BRYAN CAVE LLP
Richard C. Ochoa (Cal. Bar No. 145998)
Timothy L. Hayes (Cal. Bar No. 175958)
120 Broadway, Suite 300
Santa Monica, California 90401-2386
Telephone: (310) 576-2100
Facsimile: (310) 576-2200
Email: rcochoa@bryancave.com
tlhayes@bryancave.com

Attorneys for Defendant
BANK OF AMERICA, N.A.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ROBERT LEE LOCKETT, an individual; LORRAINE LOCKETT, an individual,

Plaintiffs,

v.

BANK OF AMERICA, a national banking association; 5921 SOUTH RIMPAU BLVD., LOS ANGELES, CA 90043 real property, *in rem*, and DOES 1 through 50, INCLUSIVE,

Defendants.

Case No. BC491093

Assigned for all purposes to the Honorable Abraham Kahn

NOTICE OF RULING ON DEFENDANT BANK OF AMERICA, N.A.'S DEMURRER TO FIRST AMENDED COMPLAINT AND MOTION TO STRIKE PORTIONS OF FIRST AMENDED COMPLAINT

Date: April 3, 2013
Time: 9:00 a.m.
Dept.: 51

Complaint Filed: August 29, 2012
FAC Filed: January 7, 2013

TO THE CLERK OF THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT that on April 3, 2013, at 9:00 a.m., the Demurrer of Defendant Bank of America, N.A. ("Defendant") to the First Amended Complaint of Plaintiffs, Robert E. Lockett and Lorraine Lockett ("Plaintiffs"), came on for hearing in Department 51 of the above-entitled court, the Honorable Abraham Kahn presiding. Also on calendar for hearing were Defendant's Request for Judicial Notice in Support of Demurrer to First Amended Complaint and Motion to Strike Portions of First Amended Complaint.

Timothy L. Hayes of Bryan Cave LLP appeared on behalf of Defendant. Barry S. Fagan appeared on behalf of Plaintiffs.

After reading and considering the papers submitted by the parties and having heard and considered the oral argument of counsel, the Court adopted its tentative ruling as its final ruling, a true and correct copy of which is attached hereto as Exhibit A.

In relevant part, the Court's ruling provides as follows:

> **The demurrer is SUSTAINED, without leave to amend, only as to the Fourth and Fifth claims for fraud, and is otherwise OVERRULED.**
>
> **The motion is GRANTED, without leave to amend, as to punitive damages, and DENIED, as to attorney fees.**
>
> **Judicial notice is DENIED.**
>
> **Twenty days to answer the surviving causes of action and remedies.**

The Court also continued the case management conference, to May 30, 2013 at 8:45 a.m. in Department 51.

Counsel for Defendant was asked to provide notice.

BRYAN CAVE LLP
120 BROADWAY, SUITE 300
SANTA MONICA, CALIFORNIA 90401-2386

Dated: April 4, 2013

Respectfully submitted,

BRYAN CAVE LLP
Richard C. Ochoa
Timothy L. Hayes

By: _____
Timothy L. Hayes
Attorneys for Defendant
BANK OF AMERICA, N.A.

BRYAN CAVE LLP
120 BROADWAY, SUITE 300
SANTA MONICA, CALIFORNIA 90401-2386

EXHIBIT A

#7

Superior Court of California

County of Los Angeles

Department 51

Honorable Abraham Khan

LOCKETT, Plaintiff(s), v. BANK OF AMERICA, Defendant(s).	Case No.: BC491093 Hearing Date: 4/3/13 **[TENTATIVE] RULING RE:** DEFENDANT BANK OF AMERICA, N.A.'S DEMURRER TO FIRST AMENDED COMPLAINT; MOTION THEREOF TO STRIKE PORTIONS OF FIRST AMENDED COMPLAINT.

The demurrer is sustained, without leave to amend, only as to the Fourth and Fifth claims for fraud, and is otherwise overruled.

The motion is granted, without leave to amend, as to punitive damages, and denied, as to attorney fees.

Judicial notice is denied.

Twenty days to answer the surviving causes of action and remedies.

Regarding declaratory relief, the pleading sufficiently alleges that promissory note was invalidly assigned to one claiming a right to payments based upon the loan transaction, to state an actual controversy.

As for quiet title, defendant's adverse "interest," based upon a deed of trust, is alleged (e.g., First Amended Complaint, ¶34). This opinion cited in the reply distinguishably did not address quiet title: Lupertino v. Carbahal (1973) 35 Cal.App.3d 742. Also, a ruling cited in the reply, is a non-binding one from a federal trial judge, and errs in its reasoning, because only an adverse interest is required, not an adverse claim to title. *See* Vega v. JPMorgan Chase Bank, NA. (E.D. Cal. 2009) 654 F. Supp. 2d 1104, 1120 -1121.

With regard to fraud, actionable representations of entitlement to enforce the deed of trust are not pled with sufficient particularity, including as to identities, times and methods, and knowledge a the time of a forged assignment (e.g., First Amended Complaint, ¶¶61-66), and many alleged nondisclosures are not supported by any case-recognized duty, such as the alleged duty to disclose splitting the note from the deed of trust that is merely legal conduct (id. at ¶44), or to disclosure changes in loan character to an investment that are simply legal transactions (e.g., id. at ¶¶45-49, 67).

Further, California law has never recognized a cause of action for fraud based upon a forged assignment or a scheme of conduct, but instead defines actionably fraud claims as being misrepresentations, concealment, promissory fraud or fraudulent inducement of contracting.

With respect to an accounting, the pleading sufficiently alleges unknown payments to one not entitled to the funds (e.g., First Amended Complaint, ¶¶22-23, 91-92).

Regarding a tender, an exception applies, based on allegations that Defendant lacks any beneficial interest in order to conduct a future foreclosure sale-- here due to an alleged forgery.

Concerning cancellation, the Plaintiff sufficiently alleges a void assignment of a deed of trust, based upon a forgery (e.g., First Amended Complaint, ¶40).

As to punitive damages, fraud, oppression or malice are not alleged, except by conclusions about Defendant's past fraudulent intent in pursuing a forged assignment and claims for debts.

Attorneys' fees are not subjected to any minimal pleading standard, under California law.

Judicial notice of an assignment of the deed of trust would be error, where the pleading very specifically alleges that it is a forgery (e.g., First Amended Complaint, ¶13).

Effective January 1, 2013, legislation named "The California Homeowner Bill of Rights," precludes loan servicers from foreclosing until after pre-modification and pre-foreclosure notices and reviewing loan-modification applications.

A published opinion indicates that the California Homeowners Bill of Rights helps to shape judicial policy, even in areas and for times falling outside of its express application. Specifically, an opinion indicates that courts should increase minimum standards for banks dealing with borrowers, in order to follow the lead of new legislation, as follows:

> Granted, these ameliorative efforts have been directed primarily at aiding resident homeowners at risk of losing their homes. (Civ. Code, §§ 2923.5, subd. (f); Assem. Bill No. 278, § 18, adding Civ. Code, § 2924.15.) We also understand there is no express duty on a lender's part to grant a modification under state or federal loan modification statutes. And until the new legislation takes effect, no private right of action for damages is granted under the statutes. (See Hamilton v. Greenwich Investors XXVI, LLC (2011) 195 Cal.App.4th 1602, 1616 [126 Cal. Rptr. 3d 174]; Mabry v. Superior Court (2010) 185 Cal.App.4th 208, 214 [110 Cal. Rptr. 3d 201]; Pantoja v. Countrywide Home Loans, Inc. (N.D.Cal.2009) 640 F.Supp.2d 1177, 1188.) We do not cite any of these legislative measures in reliance upon their provisions, nor do we suggest their provisions were violated in the present case. Rather, we refer to the existence—and recent strengthening—of these legislative measures because they demonstrate a rising trend to require lenders to deal reasonably with borrowers in default to try to effectuate a workable loan modification. In short, these measures indicate that HN16 courts

should not rely mechanically on the "general rule" that lenders owe no duty of care to their borrowers.

Existing state statutes relating to loan modifications will soon be supplemented by stiffer restrictions on the conduct of lenders and loan servicers during the loan modification process. Even as this case has been pending before us, on July 2, 2012, the California Legislature passed Assembly Bill No. 278 and Senate Bill No. 900, which have since been signed into law by the Governor. These provisions address more pointedly the foreclosure crisis in our state through even greater encouragement to lenders and loan servicers to engage in good faith loan modification efforts.

Jolley v. Chase Home Finance, LLC (2013) _ Cal.App.4th _, _, 2013 Cal. App. LEXIS 107, 22, 61 - 63.

However, a federal trial judge indicated that the bill is not retroactive. The California Homeowner Bill of Rights, Civil Code Section 2924 went into effect January 1, 2013, has not been applied retroactively. McGough v. Wells Fargo Bank, N.A. (N.D.Cal., 2012) 2012 WL 5199411, 5 n.4.

Additionally, there is no authority providing for a homeowner's court action seeking a *presale determination* as to whether the party initiating foreclosure was authorized to do so. Gomes v. Countrywide Home Loans, Inc. (2011) 192 Cal.App.4th 1149,1154. Instead, borrowers legitimately can seek to enjoin trustees' sales, or to set aside past sales. Robinson v. Countrywide Home Loans, Inc. (2011) 199 Cal.App.4th 42, 46 n.5 (demurrer properly sustained, without leave to amend, as to claims for "wrongful initiation of foreclosure," and "declaratory relief," where based on allegations that MERS lacked authority to initiate foreclosure).

However, a District Court judge intelligently distinguished *Gomes, supra* (disapproving presale, declaratory relief allegations as to foreclosure authority), in reasoning that declaratory relief could be actionable where the parties are not facing foreclosure, but are disputing whether the promissory note was properly assigned to one demanding payments based upon the loan transaction. *See* Mata v. Citimortgage, Inc. (C.D.Cal. 2011) 2011 WL 4542723, 2.

Distinguishably, as to claims of wrongful foreclosure, based upon illegal assignments, borrowers must allege and show prejudice. Fontenot v. Wells Fargo Bank, N.A. (2011) 198 Cal.App.4th 256, 272 (noting that it is difficult to conceive how borrowers could show prejudice from an unauthorized transfer, because borrowers must anticipate the legal possibility of note transfers to different creditors, defaults in payments on the note cause any prejudice via foreclosure, and original lenders would be the ones prejudiced by an unauthorized loss). *Accord* Herrera v. Fed. Nat'l Mort. Assoc. (2012) _ Cal.App.4th _, _, 2012 WL 1726950, _.

As for fraud, the requirements of particular pleading, applicable generally, likewise apply to complaints related to foreclosures. "Each element in a cause of action for fraud ... must be factually and specifically alleged. [Citation.]" Perlas v. GMAC Mortg., LLC (2010) 187 Cal.App.4th 429, 434 (addressing alleged home-loan fraud). In one case, plaintiffs failed to allege fraudulent forbearance representations, where the allegations entirely failed to specify who said what, to whom, and how the statements caused harm. Hamilton v. Greenwich Investors (2011) 195 Cal.App.4th 1602, 1614.

The following allegations were not sufficiently specific for pleading fraud:

> "Plaintiff had specific discussions with employees of JPMorgan Chase prior to the time JPMorgan Chase acquired the certain assets and liabilities of Washington Mutual from the FDIC in which the representatives and employees of JPMorgan Chase, both prior to its acquisition of Washington Mutual from the FDIC and subsequent to its acquisition of Washington Mutual, made representations that if plaintiff spent his own funds to bring the house to the point of obtaining a final building inspection, JPMorgan Chase would provide reimbursement of the balance of the construction funds and permanent financing.

As a result of those representations, plaintiff did expend in excess of $400,000.00 of his personal funds, including, but not limited to, borrowing from his pension plan to comply with the conditions set forth by JPMorgan Chase."

Scott v. JPMorgan Chase Bank, N.A. (2013) _ Cal.App.4th _, _, 2013 Cal. App. LEXIS 211, 45.

In contrast, these described allegations were adequate for pleading fraud:

West met that specificity requirement. She alleged quite specifically that Chase Bank made misrepresentations in the Trial Plan Agreement, in the April 5, 2010 letter, and in telephone conferences on April 8 and May 24, 2010. Both the Trial Plan Agreement and the April 5 letter were attached to the third amended complaint. The Trial Plan Agreement was sent to West on July 24, 2009 by a Washington Mutual loan workout specialist identified as Russell Buelna.

West alleged that, in the April 5, 2010 letter, Chase Bank falsely represented that it would reevaluate her case and send her the NPV input data if she so requested within 30 days. The April 5 letter is from the Chase Fulfillment Center and, though the letter does not identify the preparer, West did not have to plead that information because it was uniquely within Chase Bank's knowledge....

West alleged that on April 8, 2010, she spoke with a supervisor in the loan modification department of Chase Bank, and, on May 24, 2010, spoke with someone in that department. She specifically described the misrepresentations allegedly made during those conferences and alleged the misrepresentations were communicated by telephone. She alleged that, in a telephone call on May 24, 2010, a Chase Bank representative told her she "could resubmit her updated financial data for re-evaluation for HAMP modification solutions, and that there was no foreclosure sale date or sale scheduled." (Boldface & underscoring omitted.) Her allegation of the persons who made the alleged

misrepresentations was sufficient to give notice to Chase Bank of the charges. The identification of the Chase Bank employees who spoke with West on those dates is or should be within Chase Bank's knowledge.

West v. JPMorgan Chase Bank, N.A. (2013) _ Cal.App.4th _, _, 2013 Cal. App. LEXIS 207, 18-19.

Regarding a claim for concealment, a bank duty to notify a borrower, " 'may be directly imposed by statute or other prescriptive law; it may be voluntarily assumed by contractual undertaking; it may arise as an incident of a relationship between the defendant and the plaintiff; and it may arise as a result of other conduct by the defendant that makes it wrongful for him to remain silent.' " SCC Acquisitions Inc. v. Central Pacific Bank (2012) 207 Cal.App.4th 859, 864.

Further, a tender is not required, "when the lender has not yet foreclosed and has allegedly violated laws related to avoiding the necessity for a foreclosure." Pfeifer v. Countrywide Home Loans (2012) _ Cal.App.4th _, _, 2012 Cal. App. LEXIS 1265, 61 (complaint sufficiently alleged lenders' failure to comply with the HUD regulations that could avoid a foreclosure).

"In order to survive a motion to strike an allegation of punitive damages, the ultimate facts showing an entitlement to such relief must be pled by a plaintiff." Clauson v. Sup. Ct. (1998) 67 Cal. App. 4th 1253, 1255. *Accord* Spinks v. Equity Residential Briarwood Apartments (2009) 171 Cal. App. 4th 1004, 1055; Blegen v. Sup. Ct. (1981) 125 Cal.App.3d 959, 962.

As for punitive damages, complainants must allege and prove an underlying tortious act, and a cognizable recovery. McLaughlin v. National Union Fire Ins. Co. (1994) 23 Cal.App.4th 1132, 1164. *See also* Bosetti v. U.S. Life Ins. Co. in City of N.Y. (2009) 175 Cal.App.4th 1208, 1242 ("As U.S. Life is entitled to summary adjudication on all ... tort causes of action, her claim for punitive damages must fail as well.").

Next, even wholly unsupported attorneys' fees allegations need not be stricken pursuant to a motion to strike, since later discovery may reveal a basis for their recovery. Camenisch v. Sup. Ct. (1996) 44 Cal.App.4th 1689, 1699. "There is no requirement that a party plead that it is seeking attorney fees, and there is no requirement that the ground for a fee award be specified in the pleadings." Yassin v. Solis (2010) 184 Cal.App.4th 524, 533. *Accord* Snatchko v. Westfield LLC (2010) 187 Cal.App.4th 469, 497 (error to strike attorney fees sought under Code of Civil Procedure Section 1021.5, because there is no pleading requirement involved.); Chinn v. KMR Property Management (2008) 166 Cal.App.4th 175, 194 ("We agree that the complaint need not include a prayer for attorney fees, and that due process is satisfied by notice to the opposing party of the motion for attorney fees.").

Finally, judicial notice of the contents of a declaration of compliance with Civil Code Section 2923.5 (regarding diligence to contact borrowers to explore foreclosure alternatives), could not be taken, where the complaint alleged that the declaration is false, and the facts asserted in the declaration are reasonably subject to dispute. *See* Intengan v. Bac Home Loans Servicing LP (2013) _ Cal.App.4th _, _, 2013 Cal. App. LEXIS 225, 18-19, 25 (order sustaining the demurrer reversed as to cause of action for wrongful foreclosure based on allegations of noncompliance with Section 2923.5).

Dated: 4/3/13

Hon. Abraham Khan
Superior Court Judge

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 120 Broadway, Suite 300, Santa Monica, California 90401-2386.

On April 4, 2013, I served the foregoing document, described as:

NOTICE OF RULING ON DEFENDANT BANK OF AMERICA, N.A.'S DEMURRER TO FIRST AMENDED COMPLAINT AND MOTION TO STRIKE PORTIONS OF FIRST AMENDED COMPLAINT

on each interested party in this action, as follows:

Attorney for Plaintiffs

Barry S. Fagan, Esq.
P.O. Box 1213
Malibu, CA 90265-1213
Phone (310) 717-1790
pendinglawsuit@yahoo.com

☒ (BY MAIL) I placed a true copy (or original) of the foregoing document in a sealed envelope addressed to each interested party as set forth above. I placed each such envelope, with postage thereon fully prepaid, for collection and mailing at Bryan Cave LLP, Santa Monica, California. I am readily familiar with Bryan Cave LLP's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, the correspondence would be deposited in the United States Postal Service on that same day in the ordinary course of business.

☐ (BY FEDEX) I deposited in a box or other facility maintained by FedEx, an express carrier service, or delivered to a courier or driver authorized by said express carrier service to receive documents, a true copy of the foregoing document, in an envelope designated by said express service carrier, with delivery fees paid or provided for.

☐ (BY FAX) I caused a true copy of the foregoing document to be served by facsimile transmission from sending facsimile machine telephone number (310) 576-2200 to each interested party at the facsimile number set forth above. Each transmission was reported as complete and without error. A transmission report was properly issued by the sending facsimile machine for each interested party served.

☒ (BY E-MAIL) I caused a true copy of the foregoing document to be served by e-mail at the e-mail address set forth above. Each e-mail was complete and no reports of error were received.

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

Executed on April 4, 2013, at Santa Monica, California.

Chereese Campbell

BRYAN CAVE LLP
120 BROADWAY, SUITE 300
SANTA MONICA, CALIFORNIA 90401-2386