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

DOUGLAS GILLIES,	)	Case No. B224995
Plaintiff and Appellant,	)	Santa Barbara Co. Case No. 1340786
vs.	)	
CALIFORNIA RECONVEYANCE CO.,	)	**APPELLANT'S OPENING BRIEF**
JP MORGAN CHASE BANK N.A., et al.,	)	
Defendants and Respondents.	)	

APPEAL FROM SUPERIOR COURT OF SANTA BARBARA COUNTY

THE HONORABLE DENISE DE BELLEFEUILLE, and
THE HONORABLE THOMAS ANDERLE, PRESIDING

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3756 Torino Drive
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Appellant *in pro per*

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

DOUGLAS GILLIES, Plaintiff and Appellant, v. CALIFORNIA RECONVEYANCE CO., JP MORGAN CHASE BANK N.A., and DOES 1-20 Defendants and Respondents.	Case No. B224995 Santa Barbara County No. 1340786 APPELLANT'S OPENING BRIEF

Appeal from Judgment of Dismissal following Order Sustaining Defendants' Demurrer to First Amended Complaint without leave to amend

Trial court: Hon. Denise de Bellefeuille and Hon. Thomas Anderle

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INTRODUCTION

California was swamped with foreclosures when the Legislature passed SB 1137 in 2008 enacting Cal. Civil Code §2923.5, which requires lenders to meet and confer with borrowers before recording a Notice of Default ("NOD"). The statute also prescribes a declaration on the NOD showing compliance with §2923.5. Banks skirted the declaration requirement, or attached unsigned statements alleging compliance, or attached pseudo-declarations signed by robo-signers who had no personal knowledge of the facts—all of which happened in this case.

The Court of Appeal in *Mabry v. Superior Court of Orange County* (4th Dist. June 2, 2010), 185 Cal.App.4th 208, 110 Cal. Rptr. 3d 201, found that a borrower has a private right of action under §2923.5 and is not required to tender the full amount of the mortgage before filing suit, since that would defeat the purpose of the statute. The statute adds a procedural step in the foreclosure process, but since the statute is not substantive, it is not preempted by federal law. However, the *Mabry* court found that the declaration required by §2923.5 does not have to be signed under penalty of perjury. The California Supreme Court denied a Petition for Review on August 18, 2010.

On September 30, 2010, Attorney General Edmund G. Brown sent a letter to Respondent JPMorgan Chase ("Chase") stating that a lender may not record a notice of default in California unless it can declare that it has contacted the borrower or has tried with due diligence to contact the borrower as required by §2923.5. "JP Morgan Chase has now admitted that employees assigned to handling foreclosures signed affidavits without first personally reviewing the contents of borrowers' loan files. Thus, borrowers suffered the foreclosure of their homes based on affidavits which JP Morgan Chase had not confirmed to be accurate."

There appears to be some disagreement over the interpretation of §2923.5. Does Cal. Civil Code §2923.5 require a declaration under penalty of perjury based on personal knowledge?

ISSUES

This appeal raises the following questions:

1. Did Respondents' notice of default conform to the requirements of Civil Code §2923.5?

2. Does it matter what name is used to describe the trustor on a notice of default and a notice of trustee's sale, or is any name satisfactory?

3. Does Cal Civil Code §2924 require that a true copy of the recorded NOD be sent to the borrower, or can the copy differ from the recorded notice in many respects, including font, layout, justification, and content?

4. Can the trial court make findings of fact at a hearing on demurrer without receiving evidence, and then sustain a demurrer without leave to amend based on a conclusion not supported by the pleadings?

5. Is the trial court justified in taking judicial notice of facts contained in an agreement being negotiated by Chase that is still not final after two years, where both parties to the contract have been sued for fraud, collusion, and interference with contract as a result of conduct while drafting the agreement?

6. Can a bank foreclose on a California residence where it has produced no document to show that it is a borrower, beneficiary, mortgagee, or servicer?

FACTS

Plaintiff/Appellant borrowed money from Washington Mutual ("WaMu") secured by a First Deed of Trust on his residence ("the Property") (CT 19:18-23). He made timely payments for six years until he started receiving letters from Chase that simply said, "WaMu is becoming Chase." He searched the Grantor/Grantee Index at the Santa Barbara County Recorder's Office under

"Douglas Gillies" and found that no documents had been recorded under his name since January 2006 (CT 20:1-4). There was no recorded document showing that WaMu's interest in the Property had changed since the inception of the loan in 2003.

On August 12, 2009 he received a NOD in the mail (CT 007-008). It was not signed, did not have a declaration of compliance under Cal. Civ. Code §2923.5, and could not be located in the Santa Barbara County Recorder's Office (see Verified Complaint, CT 002:1-003:21).

In November 2009, CRC posted a Notice of Trustee's Sale ("NOTS") on the Property (CT 009-010). An unsigned "Exhibit" attached to the NOTS described JP Morgan Chase Bank as a loan servicer. It was titled "Declaration Pursuant to California Civil Code Section 2923.54" but the exhibit merely had a printed name at the bottom:

> JPMorgan Chase Bank, National Association
> Name: Ann Thorn
> Title: First Vice President

Plaintiff/Appellant is informed and believes that the name "Ann Thorn" has appeared on hundreds of thousands of foreclosure documents issued by CRC and Chase since Chase stopped using MERS and started relying on CRC to carry out its foreclosures in 2008.

