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 9 *on behalf of himself and all others similarly situated*

10 **THE UNITED STATES DISTRICT COURT**
 11 **SOUTHERN DISTRICT OF CALIFORNIA**

12 NIMAL SUSANTHA DIUNUGALA, an
 13 individual, *on behalf of himself and all*
 14 *others similarly situated,*

15 Plaintiff,

16 vs.

17 JPMORGAN CHASE BANK, N.A.; THE
 18 BANK OF NEW YORK MELLON
 19 TRUST COMPANY, N.A.; AMERICAN
 20 HOME MORTGAGE SERVICING, INC.;
 21 POWER DEFAULT SERVICES, INC.;
 22 and DOES 1 through 10, inclusive,
 23 Defendants.

CASE NO. 12-cv-2106-WQH-NLS

Assigned to the Honorable: William Q. Hayes

FIRST AMENDED CLASS ACTION COMPLAINT

[DEMAND FOR JURY TRIAL]

24 Plaintiff NIMAL SUSANTHA DIUNUGALA, (referred to as “plaintiff” or
 25 “Plaintiff”), by and through their attorney, bring this action against defendants, and
 26 each of them so captioned, (collectively the “Defendants”) and alleges the following on

FIRST AMENDED CLASS ACTION COMPLAINT

1 information and belief, except as to those allegations which pertain to the Plaintiff and
2 are within their personal knowledge:

3 **PARTIES**

4 1. Plaintiff, NIMAL SUSANTHA DIUNUGALA, at all times mentioned herein
5 relevant to this complaint was the owner in fee simple of real property commonly
6 known as 987 Merced River Road, Chula Vista, California 91913, hereinafter
7 “Property”.

8 2. Defendant, JP MORGAN CHASE BANK, N. A. has its principal place of
9 business at Columbus, Ohio, and regularly conducts business in the State of California,
10 and is authorized to conduct business in the State of California.

11 3. Defendant THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A.,
12 has its principal place of business at New York, New York and regularly conducts
13 business in the State of California.

14 4. Defendant AMERICAN HOME MORTGAGE SERVICING, INC.
15 (“AMERICAN HOME MORTGAGE SERVICING” “AHMSI” or “loan servicer”) is
16 headquartered in California, with its principal place of business located at 6501 Irvine
17 Center Drive, Irvine, CA 92618 and regularly conducts business in the State of
18 California.

19 5. Defendant POWER DEFAULT SERVICES, INC. (“PDS”), purports that its
20 principal place of business is in Irving, Texas and regularly conducts business in the
21 State of California. It is affiliated with AHMSI.

22 6. Plaintiff does not know the true names and capacities of the defendants DOES 1
23 through 10, inclusive, and, as such, names said defendants by such fictitious names.
24 Plaintiff will amend the complaint to state the true name and capacity of the DOE
25 defendant(s) when such information is ascertained.
26

1 7. Plaintiff is informed and believes, and alleges thereon, that each defendant is
2 responsible in some manner for the occurrences alleged in this complaint, and that
3 Plaintiff's' damages were proximately caused by the defendants at all times mentioned
4 in this complaint.

5 8. Plaintiff is further informed and believes, and alleges thereon, that each
6 defendant was the agent, servant, representative, and/or employee of their co-
7 defendants, and in doing the things hereinafter alleged was acting in the scope of their
8 authority as agents, servants, representatives, family members and/or employees, and
9 with the permission and consent of their co-defendants.
10

11 9. Additionally, Plaintiff is informed and believes, and alleges thereon, that each
12 defendant assisted, aided and abetted, adopted, ratified, approved, or condoned the
13 actions of every other defendant and that each corporate defendant, if any, was acting
14 as the alter ego of the other in the acts alleged herein.

15 10. Any applicable statutes of limitations have been tolled by the Defendants
16 continuing, knowing, and active concealment of the facts alleged herein. Despite
17 exercising reasonable diligence, Plaintiff could not have discovered, did not discover,
18 and were prevented from discovering, the wrongdoing complained of herein.

19 11. In the alternative, Defendants should be stopped from relying on any statutes of
20 limitations. Defendants have been under a continuing duty to disclose the true character,
21 nature, and quality of their financial services and debt collection practices. Defendants
22 owed Plaintiff an affirmative duty of full and fair disclosure, but knowingly failed to
23 honor and discharge such duty.
24

25 **FACTS**

26 **SECURITIZATION OF THE MORTGAGE**

1 12. In early 2006, Nimal Diunugala purchased the real property commonly known as
2 987 Merced River Road, Chula Vista, California 91913, hereinafter “Property” as his
3 personal residence and BONY stole it after plaintiff invested one-quarter of one-million
4 dollars to one-half of one-million dollars into owning the home.

5
6 13. Plaintiff **shelled out approximately \$206,458.33 cash** as a down payment on the
7 home to be secured by a conventional loan from American Broker Conduit who sold the
8 loan to Nimal Susantha Diunugala which was memorialized in a Note and Deed of Trust
9 recorded on March 17, 2006 in the San Diego County Recorder’s Office.

10
11 14. His initial monthly payments were \$1,752.06 per month.

12 15. In late 2010, Plaintiff sought legal advice and hired the Law Offices of Shahnaz
13 Hussain to assist him with negotiating a more favorable loan.

14
15 16. The law firm sent a Qualified Written Request “QWR” to plaintiff’s servicer,
16 defendant AHMSI.

17 17. By way of a letter dated January 11, 2011 defendant AHMSI responded to the
18 QWR and represented to plaintiff that the owner/creditor of his loan was “Structured
19 Asset mortgage Investments II Trust 2006-AR5, Mortgage Pass-Through Certificates,
20 Series 2006-AR5” (hereinafter the “MBS trust”).

21 18. The same letter also represented that “The Bank of New York Mellon
22 Corporation” was the trustee of the MBS trust.

23 19. The letter was signed by Stephanie Ellis, Loan Administration Research
24 Specialist for American Home Mortgage Servicing, Inc.

