U.S. Court of Appeals Docket No. 12-56566, 13-55048

U.S.D.C. Case No. 10-cv-05152-GW-PLA, 11-cv-10072-ODW-FFM

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DARYOUSH JAVAHERI
Plaintiff/Appellant,

v.

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

ANSWERING BRIEF OF DEFENDANT-APPELLEE JPMORGAN CHASE BANK, N. A.

On Appeal from the United States District Court for the Central District of California, Los Angeles

Case No.: CV-10 8185 ODW

The Honorable Otis D. Wright, Judge Presiding

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CORPORATE DISCLOSURE STATEMENT

FEDERAL RULE OF APPELLATE PROCEDURE 26.1

Pursuant to Federal *Rule of Appellate Procedure* 26.1, appellee JPMorgan Chase Bank, N.A. ("JPMorgan") provides the following Corporate Disclosure Statement:

Defendant/Appellee JPMorgan is a wholly owned subsidiary of JPMorgan Chase & Co., which is a publicly traded corporation. No publicly held corporation owns ten percent (10%) or more of JPMorgan Chase & Co.'s stock as of August 21, 2009.

DATED: October 23, 2013

Respectfully submitted,

ALVARADOSMITH
A Professional Corporation

By: /s/ Michael B. Tannatt
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STATEMENT OF RELATED CASES

CIRCUIT RULE 28-2.6

In compliance with *Ninth Circuit Court of Appeals Rule* 28-2.6, Defendant/Appellee JPMorgan Chase Bank, N. A. is unaware of any related case pending in this Court.

DATED: October 23, 2013

Respectfully submitted,

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I. JURISDICTIONAL STATEMENT.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, which provides, in pertinent part, that "[t]he courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States...." *See* 12 U.S.C. § 1291. This case consolidates two actions, Javaheri v. JPMorgan Chase Bank, N.A., Central District of California Case No. CV 10-8185 (the "Wellworth Action"), and Javaheri v. JPMorgan Chase Bank, N.A., Central District of California Case No. CV 11-10072 (the "Wilshire Action").

On August 13, 2012, the District Court entered an order granting JPMorgan's Motion for Partial Summary Judgment in the Wellworth Action (the "Wellworth Judgment"). *See* Javaheri's Excerpt of Record "ER", Vol. 1, pgs. 018 – 032 (Order Granting Wellworth MSJ). The Notice of Appeal of the Order Granting Wellworth MSJ was timely filed on August 24, 2012.

On December 11, 2012, the District Court granted JPMorgan's Motion for Summary Judgment in the Wilshire Action (the "Wilshire Judgment") which disposed of the remaining claims in the consolidated case. *See* ER, vol. 1, page 2-14 (Order Granting Wilshire MSJ or "Wilshire MSJ Order"). Judgment was entered on December 11, 2012. ER, vol. 1, page 1. The Notice of Appeal of the

Wilshire Action was filed on January 8, 2013. Thus, the appeal is timely under *Federal Rule of Appellate Procedure* 4.

II. STATEMENT OF ISSUES PRESENTED.

1. Whether the District Court properly entered the Wellworth Judgment on claims for wrongful foreclosure and quiet title where evidence of Respondent's authority to foreclose was opposed by speculative supposition rather than proof and where Javaheri failed to allege he had tendered or stood ready and able to tender the amount due.

2. Whether the District Court abused its discretion in striking the declaration of Javaheri's previously unidentified expert, William Paatalo, filed in support of Javaheri's Opposition to the Wilshire MSJ due to Javaheri's failure to timely designate Mr. Paatalo as an expert witness in violation of Federal Rule of Civil Procedure 26 and after the close of discovery.

III. STATEMENT OF THE CASE.

A. Statement of Case Relating to the Wellworth Action.

Javaheri's SAC asserts five state law claims relating to the foreclosure proceedings regarding the loan secured by the property located at 10809 Wellworth Avenue, Los Angeles, California 90024 (the "Wellworth Property"), which he obtained on or about November 14, 2007, from Washington Mutual Bank ("WaMu") in the substantial amount of $2,660,000.00 (the "Wellworth Loan"). Javaheri

attempts to exonerate himself from his contractual obligations either to repay the Wellworth Loan or face liquidation of the Wellworth Property that serves as collateral for such repayment by alleging various theories he contends voids the sale and that the District Court got wrong: a) that WaMu sold the note for the Wellworth Loan to a securitized trust prior to the date that JPMorgan purchased WaMu's assets and therefore that JPMorgan lacked standing to initiate a non-judicial foreclosure on the Wellworth Property (See 34, ER, Vol. 2, pages 240 – 241 (SAC, ¶¶ 28 – 29); b) that the signature of Deborah Brignac ("Ms. Brignac") on the Substitution of Trustee ("Substitution") does not match her signature on the Notice of Trustee's Sale ("NOTS") and must therefore be forged and the notice consequently invalid (ER, Vol. 2, pages 242 – 244, SAC, ¶¶ 36 – 37); and c) failure to produce the original note for the Wellworth Loan destroys standing (ER, Vol. 2, page 240, SAC, ¶ 31); and d) tender is not required in a quiet title action (ER, Vol. 2, page 248, SAC, ¶62.

JPMorgan filed the Wellworth MSJ to the SAC, contending that all of the claims set forth in the SAC with respect to the foreclosure of the Wellworth Property were without merit. ER, Vol. 2, pg. 217 – 218. The District Court agreed and granted the MSJ. ER, Vol. 1, pages 18-32 (Order Granting Wellworth MSJ). On appeal, Javaheri presents disposition of two of the claims for review, thereby waiving his First Claim for "Violation of Civil Code § 2923.5," ER, Vol. 2, pages

237 – 240, SAC, ¶¶ 18-26; Third Claim for "Quasi Contract", ER, Vol. 2, pages 244 – 245, SAC, ¶¶ 40 – 44; and Sixth Claim for Declaratory and Injunctive Relief ER, Vol 2, SAC, ¶¶ 66 - 71.

B. Statement of Case Relating to the Wilshire Action.

In the Wilshire Action, Javaheri's Complaint asserts claims relating to the non-judicial foreclosure proceedings initiated by JPMorgan concerning a luxury condominium commonly known as commonly known as 10660 Wilshire Boulevard, #1401, Los Angeles, California 90024 (the "Wilshire Property"), which secured a loan in the amount of $975,000.00 Javaheri obtained from WaMu on or about December 13, 2006 (the "Wilshire Loan"). In the Wilshire Action, Javaheri contended much as he did in the Wellworth Action that, shortly after the origination of the Wilshire Loan, WaMu transferred the loan to the Washington Mutual Mortgage Pass-Through Certificates Series 2007-HY1 Trust (the "2007-HY1 Trust"), as a consequence of which JPMorgan lacks authorization to collect payments on the Wilshire Loan or to non-judicially foreclose on the Wilshire Property. ER, Vol. 3, pp. 564-636 (Complaint). He asserts that the identity of the lender is "unknown," which, in his mind, apparently means that he can continue to enjoy use of the Wilshire Property without paying anyone.

JPMorgan filed the Wilshire MSJ, contending that the claims set forth in the related complaint lacked merit because JPMorgan is authorized by the 2007-HY1

Trust to collect payments on the Wilshire Loan and, if necessary, to foreclose on the Wilshire Property. SER, Vol. 1, pg. 49-82 (Wilshire MSJ). The District Court agreed and granted the MSJ. ER, Vol. 1, pages 2-14 (Wilshire MSJ Order). In support of his opposition to the Wilshire MSJ, Javaheri submitted a declaration from one William Paatalo, an expert not identified in discovery, in which Mr. Paatalo set out the basis for the conclusion that JPMorgan did not succeed to WaMu's rights in the Wilshire Loan. As part of its ruling on the motion, the District Court struck the Paatalo declaration of Javaheri's expert, William Paatalo, based upon because Javaheri had not's failure to timely designated him as a witness. ER, Vol. 1, pages 6-7 (*Id.*).

IV. STATEMENT OF FACTS.

A. Statement of Material Facts Relating to the Wellworth Loan.

Javaheri obtained the Wellworth Loan in the amount of $2,660,000.00 from WaMu on or about November, 2007, repayment of which was secured by the Wellworth Property. ER, Vol. 1, page 18, lines 24 - 26 (Order Granting Wellworth MSJ). The Wellworth Loan was a construction loan subject to a Residential Construction Loan Agreement, which represented Javaheri's obligation to repay the Wellworth Loan pursuant to its terms (the "Agreement"). SER, Vol. 1, page 576, lines 11 - 16 (SUF, No. 1). In addition, in November, 2007, Javaheri signed a Fixed/Adjustable Rate Note, along with a Construction Loan Addendum to Note (hereinafter collectively referenced as the "Note") for the Wellworth Loan. SER, Vol. 2, page 576, lines 17 - 22 (SUF, No. 2.) The Note

was secured by a deed of trust ("DOT"), which encumbered the Wellworth Property for of $2,660,000.00. SER, Vol. 2, page 578, lines 1 - 11 (SUF, No. 6.)