Plaintiff filed a Complaint on November 25, 2009, requesting a TRO, declaratory relief, and damages (CT 001-010). He filed a timely ex parte application asking the court to restrain a Trustee's Sale of his residence of eighteen years on the grounds that the notice of default had not been recorded, it was not signed, and it did not include the declaration required by Civil Code §2323.5 (CT pp 013-020; 023-028). Plaintiff's declaration stated:

(1) He found no evidence that the NOD had been recorded, and no documents related to the residence had been recorded since January 31, 2006;

(2) The Notice of Trustee's Sale included an exhibit that described Chase

as “a loan servicer," not a beneficiary, a mortgagee, or an authorized agent;

(3) A Notice of Default must include a declaration from the mortgagee, beneficiary, or authorized agent stating that it has contacted the borrower or tried with due diligence to contact the borrower, and Plaintiff had not spoken with either Chase or CRC; and,

(4) Washington Mutual had made no declaration or statement whatsoever regarding the alleged default and proposed sale. (CT 20:1-12).

Five days before the scheduled Trustee's Sale, Judge Thomas Anderle announced his decision by drawing a big "X" across each page of the proposed Order to Show Cause and writing "Denied" on the first page (CT 026-028). Judge Anderle did not meet with plaintiff as he waited outside the court's chambers for ninety minutes in the corridor.

Plaintiff filed a First Amended Complaint adding a Fifth Cause of Action for Quiet Title on December 23, 2010 (CT 029-040). Defendants demurred (CT 043-056).

At the first hearing in this matter three months later, Judge Denise de Bellefeuille sustained Respondents' demurrer without leave to amend and issued an Order After Hearing on March 26, 2010 (CT 140-147). Judgment of dismissal was entered on April 19, 2010 (CT 148).

1. A DECLARATION IS REQUIRED BY CAL CIVIL CODE §2923.5

Respondent CRC had indeed recorded a notice of default describing the Property on August 13, 2009 (CT 110-111), revealed in Defendants' Exhibit 3, but it was not properly indexed in the Grantor/Grantee Index because CRC did not correctly state the Trustor's name (see section 2, below).

No §2923.5 declaration was attached. Stacy White, an "assistant secretary" for CRC who signed the recorded version of the NOD, could not have had personal knowledge of attempts by Chase, whose offices were in Florida, to

contact the borrower. She worked for CRC, a Trustee located in California that was not directly involved in Chase's efforts to talk to borrowers.

Instead of a declaration, the final paragraph of the NOD simply parroted some of the language in §2923.5.

> "The beneficiary or its designated agent declares that it has contacted the borrower, tried with due diligence to contact the borrower as required by California Civil Code 2923.5, or the borrower has surrendered the property to the beneficiary or authorized agent, or is otherwise exempt from the requirements of §2923.5." (CT 111)

Does Civil Code §2923.5 provide any meaningful protection to California homeowners facing foreclosure, or was the Legislature just placing a stepping-stone in the path of the banks when it adopted SB 1137 in 2008? The preamble to SB 1137 states:

> (a) California is facing an unprecedented threat to its state economy and local economies because of skyrocketing residential property foreclosure rates in California. Residential property foreclosures increased sevenfold from 2006 to 2007. In 2007, more than 84,375 properties were lost to foreclosure in California, and 254,824 loans went into default, the first step in the foreclosure process.
>
> …
>
> (g) This act is necessary to avoid unnecessary foreclosures of residential properties and thereby provide stability to California's statewide and regional economies and housing market by requiring early contact and communications between mortgagees, beneficiaries, or authorized agents and specified borrowers to explore options that could avoid foreclosure and by facilitating the modification or restructuring of loans in appropriate circumstances."

Can anyone satisfy the declaration requirement of Cal. Civil Code §2923.5 simply by signing a notice of default, regardless of whom they work for, what their job title is, or whether they have any personal knowledge of the facts described in the NOD? Can a robo-signer satisfy the §2923.5 declaration requirement by signing thousands of notices per month without reading them

and without any personal knowledge of the facts alleged?

The California Attorney General has asserted that §2923.5 has meaning. On September 24, 2010, he ordered a halt to thousands of GMAC and Ally foreclosures. Mr. Brown's letter stated,

> "The head of Ally Financial's foreclosure document processing team recently admitted that he approved the commencement of judicial foreclosures without verifying that the foreclosures were legally justified or the information in the foreclosure papers was accurate. This admission strongly suggests that any purported verification by Ally Financial that it complied with section 2923.5 before commencing a foreclosure in California is similarly suspect." (Mr. Brown's letter is posted at his website, http://ag.ca.gov/newsalerts/release.php?id=1990).

Ally Financial's Jeffrey Stephen testified that he had signed 10,000 foreclosure documents per month.[1] Then it was reported on September 26 that Beth Ann Cottrell had testified on May 17 that her team at Chase had signed affidavits in 18,000 foreclosures a month without checking them to see if the facts they swore to under oath were true.[2] Chase did not report this revelation until it was leaked to the press four months later.

Can a California homeowner hope to get past demurrer in a nonjudicial state and conduct discovery to determine whether a mortgagee, beneficiary, or authorized agent trying to seize their house complied with §2923.5, whether the individual who signed the NOD had personal knowledge of the matters stated, and how many foreclosure documents that person signed per month?

