

1 by attorney Regina McClendon. Defendant seeks to dismiss
2 Plaintiffs' complaint for failure to state a claim.

3 For the reasons set forth below, Defendant's motion is granted
4 in part, with leave to amend.

5 Under Fed. R. Civ. P. 12(b)(6) (applicable in bankruptcy via
6 Fed. R. Bankr. P. 7012), a court must dismiss a complaint if it
7 fails to state a claim upon which relief can be granted. To
8 survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss, the plaintiff
9 must allege "enough facts to state a claim to relief that is
10 plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S.
11 544, 570 (2007). This standard requires the plaintiff to allege
12 facts that add up to "more than a sheer possibility that a
13 defendant has acted unlawfully." Ashcroft v. Iqbal, 556 U.S. 662,
14 678 (2009). Plaintiff must provide "more than labels and
15 conclusions, and a formulaic recitation of the elements of a cause
16 of action will not do." Id.

17 In deciding whether the plaintiff has stated a claim upon which
18 relief can be granted, the Court must assume that the plaintiff's
19 allegations are true and must draw all reasonable inferences in
20 favor of the nonmoving party. Usher v. City of Los Angeles, 828
21 F.2d 556, 561 (9th Cir.1987).

22 If the Court dismisses the complaint, it must then decide
23 whether to grant leave to amend. The Court should grant leave to
24 amend even if no request to amend the pleading was made, unless it
25 determines that the pleading could not possibly be cured by the
26 allegation of other facts. Lopez v. Smith, 203 F.3d 1122, 1130
27 (9th Cir. 2000).

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1 Generally, courts may not consider material outside the
2 complaint when ruling on a motion to dismiss. Hal Roach Studios,
3 Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th
4 Cir.1990). However, documents specifically identified in the
5 complaint whose authenticity is not questioned by parties may also
6 be considered. Fecht v. Price Co., 70 F.3d 1078, 1080 n.1 (9th Cir.
7 1995) (superseded by statutes on other grounds). Moreover, the
8 Court may consider the full text of those documents, even when the
9 complaint quotes only selected portions. Id. The Court may also
10 consider material properly subject to judicial notice without
11 converting the motion into one for summary judgment. Barron v.
12 Reich, 13 F.3d 1370, 1377 (9th Cir. 1994).

13 Here, the parties have provided the Court with copies of
14 documents recorded with the Santa Clara County Recorder with
15 respect to the property at 340 South Temple Drive, Milpitas,
16 California - and that are the subject of the Amended Complaint.
17 The Court has considered those documents.

18 The Amended Complaint filed December 7, 2012 contains the
19 following six causes of action:

20 First, Plaintiffs ask the Court to determine the validity,
21 extent, and priority of Defendant's lien.

22 Second, Plaintiffs seek a declaratory judgment that Defendant
23 has no lien, and that certain documents, as detailed below, are
24 unenforceable or not valid, and that Defendant had no right to
25 conduct a foreclosure sale so that the Trustee's Deed Upon Sale is
26 invalid.

27 Third, Plaintiffs seek an injunction enjoining Defendant from
28 proceeding with eviction.

1 Fourth, Plaintiffs seek to set aside the foreclosure sale.

2 Fifth, Plaintiffs seek damages for Slander of Title.

3 Sixth, Plaintiffs seek damages for violation of Unfair Business
4 Practices Act, Cal Bus. & Prof. Code § 17200.

5 The complaint alleges the following:

6 On February 7, 2007, Debtors executed a note ("Note") and deed
7 of trust ("Deed of Trust") in favor of Fremont Investment & Loan
8 ("Fremont").

9 On July 24, 2008, Quality Loan Service Corporation ("Quality
10 Loan") recorded a Notice of Default which alleged that Wilshire
11 Credit Corporation ("Wilshire") was the beneficiary of the mortgage
12 (this Notice of Default was rescinded on February 11, 2010).
13 Plaintiffs allege that there is no publicly available evidence that
14 Wilshire was the beneficiary or that Quality Loan was the legal
15 trustee of the mortgage.

16 On September 4, 2008 a substitution of trustee was recorded on
17 the property attempting to substitute Quality Loan as Trustee of
18 the mortgage. It was supposedly executed by Wilshire in its
19 capacity as attorney in fact for Citigroup Global Markets Realty
20 Corp but there is no publicly available evidence that Citigroup was
21 the beneficiary at the time the substitution was recorded.

22 On October 24, 2008 a purported Assignment of Deed of Trust was
23 recorded on the property attempting to assign the mortgage from
24 Mortgage Electronic Registration Systems, Inc., ("MERS") to
25 Defendant, executed by Peter Steinmetz in his alleged capacity as
26 Assistant Secretary of MERS. Steinmetz was never assistant
27 secretary or an officer of MERS; he was an employee of Citigroup.

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1 On July 16, 2009 a purported Loan Modification Agreement was
2 recorded on the property, attempting to identify LNV Corporation as
3 lender, but there is no publicly available evidence that LNV Corp.
4 was the lender at the time the loan modification was recorded.

5 On October 14, 2009 a purported Corporate Assignment of
6 Mortgage/Deed of Trust was recorded on the property attempting to
7 assign the mortgage from MERS, as nominee for Fremont, to
8 Defendant. The assignment was executed by Terri Harland as
9 Assistant Secretary of MERS, but she was never assistant secretary
10 or an officer of MERS. She was an employee of Wilshire.

11 On February 11, 2010, Quality Loan recorded a "Rescission of
12 Notice of Default and Election to Sell Under Deed of Trust" on the
13 subject property, which rescinded the Notice of Default recorded on
14 July 24, 2008.

15 MCG Mortgage sent bills to Debtors as the servicer of the note
16 when it had no interest in the note or mortgage. Debtors paid many
17 of these bills. There is no publicly available evidence MCG
18 Mortgage ever acquired any rights in the note or DOT.

19 On May 5, 2011 Quality Loan recorded a purported Substitution
20 of Trustee attempting to substitute itself as the trustee of the
21 mortgage. The substitution was signed by Mary Przybyla in her
22 capacity as authorized signer for Defendant. At the time of
23 signing she was an employee of Dovenmuehle Mortgage, Inc.

24 On May 16, 2011 Quality Loan recorded a notice of default and
25 election to sell under deed of trust against Debtors alleging that
26 LPP was the beneficiary of the Mortgage.

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1 On January 17, 2012, Quality Loan conducted a foreclosure sale
2 and on January 23, 2012, recorded a Trustee's Deed Upon Sale
3 conveying the Property to Defendant.

4 As of April 12, 2012 there is no recorded or other evidence
5 that Fremont ever sold the note or mortgage to any other entity.

6 Plaintiffs pray for a declaratory judgment, injunction,
7 damages, costs and attorney's fees.

8 Debtors filed this bankruptcy case on April 25, 2012, after the
9 recording of the trustee's deed.

10 Defendant argues that the bankruptcy court is not the proper
11 forum for the action because Plaintiffs' claims consist solely of
12 non-core state law claims. However, on April 24, 2013 in case no.
13 13-cv-01083, Judge Alsup of the District Court for the Northern
14 District of California entered an order denying Defendant's motion
15 to withdraw the reference, ruling that this Court has jurisdiction
16 over - and authority to enter final judgment regarding - the
17 determination of the validity, extent, or priority of liens, which
18 is a core proceeding under 28 U.S.C. § 157(b)(2)(K).

19 Defendant also argues that Debtors lack standing because any
20 interest they may have had in the property on the filing date
21 became property of the estate. The chapter 7 trustee is now a
22 plaintiff, and there is no question that the trustee has standing
23 as the representative of the bankruptcy estate. The trustee - who
24 is represented by Ms. Cliff - has taken no position on this motion.
25 Debtors also have standing: they have a pecuniary interest in the
26 outcome of this proceeding, having claimed an exemption of \$175,000
27 in the real property at issue.

28 Turning to the individual claims,

1 1. Declaratory and injunctive relief based on determination of
2 validity, priority or extent of lien. Declaratory and injunctive
3 relief are remedies and not independent causes of action. Sami v.
4 Wells Fargo Bank, 2012 WL 967051, at *8-9 (N.D. Cal. Mar. 21,
5 2012). Therefore, the Court will consider Plaintiff's first,
6 second and third causes of action as one cause of action for a
7 declaration of the validity or extent of Defendant's interest in
8 the Property.

9 When an actual controversy exists, the court may declare the
10 rights and other legal relations of any interested party seeking
11 such a declaration. 28 U.S.C. § 2201. Plaintiffs allege that
12 there are defects with the Assignments of Deed of Trust recorded on
13 October 24, 2008 and October 14, 2009, the Notice of Default
14 recorded July 24, 2008, the Substitutions of Trustee recorded
15 September 2, 2008 and May 5, 2011, and the Loan Modification
16 recorded on July 16, 2009.

17 **a) Assignments of Deed of Trust**

18 Plaintiffs allege that there are three "fatal" defects with the
19 Assignment of Deed of Trust recorded October 24, 2008 from MERS to
20 Defendant ("10/24/08 Assignment"): (1) the 10/24/08 Assignment was
21 executed by Peter Steinmetz, who was an employee of Citigroup and
22 not an Assistant Secretary of MERS so that Mr. Steinmetz lacked
23 authority to sign the Assignment; (2) MERS cannot assign the note
24 or Deed of Trust; and (3) the 10/24/08 Assignment did not convey
25 the note. Plaintiffs allege that the same defects exist with
26 respect to the Corporate Assignment of Deed of Trust recorded
27 October 14, 2009 ("10/14/09 Assignment"). The only difference is
28 that the 10/14/09 Assignment was executed by Terri Harland, whom

1 Plaintiffs allege was an employee of Wilshire Corporation and not
2 an Assistant Secretary of MERS, and therefore lacked authority to
3 sign the document.

4 **b) Notice of Default**

5 Plaintiffs also allege that the Notice of Default recorded July
6 24, 2008 ("7/24/08 NOD") was defective because it was recorded in
7 the name of Wilshire, when there is no evidence Wilshire had any
8 legal interest in the Note or Deed of Trust.

9 **c) Substitutions of Trustee**

10 Plaintiffs allege that the Substitution of Trustee recorded
11 September 2, 2008 ("9/2/08 SOT") was invalid because it was
12 executed by Wilshire as attorney in fact for Citigroup when there
13 was no recorded power of attorney and no evidence that Citigroup
14 was the beneficiary of the Deed of Trust. Plaintiffs also allege
15 that the Substitution of Trustee recorded on May 5, 2011 ("5/5/11
16 SOT") is defective because the signer of the document, Mary
17 Przybyla, was an employee of Dovenmuehle, Defendant has never
18 recorded any power of attorney for Ms. Przybyla in Santa Clara
19 County, and because Defendant had no authority to substitute the
20 trustee because of the "faulty" assignment.

21 **d) Loan Modification**

22 Finally, Plaintiffs allege that the loan modification recorded
23 on July 16, 2009 is "fatally defective" because the modification
24 erroneously states that the Deed of Trust was assigned to LNV
25 Mortgage rather than LPP Mortgage.

26 Plaintiffs allege that the irregularities in the foregoing
27 documents recorded against the property raise questions as to the
28 validity of Defendant's lien, place a cloud on the title, and that

1 there is no way short of a lawsuit to discover the status of the
2 various entities which have asserted a right and/or interest in the
3 Note and Deed of Trust. Plaintiffs also allege that these
4 documents are "indicative of forgery and fraud," but these are
5 legal conclusions, not factual allegations. See Ashcroft v. Iqbal,
6 556 U.S. 662, 678 (2009) (plaintiff must provide more than labels
7 and conclusions). The 7/24/08 NOD was rescinded on February 11,
8 2010, so it is not clear that this document (or the 9/2/08 SOT)
9 retains any relevance.

10 With respect to the assertion that MERS lacked authority to
11 assign the Deed of Trust, this is incorrect. The Deed of Trust
12 identifies MERS as "Mortgage Electronic Registration Systems, Inc.
13 MERS is a separate corporation that is acting solely as nominee for
14 Lender and Lender's successors and assigns. MERS is the
15 beneficiary under this Security Instrument"

16 California courts have consistently upheld the authority of
17 MERS, as nominee beneficiary, to assign deeds of trust, when the
18 deed of trust so provides. Herrera v. Federal Nat'l Mortgage
19 Ass'n, 205 Cal. App. 4th 1495, 1498 (2012). Here, the Deed of Trust
20 provides, at page 3:

21 Borrower understands and agrees that MERS holds only legal
22 title to the interests granted by Borrower in this Security
23 Instrument, but, if necessary to comply with law or custom,
24 MERS (as nominee for Lender and Lender's successors and
25 assigns) has the right: to exercise any or all of those
26 interests, including, but not limited to, the right to
27 foreclose and sell the Property; and to take any action
28 required of Lender including, but not limited to, releasing
and canceling this Security Instrument.

26 Courts have also upheld the authority of MERS to assign a note
27 when the assignment document so provides. See Fontenot v. Wells
28 Fargo Bank, N.A., 198 Cal. App. 4th 256, 271 (2011). However, the

1 assignments are not included in the requests for judicial notice
2 provided to the Court in connection with this motion.

3 Plaintiffs also allege that MCG Mortgage sent the Debtors false
4 monthly statements, purporting to be the servicer of the Note, but
5 it is not clear how this allegation, if true, relates to the
6 alleged defective chain of title.

