

1 breakfast. The DOT was recorded on November 16, 2007¹ and identifies Recontrust Company, N.A.
2 (“Recontrust”), as trustee and Mortgage Electronic Registration Systems, Inc. (“MERS”) as beneficiary.
3 In November 2009, Ms. Robinson stopped making note payments.

4 On April 29, 2010, Quality Loan Service Corp. (“Quality Loan”), as MERS agent, recorded a
5 Notice of Default and Election to Sell Under Deed of Trust (“default notice”) to indicate that Ms.
6 Robinson owed \$19,251.33 as of April 28, 2010.²

7 On May 13, 2010, an Assignment of Deed of Trust was recorded to assign the beneficial interest
8 under the DOT to BAC Home Loans Servicing, LP in place of MERS as beneficiary. On July 6, 2010,
9 a Substitution of Trustee was recorded to substitute Quality Loan as DOT trustee in place of Recontrust.
10 On August 3, 2010, Quality Loan recorded a Notice of Trustee’s Sale to set an August 23, 2010
11 foreclosure sale of the property. The record does not reflect the property’s sale.

12 **Ms. Robinson’s Claims**

13 On August 20, 2010, Ms. Robinson filed her operative complaint (“complaint”) in Tulare County
14 Superior Court, and B of A removed the action to this Court. The complaint alleges that:

- 15 1. In June 2010, Ms. Robinson “tried to apply for the Bank of America Home Loan
16 Modification Program”;
- 17 2. B of A representatives “advised her that she wouldn’t be eligible for that program, since
18 she was a small business owner”; and
- 19 3. B of A representatives “suggested a home loan modification program for small business
20 and commercial property, which Plaintiff applied to.”

21 B of A notes the absence in the record that B of A “either accepted or denied the small business loan
22 modification.”

23 The complaint alleges claims of breach of contract, defective service and fraud, which will be
24 addressed in greater detail below. The complaint seeks to recover punitive damages and for Ms.

25 ¹ Documents pertaining to Ms. Robinson’s loan and default were recorded with the Tulare County Official
26 Records.

27 ² The default notice directed Ms. Robinson to contact B of A “[t]o find out the amount you must pay, or
28 arrange for payment to stop the foreclosure, or if your property is in foreclosure for any other reason.” This Court surmises
that B of A purchased and/or was assigned the note to succeed Countrywide’s interests.

1 Robinson's emotional distress.

2 **DISCUSSION**

3 **F.R.Civ.P. 12(b)(6) Motion To Dismiss Standards**

4 B of A seeks to dismiss this action in the absence of Ms. Robinson's tender of amounts owed
5 to establish her standing to pursue her claims. B of A offers further legal challenges to Ms. Robinson's
6 claims, including the statute of frauds and lack of required particularized pleading.

7 "A trial court may dismiss a claim sua sponte under Fed.R.Civ.P. 12(b)(6). . . . Such dismissal
8 may be made without notice where the claimant cannot possibly win relief." *Omar v. Sea-Land Service,*
9 *Inc.*, 813 F.2d 986, 991 (9th Cir. 1987); *see Wong v. Bell*, 642 F.2d 359, 361-362 (9th Cir. 1981). Sua
10 sponte dismissal may be made before process is served on defendants. *Neitzke v. Williams*, 490 U.S.
11 319, 324 (1989) (dismissals under 28 U.S.C. § 1915(d) are often made sua sponte); *Franklin v. Murphy*,
12 745 F.2d 1221, 1226 (9th Cir. 1984) (court may dismiss frivolous in forma pauperis action sua sponte
13 prior to service of process on defendants).

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

23 In resolving a F.R.Civ.P. 12(b)(6) motion, a court must: (1) construe the complaint in the light
24 most favorable to the plaintiff; (2) accept all well-pleaded factual allegations as true; and (3) determine
25 whether plaintiff can prove any set of facts to support a claim that would merit relief. *Cahill v. Liberty*
26 *Mut. Ins. Co.*, 80 F.3d 336, 337-338 (9th Cir. 1996). Nonetheless, a court is not required "to accept as
27 true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences."
28 *In re Gilead Sciences Securities Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (citation omitted). A court

1 “need not assume the truth of legal conclusions cast in the form of factual allegations,” *U.S. ex rel.*
2 *Chunie v. Ringrose*, 788 F.2d 638, 643, n. 2 (9th Cir.1986), and a court must not “assume that the
3 [plaintiff] can prove facts that it has not alleged or that the defendants have violated . . . laws in ways
4 that have not been alleged.” *Associated General Contractors of California, Inc. v. California State*
5 *Council of Carpenters*, 459 U.S. 519, 526, 103 S.Ct. 897 (1983). A court need not permit an attempt
6 to amend if “it is clear that the complaint could not be saved by an amendment.” *Livid Holdings Ltd.*
7 *v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005).

