IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

C.A. No. 12-56566, 13-55048

DARYOUSH JAVAHERI

Plaintiff-Appellant

v.

JPMORGAN CHASE BANK, N.A.

Defendant-Appellee

BRIEF OF APPELLANT

Appeal from Judgment of the United States District Court
For the Central District of California
D.C. No. 10-cv-05152-GW-PLA
Consolidated with
D.C. No. 11-cv-10072-ODW-FFM
(Honorable Otis D. Wright)

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I. STATEMENT OF JURISDICTION

This appeal arises from a final judgment following orders granting summary judgment in favor of Defendant-Appellee JPMorgan Chase Bank N.A. in two consolidated cases filed by Plaintiff/Appellant Daryoush Javaheri in Federal District Court. ER 001 [Judgment]; ER 002 [Order Granting Defendant's Motion for Summary Judgment, Dec. 11, 2012]; and, ER 018 [Order Granting Defendants' Motion for Partial Summary Judgment, Aug. 13, 2012].

Plaintiff/Appellant filed Notices of Appeal on January 8, 2013, and August 24, 2012. The appeals are timely. Fed. R. App. P. 4(a)(1)(A).

There is diversity of citizenship between Plaintiff and Defendant Chase, and the amount in controversy exceeds the sum of $75,000. District Court has jurisdiction of the action pursuant to 28 U.S.C. 1332(a).

An order denying a motion for summary judgment is interlocutory and thus, in most cases, not appealable. *State of Calif., on Behalf of Calif. Dept. of Toxic Substances Control v. Campbell* (9th Cir. 1998) 138 F3d 784, 786. Partial summary judgment orders generally are not immediately appealable because they do not dispose of all claims and end the litigation on its merits. *American States Ins. Co. v. Dastar Corp.* (9th Cir. 2003) 318 F3d 881, 884;

Williamson v. UNUM Life Ins. Co. of America (9th Cir. 1998) 160 F3d 1247, 1251; *Stewart Title & Trust of Phoenix v. Ordean* (9th Cir. 1976) 528 F2d 894, 897, fn. 1 (ruling on motion for partial summary judgment merges with final judgment and reviewable on appeal from final judgment).

The order is reviewable if the district court enters final judgment in the case (i.e., appellate review lies on appeal from the final judgment). *Swint v. Chambers County Comm'n* (1995) 514 U.S. 35, 42–43, 115 S.Ct. 1203, 1207–1208; *Padfield v. AIG Life Ins. Co.* (9th Cir. 2002) 290 F3d 1121, 1124.

II. ISSUES PRESENTED

1. The District Court violated the Due Process Clause of the Fourteenth Amendment in deciding that California law does not allow court action to determine if a foreclosing entity is authorized to foreclose.

2. The Court violated the Due Process Clause in ruling that Chase was authorized to foreclose after Chase admitted that the collateral file containing all the original loan documents was inexplicably missing in the Wellworth case ("Wellworth").

3. The Court erred in ruling that Javaheri did not have standing to object to forged signatures on the Substitution of Trustee and/or the Notice of Trustee's Sale.

4. The Court erred in ignoring the declaration of Jeffrey Thorne stating that the Purchase and Assumption Agreement between the FDIC and Chase was 118 pages, not 44 pages, as alleged by Chase.

5. The Court erred in striking the declaration of William Paatalo on the grounds that it was untimely when it was filed 21 days before the hearing on Defendant's Summary Judgment Motion in the Wilshire case ("Wilshire"). Excerpts of Record ("ER") pp. 7, 14 [Doc. 127, Order Granting Motion for Summary Judgment].

6. Tender is not required to file a quiet title action before a trustee's sale.

III. STATEMENT OF THE CASE

On October 29, 2010, Javaheri filed a Complaint regarding the Wellworth property in Federal District Court, CDCA, against JPMorgan Chase ("Chase") and California Reconveyance Company ("CRC"), *Javaheri v. JPMorgan Chase Bank N.A. et. al.*, No. CV10-8185-ODW. ER 417 [Doc. 1]. Javaheri's original Complaint and his subsequent First Amended Complaint were dismissed for failure to state claims. ER 044 [Doc. 20], ER 067 [Doc. 28.] Javaheri filed a Voluntary Dismissal of CRC on January 29, 2011.

On April 12, 2011, Javaheri filed a Second Amended Complaint ("SAC") against Chase. ER 231 [Doc. 29]. The Court partially granted Chase's Motion to

Dismiss, leaving claims for: (1) violation of California Civil Code section 2923.5; (2) wrongful foreclosure; (3) quasi-contract; (4) quiet title; and (5) declaratory and injunctive relief. ER 056 [Doc. 36].

On December 5, 2011, Plaintiff filed a Complaint similar to the SAC, except that it concerned Javaheri's condominium on Wilshire Boulevard instead of his house on Wellworth. *Javaheri v. JPMorgan Chase Bank N.A*, No. CV11-10072-ODW (FFMx). ER 564 [Doc. 1, Wilshire Complaint].

The cases were consolidated on stipulation of the parties on May 16, 2012. Both consolidated cases are between the same parties and the complaints state the same causes of action: (1) Wrongful Foreclosure, (2) Quasi Contract (3) Quiet Title, and (4) Declaratory and Injunctive Relief.

The Court ordered that all papers filed in either of the consolidated actions "shall bear the title Daryoush Javaheri v. JPMorgan Chase Bank N.A, and shall be filed under No. CV10-8185-ODW(FFM)." As a result, the docket sheet for Case No. 11-10072 ended with Doc. 25 [Order Closing Case] and merged with the docket for No. CV10-8185, starting with Doc. 102 [Motion for Summary Judgment—Wilshire].

Chase filed a Motion for Partial Summary Judgment regarding the Wellworth property on June 21, 2012. The Court granted Chase's motion on

August 13, 2012. ER 018 [Doc. 92]. Daryoush Javaheri filed a notice of appeal on August 24, 2012.

Chase filed a Motion for Summary Judgment pertaining to the Wilshire property on October 29, 2012. The Court granted Chase's motion on December 11, 2102. ER 002 [Doc. 127]. Daryoush Javaheri filed a notice of appeal on January 8, 2013. The appeals were consolidated on March 4, 2013.

IV. STATEMENT OF FACTS

The subject loans between Javaheri and WaMu started with a single Uniform Residential Loan Application filled out in Plaintiff's handwriting and submitted to Washington Mutual Bank on September 8, 2006. ER 258 [Doc. 29, p. 28, SAC Exhibit 2]. All subsequent loan documents were drafted by WaMu.

On December 6, 2006, Javaheri entered into a mortgage transaction with Washington Mutual Bank, FA ("WaMu") secured by his personal residence, a condominium on Wilshire Boulevard, Los Angeles (the "Wilshire" condo). ER 590 [Doc. 1, Wilshire Complaint, Ex. 3]. A Deed of Trust recorded on December 13, 2006, names WaMu as Lender. ER 595 [Doc. 1, Compl Ex. 4].

Chase alleges that on or about January 1, 2007, WaMu sold Javaheri's loan to WaMu Asset Acceptance Corporation, which then transferred the loan to LaSalle Bank National Association, as trustee of the Washington Mutual

Mortgage Pass-Through Certificates Series 2007-HY1 Trust (the "2007-HY1 Trust").

In November 2007, Javaheri entered into a construction loan agreement with WaMu through which he borrowed $2,660,000.00 to demolish and rebuild a residence on Wellworth Avenue in Los Angeles, which he had purchased with the Wilshire loan. The Deed of Trust recorded on November 30, 2007, identifies Washington Mutual as the lender and Chicago Title Company as the Trustee. ER 274 [Doc. 29, Second Amended Complaint].

On September 25, 2008, WaMu was closed by the Office of Thrift Supervision, and the FDIC was appointed receiver. On the same date, Chase acquired "certain" assets of WaMu pursuant to a Purchase and Assumption "P&A") Agreement between the FDIC as receiver and Chase. The P&A Agreement does not specify any of the "certain" assets acquired.

On May 3, 2010, CRC filed a Substitution of Trustee regarding the Wellworth property, allegedly signed by CRC Vice President Deborah Brignac, substituting CRC as trustee in place of Chicago Title Company. ER 177 [Doc. 61-1, Sneddon Ex. 1]. On the same day, CRC recorded a Notice of Default and Election to Sell the Wellworth property in the Los Angeles County Recorder's Office. ER 179 [Doc. 61-1, Ex. 2].

On May 14, 2010, CRC recorded a Notice of Rescission and a second Notice of Default (Wellworth). ER 183 [Doc. 61-1, Ex. 3, 4]. On August 16, 2010, CRC recorded a Notice of Trustee's Sale bearing a different signature of Deborah Brignac. ER 200 [Doc. 61-1, Ex. 6]. Judge Wright ruled that the Brignac signatures on the Substitution of Trustee and the Notice of Trustee's Sale were not signed by the same person. ER 026 [Doc. 92, Order Granting Partial Summary Judgment]

A Notice of Default was recorded against the Wilshire condominium on May 20, 2010 and a Notice of Trustee's Sale was recorded on November 18, 2011. ER 625 [Doc. 1, Ex. 6]; ER 630 [Doc. 1, Ex 7].

