

SEVERSON & WERSON
A Professional Corporation
One Embarcadero Center, Suite 2600
San Francisco, California 94111
Telephone: (415) 398-3344
Facsimile: (415) 956-0439
Bernard J. Kornberg (CSB. 252006)
Admitted *Pro Hac Vice*

Hearing Date and Time: March 22, 2016 at 10:00 a.m.
Deadline to Respond: February 24, 2016

Counsel for Ocwen Loan Servicing, LLC

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:

Residential Capital, LLC, *et al.*,

Debtors.

Shelley von Brincken,

Plaintiff,

GMAC Mortgage, LLC *et al.*,

Defendants.

Case No. 12-12020 (MG)

Chapter 11

Jointly Administered

Adv. Case. No. 13-01436 (MG)



NOTICE OF MOTION TO DISMISS FIRST AMENDED COMPLAINT

Please take notice that defendant Ocwen Loan Servicing, LLC (“Ocwen”) has filed the attached motion Motion To Dismiss First Amended Complaint Pursuant To Bankruptcy Rule 7012.

Please take further notice that, pursuant to the Joint Stipulation and Scheduling Order entered on January 21, 2016, hearing on this motion shall be on March 22, 2016 at 10:00 a.m. in Room 501 of this Court located at One Bowling Green, New York, New York 10004. Objection, if any, from plaintiff Shelley von Brincken, shall be filed by February 24, 2016. Service of such objection to Ocwen’s motion shall be mailed to counsel listed in the caption of this motion.

Please take further notice that that if you do not timely file and serve a written objection to the relief requested in the Motion, the Bankruptcy Court may deem any opposition waived, treat the Motion as conceded, and enter an order granting the relief requested in the Motion without further notice or hearing.

Dated: January 25, 2016

Respectfully submitted,

/s/ Bernard J. Kornberg

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Counsel for Ocwen Loan Servicing, LLC

**MOTION TO DISMISS FIRST AMENDED COMPLAINT
PURSUANT TO BANKRUPTCY RULE 7012**

TO THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY JUDGE:

Defendant Ocwen Loan Servicing, LLC (“Ocwen”) respectfully submits this motion to dismiss the adversary proceeding of plaintiff Shelley von Brincken (“Plaintiff”) pursuant to Federal Rule of Civil Procedure 12(b)(6) as incorporated by Federal Rule of Bankruptcy Procedure 7012.

The basis of this motion is that Plaintiff’s amended complaint, filed on February 21, 2014, fails to state a claim upon which relief can be granted. Pursuant to the Joint Stipulation and Scheduling Order entered on January 21, 2016, hearing on this motion shall be on March 22, 2016 at 10:00 a.m. in this Court located at One Bowling Green, New York, New York 10004.

I. PRELIMINARY STATEMENT

This is one of many suits by plaintiff Shelley von Brincken (“Plaintiff”) to rescind the 2011 foreclosure sale of her property. Having lost her claims in multiple courts in California, she now brings he claims to New York in hope of a more favorable audience.

Unfortunately for plaintiff, a change in location does not make her complaint any more favorable. This action brings claims against Ocwen Loan Servicing, LLC (“Ocwen”). However, except for its position as being listed in the caption, the complaint never mentions Ocwen or explains how what wrongdoing Ocwen is responsible for. Thus the complaint fails to state a claim against Ocwen.

Further, the issue of the validity of the foreclosure has been conclusively litigated. Plaintiff has, at least twice, brought suit to challenge the validity of the foreclosures. These suits

were dismissed on the merits. Accordingly, this issue is *res judicata* as to plaintiff and may not be relitigated.

II. PERTINENT FACTS

On or about January 14, 2009, Plaintiff took out a note for \$220,000.00 from Mortgageclose.com, Inc. In order to secure the loan, she granted a deed of trust in favor of Mortgage Electronic Registration Systems, Inc. (“MERS”) as nominee for Mortgageclose.com, Inc on the real property located at 14738 Wolf Road, Grass Valley, CA 95949 (the “Property”). Deed of Trust, RJN, Exhibit 1.

GMAC Mortgage, LCC (“GMAC”) was, as least as of July 23, 2012, the servicer of the loan. Escrow Letter, RJN, Exhibit 1. At some time while GMAC was servicer of the loan, the Property was foreclosed on under a duly noticed non-judicial foreclosure under California Civil Code § 2924 *et seq.* First Amended Complaint (“FAC, ¶ 1”).

III. PLAINTIFFS HAVE FAILED TO STATE A CLAIM

A. The FAC Does Not List Any Allegations Against Ocwen

Here, the complaint lists Ocwen but once. Ocwen is named as a defendant in the caption and is never mentioned again. As such, Ocwen is entirely unclear of what wrongdoing it is accused of. Suffice to say, this does not provide necessary “fair notice of the grounds for entitlement to relief” needed to state a claim. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561

(2007); Fed. R. Civ. P. 8(a). As Plaintiff's complaint entirely forgets about Ocwen, it does not state a claim.¹

B. The Foreclosure Has Been Conclusively Adjudicated as Valid

In 2010, Plaintiff filed suit in the Eastern District of California entitled *Shelly von Brincken v. Mortgageclose.com, Inc. et al.*, Case No. 2:10-cv-02153. This suit, which named GMAC as a defendants, alleged that the pending foreclosure sale on her property was invalid. Second Amended Complaint, RJN, Exhibit 2. GMAC filed a motion to dismiss this action on the grounds that it failed to state a claim. Motion to Dismiss, RJN, Exhibit 3. This motion was granted and the suit was dismissed with prejudice. Order Granting Motion to Dismiss, RJN, Exhibit 4.

After the foreclosure had occurred, Plaintiff decided to try her luck again.² In 2011, Plaintiff filed suit in the Nevada County Superior Court a suit entitled *Shelley von Brinken v. Federal National Mortgage Association, et al.*, Case No. 78503. This suit alleged that the foreclosure was void and should be rescinded. Amended Complaint, RJN, Exhibit 5. Federal National Mortgage Association demurred on the ground that the complaint failed to state a claim and was barred by *res judicata*. Demurrer, RJN, Exhibit 6. The court agreed and dismissed the case with prejudice. Order of Dismissal, RJN, Exhibit 7.

These cases are *res judicata* to the complaint here. "Under the doctrine of *res judicata*, or claim preclusion, a final judgment on the merits of an action precludes the parties or their privies

¹ In reality, Ocwen took over a servicer of the loan after the non-judicial foreclosure occurred. As all of Plaintiff's allegations relate to the foreclosure of the loan, even if any valid allegations were alleged, Ocwen would not be liable for them.

² This actually understates the case. Plaintiff has filed numerous actions in various venues without any success. The cases provided in this matter are enough to conclusively show that *res judicata* applies.

from relitigating issues that were or could have been raised in that action.” *EDP Med. Computer Sys., Inc. v. United States*, 480 F.3d 621, 624 (2d Cir. 2007) (internal quotations omitted). “The doctrine bars later litigation if [an] earlier decision was (1) a final judgment on the merits, (2) by a court of competent jurisdiction, (3) in a case involving the same parties or their privies, and (4) involving the same cause of action.” *Id.* (internal quotation omitted).³

All these elements are met. The two previous cases ended with final judgments dismissing the cases with prejudice from courts of competent jurisdiction. Order Granting Motion to Dismiss, RJN, Exhibit 4; Order of Dismissal, RJN, Exhibit 7. The parties were the same or privies. GMAC was a party to the first action as the servicer of the loan. Federal National Mortgage Association, the owner of the loan, was a party to the second action. Federal National Mortgage Association, as the owner of the loan that was serviced by GMAC, was a privy to GMAC. *See Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56 F.3d 343, 346 (2d Cir. 1995). Finally, the same claim was raised in all actions – the validity of the foreclosure.

This suit was litigated multiple times in California. Plaintiff lost all of them. Accordingly, the claims are barred by *res judicata*.

IV. CONCLUSION

For the reasons stated above, the Court should grant the motion to dismiss, with prejudice.

³ The elements of *res judicata* under California law, which apply to the second action, are identical. *Staniforth v. Judges' Retirement System*, 226 Cal.App.4th 978, 988 (2014).

Dated: January 25, 2016

Respectfully submitted,

/s/ Bernard J. Kornberg

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Admitted *Pro Hac Vice*

Counsel for Ocwen Loan Servicing, LLC

PROOF OF SERVICE

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

On January 25, 2016, I served true copies of the following document(s):

**MOTION TO DISMISS FIRST AMENDED COMPLAINT
PURSUANT TO BANKRUPTCY RULE 7012**

on the interested parties in this action as follows:

Shelley Von Brincken
P.O. Box 2362
Grass Valley, CA 95945

Norman Scott Rosenbaum
Morrison & Foerster LLP
Email: nrosenbaum@mofo.com

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

BY CM/ECF NOTICE OF ELECTRONIC FILING: I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

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

Executed on January 25, 2016, at San Francisco, California.

/s/ Erica W. Holloway

Erica W. Holloway

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UNITED STATES BANKRUPTCY COURT
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Adv. Case. No. 13-01436 (MG)

REQUEST FOR JUDICIAL NOTICE

Defendant Ocwen Loan Servicing, LLC hereby requests that the Court take judicial notice of the following records pursuant to Federal Rule of Evidence 201.

1. Proof of Claim #441, filed in *In re GMAC Mortgage, LLC*, Case No. 12032 (MG) in the United States Bankruptcy Court for the Southern District of New York. A copy of this document is attached as Exhibit 1.

2. Second Amended Complaint, filed in *Shelly von Brincken v. Mortgageclose.com, Inc. et al.*, Case No. 2:10-cv-02153, in the Eastern District of California. A copy of this document is attached as Exhibit 2.

3. Motion to Dismiss, filed in *Shelly von Brincken v. Mortgageclose.com, Inc. et al.*, Case No. 2:10-cv-02153, in the Eastern District of California. A copy of this document is attached as Exhibit 3.

4. Order Granting Motion to Dismiss, filed in *Shelly von Brincken v. Mortgageclose.com, Inc. et al.*, Case No. 2:10-cv-02153, in the Eastern District of California. A copy of this document is attached as Exhibit 4.

5. Second Amended Complaint, filed in *Shelley von Brinken v. Federal National Mortgage Association, et al.*, Case No. 78503, in the Nevada County Superior Court. A copy of this document is attached as Exhibit 5.

6. Demurrer, filed in *Shelley von Brinken v. Federal National Mortgage Association, et al.*, Case No. 78503, in the Nevada County Superior Court. A copy of this document is attached as Exhibit 6.

7. Order Granting Motion to Dismiss, filed in *Shelley von Brinken v. Federal National Mortgage Association, et al.*, Case No. 78503, in the Nevada County Superior Court. A copy of this document is attached as Exhibit 7.

Dated: January 25, 2016

Respectfully submitted,

/s/ Bernard J. Kornberg

Bernard J. Kornberg

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Counsel for Ocwen Loan Servicing, LLC

B 10 (Official Form 10) (12/11)

UNITED STATES BANKRUPTCY COURT Southern District of New York		PROOF OF CLAIM
Name of Debtor: GMAC MORTGAGE, LLC	Case Number: 12-12032-MG	AUG 27 2012
NOTE: Do not use this form to make a claim for an administrative expense that arises after the bankruptcy filing. You may file a request for payment of an administrative expense according to 11 U.S.C. § 503.		
Name of Creditor (the person or other entity to whom the debtor owes money or property): SHELLEY VON BRINCKEN		
Name and address where notices should be sent: 14738 WOLF RD GRASS VALLEY, CA. 95949		COURT USE ONLY <input type="checkbox"/> Check this box if this claim amends a previously filed claim. Court Claim Number: _____ (If known) Filed on: _____
Telephone number: (530) 268-8777 email: _____		
Name and address where payment should be sent (if different from above): N/A		<input type="checkbox"/> Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach copy of statement giving particulars.
Telephone number: _____ email: _____		
1. Amount of Claim as of Date Case Filed: \$ <u>186,940.72</u> If all or part of the claim is secured, complete item 4. If all or part of the claim is entitled to priority, complete item 5. <input type="checkbox"/> Check this box if the claim includes interest or other charges in addition to the principal amount of the claim. Attach a statement that itemizes interest or charges.		
2. Basis for Claim: <u>DEBT INSTRUMENT "Deed of Trust"</u> (See instruction #2)		
3. Last four digits of any number by which creditor identifies debtor: <div style="text-align: center; font-size: 1.2em;">4 8 4 0</div>	3a. Debtor may have scheduled account as: _____ (See instruction #3a)	3b. Uniform Claim Identifier (optional): _____ (See instruction #3b)
4. Secured Claim (See instruction #4) Check the appropriate box if the claim is secured by a lien on property or a right of setoff, attach required redacted documents, and provide the requested information.		
Nature of property or right of setoff: <input checked="" type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other Describe: _____ Value of Property: \$ <u>173,500.00</u> Annual Interest Rate <u>5.914%</u> <input type="checkbox"/> Fixed or <input checked="" type="checkbox"/> Variable (when case was filed)		Amount of arrearage and other charges, as of the time case was filed, included in secured claim, if any: <div style="text-align: right;">\$ <u>186,940.72</u></div> Basis for perfection: <u>Security Instrument</u> Amount of Secured Claim: \$ <u>186,940.72</u> Amount Unsecured: \$ <u>0.00</u>
5. Amount of Claim Entitled to Priority under 11 U.S.C. § 507 (a). If any part of the claim falls into one of the following categories, check the box specifying the priority and state the amount.		
<input type="checkbox"/> Domestic support obligations under 11 U.S.C. § 507 (a)(1)(A) or (a)(1)(B).	<input type="checkbox"/> Wages, salaries, or commissions (up to \$11,725*) earned within 180 days before the case was filed or the debtor's business ceased, whichever is earlier – 11 U.S.C. § 507 (a)(4).	<input type="checkbox"/> Contributions to an employee benefit plan – 11 U.S.C. § 507 (a)(5).
<input type="checkbox"/> Up to \$2,600* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. § 507 (a)(7).	<input type="checkbox"/> Taxes or penalties owed to governmental units – 11 U.S.C. § 507 (a)(8).	<input checked="" type="checkbox"/> Other – Specify applicable paragraph of 11 U.S.C. § 507 (a)(C)2.
Amount entitled to priority: \$ <u>186,940.72</u>		
*Amounts are subject to adjustment on 4/1/13 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.		
6. Credits. The amount of all payments on this claim has been credited for the purpose of making this proof of claim. (See instruction #6)		

RECEIVED

AUG 29 2012



1212032120827000000000003

B 10 (Official Form 10) (12/11)

2

7. Documents: Attached are redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. If the claim is secured, box 4 has been completed, and redacted copies of documents providing evidence of perfection of a security interest are attached. (See instruction #7, and the definition of "redacted".)

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

RECEIVED

AUG 29 2012

8. Signature: (See instruction #8)

Check the appropriate box.

- ☒ I am the creditor. ☐ I am the creditor's authorized agent. ☐ I am the trustee, or the debtor, or their authorized agent. ☐ I am a guarantor, surety, indorser, or other codebtor.
- (Attach copy of power of attorney, if any.) (See Bankruptcy Rule 3004.) (See Bankruptcy Rule 3005.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

Print Name: SHELLEY VON BRINCKEN

Title: MORTGAGOR

Company: N/A

Address and telephone number (if different from notice address above):

14738 WOLF RD

GRASS VALLEY, CA. 95949

Telephone number: email:

(Signature)

(Date)

Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, exceptions to these general rules may apply.

Items to be completed in Proof of Claim form

Court, Name of Debtor, and Case Number:

Fill in the federal judicial district in which the bankruptcy case was filed (for example, Central District of California), the debtor's full name, and the case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is at the top of the notice.

Creditor's Name and Address:

Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

1. Amount of Claim as of Date Case Filed:

State the total amount owed to the creditor on the date of the bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

2. Basis for Claim:

State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. If the claim is based on delivering health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to provide additional disclosure if an interested party objects to the claim.

3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:

State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

3a. Debtor May Have Scheduled Account As:

Report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

3b. Uniform Claim Identifier:

If you use a uniform claim identifier, you may report it here. A uniform claim identifier is an optional 24-character identifier that certain large creditors use to facilitate electronic payment in chapter 13 cases.

4. Secured Claim:

Check whether the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See Definitions.) If the claim is secured, check the box for the nature and value of property that secures the claim, attach copies of lien documentation, and state, as of the date of the bankruptcy filing, the annual interest rate (and whether it is fixed or variable), and the amount past due on the claim.

5. Amount of Claim Entitled to Priority Under 11 U.S.C. § 507 (a).

If any portion of the claim falls into any category shown, check the appropriate box(es) and state the amount entitled to priority. (See Definitions.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

6. Credits:

An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

7. Documents:

Attach redacted copies of any documents that show the debt exists and a lien secures the debt. You must also attach copies of documents that evidence perfection of any security interest. You may also attach a summary in addition to the documents themselves. FRBP 3001(c) and (d). If the claim is based on delivering health care goods or services, limit disclosing confidential health care information. Do not send original documents, as attachments may be destroyed after scanning.

8. Date and Signature:

The individual completing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what constitutes a signature. If you sign this form, you declare under penalty of perjury that the information provided is true and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirements of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line, you are responsible for the declaration. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. If the claim is filed by an authorized agent, attach a complete copy of any power of attorney, and provide both the name of the individual filing the claim and the name of the agent. If the authorized agent is a servicer, identify the corporate servicer as the company. Criminal penalties apply for making a false statement on a proof of claim.

Von Brincken #0810219

gmac# [REDACTED] 7759

18

RECORDING REQUESTED BY:

**CALIFORNIA LAND TITLE COMPANY OF
NEVADA COUNTY**

AND WHEN RECORDED MAIL TO:

**MORTGAGECLOSE.COM, INC.
1855 WEST KATELLA AVE., SUITE 200
ORANGE, CA 92867**



Nevada County Recorder

Gregory J. Diaz

DOC- 2009-0001231-00

Acct 1-California Land Title Co.

Friday, JAN 23, 2009 08:00:00

REC \$22.00:SBS \$17.00:SSR \$1.00

MIC \$1.00:AUT \$18.00:

Ttl Pd \$59.00

Nbr-0000576689

ENM/EM/1-18

ORDER NO.: 105038-TO

SPACE ABOVE THIS LINE FOR RECORDER'S USE

DEED OF TRUST

DOCUMENT TITLE

SEPARATE PAGE - PURSUANT TO GOVERNMENT CODE 27361.6

titlepg

Recording Requested By:
MORTGAGECLOSE.COM, INC.

And After Recording Return To:
MORTGAGECLOSE.COM, INC.
1855 WEST KATELLA AVENUE, SUITE 200
ORANGE, CALIFORNIA 92867
Loan Number: 0810219

RECORDING REQUESTED
BY: OLD REPUBLIC TITLE

2123006084-SE

(Space Above This Line For Recording Date)

DEED OF TRUST

MIN: 1002310-0000810219-5

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

- (A) "Security Instrument" means this document, which is dated JANUARY 14, 2009, together with all Riders to this document.
- (B) "Borrower" is SHELLEY VON BRINCKEN, A MARRIED WOMAN AS HER SOLE AND SEPARATE PROPERTY

Borrower is the trustor under this Security Instrument.

- (C) "Lender" is MORTGAGECLOSE.COM, INC.

Lender is a NEVADA CORPORATION

and existing under the laws of NEVADA

organized

Lender's address is 1855 WEST KATELLA AVENUE, SUITE 200, ORANGE, CALIFORNIA 92867

- (D) "Trustee" is CALIFORNIA LAND TITLE COMPANY OF NV COUNTY
464 BRUNSWICK RD, GRASS VALLEY, CALIFORNIA 95945

(E) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument. MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.

- (F) "Note" means the promissory note signed by Borrower and dated JANUARY 14, 2009
The Note states that Borrower owes Lender TWO HUNDRED TWENTY THOUSAND AND 00/100
Dollars (U.S. \$ 220,000.00) plus interest.

Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than
FEBRUARY 1, 2039

(G) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."

(H) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

(I) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

- | | |
|--|--|
| <input type="checkbox"/> Adjustable Rate Rider | <input checked="" type="checkbox"/> Planned Unit Development Rider |
| <input type="checkbox"/> Balloon Rider | <input type="checkbox"/> Biweekly Payment Rider |
| <input type="checkbox"/> 1-4 Family Rider | <input type="checkbox"/> Second Home Rider |
| <input type="checkbox"/> Condominium Rider | <input type="checkbox"/> Other(s) [specify] |

(J) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appellable judicial opinions.

(K) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(L) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(M) "Escrow Items" means those items that are described in Section 3.

(N) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(O) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(P) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(Q) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(R) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS. This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's

obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. Application of Payments or Proceeds. Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. Funds for Escrow Items. Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender

shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee and Borrower further agrees to generally assign rights to insurance proceeds to the holder of the Note up to the amount of the outstanding loan balance. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee and Borrower further agrees to generally assign rights to insurance proceeds to the holder of the Note up to the amount of the outstanding loan balance.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. Occupancy. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. Preservation, Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. Borrower's Loan Application. Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. Borrower shall not surrender the leasehold estate and interests herein conveyed or terminate or cancel the ground lease. Borrower shall not, without the express written consent of Lender, alter or amend the ground lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to those agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

(b) Any such agreements will not affect the rights Borrower has - if any - with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether

or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

12. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

13. Joint and Several Liability; Co-signers; Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

14. Loan Charges. Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires

otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

16. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. Borrower's Copy. Borrower shall be given one copy of the Note and of this Security Instrument.

18. Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. Sale of Note; Change of Loan Servicer; Notice of Grievance. The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. Hazardous Substances. As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action

required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If Lender invokes the power of sale, Lender shall execute or cause Trustee to execute a written notice of the occurrence of an event of default and of Lender's election to cause the Property to be sold. Trustee shall cause this notice to be recorded in each county in which any part of the Property is located. Lender or Trustee shall mail copies of the notice as prescribed by Applicable Law to Borrower and to the other persons prescribed by Applicable Law. Trustee shall give public notice of sale to the persons and in the manner prescribed by Applicable Law. After the time required by Applicable Law, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Trustee may postpone sale of all or any parcel of the Property by public announcement at the time and place of any previously scheduled sale. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's and attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

23. **Reconveyance.** Upon payment of all sums secured by this Security Instrument, Lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Instrument to Trustee. Trustee shall reconvey the Property without warranty to the person or persons legally entitled to it. Lender may charge such person or persons a reasonable fee for reconveying the Property, but only if the fee is paid to a third party (such as the Trustee) for services rendered and the charging of the fee is permitted under Applicable Law. If the fee charged does not exceed the fee set by Applicable Law, the fee is conclusively presumed to be reasonable.

24. **Substitute Trustee.** Lender, at its option, may from time to time appoint a successor trustee to any Trustee appointed hereunder by an instrument executed and acknowledged by Lender and recorded in the office of the Recorder of the county in which the Property is located. The instrument shall contain the name of the original Lender, Trustee and Borrower, the book and page where this Security Instrument is recorded and the name and address of the successor trustee. Without conveyance of the Property, the successor trustee shall succeed to all the title, powers and duties conferred upon the Trustee herein and by Applicable Law. This procedure for substitution of trustee shall govern to the exclusion of all other provisions for substitution.

25. **Statement of Obligation Fee.** Lender may collect a fee not to exceed the maximum amount permitted by Applicable Law for furnishing the statement of obligation as provided by Section 2943 of the Civil Code of California.

The undersigned Borrower requests that a copy of any Notice of Default and any Notice of Sale under this Security Instrument be mailed to the Borrower at the address set forth above. A copy of any Notice of Default and any Notice of Sale will be sent only to the address contained in this recorded request. If the Borrower's address changes, a new request must be recorded.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.



SHELLEY VON BRINCKEN (Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

Witness:

Witness:

[Space Below This Line For Acknowledgment]

State of California)

County of Placer) ss.

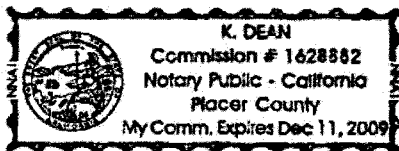
On 1-15-09 before me, K. Dean Notary public

personally appeared SHELLEY VON BRINCKEN

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



KD
NOTARY SIGNATURE

K. Dean
(Typed Name of Notary)

NOTARY SEAL

GMAC Mortgage

3451 Hammond Ave
P.O. Box 780
Waterloo, IA 50704-0780

07/24/12

SHELLEY VON BRINCKEN

14738 WOLF ROAD

GRASS VALLEY CA 95949

RE: Account Number [REDACTED] 7759
Property Address 14738 WOLF ROAD
GRASS VALLEY CA 95949

Dear SHELLEY VON BRINCKEN

The enclosed mortgage history is being provided in conjunction with the recent escrow analysis review of your account which was mailed to you under separate cover.

As your last annual escrow review was completed on your account more than one year ago, this document reflects a history of your escrow account activity since the last annual statement was issued.

If you have any questions about this matter, please call our office at 800-766-4622 (weekdays, 6:00 a.m. - 10:00 p.m. CT; Saturday, 9:00 a.m. - 1:00 p.m.).

