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

SUSAN LANGE, Plaintiff and Appellant, v. JP MORGAN CHASE BANK, N.A., a New York Corporation; WASHINGTON MUTUAL, INC., a Delaware Corporation; WASHINGTON MUTUAL BANK, F.A., a Washington Corporation; WASHINGTON MUTUAL ASSET ACCEPTANCE CORP., a Washington Corporation; WASHINGTON MUTUAL MORTGAGE SECURITIES CORP., a Washington Corporation; ALTA COMMUNITY INVESTMENT INC., a California Corporation; WASHINGTON MUTUAL CAPITAL CORP., a corporation of unknown locale; ALTA COMMUNITY INVESTMENT III, LLC, A California Limited Liability Company; SEASIDE CAPITAL FUND I, LP, A California Limited Partnership; and DOES 1-250, inclusive, Defendants and Respondents.	**Case No. B233670** Ventura County Superior Court Case No. 56-2010-00378356

APPEAL FROM JUDGMENT OF DISMISSAL FOLLOWING DEMURRERS TO THIRD AMENDED COMPLAINT

Hon. Mark S. Borrell, Judge

APPELLANT'S OPENING BRIEF

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Plaintiff Susan Lange's counsel negotiated a Trial Plan Agreement with JPMorgan Chase to reduce the payments on her Washington Mutual home loan, but Chase sold the property nine months later to Alta and Seaside at a trustee's sale while plaintiff was making timely payments to Chase of $6,384.00 per month. Plaintiff filed a complaint on August 2, 2010, in Ventura County Superior Court against Chase, Washington Mutual, Alta, and Seaside to set aside the trustee's sale.

Defendants' demurrer was sustained, plaintiff's counsel filed a first amended complaint, and then plaintiff substituted new counsel. Judge Mark Borrell granted plaintiff's new attorney, Roger Senders, thirty days over the Christmas holidays to file the second amended complaint on January 4, 2011. On February 17, 2011, Senders moved to file a third amended complaint to add new parties and causes of action (CT 456:4-6). Judge Borrell denied plaintiff's motion to add new parties but allowed plaintiff to file a third amended complaint alleging new causes of action (CT 606-608). He later sustained demurrers to the third amended complaint without leave to amend.

Judgment of Dismissal was entered in favor of defendants Alta Community Investment III, LLC, Seaside Capital Fund I, LP, Todd Kaufman, and Luke McCarthy on May 27, 2011 (CT 1237-1338). Judgment of Dismissal was entered in favor of defendant JP Morgan Chase Bank, N.A., on August 1, 2011 (CT 1331-1332).

Notices of Appeal were filed on June 6, 2011, and October 12, 2011, and the two appeals were consolidated.

II. STATEMENT OF THE CASE

Susan Lange appeals from judgments of dismissal after the court sustained demurrers to her third amended complaint without leave to amend.

III. ISSUES PRESENTED

1. Whether this Court should reverse a judgment of dismissal entered by the Honorable Mark Borrell of the Ventura County Superior Court in Case No. 56-2010-00378356 after sustaining demurrers to plaintiff's third amended complaint because disputed material facts support all causes of action and they must be decided by a jury of her peers.

2. Whether the court erred in denying plaintiff's request to add new parties to the third amended complaint.

3. Whether appellant alleged sufficient facts to support her contention that the trustee's sale of her property on July 14, 2010 was illegal.

4. Whether a jury should decide if the Notice of Default and Notice of Trustee's Sale were void on the grounds that a Substitution of Trustee was signed and recorded after the substitute trustee executed and filed the Notice of Default.

5. Whether the Notice of Default was void due to failure to include a declaration required by Cal. Civ. Code §2923.5.

6. Whether appellant alleged sufficient facts to support her contention that JP Morgan Chase Bank, N.A. had no right to sell her property.

7. Whether a jury should decide if respondents Alta Community Investment III, LLC, Seaside Capital Fund I, LP, Todd Kaufman, and Luke McCarthy were insiders, not bona fide purchasers, when they bid on appellant's property at the trustee's sale.

IV. STANDARD OF REVIEW

In reviewing a demurrer, the court accepts as true all of the complaint's allegations of material facts. *A1 Holding Co. v. O'Brien & Hicks, Inc.* (1999) 75 Cal.App.4th 1310, 1312. 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. The court also reads the complaint as though it included matters of which the trial court has properly taken judicial notice. Cal. Code Civ. Proc. §430.30(a). If it appears the plaintiff is entitled to any relief, the complaint will be held good. *Chase Chemical Co. v. Hartford Acc. & Indemn.,* (1984) 159 Cal.App.3d 229, 242.

Questions of law are reviewed de novo. The trial court's decision on such an issue is immaterial. *Committee for Green Foothills v Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42 (on review from order sustaining demurrer, appellate court examines complaint de novo). Mixed questions of law and fact may also be reviewed de novo. *Haworth v Los Angeles County Superior Court* (2010) 50 Cal.4th 372, 383.

V. INTRODUCTION

On October 29, 2010, Roger Senders substituted for Julie Gaviria as plaintiff Susan Lange's counsel (CT 606). Gaviria had filed a first amended complaint (CT 153-159) shortly before Senders entered the case. Five months later, Judge Borrell wrote:

> On October 29, 2010, plaintiff changed counsel. On December 6, 2010, the court sustained a demurrer to (Gaviria's) first amended complaint with leave to amend by the close of business on January 4, 2011. Plaintiff fax filed her second amended complaint in two parts, at 5:03 p.m. and 11:34 p.m., on January 4, 2011.

> (Senders') assertion that this case is so complex that seven-months have been required to understand plaintiff's theories and identify the culpable parties is unpersuasive. First, the assertion is unexplained. But, based on that which is apparent to the court, no such complexity exists.
>
> - Hon. Mark Borrell, Minute Order 3/23/2011 (CT 606-607).

In his order, Judge Borrell denied Sender's motion to add new parties in the third amended complaint, including Todd Kaufman, Luke McCarthy, Mike Szakos & Associates, Nancy Mura, California Reconveyance Co. (CRC), Quality Loan Service Corp. (Quality), and LSI Title Company (CT 456:11-18).

Senders was five weeks into the case when Judge Borrell ordered him to draft a second amended complaint (2AC) over the holidays and file it "no later than close of business 1/4/11"—the second business day of the new year (CT 312). The elapsed time between Senders' first appearance and the court's deadline for filing the 2AC was nine weeks—October 29 to January 4. In his minute order on 3/23/2011, Judge Borrell noted the exact times that Senders fax-filed the 2AC complaint from his office (CT 606).

Disregarding some puzzling language in earlier pleadings filed by Gaviria, Judge Borrell wrote, "Counsel's barren assertion that this is plaintiff's first 'real opportunity' to plead her case is inconsistent with the facts. Plaintiff has squandered considerable time, when in fact time was of the essence…With new parties, a summer trial date is unlikely. Defendants' prejudice arises from delay." (CT 607-608).

The case pressed on to judgment so that Todd Kaufman, Alta Community Investment III, LLC, Luke McCarthy, and Seaside Capital Fund I, LP could sell Susan Lange's home without delay after she had lived there for over twelve years (CT:7). She was paying $6,000 per month into

their attorney's trust fund (CT 529, 647:22-648:5) to stay Seaside's unlawful detainer action during her lawsuit for wrongful foreclosure, fraud, quiet title, unjust enrichment, and ten other causes of action.

Plaintiff argued, "If Lange pays Alta and Seaside the fair rental value of Running Ridge and those payments are held in trust pending the outcome of this case, the burden to them is minimal (3AC ¶161, CT 664:7-9).

Nevertheless, the court ruled in favor of defendants. The court had the power to lift the stay in the related unlawful detainer action and allow the lead case to proceed with the additional defendants–Jeff Dunavant, Todd Kaufman, Luke McCarthy, CRC, and others. Indeed, the stay was lifted soon afterward and Susan Lange was escorted out of her home by a sheriff on July 29, 2011. Three days later, on August 1, 2011, Judgment of Dismissal was filed (CT 1324) in favor of JPMorgan Chase, whose demurrer addressed issues of the legality of the mortgage and foreclosure.

