

Case No. S258019

**In the Supreme Court
of the State of California**

KWANG K. SHEEN,

Plaintiff and Appellant

v.

WELLS FARGO BANK, N.A., et al.

Defendant and Respondent

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION EIGHT

CASE NO. B289003

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

CASE NO. BC631510

THE HONORABLE JUDGE ROBERT L. HESS

***AMICUS CURIAE* JOHN A. PHILLIPS' MOTION FOR JUDICIAL
NOTICE AND [PROPOSED] ORDER**

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Amicus Curiae JOHN A. PHILLIPS (“PHILLIPS”) brings this Motion for Judicial Notice pursuant to the provisions of Rule 8.252.

Pursuant to Evidence Code Sections 452, 453 and 459(a), *Amicus Curiae* JOHN A. PHILLIPS (“PHILLIPS”) hereby requests that the Court take judicial notice of the following records filed in the Superior Court of California, County of San Francisco in support of PHILLIPS’ *Amicus Curiae* Brief:

1. Statement of Decision in *Bank of America v. Phillips*, San Francisco Superior Court Case No. CGC 13531103, filed on May 31, 2017, attached hereto as Exhibit A;
2. Amended Judgment in *Bank of America v. Phillips*, San Francisco Superior Court Case No. CGC 13531103, filed on October 19, 2017, attached hereto as Exhibit B; and
3. Order Granting Petition for Review in *Bank of America v. Phillips*, California Supreme Court Case No. S259482, attached hereto as Exhibit C.

These documents are relevant to the facts upon which a portion of PHILLIPS’ *Amicus Curiae* Brief is based. The facts, as found in the Statement of Decision and that are the basis for the Amended Judgment, can be of assistance to this Court in its determination of the issues in this case.

Judicial notice may be taken of the records of any court of this state. (Evidence Code §452(d)) This Court may take judicial notice of any matter specified in Evidence Code §452. (Evidence Code §459(a)) The Court shall take judicial notice of any matter specified in Evidence Code §452 if a party requests it and gives each adverse part sufficient notice of the request to enable such adverse party to prepare to meet the request.

PHILLIPS has provided notice of this Motion to all counsel in this case and to all counsel in *Bank of America v. Phillips*, San Francisco Superior Court Case No. CGC 13531103, California Supreme Court No. S259482.

Dated: August 18, 2020 Respectfully submitted,

HUDDLESTON & SIPOS LAW GROUP LLP

By /s/ Robert A. Huddleston
ROBERT A. HUDDLESTON, ESQ.
Attorney for John A. Phillips

CERTIFICATE OF SERVICE

Kwang v. Sheen v. Wells Fargo Bank, N.A., et al.
Case No. S258019

I, the undersigned, declare that I am over the age of 18 and am not a party to this action. I am employed in City of Walnut Creek, California; my business address is 1280 Civic Drive, Suite 210, Walnut Creek, CA 94596.

On the date below, I served a copy of the foregoing document entitled ***AMICUS CURIAE JOHN A. PHILLIPS' MOTION FOR JUDICIAL NOTICE AND [PROPOSED] ORDER*** on the interested parties in said case as follows:

BY THE COURT'S TRUEFILING SYSTEM: Upon filing, I will cause the document to be transmitted via the Court's TrueFiling System.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. This declaration is executed in Oakland, California on August 18, 2020.

/s/ Michele Hinton
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Case No. BC631510 [**By USPS Only**]

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Los Angeles, CA 90013

Case No. B289003 [**By USPS Only**]

Exhibit A Statement of Decision



**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO**

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STATEMENT OF DECISION

BANK OF AMERICA, N.A. VS. JOHN A. PHILLIPS et al

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MAY 9 2017

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BY: [Signature]
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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

BANK OF AMERICA, N.A.,
Plaintiff,

v.

JOHN A. PHILLIPS, an individual;
JOHN A. PHILLIPS, an individual dba
ARISTOTLE VENTURES; DEAN A.
PHILLIPS, an individual; and DOES 1-50,
inclusive,
Defendants.

CASE NO. CGC-13-531103

STATEMENT OF DECISION

Trial: February 1, 2017
Time: 9:30 a.m.
Dept.: 502
Judge: A. James Robertson, II

AND RELATED CROSS-ACTIONS.

STATEMENT OF DECISION

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I. INTRODUCTION

The trial of this matter commenced on February 1, 2017 before the Honorable A. James Robertson, II. Plaintiff and cross-defendant BANK OF AMERICA, N.A. was represented by Eugene J. Chiarelli and Jane N. Yi of Chiarelli & Mollica LLP. Defendants and Cross-Complainants JOHN A. PHILLIPS, individually and doing business as ARISTOTLE VENTURE, and DEAN A. PHILLIPS were represented by Robert A. Huddleston and Sandra Lowenstein of Huddleston & Sipos LLP. The following witnesses were sworn and testified before the Court: Jessica Woodbridge, Ingrid Carney, defendant JOHN A. PHILLIPS, Charles Hansen, Kevin Rose, Peter Mankin, S. Guy Puccio, Brian Grey, Enrique Rodriguez, and Lawrence Mansbach. Deposition testimony was read from defendant DEAN A. PHILLIPS and Wendy Johnson. Trial of the action took place over twelve court days.

This action involves claims by plaintiff BANK OF AMERICA, N.A. (hereinafter "BANK") set forth in the BANK's Third Amended Complaint for Breach of Contract, Common Count – Money Had and Received, Common Count – Account Stated, Constructive Trust and Specific Performance. The case also involves claims by defendants and cross-complainants JOHN A. PHILLIPS (hereinafter "J. PHILLIPS") and DEAN A. PHILLIPS (hereinafter "D. PHILLIPS") in their Cross-Complaint for Abuse of Process, Negligence, Deceit, Breach of Business & Professions Code § 17200, *et seq.*, and Breach of the Fair Debt Collection Practices Act.

The case centers upon a loan for \$1,120,000 by J. PHILLIPS from the BANK in August of 2009 (the "2009 Loan"). The 2009 Loan consisted of a Promissory Note for \$1,120,000 dated August 10, 2009 (the "2009 Note") that was supposed to be secured by a deed of trust on J. PHILLIPS' primary residence at 2237 Union Street, San Francisco, CA (the "Union Street property"). The deed of trust was not recorded as it should have been and the reasons for it not being recorded and the relative fault between the parties for it not being recorded is one issue in the case. A sub-issue is the intentions of the parties in entering into the transaction and the application of the covenant of good faith and fair dealing.

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STATEMENT OF DECISION

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1 A second issue concerns the BANK's contention that J. PHILLIPS is in breach of the
2 terms of the 2009 Note and/or the deed of trust he signed as part of 2009 Loan. Sub-issues
3 include whether the BANK gave the required notices to accelerate J. PHILLIPS' obligations
4 under the 2009 Note and J. PHILLIPS' contention that he properly tendered monthly payments
5 for the 2009 Note thereby excusing him from making those monthly payments. A further sub-
6 issue is the BANK's contention that J. PHILLIPS failed to give proper notice to the BANK
7 when he sold the Union Street property in 2013.

8 A third issue involves J. PHILLIPS' application in 2012 to refinance the 2009 Loan and
9 the BANK's denial of that refinance application. The two component parts of the third issue are
10 whether the BANK had a duty to reasonably consider that application and, if a duty existed,
11 whether the BANK breached that duty. If the BANK had such a duty and if the BANK breached
12 that duty, the issue of the appropriate resulting damage to J. PHILLIPS must be decided. These
13 are the primary issues in the case but are by no means all of the relevant issues, as detailed
14 below.

15 II. SUMMARY OF WITNESSES' TESTIMONY

16 Jessica Woodbridge

17 Ms. Woodbridge was presented as the BANK's Person Most Qualified both in
18 deposition and at trial. She testified that she had no personal knowledge of any of the dealings
19 between the BANK and J. PHILLIPS but was familiar with both the BANK's documents and its
20 practices. She authenticated the BANK's records relating to the 2009 Loan and to J. PHILLIPS'
21 refinance application in 2012. As to the 2009 Loan Ms. Woodbridge testified that the BANK
22 lent \$1,120,000 to J. PHILLIPS and that the money was used to pay off an existing loan to
23 Wells Fargo Bank in the name of J. PHILLIPS and D. PHILLIPS. She testified that the BANK's
24 records show that J. PHILLIPS signed both the 2009 Note to the BANK and a deed of trust that
25 was to be recorded as a first deed of trust encumbering J. PHILLIPS' Union Street property. She
26 also testified that escrow for the 2009 Loan was handled by Entitle Insurance Company. She
27 also testified that the BANK's records show that the escrow closed and funds were disbursed by
28 the BANK to pay closing costs, to pay off the Wells Fargo Bank loan and that \$94,390.22 was

1 disbursed to J. PHILLIPS. Ms. Woodbridge testified that the BANK received back the original
2 2009 Note for the 2009 Loan from escrow but that the deed of trust in favor of the BANK was
3 not recorded. Ms. Woodbridge testified that the BANK's records indicate that the BANK was
4 unaware that the deed of trust had not recorded until March 2012. Ms. Woodbridge also
5 authenticated numerous BANK records relating to J. PHILLIPS' application for refinance in
6 2012. Ms. Woodbridge also authenticated BANK records showing the payment history by
7 J. PHILLIPS on the 2009 Loan and the amount the BANK contends is presently due.
8 Ms. Woodbridge also testified as to the BANK records relating to the sale of the 2009 Note and
9 what they showed regarding the BANK'S position that it was "re-purchased" by the BANK.

10 Ingrid Carney

11 Ms. Carney testified that she and her husband lived next door to J. PHILLIPS' Union
12 Street property. She testified that she and her husband expressed an interest in purchasing the
13 Union Street property. In December 2012 she and J. PHILLIPS discussed and exchanged emails
14 regarding her and her husband's interest in purchasing the Union Street property. She testified
15 that they and J. PHILLIPS expressed a desire to complete the sale prior to year-end 2012. She
16 authenticated a Purchase and Sale Agreement for her and her husband's purchase of the Union
17 Street property that was signed in January 2013. She authenticated emails between her and
18 J. PHILLIPS wherein he stated that the transaction could not close without the BANK's
19 consent. She testified that she and her husband completed the purchase of the Union Street
20 property in September 2013 for the purchase price of \$2,100,000.

21 JOHN A. PHILLIPS

22 J. PHILLIPS testified that he and his brother, D. PHILLIPS, purchased the Union Street
23 property in about 1998. He testified that title was held by him and his brother. He also testified
24 that they co-owned a property in Washington D.C. He testified that he and his family (his wife
25 and daughter) began living in the Union Street property soon after its purchase and all of them
26 lived there full time until sometime in about 2009. He testified that at some point prior to 2009
27 he and his brother agreed to exchange their interests in the two properties they co-owned since
28 he was living in the Union Street property and his brother was living at the property in

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1 Washington D.C. He testified that he and his brother have been in business together for over 30
2 years and therefore did not document the exchange. J. PHILLIPS testified that as of 2009 the
3 Union Street property was encumbered by a first deed of trust in favor of Wells Fargo Bank. He
4 testified that the Wells Fargo Bank deed of trust secured payment of a note for approximately
5 \$1,000,000 that he and his brother had signed. He testified that as of 2009 both he and his
6 brother were still technically on title to the Union Street property even though they had
7 previously agreed that the Union Street property would be solely owned by J. PHILLIPS.

8 J. PHILLIPS testified that he sought a loan from the BANK in 2009. He authenticated
9 his Loan Application and the financial records he was asked to provide to the BANK for the
10 2009 Loan. These included documents showing that he had approximately \$100,000 in
11 retirement funds at Fidelity. He authenticated the appraisal conducted by the BANK that valued
12 the Union Street property at \$1,600,000. He also authenticated documents showing his income
13 from the company owned by him and his brother as well as the tax returns provided to the
14 BANK. J. PHILLIPS testified that he signed all documents that the BANK requested that he
15 sign as part of the loan application. He testified that these included the 2009 Note and a deed of
16 trust. He also testified that he and his brother signed a Quit Claim Deed transferring title to the
17 Union Street property solely to himself. He testified that he signed all documents for the closing
18 of the escrow for the 2009 Loan that the BANK requested. He testified that he did not recall
19 exactly where in San Francisco he signed the various documents for the 2009 Loan but that it
20 was not at the place in Pennsylvania stated in the escrow closing statement as the place the
21 escrow was conducted.

22 J. PHILLIPS testified that he set up an automatic payment method so that each month
23 the monthly payment for the 2009 Note would be directly transferred from his checking account
24 at Wells Fargo to the BANK. He testified that thereafter, until September 2013, all monthly
25 payments were made as required under the 2009 Note.

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1 J. PHILLIPS testified that his wife and daughter moved to a rented apartment in New
2 York City sometime in 2009. He also testified that the Union Street property was the only real
3 property he owned and that he lived in it a majority of the time until the Union Street property
4 was sold to the Carneys in 2013.

5 J. PHILLIPS testified that he was unaware of any problems relating to the closing of the
6 2009 Loan until approximately September 2009, when he received a letter purporting to be from
7 Kyle Johnston at National Real Estate Information Services (hereinafter "NREIS"). That letter
8 states that the "Mortgage and Deed" J. PHILLIPS signed as part of the closing of the 2009 Loan
9 had not been recorded. J. PHILLIPS testified that he thereafter spoke to Mr. Johnston several
10 times and asked for confirmation that he and NREIS were authorized representatives of the
11 BANK. He testified that he never received such corroboration. The next contact regarding a
12 possible problem with the closing of the 2009 Loan was when his brother was sent a letter,
13 dated June 16, 2011, from attorney Kenneth Smolar. That letter states that it concerns "an
14 unsigned Transfer Tax Affidavit pertaining to your Deed" of the Union Street property. The
15 letter also states that he had signed a Loan Agreement and a Document Correction Agreement
16 that obligated him to sign a Transfer Tax Affidavit so that the deed of trust in favor of the
17 BANK can be recorded. J. PHILLIPS testified that he did not believe he had signed either a
18 Loan Agreement or a Document Correction Agreement and that he contacted attorney Smolar
19 and asked for a copy of those Agreements. He testified that he never received confirmation that
20 he had signed either of the Agreements that were referenced in attorney Smolar's letter.

21 J. PHILLIPS testified that he heard or saw an advertisement from the BANK advertising
22 refinance opportunities in early 2012. He testified that he called the BANK and spoke with
23 Sheila Pott, a loan originator at the BANK. J. PHILLIPS testified that he was interested in
24 refinancing with the BANK because the interest rate on the 2009 Note, which was 5.125%, was
25 above the rates being advertised as available. He also testified that one of the reasons he sought
26 the refinancing was to solve any problem having to do with the BANK's deed of trust from the
27 2009 Loan not being recorded. J. PHILLIPS told Ms. Pott that his income was the same or
28 better than in 2009 and that he had more in his Fidelity account than in 2009. He testified that

1 Ms. Pott asked for various documents and that he thereafter sent to the BANK, in April 2012,
2 documents verifying that his income was about the same as it had been in 2009 and that he now
3 had over \$310,000 in available funds at Fidelity. He testified that he also sent to the BANK the
4 tax returns that were requested. He testified that he received a Good Faith Estimate that was
5 dated April 6, 2012 showing that the loan amount being sought is \$1,120,000, the interest rate
6 would be 3.375% and the monthly payments would be \$3,150 per month. He also testified that
7 he received a Notice of Conditional Approval, dated April 26, 2012, for the refinance being
8 requested. J. PHILLIPS was thereafter told that the Union Street property was appraised by the
9 BANK for \$1,750,000 and that the refinance was proceeding. J. PHILLIPS testified that he
10 received another Good Faith Estimate, dated July 3, 2012, that also stated the loan amount being
11 requested is \$1,120,000, an interest rate of 3.375% and a monthly payment of \$3,150 per month.
12 He testified that he then had several email exchanges with Ms. Pott where she requested
13 additional information from him, which he supplied.

14 J. PHILLIPS testified that he received a Good Faith Estimate dated August 28, 2012 that
15 stated that the loan amount being requested is \$1,050,000 and that the monthly payment would
16 be \$4,642.01 per month. He testified that this was the first time he was told that the loan amount
17 had been reduced from \$1,120,000 to \$1,050,000 and that he had not been asked if he would
18 consent to that loan amount reduction and he had not approved of that loan amount reduction.
19 J. PHILLIPS testified that he also received a Notice of Action Taken dated September 6, 2012
20 stating that his refinance application had been denied. The reasons specified were
21 "INSUFFICIENT CASH: INSUFFICIENT LIQUID ASSETS TO CLOSE THE LOAN. LACK
22 OF ANTICIPATED CASH RESERVES AFTER CLOSING." J. PHILLIPS testified that he had
23 substantial other liquid assets available to him and that no one from the BANK had ever asked if
24 he had liquid assets other than the funds at Fidelity.

25 J. PHILLIPS testified that because of the pendency of the First Action filed by the
26 BANK against him and because of the carrying costs for the Union Street property that he felt
27 forced to sell it. J. PHILLIPS testified that he believed that the *lis pendens* the BANK had
28 recorded in conjunction with the First Action filed by the BANK against him prevented him

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1 from refinancing with another bank. J. PHILLIPS testified that he was aware of interest by his
2 neighbors, the Carneys, in purchasing his Union Street property. He testified that he had
3 discussions with Ms. Carney in early December 2012 and that he and she discussed trying to
4 complete a sale by the end of 2012. J. PHILLIPS testified that he wanted to complete any sale
5 by the end of 2012 because he knew there would be an additional tax of 3% of the selling price
6 imposed by the Affordable Care Act if the transaction closed after December 31, 2012.
7 J. PHILLIPS testified that he believed both he and the Carneys were willing to close the sale
8 before December 31, 2012 and could have done so if he and his counsel could resolve the
9 claims of the BANK or otherwise obtain the BANK's consent to the sale. J. PHILLIPS testified
10 that he thereafter entered into a Purchase and Sale Agreement that he signed in January 2013 to
11 sell the Union Street property to the Carneys. He testified that the sale to the Carneys could not
12 close because of the pendency of the First Action filed by the BANK and the BANK's
13 *lis pendens*. He testified that when efforts to resolve the First Action filed by the BANK were
14 unsuccessful, his counsel Peter Mankin prepared for trial that was set for May 2013. He also
15 testified that the BANK thereafter dismissed the prior suit just prior to its trial date and filed this
16 current action and recorded another *lis pendens*.

17 J. PHILLIPS testified that his counsel then was successful in a motion to expunge the
18 BANK's *lis pendens* so he went forward with and closed the sale of the Union Street property to
19 the Carneys. He testified that he sold the Union Street property to the Carneys for \$2,100,000
20 and that, other than closing costs, he received all of the net proceeds. He testified that the
21 BANK did not receive any of the net proceeds. He also testified that his brother, D. PHILLIPS,
22 did not receive any of the net proceeds.

23 J. PHILLIPS testified that it was his intention, even after the sale to the Carneys, to
24 continue to make all monthly payments to the BANK on the 2009 Note. He also testified that
25 about this same time, in August 2013, he signed up for what the BANK called PayPlan 12. He
26 testified that he received documents from the BANK verifying that he was signed up for
27 PayPlan 12 and that his monthly payment would thereafter be pulled from his Wells Fargo
28 account on the 15th day of each month. He testified that also about this time he was made aware

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1 of fraudulent activity on his Wells Fargo account and, as a result, closed that account and
2 opened a new account at Well Fargo. J. PHILLIPS testified that he received documents from
3 the BANK stating that his payments under PayPlan 12 would commence on October 15, 2013.
4 He testified that he called the telephone number stated on the BANK notice and spoke with a
5 BANK representative who confirmed that she would change the commencement date for his
6 PayPlan 12 to September 15, 2013 so no payments would be missed. J. PHILLIPS stated he
7 monitored his Wells Fargo account activity and called the BANK when he saw that the payment
8 for September 15, 2013 was not showing on his Wells Fargo account. He testified that he
9 informed the BANK of the problem with the fraudulent activity on his old Wells Fargo account
10 and gave the BANK his new Wells Fargo account number and routing number. He testified that
11 the BANK representative assured him that she would have the payment due for September 15,
12 2013 pulled from his new Wells Fargo account. J. PHILLIPS testified that he thereafter received
13 a notice from the BANK stating that the BANK had not received the payment due for
14 September 15, 2013. He testified that he called several times after that and was eventually told
15 that because the matter was in litigation they could not speak to him. He testified that he asked
16 his attorney to thereafter contact the BANK on his behalf. He testified that he thereafter
17 received a notice from the BANK stating that because he was delinquent in payments for three
18 months he was no longer eligible for PayPlan 12. He testified that he was, during all of this
19 time, ready, willing and able to pay the monthly payments to the BANK and tried to do so in the
20 way he was directed by the BANK in his telephone calls.

21 J. PHILLIPS testified that his credit was very important to him as a co-owner of a
22 business. He testified that he learned that the BANK had provided negative credit reports due to
23 the nonpayment on the 2009 Note. He testified that a personal line of credit was reduced and
24 that he has not been able to purchase another home because of the negative credit reporting by
25 the BANK.

