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6 Defendant In Pro Per

7 **SUPERIOR COURT OF CALIFORNIA**
8 **COUNTY OF GLENN – WILLOWS COURTHOUSE**

9 **DEUTSCHE BANK NATIONAL TRUST)**
10 **COMPANY, AS TRUSTEE OF THE)**
11 **INDYMAC IMSC MORTGAGE, its)**
12 **assignees and/or successors in interest,)**
13 **Plaintiff,)**
14 **vs.)**
15 **SARINA ANN NELSON)**
16 **Defendant)**

Case No.: 10NUD00320

**POINTS AND AUTHORITIES IN
SUPPORT OF DEMURRER**

17 **DEFENDANT'S DEMURRER IS PROPERLY BEFORE THE COURT**

18 It is unlawful for any person to initiate, enter into, negotiate, or
19 consummate any transaction involving residential real property in
20 foreclosure, as defined in Section 1695.1, if such person, by the terms of
21 such transaction, takes unconscionable advantage of the property owner in
22 foreclosure. *California Civil Code Section 1695.13*

23 **I. ARGUMENT**

24 **1.) Defendant Demurrer on Judicially-Noticeable Wrongful**
25 **Foreclosure**

26 CCP § 430.10 provides in pertinent part:

27 "The party against whom a complaint or cross-
28 complaint has been filed may object, by demurrer ...
as provided in Section 430.30, to the pleading on

1 any one or more of the following grounds: ... (b) **The**
2 **person who filed the pleading does not have the**
3 **legal capacity to sue**" (emphasis added).

4 In turn, CCP § 430.30(a) states:

5 When any ground for objection to a complaint, cross-
6 complaint, or answer appears on the face thereof, or
7 **from any matter of which the court is required to or**
8 **may take judicial notice**, the objection on that
9 ground may be taken by a demurrer to the pleading
10 (emphasis added).

11 A demurrer may challenge the legal sufficiency of an opponent's
12 pleading **based on defects that appear on the face of the pleading**
13 **under attack and/or from matters outside the pleading that are**
14 **judicially noticeable.** See, Blank v. Kirwan (1985) 39 Cal.3d 311,
15 318; County of Fresno v. Shelton (App. 5 Dist. 1998) 66
16 Cal.App.4th 996, 1008-1009, as modified.

17 Plaintiff does not in fact hold a perfected title. Because
18 title and right to ownership of the property is an issue in the
19 lawsuit it may be that this can not be decided in an unlawful
20 detainer case. (See Mehr v. Superior Court (1983) 139 Cal. App.3d
21 1044, 1049, 189 Cal.Rptr.) If this is the judge's recommendation
22 then Defendant agrees and requests moving to a court with
23 jurisdiction in the matter.

24 It is the Defendant's belief that unlawful detainer action
25 questions the right of possession and question of title may not
26 be triable in unlawful detainer action. Patapoff v. Reliable
27 Escrow Service Corp. (1962, Cal App 2d Dist) 201 Cal App 2d 484,
28 19 Cal Rptr 886, 1962 Cal App LEXIS 2618.

At issue is the right of possession to the property located
at 4081 County Road 203, Hamilton City, California after a non
judicial foreclosure sale under CCP § 1161a. By extending the
summary eviction remedy beyond the conventional landlord-tenant

1 relationship to include purchasers of the occupied property, the
2 statute provides for a narrow and sharply focused examination of
3 title. A purchaser of the property as described in the statute,
4 who starts an unlawful detainer proceeding to evict an occupant
5 in possession, must show that Plaintiff acquired the property at
6 a regularly conducted sale and thereafter "**duly perfected**" the
7 title [CCP § 1161a.; Vella v. Hudgins (1977) 20 C3d 251, 255, 142
8 DR 414, 572 P2d 28]. To this limited extent, as provided by the
9 statute, title may be litigated in the unlawful detainer
10 proceeding [Cheny v. Trauzettel (1937) 9 C2d 158, 159, 69 P2d
11 832]. (emphasis added)

12 **2.) THIS DEMURRER TO THE COMPLAINT MUST BE SUSTAINED BECAUSE THE**
13 **PLAINTIFF LACKS THE CAPACITY TO SUE PURSUANT TO CODE OF CIVIL**
14 **PROCEDURE § 430.10 (b)**

15 Right of possession is in question as Defendant believes due
16 to unlawful and fraudulent Deed Transfers which occurred prior
17 to, during and after foreclosure there is no way Plaintiff could
18 have a clear and perfected title to Defendant's home and
19 property.

