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

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DOUGLAS GILLIES,

Plaintiff,

vs.

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

Defendants.

Case No: CV12-10394-GW (MANx)
Assigned to the Hon. George H. Wu

POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Date: February 7, 2012
Time: 8:30 a.m.
Courtroom: 10
Date Action Filed: December 5, 2012
Trial Date: None set

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I. INTRODUCTION

This case does not revisit the issues raised in state court that the name of the Trustor was not spelled correctly, and as a result the Deed of Trust, Notice of Default, and Notices of Trustee's Sale could not be found by searching the name of the Grantor in the Grantor-Grantee Index. The California courts decided to ignore the indexing problem and constructive notice as they found that there was actual notice.

But Chase could have avoided the state court litigation if it had simply asked the Lender to send a request that the Trustor correct the clerical error, as provided in the contract between the parties. Instead, Chase filed thousands of pages of documents in state court. Chase's litigation strategy proved that it could not identify the Lender. Therefore it must have kept mortgage payments it collected from Plaintiff after September 25, 2008. Now it seeks to sell Plaintiff's home at a trustee's sale, even though it has demonstrated that it cannot name the Lender and is not in communication with the Lender. Chase's conduct has proven what the California courts might never have allowed Plaintiff to ask. Who's the Lender? Chase doesn't know. Now Chase beseeches this court to deprive Plaintiff of his property without due process of law.

II. MISCONCEPTIONS IN CHASE'S ARGUMENT

1. Fatal to Plaintiff's Third Complaint is that it "brings up the same issues from the First Complaint against the same defendant…" (Chase P&A 1:28-2:3)

—The third Complaint alleges that Chase cannot identify the Lender. The first Complaint alleged that the Notice of Default was not recorded. The clerical error of a misspelled name alleged in the second Complaint is not the same issue or even remotely similar to the issue of conducting a trustee's sale without a Lender.

2. Plaintiff is required to allege tender (2:7).

—There are many applicable exceptions to the tender rule described below.

3. Plaintiff cannot allege prejudice as a result of wrongful foreclosure (2:25).

—If Chase is a renegade bank seeking to foreclose without knowing the identity of the Lender, Plaintiff's damages will be substantial if Chase succeeds.

4. Under California, a borrower is not allowed to preemptively file suit challenging the standing of a defendant to foreclose (3:6-9).

—Miller & Starr recently characterized this approach as the civil equivalent of a Star Chamber proceeding.

5. No factual allegations support Plaintiff's claim for injunction (3:9-11).

—If Chase seeks to steal Plaintiff's house, injunction is the preferred option.

III. RES JUDICATA DOES NOT BAR THIS ACTION

Plaintiff filed a six-page Complaint against Chase and its in-house trustee, California Reconveyance Company to stop a trustee's sale. The Complaint in that case, now described as *Gillies I,* alleged in paragraph 15 that defendants had not recorded a Notice of Default. "Plaintiff contends that defendants are not the real parties in interest and are not entitled to accelerate the maturity of the secured obligation and sell the residence because no beneficiary or authorized agent has delivered, served, or recorded a notice of default that complies with Civil Code §2923.5…" The complaint is marked Exhibit A, Defendant's Request for Judicial Notice.

Defendants attached a recorded NOD to their demurrer, and the court sustained the demurrer without leave to amend. Defendant now contends that all subsequent action is barred as a result of this single decision in which the court found that a NOD had been recorded.

Shortly before the demurrer hearing in *Gillies I*, Plaintiff discovered that defendants had recorded a NOD that did not spell his name correctly as Grantor. For that reason, the NOD could not be located in the Santa Barbara Grantor-Grantee Index because it was indexed under a fictitious name. Plaintiff's request to

amend the complaint to raise this issue was denied. Judge deBellefeuille did not address the issue of the misspelled name at the demurrer hearing or in her order. She ruled in her Order dated March 26, 2010: "Because the only basis for the first cause of action for declaratory relief is plaintiff's erroneous allegation regarding the non-recordation of the notice of default, the court finds that there is no 'actual controversy' for the court to determine....The notice of default and notice of trustee sale were issued in conformity with California law."

The demurrer was sustained without leave to amend, the case was dismissed, and the California Court of Appeal affirmed, stating, "The trial court properly took judicial notice that the notice of default was recorded on August 13, 2009." (Defendant's RJN, Ex. C, pg. 34; Doc. 7-1, pg. 28). "Gillies points out that the notice of default misspells his first name Dougles, instead of the correct 'Douglas.' But no reasonable person would be confused by such a minor error. Gillies last name is spelled correctly and the notice contains the street address of the property as well as the assessor's parcel number. Moreover, Gillies does not contest that he received the notice." (RJN, Ex. C, pg. 37; Doc. 7-1, pg. 31).

