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EL DORADO CO. SUPERIOR CT.

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BY EB
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Attorneys for Plaintiffs
DANIEL MAJOR EDSTROM, an individual;
and TERI ANNE EDSTROM, an individual

355-
7 SUPERIOR COURT OF CALIFORNIA

8 COUNTY OF EL DORADO

9
10 DANIEL MAJOR EDSTROM, an)
11 individual; and TERI ANNE)
12 EDSTROM, an individual,)
13 Plaintiffs,)

CASE NO. **PC 20100314**

COMPLAINT FOR EMERGENCY
INJUNCTIVE, DECLARATORY AND OTHER
RELIEF AND TO STAY FORECLOSURE

13 v.

14 NDEX WEST, LLC, a Delaware limited)
15 liability company; WELLS FARGO)
16 BANK, N.A.; AMERICA'S)
17 SERVICING COMPANY, a division of)
18 Wells Fargo Home Mortgage; U.S.)
19 BANK NATIONAL ASSOCIATION;)
20 RESIDENTIAL FUNDING COMPANY)
21 LLC; GMAC RESCAP, a wholly owned)
22 subsidiary of GMAC Financial Services;)
23 GMAC LLC; ALLY BANK fka GMAC)
24 Bank; RESIDENTIAL ASSET)
25 SECURITIES CORPORATION; RASC)
26 SERIES 2006-EMX4 TRUST;)
27 MORTGAGE ELECTRONIC)
28 REGISTRATION SYSTEMS (MERS);)
and DOES 1-10,000,)

Defendants.

Plaintiffs sue defendants for emergency injunctive and declaratory and other relief and to stay an imminent foreclosure sale.

PARTIES

1. At all times relevant herein plaintiffs have been residents of the County of El

1 Dorado, state of California and the owner of real property, including but not limited to the
2 property at issue herein, 2690 Brown Bear Court, Cool, California 95614, APN 073-141-03-100
3 (hereafter, “subject property” or “Real Property”).

4 2. Defendant NDex West, LLC (hereinafter “NDex West”) at all times herein
5 mentioned, was a Delaware limited liability company, registered to do business in California and
6 was doing business in the County of El Dorado and is handling the Notice of Trustee’s Sale for
7 this property.

8 3. Defendant Wells Fargo Bank, N.A. is a national banking association.

9 4. Defendant American’s Servicing Company is a division of Wells Fargo Home
10 Mortgage, and at all times herein mentioned was doing business in the State of California and is
11 the contact agency on the Notice of Default recorded in El Dorado County on December 23,
12 2008, and purportedly the servicer of the subject loan.

13 5. Defendant U.S. Bank National Association is the 5th largest commercial bank in
14 the United States, and provides a comprehensive line of banking, brokerage, insurance,
15 investment, mortgage, trust and payment services products to consumers, businesses and
16 institutions. U.S. Bank is a nationally chartered bank, regulated by the Office of the Comptroller
17 of the Currency, Department of the Treasury.

18 6. Defendant Residential Funding Company, LLC is part of GMAC Mortgage
19 Group, and is in the business of acquiring residential mortgages, home equity loans, and lines of
20 credit originated by other mortgage banks and financial institutions. After acquiring, the
21 company (also known as GMAC-RFC) packages the loans as mortgage-backed securities, which
22 it then sells to institutional investors. RFC and its various divisions have more than 15 offices in
23 North America.

24 7. Defendant GMAC ResCap is a wholly owned subsidiary of GMAC Financial
25 Services, which provides, among other services, conduit services for mortgage lenders, and credit
26 for mortgage lenders and commercial borrowers.

27 8. Defendant GMAC LLC was at all relevant times herein an automobile and home
28 lender.

1 9. Defendant Ally Bank fka GMAC Bank is a short term credit institution, a private
2 company, a member of the FDIC and is located in Horsham, Pennsylvania.

3 10. Defendant Residential Asset Securities Corporation is a Delaware corporation
4 with its registered office in Wilmington, Delaware, whose articles of incorporate state “the
5 purpose for which the corporation is organized is to engage in any lawful act or acticity for which
6 corporations may be organized under the general corporations law of Delaware.

7 11. Defendant RASC SERIES 2006-EMX4 Trust was at all relevant times an issuing
8 entity of trust certificates.

9 12. Defendant Mortgage Electronic Registration Systems (MERS) at all times herein
10 mentioned was presumed to be doing business in the County of El Dorado, State of California
11 and alleged to be the Beneficiary regarding Plaintiffs’ Real Property as described above and as
12 situated in El Dorado County, California.

13 13. Mortgage Lenders Network (hereafter, “Mortgage Lenders”), who is not a party to
14 this action, was at all times herein mentioned, a Delaware corporation, and doing business in the
15 County of El Dorado, State of California, and was the original Lender for Plaintiffs’ Deed of
16 Trust Deed and Note. Mortgage Lenders forfeited its status to do business in California on some
17 unknown date, and currently is in bankruptcy.

18 14. Plaintiffs are ignorant of the true names and capacities of defendants sued herein
19 as DOES 1 through 10,000, inclusive, and therefore sues these defendants by such fictitious
20 names and all persons unknown claiming any legal or equitable right, title, estate, lien, or interest
21 in the property described in the complaint adverse to plaintiff’s title, or any cloud on Plaintiffs’
22 title thereto. Plaintiff will amend this complaint to allege their true names and capacities when
23 ascertained.

24 15. Plaintiffs are informed and believe and thereon alleges that, at all times herein
25 mentioned each of the defendants sued herein was the agent and employee of each of the
26 remaining defendants. Plaintiffs alleges that each and every defendant alleged herein ratified the
27 conduct of each and every other defendant. Plaintiffs further allege that at all times said
28 defendants were was acting within the purpose and scope of such agency and employment.

FACTUAL ALLEGATIONS

16. Plaintiffs refinanced their home, in the amount \$500,000, with Mortgage Lenders on September 7, 2005.

17. Plaintiff executed an "Adjustable Rate Note" promising to pay Mortgage Lenders, at the rate of 7.2000%, the monthly amount of \$3,393.95 for 360 months.

18. The loan was secured by a deed of trust on the subject property.

19. The parties to the trust deed were designated as follows: Borrower - Daniel Major Edstrom and Teri Anne Edstrom, husband and wife; Lender - Mortgage Lenders Network USA, Inc.; and Trustee - Mitchell L. Heffernan.

20. The trust deed was subsequently recorded, with the El Dorado County Recorder's Office, on September 14, 2005.

21. The broker provided plaintiff with the Good Faith Estimate, dated August 22, 2005.

22. The GFE did not reveal the amount of yield spread premium to be paid to the broker.

23. Mortgage Lenders Network did not otherwise provide plaintiff with the amount of yield spread premium.

24. At the time of the loan transaction, Mortgage Lenders Network was fully aware that plaintiffs' loan would be securitized, that Mortgage Lenders Network would be paid a fee outside of closing by GMAC-Residential Financial Corporation for providing the loan and that Mortgage Lenders Network would be paid monthly sub-servicing fees for the loan.

25. In addition, Mortgage Lenders Network had knowledge of many other fees that would be paid outside of closing including master servicing fees, trustee fees, fees for setting up a Trust, undisclosed Yield Spread Premiums, etc.

26. All of these fees and business combinations were material information that should have been disclosed under various federal and state laws.

27. Mortgage Lenders Network and GMAC-Residential Financial Corporation performed securitization "deals" in 2005 prior to the securitization "deal" the homeowner's

1 alleged loan was put into.

2 28. Each “deal” represents thousands of pages of SEC filings and contracts describing
3 untold fees that were known to ALL parties involved with the homeowner’s loan – with the
4 exception of the homeowners, who entered into the alleged transaction with the least amount of
5 knowledge.

6 29. Plaintiffs entered into the subject mortgage loan based on a statement that certain
7 fees and only those fees stated would be paid by plaintiffs and no other fees.

8 30. Plaintiffs entered the subject mortgage loan transaction relying on the fact that
9 plaintiffs would not be paying any other fees other than those stated.

10 31. Plaintiff discovered later that the fees paid by plaintiffs were fees not paid to
11 Mortgage Lenders Network or to the broker but to strangers to the subject loan transaction.

12 32. As a result of this reliance, plaintiff was deprived of shopping around for other
13 loan transactions that provided less fees that plaintiffs would be required to pay.

14 33. On December 19, 2008, a default notice was issued, and thereafter recorded on
15 December 23, 2008.

16 34. Plaintiff rescinded the subject loan transaction on December 29, 2008, and
17 defendants have no power of sale, therefore, to conduct the non-judicial foreclosure.

18 35. Plaintiff rescinded under California statutory law and therefore defendants have
19 no power of sale.

20 36. In California, a party to a contract may rescind the contract if the consent of the
21 party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained
22 through duress, menace, fraud, or undue influence, exercised by or with the connivance of the
23 party as to whom he rescinds, or of any other party to the contract jointly interested with such
24 party and if the contract is unlawful for causes which do not appear in its terms or conditions, and
25 the parties are not equally at fault.

26 37. It was the intent of the defendant parties to create a REMIC (Real Estate Mortgage
27 Investment Conduit) trust. The parties executed a Pooling and Servicing Agreement (PSA) to
28 govern the conduct of the parties in relation to that trust.

1 38. Plaintiff rescinded the contract, among other reasons, because his consent was
2 obtained through fraud.

3 39. Plaintiff rescission under California law was timely.

4 40. Therefore, defendants have no power of sale.

5 41. Defendant Ndex West, LLC asserts it is the “duly appointed trustee,” authorized
6 to conduct the subject foreclosure proceedings, under a “Substitution of Trustee,” executed by
7 “Wells Fargo Bank, N.A., as attorney in fact for U.S. National Bank Association, as Trustee,” in
8 which NDEX West, LLC was purportedly substituted for Mitchell L. Heffernan.

9 42. Likewise, “U.S. National Bank, as Trustee” purportedly executed the trustee
10 substitution under an assignment of deed of trust from the original lender, Mortgage Lenders
11 Network. However, two assignments of deed of trust are on record with the El Dorado County
12 Recorder—neither one of which is effective.

13 43. The first one is dated February 6, 2009—one day after the trustee substitution had
14 been recorded—in which MERS, as nominee for Mortgage Lenders, purportedly transferred all
15 rights and title in the note and deed of trust to “U.S. Bank National Association as Trustee by
16 Residential Funding Company, LLC FKA Residential Funding Corporation Attorney in Fact.”

17 44. In connection with assignment of any MERS loan, the depositor must agree that it
18 will within thirty business days after the closing date, cause the MERS system to indicate that the
19 loan has been assigned by the depositor to the trustee in accordance with the PSA for the benefit
20 of the certificate holders by including in the computer files the code in the field that identifies the
21 specific trustee and the code in the field “pool field” that identifies the series of the certificates
22 issued in connection with such mortgage loans.

23 45. The closing date, in this case, for plaintiff’s loan was November 5, 2005.

24 46. Plaintiff’s loan was a MERS loan.

25 47. If the depositor had assigned to the trustee the deed of trust pursuant to the PSA,
26 then any assignment to be valid cannot occur after December 5, 2005.

27 48. There is no assignment on record that evidences that defendants complied with the
28 PSA.

1 49. Therefore, because no assignments on record evidence an assignment within thirty
2 days from the closing date, or in other words prior to December 5, 2005, none of the assignments
3 on record, because they occurred in 2009, are valid, in that the executing party lacked authority.

4 50. The second assignment of deed of trust was executed, on July 7, 2009, and a
5 notice of trustee's sale was issued by NDEx West, purportedly the duly appointed trustee, under
6 the trustee substitution that had been recorded on February 5, 2009.

7 51. The second assignment of deed of trust, recorded thereafter on July 15, 2009, was
8 executed by MERS, as nominee for Mortgage Lenders Network, and purportedly assigned all
9 rights and interests to the note and deed of trust to "U.S. Bank National Association, as Trustee."

10 52. No rescission of the first assignment of deed of trust has been recorded with the El
11 Dorado County Recorder's Office.

12 53. According to the records of defendant NDEx West, dated November 2, 2009, the
13 subject property was sold on August 7, 2009. But, no trustee's deed of sale was ever recorded.

14 54. Thereafter, NDEX West issued a second trustee's sale notice, on November 17,
15 2009, scheduling the sale for December 16, 2009.