26 J. PHILLIPS testified that he has been damaged by the BANK as follows: (1) Attorneys'
27 fees incurred in defending against the First Action filed by the BANK against him; (2)
28 Attorneys' fees incurred in defending this case; (3) Expert costs and court reporting costs in

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1 defending this case; (4) His travel costs in defending this case; (5) Reimbursement for the time
2 he has spent defending this case: (6) \$24,495 for the difference in the monthly payments he paid
3 between June 2012 and August 2013 because the 2009 Note had a higher interest rate than he
4 would have paid if the refinance had been approved; (7) \$1,500,000 in lost equity in the Union
5 Street property (the difference between the \$2,100,000 he sold it for and the \$3,600,000 it is
6 now worth) because he would not have sold the Union Street property if his refinance
7 application had been approved; (8) \$61,170 in additional tax he had to pay under the Affordable
8 Care Act because the sale of the Union Street property was not closed prior to
9 December 31, 2012; and (9) \$75,000 for damage to his credit caused by the BANK reporting he
10 was delinquent in making his monthly payments for the 2009 Loan.

11 Charles Hansen

12 Mr. Hansen testified as an expert on behalf of the BANK. Mr. Hansen qualified as an
13 expert in escrows and escrow closings. Mr. Hansen testified that the deed of trust signed by
14 J. PHILLIPS for the 2009 Loan was not recorded because the San Francisco Recorders office
15 would not record the Quit Claim Deed transferring the Union Street property from J. PHILLIPS
16 and D. PHILLIPS to J. PHILLIPS. He testified that since title to the Union Street property was
17 in the name of both J. PHILLIPS and D. PHILLIPS, the deed of trust that was signed solely by
18 J. PHILLIPS could not be recorded when the Quit Claim Deed was rejected. He testified that it
19 was his opinion that the Recorders office would not record the Quit Claim Deed because of the
20 County's requirement that a Transfer Tax Affidavit be signed and filed at the same time.
21 Mr. Hansen stated that it was his opinion that even though there was one escrow and that Entitle
22 Insurance Co. was handling both the recordation of the Quit Claim Deed and the recordation of
23 the deed of trust in favor of the BANK, these were actually two separate escrows. He testified
24 that it was his opinion that the BANK had no responsibility for the failure to record the Quit
25 Claim Deed and that it was J. PHILLIPS' obligation to have the Quit Claim Deed recorded.

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1 Kevin Rose

2 Mr. Rose testified that he was the attorney for the Carneys in their purchase of the Union
3 Street property from J. PHILLIPS. He authenticated documents regarding that sale and emails
4 with Peter Mankin, the attorney representing J. PHILLIPS in the sale.

5 DEAN A. PHILLIPS

6 Portions of the deposition of D. PHILLIPS were read. D. PHILLIPS testified that he had
7 signed the promissory note from Wells Fargo that was secured by a first deed of trust on the
8 Union Street property as of 2009. He also testified that he and J. PHILLIPS co-owned both the
9 Union Street property and property in Washington D.C. He testified that he and J. PHILLIPS
10 swapped their interests in the two properties so that he was the sole owner of the Washington
11 D.C. property and J. PHILLIPS was the sole owner of the Union Street property. He testified
12 that the swap of properties occurred before J. PHILLIPS' 2009 Loan from the BANK. He
13 testified that he signed the Quit Claim Deed.

14 Peter Mankin

15 Mr. Mankin testified that he is an attorney specializing in real estate matters and real
16 estate litigation. He testified that he represented J. PHILLIPS in all matters relating to the
17 BANK from approximately December 2012 until approximately September 2016. He testified
18 that he tried to obtain the BANK's cooperation in the closing of the sale of the Union Street
19 property to the Carneys prior to year-end 2012 but could not get any response from the BANK.
20 He testified that he continued trying to get a response from the BANK's counsel to settlement
21 offers throughout early 2013 and never received any substantive responses. He testified that he
22 thereafter prepared for trial in the First Action filed by the BANK against J. PHILLIPS. He
23 testified that the BANK dismissed the First Action without prejudice just days prior to the
24 scheduled trial date and then filed the Complaint in this action the same day. He testified that
25 the BANK then recorded on the same day it filed the Complaint in this case another *lis pendens*.
26 He testified that he filed a motion to expunge the *lis pendens*, which was granted in August
27 2013. He testified that he had filed a Declaration of J. PHILLIPS re: Notification to the BANK
28 as required by the Order Granting Motion to Expunge *Lis Pendens*. He also testified that he

1 provided notice to the BANK that J. PHILLIPS had signed papers to sell the Union Street
2 property in conformance with the Order and Declaration. He testified that J. PHILLIPS' sale of
3 the Union Street property then closed. He testified that on October 15, 2013 and again on
4 November 20, 2013 he wrote to the BANK's counsel stating that J. PHILLIPS was ready,
5 willing and able to make his monthly payments to the BANK on the 2009 Note but that the
6 BANK was refusing to accept his payments.

7 S. Guy Puccio

8 Mr. Puccio testified as an expert on behalf of J. PHILLIPS. Mr. Puccio qualified as an
9 expert in escrows and escrow closings. Mr. Puccio testified that the documents indicated that it
10 was the BANK that chose Entitle Insurance Co. as the escrow company. He also testified that
11 the escrow closing, which he testified was more like a New York-style settlement, occurred in
12 Pennsylvania. He testified that it was neither proper nor within the applicable standard of care
13 for the escrow closing to be held in Pennsylvania when the borrower was a California resident
14 and the property was in California. He also testified that the distance between the situs of the
15 closing and the San Francisco Recorders office was what caused the funds from the 2009 Loan
16 to be disbursed before the deed of trust in favor of the BANK could even be presented for
17 recording in San Francisco. Mr. Puccio also testified that the Quit Claim deed and the deed of
18 trust were all part of one escrow and that Entitle Insurance Co. was the agent for the BANK in
19 handling the recording of both documents. Mr. Puccio also testified that it was his opinion that
20 Entitle Insurance Co. had hired NREIS to assist it in the closing. Mr. Puccio also testified that it
21 was his opinion that the San Francisco Recorders office would not record the Quit Claim Deed
22 because of the County's requirement that a Transfer Tax Affidavit and Preliminary Change of
23 Ownership Report be filed at the same time.

24 Brian Grey

25 Mr. Grey testified as an expert on behalf of J. PHILLIPS. Mr. Grey qualified as an
26 expert real estate appraiser. Mr. Grey testified that the value of the Union Street property, as of
27 December 2016, was \$3,600,000. He also testified that it was his opinion that the value of the
28 Union Street property, as of July 2012, was \$1,850,000 and that it increased in value twenty

1 percent (20%) between July 2012 and September 2013.

2 Wendy Johnson

3 Portions of Ms. Johnson's deposition were read. Ms. Johnson testified that she was an
4 employee of the BANK and was a home service specialist at the time of J. PHILLIPS' refinance
5 application in 2012. She testified that it was the BANK's practice to provide any potential
6 borrower with a new Good Faith Estimate whenever there was any material change in the loan
7 terms being considered. She testified that her job duties included communicating with potential
8 borrowers when additional documents or information was needed for a refinance application.
9 She testified that she did not recall any communications with J. PHILLIPS regarding his
10 refinance application in 2012 and that she was not aware of any requests by the BANK to
11 J. PHILLIPS to inquire about additional assets he had available to satisfy the BANK's
12 underwriters.

13 Enrique Rodriguez

14 Mr. Rodriguez testified as an expert on behalf of J. PHILLIPS. He qualified as an expert
15 in a bank's lending practices. Mr. Rodriguez testified that the BANK's handling of the
16 documents relating to the 2009 Loan fell below the normal standard of care for lending
17 institutions and that this contributed to the deed of trust in favor of the BANK not being
18 recorded. He testified that the BANK's handling of the 2009 Loan closing fell below the normal
19 standard of care for lending institutions in not conducting a post-closing audit within thirty to
20 sixty days of the closing of the loan transaction so that it would have promptly discovered that
21 the deed of trust in its favor had not been recorded. He testified that it was his opinion that the
22 BANK's handling of J. PHILLIPS' refinance application fell below the normal standard of care
23 for lending institutions in the following ways: (1) J. PHILLIPS' application should have been
24 elevated to a more senior level because of the problem created by the deed of trust in favor of
25 the BANK from the 2009 Loan not having been recorded; (2) changing the loan terms of the
26 refinance (the amount financed and the type of loan so as to result in an increased monthly
27 payment) without the borrower's knowledge or consent; (3) failing to promptly provide
28 J. PHILLIPS with a new Good Faith Estimate after the BANK changed the amount financed

1 and the type of loan; and (4) denying J. PHILLIPS' refinance application when, by every
2 appropriate measure, his financial condition was equal to or better than it was at the time of the
3 2009 Loan and the refinance would have solved the BANK's problem in not having a deed of
4 trust recorded to secure the 2009 Note signed by J. PHILLIPS.

5 Lawrence Mansbach

6 Mr. Mansbach testified as an expert on behalf of the BANK. He qualified as an expert
7 real estate appraiser. He testified that the value of the Union Street property, as of
8 December 2016, was \$3,100,000.

9 **III. PROCEDURAL BACKGROUND**

10 There was a prior action filed by the BANK against J. PHILLIPS on November 4, 2011;
11 Case No. CGC-11-515670 (the "First Action"). (Exhibit 310) The BANK recorded a *lis pendens*
12 on November 8, 2011. The BANK recorded a second *lis pendens* on July 3, 2012. (Exhibit 333)
13 The BANK dismissed the First Action without prejudice on May 2, 2013. (Exhibit 356)

14 This action was filed by the BANK on May 2, 2013. The BANK recorded a *lis pendens*
15 on May 2, 2013. (Exhibit 357) J. PHILLIPS' motion to expunge the *lis pendens* was granted on
16 August 19, 2013. (Exhibit 358) J. PHILLIPS and D. PHILLIPS filed their Cross-Complaint
17 against the BANK on September 3, 2013. The BANK filed its Answer to the Cross-Complaint
18 on March 25, 2014. The BANK filed a Third Amended Complaint on December 7, 2015.
19 J. PHILLIPS and D. PHILLIPS filed an Answer to the Third Amended Complaint on
20 January 8, 2016.

21 **IV. STATEMENT OF FACTS**

22 The Court makes the following findings of fact and, to the extent there is contrary
23 evidence, the Court finds it to not be credible or persuasive:

24 The 2009 Loan to J. PHILLIPS

25 J. PHILLIPS and D. PHILLIPS purchased the Union Street property in approximately
26 1998. They also co-owned property in Washington, D.C. While they co-owned the Union Street
27 property they obtained a loan from Wells Fargo Bank for \$1,000,000 that was secured by a first
28 deed of trust on the Union Street property. (Exhibit 9) At some point prior to 2009, J. PHILLIPS

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1 and D. PHILLIPS agreed that they would swap their interests so that J. PHILLIPS would solely
2 own the Union Street property and D. PHILLIPS would solely own the property in Washington
3 D.C.

4 In June 2009, J. PHILLIPS applied for a loan from Bank of America ("the 2009 Loan).
5 His application was supported, as is typical, by wage information, asset information and
6 verification, income verification through tax returns, a credit check and an appraisal of the
7 property. His Residential Loan Application listed a loan amount of \$1,120,000 and an interest
8 rate of 5.125%. (Exhibit 301) It lists the Union Street property as J. PHILLIPS' primary
9 residence and states that title to the Union Street property was then held by J. PHILLIPS and
10 D. PHILLIPS as joint tenants. It lists his assets as including money market funds at Fidelity of
11 \$103,968. The property appraised for \$1,600,000 and J. PHILLIPS satisfied all underwriting
12 guidelines. (Exhibits 304 and 305) The interest-only loan in the amount of \$1,120,000 was
13 approved. The 2009 Loan was in an amount sufficient to pay off the Wells Fargo loan that was
14 secured by a first deed of trust and provide cash to J. PHILLIPS totaling \$94,390.22.
15 (Exhibit 30) The interest rate on the 2009 Note was 5.125% and the monthly payments were
16 \$4,783.33. (Exhibit 32)

17 Problems with the Closing of the 2009 Loan

18 The BANK elected to have the loan closing through EnTitle Insurance Co. ("Entitle")
19 and either it or the BANK decided that the closing should take place through an escrow in
20 Pennsylvania. (See Settlement Statement, Exhibit 307) J. PHILLIPS had no involvement in the
21 selection of Entitle or with the situs of the escrow closing. J. PHILLIPS was the sole borrower
22 from the BANK even though both he and D. PHILLIPS were on title to the Union Street
23 property, each holding title as his sole and separate property. As a result, it was necessary for
24 D. PHILLIPS to deed his interest in the Union Street property to J. PHILLIPS prior to the deed
25 of trust to the BANK being recorded (so that J. PHILLIPS was both the sole borrower and the
26 sole owner of the Union Street property). A Quit Claim deed was drafted by someone at the
27 request of Entitle and it was signed by both J. PHILLIPS and D. PHILLIPS. (Exhibit 306) The
28 Quit Claim deed purported to transfer sole title in the Union Street property to J. PHILLIPS.

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1 J. PHILLIPS, at the same time that he signed the Quit Claim deed, signed the Residential Loan
2 Application, the 2009 Note and Deed of Trust that was to secure repayment of the 2009 Note,
3 the Adjustable Rate Rider, the Federal Truth in Lending Disclosure Statement, the Errors and
4 Omissions/Compliance Agreement, and an Affidavit of Title (Refinance). (Exhibits 301, 32, 33,
5 35, 31, 36, and 39, respectively) He signed all of these documents in San Francisco on
6 August 10, 2009. J. PHILLIPS signed all documents that the BANK requested that he sign to
7 obtain the 2009 Loan. He also signed a Settlement Statement (Transaction Without Sellers).
8 (Exhibit 30)

9 The BANK prepared and sent to Entitle "Lender's Closing Instructions." (Exhibit 26)
10 The Lender's Closing Instructions are incomplete as it states that Conditions Addendum and a
11 Document Checklist are attached as addenda and no such documents are attached. The Lender's
12 Closing Instructions state that the BANK will not disburse funds until the Lender has received a
13 number of documents including an executed Note, an executed Deed of Trust (Notary pages)
14 and "Outstanding Conditions (as listed in the Conditions Addendum)." No Conditions
15 Addendum is attached to the Lender's Closing Instructions. Attached to the Lender's Closing
16 Instructions is a "Title Insurance Addendum." The Title Insurance Addendum states that the
17 title policy the BANK is to receive must show the deed of trust as a first lien against the Union
18 Street property and that the title policy must show that J. PHILLIPS has fee simple title to the
19 Union Street property. There is no evidence of any escrow instructions being signed by
20 J. PHILLIPS.

21 The escrow for the 2009 Loan closed on or about August 14, 2009. As part of the
22 disbursements from the escrow closing, Entitle was paid a settlement or closing fee and for title
23 insurance, Wells Fargo Bank was paid \$1,007,833.10 to satisfy the obligation secured by the
24 then-existing first deed of trust and J. PHILLIPS received \$94,390.22. (Settlement Statement,
25 Exhibit 307) As a result of the escrow being in Pennsylvania there was a delay in the effort to
26 record the documents that needed to be recorded: the Quit Claim deed and the deed of trust in
27 favor of the BANK. Entitle engaged NREIS as its sub-agent to assist in the closing. Entitle and
28 NREIS were in charge of recording the necessary documents from the escrow. The Recorders

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1 office at the City and County of San Francisco (“CCSF”) would not record the Quit Claim deed
2 because a Transfer Tax Affidavit needed to accompany it for a determination as to whether or
3 not a transfer tax was required for the transfer of the Union Street property from D. PHILLIPS
4 to J. PHILLIPS. The deed of trust in favor of the BANK also was not recorded. The result was
5 that the loan proceeds from the 2009 Loan were disbursed, J. PHILLIPS signed all documents
6 he was requested to sign including the 2009 Note, but the deed of trust in favor of the BANK
7 was not recorded.

8 J. PHILLIPS Payments on the 2009 Loan

9 J. PHILLIPS set up an automatic payment method for the monthly interest-only
10 payments due under the 2009 Loan. The monthly interest-only payments were \$4,783.33 per
11 month. The automatic payments were made from J. PHILLIPS’ checking account at Wells
12 Fargo Bank. Each monthly payment was timely made from the beginning of the 2009 Loan until
13 September 2013. (Exhibit 163) The reasons for the non-payment beginning in September 2013
14 are discussed below.

15 Demands on Behalf of the BANK

16 On November 5, 2009, NREIS, purporting to act on behalf of the BANK, sent a letter to
17 J. PHILLIPS informing him that “the Mortgage and Deed that you signed at your closing have
18 not been recorded.” (Exhibit 308) The letter sent a Transfer Tax Affidavit and asked that he sign
19 it. J. PHILLIPS had had no prior contact with anyone from NREIS and did not know if the letter
20 was either legitimate or from an entity that was an authorized representative of the BANK. He
21 called and spoke to the purported author of the letter, Kyle Johnston from NRIES, and asked for
22 proof that he and NREIS were authorized representatives of the BANK. J. PHILLIPS also
23 called the CCSF and was told that all documents were in order regarding his Union Street
24 property and all taxes were paid. There were no other substantive follow-up contacts by
25 Mr. Johnston or NREIS for over a year and a half.

26 In June 2011, a letter was received by D. PHILLIPS, who passed it along to
27 J. PHILLIPS. The letter purported to be from an attorney, Kenneth Smolar, in Pennsylvania.
28 (Exhibit 309) The letter states he was engaged by NREIS and the BANK. The letter states that

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1 NREIS was retained by the BANK and acted as settlement agent for the closing of the 2009
2 Loan. The letter from attorney Smolar stated that a Loan Agreement and a Document Correction
3 Agreement had been executed as part of the closing of the 2009 Loan and that these Agreements
4 required that J. PHILLIPS execute a Transfer Tax Affidavit so that the deed of trust in favor of
5 the BANK could be recorded. J. PHILLIPS contacted attorney Smolar and told him he did not
6 recall signing either a Loan Agreement or a Document Correction Agreement and asked for a
7 copy of both. None were ever received. J. PHILLIPS had not signed either a Loan Agreement or
8 a Document Correction Agreement. The only document of this nature signed by J. PHILLIPS as
9 part of the closing of the 2009 Loan was an "Errors and Omissions/Compliance Agreement."
10 (Exhibit 36) The Errors and Omissions Agreement requires that J. PHILLIPS fully cooperate
11 and adjust all closing documentation "for clerical errors" if necessary to enable the BANK to
12 sell the 2009 Note.

13 2012 Refinance Application

14 In about March 2012 J. PHILLIPS decided to apply to the BANK to refinance the 2009
15 Loan. He did so because interest rates had decreased from when he received the 2009 Loan and
16 because a refinance would result in the recording of a deed of trust in favor of the BANK and
17 that would solve the issue of the deed of trust relating to the 2009 Loan not having been
18 recorded. J. PHILLIPS spoke to Sheila Pott a loan originator on April 3, 2012. (Residential
19 Loan Application, Exhibit 312) The April 2012 Residential Loan Application prepared by the
20 BANK states that the amount sought by the refinance is \$1,120,000. That is the amount that was
21 owed to the BANK on the 2009 Loan because that loan was an interest-only loan and
22 J. PHILLIPS, from the inception of the 2009 Loan through 2012, had made all required monthly
23 interest-only payments. The April Residential Loan Application states that its purpose was a
24 term and rate reduction. The Application also states that J. PHILLIPS had a money market
25 account at Fidelity worth over \$300,000. The April Loan Application states that the information
26 contained in it was based on a telephone interview on April 3, 2012 between J. PHILLIPS and
27 Ms. Pott. Through discussions with Ms. Pott and documents provided by J. PHILLIPS to her at
28 her request, J. PHILLIPS provided information to the BANK that established that his income

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1 and expenses were the same or better than in 2009 when the 2009 Loan was approved, that his
2 credit history was equal to or better than it was, and that he had three times more in his 401(k)
3 retirement account at Fidelity. (See 2009 Loan Application, Exhibit 301, and April 2012 Loan
4 Application, Exhibit 312) J. PHILLIPS provided all documents that were requested of him by
5 the BANK for his refinance application. These documents included a statement from Fidelity
6 showing a net vested balance of over \$310,000 in his 401(k) account. (Exhibit 313)

7 The April 2012 Loan Application states that the Union Street property is J. PHILLIPS'
8 "Primary Residence." No one at the BANK ever asked J. PHILLIPS if he lived at the Union
9 Street property or described to him what was meant in the Loan Application when it refers to a
10 property as a borrower's "Primary Residence." J. PHILLIPS always considered the Union Street
11 property as his primary residence. He owned no other real property. While his wife and
12 daughter moved to New York City sometime in about 2009 due to his wife's medical condition
13 and lived there in a rented apartment and while he rented out the upper floors of the Union
14 Street property to tenants, J. PHILLIPS stayed in the lower floor of the Union Street property
15 when he was in California. J. PHILLIPS stayed at the Union Street property a majority of the
16 time: 70% of the time in 2011 and slightly more than that in 2012. J. PHILLIPS always, through
17 2012, filed a California state tax return stating that he resided in the Union Street property a
18 majority of the time. During that same time period he filed a New York state tax return as a
19 "nonresident and part-year resident." (Exhibit 378) J. PHILLIPS was registered to vote in
20 California and had a California driver's license.

21 J. PHILLIPS was provided with a Good Faith Estimate ("GFE") for the refinance loan
22 he was applying for on April 6, 2012. (Exhibit 319) That GFE showed a loan amount of
23 \$1,120,000, an initial interest rate of 3.375%, an initial monthly payment of \$3,150 and
24 estimated settlement charges of \$20,402.40. The BANK sent to J. PHILLIPS a Notice of
25 Conditional Approval and Loan Conditions on April 26, 2012. (Exhibit 325) The Notice of
26 Conditional Approval states that, among other conditions, J. PHILLIPS had to provide proof of
27 liquid assets in the amount of not less than \$16,761.

