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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**LEE JENSEN,**

**Plaintiff and Appellant,**

**v.**

**GREENPOINT MORTGAGE  
FUNDING INC. et al.,**

**Defendants and Respondents.**

**A133448**

**(Contra Costa County  
Super. Ct. No. C10-02675)**

Plaintiff Lee Jensen sued his mortgage lender and other entities,<sup>1</sup> alleging improprieties in connection with a 2005 loan to finance Jensen’s purchase of real property and a 2010 nonjudicial foreclosure sale of the property. The trial court sustained defendants’ demurrers to Jensen’s first amended complaint (FAC), without leave to amend, and dismissed the action. On appeal, Jensen principally contends the trial court should have permitted him to amend to assert causes of action based on his allegation that

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<sup>1</sup> Responding defendants are: Greenpoint Mortgage Funding, Inc. (Greenpoint); Mortgage Electronic Registration Systems, Inc. (MERS); America’s Servicing Company (ASC); Wells Fargo Bank, N.A., erroneously sued as Wells Fargo Mortgage, Inc. (Wells Fargo); Bank of New York Mellon, formerly known as The Bank of New York, as successor in interest to JP Morgan Chase Bank N.A., as Trustee for Structured Asset Mortgage Investments II Inc. Bear Stearns Alt-A Trust 2005-7 (Bank of New York); and, NDeX West, LLC (NDeX).

the signature on the underlying 2005 deed of trust encumbering the property is not his signature and is forged. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

### *Facts*<sup>2</sup>

In January 2005, Jensen purchased property at 15 Harbor View Drive in Richmond, California. In the FAC, Jensen alleges he “financed the [property] on or about January 3, 2005 through [Greenpoint] by virtue of a Trust Deed and Notes securing the Loan (See Exhibit ‘A’).” Exhibit A to the FAC is a deed of trust dated January 3, 2005, which encumbers the property; the deed of trust states that it secures a loan to Jensen for \$575,200.

The deed of trust states that Marin Conveyancing Corp. is the trustee; MERS is the beneficiary and is “nominee” for lender Greenpoint. The deed of trust specifies that Jensen conveys the property to the trustee “in trust, with power of sale.” The signature line for the borrower on the deed of trust has Jensen’s name printed under it, and a signature above it. A notary’s certification on the following page states that Jensen acknowledged signing the document.

In February 2009, NDeX, as agent for MERS, recorded a notice of default and election to sell under the deed of trust. The notice of default stated that Jensen was \$19,132.48 in arrears in payments on the loan. The notice of default was accompanied by a declaration under Civil Code section 2923.5 by ASC.

Effective March 20, 2009, MERS assigned all beneficial interest in the deed of trust to Bank of New York. The assignment was recorded on March 31, 2009.<sup>3</sup> On March 26, 2009, defendant Wells Fargo, as attorney-in-fact for Bank of New York,

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<sup>2</sup> This factual summary is based on the allegations in the FAC, the exhibits attached to the FAC, and documents judicially noticed by the trial court. Jensen did not include most of these documents in the record on appeal. On May 14, 2012, we granted defendants’ motion to augment the appellate record to include the FAC, the original complaint, and defendants’ demurrers and related documents.

<sup>3</sup> A similar assignment from MERS to Bank of New York, dated January 11, 2010, was recorded on March 4, 2010.

recorded a substitution of trustee designating NDeX as trustee under the deed of trust. In May 2009, NDeX recorded a notice of trustee's sale stating Jensen was in default under the 2005 deed of trust, and stating an intent to sell the property at a public auction on June 16, 2009.

In December 2009, before the property was sold, Jensen filed a petition seeking protection from creditors under Chapter 13 of the Bankruptcy Code. On March 2, 2010, Bank of New York filed a motion for relief from the automatic stay.<sup>4</sup> The bankruptcy court granted the motion on April 11, 2010.

The property was sold on April 26, 2010, to Bank of New York. NDeX recorded a trustee's deed upon sale, conveying the property to the "foreclosing beneficiary," Bank of New York.

### *Proceedings*

Jensen filed his original complaint in September 2010, and the FAC in December 2010. The FAC names as defendants Greenpoint, MERS, NDeX, ASC, Bank of New York, and Wells Fargo (collectively, defendants).<sup>5</sup> As we discuss further in part II. below, the FAC challenges various aspects of the foreclosure process and other alleged conduct by defendants.

Defendants demurred to the FAC.<sup>6</sup> Bank of New York also filed a motion to expunge a notice of pendency of action filed by Jensen. After hearing argument on

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<sup>4</sup> In their appellate briefs, the parties state that Bank of New York filed in the bankruptcy court a proof of claim and copies of the deed of trust and note for the property. Jensen asserts that the signatures on the note and deed of trust were forged.

<sup>5</sup> The FAC also names Capital One, N.A. (Capital One), as a defendant, and alleges Capital One is a successor in interest to Greenpoint. Capital One apparently did not appear in the trial court and is not a party to this appeal.

<sup>6</sup> Two law firms, representing overlapping groups of defendants, filed separate demurrers. The Severson & Werson law firm filed a demurrer on behalf of Greenpoint, MERS, ASC, and Wells Fargo (collectively, the Greenpoint defendants). The law firm of Barrett Daffin Frappier Treder & Weiss, LLP, filed a demurrer on behalf of MERS, NDeX, Wells Fargo, ASC, and Bank of New York (collectively, the Bank of New York defendants).

August 10, 2011, the trial court adopted its tentative rulings sustaining both demurrers without leave to amend and granting the motion to expunge. On August 24, 2011, the court entered a judgment addressing the demurrer filed by the Bank of New York defendants. The judgment specified that the demurrer was sustained without leave to amend, the action was dismissed with prejudice, and judgment was in favor of defendants. The court also entered a written order granting Bank of New York's motion to expunge. On September 6, 2011, the court entered a separate order (September 6 order) sustaining the Greenpoint defendants' demurrer without leave to amend.<sup>7</sup> Jensen filed a timely notice of appeal.<sup>8</sup>

## DISCUSSION

### I. *Standard of Review*

In reviewing whether the trial court erred in sustaining defendants' demurrers without leave to amend, we review the FAC de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory. (*McCall v. PacificCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) “ “We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.” [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its

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In this court, the Barrett firm represents NDeX; the Severson firm represents the remaining defendants. NDeX joined in the appellate brief filed by the other defendants.

<sup>7</sup> No separate dismissal order or judgment was filed as to the Greenpoint defendants. However, the September 6 order stated: “The action is dismissed as to these Defendants with Judgment for Defendants.” We construe the September 6 order as a dismissal order. (See *Hudis v. Crawford* (2005) 125 Cal.App.4th 1586, 1590, fn. 4 [order sustained demurrer without leave to amend and stated case was dismissed; appellate court construed order as appealable dismissal order].) Because this dismissal order was signed by the court and filed in the action, it is an appealable judgment. (Code Civ. Proc., § 581d; *Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 565, fn. 4 [written dismissal order following sustaining of demurrer was appealable judgment]; *Etheridge v. Reins Internat. California, Inc.* (2009) 172 Cal.App.4th 908, 913 [same].)

<sup>8</sup> We construe Jensen's notice of appeal as challenging the judgments dismissing the action as to both the Bank of New York defendants and the Greenpoint defendants.

parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.’ [Citations.]” (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126 (*Zelig*).)

“ ‘Where written documents are the foundation of an action and are attached to the complaint and incorporated therein by reference, they become a part of the complaint and may be considered on demurrer.’ [Citation.]” (*Qualcomm, Inc. v. Certain Underwriters at Lloyd’s, London* (2008) 161 Cal.App.4th 184, 191.) To the extent a plaintiff’s factual allegations conflict with the content of exhibits to the complaint, “we rely on and accept as true the contents of the exhibits and treat as surplusage the pleader’s allegations as to the legal effect of the exhibits.” (*Barnett v. Fireman’s Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505.)

“[W]e will affirm a ‘trial court’s decision to sustain a demurrer [if it] was correct on any theory. [Citation.]’ [Citation.] Accordingly, ‘we do not review the validity of the trial court’s reasoning but only the propriety of the ruling itself. [Citations.]’ [Citation.]” (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034-1035.) “Because a demurrer raises only questions of law, ‘ ‘an appellant challenging the sustaining of a general demurrer may change his or her theory on appeal [citation], and an appellate court can affirm or reverse the ruling on new grounds. [Citation.]’ ’ ” (*Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1022.)

## II. *The Ruling Sustaining the Demurrer*

The FAC asserts 11 causes of action: (1) violation of Civil Code section 2923.6 (relating to loan modifications); (2) unfair business practices in violation of Business and Professions Code section 17200; (3) injunctive relief; (4) misrepresentation/nondisclosure in violation of Civil Code section 1572; (5) fraud; (6) declaratory relief; (7) intentional

misrepresentation; (8) wrongful foreclosure based on violations of Civil Code sections 2923.5 and 2924; (9) slander of title; (10) intentional infliction of emotional distress; and (11) quiet title.

The first 10 causes of action are not based on the alleged forgery of Jensen's signature on the underlying deed of trust; they rely on other alleged conduct. For example, these causes of action allege defendants made misrepresentations and failed to disclose information in connection with the 2005 loan, the loan contract was unconscionable, and defendants are obligated to modify the loan. These causes of action also focus on defendants' standing and the foreclosure process, alleging that MERS was not a proper beneficiary, the assignments after the 2005 loan were invalid, the notice of default was defective, defendants lacked standing to foreclose because they did not hold the original note, and the foreclosure sale did not comply with statutory requirements.

The final cause of action in the FAC, the quiet title claim, appears to be based primarily on Jensen's assertion that defendants do not hold the original note; it states that, because defendants "ha[ve] yet to produce the original note," they have no interest in the property. After stating this conclusion, the quiet title cause of action includes the following one-sentence allegation: "[Jensen] further alleges that his signature on the Deed and other related documents is not his and [is] the result of a blatant forgery orchestrated by the Defendants." The FAC does not elaborate on this point—it provides no specific factual allegations supporting the assertion that defendants committed forgery and does not explain why this allegation entitles Jensen to relief.<sup>9</sup>

The trial court ruled that some of the causes of action in the FAC were barred by applicable statutes of limitations, and that others were not viable for other reasons. As to the quiet title cause of action, the court ruled that (1) the FAC did not comply with Code

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<sup>9</sup> The general allegations section of the FAC includes the allegation that "[Jensen] never signed the purported Deed of Trust!! The signature on the Deed of Trust (Exhibit A) is not that of [Jensen]." This portion of the FAC also does not elaborate on this allegation or explain why it entitles Jensen to relief. On appeal, Jensen agrees that the FAC, drafted by his former attorney, did not elaborate on this issue and did not assert causes of action based specifically on the alleged forgery.

of Civil Procedure section 761.020, which requires that complaints seeking to quiet title be verified, and (2) Jensen could not quiet title because he had not discharged his debt.

In his appellate briefs, Jensen does not contend the trial court's ruling sustaining the demurrer as to the causes of action in the FAC was erroneous,<sup>10</sup> and he does not argue that the factual and legal theories underlying those claims (such as the allegations of defects in the assignments or the foreclosure process) are viable.<sup>11</sup> He focuses instead on arguing that the trial court should have granted him leave to amend to state new causes of action focusing specifically on the alleged forgery. Jensen thus has forfeited any challenge to the trial court's ruling sustaining the demurrer as to the causes of action in the FAC. (See *State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610 [trial court's judgment is presumed to be correct, and appellant has burden to overcome presumption by demonstrating reversible error].) We next consider Jensen's challenge to the trial court's denial of his request to amend his complaint.

### III. *The Denial of Leave to Amend*

Jensen argues the trial court should have permitted him to file a second amended complaint to assert causes of action based on the alleged forgery of his signature on the 2005 deed of trust and promissory note. If permitted to amend, he would seek to recover monetary damages, set aside the foreclosure sale, and obtain a reconveyance of the property or quiet title to the property.

The plaintiff, not the court, has the burden to show in what manner he or she can amend the complaint, and how that amendment will change the legal effect of the pleading. (*Medina v. Safe-Guard Products, Internat., Inc.* (2008) 164 Cal.App.4th 105,

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<sup>10</sup> Jensen does contend the trial court erred in holding the statutes of limitations barred his claims. But Jensen focuses on whether the statutes of limitations bar potential causes of action based on the alleged forgery, not on whether they bar the claims in the FAC based on other conduct.

<sup>11</sup> Jensen appears to have abandoned these theories. At oral argument in the trial court, Jensen emphasized that his forgery allegation was "the central issue," and stated that "there's a lot of stuff in [the FAC] that's not important to me." On appeal, Jensen states that the FAC "addressed several technical legal issues of which [Jensen] had no knowledge."

112-113, fn. 8; Weil & Brown et al., Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2012) ¶ 7:130, pp. 7(I)-51 to 7(I)-52 (rev. #1 2011).) “While such a showing can be made for the first time to the reviewing court [citation], it must be made.” (*Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 711.) We conclude Jensen has not met this burden.

Jensen has not articulated the precise theory of recovery he seeks to pursue based on the alleged forgery of his signature on the note and deed of trust, but he suggests the alleged forgery establishes the 2010 foreclosure sale was invalid, and thus supports causes of action for wrongful foreclosure and/or to quiet title.<sup>12</sup> Generally, a grant deed or trust deed “is void if the grantor’s signature is forged or if the grantor is unaware of the nature of what he or she is signing. [Citation.]” (*Schiavon v. Arnaudo Brothers* (2000) 84 Cal.App.4th 374, 378; *Wutzke v. Bill Reid Painting Service, Inc.* (1984) 151 Cal.App.3d 36, 43-44 (*Wutzke*).) Because a forged deed of trust is void, “it follows that any claim of title flowing from such a deed is void.” (*Wutzke*, at p. 44.) One ground for setting aside a trustee’s sale is that the underlying deed of trust is void. (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 105 (*Lona*); *Saterstrom v. Glick Bros. Sash etc. Co.* (1931) 118 Cal.App. 379, 383 [trustee’s sale set aside where deed of trust was void because it failed to adequately describe property]; see *Stockton v. Newman* (1957) 148 Cal.App.2d 558, 563-564 [trustor sought rescission of promissory note on grounds of fraud].) When a trustor seeks to set aside a trustee’s sale on the ground that the sale is void (rather than merely voidable), the trustor need not tender the amounts due under the note. (*Dimock v. Emerald Properties* (2000) 81 Cal.App.4th 868, 878; *Lona*, at p. 113.)

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<sup>12</sup> In his reply brief, Jensen also states that he intends to assert causes of action for “Forgery of Mortgage Instruments,” “Fraud by Intentional Misrepresentation,” and “Accounting.” But Jensen has not shown a reasonable possibility that he can amend the complaint to state separate causes of action based on these theories. He has not shown that the alleged forgery supports a cause of action independent of his challenge to the foreclosure sale; he has articulated no facts supporting a fraud claim apart from the alleged forgery; and he does not elaborate on the basis for a separate claim for an accounting.

Under the above principles, a showing that a grantor's signature on a deed of trust was forged could, in some circumstances, establish that the trust deed, and a subsequent trustee's sale, were void. But in the circumstances of this case, and in light of the other allegations in the FAC, Jensen has not shown a reasonable possibility that he can amend the complaint to state a viable cause of action. First, we note that Jensen's bare allegation that the signatures on the 2005 note and deed of trust are not his does not establish the legal elements of forgery.<sup>13</sup> “ ‘ “Forgery, at common law, is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability.” ’ [Citation.]” (*Lewis v. Superior Court* (1990) 217 Cal.App.3d 379, 387.) In *Wutzke*, the court noted that “the act of forgery is not defined in the Commercial Code or otherwise for purposes of civil actions,” and stated that, in the context of determining whether a deed was void on grounds of forgery, “the term must be construed in accord with the reasonable understanding of a layman.” (*Wutzke, supra*, 151 Cal.App.3d at pp. 40-41.) The *Wutzke* court stated that “in order to establish forgery three essential facts must be proven: ‘(1) Intent to defraud, (2) making a false instrument by signing another’s name without authority or the name of a fictitious person . . . , and (3) the instrument on its face be capable of defrauding someone who might act upon it as genuine or the person in whose name it is forged.’ ” (*Id.* at p. 41.) Jensen has not shown that he can allege specific facts supporting the elements of forgery, such as whether the unidentified person who signed the document lacked authority to do so and had the intent to defraud.

Second, Jensen has not shown a reasonable possibility that he can state a cause of action based on his allegation about the signatures on the 2005 note and deed of trust, because other allegations in the FAC establish that Jensen *did* finance his 2005 purchase of the property by giving Greenpoint a promissory note and deed of trust. When a

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<sup>13</sup> We need not accept as true the conclusory assertion in the FAC that the allegedly different signatures “are the result of a blatant forgery orchestrated” by defendants. (*Zelig, supra*, 27 Cal.4th at p. 1126 [court treats demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law].)

plaintiff's complaint contains allegations that defeat his claim, the plaintiff cannot avoid those defects by filing an amended complaint. (*Banis Restaurant Design, Inc. v. Serrano* (2005) 134 Cal.App.4th 1035, 1044; *Mercury Casualty Co. v. Superior Court* (1986) 179 Cal.App.3d 1027, 1035 & fn. 6.) In the FAC, Jensen alleges that he executed a deed of trust and specifies its date and some of its terms, all of which are consistent with the 2005 deed of trust attached to the FAC. These allegations preclude Jensen from amending to allege that he never took a loan or signed a deed of trust.<sup>14</sup>

In paragraph 11 of the FAC, Jensen alleges that he “financed the [property] *on or about January 3, 2005* through [Greenpoint] *by virtue of a Trust Deed and Notes securing the Loan (See Exhibit ‘A’)*.” (Italics added.) The exhibit cited in this paragraph, exhibit A to the FAC, is the January 3, 2005, deed of trust encumbering the property and securing a loan to Jensen for \$575,200.<sup>15</sup> In paragraph 32 of the FAC, Jensen expressly alleges that he signed a deed of trust—Jensen states that, “on or about January 3, 2005,” he “*executed a ‘Deed of Trust.’*” (Italics added.) In that paragraph, Jensen also describes the terms of the deed of trust he signed, and quotes from it. He states that the deed of trust listed Greenpoint as the lender, and stated in the definitions section that: “ ‘(E) . . . MERS is a separate corporation that is acting solely as a nominee for Lender and Lender’s successors and assigns. MERS is the beneficiary under this Security Instrument.’ ” The January 3, 2005, deed of trust attached to the FAC includes these terms. Similarly, in paragraph 2 of the FAC, Jensen refers to the attached deed of trust and confirms that Greenpoint loaned him money in connection with the purchase of the property. He notes that the deed of trust was “dated January 3, 2005 and recorded January 11, 2005,” and that Greenpoint was “the original Lender and Trustee for the

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<sup>14</sup> Jensen does not argue he could amend the FAC to allege he signed documents reflecting a deal that was materially different from the one reflected in the 2005 deed of trust attached to the FAC. Instead, he makes only the vague assertion that “[i]t will be impossible to know the extent and contents of any contractual agreements between [Jensen] and [defendants] unless and until *bona fide* documents are produced.”

<sup>15</sup> The note referred to in the deed of trust is not attached to the FAC.

[property] (See Exhibit ‘A’).” Again, Jensen’s description is consistent with the deed of trust attached to the FAC.

Later in the FAC, Jensen confirms that his loan was secured by a deed of trust. For example, in paragraphs 55 and 56, Jensen states that he incurred a debt when he obtained a loan on the property, and that “[t]he loan is memorialized via a Deed of Trust and Promissory note.” He also alleges that each document includes “an attorney fees provision for the lender should they prevail in the enforcement of their contractual rights.” The 2005 deed of trust attached to the FAC includes such a provision.

In several of the causes of action in the FAC, Jensen bases his entitlement to relief in part on his execution of the deed of trust and his status as a party to it. In the third cause of action for injunctive relief, Jensen states that he “seeks a determination as to the legal status of the parties as to the Adjustable Rate Note and the Deed of Trust.” He again quotes from the note and the deed of trust, contradicting his suggestion in his appellate brief that he is unaware of the contents of the documents. In the fourth and fifth causes of action alleging misrepresentations by defendants in connection with the 2005 loan, Jensen alleges that defendants’ misrepresentations harmed him by causing him to accept the loan. Jensen alleges that he acquired the property by obtaining financing from Greenpoint, and affirms repeatedly that he took the loan. In the eighth cause of action for wrongful foreclosure, Jensen again refers to the deed of trust, stating that defendants drafted it and that Jensen had no opportunity to negotiate its terms.

In sum, in the FAC, Jensen alleges that he took a loan from Greenpoint and signed a deed of trust; he describes the document, including specifying the date and some of the parties and terms, which correspond to those in the 2005 deed of trust attached to the FAC; he quotes some of its language, which also corresponds to the attached deed of trust; and he asserts several theories of recovery that rely on his entry into the deed of trust and/or his status as a party to it. In light of these allegations, we conclude Jensen has not shown a reasonable possibility that he can amend to state a cause of action based on his assertion that the signature on the 2005 deed of trust is not his.

Because we conclude that Jensen has not shown a reasonable possibility that he can amend to state a cause of action, we need not address the parties' arguments as to whether a cause of action challenging the foreclosure sale would be barred on other grounds, such as the statute of limitations, Jensen's failure to tender the amounts due under the loan, and the alleged subsequent sale of the property to third parties.<sup>16</sup>

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal.

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SIMONS, J.

We concur.

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JONES, P.J.

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NEEDHAM, J.

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<sup>16</sup> We thus deny defendants' April 18, 2012 request for judicial notice of documents relating to the alleged subsequent sale of the property.