

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

MARLA LYNN SWANSON,
Plaintiff,

CASE NO. CV F 09-1507 LJO DLB

**ORDER ON DEFENDANT WEISS’ F.R.Civ.P.
12 MOTION TO DISMISS**

vs.

EMC MORTGAGE CORPORATION, et al,
Defendants.

INTRODUCTION

Defendant Robert E. Weiss, Inc. (“Weiss”) seeks to dismiss plaintiff Marla Lynn Swanson’s (“Ms. Swanson’s”) negligence, fraud, unfair business practices and wrongful foreclosure claims as legally barred and deficient. Ms. Swanson filed no papers to oppose dismissal of her claims against Weiss. This Court considered Weiss’ F.R.Civ.P. 12(b)(6) motion on the record and VACATES the December 22, 2009 hearing, pursuant to Local Rule 230(c), (g). For the reasons discussed below, this Court DISMISSES this action against Weiss.

BACKGROUND

Ms. Swanson’s Home Loan

On July 7, 2006, Ms. Swanson executed a \$308,000 promissory note (“note”) payable to defendant Community Lending, Inc. (“Community”) for her Sanger residence (“property”). A July 7, 2006 Deed of Trust (“DOT”) encumbered the property to secure the note. The DOT identifies former

1 defendant Mortgage Electronic Registration Systems, Inc. (“MERS”) as the beneficiary acting as
2 Community’s nominee. The DOT identifies Stewart Title of California (“Stewart Title”) as trustee.

3 By a Substitution of Trustee (“SOT”) recorded on February 24, 2009, Weiss substituted as DOT
4 trustee.¹ On March 5, 2009, Weiss recorded a Notice of Default and Election to Sell Under Deed of
5 Trust (“NOD”) to initiate foreclosure of the property. Foreclosure has proceeded no further, and no
6 notice of trustee’s sale has been recorded.

7 **Ms. Swanson’s Claims**

8 Ms. Swanson proceeds on her First Amended Complaint (“FAC”) to allege claims in connection
9 with her home loan against several defendants. The FAC alleges:

10 . . . None of the named Defendants own the loan subject to this action, and none are
11 entitled to enforce the security interest.

12 . . .

13 . . . No legal transfer of the Mortgage Note, Deed of Trust or any other interest
14 in Plaintiff’s Property was ever effected that gave any of the Defendants the right to be
15 named trustee, mortgagee, beneficiary or an authorized agent of trustee, mortgagee or
16 beneficiary of Plaintiff Mortgage Note, Deed of Trust or any other interest in Plaintiff’s
17 Property.

18 The FAC alleges that Weiss “was not legally entitled to initiate foreclosure proceedings.” The FAC
19 further alleges that Weiss is not a real party in interest and faults the defendants’ absence of possession
20 of the note.

21 The FAC seeks to recover compensatory and punitive damages and injunctive relief to preclude
22 the property’s foreclosure.

23 Weiss challenges the claims against it – negligence, fraud, violation of California Business &
24 Professions Code, §§ 17200, et seq. (Unfair Competition Law (“UCL”)), and wrongful foreclosure –
25 which will be discussed below.

26 **DISCUSSION**

27 **F.R.Civ.P. 12(b)(6) Motion Standards**

28 A F.R.Civ.P. 12(b)(6) motion to dismiss is a challenge to the sufficiency of the pleadings set

¹ All documents pertaining to Ms. Swanson’s loan and foreclosure were recorded in the Fresno County Recorder’s Office.

1 forth in the complaint. “When a federal court reviews the sufficiency of a complaint, before the reception
2 of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not
3 whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to
4 support the claims.” *Scheurer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683 (1974); *Gilligan v. Jamco*
5 *Development Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). A F.R.Civ.P. 12(b)(6) dismissal is proper where
6 there is either a “lack of a cognizable legal theory” or “the absence of sufficient facts alleged under a
7 cognizable legal theory.” *Balisteri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990); *Graehling*
8 *v. Village of Lombard, Ill.*, 58 F.3d 295, 297 (7th Cir. 1995).

