Court of Appeal Case No. F064556
Superior Court Case No. 09CECG03601

IN THE COURT OF APPEAL, STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THOMAS A. GLASKI,
Plaintiff and Appellant

vs.

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" TRUST, CHASE HOME FINANCE LLC, JPMORGAN CHASE BANK, N.A., AND CALIFORNIA RECONVEYANCE COMPANY,
Defendants and Respondents.

Appeal from the Superior Court of the State of California
County of Fresno
Case No. 09CECG03601

The Honorable Alan Simpson, Judge

RESPONDENTS' BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, FIFTH APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: F064556
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	FOR COURT USE ONLY
APPELLANT/PETITIONER: Thomas A. Glaski RESPONDENT/REAL PARTY IN INTEREST: Bank of America, et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Respondents Bank of America, et al.

2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☑ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1) Bank of America, National	Respondent/Defendant
(2) Association as successor by merger	
(3) to "La Salle Bank N.A. as Trustee	
(4) for WaMu Mortgage Pass-Through	
(5)	

☑ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: November 26, 2012

MIKEL A. GLAVINOVICH
(TYPE OR PRINT NAME)

▶ /s/ Mikel A. Glavinovich
(SIGNATURE OF PARTY OR ATTORNEY)

COURT OF APPEAL, FIFTH APPELLATE DISTRICT,	COURT OF APPEAL CASE NO. F064556
APPELLANT: THOMAS A. GLASKI RESPONDENT: BANK OF AMERICA, ET AL	SUPERIOR COURT CASE NO. 09CECG03601

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (CONT)

ATTACHMENT 2

	Full name of interested Entity or person	Nature of interest
1. cont.	Certificate Series 2005-AR-17" Trust	
2.	Chase Home Finance LLC	Respondent/Defendant
3.	JPMorgan Chase Bank, N.A. as successor by merger to Chase Home Finance, LLC	Respondent/Defendant
4.	California Reconveyance Company	Respondent/Defendant
5.	Mikel A. Glavinovich	Attorney for Respondent/Defendant
6.	Thomas A. Glaski	Appellant/Plaintiff
7.	Catarina M. Benitez	Attorney for Appellant/Plaintiff

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I. INTRODUCTION

Appellant Thomas A. Glaski ("Appellant") seeks to have this Court overrule the Trial Court's decision to sustain the Demurrer to the Second Amended Complaint by Respondents Bank of America, N.A. as successor by merger to "La Salle Bank NA as trustee for WaMu Mortgage Pass-Through Certificates Series 2005-AR17" Trust ("Bank of America"); JPMorgan Chase Bank, N.A. as successor by merger to Chase Home Finance, LLC, JPMorgan Chase Bank, N.A. (collectively "JPMorgan"), and California Reconveyance Company ("CRC"; collectively "Respondents") without leave to amend. However, Appellant offers no substantive reason for this Court to find that the Trial Court was in error, nor does Appellant demonstrate that he should have been given fourth opportunity to plead a viable complaint. Thus, the Trial Court's decision should be affirmed.

II. SUMMARY OF ARGUMENT

In 2005, Appellant obtained a loan from Washington Mutual Bank. Appellant later became delinquent on the loan and failed to cure the delinquencies, thus the foreclosure process followed. Appellant contends there were irregularities associated with the foreclosure process and filed suit in 2009 alleging claims of fraud, declaratory relief, wrongful foreclosure and Unfair Business Practices.

The purported bases for Appellant's allegations are twofold. First, Appellant assumes that the signature of Deborah Brignac, an officer of the trustee CRC, was "forged" on certain foreclosure documents. This allegation is the basis for Appellant's First Cause of Action for Fraud, Third Cause of Action to Quiet Title, Fourth Cause of Action for Wrongful Foreclosure, Fifth Cause of Action for Declaratory Relief, Eighth Cause of Action for Cancellation of Instrument and Ninth Cause of Action for Unfair Business Practices. However, as set forth below, while a court considering a demurrer will presume that all allegations are true, those allegations must be made in good faith and cannot be mere conclusions such as Appellant's assumption that Ms. Brignac's

signature was forged. Further, California law does not preclude Ms. Brignac from authorizing someone else to sign her name. And given that CRC as trustee proceeded in using the documents, thereby ratifying the signatures in question, Appellant's suppositions have no legal effect on the validity of sale. Indeed, Appellant does not contend that the information contained in the notices was inaccurate, improperly served and or improperly recorded pursuant to the California Civil Code. Thus, the trial court properly found that the six causes of action based on the forgery contention fail to state a cognizable claim, recognizing that "even if the signature of Brignac was 'forged', CRC ratified the signature by treating it as valid." (Appellant's Appendix ("AA") at 428.)

Appellant's second primary contention, *i.e.*, that the trustee's sale should be declared "void ab initio" because Bank of America allegedly was not a proper holder of the promissory note forms the basis for his Second Cause of Action for Fraud. The second contention also proved insufficient to withstand demurrer. In this case, the public records reveal that Bank of America had standing to foreclose. More specifically, an Assignment of the Deed of Trust ("Assignment") was properly recorded on December 8, 2008, which put Appellant on notice that all "beneficial interest under the Deed of Trust" was thereby granted, assigned and transferred to LaSalle Bank NA as trustee for WaMu Mortgage Pass-Through Certificates Series 2005-AR17 Trust ("LaSalle Trust"). At some point after December 8, 2008, Bank of America succeeded by merger to the LaSalle Trust, and a second Assignment of Deed of Trust was recorded on June 15, 2009. Indeed, there is nothing in the California Civil Code to support Appellant's allegations that Bank of America was not entitled thereby to take title of the Subject Property at the trustee's sale on May 27, 2009. The trial court therefore recognized that Appellant's allegations that the Deed of Trust was improperly transferred to the La Salle Trust could not survive as pled. (AA at 430.) A contrary finding would require an expansion of the requirements of California Civil Code §2924 et seq., and this the trial court would not do.

Given the defects in Appellant's two primary contentions, the trial court was

compelled to sustain Respondents' Demurrer. The trial court also concluded that Appellant could point to no allegations which, if added to the Complaint, would resuscitate his causes of action, thus the trial court did not grant leave to amend. Appellant, while asking this Court to overturn the lower court's ruling, does not identify any error in the trial court's judgment or reasoning,. And just as was the case at thr trial court level, he does he identify any new facts that could be alleged to save any of his claims. Accordingly, the judgment should be affirmed.

III. SUMMARY OF FACTS

In July of 2005, Appellant obtained a loan from Washington Mutual Bank ("WaMu") ("Subject Loan"). The Subject Loan was secured by certain real property located at 7741 E. Saginaw Way, Fresno, California 93727 (the "Subject Property"), as evidenced by a recorded deed of trust ("DOT") that named WaMu as the beneficiary and CRC named as the trustee. (AA at 200-229.) The Subject Loan was later transferred to a mortgage pool, with WaMu and then Chase Home Finance, LLC continuing to service the loan, and CRC with remaining the trustee throughout.

On September 25, 2008, the Office of Thrift Supervision placed Washington Mutual Bank ("WaMu") into the receivership of the FDIC. (AA at 305-307.) On the same day, JPMorgan entered into a Purchase and Assumption Agreement with the FDIC whereby JPMorgan acquired an interest in the Subject Loan. ("Purchase and Assumption Agreement"; AA at 309-322.) A few months later, on December 8, 2008, CRC recorded an Assignment of Deed of Trust ("2008 Assignment"),pursuant to which all beneficial interest in the Subject Loan was assigned to LaSalle Bank N.A. as trustee for WaMu Mortgage Pass Through Certificates Services 2005-AR17 Trust. (Respondent's Appendix ("RA") at 78-80.)

In the same year that the Purchase and Assumption Agreement was entered into by JPMorgan and the FDIC, Appellant became delinquent on his loan obligations under the Subject Loan. (AA at 231-232.) Therefore, a Notice of Default and Election to Sell

Under Deed of Trust ("NOD") was recorded by CRC on December 9, 2008. (*Id.*) Pursuant to the NOD, as of December 8, 2008, Appellant was $11,200.78, in arrears on the Subject Loan. (AA at 231.) Appellant did not cure the default and CRC recorded a Notice of Trustee's Sale ("NOTS") on March 12, 2009. (AA at 241-242.) As of the NOTS' recording, the unpaid balance and reasonable costs were estimated to be $734,115.10. (AA at 241.) Appellant failed to reinstate the Subject Loan, and a trustee's sale went forward as scheduled on May 27, 2009. With the sale completed, CRC recorded a Trustee's Deed Upon Sale on June 15, 2009, granting all interest in the Subject Property to Bank of America, National Association as successor by merger to LaSalle Bank as trustee for WaMu Mortgage Pass-Through Certificates Series 2005-AR17 Trust.[1]

On October 1, 2009, Appellant filed the instant action against Bank of America, Chase Home Finance and CRC; JPMorgan was later named as DOE 1. (AA at 18-31.)

IV. PROCEDURUAL SUMMARY

Appellant filed his action in Superior Court on October 1, 2009, alleging causes of action for fraud, quiet title, wrongful foreclosure, accounting, declaratory relief, injunctive relief, and intentional infliction of emotional distress. (AA at 18-31.) Although indisputably in default and unable to tender funds to reinstate his loan, Appellant also filed a Motion for Preliminary Injunction on October 6, 2009. (AA at 32-50.) The Trial Court denied the Motion for Preliminary Injunction on October 8, 2009. (AA at 5.)

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[1] (AA at 244-245.) Given that Bank of America had become the successor by merger to LaSalle Bank since the first Assignment of Deed of Trust was recorded on December 8, 2008, a second Assignment of Deed of Trust was recorded on June 15, 2009 ("2009 Assignment"), whereby all beneficial interest in the Deed of Trust was assigned to Bank of America, National Association as successor by merger to LaSalle Bank as trustee for WaMu Mortgage Pass-Through Certificates Series 2005-AR17 Trust. (AA 238-239.)

Respondents answered the initial complaint, and then filed a Motion for Judgment on the Pleadings, which was granted without leave to amend as to the accounting, injunctive relief and intentional infliction of emotional distress claims, and granted with leave to amend as to the remaining claims. (AA at 51-110.) Appellant then filed a First Amended Complaint on April 29, 2011. (AA at 111-136.) Respondents demurred to the First Amended Complaint on June 1, 2011. (AA at 137-150.) The Trial Court sustained the demurrer, and Appellant was given a further opportunity to amend his complaint, with strict instructions as follows: "[Appellant] is advised **for the last time** to plead each cause of action such that only the essential **elements** for the claim are set forth without reincorporation of lengthy 'general allegations'." (AA at 175-181; 179 [emphasis original].) Appellant filed his Second Amended Complaint on August 5, 2011, and the Trial Court sustained Respondents' demurrer to the same, without leave to amend, on November 15, 2011. (AA at 182-276; 299-381; 409-412, and 420.) A Judgment of Dismissal of Action in Favor of Respondent was entered on November 20, 2011. (AA at 413-420.) The Notice of Entry of Judgment was served on Appellant's Counsel on December 19, 2011. (AA at 421-432.) The Notice of Appeal followed on February 16, 2012. (Opening Brief at 433-434.)

V. ISSUES PRESENTED FOR REVIEW

The issues on appeal are as follows:

1. May a borrower challenge a foreclosure sale based merely on an assumption that certain foreclosure documents were forged, where the trustee with reason to know of the alleged forgery adopts the documents as valid?

2. Where a borrower has defaulted on his loan and foreclosure proceedings ensue, can that borrower state a claim for wrongful foreclosure based on an allegation that a particular entity did not have authority to foreclose even though such a claim would violate the policy behind California's non-judicial foreclosure laws?

VI. STANDARD OF REVIEW

A demurrer tests the legal sufficiency of the complaint. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Code of Civil Procedure § 430.10 lists the grounds for sustaining a demurrer. The ground for a general demurrer is stated in subdivision (e) as follows: "The pleading does not state facts sufficient to constitute a cause of action." The appellate court reviews a judgment entered based on an order sustaining a demurrer by "independently review[ing] the pleading to determine whether the facts alleged state a cause of action under any possible legal theory." (*Davaloo v. State Farm Ins. Co.* (2005) 135 Cal.App.4th 409, 414.) The appellate court accepts as true " ' "all material facts properly pleaded" ' " in the complaint, as well as facts from judicially noticeable sources. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) The appellate court gives no effect, however, to contentions, deductions or conclusions of fact or law. (*Ibid.*) The appellate court will affirm the demurrer if any proper ground for sustaining the demurrer exists, whether or not the trial court relied on it or the defendant asserted it in the trial court. (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 880, fn. 10.)

When a demurrer is properly sustained, the Appellate Court reviews the trial court's grant or denial of leave to amend the defective complaint for abuse of discretion. (*Cantu v. Resolution Trust Corp., supra,* 4 Cal.App.4th at p. 889.) The appellate court's task is to determine whether there is a reasonable possibility that the complaint can be amended to state a cause of action. (*Blank v. Kirwan, supra,* 39 Cal .3d at p. 318.) The Appellant has the burden to show there is such a reasonable possibility. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.) If there is such a possibility, but the trial court denied leave to amend, the trial court abused its discretion, and the appellate court reverses its ruling. (*Ibid.*) If not, there is no abuse of discretion, and the appellate court affirms. (*Ibid.*)

In this case, Appellant does not identify any abuse of discretion, any reasonable possibility of ability to amend to state a cause of action or any reversible error of any

kind on the part of the trial court. Thus, the ruling on the Respondents' Demurrer to the Second Amended Complaint should be affirmed.

VII. THE TRIAL COURT PROPERLY SUSTAINED THE DEMURRER TO APPELLANT'S SECOND AMENDED COMPLAINT

First and foremost, the allegations of Appellant's Second Amended Complaint and those facts which may properly be judicially noticed are the only allegations that may be considered to determine whether the trial court properly sustained Respondents' Demurrer without leave to amend. As stated above, the causes of action in the Second Amended Complaint rest on two primary assumptions: (1) that certain foreclosure documents were forged, and (2) that Respondents did not have the authority to foreclose. The trial court correctly concluded that these claims could not survive. (AA 428-430.) As to the "forgery" allegations, the court reasoned that "... even if the signature of Brignac was 'forged', CRC ratified the signature by treating it as valid," making the allegation of forgery immaterial. (AA at 428.) Moreover, under *Gomes* "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." (AA at 428-429.) Thus, the trial court concluded that the Appellant's First Cause of Action for Fraud, Third Cause of Action to Quiet Title, Fourth Cause of Action for Wrongful Foreclosure, Fifth Cause of Action for Declaratory Relief, Eighth Cause of Action for Cancellation of Instrument, and Ninth Cause of Action for Unfair Business Practices, all of which were based on alleged "forgery" must be sustained without leave to amend. (AA at 428-430.)

With regard to Appellants' Second Cause of Action for Fraud, the trial court again turned to *Gomes*: "*Gomes* ... holds that there is no legal basis to challenge the authority of the trustee, mortgagee, beneficiary, or any of their §2924, authorized agents to initiate the foreclosure process ...." (AA at 429.) As the trial court noted, this is consistent with the "policy behind the nonjudicial foreclosure statutes[, which] is to provide a quick,

inexpensive and efficient remedy for default on a loan secured by real property." (*Id.*) Thus, the trial court concluded, "If every trustor or mortgagor could challenge nonjudicial foreclosure by requiring the trustee, mortgagee, beneficiary, or any of their authorized agents to prove their authority to initiate the foreclosure, the policy would be thwarted." (*Id.*) And again, the trial court found there are no allegations "under any theory" to support the Second Cause of Action for Fraud.

Appellant offers no substantive reason to disturb this sound reasoning and its resulting conclusions.

A. Appellant Was Not Harmed by the "Forgery"

In this case, Appellant contends based on information and belief that Ms. Brignac's signature was forged on certain recorded foreclosure documents. (AA at 189-190.) However, in order to allege a viable claim for fraud, a plaintiff must meet certain requirements of specificity and also specially plead the "detriment proximately caused" by defendant's tortious conduct. (Civil Code § 3333.) This requires specific factual allegations of both the injury or damage suffered, as well as its causal connection with the plaintiff's reliance on the defendant's representations. (*Service By Medallion, Inc. vs. Clorox Co.*, 44 Cal.App.4th 1807, 1818 (1996).) In other words, deception – whether by alleged forgery or any other alleged irregularity in foreclosure proceedings -- without resulting loss is not actionable fraud. (*Hill v. Wrather*, 158 Cal.App.2d 818, 825 (1958).) "Whatever form it takes, the injury or damage must not only be distinctly alleged but its causal connection with the reliance on the representations must be shown." (*Service by Medallion, Inc.*, *supra*, 44 Cal.App.4th at 1818.)

Thus, it is not sufficient for Appellant to assume that signatures are forged. While it is correct that the appellate court accepts as true "all material facts properly pleaded" in the complaint, as well as facts from judicially noticeable sources, it is not required to accept as true those allegations that are merely self-serving assumptions. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.)

Moreover, Appellant does not make any allegations of how the purported forgery caused him cognizable harm. (AA at 182-277.) . (*Id.*) In this case, Appellant fails to allege any prejudice as a result of the supposed irregularities in the foreclosure sale. Nonetheless, Appellant contends that he was prejudiced because of the "forged" signature on the Notice of Trustee's Sale. (Opening Brief at 38.) Appellant also contends he suffered prejudice because he attempted to negotiate a loan modification with Chase Home Finance. (*Id.*) However, there are no allegations that Appellant failed to receive notice of the default, sale or any other foreclosure event and therefore did not seek bankruptcy protection. He likewise does not allege that he failed to receive a loan modification because of the forgeries. (*Id.* at 39.) Instead, Appellant asks this Court to reject the reasoning of the Trial Court based on a hypothetical without any causal link between the alleged forgeries and Appellant's purported harm. Absent any prejudice, irregularities in the foreclosure notices are not actionable. (*See Aceves v. U.S. Bank, N.A.*, 192 Cal.App.4th 218, 232 (2011) ("*Aceves*").) [2] In this case, as in *Aceves*, Appellant does not allege that the documents at issue were not recorded and served in accordance with the applicable provisions of the California Civil Code §§ 2934 and 2924, or that the information contained on these recorded documents was not accurate. Thus, Appellant failed to allege the necessary causal connection between the purported irregularity in the foreclosure, the "forgery", and the alleged harm.

To summarize, the speculation and conjecture included in Appellant's First Cause of Action for Fraud claim do not meet the requirements of an adequately pled fraud claim and the Trial Court sustained Respondents' Demurrer to the First Cause of Action. Further, and Appellant's conjecture notwithstanding, there is no allegation of any actual harm as a result of the so-called forgery. (AA at 182-277.) Finally, because the same insufficient forgery allegation also served as the basis for Appellant's Third Cause of

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[2] *Aceves* held that no cause of action is stated simply because the NOD incorrectly names the wrong beneficiary if the other information on the NOD is provided.)

Action for Quiet Title, Fourth Cause of Action for Wrongful Foreclosure, Fifth Cause of Action for Declaratory Relief, Eighth Cause of Action for Cancellation of Instrument, and Ninth Cause of Action for Unfair Business Practices, the Demurrer was sustained without leave to amend as to these causes of action as well. Appellant has not identified any error in this conclusion, and the ruling should be affirmed.

B. Foreclosure Proceedings Were Properly Initiated

In support of his Second Cause of Action for Fraud, Property, Appellant asserts that Respondents did not have the authority to foreclose "because the [Subject Loan] had not been properly transferred to the Trust." (Opening Brief at 10.) However, Appellant overlooks the dispositive fact that on December 8, 2008 – well before the Notice of Default was recorded - an Assignment of Deed of Trust was recorded by CRC. (RA at 78-80.) Pursuant to the Assignment, JPMorgan assigned all beneficial interest in the Subject Loan to LaSalle Bank N.A. as trustee for WaMu Mortgage Pass Through Certificates Services 2005-AR17 Trust. (RA at 78-80.) At this time and at all times relevant herein, CRC remained the Trustee expressly authorized by the Deed of Trust to initiate foreclosure proceedings in the event of Appellant's default. (*Id.*)

Despite the clear public record showing otherwise, Appellant alleges that "[Respondents] 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." (Opening Brief at 12.) More specifically, Appellant alleges that the "[promissory] Note was not duly endorsed, transferred and delivered to the Trust prior to the Closing Date of the Trust, as set forth in 2.05 of the Pooling and Servicing Agreement on file in this action." (AA at 9.) Appellant also alleges that the promissory note "was never lawfully negotiated and physically delivered to the Trust." (AA at 10.) Based on these ostensible facts, Appellant claims that the entire Trustee's Sale was "void ab initio." (AA at 10.) Appellant does not allege how the purported violation(s) of the Pooling and Servicing Agreement years before his default

gives him any rights as a stranger to the cited agreement. More specifically, there is no allegation that Appellant was an intended third party beneficiary of the Pooling and Servicing Agreement.[3]

In attacking Respondents' authority to foreclose, Appellant ignores the fact CRC was the authorized Trustee at all times relevant herein, and that neither the trustee nor the beneficiary of the DOT is required to possess the promissory note at the time of the foreclosure. Indeed, contrary to Appellant's alleged contentions, "under Civil Code section 2924, no party needs to physically possess the promissory note."[4] Even without these deficiencies, the claims would still be subject to demurrer: after all, the Deed of Trust authorized CRC, as trustee, to initiate foreclosure proceedings once Appellant defaulted on the Subject Loan. (AA at 222.) Beyond these defects in pleading, Appellant does not allege that he was not in default. In short, everything before the trial court supported the conclusion that Appellant had no valid claim and could not state a valid

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[3] To state a cause of action for breach of contract, a plaintiff must allege (1) the terms of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) the defendant's breach, and (4) resulting damages to the plaintiff. (*McDonald v. John P. Scripps Newspaper* (1989) 210 Cal.App.3d 100, 104.) Additionally, the facts constituting the defendant's breach should be stated with certainty. (*Wise v. Southern Pacific Co.*, 223 Cal.App.2d 50, 60 (1963) Statements that the defendant "breached" or "violated his contract" or "failed and refused to perform" are held insufficient as conclusions of law. (*Id.*) Rather, Plaintiff must plead the legal effect of the contract, meaning the material terms of the contract must be stated. (*Construction Protective Services v. TIG Specialty Insurance Co.*, 29 Cal.4th 189, 199 (2002) Furthermore, under third party beneficiary contracts, a contract made "expressly for the benefit of a third person" may be enforced by that person. (*See*, Civil Code § 1559; *see also, Performance Plastering v. Richmond American Homes of Calif., Inc.*, 153 Cal. App. 4th 659 (2007).) In order to be able to enforce the contract, the person to be benefited need not be named in the contract, but the contracting parties' intent to benefit that person must appear in the terms of the agreement. (*See, Johnson v. Sup.Ct. (Calif. Cryobank, Inc.)*, 80 Cal. App. 4th 1050, 1064 (2000).) On the other hand where, as here, someone is only incidentally or remotely benefited by an agreement between others cannot enforce it, that person cannot enforce the agreement. (*See Lucas v. Hamm*, 56 Cal. 2d 583, 590 (1961).)

[4] (*Sicairos v. NDEX West,* LLC, 2009 WL 385855 (S.D. Cal. 2009) (citing CCC § 2924(a)(1); *See also Lomboy v. SCME Mortgage B*ankers, 2009 WL 1457738 * 12-13 (N.D. Cal. 2009) ("Under California law, a trustee need not possess a note in order to initiate foreclosure under a deed of trust.") and *Wood v. Aegis Wholesale Corp.* 2009 WL 1948844, 5 (E.D.Cal. 2009) (An allegation that MTC did not have physical possession of the original note is insufficient to render the foreclosure proceedings invalid.)

claim. Nonetheless, Appellant seeks to have this Court expand the non-judicial foreclosure process set forth by California Civil Code §2924, et seq. for his benefit. There is simply no legitimate basis for doing so.

As Appellant notes, the Trial Court concluded that "*Gomes v. Countrywide* [*Gomes v. Countrywide Homeloans, 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)." (AA Vol. 2 at 411.) However, Appellant erroneously contends his case falls within an exception to *Gomes.*, A review of *Gomes* and its progeny indicates that the Trial Court correctly applied the case.

For instance, Appellant suggests that the decision in *Tamburri v. Suntrust Mortgage, Inc.* 2011 WL 6294472 (N.D. Cal. 2011) supports his argument that he has stated an actionable claim based on the Respondents' lack of authority to conduct foreclosure of the Subject Property. (Opening Brief at 21.) This is notso. Appellant concedes he was in default on the Subject Loan and did not cure the default, and there is no dispute as to CRC's standing as Trustee throughout the foreclosure process, just as there is no claim that Appellant failed to receive any notice of the proceedings or was not made aware of the change in beneficiary. These facts are quite different from those of *Tamburri,* where the borrower alleged that her loan servicer never contacted her to discuss foreclosure alternatives and made multiple misstatements regarding the correct identity of the beneficiary. (*Tamburri, supra,* at 1-2.) Similarly, the facts of the present case are also distinct from those of the other cases relied on by Appellant. In *Ohlendorf v. American Home Mortgage Servicing, et al.* 279 F.R.D. 575 (E.D. Cal. 2010), the court denied a motion to dismiss as to whether a particular deed of trust had been properly assigned because it appeared that a relevant assignment had been backdated. (*Id.*) Again, there is no such allegation in this matter and the public record shows otherwise. Likewise in *Barrionuevo v. Chase Bank, N.A.* 2012 WL 3225953 (N.D. Cal. 2012), another case

relied upon by Appellant, the facts are inapposite t. In *Barrionuevo*, the allegation was the WaMu had transferred title to an investor trust in 2006, *prior* to JPMorgan purchasing the WaMu loan from the FDIC, and thereon concluded that JPMorgan had no interest in the that note. That court 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." (*Id.* at 7.) That is not what was alleged in this case.

Here, plaintiff alleges just the opposite—that the transfer to the investor trust by WaMu was never completed. (Opening brief at p. 11, quoting paragraph 47 of the complaint). So taking plaintiff's allegations as true, if the loan did not transfer to the investor trust in 2006, then WaMu owned it on September 25, 2008, and when JPMorgan bought WaMu's assets from the FDIC on that same day, it also bought WaMu's interest in the Subject Loan. And later, pursuant to the December 8, 2008, Assignment of Deed of Trust, the La Salle Trust became the beneficiary. All the while, CRC remained the Trustee under the Deed of Trust. (RA at 78-80.) Thus, when Appellant defaulted on this loan obligations, CRC was authorized to initiate foreclosure proceedings on behalf of the La Salle Trust. (RA at 78-80.)

Appellant's citation to *Javaheri* is likewise unavailing, as again, because there the plaintiff alleged that *prior to* the 2008 JPMorgan acquisition of WaMu, WaMu had sold the note to "Washington Mutual Mortgage Securities Corporation" in 2007. (*Javaheri v. JPMorgan Chase Bank, N.A.* (C.D. Cal. 2011) 2011 WL 2173786.) Thus, like the claims in *Barrionuevo,* the *Javaheri* plaintiff's allegations were that JPMorgan had nothing to acquire in 2008. But it bears repeating that in this case, the allegation is that WaMu did *not* assign the loan prior to September of 2008. (AA at 182-205.) Thus, based on Appellant's own allegations, JPMorgan did acquire WaMu's interest in the Subject Loan on September 25, 2008. As such, *Javaheri* is of little aid to Appellant's arguments – in

Javaheri the plaintiff alleged the note was sold to early, while in this case Appellant contends it was sold to late.

Appellant is tilting at windmills in a Hail Mary effort to revive his claims, but he offers no substantive argument as to any error by the Trial Court and the ruling on Respondents' Demurrer to the Second Amended Complaint should be affirmed.

C. Plaintiff's Second Cause of Action Does Not State a Viable Claim to Set Aside the Foreclosure Sale

Although Appellant labeled his second cause of action as one for fraud, it is really a claim for setting aside the foreclosure sale. More specifically, the second cause of action is an attack on the legitimacy of the trustee's sale of the Subject Property to the beneficiary Bank of America. (AA at 9-11.) In his flawed effort to support this claim, Appellant contends that the Promissory Note was not timely included in a pooling and servicing agreement trust. (*Id.*) However, even if this allegation were true, it would not justify the setting aside of the trustee's sale. (*See Nguyen v. Calhoun*, 105 Cal.App.4th at 428 at 445 (2003) ("*Nguyen*").) Specifically, the Court in *Nguyen* held, "To justify setting aside a presumptively valid foreclosure sale, the claimed irregularity must arise from the foreclosure proceeding itself. ...A mistake that occurs outside ("dehors") the confines of the statutory proceeding does not provide a basis for invalidating the trustee's sale." (*Id.* at 445 [Citations omitted].) In *Nguyen*, as here, the purported mistake, *i.e.* the "improper" transfer of the Deed of Trust, was dehors the foreclosure. Thus, there can be no valid claim to set aside the foreclosure sale and the ruling on the demurrer should be affirmed.

VIII. APPELLANT'S FAILURE TO ALLEGE ABILITY AND WILLINGNESS TO TENDER THE FULL AMOUNT OWED IS FATAL TO THE CAUSES OF ACTION FOR WRONGFUL FORECLOSURE, CANCELLATION AND QUIET TITLE

Assuming *arguendo* that Appellant's insufficient forgery allegations were not at

the heart of his third, fourth and eighth causes of action, those claims would still be subject to demurrer due to lack of tender. These claims for wrongful foreclosure, cancellation and quiet title are all associated with an allegedly improper foreclosure. A condition precedent to any cause of action arising from an alleged wrongful foreclosure is that the borrower must tender or offer to tender a sum sufficient to cure the default. (*United States Cold Storage v. Great Western Savings & Loan Association*, 165 Cal.App.3d 1214 (1985).) Appellant nevertheless omits this critical allegation from the Second Amended Complaint. In *United States Cold Storage*, the Court stated:

> It would be futile to set aside a foreclosure sale on the technical ground that notice was improper, if the party making the challenge did not first make full tender and thereby establish his ability to purchase the property. Thus, it is sensible to require that a trustor, whose default to begin with resulted in the foreclosure, give proof before the sale is set aside that he now can redeem the property.

(*Id.* at 1225.)

This rule of requiring a tender from the borrower was also addressed in *Karlsen v. American Savings & Loan Association*, 15 Cal.App.3d 112 (1971), where the Court stated:

> "A valid and viable tender of payment of the indebtedness owing is essential to an action to cancel a voidable sale under a deed of trust. [Citations omitted.] A tender of payment is of no effect if the offerer does not have the present ability to make the tender good."

The Court of Appeal reaffirmed the rule in *Abdallah v. United Savings Bank* that "in order to maintain any cause of action for irregularity" in the procedure of a trustee's sale, plaintiffs are required to tender the amount of the secured indebtedness. *Abdallah v. United Sav. Bank*, 43 Cal.App.4th 1101, 1109 (1996). In *Abdallah*, the Court of Appeal affirmed the trial court's sustaining of a demurrer, without leave to amend, to a borrower's action to set aside a trustee's sale and for damages, which among other things, failed to allege tender of the amount due on the foreclosed upon loan prior to the filing of the action. *Miller & Starr, Calif. Real Estate 4th ed.* "Deeds of Trust", section 10:212,

pg. 653-654 ("Without an allegation of such tender in the complaint that attacks the validity of the sale, the complaint does not state a cause of action.")

Here, Appellant makes no allegation of his ability to tender the amount due under the Loan. (AA at 192-195; 199-203.) Thus, Appellant cannot seek equitable relief because Appellant has not done equity. [5] In an attempt to avoid the tender requirement, Appellant now contends that tender is not required because he is also seeking damages, not simply equitable relief. (Opening Brief at 32-33.) However, claims to set aside and or cancel an allegedly wrongful foreclosure are equitable by their very nature. The fact that a plaintiff seeks damages in addition to equitable relief does not change the fact that he or she is still seeks equitable relief and must comply with the pleading requirements for such relief. (*Abdallah, supra,* 43 Cal.App.4th at 1109.) Moreover, the law Appellant relies upon is inapplicable to the facts at hand. For instance, Appellant places great weight on *Dimock v. Emerald Properties LLC, et al.* 81 Cal.App.4th 868 (2000).) In *Dimock*, the first trustee conveyed the property at issue to the new buyer following a foreclosure sale, but a second trustee had been substituted for the first. The Court of Appeal for the Fourth District of California, found that, because only the second trustee had the power to convey the property following the sale, the sale was void and not merely voidable. (*Id.*) In this case, there was no substitution of the trustee and thus CRC was entitled to convey the Subject Property to Bank of America. As such, the Trial Court's ruling was sound and need not be disturbed.

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[5] (*Williams v. Koenig*, 219 Cal. 656, 660 (1934). "A cause of action 'implicitly integrated' with the irregular sale fails unless the trustor can allege and establish a valid tender. [Citation Omitted.]" *See also, Arnold Management Corporation v. Eischen*, 158 Cal.App.3d 575, 579 (1984).)

IX. APPELLANT DOES NOT AND CANNOT STATE A VIABLE CLAIM FOR UNFAIR BUSINESS PRACTICES

Appellant's Ninth Cause of Action is brought under the Unfair Competition Law ("UCL"), California Business and Professions Code §§ 17200 through 17209, but the claim fails to allege any facts showing that Appellant. Furthermore, Appellant's Opening Brief fails to address the Trial Court's ruling as to the Ninth Cause of Action. (*See* Opening Brief.) While Appellant has arguably waived his right to appeal the Trial Court's ruling as to this particular claim, the defects in the claim are addressed below.

A. Appellant Lacks Standing To Sue Under The UCL.

As amended by Proposition 64, Business and Professions Code §17204 now limits standing in an Unfair Competition Law action to certain specified public officials and to "any person who has suffered injury in fact and has lost money or property as a result of ... unfair competition." (*Id.* at 228 (emphasis added).)[6] Whether a plaintiff has standing to sue is a threshold issue that must be decided before the merits of a case can be decided and is properly raised by a demurrer. (*See Troyk v. Farmers Group, Inc.*, 171 Cal.App.4th 1305, 1345 (2009).) Because elements for standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. [Citations.]"[7]

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[6] Prior to its amendment in 2004, the Unfair Competition Law ("UCL"), § 17200 of the Business and Professions Code and related provisions, permitted any person acting for the general public to sue for relief from unfair competition and did not predicate standing on a showing of injury or damage. (*See Californians For Disability Rights v. Mervyn's, LLC*, 39 Cal.4th 223, 228 (2006).)

[7] *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d. *See also Mervyn's, supra*, 39 Cal.4th at 233 ('[C]ontentions based on a lack of standing involve jurisdictional challenges and may be raised at any time in the proceeding. [Citations.]'

In this case, Appellant has not alleged any economic injury or loss of property due to an alleged violation of any statute or other law. Instead, Appellant repeats his allegations regarding the legitimacy of Ms. Brignac's signatures on the Assignment and/or NOTS, and Appellant also repeats that Respondents "[attempted] to transfer Plaintiff's Deed of Trust after the closing date of the Pooling and Servicing Agreement." (AA at 201.) However, by Appellant's own admission, it is his failure to maintain his monthly payments under the Subject Loan documents and his failure to cure the delinquency, that caused the Subject Property to be sold at the trustee's sale. Consequently, the Trial Court had absolutely no allegations before it satisfy the element of economic injury or loss of property because of any purported unfair or unlawful actions by any of the Respondents. Accordingly, the Trial Court's ruling on the Ninth Cause of Action should stand.

B. Appellant Fails to Allege Any Underlying Statutory Violations or Seek a Form of Relief Available Under the UCL

In addition to establishing standing, in order to state a cause of action for an unlawful business practice under the UCL, the plaintiff must allege facts demonstrating that the practice violates an underlying law. (*See People v. McKale*, 25 Cal.3d 626, 635 (1979).) These facts must be alleged with reasonable particularity. *Khoury v. Maly's of California*, 14 Cal.App.4th 612, 619 (1993) ("A plaintiff alleging unfair business practices under these statutes must state with reasonable particularity the statutory elements of the violation.") In this case, Appellant has not alleged that Respondents violated any underlying law, much less made any such allegations with reasonably particularity.

Further, Appellant does not allege any credible supporting facts that would entitle him to relief that is actually recoverable under the UCL. (AA at 202-203.) No damages are recoverable under the UCL. (*See Korea Supply Co. v. Lockheed Martin Corp.* 29 Cal. 4th 1134, 1144 (2003) ("*Korea Supply*").) Instead, the UCL provides primarily for

injunctive relief and restitution. [8] Here, Appellant does not seek the permissible injunctive relief or restitution, but instead seeks only attorney's fees which are not recoverable under the UCL. (AA at 202-203; *see Shadoan v. World Savings & Loan Association*, 219 Cal. App. 3d 97 at 103, 108, n. 7 (1990).) Consequently, no available relief under the UCL has been alleged by Appellant and the trial court was within its authority to sustain Respondent's Demurrer without leave to amend.

X. THE *U.S. v. BANK OF AMERICA CORP.* SETTLEMENT DOES NOT CURE ANY DEFECTS IN APPELLANT'S COMPLAINT

Appellant seeks to have this Court consider a consent judgment and settlement agreement reached in a separate matter, *United States v. Bank of America Corp.*, filed in the United States District Court for the District of Columbia, Case No. 12-CV-00361 ("Federal Settlement"). (Opening Brief at 16.) Appellant overlooks the fact that not only does the Federal Settlement not apply to this matter, but it also does not apply retroactively, and would not apply to Appellant's allegations in any event.[9] Appellant asserts that according to the Federal Settlement, "affidavits, sworn statements and Declarations shall be signed by the hand signature of the affiant." (Opening Brief at 17, quoting the Federal Settlement, Settlement Term Sheet, Section I.A.(11).) Appellant is apparently seeking to argue that Ms. Brignac was required to sign the Notice of Default Sale and Assignment of Deed of Trust under oath and by her own hand. But California law does not require that either of those documents be signed under oath and the requirements of the Federal Settlement are specifically limited to those documents required to be signed under oath. (*See* Appellant's Request for Judicial Notice.) As such,

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[8] *Id.* at 1144. Civil penalties are available only in government enforcement actions. (*See* California Business and Professions Code § 17206.)

[9] Respondents objected to Appellant's Request for Judicial Notice of the Federal Settlement and do not waive those objections by addressing Appellant's mistaken interpretation of the Federal Settlement. Rather, they address Appellant's arguments in the event the Request for Judicial Notice is granted.

Appellant's position is without merit and provides no grounds for overturning the Trial Court's ruling.

XI. CONCLUSION

In an attempt to confuse the issues and seek relief from a sound ruling by the Trial Court, Appellant grasps at straws with hypothetical allegations of forgery and reliance on inapplicable case law. However, the facts are in reality very simple: Appellant defaulted on his loan, the default was not cured, and the beneficiary instructed the Trustee to initiate foreclosure proceedings and those proceedings were carried out without procedural irregularity. Appellant cannot in good faith allege anything to the contrary and the Trial Court's decision to sustain Respondent's Demurrer without leave to amend should be affirmed.

Dated: November 26, 2012

ALVARADOSMITH
A Professional Corporation

By: /s/ Mikel A. Glavinovich
Mikel A. Glavinovich

Attorneys for Respondents Bank of America, National Association as successor by merger to "La Salle Bank NA as trustee for WaMu Mortgage Pass-Through Certificates Series 2005-AR17" Trust, JPMorgan Chase Bank, N.A. as successor by merger to Chase Home Finance, LLC, JPMorgan Chase Bank, N.A., and California Reconveyance Company

CERTIFICATE OF BRIEF LENGTH

[California Rules of Court, rule 8.204(c)(1)]

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that the foregoing brief contains 7513 words, as shown by the word count function of the computer program used to prepare the brief.

Dated: November 26, 2012

/s/ Mikel A. Glavinovich
Mikel A. Glavinovich

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is ALVARADOSMITH, 633 W. Fifth Street, Suite 1100, Los Angeles, CA 90071.

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JULIA EVANS

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