IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

C.A. No. 13-55296

DOUGLAS GILLIES

Plaintiff-Appellant

v.

JPMORGAN CHASE BANK, N.A.

Defendant-Appellee

BRIEF OF APPELLANT

Appeal from a Dismissal Order of the United States District Court
For the Central District of California
D.C. No. 12-cv-10394-GW-MAN

(Honorable George H. Wu)

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I. STATEMENT OF JURISDICTION

This appeal arises from an order on February 11, 2013, granting a motion filed by defendant-appellee JPMorgan Chase Bank N.A. to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6). The District Court did not enter a final judgment. However, the court ordered dismissal of the complaint in its entirety with prejudice. Excerpts of Record ("ER") p. 001 [Order Granting Defendant's Motion to Dismiss, February 7, 2013].

The courts of appeals have jurisdiction of appeals from all final decisions of the district courts of the United States. 28 U.S.C. §1291. If it appears that the district court intended the dismissal to dispose of the action, it may be considered final and appealable. *Hoohuli v. Ariyoshi* (9th Cir. 1984) 741 F.2d 1169, 1171 n.1.

There is diversity of citizenship between Plaintiff and Defendant Chase, and the amount in controversy exceeds the sum of $75,000. The District Court has jurisdiction of the action pursuant to 28 U.S.C. 1332(a).

Plaintiff/Appellant filed a timely Notice of Appeal on February 19, 2013. Fed. R. App. P. 4(a)(1)(A).

II. ISSUES PRESENTED

1. Did the District Court err in ruling that the Complaint was barred by the doctrine of res judicata where an earlier case in state court alleged that a Notice of Default ("NOD") and Notice of Trustee's Sale ("NOTS") did not comply with California statutes and had not been recorded, whereas the federal case alleges that Chase's conduct following dismissal in state court shows that it cannot identify or locate the beneficiary/lender and therefore Chase is not authorized to foreclose.

2. Although the preclusive effect of a state court judgment in a subsequent federal lawsuit generally is determined by full faith and credit, the principle of res judicata cannot deprive a party of Due Process under the 14th Amendment.

III. STATEMENT OF THE CASE

Plaintiff sued JPMorgan Chase ("Chase") and California Reconveyance Company ("CRC") in Santa Barbara Superior Court to stop a trustee's sale of his property on the grounds that he could not find a NOD in the County Grantor-Grantee Index and the NOD and NOTS did not comply with the notice requirements of Cal. Civ. Code §§2923.5—2924. Defendants demurred. They attached a NOD recorded on August 13, 2009, and a NOTS recorded on November 18, 2009, with Plaintiff's name spelled incorrectly. The demurrer was

sustained without leave to amend. The California Court of Appeals found that Plaintiff had actual notice of the misspelled NOD and affirmed.

CRC recorded a second Notice of Trustee's Sale ("NOTS") with Plaintiff's name misspelled and Plaintiff sued CRC in Superior Court alleging that the NOD and NOTS did not provide constructive notice because they could not be properly indexed. The trial court sustained CRC's motion to strike on the basis of res judicata and the Court of Appeal affirmed on September 6, 2012. In all, California courts ruled that the notices were sufficient, a NOD was recorded, and the indexing issue was barred by res judicata.

Chase and CRC recorded a third NOTS with a misspelled name on November 8, 2012. Plaintiff filed the Subject Complaint in Federal District Court against Chase for attempting to sell his Property at a trustee's sale without knowing the identity of the lender, note holder, or beneficiary. ER 085 [Doc 1 ¶2]. He alleged that subsequent to filing the NOD, Chase had invested thousands of dollars pursuing a strategy of executing a defective foreclosure based on intentionally stating a fictitious name for the trustor in a recorded Notice of Default and three recorded Notices of Trustee's Sale, when it simply needed to request that the lender contact Plaintiff and ask him to sign a correctly spelled document. The District Court dismissed the Complaint with prejudice on the

grounds that the action was precluded by the demurrer in state court. ER 089 [Doc 1, Complaint ¶24].

IV. STATEMENT OF FACTS

The name Douglas Gillies is spelled correctly under the signature line of an unsigned Adjustable Rate Note dated August 12, 2003 ("Note"). ER 167. Washington Mutual Bank, FA ("WaMuFA") is the lender. ER 163. A Deed of Trust dated August 12, 2003, names Dougles Gillies as "Borrower" and WaMuFA as "Lender" on page one [ER 170] but spells the name Douglas correctly on the signature pages. ER 183, 189. WaMuFA was dissolved in 2005 and no recorded document indicates that its interest in the Property was ever transferred to Washington Mutual Bank. ER 086 [Complaint ¶ 7].

On August 13, 2009, CRC, a subsidiary of Chase, mailed a Notice of Default ("NOD") to Plaintiff alleging a breach "under a Deed of Trust dated 08/12/2003, executed by DOUGLES GILLIES, AN UNMARRIED MAN, as trustor". ER 086 [Complaint ¶9]; ER 161 [NOD]. Plaintiff searched the County Grantor-Grantee Index under his name, Douglas Gillies, and could not find any reference to the NOD. ER 087 [Complaint ¶10].

CRC posted a Notice of Trustee's Sale ("NOTS") three months later, again stating that the Deed of Trust was executed by Dougles Gillies and that the

residence would be sold on December 7, 2009. ER 158. Gillies filed a complaint against CRC and Chase in California Superior Court ("Gillies I") one week after the NOTS was posted to stop the sale on the grounds that defendants did not record a notice of default. ER 147 [Complaint ¶6].

Defendants filed a demurrer and attached a recorded NOD that did not spell Douglas correctly. ER 057 [Doc. 12, Opposition to Motion to Dismiss]. The trial court sustained the demurrer without leave to amend, finding that a NOD had been recorded. The Court of Appeal affirmed on the grounds that Plaintiff had actual notice. "Gillies points out that the notice of default misspells his first name Dougles, instead of the correct 'Douglas.' But no reasonable person would be confused by such a minor error. Gillies last name is spelled correctly and the notice contains the street address of the property as well as the assessor's parcel number. Moreover, Gillies does not contest that he received the notice. Gillies's argument fails to raise a material issue." ER 033.

Plaintiff informed CRC on March 9, 2010, that the NOD recorded on August 13, 2009, incorrectly stated the name of the trustor to be Dougles Gillies, a fictitious person, that a search for Douglas Gillies in the Santa Barbara Grantor-Grantee Index did not turn up any NOD recorded by CRC, and that the NOD did not comply with Cal. Civ. Code §2924 because a notice of default stating the name of the trustor must be recorded prior to a nonjudicial sale. ER

088 [Complaint, *Gillies v. Chase* ¶¶ 18-21]; ER 120-122 [Complaint, *Gillies v. CRC* ¶¶ 22-25].