9 In resolving a F.R.Civ.P. 12(b)(6) motion, a court must: (1) construe the complaint in the light
10 most favorable to the plaintiff; (2) accept all well-pleaded factual allegations as true; and (3) determine
11 whether plaintiff can prove any set of facts to support a claim that would merit relief. *Cahill v. Liberty*
12 *Mut. Ins. Co.*, 80 F.3d 336, 337-338 (9th Cir. 1996). Nonetheless, a court is not required “to accept as
13 true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.”
14 *In re Gilead Sciences Securities Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (citation omitted). A court
15 need not permit an attempt to amend a complaint if “it determines that the pleading could not possibly
16 be cured by allegation of other facts.” *Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911
17 F.2d 242, 247 (9th Cir. 1990). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does
18 not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement
19 to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause
20 of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 127 S. Ct. 1955, 1964-65 (2007)
21 (internal citations omitted). Moreover, a court “will dismiss any claim that, even when construed in the
22 light most favorable to plaintiff, fails to plead sufficiently all required elements of a cause of action.”
23 *Student Loan Marketing Ass’n v. Hanes*, 181 F.R.D. 629, 634 (S.D. Cal. 1998). In practice, “a complaint
24 . . . must contain either direct or inferential allegations respecting all the material elements necessary to
25 sustain recovery under some viable legal theory.” *Twombly*, 550 U.S. at 562, 127 S.Ct. at 1969 (quoting
26 *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)).

27 In *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 1949 (2009), the U.S. Supreme Court recently
28 explained:

1 To survive a motion to dismiss, a complaint must contain sufficient factual
2 matter, accepted as true, to “state a claim to relief that is plausible on its face.” . . . A
3 claim has facial plausibility when the plaintiff pleads factual content that allows the court
4 to draw the reasonable inference that the defendant is liable for the misconduct alleged.

. . . Threadbare recitals of the elements of a cause of action, supported by mere
conclusory statements, do not suffice. (Citation omitted.)

5 For a F.R.Civ.P. 12(b)(6) motion, a court generally cannot consider material outside the
6 complaint. *Van Winkle v. Allstate Ins. Co.*, 290 F.Supp.2d 1158, 1162, n. 2 (C.D. Cal. 2003).
7 Nonetheless, a court may consider exhibits submitted with the complaint. *Van Winkle*, 290 F.Supp.2d
8 at 1162, n. 2. In addition, a “court may consider evidence on which the complaint ‘necessarily relies’
9 if: (1) the complaint refers to the document; (2) the document is central to the plaintiff’s claim; and (3)
10 no party questions the authenticity of the copy attached to the 12(b)(6) motion.” *Marder v. Lopez*, 450
11 F.3d 445, 448 (9th Cir. 2006). A court may treat such a document as “part of the complaint, and thus may
12 assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6).” *United States*
13 *v. Ritchie*, 342 F.3d 903, 908 (9th Cir.2003). Such consideration prevents “plaintiffs from surviving a
14 Rule 12(b)(6) motion by deliberately omitting reference to documents upon which their claims are
15 based.” *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998).² A “court may disregard allegations
16 in the complaint if contradicted by facts established by exhibits attached to the complaint.” *Sumner Peck*
17 *Ranch v. Bureau of Reclamation*, 823 F.Supp. 715, 720 (E.D. Cal. 1993) (citing *Durning v. First Boston*
18 *Corp.*, 815 F.2d 1265, 1267 (9th Cir.1987)). Moreover, “judicial notice may be taken of a fact to show
19 that a complaint does not state a cause of action.” *Sears, Roebuck & Co. v. Metropolitan Engravers,*
20 *Ltd.*, 245 F.2d 67, 70 (9th Cir. 1956); see *Estate of Blue v. County of Los Angeles*, 120 F.3d 982, 984 (9th
21 Cir. 1997). A court properly may take judicial notice of matters of public record outside the pleadings”
22 and consider them for purposes of the motion to dismiss. *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646,
23 649 (9th Cir. 1988) (citation omitted).

24 As such, this Court is able to consider Ms. Swanson’s pertinent loan and foreclosure documents.

25 ///

26
27 ² “We have extended the ‘incorporation by reference’ doctrine to situations in which the plaintiff’s claim
28 depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not
dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document
in the complaint.” *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (citing *Parrino*, 146 F.3d at 706).

1 **Negligence**

2 The FAC’s (third) negligence claim alleges that defendants other than Weiss breached duties
3 owed to Ms. Swanson. Weiss properly faults the claim’s absence of Weiss’ breach of duty.