25 20. A copy of plaintiff’s Note was enclosed with the January 11, 2011 letter.

26 21. The Note was endorsed in blank without recourse by American Brokers Conduit.
27

1 22. The endorsement was not dated and there were no further markings,
2 endorsements or Allonge attached to the Note.

3 23. This MBS trust required that all loans being transferred to the trust had to be
4 funded according to the terms of the pooling and servicing agreement (PSA) under
5 New York trust law by the Cutoff Date which is designated to occur on May 1, 2006
6 with a Closing Date of May31, 2006 in order to preserve its REMIC nature.

7 24. The four corners of the PSA bind the Trust to the only actions which can
8 lawfully be taken with respect to the administration of its assets.

9 25. The Free Writing Prospectus of this MBS Trust filed with the SEC on May 26,
10 2006 designated defendant, JP Morgan Chase Bank, N.A. as the trustee.

11 26. If the Trustee were removed or resigned and was then replaced; a successor
12 trustee could only be appointed and effective upon “acceptance of the appointment by
13 the successor trustee as set forth in the Agreement.”

14 27. Defendant BONY was not made a successor trustee of the MBS Trust as set
15 forth in the Agreement.

16 28. Yet, defendant AHMSI continued to use BONY’s underwriting standards
17 when evaluating plaintiff for a loan modification which failed and plaintiff’s home was
18 taken at foreclosure auction on April 9, 2012.

19 29. Truth in Lending Act 131 (“TILA”) codified at 15 USC §1641g requires a new
20 creditor to notify the borrower in writing of a transfer in their Note and Deed of
21 Trust (mortgage).

22 30. The notification must include:

- 23 a. The identity, address, telephone number of the new creditor;
24 b. The date of transfer;

- c. How to reach an agent or party having authority to act on behalf of the new creditor;
 - d. The location of the place where transfer of ownership of the debt is recorded; and
 - e. Any other relevant information regarding the new creditor within 30 days of the transfer.
31. 15 USC §1641g was enacted to “ensure [citizens] can actually renegotiate their mortgages if they are in trouble” and to provide “transparency and give[] borrowers an additional tool to fight illegitimate foreclosure or to negotiate loan modifications that would keep them in their homes.” Sen. Barbara Boxer comments made in the Congressional Record – Senate S5098-99 (May 5, 2009).
32. These combined legislative purposes are referred to in this complaint as “due process” rights.
33. Plaintiff is informed and believes and alleges thereon that defendants JP Morgan and BONY are creditors violating 15 USC §1641g causing illegitimate foreclosures and the unnecessary loss of homes because homeowners are not being given this additional tool to renegotiate their loans.
34. Defendant has a pattern and practice of playing “hide-and-seek” with debtors.
35. The defendant hides its identity as the “creditor” as defined for purposes of 15 USC §1641g until it must reveal its identity to nonjudicially foreclose.
36. Because California is a nonjudicial foreclosure state, the citizens of the state of California are particularly vulnerable to what amount to unfair debt collection activities that the borrower mistakenly believes are negotiations with their creditor.

1 37. Homeowners need to know who the owner is to serve notices or complaints or
2 confirm the authority of the party initiating a foreclosure action or offering a
3 loan modification and JP Morgan and BONY'S conduct is preventing those
4 needs from being met to the injury of consumers like the plaintiff Mr.
5 Diunugala.

6 38. The plaintiff never had a chance to successfully modify the terms of this loan on
7 the grounds that defendants misrepresented and will continue to misrepresent the
8 identity of the true creditor/assignee/trust, and thus never had the chance of
9 having the correct underwriting standards applied for investor approval.
10

11 **CLASS ALLEGATIONS**

12 39. Class Definition: Plaintiff brings this suit as a class action pursuant to Business
13 & Professions Code section 17203 on behalf of themselves and all other similarly
14 situated persons as a member of a Class defined as follows:

- 15 a. All (1) borrowers who received conflicting notifications from
16 defendant AHMSI, BONY or JP Morgan of the identity of their
17 investor, or creditor as required under 15 USC §1641g after May
18 5, 2009.
- 19 b. All (1) borrowers who received conflicting notifications from
20 defendant AHMSI of the identity of their investor, or creditor as
21 required under 12 USC §2605 within the past two years.

22 40. Excluded from the Class are the Court, defendants, and their affiliates,
23 subsidiaries, current or former employees, officers, directors, agents,
24 representatives, and their family members.

25 41. Numerosity: The persons who comprise the Plaintiff Class are so numerous
26 that the joinder of all such persons is impracticable and the disposition of their
27

1 claims as a class will benefit the parties and the Court. Class members are so
2 numerous and are dispersed throughout the United States that joinder of all Class
3 members is impracticable. Class members can be identified, *inter alia*, through
4 records maintained by the Defendants.

5 42. Common Questions of Fact and Law: Nearly all factual, legal, statutory,
6 declaratory and injunctive relief issues that are raised in this Complaint are
7 common to the Plaintiff Class and will apply uniformly to every member of the
8 Plaintiff Class;

- 9
- 10 a. Whether Defendant violated 15 USC §1641g;
 - 11 b. Whether Defendant's practice was "unfair" within the meaning of the
12 UCL; and
 - 13 c. Whether Defendant's advertisements and other statements were likely to
14 mislead within the meaning of the UCL and the FAL.
 - 15 d. Whether Class members lost money or property as a result of Defendant's
16 violations of section 17200 or 17500.

17 43. The representative Plaintiff(s) will fairly and adequately represent and protect
18 the interest of the Plaintiff Class, and have retained counsel who is competent
19 and experienced in Class Action and foreclosure claims. There are no material
20 conflicts between the claims of the representative plaintiff and the members of
21 the plaintiff class that would make class certification inappropriate. Counsel for
22 the plaintiff class will vigorously assert the claims of all members of the plaintiff
23 class.

