Claudio Aguirre
18740 Vista Del Canon unit E. # 79
Newhall, California 91321
(818) 741-6162
claudioreyaguirre@hotmail.com

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Claudio Aguirre **Plaintiff,** **v.** **Cal-Western Reconveyance Corporation,** **Aurora Loan Services, Inc., Mortgage Electronic Recording Systems,** **Joe Krasovic,** **Shannon K. Mottola,** **Rhonda Rorie** **and DOES 1-10, inclusive,** **Defendants.**	**CASE NO:** 2:11-CV-06911-CAS (AGRx) **PLAINTIFFS' OPPOSITION TO MOTION OF DEFENDANTS AURORA LOAN SERVICES AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.'S TO DISMISS FIRST AMENDED COMPLAINT;** **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF;** **REQUEST FOR JUDICIAL NOTICE IN SUPPORT THEREOF.** DATE: TIME: CTRM: JUDGE:

NOTICE TO ALL INTERESTED PARTIES, AND *SPECIAL NOTICE TO*:

Hon. Christina A. Snyder, presiding and Alicia G. Rosenberg, referral.

The undersigned CLAUDIO AGUIRRE, (hereinafter "Plaintiff "), under penalty of perjury, whom within his knowledge, information and belief, brings this OPPOSITION TO: ***MOTION TO DISMISS FIRST AMENDED COMPLAINT*** and charge that the above-named Defendants, Aurora Loan Services, Inc., Mortgage Electronic Recording Systems, (hereinafter "Defendants"), intentionally and knowingly are attempting to foreclose; ***without standing to do so.***

> Where, as here, a plaintiff's standing to commence a foreclosure action is placed in issue by the defendant, it is incumbent upon the movant to prove its standing to be entitled to relief (see *US Bank N.A. v Madero*, 80 AD3d 751, 752; U.S. Bank, N.A. v Collymore, 68 AD3d 752, 753). *A plaintiff* establishes its standing in a mortgage foreclosure action by demonstrating that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note, "either by physical delivery or execution of a written assignment prior to the commencement of the action" (*Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 108). Moreover, "an assignment of the mortgage without assignment of the underlying note or bond ***is a nullity***" (U.S. Bank, N.A. v Collymore, 68 AD3d at 754; see Bank of N.Y. v Silverberg, 86 AD3d 274, 280).

Plaintiff Respectfully Submits the Following and Allege that:

DEFENDANTS SHALL FAIL ON THEIR MOTION TO DISMISS DUE TO THE FACT THAT THEY ARE NOT THE REAL PARTY(S) IN INTEREST; AND HAVE NOT VERIFIED AND VALIDATED THE DEBT PURSUANT TO TITLE 15 U.S.C. § 1692g

THEREFORE, PLAINTIFF OBJECTS TO THE JUDICIAL NOTICE AND TO ALL OF DEFENDANT'S ALLEGATIONS AS FOLLOWS

1. Plaintiff is proceeding pro se. Therefore, this Court must construe this claim liberally and hold it to a less stringent standard than the Court would apply to a pleading drafted by a lawyer. See: Laber v. Harvey, 438 F.3d 404, 413 n. 3 (4th Cir. 2006).
2. MOREOVER, Plaintiff claims that, statements of counsel in briefs or in oral arguments ***are not facts*** before this Court. (see: *Trinsey v Pagliaro,* 229 F. Supp. 647).

ALSO, PLEASE SEE:

(a) Picking v. Pennsylvania Railway, (151 F2d. 240) (N.J. is in 3r Cir.)Third Circuit Court of Appeals. In Picking , the plaintiffs civil rights was 150 pages and described by a federal Judge as "inept." Nevertheless, it was held: Where a plaintiff pleads pro-se in a suit for

protection of civil rights, the court should endeavor to construe plaintiff's pleading without regard to technicalities.

(b) In Walter Process Equipment v. Food Machinery 382 U.S. 172 (1965)_ it was held that in a "motion to dismiss, the material allegations of the complaint are taken as admitted." from this vantage point, courts are reluctant to dismiss complaints unless it appears the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. ('See: Conley vs. Gibson, 355 U.S. 41 (1957).

3. Plaintiff, CLAUDIO AGUIRRE respectfully submit the following Memorandum of Points and Authorities in Opposition to Motion of Defendants AURORA LOAN SERVICES ("Aurora") and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.'s ("MERS") to Dismiss the Second Amended Complaint ("Motion to Dismiss").

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

1. Plaintiff in this action is a victim of unlawful acts perpetrated by Cal-Western Reconveyance Corporation , in efforts to unlawfully foreclose on Plaintiff's property., under the instructions of Aurora Loan Services (herein the Servicer of the Loan) and Mortgage Electronic Registration Systems as nominee for the beneficiary original Lender, GN MORTGAGE[a defunct corporation that sold its beneficial interest to Lehman Brothers Bank in August 8, 2005].(It was Aurora who stated in a letter sent to Plaintiff on September 1, 2010 that Lehman Brothers Bank **bought** the mortgage).

2. Defendant, Mortgage Electronic Registration Systems as beneficiary under the Deed of Trust has wrongfully assigned its beneficial interest to AURORA LOAN SERVICES after conveying its interest as a beneficiary to Defendant CAL-WESTERN RECONVEYANCE CORPORATION notwithstanding the fact that the real party in interest is CitiBank.N.A.(according to MERS website).