Thank you,

Customer Care
Loan Servicing

4:63

If this is a mortgage loan and the property is located in the state of Texas:
COMPLAINTS REGARDING THE SERVICING OF YOUR MORTGAGE SHOULD BE
SENT TO THE DEPARTMENT OF SAVINGS AND MORTGAGE LENDING, 2601 NORTH
LAMAR, SUITE 201, AUSTIN, TX 78705. A TOLL-FREE CONSUMER HOTLINE IS
AVAILABLE AT 877-276-5550.

A complaint form and instructions may be downloaded and printed from the Department's website located at www.sml.texas.gov or obtained from the Department upon request by mail at the address above, by telephone at its toll-free consumer hotline listed above, or by email at smlinfo@sml.texas.gov.

Account Number	7759
Name	SHELLEY VON BRINCKEN
Starting Escrow Balance	0.00
Ending Escrow Balance	-4,693.40
Starting Time Period	08/02/2010
Ending Time Period	07/24/2012

Transaction Date	Amount To Escrow	Trans Type	Transaction Description	Escrow Balance
9/1/2010	6,276.62	RT	PAYMENT	0.00
9/1/2010	-6,276.62	PT	PAYMENT	-6,276.62
9/9/2010	453.00	R20	Escrow Refund-Fire	-5,823.62
10/12/2010	5,823.62	SR	PAYMENT	0.00
11/10/2010	-1,154.45	E90	Escrow Disb-Tax County	-1,154.45
3/9/2011	-1,154.45	E90	Escrow Disb-Tax County	-2,308.90
11/9/2011	-1,192.25	E90	Escrow Disb-Tax County	-3,501.15
3/7/2012	-1,192.25	E90	Escrow Disb-Tax County	-4,693.40
Total Escrow Amounts	1,583.22			

GMAC**Mortgage**3451 Hammond Avenue
Waterloo, IA 50702
1-800-786-4622/Follow the Prompts

Judicial Notice Pg 22 of 137

Important Note: In accordance with RESPA requirements, this notice is being sent as a result of the review completed on your escrow account.**INITIAL ESCROW ACCOUNT
DISCLOSURE STATEMENT**48081-0000277-001
SHELLEY VON BRINCKEN
14738 WOLF RD
GRASS VALLEY CA 95949-8134

ACCOUNT NUMBER: [REDACTED] 7759

PROPERTY ADDRESS:
14738 WOLF ROAD
GRASS VALLEY CA 95949

ANALYSIS DATE: JULY 23, 2012

PLEASE KEEP THIS ESCROW ANALYSIS FOR COMPARISON TO NEXT YEAR'S STATEMENT.

Section 1:

DESCRIPTION	NEXT DUE DATE	ESTIMATED AMOUNT(S) OF NEXT DISBURSEMENT	AMOUNT(S) USED IN PRIOR ANALYSIS
COUNTY	DECEMBER 2012	1,192.25	0.00
COUNTY	APRIL 2013	1,192.25	0.00
TOTAL ANNUAL DISBURSEMENTS:		2,384.50	0.00
TOTAL ESCROW PAYMENT:		198.70	523.05

The amounts above are based on either an estimate previously provided or the amount last disbursed.

New Payment Amount:
New Payment Effective:
Next Scheduled Analysis:1,465.14
SEPTEMBER 01, 2012
SEPTEMBER 01, 2013Payment change:
Escrow

New	Prior Analysis
198.70	523.05

Total
Principal/Interest:
Total Payment

198.70	523.05
1,266.44	1,266.44
1,465.14	1,789.49

For details about the difference between the old and new payment amounts, please reference the ESTIMATED AMOUNT(S) OF NEXT DISBURSEMENT and AMOUNT(S) USED IN PRIOR ANALYSIS columns listed above.

Any questions regarding changes in the "Estimated Amount of Next Disbursement" should be directed to your Tax Authority and/or Insurance Company.
To reach our insurance department call: 1-800-256-9962.

If you are utilizing a military allotment, or third-party company to make payments on your behalf, please notify your service of any payment changes.

UNRELEASED SURPLUS NOTICE**GMAC**
Mortgage

SHELLEY VON BRINCKEN

THIS IS NOT A CHECK

Account Number	Surplus Amount
[REDACTED] 7759	6,667.50

SHELLEY VON BRINCKEN

Dear Homeowner(s):

As you know, we are the servicer for your mortgage loan. We maintain an escrow account for your loan. Part of your monthly payment is an escrow payment. We use that money to pay your escrow items. These items may include property taxes, hazard insurance, ground rents and other expenses as described in your mortgage contract.

The amount of your escrow payment depends upon the way we classified your contract. We have classified your contract as a "One Sixth Aggregate Cushion Contract." Under this kind of contract, we have estimated the amount of your future bills for escrow items. We have projected your account balance for the next year. Your projected account balance will fall to 1/6 of the total amount of your escrow bills at least once during the projected year. For example, if your estimated bills for escrow items total \$2400, your projected account balance should drop to at least \$400 (1/6 of \$2400) during the projected year following the analysis. Actual results will often differ from the projections. Differences in amounts will be considered in your next escrow analysis.

We may improperly classify a few contracts. If you believe that we have incorrectly classified your contract, contact us at the phone number or address listed below.

If you have any questions concerning your escrow analysis, please contact us at the phone number or address listed below.

GMAC Mortgage
3451 Hammond Ave.
P.O. Box 780
Waterloo, IA 50704-0780
1-800-766-4622 (Toll Free Number)

Very truly yours,

GMAC Mortgage
Escrow Analysis Department

Dear Valued Customer(s),

We recently analyzed your escrow account and found a surplus. The amount of the surplus is indicated in Section 3 of the Escrow Analysis Statement. This means there was more money in your account than we anticipate we will need to pay your estimated future escrow bills and maintain the cushion permitted by your contract. Shortly, you will receive a new monthly remittance statement based upon this new analysis.

Your escrow analysis was based on our estimate of your future escrow bills. We usually cannot determine the exact amount of these bills. Therefore, you could have either a shortage or a surplus when we do your next escrow analysis.

We are offering you **4 options** for the refund check:

1. Cash the check.

If you choose to cash the surplus check you do not need to return the attached coupon.

2. Apply the surplus to your escrow account.

You may return the check or a portion of the check and request we apply the money to your escrow account. If you choose this option, the surplus will be used to lower your next 12 payments, starting with the effective date of your new analysis.

3. Apply the surplus to your mortgage payments.

You may return the check or a portion of the check and request to have the money applied toward your mortgage payments. This will reduce or satisfy one or more of your total monthly payments. We would like to ask that if the surplus check does not fulfill your entire mortgage payment, please enclose additional funds to insure that we receive the exact amount of your monthly payment. This is done to insure the proper application of funds.

4. Apply the surplus to your outstanding principal balance.

You may return the check or a portion of the check and request the money be applied to your outstanding principal balance. This may reduce the number of months you repay your loan, however, it will not reduce your monthly payment.

If you choose **Option 1**, you need not contact us.

If you choose **Option 2, 3, or 4**, we ask that you please:

COMPLETE THE ATTACHED COUPON AND MAIL WITH THE SURPLUS CHECK AND ANY ADDITIONAL FUNDS TO US AT THE ADDRESS BELOW.

SEND TO:

**Attention: Escrow Analysis
PO Box 780
Waterloo, IA 50704-0780**

ACCT # _____

OPTION # _____

(COUPON MUST ACCOMPANY ESCROW SURPLUS CHECK)

EXHIBIT 1

680-2020-1002F

CUT HERE <-----

YOUR ESCROW ANALYSIS

If we are maintaining a reserve account for the payment of taxes, insurance premiums, and/or other escrow items, a portion of your mortgage payment is deposited into your Escrow/Impound account. Should your estimated or actual bills for taxes, insurance, and/or other escrow items go up or down, the amount we collect may be too little or too much to pay the anticipated bills. Therefore, we analyze your escrow account each year to adjust for the difference.

Your escrow account is maintained on an aggregate balance basis. This means that we calculate the amount of your required escrow payment based upon the lowest balance expected to occur within the 12-month period beginning with the effective payment change date for your escrow analysis. The anticipated lowest balance is determined through a running trial balance of the expected escrow receipts and disbursements in which the anticipated balance at the end of each month is noted. Your mortgage contract indicates what the maximum permitted low balance should be.

Your escrow payment will be equal to 1/12 of the anticipated total escrow disbursements plus a pro-rata portion of any shortage determined to exist if the lowest escrow balance in the running trial balance is less than the maximum permitted low balance. Shortages are usually a result of estimated or actual increases in taxes and/or insurance premiums, and/or the maintenance of any cushion authorized by your mortgage contract.

The effective date of your escrow analysis is the date on which the change in your payment takes effect.

THE FOLLOWING EXPLANATION IS PROVIDED TO ASSIST YOU IN UNDERSTANDING YOUR ESCROW ANALYSIS STATEMENT.

Section 1:

The “**DESCRIPTION**” identifies each escrow item that we will be paying.

The “**NEXT DUE DATE**” is the date by which the bill for each escrow item must be paid.

The “**ESTIMATED AMOUNT(S) OF NEXT DISBURSEMENT**” are the anticipated amount(s) for the next bill(s) for each escrow item.

The “**AMOUNT(S) USED IN PRIOR ANALYSIS**” are the corresponding amount(s) used in your prior escrow analysis.

Section 2:

The “**ANALYSIS TYPE**” indicates how we have classified your mortgage contract for escrow analysis purposes. It specifies the percentage, if any, of the total projected disbursements that we used to determine the maximum permitted low point for your escrow account.

The “**PROJECTED ESCROW BALANCE**” is the projected balance in your account as of the effective date of the analysis.

The “**ANTICIPATED LOW POINT FOR ANALYSIS PERIOD**” is the lowest balance anticipated to be in your escrow account during the 12 month period beginning with the effective date of the analysis.

The “**MAXIMUM PERMITTED LOW POINT**” is the maximum balance that can be projected to be in your account at its lowest point during the period covered by the escrow analysis. This balance is determined by our classification of your mortgage contract.

Section 3:

The “**SURPLUS**” is the amount by which the Anticipated Low Point exceeds the Maximum Permitted Low Point For Analysis Period.

The “**SHORTAGE**” is the amount by which the Maximum Permitted Low Point exceeds the Anticipated Low Point For Analysis Period.

1 **31**

2 Holly S. Burgess (SBN 104757)
3 LAW OFFICES OF HOLLY S. BURGESS
4 680 Auburn Folsom Road, Suite 109
5 Auburn, CA 95603
6 530-889-8900
7 530-820-1526 fax
8 hollyburgess@lohsb.com

9 Attorney for Plaintiff
10 SHELLEY von BRINCKEN

11 THE UNITED STATES DISTRICT COURT
12 THE EASTERN DISTRICT OF CALIFORNIA
13 SACRAMENTO DIVISION

14 SHELLEY von BRINCKEN,

15 Plaintiff,

16 vs.

17 MORTGAGECLOSE.COM, INC.;
18 CALIFORNIA LAND COMPANY OF NEVADA
19 COUNTY;
20 EXECUTIVE TRUSTEE SERVICES, dba ETS
21 SERVICES, LLC;
22 MORTGAGE ELECTRONIC REGISTRATION
23 SYSTEMS, INC.;
24 GMAC MORTGAGE, INC.; and
25 DOES 1-20, inclusive,

26 Defendants.

) CASE NO: 2:10-CV-02153-JAM-KJN

)
) **SECOND AMENDED**
) **COMPLAINT FOR:**

-) 1. VIOLATION OF HOMEOWNERS
) EQUITY PROTECTION ACT;
) 2. VIOLATIONS OF REAL ESTATE
) SETTLEMENT PROCEDURES ACT;
) 3. VIOLATIONS OF TRUTH IN
) LENDING ACT;
) 4. VIOLATIONS OF FAIR CREDIT
) REPORTING ACT;
) 5. FRAUDULENT MISREPRESENTA-
) TION;
) 6. BREACH OF FIDUCIARY DUTIES;
) 7. UNJUST ENRICHMENT;
) 8. CIVIL CONSPIRACY;
) 9. CIVIL RICO VIOLATIONS;
) 10. QUIET TITLE
) 11. USURY AND FRAUD;
) 12. WRONGFUL FORECLOSURE;
) 13. BREACH OF SECURITY
) INSTRUMENT
)

) **PLAINTIFF DEMANDS A JURY**
) **TRIAL**

27 **PARTIES**

28 1. Plaintiff is SHELLEY von BRINCKEN ("Plaintiff" or "von BRINCKEN"), an
individual who is the owner of 14738 Wolf Road, Grass Valley, California, 95949 ("the Subject

1 Property"). The legal description of the Subject Property is fully described in **Exhibit "A"**, attached
2 hereto and incorporated herein by reference, APN: 55-060-34

3 2. Defendant, MORTGAGECLOSE.COM, INC. ("MORTGAGECLOSE") is a
4 corporation, incorporated in Pennsylvania, whose address is 635 Swedesford Road, Malvern, PA
5 19355, and was engaged in business as a bank and/or a private lender, and/or servicer of mortgage
6 loans in the county of Nevada, California.

7 3. Defendant GMAC MORTGAGE, LLC, ("GMAC") is a wholly owned subsidiary of
8 Ally Financial Inc., whose corporate headquarters is in Fort Washington, PA, and on information and
9 belief, at all times mentioned in this Complaint was engaged in the business of title insurance,
10 banking services, including foreclosure, and acting as trustee for banks, mortgage holders and lien
11 holders in the county of Nevada, California.

12 4. Defendant, EXECUTIVE TRUSTEE SERVICES, dba ETS SERVICES, LLC
13 ("ETS") a division of GMAC Mortgage, LLC, on information and belief, at all times mentioned in
14 this Complaint was engaged in the business of banking services, including foreclosure, and involved
15 in the acquisition, purchase, sale, securitization, and servicing of residential mortgages in the county
16 of Nevada, California.

17 5. Defendant CALIFORNIA LAND COMPANY OF NEVADA COUNTY
18 ("CALIFORNIA LAND") is a California corporation, whose business address is 464 Brunswick
19 Road, Grass Valley, CA 95945, and who on information and belief, at all times mentioned in this
20 Complaint was engaged in the business of title insurance, banking services, including foreclosure,
21 and acting as trustee for banks, mortgage holders and lien holders in the county of Nevada,
22 California.

23 6. Defendant MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,
24 ("MERS") at all times relevant herein was incorporated in the state of Delaware, with its principal
25 place of business in Reston, Virginia. MERS was conducting business including, but not limited to,
26 operating a database, assigning mortgages (specifically including an attempt to assign the subject
27
28

1 mortgage herein) in violation of California Corporations Code section 191(d).

2 7. Defendant FEDERAL NATIONAL MORTGAGE ASSOCIATION ("FNMA"),
3 commonly referred to as "Fannie Mae," is a stockholder-owned corporation, chartered as a government
4 sponsored enterprise.

5 8. Defendant FANNIE MAE GUARANTEED PASS-THROUGH CERTIFICATES
6 SERIES 2007-036 ("FANNIE MAE TRUST"), is an unregistered entity in California, based on
7 information and belief, was at all relevant times mentioned herein, was a pooling and servicing trust
8 of mortgages, in which the subject mortgage and property were placed. Based on information and
9 belief, FANNIE MAE TRUST is or was the holder of the subject mortgage note.

10 9. Defendants DOES 1-10 are believed to be the current beneficiaries of the Deed of
11 Trust, if the lien has not been extinguished by operation of law.

12 10. Plaintiff does not know the true names, capacities, or basis of liability of Defendants
13 sued as Doe 1 through Doe 20. Each fictitiously named Defendant is in some manner liable to
14 Plaintiff, claims some right, title, or interest in the Subject Property, or both.

15 11. At all times relevant to this Complaint, each of the Defendants was the agent or
16 employee of each of the remaining Defendants, and was acting within the course and scope of such
17 agency or employment.

18 12. Plaintiff does not know the true names, capacities, or basis for liability of Defendants
19 sued as Doe 1 through Doe 10, i.e., the Beneficiaries. Each fictitiously named Defendant is in some
20 manner liable to Plaintiff, claims some right, title, or interest in the Subject Property, or both.

21 13. At all times relevant to this Complaint, each of the Defendants was the agent or
22 employee of each of the remaining Defendants, and was acting within the course and scope of such
23 agency or employment.

24 **JURISDICTION**

25 14. Pursuant to 28 U.S.C.A. §1331, this court has original jurisdiction based on the laws of
26 the United States, as alleged herein.

27 15. Pursuant to 28 U.S.C. §1367(a), this court has supplemental jurisdiction over the
28 related state court claims.

1 **FACTS COMMON TO ALL CAUSES OF ACTION**

2 16. Not only is the Plaintiff the victim of fraud, unlawful and predatory lending and an
3 underlying conspiracy to commit fraud, but Ms. BRINCKEN is also facing the pending loss of her
4 home through foreclosure initiated and advanced by Defendants in violation of the notice and
5 standing requirements of California foreclosure law.

6 17. In addition, the challenged foreclosure is based upon a Deed of Trust and a Note in the
7 mortgage that is no longer held by the same entity or party. Further, the foreclosure is based upon a
8 Deed of Trust that was flawed at the date of origination of the loan. The "lender" on the Deed of
9 Trust, MORTGAGECLOSE was not the actual lender or source of the monies that funded the loan.
10 The money to fund the loan came from investors. MORTGAGECLOSE acted merely as a broker for
11 the purpose of obtaining Plaintiff's signature on loan documents and, therefore, MORTGAGECLOSE
12 was merely the servicer of the loan, but never the lender or owner of the beneficial interest in the
13 Deed of Trust or the obligation purportedly secured thereby. MERS was named as nominee of the
14 "Lender" MORTGAGECLOSE and as beneficiary on the Deed of Trust, but MERS was not the true
15 beneficiary; and the "Lender," on whose behalf MERS was named as "nominee," was not the true
16 lender.

17 In this case, foreclosure and a Trustee's Deed Upon Sale have been filed. The
18 foreclosing entity ETS filing the foreclosure is a third party and has no pecuniary interest in the
19 mortgage loan. The entity lacks standing and the capacity to foreclose. The entity has no firsthand
20 knowledge of the loan, no authority to testify or file affidavits as to the validity of the loan documents
21 or the existence of the loan. The entity has no legal authority to draft mortgage assignments relating
22 to the loan. The foreclosing entity and its agents regularly commit perjury in relation to their
23 testimony.

24 17. MORTGAGECLOSE, the lender on the original Promissory Note was not the lender.
25 On information and belief, the "lender" MORTGAGECLOSE did not actually loan Plaintiff any
26 money. The true originators of the loan immediately and simultaneously securitized (allegedly) the
27 note through the means of conversion of an Article III negotiable Instrument (U.C.C.) into Article IX
28 (U.C.C.), non-negotiable paper. The beneficial interest in the Note was never in the lender. In this

1 case ETS has declared a default and is not in privity with the lender. The true owner (s) or
2 beneficiary(s) of the mortgage loan has not declared a default, cannot declare a default under its Trust
3 Agreement, and does not have an interest in the Note that allows for any remedial actions to be
4 undertaken by the Beneficial Interest Holder(s).

5 18. The obligations reflected by the Note (allegedly secured by MERS's assignment of
6 the MORTGAGECLOSE Deed of Trust to ETS and ETS's assignment of the Deed of Trust to
7 FNMA as trustee for FANNIE MAE TRUST) have been satisfied in whole or in part because the
8 investors who furnish the funding for these loans have been paid to the degree that extinguishments
9 of the debts has occurred with the result that there exist no obligations on which to base any
10 foreclosure on the property owned by Plaintiff. Defendants have and continue to cloud the title and
11 illegally collect payments and attempt to foreclose upon the property of the Plaintiff when they do
12 not have lawful rights to foreclose, and are not holders-in-due-course of the notes.

13 19. The mortgage loan assigned to MERS, as nominee, is, at most, an unsecured debt.
14 The only parties entitled to collect on the unsecured debt would be the holder-in-due-course and
15 beneficial owner(s) of the original Promissory Note (the original "Lender of Record"), if the asset is
16 still booked as an asset and has not been sold and de-recognized as an asset under FASB 140. Those
17 unknown parties have not come forward in this case.

18 20. Certain individuals, who were the employees of the Servicer, ETS, executed and
19 notarized forged documents as to the ownership of the loan. The affiants have committed counts of
20 fraud, perjury and forgery of the mortgage loan.

21 21. Defendant ETS, represented itself as a "Trustee" coming to Court and are actually not
22 common law Trustees, rather, they are special Corporate Trustees with limited ministerial duties.
23 These rights, duties and obligations do not include any remedial actions as they relate to the assets of
24 the REMIC Trust. The Servicers, like ETS, are merely administrative entities, under limited power
25 of attorney, who collect the mortgage payments and escrow funds. The Servicer has no greater
26 power than its' Principal, the Trustee, and lacks the authority to bring any action on behalf of the
27 REMIC Trust. The Trust participants have executed Trust Agreements, under oath, with the Security
28 Exchange Commission ("SEC"), and the Internal Revenue Service ("IRS"), as mortgage asset "pass-

1 through" entities wherein they can never own or manage the mortgage loan assets in the REMIC
2 Trust. This allows them to qualify as a Tax Free Real Estate Mortgage Investment Conduit
3 ("REMIC") rather than an ordinary Real Estate Investment Trust ("REIT"). As long as the Trust is a
4 qualified REMIC, no income tax will be charged to the beneficial certificateholders.

5 22. Importantly, the "Trustee" or custodian, must have the mortgages recorded in the
6 investors name as the beneficiaries of the Trust within 90 days of the "closing date" (*IRS Rule 860D*
7 (*a*)(4)), as defined within the REMIC Trust Agreement. Every mortgage in the Trust should have
8 been publicly recorded in Nevada County where the property is located with a mortgage in the name
9 of this Trust, which would have had to been recorded in this case in 2009. No such recording
10 exists in the Nevada County records.

11 23. The Promissory Note was never conveyed pursuant to the Trust mandates and the
12 mortgages were never conveyed or recorded pursuant to the proper chain of custody and Assignment
13 within the Trust Agreement(s).

14 24. In this scenario, even if the foreclosing entity produces a copy of a note, or even an
15 alleged original, the mortgage loan was not conveyed into the Trust under the requirements of the
16 prospectus for the Trust or the REMIC requirements of the IRS. Mere possession of an Instrument
17 does not confer the status of a person entitled to enforce the Instrument.

18 25. Consequentially, the end result is that the required Trust asset, or any part thereof
19 (mortgage note or security interest), was not legally transferred to the Trust to allow the Trust to
20 ever be considered a "holder" of a mortgage loan. Neither the "Trust" nor the Servicers, GMAC or
21 ETS, would ever be entitled to bring a foreclosure or declaratory action. The Trust will never have
22 standing or be a real party in interest before this Court.

23 26. The transfer of mortgage loans into the Trust in which the Trustee after the "**cut off**
24 **date**" (in this case 2007), destroys the Trust's REMIC tax exempt status, and this Trust would owe
25 millions of dollars to the IRS and the State of California as the income would be taxed at one
26 hundred percent (100%), if the Court were to find in favor of the Defendant(s). Subsequent to the
27 "cut-off date" listed in the prospectus, whereby the mortgage notes and security for these notes had
28

1 to be identified, and the Note and Mortgages transferred, within 90 days, and thereafter, the pool is
2 permanently closed to future transfers of mortgage assets.

3 27. Defendants fraudulently conveyed Plaintiff's mortgage loan, which was fraudulently
4 recorded on or about January 23, 2009, in an attempt to transfer a Mortgage Assignment into a
5 REMIC after that REMIC's "cut off" and "closing dates".

6 28. Therefore, the lack of lawful acquisition of Plaintiff's mortgage loan violates the
7 prospectus presented to the investors and the IRS REMIC requirements.

8 29. Plaintiff signed a Promissory Note and Mortgage. She was unknowingly converting
9 her property into an alleged asset of a Trust, while her credit and signature was used to sell
10 securities, the profits of which were to be used to fund the predatory "loan", (unknownst to Debtor,
11 the loan papers were processed with an inflated appraisal and inflated income) without her consent
12 or knowledge of the terms and conditions of the contract. Under the controlling Trust documents, a
13 percentage of the homeowner's monthly payment stream was used as a guarantee. This guarantee
14 and payment under the guarantee has resulted in accounting documents that Plaintiff believes show
15 all payments have been made on Plaintiff's alleged obligation. A portion of Plaintiff's monthly
16 mortgage payment was used to insure and pay her alleged obligation without her knowledge or
17 consent and the payment is believed to be current. California Commercial Code §3602(a) and UCC
18 3-602(a) provide that an obligation paid is an obligation extinguished. Plaintiff was never informed
19 of the nature of the scheme. She was deliberately induced into signing a Negotiable Instrument
20 which was never intended as such, but intended as collateral for the sale of securities. Under the
21 terms of the typical Pooling and Servicing Agreement ("PSA"), her mortgage obligation has been
22 paid. Her alleged "default" is a fiction.

23 30. The fact that this "loan" was actually the proceeds from the sale of securities, and not
24 a loan as it is defined under the laws of California, was a "material disclosure" which was
25 deliberately and intentionally undisclosed. The failure to disclose the identity of the true lender at
26 closing was also a "material disclosure"; the nature of which would make the deed of trust void
27 under California contract law.