V. SUMMARY OF ARGUMENT

Chase attempted to sell Plaintiff/Appellant's properties at trustee's sales without any lawful claim to the properties. In the Wellworth case, Chase could not produce any original documents. The collateral file for the house loan was inexplicably missing. Chase's claim was based entirely on a 44-page P&A Agreement. Plaintiff offered the declaration of Jeffrey Thorne, who at one time worked at the FDIC as an independent contractor, to show that the P&A Agreement was actually 118 pages, but the Court ignored the Thorne declaration and ruled that California law does not allow for a judicial action to determine if

the foreclosing entity is authorized to do so. Plaintiff objected to the request for judicial notice of the P&A Agreement, and filed points and authorities supporting his position, most fundamentally disputing that the 44-page Agreement was the complete document governing Chase's purchase of WaMu. Thorne's declaration stated that he had seen and read a 118-page P&A Agreement for the Chase purchase of WaMu. Thorne claimed the longer document had never been made public and its provision governing assumption of liability was different.

Forged foreclosure documents were recorded. The court found that the Substitution of Trustee and the Notice of Trustee's Sale, both bearing the signature of Deborah Brignac, were signed by two different people. Yet the court concluded that Javaheri did not have standing to object to forged robo-signed foreclosure documents. ER 026-27 [Doc. 92, Order Summary Judgment].

In the Wilshire case, a sworn declaration of William Paatalo was filed in opposition to Chase's motion for summary judgment. ER 461 [Doc. 107]. The Paatalo declaration was stricken by the Court because it was filed 73 days before trial, even though it was filed as an exhibit in opposition to summary judgment at least 21 days before the hearing. ER 007-008 [Doc. 127]. Paatalo's declaration stated that Javaheri's Wilshire loan was never placed in the 2007-HY1 Trust and therefore Chase did not acquire any interest in the Wilshire loan

when it acquired "certain" of WaMu's assets. Paatalo's declaration also provided documentary proof that the 2007-HY1 Trust alleged by Chase to be the beneficiary of the Wilshire loan was receiving regular payments, raising a substantial issue of fact as to whether or not the loan was in default. In the absence of any evidence to support its view, the Court speculated that the outstanding balance might be higher than the payments described in the Paatalo declaration. ER 010-011 [Doc. 127].

VI. STANDARD OF REVIEW

An order granting or denying summary judgment generally is reviewed de novo. *Travelers Cas. & Sur. Co. of America v. Brennete* (9th Cir. 2009) 551 F3d 1132, 1137; *Guerin v. Winston Indus., Inc.* (9th Cir. 2002) 316 F3d 879, 882 (order granting partial summary judgment); *Padfield v. AIG Life Ins. Co.* (9th Cir. 2002) 290 F3d 1121, 1124 (order denying).

The reviewing court must determine whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Ventura Packers, Inc. v. F/V Jeanine Kathleen* (9th Cir. 2002) 305 F3d 913, 916; *Valdez v. Rosenbaum* (9th Cir. 2002) 302 F3d 1039, 1043.

VII. ARGUMENT

A. DUE PROCESS IS NOT COMPATIBLE WITH CALIFORNIA NONJUDICIAL FORECLOSURES

No Action Can Be Brought To Determine Whether The Foreclosing Party Has The Authority to Foreclose. Chase Motion for Summary Judgment (Wellworth Property). ER 218 [Doc. 58, p. 21]

California law does not allow for a judicial action to determine if the foreclosing entity is authorized to do so. Order Granting Summary Judgment (Wilshire Property). ER 011 [Doc. 127].

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

California foreclosure statutes allow a foreclosure to proceed without original documentary evidence based solely on unsworn statements in a Notice of Default and a Notice of Trustee's Sale. This procedure is constitutionally defective under *Mitchell v. W. T. Grant Co.* (1974) 416 U.S. 600, 94 S. Ct. 1895, and *Connecticut v. Doehr* (1991) 501 U.S. 1, 115, 111 S.Ct. 2105.

The only evidence offered to support Chase's claim to Plaintiff's property is a 44-page P&A Agreement that does not list any assets transferred. Chase offered no proof that Plaintiff's loan was an asset on the books of WaMu on the date of the P&A Agreement.

Plaintiff raised Due Process issues in District Court but *due process* did appear in any court order.

In conjunction with his Opposition to Defendants' Motion to Dismiss the Complaint in the Wellworth case, ER 412 [Doc. 14, p. 27], Javaheri filed a Request For Judicial Notice [ER 376, Doc. 15] of a report released on November 16, 2010 by the Congressional Oversight Panel (COP) appointed by Congress to monitor the Treasury Department during the bailout of Wall Street. The COP Report stated:

> **Public Faith in Due Process Could Suffer.** If the public gains the impression that the government is providing concessions to large banks in order to ensure the smooth processing of foreclosures, the people's fundamental faith in **due process** could suffer (COP Report, Nov. 16, 2010, p. 84). ER 385 [Doc. 15, p. 87]

> If it is unclear who owns the mortgage, clear title to the property itself cannot be conveyed. If, for example, the trust were to enforce the lien and foreclose on the property, a buyer could not be sure that the purchase of the foreclosed house was proper if the trust did not have the right to foreclose on the house in the first place. Similarly, if the house is sold, but it is unclear who owns the mortgage and the note and, thus, the debt is not

> properly discharged and the lien released, a subsequent buyer may find that there are other claimants to the property. ER 382.
>
> Borrowers/Homeowners may have several available causes of action. They may seek to reclaim foreclosed properties that have been resold. They may also refuse to pay the trustee or servicer on the grounds that these parties do not own or legitimately act on behalf of the owner of the mortgage or the note. In addition, they may defend themselves against foreclosure proceedings on the claim that robo-signing irregularities deprived them of **due process**. ER 384.

Chase's Motion for Partial Summary Judgment (Wellworth) argued, "No Action Can Be Brought To Determine Whether The Foreclosing Party Has The Authority to Foreclose." ER 218 [Doc. 58, p. 21].

Plaintiff recalled the Common Law origins of Due Process in his Opposition to Summary Judgment (Wellworth}:

> In clause 39 of the Magna Charta, John of England pledged: "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land." The phrase "Due Process of Law" first appeared in a statutory rendition of the Magna Charta in A.D. 1354 during the reign of Edward III of England: "No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by **due process** of law." 28 Edw. 3, c. 3. ER 169 [Doc. 65, p. 13].

Javaheri raised Due Process again in his Opposition to Summary Judgment (Wilshire):

Chase asserts that California law does not provide for a judicial action to determine whether the person initiating the foreclosure has the authority to do so, citing *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal. App. 4th 1149. In effect, Chase is arguing that anyone can take property by initiating foreclosure in California. How could this be reconciled with Due Process?" ER 516-517 [Doc. 106, p. 8].

In granting summary judgment (Wilshire), Judge Wright wrote:

The upshot of *Gomes*, then, is that California's nonjudicial foreclosure scheme does not allow a court action to challenge the authorization of a foreclosing entity in a non-judicial foreclosure.

Here, like the borrower in *Gomes*, Javaheri challenges the foreclosing party's authority to foreclose on the Wilshire Property on grounds that ***he*** does not know the identity of the beneficial interest holder and avers that the foreclosure is improper without authorization from the original lender, WaMu. (Compl. ¶ 20.) But *Gomes* held that California law does not permit a borrower to challenge the authorization of a nominee to foreclose under these circumstances. See *Gomes*, 192 Cal. App. 4th at 1154–57. Because the California non-judicial-foreclosure scheme does not allow for a judicial action to determine if the party initiating foreclosure is authorized, Javaheri's claim for wrongful foreclosure is precluded by law. ER 008 [Doc. 127, p. 7].

Javaheri did not allege that **he** did not know the identity of the beneficiary.

He alleged that ***Chase*** did not know the identity of the owner or the Beneficiary.

21. Plaintiff is informed and believes that Chase cannot produce an original Note because Chase does not own the loan and cannot identify the owner of the loan. Chase did not purchase the loan when it assumed certain assets of WaMu in September 2008 because WaMu had sold its beneficial interest in the loan two years earlier. Plaintiff's loan was not identified as an asset in the Purchase and Assumption Agreement under which Chase purchased certain assets of WaMu. ER 570 [Doc. 1, p. 7].

The U.S. Supreme Court has formulated a balancing test to determine the rigor with which the requirements of procedural due process should be applied. "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge* (1976) 424 U.S. 319, 335.

California's nonjudicial process places homeowners at the unsupervised mercy of banks and administrative functionaries by failing to provide for a meaningful evidentiary hearing. It creates great risk of erroneous deprivations of property without due process of law, and bars adequate remedies to redress erroneous deprivations.

A foreclosure under such a nonjudicial statutory scheme is not based on a judgment, yet the unadjudicated foreclosure starts a "domino" effect of post-deprivation wrongful takings that interfere with post-deprivation remedies, by allowing evictions, releases of deeds of trusts, and statutory presumptions of validity of the trustee's deed upon sale – all before a post-deprivation action that challenges the validity of the defective foreclosure can be

resolved. This is exacerbated when the court requires that the homeowner tender the full amount of the unsubstantiated claim as a condition to a quiet title action.

In deciding what process is constitutionally due in various contexts, the Supreme Court emphasized that "procedural due process rules are shaped by the risk of error inherent in the truthfinding process. *Mathews v. Eldridge, supra*, 424 U.S. 319, 344; *Carey v. Piphus* (1978) 435 U.S. 247, 259.

Fundamental requirements of due process require that California's nonjudicial foreclosure statutes be declared unconstitutional, that documentary evidence be required to support all elements of a foreclosure, and that property owners be afforded adequate remedies to redress erroneous deprivations and be protected from wrongful takings.

