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**NOT FOR PUBLICATION**

**UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA  
NORTHERN DIVISION**

In re:	)	Case No. 9:16-bk-10631-PC
DOUGLAS GILLIES,	)	Adversary No. 9:16-ap-01065-PC
	)	Chapter 13
Debtor.	)	
DOUGLAS GILLIES,	)	<b>MEMORANDUM DECISION</b>
	)	Date: September 8, 2016
Plaintiff,	)	Time: 10:00 a.m.
v.	)	Place: United States Bankruptcy Court
JPMORGAN CHASE BANK, N.A.,	)	Courtroom # 201
<u>et al.</u> ,	)	1415 State Street
	)	Santa Barbara, CA 93101
Defendants.	)	

This matter comes before the court on a motion by Defendants, JPMorgan Chase Bank, N.A., et al. (“Chase”) seeking a dismissal of a Complaint Re: 1) Lack of Standing Re: Foreclosure; 2) Quiet Title; and 3) Declaratory and Injunctive Relief (“Complaint”) filed by Plaintiff, Douglas Gillies (“Gillies”) pursuant to F.R.Civ.P. 12(b)(6).<sup>1</sup> Gillies opposes the motion. Appearances were stated on the record. The court, having considered the pleadings and

<sup>1</sup> Unless otherwise indicated, all “Code,” “chapter” and “section” references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330. “Rule” references are to the Federal Rules of Bankruptcy Procedure (“FRBP”), which make applicable certain Federal Rules of Civil Procedure (“F.R.Civ.P.”). “LBR” references are to the Local Bankruptcy Rules of the United States Bankruptcy Court for the Central District of California (“LBR”).

1 arguments of the parties, will recommend to the district court that Chase’s motion be granted and  
2 Gillies’ Complaint be dismissed without leave to amend based upon the following findings of  
3 fact and conclusions of law made pursuant to F.R.Civ.P. 52(a)(1), as incorporated into FRBP  
4 7052 and applied to adversary proceedings in bankruptcy cases.<sup>2</sup>

5 I. STATEMENT OF FACTS

6 On June 15, 2016, Gillies filed the Complaint in this adversary proceeding. The subject  
7 of the litigation is a Fixed/Adjustable Rate Note (“Note”) executed by Gillies in the original  
8 principal sum of \$500,000 and payable to the order of Washington Mutual Bank, FA  
9 (“WMBFA”) dated August 12, 2003, and a Deed of Trust of even date therewith against the real  
10 property and improvements at 3756 Torino Drive, Santa Barbara, CA (“Property”), recorded as  
11 Instrument No. 2003-0116698 in the Official Records, County of Santa Barbara, on August 27,  
12 2003.

13 Gillies’ Complaint seeks damages in excess of \$100,000, a declaratory judgment quieting  
14 title to the Property, and a permanent injunction prohibiting Chase from taking further action to  
15 foreclose on the Property under the Deed of Trust. The substance of Gillies’ Complaint is  
16 contained in his First Claim for Relief entitled “Lack of Standing Re: Foreclosure” in which he  
17 alleges that (1) “[Chase] has no beneficial interest because the loan was sold to a mortgage-  
18 backed securities trust prior to [Chase’s] purchase from WaMu[;] (2) that “[Chase] does not have  
19 standing to enforce the Promissory Note because [Chase] is not the owner of the Note, [Chase] is  
20 not a holder of the Note, and [Chase] is not a beneficiary under the Note[;]” (3) that “[Chase]  
21 does not hold a beneficial interest in [Gillies’] Note, so it cannot authorize Trustee Corps to  
22 conduct a trustee’s sale of [Gillies’] property[;]” and (4) [Chase] “lack[s] standing to foreclose  
23 on the mortgage.”<sup>3</sup> Despite the claim that he has no adequate remedy at law, Gillies also prays  
24 for an award of “[a]ctual damages for depreciation to the Property in excess of \$100,000.00”<sup>4</sup>

25 \_\_\_\_\_  
26 <sup>2</sup> This Memorandum Decision constitutes the bankruptcy court’s proposed findings of fact and  
27 conclusions of law for purposes of 28 U.S.C. § 157(c)(1). This Memorandum Decision will be  
28 transmitted to the United States District Court for entry of a final order or judgment after de novo  
review pursuant to 28 U.S.C. § 157(c)(1).

1 On August 15, 2016, Chase filed its Motion to Dismiss Plaintiff’s Adversary Complaint  
2 (“Motion”) seeking a dismissal of Gillies’ Complaint pursuant to F.R.Civ.P. 12(b)(6) without  
3 leave to amend.<sup>5</sup> Gillies filed his Opposition to Motion To Dismiss Adversary Complaint  
4 (“Opposition”) on August 25, 2016, to which Chase replied on September 1, 2016. After a  
5 hearing on September 8, 2016, the court took the matter under submission.

6 II. DISCUSSION

7 This court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§  
8 157(b) and 1334(b). This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B),  
9 (K) and (O). To the extent that the claims made the basis of Gillies’ Complaint constitute “Stern  
10 claims,”<sup>6</sup> Gillies and Chase do not consent to the entry of a final judgment by the bankruptcy  
11 court. Venue is appropriate in this court. 28 U.S.C. § 1409(a).

12 A. Standard for Dismissal Under Rule 12(b)(6)

13 Rule 12(b)(6) authorizes the court, upon motion of the defendant, to dismiss a complaint  
14 for failure to state a claim upon which relief can be granted.<sup>7</sup> F.R.Civ.P. 12(b)(6). “The purpose  
15 of F.R.Civ.P. 12(b)(6) is to enable defendants to challenge the legal sufficiency of complaints  
16 without subjecting themselves to discovery.” Rutman Wine Co. v. E.&J. Gallo Winery, 829  
17 F.2d 729, 738 (9th Cir. 1987).

18  
19  
20 <sup>3</sup> Complaint, 7:14-26.

21 <sup>4</sup> Id. at 10:18.

22 <sup>5</sup> The court grants JPMorgan Chase Bank N.A.’s Request for Judicial Notice in Support of  
23 Motion to Dismiss Plaintiff’s Adversary Complaint (“Chase’s RJN”), and takes judicial notice of  
24 the documents attached thereto as Exhibits A through U pursuant to Rule 201(c)(1) of the  
Federal Rules of Evidence.

25 <sup>6</sup> “These claims are called ‘Stern claims,’ so named after the Supreme Court’s decision in Stern  
26 v. Marshall, [564 U.S. 462] (2011). Stern claims are claims ‘designated for final adjudication in  
27 the bankruptcy court as a statutory matter, but prohibited from proceeding in that way as a  
constitutional matter.’” Mastro v. Rigby, 764 F.3d 1090, 1093 (9th Cir. 2014) (citation omitted).

28 <sup>7</sup> Rule 12(b)(6) is applicable to adversary proceedings by FRBP 7012(b).

1 Under Rule 8(a), a complaint must contain “a short and plain statement of the claim  
2 showing that the pleader is entitled to relief.”<sup>8</sup> F.R.Civ.P. 8(a)(2). “[T]he pleading standard  
3 Rule 8 announces does not require ‘detailed factual allegations,’ but it demands more than an  
4 unadorned, the-defendant-unlawfully-harmed-me accusation.” Ashcroft v. Iqbal, 556 U.S. 662,  
5 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 554, 555 (2007)). “[A] complaint  
6 must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible  
7 on its face.’” Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 570). “A claim has facial  
8 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable  
9 inference that the defendant is liable for the misconduct alleged.” Iqbal, 556 U.S. at 678  
10 (quoting Twombly, 550 U.S. at 556). “[A] complaint [that] pleads facts that are ‘merely  
11 consistent with’ a defendant’s liability . . . ‘stops short of the line between possibility and  
12 plausibility of entitlement to relief.’” Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 557).  
13 The trial court need not accept as true conclusory allegations in a complaint, or legal  
14 characterizations cast in the form of factual allegations. Twombly, 550 U.S. at 555-56.

15 “[S]tanding is a threshold question” the court must “resolve before proceeding to the  
16 merits.” Los Angeles County Bar Ass’n v. Eu, 979 F.2d 697, 700 (9th Cir. 1992). “Article III  
17 standing requires the plaintiff to establish standing for each challenge he wishes to bring and  
18 each form of relief he seeks.” Sacks v. Office of Foreign Assets Control, 466 F.3d 764, 771 (9th  
19 Cir. 2006). “To survive a Rule 12(b)(6) motion to dismiss, [the plaintiff] must allege facts in his  
20 [Complaint] that, if proven, would confer standing upon him.” Id.

21 A Rule 12(b)(6) dismissal may be based on either the lack of a cognizable legal theory, or  
22 the absence of sufficient facts alleged under a cognizable legal theory. Johnson v. Riverside  
23 Healthcare Sys., 534 F.3d 1116, 1121 (9th Cir. 2008). A claim cannot be plausible when it has  
24 no legal basis.

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27 <sup>8</sup> Rule 8(a) is applicable to adversary proceedings by FRBP 7008(a).

1 B. Court's Inquiry is Not Limited to the Allegations of the Complaint.

2 “In deciding Rule 12(b)(6) motions, courts are not strictly limited to the four corners of  
3 complaints.” Outdoor Cent., Inc. v. GreatLodge.com, Inc., 643 F.3d 1115, 1120 (8th Cir. 2011).  
4 Courts may consider “matters incorporated by reference or integral to the claim, items subject to  
5 judicial notice, matters of public record, orders, items appearing in the record of the case, and  
6 exhibits attached to the complaint whose authenticity is unquestioned; these items may be  
7 considered by the [court] without converting the motion into one for summary judgment.”  
8 Wright & Miller, *Federal Practice and Procedure: Civil 3d* § 1357, at 376 (2004). See, e.g., U.S.  
9 v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003) (“A court may . . . consider certain materials –  
10 documents attached to the complaint, documents incorporated by reference into the complaint, or  
11 matters of judicial notice – without converting the motion to dismiss into a motion for summary  
12 judgment.”); Sears, Roebuck & Co. v. Metropolitan Engravers, Ltd., 245 F.2d 67, 70 (9th Cir.  
13 1956) (“[J]udicial notice may be taken of a fact to show that a complaint does not state a cause of  
14 action.”); Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994) (“[W]e hold that documents  
15 whose contents are alleged in the complaint and whose authenticity no party questions, but  
16 which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6)  
17 motion to dismiss.”), cert. denied, 512 U.S. 1219 (1994); Barapind v. Reno, 72 F.Supp.2d 1132,  
18 1141 (E.D. Cal. 1999) (“Matters of public record may be considered, including pleadings, orders,  
19 and other papers filed with the court or records of administrative bodies.”); Roe v. Unocal Corp.,  
20 70 F.Supp.2d 1073, 1075 (C.D. Cal. 1999) (“[E]ven if a document is neither submitted with the  
21 complaint nor explicitly referred to in the complaint, the . . . court may consider the document in  
22 ruling on a motion to dismiss so long as the complaint necessarily relies on the document and the  
23 document’s authenticity is not contested.”).

24 C. Claim Preclusion

25 “Claim preclusion, often referred to as res judicata, bars any subsequent suit on claims  
26 that were raised or could have been raised in a prior action.” Cell Therapeutics, Inc. v. Lash  
27 Group, Inc., 586 F.3d 1204, 1212 (9th Cir. 2009). Claim preclusion requires a showing of the  
28

1 following three elements: (1) identity of claims; (2) a final judgment on the merits; and (3)  
2 identity or privity between the parties. Id. at 1212. “Newly articulated claims based on the same  
3 nucleus of facts may still be subject to a res judicata finding if the claims could have been  
4 brought in the earlier action.” Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg. Planning  
5 Agency, 322 F.3d 1064, 1078 (9th Cir. 2003).

6 D. Gillies’ First Claim for Relief Must be Dismissed for Failure to State a Claim Upon Which  
7 Relief Can be Granted.

8 With respect to Gillies’ First Claim for Relief, the court notes that “[a] lender or  
9 foreclosure trustee may only be liable to the mortgagor or trustor for wrongful foreclosure if the  
10 property was fraudulently or illegally sold under a power of sale contained in a mortgage or deed  
11 of trust.” Rosenfeld v. JPMorgan Chase Bank, N.A., 732 F.Supp.2d 952, 961 (N.D. Cal. 2010).  
12 Because it is undisputed that a no foreclosure sale of the Property has occurred, the court finds  
13 any cause of action against Chase for wrongful foreclosure is premature. Id. See Kan v. Guild  
14 Mortg. Co., 230 Cal.App.4th 736, 750 (“[A]llowing a plaintiff to assert a preemptive action . . .  
15 ‘would result in the impermissible interjection of the courts into a nonjudicial foreclosure  
16 scheme enacted by the California Legislature.’”).

17 Gillies does not cite to a statute, common law rule, or other authority providing for a  
18 claim for “lack of standing re foreclosure.” “[T]here is no cause of action for ‘wrongful  
19 threatened foreclosure.’” Santos v. Countrywide Home Loans, 2009 WL 3756337, \*3 (E.D. Cal.  
20 2009). “[T]he overwhelming majority of states like California who provide for nonjudicial  
21 foreclosure, do not recognize such a cause of action.” Id. To the extent Gillies’ First Claim for  
22 Relief entitled “Lack of Standing Re Foreclosure” is predicated on the assertion that Chase does  
23 not have standing to enforce the Note because Chase is not the owner of the Note, the holder of  
24 the Note, or a beneficiary under the Note and Deed of Trust, Gillies’ claim is barred by res  
25 judicata.

26 1. Case No. 1340786 (“Gillies I”)

27 On August 13, 2009, California Reconveyance Company, as Trustee (“CRC”) recorded a  
28 notice of a default in the payments to Chase under the Note and Chase’s election to sell the

1 Property under the Deed of Trust.<sup>9</sup> On November 18, 2009, CRC recorded a Notice of Trustee's  
2 Sale which set a foreclosure sale of the Property under the Deed of Trust on December 7, 2009.<sup>10</sup>  
3 On November 25, 2009, Gillies filed a complaint in Case No. 1340786, Gillies v. California  
4 Reconveyance Co, et al., in the Superior Court of California, County of Santa Barbara, seeking  
5 to stop the foreclosure sale. In his first amended complaint, Gillies alleged, in pertinent part,  
6 that:

7 22. An actual controversy has arisen and now exists between plaintiff and  
8 defendants concerning their respective rights and duties. Plaintiff contends that  
9 defendants are not authorized to publish, post, serve, or record a Notice of  
10 Trustee's Sale under § 2923.52 any sooner than March 7, 2010 – three months  
11 plus 90 days after recording the Notice of Default – on the grounds that  
12 defendants have posted a Notice of Trustee's Sale that fails to comply with Civ.  
13 Code § 2923.52, 2923.54, and 2924, whereas defendants assert that they were  
14 entitled to sell the residence on December 7, 2009. A judicial declaration is  
15 necessary and appropriate at this time in order that the parties may ascertain their  
16 rights and duties under the note and trust deed. . . .

17 25. Plaintiff is informed and believes and on such information and belief alleges  
18 that Defendants CRC and Chase claim an interest adverse to plaintiff in the  
19 residence as assignees, beneficiaries or holders of the [Note] and Deed of Trust . .  
20 . . Some of the defendants claim interests in the property adverse to plaintiff as  
21 assignees and successors of Washington Mutual Bank.<sup>11</sup>

22 Gillies sought a declaratory judgment quieting title against the claims of CRC and Chase,  
23 damages in excess of \$100,000, and a permanent injunction prohibiting CRC and Chase from  
24 taking further action to foreclose on the Property under the Deed of Trust. CRC and Chase filed  
25 a demurrer to the first amended complaint, which was sustained by the trial court without leave  
26 to amend. Gillies appealed and the California Court of Appeals affirmed, stating:

27 Gillies argues . . . that Chase is not the mortgagee. He points out that Washington  
28 Mutual Bank is named beneficiary of the trust deed.

Here the trial court took judicial notice of the purchase and assumption agreement  
between the Federal Deposit Insurance Corporation (FDIC) as receiver for

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<sup>9</sup> Chase's RJN, Exhibit A.

<sup>10</sup> Id. at Exhibit B.

<sup>11</sup> Id. at Exhibit H, 5:2-10; 6:10-15.

1 Washington Mutual Bank and Chase. The agreement provides that Chase  
2 purchases “all right, title and interest of the Receiver in and to all assets” of  
3 Washington Mutual Bank. The agreement also states that Chase “specifically  
4 purchases all mortgage servicing rights and obligations of [Washington Mutual  
5 Bank].” The agreement is maintained on the FDIC’s official government website,  
6 and is not reasonably subject to dispute. Thus it contains facts that may be  
7 judicially noticed. . . .

8 There is simply no reasonable dispute that Chase is Washington Mutual Bank’s  
9 successor-in-interest as to Gillies’s trust deed. The trial court properly sustained  
10 Chase’s demurrer to the fifth cause of action.<sup>12</sup>

11 2. Case No. 1381828 (“Gillies II”)

12 On June 30, 2011, CRC recorded a second Notice of Trustee’s Sale which set a  
13 foreclosure sale of the Property under the Deed of Trust on July 25, 2011.<sup>13</sup> On July 13, 2011,  
14 Gillies filed a complaint in Case No. 1381828, Gillies v. California Reconveyance Co., et al., in  
15 the Superior Court of California, County of Santa Barbara, seeking to stop the foreclosure sale.  
16 In his complaint, Gillies alleged that the notice of default violated California Civil Code §  
17 2923.5, and that the “Douglas Gillies” named in the notice of default and notice of sale was a  
18 fictitious person. Gillies further alleged that:

19 An actual controversy has arisen and now exists between Plaintiff and Defendants  
20 concerning their respective rights and duties. Plaintiff contends that Defendants  
21 are not authorized to publish, post, serve, or record a Notice of Trustee’s Sale and  
22 are not entitled to sell the Property on the grounds that CRC is not a Trustee,  
23 Washington Mutual is not a Beneficiary of Record, and no Notice of Trustee’s  
24 Sale has been recorded stating the name of the owner of the Property . . . .<sup>14</sup>

25 Gillies’ complaint was stricken by the trial court on the motion of CRC. The California  
26 Court of Appeals affirmed the trial court’s ruling, stating:

27 This is the second action brought by Douglas Gillies in an attempt to prevent  
28 foreclosure of a trust deed on his home. The trial court concluded the present  
action is barred by the doctrine of res judicata. We affirm.<sup>15</sup>

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<sup>12</sup> Id. at Exhibit I, at 6.

<sup>13</sup> Id. at Exhibit C.

<sup>14</sup> Id. at Exhibit J, 4:20-25.

<sup>15</sup> Id. at Exhibit K, 1.

1  
2 In response to Gillies’ argument that the second action raised new and independent claims  
3 against CRC and Chase, the Court of Appeals stated that:

4 [R]es judicata bars re-litigation of not only claims that were determined in the  
5 prior action, but claims that could have been raised in the prior action. Here, there  
6 is no reason why Gillies could not have raised the new issues in Gillies I.<sup>16</sup>

7 3. Case No. CV12-10394-GW (MANx) (“Gillies III”)

8 On November 8, 2012, CRC recorded a third Notice of Trustee’s Sale which set a  
9 foreclosure sale of the Property under the Deed of Trust on December 12, 2012.<sup>17</sup> On December  
10 5, 2012, Gillies filed a Complaint Re: 1) Wrongful Foreclosure; 2) Quiet Title; and 3)  
11 Declaratory and Injunctive Relief in Case No. CV12-10394-GW (MANx), Gillies v. JP Morgan  
12 Chase Bank N.A., et.al., in the United States District Court for the Central District of California,  
13 seeking to stop the foreclosure sale. In his complaint, Gillies alleged, in pertinent part, that  
14 “[n]either WaMu, CRC nor Chase has recorded a transfer of beneficial interest in Plaintiff’s Note  
15 to Chase” and therefore, “Chase does not have standing to enforce the Note because Chase is not  
16 the owner of the Note, Chase is not the holder of the Note, and Chase is not a beneficiary under  
17 the Note.”<sup>18</sup> Gillies sought damages of \$100,000, a declaratory judgment quieting title to the  
18 Property, and a permanent injunction preventing Chase from taking further action to foreclose on  
19 the Property under the Deed of Trust. Gillies attached the Note to the complaint as Exhibit 6.

20 On February 7, 2013, the district court granted Chase’s motion to dismiss Gillies’  
21 complaint without leave to amend and dismissed the complaint with prejudice. In its ruling, the  
22 district court stated:

23 [T]he harm alleged to have been suffered in the state actions is the same as that  
24 alleged here, namely the loss of Plaintiff’s home due to foreclosure, and related  
25 economic injuries. . . .

26 <sup>16</sup> Id. at Exhibit K, 3-4 (citation omitted).

27 <sup>17</sup> Id. at Exhibit D.

28 <sup>18</sup> Id. at Exhibit L, 6:7-11.

1 [E]ven were Plaintiff to be correct that the case at bar raises new arguments and  
2 facts to support his claims that Defendant wrongfully foreclosed on the Property  
3 and to quiet title thereof, “a judgment for the defendant is a bar to a subsequent  
4 action by the plaintiff based on the same injury to the same right, even though [the  
5 plaintiff] presents a different legal ground for relief.”<sup>19</sup>

6 Gillies appealed and the district court’s dismissal order was affirmed by the Ninth Circuit Court  
7 of Appeals on March 3, 2016.<sup>20</sup>

8 4. Case No. 15 CV 04560 (“Gillies IV”)

9 On November 16, 2015, MTC Financial, d/b/a Trustee Corps, as Trustee, recorded a  
10 Notice of Trustee’s Sale setting a foreclosure sale of the Property under the Deed of Trust for  
11 December 30, 2015.<sup>21</sup> Gillies responded by filing a Complaint for California HBOR Violations,  
12 Lack of Standing to Foreclose, Injunctive Relief to Enjoin Illegal Foreclosure, Damages and  
13 Attorneys’ Fees in Case No. 15 CV 04560, Gillies v. MTC Financial Inc. dba Trustee Corps, et  
14 al., in the Superior Court of California, County of Santa Barbara, on December 18, 2015.<sup>22</sup> In  
15 his Second Cause of Action entitled “Lack of Standing; Wrongful Foreclosure,” Gilles alleged:

16 20. Cal. Civ. Code § 2924(a)(6) restricts the authority to foreclose to the  
17 beneficiary under the [Deed of Trust], the original or properly substituted trustee,  
18 or a designated agent of the beneficiary. A sale is void where the foreclosing  
19 entity lacked authority to foreclose. The Substitution of Trustee recorded on  
20 October 15, 2015, identifies JPMorgan as the current beneficiary.

21 21. In response to plaintiff’s Qualified Written Request, JPMorgan delivered to  
22 plaintiff in August 2015 one copy of plaintiff’s [Note]. JPMorgan cannot produce  
23 the original Note because JPMorgan does not own the loan and cannot identify  
24 the owner of the loan. Plaintiff’s loan was not identified as an asset in the  
25 Purchase and Assumption Agreement under which JPMorgan purchased certain  
26 assets of WaMu in September 2008.

27 22. JPMorgan claims to hold a beneficial interest in plaintiff’s property as a result  
28 of its assumption of “certain” unnamed assets of WaMu in September 2008, but  
WaMu did not hold a beneficial interest in plaintiff’s property in 2008.

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<sup>19</sup> Id. at Exhibit M, 3.

<sup>20</sup> Id. at Exhibit N.

<sup>21</sup> Id. at Exhibit G.

<sup>22</sup> Id. at Exhibit S.

1 23. The Note bears a blank endorsement on the back of the final page signed by  
2 Jess Almanza, AVP. . . .

3 24. WaMu had no reason to direct an Assistant Vice President to sign the blank  
4 endorsement of plaintiff's Note unless a sale of the Note was imminent.  
5 Therefore, plaintiff's Note and Deed of Trust were almost certainly sold to a third  
6 party before the Purchase & Assumption Agreement transferred "certain" of  
7 WaMu's assets to JPMorgan in September 20008. WaMu was not a beneficiary  
8 or mortgagee when JPMorgan purchased WaMu's assets and JPMorgan was not  
9 the beneficiary under plaintiff's Note when it attempted to assign the [Deed of  
10 Trust] to AVP and instructed AVP to file a Notice of Trustee's Sale. . . .

11 29. JPMorgan had no beneficial interest in the Deed of Trust when it instructed  
12 Trustee Corps to record the Notice of Trustee's Sale on November 16, 2015.  
13 JPMorgan did not have standing to enforce the [Note] because JPMorgan was not  
14 the owner of the Note, JPMorgan was not a holder of the Note, and JPMorgan  
15 was not a beneficiary under the Note. . . . [D]efendants lack standing to foreclose  
16 on the mortgage.<sup>23</sup>

17 On March 23, 2016, the trial court sustained Chase's demurrer to Gillies' complaint without  
18 leave to amend, stating that Chase has standing to foreclose and that "Gillies' Lack of Standing,  
19 Wrongful Foreclosure, Illegal Substitution of Trustee, Fraud, and Injunction causes of action also  
20 fail because they are barred by res judicata and other incurable deficiencies."<sup>24</sup> Gillies' appeal of  
21 the order is pending before the California Court of Appeals. Gillies' filed the Complaint in this  
22 adversary proceeding initiating "Gillies V" during the pendency of such appeal.

23 5. Identity of the Parties

24 Gillies was the plaintiff and Chase was a defendant in Gillies I, Gillies II, Gillies III, and  
25 Gillies IV. Gillies and Chase are the parties to this action – Gillies V. Chase is asserting res  
26 judicata against Gillies, who is the plaintiff in this case and was the plaintiff in each of the prior  
27 proceedings. There is an identity of parties sufficient to apply res judicata.

28 6. Prior Proceedings Resulting in a Final Judgment on the Merits

“[A] judgment on a general demurrer will have the effect of a barring a new action in  
which the complaint states the same facts which were held not to constitute a cause of action on

<sup>23</sup> Id. at Exhibit S, 6:22-7:27; 9:9-18.

<sup>24</sup> Id. at Exhibit T, 3.

1 the former demurrer or, notwithstanding differences in the facts alleged, when the ground on  
2 which the demurrer in the former action was sustained is equally applicable to the second one.”  
3 McKinney v. County of Santa Clara, 110 Cal.App.3d 787, 794 (1980). Similarly, a dismissal  
4 under Rule 12(b)(6) constitutes a final adjudication on the merits for the purposes of res judicata.  
5 Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 399 n. 3 (1981). In Gillies I and Gillies II,  
6 the state court sustained a demurrer to Gillies’ complaint without leave to amend. In Gillies III,  
7 the district court dismissed Gillies’ complaint under Rule 12(b)(6) without leave to amend. Each  
8 of the orders are final and constitute a final judgment on the merits entitled to res judicata.

9 7. Identity of Claims

10 To determine whether there is an identity of claims, the court considers the following  
11 factors: “(1) whether the two suits arise out of the same transactional nucleus of facts; (2)  
12 whether rights or interests established in the prior judgment would be destroyed or impaired by  
13 prosecution of the second action; (3) whether the two suits involve infringement of the same  
14 right; and (4) whether substantially the same evidence is presented in the two actions.”  
15 ProShipLine Inc. v. Aspen Infrastructures Ltd., 609 F.3d 960, 968 (9th Cir. 2010) (emphasis in  
16 original).

17 In his First Claim for Relief in this adversary proceeding, Gillies claims that (1) Chase  
18 has no beneficial interest in the Note or Deed of Trust because the loan was sold to a mortgage-  
19 backed securities trust prior to Chase’s purchase from WaMu; (2) that Chase does not have  
20 standing to enforce the Note because Chase is not the owner or holder of the Note, and is not a  
21 beneficiary under the Note; and (3) that Chase lacks standing to authorize a foreclosure on the  
22 Property under the Deed of Trust. Gillies made substantially identical claims in Gillies I, Gillies  
23 II, Gillies III, and Gillies IV. In Gillies I, Gillies challenged Chase’s right to foreclose on the  
24 Property under the Deed of Trust as an assignee or successor of Washington Mutual Bank. The  
25 California Court of Appeals affirmed the trial court’s order sustaining Chase’s demurrer in  
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1 Gillies I, stating “[t]here is simply no reasonable dispute that Chase is Washington Mutual  
2 Bank’s successor-in-interest as to Gillies’ trust deed.”<sup>25</sup>

3 Gillies I, Gillies II, Gillies III, Gillies IV and Gillies V each arise out of the same  
4 transactional nucleus of facts. The claims in each case are based on the Note and Deed of Trust  
5 secured by the Property. The issues in Gillies’ five complaints are the same, regardless of the  
6 theory and title Gillies attaches to the various causes of action. In Gillies I, Gillies II and Gillies  
7 III, Gillies challenged Chase’s standing to enforce the Note and Deed of Trust, alleging that  
8 Chase was not the owner or holder of the Note nor a beneficiary under the Note and Deed of  
9 Trust.<sup>26</sup> The claims made the basis of Gillies’ First Claim for Relief in this adversary proceeding  
10 were fully and finally adjudicated in Gillies I and thus barred, as determined by the state court in  
11 Gillies II and Gillies IV and the federal district court in Gillies III. Also barred are newly  
12 articulated claims based on the same nucleus of facts if they could have been brought in the  
13 earlier action. See Tahoe Sierra Preservation Council, 322 F.3d at 1078. Chase’s rights and  
14 interests under the Note and Deed of Trust were adjudicated by a final judgment in Gillies I,  
15 Gillies II, and Gillies III. Chase’s rights would be impaired or destroyed by prosecution of the  
16 Complaint in this adversary proceeding -- Gillies V.

17 For the reasons stated, Gillies First Claim for Relief must be dismissed as barred by res  
18 judicata.

19 E. Gillies’ Second Claim for Relief Must be Dismissed for Failure to State a Claim Upon  
20 Which Relief Can be Granted.

21 To state a cause of action to quiet title under California law, a plaintiff must allege:

22 a. A description of the property that is the subject of the action. . . . In the case  
23 of real property, the description shall include both its legal description and its  
24 street address or common designation, if any.

25  
26 <sup>25</sup> See footnote # 12, infra.

27 <sup>26</sup> Indeed, the language of Gillies’ Second Cause of Action in Gillies IV is nearly identical to the  
28 allegations in his First Claim for Relief in this adversary proceeding.

- 1 b. The title of the plaintiff as to which a determination under this chapter is  
2 sought and the basis of the title. . . .
- 3 c. The adverse claims to the title of the plaintiff against which a determination is  
4 sought.
- 5 d. The date as of which the determination is sought. If the determination is  
6 sought as of a date other than the date the complaint is filed, the complaint shall  
7 include a statement of the reasons why a determination as of that date is sought.
- 8 e. A prayer for the determination of the title of the plaintiff against the adverse  
9 claims.

9 Cal. Civ. Proc. Code § 761.020. “Quieting title is the relief granted once the court determines  
10 that title belongs to the plaintiff.” Leeper v. Beltrami, 53 Cal.2d 195, 216 (1959). The  
11 plausibility of Gillies’ quiet title claim hinges on the viability of his allegation that Chase does  
12 not have standing to enforce the Note and lacks authority to foreclose on the Property under the  
13 Deed of Trust. The court has determined that Gillies’ First Claim for Relief is barred by res  
14 judicata. Furthermore, “a borrower may not assert ‘quiet title’ against a mortgagee without first  
15 paying the outstanding debt on the property.” Rosenfeld v. JPMorgan Chase Bank, N.A., 732  
16 F.Supp.2d 952, 975 (N.D. Cal. 2010). It is undisputed that Gillies has not paid the Note secured  
17 by the Deed of Trust. Accordingly, Gillies’ Second Claim for Relief must be dismissed without  
18 leave to amend.

19 F. Gillies’ Third Claim for Relief Must be Dismissed for Failure to State a Claim Upon  
20 Which Relief Can be Granted.

21 Gillies’ third claim seeks declaratory and injunctive relief. Gillies requests “a judicial  
22 determination of his rights and duties as to the validity of the Note and [Deed of Trust], and  
23 [Chase’s] right to proceed with nonjudicial foreclosure on the Property.”<sup>27</sup> “A declaratory  
24 judgment is not a theory of recovery.” Commercial Union Ins. Co. v. Walbrook Ins. Co., Ltd.,  
25 41 F.3d 764, 775 (1st Cir. 1994). “[W]here a plaintiff has alleged a substantive cause of action, a  
26 declaratory relief claim should not be used as a superfluous ‘second cause of action for the  
27 determination of identical issues’ subsumed within the first.” Jensen Quality Loan Serv. Corp.,

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28 <sup>27</sup> Complaint, 9:17-19.

1 702 F.Supp.2d 1183, 1189 (E.D. Cal. 2010) (citation omitted). Gillies' Third Claim for Relief  
2 for declaratory judgment is entirely duplicative of his quiet title claim. Having determined that  
3 his First Claim for Relief and quiet title claim should be dismissed, the court must dismiss  
4 Gillies' claim for declaratory relief as redundant.

5 Similarly, Gillies' Third Claim for Relief to the extent that it seeks injunctive relief must  
6 be dismissed. "Injunctive relief is a remedy and not, in itself a cause of action." McDowell v.  
7 Watson, 59 Cal.App.4th 1155, 1159 (1997); see Rosenfeld, 732 F.Supp.2d at 975 ("[D]eclaratory  
8 and injunctive relief are not causes of action; rather, they are remedies."); Santos v. Countrywide  
9 Home Loans, 2009 WL 3756337, \*5 (E.D. Cal. 2009) ("Declaratory and injunctive relief are not  
10 independent claims, rather they are forms of relief."). A pleading can "request injunctive relief  
11 in connection with a substantive claim, but a separately pled claim or cause of action for  
12 injunctive relief is inappropriate." Jensen v. Quality Loan Serv. Corp., 702 F. Supp. 2d 1183,  
13 1201 (E.D. Cal. 2010). Therefore, Gillies' Third Claim for Relief must be dismissed.

14 G. Leave to Amend Will Be Denied.

15 Rule 15(a)(2) of the Federal Rules of Civil Procedure states that "[t]he court should freely  
16 give leave [to amend] when justice so requires." F.R.Civ.P. 15(a)(2).<sup>28</sup> If a complaint lacks  
17 facial plausibility, a court must grant leave to amend unless it is clear that the complaint's  
18 deficiencies cannot be cured by amendment. See, e.g., Steckman v. Hart Brewing, Inc., 143 F.3d  
19 1293, 1298 (9th Cir. 1998) ("Although there is a general rule that parties are allowed to amend  
20 their pleadings, it does not extend to cases in which any amendment would be an exercise in  
21 futility."); Rutman Wine, 829 F.2d at 738 ("Denial of leave to amend is not an abuse of  
22 discretion where the pleadings before the court demonstrate that further amendment would be  
23 futile.").

24 Gillies' First Claim for Relief is barred by res judicata and must be dismissed without  
25 leave to amend. Since the Second and Third Claims for Relief are essentially remedies sought  
26 by Gillies in conjunction with his First Claim for Relief, Gillies' Second and Third Claims for  
27 Relief must be dismissed without leave to amend as well.

28 <sup>28</sup> Rule 15(a)(2) is applicable to adversary proceedings by virtue of FRBP 7015.

1 CONCLUSION

2 In sum, Chase's motion must be granted pursuant to F.R.Civ.P. 12(b)(6) for failure to  
3 state a claim upon which relief can be granted. Gillies' Complaint fails to state a claim upon  
4 which relief can be granted with respect to his First, Second and Third Claims for Relief.  
5 Because it is clear that the Complaint's deficiencies as to each of the claims cannot be cured by  
6 amendment, the claims made the basis of Gillies' Complaint must be dismissed without leave to  
7 amend. The status conference in this adversary proceeding, which was continued at the hearing  
8 to 10:00 a.m. on November 10, 2016, is taken off calendar.

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24 Date: September 15, 2016



25 Peter H. Carroll  
26 United States Bankruptcy Judge  
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