3. **This clearly means that:**

(a) the Loan has been securitized and its not in compliance with the requirements of the pooling and servicing agreements;

(b) a Broken Chain of Title exists between the original Lender and the current Lender/Investor

(c) **the Real Party in Interest is the *Trustee* of the Securitized Trust.**

(d) Mortgage Electronic Recording Systems and Aurora Loan Services have no pecuniary interest in this matter. Thus, lacking Legal Authority to foreclose. Hence, committing fraud with intent and knowledge on Plaintiff and others***; Qualifying this as a RICO act***.

4. Defendants and/or their attorney failed to address or offer any proof of compliance with California Civil Code 2932.5 which vest the Power Of Sale.

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

5. Defendants and/or their attorney failed to address or rebut Plaintiff's Foreclosure Documents Examination Report or any part thereof. Which reveals the irregularaties Committed by Defendants.

6. Plaintiff believes Defendants counsel is ignorant as to who the Real Party in Interest is unless, counsel is trying to confuse this Honorable Court.

7. Defendants claim that Plaintiff is not the real party in interest because the property was put in a family trust is absurd. To avoid any further confusion created by opposing counsel, a rescission has been filed. Quieting title would be most proper since, its not quite clear as to who is the owner or the mortgage.

8. Plaintiff does acknowledge that money is owed to someone, and at no time has been his intention of not paying a debt he legally owes, nor asking the Court to gift him a house. Plaintiff requests the necessary discovery to determine who is legally entitled to: collect on the debt and requests a disclosure pursuant to;

§ 1692 g (a)(1) Must state Amount of Debt;
§ 1692 g (a)(2) Must state Name of Creditor to Whom Debt Owed;
§ 1692 g (a)(3) Must state Right to Dispute within 30 Days;
§ 1692 g (a)(4) Must state Right to Have Verification/Judgment Mailed to Consumer;
§ 1692 g(a)(5) Must state, Will Provide Name and Address of original Creditor if Different from Current Creditor;
§ 1692 g(B) **Collector must cease collection efforts until debt is validated.**

9. If Plaintiff is denied this opportunity, Plaintiff may be confronted by multiple parties demanding payment, claiming to be the real parties in interest.

10. Plaintiff demands that Defendants verify, validate and document the purported debt that they claim Plaintiff owes; in order to prove if in fact they have the legal authority to foreclose.

11. Plaintiff respectfully request, for the foregoing reasons that, Defendants Aurora and MERS' Motion to Dismiss be denied in its entirety or, in the alternative that, Plaintiffs be given leave to amend his Second Amended Complaint.

II.

FACTUAL BACKGROUND

12. Defendants Aurora and MERS are two cogs in the machinery designed, beginning in 1990's, to rapidly infuse capital into the home mortgage lending system by selling mortgages on the secondary market. The scheme was (and is) elegant in its simplicity: the loans were "packaged" and sold, normally three to five times, to create a bankruptcy remote transaction.

13. The financial entities then pooled the loans into large trusts, securitized and sold these securities on Wall Street as mortgage backed securities, bonds, derivatives and insurances. Often, this was done at twenty (20) or thirty (30) times the original mortgage, turning a billion dollars in loans into twenty or thirty billion in profit for the lenders. (See, Kurt Eggert, The Great Collapse: How Securitization Caused the Subprime Meltdown, 41 CONN. L.R. 1257, 1264-1268 (2009).)

14. As profits soared, so did the lender's greed and arrogance. Following the legal requirements of having written assignments, notices, and consents between the various parties, was cast aside as too expensive and too time consuming. The lenders arrogantly and recklessly failed to follow the simple edicts of negotiable instruments and contract law, even after they were repeatedly warned of the potential consequences. (Eggert, supra, at 1292-1311.).

15. The notes, instead of being properly assigned and delivered, were either shredded or boxed and warehoused. Occasionally, the notes were delivered directly to the servicer but not to the purchasing party, the real party in interest. To facilitate this scheme, the lenders developed a system to track and move mortgage notes on this self-erected secondary market. They created an entity called the Mortgage Electronic Registration Systems, Inc. ("MERS"), the moving Defendant. Mortgages were then recorded in MERS computers and sold.

16. Further, as this process became more and more profitable, the underwriting requirements were repeatedly reduced to trap more and more unsuspecting borrowers. (Eggert, supra, at 1284-1927.) As the lenders reduced the underwriting requirements, they introduced the concept of "churning" loans, a calculated plan to repeatedly refinance borrowers loans, taking as much equity as possible, and artificially driving up housing prices. (Id. at 1287-1288.)

17. At the same time, the numbers of transactions necessitated the hiring of greater numbers of less and less qualified people who received minimal training, if any at all. The result has been highly unqualified persons advising unsuspecting homeowners and potential homeowners on what maybe the greatest financial decision of their lifetime. This scheme has resulted in catastrophic effects to the market and the average homeowners, Plaintiff included.

18. The Deed of Trust also identified Defendant Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for the Lender and Lender's successors and assigns, and the beneficiary. Defendant MERS was developed to be a document storage company, not a nominee or beneficiary of any of the Defendants.

19. Defendant MERS was developed by the real estate finance industry to facilitate the sale and resale of instruments in the secondary mortgage market and to track registered security instruments for lenders. (See, Phyllis K. Slesinger & Daniel McLaughlin, Mortgage Electronic Registration System, 31 Idaho L. Rev. 805 (1995).) "This registry, created in 1997 to improve profits and efficiency among lenders eliminated the need to record changes in property ownership in local land records. Dotting i's and crossing t's can be a costly bore....And eliminating the need to record mortgage assignments helped keep the lending machine humming during the boom." (See, Gretchen Morgenson.

