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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

LESTER PASCUAL, and individual, and OFELIA PASCUAL, an individual, Plaintiffs, vs. AURORA LOAN SERVICES, LLC and DOES 1-100 inclusive, Defendants.	CIVIL NO. 10-00759 JMS-KSC PLAINTIFFS' **REPLY MEMORANDUM** IN FURTHER SUPPORT OF THEIR MOTION FOR RECONSIDERATION AND/OR CLARIFICATION OF THIS COURT'S ORDER GRANTING DEFENDANT AURORA LOAN SERVICES, LLC'S MOTION FOR SUMMARY JUDGMENT (WHICH THE COURT CONSTRUES AS A MOTION TO DISMISS) AND JUDGMENT, FILED JUNE 19, 2012; DECLARATION OF [redacted]; CERTIFICATE OF SERVICE

PLAINTIFFS' REPLY MEMORANDUM IN FURTHER SUPPORT OF THEIR MOTION FOR RECONSIDERATION AND/OR CLARIFICATION OF THIS COURT'S ORDER GRANTING DEFENDANT AURORA LOAN SERVICES, LLC'S MOTION FOR SUMMARY JUDGMENT (WHICH THE COURT CONSTRUES AS A MOTION TO DISMISS) AND JUDGMENT, FILED JUNE 19, 2012

COME NOW Plaintiffs LESTER PASCUAL and OFELIA PASCUAL, by and through their undersigned attorneys, and hereby reply to "Defendant Aurora Loan Services, LLC's Memorandum in opposition to Plaintiffs' Motion for Reconsideration and/or Clarification of this Court's Order Granting Defendant Aurora Loan Services, LLC's Motion for Summary Judgment (Which the Court Construes as a Motion to Dismiss) and Judgment," filed July 17, 2012.

In dismissing a complaint as the Court did here, a district court must consider whether to grant leave to amend. As explained by the Ninth Circuit Court of Appeals in Lopez v. Smith, 203 F.3d 1122 (9th Cir. 2000):

> Federal Rule of Civil Procedure 15(a) provides that a trial court shall grant leave to amend freely "when justice so requires." The Supreme Court has stated that "this mandate is to be heeded." Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). In addition, we have repeatedly held that "a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." Doe [v. United States, 58 F.3d 494, 497 (9th Cir.1995)].

Id. at 1130.

This Court in its June 19, 2012 Order (Doc. #65), in considering whether to grant leave to amend, explained in part:

> Nor have Plaintiffs offered any basis to question that Defendant does not hold the note. Instead, Plaintiffs ask the court to draw the inference that Defendant may not physically hold the note because Defendant asserts that it obtained the note in 2007, yet the Assignment of Mortgage recorded in the Hawaii Bureau of Conveyances states that the note and mortgage were assigned to Defendant in 2009. See Doc. No. 62, at 2-3. This difference in dates, however, fails to support the inference that Defendant does not hold the note. Rather, at most, it suggests at most a confusion regarding when Defendant received the note.
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> Thus, Plaintiffs have failed to state a claim that is plausible on its face based on Defendant's failure to prove that it holds the note.

Plaintiffs maintain that the Court should reconsider its Order on the basis of, inter alia, manifest error of law or fact, fraud, the need to prevent manifest injustice, and newly discovered evidence sufficient for Plaintiffs to maintain a claim that Defendant Aurora Loan Services, LLC ("Aurora"), does not and never has held Plaintiffs note, which is secured by the mortgage Defendant Aurora claims to have foreclosed.

Instead, Plaintiffs' note is and since 2007 has been owned by the investors of a securitized mortgage trust, in which it is held on their behalf by a Trustee. As previously explained in Plaintiffs' motion papers including the Declaration of Gary Victor Dubin, and as verified in the attached declaration of expert witness [redacted]

[redacted], on July 1, 2012 evidence was uncovered by Mr. [redacted] demonstrating that the subject mortgage loan is being actively traded in a securitized trust identified on the Bloomberg Terminal as "LXS 2007SH Lehman XS Trust," where it has been held since 2007. That Bloomberg Terminal data is substantial, reliable evidence that Defendant Aurora is not, nor has it ever been, the owner of the subject mortgage loan.