28 ////

1 On July 2, 2012 the BANK's appraiser appraised the Union Street property as having a
2 fair market value of \$1,750,000. (Exhibit 82) Even though the appraisal indicates that the
3 occupant is a tenant, only the upper floors were occupied by tenants and the Union Street
4 property remained, until its sale, J. PHILLIPS's primary residence. On July 3, 2012, the BANK
5 prepared an Estimated Settlement Charge Summary that stated the loan amount would be
6 \$1,120,000, the settlement charges would be \$18,682.40 and the monthly payment would be
7 \$3,150. (Exhibit 331) On July 3, 2012, the BANK also sent to J. PHILLIPS another GFE that
8 again listed the loan amount as \$1,120,000, the initial interest rate as 3.375% and an initial
9 monthly payment of \$3,150. (Exhibit 332) Also on July 3, 2012, and without informing
10 J. PHILLIPS, the BANK reduced the loan amount for the refinance from \$1,120,000 to
11 \$1,050,000. (Exhibit 329) No revised GFE was sent to J. PHILLIPS at the time of this
12 reduction.

13 Throughout late July and August 2012, J. PHILLIPS was told by Ms. Pott that his
14 refinance was progressing and that she anticipated that it would be approved. Ms. Pott requested
15 additional documents from J. PHILLIPS for the refinance application; all of which were
16 supplied by him. (Exhibits 330, 338, 339 and 340) These documents included an updated
17 printout showing a net amount in J. PHILLIPS' 401(k) funds held at Fidelity in the amount of
18 \$324,153.02. (Exhibit 330)

19 On August 28, 2012, the BANK prepared an Estimated Settlement Charge Summary.
20 (Exhibit 343) This Estimate was the first that used the lower loan amount of \$1,050,000. As a
21 result of the lowered loan amount, and because the existing \$1,120,000 promissory note was to
22 be paid off from the refinancing, the estimated cash to close increased from the Estimated
23 Settlement Charge Summary of July 3, 2012 from \$18,682.40 to \$87,226.09. (Exhibits 331 and
24 343) The BANK also prepared a revised GFE on August 28, 2012. (Exhibit 344) This was the
25 first GFE that was sent to J. PHILLIPS that listed the lower loan amount of \$1,050,000. The
26 August 28, 2012 GFE also stated that J. PHILLIPS' initial monthly payment would be increased
27 to \$4,642. This is an increase of \$1,492 per month from the GFE that had been sent on
28 July 3, 2012. (Exhibit 332)

1 About this same time, the BANK prepared another Residential Loan Application for
2 J. PHILLIPS' application for refinance. It has a print date of September 6, 2012. (Exhibit 348)
3 This September Refinance Application lists the loan amount as \$1,050,000 with an interest rate
4 of 3.375%. It lists the purpose of the loan as a refinance and states the property will be
5 J. PHILLIPS' "Primary Residence." The Residential Loan Application states that the amount in
6 J. PHILLIPS' Fidelity account is \$194,491.81, even though the documents provided to the
7 BANK state that the funds in J. PHILLIPS' Fidelity account had a net value of over \$320,000.
8 The September Residential Loan Application states that the cash necessary from J. PHILLIPS to
9 close the loan is \$74,314.09. This Residential Loan Application, like the one in April, 2012, is
10 not signed by J. PHILLIPS because it was the BANK's practice to not have borrowers sign the
11 Loan Application until the loan closing. Neither the April Residential Loan Applications nor the
12 September Residential Loan Application was ever provided to J. PHILLIPS during the refinance
13 loan application process. Neither the April nor the September Loan Application (Exhibits 312
14 and 348) state that J. PHILLIPS was a party to a lawsuit. These Loan Applications were filled
15 out by BANK personnel and were never reviewed or approved by J. PHILLIPS. Even though J.
16 PHILLIPS was a party to a lawsuit at that time, that lawsuit was filed by the BANK and
17 therefore the BANK would have or should have known that J. PHILLIPS was a party to a
18 lawsuit.

19 The BANK denied J. PHILLIPS' refinance application. He was sent a Notice of Action
20 Taken dated September 6, 2012 informing him that his refinance application had been denied.
21 (Exhibit 349) The Notice states that the loan was denied for the following reasons:
22 "INSUFFICIENT CASH; INSUFFICIENT LIQUID ASSETS TO CLOSE THE LOAN. LACK
23 OF ANTICIPATED CASH RESERVES AFTER CLOSING." At no point during the refinance
24 application process did the BANK ask J. PHILLIPS if he had more liquid assets than those
25 contained in his 401(k) account at Fidelity. At no point during the refinance application process
26 did the BANK ask J. PHILLIPS if he had additional cash reserves available. J. PHILLIPS,
27 through his business, had more than \$200,000 in liquid assets in addition to his funds at Fidelity
28 plus other cash reserves available to him.

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1 The First Action and the Commencement of this Case

2 The BANK filed the First Action, a Complaint for Declaratory Relief and Breach of
3 Contract/Specific Performance, against J. PHILLIPS on November 4, 2011. (Exhibit 310) The
4 Complaint in the First Action alleges that on or about August 14, 2009 the BANK's "settlement
5 agent, NREIS conducted the loan's closing..." (Exhibit 310, ¶ 8) The Complaint in the First
6 Action also describes how the BANK's "settlement agent" made numerous attempts to contact
7 J. PHILLIPS regarding the Transfer Tax Affidavit. The Complaint in the First Action alleges
8 that J. PHILLIPS signed and breached a "Loan Agreement" and a "Document Correction
9 Agreement." The BANK requested relief in the form of a court declaration of an equitable lien
10 on the Union Street property in favor of the BANK and a request that J. PHILLIPS be ordered
11 to execute or re-execute the documents necessary to permit the recording of a deed of trust in
12 favor of the BANK. When the BANK filed the Complaint in the First Action it also recorded a
13 *lis pendens* that had the effect of providing notice that a lawsuit was pending that affected title
14 to the Union Street property. The BANK did not serve the Complaint in the First Action right
15 away so J. PHILLIPS was unaware of it for many months. J. PHILLIPS' first knowledge of the
16 First Action was when he saw the *lis pendens* listed as an exception in the Preliminary Title
17 Report dated March 29, 2012 that the BANK ordered when he applied for his refinance.
18 (Exhibit 311)

19 The BANK's representative testified at the trial that there are no records in the BANK's
20 files indicating that the BANK was aware of the First Action until March 2012. (Exhibit 194)
21 On March 6, 2012, the BANK's in-house legal counsel was sent an email describing NREIS as
22 one of the BANK's "many vendors." The email states that NREIS "has a curative title matter"
23 and is looking for a contact at the BANK. The title policy that had been issued in favor of the
24 BANK as part of the closing of the 2009 Loan authorized Entitle to "institute and prosecute any
25 action or proceeding or to do any other act that in its opinion may be necessary or desirable to
26 establish the Title or the lien of the Insured Mortgage, as insured, or to prevent or reduce loss or
27 damage to the Insured." (Exhibit 190, Short Form Residential Loan Policy, §5(b)) This
28 authorization granted to Entitle is consistent with the allegations in the Complaint in the First

1 Action and explains why the BANK has no records authorizing the prosecution of the First
2 Action until March 2012. After March 2012 the BANK had direct knowledge of and prosecuted
3 the Complaint in the First Action. The BANK also recorded another *lis pendens* on July 3, 2012.
4 (Exhibit 333)

5 After J. PHILLIPS' refinance application was denied, and after he was unsuccessful in
6 selling the Union Street property in late 2012 and early 2013, as described below, J. PHILLIPS
7 and his counsel prepared for trial of the First Action which was set for May 13, 2013. On
8 May 2, 2013, the BANK dismissed the Complaint in the First Action without prejudice.
9 (Exhibit 356)

10 On the same day that the BANK dismissed the First Action, it filed this action. The
11 BANK also on May 2, 2013, recorded a *lis pendens* so as to give recorded notice that this action
12 affected title to the Union Street property. (Exhibit 357) As described in the Procedural
13 Background section described above, J. PHILLIPS' motion to expunge the *lis pendens* was
14 granted August 19, 2013.

15 Sale of the Union Street Property

16 When J. PHILLIPS' refinance application was denied in September, 2012, he and his
17 counsel both believed that the *lis pendens* the BANK had recorded during the First Action
18 would prevent J. PHILLIPS from selling the Union Street property or refinancing with another
19 lender. J. PHILLIPS did not believe that he could afford the carrying costs of the Union Street
20 property when he also had to take into account the expenses he was going to incur in defending
21 against the Complaint in the First Action. He therefore decided that he had to sell the Union
22 Street property.

23 Ingrid and George Carney lived next door to the Union Street property. J. PHILLIPS
24 knew that they were interested in purchasing the Union Street property so he approached them
25 about purchasing it. J. PHILLIPS believed that because of his past dealings and difficulties with
26 the BANK, the claims in the First Action and the recorded *lis pendens* he could not list the
27 property for sale as a normal property would typically be listed, marketed and sold. He therefore
28 contacted neighbors who he knew were already interested in possibly purchasing the property.

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1 J. PHILLIPS and Ms. Carney engaged in discussions commencing in early December 2012
2 about the Carneys purchasing the Union Street property. Both parties expressed a desire and an
3 ability to complete the sale prior to December 31, 2012. J. PHILLIPS expressed his desire to do
4 so because selling after that date would result in him having to pay an additional tax of three
5 percent (3%) of the sales price for a tax imposed by the Affordable Care Act, also known as
6 ObamaCare. J. PHILLIPS, through counsel, approached the BANK to try to reach a settlement
7 or to otherwise obtain their consent to the sale. The BANK's consent was necessary because of
8 the exception to the title to the Union Street property caused by the *lis pendens* that the BANK
9 had recorded. J. PHILLIPS' counsel received no substantive responses by the BANK's counsel
10 to any of his overtures.

11 The Carneys and J. PHILLIPS entered into a Purchase and Sale Agreement for the sale
12 of the Union Street property to the Carneys in January 2013. (Exhibit 131) The sales price was
13 \$2,100,000. A Preliminary Title Report was received dated January 23, 2013. (Exhibit 119) It
14 listed two *lis pendens* from the First Action as exceptions to the title of the Union Street
15 property. Contingencies by the Carneys were removed effective January 31, 2013. (See
16 Addendum No. 1 to Purchase and Sale Agreement, Exhibit 131) When a sale could not be
17 consummated because of the *lis pendens* from the First Action, J. PHILLIPS and his counsel
18 turned their attention to defending against the BANK's claims in the First Action. Trial was set
19 for May 13, 2013. After the BANK dismissed the First Action and filed the Complaint in this
20 action, the Court expunged the BANK's *lis pendens*. (Exhibit 358). The Order Granting Motion
21 to Expunge *Lis Pendens* expunged the BANK's *lis pendens* "so that neither the notice nor any
22 information derived from it shall constitute actual or constructive notice of any of the matters
23 contained, claimed, alleged, or contended in it or of any of the matters relating to this action
24 dealing with the affected property, commonly known as 2237 Union Street, San Francisco,
25 California." As a condition of the Order the Court required that J. PHILLIPS that he agrees to
26 notify the BANK, through its counsel, if in the future, during the pendency of this action, he
27 signs an agreement to sell, refinance, or otherwise encumber the Union Street property. J.
28 PHILLIPS signed and filed a Declaration that satisfied the condition of the Order Granting

1 Motion to Expunge *Lis Pendens*. (Exhibit 376) J. PHILLIPS went forward with his sale to the
2 Carneys.

3 J. PHILLIPS, through his attorney Mr. Mankin, gave the notice on September 12, 2013,
4 that J. PHILLIPS had signed papers to sell the Union Street property. (Exhibit 377) This letter
5 satisfied the notice required in the Order Granting Motion to Expunge *Lis Pendens*. The sale to
6 the Carneys closed on September 13, 2013. A Grant Deed of the Union Street property to the
7 Carneys was executed by J. PHILLIPS and D. PHILLIPS. (Exhibit 145) D. PHILLIPS'
8 execution of the Grant Deed was necessary because the 2009 Quit Claim deed from
9 J. PHILLIPS and D. PHILLIPS to J. PHILLIPS was never recorded. The Carneys paid
10 \$2,100,000 to J. PHILLIPS for the Union Street property. No money was paid to the BANK.
11 After costs of sale, J. PHILLIPS received \$2,071,590.89. (Exhibit 144) The net proceeds from
12 the sale of the Union Street property to the Carneys were deposited into J. PHILLIPS' Wells
13 Fargo account on September 13, 2013. (Exhibit 147) D. PHILLIPS did not receive any of the
14 net proceeds from the sale of the Union Street property to the Carneys.

15 Attempted Payments by J. PHILLIPS After the Sale

16 At about the same time that the sale to the Carneys was being consummated,
17 J. PHILLIPS received a solicitation from the BANK to change the date his monthly payment
18 was due, from the 5th of the month to the 15th of each month. The BANK called this new
19 payment plan PayPlan 12. J. PHILLIPS signed up for PayPlan 12. When he received a
20 September 4, 2013 notice of his enrollment he saw that his enrollment was to take effect as of
21 October 15, 2013. (Exhibit 149) He called the number listed on the notice and spoke with a
22 BANK representative. All of these telephone conversations were recorded. (Exhibit 359) The
23 BANK representative stated that she would change the start date for his payments under
24 PayPlan 12 to September 15, 2013. (Exhibit 359, pages 1 – 3) This would insure that the
25 payment due for September 2013 was paid. J. PHILLIPS monitored his Wells Fargo account
26 from which the payment to the BANK was to be withdrawn and saw that the monthly payment
27 was not withdrawn on September 15 2013, as he had been told it would be. He then again called
28 the BANK at the number referenced in the PayPlan 12 notices and told the BANK

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1 representative that he had not seen a debit for the September mortgage and was concerned that
2 the BANK did not have his new Wells Fargo bank account number. J. PHILLIPS told the
3 BANK representative that the account at Wells Fargo he had been using had to be closed due to
4 fraudulent activity and that he had a new account at Wells Fargo that the BANK should use.
5 J. PHILLIPS gave the BANK representative his new account number and routing number at
6 Wells Fargo. In that same conversation he confirmed with the BANK representative that the
7 BANK would have the payment due for September 15, 2013 pulled from his new Wells Fargo
8 account. The BANK representative assured J. PHILLIPS that the BANK would do so.
9 (Exhibit 359, pages 4 – 8)

10 During this same time frame, in late September, 2013, J. PHILLIPS received three
11 notices from the BANK. The first notice, dated September 18, 2013, stated that his request to
12 make a change to the PayPlan 12 service was received and would take effect on
13 October 15, 2013. (Exhibit 151) It stated that the change was switching the Wells Fargo account
14 from which the payments would be made to his newly-opened Wells Fargo account. The second
15 notice, dated September 19, 2013, stated that his payment drafted on September 16, 2013 was
16 returned because his account at Wells Fargo had been closed. (Exhibit 152) The second notice
17 states that he now owes \$5,047.49 for his September 1, 2013 payment, and that this amount
18 includes a return item fee of \$25. The third notice, dated September 30, 2013, states that his
19 PayPlan 12 service has been discontinued. (Exhibit 153) Each of these notices requests that
20 J. PHILLIPS call a specific number if he has questions or concerns.

21 J. PHILLIPS again called the number given in the notices about these payments and the
22 notices he had received. He told the BANK representative that he wanted to make the payment
23 due but should not have to pay the return item fee. He attempted, with the assistance of the
24 BANK representative, to log onto the BANK's website to make a payment during the
25 conversation. They were unable to do so because it was a bank holiday for that department.
26 (Exhibit 359, pages 9 – 13) He was told to call back the next day. J. PHILLIPS did so and was
27 then transferred to the "Escalations Department." He was told he was transferred to that
28 Department because the status of his account shows it is in litigation. He was told by the BANK

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1 representative that she would have to reach out to the BANK's legal department and get
2 clarification on servicing instructions. J. PHILLIPS confirmed that the BANK representative
3 could not speak with him at that time about how he could make the payment that was due.
4 J. PHILLIPS gave the BANK representative his cell phone number and requested a call back.
5 (Exhibit 359, pages 14 – 18) He never received any call back.

6 On October 15, 2013, Peter Mankin, J. PHILLIPS' counsel, wrote the BANK's attorney
7 about the refusal of the BANK to accept payments. (Exhibit 366) In that letter he references
8 that he had informed the BANK's counsel in September that the BANK was refusing to accept
9 monthly payments. Mr. Mankin recounted the conversations between J. PHILLIPS and BANK
10 representatives and J. PHILLIPS' efforts to make the monthly payment due on the 2009 Note.
11 Mr. Mankin requested that the BANK refrain from making any negative reporting to any credit
12 bureau. In early November 2013, J. PHILLIPS received a Statement of the amount due on the
13 2009 Note that was dated October 30, 2013. (Exhibit 154) The amount stated as due included
14 outstanding late charges and fees of \$503.32.

15 On November 15, 2013, J. PHILLIPS sent a letter to the BANK stating the difficulties
16 he was having in making arrangements for the correct monthly payment to be withdrawn from
17 the correct bank account. (Exhibit 155) On November 20, 2013, Mr. Mankin sent a second letter
18 to the BANK's counsel. (Exhibit 367) In that letter he states: "As we have been discussing for
19 several months now, Bank of America is refusing to accept monthly loan payments from
20 Mr. Phillips." He recounts that J. PHILLIPS has contacted the BANK's loan department
21 numerous times to try to remedy the problem but has received no response. Mr. Mankin states
22 that the BANK's counsel had promised to look into the matter. The letter states: "Mr. Phillips
23 has been ready, willing and able to make each monthly payment, but has not been able to do so
24 because Bank of America has refused the payments." On December 9, 2013, the BANK sent a
25 notice stating it had completed its inquiry and that because payments were then delinquent three
26 months, the BANK was cancelling J. PHILLIPS' PayPlan 12 service. At that point,
27 J. PHILLIPS ceased making efforts to pay the monthly payments due on the 2009 Loan.

28 ////

STATEMENT OF DECISION

1 Acceleration of Amounts due under the 2009 Note and Deed of Trust

2 The 2009 Note executed by J. PHILLIPS provides that if he is in default in making
3 monthly payments, the BANK may send a written notice stating that if the overdue amount is
4 not paid by a certain date, the BANK may require J. PHILLIPS to pay the full amount of
5 principal and all accrued interest. (Exhibit 32, § 7(C)) The “certain date” must be at least thirty
6 (30) days after the date on which the notice is mailed to J. PHILLIPS. The BANK did not
7 provide any such notice to J. PHILLIPS.

8 The deed of trust executed by J. PHILLIPS provides that if the Union Street property is
9 sold without the BANK’s consent, the BANK may require immediate payment in full of all
10 amounts due under the 2009 Note. (Exhibit 33, § 18) That same section also provides that if the
11 BANK exercises this option, the BANK shall give J. PHILLIPS notice of acceleration. Section
12 18 of the deed of trust states that the notice shall provide a period of not less than thirty (30)
13 days from the date of the notice within which J. PHILLIPS must pay all sums secured by the
14 deed of trust. The BANK did not provide any such notice to J. PHILLIPS.

15 The BANK contends that the Complaint it filed in this action after it was aware of the
16 sale to the Carneys, the First Amended Complaint filed herein on October 3, 2014, provided J.
17 PHILLIPS with the notice required for acceleration under both the 2009 Note and the deed of
18 trust. The First Amended Complaint herein does not state that J. PHILLIPS is in default for
19 failure to make monthly payments due under the 2009 Note or by reason of his sale of the
20 Union Street property to the Carneys. J. PHILLIPS was not given proper or adequate notice of
21 his rights to cure any defaults under the 2009 Note and deed of trust by the BANK’s allegations
22 in the First, Second or Third Amended Complaint.

23 Plaintiff’s Sale And Repurchase Of The Subject Loan In 2016

24 After the closing of the subject loan in 2009, Plaintiff indorsed the Note in blank.
25 (Exhibit 190 at BANA001340 [copy of original Note in collateral file]; (Exhibit 32 at
26 BANA000221) Blank indorsement of promissory notes is a customary practice and procedure
27 of Plaintiff after originating a loan.

28 ////

1 Plaintiff sold the subject loan, along with other loans, to purchaser LSF9 Mortgage
2 Holdings, LLC ("LSF9") in 2016 pursuant to a Mortgage Loan and HELOC Loan Purchase and
3 Interim Servicing Agreement ("PSA") dated as of March 30, 2016. (Exhibits 191 and 196)

4 LSF9 subsequently gave written notice to Plaintiff of breach of section 3.02(d) of the
5 PSA as to the subject loan and demanded that Plaintiff cure the breach. (Exhibit 192) In
6 response to LFS9's demand, Plaintiff repurchased the subject loan and wired funds to LSF9 to
7 cure the breach. (Exhibits 193, 197)

8 Plaintiff is the current owner of the subject loan made to JOHN PHILLIPS in 2009.
9 (Exhibit 190 at BANA001329) [AS400 Investor Requirements Display]

10 Plaintiff is the current holder with possession of the Note. (Exhibit 190 at
11 BANA001330) [AS400 Document Detail] The original Note is contained in the collateral file
12 for the subject loan. (Exhibit 190 at BANA001335-1340) [copy of original Note in collateral
13 file]) Plaintiff produced the original Note at trial beginning on February 6, 2017.

