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Attorneys for Defendant
JPMORGAN CHASE BANK, N.A.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DOUGLAS GILLIES,

Plaintiff,

vs.

JPMORGAN CHASE BANK, N.A., and DOES 1 through 10, Inclusive

Defendants.

Case No: CV12-10394-GW (MANx)

Assigned to the Hon. George H. Wu

NOTICE OF MOTION AND MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6); MEMORANDUM OF POINTS AND AUTHORITIES

[Filed concurrently with Request for Judicial Notice; [Proposed] Order]

Date: January 24, 2013
Time: 8:30 a.m.
Courtroom: 10

Date Action Filed: December 5, 2012
Trial Date: None Set

TO THE CLERK OF THE ABOVE-ENTITLED COURT, AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on January 24, 2013 at 8:30 a.m. or as soon thereafter as the matter may be heard in Courtroom 10 of the above-entitled Court, located at 312 North Spring Street, Los Angeles, CA 90012, Defendant, JPMorgan Chase Bank, N.A. ("Chase"), will, and hereby does, move the Court pursuant to Federal Rule of Civil Procedure 12(b)(6) for an Order dismissing the Complaint of Plaintiff, Douglas Gillies ("Plaintiff") for failure to state a claim upon which relief can be granted. The Motion is made on the following grounds:

All of Plaintiff's causes of action fail to state a claim for relief because the complaint is barred by the doctrine of res judicata, since Plaintiff has already filed *two* other lawsuits related to this property, both of which have been dismissed in California State Court, and affirmed on appeal by the California Court of Appeals.

Alternatively, each cause of action independently fails. Plaintiff's purported First Cause of Action for Wrongful Foreclosure fails to state a claim for relief because (1) Plaintiff alleges no tender of the amount due and owing on his loan, (2) the foreclosure process has complied with both California law governing nonjudicial foreclosures and the Deed of Trust, (3) there is no requirement under California law that Chase must present the note in order to foreclose, (4) there is no requirement under California law that an assignment of the beneficial interest in the note had to be recorded, and (5) Plaintiff alleges no prejudice as a result of the foreclosure process.

Plaintiff's purported Second Cause of Action for Quiet Title fails because it is a remedy, not an independent cause of action, and because Plaintiff does not plead the elements to receive the remedy.

Plaintiff's purported Third Cause of Action for "Declaratory and Injunctive Relief" fails because declaratory and injunctive relief are remedies, not causes of action, and Plaintiff fails to plead the elements to receive the remedies.

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Alternatively, the entire Complaint of Plaintiff should be dismissed because Plaintiff challenges the alleged foreclosure proceedings and does not allege any tender of the amount due and owing on the loan.

This Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the records on file in this case, and all other matters that the Court may consider, including the oral argument of counsel.

COMPLIANCE WITH L.R. 7-3

This Motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on December 17, 2012 at 1:55 p.m. Counsel for Defendant called Plaintiff and left a voicemail message. Plaintiff returned counsel's call on December 18, 2012. The parties were unable to reach a resolution which eliminates the necessity for a hearing.

Dated: December 26, 2012

Respectfully submitted,

BRYAN CAVE LLP

By: */s/ Bradley Dugan*
Bradley Dugan
Attorneys for Defendant
JPMORGAN CHASE BANK, N.A.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Motion to Dismiss Plaintiff's Complaint should be granted and the Complaint dismissed with prejudice because this lawsuit is barred by the doctrine of res judicata, as Plaintiff has filed *two prior actions* in the Superior Court of California for the County of Santa Barbara *concerning the same property as this lawsuit*, both of which were dismissed by the trial court and affirmed on appeal by the California Court of Appeals.

Specifically, Plaintiff filed his first lawsuit on November 25, 2009, against JPMorgan Chase Bank, N.A. ("Chase") and California Reconveyance Company ("CRC"). In that complaint (the "First Complaint"), Plaintiff alleged three causes of action for defects in the foreclosure process related to the notice of default and notice of trustee's sale, and two additional causes of action for quiet title and injunctive relief. The trial court sustained the demurrer of the Defendants without leave to amend and entered judgment in favor of the Defendants, and Plaintiff subsequently filed an appeal. The California Court of Appeals upheld the trial Court's judgment.

Plaintiff then proceeded to file an additional lawsuit in state court against CRC on July 13, 2011. That complaint (the "Second Complaint") alleged causes of action for declaratory relief, fraudulent transfer, violation of California Civil Code § 2923.5, and an injunction. The trial court held that this second lawsuit was barred by the California doctrine of res judicata. Plaintiff again appealed, and the California Court of Appeals again affirmed the judgment.

Now, in blatant disregard of the California Court of Appeals' two prior rulings, Plaintiff has filed a third lawsuit concerning the same property, this time against Chase. In his vexatious and frivolous complaint (the "Third Complaint"), Plaintiff alleges three causes of action for wrongful foreclosure, quiet title, and declaratory and injunctive relief. Fatal to Plaintiff's Third Complaint is that it

brings up the same issues from the First Complaint against the same defendant after a final judgment on the merits was entered. Thus, the Third Complaint, too, is barred by California's doctrine of res judicata

Even assuming, *arguendo*, that the Third Complaint was not barred by res judicata, each cause of action independently fails *as a matter of law*.