The word *index* was not used, and the improbability that anyone other than the parties could find the Deed of Trust or the NOD or the NOTS in the Grantor-Grantee index was not considered. There was one complaint, one hearing, and one essential finding—that a NOD had been recorded. The complaint also included causes for violations of Cal. Civ. Code §2923.5 and §2923.52, injunctive relief, and quiet title, which were also dismissed. Defendant argues that declaratory and injunctive are remedies, not causes of action; if so, res judicata is not applicable.

Code of Civil Procedure §426.50 states:

> A party who fails to plead a cause of action subject to the requirements of this article, whether through oversight, inadvertence, mistake, neglect, or other cause, may apply to the court for leave to amend his pleading, or to file a cross-complaint, to assert such cause at

any time during the course of the action. The court, after notice to the adverse party, shall grant, upon such terms as may be just to the parties, leave to amend the pleading, or to file the cross-complaint, to assert such cause if the party who failed to plead the cause acted in good faith. This subdivision shall be liberally construed to avoid forfeiture of causes of action.

However, the court did not grant leave to amend so Plaintiff filed a second Complaint against CRC (*Gillies II*) raising the indexing issue and alleging that the DOT, NOD, and NOTS could not be located in the Grantor-Grantee Index because they misspelled the name of the trustor. The trial court granted CRC's Motion to Strike, or in the alternative, sustained CRC's demurrer on the grounds of res judicata. Having ruled that a NOD had been recorded, the court found that the issue of whether the NOD was defective on its face and could not be indexed in the County Records was barred.

As a result, the indexing problem was not addressed by the trial judge in either case. The Court of Appeal affirmed the trial court's decision that the action was barred by the doctrine of res judicata (Defendant's RJN, Ex. E, pg. 58; Doc. 7-1, pg. 52), and concluded, "(Gillies) claims the instant action alleges…that the trust deed and notice of default were not indexed properly. But res judicata bars re-litigation of not only claims that were determined in the prior action, but claims that could have been raised in the prior action. (*Ojavan Investors, Inc. v. California Coastal Com.* (1997) 54 Cal.App.4th 373, 384.) Here there is no reason why Gillies could not have raised the new issues in *Gillies I.* " (RJN, Ex. E, pg. 60-61; Doc. 7-1, pg. 54-55).

There was one good reason: the "new issue" of indexing was not raised in *Gillies 1* because the demurrer in that case was sustained without leave to amend.

The court of appeal misconstrued *Ojavan Investors*, which actually stated:

"Contrary to Ojavan Investors' contention, whether the res judicata

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

The issue of whether Chase can identify or communicate with the Lender is not a matter that might have been urged to sustain or defeat the determination in *Gillies I* as to whether the Notice of Default was recorded.

The Court of Appeal in *Gillies II* applied a rule that is applicable to nonsuits, but not to demurrers. The history of the distinction is set forth by Justice Traynor in *Keidatz v. Albany* (1952) 39 Cal.2d 826, 829-830:

> Defendants contend however, that *Wulfjen v. Dolton*, 24 Cal.2d 891, establishes the rule that a party claiming to have been defrauded must seek all the relief to which he may be entitled in one action, and that he may not, after having failed in an action to rescind a contract for fraud, thereafter bring a second action for damages. In the Wulfjen case, however, the judgment in the rescission action had not been entered on demurrer, but had followed a full trial on the merits, and the court applied the rule that such a judgment is res judicata not only as to issues actually raised, but as to issues that could have been raised in support of the action. (See *Sutphin v. Speik*, 15 Cal.2d 195, 202.) As has been pointed out above, however, it has been the settled rule in this state that a judgment entered on demurrer does not have such broad res judicata

effect. The rule respecting such judgments is illustrative of the line that has been drawn beyond which a plaintiff may not go if he hopes thereafter to start again. It is analogous to the rule that was applicable to nonsuits before section 581c was added to the Code of Civil Procedure in 1947. A judgment of nonsuit was not on the merits, and a plaintiff could start anew and recover judgment if he could prove sufficient facts in the second action. (citations). Section 581c now provides that a judgment of nonsuit operates as an adjudication upon the merits unless the court otherwise specifies. In view of the liberal rules relating to amendments to the pleadings, it has been forcefully advocated that the same policy reflected in section 581c should apply to judgments on demurrer, and that a plaintiff should be required to set forth all the facts relating to his dispute in one action. (citations.) On the other hand less prejudice is suffered by a defendant who has had only to attack the pleadings, than by one who has been forced to go to trial until a nonsuit is granted, and the hardship suffered by being forced to defend against a new action, instead of against an amended complaint, is not materially greater. (*Commercial Centre R. Co. v. Superior Court*, 7 Cal.2d 121, 129-130). We do not feel, however, that at this time we should reweigh the conflicting arguments over the wisdom of the rule we apply. 39 Cal.2d 826, 829-830.