7 Nevertheless, the Court finds that at this stage of the
8 proceedings, the allegations that the signers of the various
9 documents lacked authority to do so raises a question sufficient to
10 support Plaintiffs' claim for a determination of the validity of
11 those documents. See Albano v. Cal-Western Reconveyance Corp.,
12 2012 WL 5389922 (N.D. Cal. 2012) (Westmore) (finding allegations of
13 robo-signing sufficient to support the proposition that there was a
14 fraudulent or illegal foreclosure sale).

15 2. Wrongful foreclosure. A wrongful foreclosure action
16 requires allegations of a violation of California's non-judicial
17 foreclosure statutes. See Stebley v. Litton Loan Servicing, LLP,
18 202 Cal. App. 4th 522, 524-25, 134 Cal. Rptr. 3d 604 (2012). The
19 elements of a cause of action to set aside a foreclosure sale are:
20 (1) the trustee or mortgagee caused an illegal, fraudulent, or
21 willfully oppressive sale of real property pursuant to a power of
22 sale in a mortgage or deed of trust; (2) the party attacking the
23 sale was prejudiced or harmed; and (3) in cases where the trustor
24 or mortgagor challenges the sale, the trustor or mortgagor tendered
25 the amount of the secured indebtedness or was excused from
26 tendering. Lona v. Citibank, N.A., 202 Cal. App. 4th 89, 104, 134
27 Cal. Rptr. 3d 622 (2011). Plaintiffs have adequately pleaded the
28 first and last elements, but not the prejudice element.

1 a) Illegal, fraudulent, or willfully oppressive sale.
2 Plaintiffs allege that the foreclosure was based on false and
3 invalid documents. Plaintiffs also allege that Defendant is not
4 the true beneficiary under the Deed of Trust and thus lacked the
5 power of sale, and that various entities have colluded to commit
6 theft by false pretext.

7 Under Cal. Civ. Code § 2924, the party initiating foreclosure
8 is not required to have a beneficial or economic interest to
9 foreclose, and there is no requirement that the entity have
10 physical possession of the note. In re Cedano, 470 B.R. 522, 530
11 (9th Cir. BAP 2012) (citing Lane v. Vitek Real Estate Indus. Grp.,
12 713 F. Supp. 2d 1029, 1099 (E.D. Cal. 2010)). Under Cal. Civ. Code
13 § 2924(a)(1), a trustee, mortgagee, or beneficiary, or any of their
14 authorized agents may commence the nonjudicial foreclosure process.
15 Id. However, Plaintiffs' allegations that the signers of the
16 various documents lacked authority to sign satisfies the
17 requirement for alleging this element of a wrongful foreclosure.

18 b) Tender. Plaintiffs have alleged that they are not required
19 to tender the amount of indebtedness. Plaintiffs allege that it
20 would be inequitable to require tender because Plaintiffs allege
21 that Defendant lacked the legal power to foreclose and that the
22 foreclosure sale is void. In such an instance an offer of tender
23 is not required. See In re Cedano, 470 B.R. 522, 529-30 (9th Cir.
24 BAP 2012). Plaintiffs have adequately alleged this element.

25 c) Prejudice. Plaintiffs allege that Plaintiffs "will be
26 defrauded" because the debt to the true mortgagee under the note
27 will not be satisfied, and Plaintiffs may have to pay twice.
28 Plaintiffs also allege that the true mortgagee will be defrauded

1 because it has not been notified of the foreclosure and will not be
2 paid by the parties committing the fraud. Plaintiffs allege
3 further that any future purchaser may have to return the "stolen
4 Subject Property to its rightful owners, which would harm the
5 purchaser and his title insurance company." However, prejudice to
6 third parties is irrelevant to Plaintiffs' claim of wrongful
7 foreclosure.

8 The prejudice or harm element is met only if a plaintiff
9 alleges that he or she was harmed by a violation of the foreclosure
10 statute. Permito v. Wells Fargo Bank, N.A., 2012 WL 1380322, at *6
11 (N.D. Cal. 2012) (dismissing wrongful foreclosure claim where
12 plaintiff failed to allege facts showing that the violation of the
13 foreclosure statute - not the foreclosure itself - was the cause of
14 plaintiff's injury). The plaintiff must allege that the
15 foreclosure would have been averted but for the alleged
16 violation(s). See Albano, 2012 WL 5389922, at *6 (N.D. Cal. Nov.
17 5, 2012) (citing Reynoso v. Paul Fin., LLC, 2009 WL 3833298, at *4
18 (N.D. Cal. Nov. 16, 2009) and Ghuman v. Wells Fargo Bank, N.A.,
19 2012 WL 2263276, at *5 (E.D. Cal. Jun. 15, 2012)) (dismissing
20 wrongful foreclosure claim for failure to plead prejudice other
21 than alleging that the foreclosing parties lacked authority to
22 foreclose). To plead wrongful foreclosure, a plaintiff must allege
23 that no entity had the right to foreclose, not simply that the
24 wrong entity foreclosed. Permito, 2012 WL 1380322, at *6
25 (dismissing wrongful foreclosure claim for, among other reasons,
26 plaintiff's failure to allege her own performance under the deed of
27 trust). "An action for the tort of wrongful foreclosure will lie
28 if the trustor or mortgagor can establish that at the time the