28

1 31. As required by SEC, this Trust has a PSA and must be publicly filed. The only
2 purpose for the PSA is for the administration and distribution of funds to the investors and the
3 obligation of the so called Trustee in administering the Trust. The investors who put up money for
4 the Trust and who received the securities certificates or Bonds, are purported to not be parties to the
5 PSA. However, under the Step Transaction Doctrine, as adopted by the Courts, these transactions
6 are interdependent of one another and interrelated and, therefore, fall under the scope of a "single
7 transaction", as defined by the Doctrine. The Borrowers and the Investors are the true Principals to
8 the transaction, with the only financial and pecuniary interest in the transaction(s).

9 32. The PSA merely sets forth what happens after the mortgages are bundled together.
10 However, the PSA also sets forth a **Cut Off Date**. The Cut off date is the date on which all mortgage
11 loans in the Trust must be identified and set out in the SEC required list of mortgage loans.

12 33. Like the cut off date, this Trust had a **Closing Date**. The Closing Date is the date that
13 the individually identified mortgages were to be transferred through the Custodian for the benefit of
14 the investors. The Trust Custodian must certify that for each mortgage loan, the Trust Custodian has
15 possession of the original Promissory Note, all original endorsements and assignments transferring
16 the Note and proof that the ownership of the Note has been lawfully transferred for the benefit of the
17 investors. Further proof of the ownership of a mortgage loan is required by a public recording of the
18 Mortgage or Assignment of the mortgage itself. This MUST have occurred by the closing date.

19 34. In this case, based upon information and belief, Plaintiff believes the Trust was
20 actually closed before the loan was finalized in late December 2009.

21 35. Whoever claims to be acting on behalf of the Trust and claims that it has acquired the
22 loan from MORTGAGECLOSE, was not the party in the original Deed of Trust. The multiple
23 transfers of title of the mortgage loan between the originator, MORTGAGECLOSE, The REIT
24 Trust, the Depositor and the REMIC Trust is simply ignored as it can never be proved or shown to
25 the Court. Chain of Mortgage assignment is broken as the assignees in the chain of title were never
26 the mortgagee of record under a Mortgage Assignment and have absolutely no legal tie to the
27 investors in the Trust.

28

36. The assignment of Plaintiff's mortgage was signed and notarized many years after the actual date of the "loan" and the date listed with the SEC and IRS as the "Closing" of the REMIC. In this case, if found to be true, this Trust has been operating illegally as a tax exempt REMIC.

37. On or about January 23, 2009, Plaintiff executed a written DEED of TRUST and security instrument, with MORTGAGECLOSE as the lender and CALIFORNIA LAND as the trustee. A copy of the DEED of TRUST is attached as **Exhibit "B"** and incorporated herein by reference. The DEED of TRUST and Security Instrument has never been transferred from MORTGAGECLOSE, to the foreclosing entity, ETS or GMAC. Plaintiff is informed and believes the Deed of Trust has been transferred to an unknown entity at the time of execution in January 2009, or was transferred to other unnamed entities and that the parties claiming a right or beneficial interest in the Deed of Trust, in fact have not legitimate claims, as more fully explored below, in the TWELFTH CAUSE OF ACTION for WRONGFUL FORECLOSURE.

38. All Defendants, if any of the Defendants has any interest in the Note and Deed of Trust (referred to collectively as "Mortgage"), are responsible and liable herein for all the actions of its predecessor-in-interest, the owner of the subject mortgage loan and the servicer/agent.

Chain of Title Problems

39. The chain of title is hopelessly confused and convoluted, with multiple entities claiming a pecuniary interest in the Subject Property. At the time of the Notice of Default, the recorded interests contradict the assertion that MERS or FNMA for FANNIE MAE TRUST was the foreclosing beneficiary, and reveal a slew of other illegal actions. Starting from the beginning, the chain of recordation is as follows:

<u>DATE</u>	<u>DOCUMENT</u>	<u>PARTIES</u>	
Dated 1/14/2009	NOTE Loan #0810219 [Attached as Exhibit "B"]	Lender:	Mortgageclose.Com, Inc. (NV)
		Borrower:	Shelley Von Brincken

<u>DATE</u>	<u>DOCUMENT</u>	<u>PARTIES</u>	
Dated 1/14/2009	NOTE Loan #0810219 [Attached as Exhibit "B"]	Lender:	Mortgageclose.Com, Inc. (NV)
		Borrower:	Shelley Von Brincken
Filed: 1/23/2009	DEED OF TRUST \$220,000 [Attached as Exhibit "B"]	Lender/Beneficiary:	Mortgageclose.Com, Inc. (NV)
		Borrower/Trustor:	Shelley Von Brincken
		Trustee:	California Land Title Company
		Nominee/beneficiary:	MERS
not filed Dated: 3/1/2009	Notice of Assignment, Sale or Transfer of Servicing Rights Loan #0810219 [Attached as Exhibit "C"]	Servicer:	Mortgageclose.Com, Inc.
		New Servicer:	[unnamed]
		Borrower:	Shelley Von Brincken
Dated: 3/17/2010	Borrower's Qualified Written Request [Attached as Exhibit "D"]	Borrower/Affiant:	Shelley Von Brincken
		Servicer/Addressee:	GMAC Mortgage
Dated: 3/30/2010	GMAC's First Response to Borrower's Qualified Written Request [Attached as Exhibit "E"]	Borrower/Affiant:	Shelley Von Brincken
		SubServicer/Sender:	GMAC Mortgage
		Master Servicer:	FNMA
		Loan owner:	FNMA
Dated: 4/16/2010	Borrower's Notice of Exercising Right to Cancel "Rescission Letter" [Attached as Exhibit "F"]	Borrower/Affiant:	Shelley Von Brincken
		Addressees:	Mortgageclose.com; GMAC Mortgage; California Land Title Company; MERS

DATE	DOCUMENT	PARTIES	
Filed: 4/28/2010	SUBSTITUTION OF TRUSTEE [Attached as Exhibit "G"]	Trustor:	Shelley Von Brincken
		Orig Trustee:	California Land Title Company of NV County
		Orig Beneficiary:	MERS as nominee for Mortgageclose.Com, Inc.
		New Trustee:	Executive Trustee Services, LLC dba ETS Services, LLC
		Signer:	MERS Donna Fitton, Assistant Secretary
		DATE:	4/27/2010
Filed: 4/28/2010	NOTICE OF DEFAULT & ELECTION TO SELL UNDER DEED OF TRUST ** NO Notarized Declaration of Compliance ** [Attached as Exhibit "H"]	Trustor:	Shelley Von Brincken
		Beneficiary:	unnamed
		Contact to stop foreclosure	MERS c/o ETS Services, LLC
		undersigned:	ETS Services, LLC as Agent for beneficiary By Maricela Miseroy, Trustee Sale Officer
		DATE signed:	4/27/2010
Dated: 5/4/2010	GMAC's Second Response to Borrower's Qualified Written Request [Attached as Exhibit "I"]	Borrower/Affiant:	Shelley Von Brincken
		SubServicer/Sender:	GMAC Mortgage
		Master Servicer:	FNMA
		Loan owner:	FNMA
Dated 5/5/2010	DEBT VALIDATION NOTICE [Attached as Exhibit "J"]	Creditor:	MERS
		Sender:	ETS Services, LLC
Filed: 8/6/2010	NOTICE OF TRUSTEE'S SALE Loan #0602227759 Sale Date: August 19, 2010 [Attached as Exhibit "K"]	Trustor:	Shelley Von Brincken
		Trustee:	ETS Services, LLC
		Signer:	ETS Services, LLC Ileanna Petersen, Trustee Sale Officer
		DATE:	7/28/2010

DATE	DOCUMENT	PARTIES	
Filed: 8/11/2010	LIS PENDENS [Attached as Exhibit "L"]	Plaintiff:	Shelley Von Brincken
		Defendants:	Mortgageclose.Com, Inc.; Executive Trustee Services, LLC dba ETS Services, LLC
Filed: 9/10/2010	TRUSTEE'S DEED UPON SALE & Acknowledgement of COMPLIANCE Sold on 8/31/2010 Sale price \$186,904.72 Loan #0602227759 [Attached as Exhibit "M"]	Grantor	Executive Trustee Services, LLC dba ETS Services, LLC, as Trustee
		Grantee:	"The Foreclosing Beneficiary" Federal National Mortgage Association (FNMA)
		Trustee:	Executive Trustee Services, LLC dba ETS Services, LLC
		Trustor:	Shelley Von Brincken
		Acknowledgement Signer:	Executive Trustee Services, LLC dba ETS Services, LLC, as Trustee By Kathleen Gowen, Limited Signing Officer
		DATE:	9/3/2010
Dated 10/27/2010	Letter to advise borrower that Fannie Mae is current owner of borrower's LOAN and GMAC is the LOAN servicer [Attached as Exhibit "N"]	Borrower:	Shelley Von Brincken
		Beneficiary:	Fannie Mae (FNMA)
		Servicer:	GMAC Mortgage, LLC

40. On or about March 1, 2009 Defendant MORTGAGECLOSE provided Plaintiff with a Notice of Assignment, Sale or Transfer of Servicing Rights dated January 14, 2009 ("Notice of Assignment"). The Notice of Assignment states that MORTGAGECLOSE is the servicer of Plaintiff's mortgage loan, not the beneficiary. It further states that it is transferring the servicing of mortgage loan to a new servicer, however, the new servicer's name was not provided. This is contrary to the Deed of Trust, paragraph 20 that requires written notice that states the name and address of the new servicer. This indicative of Defendants' pattern of breaches and nondisclosure of

1 required information.

2 41. On or about March 17, 2010, Plaintiff sent a Qualified Written Request ("QWR") to
3 Defendant GMAC regarding her mortgage loan. GMAC sent a reply dated March 30, 2010, stating
4 that it is the subservicer of her account and that FNMA is both the Master Servicer and the owner of
5 Plaintiff's mortgage. However, contrary to California Civil Code Section §2932.5, no assignment of
6 the security interest from the purported Lender Mortgageclose.Com to FNMA was ever "duly
7 acknowledged and recorded" in California. Compliance with this code is required in other for an
8 assignee to have the power of to sell Plaintiff's property. Thus, FNMA wrongly foreclosed and
9 ordered the sale of Plaintiff's Property. A copy of GMAC's March 30, 2010 reply letter is attached
10 as **Exhibit "C"**.

11 42. To further contradict Defendants' assertions, Defendant GMAC sent a second reply to
12 Plaintiff's QWR, dated May 4, 2010. The reply is addressed to Plaintiff von BRINCKEN, but bears
13 the greeting "Dear Ms. Gottesburen." This second reply, contrary to Defendant GMAC's first reply,
14 states on page 2, item #6 that Plaintiff's Loan is registered with MERS and "therefore, there are no
15 assignments." A copy of GMAC's May 4, 2010 reply letter is attached as **Exhibit "G"**.

16 Defendant GMAC's second reply letter also answers most of Plaintiff's questions with
17 the statement: "Subject to business and trade practices which are proprietary and confidential." This
18 further demonstrates Defendants' pattern of nondisclosure of required information.

19 43. On or about April 16, 2010, Plaintiff sent a letter to the purported Lenders of her mortgage
20 loan and their agents (Mortgageclose, GMAC, California Land, and MERS) to advise them that she
21 was exercising her right to rescind the loan ("Plaintiff's Rescission Letter"). Plaintiff's letter also
22 advised Defendants that they violated TILA by failing to provide her with a "Notice of Right to
23 Cancel." Plaintiff's Rescission Letter detailed her claims against the Defendants. Plaintiff further
24 advised Defendants that their omission extended the deadline by which the Lender must accept a
25 valid offer to rescind the loan, to three years after the consummation of the loan. The loan was
26 consummated on or about January 14, 2009, and Plaintiff sent her Rescission Letter on or about
27 April 16, 2009. Thus, Plaintiff timely sent her Rescission Letter to Defendants. Plaintiff's rescission
28 pursuant to 12 C.F.R. § 226.23(d)(1) caused Defendants' security interest to become void and

1 Plaintiff is not liable for any amount. Plaintiff's Letter is attached as **Exhibit "D"**.

2 44. Defendants neither responded nor took possession of Plaintiff's tender within 20 calendar
3 days as required by 12 C.F.R. § 226.23(d)(3). Thus, Plaintiff may keep the Subject Property without
4 further obligation, as provided by 12 C.F.R. § 226.23(d)(3).

5 45. The Notice of Default (NOD), recorded on April 28, 2010, signed By "Maricela Miseroy,
6 Trustee Sale Officer", without stating any corporate *signatory* capacity as required by Corporations
7 Code 313 whatsoever. The NOD was signed by ETS, which purports to be an agent "for the
8 beneficiary" who is unnamed. Additionally, there is no notarized Declaration of Compliance
9 attached to the NOD as required by California Civil Code 2923.5. As the NOD is non-compliant with
10 California law, it is therefore invalid, should be stricken from the Official Records, the document
11 expunged, and the Sale of the Subject Property should be set aside by the court. The NOD is attached
12 as **Exhibit "F"**.

13 46. The Debt Validation Notice (dated May 5, 2010) alleges that MERS is the creditor to whom
14 Plaintiff owes the debt under the Note and Deed of Trust. Again, this is contrary to GMAC's first
15 reply letter and to the Trustee's Deed Upon Sale, which purport that FNMA is the beneficiary of
16 Plaintiff's mortgage loan. However, neither MERS nor FNMA were validly assigned a security
17 interest in Plaintiff's mortgage loan.

18 47. Notice of Trustee's Sale, filed dated September 3, 2010, is also fatally defective. It was
19 signed by ETS, citing that it received a written Declaration of Default from the original beneficial
20 interest holder under the Deed of Trust. This was false as the NOD was filed by OLD REPUBLIC
21 DEFAULT MANAGEMENT SERVICES, when MORTGAGECLOSE was the original lender and
22 beneficial interest holder. (See **Exhibit F** Notice of Default). The Notice is utterly void, ultra vires,
23 powerless and without legal validity, for the reasons stated already. The Notice of Trustee's Sale is
24 attached as **Exhibit "I"**.

25 **Separate Failure to Resolve Prior to Sale**

26 48. Plaintiff called the purported lender/servicer of the subject mortgage to advise about
27 her financial situation and to request assistance in the form of a repayment plan or other
28

1 modification relief designed to avoid foreclosure and the loss of her home.

2 49. Despite Plaintiff's efforts, the purported lender/servicer failed, refused and/or
3 neglected to work with Plaintiff in any reasonable way to avoid foreclosure during the time of her
4 financial difficulties.

5 50. Instead, the purported lender/servicer secretly was transferring the Deed of Trust and
6 then has attempted to foreclose, without notice to Plaintiff.

7 51. The purported lender/servicer failed, refused and/or neglected to disclose to Plaintiff
8 what options were available to the Plaintiff, to avoid foreclosure and the loss of her home.

9 52. As a result, Plaintiff was not provided with the specialized assistance and default loan
10 servicing that the lender/servicer was obligated to provide that comported with Plaintiff's ability to
11 pay and that served to assist Plaintiff in her efforts to avoid the default and the acceleration of the
12 subject mortgage debt and foreclosure.

13 53. Defendant failed, refused and/or neglected to evaluate the particular circumstances
14 surrounding Plaintiff's claimed default; failed to evaluate Plaintiff or the subject property; failed to
15 determine Plaintiff's capacity to pay the monthly payment or a modified payment amount; failed to
16 ascertain the reason for Plaintiff's claimed default, or the extent of Plaintiff's interest in keeping the
17 Subject Property.

18 54. The Defendants failed, refused and/or neglected to give this Plaintiff the opportunity
19 to cooperate in resolving the debt.

20 55. The Defendants purposefully deceived Plaintiff that the Mortgage modification was
21 proceeding as planned and deceptively and purposefully wrongfully foreclosed on Plaintiff's
22 property.

23 **FIRST CAUSE OF ACTION**

24 **Violations of the Home Ownership Equity Protection Act**
25 **(As to All Defendants and DOES)**

26 56. Plaintiff reaffirms and re-alleges the above paragraphs 1 through 52 herein above as if set
27 forth more fully herein below.

28 57. In 1994, Congress enacted the Home Ownership Equity Protection Act, (HOEPA) which is
codified at 15 USC §1639 et. seq. With the intention of protecting homeowners from predatory

1 lending practices targeted at vulnerable consumers. HOEPA requires lenders to make certain
2 disclosures and prohibits certain terms from being included in home loans. In the event of
3 noncompliance, HOEPA imposes civil liability for precision and statutory and actual damages.

4 58. Plaintiff is a "consumer" and each Defendant is a "creditor" as defined by HOEPA. In the
5 mortgage loan transaction at issue here, Plaintiff was required to pay excessive fees, expenses, and
6 costs which exceeded more than 10% of the amount financed.

7 59. Pursuant to HOEPA and specifically 15 USC §1639 (A.) (1), each Defendant is required to
8 make certain disclosures to Plaintiff which are to be made conspicuously and in writing no later than
9 three (3) days prior to the closing.

10 60. In the transaction at issue, Defendants are required to make the following disclosures to
11 Plaintiff by no later than three (3) days prior to said closing:

12 "You are not required to complete this agreement merely because
13 you have received these disclosures or have signed a loan
14 application. If you obtain this loan, the lender will have a mortgage
15 on your home. You could lose your home and any money you have
16 put into it, and if you do not meet your obligation under the loan."

17 61. Defendants violated HOEPA to help up by numerous acts and material omissions, including
18 but not limited to:

- 19 A. Failing to make the foregoing disclosures in the conspicuous fashion;
20 B. Engaging in a pattern and practice of extending credit to Plaintiff without regard to
21 her ability to pay and violation of 15 USC§ 1639

22 62. By virtue of the Defendants' multiple violations of HOEPA, Plaintiff has a legal right to
23 resend the consumer credit transaction the subject of this action pursuant to 15 USC§1635. This
24 complaint is to be construed, for these purposes, as formal and public notice of Plaintiff's notice and
25 precision of the mortgage and note.

26 63. Defendants further violated HOEPA by failing to make an additional disclosure, including
27 but not limited to, Plaintiff's not receiving the required disclosure of the right to rescind the
28 transactions;

1 64. Defendants failed to provide accurate TILA disclosures and understated the amount being
2 financed.

3 65. As a direct consequence of, and in connection with, Plaintiff's legal and lawful exercise of
4 her right of rescission, the true "owner" is required, within twenty (20) days of the notice of
5 rescission, to:

- 6 A. Desist from making any claims for finance charges in the transaction;
- 7 B. Return all monies paid by Plaintiff in connection with the transaction to the
8 Plaintiff;
- 9 C. Satisfy all security interests, including mortgages, which were required in the
10 transaction.

11 66. Upon the true "lender's" full performance of its obligations under HOEPA, Plaintiff shall
12 tender all sums to which the true lender is entitled.

13 67. Based on Defendants HOEPA violations, each of the Defendants is liable to the Plaintiff for
14 the following, which Plaintiff demands as a relief:

- 15 A. Rescission of the mortgage loan transaction;
- 16 B. Termination of the mortgage and security interest in the property the subject
17 of the mortgage loan documents created in the transactions;
- 18 C. Return of any money or property paid by Plaintiff including all payment made
19 in connection with the transaction;
- 20 D. The amount of money equal to twice the finance charge in connection with
21 the transactions;
- 22 E. Relinquishment of the right to retain any proceeds; and
- 23 F. Actual damages in an amount to be determined at trial, including, attorney's
24 fees.

25 68. Because it is not clear who was actually in interest at the time of the actions described below,
26 Plaintiff alleges this Cause of Action in the alternative against each of the possible parties at fault.
27 Unless otherwise indicated, allegations will be lodged against "Defendant Actually in Interest, If
28

1 any” for the purposes of this pleading, which will be amended upon discovery of which Defendant,
2 on information and belief, if it was one of the defendants named.

3 69. This Cause of Action is pled in the alternative to the more likely allegation that the Note has
4 become an ownerless “phantom note” and litigation is necessary to determine who, if anyone has
5 any right, under what transfer agreement, if any.

6 70. Plaintiff first learned of the actions of Defendants, including their failure to disclose and the
7 fraud committed upon her in November of 2009. Any applicable statute of limitations should run
8 from this date.

9
10 **SECOND CAUSE OF ACTION**
11 **Violations of Real Estate Settlement Procedures Act**
12 **(As to All Defendants and DOES)**

13 71. Plaintiff reaffirms and re-alleges paragraphs 1 through 70 herein as if specifically set forth
14 herein below.

15 72. As mortgage lenders, Defendants are subject to the provisions of the Real Estate Settlement
16 Procedures Act (“RESPA”), 12 USC §2601 et. seq.

17 73. In violation of 12 USC §2607 and in connection with the mortgage loan to Plaintiff,
18 Defendants accepted charges for the rendering of real estate services which were in fact charges for
19 other than services actually performed.

20 74. As a result of the Defendants violations of RESPA, Defendants are liable to Plaintiff in an
21 amount equal to three (3) times the amount of charges paid by Plaintiff for "settlement services"
22 pursuant to 12 USC §2607 (d) (2).

23 75. Plaintiff first learned of the actions of Defendants, including their failure to disclose and the
24 fraud committed upon her in November of 2009. Any applicable statute of limitations should run
25 from this date.

26 **THIRD CAUSE OF ACTION**
27 **Violations of Truth In Lending Act**
28 **(As to All Defendants and DOES)**

76. Plaintiff reaffirms and re-allege paragraphs 1 through 75 above herein as if set forth fully
below.

1 77. Defendants failed to include and disclose certain charges in the finance charge shown on the
2 TILA statement, which charges were imposed on Plaintiff incident to the extension of credit to
3 Plaintiff and were required to be disclosed pursuant to 15 USC §1605 and Regulation Z §226.4, thus
4 resulting in an improper disclosure of financial charges in violation of 15 USC §1601 et seq.,
5 Regulation Z §226.18(d). Such undisclosed charges included some identified on the settlement
6 statement listing the amount financed which is different from the sum listed in the original Note.

7 78. By calculating the annual percentage rate ("APR") based upon improperly calculated and
8 disclosed amounts, Defendants are in violation of 15 USC §1601 et seq., Regulation Z §226.18 (c),
9 18(d), and 22.D

10 79. Defendants' failure to provide the required disclosures provides Plaintiff with the right to
11 rescind the transaction, and Plaintiff, through this public complaint which is intended to be
12 construed for purposes of this claim as a formal notice of rescission, hereby elects to rescind the
13 transaction.

14 80. Plaintiff first learned of the actions of Defendants, including their failure to disclose and the
15 fraud committed upon her in November 2009. Any applicable statute of limitations should run from
16 this date.

17 **FOURTH CAUSE OF ACTION**
18 **Violations Of Fair Credit Reporting Act**
19 **(As to All Defendants and DOES)**

20 81. Plaintiff reaffirms and re-alleges paragraphs 1 through 80 above as if set forth fully herein
21 below.

22 82. At all times material, Defendants qualified as a provider of information to the Credit
23 Reporting Agencies, including but not limited to Experian, Equifax and Trans Union, under the fair
24 credit reporting act. Defendants wrongfully, improperly, and illegally reported negative information
25 as to the Plaintiff to one or more credit reporting agencies, resulting in Plaintiff's having negative
26 information on her credit reports and the lowering of her FICO scores.

27 A. The negative information included but was not limited to an excessive amount
28 of debt into which Plaintiff was tricked into seed into signing;

B. Notwithstanding the above, Plaintiff has paid each and every payment on time

1 from the time of the closing of the loan and until Plaintiff's default.

2 83. Pursuant to 15 USC §1681 (s) (2) (b), Plaintiff is entitled to maintain a private cause of
3 action against Defendants for an award of damages in an amount to be proven at the time of trial for
4 all violations of The Fair Credit Reporting Act which caused actual damages to Plaintiff, including
5 emotional distress and humiliation.

6 84. Plaintiff is entitled to recover damages from Defendants for negligent non-compliance with
7 The Fair Credit Reporting Act pursuant to 15 USC§1681(n)(a)(2) in an amount to be proven at the
8 time of trial.

9 85. Plaintiff first learned of the actions of Defendants, including their failure to disclose and the
10 fraud committed upon her in November of 2009. Any applicable statute of limitations should run
11 from this date.

12 **FIFTH CAUSE OF ACTION**
13 **Fraudulent Misrepresentation**
14 **(As to All Defendants and DOES)**

15 86. Plaintiffs reaffirm and re-allege paragraphs 1 through 85 above as if set forth fully herein
16 below.

17 87. Defendants knowingly and intentionally concealed material information from Plaintiff which
18 is required by federal and state statutes and regulations to be disclosed to the Plaintiff both before
19 and after closing.

20 88. Defendants also materially misrepresented material information to Plaintiff with Defendants'
21 full knowledge that their affirmative representations were false, fraudulent, and misrepresented the
22 truth at the time said representations were made.

23 89. Under the circumstances, the Defendants' material omissions of material misrepresentations
24 were malicious.

25 90. Plaintiff, not being an investment banker, securities dealer, mortgage lender, or mortgage
26 broker, reasonably relied upon the representations of the Defendants in agreeing to execute the
27 mortgage loan documents.

28 91. Had Plaintiff known of the falsity of Defendants' representations, Plaintiff would not have
entered into the transaction that is the subject of this action.

1 92. As a direct and proximate cause of Defendants' material omissions and material
2 misrepresentations, Plaintiff has suffered damages, all according to proof at trial.

3 93. Plaintiff first learned of the actions of Defendants, including their failure to disclose and the
4 fraud committed upon her in November of 2009. Any applicable statute of limitations should run
5 from this date.

6 **SIXTH CAUSE OF ACTION**

7 **Breach Of Fiduciary Duty**

8 **(As to All Defendants and DOES)**

9 94. Plaintiff reaffirms and re-alleges paragraphs 1 through 94 above as if set forth fully herein
10 below.

11 95. Defendants, by their actions and contracting to provide mortgage loan services and a loan
12 program to Plaintiff [which was not only to be best suited to Plaintiff] given her income and
13 expenses, but by which Plaintiff would also be able to satisfy her obligations without risk of losing
14 her home, were "fiduciaries" in which Plaintiff reposed trust and confidence, especially given that
15 Plaintiff was not and is not an investment banker, securities dealer, mortgage lender or mortgage
16 broker.

17 96. Defendants breached their fiduciary duties to Plaintiff by fraudulently inducing Plaintiff to
18 enter into a mortgage transaction which was contrary to Plaintiff's stated intentions; contrary to the
19 Plaintiff's interest; and contrary to Plaintiff's preservation of her home.

20 97. As a direct and proximate result of the Defendants' breaches of their fiduciary duties,
21 Plaintiff has suffered damages.

22 98. Under the totality of the circumstances, the Defendants' actions were willful, wanton,
23 intentional, and with a callous and reckless disregard for the rights of Plaintiff justifying an award of
24 not only actual compensatory damages, but also exemplary punitive damages to serve as a deterrent
25 not only as to future conduct of the named Defendants herein, but also to other persons or entities
26 with similar inclination.

27 99. Plaintiff first learned of the actions of Defendants, including their failure to disclose and the
28 fraud committed upon her in November 2009. Any applicable statute of limitations should run from
this date.

1 **SEVENTH CAUSE OF ACTION**

2 **Unjust Enrichment**

3 **(As to All Defendants and DOES)**

4 100. Plaintiffs reaffirm and re-allege paragraphs 1 through 100 above as if set forth fully
herein below.

5 101. Defendants had an implied contract with Plaintiff to ensure Plaintiff understood all
6 fees which would be paid to the Defendants to obtain credit on Plaintiff's behalf and not to charge
7 any fees that were not related to the settlement of the loan and without full disclosure to Plaintiff.

8 102. Defendants cannot, in good conscience and equity, retain the benefits from their
9 actions of charging a higher interest rate, fees, rebates, kickbacks, profits (including, but not limited
10 to, from the resale of mortgages and notes using Plaintiff's identity, credit score and reputation
11 without consent, right, justification or excuse as part of an illegal enterprise scheme) and gains and
12 yield spread premium fees ("YSP") unrelated to the settlement services provided at closing.

13 103. Defendants have been unjustly enriched at the expense of Plaintiff, and maintenance
14 of the enrichment would be contrary to the rules and principles of equity.

15 104. Defendants have also been additionally enriched to the receipt of payment from third
16 parties, including but not limited to, investors, insurers, the United States Department of the
17 Treasury, the United States Federal Reserve, the FDIC and other banks.

18 105. Plaintiff demands restitution from the Defendants in the form of actual damages,
19 exemplary damages, and attorney's fees.

20 106. Plaintiff first learned of the actions of Defendants, including their failure to disclose
21 and the fraud committed upon her in November 2009. Any applicable statute of limitations should
22 run from this date.

23 **EIGHTH CAUSE OF ACTION**

24 **Civil Conspiracy**

25 **(As to All Defendants and DOES)**

26 107. Plaintiffs reaffirm and re-allege paragraphs 1 through 106 above as if set forth fully
herein below.

27 108. In connection with the application for and the consummation of the mortgage loan the
28

1 subject of this action, Defendants agreed, between and among themselves, to engage in actions in a
2 course of conduct designed to further an illegal act or accomplish a legal act by an unlawful means,
3 and to commit one or more overt act in furtherance of the conspiracy to defraud Plaintiff, including
4 but not limited to, the commencement of foreclosure.

5 109. Defendants agreed between and among themselves to engage in the conspiracy to
6 defraud for the common purpose of accruing economic gains for themselves at the expense of and
7 detriment to Plaintiff.

8 110. The acts of the Defendants were committed intentionally, willfully, wantonly, and
9 with reckless disregard for the rights of Plaintiff.

10 111. As a direct and proximate result of the actions of the Defendants in combination
11 resulting in fraud and breaches of fiduciary duties, Plaintiff has suffered damages, all according to
12 proof at trial.

13 112. Plaintiff first learned of the actions of Defendants, including their failure to disclose
14 and the fraud committed upon her in November 2009. Any applicable statute of limitations should
15 run from this date.

16 **NINTH CAUSE OF ACTION**

17 **Civil RICO Violations**

18 **(As to All Defendants and DOES)**

19 113. Plaintiff reaffirms and re-alleges paragraphs 1 through 112 above as if set forth fully
20 herein below.

21 114. Defendants and each of them participated in the conspiracy, the subject of this action,
22 which has existed from date of application to the present, with the injuries and damages resulting
23 therefrom being continuous.

24 115. Defendants' actions and use of multiple corporate entities, multiple parties, and
25 concerted and predetermined acts and conduct specifically designed to defraud Plaintiff constitutes
26 an "enterprise," with the aim and objective of the enterprise being to perpetuate a fraud upon the
27 Plaintiff through the use of intentional nondisclosure, material misrepresentation, and creation of the
28 fraudulent loan documents.

116. Each of the Defendants is an "enterprise Defendant."

1 117. As a direct result of the actions of the Defendants, Plaintiff has suffered and
2 continues to suffer damages.

3 118. Whenever references are made in this complaint to any act of any Defendants, that
4 allegation shall mean that each Defendant acted individually and jointly with the other Defendants.

5 119. Any allegation about acts of any corporate or other business Defendant means that
6 the corporation or other business did the acts alleged to its officers, directors, employees, agents
7 and/or representatives while they were acting within the actual or ostensible scope of their authority.

8 120. At all times each Defendant committed the acts, Defendant directed others to commit
9 the acts, or permitted others to commit the acts alleged in this complaint.

10 121. Additionally, some or all of the Defendants acted as the agent of the other
11 Defendants, and all of the Defendants acted within the scope of their agency or is acting as an agent
12 of another.

13 122. At all relevant times, each Defendant knew or realized that the other Defendants were
14 engaging in or plan to engage in the violations of law alleged in the complaint. Knowing or
15 realizing that at the Defendants were in gauging and are planning to engage in unlawful conduct,
16 each Defendant nevertheless facilitated the commission of those unlawful acts. Each Defendant
17 intended to and did encourage, facilitate, or assist in the commission of the unlawful acts, and
18 thereby aided and abetted the other Defendants in the unlawful conduct.

19 123. At all relevant times, Defendants have engaged in a conspiracy, common enterprise,
20 and common course of conduct, the purpose of which is to engage in the violations of law alleged in
21 the complaint. This conspiracy, common enterprise, and common course of conduct continue to the
22 present.

23 124. Plaintiff first learned of the actions of Defendants, including their failure to disclose
24 and the fraud committed upon her in November 2009. Any applicable statute of limitations should
25 run from this date.

26 **TENTH CAUSE OF ACTION**

27 **Quiet Title**

28 **(As to All Defendants and DOES)**

125. Plaintiff reaffirms and re-alleges paragraphs 1 through 124 above as if set forth fully

1 herein below.

2 126. Plaintiff has sent or has caused to be sent notice of her intent to rescind the subject
3 loan transaction, but only sent those notices to the entities that have been disclosed. Hence, without
4 this action, neither the rescission nor the reconveyance which Plaintiff is entitled to file gives
5 Plaintiff full and clear title to the Subject Property.

6 127. The real party in interest on the lender's side may be the owner of the asset-backed
7 security issued by the servicing and pooling vendor, the insurer through some claim equitable
8 interests, or the Federal Government through the United States Department of the Treasury or the
9 Federal Reserve. The security is a "securitized" bond deriving its value from the underlying
10 mortgages, of which the subject mortgage is one. Thus Plaintiff is entitled to quiet title against
11 Defendants, clearing title of the purported subject mortgage encumbrance.

12 128. Plaintiff is informed and believes and thereon alleges that each of the Defendants
13 claim an interest in the Subject Property.

14 129. However, Defendants' claims are without any right whatsoever, and said Defendants
15 have no legal or equitable rights, claim, or interest in the Subject Property.

16 130. Plaintiff therefore seeks a declaration that the title to the Subject Property is vested in
17 Plaintiff alone and that the Defendants herein, and each of them, be declared to have no estate, right,
18 title or interest in the Subject Property and that said Defendants, and each of them, be forever
19 enjoined from asserting any estate, right, title or interest in the Subject Property adverse to the
20 Plaintiff herein.

21 131. Plaintiff first learned of the actions of Defendants, including their failure to disclose
22 and the fraud committed upon her in November 2009. Any applicable statute of limitations should
23 run from this date.

24 **ELEVENTH**

25 **Usury and Fraud**

26 **(As to All Defendants and DOES)**

27 132. Plaintiff reaffirms and re-alleges the above paragraphs 1 through 131 above as if set
28 forth fully herein below.

1 133. Plaintiff is informed and believes that the subject loan, notes, and mortgage were
2 structured so as to create the appearance of a higher value of real property than the actual fair market
3 value.

4 134. Defendants disguised the transaction to create the appearance of the lender being a
5 properly chartered and registered financial institution, authorized to do business and to enter into the
6 subject transaction, when in fact the real party in interest was not disclosed to Plaintiff, and neither
7 were the various fees, rebates, refunds, kickbacks, profits and gains of the various parties who
8 participated in this unlawful scheme.

9 135. Said real party in interest, i.e. the source of funding for the loan and the person to
10 whom the note was transmitted or eventually "assigned" was neither a financial institution nor an
11 entity nor person authorized, chartered or register to do business in the state, nor to act as banking,
12 lending or other financial institution anywhere else.

13 136. As such, this fraudulent scheme (which was in actuality a plan to trick Plaintiff into
14 signing what would become a negotiable security used to sell unregulated securities under fraudulent
15 and changed terms from the original notes) was in fact a sham to use Plaintiff's interest in the real
16 property to collect interest in excess of the legal rate.

17 137. The transaction of all the loan of money pursuant to a written agreement, and as such,
18 subject to the rate limitation set forth under state and federal law. The "formula break" a reference
19 to end these laws was exceeded by a factor in excess of 10 contrary to the applicable law and
20 contrary to the requirements for disclosure under TILA and HOEPA.

21 138. Under applicable law Plaintiff is also entitled to demand that a permanent injunction
22 be entered against the Defendants:

23 A. Preventing them from taking any action or making any report in furtherance
24 of collection on this alleged debt which was usurious;

25 B. Requiring the records custodian of the county in which the alleged mortgage
26 and other instruments are recorded to remove same from the record;

27 C. Allowing the filing of said order in the office of the clerk of the property
28 records where the Subject Property, "loan transaction" and any other documents relating to this

1 transaction are located; and

2 D. Dissolving any lis pendens or notice of pendency relating to the Defendants'
3 purported claim.

4
5 **TWELFTH CAUSE OF ACTION**
6 **Wrongful Foreclosure**
7 **(As to All Defendants and DOES)**

8 139. Plaintiff reaffirms and re-alleges the above paragraphs 1 through 138 above as if set forth
9 fully herein below.

10 140. Plaintiff brings this cause of action against all parties who had an apparent hand in the
11 wrongful acts as set forth and described as to each of them below. Furthermore, their participation
12 seems to be a joint effort to hold each accountable for the actions of the rest.

13 141. California Civil Code Section 2924 mandates that a non-judicial trustee's sale "SHALL
14 NOT TAKE PLACE" unless it is done on behalf of the beneficiary of a deed of trust securing a note
15 and certain technical procedures are met.

16 142. California Civil Code Section 2924(g) allows the obligee on the note required by Section
17 2924 to make a "credit bid" at a foreclosure sale, thereby taking title without actually paying any
18 money whatsoever for the Trustee to convey title to the property.

19 143. Defendants in this case had a duty to Plaintiff to follow the laws, including the
20 foreclosure laws.

21 144. Defendants are not the beneficiaries of the mortgage at the time of the scheduled sale.
22 Defendants are acting as a Trustee of a REMIC Loan Pool Trust pursuant to a Pooling and Servicing
23 Agreement (PSA). The PSA under which Defendants purport to be acting is a public record kept by
24 the Securities and Exchange Commission, whose website EDGAR.com contains the provisions of
25 the PSA.

26 145. If the truth is that the Note was separated from the Deed of Trust and transferred to the
27 loan pool, then Under Civil Code Section 2936, the Right Title and Interest to the Deed of Trust
28 followed the Note on that date, and any subsequent purported Assignment is a lie, its declaration a
fraud, and its true legal effect null notwithstanding recordation. Any beneficiary was divested of

1 interest upon the transfer of the Note under California Law and lacked power to assign any interest.
2 Thus any attempt to foreclose on the Subject Property was null and void under California Law and
3 should be prevented from occurring.

4 146. Due to Defendants' actions, Plaintiff has been damaged, both financially and is being
5 deprived of her residence, which is a unique asset to him. Plaintiff demands damages for these
6 harms and a permanent injunction against Defendants, to prevent her from being evicted from her
7 home.

8 147. Plaintiff first learned of the actions of Defendants, including their failure to disclose and
9 the fraud committed upon her in November 2009. Any applicable statute of limitations should run
10 from this date.

11 **THIRTEENTH CAUSE OF ACTION**

12 **Breach of Trust Instrument**

13 **As to All Defendants and DOES)**

14 148. Plaintiff reaffirms and re-alleges the above paragraphs 1 through 147 above as if set
15 forth fully herein below.

16 149. The Deed of Trust is the document which allows a non-judicial foreclosure to
17 proceed and gives Power of Sale to the duly appointed Trustee. Per the Deed of Trust, only the
18 Lender can invoke the foreclosure (See, Deed of Trust, **Exhibit "B"**, paragraph 22). Per Deed of
19 Trust paragraph 24, the Lender may appoint a trustee. The Substitution of Trustee in this case is
20 void, due to fraud, and was not executed in compliance with California Civil Code§2934(a). The
21 Substitution of Trustee was invalid also because it was not executed by the Lender, per requirement
22 of the Deed of Trust. The duly appointed Trustee under the Deed of Trust as of the recording of the
23 Notice of Default on April 27, 2010 was CALIFORNIA LAND. ETS was never effectively
24 substituted as trustee. (See, Substitution of Trustee, **Exhibit "E"**).

25 150. A non-judicial foreclosure sale under the power-of-sale in a deed of trust or
26 mortgage, on the other hand, must be conducted in strict compliance with its provisions and
27 applicable statutory law. A trustee's powers and rights are limited to those set forth in the deed of
28 trust and laws applicable thereto.

1 151. The notice of acceleration and notice to cure given to borrower pursuant to
2 Section 22 and the notice of acceleration given to borrower pursuant to Section 18 shall be deemed
3 to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

4 152. When there is an agreement between the Beneficiary and Trustor, such as the
5 Condition Precedent expressed in Paragraph 20 of the Deed of Trust, a Foreclosure cannot take
6 place before the condition is satisfied. If the Beneficiary fails to carry out its obligation, a
7 subsequent foreclosure is invalid. Defendants have not complied with any expressed provisions of
8 the Deed of Trust, have speciously trespassed upon the Deed of Trust and Plaintiff's property, and
9 the foreclosure and impending sale must be rendered void and rescinded under California Civil Code
10 § 3513. Any one may waive the advantage of a law intended solely for her benefit. But a law
11 established for a public reason cannot be contravened by a private agreement. California Civil Code
12 § 3514. One must so use her own rights as not to infringe upon the rights of another. All the acts of
13 Defendants as described in this Complaint are a breach of the security instrument, the Deed of Trust.

14 153. Plaintiff first learned of the actions of Defendants, including their failure to disclose
15 and the fraud committed upon her in November 2009. Any applicable statute of limitations should
16 run from this date.

17 **WHEREFORE**, Plaintiff prays this court to enter judgment against Defendants and each of
18 them, as follows:

19 1. For an order compelling said Defendants, and each of them, to transfer or release
20 legal title and any alleged encumbrances thereon, and possession of the subject property to the
21 Plaintiff herein;

22 2. For a declaration and determination that Plaintiff is the rightful holder of title to the
23 Subject Property and that Defendants herein, and each of them, be declared to have no estate, right,
24 title or interest in said property;

25 3. For a judgment forever enjoining said Defendants, and each of them, from claiming
26 any estate, right, title or interest in the subject property;

27 4. For a declaration that the foreclosure which was instituted be deemed and declared
28 illegal and void, and that further proceedings in connection with the foreclosure be enjoined;

5. For attorney's fees according to statutes;

6. For actual, compensatory and punitive damages;
7. For costs of the suit herein incurred;
8. For such other further relief as the court may deem just and proper.

Dated: February 16, 2011.

Respectfully submitted,

LAW OFFICES OF HOLLY S. BURGESS

By: /s/ Holly S. Burgess /

HOLLY S. BURGESS

Attorney for Plaintiff, SHELLEY von BRINCKEN

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VERIFICATION

I, SHELLEY von BRINCKEN, declare as follows:

I have read the foregoing Second Amended Complaint: for 1) Violation of Homeowners Equity Protection Act; 2) Violations of Real Estate Settlement Procedures Act; 3) Violations of Truth in Lending Act; 4) Violations of Fair Credit Reporting Act; 5) Fraudulent Misrepresentation; 6) Breach of Fiduciary Duties; 7) Unjust Enrichment; 8) Civil Conspiracy; 9) Civil RICO Violations; 10) Quiet Title; 11) Usury and Fraud; 12) Wrongful Foreclosure; 13) Breach of Security Instrument.

Except for matters stated on information and belief, the facts stated therein are true on my own knowledge, and as to those matters stated on information and belief, I believe them to be true.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this verification was executed this 16 day of Feb, 2011, at Placer County, California.


SHELLEY von BRINCKEN

1 JOHN B. SULLIVAN (State Bar No. 96742)
jbs@severson.com
2 PHILIP BARILOVITS (State Bar No. 199944)
pb@severson.com
3 EDWARD R. BUELL III (State Bar No. 240494)
erb@severson.com
4 SEVERSON & WERSON
A Professional Corporation
5 One Embarcadero Center, Suite 2600
San Francisco, CA 94111
6 Telephone: (415) 398-3344
Facsimile: (415) 956-0439

7 Attorneys for Defendants
8 GMAC MORTGAGE, LLC
EXECUTIVE TRUSTEE SERVICES
9 MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.

10
11 UNITED STATES DISTRICT COURT
12 EASTERN DISTRICT OF CALIFORNIA

13 SHELLEY VON BRINCKEN,

14 Plaintiff,

15 vs.

16 MORTGAGECLOSE.COM INC., *et al.*

17 Defendants.

Case No.: 2:10-CV-02153-JAM-KJN

**NOTICE OF MOTION AND MOTION TO
DISMISS SECOND AMENDED COMPLAINT
FOR FAILURE TO STATE A CLAIM
(FED. R. CIV. P. 12(B)(6))**

Judge: Hon. John A. Mendez
Date: May 4, 2011
Time: 9:30 A.M.
Courtroom: 6

Complaint filed: August 11, 2010

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23	43 Cal.App.4th 1101 (1996)	6
24	<i>Applied Equip. Corp. v. Litton Saudi Ara-bia Ltd.</i> ,	
25	7 Cal.4th 503 (1994)	12
26	<i>Arnolds Mgmt. Corp. v. Eischen</i> ,	
27	158 Cal.App.3d 575 (1984)	6
28	<i>F.B.P.I. Rehab 01 v. E&G Invs., Ltd.</i> ,	
	207 Cal.App.3d 1018 (1989)	6, 13
	<i>Fox v. Ethicon End-Surgery, Inc.</i> ,	
	35 Cal.4th 797 (2005)	7
	<i>Ghirardo v. Antonioli</i> ,	
	8 Cal.4th 791 (1994)	14

1	<i>Gil v. Bank of Am., Nat'l Ass'n,</i>	
2	138 Cal.App.4th 1371 (2006)	10
3	<i>Gomes v. Countrywide Home Loans, Inc.,</i>	
4	____ Cal. App. 4th __, 2011 WL 566737 (Feb. 18, 2011).....	4
5	<i>I.E. Assocs. v. Safeco Title Ins. Co.,</i>	
6	39 Cal.3d 281 (1985).....	5
7	<i>Jogani v. Superior Court,</i>	
8	165 Cal. App. 4th 901 (2008)	12
9	<i>Karlsen v. Am. Sav. & Loan Ass'n,</i>	
10	15 Cal.App.3d 112 (1971)	6
11	<i>Knapp v. Doherty,</i>	
12	123 Cal.App.4th 123 (2004)	15
13	<i>Moeller v. Lien,</i>	
14	25 Cal.App.4th 822 (1994)	5
15	<i>Nymark v. Heart Federal Savings & Loan Association,</i>	
16	231 Cal.App.3d 108 (1991)	12
17	<i>Sagehom v. Engle,</i>	
18	141 Cal. App. 4th 452 (2006)	7
19	<i>United States Cold Storage v. Great W. Sav. & Loan Ass'n,</i>	
20	165 Cal.App.3d 1214 (1985)	6
21	FEDERAL RULES, REGULATIONS AND STATUTES	
22	Code of Federal Regulations	
23	Title 12	
24	§ 226.32	7
25	Federal Rules of Civil Procedure	
26	Rule 8	14
27	Rule 9	10, 11, 13, 14
28	Rule 12.....	2, 3, 4
	United States Code	
	Title 12	
	§ 2601 <i>et seq.</i>	8
	§ 2605	8
	§ 2607	8
	§ 2608	8
	§ 2614	8

United States Code

Title 15

§ 1601 <i>et seq.</i>	8
§ 1602	7
§ 1639	6
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§ 1681 <i>et seq.</i>	9, 10
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§ 1961	13

STATE STATUTES

California Civil Code

§ 1916-3.....	14
§ 2924	5
§ 2924	6

1 **NOTICE OF MOTION AND MOTION**

2 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

3 PLEASE TAKE NOTICE that on May 4, 2011, at 9:30 a.m., or as soon thereafter as counsel
4 may be heard in Courtroom 6 of the above entitled court located at 501 I Street, Sacramento,
5 California, before the Honorable John A. Mendez, Defendants GMAC Mortgage LLC ("GMACM"),
6 Executive Trustee Services ("ETS") and Mortgage Electronic Registration Systems, Inc. ("MERS")
7 will, and hereby do, move to dismiss plaintiff Shelley von Brincken's Second Amended Complaint
8 ("SAC") for failure to state a claim. The SAC fails to state a claim against GMACM, ETS, or MERS
9 upon which relief may be granted as explained further in the accompanying memorandum of points
10 and authorities.

11 This motion is based on this notice of motion and motion, the memorandum of points and
12 authorities, the pleadings and records on file in this action, the request for judicial notice filed with
13 GMACM's prior motion to dismiss, any further briefs, evidence, authorities, or argument presented
14 before or at the hearing of this motion. Defendants respectfully request an order dismissing the
15 complaint as against GMACM, ETS and MERS with prejudice.

16 DATED: March 7, 2011

SEVERSON & WERSON
A Professional Corporation

18 By: /s/ Philip Barilovits
19 Philip Barilovits

20 Attorneys for Defendants
21 GMAC Mortgage, LLC
22 Executive Trustee Services
23 Mortgage Electronic Registration Systems, Inc.
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Shelley von Brincken (“Plaintiff”) has brought her third complaint to try to find some basis of setting aside a completely legitimate foreclosure. She does not deny borrowing the money for the property, she does not deny defaulting on her loan and yet her complaint is a laundry list of supposed “defects” in the foreclosure process, the vast majority of which Plaintiff has utterly failed to show how they concern her. She advances various claims on the flimsiest of factual bases—the vast majority of which hinge on her complaints about the system and the mortgage banking industry as a whole. It is clear that her second amended complaint (“SAC”), at least insofar as it targets GMAC Mortgage, LLC (“GMACM”), Executive Trustee Services (“ETS”) and Mortgage Electronic Registration Systems (“MERS”) does not state any claims.

Plaintiff asserts a number of causes of action against the defendants as a whole, increasing her causes of action from six to no less than thirteen from her last complaint – still, though, not differentiating between the defendants: (1) violations of the Home Ownership Equity Protection Act; 2) Violations of the Real Estate Settlement Procedures Act (“RESPA”); 3) Violations of the Truth In Lending Act (“TILA”); 4) Violations of the Fair Credit Reporting Act; 5) Fraudulent Misrepresentation; 6) Breach of Fiduciary Duty; 7) Unjust Enrichment; 8) Civil Conspiracy; 9) Civil RICO Violations; 10) Quiet Title; 11) Usury and Fraud; 12) Wrongful Foreclosure and; 13) Breach of Trust Instrument.

While no foreclosure is a happy event, Plaintiff simply has no legal claim. However, as set forth herein, all of Plaintiff’s claims are either time-barred; fundamentally deficient, vague, indecipherable, or conclusory in key allegations; unavailable as to the parties against which they are asserted or the relief sought; barred by plaintiff’s failure to tender repayment; derivative claims with no valid underlying cause of action; or demonstrably without basis in law. Accordingly, GMACM, ETS and MERS move, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, that the SAC be dismissed in its entirety against GMACM, ETS and MERS without leave to amend, for failure to state a claim.

1 **II. STATEMENT OF PURPORTED FACTS**

2 Plaintiff borrowed \$220,000 from Mortgageclose.com on January 14, 2009. SAC, Ex. A.
3 She signed, on the same date, a deed of trust securing the property located at 14738 Wolf Rd., Grass
4 Valley, California, as security for that loan. *Id.*, Ex. D. She defaulted on that loan and a Notice of
5 Default was recorded on April 27, 2010. *Id.*, Ex., H. That default having not been cured, a Notice of
6 Trustee's Sale was recorded on July 28, 2010. *Id.*, Ex. K. Plaintiff filed a notice of pendency of
7 action on August 11, 2011. *Id.*, Ex. L. The default having still not been cured, the property was sold
8 and a Trustee's Deed Upon Sale was recorded in the Nevada County Recorder's Office on
9 September 3, 2011. *Id.*, Ex. M.

10 It is very difficult to discern from the SAC what exactly Plaintiff is saying happened which
11 would give her a property free and clear of the nearly quarter million dollars she borrowed. Her
12 complaints range from the fact that there was a securitization trust and that the loan was not
13 transferred into the trust in time. *See* SAC ¶¶ 22, 29, 32, 33. She does not say how this concerns
14 her, however. She complains that the "Trust will *never have standing or be a real party in interest*
15 *before this Court.*" *Id.*, ¶ 26 (emphasis added). She claims that the Deed of Trust was never
16 transferred to GMAC or ETS from Mortgageclose.com. *Id.*, 37.

17 She complains of a "slew" of vague "chain of title problems" (*id.*, ¶ 39) but never explains
18 how this, again, would prejudice her or even how some of these problems are really legally
19 problematic. On or about March 17, 2010, she sent a 13 page letter to GMACM with a host of
20 irrelevant questions under RESPA. (*Id.*, ¶ Ex. D.). GMACM responded to her letter on or about
21 March 30, 2010, in which it was pointed out that her letter "question[ed] nearly every aspect of the
22 loan transaction." *Id.* Ex. E. (Of course, Plaintiff never challenged that she borrowed the money in
23 the first place). She was given a number to call with questions. *Id.* On or about April 26, 2010,
24 Plaintiff sent a letter entitled "Notice of Right To Cancel" her loan to GMACM and others, along
25
26
27
28

1 with a lengthy “Affidavit.” *Id.*, Ex. F. She claims that the note “assigned to MERS” is “at most” an
2 unsecured debt.” *Id.*, ¶ 19.¹

3 In short, Plaintiff has filed a rambling list of supposed problems with her loan – all of
4 extraordinarily dubious legal basis. As outline below, she has failed to state a single claim against
5 defendants.

6 III. LEGAL STANDARD FOR MOTIONS TO DISMISS

7 On a motion to dismiss, the Court accepts as true the facts properly pleaded in the complaint,
8 but not conclusions of law. *Alperin v. Vatican Bank*, 410 F.3d 532, 541 (9th Cir. 2005); *In re*
9 *Verifone Sec. Litig.*, 11 F.3d 865, 868 (9th Cir. 1993). But the court should not “‘accept as true
10 allegations that contradict matters properly subject to judicial notice or by exhibit. Nor is the court
11 required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or
12 unreasonable inferences.’” *In re Gilead Sciences Securities Litigation*, 536 F.3d 1049, 1055 (9th Cir.
13 2008) (quoting *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).) “A pleading
14 that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will
15 not do.’ [citation omitted] Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of
16 ‘further factual enhancement.’ [citation omitted].” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009).
17 Rather, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to
18 relief that is plausible on its face.’” *Id.* “Threadbare recitals of the elements of a cause of action,
19 supported by mere conclusory statements” is not sufficient to establish a claim’s plausibility. *Id.* at
20 1949.

21 Furthermore, contents of documents that are mentioned in the complaint or on which
22 plaintiffs’ claims depend and whose authenticity no party questions, may also be considered even if
23 the documents are not attached to the complaint. *Kniesel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir.
24 2005) (considering surrounding web pages to determine whether accused webpage was defamatory
25 in context). The Court may also “‘take judicial notice of matters of public record outside the

26 _____
27 ¹ As far as Plaintiff’s derogatory remarks about MERS goes and her theory that its role is
28 illegitimate, she would do well to read the recent California Court of Appeal decision which fully
validated the role of MERS in California. *See Gomes v. Countrywide Home Loans, Inc.*, ____ Cal.
App. 4th ___, 2011 WL 566737 (Feb. 18, 2011).

1 pleadings' and consider them for purposes of the motion to dismiss." *Mir v. Little Co. of Mary*
2 *Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988); *accord Kourtis v. Cameron*, 419 F.3d 989, 994 n.2 (9th
3 Cir. 2005); *Mullis v. U.S. Bankr. Ct.*, 828 F.2d 1385, 1388 (9th Cir. 1987).

4 IV. ARGUMENT

5 A. The Complaint Does Not Meet the Minimum Pleading Requirements of Rule 8

6 The Supreme Court made clear in *Iqbal* and in the *Twombly* case that a complaint must do
7 more than state legal conclusions with no factual bases. *Bell Atl. Corp. v. Twombly* 550 U.S. 544
8 (2007); 556 U.S. ____ (129 S.Ct. at 1949). Plaintiff has utterly failed to allege facts sufficient to
9 constitute any viable cause of action. In fact, plaintiff provides little to no factual basis for any of her
10 asserted claims, and her disjointed complaint is manifestly uncertain even as to what causes of action
11 are being alleged. Because plaintiff has failed to meet even the minimum pleading requirements of
12 Rule 8, her entire SAC should be dismissed.²

13 B. The Promissory Note is Not Required to Foreclose

14 Plaintiff seems to allege as a general them throughout the SAC that that defendants "lack
15 standing" to foreclose because they do not have the original promissory note and because the loan
16 was securitized. (See, e.g., SAC ¶ 25).

17 The produce-the-note theory, in fact, has been raised in many recent actions by borrowers
18 seeking to delay and undo foreclosures, and the claim has been uniformly rejected because "the
19 statutory framework governing non-judicial foreclosures contains no requirement that the lender
20 produce the original note to initiate the foreclosure process." *Gamboa v. Tr. Corps*, 2009 WL
21 656285, at *4 (N.D. Cal. 2009); *see also Putkkuri v. ReconTrust Co.*, 2009 WL 32567, *2 (S.D. Cal.
22 2009); *Candelo v. NDex West, LLC*, 2008 WL 5382259, *4 (E.D. Cal. 2008); *San Diego Home*
23 *Solutions, Inc. v. ReconTrust Co.*, 2008 WL 5209972, *2 (S.D. Cal. 2008).

24 California's courts have repeatedly held that Civil Code § 2924 establishes a comprehensive
25 and exclusive set of regulations for the conduct of non-judicial foreclosures. *Moeller v. Lien*, 25
26 Cal.App.4th 822, 834 (1994); *I.E. Assocs. v. Safeco Title Ins. Co.*, 39 Cal.3d 281, 285 (1985).

27 _____
28 ² This point should be considered among the reasons for dismissing each of the claims in the
complaint in conjunction with the other points discussed in more detail below.

1 Sections 2924 through 2924f of the Civil Code do not require the person initiating foreclosure to
2 have physical possession of the promissory note which the deed of trust secures, or that the trustee
3 inquire about who physically possesses the note. Instead, § 2924(a)(1) provides that “[t]he trustee,
4 mortgagee, or beneficiary, or any of their authorized agents” may commence the nonjudicial
5 foreclosure process by recording a notice of default. Being the “holder in due course” of or
6 possessing the original note is irrelevant.

7 Plaintiff’s frivolous theory that the original note must be provided to her in order to foreclose
8 or that the loan is unsecured because it was transferred to a trust supports no viable cause of action,
9 and to the extent any of plaintiff’s causes of action rest on this specious theory, they cannot be
10 maintained.

11 **C. Plaintiff Lacks Standing Because She Has Not Tendered the Amount Due Under**
12 **the Loan**

13 Under California law a plaintiff challenging a foreclosure sale under any cause of action or
14 theory must tender the amount received under the loan. *See Abdallah v. United Sav. Bank*, 43
15 Cal.App.4th 1101, 1109 (1996); *United States Cold Storage v. Great W. Sav. & Loan Ass’n*, 165
16 Cal.App.3d 1214, 1225 (1985); *Arnolds Mgmt. Corp. v. Eischen*, 158 Cal.App.3d 575, 578-79 (1984);
17 *Karlsen v. Am. Sav. & Loan Ass’n*, 15 Cal.App.3d 112, 117 (1971). This is because “if plaintiffs
18 could not have redeemed the property had the sale procedures been proper, any irregularities in the
19 sale did not result in damages to the plaintiffs.” *F.B.P.I. Rehab 01 v. E&G Invs., Ltd.*, 207
20 Cal.App.3d 1018, 1021 (1989). Thus, tender is considered a condition precedent to challenge a
21 foreclosure sale. Plaintiff’s complaint offers no evidence in support of this ability to tender. Indeed,
22 she failed to ever cure the amount in arrears prior to the sale of the property, **which has already taken**
23 **place**. See SAC, Ex. K. (Rescission under TILA is discussed below.)

24 Plaintiff has no standing to challenge the foreclosure process by way of any purported cause of
25 action.

26 **D. Plaintiff’s Claim Under The Home Ownership Equity Protection Act Fails.**

27 Plaintiff has no claim under the Home Ownership Equity Protection Act. (15 U.S.C. § 1639).
28 See SAC ¶¶ 56-70. There are several reasons this claims fails. First, as this Court has held, HOEPA

1 is an amendment to TILA and shares TILA's statute of limitations. *Rendon v. Countrywide Home*
2 *Loans, Inc.*, 2009 WL 3126400, *9 (E.D. Cal. 2009). Plaintiff, by her own admission, admits that
3 completed her loan on January 14, 2009 and that she did not file this lawsuit until August 11, 2010
4 (see D.I. 1) – more than one year later. For that reason alone, her HOEPA claim fails.³

5 Second, HOEPA applies only to loans that meet one of two tests. Either the loan's annual
6 percentage rate ("APR") at consummation must exceed by more than 10 percent the applicable yield
7 on treasury securities, or the total points and fees payable by the consumer at or before closing must
8 exceed 8 percent of the "total loan amount," or \$400, whichever is greater. 15 U.S.C. § 1602(aa)(1),
9 (3); 12 C.F.R. § 226.32(a)(1). A HOEPA claim that fails to allege facts showing that the plaintiff's
10 loan satisfies one of these tests cannot withstand a motion to dismiss, as this Court has also
11 recognized. *See Rendon*, 2009 WL 3126400 at *9 (E.D. Cal. 2009). Because Plaintiffs' complaint
12 does not allege these facts, her HOEPA claims fails for that reason as well. See also *Amaro v.*
13 *Option One Mortg. Corp.*, 2009 WL 103302, at *3 (C.D. Cal. 2009); *Lynch v. RKS Mortg., Inc.*,
14 588 F.Supp.2d 1254, 1260 (E.D. Cal. 2008) (granting motion to dismiss claim for damages under
15 HOEPA); *Marks v. Chicone*, 2007 WL 160992, at *8 (N.D. Cal. 2007) (dismissing HOEPA cause of
16 action where plaintiff "failed to allege facts sufficient to establish that the subject loan was a high-
17 risk loan subject to HOEPA).

18 Accordingly, Plaintiff's HOEPA claim fails and should be dismissed without leave to amend.

19 _____
20 ³ Realizing many of her claims have statute of limitations problems, Plaintiff adds repeatedly
21 and without detail the conclusory sentence that she did not discover the causes of action until
22 November 2009. (See e.g., SAC ¶ 70, 75). If by these conclusory allegations, Plaintiff is intending
23 on relying in the doctrine of delayed discovery, she have failed here as well. Plaintiffs invoking this
24 doctrine must specifically pleads facts to show 1) the time and manner of discovery and 2) his or her
25 inability to have made an earlier discovery despite reasonable diligence. (*Fox v. Ethicon End-*
26 *Surgery, Inc.*, 35 Cal.4th 797, 808 (2005). Here Plaintiff alleges none of this. She cannot and does
27 not state what facts were hidden and how she exercised due diligence in finding them out.
28 Plaintiff's delayed discovery argument should be dismissed out of hand, just as all of their statute of
limitations arguments should be.

If Plaintiff intends on relying on the doctrine of fraudulent concealment, her claim is even
more questionable. To plead fraudulent concealment, Plaintiff would have to show 1) fraudulent
conduct by defendant resulting in concealment of the operative facts; 2) plaintiff's failure to discover
the operative facts, and; 3) due diligence by the plaintiff until the discovery of those facts. *Sagehom*
v. Engle, 141 Cal. App. 4th 452, 460-461 (2006). Plaintiff has alleged none of this.

1 **E. Plaintiff's Claim Under RESPA Fails.**

2 Plaintiff's claim under the Real Estate Settlement Procedures Act (12 U.S.C. § 2601 et seq.)
3 is even more faulty. (See FAC ¶¶ 71-75.) All Plaintiff does is state that defendants were subject to
4 the act and that the act was violated.

5 This claim too is barred by a one year statute of limitations. 12 U.S.C. 2614. *See also Yuhre*
6 *v. JP Morgan Chase Bank*, 2010 WL 1404609, *7 (E.D. Cal. 2009). Again, as discussed in footnote
7 2 above, Plaintiff has done nothing to show why her claim should not be dismissed on this ground
8 alone.

9 Further, only loan servicers are subject to these duties under §2605, not other participants in
10 the loan transaction. Thus, RESPA imposes no obligation the trustee under the deed of trust or the
11 trustee of the securitized trust that holds plaintiffs' loan or the holder of the note.

12 Even against the transferor and transferee of servicing rights, RESPA allows a borrower only
13 recovery of "actual damages" and costs. *See* 12 U.S.C. § 2605(f); *see also Andrew v. Ivanhoe Fin.,*
14 *Inc.*, 2008 WL 2265287, at *6 (E.D. Pa. 2008). Since Plaintiff has alleged no actual damage as a
15 result of any failure to provide notice of the transfer of servicing rights, her RESPA claim is not
16 viable.

17 Further, creates private rights of action to redress only three types of wrongful acts: (1)
18 payment of a kickbacks for real estate settlement services (12 U.S.C. § 2607(d)); (2) requiring a
19 buyer to use a title insurer selected by the seller (12 U.S.C. § 2608(b)); and (3) failure by a loan
20 servicer to give proper notice of a transfer of servicing rights or to respond to a qualified written
21 request for information about a loan (12 U.S.C. § 2605(f)). As Plaintiffs does allege any of these
22 violations, she cannot state a viable claim for relief under RESPA.

23 Thus, Plaintiff's claim under RESPA fails for many different reasons.

24 **F. Plaintiff's Claim for Violation of TILA Fails**

25 Plaintiff's Truth In Lending Claim (15 U.S.C. § 1601 et seq.) claim fails to allege any
26 specific violations of TILA by any defendant. *See* FAC ¶¶ 76-80. To the extent that plaintiff seeks
27 damages under TILA, United States Code § 1640(e) states that any action brought under TILA must
28 be brought within one year from the date of the occurrence of the violation. *Monaco v. Bear Stearns*

1 *Residential Mortg. Corp.* 554 F. Supp.2d 1034, 1039 (2008); *see also* 15 U.S.C. § 1640(e). The
2 limitations period runs from the date of the consummation of the transaction, i.e. the time that a
3 consumer becomes contractually obligated on a credit transaction. *King v. California*, 784 F.2d 910,
4 915 (9th Cir. 1986).

5 Here, it is clear from the face of the amended complaint that the one year statute of
6 limitations for a TILA violation claim has run. That is, plaintiff's loan that the transaction for the
7 subject loan was consummated on or about January 14, 2009. As such, the one year statute of
8 limitations ran by January 14, 2010, and plaintiff did not bring the instant action until August of
9 2010. As far as Plaintiff's attempt to get around the statute of limitations, see footnote 2, *supra*.

10 Furthermore, plaintiff alleges absolutely nothing of substance against any of the defendants
11 would give rise to a TILA case to begin with. It is unclear what she is seeking, against whom she is
12 seeking damages TILA was violated. Whatever allegations she does include are simple mimicry of
13 the statutory language. This claim must be dismissed.

14 Furthermore, to the extent plaintiff seeks to rescind under TILA, "by far, the majority of
15 Courts to address the issue recently have required that borrowers allege an ability to tender the
16 principal balance of the subject loan in order to state a claim for rescission under TILA." *Garcia v.*
17 *Wachovia Mortg. Corp.*, 2009 WL 3837621, *3 (C.D. Cal. 2009); *see also Ultreras v. ReconTrust*
18 *Co.*, 2010 WL 2305857, *4 (C.D. Cal. 2010) (agreeing with the "developing majority position" as
19 articulated in *Garcia*); *Cook v. Wells Fargo Bank*, 2010 WL 1289892, *4 (S.D. Cal. 2010) (citing
20 cases). As one court has explained, "It makes little sense to let the instant rescission claim proceed
21 absent some indication that the claim will not simply be dismissed at the summary judgment stage
22 after needless depletion of the parties' and the Court's resources." *Valdez v. America's Wholesale*
23 *Lender*, 2009 WL 5114305, *5 (N.D. Cal. 2009).

24 As Plaintiff has not offered to tender and she should not be able to keep the property free and
25 clear of any security interest she voluntarily placed upon it, her TILA claim should fail.

26 **G. Plaintiff's Claim Under The Fair Credit Reporting Act Fails.**

27 Plaintiff's claim under the Federal Fair Credit Reporting Act (15 U.S.C. § 1681 et seq.) is
28 also very weak. FCA §§ 81-85. Essentially, she claims that her default should not have been

1 reported because of the loan documents she was “tricked” into signing. If that stated a claim under
2 FCRA, then every foreclosure in the United States would have to be stopped.

3 The FCRA was enacted to ensure the accuracy and fairness of credit reporting. 15 U.S.C. §
4 1681(a). Specifically, the statute is designed to require consumer reporting agencies to “adopt
5 reasonable procedures for meeting the needs of commerce for consumer credit.” *Id.* § 1681(b).
6 FCRA § 1681s states that companies shall not furnish information about a consumer to a credit
7 reporting agency if they have reason to know, or know, the information is false. *Id.* § 1681s-2(a-b).
8 Plaintiff has not anywhere alleged that the information about her was false. She therefore has no
9 FCRA claim.

10 Also, Plaintiff does not even state which defendants supposedly violated FCRA, and this has
11 been found to be grounds to dismiss a FCRA claim. *Permpoon v. Wells Fargo Bank, N.A.*, 2009
12 WL 2314321, *11 (S.D. Cal. 2009).

13 This claim should be dismissed.

14 **H. Plaintiff’s Fraudulent Misrepresentation Claim Fails.**

15 Plaintiff’s next cause of action is for fraudulent misrepresentation. FAC ¶¶ 81-85. Under
16 California law, the elements of fraud are “misrepresentation, knowledge of its falsity, intent to
17 defraud, justifiable reliance, and resulting damage.” *Gil v. Bank of Am., Nat’l Ass’n*, 138
18 Cal.App.4th 1371, 1381 (2006). Fraud, of course, must be pled with sufficient particularity under
19 Federal Rule of Civil Procedure 9(b). In addition to the “time, place and content of an alleged
20 misrepresentation,” a complaint “must set forth what is false or misleading about a statement, and ...
21 an explanation as to why the statement or omission complained of was false or misleading.” *Yourish*
22 *v. Cal. Amplifier*, 191 F.3d 983, 993, n.10 (9th Cir. 1999).

23 The complaint must also name the persons who made the allegedly fraudulent statements.
24 See *Morris v. BMW of N. Am., LLC*, 2007 WL 3342612, *3 (N.D. Cal. 2007) (citing *In re Glenfed,*
25 *Inc. Sec. Litig.*, 42 F.3d 1541, 1547-48 n.7 (9th Cir.1994) (en banc)).

26 Here, Plaintiff has failed to plead any facts even *remotely* resembling fraud against any
27 defendant. The allegations supporting Plaintiff’s fraud claim are simply conclusory allegations.

1 (FAC ¶¶ 87-90.) This claim, even read with the liberality afforded *pro se* litigants on a motion to
2 dismiss, is entirely conclusory and has nothing to do with any defendants.

3 “Rule 9(b) does not allow a complaint to merely lump multiple defendants together but
4 require[s] plaintiffs to differentiate their allegations when suing more than one defendant . . . and
5 inform each defendant separately of the allegations surrounding his alleged participation in the
6 fraud.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007) (internal citations, quotes
7 omitted). *See also Edejer v. DHI Mortgage Co.*, 2009 WL 1684714, *12-13 (N.D. Cal. Jun. 12,
8 2009) (dismissing a fraud claim where plaintiff alleged no misrepresentation or false statements
9 made by defendants; did not allege names of persons who made allegedly fraudulent representations
10 and their authority to speak; and did not allege with sufficient particularity or clarity what was false
11 or misleading about the statements); *Mohammad Akhavein v. Argent Mortgage Co.*, 2009 WL
12 2157522, *4 (N.D. Cal. Jun. 12, 2009) (“This already heightened pleading standard in fraud cases is
13 further heightened when a party pleads fraud against a corporation.”).

14 Plaintiff’s fraud claim lacks any of the “who, what, when, where and how” required for
15 alleging fraud against any of the defendants. More importantly, Plaintiff identifies no knowing,
16 material misrepresentations made by any persons authorized to speak for any defendant, let alone
17 their authority to speak, what they said, to whom, or when; she fails to allege facts establishing her
18 justifiable reliance on any such misrepresentations; and she fails to identify any damage that any of
19 the unalleged misrepresentations caused her.

20 Plaintiff’s fraud claim falls short of even basic federal pleading standards as explained in *Bell*
21 *Atl. Corp. v. Twombly*: the Complaint fails to give the defendants “fair notice of what the ... claim is
22 and the grounds upon which it rests.” 550 U.S. at 555. Because plaintiff’s cause of action for fraud
23 fails to state a claim and is incomprehensively vague, it should be dismissed.

24 **I. Plaintiff’s Breach of Fiduciary Duty Claim Fails**

25 Plaintiff’s also alleges that all of the defendants were “fiduciaries.” FAC ¶¶ 94-99.
26 Plaintiff’s claim is based on the mistaken belief that GMACM, ETS and MERS owed her a fiduciary
27 duty. They did not.
28

1 It is axiomatic that in order to state a claim for breach of fiduciary duty, the defendant must
2 owe a fiduciary duty to the plaintiff. In *Nymark v. Heart Federal Savings & Loan Association*, 231
3 Cal.App.3d 108 (1991), the court held that a lender does not owe the customer/borrower a duty in
4 connection with the lender's internal in-house handling of a loan. Further, the court held, as a matter
5 of law the relationship between lender and its borrower is not fiduciary in nature. *Nymark*, at 1093.
6 As a general rule, a financial institution owes no duty of care to a borrower when the institution's
7 involvement in the loan transaction does not exceed the scope of its conventional role as a mere
8 lender of money. *Id.* at 1096. There was no fiduciary duty here. As a matter of law, then, the
9 motion to dismiss the first cause of action must be granted without leave to amend.

10 **J. Plaintiff's Unjust Enrichment Claim Fails.**

11 Plaintiff also tries to assert a claim for unjust enrichment. FAC ¶¶ 100-106. As far as unjust
12 enrichment, it too is not a theory of recovery but a result thereof. See *Jogani v. Superior Court*, 165
13 Cal. App. 4th 901, 911 (2008) ("unjust enrichment is not a cause of action.") In any event, Plaintiff
14 has provided no wrongful act for any defendant to be liable for unjust enrichment and this claim too
15 fails as a matter of law.

16 **K. Plaintiff's Civil Conspiracy Claim Fails.**

17 Plaintiff's seventh cause of action is for "conspiracy." FAC ¶¶ 100-106. However,
18 "[c]onspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who,
19 although not actually committing a tort themselves, share with the immediate tortfeasors a common
20 plan or design." *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 510-511 (1994).
21 As already shown, Plaintiff's others claims are defective. Those claims fail to establish any ground
22 for holding other persons liable in tort, so there is nothing for which [defendant] could be held
23 vicariously liable on the conspiracy "claim." Accordingly, this claim, too, should be dismissed.

24 **L. Plaintiff's RICO Claim Fails.**

25 Plaintiff's ninth cause of action is for a violation of RICO. (FAC ¶¶ 113-124). To state a
26 civil RICO claim, a plaintiff must allege five elements: (1) conduct, (2) of an enterprise, (3) through
27 a pattern, (4) of racketeering activity, establishing that (5) the defendant caused injury to the
28 plaintiff's business or property. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985); *Swartz*

1 v. *KPMG LLP*, 476 F.3d 756, 760-61 (9th Cir. 2007) (per curiam); *Chaset v. Fleer/Skybox Int'l, LP*,
2 300 F.3d 1083, 1086-87 (9th Cir. 2002).

3 Plaintiff's RICO claim does not aver facts showing any of the required elements, nor does it
4 meet Rule 9(b)'s requirement of pleading a RICO claim with particularity.

5 The complaint does not allege any predicate acts of racketeering activity giving rise to a
6 RICO claim, much less a "pattern of racketeering activity." 18 U.S.C. § 1961(5). There is no
7 underlying predicate act for which a RICO claim could be based. See *Thiel v. First Fed. Sav. &*
8 *Loan Ass'n*, 646 F.Supp. 592, 595-98 (N.D. Ind. 1986) (rejecting claims that lender had violated
9 RICO by issuing loan check in exchange for promissory note and imposing sanctions on plaintiffs
10 for bringing frivolous action).

11 The complaint also fails to allege the existence of a RICO enterprise sufficiently. It avers,
12 without factual elaboration, that the defendants regularly engage in cooperative efforts. Cooperation
13 alone does not create a RICO enterprise. Legitimate businesses cooperate with others to accomplish
14 their economic ends through legal means. See *Alejo v. Mozilo*, 2009 WL 692001, at *2 (C.D. Cal.
15 2009) ("[Plaintiff] states that Defendants engaged in "cooperative efforts," but does not identify an
16 "enterprise" or even specify which defendants were involved in the purportedly wrongful activity.").

17 A RICO claim must be pleaded with particularity pursuant to Fed. R. Civ. P. 9(b), just as a
18 fraud claim must be. See *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1065-66 (9th Cir. 2004). So,
19 too, must the mail and wire fraud claims that plaintiffs aver as predicate acts. *Swartz v. KPMG LLP*,
20 476 F.3d 756, 764-65 (9th Cir. 2007). The complaint must "state the time, place, and specific
21 content of the false representations as well as the identities of the parties to the misrepresentation."
22 See, e.g., *Murr Plumbing, Inc. v. Scherer Bros. Fin. Serv. Co.*, 48 F.3d 1066, 1069 (8th Cir. 1995)
23 When several defendants are sued, the complaint must "inform each defendant separately of the
24 allegations surrounding his alleged participation in the fraud." *Swartz*, 476 F.3d at 764-65. Also,
25 "[a]llegations of fraud based on information and belief do not satisfy the particularity requirement
26 unless accompanied by a statement of the specific facts on which the belief is founded." *County of*
27 *Santa Clara v. Astra U.S., Inc.*, 428 F.Supp.2d 1029, 1036 (N.D. Cal. 2006); citing *Moore v. Kayport*
28 *Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir.1989).

1 Plaintiffs' RICO claim makes no effort to meet this heightened pleading requirement.
2 Indeed, the complaint's "formulaic recitation of the elements of a [RICO] cause of action will not
3 do" even under Rule 8(a), let alone under the more stringent Rule 9(b) standard. Like the fraud
4 claim, the RICO claim is riddled with general allegations that the "defendants" engaged in fraudulent
5 conduct or conspired or committed other wrongs without bothering to inform either defendant what it
6 did in particular. No time, place or person is alleged. No specific misrepresentation is identified.

7 This claim should be dismissed.

8 **M. Plaintiff's Claim For Usury and Fraud Fails**

9 Plaintiff's eleventh cause of action is for usury and fraud. FAC ¶¶ 132-138. Again, Plaintiff
10 does not even state which defendants she means to sue for usury. (As far as fraud is concerned, it is
11 addressed above.) To state a claim for usury, a plaintiff must allege (1) the transaction was a loan or
12 forbearance, (2) the interest rate exceeded the statutory maximum, (3) the loan and interest was
13 absolutely repayable by the borrower, and (4) the lender had a willful intent to enter into a usurious
14 transaction. *Ghirardo v. Antonioli*, 8 Cal.4th 791, 798 (1994).

15 In this case, Plaintiff has not alleged that the interest rate her loans exceeded the statutory
16 maximum. Plaintiffs has also failed to allege that defendants willfully intended to enter into a
17 usurious transaction. Plaintiff has, therefore, failed to state a cause of action for usury, and the claim
18 should be dismissed.

19 Moreover, the statute of limitation of usury is one year. See Cal. Civ. Code § 1916-3. As
20 stated above, Plaintiff has failed to meet the statute of limitations deadline for this cause of action,
21 even if she had one, which she does not. See *Agra v. OneWest Bank FSB* 2009 WL 3526585, **2-3
22 (C.D.Cal. 2009). See footnote 2, supra.

23 **N. Plaintiff's Claim For Quiet Title, Wrongful Foreclosure and Breach of Security**
24 **Agreement All Fails As Matter of Law.**

25 Plaintiff's tenth, twelfth and thirteenth causes of action also fail as a matter of law. (FAC ¶¶
26 125-131, 139-147, 148-153). First, all of these causes of action are based upon vague allegations
27 which in no way question the legitimate foreclosure process which proceeded against Plaintiff's
28 secured property. In addition, as stated above, Plaintiff has not tendered the amount due, so she has

1 no standing to pursue these claims to begin with. Finally, as far as Plaintiff's "breach of security
2 agreement" goes, Plaintiff describes zero prejudice which affected here as a result of this non-
3 resultant breach, which the California Court of Appeal has found to be a prerequisite to these kinds
4 of claims. *See Knapp v. Doherty*, 123 Cal.App.4th 123, 76, 88-89 (2004). Any in event, Plaintiff
5 has pointed to *zero* wrongful acts which would give rise to any of these causes of action. All of these
6 claims should be dismissed without leave to amend.

7
8 **V. CONCLUSION**

9 For the reasons discussed herein, plaintiff's complaint is deficient. It fails to state a single
10 viable claim against GMACM or ETS. Therefore, this motion to dismiss should be granted in its
11 entirety.

12 DATED: March 7, 2011

SEVERSON & WERSON
A Professional Corporation

13 By: /s/ Philip Barilovits
Philip Barilovits

14
15 Attorneys for Defendant
16 GMAC Mortgage, LLC
EXECUTIVE TRUST SERVICES
17 MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC.
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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
10

11) Case No. 2:10-CV-2153-JAM-KJN
12 SHELLEY VON BRINCKEN,)
13) ORDER GRANTING DEFENDANTS'
14 Plaintiff,) MOTION TO DISMISS
15)
16 v.)
17)
18 MORTGAGECLOSE.COM, INC.;)
19 CALIFORNIA LAND COMPANY OF)
20 NEVADA COUNTY; EXECUTIVE TRUSTEE)
21 SERVICES, dba ETS SERVICES, LLC;)
22 MORTGAGE ELECTRONIC REGISTRATION)
23 SYSTEMS, INC.; GMAC MORTGAGE,)
24 INC.; and DOES 1-20, inclusive,)
25 Defendants.)
26)
27)
28)

20 This matter comes before the Court on Defendants' GMAC
21 Mortgage, LLC, Executive Trustee Services, and Mortgage Electronic
22 Registration Systems, Inc.'s (collectively "Defendants") Motion to
23 Dismiss (Doc. #65) Plaintiff Shelley Von Brincken's ("Plaintiff")
24 Second Amended Complaint ("SAC") (Doc. #62) for failure to state a
25 claim pursuant to Federal Rules of Civil Procedure 12(b)(6).
26 Plaintiff opposes the motion (Doc. #67). Defendant
27 Mortgageclose.com, Inc. joined in the Motion to Dismiss (Doc. #66).
28 Plaintiff did not oppose the joinder, accordingly the Court will

1 consider Mortgageclose.com, Inc. as joined in the motion to dismiss
2 with Defendants. The motion was set for hearing on May 4, 2011,
3 but ordered submitted on the briefs without oral argument.¹
4

5 I. FACTUAL AND PROCEDURAL BACKGROUND

6 Plaintiff borrowed \$220,000.00 on January 14, 2009 from
7 Mortgageclose.com, Inc. On the same date she signed a deed of
8 trust securing the properly located 14738 Wolf Rd., Grass Valley,
9 California, as security for the loan. Plaintiff subsequently
10 defaulted on the loan, and a Notice of Default was recorded on
11 April 27, 2011. Thereafter, a Notice of Trustee's Sale was
12 recorded on July 28, 2010, and the property was sold and Trustee's
13 Deed Upon Sale recorded on September 3, 2010. Prior to the Sale on
14 August 11, 2010, Plaintiff filed a Notice of Pendency of Action
15 (Doc. #3) and filed an unsuccessful motion for a Temporary
16 Restraining Order (Doc. #9).

17 Plaintiff alleges that she is the victim of fraud, predatory
18 lending, and an unlawful foreclosure. Plaintiff was previously pro
19 se, but acquired counsel, who filed the SAC. The SAC alleges
20 problems with the chain of title and the Deed of Trust. Plaintiff
21 further alleges that the purported lender/servicer failed, refused
22 or neglected to work with her to avoid foreclosure. Defendants
23 contend that despite Plaintiffs slew of general allegations about
24 the mortgage banking industry, Plaintiff fails to state a claim
25 against Defendants.
26

27 _____
28 ¹ This motion was determined to be suitable for decision without
oral argument. E.D. Cal. L.R. 230(g).

II. OPINION

A. Legal Standard

A party may move to dismiss an action for failure to state a claim upon which relief can be granted pursuant to Federal Rules of Civil Procedure 12(b)(6). In considering a motion to dismiss, the court must accept the allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1975), overruled on other grounds by Davis v. Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). Assertions that are mere "legal conclusions," however, are not entitled to the assumption of truth. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009), citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). To survive a motion to dismiss, a plaintiff needs to plead "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570. Dismissal is appropriate where the plaintiff fails to state a claim supportable by a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

Upon granting a motion to dismiss for failure to state a claim, the court has discretion to allow leave to amend the complaint pursuant to Federal Rules of Civil Procedure 15(a). "Absent prejudice, or a strong showing of any [other relevant] factor[], there exists a presumption under Rule 15(a) in favor of granting leave to amend." Eminence Capital, L.L.C. v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003). "Dismissal with prejudice and without leave to amend is not appropriate unless it is clear . . . that the complaint could not be saved by amendment." Id.

1 Generally, the court may not consider material beyond the
2 pleadings in ruling on a motion to dismiss for failure to state a
3 claim. There are two exceptions: when material is attached to the
4 complaint or relied on by the complaint, or when the court takes
5 judicial notice of matters of public record, provided the facts are
6 not subject to reasonable dispute. Sherman v. Stryker Corp., 2009
7 WL 2241664 at *2 (C.D. Cal. Mar. 30, 2009) (internal citations
8 omitted). In this case, Plaintiff has attached Exhibits A-N (Doc.
9 #62, Ex. 1) to the SAC. Plaintiff relies on these documents in her
10 Complaint (several of which are also public record as they are
11 recorded documents), and Defendants do not object to the Court
12 considering the attached documents. Accordingly, the Court will
13 consider documents A-N in ruling on the motion to dismiss.

14 B. Claims for Relief

15 1. Violation of the Home Ownership Equity Protection
16 Act

17 Plaintiff alleges that Defendants have violated the
18 Homeownership Equity Protection Act ("HOEPA"), 15 U.S.C. § 1639.
19 The SAC seeks rescission and damages under HOEPA. The SAC lumps
20 all the defendants together and does not specifically identify the
21 defendant(s) to whom her allegations pertain. Defendants argue
22 that Plaintiff fails to state a claim for violation of HOEPA,
23 because her claim is barred by the statute of limitations and the
24 SAC does not sufficiently allege that her loan falls under HOEPA.
25 However, Defendants only attack the portion of Plaintiff's claim
26 seeking damages, and not her claim for rescission.

27 HOEPA is an amendment to the Truth in Lending Act ("TILA"),
28 and therefore is governed by the same remedial scheme and statutes

1 of limitations as TILA. Hensley v. Bank of New York Mellon, 2010
2 WL 5418862, *4 (E.D. Cal. Dec. 23, 2010); Wadhwa v. Aurora Loan
3 Services, LLC, 2011 WL 1601593, *2 (E.D. Cal. April 27, 2011). The
4 statute of limitations for TILA damages claim is one year from the
5 occurrence of a violation. 15 U.S.C. § 1640(e). Under 15 U.S.C.
6 § 1635(f), TILA rescission claims shall expire three years after
7 the date of consummation of the transaction, or upon sale of the
8 property, whichever occurs first. The limitations period runs from
9 the date of consummation of the transaction. Wadhwa, supra (citing
10 King v. California, 784 F.2d 910, 915 (9th Cir. 1986).

11 The doctrine of equitable tolling may, in the
12 appropriate circumstance, suspend the limitation
13 period until the borrower discovers or had reasonable
14 opportunity to discover the fraud or nondisclosures
15 that form the basis of the TILA action. While the
16 applicability of the equitable tolling doctrine often
depends on matters outside the pleadings, dismissal
may be appropriate when a plaintiff fails to allege
facts suggesting that he did not have a reasonable
opportunity to discover the violation.

17 Wadhwa, 2011 WL 1601593 at *2 (internal citations omitted).

18 Here, the loan was issued on January 14, 2009, and Plaintiff
19 filed her complaint on August 11, 2010, more than one year later.
20 Plaintiff has included the cursory allegation throughout the SAC
21 that she did not learn of any violations until November 2009, and
22 thus any applicable statute of limitation should run from this
23 date. However, the SAC offers no factual support for Plaintiff's
24 allegation that she was unable to compare the allegedly improper
25 disclosure in the loan documents with the required disclosures
26 under HOEPA, nor does she explain why she could not have learned of
27 the alleged violations within the statutory period. See, e.g.,
28 Wadhwa, 2011 WL 1601593, at *2-3 (declining to apply equitable

1 tolling where plaintiffs did not allege why they could not compare
2 disclosure forms or discover the violation during the statutory
3 period). Accordingly, the statute of limitations for Plaintiff's
4 HOEPA damages claim has run, and the Court does not find from the
5 SAC's conclusory tolling allegation that equitable tolling applies.
6 While Plaintiff's HOEPA claim for rescission is timely, Plaintiff
7 has failed to tender the full amount of the loan or alleged ability
8 to tender. See e.g. Little v. Accent Conservatory and Sunroom
9 Designs, 2011 WL 2215816, *3 (S.D. Cal. June 7, 2011). As when
10 alleging a claim for rescission under TILA, plaintiffs must make an
11 offer of complete tender before seeking rescission of the loan. Id.

12 Additionally, Defendants argue that Plaintiff has not shown
13 that HOEPA applies to her loan. A loan is subject to HOEPA if the
14 loan's annual percentage rate at consummation exceeds by more than
15 ten percent the applicable yield on treasury securities, or the
16 total points and fees payable by the consumer at or before closing
17 exceeds eight percent of the total loan amount or \$400.00,
18 whichever is greater. 15 U.S.C. § 1602(aa)(1)(3); 12 C.F.R.
19 §226.32(a)(1). A HOEPA claim that fails to allege facts showing
20 that the plaintiff's loan satisfies one of the tests cannot
21 withstand a motion to dismiss. Rendon v. Countrywide Home Loans,
22 Inc., 2009 WL 3126400, *9 (E.D. Cal. 2009). The SAC states that
23 Plaintiff was required to pay excessive fees that exceeded ten
24 percent of the amount financed. Taking this allegation as true, as
25 the Court is required, Plaintiff has sufficiently alleged that
26 HOEPA may apply to her loan. However, because her claim for
27 damages is barred by the statute of limitations, and she has not
28 sufficiently alleged tender so as to maintain her claim for

1 rescission, the HOEPA claim is dismissed in its entirety.

2 2. Violation of the Real Estate Settlement Procedures
3 Act

4 Plaintiff alleges that Defendants violated the Real Estate
5 Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607, because
6 Defendants "accepted charges for the rendering of real estate
7 services which were in fact charges for other than services
8 actually performed." SAC ¶71. Defendants argue that the RESPA
9 claim is barred by the one year statute of limitations and fails to
10 state a claim.

11 The primary ill that section 2607 is designed to
12 remedy is the potential for unnecessarily high
13 settlement charges caused by kickbacks, fee-splitting,
14 and other practices that suppress price competition
15 for settlement services. This ill occurs, if at all,
16 when the plaintiff pays for the tainted service,
17 typically at the closing. 12 U.S.C. § 2614 provides
that a section 2607 claim may be brought within 1 year
from the date of the occurrence of the violation.
Barring extenuating circumstances, the date of the
occurrence of the violation is the date on which the
loan closed.

18 Solano v. America's Servicing Company, 2011 WL 1669735, *3 (E.D.
19 Cal. May 3, 2011) (internal citations omitted).

20 In this case, Plaintiff's loan was made on January 14, 2009.
21 Thus, her current claim is barred by the statute of limitations.
22 As discussed above, neither the SAC nor Plaintiff's opposition
23 brief discuss why she could not have discovered the alleged
24 violation within the one-year statutory period. Therefore,
25 Plaintiff has not shown that equitable tolling applies to her
26 claim. Moreover, the claim itself is devoid of factual support for
27 her conclusory allegation that Defendants violated RESPA, and is
28 thus insufficient to state a claim against Defendants. Because

1 Plaintiff lumps all Defendants together, it is unclear against whom
2 she intends to bring the claim. Defendants note in their reply
3 brief that none of them were the original lenders on the loan,
4 therefore none of them were involved at the time that the alleged
5 violations occurred. Accordingly, the RESPA claim is dismissed.

6 3. Violation of the Truth in Lending Act

7 Plaintiff alleges that Defendants violated TILA, 15 U.S.C. §
8 1601, et seq., by failing to disclose certain charges in the
9 finance charge shown on the TILA statement. Plaintiff seeks
10 rescission and alleges that the SAC serves as formal notice of her
11 intent to rescind her loan under TILA. Defendants assert that
12 Plaintiff cannot state a claim for rescission under TILA, without
13 first alleging that she can tender the amount due on the loan. To
14 the extent that Plaintiff seeks damages, Defendants argue damages
15 are barred by the one year statute of limitations.

16 The statute of limitations for rescission under TILA is three
17 years. Accordingly, Plaintiff's claim for rescission is timely.
18 However, as discussed in the HOEPA claim, her claim for damages
19 under TILA is barred, as the statute of limitations has run and she
20 has not made sufficient allegations as to why equitable tolling
21 should apply. Further, Defendants are correct that Plaintiff must
22 allege tender in order to bring her claim for rescission, and she
23 has not done so. (See, e.g., Rose v. American Home Mortg.
24 Servicing, Inc., 2011 WL 2074938, at *2 (E.D. Cal. May 25, 2011).
25 A tender must be one of full performance and must be unconditional
26 to be valid. Solano, 2011 WL 1669735, at *8. Plaintiff's
27 allegation that she offered to tender in the letter of rescission
28 (Ex. F. to the SAC), conditioned on receiving approximately 4

1 million dollars in damages from Defendants, is not sufficient.
2 Accordingly, the claim for TILA rescission and damages is
3 dismissed.

4 4. Violation of the Fair Credit Reporting Act

5 Plaintiff alleges that Defendants violated the Fair Credit
6 Reporting Act ("FCRA"), 15 U.S.C. § 1681 by reporting negative
7 information about Plaintiff to the major credit reporting agencies.
8 Defendants argue that Plaintiff has not properly alleged a
9 violation of the FRCA and therefore fails to state a claim against
10 Defendants.

11 There is a private right of action for violations of section
12 1681(S)(2)(b) of the FRCA. Matracia v. JP Morgan Chase Bank, 2011
13 WL 1833092, *3 (E.D. Cal. May 12, 2011). However, to succeed on
14 such a claim, a plaintiff must allege that she had a dispute with a
15 credit reporting agency regarding the accuracy of an account, that
16 the credit reporting agency notified the furnisher of the
17 information, and that the furnisher failed to take the remedial
18 measures outlined in the statute. Id. Here, Plaintiff fails to
19 allege any of these facts. Accordingly, the FRCA claim is
20 dismissed.

21 5. Fraudulent Misrepresentation

22 Plaintiff alleges that Defendants fraudulently concealed and
23 misrepresented information about her loan, before and after
24 closing. Defendants assert that Plaintiff's allegations do not
25 meet the heightened pleading standard for claims of fraud.

26 Rule 9(b)'s heightened pleading standard applies to averments
27 of fraud in all civil cases, regardless of whether or not fraud is
28 an essential element of the claim. Rule 9(b) proves that in

1 alleging fraud or mistake, a party must state with particularity
2 the circumstances constituting fraud or mistake. The required
3 specificity includes the time, place and specific content of the
4 false representations as well as the identities of the parties to
5 the misrepresentations. Further, in alleging fraud against
6 multiple defendants, Rule 9(b) does not allow a complaint to merely
7 lump multiple defendants together but requires plaintiff to
8 differentiate her allegations when suing more than one defendant.”
9 Solano, 2011 WL 1669735, *5-6 (internal citations omitted).

10 As the SAC does not differentiate between the named
11 defendants, and is not plead with the specificity required by Rule
12 9(b), Plaintiff’s claim for fraudulent misrepresentation is
13 dismissed.

14 6. Breach of Fiduciary Duty

15 Plaintiff alleges that Defendants breached their fiduciary
16 duty by inducing Plaintiff to enter into a mortgage that was
17 contrary to Plaintiff’s intentions and interests. Defendants move
18 to dismiss for failure to prove that a fiduciary relationship
19 existed.

20 To state a claim for breach of fiduciary duty, a plaintiff
21 must allege: (1) the existence of a fiduciary relationship; (2) the
22 breach of that relationship; and (3) damage proximately caused
23 thereby. Solano, supra, at *6. As a general rule, a loan
24 transaction is an at arms length transaction and there is no
25 fiduciary relationship between the borrower and lender. Further,
26 loan servicers typically do not have a fiduciary relationship with
27 borrowers. Id. The allegations in the SAC that Defendants
28 breached their fiduciary duty are identical to allegations of

1 breach of fiduciary duty previously dismissed in *Solano*, 2011 WL
2 1669735 at *6. As the allegations in the SAC do not show that
3 these defendants are indeed fiduciaries to Plaintiff, the claim for
4 Breach of Fiduciary Duty is dismissed.

5 7. Unjust Enrichment

6 Plaintiff alleges that Defendants have been unjustly enriched
7 by receiving fees and benefits from the loan transaction, at the
8 expense of Plaintiff. Defendants move to dismiss this claim,
9 asserting that that Plaintiff cannot bring a claim for unjust
10 enrichment, and has not shown any wrongful act by Defendants.
11 Under California law, it is well settled that an action based upon
12 an implied-in-fact contract or quasi-contract cannot lie where
13 there exists between the parties a valid express contract covering
14 the same subject matter. *Solano*, 2011 WL 1669735 at *7. Because
15 the SAC alleges the existence of an express contract between the
16 parties that governed the loan transaction, she cannot bring a
17 claim for unjust enrichment based on an alleged implied contract
18 covering the same loan transaction. Accordingly, the claim for
19 unjust enrichment is dismissed.

20 8. Civil Conspiracy

21 Plaintiff alleges that Defendants engaged in a conspiracy to
22 further illegal acts in the course of the loan transaction.
23 Defendants move to dismiss this claim, arguing that there is no
24 independent claim for civil conspiracy under California law.

25 Conspiracy is not a cause of action, but a legal doctrine that
26 imposes liability on persons who, although not actually committing
27 a tort themselves, share with the immediate tortfeasors a common
28 plan or design in its perpetration. Standing alone, a conspiracy

1 does no harm and engenders no tort liability. It must be activated
2 by the commission of an actual tort. Further, to allege a civil
3 conspiracy to defraud, a complaint must meet the particularity
4 requirement of Rule 9(b). Solano, supra at *10. Accordingly, as
5 Plaintiff does not set forth the basis for her claim of conspiracy,
6 and as this Court is dismissing all other claims in the SAC upon
7 which her conspiracy claim could possibly be based, the civil
8 conspiracy claim is dismissed.

9 9. Civil RICO Violations

10 Plaintiff alleges that Defendants participate in a RICO
11 conspiracy to defraud her. Defendants move to dismiss this claim,
12 arguing that it is not plead with particularity, Plaintiff has not
13 plead any facts to support her allegation of a RICO conspiracy, and
14 has not alleged that Defendants engaged in pattern of activities
15 affecting interstate commerce. To properly plead a RICO violation
16 for civil damages, a plaintiff must show that defendants, through
17 two or more acts constituting a pattern, participated in an
18 activity affecting interstate commerce. McAnelly v. PNC Mortgage,
19 2011 WL 318575, *3 (E.D. Cal. Feb. 1, 2011). As Plaintiff has
20 raised only conclusory allegations without any factual support, and
21 has failed to allege the essential elements of a RICO claim, her
22 RICO conspiracy claim is dismissed.

23 10. Quiet Title

24 Plaintiff brings a claim to quiet title to the property,
25 seeking full and clear title. Defendants move to dismiss the claim
26 because Plaintiff has not tendered the amount she owes. "Under
27 California law, it is well settled that a mortgagor cannot quiet
28 his title against the mortgagee without paying the debt secured."

1 Solano, 2011 WL 1669735 at *8. Therefore, to maintain a quiet
2 title claim a plaintiff is required to allege tender of the
3 proceeds of the loan at the pleading stage. A tender must be one
4 of full performance and must be unconditional to be valid. Id. As
5 previously discussed, Plaintiff has not sufficiently alleged
6 tender. Accordingly, the claim to quiet title is dismissed.

7 11. Usury and Fraud

8 Plaintiff alleges that Defendants have committed usury and fraud.
9 Defendants move to dismiss, arguing that Plaintiff lumps all
10 Defendants together, fails to plead with particularity and has not
11 set forth the basis for her usury claim. Under California law, the
12 elements of a fraud claims are (1) misrepresentation; (2) knowledge
13 of falsity; (3) intent to induce reliance; (4) justifiable
14 reliance; and (5) resulting damage. Solano, 2011 WL1669735 at *9.
15 A claim for fraud in federal court must satisfy Rule 9(b)'s
16 heightened pleading requirements. Id. The elements of a usury
17 claim are (1) the transaction must be a loan or forbearance;
18 (2) the interest to be paid must exceed the statutory maximum;
19 (3) the loan an interest must be absolutely repayable by the
20 borrower; and (4) the lender must have a willful intent to enter
21 into a usurious transaction. A loan that charges an interest rate
22 greater than 10 percent per annum is usurious. Id. As Plaintiff
23 has failed to plead her claim with the required particularity, and
24 has not set forth any facts to support her claim for usury and
25 fraud, the claim is dismissed.

26 12. Wrongful Foreclosure

27 Plaintiff alleges that Defendant wrongfully foreclosed on her
28 property, because Defendants are not the beneficiaries of the

1 mortgage. Defendants contend that Plaintiff must fully tender
2 before she can challenge the foreclosure sale. To state a wrongful
3 foreclosure claim, a plaintiff must allege a credible tender of the
4 amount of the secured debt. Solano, supra, at *10. As discussed
5 above, tender must be one of full performance and must be
6 unconditional to be valid. Plaintiff makes no such unconditional
7 tender in the SAC, accordingly, the motion to dismiss this claim is
8 granted.

9 13. Breach of Trust Instrument

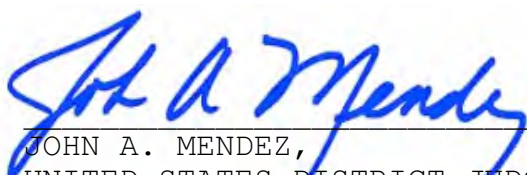
10 Lastly, Plaintiff brings a claim captioned "Breach of Trust
11 Instrument" in which she alleges that the security instrument was
12 breached. Defendants move to dismiss alleging that Plaintiff's
13 claim is vague, and that plaintiff has not set facts showing
14 wrongful acts or damages to support her claim. Identical
15 allegations were dismissed as conclusory, vague and insufficient to
16 inform each defendant of its liability for breach of the security
17 instrument in Matracia v. JP Morgan Chase Bank, 2011 WL 1833092,
18 at*6 (E.D. Cal. May 12, 2011) (dismissing a complaint brought by
19 Plaintiff's counsel). This Court likewise finds that Plaintiff has
20 failed to state claim for breach of the security instrument, and
21 the claim is dismissed.

22 III. ORDER

23 Plaintiff has already amended her complaint twice and has yet
24 to properly plead her claims. Thus it is clear that none of the
25 claims can be saved by further amendment. Accordingly, all of the
26 claims in the SAC are dismissed with prejudice.

27 IT IS SO ORDERED.

28 Dated: June 30, 2011


JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE

M. FLOWERS



FILED

JUN 26 2012

Superior Court of the
State of California
County of Nevada

1 John Von Brincken
2 Shelley Von Brincken
3 14738 Wolf Road
4 Grass Valley, California 95949
5 530-268-8777

Without an Attorney (Inter Alia)

7 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
8
9 IN AND FOR THE COUNTY OF NEVADA

10 SHELLEY VON BRINCKEN,
11 Plaintiff,

Case No.: 78503

12 vs.

PLAINTIFFS AMENDED COMPLAINT TO
ESTABLISH DEED AS MORTGAGE AND
QUIET TITLE BY MORTGAGOR

13 FEDERAL NATIONAL MORTGAGE
14 ASSOCIATION, BOARD OF GOVERNORS
15 OF THE FEDERAL RESERVE SYSTEM,
16 MORTGAGE ELECTRONIC
17 REGISTRATION SYSTEMS, INC. and DOES
1 through 20 inclusive,

[Civ. Code §§ 2924(a), 2925]
[Code Civ. Proc. §§ 760.020, 761.020]

Defendants.

(Limited Civil)

18
19
20 Plaintiff complains and for causes of action alleges as follows:

21 FIRST CAUSE OF ACTION-QUIET TITLE

22 1. Defendant, FEDERAL NATIONAL MORTGAGE ASSOCIATION, is and at all times
23 herein mentioned, was a Corporation organized and existing under the laws of the State of
24 Delaware with principle offices located at 3900 Wisconsin Avenue, Washington, DC 20016 in
25 the City of District of Columbia, Washington D.C.
26

27 PLAINTIFFS AMENDED COMPLAINT TO ESTABLISH DEED AS MORTGAGE AND QUIET TITLE BY MORTGAGOR
28

1 2. Defendant, BOARD OF GOVERNERS OF THE FEDERAL RESERVE SYSTEM, is
2 and at all times herein mentioned, was a Corporation organized and existing under the laws of
3 the United States with principle offices located at 20th Street and Constitution of the Federal
4 Reserve System in the City of District of Columbia, Washington D.C..

5
6 3. Defendant, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., is at all
7 times herein mentioned, was a Corporation organized and existing under the laws of the United
8 States with principal offices at 3300 S.W. 34TH AVENUE, SUITE 101, OCALA, FL. 34474.

9
10 4. Plaintiffs are informed and believe and thereon alleges that at all times herein mentioned,
11 each of the defendants sued herein was the agent and employee of each of the remaining
12 defendants and was at all times acting within the purpose and scope of such agency and
13 employment.

14
15 6. On or about January 14, 2009, plaintiff was the owner of certain real property located at
16 14738 WOLF ROAD, GRASS VALLEY, CA. 95949 County of Nevada, California, and
17 described as follows ("the property"): Legal Description: LOT 1, AS SHOWN ON FINAL MAP.
18 NO. 00-002 OF THE WOLF, FILED IN THE OFFICE OF THE COUNTY RECORDER,
19 COUNTY OF NEVADA, STATE OF CALIFORNIA, ON MAY 6, 2008, IN BOOK 8 OF
20 SUBDIVISIONS, AT PAGE 178.

21
22 A.P.N. 55-00-34

23 7. Plaintiff's title at that time was based on a Grant Deed from Wolf Creek Associates, LLC.
24 granting the property in fee simple to plaintiff, dated 1/15/2009 and recorded in Nevada County,
25

26
27 PLAINTIFFS AMENDED COMPLAINT TO ESTABLISH DEED AS MORTGAGE AND QUIET TITLE BY MORTGAGOR

1 California, at book 8, page 178, Instrument Number 2009-0001230-00. And therefore is marked
2 (Exhibit A).

3
4 8. On 1/14/2009, plaintiff, for a valuable consideration, made and delivered a promissory
5 note in the sum of \$220,000.00, with interest at the rate of 5.914 percent per annum, payable
6 monthly ("the note"). Defendant appears to be the present holder of the note, a copy of which is
7 attached as (Exhibit B) and incorporated by reference.

8
9 9. On the same day, plaintiff executed and delivered to defendant a deed to the property. On
10 1/23/2009, that deed was recorded in Nevada County, California, at book 8 page 178; Instrument
11 Number 2009-0001231-00. A copy of that deed is attached as (Exhibit C) and incorporated by
12 reference. That deed was in fact a mortgage only and was intended by both parties to be
13 mortgage only, in that it was executed and delivered solely to secure payment of the note.

14
15 10. On or about 4/25/2012, plaintiff demanded that defendant re-convey the title to plaintiff.
16 Defendants failed and refused, and continue to fail and refuse, to re-convey or to recognize the
17 deed (Exhibit D) as a mortgage only.

18
19 11. On or about 1/6/2012, plaintiff offered to pay defendant the whole sum or the unpaid
20 balance of principal and interest owing and unpaid under the terms of the note, in the sum of
21 \$220,000.00 and demanded that the defendant re-convey the title to plaintiff. Defendants, failed
22 and refused, and continue to fail and refuse, to accept this tender or to re-convey or to recognize
23 the deed (Exhibit E) as a mortgage only.

24
25 12. Defendants are not and at all times herein mentioned the owner and/or entitled to
26 possession of the property located at 14738 WOLF ROAD, GRASS VALLEY, CA. 95949.

27 PLAINTIFFS AMENDED COMPLAINT TO ESTABLISH DEED AS MORTGAGE AND QUIET TITLE BY MORTGAGOR

1 13. Plaintiff is informed and believes and thereupon alleges that, and each of them, claim an
2 interest in the property adverse to plaintiff herein. However, the claim of said Defendants are
3 without any right whatsoever, and said Defendants have no legal or equitable right, claim, or
4 interest in said property.
5

6 14. Plaintiff therefore seek a declaration that the title to the subject property is vested in
7 plaintiff alone and that the defendants herein, and each of them, be declared to have no estate,
8 right, title or interest in the subject property and that said defendants, and each of them, be
9 forever enjoined from asserting any estate, right, title or interest in the subject property adverse
10 to plaintiff herein.
11

12 **WHEREFORE**, Plaintiff prays judgment against defendant as follows:

- 13 1. That the deed attached as Exhibit C be adjudged to be a mortgage;
14
15 2. For an order compelling said Defendants, and each of them, to transfer legal title and
16 possession of the subject property to Plaintiff SHELLEY C VON BRINCKEN herein;
17
18 3. For a declaration and determination that Plaintiffs are the rightful holder of title to the
19 property and that Defendants herein, and each of them, be declared to have no estate, right, title
20 or interest in said property;
21
22 4. For a judgment forever enjoining said defendants, and each of them, from claiming any
23 estate, right, title or interest in the subject property;
24
25 5. That plaintiff be allowed to deposit whatever amount is adjudged due with the clerk of
26 the court for defendant's benefit in discharge of the note and, on condition of making the deposit,
27 plaintiff have title to the property quieted in plaintiff;
28

PLAINTIFFS AMENDED COMPLAINT TO ESTABLISH DEED AS MORTGAGE AND QUIET TITLE BY MORTGAGOR

- 1 6. That the note be adjudged to have been fully paid;
- 2 7. That plaintiff have title to the property quieted in plaintiff;
- 3
- 4 8. For costs of suit herein incurred; and
- 5 9. For any other and further relief as the court may deem proper.

6 Date: 6/24/2012

Respectfully Submitted,

Shelley Von Blancken
14738 Wolf Road
Grass Valley, California 95949

PLAINTIFFS AMENDED COMPLAINT TO ESTABLISH USED AS MORTGAGE AND QUIET TITLE BY MORTGAGOR

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VERIFICATION

I, SHELLEY C VON BRINCKEN, am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

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

Date: 6/24/2012

Respectfully Submitted,

Shelley Von Brincken
14738 Wolf Road
Grass Valley, California 95949

PLAINTIFFS AMENDED COMPLAINT TO ESTABLISH DEED AS MORTGAGE AND QUIET TITLE BY MORTGAGOR

EXHIBIT 5

[EXHIBIT] A

EXHIBIT A

2

RECORDING REQUESTED BY:

Old Republic Title Company

Order No.: 2123006684-SE

APN: 55-060-68

105038-70

When Recorded Mail Document and Tax Statements to:

Shelley von Brincken
14738 Wolf Road
Grass Valley, CA 95949

Nevada County Recorder

Gregory J. Diaz

DOC- 2009-0001230-00

Acct 1-California Land Title Co.

Friday, JAN 23, 2009 08:00:00

REC \$6.00:SBS \$1.00:DOC \$302.50

SSR \$1.00:MIC \$1.00:AUT \$2.00

Ttl Pd \$313.50

Nbr-0000576688

ENM/EM/1-2

SPACE ABOVE THIS LINE IS FOR RECORDER'S USE

Grant Deed

The undersigned grantor(s) declare(s):

Documentary Transfer Tax is \$302.50

(X) computed on full value of property conveyed, or

() computed on full value less of liens and encumbrances remaining at time of sale.

(X) Unincorporated area: () City of

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged,
Wolf Creek Associates, LLC

hereby GRANT(S) to

Shelley von Brincken, a married woman, as her sole and separate property

that property in Unincorporated area of Nevada County, State of California, described as follows:
See "Exhibit A" attached hereto and made a part hereof.

Date: January 15, 2009

Wolf Creek Associates, LLC

By:

Jay Selby

MEMBER

State of California

County of Placer

On

1/22/09

before me,

K. Dean

a

Notary Public, personally appeared

Jay Selby

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

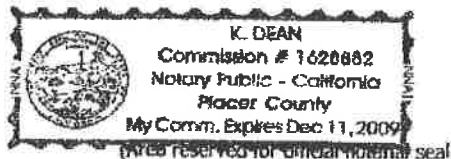
Signature

K. Dean

Name

K. Dean

(typed or printed)



Grant Deed

MAIL TAX STATEMENTS AS DIRECTED ABOVE

EXHIBIT A

The land referred to in this report is situated on the State of California, County of Nevada, unincorporated area and is described as follows:

Lot 1, as shown on Final Map No. 00-002 of The Wolf, filed in the office of the County Recorder, County of Nevada, State of California, on May 6, 2008, in Book 8 of Subdivisions, at Page 178.

APN: 55-060-34

C (1/25/16)
[EXHIBIT] B

EXHIBIT "B"

3

MIN: 1002310-0000810219-5

NOTE

Loan Number: 0810219

JANUARY 14, 2009

[Date]

ORANGE

[City]

CALIFORNIA

[State]

14738 WOLF ROAD, GRASS VALLEY, CALIFORNIA 95949

[Property Address]

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. \$ 220,000.00 (this amount is called "Principal"), plus interest, to the order of the Lender. The Lender is MORTGAGECLOSE.COM, INC., A NEVADA CORPORATION

I will make all payments under this Note in the form of cash, check or money order.

I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

2. INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of 5.625 %.

The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 6(B) of this Note.

3. PAYMENTS

(A) Time and Place of Payments

I will pay principal and interest by making a payment every month.

I will make my monthly payment on the 1st day of each month beginning on MARCH 1 2009. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on FEBRUARY 1, 2039, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at 1855 WEST KATELLA AVENUE, SUITE 200, ORANGE, CALIFORNIA 92867

or at a different place if required by the Note Holder.

(B) Amount of Monthly Payments

My monthly payment will be in the amount of U.S. \$ 1,266.44

4. BORROWER'S RIGHT TO PREPAY

I have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a "Prepayment." When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under the Note.

I may make a full Prepayment or partial Prepayments without paying a Prepayment charge. The Note Holder will use my Prepayments to reduce the amount of Principal that I owe under this Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the Prepayment amount, before applying my Prepayment to reduce the Principal amount of the Note. If I make a partial Prepayment, there will be no changes in the due date or in the amount of my monthly payment unless the Note Holder agrees in writing to those changes.

5. LOAN CHARGES

If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit;

and (b) any sums already collected from me which exceeded permitted limits will be refunded to me. The Note Holder may choose to make this refund by reducing the Principal I owe under this Note or by making a direct payment to me. If a refund reduces Principal, the reduction will be treated as a partial Prepayment.

6. BORROWER'S FAILURE TO PAY AS REQUIRED

(A) Late Charge for Overdue Payments

If the Note Holder has not received the full amount of any monthly payment by the end of 15 calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 5.000 % of my overdue payment of principal and interest. I will pay this late charge promptly but only once on each late payment.

(B) Default

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

(C) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

(D) No Waiver By Note Holder

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

(E) Payment of Note Holder's Costs and Expenses

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

7. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address.

Any notice that must be given to the Note Holder under this Note will be given by delivering it or by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if I am given a notice of that different address.

8. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note.

9. WAIVERS

I and any other person who has obligations under this Note waive the rights of Presentment and Notice of Dishonor. "Presentment" means the right to require the Note Holder to demand payment of amounts due. "Notice of Dishonor" means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.

10. UNIFORM SECURED NOTE


This Note is a uniform instrument with limited variations in some jurisdictions. In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses which might result if I do not keep

the promises which I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of those conditions are described as follows:

If all or any part of the Property or any interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED.


SHELLEY VON BRINCKEN (Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

[Sign Original Only]

[REDACTED]

[EXHIBIT] C

EXHIBIT

Von Brincken #0810219

gmcc # 602227759

18

RECORDING REQUESTED BY:

**CALIFORNIA LAND TITLE COMPANY OF
NEVADA COUNTY**

AND WHEN RECORDED MAIL TO:

**MORTGAGECLOSE.COM, INC.
1855 WEST KATELLA AVE., SUITE 200
ORANGE, CA 92667**



Nevada County Recorder

Gregory J. Diaz

DOC- 2009-0001231-00

Acct 1-California Land Title Co.

Friday, JAN 23, 2009 08:00:00

REC \$22.00:SSS \$17.00:SSR \$1.00

RIC \$1.00:RUY \$18.00:

Ttl Pd \$59.00

Nbr-0000578689

ENR/EM/1-10

ORDER NO.: 185038-TO

SPACE ABOVE THIS LINE FOR RECORDER'S USE

DEED OF TRUST

DOCUMENT TITLE

SEPARATE PAGE - PURSUANT TO GOVERNMENT CODE 27351.6

littepg

Recording Requested By:
MORTGAGECLOSE.COM, INC.

And After Recording Return To:
MORTGAGECLOSE.COM, INC.
1855 WEST KATELLA AVENUE, SUITE 200
ORANGE, CALIFORNIA 92667
Loan Number: 0810219

RECORDING REQUESTED
BY: OLD REPUBLIC TITLE

2123006684-NE

[Space Above This Line For Recording Date]

DEED OF TRUST

MIN: 1002310-0000810219-5

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

- (A) "Security Instrument" means this document, which is dated **JANUARY 14, 2009**, together with all Riders to this document.
- (B) "Borrower" is **SHELLEY VON BRINCKEN, A MARRIED WOMAN AS HER SOLE AND SEPARATE PROPERTY**

Borrower is the trustor under this Security Instrument.

(C) "Lender" is **MORTGAGECLOSE.COM, INC.**

Lender is a **NEVADA CORPORATION** organized and existing under the laws of **NEVADA**
Lender's address is **1855 WEST KATELLA AVENUE, SUITE 200, ORANGE, CALIFORNIA 92667**

(D) "Trustee" is **CALIFORNIA LAND TITLE COMPANY OF NV COUNTY**
464 BRUNSWICK RD, GRASS VALLEY, CALIFORNIA 95945

(E) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument. MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (883) 679-MERS.

(F) "Note" means the promissory note signed by Borrower and dated **JANUARY 14, 2009**.
The Note states that Borrower owes Lender **TWO HUNDRED TWENTY THOUSAND AND 00/100**
Dollars (U.S. \$ 220,000.00) plus interest.

Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than
FEBRUARY 1, 2039

(G) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."

(H) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

(I) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

- | | |
|--|--|
| <input type="checkbox"/> Adjustable Rate Rider | <input checked="" type="checkbox"/> Planned Unit Development Rider |
| <input type="checkbox"/> Balloon Rider | <input type="checkbox"/> Biweekly Payment Rider |
| <input type="checkbox"/> 1-4 Family Rider | <input type="checkbox"/> Second Home Rider |
| <input type="checkbox"/> Condominium Rider | <input type="checkbox"/> Other(s) [specify] |

(J) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(K) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium, association, homeowners association or similar organization.

(L) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(M) "Escrow Items" means those items that are described in Section 3.

(N) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(O) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(P) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(Q) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(R) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS. This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's

covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in the

COUNTY of NEVADA

[Type of Recording Jurisdiction]

[Name of Recording Jurisdiction]

LOT 1, AS SHOWN ON FINAL MAP NO. 30-002 OF THE WOLF, FILED IN THE
OFFICE OF THE COUNTY RECORDER, COUNTY OF NEVADA, STATE OF
CALIFORNIA, ON MAY 6, 2008, IN BOOK 8 OF SUBDIVISIONS, AT PAGE
178.

A.P.N. : 55-00-34

which currently has the address of 14738 WOLF ROAD

[Street]

GRASS VALLEY

[City]

California 95949 ("Property Address")

[Zip Code]

TOGETHER WITH all the improvements now or hereafter erected on this property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property." Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

BORROWER COVENANTS that Borrower is lawfully seized of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. **Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges.** Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not

obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. Application of Payments or Proceeds. Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. Funds for Escrow Items. Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 12. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender

shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender:

4. **Charges; Liens.** Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. **Property Insurance.** Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee and Borrower further agrees to generally assign rights to insurance proceeds to the holder of the Note up to the amount of the outstanding loan balance. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee and Borrower further agrees to generally assign rights to insurance proceeds to the holder of the Note up to the amount of the outstanding loan balance.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. **Occupancy.** Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. **Preservation, Maintenance and Protection of the Property; Inspections.** Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. **Borrower's Loan Application.** Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. **Protection of Lender's Interest in the Property and Rights Under this Security Instrument.** If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. Borrower shall not surrender the leasehold estate and interests herein conveyed or terminate or cancel the ground lease. Borrower shall not, without the express written consent of Lender, alter or amend the ground lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. **Mortgage Insurance.** If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

(b) Any such agreements will not affect the rights Borrower has - if any - with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures; to request and obtain cancellation of the Mortgage Insurance; to have the Mortgage Insurance terminated automatically; and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether

or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

12. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

13. Joint and Several Liability; Co-signers; Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

14. Loan Charges. Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires

otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

16. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. Borrower's Copy. Borrower shall be given one copy of the Note and of this Security Instrument.

18. Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. Sale of Note; Change of Loan Servicer; Notice of Grievance. The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. Hazardous Substances. As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action

required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If Lender invokes the power of sale, Lender shall execute or cause Trustee to execute a written notice of the occurrence of an event of default and of Lender's election to cause the Property to be sold. Trustee shall cause this notice to be recorded in each county in which any part of the Property is located. Lender or Trustee shall mail copies of the notice as prescribed by Applicable Law to Borrower and to the other persons prescribed by Applicable Law. Trustee shall give public notice of sale to the persons and in the manner prescribed by Applicable Law. After the time required by Applicable Law, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Trustee may postpone sale of all or any parcel of the Property by public announcement at the time and place of any previously scheduled sale. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's and attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.


23. **Reconveyance.** Upon payment of all sums secured by this Security Instrument, Lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Instrument to Trustee. Trustee shall reconvey the Property without warranty to the person or persons legally entitled to it. Lender may charge such person or persons a reasonable fee for reconveying the Property, but only if the fee is paid to a third party (such as the Trustee) for services rendered and the charging of the fee is permitted under Applicable Law. If the fee charged does not exceed the fee set by Applicable Law, the fee is conclusively presumed to be reasonable.

24. **Substitute Trustee.** Lender, at its option, may from time to time appoint a successor trustee to any Trustee appointed hereunder by an instrument executed and acknowledged by Lender and recorded in the office of the Recorder of the county in which the Property is located. The instrument shall contain the name of the original Lender, Trustee and Borrower, the book and page where this Security Instrument is recorded and the name and address of the successor trustee. Without conveyance of the Property, the successor trustee shall succeed to all the title, powers and duties conferred upon the Trustee herein and by Applicable Law. This procedure for substitution of trustee shall govern to the exclusion of all other provisions for substitution.

25. **Statement of Obligation Fee.** Lender may collect a fee not to exceed the maximum amount permitted by Applicable Law for furnishing the statement of obligation as provided by Section 2043 of the Civil Code of California.

The undersigned Borrower requests that a copy of any Notice of Default and any Notice of Sale under this Security Instrument be mailed to the Borrower at the address set forth above. A copy of any Notice of Default and any Notice of Sale will be sent only to the address contained in this recorded request. If the Borrower's address changes, a new request must be recorded.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.


SHELLEY VON BRINCKEN (Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

Witness:

Witness:

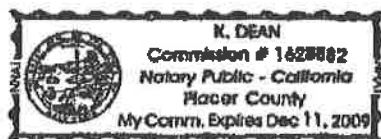
(Space Below This Line For Acknowledgment)

State of California)
County of Placer) ss.
On 1-15-09 before me, K. Dean Notary public
personally appeared SHELLEY VON BRINCKEN

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



NOTARY SEAL

K. Dean
NOTARY SIGNATURE
K. Dean
(Typed Name of Notary)

EXHIBIT 5

[EXHIBIT] D

EXHIBIT

D

PRIVATE INTERNATIONAL BILL OF EXCHANGE

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EFFECTIVE DATE	COUNTY & STATE OF TRANSACTION
6/19/2012	NEVADA, CALIFORNIA
PARTY OF THE FIRST PART	PARTY OF THE SECOND PART
SHELLEY VON BRINCKEN	FEDERAL NATIONAL MORTGAGE ASSOCIATION
14738 WOLF RD	3900 WISCONSIN AVENUE
GRASS VALLEY, CA. 95949	NW WASHINGTON, DC, 20016

This contract is dated this 19 day of June, 2012, and is between, SHELLEY C VON BRINCKEN, hereafter known as "Party of the First Part", and FEDERAL NATIONAL MORTGAGE ASSOCIATION, 3900 WISCONSIN AVENUE, NW WASHINGTON, DC 20016 hereafter known as "Party of the Second Part".

The Parties named herein reserve all rights to the Course of Common Law, without prejudice, and come together, this date, in this two party contractual relationship to transfer complete, absolute ownership and control, in allodium, over the following described property.