On September 25, 2008, the Office of Thrift Supervision ("OTS") appointed the Federal Deposit Insurance Corporation ("FDIC") as receiver of WaMu ("OTS Order"). ER, Vol. 1, page 19, lines 15 – 21. (Order Granting Wellworth MSJ).

On the same day, the FDIC and JPMorgan entered a Purchase and Assumption Agreement ("P&A Agreement") under which the FDIC as receiver of WaMu transferred to JPMorgan "all right, title, and interest of the Receiver in and to all of the assets" of WaMu and its subsidiaries, and "specifically [including] all mortgage servicing rights and obligations of [WaMu]" pursuant to. § 3.1 of the P&A Agreement. ER, Vol. 1, page 19, lines 15 - 21 (Order Granting Wellworth MSJ). The transfer of assets included the Wellworth Loan, which had never been sold to a securitized trust. ER, Vol. 1, page 19, lines 3 – 14 (Order Granting Wellworth MSJ).

Beginning in 2009, Javaheri fell behind on his payments on the Wellworth Loan. ER, Vol. 1, page 19, lines 22 – 26 (Order Granting Wellworth MSJ).

On May 3, 2010, a Substitution of Trustee was recorded in which CRC was designated the trustee. ER, Vol. 1, page 019, lines 27 - 28 (Order Granting Wellworth MSJ). Ms. Brignac or someone authorized by her signed the Substitution in her capacity as a Vice President of JPMorgan. SER, Vol. 3, pages 580, line 26 to page-581, line 4 (SUF, No. 20).

Javaheri received multiple notices of his default. On May 3, 2010, a Notice of Default was recorded in the official records of the Los Angeles County Recorder's Office. ER, Vol. 1, page 020, lines 1-3 (Order Granting Wellworth MSJ). On May 14, 2010, the Notice of Default was rescinded by a Notice of Rescission recorded in the official records of the Los Angeles County Recorder's

Office. ER, vol. 1, page 20, lines 4–5. (Order Granting Wellworth MSJ).

On May 14, 2010, CRC mailed a Second Notice of Default to Javaheri, and on June 10, 2010, CRC mailed a third Notice of Default to Javaheri. ER, Vol. 1, page 20, lines 4–7.

On August 16, 2010, a Notice of Trustee's Sale ("NOTS") was recorded and subsequently served on Javaheri, published in the local newspaper and posted on the Wellworth Property. ER, Vol. 1, page 020, lines 7 - 9 (Order Granting Wellworth MSJ)

To date, the Trustee's Sale of the Wellworth Property has not gone forward because of Javaheri's litigation. SER, Vol. 3, page, lines 1-2 (SUF, No. 65).

B. Statement of Material Facts Relating to the Wilshire Loan.

Javaheri obtained the Wilshire Loan in the amount of $975,000.00 from WaMu on or about December 2006, repayment of which was secured by the Wilshire Property. ER, Vol. 1, page 3, lines 2-6 (Order Granting Wilshire MSJ). In connection with the Wilshire Loan, Javaheri executed a promissory note and a Deed of Trust encumbering the Wilshire Property. The Deed of Trust, recorded on December 13, 2006, identifies WaMu as the lender and beneficiary and California Reconveyance Company ("CRC") as the trustee. ER, Vol. 1, page 3, lines 6-10 (*Id.*).

On or about January 1, 2007, the Loan was sold by WaMu to WaMu Asset Acceptance Corporation ("WMAAC"), which then transferred the Loan to LaSalle Bank National Association ("LaSalle Bank"), as trustee of the 2007-HY1 Trust. ER, Vol. 1, page 3, lines 11-14 (Order Granting Wilshire MSJ). Later in 2007, Bank of America took LaSalle's place as trustee of the 2007 HY-1 Trust as the successor by merger to LaSalle. ER, Vol. 1, page 3, lines 14-16 (*Id.*).

Shortly after the transfer of the Wilshire Loan to the 2007-HY1 Trust, WaMu, WMAAC, and LaSalle Bank entered into a Pooling and Servicing Agreement in which WaMu was designated as the Servicer of the pool of loans sold to the 2007-HY1 Trust, including the Wilshire Loan, and had "full power and authority to do or cause to be done any and all things in connection with such servicing and administration which a prudent servicer of mortgage loans would do under similar circumstances, including, without limitation, the power and authority to bring actions and defend the Mortgage Pool Assets on behalf of the Trust in order to enforce the terms of the Mortgage Notes." ER, vol. 1, page 3, lines 18-23 (*Id.*). Said servicing and administration duties included, but were not limited to, collecting all loan payments, following customary collection practices for comparable loans (*id.*), and foreclosing upon loans in default. ER, vol. 1, page 3, line 23, to page 4, line 1 (*Id.*). WaMu acted as the servicer of the Wilshire Loan from origination until WaMu's failure in 2008. ER, Vol. 1, page 4, lines 1-2 (*Id.*).

On September 25, 2008, following WaMu's failure and pursuant to the P&A Agreement mentioned in Section IV.A, *supra*, JPMorgan acquired WaMu's mortgage servicing rights, which included the right to service the Wilshire Loan. JPMorgan does not contend that it acquired a beneficial interest in the Wilshire Loan through the P&A Agreement. ER, Vol. 1, page 4, lines 3 to 13 (*Id.*).

In February 2010, Plaintiff defaulted on his payment obligations under the Wilshire Loan. ER, Vol. 1, page 4, lines 16-17 (*Id.*).

On May 20, 2010, an Assignment of Deed of Trust ("Assignment of DOT") was recorded in the Los Angeles County Recorder's Office as Instrument No. 20100687282, in which JPMorgan assigned the interests represented by the DOT to Bank of America, National Association, successor by merger to LaSalle Bank, for the 2007-HY1 Trust. ER, Vol. 1, page 4, lines 24-26 (*Id.*). JPMorgan never

claimed to hold an actual beneficial interest in the DOT since WaMu had transferred the Loan to the 2007-HY1 Trust before September 25, 2008. ER, Vol. 1, page 4, line 26, to page 5, line 2 (*Id.*). Rather, JPMorgan executed the Assignment of DOT so the public record would reflect which entity held the security interest in the Wilshire Property in connection with the Wilshire Loan. ER, Vol. 1, page 5, lines 2-4 (*Id.*).

Also on May 20, 2010, a Notice of Default ("NOD") of the Wilshire Loan was recorded in the official records of the Los Angeles County Recorder's Office. ER, Vol. 1, page 5, 5-11 (*Id.*).

On November 18, 2011, a Notice of Trustee's Sale ("NOTS") was recorded and subsequently served on Javaheri, published in the local newspaper and posted on the Wilshire Property. ER, Vol. 1, page 5, lines 12-14 (*Id.*).

To date, the Trustee's Sale of the Wilshire Property has not gone forward. ER, Vol. 1, page 5, lines 15-16 (*Id.*).

V. PROCEDURAL HISTORY.

A. Procedural History Relating to the Wellworth Action.

On October 29, 2010, Javaheri filed his Complaint with respect to the Wellworth Property. *See* ER, Vol. 1, page 020, lines 10-11. (Complaint).

Both Javaheri's original Complaint and his subsequent First Amended Complaint were dismissed under Fed. R. Civ. Proc. 12(b)(6) for failure to state claims for which relief could be granted. See ER, Vol. 1, page 020, lines 11 – 13.

On April 12, 2011, Javaheri filed the SAC that is now before this Court, this time naming only JPMorgan as a defendant. ER, Vol. 1, page 020, lines 13-14 (Order Granting Wellworth MSJ).

On April 28, 2012, JPMorgan filed a Motion to Dismiss the SAC, which the Court granted, leaving only claims for (1) violation of California Civil Code § 2923.5; (2) wrongful foreclosure; (3) quasi contract; (4) quiet title and (5) declaratory and injunctive relief. (ER, Vol. 1, pages 056 - 074 [Ruling on Wellworth Motion to Dismiss the SAC].)

On June 21, 2012, JPMorgan filed the Wellworth MSJ to dispose of the remaining five claims in the SAC, along with all supporting pleadings, declarations and exhibits. (ER, Vol. 3, page 642 [Court's Docket, entries for 58–63]; SER, Vol. 3, pages 596 - 625; SER, Vol. 2 pages 284 - 358; SER, Vol. 2 pages 403- 574; SER, Vol. 2, pages 362 -402; ER, Vol. 2, pages 174 -175; SER, Vol. 3, pages 575 - 595.

On July 9, 2012, Javaheri filed his opposition to the Wellworth MSJ, and its supporting pleadings. ER, Vol. 3, pages 157–170; ER, Vol. 2, pages 157 - 170.

On July 16, 2012, JPMorgan filed its Reply Memorandum to Javaheri's Opposition and its supporting pleading (SER, Vol. 1, pages 155 – 170), including evidentiary objections to Javaheri's evidence filed in opposition to the Wellworth MSJ (SER, Vol. 1, pages 148 – 151) , and a response to Javaheri's three disputed facts (SER, Vol. 1, pages 152 - 154).

