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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

REPLY IN SUPPORT OF MOTION TO DISMISS

Date: February 7, 2013
Time: 8:30 a.m.
Courtroom: 10

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

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

Plaintiff's Opposition offers more than an improper attempt to re-litigate in this Court the merits of two state court appeals Plaintiff lost, wherein the California Court of Appeals affirmed two trial court orders sustaining the demurrers to Plaintiff's First Complaint and Second Complaint (involving the same property and loan), without leave to amend. This Court need look no further than Page 3 of Plaintiff's Opposition, where he states that the trial courts and California Court of Appeals in those lawsuits -- *Gillies I* and *Gillies II* -- made "erroneous decisions" and that he is therefore entitled to bring his Third Complaint in federal court to redress those allegedly erroneous decisions. Accordingly, this Court should summarily grant this Motion and bar Plaintiff's Third Complaint as a matter of law under the well-established *Rooker-Feldman* doctrine, which holds that a federal district court cannot exercise subject matter jurisdiction over a suit that is, as Plaintiff tacitly admits here, a de facto appeal of a state judgment.

Moreover, Plaintiff cannot demonstrate that his Third Complaint presents any new causes of action which were not previously addressed in the prior state court actions. Although Plaintiff argues that two new "issues" are presented, namely, that (1) the trial court in *Gillies I* did not address the indexing problem of Plaintiff's name being misspelled on the Deed of Trust and Foreclosure documents, and (2) that Chase's refusal to ask Plaintiff to correct the clerical error of the misspelled name on the Deed of Trust means that Chase is not the "Lender" under the Deed of Trust, there are neither new nor have any merit.

Indeed, Plaintiff admits in his Opposition that before the first demurrer hearing in *Gillies I*, he discovered that the Notice of Default did not spell his name correctly and requested leave to amend his First Complaint to present the issue. The trial court denied the request and the Court of Appeals affirmed the judgment in Chase's favor, stating that "no reasonable person would be confused by such a

minor error." Similarly, Plaintiff previously contended in *Gillies I* that Chase was not the beneficiary under the Deed of Trust, and the Court of Appeals disagreed, finding that "there is simply no reasonable dispute that Chase is Washington Mutual Bank's successor-in-interest as to Gillies' trust deed." As detailed below, numerous other California courts have consistently held that Chase is Washington Mutual's successor in interest pursuant to the Purchase and Assumption Agreement (attached as Exhibit F to Chase's Request for Judicial Notice). Thus, contrary to Plaintiff's contention, it is clear that these issues are not "new," were previously considered and determined against Plaintiff, and cannot plausibly constitute a new causes of action or claims in the Third Complaint.

Third, Plaintiff has failed to address numerous other substantive and pleading deficiencies in Chase's Motion supporting Plaintiff's re-hashed causes of action each fail as a matter of law. Chase's Motion should therefore be granted and the Third Complaint should be dismissed with prejudice.

II. The Third Complaint is Barred by the *Rooker-Feldman* Doctrine, Because The Opposition and The Complaint Clearly Evidence Plaintiff's Challenge To The California Court of Appeals' Decisions Which Upheld the Prior State Court Orders Sustaining the Demurrers to Plaintiff's Prior Complaints Without Leave to Amend.

Plaintiff's Opposition repeatedly challenges the California Court of Appeals' decisions affirming the trial courts' rulings in both *Gillies I* and *Gillies II*, thus invoking the *Rooker-Feldman* doctrine. "The *Rooker-Feldman* doctrine has evolved from the two Supreme Court cases from which its name is derived." *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1139 (9th Cir. 2004). *Rooker-Feldman* "is a narrow doctrine, confined to cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Lance v. Dennis*, 546 U.S. 459, 464 (2006); *see also Wolfe v. Strankman*, 392 F.3d