20. Plaintiff was not informed about the actual terms of the loans being sold to him until recently, primarily because, Plaintiff was not given a copy of any of the loan documents prior to closing as required. At closing, Plaintiff was only given a few minutes to sign the documents. The notary did not explain any of the loans documents nor were Plaintiffs allowed to review them. Plaintiff was simply told to sign and initial the documents provided by the notary. Further, Plaintiff did not receive the required copies of a proper notice of cancellation.

21. Plaintiff has alleged that the facts surrounding these loan transactions were purposefully hidden to prevent him from discovering the true nature of the transactions and the documents involved therein.

22. Facts surrounding this transaction continue to be hidden from Plaintiffs to this day subsequent to the closing of Plaintiff's residential mortgage loans, Defendant Aurora began demanding mortgage payments.

23. On or about April 20, 2009, a Notice of Default for the first loan was filed in Los Angeles County, California, by Defendant Quality Cal-Western Reconveyance Corp. ("Cal-Western"). This notice, however, identified Defendant Cal-Western as either the original Trustee (which it was not), the substitute Trustee or acting as agent for the Beneficiary under the Deed of Trust for Plaintiff's first loan. The notice failed to explain when, how or under what authority Defendant Cal-Western became a substitute Trustee or an agent for the Beneficiary. Mortgage Machine Backfires, N.Y. TIMES, Sept. 27, 2009, at BU1.)

III.

DISCUSSION

MERS Creation, Purpose, and Operation.

24. The current financial crisis in the United States can be directly traced to the creation and operation of Defendant MERS. (See, Peterson, Christopher Lewis, Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System, at 10-27 (September 7, 2009) (available at http://ssrn.com/abstract=1469749).

25. As noted above, in the 1990s lenders developed a scheme whereby they securitized mortgage loans and sold them on Wall Street for a substantial profit. As the success of this scheme blossomed, the lenders expanded their borrower pool into the subprime arena and began introducing toxic and predatory loans, such as those sold to the Plaintiff herein.

26. While lenders could have simply gone to Congress and obtained legal modifications to existing law that would allow for these envisioned transfers, they did not. Instead the lenders, Defendants included, simply, out of profit motive, ignored the law. It soon became evident that the system of physically transferring the notes and recordingtheir transfers was expensive, cumbersome and inefficient for quick action.

27. Defendant MERS was then developed by the real estate finance industry to streamline the process. (See, Phyllis K. Slesinger & Daniel McLaughlin, Mortgage Electronic Registration System, 31 Idaho L. Rev. 805 (1995) (discussing the MERS model).)

28. Defendant MERS is a national electronic registration and tracking system that tracks the beneficial ownership interest and servicing rights in mortgage loans. MERS purportedly operates as follows: "loans are registered to a "MERS Member" who has entered into the MERS Membership Agreement.

29. MERS Members enter into a contract with MERSCORP to electronically register and track beneficial ownership interest and servicing rights in MERS registered mortgage loans." (In re Hawkins, 2009 Bankr. LEXIS 877, at *3.) (See, In re Hawkins, No. BK-S-07-13593, 2009 Bankr. LEXIS 877, at *3 (Bankr. D. Nev. Mar. 31, 2009); see also, In re Vargas, 396 B.R. 511(Bankr. C.D. Cal. 2008).)

30. Defendant MERS has advertised itself as an innovative process that simplifies the way mortgage ownership and servicing rights are originated, sold and tracked, eliminating the need to prepare and record assignments when trading residential and commercial mortgage loans. (Id.)

31. Defendant MERS is basically an electronic phone book for mortgages. MERS' purpose is clearly stated in its corporate charter, identified as "Terms and Conditions": "MERS shall serve as mortgagee of record with respect to all such mortgage loans solely as a nominee, in an administrative capacity, for the beneficial owner or owners thereof from time to time.

32. MERS shall have no rights whatsoever to any payments made on account of such mortgage loans, to any servicing rights related to such mortgage loans, or to any mortgaged properties securing such mortgage loans.

33. MERS agrees not to assert any rights (other than rights specified in MERS as the lien holder of record in a nominee capacity on all recorded security instruments on loans within its system.

34. "[O]nce MERS becomes the beneficiary of record as nominee, it remains the beneficiary when the beneficial ownership interests in the promissory note or servicing rights are transferred by one MERS Member to another...[while] MERS tracks the transfers electronically on the MERS System. So long as the sale of the note involves a member of MERS, MERS remains the beneficiary [nominee] of record on the deed of trust and continues to act as nominee for the new beneficial owner." (Id. at *4.)

MERS' membership consisted of mortgage lenders and other entities. (Id. at *3, n. 11.)

35. "For centuries, when a property changed hands, the transaction was submitted to county clerks who recorded it and filed it away. These records ensured that the history of a property's ownership was complete and that the priority of multiple liens placed on the property - a mortgage and a home equity loan, for example - was accurate.

36. During the mortgage lending spree, however, home loans changed hands constantly. Those that ended up packaged inside of mortgage pools, for instance, were often involved in a dizzying series of transactions. To avoid the costs and complexity of tracking all these exchanges, Fannie Mae, Freddie Mac and the mortgage industry set up MERS to record loan assignments electronically. [MERS] didn't own the mortgages it registered, but it was listed in public records either as a nominee for the actual owner of the note or as the original mortgage holder.