Property Description

First Party secures payment acquired from said US Treasury Bond #D70445617 account known and identified actually as Routing No. 0041000014 (Cleveland), Account No. 0070445617; acquired and derived from Social Security Number 561-50-3837 and all assets withheld on behalf of the borrower SHELLEY VON BRINCKEN. First Party tenders full payment in the form of a draft as a basis reduction under Internal Revenue Code relevant §§108(b)(5); 1017; 1221; 1273-1275(a)(1); 1082(a)(2); 1081(b) Treasury Regulation 1.1017-1T and residual credits to satisfy and cancel the obligation described herein by way of administrative sett-off. Payment satisfies all claims Second Party may have to the following property:

- | | |
|------------------------------------|-------------------|
| 1. (Legal Descriptions); | 5) MONEY ORDER |
| 2. Letter of Credit; | 6) IRS FORM 1099A |
| 3. Attached Promissory Note; | 7) IRS FORM 1040V |
| 4. Original Issue Discount Credit; | 8) IRS FORM 56 |

The Party of the First Part warrants that they have full and absolute ownership rights, and right of control of the of said described property and that the property is free of liens and encumbrances by this unconditional Property Bill of Exchange-Contract and Agreement.

The Party of the Second Part agrees and offers to release the aforementioned property upon satisfaction by payment of enclosed Money Order, 1099A, Form 56 Appointment of Fiduciary; Form 1040V; Enclosed Cover Letter to the Department of Treasury and abovementioned collateral and whereby releases all Beneficial Interests, of undetermined value, in exchange for the acquisition of all absolute release and control at-law, of the above, described property, with the condition that it is free from liens and encumbrances by consent under Internal Revenue Code §1082(a)(2) and 1081(b).

The Party of the First Part accepts for value the tender offer at-law of the above trade on Party of the Second Parts condition, warranting that the liens and or encumbrances have been extinguished on completion of this transaction provided to the Party of the Second Part by the Party of the First Part.

The Party of the First Part now delivers, by this instrument have legally tendered payment by Money Order, to the above described Party of the Second Part, and the Party of the Second Part acknowledges receipt of tender by Party of the First Part on behalf of the Borrower herein, in addition releases all units of beneficial interest of undetermined value in exchange from the Party of the First Part for the absolute ownership and control at-law, of the above described property.

This Bill of Exchange/Contract and Agreement serves as a public notice to all, that the Parties named herein are functioning by the Course of Common Law by exercising full and complete rights of absolute ownership and control over property exchanged. All rights are reserved to the Course of Common Law, none are waived without prejudice.

- 1. CONVEYANCE.** For valuable consideration, receipt of which is acknowledged by Seller, Seller sells and conveys to Buyer the Property Sold, to have and to hold the Property sold to Buyer and the heirs, executors, administrators and assigns of Buyer forever, and Seller and the heirs, executors, administrators and assigns of Seller warrant to defend the sale of the Property Sold

PRIVATE INTERNATIONAL BILL OF EXCHANGE

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unto Buyer and the heirs, executors, administrators and assigns of Buyer, against all and every person whomsoever lawfully claiming or to claim.

2. **WARRANTY BY SELLER.** Seller warrants that (1) Seller has title to the Property Sold, or has the right to possess and convey title, (2) the Property Sold is free of all liens, and (3) has no defects and is in good workable, usable condition except:
3. **INSURANCE AND RISK OF LOSS.** As soon as Seller conveys possession to Buyer by delivery, freight, or mail, the risk of loss and duty for insurance protection shall pass to Buyer. Until that time Seller shall assume risk of loss and maintain fire, theft, and casualty insurance on the Property Sold.

Acknowledgements: Both parties agree and accept the terms and conditions.

Signed this ____ day of _____, 2012

Signed this ____ day of _____, 2012

(First)
All rights Reserved to the course of
Common Law, Without Prejudice.

(Second)
All rights Reserved to the course of
Common Law, Without Prejudice.

SHELLEY VON BRINCKEN

By: FEDERAL NATIONAL MORTGAGE ASSOCIATION
Officer

State of California
Country of United States of America

State of _____
Country of United States of America

Then personally appeared before me
On this ____ day of _____, 2012,
SHELLEY VON BRINCKEN Borrower,
Known to be the person who acknowledged
The foregoing document as a free acts
and deed.

Then personally appeared before me
On this ____ day of _____, 2012,
FEDERAL NATIONAL MORTGAGE ASSOCIATION, as Lender,
Known to be the person who acknowledged
The foregoing document as a free acts and deed.

Notary Public Commission Expires

Notary Public Commission Expires

[EXHIBIT] E

EXHIBIT E 1012

HDPC ACQUISITIONS & SETTLEMENT INITIATIVE, LLC FAX COVER SHEET

2012

TO: GMAC MORTGAGE, LLC/ GMAC MORTGAGE CORPORATION

FROM: HDPC ACQUISITIONS & SETTLEMENT INITIATIVE, LLC

RE: SHELLEY VON BRINCKEN

LOAN NO.: 0602227759

DATE: January 6, 2012

To whom it may concern:

Please find attached authority to proceed upon settling the debt of the aforementioned borrowers. We hope this offer is in good faith to settle and close this account.

Our intent is to reverse and a sale that was conducted on the said property, as we would in the alternative request a bid in this sale of real property but not limited to letters of credit.

Thank you for your attention to this matter and patiently await your response. Do not hesitate to contact us.

HDPC ACQUISITIONS & SETTLEMENT INITIATIVE, LLC

Agent Huelbig for the Borrower

P.O. Box 330-279

Brooklyn, NY 11233

347-413-8193 Office

352-255-8305 Direct

TOTAL PAGES: 1-7

20#2

HDPC ACQUISITIONS & SETTLEMENT INITIATIVE, LLC

Mail Tracking No.: 7010 0290 0000 4251 3893

April 5, 2012

REQUEST FOR MORTGAGE LOAN ESTOPPEL AND AUTHORIZATION

From: HDPC ACQUISITIONS & SETTLEMENT INITIATIVE, LLC
o/b/o SHELLEY VON BRINCKEN
P.O. BOX 330279
BROOKLYN, NY 11233

To: MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.
o/b/o FEDERAL NATIONAL MORTGAGE ASSOCIATION
2255 NORTH ONTARIO STREET, SUITE 400
BURBANK, CA. 91504

RE: Loan Number: 0602227759

Secured Property Address: 14738 WOLF ROAD, GRASS VALLEY, CA. 95949

Borrower's Social Security Number: 561-50-3837

Please let this serve as a formal written request pursuant to California Codes of Civil Procedure Section 760.020, for an estoppel letter setting forth the payoff and reinstatement amount for the unpaid principal balance (including late fees, charges, and other miscellaneous fees), interest due, and the per diem rate for the above-referenced mortgage loan. Please forward the estoppel letter by mail or telefacsimile to the following address and or fax number.

HDPC ACQUISITIONS & SETTLEMENT INITIATIVE, LLC.
AGENT DENNIS HUELBIG for Borrowers
P.O. BOX 330279
BROOKLYN, NY 11233
347-413-8193
321-445-5422

We also authorize the lender to discuss any aspect of this loan with any employee or agent of the above-referenced title company, including, but not limited to:

Thank you for your prompt attention to this matter.

Sincerely,


HDPC ACQUISITION & SETTLEMENT INITIATIVE, LLC
AGENT DENNIS HUELBIG

Enclosures:

Cc: HDPC BANK & TRUST CO., 219 Thomas S. Boyland St., Suite 3R, Brooklyn, NY 11233

Cc: FEDERAL NATIONAL MORTGAGE ASSOCIATION; 3900 WISCONSIN AVE. NW WASHINGTON, DC 20016

Acct. Ref.: 2011-AQ-90000014

Mail Tracking No.: 7010 0290 0000 4251 3893

1 JOHN B. SULLIVAN (State Bar No. 96742)
EDWARD R. BUELL III (State Bar No. 240494)
2 MICHAEL G. CROSS (State Bar No. 268999)
mgc@severson.com
3 SEVERSON & WERSON
A Professional Corporation
4 One Embarcadero Center, Suite 2600
San Francisco, CA 94111
5 Telephone: (415) 398-3344
Facsimile: (415) 956-0439

6 Attorneys for Defendants
7 MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.

8
9 **SUPERIOR COURT OF CALIFORNIA**
10 **IN AND FOR THE COUNTY OF NEVADA**

11 SHELLEY VON BRINCKEN,

12 Plaintiff,

13 vs.

14 FEDERAL NATIONAL MORTGAGE
15 ASSOCIATION, BOARD OF GOVERNORS
OF THE FEDERAL RESERVE SYSTEM,
16 MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC. and DOES
17 1 through 20 inclusive,

18 Defendants.

Case No.: 78503

**NOTICE OF DEMURRER AND DEMURRER
TO FIRST AMENDED COMPLAINT**

[Filed concurrently with Request for Judicial
Notice]

Judge:	The Hon. Sean P. Dowling
Date:	September 21, 2012
Time:	10:00 A.M.
Dept.	6

Complaint filed: April 27, 2012 (Previous
Complaint Filed: July 14, 2011, under case No.
77648)

FILED
R. VASQUEZ
AUG 02 2012

Superior Court of the
State of California
County of Nevada

**FILE
BY FAX**

NOTICE OF DEMURRER AND DEMURRER

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 21, 2012 at 10:00 a.m., or as soon thereafter as counsel may be heard in Department 6 of the above entitled court located at 201 Church Street, Nevada City, California, before the Honorable Sean P. Dowling, defendant Mortgage Electronic Registration Systems, Inc. ("MERS") will, and hereby does demur to Shelley von Brincken's ("Plaintiff's") first amended complaint ("FAC") for failure to state a claim. The Complaint fails to state a claim against MERS upon which relief may be granted as explained further in the accompanying memorandum of points and authorities.

1. MERS demurs to the entire FAC because it is barred by the doctrine of res judicata and by issue preclusion.

2. MERS demurs to the entire FAC because Plaintiff has not tendered the amount she borrowed.

3. MERS demurs to the First Cause of Action for Quiet Title because it fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10(e).)

This demurrer is based on this notice of motion and motion, the memorandum of points and authorities, the pleadings and records on file in this action, the request for judicial notice filed herewith, any further briefs, evidence, authorities, or argument presented before or at the hearing of this motion. MERS respectfully request an order sustaining the demurrer and dismissing the complaint without leave to amend.

DATED: August 2, 2012

SEVERSON & WERSON
A Professional Corporation

By: 

Michael G. Cross

Attorneys for Defendants
Mortgage Electronic Registration Systems, Inc.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is no less than the third separate lawsuit that Shelley von Brincken ("Plaintiff") has filed regarding the foreclosure on her real property loan. Having filed multiple complaints in the United States District Court for the Eastern District of California and lost on the merits, and having filed another lawsuit in this Court and been dismissed on *res judicata* grounds, Plaintiff tries yet again. This is the rare case where a lawsuit is barred by *res judicata*, not once, but twice.

This complaint fails for the simple and straightforward reason that Shelley von Brincken and has already lost her complaint. She cannot add a few different causes of action and then have a redo every time she feels like it. The law does not—and cannot—operate like this. In any event, her claim for quiet title is without merit and fails on its own. This demurrer should sustained without leave to amend.

II. STATEMENT OF PURPORTED FACTS

Plaintiff, along with John von Brincken, borrowed \$220,000 from Mortgageclose.com on January 14, 2009. (Request for Judicial Notice ("RJN"), Ex. 1, Plaintiff's Federal Second Amended Complaint, Ex. A.) They signed, on the same date, a deed of trust securing the property located at 14738 Wolf Rd., Grass Valley, California, as security for that loan. (*Id.*, Ex. D.) Plaintiffs defaulted on that loan and a Notice of Default was recorded on April 27, 2010. (*Id.*, Ex., H.) That default having not been cured, a Notice of Trustee's Sale was recorded on July 28, 2010. (*Id.*, Ex. K.) Plaintiffs filed a notice of pendency of action on August 11, 2011. (*Id.*, Ex. L.) The default having still not been cured, the property was sold and a Trustee's Deed Upon Sale was recorded in the Nevada County Recorder's Office on September 3, 2011. (*Id.*, Ex. M.)

This is no less than the third separate lawsuit filed by Shelley von Brincken over this foreclosure, each of the prior two having been dismissed on the merits. First, Plaintiff filed a complaint in the United States District Court for the Eastern District of California. (*See* RJN, Ex. 1, Ex. A.) On June 30, 2011, Judge Mendez dismissed all of the claims with prejudice along with an opinion explaining his reasoning. (*Id.*, Exs. B, C.) That lawsuit, like this one, consisted of the same list of supposed chain of title problems with the foreclosure at issue here. Plaintiff then brought a

1 second lawsuit in this Court, which was dismissed by this Court as being subject to res judicata.
2 (RJN, Ex. D.) This is Plaintiff's third repackaging of the same lawsuit she has lost twice before.

3 III. LEGAL STANDARD FOR DEMURRERS

4 For the purposes of testing the sufficiency of the pleadings, the demurrer assumes the truth
5 of the well-pleaded factual allegations of the complaint. (*City of Dinuba v. County of Tulare*
6 (2007) 41 Cal.4th 859, 865; *Kearney v. Salomon Smith Barney, Inc.* (2006) 39 Cal.4th 95, 101.) A
7 demurrer does not, however, assume the truth of "contentions, deductions or conclusions of fact or
8 law." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *see also Aubry v. Tri-City Hosp. Dist.* (1992) 2
9 Cal.4th 962, 967.) Additionally, a demurrer may be based on matters appearing on the face of a
10 complaint or on matters of which the court is required or requested to take judicial notice. (Code
11 Civ. Pro., § 430.30, subd. (a).)

12 Conclusory averments and conclusions of law do not constitute a statement of the facts
13 constituting the cause of action, nor do they establish a claim upon which relief may be granted.
14 (*Smith v. Busniewski* (1952) 115 Cal.App.2d 124; *Fishback v. J.C. Forkner Fig Gardens* (1934) 137
15 Cal.App. 211.) A complaint that fails to set forth an adequate statement of facts is subject to
16 demurrer both for failure to allege facts upon which relief may be granted and for uncertainty. (Code
17 Civ. Proc., § 430.10(e), (f).)

18 IV. ARGUMENT

19 A. The Entire Complaint Is Barred By Res Judicata and Collateral Estoppel.

20 Plaintiffs' entire complaint is barred by the doctrine of res judicata. A general demurrer lies
21 where the facts alleged in the complaint or matters judicially noticed show that plaintiff is seeking
22 relief from the same defendant on the same cause of action as in a prior action, or is asserting an
23 issue decided against plaintiff in the prior action. (*Boeken v. Philip Morris USA, Inc.* (2010) 48
24 C4th 788, 792, 108 CR3d 806, 808; *Gabriel v. Wells Fargo Bank, N.A.* (2010) 188 CA4th 547,
25 556, 115 CR3d 622, 630.)

26 If an issue "could have been raised, the judgment is conclusive on it despite the fact that it
27 was not in fact expressly pleaded or otherwise urged." (*Sutphin v. Speik* (1940) 15 Cal.2d 195, 202.)
28 "A party cannot by negligence or design withhold issues and litigate them in consecutive actions.

1 Hence the rule is that the prior judgment is res judicata on matters which were raised or could have
2 been raised, on matters litigated or litigable.” (*Ibid.* (emphasis added); *In re Marriage of Mason*
3 (1996) 46 Cal.App.4th 1025, 1028, 54.)

4 Essentially the same complaint was brought in federal court and dismissed with prejudice.
5 Essentially the same complaint was brought in this Court and dismissed with prejudice as well.
6 Losing plaintiffs do not get to keep refileing their complaints until they win. The demurrer should be
7 sustained on this ground alone.

8 **B. Plaintiff Lacks Standing Because She Has Not Tendered the Amount Due Under**
9 **the Loan.**

10 Notwithstanding the simple, straightforward reason that this claim is barred by res judicata and
11 collateral estoppel, Plaintiff would still not have a claim.

12 A cause of action for quiet title requires a verified complaint with (1) a legal description of the
13 property, (2) the title of plaintiff and the basis of the title, (3) the adverse claims to the title, (4) the
14 date as of which the determination is sought, and (5) a prayer for determination of the title of the
15 plaintiff as against the adverse claim. (Cal. Civ. Proc. Code §761.020). Plaintiff’s Complaint fails to
16 satisfy these elements.

17 In addition to these elements—which have not been fully pled in the FAC—tender of amounts
18 owed against a lien against the property is a condition precedent to stating a claim for quiet title. (*See*
19 *Abdallah v. United Sav. Bank* (1996) 43 Cal.App.4th 1101, 1109; *United States Cold Storage v. Great*
20 *W. Sav. & Loan Ass’n* (1985) 165 Cal.App.3d 1214, 1225; *Arnolds Mgmt. Corp. v. Eischen* (1984)
21 158 Cal.App.3d 575, 578-79; *Karlsen v. Am. Sav. & Loan Ass’n* (1971) 15 Cal.App.3d 112, 117.)
22 This is because “if plaintiffs could not have redeemed the property had the sale procedures been
23 proper, any irregularities in the sale did not result in damages to the plaintiffs.” (*F.B.P.I. Rehab 01 v.*
24 *E&G Invs., Ltd.* (1989) 207 Cal.App.3d 1018, 1021.)

25 In other words, even if Plaintiff had alleged each element of a quiet title claim, the FAC fails
26 to state a claim because it is missing an averment of tender or the promise of tender of the amounts
27 Plaintiff admits she borrowed. But a trustor cannot “quiet title without discharging his debt. The
28

1 cloud upon his title persists until the debt is paid.” (*Aguilar v. Bocci* (1974) 39 Cal.App.3d 475, 477
2 (citation omitted).)

3 Simply stated, Plaintiff cannot re-acquire good title to the Property without paying or
4 tendering what she borrowed against the property. Plaintiff asks for relief in equity, but does not offer
5 to do equity herself. Plaintiff, instead, seeks a windfall: the Property back, free of liens, while she
6 also retains, without any obligation to repay, the \$220,000 she received from the lender. California
7 law does not countenance such an inequitable claim, as the above-cited authorities make clear.

8 Plaintiff does add to the FAC an allegation that she offered to pay the amount owing under the
9 note. (FAC ¶ 11.) But this allegation is not supported by the exhibit Plaintiff introduces to support it.
10 Exhibit E to Plaintiff’s FAC is an excerpt from a letter her agent sent to GMAC Mortgage stating that
11 the agent had “authority to proceed upon settling the debt of the aforementioned borrowers.” This is
12 not an unambiguous tender of amounts owed, which is required.

13 As Courts in this State have consistently held, “it is a debtor’s responsibility to make an
14 unambiguous tender of the entire amount due or else suffer the consequence that the tender is of no
15 effect.” (*Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 439 (citation omitted).) For a tender offer
16 to be effective, “[t]he tenderer must do and offer everything that is necessary on his part to complete
17 the transaction, and must fairly make known his purpose without ambiguity, and the act of tender
18 must be such that it needs only acceptance by the one to whom it is made to complete the
19 transaction.” (*Gaffney v. Downey Sav. & Loan Ass’n* (1988) 200 Cal.App.3d 1154, 1165 (emphasis
20 original).)

21 Plaintiff’s inclusion of Exhibit E to the FAC in no way serves to show that she made an
22 unambiguous tender of amounts owed under the Note. For this reason, as well, the FAC must fail.
23 The debtor bears the “responsibility to make an unambiguous tender of the entire amount due or else
24 suffer the consequence that the tender is of no effect.” (*Id.*)

25 V. CONCLUSION

26 This entire complaint is an improper attempt to relitigate a case that has already been lost,
27 twice. MERS respectfully requests that the complaint be dismissed with prejudice.

1 DATED: August 2, 2012

SEVERSON & WERSON
A Professional Corporation

2
3 By: 
Michael G. Cross

4 Attorneys for Defendants
5 Mortgage Electronic Registration Systems, Inc.

1 JOHN B. SULLIVAN (State Bar No. 96742)
2 EDWARD R. BUELL III (State Bar No. 240494)
3 MICHAEL G. CROSS (State Bar No. 268999)
4 mgc@severson.com
5 A Professional Corporation
6 One Embarcadero Center, Suite 2600
7 San Francisco, CA 94111
8 Telephone: (415) 398-3344
9 Facsimile: (415) 956-0439

6 Attorneys for Defendants
7 FEDERAL NATIONAL MORTGAGE
8 ASSOCIATION and MORTGAGE
9 ELECTRONIC REGISTRATION
10 SYSTEMS, INC.

FILED

APR 29 2013

Superior Court of the
State of California
County of Nevada

10 SUPERIOR COURT OF CALIFORNIA
11 IN AND FOR THE COUNTY OF NEVADA

12 SHELLEY VON BRINCKEN,
13

14 Plaintiffs,

15 vs.

16 MORTGAGECLOSE.COM INC., *et al.*
17

18 Defendants.
19

Case No.: 78503

**[PROPOSED] ORDER GRANTING FEDERAL
NATIONAL MORTGAGE ASSOCIATION'S
MOTION TO DISMISS**

Judge: The Hon. Sean Dowling
Date: March 15, 2013
Time: 10:00 A.M.
Dept. 6

Complaint filed: April 27, 2012

1 This matter came before the Court on March 15, 2013, on the motion of defendant Federal
2 National Mortgage Association ("FNMA") to dismiss the action with prejudice and for entry of
3 judgment.

4 On March 14, 2013, the Court issued the following tentative ruling:

5 Defendant FNMA's unopposed Motion to Dismiss is granted. The Court
6 may dismiss a complaint when a Plaintiff fails to amend it within the time
7 allowed by the court and either party moves for dismissal. See Code of
8 Civil Procedure § 571(f)(2). Plaintiff was granted leave to amend her
complaint until January 14, 2013, and failed to file an amended complaint
by that date. Therefore this action is dismissed as to Defendant FNMA.

9 After considering the history of this case, the Court's docket, and the briefing provided by
10 all parties, and good cause therefore appearing, **IT IS HEREBY ORDERED, ADJUDGED,**
11 **AND DECREED** that FNMA's motion to Dismiss is **GRANTED**, and this matter, as against
12 FNMA, is **DISMISSED WITH PREJUDICE**. Judgment is hereby entered in favor of FNMA
13 and against Plaintiff for this entire action. Plaintiff shall recover nothing against FNMA in this
14 suit.

15 **IT IS SO ORDERED.**

16
17 DATED: APR 29 2013

Thomas M. Anderson
JUDGE OF THE SUPERIOR COURT

18
19
20 APPROVED AS TO FORM:

21
22
23 Shelly Von Brincken
in propria persona

3-15-13

VonBrincken v. MortgageClose

Case No. 78503

Superior Court of Nevada County

Tentative Ruling

This tentative ruling is issued by Judge Thomas Anderson. If oral argument is requested, such oral argument shall be heard on Friday, March 15, 2013, at 1:30 p.m. in Department VI. CourtCall is permitted.

Defendant FNMA's unopposed Motion to Dismiss is granted. The Court may dismiss a complaint when a Plaintiff fails to amend it within the time allowed by the court and either party moves for dismissal. See Code of Civil Procedure §571(f)(2). Plaintiff was granted leave to amend her complaint until January 14, 2013 and failed to file an amended complaint by that date. Therefore, this action is dismissed as to Defendant FNMA.

Defendant's attorney is to submit a formal order that sets out verbatim the tentative ruling herein and complies with California Rule of Court 3.1312 and is thereafter to prepare, file and serve notice of order.

This is the Court's tentative ruling. In order to argue at the hearing, you must notify the parties and thereafter notify the court's law and motion secretary at (530) 265-1273 by 4:00 p.m. the court day before the hearing. If you do not so notify the parties and court, the tentative ruling shall become the final ruling. Any argument is limited to five minutes. California Rule of Court 3.1308, Local Rule 4.05.3.

Unless the court orders otherwise, the court does not provide court reporters for civil law and motion hearings and case management conferences at the court's expense. Any litigant who wants a record of a law and motion matter or a case management conference must arrange for the presence of a court reporter at his or her expense. Local Rule 10.00.3B.

Sent via fax on 3/14/2013 as follows:

Shelly Von Brincken, Pro Per
✓ Michael G. Cross, Esq.

No fax number available
(415) 956-0439

Nevada County Superior Court Tentative Rulings are now available on our website at www.nevadacountycourts.com.

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:

Residential Capital, LLC, *et al.*,

Debtors.

Shelley von Brincken,

Plaintiff,

GMAC Mortgage, LLC *et al.*,,

Defendants.

Case No. 12-12020 (MG)

Chapter 11

Jointly Administered

Adv. Case. No. 13-01436 (MG)

ORDER ON OCWEN LOAN SERVICING, LLC'S MOTION TO DISMISS

Upon consideration of Ocwen Loan Servicing, LLC's ("Ocwen") motion to dismiss the complaint of plaintiff Shelley von Brincken ("Plaintiff"), the pleadings and files in this case, and finding that service of the motion was proper, the Court hereby concludes that Plaintiff's first amended complaint fails to state a claim upon which relief can be granted. Accordingly, the Court grants the motion to dismiss.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED THAT:

1. Plaintiff's complaint is dismissed with prejudice; and
2. This action is dismissed.

DATED: March ___, 2016

The Honorable Martin Glenn
Judge of the United States Bankruptcy Court