CRC recorded another NOTS on June 30, 2011, again misidentifying the trustor as Dougles Gillies. ER 137. Plaintiff sued CRC ("Gillies II") alleging that the NOD and NOTS were defective because they misspelled the trustor's name and therefore they could not be properly indexed in the County Grantor-Grantee Index. ER 119-122. CRC moved to strike the complaint under the doctrine of res judicata. The trial court granted the motion to strike. ER 23-24 [Court of Appeal Opinion, Sept. 6, 2012]. The Court of Appeal noted the second action alleged that the trust deed and notice of default were not indexed properly and then affirmed on the grounds that res judicata bars re-litigation of claims that could have been raised in the prior action, citing *Ojavan Investors, Inc. v. California Coastal Com.* (1997) 54 Cal.App.4th 373, 384. ER 025.

On November 8, 2012 CRC filed a third NOTS that misidentified the trustor as Dougles Gillies. ER 109 [NOTS]; ER 087 [Complaint].

Plaintiff's name on the Note is Douglas Gillies. ER 167-168. Plaintiff's name beneath his signature on the Deed of Trust is Douglas Gillies. ER 183, 189. CRC's assertion on each NOTS that the Deed of Trust was executed by Dougles Gillies is false. CRC and Chase intentionally recorded the second and third notices of trustee's sale under a fictitious name.

A spelling discrepancy is a clerical error. Chase's remedy is found in the Adjustable Rate Note. The Adjustable Rate Note states in Paragraph 12 that in the event of a clerical error, "I agree, upon notice from the Note Holder, to reexecute any Loan Documents that are necessary to correct any such Errors…" ER 167. The note holder can request that the trustor amend the Deed of Trust to correct a clerical error. Rather than follow the simple procedure in the contract to correct the error, CRC elected to repeatedly present false documents to the County Recorder with the intention that they be recorded and indexed under a fictitious name. ER 089 [Complaint ¶ 23].

Chase has invested hundreds of thousands of dollars pursuing a strategy of completing a defective foreclosure that identifies a fictitious name as the trustor in a recorded Notice of Default and three recorded Notices of Trustees Sale, when Chase could simply instruct the lender to request that Plaintiff sign an amended document to correct a clerical error. That would have required one phone call, compared to hundreds (if not thousands) of billable hours filing demurrers, motions to strike, and three appellate briefs. ER 89 [Complaint ¶ 24].

In summary, Gillies I complaint alleged that no Notice of Default was recorded. The Court found that a NOD was recorded, albeit with a misspelled name, and sustained a demurrer. The Court of Appeal affirmed, finding that Plaintiff had actual notice of the NOD. Gillies II complaint alleged that the Deed

of Trust, the Notice of Default, and two Notices of Trustee's Sale could not be properly indexed in the County Grantor-Grantee Index. The Superior Court dismissed and the Court of Appeal affirmed based on the doctrine of res judicata.

The Complaint filed in federal court recounts these facts not for the purpose of re-litigating issues of defective notice, but rather as a foundation of facts that emerged as a result of Chase and CRC's persistence in perpetrating a clerical error. In litigating so vigorously instead of simply inviting the beneficiary to request a correction of a clerical error, Chase and CRC demonstrated that they could not locate or identify the beneficiary. Appellant could not have known this material fact when the state court action commenced. The smoking gun was the sequence of defective NOTSs.

V. SUMMARY OF ARGUMENT

Chase attempted to sell Plaintiff/Appellant's property at a trustee's sale when it could not identify the lender or beneficiary. Chase has produced no supporting documents. Chase's claim is based on a 44-page version of a Purchase & Assumption Agreement of which the district court did not take judicial notice. This case is based on facts unknown to Plaintiff when the state court action was filed.

VI. STANDARD OF REVIEW

The reviewing court must determine whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Ventura Packers, Inc. v. F/V Jeanine Kathleen* (9th Cir. 2002) 305 F3d 913, 916; *Valdez v. Rosenbaum* (9th Cir. 2002) 302 F3d 1039, 1043. "The preclusive effect of a state court judgment in federal court is based on state preclusion law." *Howard v. Am. Online, Inc.* (9th Cir. 2000) 208 F.3d 741, 748.

The court of appeals reviews de novo a district court's dismissal of an action pursuant to Fed. R. Civ. P. 12(b)(6). "In determining whether dismissal was properly granted, we assume all factual allegations are true and construe them in the light most favorable to the plaintiff." *Cervantes v. U.S.* (9th Cir. 2003) 330 F. 3d 1186, 1187; *Fireman's Fund Ins. Co. v. City of Lodi* (9th Cir. 2002) 302 F.3d 928, 939.

A court should freely give leave to amend when justice so requires. Fed. R. Civ. P. 15. An amendment would be "futile" only if no set of facts can be proved which would constitute a valid claim or defense. *Miller v. Rykoff-Sexton, Inc.* (9th Cir. 1988) 845 F.2d 209, 214 .

VII. ARGUMENT

A. A DEMURRER DOES NOT BAR A COMPLAINT IN A SUBSEQUENT ACTION ALLEGING NEW FACTS & ISSUES

The District Court found that an issue never raised in state court based upon facts that occurred following dismissal of the state court action was conclusively resolved by a demurrer without leave to amend.

Under 28 U.S.C. §1738, a federal court generally is required to consider first the law of the State in which the judgment was rendered to determine its preclusive effect. *Marrese v. American Academy of Orthopaedic Surgeons* (1985) 470 U.S. 373, 375. The preclusive effect of a state court judgment in a subsequent federal lawsuit generally is determined by the full faith and credit statute, which provides that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." U.S.C. §1738. This statute directs a federal court to refer to the preclusion law of the State in which judgment was rendered. "It has long been established that §1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from

which the judgment is taken." *Kremer v. Chemical Construction Corp.* (1982) 456 U.S. 461, 481-482, 102 S. Ct. 1883.

After a trial on the merits, a judgment is res judicata not only as to issues actually raised, but also as to issues that could have been raised in support of the action. However, it is a settled rule in California that a judgment entered on demurrer does not have such broad res judicata effect. *Keidatz v. Albany* (1952) 39 Cal. 2d. 826, 830.

New facts might justify subsequent action if plaintiff was blamelessly ignorant of facts before filing prior action. *Marrapese v. Rhode Island* (1st Cir. 1984) 749 F.2d 934, 937. Courts have recognized an exception to the general rule against claim splitting where the plaintiff's blameless ignorance of his injury or its cause resulted in his not bringing suit until after the limitations period had elapsed. See *Guerrero v. Katzen* (D.C. Cir. 1985) 774 F.2d 506, 508 (exception to general rule of claim preclusion may apply when newly discovered evidence could not have been discovered with due diligence).

The district court's ruling [ER 004-008] includes the following errors:

The Complaint alleges that Chase erroneously foreclosed on Plaintiff's home. In fact, neither party has contended that a foreclosure has occurred.

Plaintiff previously filed suit against Chase in state court asserting identical and similar claims. The allegation in the federal complaint that Chase

cannot identify the beneficiary was not raised in state court and could not have been raised because it is based on conduct following dismissal of the state complaint.

The instant matter involves the same cause of action as his state lawsuits. The state court action alleged a failure to record a Notice of Default. The federal action alleges that Chase is not authorized by the beneficiary to foreclose.

Here, the harm alleged to have been suffered in the state actions is the same as that alleged here, namely the loss of Plaintiff's home due to foreclosure, and related economic injuries. Plaintiff did not allege loss of home. The primary right asserted in state court was the statutory right to be afforded the protections spelled out in Cal. Civ. Code §§2923.5 – 2924.[1] This right could not be asserted until Chase's conduct following demurrer revealed the probability of a breach.

The primay right asserted in federal court is a contractual right under the DOT, which states that only the lender is authorized to accelerate the loan. ER 182 [DOT ¶22].

He first argues that this case should be able to move forward because the decisions rendered against him by the California Court of Appeal were in error.

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[1] Cal. Civ. Code §2924 states: "The trustee, mortgagee, or beneficiary, or any of their authorized agents shall first file for record in the office of the recorder…a notice of default." ER 140. "Plaintiff is informed and believes that (the notice of default) has not been recorded.' ER 140 [FAC ¶¶ 6, 8].

The federal case does not challenge any decision of the California Court of Appeal.

This case supposedly raises "a more central issue" related to the foreclosure involving the recording of various documents. The central issue in this case is the allegation that Chase cannot identify or name the beneficiary. Chase's pattern of recording flawed documents is a central issue. It is evidence that Chase is not authorized to foreclose.

It is beyond question that the instant matter involves the same causes of action as the state court actions. Whether or not a Notice of Default was recorded has no bearing on a cause of action alleging that Chase is not authorized to foreclose.

The complaint states the same facts which were held not to constitute a cause of action on the former demurrer. The federal complaint states facts that occurred after the demurrer in state court was sustained.

The two state complaints and the Complaint filed here allege virtually identical facts, all centering around Defendant's alleged wrongful conduct in foreclosing on Plaintiffs home. No foreclosure has been alleged or occurred.

Appellant does not seek federal court review a of state court decision. Plaintiff alleged in state court that the NOD was not recorded. The trial court found that a NOD was recorded. The appellate court affirmed. Plaintiff then

alleged that the NOD could not be indexed. The trial court found this issue was barred by res judicata and again the appellate court affirmed. So it was settled in the California courts that a NOD was recorded.

Plaintiff could not have discovered at the time the state court action was filed that Chase and CRC were unable to contact the lender/beneficiary to request that a clerical error be corrected. Only Chase and CRC could have known they were acting without the knowledge or consent of the only entity that could authorize foreclosure. Chase's conduct raises a plausible new issue.

When a demurrer is sustained, the case is dismissed, and then new or additional facts are alleged that cure the defects in the original pleading, it is settled that the former judgment is not a bar to the subsequent action, whether or not plaintiff had an opportunity to amend his complaint. *Keidatz v. Albany* (1952) 39 Cal. 2d. 826, 830; *Goddard v. Security Title Ins. & Guar. Co*. (1939) 14 Cal.2d 47, 52.

The doctrine of res judicata requires that the cause of action in the prior proceeding be the same as in the present cause of action, the prior proceeding result in a final judgment on the merits, and the parties be the same as in the prior proceeding. *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797; *Kurtin v. Elieff* (4th Dist. 2013) 215 Cal. App. 4th 455, 467.

Res judicata bars a cause of action that was or could have been litigated in a prior proceeding if: "(1) the present action is on the same cause of action as the prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the parties in the present action or parties in privity with them were parties to the prior proceeding. *Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 557.

"We are instructed by Keidatz that we must evaluate the second complaint to determine whether new or additional facts are alleged which cure the defects in the original pleading. If they are, the order of dismissal must be reversed." *Kanarek v. Bugliosi* (1980) 108 Cal. App. 3d 327, 335.

Where a general demurrer is sustained and a new and different complaint is filed, the defense of res judicata has no application. *Rose v. Ames* (1945) 68 Cal.App.2d 444, 448; *Dyment v. Board of Medical Examiners* (1928) 93 Cal.App. 65, 71; *Takekawa v. Hole* (1911) 17 Cal.App. 653, 656 (prior judgment on the pleadings was not a bar to new action alleging different facts).

If the plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right, because the merits of the cause

disclosed in the second case were not heard and decided in the first. *See v. Joughin* (1941) 18 Cal.2d 603, 606.

While a judgment upon demurrer is conclusive in subsequent actions between the parties as to those matters it actually adjudicates, if an essential fact missing in the first complaint is supplied in the second, the former judgment is not a bar. *Erganian v. Brightman* (1936) 13 Cal.App.2d 696, 699-700.

Justice Traynor stated in *Keidatz v. Albany* (1952) 39 Cal. 2d. 826, 830.

> If, on the other hand, new or additional facts are alleged that cure the defects in the original pleading, it is settled that the former judgment is not a bar to the subsequent action whether or not plaintiff had an opportunity to amend his complaint. (*Goddard v. Security Title Ins. & Guar. Co., supra*; *Newhall v. Hatch*, 134 Cal. 269, 272; *Heilig v. Parlin*, 134 Cal. 99, 101-102; *Morrell v. Morgan*, 65 Cal. 575, 576-577; *City of Los Angeles v. Mellus*, 59 Cal. 444, 453; *Rose v. Ames*, 68 Cal. App.2d 444, 448; *Dyment v. Board of Medical Examiners*, 93 Cal. App. 65, 71; *Takekawa v. Hole*, 17 Cal. App. 653, 656; see *See v. Joughin*, 18 Cal.2d 603, 606; *Campenella v. Campenella*, 204 Cal. 515, 521; *Erganian v. Brightman*, 13 Cal. App.2d 696, 700; Restatement Judgments, § 50, Comments c and e; 30 Cal.L.Rev. 487; Anno., 106 A.L.R. 437, 444.)