On September 30, 2010, California Attorney General Jerry Brown sent a letter to Chase. The letter is posted on the Attorney General's website at http://ag.ca.gov/newsalerts/release.php?id=1996

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1 www.washingtonpost.com/wp-dyn/content/article/2010/09/23/AR2010092306440.html?sid=ST2010092706194

2 www.bloomberg.com/news/2010-09-27/jpmorgan-based-home-foreclosures-on-faulty-court-documents-lawyers-claim.html

> The Office of the Attorney General writes to demand that JP Morgan Chase demonstrate immediately that it conducts foreclosures in compliance with California Civil Code, section 2923.5 or, if it cannot, halt all foreclosures in California until it can.
>
> Section 2923.5, subdivision (b) provides that a lender may not record a notice of default in California for a California mortgage originated between January 1, 2003 and December 31, 2007, unless it can declare that it "has contacted the borrower, has tried with due diligence to contact the borrower as required by this section, or that no contact was required pursuant to subdivision (h)."
>
> JP Morgan Chase has now admitted that employees assigned to handling foreclosures signed affidavits without first personally reviewing the contents of borrowers' loan files. Thus, borrowers suffered the foreclosure of their homes based on affidavits which JP Morgan Chase had not confirmed to be accurate. This admission strongly suggests that any purported verification by JP Morgan Chase that it complied with section 2923.5 before commencing a foreclosure in California is similarly suspect.

The Attorney General suggests in his letters to Chase and GMAC/Ally that the declaration specified by §2923.5 requires a declaration under penalty of perjury signed by someone who has personal knowledge of the facts recited in the declaration.

Foreclosures across the nation are being stopped by state attorneys general based on admissions by Chase, Bank of America, Ally, and other financial institutions that the declarations and affidavits they generated to commence foreclosures were not based on personal information of the robo-signers who names were attached to the foreclosure documents.

The Notice of Default that initiated a foreclosure in the instant case does not include a §2923.5 declaration. Civil Code § 2923.5 added a requirement in 2009 that a notice of default must include a declaration that describes attempts by one of three entities to contact the borrower.

Cal. Civil Code §2923.5
(a) (1) A mortgagee, trustee, beneficiary, or authorized agent may not file a notice of default pursuant to Section 2924 until 30 days after contact is made as required by paragraph (2) or 30 days after satisfying the due diligence requirements as described in subdivision (g).

(2) **A mortgagee, beneficiary, or authorized agent shall contact the borrower** in person or by telephone in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure. During the initial contact, the mortgagee, beneficiary, or authorized agent shall advise the borrower that he or she has the right to request a subsequent meeting and, if requested, the mortgagee, beneficiary, or authorized agent shall schedule the meeting to occur within 14 days. The assessment of the borrower's financial situation and discussion of options may occur during the first contact, or at the subsequent meeting scheduled for that purpose. In either case, the borrower shall be provided the toll-free telephone number made available by the United States Department of Housing and Urban Development (HUD) to find a HUD-certified housing counseling agency. Any meeting may occur telephonically.

(b) A notice of default filed pursuant to Section 2924 shall include a **declaration from the mortgagee, beneficiary, or authorized agent** that it has contacted the borrower, tried with due diligence to contact the borrower as required by this section, or the borrower has surrendered the property to the mortgagee, trustee, beneficiary, or authorized agent.

(c) through (i) omitted.

(emphasis added)

The notice of default recorded by Defendants (CT 110-111) does not include a declaration from the mortgagee, the beneficiary, or an authorized agent as required by §2923.5(b). The final paragraph of the NOD is a statement attributed to an assistant secretary of the trustee. A trustee cannot switch hats and act as an authorized agent of the mortgagee or beneficiary to

access the trustor/borrower and explore options to avoid foreclosure.

The assistant secretary's statement does not indicate whether there was actual contact, due diligence, or surrender of the property. Rather, the notice of default states disjunctively, “The beneficiary or its designated agent declares that it has contacted the borrower, tried with due diligence to contact the borrower as required by California Civil Code 2923.5, or the borrower has surrendered the property to the beneficiary…”

This ambiguous statement does not specify who made the missing declaration—the beneficiary or the authorized agent—nor does it say whether anyone contacted the borrower. Given a choice in §2923.5 between (a) (b) or (c), CRC picked (a) (b) *and* (c). That was not an option. In effect, the trustee's assistant secretary has posed a riddle: "I did A, or I did B, or X did C. Try to guess what happened."

California Reconveyance Co., the trustee, is arguably the only entity that categorically cannot act as an authorized agent for the mortgagee or the beneficiary under §2923.5. It can file the notice of default under §2923.5 but it cannot contact the borrower under §2923.5(a)(2) and ask about finances and foreclosure options. Having no personal knowledge, CRC adopted a shotgun approach to the declaration requirement. Shotgun was not an option.

The trial judge found that §2923.5 does not require the declaration to specify who made the declaration or who contacted the borrower, and that the ambiguity is not sufficient to constitute an actual controversy under Code of Civil Procedure Section 1060 because it does not give rise to any material violation of §2923.5(b) (CT 143:23-28)

2. THE NOTICE OF DEFAULT AND NOTICE OF TRUSTEE'S SALE DID NOT STATE THE NAME OF TRUSTOR

Does the notice of default or the notice of trustee's sale have to state the

correct name of the Trustor so that it can be properly indexed, or will any approximation of the name suffice to proceed with a nonjudicial sale?

