IN THE SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

BEFORE THE HONORABLE NANCY L. DAVIS, JUDGE PRESIDING

DEPARTMENT NO. 306

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WASHINGTON MUTUAL BANK,

Plaintiff,

vs.

GERANO PAED, et al.,

Defendant.

Case No. CUD-08-627561

Court Trial

COPY

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Monday, February 23, 2009
Thursday, February 26, 2009

A P P E A R A N C E S:

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Monday, February 23, 2009 **2:25 P.M.**

P R O C E E D I N G S

THE CLERK: This is the matter of Washington Mutual Bank, plaintiff versus Gerano Paed, et al, defendant. Case No. CUD-08-627561. Counsel, please state your names starting with the plaintiff.

MS. MacDONALD: Good afternoon, Your Honor. Elizabeth MacDonald on behalf of plaintiff.

MR. HONAKER: Good afternoon, Your Honor. Jason Honaker on behalf of the defendant.

THE COURT: All right. Welcome, everyone. This matter was sent to Department 306 by our trial department earlier today, and it's my understanding that this is a court trial. It is expected to be quite short, that there are no witnesses contemplated.

And I'd like the record to reflect that I've been provided prior to our getting underway this afternoon with exhibits that each counsel wanted The Court to be able to review, and we have three from Ms. MacDonald, and we have three as well from Mr. Honaker.

And it's my further understanding that neither counsel has an objection to the authentic nature of the documents and their admissibility. Is that right, Ms. MacDonald?

MS. MacDONALD: That's correct, Your Honor.

THE COURT: And, Mr. Honaker?

MR. HONAKER: Yes, Your Honor.

THE COURT: Okay. Very well. I also understand from counsel that the issues or issue at hand is of really a legal

question, and I don't know that there will be any factual issues in controversy, but that seems to be the nub of it from what counsel advised me before we got on the record. Is that right, Ms. MacDonald?

MS. MacDONALD: That's correct, Your Honor.

THE COURT: And, Mr. Honaker?

MR. HONAKER: Yes, Your Honor.

THE COURT: Okay. So we will proceed with your presentations, and it will be my expectation given your representations that we'll conclude this afternoon and we'll get under way. Please if you could use the mikes that's helpful, and bring them close enough so that they enable us all to hear. It assists all of us present in both being able to hear you and assuring that we have a clear record.

I'll also ask that you try to speak slowly, within reason, so that Ms. Martinez can provide you with the best record she can and sometimes when counsel are speaking directly to The Court and not doing Q's and A's that they get carried away, if you will.

So, Ms. MacDonald, why don't you begin, ma'am.

MS. MacDONALD: Thank you, Your Honor. We're going to proceed by way of the exhibits that we have marked. And the judge, Your Honor, you have those exhibits. I don't have them in front of me.

THE COURT: Would you like them for your purposes at this time?

MS. MacDONALD: Yes, please. Just to identify them.

THE COURT: Very well. Let me hand those back to you.

MS. MacDONALD: Thank you.

THE COURT: Did you need yours as well, Mr. Honaker, or do you have copies?

MR. HONAKER: I have copies.

THE COURT: All right. Thank you.

(Plaintiff's Exhibits 1, 2 and 3 were premarked for identification.)

MS. MacDONALD: Your Honor, we're going to proceed by way of presenting to The Court a certified copy, and that's Plaintiff's Exhibit 3, of the Trustee's Deed upon Sale in which Washington Mutual became the purchaser and owner of the property in question which is at 69 Santa Cruz Avenue in San Francisco.

And we're also going to proceed by way of Plaintiff's Exhibit 1 which is a Three-Day Notice to Perform Covenant or Quit. And Plaintiff's Exhibit 2 which is the proof of service regarding the Three-Day Notice to Perform Covenant or Quit. I'll present these back to The Court.

THE COURT: Very well. Thank you.

MS. MacDONALD: Thank you. And, Your Honor, that's basically plaintiff's case. That's all the evidence that we have that shows that Washington Mutual is a bona fide purchaser of the property at a trustee sale and that the three-day notice to pay or quit was properly performed as evidenced by the proof of service. And all we're asking for is possession. We're not seeking damages.

And for The Court, I think The Court is aware of the fact that the other defendant, a default has been entered against the other defendant, and it's just Mr. Paed is the only remaining

defendant.

THE COURT: Yes. I did note that when I reviewed the file that Mr. Vendle (phonetic) is no longer a part of these proceedings. Anything further, Ms. MacDonald, you'd like to put on the record at this time?

MS. MacDONALD: No, Your Honor. We'd rest at this point.

THE COURT: All right. Mr. Honaker, the floor is yours, sir.

(Defendant's Exhibits A, B and C were premarked for identification.)

MR. HONAKER: Thank you, Your Honor. We'd like to proceed by Exhibit A which is the Notice of Default and Election to Sell Under Deed of Trust; Exhibit B, which is a Substitution of Trustee; and Exhibit C which is a Notice of Trustee Sale.

And on behalf of Mr. Paed we'd submit to The Court that the Substitution of Trustee was dated February 11th and notarized on February 19th and recorded on May 14 of 2008.

THE COURT: I just wanted to make sure we got the year in there.

MR. HONAKER: 2008 on all dates.

THE COURT: All right.

MR. HONAKER: And the Notice of Default was recorded on February 12th of 2008 and dated February 11th of 2008. And then finally the Notice of Trustee Sale was dated May 13th and recorded on May 14th.

And we submit to The Court that this procedure was improper because the Substitution of Trustee while dated the same as the Notice of Default on February 11th was notarized on

February 19th and recorded approximately three months after the Notice of Default.

The Notice of Default was signed by Quality Loan Service as agent for the beneficiary by Fidelity National Title Insurance Company, and then Quality Loan Service was substituted in as trustee by a document dated February 11, 2008 -- excuse me, the Substitution of Trustee form and notarized on February 19th.

So it's our contention that Quality Loan Service was not empowered to issue a Notice of Default when they did because the Substitution of Trustee was dated -- or was notarized on February 19th and recorded on May 14th.

And in addition to that, to address plaintiff's argument regarding the status of Washington Mutual as a bona fide purchaser, it is our contention that Washington Mutual was not in fact a bona fide purchaser because Quality Loan Service signed or is designated as an agent for the beneficiary, the beneficiary being Washington Mutual.

And it is our contention that if Quality Loan Service is an agent for Washington Mutual, then the acts of Quality Loan Service could be imputed to Washington Mutual. And then accordingly so we argue that the procedure was not conducted pursuant to California law as noted by the dating of the documents.

And then in addition to that Washington Mutual effectively took title with notice of those defects insofar as it had designated Quality Loan Service as an agent. And that's all. Thank you.

THE COURT: Thank you, Mr. Honaker. Ms. MacDonald, do you

care to respond to any of that?

MS. MacDONALD: Yes. I'm not quite sure legally if the procedure in which the Substitution of Trustee is recorded at a time after the Notice of Default, I don't know what bearing that has on the foreclosure proceeding. It can be an issue, but it doesn't seem to have been by the defendant that this is in any way a violation of the required procedures under the statute.

And if there were some particular procedures that had to be followed in some kind of chronological order, even if that were true, is there some kind of detriment to the defendant. Would this situation have changed one way or the other if one document had been recorded earlier?

It's just a substitution of a trustee for purposes of a sale. There has been no contention by the defendant that the notice of the sale itself was in any way improperly posted or noticed as to be a detriment to the defendant.

And the issue of the agent, the Quality Loan Service signs as the agent for the beneficiary because Quality Loan Service was appointed the trustee for the purpose of the sale. And the person who becomes the purchaser at the sale is the beneficiary, so it doesn't state that they were hired as an independent agent to work on behalf of a specific beneficiary. They become the agent at the time of the sale.

THE COURT: All right. Mr. Honaker, do you want to respond to that?

MR. HONAKER: Yes. There were a few points in there that I'd like to respond to. First as regards notice or the importance of following a certain form and chronology, it would

be our contention that at the point that the default was entered Quality Loan Service was apparently either a stranger to the action or only an agent acting on behalf of the lender and not an actual trustee.

In regards to the detriment to the defendant, I think that the foreclosure process and the integrity of that process, I do think it's a detriment to the defendant if there are third parties coming in without a formalized authority to act on behalf of the lender and also that there would be a significant detriment to the integrity of the foreclosure process in California itself. That's all.

THE COURT: So what would be your position other than the obvious fact that your client wants to stay in the premises that are at dispute here? What I think I'm hearing you say is that these were -- you're raising some procedural issues but that they could be cured and he could be removed from the home if and when that were accomplished; is that right?

MR. HONAKER: Yeah. I don't disagree that he would still be subject to removal and eviction only that but I do request that The Court consider that the parties, the plaintiffs have to reinstitute these proceedings and make sure that, well, now that QLS has in fact been substituted it gives notice of default and then follows the necessary procedures.

There's another -- there's an action pending in the unlimited jurisdiction.

THE COURT: Yes. I'm aware of that, and there has been an effort to consolidate which I gather had been denied.

MR. HONAKER: Yes. That's correct.

THE COURT: I don't mean to cut you off, but if there's something you want to say about that that you think has bearing today, you're welcome to say so.

MR. HONAKER: Thank you. Only that the timing of this, it is of consequence in light of that, those proceedings going forward, the motion to consolidate was denied. So if things were done out of order improperly it would be a detriment to the system itself but also to our client under the circumstances since there is another lawsuit.

THE COURT: Ms. MacDonald?

MS. MacDONALD: Your Honor, I think the evidence shows that the substitution of the trustee was notarized on February 19th of '08. So there's a difference of seven days between the Notice of Default and the actual signing by the trustee, and I just don't know where the legal authority is. The challenge is that that's improper, and that's the problem.

THE COURT: Well, let's ask. Mr. Honaker, do you have any legal authority other than your passionate advocacy on behalf of your client?

MR. HONAKER: I have been trying to find a case that's directly on point on this matter and have been unable to find that which might be partly due to the summary nature of an unlawful detainer proceeding. The thrust of our argument would just be that as a logical matter could Quality Loan Service issue a notice of default on a deed to which it is not a party insofar as the record reflects?

THE COURT: Ms. MacDonald.

MS. MacDONALD: Well, QLS or Quality Loan Service

Corporation is actually not a party. They're just the trustee for the purposes of the sale, so I'm not sure where the idea of that party comes in. And as a practical matter if this were to have to start all over again, Quality Loan Services, they can't be considered the trustee anymore. They were the trustee for the purposes of the sale.

Washington Mutual is the owner of the property, so I don't know how you then go and undo everything that has been done. Washington Mutual has title to the property. They are the owner, and this Quality Loan Service is no longer involved in it once the sale is completed. That's the end of their relationship to the situation, so I don't know how this could be undone anyway.

But I'm still just wondering there's just a seven-day period between the actual signing of the substitution of the trustee and the notice of the default. I know there's a longer period of recording, but the actual signing of the documents for the trustee becomes the trustee of this action as opposed to the recording of the document itself.

THE COURT: Anything further, Mr. Honaker?

MR. HONAKER: No. We would just like to note that under the Code in the unlawful detainer proceeding it is permissible for there to be a limited inquiry in regards to whether the trustee, whether there was any impropriety in the process by which the party to whom the trustee's deed upon sale was transferred did not take according to California law.

THE COURT: Try that again.

MR. HONAKER: Okay. So even though it is a summary

proceeding, it is still permissible at this proceeding to ask whether Washington Mutual gained the trustee's deed upon sale in a manner that was permitted by California law. If not, then the trustee's deed upon sale could be set aside. And I believe the Civil Code section is 2924, California Civil Procedure.

THE COURT: So that's the question you are asking?

MR. HONAKER: Um-hum.

THE COURT: And what's your answer?

MR. HONAKER: My answer is that since they have not -- based on the evidence they've not complied with the logical chronology in obtaining their deed, that that deed should be set aside and they should have to reinstitute this process properly.

THE COURT: Well, let me -- you used the word logical chronology. Logic is often a good thing, but the question is: Is the chronology here unlawful? That's what I want to know.

MR. HONAKER: It is our contention that it is and based on the fact as reflected in the evidence that Quality Loan Service did not have the authority to issue a notice of default. And I used the word "party" earlier, and that wasn't what I meant to say, just that Quality Loan Service had not been designated as a trustee at that point.

MS. MacDONALD: Well, that may be an issue for the other pending case. I don't think that that really is an issue that should be raised here. I mean, Quality Loan Service is not Washington Mutual. Washington Mutual is a bona fide purchaser. And it should also have been raised as an affirmative defense in the Answer against Washington Mutual that Washington Mutual has done something procedurally incorrect.

I don't have any evidence that Washington Mutual did anything procedurally incorrect. They bought the property at a trustee sale. And I can't help The Court out, and I'd like to review the section where Mr. Honaker was just talking about this, have some kind of review of the proceedings.

THE COURT: 2924?

MS. MacDONALD: Yes. I'm not sure what actual section he's referring to which allows The Court to go behind the sale document to see what happened before that.

THE COURT: All right. Mr. Honaker, anything further?

MR. HONAKER: Actually, I was looking back at our motion to consolidate and there's a case and this is a summary that says that California law recognizes, and this is my own words, that in an unlawful detainer matter the tenant may not be summarily evicted consistent with due process guarantees without being afforded the opportunity to raise affirmative defenses of fraud in obtaining title that if proved would give them rightful possession and ownership. And that's *Asuncion v. Superior* Court.

THE COURT: I know that was cited in that brief.

MR. HONAKER: Okay. So that would be the also basis underlying our argument today that that inquiry is permissible at this proceeding.

THE COURT: Ms. MacDonald?

MS. MacDONALD: I believe that that would go to what the trustee did prior to Washington Mutual standing on the courthouse steps at the sale and just buying the property. I don't know how it applies to Washington Mutual. Those are

proceedings prior to the Washington Mutual entering into this action.

And still to go back to there's no indication that if the trustee signs the substitution of trustee seven days after recording the notice of the default, that that is somehow a fraudulent act.

THE COURT: That's what I'm hearing is the gravamen if you will of your complaint; is that right, Mr. Honaker? It's that seven-day period that you're taking issue with?

MR. HONAKER: Yes, just the order in which things were recorded or dated or executed which I guess it isn't entirely clear when they were executed, but based on the documents we do see that the substitution of trustee was notarized and recorded at some point after the notice of default was recorded.

Just one other thing I wanted to respond to. She had asked questions whether Washington Mutual, their responsibility for the actions of Quality Loan Service. And we just would like to point out that on the Notice of Default and Election to Sell Under Deed of Trust, Exhibit A, that Quality Loan Service has signed as an agent for the beneficiary and the beneficiary is Washington Mutual so that they, because of that, they should bear responsibility for the actions of Quality Loan Service.

THE COURT: Do you want to respond to that?

MS. MacDONALD: No, Your Honor. We're going to submit it. Really I can't speak to the procedure that went on between Quality Loan Service and Washington Mutual. I believe that that's just listed as the agent for the purposes of proceeding as opposed to agent in the broader sense of the Code section

where we impute the acts of the agent to the employer. So I can't really address that issue.

THE COURT: All right. Mr. Honaker, anything else, sir?

MR. HONAKER: Nothing more, Your Honor.

THE COURT: All right. Let me ask you this: I know that when we talked informally this morning you had submitted a request by is it Mr. Nocos?

MR. HONAKER: Mr. Nocos.

THE COURT: For a Statement of Decision pursuant to 632 of the Code of Civil Procedure, and I want to ask you a couple of questions about that. It is certainly something that you are well within your right to request, but I want just to note that it's my view that at least as set forth here that the request doesn't meet the requirements of 632, that it must specify controverted issues as you know as to which Statement of Decision is being requested.

And any issue being not so specified as being waived, a general request for a statement does not require a bench officer to prepare a statement as to any issues, and nor does a request for findings with regard to evidentiary facts or individual items of evidence.

Though as the parties have indicated, this is really in their view a question of law, not of facts. The documents say what the documents say what the various dates, and the statutes say what the statutes say.

So based -- Well, let me see if you'd like to respond to that. And the other thing I wanted to say to you -- I know you're stepping in for is this a colleague; are you in the same

firm with Mr. Nocos?

MR. HONAKER: I work with him regularly. It's a contract basis, yes.

THE COURT: I see. Okay. This request that says, requests The Court to issue a Statement of Decision in any and all fact finding hearings that impact his continued possession of his home, the "he" referred to is Mr. Paed, and that this isn't going to cut it I guess is what I would like you to be the messenger for. And tell him that's what I said so that you are not taken to task.

MR. HONAKER: Okay. Yes. I didn't fill it out.

THE COURT: I know you didn't, and I understand he's not here and he wants that for his future purposes. But since we don't really have issues of fact here, that's what I'm hearing from the two of you, that you're making that representation to The Court that this really doesn't address today's hearing in any event.

MR. HONAKER: Okay.

THE COURT: Okay. And if he is not always available or he needs something that for his purposes he needs to address that so that you've got your bases covered.

MR. HONAKER: Okay. I think it was sort of a new request for him, too, and I think it's this issue he was hoping to get something on the record regarding the legal issues that we disputed, but it sounds like maybe he didn't follow the necessary steps.

THE COURT: Let me just for your purposes also share with you the specific language of the last portion of Section 632.

I've already gone over a portion of this, but that the request for Statement of Decision shall specify those controverted issues as to which the party is requesting a Statement of Decision, and a Statement of Decision shall be in writing; however, when the trial is concluded within one calendar day or in less than eight hours over more than one day, the Statement of Decision may be made orally on the record in the presence of the parties.

And I want to give you an opportunity if you would like to take it today to tell me what it is, what are the principal controverted issues that you request The Court to decide?

MR. HONAKER: Thank you. Yes. The issues that we would like for The Court to address are just the necessity or lack thereof for a trustee or future trustee to first record their interest before issuing a Notice of Default.

And then in addition to that whether Washington Mutual could be considered a bona fide purchaser when they've indicated or when there's indications from the recorded documents that the trustee was their agent.

THE COURT: All right. So let's make clear that we have those two issues crafted as you would like them to be, and then I want to give Ms. MacDonald an opportunity to add any, or question these issues from your client's standpoint.

So I'm going to be parroting back to you, Mr. Honaker. I'm looking at my colleague's recording as well as my own notes but that the first issue as I understand it that you framed is the necessity for a trustee to first record its interest before issuing a notice of default; is that a fair statement?

MR. HONAKER: Yes, Your Honor.

THE COURT: All right. And the second question that you put to The Court is whether in this instance Washington Mutual is a bona fide purchaser when they've indicated or when there are indications from the recorded documents that the trustee was their agent.

MR. HONAKER: Exactly.

THE COURT: I said that correctly?

MR. HONAKER: Yes. Thanks.

THE COURT: Ms. MacDonald, you got that?

MS. MacDONALD: Yes.

THE COURT: So I'd like to give you an opportunity to frame any issues that you would like to frame and/or to respond to these two if you would like.

MS. MacDONALD: I think on the first issue that Mr. Honaker raises I would just like to add -- Well, I just want to make sure that he's narrowed it down to record as opposed to the fact that the trustee actually it's his or her signature is notarized on the document when they substituted in. There's a difference between the recording date and the date that the trustee actually substituted in.

THE COURT: All right. Well, what I heard from Mr. Honaker, and I'm sure he'll correct both of us, was the necessity for the trustee to first record the interest before issuing a notice of default. Is that correct, Mr. Honaker?

MR. HONAKER: Actually, now that you say that, maybe I should have framed that question more generally.

THE COURT: All right. Let's have you...

MR. HONAKER: A two-part inquiry as to whether, as I mentioned before, whether they would have to record that interest but in addition to that whether they would have to execute a document, substitute him in as trustee even if it weren't recorded yet before an issuance of Notice of Default.

THE COURT: Ms. MacDonald is looking puzzled, so I'm not sure that what you've just said responds to the question that she raised. So let's try again, Ms. MacDonald.

MS. MacDONALD: I was wondering if the Court would indulge me and maybe repeat what Mr. Honaker just said. I understand it's a two-part question now that he's addressing.

THE COURT: All right. Ms. Martinez, will you help me if I'm inaccurate?

THE REPORTER: I'd rather read it.

(Record read.)

THE COURT: Okay. Let's go off the record for a moment.

(Discussion off the record.)

THE COURT: Let's go back on the record. We have been talking about the framing of the questions that Mr. Honaker would like to have The Court answer by way of a Statement of Decision, and counsel have been working on those together in part to try to cover all the bases. And we're going to put those questions on the record at this time.

So, Mr. Honaker, are you going to be doing the honors here, sir?

MR. HONAKER: Yes.

THE COURT: Go ahead.

MR. HONAKER: Three questions. Number one, whether the

substitution of trustee should have been recorded prior to the recording of the Notice of Default, and if so, does the trustee's failure to do so render the sale unlawful?

Question two, whether the substitution of trustee should have been executed prior to recording a Notice of Default and, if so, does trustee's failure to do so render the sale unlawful?

And question three, in light of page 2 of Exhibit A was Quality Loan Services an agent specifically for Washington Mutual and, if so, does that negate Washington Mutual's claim of bona fide purchaser status?

THE COURT: All right. So those are the questions that have been requested by counsel that The Court answer. Let me invite either of you if you wish to say anything further about those questions you may do so.

So, Ms. MacDonald, anything you want to add at this point?

MS. MacDONALD: No, Your Honor. We did have extensive conversations off the record, and I think that there is enough information available for The Court to make its decision. And these are Mr. Honaker's requests for a Statement of Decision issues, so I would submit.

THE COURT: Mr. Honaker?

MR. HONAKER: No. Those are the questions we've decided on, and I think we have definitely reached an agreement as to what the questions are.

THE COURT: All right. So both sides at this time are submitting the matter; is that correct?

MS. MacDONALD: Yes.

MR. HONAKER: Yes.

THE COURT: All right. So I appreciate your working to come up with your controverted issues I guess is the way the statute reads and what I would like to do is spend a little time looking at these now and see if I can't respond this afternoon to you. So if you are willing to do that, then we can wrap it up today and I can give you my decision from the bench.

But let me ask whether that works in terms of your schedules this afternoon. Ms. MacDonald?

MS. MacDONALD: I'm fine, Your Honor, with staying.

THE COURT: Mr. Honaker?

MR. HONAKER: That will be fine. Thank you.

THE COURT: So I'll go in back and think about what you've said and the questions as you've framed them and get back out here. So we're in recess, and I will be back as quickly as I can. If you'd like to go get a cup of coffee or something -- I think actually the cafe downstairs is closed at this point.

So thank you, and we're off the record.

(Recess taken.)

THE COURT: Back on the record. I've advised counsel that I want to take a little more time to think about the questions that were delineated earlier this afternoon as being those that Mr. Honaker would like The Court to address and have an opportunity to review the transcript in this matter.

So I've advised counsel that we have a matter proceeding here tomorrow morning, Tuesday the 24th, but that we could get together on the afternoon of February 25, 2009, and the appointed time is 3:00 p.m.

So we'll have that on calendar and that will enable

Ms. MacDonald to take care of whatever she needs to take care of in Department 212. And I know there are a couple of things that Ms. MacDonald wishes to lodge with Ms. Davis.

And is there anything else we need to take care of right now?

MR. HONAKER: No.

THE COURT: Okay. I'll see you on Wednesday. Thank you. We're in recess. We're off the record.

(Proceedings adjourned.)

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Thursday, February 26, 2009. 3:06 P.M.

THE CLERK: This is the matter of Washington Mutual Bank, plaintiff versus Paed, et al., defendant. Case CUD-08-627561. Counsel, please state your names beginning with the plaintiff.

MS. MacDONALD: Good afternoon. Elizabeth MacDonald appearing on behalf of the plaintiff.

MR. HONAKER: Good afternoon. Jason Honaker appearing on behalf of the defendant.

THE COURT: Welcome. We are here as you all know for The Court's decision with respect to the complaint filed in this matter. And let's have the record reflect that we were in trial I believe day before yesterday, so that was the 24th of February.

And just to refresh all of our collective recollections that counsel as we got under way informed me that they were of the view that there was really not much of a factual dispute, that there were some legal issues that needed to be resolved. Each side provided The Court with direct documents that were all

admitted into evidence without objection.

This is an interesting matter. It's here as an unlawful detainer, as you know, and there's a summary proceeding for unlawful detainer matters because of the kinds of rights involved and so a special statutory blueprint if you will about how those matters are handled under California law.

And this UD was filed, my recollection is, on the 14th of October 2008, and it came following a trustee sale that occurred in early June, June 2nd, 2008 according to my review of the file. And the purchaser of the property, Washington Mutual, wanted to file the UD because Mr. Paed was behind in his payments. Is that a fair statement?

MR. HONAKER: (Nodding head.)

THE COURT: So a three-day notice was provided to him, and he did not meet its requirements and thereafter came this proceeding. The complaint was filed. An answer was filed on the 28th of October. It's my understanding -- I should have asked this question of you when you were before, Mr. Honaker, but there was no effort early on to stop the sale. There was no motion or preliminary injunction or TRO that was sought?

MR. HONAKER: That's correct.

THE COURT: And after the UD was filed and everything was sort of moving along in its summary fashion as it does in these proceedings, it was then that a complaint was filed by Mr. Paed against Washington Mutual and its successors alleging numerous things including fraud with respect to the original mortgage agreement and whatever else, the various transactions or notice or lack thereof that had gone on between the lender and Mr. Paed

at an earlier date. Is that a fair statement?

MS. MacDONALD: Yes.

MR. HONAKER: Yes.

THE COURT: And I'm aware that because this matter was moving very quickly and the other matter was in the unlimited jurisdiction side of the court that Mr. Paed sought to get the matters consolidated.

MR. HONAKER: Yes.

THE COURT: And I re-read *Asuncion*, that is A-S-U-N-C-I-O-N, *v. Superior Court* which had been cited in consolidation papers that were attached to some of your filings in this matter. And indeed in that case the court does speak to its concerns about the summary nature of these kinds of proceedings, and if there are allegations of fraud, how do you accommodate all that and bring those two things together.

And one is to -- of the various procedural devices that are talked about would be to seek a preliminary injunction if one were at that point prior to a sale having occurred, but that's sort of water under the bridge as it were in this case.

And I know that in the Law and Motion Department there was a temporary stay granted. Am I correct about that, of about a month?

MR. HONAKER: Yes.

THE COURT: Were you involved in this at all at that point?

MS. MacDONALD: No.

THE COURT: So I think Judge Busch signed an order for a month to stay the proceedings, and it's not clear to me on what I have here what happened after a month, but the stay was lifted

and then a motion to consolidate was heard on the merits; is that correct?

MR. HONAKER: As far as I know. I didn't participate in those motions.

THE COURT: In any event, the motion to consolidate had been before another department in this courthouse, and that's another procedural device that was talked in *Asuncion* as a way to try to deal with a situation where you have both of these things happening at once, where you have a UD and allegations of fraud by the person who is being asked to leave the premises. And they talk about consolidation being a possibility.

And that was tried here, and it was not granted for whatever reason. I think there's a brief in the statement of -- In the Registry of Actions there is a very brief description that there would be prejudice to Washington Mutual if that were allowed -- if the matters were consolidated at this point and the UD was put on hold. So that decision was made.

So as a basic rule of thumb a purchaser at a trustee sale is entitled to the immediate possession of the property under California law, and a purchaser can bring an unlawful detainer action against a trustor, in this case Mr. Paed, who refuses to relinquish possession after the sale and indeed is only entitled to the three days' notice before the action may be filed, and all of that was accomplished, the appropriate notice.

And as I understand it there was not anything in the answer to the unlawful detainer that took issue with any of the usual UD procedures. I know that there was an affirmative defense of fraud and violations, I think just a general allegation or an

affirmative defense of violation of California and federal law and that those I believe I'm assuming that are asserted more particularly in the complaint that is in the unlimited jurisdiction part of the court. Is that a fair statement?

MR. HONAKER: Yes.

THE COURT: Okay. So I know that we took some time per my I guess really my insistence to formulate what the questions were for me to answer here in response to your request via -- I think you're the messenger here on behalf of your colleague for a Statement of Decision and that there's an obligation for you to frame what those issues are. And so the three of us spent some time talking about that on and off the record when we were here after the conclusion of the evidence and argument.

But in reading some of the cases that came to my attention here, there's an old case called *Crummer v. Whitehead* in which the court talks about if a sale was improper, a UD action may fail.

But at the same time there is case law that says that a trustor may indeed challenge a purchaser's title by asserting that the sale didn't meet statutory requirements, but it may be required to first offer to pay the full amount of the debt in order to make that contention. And that's not occurred here that I know about, and that's why the UD went forward because the debt wasn't paid.

And I know, Mr. Honaker, that you raised the question of whether or not certain actions in this matter did not meet requirements of California law or the chronology was not logical I think you said. And my question back to you was, why, that

may be absolutely right, but is it unlawful and do we have any case law to support that proposition?

And I don't think anybody has any, including me, and neither of you came up with any. Is that a fair statement?

MS. MacDONALD: That's correct.

MR. HONAKER: Yes.

THE COURT: So now I'm looking at the -- I have a transcript. Thank you, Ms. Martinez, my court reporter, for providing this so quickly. And I'm using that to, if I can find my stickies here, to look specifically at the questions that we did talk about of being the ones that you would like to see answered.

And the first one was whether the substitution of trustee should have been recorded prior to the recording of the Notice of Default. Everybody agree that that was the question?

MS. MacDONALD: Yes.

MR. HONAKER: Yes.

THE COURT: And then if it should have, the follow-up question was: Does the trustee's failure to do so render the sale unlawful? Now, I'll be very honest with you. I don't know about the answer to the first part of that question, but my view is under all the circumstances of the case as I understand them to be and the other case that's out there and just the procedures that have been followed here is I don't think it does render the sale unlawful. So that's finding number one from me.

And the question two was whether the substitution of trustee should have been executed prior to recording a Notice of Default. And then depending on the answer to that question, if

so, does trustee's failure to do so render the sale unlawful? Again, I don't think there's any case law on that.

I've not found any, and neither of you has provided me with any, and there's only so many hours in the day, but I've not found any. But my view is that it would not render the sale under all these circumstances unlawful in my view.

And then there was the last question that you asked about was looking at Exhibit A which was Mr. Honaker's exhibit, specifically page 2, was Quality Loan Service an agent specifically for Washington Mutual, and did that then negate Washington Mutual's claim of being a bona fide purchaser in this situation?

And I know that your position, Ms. MacDonald, was no. It wasn't an agent. It was the trustee for purposes of the sale. Is that a fair statement?

MS. MacDONALD: Yes.

THE COURT: And I think you were, Mr. Honaker, looking at the language in the document saying that your view was that the language suggests that Quality Loan Service was indeed an agent as opposed to a trustee and that that would then raise questions about whether or not Washington Mutual was indeed a bona fide purchaser. Is that a fair statement?

MR. HONAKER: Yes.

THE COURT: Do you agree with that?

MS. MacDONALD: I'll agree.

THE COURT: And I think that Ms. MacDonald has the better part of the argument here, that I don't see Quality Loan Service, notwithstanding some of the language in there, as being

specifically an agent for Washington Mutual. I don't know that this issue really even needs to be decided for purposes of this case, quite frankly, and I think it's fair -- and it goes more to your other case, does it not; do you agree with me about that? Feel free to say, "No," but --

MR. HONAKER: I think so, but I've been more involved with this part of this case.

THE COURT: And part of the reason why I asked you the question I did when you were pursuing that particular issue when we were trying to craft the language day before yesterday was my concern whether that would become res judicata for purposes of your other case, and we really hadn't had a full explication hearing and evidence on that issue. So that troubled me.

Though I'm less troubled now because the cases that I have looked at since we last met suggests to me that you would not be bound by that, or if you prefer I will not make a finding on that for purposes of this proceeding just to cover your bases.

MS. MacDONALD: Yes. I would prefer that.

THE COURT: So we'll agree that question three and whether or not Washington Mutual is or is not a bona fide purchaser is not before This Court at this time.

MS. MacDONALD: Well, that was what the -- I'd like to object to that because I believe that when we were fashioning these three questions, The Court did raise that issue with defense counsel about whether this should really remain in it, whether number three should remain in that list. And I think we decided that if the first two were, "No," then three really wouldn't matter, but.

THE COURT: I will note on the record that I am of the -- I don't think that that exhibit negates your claim. I'll say that, but I am also of the view that that needs to be litigated more fully. And I'm not taking the position, and you can tell any bench officer in front of whom -- not that they have to do what I say, but that my reading of the law given the nature of the two cases and having raised the affirmative defense of fraud and bringing that to the court in the other action, that my views about that here would not prevent you from raising that issue and having it be heard in the other proceeding.

Okay; does that make sense?

MR. HONAKER: Yes, it does.

THE COURT: Okay. So the long and the short of it is then is that I am finding in Washington Mutual's behalf today. And this is a difficult situation all around, and these are hard cases. Does either of you have anything else you'd like to say or put on the record at this point? Have I in my rather wordy way responded to your inquiries?

MS. MacDONALD: I'm satisfied with The Court's response to the inquiries. It was pretty much well covered.

THE COURT: Mr. Honaker?

MR. HONAKER: Yes. I think you responded to all the things we talked about.

THE COURT: So I just want to note on the record that I've been given a Form of Proposed Judgment here, and we need to fill all of those things out, but I want to be clear that Washington Mutual is not seeking any damages of any kind or any fees in this matter and solely was seeking possession of the property.

Is that a fair statement, Ms. MacDonald?

MS. MacDONALD: That's correct, Your Honor.

THE COURT: So I'm going to have you review this to make sure that everything is filled out appropriately before you go today and you can show it to one another and then I can sign it, and you'll know that it's been taken care of and we can file it appropriately. And I think that's all that I have.

So, again, my thank you to you two for your flexibility in accommodating my schedule which was getting rather complex, shall we say.

MS. MacDONALD: Much more complex than mine.

THE COURT: Let's go off the record.

(Discussion off the record.)

THE COURT: Let's go back on the record briefly. I just would like the record to reflect that counsel's exhibits will be ordered returned to them at this time. Thank you. Off the record.

(Proceedings adjourned.)

State of California)
)
County of San Francisco)

I, Laura Martinez, Official Reporter for the Superior Court of California, County of San Francisco, do hereby certify:

That I was present at the time of the above proceedings;

That I took down in machine shorthand notes all proceedings had and testimony given;

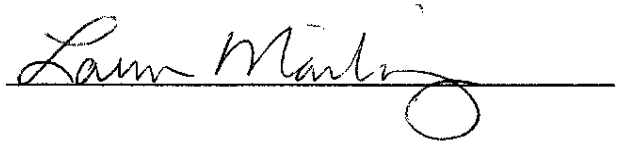
That I thereafter transcribed said shorthand notes with the aid of a computer;

That the above and foregoing is a full, true, and correct transcription of said shorthand notes, and a full, true and correct transcript of all proceedings had and testimony taken;

That I am not a party to the action or related to a party or counsel;

That I have no financial or other interest in the outcome of the action.

Dated: March 24, 2009.



LAURA MARTINEZ, CSR NO. 11332