAUSE OF ACTION" (P&A p.4:21-P.13:11)

Defendants' statement is completely untrue. If Plaintiff failed to state facts sufficient to constitute any cause of action, Defendants would not be able to argue page after page attacking the facts stated in Plaintiff's Complaint; facts which must be taken as true when ruling on a demurrer.

Re: Defendants' § IV A. "Plaintiff Lacks Standing" (P&A p.4:23-p.6:24)

Defendants raise "the doctrine[s] of judicial estoppel or claims preclusion" but do not designate which doctrine applies, or adequately explain how or why[20]. Defendants falsely state that the Bankruptcy Court determined "that Cox waived the right to bring this action" which is both untrue and impossible. "[T]his action" did not exist, nor were "the claims[21]" (once again an unqualified term) made prior to Plaintiff's bankruptcy and could therefore not be scheduled, listed and were therefore neither "property" nor "property of the estate." No such determination

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[15] *Witkin, Summary of California Procedure* (2d Ed.) Pleading, §800, p. 2413.
[16] *Addiego v. Hill*, (1965) 238 Cal.App.2d 842.
[17] *Dubins v. Regents of Univ. Of Cal.*, (1994) 25 Cal. App. 4th 77, 82.
[18] *Credit Managers Association of Southern California v. Superior Court*, (1975) 51 Cal.App.3d 352, 361 citations omitted.
[19] *Perdue v. Crocker Natl. Bank*, (1985) 38 Cal. 3d 913, 922.
[20] Judicial estoppel is issue preclusion, not claims preclusion. Claims preclusion is collateral estoppel. Defendants improperly mix these different doctrines and fail to make their allegations with the requisite specificity.
[21] See P&A p.4:26.

was made by the Bankruptcy Court[22]. The Bankruptcy Court elected not to exercise **subject matter** jurisdiction[23] which means the claims for relief or "causes of action" were not adjudicated.

This instant Complaint is a State Court action, not a Bankruptcy Court action. Standing to file an Adversary Proceeding in Bankruptcy Court is governed by a completely different set of rules and statutes. A demurrer in State Court is not the forum to re-litigate a Bankruptcy case.

Defendants' failure to specifically define what "[t]he claims" are, makes Defendants' statements unintelligible. Therefore Defendant's citation of 11 U.S.C. 554 (d) is nothing more than rhetoric. Defendants' averment that "Cox's motion to force abandonment was denied" is also untrue. In fact, the order for abandonment was filed, not denied[24] (although unsigned.)

Defendants' citation[25] is a perfect example of their attempts to mislead this Court by misusing the term "claim" or "claims." *Lopez* actually made a formal, signed "claim" which was submitted to the Calif. Dept. of Fair Employment and Housing alleging sexual harassment. This "claim" was made before the plaintiff's bankruptcy was filed. Plaintiff having a "claim available" to her prior to bankruptcy is not the same thing as having made a written claim.

Having a claim available prior to bankruptcy is neither "property" nor "property of the estate." *Lopez* is distinguishable for that reason and the Bankruptcy Court never cited *Lopez* as claimed by Defendants[26].

Defendants' continue to mislead, utilizing the term "property" without defining, qualifying or specifying what "property" is or means[27]. Defendants provide inapposite citations related to the term "property" that are inclusive of: (a) parts and equipment; (b) mortgages; and (c) a tax refund. These citations and the "property" or "claims" made, have no relevance to Plaintiff's instant Action or bankruptcy. These types of "assets" are inapposite to what Defendants are attempting to mislead the court into believing are the same as "causes of action" available to Plaintiff that Defendants claim should have been listed as "assets" in her bankruptcy schedules.

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[22] See, Cal. Bus. & Prof. Code §§ 6068(d), 6013; Cal. Rule of Prof. Conduct 5-200(C) and CCP § 128.7 et seq.
[23] See, p.4:12-13 herein above.
[24] See, Exhibit 3 incorporated herein by this reference.
[25] *In re Lopez* (2002) U.S. BAP for the 9th Cir. BAP No CC-01-1216-MoHK; 283 B.R. 22
[26] See, P&A p.5:10-13.
[27] See, P&A p.5:14-22.

Likewise, Defendants wrongfully assert that Plaintiff is estopped from pursuing her "claims" (see the definition of the term "claim" in the context of bankruptcy[28]) because *Hamilton v. State Farm Fire & Cas. Co*., (2001) 270 F.3d 778, 783[29] requires that Plaintiff somehow list her available causes of action (assuming Defendants use the term "claims" to mean "causes of action" given the lack of qualification of the term) in her Complaint.

