Gary S. Saunders, Esq. SBN: 144385
SAUNDERS LAW GROUP, LTD.
1891 California Avenue, Suite 102
Corona, CA 92881
Tel. (951) 272-9114
Fax (951) 270-5250

Attorney for Plaintiffs
SILVIA BURLEY and THE CALIFORNIA VALLEY MIWOK TRIBE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SILVIA BURLEY, as chairperson of the California Valley Miwok Tribe; and THE CALIFORNIA VALLEY MIWOK TRIBE, as a federally recognized tribe of the Miwok People,

Plaintiffs,

v.

ONEWEST BANK, FSB; MERIDIAN FORECLOSURE SERVICE; DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE OF THE INDYMAC INDA MORTGAGE LOAN TRUST 2007-AR3, MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2007-AR-3 UNDER THE POOLING AND SERVICING AGREEMENT DATED MAY 1, 2007; and DOES 1 – 10, inclusive,

Defendants.

Case No: 2:14-1349 WBS EFB

Hon. William B. Shubb

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: December 1, 2014
Time: 2:00 p.m.
Courtroom: 5 (14th Floor)

TO ALL PARTIES AND TO THEIR RESPECTIVE ATTORNEYS OF RECORD

SAUNDERS LAW GROUP, LTD.
1891 California Avenue, Suite 102, Corona, CA 92881 Tel. (951) 272-9114 Fax: (951) 270-5250

HEREIN:

Plaintiffs SILVIA BURLEY, as chairperson of the California Valley Miwok Tribe, and THE CALIFORNIA VALLEY MIWOK TRIBE (hereinafter referred to as "Plaintiffs") and through their undersigned counsel, hereby respectfully submit the following Opposition to Defendants ONEWEST BANK, FSB and DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE OF THE INDYMAC INDA MORTGAGE LOAN TRUST 2007-AR3, MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2007-AR-3 UNDER THE POOLING AND SERVICING AGREEMENT DATED MAY 1, 2007 (hereinafter referred to as "Defendants")'s Motion to Dismiss First Amended Complaint for Failure to State a Claim upon which Relief can be Granted ("Motion to Dismiss"). The Opposition is made of the grounds that all claims and requests for relief are legally proper, relevant and/or factually support and should not be dismissed by this Court. This Opposition will be based upon the Opposition, the Memorandum of Points and Authorities herein, the records filed in this action, any oral or written documentary evidence that may be presented at the hearing.

DATED: November 17, 2014

SAUNDERS LAW GROUP, LTD.

By: /s/ Gary S. Saunders
GARY SAUNDERS, ESQ.
Attorney for Plaintiffs
SILVIA BURLEY and THE CALIFORNIA VALLEY MIWOK TRIBE

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

At this stage of the action, Plaintiffs are required only to state sufficient facts to put Defendants on notice of the claims alleged against them in the Complaint. The FAC more than adequately informs Defendants of the claims against them and the factual basis for these claims. Defendants foreclosed the subject property based on void Deed of Trust as well as through breach of duties, agreements, and violation of civil codes. Also, Defendants did not correct default amount after misapplying payments, and made misrepresentations to prevent Plaintiffs from asserting their rights. Defendants' Demurrer is based on the incorrect assumption that the loan was obtained personally by Silvia Burley, when all documents and claims provided in the FAC state to the contrary. Silvia Burley was only acting as a trial chairperson and the loan was for the Miwok Tribe for their trial land and members.

What the Defendants are asking is that they be relieved of responsibility for the actions of each other and their agents. Further, Defendants claim that Plaintiffs need to specify the role of each Defendant in claims; Defendants want to hold Plaintiffs responsible for providing information that is largely already in Defendants' possession and control. Defendants could produce the evidence in its files, but they prefer that Plaintiffs be denied their day in court. To dismiss this lawsuit before ascertaining the truth of these allegations would be unjust. This should not be allowed by the Court.

II. FACTUAL BACKGROUND

On June 25, 1999, the BIA CCA recognized Silvia Burley as tribal chairperson for the Miowk Tribe, with whom government to government business would be conducted. Further, the Governing Body of the Miowk Tribe enacted a Resolution authorizing their tribal chairperson to acquire a loan on the Tribe's behalf. The subject property was purchased on or about March 29, 2002 by Plaintiff Miwok Tribe, in which the Tribe took title and possession as a tribal land. The subject property was

since used as government and residence for the body of the Tribe. A 1981 case, *Montana v U.S.*, clarified that tribal nations possess inherent power over their internal affairs and civil authority over non-members within tribal lands to the extent necessary to protect health, welfare, economic interests or political integrity of the tribal nation. The Miwok Tribe had worked with the Bureau of the Indian Affairs (BIA) to establish their tribal identity and land on the subject property. The California State Board of Equalization has also accepted and approved the subject property as where the tribe conducts tribal government business and is eligible for tax exemption status.