In the present action, new and additional facts are alleged. It is one thing to spell the name wrong. It is quite another to torpedo the market value of a residence by recording a Notice of Default and scheduling a trustee's sale when you have no idea who the Lender might be. One is a clerical error; the other is grand theft.

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

> The applicable rules are set forth in *Keidatz v. Albany*, 39 Cal.2d 826, 828: (1) A judgment entered after a general demurrer has been

sustained "is a judgment on the merits to the extent that it adjudicates that the facts alleged do not constitute a cause of action, and will accordingly, be a bar to a subsequent action alleging the same facts."

(2) [E]ven though different facts may be alleged in the second action, if the demurrer was sustained in the first action on a ground equally applicable to the second, the former judgment will also be a bar.

(3) If, on the other hand, new or additional facts are alleged that cure the defects in the original pleading, it is settled that the former judgment is not a bar to the subsequent action whether or not plaintiff had an opportunity to amend his complaint.

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

The misspelled name of the Trustor on the NOD and the Notice of Trustee's Sale first appeared on the first page of Plaintiff's Deed of Trust in 2003 (DOT), which is attached to defendant's Request for Judicial Notice as Exhibit G.

A spelling discrepancy is a clerical error. Chase's remedy can be found in the contract between the parties—the Adjustable Rate Note. The Adjustable Rate Note states in Paragraph 12 that in the event of a clerical error, "I agree, upon notice from the Note Holder, to reexecute any Loan Documents that are necessary to correct any such Errors…"

The Note Holder can simply request that the Trustor sign an amended Deed of Trust to correct the clerical error. Rather than follow this contractual remedy to correct the indexing error, Chase and its subsidiary, CRC, repeatedly presented false documents to the County Recorder to be recorded and indexed under a

fictitious name, and then spent thousands of dollars pursuing that strategy. The Adjustable Rate Note, which describes in ¶12 the remedy to fix a clerical error, is attached to Plaintiff's Complaint as Exhibit 6.

The doctrine for resolving this case is not *res judicata*. It is *res ipsa loquitur*. Chase's costly litigation strategy speaks for itself. If Chase can't locate the Lender and Chase can't communicate with the Lender, then it was not entitled to keep Plaintiff's mortgage payments and it is not authorized to sell his property.

A mortgage is a contract:

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

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

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

A beneficiary is required to show it had the right to foreclose, and a simple declaration from a bank officer is insufficient.

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

to testify to the matters stated." (Code Civ. Proc., § 437c, subd. (d).) Brignac's declaration does not affirmatively show that she can competently testify the Bank is the beneficiary under the 2003 deed of trust. At most, her declaration shows she can testify as to what the assignment of deed of trust "indicates." But the factual contents of the assignment are hearsay and defendants offered no exception to the hearsay rule prior to oral argument to make these factual matters admissible. *Herrera v. Deutsche Bank Nat'l Trust Co.* (2011) 196 Cal.App.4th 1366, 1376-78.

Chase is not a Lender, Note Holder, or Beneficiary. If it cannot correct a clerical arror by contacting the Lender, then how can it declare itself endowed with the power to foreclose?

A. A Demurrer is not a Final Judgment on the Merits

After the court in *Gillies I* sustained defendant's demurrer based upon a finding that defendants had recorded a NOD, despite the fact it was recorded under a fictitious name, and the Court of Appeal affirmed after concluding that plaintiff had actual notice of the NOD, Plaintiff filed a new complaint on July 13, 2011, alleging different facts and raising new issues. At a hearing on Respondent's Motion to Dismiss, the court found that the action was barred by the doctrines of res judicata and collateral estoppel.

The trial court wrote, "(I)n ruling on plaintiff's indexing argument, the Court of Appeal necessarily determined that there was no reasonable possibility that Gillies could state a valid cause of action against the defendants by amending his complaint to add the indexing issue."