14 Sums Presently Owed Under The Subject Loan

15 As of December 20, 2016, Plaintiff testified to the sums owed under the subject loan
16 were as follows: principal balance of \$1,120,000.00; interest from August 1, 2013 of
17 \$135,200.92; fees of \$75.00; for a total amount of \$1,255,275.92. (Exhibit 172) Per the Note,
18 interest accrues thereunder at the rate of 6.0% of the overdue payment of principal and interest
19 per diem, thus \$103.56 per day until the sums owed are paid in full.

20 **V. ISSUES TO BE DECIDED**

21 **A. Issue No. 1: Is the BANK the owner of the 2009 Promissory Note?**

22 Contentions of the Parties:

23 The BANK contends that it is the owner of the 2009 Promissory Note. The BANK
24 contends that while it sold the Note to LSF 9 in May 2016, it has proven that it repurchased the
25 2009 Note and now owns all right, title and interest in it. The BANK contends that its
26 possession of the original 2009 Note is also sufficient, in and of itself, to prove ownership of the
27 2009 Note.

28 ////

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1 Defendants claim that the BANK is not the owner of the 2009 Note. Defendants contend
2 that all right, title and interest in the 2009 Note was sold to LSF 9 in May 2016 and that there
3 has been no assignment back to the BANK of ownership of the 2009 Note. Defendants contend
4 that without evidence of a written transfer of ownership back to the BANK the BANK cannot
5 establish that it is the owner of the 2009 Note and entitled to pursue its claims.

6 Ruling: Plaintiff is the holder of the negotiable instrument that is the subject Note—not
7 to mention the only “person entitled to enforce” the Note as a matter of law, and therefore has
8 standing to prosecute the current action. The California Commercial Code governs the
9 enforceability of negotiable instruments. An indorsement made by the holder of an instrument
10 which is not a special indorsement, is a “blank indorsement.” (Comm. Code § 3205(b)) “When
11 indorsed in blank, an instrument becomes payable *to bearer* and may be negotiated by transfer
12 of possession alone until specially indorsed.” (*Id.* (emphasis added)) Thus, a note endorsed “in
13 blank” is “much like a dollar or bill or any other currency.” (*In re Lee* (Bankr. C.D. Cal. 2009)
14 408 B.R. 893, 899 and n. 6) The Official Comments to Section 3205 explicitly state in part that
15 an indorsement in the form of “Pay to the order of” without completing the indorsement by
16 writing the name of the indorsee, as here, specifically constitutes a “blank indorsement and the
17 instrument is payable to bearer.” Plaintiff, as the holder of the instrument (Note), is entitled as a
18 matter of law to enforce it. (*In re Lee, supra*, 408 B.R. at 900, citing Comm. Code § 3301; UCC
19 § 3–301) Moreover, possession of the original note “is required for its enforcement.” (*In re Lee*
20 at 900, n.7 (“The court did not make the original note an exhibit at trial because possession of
21 the original is required for its enforcement. If the note went into the trial exhibits, the owner of
22 the note would not be able to produce it for enforcement purposes.”))

23 **B. Issue No. 2: Did the BANK prove that D. PHILLIPS is liable on the**
24 **BANK’s Common Count – Money Had And Received?**

25 Contentions of the Parties:

26 The BANK contends that it has proven that D. PHILLIPS benefitted from the 2009 Note
27 because the proceeds from that loan paid off a promissory note to Wells Fargo Bank for which
28 both J. PHILLIPS and D. PHILLIPS were obligors. The BANK contends that it should be

1 permitted to amend the claims in its Third Amended Complaint to state that this benefit
2 constitutes a valid Common Count for money had and received. The BANK further contends
3 that it is also pursuing a claim against D. PHILLIPS for constructive trust in the Fourth Cause of
4 Action in the Third Amended Complaint.

5 D. PHILLIPS contends that the Second Cause of Action alleges that he is liable for
6 monies he received from the sale of the Union Street property to the Carneys in 2013 and that
7 there is no evidence that he received any monies from the sale of the Union Street property. D.
8 PHILLIPS contends that the BANK should not be permitted leave to amend its Third Amended
9 Complaint.

10 Ruling: The Court has weighed the evidence and finds, based on a preponderance of the
11 evidence, that D. PHILLIPS did not receive any funds from the sale of the Union Street
12 property so as to satisfy the elements of a Common Count claim for money had and received. A
13 cause of action for money had and received, while available in a great variety of situations,
14 generally “lies wherever one person has received money which belongs to another, and which in
15 equity and good conscience should be paid over to the latter.” *Gutierrez v. Giradi* (2011) 194
16 Cal.App.4th 925, 937. Witkin states that a count for money had and received is available in the
17 following situations: (a) quasi contract – actions to recover money paid under mistake, fraud or
18 coercion where no contractual relationship is involved; (b) express contract void – where the
19 plaintiff paid money pursuant to a contract that is void for illegality, lack of consideration or
20 some other incapacity; (c) express contract voidable or unenforceable – where the money is paid
21 under a contract rescinded by the plaintiff for ordinary mistake, fraud and the inducement or
22 innocent misrepresentation or incapacity; (d) express contract valid – where the plaintiff elects
23 the remedy of restitution after the defendants’ breach or failure of consideration or where the
24 contract has become executed on one side and the plaintiff elects to plead the cause of action on
25 the express contract as a common count. 4 Witkin, *California Procedure* 5th Ed., Pleading,
26 Section 561. Under these circumstances D. PHILLIPS is not liable to the BANK for a Common
27 Count money had and received. D. PHILLIPS did not receive money which belongs to the
28 BANK or which in equity and good conscience should be paid over to the latter. The Court

1 denies the BANK's motion for leave to amend its Second Cause of Action in the Third
2 Amended Complaint as being both too late and prejudicial to D. PHILLIPS. The Court further
3 finds, based on a preponderance of the evidence, that the benefit conferred on D. PHILLIPS
4 from the 2009 Loan is also not sufficient benefit to establish a Common Count claim for money
5 had and received. The court will rule on the claims in the Fourth Cause of Action in the Third
6 Amended Complaint separately. Those ruling are set forth below in Issue No. 9.

7 **C. Issue No. 3: Has the BANK proven that J. PHILLIPS breached his**
8 **contractual obligations to the BANK by not executing all documents**
9 **necessary for the recording of the deed of trust in favor of the BANK?**

10 Contention of the Parties:

11 The BANK contends that J. PHILLIPS was contractually obligated to execute any and
12 all documents necessary to fulfill J. PHILLIPS' covenants to give the BANK a security interest
13 in the Union Street property as its sole owner and to cooperate in correcting any impairment of
14 the BANK's security instrument, so that the BANK's deed of trust could be recorded. The
15 BANK contends that the 2009 Loan transaction is evidenced by an integrated agreement that
16 includes various documents expressing the intent of the parties at the time of formation of the
17 contract. The BANK contends that its deed of trust was not recorded because J. PHILLIPS
18 failed to sign and refused to file a Transfer Tax Affidavit ("TTA") with the City and County of
19 San Francisco ("CCSF") and refused to pay transfer taxes due on the transfer because he simply
20 did not want to pay any more money. The BANK contends that J. PHILLIPS was contractually
21 obligated to execute the TTA because the transfer of full title to the Union Street property to J.
22 PHILLIPS was a predicate of the 2009 Loan and the CCSF required the submission of a TTA
23 and payment of transfer taxes so that the Quit Claim deed, deeding the Union Street property
24 from D. PHILLIPS to J. PHILLIPS, could be recorded. The BANK contends that it had no
25 responsibility for either preparing or filing the TTA. The BANK contends that it was the failure
26 of J. PHILLIPS to accept the consequences of recording the transfer, including the payment of
27 taxes required by the CCSF, that caused the Quit Claim deed to be rejected by the CCSF and not
28 recorded which then led to the deed of trust in favor of the BANK not being recorded because

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1 J. PHILLIPS was the sole signatory on the deed of trust and the title to the Union Street
2 property remained in the joint names of J. PHILLIPS and D. PHILLIPS (because the Quit Claim
3 deed was not recorded). The BANK contends that J. PHILLIPS was contractually obligated to
4 execute any and all documents necessary to correct the impairment of the BANK's security
5 interest (i.e., the failure to record the Quit Claim deed and deed of trust) because of provisions
6 in the August 2009 Residential Loan Application (Exhibit 17), the Real Estate Loan
7 Approval/Commitment (Exhibit 24), the Federal Truth in Lending Disclosure Statement
8 (Exhibit 31), the Errors and Omissions Agreement (Exhibit 36), the Affidavit of Title (Exhibit
9 39), the 2009 Note (Exhibit 32), the deed of trust (Exhibit 33), the Adjustable Rate Rider
10 (Exhibit 35), the Quit Claim deed tendered to escrow (Exhibit 52), the Lender's Closing
11 Instructions (Exhibit 26) and the Settlement Statement (Transaction Without Sellers)
12 (Exhibit 30).

13 The BANK further contends that both parties to the 2009 Loan had a duty to act in good
14 faith throughout the performance of the contract and that each party had a duty to not deprive
15 the other party of the benefits of the contract as contemplated. The BANK contends that the
16 covenant of good faith and fair dealing continues throughout performance of the contract and
17 when J. PHILLIPS took the money and allowed his and D. PHILLIPS' prior debt to be paid off
18 he had an obligation to cooperate and fulfill his obligations under the contract of providing
19 recordable security for the BANK. The BANK further contends that at no time, whether
20 requested by Entitle, NREIS or the BANK itself in its lawsuit filed in the present action, has
21 J. PHILLIPS ever fulfilled his obligation of good faith and fair dealing by cooperating in the
22 correction of documents necessary to accomplish the purpose of the transaction for both parties.

23 J. PHILLIPS contends that he was not contractually obligated to sign the TTA, he signed
24 all documents for the 2009 Loan that the BANK and escrow company requested, and that the
25 deed of trust in favor of the BANK was not recorded because of the actions and conduct of the
26 BANK and its agents. J. PHILLIPS contends that he did not breach any obligations to the
27 BANK, contractual or otherwise, by not signing a TTA. J. PHILLIPS contends that he did not
28 breach any obligations to the BANK, contractual or otherwise, to correct the impairment to the

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1 BANK's security interest and that he never refused to pay transfer taxes that may have been due
2 as a result of the transfer of title from D. PHILLIPS to J. PHILLIPS. J. PHILLIPS contends that
3 he acted in good faith throughout his dealings with the BANK and that nothing he did deprived
4 the BANK of the benefits of the 2009 Loan.

5 Ruling: The Court finds, based on a preponderance of the evidence, the following. The
6 fault for the deed of trust not being recorded was caused by the BANK and the escrow company
7 it selected. The escrow company selected acted as the agent for the BANK. The fault was in part
8 caused by the location of the escrow in Pennsylvania, a location chosen by either the BANK or
9 the escrow company it chose. The location of the escrow led to the proceeds from the 2009
10 Loan being disbursed by the BANK prior to the deed of trust in its favor being recorded or the
11 BANK being made aware that it would not be recorded. The fault for the deed of trust not being
12 recorded was also caused in part by the BANK not providing clear escrow instructions to the
13 escrow company. J. PHILLIPS signed all documents and did everything he was requested to do
14 by the BANK and the escrow company for the closing of the 2009 Loan and his actions did not
15 result in the deed of trust not being recorded. "When the parties to a transaction select a third
16 person to perform the escrow functions, the third person becomes the agent of each of the
17 parties who submit instructions, documents, and the funds to the escrow...The agency created is
18 limited to the obligation of the escrow holder to carry out the instructions of each of the parties
19 to the escrow...the escrow holder is a dual agent and owes duties to each party to the escrow." 2
20 Miller & Starr *California Real Estate* 4th Ed, Escrows § 6:11. "The parties are only entitled to
21 the performance that is provided in their instructions and the escrow holder is only obligated to
22 perform in accordance with instructions from the parties to the escrow." 2 Miller & Starr
23 *California Real Estate* 4th Ed, Escrows § 6:12. The escrow company was selected by the
24 BANK. There is no evidence that J. PHILLIPS submitted any escrow instructions to the escrow
25 company. It appears that the only escrow instructions submitted to the escrow were the
26 incomplete escrow instructions that are Exhibit 26. Under these relatively unique circumstances,
27 the escrow company was acting as an agent for the BANK and its disbursement of proceeds
28 from the escrow prior to confirming the deed of trust was recorded was caused by the escrow

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1 company, acting as the BANK's agent, and by the fault of the BANK in selecting an out of state
2 escrow company and by not providing clear escrow instructions to the escrow company.

3 The August 2009 Residential Loan Application states that J. PHILLIPS is representing
4 that the loan requested pursuant to the Application will be secured by a deed of trust. At the
5 time of the execution of the Application, J. PHILLIPS believed that the 2009 Note would be
6 secured by a deed of trust. Under the circumstances of this situation, J. PHILLIPS' belief was
7 reasonable. J. PHILLIPS' representations in the August 2009 Residential Loan Application and
8 the terms of the August 2009 Residential Loan Application, under these relatively unique
9 circumstances, do not create a contractual obligation to execute any and all documents
10 necessary so that the BANK's deed of trust could be recorded.

11 The Real Estate Loan Approval/Commitment (Exhibit 24) is not a contractual obligation
12 by J. PHILLIPS. The Loan Approval/Approval is a notice to J. PHILLIPS informing him that
13 his loan application has been approved with certain stated conditions. Under the heading "Items
14 Bank of America will obtain to support your loan request" is the following: "verify the subject
15 property meets the Bank's requirements for title." This is a condition for the BANK to verify,
16 not a condition that J. PHILLIPS must satisfy. Under these relatively unique circumstances, the
17 terms of the Loan Approval/Commitment do not create a contractual obligation that obligated J.
18 PHILLIPS to execute any and all documents necessary so that the BANK's deed of trust could
19 be recorded.

20 The Federal Truth in Lending Disclosure Statement (Exhibit 31) states that J. PHILLIPS
21 is giving a security interest in the Union Street property. It was J. PHILLIPS intent, at the time
22 of the 2009 Note transaction, to give a security interest in the Union Street property to the
23 BANK as security for the 2009 Note. Under these relatively unique circumstances, the terms of
24 the Federal Truth in Lending Disclosure Statement do not create a contractual obligation that
25 obligated J. PHILLIPS to execute any and all documents necessary so that the BANK's deed of
26 trust could be recorded.

27 The Affidavit of Title (Exhibit 39) was executed by J. PHILLIPS "to the best of [his]
28 knowledge, information and belief." In the Affidavit of Title J. PHILLIPS states that he is the

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1 sole owner of the Union Street property and that the mortgage that is being given to the BANK
2 is to secure a loan of \$1,120,000. At the time J. PHILLIPS executed the Affidavit of Title he
3 reasonably believed that he was the sole owner of the Union Street property and that he
4 intended for the 2009 Note to be secured by a deed of trust on the Union Street property.
5 J. PHILLIPS reasonably believed that he was the sole owner of the Union Street property
6 because he and DEAN PHILLIPS were signing a Quit Claim deed that would result in him
7 being the sole title holder of record for the Union Street property. J. PHILLIPS also reasonably
8 believed that he was the sole owner of the Union Street property because he and D. PHILLIPS
9 had already agreed to swap J. PHILLIPS' interest in the Washington D.C. property for
10 D. PHILLIPS' interest in the Union Street property. J. PHILLIPS was also reasonably relying
11 upon the escrow agent to record the Quit Claim deed he and D. PHILLIPS were signing.
12 J. PHILLIPS reasonably believed that he was giving a security interest to the BANK because of
13 all the documents he had signed at the BANK's request. Under these relatively unique
14 circumstances, the terms of the Affidavit of Title do not create a contractual obligation that
15 obligated J. PHILLIPS to execute any and all documents necessary so that the BANK's deed of
16 trust could be recorded.

17 The 2009 Note (Exhibit 32) states that in addition to the protections given to the BANK
18 under the Note, a deed of trust protects the BANK from possible losses. The 2009 Note states
19 that the deed of trust describes how and under what circumstances J. PHILLIPS may be
20 required to make immediate payment. The 2009 Note then describes some of those conditions.
21 One of the conditions described is if the property that is security for the 2009 Note is sold
22 without the BANK's consent. While the conditions in the deed of trust that could lead the
23 BANK to require immediate payment are described, they are not incorporated into the terms and
24 obligations of the 2009 Note. Under these relatively unique circumstances, the terms of the
25 2009 Note do not create a contractual obligation that obligated J. PHILLIPS to execute any and
26 all documents necessary so that the BANK's deed of trust could be recorded.

27 The deed of trust executed by J. PHILLIPS (Exhibit 33) states that it is security for the
28 repayment of the 2009 Note. The deed of trust states that the borrower (J. PHILLIPS)

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1 “covenants” that he is “lawfully seised of the estate hereby conveyed” and that he “warrants and
2 will defend generally the title to the Property against all claims and demands...” At the time of
3 the execution of the deed of trust, J. PHILLIPS reasonably believed that he was the sole owner
4 of the Union Street property since he and D. PHILLIPS had executed a Quit Claim deed that
5 transferred all record title to J. PHILLIPS. The execution and delivery of the Quit Claim deed
6 did transfer title of the Union Street property from D. PHILLIPS to J. PHILLIPS. (Civil Code §
7 1217) The “warranty” of title in the deed of trust obligated J. PHILLIPS to defend his title to the
8 Union Street property against all claims and demands. Under these relatively unique
9 circumstances, the terms of the deed of trust and the warranties in the deed of trust do not create
10 a contractual obligation that obligated J. PHILLIPS to execute any and all documents necessary
11 so that the BANK’s deed of trust could be recorded.

12 The Adjustable Rate Rider executed by J. PHILLIPS (Exhibit 35) states that it amends
13 and supplements the deed of trust given to the BANK to secure payment of the 2009 Note that
14 is “covering” the Union Street property. Under these relatively unique circumstances, the terms
15 of the Adjustable Rate Rider do not create a contractual obligation that obligated J. PHILLIPS
16 to execute any and all documents necessary so that the BANK’s deed of trust could be recorded.

17 The Quit Claim executed by J. PHILLIPS and D. PHILLIPS (Exhibit 52) provides that
18 title to the Union Street property is transferred from the two of them to J. PHILLIPS. The terms
19 of the Quit Claim deed do not create a contractual obligation that obligated J. PHILLIPS to
20 execute any and all documents necessary so that the BANK’s deed of trust could be recorded.

21 The Lender’s Closing Instructions (Exhibit 26) were prepared and sent to Entitle for the
22 closing of the 2009 Loan. The evidence does not establish that J. PHILLIPS signed or approved
23 the Lender’s Closing Instructions. The Lender’s Closing Instructions are incomplete as it states
24 that Conditions Addendum and a Document Checklist are attached as addenda and no such
25 documents are attached. The terms of the Lender’s Closing Instructions do not create a
26 contractual obligation that obligated J. PHILLIPS to execute any and all documents necessary
27 so that the BANK’s deed of trust could be recorded.

28 ////

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1 The Settlement Statement (Transaction Without Sellers) (Exhibit 30) contains J.
2 PHILLIPS acknowledgement and agreement to disbursements and charges relating to the
3 escrow for the 2009 loan transaction but is not incorporated into any parts of the integrated
4 contract that constitutes the 2009 loan transaction. The terms of the Settlement Statement
5 (Transaction Without Sellers) do not create a contractual obligation that obligated J. PHILLIPS
6 to execute any and all documents necessary so that the BANK's deed of trust could be recorded.

7 After the closing, when contacted by NREIS, J. PHILLIPS had no contractual or other
8 obligation to act based on the demands by NREIS because its representative never provided the
9 requested authorization that it was acting on behalf of the BANK. When contacted by attorney
10 Smolar and when sued in the First Action J. PHILLIPS had no contractual or other obligation to
11 act based on demands that he had signed both a Loan Agreement and a Document Correction
12 Agreement. J. PHILLIPS had not signed either a Loan Agreement or a Document Correction
13 Agreement. The Error and Omissions Agreement he did sign as part of the closing of the 2009
14 Loan transaction was only for "clerical errors" and to correct errors to aid the BANK in being
15 able to sell the loan, neither of which obligated J. PHILLIPS to sign the TTA or otherwise solve
16 the problem of the deed of trust not being recorded. The Errors and Omissions Agreement was
17 not designed or intended to obligate J. PHILLIPS to sign the TTA or otherwise solve the
18 problem of the deed of trust not being recorded. Under these relatively unique circumstances,
19 the terms of the Errors and Omissions Agreement do not create a contractual obligation that
20 obligated J. PHILLIPS to execute any and all documents necessary so that the BANK's deed of
21 trust could be recorded.

22 J. PHILLIPS did not breach any contractual or other obligation he had to the BANK by
23 not executing the TTA or otherwise solving the problem of the deed of trust not being recorded.
24 J. PHILLIPS did not ever refuse to pay the transfer taxes that may have been due as a result of
25 the transfer of title to the Union Street property from D. PHILLIPS to J. PHILLIPS.
26 J. PHILLIPS did not do anything that deprived the BANK of the benefits of the 2009 Loan.
27 Under these relatively unique circumstances, the terms of the August Residential Loan
28 Application, Real Estate Loan Approval/Commitment, Federal Trust in Lending Disclosure

1 Statement, Errors and Omissions Agreement, Affidavit of Title, 2009 Note, the deed of trust
2 executed by J. PHILLIPS, the Adjustable Rate Rider, the Quit Claim deed, the Lender's Closing
3 Instructions, and the Settlement Statement (Transaction Without Seller) did not create an
4 obligation requiring J. PHILLIPS to cooperate with the BANK in executing any and all
5 documents necessary so that the BANK's deed of trust could be recorded.

