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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF JOSEPHINE

DAVID M. BUCKLAND, Plaintiff, vs. AURORA LOAN SERVICES, Defendants.	Case No. 10 CV 1023 **GENERAL JUDGMENT OF DISMISSAL**

This matter having come before the Court on January 10, 2010 for oral argument on upon Defendant Aurora Loan Services' Motion to Dismiss, and the Court having conducted oral argument and having received and reviewed the argument and legal memoranda of the parties; and the Court having issued its opinion in open court;

And the Court having allowed Plaintiffs 20 days to replead and Plaintiff having failed to replead;

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff's Complaint be, and the same is, hereby dismissed with prejudice and Defendants shall be entitled to an award of their costs and disbursements against Plaintiff in an amount to be determined in accordance with ORCP 68.

DATED: 3·18, 2011

/s/ PAT WOLKE
JUDGE

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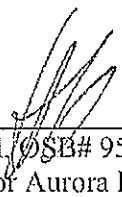
Respectfully submitted:



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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF JOSEPHINE

DAVID M. BUCKLAND, Plaintiff, vs. AURORA LOAN SERVICES, Defendant.	Case No. 10 CV 1023 **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

COMES NOW THE DEFENDANT AURORA LOAN SERVICES ("AURORA" or "ALS") and respectfully move the Court to dismiss the Plaintiffs Complaint pursuant to ORCP 21(A)(8) because the Complaint fails to state ultimate facts sufficient to constitute a claim.

I INTRODUCTION

Plaintiff has admitted in his pleadings that he obtained a loan secured by real property:

"The Plaintiff did agree to sign a promissory note and Deed of Trust with the Defendant..." See Complaint, Page 2. However, Plaintiff's pleadings have provided no further substantive information as to this dispute. It is assumed that the property in question is the property known as 221 Trevor Way, Grants Pass, OR 97526. The public record shows that a Deed of Trust was recorded on November 29, 2006 as Instrument # 2006-024026. In said Deed of Trust, Plaintiff conveyed to First American Title insurance Company of Oregon in trust and

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with the power of sale certain real property located in Josephine County, Oregon, known as 221 Trevor Way, Grants Pass, OR 97526, and described as Parcel 2 of Partition Plat No. 1994-1111 in Josephine County, Oregon. The named beneficiary of the Deed of Trust is MERS as a nominee for American Mortgage Network, Inc., dba American Mortgages Network of Oregon, its successors and assigns. It is assumed that Plaintiff's reference to a Deed of Trust, is to said recorded instrument. His arguments can be summarized as follows:

1) The Defendant does not have standing because the Defendant failed to provide any proof that they it has the authority to act on behalf of the Holder In Due Course which can only be done by showing Plaintiff the original promissory note.
2) Defendant has lost its rights through Estoppel by Acquiesence.
3) MERS does not have the power to appoint the trustee
4) Plaintiff seeks to quiet title, and have his debt discharged as a result.

II ORCP 21(A)(8) STANDARD

Under Oregon Rules of Civil Procedure 21(A)(8), a case may be dismissed for failure to state ultimate facts sufficient to constitute a claim. *ORCP 21(A)(8).* "The issue is not whether the Plaintiffs will ultimately prevail, but whether the party is entitled to offer evidence to support the claims.'" *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974)). The non-moving party is entitled to have all inferences from the record viewed in his favor. *Huang v. Claussen,* 147 Ore. App. 330 (Or. Ct. App. 1997). Nevertheless, "whatever the theory of recovery, facts must be alleged which, if proved, will establish the right to recover." *Davis v. Tyee Industries, Inc.*, 295 Ore. 467, 479 (Or. 1983)

The Court will disregard any allegations that are conclusions of law and mere "recitation of the elements of a particular claim for relief, without more, is not a statement of ultimate facts sufficient to constitute that claim for relief." *Huang v. Claussen, supra.* "[N]othing passes as a fact unless it is expressed in plain and concise language." *Harding v. Bell*, 265 Ore. 202, 209 (Or. 1973), *citing Baker Hotel v. Employees Local 161*, 187 Or 58, 64, 207 P2d 1129, 1132 (1949).