First, since all causes of action challenge the foreclosure proceedings, under well established California law, Plaintiff is required to allege tender of the amount due and owing on his loan. Not once does Plaintiff do so, and thus he has no standing to assert any of his three defective claims.

Second, the claim for wrongful foreclosure fails. Plaintiff complains that no transfer of the note from Washington Mutual Bank (the original lender of the loan) was recorded after Chase acquired certain assets of Washington Mutual. However, there is no requirement under California law that any assignment of a note must be recorded. Plaintiff likewise complains that Chase cannot present the note. Again, California law has no requirement that a party must present the note in order to foreclose. Finally, Plaintiff makes the baseless argument that because his first name is spelled as "Dougles" instead of "Douglas" on the Deed of Trust and foreclosure documents, the foreclosure is invalid. In response to this argument during the first appeal, the California Court of Appeals stated "no reasonable person would be confused by such a minor error." Moreover, there is no dispute that the property address is listed correctly on all documents or that Plaintiff's last name is spelled correctly. Indeed, even the adjustable rate rider attached to the Deed of Trust spells Plaintiff's name correctly, demonstrating the absurdity of his argument. Plaintiff even characterizes this as a simple "clerical error" in the Third Complaint. In any event, California law requires that a Plaintiff must allege prejudice as a result of any wrongful foreclosure. Plaintiff cannot do so.

Third, the claim for quiet title fails. Apart from not alleging that he will tender the amount due and owing on the loan, Plaintiff's claim is defective because

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quiet title is a remedy, not a cause of action, and because Plaintiff cannot plead any competing claims to the property in order to receive the relief.

Finally, the claim for declaratory and injunctive relief fails. At the outset, both of these purported causes of actions are remedies, not independent causes of action. Moreover, Plaintiff is not entitled to declaratory relief because it is duplicative of his other claims. Additionally, under California law, a borrower is not allowed to preemptively file suit challenging the standing of a defendant to foreclose. This is exactly what Plaintiff has done. Thus, the claim is improper. Plaintiff is not entitled to any injunctive relief, either. The Third Complaint merely puts forth boilerplate statements that Plaintiff is entitled to an injunction, but there are no factual allegations to support such claims. Moreover, as indicated throughout this Motion, Plaintiff has *no* likelihood of success on the merits.

As described more in depth below, Plaintiff's Third Complaint fails and should be dismissed with prejudice.

II. STATEMENT OF FACTS

Plaintiff filed his first lawsuit against Chase and CRC on November 25, 2009.[1] (Request for Judicial Notice ("RJN"), Ex. A). The First Complaint included a cause of action alleging that a notice of default was never recorded, a cause of action alleging that the notice of default was not filed in compliance with California Civil Code § 2923.5, a cause of action alleging that Chase and CRC did not properly record the notice of trustee's sale, a cause of action for an injunction, and a cause of action for quiet title. (RJN, Ex. B). Chase and CRC filed a demurrer to the complaint, which the trial court sustained without leave to amend. (RJN, Ex. C, p. 1; *see also Gillies v. California Reconveyance Co.*("*Gilllies I*"), 2011 WL 1348413 at *1 (Cal. Ct. App., April 11, 2011)). Plaintiff subsequently appealed the judgment,

[1] Plaintiff filed his original complaint in the California Superior Court for the County of Santa Barbara. He subsequently filed a first amended complaint, which is the pleading attached as Exhibit B to the RJN. This was the operative pleading in the Superior Court and Court of Appeals.

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and the California Court of Appeals affirmed the ruling. (RJN, Ex. B; *see also Gillies I*, 2011 WL 1348413). Plaintiff also argued on appeal that his name was not properly spelled on the notice of the default. (RJN, Ex. C, p. 7; *Gillies I, supra*, 2011 WL 1348413 at *4). Plaintiff likewise disputed whether Chase was the successor in interest to Washington Mutual Bank. (RJN, Ex. C, p. 6; *Gillies I, supra*, 2011 WL 1348413 at * 4).

Disregarding the California Court of Appeals' judgment, Plaintiff yet again filed another lawsuit on July 13, 2011, this time only against CRC. (RJN, Ex. D). The Second Complaint included causes of action for declaratory relief, fraudulent transfer based on the spelling error with Plaintiff's first name in the foreclosure documents, a violation of California Civil Code § 2923.5, and an injunction. (RJN, Ex. D). CRC filed a motion to strike, based on the doctrine of res judicata. The trial court granted the motion to strike. Plaintiff appealed to the California Court of Appeals. The California Court of Appeals affirmed the trial court's ruling. (RJN, Ex. E; *see also Gillies v. California Reconveyance Co.* ("*Gillies II*"), 2012 WL 3862167 (Cal. Ct. App., Sept. 6, 2012)).

Now, in disregard of *two* prior judgments from the California Court of Appeals, Plaintiff has shifted his strategy to again filing suit against Chase, and this time in Federal Court. The Third Complaint alleges three causes of action for wrongful foreclosure, quiet title, and declaratory and injunctive relief. Fatal to this Third Complaint is that all these issues have been adjudicated in state court and a final judgment on the merits in favor of Chase was entered. Thus, the Third Complaint is barred by the doctrine of res judicata and the Motion must be granted. Moreover, each cause of action independently fails, as outlined below.