6 The BANK contends that the 2009 Note, deed of trust and other documents executed by
7 J. PHILLIPS in connection with the 2009 Loan are one integrated contract. The BANK
8 contends that the 2009 loan transaction is evidenced by an integrated agreement that consists of
9 the following: (1) the August 2009 Residential Loan Application (Exhibit 17), (2) the Real
10 Estate Loan Approval/Commitment (Exhibit 24), (3) the Federal Truth in Lending Disclosure
11 (Exhibit 31), (4) the Errors and Omissions Agreement (Exhibit 36), (5) the Affidavit of Title
12 (Exhibit 39), (6) the 2009 Note (Exhibit 32), (7) the deed of trust (Exhibit 33), (8) the
13 Adjustable Rate Rider (Exhibit 35), (9) the Quit Claim deed (Exhibit 52), (10) the Lender's
14 Closing Instructions (Exhibit 26) and (11) the Settlement Statement (Transactions Without
15 Sellers) (Exhibit 30). J. PHILLIPS contends that the integrated agreement for the 2009 loan
16 transaction consists of the 2009 Note (Exhibit 32), the deed of trust (Exhibit 33), the Adjustable
17 Rate Rider (Exhibit 35) and the Errors and Omissions Agreement (Exhibit 36).

18 Ruling: The Court finds, based on a preponderance of the evidence, the following: The
19 2009 loan transaction between J. PHILLIPS and the BANK and the terms of the agreement
20 between the parties for the 2009 loan transaction are set forth in the 2009 Note (Exhibit 32), the
21 deed of trust (Exhibit 33), the Adjustable Rate Rider (Exhibit 35) and the Errors and Omissions
22 Agreement (Exhibit 36). The Residential Loan Application (Exhibit 17) and Affidavit of Title
23 (Exhibit 39) contain representations by J. PHILLIPS regarding the matters set forth therein but
24 neither is incorporated into any parts of the integrated contract that constitutes the 2009 loan
25 transaction. The Federal Truth in Lending Disclosure (Exhibit 31) is a disclosure by the BANK
26 to J. PHILLIPS of the terms of the 2009 loan transaction that is required by federal law, but it is
27 not incorporated into any parts of the integrated contract that constitutes the 2009 loan
28 transaction. The Quit Claim deed (Exhibit 52), while a part of the closing documents necessary

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1 to place record title in the name of J. PHILLIPS, is not incorporated into any parts of the
2 integrated contract that constitutes the 2009 loan transaction. The Lender's Closing Instructions
3 (Exhibit 26) are incomplete instructions by the BANK to the escrow company that conducted
4 the escrow and were neither incorporated into any parts of the integrated contract that
5 constitutes the 2009 loan transaction nor is there evidence that the terms contained therein were
6 agreed to by J. PHILLIPS. The Settlement Statement (Transaction Without Sellers) (Exhibit 30)
7 contains J. PHILLIPS acknowledgement and agreement to disbursements and charges relating
8 to the escrow for the 2009 loan transaction but is not incorporated into any parts of the
9 integrated contract that constitutes the 2009 loan transaction. As set forth above and below, J.
10 PHILLIPS did not materially breach any of his obligations in the documents that constitute the
11 integrated contract for the 2009 loan transaction. Also as set forth above and below, J.
12 PHILLIPS did not materially breach any of his representations to the BANK in either the
13 Residential Loan Application or the Affidavit of Title. Any breach by J. PHILLIPS of his
14 contractual obligations or representations was immaterial.

15 A contract must be interpreted so as to give effect to the mutual intention of the parties
16 as it existed at the time of contracting, so far as the same is ascertainable and lawful. Civil Code
17 § 1636. The language of a contract is to govern its interpretation if the language is clear and
18 explicit and does not involve an absurdity. Civil Code § 1638. Several contracts relating to the
19 same matters, between the same parties, and made as parts of substantially one transaction, are
20 to be taken together. Civil Code § 1642. The mutual intent of the parties, the language of the
21 documents and their relationship to the 2009 loan transaction establish that the terms of the
22 agreement between the parties for the 2009 loan transaction are set forth in the 2009 Note
23 (Exhibit 32), the deed of trust (Exhibit 33), the Adjustable Rate Rider (Exhibit 35) and the
24 Errors and Omissions Agreement (Exhibit 36). In cases of uncertainty, the language of a
25 contract should be interpreted most strongly against the party who caused the uncertainty to
26 exist. Civil Code § 1654. Under these relatively unique circumstances none of the documents
27 that constitute the agreement for the 2009 loan transaction, all of which were drafted by the
28 BANK, can be interpreted to obligate J. PHILLIPS to execute any and all documents necessary

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1 so that the BANK's deed of trust could be recorded. This finding is expressly applicable to the
2 obligations of J. PHILLIPS set forth in the Errors and Omissions Agreement (Exhibit 36) as it is
3 ambiguous as to the type of "clerical errors" that he is obligated to "adjust" and whether or not
4 his obligations arise in any situations other than a circumstance where the BANK is seeking to
5 "sell, convey, seek guaranty, or market the loan..." Under these relatively unique
6 circumstances, the ambiguous terms of the Errors and Omissions Agreement do not obligate J.
7 PHILLIPS to execute any and all documents necessary so that the BANK's deed of trust could
8 be recorded.

9 The Court further finds, based on a preponderance of the evidence, that under these
10 relatively unique circumstances J. PHILLIPS acted in good faith throughout his dealings with
11 the BANK and did not breach any covenant of good faith and fair dealing owed to the BANK.

12 **D. Issue No. 4: Has the BANK proven that J. PHILLIPS breached his**
13 **contractual obligations to the BANK when monthly payments were stopped**
14 **in September 2013?**

15 Contentions of the Parties:

16 The BANK contends that J. PHILLIPS is in breach of his obligations under the 2009
17 Note because he stopped making payments in September 2013. The BANK contends that it may
18 accelerate the full amount due under the 2009 Note because of that non-payment. The BANK
19 also contends that it gave proper notice of the acceleration of the amount owing under the 2009
20 Note when it filed the Complaint and the Amendments to the Complaint in this action.

21 J. PHILLIPS contends that he fully and properly tendered monthly payments to the
22 BANK in September 2013 and thereafter and that the BANK refused those tenders and he is
23 thereby legally excused from being obligated for all monthly payments thereafter. J. PHILLIPS
24 also contends that the BANK must provide him with notice that the BANK has elected to
25 accelerate the full amount due under the 2009 Note before that acceleration is effective and that
26 the BANK failed to properly do so.

27 Ruling: The Court finds, based on a preponderance of the evidence, the following.
28 J. PHILLIPS made all monthly interest-only payments on the 2009 Note from its inception

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1 through August 2013 on a timely basis. The monthly payments were made through automatic
2 electronic transfers from his account at Wells Fargo Bank. In August 2013 he received a
3 solicitation from the BANK for a payment program the BANK called "PayPlan 12." He agreed
4 to have his payments made through the PayPlan 12 program, which would result in his monthly
5 payments then being due on the 15th of each month. When J. PHILLIPS received notice that his
6 payments under PayPlan 12 program would not start until October 15, 2013 he called the
7 BANK, at the number stated in the notices he had received regarding PayPlan 12 program, and
8 was assured that the BANK would start his payments under PayPlan 12 program on
9 September 15, 2013. When J. PHILLIPS had to close the Wells Fargo account he had been
10 using due to fraudulent activity on that account and open a new Wells Fargo account he
11 informed the BANK of that change and was again assured that payments under PayPlan 12
12 program would be made beginning with the September 15, 2013 payment and thereafter. When
13 the BANK did not use the Wells Fargo account information provided and did not comply with
14 its assurances that payments under the PayPlan 12 program would commence
15 September 15, 2013, J. PHILLIPS followed up with more telephone calls to the BANK and with
16 a letter documenting the assurances he had been given. J. PHILLIPS' counsel also wrote to the
17 BANK documenting the assurances that had been given to J. PHILLIPS. Both J. PHILLIPS and
18 his counsel stated that J. PHILLIPS was ready, willing and able to make all monthly payments
19 to the BANK. The BANK breached the assurances of its representatives that the PayPlan 12
20 program would be set up so that payments could be made under it beginning
21 September 15, 2013 and its assurances that the failure to use the correct Wells Fargo account for
22 the payments would be cured by the BANK so that payments could be made on a timely basis
23 through that program. J. PHILLIPS has proven that he was ready, willing and able to make all
24 monthly payments to the BANK, did properly tender those payments to the BANK beginning in
25 September 2013 and continuing through December 2013, and that further tendering of payments
26 thereafter would have been fruitless and would not have been accepted by the BANK. An
27 obligation is extinguished by an offer of performance and with an intent to extinguish the
28 obligation. Civil Code § 1485. An offer of performance must be made to the creditor and at the

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1 time fixed for performance. Civil Code §§ 1488, 1490. An offer of performance must be made
2 in good faith and be unconditional. Civil Code §§ 1493, 1494. The person tendering
3 performance must be able and willing to perform according to the offer. Civil Code § 1495. “A
4 tender must be of full performance, at a proper time and place, made by the debtor or by some
5 person on his or her behalf and with the debtor’s consent, to the creditor or some person
6 authorized to receive or collect what is due, at a place appointed by the creditor or a place where
7 the person authorized can be found.” 1 Witkin, *Summary of California Law* 10th Ed., Contracts
8 § 771. Compliance with the following requirements is essential to a valid tender: (1) the tender
9 must be timely; (2) the tender must be unconditional; (3) the tender must be in good faith; and
10 (4) the party must be able to fulfill the offer of tender. 1 Witkin, *Summary of California Law*
11 10th Ed., Contracts § 771. See also, 1 Miller & Starr, *California Real Estate* 4th Ed., Contract
12 Law Applicable to Real Estate Transactions §1:109. The actions of J. PHILLIPS described
13 above meet all requirements of a proper tender in that he unconditionally offered to make his
14 monthly payments on the 2009 Note, he did so within the time payments were due, his tender of
15 payment was made in good faith, and he was fully able to make the payments that were
16 tendered. The Court further finds that as a result of the tender by J. PHILLIPS and the BANK’s
17 refusal of that tender J. PHILLIPS is legally excused for all monthly interest-only payments
18 from September 15, 2013 through entry of judgment in this case. An offer of payment or
19 performance, duly made, stops the running of interest on the obligation and has the same effect
20 as if the payment was made. Civil Code § 1504. “A proper tender stops the running of interest
21 on the debt...” 1 Miller & Starr, *California Real Estate* 4th Ed., Contract Law Applicable to
22 Real Estate Transactions §1:109. See also, 1 Witkin, *Summary of California Law* 10th Ed.,
23 Contracts, § 770. The Court finds that the principal balance owing on the note as of September
24 15, 2013 to be \$1,120,000.

25 The BANK contends that J. PHILLIPS was advised to make delinquent payments by
26 mail, phone or the web in order to reinstate his PayPlan 12 program. The BANK also contends
27 that the BANK’s letters to J. PHILLIPS beginning on September 19, 2013 (Exhibits 152, 153,
28 154, 368, and 369) constitute a proper objection under Civil Code § 1501. The BANK also

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1 contends that J. PHILLIPS was required to immediately deposit the amount owed to extinguish
2 the obligation with a bank or savings and loan association as set forth in Civil Code § 1500 in
3 order to perform under the parties' contract. The BANK contends that mere offers to "tender"
4 by J. PHILLIPS could not and did not discharge his obligation to pay money to the BANK, as a
5 matter of law, and that by failing to make payments despite repeated requests J. PHILLIPS
6 breached the parties' contract. The BANK contends that J. PHILLIPS' tender was legally
7 insufficient because they failed to pay all amounts then due because he refused to pay the late
8 fees due for the monthly payments. The BANK also contends that J. PHILLIPS' tender of
9 monthly payments through the BANK's discontinued PayPlan 12 program was invalid as a
10 matter of law.

11 J. PHILIPS contends that he spoke with several different BANK representations, after
12 having called the number given to him in the BANK correspondence, and was assured that the
13 BANK would fix and reinstitute his PayPlan 12 payment program. J. PHILLIPS also contends
14 that the BANK's correspondence to him does not constitute a proper objection under Civil Code
15 § 1501 and that he was not required to deposit the amount being tendered with a bank or savings
16 and loan association as set forth in Civil Code § 1500 for his tender to be proper. The Court
17 finds, based on a preponderance of the evidence, the following. When he received notice that
18 his payments under the PayPlan 12 program were not made, J. PHILLIPS called the BANK and
19 was assured that the BANK would fix and reinstitute his PayPlan 12 payment program. Under
20 these circumstances, J. PHILLIPS was not required to send payment in another form to the
21 BANK. There is also no evidence that the BANK would have accepted payments by mail,
22 phone or the web that did not include late charges and the imposition of late charges, under
23 these circumstances, would not have been proper. Civil Code § 1501 provides that all objections
24 to the mode of an offer of performance, which the creditor has an opportunity to state at the time
25 to the person making the offer, and which could then be obviated by him, are waived by the
26 creditor, if not then stated. Under these circumstances, the letters the BANK sent to J.
27 PHILLIPS (including Exhibits 152, 153, 154, 368, and 369) were not proper objections to the
28 tender by J. PHILLIPS that result in J. PHILLIPS being obligated to make payments in any

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1 manner other than he had been, i.e., electronically through electronic payment programs set up
2 by the BANK. The tender by J. PHILLIPS of his monthly interest-only payments was proper
3 and effective even though he did not deposit the amount being tendered with a bank or savings
4 and loan association. The BANK contends that, for there to be a proper tender, J. PHILLIPS
5 was required to deposit the amount owed to extinguish the obligation, citing Civil Code § 1500
6 and *Gaffney v. Downey Savings & Loan Assn.* (1988) 200 Cal.App.3d 1154. Civil Code § 1500
7 states that an obligation is extinguished by a due offer of payment if the amount is immediately
8 deposited in the name of the creditor with some bank or savings and loan association. "This
9 section [Civil Code § 1500] states a special rule where money is due, but it is not a rule of
10 tender, it is rather a rule of complete performance. It is still possible to tender money called for
11 under a contract without depositing it in the bank, and this tender will have the usual effect of
12 placing the other party in default, discharging any lien or secondary liability, and stopping the
13 running of interest...In such a case, however, the ultimate obligation to pay the debt will still
14 remain. In order to completely extinguish that obligation, it is necessary to deposit the money in
15 a bank in accordance with the provisions of Civil Code § 1500." 1 Witkin, Summary of
16 California Law 10th Ed, Contracts § 775. See also, *Hunt v. Mahoney* (1948) 82 Cal.App.2d 540,
17 187 P.2d 43. "'Tender' is an offer of performance, and the effect of such an offer is governed by
18 statutory provisions, both in the Civil Code as to obligations generally and in the Uniform
19 Commercial Code as to negotiable instruments specifically." 10 Cal.Jur.3d Bills and Notes §
20 267. California Commercial Code § 3603(b) provides as follows: "If tender of payment of an
21 obligation to pay an instrument is made to a person entitled to enforce the instrument and the
22 tender is refused, there is discharge, **to the extent of amount of the tender**, of the obligation of
23 an indorser or accommodation party having a right of recourse with respect to the obligation to
24 which the tender relates." (Emphasis added) Commercial Code § 3603(c) provides as follows:
25 "If tender of payment of an amount due on an instrument is made to a person entitled to enforce
26 the instrument, the obligation of the obligor to pay interest after the due date on the amount
27 tendered is discharged." J. PHILLIPS' tender of monthly payments for the 2009 Note was
28 proper and effective and he was not required to deposit those payments in a bank or savings and

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1 loan association for the tender to be effective. The tender of monthly payments for the 2009
2 Note did not extinguish the principal amount owed on the 2009 Note. J. PHILLIPS was not
3 required to deposit the amount owed with a bank in compliance with Civil Code § 1500 for his
4 tender to result in the interest owed on the 2009 Note to be extinguished. *Gaffney, supra*, is
5 distinguishable in part because, in that case, the borrower contended that his conditional
6 payments of past due monthly obligations extinguished the entire debt, not just the amounts
7 tendered or interest accruing on the obligation. Compliance with Civil Code § 1500 is not
8 necessary to extinguish, as here, the accrual of interest after monthly payments were tendered
9 and rejected.

10 Section 1500 of the Civil Code provides: "An obligation for the
11 payment of money is extinguished by a due offer of payment, if the
12 amount is immediately deposited in the name of the creditor, with
13 some bank or savings and loan association within this state, of
14 good repute, and notice thereof is given to the creditor." The mere
15 fact that such a deposit is made does not extinguish the obligation
16 if the requirements for offer and notice are not satisfied. The
17 deposit must be an unconditional deposit to the credit of the owner
18 or holder of the obligation to satisfy § 1500, and the money
19 deposited under § 1500 immediately becomes the property of the
20 person to whose credit it is placed. A proper deposit extinguishes
21 the obligation and terminates the running of interest because a
22 deposit that is in compliance with § 1500 constitutes actual
23 performance of the obligation, not a mere tender of performance.
24 **As an alternative to the procedure in § 1500, a second form of
25 offer of payment will also stop interest but will not extinguish
26 the underlying obligation.** Section 1504 of the Civil Code
27 provides: "An offer of payment or other performance, duly made,
28 though the title to the thing offered be not transferred to the
creditor, stops the running of interest on the obligation, and has the
same effect upon all its incidents as a performance thereof." A
**tender of payment that will stop interest running but will not
affect the obligation need not be kept good by a deposit of
money in a bank in the name of the creditor.** 3 Cal.Affirmative
Def. § 69:4. (Emphasis added)

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1 See also, *Rose v. Hecht* (1949) 94 Cal.App.2d 662, 666 (“While tenders of monthly
2 rentals by personal checks without depositing in a bank the amount thereof to the lessor’s credit
3 does not extinguish the obligation, such tenders are sufficient to stop the running of interest.”)

4 The Court further finds, based on a preponderance of the evidence, the following. J.
5 PHILLIPS efforts to make monthly payments through the BANK’s offered PayPlan 12 program
6 were proper tenders of the monthly amounts due on the 2009 Loan. No late fees were owed on
7 the monthly payments tendered by J. PHILLIPS because the payments were tendered timely and
8 any failure to accept or credit those payments was the fault of the BANK in not doing what its
9 representatives told J. PHILLIPS they would do when he called the BANK about the payments.
10 A tender must be made at “at a place appointed by the creditor or a place the person authorized
11 can be found.” 1 Witkin, *Summary of California Law*, 10th Ed., Contracts § 771. “If a creditor,
12 or any one of two or more joint creditors, at any time directs the debtor to perform his
13 obligation in a particular manner, the obligation is extinguished by performance in that manner,
14 even though the creditor does not receive the benefit of such performance.” Civil Code § 1476.
15 J. PHILLIPS tender of monthly payments through the PayPlan 12 program was proper under the
16 circumstances and in light of both the letters he received and what he was told by BANK
17 representatives when he called about the payments. Under these circumstances, J. PHILLIPS
18 was not obligated to tender payments to the BANK in any other way (such as by separate check,
19 money order or cashier’s check) for his tender to be effective.

20 The Court further finds, based on a preponderance of the evidence, the following. The
21 2009 Note provides in section 7(C) that if J. PHILLIPS is in default, the BANK may send him a
22 written notice telling him that if he does not pay the overdue amount by a certain date, the
23 BANK may require him to pay immediately the full amount of principal. The written notice
24 must give J. PHILLIPS at least 30 days to pay the overdue amount before the full amount due
25 under the 2009 Note is accelerated. “Absent a specific provision in the loan documents, the
26 lender has no right to accelerate the payment of the loan prior to its maturity date.” 5 Miller &
27 Starr *California Real Estate* 4th Ed. Deeds of Trust and Mortgages § 13:137. “The creditor’s
28 right to accelerate the due date of the debt is a valuable right and privilege but for either type of

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1 acceleration clause it must be found in the language of the note and security instrument; it is a
2 contractual provision and subject to the terms of the contract between the parties.” 5 Miller &
3 Starr *California Real Estate* 4th Ed. Deeds of Trust and Mortgages §13:130. The terms of the
4 2009 Note are clear as to the BANK’s right to accelerate if a monthly payment is not made: “If I
5 am in default, the Note Holder may send me a written notice telling me that if I do not pay the
6 overdue amount by a certain date, the Note Holder may require me to pay immediately the full
7 amount of Principal which has not been paid and all the interest that I owe on that amount. That
8 date must be at least 30 days after the date on which the notice is mailed to me or delivered by
9 other means.” (2009 Note, Exhibit 32, §7(C)) Both the language and intent of this provision in
10 the 2009 Note is clear and binding on the BANK. Civil Code §§ 1636, 1638. The BANK did not
11 provide this required notice to J. PHILLIPS and therefore there was no acceleration of the
12 amount due under the 2009 Note. The BANK contends that notice of acceleration was alleged
13 in the Verified First Amended Complaint filed October 3, 2014, including without limitation in
14 its Twelfth Cause of Action for Judicial Foreclosure. In that cause of action the BANK alleges
15 that J. PHILLIPS is currently in default under the 2009 Note and that the BANK is entitled to
16 judicially foreclose under the deed of trust. (Verified First Amended Complaint, ¶¶ 69, 70) The
17 allegations of the Verified First Amended Complaint do not satisfy the notice required by
18 section 7(C) of the 2009 Note. Most expressly, the allegations of the Verified First Amended
19 Complaint do not provide, as required by section 7(C), that J. PHILLIPS may prevent the
20 acceleration of the full amount owing under the 2009 Note by paying any overdue amount
21 within thirty (30) days. The BANK also contends that notice of acceleration was alleged in the
22 Third Amended Complaint filed herein. The allegations of the Third Amended Complaint also
23 do not satisfy the notice required by section 7(C) of the 2009 Note. The allegations in the Third
24 Amended Complaint also do not provide, as required by section 7(C), that J. PHILLIPS may
25 prevent the acceleration of the full amount owing under the 2009 Note by paying any overdue
26 amount within thirty (30) days. The filing of the Complaint and the Amended Complaints in this
27 action do not constitute legally sufficient notice required for acceleration of the amount due
28 under the 2009 Note. The filing of the Complaint and the Amended Complaints were not proper

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1 notice because it was not notice given in the manner required by the provisions of the 2009 Note
2 and did not fairly or clearly put J. PHILLIPS on notice of the BANK's election to accelerate
3 payment in full of all sums due under the 2009 Note. It would be both inequitable and
4 unreasonable to permit the BANK to utilize the allegations in the Third Amended Complaint,
5 filed over two and one-half years from the filing of the Complaint, to give notice of acceleration
6 of the sums due under the 2009 Note. That delay eviscerates the purpose of the provisions in the
7 2009 Note allowing J. PHILLIPS to prevent the acceleration by paying all sums due under the
8 2009 Note within thirty (30) days when the parties had been engaged in this litigation for over
9 two and one-half years. The BANK is bound to follow those provisions since it was the author
10 of the 2009 Note and the notice requirements are clear. The filing of the Complaint and the
11 Amended Complaints were also not proper notice because the Complaint and the Amended
12 Complaints did not provide J. PHILLIPS with thirty (30) days to pay the alleged overdue
13 amount before the full amount due under the 2009 Note is accelerated.