On August 13, 2012, the Court granted the Wellworth MSJ. (ER, Vol. 1, pages 2–14 [Order Granting Wellworth MSJ] and [Reporter's Transcript of the August 12, 2012 Hearing] ER, Vol. 1, pages 33 – 41).

This appeal followed. (*See* SER. Vol. 3, page 792) [Notice of Appeal of Wellworth MSJ].)

B. Procedural History Relating to the Wilshire Action.

On December 5, 2011, Javaheri filed the Wilshire Complaint, the claims in which substantially track those asserted in the SAC in the Wellworth Action. ER, Vol. 3, pages 564-637 (Wilshire Complaint).

JPMorgan moved to dismiss all claims pleaded in the Wilshire Complaint under Fed. R. Civ. Proc. 12(b)(6), but the Court granted dismissal in part,[1] leaving claims for (1) wrongful foreclosure; (2) quasi contract; (3) quiet title and (4) declaratory and injunctive relief. SER, vol. 3, pages 665-671 (Ruling on Motion to Dismiss Wilshire Complaint.)

On October 29, 2012, after the deadline for designating experts had passed and the discovery period had concluded (SER, vol. 3, pages 635-636 [Amended Scheduling Order]), JPMorgan duly filed its Motion for Summary Judgment as to all claims related to the Wilshire Loan (the "Wilshire MSJ") along with all pleadings in support thereof. SER, vol. 1, pages 58-138.

[1] The fifth cause of action for "No Contract/Fraud,"

On November 5, 2012, in support of his opposition to the Wilshire MSJ, in addition to his Memorandum of Points and Authorities (ER, Vol. 3, pages 509-523), and Statement of Genuine Issues in Opposition to the MSJ (ER, Vol. 3, pages 524-527), Javaheri filed a declaration from a purported expert witness, William Paatalo, who had never been previously disclosed in the case. ER, Vol. 3, pages 461-478. Javaheri's initial disclosures pursuant to Rule 26(a) did not identify any expert witnesses, and he never supplemented his disclosures. Javaheri's Statement of Genuine Issues in Opposition to the Wilshire MSJ did not dispute any of the facts set forth in JPMorgan's Separate Statement. Rather, Javaheri's Statement of Genuine Issues in Dispute included 17 additional "facts," all of which were based upon the declaration from the surprise expert. ER, Vol. 3, pages 524-527.

On November 9, 2012, JPMorgan filed its reply (SER, Vol. 1, pages 17-29), objecting to the Paatalo Declaration (SER, Vol. 1, pages 42-48)and adding certain facts through the declaration of counsel (SER, Vol. 1, pages 30-41). JPMorgan moved to strike the Paatalo Declaration on the basis of Javaheri's failure to designate Paatalo as his expert before the deadline for doing so and before the discovery end date and the prospective prejudice to JPMorgan and disruption of the proceedings in the case. SER, Vol. 1, pages 21-23 (Reply re Wilshire MSJ); SER, Vol. 1, pages 43-44 (Objections to Paatalo Decl.).

On November 19, 2012, Javaheri filed a Request for Leave to File a Sur-Reply, and the Declaration of Douglas Gillies in support thereof (ER, Vol. 3, pages 448-455, 456-460), in which Javaheri argued for the admission of the Paatalo Declaration. The District Court allowed Javaheri to file his Sur-Reply. ER, Vol. 1, pages 15-16.

On December 7, 2012, Javaheri filed a Request to designate William Paatalo as his expert witness on the ground that Plaintiff only realized he was necessary after he received the Wilshire MSJ (ER, Vol. 3, pages 437-442). JPMorgan opposed on December 10, 2012, on the grounds that the request was untimely, Javaheri's delay was due to his failure to diligently prosecute his case, and that granting Javaheri's request would unduly prejudice Respondents and would materially disrupt the trial schedule. SER, Vol. 1, pages 1-5.

On December 11, 2013, the Court granted the Wilshire MSJ. ER, Vol. 1, pages 2-14 (Order Granting Wilshire MSJ). As part of its ruling, the Court struck the Declaration of William Paatalo because Javaheri had failed to disclose him as his expert in a timely manner. ER, Vol. 1, pages 7-8 (*Id.*). Additionally, the Court ruled that because Javaheri did not dispute or place in issue any of JPMorgan's undisputed facts, the Court considered all of the facts contained within JPMorgan's Separate Statement "undisputed for purposes of the motion." FRCP 56(e)(2). ER, Vol. 1, page 2, fn. 1 (Order Granting Wilshire MSJ).

This appeal followed.

VI. STANDARD ON REVIEW.

A grant of summary judgment is reviewed *de novo*. *Buono v. Norton*, 371 F.3d 543, 545 (9th Cir. 2004). The appellate court in reviewing summary judgment determines whether there are genuine issues of material fact requiring trial and whether the district court correctly applied the relevant substantive law. *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004).

JPMorgan had the initial burden to show that no genuine issue of material fact existed. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). However, since JPMorgan met that burden, the burden shifted to Javaheri to identify specific facts demonstrating that there was a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). *See alsoMurphy v. ITT Technical Services, Inc.*, 176 F.3d 934, 936 (7th Cir. 1999) (holding that more than a mere "scintilla of evidence" is required for such a showing); Fed. R. Civ. P. 56(e). "Conclusory allegations alone cannot defeat a motion for summary judgment." *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 888-89, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990).

"In reviewing decisions of the district court, the Court of Appeal may affirm on any ground finding support in the record." *Smith v. Block*, 784 F.2d 993, 996 fn.4 (9th Cir. 1986). The Court of Appeal will also affirm so long as the district court decision was correct on any theory, even if the district court relied on the wrong grounds or faulty reasoning. *Marino v. Vasquez* , 812 F.2d 499, 508 (9th Cir. 1987).

To the extent that Javaheri challenges the District Court's striking of the Paatalo Declaration filed in support of Javaheri's opposition to the Wilshire MSJ,

this Court will review the ruling for an abuse of discretion. *Domingo v. T.K.*, 289 F.3d 600, 605 (9th Cir.2002) (noting limited appellate review "even when the rulings determine the outcome of a motion for summary judgment").

VII. SUMMARY OF ARGUMENT.

A. Summary of Argument As To The Wellworth Action.

Javaheri asserted in his SAC that JPMorgan lacked authority to foreclose on the Wellworth Loan because, in November, 2007, WaMu transferred the Note to the Washington Mutual Bank Mortgage and Securities Corporation. ER. Vol 1, page 019, lines 3–4 (Order Granting Wellworth MSJ). However, as the Court correctly found, there was no evidence of this alleged transfer. ER. Vol. 1, page 019, lines 4-5 (Order Granting Wellworth MSJ). Javaheri claimed that the Note was then sold to unknown private investors. Javaheri's only evidence of this sale was reference to a Standard & Poor's registry CUSIP number 31379XQC2, Pool Number from 432551. (ER. Vol. 1, page 019, lines 5–8 [Order Granting Wellworth MSJ].) Javaheri claimed that this number corresponded to a handwritten number that appeared on the front page of the recorded Deed of Trust for the Wellworth Loan, which read "4323-5-14". Javaheri entered this number ("4323-5-14") into a "Pool Talk form on the Fannie Mae website. (ER, Vol. 1, page 19, lines 8–10.) As the Court correctly found, the fatal problem with Javaheri's deduction was that the handwritten number appearing on the Deed of Trust did not correspond to the Pool Number on the Fannie Mae website; instead, it

corresponded to the Assessor's Parcel Number for the Wellworth Property, which is "4323-005-014. (ER, Vol. 1, page 20, lines 13-14 [Order Granting Wellworth MSJ].) Based on the paucity of evidence in support of Javaheri's supposition, the Court properly determined that Javaheri had failed to provide credible evidence that the Note had been sold to a securitized trust.[2] (ER, vol. 1, page 24, line 7 to page 025, line 26.)

Javaheri also claimed that the signature of Ms. Brignac on the Substitution did not match Ms. Brignac's signature on the NOTS. (*See* ER, Vol. 2. pgs. 242-244 [SAC, ¶¶ 36 – 37].) However, in the Brignac Decl., Ms. Brignac testified that the signature on the Substitution was her signature. (ER, Vol. 1, page 174–178 [Brignac Decl.].) Although someone other than Ms. Brignac signed on Ms. Brignac's behalf on the NOTS, Javaheri pointed to no evidence that the signature was invalid, that the information contained in the NOTS was incorrect, or that any

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[2] It is Chase's position, supported by California law, that securitization of the loan would not have been a material fact, in any event. See *Rodenhurst v. Bank of America* 773 F.Supp.2d 886, 898 (D. Hawaii 2011) ("*Rodenhurst*"), which holds: "The Court also rejects Plaintiffs' contention that securitization in general somehow gives rise to a cause of action—Plaintiffs point to no law or provision in the mortgage preventing this practice, and cite to no law indicating that securitization can be the basis of a cause of action. Indeed, courts have uniformly rejected the argument that securitization of a mortgage loan provides the mortgagor a cause of action. [Citations omitted]."

