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

SAMETH CHIM,

Plaintiffs,

vs.

WACHOVIA,

Defendant.

CASE NO. CV F 11-0073 LJO DLB

**SUPERSEDING ORDER TO DISMISS
ACTION
(Doc. 1.)**

BACKGROUND

On January 13, 2011, pro se plaintiff Sameth Chim (“Ms. Chim”) filed her complaint (“complaint”) to “challenge the validity of the foreclosure” of her Fresno property. Ms. Chim attached to her complaint nonsensical papers which this Court construes were recorded to attempt to thwart or complicate non-judicial foreclosure and subsequent transfer of the property. For the reasons discussed below, this Court DISMISSES this action based on the complaint’s failure to state credible claims and Mr. Chim’s abuse of the judicial process. **This order supersedes and replaces the January 19, 2011 order signed by U.S. Magistrate Judge Dennis L. Beck. Ms. Chim is denied an attempt to amend her claims.**

DISCUSSION

Sua Sponte Dismissal

The complaint fails to allege cognizable claims.

1 “A trial court may dismiss a claim sua sponte under Fed.R.Civ.P. 12(b)(6). . . . Such dismissal
2 may be made without notice where the claimant cannot possibly win relief.” *Omar v. Sea-Land Service,*
3 *Inc.*, 813 F.2d 986, 991 (9th Cir. 1987); *see Wong v. Bell*, 642 F.2d 359, 361-362 (9th Cir. 1981). Sua
4 sponte dismissal may be made before process is served on defendants. *Neitzke v. Williams*, 490 U.S.
5 319, 324 (1989) (dismissals under 28 U.S.C. § 1915(d) are often made sua sponte); *Franklin v. Murphy*,
6 745 F.2d 1221, 1226 (9th Cir. 1984) (court may dismiss frivolous in forma pauperis action sua sponte
7 prior to service of process on defendants).

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

16 In addressing dismissal, a court must: (1) construe the complaint in the light most favorable to
17 the plaintiff; (2) accept all well-pleaded factual allegations as true; and (3) determine whether plaintiff
18 can prove any set of facts to support a claim that would merit relief. *Cahill v. Liberty Mut. Ins. Co.*, 80
19 F.3d 336, 337-338 (9th Cir. 1996). Nonetheless, a court is not required “to accept as true allegations that
20 are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead*
21 *Sciences Securities Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (citation omitted). A court “need not
22 assume the truth of legal conclusions cast in the form of factual allegations,” *U.S. ex rel. Chunie v.*
23 *Ringrose*, 788 F.2d 638, 643, n. 2 (9th Cir.1986), and a court must not “assume that the [plaintiff] can
24 prove facts that it has not alleged or that the defendants have violated . . . laws in ways that have not
25 been alleged.” *Associated General Contractors of California, Inc. v. California State Council of*
26 *Carpenters*, 459 U.S. 519, 526, 103 S.Ct. 897 (1983). A court need not permit an attempt to amend if
27 “it is clear that the complaint could not be saved by an amendment.” *Livid Holdings Ltd. v. Salomon*
28 *Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005).

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

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

12 . . . a complaint must contain sufficient factual matter, accepted as true, to “state
13 a claim to relief that is plausible on its face.” . . . A claim has facial plausibility when the
14 plaintiff pleads factual content that allows the court to draw the reasonable inference that
15 the defendant is liable for the misconduct alleged. . . . The plausibility standard is not
16 akin to a “probability requirement,” but it asks for more than a sheer possibility that a
17 defendant has acted unlawfully. (Citations omitted.)

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

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

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

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

1 whether they plausibly give rise to an entitlement to relief.

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

3 As discussed below, the complaint is subject to dismissal in the absence of claims supported by
4 a cognizable legal theory or sufficient facts alleged under a cognizable legal theory.

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

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

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

17 Moreover, a pleading may not simply allege a wrong has been committed and demand relief.
18 The underlying requirement is that a pleading give “fair notice” of the claim being asserted and the
19 “grounds upon which it rests.” *Yamaguchi v. United States Department of Air Force*, 109 F.3d 1475,
20 1481 (9th Cir. 1997). Despite the flexible pleading policy of the Federal Rules of Civil Procedure, a
21 complaint must give fair notice and state the elements of the claim plainly and succinctly. *Jones v.*
22 *Community Redev. Agency*, 733 F.2d 646, 649 (9th Cir. 1984). A plaintiff must allege with at least some
23 degree of particularity overt facts which defendant engaged in to support plaintiff’s claim. *Jones*, 733
24 F.2d at 649. A complaint does not suffice “if it tenders ‘naked assertion[s]’ devoid of ‘further factual
25 enhancement.’” *Iqbal*, __ U.S. __, 129 S.Ct. at 1949 (quoting *Twombly*, 550 U.S. at 557, 127 S.Ct.
26 1955). The U.S. Supreme Court has explained:

27 While, for most types of cases, the Federal Rules eliminated the cumbersome
28 requirement that a claimant “set out in detail the facts upon which he bases his claim,”
Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) (emphasis added),

1 Rule 8(a)(2) still requires a “showing,” rather than a blanket assertion, of entitlement to
2 relief. Without some factual allegation in the complaint, it is hard to see how a claimant
3 could satisfy the requirement of providing not only “fair notice” of the nature of the
claim, but also “grounds” on which the claim rests.

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

5 The complaint fails to satisfy F.R.Civ.P. 8. The complaint merely names “Wachovia” as a
6 defendant. The complaint lacks facts of Wachovia’s purported wrongdoing to provide fair notice as to
7 what it is to defend. The complaint makes passing reference to the Truth in Lending Act, 15 U.S.C. §§
8 1601, and its implementing Regulation Z, 12 C.F.R. §§ 226, et seq. The complaint mentions “failure
9 to give full disclosure” without identifying such failures. The complaint lacks cognizable claims or legal
10 theories upon which to support defendants’ liability. The complaint lacks specific, clearly defined
11 allegations to give fair notice of claims plainly and succinctly to warrant dismissal of this action.

12 **Failure To Tender Indebtedness**

13 Ms. Chim’s failure to tender, and apparent inability to tender, the amount owing on her loan
14 further dooms her global claims.

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

22 A defaulted borrower is “required to allege tender of the amount of [the lender’s] secured
23 indebtedness in order to maintain any cause of action for irregularity in the sale procedure.” *Abdallah*
24 *v. United Savings Bank*, 43 Cal.App.4th 1101, 1109, 51 Cal.Rptr.2d 286 (1996), *cert. denied*, 519 U.S.
25 1081, 117 S.Ct. 746 (1997). “A party may not without payment of the debt, enjoin a sale by a trustee
26 under a power conferred by a deed of trust, or have his title quieted against the purchaser at such a sale,
27 even though the statute of limitations has run against the indebtedness.” *Sipe v. McKenna*, 88
28 Cal.App.2d 1001, 1006, 200 P.2d 61 (1948).

1 In *FPCI RE-HAB 01 v. E & G Investments, Ltd.*, 207 Cal.App.3d 1018, 1021, 255 Cal.Rptr. 157
2 (1989), the California Court of Appeal explained:

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

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

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

28 Moreover, to obtain “rescission or cancellation, the rule is that the complainant is required to do
equity, as a condition to his obtaining relief, by restoring to the defendant everything of value which the
plaintiff has received in the transaction. . . . The rule applies although the plaintiff was induced to enter
into the contract by the fraudulent representations of the defendant.” *Fleming v. Kagan*, 189 Cal.App.2d

1 791, 796, 11 Cal.Rptr. 737 (1961). “A valid and viable tender of payment of the indebtedness owing
2 is essential to an action to cancel a voidable sale under a deed of trust.” *Karlsen*, 15 Cal.App.3d at 117,
3 92 Cal.Rptr. 851. Analyzing “trust deed nonjudicial foreclosure sales issues in the context of common
4 law contract principles” is “unhelpful” given “the comprehensive statutory scheme regulating
5 nonjudicial foreclosure sales.” *Residential Capital v. Cal-Western Reconveyance Corp.*, 108
6 Cal.App.4th 807, 820, 821, 134 Cal.Rptr.2d 162 (2003).

7 “The rules which govern tenders are strict and are strictly applied.” *Nguyen v. Calhoun*, 105
8 Cal.App.4th 428, 439, 129 Cal.Rptr.2d 436 (2003). “The tenderer must do and offer everything that is
9 necessary on his part to complete the transaction, and must fairly make known his purpose without
10 ambiguity, and the act of tender must be such that it needs only acceptance by the one to whom it is
11 made to complete the transaction.” *Gaffney v. Downey Savings & Loan Assn.*, 200 Cal.App.3d 1154,
12 1165, 246 Cal.Rptr. 421 (1988). The debtor bears “responsibility to make an unambiguous tender of
13 the entire amount due or else suffer the consequence that the tender is of no effect.” *Gaffney*, 200
14 Cal.App.3d at 1165, 246 Cal.Rptr. 421.

15 Turning to the Truth in Lending Act (“TILA”), 15 U.S.C. §§ 1601, et seq., the “voiding of a
16 security interest may be judicially conditioned on debtor’s tender of amount due under the loan.”
17 *American Mortgage Network, Inc. v. Shelton*, 486 F.3d 815, 821 (4th Cir. 2007).

18 15 U.S.C. § 1635(b) governs the return of money or property when a borrower has rescinded
19 effectively:

20 . . . Within 20 days after receipt of a notice of rescission, the creditor shall return to the
21 obligor any money or property given as earnest money, downpayment, or otherwise, and
22 shall take any action necessary or appropriate to reflect the termination of any security
23 interest created under the transaction. If the creditor has delivered any property to the
24 obligor, the obligor may retain possession of it. Upon the performance of the creditor's
25 obligations under this section, the obligor shall tender the property to the creditor, except
26 that if return of the property in kind would be impracticable or inequitable, the obligor
shall tender its reasonable value. Tender shall be made at the location of the property or
at the residence of the obligor, at the option of the obligor. If the creditor does not take
possession of the property within 20 days after tender by the obligor, ownership of the
property vests in the obligor without obligation on his part to pay for it. The procedures
prescribed by this subsection shall apply except when otherwise ordered by a court.

27 12 C.F.R. § 226.23(d) address rescission effects and provides:

28 (2) Within 20 calendar days after receipt of a notice of rescission, the creditor

1 shall return any money or property that has been given to anyone in connection with the
2 transaction and shall take any action necessary to reflect the termination of the security
3 interest.

4 (3) If the creditor has delivered any money or property, the consumer may retain
5 possession until the creditor has met its obligation under paragraph (d)(2) of this section.
6 When the creditor has complied with that paragraph, **the consumer shall tender the**
7 **money or property to the creditor** or, where the latter would be impracticable or
8 inequitable, tender its reasonable value. At the consumer's option, tender of property may
9 be made at the location of the property or at the consumer's residence. Tender of money
10 must be made at the creditor's designated place of business. If the creditor does not take
11 possession of the money or property within 20 calendar days after the consumer's tender,
12 the consumer may keep it without further obligation. (Bold added.)

13 Neither TILA nor its Regulation Z, 12 C.F.R. §§ 226, et seq., “establishes that a borrower’s
14 mere assertion of the right of rescission has the automatic effect of voiding the contract.” *Yamamoto*
15 *v. Bank of New York*, 329 F.3d 1167, 1172 (9th Cir. 2003) (quoting *Large v. Conseco Financing*
16 *Servicing Corp.*, 292 F.3d 49, 54-55 (1st Cir. 2002)). The Ninth Circuit Court of Appeals, relying on
17 *Large*, explained:

18 Instead, the “natural reading” of the language of § 1635(b) “is that the security interest
19 becomes void when the obligor exercises a right to rescind that is available in the
20 particular case, either because the creditor acknowledges that the right of rescission is
21 available, or because the appropriate decision maker has so determined. . . . Until such
22 decision is made the [borrowers] have only advanced a claim seeking rescission.”

23 *Yamamoto*, 329 F.3d at 1172 (quoting *Large*, 292 F.3d at 54-55)).

24 A rescission notice is not automatic “without regard to whether the law permits [borrower] to
25 rescind on the grounds asserted.” *See Yamamoto*, 329 F.3d at 1172. Entertaining rescission
26 automatically “makes no sense . . . when the lender contests the ground upon which the borrower
27 rescinds.” *Yamamoto*, 329 F.3d at 1172. “In these circumstances, it cannot be that the security interest
28 vanishes immediately upon the giving of notice. Otherwise, a borrower could get out from under a
secured loan simply by *claiming* TILA violations, whether or not the lender had actually committed
any.” *Yamamoto*, 329 F.3d at 1172 (italics in original).

Moreover, although 15 U.S.C. § 1635(b) “provides for immediate voiding of the security interest
and return of the money within twenty days of the notice of rescission, we believe this assumes that the
notice of rescission was proper in the first place.” *In re Groat*, 369 B.R. 413, 419 (Bankr. 8th Cir. 2007).
A “court may impose conditions on rescission that assure that the borrower meets her obligations once

1 the creditor has performed its obligations.” *Yamamoto*, 329 F.3d at 1173. The Ninth Circuit has
2 explained that prior to ordering rescission based on a lender’s alleged TILA violations, a court may
3 require borrowers to prove ability to repay loan proceeds:

4 As rescission under § 1635(b) is an on-going process consisting of a number of
5 steps, there is no reason why a court that may alter the sequence of procedures after
6 deciding that rescission is warranted, may not do so before deciding that rescission is
7 warranted when it finds that, assuming grounds for rescission exist, rescission still could
8 not be enforced because the borrower cannot comply with the borrower's rescission
9 obligations no matter what. Such a decision lies within the court's equitable discretion,
taking into consideration all the circumstances including the nature of the violations and
the borrower's ability to repay the proceeds. If, as was the case here, it is clear from the
evidence that the borrower lacks capacity to pay back what she has received (less interest,
finance charges, etc.), the court does not lack discretion to do before trial what it could
do after.

10 *Yamamoto*, 329 F.3d at 1173 (affirming summary judgment for lender in absence of evidence that
11 borrowers could refinance or sell property); *see American Mortgage*, 486 F.3d at 821 (“Once the trial
12 judge in this case determined that the [plaintiffs] were unable to tender the loan proceeds, the remedy
13 of unconditional rescission was inappropriate.”); *LaGrone v. Johnson*, 534 F.2d 1360, 1362 (9th Cir.
14 1974) (under the facts, loan rescission should be conditioned on the borrower’s tender of advanced funds
15 given the lender’s non-egregious TILA violations and equities heavily favoring the lender).¹

16 Neither the complaint nor record references Ms. Chim’s tender of indebtedness or meaningful
17 ability to do so. The record’s silence on Ms. Chim’s tender of or ability to tender amounts outstanding
18 is construed as her concession of inability to do so. Without Ms. Chim’s meaningful tender, Ms. Chim
19 seeks empty remedies, not capable of being granted. In addition, the complaint does not address
20 conditions precedent to permit rescission even under TILA. The complaint is not a timely, valid
21 rescission notice. “Clearly it was not the intent of Congress to reduce the mortgage company to an
22 unsecured creditor or to simply permit the debtor to indefinitely extend the loan without interest.”

23
24 ¹ The Fourth Circuit Court of Appeals agrees with the Ninth Circuit that 15 U.S.C. § 1635(b) does not
compel a creditor to remove a mortgage lien in the absence of the debtor’s tender of loan proceeds:

25 Congress did not intend to require a lender to relinquish its security interest when it is now known that the
26 borrowers did not intend and were not prepared to tender restitution of the funds expended by the lender
in discharging the prior obligations of the borrowers.

27 *Powers v. Sims & Levin*, 542 F.2d 1216, 1221 (4th Cir. 1976).

1 *American Mortgage*, 486 F.3d at 820-821. Without Ms. Chim’s meaningful tender, her purported claims
2 are doomed.

3 **Foreclosure Sale Presumption**

4 The complaint is unclear whether a foreclosure sale occurred. If it has, Ms. Chim is unable to
5 overcome presumption of a foreclosure sale’s validity to doom further her claims.

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

13 If a borrower defaults on a loan and the deed of trust contains a power of sale clause, the lender
14 may non-judicially foreclose. *See McDonald v. Smoke Creek Live Stock Co.*, 209 Cal. 231, 236-237,
15 286 P. 693 (1930). The California Court of Appeal has explained non-judicial foreclosure under the
16 applicable California Civil Code sections:

17 The comprehensive statutory framework established to govern nonjudicial
18 foreclosure sales is intended to be exhaustive. . . . It includes a myriad of rules relating
19 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.

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

23 Under California Civil Code section 2924(a)(1), a “trustee, mortgagee or beneficiary or any of
24 their authorized agents” may conduct the foreclosure process. Under California Civil Code section
25 2924b(4), a “person authorized to record the notice of default or the notice of sale” includes “an agent
26 for the mortgagee or beneficiary, an agent of the named trustee, any person designated in an executed
27 substitution of trustee, or an agent of that substituted trustee.” “Upon default by the trustor, the
28 beneficiary may declare a default and proceed with a nonjudicial foreclosure sale.” *Moeller*, 25

1 Cal.App.4th at 830, 30 Cal.Rptr.2d 777.

2 “A properly conducted nonjudicial foreclosure sale constitutes a final adjudication of the rights
3 of the borrower and lender.” *Moeller*, 25 Cal.App.4th at 831, 30 Cal.Rptr.2d 777. “As a general rule,
4 a trustee's sale is complete upon acceptance of the final bid.” *Nguyen v. Calhoun*, 105 Cal.App.4th 428,
5 440-441, 129 Cal.Rptr.2d 436 (2003). “If the trustee's deed recites that all statutory notice requirements
6 and procedures required by law for the conduct of the foreclosure have been satisfied, a rebuttable
7 presumption arises that the sale has been conducted regularly and properly; this presumption is
8 conclusive as to a bona fide purchaser.” *Moeller*, 25 Cal.App.4th at 831, 30 Cal.Rptr.2d 777 (citations
9 omitted). “A nonjudicial foreclosure sale is accompanied by a common law presumption that it ‘was
10 conducted regularly and fairly.’” *Melendrez v. D & I Investment, Inc.*, 127 Cal.App.4th 1238, 1258, 26
11 Cal.Rptr.3d 413 (2005) (quoting *Brown v. Busch*, 152 Cal.App.2d 200, 204, 313 P.2d 19 (1957)). “This
12 presumption may only be rebutted by substantial evidence of prejudicial procedural irregularity.”
13 *Melendrez*, 127 Cal.App.4th at 1258, 26 Cal.Rptr.3d 413.

14 To challenge foreclosure, “it is necessary for the complaint to state a case within the code
15 sections for which reason it is essential to allege the facts affecting the validity and invalidity of the
16 instrument which is attacked.” *Kroeker v. Hurlbert*, 38 Cal.App.2d 261, 266, 101 P.2d 101 (1940).
17 A “trustee or mortgagee may be liable to the trustor or mortgagor for damages sustained where there has
18 been an illegal, fraudulent or wilfully oppressive sale of property under a power of sale contained in a
19 mortgage or deed of trust.” *Munger v. Moore*, 11 Cal.App.3d 1, 7, 89 Cal.Rptr. 323 (1970).

20 The complaint lacks facts of a specific statutory irregularity or misconduct in the foreclosure
21 proceedings. Ms. Chim’s conclusory claims of “challenge” to foreclosure validity offer nothing to
22 support a discrepancy in the foreclosure process to warrant dismissal of her claims. The complaint lacks
23 allegations to overcome the presumption of foreclosure sale validity.

24 **Attempt At Amendment And Malice**

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

27 Moreover, this Court surmises that Ms. Chim brought this action in absence of good faith and
28 seeks to exploit the court system solely for delay or to vex parties entitled to foreclose on the property.

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

8 **CONCLUSION AND ORDER**

9 For the reasons discussed above, this Court:

- 10 1. DISMISSES without prejudice this action and DENIES Ms. Chim an attempt to amend
11 her claims; and
12 2. DIRECTS the clerk to enter judgment against plaintiff Sameth Chim and in favor of
13 defendant Wachovia and to close this action.

14 IT IS SO ORDERED.

15 **Dated: January 20, 2011**

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

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