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**FILED**  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SANTA BARBARA  
**SEP 22 2011**  
GARY M. BLAIR, Executive Officer  
BY *TERRI CHAVEZ*  
TERRI CHAVEZ, Deputy Clerk

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7 Attorneys for Defendant  
CALIFORNIA RECONVEYANCE COMPANY

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
9 **COUNTY OF SANTA BARBARA**

11 DOUGLAS GILLIES  
12 Plaintiffs,  
13  
14 v.  
15 CALIFORNIA RECONVEYANCE CO and  
DOES 1 - 150  
16 Defendants.

CASE NO.: 1381828 *By FAX*

Case Assigned to Honorable Denies de Bellefeuille

**REPLY MEMORANDUM FILED IN  
RESPONSE TO OPPOSITION TO  
MOTION TO STRIKE COMPLAINT**

New Hearing Date: September 29, 2011  
Department: 6  
Time: 9:30 a. m.

Action filed on July 13, 2011

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 Defendant California Reconveyance Company ("CRC") respectfully submits this Reply  
3 Memorandum in response to the Opposition to Motion To Strike ("Motion") to the Complaint of  
4 Plaintiff Douglas Gillies ("Plaintiff").

5 **I. MOTION SHOULD BE GRANTED BECAUSE COMPLAINT HAS BEEN FILED**  
6 **IN VIOLATION OF THE ONE JUDGMENT RULE**

7 Contrary to Plaintiff's contentions in the Opposing Papers at p 5, l. 10 to p. 7., l. 20, the  
8 Demurrer that was sustained without leave to amend and was affirmed on appeal in *Gillies I* was on  
9 the merits. Therefore, the res judicata doctrine is applicable to the Complaint filed in *Gillies II*. See  
10 *Ojavan Investors, Inc. v. California Coastal Com.* 54 Cal.App.4th 373, 383 -  
11 84 (Cal.App.2.Dist.1997), which holds:

12 In analyzing these issues, we take note of *Ojavan Investor, Inc. v. California Coastal*  
13 *Com. supra*, 26 Cal.App.4th 516 (*Ojavan I*), which upheld dismissals of related  
14 actions brought by Ojavan Investors. Since *Ojavan I* is a final decision on the merits  
15 and concerned the same permits, deed restrictions and issue of whether the  
16 Commission's cease-and-desist order is enforceable against Ojavan Investors, the res  
17 judicata doctrine prohibits relitigation of matters already determined in Ojavan I. (1)  
18 **The fact the appeals in *Ojavan I* stemmed from general demurrers did not  
render the res judicata doctrine inapplicable.<sup>FN8</sup> Unlike a judgment following  
the sustaining of a special demurrer, a judgment following the sustaining of a  
general demurrer may be on the merits. (*Goddard v. Security Title Ins. & Guar.*  
*Co.* (1939) 14 Cal.2d 47, 52 [92 P.2d 804].)**

19 FN8 A special demurrer attacks a pleading for uncertainty, while a general demurrer  
20 points out substantive pleading defects such as failure to state a cause of action or  
21 affirmative defenses (e.g., statute of limitations or waiver).

22 (2) Contrary to Ojavan Investors' contention, whether the res judicata doctrine applies  
23 does not depend on whether the causes of action in the present action are identical to  
24 the causes of action in a prior action. **Although the causes of action in a first  
lawsuit may differ from those in a second lawsuit, "... the prior determination  
of an issue in the first lawsuit becomes conclusive in the subsequent lawsuit  
between the same parties with respect to that issue and also with respect to every  
matter which might have been urged to sustain or defeat its determination...."**  
25 **(*Frommhagen v. Bd. of Supervisors* (1987) 197 Cal.App.3d 1292, 1301 [243  
26 Cal.Rptr. 390], quoting *Safeco Insurance Co. v. Tholen* (1981) 117 Cal.App.3d  
27 685, 697 [173 Cal.Rptr. 23].)**

1 *Ojavan Investors, Inc. v. California Coastal Com.* 54 Cal.App.4th 373, 383 -  
2 384 (Cal.App.2.Dist.1997) ("**Ojavan**"). (Emphasis in bold added.)

3 In this case, each of the issues that Plaintiff asserts in *Gillies II* involves matters that either  
4 were asserted without success in *Gillies I* or that might have been but asserted but were not asserted  
5 in *Gillies I*.

6 **A. Plaintiff's First and Second Causes of Action Should Be Stricken**

7 As is made clear in the Opposing Papers at p. 2, l. 2 to 5, l. 7, the first two causes of action  
8 are nothing more than the virtually identical factual issues that Plaintiff raised in the Appellant's  
9 Brief in *Gillies I*. This issue concerns the spelling of Plaintiff's name as "Douglas" rather than  
10 "Douglas". The California Court of Appeal held this argument to be without merit. Here is what the  
11 Court of Appeal decided:

12 Gillies points out that the notice of default misspells his first name Douglas, instead of the  
13 correct "*Douglas*." But no reasonable person would be confused by such a minor error.  
14 Gillies' last name is spelled correctly and the notice contains the street address of the property  
15 as well as the assessor's parcel number. Moreover, Gillies does not contest that he received  
the notice. Gillie's argument fails to raise a material issue.

16 Unpublished Opinion of the California Court of Appeal, Second Appellate District, filed on April  
17 11, 2011 ("Opinion"), page 7, attached as Exhibit "3" to the RJN.