(unidentified) error in the NOTS had prejudiced him, i.e., that the result of his default under the Wellworth Loan would have been different. Moreover, there is no requirement that the signature on a notice of trustee's sale be notarized or signed under oath of perjury.

The undisputed evidence further showed that JPMorgan had acquired all of WaMu's servicing rights when it purchased WaMu's assets from the FDIC. CRC was properly substituted as the trustee under the DOT. Consequently, under the California Civil Code, JPMorgan was entitled to initiate and conduct the non-judicial foreclosure action.

Javaheri's cause of action for quiet title failed because there was no dispute that he has had not tendered the amount owing on the Wellworth Loan. On such evidence, the District Court correctly determined that Javaheri had failed to meet his burden in opposing the motion and properly entered summary judgment on the pending claims.

B. Summary of Argument As To The Wilshire Action.

Notwithstanding the tender issue, which is common to the quiet title claims in both actions, the only issue presented with respect to the Wilshire Appeal is whether the District Court abused its discretion by striking the declaration of his surprise expert, William Paatalo, on the grounds that Javaheri had failed to disclose

Mr. Paatalo according to the procedures set forth in FRCP 26(a)(2)(A) and 26 (a)(2)(D) and the trial court's scheduling order.

It is undisputed that Javaheri failed to disclose Mr. Paatalo as an expert in his initial disclosures under Rule 26(a) and likewise failed to designate him as a witness at least 90 days before the scheduled trial date. Moreover, Javaheri never offered any reasonable justification for his failure, nor did he acknowledge and address the harm that would have been caused if Paatalo's late designation was allowed. As a result, the District Court did not abuse its discretion in striking the Paatalo Declaration.

As to the Wilshire MSJ itself, because Javaheri did not dispute any of the facts contained in JPMorgan's Separate Statement, the Court was compelled to adopt all of JPMorgan's facts as "undisputed for purposes of the motion" pursuant to Fed. R. Civ. Proc. 56(e)(2). As a result, the District Court properly granted summary judgment in favor of JPMorgan as to the entire Complaint.

VIII. ARGUMENT AS TO THE WELLWORTH ACTION.

A. The District Court Properly Concluded That Javaheri Failed to State A Claim For "Wrongful Foreclosure".

1. The District Court Correctly Ruled that JPMorgan Was Authorized to Foreclose On the Wellworth Loan.

In the Appellant's Brief, at the last full paragraph on page 25, Javaheri challenges JPMorgan's authority to initiate foreclosure and to proceed to sale on

the Wellworth Loan that he does not dispute is in default, based on his allegation that JPMorgan "is not the owner of the [Promissory] Note". (See also ER, Vol. 2, pg. 67 [FAC, ¶ 18].) The contention misses the point: non-judicial foreclosure is governed by Civil Code §§ 2924 – 2924k, which permits the agents of the beneficiary to initiate a non-judicial foreclosure action. See *Gomes v. Countrywide Home Loans, Inc.,* 192 Cal. App. 4th 1149, 1155 (2011) ("*Gomes*"). The California Civil Code does not limit authority to non-judicially foreclose to the note holder, making Javaheri' s contention, even if it were true, which it is not, immaterial in the summary judgment context or otherwise. *Gomes* establishes the hollowness of Javaheri's focus on "who owns the note":

> In his declaratory relief cause of action, *Gomes* sets forth the purported legal authority for his first cause of action, alleging that Civil Code section 2924, subdivision (a), by "necessary implication," allows for an action to test whether the person initiating the [non-judicial] foreclosure has the authority to do so. **We reject this argument. Section 2924, subdivision (a)(1) states that a "trustee, mortgagee, or beneficiary, or any of their authorized agents" may initiate the foreclosure process.**

Emphasis added. Thus, as a threshold matter, Javaheri cannot "test" standing here.

Even so, Javaheri does not dispute that that JPMorgan acquired the servicing rights to the Wellworth Loan from the FDIC pursuant to the P&A Agreement, which makes JPMorgan the agent of the beneficiary here. (See ER, Vol. 2, pages 231 – 253 [SAC].) Furthermore, CRC was and is the trustee under the DOT as

noticed in the recorded Substitution. (See ER, vol. 2 page 300 [Substitution].) Although Javaheri tries mightily to discredit the Substitution in apparent recognition that, regardless whether JPMorgan is authorized to foreclose, the trustee is authorized as well, his efforts fail on the facts and the law.

In the SAC, Javaheri alleged that JPMorgan lacked standing to foreclose because WaMu had sold the Note for the Wellworth Loan to a securitized trust. (See ER, Vol. 2, pgs. 231-253 [SAC, ¶¶ 14-15, 30–31, 34, 39, 42–43, 64, 67–68].) However, as the District Court correctly determined, Javaheri failed to provide any credible evidence to substantiate the allegation. (See ER, Vol. 1, pages 024-025 [Order Granting Wellworth MSJ].) The SAC alleged that JPMorgan lacked authority to foreclose on the Wellworth Loan because, in November, 2007, WaMu transferred the Note to the Washington Mutual Bank Mortgage and Securities Corporation. ER. Vol. 1, page 019, lines 3–4 (Order Granting Wellworth MSJ). However, Plaintiff presented no evidence of this alleged transfer. ER. Vol. 1, page 019, lines 4-5 (Order Granting Wellworth MSJ). Javaheri further alleged that the Note was sold to unknown private investors. The SAC identified the security to which the Note was sold as Standard & Poor's registry CUSIP number 31379XQC2, Pool Number from 432551. (ER. Vol. 1, page 019, lines 5–8 [Order Granting Wellworth MSJ].) In response to JPMorgan's interrogatories, Javaheri stated that he obtained this information by taking a number that had been

handwritten on the front page of the recorded Deed of Trust for the Wellworth Loan, which read "4323-5-14", and then entered the number into a "Pool Talk form on the Fannie Mae website. (ER, Vol. 1, page 19, lines 8–10.) The fatal problem with Javaheri's deduction was that the handwritten number appearing on the Deed of Trust did not correspond to the Pool Number on the Fannie Mae website, but did correspond to the Assessor's Parcel Number for the Wellworth Property, which is "4323-005-014. (ER, Vol. 1, page 20, lines 13-14 [Order Granting Wellworth MSJ].) On the paucity of evidence in support of Javaheri's supposition, the Court properly determined that Javaheri had failed to provide credible evidence that the Note had been sold to a securitized trust.[3] (ER, vol. 1, page 24, line 7 to page 025, line 26.)

Even if the Note had been sold, JPMorgan as servicer would have had the statutory authority to implement the non-judicial foreclosure action, as CRC also would have had authority as the trustee under the DOT. Consequently, Javaheri presents no triable issue of material fact that CRC and JPMorgan lacked the authority to initiate the non-judicial foreclosure on the Wellworth Loan.

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[3] It is Chase's position, supported by California law, that securitization of the loan would not have been a material fact, in any event. See *Rodenhurst, supra,* 773 F.Supp.2d 886, at 898.

Furthermore, California Courts of Appeal have uniformly held that there is no California cause of action as to whether a lender has the authority to initiate a non-judicial foreclosure action, where, as in this case, the plaintiff has failed to provide any evidence of lack of authorization to foreclose. See *Diane Jenkins v JPMorgan*, *supra,* 216 Cal.App.4th 497 at 521 (2013), which holds in pertinent part:

> Jenkins's first cause of action, like the claim brought by the appellant in *Gomes*, asserts she has a right to bring a preemptive judicial action to determine whether Defendants have the authority to initiate nonjudicial foreclosure on her home; however, like the appellant in *Gomes*, she fails to identify legal authority for such a preemptive action in the statutory provisions setting forth the nonjudicial foreclosure scheme. After our own examination of the nonjudicial foreclosure statutes, we agree with the Gomes court that the provisions do not contain express authority for such a preemptive action. Also, even if the statutes are interpreted broadly, it cannot be said the provisions imply the authority for such a preemptive action exists, because doing so would result in the impermissible interjection of the courts into a nonjudicial scheme enacted by the California Legislature. (See *Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, 596, 113 Cal.Rptr.3d 498, 236 P.3d 346 [legislative intent to create cause of action revealed through interpretation of statute and legislative history]; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 80, 124 Cal.Rptr.2d 519, 52 P.3d 695 (**926 City of Cotati) [plaintiff may not use claim for declaratory relief to " 'create a cause of action that otherwise does not exist' "].) "The recognition of the right to bring a lawsuit to determine a nominee's authorization to proceed with foreclosure on behalf of the note holder would fundamentally undermine the nonjudicial nature of the process and introduce the possibility of lawsuits filed solely for the purpose of delaying valid foreclosures." (*Gomes*, *supra*, 192 Cal.App.4th at p. 1155, 121 Cal.Rptr.3d 819.)
>
> Moreover, we find the statutory provisions, because they broadly authorize a "trustee, mortgagee, or beneficiary, or any of their authorized agents "to initiate a nonjudicial

> foreclosure (§ 2924, subd. (a)(1), italics added), do not require that the foreclosing party have an actual beneficial interest in both the promissory note and deed of trust to commence and execute a nonjudicial foreclosure sale. Thus, we conclude the court properly sustained Defendants' demurrers to the first cause of action in Jenkins's SAC.