The *Hamilton* case involved an "insurance claim" not "claims" as the term is misleadingly used by Defendants. *Hamilton Id.* is not applicable to Defendants' assertions.

The same is true of Defendants' additional inapposite citation of *Harris*[30] which relates to a "claim" and complaint that was formally made in writing on an Equal Employment Opportunity Commission Form 283 intake questionnaire where Plaintiff alleged to be wrongfully discharged alleging age and sex discrimination. She submitted her "claim" (a formal written claim for discrimination) prior to her Ch. 7 bankruptcy.

The continued arguments made by Defendants in this section fail because their claims that Plaintiff's causes of action in her Complaint are or were "property" of the bankruptcy estate are simply untrue. Plaintiff's causes of action in her Complaint did NOT exist (were not made) prior to her bankruptcy and were therefore not "property" as claimed by Defendants, nor property of the estate.

Defendants further misusing the term "property" and assertions related to Plaintiff's real property being abandoned by the bankruptcy trustee, which further mislead[31]. Defendants claim again that *Lopez Id.* applies, it does not. Again, *Lopez Id.* related to formal claims made in writing prior to filing bankruptcy, such is not the case here.

Defendants' averment that "the bankruptcy court's judgment has preclusive *res judicata* effect" is unintelligible. Once again Defendants cite inapposite cases. Defendants continue to ignore the fact that the bankruptcy Court did not rule on Plaintiff's Claims for Relief and elected to not exercise subject matter jurisdiction[32]. Defendants' citations are inapposite relating to (a) a

[28] See, p.4:5-9 herein above.
[29] See, P&A p.5:23-p.6:2.
[30] See P&A p.5:17-18; *In re Harris* (Bankr. S.D. Fla. 1983) 32 B.R. 125, 127.
[31] See, P&A p.6:3-12.
[32] See, p.4:12-13 herein above.

tax case attempting to relitigate in a parallel case; the issue of a refund of income taxes, penalties and interest for unreported income; and (b) a "RICO count" being untenable in light of a dismissal of the claim against the respondents in federal district court.

Again, Plaintiff is not attempting to "relitigate" anything. She was never afforded the opportunity to litigate any of these causes of action ("claims for relief" in bankruptcy) in the first place because the bankruptcy judge elected not to exercise subject matter jurisdiction.

Re: Defendants' § IV B. "Plaintiff Is Judicially Estopped from Asserting Her Causes of Action" (P&A p.6:25-p.9:6)

Defendants rehash the same inapplicable issues in § IV B as they did in § IV A, wrongfully claiming Plaintiff is judicially estopped from asserting her causes of action because somehow Plaintiff was supposed to list her causes of action as personal property in bankruptcy Schedule B. This was neither possible nor required. Once again, Plaintiff's Complaint and associated causes of action did not exist when Plaintiff's bankruptcy or schedules were filed. "[T]his Complaint" was filed 05/24/2012 some two and a half years after filing Plaintiff's bankruptcy (11/12/2010). *Hamilton Id*. continues to be inapposite because it relates to an insurance claim made pre-petition that was not scheduled in the Hamilton's bankruptcy. This is not even remotely similar to the situation here.

There is no inconsistent position with regard to Plaintiff's allegations. Defendants themselves claim Plaintiff's position is the same[33]. Defendants continue misleading this Court stating Plaintiff's "claims [were] denied because they were unabandoned assets belonging to the trustee." This is once again, an abject false representation of the bankruptcy Court's order[34].

Plaintiff objects to, and denies she is "…trying to profit by at least $544,000 by having her debt deemed cancelled[35]." Defendants make no mention of the hundreds of thousands of dollars invested by Plaintiff in her Property. This is yet another untrue and misleading statement by Defendants and similar to stating that when debtors obtain a discharge in bankruptcy they are making a profit because their debts were cancelled. This is an absurd statement. First, Plaintiff's alleged "debt" was scheduled and discharged in bankruptcy. Second, it is the Defendants who are

[33] See, P&A p.1:13-15
[34] See, P&A p.7:17-18; Cal. Bus. & Prof. Code §§ 6068(d), 6013; Cal. Rule of Prof. Conduct 5-200(C) and CCP § 128.7.
[35] See, P&A p.7:24-26.

attempting to gain a windfall by claiming and attempting to collect not only a debt they are *not* owed (and no longer exists, if it ever did); but for "money" they never "loaned" in the first place.