16 55. Following this trustee's sale notice, and subsequent postponement, NDEX West
17 issued yet a third trustee's sale notice, scheduling the sale for its currently scheduled date, May
18 26, 2010.

19 56. Defendant MERS has never been authorized to transact business in California.

20 57. The California Corporations Code requires entities that transact[] intrastate
21 business" in California to acquire a "certificate of qualification" from the California Secretary of
22 State. Cal. Corp. Code § 2105(a).

23 58. MERS has never acquired such a certificate to transact intrastate business in
24 California.

25 59. Moreover, MERS' activities do not fall within exceptions to the statutory
26 definition of transacting intrastate business, and therefore this requirement does apply. See Cal.
27 Corp. Code § 191.

28 60. MERS therefore has no power of sale.

1 61. MERS is not exempt under California Corporations Code § 191(d)(3).

2 62. MERS is not exempt under Cal. Corp. Code § 191(c)(7).

3 63. This and additional argument regarding fraudulent practices and securitization
4 have been pled by the San Francisco Federal Home Loan Bank, of which we ask this Court to
5 take judicial notice.

6 64. Defendants through its agent defendant NDEX West, instituted a non-judicial
7 foreclosure proceeding to foreclose on a mortgage as to the property which mortgage was
8 originally issued in the name of Mortgage Lenders.

9 65. Defendants have taken the unverified position that Mortgage Lenders previously
10 assigned the mortgage issued on the property by Mortgage Lenders to defendant US Bank.

11 66. No assignment has, however, ever taken place.

12 67. Defendants America's Servicing, Wells Fargo Bank, and MERS have failed to
13 prove or even take the position that it is the holder of all rights under the Note, which is the
14 instrument of indebtedness that would permit the legal holder thereof to declare a default and
15 trigger a foreclosure.

16 68. Furthermore, defendant US Bank, as alleged "Trustee" for unnamed
17 "Certificateholders" of a series of mortgage-backed securities, has failed to demonstrate that it,
18 and not the Certificateholders, is the party with the true ownership interest in the mortgage that is
19 the subject of this action, or that the Certificateholders have acceded or legally assigned their
20 rights to and under the subject mortgage to defendant US Bank; specifically the right to seek a
21 foreclosure.

22 69. As such, defendants America's Servicing, Wells Fargo Bank, nor MERS have
23 demonstrated that they have suffered an actual or threatened injury as a consequence of any
24 default, to satisfy the legal prerequisite to prove that they have sufficient personal stake in and
25 legal standing to institute the foreclosure on the property.

26 70. Foreclosure sale on the property is scheduled to occur on May 26, 2010.

27 71. On May 21, 2010, plaintiffs, advised defendant NDEX West that plaintiffs were
28 seeking a TRO essentially on the same basis as sought in December 2009 and requesting they

1 contact plaintiffs if it decides to postpone the sale.

2 72. No contact has yet been had from NDEX West.

3 73. This Complaint is thus being timely filed in accordance with applicable law to
4 challenge the foreclosure prior to the sale.

5 74. As a severance of the ownership and possession of the original Note and
6 Mortgage has occurred and as the true owner and holder of both the original Note and Mortgage
7 are unknown as a result of one or more alleged assignments and the parsed sale of certain rights
8 under the Note, defendants are legally precluded from foreclosing on the property unless and
9 until it can demonstrate full legal standing to do so.

10 75. Cal. Civ. Code section 2932.5 provides a condition precedent for an assignee of a
11 Deed of Trust prior to commencing a foreclosure:

12 “Where a power to sell real property is given to a mortgagee, or
13 other encumbrancer, in an instrument intended to secure the
14 payment of money, the power is part of the security and vests in
15 any person who by assignment becomes entitled to payment of the
16 money secured by the instrument. The power of sale may be
17 exercised by the assignee *if* the assignment is duly **acknowledged**
18 **and recorded**. (Emphasis added)

16 76. Defendants drafted the Deed of Trust, and Plaintiffs had no opportunity to
17 negotiate the terms of the instrument.

18 77. Defendants failed to record the assignment prior to commencing the foreclosure,
19 and as such the foreclosure is not being conducted in accordance with Cal Civ. Code Sec 2924
20 and 2932.5.

21 78. There is in existence a certain written instrument which purports to be a Notice of
22 Default that is in the possession of Defendants, and each of them.

23 79. Defendants cannot prove that the nonjudicial foreclosure which is occurring
24 strictly complied with the tenets of *California Civil Code Sections 2923.5 and 2924* in order to
25 maintain an action for possession pursuant to California Code of Civil Procedure section 1161.

26 80. As of September 6, 2008, *California Civil Code Section 2923.5* applies to loans
27 made from January 1, 2003, to December 31, 2007, and loans secured by residential real property
28 that are for owner-occupied residences. For purposes of *Section 2923.5*, “owner-occupied”

1 means that the residence is the principal residence of the borrower. Prior to filing a Notice of
2 Default, Section 2923.5 of the California Civil Code provides in pertinent part: (1) *A trustee may*
3 *not file a notice of default pursuant to Section 2924 until 30 days after contact is made* as
4 required by paragraph (2) or 30 days after satisfying the due diligence requirements as described
5 in subdivision (g). (2) *An authorized agent shall contact the borrower* in person or by telephone
6 *in order to assess the borrower's financial situation and explore options for the borrower to*
7 *avoid foreclosure.* During the initial contact, the mortgagee, beneficiary, or authorized agent
8 shall advise the borrower that he or she has the right to request a subsequent meeting and, if
9 requested, the mortgagee, beneficiary, or authorized agent shall schedule the meeting to occur
10 within 14 days. (3) *A notice of default filed pursuant to Section 2924 shall include a*
11 *declaration from the mortgagee, beneficiary, or authorized agent that it has contacted the*
12 *borrower, tried with due diligence to contact the borrower as required by this section,* or the
13 borrower has surrendered the property to the mortgagee, trustee, beneficiary, or authorized agent.

14 81. The purpose of permitting a declaration under penalty of perjury, in lieu of a
15 sworn statement, is to help ensure that declarations contain a truthful factual representation and
16 are made in good faith. (In re Marriage of Reese & Guy, 73 Cal. App. 4th 1214, 87 Cal. Rptr. 2d
17 339 (4th Dist. 1999).

18 82. In addition to *California Civil Code* §2923.5, *California Code of Civil Procedure*
19 §2015.5 states:

20 “Whenever, under any law of this state or under any rule,
21 regulation, order or requirement made pursuant to the law of this
22 state, any matter is required or permitted to be supported,
23 evidenced, established, or proved by the sworn statement,
24 **declaration**, verification, certificate, oath, or affidavit, in writing
25 of the person making the same, such matter may with like force
26 and effect be supported, evidenced, established or proved by the
27 unsworn statement, **declaration**, verification, or certificate, in
28 writing of such person which recites that is certified or **declared**
by him or her to be true under penalty of perjury, is subscribed
by him or her, and (1), if executed within this state, states the date
and place of execution; (2) if executed at any place, within or
without this state, states the date of execution and that is so
certified or declared under the laws of the State of California. The
certification or declaration must be in substantially the following
form: If executed within this state: “I certify (or declare) under
penalty of perjury that the foregoing is true and correct”:

1 (Date and Place)

(Signature)

2 83. For our purposes we need not look any farther than the Notice of Default to find
3 the declaration is not signed under penalty of perjury; as mandated by new Civil Code
4 §2923.5(c). (Blum v. Superior Court (Copley Press Inc.) (2006) 141 Cal App 4th 418, 45 Cal.
5 Repr. 3d 902).

6 84. The Declaration is merely a form declaration with a check box.

7 85. According to Giles v. Friendly Finance Co. of Biloxi, Inc., 199 So. 2nd 265 (Miss.
8 1967), “an affidavit on behalf of a corporation must show that it was made by an authorized
9 officer or agent, and the officer him or herself must swear to the facts.” Furthermore, in Giles v.
10 County Dep’t of Public Welfare of Marion County (Ind.App. 1 Dist.1991) 579 N.E.2d 653, 654-
11 655 states in pertinent part, “a person who verified a pleading to have personal knowledge or
12 reasonable cause to believe the existence of the facts stated therein.”

13 86. Here, the Declaration for the Notice of Default by the agent does not state if the
14 agent has personal knowledge and how he obtained this knowledge.

15 87. The proper function of an affidavit is to state facts, not conclusions (Lindley v.
16 Midwest Pulmonary Consultants, P.C., 55 S.W.3d 906 (Mo. Ct. App. W.D. 2001) and affidavits
17 that merely state conclusions rather than facts are insufficient (Jaime v. St. Joseph Hosp.
18 Foundation, 853 S.W.2d 604 (Tex. App. Houston 1st Dist. 1993). An affidavit must set forth
19 facts and show affirmatively how the affiant obtained personal knowledge of those facts.
20 (M.G.M. Grand Hotel, Inc. v. Castro, 8 S.W.3d 403 (Tex. App. Corpus Chrisit 1999).

21 88. Here, The Notice of Default does not have the required agent’s personal
22 knowledge of facts and if the Plaintiff borrower was affirmatively contacted in person or by
23 telephone to assess the Plaintiffs’ financial situation and explore options for the Plaintiffs to
24 avoid foreclosure. A simple check box next to the “facts” does not suffice.

25 89. Furthermore, “it has been said that personal knowledge of facts asserted in an
26 affidavit is not presumed from the mere positive averment of facts, but rather, a court should be
27 shown how the affiant knew or could have known such facts, and, if there is no evidence from
28 which the inference of personal knowledge can be drawn, then it is presumed that such does not

1 exist.” Bova v. Vinciguerra, 139 A.D.2d 797, 526 N.Y. S.2d 671 (3d Dep’t 1988).

2 90. The declaration signed by agent does not state anywhere how he knew or could
3 have known if Plaintiff was contacted in person or by telephone to explore different financial
4 options. It is vague and ambiguous if he himself called plaintiff.

5 91. Defendants have not adhered to the mandates laid out by legislature before a
6 foreclosure can be considered duly perfected.

7 92. Notwithstanding the language in the Notice of Default, Defendants do not have
8 the Deed of Trust, nor do they provide any documents evidencing obligations secured thereby.
9 For the aforementioned reasons, the Notice of Default is void as a matter of law.

10 93. Furthermore, according to California Penal Code § 115 in pertinent part:

11 “(a) Every person who knowingly procures or offers any false or
12 forged instrument to be filed, registered, or recorded in any public
13 office within this state, which instrument, if genuine, might be
14 filed, registered, or recorded under any law of this state or of the
15 United States, is guilty of a felony.

16 “Each instrument which is procured or offered to be filed,
17 registered, or recorded in violation of subdivision (a) shall
18 constitute a separate violation of this section.”

19 94. In addition, California Evidence Code § 669 states in pertinent part:

20 (a) The failure of a person to exercise due care is presumed if: (1)
21 He violated a statute, ordinance, or regulation of a public entity; ...”

22 95. Here, as stated above the Declaration of Due Diligence as required by Section
23 2923.5 of the California Civil Code is missing and/or improper for the Notice of Default.

24 96. Therefore, Defendants are guilty of a felony for recording the Notice of Default
25 with a false instrument according to California Penal Code §115. Since Defendants have
26 violated a statute, the failure of them to exercise due care is presumed.

27 97. Any trustee’s deed upon sale acquired by Defendants will be in violation of
28 statutes including but, not limited to: California Civil Code 2924b etc. et seq., California Civil
Code §§§ 2924b(a), 2924b(d), 2924b(e), by failing and/or refusing to mail the Notice of Default
within ten business days to Plaintiff; by failing and/or refusing to post and mail the Notice of
Default; by failing and/or refusing to mail Plaintiffs the Notice of Default within one month,

1 pursuant to California Civil Code § 2924b (c (1), (2)); by failing and/or refusing to properly set
2 the sale date pursuant to California Civil Code § 2924f(b); by failing and/or refusing to publish
3 the Notice of Sale twenty days prior to the date set for sale pursuant to California Civil Code §
4 2924f(b); by failing and/or refusing to record the Notice of Sale pursuant to California Civil
5 Code § 2924g(d).

6 98. The sale of the property at issue will be invalid pursuant to *California Civil Code*
7 *Sections 2923.5 and 2924*, and thus the Defendants' claim of title and allegation thereto are
8 erroneous.

9 99. Plaintiffs allege that Defendants, and each of them, willfully, wrongfully and
10 without justification, and without privilege are seeking to conduct an invalid foreclosure sale
11 against Plaintiffs' subject property, thereby, slandering Plaintiffs' title thereto.

12 100. Furthermore, the California Foreclosure Prevention Act became effective June 15,
13 2009. This new law delays the non-judicial foreclosure process by requiring an **additional 90-**
14 **day delay (beyond the current three-month period) between recording a notice of default**
15 **and a notice of stay for certain residential properties**. The law applies to: 1. Loans recorded
16 between January 1, 2003 and January 1, 2008, inclusive, 2. The borrower occupies the property
17 as his/her principal residence and occupied it at the time the loan became delinquent; 3. A notice
18 of default has been recorded on the property; and 4. The loan is secured by a first lien on
19 residential property that is located in California.

20 101. In the instant case, Plaintiffs property is their principal place of residence and their
21 deed is within the time limitations stated hereinabove. Therefore, the California Foreclosure
22 Prevention Action applies and Plaintiffs must be allowed an additional 90 days (plus the three-
23 month period already) after Notice of Default is recorded.

24 102. Any Trustee's Deed Upon Sale obtained from a sale of plaintiffs' home will be
25 false, cause a doubt to be cast on Plaintiffs' title to the property described above, and will directly
26 impair Plaintiff's right to possession and ownership of the Subject Property.

27 103. Furthermore, the aforementioned acts of Defendants, and each of them, have been
28 motivated by oppression, fraud, and malice in that Defendants, and each of them, by their

1 respective acts, omissions, nonfeasance, misfeasance and/or malfeasance are attempting to
2 execute an invalid foreclosure sale of Plaintiffs' Subject Property, in order to deny Plaintiffs of
3 their rights of possession and ownership.

4 104. Plaintiffs seek a determination as to the legal status of the parties as to the
5 Adjustable Rate Note and the Deed of Trust.

6 105. The Adjustable Rate Note states that the Lender is Mortgage Lenders. It also
7 states, "Lender or anyone who takes this Note by transfer and who is entitled to receive payment
8 under this Note is called the "Note Holder."

9 106. Mortgage Lenders sent to Plaintiffs a statement with a coupon asking for payment.

10 107. The Deed of Trust which cited the lender as Mortgage Lenders and stating in the
11 definition section that: "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a
12 separate corporation that is acting solely as a nominee for Lender and Lender's successors and
13 assigns; MERS is the beneficiary under this Security Instrument.

14 108. Additionally, based upon information and belief, Mortgage Electronic
15 Registration Systems is not qualified to do business in the state of California and therefore,
16 would not have standing to seek non-judicial remedies as well as judicial remedies.

17 109. Defendants should be required to provide the original note with the appropriate
18 endorsements thereon to Plaintiffs or this Honorable Court so that it may determine under
19 California law, who owns the right to receive payments and exercises the rights relating to said
20 ownership.

21 110. Only the Note Holder is authorized to collect payments and, in the event of a
22 default, commence foreclosure proceedings, including authorizing the substitution of a Trustee.

23 111. Until Defendants are able to provide Plaintiffs and this Honorable Court the
24 aforementioned documents, this Honorable Court should order that Plaintiffs are not required to
25 make any further payments on the Adjustable Rate Note and enjoin any further collection activity
26 on the Note, including staying the count down towards the date of the trustee's sale.

27 112. Any foreclosure sale will be defective and as such will have to be restored to
28 Plaintiffs or Plaintiffs will be entitled to the value thereof.

1 113. Plaintiffs are informed and believe that directly after, Mortgage Lenders caused
2 Mortgage Electronic Registration Systems (“MERS”) to go on title as the “Nominee
3 Beneficiary,” which is routinely done in order to hide the true identity of the successor
4 Beneficiaries when and as the loan was sold. MERS, however, acted as if they were the actual
5 beneficiary although a Nominee is an entity in whose name a security is registered though true
6 ownership is held by another party, in other words MERS is not the Beneficiary but is used to
7 hide the true identity of the Beneficiary. Based on this failure to disclose, and the lack of
8 consideration paid by MERS, Plaintiffs allege that the Deed of Trust was never perfected and is a
9 nullity as the MERS recording separates the Debt from the Lien, and this is more so especially
10 upon a sale of the Note and Trust Deed.

11 114. Plaintiffs further allege that MERS acts as a Nominee for more than one principal,
12 and conceals their identity therefore if a Nominee is the same as an agent. MERS cannot act as an
13 agent for multiple Banks, insurance and title companies and Mortgage Companies because of a
14 serious Conflict of interest. In addition Plaintiffs allege that a Deed of Trust cannot lawfully be
15 held by a Nominee who has no financial interest in the instrument without disclosing the identity
16 of the actual Beneficiary, and that if a party with no interest in the Note records it in their name,
17 the recorded deed is Nullity.

18 115. Plaintiffs further allege that MERS failure to transfer beneficial interests as the
19 Note and deed are sold further renders the Deed recording a nullity.

20 116. Plaintiffs further allege that defendants allege that Plaintiffs became in default of
21 their loan and that payments were due to MERS and Mortgage Lenders as Beneficiary. However
22 this default of the loan was occasioned by the high payments, the structure of the loan and
23 interest rate and the fact that Plaintiffs were not provided full disclosure of the terms of their
24 loan.

25 117. Plaintiffs were forced into default of their payments due to non-full disclosure of
26 their loan through Mortgage Lenders. Moreover, the Declaration of Due Diligence attached to
27 the Notice of Default is void because the required “penalty of perjury” and signature of a person
28 with actual knowledge is missing (discussed later in the complaint).

1 118. Plaintiffs allege that the loan contract was procedurally and substantively
2 unconscionable because at the time, defendants did not did not disclose to Plaintiffs the terms
3 and conditions of the repayment, and Plaintiffs executed documents without any explanation
4 whatsoever.

5 119. Plaintiffs allege that the employees and/or agents of Mortgage Lenders
6 represented that said employees and/or agents could work-around the fact that Plaintiffs' credit
7 was not in good standing and could get Plaintiffs approved for the loan.

8 120. Plaintiffs allege that the loan contract, deed of trust and accompanying documents
9 were offered to Plaintiff on a take it or leave it basis.

10 121. Further, on information and belief, Plaintiffs allege that the Defendants charged
11 and obtained improper fees for the placement of their loan as "sub-prime" when they qualified
12 for a prime rate mortgage which would have generated less in fees and interest.

13 122. On information and belief, Plaintiffs alleges that the service of the purported note
14 was, without their knowledge, by some means transferred from or by Mortgage Lenders either
15 completely or by association or other means to MERS, who unknown to Plaintiffs provided
16 services in various forms to be determined to others which were of such a nature to render them a
17 "Servicer."

18 123. Also on or about September 7, 2005, Plaintiffs executed a "Deed of Trust" which
19 cited the lenders as Mortgage Lenders and stated in the definition section that: (E) "MERS is
20 Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting
21 solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary
22 under this Security Instrument."

23 124. Plaintiffs allege that Mortgage Lenders had a superior bargaining strength over
24 Plaintiff, and that Plaintiffs were relegated only the opportunity to adhere to the contract or reject
25 it; that Mortgage Lenders drafted all of the documents related to the loan; that no negotiations
26 were possible between Plaintiff and Mortgage Lenders, and the remaining defendants; and that
27 the contract was a contract of adhesion.

28 125. Plaintiffs alleges that the loan was unconscionable in that the repayment terms

1 were unfair and unduly oppressive, because the payments exceeded Plaintiffs' entire combined
2 income and as such, Defendants, and each of them, cannot enforce the terms and conditions of
3 the loan against Plaintiffs, and any non-judicial foreclosure arising therefrom is void.

4 126. Plaintiffs are informed and believes and thereupon alleges that Defendants,
5 especially and each of them, entered into a fraudulent scheme, the purpose of which was to make
6 a loan to Plaintiffs, which Defendants, and each of them, were keenly aware that Plaintiffs could
7 not afford, at a cost way above the then prevailing market rate; made a loan to Plaintiffs and
8 falsely represented to Plaintiffs that they could not qualify for any other financing; that Plaintiff
9 could not qualify under any reasonable underwriting guidelines; that such scheme was devised to
10 extract illegal and undisclosed compensation from Plaintiffs by virtue of an undisclosed yield
11 spread premium and which Defendants, and each of them, shared in some presently unknown
12 percentage. Defendants experienced no risk of loss; risk instead was borne by taxpayers through
13 the United States government.

14 127. Plaintiffs are informed and believe and therefore allege that the loan, after it was
15 originated and funded, sold on multiple occasions, bundled into a group of Trust Deeds and
16 subsequently sold to investors as a Derivative, "Mortgage Backed Security", and that therefore
17 none of these defendants, and each of them, own this loan, or Note and cannot be and are not the
18 Beneficiary, or lawfully appointed trustee, and have no right to declare a default, to cause notices
19 of default to issue or to be recorded, or to foreclose on Plaintiffs' interest in the subject property,

20 128. Defendants and each of them were not the note Holder or the Note holder in due
21 course or any Beneficiary at any time in regards to this loan.

22 129. Plaintiffs further allege that none of these Defendants, and each of them, were
23 ever disclosed as the beneficiary in accordance with California Code of Civil Procedure section
24 2924 et seq.

25 130. Moreover The California Legislature passed Senate Bill 1137, impacting
26 residential mortgage lenders, foreclosure procedures and eviction procedures. The Governor has
27 signed this law into effect and it has taken effect as Urgency Legislation. The law has three
28 pertinent parts. It amends California Code of Civil Procedure Section 1161(b) regarding notice

1 of an eviction. It adds a provision strengthening the right of local governments to adopt “blight”
2 ordinances and moreover, it modifies the non-judicial foreclosure procedures set forth in
3 California Civil Code Section 2924. The legislature recognized that the need for such legislation
4 by stating as follows:

5 “...It is essential to the economic health of California for the state
6 to ameliorate the deleterious effects on the state economy and local
7 economies and the California housing market that will result from
8 the continued foreclosures of residential properties in
9 unprecedented numbers by modifying the foreclosures process to
10 require mortgagees, beneficiaries, or authorized agents to contact
11 borrowers and explore options that could avoid foreclosure...”

12 131. This law became effective in September 2008, and extends on to January 1,
13 2013. This law impacts owner-occupied primary residences only and only loans made on
14 January 1, 2003 and December 3, 2007. California Civil Code Section 2924 states in
15 part:

16 “**Foreclosure:** The primary purpose for the Statute is
17 foreclosure procedures and imposes an unprecedented duty
18 upon lenders relating to contact with borrowers. The Statute
19 amends provisions of the non-judicial foreclosure procedures
20 found in California Code of Civil Procedure §2924, by adding
21 requirements for meetings, due diligence, and notification of
22 counseling.”

23 132. Some of the more important provisions include all of the following:

24 The lender, beneficiary or authorized agent must wait thirty (30) days
25 after contact is made with the borrower, or thirty days (30) after satisfying the due
26 diligence requirements set forth in the Statute, in order to commence the filing of a Notice
27 of Default.

28 The contact requires that the borrower’s financial situation be assessed and
requires that the borrower and lender explore options for the borrower to avoid
foreclosure. *This was not done by defendants or the lender.*

The Statute requires the lender or their authorized agent to advise the
borrower that the borrower has the right to a subsequent meeting within fourteen (14)
days of the initial contact.

The borrower is to be provided a toll free telephone number available at

1 HUD for certified housing counseling agencies.

2 The borrower may designate an authorized agent, such as a counseling
3 service, REALTOR® or attorney, to act as their authorized agent but must expressly
4 approve any workout agreement reached by that agent.

5 The Notice of Default must include a declaration indicating that the lender
6 has made the contact or made a diligent effort to make the contact and will not apply in
7 the event of surrender of the property.

8 If the Notice of Default was already recorded prior to the date of the
9 Statute, this declaration must be included in Notices of Sale.

10 In the event that the lender is initially unable to contact the borrower, they
11 must attempt telephone contact on three separate occasions at three different times.

12 The lender must provide the borrower with an (800) number that will be
13 answered by a live person during normal business hours and provide certain links to web
14 pages. The web page must be a prominent link and must link to the following
15 information:

16 - Options for borrowers who cannot afford their payments.
17 - A list of financial documents to gather when discussing their options.
18 - A toll-free telephone number available by HUD for certified counseling
19 services.

20 - A toll-free telephone number for borrower's to discuss options to avoid
21 foreclosure with the lender or lender's representative. *Defendants did not fully comply*
22 *with this code therefore the title is not duly perfected.*

23 133. Plaintiffs further allege on information and belief that none of these alleged
24 beneficiaries or representatives of the Beneficiary have the original note to prove that they
25 are in fact the party authorized to conduct the foreclosure.

26 134. Plaintiffs further allege that the foreclosure proceedings of the Subject
27 Property are not being executed in accordance with the requirements of California Civil
28 Code Sections 2923.5, 2932.5 and Commercial Code section 3302 et seq.

1 135. Plaintiffs further allege that the notices and foreclosure proceedings thus far
2 have failed to conform with the provisions of California Civil Code Sections 2923.5,
3 2932.5 et seq., and Commercial Code section 3302 et seq.

4 136. Furthermore, the Notice of Default did not have a penalty of perjury
5 disclosure, nor is the agent of personal knowledge. Therefore, it is not a valid declaration.

6 137. Plaintiffs further allege that California Civil Code section 2924 et seq. and
7 its subparts are being applied to Plaintiffs in a manner that is unlawful, because at least in
8 part the party acting as the Trustee is proceeding with the foreclosure of Plaintiffs'
9 Subject Property notwithstanding the fact that the Trustee is not in possession of the
10 original Note; that the Note when it was assigned from Mortgage Lenders and its assigns
11 did not convey the power of sale because it violated the terms of California Civil Code
12 section 2932.5; that when the assignment was made, the Note executed by Plaintiffs was
13 no longer a negotiable instrument because the assignment was not physically applied to
14 the Note pursuant to the holding of *Pribus v. Bush*, (1981) 118 Cal.App.3d 1003,
15 although there was sufficient room on the back of the Note to complete the assignment,
16 and as such any foreclosure sale of Plaintiffs' subject property will not conform to the
17 strict mandates of Civil Code section 2924.76.

18 138. Plaintiffs allege that the employees and/or agents of Mortgage Lenders
19 represented that said employees and/or agents could work-around the fact that Plaintiffs'
20 credit was not in good standing and could get Plaintiffs approved for the loan. Defendants
21 did not disclose at any time to Plaintiffs that the initial loan payment would exceed their
22 entire income.

23 139. Plaintiffs allege that the loan contract, deed of trust and accompanying
24 documents were offered to Plaintiffs on a take it or leave it basis. That by virtue of the
25 method and manner of Defendants carrying out Civil Code section 2924 et seq., any
26 foreclosure of Subject Property will be void ab initio as a matter of law.

27 140. Plaintiffs allege that Defendants, and each of them, are engaged in and
28 continue to engage in violations of California law including but, not limited to: Civil

1 Code section 2924 et seq. and 2932.5 et seq., and unless restrained will continue to
2 engage in such misconduct, and that a public benefit necessitates that Defendants be
3 restrained from such conduct in the future.

4 141. Recently, the California Legislature found and declared the following in
5 enacting California Civil Code 2923.6 on July 8, 2008:

6 *“(a) California is facing an unprecedented threat to its*
7 *state economy because of skyrocketing residential property*
8 *foreclosure rates in California. Residential property*
9 *foreclosures increased sevenfold from 2008 to 2007, in 2007,*
10 *more than 84,375 properties were lost to foreclosure in*
11 *California, and 254,824 loans went into default, the first step*
12 *in the foreclosure process.*

13 *“(b) High foreclosure rates have adversely affected property*
14 *values in California, and will have even greater adverse*
15 *consequences as foreclosure rates continue to rise. According*
16 *to statistics released by the HOPE NOW Alliance the number*
17 *of completed California foreclosure sales in 2007’ increased*
18 *almost threefold from 2002 in the first quarter to 5574 in the*
19 *fourth quarter of that year. Those same statistics report that*
20 *10,556 foreclosure sales, almost double the number for the*
21 *prior quarter, were completed just in the month of January*
22 *2008. More foreclosures means less money for schools, public*
23 *safety, and other key services.*

24 *“(c) Under specified circumstances, mortgage lenders and*
25 *servicers are authorized under their pooling and servicing*
26 *agreements to modify mortgage loans when the modification is*
27 *in the best interest of investors. Generally, that modification*
28 *may be deemed to be in the best interest of investors when the*
net present value of the income stream of the modified loan is
greater than the amount that would be recovered through the
disposition of the real property security through a foreclosure
sale.

“(d) It is essential to the economic health of California for the
state to ameliorate the deleterious effects on the state economy
and local economies and the California housing market that
will result from the continued foreclosures of residential
properties in unprecedented numbers by modifying the
foreclosure process to require mortgagees, beneficiaries, or
authorized agents to contact borrowers and explore options
that could avoid foreclosure. These Changes in accessing the
state's foreclosure process are essential to ensure that the
process does not exacerbate the current crisis by adding more
foreclosures to the glut of foreclosed properties already on the
market when a foreclosure could have been avoided. Those
additional foreclosures will further destabilize the housing
market with significant, corresponding deleterious effects on
the local and state economy.

1 “(e) According to a survey released by the Federal Home Loan
2 Mortgage Corporation (Freddie Mac) on January 31, 2008,
3 57 percent of the nation’s late-paying borrowers do not know
 their lenders may offer alternative to help them avoid
 foreclosure.

4 “(f) As reflected in recent government and industry-led efforts
5 to help troubled borrowers, the mortgage foreclosure crisis
6 impacts borrowers not only in nontraditional loans, but also
 many borrowers in conventional loans.

7 “(g) This act is necessary to avoid unnecessary foreclosures of
8 residential properties and thereby provide stability to
9 California’s statewide and regional economies and housing
10 market by requiring early contact and communications
11 between mortgagees, beneficiaries, or authorized agents and
12 specified borrowers to explore options that could avoid
13 foreclosure and by facilitating the modification or
14 restructuring of loans in appropriate circumstances.

15 “Operation Malicious Mortgage’ is a nationwide operation
16 coordinated by the U.S. Department of Justice and the FBI to
17 identify, arrest, and prosecute mortgage fraud violators.” San
18 Diego Union Tribune, June 19, 2008. As shown below,
19 Plaintiff were victims of such mortgage fraud.

20 “Home ownership is the foundation of the American Dream.
21 Dangerous mortgages have put millions of families in
22 jeopardy of losing their homes.” CNN Money, December 24,
23 2007. The Loan which is the subject of this action to Plaintiffs
24 are of such character.

25 “Finding ways to avoid preventable foreclosures is a
26 legitimate and important concern of public policy. High rates
27 of delinquency and foreclosure can have substantial spillover
28 effects on the housing market, the financial markets and the
 broader economy. Therefore, doing what we, can to avoid
 preventable foreclosures is not just in the interest of the
 lenders and borrowers. It’s in everybody’s best interest.” Ben
 Bernanke, Federal Reserve Chairman, May 9, 2008.

22 142. Plaintiffs allege that Defendants had the duty to prevent such foreclosure,
23 but failed to so act. *“Most of these homeowners could avoid foreclosure if present loan
24 holders would modify the existing loans by lowering the interest rate and making it fixed,
25 capitalizing the arrearages, and forgiving a portion of the loan. The result would benefit
26 lenders, homeowners, and their communities.”* CNN Money, id.

27 143. On behalf of former President Bush, former Secretary Paulson encouraged
28 lenders to voluntarily freeze interest rates on adjustable-rate mortgages. Mark Zandl,

1 chief economist for Moody's commented, "*There is no stick in the plan. There are a*
2 *significant number of investors who would rather see homeowners default and go into*
3 *foreclosure.*" San Diego Union Tribune, id. "*Fewer than 1% of homeowners have*
4 *experienced any help "from the Bush-Paulson plan."* San Diego Union Tribune, id.
5 Plaintiff are not of that sliver that have obtained help.

6 144. The Gravamen of Plaintiffs' complaint is that Defendants violated State
7 laws which were specifically enacted to protect such abusive, deceptive, and unfair
8 conduct by Defendants, and that Defendants cannot legally enforce a non-judicial
9 foreclosure.

10 145. Plaintiffs are "debtors" as defined by the Rosenthal Act, *California Civil*
11 *Code 1788.2(h).*

12 146. Defendants are engaged in the collection of debts from consumers using the
13 mail and telephone.

14 147. Defendants regularly attempt to collect consumer debts alleged to be due to
15 another.

16 148. Defendants are "debt collectors" as defined by the Rosenthal Act, California
17 Civil Code §1788.2(c).

18 149. The purported debt which Defendants are attempting to collect from
19 Plaintiffs are as defined by the Rosenthal Act, *California Civil Code §1788.2(f).*

20 150. Defendants are not holders in due course since plaintiffs were duped into an
21 improper loan and there is no effective endorsement.

22 151. Plaintiffs incurred a "debt" as that term is defined by *California Civil 17*
23 *Code §1788(d)*, when they obtained a Loan on their Personal Residence.

24 152. The loan was memorialized via a Deed of Trust and Promissory Note, each
25 of which contains an attorney fees provision for the lender should they prevail in the
26 enforcement of their contractual rights.

27 153. Plaintiffs have no experience beyond basic financial matters.
28

1 154. Plaintiff were *never explained the full terms of their loan*, including but
2 not limited to the rate of interest how the interest rate would be calculated, what the
3 payment schedule should be, the risks and disadvantages of the loan, the prepay penalties,
4 the maximum amount the loan payment could arise to.

5 155. Certain fees in obtaining the loan, were also not explained to the Plaintiffs,
6 including but not limited to "underwriting fees," "MERS registration fee," "appraisal
7 fees," "broker fees", "loan tie in fees," etc.

8 156. A determination of whether Plaintiffs would be able to make the payments
9 as specified in the loan was never truly made.

10 157. Plaintiffs' income was never truly verified

11 158. Plaintiff could not understand any of the documents and signed them based
12 on representations and the trust and confidence the Plaintiffs placed in Defendants'
13 predecessors.

14 159. Plaintiffs are informed and believe that Defendants and/or Defendants'
15 predecessors established and implemented the policy of failing to disclose material facts
16 about the Loan, failing to verify Plaintiffs' incomes, falsifying Plaintiffs' income,
17 agreeing to accept a Yield Spread Premium, and causing Plaintiffs' Loan to include a
18 penalty for early payment.

19 160. Plaintiffs are informed and believe that Defendants and/or Defendants'
20 predecessors established such policy so as to profit, knowing that Plaintiffs would be
21 unable to perform future terms of the Loan.

22 161. Plaintiffs were victims of Fraud in the Factum since the forgoing
23 misrepresentations caused them to obtain the home loan without accurately realizing, the
24 risks, duties, or obligations incurred.

25 162. The Promissory Note contains sufficient space on the note itself for
26 endorsement whereby any assignment by allonge is ineffective pursuant to *Pribus v.*
27 *Bush*, 118 Cal. App. 3d 1003 (May 12, 1981).

1 163. Defendants are not holders in due course due to Fraud in Factum and
2 ineffective endorsement.

3 164. Defendants have no standing to enforce a non-judicial foreclosure un
4 California Civil Code section 2923.5.

5 165. Defendants are strangers to this transaction, and have no authority to go
6 forward with the foreclosure and Trustee's Sale.

7 166. Plaintiffs executed an adjustable rate note (hereinafter the "Note") and a
8 Deed of Trust to Mortgage Lenders.

9 167. Mortgage Lenders is the Lender and only party entitled to enforce the Note
10 and any security interest with it.

11 168. Defendant America's Servicing Company and NDex West are not listed
12 anywhere in the Deed of Trust or Promissory Note.

13 169. In California, *California Civil Code § 2932.5* governs the Power of sale
14 under an assigned mortgage, and provides that the power of sale can only vest in a person
15 entitled to money payments:

16 *"Where a power to sell real property is given to a mortgagee,*
17 *or other encumbrancer, in an instrument intended to secure*
18 *the payment of money, **the power is part of the security and***
19 *vests in any person who **by assignment becomes entitled to***
payment of the money secured by the instrument. The power
of sale may be exercised by the assignee if the assignment is
duly acknowledged and recorded."

20 170. The El Dorado County Recorder does not contain any evidence of a
21 recorded assignment from Mortgage Lenders.

22 171. Mortgage Lenders has never assigned its rights under the Note.

23 172. The power of sale may not be exercised by any of the Defendants since
24 there was never an' acknowledged and recorded assignment pursuant to California Civil
25 Code § 2932.5.

26 173. Since the Defendants did not comply with *California Civil Code* §2932.5,
27 the Notice of Default provisions of *California Civil Code § 2924* were likewise never
28 complied with.

1 174. America's Servicing Company never complied with the Notice of Default
2 provisions of *California Civil Code §2924*.

3 175. NDex West never complied with the Notice of Default provisions of
4 *California Civil Code §2924*.

5 176. Defendants lack standing to enforce a non-judicial foreclosure pursuant to
6 California Commercial Code § 3301.

7 177. A promissory note is personal property, and the deed of trust securing a note
8 is a mere incident of the debt it secures, with no separable ascertainable market value.
9 California Civil Code §§ 657, 663. (*Kirby v. Palos Verdes Escrow Co.*, 183 Cal. App. 3d
10 57, 62.)

11 178. Any transfers of the notice and mortgage fundamentally flow back to the
12 note:

13 "The assignment of a mortgage without a transfer of the
14 Indebtedness confers no right, since debt and security are
15 inseparable and the mortgage alone is not a subject of transfer,
16 " *Hyde v. Mangan* (1891) 88 Cal. 319, 26 P 180, 1891 Cal
17 LEXIS 693; *Johnson v. Razy* (1919) 181 Cal 342, 184 P 657;
18 1919 Cal LEXIS 358; *Bowman v. Sears* (1923, Cal App) 63
19 Cal App 235, 218 P 489, 1923 Cal App LEXIS 199; *Treat v.*
20 *Burns* (1932) 216 Cal 216, 13 P2d,724, 1932 Cal LEXIS
21 554.80.

22 "A mortgagee's purported assignment of the mortgage
23 without an assignment of the debt which is secured is a legal
24 nullity." *Kelley V. Upshaw* (1952) 39 Cal 2d 179, 246 P2d
25 23, 1952 Cal. LEXIS 248.

26 "A trust deed has no assignable quality independent of the
27 debt; it may not be assigned or transferred apart from the debt;
28 and an attempt to assign the trust deed without a transfer of the
debt is without effect." *Domarad v. Fisher & Burke, Inc.*
(1969 Cal. App. 1st Dist) 270 Cal. App. 2d 543, 76 Cal. Rptr.
529, 1969 Cal. App. LEXIS 1556.

The Promissory Note is a negotiable instrument. Transferring
a Deed of Trust by itself does not allow enforcement of the
instrument unless the Promissory Note is properly negotiated.
Where an instrument has been transferred, enforceability is
determined based upon possession.

179. *California Commercial Code § 3301* limits a negotiable instrument's
enforcement to the following:

1 “*Person entitled to enforce*” an Instrument means (a) the
2 holder of the instrument, (b) a nonholder in possession of the
3 instrument who has the rights of a holder, or (c) a person not
4 in possession of the instrument who is entitled to enforce the
5 instrument pursuant to Section 3309 or subdivision (d) of
6 Section 3418. A person may be a person entitled to enforce
7 the instrument even though the person is not the owner of the
8 instrument or is in wrongful possession of the instrument.

9 180. None of the Defendants are present holders of the instrument.

10 181. None of the Defendants are nonholders in possession of the instrument who
11 has rights of the holder.

12 182. None of the Defendants are entitled to enforce the instrument pursuant to
13 section 3309 or subdivision (d) of Section 3418.

14 183. Defendants have no enforceable rights under *California Commercial Code*
15 *3301(a)* to enforce the negotiable instrument.

16 184. Since there is no right to enforce the negotiable instrument, the Notice of
17 Default provisions of *California Civil Code* § 2924 and Notice of Sale provisions of
18 *California Civil Code* § 2924(f) have never been complied with, and there is no
19 subsequent incidental right to enforce any deed of trust and conduct a non-judicial
20 foreclosure.

21 185. The Trustee and the loan servicer are acting as agents of the Beneficiary and
22 signing documents as the agent of the agent of the agent of the Beneficiary for Plaintiffs’
23 Note and the notices therein, notwithstanding the fact that the Notes are not negotiable.

24 186. By virtue of the method and manner of Defendants carrying out Civil Code
25 section 2924 et seq., any foreclosure of the Subject Property will be void ab initio as a
26 matter of law.

27 187. MERS was NOT and never has been a Beneficiary of this loan or any other.
28 MERS is solely a registration service for tracking these Trust Deeds and mortgages and
also the Notes. MERS records these Trust Deeds in their name as a “nominee”, with NO
actual ownership interest in these Loans, the purpose is allegedly to allow the sale and

1 transfer of these instruments without the need for further recordation, however what
2 actually occurs is that the real Beneficiary remains obscured, and unknown.

3 188. In addition MERS is NOT a TRUSTEE and has no right to collect any TD
4 payments on the Note, neither does MERS have any right to enforce the notes or to be a
5 party in any Foreclosure proceedings. Yet MERS has represented itself under oath in this
6 case to be the BENEFICIARY and in that "stated" but "false" capacity has unlawfully
7 nominated a successive trustee.

8 189. While MERS remain on title as a "nominee" for the Trust Deed and Note,
9 both are sold on several occasions afterward and ultimately bundled as a security and sold
10 to a final investor. MERS actually helps to conceal the real beneficiary which is in
11 violation of California statutory law, Cal. Civ. Code Sec. 2924 et. Seq. The Beneficiary
12 is completely shielded and not disclosed as required. Also the forms that they used to
13 give Notices are defective.

14 190. Evidence in prior cases has demonstrated that MERS is nothing more than a
15 Registration Service, and does not even service the loan. MERS cannot prove or show
16 ownership in the form of an "original Note" (i) with proper indorsements, to them, or that
17 they are actually in the chain of ownership and (ii) to establish the actual relationship of
18 the holder of the Note, as a Holder in Due course, and (iii) with the right to enforce the
19 Note.

20 FIRST CAUSE OF ACTION

21 EMERGENCY TEMPORARY AND PERMANENT INJUNCTIVE RELIEF

22 (Against All Defendants and DOES 1-10,000)

23 191. Plaintiffs reaffirm and reallege all paragraphs hereinabove as if set forth
24 more fully hereinbelow.

25 192. This is an action, in part, for emergency temporary and permanent
26 injunctive and other relief which is brought pursuant to applicable law.

27 193. Plaintiffs have a clear legal right to seek temporary and permanent
28 injunctive and other relief as Plaintiffs resides in the subject property and as defendants

1 are seeking, without satisfying the necessary legal standing requirements to institute a
2 foreclosure, to take possession, custody, and control of the subject property and ultimately
3 remove the plaintiffs from their home.

4 194. Defendants should be required to provide the original note with the
5 appropriate endorsements thereon to Plaintiffs or this Honorable Court so that it may
6 determine under California law, who owns the right to receive payments and exercises the
7 rights relating to said ownership.

8 195. Only the Note Holder is authorized to collect payments and, in the event of
9 a default, commence foreclosure proceedings, including authorizing the substitution of a
10 Trustee.

11 196. Until Defendants are able to provide Plaintiffs and this Honorable Court the
12 aforementioned documents, this Honorable Court should order that Plaintiffs are not
13 required to make any further payments on the Adjustable Rate Note and enjoin any
14 further collection activity on the Note, including staying the count down towards the date
15 of the trustee's sale.

16 197. Any foreclosure sale will be defective and as such will have to be restored
17 to Plaintiffs or Plaintiffs will be entitled to the value thereof.

18 198. Plaintiffs have no adequate remedy at law to redress the harm complained
19 of, and the sale of the Plaintiffs' property, under the circumstances of record, is contrary
20 to equity and good conscience in that such sale is being instituted by parties who have no
21 legal standing to institute or maintain the foreclosure ab initio.

22 199. The specific facts set forth in this Complaint demonstrate that unless an
23 emergency temporary injunction against the foreclosure sale set for Wednesday, May 26,
24 2010, is not granted that Plaintiffs will suffer the irreparable injury, loss, and damage of
25 the loss of their home and eviction therefrom.

26 200. Under the circumstances where the foreclosure sale is set for less than five
27 (5) calendar days (which include a Saturday and Sunday) from the date of the filing of
28

1 this Complaint, the irreparable loss to the Plaintiffs will result if the emergency relief
2 requested herein is not granted immediately.

3 201. As Defendants have no legal standing to institute or maintain a foreclosure
4 of the Property, there is no harm to said Defendants with the granting of the requested
5 relief, and any claimed harm is substantially outweighed by the irreparable harm to the
6 Plaintiffs if the relief requested herein is not granted.

7 202. The granting of the relief requested herein is in the public interest, as the
8 consuming public, including Plaintiffs, will continue to be harmed by the illegal and
9 unlawful conduct of the Defendants if the relief requested herein is not granted.

10 203. Under the circumstances where there is no harm to Defendants with the
11 granting of the requested relief, no bond should be required as a prerequisite to the
12 granting of the relief requested herein as there are no costs or other damages which could
13 be contemplated on the part of Defendants with the granting of the requested relief for
14 which a bond would otherwise be necessary.

15 WHEREFORE, Plaintiffs respectfully request that this Court immediately take
16 jurisdiction of this matter and enter an Order granting temporary and permanent
17 injunctive relief expressly precluding and cancelling the foreclosure sale presently
18 scheduled for May 26, 2010, for the reasons set forth herein, and for any other and further
19 relief which is just and proper.

20 SECOND CAUSE OF ACTION

21 DECLARATORY RELIEF

22 (Against All Defendants and DOES 1-10,000)

23 204. Plaintiffs reaffirm and reallege paragraphs above as if set forth more fully
24 hereinbelow.

25 205. This is an action also, in part, for declaratory relief which is being brought
26 pursuant to applicable law to declare that Defendants must conduct a judicial foreclosure
27 or are not otherwise entitled to conduct a nonjudicial foreclosure because plaintiff has
28 effectively rescinded the contract and defendants do not otherwise have any legal or

1 equitable rights in the Note or Mortgage for purposes of foreclosure and said Defendants
2 have no legal standing, therefore, to institute or maintain non-judicial foreclosure on the
3 subject Property.

4 206. Plaintiffs have no adequate or alternative remedy at law with reference to
5 the relief requested herein.

6 207. As set forth above, plaintiff timely and properly rescinded the deed of trust
7 and therefore no power of sale exists.

8 208. Plaintiffs' rescission was based on the fact that his consent to the loan
9 transaction was obtained through fraud as explained above.

10 209. As also stated above, defendants do not possess the requisite legal rights to
11 foreclose on the subject Property because they lack standing, based on among other
12 things, improper or invalid assignments of deeds of trust.

13 210. As set forth above, Defendants have provided no evidence that they have
14 full legal interest in and title to the Mortgage, and has provided no evidence that they
15 have any interest in the Note.

16 211. The declaration by this Court that Defendants are not entitled to a non-
17 judicial foreclosure and must conduct a judicial foreclosure of plaintiff's property is a
18 proper subject matter for declaratory relief.

19 212. The declaration by this Court that Defendants have no legal right and
20 cannot satisfy the legal standing requirements to institute and maintain a foreclosure is
21 proper subject matter for declaratory relief.

22 213. As set forth above, Defendants, as the alleged foreclosing parties, were not
23 parties to the original mortgage contract documents; were not named as payees in the
24 Note; and have failed to demonstrate any valid assignment of either the Mortgage or the
25 Note, and are thus legally precluded from instituting or maintaining a foreclosure.

26 WHEREFORE, Plaintiffs demand that the court adjudge:

27 (a) that Defendants cannot conduct a non-judicial foreclosure and foreclosure must
28 be a judicial foreclosure;

1 (b) that Defendants have no legal standing or the proper legal or equitable interest
2 in either the Note or Mortgage to institute or maintain a foreclosure;

3 (c) that the attempt by Defendants to conduct a non-judicial foreclosure sale of the
4 subject property is legally defective and precluded from enforcement; and

5 (d) that the Plaintiffs recover their costs as provided by law.

6 THIRD CAUSE OF ACTION

7 VIOLATION OF CALIFORNIA CIVIL CODE §2923.6

8 (Against All Defendants and DOES 1-10,000)

9 214. Plaintiffs reallege and incorporate by reference all above paragraphs as
10 though fully set forth herein.