In this case, likewise, Javaheri has failed to allege any misconduct by JPMorgan in the initiation or the processing of the non-judicial foreclosure action, or any evidence to support that JPMorgan did not have proper authority to authorize the non-judicial foreclosure action. For these reasons, as set forth in *Jenkins*, *Gomes*, as well as in *Debrunner v. Deutsche Bank National Trust Co.*, 204 Cal. App. 4th 433, 440-442 (2012), no cause of action for wrongful foreclosure has been stated against JPMorgan. Accordingly, the Court of Appeal is requested to affirm the judgment in this case.

For these reasons, judgment should be affirmed in favor of JPMorgan.

2. Javaheri's "Evidence" of Securitization Was Both Non-Probative and Irrelevant.

In the SAC, Javaheri alleged that JPMorgan lacked standing because WaMu had sold the Note for the Wellworth Loan to a securitized trust. (*See* ER, vol. 2, pgs. 231-253 [FAC, ¶¶ 14-15, 30–31, 34, 39, 42–43, 64, 67–68].) However, as the District Court correctly determined, the evidential support for the allegation failed. (*See* ER, vol. 2, pages 24-25 [Order Granting Wellworth MSJ].)

In addition, the courts of California have routinely held that securitization of a loan does not strip a deed of trust beneficiary of the power of sale. See *Rodenhurst supra,* 773 F.Supp.2d 886 at 898.

As set forth above, even if the Note had been sold, however, JPMorgan as beneficiary and servicer had the statutory authority to prosecute the non-judicial foreclosure action. Further, CRC as trustee, also had authority to initiate and maintain the non-judicial foreclosure process. Consequently, no triable issue was presented to the District Court that CRC and JPMorgan lacked the authority to initiate the non-judicial foreclosure on the Wellworth Loan. That being so, judgment in favor of JPMorgan should be affirmed,

3. The District Court Did Not Err in Rejecting Javaheri's Argument That the Bank's Failure to Produce the Original Note Did Not Affect Its Standing to Foreclose.

As stated in the Order Granting Wellworth MSJ, prevailing California law does not require the production of the Note as a condition to proceeding with a non-judicial foreclosure, citing by example *Saldate v. Wilshire Credit Corp.*, 686 F. Supp. 2nd 1051, 1068 (E. D. Cal. 2010) and *Ngoc Nguyen v. Wells Fargo, Bank*, N.A., 749 F. Supp. 2nd 1022, 1035 (N. D. Cal. 2010). (ER. vol. 1, page 026 [Order Granting Wellworth MSJ]; *See also Pajarillo v. Bank of America*, 2010 WL 4392551 (S.D. Cal. Oct. 28, 2010) (citing cases), *Neal v. Juarez*, 2007 WL 2140640 (S. D. Cal. 2007); *Nool v. Homeq Servicing*, 653 F.Supp.2d 1047 (E.D.

Cal. 2009); *Sicairos v. NDEX West, LLC*, 2009 WL 385855, *3 (S.D. Cal. 2009) ("Under Civil Code section 2924, no party needs to physically possess the promissory note."); *Spencer v. DHI Mortg. Co., Ltd.,* 642 F.Supp.2d 1153, 1166 (E.D. Cal. 2009) and *Hafiz v. Greenpoint Mortg. Funding, Inc.*, 652 F.Supp.2d 1039, 1043 (N.D.Cal. 2009).)

The District Court was also correct in rejecting Javaheri's argument, devoid of citation to authority and repeated here without authority, that Chase's inability to locate other original documents in the "collateral file" is fatal to standing. (AOB, page 29.) Furthermore, Javaheri provides no basis for his speculative and incoherent contention at page 31 of Appellant's Brief that "[m]issing original documents raised a triable issue whether the loan had been sold before WaMu was purchased and sold before WaMu was purchased and assumed by Chase." Inasmuch as the sale of the note is not a fact that would alter the outcome of the case, the District Court properly gave it no weight in deciding the motion for summary judgment on the Wellworth Action.

In this case, Javaheri has failed to allege any misconduct by JPMorgan in the initiation or the processing of the non-judicial foreclosure action, or any evidence to support that JPMorgan did not have proper authority to authorize the non-judicial foreclosure action. For these reasons, as set forth in *Jenkins*, *Gomes*, as well as *Debrunner v. Deutsche Bank National Trust Co.*, 204 Cal. App. 4th 433,

440-442 (2012), no cause of action for wrongful foreclosure has been stated against JPMorgan. Accordingly, the Court of Appeal is requested to affirm the judgment in this case.

In sum, the District Court correctly granted the Wellworth MSJ as to the First Cause of Action and its ruling should be affirmed.

4. Javaheri's Lack of Credible Evidence To Contravene Brignac's Declaration Compels Affirmance of the Decision Below.

Javaheri adduced no facts that called into question the Brignac Declaration, in which Ms. Brignac declared, in relevant part:

> As of April 30, 2010, I had signing authority as Vice-President of JPMorgan Chase Bank, N. A. In this capacity, I was authorized to sign and did sign the Substitution of Trustee [attached as Exhibit as "I" to the Declaration of Jessica Snedden] on behalf of JPMorgan Chase Bank, N. A.

ER, Vol. 2, pages 1- 2 (Brignac Decl.) and SER, Vol. 2, pages 365 - 366 (Exhibit "1" to the Snedden Decl.) All that Javaheri could come up with in rebuttal is that the signature on the Substitution does not match the signature on the NOTS. (*See* ER, vol. 2, page 166, line 17 to page 168, line 6 [Javaheri's Opposition].) As the District Court correctly observed, the signature on the NOTS is not Ms. Brignac's signature and does not purport to be. (*See* ER, vol. 1, pages 026, line 23 to 027, line 2.) Rather, Ms. Brignac's signature on the NOTS was apparently made by a designated agent because the signature is followed by what look like initials "ml,"

which is the customary form for one signing on behalf of another with that other's authorization. Regardless, however, Civil Code § 2924f does not require that the signature on a notice of trustee's sale be signed only by the person whose name appears on the document and/or that it be signed under oath or penalty of perjury, or that the signature be notarized. Indeed, the statute does not even require that the notice of trustee's sale contain a signature at all. Accordingly, who actually signed the NOTS here and under what circumstances are not material to either side's case.

What is important, as the Order Granting Wellworth MSJ notes, is that Javaheri does not allege any inaccuracy in the Notice of Default or NOTS. (ER, vol. 1, page 26, line 12 to page 27, line 24 [Order Granting Wellworth MSJ].) Thus, no prejudice has been shown. See *Cerecedes*, *supra*, 2011 WL 2711071 at *5 ("Perhaps more importantly, plaintiffs do not dispute that they defaulted on their loan or that they received the notices required."); *see also Bucy v. Aurora Loan Servs., LLC*, 2011 WL 1044045 at *6 (S.D. Ohio Mar. 18, 2011) ("Plaintiff d[id] not dispute the accuracy of any of the salient facts, such as the amount owed or the amount in default.").]

Moreover, Javaheri pointed to no prejudice from the purported "forgery" alleged. He has not and cannot allege that he has cured the default under the Wellworth Loan such that he would have a right to retain the Wellworth Property were it not for the alleged defect in either of the two notices. California courts

have held that "strict compliance" with the non-judicial foreclosure statute does not mean every "trivial" procedural defect is actionable in absence of prejudice to the complainant. See, e.g., *Knapp v. Dougherty,* 123 Cal. App. 4th 76, 93-94 (2004) (upholding foreclosure sale and rejecting technical objections to deficiencies of notice because "[t]here was no prejudicial procedural irregularity."); *Williams v. Koenig*, 219 Cal. 656, 660 (1934) ("[t]here is no requirement that the wording of a notice of default follow literally the wording of the statute; a substantial compliance in accord with the spirit and purpose of the statute is sufficient."); *Reynoso v. Paul Financial, LLC*, 2009 U.S. Dist. LEXIS 106555, *13 (N.D. Cal. Nov. 16, 2009) ("Courts have rejected claims of deficient notice where no prejudice was suffered as the result of a procedural irregularity" (internal quotations omitted) (citing cases); *Lawther v. OneWest Bank*, 2010 U.S. Dist. LEXIS 131090, *15 (N.D. Cal. Nov. 30, 2010) (emphasizing that plaintiff must allege that *the statutory violation itself*, not just the pending foreclosure, is the cause of injury).

For these reasons, the judgment in support of JPMorgan should be affirmed.