Defendants delve further into securitization allegations Plaintiff has not made[36]; citing cases that have nothing to do with Plaintiff's causes of action in her Complaint or Defendants' Demurrer. Defendants assert further statements about MERS; apparently cutting and pasting additional rhetoric from another case or pleading alleging that "U.S. Bank [is] the current assignee[37]" which is untrue. U.S. Bank has nothing to do with this case.

Not having enough allowable pages to deal with the sheer volume of false statements and irrelevant rhetoric, Plaintiff is relegated to denying everything Defendants allege in this entire section. Even if any of these facts were relevant, which they are not, they would be triable issues of fact constituting Plaintiff's causes of action which must be taken as true for ruling on a demurrer.

Re: Defendants' § IV C. "The First Cause of Action for Failure to Establish Declaratory Relief is Insufficient to Constitute a Cause of Action" (P&A p.9:7-p.10:22)

Plaintiff's first Cause of Action is for "DECLARATORY RELIEF," not "for Failure to Establish Declaratory Relief" as claimed by Defendants.

A defendant cannot attack a declaratory relief claim on the merits; so long as an actual controversy is alleged, the pleader need not establish the right to a favorable judgment[38].

"A demurrer is a procedurally inappropriate method for disposing of a complaint for declaratory relief[38]".

Re: Defendants' § IV C 1. "The Assertion that AWL Could Not Make a Loan is Without Merit" (P&A p.9:8-p.10:22)

Defendants mislead the Court when stating that the purported "Note" listed "America's Wholesale Lender" as "the initial Lender" [only] but failing to mention that the associated "security instrument," the purported "DOT," lists "AMERICA'S WHOLESALE LENDER" "a CORPORATION organized and existing under the laws of NEW YORK[39]" ("AWLCORP") as the

[36] See, P&A p.7:27-p:9:6
[37] See, P&A p.8 footnote 1.
[38] *Wellenkamp v. Bank of America* (1978) 21 Cal.3d 943, 947-948.
[39] See, Exhibit 4 p.2 ¶ (C) incorporated herein by this reference.

purported "Lender" and that AWLCORP did not exist at the time the purported "DOT" was allegedly ratified. America's Wholesale Lender, Inc.[40] ("AWLINC") came into existence in 2008, some four years after the purported "DOT" and is a completely different entity than AWLCORP. That AWLCORP was listed as the "Lender" and did not exist; and that AWLINC did not exist at the relevant time; are proven uncontroverted facts, not allegations, and must be taken as true for the purpose of ruling on the demurrer. Accordingly, the purported "Note" and "DOT" were invalid and void *ab initio* pursuant to Cal. Civ. Code ("CCC") § 1558 which states that, in order for a contract to be valid, the parties should exist and it should be possible to identify them. Even if assuming *arguendo*, "America's Wholesale Lender" was a d/b/a of Countrywide Home Loans ("CWHL"); that identification or designation was never made in either the purported "Note" or "DOT." Therefore the "Lender" neither existed as designated; nor was it possible to identify the "Lender" in the "contract" even considering Defendants' claim that AWL was a d/b/a of CWHL.

Defendants again claim[41]: "[a]the time the loans were made[42], AWL was a registered fictitious business name of Countrywide Home Loans." This is irrelevant because (a) there were no "loans" made to Plaintiff by either AWLCORP who did not exist (b) or by "Countrywide Home Loans, Inc. d/b/a America's Wholesale Lender" who was not identified in the "contract." Again, this makes the contract (the purported "Note" and "DOT") invalid pursuant to CCC § 1558.

Plaintiff denies admitting "to having received at least the amount necessary to satisfy her prior deed of trust on the property[43]." Plaintiff objects to and denies Defendants' hearsay statement, that Plaintiff "wants" or was even able, to "benefit" from the invalid "agreement" (and it was not "her agreement")[44]. Plaintiff further objects to Defendants' continued statement that Plaintiff has no "burden," which is preposterous not to mention being conclusory and hearsay.

Defendants' citation of *Gomes v. Countrywide* has no relevance to Plaintiff's Complaint[45] or Defendants' Demurrer thereto.

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[40] Identified in the New York State Department of State Division of Corporations.
[41] P&A p.9:15-18.
[42] America's Wholesale Lender was misleadingly abbreviated as "AWL"
[43] P&A p.10:4-7. Per CCC 1558, the "agreement" or purported "Note" and "DOT" were and are invalid.
[44] P&A p.10:7.
[45] P&A p.10:8-16.

Plaintiff made no "claim" related to MERS transferring "the Note and Deed of Trust" or being unauthorized to "initiate a foreclosure proceeding." Once again Defendants must have cut and paste from some other inapposite case.

