

IN THE DISTRICT COURT IN AND FOR _____ COUNTY
STATE OF _____

_____ HOME LOANS SERVICING LP,)
Plaintiff,)
v.)
JOHN DOE, and JANE DOE,)
Defendants.) Case No.)
Judge)

ANSWER AND COUNTERCLAIM

COMES NOW the separate Defendant, _____, and in response to Plaintiff's First Amended Petition would show the Court as follows:

1. That Defendant _____ is a resident of the State of _____.
2. That Defendant denies each of the numbered paragraphs of Plaintiff's Petition and First Amended Petition and demands strict proof thereof.

AFFIRMATIVE DEFENSES

3. Plaintiff lacks standing to commence this action. This affirmative defense is not merely about problems with paperwork, or a matter of dotting i's and crossing t's. Instead, this defense lies at the heart of the protections given to homeowners and borrowers by the State of _____, and commands that this action be dismissed. See, *In re Jacobson*, 2009 WL 567188 (Bkrcty. W.D. Wash.) (holding that an entity that claims to be only a servicer for deed of trust note is not a real party in interest, and alleged servicing agent failed to establish that it had standing to enforce deed of trust); *In re Hwang*, 396 B. R. 757 (C. D. Ca., 2008) (holding that mortgage note could not be enforced by a bank that had previously assigned its rights under note to another entity, and retained only loan servicing rights, unless there was joinder of the party that owned the note following the assignment).
4. Defendant's original mortgage was with a National Bank that is not a party to this

action. Defendant's mortgage lender is not, and never has been, the same legal entity that commenced this action.

5. Plaintiff is not the agent of the owner or holder of the original or certified copies of, the note and mortgage and all relevant assignment(s), if any, and neither the holder nor the owner of the note, if different from the holder, have joined this action as plaintiffs.
6. Plaintiff is not the owner and holder of the mortgage and note executed by Defendants, and has no grounds to commence a foreclosure action against Defendants. See, *In re Hwang*, 396 B. R. 757 (C. D. Ca., 2008) (holding that bank to which mortgage note was payable, and which was in physical possession of the note, qualified as the "holder" of the note, even though it had assigned its rights under the note to another entity); Oklahoma UCC §§3-301, 3-305, and 1-201 (for the note to be enforced, the entity asserting the status of holder must be in physical possession of the instrument).
7. Plaintiff, if it is the proper servicing agent for Defendant's note, has not properly communicated instructions to Defendants that it is the last entity to whom the Defendants have been instructed to make payments, and that it is still the holder of the note.
8. Plaintiff's cause of action is barred in whole or in part due to Plaintiff's violation of state and federal Truth in Lending Acts.
9. Plaintiff's cause of action is barred in whole or in part due to Plaintiff's violation of state and federal Fair Debt Collection Practices Acts.
10. Plaintiff's cause of action is barred in whole or in part due to insufficient and/or incorrect notice.
11. Plaintiff's cause of action is barred in whole or in part due to insufficient and/or incorrect service of process.
12. Plaintiff's cause of action is barred in whole or in part due to Plaintiff's loss of

Defendant's payments on the note and mortgage.

13. Plaintiff's cause of action is barred in whole or in part under the doctrine of accord and satisfaction.
14. Defendant's actual lender has notified Defendant that said lender has approved Defendant for a Loan Modification pursuant to the Federal Helping Families Save Their Homes Act, effective May 20, 2009. The agreement to Loan Modification by the lender represents an agreement and election to not proceed with a foreclosure of the same loan.
15. Additional Defendant, Mortgage Electronic Registration System, Inc. ("MERS"), is not a necessary party defendant in this action. See, *Landmark National Bank v. Kesler*, 192 P. 3d 177 (Kan. App. 2008) (MERS held to not be a contingently necessary party in bank's foreclosure action).
16. Defendants executed a mortgage and promissory note to a national bank that is not a party defendant herein. On information and belief, the bank's nominee or beneficiary under Defendant's mortgage was MERS. However, MERS has never been a Holder of Defendant's promissory note or mortgage, and thus no purported assignment of the mortgage and note to Plaintiff, or any other entity, is of any legal force or effect.

COUNTERCLAIM

17. Defendant restates and realleges each of the above numbered paragraphs.
18. Plaintiff is in violation of state and federal Truth in Lending Acts.
19. Plaintiff is in violation of state and federal Fair Debt Collection Practices Acts.
20. Plaintiff has caused Defendant mental and emotional distress and suffering due to Plaintiff's pursuit of this action in derogation of its duty to forebear all legal proceedings during the pendency of Defendant's Loan Modification.

WHEREFORE, premises considered, Defendant, _____, prays to the Court that Plaintiff take nothing by way of its Petition, and that Defendant be awarded damages on his

counterclaim in an amount in excess of \$10,000.00, plus costs, interest and attorney's fees, and for all other just and equitable relief as the Court deems proper.

Respectfully submitted,

CERTIFICATE OF SERVICE

The undersigned certifies that on the _____ day of _____, a copy of the foregoing document was mailed to the Attorney for Plaintiff at the following address:
