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**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

COUNTRYWIDE HOME LOANS, INC.)
a New York Corporation,)

Plaintiff,)

v.)

CV F 02 6405 AWI SMS

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

UNITED STATES OF AMERICA,)
acting through the Internal Revenue)
Service; LA JOLLA GROUP II, an)
entity form unknown; TERRANCE)
FRAZIER, individually and dba La Jolla)
Group II; NEVADA TRUST DEED)
SERVICES INC., a Nevada Corporation;)
LA SALLE NATIONAL BANK, as)
TRUSTEE FOR AVONDALE HOME)
EQUITY LOAN TRUST 1998-1, an)
entity form unknown; ROBERT G.)
GONZALES, an individual; MARISELA)
GONZALES, an individual; ALL)
PERSONS KNOWN AND UNKNOWN)
CLAIMING A RIGHT, TITLE OR)
INTEREST IN OR TO THE REAL)
PROPERTY COMMONLY KNOWN)
AS 765 EAST WOODHAVEN LANE,)
FRESNO, CALIFORNIA,)

Defendants.)

and related cross and counter claims.

FINDINGS OF FACT

1. The real property, which is the subject of this action, is generally described as 765 E. Woodhaven Lane, Fresno, California, and is legally described as Lot 14 of Tract No. 3374, Mount Vernon Place No. 1, in the City of Fresno, County of Fresno, State of California, according to the Map recorded August 24, 1984, in Book 41 at Pages 97 to

1 100 Inclusive, of Maps, Fresno County Records (the "Property"). The Property was
2 owned by Robert Gonzales and Marisela Gonzales, husband and wife, as joint tenants.

3 2. A deed of trust executed by Robert G. Gonzales and Marisela Gonzales (the
4 "Gonzaleses") as trustors in favor of Victoria Mortgage Company as beneficiary was
5 recorded February 9, 1994 as Document No. 94021990 in Official Records of the Fresno
6 County Recorder, encumbering the Property (the "CHL Deed of Trust"). (Trial Exhibit,
7 hereafter "Ex." No. 1).

8 3. The beneficial interest under the CHL Deed of Trust was assigned to Countrywide Home
9 Loans Inc. ("Countrywide") by an Assignment recorded on July 14, 1994 as Document
10 No. 94112148 and thereafter Countrywide became the servicer of the loan. (Ex. No. 2).

11 4. When the CHL Deed of Trust was assigned to Countrywide, CTC Real Estate Services,
12 Inc. ("CTC"), formerly known as CTC Foreclosure Services and as Countrywide Title
13 Corporation. CTC became the trustee under the CHL Deed of Trust.

14 5. On February 25, 1998, a deed of trust executed by the Gonzaleses as trustors in favor of
15 Avondale Federal Savings Bank in the amount of \$18,900.00 was recorded as Document
16 No. 98026346 (the "La Salle Trust Deed") encumbering the Property. (Ex. No. 13).
17 Defendant La Salle National Bank, Trustee, is the successor in interest to Avondale, and
18 this obligation is hereafter referred to as the "La Salle Loan."

19 6. On November 23, 1998, the United States made federal income tax assessments against
20 Robert Gonzales for the calendar year 1997 in the amounts of \$3,085 in tax, \$269.40 in
21 penalties and \$128.88 in interest. On May 31, 1999, the United States made federal
22 income tax assessments against Robert Gonzales for the calendar year 1998 in the
23 amounts of \$7,680 in tax, \$231.80 in penalties and \$77.81 in interest. On May 29, 2000,
24 the United States made federal income tax assessments against Robert Gonzales for the
25 calendar year 1999 in the amounts of \$8,278 in tax, \$479.78 in penalties and \$90.04 in
26 interest.

- 1 7. On August 18, 2000, the United States filed a Notice of Federal Tax Lien with the Fresno
2 County Recorder's Office with respect to the income tax assessments against Robert
3 Gonzales for the years 1997, 1998 and 1999. The Notice of Federal Tax Lien was
4 recorded as Document No. 2000-0099536. (Ex. No. 16).
- 5 8. After the Gonzaleses defaulted under the CHL Loan, CTC caused a Notice of Default and
6 Election to Sell Under Deed of Trust to be recorded on April 9, 2001, as Document No.
7 2001-0047487("CHL NOD I"). (Ex. No. 3).
- 8 9. After expiration of the statutory three-month period, CTC caused a Notice of Trustee's
9 Sale to be recorded on July 13, 2001, as Document No. 2001-0097583 ("CHL NOS I").
10 Ex. No. 4.
- 11 10. The Gonzaleses then cured the default under the CHL Loan.
- 12 11. On July 30, 2001, CTC employee, Angelica Del Toro, made an entry in the CTC
13 foreclosure file concerning the pending foreclosure of the CHL deed of trust as follows:
14 "Cancelled order on this date due to full payoff". (Ex. No. 58) This entry generated the
15 preparation of a full reconveyance.
- 16 12. On August 3, 2001, CTC recorded a Full Reconveyance of the CHL Deed of Trust as
17 Document No. 2001-0047487. (Ex. No. 5). This recording was a mistake and only the
18 CHL NOD I should have been rescinded.
- 19 13. After default under the La Salle Loan, non-judicial foreclosure under the La Salle Trust
20 Deed was initiated when Nevada Trust Deed Services, Inc. ("Nevada Trust") caused a
21 Notice of Default and Election to Sale Under Deed of Trust to be recorded on November
22 21, 2001, as Document 01-0171086. (Ex. No. 14). The trustee's sale guarantee that
23 Nevada Trust obtained when commencing its foreclosure in November 2001 did not show
24 the Countrywide Deed of Trust because it had been reconveyed in August 2001.
- 25 14. The Gonzaleses made the August and September 2001 payments on the CHL Loan.
26 However, the CHL Loan again went into default. On January 4, 2002, CTC caused a
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1 Notice of Default and Election to Sell Under the CHL Deed of Trust to be recorded as
2 Document No. 2002-0001952 (the "CHL NOD II"). (Ex. No. 6). This Notice does not
3 reveal that the deed of trust had been reconveyed. The trustee's sale guarantee issued by
4 CTC as party of the January 4, 2002 CHL NOD II should have shown that the
5 Countrywide Deed of Trust had been previously reconveyed. CTC did not realize it had
6 erroneously reconveyed the Countrywide Deed of Trust until October 2002.

7 15. After expiration of the statutory three-month period for the default on the LaSalle Loan,
8 Nevada Trust caused a Notice of Trustee's Sale to be recorded in February, 2002, as
9 Document No. 2002-0031880. This Notice of Trustee's Sale initially scheduled a
10 trustee's sale date of March 15, 2002. (Ex. No. 15).

11 16. One of the parties entitled to receive notice of the foreclosure sale was the Internal
12 Revenue Service ("IRS"), which had recorded a Notice of Federal Tax Lien against the
13 Gonzaleses on August 18, 2000.

14 17. On February 20, 2002, Nevada Trust first provided the IRS with written notice of the
15 pending sale of the Property pursuant to the LaSalle Loan. By certified mail, return
16 receipt requested, on February 20, 2002, Nevada Trust sent a copy of the Notice of
17 Trustee's Sale to the IRS addressed to 5104 N. Blythe Street, Suite 102 (Stop FR 5530),
18 Fresno, California 93722. Based upon the delivery information contained on the return
19 receipt, the IRS received the Notice of Trustee's Sale on February 25, 2002.

20 18. The notice provided on February 20, 2002, was the only written notice provided by
21 Nevada Trust to the IRS with respect to the trustee's sale of the Property. Nevada Trust
22 mailed notice of its trustee sale, along with appropriate documents, to the IRS in an
23 untimely fashion. The IRS received only 23 day notice of the Nevada Trust foreclosure
24 sale. Nevada Trust did not realize that it did not properly give notice to the IRS until
25 after the foreclosure sale had taken place.

26 19. On March 15, 2002, Robert G. Gonzales filed a petition in the United States Bankruptcy
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1 Court, Eastern District of California (Fresno), Case No. 02-12384. The filing of the
2 bankruptcy caused the Countrywide and the La Salle foreclosure sales to be postponed.
3 Case No. 02-12384 was dismissed on April 25, 2002. (Ex. No. 7).

4 20. Robert G. Gonzales filed a second petition on April 26, 2002 in the United States
5 Bankruptcy Court, Eastern District of California (Fresno), Case No. 02-13889.

6 21. Countrywide filed a motion for relief from the automatic stay and obtained relief from the
7 Automatic Stay in Case No. 02-13889. Case No. 02-13889 was dismissed on August 1,
8 2002. (Ex. No. 8).

9 22. The trustee's sale under the La Salle Trust Deed was conducted on August 15, 2002.

10 23. Alan Boyajian personally attended the sale on behalf of La Jolla Group II ("LJG II").
11 Terrance Frazier also personally attended the sale. Because he had arrived late, Boyajian
12 and Frazier did not discuss the Property. Boyajian and Frazier (collectively "LJG II and
13 Frazier") agreed on the day of the foreclosure sale to purchase the Property together.

14 24. Boyajian has access on his computer to information from title companies regarding
15 comparable sales information, which he uses in forming opinions of the value of property
16 he is thinking of purchasing at foreclosure sales.

17 25. Boyajian based his decision to bid at the foreclosure sale upon his estimate of the value of
18 the Property, which was \$235,000. In his experience, Boyajian expected the bidding to
19 go up to \$120,000 to \$130,000. Expert witness Barbara Radcliffe estimated the value
20 of the Property at \$260,000 on August 15, 2002 and \$415,000 as of April 26, 2007.

21 26. When Boyajian noticed that the Property was scheduled for sale, Boyajian recalled that
22 the prior deed of trust on this property had been reconveyed. As a result, at the time of
23 the sale Boyajian believed that he was bidding on a first deed of trust.

24 27. LJG II and Frazier submitted the successful bid of \$24,200.00. (Ex. No. 17). Boyajian
25 was "ecstatic" when LJG II acquired title to the Property for \$24,200.00. Boyajian
26 believed that he and Frazier had made a very favorable purchase of a property that was
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1 unencumbered by any senior deeds of trust.

2 28. The Trustee's Deed Upon Sale for the trustee's sale conducted by Nevada Trust on
3 August 15, 2002, was recorded on August 27, 2002 as Document No. 02-145898. (Ex.
4 No. 17).

5 29. The Trustees Deed Upon Sale issued in favor of LJG II and Frazier contained the
6 statutory recitals provided for in California Civil Code § 2924.

7 30. After expiration of the statutory three-month period and receiving relief from Robert
8 Gonzales' Automatic Stay in Bankruptcy Case No. 02-13889, CTC caused a second
9 Notice of Trustee's Sale to be recorded on September 3, 2002 as Document No.
10 2002-0150872, setting a trustee's sale date of September 19, 2002 ("CHL NOS II").

11 31. On or about August 30, 2002, LJG II and Fraizer learned that Countrywide had noticed a
12 foreclosure sale on the Property for September 19, 2002.

13 32. Unaware that the Countrywide Deed of Trust had been reconveyed, Frazier authorized
14 sending Countrywide \$22,721.22 to reinstate the default and prevent the sale from going
15 forward on September 19, 2002. When Boyajian learned that this payment had been
16 made, he notified Frazier about the reconveyance and contacted Countrywide to obtain
17 the return of funds.