The erroneous identification of the Trustor on the Notice of Default and the Notice of Trustee's Sale addressed by the state court did not adjudicate the issues raised in the case now before the court relating to the absence of a Lender. As stated in *Goddard v. Security Title Ins. & Guar. Co.* (1939) 14 Cal.2d 47:

> If a new cause of action arises from a new issue or new facts that were not stated in the previous complaint, it necessarily precludes a finding that it is barred by res judicata or collateral estoppel. A judgment on general demurrer may not be on the merits, for the defects set up may be technical or formal, and the plaintiff may in such case by a different pleading eliminate them or correct the omissions and allege facts constituting a good cause of action, in proper form. Where such a new and sufficient complaint is filed, the prior judgment on demurrer will not be a bar (citations). This result has frequently been reached where the failure of the first complaint was in misconceiving the remedy, or framing the complaint on the wrong form of action. *Goddard v. Security Title Ins. & Guar. Co.* (1939) 14 Cal.2d 47, 52.

A demurrer is not a trial on the merits. The earlier conclusion of the trial court, which was to sustain a demurrer without leave to amend because the court could not foresee any way to amend the Complaint to state a cause of action, can be shown by subsequent pleadings to be erroneous.

IV. QUIET TITLE IS A REMEDY AFTER A BANK RECORDS AN UNAUTHORIZED NOTICE OF DEFAULT AND TRUSTEE'S SALE

Chase argues that a Notice of Default and a Notice of Trustee's Sale do not affect title to real property, precluding an action for quiet title. After filing three defective notices of trustee's sale against the Property, Chase cites *Ortiz v. Accredited Home Lenders, Inc.* (2009) 639 F.Supp.2d 1159, 1168, "Plaintiffs are still the owners of the Property. The recorded foreclosure notices do not affect Plaintiffs' title, ownership, or possession in the Property." Ortiz cites no cases in support of this proposition, which defies common sense. Even a fraudulent NOTS filed in bad faith will depress the value of real property. Just ask any realtor. The subject of this lawsuit, a deed of trust, is unquestionably an interest in real

property. It affects title, and if it is defective on its face, any claim against the Property asserted under that DOT is suspect.

If a court wrongly concludes that the plaintiff cannot amend his complaint to state a cause of action, and a new lawsuit reveals the error, then the court can revise its decision rather than dismiss the complaint. It is an abuse of discretion to sustain a demurrer without leave to amend if plaintiff shows there is reasonable possibility any defect identified by defendant can be cured by amendment. *Shvarts v. Budget Group, Inc.* (2000) 81 Cal.App.4th 1153, 1157. Chase's inability to contact the Lender states a new cause of action not raised in any previous action.

IV. DUE PROCESS

The Due Process Clause of the Fourteenth Amendment provides:

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

If a buyer wants to take out a loan to purchase a house, (s)he must accept the terms of the Note and Deed of Trust presented by the Lender or the title company for signature. The Adjustable Rate Note and the Deed of Trust are adhesion contracts. The borrower must sign on the dotted line or walk away from the deal.

Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property. Thus, in deciding what process constitutionally is due in various contexts, the Court repeatedly has emphasized that "procedural due process rules are shaped by the risk of error inherent in the truthfinding process. *Mathews v. Eldridge* (1976) 424 U.S. 319, 344; *Carey v. Piphus* (1978) 435 U.S. 247, 259. The risk of error is extreme where a foreclosing bank demonstrates repeatedly that it cannot contact the Lender.

Although due process tolerates variances in procedure "appropriate to the nature of the case," it is nonetheless possible to identify its core goals and

requirements. The required elements of due process are those that "minimize substantively unfair or mistaken deprivations" by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests. The core of these requirements is notice and a hearing before an impartial tribunal. Due process 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. Plaintiff was granted one brief hearing without leave to amend.

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

The Supreme Court has found state action present in the exercise by a private entity of powers traditionally reserved to the State. See, e. g., *Marsh v. Alabama* (1946) 326 U.S. 501 (company town). We have found state action present in the exercise of a private entity of powers traditionally reserved to the State which are associated with sovereignty, such as eminent domain, and Due Process may be required. *Jackson v. Metropolitan Edison Co.* (1974) 419 U.S. 345, 353.

California courts have consistently refused to enforce contractual protections to homeowners in foreclosure, while breach of any other form of contract results in a fair trial. Justice Douglas, in his dissenting opinion in *Jackson*, wrote:

In *Burton v. Wilmington Parking Authority*, *supra* 365 U.S. 715,

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

It is not enough to examine seriatim each of the factors upon which a claimant relies and to dismiss each individually as being insufficient to support a finding of state action. It is the aggregate that is controlling. *Jackson v. Metropolitan Edison Co.* (1974) 419 US 345, 360.