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358, 363 (9th Cir.2004) (stating that the *Rooker-Feldman* doctrine bars a federal district court "from exercising subject matter jurisdiction over a suit that is a de facto appeal from a state court judgment"); *Noel v. Hall*, 341 F.3d 1148, 1164 (9th Cir.2003) ("If a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision, *Rooker-Feldman* bars subject matter jurisdiction in federal district court")

That Plaintiff's Complaint is a clear attack and attempt to re-litigate the Court of Appeals' rulings is plainly illustrated by the following Opposition statements:

- "Judge deBellefeuille [the trial court judge in *Gillies I*] did not address the issue of the misspelled name at the demurrer hearing or in her order." (Opposition, 3:1-2).
- "The California courts decided to ignore the indexing problem and constructive notice as they found that there was actual notice." (Opposition, 1:5-6).
- "The indexing problem was not addressed by the trial judge in either case" because the trial courts allegedly erred in not granting leave to amend the complaints. (Opposition, 4:15-16)
- "[T]he 'new issue' of indexing was not raised in *Gillies I* because the demurrer in that case was sustained without leave to amend." (Opposition, 4:25-26).
- "The court of appeal misconstrued" the case law which it relied on in *Gillies II* to dismiss the complaint based on res judicata. (Opposition, 4:27). Plaintiff continues to analyze why the Court of Appeals in *Gillies II* was allegedly incorrect. (Opposition, 4:28 – 4:13).
- "The Court of Appeal in *Gillies II* applied a rule that is applicable to nonsuits, but not demurrers." (Opposition, 5:14-15). Plaintiff's Opposition proceeds to rant on why the Court of Appeals was incorrect. (Opposition, 5:17 – 6:20).
- The California Court of Appeals in *Gillies I* made an "erroneous identification

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of the Trustor on the Notice of Default and the Notice of Trustee's Sale." (Opposition, 9:25-26).

- "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." (Opposition, 10:13-16).
- "It is an abuse of discretion to sustain a demurrer without leave to amend if plaintiff shows there is a reasonable possibility any defect identified by defendant [sic] can be cured by amendment." (Opposition, 11:5-7).
- "[T]he court in *Gillies I* sustained defendant's demurrer based upon a finding that defendants had recorded a NOT, despite the fact that it was recorded under a fictitious name." (Opposition, 9:14-15).
- Plaintiff also complains that his request in *Gillies I* to amend the Complaint to address the index issues "was denied" (Opposition, 2:28-3:1) and that "the court [in Gillies I] did not grant leave to amend." (Opposition, 4:7).
- Finally, although the Court of Appeals in *Gillies I* already held that the Notice of Default *was not* defective (RJN, Ex. C), Plaintiff continues to argue why the Notice of Default is defective. (*See generally* Opposition, 7:11 – 8:3).

Thus, the *Rooker-Feldman* doctrine clearly applies and this Court has no jurisdiction to entertain the Third Complaint. The Motion to Dismiss should be granted in its entirety, and this action dismissed with prejudice.

III. Alternatively, the Complaint is Barred by Res Judicata.

A. Plaintiff's Opposition Confirms that The Third Complaint Addresses the Same Issues in the First Complaint, Including Issues Which Could have Been Addressed in the First Complaint.

1. The Court of Appeals and the State Trial Courts Did Consider Plaintiff's Grantor-Grantee Index Issue, And Ruled Against Plaintiff.

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As stated in the Motion to Dismiss, res judicata bars not only issues that were actually litigated in the prior action, but also issues that could have been litigated in the prior action. (Motion to Dismiss, Docket No. 6, 6:4-5).

Plaintiff states that "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." (Opposition, 2:25-28). Plaintiff then states that "[t]he 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 Grantor-Grantee index was not considered." (Opposition, 3:17-19) (emphasis in original). Plaintiff concludes that "[a]s a result, the indexing problem was not addressed by the trial judge in either [*Gillies I* or *Gillies II*]." (Opposition, 4:15-16).

