

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**

RON GEREN,

CASE NO. CV F 11-0938 LJO GSA

Plaintiff,

ORDER TO DISMISS
(Docs. 8, 10.)

vs.

DEUTSCHE BANK NATIONAL, et al.,

Defendants.

INTRODUCTION

On June 9, 2011, pro se plaintiff Ron Geren (“Mr. Geren”) filed a document which this Court construes as a complaint to allege claims arising from foreclosure of Mr. Geren’s Coarsegold, California property (“property”). Several defendants¹ seek dismissal of this action in the absence of viable claims against them. For the reasons discussed below, this Court dismisses this action against defendants and VACATES the August 25, 2011 and September 7, 2011 hearings set by defendants.

BACKGROUND

Mr. Geren’s Property Loan And Foreclosure

Mr. Geren and his wife Victoria Geren (collectively the “Gerens”) obtained from Sierra Pacific

¹ Defendants seeking dismissal are Sierra Pacific Mortgage Company, Inc. (“Sierra Pacific”), OneWest Bank, F.S.B. (“OneWest”), Mortgage Electronic Registration Systems, Inc. (“MERS”), and Deutsche Bank National Trust Company (“Deutsche Bank”). This Court will refer to Sierra Pacific, OneWest, MERS and Deutsche Bank collectively as “defendants.”

1 a \$227,000 property loan secured by a Deed of Trust (“DOT”) recorded on February 7, 2007.² The DOT
2 identifies Sierra Pacific as lender, Greenhead Investments, Inc. (“Greenhead”) as trustee, and MERS as
3 beneficiary, acting “solely as nominee for Lender.”

4 On August 7, 2009, a Notice of Default and Election to Seel under Deed of Trust (“default
5 notice”) was recorded to indicate the Gerens’ \$13,460.32 amount in arrears. The default notice includes
6 Indymac Mortgage Servicing’s declaration that:

7 The mortgagee, beneficiary or authorized agent has tried with due diligence to contact
8 the borrower to discuss the borrower’s financial situation and to explore options for the
9 borrower to avoid foreclosure as required by Cal. Civ. Code Section 2923.5. Thirty days
or more have elapsed since these due diligence efforts were completed.

10 On November 12, 2009, Indymac Federal Bank, FSB recorded an Assignment of Deed of Trust
11 to transfer to Deutsche Bank all beneficial interest under the DOT. On that same date, a Substitution
12 of Trustee was recorded to replace Greenhead as trustee with MTC Financial Inc. dba Trustee Corps
13 (“Trustee Corps”). On December 11, 2009, Indymac Federal Bank, FSB recorded another Assignment
14 of Deed of Trust which appears nearly identical to the DOT assignment recorded on November 12, 2009.

15 Also on November 12, 2009, Trustee Corps recorded a Notice of Trustee’s Sale to set a
16 December 2, 2009 sale of the property. On December 11, 2009, OneWest recorded a Trustee’s Deed
17 Upon Sale to indicate that Deutsche Bank purchased the property at a December 2, 2009 auction.

18 **Mr. Geren’s Complaint**

19 On June 9, 2011, Mr. Geren filed a document entitled “Collaretal [sic] Attack, Set Aside
20 Wrongful Foreclosure Emotional Distress Intentional Misrepresentation of Facts Suppression of Facts,
21 Omissions Negligent Misrepresentation Violations of Ca. Civ. Code 2923.6, 1572 Civil Rico.” This
22 Court construes the document as a complaint and will refer to it as “complaint.”

23 The complaint generally is indecipherable and, as Sierra Pacific describes, “offers an
24 unintelligible screed against mortgage lending in general.” The complaint makes references to
25 “egregious and ongoing, far reaching, fraudulent schemes” and an “illegal Securitization scheme.” The
26 complaint includes a “Count One Wrongful Foreclosure” to take issue apparently with the property’s

27 ² Documents pertaining to the Gerens’ loan and foreclosure were recorded in the Madera County Official
28 Records.

1 foreclosure sale.

2 **DISCUSSION**

3 **Sua Sponte Dismissal**

4 Defendants fault the complaint's failure to allege viable claims and grounds for this Court's
5 jurisdiction. This Court agrees with defendants.

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

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

21 In addressing dismissal, a court must: (1) construe the complaint in the light most favorable to
22 the plaintiff; (2) accept all well-pleaded factual allegations as true; and (3) determine whether plaintiff
23 can prove any set of facts to support a claim that would merit relief. *Cahill v. Liberty Mut. Ins. Co.*, 80
24 F.3d 336, 337-338 (9th Cir. 1996). Nonetheless, a court is not required "to accept as true allegations that
25 are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead*
26 *Sciences Securities Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (citation omitted). A court "need not
27 assume the truth of legal conclusions cast in the form of factual allegations," *U.S. ex rel. Chunie v.*
28 *Ringrose*, 788 F.2d 638, 643, n. 2 (9th Cir.1986), and a court must not "assume that the [plaintiff] can

1 prove facts that it has not alleged or that the defendants have violated . . . laws in ways that have not
2 been alleged.” *Associated General Contractors of California, Inc. v. California State Council of*
3 *Carpenters*, 459 U.S. 519, 526, 103 S.Ct. 897 (1983). A court need not permit an attempt to amend if
4 “it is clear that the complaint could not be saved by an amendment.” *Livid Holdings Ltd. v. Salomon*
5 *Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005).