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

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

> overlords on subservient state agencies make recovery in state courts unlikely.
>
> Section 1983 addresses itself to grievances inflicted "under color of any statute, ordinance, [or] regulation. . . of any State . . . ." A private residence, being a necessity of life, is an entitlement which may not be taken without the requirements of procedural due process. *Fuentes v. Shevin* (1972) 407 U.S. 67, 80; *Goldberg v. Kelly* (1970) 397 U.S. 254; *Palmer v. Columbia Gas of Ohio, Inc.* (CA6 1973) 479 F.2d 153 *Jackson v. Metropolitan Edison Co.* (1974) 419 U.S. 345, 364.

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Chase has invested many thousands of dollars pursuing a strategy of completing a defective foreclosure based on intentionally stating a fictitious name as the Trustor in a recorded Notice of Default and three recorded Notices of Trustees Sale, when it simply needed to request that the Lender contact Plaintiff and ask him to sign a correctly spelled document. One call, compared to hundreds of hours of attorneys' fees invested in filing demurrers, motions to strike, and appellate briefs. If Chase cannot identify the Lender, then Chase and its in-house "trustee" CRC cannot initiate foreclosure under the explicit terms of the Note and Deed of Trust.

According to Plaintiff's Deed of Trust, the "Lender" is WASHINGTON MUTUAL BANK, FA— a defunct organization. Plaintiff did not at any time enter into a contract with Chase. According to 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).

If Chase cannot identify the Lender, then its in-house trustee, CRC, was not authorized to initiate foreclosure against Plaintiff when it recorded the Notice of Default, and it was not acting on behalf of the Lender when it filed a Notice of Trustee's Sale. Therefore, the pending trustee's sale is illegal.

Chase argues that Plaintiff is not allowed to preemptively file suit to challenge the foreclosure, and therefore he is not entitled to declaratory relief. If this were the law, *anyone* could file a NOD and a NOTS, adhere to the statutory procedures, and take a person's home. If the courts refused to intervene, his or her only recourse would be to fight or quit. That cannot be the law, and yet this sense of entitlement by the banks has emerged as a widespread pattern during the past several years. California's "comprehensive statutory scheme" has been abused, and the widespread failure of California courts to require some proof of entitlement is a denial of Due Process.

Miller & Starr published a stark criticism of what they described as the Star Chamber proceedings that have dominated California foreclosure proceedings in recent years in Miller & Starr, *Real Estate NewsAlert* (2012) Vol. 22, No. 3:

Having rejected the argument for allowing a pre-foreclosure suit to establish authority to foreclose non-judicially, the court of appeal in *Gomes v. Countrywide* (2011) 192 Cal.App.4th 1149, added insult to injury by refusing to permit the homeowner to amend its complaint to allege "on information and belief" that the proper noteholder had not authorized the proceeding... essentially holding that by keeping the assignments of the debt instrument secret, the creditor parties had precluded the debtor from challenging their ownership of the debt and their fundamental right to enforce the debt at any time prior to the completion of the foreclosure. (p. 27).

The case confronts the 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 *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal. App. 4th 256, since the plaintiff was required to plead that "HSBC did not receive a valid assignment of the debt in any manner," said the court, its claim failed, even though the plaintiff had no way of knowing what might have occurred. Again, the court seemed to be requiring a debtor to plead facts which were solely known to the foreclosing parties and not available to him, even though these facts, at least in the abstract, are of great importance to a debtor seeking to avoid double liability—to avoid paying

an indebtedness to someone who claims all the remedies of a holder but refuses to demonstrate (or cannot demonstrate) that it is, in fact, the holder of the debt instrument.

IV. CONCLUSION

The overwhelming weight of recent court of appeal decisions in California is to preserve the nonjudicial foreclosure process and protect foreclosing parties from having to "produce the note" or demonstrate their true holder status as a condition of foreclosing, or to require the self-proclaimed "agents," "nominees" or "attorneys in fact" of the foreclosing beneficiary from producing their "badges" authorizing their action against the debtor.

V. TENDER IS NOT REQUIRED

Chase argues that Plaintiff's claims challenge the foreclosure process, and so he must allege tender. Plaintiff is not challenging the foreclosure process. He is alleging that Chase's conduct proves that it cannot identify the Lender, and so its efforts to collect payments from Plaintiff and foreclose are illegal and fraudulent.