14 **E. Issue No. 5: Has the BANK proven that J. PHILLIPS breached his**
15 **contractual obligations to repay the BANK when the Union Street property**
16 **was sold to the Carneys?**

17 Contentions of the Parties:

18 The BANK contends that J. PHILLIPS is in breach of his obligations under the 2009
19 Note and deed of trust because he failed to pay the BANK the amount owing under the 2009
20 Note when he sold the Union Street property to the Carneys in 2013. The BANK contends that
21 because it did not consent to the sale of the Union Street property to the Carneys the amount due
22 under the 2009 Note was accelerated when the property was sold. The BANK also contends that
23 notice of the acceleration of the amount due under the 2009 Note was properly given when it
24 filed the Complaint and the Amendments to the Complaint in this action. The BANK also
25 contends that it never received notice of the sale to the Carneys until a day after September 12,
26 2013, so it was never given an opportunity to consent and that because it was not given notice of
27 the sale, "the acceleration was triggered." The BANK also contends that because its deed of
28 trust was never recorded, a Notice of Default, being dependent on a recorded security

1 instrument, could not be recorded announcing a default under the deed of trust. The BANK also
2 contends that it would have been an idle act for it to give notice of its intent to accelerate the
3 2009 Note under the deed of trust after J. PHILLIPS had sold the Union Street property.

4 J. PHILLIPS contends that he is not in breach of his obligations under the 2009 Note and
5 deed of trust because the BANK did not provide him with proper notice under the provisions of
6 the 2009 Note or the deed of trust that the BANK was electing to accelerate the amount due
7 under the 2009 Note because of the sale of the Union Street property to the Carneys.
8 J. PHILLIPS also contends that he did not breach the terms of the deed of trust by selling the
9 Union Street property to the Carneys because the sale was made in compliance with the Court's
10 Order Granting Motion to Expunge *Lis Pendens*. (Exhibit 358)

11 Ruling: The Court finds, based on a preponderance of the evidence, as follows. The
12 2009 Note does not contain an acceleration clause entitling the BANK to accelerate the amount
13 due under the 2009 Note if the Union Street property is sold without its consent. The 2009 Note
14 does reference, but does not incorporate, the terms of the deed of trust that relate to the possible
15 acceleration of the amounts due under the 2009 Note if the Union Street property is sold without
16 the BANK's consent. The BANK therefore has not proven that J. PHILLIPS breached the terms
17 of the 2009 Note by the sale of the Union Street property without the consent of the BANK.

18 The Court further finds, based on a preponderance of the evidence, as follows. The deed
19 of trust does contain, in section 18, a provision that if the Union Street property is sold or
20 transferred without the BANK's prior written consent, the BANK may require immediate
21 payment in full of all sums due under the 2009 Note. However, section 18 also provides that if
22 the BANK exercises this option, the BANK must give J. PHILLIPS notice of acceleration and
23 the notice must provide J. PHILLIPS with a period of not less than thirty (30) days from the
24 date of the notice to pay all sums under the 2009 Note. "Absent a specific provision in the loan
25 documents, the lender has no right to accelerate the payment of the loan prior to its maturity
26 date." 5 Miller & Starr *California Real Estate* 4th Ed. Deeds of Trust and Mortgages §13:137.
27 "The creditor's right to accelerate the due date of the debt is a valuable right and privilege but
28 for either type of acceleration clause it must be found in the language of the note and security

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1 instrument; it is a contractual provision and subject to the terms of the contract between the
2 parties.” 5 Miller & Starr *California Real Estate* 4th Ed. Deeds of Trust and Mortgages §13:130.
3 The terms of the deed of trust are clear as to the BANK’s right to accelerate if the property that
4 is security for the obligation is sold without the BANK’s consent: “If all or any part of the
5 Property or any Interest in the Property is sold or transferred ... without Lender’s prior written
6 consent, lender may require immediate payment in full of all sums secured by this Security
7 Instrument...If Lender exercises this option, Lender shall give Borrower notice of acceleration.
8 The notice shall provide a period of not less than 30 days from the date the notice is given in
9 accordance with Section 15 within which Borrower must pay all sums secured by this Security
10 Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender
11 may invoke any remedies permitted by this Security Instrument without further notice or
12 demand on Borrower.” (Deed of Trust, Exhibit 33, §18) Both the language and intent of this
13 provision in the deed of trust are clear and binding on the BANK. Civil Code §§ 1636, 1638.
14 The BANK did not provide the notice required by the contract documents to J. PHILLIPS of the
15 BANK’s election to accelerate payment in full of all sums under the 2009 Note after it learned
16 that the Union Street property had been sold to the Carneys.

17 The BANK contends that because its deed of trust was never recorded, a Notice of
18 Default, being dependent on a recorded security instrument, could not be recorded announcing a
19 default under the deed of trust. The BANK also contends that it would have been an idle act for
20 it to give notice of its intent to accelerate the payment obligations under the 2009 Note after
21 J. PHILLIPS had sold the Union Street property. The Court finds, based on a preponderance of
22 the evidence, as follows. The provisions of the deed of trust providing for the BANK’s ability to
23 accelerate the sums due under the 2009 Note, if the Union Street property is sold, are contained
24 in Section 15 of the deed of trust. (Deed of Trust, Exhibit 33) That section obligates the BANK
25 to provide the Borrower (J. PHILLIPS) with at least 30 days’ notice if the BANK elects to
26 accelerate all sums due under the 2009 Note. (Exhibit 33, § 18) If the BANK exercises this
27 option and elects to require immediate payment in full of all sums due under the 2009 Note and
28 gives the Borrower 30 days’ notice of the exercise of this option, and if the Borrower then fails

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1 to pay these sums prior to the expiration of the 30 day period, "Lender may invoke any
2 remedies permitted by this Security Instrument without further notice or demand on Borrower."
3 (Exhibit 33, § 18) Under these relatively unique circumstances the BANK's obligation to
4 provide J. PHILLIPS with at least 30 days' notice of the BANK exercising its option to require
5 immediate payment in full of all sums due under the 2009 Note was not dependent upon the
6 recordation of the deed of trust and such notice was required under the deed of trust whether or
7 not the BANK could thereafter record a Notice of Default under the deed of trust. In addition,
8 under these relatively unique circumstances, it would not have been an idle act for the BANK to
9 give notice of its intent to accelerate J. PHILLIPS' payment obligations under the 2009 Note, as
10 required by the deed of trust.

11 The BANK contends that notice of acceleration was alleged in the Verified First
12 Amended Complaint filed October 3, 2014 ("FAC"). The BANK contends that the notice of
13 acceleration can be found in the FAC because it is alleged therein that the defendants in the
14 FAC entered into an agreement with the Carneys prior to the current action to sell the Union
15 Street property and closed escrow in September 2013 with full knowledge of the 2009 Loan and
16 the BANK's unrecorded lien. (Citing to FAC, ¶¶ 18-19) The BANK also contends the notice of
17 acceleration can be found in the Ninth and Tenth Causes of Action in the FAC wherein it is
18 alleged that J. PHILLIPS and D. PHILLIPS were unjustly enriched by selling the Union Street
19 property to the Carneys without paying the 2009 Note and that J. PHILLIPS breached the
20 covenant of good faith and fair dealing in not correcting the recording obstacles and in selling
21 the property without repayment to the BANK. (Citing to FAC, ¶¶ 58, 59, and 61) The BANK
22 contends that the notice of acceleration was also contained in the Eleventh Cause of Action of
23 the FAC for constructive trust by the BANK's requested relief in "the Amount of the
24 Indebtedness in the Amount of \$1,120,000 plus interest." (Citing to FAC, page 18, ¶21) The
25 BANK also contends that the notice of acceleration was contained in the Twelfth Cause of
26 Action for judicial foreclosure by the BANK's allegation that the BANK is "entitled to all
27 amounts owed under the Subject Note and Subject Deed of Trust..." (Citing FAC, ¶70)

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1 The Court finds, based on a preponderance of the evidence, as follows. The allegations
2 of the FAC do not state that the BANK is electing, under the terms of the deed of trust, to
3 require the payment of all sums due under the 2009 Note by reason of the sale of the Union
4 Street property. The allegations of the FAC do not fairly or clearly put J. PHILLIPS on notice of
5 such election by the BANK. The allegations in the FAC, ¶¶ 18-19 do not support the BANK's
6 contention that the allegations contained therein are notice of the BANK's election to accelerate
7 the sums due under the 2009 Note by reason of the sale of the Union Street property. The
8 allegations in the Ninth Cause of Action, for unjust enrichment, also do not support the BANK's
9 contention that the allegations contained therein are notice of the BANK's election to accelerate
10 the sums due under the 2009 Note by reason of the sale of the Union Street property. The
11 allegations in the Tenth Cause of Action, for breach of the implied covenant of good faith and
12 fair dealing, also do not support the BANK's contention that the allegations contained therein
13 are notice of the BANK's election to accelerate the sums due under the 2009 Note by reason of
14 the sale of the Union Street property. The Eleventh Cause of Action is a claim for constructive
15 trust alleged solely against defendant ARISTOTLE INTERNATIONAL, INC., who is no longer
16 a party to this action. The allegations in the Eleventh Cause of Action also do not support the
17 BANK's contention that the allegations contained therein are notice of the BANK's election to
18 accelerate the sums due under the 2009 Note by reason of the sale of the Union Street property.
19 The allegations in the Twelfth Cause of Action, for judicial foreclosure, also do not support the
20 BANK's contention that the allegations contained therein are notice of the BANK's election to
21 accelerate the sums due under the 2009 Note by reason of the sale of the Union Street property.
22 The allegations of the FAC do not satisfy the notice required by section 18 of the deed of trust.
23 Most expressly, the allegations of the FAC do not provide, as required by section 18, that J.
24 PHILLIPS may prevent the acceleration by paying all sums due prior to the expiration of the
25 notice period.

26 The BANK also contends that notice of acceleration was alleged in the Third Amended
27 Complaint filed herein. The Court finds, based on a preponderance of the evidence, as follows.
28 The allegations of the Third Amended Complaint also do not satisfy the notice required by

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1 section 18 of the deed of trust. The allegations of the Third Amended Complaint do not fairly or
2 clearly put J. PHILLIPS on notice of the BANK's election to accelerate the sums due under the
3 2009 Note by reason of the sale of the Union Street property. The allegations in the Third
4 Amended Complaint also do not provide, as required by section 18, that J. PHILLIPS may
5 prevent the acceleration by paying all sums secured by the deed of trust within thirty (30) days.
6 It would be both inequitable and unreasonable to permit the BANK to utilize the allegations in a
7 Third Amended Complaint, filed over two and one-half years from the filing of the Complaint,
8 to give notice of acceleration of the sums due under the 2009 Note by reason of the sale of the
9 Union Street property. That delay eviscerates the purpose of the provisions in the deed of trust
10 allowing J. PHILLIPS to prevent the acceleration by paying all sums secured by the deed of
11 trust within thirty (30) days when the parties had been engaged in this litigation for over two
12 and one-half years. The filing of the Complaint and the Amended Complaints in this action are
13 not proper or sufficient notice of the BANK's election to accelerate payment in full of all sums
14 under the 2009 Note and do not fairly or clearly put J. PHILLIPS on notice of the BANK's
15 election to accelerate the sums due under the 2009 Note by reason of the sale of the Union
16 Street property. The BANK is bound to follow the notice provisions in the deed of trust since it
17 was the author of the deed of trust and the notice requirements are clear.

18 The Court further finds, based on a preponderance of the evidence, as follows. The only
19 notice to the BANK of the sale of the Union Street property to the Carneys that was required is
20 contained in the Order Granting Motion to Expunge *Lis Pendens* (Exhibit 358). Neither the
21 2009 Note (Exhibit 32) nor the deed of trust (Exhibit 33) require that the BANK be provided
22 with notice of a sale of the Union Street property. The Order Granting Motion to Expunge
23 *Lis Pendens* provides that J. PHILLIPS submit a Declaration that he agrees to notify the BANK,
24 through counsel, if in the future during the pendency of this action, he signs an agreement to
25 sell, refinance, or otherwise encumber the Union Street property. (Exhibit 358) J. PHILLIPS
26 submitted a Declaration in conformance with the requirement of the Order Granting Motion to
27 Expunge *Lis Pendens*. (Exhibit 376) J. PHILLIPS, through his legal counsel, provided to the
28 BANK notice in conformance with the Order Granting Motion to Expunge *Lis Pendens*.

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1 (Exhibit 377) Under these circumstances, J. PHILLIPS provided all notice to the BANK that
2 was required. Under the documents constituting the agreement for the 2009 loan transaction, no
3 other notice was required and no consent by the BANK to sell the Union Street property to the
4 Carneys was required. Under these circumstances, J. PHILLIPS' obligations under the
5 documents constituting the agreement for the 2009 loan transaction were not accelerated by the
6 failure to give any other notice to the BANK of the sale of the Union Street property to the
7 Carneys.

8 **F. Issue No. 6: Has the BANK proven that J. PHILLIPS breached any other**
9 **contractual obligations owed to the BANK?**

10 Contention of the Parties:

11 The BANK contends that J. PHILLIPS breached implied promises to the BANK that
12 were made as part of the 2009 Loan and breached implied covenants of good faith and fair
13 dealing arising from the 2009 Loan. The BANK contends that J. PHILLIPS breached implied
14 promises and covenants by not cooperating in the execution of documents so that the deed of
15 trust in favor of the BANK could be recorded. The BANK also contends that J. PHILLIPS
16 breached the "Borrower Covenants" in the deed of trust that he "[was] lawfully seized of the
17 estate hereby conveyed and ha[d] the right to grant and convey the Property," and that he "will
18 defend generally the title to the Property against all claims and demands..." The BANK
19 contends that J. PHILLIPS failure to cooperate in recording the Quit Claim deed, Transfer Tax
20 Affidavit and Preliminary Change of Ownership Report is a breach of the warranty in the deed
21 of trust. The BANK also contends that J. PHILLIPS breached the Errors and Omissions
22 Agreement (Exhibit 36) because the filing of the Quit Claim deed and the deed of trust was a
23 "clerical task." The BANK also contends that in applying for the 2009 loan as the sole
24 borrower, J. PHILLIPS covenanted that he would become the sole owner of record of the Union
25 Street property and that transfer of full record title to him by delivery of the Quit Claim deed
26 into escrow was a predicate of the 2009 loan. The BANK contends that this is because, in order
27 to be able to pledge a security interest in the entire Union Street property, as he covenanted in
28 the deed of trust, J. PHILLIPS had to first acquire full title to the property. The BANK also

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1 contends that J. PHILLIPS covenanted in the Affidavit of Title (Exhibit 39) that he, referred to
2 in the plural, was “the only owners of Property located at: 2237 Union Street, San Francisco,
3 CA 94123... We are in sole possession of this Property. We have owned this Property since
4 1999. Since then no one has questioned our ownership or right of possession... We make this
5 Affidavit in order to obtain the Mortgage Loans. We are aware that our Lender will rely on our
6 truthfulness and the statements made in this Affidavit.” (Exhibit 39, ¶¶ 3 and 7)

7 J. PHILLIPS contends that he fulfilled all promises to the BANK and that he cooperated
8 with the BANK in all ways required of him. J. PHILLIPS contends that he did not breach any
9 warranty in the deed of trust. J. PHILLIPS contends that he was neither obligated to cooperate
10 with the BANK in recording the Quit Claim deed, Transfer Tax Affidavit and Preliminary
11 Change of Ownership Report nor failed to so cooperate. J. PHILLIPS also contends that the
12 filing of the Quit Claim deed and the deed of trust was not a “clerical task” that he was
13 obligated to perform under the terms of the Errors and Omissions Agreement. J. PHILLIPS
14 contends that he did everything asked and required of him in terms of having record title to the
15 Union Street property transferred to him including but not limited to signing the Quit Claim
16 deed and delivering it to the escrow chosen by the BANK.

17 Ruling: The Court finds, based on a preponderance of the evidence, as follows. The
18 documents for the 2009 Loan, including both the 2009 Note and deed of trust, were drafted by
19 the BANK and set out the contractual obligations of both the BANK and J. PHILLIPS.
20 J. PHILLIPS complied with his contractual obligations in all of the documents he signed in
21 relation to the 2009 Loan including both the 2009 Note and the deed of trust. J. PHILLIPS
22 signed all documents requested of him as part of the closing of the 2009 Loan. J. PHILLIPS
23 made all of the required monthly interest-only payments until the BANK refused his payments
24 beginning in September 2013. To the extent that there were any implied promises or an implied
25 covenant of good faith and fair dealing, J. PHILLIPS did not breach any implied promises to the
26 BANK or any implied covenant of good faith and fair dealing. The Court further finds, based
27 on a preponderance of the evidence, as follows. The deed of trust for the 2009 loan transaction
28 (Exhibit 33) contains a covenant by J. PHILLIPS that he is “lawfully seised of the estate hereby

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1 conveyed” and that he “will defend generally” his title to the Union Street property. Under these
2 relatively unique circumstances the covenants in the deed of trust did not obligate J. PHILLIPS
3 to cooperate more than he did in the recording of the Quit Claim deed and the deed of trust. J.
4 PHILLIPS executed all documents requested of him by the BANK and the escrow company.
5 The rejection of the Quit Claim deed and the deed of trust by the County Recorder’s office was
6 not caused by J. PHILLIPS; it was caused by the negligence of the BANK and the escrow
7 company it chose to handle the escrow. J. PHILLIPS was not obligated to cooperate with the
8 demands made upon him to execute a Transfer Tax Affidavit or a new deed of trust by people
9 associated with NREIS because they did not provide him with any evidence that they were
10 authorized representatives of the BANK. No authorized BANK representative made demand
11 upon J. PHILLIPS to execute a Transfer Tax Affidavit, a new deed of trust, or a Preliminary
12 Change of Ownership. Under these relatively unique circumstances the signing of a Transfer
13 Tax Affidavit, a new deed of trust or a Preliminary Change of Ownership Report are not the
14 correction of “clerical errors” to enable the BANK to sell, convey or market the 2009 Note so as
15 to constitute a breach of the Errors and Omissions Agreement.

16 The Court further finds, based on a preponderance of the evidence, J. PHILLIPS did
17 everything asked and required of him in terms of having record title to the Union Street property
18 transferred to him including but not limited to signing the Quit Claim deed and delivering it to
19 the escrow chosen by the BANK.

20 There is implied in every contract a covenant by each party not to do anything which
21 will deprive the other parties thereto of the benefits of the contract. This covenant not only
22 imposes upon each contracting party the duty to refrain from doing anything which would
23 render performance of the contract impossible by any act of his own, but also the duty to do
24 everything that the contract presupposes that he will do to accomplish its purpose. 1 Witkin
25 *Summary of California Law* 10th Ed., Contracts § 798. Breach of the covenant of good faith and
26 fair dealing rests on the existence of a specific contractual obligation. The implied covenant
27 does not impose substantive terms and conditions beyond those to which the parties actually
28 agreed. 1 Witkin *Summary of California Law* 10th Ed., Contracts § 798, citing *Avidity Partners*,

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1 *LLC v. California* (2013) 221 Cal.App.4th 1180, 1203, 1204, 165 Cal.Rptr.3d 299 and *Jenkins v.*
2 *JPMorgan Chase Bank* (2013) 216 Cal.App.4th 497, 527, 156 Cal.Rptr.3d 912. Under these
3 relatively unique circumstances, J. PHILLIPS actions and inaction did not breach any implied
4 promises to the BANK or any implied covenants of good faith and fair dealings he owed to the
5 BANK.