Plaintiff Miwok Tribe then got a refinancing of the loan in March 2007 to obtain the fixed interest rate promised by the Defendants. This was again done using tribal money, for the use and privilege of the Miwok Tribe as its tribal office and for the tribal members.

At the time of loan origination and refinance, the representatives/agents for the Defendants knew that they were dealing with an Indian tribe. Defendants specifically required the Tribe to use their trial member to be on the loan documents in processing the loan transaction, just to facilitate the transaction for them. The bank's activities went beyond the usual relationship and induced Plaintiffs to enter into a particular loan transaction that was only devised to protect the lender. The bank instructed that one person of the tribe come forward to use their credit as an individual and in turn charged more because of being an American Indian. Conventional lending practices have not made their way into Indian country. Lenders needed to obtain the consent from Department of Interior to obtain the title or interest in the subject property. Defendants tried to circumvent it by getting Silvia Burley to sign documents as individuals when she was acting on behalf of the Tribe as a chairperson, in order to obtain a security interest against the Tribal land or property.

Plaintiffs were in contact with representative from Defendants with regards to obtaining a refinancing of the loan. Defendants stated that Plaintiffs can get a refinancing loan with fixed interest

rate for 30-years instead of then-variable rate; then the principal amount would be paid off. Plaintiff was also told that the loan can be refinanced or modified if any changes occur in payment amounts. Plaintiff's loan was not subject to any investor's guideline and they were not informed of any changes to it. Through specific instruction and direction by the lenders including the Defendants, the Miwok Tribe used Silvia Burley's name to refinance.

Defendants, through their representative Joshua Loeb, confirmed that the loan interest would be a 6.5% fixed for thirty years. Defendants specifically instructed Plaintiffs to use their Chairperson Silvia Burley, but acknowledged that the Miwok Tribe is the true borrower and owner who would be financing all fees and costs to get a refinancing with this fixed interest rate. In fact, Defendants used Miowk Tribe's financials to approve the subject loan. Accordingly, the Miwok Tribe continued to make all of the payments including mortgage, property tax, and appraisal for refinancing.

In reliance of these representation and promise, Plaintiffs signed the loan documents under the instruction of representatives for the Defendants. Plaintiffs were just provided with documents to sign. Defendants' represented that they will provide fixed rate interest, with favorable terms, if and only if the Tribe uses Silvia Burley as a borrower. Defendants explained that it is due to the credit. The transaction was requested on behalf of the California Valley Miwok Tribe to purchase the subject property using tribal money. The title was transferred temporarily from Miwok Tribe to Silvia Burley, and then back to the Miwok Tribe.

Contrary to the terms explained to the Plaintiffs though, the Deed of Trust included an Adjustable Rate Rider and an interest-only period of 10 years, instead of fixed interest for 30 years. The monthly mortgage payments went up to $5,625 from around $3,500. Further, the DOT included a prepayment penalty to preclude Plaintiffs from refinancing. This is after Plaintiffs had informed the Defendants the possibility of paying off the entire loan with the Revenue Sharing Trust Fund.

In dealing with the sovereign Tribe, Defendants made false promises and misrepresentations as to the material loan terms, and eligibility of the Miwok Tribe to obtain the loan; Defendants also violated ECOA. The banks and lenders need to follow the federal law to obtain a security interest in tribal land, specifically an approval by the Secretary of Interior to execute a mortgage or Deed of Trust. Plaintiffs allege that Defendants have violated such. Plaintiffs suffered damages as Defendant refused to apply the mortgage payments to the principal loan balance, refused to account for the overpayment, and just provided a modification, adding all the arrears and fees to the principal balance.

Then on or about December 11, 2008, Defendants tried to place Plaintiffs into default status in order to take away the property, hoping they do not have to deal with the Tribe. Defendants alleged the default amount to be about $48,000 when the previous mortgage payments have not been applied properly. Further, Plaintiffs were able and willing to reinstate the loan fully.

Also importantly, this Notice of Default was recorded through unauthorized trustee. Unbeknownst to the Plaintiffs, Defendants wrongfully foreclosed the subject property on or about April 1, 2009, without proper notice and based on invalid Notice of Default. Accordingly, Defendants rescinded the sale on or about February 1, 2010. The Notice of Default from December 2008 was rescinded as well. It took Plaintiffs almost a year for Defendants to correct these defects.

After intentionally placing Plaintiffs into default status and prolonged the foreclosure process for about a year half, within weeks of curing their defects, Defendants re-recorded a Notice of Default on or about February 19, 2010. The amount in of default was listed as $133,237.98, which is excessive; therefore, the NOD is defective once again. There is no valid 2923.5(b) declaration either.

Without curing defects, Defendant just tried to transfer the subject loan once again and avoided taking liabilities. On June 21, 2010, an Assignment of Deed of Trust was recorded in the Official Records of San Joaquin County. The Assignment is signed by IndyMac and claims to grant

the Deed of Trust to Deutsche Bank National Trust Company, as Trustee of the IndyMac INDA Mortgage Loan Trust 2007-AR3, Mortgage Pass-Through Certificates, Series 2007-AR3 under the Pooling and Servicing Agreement dated May 1, 2007 ("the Trust"). The Assignment is not valid as the trust closed in 2007 and could not be assigned in 2010 to the alleged securitized trust.