The Court of Appeal spelled out exceptions to the tender requirement in *Lona v. Citibank* (2011) 202 Cal.App.4th 89. Lona brought an action to set aside the trustee's sale claiming that he was a victim of predatory lending. The court held that summary judgment in favor of Citibank was improper because the homeowner presented sufficient evidence of triable issues of material fact with regard to the alleged unconscionability of the transaction.

Lona argued that he was not required to tender in order to seek equitable remedies or damages because: (1) the deed of trust was illegal from the time of formation and therefore, unenforceable and non-assignable; and (2) his claims would offset any amounts claimed to be due under the void agreements. Lona also argued that a tender was not required because his claim was based on the illegality

of the loan contract, and not any irregularity in noticing or conducting the trustee's sale. *Lona* described other grounds for setting aside a trustee's sale in the case law, including assertions that no breach occurred, that the borrower was not in default, that the deed of trust was void, that the sale was the result of sham bidding or an attempt to restrict competition in bidding; or that the trustee did not have the power to foreclose. *Id.*, 202 Cal.App.4th at 115. The summary judgment was reversed.

A tender may not be required where it would be inequitable to do so. When the person making the claim has a counter-claim or set-off against the beneficiary, it is deemed that they offset each other, and if the offset is equal to or greater than the amount due, a tender is not required. Also, if the action attacks the validity of the underlying debt, a tender is not required since it would constitute an affirmative of the debt." *Onofrio v. Rice* (1997) 55 Cal.App.4th 413, 424 (citing 4 Miller & Starr, Cal. Real Estate, Deeds of Trust & Mortgages § 9:154, at pp. 508-512). Since Plaintiff here is challenging Chase's assertion that it is acting on behalf of the Lender, the action attacks the validity of the foreclosure action. A tender would constitute an affirmative of the foreclosure.

Tamburri v. Suntrust Mortg., Inc. (N.D.Cal. 2011) 2011 U.S. Dist. LEXIS 144442, 2011 WL 6294472, at *4-5, describes many exceptions and qualifications to the tender rule. "These exceptions and qualifications counsel against a blanket requirement of the tender rule at the pleading stage. The Court thus declines to dismiss the complaint on the basis of her failure to allege tender."

In *Ogilvie v. Select Portfolio Serv.* (N.D.Cal. July 23, 2012, No. 12-1654), the District Court followed *Tamburri*:

> The tender element of wrongful foreclosure is an equitable concept. The Court declines to apply the tender rule at this early pleading stage without an opportunity to undertake a more informed analysis of the equities, and where the claim is dismissed on other grounds with leave to amend. See *Tamburri v. Suntrust Mortg., Inc.*, (N.D.Cal. 2011).

ING Bank v. Ahn (N.D.Cal.) 2009 WL 2083965, at *2 noted that *Yamamoto v. Bank of New York* (9th Cir. 2003) 329 F.3d 1167 "did not hold that a district court must, as a matter of law, dismiss a case if the ability to tender is not pleaded".

Singh v. Wash. Mut. Bank, (N.D.Cal.) 2009 WL 2588885, at *3 collected cases indicating that *Yamamoto* did "not hold that a claim for rescission must, in all instances, be conditioned on a tender offer by the plaintiff."

Botelho v. US Bank, NA (N.D.Cal. 2010) 692 F.Supp. 2d 1174, 1180, summarized the diverse interpretations of the tender requirement:

> ...district courts should base their decision as to when a plaintiff must show ability to tender on the particular "circumstances" and "evidence" of each case. This reading of Yamamoto is also consistent with the liberal pleading standards of Federal Rule of Civil Procedure 8, which require only that the averments of the complaint sufficiently establish a basis for judgment against the defendant. *Allied Signal, Inc. v. City of Phoenix*, 182 F.3d 692, 696 (9th Cir.1999). *Id* at 1181. Finally, and most fundamentally, this is the most workable practice. It is hard to see how a judge could decide on the bare pleadings whether to require a given plaintiff to allege an extra element of a claim in order to proceed any further with his or her suit. The enumerated elements of any given claim are among the most fixed of legal principles; a particular fact either must be pleaded every time in order to state a claim, or it need not be pleaded at all. The list of elements cannot be altered on a case-by-case basis.

The court concluded that Botelho's complaint was not deficient for failure to plead ability to tender loan proceeds.

Respectfully submitted.

January 16, 2013

Douglas Gillies, Plaintiff