6 The Court further finds, based on a preponderance of the evidence, as follows.
7 J. PHILLIPS did not breach any of the "Borrower Covenants" in the deed of trust. J. PHILLIPS
8 correctly believed and understood that at all times he was the lawful owner of full title to the
9 Union Street property, that prior to his application for the 2009 Loan he and his brother,
10 D. PHILLIPS, had agreed to swap interests in that property and the Washington, D.C. property
11 that was transferred to D. PHILLIPS' sole name and that the transfer of record title in the Union
12 Street property was being accomplished by the Quit Claim deed that he and D. PHILLIPS
13 executed. In addition, J. PHILLIPS did not cause the circumstances that resulted in the Quit
14 Claim deed not being recorded. Furthermore, it was the fault of the BANK and its agents that
15 caused the deed of trust securing the 2009 Note to not be recorded. For these same reasons,
16 J. PHILLIPS correctly believed and understood that the covenants he was making in the
17 Affidavit of Title (Exhibit 39) were true and correct. The BANK, at all times, knew the status of
18 the ownership of the Union Street property, knew that D. PHILLIPS and J. PHILLIPS were
19 signing, as part of the documents J. PHILLIPS was required to sign for the closing of the 2009
20 Loan, the Quit Claim deed that they did in fact execute, and knew that for J. PHILLIPS to be the
21 sole record title holder of the Union Street property that the Quit Claim deed had to be recorded.
22 As a result, the BANK was not relying upon the "Borrower Covenants" in the deed of trust
23 quoted above or upon ¶¶ 3 and 7 of the Affidavit of Title in approving and closing the 2009
24 Loan.

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26 ////

27 ////

28 ////

1 **G. Issue No. 7: Is J. PHILLIPS liable to the BANK for a Common Count –**
2 **Money Had And Received Claim?**

3 Contention of the Parties:

4 The BANK contends that it lent \$1,120,000 to J. PHILLIPS, that he received and used
5 those funds and that he is therefore liable to the BANK for its repayment as a Common Count –
6 Money Had and Received. The BANK also contends that J. PHILLIPS received the sales
7 proceeds from the sale of the Union Street property to the Carneys and that this money
8 constitutes money that was intended to benefit the BANK.

9 J. PHILLIPS contends that the allegations of the BANK's Common Count – Money Had
10 And Received claim are not based upon the 2009 Loan transaction but upon J. PHILLIPS'
11 receipt of money from the Carneys when he sold the Union Street property to them. As such,
12 J. PHILLIPS contends that the money from the Carneys is not money received from the BANK
13 and therefore cannot be the basis for a Common Count claim. J. PHILLIPS also contends that
14 he is not liable for a Common Count, money had and received claim, when there is a written
15 contract between the parties and he is not in breach of that written contract. See 4 Witkin,
16 *California Procedure*, 5th Ed. Pleading § 561.

17 Ruling: The Court finds, based on a preponderance of the evidence, as follows. The
18 BANK's claim for Common Count – Money Had And Received in its Third Amended
19 Complaint is based upon the money that J. PHILLIPS received from the sale of the Union Street
20 property to the Carneys. The sale of the Union Street property was completed after the Court in
21 this action expunged the *lis pendens* the BANK had recorded, expressly finding that the BANK
22 had "failed to sustain its burden to show probable validity of its real property claims ... and the
23 Court finds that [the BANK] is not likely to prevail on any real property claims." Under these
24 circumstances, the proceeds from the sale of the Union Street property were not monies that
25 were intended for the benefit of the BANK.

26 Alternatively, and in addition to the foregoing, there were written contracts between the
27 parties, including both the 2009 Note and deed of trust, and J. PHILLIPS is not liable under a
28 Common Count – Money Had and Received claim because he is not in breach of any

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1 obligations contained in those written contracts. A cause of action for money had and received,
2 while available in a great variety of situations, generally “lies wherever one person has received
3 money which belongs to another, and which in equity and good conscience should be paid over
4 to the latter.” *Gutierrez v. Giradi* (2011) 194 Cal.App.4th 925, 937. Witkin states that a count for
5 money had and received is available in the following situations: (a) quasi-contract – actions to
6 recover money paid under mistake, fraud or coercion where no contractual relationship is
7 involved; (b) express contract void – where the plaintiff paid money pursuant to a contract that
8 is void for illegality, lack of consideration or some other incapacity; (c) express contract
9 voidable or unenforceable – where the money is paid under a contract rescinded by the plaintiff
10 for ordinary mistake, fraud and the inducement or innocent misrepresentation or incapacity; (d)
11 express contract void – where the plaintiff elects the remedy of restitution after the defendants’
12 breach or failure of consideration or where the contract has become executed on one side and
13 the plaintiff elects to plead the cause of action on the express contract as a common count. 4
14 Witkin, *California Procedure* 5th Ed., Pleading, Section 561. Under these circumstances J.
15 PHILLIPS is not liable to the BANK for Common Count money had and received.

16 **H. Issue No. 8: Is J. PHILLIPS liable to the BANK for a Common Count –**
17 **Account Stated claim?**

18 Contentions of the Parties:

19 The BANK contends that J. PHILLIPS is liable to the BANK for a Common Count –
20 Account Stated claim based on its lending of funds to him as a result of the 2009 Loan and his
21 promise to pay the sum of \$1,120,000 back to the BANK.

22 J. PHILLIPS contends that he cannot be liable for a Common Count claim when there
23 are written contracts setting forth his obligations to the BANK and he is not in breach of any of
24 those obligations.

25 Ruling: The Court finds, based on a preponderance of the evidence, as follows: There
26 are written contracts between the parties, including both the 2009 Note and deed of trust, and
27 J. PHILLIPS is not liable under a Common Count – Account Stated claim because he is not in
28 breach of any obligations contained in those written contracts. An account stated common claim

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1 requires that an account was stated by and between the plaintiff and defendant by which a
2 balance of a specified sum was found due from defendant to plaintiff (or in which it was agreed
3 that defendant was indebted to plaintiff in that sum). 4 Witkin, *California Procedure*, 5th Ed.,
4 Pleading, Section 565. Parties transacting business with each other, and keeping accounts of
5 their transactions and items of indebtedness, may come to an agreement upon the amount of the
6 final balance due from one to the other. The agreement is an “*account stated*” a new and
7 independent executory contract. 1 Witkin, *Summary of California Law*, 10th Ed., Contracts,
8 Section 972. Under these circumstances, where there are written contracts setting forth J.
9 PHILLIPS’ obligations to the BANK and where it has not been proven that there was an
10 agreement upon the amount of the final balance due from J. PHILLIPS to the BANK, J.
11 PHILLIPS is not liable to the BANK for a Common Count – Account Stated.

12 **I. Issue No. 9: Are J. PHILLIPS and D. PHILLIPS liable to the BANK for a**
13 **Constructive Trust Claim?**

14 Contention of the Parties:

15 The BANK asserts that it is still proceeding with its claims in its Fourth Cause of Action
16 for Constructive Trust. Under that claim the BANK contends that J. PHILLIPS and D.
17 PHILLIPS have both received proceeds from the sale of the Union Street property to the
18 Carneys, have been unjustly enriched by that sale, and that they hold the proceeds from the sale
19 as constructive trustees for the benefit of the BANK.

20 Defendants contend that D. PHILLIPS did not receive any proceeds from the sale of the
21 Union Street property and therefore cannot be liable for a constructive trust claim. Defendants
22 further contend that J. PHILLIPS was entitled to receive the proceeds from the sale of the Union
23 Street property and therefore cannot be liable for a constructive trust claim.

24 Ruling: The Court finds, based on a preponderance of the evidence, as follows: All net
25 proceeds from the sale of the Union Street property to the Carneys were received by
26 J. PHILLIPS and D. PHILLIPS did not receive any of the net proceeds. As a result,
27 D. PHILLIPS is not liable to the BANK for any claim that he holds proceeds to which the
28 BANK might be entitled because he did not receive any of the net proceeds from the sale of the

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1 Union Street property to the Carneys. J. PHILLIPS was entitled to receive the net proceeds from
2 the sale of the Union Street property because no deed of trust had been recorded in favor of the
3 BANK and the BANK's *Lis Pendens* had been expunged. The BANK therefore did not have a
4 valid security interest in the Union Street property or a valid claim to the net proceeds from the
5 sale of the Union Street property. J. PHILLIPS was not unjustly enriched from the sale of the
6 Union Street property to the Carneys. "A constructive trust is a remedy used by a court of equity
7 to compel a person who has property to which he or she is not justly entitled to transfer it to the
8 person entitled to it." 13 Witkin, *Summary of California Law*, 10th Ed., Trusts § 319. "A
9 constructive trust is not a true trust but an equitable remedy available to a plaintiff seeking the
10 recovery of specific property in a number of widely differing situations. The cause of action is
11 not based on the establishment of a trust, but consists of the fraud, breach of fiduciary duty, or
12 other act that entitles the plaintiff to some relief. That relief, in a proper case, may be to make
13 the defendant a constructive trustee with a duty to transfer the property to the plaintiff." 4
14 Witkin, *California Procedure*, 5th Ed., Pleading, § 840. See also, *Michaelian v. State Comp. Ins.*
15 *Fund* (1996) 50 Cal.App.4th 1093, 1113. "The principal constructive trust situations are covered
16 by statute. Civil Code § 2223 provides: 'One who wrongfully detains a thing is an involuntary
17 trustee thereof, for the benefit of the owner.' Civil Code § 2224 provides: 'One who gains a
18 thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act,
19 is, unless he or she has some other and better right thereto, an involuntary trustee of the thing
20 gained, for the benefit of the person who would otherwise have had it.'" 13 Witkin, *Summary of*
21 *California Law*, 10th Ed., Trusts § 319. "The case law explains that in order to create a
22 constructive trust as defined in [Civil Code] section 2224, three conditions must be satisfied: the
23 existence of a res (property or some interest in the property); the plaintiff's right to that res; and
24 the defendant's acquisition of the res by some wrongful act." *Pacific Lumber Company v.*
25 *Superior Court* (1990) 226 Cal.App.3d 371, 377, quoting *Calistoga Civic Club v. City of*
26 *Calistoga* (1983) 143 Cal.App.3d 111, 116. J. PHILLIPS' conduct in relation to the BANK was
27 not fraudulent, a breach of a fiduciary duty owed to the BANK, or wrongful in any way that
28 entitles the BANK to any relief and therefore the BANK is not entitled to a constructive trust. J.

1 PHILLIPS did not obtain the proceeds from the sale of the Union Street property by fraud,
2 accident, mistake, undue influence, the violation of a trust, or by any other wrongful act or
3 conduct and therefore the BANK is not entitled to a constructive trust.

4 **J. Issue No. 10: Did the BANK have a duty to reasonably consider**
5 **J. PHILLIPS' refinance application in 2012?**

6 Contention of the Parties:

7 J. PHILLIPS contends that under his circumstances the BANK had a duty to reasonably
8 consider his refinance application in 2012. J. PHILLIPS contends that this duty arose because
9 J. PHILLIPS was already a borrower from the BANK by reason of the 2009 Loan, the refinance
10 only sought to refinance the amount owing under the 2009 Note, the BANK accepted, processed
11 and considered the refinance application, the BANK told him his refinance application was
12 conditionally approved, and the refinance application would have solved the BANK's lack of a
13 deed of trust for the 2009 Note. J. PHILLIPS relies primarily on *Alvarez v. BAC Home Loan*
14 *Servicing, L.P.* (2014) 228 Cal.App.4th 941 and cases following its holding on this issue.
15 J. PHILLIPS also asserts that the Court should consider and apply the balancing test known as
16 the "Biakanja Factors" in determining if the BANK owes a duty to him. *Biakanja v. Irving*
17 (1958) 49 Cal.2d 647.

18 The BANK contends that it had no duty to consider any refinance application from
19 J. PHILLIPS. The BANK contends that because it had no duty to consider any refinance
20 application from J. PHILLIPS it cannot be liable for negligence in its handling, processing or
21 denial. The BANK relies primarily on *Nymark v. Heart Fed. Savings and Loan Assn.* (1991)
22 231 Cal.App.3d 1089, *Carbajal v. Wells Fargo Bank, N.A.* (2015) 2015 WL 245054 and cases
23 following their holdings on the issue of duty.

24 Ruling: The Court finds, based on a preponderance of the evidence as follows. Under
25 the circumstances of this case, J. PHILLIPS has proven that the BANK had a duty to reasonably
26 consider his refinance application. The duty arose because J. PHILLIPS was already a borrower
27 from the BANK by reason of the 2009 Loan, the refinance only sought to refinance the amount
28 owing under the 2009 Note, the BANK accepted, processed and considered the refinance

1 application, the BANK told him his refinance application was conditionally approved, and the
2 refinance application would have solved the BANK's lack of a deed of trust for the 2009 Note.
3 J. PHILLIPS' situation is similar to a borrower seeking a loan modification from a bank because
4 he was already a borrower from the BANK and he was not seeking any additional money from
5 the BANK; only a payoff and refinance of his existing debt. His motivation for the refinance
6 was, in part, to seek a lower interest rate to lower his monthly payments. As a result of the *lis*
7 *pendens* the BANK had recorded he was limited in the financial institutions which would
8 consider his refinance application. As a result, it is appropriate and proper for the Court to apply
9 the balancing test known as the "*Biakanja* Factors" in determining if the BANK owed a duty to
10 reasonably consider his refinance application in this circumstance.

11 The Court further finds, based on a preponderance of the evidence, as follows:
12 Balancing the "*Biakanja* Factors" favors the imposition of a duty on the BANK. The first
13 element of the "*Biakanja* Factors" is the extent to which the transaction was intended to affect
14 the borrower. The refinance application was intended to benefit J. PHILLIPS. The second
15 element of the "*Biakanja* Factors" is the foreseeability of the harm to J. PHILLIPS. It was
16 foreseeable to the BANK that J. PHILLIPS would be harmed because the interest-only
17 payments he was making on the 2009 Note were based on an interest rate that was almost 2%
18 more than was available for the refinance loan. As set out in the Good Faith Estimate prepared
19 by the BANK at the outset of the refinance application process, J. PHILLIPS monthly payments
20 under the refinance loan were going to be \$3,150 per month (Exhibit 319) in comparison to
21 \$4,783.33 under the 2009 Note (Exhibit 32). The third element of the "*Biakanja* Factors" is the
22 degree of certainty that the borrower suffered injury. J. PHILLIPS did suffer injury by paying
23 higher monthly payments under the 2009 Note than he would have had to pay if the refinance
24 had been approved. J. PHILLIPS also paid attorneys' fees to defend against the claims of the
25 BANK in the First Action and those fees would not have been incurred if the refinance was
26 approved because the refinance would have paid off all amounts owing on the 2009 Note. The
27 fourth element of the "*Biakanja* Factors" is the closeness of the connection between the
28 BANK's conduct and the injury suffered. The denial of the refinance application led directly to

1 J. PHILLIPS paying more interest to the BANK than he would have had to pay if the refinance
2 was approved and to J. PHILLIPS incurring attorneys' fees in defending against the BANK's
3 claims in the First Action that would not have been incurred if his refinance application was
4 approved. The fifth element of the "*Biakanja* Factors" is the moral blame attached to the
5 BANK's conduct. The Court need not attribute "moral blame" to the BANK's conduct in this
6 circumstance. However, there does not appear to be any reasonable reason for the BANK taking
7 five months to consider J. PHILLIPS' refinance application and then denying that application
8 on grounds that the BANK never even asked him about (any other available liquid assets or
9 cash reserves). The BANK also failed to follow its own procedures in not promptly providing
10 J. PHILLIPS with a revised Good Faith Estimate after it internally reduced the loan amount
11 being sought and changed the terms of the loan. (Exhibits 329, 332, and 344) The sixth element
12 of the "*Biakanja* Factors" takes into account preventing future harm. The BANK did not
13 provide J. PHILLIPS with sufficient information or communicate clearly with him regarding the
14 refinance process and this should be improved. The BANK contends that imposing a duty
15 would have drastic consequences of imposing an affirmative duty on banks, acting only in their
16 role as conventional lenders, to make new loans (refinance) simply because the lender and
17 borrower are involved in litigation and a *lis pendens* has been recorded on the property. The
18 Court's finding that the BANK had a duty to reasonably consider J. PHILLIPS' refinance
19 application in 2012, under the relatively unique circumstances stated herein, does not constitute
20 a drastic consequence that require a lending institution, in all situations, to "make new loans
21 (refinance) simply because the lender and borrower are involved in litigation and a *lis pendens*
22 has been recorded." Weighing and balancing the "*Biakanja* Factors" tilts in favor of the BANK
23 owing a duty to reasonably consider J. PHILLIPS' refinance application.

24 The BANK contends that J. PHILLIPS' 2012 refinance application was "for an ordinary
25 refinance." The Court finds, based on a preponderance of the evidence, that under these
26 relatively unique circumstances, J. PHILLIPS' 2012 refinance application was not a typical or
27 ordinary refinance application. The 2012 refinance application was not typical because the loan
28 being refinanced, the 2009 Note, was supposed to be secured by a deed of trust on the Union

1 Street property and, through no fault of J. PHILLIPS, the deed of trust was not recorded. The
2 2012 refinance application was not typical because there was a lawsuit pending between the
3 parties and the BANK had recorded a *lis pendens* that encumbered the Union Street property
4 and the *lis pendens* impeded J. PHILLIPS from being able to sell the property or refinance the
5 2009 Loan with another lender. As a result, J. PHILLIPS' 2012 refinance application was
6 similar to the borrowers in loan modification cases such as *Alvarez* and the cases following its
7 holding.

8 The Court finds, based on a preponderance of the evidence, that under these
9 circumstances the BANK owed a duty to J. PHILLIPS to reasonably consider his refinance
10 application.

11 **K. Issue No. 11: Was the BANK negligent in its handling, processing and**
12 **denial of J. PHILLIPS' refinance application?**

13 Contentions of the Parties:

14 J. PHILLIPS contends that the BANK breached its duty to reasonably consider his
15 refinance application when it failed to reasonably consider his refinance application, failed to
16 promptly provide him with Good Faith Estimates, took five months before giving him a
17 decision, based its decision on incorrect information generated by the BANK and loan terms he
18 had not agreed to, failed to inquire about his assets and income, and then denied the refinance
19 application when he was more qualified for the refinance loan than he was in 2009 for the 2009
20 Loan.

21 The BANK contends that it properly denied the refinance application because the Union
22 Street property was no longer owner occupied according to the appraisal and therefore the
23 underwriting guidelines for the refinance application were different than for the 2009 Loan and
24 he did not qualify for the refinance based on these different underwriting guidelines.

25 Ruling: The Court finds, based on a preponderance of the evidence, as follows.
26 J. PHILLIPS' financial condition as of 2012 was better than it was at the time of the 2009 Loan.
27 His income was approximately the same or better, his expenses were approximately the same or
28 less, his credit rating was approximately the same, the Union Street property was worth more,

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1 and he had significantly more in liquid cash reserves. The BANK during its consideration of his
2 refinance application failed to provide J. PHILLIPS with a timely Good Faith Estimate showing
3 that it had changed the loan amount and the type of loan (which resulted in an increased initial
4 monthly payment from what was first disclosed). The BANK changed both the loan amount and
5 the type of loan during its consideration of his refinance application without his knowledge or
6 consent. The BANK unreasonably delayed in informing J. PHILLIPS of its decision on the
7 refinance application. The BANK decreased the amount of liquid assets stated to be available to
8 J. PHILLIPS by reducing the amount stated to be in his Fidelity funds below the net assets that
9 were available at Fidelity. The BANK failed to inquire of J. PHILLIPS if he had other liquid
10 assets or other available funds to satisfy the guidelines of the BANK for approval of the
11 refinance application. The BANK unreasonably denied J. PHILLIPS' refinance application.
12 These actions by the BANK were below the normal and accepted standards of care for a lending
13 institution.

14 The Court also finds, based on a preponderance of the evidence, as follows. The BANK
15 did not consider J. PHILLIPS' refinance application as anything other than a refinance
16 application of his primary residence. The Union Street property was J. PHILLIPS' primary
17 residence throughout the applicable time period for his refinance application so there was no
18 basis for considering it as anything but a refinance application of J. PHILLIPS' primary
19 residence. J. PHILLIPS always considered the Union Street property his primary residence. He
20 owned no other real property. While his wife and daughter moved to New York City sometime
21 in about 2009 due to his wife's medical condition and lived there in a rented apartment and
22 while he rented out the upper floors of the Union Street property to tenants, J. PHILLIPS stayed
23 in the lower floor of the Union Street property when he was in California. J. PHILLIPS stayed
24 at the Union Street property a majority of the time in 2011 and 2012. J. PHILLIPS always,
25 through 2012, filed a California tax return stating that he had resided in the Union Street
26 property a majority of the time. During that same time period he filed a New York state tax
27 return as a "nonresident and part-year resident." (Exhibit 378) J. PHILLIPS was registered to
28 vote in California and had a California driver's license. The reference in the appraisal of the

STATEMENT OF DECISION

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1 Union Street property to it being occupied by a tenant (Exhibit 82) is not sufficient evidence to
2 overcome the testimony by J. PHILLIPS, supported by his tax returns (including Exhibit 378),
3 that the Union Street property remained his primary residence. The rental of portions of the
4 Union Street property by both tenants and by J. PHILLIPS' company is not sufficient evidence
5 to overcome the testimony that the Union Street property was J. PHILLIPS' primary residence.
6 No underwriting guidelines for properties that are not a borrower's primary residence were
7 provided so the BANK has not proven that the refinance application should have or would have
8 been denied even if the Union Street property was considered a type of property different than
9 J. PHILLIPS' primary residence.