III. LEGAL STANDARD FOR MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

Motions to dismiss pursuant to Rule 12(b)(6) test the legal sufficiency of the complaint. *See Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). "To survive a

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motion to dismiss, 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) (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007)); *see also Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008) ("A Rule 12(b)(6) dismissal may be based on either a 'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'"). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S. Ct. at 1949; *see also Twombly*, 127 S. Ct. at 1959 (Mere "labels and conclusions" and/or "formulaic recitation[s] of the elements of a cause of action" will not suffice to overcome a motion to dismiss. (Citations omitted)). Rather, the "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . ." *Twombly*, 127 S. Ct. at 1959. To determine whether a complaint states a plausible claim for relief, the court must rely on its "judicial experience and common sense." *Id*. at 1950.

A court may dismiss claims without granting leave to amend if amending the complaint would be futile. *See Vasquez v. L.A. Cnty*., 487 F.3d 1246, 1258 (9th Cir. 2007) ("Granting Vasquez leave to amend would have been futile, and we hold that the district court did not err in preventing such futility.").

IV. THE COMPLAINT SHOULD BE DISMISSED UNDER THE DOCTRINE OF RES JUDICATA

Plaintiff's filing of this Third Complaint concerning the subject property is barred by the doctrine of res judicata. It is well settled that "a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City School Dist. Bd. Of Educ.*, 465 U.S. 75, 80-81 (1984). In California, "the doctrine of res judicata rests upon the ground that the party to be affected . . . has litigated or had an opportunity to litigate the same matter in a former action in a

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court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. *Citizens for Open Acces Tc. Tide, Inc. v. Seadrift Association*, 60 Cal. App. 4th 1053, 1065 (1998).

Moreover, "res judicata bars the litigation not only of issues that were actually litigated *but also issues that could have been litigated.*" *Federation of Hillside and Canyon Associations v. City of Los Angeles*, 126 Cal. App. 4th 1180, 1202 (2004) (emphasis added). Under California law, it is irrelevant whether "the 'causes of action' in [the second] suit are 'distinct and different' from those in the [first] lawsuit." *Johnson v. Am. Airlines, Inc.*, 157 Cal. App. 3d 427, 432 (1984). "While it is true that res judicata will only bar relitigation of the same cause of action by the same parties, the question of whether a cause of action is identical for purposes of res judicata depends not on the legal theory or label used, but on the 'primary right' sought to be protected in the two actions. The invasion of one primary right gives rise to a single cause of action." *Id.* "Hence a judgment for the defendant is a bar to a subsequent action by the plaintiff based on the same injury to the same right, even though he presents a different *legal ground* for relief." *Id.* (citations omitted).

Res judicata bars a subsequent action when "(1) the issues decided in the prior adjudication are identical with those presented in the later action; (2) there was a final judgment on the merits in the prior action; and (3) the party against whom the plea is raised was a party . . . to the prior adjudication." *Pollock v. University of Southern California*, 112 Cal. App. 4th 1416, 1427 (2003). In California, the rule is that the finality required to invoke the preclusive bar of res judicata occurs when the time to appeal has expired or when an appeal from the trial court judgment has been exhausted. *Franklin & Franklin v. 7-Eleven Owners for Fair Franchising*, 85 Cal. App. 4th 1168, 1174 (2000).

Applicable here, Plaintiff's Third Complaint rehashes the same failed causes of action from the First Complaint. The California Court of Appeals upheld the trial court's decision sustaining the demurrer of Chase without leave to amend. (RJN,

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Ex. C; *see also Gillies I*, *supra*, 2011 WL 1348413). Moreover, after Plaintiff filed yet a second lawsuit in state court against CRC, the California Court of Appeals upheld the trial court's decision granting CRC's motion to strike the Second Complaint based on the doctrine of res judicata. (RJN, Ex. E; *see also Gillies v. California Reconveyance Co. (Gillies II)*, 2012 WL 3862167 (Sept. 6, 2012)).

Because this is now Plaintiff's second lawsuit filed against Chase concerning the same issues in the First Complaint even though a final judgment was entered in Chase's favor, the Court should dismiss the Third Complaint on the basis of res judicata just as the California Superior Court did when Plaintiff filed his second lawsuit against CRC. (RJN, Ex. E).

A. The Issues in the First Complaint Are Identical to the Issues in the Third Complaint

All of the issues in the Third Complaint have already been addressed in the First Complaint that Plaintiff filed in the California Superior Court for the County of Santa Barbara, and which the California Court of Appeals confirmed had no merit.

First, just as in the First Complaint, Plaintiff brings a cause of action for quiet title. (*Compare* First Compl., p. 6, ¶¶ 23-27 *to* Third Compl., ¶¶ 27-32). Although in the Third Complaint there is a minor difference that Plaintiff claims all secured sums were paid before Chase assumed Washington Mutual's assets on September 25, 2008 (Third Compl., ¶ 30), there is no reason why Plaintiff could not have presented this argument in the first lawsuit he filed. Thus, pursuant to *Federation of Hillside and Canyon Associations*, *supra*, 126 Cal. App. 4th at 1202, res judicata bars this new argument because it could have been presented in the first lawsuit.