5. Javaheri's Arguments Raised For The First Time On Appeal Should Not Be Considered.

Although not raised in the District Court, Javaheri devotes much of his Appellant's Brief to "due process." See AOB, pages 10 to 25, and pages 26 to 27. The general rule – and a sound one -- is that a party who does not raise an issue

before the trial court is prevented from doing so on appeal. *U.S. v. Kaczynski*, 551 F.3d 1120, 1123-24 (9th Cir. 2009), *citing U.S. v. De Salvo*, 41 F.3d 505, 510-11 (9th Cir. 1994). This Court's role is to review District Court decisions for error, not to serve as a second trial court. The appellate court may, at its discretion, "hear an issue for the first time on appeal '(1) when review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process, (2) when a change in law raises a new issue while an appeal is pending, and (3) when the issue is purely one of law.'" *U.S. v. Kaczynski*, 551 F.3d 1120, 1124 (9th Cir. 2009), *citing Jovanovich v. U.S.*, 813 F.2d 1035, 1037 (9th Cir. 1987). None of these three circumstances applies here. The integrity of the judicial process is not at stake and there has been no change in the law.

Furthermore, the case law is clear that the issue of due process under the Fourteenth Amendment as relied on by Javaheri does not apply to a non-judicial foreclosure action because there is no state action involved. The Fourteenth Amendment to the United States Constitution provides: "No *state* shall ... deprive any person of life, liberty, or property, without due process of law." (Emphasis supplied.) The Fourteenth Amendment "shields citizens from unlawful governmental actions, but does not affect conduct by private entities." *Apao v. Bank of New York,* 324 F.3d 1091, 1093 (9th Cir. 2003). Non-judicial foreclosure proceedings do not involve "state action" sufficient to support a claim for violation of the Fourteenth Amendment. *Apao* at 1095. ("While the bar for state action is low, non judicial foreclosure procedures ... nevertheless slip under it for want of direct state involvement.") (citation omitted). *See also Charmicor v. Deanor*, 572 F. 2nd 696 (9th Cir. 1978) (holding that non-judicial foreclosure does not amount to state action, but rather is purely private action that is limited and restricted by statute); *Fant v. Residential Services Validated Publications*, 2006 WL 1806157, * 4 (N. D. Cal. June 29, 2006) ("While this claim raises a federal question, it must be

dismissed for failure to state a claim. Numerous courts have reviewed similar challenges to non-judicial foreclosure schemes, and all have concluded that state regulation of non-judicial foreclosure does not constitute state action sufficient to invoke the Fourteenth Amendment"); *Geist v. Cal Reconveyance Co.*, 2010 WL 1999854, * 2 (N.D. Cal. May 18, 2010) ("*Apao* therefore squarely controls this case and compels this case and compels a finding that Defendants' use of non-judicial foreclosure procedures does not qualify as 'state action'".)

6. Javaheri's Application For A Continuance To Oppose The MSJ Was Correctly Denied.

The District Court properly denied Javaheri's Application to Continue the Summary Judgment ("Application") because Javaheri failed to provide any specific reasons, much less good cause, why he was could not timely obtain facts necessary to support his opposition as required under FRCP 56(d).

In the Application, Javaheri's request for a continuance was premised on the fact that JPMorgan had not responded to Javaheri's Request for Production, Set Two, Request No. 52, by producing a document that does not exist, the purported 118 page Purchase and Assumption Agreement between JPMorgan and the FDIC discussed in the California state court case of *Jolley v. Chase Home Finance LLC* 213 Cal.App.4th 872 (2013). (*See* ER, vol. 2, page 153, line 13 to page 154, line 3 [Application].) Javaheri did not identify how production of this desired document that only an affiant in the Jolley case has reportedly seen would be material to the parties' dispute. Significantly, as set forth in the Declaration of David Masutani

("Masutani Decl."), filed in opposition to the Application, ("Opposition"), JPMorgan had fully responded to Javaheri's First Set of Request for Documents filed in the Wellworth Action, producing 1,893 pages of responsive documents. (ER, vol. 2, page 086, lines 10-13 [Masutani Decl., ¶ 7].)

Furthermore, as set forth in the District Court's Order denying the Application, the discovery cut-off in the Wellworth Action was always June 19, 2012. "Thus, to the extent facts are unavailable to Plaintiff regarding the Wellworth Property, this is the result of Plaintiff's own failure to prosecute his case diligently." (ER, vol. 1, page 43, line 2 to 6 [Order Denying Application].) So no abuse of discretion by the District Court occurred in denying the Application.

7. The District Court Properly Granted Judicial Notice of the OTS Order and the P & A Agreement.

In support of the Wellworth MSJ, JPMorgan requested judicial notice of the OTS Order and the P&A Agreement between the FDIC and JPMorgan.[4] Federal

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[4] Although Javaheri contends the District Court incorrectly granted judicial notice of these two documents (Appellant's Brief at pages 38 to 42 and 55 to 57), he did not include these documents in his Appellant's Excerpts of Record. Accordingly, JPMorgan has included the Request for Judicial Notice as part of its supplemental excerpt of record. (SER, vol. 2, pages 413-415 [OTS Order] and SER, vol. 2, pages 417-460 [P&A Agreement].)

Rule of Evidence 201(b) states that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The Ninth Circuit has explained that "on a motion to dismiss a court may properly look beyond the complaint to matters of public record and doing so does not convert a Rule 12(b)(6) motion to one for summary judgment." *Mack v. South Bay Beer Distribs.*, 798 F.2d 1279, 1282 (9th Cir. 1986), abrogated on other grounds by *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 111 (1991). On appeal, a district court's decision to take judicial notice is reversed only for abuse of discretion. *Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 458 (9th Cir.1995) and *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001).

In this case, no abuse of discretion has occurred.

Judicial notice may be taken of documents available on government websites. *Laborers' Pension Fund v. Blackmore Sewer Constr., Inc.*, 298 F.3d 600, 607 (7th Cir. 2002) (taking judicial notice of information from FDIC's official website); *United States ex rel. Dingle v. BioPort Corp.*, 270 F.Supp.2d 968, 972 (W.D. Mich. 2003) ("Public records and government documents are generally considered not to be subject to reasonable dispute. . . . This includes public records

and government documents available from reliable sources on the Internet.") (citation omitted).

Because the OTS Order and the P&A Agreement are public records available from a reliable governmental site on the internet, federal district court cases have routinely taken judicial notice of these documents. *See Molina v. Washington Mut. Bank,* 2010 WL 431439, *3 (S.D. Cal., 2010), which granted judicial notice of the Purchase and Assumption Agreement and OTS Order:

> Defendants also request judicial notice of (1) the Purchase and Assumption Agreement among Federal Deposit Insurance Organization, Receiver of Washington Mutual Bank, Henderson, Nevada ("FDIC") and JPMorgan, dated September 25, 2008, available on the FDIC's website, and (2) the Order from the Office of Thrift Supervision ("OTC") appointing the FDIC as Receiver of Washington Mutual Bank, available on OTC's website. The Court grants Defendants' request for judicial notice of these documents. Information on government agency websites has often been treated as properly subject to judicial notice." *Paralyzed Veterans of Am. v. McPherson*, 2008 U.S. Dist. LEXIS 69542, at *5 (N.D. Cal., Sept. 8, 2008); *see also United States ex rel. Dingle v. BioPort Corp.*, 270 F.Supp.2d 968, 972 (W.D. Mich., 2003) ("Public records and government documents are generally considered 'not to be subject to reasonable dispute.' This includes public records and government documents available from reliable sources on the Internet.") (*citing Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir.1999)).

See also Yeomelakis v. FDIC, 562 F.3d 56, 60, fn. 2 (1st Cir. 2009); *Rosenfeld v. JPMorgan Chase Bank, N.A.,* 732 F.Supp.2d 952, 959 (N.D. Cal., 2010); *Miller v. California Reconveyance Co.*, 2010 WL 2889103 (S.D. Cal., July 22, 2010) ("The Court will take judicial notice of the P & A Agreement between

JPMorgan and the FDIC ... because this agreement is a matter of public record whose accuracy cannot reasonably be questioned."); *Jarvis v. JP Morgan Chase Bank, N. A.*, 2010 WL 2927276, *2 (C.D. Cal. Jul. 23, 2010) (Chase did not assume liability for borrower claims arising out of lending activities by WaMu); *Lemperle v. Washington Mut. Bank*, 2010 WL 3958729, *4 (S.D. Cal., 2010).

Javaheri cites no federal cases in support of his arguments that judicial notice cannot be taken of these documents, only state court cases. Clearly, numerous federal district courts have taken judicial notice of the OTS Order and the P&A Agreement, and the District Court's granting of such judicial notice in this case should be affirmed.