4 ***Limited Trustee Duties***

5 Weiss notes that a DOT trustee “is a passive, special agent with limited powers.” Weiss faults
6 the negligence claim’s silence “as to any act performed by Defendant Weiss violative of its duty to
7 record and provide the statutory notices required for a power of sale foreclosure.”

8 “Financing or refinancing of real property is generally accomplished in California through a deed
9 of trust. The borrower (trustor) executes a promissory note and deed of trust, thereby transferring an
10 interest in the property to the lender (beneficiary) as security for repayment of the loan.” *Bartold v.*
11 *Glendale Federal Bank*, 81 Cal.App.4th 816, 821, 97 Cal.Rptr.2d 226 (2000). A deed of trust “entitles
12 the lender to reach some asset of the debtor if the note is not paid.” *Alliance Mortgage Co. v. Rothwell*,
13 10 Cal.4th 1226, 1235, 44 Cal.Rptr.2d 352 (1995).

14 If a borrower defaults on a loan and the deed of trust contains a power of sale clause, the lender
15 may non-judicially foreclose. *See McDonald v. Smoke Creek Live Stock Co.*, 209 Cal. 231, 236-237,
16 286 P. 693 (1930).

17 An “ordinary trust deed conveys the legal title to the trustee only so far as may be necessary to
18 the execution of the trust.” *Lupertino v. Carbahal*, 35 Cal.App.3d 742, 748, 111 Cal.Rptr. 112 (1973).
19 A deed of trust “carries none of the incidents of ownership of the property, other than the right to convey
20 upon default on the part of the debtor in the payment of his debt.” *Lupertino*, 35 Cal.App.3d at 748, 111
21 Cal.Rptr. 112 (quoting *Bank of Italy, etc. Assn. v. Bentley*, 217 Cal. 644, 656, 20 P.2d 940 (1933)). The
22 California Court of Appeal has explained a deed of trust trustee’s limited authority:

23 The trustee under a deed of trust “is not a true trustee, and owes no fiduciary
24 obligations; [it] merely acts as a common agent for the trustor and beneficiary of the deed
25 of trust. [The trustee's] only duties are: (1) upon default to undertake the steps necessary
26 to foreclose the deed of trust; or (2) upon satisfaction of the secured debt to reconvey the
27 deed of trust.” (*Vournas v. Fidelity National Title Ins. Co.* (1999) 73 Cal.App.4th 668,
28 677, 86 Cal.Rptr.2d 490.) Consistent with this view, California courts have refused to
impose duties on the trustee other than those imposed by statute or specified in the deed
of trust. As our Supreme Court noted in *I.E. Associates v. Safeco Title Ins. Co.* (1985)
39 Cal.3d 281, 216 Cal.Rptr. 438, 702 P.2d 596, “The rights and powers of trustees in
nonjudicial foreclosure proceedings have long been regarded as strictly limited and
defined by the contract of the parties and the statutes.... [¶] ... [T]here is no authority for

1 the proposition that a trustee under a deed of trust owes any duties with respect to
2 exercise of the power of sale beyond those specified in the deed and the statutes.” (*Id.*
at pp. 287-288, 216 Cal.Rptr. 438, 702 P.2d 596.)

3 *Heritage Oaks Partners v. First American Title Ins. Co.*, 155 Cal.App.4th 339, 345, 66 Cal.Rptr.3d 510
4 (2007); *see Monterey SP Partnership v. WL Bangham*, 49 Cal.3d 454, 462-463, 261 Cal.Rptr. 587
5 (1989) (“The similarities between a trustee of an express trust and a trustee under a deed of trust end
6 with the name. . . . the trustee under a deed of trust does not have a true trustee's interest in, and control
7 over, the trust property. Nor is it bound by the fiduciary duties that characterize a true trustee.”)

8 A “trustee has a general duty to conduct the sale ‘fairly, openly, reasonably, and with due
9 diligence,’ exercising sound discretion to protect the rights of the mortgagor and others.” *Hatch v.*
10 *Collins*, 225 Cal.App.3d 1104, 1112, 275 Cal.Rptr. 476 (1990)(citation omitted).

11 The FAC lacks facts to support a duty owed and breached by Weiss to warrant dismissal of the
12 negligence claim against Weiss.