20 Plaintiff claims they are the owner of and are entitled to
21 possession of the premises located at and commonly described as :
22 4081 County Road 203, Hamilton City, California. Plaintiff can
23 not be the owner and entitled to possession because they can not
24 and do not have a "duly perfected" title, do to the fact that
25 Regional Trustee Services Inc., the "equity seller" of said
26 property did not have clear title for reasons as follows but not
27 limited to:

28 A. Original note was obtained through "predatory lending" tactics
and no original note or copy of note has been provided to
Defendant since date of signing. Defendant was visited at

1 Defendant's place of employment by the original lender to sign
2 the Note, the Second Loan and other documents on March 01,
3 2007. Payments became due and payable to IndyMac Bank in the
4 amount of \$ 1,534.50 per month. (Exhibit __A__) Defendant
5 worked as a Pre-school teacher for the past 20 years and was
6 averaging an income of
7 \$ 2,221.00 per month. The Second Deed of Trust was also
8 issued at the same time by the same lender and that additional
9 monthly payment was \$ 221.43 per month. (exhibit __B__) My
10 copy of signed documents were never received from IndyMac or
11 American Mortgage Network for either loan application. The
12 first and the second loans were provided by the same lender as
13 recorded on 03/08/2007 in the Glenn County Records. See
14 (exhibit __C__) and (exhibit __D__) Defendant was the only
15 applicant on the loans and only Defendant's income was used in
16 determining eligibility for the loans and for payments. It is
17 clear to see that over 77% of Defendant's gross income would
18 go to pay mortgage payments alone. Clearly not a usual
19 business practice by ANY financial institution which would
20 claim they are there to help and benefit homeowners much less
21 to anticipate that it would be a good lending practice unless
22 it had motive and intention to collect on defaulted loans.

23 B. ASSIGNMENT OF DEED OF TRUST recorded on 10/23/2009 in Official
24 Records in the County of Glenn, see (Exhibit __E__) was not
25 perfectly assigned and is not true and correct and is in fact
26 fraudulent and unlawful. The assignment of Deed Of Trust
27 states "FOR VALUE RECEIVED, the undersigned, Mortgage
28 Electronic Registration Systems, Inc., by these presents,
grants, bargains, sells, assigns, transfers and sets over unto

1 OneWest Bank FSB". Mortgage Electronic Registration Systems,
2 Inc., hereinafter known as MERS further states on the
3 Assignment of Deed of Trust "Together with the Note therein
4 described or referred to, the money due and to become due
5 therein with interest, and all rights accrued or to accrue
6 under said Deed of Trust." Page 2 of (Exhibit __E__) also
7 known as ASSIGNMENT OF DEED OF TRUST was signed by Dennis
8 Kirkpatrick, Vice President of MERS, and notarized by
9 Elizabeth Hernandez, commissioned in the state of Texas,
10 County of Williamson on 06/23/2009.

11 C. Under California law, to perfect the transfer of mortgage
12 paper as collateral the owner should physically deliver the
13 note to the transferee. Bear v. Golden Plan of California,
14 Inc., 829 F. 2d 705, 709 (9th cir. 1986). Without physical
15 transfer, the sale of the note could be invalid as a
16 fraudulent conveyance, Cal. Civ. Code §3440, or as
17 unperfected, Cal. Com. Code §9313-9314. See Roger Bernhardt,
18 California Mortgages and Deeds of Trusts, and Foreclosure
19 Litigation §1.26 (4th ed. 2009).

20 D. Although the original note at time of signing by the
21 Defendant was in fact understood by Defendant that the
22 holder of the note would be IndyMac Bank, as this is who
23 Defendant applied for the original note with, however,
24 court documents recorded in the County of Glenn show the
25 original lender for the Note AND the Second Loan to be
26 American Mortgage Network, Inc., a Delaware Corporation
27 with an address of San Diego, with MERS existing under the
28 laws of Delaware with an address in Flint, MI.. Defendant

1 hereby requests that Plaintiff provide original Note to the
2 Court for review and verification with a copy for Defendant
3 if in fact it did receive a copy. Although at Trustee Sale
4 any bidder should be able to bid and purchase since there
5 would be no transfer of a promissory note to purchaser
6 however, in this case, where the purchaser was yet another
7 lending institution it is quite possible that this
8 financial institute did in fact receive the note. In this
9 case it would be detrimental to Defendant in that if
10 purchaser did obtain a true copy of the note it could in
11 the future produce said note for additional collection from
12 Defendant.

13 **E.** (Exhibit __C__) DEED OF TRUST recorded 03/08/2007
14 purports that American Mortgage Network, INC., is the
15 Lender and Mortgage Electronic Registration Systems (MERS)
16 is the beneficiary under this Security Instrument, and the
17 Trustee is First American Title Insurance Company. MERS's
18 own corporate bylaws states MERS is prohibited from owning
19 rights to a note. The note can not be transferred unless
20 the note is endorsed. See Cal. Com. Code §3109, 3201,
21 3203, 3204. No verification has been provided that the
22 note was in fact endorsed and sold to any other party.
23 Since no evidence has been offered that the promissory note
24 has been transferred, MERS could only transfer what ever
25 interest, if any, it had in the Deed Of Trust. However,
26 the promissory note and the Deed of Trust are inseparable.
27 "The note and the mortgage are inseparable; the former as
28 essential, the later as an incident. An assignment of the
note carries the mortgage with it, while an assignment of