It turns out that there was a nominal lender only named in the Note to facilitate the creation of a DOT to secure the Note as a loan on investment when it could not as a DOT cannot secure an investment security. Further, the Note had also been paid off when the loan was supposedly securitized into the Trust. Even if the loan was paid off and securitized into the Trust in year 2005, there was no proper and timely assignment of Deed of Trust or the Note on the subject property. While the loan may exist, it is no longer secured against the subject property.

Had Plaintiffs known that the loan was a securitized loan, they would have not obtained the loan because there are different fees, unknown investor's guidelines, and unclear chain of title associated with securitized loan. And as a result, Plaintiffs had been charged with additional fees, subject to investor's guidelines on modification reviews, and had difficulty communicating with a right party to negotiate the loan or receive explanations. As such, it was unclear what role Defendants played in the subject loan. Regardless, Defendants promised to correct the loan terms as promised and to work with Plaintiffs to reinstate the loan upon payment from CA Gambling Control Commission ("CGCC"); there was approximately $10 million in the escrow account for the Tribe.

By promising to resolve the payment through gaming money, Defendants made Plaintiffs to rely and focus on receiving such payment. Plaintiffs were not provided with any other options to avoid foreclosure process. What Defendants did was to try to wait long enough for Plaintiffs to run out of their resources and legal remedies before they simply foreclose on the property after racking up fees and costs for years. The foreclosure process generates a lucrative stream of fees for mortgage servicers.

These added fees provide mortgage servicers like Defendants with a financial incentive to foreclose and place borrowers into a foreclosure status.

Accordingly, on or about June 24, 2013, a Notice of Default was recorded by Meridian Foreclosure Service as a trustee. The Substitution is executed by Carla A. Hardin, Assistant Secretary of the Deutsche Bank National Trust Company, as Trustee of The Trust, by OneWest Bank FSB as attorney in fact and named Meridian Foreclosure Service as the substituted trustee under the Deed of Trust. This time, Jon Dickerson from IndyMac claims to have tried to contact Plaintiffs pursuant to 2923.55(c); again, this is not true as Plaintiffs have retained same contact information and never received any communication with due diligence to explore options to avoid foreclosure. It simply does not make sense for Defendants to claim that they could not reach Plaintiffs for three years if they actually tried with any efforts.

Not only NOD had incorrect default amount, Plaintiffs were deprived of their right to explore options with the right parties to save home at that time, due to the misrepresentations and false promises.Instead, Defendants have been stringing Plaintiffs along with false promises and misrepresentations to create “smoke screen” to lull Plaintiffs into a state of complacency and the end result would be a sophisticated shell game designed to fatigue Plaintiffs and relieve them of both their income, assets and the home.

Defendants conducted the foreclosure of the Tribal property regardless. On November 6, 2013, a Trustee’s Deed Upon Sale was recorded in the Official Records of San Joaquin County unbeknownst to the Plaintiffs. The Trustee’s Deed Upon Sale claims that the subject property was sold at public auction back to Deutsche Bank National Trust Company, as Trustee for the securitized trust. The amount claimed to be paid by the grantee was $580,004.50 when the amount of the unpaid debt is claimed to be $1,451,550.05.

III. LEGAL STANDARD REGARDING DEMURRER

A complaint must only contain "a short and plain statement of the claim showing that the [plaintiff] is entitled to relief." Fed R. Civ. P. 8(a)(2). In ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, a court must accept all material factual allegations in the complaint as true and must construe them in the light most favorable to the plaintiff. *Cooper v. Pickett*, 137 F.3d 616, 622 (9th Cir. 1997). The plaintiff need only provide enough facts to state a claim for relief that is plausible on its face. *Bell Atl Corp. v. Twombly*, 550 U.S. 544 (1955).

Under Federal Rule of Civil Procedure 15(a)(2), leave to amend "shall be freely given when justice so requires." *Foman v. Davis*, 371 U.S. 178, 182 (1962) (quoting Fed. R. Civ. P. 15(a)(2)). Leave to amend is "to be applied with extreme liberality." *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001). Rule 15(a) thus requires a strong showing by the opposing party of prejudice, delay, futility, or bad faith before leave to amend may be denied. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051-52 (9th Cir. 2003); *Foman*, 371 U.S. at 182.

IV. ARGUMENTS

A. PLAINTIFFS' CLAIMS FOR NEGLIGENT MISREPRESENTATION, INTENTIONAL MISREPRESENTATION, AND PROMISSORY ESTOPPEL ARE PROPERLY PLED

The elements for Negligent Misrepresentation are: "(1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage." Intentional Misrepresentation requires a knowledge/scienter in addition. Plaintiffs also allege damages for all causes of action as lost refinancing, bankruptcy, and sale opportunities. *Loftis v. Homeward Residential, Inc.*, 2013 WL 4045808(C.D. Cal. June 11, 2013).