13 ***Possession Of Original Note***

14 The negligence claim references failure “to maintain the original Mortgage Note.” Weiss notes
15 that the “produce-the-note” theory “is confusingly directed” at Weiss.

16 “If the trustee's deed recites that all statutory notice requirements and procedures required by law
17 for the conduct of the foreclosure have been satisfied, a rebuttable presumption arises that the sale has
18 been conducted regularly and properly.” *Nguyen v. Calhoun*, 105 Cal.App.4th 428, 440, 129 Cal.Rptr.2d
19 436 (2003). The California Court of Appeal has explained non-judicial foreclosure under California
20 Civil Code sections 2924-2924l:

21 The comprehensive statutory framework established to govern nonjudicial
22 foreclosure sales is intended to be exhaustive. . . . It includes a myriad of rules relating
23 to notice and right to cure. It would be inconsistent with the comprehensive and
exhaustive statutory scheme regulating nonjudicial foreclosures to incorporate another
unrelated cure provision into statutory nonjudicial foreclosure proceedings.

24 *Moeller v. Lien*, 25 Cal.App.4th 822, 834, 30 Cal.Rptr.2d 777 (1994).

25 Under California Civil Code section 2924(a)(1), a “trustee, mortgagee or beneficiary or any of
26 their authorized agents” may conduct the foreclosure process. Under California Civil Code section
27 2924b(4), a “person authorized to record the notice of default or the notice of sale” includes “an agent
28 for the mortgagee or beneficiary, an agent of the named trustee, any person designated in an executed

1 substitution of trustee, or an agent of that substituted trustee.” “Upon default by the trustor, the
2 beneficiary may declare a default and proceed with a nonjudicial foreclosure sale.” *Moeller*, 25
3 Cal.App.4th at 830, 30 Cal.Rptr.2d 777. “The foreclosure process is commenced by the recording of
4 a notice of default and election to sell by the trustee.” *Moeller*, 25 Cal.App.4th at 830, 30 Cal.Rptr.2d
5 777.

6 “Under Civil Code section 2924, no party needs to physically possess the promissory note.”
7 *Sicairos v. NDEX West, LLC*, 2009 WL 385855, *3 (S.D. Cal. 2009) (citing Cal. Civ. Code, §
8 2924(a)(1)). An “allegation that the trustee did not have the original note or had not received it is
9 insufficient to render the foreclosure proceeding invalid.” *Neal v. Juarez*, 2007 WL 2140640, *8 (S.D.
10 Cal. 2007).

11 Weiss is correct that Ms. Swanson’s “produce-the-note” claim lacks “legal merit.”

12 ***Loan Origination And Disclosures***

13 The negligence claim references breach of duties regarding origination of Ms. Swanson’s loan
14 and loan disclosures. Weiss correctly notes that it is not subject to loan origination and disclosure claims
15 in that it was not the original trustee and substituted as trustee three years after the loan.

16 Weiss points out that to the extent the negligence claim attempts to allege breach of duty as to
17 preparation or recordation of the SOT or NOD, such action is privileged.

18 Non-judicial foreclosure sales “are governed by a ‘comprehensive’ statutory scheme. This
19 scheme, which is found in Civil Code sections 2924 through 2924k, evidences a legislative intent that
20 a sale which is properly conducted ‘constitutes a final adjudication of the rights of the borrower and
21 lender.’” *Royal Thrift and Loan Co. v. County Escrow, Inc.*, 123 Cal.App.4th 24, 32, 20 Cal.Rptr.3d 37
22 (2004) (quoting *6 Angels, Inc. v. Stuart-Wright Mortgage, Inc.*, 85 Cal.App.4th 1279, 1283-1284, 102
23 Cal.Rptr.2d 711, fn. omitted (2001)).

24 Subsection (d) of California Civil Code section 2924 (“section 2924”) renders as California Civil
25 Code section 47 “privileged communications” the “mailing, publication, and delivery” of foreclosure
26 notices and “performance” of foreclosure procedures. The section 2924(d) privilege extended through
27 California Civil Code section 47 applies to tort claims other than malicious prosecution. *Hagberg v.*
28 *California Federal Bank FSB*, 32 Cal.4th 350, 361 81 P.3d 244 (2004) (“As noted, the only tort claim

1 we have identified as falling outside the privilege established by section 47(b) is malicious
2 prosecution.”)