1 power of sale was exercised or the foreclosure occurred, no breach
2 of condition or failure of performance existed on the mortgagor's
3 or trustor's part which would have authorized the foreclosure or
4 exercise of the power of sale." Collins v. Union Fed. Sav. & Loan
5 Ass'n, 662 P.2d 610, 623 (Nev. 1983) (applying California law).

6 Debtors do not allege that no entity could have foreclosed or
7 they were not in default on the note, or that the foreclosure sale
8 would not have occurred but for the alleged irregularities in the
9 chain of title. Plaintiffs have thus failed to adequately plead
10 this element. The wrongful foreclosure claim is dismissed with
11 leave to amend.

12 3. Slander of Title. Under California law, slander of title
13 requires allegations that a person, without a privilege to do so,
14 published a false statement that disparaged title to property and
15 caused the property owner some special pecuniary loss or damage.
16 Sumner Hill Homeowners' Ass'n, Inc. v. Rio Mesa Holdings, LLC, 205
17 Cal. App. 4th 999, 1030, 141 Cal. Rptr. 3d 109 (2012) (citing Fearon
18 v. Fodera, 169 Cal. 370, 379-80 (1915)). The elements of the tort
19 are (1) a publication, (2) without privilege or justification, (3)
20 falsity, and (4) direct pecuniary loss. Id. (citing Truck Ins.
21 Exchange v. Bennett, 53 Cal. App.4th 75, 84, 61 Cal. Rptr. 2d 497
22 (1997)).

23 Plaintiffs allege that the Assignments, Notices of Default,
24 Substitutions of Trustee and Loan Modifications recorded on the
25 property contained false representations and disparage, without
26 authority, Plaintiffs' title to the property, and that Plaintiffs
27 were forced to retain attorneys to bring this action.

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1 Absent a showing of malice, notices published in connection
2 with non-judicial foreclosure are privileged and cannot form the
3 basis for a slander of title claim. Albano, 2012 WL 5389922, at
4 *8; Kachlon v. Markowitz, 168 Cal. App. 4th 316, 333 (2008).
5 Plaintiffs allege that Defendant's claim to the mortgage was
6 premised on fraudulent assignments, but does not allege that
7 Defendant acted with malice, or that the publication was motivated
8 by hatred or ill will toward the Debtors, or by a showing that
9 Defendant lacked reasonable ground for belief in the truth of the
10 publication. See Ogilvie v. Select Portfolio Servicing, 2012 WL
11 3010986, at *4 (N.D. Cal. July 23, 2012) (Ryu) (dismissing - for
12 failure to state a claim - slander of title claim that was based on
13 the recording of a corporate assignment and substitution of trustee
14 for failure to plead facts amounting to malice). Further,
15 Plaintiffs allege that their damages consist of attorney's fees
16 incurred to bring this action. However, fees incurred prosecuting
17 a slander of title action are not recoverable. Id. (citing Ryan v.
18 Editions Ltd. W., Inc., 2007 WL 4577867, at *13 (N.D. Cal. Dec. 27,
19 2007) (Trumbull).

20 The Court will therefore dismiss this claim, with leave to
21 amend.

22 4. Unfair Business Practices Act, Cal Bus. & Prof. Code §
23 17200. Cal. Bus. & Prof. Code § 17200 defines "unfair competition"
24 as "any unlawful, unfair or fraudulent business act or practice and
25 unfair, deceptive, untrue or misleading advertising and any act
26 prohibited by Chapter 1 (commencing with Section 17500) of Part 3
27 of Division 7 of the Business and Professions Code." Plaintiffs
28 allege that Defendant initiated and prosecuted the foreclosure in

1 reliance on a false Substitution of Trustee and Assignment of Deed
2 of Trust and Notice of Trustee's Sale, and that this conduct
3 violated California's non-judicial foreclosure statutes, and caused
4 Plaintiffs to suffer an injury by instituting foreclosure
5 proceedings and causing monetary damages. Because this claim is
6 derivative of Plaintiffs' wrongful foreclosure and slander of title
7 claims, the Court will dismiss this claim as well, but with leave
8 to amend.

9
10 *** END OF TENTATIVE DECISION ***

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