However, Plaintiff admits that he discovered this alleged "error" prior to the demurrer hearing in *Gillies I*, which Plaintiff states occurred on March 26, 2010. (Opposition, 2:25 – 3:3). Plaintiff in fact states that his "request to amend the complaint to raise this issue was denied." (Opposition, 2: 28 – 3:1). Thus, at the outset, Plaintiff admits that he did raise this issue in the prior action and the trial court and Court of Appeals found the argument meritless. Thus, because this issue was already addressed in the first lawsuit that Plaintiff filed, it is barred by res judicata.

Moreover, the Court of Appeals in *Gillies I* specifically addressed that the Notice of Default misspelled Plaintiff's name, stating that the argument lacked merit because "no reasonable person would be confused by such a minor error." (RJN, Ex. C, p. 7; *Gillies v. California Reconveyance Co.*, 2011 WL 1348413 at *4 (Cal. Ct. App. April 11, 2011). Thus, it is disingenuous for Plaintiff to state that the alleged indexing issue is a new issue that could not have previously been alleged.

Finally, the Court of Appeals in *Gillies II* addressed this same exact issue.

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See Gillies v. California Reconveyance Co., 2012 WL 862167 at * (Cal. Ct. App. Feb. 6 2012) ("[Gillies] claims. . . that the trust deed and notice of default were not indexed properly."). The Court of Appeals reasoned that this was an issue that could have been addressed in *Gillies I*, thus finding that this argument constituted the same "cause of action" as the prior lawsuit. *Id.* at *2; RJN, Ex. E. For Plaintiff to state that neither court in *Gillies I* or *Gillies II* addressed the indexing issue simply lacks any veracity or credibility, as demonstrated by the judgments in those cases. Thus, the indexing issue is not a new cause of action, and is barred by res judicata.

2. <u>The Court of Appeals and the State Trial Courts Did Consider Plaintiff's Claim That Chase Has No Interest in the Deed of Trust Because it Cannot Identify the Lender, And Ruled Against Plaintiff.</u>

Plaintiff also contends that because Chase will not fix the clerical error of misspelling Plaintiff's name on the Deed of Trust, it has no interest under the Deed of Trust, and that this conduct therefore constitutes a "new" issue that was not previously considered by the courts. (See, Opposition, 6:21-24, where Plaintiff states that "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.") As a result, Plaintiff goes on to claim that "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 (Opposition, 7:11-12), arguing that the spelling error is a clerical error which Chase could have remedied by asking Plaintiff to amend the Deed of Trust to fix the mistake. (Opposition, 7:17 - 8:3). Thus, Plaintiff argues that if Chase does not ask Plaintiff to correct the spelling discrepancy in the Deed of Trust, then Chase is not the "Lender" under the Deed of Trust as the lender would have

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corrected the clerical error. (Opposition, 9:10-12).

Likewise, this is not a "new" issue, because the Court of Appeals in *Gillies I* specifically addressed, and determined that, Chase was the beneficiary under the deed of trust. In *Gillies I*, the Court of Appeals stated "Gillies argues . . . that Chase is not the mortgagee. He points out that Washington Mutual bank is named beneficiary of the trust deed." *Gillies I*, 2011 WL 1348413 at *3. In response, the Court stated:

> Here the trial court took judicial notice of the purchase and assumption agreement between the Federal Deposit Insurance Corporation (FDIC) as receiver for Washington Mutual Bank and Chase. The agreement provides that Chase purchases "all right, title and interest of the Receiver in and to all of the assets" of Washington Mutual Bank. The agreement also states that Chase "specifically purchases all mortgage servicing rights and obligations of [Washington Mutual Bank]." The agreement is maintained on the FDIC's official government website, and is not reasonably subject to dispute. Thus it contains facts that may be judicially noticed. (Evid.Code, § 452, subd. (h) [allows the court to take judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy"].)
>
> There is simply no reasonable dispute that Chase is Washington Mutual Bank's successor-in-interest as to Gillies's trust deed. The trial court properly sustained Chase's demurrer to the fifth cause of action.

Id. at 3-4. Thus, Plaintiff in fact presented the argument that Chase has no interest in the Deed of Trust in his first lawsuit, and this Court can reach no other conclusion that it was misleading for Plaintiff to argue otherwise. The Court should also note that the Court of Appeal's holding was consistent with conclusions reached by numerous other courts that Chase is Washington Mutual's successor in interest, and that Chase succeeded to Washington Mutual's beneficial interest in Plaintiff's Note through the purchase of Washington Mutual's assets via the Purchase Agreement. *See Rosenfeld v. JPMorgan Chase Bank, N.A.*, 732 F.Supp.2d 952, 960 (N.D. Cal. 2010); *Hilton v. Wash. Mut. Bank*, 2009 U.S. Dist. LEXIS 100441, at *9 n.5 (N.D. Cal. 2009); *Yeomalakis v. FDIC*, 562 F.3d 56, 60 (1st Cir.

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2009).[1]

In any event, even if the Court did not consider the issue in *Gillies I*, it is clear Plaintiff could have presented the argument at an earlier time and Plaintiff provides no reason why he could not have alleged this argument in the First Action. Rather, he simply concludes this issue "could only have been discovered as a result of Chase's vigorous defense in the first two actions." (Opposition, 7:11-12). Even assuming, *arguendo*, that Plaintiff's contention is premised upon a theory that Chase's alleged continuous refusal to ask Plaintiff to amend the Deed of Trust lead to plaintiff's discovery of this "issue," such contention is without merit since it is contrary to the terms of the Adjustable Rate Note. First, the Adjustable Rate Note which Plaintiff attaches as Exhibit 6 to his Complaint -- which he claims has a procedure for fixing clerical errors -- is *not signed* by either party. (Complaint, Ex. 6; *see also* Motion to Dismiss, Docket No. 6, p. 13, n. 3). Thus, Plaintiff presents no plausible theory that this Adjustable Rate Note is a controlling document in this matter. In contrast, the judicially noticeable *recorded* Adjustable Rate Note which was *signed by Plaintiff* (and attached to the Deed of Trust as Exhibit G to Chase's Request for Judicial Notice) does not contain any such alleged provision. Finally, Chase is not required by any provision under the Deed of Trust or Adjustable Rate Note to fix any clerical error. Even if the Court could consider the unsigned and unrecorded Adjustable Rate Note, Paragraph 12 only states that Plaintiff must agree to fix any clerical or ministerial mistake if Chase so demands -- it does *not* state that Chase is *obligated* to demand from Plaintiff that any such mistake be corrected. Accordingly, Plaintiff's theory that Chase is not the Lender because it will not demand that Plaintiff correct the clerical error is without merit and cannot affect

[1] Indeed, the Deed of Trust explicitly states that "The covenants and agreements in this Security Instrument shall bind . . . and benefit the successors and assigns of Lender." (RJN, Ex. G, ¶ 13). Because the unambiguous language of the Purchase and Assumption Agreement (RJN, Ex. F) provides that Chase purchased certain assets of Washington Mutual, Chase is the "successor[] and assign[]" of Washington Mutual, and thus all of Washington Mutual's obligations under the Deed of Trust succeeded to Chase.

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Chase's status as the successor in interest to Washington Mutual. For res judicata purposes, it is thus inescapable that Plaintiff's prior two state court actions involved the same issues he seeks to now re-litigate in this Court.

B. There Was A Final Judgment on the Merits As Plaintiff Exhausted His Appeals in State Court.

Although Plaintiff claims because the Trial Court and Court of Appeals in *Gillies I* did not allow him leave to amend the complaint, there was not a final judgment on the merits (Opposition, 10:13-16), such contention is simply contrary to law.