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Doctrine of promissory estoppel is founded on concepts of equity and fair dealing, providing that a person may not deny the existence of a state of facts if he or she intentionally led another to believe a particular circumstance to be true and to rely upon such belief to his or her detriment. *City of Goleta v. Superior Court*, 52 Cal.Rptr.3d 114 (2006). While misrepresentation is about facts known to Defendants, promissory estoppel is about promises about future events. This is the case for each misrepresentations alleged; some include the promises about future events, especially regarding methods and terms to the refinancing and subject Deed of Trust. Further, Defendants stopped Plaintiffs from saving their home through other means.

First misrepresentation was regarding a method of obtaining the loan and refinancing. Defendants stated that the tribal officer needs to be the one obtaining the loan on the behalf of the Tribe, and that the Tribe is ineligible to obtain a loan. These are not true. Not only Defendants violated the ECOA on credit-issue, Defendants also circumvented the rules in providing a loan to the Tribe. While fully aware of their dealing with the Indian Tribe and their tribal chairperson, Defendants tried to make a paper trail to claim that a loan transaction was done with an individual alone. This is also shown to be false, based on the communication and resolutions made prior to obtaining the subject loan.

Further, Defendants made false promise to induce Plaintiffs into the loan, especially by using Burley's name. Defendants promised that the loan would have a 30-year fixed interest rate term, with no adjustable rider and pre-payment penalty. In reliance, Plaintiffs agreed to obtain a loan in the method provided by the Defendants, and made mortgage payments accordingly. This was false as Plaintiffs' payment went up by $2,000 within a year. By giving documents to sign, Defendants changed the terms to have adjustable rate rider and pre-payment penalty addendum. Plaintiffs were also told that the loan would be modified when there are financial difficulties and/or can be transferred to the Tribe's name only upon request. Also importantly, Plaintiffs were never informed about the loan being

securitized. Plaintiffs would not have obtained the subject loan if they knew. As a result, Plaintiffs lost money they paid into as mortgage, loss of equity and enjoyment of their home through foreclosure process, as well as other damages in credit and legal fees.

Next, Defendants misrepresented the status of default and alleged default amount, when they filed the Notices of Default on or about April 1, 2009 and June 24, 2013. Although the Notice of Default in April 2009 has been rescinded, Defendants recklessly added more amount to the loan balance, which resulted in incorrect default amount in later dates. Further, Defendants misrepresented that they had tried to contact Plaintiffs to explore options to avoid foreclosing. While Plaintiffs had same address, number, and contact information, they received no such attempts. It does not make sense for Defendants to have tried to contact Plaintiffs and were not able to reach them for three years.

Defendants also represented to the Plaintiffs that they will resolve the discrepancies on the loan balance and default amount, and then instructed Plaintiffs to wait and not seek other options. Defendants prevented Plaintiffs from reinstating the loan or other options at that time, after learning about the tribal money in the CGCC account for up to $10 million. Instead of curing the defects, Defendants just bought time to record other Assignments and Substitutions to try to cure the breaks in chain of title, and to proceed with the foreclosure after racking up enough bills and penalties for years. While representing that no foreclosure process will take place, Defendants did exactly that after promising to wait and resolve through the tribal escrow account with CGCC. As willfully planned, Defendants did not cure the defects in NOD, Declaration, or sought approval from Secretary of Interior to conduct the foreclosure. Then on October 22, 2013, Defendants conducted the foreclosure sale of the Subject Property, and just took the property title for $580,000 when there is equity on the property. Plaintiffs were not provided with any loss mitigation options, as should have provided under California Homeowners Bill of Rights.

While Defendants may not have a duty to provide a loan modification under the Deed of Trust, they went beyond that usual relationship to induce Plaintiffs into a specific loan, then default status, and then a hold for years. Defendants' actions meet the conditions of a six-factor test established by California Supreme Court that would impose a duty on the lender. C*onnor v. Great Western Sav. & Loan Association*, (1969) Cal. 2d 850, 865. In addition to explicitly stating that parties must act in "good faith", Courts have also held that parties need to guard against moral risk. "A deed of trust is not to be enforced simply because the trustor-obligor enters into an installment land contract for the sale of the security. Such legitimate interests include not only that of preserving the security from waste or depreciation but also that of guarding against what has been termed the "moral risks" of having to resort to the security upon default." *Tucker v. Lassen Saving & Loan Assn*., 12 Cal. 3d 629, 634 (1974).

"[T]he requirement of specificity is relaxed when the allegations indicate that the defendant must necessarily possess full information concerning the facts of the controversy or when the facts lie more in the knowledge of the opposite party." *Tarmann v. State Farm Mut. Auto. Ins., Co*. (1991) 2 Cal. App. 4th 153.