37. Cost savings to members who joined the registry were meaningful. In 2007, the organization calculated that it had saved the industry $1 billion during the previous decade. some 60 million loans are registered in the name of MERS.

38. As long as real estate prices rose, this system ran smoothly. When that trajectory stopped, however, foreclosures brought against delinquent borrowers began flooding the nation's courts. [Given that MERS is simply an electronic registry] to call this electronic registry a creditor in foreclosure...is legal pretzel logic, [and] nothing more than an artifice constructed to save time, money and paperwork." (See, Gretchen Morgenson.

39. The Mortgage Machine Backfires, N.Y. TIMES, Sept. 27, 2009, at BU1.) the Governing Documents) with respect to such mortgage loans or mortgaged properties. References herein to "mortgage(s)" and "mortgagee of record" shall include deed(s) of trust and beneficiary under a deed of trust and any other form of security instrument under applicable state law."

40. In reality, however, MERS served nothing more than as a shell or front corporation for its "Members". Defendant MERS' primary function was to hide these toxic and fraudulent loans from borrowers, the government and the investors in the mortgage-backed securities.

41. Before Defendant MERS was created, it was impossible for mortgages, which have no market value, to be sold at a profit or collateralized and sold as mortgage-backed securities.

42. Before Defendant MERS, it would not have been possible for Defendants to conceal from government regulators the extent of financial risk entailed in origination of the predatory residential loans, and the fraudulent re-sale and securitization of those otherwise non-marketable loans.

43. Before MERS became an integral part of the lending industry, the actual beneficiary of every deed of trust on every parcel of land in California could be readily ascertained by merely reviewing the public records. After Defendant MERS was created, it was impossible for a borrower, their attorney, the courts, the government, or anyone else, to identify the actual beneficial owner of any particular loan or the property which was the collateral securing the loan.

44. In other words, post MERS, from the moment the deed of trust was executed by the borrower, there was no true "beneficiary" under the deed of trust. As a result, all subsequent assignments of any interest in the loan and deed of trust were known by the MERS Members, to be fraudulent and unlawful.

45. Finally, after creation of Defendant MERS, the servicing rights to these predatory loans, Plaintiff's loan included, were rarely retained by the originator, and instead transferred to other predatory entities. This was done for the specific purpose of forcing the borrower to refinance the loan, taking much of the equity through high fees and prepayment penalties, or ultimately foreclose on the residence and take the borrowers home, without any right to do so.

46. The MERS system led to confusion for the borrowers because when MERS was involved, borrowers who were in default but who hoped to work out their loans couldn't identify who they should turn to. (See, Gretchen Morgenson, The Mortgage Machine Backfires, N.Y. TIMES, Sept. 27, 2009, at BU1.) MERS overlaps, and in some cases virtually eliminates, the County Recorder system so that transfers and assigns are now no longer physically filed, they are "registered" with MERS instead. As a result, the real property paper trail is incomplete, confusing or even absent.

Involvement in Plaintiffs' Loan

47. In order to accomplish the scheme outline above, Defendant MERS, after being included on a deed of trust as a nominee, routinely managed the loan transactions entered into its system, Plaintiffs' loans included. In this case, Defendant MERS was included on both of Plaintiffs' Deeds as a nominee and a beneficiary.

48. The "nominee" status appears to be legal fiction, as there is very limited case law and no statutory authority to support it. Black's Law Dictionary defines a nominee as "[a] person designated to act in place of another, usually in a very limited way" and as "[a] party who holds bare legal title for the benefit of others..." (BLACK'S LAW DICTIONARY, 1076 (8th ed. 2004)).

49. This definition suggests that a nominee possesses few or no legally enforceable rights beyond its ministerial function. California courts that have considered the meaning of the "nominee" designation have found that the use of the term can make the contract uncertain and therefore a nullity. (See, Rivadell, Inc. v. Razo, 215 Cal. App. 2d 614, 625 (1963); see also, Cisco v. Van Lew, 60 Cal. App. 2d 575, 583-584 (1943) (in its ordinary meaning, a nominee represents the principal in only a nominal capacity and does not receive any property or ownership rights of the person represented.) Similarly, courts in other states have repeatedly held that a nominee of the lender of the note and mortgage lacks ownership of such note and mortgage and consequently does not have the power or right to assign. (See, LaSalle Bank Nat. Ass'n v. Lamy, 2006 WL 2251721 (N.Y.Sup. 2006) (citations omitted) (holding that "[a] nominee of the owner of a note and mortgage may not effectively assign the note and mortgage to another for want of an ownership interest in said note and mortgage by the nominee."); see also, Landmark National Bank v. Kesler, 2009 Kan. LEXIS 834 (Kan. Aug. 28, 2009).) As a result, it is unclear exactly what interest Defendant MERS acquired in its capacity as a nominee for Defendant Aurora under Plaintiff's Deeds for the first loan respectively.

50. Alternatively, Defendant MERS' designation as a beneficiary is similarly problematic. A "beneficiary" is defined as "one designated to benefit from appointment, disposition, or assignment...or to receive something as a result of a legal arrangement or

instrument." (In re Hawkins, 2009 Bankr. LEXIS 877, at *7 (quoting BLACK'S LAW DICTIONARY 165 (8th ed. 2004).)