As shown in Chase's Motion to Dismiss, res judicata applies when the time to appeal has expired or when an appeal from the trial court judgment has been exhausted. (Motion to Dismiss, Docket No. 6, 6:21-25). Here, Plaintiff appealed the trial court's ruling sustaining the demurrer without leave to amend. The California Court of Appeals affirmed the judgment. (RJN, Ex. C). Thus, there was a final judgment on the merits.

Plaintiff's reliance on *Goddard v. Security Title Ins. & Guaranty Co.*, 14 Cal.2d 47, 52 (1939) for the proposition that a demurrer is not a final judgment on the merits is misplaced. In *Goddard*, there was a prior "judgment of dismissal based upon a demurrer sustained for *defects of form*, under circumstances where it was possible to plead a good cause of action in another suit." *Id.* at 55 (emphasis added). The Court applied the rule that "where the dismissal of an action *does not purport to go to the merits of the case*, the trial court has no authority to include within the judgment of dismissal an order which in effect precludes the plaintiff from instituting another action in which the merits of the controversy may be litigated." *Id.* at 54-55 (emphasis added).

Here, unlike in *Goddard*, the dismissal of Plaintiff's first complaint was on the merits. As clearly evidenced by the Court of Appeals decision in *Gillies I*, the demurrer was sustained because the pleaded allegations did not state any cause of

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action. (RJN, Ex. C). Unlike *Goddard*, the Demurrer was not sustained because Plaintiff "fram[ed] the complaint on the wrong form of action." *Goddard*, *supra*, 14 Cal.2d. at 52. The pivotal question, therefore, is whether "the demurrer was sustained on substantive grounds," which it was. *Shuffer v. Board of Trustees*, 67 Cal. App. 3d 208, 216 (1977). Because the prior action was dismissed on substantive grounds, Plaintiff's reliance on *Goddard* is misplaced. Plaintiff exhausted his appeal of the trial court's ruling which constitutes a final judgment on the merits.

C. The Parties Are the Same.

Plaintiff does not contend, and thereby concedes, that the parties were different in the First Complaint and Third Complaint. Thus, the final element of res judicata is met, and the Complaint should be dismissed with prejudice.

IV. Plaintiff's Opposition Has Not Rebutted That All the Causes of Action Fail to State A Claim for Relief.

A. Plaintiff's Cause of Action for Quiet Title Fails.

Plaintiff cannot state a cause of action for quiet title. As stated in the Motion to Dismiss, the claim fails because (1) quiet title is a remedy, not a cause of action, (2) Plaintiff fails to allege a tender of the amount due and owing on his loan, and (3) Plaintiff does not plead any competing claims to the property because foreclosure notices do not affect any title, ownership, or possession to property. (Motion to Dismiss, Docket No. 6, 15:28 – 17:21). At the outset, Plaintiff does not even address Chase's first or second contention. Instead, Plaintiff agrees that quieting title is a remedy (Opposition, 10: 18-19).

Plaintiff then incorrectly argues that there is a competing claim to the property. Plaintiff states that the case Chase relies on, *Ortiz v. Accredited Home Lenders, Inc.*, 639 F. Supp. 2d 1159, 1168 (S. D. Cal. 2009), "defies common sense" because one needs to only "ask any realtor" to learn that a "fraudulent NOTS filed in bad faith will depress the value of real property." (Opposition, 10:25-27).

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However, a decline in the value of real property is not an element to receive the remedy of quiet title. Instead, the validity of the remedy is dependent upon there being a competing claim to property. Cal Code Civ. Proc. § 761.020(a)-(e). Because foreclosure notices are not considered competing claims to property pursuant to *Ortiz*, *surpa*, Plaintiff's cause of action fails and the Motion to Dismiss should be granted. *See also Tamburri v. Suntrust Mortgage, Inc.*, 875 F.Supp.2d 1009, 1026 (2012) (applying the holding in *Ortiz* that foreclosure notices do not affect title, ownership, or possession to real property and dismissing a quiet title claim with prejudice).