Contrary to Defendants' assertions, Plaintiff never made an "incorrect legal conclusion" "claim[ing]" Recontrust ("RECON") could not record a notice of default without first having recorded a substitution of trustee. The fact is, RECON, did record both documents and did so absent contractual or statutory authority. Another fact is the purported "DOT" requires any such recordings to be effected by the "Lender" or "Lender's" agent, not by an unauthorized agent of an agent as was done by RECON. Demonstration of agency authority is irrelevant to whether or not such agency exists[46]. *Fontenot*[47] as cited by Defendants relates to MERS foreclosing on that case's plaintiff which is inapposite to the instant case.

All facts pled in Plaintiff's Complaint must be taken as true for the purposes of ruling on Defendants' demurrer.

Re: Defendants' § IV D. "Plaintiff's Second Cause of Action for Violation of Unfair Business Practices Fails" (P&A p.10:23-p.11:10)

Contrary to Defendants' arguments[48], RECON's recordings and MERS conspiring with RECON to record of the documents identified in Plaintiff's Complaint, *were* violations of Penal codes §§ 532(f)(a)(4) and 115(a) and (b) for the reasons stated therein. Defendants' denial does not change those facts which must be taken as true for the purpose of ruling on a demurrer.

Plaintiff did not allege recording of a notice of default or sale were violations as Defendants[49] claim. However; Plaintiff does allege that Defendants wrongfully recorded or caused to be recorded, the "Notice of Default;" "Substitution of Trustee and Assignment of Deed of trust;" and "Notice of Trustee's Sale[50]." These are properly alleged facts which must be taken as true for the purpose of ruling on a demurrer.

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[46] P&A p.10: 17-22.
[47] *Fontenot v. Wells Fargo Bank, N.A.,* (2011) 198 Cal.App.4th 256, 258-259.
[48] See, P&A p.10:24-p.11:1.
[49] See, P&A p.11:2.
[50] See, SAC p.20:9-26.

Contrary to Defendants' claim, Plaintiff did not allege a tort claim[51] for Defendants felonious acts in conspiring to wrongfully record fraudulent documents. Plaintiff provided facts of Defendants' actions in support of Plaintiff's UCL cause of action. Privileged communications have nothing to do with Defendants' UCL violations or ruling on Defendants' Demurrer.

Defendants falsely claim that Plaintiff fails to seek injunctive relief[52]. ¶¶ 9, 6, 10 and 58[53] of Plaintiff's FAC indicates otherwise.

These are all facts sufficient to constitute Plaintiff's cause of action that must be taken as true for the purposes of ruling on a demurrer.

Re: Defendants' § IV E. "Plaintiff's Third Cause of Action for Quasi Contract is Contradictory" (P&A p.11:11-16)

Defendants misrepresent the facts. Contrary to Defendants' comment, what is "nonsense[54]," is Defendants' continued assertion that Bank of America, N.A. ("BofA") and Countrywide Home Loans ("CWHL") as purported servicers; could legally or contractually demand and accept payments from Plaintiff for a "Lender" that did not exist. This is not the role of any servicer and an example of unjust enrichment warranting restitution from Defendants.

These are facts sufficient to sustain Plaintiff's Cause of Action which for the purposes of ruling on a demurrer must be taken as true.

Re: Defendants' § IV F. "Plaintiff's Fourth and Fifth Causes of Action for Slander of Title and Quiet Title Fail for Similar Reasons." (P&A p.11:17-p13:11)

Defendants' first paragraph in this section is unintelligible. "[C]lear[ing] title" and "nullify[ing] the lien[55]" are very different things and Plaintiff has not requested either. What defendants refer to as "the encumbrance" is also unqualified, unexplained and therefore unintelligible. Plaintiff denies there is any "rightful" encumbrance on her Property due to the invalid "Note" and "DOT" (and discharge purported "debts" in bankruptcy.) Defendants' continue to slander Plaintiff's title claiming any "encumbrance" exists and another reason Plaintiff seeks quiet title.

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[51] P&A p.11:2-3.
[52] P&A p.11:7-8.
[53] FAC ¶ 58 claims Plaintiff is entitled to temporary, preliminary and permanent injunctive relief.
[54] P&A p.11:13.
[55] P&A p.11:19-20.

Defendants refuse to understand that the invalid "instruments" failed to secure the alleged "debt" whether Plaintiff "got the money" (which plaintiff denies) or not[56].