Second, just as in the First Complaint, Plaintiff brings a cause of action for an injunction. (*Compare* First Compl., p. 5, ¶¶ 23-27 *to* Third Compl., ¶¶ 33-38). The causes of action in both Complaints contain the same boilerplate language. *Id.* Thus, the issues are identical in both complaints.

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Third, even the Prayers of both Complaints are merely identical, apart from minor cosmetic changes. (*Compare* First Compl., Prayer, ¶¶ 1 – 7 *to* Third Compl., Prayer, ¶¶ 1-8). In both Prayers, Plaintiff requests a temporary restraining order and preliminary injunction. (*Id.*) In both Prayers, Plaintiff seeks $100,000 in damages. (*Id.*) In both Prayers, Plaintiff seeks a judgment that he owns the property in fee simple. (*Id.*) In both Prayers, Plaintiff seeks costs of suit and attorneys' fees. (*Id.*)

Finally, although the Third Complaint includes a cause of action for wrongful foreclosure that was not present in the First Complaint, the claim is predicated upon the same facts that form the basis for the First Complaint, and thus could have been presented in the First Complaint. The Third Complaint thus results in re-litigation of the same primary right which was already adjudicated in state court.

Specifically, the Third Complaint alleges that the Notice of Default and Notice of Trustee's Sale are invalid because the documents spell Plaintiff's first name as "Dougles" instead of "Douglas." (*See e.g.* Third Compl., ¶¶ 20-22, 26). However, this specific issue was disposed of by the Court of Appeals affirming the trial court's ruling sustaining Chase's demurrer to the First Complaint without leave to amend:

> Gillies points out that the notice of default misspells his first name Dougl*e*s, instead of the correct "*Douglas*." But no reasonable person would be confused by such a minor error. . . Gillies's argument fails to raise a material issue.

(RJN, Ex. C, p. 7; *Gillies I*, *supra*, 2011 WL 1348413 at *4) (emphasis in original).

Thus, Plaintiff already presented this argument on his first appeal, which the Court of Appeals found lacked merit. To the extent Plaintiff may try to argue that this argument was not explicitly alleged in the First Complaint but rather brought up on appeal, there is no reason why Plaintiff could not have included the argument in his First Complaint, thus constituting the same cause of action. Indeed, this was

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precisely the California Court of Appeals' reasoning in *Gillies II*. (RJN, Ex. E).

Moreover, the Third Complaint states that CRC was not authorized to initiate the foreclosure process. (Third Compl., ¶ 26). However, in the First Complaint, Plaintiff complained that a notice of default was not recorded, that the notice of default violated California Civil Code § 2923.5, and that the notice of trustee's sale did not comply with the California Civil Code. (First Compl., ¶¶ 6, 13, 16-22). Thus, Plaintiff has already challenged the validity of the foreclosure proceedings and is merely changing the name of the cause of action to get another proverbial bite at the apple. Indeed, the Court of Appeals in *Gillies I* stated that there were no such defects in the foreclosure process. (RJN, Ex. B, pp. 4-6; *Gillies I*, *supra*, 2011 WL 1348413 at * 2-3). Plaintiff has already adjudicated this same primary right regarding the foreclosure proceedings and therefore, these "new" allegations are the same cause of action for purposes of res judicata.

Plaintiff also brings up miscellaneous arguments concerning Chase having to record a transfer of the beneficial interest of the note (Third Compl., ¶¶ 7, 17), and that Chase has not presented the note (Third Compl., ¶ 19). However, there is no reason why these arguments could not have been presented when the first lawsuit was filed. In any event, the allegations fail as a matter of law, as outlined below.

Thus, as demonstrated above, the First Complaint and Third Complaint concern the same issues, and the first element of res judicata is met.

B. <u>There Was a Final Judgment on the Merits in the Prior Action</u>

The demurrer to the First Complaint was sustained without leave to amend. The California Court of Appeals affirmed this judgment. (RJN, Ex. C). Because Plaintiff has exhausted his appeals of the First Complaint, there has been a final judgment on the merits.

C. <u>The Parties Are Identical</u>

Chase was a defendant in the First Complaint filed by Plaintiff. (RJN, Ex. A & B). Chase is also a defendant in the Third Complaint filed by Plaintiff. (*See*

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generally Third Compl.). Douglas Gillies has been the Plaintiff in both the First and Third Complaints. (RJN, Ex. A; Third Compl.). Thus, the parties are identical, and res judicata applies to bar this frivolous, vexatious lawsuit.

V. ALTERNATIVELY, ALL OF PLAINTIFF'S CAUSES OF ACTION FAIL AS A MATTER OF LAW

A. Plaintiff's Failure to Allege Tender Bars All His Claims

All of Plaintiff's causes of action are barred because he does not allege tender and because all claims either challenge the foreclosure process or seek equitable remedies. A plaintiff challenging a foreclosure sale must allege tender under "any cause of action for irregularity in the sale procedure." *Abdallah v. United Savs. Bank*, 43 Cal. App. 4th 1101, 1109 (1996). "When a debtor is in default of a home mortgage loan, and a foreclosure is either pending or has taken place, the debtor must allege a credible tender of the amount of the secured debt to maintain any cause of action for wrongful foreclosure." *Alicea v. GE Money Bank*, 2009 WL 2136969, at *3 (N.D. Cal. July 19, 2009). "The rules which govern tenders are strict and are strictly applied . . . ." *Nguyen v. Calhoun*, 105 Cal. App. 4th 428, 439 (2003). A plaintiff must also plead facts to show that their offer is valid. *Miller v. Wells Fargo Home Mortg.*, 2010 WL 3431802, at *5 (E.D. Cal. Aug. 31, 2010).