18 33. On September 24, 2002, Countrywide instructed CTC to rescind the CHL NOD II and
19 CTC rescinded CHL NOD II as Document No. 2002-0166168.

20 34. In 2002, it was not CTC's custom and practice to examine the chain of title to determine
21 whether there had been prior foreclosures under the same deed of trust before processing
22 a new foreclosure. The Trustee Sale Guarantee obtained by CTC for CHL NOD II did not
23 contain a reference to the Full Reconveyance. Landsafe Title Company, who prepared
24 this Trustee Sale Guarantee, failed to provide this information to CTC. Landsafe is not
25 part of First American Title who provided the Trustee Sale Guarantee for CHL NOD I.
26 CTC therefore did not discover the error with the Full Reconveyance until October 2002.

1 35. On October 15, 2002, CTC recorded a document entitled Notice of Void Reconveyance
2 as Document No. 2002-08142.

3 36. In November 2003, Countrywide offered to return and refund the amount of LJJ II's
4 foreclosure bid, plus interest.

5 37. On or about March 19, 2004 Countrywide, CTC, Nevada Trust, and La Salle entered into
6 a written settlement that had been reached in November 2003. As part of the settlement
7 La Salle authorized Nevada Trust to rescind the Trustees Deed Upon Sale in favor of LJJ
8 II and Frazier and assigned the La Salle Note and the La Salle Trust Deed to
9 Countrywide. (Ex. No. 18).

10 38. On or about June 24, 2004, Nevada Trust caused a "Notice of Rescission of Trustee's
11 Deed Upon Sale" to be recorded as Document No. 04-138117. (Ex No. 11).

12 39. LJJ II is a general partnership consisting of Alan Boyajian and Lee Kleim. LJJ II has
13 been in the primary business of buying, selling, and leasing residential foreclosure
14 properties since 1987. Boyajian has been in the residential foreclosure business since
15 1974.

16 40. Boyajian and Frazier frequently bought properties at foreclosure sales together, Boyajian
17 and Frazier rarely bided against each other, and 95% of the time Boyajian and Frazier bid
18 as partners. If both Boyajian and Frazier showed up at the same sale, their understanding
19 was that each party was acquiring a 50% interest in the property unless someone told the
20 other he was not interested in the property.

21 41. Both Boyajian and Frazier were experienced and sophisticated "professional bidders."
22 Boyajian has purchased hundreds of properties at foreclosure sales. Frazier started
23 helping his guardian, Michael Thaler, in the foreclosure sale business when he was 13
24 years of age. Frazier started buying property on his own in 1995.

25 42. LJJ II has a process it uses to locate properties being offered at foreclosure sales. Office
26 staff clip and post notices of sales, which are organized by date. Because of the large
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1 volume of such notices, Boyajian generally only reviews the notices within a week to
2 several days prior to the scheduled sale.

3 43. Most foreclosure sales are cancelled or postponed.

4 44. It was not Boyajian's business practice to obtain preliminary reports from a title insurer.
5 Under the circumstances this process takes too long and is too costly. Neither Boyajian
6 nor Frazier obtained a preliminary title report, guarantee or commitment from a title
7 company concerning a property prior to bidding at the foreclosure sale. Neither Boyajian
8 nor Frazier pay for the information they receive regarding properties.

9 45. In 2002, Boyajian's usual practice to obtain information on property was to contact a
10 customer service at a title company to obtain information about open deeds of trust and
11 encumbrances. If a sale is postponed, a new research is done.

12 46. Boyajian focuses his research on the position of the deed of trust they are buying and
13 whether there are any open deed of trust against the property. Neither Boyajian nor
14 Frazier look into whether there are judgment liens on a property, tax liens, or other liens.
15 These are risk they take into account in their business.

16 47. Concerning LJG II's practices on this purchase, Boyajian looked at the information he
17 had on the property in his file and did not see any open deeds of trust.

18 47.a. Boyajian's investigation of the state of title to the Property first consisted of
19 requesting from First American Title Company copies of "open" trust deeds, i.e.,
20 trust deeds which had not been reconveyed.

21 47.b. Second, Boyajian contacted Sandi Jenkins, a customer service representative at
22 First American Title, in order to obtain more information on the Property. In his
23 initial conversation with Jenkins, she told Boyajian that the LaSalle Deed of Trust
24 was going to sale as a first deed of trust. Boyajian responded that he though there
25 would be another deed of trust ahead of the LaSalle Deed of Trust. Jenkins
26 responded that there had been, but it was paid off. Boyajian asked Jenkins to
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1 send him all information about the Property.

2 47.c. On April 29, 2002, Boyajian received a 15 page fax from Jenkins. The
3 documents included the CHL Deed of Trust and a January 4, 2002 notice of
4 default.

5 47.d. Because the original fax did not include a copy of a recorded reconveyance on the
6 CHL Deed of Trust, on May 2, 2002, Jenkins faxed this document.

7 48. In reviewing the documents, Boyajian determined that a notice of default had been
8 recorded on the CHL Deed of Trust after the full reconveyance. Boyajian knew there
9 was an inconsistency between the Full Reconveyance and the CHL NOD II. Boyajian
10 knew that a mistake had been made by Countrywide at the time that he bid at the Nevada
11 Trust foreclosure sale on August 15, 2002 because Countrywide had filed a notice of
12 reconveyance and then a notice of default.

13 49. Because the Countrywide deed of trust had been reconveyed, Boyajian decided that the
14 CHL NOD II had been recorded in error. Boyajian's conclusion – that the CHL NOD II
15 was the error – was not unreasonable.

16 50. Boyajian did not attempt to contact Countrywide, CTC, or Nevada Trust concerning the
17 full reconveyance or CHL NOD II because he believed loan information is not normally
18 given to third party caller regarding a loan.

19 51. Countrywide and CTC provide limited public information to prospective bidders, such as
20 whether a sale was going to proceed. Had Boyajian called Countrywide and/or CTC and
21 asked about the CHL NOD II, he would have been told CTC intended to proceed with a
22 foreclosure sale.

23 52. Carroll Gagnier, the President of Nevada Trust, reached the conclusion that the CHL
24 Deed of Trust was a valid lien and the full reconveyance must have been done in error.

25 52.a Gagnier formed the opinion that the CHL Deed of Trust had been reconveyed in
26 error because of the timing of the documents and his conclusion that a person who
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1 pays off a \$180,000 obligation does not lose his property over a \$20,000
2 obligation a few months later.

3 52.b In Gagnier's experience it is unlikely to see a full reconveyance for \$180,000
4 without new financing.

5 52.c. Gagnier did not contact CTC or Countrywide to ask whether the full reconveyance
6 was in error.

7 52.d. Gagnier reached his conclusion based on his position as one conducting the
8 foreclosure sale and not from the prospective of a bidder.

9 53. Normally, Gagnier provides no information to prospective bidders on the priority of the
10 deed of trust being foreclosed on.

11 54. However, in this case, Gagnier instructed his staff that all parties who contracted Nevada
12 Trust inquiring about the La Salle sale were to be directed to him personally. Gagnier
13 told any parties who contacted Nevada Trust, including those who did not request lien
14 priority information, that the CHL Deed of Trust still remained a valid lien against the
15 Property, the LaSalle Trust Deed being foreclosed was a junior trust deed, and the CHL
16 Deed of Trust would have to be satisfied by any bidder acquiring title to the Property.

17 55. Gagnier never spoke to Boyajian or Fraizer concerning the sale.

18 56. Gagnier believed that any interested bidder would have called prior to the sale. As such,
19 Gagnier did not have an announcement made at the August 15, 2002 sale that the CHL
20 Deed of Trust was valid nor did he post any warnings about the sale.

21 57. Had either Boyajian or Frazier called Nevada Trust to inquire about the foreclosure sale,
22 either would have been told by Gagnier that the Full Reconveyance had been recorded by
23 mistake, and that any successful bidder at the foreclosure sale would be required to satisfy
24 the debt to Countrywide.

25 58. No expert testimony was provided on what a sophisticated bidder in the community
26 would believe or do if faced with a title that contained a notice of default on a deed of
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1 trust that had already been reconveyed.

2 59. Simply because Boyajian did not reach the same conclusion as Gagnier about which
3 recording – the full reconveyance or the CHL NOD II – was in error, is insufficient to
4 establish that any reasonable investor would have reached the same conclusion as
5 Gagnier.

6 60. In the industry it is more common for a notice of default to be recorded in error than a full
7 reconveyance. In fact, it is very rare for a full reconveyance to be recorded in error.

8 61. It was not unreasonable for Boyajian to assume that the Full Reconveyance was not a
9 mistake, and that the CHL Loan had been paid in full.

10 62. Gagnier's statements to prospective bidders prior to the conduct of the sale might have
11 contributed to a lower sale price. However, it is speculative to determine how many
12 prospective bidders Gagnier spoke to and/or if his statements had any impact on the price.

13 63. Both Frazier and Boyajian had the practice of having their staffs make telephone calls to
14 the foreclosure trustee on the day before and the day of a scheduled sale to make sure the
15 sale was going to proceed.

16 64. Boyajian's office phone records reveal that his office had called Nevada Trust several
17 times between February 2002 and August 2002.

18 65. It is unclear if Nevada Trust told Boyajian's staff about the CHL Deed of Trust.

19 66. Boyajian testified that he came to the foreclosure sale prepared to bid up to \$120,000, and
20 that he was surprised when the bidding stopped at a lower amount.

21 67. Boyajian's surprise at the low bidding and enthusiastic behavior is evidence confirming
22 Boyajian's belief that the CHL Deed of Trust had been reconveyed.

23 68. It is possible that the reason the bidding stopped at \$24,200 is that all other bidders were
24 aware that the La Salle Deed of Trust was not the senior lien on the Property.

25 69. It is equally possible that the reason the bidding stopped at only \$24,200 was because
26 Boyajian and Frazier were the only experienced bidders at the auction who were serious
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1 about obtaining the Property.

2 70. Boyajian's and Frazier's inability to remember if they had a cell phone during 2002
3 and/or the cell phone numbers and their failure to produce cell phone records does not
4 make Boyajian's or Frazier's testimony incredible on other respects.

5 71. Lery Albert Kleim testified that the Property generated \$59,586 in income from March
6 2003 to April 2006. The property also had income of \$1600 per month from April 2006
7 to May 2007.

8 72. LYG II and Frazier have not paid property taxes since acquiring the Property.
9 Countrywide has paid \$17,234.78 in real property taxes from 2001 to August 6, 2007

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11 **CONCLUSIONS OF LAW**

12 1. A deed of trust is a lien on real property. Monterey S.P. Partnership v. W.L. Bangham,
13 Inc., 49 Cal.3d 454, 460 (1989). Reconveyance of a deed of trust transfers the security
14 interest to the current owner of the property, and upon recording, the lien is extinguished.
15 California Civ. Code §§ 2939, 2941(b)(1); First Fidelity Thrift & Loan Assn. v. Alliance
16 Bank, 60 Cal.App.4th 1433, 1441 (1998). CTC, acting as Countrywide's agent,
17 recorded a reconveyance on August 3, 2001, extinguishing Countrywide's lien.