1 the latter alone is a nullity." *Carpenter v. Longan*, 83
2 U.S. 271, 274 (1872); accord *Henley v. Hotaling*, 41 Cal.
3 22, 28 (1871); *Seidell v. Tuxedo Land Co.*, 216 Cal. 165,
4 170 (1932); Cal. Civ. Code §2936. Therefore, if one party
5 receives the note and another receives the deed of trust,
6 the holder of the note prevails regardless of the order in
7 which the interests were transferred. *Adler v. Sargent*, 109
8 Cal. 42, 49-50 (1895). Notes can not be enforced by an
9 assignee; they can only be enforced by an endorsee. *UCC*, 3-
10 203(c)

11 Further, several courts have determined that MERS is
12 not the owner of the underlying note and therefore could
13 not transfer the note, the beneficial interest in the Deed
14 Of Trust, or foreclose upon property secured by the deed.
15 See *in re Foreclosure Cases*, 521 F. Supp. 2d 650, 653 (S.D.
16 Oh. 2007); *In re Vargas*, 396 B.R. 511, 520 (Bankr. C.D.
17 Cal. 2008); *Landmark Nat'l Bank v. Kesler*, 216 P. 3d 158
18 (Kan. 2009); *LaSalle Bank v. Lamy*, 824 N.Y.S. 2d 769 (N.Y.
19 Sup. Ct. 2006). Since no evidence of MERS ownership of the
20 underlying note has been offered, and other courts have
21 concluded that MERS does not own underlying notes, this
22 court must conclude that MERS had no interest it could
23 transfer to OneWest Bank FSB. Since MERS did not own the
24 underling note, it could not transfer the beneficial
25 interest of the Deed Of Trust to another. Any attempt to
26 transfer the beneficial interest of a trust deed without
27 ownership of the underlying note is void under California
28 law. Therefore OneWest bank did not establish that it is
entitled to assert a claim in this case and have the legal

1 right to sell said property at public Auction to Deutsche
2 Bank or any other bidder.

3 **F.** Throughout the time since 03/01/2007 when defendant
4 signed the original note and loan papers at her place of
5 employment with a representative from who Defendant was led
6 to believe was IndyMac, the Deed Of Trust has been claimed
7 by other Lenders. As per recorded documents Recorded at
8 the Glenn County Recorders office:

9 **a.)** On 03/08/2007 a Deed of Trust 2007-1472 was recorded
10 with American Mortgage Network as Lender, Trustee as
11 First American Title Co. and MERS as Beneficiary see
12 (Exhibit __C_).

13 **b.)** On 04/12/2007 a Substitution of Trustee and Deed Of
14 Reconveyance 2007-2200 was recorded by Wells Fargo Bank
15 substituting Town and Country Title Services Inc. as
16 Trustee and Reconveying Deed back to Defendant.
17 Notarized on 04/09/2007 (Exhibit _F_).

18 **c.)** On 10/23/2009 an ASSIGNMENT OF DEED OF TRUST 2009-5065
19 was recorded with MERS assigning OneWest Bank FSB as
20 Beneficiary with return to OneWest Bank, FSB.
21 (Exhibit __E__)

22 **d.)** On 04/01/2010 ASSIGNMENT OF DEED OF Trust 2010-1370
23 was recorded with Deutsche Bank National Trust Company
24 as Trustee of the IndyMac IMSC Mortgage Trust 2007-F3
25 (states "Together with the Note or Notes therein
26 described under said Deed of Trust") (Exhibit _G_)

27 **e.)** On /4/01/2010 TRUSTEE'S DEED 2010-1371 was recorded
28 with Deutsche Bank National Trust Company as Trustee of

the Indy Mac IMSC Mortgage Trust 2007-F3.

(Exhibit _H_)

Plaintiff makes claim, **per page 2 #5, in the Verified Complaint for Unlawful Detainer** filed in the Superior Court of California in the County of Glenn, on October 08, 2010, (Exhibit _I_) that said property was acquired "at a duly conducted foreclosure sale and obtained a trustee's Deed Upon Sale." It should be noted by the court that Plaintiff did not acquire said property at a "duly conducted foreclosure sale", Trustee's Sale No: 05-FMB-77681, on March 26, 2010. In fact, 3 or more witnesses that can be subpoenaed to testify that they were present at the advertised and published Date, Time and Place and that no sale took place. Per witnesses and statement of Dee Ann Tripp, Senior V.P. County Manger at North State Title company, NO BIDDERS WERE PRESENT on scheduled Date, Time and Place of the Trustee Sale and further information provided by Dee Ann Tripp was that since no one showed up the property would return to the bank.

Defendant questions the intent of Plaintiff in their claim as the Glenn County Records at the Recorders office provides recorded ASSIGNMENT OF DEED OF TRUST document signed by Chamagne Williams as Assistant Vice President of One West Bank FSB with last known address of Pasadena, California on 02/25/2010 and notarized by Troy Lazzara commissioned in the State of Texas, county of Travis, on 02/25/2010, some 29 days prior to scheduled Trustee Sale on March 26, 2010. See (Exhibit _G_) page 2.