18 In other words, the issues raised in the first and second causes of action were considered in  
19 *Gillies I* and rejected. It speaks volumes that Plaintiff does not even address in the Opposing Papers  
20 the fact that the Court of Appeal has considered this "minor error" and deemed it to be without merit.  
21 Nor does Plaintiff address in his Opposing Papers that this Court has already rejected the contentions  
22 raised in his Opposing Paper when this Court denied his Application for Preliminary Injunction:

23 Gillies did, nonetheless, actually and fully litigate the effect of the misspelling under  
24 the legal theory asserted in this case, namely, that the NOD and NOTS were invalid  
25 because the misspelling prevented the proper indexing in the Grantor/Grantee index.  
26 (Appellant's Opening Brief, at p. 11 [Tannatt decl., exhibit 1].) The Court of Appeal's  
27 disposition that the misspelling facts and argument did not raise a reasonable  
28 possibility that plaintiff could state a valid cause of action operates as collateral  
estoppel of that issue here.

1 For the same reasons set forth in the Court Ruling on Plaintiff's Application for Preliminary  
2 Injunction, CRC's Motion should be granted and the First and Second Causes of Action should be  
3 dismissed.

4 **B. Plaintiff's Third Cause of Action Should Be Stricken**

5 In the Court's OSC Ruling at page 3, this Court has acknowledged that the Court of  
6 Appeal's rejection of the issues raised in the third cause of action based on non-compliance with §  
7 2923.5 constitutes a bar to the re-litigating of these same issues in *Gillies II*:

8 The Court of Appeal rejected the precise claim asserted by Gillies with respect to Civil Code  
9 section 2923.5. That argument is therefore barred by res judicata. (See *Keidatz v. Albany*  
10 (1952) 39 Cal.2d 826, 828 ["if the demurrer was sustained in the first action on a ground  
11 equally applicable to the second, the former judgment will also be a bar"].))

12 In the Opposing Papers, Plaintiff erroneously contends the one judgment rule does not apply  
13 to this cause of action because in *Gillies II*, he is now alleging a different purported violation of  
14 Civil Code § 2923.5 than the violation that he asserted in *Gillies I*. What Plaintiff ignores is that the  
15 one judgment rule does bar every issue that was raised, but every issue that "might" have been  
16 raised. See *Ojavan, supra*. See also the California Supreme Court Case *Johnson v City of Loma*  
17 *Linda*, 24 Cal 4<sup>th</sup> 61, 76-77 ("The general rule that a judgment is conclusive as to matters that could  
18 have been litigated 'does not apply to new rights acquired pending the action which might have  
19 been, but which were not, required to be litigated [Citations].' [Citation.]" (*Allied Fire Protection,*  
20 *supra*, 127 Cal.App.4th at p. 155, 25 Cal.Rptr.3d 195 and *Burdette v. Carrier Corp.*, 158  
21 Cal.App.4th 1668, 1674-1675, 71 Cal.Rptr.3d 185, 191 (2008)

22 A trial on the merits includes a trial in which the plaintiff fails to provide evidence in  
23 support of the claim. Res judicata bars the relitigation not only of claims that were  
24 conclusively determined in the first action, but also matter that was within the scope  
25 of the action, related to the subject matter, and relevant to the issues so that it could  
26 have been raised. (*Sutphin v. Speik* (1940) 15 Cal.2d 195, 202, 99 P.2d 652; *Merry v.*  
27 *Coast Community College Dist.* (1979) 97 Cal.App.3d 214, 222, 158 Cal.Rptr. 603.)  
28 **"A party cannot by negligence or design withhold issues and litigate them in  
consecutive actions. Hence the rule is that the prior judgment is res judicata on  
matters which were raised or could have been raised, on matters litigated or  
litigable."** (*Sutphin v. Speik, supra*, at p. 202, 99 P.2d 652.)

Emphasis in bold added.

1 In this case, the Notice of Default and Election To Sell ("NOD") was recorded on August 13,  
2 2009, over three years ago. In *Gillies I*, Plaintiff filed his complaint on November 25, 2009 and his  
3 First Amended Complaint on December 23, 2009. In *Gillies I*, Plaintiff raised the issue of Civil  
4 Code § 2923.5. Consequently, any of the issues raised in the third cause of action regarding any  
5 non-compliance with § 2923.5 could and should have been asserted in *Gillies I*. Consequently, the  
6 one judgment rule bars Plaintiff from asserting these issues in *Gillies II*. These factual issues do not  
7 constitute new matter arising after the conclusion of *Gillies I* or even arising while *Gillies I* was  
8 pending. These issues are merely ones that Plaintiff, either through negligence or design, did not  
9 assert in *Gillies I* but clearly could have. Accordingly, the one judgment rule now bars him from  
10 doing so in *Gillies II* and the third cause of action should be dismissed.

11 **C. Plaintiff's Fourth Cause of Action Should Also Be Stricken**

12 Plaintiff's Opposing Papers do not address this cause of action. Failure to oppose the  
13 Demurrer may be construed as having abandoned the claims. See, *Herzberg v. County of Plumas*,  
14 133 Cal. App. 4th 1, 20 (2005) ("Plaintiffs did not oppose the County's demurrer to this portion of  
15 their seventh cause of action and have submitted no argument on the issue in their briefs on appeal.  
16 Accordingly, we deem plaintiffs to have abandoned the issue."). Consequently, this cause of action  
17 should be stricken because it may be construed that Plaintiff has abandoned this fourth cause of  
18 action for injunctive relief at ¶¶ 38 to 41. Furthermore, because this cause of action does not allege  
19 any additional facts, it should be dismissed for the same reasons stated above.

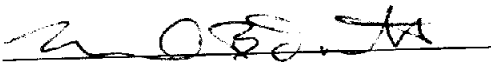
20 **II. CONCLUSION**

21 For the foregoing reasons, CRC respectfully request that the Court strike each of the causes  
22 of action in Plaintiff's Complaint and issue and Order in its favor dismissing this action with  
23 prejudice.

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DATED: September 22, 2011

By:   
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