24 44. Defendants have acted or refused to act on grounds generally applicable to the
25 class.
26

1 45. A class action is superior to other methods for the fast and efficient
2 adjudication of this controversy and to avoid the risk of disparate and
3 inconsistent rulings in different courts. A class action regarding the issues in this
4 case does not create any problems of manageability.

5 46. The nature of notice to the proposed class required and/or contemplated is the
6 best practicable method possible and the contemplated defendant's list, when
7 disclosed, would most likely be notice through media outlets, mailing, the
8 internet and other general notices are contemplated to ensure notice.

9
10 **FIRST CAUSE OF ACTION**

11 **Negligence**

12 **(Against All Defendant and Does 1 through 10)**

13 47. Plaintiff incorporates herein by reference paragraphs 1 through 36 above in this
14 pleading as though fully set forth herein.

15 48. Plaintiff is a homeowner entitled to notice under 15 USC §1641g.

16 49. Defendant AHMSI'S was plaintiff's loan servicer at all times mentioned in this
17 complaint.

18 50. Defendant JP Morgan is a creditor or assignee under 15 USC §1641g wherein
19 plaintiff is informed and believes and alleges therein JP Morgan acquired an
20 ownership interest of plaintiff's mortgage/deed of trust after May 20, 2009.

21 51. Defendant JP Morgan owed a duty of due care pursuant to 15 USC §1641g to
22 ensure that it gave notice within 30 days of a borrower's loan being transferred
23 or assigned to a new "creditor" or "assignee" as defined in the statute.

24 52. Additionally or alternatively, Defendant BONY is a creditor or assignee under 15
25 USC §1641g wherein plaintiff is informed and believes and alleges therein
26

1 BONY acquired an ownership interest of plaintiff's mortgage/deed of trust after
2 May 20, 2009.

3 53. Additionally or alternatively, Defendant BONY owed a duty of due care pursuant
4 to 15 USC §1641g to ensure that it gave notice within 30 days of a borrower's
5 loan being transferred or assigned to a new "creditor" or "assignee" as defined in
6 the statute.

7 54. Defendant AHMSI's employee, Stephanie Ellis, Loan Administration Research
8 Specialist for American Home Mortgage Servicing, Inc. represented on January 11,
9 2011 that BONY became plaintiffs' new creditor or assignee on or about January 11,
10 2011 in the response to the QWR.

11 55. Defendant AHMSI was acting as defendant BONY's agent at the time the
12 representation was made.

13 56. Defendant Power Default represented JP Morgan was the creditor/assignee in the
14 Notice of Default recorded on June 15, 2011.

15 57. Defendant Power Default also represented BONY was plaintiff's creditor/assignee
16 in the Trustee's Deed Upon Sale on April 13, 2012.

17 58. Defendant Power Default was acting as defendant BONY and defendant JP
18 Morgan's authorized agent at the time each of these representations were made.

19 59. Plaintiff has not received any notice directly from BONY or JP Morgan of any of
20 these assignments of their loan.

21 60. As a consequence of defendants' actions and/or failure to act, plaintiff has not been
22 given a meaningful opportunity to modify his loan in order to save his home
23 from foreclosure.

24 61. As a further proximate result, defendant AHMSI erroneously continued to use
25 BONY's underwriting standards when reviewing plaintiff's loan for a
26

1 modification although BONY was not made a successor trustee of the MBS trust
2 as set forth in the PSA and plaintiff's home was erroneously taken at foreclosure
3 as a result.

4 62. The defendants actions and failure to act caused plaintiff emotional distress.

5 63. As a proximate result, plaintiff was damaged in an amount to be determined at
6 trial.

7
8 **SECOND CAUSE OF ACTION**

9 **Violation of 12 USC §2605**

10 **(Against Defendant AHMSI)**

11 64. Plaintiffs incorporate herein by reference the allegations made in paragraphs 1
12 through 63 above as though fully set forth herein.

13 65. Plaintiff brings this claim on his behalf and on behalf of all other class members.

14 66. On January 11, 2011, AHMSI represented BONY became plaintiff's current
15 creditor.

16 67. On June 15, 2011 Power Default represented JP Morgan became plaintiff's current
17 creditor.

18 68. On April 19, 2012 Power Default represented BONY became plaintiff's current
19 creditor.

20 69. AHMSI was under a duty to service plaintiff's loan in a manner wherein if the
21 name of the creditor was requested, defendant had a duty to do due diligence in
22 determining the identity of the creditor and furnishing that information to the
23 borrower within a statutory time limit.

24 70. AHMSI violated 12 USC 2605 by failing to perform any diligence in determining
25 the identity of plaintiff's creditor and furnishing that information to the plaintiff.
26

1 71. If AHMSI had properly conducted an investigation with any diligence in
2 determining the true identity of the creditor, AHMSI would have realized that
3 the trustee for the MBS trust it stated in the response to the QWR was JP
4 Morgan and not BONY.

5 72. As a result, AHMSI is strictly liable for violating 12 USC §2605 entitling plaintiff
6 to damages.

7
8 **THIRD CAUSE OF ACTION**

9 **Violation of 15 USC §1641g**

10 **(Against Defendants JP Morgan and BONY)**

11 73. Plaintiffs incorporate herein by reference the allegations made in paragraphs 1
12 through 72 above as though fully set forth herein.

13 74. Plaintiff brings this claim on his behalf and on behalf of all other class members.

14 75. After May 20, 2009, JP Morgan and BONY were required to notify the plaintiff in
15 writing of the transfer of the loan from lender to new creditor or assignee
16 pursuant to 15 USC §1641.

17 76. The notification needed to include:

- 18 a. The identity, address, telephone number of the new creditor;
19 b. The date of transfer;
20 c. How to reach an agent or party having authority to act on behalf of the
21 new creditor;
22 d. The location of the place where transfer of ownership of the debt is
23 recorded; and
24 e. Any other relevant information regarding the new creditor within 30 days
25 of the transfer which occurred on or about September 15, 2010.
26

1 77. Both JP Morgan and BONY failed to notify plaintiff and those similarly situated
2 within 30 days of the purported assignment or transfer of plaintiff's loan when it
3 believed it became the new creditor or assignee after May 20, 2009 and failed to
4 give proper notice as described in 15 USC §1641g.