The tender requirement applies to any claim "implicitly integrated" with the foreclosure proceedings – not merely claims that challenge the proceedings, but also those that seek damages related to the proceedings. *Arnolds Mgmt. Corp. v. Eischen*, 158 Cal.App.3d 575, 579 (1984). The tender rule applies as a further basis for dismissal of these causes of action insofar as they seek equitable remedies. *Dimock v. Emerald Properties, LLC*, 81 Cal. App. 4th 868, 878 (2000).

Here, Plaintiff not once makes any allegation of tender. Each cause of action challenges the nonjudicial foreclosure proceedings. (*See e.g.* Third Compl., ¶¶ 7-15; 17; 19-26; 29-32; 34 -38). Indeed, quiet title, declaratory relief, and injunctive relief are all equitable remedies. (*See* Section V(C)(1) and V(D)(1) & (2)). Thus, because

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Plaintiff's Complaint seeks equitable remedies which are implicitly integrated with the foreclosure process, the tender rule applies. As such, Plaintiff's failure to allege tender bars all his claims. The Motion should be granted for this sole reason.

B. Plaintiff's First Cause of Action for Wrongful Foreclosure Fails

1. The Foreclosure Process Has Been Conducted In Accordance With California Law and the Provisions of the Deed of Trust

Plaintiff's Third Complaint demonstrates a flawed understanding of California's law governing nonjudicial foreclosure sales. Plaintiff comes up with an incorrect theory that California Reconveyance Company was not authorized to initiate the foreclosure process and that the pending trustee's sale is "illegal." (Third Compl., ¶ 26). However, the express terms of the Deed of Trust and California law rebut Plaintiff's contentions.

Specifically, Plaintiff obtained a $500,000 loan on August 12, 2003. (RJN, Ex. G, p. 2). The Deed of Trust lists the lender as Washington Mutual Bank and the trustee as CRC. (RJN, Ex. G, p. 2). The Deed of Trust explicitly grants CRC the power to execute a notice of default, execute a notice of trustees' sale, and to conduct a nonjudicial foreclosure in the event of Plaintiff's default. (RJN, Ex. G, p. 2; p. 13, ¶ 22).

Pursuant to a Purchase and Assumption Agreement dated September 25, 2008, Chase acquired certain assets and assumed certain liabilities of WaMu from the FDIC acting as receiver. (RJN, Ex. F). Thus, Chase is the successor in interest of Washington Mutual, which is expressly permitted under the Deed of Trust. (RJN, Ex. G, ¶ 13) (providing that the "The covenants and agreements of this Security Instrument shall bind . . . and benefit the successors and assigns of Lender.") (*See also* RJN, Ex. G, ¶ 20) (providing that the note can be sold to another entity).

The California statutory process governing nonjudicial foreclosures allows the foreclosure to be conducted by the "trustee, mortgagee, or beneficiary." Civ. Code § 2924(a)(1). Here, on August 13, 2009, CRC, acting pursuant to its powers

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as the trustee under the Deed of Trust, recorded a Notice of Default listing arrears of $10,367.71 as of August 12, 2009. (RJN, Ex. H, p. 1).

On November 18, 2009, CRC—acting pursuant to its powers as the trustee under the Deed of Trust—recorded a Notice of Trustee's Sale. (RJN, Ex. I). As Plaintiff failed to cure his arrearages, CRC recorded two more Notices of Trustee's Sales on June 30, 2011 and November 8, 2012, respectively. (RJN, Exs. J & K). Thus, the foreclosure process has occurred in conformance with California law and the terms of the Deed of Trust.

Plaintiff also complains that because the Deed of Trust misspells his first name as "Dougles" instead of "Douglas" the foreclosure documents were not properly indexed and the foreclosure process is invalid. (*See e.g.* Third Compl., ¶¶ 9-14, 20-24). As the California Court of Appeals stated in the first lawsuit after Plaintiff presented this same theory, "no reasonable person would be confused by such a minor error. Gillies' last name is spelled correctly and the notice [of default] contains the street address of the property as well as the assessor's parcel number." (RJN, Ex. C; *Gillies I, supra*, 2011 WL 1348413 at *4). Here, the same analysis applies yet again. There is no dispute that the property address is listed correctly on all foreclosure notices, and Plaintiff's last name is spelled correctly on all documents. Indeed, the Adjustable Rate Rider attached to the Deed of Trust correctly lists Plaintiff's name as "Douglas Gillies." (RJN, Ex. G, p. 21).

Further demonstrating the absurdity of Plaintiff's argument is that Plaintiff admits to receiving $500,000 from Washington Mutual (Third Compl., ¶ 7 ; Ex. 6). In fact, Plaintiff seeks to enforce Paragraph 22[2] of the Deed of Trust, thus tacitly admitting that the Deed of Trust is a valid document. (Third Compl., ¶ 25). Plaintiff likewise recognizes that "Dougles Gillies" is a simple spelling error when

[2] This section of the Deed of Trust permits the Trustee to start the nonjudicial foreclosure process. As described above, California Reconveyance Company complied with the Deed of Trust and California law when starting the nonjudicial foreclosure process.