3 Weiss’ alleged wrongs are subject to section 2924(d) immunity. This Court construes Ms.
4 Swanson’s absence of opposition as her concession that Weiss is shielded by section 2924(d) immunity
5 to further warrant dismissal of the negligence claim against Weiss.

6 *Wrongful Foreclosure*

7 Weiss argues that to the extent the negligence claim alleges that foreclosure was negligently
8 commenced or was wrongful, section 2924(b) protects Weiss. Section 2924(b) provides in pertinent
9 part: “In performing acts required by this article, the trustee **shall incur no liability** for any good faith
10 error resulting from reliance on information provided in good faith by the beneficiary regarding the
11 nature and amount of the default under the secured obligation, deed of trust, or mortgage.” (Bold added.)
12 Weiss is correct that the FAC lacks support for a claim regarding Weiss’ recording of the SOT and
13 NOD.

14 The negligence claim fails as to Weiss to warrant its dismissal against Weiss.

15 Fraud

16 The FAC’s (sixth) fraud claim alleges:

17 . . . Weiss misrepresented to Plaintiff that Weiss was entitled to enforce the
18 security interest and has the right to institute a non-judicial foreclosure proceeding under
19 the Deed of Trust when they [sic] filed a Notice of Default on March 5, 2009. In fact,
20 Defendant Weiss was not a trustee, mortgagee or beneficiary, nor are they [sic]
21 authorized agents of the trustee, mortgagee or beneficiary, nor are they [sic] in possession
of the Note, or holders of the Note, or non-holders of the Note entitled to payment, as
required by California Commercial Code §§ 3301 and 3309. As a result, Defendant
Weiss did not have the right to initiate foreclosure proceeding herein under California
Civil Code § 2924 et seq.

22 *Absence Of Particularity*

23 Weiss challenges the fraud claim’s failure to satisfy F.R.Civ.P. 9(b) requirements to allege fraud
24 with particularity.

25 The elements of a California fraud claim are: (1) misrepresentation (false representation,
26 concealment or nondisclosure); (2) knowledge of the falsity (or “scienter”); (3) intent to defraud, i.e.,
27 to induce reliance; (4) justifiable reliance; and (5) resulting damage. *Lazar v. Superior Court*, 12 Cal.4th
28 631, 638, 49 Cal.Rptr.2d 377 (1996). The same elements comprise a cause of action for negligent

1 misrepresentation, except there is no requirement of intent to induce reliance. *Caldo v. Owens-Illinois,*
2 *Inc.*, 125 Cal.App.4th 513, 519, 23 Cal.Rptr.3d 1 (2004).

3 “[T]o establish a cause of action for fraud a plaintiff must plead and prove in full, factually and
4 specifically, all of the elements of the cause of action.” *Conrad v. Bank of America*, 45 Cal.App.4th 133,
5 156, 53 Cal.Rptr.2d 336 (1996). There must be a showing “that the defendant thereby intended to induce
6 the plaintiff to act to his detriment in reliance upon the false representation” and “that the plaintiff
7 actually and justifiably relied upon the defendant’s misrepresentation in acting to his detriment.”
8 *Conrad*, 45 Cal.App.4th at 157, 53 Cal.Rptr.2d 336.

9 F.R.Civ.P. 9(b) requires a party to “state with particularity the circumstances constituting fraud.”³
10 In the Ninth Circuit, “claims for fraud and negligent misrepresentation must meet Rule 9(b)’s
11 particularity requirements.” *Neilson v. Union Bank of California, N.A.*, 290 F.Supp.2d 1101, 1141 (C.D.
12 Cal. 2003). A court may dismiss a claim grounded in fraud when its allegations fail to satisfy F.R.Civ.P.
13 9(b)’s heightened pleading requirements. *Vess*, 317 F.3d at 1107. A motion to dismiss a claim
14 “grounded in fraud” under F.R.Civ.P. 9(b) for failure to plead with particularity is the “functional
15 equivalent” of a F.R.Civ.P. 12(b)(6) motion to dismiss for failure to state a claim. *Vess*, 317 F.3d at
16 1107. As a counter-balance, F.R.Civ.P. 8(a)(2) requires from a pleading “a short and plain statement of
17 the claim showing that the pleader is entitled to relief.”