5 78. Both JP Morgan and BONY violated 15 USC §1641g by failing to notify the
6 plaintiff of said transfer within 30 days in writing which included the following
7 information:

- 8 a. The identity, address, telephone number of the new creditor;
- 9 b. The date of transfer;
- 10 c. How to reach an agent or party having authority to act on behalf of the
11 new creditor;
- 12 d. The location of the place where transfer of ownership of the debt is
13 recorded; and
- 14 e. Any other relevant information regarding the new creditor.

15
16 79. Although Mr. Diunugala was attempting to get a loan modification approved by his
17 new creditor after May 20, 2009, it was never a settled matter who the trustee of
18 the MBS trust was or what the underwriting guidelines were while he was facing
19 imminent foreclosure.

20 80. Yet, he was denied based on the fact that the servicer was not using the correct
21 underwriting standards.

22 81. As a result of defendants' breach, plaintiffs are entitled to actual damages, statutory
23 damages/civil penalties in an amount to be proven at trial.

24
25 **FOURTH CAUSE OF ACTION**

26 **Cancellation of Documents to Set Aside the Foreclosure Sale**
27 **(Against Defendants Power Default and BONY)**

28 13

FIRST AMENDED CLASS ACTION COMPLAINT

1 82. Plaintiffs incorporate herein by reference the allegations made in paragraphs 1
2 through 81 above as though fully set forth herein.

3 83. Six months after AHMS represented that BONY was the trustee of the MBS trust
4 and as such was the creditor of plaintiff's loan, on June 15, 2011 Power Default caused a
5 Notice of Default and Election to Sell Under Deed of Trust, hereinafter "NOD" to be
6 recorded which stated it was for the benefit of:

- 7
8 a. **JP Morgan Chase Bank, National Association**, Not Individually But
9 Solely As Trustee For The Holders Of Structured Asset Mortgage
10 Investments II Inc., Mortgage Pass-Through Certificates, Series 2006-AR5,
11 hereinafter "JPM".

12
13 84. The NOD stated plaintiff was in default in the amount of \$27,388.55 as of June
14 21, 2011 and "That by the reason thereof, the present Beneficiary under such Deed of
15 Trust has executed and delivered to said Trustee, a written Declaration of Default and
16 Demand for Sale."

17 85. The Beneficiary was named "JP Morgan Chase Bank, National Association" as
18 trustee of the MBS trust.

19 86. The legal trustee was T.D. Service Company.

20 87. On June 14, 2011 a Substitution of Trustee was executed whereby "JP Morgan
21 Chase Bank, National Association" as trustee of the MBS trust substituted "Power
22 Default Services, Inc. % T.D. Service, 1820 E 1st St, Suite 210, Santa Ana, CA 92705"
23 as legal trustee in place and stead of Steward Title of California. The document was
24 signed by April King with an effective date of "06/14/11."

25 88. The document was notarized by Brenda L. Frazier in Duval County Florida on
26 June 17, 2011.

1 89. The document had an affidavit of mailing attached to it signed by affiant Maria
2 D. Gutierrez and notarized by Cheryl L. Grech in Orange County, California on July
3 18, 2011.

4 90. Thereafter a Notice of Sale was executed on September 12, 2011 by Cheryl L.
5 Grech, now as Assistant Secretary and recorded with the San Diego County Recorder's
6 office on September 13, 2011.

7 91. The NOS represented the outstanding obligation was \$684,361.54.

8 92. On April 13, 2012, contrary to the Chain of Title, a Trustee's Deed Upon Sale ,
9 hereinafter "TDUS" was recorded representing that the beneficiary who was the grantee
10 taking by credit bid was:
11

- 12 a. **The Bank of New York Mellon**, As Trustee For The Holders Of
13 Structured Asset Mortgage Investments II Inc., Mortgage Pass Through
14 Certificates, Series 2006-AR5, hereinafter "BONY".
15

16 93. However, BONY is not and has never been the Trustee for the MBS trust and did
17 not receive a valid assignment in any manner.

18 94. Nevertheless, the TDUS stated the property was taken by credit bid by defendant
19 The Bank of New York Mellon (BONY) as trustee for the MBS trust on April 9, 2012
20 for "the sum of \$425,000.00 Pro-tanto."
21

22 95. The Trustee's Deed Upon Sale "TDUS" was signed by Susan Earnest, Assistant
23 Secretary and Crystal Espinoza, Assistant Secretary on April 11, 2012.

24 96. Cheryl L. Grech, now acting as notary notarized the document as being signed in
25 Orange County, California on April 11, 2012 and the document was recorded on April
26 13, 2012 with the San Diego County Recorder's Office.
27

1 97. Plaintiff formerly objected to defendant BONY taking his home by credit bid
2 when BONY was not the beneficiary, however, BONY and Default Power refused to
3 rescind the sale.

4 98. BONY neither initiated the nonjudicial foreclosure nor was the trustee of the
5 MBS trust.

6 99. After this lawsuit was initiated, plaintiff received a 1099-A for 2012 which listed
7 “Homeward Residential, Inc.” as the “Lender” identifying Homeward Residential,
8 Inc.’s federal identification number for tax purposes.

9 100. Therefore, Plaintiff requests the TDUS be cancelled.

10 101. The TDUS is fraudulent, void and conveyed no interest in the Property because
11 inter-alia:

- 12 a. Defendant BONY did not receive a valid assignment of the debt in any
13 manner.
14 b. On June 15, 2011 a NOD was recorded which clearly stated JPM was the
15 beneficiary.
16 c. The MBS trust is a publicly recorded document created in 2006 and the
17 424b5, PSA and FWP all show that JP Morgan Chase Bank is the trustee of
18 the MBS trust.
19 d. The TDUS depends solely and entirely on the NOD, to substantiate its
20 validity and the fact these documents are inconsistent on their face establishes
21 the invalidity of the TDUS.
22 e. And the “Lender” as later identified to the IRS was in fact, neither JP Morgan
23 nor BONY but was Homeward Residential, Inc.
24

25 102. None of the Defendants have taken any steps to rescind the TDUS, making them
26 each liable, severally and/or jointly for the injury to the Plaintiff in this case.
27

1 103. The TDUS is tantamount to an attempted theft of the plaintiff's interest in the
2 Property.