8 “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual
9 allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more
10 than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”
11 *Bell Atl. Corp. v. Twombly*, 550 U.S. 554,127 S. Ct. 1955, 1964-65 (2007) (internal citations omitted).
12 Moreover, a court “will dismiss any claim that, even when construed in the light most favorable to
13 plaintiff, fails to plead sufficiently all required elements of a cause of action.” *Student Loan Marketing*
14 *Ass’n v. Hanes*, 181 F.R.D. 629, 634 (S.D. Cal. 1998). In practice, “a complaint . . . must contain either
15 direct or inferential allegations respecting all the material elements necessary to sustain recovery under
16 some viable legal theory.” *Twombly*, 550 U.S. at 562, 127 S.Ct. at 1969 (quoting *Car Carriers, Inc. v.*
17 *Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)).

18 In *Ashcroft v. Iqbal*, __ U.S. __, 129 S.Ct. 1937,1949 (2009), the U.S. Supreme Court recently
19 explained:

20 To survive a motion to dismiss, a complaint must contain sufficient factual
21 matter, accepted as true, to “state a claim to relief that is plausible on its face.” . . . A
22 claim has facial plausibility when the plaintiff pleads factual content that allows the court
23 to draw the reasonable inference that the defendant is liable for the misconduct alleged.
24 . . . The plausibility standard is not akin to a “probability requirement,” but it asks for
25 more than a sheer possibility that a defendant has acted unlawfully. (Citations omitted.)

26 After discussing *Iqbal*, the Ninth Circuit Court of Appeals summarized: “In sum, for a complaint
27 to survive a motion to dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that
28 content, must be plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret*
Service, 572 F.3d 962, 989 (9th Cir. 2009) (quoting *Iqbal*, __ U.S. __, 129 S.Ct. at 1949).

The U.S. Supreme Court applies a “two-prong approach” to address a motion to dismiss:

1 First, the tenet that a court must accept as true all of the allegations contained in
2 a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of
3 a cause of action, supported by mere conclusory statements, do not suffice. . . . Second,
4 only a complaint that states a plausible claim for relief survives a motion to dismiss. . .
5 . Determining whether a complaint states a plausible claim for relief will . . . be a
6 context-specific task that requires the reviewing court to draw on its judicial experience
7 and common sense. . . . But where the well-pleaded facts do not permit the court to infer
8 more than the mere possibility of misconduct, the complaint has alleged – but it has not
9 “show[n]”-“that the pleader is entitled to relief.” Fed. Rule Civ. Proc. 8(a)(2).

10 In keeping with these principles a court considering a motion to dismiss can
11 choose to begin by identifying pleadings that, because they are no more than conclusions,
12 are not entitled to the assumption of truth. While legal conclusions can provide the
13 framework of a complaint, they must be supported by factual allegations. When there are
14 well-pleaded factual allegations, a court should assume their veracity and then determine
15 whether they plausibly give rise to an entitlement to relief.

16 *Iqbal*, __ U.S. __, 129 S.Ct. at 1949-1950.

17 For a F.R.Civ.P. 12(b)(6) motion, a court generally cannot consider material outside the
18 complaint. *Van Winkle v. Allstate Ins. Co.*, 290 F.Supp.2d 1158, 1162, n. 2 (C.D. Cal. 2003).
19 Nonetheless, a court may consider exhibits submitted with the complaint. *Durning v. First Boston*
20 *Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987); *Van Winkle*, 290 F.Supp.2d at 1162, n. 2. In addition, a
21 “court may consider evidence on which the complaint ‘necessarily relies’ if: (1) the complaint refers to
22 the document; (2) the document is central to the plaintiff’s claim; and (3) no party questions the
23 authenticity of the copy attached to the 12(b)(6) motion.” *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir.
24 2006). A court may treat such a document as “part of the complaint, and thus may assume that its
25 contents are true for purposes of a motion to dismiss under Rule 12(b)(6).” *United States v. Ritchie*, 342
26 F.3d 903, 908 (9th Cir.2003). Such consideration prevents “plaintiffs from surviving a Rule 12(b)(6)
27 motion by deliberately omitting reference to documents upon which their claims are based.” *Parrino*
28 *v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998).³ A “court may disregard allegations in the complaint
if contradicted by facts established by exhibits attached to the complaint.” *Sumner Peck Ranch v.*
Bureau of Reclamation, 823 F.Supp. 715, 720 (E.D. Cal. 1993) (citing *Durning v. First Boston Corp.*,
815 F.2d 1265, 1267 (9th Cir.1987)). Moreover, “judicial notice may be taken of a fact to show that a

³ “We have extended the ‘incorporation by reference’ doctrine to situations in which the plaintiff’s claim 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 complaint does not state a cause of action.” *Sears, Roebuck & Co. v. Metropolitan Engravers, Ltd.*, 245
2 F.2d 67, 70 (9th Cir. 1956); *see Estate of Blue v. County of Los Angeles*, 120 F.3d 982, 984 (9th Cir.
3 1997). A court properly may take judicial notice of matters of public record outside the pleadings” and
4 consider them for purposes of the motion to dismiss. *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649
5 (9th Cir. 1988) (citation omitted).

6 As discussed below, the complaint is subject to dismissal in the absence of claims supported by
7 a cognizable legal theory or sufficient facts alleged under a cognizable legal theory. In addition, the
8 complaint is susceptible to defenses and pleading deficiencies.

9 **Failure To Satisfy F.R.Civ.P. 8**

10 The complaint is subject to global attack for failure to satisfy requirements of F.R.Civ.P. 8, which
11 requires a plaintiff to “plead a short and plain statement of the elements of his or her claim, identifying
12 the transaction or occurrence giving rise to the claim and the elements of the prima facie case.” *Bautista*
13 *v. Los Angeles County*, 216 F.3d 837, 840 (9th Cir. 2000).

14 F.R.Civ.P. 8(d)(1) requires each allegation to be “simple, concise, and direct.” This requirement
15 “applies to good claims as well as bad, and is the basis for dismissal independent of Rule 12(b)(6).”
16 *McHenry v. Renne*, 84 F.3d 1172, 1179 (9th Cir. 1996). “Something labeled a complaint but written
17 more as a press release, prolix in evidentiary detail, yet without simplicity, conciseness and clarity as to
18 whom plaintiffs are suing for what wrongs, fails to perform the essential functions of a complaint.”
19 *McHenry*, 84 F.3d at 1180. “Prolix, confusing complaints . . . impose unfair burdens on litigants and
20 judges.” *McHenry*, 84 F.3d at 1179.

21 Moreover, a pleading may not simply allege a wrong has been committed and demand relief.
22 The underlying requirement is that a pleading give “fair notice” of the claim being asserted and the
23 “grounds upon which it rests.” *Yamaguchi v. United States Department of Air Force*, 109 F.3d 1475,
24 1481 (9th Cir. 1997). Despite the flexible pleading policy of the Federal Rules of Civil Procedure, a
25 complaint must give fair notice and state the elements of the claim plainly and succinctly. *Jones v.*
26 *Community Redev. Agency*, 733 F.2d 646, 649 (9th Cir. 1984). A plaintiff must allege with at least some
27 degree of particularity overt facts which defendant engaged in to support plaintiff’s claim. *Jones*, 733
28 F.2d at 649. A complaint does not suffice “if it tenders ‘naked assertion[s]’ devoid of ‘further factual

1 enhancement.” *Iqbal*, ___ U.S. ___, 129 S.Ct. at 1949 (quoting *Twombly*, 550 U.S. at 557, 127 S.Ct.
2 1955). The U.S. Supreme Court has explained:

3 While, for most types of cases, the Federal Rules eliminated the cumbersome
4 requirement that a claimant “set out in detail the facts upon which he bases his claim,”
5 *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) (emphasis added),
6 Rule 8(a)(2) still requires a “showing,” rather than a blanket assertion, of entitlement to
relief. Without some factual allegation in the complaint, it is hard to see how a claimant
could satisfy the requirement of providing not only “fair notice” of the nature of the
claim, but also “grounds” on which the claim rests.

7 *Twombly*, 550 U.S. at 556, n. 3, 127 S.Ct. 1955.

8 The complaint fails to satisfy F.R.Civ.P. 8. As discussed in greater detail below, the complaint
9 makes references to breach of contract, defective service and fraud but lacks facts to support claims or
10 valid, cognizable legal theories. The complaint lacks specific, clearly defined allegations. The
11 complaint fails to give B of A fair notice of claims plainly and succinctly to warrant dismissal of this
12 action.

13 **Failure To Tender Indebtedness**

14 B of A notes that the complaint’s claims “challenge the foreclosure sale” and fail without an
15 allegation that Ms. Robinson “is prepared to tender all amounts due and owing under her loan.”

16 “A tender is an offer of performance made with the intent to extinguish the obligation.” *Arnolds*
17 *Management Corp. v. Eischen*, 158 Cal.App.3d 575, 580, 205 Cal.Rptr. 15 (1984) (citing Cal. Civ.
18 Code, § 1485; *Still v. Plaza Marina Commercial Corp.*, 21 Cal.App.3d 378, 385, 98 Cal.Rptr. 414
19 (1971)). “A tender must be one of full performance . . . and must be unconditional to be valid.” *Arnolds*
20 *Management*, 158 Cal.App.3d at 580, 205 Cal.Rptr. 15. “Nothing short of the full amount due the
21 creditor is sufficient to constitute a valid tender, and the debtor must at his peril offer the full amount.”
22 *Rauer's Law etc. Co. v. S. Proctor Co.*, 40 Cal.App. 524, 525, 181 P. 71 (1919).