18 F.R.Civ.P. 9(b)’s heightened pleading standard “is not an invitation to disregard Rule 8’s
19 requirement of simplicity, directness, and clarity” and “has among its purposes the avoidance of
20 unnecessary discovery.” *McHenry v. Renne*, 84 F.3d 1172, 1178 (9th Cir. 1996). F.R.Civ.P. 9(b)
21 requires “specific” allegations of fraud “to give defendants notice of the particular misconduct which
22 is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that
23 they have done anything wrong.” *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). “A pleading
24 is sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so that the defendant can

25
26 ³ F.R.Civ.P. 9(b)’s particularity requirement applies to state law causes of action: “[W]hile a federal court
27 will examine state law to determine whether the elements of fraud have been pled sufficiently to state a cause of action, the
28 Rule 9(b) requirement that the *circumstances* of the fraud must be stated with particularity is a federally imposed rule.” *Vess*
v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103 (9th Cir. 2003) (quoting *Hayduk v. Lanna*, 775 F.2d 441, 443 (1st Cir.
1995)(italics in original)).

1 prepare an adequate answer from the allegations.” *Neubronner v. Milken*, 6 F.3d 666, 671-672 (9th Cir.
2 1993) (internal quotations omitted; citing *Gottreich v. San Francisco Investment Corp.*, 552 F.2d 866,
3 866 (9th Cir. 1997)). The Ninth Circuit Court of Appeals has explained:

4 Rule 9(b) requires particularized allegations of the circumstances *constituting* fraud. The
5 time, place and content of an alleged misrepresentation may identify the statement or the
6 omission complained of, but these circumstances do not “constitute” fraud. The
7 statement in question must be false to be fraudulent. Accordingly, our cases have
8 consistently required that circumstances indicating falseness be set forth. . . . [W]e [have]
9 observed that plaintiff must include statements regarding the time, place, and *nature* of
10 the alleged fraudulent activities, and that “mere conclusory allegations of fraud are
11 insufficient.” . . . The plaintiff must set forth what is false or misleading about a
12 statement, and why it is false. In other words, the plaintiff must set forth an explanation
13 as to why the statement or omission complained of was false or misleading. . . .

14 In certain cases, to be sure, the requisite particularity might be supplied with great
15 simplicity.

16 *In Re Glenfed, Inc. Securities Litigation*, 42 F.3d 1541, 1547-1548 (9th Cir. 1994) (en banc) (italics in
17 original) *superseded by statute on other grounds as stated in Marksman Partners, L.P. v. Chantal*
18 *Pharm. Corp.*, 927 F.Supp. 1297 (C.D. Cal. 1996); *see Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir.
19 1997) (fraud allegations must be accompanied by “the who, what, when, where, and how” of the
20 misconduct charged); *Neubronner*, 6 F.3d at 672 (“The complaint must specify facts as the times, dates,
21 places, benefits received and other details of the alleged fraudulent activity.”)

22 As to multiple fraud defendants, a plaintiff “must provide each and every defendant with enough
23 information to enable them ‘to know what misrepresentations are attributable to them and what
24 fraudulent conduct they are charged with.’” *Pegasus Holdings v. Veterinary Centers of America, Inc.*,
25 38 F.Supp.2d 1158, 1163 (C.D. Ca. 1998) (quoting *In re Worlds of Wonder Sec. Litig.*, 694 F.Supp.
26 1427, 1433 (N.D. Ca. 1988)). “Rule 9(b) does not allow a complaint to merely lump multiple defendants
27 together but ‘require[s] plaintiffs to differentiate their allegations when suing more than one defendant
28 . . . and inform each defendant separately of the allegations surrounding his alleged participation in the
29 fraud.’” *Swartz v. KPMG LLP*, 476 F.3d 756, 764-765 (9th Cir. 2007) (quoting *Haskin v. R.J. Reynolds*
30 *Tobacco Co.*, 995 F.Supp. 1437, 1439 (M.D. Fla. 1998)). “In the context of a fraud suit involving
31 multiple defendants, a plaintiff must, at a minimum, ‘identif[y] the role of [each] defendant[] in the
32 alleged fraudulent scheme.’” *Swartz*, 476 F.3d at 765 (quoting *Moore v. Kayport Package Express, Inc.*,
33 885 F.2d 531, 541 (9th Cir. 1989)).