B. Plaintiff's Opposition Fails to Address Chase's Arguments that Plaintiff Cannot State a Claim for Wrongful Foreclosure.

Plaintiff's Opposition fails to address most of Chase's arguments that Plaintiff cannot state a cause of action for wrongful foreclosure. Chase argued in its Motion to Dismiss that (1) the foreclosure process has been conducted in accordance with California law and the provisions of the Deed of Trust, (2) there is no requirement to present the note in order to foreclose, (3) there is no requirement that an assignment of deed of trust or note be recorded, and (4) Plaintiff alleges no prejudice as a result of the foreclosure proceedings. (Motion to Dismiss, Docket No. 6, 11:5 – 15:26).

Plaintiff's Opposition does not address the first, second, or third contentions listed above. Instead, Plaintiff cursorily states that "[i]f Chase is a renegade bank seeking to foreclose without knowing the identity of the Lender, Plaintiff's damages will be substantial if Chase succeeds." (Opposition, 2:2-3).

However, Plaintiff's theory lacks merit. As demonstrated above in Section III(A)(2), numerous courts across California have recognized that Chase acquired certain assets and certain liabilities of Washington Mutual pursuant to a Purchase and Assumption Agreement. Indeed, as stated in *Gillies I*, "there is simply no reasonable dispute that Chase is Washington Mutual Bank's successor-in-interest as to Gillies trust deed." *Gillies I*, 2011 WL 1348413 at *4. The Deed of Trust

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explicitly states that "The covenants and agreements in this Security Instrument shall bind . . . and benefit the successors and assigns of Lender." (RJN, Ex. G, ¶ 13). Plaintiff's theory that the identity of the Lender has not been disclosed is thus a red herring, as Chase—pursuant to the Purchase and Assumption Agreement— is the successor to the original lender, Washington Mutual. (RJN, Ex. F). Thus, the entire premise of Plaintiff's argument fails. As demonstrated in Section V(B)(1) of Chase's Motion to Dismiss, the foreclosure has complied with California law and the Deed of Trust. For these reasons, Plaintiff cannot demonstrate any prejudice as Chase is Washington Mutual's successor in interest and CRC is the trustee who, under the terms of the Deed of Trust—which Plaintiff signed and agreed to the terms included therein—can initiate the nonjudicial foreclosure proceeding. (RJN, Ex. G, p. 2; p. 13; ¶ 22; Motion to Dismiss, Docket No. 6, 11:13-18).

C. Plaintiff's Opposition Fails to Address Chase's Arguments that Plaintiff Cannot State a Claim for Declaratory and Injunctive Relief.

1. Plaintiff Cannot State a Claim for Declaratory Relief As He Has No Right to Preemptively File Suit Challenging the Standing of Chase to Foreclose.

In its Motion to Dismiss, Chase argued that Plaintiff cannot maintain a cause of action for declaratory relief because (1) Plaintiff is not allowed to preemptively file suit challenging Chase's standing to foreclose, (2) declaratory relief is only a remedy, not a cause of action, and (3) the claim is duplicative of Plaintiff's other failed causes of action. Plaintiff only addresses the first contention, thus tacitly admitting that declaratory relief is only a remedy and it is duplicative of the other causes of action. The Motion should be granted for this reason.