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he states that all Chase had to do to correct the error is "contact Plaintiff and ask him to sign a correctly spelled document."[3] (Third Compl., ¶ 24; *see also* Third Compl., ¶ 23). Plaintiff provides no authority for the proposition that the foreclosure process is invalid because of a spelling error. Instead, as demonstrated above (and as the California Court of Appeals has affirmed *twice*), there was no error in the foreclosure process. Thus, the Motion should be granted and the Third Complaint should be dismissed with prejudice.

2. There Is No Requirement to Present the Note In Order to Foreclose

Plaintiff states in support of his cause of action that "Chase cannot produce an original Note because Chase does not own the loan and cannot identify the owner of the loan." (Third Compl., ¶ 19). However, under California law there is "nothing in the applicable statutes that precludes foreclosure when the foreclosing party does not possess the original promissory note. [California Civil Code § 2924 *et seq.*] sets forth a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust." *Debrunner v. Deutsche Bank National Trust Co.*, 204 Cal. App. 4th 433, 440 (2012) (citations omitted). Moreover, the California Court of Appeals stated in Plaintiff's prior state court action that "there is simply no reasonable dispute that Chase is Washington Mutual Bank's successor-in-interest as to Gillies trust deed." (RJN, Ex. C; *Gillies I, supra*, 2011 WL 1348413 at *4). Indeed, Plaintiff even admits in his Third Complaint that Chase assumed certain assets of Washington Mutual. (Third Compl., ¶ 30). Thus, because Chase is not required to present the note in order to foreclose, because the California Court of Appeals already stated that Chase is the successor in interest to Washington Mutual, and because Plaintiff even admits that Chase is the successor in

[3] Plaintiff also states that the Adjustable Rate Note at Paragraph 12 (Compl., Ex. 6) provides for the method of correcting the spelling error. However, this document attached to Plaintiff's Complaint is not signed by either party, rather, it is blank. In any event, the provision is not mandatory and is for the protection of the lender, not the borrower.

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interest to Washington Mutual, Plaintiff's claim lacks merit. The Motion should be granted.

3. There Is No Requirement that an Assignment of the Deed of Trust or Note Be Recorded

Plaintiff states that "[n]o recorded document indicates that the interest of Washington Mutual Bank, FA in the Property was ever transferred before or after the entity cease to exist." (Third Compl., ¶ 7; *see also* Third Comp., ¶ 17).

Plaintiff misunderstands the law. A recorded assignment is not necessary for a party to be a valid beneficiary that can conduct foreclosure proceedings. Indeed, in *Haynes v. EMC Mortgage Corp.*, the California Court of Appeals upheld the Superior Court's decision sustaining a demurrer without leave to amend when the plaintiff argued that Civil Code § 2932.5 mandated that the assignment be recorded. The Court held that "where a deed of trust is involved, the trustee may initiate foreclosure irrespective of whether an assignment of the beneficial interest is recorded." *Haynes v. EMC Mortgage Corp.*, 205 Cal. App. 4th 329, 336 (2012); *see also Parcray v. Shea Mortg., Inc.*, 2010 U.S. Dist. LEXIS 40377, at *31 (E.D. Cal. 2010) ("There is no requirement under California law for an assignment to be recorded in order for an assignee beneficiary to foreclose."). Moreover, as stated in *Herrera v. Federal National Mortgage Association*, 205 Cal. App. 4th 1495, 1506 (2012), an assignment of the note is commonly not recorded. *Herrera* relied on *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256, 272 (2011), which held, "assignments of debt, as opposed to assignments of the security interest incident to the debt, are commonly not recorded. The lender could readily have assigned the promissory note to HSBC in an unrecorded document that was not disclosed to plaintiff."

Thus, the fact that there has been no assignment of the beneficial interest in the note to Chase does not render the foreclosure process invalid. Rather, this is just a red herring and has no bearing on the propriety of the foreclosure process. The

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Motion should be granted.

4. Plaintiff Does Not Allege Any Prejudice As a Result of the Alleged Foreclosure

Finally, the Motion should be granted for the additional independent reason that Plaintiff alleges no prejudice as a result of the foreclosure. Under California law, "a plaintiff in a suit for wrongful foreclosure has generally been required to demonstrate [that] the alleged imperfection in the foreclosure process was prejudicial to plaintiff's interests." *Debrunner v. Deutshe Bank National Trust Company*, 204 Cal. App. 4th 433, 443 (2012) (*citing Fontenot, supra.*, 198 Cal. App. 4th at 271.

Thus, to prevail on his claim, Plaintiff must show that he was prejudiced by the purported "clerical error" of misspelling his name, which he has not. *Id.* (finding no prejudice where an assignment merely substitutes one creditor for another, without changing Plaintiff's obligations under the note). Plaintiff's Third Complaint does not plead any allegations of any prejudice as a result of the purported spelling error. Indeed, Plaintiff even states that this was a simple "clerical error." (Third Compl., ¶¶ 23, 24). This admission conclusively establishes that Plaintiff has not been prejudiced. Moreover, as the California Court of Appeals stated, there is no dispute that the property address and assessor's parcel number are correct. (RJN, Ex. C; *Gillies I, supra*, 2011 WL 1348413 at *4). Indeed, "*no reasonable person would be confused by such a minor error*." *Id.* (emphasis added). Finally, to the extent that the simple error with the spelling of Plaintiff's first name caused Plaintiff any confusion with the grantor-grantee index, Plaintiff attaches *all* foreclosure related documents to his Third Complaint, demonstrating he was in no way prejudiced. Thus, the claim fails for this additional reason. The Motion to Dismiss should be granted.