1 Weiss notes that recordation of the SOT and NOD are the only wrongs which the FAC attributes
2 to Weiss. Weiss argues that its actions complied with the foreclosure statutory scheme of California
3 Civil Code sections 2924-2924I to provide a “complete defense” to a UCL claim.

4 “Unfair competition is defined to include 'unlawful, unfair or fraudulent business practice and
5 unfair, deceptive, untrue or misleading advertising.’” *Blank v. Kirwan*, 39 Cal.3d 311, 329, 216 Cal.Rptr.
6 718 (1985) (quoting Cal. Bus. & Prof. Code, § 17200). An “unlawful business activity” includes
7 anything that can properly be called a business practice and that at the same time is forbidden by law.
8 *Blank*, 39 Cal.3d at 329, 216 Cal.Rptr. 718 (citing *People v. McKale*, 25 Cal.3d 626, 631-632, 159
9 Cal.Rptr. 811, 602 P.2d 731 (1979)).

10 The UCL prohibits “unlawful” practices “forbidden by law, be it civil or criminal, federal, state,
11 or municipal, statutory, regulatory, or court-made.” *Saunders v. Superior Court*, 27 Cal.App.4th 832,
12 838, 33 Cal.Rptr.2d 548 (1999). According to the California Supreme Court, the UCL “borrows”
13 violations of other laws and treats them as unlawful practices independently actionable under the UCL.
14 *Farmers Ins. Exchange v. Superior Court*, 2 Cal.4th 377, 383, 6 Cal.Rptr.2d 487 (1992).

15 “Unfair” under the UCL “means conduct that threatens an incipient violation of an antitrust law,
16 or violates the policy or spirit of one of those laws because its effects are comparable to or the same as
17 a violation of the law, or otherwise significantly threatens or harms competition.” *Cal-Tech*
18 *Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal.4th 163, 187, 83 Cal.Rptr.2d 548 (1999).

19 The “fraudulent” prong under the UCL requires a plaintiff to “show deception to some members
20 of the public, or harm to the public interest,” *Watson Laboratories, Inc. v. Rhone-Poulenc Rorer, Inc.*,
21 178 F.Supp.2d 1099, 1121 (C.D. Ca. 2001), or to allege that “members of the public are likely to be
22 deceived.” *Medical Instrument Development Laboratories v. Alcon Laboratories*, 2005 WL 1926673,
23 at *5 (N.D. Cal. 2005).

24 “A plaintiff alleging unfair business practices under these statutes [UCL] must state with
25 reasonable particularity the facts supporting the statutory elements of the violation.” *Khoury v. Maly's*
26 *of California, Inc.*, 14 Cal.App.4th 612, 619, 17 Cal.Rptr.2d 708 (1993).

27 Weiss is correct that an unfair business practice claim based on “recordation of documents
28 required in a statutory power of sale foreclosure” lacks logic and merit. The FAC is deficient to allege

1 that Weiss engaged in unfair business practices subject to the UCL. The FAC lacks reasonable
2 particularity of facts to support an UCL claim. The claim’s bare mention of “unlawful, unfair and/or
3 fraudulent business practices” provides not the slightest inference that Ms. Swanson has a viable UCL
4 claim against Weiss. The FAC points to no predicate violation of law. Similar to the fraud claim, the
5 UCL claim lacks particularity of fraudulent circumstances, such as a misrepresentation, for a UCL claim
6 against Weiss. The FAC lacks allegations of ongoing wrongful business conduct or a pattern of such
7 conduct. The UCL claim lacks facts to hint at a wrong subject to the UCL to warrant the claim’s
8 dismissal against Weiss.

9 Wrongful Foreclosure

10 The FAC’s (tenth) wrongful foreclosure claim alleges:

11 In the Notice of Trustee Sale, Defendant Weiss claims that it was the duly
12 appointed Trustee pursuant to the Deed of Trust but fails to identify the holder of the
13 beneficial interest. None of the Defendants are in possession of the Note and,
14 accordingly, none are entitled to enforce the security interest on the Property.