In any event, Plaintiff's argument that Chase cannot rely on *Robinson v. Countrywide Home Loans, Inc.*, 199 Cal. App. 4th 42 (2011) for the proposition that a borrower cannot preemptively file suit challenging a parties' standing to foreclose

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has no merit. Plaintiff attempts to discredit *Robinson* by citing to a non-binding secondary authority that criticizes the California Court of Appeals for not allowing a borrower to challenge the standing of a defendant to foreclose. (Opposition, 15:26 – 17:3). However, *Robinson* has not been overturned, and has indeed been confirmed by numerous District Courts, the Ninth Circuit Court of Appeals, and the California Court of Appeals. *See Carswell v. JPMorgan Chase Bank, N.A.*, 2012 WL 6053168 at *1 (9th Cir. Nov. 21, 2012); *Boyter v. Wells Fargo Bank, N.A.*, 2012 WL 1144281 at *4-5 (N.D. Cal. April 4, 2012); *Cromwell v. NDeX West, LLC*, 2012 WL 4951214 at *2 (Cal. Ct. App. Oct. 18, 2012); *Ananiev v. Aurora Loan Services, LLC*, 2012 WL 2838689 at *6 (N.D. Cal. July 10, 2012). Thus, Plaintiff has no standing to challenge Chase's authority to foreclose, and the declaratory relief claim should be dismissed with prejudice.

2. Plaintiff Fails to Address His Claim for an Injunction.

Chase argued in its Motion to Dismiss that Plaintiff' claim for injunctive relief fails because (1) it is a remedy, not a cause of action, and (2) Plaintiff does not plead the elements to demonstrate he is entitled to any injunctive relief. (Motion to Dismiss, Docket No. 6, 18:22 – 20:5). All Plaintiff states in response is that "If Chase seeks to steal Plaintiff's house, injunction is the preferred option." (Opposition, 2:9). Since Plaintiff utterly fails to address Chase's contentions, the Motion to Dismiss should be granted with prejudice.

V. Plaintiff's New Due Process and 42 U.S.C. § 1983 Arguments Fail as Chase is Not A State Actor Subject to the Fourteenth Amendment and Following California's Nonjudicial Foreclosure Process Is Not State Action.

A. The Fourteenth Amendment is Not Implicated by this Action.

Plaintiff's Opposition states for the first time that the Due Process Clause of the Fourteenth Amendment applies to this action because "the non-judicial foreclosure provisions at issue were authorized by state law and were made

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enforceable by the weight and authority of the State." (Opposition, 13:16-18). Private entities are liable for constitutional violations only under certain circumstances, and a private entity's alleged constitutional violations do not provide a plaintiff with a cause of action unless the private entity acted under state law. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 936-40 (1982); *Holmstrand v. Dixon Housing Partners, LP*, 2011 WL 2631834 at *3-4 (E.D. Cal June 30, 2011). Here, Plaintiff does not plead any facts indicating that Chase's actions taken against him were attributable to the state government. Instead, he just concludes that Chase's alleged action "are sufficiently intertwined with those of the State." (Opposition, 13:19-20). Plaintiff cannot meet the threshold showing that Chase is a state actor.

Moreover, "it is well-settled law that non-judicial foreclosure proceedings do not involve 'state action' even though such proceedings are regulated by state law." *Edwards v. Aurora Loan Services, LLC*, 2011 WL 1668926 at *7 (E.D. Cal. May 2, 2011) (*citing Apao v. Bank of New York*, 324 F.3d 1091 (9th Cir. 2003)). Here, Plaintiff complains about Chase's enforcement of California's non-judicial foreclosure statute in support of his new due process violation. Because following the nonjudicial foreclosure statute is not considered state action, Plaintiff's newly alleged claim for a violation of the Fourteenth Amendment fails as a matter of law.

B. 42 U.S.C. § 1983 Is Not Implicated by this Action.

Finally, Plaintiff, also for the first time, alleges a violation of 42 U.S.C. § 1983. To state a claim under Section 1983, plaintiff must allege the defendant, acting under color of state law, deprived him of a constitutionally protected federal right. *Luckes v. County of Hennepin*, 415 F.3d 936, 939 (8th Cir. 2005). In order to succeed on a claim under Section 1983, a plaintiff must allege facts the defendant was personally involved in the constitutional violation. *Carter v. Blake*, 2006 WL 568347, at *2 (E.D. Mo. Mar. 7, 2006); *see also Wilson v. Cross*, 845 F.2d 163, 165 (8th Cir. 1988) ("It is now axiomatic that vicarious liability has no place in § 1983

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lawsuits. Only the person who caused the deprivation can be held liable.").