11 215. Defendants' Pooling and Servicing Agreement (hereinafter "PSA") contain
12 a duty to maximize net present value to its investors and related parties.

13 216. California Civil Code 2923.6 broadens and extends this PSA duty by
14 requiring servicers to accept loan modifications with borrowers.

15 217. Pursuant to *California Civil Code 2923.6(a)*, a servicer acts in the best
16 interest of all parties if it agrees to or implements a loan modification where the (1) loan
17 is in payment default, and (2) anticipated recovery under the loan modification or
18 workout plan exceeds the anticipated recovery through foreclosure on a net present value
19 basis.

20 218. California Civil Code 2923.6(b) now provides that the mortgagee,
21 beneficiary, or authorized agent offer the borrower a loan modification or workout plan if
22 such a modification or plan is consistent with its contractual or other authority.

23 219. Plaintiffs' loan is presently in an uncertain state.

24 220. Plaintiffs are willing, able, and ready to execute a modification of their loan
25 on a reasonable basis

26 221. The Joint Economic Committee of Congress estimated in June, 2007, that
27 the average foreclosure results in \$77,935.00 in costs to the homeowner, lender, local
28 government, and neighbors.

1 222. Of the \$77,935.00 in foreclosure costs, the Joint Economic Committee of
2 Congress estimates that the lender will suffer \$50,000.00 in costs in conducting a non-
3 judicial foreclosure on the property, maintaining, rehabilitating, insuring, and reselling the
4 property to a third party. Freddie Mac places this loss higher at \$58,759.00.

5 223. Pursuant to *California Civil Code §2823.6*, Defendants are now
6 contractually bound to accept a reasonable loan modification and tender is deemed made
7 pursuant to Defendants' Pooling and Service Agreement, California Civil Code
8 2923.6(a), and California Civil Code 2923.6(b), taken individually or entirely.

9 224. Plaintiffs invoke the remedies embodied in the aforementioned agreement
10 and/or codes with a willingness to execute a modification of their loan.

11 225. Alternatively, Plaintiffs allege that tender, if any, is excused by obstruction
12 or prevention or imposition of unwarranted conditions by the person or corporate entity to
13 whom it was to be made.

14 226. Alternatively, Plaintiffs allege that obstruction or imposition of unwarranted
15 conditions by defendants has occurred when defendants have evaded the Plaintiffs'
16 attempts to provide tender as specified and encouraged by defendants' pooling agreement,
17 California Civil Code 2923.6(a), and California Civil Code 2923.6(b). [Hudson v.
18 Morton, 231 Ala. 392, 165 So. 227 (1936); Loftis v. Alexander, 139 Ga. 346, 77 S.E. 169
19 (1913); Kennedy v. Neil, 333 Ill. 629, 165 N.E. 148 (1929); Borden v. Borden, 5 Mass.
20 67, 1809 WL 989 (1809); Loughney v. Quigley, 279 Pa. 396, 123 A. 84 (1924);
21 Montague Corp. v. E.P. Burton Lumber Co., 136 S.C. 40, 134 S.E. 147 (1926); Stansbury
22 V. Embrey, 128 Tenn. 103, 158 S.W. 991 (1913); Loehr v. Dickson, 141 Wis. 332, 124
23 N.W. 293 (1910)]

24 227. Alternatively, Plaintiffs further allege that obstruction or imposition of
25 unwarranted conditions by defendants have occurred when defendants have manifested to
26 the Plaintiffs that tender, if made, will not be accepted, the Plaintiffs are excused from
27 making tender as it would be a futile gesture, and the law will not require the doing of a
28 useless act. [Simmons v. Swan, 275 U.S. 113, 48 S. Ct. 52, 72 L. Ed. 190 (1927); Lee v.

1 Joseph E. Seagram & Sons, Inc., 552 F.2d 447 (2d Cir. 1977); Buckner v. Tweed, 157
2 F.2d 211 (App. D.C. 1946); Peterson v. Hudson Ins. Co., 41 Ariz. 31, 15 P.2d 249
3 (1932); Woods-Drury, Inc. v. Superior Court in and for City and County of San
4 Francisco, 18 Cal. App. 2d 340, 63 P.2d 1184 (1st District 1936); Chesapeake Bay
5 Distributing Co. v. Buck Distributing Co., Inc. 60 Md. App. 210, 481 A.2d 1156 (1984);
6 Issacs v. Caterpillar, Inc., 765 F. Supp. 1359 (C.D. Ill. 1991); Platsis v. Diafokeris, 68
7 Md. App. 257, 511 A.2d 535 (1986)]

8 228. Alternatively, Plaintiffs further allege that obstruction or imposition of
9 unwarranted conditions by defendants has occurred when defendants' objection for want
10 of actual tender of money has been waived by defendants' refusal to receive the money if
11 produced. [Shaner v West Coast Life Ins. Co., 73F.2d 681 (C.C.A. 10th Cir. 1934); Buell
12 v. White, 908 P.2d 1175 (Colo. Ct. App. 1995) (when party, who is willing and able to
13 pay, offers to pay another a sum of money and is advised that it will not be accepted, offer
14 amounts to tender even though money is not produced); Hall v. Norwalk Fire Ins. Co., 57
15 Conn. 105, 17 A. 356 (1888); Lamar v. Sheppard, 84 Ga. 561, 10 S.E. 10984 (1890);
16 Ventres v. Cobb, 105 Ill. 33, 1882 WL 10475 (1882); Metropolitan Credit Union v.
17 Matthes, 46 Mass. App. Ct. 326, 706 N.E.2d 296 (1999)].

18 FOURTH CAUSE OF ACTION

19 (VIOLATION OF BUSINESS AND PROFESSIONS CODE §17200

20 (Against All Defendants and DOES 1-10,000)

21 229. Plaintiffs reallege and incorporate by reference all above paragraphs as
22 though set forth at length herein again.

23 230. Beginning in July 2008 and continuing to the present time, Defendants
24 committed acts of unfair competition as defined by *Business and Professions Code §*
25 *17200*, by engaging in the practices identified above.

26 231. These acts and practices, as described in the previous paragraphs, violate
27 *Business and Professions Code § 17200* because they violate all the statutes as previously
28

1 listed and *California Civil Code § 1709*, and consequently, constitute an unlawful
2 business act of practice within the meaning of *Business and Professions Code § 17200*.

3 232. The harm to Plaintiffs and to members of the general public outweighs the
4 utility of Defendants' policy and practices, and consequently, constitute an unlawful
5 business act of practice within the meaning of *Business and Professions Code §17200*.

6 233. Further, the foregoing conduct threatens an incipient violation of a
7 consumer law, including, or violates the policy or spirit of such law or otherwise
8 significantly threatens or harms competition.

9 234. Defendants' practices described above are likely to mislead the general
10 public, and therefore, constitute a fraudulent business act of practice within the meaning
11 of *Business and Professions Code §17200*.

12 235. The Defendants' unfair, unlawful, and fraudulent business practices and
13 false and misleading advertising present a continuing threat to members of public in that
14 other consumers will be defrauded into closing on similar fraudulent loans. Plaintiffs and
15 other members of the general public have no other adequate remedy of law.

16 236. As a result of the aforementioned acts, Plaintiffs have lost money or
17 property and suffered injury in fact. Defendants received and continue to hold Plaintiffs'
18 money and other members of the public who fell victim to Defendants' scheme.

19 FIFTH CAUSE OF ACTION

20 BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING

21 (Against All Defendants and DOES 1-10,000)

22 237. Plaintiffs reallege and incorporate by reference all above paragraphs as
23 though set forth at length herein again.

24 238. Plaintiffs allege that at all times there existed an implied covenant of good
25 faith and fair dealing requiring Defendants, and each of them, to safeguard, protect, or
26 otherwise care for the assets and rights of Plaintiffs.

27 239. Said covenant prohibited Defendants from activities interfering with or
28 contrary to the rights of Plaintiffs.

1 that the payments were due to defendants American's Servicing Company and MERS as
2 Beneficiary ("Notice of Default and Election to Sell Under Deed of Trust.")

3 259. On the Notice of Breach, it stated, in part, as follows:

4 "That by reason thereof, the present beneficiary under such
5 deed of trust, has executed and delivered to said agent, a
6 written Declaration of Default and Demand for Same, and has
7 deposited with said agent such Deed of Trust and all
8 documents evidencing obligations secured thereby and has
9 declared and does hereby declare all sums secured thereby
10 immediately due and payable and has elected and does hereby
11 elect to cause the trust property to be sold to satisfy the
12 obligations served thereby."

13 260. These representations were made by these defendants in order to induce
14 reliance by Plaintiffs.

15 261. Plaintiffs have relied on these representations, and their reliance is justified.

16 262. As a result of their reliance, their property is scheduled for foreclosure and
17 will be foreclosed unless this Court grants the temporary order herein.

18 263. Plaintiffs are informed and believe that the representation as stated on the
19 Notice of Default are false representations in that documents have not been provided to
20 the trustee that show that America's Servicing Company or MERS is the Beneficiary and
21 entitled to the payments.

22 264. At the time defendants made the representations they knew they were false
23 and were made for the sole purpose of inducing reliance.

24 265. Plaintiffs allege that Defendants, and each of them, have been engaged in an
25 illegal scheme, the purpose of which is to execute loans secured by real property in order
26 to make commissions, kick-backs, illegal undisclosed yield spread premiums, and
27 undisclosed profits by the sale of any instruments arising out of the transaction; and to
28 make loans to borrowers who could not afford to repay the loan, given the stated financial
situation of the borrowers.

26 266. Plaintiffs allege that Defendants, and each of them, have represented to
27 Plaintiffs and to third parties that defendants are the owners of the Trust Deed and Note,
28 as either the Trustee or the Beneficiary, regarding Plaintiffs' real property.

1 267. Based on this representation defendants caused a Notice of Default to be
2 issued and recorded without disclosing the true role of defendants; and, thereafter a notice
3 of trustee's sale.

4 268. Plaintiffs allege that the promissory note which was executed by Plaintiffs
5 and which initially formed a basis of a security interest in the subject property was
6 assigned, in violation of Civil Code section 2932.5 et seq., because the assignment was
7 not recorded; and, as such the promissory note was rendered as non-negotiable and no
8 power of sale was conveyed with the note at the time of the assignment, and therefore,
9 Defendants, and each of them, had no lawful security interest in the subject property.

10 269. On or about September 2005, representatives, agents and/or employees of
11 Defendants, and each of them, made false representations to Plaintiffs in order to fund a
12 loan, in which the Plaintiffs' personal residence was to be security therefore.

13 270. Plaintiffs allege that Defendants, and each of them, made certain
14 representations regarding defendants' honesty, that they were experts in obtaining loans
15 which borrowers could afford, and that they would only offer Plaintiffs a loan which was
16 in their best interests, given their credit history and financial needs and limitations and
17 that Plaintiffs could trust the representations of Defendants, and each of them.

18 271. Plaintiffs allege that based upon the representations made by Defendants,
19 and each of them, Plaintiffs reasonably reposed his trust in Defendants' representations
20 and disclosed their private financial information to Defendants, in order that Defendants
21 could in keeping with their representations, find a loan which was in the best interests of
22 Plaintiffs given their financial needs and limitations.

23 272. More particularly, Defendants, and each of them, represented that they
24 would not make a loan to Plaintiffs unless they could afford the loan, and that defendants
25 would not make the loan unless and until plaintiffs had passed the underwriting
26 guidelines of the lender, which further assured to Plaintiffs that the loan being offered to
27 Plaintiffs was in fact in the Plaintiffs' best interests, and that the loan was within
28 Plaintiffs' financial needs and limitations.

1 273. Plaintiffs allege that the loans provided by Defendants, and each of them,
2 contained a repayment schedule which exceeded Plaintiffs' total spendable income,
3 contained excessive financing and was approved to allow closing costs to be financed.

4 274. Defendants failed to utilize adequate due diligence regarding Plaintiff's
5 ability to repay the loan.

6 275. Defendants' as part of their continuing scheme intentionally placed
7 Plaintiffs in a sub-prime loan to the benefit of the Defendants with excessively high
8 interest rates.

9 276. Defendants failed to provide Plaintiffs mandated disclosures, and
10 Defendants repeatedly employed coercive tactics in order to force Plaintiffs to sign the
11 loan documents.