B. <u>PLAINTIFFS' CLAIM FOR BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DELAING IS PROPERLY PLED</u>

Every contract contains an implied covenant of good faith and fair dealing that "neither party will do anything which will injure the right of the other to receive the benefits of the agreement." *Kransco v. Am. Empire Surplus Lines Ins. Co., 23 Cal. 4th 390, 400 (2000).* This covenant imposes an affirmative duty on each party to do everything that a reasonable interpretation of an agreement presupposes he will do to accomplish the purpose of the agreement, even if those acts are not expressly required by the agreement itself. The covenant is elastic and failures to act in good faith can take on almost any form, because it is the spirit of good faith and fair dealing that governs.

At all times relevant herein, Defendants acting as Plaintiffs' lender and/or servicer, had a duty to exercise reasonable care and skill to maintain proper and accurate loan records and to discharge and fulfill the other incidents attendant to the maintenance, accounting and servicing of loan records, including, but not limited, disclosing to Plaintiffs the status of any foreclosure actions taken by it, disclosing who owned Plaintiffs' Loan to Plaintiffs and when, refraining from taking any action against Plaintiffs that it did not have the legal authority to do, and providing all relevant information regarding the Loan Plaintiffs had with them to Plaintiffs.

Defendants and Plaintiff allegedly had a contractual relationship through the Deed of Trust. Defendants went beyond usual relationship between a borrower and lender to induce Plaintiffs into specific loan and by using specific method. Then Defendants concealed about adjustable rate rider when represented the refinancing had a fixed interest rate; it was interest only on top of it with pre-payment penalty. While Plaintiffs were making the payments demanded by Defendants, Defendants unfairly prevented Plaintiffs from receiving the benefits of paying off on the loan. Defendants misapplied the payments and did not communicate property regarding securitizing the loan.

Further, by promising to cure the discrepancy on the loan term and balance, Defendants prevented Plaintiffs from exercising their right to reinstate the loan or explore other options. After learning about the escrow account with CGCC, Defendants placed Plaintiff into a hold period for three years, representing that they will wait and resolve these issues altogether. Defendants induced Plaintiffs to sit on their rights. Defendants guised their intent and continued with the foreclosure process to rack up fees and penalties to finally foreclose for a greater amount than justifiable.

A "breach of the implied covenant of good faith and fair dealing involves something beyond breach of the contractual duty itself and it has been held that bad faith implies unfair dealing." *Careau & Co. v.Security Pacific Business Credit*, Inc., 222 Cal. App. 3d 1371, 1394 (1990). These "choice[s]

had been made in bad faith ...[w]here a contract confers on one party a discretionary power affecting the rights of the other, a duty is imposed to exercise that discretion in good faith and in accordance with fair dealing." *Careau*, at 1394. California law recognizes that a deteriment constituting consideration includes "expenditure of time and energy." *Raedeke v. Gibraltar Sav. & Loan Assn*., 10 Cal. 3d 665, 693 (1974). Defendants owe a duty to Plaintiff Burley as the federally recognized chairperson for the California Miwok Tribe. The Tribe is a sovereign Indian nation and therefore is immune from state laws and administrative actions that would interfere with the rights of self-government and sovereign immunity. See *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831).

C. PLAINTIFFS' CLAIM FOR VIOLATION OF EQUAL CREDIT OPPORTUNITY ACT IS PROPERLY PLED

Plaintiffs properly alleged that Defendants violated ECOA by credit discrimination against Plaintiff Miwok Tribe. Under the Act the term person includes natural persons, corporations, governmental agencies and subdivisions, trusts, estates, associations, partnerships and cooperation. This was done to achieve their ulterior motive about getting into a loan agreement with an Indian Tribe without going through the proper venue and route with Department of Interior. Further, Defendants used the financial information of the Tribe in providing the subject loan, but by just using Plaintiff Burley's name. These unfair or deceptive methods by a business need only to have the possible likelihood of deceiving the consumer. The law does not require that an actual deception take place. A business may also be liable for the unfair and deceptive acts of its employees, agents, or representatives.

D. PLAINTIFFS' CLAIM FOR VIOLATION OF TRUTH IN LENDING ACT IS PROPERLY PLED

The Truth in Lending Act ("TILA") requires that an assignee of a residential loan notify the borrower in writing of the assignment not later than thirty days after the assignment. 15 U.S.C.

§1641(g)(1). This written notification must provide specific information about, among other things, the assignee, the assignment, and the assignee's authorized agent. According to the Defendants, the TILA became effective in May 2009 and the subject loan was assigned on or about June 21, 2010; therefore, TILA applies. However, Defendants never provided Plaintiffs with a written notification as TILA required. The violation of TILA is statutory under the federal law.

E. PLAINTIFFS' CLAIMS FOR UNJUST ENRICHMENT/EMBEZZLEMENT AND TRESPASS TO LAND/CHATTEL ARE PROPERLY PLED

Plaintiffs made mortgage payments using the tribal money since year 2002 and after refinancing in year 2007; however these payments were not applied to the loan balance. Then Defendants foreclosed the property and took over the property and equity that exceeds the amount owed by the Plaintiffs, even without accounting for the misapplied mortgage payments. As Defendants induced Plaintiffs into the loan agreement with fraudulent representation, and then took over all the mortgage payment, equity, and the property itself, Defendants are unjustly enriched at the expense of the Plaintiffs. On the other hand, Plaintiffs lost their tribal land.