The Supreme Court has instituted a two-part test to determine if an act is attributable to the state. "First, the deprivation of rights must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible . . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Lugar v. Edmondson Oil Co., Inc.*, 457 U. S. 922, 937 (1982).

Nonjudicial foreclosure sales do not implicate state action because "California does not participate in any way in the sale of . . . foreclosed property, which is done strictly on the basis of the power of sale in the deed of trust." *Homestead Savs. v. Darmiento*, 230 Cal. App. 3d 424, 432 (1991). Non-judicial foreclosure sales conducted pursuant to California state law do not implicate constitutional rights. *Id.* at 432-33. Thus, Plaintiff cannot maintain a cause of action for a violation of Section 1983, and leave to amend should not be granted.

VI. THE TENDER RULE APPLIES TO ALL CLAIMS.

The tender rule acts as an alternative basis to dismiss all of Plaintiff's causes of action and Plaintiff's analysis that an exception applies to this case is flawed. Plaintiff's argument that he "is not challenging the foreclosure process" (Opposition, 17:15) is a blatant mischaracterization of the Third Complaint. The Third Complaint at paragraphs 7-15, 17, 19-26, 29-32, and 34-38 all challenge the nonjudicial foreclosure proceedings. Contrary to Plaintiff's assertion, he does not simply allege that "Chase's conduct proves that it cannot identify the Lender." (Compl., 17:16).

Plaintiff's next argument that the underlying action attacks the validity of the underlying debt is likewise misplaced. (Opposition, 18:7-16). Plaintiff *does not* allege that the underlying debt is invalid. Indeed, he seeks to enforce various provisions of the Deed of Trust, demonstrating the validity of the underlying debt. (Third Compl., ¶ 22). Plaintiff likewise admits to receiving $500,000 from

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Washington Mutual (Third Compl., ¶ 7; Ex. 6), thus further demonstrating that this action does not attack the validity of the debt.

Moreover, *Onofrio v. Rice*, 55 Cal. App. 4th 413, 424 (1997), the case Plaintiff relies upon for the proposition that tender is not required where it would be inequitable to do so, is easily distinguishable from the instant matter. In *Onofrio*, the court applied a limited exception to the tender rule. In that case, the defendant, acting as a foreclosure consultant and real estate broker, participated in a scheme to unlawfully obtain title to the plaintiff's home. *Id.* at 416-18. The court found the defendant breached his fiduciary duty to the plaintiff, engaged in unlawful business practices, and participated in unscrupulous and deceptive loan practices resulting in an unlawful taking of the plaintiff's property. *Id*. at 419-20, 422-23. Based on that conduct the Court of Appeals rejected the defendants' claim that the plaintiff had no standing because she had not tendered the amount owing on her underlying loan. *Id*. at 424. No such circumstances exist here. Rather, Plaintiff defaulted on his loan and Chase has complied with Civil Code § 2924 in regards to the foreclosure proceedings. Tender is required, and Plaintiff's failure to allege tender bars all of his claims.

Finally, although Plaintiff cites to case law that includes exceptions to the tender rule and which state that the tender rule must be applied to the individual circumstances of each case (Opposition, 18:17 – 19:22), Plaintiff fails to state what circumstances in this case would exclude the application of the tender rule. Thus, because Plaintiff has not rebutted that the tender rule applies to his claims, the Motion should be granted and the Third Complaint should be dismissed with prejudice.

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VII. CONCLUSION

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

Dated: January 24, 2012

Respectfully submitted,

BRYAN CAVE LLP

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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 January 24, 2013, 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 January 24, 2013, at Santa Monica, California.

/s/ Michelle Hicks
Michelle Hicks