10 The Court finds, based on a preponderance of the evidence, that under the circumstances
11 of this case the BANK's conduct in the handling of J. PHILLIPS' refinance application fell
12 below applicable standards of care for a financial institution in such a situation and the BANK's
13 conduct was negligent in its handling, processing and denial of J. PHILLIPS' refinance
14 application. If the BANK had properly handled, considered and processed J. PHILLIPS'
15 refinance application, the refinance application would have and should have been granted.

16 **L. Issue No. 12: What damages is J. PHILLIPS entitled to as a result of the**
17 **BANK's negligence in its handling, processing and denial of his refinance**
18 **application?**

19 Contentions of the Parties:

20 J. PHILLIPS contends that he is entitled to the following damages for the BANK's
21 negligent handling, processing and denial of his refinance application: (1) Attorneys' fees
22 incurred in defending against the prior action filed by the BANK against him; (2) Attorneys'
23 fees incurred in defending this case; (3) Expert costs and court reporting costs in defending this
24 case; (4) His travel costs in defending this case; (5) Reimbursement for the time he has spent
25 defending this case: (6) \$24,495 for the difference in the monthly payments he paid between
26 June 2012 and August 2013 because the 2009 Note had a higher interest rate than he would
27 have paid if the refinance had been approved; (7) \$1,500,000 in lost equity in the Union Street
28 property (the difference between the \$2,100,000 he sold it for and the \$3,600,000 it is now

1 worth) because he would not have sold the Union Street property if his refinance application
2 had been approved; (8) \$61,170 in additional tax he had to pay under the Affordable Care Act
3 because the sale of the Union Street property was not closed prior to December 31, 2012; and
4 (9) \$75,000 for damage to his credit caused by the BANK reporting he was delinquent in
5 making his monthly payments for the 2009 Loan.

6 The BANK contends that the attorneys' fees, expert costs, travel costs and compensation
7 for J. PHILLIPS' time incurred are not recoverable damages. The BANK contends that
8 J. PHILLIPS' alleged damages of \$24,495 for the difference in the monthly payments he paid
9 between June 2012 and August 2013 are irrelevant and unrecoverable as the evidence
10 established that the changed use of the Union Street property from an owner-occupied primary
11 residence to commercial/residential tenant-occupied, resulted in J. PHILLIPS' failure to qualify
12 for an owner-occupied refinance. The BANK also contends that J. PHILLIPS' 2012 refinance
13 application represented that the real property was "owner occupied," but the 2012 appraisal and
14 J. PHILLIPS' own disclosure of his company paying rent for commercial space demonstrated
15 that the loan applied for in 2012 was different from the 2009 Loan. (Citing Exhibits 82 and 338)
16 The BANK asserts that its contention is supported by the Carney's delay in 2013 in getting
17 financing to buy the Union Street property because of its appraised mixed use, of both
18 commercial and residential. (Citing Exhibit 130) The BANK contends that there is at most
19 \$1,000,000 in lost equity and also that the lost equity is not damages that are recoverable
20 because it is speculative that J. PHILLIPS would have retained ownership of the Union Street
21 property if the refinance application had been granted. The BANK contends that the tax paid
22 under the Affordable Care Act is not recoverable because J. PHILLIPS has not proven that he
23 could have closed the sale to the Carneys prior to December 31, 2012. The BANK contends
24 that it was proper to provide negative credit reports for J. PHILLIPS' failure to make payments
25 on the 2009 Note and alternatively that J. PHILLIPS has not proven any damage caused by the
26 negative credit reports.

27 Ruling: The Court finds, based on a preponderance of the evidence, as follows.
28 J. PHILLIPS is not entitled to recover attorneys' fees or expert fees except to the extent that he

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1 is the prevailing party on claims that he breached a written contract that contains an attorneys'
2 fees provision, which will be determined separately from his negligence claim. See Code of
3 Civil Procedure §§ 1032, 1033.5. J. PHILLIPS is not entitled to recover court reporting costs
4 except as recoverable costs in this action and not as part of a negligence claim. Code of Civil
5 Procedure § 1033.5. J. PHILLIPS has not proven that he is entitled to recover for his time or
6 travel expenses in this case. *Carpenter & Zuckerman v. Cohen* (2011) 195 Cal.App.4th 373,
7 375-376.

8 The Court further finds, based on a preponderance of the evidence, as follows.
9 J. PHILLIPS has proven that he is entitled to recover the following for the negligence of the
10 BANK in its handling, processing and denial of his refinance application: (1) \$24,495 for the
11 difference in the monthly payments he paid between June 2012 and August 2013 because the
12 2009 Note had a higher interest rate than he would have paid if the refinance had been
13 approved; (2) \$1,100,000 in lost equity in the Union Street property (the difference between the
14 \$2,100,000 he sold it for and the \$3,200,000 it is now worth (the Court finds the fair market
15 value of the property presently is \$3,200,000 based on its consideration of the testimony of
16 Lawrence Mansbach, the approved expert for the Bank, and Mr. Brian Grey, approved expert
17 for Defendant) because he would not have sold the Union Street property if his refinance
18 application had been approved; (3) \$61,170 in additional tax he had to pay under the Affordable
19 Care Act because the sale of the Union Street property was not closed prior to
20 December 31, 2012. The sale to the Carneys would have closed prior to December 31, 2012 if
21 the BANK had processed J. PHILLIPS' refinance application in a reasonable period of time.
22 The delay and the BANK's lack of response to requests for cooperation caused there to be
23 insufficient time to close the sale to the Carneys prior to December 31 2012; and (4) \$75,000 for
24 damage to J. PHILLIPS' credit caused by the BANK reporting he was delinquent in making his
25 monthly payments for the 2009 Note. There would have been no delinquencies in payments if
26 the refinance application had been approved. This amount is reasonable and is not speculative
27 based on J. PHILLIPS' testimony of the consequences he incurred as a result of the negative
28 credit reporting by the BANK.

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1 On the BANK's contention that the damages of \$24,495, for the difference in the
2 monthly payments J. PHILLIPS paid between June 2012 and August 2013, are irrelevant and
3 unrecoverable, the Court finds, based on a preponderance of the evidence, as follows. If the
4 BANK had properly and reasonably handled and processed J. PHILLIPS' refinance loan
5 application in a manner consistent with applicable standards of care for a financial institution in
6 such a situation the refinance application would have and should have been approved by
7 June 2012. As set forth above in the Court's ruling on Issue 11, J. PHILLIPS' financial
8 condition as of 2012 was better than it was at the time of the 2009 Loan, his income was
9 approximately the same or better, his expenses were approximately the same or less, his credit
10 rating was approximately the same, the Union Street property was worth more, and he had
11 significantly more in liquid cash reserves. The Union Street property was still J. PHILLIPS'
12 primary residence at the time of his refinance application in 2012. The BANK's contention that
13 J. PHILLIPS' 2012 refinance application represented that the real property was "owner
14 occupied" does not support a contrary finding because the Union Street property was
15 J. PHILLIPS' primary residence and because the 2012 refinance application with a print date of
16 April 5, 2012 (Exhibits 312) was prepared by the BANK and was not signed by J. PHILLIPS.
17 The finding that the Union Street property was J. PHILLIPS' primary residence is supported by
18 J. PHILLIPS' testimony that this was the only real property he owned and that he stayed at the
19 Union Street property a majority of his time in both 2011 and 2012. The finding is also
20 supported by the tax returns he filed and the other facts stated above in Issue No. 11. (See
21 Exhibit 378) The reference in the appraisal of the Union Street property to it being occupied by
22 a tenant (Exhibit 82) is not sufficient evidence to overcome the testimony of J. PHILLIPS,
23 supported by his tax returns. The rental of portions of the Union Street property by both tenants
24 and by J. PHILLIPS' company and the testimony regarding the Carney's financing efforts is
25 also not sufficient evidence to overcome the testimony of J. PHILLIPS, supported by his tax
26 returns. The evidence does not support the BANK's claim that any change in use of the Union
27 Street property resulted in J. PHILLIPS' failure to qualify for the refinance application. The
28 BANK continued, throughout the process and long after both the appraisal (Exhibit 82, dated

STATEMENT OF DECISION

1 July 2, 2012) and being supplied with evidence that J. PHILLIPS' company rented a portion of
2 the Union Street property (Exhibit 338, dated August 7, 2012), to consider the refinance
3 application as a refinance of J. PHILLIPS' primary residence. (See Exhibit 348, Refinance
4 Application with a print date of September 6, 2012, that still lists the Union Street property as
5 J. PHILLIPS' primary residence.) The reason stated by the BANK for denial of the refinance
6 application (insufficient cash) makes no reference to the refinance application as being
7 considered anything other than as a refinance of J. PHILLIPS' primary residence and therefore
8 also supports the finding that the denial of the refinance application was not based on a change
9 in the Union Street property from owner-occupied primary residence to commercial/residential
10 tenant-occupied. (Exhibit 347) No underwriting guidelines for properties that are not a
11 borrower's primary residence were provided so the evidence does not support the contention by
12 the BANK that J. PHILLIPS failed to qualify for the refinance because the Union Street
13 property was no longer his primary residence.

14 The Court finds, based on a preponderance of the evidence, that the total damage to
15 J. PHILLIPS for the BANK's negligence in the handling, processing and denial of his refinance
16 application is \$1,260,665.

17 **M. Issue No. 13: Are J. PHILLIPS or D. PHILLIPS entitled to recover under**
18 **any other claims in their Cross-Complaint?**

19 J. PHILLIPS and D. PHILLIPS contend that the BANK's conduct was deceitful, a
20 breach of Business & Professions Code §17200, *et seq.*, and a breach of Fair Debt Collection
21 Practices Act. J. PHILLIPS and D. PHILLIPS contend that the letter and contacts by NREIS,
22 the letter from attorney Smolar and the filing of the First Action are actionable.

23 The BANK contends that all of its actions were both proper and privileged and that the
24 BANK's conduct was not intentionally deceitful.

25 Ruling: The Court finds, based on a preponderance of the evidence, as follows.
26 J. PHILLIPS and D. PHILLIPS have not proven that the BANK's conduct after the 2009 Loan
27 was approved and closed was wrongful or a breach of Business & Professions Code § 17200,
28 *et seq.*, or the Fair Debt Collection Practices Act. J. PHILLIPS has not proven that the BANK's

1 conduct was intentionally deceitful. The actions of NREIS in writing to J. PHILLIPS regarding
2 the TTA were not improper or actionable. The letter from attorney Smolar, while referencing
3 both a Loan Agreement and a Document Corrections Agreement that J. PHILLIPS had not
4 signed, was also not improper or actionable. The filing of the First Action was a privileged act
5 and therefore no damages are recoverable for its filing.

6 N. **Issue No. 14: Court Exercises its Equitable Powers and Jurisdiction to End**
7 **this Litigation and Any Necessity for the Parties to Have Further Dealings**
8 **with each other.**

9 Pursuant to the Court's inherent equitable authority based upon the claims and defenses
10 set forth in the pleadings in this action, the Court offsets the amount owing by J. PHILLIPS on
11 the 2009 Note, the sum of \$1,120,000, from damages found by the Court to be owing to
12 J. PHILLIPS by the BANK, the sum of \$1,260,665, for a net judgment in favor of J. PHILLIPS
13 of \$140,665. J. PHILLIPS shall be entitled to apply for attorneys' fees and costs as the
14 prevailing party.

15
16
17
18 DATED: May 31, 2017


A. JAMES ROBERTSON, II
JUDGE OF THE SUPERIOR COURT

Exhibit B Amended Judgment

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2 SANDRA LOWENSTEIN, ESQ., SBN 138823
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Facsimile: (925) 947-0111

5 Attorneys for Defendants and Cross-Complainants
6 JOHN A. PHILLIPS and DEAN A. PHILLIPS

ENDORSED
FILED
Superior Court of California
County of San Francisco

OCT 19 2017

CLERK OF THE COURT
BY: ROBERT GOULDING
Deputy Clerk

8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO

11 BANK OF AMERICA, N.A.,

12 Plaintiff,

13 v.

14 JOHN A. PHILLIPS, an individual;
15 JOHN A. PHILLIPS, an individual dba
ARISTOTLE VENTURES; DEAN A.
16 PHILLIPS, an individual; and DOES 1-50,
inclusive,

17 Defendants.

18 AND RELATED CROSS-ACTIONS.
19

CASE NO. CGC-13-531103

HON. A. JAMES ROBERTSON, II

~~[PROPOSED]~~ AMENDED
JUDGMENT

Trial: February 1, 2017
Time: 9:30 a.m.
Dept: 502
Judge: A. James Robertson, II

21 This Amended Judgment shall supersede the Judgment entered herein on May 31, 2017.

22 The trial of this matter commenced on February 1, 2017 before the Honorable
23 A. James Robertson, II. Plaintiff and Cross-Defendant BANK OF AMERICA, N.A. was
24 represented by Eugene J. Chiarelli and Jane N. Yi of Chiarelli & Mollica LLP. Defendants and
25 Cross-Complainants JOHN A. PHILLIPS, individually and doing business as ARISTOTLE
26 VENTURE, and DEAN A. PHILLIPS were represented by Robert A. Huddleston and
27 Sandra Lowenstein of Huddleston & Sipos LLP. Trial of the action took place over twelve
28 court days.

[PROPOSED] AMENDED JUDGMENT

1 Based upon the findings and determinations set forth in the Court's Statement of
2 Decision, the Court finds, adjudges, and determines as follows:

3 **Complaint**

4 The applicable pleading setting forth the claims of the Plaintiff is the Plaintiff's Third
5 Amended Complaint. During the course of the trial the Plaintiff dismissed with prejudice its
6 claim in the fifth cause of action of the Third Amended Complaint for specific performance. On
7 the Plaintiff's claims set forth in the first, second, third and fourth causes of action of the Third
8 Amended Complaint (for breach of contract, common count – money had and received,
9 common count – account stated, and constructive trust, respectively) judgment is entered in
10 favor of Defendants JOHN A. PHILLIPS, individually and doing business as ARISTOTLE
11 VENTURE, and DEAN A. PHILLIPS.

12 **Cross-Complaint**

13 On the claims set forth in the first, second, third and fifth causes of action in the Cross-
14 Complaint filed by JOHN A. PHILLIPS and DEAN A. PHILLIPS against Cross-Defendant
15 BANK OF AMERICA, N.A. (for abuse of process, deceit, unlawful, unfair or fraudulent
16 business acts, and breach of the Rosenthal Fair Debt Collection Practices Act) judgment is
17 entered in favor of Cross-Defendant BANK OF AMERICA, N.A. On the claim of Cross-
18 Complainant DEAN A. PHILLIPS in the fourth cause of action in the Cross-Complaint (for
19 negligence) judgment is entered in favor of Cross-Defendant BANK OF AMERICA, N.A. On
20 the claim of Cross-Complainant JOHN A. PHILLIPS set forth in the fourth cause of action in
21 the Cross-Complaint (for negligence) judgment is entered in favor of Cross-Complainant
22 JOHN A. PHILLIPS and against Cross-Defendant BANK OF AMERICA, N.A. in the amount
23 of \$1,260,665. The amount awarded is subject to the equitable setoff set forth below.

24 **Equitable Setoff**

25 Based upon the Court's equitable authority, the Court does hereby offset the amount
26 owing by Cross-Complainant JOHN A. PHILLIPS on the August 10, 2009 Promissory Note
27 that was the subject of this action, the sum of \$1,120,000, from the damages awarded to Cross-
28 Complainant JOHN A. PHILLIPS, for a net judgment in favor of Cross-Complainant

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JOHN A. PHILLIPS and against Cross-Defendant BANK OF AMERICA, N.A. in the amount of \$140,665.

Prevailing Party

Defendant and Cross-Complainant JOHN A. PHILLIPS is the prevailing party in this action and is entitled to an award of attorneys' fees from Plaintiff and Cross-Defendant BANK OF AMERICA, N.A. Pursuant to a noticed motion Defendant and Cross-Complainant JOHN A. PHILLIPS was awarded attorneys' fees totaling \$568,071.25 from plaintiff and cross-defendant BANK OF AMERICA, N.A.

Defendant and Cross-Complainant JOHN A. PHILLIPS is also awarded statutory costs in the amount of \$18,119.31.

DATED: 10/19/2017

A. JAMES ROBERTSON, II

HON. A. JAMES ROBERTSON, II
Judge of the Superior Court

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PROOF OF SERVICE
C.C.P. §§ 1013a, 2015.5

Bank of America v. John Phillips
Case No. CGC-13-531103

I declare that I am employed in the County of Contra Costa, California. I am over the age of 18 years, and not a party to the within cause; my business address is Huddleston & Sipos Law Group LLP, 1280 Civic Drive, Suite 210, Walnut Creek, California 94596.

On October 23, 2017 I served the following document(s):

AMENDED JUDGMENT

BY EMAIL: Based on a court order or an agreement of the parties to accept electronic service, I caused the documents to be served electronically through File & ServeXpress in portable document format (“pdf”) Adobe Acrobat.

STATE: I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 23, 2017 at Walnut Creek, California.



MICHELE SOTO

Exhibit C Order Granting Petition for Review

FEB 11 2020

Court of Appeal, First Appellate District, Division Three - No. A152201

Jorge Navarrete Clerk

S259482

Deputy

IN THE SUPREME COURT OF CALIFORNIA

En Banc

BANK OF AMERICA, N.A., Plaintiff and Appellant,

v.

JOHN A. PHILLIPS, et al., Defendants and Respondents.

The petition for review is granted. Further action in this matter is deferred pending consideration and disposition of a related issue in *Sheen v. Wells Fargo, N.A.*, S258019 (see Cal. Rules of Court, rule 8.512(d)(2)), or pending further order of the court. Submission of additional briefing, pursuant to California Rules of Court, rule 8.520, is deferred pending further order of the court.

Chin, J., was recused and did not participate.

Cantil-Sakauye
Chief Justice

Associate Justice

Corrigan
Associate Justice

Liu
Associate Justice

Cuellar
Associate Justice

Kruger
Associate Justice

Groban
Associate Justice

Case No. S258019

**In the Supreme Court
of the State of California**

KWANG K. SHEEN,
Plaintiff and Appellant

v.

WELLS FARGO BANK, N.A., et al.
Defendant and Respondent

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION EIGHT
CASE NO. B289003
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
CASE NO. BC631510
THE HONORABLE JUDGE ROBERT L. HESS

**[PROPOSED] ORDER GRANTING *AMICUS CURIAE* JOHN A.
PHILLIPS' MOTION FOR JUDICIAL NOTICE**

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Attorneys for Amicus Curiae JOHN A. PHILLIPS

Good cause appearing, the Court grants *Amicus Curiae* JOHN A. PHILLIPS' Motion for Judicial Notice pursuant to the provisions of Rule 8.252.

The Court does hereby take judicial notice of the following records:

1. Statement of Decision in *Bank of America v. Phillips*, San Francisco Superior Court Case No. CGC 13531103, filed on May 31, 2017;
2. Amended Judgment in *Bank of America v. Phillips*, San Francisco Superior Court Case No. CGC 13531103, filed on October 19, 2017; and
3. Order Granting Petition for Review in *Bank of America v. Phillips*, California Supreme Court Case No. S259482.

IT IS SO ORDERED.

Dated: _____

Justice of the California Supreme Court

CERTIFICATE OF SERVICE

Kwang v. Sheen v. Wells Fargo Bank, N.A., et al.

Case No. S258019

I, the undersigned, declare that I am over the age of 18 and am not a party to this action. I am employed in City of Walnut Creek, California; my business address is 1280 Civic Drive, Suite 210, Walnut Creek, CA 94596.

On the date below, I served a copy of the foregoing document entitled **[PROPOSED] ORDER GRANTING AMICUS CURIAE JOHN A. PHILLIPS' MOTION FOR JUDICIAL NOTICE** on the interested parties in said case as follows:

BY THE COURT'S TRUEFILING SYSTEM: Upon filing, I will cause the document to be transmitted via the Court's TrueFiling System.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. This declaration is executed in Oakland, California on August 18, 2020.

/s/ Michele Hinton

MICHELE HINTON

SERVICE LIST

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Clerk of the Court
Los Angeles Superior Court
c/o Honorable Robert L. Hess
Stanley Mosk Courthouse, Department 24
111 North Hill Street Los Angeles 90012

Case No. BC631510 [**By USPS Only**]

Clerk of the Court
California Court of Appeal
Second Appellate District
300 S. Spring Street, Fl. 2, N. Tower
Los Angeles, CA 90013

Case No. B289003 [**By USPS Only**]

STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

Case Name: **SHEEN v. WELLS FARGO
BANK**

Case Number: **S258019**

Lower Court Case Number: **B289003**

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MOTION	Sheen.Motion
ADDITIONAL DOCUMENTS	Sheen.Motion.Ord
BRIEF	Phillips.Amicus.Brief-Final

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8/18/2020

Date

/s/Michele Hinton

Signature

Huddleston, Robert (83662)

Last Name, First Name (PNum)

Huddleston & Sipos Law Group LLP

Law Firm