Defendants provide numerous paragraphs evidently copied and pasted from another case because none[57] have anything to do with Plaintiff's Complaint, causes of action or allegations.

Every paragraph[58] in this section has to do with a "foreclosure sale;" "validity of the trustee's sale;" a "voidable sale under a deed of trust;" and/or when "a foreclosure is either pending or has taken place." This means the sale has already taken place. None of these circumstances relate to Plaintiff's Property or her Complaint. The Property has not been foreclosed, is pending nor has any sale has taken place. Accordingly all Defendants arguments related to Plaintiff's alleged requirement to "tender" do not apply. Further, tender is not required because Plaintiff is attacking the validity of the purported "debt[59]" which is an exception to the tender rule.

Defendants' last paragraph in this section appears to have been cut and pasted from some other case, because Plaintiff is NOT seeking damages for "breach of contract" nor was it a cause of action in Plaintiff's Complaint. There cannot be a breach of an invalid contract[60].

Defendant is not seeking damages for "wrongful foreclosure[61]" as there has been no foreclosure, there is no foreclosure pending, nor is there a wrongful foreclosure cause of action in Plaintiff's Complaint. Defendants' characterization of Plaintiff's first cause of action is unintelligible[62]. Plaintiff's first cause of action is for declaratory relief[63]. Plaintiff is not seeking "damages for Unfair Business Practices" in her second cause of action as Defendants claim[64] but seeking temporary, preliminary and permanent injunctive relief[65]. And none of Plaintiff's requests for relief or damages have anything to do with "the same allegations of wrongful foreclosure" which is not Plaintiff's "Third Cause of Action[66]."

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[56] P&A p.11:22-p.12:1.
[57] P&A p.12:2-p.13:11.
[58] P&A pp.12:2-6; 12:8-12; 12:14-20; and 12:21-13:4 respectively.
[59] See *Lona v. Citibank,* (2011) 202 Cal.App.4th 89 at 113.
[60] P&A p.13:5.
[61] P&A p.13:5.
[62] P&A p.13:5-6.
[63] FAC Caption and First Cause of Action p.13:20-21.
[64] P&A p.13:6-7.
[65] FAC p.21:23-25
[66] P&A p.13:8-9.

Defendants' further comments about "tender" are so unintelligible[67] and irrelevant that Plaintiff is unable to adequately respond, particularly given the number of pages allowed.

Plaintiff is not seeking "rescission of the loan or Deed of Trust" nor is there a "foreclosure sale" pending as claimed in Defendants' inapposite citations[68].

CONCLUSION

Defendants' assertions in their Demurrer and P&A in support thereof are utterly without merit containing improper, inapplicable; unintelligible; misleading and false statements; hearsay asserting inappropriate and unavailable grounds to sustain their demurrer.

No matter how unlikely or improbable, plaintiff's allegations must be accepted as true for the purpose of ruling on the demurrer.

In determining the sufficiency of a pleading against a demurrer, the court must look exclusively to facts alleged in the pleadings. Whether the plaintiff will be able to prove the pleaded facts is irrelevant to ruling upon the demurrer.

A complaint states facts sufficient to constitute a cause of action if it appears the plaintiff is entitled to any relief.

A Plaintiff need not plead facts with specificity where the facts are within the knowledge and control of the defendant and are unknown to Plaintiff.

All facts are to be construed in the light least favorable to defendant.

The facts Plaintiff has pled are more than sufficient to constitute each and every cause of action in Plaintiff's Complaint. Defendants' Demurrer cannot be sustained under the required legal standards and was designed merely to delay having to answer Plaintiff's Complaint.

Plaintiff respectfully requests the Court overrule Defendants' Demurrer in its entirety.

Dated: October 17, 2012

Ronald H. Freshman
Attorney for Plaintiff Kimberly Cox

[67] P&A p.13:1-4.
[68] P&A p.12:2-p.13:4

VERIFICATION AND DECLARATION OF KIMBERLY COX IN SUPPORT OF PLAINTIFF KIMBERLY COX'S OPPOSITION TO DEFENDANTS' DEMURRER, REQUEST FOR JUDICIAL NOTICE AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

I, KIMBERLY COX, declare that I am the Plaintiff in the above-entitle Action and verify that I have read the foregoing Objection to Defendants' Demurrer, Request for Judicial Notice and the Memorandum of Points and Authorities in Support Thereof, and know their contents. I further verify that the matters stated therein are true of my own personal knowledge, except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge and belief.

Executed on this _____ day of _____, 2012 at Medford, Oregon.

_____
Kimberly Cox