CASE NO. F064556

IN THE COURT OF APPEAL

STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THOMAS A. GLASKI,

Plaintiff and Appellant,

v.

BANK OF AMERICA, NATIONAL ASSOCIATION AS SUCCESSOR BY MERGER TO "LA SALLE BANK N.A. AS TRUSTEE FOR WAMU MORTGAGE PASS THROUGH CERTIFICATES SERIES 2005-AR-17", CHASE HOME FINANCE LLC, JPMORGAN CHASE BANK, N.A., AND CALIFORNIA RECONVEYANCE COMPANY,

Defendants and Respondents.

Appeal from a Judgment of the
Superior Court for Fresno County
Hon. Alan M. Simpson, Judge
Case No. 09CECG03601

APPELLANT'S OPENING BRIEF

Richard L. Antognini
(CA Bar No. 075711)
LAW OFFICES OF RICHARD L. ANTOGNINI
819 I Street
Lincoln, California 95648-1742
Telephone: (916) 645-7278
Facsimile: (916) 290-0539
E-Mail: rlalawyer@yahoo.com

Catarina M. Benitez
(CA Bar No. 256518)
LAW OFFICES OF CATARINA M. BENITEZ
2014 Tulare Street, Suite 400
Fresno, California 93721
Telephone: (559) 472-7337
Facsimile: (559) 579-1100

Attorneys for Plaintiff and Appellant
THOMAS A. GLASKI

CERTIFICATE OF INTERESTED ENTITIES AND PERSONS

Appellant Thomas A. Glaski knows of no interested parties or persons who must be listed in this certificate under California Rule of Court 8.208.

Dated: September 25, 2012

LAW OFFICES OF
CATARINA M. BENITEZ

By: _____

Catarina M. Benitez
Attorneys for Plaintiff and
Appellant
Thomas A. Glaski

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

California Cases

I. INTRODUCTION

This appeal asks: can a homeowner's complaint survive a demurrer when he has alleged that an investment trust lacked the power to foreclose because the homeowner's loan was not assigned to the trust before the foreclosure sale? The answer to that question must be yes, because California law requires that any party that prosecutes a foreclosure must have the power to foreclose. Because the trial court did not recognize this basic principle when it sustained a demurrer to Thomas Glaski's Second Amended Complaint without leave to amend, the judgment must be reversed.

The appeal asks a second question: can a homeowner challenge a foreclosure sale when the foreclosure could not have proceeded except for documents that contained forged signatures? Again, the answer must be yes, because the used of forged signatures on recorded documents are fraud. Because the trial court did not recognize that forged signatures amount to fraud, the judgment must be reversed.

II. STATEMENT OF FACTS

A. Rules Governing Demurrers

This Statement of Facts should be read against the background of the rules governing demurrers and appeals from demurrers. Like the trial court, the appellate court must assume the truth of all facts the plaintiff properly pleads in his complaint. *Evans v. City of Berkeley,* 38 Cal.4th 1, 5 (2006);

Curcini v. County of Alameda, 164 Cal.App.4th 629, 633 (2008). The court also must accept as true all facts that may be implied or inferred from the allegations in the complaint, including facts found in exhibits to the complaint. *Satten v. Webb,* 99 Cal.App.4th 365, 375 (2002); *Marshall v. Gibson, Dunn & Crutcher,* 37 Cal.App.4th 1397, 1403 (1995). Finally, the reviewing court must take account of facts that are properly subject to judicial notice. *Evans v. City of Berkeley,* 38 Cal.4th at 5.

B. The Original Complaint

Plaintiff and appellant Thomas A. Glaski ("Glaski") filed his original complaint on October 1, 2009. (Vo. 1 of Appellant's Appendix [or "1 AA"], 000018-000031.) He sued Bank of America in its capacity as the trustee of the "WAMU Mortgage Pass Through Certificates Series 2005-AR-17." (1 AA 000018-000019.) The words "WAMU Mortgage Pass Through Certificates Series 2005-AR-17" referred to an investment trust that, at some point, acquired Glaski's mortgage. (*Ibid.*) La Salle Bank was the original trustee of the trust; Bank of America became the trustee when La Salle Bank merged with it. (*Ibid.*) The other named defendants included Chase Home Finance LLC and California Reconveyance Company. (1 AA 00018-000020.)

Glaski alleged that in July 2005, he bought a home in Fresno, California at 7741 E. Saginaw Way. (1 AA 000020.) He paid $812,000 for the home. (*Ibid.*) He financed that purchase with a home loan through

Washington Mutual or "WaMu." (*Ibid.*) At first, his loan payments were $1700 per month. They then rose to $1900 per month in August 2006 and then to $2100 in August 2007. (*Ibid.*)

Beginning in August 2008, Glaski talked to WaMu about a loan modification. (*Ibid.*) Glaski continued these discussions with Chase Home Loan LLC (or "Chase") after WaMu failed and JP Morgan Chase Bank, N.A. acquired its assets. (*Ibid.*) Until May 2009, Glaski was led to believe that Chase was considering him for a loan modification. (1 AA 000021.) On March 10, 2009, California Reconveyance Company, acting as the substitute trustee under Glaski's deed of trust, recorded a Notice of Trustee's Sale. (*Ibid.*) His home was sold at a foreclosure sale on May 27, 2009. (*Ibid.*)

Glaski charged that the defendants put him in an adjustable rate loan, when he wanted a fixed rate loan. (1 AA 000022-000023.) They also gave him a subprime loan he could not afford. (*Ibid.*) Glaski attempted to state causes of action for fraud, quiet title, wrongful foreclosure, accounting, declaratory relief, injunctive relief, and intentional infliction of emotional distress. (1 AA 000018.) The wrongful foreclosure cause of action alleged a violation of Civil Code section 2923.6 (b), because defendants did not give Glaski a loan modification. (1 AA 000025-000026.) The declaratory relief cause of action argued that defendants did not have the right to foreclose because they were not holders of Glaski's note. (1 AA 000027.)

Based on these allegations, Glaski filed an application for a temporary restraining order on October 6, 2009 to stop defendants from evicting him from his home or transferring title. (1 AA 000032-000050.) Glaski's declaration in support of the TRO application stated that from March 1, 2009 to May, 2009, he was under the impression that Chase was evaluating his loan modification request. (1 AA 000045.) It was not until after his home was sold on May 27, 2009 that he first learned that the Bank of America apparently held his note, as it had become the beneficiary under his deed of trust. (*Ibid.*) The trial court denied the TRO application on October 5, 2009. (1 AA 000005.)

On February 14, 2011, Chase filed an answer to the complaint. (1 AA 000051-000055.) No other defendant answered, including the Bank of America. (*Ibid.*) At the same time, all three defendants—Bank of America, Chase and California Reconveyance Company—filed a motion for judgment on the pleadings, to be hard on March 10, 2011. (1 AA 000056-000071.) Much of this motion attacked Glaski's claims about fraud in the origination of his loan, arguing that JP Morgan Chase had not acquired Washington Mutual's liabilities when it bought WaMu assets from the FDIC. (1 AA 000065-000067.) The motion also contended that various statutes of limitation barred the loan origination claims. (1 AA 000067-000069.)

Glaski filed opposition to this motion (1 AA 000075-000088), contending that none of the defendants held his note and therefore had no power to foreclose. (1 AA 000080-000081.) Glaski also offered to amend the complaint to correct any deficiencies. (1 AA 000083). On March 30, 2011, the trial court granted the motion, but gave Glaski 30 days leave to amend his causes of action for fraud, quiet title, wrongful foreclosure, and declaratory relief. (1 AA 000105-000110.) The court dismissed the causes of action for an accounting, intentional infliction of emotional distress, and an injunction. (*Ibid.*)

C. The First Amended Complaint

Glaski filed a First Amended Complaint (or "FAC") on April 29, 2011. (1 AA 000111.) The FAC alleged causes of action for fraud, quiet title, wrongful foreclosure, declaratory relief, cancellation of instruments, and violation of the Unfair Competition Law (or "UCL"), Business & Professions Code section 17200 et seq. (1 AA 000111-000132.) The FAC attached and incorporated a single exhibit, an "Assignment of Deed of Trust," that assigned Glaski's loan from JP Morgan Chase Bank to Bank of America, "as trustee for WaMu Mortgage Pass-Through Certificates Series 2005-AR17." (1 AA 000134-000135.) The assignment was dated June 11, 2009 and recorded on June 15, 2009, after Glaski's home had been sold. (1 AA 000134.) It was signed by "Deborah Brignac," who claimed to be a

"Vice President" of "JP Morgan Chase Bank, National Association." (*Ibid.*) Her signature was notarized. (1 AA 000135.)

The FAC added JP Morgan Bank N.A. ("JP Morgan") as a defendant, alleging that JP Morgan acquired certain assets of WaMu from the FDIC. (1 AA 000112.) The FAC asserted that JP Morgan was the trustee for an investment trust called the "WAMU Mortgage Pass-Through Certificates Series 2005-AR17" (or "the Trust"). (1 AA 000113.) The corpus of the Trust was a pool of residential mortgages. (*Ibid.*) The Trust was operated under a "Pool Servicing Agreement" or "PSA." (*Ibid.*)

The FAC charged that, under the PSA, all notes, including Glaski's loan, were required to be transferred to the Trust before the Trust's "Closing Date." (1 AA 000117.) Unless the transfer was done before the "Closing Date," the Trust did not acquire the loan or any rights under the loan. (*Ibid.*) The FAC then alleged that the Glaski loan was not transferred to the trust before the "Closing Date." (1 AA 000117-000118.) In fact, the loan was not transferred to the trust until June 11, 2009, well after the closing date and after Glaski lost his home at the foreclosure sale. (1 AA 000134-000135.) As a result, the Trust and the other defendants did not have the power to foreclose. (1 AA 000117-00118.)

The first cause of action for fraud alleged that Deborah Brignac's signature on the June 11, 2009 Assignment of Deed of Trust was forged. (1 AA 000118.) The purpose of the forgery was to allow the defendants to go

forward with the foreclosure sale. (1 AA 000119.) Plaintiff relied on this recorded document. (*Ibid.*)

The second cause of action, also for fraud, alleged that defendants concealed the fact that the Glaski loan was transferred to the Trust after the Trust's closing date (1 AA 000118-000119.) Glaski, believing that defendants had to power to service his loan and the power to foreclose, relied on this concealed fact by attempting to negotiate a loan modification with "representatives of Chase Home Finance LLC, agents of JP MORGAN." (1 AA 000119.)

The third cause of action to quiet title incorporated the above allegations and contended that Glaski should have title because defendants forged the signature of Deborah Brignac and because they did not have the power to foreclose. (1 AA 000121.) The fourth cause of action for wrongful foreclosure repeated these charges—that because the defendants did not have the power to foreclose, they committed the tort of wrongful foreclosure when they sold Glaski's home. (1 AA 000122-000123.) The fifth cause of action for declaratory relief requested a declaration that the foreclosure sale was void because defendants never had the power to foreclose. (1 AA 000123-000124.)

The eighth cause of action sought cancellation of the Substitution of Trustee, Notice of Trustee's Sale, and Trustee's Deed Upon Sale, based on the allegation that defendants lacked the power to foreclose. (1 AA

000127-000128.) The ninth cause of action, for violation of the UCL, asserted that defendants had engaged in illegal and deceptive acts by forging Brignac's signature and by proceeding with the foreclosure sale without the power to do so. (1 AA 000128-000129.)

Defendants filed a demurrer to the FAC on June 1, 2011. (1 AA 000137-000138.) They first argued that the fraud causes of action were barred by the statute of limitations. (1 AA 000144-000146.) They also contended that Glaski had not pled the fraudulent statements with sufficient particularity. (*Ibid.*) They insisted Glaski could not sue to quiet title because he no longer owned the home and because he had not tendered the balance of the loan. (1 AA 000146.) Defendants attacked the wrongful foreclosure cause of action by arguing that Glaski had not alleged tender and because they believed the claim was based on Civil Code section 2923.6, which did not create a private cause of action. (1 AA 000147.) They said the declaratory relief cause of action failed because it was founded on the other invalid causes of action. (1 AA 000147-000148.) Finally, defendants challenged the UCL cause of action, contending that the foreclosure sale was proper and thus neither deceptive nor illegal. (1 AA 000148-000149.)

In opposition, Glaski pointed out that defendants misconstrued his fraud causes of action. The first cause of action for fraud was based on the Brignac forged signature, and invoked the rule that a forged document was

void and fraudulent. (1 AA 000157-000158.) Next, because the Glaski loan was not properly transferred to the Trust, defendants misrepresented that they had the power to foreclose. (1 AA 000159-000160.) The same allegation supported the wrongful foreclosure cause of action, and the causes of action for declaratory relief, quiet title, and violation of the UCL. (1 AA 000160-000164.)

The trial court struck the FAC "sua sponte" under Code of Civil Procedure section 436. (1 AA 000175.) It thought the FAC was unclear and confusing, but granted 30 days leave to amend. (*Ibid.*) It required an amended complaint to state "ultimate facts," rather than legal conclusions. (1 AA 000179.)

D. The Second Amended Complaint

Glaski filed a Second Amended Complaint on August 5, 2011. (1 AA 000182.) The Second Amended Complaint (or "SAC") stated the same causes of action as the First Amended Complaint—fraud, quiet title, wrongful foreclosure, declaratory relief, cancellation of instruments, and violation of the UCL. (1 AA 000182-000204.) It also named the same defendants. (1 AA 000183.)

The SAC attached and incorporated several exhibits. These included the Glaski Deed of Trust, the Notice of Default, the June 11, 2009 Assignment of Deed of Trust, the March 12, 2009 Notice of Trustee's Sale, the June 15, 2009 Trustee's Deed Upon Sale, and several recorded

documents involving other properties. (1 AA 000207-000276.) These recorded documents, used by defendants to foreclose other homes, had several things in common. First, they all were signed by Deborah Brignac. Second, each signature was different; they could not have been made by the same person. (1 AA 000247-000276.) Third, they showed that Ms. Brignac had multiple employers. She was represented to be an officer of California Reconveyance Company and JP Morgan. (*Ibid.*) Fourth, in many cases, the signatures were notarized, which meant that Ms. Brignac and the notary swore under penalty of perjury that the signatures were actually made by Ms. Brignac. (*Ibid.*)

The SAC's first cause of action for fraud identified the first fraudulent statement made by the defendants—the signature of Deborah Brignac on the Notice of Trustee's Sale was authentic and that she was an employee of JP Morgan. (1 AA 000189.) In reality, the signature was forged and Deborah Brignac was not employed by JP Morgan. (1 AA 000190.) The purpose of the fraud was "to conduct a Trustee's sale" of Glaski's home. (*Ibid.*) Plaintiff relied on the authenticity of Brignac's signature. (*Ibid.*)

The second cause of action for fraud charged that defendants did not have the power to foreclose because the Glaski loan had not been properly transferred to the Trust. Paragraphs 45-49 stated:

> "45. Plaintiff further believes and upon such belief alleges that the Note was not duly endorsed, transferred and delivered to the Trust prior to the Closing Date of the Trust, as set forth in Section 2.05of the Pooling and Servicing Agreement. . . ."
>
> 46. Plaintiff believes and upon such belief contends that Defendants Misrepresented and/or concealed the true facts regarding the transfer of Plaintiff's Note and Deed of Trust . . . by assigning the Deed of Trust into the Trust . . . after the closing date.
>
> 47. Plaintiff is further informed and believes and thereon alleges that the Note in this case was never actually transferred or delivered by Washington Mutual . . . to the Depositor and by the Depositor to the Custodian on behalf of the Trustee for the Trust prior to the closing date.
>
> 48. In addition, there is no indication that Plaintiff's loan was transferred into the trust pursuant to the PSA before the closing date, as it was not listed in any documents filed by the Trust and available to the public at www.edgar.gov. Accordingly, Plaintiff alleges that the Note in this case was never lawfully negotiated and physically delivered to the Trust.
>
> 49. Based upon information and belief, the Assignment of the Deed of Trust did not occur by December 21, 2005, or ninety (90) days thereafter, but rather on June 15, 20098, long after the Trust had closed. Said assignment was ineffective as the Trust could not have accepted the Deed of Trust after the Closing Date pursuant to the PSA and the requirements for a REMIC Trust, *thereby rendering the foreclosure of the Subject Property, as well as the Notice of Default, Notice of Trustee's Sale, and Trustee's Deed Upon Sale, void ab initio.*" (1 AA 000190-000191; italics added.)

Glaski then pleaded reliance: "Defendants . . . also knew that the act of recording the Assignment of Deed of trust without authorization to do so would cause Plaintiff to rely upon Defendants' actions by attempting to

negotiate a loan modification with representatives of Chase Home Finance, LLC, agents of JP MORGAN." (Paragraph 50 of the SAC, 1 AA 000191.)

The second cause of action concluded:

> "Defendants intentionally mislead Plaintiff and engaging in material omissions by failing to disclose the true facts, including the fact that Defendants conducted a non-judicial foreclosure sale without any right under the law by assigning the Deed of Trust after the date allowed pursuant to the Pooling and Servicing Agreement of the . . . Trust. In addition, Defendants allowed the forged signatures of CRC Vice President, Deborah Brignac to be placed on the Assignment of Deed of Trust and Notice of Trustee's Sale to effectuate a fraudulent foreclosure and Trustee's Sale of Plaintiff's primary residence." (Paragraph 52 of the SAC, 1 AA 000192.)

The SAC made identical allegations in the other causes of action, including the fourth cause of action for wrongful foreclosure and the ninth cause of action for violation of the UCL. (1 AA 000194, 000200.) Glaski sought compensatory damages, punitive damages, and a reversal of the foreclosure sale. (1 AA 000203.)

E. The Demurrer to the Second Amended Complaint

Defendants filed their demurrer to the SAC on September 23, 2011. (2 AA 00279.) They contended that the forged signature of Deborah Brignac did not matter because "there is nothing in California law precluding Ms. Brignac from having delegated the signing of her signature to an agent." (2 AA 000287.) According to defendants, Glaski had the burden of alleging and proving that Brignac did not delegate authority to

sign her name: "[T]here is no allegation that Brignac had disavowed the signatures in question, nor is there any allegation showing that whoever would have signed on Brignac's behalf lacked the authority to sign on her behalf." (2 AA 000290.)

Next, defendants argued that "there is no requirement that any party be a holder of the promissory note in order to enforce the power of sale in the deed of trust once the borrower's loan goes into default." (*Ibid.*) Thus, it was irrelevant that the Glaski loan was not transferred to the Trust until after Glaski's home had been foreclosed. (*Ibid.*)

Defendants maintained that plaintiff did not allege reliance on the fraudulent misrepresentations (2 AA 000290), although Glaski did plead reliance. (1 AA 000191.)

Defendants also asked the trial court to take judicial notice of two documents—a letter from the FDIC and the agreement under which JP Morgan bought certain assets of Washington Mutual from the FDIC after the FDIC took over WaMu. (2 AA 000305 to 000352.) In its final ruling, however, the trial court did not rule on this judicial notice request and did not rely on these documents. (2 AA 000410-000412.)

Glaski opposed the demurrer. (2 AA 000383-000399). He argued that trial courts had the power to vacate a foreclosure sale based on fraud. (2 AA 000388-000389). Glaski then showed reliance on the forged signature: "[T]he act of recording instruments with fraudulent signatures

sends notice to the public that Deborah Brignac actually signed" the foreclosure documents. (2 AA 000389-000390.) "These acts thereby lead Plaintiff and the public to believe that the parties in these named documents held the authority to initiate the Trustee's Sale of Plaintiff's property." (2 AA 000390.) "Plaintiff, having received the fraudulently signed documents, relied on those documents in believing . . . that the sale was lawfully conducted." (*Ibid.*)

Glaski also pointed out that defendants had cited no authority for the proposition that they could use forged signatures on recorded documents to conduct a foreclosure. (2 AA 000390-000391.)

Glaski concluded that "Defendants have yet to prove that they were either the lender or beneficiary which would confer upon them the power to foreclose. . . . Thus, there is no entity with standing to enforce the power of sale. Even if the signatures of Deborah Brignac are found to be legitimate signatures, the assignment remains ineffective." (2 AA 000393.)

Glaski presented further arguments on reliance and his damages. He lost his home, which defendants allowed to deteriorate after the foreclosure sale. He spent considerable time and money pursing litigation against defendants. The foreclosure ruined his credit so he cannot buy another home. (2 AA 000397). Finally, if the trial court was not satisfied with the allegations of the SAC, Glaski asked leave to amend to cure any deficiencies. (2 AA 000399.)

F. The Ruling on the Demurrer to the Second Amended Complaint.

The trial court sustained the demurrer without leave to amend in a November 14, 2011 tentative ruling, which it made final on November 15, 2011. (Reporter's Transcript [or "RT"], p. 1.)

On the first cause of action for fraud, the court insisted that Brignac and California Reconveyance Company had, in effect, ratified or adopted the forged signature as her own. (2 AA 000410.) Further, the trial court believed that the comprehensive nature of California's foreclosure statutes prohibited "the introduction of additional requirements challenging the authority of the lender's nominee to initiate foreclosure." (2 AA 000410-000411.) As for the allegation that the Glaski loan was not properly transferred before the foreclosure sale, the trial court concluded "*Gomes v. Countrywide* [*Gomes v. Countrywide Home Loans, Inc.,* 192 Cal.App.4th 1149 (2011)] holds that there is no legal basis to challenge the authority of the trustee, mortgagee, beneficiary, or any of their authorized agents to initiate the foreclosure process citing Civil Code § 2924, subd. (a) (1)." (2 AA 000411.)

The trial court found that the remaining causes of action---quiet title, wrongful foreclosure, declaratory relief, cancellation of instruments, and violation of the UCL---were based solely on the allegations that the Glaski loan was not properly transferred and the Brignac signature was forged. (2

AA 000411-00412.) Because these allegations did not support any viable legal claim, the trial court sustained the demurrer without leave to amend as to the other causes of action. (*Ibid.*)

G. The 50 State Settlement-JP Morgan and Chase Agree to Change Their Practices

On April 4, 2012, JP Morgan and Chase Home Finance agreed to a consent judgment and consent settlement in United States v. Bank of America Corp., Case No. 12-CV-00361 (D.D.C.) (called the "50 State Settlement".)

Glaski asks the Court to take judicial notice of this consent judgment and settlement under Evidence Code section 452 (d): "Judicial notice may be taken of the following matters . . . . [¶] (d) Records of . . . (2) any court of record of the United States. . . ." A court of appeal is allowed to take judicial notice of the records of other courts: "The reviewing court may take judicial notice of nay matter specified in Section 452." Evidence Code section 459 (a); *Fitz v. NCR Corp.*, 118 Cal.App.4th 702, 719, fn. 4 (2004).

The consent judgment in the 50 state settlement incorporated a document called a "Settlement Term Sheet." JP Morgan and Chase Home Finance accepted all the terms of this Settlement Term Sheet. (See Appellant's Request for Judicial Notice [or "RJN"], at p. RJN 000006). The Settlement Term Sheet bars forged signatures; the person identified as the signer of a document must actually sign the document. For example,

"Servicer shall ensure that factual assertions made in . . . notices of default, notices of sale and similar notices submitted by or on behalf of Servicer in non-judicial foreclosures are accurate and complete and supported by competent and reliable evidence." (Settlement Term Sheet, Section I. A. (1), at p. RJN 000013.) The term "Servicer" includes JPMorgan Chase Bank, N.A. . ." (Settlement Term Sheet, Section IX (B) (2), at p. RJN 000054.)

Further, "Affidavits, sworn statements and Declarations shall not include information that is false or unsubstantiated." (Settlement Term Sheet, Section I. A. (8), at p. RJN 000014.) Finally, "affidavits, sworn statements and Declarations shall be signed by hand signature of the affiant. . . ." (Settlement Term Sheet, Section I. A. (11), at p. RJN 000015)

JP Morgan and Chase Home Finance recognized in the 50 state settlement that they could not foreclose on a home if they did not have the proper assignment of the loan: "Servicer shall implement processes to ensure the Servicer or the foreclosing entity has a documented enforceable interest in the promissory note and mortgage (or deed of trust) . . . or is otherwise a proper party to the foreclosure action." (Settlement Term Sheet, Section I. C. (1), at p. RJN 000020.) In addition, "Servicer shall set forth the information establishing the party's right to foreclose . . . in a communication set to the borrower. . . ." (Settlement Term Sheet, Section I. C. (3), page A-8.)

III. STATEMENT OF APPEALABILITY

The trial court issued a tentative ruling sustaining defendants' demurrer without leave to amend on November 14, 2011. (2 AA 000410-000412.) The case was argued on November 15, 2011. (RT p. 1.) The trial court adopted the tentative ruling as its final ruling on November 15, 2011. (RT p. 4: 12-14; 2 AA 000416-000419.) Defendants submitted a proposed judgment to the trial court on November 22, 2011. (2 AA 000421.) The trial court signed the proposed judgment on November 30, 2011 and filed it the same day. (2 AA 000424-000425.) However,

Neither defendants nor the court clerk mailed the judgment to counsel for Glaski on November 30, 2011. (*Ibid.*) Instead, defense counsel chose to serve Glaski's counsel with a Notice of Entry of Judgment. (2 AA 000421-000422.) Although the Notice of Entry of Judgment was signed on December 16, 2011, it was not mailed to Glaski's counsel until December 10, 2011, according to the proof of service. (2 AA 000432.) This service was the first time Glaski knew judgment had been entered. (*Ibid.*)

Under Rule 8.104 (a) (1) (B) of the California Rules of Court, as it read before July 1, 2012, a notice of appeal must be filed within 60 days after a party or the court clerk serves the opposing party with a document entitled "Notice of Entry of Judgment:"

> "(1) Unless a statute or rule 8.108 provides otherwise, a notice of appeal must be filed on or before the earliest of:

* * * * *

(B) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, accompanied by proof of service. . . ."

Glaski filed his Notice of Appeal on February 16, 2012. (2 AA 000433.) The appeal is timely because Glaski filed his Notice of Appeal on February 16, 2012, less than 60 days after defendants' counsel served his counsel with the Notice of Entry of Judgment.

IV. ARGUMENT

A. Standard of Review

When a plaintiff appeals a judgment granting a demurrer without leave to amend, the court of appeal reviews the trial court's ruling *de novo.* "On appeal from an order of dismissal after an order sustaining a demurrer, we exercise our independent judgment about whether the complaint states a cause of action as a matter of law." *Los Altos El Granada Investors v. City of Capitola,* 139 Cal.App.4th 629, 650 (2006).

If "the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. If we find an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse. . . . The plaintiff has the burden of proving that an amendment would cure the defect." *Schifando v. City of Los Angeles,* 31 Cal.4th 1074, 1082 (2003).

B. Because Glaski Alleged that his Loan Was Not Transferred to the Trust Before the Foreclosure Sale, His Second Amended Complaint Stated a Cause of Action for Wrongful Foreclosure.

(1) Elements of a Wrongful Foreclosure Claim

In its fourth cause of action, the SAC alleged a cause of action for wrongful foreclosure. (1 AA 000194-000196.) The tort of wrongful foreclosure began in California with *Munger v. Moore,* 11 Cal.App.4th 1, 7-8 (1970), where the court found that wrongful foreclosure was similar to conversion, except that it arose from the wrongful conversion of real property:

> "Since conversion is a tort which applies to personal property, we disagree with the *Murphy* case [*Murphy v. Wilson,* 153 Cal.App.2d 132] to the extent that it purports to indicate that there may be a conversion of real property. We are inclined, however, to believe that with respect to real property the *Murphy* case was articulating a rule that has been applied in other jurisdictions. That rule is that a trustee or mortgagee may be liable to the trustor or mortgagor for damages sustained where there *has been an illegal, fraudulent or willfully oppressive sale of property under a power of sale contained in a mortgage or deed of trust.* . . .This rule of liability is also applicable in California, we believe, upon the basic principle of tort liability declared in the Civil Code that every person is bound by law not to injure the person or property of another or infringe on any of his rights." (Citations omitted; footnote omitted; italics added.)

Later opinions have likened wrongful foreclosure to a cause of action to set aside a trustee's sale, where the elements are:

> "(1) [T]he trustee or mortgagee caused an illegal, fraudulent or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering." *Lona v. Citibank, N.A.*, 202 Cal.App.4th 89, 103 (2011).

Several federal district courts have allowed a homeowner to state a cause of action for wrongful foreclosure when the plaintiff can allege the foreclosing party did not have the power to foreclose because the loan had never been properly transferred to it. (California appellate courts can rely on unpublished federal court decisions, and often do so in mortgage litigation. *Landmark Screens, LLC v. Morgan, Lewis & Bockius, LLP*, 183 Cal.App.4th 238, 251, fn. 6 (2010); *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal.App.4th 1149, 1156 (2011).)

For example, in *Tamburri v. Suntrust Mortgage, Inc.*, 2011 U.S.Dist. LEXIS 144442, at *36 (N.D. Cal. Dec. 15, 2011), Judge Chen of the Northern District held: "Regardless of whether § 2932.5 [of the Civil Code] applies, Plaintiff may still assert that only an authorized entity may initiate foreclosure." He relied on Civil Code section 2924 (a) (1), which required "that the notice of default . . . be issued by the 'trustee, mortgagee, or beneficiary, or any of their authorized agents.'" *Ibid.*

Judge Chen came to the same conclusion in *Barrionuevo v. Chase Bank, N.A.,* 2012 U.S. Dist. LEXIS 109935, at *22 (N.D. Cal. Aug. 6, 2012): "Several courts have recognized the existence of a valid cause of action for wrongful foreclosure where a party alleged not to be the true beneficiary instructs a trustee to file a Notice of Default and initiate nonjudicial foreclosure."

Another federal judge held in *Ohlendorf v. American Home Mortgage Servicing,* 279 F.R.D. 575, 583 (E.D. Cal. 2010) (applying California law) that "defendants need not offer proof of possession of the note to legally institute non-judicial foreclosure proceedings against plaintiff, although, of course, *they must prove that they have the right to foreclose.*" (Italics added.) *See also, Sacchi v. Morg. Elec. Registrations Sys., Inc.,* 2011 U.S. Dist. LEXIS 68007, at ** 9-10 (C.D. Cal. June 24, 2011) (refusing to dismiss a plaintiff's wrongful foreclosure claim against a defendant alleged to have "no beneficial interest in the Deed of Trust when it acted to foreclose on Plaintiffs' home.")

These decisions apply the California opinions that allow a wrongful foreclosure claim when a "trustee caused an illegal, fraudulent or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust. . . ." *Lona v. Citibank, N.A.,* 202 Cal.App.4th at 103; *Munger v. Moore,* 11 Cal.App.3d at 7. They conclude that a foreclosure sale initiated by a party without the power to declare a default and pursue a

foreclosure sale is "willfully oppressive." *Tamburri v. Suntrust Mortgage, Inc.,* 2011 U.S.Dist. LEXIS 144442, at *36; *Ohlendorf v. American Home Mortgage Servicing,* 279 F.R.D. at 583. A foreclosure by an unauthorized entity also is illegal, as it violates Civil Code section 2924 (a) (1). *Ibid.*

A wrongful foreclosure claim can exist even without fraud, as the bases for such are claim are independent of each other: "an illegal, fraudulent or willfully oppressive sale. . . ." *Lona v. Citibank, N.A.,* 202 Cal.App.4th at 103. A plaintiff need not allege the specific fraudulent statements or reasonable reliance on those statements. It is enough that he charge that party without the power to foreclose initiated and prosecuted the foreclosure and that he suffered prejudice. *Tamburri v. Suntrust Mortgage, Inc.,* 2011 U.S.Dist. LEXIS 144442, at *36; *Ohlendorf v. American Home Mortgage Servicing,* 279 F.R.D. at 583.

Glaski's SAC met these tests. His wrongful foreclosure cause of action rested on two allegations—the forged Brignac signature and the failure by the foreclosing parties to assign his loan to the Trust that ordered the foreclosure. Paragraph 70 of the SAC stated: "Plaintiff believes and upon such belief alleges that the Assignment of Deed of Trust recorded June 15, 2009 assigned the subject property's Deed of Trust to BANK." (1 AA 000195). Paragraph 71 then alleged: "Defendants . . . failed to provide the Trust with an endorsement of the Note prior to the Closing Date of the

Trust. Plaintiff thus alleges . . . that the Trust did not have standing to foreclose on the Subject Property. . . ." (*Ibid.*)

The wrongful foreclosure cause of action concluded: "Plaintiff . . . contends that Defendants cannot prove that the trust held Plaintiff's loan, nor can they prove that the trust, which had a cut-off date of December 21, 2005, had an ownership interest in Plaintiff's Deed of Trust, as the documents indicate that Plaintiff's loan was not assigned to the trust until 2009, approximately four years after the trust closed." (1 AA 000196.)

Glaski incorporated the Trustee's Deed Upon Sale into his SAC, including his wrongful foreclosure cause of action. (1 AA 000195, 000244.) The Trustee's Deed stated that the Trust was the beneficiary under Glaski's Deed of Trust. (1 AA 000244.) Yet, the Deed of Trust was not transferred to the Trust until the Assignment of Deed of Trust dated June 11, 2009 and recorded June 15, 2009. (1 AA 000238.) These two documents established that, when the Trust caused California Reconveyance Company to issue the Notice of Default and then the Notice of Sale, it did not have the power to foreclose.

Because defendants demurred to the wrongful foreclosure cause of action, all of its allegations must be accepted as true. *Blank v. Kirwan,* 39 Cal.3d 311, 318 (1985). It is irrelevant whether the plaintiff can prove them. *Alcorn v. Ambro Engineering, Inc.,* 2 Cal.3d 493, 496 (1970).

(2) Cases Similar to Glaski's SAC Allow a Wrongful Foreclosure Claim.

In *Barrionuevo v. Chase Bank, N.A.,* 2012 U.S. Dist. LEXIS 109935, the plaintiff obtained a home loan from Washington Mutual or "WaMu." WaMu later assigned the loan to an investment trust, as happened in Glaski's case. When the plaintiff defaulted, JP Morgan attempted to foreclose, claiming it held the loan and was the beneficiary. The plaintiff sued for wrongful foreclosure, alleging that, when it initiated the foreclosure, JP Morgan did not hold the loan. Judge Chen refused to dismiss the claim:

> "Plaintiffs properly assert that only the 'true owner' or 'beneficial holder' of a Deed of Trust can bring to completion a nonjudicial foreclosure under California law. . . .[¶] In the present case, [plaintiffs] allege that Chase and California Reconveyance recorded their . . . Notice of Default without the legal right to do so, given that the prior alienation of Plaintiff's DOT by Washington Mutual in 2006 precluded these Defendants from obtaining any beneficial interest in the DOT. [¶] [T]his Court finds that the Plaintiffs have sufficiently stated a claim for wrongful foreclosure. . . .[U]nder California law, a party may not foreclose without the legal power to do so." *Barrionuevo v. Chase Bank, N.A.,* 2012 U.S. Dist. LEXIS 109935, at ** 21, 26-27.

In another WaMu case, a federal court in Los Angeles found that the plaintiff had stated a wrongful foreclosure claim against JP Morgan because the plaintiff alleged the loan had been assigned to "Washington Mutual Securities Corporation," rather than JP Morgan. Because JP Morgan lacked to power to foreclose, the plaintiff could sue for wrongful foreclosure.

Javaheri v. JP Morgan Chase Bank, N.A., 2011 U.S. Dist. LEXIS 62152, at *5-6 (C.D. Cal. June 2, 2011); *see also, Sacchi v. Morg. Elec. Registrations Sys., Inc.*, 2011 U.S. Dist. LEXIS 68007, at ** 9-10.

These cases are identical to Glaski's wrongful foreclosure claim. They uphold a wrongful foreclosure cause of action when the plaintiff alleged that the foreclosing entity did not hold the loan and thus held no beneficial interest. Because the foreclosing entity lacked the power to foreclose, the plaintiffs could state a cause of action for wrongful foreclosure. Glaski has done the same. He has alleged that defendants lacked any beneficial interest in his loan because it was assigned to the Trust well after the closing date for the trust and indeed well after his home was sold. That allegation is enough to make out a cause of action for wrongful foreclosure.

(3) A Homeowner Can Challenge the Authority of an Entity to Foreclose.

The trial court's ruling on defendants' demurrer to the SAC relied on the idea that a homeowner never could challenge the authority of a party to initiate a foreclosure: "But, to reiterate, *Gomes v. Countrywide* [*Gomes v. Countrywide Home Loans, Inc.*, 192 Cal.App.4th 1149 (2011)] holds that there is no legal basis to challenge the authority of the trustee, mortgagee, beneficiary or any of their authorized agents to initiate the foreclosure process citing Civil Code § 2924, subd. (a) (1)." (2 AA 000411.) *Gomes*

ruled, however, that a plaintiff can attack the authority of a party to conduct a foreclosure if his complaint "identified a *specific factual basis* for alleging the foreclosure was not initiated by the correct party." *Gomes v. Countrywide Home Loans, Inc.,* 192 Cal.App.4th at 1156 (italics added).

In *Fontenot v. Wells Fargo Bank, N.A.,* 198 Cal.App.4th 256, 271-272 (2011), the court upheld a demurrer to a wrongful foreclosure cause of action against MERS and HSBC. The court wrote that "Plaintiff's cause of action ultimately seeks to demonstrate that the nonjudicial foreclosure sale was invalid because HSBC lacked authority to foreclose, never having received a proper assignment of the debt." Plaintiff's wrongful foreclosure claim failed because she was "required to allege not only that the purported MERS assignment was invalid, but also that HSBC did not receive an assignment of the debt in any other manner. *There is no such allegation.*" (Italics added.) If plaintiff could have alleged an invalid assignment of the loan, she would have had a case. *Id.*

These cases apply a simple principle: "Where a [party claims legal title] after a mortgage foreclosure, a judge is entitled to ask for proof that the foreclosing entity was the mortgage holder at the time of the notice of sale and foreclosure, or was one of the parties authorized to foreclose. . . ." *U.S. Bank National Assoc. v. Ibanez,* 941 N.E.2d 40, 52 (Mass. 2011), *cited with approval in Sacchi v. Morg. Elec. Registrations Sys., Inc.,* 2011 U.S. Dist. LEXIS 68007, at * 21.

Glaski alleged in his SAC "that Defendants cannot prove that the trust held Plaintiff's loan, nor can they prove that the trust, which had a cut-off date of December 21, 2005, had an ownership interest in Plaintiff's Deed of Trust, as the documents indicate that Plaintiff's loan was to assigned to the trust until 2009, approximately four years after the trust closed." (1 AA 000196.) This statement is exactly the kind of specific, factual allegation the *Gomes* and *Fontenot* courts hold will support a wrongful foreclosure claim. *Gomes* does not support the trial court's ruling on the demurrer.

The trial court also thought that allowing Glaski to allege wrongful foreclosure somehow would interfere with the speedy nature of the foreclosure process. "The policy behind the nonjudicial foreclosure statutes is to provide a quick, inexpensive and efficient remedy for default. . . . If every trustor . . . could challenge nonjudicial foreclosure by requiring the trustee . . . beneficiary to prove their authority to initiate the foreclosure, the policy would be thwarted." (2 AA 000411.) The trial court cited *Gomes v. Countrywide*, 192 Cal.App.4th at 1154-1155, for this proposition.

Gomes, in turn, cited *Moeller v. Lien,* 25 Cal.App.4th 822, 830 (1994), as authority. *Gomes,* 192 Cal.App.4th at 1154-1155. In *Moeller v. Lien,* however, the court identified another purpose behind the foreclosure statutes, in additional to the speed remedy cited by *Gomes*: "(2) to protect the debtor/trustor from wrongful loss of the property." *Moeller v. Lien,* 25

Cal.App.3d at 830. Permitting a wrongful foreclosure suit to challenge the authority of a party to foreclose upholds this principle, because it prevents the wrongful loss of a home. Even the *Gomes* court recognized that such a suit was proper when the plaintiff could allege specific facts showing the foreclosing entities did not have the power to foreclose. *Gomes v. Countrywide*, 192 Cal.App.4th at 1156; *Fontenot v. Wells Fargo Bank,* 198 Cal.App.4th at 271. Glaski, as shown above, made such specific allegations of fact in his wrongful foreclosure cause of action.

Contrary to defendants' assertions before the trial court (2 AA 000291-000292), this is not a "produce the note" case. California courts have rejected the proposition that a beneficiary under a deed of trust cannot foreclose unless it produces the original loan note. (See cases cited by defendants at 2 AA 000292). Glaski's wrongful foreclosure claim does not charge defendants are unable to produce his note. He alleges that the note was not properly assigned to Trust before the Trust foreclosed. (1 AA 000196). It is irrelevant whether the Trust has physical possession of the note or note. What matters is the too-late assignment of the note to the Trust—after the Trust had California Reconveyance Company issue a Notice of Default and a Notice of Trustee's Sale, and after the home was sold. (*Ibid.*)

(4) Glaski Has Alleged Prejudice and Damage

A plaintiff can assert a wrongful foreclosure claim only if he can allege he was "prejudiced or harmed." *Lona v. Citibank, N.A.,* 202 Cal.App.4th at 103; *Munger v. Moore,* 11 Cal.App.3d at 7. Glaski alleged that as "a result of the above-described breaches and wrongful conduct by Defendants, Plaintiff has suffered general and special damages in an amount according to proof at trial, but not less than $1,000." (1 AA 000196.)

This cause of action also must be read against the allegations Glaski reasonably can make if he is allowed to amend his complaint. *Schifando v. City of Los Angeles,* 31 Cal.4th 1074, 1082 (2003). Glaski lost his home at a foreclosure sale. (1 AA 00187.) That shows prejudice. This loss also would cause any homeowner significant harm, including emotional pain. One case has held that if a lender wrongfully forecloses on a home, the homeowner can sue for intentional infliction of emotional distress. *Ragland v. U.S. Bank National Assoc.,* 2012 Cal.App. LEXIS 965, at ** 39-41 (Cal. Ct. App. Sept. 11, 2012.) So, Glaski can amend his SAC to claim damages for emotional distress. Those damages establish prejudice.

In addition, when he opposed the demurrer, Glaski argued that the foreclosure had ruined his credit rating and thus damaged his ability to buy another home. (2 AA 000397.) Further, Glaski incurred considerable

expense, including attorney's fees, in pursuing this case against the defendants. (*Ibid.*) That expense demonstrates prejudice.

Finally, Glaski was pursuing a modification of his loan when he lost his home in the foreclosure sale: "From March until May, 2009, Plaintiff was led to believe that a loan modification was in the process through JP MORGAN, per negotiations made with Chase Home Finance, LLC." (1 AA 000186.) When Glaski filed an application for a TRO to stop the foreclosure sale, he submitted a declaration outlining his loan modification efforts. (1 AA 000043-000046.) He can reasonably allege that, if the foreclosure had not occurred in May 2009, he would have completed the loan modification process and been approved for a modification. (1 AA 000186.) He would have kept his home. Those potential allegations show prejudice.

Defendants likely will argue that Glaski already had defaulted on his loan and was doomed to lose his home anyway. But, the SAC makes no such charge, and its allegations control. *Alcorn v. Ambro Engineering, Inc.*, 2 Cal.3d at 496. Whether Glaski would have lost his home in any case is not a fact subject to judicial notice under Evidence Code section 452 (h), as it is subject to dispute and not "capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."

(5) Tender is Not Required.

Contrary to defendants' contention in their demurrer to the SAC (2 AA 000293-00294), Glaski was not required to tender the balance of his loan before he could state a claim for wrongful foreclosure. Tender is mandated only for claims seeking equitable relief. *See, e.g., Abdallah v. United Savings Bank,* 43 Cal.App.4th 1101, 1109 (1996), and *U.S. Cold Storage v. Great Western Savings & Loan Association,* 165 Cal.App.3d 1214, 1225 (1985). A claim for damages does not request equitable relief and therefore is not subject to equitable defenses, such as the tender rule. Wrongful foreclosure is a tort cause of action for damages the California courts have recognized for nearly 40 years. *Munger v. Moore,* 11 Cal.App.3d at 1. Glaski's wrongful foreclosure cause of action requests only damages. (1 AA 000196.)

A tender "will not be required when the person who seeks to set aside the trustee's sale has a counter-claim or set-off against the beneficiary. In such cases, it is deemed that the tender and the counter claim offset one another, and if the offset is equal to or greater than the amount due, a tender is not required." *Lona v. Citibank, N.A.,* 202 Cal.App.4th at 113; *Hauger v. Gates,* 42 Cal.2d 752, 755 (1954). Glaski alleges damages of over $1 million, which more than offset the $650,000 balance of his loan. (Compare 1 AA 000196 with 1 AA 000044.)

Finally, the tender rule does not apply to a sale that is void because it was obtained by fraud. *Dimock v. Emerald Properties, LLC,* 81 Cal.App.4th 868, 876-877 (1977); *Lona v. Citibank, N.A.,* 202 Cal.App.4th at 113. Glaski alleges fraud—the forged signatures of Deborah Brignac on the Notice of Default, the Notice of Trustee's Sale, and the Assignment of Deed of Trust. (1 AA 000194-000195.) In addition, the SAC charges that the defendants transferred Glaski's loan to the Trust by fraudulent means: "[By] utilizing a forged legal instrument to assign a Deed of Trust after the closing date, the assignment becomes ineffective, thus precluding these Defendants . . . from conducting a Trustee's Sale. Thus rendering the Trustee's Sale void ab initio." (Paragraph 73 of the SAC, 1 AA 000196.) These allegations must be accepted as true. *Alcorn v. Ambro Engineering, Inc.,* 2 Cal.3d at 496. Because the sale was accomplished through fraud, it was void and the tender rule does not apply. *Lona v. Citibank, N.A., supra.*

C. Because Glaski Alleged His Loan was not Properly Transferred, and Because He Alleged the Brignac Signatures were Forged, He Stated Two Causes of Action for Fraud.

(1) The First Cause of Action for Fraud

The SAC stated two causes of action for fraud. The first cause of action charged that defendants forged the signature of Deborah Brignac on the March 10, 2009 Notice of Trustee's Sale and the June 15, 2009 Assignment of Deed of Trust. (1 AA 000189). By this forgery, defendants

represented "to the public that these documents actually were signed by Deborah Brignac, servicing as *both* Vice President of CRC and JP MORGAN." (*Ibid.*) The purpose of the forged documents "was to initiate the Trustee's Sale of the subject property." (1 AA 000190.)

The trial court sustained defendants' demurrer to the first cause of action without leave to amend. (2 AA 000410.) It concluded, in effect, that defendants had authorized and the forgery or ratified it, and that authorization or ratification forgave the forgery: "A party may also adopt his signature written by another person, as valid or binding, by subsequent approval or ratification, even though the signature was originally forged. . . . [¶] [E]ven if the signature of Brignac was 'forged,' CRC ratified the signature by treating it as valid." (*Ibid.*)

There are several problems with this reasoning. First, what defendants did was "robo-signing," the practice of having one person sign another person's name. *See, e.g., Mena v. JP Morgan Chase Bank, N.A.,* 212 U.S.Dist. LEXIS 128585, at ** 13-14 (N.D. Cal. Sept. 7, 2012) (robo signing also involving Deborah Brignac). Several courts have questioned this practice. *See, e.g., Mena v. JP Morgan Chase Bank, N.A., supra.*

In the recent 50 state settlement, JP Morgan agreed to ban the practice. For example, "Servicer shall ensure that factual assertions made in . . . notices of default, notices of sale and similar notices submitted by or on behalf of Servicer in non-judicial foreclosures are accurate and complete

and supported by competent and reliable evidence." (Settlement Term Sheet, Section I. A. (1), at p. RJN 000013.)

Second, in effect the trial court's reasoning allows defendants to benefit from their own wrong. Even if the Brignac signature is forged, defendants can validate the forged documents merely by claiming that they authorized or ratified the forgery. But, under California law, a party "cannot take advantage of its own wrong." *Ragland v. U.S. Bank National Association,* 2012 Cal.App. LEXIS 965, at * 26, *citing* Civil Code section 3517.

Third, as Glaski pointed out to the trial court, whether defendants authorized or ratified the forged signature was an issue of fact that could not be resolved on demurrer. (RT 2: 2-14.) Glaski did not allege in his complaint that defendants had authorized or ratified the signature, and the allegations of his complaint controlled. *Alcorn v. Ambro Engineering, Inc.,* 2 Cal.3d at 496. Authorization or ratification was not a fact subject to judicial notice under Evidence Code section 452 (h), because it was disputed and not "capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."

Fourth, the trial court reasoned that "the exhaustive nature of California's nonjudicial foreclosure scheme *prohibits* the introduction of additional requirements challenging the authority of the lender's nominee to initiate nonjudicial foreclosure." (2 AA 000410-000411; italics in

original.) In practice, this means that a foreclosing party can commit outright fraud, because fraud is not mentioned in the foreclosure statutes, Civil Code sections 2924 et seq.

California law bars fraud. See Civil Code sections 1708 and 1710. In addition, California law imposes criminal penalties for knowing forgery of a contract or assignment of a note. Penal Code section 470 (d).

The anti-fraud and forgery statutes must be read together with the foreclosure statutes, so that all can be given effect. California law frowns on any attempt to say that one statute overrides another statute. *Murillo v. Fleetwood Enterprises, Inc,* 17 Cal.4th 985, 992 (1998). By concluding that the foreclosure statutes barred any claim for fraud or forgery, the trial court implied that they overrode the fraud and forgery statutes. This is not true. The fraud and forgery statutes must be applied with the foreclosure statutes, thus allowing a homeowner to challenge fraud in the foreclosure process.

Fifth, the trial court cited *Gomes v. Countrywide*, 192 Cal.App.4th at 1154-1155, for the proposition that the foreclosure statutes barred a claim for fraud. As pointed out above, *Gomes* cited *Moeller v. Lien,* 25 Cal.App.4th at 830 as authority. *Gomes, supra.* In *Moeller v. Lien,* the court held another purpose behind the foreclosure statutes was to protect the homeowner form wrongful loss of his home. *Moeller v. Lien,* 25 Cal.App.3d at 830. Permitting a fraud claim affirms this principle, because it prevents the wrongful loss of a home.

(2) The Second Cause of Action for Fraud

The Second cause of action for fraud alleged that defendants fraudulently represented that they had the power to foreclose. (1 AA 000191-000192.) In effect, Glaski also pleaded a claim for concealment, as he charged that "Defendants intentionally mislead Plaintiff . . . by failing to disclose to Plaintiff the true facts, including the fact that Defendants conducted a non-judicial foreclosure sale without any right under the law by assigning the Deed of Trust after the date allowed pursuant to the Pooling and Servicing Agreement of the WaMu" Trust. (1 AA 000192.)

The trial court sustained defendants' demurrer to this cause of action without leave to amend. (2 AA 000410.) The trial court reasoned that "G*omes v. Countrywide* holds that there is no legal basis to challenge the authority of the trustee, mortgagee, beneficiary or any of their authorized agents to initiate the foreclosure process citing Civil Code § 2924, subd. (a)(1)." (2 AA 000411.)

But, as explained above, even the *Gomes* court ruled that a plaintiff can attack the authority of a party to conduct a foreclosure if his complaint "identified a *specific factual basis* for alleging the foreclosure was not initiated by the correct party." *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal.App.4th at 1156 (italics added). Glaski does exactly that by alleging that defendants concealed from him the fact that his loan had not

been properly assigned to the foreclosing trust and that defendants therefore did not have the power to foreclose. (1 AA 000191-000192.)

(3) Glaski Pleaded Reliance.

Although the trial court did not rule on this argument, defendants contended in their demurrer to the SAC that Glaski did not plead reliance on their alleged false representations. (2 AA 000289-00290.) Glaski did plead reliance in paragraph 50 of the SAC by stating that the fraud caused him to apply for a loan modification: "Defendants . . . knew that the act of recording the Assignment of Deed of Trust without the authorization to do would cause Plaintiff *to rely on Defendants' actions by attempting to negotiate a loan modification* with representatives of Chase Home Finance, LLC, agents of JP MORGAN." (1 AA 000191; italics added.) For the purpose of ruling on the demurrer, this allegation must be accepted as true. *Alcorn v. Ambro Engineering, Inc.,* 2 Cal.3d at 496.

In addition, this Court must consider whether Glaski can reasonably amend his complaint to cure its deficiencies, if any, on the reliance question. ." *Schifando v. City of Los Angeles,* 31 Cal.4th at 1082. The SAC can reasonably be amended to allege several acts of reliance. For example, Glaski charged he was pursuing a loan modification when he lost his home. (1 AA 000186). If defendants had revealed the truth—that the Brignac signature on the Notice of Trustee's Sale was forged--Glaski could have gone to court earlier, in April or May 2009, before the foreclosure sale. He

could have asked a court to block the sale based on the forged signature. He also could have filed for Chapter 13 bankruptcy to stop the sale. *See, e.g., Aceves v. U.S. Bank National Assoc.,* 192 Cal.App.4th 218, 229-230 (2011).

One way to judge reliance in a concealment case is to ask how the plaintiff would have acted had the defendant told the truth. *Vega v. Jones, Day, Reavis & Pogue,* 121 Cal.App.4th 282, 292 (2004); *Lovejoy v. AT&T Corp.,* 119 Cal.App.4th 151, 157 (2004). What could have happened had defendants revealed to Glaski the truth that the loan had not been properly assigned and that they did not have the power to foreclose? Defendants would have been compelled to restart the foreclosure. After the loan was assigned to the Trust in June 2009, they would have issued a new Notice of Default, which would have given Glaski 90 days minimum to cure the default. They then would have issued a new Notice of Trustee's Sale, which would have provided Glaski another 20 days.

In short, had defendants revealed the truth, Glaski would have had more time. He could have used that time to find other financing, *see, e.g., Garcia v. World Savings,* 183 Cal.App.4th 1031, 1041-1042 (2010), or he could have filed for bankruptcy. *Aceves v. U.S. Bank National Assoc., supra.* Or, since he already had applied for a loan modification, he could have continued to prosecute his application. He could allege that his

modification request would have been granted and he would have kept his home. Those potential allegations show reliance.

D. Because Glaski's Remaining Causes of Action Were Based on the Fraud and Wrongful Foreclosure Causes of Action, They Should Be Reinstated.

The trial court sustained the demurrer to the quiet title, declaratory relief, cancellation of instruments, and UCL causes of action because they were based on the fraud and wrongful foreclosure causes of action. Because it had dismissed those foundational causes of action, it dismissed the remaining claims as well. (2 AA 000411-000412.) The same logic applies here. Because Glaski clearly alleged causes of action for wrongful foreclosure and for fraud, his causes of action for violation of the UCL, cancellation of instruments, declaratory relief, and quiet title should be restored.

In addition, a plaintiff can allege that a defendant violates the UCL by violating some other California or federal statute or by stating the defendant engaged in deceptive conduct. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 27 Cal.4th 163, 180 (1999). Glaski alleged violations of at least five statutes—Civil Code section 2924 (a) (1), which courts have read to bar a foreclosure by a party without the power to do so, *Javaheri v. JP Morgan Chase Bank, N.A.*, 2011 U.S. Dist. LEXIS 62152, at ** 5-6; Civil Code sections 1709 and 1710, which prohibit fraud; Penal Code section 470 (d), which bars forgery; and Civil Code section

1572 (3), which prohibits fraudulent concealment. Glaski has demonstrated injury, as required by Business & Professions Code section 17204, because he has alleged reliance and damages, for the reasons stated above.

The UCL bars deceptive conduct, such as fraud. *Blank v. Kirwan,* 39 Cal.3d at 329. By successfully alleging fraud, Glaski has stated a UCL claim for deceptive acts. *Blank v. Kirwan, supra.*

A cause of action for cancellation of instruments is similar to a claim to set aside a foreclosure sale. *Lona v. Citibank, N.A.,* 202 Cal.App.4th at 103. The elements of the cause of action are an illegal or fraudulent foreclosure, prejudice to the homeowner, and either tender of the loan balance or an excuse from tender. *Ibid.* Glaski has alleged that the foreclosure of his home was fraudulent and was illegal, as it violated several statutes. He has alleged prejudice and damage, as explained above. And, he is excused from tendering, as also explained above.

Finally, a quiet title cause of action has many of the same elements as a cause of action for wrongful foreclosure or cancellation of instruments. *Lona v. Citibank, N.A., supra.* Because Glaski has stated valid causes of action for wrongful foreclosure, fraud, and cancellation of instruments, he has stated a quiet title claim.

V. CONCLUSION

For these reasons, plaintiff and appellant THOMAS A. GLASKI respectfully requests that the judgment of the trial court be reversed.

Dated: September 25, 2012

LAW OFFICES OF
CATARINA M. BENITEZ

By: _____

Catarina M. Benitez
Attorneys for Plaintiff and
Appellant
Thomas A. Glaski

CERTIFICATE OF WORD COUNT
Calif. Rules of Court, Rule 8.204 (c) (1).

The text in this brief consists of 10,021 words, as counted by the Word 2007 word processing program used to generate the brief.

Dated: September 25, 2012

LAW OFFICES OF
CATARINA M. BENITEZ

By: _____

Catarina M. Benitez
Attorneys for Plaintiff and
Appellant
Thomas A. Glaski