C. Plaintiff's Second Cause of Action for Quiet Title Fails

1. Quiet Title Is a *Remedy*, Not a Cause of Action

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Quieting title is not itself an independent cause of action, but rather is "the *relief* granted once a court determines that title belongs to plaintiff." *Leeper v. Beltrami*, 53 Cal. 2d 195, 216 (1959) (emphasis added). "In other words, in such a case, the plaintiff must show he has a substantive right to relief before he can be granted any relief at all." *Id.* Because Plaintiff impermissibly pleads quiet title as an affirmative cause of action, the claim should be dismissed without leave to amend.

2. Plaintiff Fails to Tender the Amount Due and Owing on His Loan

Plaintiff also fails to allege tender in his quiet title count. In California, "[t]ender of the indebtedness is required to quiet title in California." *Pedersen v. Greenpoint Mortg. Funding, Inc.*, 2011 WL 3818560, at *13 (E.D. Cal. Aug. 29, 2011) (citing *Aguilar v. Boci*, 39 Cal. App. 3d 475, 477 (1974)); *Kelley v. Mortg. Elec. Regis.*, 642 F. Supp. 2d 1048, 1057 (N.D. Cal. 2009) ("Plaintiffs have not alleged . . . that they have satisfied their obligation under the Deed of Trust. As such, they have not stated a claim to quiet title.").

Here, as discussed above in Section V(A), Plaintiff does not state he will tender any of the amount due and owing on his loan. This alone is grounds for dismissal of the second cause of action, and the Motion thus should be granted and the Complaint dismissed with prejudice.

To the extent that Plaintiff argues that he "is informed and believes that the lawful beneficiary has been paid in full" (Third Compl., ¶ 29) and that "the obligations owed to WaMu under the DOT were fulfilled and the loan was fully paid before Chase assumed Washington Mutual assets" (Third Compl., ¶ 30), the Court should disregard such allegations. Plaintiff only alleges conclusory allegations that the loan has been paid in full. He alleges no specific facts of when the loan was paid, or who even paid off the loan, or what amount was paid. In fact, the California Court of Appeals in *Gillies I* affirmed the trial court's decision sustaining Chase's

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demurrer to the quiet title cause of action without leave to amend because Plaintiff did not tender. (RJN, Ex. C; *Gillies I*, *supra*, 2011 WL 1348413 at * 3). Thus, pursuant to *Iqbal*, *Twombly*, and *Gillies I*, *supra*, Plaintiff's conclusory statements should be disregarded.

3. Plaintiff Fails to Plead Any Competing Claims to the Property

Finally, Plaintiff fails to allege all of the elements required to receive the remedy of quiet title. In order to quiet title, a plaintiff must allege: (1) a description of the subject property; (2) the title of the plaintiff as to which determination is sought and the basis of the title; (3) the claims adverse to the title of the plaintiff against which a determination is sought; (4) the date as of which the determination is sought; and (5) a prayer for determination of the title of the plaintiff against adverse claims. Cal. Code Civ. Proc. §761.020(a)-(e); 5 Witkin, California Procedure § 663, p. 90 (5th ed. 2008).

Here, Plaintiff cannot establish any competing claim to title. The foreclosure process has yet to be completed and title remains in his name. (*See* RJN, Exs. G - K); *Ortiz v. Accredited Home Lenders, Inc.*, 639 F. Supp. 2d 1159, 1168 (S.D. Cal. 2009) (holding that "recorded foreclosure Notices do not affect Plaintiffs' title, ownership, or possession in the Property"). Because only foreclosure notices have been recorded, there are no "adverse" claims to quiet title. Thus, the Motion should be Granted.

D. Plaintiff's Third Cause of Action for Declaratory and Injunctive Relief Fails

1. Plaintiff Is Not Entitled to Any Declaratory Relief

Plaintiff seeks declaratory relief concerning his and Chase's respective rights and duties pertaining to the note and deed of trust. The claim fails for multiple, independent reasons.

First, fatal to the cause of action is that, as applicable here, the nonjudicial

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foreclosure process of Civil Code § 2924 *et seq*. does not permit Plaintiff to preemptively file suit challenging the standing of Defendants to foreclose. *Robinson v. Countrywide Home Loans, Inc.*, 199 Cal. App. 4th 42, 46 (2011) ("the statutory scheme . . . does not provide for a preemptive suit challenging standing.). Here, Plaintiff "desires a judicial determination of his rights and duties as to the validity of the Note and DOT, and Defendant's rights to proceed with nonjudicial foreclosure on the Property." (Third Compl., ¶ 35). Because Plaintiff is not allowed to preemptively file suit to challenge the foreclosure, he is not entitled to the declaratory relief he seeks.