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"Plaintiffs is presumed to have stated his case as strongly as the facts will justify, and facts not alleged will be presumed not to exist." *Harding, supra citing Windle, Adm'x et al v. Flinn et al*, 196 Or 654, 662, 251 P2d 136 (1952). Thus "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Williams ex rel. Tabiu v. Gerber Products Co., 523 F.3d 934, 938 (9th Cir.2008), quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. The allegations must be more "than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic, Id. at 555.*

A claim has facial plausibility only when the Plaintiffs plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id. at 556.* It asks for more than a sheer possibility that a defendant has acted unlawfully, *Id.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id. at 557.* In *Ashcroft v. Iqbal, U.S., 129 S.Ct. 1937, 173 L. Ed. 2d 868 (2009)*, the Supreme Court explained the analysis a court must take:

> Two working principles underlie our decision... First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitations of the elements of a cause of action, supported by mere conclusory statements, do not suffice ...
>
> Second, only a complaint that states a plausible claim for relief survives a motion to dismiss ... [and] where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged - but it has not 'show[n]' - 'that the pleader is entitled to relief.' ....
>
> In keeping with these principles, a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.

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III ARGUMENT

THE ALLEGATIONS LACK LEGAL AND FACTUAL SUPPORT.

A THE PROMISSORY NOTE IS NOT REQUIRED IN A NON JUDICIAL FORECLOSURE

Plaintiff argues that Defendant is required as a pre condition to a non judicial foreclosure, to present Plaintiff with the original note to determine if the note has been endorsed to a "holder in due course." That is not the law. The general rule is that an " indorsement of a negotiable instrument is not within the meaning of a statute providing for the recording of assignments of mortgages and deeds of trust. *Hughes v. Kaw Inv. Co.*, 97 So. 465 (Miss. 1923). The Oregon Trust Deed Act, does not mention the promissory note and "does not require presentment of the Note or any other proof of 'real party in interest' or 'standing', other than the Deed of Trust." *Stewart v. Mortgage Electronic Registration Systems, Inc.*, 2010 WL 1055131 *12 (D. Or. 2010) (findings and recommendation of Magistrate Judge Papak *adopted* by Order dated March 19, 2010 by Judge Garr King). This is because the exercise of the power of sale, is not an action to sue on the note.

1) PLAINTIFF'S PROPERTY IS BEING FORECLOSED NOT THROUGH A JUDICIAL PROCEEDING BUT UNDER A POWER OF SALE AND IT IS THUS NOT AN ACTION TO RECOVER A JUDGMENT ON A DEBT.

It is not in dispute that Plaintiffs voluntarily executed a Note and Deed of Trust. This is often referred to as a mortgage. A mortgage is generally foreclosed through a judicial process. However, unlike a traditional Mortgage, a Deed of Trust maybe "foreclosed" through an auction sale instead of a court proceeding:

> "[I]t confers upon a trustee the power to sell property securing an obligation under a trust deed in the event of default, without the necessity for judicial action."

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> *Staffordshire Investments, Inc. v. Cal-Western Reconveyance Corp.*, 209 Or.App. 528, 149 P.3d 150 (Or.App. 2006) at 542, also *See* Oregon Trust Deed Act (Act), ORS 86.705 to 86.795.

The holder of the beneficial interest, instructs the trustee/auctioneer to commence foreclosure proceedings by filing a notice of default. *See* ORS 86.735. Once that notice is recorded, a sale date is set and the auctioneer trustee then prepares a notice of such sale and provides notice to affected parties. The borrower has a right by statute, to reinstate his loan or pay it off prior to sale.

A sale under a power of sale, i.e. a sale by a trustee, "is not a judicial sale, although, ..., it is as valid and binding and has the same force and effect as a sale under a decree." 55 Am.Jur. 2d, Mortgages §694, p. 635, also see *Siuslaw Valley Bank, Inc. v. Christopher H. Canfield Associates, Oreg., Ltd.*, 64 Ore. App. 198, 201 (Or. Ct. App. 1983) ("statute [ORS 86.735] sets forth the circumstances under which a trustee may proceed by advertisement and sale; it does not govern judicial foreclosure of a trust deed.")

While the process is governed by statute, the authority to conduct such a sale is a matter of contract. It is the Grantor, i.e. Plaintiffs, that grants the power of sale upon default. Court's have universally upheld that contractual right:

> There is nothing in the law of mortgages, nor in the law that covers what are sometimes designated as "trust deeds in the nature of mortgages," which prevents the conferring by the grantor or mortgagor in such instrument of the power to sell the premises described therein upon default in payment of the debt secured by it... *Bell Silver &Copper Mining Co. v. First Nat. Bank of Butte, 156 U.S. 470 at page 477, 15 S.Ct. 440 at page 443, 39 L.Ed. 497 at page 501*

This is no different in Oregon. The right conferred upon the mortgagee by the mortgage is the right, upon default to have the mortgage foreclosed and the mortgaged property sold to satisfy his demand. *Schleef v. Purdy*, 214 P. 137, 140 (Or. 1923). If that right is written into the contract,

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the borrower must expect that in the face of a breach, this remedy will be invoked. *Uptown Heights Assocs. Ltd. Partnership v. Seafirst Corp.*, 320 Ore. 638, 645 (Or. 1995).

Plaintiff's theory, that foreclosure may not be commenced until Defendant produces the note, is thus unfounded. Plaintiff has offered neither a rational why the original note would be relevant in the foreclosure process nor even a single Oregon case to stand for the proposition that Defendant must produce the note before commencing a (foreclosure) sale. [1]

The exercise of the power of sale is not an attempt to collect funds from Plaintiffs:

> Foreclosing on a trust deed is distinct from the collection of the obligation to pay money...Payment of funds is not the object of the foreclosure action. Rather, the lender is foreclosing its interest in the property.
> ...
> An important point here is that with a trust deed, the trustee possesses the power the sale which may be exercised after a breach of the obligation for which the transfer in trust of the interest in real property is security. Foreclosure by the trustee is not the enforcement of the obligation because it is not an attempt to collect funds from the debtor.
>
> *Hulse v. Ocwen Fed. Bank, FSB*, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002)

Simply put, an "action to foreclose on the security does not constitute an action to recover a judgment on the debt. *Wright v. Associates Financial Services Co.,* 59 Ore. App. 688, 693 (Or. Ct. App. 1982). The Note is therefore irrelevant in this type of process. And it becomes clear why Oregon's comprehensive non-judicial system simply does not require a foreclosing entity to

---

[1] That is because no such cases exist. The cases that spawned this popular theory are cases from other states that have exclusively *judicial* foreclosure systems, in which the foreclosing lender must prove in a court of law that it has the capacity to sue, i.e. standing, to initiate court proceedings to foreclose. *See e.g., Newbeck v. Wash. Mut. Bank, 2010 U.S. Dist. LEXIS 3830 (N.D. Cal. Jan. 19, 2010)*(rejecting popular cited cases such as *Landmark Nat'l Bank v. Kesler, 289 Kan. 528, 216 P.3d 158 (2009)*, because those cases do not apply to non-judicial foreclosure sale statutes.)

The two cases most often cited are Landmark, supra, and *Bellistri v. Ocwen*, 284 S.W.3d 619 (Mo. Ct. App. 2009). The issue in Landmark was whether in a judicial foreclosure the Plaintiff had to provide notice to MERS, the named beneficiary on a junior deed of trust, in addition to the Lender. The issue in *Bellistri* was whether Ocwen, a loan servicer, could challenge a tax deed under Missouri law in its own name, not whether Ocwen or MERS had standing to exercise the contractual power of sale under the Deed of Trust. *Also see Mortgage Elec. Registration Sys. v. Bellistri*, 2010 U.S. Dist. LEXIS 67753 (E.D. Mo. July 1, 2010)(MERS in fact has standing to foreclose and the tax deed was issued subject to the interest of MERS).

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"produce the note" upon demand by the borrower: "Foreclosure by the trustee is not the enforcement of the obligation because it is not an attempt to collect funds from the debtor." *Id.* Nowhere in the Deed of Trust, Note, or in the Oregon foreclosure statutes, is there a requirement to produce the promissory note or show physical possession to commence the sale. Plaintiffs have provided no authority and no rational for the thesis that a foreclosure conducted pursuant to ORS 86.705 through 86.795, also needs to comply with the requirements for a judicial foreclosure. This is then simply a renewed attack on the statutory foreclosure scheme as provided for in ORS 86.705 et.seq., which has already been upheld by the Oregon courts based on constitutional challenges. *Wright, supra at* 693. There is no doubt that "[n]o requirement exists under the statutory framework to produce the original note to initiate non-judicial foreclosure." *Pantoja, supra, at 15*[2]. Therefore, the absence of an original promissory note in a non-judicial foreclosure does not render a foreclosure invalid." *Candelo v. NDEX West, LLC*, 2008 U.S. Dist. LEXIS 105926 (E.D. Cal. Dec. 23, 2008); *Neal v. Juarez, No. 06-0055, 2007 WL 2140640,* 8 (S.D. Cal. July 23, 2007) (*citing R.G. Hamilton Corp. v. Corum, 218 Cal. 92, 97 (1933); California Trust Co. v. Smead Inv. Co., 6 Cal. App. 2d 432, 435 (1935)).*