In August 2009, California Reconveyance Company ("CRC") mailed a notice of default (CT 007-008) to Appellant. The NOD identified the trustor as *Dougles Gillies*, not Douglas Gillies. It named Washington Mutual Bank, FA, as Beneficiary but instructed whomever received the NOD to contact JPMorgan Chase Bank in Jacksonville FL to stop the foreclosure. Chase's role was not described. CRC recorded a different notice of default in the Santa Barbara County Recorder's Office (CT 110-111). Three months later, CRC recorded a notice of trustee's Sale ("NOTS") that again incorrectly described the trustor as Dougles Gillies.

Cal. Civil Code §2924 provides that a notice of default must be recorded prior to a nonjudicial sale and that the name of the trustor must be stated as a means of identifying the deed of trust.

.

> Cal. Civil Code §2924
> (a) Where…a power of sale is conferred upon the mortgagee, trustee, or any other person, to be exercised after a breach of the obligation for which that mortgage or transfer is a security, the power shall not be exercised except where the mortgage or transfer is made pursuant to an order, judgment, or decree of a court of record…until all of the following apply:
> (1) The trustee, mortgagee, or beneficiary, or any of their authorized agents shall first file for record, in the office of the recorder of each county wherein the mortgaged or trust property or some part or parcel thereof is situated, a notice of default. That notice of default shall include all of the following:
> **(A) A statement identifying the mortgage or deed of trust by stating the name or names of the trustor or trustors** and giving the book and page, or instrument number, if applicable, where the mortgage or deed of trust is recorded or a description of the mortgaged or trust property.
> (emphasis added)

Plaintiff alleged in his Verified Complaint (CT 02:6-9) and his First Amended Complaint (CT 030:9-11) that a notice of default was not recorded. Since the Trustor's name was not stated correctly on the NOD, it could not be located in the Grantor/Grantee index. After defendants filed a Demurrer and a Request for Judicial Notice with a recorded notice of default attached as Exhibit 3 (CT 110-111), plaintiff discovered that Defendants' Exhibit 3, the NOD (CT 110-111), and Defendants' Exhibit 4, the NOTS (CT 113-115), stated the name of the trustor as *Dougles Gillies*, a fictitious person (not even one hit for "Dougles Gillies" on Google). Since the notice of default and notice of trustee's sale did not comply with Civ. Code §2924, a trustee's sale is not authorized under California law.

Plaintiff raised this issue in his Opposition to Demurrer and requested leave to amend his Complaint to accurately state the defect in the NOD and the NOTS (CT 121:7-17). The defect in stating the name was raised at the hearing by Appellant. "Anyone's name can be on the notice. If you take away one letter, why not two? If it's the fifth letter, why not the seventh? Why not Douglas Willies?" (RT 5:4-19). The demurrer was sustained without comment by the court about the name.

If the name is misspelled on a notice of default and notice of trustee's sale, the records cannot be properly indexed. In *Cady v. Purser* (1901), 131 Cal. 552, a mortgage on property had been recorded, but had been improperly indexed in the book covering "Bills of Sale and Agreements" rather than in the mortgage book. The court noted that the statutory scheme for recording contemplated that indexes were to be kept, the purpose of which was to allow subsequent purchasers to locate liens against the property by searching the proper indexes. Because the purpose of proper indexing was to allow the document to be located, the failure to properly index a document rendered it unlocatable, and hence the document had to be treated as though

never having been recorded. (131 Cal. at 555-558; see also *Rice v. Taylor* (1934) 220 Cal. 629, 633-634, 32 P.2d 381 (purchaser searching the appropriate index would not have located the recorded document because it was improperly indexed; court held the purchaser was not charged with constructive notice even though the document had been recorded).

"Although the statutory rules governing the mechanics of recording and indexing documents have changed since the decisions in *Cady* and *Rice*, our review of the current statutory scheme convinces us that proper indexing remains an essential precondition to constructive notice. The statutes governing recording (Gov. Code, § 27201 et seq.) still require that indexes be kept and abstracts of judgments be indexed in a column listing "judgment debtors" (Gov. Code, § 27248), or "grantors" where a general index system is used (Gov. Code, § 27257)." *Hochstein v. Romero* (1990), 219 Cal.App.3d 447, 453, 268 Cal.Rptr. 202.

3. THE NOTICE OF DEFAULT MAILED TO TRUSTOR WAS NOT A TRUE COPY OF THE NOD RECORDED BY THE TRUSTEE

There are two different versions of a notice of default in the Clerk's Transcript. The NOD marked Plaintiff's Exhibit "A" and attached to Plaintiff's Complaint (CT 007-008) was mailed to Plaintiff by CRC. (CT 2:6-9). It is not signed. The NOD marked Defendants' Exhibit 3 (CT 109-111) was recorded on August 13, 2010. It is signed by Stacy White, Assistant Secretary for CRC.

The version mailed to Plaintiff states in the upper right corner that it is a "copy of the original which was filed for record on 08/13/2009 in the Office of the County Recorder." However, the original differs from the copy in several respects:

(1) "Space above this line for recorder's use only" missing from the copy.

(2) The first line of page 2 identifying the Trustee Sale No., Loan No., and

Title Order No. is left-justified on the original and center-justified on the copy.

(3) Every line of the third and fourth paragraphs of page 2 starting with "REMEMBER, YOU MAY LOSE…" and ending with "obligations secured thereby" begins and ends with different words when comparing the recorded original to the copy.

(4) The date and name of CRC at the bottom of page 2 are displayed in Times font in the original and Arial font in the copy. It took some work to come up with these different versions of the notice of default.

(5) The name and title of Stacy White are missing from the copy.

It appears that CRC sent out the copy, and then they drafted the original. This substantial difference between the original and the copy indicates that something was seriously amiss at CRC, which replaced MERS as Chase's foreclosure mill in 2008.

When the Superior Court dismisses a nonjudicial foreclosure on demurrer without leave to amend prior to commencement to discovery, most indicators of systemic injustice and fraud that would turn up in discovery are hidden and overlooked. What if the outcome of every trial depended on what the parties knew or should have known before an answer was filed? The discrepancy in the two NODs is troubling, inexplicable, and an indicator of fraud at CRC.

4. THE NOTICE OF TRUSTEE'S SALE VIOLATED CIVIL CODE §2923.52, AND DECLARANT ANN THORN WAS A ROBO-SIGNER

The three-month waiting period between a notice of default and a notice of sale was extended by an additional 90 days with the passage of Cal. Civil Code §2923.52, the California Foreclosure Prevention Act, signed by the Governor on June 15, 2009.

> Civil Code §2923.52
> (a) Notwithstanding paragraph (3) of subdivision (a) of Section 2924, a mortgagee, trustee, or other person authorized to take sale **shall not give notice of sale until at least 90 days after the lapse**

of three months as set forth in paragraph (2) of subdivision (a) of Section 2924, in order to allow the parties to pursue a loan modification to prevent foreclosure, if all of the following conditions exist:

(1) The loan was recorded during the period of January 1, 2003, to January 1, 2008, inclusive, and is secured by residential real property.

(2) The loan at issue is the first mortgage or deed of trust that the property secures.

(3) The borrower occupied the property as the borrower's principal residence at the time the loan became delinquent.

(4) The notice of default has been recorded on the property.

(b) This section does not apply to loans serviced by a mortgage loan servicer if that mortgage loan servicer has obtained a temporary or final order of exemption pursuant to Section 2923.53 that is current and valid at the time the notice of sale is given.

Civil Code §2923.54 prescribes the contents of a declaration that must be added to a NOTS when an exempt organization seeks to bypass the 90-day extension in Senate Bill 1137. It begins:

Section 1. The Legislature finds and declares California is facing an unprecedented threat to its state economy and local economies because of skyrocketing residential property foreclosure rates in California. Residential property foreclosures increased sevenfold from 2006 to 2007. In 2007, more than 84,375 properties were lost to foreclosure in California, and 254,824 loans went into default, the first step in the foreclosure process."

The legislative intent was clear when Cal. Civ Code §2923.54 passed.

Cal. Civil Code §2923.54

(a) A notice of sale filed pursuant to Section 2924f shall include a declaration from the mortgage loan servicer stating both of the following:

(1) Whether or not the mortgage loan servicer has obtained from the commissioner a final or temporary order of exemption pursuant to Section 2923.53 that is current and valid on the date the notice of sale is filed.

(2) **Whether** the timeframe for giving notice of sale specified in subdivision (a) of Section 2923.52 does not apply pursuant to Section 2923.52 or 2923.55.
(emphasis added)

Defendants' NOTS does not comply with *Civil Code* § 2923.54, which requires a declaration on the NOTS that specifies the statutory basis for claiming an exemption in order to bypass the legislature's 90-day grace period. The Exhibit attached to defendants' NOTS (CT 113-115) reads:

Exhibit

DECLARATION PURSUANT TO CALIFORNIA CIVIL CODE SECTION 2923.54
Pursuant to California Civil Code Section 2923.54, the undersigned loan servicer declares as follows:
3. It has obtained from the commissioner a final or temporary order of exemption pursuant to Section 2923.54 that is current and valid on the date the notice of sale is filed; and
4. The timeline for giving notice of sale specified in subdivision (a) of Section 2923.52 does not apply **pursuant to Section 2923.52 or Section 2923.55**.

JPMorgan Chase Bank,
National Association

Name: Ann Thorn
Title: First Vice President

Plaintiff pointed out in his Opposition to Demurrer that items 1 and 2 of the "declaration" were missing (CT 124:28). The judge did not comment on these omissions.

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

Whether requires the declarant to choose. In item 4, Chase and CRC choose either 2923.52 or 2923.55, ignoring the statutory requirement that it indicate which section it relies on to avoid the 90-day extension and evict

homeowners sooner rather than later.

The law says to *choose .52 or .55* and Ann Thorn chooses both. Defendants' notice of trustee's sale does not comply with § 2923.54(a)(2)

Ann Thorn's unsigned exhibit (CT 115) is not a declaration. Ann Thorn is a prolific robo-signer, and if the trial court had not dismissed the case before the plaintiff got to first base, one question on discovery would nave revealed whether she had any personal knowledge of matters stated in one of the hundreds of thousands of "declarations" she signed.

Defendants' Exhibit 5 was described as "The list of licensees that are exempt" under 2923.52 (CT 59:13-15). However, Defendants' Exhibit 5 is missing (CT 116). Plaintiff argued that Chase claimed without proof that it had obtained an exemption from the 90-day extension pursuant to §2923.53 (CT 125:4-5). The trial court responded, "Okay." (RT 3:12-15). She then described the contents of Exhibit 5 in the Order After Hearing.