3 104. The recording of the false and fraudulent TDUS with the intent to pass the false
4 documents as true and genuine, was a plan to defraud Plaintiff and directly affects
5 Plaintiff's interest in the subject property.

6 105. BONY then proceeded to evict plaintiff based on the false and fraudulent TDUS.

7 106. Accordingly, there is a reasonable apprehension that unless the Fraudulent
8 TDUS is cancelled, it will damage Plaintiff in that the documents purport to deprive
9 plaintiff of his interest in the Property. Pursuant to Civil Code §3412, Plaintiff is
10 entitled to an order cancelling the Fraudulent documents and compelling delivery of
11 the original documents to plaintiff.
12

13 107. Second, the NOD is fraudulent, void and conveyed no right to institute
14 nonjudicial proceedings by JPMorgan Chase Bank in this case because the Note was
15 not endorsed to JPMorgan Chase Bank as required by the terms of the MBS trust.

16 108. According to the terms of the MBS trust, the trust cannot be a holder of this Note
17 and JPMorgan Chase Bank had no power to claim, transfer or refer to plaintiff's loan
18 as MBS trust property after on or about July 1, 2006.

19 109. Therefore, Plaintiff requests the NOD be cancelled.

20 110. The NOD is fraudulent, void and conveyed no interest in the Property because
21 inter-alia:

- 22 a. On June 15, 2011 a NOD was recorded which clearly stated JPM was the
23 beneficiary.
24 b. On January 11, 2011 AHMSI supplied a copy of the Note to plaintiff wherein
25 the note was endorsed in blank and made no mention of JPM in the
26 endorsement.
27

- 1 c. The MBS trust is a publicly recorded document created in 2006 and the
2 424b5 form shows that JP Morgan Chase Bank must be endorsed on the Note
3 in order to transfer the loan to the MBS trust and if the endorsement was not
4 so made, then the property cannot be transferred to the trust or the trustee.
5
6 d. The designation of beneficiary on the NOD to JP Morgan Chase Bank
7 depended solely and entirely on the MBS Trust, to substantiate its validity
8 and the fact these documents are inconsistent on their face establishes the
9 invalidity of the NOD.
10
11 e. Finally, JP Morgan never received a valid assignment from Homeward
12 Residential, Inc. giving JP Morgan the right to initiate a nonjudicial
13 foreclosure by invoking the power of sale under the Deed of Trust.

14 111. None of the Defendants have taken any steps to rescind the NOD, making them
15 each liable, severally and/or jointly for the injury to the Plaintiff in this case.

16 112. The NOD is tantamount to an attempted theft of the plaintiff's interest in the
17 Property.

18 113. The recording of the false and fraudulent NOD with the intent to pass the false
19 documents as true and genuine, was a plan to defraud Plaintiff and directly affects
20 Plaintiff's interest in the subject property.

21 114. A Notice of Sale "NOS" was then recorded based on the fraudulent and
22 fabricated NOD making the NOS fraudulent and fabricated.

23 115. A TDUS was then recorded based on the fraudulent and fabricated NOD and
24 NOS.

25 116. BONY then proceeded to evict plaintiff based on the false and fraudulent TDUS.

26 117. Accordingly, there is a reasonable apprehension that unless the Fraudulent NOD
27 and NOS is cancelled, it will damage Plaintiff in that the documents purport to deprive
28

1 plaintiff of his interest in the Property. Pursuant to Civil Code §3412, Plaintiff is
2 entitled to an order cancelling the Fraudulent documents and compelling delivery of
3 the original documents to plaintiff.

4 118. Additionally, the Pooling and Servicing Agreement in Form 424b5 required the
5 Note to be endorsed:

6 a. **“without recourse to the order of the Trustee** and showing to the extent
7 available to the Depositor an unbroken chain of endorsements from the
8 original payee thereof to the person endorsing it to the Trustee...

9 **“JPMorgan Chase Bank, N.A. as trustee.”** (424b5 page S-110)

10 119. Under the strict rules of this PSA to this MBS trust, the Sponsor, which was
11 EMC, was required to provide a substitute mortgage loan or purchase the related
12 mortgage loan within 180 days if the Note or other required assignments were not
13 effectuated within 90 days of the closing date. (424b5 page S-112)

14 120. Further, the four corners of the PSA establish the only mechanism by which this
15 New York Corporate Trust may acquire, transfer, dispose of, or sell any asset.

16 121. The PSA is filed as a record with the Securities and Exchange Commission and
17 is a matter of public record.

18 122. The “Property” is located in San Diego County, California.

19 123. The note on Diunugala’s loan was not transferred within 90 days or repurchased
20 by EMC within 180 days as required by the PSA of the MBS trust.

21 124. The IRS Tax Code 28 USC §§ 860A-860G subject this REMIC Trust to
22 regulation to qualify as a REMIC and has explicit instructions.

23 125. Pursuant to the terms of most PSA’s no Trust could be the owner of the subject
24 loan.

1 126. As the subject mortgage was not transferred to the trustee (JPMorgan Chase
2 Bank, N.A.) or the Sponsor (EMC).

3 127. That said actions by JP Morgan Chase Bank and BONY purporting that either
4 had standing as Trustee of the MBS trust to foreclose or assign this mortgage loan to
5 the Trust in 2012 were in contravention of the trust and were void. (Dye v Lewis
6 (1971) 67 Misc 2d 426, 324 NYS2d 172, mod on other grounds (1972, 4th Dept) 39
7 AppDiv2d 828, 332 NYS2d 968. The authority of a trustee to whom a mortgage had
8 been delivered under a trust indenture was subject to any limitations imposed by the
9 trust instrument, and every act in contravention of the trust was void.)