The Supreme Court addressed due process requirements for foreclosure in *Mitchell v. W. T. Grant Co.* (1974) 416 U.S. 600, 616-618, 94 S.Ct. 1895, 1904-1905, where Louisiana statutory procedures withstood due process scrutiny:

> [B]are conclusory claims of ownership or lien will not suffice under the Louisiana statute. Article 3501 authorizes the writ 'only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts shown by verified petition or affidavit. Moreover, in the parish where this case arose, the requisite showing must be made to a judge, and judicial authorization obtained. Mitchell was not at the unsupervised mercy of the creditor and court functionaries. The Louisiana law provides for judicial control of the process from beginning to end. This control is one of the measures adopted by the State to minimize the risk that the ex parte

> procedure will lead to a wrongful taking. It is buttressed by the provision that should the writ be dissolved there are 'damages for the wrongful issuance of a writ' and for attorney's fees 'whether the writ is dissolved on motion or after trial on the merits.'
>
> Documentary proof is particularly suited for questions of the existence of a vendor's lien and the issue of default. . . .Louisiana law expressly provides for an immediate hearing and dissolution of the writ 'unless the plaintiff proves the grounds upon which the writ was issued.'

The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms. *Sniadach v. Family Finance Corp.* (1969) 395 U.S. 337, 340; 89 S.Ct. 1820, 23 L.Ed.2d 349.

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

Fundamental elements of *Mitchell's* due process inquiry were reiterated in *Mathews v. Eldridge*, then refocused and again applied in *Connecticut v. Doehr* (1991) 501 U.S. 1, 111 S. Ct. 2105, 115 L. Ed. 2d 1, resulting in a three-part inquiry to guide the Court's analysis. Various types of property interests are involved in these cases, but the Supreme Court is "no more inclined now than we have been in the past to distinguish among different kinds of property in

applying the due process clause." *North Georgia Finishing, Inc. v. Di–Chem, Inc.* (1975) 419 U.S. 601, 608; 95 S.Ct. 719, 42 L.Ed.2d 751.

In *Doehr*, *supra*, as in the instant case, the dispute was between private parties, one of whom sought to rely on a state statute to file a lien on the other's real property.

> For this type of case, therefore, the relevant inquiry requires, as in *Mathews*, first, consideration of the private interest that will be affected by the prejudgment measure; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, in contrast to *Mathews*, principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections. *Connecticut v. Doehr,* supra, 501 U.S. 1, 11.

THREE-PART DUE PROCESS INQUIRY

1. Private Homeowner Interests Affected

For a property owner, attachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default.

Even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection. Without doubt, state procedures for creating and enforcing

attachments, as with liens, "are subject to the strictures of due process." *Peralta v. Heights Medical Center, Inc.* (1988) 485 U.S. 80, 85, 108 S.Ct. 896, 899.

The private interests of California homeowners affected by foreclosures on their real property are even more significant than the interest affected in *Doehr*, supra. California is a "lien theory" state, which means that the homeowner holds title to the property, even while it is encumbered by a deed of trust, and the beneficiary of the deed of trust holds only a lien in the property. Although technically, under a deed of trust, legal title passes to the trustee, such conveyance of title is solely for the purpose of security, leaving in the trustor a legal estate in the property, as against all persons except the trustees and those lawfully claiming under them. *Aviel v. Ng* (2008) 161 Cal.App.4th 809, 74 Cal.Rptr.3d 200, 205. In practical effect, a deed of trust is a lien on the property, and the deed of trust conveys "title" to the trustee only so far as may be necessary to the execution of the trust. *Monterey S.P. Partnership v. W.L. Bangham, Inc.* (1989) 49 Cal.3d 454, 460, 261 Cal.Rptr. 587.

California homeowners not only face the risk of total loss of real property in a foreclosure under Cal. Civ. Code §2924 by a party that is not required to produce evidence of its right to enforce a valid security interest in the property, but they also face the risks of erroneous partial impairments of property rights that concerned the Court in *Doehr*. As soon as a foreclosing party who "claims

to be" the lender, beneficiary, or authorized agent files the Notice of Default to commence the foreclosure, the following occurs: (1) the Trustee promptly records the Notice of Default in the office of the County Recorder where the property is located, thereby creating a cloud on title; (2) the Trustee commences advertisement of the Notice of Trustee's Sale, which Notice includes the names of the foreclosing party who claims to be the holder of the evidence of debt, the names of the original grantors of the deed of trust, the legal description of the property being foreclosed, and the date of the sale, thereby creating a stigma for the property and the owner, diminishing the market value of the property, and negatively impacting the homeowner's credit rating with credit reporting agencies.

Here, as in *Doehr, supra,* California procedures for enforcing a lien on real property through the foreclosure procedures prescribed in Cal. Civ. Code §2924 that are before this Court for review, are clearly "subject to the strictures of due process." *Connecticut v. Doehr* (1991) 501 U.S. 1, 12

2. Risk of Erroneous Deprivation

The risks of erroneous deprivation of protected property interests through California's nonjudicial foreclosure process are substantial.

The provisions of Cal. Civ. Code §2924 bypass the fundamental documentary evidence foundations on which *Mitchell v. W. T. Grant Co., supra*, relied in upholding the Louisiana statute. Unsworn statements:

(1) are nothing more than "bare conclusory claims of ownership or lien;"

(2) do not constitute "specific fact shown by verified petition or affidavit;"

(3) diminish the "requisite showing [that] must be made to a judge" to a mere unsworn certification or statement;

(4) effectively place the homeowner "at the unsupervised mercy of the creditor and court functionaries;"

(5) require a Court to authorize and approve a foreclosure sale based on an unsworn certification or even a forged statement, thereby rendering " judicial control of the process from beginning to end" superfluous, and increasing "the risk that the ex parte procedure will lead to a wrongful taking;"

(6) eliminate the requirement of "documentary proof that is particularly suited for questions of the existence of a vendor's lien and the issue of default;"

(7) do not require the foreclosing party to "prove the grounds upon which the (Notice of Trustee's Sale) was issued."

The risks of erroneous deprivation of real property under these procedures are substantial. See *Mitchell v. W. T. Grant Co., supra*, 416 U.S. at 616-618, 94 S. Ct., at 1904-1905.

3. Interests of Foreclosing Party and State

The interests of the foreclosing party are protected in California foreclosure statutes, and will not be impaired if the due process defects are remedied by this Court. The foreclosing party may still enforce a valid lien on real property under the expedited trustee foreclosure process – they will simply have to produce evidence to support their claims. Due process requires, *inter alia*, "documentary proof" rather than "bare conclusory claims of ownership or lien" (*Mitchell v. W. T. Grant Co., supra*, 416 U.S. at 616-618, 94 S. Ct., at 1904-1905). Foreclosing parties may pursue a judicial foreclosure, so their right to enforce valid liens on real property will not be impaired.

Additionally, the State's interest in providing foreclosure processes will not be impaired by the Constitutional due process remedies requested herein.

To comply with *Mitchell's* due process standard, California courts must assume judicial control over the proceedings and require evidence (not mere "certifications" or "statements") to support claims of right to invoke the power of sale provisions of a Deed of Trust, whether the foreclosure is opposed or not.

Although due process tolerates variances in procedure "appropriate to the nature of the case," it is possible to identify its core goals and requirements. The required elements of due process are those that "minimize substantively unfair or mistaken deprivations" by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests. The core of these requirements is notice and a hearing before an impartial tribunal. Due process may also require an opportunity for confrontation and cross-examination, and for discovery; that a decision be made based on the record, and that a party be allowed to be represented by counsel. *Ballard v. Hunter* (1907) 204 U.S. 241, 255; *Palmer v. McMahon* (1890) 133 U.S. 660, 668.

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

Justice Douglas wrote in a dissenting opinion in *Jackson v. Metropolitan Edison Co.* (1974) 419 U.S. 345, 360:

> In *Burton v. Wilmington Parking Authority*, *supra* 365 U.S. 715, we said: "Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance." *Id.* at 722. A particularized inquiry into the circumstances of each case is necessary in order to determine whether a given factual situation falls within "the variety of individual-state relationships which the Fourteenth Amendment was designed to embrace." *Ibid*. As *Burton* made clear, the dispositive question in any state-action case is not whether any single fact or relationship presents a sufficient degree of state involvement, but rather whether the aggregate of all relevant factors compels a finding of state responsibility. *Id*. at 722-726. See generally *Moose Lodge No. 107 v. Irvis,* 407 U. S. 163 (1972).
>
> It is not enough to examine seriatim each of the factors upon which a claimant relies and to dismiss each individually as being insufficient to support a finding of state action. It is the aggregate that is controlling.

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

California Supreme Court has not resolved the Constitutionality of the statutory provisions and procedures now before this Court in this case.

B. WRONGFUL FORECLOSURE - WELLWORTH HOUSE

Plaintiff alleged that Chase does not have standing to enforce the Wellworth Note because Chase is not the owner of the Note, Chase is not a holder of the Note, and Chase is not a beneficiary under the Note. Paragraph 7 of the Adjustable Rate Note vests this power in the Note Holder. Only a Lender under the DOT ¶22 has the capacity to exercise a power of sale. ER 240, 266, 286 [Doc. 29, SAC, pp. 10, 36, 56].

1. Due Process requires that Chase prove that it has authority to foreclose

Chase asserted that California law did not provide for a judicial action to determine whether the person initiating the foreclosure has the authority to do so, relying on *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal. App. 4th 1149. Therefore, anybody can take property without Due Process of Law by initiating non-judicial foreclosure in California.

Gomes was a case involving MERS. The court recognized that California courts have repeatedly allowed parties to pursue additional remedies for misconduct arising out of a nonjudicial foreclosure sale, but found that Gomes was not seeking a remedy for misconduct and the owner of the note was not an issue. *Gomes, supra*,

192 Cal. App. 4th at 1154. Nor did *Gomes* examine the language of the Deed of Trust, which states in ¶22 of Javaheri's DOT that only the Lender can execute or authorize the Trustee to execute a Notice of Default and only the Lender under ¶24 may appoint a successor trustee. ER 286 [Doc. 29, SAC, p. 56].