12 277. Plaintiffs are informed and believe and thereupon allege that defendants
13 engaged in some degree in making the loan to Plaintiffs including, but not limited to
14 making the loan to Plaintiffs by "marketing and extending adjustable-rate mortgage
15 ("ARM") products to Plaintiffs in an unsafe and unsound manner that greatly increased
16 the risk that Plaintiffs would default on the loan, because the initial payments on the loan
17 exceeded Plaintiffs' established retirement income, and the loan terms offered to
18 Plaintiffs included ARM products with one or more of the following characteristics:
19 utilization of an inadequate analysis of Plaintiffs' ability to repay the debt at the fully-
20 indexed rate; approving Plaintiffs without considering appropriate documentation and/or
21 verification of their income; including substantial prepayment penalties and/or
22 prepayment penalties that extended beyond the initial interest rate adjustment period;
23 providing Plaintiffs with inadequate and/or confusing information relative to product
24 choices, material loan terms and product risks, prepayment penalties, and Plaintiffs'
25 obligations for property taxes and insurance; approving Plaintiffs for a loan with
26 inadequate debt-to-income analyses that did not properly consider the Plaintiffs' ability to
27 meet their overall level indebtedness and common housing expenses; and/or approving
28 Plaintiffs for loan arrangements with loan-to-value ratios approaching or exceeding 100

1 percent of the value of the collateral;" and making Plaintiffs a mortgage loan without
2 adequately considering the Plaintiffs' ability to repay the mortgage according to its terms.

3 278. Plaintiffs allege that based upon the foregoing representations of
4 Defendants, and each of them, Plaintiffs did in fact repose their trust in the
5 representations of Defendants, and each of them, and that such trust was reasonable.

6 279. Plaintiffs allege that Defendants, and each of them, presented a loan to
7 Plaintiffs whereby Defendants represented that they did qualify for ordinary underwriting,
8 and that the loan was within Plaintiffs' personal financial needs and limitations, given the
9 confidential financial information that Plaintiffs shared with Defendants.

10 280. However, the truth is that the loan payments exceeded Plaintiff' established
11 retirement income.

12 281. Plaintiffs allege that Defendants, and each of them, had a duty to disclose
13 the true cost of the loan which was made to Plaintiffs, and the fact that Plaintiffs could
14 not afford the loan in the first instance.

15 282. Defendants, and each of them, provided Plaintiffs a loan through Mortgage
16 Lenders, and Defendants, and each of them, were secretly compensated.

17 283. However, defendants did not disclose for this loan that they were being paid
18 for its services, and in a spread of the yield of an amount which has not yet been fully
19 ascertained as a Yield Spread Premium paid-outside and after the close of escrow.

20 284. Plaintiffs are informed and believe and thereupon allege that after the close
21 of escrow Mortgage Lenders paid the other Defendants herein fees above and beyond the
22 value of the services actually performed and an illegal kickback and added that additional
23 amount to the total amount being financed; and that such amount was never disclosed to
24 Plaintiff.

25 285. Plaintiffs acquired the foregoing property by virtue of the said funding
26 through Defendant Mortgage Lenders based on the representations of Defendants, and
27 each of them, that the loan was the best they could obtain for Plaintiffs, and that the loan
28 was well within Plaintiffs' financial needs and limitations.

1 286. Plaintiffs are informed and believe and thereupon allege that Defendants,
2 and each of them, represented to Plaintiffs that Defendants, and each of them, were
3 working for the benefit of Plaintiffs and in their particular best interest to obtain for them
4 the best loan and at the best rates available.

5 287. Defendants, and each of them, made the foregoing false representations to
6 Plaintiffs when they knew that they were untrue and that these representations were
7 material representations, and that no basis in fact existed to support such fraudulent
8 representations.

9 288. The foregoing representations were made in order to induce Plaintiffs to act
10 on and take the said loan(s) in order for defendants to make a substantial amount of
11 money thereby and there from.

12 289. Plaintiffs were in fact induced to and did take these loans based on the said
13 fraudulent representations.

14 290. Plaintiffs were induced to rely and did rely on the representations of these
15 defendants through deception and Plaintiffs' reliance was justified inasmuch as they
16 believed that Defendants, and each of them, were working for Plaintiffs and in their best
17 interests.

18 291. By virtue of Plaintiffs' reasonable reliance and the increased interest they
19 were made to pay, they have been damaged in the loss of their good credit and a higher
20 payment and are now being involved in litigation that they did not bargain for, all to their
21 damage and injury.

22 292. Plaintiffs have relied on the representations of Defendants, and each of
23 them, and because of this reliance have made various moves to avoid foreclosure all to no
24 avail, while defendants knew all the time that they were deceiving Plaintiffs.

25 293. Plaintiffs' reliance was justified based upon the false representations of
26 Defendants, and each of them, and had no reason to believe that a party representing a
27 bank would go to such lengths to deceive and to convert Plaintiffs' property by utilizing
28 such a fraud and artifice.

1 FOR DECLARATORY RELIEF

2 (Against All Defendants and DOES 1-10,000)

3 302. Plaintiffs reallege and incorporate by reference all above paragraphs as
4 though set forth at length herein again.

5 303. A dispute has arisen between and among Plaintiffs and Defendants and
6 each of them as to the duties and obligations of the respective parties with regard to the
7 loan or the foreclosure.

8 304. These disputes concern but are not limited to the ownership rights and the
9 validity of the commencement of the foreclosure process.

10 305. As to these issues, Plaintiffs are required to seek this relief.

11 306. Plaintiffs further allege that a declaration of rights and duties of the parties
12 herein are essential to determine the actual status and validity of the loan, deed of trust,
13 nominated beneficiaries, actual beneficiaries, loan servicers, trustees instituting
14 foreclosure proceedings and related matters.

15 NINTH CAUSE OF ACTION

16 FOR INTENTIONAL MISREPRESENTATION

17 (Against All Defendants and DOES 1-10,000)

18 307. Plaintiffs reallege and incorporate by reference all above paragraphs as
19 though set forth at length herein again.

20 308. Plaintiffs are informed and believe that the representation as stated on the
21 Notice of Default were a false representation in that documents were not provided to the
22 trustee that showed that any of the Defendants was the Beneficiary and entitled to the
23 payments.

24 309. At the time Defendants made the representations they knew they were
25 false and were made for the sole purpose of inducing reliance and confusing Plaintiffs.

26 TENTH CAUSE OF ACTION

27 VIOLATION OF THE ROBBINS-ROSENTHAL

28 FAIR DEBT COLLECTION PRACTICES ACT

1 (Against All Defendants and DOES 1-10,000)

2 310. Plaintiffs fully incorporate herein by reference all paragraphs heretofore
3 set forth in the complaint.

4 311. The Robbins-Rosenthal Fair Debt Collection Practices Act (Robbins-
5 Rosenthal Act), Civil Code § 1788, et seq., prohibits unfair and deceptive acts and
6 practices in the collection of consumer debts.

7 312. All defendants are debt collectors under the Rosenthal Act. To the extent
8 lender is not a “debt collector,” it is vicariously liable for the acts of defendant trustee and
9 defendant servicer of the loan.

10 313. Each of defendants threatened plaintiff with the attachment and sale of his
11 home with no legal authority to do so, in violation of California Civil Code section
12 1788.10(e).

13 314. Moreover, none of the defendant have legal authority to enforce or collect
14 on the loan because defendants are not the note holder of said debt and as such cannot
15 authorize defendant trustee or anyone else for that matter to enforce or collect on the loan.

16 315. By their acts and practices as hereinabove described, defendants have
17 violated the Robbins-Rosenthal Act as follows, without limitation: a) in failing to inform
18 consumers that defendants would engage in debt collection practices during the loan
19 application and approval process, defendants have violated § 1788.13(i), which prohibits
20 the false representation of the true nature of the business or services being rendered by the
21 debt collector. Mortgage Lenders represented itself as a lender but failed to disclose the
22 material fact that it is acting as a debt collector with respect to the same transaction; and
23 (b) by failing to include certain debt collection notices required by law.

24 316. As a direct and proximate result of these violations as alleged herein,
25 plaintiff, under § 1788.30 of the Robbins-Rosenthal Act, is entitled to recover his actual
26 damages sustained as a result of defendants’ violations of the Robbins-Rosenthal Act.
27 Such damages include, without limitation, monetary losses and damages, and emotional
28 distress damages suffered by plaintiff, the amount of which will be proven at trial.

1 materials.

2 324. As a direct and legal result of the defendants' fraudulent conduct as
3 described above, plaintiff suffered damage within the meaning of Business and
4 Professions Code §17537.4 in an amount to be proven at trial, plus pre and post-judgment
5 interest at the legal rate as a result of plaintiff's use of defendants' services based on
6 defendants' false, misleading and deceptive representations and marketing materials.

7 325. The damages of the plaintiff and other consumers similarly situated are
8 within the jurisdictional limits of this Court.

9 326. Moreover, Plaintiffs are entitled to an award of treble damages and
10 reasonable attorneys fees pursuant to Section 17537.4.

11 327. By committing the acts alleged above, defendants, and each of them, have
12 acted unfairly and deceptively, and have engaged in an unlawful business practice within
13 Business & Professions Code §17200.

14 328. An action for injunctive relief and restitution under the Unfair
15 Competition Act is specifically authorized by Business & Professions Code §17203.

16 329. Continuing commission by defendants, and each of them, of the acts
17 alleged above will irreparably harm plaintiff and other similarly situated consumers, for
18 which harm they have no plain, speedy or adequate remedy at law.

19 330. By reason of the foregoing, plaintiffs and other similarly situated
20 consumers are entitled to recover actual damages and equitable relief including
21 restitutionary disgorgement from defendants, as shown by the evidence and determined
22 by the trier of fact.

23 WHEREFORE, plaintiffs prays judgment against defendants, and each of them, as
24 set forth hereinbelow.

25 TWELFTH CAUSE OF ACTION

26 UNFAIR AND FRAUDULENT BUSINESS PRACTICES

27 (Violation of California Business and Professions Code §§ 17500 et seq.)

28 (Against All Defendants and DOES 1-10,000)

1 331. Plaintiffs fully incorporate as though fully set forth herein all paragraphs
2 heretofore alleged in the complaint.

3 332. The above-described conduct of the defendants constituted unlawful,
4 unfair, deceptive, and fraudulent business practices within the purview of California
5 Business and Professions Code §§ 17500 et seq.

6 333. Among other things, defendants' representations and advertising to
7 plaintiff and other similarly situated consumers were false, misleading and deceptive
8 within the meaning of these statutes.

9 334. Defendants, and each of them, have no substantiation to support the
10 representations made.

11 335. The defendants, and each of them, derived substantial profits and ill-gotten
12 gains as a direct and proximate result of the unlawful, deceptive and fraudulent
13 representations.

14 336. As a result of the above-described conduct, the defendants have been, and
15 will continue to be, unjustly enriched in profits, income and ill-gotten gains at the
16 expense of the plaintiff and all consumers who used defendants' services in reliance on
17 the defendants' false and fraudulent representations and marketing materials.

18 337. As a direct and legal result of the defendants' fraudulent conduct as
19 described above, plaintiff suffered damage within the meaning of Business and
20 Professions Code §17537.4 in an amount to be proven at trial, plus pre and post-judgment
21 interest at the legal rate as a result of plaintiff's use of defendants' services based on
22 defendants' false, misleading and deceptive representations and marketing materials.

23 338. The damages of the plaintiff and other consumers similarly situated are
24 within the jurisdictional limits of this Court. Moreover, Plaintiffs are entitled to an award
25 of treble damages and reasonable attorneys fees pursuant to Section 17537.4.

26 339. By committing the acts alleged above, defendants, and each of them, have
27 acted unfairly and deceptively, and have engaged in an unlawful business practice within
28 Business & Professions Code §17500.

1 contested certain accounts, also in violation of the CLRA.

2 348. Defendants failed to conduct proper investigations of disputed credit
3 entries, in violation of the CLRA.

4 349. Defendants continued to list plaintiff as past-due, delinquent, and in
5 default, on his credit reports even after being notified that the underlying debt entries were
6 false or erroneous, also in violation of the CLRA.

7 350. By their actions, defendants have jointly and severally injured plaintiff.

8 351. As a result of the foregoing, plaintiff has suffered damages to an extent and
9 in an amount reserved for determination at trial.