10 128. All land records, including but not limited to the NOD, NOS, TDUS and
11 Substitution of Trustee are fraudulent and fabricated in that each were recorded on
12 behalf of the MBS trust that initiated this fraudulent foreclosure.

13 129. BONY then proceeded to evict plaintiff based on the false and fraudulent TDUS
14 and all legal papers premised on these fraudulent and fabricated documents are only in
15 furtherance of this fraudulent scheme and are fraudulent, too.

16 130. Finally, the 1099-A form represents that in fact Homeward Residential, Inc. is
17 the true creditor demonstrating that neither JP Morgan nor BONY.

18 131. Accordingly, there is a reasonable apprehension that unless the Fraudulent NOD
19 , TDUS, NOS and Substitution of Trustee are cancelled, it will damage Plaintiff in that
20 the documents purport to deprive plaintiff of his interest in the Property. Pursuant to
21 Civil Code §3412, Plaintiff are entitled to an order cancelling the Fraudulent
22 documents and compelling delivery of the original documents to plaintiff.

23 Wherefore plaintiff demands judgment against defendants as set forth below.

24 **FIFTH CAUSE OF ACTION**

25 **Fraud**

26 20

27 **FIRST AMENDED CLASS ACTION COMPLAINT**

(Against AHMSI)

1
2 132. Plaintiff incorporates herein by reference paragraphs 1 through 131 above in this
3 pleading as though fully set forth herein.

4 133. Plaintiff was fraudulently thrown into foreclosure by a Servicer Driven Default
5 from AHMSI.

6 134. Homeward Residential, Inc. is the successor in interest to AHMSI.

7 135. AHMSI's employee, Cindy Ellis, while acting within the scope of her
8 employment, misrepresented that BONY was the creditor of plaintiff's loan on
9 January 11, 2011 in response to plaintiff's QWR.

10 136. Plaintiff learned in 2013 that Homeward Residential, Inc. was the true Lender as
11 stated in the IRS 1099-A.

12 137. In 2006 plaintiff paid \$215,218.63 which includes his cash down payment of
13 approximately \$201,458.33 for his home believing that he had obtained a conventional
14 loan.

15 138. In 2007 he paid \$65,837.29 for his mortgage and property taxes.

16 139. From March 2007 to June 2007, plaintiff was called into active military duty and
17 had to serve in Kuwait during this time period.

18 140. After he returned, while the economy was still healthy, plaintiff contacted AHMSI
19 at phone number 1-877-304-3100 where he was directed to the Loan Administration –
20 Research Department and explained that he wanted to modify his loan.

21 141. The AHMSI representative on the telephone, who did not disclose his name, told
22 plaintiff he could obtain a fixed rate loan with payments similar to the monthly payment
23

1 he was now making at \$1,752.06 per month if he sent in an additional \$31,752.06 to pay
2 towards his principal.

3
4 142. So on November 27, 2007 plaintiff withdrew \$30,000 from his IRA account and
5 sent AHMSI an additional \$31,752.06 to be applied to his loan toward principal in
6 reliance on the statements made to him by AHMSI on the phone and based on the belief
7 that he could obtain a loan with similar monthly payments at a fixed interest rate.

8
9 143. Plaintiff alleges that this representation was false.

10 144. AHMSI accepted and cashed the check, but AHMSI did not then offer plaintiff the
11 refinancing of his loan as promised.

12
13 145. AHMSI also concealed how it applied the large payment to plaintiff's loan by
14 failing and refusing to include the payment history before July 2, 2008 in response to
15 plaintiff's QWR demand in 2011.

16
17 146. Plaintiff is informed and believes and alleges thereon that AHMSI made
18 these representations with the intent to defraud or induce reliance thereon.

19
20 147. In reliance on this representation, plaintiff did not shop around to refinance
21 his loan with another financial institution in 2007 when his home still had equity in it
22 and instead, he sent \$31,752.06 to AHMSI on November 27, 2007 and also paid
23 AHMSI an additional \$28,998.27 in 2008.

24
25 148. As a proximate result of defendant's conduct, the economy had collapsed
26 and his home no longer had any equity in it so he could not obtain financing elsewhere.

27
28 149. So plaintiff called AHMSI at 1-877-304-3100 on or about August 7, 2008
and asked for a modification of his loan.

1 150. AHMSI's employee plaintiff reached at this number, who did not disclose
2 his name, told plaintiff that he appeared to qualify for a modification but he had to
3 first default on three of his monthly mortgage payments before AHMSI would
4 consider him for a modification (aka a Servicer Driven Default).

5 151. So plaintiff stopped making his payments in order to negotiate and obtain a loan
6 modification.

7
8 152. Plaintiff submitted all of his paperwork and waited.

9
10 153. Defendant kept plaintiff in default then finally sent him an offer to modify his loan
11 dated April 1, 2010.

12 154. The offer stated that his new principal balance would be increased by almost
13 \$100,000.00 to \$672,070.16 and his monthly mortgage payments would increase to
14 \$2,360.93 through April 1, 2011, then they would escalate to \$2,450.34 per month until
15 April 1, 2012 wherein they would again increase to \$2,539.43 and then jump again after
16 April 1, 2013 to \$2,903.58 plus taxes and insurance that we now being impounded.
17

18 155. Although plaintiff had paid hundreds of thousands of dollars on his loan, the
19 modification was worse than his regular monthly terms because he was in a negatively
20 amortizing loan with predatory and abusive terms where AHMSI forced plaintiff to first
21 default.
22

23 156. The loan modification package came with a cover page that stated:

- 24 a. If you have questions concerning the terms of the modification, please
25 contact your negotiator at 877-304-3100: NEGOTIATOR – Sandra Claridy –
26 Simpson Ext – 48788
27

1 157. Plaintiff is informed and believes and alleges thereon that Sandra Claridy is either
2 an employee, authorized agent or representative of defendant AHMSI.