23 The “law is long-established that a trustor or his successor must tender the obligation in full as
24 a prerequisite to challenge of the foreclosure sale.” *United States Cold Storage v. Great Western*
25 *Savings & Loan Assn.*, 165 Cal.App.3d 1214, 1222, 212 Cal.Rptr. 232 (1985). A defaulted borrower
26 is “required to allege tender of the amount of [the lender's] secured indebtedness in order to maintain
27 any cause of action for irregularity in the sale procedure.” *Abdallah v. United Savings Bank*, 43
28 Cal.App.4th 1101, 1109, 51 Cal.Rptr.2d 286 (1996), *cert. denied*, 519 U.S. 1081, 117 S.Ct. 746 (1997).

1 “A party may not without payment of the debt, enjoin a sale by a trustee under a power conferred by a
2 deed of trust, or have his title quieted against the purchaser at such a sale, even though the statute of
3 limitations has run against the indebtedness.” *Sipe v. McKenna*, 88 Cal.App.2d 1001, 1006, 200 P.2d
4 61 (1948).

5 In *FPCI RE-HAB 01 v. E & G Investments, Ltd.*, 207 Cal.App.3d 1018, 1021, 255 Cal.Rptr. 157
6 (1989), the California Court of Appeal explained:

7 . . . generally “an action to set aside a trustee's sale for irregularities in sale notice or
8 procedure should be accompanied by an offer to pay the full amount of the debt for
9 which the property was security.” . . . This rule . . . is based upon the equitable maxim
10 that a court of equity will not order a useless act performed. . . . “A valid and viable
11 tender of payment of the indebtedness owing is essential to an action to cancel a voidable
12 sale under a deed of trust.” . . . The rationale behind the rule is that if plaintiffs could not
13 have redeemed the property had the sale procedures been proper, any irregularities in the
14 sale did not result in damages to the plaintiffs. (Citations omitted.)

15 An action to set aside a foreclosure sale, unaccompanied by an offer to redeem, does not state
16 a cause of action which a court of equity recognizes. *Karlsen v. American Sav. & Loan Assn.*, 15
17 Cal.App.3d 112, 117, 92 Cal.Rptr. 851 (1971). The basic rule is that an offer of performance is of no
18 effect if the person making it is not able to perform. *Karlsen*, 15 Cal.App.3d at 118, 92 Cal.Rptr. 851
19 (citing Cal. Civ. Code, § 1495). Simply put, if the offeror “is without the money necessary to make the
20 offer good and knows it” the tender is without legal force or effect. *Karlsen*, 15 Cal.App.3d at 118, 92
21 Cal.Rptr. 851 (citing several cases). “It would be futile to set aside a foreclosure sale on the technical
22 ground that notice was improper, if the party making the challenge did not first make full tender and
23 thereby establish his ability to purchase the property.” *United States Cold Storage v. Great Western
24 Savings & Loan Assn.*, 165 Cal.App.3d 1214, 1224, 212 Cal.Rptr. 232 (1985). “A cause of action
25 ‘implicitly integrated’ with the irregular sale fails unless the trustor can allege and establish a valid
26 tender.” *Arnolds Management*, 158 Cal.App.3d at 579, 205 Cal.Rptr. 15.

27 “It is settled in California that a mortgagor cannot quiet his title against the mortgagee without
28 paying the debt secured.” *Shimpones v. Stickney*, 219 Cal. 637, 649, 28 P.2d 673 (1934); see *Mix v.
Sodd*, 126 Cal.App.3d 386, 390, 178 Cal.Rptr. 736 (1981) (“a mortgagor in possession may not maintain
an action to quiet title, even though the debt is unenforceable”); *Aguilar v. Bocci*, 39 Cal.App.3d 475,
477, 114 Cal.Rptr. 91 (1974) (trustor is unable to quiet title “without discharging his debt”).

1 for a response from Defendant.”

2 B of A challenges the absence of facts to support a breach of contract claim.

3 ***Elements And Statute Of Frauds***

4 “The standard elements of a claim for breach of contract are: ‘(1) the contract, (2) plaintiff’s
5 performance or excuse for nonperformance, (3) defendant’s breach, and (4) damage to plaintiff
6 therefrom.’” *Wall Street Network, Ltd. v. New York Times Co.*, 164 Cal.App.4th 1171, 1178, 80
7 Cal.Rptr.3d 6 (2008). “To form a contract, an ‘offer must be sufficiently definite . . . that the
8 performance promised is reasonably certain.’” *Alexander v. Codemasters Group Limited*, 104
9 Cal.App.4th 129, 141. 127 Cal.Rptr.2d 145 (2002).

10 Essential elements to contract existence are: (1) “[p]arties capable of contracting;” (2) “[t]heir
11 consent;” (3) a “lawful object;” and (4) a “sufficient cause or consideration.” Cal. Civ. Code, § 1550.

12 B of A challenges that the complaint’s failure to identify an oral contract or terms of an alleged
13 contract in that the complaint references only a loan modification. B of A points out that an alleged oral
14 promise is barred by the statute of frauds.

15 “A modification of a contract is a change in the obligations of a party by a subsequent mutual
16 agreement of the parties.” *Secrest v. Security Nat. Mortg. Loan Trust 2002-2*, 167 Cal.App.4th 544, 553,
17 84 Cal.Rptr.3d 275 (2008). “A contract coming within the statute of frauds is invalid unless it is
18 memorialized by a writing subscribed by the party to be charged or by the party’s agent.” *Secrest*, 167
19 Cal.App.4th at 552, 84 Cal.Rptr.3d 275 (citing Cal. Civ.Code, § 1624)). An “agreement by which a
20 lender agreed to forbear from exercising the right of foreclosure under a deed of trust securing an interest
21 in real property comes within the statute of frauds.” *Secrest*, 167 Cal.App.4th at 547, 84 Cal.Rptr.3d
22 275.

23 B of A is correct that the complaint fails to identify an oral contract or promise on which to
24 support a breach of contract claim. Moreover, an alleged agreement to modify Ms. Robinson’s loan
25 documents required a writing which is identified in neither the complaint nor record.

26 B of A further notes the absence of Ms. Robinson’s consideration to support B of A’s alleged
27 oral promise. B of A holds Ms. Robinson to offer something more than her existing obligation in that
28 “[p]ast consideration cannot support a contract.” *Passante v. McWilliam*, 53 Cal.App.4th 1240, 1247,

1 62 Cal.Rptr.2d 298 (1997). B of A is correct that a “loan modification agreement would require new
2 consideration other than her existing debt.”

3 ***Equitable Estoppel***

4 The complaint’s breach of contract claim seeks “injunctive relief against the upcoming Trustee
5 sale on the basis of equitable estoppel.” B of A argues that Ms. Robinson “has no right to any such
6 relief.”

7 The elements of equitable estoppel are:

- 8 1. The “party to be estopped must be apprised of the facts”;
- 9 2. He/she “must intend that his[/her] conduct shall be acted upon, or must so act that the
10 party asserting the estoppel had a right to believe it was so intended”;
- 11 3. The “other party must be ignorant of the true state of facts”; and
- 12 4. He/she “must rely upon the conduct to his[/her] injury.”

13 *City of Long Beach v. Mansell*, 3 Cal.3d 462, 489, 91 Cal.Rptr. 23 (1970).

14 Decades ago, the California Supreme Court explained: “The vital principle is that he who by his
15 language or conduct leads another to do what he would not otherwise have done shall not subject such
16 person to loss or injury by disappointing the expectations upon which he acted.” *Seymour v. Oelrichs*,
17 156 Cal. 782, 795, 106 P. 88 (1909).

18 B of A correctly notes the complaint’s failure to identify B of A promises to excuse Ms.
19 Robinson’s “performance on the loan or promising to modify the loan.” The complaint’s mere reference
20 to B of A “oral promises” fails to support an equitable estoppel claim. Moreover, as B of A notes, the
21 complaint lacks allegations of Ms. Robinson’s detrimental reliance. Ms. Robinson’s preparation of an
22 application for home loan modification does not equate to actionable harm, especially given that
23 foreclosure proceedings had been initiated.

24 The complaint fails to allege a cognizable breach of contract claim.

25 **Defective Service**

26 The complaint’s (second) defective service claim alleges that Ms. Robinson “was denied due
27 process consistently with regards to the foreclosure process.”

28 B of A points to the absence of allegations to identify foreclosure procedure deficiencies or due

1 process violations. B of A argues that the recorded foreclosure documents “belie” Ms. Robinson’s
2 claims.

3 The record demonstrates that the default notice was properly recorded on April 29, 2010 and
4 included the requisite declaration of due diligence to contact Ms. Robinson to explore options to avoid
5 foreclosure. The record further reveals the proper August 3, 2010 recording of the trustee’s sale notice.
6 The complaint lacks allegations of failure to satisfy foreclosure procedures. Moreover, the absence of
7 an allegation of tender of indebtedness, or ability to do so, further dooms a “defective service” claim.

8 **Fraud**

9 The complaint’s (third) fraud claim alleges that B of A “never provided to Plaintiff that they [sic]
10 were holders in due course of the note over the property and never offered to her a settlement from the
11 Countrywide Settlement Funds put into place by Defendant for former Countrywide borrowers.”

12 B of A challenges the complaint’s failure to allege fraud with required particularity.

13 ***Elements***

14 The elements of a California fraud claim are: (1) misrepresentation (false representation,
15 concealment or nondisclosure); (2) knowledge of the falsity (or “scienter”); (3) intent to defraud, i.e.,
16 to induce reliance; (4) justifiable reliance; and (5) resulting damage. *Lazar v. Superior Court*, 12 Cal.4th
17 631, 638, 49 Cal.Rptr.2d 377 (1996). The same elements comprise a cause of action for negligent
18 misrepresentation, except there is no requirement of intent to induce reliance. *Caldo v. Owens-Illinois,*
19 *Inc.*, 125 Cal.App.4th 513, 519, 23 Cal.Rptr.3d 1 (2004).

20 “[T]o establish a cause of action for fraud a plaintiff must plead and prove in full, factually and
21 specifically, all of the elements of the cause of action.” *Conrad v. Bank of America*, 45 Cal.App.4th 133,
22 156, 53 Cal.Rptr.2d 336 (1996). There must be a showing “that the defendant thereby intended to induce
23 the plaintiff to act to his detriment in reliance upon the false representation” and “that the plaintiff
24 actually and justifiably relied upon the defendant’s misrepresentation in acting to his detriment.”
25 *Conrad*, 45 Cal.App.4th at 157, 53 Cal.Rptr.2d 336. “The absence of any one of these required elements
26 will preclude recovery.” *Wilhelm v. Pray, Price, Williams & Russell*, 186 Cal.App.3d 1324, 1332, 231
27 Cal.Rptr. 355 (1986).

28 ///

1 ***Particularity Pleading Standard***

2 F.R.Civ.P. 9(b) requires a party to “state with particularity the circumstances constituting fraud.”⁴
3 In the Ninth Circuit, “claims for fraud and negligent misrepresentation must meet Rule 9(b)'s
4 particularity requirements.” *Neilson v. Union Bank of California, N.A.*, 290 F.Supp.2d 1101, 1141 (C.D.
5 Cal. 2003). A court may dismiss a claim grounded in fraud when its allegations fail to satisfy F.R.Civ.P.
6 9(b)'s heightened pleading requirements. *Vess*, 317 F.3d at 1107.⁵ A motion to dismiss a claim
7 “grounded in fraud” under F.R.Civ.P. 9(b) for failure to plead with particularity is the “functional
8 equivalent” of a F.R.Civ.P. 12(b)(6) motion to dismiss for failure to state a claim. *Vess*, 317 F.3d at
9 1107. As a counter-balance, F.R.Civ.P. 8(a)(2) requires from a pleading “a short and plain statement of
10 the claim showing that the pleader is entitled to relief.”

11 F.R.Civ.P. 9(b)'s heightened pleading standard “is not an invitation to disregard Rule 8's
12 requirement of simplicity, directness, and clarity” and “has among its purposes the avoidance of
13 unnecessary discovery.” *McHenry v. Renne*, 84 F.3d 1172, 1178 (9th Cir. 1996). F.R.Civ.P 9(b) requires
14 “specific” allegations of fraud “to give defendants notice of the particular misconduct which is alleged
15 to constitute the fraud charged so that they can defend against the charge and not just deny that they have
16 done anything wrong.” *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). “A pleading is sufficient
17 under Rule 9(b) if it identifies the circumstances constituting fraud so that the defendant can prepare an
18 adequate answer from the allegations.” *Neubronner v. Milken*, 6 F.3d 666, 671-672 (9th Cir. 1993)
19 (internal quotations omitted; citing *Gottreich v. San Francisco Investment Corp.*, 552 F.2d 866, 866 (9th
20 Cir. 1997)). The Ninth Circuit has explained:

21 Rule 9(b) requires particularized allegations of the circumstances *constituting* fraud. The
22 time, place and content of an alleged misrepresentation may identify the statement or the
23 omission complained of, but these circumstances do not “constitute” fraud. The
statement in question must be false to be fraudulent. Accordingly, our cases have

24 ⁴ F.R.Civ.P. 9(b)'s particularity requirement applies to state law causes of action: “[W]hile a federal court
25 will examine state law to determine whether the elements of fraud have been pled sufficiently to state a cause of action, the
26 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)).

27 ⁵ “In some cases, the plaintiff may allege a unified course of fraudulent conduct and rely entirely on that
28 course of conduct as the basis of a claim. In that event, the claim is said to be ‘grounded in fraud’ or to ‘sound in fraud,’ and
the pleading of that claim as a whole must satisfy the particularity requirement of Rule 9(b).” *Vess*, 317 F.3d at 1103-1104.

1 consistently required that circumstances indicating falseness be set forth. . . . [W]e [have]
2 observed that plaintiff must include statements regarding the time, place, and *nature* of
3 the alleged fraudulent activities, and that “mere conclusory allegations of fraud are
4 insufficient.” . . . The plaintiff must set forth what is false or misleading about a
5 statement, and why it is false. In other words, the plaintiff must set forth an explanation
6 as to why the statement or omission complained of was false or misleading. . . .

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

9 *In Re Glenfed, Inc. Securities Litigation*, 42 F.3d 1541, 1547-1548 (9th Cir. 1994) (en banc) (italics in
10 original) *superseded by statute on other grounds as stated in Marksman Partners, L.P. v. Chantal*
11 *Pharm. Corp.*, 927 F.Supp. 1297 (C.D. Cal. 1996); *see Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir.
12 1997) (fraud allegations must be accompanied by “the who, what, when, where, and how” of the
13 misconduct charged); *Neubronner*, 6 F.3d at 672 (“The complaint must specify facts as the times, dates,
14 places, benefits received and other details of the alleged fraudulent activity.”)

15 In a fraud action against a corporation, a plaintiff must “allege the names of the persons who
16 made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they
17 said or wrote, and when it was said or written.” *Tarmann v. State Farm Mut. Auto. Ins. Co.*
18 2 Cal.App.4th 153, 157, 2 Cal.Rptr.2d 861 (1991).

19 The complaint’s conclusory allegations fail to meet Rule 9(b)’s strict standard. The complaint
20 lacks facts to support fraud elements let alone the who, what, when, when and how of alleged
21 misconduct. Mere allegations of misleading is insufficient to warrant dismissal of the complaint’s
22 claims sounding in fraud. Moreover, the complaint lacks allegations that B of A promised or represented
23 that Ms. Robinson was entitled to “settlement funds.”

24 **Note Possession**

25 The complaint “contests the validity of Defendant’s ownership of the alleged note, under UCC
26 §3-306, the statute regarding ‘holder in due course’ status.”

27 B of A correctly notes that the Uniform Commercial Code does not govern non-judicial
28 foreclosures.

Under California law, a lender may pursue non-judicial foreclosure upon default with a deed of
trust with a power of sale clause. “Financing or refinancing of real property is generally accomplished
in California through a deed of trust. The borrower (trustor) executes a promissory note and deed of

1 trust, thereby transferring an interest in the property to the lender (beneficiary) as security for repayment
2 of the loan.” *Bartold v. Glendale Federal Bank*, 81 Cal.App.4th 816, 821, 97 Cal.Rptr.2d 226 (2000).

3 A deed of trust “entitles the lender to reach some asset of the debtor if the note is not paid.” *Alliance*
4 *Mortgage Co. v. Rothwell*, 10 Cal.4th 1226, 1235, 44 Cal.Rptr.2d 352 (1995).

5 If a borrower defaults on a loan and the deed of trust contains a power of sale clause, the lender
6 may non-judicially foreclose. See *McDonald v. Smoke Creek Live Stock Co.*, 209 Cal. 231, 236-237,
7 286 P. 693 (1930). The California Court of Appeal has explained non-judicial foreclosure under the
8 applicable California Civil Code sections:

9 The comprehensive statutory framework established to govern nonjudicial
10 foreclosure sales is intended to be exhaustive. . . . It includes a myriad of rules relating
11 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.

12 *Moeller v. Lien*, 25 Cal.App.4th 822, 834, 30 Cal.Rptr.2d 777 (1994); see *I.E. Assoc. v. Safeco Title Ins.*
13 *Co.*, 39 Cal.3d 281, 285, 216 Cal.Rptr. 438 (1985) (“These provisions cover every aspect of exercise of
14 the power of sale contained in a deed of trust.”)

15 Under California Civil Code section 2924(a)(1), a “trustee, mortgagee or beneficiary or any of
16 their authorized agents” may conduct the foreclosure process. Under California Civil Code section
17 2924b(4), a “person authorized to record the notice of default or the notice of sale” includes “an agent
18 for the mortgagee or beneficiary, an agent of the named trustee, any person designated in an executed
19 substitution of trustee, or an agent of that substituted trustee.” “Upon default by the trustor, the
20 beneficiary may declare a default and proceed with a nonjudicial foreclosure sale.” *Moeller*, 25
21 Cal.App.4th at 830, 30 Cal.Rptr.2d 777.

22 A “trustee or mortgagee may be liable to the trustor or mortgagor for damages sustained where
23 there has been an illegal, fraudulent or wilfully oppressive sale of property under a power of sale
24 contained in a mortgage or deed of trust.” *Munger v. Moore*, 11 Cal.App.3d 1, 7, 89 Cal.Rptr. 323
25 (1970).

26 “Under Civil Code section 2924, no party needs to physically possess the promissory note.”
27 *Sicairos v. NDEX West, LLC*, 2009 WL 385855, *3 (S.D. Cal. 2009) (citing Cal. Civ. Code, §
28 2924(a)(1)). Rather, “[t]he foreclosure process is commenced by the recording of a notice of default and

1 election to sell by the trustee.” *Moeller*, 25 Cal.App.4th at 830, 30 Cal.Rptr.2d 777. An “allegation that
2 the trustee did not have the original note or had not received it is insufficient to render the foreclosure
3 proceeding invalid.” *Neal v. Juarez*, 2007 WL 2140640, *8 (S.D. Cal. 2007).

4 A purported holder in due course challenge fails as a matter of law to further warrant dismissal
5 of this action. The record lacks facts of failure to comply with the statutory scheme for non-judicial
6 foreclosure. A purported unlawful foreclosure claim fails, especially in the absence of allegations of
7 misconduct in the foreclosure proceedings to further doom Ms. Robinson’s claims.