The rule respecting such judgments is analogous to the rule that was applicable to nonsuits before Cal. Code Civ. Proc. §581c was added to the Code of Civil Procedure in 1947. A judgment of nonsuit was not on the merits, so a plaintiff could start anew and recover judgment if he could prove sufficient facts in the second action. Section 581c now provides that a judgment of nonsuit operates as an adjudication upon the merits unless the court otherwise specifies.

Less prejudice is suffered by a defendant who has had only to attack the pleadings, than by one who has been forced to go to trial until a nonsuit is granted, and the hardship suffered by being forced to defend against a new action, instead of against an amended complaint, is not materially greater. *Keidatz v. Albany* (1952) 39 Cal. 2d. 826, 830., 830.

In *Goddard v. Security Title Ins. & Guar. Co*. (1939) 14 Cal.2d 47, 52-53, the court sustained a general demurrer and the judgment against the plaintiff was affirmed on appeal. In the new action, the record was examined, and it appeared from the minute order of the trial judge and the opinion of the appellate court that the fatal defect was in the form of the action – the complaint was framed on a theory of conversion rather than case. "The court's determination amounted to nothing more than that the plaintiff had failed to establish a right of recovery against the defendant by that particular complaint. The judgment was based upon formal matters of pleading, and concluded nothing save that the complaint, in the form in which it was then presented, did not entitle plaintiff to go to trial on the merits. Such a judgment is clearly not on the merits, and under the rules set forth above, is not res judicata."

In *Lunsford v. Kosanke* (1956) 140 C.A.2d 623, 628, a contract action, defendant demurred and objected to all evidence. The trial judge ruled that the pleading was insufficient but also filed findings against plaintiffs on the merits.

Later, plaintiff brought a second action with a good complaint. *Held*, the first judgment was not res judicata. It was not on the merits, for the judge had held the complaint so defective as to preclude the introduction of any evidence under it. Because the case was decided purely on the insufficiency of the pleadings, the findings on the merits were improper and void.

Crowley v. Modern Faucet Mfg. Co. (1955) 44 Cal. 2d 321, 323 clarified Keidatz:

> The applicable rules are set forth in *Keidatz v. Albany*, 39 Cal.2d 826, 828: (1) A judgment entered after a general demurrer has been sustained "is a judgment on the merits to the extent that it adjudicates that the facts alleged do not constitute a cause of action, and will accordingly, be a bar to a subsequent action alleging the same facts."
>
> (2) [E]ven though different facts may be alleged in the second action, if the demurrer was sustained in the first action on a ground equally applicable to the second, the former judgment will also be a bar.
>
> (3) If, on the other hand, new or additional facts are alleged that cure the defects in the original pleading, it is settled that the former judgment is not a bar to the subsequent action whether or not plaintiff had an opportunity to amend his complaint.

In order to apply direct estoppel in a later action, the issue being argued in the later action has to be fully and finally litigated in the first action. *South Sutter, LLC v. LJ Sutter Partners, L.P.* (3d Dist. 2011) 193 Cal. App. 4th 634, 665.

Federal courts are in accord with California law. If the plaintiff is unaware of facts when filing a complaint, res judicata will not bar subsequent litigation. *Doe v. Allied-Signal, Inc.* (7th Cir.1993) 985 F. 2d 908, 914; *Himel v. Continental Ill. Nat. Bank & Trust Co. of Chicago* (7th Cir.1979) 596 F.2d 205, 210. If the new facts establish a new claim separate and distinct from the previous claim, then claim preclusion has no applicability. See *Lawlor v. National Screen Serv. Corp.* (1955) 349 U.S. 322, 327−328, 75 S. Ct. 865 (prior dismissal of action alleging antitrust violations did not preclude new action alleging antitrust violations and other legal theories based on conduct of defendant which occurred after prior judgment); *Harkins Amusement Enters. v. Harry Nace Co.* (9th Cir. 1989) 890 F.2d 181, 183 (additional antitrust violations occurring after prior action gave rise to new claim); *Wu v. Thomas* (11th Cir. 1989) 863 F.2d 1543, 1548, 1549 (prior suit for sex discrimination did not bar current action for termination of employment in retaliation for bringing first action); *Morgan v. Covington Twp.* (3d Cir. 2011) 648 F.3d 172, 178 (res judicata does not bar claims that are predicated on events that postdate the filing of the initial complaint); *Drake v. FAA* (D.C. Cir. 2002) 291 F.3d 59, 66−67 (claim preclusion does not preclude claims based on facts not yet in existence at the time of the original action).

In the present action, new and additional facts are alleged. It is one thing to misspell the name of the trustor on a NOD. It is quite another to lower the market value of a residence by recording a NOD and scheduling a trustee's sale having no idea who the lender might be. One is a clerical error; the other is a felony.

This federal court action raises a more central issue that could only have been discovered as a result of Chase's conduct in the first two actions. Chase filed pleading after pleading in Superior Court as well as three briefs in the California Court of Appeal and the California Supreme Court to defend a defective NOD, and all the while Chase could have resolved the indexing snafu, which remains a cloud on Plaintiff's title, with one simple request to the beneficiary.

B. A DEMURRER IS NOT A FINAL JUDGMENT ON THE MERITS GIVING RISE TO RES JUDICATA AND COLLATERAL ESTOPPEL

The original lawsuit (Gillies I) started with a 6-page complaint filed on November 25, 2009, to prevent a trustee's sale twelve days later on December 7, 2010. Plaintiff alleged that the Notice of Default had not been recorded. ER 147 [Complaint ¶6]. There was one brief hearing. The court sustained defendant's demurrer based upon a finding that defendants had recorded a NOD, without

noting that it was recorded under a fictitious name. ER 037 [Order After Hearing, Santa Barbara Superior Court, March 26, 2010]. The Court of Appeal affirmed after concluding that plaintiff had actual notice of the NOD.

The Court of Appeal did not address the indexing issue. "Gillies points out that the notice of default misspells his first name Dougl*e*s, instead of the correct *'Douglas*.' But no reasonable person would be confused by such a minor error. Gillies last name is spelled correctly and the notice contains the street address of the property as well as the assessor's parcel number. Moreover, Gillies does not contest that he received the notice." ER 033. The court addressed actual notice, but not constructive notice.

Plaintiff filed a new complaint on July 13, 2011 (Gillies II) alleging different facts and raising a new issue that the Notice of Default and Notice of Trustee's Sale could not provide constructive notice because the name of the trustor was not spelled correctly. The trial court was unsure whether a motion to strike or demurrer was the proper procedure. It granted the motion to strike stating that to the extent the issues were properly addressed by demurrer, the motion was deemed a demurrer. ER 024.

The appropriate doctrine for resolving this case is not *res judicata*. It is *res ipsa loquitur*. Chase's costly litigation strategy speaks for itself. If Chase

cannot locate the lender or communicate with the lender, it is not authorized to sell the property.

A mortgage is a contract by which specific property, including an estate for years in real property, is hypothecated for the performance of an act, without the necessity of a change of possession. Cal. Civ. Code §2920 (a).

Paragraph 1 of Plaintiff's Note states that the lender under the Note "or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the Note Holder." ER 163. Paragraph 7(c) of the Note states that if the Borrower is in default, the note holder—not the servicer—may require the Borrower to pay the full amount of the principal. ER 165.

Paragraph 22 of the Deed of Trust empowers the lender to initiate a foreclosure: "If Lender invokes the power of sale, Lender shall execute or cause Trustee to execute a written notice of the occurrence of an event of default and of Lender's election to cause the property to be sold." ER 182. In the absence of a lender, a bank lacks the authority to invoke the power of sale.

A beneficiary is required to show it has the right to foreclose. A simple declaration from a bank officer is insufficient. This issue was addressed in *Herrera v. Deutsche Bank Nat'l Trust Co.* (2011) 196 Cal.App.4th 1366, 1376:

> This declaration is insufficient to show the Bank is the beneficiary under the 2003 deed of trust. A supporting declaration must be made on personal knowledge and "show affirmatively that the affiant is competent

> to testify to the matters stated." Code Civ. Proc., § 437c, subd. (d). Brignac's declaration does not affirmatively show that she can competently testify the Bank is the beneficiary under the 2003 deed of trust. At most, her declaration shows she can testify as to what the assignment of deed of trust "indicates." But the factual contents of the assignment are hearsay and defendants offered no exception to the hearsay rule prior to oral argument to make these factual matters admissible.

Chase is not a lender, beneficiary, or note holder. If it cannot contact the lender to correct a clerical error, it lacks the power to foreclose. "(W)here a plaintiff alleges that the entity lacked authority to foreclose on the property, the foreclosure sale would be void." *Lester v. JPMorgan Chase Bank* (ND Cal. Feb. 20, 2013) ___ F.Supp.2d ___, 2013 WL 633333, p. *8; *Glaski v. Bank of America* (July 31, 2013) Cal. Court of Appeal, 5th Dist., certified for publication Aug. 8, 2013.

Anyone who takes title as a result of CRC's trustee's sale will acquire defective title and an enduring risk of protracted litigation. If there is a defect in title to real property, it cannot be resolved by demurrer or dismissal. A dismissal on the pleadings does not quiet title to real property. It only robs the parties and their successors of a lasting result. Chase sticks to a questionable strategy because it cannot contact the beneficiary.

The Congressional Oversight Panel Report stated:

> If future revelations show that documentation problems are pervasive, investors and others will have reason to doubt the legal ownership of

> pooled mortgages, which could have severe consequences. In this scenario, borrowers may be unable to determine whether they are sending their monthly payments to the right people. Judges may block any effort to foreclose, even in cases where borrowers have failed to make regular payments. Multiple banks may attempt to foreclose on the same property. Borrowers who suffered foreclosure may seek to regain title to their homes and force any new owners to move out. Would-be buyers and sellers could find themselves in limbo, uncertain about whether they can safely buy or sell a home.
> - Final Report, Congressional Oversight Panel, March 16, 2011, p. 94.[2]

The Note spells out the procedure to correct clerical mistakes. The trustor is to receive notice from the note holder requesting that he reexecute the loan documents. If a bank cannot locate the note holder, clear title cannot be transferred to a bona fide purchaser at a trustee's sale.

C. DUE PROCESS IS INCOMPATIBLE WITH CALIFORNIA NONJUDICIAL FORECLOSURES

> *[N]or shall any State deprive any person of life, liberty, or property, without due process of law.* Due Process Clause, Fourteenth Amendment.

Defendant argues that an issue that was never raised in the state court pleadings and was not addressed by any California court has nevertheless been

[2] http://cybercemetery.unt.edu/archive/cop/20110401232213/http://cop.senate.gov/documents/cop-031611-report.pdf

silently and conclusively resolved by a single demurrer without leave to amend at one brief hearing in March 2010. Plaintiff had no opportunity to request documents, submit interrogatories, depose witnesses, or request admissions. Due process surely affords a homeowner more than one hearing on a crowded law and motion calendar to challenge a bank with assets of $2.4 trillion[3] pursuing non-judicial foreclosure by recording documents that are defective on their face. The California Court of Appeal found that Plaintiff had actual notice of the Notice of Default. That is the extent of the state court decisions. Appellant does not seek federal review of Judge deBelleuille's decision that a NOD was recorded.

There was one pitch, a swing and a miss. "NOD recorded." Game over, ruled the federal district court, and that decision is now under review.

California courts have ruled that a Notice of Default is good even though the name of the trustor is misspelled. This has little to do with whether or not Chase and CRC can identify the note holder or have any claim to the property. Anyone with access to a computer can draft a somewhat plausible Notice of Default and a Notice of Trustee's Sale with a few spelling mistakes and pay the County Recorder a few dollars to file them.

[3] http://www.jpmorganchase.com/corporate/About-JPMC/about-us.htm

To the extent that California foreclosure statutes allow a foreclosure to proceed without original documentary evidence based solely on unsworn statements in a Notice of Default and a Notice of Trustee's Sale, this procedure is constitutionally defective. *Mitchell v. W. T. Grant Co.* (1974) 416 U.S. 600, 94 S. Ct. 1895; *Connecticut v. Doehr* (1991) 501 U.S. 1, 11, 111 S.Ct. 2105. Plaintiff/Appellant raised the issue of Due Process in his Opposition to Chase's Motion to Dismiss. ER 070-072. Due Process is not an issue that was raised when Plaintiff alleged in state court that a NOD was not recorded.

The beneficiary is the only party that can initiate nonjudicial foreclosure. The trustee who records a Notice of Default does so solely as the authorized agent of the beneficiary. Cal. Civ. Code §2924 (a)(1). "When the trustor defaults on the debt secured by the deed of trust, the beneficiary may declare a default and make a demand on the trustee to commence foreclosure." *Kachlon v. Markowitz* (2008) 168 Cal. App. 4th 316, 334.

Sacchi v. Mortgage Electronic Registration Systems (C.D. Cal. 2011) No. CV11-1658 AHM, 2011 WL 2533029 at *9-10, upheld a plaintiff's wrongful foreclosure claim against an entity alleged to have "no beneficial interest in the Deed of Trust when it acted to foreclose on Plaintiffs' home." The court expressed dismay when confronted with counsel's arguments suggesting that "someone . . .

can seek and obtain foreclosure regardless of whether he has established the authority to do so." *Id.* at *7.