8. The District Court Properly Disregarded the Thorne Declaration.

In his Appellant's Brief at pages 39–42, Javaheri claims that it was judicial error for the Court to disregard the Declaration of Jeffrey Thorne ("Thorne Decl.") filed in the previously mentioned Jolley case, a copy of which is attached at ER, Vol. 2, pages 126-131. Mr. Thorne, like Mr. Paatalo, was also not disclosed as a witness for Javaheri prior to the discovery cut-off date. More fundamentally, as the Court correctly indicated in oral argument, the Thorne Declaration lacks relevance to the Wellworth MSJ. (ER, vol. 1, page 038, lines 16–22 [Transcript of Wellworth MSJ Hearing].) The Thorne Declaration was filed in a different case involving a different plaintiff and a different loan. Nor were any of the documents

referred to in the Thorne Declaration included as part of the record as required by FRCP 56(c). Even were it to qualify for the District Court's consideration, which it could not, the Thorne Declaration did not contradict that "the FDIC entered into an agreement with [JPMorgan]" to acquire WaMu's assets. As the District Court found, there is nothing in the Thorne Declaration that was relevant to the causes of action in the SAC under consideration in the Wellworth MSJ. ER, Vol. 1, page 038, lines 16 – 22 [Transcript of Wellworth MSJ hearing].

Indeed, Javaheri does not argue in the Appellant's Brief that the Thorne Declaration is relevancy to any of the issues raised in the Wellworth MSJ. For these reasons, the District Court committed no error regarding whatever weight or lack thereof that the District Court accorded the Thorne Declaration when it granted the MSJ.

B. The District Court Properly Concluded That Javaheri Failed to State A Claim For "Quiet Title" in the Fifth Count of the Complaint.

Under California law, a claim for quiet title must be made in a verified complaint and include: (1) a description of the property that is the subject of the action, (2) the title of the plaintiff as to which a determination under this chapter is sought and the basis of the title, (3) the adverse claims to the title of the plaintiff against which a determination is sought, (4) the date as of which the determination

is sought, and (5) a prayer for the determination of the title of the plaintiff against the adverse claims. *See* Cal. Code of Civ. Proc. § 761.020.

Further, a "mortgagor of real property cannot, without paying his debt, quiet his title against the mortgagee." *Nool, supra,* 653 F.Supp.2d at 1056; *Miller v. Provost*, 26 Cal. App. 4th 1703, 1707 (1994). That is, "a trustor/borrower is unable to quiet title without discharging his debt. The cloud upon his title persists until the debt is paid." *Coyotzi v. Countrywide Fin. Corp.*, 2009 WL 2985497, *20 (E.D. Cal. Sept. 16, 2009); *Pagtalunan v. Reunion Mortg., Inc.*, 2009 WL 961995, *5 (N.D. Cal. April 8, 2009).

Javaheri's claim contains multiple fatal flaws. First, the SAC's allegations do not sufficiently address the nature of the adverse interests claimed by JPMorgan. *See* Cal. Code of Civ. Proc. § 761.020(c). The Court is asked to take note that a security interest does not even constitute an adverse claim in real property. *See Lupertino v. Carbahal*, 35 Cal.App.3d 742, 748 (1973) (A deed of trust "carries none of the incidents of ownership of the property, other than the right to convey upon default on the part of the debtor in payment of his debt.") Furthermore, whether a notice of default or a notice of trustee sale has been recorded on the subject property does not affect Plaintiff's ownership right in the subject property.

Aside from other flaws in the pleading, Javaheri has failed to allege that he has paid or can pay off the debt in the amount of $2,660,000.00 owed on the Wellworth Property under the DOT. Unless an allegation of tender is made, no quiet title claim is stated. *See Coyotzi*, supra, 2009 WL 2985497 at *20; *Nool*, *supra*, 653 F.Supp.2d at 1056; *Pagtalunan*, supra, 2009 WL 961995, at *5; *Miller*, *supra*, 26 Cal.App.4th at 1707. The District Court's reliance on this well-established rule is clearly not error.

In hisAppellant's Brief, Javaheri cites several cases for the proposition that tender is not required to quiet title. (*See* Appellant's Brief, pages 53-55.) However, only one of the four cases upon which Javaheri relies, *Giannini v. American Home Mortg. Servicing, Inc.*, 2012 WL 298254 (N.D. Cal., Feb. 1, 2012), addresses a cause of action for quiet title. That case confirms the propriety of the decision below rather than supporting Javaheri's argument. In *Giannini*, the District Court affirmed that tender is required in order to quiet title:

> Under California law, a borrower is required to have payed the outstanding debt on the property before he may quiet title against a mortgagee. *Nool v. HomeQ Servicing,* 653 F.Supp.2d 1047 (E.D.Cal.2009). In other words, 'a trustor/borrower is unable to quiet title without discharging his debt. The cloud upon his title persists until the debt is paid.' *Coyotzi v. Countrywide Fin. Corp.* 2009 WL 2985497 at *20 (E.D.Cal.2009).

Giannini, supra, 2012 WL 298254, at *4.

Accordingly, the District Court correctly decided that the fifth claim should be dismissed and its ruling should be affirmed.

IX. ARGUMENT AS TO THE WILSHIRE ACTION.

A. The District Court Did Not Abuse Its Discretion in Striking the Declaration of Javaheri's Untimely Designated Expert.

Although a grant of summary judgment is reviewed *de novo* (*Buono v. Norton*, 371 F.3d 543, 545 (9th Cir. 2004), rulings regarding evidence made in the context of summary judgment are reviewed for an abuse of discretion. *Domingo v. T.K.*, 289 F.3d 600, 605 (9th Cir. 2002) (noting limited appellate review "even when the rulings determine the outcome of a motion for summary judgment"). Here, because Javaheri limits his appeal of the Wilshire Action to the District Court's striking of the Paatalo Declaration due to Javaheri's failure to designate him pursuant to FRCP 26(a)(2)(A) and 26 (a)(2)(D), the District Court's evidentiary ruling is reviewed for abuse of discretion. As this Court has stated, "[t]he abuse of discretion standard is deferential, and properly so, since the district court needs the authority to manage the cases before it efficiently and effectively." *Wong v. Regents of the Univ. of Cal.*, 410 F.3d 1052, 1060 (9th Cir.2005).

The District Court acted well within its discretion in striking the Paatalo Declaration. "If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence *on a motion*, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." FRCP 37(c)(1) (emphasis supplied). The Paatalo Declaration was neither.

In determining whether a violation of a discovery deadline was substantially justified or harmless, courts are guided by the following considerations: (1) prejudice or surprise to the party against whom the evidence is offered; (2) the ability of that party to cure the prejudice; (3) the likelihood of disruption of the trial; and (4) bad faith or willfulness involved in not timely disclosing the

evidence. *Lanard Toys, Ltd. v. Novelty, Inc.,* 375 Fed. Appx. 705, 713 (9th Cir. Apr.13, 2010). The Ninth Circuit affords particularly wide latitude to the exercise of discretion in matters pertaining to failure to provide discovery. *Yeti by Molly,* 259 F.3d 1101, 1106 (9th Cir.2001). Javaheri bore the burden of establishing that justification and lack of prejudice. *Id.* At 1106–07.

In *Wong v. Regents of the Univ. of Calif.,* 410 F.3d 1052, 1061–62 (9th Cir.2005), this Court explained:

> In these days of heavy caseloads, trial courts in both the federal and state systems routinely set schedules and establish deadlines to foster the efficient treatment and resolution of cases. Those efforts will be successful only if the deadlines are taken seriously by the parties, and the best way to encourage that is to enforce the deadlines. ***Parties must understand that they will pay a price for failure to comply strictly with scheduling and other orders, and that failure to do so may properly support severe sanctions and exclusions of evidence***. The Federal Rules of Civil Procedure explicitly authorize the establishment of schedules and deadlines, in Rule 16(b), and the enforcement of those schedules by the imposition of sanctions, in Rule 16(f).

Id. (Emphasis added).

1. <u>It is undisputed that the designation was untimely pursuant to FRCP 26(a)(2)(A) and 26 (a)(2)(D).</u>

Under the Federal Rules of Civil Procedure, each party is required to disclose the "identity of any [expert] witness it may use at trial." FRCP 26(a)(2)(A). Failure to disclose testimony is not substantially justified where the need for such testimony could reasonably have been anticipated. *See Wong v.*

initial Rule 26(a) disclosures served on June 19, 2012, did not identify any expert witnesses (SER, Vol. 3, pg. 626-634), and Javaheri never supplemented his Rule 26(a) disclosures.

FRCP 26(a)(2)(D) also states that absent a stipulation or court order, a party's expert disclosures must be made "at least 90 days before the date set for trial or for the case to be ready for trial." The trial in the Wilshire Action was set for January 15, 2013; therefore, Javaheri's expert witness disclosures were due on October 17, 2012. Javaheri first served Paatalo's declaration on Defendants on November 5, 2012, more than two weeks after the deadline to designate experts. ER, Vol. 3, pgs. 461-478 (Paatalo Decl.). There was no stipulation or court order affecting the disclosure cutoff date. SER, Vol. 1, pg. 31 (Masutani Decl., ¶ 4). Clearly, then, Javaheri's disclosure of William Paatalo as his expert was untimely pursuant to FRCP 26(a)(2)(A) and 26 (a)(2)(D). Javaheri's argument in Appellant's Brief that the Paatalo Declaration was timely because it was filed and served 21 days before the hearing of the Wilshire MSJ completely misses the mark. (AOB, p. 46.) The District Court did not strike the Paatalo Declaration because the declaration was untimely; it struck the Paatalo Declaration because Javaheri had not timely designated Paatalo as Javaheri's expert pursuant to pursuant to FRCP 26(a)(2)(A) and 26 (a)(2)(D). In Appellant's Brief, Javaheri never even addresses his failure to comply with FRCP 26(a)(2)(A) and 26 (a)(2)(D).