8 Punitive Damages

9 B of A further challenges the complaint’s grounds for punitive damages.

10 California Civil Code section 3294 (“section 3294”) provides that in an action “for breach of an
11 obligation not arising from contract,” a plaintiff may seek punitive damages “where it is proven by clear
12 and convincing evidence that the defendant has been guilty of oppression, fraud, or malice.” Cal. Civ.
13 Code, § 3294(a).

14 “Although the court will apply the substantive law embodied in section 3294, ‘determinations
15 regarding the adequacy of pleadings are governed by the Federal Rules of Civil Procedure.’” *Jackson*
16 *v. East Bay Hosp.*, 980 F.Supp. 1341, 1353 (N.D. Cal. 1997).

17 Punitive damages are “available to a party who can plead and prove the facts and circumstances
18 set forth in Civil Code section 3294.” *Hilliard v. A.H. Robbins Co.*, 148 Cal.App.3d 374, 392, 196
19 Cal.Rptr. 117 (1983). “To support punitive damages, the complaint . . . must allege ultimate facts of the
20 defendant's oppression, fraud, or malice.” *Cyrus v. Haveson*, 65 Cal.App.3d 306, 316-317, 135 Cal.Rptr.
21 246 (1976). Pleading the language in section 3294 “is not objectionable when sufficient facts are alleged
22 to support the allegation.” *Perkins v. Superior Court*, 117 Cal.App.3d 1, 6-7, 172 Cal.Rptr. 427 (1981).

23 In *G.D. Searle & Co. v. Superior Court*, 49 Cal.App.3d 22, 29, 122 Cal.Rptr. 218 (1975), the
24 California Court of Appeal explained punitive damages pleading:

25 When the plaintiff alleges an intentional wrong, a prayer for exemplary damage may be
26 supported by pleading that the wrong was committed willfully or with a design to injure.
27 . . . When nondeliberate injury is charged, allegations that the defendant's conduct was
28 wrongful, willful, wanton, reckless or unlawful do not support a claim for exemplary
damages; such allegations do not charge malice. . . . When a defendant must produce
evidence in defense of an exemplary damage claim; fairness demands that he receive
adequate notice of the kind of conduct charged against him. (Citations omitted.)

1 “Allegations that the acts . . . were ‘arbitrary, capricious, fraudulent, wrongful and unlawful,’ like other
2 adjectival descriptions of such proceedings, constitute mere conclusions of law . . .” *Faulkner v.*
3 *California Toll Bridge Authority*, 40 Cal.2d 317, 329, 253 P.2d 659 (1953); *see Letho v. Underground*
4 *Construction Co.*, 69 Cal.App.3d 933, 944, 138 Cal.Rptr. 419 (1997) (facts and circumstances of fraud
5 should be set out clearly, concisely, and with sufficient particularity to support punitive damages); *Smith*
6 *v. Superior Court*, 10 Cal.App.4th 1033, 1042, 13 Cal.Rptr.2d 133 (1992) (punitive damages claim is
7 insufficient in that it is “devoid of any factual assertions supporting a conclusion petitioners acted with
8 oppression, fraud or malice.”); *Brousseau v. Jarrett*, 73 Cal.App.3d 864, 872, 141 Cal.Rptr. 200 (1977)
9 (“conclusory characterization of defendant's conduct as intentional, willful and fraudulent is a patently
10 insufficient statement of ‘oppression, fraud, or malice, express or implied,’ within the meaning of section
11 3294”).

12 Punitive damages are never awarded as a matter of right, are disfavored by the law, and should
13 be granted with the greatest of caution and only in the clearest of cases. *Henderson v. Security Pacific*
14 *National Bank*, 72 Cal.App.3d 764, 771, 140 Cal.Rptr. 388 (1977).

15 B of A is correct that the complaint lacks allegations that B of A acted with malice, oppression
16 or fraud. The complaint’s mere request for punitive damages and reference to fraud are conclusory
17 without illustrative facts. The complaint lacks specific allegations of B of A’s wrongdoing to impose
18 punitive damages. The complaint fails to provide adequate notice of alleged conduct to support punitive
19 damages. Moreover, the failure of Ms. Robinson’s claims warrants dismissal of the punitive damages
20 claim.

21 **Attempt At Amendment And Malice**

22 Since the complaint’s claims are insufficiently pled and barred as a matter of law, Ms. Robinson
23 is unable to cure her claims by allegation of other facts and thus is not granted an attempt to amend.

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

6 **CONCLUSION AND ORDER**

7 For the reasons discussed above, this Court:

- 8 1. DISMISSES with prejudice this action; and
- 9 2. DIRECTS the clerk to enter judgment in favor of defendant Bank of America, N.A., and
10 against plaintiff Lucy Robinson and to close this action.

11 IT IS SO ORDERED.

12 **Dated: December 9, 2010**

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