The subject property has been possessed and operated by the Miwok Tribe, recognized by the Bureau of the Indian Affairs (BIA) as well as the California State Board of Equalization. It was for the Tribe to exercise their sovereignty, govern, and to provide housing for the members. Defendants, by foreclosing and then initiating an unlawful detainer action against Plaintiffs, have violated the Plaintiffs' possessory rights to their tribal land.

F. PLAINTIFFS' CLAIMS FOR WRONGFUL FORECLOSURE, CANCELLATION OF INSTRUMENTS, AND QUIET TITLE ARE PROPERLY PLED

The elements are as follows: (1) a trustee caused an illegal, fraudulent, or willfully oppressive sale of real property; (2) pursuant to a power of sale contained in a deed of trust; and (3) the trustor sustained damages. (*Munger v. Moore* (1970) 11 Cal.App.3d 1, 7) A court may cancel a written

instrument if it creates a reasonable apprehension that, if left outstanding, may cause serious injury to a person against whom it is void or voidable. (*Civ. Code § 3412*.)

As described in allegations and other causes of action, Defendants did not file or record documents in connection with this non-judicial foreclosure that are accurate, complete, and supported by competent and reliable evidence. First, there is no valid DOT to enforce a power of sale. The purported DOT recorded on or about April 30, 2007, was made without the requisite approval by the Secretary of Interior since the subject property was owed by the Miwok Tribe. Defendants may not obtain an interest or security against the tribal land without doing so.

Further, the DOT is void due to breach of material terms to be incorporated into the Deed. Contrary to the terms explained to the Plaintiffs though, the Deed of Trust included an Adjustable Rate Rider and an interest-only period of 10 years, instead of fixed interest for 30 years. The monthly mortgage payments went up to $5,625 from around $3,500. Also, the DOT included a prepayment penalty to preclude Plaintiffs from refinancing for three years.

Second, Defendants do not have authority to foreclose on the void NOD. The nominal lender never funded the loan; there is lack of consideration to make the purported DOT void. This is fraudulent act by Defendants who used nominal lender to facilitate the creation of DOT to secure the Note as a loan, when they were getting an investment security which could not been secured. The loan was supposedly securitized at this time into the Trust. However, even this was not done correctly.

In order for the Deed of Trust to be a part of the securitized trust, the entities involved were required to follow various agreements and established laws, including the trust agreement that governed the creation of the trust. The cutoff date of the trust is May 1, 2007, and the closing date is May 30, 2007. Only loans that were placed in the trust between May 1, 2007, and May 30, 2007, are eligible for

the named Trust. Plaintiffs allege that the entities involved in the attempted securitization failed to adhere to the requirements of the trust agreement necessary to properly assign the Deed of Trust into the trust which makes the assignment invalid.

Next, Defendants broke the chain of title and issued NOD without establishing the requisite authority. Defendants violated *Civil Code §2924(a)(6),* and did not identify the beneficiary on the loan. Then, Defendants tried to establish the chain by assigning the loan into the securitized Trust, which has already been closed; and this assignment occurred after filing of NOD. *Civil Code §2924(a)* clearly states that the power of foreclosure is "to be exercised after a breach of the obligation for which that mortgage or transfer is a security." Endorsement of the note clarifies that the Note was actually paid off, and no longer secured against the property. Accordingly, Defendants rescinded the NOD in 2009, but just racked up more fees and penalties to re-record on a later date.

Also importantly, Plaintiffs were *not* in default of the subject loan when the Notices of Default was recorded. Plaintiffs have been making mortgage payments that did not get properly applied to the balance, causing the default to occur. Defendants breached the terms of the loan as they increased the monthly after agreement was reached and prevented Plaintiffs from reinstate the loan at that time. Therefore, Defendants forced Plaintiffs into default status and initiated the foreclosure process that rack-up additional fees and penalties.

When Plaintiffs challenged the validity of the loan, foreclosure documents, and identity of parties with authority, Defendants again just transferred the loan and substituted a new Trustee. Then on or about June 24, 2014, Defendants re-recorded a Notice of Default. This time, Jon Dickerson from IndyMac claims to have tried to contact Plaintiffs pursuant to 2923.55(c); again, this is not true as Plaintiffs have retained same contact information and never received any communication with due

diligence to explore options to avoid foreclosure. It simply does not make sense for Defendants to claim that they could not reach Plaintiffs for three years if they actually tried with any efforts.

The Notice of Default the Trustee's Sale was based upon was invalid due to excessive default amount, non-compliance with 2923.55 declaration requirement, and by breach of their duties. Then Defendants just foreclosed the subject property on or about October 22, 2013.

Not only Defendants conducted wrongful foreclosure proceedings, Defendants did not comply with the necessary requirements to conduct a foreclosure over a tribal land, in which the Miwok Tribe exercise its sovereign power over the land and their properties and tribal members. Defendants needed to obtain the consent from Department of Interior to obtain the title and interest in the subject property, especially if they would like to proceed with foreclosure of the land or property owned by the Tribe. Defendants must also gain the approval of the BIA as well.

Indian country and tribal land are also defined as communities made up of mainly of Indians, or Indian Trust, or restricted land, under 18 U.S.C. section 1151. This applies even if outside of reservation boundaries. Even if the property was purchased or owned by an individual tribal member, they are still subject to federal law because tribal land also includes restricted land owned by an individual tribal member. Restricted land is a land the title to which is held by an individual Indian or a tribe and which can only be eliminated or encumbered by the owner with the approval of the Secretary of the Interior because of limitations contained in the conveyance instrument pursuant to federal law or because of a federal law directly imposing such limitations (25 CFR Section 151.2(e)). Defendants attempted to circumvent the rules and deprive Plaintiffs from their sovereignty immunity, to conduct the oppressive foreclosure sale against the tribal land.

The Tribe conducts business from the subject property with such groups as Health & Human Services, Indian Child Welfare Act (ICWA); Native American Graves Protection and Repatriation Act

(NAGPRA); Miwok Cultural Preservation, Miwok Central Valley and Northern Sierra Miwok Language Retention; Miwok Arts & Crafts; Emergency Management, FEMA; Tribal Enrollment, USDA Food Distribution Program on Indian Reservations (FDPIR); US Fish and Wildlife, US Forestry; City and County Planning Departments; California Tribal Water Issues; and local community outreach. Plaintiffs cannot be imposed a state jurisdiction to impose civil regulatory laws on the tribes or tribal territory.

Defendants may argue that Plaintiff must assert prejudice to challenge the foreclosure proceedings against them. However, this requirement only applies if the borrower is relying on irregularities in the foreclosure process to challenge the foreclosure. *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal.App.4th 256, 272 (2011). In the matter at hand, Plaintiffs are arguing more than just irregularities; Plaintiffs are asserting, among other things, that Defendants acted unlawfully and in bad faith by creating and recording void written instruments, grossly overstated default amount, and prevented options to save home otherwise. Therefore, Plaintiffs have already alleged damages such as misapplied payments, loss of right to reinstate the loan, loss of refinancing and/or modification, and incurred expenses and fees; Plaintiffs also lost time and opportunities, and lost the beneficial use and enjoyment of their home by living in fear. Defendants claimed an interest adverse to Plaintiffs, also by virtue of an unlawful and improper creation and filing of DOT, NOD and NOTS. The connection between Defendants' conduct and Plaintiffs' loss is obvious. Defendants' role in this situation also subjects them to moral blame. Upon information and belief, these acts by Defendants constitute fraud, oppression and malice under *Cal. Civil Code §3294*.

Damages are measured by the value of the property at the time of the sale in excess of the mortgage lien against the property (i.e the equity in the property). Second, damages are available in the amount that is sufficient to compensate for all detriment proximately caused by the wrongful conduct.

California Civil Code Section 3333. Third, the borrower may be able to obtain damages for *emotional distress* in a wrongful foreclosure action and if the *borrower can prove by clear and convincing evidence that the servicer/trustee was guilty* of fraud, oppression or malice *punitive* damages may be awarded**.** Where there is a wrongful foreclosure, the borrower may seek punitive damages. The connection between Defendants' conduct and Plaintiffs' loss is obvious. Defendants' role in this situation also subjects them to moral blame. Upon information and belief, these acts by Defendants constitute fraud, oppression and malice under *Cal. Civil Code §3294.*

Last but not lease, California Code of Civil Procedure section 761.020 authorizes a quiet title action. Further, the portion of CA Civil Code section 1214 reads: "Every conveyance of real property ... is void as against ... any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action." Defendants recorded the conveyance of title after wrongfully foreclosing the property. Defendants are widely known banks that specialize in the mortgage servicing industry as well as very familiar with the foreclosure process and title documents.

G. PLAINTIFFS' CLAIM FOR VIOLATION OF CALIFORNIA BUSINESS AND PROFESSIONAL CODE SECTION 17200 IS PROPERLY PLED

California B&P Code § 17200, "prohibits any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising…." The "unfair" prong intentionally provides courts with broad discretion to prohibit new schemes to defraud. *Motors, Inc. v. Times-Mirror Co.* (1980) 102 Cal. App. 3d 735, 740. An unlawful business practice or act is "unfair" when it "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. *People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal. App. 3d 509, 530.

As described in all other cause of action, Plaintiffs have sufficiently alleged that Defendants

conducted business acts and practices that were unlawful and unfair when they made voidable Deed of Trust, Notice of Default, misrepresentations and false statements with regards to the refinancing option, method, loan terms, eligibility of each Plaintiff for a loan, as well as status, intent, and process during the alleged default period. Misleading Plaintiffs with reinstatement and other available options was unscrupulous and substantially injurious to Plaintiffs since Defendants did not act in a good faith to explore any options but made Plaintiffs sit on the rights while they place Plaintiffs deeper into default status with higher arrears. It is unlawful and unfair to deprive Plaintiffs from learning and/or exploring other options to save home; there was no contact by Defendants prior to recording a Notice of Default, in violation of *CC § 2923.55.* It is also unfair and fraudulent to prevent Plaintiffs from exploring other options to save home, such as sales, reinstatement, sales or restructuring of the loan.

The harm to Plaintiffs and to members of the general public outweighs the utility of Defendant's policy and practices. Plaintiffs and the general public have no other adequate remedy of law. A plaintiff can sue for "unlawful" business practices or acts even if the law or statute the defendant violated does not provide for a private right of action. See *Rose v. Bank of Am.*, 57 Cal. 4th 390, 395-96 (2013). At the pleading stage, a UCL plaintiff satisfies its burden of demonstrating standing by alleging an economic injury. *Boschma v. Home Loan Center, Inc*., 198 Cal. App. 4th 230, 254 (2011). Plaintiffs alleged they suffered an economic injury as a result. Specifically, plaintiffs contend that they lost mortgage payments and equity; further, Plaintiffs had to pay expenses that they otherwise would not have incurred, such as added arrears and fees. Plaintiffs lost their right to a modification, other opportunity to work out their delinquencies and unwarranted fees such as sales, re-constructuring, or repayment plan. The Court had deemed this as sufficiently pled as economic injury. *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 322.

H. <u>TENDER IS NOT REQUIRED</u>

There are many exceptions to the tender rule. First, tender is not required if it would be inequitable to require tender. (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 113) Here, it would be inequitable to require tender since the foreclosure sale should have never been set. Plaintiffs were not in default as there was intentional inducement into default status, followed by Defendants actively preventing Plaintiffs from reinstating the loan or exploring other options to pay off the loan. Also there is dispute over the default and reinstatement amount. Further, Defendants conducted foreclosure process in violation of civil codes and duties. Tender is not required if the plaintiff is alleging the foreclosure sale was void. (*Dimock v. Emerald Props.* (2000) 81 Cal.App.4th 868, 877-78)

V. IF THIS COURT IS INCLINED TO SUSTAIN DEFENDANTS' DEMURRER, AS TO ANY OF THE ABOVE STATED CAUSES OF ACTIONS, PLAINTIFFS REQUEST LEAVE TO AMEND

Courts commonly use four factors to determine whether to grant leave to amend: bad faith, undue delay, prejudice to the opposing party, and futility of amendment. *Roth v. Marquez*, 942 F.2d 617, 628 (9th Cir. 1991). None of these factors is present here. Plaintiffs would not be seeking leave to amend in bad faith; rather, Plaintiffs would simply be seeking the opportunity to clarify the facts and claims and to assert any new facts that may have become known. There is no undue delay since Plaintiffs have timely filed the complaints. There is no prejudice to Defendants because they are fully aware of this lawsuit and the issues pleaded. Finally, permitting Plaintiffs to amend their Complaint would not be futile since clarifying the Complaint, if necessary, would show that Plaintiffs do have valid claims that should be heard beyond just the pleadings.

Because a "court should freely give leave [to amend] when justice so requires," the Court should grant leave (assuming it grants to the Motion to Dismiss) since it would be unjust to Plaintiffs to bar them the opportunity to clarify their legitimate claims and assert their rights. The policy of the law is that controversies should be heard and disposed of on their merits *Fasuyi v. Permatex, Inc.* (2008)

167 Cal. App. 4th 681, 694-703. Plaintiffs who have pleaded general facts on which their cause of action is based, should be given the opportunity to amend their complaint and should not be deprived of their right to prosecute their action on the ground that their pleadings are defective for lack of particulars. *Reed v. Norman* (1957) 152 Cal App 2d 892.

And typically, relief under Code Civ. Proc. §473(b) is sought on several, if not all, the grounds available under the statute based on the same conduct. Any defects in the Complaint or timely filing of this opposition were made by inadvertence, excusable neglect, and/or mistake. Plaintiffs should be given the opportunity to cure the defects and to maintain their action against Defendants.

VI. CONCLUSION

As was set forth above, each and every claim in the First Amended Complaint should be upheld. All claims against Defendants are based on facts alleged in the FAC, based on supported legal theories and in accordance with Federal and California Law. Because the FAC states valid claims for relief and are specific and concrete enough to enable Defendants to prepare a defense to Plaintiff's suit, the FAC should be upheld in its entirety.

Dated: November 17, 2014

SAUNDERS LAW GROUP, LTD.

By: __/s/ Gary S. Saunders_____
GARY SAUNDERS, ESQ.
Attorney for Plaintiffs
SILVIA BURLEY and THE CALIFORNIA VALLEY MIWOK TRIBE