18 2. A reconveyance recorded by a trustee by mistake can be set aside by a court of equity in
19 the absence of a bona fide purchaser or encumbrancer. Conlan v. Sullivan, 110 Cal. 624,
20 626-27 (1895); First Fidelity Thrift & Loan Ass'n v. Alliance Bank, 60 Cal. App. 4th
21 1433, 1441 (1998); Ankoanda v. Walker-Smith, 44 Cal. App. 4th 610, 615 (1996); First
22 Nationwide Savings v. Perry, 11 Cal. App.4th 1657, 1669 (1992); Vilkin v. Sommer, 260
23 Cal.App. 2d 687, 694 (1968); Simmons v. Briggs, 69 Cal. App. 447, 448 (1924); MILLER
24 AND STARR CALIFORNIA REAL ESTATE § 10:116, Effect of an erroneous reconveyance
25 (2006).

26 3. If a trustee executes an unauthorized reconveyance and the trustee subsequently conveys
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1 the property, a bona fide purchaser who does not have notice of the trustee's lack of
2 authority receives title free and clear of the lien. CALIFORNIA REAL ESTATE 2D DIGEST
3 DEEDS OF TRUST § 22 Reconveyance (2006); see also Firato v. Tuttle, 48 Cal.2d 136,
4 139 (1957); Triple A Management Co., Inc. v. Frisone, 69 Cal.App.4th 520, 530 (1999).
5 Here, the reconveyance prepared and recorded by CTC was voidable because it was filed
6 by mistake. Because the reconveyance was recorded in error, Countrywide had an
7 equitable lien on the Property.

8 4. A bona fide purchaser for value is not subject to a prior equitable lien. First Fidelity
9 Thrift & Loan Assn. v. Alliance Bank, 60 Cal.App.4th 1433, 1442 (1998).

10 5. A bona fide purchaser for value who acquires his or her interest in real property without
11 knowledge or notice of another's prior rights or interest in the property takes the property
12 free of such unknown interests. Any purchaser of real property acquires the property
13 subject to prior interests of which he or she has actual or constructive notice. Stout v.
14 Gill, 110 Cal.App. 445, 449 (1930); In re Marriage of Cloney, 91 Cal.App.4th 429, 437
15 (2001); Hochstein v. Romero, 219 Cal.App.3d 447, 451-52 (1990).

16 6. California Civil Code § 2924 creates a conclusive presumption in favor of a bona fide
17 purchaser who receives a trustee's deed that contains a recital that the trustee has fulfilled
18 its statutory notice requirements. Melendrez v. D & I Investment, Inc., 127 Cal.App.4th
19 1238, 1250 (2005). Section 2924 reads in relevant part:

20 A recital in the deed executed pursuant to the power of sale of
21 compliance with all requirements of law regarding the mailing of
22 copies of notices or the publication of a copy of the notice of
23 default or the personal delivery of the copy of the notice of default
24 or the posting of copies of the notice of sale or the publication of a
copy thereof shall constitute prima facie evidence of compliance
with these requirements and conclusive evidence thereof in favor
of bona fide purchasers and encumbrancers for value and without
notice.

25 7. At issue in this action is whether LJV II and Frazier were bona fide purchasers of the
26 Property. The parties agree that if LJV II and Frazier were bona fide purchasers who had
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1 no actual or constructive notice of the mistake in recording the full reconveyance, they
2 hold title to the Property clear of Countrywide's equitable interest in the Property.
3 However, if they were not bona fide purchasers, Countrywide maintains an equitable
4 interest in the Property.

5 8. Whether a buyer is a bona fide purchaser is a question of fact. Melendrez v. D & I
6 Investment, Inc., 127 Cal.App.4th 1238, 1254 (2005); Asisten v. Underwood, 183
7 Cal.App.2d 304, 311 (1960).

8 9. Because Countrywide claims an equitable interest rather than an interest based on legal
9 title, it has the burden to establish that LJV II and Frazier were not bona fide purchases
10 and were on notice of Countrywide's equitable lien or interest in the property. See First
11 Fidelity Thrift & Loan Assn. v. Alliance Bank, 60 Cal.App.4th 1433 1442; 5 Miller &
12 Starr, CALIFORNIA REAL ESTATE, § 11:50.

13 10. A bona fide purchaser is one who pays value for the property without notice of any
14 adverse interest or of any irregularity in the sale proceedings. Hochstein v. Romero, 219
15 Cal.App.3d 447, 451 (1990). The elements of bona fide purchase are payment of value,
16 in good faith, and without actual or constructive notice of another's rights. Melendrez v.
17 D & I Investment, Inc., 127 Cal.App.4th 1238, 1251 (2005); Gates Rubber Co. v. Ulman,
18 214 Cal.App.3d 356, 364 (1989).

19 11. The second element requires the buyer have neither knowledge nor notice of the
20 competing claim. Triple A Management Co. v. Frisone, 69 Cal.App.4th 520, 530 (1999).
21 "A person generally has notice of a particular fact if that person has knowledge of
22 circumstances which, upon reasonable inquiry, would lead to that particular fact." First
23 Fidelity Thrift & Loan Assn., 60 Cal.App.4th 1433, 1443 (1998); see also California Civ.
24 Code, § 19; 5 MILLER & STARR, CAL. REAL ESTATE, Recording and Priorities, §§ 11:49-
25 11:51, 11:58-11:59. The rationale for this requirement is that "[t]he recording laws were
26 not enacted to protect those whose ignorance of the title is deliberate and intentional . . .

1 Their purpose is to protect those who honestly believe they are acquiring a good title, and
2 who invest some substantial sum in reliance on that belief.” Beach v. Faust, 2 Cal.2d 290,
3 292-93 (1935); Melendrez, 127 Cal.App.4th at 1252.

4 12. A bona fide purchaser or encumbrancer can rely on the public records and receives title
5 free and clear of the equitable lien if he or she does not have knowledge or notice that a
6 trustee was not authorized to make the reconveyance. Firato v. Tuttle, 48 Cal. 2d 136
7 (1957); March v. Pantaleo, 4 Cal. 2d 242, 243-44 (1935); First Fidelity Thrift & Loan
8 Ass'n v. Alliance Bank, 60 Cal. App. 4th 1433, 1441-42 (1998); Huckell v. Matranga, 99
9 Cal. App. 3d 471, 478 (1979).

10 13. Boyajian reasonably relied on the duly recorded reconveyance in this case. This
11 reconveyance was properly filed, and had been filed for over a year without any
12 indication that it was a mistake. The CW NOD II had been recorded after the
13 reconveyance, but it made no mention of the reconveyance. Boyajian knew that a
14 mistake had been made because the CW NOD II was inconsistent with the full
15 reconveyance. However, it would have been reasonable to conclude that if the CW NOD
16 II was proper, it would have addressed the reconveyance. It also would have been
17 reasonable to conclude that while notices of default are recorded in error, full
18 reconveyances are almost never recorded in error. As such, LYG II and Frazier could
19 properly rely on the title because nothing in the title put them on constructive notice that
20 the full reconveyance had been recorded in error.

21 14. The duties on a purchaser to go beyond a title are minimal. This case is similar to First
22 Fidelity Thirt & Loan Asso’n v. Alliance Bank, 60 Cal.App.4th 1433 (1998).

23 14.a. In First Fidelity, the borrower obtained a loan from First Fidelity, which originally
24 encumbered the borrower's commercial property and also his home. Id. at 1436.
25 The agreement provided that when a capital reduction payment was made, First
26 Fidelity would reconvey the encumbrance on the borrower's home. When the
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1 borrower made the capital reduction payment, First Fidelity mistakenly instructed
2 the trustee to reconvey the commercial property, not the home, and the trustee
3 recorded a reconveyance of the commercial property, not the home. Id. Four
4 months later, when the borrower applied to Alliance for a loan, the borrower listed
5 the commercial property as an asset and noted an encumbrance against this
6 property in favor of First Fidelity. Id. Before the Alliance loan was given, the
7 borrower obtained a loan from a third bank, using the commercial property as
8 collateral. Id. at 1437.

9 14.b. Prior to funding its loan, Alliance's loan officer reviewed title reports showing
10 only the third bank's deed of trust and not First Fidelity's deed of trust on the
11 commercial property. Id. at 1437. Noting the discrepancy between this
12 statement and the borrower's loan application, the loan officer spoke to the
13 borrower who told Alliance that he had "refinanced" and that one of his properties
14 had been released. The borrower advised that his application was in error, and
15 that the deed of trust in favor of First Fidelity encumbered only his home. Id.
16 The Alliance loan officer then phoned the third party bank, and it advised that the
17 loan from First Fidelity against the commercial property had been repaid and First
18 Fidelity held a deed of trust only against the borrower's home. Id. at 1437-38.
19 Alliance then funded its own loan, and secured it by a second deed of trust on the
20 commercial property.

21 14.c. Almost two years after Alliance funded its loan, First Fidelity discovered that it
22 had mistakenly reconveyed its deed of trust against the commercial property. Id.
23 at 1439. First Fidelity sued the borrower and obtained a judgment which
24 reinstated First Fidelity's deed of trust against the commercial property as of the
25 date on which First Fidelity had recorded its lis pendens. This date was after the
26 recording of Alliance's deed of trust, and thus First Fidelity's deed of trust against
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1 the commercial property was junior in time to Alliance's deed of trust. Id.

2 14.d. The third party bank was paid, and when both Alliance's and First Fidelity's deeds
3 of trust went into default both lenders instituted foreclosure proceedings. Id. A
4 lawsuit between Alliance and First Fidelity resulted, with First Fidelity and
5 Alliance both filing motions for summary judgment. First Fidelity contended that
6 Alliance was not a bona fide encumbrancer because Alliance had a duty to
7 investigate the manner in which the encumbrance had been released, making First
8 Fidelity's encumbrance senior. Alliance contended that it had no actual notice of
9 any outstanding interest held by First Fidelity and that it had no duty to investigate
10 any more than it did. Id. at 1440. The trial court denied First Fidelity's motion
11 and granted Alliance's motion, and First Fidelity appealed. Id.

12 14.e. The court of appeal first confirmed that a good faith encumbrancer takes title clear
13 of unknown and unrecorded liens. Id. at 1440-41. The court of appeal found
14 that First Fidelity's claim was an equitable claim to reinstatement of a previously
15 extinguished lien. First Fidelity, 60 Cal.App.4th at 1441. The court of appeal
16 concluded that Alliance presented evidence that it had no knowledge that First
17 Fidelity had an equitable claim. Id. at 1442. When the burden shifted to First
18 Fidelity to present evidence showing a triable issue of fact on whether Alliance
19 did have constructive notice of First Fidelity's claim, First Fidelity attempted to
20 meet this burden by presenting evidence of two facts: (1) That the borrower had
21 initially listed a First Fidelity encumbrance against the commercial property, and
22 (2) That Alliance had not telephoned First Fidelity to inquire. Id. On these
23 facts, the court of appeal determined that Alliance had done all that was required
24 because upon being advised of one encumbrance in favor of First Fidelity and
25 obtaining a title report without such an encumbrance, Alliance was told that First
26 Fidelity held an encumbrance only against the borrower's home. Id. at 1444.

1 “No evidence was presented to the effect that Alliance had reason to suspect that
2 the unusual had occurred: that First Fidelity had reconveyed by mistake.” Id.
3 While it might have been a good business practice for Alliance to have done
4 more, the court of appeal concluded that “there is no authority for the proposition
5 that a prospective lender, learning that a prior deed of trust had been reconveyed,
6 has a duty to investigate further to determine whether that reconveyance was in
7 error.” Id. 1444-45. In making this finding, the court of appeal noted Alliance
8 had not ignored the inconsistency. Id. at 1445. Instead, Alliance had obtained
9 further clarification from the borrower, spoke to the third party bank, and
10 consulted a title report. Id. The California Court of Appeal stated:

11 The inquiry legally required . . . is only a reasonable
12 inquiry, not an exhaustive one. Although this is a matter of
13 degree, the duty to inquire here was discharged once the
14 sole discrepancy had been explained in a manner consistent
with normal practice. As the Supreme Court stated in
March, “[f]urther inquiries ... were not, under these
circumstances, necessary.”

15 Id. at 1445 (quoting March v. Pantaleo, 4 Cal.2d 242, 244 (1935)).

- 16 15. Based on First Fidelity, LJJ II and Frazier could rely on the Property’s title and had no
17 duty to investigate beyond the Property’s record title.
- 18 16. The title to the Property showed that the Countrywide loan had been discharged, and in
19 general, there is no duty to investigate beyond the state of record title. First Fidelity, 60
20 Cal.App.4th at 1444-45.
- 21 17. As in First Fidelity, LJJ II and Frazier did not know about Countrywide’s equitable
22 claim. Based on the evidence admitted at trial, LJJ II and Frazier had insufficient
23 information for the court to find that they had knowledge of Countrywide’s equitable
24 claim.
- 25 18. While Boyajian was a sophisticated purchaser who knew that a mistake had been made
26 regarding the Property’s title, all evidence indicates that a mistaken full reconveyance,
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1 unlike a mistake notice of default, is very rare.

2 19. The amount Boyajian was willing to bid for the property and his response to his low
3 winning bid show that Boyajian did not believe Countrywide had an equitable interest in
4 the property.

5 20. Other than Gagnier, no evidence was admitted that any other expert or sophisticated
6 bidder in the industry would have believed Countrywide maintained an interest in the
7 property. The fact an employee of Nevada Trust came to a conclusion different than
8 Boyajian is insufficient evidence of Boyajian's knowledge of Countrywide's equitable
9 interest.

10 21. The court recognizes that a subsequent purchaser or encumbrancer is charged with
11 constructive knowledge of what a reasonable investigation would have revealed. Rutter,
12 CAL. PRACTICE GUIDE: REAL PROP. TRANSACTIONS CH. 6-H, H. Security For Promissory
13 Note (2006). While a subsequent encumbrancer is permitted to rely only on the recorded
14 state of title as that state of title objectively presents itself, such a purchaser or
15 encumbrancer is not entitled to view the record either through rose-colored glasses or
16 with blinders on. Triple A Management Co., Inc. v. Frisone, 69 Cal.App.4th 520, 530
17 (1999). He is not entitled to interpret ambiguities in his own favor by ignoring
18 reasonable warning signs that appear in the recorded documents or from information
19 obtained outside the chain of title. Id. at 530-31. Information that reasonably brings
20 into question the state of the title triggers a limited duty of inquiry.

21 22. Given the evidence that full reconveyances are almost never recorded in error, Boyajian
22 did not ignore reasonable warning signs appearing in title. In addition, Boyajian had no
23 information from an outside source that the reconveyance was in error. All evidence
24 indicates that had Boyajian called Countrywide or CTC and asked if the full
25 reconveyance had been recorded in error, Boyajian would not have been given this
26 information.

1 23. Under the facts of this case, the court finds that Boyajian’s inquiry was reasonable and
2 LIG II and Frazier were bona-fide purchasers.

3 24. The IRS was not given proper notice of the foreclosure sale.

4 25. Current California Civil Code § 2924b would require Nevada Trust to rescind the sale
5 because the IRS was not given proper notice. However, Section 2924b was not the law
6 at the time the sale took place, and did not provide Nevada Trust with a basis to rescind
7 the sale. Unlike the current version of Section 2924b, the 2002 version only required
8 notice to the IRS.

9 26. California Civil Code § 1058.5(b) allows a trustee to rescind a sale and reads in part:
10 “Where a trustee's deed is invalidated by a pending bankruptcy or otherwise, recondition
11 of a notice of rescission of the trustee's deed . . . [that] names of all trustors and
12 beneficiaries, the location of the property subject to the deed of trust, and the reason for
13 rescission, shall restore the condition of record title to the real property described in the
14 trustee's deed and the existence and priority of all lien holders to the status quo prior to
15 the recondition of the trustee's deed upon sale.” Using Section 1058.5(b), a trustee may
16 set aside or void a otherwise completed non-judicial foreclosure sale even after the
17 trustee's deed is delivered to the high bidding purchaser under certain circumstances in
18 the absence of an intervening bona fide purchaser. RUTTER, CAL. PRACTICE GUIDE:
19 REAL PROP. TRANSACTIONS Ch. 6-I, § 6:535.35. Statutorily deficient notice of default
20 and/or notice of the sale is grounds to set aside a sale. The statutory requirements of
21 Section 2924 must be strictly complied with, and a trustee’s sale based on a statutorily
22 deficient notice of default is invalid. Miller v. Cote, 127 Cal.App.3d 888, 894 (1982).

23 27. California Civil Code § 2924 limits the trustee’s ability to set aside a deed of trust for
24 failures in notice if the trustee’s deed complied with Section 2924. A recital in the
25 trustee's deed of compliance with “all requirements of law” regarding mailing or personal
26 delivery and publication or posting of the copies of notice of default and notice of sale
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1 “shall constitute prima facie evidence of compliance with these requirements and
2 conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value
3 and without notice.” California Civil Code § 2924. Setting aside a trustee’s sale for
4 inadequate notice is not possible in the event of a bona fide purchaser who has the benefit
5 of a conclusive presumption that the foreclosure sale was properly noticed. Melendrez v.
6 D & I Investment, Inc., (2005) 127 Cal. App. 4th 1238, 1255 (2005); Bank of America,
7 N.A. v. La Jolla Group II, 129 Cal.App.4th 706, 714 (2004); Kolodge v. Boyd, 88
8 Cal.App.4th 349, 359 (2001). Because the court finds LJC II and Fraizer were bona
9 fide purchases, Nevada Trust had no common law ability to rescind the sale even if notice
10 to the IRS was improper in light of Section 2924.

11 28. As a general rule, the purchaser of property at a nonjudicial foreclosure sale receives title
12 under a trustee's deed free and clear of any right, title, or interest of the trustor. Cal. Civ.
13 Code § 2924g; Melendrez v. D & I Investment, Inc., 127 Cal. App.4th 1238 (2005).
14 However, an inadequate sale price coupled with a procedural irregularity may warrant a
15 set-aside of a completed foreclosure sale just as it may be a basis for aborting a sale not
16 yet completed. Knapp v. Doherty, 123 Cal.App. 4th 76, 94–97 (2004). “A non-judicial
17 foreclosure sale is accompanied by a common law presumption that it ‘was conducted
18 regularly and fairly.’” Melendrez, 127 Cal.App.4th at 1258 (quoting Brown v. Busch,
19 152 Cal.App.2d 200, 204 (1957)). One attacking such a sale must overcome this
20 common law presumption by substantial evidence of prejudicial procedural irregularity.
21 Melendrez, 127 Cal.App.4th at 1258; Knapp v. Doherty, 123 Cal.App.4th 76, 87 (2004).
22 While mere inadequacy of price, standing alone, will not justify setting aside a trustee's
23 sale, gross inadequacy of price coupled with even slight unfairness or irregularity is a
24 sufficient basis for setting the sale aside.” Estate of Yates, 25 Cal.App.4th at 523;
25 Whitman v. Transtate Title Co. 165 Cal.App.3d 312, 323 (1985); Miller and Starr,
26 CALIFORNIA REAL ESTATE 3d § 10:210 (2006). “The inquiry is whether, recognizing the
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1 purposes of the statutory scheme, there is a substantial defect in the statutory procedure
2 that is prejudicial to the interests of the trustor and claimants.” Residential Capital v.
3 Cal-Western Reconveyance Corp., 108 Cal.App.4th 807, 822 (2003).

4 29. Unlike notice errors, the statutory presumption in favor of a bona fide purchaser at non-
5 judicial foreclosure sale found in Section 2924 pertains only to notice requirements for
6 sale, and it does not apply to other requirements of the foreclosure process. CA JUR. 3D
7 DEEDS OF TRUST § 318 Irregularities in conduct of sale; 4 MILLER & STARR, § 10:211, p.
8 680; see also Bank of America, N.A. v. La Jolla Group II, 129 Cal.App.4th at 714 (2005).

9 For example, the Section 2924 recitals do not protect purchasers when the trustee
10 violated its statutory obligation of postponing the sale upon agreement of the beneficiary
11 and trustor. Melendrez, 127 Cal.App.4th at 1255-56.

12 30. The presumption that nonjudicial foreclosure sale was conducted regularly and fairly may
13 be rebutted only by substantial evidence of prejudicial procedural irregularity.
14 Cal.Civ.Code § 2924.

15 31. Here, the court finds that LJG II and Frazier were bona fide purchasers for value even
16 though they had experience in foreclosure sales and purchased the Property at below
17 market value.

18 32. Gagnier’s statements to some unknown number of persons that the CHL Deed of Trust
19 remained on the Property is insufficient to find substantial evidence of prejudicial
20 procedural irregularity in the sale. There is no evidence as to how many persons
21 Gagnier spoke to, whether Gagnier’s comments impacted the bids, or whether but for
22 Gagnier’s statements, the Property would have sold for more.

23 33. Whether LJG II and Frazier’s agreement to bid together on the Property forestalled
24 competitive bidding and resulting in an inadequate purchase price is speculative.

25 34. The rescission of the trustee’s deed issued in favor of LaJolla and Frazier was improper.
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CONCLUSION AND ORDER

1. LJG II and Frazier were bona fide purchasers at the August 15, 2002 sale.
2. LJG II and Frazier took title to the Property free and clear of any equitable claim asserted by Countrywide.
3. The foreclosure sale was conducted fairly and regularly and without substantial evidence of a prejudicial procedural irregularity.
4. LJG II and Frazier are entitled to judgment quieting title to the Property against Countrywide and Gonzales.
5. Pursuant to the agreement of the parties and the court's prior orders, LJG II's and Frazier's title is subject to the tax liens asserted by the United States for those amounts levied prior to August 15, 2002.
6. Pursuant to the court's order on summary judgment, the court finds against LJG II and Frazier on any negligence claims.
7. Countrywide SHALL return to LJG II and Fraizer the sum of \$22,721.22 paid in order to prevent a foreclosure sale on the Countrywide Deed of Trust.
8. Within fifteen days of this order's date of service, the parties shall submit either a proposed judgment, in conformance with this order, or a scheduling statement setting forth what remains of this action and the deadlines for any further filings.

IT IS SO ORDERED.

Dated: August 10, 2007

/s/ Anthony W. Ishii
UNITED STATES DISTRICT JUDGE