Rather than making any attempt to rebut this newly discovered evidence (which it clearly cannot do), Defendant Aurora in its opposition -- in complete disregard of its prior fraudulent misrepresentation to this court that it in fact was the holder of the note -- merely argues that Plaintiffs could have previously presented this evidence in their memorandum in opposition or at the hearing on Defendant's motion for summary judgment. Defendant Aurora is mistaken, and its failure to offer any rebuttal is itself grounds for granting Plaintiffs' instant motion.[1]

Moreover, counsel herein for Plaintiffs only recently appeared in this case after Defendant's motion for summary judgment had been filed and set for hearing. Plaintiffs' present counsel filed a Notice of Withdrawal and Substitution of Counsel less than three months ago on April 19, 2012 (Doc. #52). The Bloomberg

[1] Cf. Naranjo v. SBMC Mortg., 2012 WL 3030370, *3 (S.D. Cal., July 24, 2012) ("The vital allegation in this case is the assignment of the loan into the WAMU Trust was not completed by May 30, 2006 as required by the Trust Agreement. This allegation gives rise to a plausible inference that the subsequent assignment, substitution, and notice of default and election to sell may also be improper. **Defendants wholly fail to address that issue. . . . This reason alone is sufficient to deny Defendants' motion with respect to this issue.**" (Emphasis added)).

Terminal data was not available to Plaintiffs or their newly retained counsel prior to the earlier scheduled hearing.

As previously explained in the Declaration of Gary Victor Dubin, which originally accompanied Plaintiffs' instant motion, counsel herein only recently completed their research on this issue, having after being recently retained by Plaintiffs contracted with a finance expert to conduct a very specialized investigation utilizing an advanced computer system regularly relied upon by professionals in the finance and investment industries. Furthermore, this newly discovered evidence is not of the type that is readily available to borrowers, the public, or even most attorneys, and Plaintiffs cannot reasonably have been expected to present such evidence before the prior hearing.

Based upon the results of Plaintiffs' counsels' investigation and the newly discovered evidence arising therefrom, this Court in the interests of justice should reconsider and set aside its June 19, 2012 order of dismissal. Otherwise, the Court's dismissal without leave to amend will stand contrary to the Ninth Circuit's longstanding rule, which as it explained in Lopez:

> in a line of cases stretching back nearly 50 years, we have held that in dismissing for failure to state a claim under Rule 12(b)(6), "a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." Doe v. United States, 58 F.3d 494, 497 (9th Cir.1995); see also Cook, Perkiss & Liehe, Inc. v. Northern Cal. Collection

> Serv., Inc., 911 F.2d 242 (9th Cir.1990); Balistreri v. Pacifica Police Dep't, 901 F.2d 696 (9th Cir.1990); Noll v. Carlson, 809 F.2d 1446 (9th Cir.1987); Bonanno v. Thomas, 309 F.2d 320 (9th Cir.1962); Sidebotham v. Robison, 216 F.2d 816 (9th Cir.1954).
>
> This amendment policy is informed by Federal Rule of Civil Procedure 15(a), which provides that leave to amend should be freely granted "when justice so requires." Although Rule 15(a) gives the trial court discretion over this matter, we have repeatedly stressed that the court must remain guided by "the underlying purpose of Rule 15 . . . to facilitate decision on the merits, rather than on the pleadings or technicalities." Noll, 809 F.2d at 1448.

Lopez, 203 F.3d at 1127.

Finally, insofar as Plaintiffs' newly discovered evidence indicates that Defendant Aurora has apparently fraudulently misrepresented that it was the holder of Plaintiffs' mortgage note, such apparent fraud provides additional grounds for the Court to reconsider and set aside its June 19, 2012 order of dismissal, not only pursuant to its power under Rule 59(e) to prevent manifest injustice and correct errors of fact and law, but also pursuant to the more stringent standard of Rule 60(b)(3) of the Federal Rules of Civil Procedure.

Because Plaintiffs have discovered substantial new evidence demonstrating far more than a mere inference that Defendant Aurora is not and never has been the holder of their note despite its misrepresentations to the contrary, Plaintiffs

respectfully request that this Court reconsider and set aside its June 19, 2012 Order and at a minimum allow Plaintiffs leave to amend.

DATED: Honolulu, Hawaii; July 31, 2012.

/s/ Frederick J. Arensmeyer

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