Pursuant to FRCP 37(c)(1), the striking of the Paatalo declaration based upon his failure to timely disclose Paatalo as his expert pursuant to Rule 26(a) was *required* "unless the failure was substantially justified or is harmless." Prior to the ruling on the Wilshire MSJ and on appeal, Javaheri failed to satisfy his burden of demonstrating that his failure was substantially justified or harmless.

2. Javaheri failed to provide reasonable justification for the late disclosure of William Paatalo.

Javaheri provided no reasonable justification for his failure to timely designate Mr. Paatalo. In his Request for Leave to add Paatalo as his expert, Javaheri claimed that "the necessity of William Paatalo's appearance became apparent to Plaintiff's Counsel after Defendant filed its Motion for Summary Judgment." According to Javaheri's attorney, Douglas Gillies, Gillies consulted with Paatalo a second time (he previously consulted with him in February 2012 regarding the case) to prepare opposition to the Wilshire MSJ. In his declaration, Gillies claims to have been surprised by JPMorgan's assertion in the Wilshire MSJ why it caused an Assignment of Deed of Trust to be recorded on May 20, 2010, in which it assigned the DOT to Bank of America as trustee of the 20076-HY1 Trust.

However, there was nothing new or surprising about the recording of the Assignment of DOT. Javaheri alleged in his Complaint that "days after WaMu originated the loan, WaMu transferred all beneficial interest in the loan to" the 2007-HY1 Trust (ER, Vol. 3, pg. 570 (Complaint, ¶ 18), and therefore JPMorgan had no beneficial interest in the DOT on May 20, 2010, when the Assignment of Deed of Trust was recorded. (ER, Vol. 3, pg. 572 (Complaint, ¶ 28). Further, in response to Special Interrogatories, Set One, Interrogatory No. 9[5], JPMorgan stated that "the Assignment of Deed of Trust is valid in that JPMorgan appeared in the public record to be the beneficiary under the Deed of Trust, and the Assignment of Deed of Trust provided notice to the general public that the Investment Trust is the Beneficiary under the Deed of Trust." SER, Vol. 1, pg. 140 (JPMorgan's

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[5] Javaheri served his first set of Special Interrogatories in the Wilshire Action on September 6, 2012, just 39 days prior to discovery cutoff. SER, Vol. 1, pg. 144-147 (Excerpt of Javaheri's Special Interrogatories, Set One, to JPMorgan).

Responses to Special Interrogatories, Set One, Response to Interrogatory No. 9).

Thus, the facts alleged by JPMorgan in the Wilshire MSJ with regard to the Assignment of Deed of Trust were consistent with facts Javaheri alleged in his Complaint and that were disclosed to Javaheri in JPMorgan's verified answer and his responses to Special Interrogatories. That Javaheri waited until after JPMorgan filed the Wilshire MSJ to consult with Mr. Paatalo regarding the Assignment of DOT was the result of Javaheri's lack of diligence in developing his case, not surprise. Therefore, Javaheri failed to establish reasonable justification for his failure to timely designate Mr. Paatalo. This Court has affirmed the exclusion of untimely expert testimony in a similar case where the plaintiff unjustifiably missed the deadline for disclosing expert witnesses by twenty days and missed the deadline for submitting expert reports by six weeks. *Quevedo v. Trans–Pacific Shipping, Inc.,* 143 F.3d 1255, 1258 (9th Cir.1998) (upholding exclusion of untimely expert testimony submitted by plaintiff in opposition to summary judgment).

3. Javaheri failed to acknowledge and address the disruption to the trial schedule that his late designation of Mr. Paatalo would cause.

In the Gillies Declaration in in Sur-Reply to the Wilshire MSJ, Mr. Gillies declared "I cannot conceive that any prejudice was caused by the lapse of a few hours between my receipt of the Paatalo declaration [on November 5, 2012] and the electronic filing and serving of his declaration of [JPMorgan later that same evening]." ER, Vol. 3, pg. 453 (Gillies Decl., ¶ 8). Completely oblivious to the harm Paatalo's late designation would cause to the trial schedule or to JPMorgan's case, Mr. Gillies seemed to contend that he should have been commended for his quick work in receiving Paatalo's declaration on November 5, 2012, and filing and serving the declaration that same evening. Javaheri and Mr. Gillies failed to

acknowledge and address in any way the fallout that would have occurred had the District Court permitted the late designation of Mr. Paatalo, to wit:

- JPMorgan filed the Wilshire MSJ based upon the facts disclosed by Javaheri while discovery was open, and would have been unduly prejudiced if Javaheri was allowed to oppose its MSJ with evidence that Javaheri did not disclose during discovery.
- If Javaheri was granted leave to add Mr. Paatalo as an expert witness, justice would have required the re-opening of discovery to allow JPMorgan to take Mr. Paatalo's deposition, review all of the documents that he reviewed and that support his opinions, and to interview and possibly retain a rebuttal expert of their own, and to potentially conduct follow-up discovery.
- If Javaheri was granted leave to add Mr. Paatalo as an expert witness, justice would have required that JPMorgan be allowed to designate an expert witness to rebut Mr. Paatalo's opinion, with attendant delay in trial.
- If Javaheri was granted leave to add Mr. Paatalo as an expert witness, justice would have required that JPMorgan be allowed to refile its MSJ after the parties had had the opportunity to conduct discovery regarding Mr. Paatalo's opinions and those of an opposing expert.
- JPMorgan incurred significant costs and attorneys' fees in connection with the preparation and filing of the Wilshire MSJ based upon the evidence available to it as of discovery cutoff. Justice would have required that Javaheri reimburse JPMorgan for those actual costs and attorneys' fees incurred.

Moreover, all of the above would have necessitated the continuance of the

trial date for several months, all due to Javaheri's and his counsel's inexcusable neglect in failing to develop his case within the District Court's scheduled time limits.

Given that Javaheri failed to designate Mr. Paatalo pursuant to FRCP 26(a)(2)(A) and 26 (a)(2)(D) without reasonable justification, and his failure was not harmless, the District Court's decision to strike the declaration of Mr. Paatalo in support of Javaheri's Opposition to the Wilshire MSJ was not an abuse of discretion.

B. Javaheri's conclusory arguments opposing the Wilshire MSJ fail because all facts contained in JPMorgan's Separate Statement were deemed undisputed for the purposes of the MSJ.

In his brief, Javaheri also re-raises the allegations in his Complaint that JPMorgan did not have standing to enforce the Wilshire Note because it was not the holder of the Wilshire Note (AOB, § VII.C, pp. 44-45). However, other than what was contained within the stricken Paatalo Declaration, Javaheri submitted no evidence to support this or any other arguments in opposition to the Wilshire MSJ. Moreover, Javaheri did not dispute any of the facts submitted by JPMorgan in its Separate Statement in support of the Wilshire MSJ. Accordingly, the District Court correctly ruled pursuant to FRCP 56(e) (2) ruled that all of the facts contained within JPMorgan's Separate Statement are "undisputed for purposes of the motion." See *In re Control Data Corp. Securities Litigation, C.A.8 (Minn.) 1991, 933 F.2d 616 (C.A. Minn. 1991)*, certiorari denied 112 S.Ct. 438, 502 U.S. 967, 116 L.Ed.2d 457 (To avoid summary judgment, party must show factual dispute regarding viable issue.)

Javaheri did not appeal that ruling.

As a result, Javaheri cannot dispute that JPMorgan was the Wilshire Loan's

servicer (ER, Vol. 1, pg. 4, lines 14-15, and pg. 5, lines 16-17 [*id.*]), and that Bank of America as Trustee of the HY1Trust was its lender (ER, vol. 1, pg. 5, lines 15-16 [*id.*]), and that JPMorgan was authorized by the lender to foreclose upon loans in default pursuant to the Pooling and Servicing Agreement (ER, Vol. 1, pg. 3, line 18, to page 4, line 1 [*id.*]). Javaheri's opposition to the Wilshire MSJ and his appeal are based solely upon unsubstantiated arguments that are not supported by the facts deemed undisputed by the District Court. Therefore, the District Court correctly granted the Wilshire MSJ.

X. CONCLUSION.

For the foregoing reasons, JPMorgan's Wellworth MSJ and Wilshire MSJ were both properly granted, and JPMorgan respectfully requests that this Court *affirm* the decisions of the District Court in their entireties.

DATED: October 23, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

CIRCUIT RULE 32(a)(7)(B)

Counsel of Record certifies that pursuant to *Federal Rule of Appellate Procedure* 32, this brief is proportionately spaced, has a typeface of 14 point or more and contains 11,507 words, which is less than the 14,000 words permitted by the rule. Counsel relies on the word count of the computer program used to prepare this brief.

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