51. MERS is not and cannot be a beneficiary under the Plaintiffs' Deeds. It did not lend the money to the Plaintiffs. Further, Plaintiffs were not required by statute or contract to pay money to Defendant MERS on any of the two mortgages, and there is no evidence that Defendant MERS would realize any value of the Property through the non-judicial foreclosure against Plaintiffs' Property.

52. Additionally, Plaintiffs' Deeds consistently refers only to rights of the Lender, including rights to receive notice of litigation, collect payments, and to enforce the debt obligation. (See, PRFJN, page 3 (UNIFORM COVENANTS) and , page 3 (UNIFORM COVENANTS.)

53. Plaintiffs' Deeds consistently limit Defendant MERS to acting "solely" as the nominee of the Lender. Moreover, nominating Defendant MERS as a beneficiary under Plaintiffs' Deeds directly conflicts with Defendant MERS' "Terms and Conditions". The latter states that Defendant MERS cannot act as a beneficiary, but may act "solely as a nominee, in an administrative capacity...[and] shall have no rights whatsoever to any payments made on account of such mortgage loans, to any servicing rights related to such mortgage loans, or to any mortgaged properties securing such mortgage loans."

54. As the Court noted in In re Hawkins case, "[t]o reverse an old adage, if it doesn't walk like a duck, and doesn't quack like a duck then its not a duck." (In re Hawkins, 2009 Bankr. LEXIS 877, at *7.) Plaintiffs' position is that Defendant MERS' ability to engage in any transaction relating to Plaintiffs' loans was limited to administrative acts of tracking and recording, as is prescribed by its charter.

MERS Was Not Qualified to Do Business In California At the Relevant Times.

55. The California Corporations Code § 2105(a) prohibits any foreign corporation from transacting intrastate business without having first obtained from the Secretary of State a certificate of qualification. (Cal. Corp. Code § 2105(a).) Thus, Defendant MERS was required to register with California's Secretary of State before transacting business in California.

56. In this case, Defendant MERS was not licensed to do business in California at the inception of Plaintiffs' loans. MERS knew it needed to file with the California Secretary of State as evidenced by its Even if Defendant MERS' "Terms and Conditions" allowed it to act as a beneficiary under Plaintiffs' Deeds, Plaintiffs have alleged that Defendant MERS was not licensed to do business in California. Corporate filings on June 1, 2009 (although the filing may have been prompted by the recentonslaught of litigation in California against Defendant MERS.)

B. Legal Standard

Dismissal Is Inappropriate Under Rule 12(b)(6).

57. On a motion to dismiss, the Court should accept all the allegations as true, draw all reasonable inferences in favor of the plaintiff, and resolve all doubts in the pleader's favor. (Scheuer v. Rhodes, 416 U.S. 232, 236, overruled on other grounds by Davis v. Scherer, 468 U.S. 183 (1984); Cruz v. Beto 405 U.S. 319, 322 (1972); Lazy Y. Ranch LTD v. Behrens, 546 F.3d 580, 588 (9 th Cir. 2008).)

58. To survive a motion to dismiss a plaintiff need to plead "only facts to state a claim for relief that is plausible on its face." (Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 570 (2007).) "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." (Ashcroft v. Iqbal,129 S. Ct. 1937, 1949 (2009).) A dismissal is only appropriate where the plaintiff fails to state a claim supportable by any cognizable legal theory. (Balistreri v. Pacific Police Department, 901 F.2d 696, 699 (9 th Cir. 1990).) A complaint must "only give the defendant fair notice of what plaintiff's claim and the grounds of which it rests". (Conley v. Gibson, 355 U.S. 41, 47 (1957), abrogated on other grounds by Bell Atlantic Corporation v. Twombly, 550 U.S. at 563.)

59. Any existing ambiguities must be resolved in favor of the pleading. (Walling v. Beverly Enters., 476 F.2d 393, 396 (9th Cir.1973).) In deciding a motion to dismiss, the court must accept as true the allegations of the complaint and must construe those allegations in a light most favorable to the non-moving party. (Wyler Summit Partnership v. Turner Broadcasting Inc., 135 F. 3d 658, 661 (9 th Cir. 1998).)

Generally, a court may not consider any material beyond the pleading in ruling on a 12(b)(6) motion. Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F. 2d 1542, 1555 n. 19 (9th Cir. 1990).)

60. However, where it is inclined to grant a motion to dismiss, a district court should provide leave to amend unless it is clear that a complaint could not be saved by any amendment. (Chang v. Chen, 80 F.3d 1293, 1296 (9 thCir. 1996).)

61. In this case, Plaintiffs have plead more than sufficient facts to allege the nature and extent of the wrongful conduct committed by each of the moving Defendants in the Plaintiff's FAC. These factual allegations are thereafter incorporated by reference into each applicable Cause of Action.

62. Each Cause of Action identifies the elements of that particular Cause of Action and specifies which Defendant or Defendants that Cause of Action applies to.

63. Plaintiff is not required to "prove" their case, but only to allege enough facts to place Each of the moving Defendants on notice of the cause of action, general facts, elements and damages claimed. In accordance with the holding in Bell Atlantic, proof of the specific and detailed wrong doing is reserved for a later stage of the litigation due to the simple fact that such proof can only be obtained through discovery.

