No. 14-

IN THE

Supreme Court of the United States

DARYOUSH JAVAHERI,
Petitioner,

v.

JPMORGAN CHASE BANK.
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is non-judicial foreclosure pursuant to California's extensive statutory procedure subject to 14th Amendment Due Process protection?

2. Does a homeowner have standing to challenge the authority of a national bank possessing no original loan documents to foreclose with forged foreclosure documents?

3. Can a court take judicial notice of the contents of a 44-page Purchase & Assumption Agreement and grant summary judgment in favor of Chase where a homeowner introduces documentary proof that a 118-page Agreement assigns liabilities to Chase?

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OPINIONS BELOW

The court of appeals' order affirming the district court is unpublished and appears at App. 1a-4a. The Court of Appeals' order denying Javaheri's petition for rehearing was entered on 4/18/2014 and appears at App. 5a.

The district court's order granting respondent's motion for partial summary judgment in the Wellworth matter is reported at 2012 WL 3426278 and appears at App. 6a-25a. The district court's order granting respondent's motion for summary judgment in the Wilshire matter is unpublished and appears at App. 26a-42a.

JURISDICTION

There is diversity of citizenship between the parties and the amount in controversy exceeds the sum of $75,000. The district court has jurisdiction under 28 U.S.C. §1332(a).

The Ninth Circuit entered its order on March 10, 2014. Mr. Javaheri filed a timely petition for re-hearing on March 24, 2014, which was denied on April 18, 2014. This court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment states:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV

INTRODUCTION

Daryoush Javaheri filed two complaints in Federal District Court alleging that JPMorganChase Bank ("Chase") was attempting to sell his two properties at trustee's sales without lawful claim to the properties.

In the case of the Wellworth Avenue property, filed October 29, 2010, Chase did not produce any original documents. The collateral file for the Wellworth loan was inexplicably missing. Chase's claim was based entirely on a 44-page Purchase & Assumption ("P&A") Agreement that shielded Chase from any liability for conduct by Washington Mutual Bank, FA ("WaMu").

Javaheri offered a declaration of Jeffrey Thorne, who worked as an independent contractor for the FDIC and had read a 118-page version of the P&A Agreement at the time Chase purchased WaMu. Thorne declared that the longer document, which had not been made public, provided that Chase would assume WaMu liabilities. App. 148a. The District Court ruled that California law does not permit a judicial action to determine if the foreclosing entity is authorized to foreclose. App. 35a.

Forged foreclosure documents were recorded against Javaheri's residence. The court determined that a recorded Substitution of Trustee and a recorded Notice of Trustee's Sale, each bearing the signature of Deborah Brignac, were signed by different people. Yet the court decided that Javaheri did not have standing to object to forged foreclosure documents. App. 17a—18a.

In the case involving the Wilshire Boulevard property, filed December 5, 2011, the court found that WaMu sold Javaheri's loan to the 2007-HY1 Trust [App. 27a, 36a], disregarding the declaration of William Paatalo filed in opposition to Chase's motion for summary judgment stating that Javaheri's Wilshire loan was never placed in the 2007-HY1 Trust and therefore Chase did not acquire any interest in the Wilshire loan when it acquired "certain" WaMu assets. App. 114a-126a. The Court struck the Paatalo declaration on the grounds it was filed 73 days before trial, despite the fact that it was filed in opposition to Chase's motion for summary judgment more than 21 days before the hearing on the motion. App. 33a-34a.

STATEMENT OF THE CASE

This appeal arises from a final judgment following orders granting summary judgment in favor of Chase in two consolidated cases filed by Daryoush Javaheri in Federal District Court. App. 6a-42a.

On December 6, 2006, Javaheri borrowed $975,000 from WaMu secured by his condominium on Wilshire Boulevard in Los Angeles ("Wilshire"). App. 27a. On November 14, 2007, Javaheri obtained a $2,660,000.00 loan from WaMu to rebuild a residence on Wellworth Avenue in Los Angeles ("Wellworth"). A Deed of Trust identified WaMu as the lender and Chicago Title Company as Trustee. App. 6a.

Both loans were initiated with one single Uniform Residential Loan Application submitted by Javaheri to WaMu consisting of Javaheri's name, address, and two bank account numbers that he filled in by hand.

App. 78a, 92a [SAC], 155a-159a [SAC Ex. 2]. WaMu filled in all the remaining information on both loan applications.

On September 25, 2008, the Office of Thrift Supervision closed WaMu and appointed FDIC as receiver. On the same day Chase acquired "certain" assets of WaMu under a P&A Agreement with the FDIC. App. 28a. The P&A Agreement did not identify any of those certain assets.

On May 3, 2010, CRC filed a Substitution of Trustee for Wellworth property bearing a signature of CRC Vice President Deborah Brignac, which purported to substitute her company CRC as trustee in place of Chicago Title. On the same day, CRC recorded a Notice of Default. On August 16, 2010, CRC recorded a Notice of Trustee's Sale. App. 8a.

The Court found that the signature of Deborah Brignac on the Substitution of Trustee was signed by a different person than the person who signed "Deborah Brignac" on the Notice of Trustee's Sale, but concluded that Javaheri lacked standing to object to forged foreclosure documents. App. 17a-18a.

A Notice of Default was recorded against Javaheri's condominium on Wilshire Boulevard on May 20, 2011, followed by a Notice of Trustee's Sale six months later. App. 29a-30a.

Petitioner Daryoush Javaheri filed a complaint in Federal District Court against Chase and CRC[1] to stop the foreclosure of his residence on Wellworth

[1] Javaheri filed a Dismissal of CRC on January 29, 2011.

Avenue, Los Angeles, CA, Case No. CV10-8187. The Complaint and First Amended Complaint were dismissed with leave to amend. Javaheri filed a Second Amended Complaint [App. 74a], and Chase's motion for summary judgment was denied in part. The Court ordered the case to proceed on five causes of action. App. 59a.

On December 5, 2011, Javaheri filed a similar Complaint to stop foreclosure of his Wilshire condominium, Case No. CV11-10072. The Court ordered the case to proceed on the same causes of action as in the Wellworth case. App. 68a-73a.

The cases were consolidated and proceeded on claims for: (1) violation of California Civil Code §2923.5; (2) wrongful foreclosure; (3) quasi contract; (4) quiet title; (5) declaratory and injunctive relief. In both cases, the Court dismissed Javaheri's cause of action for fraud/no contract. App. 48a-50a, 66a-68a; see App. 92a [SAC, Fourth Cause of Action].

Chase's Motion for Partial Summary Judgment regarding the Wellworth property was granted on August 13, 2012. App. 24a. Chase's Motion for Summary Judgment in the Wilshire matter was granted on December 11, 2012. App. 42a.

Javaheri appealed and the two appeals were consolidated on March 4, 2013. A three-judge panel in the Ninth Circuit suspended oral argument and issued a 4-page Memorandum on March 10, 2014, affirming the District Court's decisions App. 1a-4a. Rehearing was denied. App. 5a.

REASONS FOR GRANTING THE PETITION

I. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES A JUDICIAL DETERMINATION WHETHER THE FORECLOSING ENTITY IS AUTHORIZED.

Due Process is not compatible with California nonjudicial foreclosures.

> California law does not allow for a judicial action to determine if the foreclosing entity is authorized to do so. Order Granting Summary Judgment (Wilshire Property). App. 35a.
>
> While the allegation of robo-signing may be true, the Court ultimately concludes that Javaheri lacks standing to seek relief under such an allegation. Order Granting Summary Judgment (Wellworth Property). App. 18a.
>
> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." Fourteenth Amendment, United States Constitution.

California's nonjudicial foreclosure procedure allowed Javaheri's foreclosures to proceed without documentary evidence based solely on unsworn statements and forged signatures on a recorded Substitution of Trustee and/or a Notice of Trustee's Sale. This procedure is constitutionally defective under *Mitchell v. W.T. Grant Co.* (1974) 416 U.S. 600, 94 S. Ct. 1895, and *Connecticut v. Doehr* (1991) 501 U.S. 1, 115, 111 S.Ct. 2105.

The only evidence offered to support Chase's claim to Javaheri's property was a 44-page P&A Agreement between the FDIC and Chase that did not list any assets transferred. App. 136a-137a [Waller declaration]. Chase offered no proof that Javaheri's loans were assets on the books of WaMu on the date of the P&A Agreement.

Javaheri repeatedly raised due process issues in District Court but the words *due process* did not appear in any court order. In Opposition to Summary Judgment (Wellworth) he argued:

> In clause 39 of the Magna Charta, John of England pledged:
>
> "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land."
>
> The phrase "Due Process of Law" first appeared in a statutory rendition of the Magna Charta in A.D. 1354 during the reign of Edward III of England: "No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law." 28 Edw. 3, c. 3.

The orders granting summary judgment do not address due process [App. 6a-42a] but when granting

summary judgment in the Wilshire case, Judge Wright wrote:

> "(N)owhere does the statute provide for a judicial action to determine whether the person initiating the foreclosure process is indeed authorized." *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal. App.4th 1149, 1155. The Court of Appeal therefore noted that recognizing the right to bring suit to determine whether one is able to proceed with foreclosure 'would fundamentally undermine the non-judicial nature of the process' and allow for lawsuits to be filed solely to delay valid foreclosures. The upshot of *Gomes*, then, is that California's nonjudicial foreclosure scheme does not allow a court action to challenge the authorization of a foreclosing entity in a non-judicial foreclosure.
>
> "Here, like the borrower in *Gomes*, Javaheri challenges the foreclosing party's authority to foreclose on the Wilshire Property on grounds that he does not know the identity of the beneficial interest holder and avers that the foreclosure is improper without authorization from the original lender, WaMu. (Compl. ¶ 20.) But *Gomes* held that California law does not permit a borrower to challenge the authorization of a nominee to foreclose under these circumstances. See *Gomes*, 192 Cal. App. 4th at 1154–57. Because the California non-judicial-foreclosure scheme does not allow for a judicial action to determine if the party initiating foreclosure is authorized, Javaheri's

> claim for wrongful foreclosure is precluded by law." App. 35a.

Javaheri did not allege that ***he*** did not know the identity of the beneficiary. His complaint alleged that ***Chase*** did not know the identity of the owner or the Beneficiary.

> "31. Plaintiff is informed and believes that Chase cannot produce an original Note because Chase does not own the loan and cannot identify the owner of the loan. Chase did not purchase the loan when it assumed certain assets of WaMu in September 2008 because WaMu had sold its beneficial interest in the loan two years earlier." App. 86a [SAC].

Plaintiff's loan was not identified as an asset in the Purchase and Assumption Agreement under which Chase purchased certain assets of WaMu.

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 bars adequate remedies to redress erroneous deprivations.

A foreclosure under such a nonjudicial statutory scheme is not based on a judgment, yet the privately conducted foreclosure starts a "domino" effect of post-deprivation wrongful takings 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 emphasizes that "procedural due process rules are shaped by the risk of error inherent in the truth finding process. *Mathews v. Eldridge, supra*, 424 U.S. 319, 344; *Carey v. Piphus* (1978) 435 U.S. 247, 259.

Fundamental requirements of due process require that California's nonjudicial foreclosure statutes be declared unconstitutional, that documentary evidence be required 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, 94 S. Ct. 1895, 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 it gives 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 loan to purchase a house, 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*, 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.

Federal courts apply a three-part due process inquiry:

1. Private Homeowner Interests Affected

For a property owner, attachment clouds title, impairs the ability to sell or otherwise alienate the property, taints any credit rating, reduces the chance of obtaining a home equity loan or additional mortgage, and can place an existing mortgage in technical default. Even temporary or partial impairments to property rights that attachments 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.

California homeowners not only face the 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 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 files a Notice of Default to commence the foreclosure, the following occurs: (1) the Trustee records the Notice of Default in the office of the County Recorder, creating a cloud on title; (2) the Trustee publishes a Notice of Trustee's Sale, which includes the names of the foreclosing party, the names of the original grantors of the deed of trust, the legal description of the property, and the date of the sale. This creates a stigma for the property and the owner, diminishes the market value of the property, and negatively impacts the homeowner's credit rating.

Here, as in *Doehr,* California procedures for enforcing a lien on real property through the foreclosure procedures prescribed in Cal. Civ. Code §2924 are "subject to the strictures of due process."

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 bypass the fundamental documentary evidence foundations on which *Mitchell v. W. T. Grant Co., supra*, relied in upholding Louisiana's statute. Unsworn statements:

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

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

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

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

(5) eliminate the need for documentary proof; and,

(6) excuse the foreclosing party from proving the grounds upon which the Notice of Trustee's Sale was issued.

The risks of erroneous deprivation of real property under these procedures are substantial.

3. Interests of Foreclosing Party and State

The interests of the foreclosing party will not be impaired if the due process defects are remedied. The foreclosing party may still enforce a valid lien on real property and will simply have to produce evidence to support its claim. Due process requires 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).

To comply with *Mitchell's* due process standard, California courts must take judicial control over the proceedings and require evidence to support claims of right to invoke the power of sale.

The required elements of due process minimize unfair or mistaken deprivations by enabling persons to contest the basis upon which a State enables others to deprive them of protected interests. The core of these requirements is notice and a hearing before an impartial tribunal. Due process may also require 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. California courts have refused to grant homeowners the right to a hearing before an impartial tribunal or an opportunity for confrontation, cross-examination, and discovery.

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. 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."

The non-judicial foreclosure provisions at issue were authorized by state law and were made enforceable by the weight and authority of the State.

The statutory scheme followed by every lender in pursuit of nonjudicial foreclosure is spelled out in intricate detail in Cal. Civ. Code §§ 2020—2944.7, a blueprint comprised of 57,700 words. If that scheme were included in the attached Appendix, it would fill 240 pages. Chase's actions are sufficiently intertwined with the State, and its non-judicial foreclosures are sufficiently buttressed by state law to warrant a holding that Chase's actions in initiating foreclosure constitute "state action".

II. CONFLICTS IN FEDERAL AND STATE COURT DECISIONS REQUIRE RESOLUTION OF WHETHER OR NOT A HOMEOWNER HAS STANDING TO CHALLENGE THE AUTHORITY OF THE FORECLOSING ENTITY

Javaheri alleged that Chase did not have standing to enforce the Wellworth Note because Chase is not the owner of the Note, Chase is not a holder of the Note, and Chase is not a beneficiary under the Note. Paragraph 7 of the Adjustable Rate Note vests the power to foreclose in the Note Holder. Only a Lender under ¶22 of the Deed of Trust has the capacity to exercise a power of sale. App. 86a [SAC].

In granting Chase's motion for summary judgment, the Court relied on *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal. App.4th 1149. App. 34-36. *Gomes* was a case addressing MERS; the owner of the note was not an issue. *Gomes, supra*, 192 Cal. App. 4th at 1154. Nor did *Gomes* examine the language of the Deed of Trust, which states in ¶22 of Javaheri's DOT that only the Lender can execute or authorize the Trustee to execute a Notice of Default

and only the Lender under ¶24 may appoint a successor trustee. App. 68a [Order Denying Motion to Dismiss – Wilshire]; App. 86a [SAC, ¶33].

A trustee who records a Notice of Default pursuant to Cal. Civ. Code §2924 does so as the authorized agent of 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, Inc., No. CV 11-1658 AHM, 2011 WL 2533029 (C.D. Cal. 2011) 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 *Sacchi* 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."

Federal courts have recognized that a mortgagor has standing to challenge void mortgage assignments. *Culhane v. Aurora Loan Services of Nebraska* (1st Cir. 2003) 708 F.3d 282 states:

> A mortgagor has standing to challenge a mortgage assignment as invalid, ineffective, or void (if, say, the assignor had nothing to assign or had no authority to make an assignment to a particular assignee). If successful, a challenge of this sort would be sufficient to refute an assignee's status qua

> mortgagee. See 6A C.J.S. Assignments § 132. 708 F.3d 282, 291.

A contrary rule would lead to the odd result that the bank could foreclose on the borrower's property though it is not a valid party to the deed of trust or promissory note, which would mean that it lacks "standing" to foreclose. *Reinagel v. Deutsche Bank Nat. Trust Co.* (5th Cir. 2013) 722 F.3d 700, 705.

Culhane was followed by *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079:

> We reject the view that a borrower's challenge to an assignment must fail once it is determined that the borrower was not a party to, or third party beneficiary of, the assignment agreement. Cases adopting that position "paint with too broad a brush." (*Culhane v. Aurora Loan Services of Nebraska*, supra, 708 F.3d at p. 290.) Instead, courts should proceed to the question whether the assignment was void. 218 Cal.App.4th at 1095.
>
> We are aware that some federal district courts sitting in California have rejected the post-closing date theory of invalidity on the grounds that the borrower does not have standing to challenge an assignment between two other parties (citations). These cases are not persuasive because they do not address the principle that a borrower may challenge an assignment that is void and they do not apply New York trust law to the operation of the securitized trusts in question. 218 Cal.App.4th at 1098.

Miller & Starr comments on *Glaski*:

> After noting the various scenarios regarding chain of title issues, the court of appeal observed that each were alleged to have suffered from the same defect—a transfer to the securitized trust that occurred after the closing date of the trust. According to the court, it had to address, based on these allegations, whether a post-closing date transfer into a securitized trust was the type of defect that would render the transfer void. Relevant to the inquiry was the fact that the trust was formed under New York law, and was also subject to the requirements on REMIC trusts (entities that do not pay federal income tax) by the Internal Revenue Code. New York law provides in relevant part that actions taken in contravention of the trust are void. 4 Miller & Starr, Cal. Real Estate (3d ed. 2003) Deeds of Trust, §10:212, p. 686.

The *Glaski* court concluded:

> We conclude that Glaski's factual allegations regarding post-closing date attempts to transfer his deed of trust into the WaMu Securitized Trust are sufficient to state a basis for concluding the attempted transfers were void. As a result, Glaski has a stated cognizable claim for wrongful foreclosure under the theory that the entity invoking the power of sale (i.e., Bank of America in its capacity as trustee for the WaMu Securitized

> Trust) was not the holder of the Glaski deed of trust. 218 Cal.App.4th at 1097.

Glaski was followed by *Subramani v. Wells Fargo Bank N.A.* (N.D. Cal. 2013) 2013 U.S. Dist. LEXIS 156556:

> The Court finds that at the 12(b)(6) stage, Plaintiff has sufficiently stated a claim for wrongful foreclosure based on his allegations that Defendant's 2006 sale of Plaintiff's DOT precluded Defendant from retaining a beneficial interest in the DOT. See *Barrionuevo v. Chase Bank, N.A.* (N.D. Cal. 2012) 885 F. Supp. 2d 964, 975. Plaintiff has sufficiently alleged that Defendant directed the wrong party to issue Notices of Default, that Defendant is not the true beneficiary, and that Defendant failed to abide by the rules regarding transference of the Loan.

Chase produced no documents and identified no witnesses to support its claim of a right to foreclose. If the loan had been retained by WaMu and then transferred to Chase, there would be accounting records from WaMu's files in Chase's possession showing that the loan remained on the books of WaMu until it was seized by the FDIC. Instead of offering testimony of a qualified expert who examined WaMu's records and found anything that could support Chase's contention, Chase based its claim on the declaration of Eric Waller, who concluded:

> "However, the hard copy collateral file pertaining to the Subject Loan containing the

> original of the Note cannot be located." App. 137a [Waller Decl.].

The court found that Chase could not produce the original Note.

> "Javaheri also argues that JPMorgan cannot produce the original Note. (SAC ¶ 31.) This is also true. (Waller Decl. Ex. 5.) Nevertheless, numerous courts have concluded that production or possession of the original promissory note is not necessary for non-judicial foreclosure under California law." App. 17a [Order Granting Partial Summary Judgment (Wellworth)].

Chase was not just missing the Note—it could not even locate the WaMu collateral file containing any original loan documents. Chase offered nothing to support its claim but the unfounded opinion of a Chase employee who had no explanation for the missing collateral file. The missing original documents raised a triable issue whether the loan had been sold before WaMu's assets were assumed by Chase. The disappearance of the entire file of original documents, during a national epidemic of similar unexplained disappearances, is consistent with Javaheri's claim that the loan was transferred to a third party.

The court erred in ruling that Javaheri does not have standing to challenge forged signatures on robo-signed foreclosure documents.

The Second Amended Complaint (Wellworth) alleged that the signature of Deborah Brignac on the Substitution of Trustee was a forgery. App 88a-90a.

Dr. Laurie Hoeltzel, a Court Qualified Document Examiner and Handwriting Expert examined the two exhibits "signed" by Deborah Brignac. Judge Wright accepted Hoetzel's conclusion. In granting summary judgment, he stated,

> "Indeed, for the purposes of this Motion, the Court finds that the signature of Deborah Brignac on the Substitution of Trustee was signed by a different person than that purporting to be Deborah Brignac on the Notice of Trustee's Sale. (Gillies Decl. Ex. 6)[2].
>
> "While the allegation of robo-signing may be true, the Court ultimately concludes that Javaheri lacks standing to seek relief under such an allegation...The foreclosure would occur regardless of what entity was named as trustee." App. 17a-18a.

If homeowners have no standing to object to forged foreclosure documents, and anyone can step in to play the role of trustee, then state law deprives its citizens of property without Due Process of Law.

Some federal courts have accepted allegations of robo-signing as true, but held that plaintiff lacked standing to challenge a substitution of trustee or an assignment of deed of trust. See *In re MERS Litigation*, 2012 WL 932625 at *3 (borrower could

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[2] Gillies Decl. Exhibit 6 is the declaration of Laurie Hoetzel

not demonstrate injury attributable to alleged robo-signing because borrower was "uninvolved and unaffected by the assignments"); and *Kuc*, 2012 WL 1268126 at *2 (same).

This reasoning was followed in *Brodie v. Northwest Trustee Services, Inc.,* No. 12-CV-0469 (E.D. WA 2012). "Because Plaintiff is neither a party to nor a third-party beneficiary of the Assignment of Deed of Trust or the Appointment of Successor Trustee, she could not have been injured by the alleged robo-signing of these documents."

Javaheri raised material questions of fact as to whether the Substitution of Trustee was authorized by the Lender, whether it was executed by Deborah Brignac, and whether she had authority to substitute her company, CRC, as trustee, in place of the original Trustee, Chicago Title, and record the Notice of Trustee's Sale against the Wellworth property. The District Court ruled that the borrower did not have standing and the Ninth Circuit affirmed.

On July 11, 2012, the State of California enacted the "Homeowner's Bill of Rights," adopting into law the mortgage foreclosure reform principles outlined in the National Mortgage Servicing Settlement with the nation's top five mortgage servicers. Recording "robo-docs" is prohibited on notices of default and supporting declarations, including substitutions of trustee and notices of trustee' sale. Documents must be accurate, complete and supported by competent and relevant evidence. Cal. Civ. Code §2924.17. Dual tracking is also prohibited. The law affords a private right of action. Borrowers may seek a court injunction for a material violation up until a

foreclosure sale is completed, and may seek attorney's fees.

The Legislature did not necessarily create new law. *Jolley v. Chase* (2013) 213 Cal. App. 4th 872, noted that Chase's dual tracking conduct in that case violated a law that the Legislature enacted after the conduct occurred. The Court of Appeal reasoned that by enacting the law, the Legislature had recognized the existence of a public policy, and so the *Jolley* court concluded that the Chase's conduct in contravention of that policy was "unfair" under the state's Unfair Competition Law.

Nevertheless, the Ninth Circuit affirmed the District Court's decision on March 10, 2014, stating, "(N)either Javaheri's speculation that his loan was securitized nor his claims that documents related to his deed of trust were robo-signed suffice to establish a genuine and material dispute of fact." App. 3a.

Both of Javaheri's cases raise triable issues of fact as to whether Chase is a lender, beneficiary, or authorized agent. The Second Amended Complaint (Wellworth) alleged. "Chase does not have standing to enforce the Note because Chase is not the owner of the Note, Chase is not a holder of the Note, and Chase is not a beneficiary under the Note. Chase does not claim to be a holder of the Note or a beneficiary." App. 85a [SAC ¶30]. Javaheri alleged in the Wilshire Complaint that Chase did not have standing to enforce the Wilshire Note because Chase was not the owner of the Note, Chase was not a holder of the Note, and Chase was not a beneficiary under the Note. Chase did not claim to be a holder of the Note or a beneficiary. Chase was merely named

as a contact in the Notice of Default. If Chase could prove that it is a servicer, the complaint alleged that Chase could not foreclose on Plaintiff's property without authorization from the Lender under paragraph 22 of the Deed of Trust. App. 60a, 62a [Order Denying Motion to Dismiss Complaint (Wilshire)].

In Opposition to Summary Judgment (Wilshire), Javaheri attached a declaration of William Paatalo. App. 111a. The Court struck the Paatalo Declaration on the grounds that Javaheri failed to disclose his expert in a timely manner, even though his declaration was filed and served more than twenty-one days before the hearing on Chase's Summary Judgment Motion. App. 33a-34a

Disregarding facts that contradicted Chase's assertions, the Court concluded, "[T]he Court GRANTS Defendants' Motion for Summary Judgment on all claims. Javaheri's pending request for leave to add Paatalo as an expert trial witness (ECF No. 124) is therefore DENIED AS MOOT." App. 42a.

The declaration of Javaheri's attorney, Douglas Gillies, described the reason for adding Paatalo [App. 106a]:

> 5. I was surprised by Mr. Masutani's revelation in Chase's Points and Authorities that Chase recorded an Assignment of Deed of Trust on May 20, 2010, "in which JPMorgan assigned the beneficial interest in the DOT it acquired from the FDIC, *if any*, to Bank of America," even though "JPMorgan did not

> claim to hold an actual beneficial interest in the DOT since WaMu had transferred the Loan to the 2007-HY1 Trust before September 25, 2008" because "it could appear to the general public, based upon the recorded public records, that JPMorgan was the then-current beneficiary under the DOT." (Doc. 102, p. 5:22-28).
>
> ...
>
> 7. I received Mr. Paatalo's declaration on November 5, 2012. On November 5, I served Mr. Paatalo's declaration on Chase (Document 107) disclosing his identity and providing Chase with a written report prepared and signed by Mr. Paatalo containing (i) the opinions Mr. Paatalo will express and the basis and reasons for them; (ii) facts or data considered by Mr. Paatalo in forming them; (iii) exhibits used to summarize or support them; and (iv) Mr. Paatalo's qualifications, as required by Rule 26.01 (a)(2)(D)(ii) and 26.01(a)(3). The disclosure under Rule 26(a) was in writing, signed, and served. App. 107a [Declaration of Douglas Gillies].

The court did not take into consideration whether striking the Paatalo declaration and entering summary judgment against Javaheri would be proper under the five-factor test stated in *Wendt v. Host Intern Inc.* (9th Cir. 1997) 125 F.3d 806, 814: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the non-offending party; (4) the public policy favoring disposition of cases on

their merits; (5) the availability of less drastic sanctions.

Where the harm can be easily remedied, exclusion is not the proper sanction. See *Frontline Med. Assocs. v. Coventry Health* (C.D. Cal. 2009) 263 F.R.D. 567, 570; *Baltodano v. Wal-Mart Stores, Inc.* (2011 Dist. Ct. Nevada) No. 2:10-cv-2062. A delay of a few weeks in the Javaheri matter would not have prejudiced Chase. The District Court's calendar might have adjusted, but this did not outweigh Javaheri's loss of two properties, including his family home.

Due process limits the imposition of the severe sanctions of dismissal or default to "extreme circumstances" in which "the deception relates to the matters in controversy" and prevents their imposition "merely for punishment of an infraction that did not threaten to interfere with the rightful decision of the case." *Wyle v. R.J. Reynolds Industries, Inc.* (9th Cir. 1983) 709 F.2d at 589, 591.

The Paatalo declaration supported Javaheri's Opposition to Summary Judgment by showing that (a) WaMu did not have any interest in Javaheri's note, and (b) Javaheri was not in default because the HY1 Trust was receiving regular payments [App. 114a-128a]. The Court speculated that the outstanding balance might be higher than the payments described in Paatalo's declaration when it granted Summary Judgment. App. 37a.

Oral argument for the Summary Judgment Motion (Wilshire) was cancelled by the Court. The Order Granting Summary Judgment weighed facts offered in the "moot" Paatalo declaration that the certificate

holders had been receiving payments toward Plaintiff's alleged obligation:

> 50. At the time I conducted the original report in February of 2012, the current amount of the subject loan was "$974,978" ("BP Investigative Agency Exhibit D.")
>
> As of 11/01/12, the current amount shows "$955,106" ("BP Investigative Agency Exhibit F.")
>
> The principal balance of the subject loan has decreased by $19,872." This is irrefutable evidence that the certificate holders have been receiving payments toward Plaintiff's alleged obligation and that there is no default. [App. 128a].

The summary judgment order stated, "Indeed, Javaheri's $22,851 arrears could have blossomed into significantly more in the two-and-a-half years since the NOD was filed—possibly in excess of the payments Javaheri has made over the last eight months." App. 38a.

The court made findings of fact as to the amount that Javaheri was in arrears based upon disputed hearsay declarations in the Notice of Default and Notice of Trustee's Sale, and then speculated that Javaheri's arrears could have "blossomed" while the court disregarded detailed financial records from a Bloomberg terminal attached to Paatalo's declaration. [App. 126a-128a].

III. A COURT CANNOT GRANT SUMMARY JUDGMENT ON THE BASIS OF A 44-PAGE P&A AGREEMENT WHILE DISREGARDING THE 118-PAGE P&A AGREEMENT THAT ASSIGNS LIABILITIES TO CHASE

Chase requested that the court take judicial notice of its 44-page version of the P&A Agreement as the sole basis for its claim in the Wellworth case. Javaheri objected. In dismissing Petitioner's Cause of Action for "No Contract," based on WaMu's conduct in making the loan, the court found, "JP Morgan argues in its Opposition that Plaintiff's claim for "No Contract/Fraud" against JP Morgan fails because JP Morgan did not assume any liabilities arising from claims relating to WaMu's origination of Plaintiff's Note. The Court agrees. JP Morgan expressly disclaimed assumption of liability arising from borrower claims against WaMu." App. 74a-76a.

Chase also requested judicial notice of the P&A Agreement in the Wilshire case. Again, Javaheri objected. The court wrote, "The OTS Order and the P&A Agreement are the official documents memorializing these facts, and each is published by a governmental organization. Therefore, they cannot reasonably be questioned. Accordingly, the Court GRANTS JPMorgan's request for judicial notice as to both documents." App. 66a.

The declaration of Jeffrey Thorne was not considered as the Court concluded, "The Note was properly transferred from Washington Mutual to the FDIC as receiver of the bank, and from the FDIC to

JPMorgan through the P&A Agreement. So, JPMorgan is now the Note Holder." App. 21a [Summary Judgment–Wellworth]. The Court made a finding of fact when it ruled in favor of Chase based solely on the 44-page P&A Agreement. App. 28a, 45a, 65a-66a.

The Ninth Circuit 3-judge panel found that the district court "did not abuse its discretion by taking judicial notice of the document memorializing Chase's acquisition of assets, including the beneficial interest in Javaheri's loan, from the FDIC. The document was available from the agency on its website and is not reasonably subject to dispute." App. 2a.

However, 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 . Thorne's declaration was filed with Javaheri's Opposition to Summary Judgment (Wellworth) and included in the Excerpts of Record on appeal. The courts paid no heed.

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 National Trust Co.* (2011) 196 Cal.App4th 1336*; 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."

While the court may take judicial notice of the existence of a P&A Agreement, it may not take judicial notice of factual matters stated therein.

The only factual representations made by Javaheri to WaMu are found in his handwritten application. App. 155a [SAC, Exhibit 2]. All of the loan documents, including all of the numbers, were filled in by WaMu employees. The court dismissed his cause of action for "No Contract," which the court characterized as a cause of action for fraud, after finding that Chase was not liable for WaMu's actions under the 44-page P&A Agreement.

> JP Morgan argues in its Opposition that Plaintiff's claim for "No Contract/Fraud" against JP Morgan fails because JP Morgan did not assume any liabilities arising from claims relating to WaMu's origination of Plaintiff's Note. The Court agrees. JP Morgan expressly disclaimed assumption of liability arising from borrower claims against WaMu. App. 67a [Order Denying Motion to Dismiss].

Mr. Thorne declared that he was a senior loan consultant for WaMu from 2002 to 2006, where he led efforts to originate residential construction loans and residential purchase loans and established loan policy. Then he worked for the FDIC drafting the agreement that transferred WaMu's assets and liabilities to Chase on September 25, 2008. Thorne declared under penalty of perjury that he read the P&A Agreement and it did not absolve Chase of liability for WaMu.

> The complete agreement with the FDIC and Chase Bank is 118 pages long, which has not been made public. I am familiar with this agreement. I have read it. Chase took liability for the ongoing contracts in return for getting an 80% discount on the loan's principal owed. App. 148a [Thorne Declaration].

According to the Thorne declaration, the 118-page Purchase & Assumption Agreement made Chase liable for torts and contractual breaches by WaMu, in contrast to the 44-page document. The *Jolley* decision recognized the existence of the 118-page P&A:

> In November 2011, Jolley began trying to secure a copy of the 118-page agreement referred to in Thorne's declaration. His counsel requested a copy from the FDIC, and also apparently served a subpoena duces tecum seeking production of it. According to Jolley's counsel, the FDIC refused to produce the document unless all parties to the litigation signed a confidentiality agreement. On November 9, 2011, six days before the motion was to be heard, Jolley requested that counsel for Chase sign a confidentiality agreement. She refused to do so. *Jolley v. Chase, supra,* 213 Cal.App. 4th at 883.

Countless foreclosures have been carried out by Chase on the assumption that it acquired all the assets of WaMu but was spared WaMu's liabilities pursuant to the 44-page P&A Agreement. It appears that the FDIC withheld the 118-page P&A Agreement from the public while Chase filed requests for judicial notice of the 44-page agreement.

CONCLUSION

Karl Grier, Editor-in-Chief of Miller & Starr, *California Real Estate 3d,* offered this observation of California's nonjudicial foreclosure procedure in the March 2012 *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, the 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 official California Senate website reports:

> 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, Sacramento.
>
> There are approximately another 570,000 California households currently in delinquency or foreclosure—the so-called "foreclosure pipeline." [3]

The risk of foreclosure fraud has not been resolved, and the government has no interest in depriving people of their property without due process.

JPMorgan Chase, Citigroup, Bank of America, and Wells Fargo each now possess more than $1 trillion in assets, even though each has paid billions to settle claims for bad mortgage loans.[4]

State and federal courts have frequently looked the other way as millions of American families struggle to regain a foothold in the smoldering ruins of real property title principles that reach back through the common law for five hundred years. Millions of children will not easily forget the devastation to their lives caused by the housing crash. Leaving it to state

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

[4] www.latimes.com/business/la-fi-wells-fargo-20140712-story.html (Los Angeles Times, July 11, 2014).

courts to resolve this mortgage crisis would be like asking local sheriffs to keep an eye on the NSA.

Banks now exert unprecedented influence with the blessing of the courts, and failure of the federal government establish a uniform system of regulating foreclosures does not serve the people or the nation.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Daryoush Javaheri

APPENDIX

A. Court of Appeals Opinion (3/10/2014)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DARYOUSH JAVAHERI,
Plaintiff - Appellant,

v.

JPMORGAN CHASE BANK N.A.,
Defendant - Appellee.

No. 12-56566
D.C. No. 2:10-cv-08185-ODWFFM

No. 13-55048
D.C. No. 2:10-cv-08185-ODWFFM

MEMORANDUM*

Appeals from the United States District Court
for the Central District of California
Otis D. Wright II, District Judge, Presiding

FILED
MAR 10 2014

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Submitted March 6, 2014**
Pasadena, California

Before: FERNANDEZ, GRABER, and MURGUIA, Circuit Judges.

Plaintiff Daryoush Javaheri appeals from the district court's orders granting summary judgment for Defendant JPMorgan Chase Bank N.A. ("Chase") on his wrongful foreclosure, quiet title, and related claims concerning two properties encumbered by deeds of trust. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo an order granting summary judgment, *Grenning v. Miller-Stout*, 739 F.3d 1235, 1238 (9th Cir. 2014), and we affirm.

Javaheri defaulted on a loan that he took out against his property on Wellworth Avenue in Los Angeles. He argues that Chase lacked the authority to initiate foreclosure proceedings. There is no genuine dispute of material fact on Javaheri's wrongful foreclosure claim. First, the district court did not abuse its discretion by taking judicial notice of the document memorializing Chase's acquisition of assets, including the beneficial interest in Javaheri's loan, from the FDIC. See *Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 458 (9th Cir. 1995). The document was available from the agency on its website and is not reasonably subject to dispute. See id.; see also *Laborers' Pension Fund v. Blackmore Sewer*

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Constr., Inc., 298 F.3d 600, 607 (7th Cir. 2002). Accordingly, Chase provided credible evidence that it owned the loan on the Wellworth Avenue property. Second, under California law a beneficiary need not produce the original promissory note in order to initiate a non-judicial foreclosure. *Saldate v. Wilshire Credit Corp.*, 686 F. Supp. 2d 1051, 1068 (E.D. Cal. 2010). Thus, the fact that Chase could not produce the original promissory note for the loan on the Wellworth Avenue property did not divest Chase of the authority to foreclose. Third, neither Javaheri's speculation that his loan was securitized nor his claims that documents related to his deed of trust were robo-signed suffice to establish a genuine and material dispute of fact. The district court properly granted summary judgment on the wrongful foreclosure claim related to the Wellworth Avenue property.

Javaheri also defaulted on a loan that he took out against his condominium on Wilshire Boulevard in Los Angeles. Again he contends that Chase wrongfully initiated foreclosure proceedings against this property. However, Chase presented evidence that (1) it had acquired the right to service the loan and thus to foreclose if Javaheri failed to make payments; and (2) Javaheri had defaulted on his loan. Javaheri's opposition rested entirely on an expert's declaration pointing to chain-of- title issues with the deed of trust, but Javaheri failed to timely disclose his

expert, and the district court did not abuse its discretion in striking the expert's declaration. See *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 969 n.5 (9th Cir. 2006). Javaheri offered nothing else to dispute Chase's evidence, and thus summary judgment on the Wilshire Boulevard property wrongful foreclosure claim was appropriate.

Javaheri's quiet title claims–one concerning the Wellworth Avenue property and one concerning the Wilshire Boulevard property–likewise fail. "It is settled in California that a mortgagor cannot quiet his title against the mortgagee without paying the debt secured." *Shimpones v. Stickney*, 28 P.2d 673, 678 (Cal. 1934). Javaheri proffered no evidence that he had paid his loans or that he had offered to do so.

Lastly, Javaheri asserts that California's statutory scheme for non-judicial foreclosures does not comport with the requirements of due process. But he failed to raise this argument below, and we therefore will not consider it. See *Baccei v. United States*, 632 F.3d 1140, 1149 (9th Cir. 2011).

AFFIRMED.

B. Court of Appeals Order Denying Petition For Rehearing (4/18/2014)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DARYOUSH JAVAHERI,
Plaintiff - Appellant,

v.

JPMORGAN CHASE BANK N.A.,
Defendant - Appellee.

No. 12-56566
D.C. No. 2:10-cv-08185-ODWFFM

No. 13-55048
D.C. No. 2:10-cv-08185-ODWFFM

ORDER

Before: FERNANDEZ, GRABER, and MURGUIA, Circuit Judges.

Judge Graber and Judge Murguia vote to deny the petition for rehearing en banc and Judge Fernandez so recommends.

FILED APR 18 2014

C. District Court Order Granting Motion For Partial Summary Judgment (Wellworth) (8/13/2012)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DARYOUSH JAVAHERI,

Plaintiff,

v. No. 2:10-cv-08185-ODW

JPMORGAN CHASE BANK, N.A.; and DOES 1–150, inclusive,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [102]

I. INTRODUCTION

Defendant JPMorgan Chase Bank, N.A. moves for partial summary judgment on Plaintiff Daryoush Javaheri's Second Amended Complaint ("SAC"). (ECF 20 No. 58.) The Court has carefully considered the arguments in support of and in opposition to the JPMorgan's Motion. For the following reasons, JPMorgan's Motion is GRANTED.

II. FACTUAL BACKGROUND

On November 14, 2007, Javaheri obtained a $2,660,000.00 mortgage loan from Washington Mutual Bank, FA to finance his property located at 10809 Wellworth Avenue, Los Angeles, California

90024 (the "Wellworth Property"). (Eric Waller Decl. Ex. 4.) In connection with the loan, Javaheri executed a promissory note (the "Note") and a Deed of Trust encumbering the property. (Waller Decl. Exs. 4, 6.) The Deed of Trust identifies Washington Mutual as the lender and Chicago Title Company as the Trustee. (Waller Decl. Ex. 6.)

Javaheri asserts that in November 2007, Washington Mutual transferred the Note to Washington Mutual Mortgage and Securities Corporation. (SAC ¶ 14.) There is no evidence of this. Javaheri also alleges that the Note evidencing his indebtedness was then sold as an investment security to unknown private investors. (SAC ¶¶ 14, 28.) Javaheri identifies this security as Standard and Poor CUSIP number 31379XQC2, Pool Number 432551. (Douglas Gillies Decl. Ex. 5.) Javaheri took this Pool Number from the Deed of Trust and entered it into a "Pool Talk" form on the Fannie Mae website. (Michael B. Tannatt Decl. Ex. 1, Interrogatory No. 5.) But the number on the Deed of Trust was handwritten and read "4325-5-14." (Waller Decl. Ex. 6.) JPMorgan maintains that the number on the Deed of Trust corresponds to the Assessor's Parcel Number. (Mot. 11.) The Assessor's Parcel Number is "4325-005-14 014." (Jessica Snedden Decl. Exs. 1, 4, 6.)

On September 25, 2008, the Office of Thrift Supervision closed Washington Mutual and appointed the Federal Deposit Insurance Corporation as receiver. (Waller Decl. Ex. 1.) JPMorgan acquired certain of Washington Mutual's assets by entering into a Purchase and Assumption

("P&A") Agreement with the FDIC. (Waller Decl. Ex. 2.) Paragraph 3.1 of the P&A Agreement states, "Notwithstanding Section 4.8, the assuming Bank specifically purchases all mortgage servicing rights and obligations of the Failed Bank." (Waller Decl. Ex. 2.)

In March 2010, JPMorgan sent Javaheri a Notice of Collection Activity letter stating that he was in default of his mortgage because he had not made any payments since November 2009. (SAC Ex. 5.) Javaheri's attorney at the time responded to the letter, requesting that all future communication related to the loan be conducted through his office. (SAC Ex. 6.)

On May 3, 2010, California Reconveyance Company ("CRC") was substituted as the Trustee for the loan in place of Chicago Title Company. (Snedden Decl. Ex. 1.) Also on May 3, 2010, CRC recorded a Notice of Default and Election to Sell the Wellworth Property in the Los Angeles County Recorder's Office. (Snedden Decl. Ex. 2.)

On May 14, 2010, CRC recorded a Notice of Rescission and a second Notice of Default. (Snedden Decl. Exs. 3, 4.) CRC then mailed a second Notice of Default to Javaheri on or about May 24, 2010, and again on June 8, 2010. (Snedden Decl. Ex. 5.) On August 16, 2010, a Notice of Trustee's Sale was recorded and subsequently served on Javaheri, published in a local newspaper, and posted on the Wellworth Property. (Snedden Decl. Exs. 6–9.)

As a result of these events, on October 29, 2010, Javaheri filed a Complaint in this Court against

JPMorgan and CRC. (ECF No. 1.) Both Javaheri's original Complaint and his subsequent First Amended Complaint were dismissed for failure to state claims. (ECF Nos. 20, 28.) On April 12, 2011, Javaheri filed his SAC against JPMorgan. (ECF No. 29.) JPMorgan filed a Motion to Dismiss (ECF No. 30), which the Court partially granted, leaving only claims for: (1) violation of California Civil Code section 2923.5; (2) wrongful foreclosure; (3) quasi-contract; (4) quiet title; and (5) declaratory and injunctive relief. (ECF No. 36.)

On December 5, 2011, Javaheri filed a Complaint in another action that was nearly identical to the SAC in this case, except that it concerned Javaheri's condominium on Wilshire Boulevard instead of his house on Wellworth. Javaheri v. JPMorgan Chase Bank N.A., No. CV11-10072-ODW (FFMx) (C.D. Cal. Dec. 5, 2011). Due to the cases' similarities, the Court consolidated the later-filed case regarding Plaintiff's condo (CV11-10072) with this earlier-filed case concerning the Wellworth Property (CV10-8185). (ECF No. 50.)

On June 21, 2012, JPMorgan filed a Motion for partial Summary Judgment as to the remaining claims from Javaheri's SAC. (ECF No. 58.) JPMorgan's Motion pertains solely to the Wellworth Property originally associated with case number CV10-8185; it does not address Javaheri's condo.

III. LEGAL STANDARD

Summary judgment is appropriate when, after adequate discovery, the evidence demonstrates that there is no genuine issue as to any material fact and

the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A disputed fact is "material" where the resolution of that fact might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. Id. Where the moving party's version of events differs from the nonmoving party's version, "courts are required to view the facts and draw reasonable inferences in the light most favorable to the party opposing the summary judgment motion." *Scott v. Harris,* 550 U.S. 372, 378 (2007) (internal quotation marks omitted).

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). The moving party may satisfy that burden by demonstrating to the court that "there is an absence of evidence to support the nonmoving party's case." Id. at 325.

Once the moving party has met its burden, the nonmoving party must go beyond the pleadings and identify specific facts that show a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Celotex*, 477 U.S. at 323–34; Liberty Lobby, 477 U.S. at 248. Only genuine disputes over facts that might affect the outcome of the suit will properly preclude the entry of summary judgment. Anderson, 477 U.S. at 248; see also *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001) (finding that the non-moving party must present specific evidence

from which a reasonable jury could return a verdict in its favor).

The evidence presented by the parties on summary judgment must be admissible. See Fed. R. Civ. P. 56(e). "[E]vidence that is merely colorable or not significantly probative does not present a genuine issue of material fact." *Addisu v Fred Meyer*, 198 F.3d 1130, 1134 (9th Cir. 2000). Likewise, conclusory or speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *Thornhill's Publ'g Co. v. GTE Corp*., 594 F.2d 730, 738 (9th Cir. 1979). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson,* 477 U.S. at 253.

Finally, it is not the task of the district court "to scour the record in search of a genuine issue of triable fact. [Courts] rely on the nonmoving party to identify with reasonable particularity the evidence that precludes summary judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (*quoting Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir. 1995)); see also *Carmen v. S.F. Unified Sch. Dist*., 237 F.3d 1026, 1031 (9th Cir. 2001) ("The district court need not examine the entire file for evidence establishing a genuine issue of fact, where the evidence is not set forth in the opposing papers with adequate references so that it could conveniently be found.").

IV. DISCUSSION

A. Violation of Civil Code § 2923.5

Javaheri's claim for violation of California Civil Code section 2923.5 is preempted by the Home Owner's Loan Act ("HOLA"), 12 U.S.C. §§ 1461–1468c. In California, section 2923.5 requires mortgagees, beneficiaries, or authorized agents to communicate with borrowers facing foreclosure. Cal. Civ. Code § 2923.5(a)(1). Section 2923.5 is a state law that attempts to regulate banks' lending and servicing activities, and is "exactly the sort of statute that is proscribed by the HOLA." *McNeely v. Wells Fargo Bank, N.A.*, No. SACV 11-01370 DOC (MLGx), 2011 WL 6330170, at *3 (C.D. Cal. Dec. 15, 2011).

HOLA is a comprehensive financial statute providing for the regulation of federal savings banks and associations by the Office of Thrift Supervision ("OTS"). See 12 U.S.C. § 1464; *Ngoc Nguyen v. Wells Fargo Bank, N.A.*, 749 F. Supp. 2d 1022, 1031 (N.D. Cal. 2010). "Through HOLA, Congress gave the OTS broad authority to issue regulations governing federal savings associations." Ngoc Nguyen, 749 F. Supp. 2d at 1031 (citing 12 U.S.C. § 1464; *Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001, 1005 (9th Cir. 2008)). In exercising its authority, the OTS "occupies the entire field of lending regulation for federal savings associations." 12 C.F.R. § 560.2. Indeed, the Ninth Circuit has noted that HOLA is "so pervasive as to leave no room for state regulatory control." *Silvas*, 514 F.3d at 1004–05 (quoting *Conference of Fed. Sav. & Loan Ass'ns v. Stein*, 604 F.2d 1256, 1257 (9th Cir. 1979), aff'd, 445 U.S. 921).

Here, the loan originator, Washington Mutual Bank, FA, was a federally chartered savings bank at the time the loan originated. (Waller Decl. Ex 1.); see Rodriguez v. JPMorgan Chase & Co., 809 F. Supp. 2d 1291, 1295 (S.D. Cal. 2011). Although JPMorgan is not a federal savings bank and is not regulated by the OTS, the same HOLA preemption analysis still applies because the loan originated with Washington Mutual. Rodriguez, 809 F. Supp. 2d at 1295; see Deleon v. Wells Fargo Bank, N.A., 729 F. Supp. 2d 1119, 1126 (N.D. Cal. 2010).

While the California Court of Appeals, in Mabry v. Superior Court, 185 Cal. App. 4th 208, 213–19 (2010), has construed section 2923.5 to be outside the scope of preemption, the weight of federal authority supports a finding that HOLA preempts section 2923.5. See, e.g., *Tanguinod v. World Sav. Bank, FSB*, 755 F. Supp. 2d 1064, 1073–74 (C.D. Cal. 2010); *Giannini v. Am. Home Mortg. Servicing, Inc.*, No. C11- 04489 TEH, 2012 WL 298254, at *6–8 (N.D. Cal. Feb 1, 2012). "Because the issue is not one of interpreting state law but rather of federal preemption, 'the [Court] is not bound by the decision in *Mabry*.'" *McNeely*, 2011 WL 6330170, at *3 (quoting *Tanguinod,* 755 F. Supp. 2d at 1074).

The Court agrees with the majority of courts in the Ninth Circuit and finds that HOLA preempts section 2923.5. The Court therefore GRANTS JPMorgan's Motion for Summary Judgment on Javaheri's claim for violation of California Civil Code section 2923.5 as it relates to the Wellworth Property.

B. Wrongful Foreclosure

Javaheri's claim for wrongful foreclosure relies on three contentions: (1) that JPMorgan is not owner, holder, or beneficiary of the Note; (2) that JPMorgan does not have the authority to foreclose; and (3) that the signatures of Deborah Brignac were robo-signed. The Court addresses each of these arguments in turn.

1. Ownership of the Note

Javaheri alleges that JPMorgan did not own his Note and therefore did not have the right to foreclose. (SAC ¶ 30.) The Second Amended Complaint states that Washington Mutual transferred the Note to Washington Mutual Mortgage Securities Corporation in November 2007, and the Note was then sold to an investment trust. (SAC ¶ 14.)

To support this contention, Javaheri purports to provide evidence of the sale. The number "4325-5-14" is handwritten in the margin of the Deed of Trust.[1][1] (Waller Decl. Ex. 6.) In April 2011, Counsel for Javaheri entered the number "432551" as a Pool Number in a form titled "Pool Talk" that was publicly available on Fannie Mae's website.[2][2]

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[1] The number as written on the Deed of Trust is "4325-5-14." But, in his response to Interrogatory No. 5, Javaheri claims that the number was written as "432551." (Tannatt Decl. Ex. 1.) In the Opposition to the JPMorgan's Motion, Counsel for Javaheri states that the number is "4325514." (Opp'n 3.)

[2] Javaheri is inconsistent in enumerating the number that he entered into the "Pool Talk" form. As stated in the Opposition

(Gillies Decl. Ex. 5.) But the number that Counsel entered differs in both form and substance from the number written on the deed of trust: it includes neither the dashes nor the last digit. The only information available on the "Pool Talk" form is that the pool number "432551" corresponds to the CUSIP number "31379XQC2" and that as of 2011, the status of this security was "Preliminary." (Gillies Decl. Ex. 5.) Aside from this, Javaheri provides no information on who the private investors are, when the Note was sold, how much it was sold for, or any other evidence that would connect the Note to this loan pool.

JPMorgan's explanation for the number "4325-5-14" handwritten in the margin of the Deed of Trust is that it refers to the Assessor's Parcel Number for the Wellworth Property. (Mot. 11.) The Assessor's Parcel Number for the Wellworth Property is "4325-005-014". (Snedden Decl. Exs. 1, 4, 6.) The parcel number and the handwritten number on the Deed of Trust are the same, and in the same format, except that the handwritten number omits the zeros contained in the Assessor's Parcel Number.

Ordinarily, summary judgment cannot lie when there is a "genuine" issue of material fact. *Anderson,* 477 U.S. at 248. But if the evidence is merely colorable or not sufficiently probative, then the Court

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and as appearing in Exhibit 5, the number entered is "432551." (Opp'n 3; Gillies Decl. Ex. 5.) But, Gillies' Declaration states that he entered the number "4325514" in the "Pool Talk" form. (Gillies Decl. at 3.)

may grant summary judgment. Id. at 249– 50. Only if genuine factual issues may reasonably be resolved in favor of either party should the case proceed to trial. Id. at 250. "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd.*, 475 U.S. at 587 (internal quotation marks omitted).

Here, no reasonable jury could conclude that Javaheri's Note had been sold as part of a securitized trust. The pool number was only a partial entry of what was written in the margin of the Deed of Trust, and the only possible connection to some heretofore unnamed private investors is that the number entered into "Pool Talk" corresponds with a CUSIP number that had a Preliminary status in 2011—several months after the lawsuit was originated and at least two-and-a-half years since the Note was allegedly sold as a securitized trust. While the number written on the Deed of Trust bears a striking resemblance to a number associated with a securitized trust, Plaintiff simply fails to produce sufficient evidence to establish that this is anything more than a rare coincidence. The Court therefore finds that Javaheri has failed to establish that JPMorgan does not own his Note and Deed of Trust.

2. Authority to foreclose

Javaheri also argues that JPMorgan cannot produce the original Note and that there has been no recording of the beneficial interest in the Note to Chase.

The SAC states, "Neither WaMu, Chicago Title, CRC, nor Chase has recorded a transfer of the beneficial interest in the Note to Chase." (SAC ¶ 29.) Javaheri is correct in this assertion, and JPMorgan offer no evidence to counter it. But this argument bears no weight on JPMorgan's authority to foreclose. California courts have routinely held that a transfer of assignment of a debt does not need to be recorded. See, e.g., *Herrera v. Fed. Nat'l Mortg. Assn.,* 205 Cal. App. 4th 1495, 1506 (2012); *Fontenot v. Wells Fargo Bank, N.A.,* 198 Cal. App. 4th 256, 271–72 (2011).

Javaheri also argues that JPMorgan cannot produce the original Note. (SAC ¶ 31.) This is also true. (Waller Decl. Ex. 5.) Nevertheless, numerous courts have concluded that production or possession of the original promissory note is not necessary for non-judicial foreclosure under California law. See, e.g., *Saldate v. Wilshire Credit Corp.*, 686 F. Supp. 2d 1051, 1068 (E.D. Cal. 2010); *Ngoc Nguyen v. Wells Fargo Bank, N.A.*, 749 F. Supp. 2d 1022, 1035 (N.D. Cal. 2010). The Court agrees.

Therefore, although JPMorgan cannot produce the original Note and has not recorded its interest in the Note, these actions are not required for non-judicial foreclosure in California and thus are inapposite to Javaheri's claim for wrongful foreclosure.

3. Robo-signing

Javaheri contends finally that the Substitution of Trustee is invalid because it was robo-signed. (SAC ¶ 39.) According to Javaheri, surrogate signers allegedly signed several documents on behalf of and

in the name of Deborah Brignac, without reading or understanding the documents' contents. (Gillies Decl. Ex. 4.) Indeed, for the purposes of this Motion, the Court finds that the signature of Deborah Brignac on the Substitution of Trustee was signed by a different person than that purporting to be Deborah Brignac on the Notice of Trustee's Sale. (Gillies Decl. Ex. 6.)

While the allegation of robo-signing may be true, the Court ultimately concludes that Javaheri lacks standing to seek relief under such an allegation. District Courts in numerous states agree. See, e.g., *Repokis v. Deutsche Bank Nat'l Trust Co.*, No. 11-15145, 2012 WL 2373350, at *2 (E.D. Mich. June 25, 2012); *In re Mortgage Electronic Registration Systems (MERS) Litigation,* No. CV 10-1547-PHX-JAT, 2012 WL 932625, at *3 (D. Ariz. Mar. 20, 2012) see also See *Bleavins v. Demarest*, 196 Cal. App. 4th 1533, 1542 (2011) ("Someone who is not a party to a contract has no standing to challenge the performance of the contract . . . ." (internal quotation marks and alterations omitted)).

Only someone who suffered a concrete and particularized injury that is fairly traceable to the substitution can bring an action to declare the assignment of CRC as void. *In re Mortgage Electronic Registration Systems (MERS) Litigation*, 2012 WL 932625, at *3. The Substitution of Trustee in this case replaces Chicago Title Company with CRC as trustee of the Deed of Trust. (Snedden Decl. Ex. 1.) Javaheri was not party to this assignment, and did not suffer any injury as a result of the assignment. Instead, the only injury Javaheri alleges is the pending foreclosure on his home, which is the result

of his default on his mortgage. The foreclosure would occur regardless of what entity was named as trustee, and so Javaheri suffered no injury as a result of this substitution. See *Bridge v. Aames Capital Corp*., No. 1:09 CV 2947, 2010 WL 3834059, at *4 (N.D. Ohio Sept. 29, 2010) ("Plaintiff is still in default on [his] mortgage and subject to foreclosure. As a consequence, Plaintiff has not suffered any injury as a result of the assignment.")

In sum, Javaheri fails to establish that JPMorgan is not the owner, holder, or beneficiary of the Note or that it lacked the authority to foreclose, and he lacks standing to assert his robo-signing contentions. The Court therefore GRANTS JPMorgan's Motion on Javaheri's wrongful foreclosure claim as it pertains to the Wellworth Property.

C. Quasi-Contract

Javaheri's claim for quasi-contract alleges that JPMorgan was unjustly enriched when Javaheri paid it monthly mortgage payments because JPMorgan was not the owner, lender, or beneficiary of the note. (SAC ¶ 42.) In its previous Order, the Court denied JPMorgan's Motion to Dismiss the quasi-contract claim on the basis that "if indeed JPMorgan did not own the Note yet received payments therefrom, those payments may have been received unjustly." (Order 8.) The Court premised its decision on Javaheri's well-pleaded allegations that JPMorgan was not the rightful owner of the Note, and so was unjustly enriched by collecting mortgage payments from Javaheri. (SAC ¶ 42.)

These allegations were sufficient to withstand a Rule 12(b)(6) motion to dismiss, but to withstand summary judgment, Javaheri must provide admissible evidence demonstrating that the Note is owned by another entity. Javaheri has not done this, and so, as the Court has already concluded, Javaheri fails to establish that JPMorgan is not the rightful owner of the Note.

Javaheri does not argue that the Note and the Deed of Trust are not valid documents as to the Subject Loan and Wellworth Property; he argues only that JPMorgan is not the valid owner. (SAC ¶ 42.) These documents are thus controlling in establishing the respective rights and obligations between Javaheri and JPMorgan.

Under California law, a claim for quasi-contract alleging unjust enrichment cannot lie "when an enforceable, binding agreement exists defining the rights of the parties." *Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1167 (9th Cir. 1996). Here, the Note and the Deed of Trust are express contracts covering the same subject material as Javaheri's quasi-contract claim. The Court must therefore look to the physical, written contracts (the Note and the Deed of Trust) to determine whether Javaheri's claim fails as a matter of law. See *Klein v. Chevron U.S.A., Inc.,* 202 Cal. App. 4th 1342, 1388 (2012); *Lance Camper Mfg. Corp. v. Republic Indem. Co. of Am.*, 44 Cal. App. 4th 194, 203 (1996).

The Note instructs the Borrower to make monthly payments to the Note Holder. (Waller Decl. Ex. 4.) The Note Holder is either the original lender, Washington Mutual, or "anyone who takes the Note

by transfer and who is entitled to receive payments under this Note." (Waller Decl. Ex. 4.) The Note was properly transferred from Washington Mutual to the FDIC as receiver of the bank, and from the FDIC to JPMorgan through the P&A Agreement. So, JPMorgan is now the Note Holder. Thus, the Note is a valid contract between Javaheri and JPMorgan, and any attempt to plead a quasi-contract claim in substitution of the Note and Deed of Trust must necessarily fail.

Finally, even if the Court could find that there was no enforceable contract governing the parties' rights and obligations in this case, there is still no evidence that JPMorgan has unjustly benefitted from Javaheri's mortgage payments at Javaheri's expense. Unjust enrichment requires the receipt of a benefit and the unjust retention of that benefit at the expense of another. *Tilley v. Ampro Mortg.*, No. S–11–1134 KJM CKD, 2011 WL 5921415, at *9 (E.D. Cal. Nov. 28, 2011) (quoting *Peterson v. Cellco Partnership*, 164 Cal.App.4th 1583, 1593 (2008)); *Cross v. Wells Fargo Bank, N.A.,* No. CV11-00447 AHM (Opx), 2011 WL 6136734, at *3 (C.D. Cal. Dec. 9, 2011) (same). Conspicuously absent from both Javeheri's Complaint and the evidentiary record in this case is any contention or any evidence that JPMorgan—to the extent that it does not own Javaheri's Note and is not entitled to keep Javaheri's mortgage payments—has failed to credit Javaheri's account or forward Javaheri's payments to the appropriate entity. Nor does any other creditor appear to claim an interest in any of the payments Javaheri made prior to default. Javaheri therefore

has not established the very essence of a quasi-contract claim.

The Court therefore GRANTS JPMorgan's Motion for Summary Judgment on Javaheri's quasi-contract claim as it relates to the Wellworth property.

D. Quiet Title

Javaheri's claim for quiet title is based on allegations (1) that JPMorgan does not own and cannot produce the original promissory note and (2) that all necessary sums have been paid.

California courts have held that a party seeking to quiet title to a property on which he owes a debt must first offer payment in full on that debt. *Rosenfeld v. JPMorgan Chase Bank, N.A.,* 732 F. Supp. 2d 952, 975 (N.D. Cal. 2010*); Miller v. Provost*, 26 Cal. App. 4th 1703, 1707 (1994). In his SAC, Javaheri alleges, "[T]he obligations owed to WaMu under the DOT were fulfilled and the loan was fully paid when WaMu received funds in excess of the balance on the Note as proceeds of sale through securitization(s) of the loan and insurance proceeds from Credit Default Swaps." (SAC ¶ 63.) In other words, Javaheri suggests that he need not pay off his debt simply because Washington Mutual transferred the Note to a third party. Even assuming that Washington Mutual did sell the Note to a securitized trust, which Javaheri has failed to establish, public policy demands that Javaheri pay off his debt. It would be patently unfair to allow Javaheri to own his home free and clear without fully paying the money he owes on the home. Moreover, district courts have consistently held that "the sale or pooling of

investment interests in an underlying note [cannot] relieve borrowers of their mortgage obligations." *Upperman v. Deutsche Bank Nat'l Trust Co.*, No. 01:10-cv-149, 2010 WL 1610414, at *2 (E.D. Va. Apr. 16, 2010); see *Matracia v. JP Morgan Chase Bank*, NA, No. CIV. 2:11-190 WBS JFM, 2011 WL 3319721, at *3 (E.D. Cal. Aug. 1, 2011).

JPMorgan has satisfied its burden by providing evidence that Javaheri has not tendered the full amount due under the loan. (Tannatt Decl. Ex. 4, at 22.) Javaheri does not refute this. (See Plaintiff's Statement of Genuine Issues in Opposition to Motion for Summary Judgment.) Javaheri's SAC does allege that his obligation to pay Washington Mutual was fulfilled when Washington Mutual received proceeds from the sale of the Deed of Trust to private investors in a securitized trust. (SAC ¶¶ 43, 63.) But while this was enough to survive a Rule 12(b)(6) motion to dismiss, it is not enough to survive summary judgment. Javaheri provides no evidence that there were any proceeds from the sale of the Deed of Trust to private investors. Therefore, even if this sale did occur, there is still no evidence of tender. And because Javaheri provides no evidence that he tendered the full amount owed under the Deed of Trust, there can be no claim to quiet title. Accordingly, JPMorgan's Motion is GRANTED with respect to Javaheri's claim for quiet title as it relates to the Wellworth Property.

E. Declaratory and Injunctive Relief

Claims for declaratory and injunctive relief are ultimately prayers for relief, not causes of action. *Lane v. Vitek Real Estate Indus. Grp.*, 713 F. Supp.

2d 1092, 1104 (E.D. Cal. 2010). Javaheri is not entitled to such relief absent a viable underlying claim. *Shaterian v. Wells Fargo Bank, N.A.*, 829 F. Supp. 2d 873, 888 (N.D. Cal. 2011).

The Court stated in its June 2, 2011 Order, "Plaintiff has properly pleaded his underlying claims and Defendant may therefore be found liable at a later stage of the litigation." (Order 9.) Javaheri's allegations were enough to withstand dismissal under 12(b)(6), but for summary judgment, Javaheri cannot rest upon mere allegations or denials in his pleadings; rather, he must assert evidentiary materials showing that there is a genuine issue for trial. *Anderson*, 477 U.S. at 256. Because there is no evidence to support Javaheri's underlying claims, injunctive relief is improper.

To state a claim for declaratory relief, there must be an actual controversy. *Am. States Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9th Cir. 1994). The Court has dismissed Javaheri's claims, so there is no longer a controversy regarding the Wellworth Property. Therefore, the Court has no jurisdiction to award declaratory relief on the Wellworth Property.

Accordingly, the Court GRANTS JPMorgan's Motion for Summary Judgment on Javaheri's claim for declaratory and injunctive relief as it relates to the Wellworth Property.

V. CONCLUSION

The Court GRANTS Defendant's Motion for Partial Summary Judgment in its Entirety. The parties shall proceed in this litigation solely on Plaintiff's

Wilshire Boulevard condo, which is the only property remaining subject to this action.

IT IS SO ORDERED.

August 13, 2012

OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE

D. District Court Order Granting Motion for Summary Judgment (Wilshire) (12/11/2012)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DARYOUSH JAVAHERI,

Plaintiff,

v. No. 2:10-cv-08185-ODW

JPMORGAN CHASE BANK, N.A.; CALIFORNIA RECONVEYANCE COMPANY and DOES 1–150, inclusive,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [102]

I. INTRODUCTION

Defendants JPMorgan Chase Bank, N.A. and California Reconveyance Company move for summary judgment on Plaintiff Daryoush Javaheri's Complaint originally filed in *Javaheri v. JP Morgan Chase Bank N.A.* ("*Javaheri II*"), No. 11-cv-10072-ODW-FFM (C.D. Cal. filed December 5, 2011). (*Javaheri II* has now been consolidated with *Javaheri v. JP Morgan Chase Bank N.A.* ("*Javaheri I*"), No. 10-cv-08185-ODW-FHM (C.D. Cal. filed Oct. 29, 2010).) Having carefully considered the papers filed in support of and in opposition to Defendants' Motion, the Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P.

78; L.R. 7-15. For the reasons discussed below, the Court GRANTS Defendants' motion in its entirety.

II. FACTUAL BACKGROUND[1]

On December 6, 2006, Plaintiff Daryoush Javaheri obtained a $975,000 mortgage loan from Washington Mutual Bank, FA ("WaMu") to finance the purchase of a condominium located at 10660 Wilshire Blvd., #1401, Los Angeles, California 90024 (the "Wilshire Property"). (JPMorgan's Statement of Undisputed Fact ("SUF") 1.) In connection with the loan, Javaheri executed a promissory note (the "Note") secured by a Deed of Trust encumbering the property. (Id.) The Deed of Trust, recorded on December 13, 2006, identifies WaMu as the lender beneficiary and California Reconveyance Company ("CRC") as trustee under the Deed of Trust. (SUF 2.)

On January 1, 2007, WaMu sold the beneficial interest in Javaheri's loan to WaMu Asset Acceptance Corporation, which then transferred the loan to LaSalle Bank National Association, as trustee of the Washington Mutual Mortgage Pass-Through Certificates Series 2007-HY1 Trust (the "2007-HY1 Trust"). (SUF 6.) Later in 2007, Bank of America took LaSalle's place as trustee of the 2007-HY1 Trust as the successor by merger to LaSalle. As a result, Bank of America is the current trustee of

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[1] This Factual Background section is drawn almost entirely from Defendants' separate statement of undisputed facts and supporting evidence. Because Javaheri's statement of genuine disputes failed to dispute any of Defendants' undisputed facts, the Court considers all of the facts contained within Defendants' separate statement "undisputed for purposes of the motion." Fed. R. Civ. P. 56(e)(2).

the 2007-HY1 Trust and beneficial interest-holder in Javaheri's loan.

Shortly after the transfer of Javaheri's loan to the 2007-HY1 Trust, WaMu, WaMu Asset Acceptance, and LaSalle entered into a Pooling and Servicing Agreement whereby WaMu became the servicer of the pool of loans sold to 2007- HY1 Trust (including Javaheri's loan). (SUF 10.) As a result, WaMu was expressly given "full power and authority to do . . . all things in connection with such servicing and administration" of the trust. (*Id.*) WaMu's servicing and administration duties included collecting all loan payments, abiding by collection practices for comparable loans, and foreclosing on loans in default. (SUF 11.) WaMu acted as servicer on Javaheri's loan from origination until WaMu's failure in 2008. (SUF 12.)

On September 25, 2008, the Office of Thrift Supervision ("OTS") closed WaMu and appointed the Federal Deposit Insurance Commission ("FDIC") as receiver. (SUF 13.) In this role, the FDIC assumed all of WaMu's "rights, titles, powers, and privileges." 12 U.S.C. § 1821(d)(2)(A)(i). Additionally, the FDIC as Receiver held the power to transfer assets and liabilities of WaMu through purchase- and-assumption agreements. 12 U.S.C. § 1821(d)(2)(G)(i).

On September 25, 2008, the FDIC negotiated the sale of certain assets held by WaMu to JPMorgan. (SUF 15.) That same day, the parties memorialized the arrangement in a Purchase and Assumption Agreement. (Id.) Among the assets JPMorgan acquired were WaMu's mortgage-servicing rights,

which included the right to service Javaheri's loan. (JP Morgan's UF 16.)

After WaMu failed, Javaheri understood that JPMorgan was his loan servicer, and he accordingly directed loan payments to JPMorgan for some time. (SUF 18.) Javaheri made payments through January 15, 2010, before defaulting on his loan in February 2010.(SUF 19, 26.) Javaheri contends he stopped making his mortgage payments because he was unsure who his lender was, though he made no effort to ascertain the identity of his lender before he stopped making his payments. (SUF 20–21.) In addition, Javaheri has testified that he is unsure he would have been able to make payments on his loan at the time of default because he had no income or assets to use to make his payments. (SUF 27.) Through at least October 3, 2012, Javaheri had no source of income. (SUF 28.)

On May 20, 2010, JPMorgan assigned any beneficial interest in the Deed of Trust it may have acquired from the FDIC—if any—to Bank of America (as successor by merger to LaSalle Bank) as trustee of the 2007-HY1 Trust. (SUF 29.) At the time this Assignment of Deed of Trust was recorded, JPMorgan did not claim to hold the beneficial interest in Javaheri's Deed of Trust, as WaMu had transferred Javaheri's loan to the 2007-HY1 Trust prior to September 25, 2008 (the date JPMorgan acquired certain of WaMu's assets from the FDIC as receiver). (SUF 30.) Nevertheless, JPMorgan executed the Assignment to clarify in the public records that it was not the then-current beneficiary under the Deed of Trust. (Id.)

Also on May 20, 2010, CRC (still the original trustee under the Deed of Trust) recorded a Notice of Default ("NOD"). (SUF 31.) The NOD indicated that, as of May 28, 2010, Javaheri's account was overdue in the amount of $22,851.64. (Id.) At the time the NOD was recorded, the 2007-HY1 Trust was the beneficiary under the Deed of Trust, and JPMorgan, as the Servicer under P&S Agreement, was fully authorized by the 2007-HY1 Trust to foreclose on Javaheri's defaulted loan. (SUF 32.)

On November 18, 2011, CRC recorded a Notice of Trustee's Sale ("NOTS") representing that as of November 18, 2011, the total unpaid balance and other charges on Javaheri's loan were estimated at $1,105,716.79. (Id.)

As of October 29, 2012, the Trustee's Sale of the Property has not occurred. (SUF 34.) JPMorgan currently remains the servicer of Javaheri's loan, and the 2007- HY1 Trust is the record Lender and beneficiary of the loan. (SUF 35–36.) JPMorgan is in possession of the original Note and Deed of Trust on behalf of the 2007-HY1 Trust. (SUF 37.)

III. PROCEDURAL BACKGROUND

On December 5, 2011, Plaintiff Daryoush Javaheri filed suit against Defendants for (1) wrongful foreclosure; (2) quasi contract; (3) quiet title; (4) declaratory and injunctive relief; and (5) no contract/fraud. Javaheri II, No. 11-cv-10072-ODW-FFM, ECF No. 1 (C.D. Cal. filed December 5, 2011). In response, Defendants moved to dismiss Javaheri's claims. Javaheri II, ECF No. 12. The Court dismissed Javaheri's claim for no contract/fraud with

prejudice and denied the motion as it related to all remaining claims. Javaheri II, ECF No. 20.

On May 16, 2012, the Court consolidated Javaheri I and Javaheri II. Javaheri II, ECF No. 23. Although the cases concern different properties (Javaheri I pertained to Javaheri's Wellworth Ave home, while Javaheri II dealt with Javaheri's Wilshire Boulevard condominium), the actions involved identical claims and parties. Id. As a result of the consolidation, Javaheri I became the lead case for all purposes. Id. at 2.

On October 29, 2012, Defendants filed this Motion for Summary Judgment pertaining solely to the Wilshire Property. Javaheri I, ECF No. 102. Defendants seek summary judgment on each of Javaheri's claims, arguing that (1) Javaheri cannot bring a wrongful-foreclosure action to determine whether the foreclosing party has the authority to foreclose, and in any event the foreclosure proceedings complied with California Civil Code section 2924–2924(k); (2) Javaheri's quasi-contract claim fails because JPMorgan is the proper party to initiate foreclosure; (3) Javaheri cannot quiet title because he has not tendered the amount owed, JPMorgan makes no adverse claim to title, and Javaheri's obligation to repay was not terminated when WaMu sold the loan; and (4) declaratory and injunctive relief are improper.[2]

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[2] Defendants also contend the no contract (fraud) claim fails because JPMorgan cannot be held liable for alleged acts of WaMu. But because the Court dismissed Javaheri's fifth claim for no contract with prejudice at the pleading stage (Javaheri II, ECF No. 20), the Court does not consider this argument.

IV. LEGAL STANDARD

Summary judgment should be granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). Once the moving party has met its burden, the nonmoving party must go beyond the pleadings and identify specific facts through admissible evidence that show a genuine issue for trial. Id.; Fed. R. Civ. P. 56(c). Conclusory or speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *Thornhill's Publ'g Co. v. GTE Corp*., 594 F.2d 730, 738 (9th Cir. 1979).

A genuine issue of material fact must be more than a scintilla of evidence, or evidence that is merely colorable or not significantly probative. *Addisu v. Fred Meyer,* 198 F.3d 1130, 1134 (9th Cir. 2000). A disputed fact is "material" where the resolution of that fact might affect the outcome of the suit under the governing law. i 477 U.S. 242, 248 (1968). An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. Id. Where the moving and nonmoving parties' versions of events differ, courts are required to view the facts and draw reasonable inferences in the light most favorable to the nonmoving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007).

V. DISCUSSION

As a threshold matter, the Court addresses admissibility of the declaration of William Paatalo

Javaheri submitted in support of his Opposition. The Court then proceeds to consider the merits of Defendants' Motion with respect to each of Javaheri's claims for (1) wrongful foreclosure; (2) quasi contract; (3) quiet title; and (4) declaratory and injunctive relief.

A. Paatalo Declaration

As the sole evidence in support of his Opposition, Javaheri submitted the declaration of purported expert William Paatalo. Javaheri I, ECF No. 107. Defendants insist that the declaration be stricken because Javaheri failed to disclose Paatalo in his expert disclosures according to the procedures set forth in Federal Rules of Civil Procedure 26(a)(2)(A) and 26(a)(2)(D). The Court agrees.

Under the Federal Rules of Civil Procedure, each party is required to disclose the "identity of any [expert] witness it may use at trial." Fed. R. Civ. P. 26(a)(2)(A). A party's expert disclosures must be made "at least 90 days before the date set for trial or for the case to be ready for trial." Fed. R. Civ. P. 26(a)(2)(D).

Javaheri's expert disclosures, served on June 19, 2012, did not disclose any expert witnesses. (Masutani Decl. Ex. A.) Because trial is set for January 15, 2013, Javaheri's expert witness disclosures were due on October 17, 2012. Javaheri first served Paatalo's declaration on Defendants on November 5, 2012, over two weeks late. Further, there is no stipulation or Court order in this matter affecting the disclosure cutoff date. The Court therefore strikes the Paatalo Declaration because

Javaheri failed to disclose his purported expert in a timely manner.

B. Wrongful Foreclosure

Javaheri argues that JPMorgan does not have standing to enforce his Note because JPMorgan is not the owner, holder, or beneficiary of the Note. (Compl. ¶ 20.) And even if JPMorgan could prove it is a servicer of Javaheri's loan, foreclosure without authorization from the lender is improper. (Id.) Defendants respond that California's non-judicial-foreclosure scheme does not allow for a judicial action to determine whether the foreclosing party is authorized to do so. (Mot. 8.) Defendants' rely largely on a recent and frequently cited California Court of Appeal case, *Gomes v. Countrywide Home Loans,* Inc., 192 Cal. App. 4th 1149 (2011), to support their position.

In *Gomes*, a borrower claimed not to know the identity of the Note's beneficial owner and challenged the foreclosing entity's authorization to initiate foreclosure. Id. at 1152. The California Court of Appeal explained that the non-judicial foreclosure scheme created by California Civil Code sections 2924–2924(k) "provide[s] a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust. Id. at 1154 (quoting *Moeller v. Lien*, 25 Cal. App. 4th 822, 830 (1994)). Because the framework is comprehensive, "courts have refused to read any additional requirements into the non-judicial foreclosure statute." *Lane v. Vitek Real Estate Indus. Grp.,* 713 F. Supp. 2d 1092, 1098 (E.D. Cal. 2010). And though the framework is

exhaustive, "nowhere does the statute provide for a judicial action to determine whether the person initiating the foreclosure process is indeed authorized." *Gomes*, 192 Cal. App. 4th at 1155. The Court of Appeal therefore noted that recognizing the right to bring suit to determine whether one is able to proceed with foreclosure "would fundamentally undermine the non-judicial nature of the process" and allow for lawsuits to be filed solely to delay valid foreclosures. Id. at 1155. The upshot of Gomes, then, is that California's nonjudicial-foreclosure scheme does not allow a court action to challenge the authorization of a foreclosing entity in a non-judicial foreclosure.

Here, like the borrower in Gomes, Javaheri challenges the foreclosing party's authority to foreclose on the Wilshire Property on grounds that he does not know the identity of the beneficial interest holder and avers that the foreclosure is improper without authorization from the original lender, WaMu. (Compl. ¶ 20.) But Gomes held that California law does not permit a borrower to challenge the authorization of a nominee to foreclose under these circumstances. See Gomes, 192 Cal. App. 4th at 1154–57. Because the California non-judicial-foreclosure scheme does not allow for a judicial action to determine if the party initiating foreclosure is authorized, Javaheri's claim for wrongful foreclosure is precluded by law.

Javaheri contends that by relying on Gomes, Defendants are "arguing that anyone can take property by initiating foreclosure in California." (Opp'n 9.) But Gomes does not allow any party to

initiate foreclosure; Gomes's facts and reasoning were limited to "the right to bring a lawsuit to determine a nominee's authorization to proceed with foreclosure on behalf of the noteholder." 192 Cal. App. 4th at 1155 (emphasis added). As servicer of the loan, JPMorgan can certainly be considered a nominee or authorized agent and has the authority to foreclose.

Notwithstanding *Gomes*, which precludes Javaheri's challenge, JPMorgan still has the authority to foreclose on the Property. California Civil Code section 2924(a)(1) states that a "trustee, mortgagee, or beneficiary, or any of their authorized agents" may initiate a non-judicial foreclosure. Therefore, if JPMorgan is an authorized agent of the trustee, mortgagee, or beneficiary, then it can foreclose on the Property.

Tracing Javaheri's loan from its origination to its present form reveals that JPMorgan is authorized to foreclose—and indeed, nowhere in Javaheri's Opposition does he challenge JPMorgan's agency authority to foreclose on behalf of Bank of America as Trustee of the 2007-HY1 Trust. WaMu issued Javaheri's loan and held all beneficial interest in the Property. WaMu then transferred all beneficial interest in the loan to the 2007-HY1 Trust but retained all the servicing and administration duties concerning Javaheri's loan. (SUF 8, 10.) On September 25, 2008, JPMorgan acquired all of WaMu's servicing rights from the FDIC, thereby becoming the servicer of Javaheri's loan. (SUF 15–16.) Consequently, as servicer, JPMorgan is

authorized to act on behalf of the beneficiary, the 2007-HY1 Trust, and foreclose on the Property.

Finally, Javaheri makes the curious argument that "[t]he Beneficiary cannot initiate foreclosure against Plaintiff unless there is a default" and proceeds to imply that he was not in default because the "balance of [his] loan has decreased $150,610 in the eight months[] since the Complaint was filed, and the principal balance has dropped from $975,000 to $955,106." (Opp'n 6.) The Court need not give this argument serious consideration, as the only "evidence" Javaheri submits in support of this argument is attached to the stricken Paatalo declaration. (Pl.'s Statement of Genuine Issues 1.) This inadmissible evidence is insufficient to satisfy Javaheri's burden to bring forth a genuine issue of material fact through admissible evidence. See *Celotex*, 477 U.S. at 323–24; Fed. R. Civ. P. 56(c).

But the argument fails on the merits, as well. The May 20, 2010 NOD noted that Javaheri was in default in the amount of $22,851.64, which amount would increase until his account became current. It also informed Javaheri that he could bring his account into good standing by paying all of his past-due payments plus permitted costs and expenses within 5 days prior to the sale of his property. A year and a half later, the November 18, 2011 NOTS indicated that Javaheri was still in default, with an estimated unpaid balance plus other charges of $1,105,716.79. Javaheri filed suit a month later on December 5, 2011.

Javaheri now contends that a genuine issue exists regarding his default because he has brought the

balance on his loan down to $955,106 as of November 1, 2012. He doesn't argue, however, that his payments over the last eight months are sufficient to cure his default, nor that merely curing his default would have been sufficient to avoid foreclosure after the NOTS had been filed and recorded. Indeed, Javaheri's $22,851 arrears could have blossomed into significantly more in the two-and-a-half years since the NOD was filed—possibly in excess of the payments Javaheri has made over the last eight months. Thus, even if the Court could consider Javaheri's evidence on this point, the argument is, at best, merely colorable and therefore insufficient to create a genuine issue of material fact.

Because California law does not allow for a judicial action to determine if the foreclosing entity is authorized to do so, and because JPMorgan was and is authorized to foreclose on the Property, the Court GRANTS Defendants' motion with respect to the wrongful-foreclosure claim.

C. Quasi Contract

Javaheri contends that JPMorgan has been unjustly enriched in an amount of $45,000 by improperly collecting and retaining loan payments from Javaheri. The Complaint also requests restitution and damages in excess of $100,000 for depreciation in the value of the Property caused by the wrongful-foreclosure proceeding. (Compl. ¶¶ 32–33.) Astonishingly, the basis for this request is Javaheri's argument that when WaMu sold the Note to private investors, his obligation to repay the loan was terminated. (Compl. ¶ 32.)

Defendants argue that as servicer of the loan, JPMorgan "is authorized to collect [Javaheri's] loan payments" because the loan is in default. (Mot. 14.) Defendants also argue that Javaheri has "no reason" to contend any payments made to JPMorgan were not credited to the loan. (Id.)

Under California law, a claim of quasi-contract alleging unjust enrichment cannot lie "when an enforceable, binding agreement exists defining the rights of the parties." *Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1167 (9th Cir. 1996). Here, the Note and Deed of Trust are express contracts covering the same subject matter as Javaheri's quasi-contract claim. Therefore, the Court must look to the physical, written contracts (the Note and the Deed of Trust) to determine whether Javaheri's claim fails as a matter of law. See *Klein v. Chevron U.S.A., Inc.,* 202 Cal. App. 4th 1342, 1388 (2012); *Lance Camper Mfg. Corp. v. Republic Indem. Co. of Am.,* 44 Cal. App. 4th 194, 203 (1996).

The Note expressly requires the borrower to make payments on the loan until "all of the principal and interest and any other charges" owed are paid. (JP Morgan's Request for Judicial Notice Ex. 1, at 1.) Although Javaheri contends that the Lender received payment in full upon securitization of his Note, courts have consistently disagreed, holding that "the sale or pooling of investment interests in an underlying note [cannot] relieve borrowers of their mortgage obligations." *Upperman v. Deutsche Bank Nat'l Trust Co.,* No. 01:10-cv-149, 2010 WL 1610414, at *2 (E.D. Va. Apr. 16, 2010); see also *Matracia v. JP Morgan Chase Bank, NA,* No. CIV. 2:11-190 WBS

JFM, 2011 WL 3319721, at *3 (E.D. Cal. Aug. 1, 2011) (dismissing the notion that securitization of a loan extinguishes a borrowers obligation to repay). Further, the Note does not contain any language supporting the idea that if the loan is securitized, Javaheri is no longer required to pay the remaining balance. For the reasons discussed above, the Court GRANTS Defendants' motion insofar as it relates to quasi contract.

D. Quiet Title

Javaheri also asserts a quiet-title claim "against the claims of Defendants and all persons claiming any legal or equitable right" in the Property. (Compl. ¶ 35.) Defendants counter by arguing that Javaheri cannot quiet title without alleging the ability to tender the full amount owed on his loan, and notwithstanding the tender rule, JPMorgan makes no adverse claim to title. (Mot. 15.) Quiet-title claims establish title against adverse claims to real property or an interest therein. Cal. Civ. Proc. Code § 760.020. A quiet-title action requires: (1) a description of the property in question; (2) the basis for plaintiff's title; (3) the adverse claims to plaintiff's title; (4) the date as of which determination is sought; and (5) request to determine title of plaintiff against adverse claims. Cal. Civ. Proc. Code § 761.020. In California, a plaintiff cannot quiet title "against the mortgagee without paying the debt secured." *Shimpones v. Stickney*, 219 Cal. 637, 649 (1934); see also *Aguilar v. Bocci*, 39 Cal. App. 3d 475, 477 (1974) (same); *Kelley v. Mortg. Elec. Registration Sys., Inc.*, 642 F. Supp. 2d 1048, 1057 (N.D. Cal. 2009) (quiet-title claim dismissed when plaintiffs failed to allege tender).

Here, Javaheri's quiet-title claim fails because he does not allege the ability to tender the full amount due on the loan and JPMorgan does not make an adverse claim to title. Without alleging or providing tender, Javaheri is not entitled to quiet title because he fails to establish a basis for his own title in the Property. See Cal. Civ. Proc. Code § 761.020. And while Javaheri contends that tender is not required prior to a trustee's sale citing a number of unreported cases from courts outside this district, each case Javaheri cites for this point discusses the tender rule in the context of wrongful foreclosure—not quiet title. (See Opp'n 11–12.) The Court finds that because Javaheri fails to establish a basis for his own title, he cannot bring an action to quiet title in his favor.

In addition, Javaheri fails to establish that JPMorgan makes an adverse claim to title. To the contrary, JPMorgan explicitly states it "is not making an adverse claim to title." (Mot. 16.) JPMorgan acknowledges that as loan servicer, it is not the beneficiary under the Deed of Trust. (Id.) In fact, any beneficial interest JPMorgan may have held in the Deed of Trust was transferred to Bank of America, N.A. (SUF 30.) The Court therefore finds JPMorgan makes no adverse claim to title in the Property, and thus Javaheri cannot maintain a quiet title action. For the reasons discussed above, the Court GRANTS Defendants' motion with respect to this claim.

E. Declaratory and Injunctive Relief

Lastly, Javaheri requests declaratory and injunctive relief to establish that: (1) JPMorgan is

not the lender, holder, or beneficiary of the note; and (2) Defendants do not have standing to foreclose on the Wilshire Property. (Compl. ¶¶ 41(a), (b).)

Declaratory and injunctive relief do not lie where all other claims have been dismissed. Lane, 713 F. Supp. 2d at 1104. Javaheri is therefore not entitled to declaratory or injunctive relief without a viable underlying claim. *Shaterian v. Wells Fargo Bank, N.A.,* 829 F. Supp. 2d 873, 888 (N.D. Cal. 2011). Because the Court grants summary judgment in favor of the Defendants on all of Javaheri's claims, no underlying claims exist on which to receive such relief. Thus, the Court GRANTS Defendants' motion with respect to Javaheri's claim for declaratory and injunctive relief.

VI. CONCLUSION

For the reasons discussed above, the Court GRANTS Defendants' Motion for Summary Judgment on all claims. Javaheri's pending request for leave to add Paatalo as an expert trial witness (ECF No. 124) is therefore DENIED AS MOOT. A judgment will issue.

IT IS SO ORDERED.

December 11, 2012

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OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE

G. District Court Order Denying Motion to Dismiss Second Amended Complaint (Wellworth) (6/02/2011)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV10-08185 ODW (FFMx)
Date: June 2, 2011
Title: Javaheri v. JPMorgan Chase Bank, N.A., et al.

Present: The Honorable Otis D. Wright II, United States District Judge

Attorneys Present for Plaintiff(s): Not Present

Attorneys Present for Defendant(s): Not Present

Proceedings (In Chambers):

Order GRANTING in Part and DENYING in Part Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint [30] (Filed 4/28/11)

I. INTRODUCTION

Pending before the Court is Defendant JPMorgan Chase Bank, N.A.'s ("JPMorgan") Motion to Dismiss Plaintiff Daryoush Javaheri's ("Plaintiff") Second Amended Complaint ("SAC"). (Dkt. No. 30.) Plaintiff filed an Opposition on May 16, 2011, to which JPMorgan filed a Reply on May 23, 2011. (Dkt. Nos.

32, 34.) Having considered the papers filed in support of and in opposition to the instant Motion, the Court deems the matter appropriate for decision without oral argument. FED. R. CIV. P. 78; L.R. 7-15. For the following reasons, JPMorgan's Motion is GRANTED in Part and DENIED in Part.

II. FACTUAL AND PROCEDURAL BACKGROUND

On November 14, 2007, Plaintiff obtained a mortgage loan in the amount of $2,660,000 from Washington Mutual Bank ("WaMu") to finance his property located at 10809 Wellworth Los Angeles, California (the "Subject Property"). (SAC ¶¶ 4, 11-13.) In conjunction therewith, Plaintiff executed a promissory note (the "Note") and a deed of trust (the "DOT"), which encumbered the Subject Property. The DOT identifies WaMu as the lender and beneficiary under the Note. (SAC ¶ 13.)

Plaintiff alleges that "between November 15 and November 30, 2007, WaMu transferred Plaintiff's Note to Washington Mutual Mortgage Securities Corporation" and that the Note was subsequently "sold to an investment trust and became part of, or was subject to, a Loan Pool, a Pooling and Servicing Agreement, a Collateralized Debt Obligation, a Mortgage-Backed Security, a Mortgage Pass-Through Certificate, a Credit Default Swap, an Investment Trust, and/or a Special Purpose Vehicle." (SAC ¶ 14.) Plaintiff identifies this security as Standard & Poor CUSIP # 31379XQC2, Pool Number 432551. (SAC ¶ 14.) Because of this alleged transaction in which Plaintiff's Note was sold as an investment security, Plaintiff claims that JPMorgan

is not the owner, holder, or beneficiary of the Note, and therefore cannot legally foreclose on the Subject Property. Plaintiff also alleges that JPMorgan failed to properly record its claim of ownership in the Subject Property, further evidencing its lack of ownership. (SAC ¶ 15.)

JPMorgan, however, contends that it is the rightful owner, holder, and beneficiary of Plaintiff's Note. In support, JPMorgan points to its September 25, 2008 acquisition of WaMu's assets by virtue of a Purchase and Assumption Agreement ("P & A Agreement") executed by JPMorgan and the Federal Deposit Insurance Corporation ("FDIC"), who at the time was acting as Receiver for WaMu. (Dkt. No. 10, Exhs. 1-2.) JPMorgan, therefore, maintains that it succeeded to all of WaMu's assets, including Plaintiff's Note.

On or about March 22, 2010, Plaintiff received a letter stating that he had not made his monthly payments since November of 2009. (SAC ¶ 19.) Plaintiff alleges that, within thirty days of receiving this letter, his attorney faxed a letter in response, but that JPMorgan

> did not contact Plaintiff or [his attorney], either in person or by telephone, to discuss Plaintiff's financial condition and the impending foreclosure. [JPMorgan] did not call, it did not write, and it did not provide a toll-free HUD number to Plaintiff or his lawyer. [JPMorgan] did not offer to meet with Plaintiff or his lawyer and did not advise them that Plaintiff had a right to request a subsequent meeting within 14 days.

(SAC ¶ 22.) Nevertheless, on May 14, 2010, JPMorgan and CRC recorded a Notice of Default ("NOD") and a Declaration of Compliance, which identified JPMorgan as the "undersigned mortgagee, beneficiary, or authorized agent." (SAC ¶ 25.) Subsequently, on August 16, 2010, California Reconveyance Company ("CRC") recorded a Notice of Trustee's Sale. (SAC ¶ 17.)

As a result of the foregoing events, on October 29, 2010, Plaintiff filed a Complaint in this Court against JPMorgan and CRC. Subsequently, on January 11, 2011, the Court granted JPMorgan and CRC's joint Motion to Dismiss the Complaint. (Dkt. No. 20.) Plaintiff then filed a First Amended Complaint ("FAC") against JPMorgan on January 3, 2011. (Dkt. No. 22.) The Court granted JPMorgan's Motion to Dismiss Plaintiff's FAC on March 24, 2011. (Dkt. No. 28.) On April 12, 2011, Plaintiff filed a Second Amended Complaint against JPMorgan, asserting claims for: (1) violation of California Civil Code section 2923.5; (2) wrongful foreclosure; (3) quasi contract; (4) no contract; (5) quiet title; (6) declaratory and injunctive relief; and (7) intentional infliction of emotional distress. (SAC at 1.) JPMorgan now brings the instant Motion to Dismiss the SAC in its entirety.

III. LEGAL STANDARD

"To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), a complaint generally must satisfy only the minimal notice pleading requirements of Rule 8(a)(2)." *Porter v. Jones,* 319 F.3d 483, 494 (9th Cir. 2003). Rule 8(a)(2) requires "a short and plain statement of the claim showing that

the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). For a complaint to sufficiently state a claim, its "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Mere "labels and conclusions" or a "formulaic recitation of the elements of a cause of action will not do." Id. Rather, to overcome a 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (internal quotation and citation omitted). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement of relief." Id. (internal quotation and citation omitted).

When considering a 12(b)(6) motion, a court is generally limited to considering materials within the pleadings and must construe "[a]ll factual allegations set forth in the complaint . . . as true and . . . in the light most favorable to [the plaintiff]." See Lee v. City of L.A., 250 F.3d 668, 688 (9th Cir. 2001) (citing Epstein v. Washington Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996)). A court is not, however, "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

IV. DISCUSSION

The Court will discuss Plaintiff's seven claims in the following order. First, the Court will analyze Plaintiff's fourth claim for "no contract," which is predicated on events allegedly occurring during the loan origination process. Second, the Court will address Plaintiff's first claim for violation of California Civil Code section 2923.5, which is predicated on JPMorgan's alleged failure to contact Plaintiff before filing a notice of default. Third, the Court will examine Plaintiff's second claim for wrongful foreclosure, fifth claim for quiet title, third claim for quasi contract, and sixth claim for declaratory and injunctive relief, all of which can be resolved by examining the parties' dispute as to who properly owns the Note. Finally, the Court will discuss Plaintiff's seventh claim for intentional infliction of emotional distress.

A. Plaintiff's Fourth Claim for "No Contract"

Plaintiff alleges that no enforceable contract was formed between WaMu and Plaintiff because there was no "meeting of the minds." (SAC ¶ 52.) Specifically, Plaintiff contends that he "expected that he would borrow money from WaMu, . . . pay it back, and then . . . own the Property," while "WaMu expected that Plaintiff . . . would not be able to pay it back, and then WaMu or the investors would own the Property." (SAC ¶ 52.)

When ruling on Defendant's previous Motion to Dismiss Plaintiff's FAC, the Court found that "[w]hile Plaintiff frames his claim as one based on the absence of a contract, his allegations indicate that he is, in fact, alleging fraud." (Dkt. No. 28 at 5.) In this respect, Plaintiff's SAC is virtually identical

to his FAC and indeed his "no contract" claim sounds in fraud. Consequently, Plaintiff must meet the heightened pleading standards under Federal Rule of Civil Procedure 9(b), which require him to "state with particularity the circumstances constituting fraud or mistake." FED. R. CIV. P. 9(b). Plaintiff's allegations must enable the defendant to "prepare an adequate answer[.]" *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1400 (9th Cir. 1986); see *Bosse v. Crowell Collier & MacMillan*, 565 F.2d 602, 611 (9th Cir. 1977); *Walling v. Beverly Enter.,* 476 F.2d 393, 397 (9th Cir. 1973). In that regard, proper identification of the circumstances entails "specification of] such facts as the times, dates, places, and benefits received, and other details of the alleged fraudulent activity." *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993). Additionally, "[i]n a fraud action against a corporation, a plaintiff must 'allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whomthey spoke, what they said or wrote, and when it was said or written.'" *Saldate v. Wilshire Credit Corp.*, 686 F. Supp. 2d 1051, 1065 (2010) (citing *Tarmann v. State Farm Mut. Auto. Ins. Co.*, 2 Cal. App. 4th 153, 157 (1991)).

Here, Plaintiff's allegations with regard to WAMU's alleged fraudulent scheme fall exceedingly short of the Rule 9(b) requirements. Plaintiff fails to identify any particular facts regarding WaMu's supposed expectations or misrepresentations as they relate to Plaintiff's loan. Instead, Plaintiff generally asserts that WaMu engaged in a predatory lending scheme with respect to unqualified borrowers in 2006 and 2007. (SAC ¶¶ 46, 55.) As to Plaintiff's specific loan,

Plaintiff only alleges, in a conclusory fashion, that WaMu "expected he would default", that "WaMu pre-sold Plaintiff's mortgage[,]' and that WaMu's economic interests were adverse to Plaintiff's interests. (See SAC ¶¶ 48, 49, 51.) These allegations do not meet the requisite heightened pleading standard under Federal Rule of Civil Procedure 9(b) because they do not set forth the "times, dates, places, benefits received, and other details of the alleged fraudulent activity" nor do they "allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." See *Neubronner*, 6 F.3d at 672; *Saldate*, 686 F. Supp. at 1065. Furthermore, Plaintiff's allegation that "the investment bank intended to short the portfolio" is irrelevant as the investment bank, which Plaintiff fails to identify, is not a party to this action. (SAC ¶ 49.) Without specific information regarding WaMu's alleged fraudulent activity, under Federal Rule of Civil Procedure 9(b), Plaintiff's claim must fail. Accordingly, the Court GRANTS Defendant's Motion to Dismiss Plaintiff's fourth claim for "No Contract." Because Plaintiff has previously been granted leave to amend this claim, has again failed to sufficiently plead his allegations, and it appears that further leave to amend will likely prove futile, Plaintiff's fourth claim for "No Contract" is hereby DISMISSED WITH PREJUDICE.

B. Plaintiff's First Claim for Violation of California Civil Code § 2923.5

California Civil Code section 2923.5 requires "a declaration that the mortgagee, beneficiary, or authorized agent has contacted the borrower, has tried with due diligence to contact the borrower as required by this section, or that no contact was required pursuant to subdivision (h)." CAL. CIV. CODE § 2923.5(b). Courts agree that nothing in this statute requires that a declaration of compliance with section 2923.5 be signed by a person with personal knowledge. See *Pantoja v. Countrywide Home Loans, Inc.*, 640 F. Supp. 2d 1177, 1186 (N.D. Cal. July 9, 2009). Therefore, to the extent that Plaintiff's claim under section 2923.5 is predicated on the fact that the person who signed the Declaration of Compliance did not have personal knowledge of the facts contained therein, it is insufficient. Indeed, the Court previously dismissed Plaintiff's claim in his FAC on this very ground. (See Dkt. No. 28 at 4-5.) However, Plaintiff's SAC cures the remaining deficiencies with respect to this claim. Rather than solely attacking the personal knowledge of the signer of the Declaration of Compliance, Plaintiff alleges that JPMorgan

> did not contact Plaintiff or [his attorney], either in person or by telephone, to discuss Plaintiff's financial condition and the impending foreclosure. [JPMorgan] did not call, it did not write, and it did not provide a toll-free HUD number to Plaintiff or his lawyer. [JPMorgan] did not offer to meet with Plaintiff or his lawyer and did not advise them that Plaintiff had a right to request a subsequent meeting within 14 days.

(SAC ¶ 22.) JPMorgan attempts to controvert Plaintiff's assertion with the Declaration of Compliance itself. However, Plaintiff claims that the person who signed the Declaration of Compliance either had no personal knowledge or misrepresented the facts. Taking the facts as alleged in Plaintiff's SAC as true, which the Court must do when deciding a motion to dismiss, Plaintiff's first claim for violation of California Civil Code section 2923.5 is sufficient. Accordingly, Defendant's Motion is DENIED as to Plaintiff's first claim.

C. Plaintiff's Second Claim for Wrongful Foreclosure and Fifth Claim to Quiet Title

Plaintiff's second claim for wrongful foreclosure and fifth claim to quiet title are based on his allegations that JPMorgan does not own the note and that JPMorgan cannot produce an original promissory note. (SAC ¶ 17, 18.) In his FAC, Plaintiff simply concluded that "WaMu transferred all beneficial interest in the loan to a private investor." (FAC ¶ 15.) Standing alone, the Court found that this allegation was merely a legal conclusion and did not "raise a right to relief above the speculative level." (See Dkt. No. 28 at 3 (citing *Twombly*, 550 U.S. at 555).) Plaintiff, however, has cured this deficiency by alleging facts in his SAC to support these claims. Specifically, Plaintiff alleges that "between November 15 and November 30, 2007, WaMu transferred Plaintiff's Note to Washington Mutual Mortgage Securities Corporation." (SAC ¶ 14.) Plaintiff claims that the Note was then "sold to an investment trust and became part of, or was subject to, a Loan Pool, a Pooling and Servicing

Agreement, a Collateralized Debt Obligation, a Mortgage-Backed Security, a Mortgage Pass-Through Certificate, a Credit Default Swap, an Investment Trust, and/or a Special Purpose Vehicle." (SAC ¶ 14.) Plaintiff identifies the security as Standard & Poor CUSIP # 31379XQC2, Pool Number 432551. (SAC ¶ 14.) The Court must accept these facts as true when deciding a motion to dismiss. *Iqbal*, 129 S. Ct. at 1949. Coupled with Plaintiff's allegation that JPMorgan never properly recorded its claim of ownership in the Subject Property, (SAC ¶ 16), the abovementioned facts regarding the transfer of Plaintiff's Note prior to JPMorgan's acquisition of WaMu's assets raise Plaintiff's right to relief above a speculative level. Furthermore, in the face of these specific factual allegations, JPMorgan's assertion that the P&A Agreement suffices to establish their ownership of the Note is no longer viable. Indeed, the P&A Agreement does not specifically identify Plaintiff's Note. (See Dkt. No. 10, Exh. 2.)

The Court finds that Plaintiff has now sufficiently alleged that JPMorgan did not own his Note and therefore did not have the right to foreclose. Accordingly, the Court DENIES Defendant's Motion to Dismiss with respect to Plaintiff's second claim for wrongful foreclosure and fifth claim to quiet title.

D. Plaintiff's Third Claim for Quasi Contract

Plaintiff seeks restitution by alleging that JPMorgan was unjustly enriched by "any payments he made to [JPMorgan] that were not paid to the lender or beneficiary, if any." (SAC ¶ 44.) The Court previously dismissed Plaintiff's claim for restitution because Plaintiff's "argument [was] based on his

assertion that JPMorgan is not the owner, a holder, or a beneficiary under the note." (See Dkt. No. 28 at 5.) As the Court noted above, however, Plaintiff has cured any deficiencies with respect to this assertion. While JPMorgan correctly contends that unjust enrichment, restitution, or quasi contract are not independent causes of action, (Mot. at 7), as previously discussed, Plaintiff's allegations that JPMorgan did not own his Note have been sufficiently alleged. Consequently, if indeed JPMorgan did not own the Note yet received payments therefrom, those payments may have been received unjustly. Accordingly, Defendant's Motion is DENIED as to Plaintiff's third claim for quasi contract.

E. Plaintiff's Sixth Claim for Declaratory and Injunctive Relief

Plaintiff's sixth claim for declaratory and injunctive relief seeks a judicial determination of his rights and duties as to the Note and DOT, and JPMorgan's rights to proceed with a non-judicial foreclosure on the Subject Property. (SAC ¶ 68.) Additionally, Plaintiff seeks a Temporary Restraining Order and Preliminary Injunction restraining JPMorgan from conducting a Trustee's Sale of the Subject Property during the pendency of this action. (SAC, Prayer ¶ 1.)

As to Plaintiff's claim for declaratory relief, the Declaratory Judgment Act states that "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a).

"Jurisdiction to award declaratory relief exists only in a case of actual controversy." Am. States Ins. Co. v. Kearns, 15 F.3d 142, 143 (9th Cir. 1994). Consequently, the Ninth Circuit instructs district courts to first determine whether there is an actual controversy within its jurisdiction. Principal Life Ins. Co. v. Robinson, 394 F.3d 665, 669 (9th Cir. 2005). If the court finds that an actual controversy exists, it must next decide whether to exercise its jurisdiction by analyzing the factors enumerated in *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942). The *Brillhart* factors require the Court to (1) avoid needless determination of state law issues; (2) discourage litigants from filing declaratory actions as a means of forum shopping; and (3) avoid duplicative litigation. *Brillhart*, 316 U.S. at 495.

Here, Plaintiff contends an actual controversy has arisen in whether: (1) JPMorgan is the present owner and beneficiary of the note; (2) JPMorgan is entitled to sell the Property; and (3) CRC is a trustee duly authorized to file a Notice of Default or a Notice of Trustee's Sale. (SAC ¶ 67.) As the Court noted above, Plaintiff has cured the deficiencies with respect to these allegations. Consequently, the Court finds that an actual controversy exists. Furthermore, none of the *Brillhart* factors suggest that the Court should refrain from entertaining Plaintiff's claim for declaratory relief. Accordingly, Defendant's Motion to Dismiss is DENIED as to Plaintiff's sixth claim for declaratory relief. As to Plaintiff's claim for injunctive relief, the Court was already presented with this issue on October 29, 2010 and denied Plaintiff's ex parte application for temporary restraining order and preliminary injunction. (Dkt.

No. 6.) Plaintiff, however, has now pleaded additional facts that may support such a request. Therefore, Plaintiff is not precluded from bringing another ex parte application if he so chooses. Additionally, Plaintiff seeks that JPMorgan "be forever enjoined and restrained" from selling the Subject Property. (SAC, Prayer ¶ 2.) "As a general rule, a permanent injunction will be granted when liability has been established and there is a threat of continuing violations." *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 520 (9th Cir. 1993). Here, Plaintiff has properly pleaded his underlying claims and Defendant may therefore be found liable at a later stage of the litigation. Consequently, Defendant's Motion is DENIED as to Plaintiff's sixth claim for injunctive relief.

F. Plaintiff's Seventh Claim for Intentional Infliction of Emotional Distress

To successfully plead a claim for intentional infliction of emotional distress under California law, Plaintiff must allege "(1) [JPMorgan]'s extreme and outrageous conduct; (2) that [JPMorgan] intended to cause, or recklessly disregarded the probability of causing, emotional distress; (3) that [P]laintiff suffered severe or extreme emotional distress; and (4) actual and proximate causation of the emotional distress by [JPMorgan]'s outrageous conduct." *Davenport v. Litton Loan Servicing, LP*, 725 F. Supp. 2d 862, 883-84 (N.D. Cal. 2010); see also *Corales v. Bennett*, 567 F.3d 554, 571 (9th Cir. 2009) (setting forth the same elements). "Outrageous" conduct is that which is "so extreme as to exceed all bounds of that usually tolerated in a civilized community." Id.

at 884. Moreover, "[f]or emotional distress to be severe, it must be 'of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it.'" *Grant v. WMC Mortg. Corp*., No. CIV 2:10-1117 WBS KJN, 2010 WL 2509415 at *2 (E.D. Cal., June 17, 2010).

In support of his intentional infliction of emotional distress claim, Plaintiff alleges that JPMorgan "cashed Plaintiff's monthly checks and kept the money" when it had no right to do so. (SAC ¶ 73.) Plaintiff further alleges that JPMorgan ignored Plaintiff's letters requesting alternative options to foreclosure and that JPMorgan fraudulently transferred the DOT. (SAC ¶¶ 74, 75.) While Plaintiff concludes that these "acts and omissions . . . constitute extreme and outrageous conduct," and that JPMorgan "engaged in such conduct either intentionally or with reckless disregard as to the effect on Plaintiff,"(SAC ¶ 76, 77), Plaintiff fails to point the Court to any case law to support his contention that such acts associated with foreclosure, even if wrongful, are "so extreme as to exceed all bounds of that usually tolerated in a civilized community." See *Davenport, LP,* 725 F. Supp. 2d at 884. Moreover, "[f]or emotional distress to be severe, it must be 'of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it.'" *Grant v. WMC Mortg. Corp*., No. CIV 2:10-1117 WBS KJN, 2010 WL 2509415 at *2 (E.D. Cal., June 17, 2010). Plaintiff makes absolutely no factual allegations with respect to the severity of his emotional distress in terms of either quantity or quality. Rather, Plaintiff merely

states that he "has suffered emotional distress in the amount of $5,000,000." (SAC ¶ 78.) Such "labels and conclusions" are insufficient. See *Twombly*, 550 U.S. at 555. Ultimately, Plaintiff's claim for intentional infliction of emotional distress is nothing more than a "formulaic recitation of the elements, which simply "will not do." See id. Accordingly, Defendant's Motion to Dismiss is GRANTED as to Plaintiff's seventh claim for intentional infliction of emotional distress. Because Plaintiff has previously been granted leave to amend this claim, has again failed to sufficiently plead his allegations, and it appears that further leave to amend will likely prove futile, Plaintiff's seventh claim for intentional infliction of emotional distress is hereby DISMISSED WITH PREJUDICE.

V. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss is GRANTED in Part and DENIED in Part. Plaintiff's second claim for wrongful foreclosure, fifth claim for quiet title, first claim for violation of California Civil Code section 2923.5, third claim for quasi contract, and sixth claim for declaratory and injunctive relief survive Defendant's Motion to Dismiss. Conversely, Plaintiff's fourth claim for no contract and seventh claim for intentional infliction of emotional distress are DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

F. District Court Order Denying Motion to Dismiss Complaint (Wilshire) (1/11/2011)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DARYOUSH JAVAHERI,

Plaintiff,

v. No. 2:11-cv-10072-ODW

JPMORGAN CHASE BANK, N.A., a corporation,

Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS [12]

Pending before the Court is JP Morgan Chase Bank, N.A.'s ("JP Morgan")

Motion to Dismiss Plaintiff Daryoush Javaheri's Complaint. (Dkt. No. 12.) Having considered the papers filed in support of and in opposition to the instant Motion, the Court deems the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; C. D. Cal. L. R. 7-15. For the following reasons, the Court GRANTS in Part and DENIES in Part JP Morgan's Motion.

I. BACKGROUND

On December 6, 2006, Plaintiff Daryoush Javaheri executed a $975,000.00 promissory note (the "Note") to refinance his loan on a condominium that is located at 10660 Wilshire Blvd., #1401, Los Angeles, California 90024 (the "Property"). (Compl. ¶ 4; Compl. Ex. 3.) The Note was secured by a deed of trust ("DOT") that identifies Plaintiff as the trustor, Washington Mutual Bank ("WaMu") as the lender and beneficiary, and California Reconveyance Company ("CRC") as the trustee. (Compl. Ex. 4, at 2–3.)

Plaintiff alleges that "between December 14 and 31, 2006, WaMu transferred Plaintiff's Note to Washington Mutual Mortgage Securities Corporation" and that the Note was subsequently "sold to an investment trust and became part of, or was subject to, a Loan Pool, a Pooling and Servicing Agreement, a Collateralized Debt Obligation, a Mortgage-Backed Security, a Mortgage Pass-Through Certificate, a Credit Default Swap, an Investment Trust, and/or a Special Purpose Vehicle." (Compl. ¶ 13.) Because of this alleged transaction in which Plaintiff's Note was sold as an investment security, Plaintiff claims that JP Morgan is not the owner, holder, or beneficiary of the Note, and therefore cannot legally foreclose on the Property. Plaintiff also alleges that JP Morgan failed to properly record its claim of ownership in the Property, further evidencing its lack of ownership. (Compl. ¶ 14.) Finally, Plaintiff claims that after December 2006, WaMu was solely a servicer of the

Note and ceased to be a lender, beneficiary, and owner. (Compl. ¶ 13.)

On September 25, 2008, the Office of Thrift Supervision closed WaMu and appointed the Federal Deposit Insurance Corporation ("FDIC") as Receiver. (JP Morgan's Request for Judicial Notice Ex. 2.) On that same date, the FDIC and JP Morgan entered into a purchase and assumption agreement ("P & A Agreement") whereby JP Morgan acquired the majority of WaMu's assets. (Id.) Article 2.5 of the P & A Agreement expressly provides that JP Morgan did not assume the potential liabilities associated with claims of WaMu's borrowers.[1] (Id.) Instead, borrowers are required to direct such claims to the FDIC. (See id.)

Thereafter, beginning in October 2008, Plaintiff made monthly payments to JP Morgan. (Compl. ¶ 30.) Plaintiff ceased making payments after six months. (See id.)

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[1] Notwithstanding anything to the contrary in this Agreement, any liability associated with borrower claims for payment of 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 any way to any loan or commitment to lend made by the Failed Bank prior to failure, 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 the Failed Bank's lending or loan purchase activities are specifically not assumed by the Assuming Bank.
(Dkt. No. 13, Ex. 2 (emphasis added).)

On May 18, 2010, JP Morgan purportedly assigned the beneficial interest under the DOT to Bank of America, N.A. (Compl. Ex. 5, at 2.) On May 20, 2010, CRC filed a Notice of Default against the Property. (Compl. ¶ 15.) The Notice of Default included instructions for Plaintiff to contact JP Morgan. (Compl. ¶ 27.) On November 18, 2011, CRC recorded a Notice of Trustee's Sale, reporting that the Property would be sold at a public auction on December 12, 2011. (Compl. ¶ 16.) JP Morgan is not named on the Notice of Trustee's Sale. (Id.)

As a result of these events, Plaintiff filed a Complaint against JP Morgan on December 5, 2011, asserting claims for: (1) wrongful foreclosure; (2) quasi contract; (3) quiet title; (4) declaratory and injunctive relief; and (5) no contract/fraud. Specifically, Plaintiff contends that JP Morgan's foreclosure on Plaintiff's Property is wrongful because JP Morgan does not own the Note and therefore lacks standing to foreclose on Plaintiff's Property. (Compl. ¶ 20.) Plaintiff's quasi contract claim asserts that JP Morgan was unjustly enriched if and when it accepted and retained Plaintiff's monthly payments to which JP Morgan was not entitled. (Compl. ¶ 31.) Plaintiff further seeks to quiet title, claiming he alone has an interest in the title to his Property because Plaintiff's loan was fully paid when WaMu assigned the DOT to the investment trust. (Compl. ¶¶ 36–37.) Accordingly, Plaintiff also requests a declaration of his rights in relation to the Property and an injunction that prevents JP Morgan from selling the Property. (Compl. ¶ 42.) Finally, Plaintiff alleges that the contract between Plaintiff and WaMu was invalid

because the parties did not share any expectation with respect to the transaction. (Compl. ¶ 53.)

JP Morgan moved to dismiss Plaintiff's Complaint entirely on January 1, 2012. (Dkt. No. 12.) In support of JP Morgan's Motion, it filed a Request for Judicial Notice. (Dkt. No. 13.) The Court now considers JP Morgan's Motion to Dismiss under Rule 12(b)(6).

II. LEGAL STANDARD

"To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), a complaint generally must satisfy only the minimal pleading requirements of Rule 8(a)(2)." *Porter v. Jones,* 319 F.3d 483, 494 (9th Cir. 2003). Rule 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). For a complaint to sufficiently state a claim, its "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Dismissal under a 12(b)(6) motion can be based on "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). To overcome a 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662; 129 S. Ct. 1937, 1949 (2009) (internal quotation marks omitted). The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line

between possibility and plausibility of entitlement of relief." Id.

When considering a 12(b)(6) motion, a court is generally limited to considering material within the pleadings and must construe "[a]ll factual allegations set forth in the complaint . . . as true and . . . in the light most favorable to [the plaintiff]." See *Lee v. City of L.A.*, 250 F.3d 668, 688 (9th Cir. 2001) (citing i., 83 F.3d 1136, 1140 (9th Cir. 1996)). A court is not, however, "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

As a general rule, leave to amend a complaint that has been dismissed should be freely granted. Fed. R. Civ. P. 15(a). However, leave to amend may be denied when "the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986); see *Lopez v. Smith,* 203 F.3d 1122, 1127 (9th Cir. 2000).

III. DISCUSSION

The Court proceeds to consider JP Morgan's Motion to Dismiss with respect to each of Plaintiff's claims. The Court first will consider JP Morgan's Request for Judicial Notice. The Court will then consider Plaintiff's claim for no contract, followed by Plaintiff's remaining causes of action in the order in which they appear in Plaintiff's Complaint.

A. DEFENDANT'S REQUEST FOR JUDICIAL NOTICE

In support of its Motion to Dismiss, JP Morgan requests that the Court take judicial notice of the following documents,[2] pursuant to Federal Rules of Evidence 201(b), 201(c), and 201(d): (1) the Office of Thrift Supervision Order ("OTS Order") directing the FDIC to act as Receiver of Washington Mutual, available at http://files.ots.treas.gov/680024.pdf; and (2) the P & A Agreement between the FDIC, receiver of WaMu, and JP Morgan, dated September 25, 2008, available at www.fdic.gov/about/freedom/Washington_Mutual_P_and_A.pdf. (Dkt. No. 13.)

Rule 201 states that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Because the Court may presume that public records are authentic and trustworthy, *Gilbrook v. City of Westminster*, 177 F.3d 839, 858 (9th Cir. 1999), such public records fall within the purview of Federal Rule of Evidence 201. See *Lee v. City of L.A.*, 250 F.3d 668, 688 (9th Cir. 2011); see also *Peruta v. County of San Diego*, 678 F. Supp. 2d 1046, 1054 n.8 (S.D. Cal. 2010) (stating that courts may properly take judicial notice of

[2] JP Morgan also requests that the Court take judicial notice of the Notice of Trustee's Sale. The Court does not consider JP Morgan's request with respect to that document at this time.

documents appearing on governmental websites); *Miller v. Cal. Reconveyance Co.*, No. 10-cv-421-IEG-CAB, 2010 U.S. Dist. LEXIS 74290, at *7 n. 1 (S.D. Cal. July 22, 2010) ("The Court will take judicial notice of the P & A Agreement between JPMorgan and the FDIC . . . because this agreement is a matter of public record whose accuracy cannot reasonably be questioned."). The closure of WaMu and the appointment of FDIC as its Receiver are facts not subject to reasonable dispute and indeed are not in dispute. (See Compl. ¶¶ 21, 37.) The OTS Order and the P & A Agreement are the official documents memorializing these facts, and each is published by a governmental organization. Therefore, they cannot reasonably be questioned. Accordingly, the Court GRANTS JP Morgan's request for judicial notice as to both documents.

B. PLAINTIFF'S FIFTH CLAIM FOR NO CONTRACT (FRAUD)

As a threshold matter, the Court notes that Plaintiff's Complaint in this action is a near carbon copy of Plaintiff's second amended complaint in a similar case pending before this Court ("Javaheri I"). See Javaheri v. JP Morgan Chase Bank N.A. (Javaheri I), No. 2:10-cv-08185-ODW-FFM, ECF No. 29 (C.D. Cal. Apr. 12, 2011). In Javaheri I, this Court entertained and granted motions to dismiss Plaintiff's original and first amended complaints. Javaheri I, ECF Nos. 20, 28. Subsequently, the Court granted in part and denied in part JP Morgan's motion to dismiss Plaintiff's second amended complaint. Javaheri I, ECF No. 36. In doing so, the Court construed Plaintiff's claim for no contract as a

garden-variety fraud claim and dismissed it with prejudice for Plaintiff's repeated failure to plead a viable fraud claim. Id. at 4–5.

Plaintiff's claim for "No Contract/Fraud" in this action is little more than a verbatim repetition of the "No Contract" claim this Court dismissed with prejudice in Javaheri I, save for a sparse sprinkling of facts apparently designed to address the shortcomings the Court noted in dismissing that claim. In so doing, Plaintiff flirts boldly with a violation of Federal Rule of Civil Procedure 11(b), as Plaintiff has filed a claim that is virtually identical to a claim that he knows was previously dismissed with prejudice. However, because Plaintiff's Claim for "No Contract/Fraud" fails on other substantive grounds, the Court does not discuss further Plaintiff's haphazard attempt to cure the claim in the instant action.

JP Morgan argues in its Opposition that Plaintiff's claim for "No Contract/Fraud" against JP Morgan fails because JP Morgan did not assume any liabilities arising from claims relating to WaMu's origination of Plaintiff's Note. (Opp. 12.) The Court agrees.

JP Morgan expressly disclaimed assumption of liability arising from borrower claims against WaMu. (See Dkt. No. 13, Ex. 2 at 9.) Therefore, because Plaintiff's claim for "No Contract/Fraud" alleges a cause of action that predates the P & A Agreement, that action cannot be brought against JP Morgan. See *Ansanelli v. JP Morgan Chase Bank, N.A.*, No. C 10-03892-WHA 2011 U.S. Dist. LEXIS 32350, at *6 (N.D. Cal. Mar. 28, 2011); *St. James v. JP Morgan*

Chase Bank Corp., No. 10-CV- 1893-IEG-NLS 2010 U.S. Dist. LEXIS 134727, at *6 (S.D. Cal. Dec. 21, 2010). Accordingly, JP Morgan's Motion as to Plaintiff's fifth claim for "No Contract/Fraud" is GRANTED, and Plaintiff's claim is hereby DISMISSED WITH PREJUDICE.

C. PLAINTIFF'S FIRST CLAIM FOR WRONGFUL FORECLOSURE

Plaintiff's first claim for wrongful foreclosure is based on his allegation that JP Morgan does not own the Note. (Compl. ¶ 20.) JP Morgan argues in its Motion that Plaintiff fails to state a claim because CRC as trustee initiated foreclosure, not JP Morgan. The Court finds that Plaintiff has sufficiently pled a claim for wrongful foreclosure.

Non-judicial foreclosure is a process whereby, pursuant to a power of sale contained in a deed of trust, a trustee sells the property securing an obligation on which a trustor has defaulted. *Citicorp Real Estate v. Smith,* 155 F.3d 1097, 1105 (9th Cir. 1998). The power of sale is conferred by the deed of trust, not by statute. See *Nguyen v. Calhoun*, 105 Cal. App. 4th 428, 440 (2003). Pursuant to the DOT, only the Lender or owner of the Note can invoke the power of sale. (See Compl. Ex. 4, at 14; see also Compl. Ex. 3, at 1–5 (explaining that Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder," and that the Note Holder is authorized to accelerate the Note).) Once the Lender decides to invoke the power of sale, the trustee must enter Notice of Default and then conduct a Trustee's Sale. (Compl. Ex. 4, at 14.)

According to Plaintiff's Complaint, CRC filed the Notice of Default and Notice of Trustee's Sale. (Compl. ¶¶ 15–16.) CRC is the trustee under the DOT. (See Compl. Ex. 4, at 2–3.) Thus, CRC could conduct the foreclosure process only if the Lender or owner of the Note had invoked the power of sale. (Compl. Ex. 4, at 14.) Plaintiff alleges in his Complaint that JP Morgan seeks to foreclose Plaintiff's Property notwithstanding JP Morgan is not the Lender and does not own Plaintiff's Note. If JP Morgan is in fact foreclosing on Plaintiff's Property and is not the Lender, then the foreclosure may be wrongful. In support of Plaintiff's allegation that JP Morgan is not the Lender and does not own Plaintiff's Note, Plaintiff asserts that WaMu transferred Plaintiff's Note to an investment trust, which Plaintiff identifies as Washington Mutual Mortgage Pass-Through Certificates Series 2007-HY1 Trust. Plaintiff alleges that WaMu transferred Plaintiff's Note before JP Morgan acquired all of WaMu's assets and thus JP Morgan did not acquire Plaintiff's Note. The Court must accept these allegations as true.

Therefore, the Court finds that Plaintiff has sufficiently pled that JP Morgan does not own Plaintiff's Note and consequently lacks authority to invoke the power of sale and foreclose on Plaintiff's Property. Accordingly, the Court DENIES JP Morgan's Motion to Dismiss with respect to Plaintiff's first claim for wrongful foreclosure.

D. PLAINTIFF'S SECOND CLAIM FOR QUASI CONTRACT

Plaintiff seeks restitution by alleging that JP Morgan was unjustly enriched by "any payments he made to [JP Morgan] that were not paid to the lender or beneficiary, if any." (Compl. ¶ 32.) JP Morgan correctly contends in its Motion that unjust enrichment, restitution, and quasi contract are not independent causes of action. See Durell v. Sharp Healthcare, 183 Cal. App. 4th 1350, 1370 (2010). However, as discussed supra, Plaintiff has sufficiently alleged that JP Morgan did not own Plaintiff's Note. Consequently, if in fact JP Morgan did not own the Note yet received payments from Plaintiff for JP Morgan's own use, those payments may have been received unjustly. In such case, Plaintiff may be entitled to restitution. Accordingly, JP Morgan's Motion is DENIED as to Plaintiff's second claim for quasi contract.

E. PLAINTIFF'S THIRD CLAIM FOR QUIET TITLE

As with Plaintiff's other claims, Plaintiff's third claim to quiet title is based on Plaintiff's allegation that JP Morgan does not own the Note. An action for quiet title may be brought "to establish title against adverse claims to real or personal property or any interest therein." Cal. Civ. Proc. Code § 760.020. To maintain a quiet title action under California law, Plaintiff must file a verified[3] complaint including (1)

[3] California District Courts are currently split on the issue whether plaintiffs alleging claims for quiet title must verify their complaints in federal court. Compare Briosos v. Wells Fargo Bank, 737 F. Supp. 2d 1018, 1031–32 (N.D. Cal. 2010) (dismissing without prejudice plaintiff's failure to assert a quiet title claim in a verified complaint); Ritchie v. Cmty Lending

a legal description of the property and its address; (2) the title sought and the basis of that title; (3) the adverse claim to title sought; (4) the date as of which determination is sought; and (5) a prayer for relief. Cal. Civ. Proc. Code § 761.020.

Plaintiff has sufficiently pled a claim to quiet title. Plaintiff's Complaint is verified. (Compl. ¶ 17.) Plaintiff adequately describes the Property by alleging it is a condominium and by providing its address. (Compl. ¶ 4.) In his Complaint, Plaintiff seeks to quiet title against JP Morgan and all persons claiming any legal or equitable right, title, estate, lien, or adverse interest in the Property. (Compl. ¶ 35.) As discussed supra, Plaintiff has sufficiently alleged JP Morgan's adverse claim by contending that JP Morgan does not own the Note and therefore has no right to foreclose on the Property. Plaintiff alleges in his Complaint the date that JP Morgan apparently caused the Notice of Default to be entered. (Compl. ¶¶ 15–16.) Finally, Plaintiff includes a prayer for relief, asking the Court to declare that the title in the Property is vested solely in Plaintiff and that JP Morgan has no right, title, estate, lien, or interest in the Property. (Compl.

Corp., No. CV 09-02484 DDP (JWJx), 2009 WL 2581414, at *7 (C.D. Cal. Aug. 12, 2009) (same) with *Gomez v. Calpacific Mortg. Consultants, Inc.,* No. 09-CV-2926-IEG (CAB), 2010 WL 2610666, at *5 n.2 (S.D. Cal. June 29, 2010) (citing Fed.R.Civ.P. 11(a); *Farzana K. v. Indiana Dept. of Educ.*, 473 F.3d 703, 705 (7th Cir. 2007)) ("[A] federal court need not follow a state practice requiring verification.") and *Fimbres v. Chapel Mortg. Corp.*, No. 09-CV-0886-IEG POR, 2009 WL 4163332, at *6 (S.D.Cal. Nov. 20, 2009) (same). However, the Court declines to resolve this issue in this litigation, as Plaintiff's Complaint is in fact verified.

¶ 39.) Thus, Plaintiff has alleged each of the elements to quiet title required by California Civil Procedure Code section 761.020. Accordingly, the Court DENIES JP Morgan's Motion to Dismiss with respect to Plaintiff's third claim to quiet title.

F. PLAINTIFF'S FOURTH CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff's fourth claim for declaratory and injunctive relief seeks a judicial determination of Plaintiff's rights and duties as to the Note and the DOT, and JPMorgan's rights to proceed with a non-judicial foreclosure on the Property. (Compl. ¶ 42.)

The Declaratory Judgment Act states that "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a). "Jurisdiction to award declaratory relief exists only in a case of actual controversy." *Am. States Ins. Co. v. Kearns,* 15 F.3d 142, 143 (9th Cir. 1994). Consequently, the Ninth Circuit instructs district courts first to determine whether there is an actual controversy within its jurisdiction. Principal Life Ins. Co. v. Robinson, 394 F.3d 665, 669 (9th Cir. 2005). If the court finds that an actual controversy exists, next it must decide whether to exercise its jurisdiction by following the guidance provided in *Brillhart v. Excess Ins. Co.,* 316 U.S. 491 (1942). The *Brillhart* factors require the Court to (1) avoid needless determination of state law issues; (2) discourage litigants from filing declaratory actions as a means of forum shopping; and (3) avoid duplicative litigation. *Id.* at 495. Essentially, the court must

balance concerns of judicial administration, comity, and fairness. *Kearns*, 15 F.3d at 144.

Plaintiff contends an actual controversy has arisen in whether (1) JP Morgan is the Lender and is the present holder and beneficiary of the Note; and (2) JP Morgan has standing to foreclose on and sell the Property. As discussed supra, the Court finds that Plaintiff sufficiently alleged that JP Morgan is not the Lender, present holder, or beneficiary of the Note and consequently lacks standing to foreclose on Plaintiff's Property. Therefore, the Court also finds that an actual controversy exists. None of the guidelines in *Brillhart* suggest that the Court should refrain from entertaining Plaintiff's claim for declaratory relief. Accordingly, JP Morgan's Motion to Dismiss is DENIED with respect to Plaintiff's fourth claim for declaratory and injunctive relief.

IV. CONCLUSION

For the reasons discussed above, JP Morgan's Motion to Dismiss is GRANTED in Part and DENIED in Part. Plaintiff's fifth claim for "No Contract/Fraud" is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

March 27, 2012

_____

HON. OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE

G. Second Amended Complaint (Wellworth)

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DARYOUSH JAVAHERI

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DARYOUSH JAVAHERI,

Plaintiff,

v. CV10 8185 ODW

JP MORGAN CHASE BANK N.A.,
and DOES 1-50, inclusive,

Defendants.

SECOND AMENDED COMPLAINT

1) Violation of Cal Civ. Code §2923.5
2) Wrongful Foreclosure
3) Quasi Contract
4) No Contract
5) Quiet Title
6) Declaratory and Injunctive Relief
7) Intentional Infliction Emotional Distress

INTRODUCTION

1. During the past decade, Washington Mutual Bank (WaMu) and JPMorgan Chase Bank (Chase) abandoned traditional underwriting practices and contributed to a frenzy of real estate speculation by issuing predatory loans that ultimately lowered property values in the United States by 30-60%. Kerry Killinger, CEO of Washington Mutual, took home more than $100 million during the seven years he steered WaMu into bankruptcy. In March 2011, the FDIC filed a sixty-page complaint against Killinger and Stephen Rotella, a former WaMU COO, alleging gross negligence, breach of fiduciary duty, and fraudulent conveyance. FDIC v. Kerry Killinger, Stephen Rotella, et. al., Case No. 2:11-cv-00459 USDC (WD WA Mar. 16, 2011) .

2. WaMu issued millions of predatory loans between 2001 and 2008 with the knowledge that borrowers, including Plaintiff, would default and lose their homes. WaMu filled in fictitious figures on Plaintiff's loan application so that it would meet underwriting standards and WaMu could earn fees when it sold the loan to investors and then acted as servicer without any risk of loss when the borrower defaulted. Such blatant, systematic, and inexcusable acts of fraud constituted a criminal enterprise. As a direct, foreseeable result of WaMu's illegal behavior, over a million families will lose their homes if the courts do not intervene and permit the borrowers to conduct discovery in order to determine who owns their loans.

3. Plaintiff DARYOUSH JAVAHERI is facing illegal foreclosure of his home at a Trustee's Sale, currently scheduled for April 26, 2011. The loan application he submitted to Washington Mutual, attached as Exhibit 1, shows that his loan application consisted only of his name and address and three account numbers. The rest of the application was filled in by unknown employees of WaMu on or about September 8, 2006, to meet underwriting standards so that WaMu would collect fees when it sold the loan to unsuspecting investors in mortgage-backed securities and collateralized debt obligations.

PARTIES AND JURISDICTION

4. Plaintiff DARYOUSH JAVAHERI is the owner of the single-family residence located at 10809 Wellworth Avenue, Los Angeles, California 90024, APN 4325-005-014 ("the Wellworth Property"). He acquired it by a Grant Deed recorded on December 11, 2006. The legal description is:

Lot 8 in Block 31 of Tract No 7803 in the City of Los Angeles, County of Los Angeles, State of California, as per map recorded in Book 88, Pages 73 to 75 inclusive of Maps, in the Office of the County Recorder of said County.

5. Defendant JP MORGAN CHASE BANK, NATIONAL ASSOCIATION, ("Chase"), a New York corporation licensed to do business in California, claims to be a note holder, beneficiary, or servicer for investment trusts of a Note secured by the Wellworth Property.

6. Defendants Does 1-50, inclusive, are sued under fictitious names. When their true names and capacities are known, Plaintiff will amend this Complaint and insert their names and capacities. Plaintiff is informed and believes and thereon alleges that each of these fictitiously named defendants is legally responsible, negligently or in some other actionable manner, for the events and happenings hereinafter referred to and proximately thereby caused the injuries and damages to plaintiff as hereinafter alleged, or claims some right, title, estate, lien, or interest in the residence adverse to Plaintiff's title and their claims constitute a cloud on Plaintiff's title to the property, or participated in unlawful or fraudulent acts that resulted in injury to Plaintiff's person or property. Upon information and belief, Does 1-30 claim to have become successors in interest to the Subject Mortgage by virtue of Plaintiff's loan having been made a part of a securitization process wherein certain residential mortgages and the promissory notes based thereon were securitized by aggregating a large number of promissory notes into a mortgage loan pool, then selling security interests in that pool of mortgages to investors by way of items called "Secondary Vehicles".

7. There is diversity of citizenship between Plaintiff and Defendant Chase, and the matter in controversy exceeds, exclusive of interest and costs, the sum of $75,000. This court has jurisdiction of the action pursuant to 28 U.S.C. 1332(a). Declaratory relief is authorized under 28 U.S.C. 2210.

JURY TRIAL DEMAND

8. Plaintiff demands a jury trial on all issues.

CLAIM FOR RELIEF

9. Plaintiff brings this action against JPMorgan Chase Bank, NA ("Chase") and Does 1 through 50 for attempting to sell Plaintiff's Wellworth Property at a trustee's sale and deprive Plaintiff of his residence without a lawful claim to the Property. Plaintiff seeks to clear his title of Chase's claim.

BACKGROUND FACTS

10. Plaintiff is the owner of the Wellworth Property under the terms of a Grant Deed executed by Helene Caron in favor of Daryoush Javaheri dated October 19, 2006 (Exhibit 1).

11. To finance his purchase of the Wellworth Property, Plaintiff submitted a loan application to Washington Mutual Bank ("WaMu") on September 8, 2006. A copy of Plaintiff's Uniform Residential Loan Application, furnished to him by WaMu with instructions to leave virtually all of the items blank, is attached hereto as Exhibit 2.

12. Plaintiff purportedly signed an Adjustable Rate Note (Exhibit 3) (hereinafter "Note") and a Deed of Trust (Exhibit 4) on November 14, 2006, at Chicago Title Company. He was not given an opportunity to review the documents, other than to quickly initial or sign some pages. After he signed, a Chicago Title Company employee informed Plaintiff that WaMu would forward the final documents to him. Plaintiff did not receive any documents from Chicago Title or WaMu.

13. Plaintiff is named as Borrower on the Note and on the Deed of Trust dated November 14, 2007 ("DOT"). Washington Mutual Bank, FA is identified on the DOT as "Lender" as well as "the beneficiary under this security agreement." Chicago Title Company is named as Trustee.

14. Plaintiff is informed and believes that between November 15 and November 30, 2007, WaMu transferred Plaintiff's Note to Washington Mutual Mortgage Securities Corporation. The Note was then sold to an investment trust and became a part of, or was subject to, a Loan Pool, a Pooling and Servicing Agreement, a Collateralized Debt Obligation, a Mortgage-Backed Security, a Mortgage Pass-Through Certificate, a Credit Default Swap, an Investment Trust, and/or a Special Purpose Vehicle. The security is identified as Standard & Poor CUSIP # 31379XQC2, Pool Number 432551. Thereafter, WaMu acted solely as a servicer of the loan, and was neither Lender nor Beneficiary after November 2007.

15. CHASE claims to be the note holder, lender, beneficiary, and servicer for investment trusts of the Subject Mortgage. Chase has not recorded its claim of ownership of the purported mortgage.

16. Plaintiff is informed and believes that California Reconveyance Company (“CRC”) is a wholly owned subsidiary of Chase.

17. On August 16, 2010, CRC recorded a Notice of Trustee's Sale ("NOTS") stating that the Wellworth Property would be sold at public auction on September 7, 2010. The NOTS bears the purported signature of Deborah Brignac, Vice President of

California Reconveyance Company, as Trustee. The NOTS included an unsigned "declaration" pursuant to Cal. Civil Code Section 2923.54 bearing the name of Ann Thorn, First Vice President, JPMorgan Chase Bank, National Association. Chase is identified as a servicer on the NOTS.

FIRST CAUSE OF ACTION – VIOLATION OF CAL CIV CODE §2923.5

18. Plaintiff re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 17.

19. On or about March 22, 2010, Chase Home Finance LLC in Jacksonville FL mailed to Plaintiff a Notice of Collection Activity, attached hereto as Exhibit 5, stating that Plaintiff had not made his monthly payments since November 2009. It stated, "You may cure this default within thirty (30) days from date of letter" (sic) and "your home loan may be eligible for a loan modification program."

20. Within 30 days, Plaintiff's lawyer, Fariba Banayan, faxed a letter to Chase offices in Jacksonville FL, Columbus OH, and Glendale CO requesting the bank's assistance to rectify the account. It stated, in part, "This office has been retained to represent Daryoush Javaheri in reference to the above stated loan. All future communications with Mr. Javaheri in this regard should be conducted through this office…. Please provide my client with the alternatives available to him at this time regarding this loan." The letter is attached as Exhibit 6. Chase did not respond to Mr. Banayan's timely request for assistance.

21. California Civil Code § 2923.5 provides that a borrower may designate an attorney to discuss options with the mortgagee, beneficiary, or authorized agent, on the borrower's behalf, to avoid foreclosure. § 2923.5 (a) states:

> (1) A mortgagee, trustee, beneficiary, or authorized agent may not file a notice of default pursuant to Section 2924 until 30 days after contact is made as required by paragraph (2) or 30 days after satisfying the due diligence requirements as described in subdivision (g).
>
> (2) A mortgagee, beneficiary, or authorized agent shall contact the borrower in person or by telephone in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure. During the initial contact, the mortgagee, beneficiary, or authorized agent shall advise the borrower that he or she has the right to request a subsequent meeting and, if requested, the mortgagee, beneficiary, or authorized agent shall schedule the meeting to occur within 14 days. The assessment of the borrower's financial situation and discussion of options may occur during the first contact, or at the subsequent meeting scheduled for that purpose. In either case, the borrower shall be provided the toll-free telephone number made available by the United States Department of Housing and Urban Development (HUD) to find a HUD-certified housing counseling agency. Any meeting may occur telephonically.

22. Chase did not contact Plaintiff or Mr. Banayan, either in person or by telephone, to discuss Plaintiff's financial condition and the impending foreclosure. Chase did not call, it did not write, and it did not provide a toll-free HUD number to Plaintiff or his lawyer. Chase did not offer to meet with Plaintiff or his lawyer and did not advise them that Plaintiff had a right to request a subsequent meeting within 14 days.

23. California Civil Code § 2923.5(g) states that a notice of default may be filed pursuant to § 2924 when a mortgagee, beneficiary, or authorized agent has not contacted a borrower provided that the failure to contact the borrower occurred despite the due diligence of the mortgagee, beneficiary, or authorized agent. Due diligence is defined in (g) as:

> (1) A mortgagee, beneficiary, or authorized agent shall first attempt to contact a borrower by sending a first-class letter that includes the toll-free telephone number made available by HUD to find a HUD-certified housing counseling agency.
>
> (2) (A) After the letter has been sent, the mortgagee, beneficiary, or authorized agent shall attempt to contact the borrower by telephone at least three times at different hours and on different days. Telephone calls shall be made to the primary telephone number on file.
>
> (B) A mortgagee, beneficiary, or authorized agent may attempt to contact a borrower using an automated system to dial borrowers,

provided that, if the telephone call is answered, the call is connected to a live representative of the mortgagee, beneficiary, or authorized agent.

(C) A mortgagee, beneficiary, or authorized agent satisfies the telephone contact requirements of this paragraph if it determines, after attempting contact pursuant to this paragraph, that the borrower's primary telephone number and secondary telephone number or numbers on file, if any, have been disconnected.

(3) If the borrower does not respond within two weeks after the telephone call requirements of paragraph (2) have been satisfied, the mortgagee, beneficiary, or authorized agent shall then send a certified letter, with return receipt requested.

(4) The mortgagee, beneficiary, or authorized agent shall provide a means for the borrower to contact it in a timely manner, including a toll-free telephone number that will provide access to a live representative during business hours.

(5) The mortgagee, beneficiary, or authorized agent has posted a prominent link on the homepage of its Internet Web site, if any, to the following information:

(A) Options that may be available to borrowers who are unable to afford their mortgage payments and who wish to avoid

foreclosure, and instructions to borrowers advising them on steps to take to explore those options.

(B) A list of financial documents borrowers should collect and be prepared to present to the mortgagee, beneficiary, or authorized agent when discussing options for avoiding foreclosure.

(C) A toll-free telephone number for borrowers who wish to discuss options for avoiding foreclosure with their mortgagee, beneficiary, or authorized agent.

(D) The toll-free telephone number made available by HUD to find a HUD-certified housing counseling agency.

24. Chase did none of the above. Chase Fulfillment Center sent Plaintiff a "Request Disqualification" on September 1, 2010, attached as Exhibit 7. It said, "Unfortunately, because your initial request was less than seven (7) business days from the date of the scheduled foreclosure sale on your home, you are no longer eligible under Making Home Affordable ("MHA") Program guidelines." A second copy was sent on September 7.

25. Chase and CRC recorded a Notice of Default against the Wellworth Property in the Los Angeles County Recorder's Office on May 14, 2010 (Exhibit 9). Attached to the NOD was a Declaration of Compliance with Cal. Civil Code §2923.5 certified under penalty of perjury by Renee Daniels on behalf of Chase. She checked off a box that read, "The

mortgagee, beneficiary or authorized agent tried with due diligence but was unable to contact the borrower to discuss the borrower's financial situation and to explore options for the borrower to avoid foreclosure as required by Cal. Civ. Code Section 2923.5. Thirty days or more have elapsed since these due diligence efforts were completed."

26. Renee Daniels either misrepresented the facts, if and when she signed the declaration, or she did not have personal knowledge of the matters described in her declaration when she asserted that Chase attempted to contact Plaintiff as required by §2923.5. Since the contacts required by §2923.5 did not occur, the foreclosure is illegal.

SECOND CAUSE OF ACTION – WRONGFUL FORECLOSURE

27. Plaintiff re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 26.

28. Soon after WaMu originated the loan, Plaintiff is informed and believes that WaMu transferred all beneficial interest in the loan to a private investor.

29. Neither WaMu, Chicago Title, CRC, nor Chase has recorded a transfer of beneficial interest in the Note to Chase.

30. Chase does not have standing to enforce the Note because Chase is not the owner of the Note, Chase is not a holder of the Note, and Chase is not a beneficiary under the Note. Chase does not claim to be a holder of the Note or a beneficiary. Chase

describes itself as a loan servicer in the Notice of Trustee's Sale. If Chase can prove that it is a servicer, Chase cannot foreclose on Plaintiff's property without authorization from the Lender under the terms of the Deed of Trust.

31. Plaintiff is informed and believes that Chase cannot produce an original Note. Chase does not own the loan and cannot identify the owner of the loan. Chase did not purchase the loan when it took over WaMu in September 2008 because WaMu had sold its beneficial interest in the loan two years earlier.

32. A power of sale is conferred by the mortgage under Cal. Civ. Code §2924. The Adjustable Rate Note attached as Exhibit 3 states, "Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder." The Note states in paragraph 7(C): "Notice of Default. If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount." The Note gives the right to collect, if timely payments are not made, to the Lender and anyone who takes the Note by transfer. This does not include a servicer who is not the Note Holder.

33. According to Plaintiff's Deed of Trust, the "Lender" is WASHINGTON MUTUAL BANK, FA, and the "Trustee" is Chicago Title Company.

Consistent with the language of the Note, only the Lender is authorized under paragraph 22 of the DOT to accelerate the loan:

"Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant of agreement in this Security Instrument…

"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. Trustee shall cause this notice to be recorded in each county in which any part of the Property is located." (DOT page 13, paragraph 22).

34. Washington Mutual Bank remained the Lender for no more than a few days until it sold the loan. Thereafter, it was a servicer of the loan. The Note Holder or Lender was the Investment Trust or that funded the loan.

35. Paragraph 24 of the DOT (Plaintiff's Ex 4) states:

> 24. Substitute Trustee. Lender, at its option, may from time to time appoint a successor trustee to any Trustee appointed hereunder by an instrument executed and acknowledged by Lender and recorded in the office of the Recorder of the county in which the property is located. The instrument shall contain the name of the original Lender, Trustee and Borrower, the book and page where this Security Instrument is recorded and the name and address of the successor trustee. Without reconveyance of the property, the successor trustee shall succeed to all the title, powers and duties conferred upon the Trustee herein and by Applicable Law. This procedure for substitution of trustee shall govern to the

exclusion of all other provisions for substitution.

Chase seeks to proceed with foreclosure of Plaintiff's property even though it cannot identify the Lender and therefore is incapable of substituting the Trustee.

36. On May 3, 2010, CRC recorded a Substitution of Trustee (Exhibit 8) signed by Deborah Brignac, Vice President of JPMorgan Chase Bank. The signature of Deborah Brignac on the Substitution of Trustee does not resemble the signature of Deborah Brignac, Vice President of California Reconveyance Company on the Notice of Trustee's Sale (Ex. 10). It is a forgery.

37. The Substitution of Trustee purports to substitute CRC as Trustee in place of Chicago Title. Brignac's forged signature is acknowledged by Loren Lopez, a California Notary Public. It is not remotely similar to the Deborah Brignac signatures appearing on the recorded documents attached hereto as Exhibits 11, 12, 13, and 14.

DATE: April 30, 2010
JPMorgan Chase Bank, National Association successor in interest to Washington Mutual Bank, FA

Deborah Brignac, Vice President

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Substitution of Trustee, Exhibit 8 – recorded on May 3, 2010)

DATE: 08-16-2010 SEE ATTACHED EXHIBIT

CALIFORNIA RECONVEYANCE COMPANY, as Trustee
(714) 259-7850 or www.fidelityasap.com
(714) 573-1965 or www.prioritypostings.com

DEBORAH BRIGNAC, VICE PRESIDENT
9200 OAKDALE AVE

CALIFORNIA RECONVEYANCE COMPANY
COLLECTOR ATTEMPTING TO COLLECT A

Notice of Trustee's Sale, Exhibit 10, recorded on Aug. 16, 2010

DATE: 10-02-2009

CALIFORNIA RECONVEYANCE COMPANY, as Trustee
(714) 259-7850 or www.fidelityasap.com
(714) 573-1965 or www.orioritvposting.com

DEBORAH BRIGNAC, VICE PRESIDENT
9200 OAKDALE AVE
MAILSTOP N110612
CHATSWORTH, CA 91311

CALIFORN
COLLECTC
INFORMA1

Exhibit 11 – recorded on Oct. 6, 2009

DATE: 10-01-2009

CALIFORNIA RECONVEYANCE COMPANY, as Trustee
(714) 259-7850 or www.fidelityasap.com
(714) 573-1965 or www.priorityposting.com

DEBORAH BRIGNAC, VICE PRESIDENT
9200 OAKDALE AVE
MAILSTOP N110612
CHATSWORTH, CA 91311

CALIFORN
COLLECTC
INFORMA1

Exhibit 12 – recorded on Oct. 8, 2009

DATE: 10-01-2009

CALIFORNIA RECONVEYANCE COMPANY, as Trustee
(714) 259-7850 or www.fidelityasap.com
(714) 573-1965 or www.priorityposting.com

DEBORAH BRIGNAC, VICE PRESIDENT
9200 OAKDALE AVE
MAILSTOP N110612
CHATSWORTH, CA 91311

CALIFORNI
COLLECTO
INFORMAT

Exhibit 13 – recorded on Oct. 8, 2009

DATE: September 29, 2010
Wells Fargo Bank, National Association as Trustee for the Certifi
Bear Stearns Mortgage Funding Trust 2007-AR2 Mortgage Pass
Corporation as attorney in fact

Deborah Brignac, Vice President

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Exhibit 14 – recorded on Sept. 30, 2010

Courts are putting a stop to the epidemic of forgery and robo-signing that infected the banking industry during the past ten years. Deborah Brignac's diverse signatures and Loren Lopez's acknowledgment of them are fraudulent and illegal.

38. On May 14, 2010, CRC recorded a Notice of Default ("NOD"), attached hereto as Exhibit 9, describing the Wellworth Property with instructions that Plaintiff contact JPMORGAN CHASE BANK, NATIONAL ASSOCIATION to stop the foreclosure. The NOD was signed by Silvia Freeberg, Assistant Secretary. The "Declaration of Compliance (Cal Civil Code Section 2923.5(b)" attached to the NOD was signed under penalty of perjury by Renee Daniels on behalf of JPMorgan Chase Bank, National Association. Chase is described in the Declaration of Compliance as "The undersigned mortgagee, beneficiary or authorized agent." Washington Mutual is described in the body of the NOD as beneficiary. However, Chase's interest, if any, was acquired from WaMu in September 2008, and WaMu's beneficial interest had terminated when WaMu sold the Note to investors in 2006.

39. Chase was not the beneficiary and Brignac had no authority to act on behalf of the beneficiary when someone forged her signature to the Substitution of Trustee. The Substitution of Trustee was unauthorized and fraudulent, so CRC was not authorized to initiate foreclosure against Plaintiff on May 14, 2010, when it recorded the Notice of Default, and it was not acting for the Lender when it filed the Notice of Trustee's Sale on August 16, 2010.

THIRD CAUSE OF ACTION–QUASI CONTRACT

40. Plaintiff re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 39.

41. Chase demanded monthly mortgage payments from Plaintiff starting in October 2008, and continued to collect payments from Plaintiff for twelve months. Plaintiff reasonably relied upon Chase's assertion that it was entitled to payments for the reason that it had acquired certain assets from WaMu under an agreement with the FDIC.

42. Chase knowingly accepted the payments and retained them for its own use knowing that WaMu was not a beneficiary under Plaintiff's Note on the date that its assets were transferred to Chase and therefore Chase did not acquire any right from WaMu to accept or keep Plaintiff's payments. It would be inequitable for Chase to retain the payments it received from Plaintiff. The equitable remedy of restitution when unjust enrichment has occurred is an obligation created by the law without regard to the intention of the parties, and is designed to restore the aggrieved party to his or her former position by return of the thing or its equivalent in money.

43. The DOT states in Paragraph 23: "Upon payment of all sums secured by this Security Instrument, Lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Instrument to Trustee." The obligations to WaMu under the DOT were fulfilled when WaMu received the balance on the Note as proceeds of sale through securitization to private

investors. Chase has been unjustly enriched by collecting monthly payments from Plaintiff.

44. Plaintiff seeks restitution for any payments he made to Chase that were not paid to the lender or beneficiary, if any.

FOURTH CAUSE OF ACTION - NO CONTRACT

45. Plaintiff re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 44.

46. Plaintiff is informed and believes that WaMu routinely approved predatory real estate loans to unqualified buyers in 2006 and 2007 and implemented unlawful lending practices by encouraging brokers and loan officers to falsify borrowers' income and assets to meet underwriting guidelines when borrowers were not qualified.

47. Plaintiff followed WaMu's instructions when he submitted a Uniform Residential Loan Application to WaMu that contained only his basic identifying information, such as name, address, phone number, social security number, and bank account number. WaMu employees filled out the application.

48. Plaintiff is informed and believes that WaMu pre-sold Plaintiff's mortgage. Immediately after he signed the Note, WaMu transferred all of its interest in the Note to an investment bank that bundled Plaintiff's Note with numerous other residential mortgages into residential mortgage-backed securities ("RMBS") which were structured into synthetic collateralized debt obligations ("CDOs")

and sold to investors in Pool Number 432551 identified in Standard & Poor's registry as CUSIP # 31379XQC2.

49. Plaintiff is informed and believes that the investment bank intended to short the portfolio it helped to select by entering into credit default swaps to buy protection against the certain event that the promissory notes would default. WaMu expected that Plaintiff would not have the ability to repay the loan. It was not a matter of being unconcerned with the possible outcome that Plaintiff would default; WaMu expected he would default.

50. Washington Mutual Bank, the sponsor of the securitization transaction, was a wholly owned subsidiary of Washington Mutual Inc. Securitization of mortgage loans was an integral part of Washington Mutual Inc.'s management of its capital. It engaged in securitizations of first lien single-family residential mortgage loans through Washington Mutual Mortgage Securities Corporation, as depositor, beginning in 2001. WaMu acted only as a servicer of Plaintiff's loan.

51. WaMu failed to disclose to Plaintiff that its economic interests were adverse to Plaintiff and that WaMu expected to profit when Plaintiff found it impossible to perform and defaulted on his mortgage.

52. A necessary element in the formation of an enforceable contract under the common law is a meeting of the minds. Two or more parties must share some expectation that a future event will occur. Plaintiff expected that he would borrow money from WaMu, he would pay it back, and then he

would own the Property. WaMu expected that Plaintiff would borrow money, he would not be able to pay it back, and then WaMu or the investors would own the Property. Since there was no shared expectation—no meeting of the minds—no contract was formed between Plaintiff and WaMu.

53. In addition to WaMu's expectation that Plaintiff would lose title to the Wellworth Property through foreclosure, WaMu anticipated transferring the Note to investors immediately after Plaintiff signed the Note. Plaintiff is informed and believes that WaMu purchased credit default insurance so that WaMu would receive the balance on the Note when Plaintiff defaulted, in addition to any money WaMu received when it securitized the Note.

54. Not only did WaMu dispense with conventional underwriting practices in 2006, it also paid premium fees and other incentives to mortgage brokers who signed up the riskiest borrowers. Fueled by spiraling profits to Chase, WaMu, and other bankers, common law principles of contract formation, customary underwriting practices, and statutory procedures for transferring interests in real property, including the recordation of transfers of interests in real property, disintegrated and the system collapsed.

55. WaMu expected that Plaintiff would not perform as merely one victim in a scheme in which:

(1) WaMu's fees as servicer would be greater as the number of loans increased;

(2) WaMu's fees as servicer would be greater as the balances of loans increased;

(3) WaMu would recover the unpaid balance of Plaintiff's loan through credit default insurance when Plaintiff inevitably defaulted; and

(4) All risk of loss in the event of Plaintiff's default would be borne by investors, not WaMu as the servicer.

56. Plaintiff's participation in the mortgage contract was procured by overt and covert misrepresentations and nondisclosures. The parties did not share a single expectation with respect to any of the terms of the mortgage contract and therefore the contract was void *ab initio*.

57. No enforceable contract was formed between Plaintiff and WaMu, so his DOT and Promissory Note were not assets of WaMu that could be acquired or assumed by Chase from the Federal Deposit Insurance Corporation (FDIC) as receiver after WaMu was closed by the Office of Thrift Supervision on September 25, 2008.

58. Chase Bank has no right to receive payment under Plaintiff's mortgage loan and has no right to foreclose on his Wellworth Property. Plaintiff does not seek rescission of the contract. He alleges that the contract was void *ab initio*.

FIFTH CAUSE OF ACTION - QUIET TITLE

59. Plaintiff re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 58.

60. Plaintiff seeks to quiet title against the claims of Defendants and all persons claiming any legal or equitable right, title, estate, lien, or adverse interest in the Wellworth Property as of the date the Complaint was filed (Cal Code Civil Procedure §760.020)

61. Plaintiff is the titleholder of the Wellworth Property according to the terms of the Grant Deed recorded on December 11, 2006.

62. WaMu securitized Plaintiff's single-family residential mortgage loan through Washington Mutual Mortgage Securities Corp. Plaintiff is informed and believes that the lawful beneficiary has been paid in full.

The DOT states in paragraph 23:

> 23. Reconveyance. Upon payment of all sums secured by this Security Instrument, lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Instrument to trustee. Trustee shall reconvey the Property without warranty to the person or persons legally entitled to it…

63. The DOT does not state that Plaintiff must pay all sums, only that all secured sums must be paid. Plaintiff alleges that the obligations owed to WaMu under the DOT were fulfilled and the loan was fully paid when WaMu received funds in excess of the balance on the Note as proceeds of sale through securitization(s) of the loan and insurance proceeds from Credit Default Swaps.

64. Defendants' claims are adverse to Plaintiff because Plaintiff is informed and believes that none of the defendants is a holder of the Note, none of them can prove any interest in the Note, and none of them can prove that the Note is secured by the DOT, as well as for the reasons set forth in the preceding causes of action. As such, Defendants have no right, title, lien, or interest in the Wellworth Property.

65. Plaintiff therefore seeks a judicial declaration that the title to the Wellworth Property is vested solely in Plaintiff and that Defendants have no right, title, estate, lien, or interest in the Property and that Defendants and each of them be forever enjoined from asserting any right, title, lien or interest in the Property adverse to Plaintiff.

SIXTH CAUSE OF ACTION - DECLARATORY & INJUNCTIVE RELIEF

66. Plaintiff re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 65.

67. An actual controversy has arisen and now exists between Plaintiff and Defendants concerning their respective rights and duties. Plaintiff contends:

(a) that Chase is not the present holder in due course or beneficiary of a Promissory Note executed by Plaintiff. However, Defendants contend that Chase is the present owner and beneficiary of a Promissory Note executed by Plaintiff.

(b) that Defendants are not real parties in interest, do not have standing, and are not entitled to

accelerate the maturity of any secured obligation and sell the Wellworth Property because they are not a beneficiary or authorized agent of beneficiaries under the purported Note. However, Defendants assert that they are entitled to sell the Property.

(c) that the Substitution of Trustee recorded in Los Angeles County on May 3, 2010, which purports to substitute CRC in place of Chicago Title Co. as Trustee under the Deed of Trust dated 11-14-2007, was subscribed with a forged signature of Deborah Brignac and fraudulently acknowledged, and therefore CRC is not a trustee authorized to file a Notice of Default or a Notice of Trustee's Sale on the Wellworth Property. However, Defendants contend that CRC is a trustee duly authorized to file said Notices.

68. Plaintiff desires a judicial determination of his rights and duties as to the validity of the Note and DOT, and Defendants' rights to proceed with nonjudicial foreclosure on the Wellworth Property. Unless restrained, Defendants will sell Plaintiff's residence, or cause it to be sold, to Plaintiff's great and irreparable injury, for which pecuniary compensation would not afford adequate relief.

69. Defendants' wrongful conduct, unless and until restrained by order of this court, will cause great irreparable injury to Plaintiff as the value of the residence declines under threat of foreclosure and Plaintiff faces the prospect of eviction from his residence. Plaintiff designed and built this home himself. It is unique and cannot be replicated.

70. If the foreclosure sale is allowed to proceed, the burden on Plaintiff significantly outweighs the benefit to Defendants, and each of them. By contrast, if the foreclosure sale is enjoined, the burden to defendants is minimal and is not outweighed by the benefit to Plaintiff.

71. Plaintiff has no adequate remedy at law for the injuries currently being suffered and that are threatened. It will be impossible for Plaintiff to determine the precise amount of damage that he will suffer if Defendants' conduct is not restrained and Plaintiff must file a multiplicity of suits to obtain compensation for his injuries.

SEVENTH CAUSE OF ACTION - INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

72. Plaintiff re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 71.

73. Between October 2008 and November 2009 Chase cashed Plaintiff's monthly checks and kept the money when a cursory review of WaMu's records, under Chase's control, would have revealed that Chase had no right to keep the money. When Plaintiff stopped paying, Chase notified Plaintiff in 2010 that it would take his family home—a house that he had built himself. There was no signature or name on Chase's correspondence, so Plaintiff cannot identify the authors prior to commencement of discovery.

74. In March 2010, Plaintiff hired a lawyer to negotiate with Chase and explore options to

foreclosure. Chase ignored his lawyer's letters, which were faxed to Chase's offices in three states.

75. Knowing that it was a servicer, not a beneficiary or lender of Plaintiff's loan, Chase pretended to transfer the deed of trust to its subsidiary, CRC, on April 30, 2010, so CRC could record a fraudulent Notice of Default on 5/14/2010.

76. Plaintiff contends that the acts and omissions of the Defendants, and each of them, constitute extreme and outrageous conduct.

77. Plaintiff further contends that Defendants, and each of them, engaged in such conduct either intentionally or with reckless disregard as to the effect on Plaintiff.

78. As a result of said extreme and outrageous conduct by Defendants, and each of them, Plaintiff has suffered severe emotional distress in the amount of $5,000,000.00.

PRAYER

WHEREFORE, Plaintiff requests judgment as follows:

1. That this court issue an Order to Show Cause and, after a hearing, issue a Temporary Restraining Order and Preliminary Injunction restraining Defendants, and each of them, during the pendency of this action, from continuing with their efforts to conduct a Trustee's Sale of the Wellworth Property.

2. That the attempted foreclosure of the Wellworth Property be declared illegal and that Defendants be forever enjoined and restrained from selling the Property or attempting to sell it or causing it to be sold, either under power of sale pursuant to trust deed or by foreclosure action, and from posting, publishing, or recording any notice of default or notice of trustee's sale contrary to state or federal law.

3. That the underlying loan transaction be declared void as a result of Defendants' and WaMu's misrepresentations, fraud, concealment, and predatory loan practices.

4. That Defendants make restitution to Plaintiff according to proof.

5. For a judgment determining that Plaintiff is the owner in fee simple of the Wellworth Property against the adverse claims of Defendants and that Defendants have no interest in the subject property adverse to Plaintiff.

6. For damages in an amount of $5,000,000.00.

6. For costs of suit and reasonable attorney fees.

7. For any and all other and further relief that may be just in this matter.

Date: April 11, 2011

_____

Douglas Gillies
Attorney for Plaintiff

VERIFICATION

Daryoush Javaheri declares:

I am the plaintiff in the above-entitled action. I have read the foregoing Second Amended Complaint and know its contents. The same is true of my own knowledge, except as to those matters that are alleged on information and belief, and as to those matters, I believe them to be true. I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed in Los Angeles, California, on April 12, 2011.

_____

Daryoush Javaheri

PLAINTIFF'S EXHIBITS

Exhibit	Description
1	Grant Deed recorded 12/11/2006
2	Uniform Residential Loan Application 9/8/2006
3	Adjustable Rate Note 11/14/2007
4	Deed of Trust 11/14/2007
5	Notice of Collection Activity 3/22/2010
6	Attorney Fariba Banayan's fax to Chase 4/19/2010
7	Request Disqualification (Chase) 9/1/10 and 9/7/10
8	Substitution of Trustee 4/30/2010
9	Notice of Default 5/14/2010
10	Notice of Trustee's Sale 8/16/2010
11-14	Deborah Brignac's signatures 10/2/09 – 9/29/10

H. Declaration of Douglas Gillies

DOUGLAS GILLIES, ESQ. (CA 53602)
douglasgillies@gmail.com
3756 Torino Drive
Santa Barbara, CA 93105
(805) 682-7033

Attorney for Plaintiff
DARYOUSH JAVAHERI

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DARYOUSH JAVAHERI,

Plaintiff,

v.

JPMORGAN CHASE BANK N.A.,
and DOES 1-10, inclusive,

Defendant

Case No. CV 10-8185-ODW (FFM)
[Consolidated with Case No.
CV11-10072-ODW(FFM)]

JUDGE: Hon. Otis D. Wright II

DECLARATION OF DOUGLAS GILLIES
IN RESPONSE TO DEFENDANT'S
MEMORANDUM IN REPLY TO
PLAINTIFF'S OPPOSITION TO MOTION
FOR PARTIAL SUMMARY JUDGMENT

DATE: November 26, 2012
TIME: 1:30 PM
CRTRM: 11

Action Filed: December 5, 2011
Trial Date: January 15, 2013

Pursuant to prior written order of the Court, Douglas Gillies hereby declares:

1. I am attorney of record for Plaintiff Daryoush Javaheri. I have been duly admitted to practice law in the State of California and in the United States District Court, Central District of California, and if called as a witness in this matter, I am competent to testify of my own personal knowledge, to the best of my recollection, as to the matters set forth in this declaration.

2. A cacd_ecf email with links to defendant JPMorgan Chase's Motion for Summary Judgment was generated on October 29, 2012, at 5:32 PM, as Hurricane Sandy made landfall on the Jersey Shore. I reviewed the ecf email linked to Chase's moving papers on Tuesday, October 30. Chase had six months to draft its motion for summary judgment. Plaintiff had six days to file his Opposition 21 days before the hearing.

3. I purchased a report of public records from William Paatalo in February 2012 to assist me in identifying the registered security or securities into which Plaintiff's Note may have been placed. I had no intention of using Mr. Paatalo as an expert witness to testify in this matter, appear on behalf of Plaintiff, or represent Plaintiff in any capacity.

4. After receiving Chase's Motion for Summary Judgment, I requested Mr. Paatalo's assistance to rebut or contradict evidence identified in Chase's motion. After reading Chase's motion I decided to use Mr. Paatalo in the presentation of Plaintiff's case.

5. I was surprised by Mr. Masutani's revelation in Chase's Points and Authorities that Chase recorded an Assignment of Deed of Trust on May 20, 2010, "in which JPMorgan assigned the beneficial interest in the DOT it acquired from the FDIC*, if any*, to Bank of America" even though "JPMorgan did not claim to hold an actual beneficial interest in the DOT since WaMu had transferred the Loan to the 2007-HY1 Trust before September 25, 2008" because "it could appear to the general public, based upon the recorded public records, that JPMorgan was the then-current beneficiary under the DOT." (Doc. 102, p. 5:22-28).

6. This scenario was supported by the Declaration of Roberto Silva, a research specialist, who offered no foundation for those "facts" in paragraph 12 of his declaration (Doc 103, p. 5) other than that "it could appear to the general public, based upon the recorded public records, that JPMorgan was the then-current beneficiary under the DOT."

7. I received Mr. Paatalo's declaration on November 5, 2012. On November 5, I served Mr. Paatalo's declaration on Chase (Document 107) disclosing his identity and providing Chase with a written report prepared and signed by Mr. Paatalo containing (i) the opinions Mr. Paatalo will express and the basis and reasons for them; (ii) facts or data considered by Mr. Paatalo in forming them; (iii) exhibits used to summarize or support them; and (iv) Mr. Paatalo's qualifications, as required by Rule 26.01 (a)(2)(D)(ii) and 26.01(a)(3). The disclosure under Rule 26(a) was in writing, signed, and served.

8. I cannot conceive that any prejudice was caused by the lapse of a few hours between my receipt of the Paatalo declaration and the electronic filing and service of his declaration on Chase. On the other hand, Chase has demonstrated a pattern of disregard for all witness disclosure requirements that borders on contempt.

9. In its Initial Disclosures dated June 19, 2012, Chase disclosed:

> I. WITNESSES
>
> Pursuant to Rule 26(a)(1)(A) of the FRCP, and subject to the Preliminary Statement, Defendants identify the following witnesses:
>
> 1. Person most knowledgeable of JPMorgan, c/o AlvaradoSmith, a Professional Corporation, 633 W. Fifth Street, Suite 1100, Los Angeles, CA.

> 2. Person most knowledgeable of CRC, c/o AlvaradoSmith, a Professional Corporation, 633 W. Fifth Street, Suite 1100, Los Angeles, California.

10. Plaintiff's first set of interrogatories to Chase served on September 6, 2012, requested the names of Chase's witnesses:

> Interrogatory No. 1. Identify the name, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that Chase may use to support its claims or defenses.

Chase objected that the interrogatory was "vague, ambiguous, too general and overly broad as phrased and in scope." Then Chase responded, "JPMorgan will not respond to this interrogatory."

Federal Rule of Civil Procedure 26 (a) states:

> REQUIRED DISCLOSURES.
>
> (1) Initial Disclosure.
>
> (A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:
>
> (i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the

> subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

The objection raised by Chase defies the exact language of the FRCP 26 (a).

11. Chase argues that the parties were required to provide expert witness disclosures by October 17, 2012, 90 days before trial. Chase received the Paatalo declaration on November 5, 2012 – a mere 17 days after that date. On this basis Chase moves to strike the declaration of Mr. Paalato even though Chase has not yet provided Plaintiff with any expert witness disclosures.

12. I did not anticipate using Mr. Paalato as a witness until I received Chase's motion for summary judgment. FRCP 26.01(a)(2)(D)(ii) provides that if the evidence is intended to contradict or rebut evidence identified by another party, a party must disclose the expert testimony within 30 days after the other party's disclosure.

13. Chase has not disclosed any expert witnesses, but on October 29, 2012, it disclosed its puzzling rationale for recording an assignment of beneficial interest on May 20, 2010, when it didn't have any beneficial interest, in order to reassure the general public that it didn't have that beneficial interest because "it could appear to the general public, based upon (unspecified) recorded public documents, that JPMorgan was the then-current beneficiary under the DOT." (Doc. 102, p. 5:22-28).

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 29, 2012, in Santa Barbara, California.

/s/_____

Douglas Gillies

Attorney for Plaintiff Daryoush Javaheri

I. Declaration of William Paatalo

DOUGLAS GILLIES, ESQ. (CA 53602)
douglasgillies@gmail.com
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(805) 682-7033
Attorney for Plaintiff
DARYOUSH JAVAHERI

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DARYOUSH JAVAHERI,

Plaintiff,

v.

JPMORGAN CHASE BANK N.A.,
and DOES 1-10, inclusive,

Defendants

Case No. CV 10-8185-ODW (FFM)

[Consolidated with Case No. CV11-10072-ODW(FFM)]

JUDGE: Hon. Otis D. Wright II

DECLARATION OF WILLIAM
PAATALO IN OPPOSITION TO MOTION
FOR SUMMARY JUDGMENT

DATE: November 26, 2012
TIME: 1:30 PM
CRTRM: 11

Action Filed: December 5, 2011
Trial Date: January 15, 2013

I, WILLIAM J. PAATALO, HEREBY DECLARE AS FOLLOWS:

1. I am an Oregon licensed private investigator under ORS 703.430, and have met the necessary requirements under ORS 703.415. My Oregon PSID number is 49411.

2. I am over the age of eighteen years, am of sound mind, having never been convicted of a felony or a crime or moral turpitude. I am competent in all respects to make this Declaration. I have personal knowledge of the matters declared herein, and if called to testify, I could and would competently testify thereto.

3. I have 17 years combined experience in law enforcement and the mortgage industry.

4. I worked in the mortgage industry from 1999 to 2008. I was a "loan officer" with Conseco Home Finance from 1999 to 2000 before becoming a "mortgage broker" from 2000 to 2008. I was the President of Midwestern Mortgage, LLC f/k/a

Wissota Mortgage, LLC in Wisconsin and Minnesota from 2002 – 2008. My company was strictly a "broker" for numerous lending institutions to which I would originate loans on their behalf. I was not a "lender," nor was I involved in "Table-Funding" loans.

5. I have worked exclusively over the last 24 months investigating foreclosure fraud and issues related to the securitization of residential and commercial mortgage loans.

6. I am a Certified Forensic Mortgage Loan Auditor (CFLA), and have spent more than 3,500 hours conducting investigatory research specifically related to mortgage securitization and chain of title analysis. I have performed such analyses for residential real estate located in many states, including, but not limited to Washington, Oregon, California, Nevada, Florida, Montana, and several other states.

7. As a result of the above education and experience I am familiar with and have sufficient training and expertise to qualify as an expert.

8. My securitization and chain of title analyses here involve the factual aspects of securitization and chain of title.

9. In the performance of my securitization and chain of title audits I rely, as do all persons who perform specialized investigative work relating to the securitization of mortgage loans and chain of title issues, on a multitude of sources. These sources include, but are not limited to my Bloomberg

subscription ; Edgar (a search tool for Securities and Exchange Commission Filings); other paid subscription sources, including those related to known robosigners and foreclosure related documents.

10. In performing this audit and report I have also relied upon documents submitted into the record by Defendant JPMorgan Chase relating to the Javaheri mortgage loan and foreclosure.

11. I was retained by Douglas Gillies, Esq. to research the securitization of Javaheri's loan number "3010901449-101" and to provide evidence pertaining to the securitization of said loan. I was also asked to conduct an investigation into any potential defects or deficiencies pertaining to the chain of title. Chain of title deficiencies include among other things lapses in the chain of title necessary to establish the chain of ownership for the promissory note as well as chain of title entries which are fraudulently manufactured or produced through robo-signing.

12. After examining the Javaheri documents, I believe that there are at least three potential scenarios as to the true beneficial party of the Javaheri Note and Deed of Trust.

Scenario 1-PSA.

13. The "Pooling & Servicing Agreement" (PSA) for the "Washington Mutual Pass-Through Certificates, Series 2007-HY1 Trust (hereinafter "the Trust")(Chase Doc 103-3) contains the restatement of the declaration of trust establishing the Mortgage Backed Securities Trust (MBST,) prescribes the

powers of the trustee and other parties and provides the rules by which the MBST will operate. The structure created by the PSA for the MBST created for Series 2007-HY1 is summarized by the Prospectus.

14. According to the PSA, WaMu Asset Acceptance Corp. established the Trust as the "WaMu Mortgage Pass-Through Certificates Series 2007-HY1 Trust" (Trust), a Delaware Trust, by executing an Original Trust Agreement.

15. The PSA defines the "Original Trust Agreement" as follows:

> "Original Trust Agreement: The Trust Agreement, dated as of January 1, 2007, between the Company and the Delaware Trustee, providing for the creation of the Trust. PSA – pg.37.

16. WaMu Asset Acceptance Corp. issued and registered the PSA with the Securities and Exchange Commission for WAMU Trust Certificates Series 2007-HY1 Trust. Cut Off January 1st, 2007.

17. The PSA describes the creation of the Trust:

> "Section 2.01. Creation of the Trust. The Trust was created pursuant to the Original Trust Agreement and is hereby continued. As set forth in the Original Trust Agreement, the Trust shall be known as "WaMu Mortgage Pass-Through Certificates Series 2007-HY1 Trust"." Chase Doc. 103-4, p. 8.

18. Prior to the sale of certificates to investors, a Prospectus was registered with the SEC. Because registered securities were issued, numerous documents have been filed with the SEC and deposited in a docket provided for "the Trust" to the SEC; which may be located at sec.gov using the search engine known as "Edgar".

19. The PSA provides that the transfer of mortgage files, which include the mortgage note, must be completed by January 24, 2007. The journey prescribed by the PSA Scenario requires a sequential transfer commencing with the Originator.

20. "Chart I" follows the scenario in the PSA and documents.

///

21. The Originator transfers the mortgage files to the Depositor. In this PSA, no Warehouser-Sponsor (an intermediate party which buys the mortgages from different originators and assembles them into a portfolio for sale to a Depositor) has been identified. The Depositor may have performed this function in-house. The documents inspected show that Washington Mutual Bank, the Seller, entered into a blanket purchase agreement with WaMu Asset Acceptance Corp., the Depositor (Chase Doc 103.2 Exhibit 2:D.)

22. There is evidence that a sale of mortgages from the Originator to the Depositor was to take place on January 24, 2007 which allegedly was to include the mortgages in Series 2007-HY1. No evidence of assignment of these mortgages has been

provided. There is no evidence that the subject Deed of Trust was transferred as part of the 2007-HY1 sale. The journey for the note according to the PSA is shown upon the next page on 'Chart 1." The note is to travel from the Originator, to the Depositor, to Trustee I, and then several successor Trustees. (Note – The originator was "Washington Mutual Bank, F.A." and the "seller" was "Washington Mutual Bank." These two entities may not have been acting as one in the same. If not, "Washington Mutual Bank, F.A." would have had to sell the subject note and deed of trust to "Washington Mutual Bank" prior to the "seller" selling to the Depositor. This presents another entity in the chain of title. In addition, there is no mention of the entity "Washington Mutual Bank, F.A." being seized by the FDIC on September 25th, 2008; only "Washington Mutual Bank.")

23. More significantly there is a complete absence of documentation to show that the Depositor ever transferred the Series 2007-HY1 mortgages to the Trustee. The following documents have not been inspected if such documents exist:

a. The fully signed and executed purchase and sale agreement of the Series 2007-HY1 mortgages to the Trust.

b. The specific mortgages included in such a transfer.

c. A 10K Report showing the mortgages owned by the trust in the four quarters of 2007.

d. The agreement between the Trustee and the Custodian.

e. A document receipt for the Series 2007-HY1 mortgages.

f. A custodian's receipt evidencing transfer of the subject Deed of Trust.

g. An assignment of the Series 2007-HY1 from the Depositor to the Trustee.

24. There is a real concern here that the Trustee paid the Depositor over three billion dollars to purchase a portfolio of mortgages which were never delivered. There are very specific requirements, both legal requirements and requirements prescribed in the PSA, for passing these notes down the chain. The PSA transfer requirements are provided to assure a genuine sale so that income of the trust is passed through to investors as a non-taxable event and to protect investors from the bankruptcy claims of the Depositor or other preceding parties in the chain of mortgage title.

25. It appears that during the worst excesses of the mortgage bubble the very basic rules of property transfer and record-keeping were ignored. If this is so, the trust and its servicers have no standing to foreclose. In the bankruptcy case of *Kemp vs. Countrywide* (2010) 440 B.R. 624, the judge states that for the mortgage loan in question, a Countrywide employee testified that the mortgage note had never been delivered to the trustee, as required under the securitization documents. "Most significantly for purposes of this discussion, the note in question was never indorsed in blank or delivered to the Bank of New York, as required by the Pooling and Servicing Agreement." In addition, the

Countrywide employee testified "that it was customary for Countrywide to maintain possession of the original note and related loan documents." *Id*. at 628. This could well be the same in this case.

26. Five transfers of the subject Deed of Trust were supposed to have been made on the PSA journey. There are no documents to confirm that this journey ever actually took place.

Scenario 2. The Assignment

27. The Assignment of Deed of Trust by "JP Morgan Chase Bank as successor in interest to Washington Mutual Bank, F.A." of the Javaheri note was dated and notarized on 05/18/10.

28. In this scenario, the Depositor never transferred the subject Deed of Trust into the Trust prior to the cut off date (See "Chart II".) Instead Chase allegedly transferred the deed of trust and note, per the 05/18/10 assignment, to Bank of America, N.A. successor by merger to La Salle Bank, N.A. as Trustee for Washington Mutual Mortgage Pass-Through Certificates Series 2007-HY1 Trust. This transfer took place more than three years after the cut off date for the required transfer to the Trust on 1/1/2007. This contradicts the PSA scenario which claims that the subject Deed of Trust and the other mortgages in Series 2007-HY1 Trust were purchased by the Depositor and then resold to the Trust.

29. BAC was a successor by merger to La Salle Bank, N.A. Chart II suggests that the Depositor never transferred the mortgages sold to the Trustee. It also leaves unanswered whether any consideration

was paid for the assignment. The Trust paid the Depositor to purchase the subject Deed of Trust.

30. The Mortgage Loan Purchase & Sale Agreement shows a sale from the Seller to the Depositor contradicted by the Assignment. The subject Deed of Trust either went from Washington Mutual Bank, F.A. or Washington Mutual Bank to WaMu Acceptance Corp., or to Chase; one or the other - not both.

31. There simply is no evidence that Chase ever transferred the note to the Trustee, or either La Salle or its successor BAC, by endorsement or otherwise.

Scenario 3. The Purchase and Sale Agreement between FDIC and Chase.

32. WAMU F.A. originated the loan. WAMU FSB held the loan and did not transfer it to the Trust. The PSA provides:

33. When defining the term "Mortgage File" and the documents which were to be included, the following exclusionary language was added as a proviso:

> provided, however, that in the event that either (a) Washington Mutual Bank or Washington Mutual Bank fsb is the "Seller of the Mortgage Loan or (b) Washington Mutual Mortgage Securities Corp. is the Seller of the Mortgage Loan and purchased the Mortgage Loan from Washington Mutual Bank or Washington Mutual Bank fsb, then the

> Mortgage File need not include an assignment of the Mortgage executed in blank or to the Trustee or the Trust as provided in clause (**X**)(iii)(1)(y) or (**X**)(iii)(2)(y) above, as applicable, but the Mortgage File shall, unless the Mortgage Loan was originated by Washington Mutual Bank or Washington Mutual Bank fsb, include a complete chain of assignments of the related Mortgage from the originator of such Mortgage Loan to Washington Mutual Bank or Washington Mutual Bank fsb, as applicable;" Chase doc 103-3, Pg. 60 ¶5.

34. In the Prospectus Supplement, WAMU states that it will not transfer the notes to the Trust despite statements to the contrary in the PSA.

> "With respect to each mortgage held by WMB fsb as custodian on behalf of the trust, an assignment of the mortgage transferring the beneficial interest under the mortgage to the trustee or the trust will not be prepared or recorded. In addition, an assignment of the mortgage will not be prepared or recorded in connection with the sale of the mortgage loan from the mortgage loan seller to the depositor." (Supplement, BP Investigative Agency – Exhibit I, pg. 21).

35. As a result the Trust may not be able to enforce the mortgages it has purchased.

> "(d) the trustee or the trust may not be able, acting directly in its own name, to enforce the mortgage against the related mortgaged

> property or mortgagor and may be required to act indirectly through the mortgage loan seller, as the existing mortgagee of record,…."

36. Furthermore, if WAMU or WAMU FSB sustains a financial failure, the mortgages will be taken over by FDIC which may decide not to transfer the mortgages to the Trust.

> "If certain events occur relating to WMB fsb's financial condition or the propriety of its actions, the FDIC may be appointed as conservator or receiver for WMB fsb…." (Supplement, BP Investigative Agency – Exhibit I, pg. 22).

> "In addition, no assurance can be given that the FDIC would not attempt to exercise control over the mortgage loans or the other assets of the depositor or the trust on an interim or a permanent basis…" (Supplement, BP Investigative Agency – Exhibit I, pg. 23).

37. The PSA makes statements in flat contradiction of the statements quoted above.

> Section 2.04. Conveyance of Mortgage Pool Assets; Security Interest.
>
> It is the express intent of the parties hereto that the conveyance of the Mortgage Pool Assets to the Trust by the Company as provided in this Section 2.04 be, and be construed as, an absolute sale of the Mortgage Pool Assets. Chase Doc 103-4, pg.11.

38. An "absolute sale" requires delivery of what has been sold in exchange for payment of the purchase price. A seller who has made an absolute sale of a horse has to deliver the horse upon receipt of payment. In other words, the transaction is perfected when there has been negotiation, payment received, and physical delivery of what has been purchased from the seller to the buyer through possession and receipt of that which was sold.

39. Again, the transfer and exchange quoted above never took place. In most cases I have investigated involving WaMu securitized loans, Chase as servicer, submits a note containing a "bank endorsement," and argues that the note(s) are considered "bearer paper." This was clearly not the intent of "the Trust." Trusts are created to hold and protect assets, and to insure that the assets are kept as bankruptcy remote. The fact that the subject note in this case was allowed to float about as "bearer paper" and suddenly be assigned to the WaMu 2007-HY1 Trust more than 3-years beyond the Trust's closing date contravenes its own laws.

40. "The Trust" was contractually closed from conducting any further business after January 24th, 2007. "The Trust" has no employees. There was no one available to negotiate consideration or physically accept the asset file. Furthermore, "the Trust" was not allowed to accept any non-performing loan.

41. The Purchase and Assumption Agreement, attached to Chase's Request for Judicial Notice as Exhibit 7, states on page 20:

ARTICLE VIII PROFORMA

> The Assuming Bank, as soon as practical after Bank Closing, in accordance with the best information then available, shall provide to the Receiver a Proforma Statement of Condition indicating all assets and liabilities of the Failed Bank as shown on the Failed Bank's books and records as of Bank Closing and reflecting which assets and liabilities are passing to the Assuming Bank and which assets and liabilities are to be retained by the Receiver. In addition, the Assuming Bank is to provide to the Receiver, in a standard data request as defined by the Receiver, an electronic database of all loans, deposits, and subsidiares and other business combinations owned by the Failed Bank as of Bank Closing. See Schedule 3.1 (Doc. 104-1, pp. 58-59)

42. This means there is a substantial likelihood that the Javaheri Deed of Trust still resides in the bowels of the FDIC (See chart III.)

43. There is no evidence that the Trustee or Depositor ever delivered the mortgage portfolio to the Custodian.

> Section 2.05. Delivery of Mortgage Files.
>
> "On the Closing Date, the Company shall deliver to and deposit with, or cause to be delivered to and deposited with, the Trustee or the Initial Custodian the Mortgage Files, which shall at all times be identified in the records of the Trustee or the Initial Custodian,

as applicable, as being held by or on behalf of the Trust. Chase doc 103-4, pg. 12.

44. There is no evidence that mortgage files were ever assembled, maintained, and conveyed to the Trust.

Chase Doc 103-3, pg. 59:

"Mortgage File" is defined as follows: The following documents or instruments with respect to each Mortgage Loan, (X) with respect to each Mortgage Loan that is not a Cooperative Loan:(i) The original Mortgage Note endorsed (A) in blank, without recourse, (B) to the Trustee, without recourse, or (C) to the Trust, without recourse, and all intervening endorsements evidencing a complete chain of endorsements from the originator to the endorser last endorsing the Mortgage Not[e.]

45. In the Prospectus Supplement, WAMU states that it will not transfer the notes to the Trust despite statements to the contrary in the PSA.

"With respect to each mortgage held by WMB fsb as custodian on behalf of the trust, an assignment of the mortgage transferring the beneficial interest under the mortgage to the trustee or the trust will not be prepared or recorded. In addition, an assignment of the mortgage will not be prepared or recorded in connection with the sale of the mortgage loan from the mortgage loan seller to the

depositor." (Supplement, BP Investigative Agency – Exhibit I, pg. 21).

46. As a result the Trust "may not be able" to enforce the mortgages it has purchased.

> "(d) the trustee or the trust may not be able, acting directly in its own name, to enforce the mortgage against the related mortgaged property or mortgagor and may be required to act indirectly through the mortgage loan seller, as the existing mortgagee of record,…." (Supplement, BP Investigative Agency – Exhibit I, pg. 22).

47. Based on my review of the documents it appears the Javaheri loan never made it to the "WaMU Mortgage Pass-Through Certificates Series 2007-HY1 Trust." It is my opinion that beneficial interest in the Javaheri loan remains within the bowels of the Federal Deposit Insurance Corporation (FDIC.)

48. Subject loan was identified within the above referenced Trust using the Bloomberg Terminal. Bloomberg Exhibits are marked as "BP Investigative Agency Exhibits A-H" are attached to this Declaration. The exhibits contain the following:

Exhibit A - Subject loan identified within the Trust as loan number "605736874." (Note: Loan numbers seldom match the number assigned at the time of origination. Also, the "orig month" almost always listed as the month after the origination.)

Exhibit B - Pool Description for Tranche "1A1" to which the subject loan was pledged. (Note: the subject loan appears to have been pledged to all 34 Classes / Tranches within the Trust.)

Exhibit C - List of 34 "Tranche" Classes within the WaMu 2007-Hy1 Trust showing 19 of the 34 tranches being paid off.

Exhibit D - Subject loan data / history. Loan is #41 which is circled, and the data runs perpendicular in the additional pages of the exhibit. This information details the type of loan (ARM, "limited" documentation of income, Loan-to-Value percentage [45%], Credit Score of Borrower, Loan Index, Interest Rate "Lifecap & Margin," etc.)

Exhibit E - Pool Description for Tranche "1A2" to which the subject loan exists. The Bond Description for this tranche shows it was "Paid Off" on "09/25/2011."

Exhibit F – "Current Amount" of the Javaheri loan ($955,106) as of October 2012.

Exhibit G – The Javaheri loan within "Tranche MB6." The Bond Description for this Tranche shows it was "paid off" on 02/25/09.

Exhibit H – Current monthly "Remittance Report" dated 09/28/12 for the WaMu 2007-HY1 Trust.

49. The evidence shows that the principal balance of the subject loan has decreased during the period Defendant has not made payments.

50. At the time I conducted the original report in February of 2012, the current amount of the subject loan was "$974,978" ("BP Investigative Agency Exhibit D.")

As of 11/01/12, the current amount shows "$955,106" ("BP Investigative Agency Exhibit F.")

The principal balance of the subject loan has decreased by $19,872." This is irrefutable evidence that the certificate holders have been receiving payments toward Plaintiff's alleged obligation and that there is no default.

51. Per the PSA, Chase Doc. 103-4 pp. 36-37):

> Monthly P&I Advances; Distribution Reports to the Trustee.
>
> To the extent described below, the Servicer is obligated to advance its own funds to the Custodial Account for P&I, or apply funds held in the Custodial Account for P&I for future distribution, to cover any shortfall between (i) Monthly Payments scheduled to be received in respect of the Mortgage Loans and (ii) the amounts actually received;

52. Monthly payments alleged to have been in default were paid in the form of advances by the Servicer.

53. Chase alleges that "Washington Mutual Bank" sold Plaintiff's Note to "Washington Mutual Asset Acceptance Corporation" on or about January 1st,

2007." There simply is no evidence that this sale ever took place.

54. There is also the fact that insurance proceeds have paid off 19 of the Trust's 34 Classes / Tranches; all to which the subject loan has been pledged. "BP Investigative Agency Exhibit G" shows the subject loan within "Tranche MB6," and that this Tranche was "Paid Off" on 02/25/09. The current Monthly Remittance Report as of 09/28/12 (BP Investigative Agency – Exhibit H – pg.2) shows "Tranche MB6" as suffering zero "Principal Loss."

55. Because the loan wasn't assigned to the trust until 05/18/10, how could it have been paid off by the insurance? The evidence represents, at a minimum, insurance fraud. "The Trust" was most likely a "naked trust" which was collecting insurance proceeds based on fictitious loans appearing as holograms.

56. Prospectus - pg. 77:

> Financial Guarantee Insurance
>
> Financial guarantee insurance, if any, with respect to a series of securities will be provided by one or more insurance companies. The financial guarantee insurance will guarantee, with respect to one or more classes of securities of a series, timely distributions of interest only, timely distributions of interest and ultimate distribution of principal or timely distributions of interest and distributions of principal on the basis of a schedule of principal distributions set forth in

> or determined in the manner specified in the related prospectus supplement. The financial guarantee insurance may also guarantee against the allocation of losses to a security holder or against any payment made to a security holder that is subsequently recovered as avoidable preference payment under federal bankruptcy law. The material terms of the financial guarantee insurance policy for a series, if any, will be described in the related prospectus supplement, and the financial guarantee insurance policy will be filed with the Commission as an exhibit to a Current Report on Form 8-K within 15 days of issuance of the securities of the related series.

57. I was asked if I had an opinion as to whether or not the Trust or JPMorgan Chase Bank could have a beneficial interest in the subject Note and Deed of Trust. My opinion is no.

58. The Office of Thrift Supervision (OTS) seized the banking operations of Washington Mutual, Inc. on September 25th, 2008. At the time of seizure, Washington Mutual Bank, F.A. did not own the subject Note and Deed of Trust as it was to have been sold in an "absolute sale" by Washington Mutual Bank to Washington Mutual Asset Acceptance Corp (WMAAC) on or before January 1st, 2007. Washington Mutual Bank would have retained only the servicing rights to the subject loan after the sale. WMAAC was to immediately sell and convey the subject loan to LaSalle Bank, N.A. as Trustee of the Trust. This never happened.

59. WMAAC retained the Notes and Mortgages / Deeds of Trust in violation of the PSA, and in violation of the representations and warranties made to the investors in the Trust. These WaMu entities appear to have retained the assets on their own books and records, further violating "Section 2.03" of the PSA. Per the PSA, Chase Doc. 103-4 pp. 10-11:

> Section 2.03. Separateness Requirements. Notwithstanding any other provision of this Agreement and any provision of law that otherwise so empowers the Trust, so long as any Certificates are outstanding, the Trust shall perform the following:
>
> (i) except as expressly permitted by this Agreement or the Custodial Agreement, maintain its books, records, bank accounts and files separate from those of any other Person;
>
> (ii) except as expressly permitted by this Agreement, maintain its assets in its own separate name and in such a manner that it is not costly or difficult to segregate, identify, or ascertain such assets;
>
> (iv) hold itself out to creditors and the public as a legal entity separate and distinct from any other Person and correct any known misunderstanding regarding its separate identity and refrain from engaging in any activity that compromises the separate legal identity of the Trust;
>
> (v) prepare and maintain separate records, accounts and financial statements in

accordance with generally accepted accounting principles, consistently applied, and susceptible to audit. To the extent it is included in consolidated financial statements or consolidated tax returns, such financial statements and tax returns will reflect the separateness of the respective entities and indicate that the assets of the Trust will not be available to satisfy the debts of any other Person;

(xi) except as expressly permitted by this Agreement, not commingle its assets or funds with those of any other Person;

(xiii) except as expressly permitted by this Agreement, not pledge its assets for the benefit of any other Person;

xiv) not hold out its credit or assets as being available to satisfy the obligations of others;

None of the Trustee, the Delaware Trustee, the Company or the Servicer shall take any action that is inconsistent with the purposes of the Trust or Section 2.02 or Section 2.03. Neither the Company nor the Servicer shall direct the Trustee or the Delaware Trustee to take any action that is inconsistent with the purposes of the Trust or Section 2.02 or Section 2.03.

60. WAMU was paid over $3 billion by investors for the purchase of the deeds of trust contained in the Series 2007-HY1 portfolio but never delivered these deeds of trust to the MBST. Essentially the

investors had been promised a true sale with delivery of the deeds of trust into the MBST which would function as a locked box. The locked box would protect investors against WAMU creditors and WAMU bankruptcy. WAMU failed to protect its investors.

61. Instead WAMU held onto the deeds of trust. Because WAMU failed to deliver the deeds of trust to the MBST, the deeds of trust were acquired by FDIC by its takeover of WAMU assets. FDIC entered into two agreements with JP Morgan Chase. It entered into a servicing agreement to service the WAMU deeds of trust, and also entered into a purchase and sale agreement with Chase which recited only terms and conditions of sale but never conveyed the mortgage portfolio, in whole or in part.

62. As stated previously in this declaration, I believe the subject loan remains with the FDIC due to the facts outlined above, and the fact that the FDIC could not sell to Chase that which Washington Mutual Bank did not own.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on the 2nd day of November, 2012.

_____

William J. Paatalo
Private Investigator – OR PSID# 49411
5200 SW Meadows Rd. #150
Lake Oswego, OR 97035

J. Declaration of Eric Waller (Doc. 60)

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JPMORGAN CHASE BANK, N.A., and CALIFORNIA RECONVEYANCE COMPANY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DARYOUSH JAVAHERI,
Plaintiff,
v.
JPMORGAN CHASE BANK, N.A., CALIFORNIA RECONVEYANCE COMPANY and DOES 1-150, inclusive,
Defendants.

Case No.: CV-10 8185 ODW (FFMx)
The Hon. Otis D. Wright II.

DECLARATION OF ERIC WALLER
IN SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT

DATE: July 30, 2012
TIME: 1:30 p.m.
CRTRM: 11
Action Filed:
Trial Date:
October 29, 2010
September 18, 2012
I, Eric Waller, declare as follows:

1. I am a HL Senior Research Specialist with JPMorgan Chase Bank, N. A.

("JPMorgan"). I am duly authorized to make this declaration on its behalf. As part of my duties at JPMorgan, I monitor and oversee loans and/or properties that are involved in litigation. As a result of this position, I have access to regularly kept business records of JPMorgan created at or near the time of events set forth in the documents and which consist of the documents relating to the loan ("Subject Loan") in connection with the property commonly known as 10809 Wellworth Avenue, Los Angeles, California 90024 ("Subject Property") ("Subject Property").

2. The documents I reviewed in connection with my role at JPMorgan are business records created by Washington Mutual Bank ("WaMu") and JPMorgan as a part of regular business practices, were all made in the ordinary course of business at or about the time of the events reflected therein occurred, and are kept in files and in computer systems at JPMorgan

and formerly at WaMu. When JPMorgan purchased certain assets of WaMu from the Federal Deposit Insurance Corporation ("FDIC"), JPMorgan took possession of the WaMu documents. These records include the documents relating to the Subject Loan. Those documents contain entries made in the ordinary course of business at or about the time the events reflected therein occurred.

3. I submit this declaration in support of JPMorgan's and California Reconveyance Company's Motion for Summary Judgment, or, In the Alternative, Partial Summary Judgment. If called as a witness in this matter, I am competent to testify based upon my review of the records, and of my own personal knowledge, to the best of my recollection, as to the matters set forth in this declaration.

4. WaMu, formerly a federally-chartered savings and loan association, is now in receivership under the control of the FDIC. On September 25, 2008 the Office of Thrift Supervision closed WaMu and appointed the FDIC as receiver ("OTS Order"). September 25, 2008 is also the date when JPMorgan acquired certain of WaMu's assets by entering into a Purchase and Assumption Agreement ("P & A Agreement") with the FDIC. The Subject Loan was among the assets which JPMorgan acquired through the P & A Agreement. Copies of the OTS Order and the P & A Agreement are attached hereto as Exhibits "1" & "2" respectively.

5. Pursuant to the terms of the P & A Agreement, JPMorgan is currently handling the Subject Loan. JPMorgan also is the current holder of the beneficial

interest in the Subject Loan. The Subject Loan has never been sold to a securitized trust.

6. In November, 2007, plaintiff Daryoush Javaheri ("Plaintiff') executed a Residential Construction Loan Agreement (the "Agreement") for the loan in question, loan number 3010332439 ("Subject Loan"). A copy of the Agreement is attached hereto as Exhibit "3". In addition, in November, 2007, the Plaintiff signed a Fixed/Adjustable Rate Note, along with a Construction Loan Addendum to Note (hereinafter collectively referenced as the "Note") for the Subject Loan. A copy of the Note is attached hereto as Exhibit "4". The Subject Loan was in the principal amount of $2,660,000.00. Under the terms of the Agreement and the Note, WaMu agreed to advance the Subject Loan's proceeds for the purpose of financing the purchase of the Subject Property, the construction of the residence ("Residence") on the Subject Property and/or other improvements to be made on the Subject Property, and if applicable, the refinancing of any existing liens on the Subject Property. The Note constitutes Plaintiffs obligation to repay the Subject Loan.

7. A thorough and diligent search for the original of the Note has been made. However, the hard copy collateral file pertaining to the Subject Loan containing the original of the Note cannot be located. A copy of the Affidavit of Lost Note is attached hereto as Exhibit "5". The Affidavit of Lost Note states that: "The loss of possession [of the original of the Note] is not the result of the original Note being canceled or transferred to another party." See Affidavit of Lost Note, Exhibit "5", ¶5.

8. The Note was secured by a deed of trust ("DOT"), which encumbered the Subject Property for the amount owing under the Subject Loan. A copy of the recorded DOT is attached hereto as Exhibit "6".

9. On October 16, 2009, a Notice of Completion of the residence and or other improvements to be completed on the Subject Property ("Notice of Completion") was recorded in the official records the Los Angeles Recorder's Office as document number 20091574519. A copy of the Notice of Completion is attached hereto as Exhibit "7".

10. The DOT identified WaMu as the Lender and Chicago Title Company as the trustee. In May, 2010, California Reconveyance Company was substituted as the Subject Loan's trustee.

11. Paragraph 2 of the DOT sets forth the procedure for applying payments or proceeds received under the Subject Loan, and states that, "all payments accepted and applied by Lender shall be applied in the following order of priority (a) interest due under the Note, (b) principal due under the Note, (c) amounts due under Section 3."

12. Beginning in 2009, Plaintiff fell behind on his payments concerning the Subject Loan.

13. The DOT contains a power of sale clause. Specifically, paragraph 22 of the DOT states that: "Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement...If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of

all sums secured by this Security instrument without further demand and may invoke the power of sale."

14. On May 3, 2010, a Notice of Default And Election To Sell ("NOD") was recorded in the official records of the Los Angeles County Recorder's Office as instrument number 20100596313. This NOD was subsequently rescinded, and a Notice of Rescission was recorded on May 14, 2010 in the official records of the of the Los Angeles County Recorder's Office as instrument number 201001661623. A new NOD was recorded on May 14, 2010 in the official records of the Los Angeles County Recorder's Office as instrument number 201001661624.

15. As a standard practice in notating the activity occurring on the home loans that JPMorgan services, a Consolidated Notes Log ("Consolidated Notes Log") is kept. These entries are contemporaneously made when the activity occurred. have reviewed the Consolidated Notes Log as to the Subject Loan for the dates of January 23, 2010 through the end of October, 2010, which is when Plaintiff filed the lawsuit herein. A copy of the Consolidated Notes Log is attached hereto as Exhibit "8". In addition I have reviewed the Loss Mitigation Process Notes ("Loss Mitigation Notes"), which, among other things, contains entries relating to loan modification activities once a loss mitigation file has been opened. The Loss Mitigation Notes are attached hereto as Exhibit "9". The Consolidated Notes Log and the Loss Mitigation Notes, which are in reverse chronological order, contain the following entries:

I. Contacts With Plaintiff Prior To The Recording Of the NOD On May 24, 2010

16. On February 2, 2010, someone called and stated that he was the borrower's attorney and that he would be sending in a loan modification package. Exhibit "8", Consolidated Notes Log, page 001054, entry for February 2, 2010.

17. On February 11, 2010, an agent for JPMorgan went to the address for the Subject Property and spoke with the Plaintiffs housekeeper. The house keeper accepted a letter in an envelope marked confidential and stated to the agent that the Plaintiff would get the letter as soon as possible. The housekeeper did not provide the agent with any employment or other contact information. Exhibit "8", Consolidated Notes Log, page 001052, entry for February 19, 2010.

18. On or about February 19, 2010, a loan servicer spoke with Plaintiff. The loan servicer advised the Plaintiff of the status of the Subject Loan and that it was in foreclosure and advised. Plaintiff of the workout options that were available to him. The loan servicer asked regarding Plaintiffs current income. Plaintiff informed that he was self-employed, that he did not have "definite number" as to what his income was but that his business of importing general merchandise to China was down. The loan servicer asked how much of a payment that he could afford. The Plaintiff said "about 8000 — 9000 payment." Plaintiff further informed that he had hired an attorney to work on this case and Plaintiff advised that "he should have document in by the next 2 weeks." The loan servicer further advised the Plaintiff that he needed to send a payment in right away due to the delinquency on the Subject loan and

that by not doing so, the Plaintiff was "running the risk of foreclosure review." Plaintiff advised that he was "liquidating assets for more income and [that the] family is helping." The loan servicer gave Plaintiff his contact information. Exhibit "8", Consolidated Notes Log, page 001051, entries for February 19, 2010.

19. In the entry for February 24, 2010, it was noted that the Plaintiff would not be able to make payment and that the HUD notice went out on February 5, 2010 and expired on March 2, 2010. It was further noted that a complete loan modification package was expected to be received in 2 weeks. Exhibit "8", Consolidated Notes Log, page 001051, entry for February 24, 2010.

20. The entry for March 16, 2010 reflects that no loan documents had been received from Plaintiff. A request was sent to have the Subject Loan classified as being breached and a request was to be made to have the loan placed in foreclosure. Exhibit "8", Consolidated Notes Log, page 001051, entries for March 16, 2010.

21. On or about March 30, 2010, the Plaintiff called and the loan servicing agent informed Plaintiff of the status of the Subject Loan and explored whether a workout solution was feasible. (The acronym "ER Wrkout Sol" stands for "early resolution workout solicitation".) However, the Plaintiff at that time was uncooperative and unconcerned. The loan servicer noted that the Plaintiff "cannot commit to pay", and Plaintiff was "gathering details on RFD & FNCLS to further [review] the situation." The Plaintiff was not prepared "to answer the financial questions." (The

acronym "RFD" stands for "reason for default" and the acronym for "FNCLS" stands for the borrower's current "financials".) Exhibit "8", Consolidated Notes Log, page 001048, entries for March 30, 2010.

22. On April 22, 2010, a loan servicer left a message on Plaintiffs cell phone to call. Exhibit "8", Consolidated Notes Log, page 001048, entries for April 22, 2010.

23. On or about April 29, 2010, a loan servicing agent contacted the Plaintiff, who hung up. Exhibit "8", Consolidated Notes Log, page 001047, entries for April 29, 2010.

24. On or about May 4, 2010, the loan servicing unit received an incomplete third party authorization from the Plaintiff and a letter was mailed to the borrower. Exhibit "8", Consolidated Notes Log, page 001047, entries for May 4, 2010

II. Contacts With Plaintiff After The Recording Of the NOD On May 24, 2010

25. On or about June 12, 2010, a loan servicing agent received a call from Plaintiff, who called to explore options to avoid foreclosure, and the agent advised Plaintiff to request a modification of the Subject Loan. Exhibit "8", Consolidated Notes Log, page 001047, entries for June 12, 2010.

26. On August 4, 2010, a representative of the loss mitigation unit spoke to the Plaintiff to inform him of the state of the Subject Loan's account. The Plaintiff informed that he was self-employed, and he advised that he had obtained an extension to file his

2009 tax return. The Loss Mitigation representative advised what documents were required to be submitted on behalf of a loan modification request, including the most recent complete business and personal bank statements, and a profit and loss statement for the current year. The representative attempted to obtain a time frame as to when the documents would be submitted. However, the Plaintiff could not give him a realistic time period as to when the documents would be submitted. Plaintiff informed that he would be the point of contact for the interior appraisal. Exhibit "9", Loss Mitigation Notes, page 001013, entries for August 4, 2010.

27. Between August 10, 2010 to September 22, 2010, documents were collected in support of the loan modification review, and on September 22, 2010, the loan modification file was submitted to an underwriter for review. See Exhibit "9", Loss Mitigation Notes, pages 001011 - 001007, entries for August 10, 2010 to September 22, 2010.

28. The September 20, 2010 entry states that Plaintiff filed for bankruptcy. See Exhibit "9", Loss Mitigation Notes, pages 00108, entry for September 20, 2010.

29. On September 22, 2010, Plaintiffs file was reclassified as bankruptcy loss mitigation file. See Exhibit "9", Loss Mitigation Notes, pages 00107, entry for September 22, 2010.

30. Also on September 22, 2010, a telephone call was received from Plaintiff informing that information was requested in regard to a short sale of the Subject Property. See Exhibit "9", Loss

Mitigation Notes, pages 00107, entry for September 22, 2010.

31. Later on September 22, 2010, the Plaintiff called and wanted to know what his options were. The representative informed Plaintiff that a short sale was an option if he had been denied a loan modification. Plaintiff informed that he would like to refinance and the representative transferred him to another representative's voice mail. See Exhibit "9", Loss Mitigation Notes, pages 00106, entry for September 22, 2010.

32. On September 23, 2010, the Plaintiff inquired what he needed to do for a short sale. Plaintiff again asked regarding his options. Plaintiff was informed that he would need to file a motion releasing the Subject Property from the bankruptcy estate if the Subject Property was to be eligible for a short sale. Plaintiff informed that he would speak with his lawyer. Plaintiff informed that he had received a letter informing him that he had been denied for a loan modification because of the high balance on the Subject Loan. The representative stated that he would send an e-mail to his superior so that the short sale department could contact Plaintiff regarding his request. See Exhibit "9", Loss Mitigation Notes, pages 00106, entry for September 23, 2010.

33. Any contacts made by JPMorgan directly to Plaintiff concerning a workout of the Subject Loan ceased when the action herein was filed on October 29, 2010.

34. At present, the Subject Loan is still due for the November 1, 2009 payment as well all subsequent payments thereafter. 35. To date, Plaintiff has not tendered or offered to tender the entire amount of indebtedness owing under the DOT.

36. To date, no trustee's sale has occurred in this case. declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 1 day of May, 2012 at Chatsworth, California.

/s/ _____
Eric Waller, Declarant

K. Declaration of Jeffrey Thorne

VERNON L. BRADLEY (SBN 49294)
LAW OFFICES OF VERNON L. BRADLEY
Waldo Point Harbor
54 Liberty Dock
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Attorney for
SCOTT C. JOLLEY

SUPERIOR COURT STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF MARIN
Unlimited Civil Case

SCOTT CALL JOLLEY,
Plaintiff,

v. Case No.: CIV 1002039

CHASE HOME FINANCE, LLC, et al.
Defendants.

PLAINTIFF'S EXPERT WITNESS
JEFFREY A. THORNE's DECLARATION
IN SUPPORT OF PLAINTIFF'S
OPPOSITION TO DEFENDANT'S
SUMMARY JUDGMENT

I. Jeffrey A. Thorne. if called upon could truthfully and competently testify to the following facts:

1. Currently I am employed as an asset manager for the FDIC through a contractor for the FDIC, RSM McGladrey Inc. I am intimately familiar with the procedures for taking over a failed bank and the required notices that must be given to insulate the buying bank from liability for the original loans of the failed banks.

2. Part of my job with the FDIC was to complete whole bank sales and receiverships through the processing of repudiations and terminations of contracts and agreements. When a failed bank takeover is opened by the FDIC, the standard procedure was to send out repudiation letters to the borrowers effectively cutting off funding and liabilities for the new bank and the outstanding loans. However, when the WAMU/Chase escrow was opened by the FDIC in 2008, after the FDIC had taken over WAMU, and its subsequent sale to Chase, the escrow opened and closed so quickly that no repudiation letters were sent out and in specific, no letter was sent to Mr. Jolley. I have specifically asked Jolley whether he received a repudiation letter and he has specifically told me that he has not, just like the millions of other borrowers. See Dec. Scott Jolley

3. Within the takeover procedures by the FDIC, the FDIC will enter into an agreement with the succeeding bank. In this instance the FDIC entered into an agreement with Chase Bank. But because of the nature of the transaction, the FDIC guaranteed 80% of the loans, while Chase only assumed 20% of

the potential losses on the loans. Pursuant to the public part of the agreement with the FDIC, of which were approximately 36 pages, the balance of the contract and the complete agreement with the FDIC and Chase bank is 118 pages long which has not been made public. I am familiar with this agreement. I read it. Chase took liability for the ongoing contracts in return for getting an 80% discount on the loan's principal owed. Essentially, Chase Bank traded their right to cut off all liability on WAMU"S end for money and a good deal.

4. Chase assumed the rights and benefits owing to WAMU under its outstanding contracts with its customers. Because of the favorable guarantee from the FDIC, they also agreed to assume the liabilities flowing from the WAMU contracts I know this because I have read the agreement.

5. From 2002 to 2006, I was senior loan consultant for WAMU. The escrow with the FDIC called for the escrow to guarantee 80% of the losses and for Chase to only obtain a 20% share of the losses so that in any given transaction if there was a million dollar loan Chase had only 20% in the loan at risk. If Chase Bank can foreclose on a loan they make immediate cash on the foreclosure because they only have 20% liability for the loan, if they modified the loan, then Chase would be holding a long term loan at a moderate or low interest rate. If they foreclose on a $1,000,000 loan, then make a credit bid of $1,000,000, they can and have sold similar homes for $500,000 after the foreclosure. They are still ahead of the game because they only have $200,000 in the loan (20%), netting $300,000 since the original credit

bid was not really a cash bid and no real money. credits, or the like in value were exchanged between the parties.

6. That was the standard in 2008 and it required the permission of the FDIC to foreclose. Under new standards, when the FDIC sells off a failed bank, the bank must agree to modify the loan to keep homeowners in their homes.

7. When I was employed at Washington Mutual Bank, I led efforts to originate residential construction loans, residential purchase loans, as well as consumer loans. I established loan policy and underwrote traditional loans being originated.

8. While I was in the position at WAMU Bank as a construction supervisor, one of the offices I worked at was the WAMU, Chatsworth office, where Mr. Jolley had been calling into the construction department saying his loan was not right, that there was something wrong, and that there was money that was supposed to be coming to him that was not getting to him.

9. The WaMu people at Chatsworth gave me Mr. Jolley's file. I sat down with the file and balanced out the file, and found that there was about $350,000 in limbo that should have been Mr. Jolley's money. But someone, to balance the computer in disbursements, just sort of placed it in categories that looked like the work that was done and the money was dispersed when the work had not been done, nor was the money dispersed. Mr. Jolley's loan was not a ground-up construction loan, but was a remodel of an existing home.

10. The difference on a straight construction loan is you calculate your loan to value based on the cost of the land plus the cost of construction, and you base your loan to value based off of that.

II. Mr. Jolley's loan, being a remodel loan because he purchased the existing dwelling for an existing loan and for doing a construction loan the original down payment when he purchased the property for $1,600,000 you can take that amount and use it an initial down payment of $320,000 for the construction loan.

12. Because the lending department at WaMu failed to use a construction loan specialist to put together the loan, they misconstrued the formula for a construction loan scenario to one of a ground up construction process, taking raw land, applying for a construction loan than in part would pay for the land and do the construction and would require a percentage of the loan to be paid in by the borrower. In the instance of Mr. Jolley's loan he was doing a remodel of a pre-existing structure and had already put down 20% of a purchase price of $1.6 million, or $320,000, that had been purchased with WAMU as a Purchase Loan.

13. From the very beginning, this loan was improperly put together and it was put together on false pretenses of something that could not have been done based on the numbers that were given. And the people that were involved should have known that, based on what was going to be done, that the work that was to be done could not have been completed for the amount of the loan.

14. Jolley was forced to be in endless battles with WaMu's construction department because the initial accounting was drawn up in such a manner as to make it appear that Jolley had done work and been compensated for categories of work such as windows roof or siding and the like when in fact that work had not yet been done and he had not been compensated which effectively reduced a million dollar loan to a half a million which made it impossible to complete the construction he had got permitted and agreed to by WaMu for the $1,000,000 agreed to but only received $500,000 in reality. See Letter of Vernon L. Bradley attached as Exhibit A.

15. After the initial contact with Jolley, I left WaMu in 2006 because they had shut down lending operations. Mr. Jolley then hired me prior to the September 28 take-over of WaMu bank to negotiate a loan modification with Washington Mutual Bank to cover an expanded scope of building. Mr. Jolley had been informed that if he increased the square footage of the project he would receive a higher appraisal and would qualify tor more money. I put together a request for loan modification and submitted it to Washington Mutual. Part of the problem of the construction process was that initially Washington Mutual had lost his loan documents delaying funding for approximately 8 months and he had a building permit requiring him to complete construction within 18 months. The endless delays in funding, the misaccounting of funds and misallocations for disbursement all led him to get expensive extensions on his building permit and even had to pay $7,000 for an extension on construction when in fact the delays had been caused by WaMu and their defective

accounting and disbursements. I put together a loan modification and outlined the circumstances which are attached as Exhibit B to my declaration. WaMu eventually agreed to the modification, but I informed them that the loan would be at least $400,000 short to finish the project. Mr. Jolley's whole ability to complete the project was doomed from the inception and was doomed even with the modification of the loan even though Chase taking over WaMu. After Chase took over WAMU, they maintained the same people in their Chatsworth office and even after they known the inherent defects in the modified Jolley loan and that it required an additional $400,000, they refused to modify the loan to provide the necessary funds to complete the project. The assumed contract called for the construction loan to roll over in to permanent financing at a substantially reduced interest rate making his payments affordable. When I approached Chase to try to convince them to complete the project and obtain the necessary additional funds to complete the construction project to roll it into permanent financing they would refuse to modify the loan because they had decided to foreclose on Mr. Jolley.

16. By the nature of a construction it is different than a conventional residential loan: it is ambulatory, that is payments are paid out over the course of construction leading up to a point of construction within specific time limits to comply with not only the time limits within the construction loan but also within the time limits required by the municipality in the building permit to complete the project. Jolley's project rather than taking 18 months to complete ended up taking over three years and as

predicted, as Jolley approached the end of the construction process, it was painfully obvious the loan was short $400,000 to complete the project. This of course resulted in Jolley experiencing a cascade of liens and lawsuits from people who had been working on the project. This caused his credit to decline and he was unable to borrow money from alternative sources and ultimately forcing him into the position of not paying the underlying construction mortgage.

17. Chase moving to foreclose on the property after it had been completed resulted in this suit. Jolley's credit had been destroyed. Then with the total collapse of the residential market a property previously appraised to be at $4 million suddenly was $3 million, The acts of WaMu and its successor in interest directly lead to the collapse of Mr. Jolley and his project. Lenders are liable for lending practices that they know will lead to the economic destruction of their borrowers. Late and faulty disbursements from WaMu and Chase created an impossible situation for Jolley.

18. There is a continuum from WaMu in which Chase agreed to assume the liability of acts and rights and obligations and the subsequent liability of Chase for the acts of its own representatives, because of the nature of the agreement Chase entered into the FDIC and the continuation of employees in the construction loan department and more importantly their was an obligation ongoing to have the construction loan rolled over into permanent financing. There was an obligation for Chase to correct the known defects in the underlying Joan by

enlarging the amount of money so that Jolley could complete the project in a timely fashion.

19. After Chase had taken over WAMU, I approached Chase's senior construction lenders and explained what had gone on before with WAMU on Jolley's loan, explaining that there was a necessity that an additional $400,000 be given to Jolley in order for him to finish the project, and then to roll the construction financing into a permanent loan. Despite Chase acknowledging all the information I had gathered about the improper formation of the loan, the improper allocation of funds for work that had not been done, and the juggling of accounts to make it impossible for Jolley to get adequate funds to finish the project, and the agreement of WAMU to modify the loan because of the expanded square footage, Chase looked at the WAMU product and made a corporate decision not to expend additional funds on the WAMU loans even though they had assumed all the liability for the WAMU loans.

I declare the foregoing to be true and correct and so declare under penalty of perjury under the laws of the State of California.

Executed this 28th day of October, 2011 at Placerville, California

_____

Jeffrey A. Thorne

L. Universal Residential Loan Application (SAC - Exhibit 2, 9/8/2006)

Uniform Residential Loan Application

This application is designed to be completed by the applicant(s) with the Lender's assistance. Applicants should complete this form as "Borrower" or "Co-Borrower" as applicable. Co-Borrower information must also be provided (and the appropriate box checked) when ☐ the income or assets of a person other than the "Borrower" (including the Borrower's spouse) will be used as a basis for loan qualification or ☐ the income or assets of the Borrower's spouse will not be used as a basis for loan qualification, but his or her liabilities must be considered because the Borrower resides in a community property state, the security property is located in a community property state, or the Borrower is relying on other property located in a community property state as a basis for repayment of the loan.

I. TYPE OF MORTGAGE AND TERMS OF LOAN

Mortgage Applied for: ☐ VA ☐ FHA ☐ Conventional ☐ USDA/Rural Housing Service ☐ Other:

Agency Case Number | Lender Case No.

Amount $ | Interest Rate % | No. of Months | Amortization Type: ☐ Fixed Rate ☐ GPM ☐ Other (explain): ☐ ARM (type):

II. PROPERTY INFORMATION AND PURPOSE OF LOAN

Subject Property Address (street, city, state, & zip code) | No. of Units

Legal Description of Subject Property (attach description if necessary) | Year Built

Property Type ☐ 1-4 SFR ☐ Manufactured Home

Purposes of Loan ☐ Purchase ☐ Refinance ☐ Construction ☐ Construction-Permanent ☐ Home Improvement ☐ Other (explain):

Property will be: ☐ Primary Residence ☐ Secondary Residence ☐ Investment

Complete this line if construction or construction-permanent loan.

Year Acquired	Original Cost	Amount Existing Liens	(a) Present Value of Lot	(b) Cost of Improvements	Total (a + b)
	$	$	$	$	

Complete this line if this is a refinance loan.

Year Lot Acquired	Original Cost	Amount Existing Liens	Purpose of Refinance	Describe Improvements ☐ made ☐ to be made
	$	$		Cost: $

Title will be held in what Name(s) | Manner in which Title will be held | Estate will be held in: ☐ Fee Simple ☐ Leasehold (show expiration date)

Source of Down Payment, Settlement Charges and/or Subordinate Financing (explain)

III. BORROWER INFORMATION

Borrower's Name (include Jr. or Sr. if applicable)	Co-Borrower's Name (include Jr. or Sr. if applicable)
DARYOUSH JAVAHERI	
Social Security Number:	Social Security Number:
Home Phone (incl. area code): 310 475-5	Home Phone (incl. area code):
DOB (MM/DD/YYYY): 01-05-1963	DOB (MM/DD/YYYY):
Yrs. School: College	Yrs. School:
☐ Married ☐ Separated ☐ Unmarried (incl. single, divorced, widowed)	☐ Married ☐ Separated ☐ Unmarried (incl. single, divorced, widowed)
Dependents (not listed by Co-Borrower): no. ages	Dependents (not listed by Borrower): no. ages
Present Address (street, city, state, zip code): 10660 Wilshire Blvd unit# 1401 Los Angles C.A. 90024 ☐ Own ☐ Rent No. Yrs	Present Address (street, city, state, zip code) ☐ Own ☐ Rent No. Yrs
Mailing Address, if different from Present Address	Mailing Address, if different from Present Address

If residing at present address for less than two years, complete the following:

Former Address (street, city, state, zip code) ☐ Own ☐ Rent No. Yrs | Former Address (street, city, state, zip code) ☐ Own ☐ Rent No. Yrs

IV. EMPLOYMENT INFORMATION

Name & Address of Employer	Self Employed	Yrs. on this job	Yrs. Employed in this line of work/profession	Position/Title/Type of Business	Business Phone (incl. area code)
DARYOUSH DVP 10660 wilshire Blvd #1401 Los Angles C.A. 90024	☒	10	10	Builder - developer	310 591-7
	☐				

If employed in current position for less than two years or if curre... employed in more than one position, complete the following:

Name & Address of Employer	Self Employed	Dates (from — to)	Monthly Income	Position/Title/Type of Business	Business Phone (incl. area code)
	☐		$		
	☐		$		

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Plaintiff's Exhibit "2"

Gross Monthly Income	Borrower	Co-Borrower	Total	Combined Monthly Housing Expense	Present	Proposed
Base Empl. Income*	$	$	$		$	
Overtime				First Mortgage (P&I)		$
Bonuses				Other Financing (P&I)		
Commissions				Hazard Insurance		
Dividends/Interest				Real Estate Taxes		
Net Rental Income				Mortgage Insurance		
Other (before completing, see the notice in "describe other income," below)				Homeowner Assn. Dues		
				Other:		
Total	$	$	$	Total	$	$

* Self-Employed Borrower(s) may be required to provide additional documentation such as tax returns and financial statements.

Describe Other Income Notice: Alimony, child support, or separate maintenance income need not be revealed if the Borrower (B) or Co-Borrower (C) does not choose to have it considered for repaying this loan.

B/C		Monthly Amount
		$

VII. ASSETS AND LIABILITIES

This Statement and any applicable supporting schedules may be completed jointly by both married and unmarried Co-Borrowers if their assets and liabilities are sufficiently joined so that the Statement can be meaningfully and fairly presented on a combined basis; otherwise separate Statements and Schedules are required. If the Co-Borrower section was completed about a spouse, this Statement and supporting schedules must be completed about that spouse also.

Completed ☐ Jointly ☐ Not Jointly

ASSETS Description	Cash or Market Value
Cash deposit toward purchase held by:	$
List checking and saving accounts below	
Name and address of Bank, S&L, or Credit Union Washington Mutual 1550 W 5th Twnd Blvd ask for Rody-Fuentes: 310-391-8213	
Acct. no. 1943	$ 5000
Name and address of Bank, S&L, or Credit Union Bank of America Acct Tel. 1800-432-1000	
Acct. no. 6883	$
Name and address of Bank, S&L, or Credit Union	
Acct no.	$
Name and address of Bank, S&L, or Credit Union	
Acct no.	$
Stocks & Bonds (Company name/number & description) TD Ameritrade 1800-934-4448 Acct# 875-77	$
Life insurance net cash value	$
Face amount: $	
Subtotal Liquid Assets	$
Real estate owned (enter market value from schedule of real estate owned)	$
Vested interest in retirement fund	$
Net worth of business(es) owned (attach financial statement)	$
Automobiles owned (make and year)	$
Other Assets (itemize)	$
Total Assets a.	$

Liabilities and Pledged Assets. List the creditor's name, address and account number for all outstanding debts, including automobile loans, revolving charge accounts, real estate loans, alimony, child support, stock pledges, etc. Use continuation sheet, if necessary. Indicate by (*) those liabilities which will be satisfied upon sale of real estate owned or upon refinancing of the subject property.	Monthly Payment & Months Left to Pay	Unpaid Balance
Name and address of Company	$ Payments/Months /	$
Acct. no.		
Name and address of Company	$ Payments/Months /	$
Acct. no.		
Name and address of Company	$ Payments/Months /	$
Acct. no.		
Name and address of Company	$ Payments/Months /	$
Acct. no.		
Name and address of Company	$ Payments/Months /	$
Acct. no.		
Name and address of Company	$ Payments/Months /	$
Acct. no.		
Name and address of Company	$ Payments/Months /	$
Acct. no.		
Name and address of Company	$ Payments/Months /	$
Acct. no.	$	
Alimony/Child Support/Separate Maintenance Payments Owed to:		
Job Related Expense (child care, union dues, etc.)	$	
Total Monthly Payments	$	
Net Worth a. minus b.	$	Total Liabilities b. $

Schedule of Real Estate (If additional properties are owned, use continuation sheet.)

Property Address (enter S if sold, PS if pending sale or R if rental being held for income)	Type of Property	Present Market Value	Amount of Mortgages & Liens	Gross Rental Income	Mortgage Payments	Insurance, Maintenance, Taxes & Misc.	Net Rental Income
		$	$	$	$	$	$
	Totals	$	$	$	$	$	$

List any additional names under which credit has previously been received and indicate appropriate creditor name(s) and account number(s):

Alternate Name | Creditor Name | Account Number

III. DETAILS OF TRANSACTION

a. Purchase price	$
b. Alterations, improvements, repairs	
c. Land (if acquired separately)	
d. Refinance (incl. debts to be paid off)	
e. Estimated prepaid items	
f. Estimated closing costs	
g. PMI, MIP, Funding Fee	
h. Discount (if Borrower will pay)	
i. Total costs (add items a through h)	
j. Subordinate financing	
k. Borrower closing costs paid by Seller	
l. Other Credits (explain)	
m. Loan amount (exclude PMI, MIP, Funding Fee financed)	
n. PMI, MIP, Funding Fee financed	
o. Loan amount (add m & n)	
p. Cash from/to Borrower (subtract j, k, l & o from i)	

IV. DECLARATIONS

If you answer "yes" to any questions a through i, please use continuation sheet for explanation.

	Borrower Yes	Borrower No	Co-Borrower Yes	Co-Borrower No
a. Are there any outstanding judgments against you?	☐	☐	☐	☐
b. Have you been declared bankrupt within the past 7 years?	☐	☐	☐	☐
c. Have you had property foreclosed upon or given title or deed in lieu thereof in the last 7 years?	☐	☐	☐	☐
d. Are you a party to a lawsuit?	☐	☐	☐	☐
e. Have you directly or indirectly been obligated on any loan which resulted in foreclosure, transfer of title in lieu of foreclosure, or judgment? (This would include such loans as home mortgage loans, SBA loans, home improvement loans, education loans, manufactured (mobile) home loans, any mortgage, financial obligation, bond, or loan guarantee. If "Yes," provide details, including date, name and address of Lender, FHA, VA case number, if any, and reason for the action.)	☐	☐	☐	☐
f. Are you presently delinquent or in default on any Federal debt or any other loan, mortgage, financial obligation, bond, or loan guarantee? If "Yes," give details as described in the preceding question.	☐	☐	☐	☐
g. Are you obligated to pay alimony, child support, or separate maintenance?	☐	☐	☐	☐
h. Is any part of the down payment borrowed?	☐	☐	☐	☐
i. Are you a co-maker or endorser on a note?	☐	☐	☐	☐
j. Are you a U.S. citizen?	☐	☐	☐	☐
k. Are you a permanent resident alien?	☐	☐	☐	☐
l. Do you intend to occupy the property as your primary residence? If "Yes," complete question m below.	☐	☐	☐	☐
m. Have you had an ownership interest in a property in the last three years?	☐	☐	☐	☐
(1) What type of property did you own–principal residence (PR), second home (SH), or investment property (IP)?				
(2) How did you hold title to the home–solely by yourself (S), jointly with your spouse (SP), or jointly with another person (O)?				

V. ACKNOWLEDGMENT AND AGREEMENT

Each of the undersigned specifically represents to Lender and to Lender's actual or potential agents, brokers, processors, attorneys, insurers, servicers, successors and assigns and agrees and acknowledges that: (1) the information provided in this application is true and correct as of the date set forth opposite my signature and that any intentional or negligent misrepresentation of this information contained in this application may result in civil liability, including monetary damages, to any person who may suffer any loss due to reliance upon any misrepresentation that I have made on this application, and/or in criminal penalties including, but not limited to, fine or imprisonment or both under the provisions of Title 18, United States Code, Sec. 1001, et seq.; (2) the loan requested pursuant to this application (the "Loan") will be secured by a mortgage or deed of trust on the property described herein; (3) the property will not be used for any illegal or prohibited purpose or use; (4) all statements made in this application are made for the purpose of obtaining a residential mortgage loan; (5) the property will be occupied as indicated herein; (6) any owner or servicer of the Loan may verify or reverify any information contained in the application from any source named in this application, and Lender, its successors or assigns may retain the original and/or an electronic record of this application, even if the Loan is not approved; (7) the Lender and its agents, brokers, insurers, servicers, successors and assigns may continuously rely on the information contained in the application, and I am obligated to amend and/or supplement the information provided in this application if any of the material facts that I have represented herein should change prior to closing of the Loan; (8) in the event that my payments on the Loan become delinquent, the owner or servicer of the Loan may, in addition to any other rights and remedies that it may have relating to such delinquency, report my name and account information to one or more consumer credit reporting agencies; (9) ownership of the Loan and/or administration of the Loan account may be transferred with such notice as may be required by law; (10) neither Lender nor its agents, brokers, insurers, servicers, successors or assigns has made any representation or warranty, express or implied, to me regarding the property or the condition or value of the property; and (11) my transmission of this application as an "electronic record" containing my "electronic signature," as those terms are defined in applicable federal and/or state laws (excluding audio and video recordings), or my facsimile transmission of this application containing a facsimile of my signature, shall be as effective, enforceable and valid as if a paper version of this application were delivered containing my original written signature.

Borrower's Signature	Date	Co-Borrower's Signature	Date
X [signature]	4-8-06	X	

VI. INFORMATION FOR GOVERNMENT MONITORING PURPOSES

The following information is requested by the Federal Government for certain types of loans related to a dwelling in order to monitor the lender's compliance with equal credit opportunity, fair housing and home mortgage disclosure laws. You are not required to furnish this information, but are encouraged to do so. The law provides that a lender may discriminate neither on the basis of this information, nor on whether you choose to furnish it. If you furnish the information, please provide both ethnicity and race. For race, you may check more than one designation. If you do not furnish ethnicity, race or sex, under Federal regulations this lender is required to note the information on the basis of visual observation or surname. If you do not wish to furnish the information, please check the box below. (Lender must review the above material to assure that the disclosures satisfy all requirements to which the lender is subject under applicable state law for the particular type of loan applied for.)

BORROWER ☐ I do not wish to furnish this information		CO-BORROWER ☐ I do not wish to furnish this information	
Ethnicity:	☐ Hispanic or Latino ☐ Not Hispanic or Latino	Ethnicity:	☐ Hispanic or Latino ☐ Not Hispanic or Latino
Race:	☐ American Indian or Alaska Native ☐ Asian ☐ Black or African American ☐ Native Hawaiian or Other Pacific Islander ☐ White	Race:	☐ American Indian or Alaska Native ☐ Asian ☐ Black or African American ☐ Native Hawaiian or Other Pacific Islander ☐ White
Sex:	☐ Female ☐ Male	Sex:	☐ Female ☐ Male

To be Completed by Interviewer

This application was taken by:

☐ Face-to-face interview
☐ Mail
☐ Telephone
☐ Internet

Interviewer's Name (print or type)

Interviewer's Signature Date

Interviewer's Phone Number (incl. area code)

Name and Address of Interviewer's Employer

Continuation Sheet/Residential Loan Application

need more space is Residential Loan Applicant. Mark B for Borrower or C for Co-Borrower.	Co-Borrower:	Agency Case Number: / Lender Case Number:

I/We fully understand that it is a Federal crime punishable by fine or imprisonment, or both, to knowingly make any false statements concerning any of the above facts as applicable under the provisions of Title 18, United States Code, Section 1001, et seq.

Borrower's Signature	Date	Co-Borrower's Signature	Date
X		X	