The only evidence offered to support Chase's claim to Plaintiff's property is a 44-page version of a Purchase & Assumption Agreement that does not list any of the assets transferred. Chase offered no proof that Plaintiff's loan was an asset on the books of WaMu on the date of the P&A Agreement. Banks keep books—that is what they do.

The U.S. Supreme Court has formulated a balancing test to determine the rigor with which the requirements of procedural due process should be applied. "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge* (1976) 424 U.S. 319, 335.

California's nonjudicial process places homeowners at the unsupervised mercy of banks and administrative functionaries by failing to provide for a meaningful evidentiary hearing. It creates great risk of erroneous deprivations

of property without due process of law, and deprives homeowners of adequate remedies to redress erroneous deprivations.

A foreclosure under such a nonjudicial statutory scheme is not based on a judgment, yet the unadjudicated foreclosure starts a "domino" effect of post-deprivation wrongful takings that interfere with post-deprivation remedies, by allowing evictions, releases of deeds of trusts, and statutory presumptions of validity of the trustee's deed upon sale – all before a post-deprivation action that challenges the validity of the defective foreclosure can be resolved. This is exacerbated when the court requires that the homeowner tender the full amount of the unsubstantiated claim as a condition to a quiet title action.

In deciding what process is constitutionally due in various contexts, the Supreme Court emphasized that "procedural due process rules are shaped by the risk of error inherent in the truthfinding process. *Mathews v. Eldridge, supra*, 424 U.S. 319, 344; *Carey v. Piphus* (1978) 435 U.S. 247, 259.

Fundamental principles of due process require that California's nonjudicial foreclosure statutes be declared unconstitutional, that documentary evidence be introduced to support all elements of a foreclosure, and that property owners be afforded adequate remedies to redress erroneous deprivations and be protected from wrongful takings.

The Supreme Court addressed due process requirements for foreclosure in *Mitchell v. W. T. Grant Co.* (1974) 416 U.S. 600, 616-618, 94 S.Ct. 1895, 1904-1905, where Louisiana statutory procedures withstood due process scrutiny:

> [B]are conclusory claims of ownership or lien will not suffice under the Louisiana statute. Article 3501 authorizes the writ only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts shown by verified petition or affidavit. Moreover, in the parish where this case arose, the requisite showing must be made to a judge, and judicial authorization obtained. Mitchell was not at the unsupervised mercy of the creditor and court functionaries. The Louisiana law provides for judicial control of the process from beginning to end. This control is one of the measures adopted by the State to minimize the risk that the ex parte procedure will lead to a wrongful taking. It is buttressed by the provision that should the writ be dissolved there are 'damages for the wrongful issuance of a writ' and for attorney's fees 'whether the writ is dissolved on motion or after trial on the merits'.
>
> Documentary proof is particularly suited for questions of the existence of a vendor's lien and the issue of default. . . .Louisiana law expressly provides for an immediate hearing and dissolution of the writ 'unless the plaintiff proves the grounds upon which the writ was issued.'

The fact that a procedure would pass muster under a feudal regime does not mean that it affords necessary protection to all property in its modern forms. *Sniadach v. Family Finance Corp.* (1969) 395 U.S. 337, 340; 89 S.Ct. 1820.

If a buyer takes out a mortgage to purchase a home, he must accept the terms of the Note and Deed of Trust presented by the lender or the title company for signature. The Note and the Deed of Trust are adhesion contracts. The borrower must sign on the dotted line or walk away from the deal.

Fundamental elements of *Mitchell's* due process inquiry were reiterated in *Mathews v. Eldridge*, then refocused and again applied in *Connecticut v. Doehr* (1991) 501 U.S. 1, 111 S. Ct. 2105, resulting in a three-part inquiry to guide the Court's analysis. Various types of property interests are involved in these cases, but the Supreme Court is "no more inclined now than we have been in the past to distinguish among different kinds of property in applying the due process clause." *North Georgia Finishing, Inc. v. Di–Chem, Inc.* (1975) 419 U.S. 601, 608; 95 S.Ct. 719.

In *Doehr*, *supra*, as in the instant case, the dispute was between private parties, one of whom sought to rely on a state statute to file a lien on the other's real property.

> For this type of case, therefore, the relevant inquiry requires, as in *Mathews*, first, consideration of the private interest that will be affected by the prejudgment measure; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, in contrast to *Mathews*, principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections. *Connecticut v. Doehr, supra*, 501 U.S. 1, 11.

D. THREE-PART DUE PROCESS INQUIRY

1. Private Homeowner Interests Affected

For a property owner, attachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints credit ratings; reduces the chance of obtaining a home equity loan or additional mortgage; and can place an existing mortgage in technical default—in addition to emotional, physical, and social stress.

Even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection. Without doubt, state procedures for creating and enforcing attachments, as with liens, "are subject to the strictures of due process." *Peralta v. Heights Medical Center, Inc.* (1988) 485 U.S. 80, 85, 108 S.Ct. 896, 899.

The private interests of California homeowners affected by foreclosures on their real property are even more significant than the interest affected in *Doehr*, supra. California is a "lien theory" state, which means that the homeowner holds title to the property, even while it is encumbered by a deed of trust, and the beneficiary of the deed of trust holds only a lien on the property. Although technically, under a deed of trust, legal title passes to the trustee, such conveyance of title is solely for the purpose of security, leaving in the trustor a legal estate in the property, as against all persons except the trustees and those

lawfully claiming under them. *Aviel v. Ng* (2008) 161 Cal.App.4th 809, 816; 74 Cal.Rptr.3d 200, 205. In practical effect, a deed of trust is a lien on the property, and the deed of trust conveys "title" to the trustee only so far as may be necessary to the execution of the trust. *Monterey S.P. Partnership v. W.L. Bangham, Inc.* (1989) 49 Cal.3d 454, 460, 261 Cal.Rptr. 587.

California homeowners not only face the risk of total loss of real property in a foreclosure under Cal. Civ. Code §2924 by a party that is not required to produce evidence of its right to enforce a valid security interest in the property, but they also face the risks of erroneous partial impairments of property rights that concerned the Court in *Doehr*. As soon as a foreclosing party who claims to be the lender, beneficiary, or authorized agent files the Notice of Default to commence the foreclosure, the following occurs: (1) the trustee promptly records the Notice of Default in the office of the County Recorder where the property is located, thereby creating a cloud on title; (2) the trustee commences advertisement of the Notice of Trustee's Sale, which notice includes the names of the foreclosing party who claims to be the holder of the evidence of debt, the names of the original grantors of the deed of trust, the legal description of the property being foreclosed, and the date of the sale, thereby creating a stigma for the property and the owner, diminishing the market value of the property, and

negatively impacting the homeowner's credit rating with credit reporting agencies.

As in *Doehr, supra,* California procedures for enforcing a lien on real property through the foreclosure procedures prescribed in Cal. Civ. Code §2924 are clearly "subject to the strictures of due process." *Connecticut v. Doehr, supra,* 501 U.S. 1, 12.

2. Risk of Erroneous Deprivation

The risks of erroneous deprivation of protected property interests through California's nonjudicial foreclosure process are substantial.

The provisions of Cal. Civ. Code §2924 do not satisfy the documentary evidence foundations on which *Mitchell v. W. T. Grant Co., supra*, relied in upholding the Louisiana statute. Unsworn statements:

(1) are nothing more than "bare facts shown conclusory claims of ownership or lien;"

(2) do not constitute "specific by verified petition or affidavit;"

(3) diminish the "requisite showing [that] must be made to a judge" to a mere unsworn certification or statement;

(4) effectively place the homeowner "at the unsupervised mercy of the creditor and court functionaries;"

(5) require a Court to authorize and approve a foreclosure sale based on an unsworn certification or even a forged statement, thereby rendering " judicial control of the process from beginning to end" superfluous, and increasing "the risk that the ex parte procedure will lead to a wrongful taking;"

(6) eliminate the requirement of "documentary proof that is particularly suited for questions of the existence of a vendor's lien and the issue of default;"

(7) do not require the foreclosing party to "prove the grounds upon which the (NOTS) was issued."

The risks of erroneous deprivation of real property under these procedures are substantial. See *Mitchell v. W. T. Grant Co., supra*, 416 U.S. at 616-618, 94 S. Ct., at 1904-1905.

3. Interests of Foreclosing Party and State

The interests of the foreclosing party are protected under California foreclosure statutes and will not be impaired if the due process defects are remedied by this Court. The foreclosing party may still enforce a valid lien on real property under the expedited trustee foreclosure process – they will simply have to produce evidence to support their claims. Due process requires, *inter alia*, "documentary proof" rather than "bare conclusory claims of ownership or lien." *Mitchell v. W. T. Grant Co., supra*, 416 U.S. at 616-618, 94 S. Ct., at 1904-1905. Foreclosing parties may pursue a judicial foreclosure, so their right

to enforce valid liens on real property will not be impaired. The State's interest in providing foreclosure processes will not be impaired by the Constitutional due process remedies requested herein.

To comply with *Mitchell's* due process standard, California courts must assume judicial control over the proceedings and require evidence (not mere "certifications" or "statements") to support claims of right to invoke the power of sale provisions of a Deed of Trust, whether the foreclosure is opposed or not.

Although due process tolerates variances in procedure "appropriate to the nature of the case," it is possible to identify its core goals and requirements. The required elements of due process are those that "minimize substantively unfair or mistaken deprivations" by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests. The core of these requirements is notice and a hearing before an impartial tribunal. Due Process also requires an opportunity for confrontation and cross-examination, and for discovery; that a decision be made based on the record, and that a party be allowed to be represented by counsel. *Ballard v. Hunter* (1907) 204 U.S. 241, 255; *Palmer v. McMahon* (1890) 133 U.S. 660, 668.

Plaintiff/Appellant in the instant case was afforded one brief hearing that resulted in a demurrer without leave to amend and a dismissal with prejudice.

E. NON-JUDICIAL FORECLOSURE IS STATE ACTION

The inquiry must be whether there is a sufficiently close nexus between the State and the challenged action so that the action of the latter may be fairly treated as that of the State itself. *Moose Lodge No. 107 v. Irvis* (1972) 407 U.S. 163, 176. The true nature of the State's involvement may not be immediately obvious, and detailed inquiry may be required in order to determine whether the test is met. *Burton v. Wilmington Parking Authority* (1961) 365 U.S. 715, 725. California courts have steadfastly refused to grant homeowners the right to a hearing before an impartial tribunal and an opportunity for confrontation, cross-examination, and discovery.

The Supreme Court has found state action present in the exercise by a private entity of powers traditionally reserved to the State. "We have, of course, found state action present in the exercise of a private entity of powers traditionally reserved to the State which are associated with sovereignty." *Marsh v. Alabama* (1946) 326 U.S. 501 (company town). See, e. g., *Nixon v. Condon*, 286 U. S. 73 (1932) (election); *Terry v. Adams*, 345 U. S. 461 (1953) (election); *Evans v. Newton,* 382 U. S. 296 (1966) (municipal park); *Jackson v. Metropolitan Edison Co.* (1974) 419 U.S. 345, 352-353.

Justice Douglas wrote in a dissenting opinion in *Jackson v. Metropolitan Edison Co.* (1974) 419 U.S. 345, 360:

> In *Burton v. Wilmington Parking Authority*, *supra* 365 U.S. 715, we said: "Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance." *Id.* at 722. A particularized inquiry into the circumstances of each case is necessary in order to determine whether a given factual situation falls within "the variety of individual-state relationships which the Fourteenth Amendment was designed to embrace." *Ibid*. As *Burton* made clear, the dispositive question in any state-action case is not whether any single fact or relationship presents a sufficient degree of state involvement, but rather whether the aggregate of all relevant factors compels a finding of state responsibility. *Id*. at 722-726. See generally *Moose Lodge No. 107 v. Irvis,* 407 U. S. 163 (1972).
>
> It is not enough to examine seriatim each of the factors upon which a claimant relies and to dismiss each individually as being insufficient to support a finding of state action. It is the aggregate that is controlling.

The non-judicial foreclosure provisions at issue were authorized by state law and were made enforceable by the weight and authority of the State. Respondent's actions are sufficiently intertwined with those of the State, and its non-judicial foreclosure proceedings are sufficiently buttressed by state law to warrant a holding that Chase's actions in initiating foreclosure are "state action" for the purpose of giving federal jurisdiction over respondent under 42 U.S.C. §1983. Justice Douglas continues:

> Section 1983 was designed to give citizens a federal forum for civil rights complaints wherever, by direct or indirect actions, a State, acting "in cahoots" with a private group or through neglect or listless oversight, allows a private group to perpetrate an injury. The theory is that in those cozy situations, local politics and the pressure of economic overlords on subservient state agencies make recovery in state courts unlikely. …

> Section 1983 addresses itself to grievances inflicted "under color of any statute, ordinance, [or] regulation. . . of any State . . . ." A private residence, being a necessity of life, is an entitlement which may not be taken without the requirements of procedural due process. *Fuentes v. Shevin* (1972) 407 U.S. 67, 80; *Goldberg v. Kelly* (1970) 397 U.S. 254; *Palmer v. Columbia Gas of Ohio, Inc.* (6th Cir. 1973) 479 F.2d 153.
>
> *Jackson v. Metropolitan Edison Co.*, *supra*, 419 U.S. at 363-364.

California Golf, L.L.C. v. Cooper (2008) 163 Cal.App.4th 1053, 1067, states that although the statutory scheme governing nonjudicial foreclosures has, in certain circumstances, been held to constitute the exclusive civil remedy for wrongdoing in the context of a nonjudicial foreclosure, that exclusivity cannot be applied to immunize fraudulent and apparently felonious conduct. "Where the construction of a statute is necessary, it should be interpreted so as to produce a result that is reasonable; the court must look to the context of the law and, where uncertainty exists, consideration should be given to the consequences that will flow from a particular interpretation." *People ex rel. Riles v. Windsor University* (1977) 71 Cal.App.3d 326, 332. Where the risk is so great that the foreclosing entity cannot locate or identify the note holder, nonjudicial foreclosure procedure should not immunize fraudulent conduct.

Construction of a statute that leads to an absurd consequence should be avoided. *In re O'Neil* (1977) 74 Cal.App.3d 120, 123; *City of Plymouth v. Superior Court* (1970) 8 Cal.App.3d 454, 466.

F. CHASE HAS NO PROOF IT IS AUTHORIZED TO FORECLOSE

Chase requested that the district court take judicial notice of its 44-page version of the P&A Agreement as the sole basis for its claim. ER 076-077. The court did not rule on Chase's request for judicial notice of the P&A Agreement in its ruling. ER 006.

Judicial notice may not be taken of any matter unless authorized or required by law. A matter ordinarily is subject to judicial notice only if the matter is reasonably beyond dispute. *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113 .

Taking judicial notice of a document is not the same as accepting the truth of its contents or accepting a particular interpretation of its meaning. *Herrera v. Deutsche Bank Nat'l Trust Co.* (2011) 196 Cal.App.4th 1366*; Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 374 . While courts take judicial notice of public records, they do not take notice of the truth of matters stated therein. *Love v. Wolf* (1964) 226 Cal.App.2d 378, 403 . When judicial notice is taken of a document, the truthfulness and proper interpretation of the document are disputable. *StorMedia, Inc. v. Superior Court* (1999) 20 Cal.4th 449, 457.

A California court considered the scope of judicial review of a recorded document in *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 117:

> [T]he fact a court may take judicial notice of a recorded deed, or similar document, does not mean it may take judicial notice of factual matters stated therein. For example, the First Substitution recites that Shanley `is the present holder of beneficial interest under said Deed of Trust.' By taking judicial notice of the First Substitution, the court does not take judicial notice of this fact, because it is hearsay and it cannot be considered not reasonably subject to dispute."

The Notice of Default identifies JPMorgan Chase Bank as a "contact." ER 162. The first Notice of Trustee's Sale describes Chase as a "servicer." ER 160. The second and third Notices of Trustee's Sale make no reference to Chase. ER 109, 137. As in *Poseidon*, Chase's authorization is hearsay and disputed; the court cannot take judicial notice of the contents of the recorded document. Taking judicial notice of the existence of the Notice of Trustee's Sale does not establish that Chase is acting on behalf of the beneficiary. The truthfulness of the contents of the Notice of Trustee's Sale remains subject to dispute. *StorMedia*, *supra*, 20 Cal.4th at p. 457, fn. 9. Appellant disputes the truthfulness of the contents of the NOD and NOTS.

VIII. CONCLUSION

Karl Grier, Editor-in-Chief of Miller & Starr, *California Real Estate 3d,* describes California's nonjudicial foreclosure procedure as a Star Chamber proceeding in the March 2012 *Miller & Starr Real Estate Newsalert*:

> (*Gomes*) suggests, however, that the mere language of authority in the deed of trust forever precludes a demand for credentials of the party

> seeking to take away the property of the debtor through a nonjudicial foreclosure... It also confronts the usual homeowner with the civil equivalent of a Star Chamber proceeding—no right to identify or cross-examine the accusers or the alleged witnesses claiming the right to foreclose, and no ability to go behind the mere notifications and self-identifications of various other nominal players in the secondary market as "agents" for creditors who remain unknown and unseen principals in a proceeding that by its very nature affects valuable property rights of the debtor. Indeed, the principles of agency and "equal dignities" are left out of the analysis, which is based solely on language in a deed of trust whose ownership is concededly unclear and unsubstantiated.
>
> In a series of decisions devoid of sympathy for the plight of borrowers attempting to hold lenders and their agents and assignees to some minimal standards of documentation and proof of authority to foreclose, California courts of appeal have protected the nonjudicial foreclosure and trustees' sale process against pre-foreclosure intrusion by the courts. As a result, while the courts have held borrowers in foreclosure to rigorous adherence to the requirements that any modifications or extensions must be in writing and that performance be tendered to the lender, they have permitted purported lender representatives to pursue the trustee's sale remedy without producing documents establishing ownership or authority to act.

The California Senate's website posts the following statistics:

> From 2008 to 2011: 1,026,572 California homes were foreclosed upon. That's 1 in every 13 homes in the state. More than 1 million children lived in those homes. In 2011, 7 of the top 10 hardest cities by the foreclosure crisis in the United States were in California. They are: Stockton, Modesto, Vallejo, Riverside, San Bernardino, Merced, Bakersfield, and Sacramento.[4]

The risk of foreclosure fraud has never been greater, and the government has no valid interest in depriving people of their property without Due Process.

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[4] http://sd02.senate.ca.gov/sites/sd02.senate.ca.gov/files/Fact%20Sheet%20on%20California%20Home%20Foreclosures.pdf

Chase's costly and dogmatic strategy of recording defective notices raises a substantial issue as to whether it is authorized to foreclose. This issue is not precluded by a finding in state court that a NOD was recorded.

Appellant respectfully submits that there are triable issues of material fact. Defendant's motion to dismiss should have been denied. For the above-stated reasons, Appellant respectfully requests that the order dismissing his complaint be reversed.

Date: August 27, 2013

s/ Douglas Gillies
Appellant

CERTIFICATE OF COMPLIANCE

CASE NO. 13-55296

Pursuant to Rule 32, F.R.A.P., I certify that this Opening Brief is proportionately spaced with Times New Roman 14 point typeface and contains no more than 14,000 words pursuant to Rule 32(a)(7)(B).

I certify that Appellant's Opening Brief contains 9,926 words.

DATED: August 27, 2013

s/ Douglas Gillies
Plaintiff-Appellant

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, plaintiff-appellant Douglas Gillies is not aware of any related cases pending in this Court.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Appellant's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 27, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Shane Saxon
Shane Saxon