64. The federal notice pleading standard requires Plaintiffs only to allege enough facts to place the named Defendants, Aurora and MERS included, on notice of the cause of action, general facts, elements and damages claimed. Here, the individual Causes of Action have been appropriately plead sufficiently to place each of the Defendants Aurora and MERS on notice and to allow each of the Defendants **including** Aurora and MERS to research and defend the allegation against them.

65. Plaintiff has stated the factual basis of and the requisite elements of each and every Cause of Action. As such, Plaintiffs have sufficiently pled all of the necessary facts and elements to state a claim against each and all of the Defendants **including** Aurora and MERS. Moreover, Plaintiff has alleged that Defendants together, in a "conspiratorial nature", undertook the misdeeds herein. Defendants named herein are indeed liable to the extent that they acted as agents, servants and/or employees of the remaining defendants and for each other.

66. The Ninth Circuit has held that averments of agency are not required in a complaint. (See, Greenberg v. Sala, 822 F.2d 882, 886 (9th Cir. 1987) (holding that "[a] person legally responsible for an act may be alleged to have committed it without going into the theories which support that ultimate fact").) As such, the "civil conspiracy" as alleged and incorporated into all subsequent Causes of Action sufficiently provides the threshold legal and factual basis for several causes of action that at first blush may seem inappropriate for a particular Defendant.

67. The overview to this "shell" game is that all who participated in this "get rich quick" scheme, cannot now claim that they are somehow an innocent, unrelated third party.

Causes of Action

68. The Cause of Action No.1, for Intentional Infliction of Emotional Distress is Sufficient to State a Cause of Action Against Defendant Aurora and Mers. The fear of Plaintiff becoming homeless by losing his home to a foreclosure and not having a roof for his children created Emotional Distress which resulted in sleepless nights, inability to perform at work and loss of consortium.

69. The Cause of Action No. 2, for Violation of The Fair Debt Collection Practice Act (FDCPA) is Sufficient to State a Cause of Action Against Defendant Aurora and Mers; for failure to validate a debt which is a Federal statute. Of which is mandated by the FDCPA 15 USC 1692.

70. The Cause of Action No. 3, for Mail Fraud is Sufficient to State a Cause of Action Against Defendants is Sufficient to State a Cause of Action;
Defendants and employees fabricated and recorded in the Los Angeles County Recorder's Office. (violation of section 115) Thereafter sent the falsified documents to Plaintiff Via The United States Postal Services. Thus committing Mail Fraud.

71. The Cause of Action No. 4, for Wrongful Initiation of Foreclosure is Sufficient to State a Cause of Action Against Defendants; Mers purportedly substituted theTrustee on behalf of GN Mortgage when in fact, GN Mortgage is not a party of interest since the debt was sold to Lehman Brother and thereafter the Loan was securitized.

72. The Cause of Action No. 5, for Violations of California Civil Code2934 a and 2932.5 is Sufficient to State a Cause of Action Against Mers; Mers violated California Civil Code 2932.5 by not recording the beneficial interest at the Los Angeles County

Recorder's Office and violated California Civil Code2934a for not following the required procedures pertaining the Substitution of Trustee.

Violations of Rosenthal Act

73. MOREOVER, the present Causes of Actions; Violation of Rosenthal Act. In enacting Civil Code § 1788 et al., (the Rosenthal Act), the California Legislature found that the banking and credit system and grantors of credit to consumers are dependent upon the collection of just and owing debts. Unfair or deceptive collection practices undermine the public confidence, which in turn is essential to the continued functioning of the banking and credit system and sound extensions of credit to consumers.

DEFENDANTS ARE DEBT COLLECTORS

74. There is a need to ensure that debt collectors and debtors exercise their responsibilities to one another with fairness, honesty and due regard for the rights of the other. (California Civil Code § 1788.1(a)(1) & (2).) Unlawful debt collection activities during foreclosure fall within the scope of the California's Rosenthal Act. (See, McGrew v. Countrywide Home Loans, Inc., 628 F. Supp. 2d 1237, 1242-1243 (S.D. Cal. 2009).) Citing to Rosal v. First Fed. Bank of Cal., 2009 U.S. Dist. LEXIS 60400 (N.D. Cal. July 15, 2009), moving Defendants argue that Plaintiffs have failed to "tether" their claims of Rosenthal Act violations to Defendant Aurora. (Motion to Dismiss, 4:19-24.) Moving Defendants misstate MOTION TO DISMISS holding in Rosal, and further, the holding in Rosal is inapplicable here. In that case, the Court dismissed plaintiff's Rosenthal claim because, among other reasons, the plaintiff failed to allege that the defendant was a debt collector or that the defendant was collecting the debt during its communications with the plaintiff. (Rosal, 2009 U.S. Dist. LEXIS 60400, *51-53.)

75. Here, the Plaintiff alleges that Defendant Aurora is a debt collector within the meaning of California Civil Code § 1788.2(c). Additionally, Plaintiffs' FAC alleges that Defendant Aurora sent deceptive letters and made phone calls to Plaintiffs demanding payments that it was not entitled to. Some of Defendant Aurora's said wrongful actions were undertaken in connectionwith foreclosure against Plaintiffs'

Property, which, pursuant to the holding in the McGrew case, is subject to liability under the Rosenthal Act.

76. A lender may be secondarily liable through the actions of a its agent. (See, Plata v. Long Beach Mortg. Co., 2005 U.S. Dist. LEXIS 38807, *23 (N.D. Cal. Dec. 13, 2005).) Additionally, a lender is subject to negligence liability for failure to provide a borrower with requisite disclosures. (Champlaie, 2009 U.S. Dist. LEXIS 102285, at *75.)

77. Plaintiff have alleges that Defendant Aurora breached its duty when it took payments to which it was not entitled, charged fees it was not entitled to charge, and made or otherwise authorized negative reporting of Plaintiffs' creditworthiness to various credit bureaus wrongfully.

78. Once Plaintiffs became aware of the actual terms of their loans, they sent Defendant Aurora a Qualified Written Request ("QWR"), whereby they requested documentation relating to Defendant Aurora's servicing of the loan. Defendant Aurora had a statutory duty, pursuant to 12 U.S.C. § 2605(e), to acknowledge Plaintiffs' QWR within 20 days of receipt, and further to respond within 60 days of such Request. To date, Defendant Aurora has failed to properly respond to Plaintiffs' QWR.

79. Defendant MERS owes Plaintiff a duty to perform its administrative function of recording, maintaining and transferring documents as it relates to Plaintiffs' loans in a manner as not to cause Plaintiff harm. Assuming arguendo that the nominee designation means that Defendant MERS acted as an administrative agent for Defendant Aurora Loan Servicing, Defendant MERS' charter allowed it to act in an administrative capacity only. Defendant MERS' "Terms and Conditions" specifically prohibit it from acquiring any rights to any payments, servicing rights, or rights against any mortgaged properties owned by its "Members".

80. Plaintiff has alleges that Defendant MERS breached its administrative duties when it failed to create and record original documents pertaining to Plaintiffs' loan. Thus, Defendants Aurora and MERS' Motion to Dismiss should be denied.

81. Moreover, in cases where fraud was conducted over several years, a plaintiff is not required to allege each date of each defendant's fraudulent conduct since such

requirement would defeat the purpose of Rule 8 requiring that pleading be short, plain, and in concise statements. (Id.)

82. In this case, Plaintiff has identified specific facts and circumstances that constitute fraud. This allows each of the Defendants Aurora and MERS to prepare an adequate answer. Due to the fact that Plaintiff alleges and has proof that they are not the Real Party in Interest.

83. Defendant Aurora is not a lender, and in particular, not a lender who extended credit to Plaintiff in this case. Even if Defendant Aurora is deemed a lender, its position is contrary to law. In recent federal and state cases, courts have found that the note and the mortgage must be together in order to proceed in a non-judicial foreclosure action. (Saxon Mortgage Services v. Hillery, 2008 U.S. Dist. LEXIS 100056, *15, *16 (N.D. Cal. 2008) "Under California law, only the holder of the promissory note is entitled to enforce it..." (In re Vargas, 396 B.R. 511 (Bankr. C.D. Cal. 2008).) When a note secured by a mortgage is transferred, "transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter" (Id., citing Carpenter v. Longan, 83 U.S. 271 (1872).)

84. The Supreme Court in Carpenter went on to note the corollary principle: "[g]iven that the debt is the principal thing and the mortgage is an accessory, the mortgage can have no separate existence." (Id. at 274.) For this reason, "an assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity." (Id; See also, In re Leisure Time Sports, Inc.194 B.R. 859, 861 (9th Cir. 1996) (stating that "[a] security interest cannot exist, much less be transferred independent from the obligation which it secures" and that, "[i]f the debt is not transferred, neither is the security interest"); Kelley v. Upshaw (1952) 39 Cal.App.2d 179, 192 (stating that assigning only the deed without a transfer of the promissory note is completely ineffective); In Re Foreclsoure Cases (521 F.Supp.2d 650, 653 (S.D. Ohio 2007) (holding that defendant must show it is the holder of the note and the mortgage before proceeding forward in its foreclosure action (emphasis added); Restatement (3) of Property (Mortgages) § 5.4.(stating that "[a] mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation that the mortgage secures")(emphasis added).)

85. None of the Defendants named in this case, including Defendant Aurora, have proffered proof of ownership of the Note. For this reason, Plaintiffs alleged that Defendant Aurora is a third party stranger to Plaintiffs' Mortgage Note and Deed of Trust. Plaintiff alleges that none of the Defendants, including Defendant Aurora, are in possession of the Note, and are not beneficiaries, assignees or employees of the person or entity in possession of the notes. and are not otherwise entitled to payment.

86. As such, Defendant Aurora is not a "person entitled to enforce" the security interest on the Property, as that term is defined in Cal. Com. Code § 3301. Moreover, a party seeking to secure performance of an obligation, when a breach of the obligation between the parties has occurred, may enforce the security instrument only aftercomplying with the remainder of the statute. (Cal. Civ. Code § 2924.) However, "the language of the statute is expressly applicable only as between parties to a contract." Moeller v. Lien (1994) 25 Cal.App.4th 822, 834. Since Defendant Aurora is not a party under Plaintiffs' Notes and/or Deed and does have possession of the Notes, it is not a party to these contracts with the Plaintiffs andcannot enforce the security agreements.

87. With respect to Defendant MERS, Plaintiff has alleges that Defendant MERS misrepresented its interest in Plaintiffs' Property when it identified itself as beneficiary under Plaintiffs' Deed of Trust. In effect, Defendant MERS, in its administrative capacity as a nominee for the Lender. Contrary to Defendant MERS' argument, it did not, does not, and cannot own the beneficial interest in Plaintiffs' Property and thus did not and does not have the right to enforce it as a beneficiary.

88. As before, a "beneficiary" is defined as "one designated to benefit from appointment, disposition, or assignment...or to receive something as a result of a legal arrangement or instrument." (In re Hawkins, 2009 Bankr. LEXIS 877, at *7 (quoting BLACK'S LAW DICTIONARY 165 (8th ed. 2004).) As such, Defendant MERS was not, is not and cannot be a beneficiary under the Plaintiffs' Deed. Instead, Defendant MERS' conduct was part of a pattern of unlawful activity to conspire with others.

89. Defendant MERS did not lend the money to the Plaintiff. Further, Plaintiffs were not required by statute or contract to pay money to Defendant, and there is no evidence that Defendant MERS will realize any value of the Property through the non-judicial

foreclosure against Plaintiffs' Property. to eventually utilize the non-judicial foreclosure structure of California law to unlawfully take Plaintiffs' Property.

90. Lastly, this action raises the issue of fraud in the inducement of the loan and fraud in subsequent actions by the named Defendants. Frankly, it would be wrong to apply a bar of recovery against the Plaintiff when majority of evidentiary facts in this case were purposefully hidden from them at the inception of the loan and continue to be hidden from them to this day.

91. Said facts are wholly within each of the named Defendants' knowledge, and discovery is needed to determine each Defendant's role and liability in this case. To deny Plaintiff's discovery would condone fraud. As noted above, given fraud at the inception of Plaintiff's loan, Defendant Aurora is not an appropriate mortgagee. Similarly, Defendant MERS is prohibited under its corporate charter from acting as a beneficiary, and in particular, from asserting any rights with respect to the mortgage loans for which it is a named nominee. Further, Defendant Aurora is not a party to either the Note or the Deed involved herein. (Id.)

92. Accordingly, Defendant Aurora is not authorized to direct Defendant Cal-Western reconveyance Co. to foreclose against Plaintiff's Property pursuant to Cal. Civ. Code § 2924, which renders the NOD inaccurate.

93. MOREOVER , Plaintiff alleges; unfair Business Practices against, Defendants Aurora and MERS. The UCL prohibits "any unlawful", unfair or fraudulent" business practice. (Cal. Bus. & Prof. Code § 17200.) A practice is unfair if the court determines that the impact of the practice or act on its alleged victim outweighs the reasons, justifications, and motives of the alleged wrongdoer. (Podolsky v. First Healthcare Corp.., 50 Cal. App. 4th 632, 647 (1996).) A practice is fraudulent ifthe members of the public are likely to be deceived by the practice. (Schnall v. Hertz Corp., 78 Cal. App. 4th 1144, 1167 (2000).) The statute "has a broad scope that allows for 'violations of other laws to be treated as unfair competition that is independently actionable' while also 'sweep[ing] within its scope acts and practices that specifically prescribed by any other law.'" (Hauk v. JP Morgan Chase Bank USA, 552 F.3d 1114, 1122, (9th Cir. 2009), quoting Kasky v. Nike, Inc., 27 Cal. 4th 939, 949 (2002).) Section 17200 "'borrowers' violations of other laws and treats"

them as unlawful business practices "independently actionable under section 17299." Farmers Ins. Exch. V. Superior Court, 2 Cal.4th 377, 383 (1992). "Violation of almost any federal, state, or local law may serve as the basis for a[n] [unfair competition] claim." Plascencia v. Lending 1st Mortg.,, 583 F. Supp. D 1090, 1098 (2008).

94. Plaintiff alleges that Defendant MERS engaged in transacting business in the state of California, in violation of Cal. Corp. Code § 2105(a). (See, Farmers Ins. Exchange v. Superior Court, 2 Cal. 4th 377, 383 (1992).)

95. Simply put, Defendant MERS, as a digital mortgage tracking service, was created to enable its Members, including Defendant Aurora, to circumvent the statutory registration requirements for notice. This system effectively precluded the public, and Plaintiff in particular, from receiving notice of who holds the obligation on a mortgage.

96. Plaintiff is not contending that he does not owe a debt. Plaintiffs simply request the opportunity to conduct discovery to determine the real parties in interest and the actual amount of debt owed. Based upon the FAC and the argument set forth herein.

IV. WHEREFORE:

97. Plaintiff respectfully requests; that Defendants Aurora and MERS' Motion to Dismiss be denied and this Court deny judicial notice to non certified/self authenticating documents filed by Defendants. In the alternative, should the Court desire more facts be plead, Plaintiffs request leave to amend.

Respectfully submitted,

Dated: NOVEMBER 07, 2011

CLAUDIO AGUIRRE_____

Verification

In Witness, Whereof, Knowing the law of bearing false witness before God and Men, I Solemnly aver the above is true and correct and is presented to the Defendants in good faith and is not interposed for the purpose of delay or any other purpose with which I, the Plaintiff, have herein stated and declared.

That I have further read the above Verified Complaint and know the contents thereof to be true; and the same is true of my own knowledge, except to the matters which are therein stated on my information and belief, and as to those matters I believe them to be true.

Dated:_____

By:_____

CLAUDIO AGUIRRE, Pro Per

(EXHIBIT A)

(EXHIBIT B)

(EXHIBIT C)

(EXHIBIT D)

(EXHIBIT E)

(EXHIBIT F)

(EXHIBIT G)