[2] *also see Contreras v. U.S. Bank*, 2009 U.S. Dist. LEXIS 121944, 2009 WL 4827016 (D. Ariz. 2009), *Rodriguez v. Litton Loan Servicing LP, No. 09-00029, 2009 WL 1326339,* 6 (E.D. Cal. May 12, 2009); *Candelo v. NDEX West, LLC, No. 08-1916, 2008 U.S. Dist. LEXIS 105926,* 12 E.D. Cal. Dec. 23, 2008) (same); *Farahani v. Cal-Western Reconveyance Corp., No, 09-194, 2009 WL 1309732,* 2 (N.D. Cal. May 8, 2009) ("[P]ossession [of the note] is not required for a non-judicial foreclosure.") *San Diego Home Solutions, Inc. v. Reconstrust Co.*, No. 08-1970 L, 2008 U.S. Dist. LEXIS 99684, 5 (S.D. Cal. Dec. 10, 2008) Also see *Candelo v. NDEX West, LLC*, No. CV F 08-1916, 2008 U.S. Dist. LEXIS 105926, 2008 WL 5382259, at 4 (E.D. Cal. Dec. 23, 2008), *Putkkuri v. Recontrust Co., No. 08cv1919, 2009 U.S. Dist. LEXIS 32, 2009 WL 32567*, at 2 (S.D. Cal. Jan. 5, 2009).

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2) A SERVICER MAY ACT AS THE AGENT FOR THE OWNER OF THE LOAN IN INSTRUCTING THE TRUSTEE TO COMMENCE FORECLOSURE.

Plaintiff's argument also relies on a deliberate confusion between principal and agent. As its name indicates, Aurora Loan Services, is a loan servicer. It does not claim to be the principal.

A loan Servicer acts as the agent of the principal in enforcing the promissory note and deed of trust. Servicing authority implies authority to initiate foreclosures if necessary. As Judge Posner has stated "[e]very mortgage needs someone to collect the borrower's monthly payments ... and if necessary foreclosing the mortgage." *CWCapital Asset Mgmt., LLC v. Chi. Props., LLC*, 610 F.3d 497, 501 (7th Cir. Ill. 2010). *The Financial Real Estate Handbook*, 3rd Ed.(1994), defines "servicing" or "mortgage servicing" as

> [c]ontrolling the necessary duties of a mortgagee, such as collecting payments, releasing the lien upon payment in full, **foreclosing if in default**, and making sure the taxes are paid, Insurance is in force, etc. Servicing may be done by the lender or a company acting for the lender, for a servicing fee. (emphasize added)

The Federal Trade Commission uses a similar explanation in its *The Real Estate Marketplace Glossary: How to Talk the Talk*:

> **Servicer:** A firm that performs servicing functions, including collecting mortgage payments, paying the borrower's taxes and insurance and generally managing borrower escrow accounts.
> **Servicing:** The tasks a lender performs to protect the mortgage investment, including the collection of mortgage payments, escrow administration, and **delinquency management.**
>
> *www.ftc.gov/bc/edu/pubs/consumer/homes/zrea03.pdf*

These obligations to service the loan remain with the loan servicer, and do not get transferred upon the sale of the note:

> **20. Sale of Note; Change of Loan Servicer; Notice of Grievance**....If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser...

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A mortgage servicer has standing to sue in his own name. *CWCapital Asset Mgmt., LLC v. Chi. Props., LLC*, 610 F.3d 497, 501 (7th Cir. Ill. 2010), relying on *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269, 128 S. Ct. 2531, 2541, 171 L. Ed. 2d 424 (2008), *also see Sturgis v. Baker*, 43 Ore. 236, 243 (Or. 1903) ("[I]n law a collecting bank is the agent of the holder of the note…") .

3) THE STANDING DOCTRINE DETERMINES THE CAPACITY TO SUE NOT THE CAPACITY OF DEFENDANT TO EXERCISE CONTRACTUAL REMEDIES

Plaintiff is attempting to convert a shield protecting Defendants from multiple lawsuits into a cause of action, and thus a sword for Plaintiff. His argument regarding standing confuses the judicial foreclosure process used in a regular mortgage, with the contractual right of sale which is used to "foreclose" a Deed of Trust. In his complaint he wants to in fact force Defendant to show they have standing to foreclosure their interest in the real property, to in effect bring a mortgage foreclosure suit. However it is not upon the Defendant to proof they have standing, but on the Plaintiffs to show that the named Defendant has no power to foreclose. *First Nat'l Bank v. Malady*, 242 Ore. 353, 357 (Or. 1965) (In declaratory judgment cases, the plaintiff initiating the action and who makes affirmative allegation must bear the burden of proving what he alleges).

Plaintiffs' understanding of the theory of Standing is simply wrong. The term "justiciable"--along with its companion terms "standing," "mootness," and "ripeness"… are, in brief, judicial constructs, developed first in reference to the "judicial power" conferred on federal courts under Article III of the United States Constitution and later adopted by the Oregon courts in reference to the "judicial power" conferred under Article VII (Amended) of the state constitution. *Utsey v. Coos County*, 176 Ore. App. 524, 529 (Or. Ct. App. 2001).

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Standing thus focuses on the Plaintiffs' standing, not the Defendant's. What is at issue is the capacity to sue not the capacity to be sued.

In addition to this constitutional standing doctrine, there is also an element of "prudential standing." *Dunmore v. United States*, 358 F.3d 1107, 1112 (9th Cir. 2004). This is also referred to as the real party in interest doctrine. The real party in interest doctrine is for the benefit of a party defendant to protect that defendant from multiple suits. *Pacific Coast Agricultural Export Asso. v Sunkist Growers, Inc.* (1975, CA9 Cal) 526 F2d 1196, 1975-2 CCH Trade Cases P 60617, *cert den* (1976) 425 US 959, 96 S Ct 1741, 48 L Ed 2d 204.

(a) THE STATUTORY PROCESS PROTECTS PLAINTIFF AGAINST BEING HARASSED TWICE FOR THE SAME CAUSE.

The Oregon Supreme Court explained the general rational for the real party in interest rule succinctly a century ago:

> The statute requiring that every action shall be prosecuted in the name of the real party in interest was enacted for the benefit of a party defendant, to protect him from being again harassed for the same cause. But **if not cut off from any just offset or counterclaim against the demand, and a judgment in behalf of the party suing will fully protect him when discharged, then is his concern at an end.** This is the test as to whether such a defense is properly interposed...

Sturgis v. Baker, 43 Ore. 236, 240 (Or. 1903) (internal citations omitted)(emphasize added)

As the *Sturgis* court explained, the test of standing is whether the party raising standing is being protected from "being again harassed for the same cause." *Sturgis, supra.* If a "judgment in behalf of the party suing will fully protect him when discharged, then is his concern at an end." *Id.* The proper focus of the rule is to determine whether the party seeking its shelter is protected from contrary or subsequent claims. The rule looks at the process to determine whether a

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decision will protect the defendant against subsequent actions. It is not a rule to make contractual obligations unenforceable.

A non judicial foreclosures under a power of sale und the applicable statutes provides procedural "due process." *See Wright, supra.* In addition to the notice provisions, ORS 86.770 specifically provides protection for the Plaintiff from being "harassed" twice for the same debt by limiting a creditors remedy to the sale of the property. Pursuant to subsection 2, after a foreclosure sale, no action for a deficiency may be brought against Plaintiff. In other words, the foreclosure sale is the sole remedy of a "Creditor," at least with respect to residential mortgages and deeds of trust. As discussed below, that Creditor is bound by the acts of its foreclosing agents with respect to the outcome of the foreclosure. Plaintiff is thus protected from "being again harassed for the same cause" by the very nature of the non-judicial foreclosure process.

The argument that Plaintiff needs to institute a declaratory action to protect herself from a civil "double jeopardy" is therefore a red herring.

4) THOSE THAT SEEK EQUITY MUST DO EQUITY – PLAINTIFFS CANNOT SEEK RESCISSION OR OTHERWISE CHALLENGE A "WRONGFUL FORECLOSURE" WITHOUT TENDERING OR OFFERING TO TENDER THE LOAN PROCEEDS.

While many of Plaintiffs' claims are aimed at rescinding the subject loan transactions, nowhere in the Complaint does Plaintiff allege that he is able and willing to tender the money he has borrowed.

That is a vital element to Plaintiff's cause of action. Generally, a court of equity will not interfere in the absence of some fraud or improper practice *Johnson v. Feskens*, 146 Ore. 657, 661 (Or. 1934). And, "he who seeks equity must do equity." *Jensen v. Probert*, 174 Ore. 143, 149 (Or. 1944). So for example, to have a court determine that an "equitable mortgage" exists,

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tender must be alleged. *Marshall v. Williams*, 21 Ore. 268, 275 (Or. 1891), *also see, Stations West, LLC v. Pinnacle Bank of Oregon*, 338 Fed. Appx. 658, 660 (9th Cir. 2009)(unpublished)(Plaintiff failed to allege it could remedy notice of default.) This is because there can be no wrongful foreclosure unless the debt was not due. *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 304 (Nev. 1983) ("material issue of fact in a wrongful foreclosure claim is whether the trustor was in default when the power of sale was exercised.")

Moreover, a party seeking to stop or reverse foreclosure proceedings must first make a "valid and viable tender [offer] of payment of the indebtedness." *Karlsen v. American Sav. & Loan Assn, 15 Cal. App. 3d 112, 117 (2d Dist. 1971); Arnolds Mgmt. Corp. v. Eischen, 158 Cal. App. 3d 575, 578 (2d Dist. 1984)* ("an action to set aside a trustee's sale for irregularities in sale notice or procedure should be accompanied by an offer to pay the full amount of the debt for which the property was security."); *see also Keen v. Am. Home Mortgage Svcg, Inc.*, No. 2:09-cv-01026-FCD-KJM, Docket No. 36, slip op. at p. 22 (E.D. Cal. Oct. 21, 2009) (dismissing wrongful foreclosure claim on the ground that the Plaintiffs failed to allege that they had tendered, or at minimum, that they was able and willing to tender, the loan proceeds), *Stations West, supra.*

The bottom line is that Plaintiffs must be able to return the funds they borrowed before they can rescind this loan, even if they could prove they were entitled to rescind. Thus, as a threshold matter, if the Plaintiffs are unwilling or unable to rescind, it makes little difference whether they are entitled to do so.

B MERS HAS THE POWER TO APPOINT A SUCCESOR TRUSTEE

1) AN OVERVIEW OF MERS.

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MERS is an electronic registration system that was created in the aftermath of the 1993 savings and loan crisis. *Jackson v. Mortg. Elec. Registration Sys., 770 N.W.2d 487, 490 (Minn. 2009); see also Bucci v. Lehman Brothers Bank, FSB*, No. 09-3888, 2009 R.I. Super, LEXIS 110, 8 (Aug. 25, 2009); *MERSCORP, Inc. v. Romaine, 861 N.E.2d 81, 83 (N.Y. 2006).* It was created by the Mortgage Bankers Association, Fannie Mae, Freddie Mac, the Government National Mortgage Association, the Federal Housing Administration, and the Department of Veterans Affairs. Gerald Korngold, *Legal and Policy Choices in the Aftermath, of the Subprime and Mortgage Financing Crisis,* 60 S.C. L.Rev. 727, 741-43 (2009).

MERS does not own loans, nor does it claim to own loans - MERS simply serves as beneficiary in a nominee capacity for the note owner, pursuant to the contractual relationship between MERS and the note owner. The borrower is notified of this relationship and agrees to the same because it is the borrower who executes the mortgage or deed of trust naming MERS as mortgagee or beneficiary.

2) MERS' LEGAL RIGHT TO ENFORCE THE DEEDS OF TRUST.

1. PLAINTIFFS CONTRACTUALLY AGREED THAT MERS WOULD SERVE AS NOMINEE FOR THE LENDER AND ITS ASSIGNS AND BENEFICIARY UNDER THE DEED OF TRUST.

The Deed of Trust states, in relevant part, that "MERS is a separate corporation that is acting solely as nominee for Lender and Lender's successors and assigns. ***MERS is the beneficiary under this Security Instrument.***" *See Instrument #_____ on _____ records of _____, Exhibit 101, Motion for Judicial Notice (hereafter Exhibit 101).* Further, in the Deed of Trust, Plaintiff acknowledges and agrees that "[t]he beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS." (*Id.* at p. 3). Thus, not only did Plaintiff agree

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that MERS would be designated as the nominee for the Lender and the beneficiary under the Deed of Trust, Plaintiffs agreed that

> MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of these interests, including but not limited to, the right to foreclose and sell the property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument." (*Id.* at 3).

The above cited language makes clear that the Deed of Trust contractually authorizes MERS to enforce the Deed of Trust on behalf of the Lender and its successors and assigns. See e.g. *Blau v. America's Servicing Co.*, 2009 U.S. Dist. LEXIS 90632 (D. Ariz. Sept. 28, 2009). This includes the power to initiate foreclosure. That power, once granted cannot be unilaterally revoked by the Grantor. *See*. 55 Am. Jur. 2d Mortgages §689. For these reasons alone, Plaintiffs' argument fails.

3) MERS WAS A VALID BENEFICIARY UNDER THE DEED OF TRUST

Oregon Revised Statutes ("ORS") Chapter 86.705 *Trust Deeds – Definitions* states that a deed of trust beneficiary "means the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or the person's successor in interest..." This statute was quoted by Justice Henry C. Breithaupt of the Clackamas County Circuit Court in a written decision awarding attorney's fees to MERS related to MERS' defense of an action brought by the plaintiff seeking a judicial determination of the priority of plaintiff's construction lien. Parkin Electric, Inc. v. Saftencu, et al Clackamas County Circuit Court No. LV08040727 (March 12, 2009). A copy of the Court's decision is attached hereto as **Exhibit "A"**. The Court awarded summary judgment to MERS finding that its mortgage lien had priority over the plaintiff's construction lien and MERS then applied to the Court for an award of attorney's fees.

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The plaintiff opposed MERS' application claiming MERS was not the real party in interest to ask for an award of attorney's fees and was not entitled to seek the benefit of Oregon's lien statutes.

In the Parkin Electric decision the Court held that MERS by virtue of its' position as beneficiary of the deed of trust encumbering co-defendant, Saftencu's real property, was a real party in interest to the construction lien action and therefore was entitled to seek attorney's fees from the plaintiff. The Court found that the parties to the deed of trust contract i.e. the borrower, MERS and the original lender agreed "that MERS could and would act as, in effect, agent for the original lender and any later holder of the rights of the original lender". Parkin Electric at page 4. The Court held that Oregon recording statutes "do not prevent agency arrangements as agreed upon among borrowers, lenders, trustees and beneficiaries" and that MERS as beneficiary and mortgagee according to Oregon's mortgage laws was entitled to the protection of Oregon's lien statutes, *ORS Chapter 87. See* Parkin Electric at page 5 and *ORS Chapter 86.715*. The Court went on to point out in its decision that the plaintiff failed to provide certain notices to MERS in violation of Oregon law because MERS' interest in the deed of trust (even as nominee for the original lender) was recorded and known to the plaintiff and thus MERS was entitled to notice pursuant to the notice provisions of Oregon's lien statutes. *See* Parkin Electric at page 5, "The notice provisions in the lien statutes do not direct notices be given to lenders but rather direct that they be given to "mortgagees". Parkin Electric at page 5.

The Court granted MERS application for fees and costs finding that the plaintiff in its original action and in its opposition to MERS' application for fees could not establish "that MERS was not the beneficiary of a trust deed or that MERS was somehow disabled from making an assertion that it was a beneficiary of a trust deed." Similar to what the Delaneys are doing in this present action i.e. challenging MERS ability to be the beneficiary of their Deed of Trust and

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the validity of MERS' 2008 assignment to IndyMac Federal Bank, the Court in Parkin Electric found that the plaintiff chose to "act as a private attorney general" and "go on a crusade" against the contractual practices that lenders, borrowers, and MERS have chosen to use, practices which "are not proscribed by [Oregon] law." Parkin Electric at page 6.

In Stewart v. Mortgage Electronic Registration Systems, Inc. et al, 2010 WL 1055131 (D. Or. Feb. 9, 2010)(Findings and Recommendations adopted in their entirety and final judgment entered on March 19, 2010) Magistrate Judge Papak held that a MERS deed of trust assignment gave the foreclosing party (assignor of the MERS deed of trust assignment) standing to foreclose and the power and authority to appoint a successor trustee. In the Stewart case MERS was the original beneficiary of the deed of trust until it assigned its interest in the deed of trust to U.S. Bank National Association ("U.S. Bank"). Subsequent to the MERS assignment U.S. Bank initiated non-judicial foreclosure proceedings against the plaintiff/borrower, Stewart. Stewart challenged the standing of U.S. Bank to foreclose claiming that neither U.S. Bank nor the successor trustee were real parties in interest. The Court found that U.S. Bank was the real party in interest as the successor to the MERS deed of trust and had the standing to appoint a successor trustee and foreclose. Judge Papak stated that the Oregon Deed of Trust Act "does not require presentment of the Note or any other proof of "real party in interest" or "standing", other than the Deed of Trust." Id. at *12. Judge Papak concluded that whereas MERS' assignment of interest and the appointment of a successor trustee were properly recorded, the defendants fully complied with the Oregon Trust Deed Act and had standing to foreclose the plaintiff's property. Stewart at *12. Thereafter, Judge King adopted Judge Papak's decision in full. *Stewart v. MERS*, 2010 WL 1054775 (D. Or. Mar. 19, 2010).

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Similar to the Stewart Court, courts throughout the Ninth Circuit including Courts in California, Arizona, and Washington have also held that under their particular states recording, lien and foreclosure laws MERS is a valid beneficiary of a deed of trust and has the power and authority to assigns its beneficial interests in a deed of trust to a third party. *See* Derakhshan v. Mortgage Electronic Registration Systems, Inc., 2009 U.S. Dist. LEXIS 63176 (C.D. Cal.)(MERS motion to dismiss plaintiff's amended complaint as to claims for injunctive relief and fraud against MERS and foreclosing lender granted) "MERS is the named beneficiary in the Deed of Trust. By signing the Deed of Trust, Plaintiff agreed that MERS would be the beneficiary and act as nominee for the lender...Plaintiff explicitly authorized MERS to act as beneficiary with the right to foreclose on the property. Plaintiff is clearly not entitled to injunctive relief based on MERS' standing" Derakhshan at 18; and Ciardi v. The Lending Company, 2010 WL 2079735 (D. Ariz.)(MERS motion to dismiss plaintiffs' first amended complaint granted and plaintiffs' application for temporary and permanent injunction (to stop non-judicial foreclosure sale) denied)"The deed of trust, as quoted, in Plaintiffs' amended complaint, designates MERS as the beneficiary and authorizes MERS to take any action to enforce the loan, including the right to foreclose and sell the property. To the extent Plaintiffs rely on a theory that the beneficiary must have an interest in the actual note, Plaintiffs have failed to cite any law so requiring. Further, Plaintiffs have failed to allege any facts or otherwise explain how the mere listing of MERS as the beneficiary renders the deed of trust invalid". Ciardi at 3-4

In Vawter v. Quality Loan Service Corporation of Washington, et al, Case No. C 09-1585JLR (W.D. Wash.), the Court granted MERS and the loan servicer's motion for judgment on the pleadings finding that MERS is a proper deed of trust beneficiary under Washington law. The Court declined to accept the Vawters' arguments that MERS cannot be a beneficiary of a deed of

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trust in Washington. The Vawter Court quoted from its 2008 decision in Moon v. GMAC Mortgage Corp., No. C08-969Z, 2008 WL 4741492 (W.D. Wash. Oct. 24, 2008) finding that "[s]imply because MERS registers documents in a database does not prove that MERS cannot be the legal holder of an instrument."

Under Oregon law and the laws of other non-judicial foreclosure states in the Ninth Circuit, MERS is a valid beneficiary of a deed of trust and it has the authority and power to transfer its interest in a deed of trust to a third-party, permitting that third-party to foreclose on a deed of trust in the State of Oregon.

In this matter the plaintiff consented to MERS being the beneficiary of hisr Deed of Trust when the executed the same. He agreed to enter into the home loan transaction with the originating lender IndyMac Bank. MERS as the beneficiary of the Deed of Trust was the agent/nominee of IndyMac Bank. Oregon law does not prohibit MERS from being the beneficiary of the Plaintiffs' Deed of Trust.

A ESTOPPEL BY ACQUIESCENCE

Plaintiff also alleges that he should not be foreclosed upon because of the doctrine of "Estoppel by Acquiescence." Estoppel is an equitable principle that precludes someone from exercising a right to another's detriment if the right holder, through words or conduct, has led the other to believe that the right would not be exercised. Daly v. Fitch, 70 Ore. App. 18, 22 (Or. Ct. App. 1984). The doctrine does not apply, even if Plaintiff's own inequitable conduce, discussed above, is ignored.

Acquiescence implies active consent. *Tillamook Country Smoker v. Tillamook County Creamery Ass'n*, 311 F. Supp. 2d 1023, 1031 (D. Or. 2004). Mere silence or "passive acquiescence," does not produce an estoppel. *Molalla v. Coover*, 192 Ore. 233, 249 (Or. 1951),

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citing Fraser v. Portland, 81 Or. 92, 158 P. 514. Generally, estoppel by acquiescence requires 4 elements, (1) "unreasonable and inexcusable delay" coupled with (2) affirmative conduct which (3) induces the belief that a claim has been abandoned and (4) detrimental reliance. *Adidas Am., Inc. v. Payless Shoesource,* Inc., 546 F. Supp. 2d 1029, 1075 (D. Or. 2008). There is no argument that there was any affirmative conduct by Defendant to lead the Plaintiff to believe that he no longer had to pay his mortgage obligation. Instead, the Complaint alleges affirmative conduct on part of the Plaintiff to artificially create an argument for the estoppel. This is simply another case where an equitable defense is turned on its head and turned into a sword to avoid having to deal with the consequences of not repaying a mortgage loan.

IV CONCLUSION

There is no question that there is a mortgage crisis, and while John F Kennedy famously saw opportunity in every crisis, there are also opportunists in every such crisis. There are those that pray on the hopes and fears of mortgagors that no longer can afford their mortgages, that promise something for nothing, that conjure away debt as by magic. The internet is full of websites that promise to magically make mortgage debt go away. They provide case citations, "legal advice"(with the big disclaimer that it is not legal advice) and in some instances pleading templates. Those conjurers of cheap tricks, however, do not provide a service to anyone. Their case law citations are misleading and incomplete. They coble together unrelated doctrines in isolation to build elaborate circular arguments. They provide false hope, clog up the judicial system with frivolous complaints, and perpetuate uncertainty at a time where certainty is badly needed. Foreclosure is an unfortunate realty in this economy, but it is also a necessary realty. Without a clear and predictable remedy, there is no mortgage lending. Without lending there is no one to buy, sell or built homes.

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Plaintiff may not be to blame for pinning his hopes on such websites, but he cannot argue away the cold hard fact that he has not paid his mortgage as agreed, and that when he entered into the bargain he also agreed that this failure would result in a non-judicial sale of his real property.

DATED: October 21, 2010

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_____

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CERTIFICATE OF SERVICE

I certify that on _____ _____, 2010, I served a copy of the foregoing document by first class mail on the following:

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