15 . . . Weiss did not have the right to commence foreclosure proceedings and as a
16 result recorded defective Notices of Default and Notices of Trustee’s Sale, in direct
17 violation of the requirements set forth in California Civil Code § 2923.5

18 Weiss correctly notes that the claim’s reliance on a “produce-the-note” theory is misplaced and
19 has been rejected by this Court and others. “Under Civil Code section 2924, no party needs to physically
20 possess the promissory note.” *Sicairos*, 2009 WL 385855, *3 (citing Cal. Civ. Code, § 2924(a)(1)).
21 Rather, “[t]he foreclosure process is commenced by the recording of a notice of default and election to
22 sell by the trustee.” *Moeller*, 25 Cal.App.4th at 830, 30 Cal.Rptr.2d 777. An “allegation that the trustee
23 did not have the original note or had not received it is insufficient to render the foreclosure proceeding
24 invalid.” *Neal*, 2007 WL 2140640, *8.

25 Moreover, in the absence of a foreclosure sale, Weiss cannot be liable for “wrongful foreclosure.”
26 “[A] trustee or mortgagee may be liable to the trustor or mortgagor for damages sustained where there
27 has been an illegal, fraudulent or wilfully oppressive sale of property under a power of sale contained
28 in a mortgage or deed of trust.” *Munger v. Moore*, 11 Cal.App.3d 1,7, 89 Cal.Rptr. 323 (1970). The
complaint lacks facts of Weiss alleged illegal or fraudulent activity to impose tort liability based on their
conduct in connection with foreclosure of the property.

1 Weiss notes that its compliance with California Civil Code section 2923.5 ("section 2923.5") to
2 further defeat the wrongful foreclosure claim. Section 2923.5 requires a lender or its agent to attempt
3 to contact a defaulted borrower prior to foreclosure. Section 2923.5(a)(2) requires a "mortgagee,
4 beneficiary or authorized agent" to "contact the borrower in person or by telephone in order to assess
5 the borrower's financial situation and explore options for the borrower to avoid foreclosure." Section
6 2923.5(b) requires a default notice to include a declaration "from the mortgagee, beneficiary, or
7 authorized agent" of compliance with section 2923.5, including attempt "with due diligence to contact
8 the borrower as required by this section."

9 The record reveals that the NOD included the necessary declaration to satisfy section 2923.5.
10 The FAC alleges no cognizable claim that Weiss was precluded to commence foreclosure based on
11 failure to satisfy section 2923.5. Section 2923.5 requires only contacts or attempted contacts to "assess
12 the borrower's financial situation and explore options for the borrower to avoid foreclosure." *See* Cal.
13 Civ. Code, § 2923.5(a)(2). An alleged section 2923.5 claim fails as to Weiss.

14 Attempt At Amendment And Malice

15 Ms. Swanson's claims against Weiss are insufficiently pled and barred as a matter of law. Ms.
16 Swanson is unable to cure her claims by allegation of other facts and thus is not granted an attempt to
17 amend.

18 Moreover, this Court is concerned that Ms. Swanson has brought this action in absence of good
19 faith and that Ms. Swanson exploits the court system solely for delay or to vex Weiss. The test for
20 maliciousness is a subjective one and requires the court to "determine the . . . good faith of the
21 applicant." *Kinney v. Plymouth Rock Squab Co.*, 236 U.S. 43, 46 (1915); *see Wright v. Newsome*, 795
22 F.2d 964, 968, n. 1 (11th Cir. 1986); *cf. Glick v. Gutbrod*, 782 F.2d 754, 757 (7th Cir. 1986) (court has
23 inherent power to dismiss case demonstrating "clear pattern of abuse of judicial process"). A lack of
24 good faith or malice also can be inferred from a complaint containing untrue material allegations of fact
25 or false statements made with intent to deceive the court. *See Horsey v. Asher*, 741 F.2d 209, 212 (8th
26 Cir. 1984). An attempt to vex or delay provides further grounds to dismiss this action against Weiss.

27 CONCLUSION AND ORDER

28 For the reasons discussed above, this Court:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1. DISMISSES with prejudice this action against Weiss;
2. DENIES as moot the request of Ms. Swanson's counsel to appear by telephone at the December 22, 2009 hearing; and
3. DIRECTS the clerk to enter judgment against plaintiff Marla Lynn Swanson and in favor of defendant Robert E. Weiss, Inc. in that there is no just reason to delay to enter such judgment given that Ms. Swanson's claims against Weiss are clear and distinct from claims against the other defendants. *See* F.R.Civ.P. 54(b).

IT IS SO ORDERED.

Dated: December 9, 2009

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE