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*Respondents*

IN THE COURT OF APPEAL  
SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA  
DIVISION SIX

DOUGLAS GILLIES,	)	Case No. B224995
	)	
Plaintiff and Appellant,	)	Santa Barbara Superior Court
	)	Case No. 1340786
v.	)	
	)	RESPONDENTS' BRIEF
CALIFORNIA RECONVEYANCE CO.,	)	
JP MORGAN CHASE BANK, N.A.,	)	
and DOES 1-20,	)	
	)	
Defendants and Respondents.	)	
	)	
	)	

Response to Appellant's Opening Brief following  
Order Sustaining Demurrer to First Amended Complaint Without Leave to Amend

Trial Court: Honorable Denise de Bellefeuille and  
Honorable Thomas Anderle

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## **I. INTRODUCTION**

Plaintiff-Appellant Douglas Gillies ("Appellant") originally filed suit in regard to a loan that he received from WaMu on or about August 12, 2003 in the amount of approximately \$500,000 ("Subject Loan"). The Subject Loan was secured by real property located at 3576 Torino Drive, Santa Barbara, California, 93105 ("Subject Property"). The Subject Loan is now delinquent and a trustee sale has been noticed. Appellant's First Amended Complaint ("FAC") contained five causes of action for declaratory relief, injunctive relief, quiet title and Violation of California Prevention Act, Civil Code § 2923.52. The gravamen of the complaint is a claim that the Notice of Default and Election To Sell ("NOD") and Notice of Trustee Sale ("NOTS") are not in conformity with certain statutory provisions. As set forth below, Appellant failed to state a single cause of action that would have entitled him to equitable relief or any other relief. For this reason, Defendants request that the Court of Appeal affirm the trial court's ("Trial Court") order sustaining the Demurrer without leave to amend of defendants JPMorgan Chase Bank, N. A. and California Reconveyance Company (hereinafter referenced as "Respondents").

## **II. STATEMENT OF THE CASE**

Appellant appeals from an order by the trial court ("Trial Court") sustaining Respondents' Demurrer to the FAC without leave to amend.

### **A. Statement of Facts**

In or about August, 2003, Plaintiff entered into the Subject Loan, secured by a deed of trust ("DOT") on the Subject Property securing the amount of the Subject Loan in the amount of approximately \$500,000. (Appellant's Appendix ("AA"), 00030: 4 to 6; 0009 to 0010.)

On September 25, 2008, WaMu was closed by the Office of Thrift Supervision ("OTS") and the FDIC was appointed as receiver ("OTS Order"). (AA: 61 to 63) JPMorgan acquired certain assets of WaMu from the FDIC acting as receiver. The acquisition was formalized by a Purchase and Assumption Agreement ("Agreement") between the FDIC and JPMorgan dated September 25, 2008. (AA: 66 to 108) Under 2.5 of the Agreement, JPMorgan did not assume liability for borrower claims related to loans

or commitments to lend made by WaMu.<sup>1</sup>

Beginning in 2009, Plaintiff stopped making payments on the Subject Loan. (AA: 00030: 9 – 11 and 00036 to 00037.)

On or about August 12, 2009, the NOD was mailed to Plaintiff. See (AA: 00030:9 -11, 00036 to 00037 and 00110 – 00111.) The NOD includes a declaration that the Plaintiff had been contacted as required by California Civil Code § 2923.5. (AA: 00036 to 00037 and 00110 – 00111.)

On or about November 16, 2009, the NOTS was posted on the Subject Property. (AA: 00030: 12 – 14, 00038 - 00039 and 00113 – 00115.) The NOD includes a declaration that pursuant to California Civil Code § 2923.52, that JPMorgan had obtained an exemption pursuant to § 2923.52 that was current and valid on the date that the NOTS was filed and which provided that the time frame for giving notice as specified in § 2923.52 did not apply pursuant to § 2923.52 or § 2923.55. ((AA: 00036 to 00037 and 00110 – 00111.)

**B. Procedural History**

Appellant filed the Complaint initiating the litigation on November 25, 2009. (AA: 00001 - 00011.)

Appellant filed the FAC on December 23, 2009. (AA: 00029 -00042.)

On January 29, 2010, Respondents filed their Demurrer to the FAC as to all five causes of action stated therein, along with a Request For Judicial Notice ("RJN") filed concurrently therewith. (AA: 00043 -00117.)

On March 9, 2010, Appellant filed his Points and Authorities to the Demurrer. (AA: 00118 – 00128.)

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<sup>1</sup> The Agreement at paragraph 2.5 provides as follows:

Borrowers Claims. Notwithstanding anything to the contrary in this Agreement, any liability associated with borrower claims for payment or liability to any borrower for monetary relief, or that provide for any other form of relief to any borrower, whether or not such liability is reduced to judgment, liquidated or unliquidated, fixed or contingent, matured or unmatured, disputed or undisputed, legal or equitable, judicial or extra-judicial, secured or unsecured, whether asserted affirmatively or defensively, related in anyway to any loan or commitment to lend made by the Failed Bank [WAMU] prior to failure [September 25, 2008], or to any loan made by a third party in connection with a loan which is or was held by the Failed Bank, or otherwise arising in connection with Failed Bank's lending or loan purchase activities are specifically not assumed by the Assuming Bank [JPMorgan].

On March 15, 2010, Respondents filed their Reply Memorandum to Appellant's Opposition Memorandum. (AA: 00129 – 00138.)

The hearing on the Demurrer occurred on March 25, 2010 in Department 6 of the California Superior Court, County of Santa Barbara, the Honorable Denise de Bellefeuille, judge presiding. Appellant Douglas Gillies appeared on his behalf, and Michael B. Tannatt appeared on behalf of Respondents. (Reporter's Transcript of Proceedings for March 25, 2010.)

On March 26, 2010, the Trial Court filed its Order After Hearing, sustaining Respondents' Demurrer in its entirety without leave to amend. (AA: 00140 – 00147.)

Judgment of Dismissal was filed on April 19, 2010. (AA: 00148 – 00150.)

Notice of Entry of Judgment was filed on May 20, 2010. (AA: 00151.)

**C. Issue Presented For Review**

Whether The Trial Court properly sustained Respondents' Demurrer to the FAC without leave to amend.

**III. STANDARD OF REVIEW**

A demurrer tests the legal sufficiency of the complaint. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Code of Civil Procedure § 430.10 lists the grounds for sustaining a demurrer. The ground for a general demurrer is stated in subdivision (e) as follows: “The pleading does not state facts sufficient to constitute a cause of action.” The appellate court reviews a judgment entered based on an order sustaining a demurrer by “independently review[ing] the pleading to determine whether the facts alleged state a cause of action under any possible legal theory.” (*Davaloo v. State Farm Ins. Co.* (2005) 135 Cal.App.4th 409, 414.) The appellate court accepts as true “ ‘ ‘all material facts properly pleaded” ‘ ‘ in the complaint, as well as facts from judicially noticeable sources. (*Evans v. City of Berkeley, supra*, 38 Cal.4th at p. 6.) The appellate court gives no effect, however, to contentions, deductions or conclusions of fact or law. (*Ibid.*) The appellate court will affirm the demurrer if any proper ground for sustaining the demurrer exists, whether or not the trial court relied on it or the defendant asserted it in the trial court. (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 880, fn. 10.)

When a demurrer is properly sustained, this Court reviews the trial court's grant or denial of leave to amend the defective complaint for abuse of discretion. (*Cantu v. Resolution Trust Corp.*,

*supra*, 4 Cal.App.4th at p. 889.) The appellate court's task is to determine whether there is a reasonable possibility that the complaint can be amended to state a cause of action. (*Blank v. Kirwan, supra*, 39 Cal .3d at p. 318.) The plaintiff has the burden to show there is such a reasonable possibility. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.) If there is such a possibility, but the trial court denied leave to amend, the trial court abused its discretion, and the appellate court reverses its ruling. (*Ibid.*) If not, there is no abuse of discretion, and the appellate court affirms. (*Ibid.*)

**IV. THE TRIAL COURT PROPERLY SUSTAINED THE DEMURRER TO THE FIRST CAUSE OF ACTION FOR DECLARATORY RELIEF BECAUSE THE NOD WAS PROPERLY RECORDED AS REQUIRED BY CIVIL CODE SECTION 2924 (a) (1)**

Section 1060, of the *Code of Civil Procedure*, sets forth the requirements for declaratory relief and states in relevant part:

“Any person interested under a written instrument, excluding a will or a trust, or under a contract, or **who desires a declaration of his or her rights or duties with respect to another**, ..., may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a **declaration of his or her rights and duties in the premises...**”

(Emphasis added.)

The trial court can refuse to issue a judicial declaration in a case in which a judicial determination or declaration is not necessary or proper. *California Civil Procedure* § 1061.

In pleading a claim for declaratory relief, the plaintiff must specifically allege (1) whatever “rights or duties” the parties have with respect to the property and (2) the existence of an actual and present controversy. General statements about a controversy are unavailing. *Alturas v. Gloster*, 16 Cal.2d 46, 48 (1940). An actual controversy involving justiciable questions relating to the rights or obligations of a party must exist. *See Tiburon v. Northwestern Pacific Railroad Co.*, 4 Cal. App. 3d 160, 170 (1970). Thus, it is axiomatic that a cause of action for declaratory relief serves the purpose of adjudicating future rights and liabilities between parties who have some sort of relationship, either contractual or otherwise. *See Cardellini v. Casey*, 181 Cal.App.3d 389 (1986); *Bachis v. State Farm Mutual Auto. Ins. Co.*, 265 Cal.App.2d 722 (1968).

Appellant alleged that, even though that he had received actual notice of the NOD and the

NOTS (AA: 9 – 14), he was entitled to declaratory relief because the NOD was not recorded as required by Civil Code Section 2924 (a) (1). (See AA 6 – 11.) However, as the trial court found in the Court's Order, Plaintiff was mistaken on this issue. (AA: 00142: 22 – 00143: 6.) The Trial Court specifically found that "as evidenced by Exhibit '3' to defendant's request for judicial notice in support of the Demurrer to the FAC, the NOD was recorded on August 13, 2009, in the official records of the Santa Barbara County Recorder's Office as Document No. 2009-0049697." (AA: 24 – 27.) The Trial Court specifically took judicial notice of the recorded NOD attached to the RJN pursuant to Evidence Code § 452 (h). (AA: 28 to 29.)

Because the only basis for the first cause of action for declaratory relief was the erroneous allegation regarding the non-recording of the NOD, the Trial Court correctly found that there was no actual controversy for the Trial Court to determine. Accordingly, the Trial Court correctly sustained Respondents' Demurrer to the first cause of action without leave to amend, citing *Ball v. FleetBoston Financial Corporation*, 164 Cal. App. 4<sup>th</sup> 794, 800 (AA: 000143: 4 to 6), which held as follows:

Fatal to Ball's claim for declaratory relief is our conclusion, *ante*, regarding Ball's CLRA claim. **Where a trial court has concluded the plaintiff did not state sufficient facts to support a statutory claim and therefore sustained a demurrer as to that claim, a demurrer is also properly sustained as to a claim for declaratory relief which is "wholly derivative" of the statutory claim.** (*Ochs v. PacifiCare of California* (2004) 115 Cal.App.4th 782, 794, 9 Cal.Rptr.3d 734.)

Emphasis added.

For these reasons, Respondents respectfully request that the Court of Appeal affirm the Trial Court's Order sustaining the Demurrer to the First Cause of Action without leave to amend.

**V. THE TRIAL COURT PROPERLY SUSTAINED THE DEMURRER TO THE SECOND CAUSE OF ACTION FOR DECLARATORY RELIEF BECAUSE THE NOD COMPLIED WITH CIVIL CODE SECTION 2923.5**

In regard to this second cause of action, Appellant contended that the NOD did not comply with subsection (b) of California Civil Code § 2923.5, which provides as follows:

A notice of default filed pursuant to Section 2924 shall include a declaration **from the mortgagee, beneficiary, or authorized agent that it has contacted the borrower,**



**tried with due diligence to contact the borrower as required by this section, or the borrower has surrendered the property to the mortgagee, trustee, beneficiary or authorized agent.**

Emphasis added.

In conformity with this statutory requirement, the NOD in this case contained the following declaration:

The beneficiary or its designated agent declares that it has contacted the borrower, tried with due diligence to contact the borrower as required by Civil Code 2923.5, or the borrower has surrendered the property to the beneficiary or authorized agent, or is otherwise exempt from the requirements of § 2923.5

(AA: 00036 to 00037 and 00110 – 00111.)

As set forth in Exhibit "3" to the RJN, the original document was signed by an employee of CRC, acting as trustee of the Subject Loan. (AA: 00110 – 00111)

Plaintiff alleged at ¶ 13 of the FAC (AA: 00031: 9 to 13) that the NOD's declaration was purportedly "ambiguous" because it "did not specify who made the missing declaration—the beneficiary or the agent—and it does not contain who contacted the borrower." (AA: 0031: 12 – 13.)

On this issue, the recent case of *Mabry v. Superior Court*, 185 Cal. App. 4<sup>th</sup> 208 (2010) ("Mabry"), has held the following in regard to what is necessary to be included in a declaration in a NOD.

In light of what we have just said about the multiplicity of persons who would necessarily have to sign off on the precise category in subdivision (b) of the statute that would apply in order to proceed with foreclosure (contact by phone, contact in person, unsuccessful attempts at contact by phone or in person, bankruptcy, borrower hiring a foreclosure consultant, surrender of keys), and the possibility that such persons might be employees of not less than three entities (mortgagee, beneficiary, or authorized agent), there is no way we can divine an intention on the part of the Legislature that each notice of foreclosure be custom drafted.

To which we add this important point: By construing the notice requirement of section 2923.5, subdivision (b), to require only that the notice track the language of the statute itself, we avoid the problem of the imposition of costs beyond the minimum costs now required by our reading of the statute.

*Mabry, supra*, 185 Cal.App.4th 208, 235 (2010)

In regard to the Appellant's allegations in the FAC "that defendants are not the real parties in interest and not entitled to accelerate the maturity of the secured obligation and sell the residence because no beneficiary or authorized agent has delivered, served or recorded a notice of default that complies with Civil Code § 2923.5" (AA: 00030: 19 – 23), the Trial Court correctly ruled that there is no requirement in Civil Code § 2923.5 that the declaration in the NOD specify who made the declaration or who contacted the borrower. (AA: 00143: 23 – 28.) The Trial Court further determined that the purported controversy was insufficient to constitute an "actual controversy" under Code of Civil Procedure § 2923.5 (b). (AA: 23 – 28.) Furthermore, Appellant did not allege that the declaration was false in anyway regarding the contacts which were required to be made prior to CRC having had the NOD mailed and recorded. (AA: 00030: 26 – 00031: 3.) As the Trial Court correctly ruled, Respondent's technical and strained linguistic interpretation of some purported "ambiguity" was insufficient to constitute an "actual controversy" under Code of Civil Procedure § 1060 because the purported ambiguity did not rise to any material violation of § 2923.5 (b). (AA: 00143: 25 to 28.)

At Part 6 of the Respondent's Brief, Appellant cites *Mabry* in arguing that it is not necessary to tender the full amount owing in order to assert a violation of § 2923.5. However, because Appellant has not stated any violation of § 2923.5, this issue does not have any relevance to Appellant's action.

Because Respondent's second cause of action was "wholly derivative" of his erroneous allegation that Respondents had violated § 2923.5, the Court of Appeal is requested to affirm the Trial Court's Order sustaining the Demurrer without leave to Respondent's second cause of action for declaratory relief.

**VI. THE TRIAL COURT PROPERLY SUSTAINED THE DEMURRER TO THE THIRD CAUSE OF ACTION FOR VIOLATION OF THE CALIFORNIA FORECLOSURE PREVENTION ACT, CALIFORNIA CIVIL 2923.52**

**D. Respondents Have Received An Exemption From the Requirements of Civil Code § 2923.53.**

Civil Code § 2923.53, which went into effect in June, 2009, provides that the three month waiting period and notice of trustee's sale specified in Civil Code § 2924 is extended by an additional ninety days. However, Civil Code § 2923.53, subdivision (a) provides that financial institutions may seek from the California Commissioner for Financial Institutions an exemption from the provisions of § 2923.52 upon a showing that the financial institution has met certain guidelines that are set forth in § 2923.53, subsection (a). Specifically, subdivision (a) provides as follows:

A mortgage loan servicer that has implemented a comprehensive loan modification program that meets the requirements of this section shall have the loans that it services exempted from the provisions of Section 2923.52, upon order of the commissioner.

California Civil Code § 2923.53, subsection (a).

In order to obtain the exemption, the loan servicer may apply directly to the commissioner for the exemption:

A mortgage loan servicer may apply to the commissioner for an order exempting loans that it services from Section 2923.52. If the mortgage loan servicer elects to apply for an order, the application shall be in the form and manner determined by the commissioner.

California Civil Code § 2923.53, subdivision (b) (1)

"The Secretary of Business, Transportation and Housing shall maintain on an Internet Web site a publicly available list disclosing the final orders granting exemptions, the date of each order, and a link to Internet Web sites describing the loan modification programs." California Civil Code § 2923.53, subdivision (f).

In ruling upon Respondents' Demurrer to the FAC, the Trial Court took judicial notice pursuant to Evidence Code § 452 (h) of the website for the Department of Corporations--  
<http://www.corp.ca.gov/FSD/CFP/default.asp>.—which contains the list of exempt companies

published by the California Department of Corporations. The Trial Court took judicial notice that JPMorgan was one of the companies listed as being exempt from the provisions of § 2923.53. The Trial Court also took judicial notice that the list of exempted companies was available at the website for the Department of Corporations. (AA: 00144: 15 – 25.)

Pursuant to the Trial Court's review of the judicially noticed information, the Trial Court correctly found that the uncontroverted evidence established that JPMorgan obtained an order from the Commissioner exempting JPMorgan from the requirements of § 2923.52. The Trial Court also correctly found that the exemption was effective July 7, 2009, more than five months before the Notice of Trustee's Sale was posted on the Subject Property.

**E. Defendants' Notice of Trustee's Sale Complies With the Provisions of Civil Code § 2923.54 (a).**

Included with the NOTS, attached as Exhibit "B" to the FAC, was a "Declaration Pursuant To California Civil Code Section 2923.54", that stated:

Pursuant to California Civil Code Section 2923.54, the undersigned loan servicer declares as follows:

1. It has obtained from the commissioner a final or temporary order of exemption pursuant to Section 2923.54 that is current and valid on the date the notice of sale is filed; and
2. The timeframe for giving notice of sale specified in subdivision (a) of Section 2923.52 does not apply pursuant to Section 2923.52 or Section 2923.55.

(AA: 00043.)

This Declaration was signed by "Ann Thorn, First Vice President of JPMorgan Chase Bank, National Association". (AA: 00043.)

In his FAC, Appellant contended that this declaration was defective based on his following allegation:

Section 2923.54 (a) (2) requires the loan servicer to state, "Whether the extra 90-day timeframe for giving notice of sale specified in subdivision (a) of Section 2923.52 does not apply pursuant to Section 2923.52 or 2923.55."

FAC, ¶ 19 (AA: 00032: 10 – 15.)

Appellant's dubious interpretation of California Civil Code § 2923.54(a) (2) would require Chase to specifically identify which of the two cited code sections it is relying on in complying with Section 2923.54(a)(2).

As set forth in the Trial Court's Order, Appellant's strained interpretation of § 2923.54, subdivision (a) (2) was invalid because the provisions of this section do not provide that the declarant must state which of the two statutes it relied on in order to bypass the 90-day extension. (AA: 000145: 26 – 000146: 5) Accordingly, the Trial Court correctly ruled that Ms. Thorn's declaration in the NOTS complied with the requirements of § 2923.5 (a) (2) and the Trial Court's Order sustaining Respondents' Demurrer to the third cause of action should be affirmed on appeal.

**F. Civil Code § 2923.53 Does Not Provide For a Private Right of Action**

"Any person who violates any provision of this section or Section 2923. 52 shall be deemed to have violated his or her license law as it relates to these provisions." West's Ann.Cal.Civ.Code § 2923.53, subdivision (f). In other words, any violation shall be subject to administrative action. No private action is allowed. See *Vikco Ins. Services, Inc. v. Ohio Indemnity Co.*, 70 Cal.App.4<sup>th</sup> 55, 62-63 (1999) ("Adoption of a regulatory statute does not automatically create a private right to sue for damages resulting from violations of the statute; **such a private right of action exists only if the language of the statute or its legislative history clearly indicates the Legislature intended to create such a right to sue for damages.**") (Emphasis added.)

Appellant alleged insufficient facts supporting that Respondents violated any of the exemption provisions under Civil Code § 2923.53 or that he was entitled to a private right of action under Civil Code § 2923.53. (AA: 00031: 24 – 000333: 10) Consequently, for this additional reason, the Trial Court's Order sustaining the Demurrer without leave to amend to Appellant's third cause of action should be affirmed.

**VII. THE TRIAL COURT PROPERLY SUSTAINED THE DEMURRER TO THE FOURTH CAUSE OF ACTION FOR INJUNCTIVE RELIEF BECAUSE APPELLANT FAILED TO STATE ANY CAUSE OF ACTION ENTITLING HIM TO SUCH RELIEF**

An injunction can be issued only if a plaintiff demonstrates:

- 1) a likelihood of success on the merits;
- 2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is denied;
- 3) the threatened injury outweighs any damage the injunction might cause to defendant; and
- 4) the injunction will not disserve the public interest.

See *Production Co. v. Village of Gambell*, 480 US 531, 542 (1987); *Owner-Operator Independent Drivers Association, Inc. v. Swift Transportation Co, Inc.*, 367 F.3d 1108, 1111 (9th Cir. 2004).

Injunctive relief is a remedy and not, in itself, a cause of action, and a cause of action must exist before injunctive relief may be granted. See *Shell Oil Co. v. Richter* 52 Cal.App.2d 164, 168, 125 P.2d 930 (1942) and *Camp v. Board of Supervisors* 123 Cal.App.3d 334, 356 (1981); and 5 Witkin, California Procedure, Pleading, Section 825, pp. 241-242 (5<sup>th</sup> ed. 2008).

Consequently, when the Complaint does not state sufficient facts to constitute a cause of action, the requested injunctive relief should be denied. See *Brown v. Rea* 150 Cal. 171 (1907) and *Bishop v. Owens* 5 Cal. App. 83, 89 (1907).

In the Trial Court's Order, the Trial Court correctly determined that Appellant had failed to allege any facts entitling Appellant to injunctive relief. Although Appellant had alleged a violation of the Foreclosure Prevention Act, the Trial Court correctly determined that no such violation had occurred. For these reasons, the Court of Appeal is requested to affirm the Court's Order sustaining the Demurrer to the fourth cause of action without leave to amend.

**VIII. THE TRIAL COURT PROPERLY SUSTAINED THE DEMURRER TO THE FIFTH CAUSE OF ACTION FOR QUIET TITLE**

In order to allege a claim for quiet title, the complaint must allege: (1) a legal description of the property and its street address or common designation; (2) the title of the plaintiff and the basis

of the title; (3) the adverse claims to the title of the plaintiff; (4) the date as of which the determination is sought; and (5) a prayer for the determination of the title of the plaintiff against the adverse claims. California Code of Civil Procedure § 761.020.

In the fifth cause of action, Appellant failed to allege the adverse claims as to which he was seeking to quiet title . (See AA 0034: 4 – 19.)

Furthermore, no quiet title action lies as to Respondents herein.

A deed of trust grants the beneficiary under the deed of trust a lien on the real property. And whether a notice of default or a notice of trustee sale has been recorded on the subject property does not affect Plaintiff's ownership right in the subject property. See *Ernesto and Araceli Ortiz v. Accredited Home Lenders, Inc., et. al.* 639 F. Supp. 2d 1159 (Cal. 2009) ("Plaintiffs are still the owners of the Property. The recorded foreclosure Notices do not affect Plaintiffs' title, ownership, or possession in the Property.")

As a matter of law, a "mortgager of real property cannot, without paying his debt, quiet his title against the mortgagee". *Miller v. Provost*, 26 Cal. App. 4<sup>th</sup> 1703, 1707 (1994) See also *Chapman v. Hicks* 41 Cal. App. 158, 166 (1919), which holds as follows:

No rule is more firmly established in this state than the one to the effect that, notwithstanding the lien of a mortgage is extinguished by lapse of time, the mortgagor cannot, without paying his debt, quiet the title as against the mortgagee. The rule is equally applicable to a grantee of the mortgagor who acquires the property while it is still burdened with a lien for the security of the debt. (*Faxon v. All Persons*, 166 Cal. 707, [L. R. A. 1916B, 1209, 137 Pac. 919]; *Bulson v. Moffatt*, 173 Cal. 685, [161 Pac. 259].)

Appellant failed to allege any ability to repay the amounts owing under the Subject Loan. (See AA 0034: 4 – 19.)

Because Appellant failed to allege any facts supporting his financial ability to pay the amount owing under the Subject Loan, the Court's Order sustaining the Demurrer to the Appellant's fifth cause of action should be affirmed.

**IX. APPELLANT'S NEW ARGUMENTS ALSO FAIL TO SET FORTH ANY BASIS FOR REVERSING THE TRIAL COURT'S RULING**

In his Opening Brief, Appellant set forth a host of new issues that purportedly arise in the FAC. However, none of these new contentions justify reversing the Trial Court's ruling.

In Part 2 of the Opening Brief (pp. 9 to 12), Appellant contends that the NOD and the NOTS issued in this case should be invalidated because the first name of Appellant was spelled as "Douglas Gillies" rather than "Douglas Gillies." However, Plaintiff alleges that he was served with both the NOD and the NOTS and he thus he has received notice of the foreclosure action on the Subject Property. Consequently, this purported fact fails to support a material issue justifying a reversal of the Trial Court's ruling.

In Part 3 of the Opening Brief (pp. 12 to 13), Appellant contends that the NOD should be invalidated because the copy that was purportedly mailed to Appellant was not signed by Stacey White, Assistant Secretary for CRC, who signed the NOD that was recorded. However, Plaintiff fails to allege any material differences in the NOD that was purportedly mailed to him. Contrary to Appellants' contentions, there are no substantial differences between the copy of the NOD that Appellant appended to the FAC as Exhibit "A" (AA: 00036 – 00037) and the NOD that was filed as Exhibit "3" with the RJN in support of the Demurrer (AA: 00110 – 00111). Consequently, the Trial Court's ruling should be affirmed.

Finally, in Parts 5, 7 and 8 of the Opening Brief (pp. 17 to 18 and pp. 19 to 23), Appellant contends that the P & A Agreement between the FDIC and JPMorgan somehow "would constitute a taking, which is not within the power of Administration, the Congress or the courts." (AA: 119: 5 – 13.)

However, Plaintiff alleges that in ¶¶ 4 and 5 of the First Amended Complaint that he obtained the Subject Loan in August, 2003 0 from WaMu secured by the Subject Property. (AA: 00030: 4 – 8).

As evidenced by the two documents which are attached to Respondent's Request for Judicial Notice, JPMorgan succeeded to any servicing rights and other obligations that WaMu possessed



prior to September 25, 2008, when the Office of Thrift Supervision ("OTS") determined that WaMu had failed, took over the bank, and appointed the FDIC as receiver for the purpose of liquidating WaMu pursuant to section 5(d)(2) of the Home Owners' Loan Act, 12 U.S.C. §1464(d)(2) and section 11(c)(6)(B) of the Federal Deposit Insurance Act, 12 U.S.C. §1821(c)(6)(B). See JPMorgan's Request for Judicial Notice ("RJN"), to which is Exhibit "1" is the OTS Order. (AA: 00061 to 63).

On September 25, 2008, the bulk of WaMu's assets were transferred to JPMorgan pursuant to a Purchase and Assumption Agreement ("P & A Agreement"). (A copy of the P & A Agreement is attached to the RJN as Exhibit "2".) (AA: 00065 – 00108)

It has been held that the P & A Agreement may be judicially noticed when ruling on a Motion to Dismiss ("MTD"). See *Molina v. Washington Mut. Bank* 2010 WL 431439, 3 (S.D.Cal.,2010), which granted judicial notice of the Purchase and Assumption Agreement attached hereto:

Defendants also request judicial notice of (1) the Purchase and Assumption Agreement among Federal Deposit Insurance Organization, Receiver of Washington Mutual Bank, Henderson, Nevada ("FDIC") and JPMorgan, dated September 25, 2008, available on the FDIC's website, and (2) the Order from the Office of Thrift Supervision ("OTC") appointing the FDIC as Receiver of Washington Mutual Bank, available on OTC's website. The Court grants Defendants' request for judicial notice of these documents. Information on government agency websites has often been treated as properly subject to judicial notice." *Paralyzed Veterans of Am. v. McPherson*, 2008 U.S. Dist. LEXIS 69542, at \*5 (N.D.Cal. Sept. 8, 2008); see also *United States ex rel. Dingle v. BioPort Corp.*, 270 F.Supp.2d 968, 972 (W.D.Mich.2003) ("Public records and government documents are generally considered 'not to be subject to reasonable dispute.' This includes public records and government documents available from reliable sources on the Internet.") (citing *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir.1999)).

In Section 3.1 of Article III of the P & A Agreement, it specifically states: "Notwithstanding Section 4.8, the Assuming Bank specifically purchases all mortgage servicing rights and obligations of the Failed Bank." See P & A Agreement, page 9. Consequently, Plaintiff's contention that JPMorgan in this action is not a successor in interest to WaMu's servicing rights and other obligations in the Subject Loan is without merit.

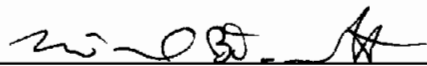
Because the P & A Agreement clearly evidences that JPMorgan is a successor to any interest that WaMu held in the Subject Loan, the Court's Order sustaining the Demurrer to the Appellant's First Amended Complaint should be affirmed.

**X. CONCLUSION**

For the foregoing reasons, Defendants respectfully request that the Court of Appeal affirm the Trial Court's Order in its entirety.

DATED: January 26, 2011

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