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

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

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

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

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

25 First, the tenet that a court must accept as true all of the allegations contained in
26 a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of
27 a cause of action, supported by mere conclusory statements, do not suffice. . . . Second,
28 only a complaint that states a plausible claim for relief survives a motion to dismiss. . .
. Determining whether a complaint states a plausible claim for relief will . . . be a
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

1 more than the mere possibility of misconduct, the complaint has alleged – but it has not
2 “show[n]”-“that the pleader is entitled to relief.” Fed. Rule Civ. Proc. 8(a)(2).

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

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

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

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

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

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

24 Moreover, a pleading may not simply allege a wrong has been committed and demand relief.
25 The underlying requirement is that a pleading give “fair notice” of the claim being asserted and the
26 “grounds upon which it rests.” *Yamaguchi v. United States Department of Air Force*, 109 F.3d 1475,
27 1481 (9th Cir. 1997). Despite the flexible pleading policy of the Federal Rules of Civil Procedure, a
28 complaint must give fair notice and state the elements of the claim plainly and succinctly. *Jones v.*
Community Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984). A plaintiff must allege with at least some
degree of particularity overt facts which defendant engaged in to support plaintiff’s claim. *Jones*, 733
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. The complaint lacks cognizable facts of defendants’
9 purported wrongdoing to provide fair notice as to what each defendant is to defend. The complaint
10 appears to decry the home loan industry and securities practices. The complaint makes passing
11 references to lending and foreclosure laws but fails to connect them to events involving Mr. Geren
12 and/or defendants. The complaint throws out terms, such as, “failure to disclose,” “lack of
13 consideration,” “conflict of interest,” and “collusion against homeowners” without meaningful reference
14 to the parties. The complaint lacks cognizable claims or legal theories upon which to support
15 defendants’ liability. The complaint lacks specific, clearly defined allegations to give fair notice of
16 claims plainly and succinctly to warrant dismissal of this action.

17 **Failure To Tender Indebtedness**

18 Mr. Geren’s failure to tender, and apparent inability to tender, the amount owing on the Gerens’
19 loan further dooms his claims.

20 “A tender is an offer of performance made with the intent to extinguish the obligation.” *Arnolds*
21 *Management Corp. v. Eischen*, 158 Cal.App.3d 575, 580, 205 Cal.Rptr. 15 (1984) (citing Cal. Civ.
22 Code, § 1485; *Still v. Plaza Marina Commercial Corp.*, 21 Cal.App.3d 378, 385, 98 Cal.Rptr. 414
23 (1971)). “A tender must be one of full performance . . . and must be unconditional to be valid.” *Arnolds*
24 *Management*, 158 Cal.App.3d at 580, 205 Cal.Rptr. 15. “Nothing short of the full amount due the
25 creditor is sufficient to constitute a valid tender, and the debtor must at his peril offer the full amount.”
26 *Rauer's Law etc. Co. v. S. Proctor Co.*, 40 Cal.App. 524, 525, 181 P. 71 (1919).

27 A defaulted borrower is “required to allege tender of the amount of [the lender's] secured
28 indebtedness in order to maintain any cause of action for irregularity in the sale procedure.” *Abdallah*

1 v. *United Savings Bank*, 43 Cal.App.4th 1101, 1109, 51 Cal.Rptr.2d 286 (1996), *cert. denied*, 519 U.S.
2 1081, 117 S.Ct. 746 (1997). “A party may not without payment of the debt, enjoin a sale by a trustee
3 under a power conferred by a deed of trust, or have his title quieted against the purchaser at such a sale,
4 even though the statute of limitations has run against the indebtedness.” *Sipe v. McKenna*, 88
5 Cal.App.2d 1001, 1006, 200 P.2d 61 (1948).

6 In *FPCI RE-HAB 01 v. E & G Investments, Ltd.*, 207 Cal.App.3d 1018, 1021, 255 Cal.Rptr. 157
7 (1989), the California Court of Appeal explained:

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

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

28 “It is settled in California that a mortgagor cannot quiet his title against the mortgagee without
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,

1 in California through a deed of trust. The borrower (trustor) executes a promissory note and deed of
2 trust, thereby transferring an interest in the property to the lender (beneficiary) as security for repayment
3 of the loan.” *Bartold v. Glendale Federal Bank*, 81 Cal.App.4th 816, 821, 97 Cal.Rptr.2d 226 (2000).