> Exhibit 5 to defendant's request for judicial notice contains a list of exempt companies published by the California Department of Corporations. One of the exempt companies is defendant JP Morgan. (CT 144:15-17)

However, the list of exempt organizations is missing in the Clerk's Transcript at page 116, so it was not in the court file.

Chase's role as a loan servicer with respect to the Property was based solely upon its own representations in the "Exhibit" attached to the NOTS, which states: "the undersigned loan servicer declares as follows…"(CT 115). There is no other designation of Chase's interest in the Property in any exhibits attached to defendants' demurrer. Based on the scant evidence that was before the Court, if Chase can sell the Property, *anybody* can sell the Property by assigning themselves a title and filing a NOD and a NOTS.

5. THE TRIAL COURT MADE A SIGNIFICANT FINDING OF FACT WITHOUT EVIDENCE AT THE HEARING ON DEMURRER

Defendants filed a Demurrer to the First Amended Complaint (CT 043-056) and a Request for Judicial Notice (CT 058-117). Plaintiff opposed the Demurrer and objected to Judicial Notice. Without ruling on defendants' request for judicial notice, Judge de Bellefeuille sustained the demurrer without leave to amend and issued an Order After Hearing on March 26, 2010 (CT 140-147). Judgment of dismissal was entered on April 19, 2010 (CT 148).

The court found that Chase is the mortgagee, and therefore Plaintiff cannot quiet title against Chase without first paying the underlying debt (CT 146:28-147:14). Defendants offered no proof that Chase is a mortgagee. They merely alluded to the possibility that Chase is a servicer in the unsigned "Exhibit" of Ann Thorn attached to the NOTS (CT 115). Otherwise, JPMorgan Chase described itself in its pleadings as "an acquirer of certain assets and liabilities of Washington Mutual Bank from the Federal Deposit Insurance Corporation acting as receiver." (CT 43:9-10; 47:21-28). They never defined their claim to the Property, leaving "certain" up to chance, but the judge made a finding and concluded that JPMorgan Chase N.A. is a mortgagee of the Property.

To be considered a mortgagee, Chase would have to show that WaMu was a mortgagee on September 25, 2010. If Chase is currently the mortgagee, then it can certainly produce the Promissory Note that it acquired from WaMu. Chase has chosen to take the Property based solely on its assertion that it is "an acquirer of certain assets."

Plaintiff only discovered the nature of Chase's claim to the Property when he read the caption to Chase's demurrer (CT 43:9-11). He said at the hearing, "I've now discovered just recently that Chase's position is that they are an acquirer of *certain* assets and liabilities. They don't claim to be a servicer, a beneficiary, a trustee, or mortgagee. So their role has just finally been defined. So if nothing else, we need to find out what the word "certain" means. What

are their rights and liabilities? We cannot tell on demurrer. And that is the key to the case." (RT 2:3-11) The trial court did not address this issue.

All Chase has produced to justify taking the Property is a caption on a pleading, a self-reference to being a Servicer on an unsigned, unsworn "declaration," and an agreement still being negotiated with FDIC that has spawned lawsuits against both parties.

Does a homeowner threatened with foreclosure by a bank with whom he has never done business have a right to discover whether the bank has a piece of paper to support its claim, whether the bank can identify the beneficiary of his promissory note, and whether that beneficiary (1) has been paid in full; or (2) is receiving any part of the mortgage payments; or (3) is named anywhere on the books of the loan servicer, lender, mortgagor? In this case, the homeowner never borrowed money from the bank that taped a Notice of Trustee's Sale to his door and published notices in local newspapers.

6. A BORROWER IS NOT REQUIRED TO PAY THE UNDERLYING DEBT TO CHALLENGE A VIOLATION OF CIV. CODE §2923.5

The trial court found that Chase is a mortgagee, and then ruled that a mortgagor of real property cannot quiet title against the mortgagee without first paying the underlying debt, citing *Miller v. Provost* (1994) 26 Cal.App.4th 1703, 1707, and *Chapman v. Hicks* (1919) 14 Cal.App. 158, 166.

Mabry v Superior Court, supra, 185 Cal.App.4th 208, considered whether tender of full payment was required to challenge a violation of §2923.5, and found that such a requirement would defeat the purpose of the statute.

> The right conferred by section 2923.5 is a right to be contacted to "assess" and "explore" alternatives to foreclosure *prior* to a notice of default. It is enforced by the postponement of a foreclosure sale. Therefore it would defeat the purpose of the statute to require the borrower to tender the full amount of the indebtedness *prior* to any enforcement of the right to -- and that's the point -- the right to be *contacted* prior to the

notice of default. 185 Cal.App.4th 208, 225.

The trial court first had to find that Chase is a mortgagee before reaching its conclusion that full payment is required. Assuming that the court could make such a finding at a hearing on demurrer, if the court is correct that full payment of the underlying debt is required for a mortgagor to challenge a violation of §2923.5 by a mortgagee, then the statute is meaningless. *Mabry* was decided two months after this case was dismissed.

7. CAN THE TRIAL COURT TAKE JUDICIAL NOTICE OF FACTS RECITED IN A HOTLY CONTESTED PENDING AGREEMENT?

Defendants requested that the trial court take judicial notice of a 39-page Purchase and Assumption Agreement (CT 059:4-7). The website cited by defendants where the court or a property owner might look up the Purchase & Assumption Agreement, the only evidence of JPMorgan Chase's claim, is www.fdic.gov/about/freedom/Washington_Mutual_P_and_A.pdf (CT 59:7). That URL didn't work, and it still doesn't work.

The court did not rule on Chase's request for judicial notice, although the P&A was mentioned in the court's order (CT 140:25-141:2).

The half-cent sale of Washington Mutual to JPMorgan Chase (a $305 billion bank "assumed" by Chase for $2 billion, give or take $100 million) is still pending more than two years after the hastily-drafted agreement was signed, due to extensions to the closing deadline ordered by the FDIC. An Amendment to the Purchase and Assumption Agreement extended the Settlement Date to August 31, 2010—seven months after defendants filed their request for judicial notice. The agreement relied upon by Chase to take Appellant's Property is still being negotiated.

Defendants asked the trial court to take judicial notice of Exhibit "2," the

Purchase and Assumption Agreement, pursuant to Cal. Evidence Code §451(f) and Evidence Code §452(d) (g) and (h).

> §451. Judicial notice shall be taken of the following:
> (f) **Facts and propositions of generalized knowledge that are so universally known** that they cannot reasonably be the subject of dispute.
>
> §452. Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:
> (d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.
> (g) Facts and propositions that are of such **common knowledge** within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.
> (h) Facts 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.

A controversial, contested agreement does not constitute "facts or propositions of generalized knowledge so universally known that they cannot be reasonably be the subject of dispute" as required by § 451(f).

It is not a record of court under §452(d). Can the court take judicial notice of all the various federal agreements and orders as "common knowledge" under §452(g)? There are 602 U.S. Government Departments and Agencies listed on the United States government website http://www.usa.gov/Agencies/Federal/All_Agencies. All of the orders and agreements issuing from this battalion of civil servants would fill a library.

The Purchase and Assumption Agreement cannot be characterized as "facts or propositions that are not reasonably subject to dispute" under §452(h). The P&A cited by Defendants is being disputed vigorously. It has created a new industry for bank lawyers.

Chase is suing WaMu. Wamu is suing Chase. In a securities fraud case

filed by the Ontario Teachers' Plan Fund against former officers of Washington Mutual Bank, the complaint is 388 pages long. In 2009, the Debtors (WaMu) filed suit in federal court against the FDIC in *Washington Mutual, Inc., et al. v. Federal Deposit Insurance Corp.,* No. 1:09-cv-00533. The suit claims that the FDIC improperly sold WaMu's banking assets to JPMorgan Chase for $1.9 billion.

The terms of the sale of WaMu to Chase remain unsettled after two years. The Examiner's Preliminary Report filed September 7, 2010 by the court-appointed examiner in the *Washington Mutual Chap. 11 Bankruptcy*, Case No. 098-12229 (Delaware) shows the extent of contested issues in JPMorgan Chase's pending acquisition of WaMu:

> ¶ 33. The JPMC Team is investigating whether, in a legally cognizable way, JPMC by itself of in conjunction with government regulators, intentionally injured WMI in connection with the seizure of WMB and sale to JPMC for approximately $1.9 billion. The team is also investigating whether JPMC improperly interfered with, or prevented, third parties from purchasing WMI or WMI.
>
> ¶ 34. The JPMC Team is investigating allegations that JPMC may have intentionally breached its March 11, 2008 confidentiality agreement with WMI in an attempt to depress WMB's market value and purchase the bank at a reduced price. This claim has been asserted in a lawsuit styled *American National Insurance Co. v. JPMC*, No. 09-01743 (D.D.C.)…Plaintiffs further alleged that JPMC breached the Confidentiality Agreement by leaking WMI's confidential information to the media, government regulators, and investors, causing OTS to seize WMB and forcing WMI into bankruptcy.
>
> ¶ 53. Specifically, it is alleged that one or both of the following occurred: (1) the FDIC established bidding parameters intentionally designed to guarantee that JPMC tendered the winning bid for the purchase of WMB; and (2) the FDIC favored or colluded with JPMC in order to ensure that JPMC tendered the winning bid for purchase of WMB to improperly provide extraordinary benefits to JPMC.

Chase and CRC requested that the trial court to take judicial notice of a contested pending P&A Agreement in which both parties, Chase and FDIC, have been accused of fraud, collusion, and interference with contract and are under a continuing investigation by the court-appointed Examiner in WaMu's Chapter 11 bankruptcy. Can the contents of so controversial a document be used as the principal evidence to sustain a demurrer without leave to amend?

If the evidence establishes that essential and material terms are left open for future settlement, then there can be no binding obligation. It is merely an inchoate effort. Implications will not be indulged. *Salomon v. Cooper* (1950) 98 Cal. App. 2d 521, 522-523. The court may not speculate upon what the parties will agree. *Autry v. Republic Productions, Inc*. (1947) 30 Cal.2d 144, 151, 152. Judicial notice would be unfounded where a document is the subject of so much dispute.

In ruling on a demurrer the court is usually limited to a consideration of the pleading attacked and to matters of which it must or may take judicial notice under Evid. Code §§ 451, 452 (see Code Civ. Proc. §§ 430.30(a), 430.70). Defendants cannot state facts in their demurrer that, if true, would defeat Plaintiff's complaint. *Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal. App. 4th 1137, 1144, 37 Cal. Rptr. 2d 718.

Even if the trial court had taken judicial notice of the existence of the P&A Agreement, that would not lead to a conclusion that the matters stated therein were true. Judicial notice of the authenticity and contents of an official document does not establish the truth of the recitals therein, nor does it transform inadmissible matter into admissible evidence. *Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063. "While the courts take judicial notice of public records, they do not take notice of the truth of matters stated therein." *Morocco v. Ford Motor Co.* (1970) 7 C.A.3d 84, 88.

Rather than asking the court to take judicial notice of a Purchase and

Assumption Agreement so controversial that it is generating millions of dollars in attorneys' fees every week, a more conventional approach would be for Chase to produce a Notice of Transfer of Servicing (12 U.S.C. 2605).

> 12 U.S.C. 2605. Servicing of mortgage loans and administration of escrow accounts
> (b) Notice by transferor of loan servicing at time of transfer
> (1) Notice requirement
> Each servicer of any federally related mortgage loan shall notify the borrower in writing of any assignment, sale, or transfer of the servicing of the loan to any other person.
> (2) Time of notice
> (B) Exception for certain proceedings
> The notice required under paragraph (1) shall be made to the borrower not more than 30 days after the effective date of assignment, sale, or **transfer of the servicing** of the mortgage loan (with respect to which such notice is made) in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by—
> (i) termination of the contract for servicing the loan for cause;
> (ii) commencement of proceedings for bankruptcy of the servicer; or
> (iii) commencement of proceedings by the Federal Deposit Insurance Corporation or the Resolution Trust Corporation for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled).
> (3) Contents of notice (omitted)

Paragraph (2)(B)(iii) requires a transferee servicer to notify the borrower of the assignment within 30 days in cases where the FDIC has commenced receivership. No transfer of servicing has been recorded in this case.

8. QUIET TITLE IS APPROPRIATE WHERE CHASE'S CLAIMS TO THE PROPERTY ARE UNPROVEN AND SUSPECT

Attached to the notice of trustee's sale (CT 113-115) is a plain document marked "Exhibit" that describes JP MORGAN CHASE BANK, NATIONAL ASSOCIATION as “a loan servicer.” Defendants' demurrer

describes JPMorgan Chase Bank, N.A., as "an acquirer of certain assets and liabilities of Washington Mutual Bank from the Federal Deposit Insurance Corporation acting as receiver." (CT 043:27-044:1). Nowhere in the pleadings is Chase described as a beneficiary or a mortgagee.

Is Chase entitled to payments from Plaintiff? Does it have standing to sue Plaintiff or sell his house? Chase made a deal with the FDIC to buy the assets of WaMu for $1.9 billion when Chase's assets were $2 trillion, so it paid 0.1% of its assets for the world's largest savings and loan. The Order of the Office of Thrift Supervision dated September 25, 2008, Defendants' Exhibit "1", states that WaMu's assets were reported to be $307 billion on June 30, 2008 (CT 061). WaMu's assets included deposits, mortgages, and 2200 branches that spanned the Western United States, an area where Chase had sparse retail penetration. Chase paid less than $1 million per bank for instant access to the western United States market. The furnishings and the safety deposit boxes were probably worth a million per bank, not to mention the vaults, the desks and chairs, and all those computers and ATM machines. It was a good deal – maybe too good. The jury is out.

Did Chase acquire the right to receive payments from Plaintiff? Is Chase entitled to sell the house? 12 U.S.C. 2605 requires that a transfer of the servicing of a loan be communicated to the borrower. Chase offers no evidence that notice was given.

Did Washington Mutual own the note when the FDIC seized its assets or had the promissory note been transferred or securitized and sold to investors on Wall Street? Did Washington Mutual have an entry on its books showing Plaintiff's promissory note as an asset? Chase contends that it assumed no liabilities when it purchased a bank worth nearly half a trillion dollars for less than two billion. Does such a disproportionate arrangement constitute a taking if a borrower's cause of action against a lender is stripped away? If

Washington Mutual committed fraud at the inception of the loan, knowing full well that the borrower would not be able to repay, can Chase acquire a right to seize Plaintiff's home without addressing the fraudulent or illegal acts committed by WaMu? What authority does the FDIC have to hand Chase benefits of a contract while stripping away the responsibilities?

If Washington Mutual, and now Chase, is a beneficiary, then why is Chase described by CRC as a servicer of the loan? On behalf of whom do they provide this service? Has the beneficiary been reimbursed payments made on the loan? Has the beneficiary recouped the entire balance of the loan by collecting insurance proceeds for an alleged default? Would it be unjust enrichment for Chase to seize the residence? Plaintiff did not enter a contract with Chase.

"The notion that many of the very same institutions that helped cause this housing crisis may well be making it worse is not only frustrating—it's shameful…banks must follow the law—and those that haven't should immediately fix what is wrong." Shaun Donovan, U.S. Secretary for Housing and Urban Development, writing in the Huffington Post, October 17, 2010.[3]

Does nonjudicial mean *no judge* in California? The deference California courts have paid to the banks has made California an oasis for foreclosures. Californians who are struggling to maintain ownership of their residences face a wall of indifference at the courthouse, where any bank can file any notice and take their homes. If nonjudicial cannot mean *no justice*.

Date: October 20, 2010

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Douglas Gillies
Plaintiff and Appellant *in pro per*

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[3] http://www.huffingtonpost.com/shaun-donovan/how-we-can-really-help-fa_b_765528.html

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed brief of__________________ is produced using 13-point Roman type including footnotes and contains approximately___________ words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: ___________

Signed: ____________________________

Print Name: ________________________

Attorney(s) for: _____________________