It was speedy, but not a trial. Kaufman was a buyer, but not a bona fide purchaser. Chase was a bank, but not the Lender. The taking of Susan Lange's house, from start to finish, was an inside job.

VI. STATEMENT OF FACTS

a. The Parties

In the years leading up to its collapse in 2008, **Washington Mutual Bank, F.A**., Washington Mutual Asset Acceptance Corp., and Washington Mutual Mortgage Securities Corp. (collectively "WaMu") issued hundreds of thousands of predatory loans, particularly adjustable rate mortgages, knowing that the borrowers would default and lose their homes. WaMu presold mortgages to packagers, and then issued credit for the money to homeowners after the fact (3AC ¶1, CT 619:5-16).

Defendant **Todd Kaufman** (2AC) was not your typical bona fide purchaser of distressed properties. WaMu's securitization division was designed and managed by Mr. Kaufman (CT 624:5-15). He wrote the securitization book, until he left WaMu when the mortgage meltdown imploded and he founded **Alta Community Investment III, LLC** so he could get a head start in the booming business of buying and selling distressed houses (CT 624:16-20).

JPMorgan Chase Bank purchased over $300 billion worth of assets of Washington Mutual from the FDIC for less than $2 billion in September 2008. Chase grew an astonishing 45% while the United States and Europe fell, gaining book value of $704 billion in total assets in four years, 2008[1] through 2011[2] to become the nation's most prosperous commercial bank with assets of $2.3 trillion (minus a $2 billion loss widely reported in May 2012 that nicked off less than 1/1000 of Chase's worth). Chase Annual Reports are available for download from NASDAQ's official website at the links listed below in footnotes 1 and 2. Our loss was JPMorgan Chase Bank's gain.

During the same four years, the Congressional Budget Office (CBO) reported in June 2012, the federal government recorded the largest budget deficits since 1945.

> In the past few years, the federal government has been recording the largest budget deficits since 1945, both in dollar terms and as a share of the economy. Consequently, the amount of federal debt held by the public has surged. At the end of 2008, that debt equaled 40 percent of the nation's annual economic output (gross

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[1] http://files.shareholder.com/downloads/ONE/809070392x0x283416/66cc70ba-5410-43c4-b20b-181974bc6be6/2008_AR_Complete_AR.pdf

[2] http://files.shareholder.com/downloads/ONE/1906441312x0x556139/75b4bd59-02e7-4495-a84c-06e0b19d6990/JPMC_2011_annual_report_complete.pdf

> domestic product, or GDP)—a little above the 40-year average of 38 percent. Since then, the figure has shot upward: By the end of this year, the Congressional Budget Office (CBO) projects, federal debt will exceed 70 percent of GDP—the highest percentage since shortly after World War II. The sharp rise in debt stems partly from lower tax revenues and higher federal spending caused by the severe economic downturn and from policies enacted during the past few years. However, the growing debt also reflects an imbalance between spending and revenues that predated the recession. Congressional Budget Office (June 2012) *The 2012 Long-Term Budget Outlook: Summary*.[3]

Susan Lange purchased her home at 276 Running Ridge Trail, Ojai, CA ("Running Ridge") in 1998 for cash. She lived there with her husband, Julian Lange, for twelve years. LANGE remodeled Running Ridge and made it a chemical free, nontoxic environment in which she could live without sickness from her severe allergies. It served as an example of a "Green Home" for their domestic and international clients with similar problems (3AC ¶21, CT 625:5-11) Running Ridge was unique and could not be replicated without an enormous investment of time, energy and money (3AC ¶160, CT 663).

Jeff Dunavant, a mortgage broker employed by **Building Capital**, approached Susan Lange and talked her into taking out a mortgage in 2004. He said he was a licensed broker, but that was not true. He said he would only sign her up for a loan that was to her advantage, and that was also not true (3AC ¶¶10 and 22, CT 622, 625).

In 1998, Todd Kaufman founded and operated Alta Residential Mortgage Trust, which was geared to buying mortgages and mortgage-backed securities. Kaufman was so successful that in 2000, WaMu

[3] http://www.cbo.gov/publication/43288

purchased Alta Residential Mortgage Trust and Kaufman went to work for WaMu. There he started WaMu's Correspondent Lending Division that ultimately became WaMu's leading channel of mortgage loans. Kaufman developed and managed WaMu's securitization division until it was one of the largest in the world. (CT 624:5-15).

Through his securitization unit, Kaufman encouraged WaMu employees to reach out to brokers like Jeff Dunavant and offer them the highest incentives to find homeowners who would take out the most toxic mortgages. It was an almost incomprehensibly vast campaign conducted in bad faith to sell debt to homeowners, and it cost most Americans dearly. WaMu encouraged Dunavant to sell riskier mortgages to his existing client base (CT 627:17-22).

Dunavant approached Susan Lange again in 2006 and talked her into refinancing the loan he had sold her, promising that it was a better deal. He promised her in writing that her payments would not increase for five years (CT 161), but Dunavant lied to Lange. Trusting him, not knowing about the incentives that were being passed on to Dunavant by Kaufman's securitization division at WaMu, Susan Lange agreed to the predatory loan that is the subject of this lawsuit. Her monthly payments started out at $3,742.58 (Adjustable Rate Note, CT 31), and then within two years they soared past $9,000.00 in August 2008 (CT 629:24-25). If anyone thinks at this point, "Let the buyer beware," they might consider the alternative: "Let the jury decide."

After September 2008, Chase instructed Lange to start sending her payments to them, but when the payments tripled, she couldn't keep up. Lange hired a lawyer, Julie Gaviria, to negotiate a loan modification (3AC ¶39 CT 629). Julie Gaviria diligently pursued negotiations with Chase on the belief that Chase had purchased Lange's loan from WaMu, despite

Chase's repeated claims that it had lost Lange's paperwork (3AC ¶118, CT 650:5-9). But Lange's loan was not one of the assets transferred from WaMu to Chase in 2008 by the FDIC.

WaMu had sold Lange's loan to an investment trust before she even signed the papers. It was never an asset of WaMu and Chase knew that plaintiff's loan was not an asset of Chase. The money to fund the loan was provided by investors. WaMu merely played the role of broker and took a percentage as a commission. They no more owned the loan than a trader on Wall Street owns the stock. The Lender's identity has not been disclosed by WaMu or Chase, who both ignored Lange's Qualified Written Request (CT 648:23-28). Discovery has not commenced.

Chase recorded a Notice of Default on March 20, 2009 (CT 631:8) and a Notice of Trustee's Sale in June (CT 632:22) while it negotiated with Gaviria until they settled on a figure for the Trial Plan Agreement of $6,384 per month—almost twice what Lange had signed up for with Dunavant. Although the Trial Plan Agreement dated September 2009 stated that it was between Lange and WaMu, it was Chase who postponed the sale and promised that if she made the payments, it would consider making a permanent modification (CT 48). She trusted them. Seasoned professionals might think her to be a fool, but what say a jury—and why should we shield banks from the scrutiny that leads to just and fair outcomes in other cases?

Lange made payments of $6,384 for nine months, and then on July 15, 2010, she came home to find a 3-day Notice to Quit the premises tacked to her door (CT 633:20-24). She had no idea the house had been sold the day before, nor did she realize that the purchaser was Todd Kaufman, the founder, owner, and principal of Alta Community Investment III, LLC, and Luke McCarthy, who controls Seaside Capital Fund I, LP. Kaufman and McCarthy bought Lange's house at a trustee's sale knowing that Chase had

no interest in Lange's loan (3AC ¶¶15-18, CT 623-624).

Lange received a knock on the door from **Nancy Mura**, who was sent to Lange's home to persuade the residents of Running Ridge to move immediately. Mura threatened Lange that if she didn't get out right away, Luke McCarthy would pay her a visit and he would be "very unpleasant" if he had to come. Mura said, "He never loses these things." Mura's efforts to scare Lange and the other tenants off the property, even though Alta and Seaside knew they had no legal title to Running Ridge, caused Lange extreme emotional distress. (CT 666:22-667:5). She was still sending Chase 6,384.00 per month.