California Golf, L.L.C. v. Cooper (2008) 163 Cal.App.4th 1053, 1067, states that although the statutory scheme governing nonjudicial foreclosures has, in certain circumstances, been held to constitute the exclusive civil remedy for wrongdoing in the context of a nonjudicial foreclosure, that exclusivity cannot be applied to immunize fraudulent and apparently felonious conduct. "Where the construction of a statute is necessary, it should be interpreted so as to produce a result that is reasonable; the court must look to the context of the law and, where uncertainty exists, consideration should be given to the consequences that will flow from a particular interpretation." *People ex rel. Riles v. Windsor University* (1977) 71 Cal.App.3d 326, 332.

Construction of a statute that leads to an absurd consequence should be avoided. *In re O'Neil* (1977) 74 Cal.App.3d 120, 123; *City of Plymouth v. Superior Court* (1970) 8 Cal.App.3d 454, 466.

The beneficiary is the only party that can initiate nonjudicial foreclosure. The trustee who records a Notice of Default pursuant to Cal. Civ. Code §2924 does so as the authorized agent of beneficiary. Cal. Civ. Code §2924(a)(1); see *Kachlon v.*

Markowitz (2008) 168 Cal. App. 4th 316, 334 ("When the trustor defaults on the debt secured by the deed of trust, the beneficiary may declare a default and make a demand on the trustee to commence foreclosure.").

Sacchi v. Mortgage Electronic Registration Systems, Inc., No. CV 11-1658 AHM, 2011 WL 2533029 (C.D. Cal. 2011) at *9-10, upheld a plaintiff's wrongful foreclosure claim against an entity alleged to have "no beneficial interest in the Deed of Trust when it acted to foreclose on Plaintiffs' home." There, the court expressed dismay when confronted with counsel's arguments suggesting that "someone . . . can seek and obtain foreclosure regardless of whether he has established the authority to do so." *Id.* at *7.

2. Chase produced no documents and identified no witnesses to support its claim of a right to foreclose.

Chase asserts that WaMu retained the beneficial interest in the Subject Loan, which Chase then acquired from the FDIC, and that the loan has never been sold to a securitized trust. ER 215 [Doc. 59, SUF ¶¶ 14 -16). This assertion lacks foundation. If the loan had been retained by WaMu and then transferred to Chase, there would be accounting records from WaMu's files in Chase's possession showing that the loan remained on the books of WaMu until it was seized by the FDIC. Instead of offering testimony of a qualified expert who examined WaMu's

records and found anything that could possibly support Chase's contention, Chase based its claim on an Affidavit of Lost Note.

In support of its motion for summary judgment (Wellworth), Chase offered an affidavit allegedly signed by a Chase Vice President, Stephanie Eure, although the signature appears on a separate page from the brief content. Eure stated that she could not find Javaheri's Note. "After a thorough and diligent manual search of the hard copy collateral file pertaining to this loan the original Note was not located." Then she continued, without any foundation to suggest personal knowledge, "The loss of possession is not the result of the original Note being canceled or transferred to another party." ER 208 [Doc. 60-1, p. 83-84]. Eure's affidavit was attached to the declaration of Eric Waller, who concluded: "However, the hard copy collateral file pertaining to the Subject Loan containing the original of the Note cannot be located." ER 206 [Waller Decl., Doc. 60, p. 3].

Chase was not just missing the original Note—it could not even locate the WaMu collateral file. That's rather like the motorist who fumbles in the glove compartment and can't find his registration or pink slip after he's pulled over, only in this case, the Officer let Chase drive away with Javaheri's house.

The court acknowledged in its Order Granting Partial Summary Judgment (Wellworth) that Chase could not produce the original Note.

> The SAC states, "Neither WaMu, Chicago Title, CRC, nor Chase has recorded a transfer of the beneficial interest in the Note to Chase." (SAC ¶

> 29.) Javaheri is correct in this assertion, and JPMorgan offer no evidence to counter it. But this argument bears no weight on JPMorgan's authority to foreclose. California courts have routinely held that a transfer of assignment of a debt does not need to be recorded. See, e.g., *Herrera v. Fed. Nat'l Mortg. Assn*., 205 Cal. App. 4th 1495, 1506 (2012); *Fontenot v. Wells Fargo Bank, N.A*., 198 Cal. App. 4th 256, 271–72 (2011)
>
> Javaheri also argues that JPMorgan cannot produce the original Note. (SAC ¶ 31.) This is also true. (Waller Decl. Ex. 5.) Nevertheless, numerous courts have concluded that production or possession of the original promissory note is not necessary for non-judicial foreclosure under California law. See, e.g., *Saldate v. Wilshire Credit Corp*., 686 F. Supp. 2d 1051, 1068 (E.D. Cal. 2010); *Ngoc Nguyen v. Wells Fargo Bank, N.A*., 749 F. Supp. 2d 1022, 1035 (N.D. Cal. 2010). The Court agrees.
> ER 026 [Doc. 92].

Chase claimed to have purchased a $2.66 million loan from WaMu and then offered nothing to support its claim but opinions of Chase employees that lacked foundation.

Defendant Chase's Rule 26 Initial Disclosures in the Wellworth case named only one witness: Daryoush Javaheri. The only documents listed on Chase's Rule 26 Initial Disclosures were some of the exhibits that were attached to Plaintiff's Second Amended Complaint. ER 147 [Doc. 73, p.2]; ER 165 [Doc. 65, p. 9]

Defendant Chase's Amended Rule 26 Initial Disclosures, served six months later on June 19, 2012, added two phantom witnesses:

(1) "Person most knowledgeable of JPMorgan, c/o AlvaradoSmith" and

(2) "Person most knowledgeable of CRC, c/o AlvaradoSmith."

ER 095 [Doc. 74, Ex. 1].

In its efforts to foreclose on a $2.6-million loan, a $2.4-trillion bank refused to name witnesses whose depositions were essential for plaintiff to obtain facts necessary to show whether there was any evidence of plaintiff's loan in WaMu's files when Chase acquired "*certain*" (not specified) WaMu assets on September 25, 2008.

Chase served its Rule 26 Initial Disclosures in the Wilshire (condo) case on June 19, 2012, which consisted of some of the exhibits attached to Plaintiff's Complaint, plus a Pooling and Servicing Agreement, the 44-page P&A Agreement, and a 7-page spreadsheet generated by a Chase computer, not a WaMu computer. ER 165 [Doc. 65, p. 9]; ER 147; [Doc. 73, p. 2]. Chase's response to Plaintiff's Request for Production of Documents (Set Two) consisted of 23 pages of objections. It ignored Plaintiff's Request for the full 118-page P&A Agreement (Request # 52). ER 099-124 [Doc. 74, Exhibit 2]. Chase produced a total of one internally-generated document in both cases prior to the hearing on its Motion for Partial Summary Judgment in the Wellworth case. When the court granted summary judgment on August 13, 2012, Chase had still not produced any documents in response to Plaintiff's Request for Production of Documents served on May 18, 2012 in the Wellworth matter—two months after they were due. ER 018 [Doc. 92, Summary Judgment]

Chase admitted that it did not have any original loan documents, the "collateral file," in the Waller declaration. A purchaser of the Note would insist on receiving the original file. Missing original documents raised a triable issue whether the loan had been sold before WaMu was purchased and assumed by Chase.

Mr. Waller did not know where the missing original loan file might be and he did not suggest that he was present at the time it went missing, if ever such a file was in the possession of Chase [ER 206, Waller declaration], so Plaintiff argued in opposition to summary judgment that Waller's declaration was not based on personal knowledge. ER 166 [Doc. 65, p. 10]. According to Chase there was no trail of evidence leading to the disappearance of the collateral file. The unexplained disappearance of the entire file of original documents, during a national epidemic of similar unexplained disappearances, is consistent with Plaintiff's allegation that the loan was transferred to a third party—a question of fact.

On July 11, 2012, Plaintiff filed an Application to Extend Time to oppose Chase's Motion for Partial Summary Judgment in order to conduct additional discovery. ER 152 (Doc. 72). The supporting declaration of Douglas Gillies described in detail the paucity of information disclosed by Chase in discovery. ER 147 [Doc. 73]. Although the court acknowledged that the discovery cutoff had been extended from June 19, 2012, to October 15, 2012, it denied Plaintiff's application to conduct discovery despite Chase's pattern of obfuscation. ER 42 [Doc. 82, Order

Denying Ex Parte Application to Extend Time]. This was an abuse of discretion. Three months remained to complete discovery in the consolidated cases. The two cases were intertwined from the day Javaheri submitted his original handwritten application. ER 258-262 [Doc.29, SAC, Exhibit 2].

Requests for continuances for summary judgment motions are permitted under Fed. R. Civ. P. Rule 56(d):

> (d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
> (1) defer considering the motion or deny it;
> (2) allow time to obtain affidavits or declarations or to take discovery; or
> (3) issue any other appropriate order.

Granting a continuance is addressed to the court's discretion. *Paddington Partners v. Bouchard* (2d Cir. 1994) 34 F.3d 1132, 1137 (whether or not to grant additional time for discovery prior to ruling on a motion for summary judgment is a matter within the trial court's discretion). Continuances for important additional discovery should be liberally granted. *XRT, Inc. v. Krellenstein* (5th Cir. 1971) 448 F.2d 772, 772–73 (plaintiff should have been given access to certain important discovery before summary judgment was entered); *Costlow v. U.S.* (3d Cir. 1977) 552 F.2d 560, 564 ("where the facts are in possession of the moving party a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course."); *Parrish v. Board of Com'rs of Alabama*

State Bar (5th Cir. 1976) 533 F.2d 942, 946–50 (trial court should have permitted additional discovery prior to ruling on a motion for summary judgment).

It was an abuse of discretion to deny Javaheri's request for a continuance of the Summary Judgment Motion.

3. The court erred in ruling that Javaheri lacks standing to challenge forged signatures on robo-signed foreclosure documents.

Plaintiff's Second Amended Complaint (Wellworth) alleged that the signature of Deborah Brignac on the Substitution of Trustee was a forgery:

> ¶17. On August 16, 2010, CRC recorded a Notice of Trustee's Sale ("NOTS") stating that the Wellworth Property would be sold at public auction on September 7, 2010. The NOTS bears the purported signature of Deborah Brignac, Vice President of California Reconveyance Company, as Trustee. ER 236.
>
> ¶36. On May 3, 2010, CRC recorded a Substitution of Trustee (Exhibit 8) signed by Deborah Brignac, Vice President of JPMorgan Chase Bank. The signature of Deborah Brignac on the Substitution of Trustee does not resemble the signature of Deborah Brignac, *Vice President* of California Reconveyance Company on the Notice of Trustee's Sale (Exhibit 10). It is a forgery. ER 242.
>
> ¶37. The Substitution of Trustee purports to substitute CRC as Trustee in place of Chicago Title. Brignac's forged signature is acknowledged by Loren Lopez, a California Notary Public. It is not remotely similar to the Deborah Brignac signatures appearing on the recorded documents attached hereto as Exhibits 11, 12, 13, and 14. ER 242.

Images of Brignac's various signatures are included in the body of the SAC. ER 242-243. Four other documents with divergent Brignac signatures recorded in

Southern California were attached to the SAC. ER 312 - 330 [Doc. 29, SAC, p. 82]. Chase included in its Motion for Summary Judgment a declaration of Deborah Brignac stating that she was *President* of California Reconveyance Company (not Vice President). Without proper foundation she also alleged that she had signing authority as a Vice-President of JPMorgan Chase and in that capacity she was authorized to sign and did sign the Substitution of Trustee attached as Exhibit 1 to the Declaration of Jessica Snedden. ER 174 [Doc. 62]. The assertion that she was authorized to sign a Substitution of Trustee lacked foundation and assumed that Chase was a Lender or was authorized by the Lender to substitute trustees. Only the Lender may appoint a successor trustee to any trustee named in the Deed of Trust. This provision clearly does not give the successor trustee authority to appoint itself.

Paragraph 24 of the DOT states:

> 24. Substitute Trustee. Lender, at its option, may from time to time appoint a successor trustee to any Trustee appointed hereunder by an instrument executed and acknowledged by Lender and recorded in the office of the Recorder of the county in which the property is located. ER 286 [SAC, Doc. 29].

Deborah Brignac's declaration, attached to Sneddon's declaration as Exhibit 1, did not acknowledge whether she also signed the Notice of Trustee's Sale attached to Sneddon's declaration as Exhibit 6 [ER 201] that also bears her signature and identifies her as Vice President of CRC. If one of the recorded documents attached to the Sneddon declaration and bearing her signature was a

forgery, their mutual endorsement of the forged document(s) under oath casts doubt on their credibility. Nor did Brignac acknowledge whether she signed any of the recorded documents attached to Javaheri's SAC as Exhibits 11 – 14, documents with more of her diverse signatures. ER 307-330 [Doc. 29, SAC. Ex. 10-13]. Brignac, Sneddon, and Chase ignored forged signatures on recorded documents attached to the SAC, raising issue as to Deborah Brignac's credibility, her role as a robo-signer, and the extent of robo-signing at CRC—a subsidiary of Chase. ER 236.

Dr. Laurie Hoeltzel, a Court Qualified Document Examiner and Handwriting Expert in the field of questioned documents in the State of California examined the two exhibits "signed" by Deborah Brignac attached to the Declaration of Jessica Sneddon as Exhibits 1 and 6. ER 003 and 020 [Doc. 61-1].

Dr. Hoeltzel's declaration concluded that the Deborah Brignac signature on the Notice of Trustee's Sale dated August 16, 2010, was a forgery. ER 135 [Doc. 74 Ex. 6].

Judge Wright accepted Hoetzel's testimony. His Order Granting Partial Summary Judgment stated:

> *3. Robo-signing*
>
> Javaheri contends finally that the Substitution of Trustee is invalid because it was robo-signed. (SAC ¶ 39.) According to Javaheri, surrogate signers allegedly signed several documents on behalf of and in the name of Deborah Brignac, without reading or understanding the documents' contents. (Gillies Decl. Ex. 4.)

Indeed, for the purposes of this Motion, the Court finds that the signature of Deborah Brignac on the Substitution of Trustee was signed by a different person than that purporting to be Deborah Brignac on the Notice of Trustee's Sale. (Gillies Decl. Ex. 6). ER 026 [Doc. 92].

But Judge Wright concluded, "While the allegation of robo-signing may be true, the Court ultimately concludes that Javaheri lacks standing to seek relief under such an allegation." ER 027.

If California's "comprehensive framework for the regulation of a nonjudicial foreclosure sale" under Cal. Civ. Code §2924 embraces forged documents to pass title back and forth, encumber property, and orchestrate trustee's sales, while insisting that homeowners have no standing to object, it brazenly deprives its citizens of their property without Due Process of Law. .

Lorraine Brown, a former executive of Lender Processing Services, was sentenced on June 25, 2013, to serve five years in prison for her participation in a six-year scheme to prepare and file fraudulently signed and notarized mortgage-related documents with recorders' offices throughout the United States, according to a US Department of Justice Press Release, http://www.justice.gov/opa/pr/2013/June/13-crm-711.html .

Brown pleaded guilty to conspiracy to commit mail and wire fraud and was sentenced by U.S. District Judge Henry Lee Adams Jr., Middle District of Florida. According to Brown's plea agreement, employees of DocX, at the

direction of Brown and others, forged and falsified signatures of authorized personnel on mortgage-related documents that they had been hired to prepare and file with recorders' offices. *USA v. Lorraine Brown* (2012) Case No. 3:12-cr-00198.

The Affidavit of John L. O'Brien, Register of Deeds, Southern Essex District, Massachusetts states that Deborah Brignac is an alleged robo- or surrogate signer. ER 132 [Doc. 74, p. 40]

The Sneddon Exhibits 1 and 6, the opinion of Dr. Laurie Hoeltzel, and the O'Brien affidavit raise material questions of fact as to whether the Substitution of Trustee was authorized by the Lender, whether it was executed by Deborah Brignac, and whether she had authority to substitute her company, CRC, as trustee before recording the Notice of Trustee's Sale against the Wellworth property.

4. It was error to disregard Jeffrey Thorne's declaration stating that the P&A Agreement was 118 pages long, not 44 pages, as alleged by Chase.

The Declaration of Jeffrey Thorne was offered by Plaintiff in Opposition to the Wilshire Summary Judgment. ER 125 [Doc. 74, Ex. 3]. Thorne's declaration was considered by the California Court of Appeals in *Jolley v. Chase Home Finance, LLC* (Feb. 11, 2013) 213 Cal.App. 4th 872, where the trial court granted Chase's request for judicial notice of a 39-page version of the P&A Agreement, not the 44-page version Chase presented in the instant case. The

P&A has many different guises. The Court of Appeals wrote, "Thorne's declaration certainly raises significant issues *vis a vis* Chase and the FDIC, with testimony that is hardly run of the mill. But that testimony is not so incredible that it could be ignored or rejected as untruthful on summary judgment." 213 Cal.App.4th at 891. The court reversed the summary judgment.

Mr. Thorne declared that he was a senior loan consultant for WaMu from 2002 to 2006, where he led efforts to originate residential construction loans and residential purchase loans and established loan policy. Then he worked for the FDIC drafting the agreement that transferred WaMu's assets and liabilities to Chase on September 25, 2008. Thorne declared under penalty of perjury that he read the P&A Agreement and it did not absolve Chase of liability for WaMu. "The complete agreement with the FDIC and Chase Bank is 118 pages long, which has not been made public. I am familiar with this agreement. I have read it. Chase took liability for the ongoing contracts in return for getting an 80% discount on the loan's principal owed." ER 125 [Doc. 74, p. 33, Jeffrey Thorne Declaration] and ER 149 [Doc. 73, pp. 3-5].

According to the Thorne declaration, the full and complete 118-page Purchase & Assumption Agreement made Chase liable for torts and contractual breaches by WaMu, in contrast to the 44-page document attached to Mr.

Tannatt's declaration. ER 171 [Doc. 63]. The 118-page agreement also describes how foreclosures and loan modifications are to be handled. [ER 150].

Plaintiff twice requested the Thorne declaration be admitted at the hearing on Defendant's Motion for Partial Summary Judgment (Wellworth). ER 037-040 [RT pp. 10 - 16].

Chase's only evidence to rebut the Thorne declaration was a tardy response to Plaintiff's Request for Production of Documents. The Request was served on May 17, 2012. Chase's belated response, dated July 12, 2012, [ER 091, Doc. 79-1] was offered in support of Chase's Motion for Partial Summary Judgment:

> Request for Production Number 52:
> The actual full and complete unabridged 118-page Purchase and Assumption Agreement entered between Chase and FDIC in September 2008 whereby Chase agreed to assume the liabilities arising out of WaMu contracts with its customers.
>
> Response to Request for Production No. 52:
> *On information and belief*, no such document exists. The forty-four (44) page Purchase and Assumption Agreement…is the Purchase and Assumption Agreement between JPMorgan and the FDIC as receiver for Washington Mutual Bank. ER 091 (emphasis added).
> ER 086-087 [Doc. 79].

The only evidence of Chase's asserted right to foreclose the Wellworth property was the P&A Agreement (the 44-page "public" version). The Order Granting Partial Summary Judgment stated:

> On September 25, 2008, the Office of Thrift Supervision closed Washington Mutual and appointed the Federal Deposit Insurance Corporation as receiver. (Waller Decl. Ex. 1.) JPMorgan acquired certain of Washington Mutual's assets by entering into a Purchase and Assumption ("P & A") Agreement with the FDIC. (Waller Decl. Ex. 2.) Paragraph 3.1 of the P & A Agreement states, "Notwithstanding Section 4.8,the assuming Bank specifically purchases all mortgage servicing rights and obligations of the Failed Bank." ER 019 [Doc. 92, Waller Decl., Ex. 2.]

This was the only evidence offered by Chase to support its claim. If the P&A Agreement was not 44 pages, as alleged by Chase on information and belief, but rather 118 pages, as sworn by Jeffrey Thorne on personal knowledge, then a material question of fact was raised by Plaintiff.

Chase requested Judicial Notice of the P&A Agreement, not its contents, and merely represented that it had attached "a copy of pertinent extracts from the Agreement" found on the FDIC website. Frances Jett, the attorney who signed the Request, was not a declarant, was not a custodian of records, was not a party to the Agreement, gave no indication she was involved in negotiating or drafting it, and provided no background as to how she acquired knowledge of the document. Indeed, she did not even aver it was a true and complete copy. ER 415-416 [Doc. 10].

The *Jolley* decision affirmed the existence of the 118-page P&A:

> In November 2011, Jolley began trying to secure a copy of the 118-page agreement referred to in Thorne's declaration. His counsel requested a copy from the FDIC, and also apparently served a subpoena duces tecum

seeking production of it. According to Jolley's counsel, the FDIC refused to produce the document unless all parties to the litigation signed a confidentiality agreement. On November 9, 2011, six days before the motion was to be heard, Jolley requested that counsel for Chase sign a confidentiality agreement. She refused to do so. *Jolley v. Chase, supra,* 213 Cal.App. 4th at 883.

Rather than acknowledge the issues raised by the Thorne declaration, Judge Wright questioned the relevance of the P&A Agreement:

MR. GILLIES: …when we had motions to dismiss, twice this court threw out causes of action based upon the 44-page P and A.

So this whole case has been shaped upon an assumption there are no liabilities. Therefore, I think because of the Thorne declaration, we are faced with a very different situation here, and if there is a 118-page contract and if it does assign to Chase the liabilities and if they are aware of this contract and they have been hiding it, we need to get to the facts.

THE COURT: Okay. Why do we care whether or not Chase has assumed liabilities?

MR. GILLIES: Well, because you threw out at least two causes of action because Chase wasn't responsible for whatever WaMu did, but if they got such a good deal that they took on this liability, at least we get two causes of action back.

THE COURT: Okay. Listen --

MR. GILLIES: And if anything else went wrong --

THE COURT: Distilled to its simplest terms, your client took out a loan for $2.66 million, paid on it for a year, then stopped. And, now, we are getting into all these little intricacies and you are raising questions and concerns that frankly some of them you even have no standing to raise. The essence of this is he took out a loan, and has defaulted on it.

MR. GILLIES: Who does he owe the money to? ER 038-39. [RT 11]

So if the homeowner owned the money to *somebody*, then under California law, just about anybody could collect the money in federal court. At the end of the hearing, Plaintiff again requested that the Thorne declaration be introduced:

MR. GILLIES: First of all, I would ask that the declaration of Jeffrey Thorne be introduced as evidence as an affidavit. I think it is clear from the face of it that he is a qualified witness, and what he has to say is relevant to this. ER 040 [RT p. 16]

Again, the court did not respond.

The 44-page P&A Agreement was the only evidence offered by Chase in support of its claim of a right to initiate foreclosure. Plaintiff offered evidence of a materially different version of the Agreement, but the Court made no mention of Thorne's declaration in its Order. The Court concluded: "JPMorgan acquired certain of Washington Mutual's assets by entering into a Purchase and Assumption ("P & A") Agreement with the FDIC." ER 019 [Doc. 92, p. 2].

5. The burden of proof to show no genuine issue of fact is with Chase

The court made findings of fact in the Wilshire Order Granting Summary Judgment:

On May 20, 2010, JPMorgan assigned its beneficial interest in the Deed of Trust it may have acquired from the FDIC—*if any*—to Bank of America (as

successor by merger to LaSalle Bank) as trustee of the 2007-HY1 Trust. (SUF 29.) At the time this Assignment of DOT was recorded, JPMorgan did not claim to hold an actual interest in (Javaheri's) DOT as WaMu had transferred the loan to the 2007-HY1 Trust before September 25, 2008 (the date JPMorgan acquired certain of WaMu's assets from the FDIC as receiver). (SUF 3.0) Nevertheless, JPMorgan executed the Assignment to clarify in the public records that it was not the then-current beneficiary under the Deed of Trust. ER 004-005 [Doc. 127 – Wilshire].The burden of establishing that there is no genuine issue of material fact lies with the moving party. *British Airways Bd. v. Boeing Co.* (9th Cir. 1978) 585 F.2d 946, 951. The moving party has the burden of demonstrating the absence of such a genuine issue, and for this purpose the material it lodges must be viewed in the light most favorable to the opposing party. *Neely v. St. Paul Fire and Marine Ins. Co.* (9th Cir. 1978) 584 F.2d 341, 343.

A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact...the burden on the moving party may be discharged by "showing"—that is, pointing out to the district court that there is an

absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett* (1986) 477 U.S. 317, 322–25, 106 S. Ct. 2548.

Under federal procedural law, the moving party in a motion for summary judgment has the burden of making a sufficient showing that the claim is entirely without merit. If he fails to do so, the motion must be denied. *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions* (8th Cir. 1976) 538 F.2d 180, 184–185 (the summary judgment movant bears the burden of showing the absence of material issues of fact and all reasonable factual inferences must be made in favor of the non-moving party); *Abdul-Jabbar v. General Motors Corp.* (9th Cir. 1996) 85 F.3d 407, 413 (trial court improperly entered summary judgment when there were remaining factual issues). Furthermore, the evidence must be construed in the light most favorable to plaintiff as the non-moving party. *Adickes v. S. H. Kress & Co.* (1970) 398 U.S. 144, 157, 90 S. Ct. 1598. Summary judgment is a drastic remedy and should be sparingly granted. *Egelston v. State University College at Geneseo* (2d Cir. 1976) 535 F.2d 752, 754–55. Summary judgment is not proper if there are triable issues of fact remaining. *Sarnoff v. Ciaglia* (3d Cir. 1947) 165 F.2d 167, 168–69 (trial court should not have granted summary judgment when the affidavits showed that there were disputed issues of material fact).

In both consolidated cases, there is a triable issue of fact as to whether Chase is a Lender, Beneficiary, or authorized agent.

C. WRONGFUL FORECLOSURE - WILSHIRE CONDO

The Wilshire Complaint alleged that Chase did not have standing to enforce the Wilshire (condo) Note because Chase was not the owner of the Note, Chase was not a holder of the Note, and Chase was not a beneficiary under the Note. Chase did not claim to be a holder of the Note or a beneficiary. Chase was merely named as a contact in the Notice of Default. If Chase could prove that it is a servicer, the complaint alleged that Chase could not foreclose on Plaintiff's property without authorization from the Lender under Paragraph 22 of the Deed of Trust. ER 570 [Doc. 1, Wilshire Complaint ¶ 20].

Days after WaMu originated the Wilshire loan, WaMu's beneficial interest in the Loan was transferred to the WaMu Mortgage Pass-Through Certificates Series 2007-HY1 Trust. ER 530 [Doc. 21, Chase's Answer to Wilshire Complaint]. WaMu retained no beneficial interest in the loan that could be transferred to Chase on September 25, 2008 when Chase acquired from the FDIC "certain" assets and liabilities pursuant to the P&A Agreement. All subsequent holders of the Note took possession subject to any claims and defenses that Plaintiff might have against WaMu, because WaMu sold its

beneficial interest at least twenty months before the P&A Agreement. An agreement between the FDIC and Chase could not absolve third parties.

The Wilshire Complaint alleges, "Defendants are not real parties in interest, do not have standing, and are not entitled to accelerate the maturity of any secured obligation and sell the Wilshire Property because they are not a Lender, beneficiary or authorized agent of a beneficiary under the purported Note. ER 575 [Wilshire Complaint, ¶41].

As in the Wellworth DOT, Paragraph 22 of the Wilshire 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." ER 571 and 609 [Wilshire Complaint, ¶23 and Ex. 4]. This does not authorize a national bank to foreclose against every property it fancies, and then to brush aside the homeowner in federal court with a motion to dismiss.

1. The Paatalo Declaration was Timely and Relevant to Chase's Summary Judgment Motion

In his Opposition to Summary Judgment (Wilshire), Javaheri attached the declaration of William Paatalo. ER 479 [Doc. 107]. Chase moved to strike the declaration because Javaheri did not disclose Paatalo at least 90 days before the

date set for trial, even though his declaration was timely filed and served at least 21 days before the hearing on Chase's Summary Judgment Motion.

The Court struck the Paatalo Declaration on the grounds that Javaheri failed to disclose his expert in a timely manner. ER 007-008 [Doc. 127, Order Granting Summary Judgment). Appellant contends that it was an abuse of discretion for the Court to strike the declaration of William Paatalo and disregard it while ruling on Defendant's motion for summary judgment.

Chase had six months to draft its motion for summary judgment, but timed it so that Javaheri would have only six days to draft his Opposition and file it twenty-one days before the hearing on November 26, 2012. ER 444.

After receiving Chase's Motion for Summary Judgment, Plaintiff requested Paatalo's assistance to rebut a surprising allegation in Chase's motion that it recorded an Assignment of Deed of Trust in order to assure the public that it was not the Beneficiary. That raised a red flag; banks don't ordinarily record documents to assure the public what they are not—as if anyone was needing reassurance.

In Opposition to Summary Judgment, Javaheri's attorney described the reason that the witness was disclosed seventeen days after October 17. The declaration of Douglas Gillies stated:

> 5. I was surprised by Mr. Masutani's revelation in Chase's Points and Authorities that Chase recorded an Assignment of Deed of Trust on May

20, 2010, "in which JPMorgan assigned the beneficial interest in the DOT it acquired from the FDIC*, if any*, to Bank of America," even though "JPMorgan did not claim to hold an actual beneficial interest in the DOT since WaMu had transferred the Loan to the 2007-HY1 Trust before September 25, 2008" because "it could appear to the general public, based upon the recorded public records, that JPMorgan was the then-current beneficiary under the DOT." (Doc. 102, p. 5:22-28).

6. This scenario was supported by the Declaration of Roberto Silva, a research specialist, who offered no foundation for those "facts" in paragraph 12 of his declaration (Doc. 103, p. 5) other than that "it could appear to the general public, based upon the recorded public records, that JPMorgan was the then-current beneficiary under the DOT."

7. I received Mr. Paatalo's declaration on November 5, 2012. On November 5, I served Mr. Paatalo's declaration on Chase (Document 107) disclosing his identity and providing Chase with a written report prepared and signed by Mr. Paatalo containing (i) the opinions Mr. Paatalo will express and the basis and reasons for them; (ii) facts or data considered by Mr. Paatalo in forming them; (iii) exhibits used to summarize or support them; and (iv) Mr. Paatalo's qualifications, as required by Rule 26.01 (a)(2)(D)(ii) and 26.01(a)(3). The disclosure under Rule 26(a) was in writing, signed, and served. ER 444 [Doc. 119].

The Paatalo declaration provided a factual basis for the assertions in Javaheri's Opposition to Summary Judgment that (a) Javaheri was not in default because the HY1 Trust was receiving regular payments, and (b) WaMu did not have any interest in Plaintiff's note when the P&A Agreement was signed on September 25, 2008.

2. Javaheri's loan was not in default.

The balance of Javaheri's Wilshire loan decreased $150,610 in the eight months after his Complaint was filed, and the principal balance dropped from $975,000 to $955,106.

Mr. Paatalo's declaration [ER 461-474, Doc. 107] stated:

> 4. I worked in the mortgage industry from 1999 to 2008. I was a "loan officer" with Conseco Home Finance from 1999 to 2000 before becoming a "mortgage broker" from 2000 to 2008. I was the President of Midwestern Mortgage, LLC f/k/a Wissota Mortgage, LLC in Wisconsin and Minnesota from 2002 – 2008. My company was strictly a "broker" for numerous lending institutions to which I would originate loans on their behalf. I was not a "lender," nor was I involved in "Table-Funding" loans.
>
> 5. I have worked exclusively over the last 24 months investigating foreclosure fraud and issues related to the securitization of residential and commercial mortgage loans. Based on my review of the documents it appears the Javaheri loan never made it to the "WaMu Mortgage Pass-Through Certificates Series 2007-HY1 Trust." It is my opinion that beneficial interest in the Javaheri loan remains within the bowels of the Federal Deposit Insurance Corporation (FDIC.)
>
> 9. In the performance of my securitization and chain of title audits I rely, as do all persons who perform specialized investigative work relating to the securitization of mortgage loans and chain of title issues, on a multitude of sources. These sources include, but are not limited to my Bloomberg subscription; Edgar (a search tool for Securities and Exchange Commission Filings); other paid subscription sources, including those related to known robo-signers and foreclosure related documents.

48. Subject loan was identified within the above referenced Trust using the Bloomberg Terminal. Bloomberg Exhibits marked as "BP Investigative Agency Exhibits A-H" are attached to this Declaration.

49. The evidence shows that the principal balance of the subject loan has decreased during the period Defendant has not made payments.

50. At the time I conducted the original report in February of 2012, the current amount of the subject loan was "$974,978" ("BP Investigative Agency Exhibit D.") As of 11/01/12, the current amount shows "$955,106" ("BP Investigative Agency Exhibit F."). The principal balance of the subject loan has decreased by $19,872. This is irrefutable evidence that the certificate holders have been receiving payments toward Plaintiff's alleged obligation and that there is no default.

Oral argument for the Summary Judgment Motion was vacated by the Court's Minute Order. ER 017 [Doc. 111]. Notwithstanding the court's ruling striking the Paatalo Declaration, and then concluding that it was moot, the Order Granting Summary Judgment stated:

> Finally, Javaheri makes the curious argument that "[t]he Beneficiary cannot initiate foreclosure against Plaintiff unless there is a default" and proceeds to imply that he was not in default because the "balance of [his] loan has decreased $150,610 in the eight months since the Complaint was filed, and the principal balance has dropped from $975,000 to $955,106." (Opp'n 6.) The Court need not give this argument serious consideration, as the only "evidence" Javaheri submits in support of this argument is attached to the stricken Paatalo declaration. (Pl.'s Statement of Genuine Issues 1.) This inadmissible evidence is insufficient to satisfy Javaheri's burden to bring forth a genuine issue of material fact through admissible evidence. See *Celotex*, 477 U.S. at 323–24; Fed. R. Civ. P. 56(c).
>
> But the argument fails on the merits, as well. The May 20, 2010 NOD noted that Javaheri was in default in the amount of $22,851.64, which

> amount would increase until his account became current. It also informed Javaheri that he could bring his account into good standing by paying all of his past-due payments plus permitted costs and expenses within 5 days prior to the sale of his property. A year and a half later, the November 18, 2011 NOTS indicated that Javaheri was still in default, with an estimated unpaid balance plus other charges of $1,105,716.79. Javaheri filed suit a month later on December 5, 2011. Javaheri now contends that a genuine issue exists regarding his default because he has brought the balance on his loan down to $955,106 as of November 1, 2012. He doesn't argue, however, that his payments over the last eight months are sufficient to cure his default, nor that merely curing his default would have been sufficient to avoid foreclosure after the NOTS had been filed and recorded. Indeed, Javaheri's $22,851 arrears could have blossomed into significantly more in the two-and-a-half years since the NOD was filed—possibly in excess of the payments Javaheri has made over the last eight months…
>
> ER 010-011 [Doc. 127].

The court made findings of fact as to the amount that Javaheri was in arrears based upon disputed hearsay declarations in the Notice of Default and Notice of Trustee's Sale, and then speculated that Javaheri's arrears could have blossomed while disregarding detailed financial records from a Bloomberg terminal.

The court concluded, "Because California law does not allow for a judicial action to determine if the foreclosing entity is authorized to do so," (a violation of Due Process) "and because JPMorgan was and is authorized to foreclose on the Property," (a disputed fact), "the Court GRANTS Defendants' motion with respect to the wrongful-foreclosure claim." ER 011 [Doc. 127].

3. WaMu did not have any interest in Plaintiff's note when the P&A Agreement was signed.

Paatalo's declaration also offers proof that WaMu did not have an interest in Plaintiff's note when the P&A Agreement was signed on September 25, 2008.

> ¶22. There is no evidence that the subject Deed of Trust was transferred as part of the 2007-HY1 sale.
>
> ¶23More significantly there is a complete absence of documentation to show that the Depositor ever transferred the Series 2007-HY1 mortgages to the Trustee.
>
> ¶24.There is a real concern here that the Trustee paid the Depositor over three billion dollars to purchase a portfolio of mortgages which were never delivered.
>
> ¶31. There simply is no evidence that Chase ever transferred the note to the Trustee, or either La Salle or its successor BAC, by endorsement or otherwise.
>
> ¶47. Based on my review of the documents it appears the Javaheri loan never made it to the "WaMU Mortgage Pass-Through Certificates Series 2007-HY1 Trust." It is my opinion that beneficial interest in the Javaheri loan remains within the bowels of the Federal Deposit Insurance Corporation (FDIC.) ER 466-473.

The order striking the Paatalo declaration did not acknowledge Chase's strategy of withholding the identity of witnesses and documents, described in Plaintiff's Opposition to Summary Judgment. ER 458 [Doc. 116-2]:

> Plaintiff's first set of interrogatories to Chase served on September 6, 2012, requested the names of Chase's witnesses.

> Interrogatory No. 1. Identify the name, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that Chase may use to support its claims or defenses.
>
> Chase objected that the interrogatory was "vague, ambiguous, too general and overly broad as phrased and in scope." Then Chase responded, "JPMorgan will not respond to this interrogatory."

Disregarding material facts filed 21 days before the date set for the cancelled hearing, the Order concluded, "[T]he Court GRANTS Defendants' Motion for Summary Judgment on all claims. Javaheri's pending request for leave to add Paatalo as an expert trial witness (ECF No. 124) is therefore DENIED AS MOOT." ER 014.

D. TENDER IS NOT REQUIRED TO QUIET TITLE

Javaheri's quiet title causes of action in both cases were rejected. In the Wellworth Summary Judgment, the court found:

> California courts have held that a party seeking to quiet title to a property on which he owes a debt must first offer payment in full on that debt… And because Javaheri provides no evidence that he tendered the full amount owed under the Deed of Trust, there can be no claim to quiet title. Accordingly, JPMorgan's Motion is GRANTED with respect to Javaheri's claim for quiet title as it relates to the Wellworth Property. ER 030-031 [Doc. 92].

In the Wilshire Summary Judgment, the court stated:

> Here, Javaheri's quiet-title claim fails because he does not allege the ability to tender the full amount due on the loan and JPMorgan does not make an adverse claim to title. Without alleging or providing tender, Javaheri is not entitled to quiet title because he fails to establish a basis for his own title in the Property. ER 013 [Doc. 127].

A growing number of federal courts have explicitly held that the tender rule only applies in cases seeking to set aside a completed sale, rather than an action seeking to prevent a sale in the first place. See, e.g., *Barrionuevo v. Chase Bank, N.A.,* No. 12-CV-0572-EMC (N.D. Cal. Aug. 6, 2012); *Vissuet v. Indymac Mortg. Services*, No. 09-CV-2321-IEG, 2010 WL 1031013 (S.D. Cal. March 19, 2010), at *2 ("[T]he California `tender rule' applies only where the plaintiff is trying to set aside a foreclosure sale due to some irregularity."); *Giannini v. American Home Mortg. Servicing, Inc.,* No. 11-04489 TEH, 2012 WL 298254, (N.D.Cal. Feb.1, 2012) at *3 ("While it is sensible to require tender following a flawed sale — where irregularities in the sale are harmless unless the borrower has made full tender — to do so prior to sale, where any harm may yet be preventable, is not."); *Robinson v. Bank of Am.*, 12-CV-00494-RMW, 2012 WL 1932842 (N.D. Cal. May 29, 2012) (the court found it "inequitable to apply the tender rule to bar plaintiff's claims" in part because "there has been no sale of the subject property").

E. THE COURT ERRED IN TAKING JUDICIAL NOTICE OF THE CONTENTS OF THE PURCHASE AND ASSUMPTION AGREEMENT

Chase requested that the court take judicial notice of its 44-page version of the P&A Agreement as the sole basis for its claim in the Wellworth case. ER 415 [Doc. 10]. Plaintiff objected. ER 412-414 [Doc. 14]. Chase also requested judicial notice of the P&A Agreement in the Wilshire case. ER 562 [Doc. 13]. Again, Plaintiff objected. ER 558 [Doc.15, Opposition to Motion to Dismiss]. The court wrote, "The OTS Order and the P&A Agreement are the official documents memorializing these facts, and each is published by a governmental organization. Therefore, they cannot reasonably be questioned. Accordingly, the Court GRANTS JP Morgan's request for judicial notice as to both documents." ER 058 [Doc. 20, p. 6]. The declaration of Jeffrey Thorne was not mentioned.

The Court repeatedly referred to the P&A Agreement in its orders. ER 045 [Doc. 20]; Order ER 057 [Doc. 36]; ER 004 [Doc. 127]. Judicial notice may not be taken of any matter unless authorized or required by law. A matter ordinarily is subject to judicial notice only if the matter is reasonably beyond dispute. *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113 .

Taking judicial notice of a document is not the same as accepting the truth of its contents or accepting a particular interpretation of its meaning. *Herrera v.*

Deutsche Bank National Trust Co. (2011) 196 Cal.App4th 1336*; Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 374 . While courts take judicial notice of public records, they do not take notice of the truth of matters stated therein. *Love v. Wolf* (1964) 226 Cal.App.2d 378, 403 . When judicial notice is taken of a document, the truthfulness and proper interpretation of the document are disputable. *StorMedia, Inc. v. Superior Court* (1999) 20 Cal.4th 449, 457.

A California court considered the scope of judicial review of a recorded document in *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 117:

> [T]he fact a court may take judicial notice of a recorded deed, or similar document, does not mean it may take judicial notice of factual matters stated therein. For example, the First Substitution recites that Shanley `is the present holder of beneficial interest under said Deed of Trust.' By taking judicial notice of the First Substitution, the court does not take judicial notice of this fact, because it is hearsay and it cannot be considered not reasonably subject to dispute."

The Substitution of Trustee claims that Chase "is the present Beneficiary under said Deed of Trust." ER 300 [Doc. 29, SAC, Ex. 8]. As in *Poseidon*, this fact is hearsay and disputed; the trial court cannot take judicial notice of the contents of the recorded document. Anyone with a credit card can record a document. Taking judicial notice of the existence of the Substitution of Trustee does not establish that the Bank is the beneficiary under the 2003 deed of trust. The truthfulness of the contents of the Substitution of Trustee remains subject to

dispute (*StorMedia*, *supra*, 20 Cal.4th at p. 457, fn. 9), and plaintiff disputes the truthfulness of the contents.

While the court may take judicial notice of the existence of a P&A Agreement, it may not take judicial notice of factual matters stated therein.

VIII. CONCLUSION

The only factual representations made by Plaintiff to WaMu are found in his handwritten application. ER 258-262 [Doc.29, SAC Exhibit 2]. All the loan documents and all the numbers were crafted by WaMu employees. Daryoush Javaheri was not given an opportunity to read the hundreds of pages presented to him for his signature. The court dismissed his cause of action for "No Contract," which the court characterized as a cause of action for fraud, after finding that Chase was not liable for WaMu's actions under the 44-page P&A Agreement.

> JP Morgan argues in its Opposition that Plaintiff's claim for "No Contract/Fraud" against JP Morgan fails because JP Morgan did not assume any liabilities arising from claims relating to WaMu's origination of Plaintiff's Note. The Court agrees. JP Morgan expressly disclaimed assumption of liability arising from borrower claims against WaMu. ER 050 [Doc. 20].

When the court disregarded the declaration of Jeffrey Thorne without ruling on Plaintiff's requests for judicial notice, he was finding: (1) the P&A Agreement was 44 pages, not 118 pages; (2) the declaration of Jeffrey Thorne

should be stricken and therefore moot, even though it was filed more than two months before trial; and (3) Chase was not liable for WaMu's tortuous conduct.

The court said at oral argument, "And, now, we are getting into all these little intricacies ….The essence of this is he took out a loan, and has defaulted on it." ER 039 [RT p. 12]. That has become known as the Free House Doctrine.

Karl Grier, Editor-in-Chief of Miller & Starr, *California Real Estate 3d,* offers a sober observation of California's nonjudicial foreclosure procedure in the March 2012 *Real Estate Newsalert*:

> (*Gomes*) suggests, however, that the mere language of authority in the deed of trust forever precludes a demand for credentials of the party seeking to take away the property of the debtor through a nonjudicial foreclosure... It also confronts the usual homeowner with the civil equivalent of a Star Chamber proceeding—no right to identify or cross-examine the accusers or the alleged witnesses claiming the right to foreclose, and no ability to go behind the mere notifications and self-identifications of various other nominal players in the secondary market as "agents" for creditors who remain unknown and unseen principals in a proceeding that by its very nature affects valuable property rights of the debtor. Indeed, the principles of agency and "equal dignities" are left out of the analysis, which is based solely on language in a deed of trust whose ownership is concededly unclear and unsubstantiated.
>
> In a series of decisions devoid of sympathy for the plight of borrowers attempting to hold lenders and their agents and assignees to some minimal standards of documentation and proof of authority to foreclose, the California courts of appeal have protected the nonjudicial foreclosure and trustees' sale process against pre-foreclosure intrusion by the courts. As a result, while the courts have held borrowers in foreclosure to rigorous adherence to the requirements that any modifications or extensions must be

> in writing and that performance be tendered to the lender, they have permitted purported lender representatives to pursue the trustee's sale remedy without producing documents establishing ownership or authority to act.

The California Senate's website posts the following statistics:

> From 2008 to 2011: 1,026,572 California homes were foreclosed upon. That's 1 in every 13 homes in the state. More than 1 million children lived in those homes. In 2011, 7 of the top 10 hardest cities by the foreclosure crisis in the United States were in California. They are: Stockton, Modesto, Vallejo, Riverside-San Bernardino, Merced, Bakersfield, and Sacramento.[1]

The risk of foreclosure fraud has never been greater, and the government has no interest in depriving people of their property without Due Process.

Plaintiff Daryoush Javaheri submits that there are triable issues of material fact. Defendant's motions for summary judgment should have been denied.

For the above-stated reasons, Daryoush Javaheri respectfully requests that the summary judgment orders be reversed.

Date: June 25, 2013

s/ Douglas Gillies
Attorney for Daryoush Javaheri

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1 http://sd02.senate.ca.gov/sites/sd02.senate.ca.gov/files/Fact%20Sheet%20on%20California%20Home%20Foreclosures.pdf

CERTIFICATE OF COMPLIANCE

CASE NO. 12-56566 and 13-55048

Pursuant to Rule 32, F.R.A.P., I certify that this Opening Brief is proportionately spaced with Times New Roman 14 point typeface and contains no more than 15,000 words pursuant to Rule 32(a)(7)(B).

I certify that Appellant Daryoush Javaheri's Opening Brief contains 13,995 words.

DATED: June 25, 2013

s/ Douglas Gillies
Attorney for Plaintiff-Appellant

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, plaintiff-appellant Daryoush Javaheri is not aware of any related cases pending in this Court other than the two consolidated cases represented in this appeal.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Appellant's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 25, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Douglas Gillies
Attorney for Plaintiff/Appellant