Second, declaratory relief is only a remedy, not an independent cause of action. *Rosas v. Carnegie Mortgage, LLC*, 2012 WL 1865480 at *10 (C.D. Cal. May 21, 2012) ("declaratory and injunctive relief are prayers for relief, not causes of action."). Thus, the Motion should be granted.

Third, "the Declaratory Relief Act ('DJA') is merely a procedural statute and does not provide an independent theory for recovery." *Derusseau v. Bank of Am., N.A.*, 2011 WL 5975821, at *9 (Nov. 21, 2011) (citing *Team Enterprises, LLC v. W. Inv. Real Estate Trust*, 721 F. Supp. 2d 898, 911 (E.D. Cal. 2010)). "Rather, where the plaintiff has stated an underlying claim for relief, the DJA merely offers the plaintiff an additional remedy." *Id.* Because all the other claims fail as discussed herein, Plaintiff has no right to relief under the DJA.

2. Plaintiff Is Not Entitled to Any Injunctive Relief

Plaintiff's purported "cause of action" for injunctive relief fails because it too is a remedy, not a cause of action. *See Rosas v. Carnegie Mortgage, LLC*, 2012 WL 1865480 at *10 (C.D. Cal. May 21, 2012) ("declaratory and injunctive relief are prayers for relief, not causes of action.") (citations omitted); *see also Marlin v. AIMCO Venezia, LLC*, 154 Cal. App. 4th 154, 162 (2007); *Shamsian v. Atl. Richfield Co.*, 107 Cal. App. 4th 967, 984-85 (2003) ("[A] request for injunctive relief is not a cause of action. Therefore, we cannot let this 'cause of action'

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stand."). As such, the "cause of action" should be dismissed with prejudice for this reason alone.

In any event, Plaintiff is not entitled to any type of injunctive relief. Injunctive relief under federal law requires that plaintiffs plead: (1) irreparable injury, (2) no adequate remedy at law, (3) a likelihood of success on the merits, (4) the balance of hardships, and (5) the effect on the public interest. *See Ebay Inc., v. MercExchange LLC*, 547 U.S. 388, 391 (2006) (permanent injunction); *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 526 (4th Cir. 2003) (preliminary injunction); *Ne. Ohio Coal. For Homeless & Serv. Employees Int'l Un. v. Blackwell*, 467 F.3d 999, 109 (6th Cir. 2006) (TRO). To satisfy the irreparable injury element, plaintiff must show that: (1) he will suffer an imminent injury, and (2) the injury would be irreparable. *See Grand River Enter. Six Nations, Ltd v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007).

Here, Plaintiff does nothing more than make a threadbare recitation of the elements for relief without providing any factual allegations to support a finding of relief. (Third Compl., ¶¶ 36-38). Notably absent from Plaintiff's allegations is *how* he will suffer irreparable injury when he has been living in the Property without making his required monthly mortgage payments. Moreover, Plaintiff completely glosses over any analysis of how the burden to Plaintiff is greater than the burden to Chase. Indeed, Chase will be more harmed by the granting of an injunction as Plaintiff has not been making his mortgage payments (thus breaching his Deed of Trust) and Chase is not receiving the monetary income it should be receiving from Plaintiff. Further, Chase has no way to ensure that the Property is being maintained properly, thereby causing a risk that the value of the Property might diminish due to Plaintiff's neglect.

Finally, for the reasons stated above, Plaintiff cannot demonstrate any likelihood of success on the merits for any of his causes of action. Notably, he has filed two lawsuits against Chase and CRC and judgment has been entered in the

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Defendants' favor in *both* lawsuits and these judgments have both been affirmed by the California Court of Appeals. (RJN, Exs. C & E; *Gillies I* and *Gillies II*, *supra*). Plaintiff's purported cause of action—which is actually a remedy—fails for this additional reason. Therefore, the Motion should be granted and the Third Complaint should be dismissed with prejudice.

VI. CONCLUSION

For the above reasons, Chase respectfully requests that this Court grant its Motion to Dismiss without leave to amend and dismiss the Third Complaint with prejudice.

Dated: December 26, 2012

Respectfully submitted,

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By: */s/ Bradley Dugan*
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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 120 Broadway, Suite 300, Santa Monica, California 90401-2386.

On December 26, 2012, I served the following documents in the within action as follows, described as: **NOTICE OF MOTION AND MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6); MEMORANDUM OF POINTS AND AUTHORITIES**, on the interested party(-ies) in this action, as follows**:**

Douglas Gillies
3756 Torino Drive
Santa Barbara, CA 93105

Plaintiff in Pro Per
Phone: (805) 682-7033
Email: douglasgillies@gmail.com

☒ **(VIA FEDEX)** I deposited in a box or other facility maintained by FedEx, an express carrier service, or delivered to a courier or driver authorized by said express carrier service to receive documents, a true copy of the foregoing document, in an envelope designated by said express service carrier, with delivery fees paid or provided for.

☒ (**VIA ELECTRONIC SERVICE)** The document was served via The United States District Court –Central District's CM/ELF electronic transfer system which generates a Notice of Electronic Filing (NEF) upon the parties, the assigned judge and any registered user in the case.

☒ **(FEDERAL ONLY)** I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on December 26, 2012, at Santa Monica, California.

/s/ Michelle Hicks
Michelle Hicks