10 352. Pursuant to California Civil Code §§ 1770 and 1780, plaintiff is entitled to
11 recover his actual damages sustained as a result of defendants' violations of the CLRA,
12 including resulting monetary losses and damages, and emotional distress damages suffered
13 by plaintiff, in an amount which will be proven at trial.

14 353. Pursuant to California Civil Code §§ 1770 and 1780, Plaintiffs are entitled
15 to enjoin implementation of the debt collection provisions and to recover his reasonable
16 attorneys' fees and costs.

17 FOURTEENTH CAUSE OF ACTION

18 UNJUST ENRICHMENT

19 (Against All Defendants and DOES 1-10,000)

20 354. Plaintiffs reallege all prior allegations of the complaint, and incorporates
21 them herein by reference as if fully set forth herein.

22 355. The misconduct of defendants, individually and severally , in engaging in
23 false, misleading and deceptive mailing and advertising techniques, and in originating,
24 servicing, collecting or transferring the mortgage loan taken out by plaintiff resulted in the
25 defendants being unjustly enriched.

26 356. As a result of the foregoing, plaintiff has suffered damages to an extent and
27 in an amount reserved for determination at trial.

28 357. Moreover, as a result of the actions of defendants as described above,

1 defendants have been unjustly enriched and should return to plaintiff the amount of
2 money by which defendants have been unjustly enriched.

3 358. As a result of their having been unjustly enriched, defendants should be
4 made to disgorge and return to plaintiff, the amount of money by which they have been
5 unjustly enriched.

6 FIFTEENTH CAUSE OF ACTION

7 NEGLIGENT MISREPRESENTATION

8 (Against All Defendants and DOES 1-10,000)

9 359. Plaintiffs fully incorporate herein by reference all paragraphs heretofore set
10 forth in this complaint.

11 360. Defendants, to the extent they did not act intentionally, negligently
12 misrepresented the facts, terms and conditions to plaintiff proximately resulting in harm
13 suffered by plaintiff.

14 WHEREFORE, plaintiff prays judgment against defendants as set forth
15 hereinbelow.

16 SIXTEENTH CAUSE OF ACTION

17 NEGLIGENCE

18 (Against All Defendants and DOES 1-10,000)

19 361. Plaintiffs fully incorporate herein by reference all paragraphs heretofore set
20 forth in this complaint.

21 362. Each person has a duty to act as a reasonable and prudent person would act
22 under the same or similar circumstances so as not to cause injury or harm to others,
23 according to Civil Code section 1714 and voluminous caselaw.

24 363. As set forth above, defendants failed to act as reasonable prudent persons
25 proximately resulting in harm to plaintiff.

26 WHEREFORE, plaintiff prays judgment against defendants as set forth
27 hereinbelow.

28 SEVENTEENTH CAUSE OF ACTION

1 NEGLIGENT PERFORMANCE OF CONTRACT

2 (Against All Defendants and DOES 1-10,000)

3 364. Plaintiffs fully incorporate herein by reference all paragraphs heretofore set
4 forth in the complaint.

5 365. Defendants were negligent in their performance of the contract as set forth
6 above proximately resulting in damages suffered by plaintiff. A claim for negligent
7 performance of a contract is well-established in California law (See e.g. J'Aire Corp,
8 North American Chemical,
9 Ochs, etc.).

10 WHEREFORE, plaintiffs pray judgment against defendants as set forth
11 hereinbelow.

12 EIGHTEENTH CAUSE OF ACTION

13 BREACH OF WRITTEN PROMISE OR AGREEMENT

14 (Against All Defendants and DOES 1-10,000)

15 366. Plaintiffs fully incorporate herein by reference all paragraphs set forth
16 above as though fully set forth herein.

17 367. Defendants breached their written promise(s) or agreement(s) as set forth
18 above
19 proximately resulting in harm suffered by plaintiff.

20 WHEREFORE, plaintiff prays judgment against defendants as set forth
21 hereinbelow.

22 NINETEENTH CAUSE OF ACTION

23 BREACH OF ORAL PROMISE OR AGREEMENT

24 (Against All Defendants and DOES 1-10,000)

25 368. Plaintiffs fully incorporate herein by reference all paragraphs set forth
26 above as though fully set forth herein.

27 369. Defendants breached their oral promise(s) or agreement(s) as set forth
28 above proximately resulting in harm suffered by plaintiff.

1 WHEREFORE, plaintiffs pray judgment against defendants as set forth
2 hereinbelow.

3 TWENTIETH CAUSE OF ACTION

4 NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

5 (Against All Defendants and DOES 1-10,000)

6 370. Plaintiffs fully incorporate herein by reference all paragraphs set forth
7 above as though fully set forth herein.

8 371. Defendants negligently inflicted severe emotional distress upon plaintiff
9 proximately resulting in harm suffered by plaintiff.

10 WHEREFORE, plaintiff prays judgment against defendants as set forth
11 hereinbelow.

12 TWENTY-FIRST CAUSE OF ACTION

13 BREACH OF IMPLIED AND/OR EXPRESS WARRANTY

14 (Against All Defendants and DOES 1-10,000)

15 372. Plaintiffs fully incorporate as though fully set forth herein all paragraphs
16 heretofore alleged in the complaint.

17 373. Defendants breached an implied or express warranty with plaintiff as set
18 forth above proximately resulting in harm suffered by plaintiff.

19 TWENTY-SECOND CAUSE OF ACTION

20 PROMISSORY ESTOPPEL

21 (Against All Defendants and DOES 1-10,000)

22 374. Plaintiffs fully incorporate as though fully set forth herein all paragraphs
23 heretofore alleged in the complaint.

24 375. Plaintiff justifiably detrimentally relied on the false promises,
25 representations and assurances of defendants.

26 376. Defendants in equity cannot and should not be allowed to retain any
27 income, profits and gains acquired by way of their false promises, representations and
28

1 assurances which induced plaintiff to enter into the defendants' fraudulent scheme
2 resulting in justifiable detrimental reliance by plaintiff.

3 377. Equity regards as done what ought to be done. Thus, defendants must pay
4 for all damages incurred by plaintiff due to defendants' fraudulent scheme perpetrated
5 upon plaintiff.

6 WHEREFORE, plaintiffs pray judgment against defendants as set forth
7 hereinbelow.

8 TWENTY-THIRD CAUSE OF ACTION
9 RESTITUTION FOR UNJUST ENRICHMENT
10 (Against All Defendants and DOES 1-10,000)

11 378. Plaintiffs fully incorporate as though fully set forth herein all paragraphs
12 heretofore alleged in the complaint.

13 379. As set forth above, defendants made false promises, assurances and
14 representations regarding facts, terms and conditions of the loss mitigation and active
15 foreclosure scheme and artifice to defraud perpetrated upon plaintiff. As a result of
16 reliance on said false representations, the defendants received and continue to receive
17 benefits of profits and material gains by unjustly retaining profits, income and ill-gotten
18 gains at the expense of the plaintiff who acted in detrimental reliance upon the defendants'
19 false assurances, representations and promises.

20 380. As a proximate result of the defendants' scienter, artifice and connivance in
21 making the above representations, defendants have been unjustly enriched and plaintiff has
22 sustained damages.

23 WHEREFORE, plaintiffs pray judgment against defendants as set forth
24 hereinbelow.

25 TWENTY-FOURTH CAUSE OF ACTION
26 MISAPPROPRIATION AND CONVERSION OF FUNDS
27 (Against All Defendants and DOES 1-10,000)
28

1 property adverse to plaintiff herein; (iii) a judgment forever enjoining said defendants, and
2 each of them, from claiming any estate, right, title or interest in the subject property; (iv)
3 for costs of suit herein incurred; and (v) for such other and further relief as the Court may
4 deem just and proper.

5 TWENTY-EIGHTH CAUSE OF ACTION

6 VIOLATION OF HOME OWNERSHIP AND EQUITY PROTECTION ACT (HOEPA)

7 (Against All Defendants and DOES 1-10,000)

8 405. Plaintiff fully incorporates as though fully set forth herein all paragraphs
9 heretofore alleged in the complaint.

10 406. Defendants violated HOEPA proximately resulting in harm suffered by
11 plaintiff as set forth above.

12 WHEREFORE, plaintiff prays judgment against defendants as set forth
13 hereinbelow.

14 TWENTY-NINTH CAUSE OF ACTION

15 VIOLATION OF THE UCC3-104

16 (Against All Defendants and DOES 1-10,000)

17 407. Plaintiffs fully incorporate as though fully set forth herein all paragraphs
18 heretofore alleged in the complaint.

19 408. Article 3 of the UCC governs negotiable instruments – it defines what a
20 negotiable instrument is and defines how ownership of those pieces of paper is transferred.
21 For the precise definition, see § 3-104(a) (“an unconditional promise or order to pay a
22 fixed amount of money, with or without interest”) The instrument may be either
23 payable to order or bearer and payable on demand or at a definite time, with or without
24 interest.

25 409. Ordinary negotiable instruments include notes and drafts (a check is a draft
26 drawn on a bank). See § 3-104(e).

27 410. Negotiable paper is transferred from the original payor by negotiation. §3-
28 301. “Order paper” must be endorsed; bearer paper need only be delivered. §3-305.

1 However, in either case, for the note to be enforced, the person who asserts the status of
2 the holder must be in possession of the instrument. See UCC § 1-201 (20) and comments.

3 411. The original and subsequent transferees are referred to as holders. Holders
4 who take with no notice of defect or default are called “holders in due course,” and take
5 free of many defenses. See §§ 3-305(b).

6 412. The UCC says that a payment to a party “entitled to enforce the instrument”
7 is sufficient to extinguish the obligation of the person obligated on the instrument. Clearly,
8 then, only a holder – a person in possession of a note endorsed to it or a holder of bearer
9 paper – may seek satisfaction or enforce rights in collateral such as real estate.

10 413. Defendants have no standing to enforce the note, and therefore, conduct the
11 foreclosure, because only a person who is the holder of the note has standing to enforce the
12 note.

13 414. Defendants must show that it holds the note or (1) that it is an agent of the
14 holder and that (2) the holder remains the holder. In addition, the owner of the note, if
15 different from the holder, must join in the motion.

16 415. Defendants must be enjoined from proceeding with the foreclosure
17 proceedings, therefore, until it shows it is the holder of this note original by transfer, with
18 all necessary rounds; it had possession of the note before it was lost; if it can show that
19 title to the note runs to it, but the original is lost or destroyed, the holder must be prepared
20 to post a bond; and if the person seeking to enforce is an agent, it must show its agency
21 status and that its principal is the holder of the note (and meets the above requirements).

22 WHEREFORE, Plaintiffs having set forth the claims for relief against Defendants,
23 respectfully pray that this Court grant the following relief against the Defendants:

24 (1) An order enjoining all defendants and their agents, assigns, employees,
25 officers, attorneys, and representatives are enjoined and restrained from
26 engaging in or performing any act to deprive plaintiff of ownership or
27 possession of the subject property, including but not limited to instituting,
28 prosecuting or maintaining foreclosure or sale proceedings on the property,

1 from recording any deeds or mortgages regarding the property or from
2 otherwise taking any steps whatsoever to deprive plaintiff of ownership in
3 the property, and in particular from proceeding within the sale of the
4 property scheduled for May 26, 2010.

5 (2) A declaration that defendants must conduct a judicial foreclosure and not a
6 non-judicial foreclosure.

7 (3) For all compensatory, economic and money damages, past, present and
8 future, in an amount to fully compensate plaintiff according to proof;

9 (4) For punitive and exemplary damages, as appropriate, according to proof;

10 (5) For attorneys' fees and costs, as appropriate, according to proof;

11 (6) For incidental and/or consequential damages, as appropriate, according to
12 proof;

13 (7) For all interest, including prejudgment and postjudgment interest;

14 (8) For all applicable statutory damages, as appropriate, according to proof;

15 (9) For all applicable special damages, as appropriate, according to proof;

16 (10) For appropriate equitable relief such as rescission and/or disgorgement;

17 (11) For all applicable general damages, including emotional and mental
18 distress, past, present, and future, according to proof.

19 DATED: May 24, 2010.

BOTTOMLINE LAWYERS

20
21 

22 By:

23 RICHARD A. HALL
Attorneys for Plaintiffs

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DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a jury trial of all causes of action.

Dated: May 24, 2010.

BOTTOMLINE LAWYERS



By:

RICHARD A. HALL
Attorneys for Plaintiffs

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