It could be a scene from "The Godfather: Part IV." Kaufman and McCarthy buy stolen property on the courthouse steps when nobody is watching, and then threaten the homeowner with a very unpleasant visit if they don't scram. Mura would make a fine character witness, taking the jury back to the days when wise guys who pounded on doors and threatened housewives took more heat than simply paying a lawyer to file a demurrer.

Susan Lange filed a complaint to set aside the trustee's sale on August 2, 2010. Seaside filed an unlawful detainer action to evict her and the court granted a stay of the related unlawful detainer action (CT 608) on condition that Lange pay $6,000.00 per month into the trust account of Seaside's attorney (CT 650:24 – 651:3).

This is the cast of characters, the parties who have taken Lange's home.

b. Facts Alleged in the Third Amended Complaint

In 2001, WaMu approached Todd Kaufman to develop and operate WaMu's securitization division. Kaufman cofounded Washington Mutual Capital Corp. ("WMCC"), which became a dominant distributor of mortgage-backed securities on Wall Street. Kaufman ran WMCC for many

years, including 2006, the year when Lange's mortgage was funded and securitized by WMCC (CT 624:10-15). Then he got out before the freefall.

Jeff Dunavant, an employee of Building Capital, held himself out to be a licensed mortgage broker, but Dunavant was in fact unlicensed (CT 622:17-20). In 2004, Dunavant approached Susan Lange to get her to obtain a mortgage on Running Ridge from WaMu in the amount of $995,000 and a Home Equity Line of Credit ("HELOC") from Countrywide in the amount of $195,000 (CT 625:12-15).

In 2006, WaMu approached Building Capital and Dunavant and encouraged them to get as many mortgages as possible. The Negatively Amortized Adjustable Rate Mortgage ("NA-ARM") was particularly desirable since it was more profitable for WaMu than a fixed rate mortgage or a traditional ARM. Building Capital and Dunavant were promised bigger fees for selling NA-ARMs instead of fixed rate mortgages (CT 625:16-22).

Building Capital and Dunavant approached Lange to refinance her original mortgages. Lange accepted the offer of Building Capital to represent her in attempting to obtain refinancing with better loans for Lange. Building Capital and Dunavant would receive any fees or bonuses associated with obtaining refinancing. Lange would only refinance if she could obtain a loan that would leave her in a better situation than she was with the original loans (CT 626:1-8).

Dunavant and Building Capital told Lange that they got her a new loan in the amount of $1,387,500.00, that it was a much better deal for her and that she would be able to afford it. Dunavant wrote to Lange, "You have the low start payment rate for five years." (CT 161). Lange didn't understand but she trusted Building Capital and Dunavant and took their word for it, to her detriment (CT 626:13-16).

WaMu, Building Capital and Dunavant made a practice of changing

borrowers' application documents after signature in order to obtain the mortgages WaMu had already sold to investors (CT 625:25-28).

The mortgage provided to Lange was toxic and fraudulent. Building Capital and Dunavant placed her in a mortgage that unbeknownst to her would become unaffordable for her in two years. WaMu, Building Capital and Dunavant failed to provide accurate, material disclosures concerning the loans (CT 626:25-28). WaMu defrauded Susan Lange into making a loan she could not afford and by failing to disclose the true nature of the loans (CT 620:5-7).

On the Deed of Trust (DOT) Lange is named as Trustor and WaMu is falsely identified as the Lender and Beneficiary, but WaMu had given up all beneficial interest in the loan when it presold the note (CT 630:1-3).

Kaufman knew of and condoned WaMu's fraudulent practices to obtain mortgages to feed his securitization pipeline. Kaufman knew that WaMu was forsaking appropriate underwriting practices for these loans and not only condoning but also making clear that it would turn a blind eye to misrepresentations on loan applications. Building Capital, Dunavant and WaMu knew that Lange's payment under the mortgage would increase within two years and that Lange could not afford the increase. With the full knowledge and approval of WaMu, Dunavant pretended to act as Lange's agent as he pushed her through the loan process without helping her to understand the loans (CT 627:10-13).

Although Lange did not want to refinance the original mortgage, WaMu, Building Capital and Dunavant fraudulently induced Lange to take out the mortgage combining the original mortgage and the balance on the HELOC, lying to her that it would benefit her financially. The Negatively Amortized Adjustable Rate Mortgage (NA-ARM) had a 3-year prepayment penalty, so it was more profitable for WaMu and earned a higher bonus for

Dunavant (CT 627:24-628:2).

The note on the mortgage was part of an elaborate securitization and securities fraud scheme wherein WaMu reported to the SEC that the note was transferred to a trust in conformity with the conditions precedent stated in the offering documents and Pooling and Servicing Agreement ("PSA") (CT 628:3-6). Lange's mortgage was securitized when many promissory notes were aggregated into a mortgage loan pool and then sold as security interests to investors. As part of this process, the mortgage was made part of, or was subject to, a Loan Pool, a Pooling and Servicing Agreement, a Collateralized Debt Obligation, a Mortgage-Backed Security, a Mortgage Pass-Through Certificate, a Credit Default Swap, an Investment Trust, and/or a Special Purpose Vehicle (CT 636:14-21).

WaMu, and then Chase, increased Lange's payments illegally and unconscionably from $3,742 in 2006 to more than $9,000 in August 2008. Lange attempted to modify the loan through her initial counsel in May 2008, and then through the law office of Julie Gaviria, who notified Chase that she represented Lange in December 2008. Gaviria attempted to work out a loan modification with Chase (CT 629:24-28), which appeared to be acting on behalf of WaMu (Complaint, Exhibit 8, CT 44-68).

A Notice of Default dated March 18, 2009 (CT 52) was drafted by "Quality Loan Service Corp., as agent for beneficiary by LSI Title Company." It was subscribed with two illegible initials without any name identifying the signer or his or her capacity. At the time California Reconveyance Company, not Quality Loan Service, was the trustee under the DOT. The NOD was initialed by a "robosigner" who had no idea what was being signed and did not know any facts relating to Lange's mortgage (CT 630:27-631:7).

A second Notice of Default dated March 18, 2009, was recorded on

March 20, 2009 (CT 54). Again the document was executed by "Quality Loan Service Corp. as agent for beneficiary by LSI Title Company," with two illegible initials and without any name or capacity identifying the signer. The NOD was initialed by a "robosigner" and is void (CT 631:8-15, 27-28).

Both NODs were initialed by one company on behalf of another company on behalf of a third company, none of which was represented by a human being, and none of which were parties to the original mortgage transaction. The signatures consisted of the same two letters, but the initials appeared to be written by different people in each case (CT 632:13-16).

Cal. Civ. Code §2923.5(a)(2) requires that a mortgagee, beneficiary, or authorized agent contact the borrower in person or by telephone in order to assess the borrower's financial condition and explore options for the borrower to avoid foreclosure prior to filing a notice of default. The NOD recorded on March 20, 2009 (CT 119-120) did not include the statutory language required by Cal. Civ. Code §2923.5(b) declaring that the beneficiary or its designated agent had contacted the borrower or tried with due diligence to contact the borrower to explore options to foreclosure.

California Reconveyance Company was the trustee named on plaintiff's Deed of Trust recorded on May 24, 2006 (CT 92-93). A Substitution of Trustee dated March 18, 2009, appointing Quality Loan Service as the new trustee, was recorded on May 4, 2009 (CT 122-123). It described JPMorgan Chase Bank, National Association, as the Beneficiary under the Deed of Trust, but the truth of this assertion is a question of fact for a jury. The acknowledgment certifies under California law that Christine Anderson, Attorney in Fact for JP Morgan Chase Bank, National Association, appeared in Minnesota before Christina Sauerer, a Minnesota Notary Public, and executed the document on March 26, 2009 (CT 122-124;

631:21-25).

Under California law, a Substitution of Trustee is valid in regard to a prior recorded Notice of Default if the Substitution is executed before the Notice of Default is executed. The second NOD was recorded on March 20, 2009. The Substitution of Trustee was not executed until March 26 (CT 632:1-10). Since the NOD was recorded before the Substitution of Trustee was executed, the NOD was invalid. The Notice of Trustee's Sale (CT 126-127) was invalid since it was recorded without a valid NOD. The NTS was recorded on June 26, 2009 and set the date for the trustee's sale as July 14, 2009—18 days later (3AC ¶56, CT 632:21-23). "Pedal to the metal."

The sale was postponed as Lange's attorney, Julie Gaviria negotiated a Trial Plan Agreement ("TPA") with Chase whereby Lange would make a monthly payment of $6,384 and Chase would suspend the foreclosure proceedings, only to be resumed if Lange breached the TPA.[4] In September 2009, Chase sent the TPA to Lange, who signed it and returned it to Chase on September 25, 2009 (CT 632:24-27). A copy of the TPA is attached to the third amended complaint (3AC) as Exhibit 2 (CT 680).

Thereafter, as required by the TPA, Chase suspended the Trustee's Sale. Lange made all payments required under the executed TPA on time and had the ability to make payments as due. In reliance on WaMu's suspension of the Trustee's Sale, Lange spent thousands of dollars to repair and modify Running Ridge (CT 633:1-7) as she paid $56,700 to Chase in TPA payments (CT 646:14-17).

No new sale date was announced orally, noticed in a newspaper or posted at the site of the auction prior to the trustee's sale. After negotiations to avoid foreclosure concluded successfully with the TPA, with no further

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[4] Although WaMu was seized by the FDIC in September 2008, the TPA drafted by Chase in September 2009 named WaMu and Susan Lange as the parties.

contact to Lange or her attorney to avoid foreclosure, Chase ambushed Susan Lange by holding a trustee's sale (CT 638:16-18).

On July 15, 2010, Lange came home to find a 3-day Notice to Quit on her door issued by "Seaside Capital Fund and Alta Community Investment – Owner" (Complaint, Exhibit 3, CT 29). At the time, title to Running Ridge had not yet passed to them (see Trustee's Deed Upon Sale, acknowledged July 16, 2010, recorded July 28, 2010, CT 129-130). Kaufman and McCarthy knew they had no right to post a notice to quit one day after the Trustee's Sale (CT 633:20-24). They were seasoned pros in too big a hurry to scare the lawful owner off the property.

Gaviria contacted Chase, who informed her that on July 6, 2010 and July 8, 2010, someone from Chase had telephoned Lange and received a "disconnected or no longer in service" message. Lange's phone was never disconnected. Chase's computer notes stated that Chase sold Running Ridge at a Trustee's Sale on July 14, 2010 with, at most, six days notice to the public. It was a heist. No notice was given to Lange or Gaviria, her attorney. This gross deception prevented Lange from appearing at the trustee's sale to oversee the process and bid on the Property. Had she known of the sale, Lange had the capacity to obtain financing to bid. No notice of the sale was published in any newspaper. No notice regarding the sale was posted at the property. If any notice of the trustee's sale was given to the public, it was inadequate in time and nature such that on its face, the sale was void (3AC ¶61, CT 633:20-634:6).

The sale took place in spite of the fact that Chase/WaMu and Lange had a valid and enforceable TPA in place and that Lange had complied with every term thereof and was current on payments. Chase, Kaufman, McCarthy, Alta, and Seaside knew that the timing and contents of the notice of trustee's sale on Running Ridge did not meet statutory

requirements and that the NOD and NTS were invalid (CT 633:27-634:11).

Plaintiff's factual allegations of fraud are not far-fetched. Last year, U.S. regulators slapped the nation's largest banks with unprecedented penalties for improper home-foreclosure practices, issuing detailed orders to revamp the way they deal with troubled borrowers. The orders were issued on April 13, 2011, to Chase and thirteen other financial institutions by the Federal Reserve, the Office of Thrift Supervision (OTS), and the Comptroller of the Currency.

Under the Consent Order, Chase had sixty days to establish plans to clean up its mortgage-servicing processes to prevent documentation errors. The Order directed Chase to take steps to ensure it had enough staff to handle the flood of foreclosures, that foreclosures didn't happen when a borrower was receiving a loan modification, and that borrowers had a single point of contact throughout the loan-modification and foreclosure process.

Chase was ordered to hire an independent consultant to conduct a "look back" of all foreclosure proceedings from 2009 and 2010, which would have included Plaintiff's foreclosure, to evaluate whether Chase improperly foreclosed on any homeowners. Chase agreed to establish a process to consider whether to compensate borrowers who had been harmed. The Federal Reserve ordered Chase and other big banks to clean up their illegal foreclosure practices.

The *New York Times* reported on April 14, 2011:

> Regulators said the enforcement actions were tough measures that would make the banks accountable. "The banks are going to have to do substantial work, bear substantial expense, to fix the problem," the Acting Comptroller of the Currency, John Walsh, told reporters in a conference call.
>
> JPMorgan Chase, one of the servicers signing the agreement, said that it was adding as many as 3,000 employees to meet the new

> regulatory demands. Jamie Dimon, its chief executive, called it "a lot of intensive manpower and talent to fix the problems of the past."
> http://www.nytimes.com/2011/04/14/business/14foreclose.html

Chase signed the Consent Order with the Board of Governors of the Federal Reserve System on April 13, 2011. Appellant requests that the court take judicial notice of the Federal Reserve Consent Order, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM Docket No. 11-023-B-HC, which is available for download on the Fed's website at: www.federalreserve.gov/newsevents/press/enforcement/enf20110413a5.pdf

The Consent Order, signed by Chase's Chief Administrative Officer, includes the following allegations against Chase, which, the Order states, initiated more than a quarter of a million foreclosures in 2009-2010. The Consent Order has been abbreviated (but not changed) in the following:

> WHEREAS, in connection with the process leading to certain foreclosures involving the Servicing Portfolio, the Mortgage Servicing Companies (Chase) allegedly:
>
> (a) Filed or caused to be filed in state courts and in connection with bankruptcy proceedings in federal courts numerous affidavits executed by employees making various assertions, such as the ownership of the mortgage note and mortgage, the amount of principal and interest due, and the fees and expenses chargeable to the borrower, in which the affiant represented that the assertions in the affidavit were made based on personal knowledge or based on a review by the affiant of the relevant books and records, when, in many cases, they were not based on such knowledge or review;
>
> (b) Filed or caused to be filed in state courts, in federal courts or in the local land record offices, numerous affidavits and other mortgage-related documents that were not properly notarized, including those not signed or affirmed in the presence of a notary;
>
> (c) Litigated foreclosure and bankruptcy proceedings and initiated non-judicial foreclosures without always confirming that documentation of ownership was in order at the appropriate time, including confirming that the promissory note and mortgage document were properly endorsed or assigned and, if necessary, in the

possession of the appropriate party;

WHEREAS, the practices set forth above allegedly constitute unsafe or unsound banking practices;

NOW, THEREFORE, Chase shall cease and desist and take affirmative action, as follows …

Chase's attempted foreclosure on Lange's home was illegal because, among other things, the underlying security instruments on which Chase relied for the foreclosure are invalid and void *ab initio* (CT 620:8-9).

Chase cannot prove that it owns the note, that it is the noteholder in due course or that it is the authorized servicer of the note. Chase cannot even provide the names of the actual owners of the note (CT 628:23-25).

Chase's foreclosure on the Property was consistent with Chase's pattern of foreclosing on properties it did not own and to which it did not have any equitable or legal title. Chase has been severely sanctioned by state and federal courts for providing false, perjured, forged, and fabricated assignments, affidavits, verifications, and pleadings (CT 629:11-14).

Chase could not have taken that which WaMu did not possess, a loan it had already sold (CT 630:8-9). Kaufman, Alta, Seaside and McCarthy were aware that neither WaMu nor Chase was a Lender or holder in due course of the note and because WaMu pre-sold the note, neither WaMu nor Chase was the Beneficiary of the note.

Kaufman and McCarthy knew better than anyone that the note was insured, that WaMu had been paid in full by the securitization investors in the note, that WaMu had also been paid in full for the note by insurance, that Chase did not have legal title to Running Ridge, and that the title documents on Running Ridge filed by LSI and Quality were statutorily defective, improper, illegal and void (CT 635:15-28).

All defendants knew that WaMu did not own the note so Chase could not have purchased it. All defendants knew that the Trustee's Sale was not valid. Despite such knowledge, defendants went through the motions of a fraudulent trustee's sale in the pretense of selling Running Ridge to Alta and Seaside (CT 633:11-15).

Lange's lawyer Julie Gaviria filed a Complaint to Set Aside Trustee's Sale on August 2, 2010 (CT 1-11) and a demurrer was sustained (CT 151). The attorney filed a first amended complaint (1AC) on October 13, 2010, where "plaintiff prays" was spelled "plaintiff praise" (CT 156:6 and 158:8) and "every action undertaking by Jeff Dunavant as broker representing WaMu and later on by Chase…were made either with the intent to cause emotional distress or done with malignant and abandoned heart." (CT 158:16-20). Two weeks later, Roger Senders in Culver City substituted as attorney of record. At a hearing on December 6, 2010, in Department 43, Judge Borrell sustained demurrers to Gaviria's 1AC "with leave to amend by the close of business on January 4, 2011" (CT 606). He read the 1AC.

Senders fax-filed a second amended complaint one day after the holidays on Tuesday, January 4, 2011 (CT 606) adding Kaufman and McCarthy as parties. Before defendants' demurrers could be heard on March 16, he asked leave to file a third amended complaint adding new parties. Although the first two complaints had been drafted by Gaviria, Judge Borrell refused Senders an opportunity to add new parties to the third amended complaint nine months after the complaint had been filed as he made "self-evident" factual findings, i.e. factual findings without evidence:

> "In defendants' eyes, the value of the property depreciates with each passing day, although no evidence to substantiate this assertion has been presented. But what is self-evident is that the asset is frozen, such that it may not be occupied, transferred,

> encumbered or developed by the purchaser at the trustee's sale… Counsel's barren assertion that this is plaintiff's first real opportunity to plead her case is inconsistent with the facts. Plaintiff has squandered considerable time when in fact time was of the essence" (CT 607-608).

It was unclear if Judge Borrell was irked by *praise* or *malignant and abandoned hearts* in the first amended complaint or if unsubstantiated concerns over money trumped specific, detailed allegations of fraud, theft, battery, and distress. In any event, Senders was committed to Gaviria's cast of characters and a fast-track schedule on a bullet train to foreclosure.

Judge Borrell granted plaintiff leave to file a third amended complaint eight months after Mura's explicit threats on the Running Ridge steps, but he refused to allow Senders to add Mura, Dunavant, and other defendants who were directly involved in the trustee's sale. The two-year Statute of Limitations for battery shrunk to a few short months so that Kaufman and McCarthy could have Lange's residence. Lange's payments of $6,000 per month, or $72,000 per year, to stay in her own home didn't satisfy them.

VII. CAUSES OF ACTION ALLEGED

First Cause of Action – Wrongful foreclosure

No valid Notice of Default was recorded against Running Ridge because it was recorded prior to execution of the Substitution of Trustee. Accordingly, the Notice of Trustee's Sale of Running Ridge was void and the trustee's sale of July 14, 2010, was illegal (3AC ¶87, CT 641:12-15).

WaMu sold the note to an entity whose name is yet undiscovered, to be bundled with other mortgages and sold again by way of a secondary vehicle. Chase was aware before causing the recording of the faulty NODs

and the invalid NTS that it was not a holder in due course, did not have title to the property, and was not the legal servicer of the note (CT 635:8-12).

Chase was not an authorized servicer (3AC ¶92, CT 641:20-22). Chase had no authority to change trustees and record a substitution of trustee naming itself as Beneficiary, so Quality had no standing to record the NOD or the NTS on Chase's behalf (3AC ¶88, CT 641:16-21).

WaMu retained no beneficial interest in the Loan that could be transferred to Chase after the FDIC placed WaMu into receivership. Therefore, Chase did not acquire or otherwise purchase plaintiff's Note and had no right to foreclose (3AC ¶89, CT 641:26-28).

Chase did not have standing to sell Running Ridge because Chase was not the holder of the note or a Beneficiary. Chase cannot produce a promissory note endorsed to Chase nor an assignment of the note to Chase. Chase cannot produce any legal document giving it authority to foreclose on Running Ridge. Chase cannot even identify the owner or holder of the Note and Chase is not an authorized servicer. (3AC ¶91-92, CT 642:14-22).

A mortgage is a contract, and under the contract only the Lender can make a decision to foreclose—regardless of who "initiates" the foreclosure.

"The comprehensive statutory framework established by Cal. Civ. Code §2924 to govern nonjudicial foreclosure sales is intended to be exhaustive." *Moeller v. Lien* (1994) 25 Cal.App.4th 822. "Moreover, the language of the statute is expressly applicable only as between parties to a contract." Chase makes no claim that it is a party to a contract with Plaintiff.

The Civil Code need not specify that the foreclosing party must possess the promissory note because the terms of the mortgage contract spell out the process to be followed.

Cal. Civ. Code §2920(a) states that a mortgage is a contract:

Cal. Civ. Code §2920.

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

(b) For purposes of Sections 2924 to 2924h, inclusive, "mortgage" also means any security device or instrument, other than a deed of trust, that confers a power of sale affecting real property or an estate for years therein, to be exercised after breach of the obligation so secured, including a real property sales contract, as defined in Section 2985, which contains such a provision.

The contract consists of a promissory note and the security instrument that supports it, in this case a Deed of Trust. These two instruments define the creation and the termination of the mortgage and in particular they determine the process of foreclosing on a mortgage.

Paragraph 7(c) of Lange's Adjustable Rate Note (CT 336-343) states that if the Borrower is in default, the *Note Holder* may require the Borrower to pay the full amount of the Principal. Paragraph 1 of the Note states, "The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the Note Holder." (CT 339).

Paragraph 16 of Lange's Deed of Trust (CT 92-117) states, "This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract." (CT 354).

Paragraph 22 of the Deed of Trust empowers only the Lender to initiate a foreclosure. "If Lender invokes the power of sale, Lender shall execute or

cause Trustee to execute a written notice of the occurrence of an event of default and of Lender's election to cause the property to be sold." This does not authorize any and every national bank to foreclose against any and every house it fancies. Neither WaMu nor Chase was ever the Lender, and the trustee cannot act in a vacuum.

Paragraph 23 of the Deed of Trust (CT 92-117) states, "Upon payment of all sums secured by this Security Instrument, Lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Instrument to Trustee." WaMu had been paid in full (CT 635:15-28).

Second Cause of Action – Civ. Code §2923.5

Cal. Civ. Code §2923.5 requires a declaration that states:

"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" *Mabry v. Superior Court of Orange County* (2010) 185 Cal.App.4th 208, 235.

The name above the signature line on both NODs was Quality Loan Service Corp. as agent for beneficiary, by LSI Title Company (CT 199-120). Indecipherable scrawl is on the signature line. A declaration must be subscribed by an identifiable real person. Nothing on either NOD states the name of the declarant. A corporation is not able to sign a declaration, only a human being is (3AC ¶100).

Initials scrawled on the signature line were made by a so-called "robosigner," a person who signed hundreds or thousands of NODs and other documents on behalf of banks, trustees and title companies without

even reading them, let alone having investigated the individual case to know whether the actions required by §2923.5 were met. The signer of the NODs had no knowledge as to the information contained in his or her declaration (3AC ¶101).

On October 1, 2010, California Attorney General, now Governor Jerry Brown sent a letter to Chase, which is attached to the third amended complaint as Exhibit 3 (CT 682-683). He ordered Chase to halt all foreclosures in California. A copy of the letter was posted on the Attorney General's website. Mr. Brown wrote, "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." (3AC ¶102, CT 682).

While taking plaintiff's monthly payments of $6,384 under the TPA, Chase did not even call to discuss options to avoid foreclosure. Yet these facts alleged in plaintiff's Second Cause of Action resulted in a demurrer without leave to amend.

Third Cause of Action – Unjust Enrichment

Chase had no interest in Lange's Running Ridge mortgage, so payments made to Chase by Lange in the sum of approximately $56,700 in 2009 and 2010 constituted unjust enrichment. The sales price paid to Chase by Defendants Alta III and Seaside was also unjust enrichment. WaMu and Chase were unjustly enriched by money received from credit default insurance. WaMu and Chase were unjustly enriched by any money they

received for the Note that was not applied toward payoff of the Note (3AC ¶106, CT 646:13-647:5).

Through his significant position at WaMu securitizing mortgages, Todd Kaufman knew that WaMu and Chase had no interest in the Mortgage and were not holders in due course of the Note. Kaufman knew that Chase had no interest in the DOT or Running Ridge. Kaufman and McCarthy, owners and operators of Alta III and Seaside, knew that they could not legally buy Running Ridge at the trustee's sale. Lange paid Alta III, Seaside, Kaufman and McCarthy $6,000 per month to continue to live in Running Ridge after the illegal trustee's sale, which constituted unjust enrichment (3AC ¶109).

Fourth Cause of Action – RESPA and TILA

On December 15, 2010, Lange requested from Chase all documents relating to the Mortgage. On January 31, 2011, she received three documents from Chase, including an accounting of payments Lange made pursuant to the TPA, an incomplete response to her request in violation of state and federal law (3AC ¶113, CT 648).

Defendants engaged in a practice of non-compliance with RESPA and the California Financial Code, including failing to respond fully to properly submitted request for documentation and information regarding her loan. This practice was designed to conceal TILA and RESPA violations, as well as violations of California law and to conceal the identity of the true owners and beneficiaries of the Mortgage (3AC ¶114, CT 649).

Lange is unable to ascertain the basis for defendants' claims to her property and she cannot identify the owner or beneficiary of the Note (3AC ¶115, CT 649). Chase has revealed nothing to support its claim, but as a result of the demurrer, it really doesn't have to.

Chase's seeming inability to document its alleged claim to Running

Ridge raises a question of fact for a jury

Fifth Cause of Action – Breach of Contract / No Contract

a. Breach of Contract.

WaMu and Lange entered into a Trial Plan Agreement (TPA) on September 25, 2009. The TPA is attached to the 3AC as Exhibit 2 (CT 680). It called for Lange to pay WaMu $6,383 per month, which she paid on time each month for nine months, and WaMu agreed to suspend the foreclosure. A lender's alleged breach of an oral agreement to postpone the trustee's sale is grounds for setting aside a trustee's sale. *Nguyen v Calhoun* (2003) 105 Cal.App.4th 428, 444-445.

The TPA says, "If any part of this Agreement is breached, Washington Mutual has the option to terminate the Agreement and begin or resume foreclosure proceedings." The court seemed to rule that a breach by Chase in selling the property terminated the agreement. A jury might disagree.

WaMu agreed to reevaluate Lange's application and determine if it was able to offer a permanent workout solution. This necessitated contact between WaMu and Gaviria. Since WaMu was seized by the FDIC in September 2008, references to WaMu in the TPA (CT 680) are really referring to Chase. No contact was made other than when WaMu/Chase repeatedly lost track of the financial data Lange and her attorney provided. Without any notice to either Lange or Gaviria or legal notice to the public, and despite Lange's consistent record of timely monthly payments, WaMu/Chase breached its TPA agreement with Lange and sold Running Ridge at a trustee’s sale on July 14, 2010 (3AC ¶118 CT 650:2-15).

In reliance on WaMu/Chase's suspension of the foreclosure and trustee’s sale, Lange spent thousands of dollars performing maintenance

and updating Running Ridge, which she would not have spent had she not entered into the TPA with WaMu (3AC ¶119).

b. No Contract.

WaMu presold the Mortgage, so WaMu was never the holder in due course of the Note. It was merely a pipeline. After receipt, the holder of the Note bundled the Note with numerous other residential mortgages into residential mortgage-backed securities ("RMBS"), which were structured into synthetic collateralized debt obligations ("CDOS") and sold to investors (3AC ¶122).

WaMu expected that Lange would not have the ability to repay the loan. It was not a matter of being unconcerned with a possible outcome that Lange would default. They knew she could not pay $9,000 per month (3AC ¶123).

WaMu expected to profit when Lange found it impossible to perform and defaulted (3AC ¶125).

A necessary element in the formation of an enforceable contract under common law is a meeting of the minds. Two or more parties must share an expectation that a future event will occur. Lange expected that she would borrow money from WaMu, she would pay it back, and then she would own Running Ridge free and clear. WaMu expected that Lange would borrow money, she would not be able to pay it back when her payments tripled, and then the investors would own Running Ridge. Since there was no shared expectation – no meeting of the minds – no contract was formed between Lange and WaMu (3AC ¶126).

Thanks to Kaufman, WaMu paid premium fees and other incentives to mortgage brokers like Building Capital and Dunavant who signed up the riskiest borrowers. Fueled by spiraling profits to WaMu, common law

principles disintegrated, including those of contract formation, customary underwriting practices, and statutory procedures for transferring interests in real property and the recordation of transfers of interests in real property (3AC ¶128, CT 653:8-15). The fictitious numbers inserted into Plaintiff's loan application were considered part of standard banking practice during Kaufman's reign and WaMu's moral meltdown. The parties did not share a single expectation regarding any of the terms of the mortgage contract and therefore the contract was void (3AC ¶130, CT 654).

No enforceable contract was formed between WaMu and Lange, so the DOT and the Note were not assets of WaMu that could be acquired or assumed by Chase from the FDIC after WaMu was closed by OTS on September 25, 2008 (3AC ¶132, CT 654).

Securitization of mortgage loans was an integral part of Washington Mutual Inc.'s management of its capital. It engaged in securitizations of first lien single-family residential mortgage loans through Washington Mutual Mortgage Securities Corporation. WaMu failed to disclose to Lange that its economic interests were adverse to her and that WaMu expected to profit when she found it impossible to perform and defaulted on her mortgage. (3AC ¶124-125, CT 652:7-15).

Consent of the parties is one of the requisites of a valid contract for the sale of realty. *Ussery v. Jackson* (1947) 78 Cal.App.2d 355. It is essential to the creation of such a contract that there be a meeting of the minds of the parties and a mutual agreement on the terms of the contract. *Holland v. McCarthy* (1916) 173 Cal. 597; *German Sav. & Loan Soc. v. McLellan* (1908) 154 Cal. 710; *Lonergan v. Scolnick* (1954) 129 Cal.App.2d 179; *Cook v. Mielke* (1935) 3 Cal.App.2d 736.

The writing must evince a free and mutual understanding of the parties and show that they both agreed on the same thing in the same sense, *Estes*

v. Hardesty (1944) 66 Cal.App.2d 747, or the writing has no binding effect on either. *Patterson v. Clifford F. Reid* (1933) 132 Cal.App. 454; *Scott v. Los Angeles Mountain Park Co*. (1928) 92 Cal.App. 258. When the writing shows that there was no meeting of the minds on the material terms of the proposed agreement, no contract exists, no obligation to convey rests on the vendor, and the purchaser is under no duty to accept the property or pay for it. *Burgess v. Rodom* (1953) 121 Cal.App.2d 71; *Salomon v. Cooper*, 98 Cal. App. 2d 521 (1950). In such a case it is immaterial that the signature of the party charged, or of both parties, is affixed. *Morton v. Foss* (1941) 48 Cal.App.2d 117.

It is indispensable to a valid memorandum of an agreement to sell and convey land that it be complete evidence of the terms to which the parties have assented. If it establishes that there was in fact no contract, if it discloses that upon essential and material terms the minds of the parties did not meet and that such terms were left open for future settlement, then there is no binding obligation upon the seller to convey or the buyer to accept and pay for the land. It will be regarded as merely an inchoate effort. Implications will not be indulged. *Salomon v. Cooper* (1950) 98 Cal.App.2d 521, 522-523.

An action for damages for breach of contract for the purchase or sale of real property will not lie unless the writing contains the essential terms and material elements of such an agreement without recourse to parole evidence of the intention of the contracting parties. *Dillingham v. Dahlgren* (1921) 52 Cal.App. 322, 326-327. The law does not provide a remedy for breach of an agreement to agree in the future, and the court may not speculate upon what the parties will agree. *Autry v. Republic Productions, Inc*. (1947) 30 Cal.2d 144, 151-152.

"If no meeting of the minds has occurred on the material terms of a

contract, basic contract law provides that no contract formation has occurred. If no contract formation has occurred, there is no settlement agreement to enforce pursuant to Cal. Code Civ. Proc. §664.6 or otherwise." *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 801.

David Horton wrote in the UCLA Law Review, "The perception that adherents (to standard form contracts) did not read and could not understand fine-print terms made it difficult to identify the requisite 'meeting of the minds' or 'mutual assent' of contract formation." David Horton, "The Shadow Terms: Contract Procedure and Unilateral Amendments," (2010) 57 UCLA Law Review 605.

WaMu expected that Plaintiff would not perform as one victim in a scheme concocted by Kaufman in which:

(1) WaMu's fees as servicer would be greater as the number of loans increased;

(2) WaMu's fees as servicer would be greater as the balances of loans increased;

(3) WaMu would recover any of its unpaid interest of the loan through credit default insurance when Lange inevitably defaulted; and

(4) All risk of loss in the event of Lange's default would be borne by investors, not WaMu as the servicer. (3AC ¶129, CT 653).

Lange's participation in the mortgage contract was procured by overt and covert misrepresentations and nondisclosures. The parties did not share a single expectation with respect to any of the terms of the mortgage contract and therefore the contract was void *ab initio*. Had Lange known that WaMu intended to sell her mortgage and engage in Kaufman's securitizations and collateralizations, she would never have entered into a mortgage contract with WaMu (3AC ¶130, CT 654).

Sixth Cause of Action - Fraud and Concealment

WaMu and its agents Building Capital and Dunavant concealed material facts from Lange: that she would not be able to afford the NA-ARM loan when her payments more than doubled; the prepayment penalty would prevent her from refinancing; her mortgage had been presold; Dunavant was not licensed; and Dunavant was paid more to sell her a NA-ARM mortgage than the fixed-rate loan she preferred. Building Capital and Dunavant told Lange she could afford the mortgage, she could refinance it without a penalty before her payments increased, and she was better off with a NA-ARM than a fixed rate mortgage (3AC ¶136, CT 655).

As agents of WaMu, Dunavant and Building Capital made the above statements knowing that they were false, intending that Lange rely on these statements to her detriment and their significant benefit. If they had not committed fraud and concealed the truth, Lange would not have entered into the mortgage with WaMu (¶¶137-138, CT 656).

Chase concealed material facts from Lange, listed in ¶139 of the 3AC, by withholding her loan application, the original promissory note, names of assignees, whether the mortgage was a part of any mortgage pool, whether investors participated in a mortgage security instrument that included her mortgage, copies of sales contracts, servicing agreements, assignments, allonges, transfers, indemnification agreements, and other agreements related to Lange's account, whether the mortgage was part of a mortgage pool, whether any investor or other interested party approved of the foreclosure of Running Ridge, and also the CUSIP number for Lange's loan account (¶139, CT 657-658).

Chase knew of the fraud of WaMu, Building Capital and Dunavant, adopted it to Chase's own benefit, and continued to perpetrate the fraud by relying on it to foreclose on Lange. Under cover of the TPA, Chase sold

Running Ridge out from under Lange without attempting to work out a modification and without discussing its findings and alternatives regarding a modification with either Lange or Gaviria (¶¶140-142, CT 658-659). It was a bold affront to the intent of the California legislature, as stated in §2923.5, and a reasonable jury could conclude that it was a violation.

In *Aceves v. US Bank, N.A.* (2nd Dist., Jan. 27, 2011) 192 Cal.App.4th 218, the bank promised to work with the borrower on a loan reinstatement and modification if she would forgo further bankruptcy proceedings. In reliance on that promise, plaintiff did not convert her Chapter 7 bankruptcy case to Chapter 13 or oppose the bank's motion to lift the bankruptcy stay.

The bankruptcy court lifted the stay, but the bank did not work with Acheves in an attempt to reinstate and modify the loan. Rather, the bank foreclosed.

The court concluded (1) plaintiff could have reasonably relied on the bank's promise to work on a loan reinstatement and modification if she did not seek relief under chapter 13; (2) the promise was sufficiently concrete to be enforceable; and (3) plaintiff's decision to forgo chapter 13 relief was detrimental because it allowed the bank to foreclose on the property.

Aceves sent documents to American Home related to reinstating and modifying the loan. On December 23, American Home informed Aceves that a "negotiator" would contact her on or before January 13, 2009 — four days *after* the auction of her residence.

The court of appeals recognized that U.S. Bank never intended to work with Aceves to reinstate and modify the loan. The bank promised this only to convince Aceves to forgo further bankruptcy proceedings so it could lift the automatic stay and foreclose on the property.

The elements of a promissory estoppel claim are: (1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the

promise is made; (3) the reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance. *Advanced Choices, Inc. v. State Dept. of Health Services* (2010) 182 Cal.App.4th 1661, 1672.

The doctrine of promissory estoppel is used to provide a substitute for the consideration, which ordinarily is required to create an enforceable promise. The purpose of this doctrine is to make a promise binding, under certain circumstances, without consideration in the usual sense of something bargained for and given in exchange. *Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 672. Under this doctrine a promisor is bound when he should reasonably expect a substantial change of position, either by act or forbearance, in reliance on his promise, if injustice can be avoided only by its enforcement. *Sutherland v. Barclays American Mortgage Corp*. (1997) 53 Cal.App.4th 299, 312; *Garcia v. World Savings, FSB* (2010) 183 Cal.App.4th1031, 1039–1041.

The *Aceves* trial court sustained a demurrer without leave to amend in favor of U.S. Bank. The court of appeals reversed on the grounds that the plaintiff had alleged promissory estoppel and fraud.

The manner in which Susan Lange was lured into a state of acquiescence by modification agreement her lawyer negotiated with Chase, how she dutifully made the monthly payments of $6,384.00, and then came home ten months later to find a notice to quit on her door, fails to meet a unforgettable test suggested by a judge in moot court at UCLA Law School in 1972: "If it makes me want to throw, it's probably not the law."

Kaufman organized and carried out the fraudulent scheme described above for WaMu. Lange was caught in Kaufman and WaMu's web of deceit, which led Lange and many other homeowners to lose their homes. Based on the fraudulent practices put into effect and endorsed by Kaufman,

Lange took out a fraudulent loan and lost her home to him (¶145, CT 660).

Seventh Cause of Action - Quiet Title

Under the contract between WaMu and plaintiff, her obligation was satisfied when the lawful beneficiary was paid in full (¶150, CT 661).

Paragraph 23 of the Deed of Trust states:

> 23. RECONVEYANCE. Upon payment of all sums secured by this Security Instrument, Lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Instrument to Trustee. Trustee shall reconvey the Property without warranty to the person or persons legally entitled to it (CT 104).

The DOT does not state that Lange must make full payment, only that all secured sums must be paid. The obligations owed to WaMu under the DOT were fulfilled years before the trustee's sale on July 14, 2010 (¶152 CT 661).

Alta and Seaside's principals knew the DOT was fraudulently obtained, the NOD and NTS were void, and the trustee's sale was illegal. They are not bona fide purchasers and have no interest in Running Ridge (¶153, CT 662).

Eighth to Fourteenth Causes of Action

The Eighth Cause of Action seeks declaratory and injunctive relief. If someone threatens to steal your property, you can either give up, or fight, or go to court. If it truly belongs to them, you will lose the case. But if no trial judge will allow you your day in court, that only leaves two options.

The Ninth Cause of Action alleges Slander of Title, to which the court concluded that plaintiff failed to allege the publication of a false statement

because the defendants did own her property as a result of the trustee's sale (Minute Order 5/12/2011, CT 1225). This ruling is contingent upon Judge Borrell's verdict that the trustee's sale was lawful—a trial on the pleadings.

The Tenth Cause of Action alleges that defendants' extreme and outrageous conduct, including Chase's widespread use of robo-signers and concealment of the sale, caused plaintiff severe emotional distress (¶171, CT 665). Mura's threats on behalf of Alta and Seaside were also alleged to cause Lange emotional distress (¶173, CT 666). The court ruled that the facts alleged in the 3AC did not constitute extreme and outrageous conduct (Minute Order 5/12/2011, CT 1225).

Accepting, as the court must, that all the material facts alleged in the Complaint are true, would it be reasonable for a jury to conclude that dreaming up a fraudulent scheme to pass off toxic mortgages to investors, putting it in place at WaMu on an international scale, urging Dunavant to deceive plaintiff and other borrowers into signing up for the worst possible loans, tripling Lange's payments to push her over the edge, squeezing another $57,400 out of her with a cynical loan mod scam, and then threatening her with a visit from the unspeakable Luke McCarthy if she didn't grab all her possessions and run for her life, all of that put together might raise an eyebrow on the jury, even if the judge was not concerned.

> Despite knowing that they had obtained title to Lange's home illegally, some defendants fraudulently attempted to evict Lange, her husband and their tenants from Lange's home. In order to effect possession of Lange's home, some defendants threatened Lange with harm if she did not vacate the property within three days after giving Lange notice of the illegal trustee’s sale. All acts were done in furtherance of an illegal enterprise (3AC ¶3, CT 620:19-24).

The Eleventh Cause of Action alleges that defendants breached their duty of good faith and fair dealing. There may be little precedent for the scope of the fraud committed on the American people by Wall Street in the first decade of the 21st Century, as indicated in the facts alleged in the case of Susan Lange in the 3AC, but the Eleventh Cause of Action was withdrawn by plaintiff upon the order of the court.

The Twelfth cause of action is for constructive trust.

The Thirteenth Cause of Action for respondeat superior alleges that WaMu and Alta are liable for the acts of Kaufman; Seaside is liable for the acts of McCarthy and Mura; WaMu and Chase are liable for CRC; and Chase is liable for Quality and LSI (¶¶185-189, CT 669-670).

The Fourteenth Cause of Action alleges that the above acts were also negligent, thereby breaching each defendant's duty to Lange and causing her damage (¶190, CT 670-671).

VIII. TENDER NOT REQUIRED IF A SALE IS VOID

In sustaining the demurrer to the 3AC, the court stated in its minute order on May 12, 2011, that a debtor must tender any amounts due under a deed of trust to overcome a voidable sale (CT 1224-1225). On this basis, he sustained demurrers to the First, Second, and Seventh Causes of Action.

The 3AC alleged that the sale was void because the Substitution of Trustee was signed and recorded after the substitute trustee executed and recorded the Notice of Default. Also, the 3AC alleged that the sale was void because the Notice of Default failed to include the declaration required by Cal. Civ. Code §2923.5.

The rationale underlying the tender rule does not apply in this case. The rationale behind the tender rule is that if plaintiff could not have redeemed the property even if the sale procedures had been proper, any irregularities

in the sale did not result in damages to the plaintiff. *FPCI RE-HAB 01 v. E & G Investments* (1989) 207 Cal.App.3d 1018, 1022. Under such circumstances, requiring tender of the amount of the secured indebtedness is proper because otherwise invalidating the foreclosure sale would be a useless act. Id. at 1021.

Voiding a foreclosure for violation of Section 2923.5 is not inherently a useless act absent tender. The whole purpose of this section is to allow a homeowner an opportunity to at least discuss with the Lender the possibility of loan modification. Where such communication does result in loan modification, the homeowner can avoid foreclosure even if he or she would not otherwise be in a position to fully "redeem" the property at a foreclosure sale. In situations like this, a requirement that the homeowner tender the entire amount of the secured indebtedness would actually defeat the purpose of the statute. *Das v. WMC Mortg. Corp.* (N.D. Cal.) 2010 U.S. Dist. LEXIS 122042. Lange has alleged that §2923.5 was violated.

The trustee's sale was void because prior to entering into the loan contracts with Lange, WaMu had presold the loan. WaMu was never the Lender and never had any interest in Running Ridge. WaMu and Kaufman knew that WaMu was never the Lender or Beneficiary on the mortgage. For this reason, the DOT and Note were void *ab initio* and could not serve as the basis for a non-judicial foreclosure sale. (3AC ¶81, CT 640:10-15).

The Court of Appeal recently spelled out exceptions to the tender requirement in *Lona v. Citibank* (6th Dist. 2011) 2011 Cal. App. LEXIS 1605. Lona brought an action to set aside the trustee's sale claiming that he was a victim of predatory lending. The court held that summary judgment in favor of Citibank was improper because the homeowner presented sufficient evidence of triable issues of material fact with regard to the alleged unconscionability of the transaction.

Lona's home was sold at a nonjudicial foreclosure sale. Three months later, Lona filed an action against the lender, the trustee, the mortgage broker, and the servicer of the loan, alleging a variety of claims, including a cause of action to set aside the trustee's sale. Lona argued that he was never told the first loan was an adjustable rate loan; nor was he told how much the payments could be.

Lona argued that he was not required to tender to seek equitable remedies or damages because: (1) the deed of trust "was illegal from the time of formation and therefore, unenforceable and non-assignable"; and (2) his "claims would offset any amounts claimed to be due under the void agreements," and (3) a tender was not required because his claim was based on the illegality of the loan contract, and not any irregularity in noticing or conducting the trustee's sale. The summary judgment was reversed. Susan Lange's 3AC alleges facts identical to Lona, and so tender was not required.

Nguyen v Calhoun (2003) 105 Cal.App.4th 428, 440 addressed two grounds for setting aside a trustee's sale: (1) alleged irregularity in the procedure coupled with inadequate price; and (2) the lender's alleged breach of an oral agreement to postpone the trustee's sale. 105 Cal.App.4th at pp. 444-445. Lange has alleged breach of Chase's agreement to postpone the sale.

Lona described other grounds for setting aside a trustee's sale in the case law, including assertions that no breach occurred, that the borrower was not in default, that the deed of trust was void, that the sale was the result of sham bidding or an attempt to restrict competition in bidding; or that the trustee did not have the power to foreclose. *Lona v. Citibank*, supra, 2011 Cal. App. LEXIS 1605 at *27.) If Judge Borrell had followed Lona, he would not have imposed a requirement that Susan Lange tender the amount of approximately $1,387,500.00 to procure her day in court.

CONCLUSION

WaMu sold plaintiff's mortgage contract before it was even signed. Chase never possessed the Promissory Note as either Noteholder or Lender. Chase could not have purchased plaintiff's mortgage contract from the FDIC and had no right to foreclose upon plaintiff's property. (3AC ¶131, CT 654).

WaMu was never the Lender and never had any interest in Running Ridge. WaMu and Kaufman knew that WaMu was not the Lender or Beneficiary of the Mortgage. Chase was not a servicer of the note on behalf of the owner(s) of the note. Defendants participated in an illegal scheme to fraudulently take Lange's home (CT 640:12-26).

Lange requested declaratory relief in the Eighth Cause of Action. She stated in ¶62 that she seeks declaratory relief as to what party, entity, individual or group was the owner of the note and whether the DOT secured any obligation by her to any defendant. If not, Lange requested final judgment granting her quiet title in Running Ridge (CT 634:13-17).

This may not be a complex case, although it seems like a handful, but surely there are any number of disputed facts recited in the pleadings that would entitle plaintiff to relief and should be decided by a jury of her peers, rather than a judge reading her complaint on law and motion calendar.

Date: June 7, 2012

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