3
4 158. Plaintiff contacted Sandra Claridy Simpson at 877-304-3100 and explained his
5 concerns on the grounds that the new monthly payment was \$1,000.00 more per month
6 than his original terms and that although he paid over \$200,000.00 cash down on his loan
7 for a conventional loan and made all of his payments plus an additional \$37,316.05 on
8 his loan, they were now asking him to increase his principal by over \$100,000.00 on his
9 loan.

10
11 159. However, plaintiff's discussions with Ms. Claridy were futile.

12 160. Plaintiff was not able to negotiate the terms or challenge the costs, fees or
13 arrearages.

14
15 161. Left with the risk of losing his home to foreclosure, he signed the modification
16 and returned it to AHMSI and began making the new increased payments of \$3,162.23
17 per month as agreed to.

18
19 162. In 2010, plaintiff paid AHMSI \$18,973.38 in monthly mortgage payment and
20 retained a lawyer to try to negotiate his loan to more fair terms.

21 163. The Law Office sent out a QWR and by way of letter dated January 11, 2011
22 AHMSI responded as more fully described above, including the fact that AHMSI
23 represented BONY was the trustee AHMSI was dealing with, with regard to loan
24 modification requests.
25
26
27
28

1 164. Relying on the representation that BONY was the trustee, a modification was
2 being negotiated based on BONY's underwriting standards.

3
4 165. On August 2, 2011 a modification package was sent to AHMSI.

5 166. Plaintiff completed the required paperwork and sent his loan application by fax
6 as instructed to Fax No. 1-866-452-1837 Attn: Loss Mitigation on October 3, 2011.

7
8 167. AHMSI responded by way of letter dated September 26, 2011 incorrectly
9 asserting that the package was incomplete.

10
11 168. On January 6, 2012 plaintiff sent a personal letter to Mr. Applegate informing him
12 of his frustration as he had been sending and resending the documents over and over
13 again that AHMSI kept losing, and also pleading for some reason and laying out his
14 special circumstances.

15 169. AHMSI responded by way of letter on February 14, 2012 stating his loan
16 modification was being reviewed. There was no mention that any documents were
17 missing.

18
19 170. He received a Step Rate Payment Change Notification dated February 23, 2012
20 noting that the payment was going to change to \$2,539.43 on May 1, 2012.

21
22 171. Then plaintiff received a modification denial letter dated March 1, 2012 stating
23 that his loan modification was denied due to missing paperwork.

24 172. Then on April 9, 2012 BONY took the home by credit bid at foreclosure auction.
25
26
27
28

1 173. Five days later, AHMSI sent out a new HAMP modification application to
2 plaintiff.

3
4 174. Plaintiff is informed and believes and alleges thereon that AHMSI made these
5 representations with the intent to defraud or induce reliance thereon.

6
7 175. In reliance on this representation, plaintiff stopped making his monthly payments
8 and went into default.

9 176. As a proximate result of defendant's conduct a series of events proceeded as
10 particularly alleged above, wherein plaintiff who was making his monthly mortgage
11 payments, was put in a position where he was no longer able to sustain homeownership
12 due to defendant's Servicer Driven Default.

13
14 177. As a proximate result of defendants' conduct, plaintiffs have been financially
15 injured in an amount to be proven at trial, including attorney fees and his credit has
16 been damaged.

17
18 178. The aforementioned conduct of defendant(s) was an intentional
19 misrepresentation, deceit, or concealment of a material fact known to the defendant(s)
20 with the intention on the part of the defendant(s) of thereby depriving plaintiff of
21 property or legal rights or otherwise causing injury, and was despicable conduct that
22 subjected plaintiff to a cruel and unjust hardship in conscious disregard of plaintiff's
23 rights, so as to justify an award of exemplary and punitive damages.

24 Wherefore plaintiff demands judgment against defendants as set forth below.

25
26 **SIXTH CAUSE OF ACTION**

27 **Bus. & Prof. Code §17200 Violation**

28 26

FIRST AMENDED CLASS ACTION COMPLAINT

(Against All Defendants)

1
2 179. Plaintiff incorporates herein by reference paragraphs 1 through 178 above in this
3 pleading as though fully set forth herein.

4 180. Plaintiff brings this claim on his own behalf and on behalf of each member of the
5 Class as described above.

6 181. Business & Professions Code §17200 prohibits any “unlawful, unfair or fraudulent
7 business act or practice and unfair, deceptive, untrue or misleading advertising and any
8 act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7
9 of the Business & Professions Code” and reaches past and one-time acts. *Id. See also,*
10 *Stop Youth Addiction, Inc. v Lucky Stores, Inc.*, 17 Cal4th 553, 570 (1998).
11

12 182. From January 2011 to the present, the following conflicting representations as to
13 whom Mr. Diunugala’s current creditor is:

- 14 a. January 2011 – AHMSI represents it is BONY
- 15 b. June 15, 2011 – Power Default represents it is JP Morgan
- 16 c. April 19, 2012 – Power Default represents it is BONY
- 17 d. February 2013 – Homeward Residential, Inc. represents it is Homeward
18 Residential, Inc. by way of the IRS 1099-A form.

19 183. Beginning at an exact date unknown to plaintiff but at least since January 2011 JP
20 Morgan and BONY have committed acts of unfair competition, as defined by Business
21 & Professions Code §17200, by engaging in the following practices:

- 22 a. JP Morgan and BONY’s policy/practice of accepting assignments of loan
23 without giving proper notice to the borrower that JP Morgan or BONY is
24 the new creditor and/or assignee (as the case may be) to persons like the
25 plaintiff where the loan and borrower are covered under 15 USC §1641g
26 violates 15 USC §1641g as more particularly described in that cause of
27

1 action above. Defendants never gave plaintiff notice of the
2 assignment/transfer although plaintiff was trying desperately to get a
3 modification or other alternative to foreclosure, and consequently,
4 constitutes an unlawful business act or practice *within* the meaning of
5 Business & Professions Code §17200.

6 184. Beginning at an exact date unknown to plaintiff but at least in the past three years,
7 AHMSI has committed acts of unfair competition, as defined by Business &
8 Professions Code §17200, by engaging in the following practices:

- 9
- 10 a. By communications forwarded to plaintiffs and as detailed above in the AHMSI
11 letters, AHMSI represented to plaintiffs that they were eligible for a loan
12 modification and that if approved, they could immediately make modified
13 payments that would satisfy existing loan obligations, lead to a permanent
14 modification and avoid foreclosure. The advertisements and communications
15 implied that AHMSI intended to comply with all federally mandated
16 requirements
- 17 b. In response to the advertisements and communications received from defendants,
18 Plaintiffs complied with all requests by AHMSI to provide documentation for a
19 loan modification on multiple occasions between 2008 up to the time the home
20 was taken at foreclosure on April 19, 2012.
- 21 c. That AHMSI then denied plaintiff based on “underwriting” standard by either
22 BONY or JP Morgan when in fact Homeward Residential, Inc. was the true
23 creditor.
- 24 d. That during this time AHMSI obfuscated the creditor plaintiff was beholden to by
25 sending out the following conflicting and erroneous communications that failed to
26 comply with 15 USC §1641g, to wit:

- i. January 2011 – AHMSI represents it is BONY
 - ii. June 15, 2011 – Power Default represents it is JP Morgan
 - iii. April 19, 2012 – Power Default represents it is BONY
 - iv. February 2013 – Homeward Residential, Inc. represents it is Homeward Residential, Inc. by way of the IRS 1099-A form.
- e. AHMSI never warned or cautioned plaintiff that its representations in these letters were not verified, may not be true and may not comply with federal disclosure laws.

185. The harm to plaintiff and to members of the general public outweighs the utility of defendant's policy/practice, and consequently, AHMSI's practice of issuing such letters/advertisements without full disclosure or warnings as described above constitutes an unfair business act or practice within the meaning of Business & Professions Code §17200.

186. JP Morgan's policy/practice of issuing notices of the identity of creditors without actually performing any due diligence to determine the veracity of those statements is likely to mislead the general public, and consequently, constitutes a fraudulent business act or practice within the meaning of Business & Professions Code §17200.

187. The unlawful, unfair, and fraudulent business practices and false and misleading advertising of AHMSI, as described above, present a continuing threat to members of the public in that it gives a false reassurance to a reasonable person in foreclosure that AHMSI is in contact with the true creditor of the loan when the bank is processing a loan modification application or otherwise assisting the borrower in preventing foreclosure, when in fact AHMSI knows or has reason to know it has no knowledge of who the creditor really is at any given point in time.

1 188. As a result of the aforementioned acts, plaintiff and Class members have lost
2 money or property and suffered injury in fact.

3 189. Finally, stopping this practice furthers the public interest. The plaintiffs are
4 therefore entitled to reasonable attorney's fees under section 1021.5 of the California
5 Code of Civil Procedure.

6 Wherefore plaintiff demands judgment against defendants as set forth below.
7

8
9 **PRAYER FOR RELIEF**

10 **WHEREFORE, Plaintiff prays for judgment** against defendants, and each of
11 them, as follows:
12

13 **A.** Declaratory and injunctive relief;

14 **B.** To set aside the trustee's deed upon sale and to cancel, vacate and set aside the Notice
15 of Sale, Notice of Default and Assignment of Deeds of Trust and any Substitution of
16 Trustee's as appropriately determined;

17 **C.** Pursuant to Business and Professions Code § 17203, that all Defendants, their
18 successors, agents, representatives, employees, and all persons who act in concert
19 with them be permanently enjoined from committing any acts of unfair competition in
20 violation of § 17200, including, but not limited to, the violations alleged herein.

21 **D.** Actual, Special and General Damages as proven at trial;

22 **E.** Statutory damages and civil penalties;

23 **F.** Rescission and Disgorgement of profits;

24 **G.** Costs of this action, including the fees and costs of experts;

25 **H.** Attorneys' fees;

26 **I.** Prejudgment interest at the statutory rate;
27

1 **J.** Post-judgment interest;

2 **K.** Exemplary and Punitive Damages; and

3 **L.** Such other and further relief as this Court finds necessary and proper.
4

5
6 **DEMAND FOR JURY TRIAL**

7 Plaintiff hereby demands a jury trial for all legal claims.

8
9 Dated: March 4, 2013

Respectfully Submitted,
LAW OFFICES OF LENORE ALBERT

10
11 /s/ Lenore Albert
12 LENORE L. ALBERT, ESQ.
13 Attorney for Plaintiff, NIMAL SUSANTHA
14 DIUNUGALA
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27

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE:

I declare that I am over the age of 18 years, and not a party to the within action; that I am employed in Orange County, California; my business address is 7755 Center Avenue Suite #1100, Huntington Beach, CA 92647.

On May 19, 2013, I served a copy of the following document(s) described as:

FIRST AMENDED CLASS ACTION COMPLAINT

On the interested parties in this action as follows:

For Defendants JPMorgan Chase Bank, NA; The Bank of New York Mellon; AHMSI n/k/a Homeward Residential, Inc.; and Power Default Services, Inc.

Nina Huerta, Esq.

Stephanie A. Chambers, Esq.

Locke Lord LLP

300 S Grand Ave, Suite #2600

Los Angeles, CA 90071

Ph: 213-485-1500 fx: 213-485-1200

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schambers@locklord.com

BY CM/ECF – I caused such document(s) to be transmitted to the office(s) of the addressee(s) listed above by electronic mail at the e-mail address(es) set forth pursuant to FRCP 5(d)(1).

BY EMAIL – I caused such document(s) to be transmitted to the office(s) of the addressee(s) listed above by electronic mail at the e-mail address(es) set forth.

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

Dated: May 19, 2013

/s/ Lenore Albert

Lenore Albert