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

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

10 The comprehensive statutory framework established to govern nonjudicial
11 foreclosure sales is intended to be exhaustive. . . . It includes a myriad of rules relating
12 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.

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

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

23 “A properly conducted nonjudicial foreclosure sale constitutes a final adjudication of the rights
24 of the borrower and lender.” *Moeller*, 25 Cal.App.4th at 831, 30 Cal.Rptr.2d 777. “As a general rule,
25 a trustee's sale is complete upon acceptance of the final bid.” *Nguyen v. Calhoun*, 105 Cal.App.4th 428,
26 440-441, 129 Cal.Rptr.2d 436 (2003). “If the trustee's deed recites that all statutory notice requirements
27 and procedures required by law for the conduct of the foreclosure have been satisfied, a rebuttable
28 presumption arises that the sale has been conducted regularly and properly; this presumption is

1 conclusive as to a bona fide purchaser.” *Moeller*, 25 Cal.App.4th at 831, 30 Cal.Rptr.2d 777 (citations
2 omitted). “A nonjudicial foreclosure sale is accompanied by a common law presumption that it ‘was
3 conducted regularly and fairly.’” *Melendrez v. D & I Investment, Inc.*, 127 Cal.App.4th 1238, 1258, 26
4 Cal.Rptr.3d 413 (2005) (quoting *Brown v. Busch*, 152 Cal.App.2d 200, 204, 313 P.2d 19 (1957)). “This
5 presumption may only be rebutted by substantial evidence of prejudicial procedural irregularity.”
6 *Melendrez*, 127 Cal.App.4th at 1258, 26 Cal.Rptr.3d 413.

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

14 It is the general rule that courts have power to vacate a foreclosure sale where
15 there has been fraud in the procurement of the foreclosure decree or where the sale has
16 been improperly, unfairly or unlawfully conducted, or is tainted by fraud, or where there
17 has been such a mistake that to allow it to stand would be inequitable to purchaser and
parties. Sham bidding and the restriction of competition are condemned, and inadequacy
of price when coupled with other circumstances of fraud may also constitute ground for
setting aside the sale.

18 *Bank of America Nat. Trust & Savings Ass'n v. Reidy*, 15 Cal.2d 243, 248, 101 P.2d 77 (1940).

19 Moreover, “[u]nder California law, there is no requirement for the production of an original
20 promissory note prior to initiation of a nonjudicial foreclosure. . . . Therefore, the absence of an original
21 promissory note in a nonjudicial foreclosure does not render a foreclosure invalid. *Pantoja v.*
22 *Countrywide Home Loans, Inc.*, 640 F.Supp.2d 1177, 1186 (N.D. Cal. 2009). “Under Civil Code section
23 2924, no party needs to physically possess the promissory note.” *Sicairos v. NDEX West, LLC*, 2009 WL
24 385855, *3 (S.D. Cal. 2009) (citing Cal. Civ. Code, § 2924(a)(1)). Rather, “[t]he foreclosure process
25 is commenced by the recording of a notice of default and election to sell by the trustee.” *Moeller*, 25
26 Cal.App.4th at 830, 30 Cal.Rptr.2d 777. An “allegation that the trustee did not have the original note
27 or had not received it is insufficient to render the foreclosure proceeding invalid.” *Neal v. Juarez*, 2007
28 WL 2140640, *8 (S.D. Cal. 2007).

1 The complaint lacks facts of a specific statutory irregularity or misconduct in the foreclosure
2 proceedings. The complaint's attempt to challenge foreclosure validity offers nothing to support a
3 discrepancy in the foreclosure process to warrant dismissal of Mr. Geren's claims. The complaint
4 references to producing the note are unavailing. The complaint lacks allegations to overcome the
5 presumption of foreclosure sale validity.³

6 Declaration Of Diligence

7 Defendants further note that Mr. Geren lacks a claim based on failure to observe California Civil
8 Code section 2923.5 ("section 2923.5").

9 Section 2923.5(a)(2) requires a "mortgagee, beneficiary or authorized agent" to "contact the
10 borrower in person or by telephone in order to assess the borrower's financial situation and explore
11 options for the borrower to avoid foreclosure." Section 2923.5(b) requires a default notice to include
12 a declaration "from the mortgagee, beneficiary, or authorized agent" of compliance with section 2923.5,
13 including attempt "with due diligence to contact the borrower as required by this section."

14 Defendants note that section 2923.5 does not require the compliance statement be made by in
15 individual with personal knowledge under penalty of perjury. In *Mabry v. Superior Court*, 185
16 Cal.App.4th 208, 233, 110 Cal.Rptr.3d 201 (2010), the California Court of Appeal explained:

17 The way section 2923.5 is set up, too many people are necessarily involved in the process
18 for any one person to likely be in the position where he or she could swear that all three
19 requirements of the declaration required by subdivision (b) were met. We note, for
20 example, that subdivision (a)(2) requires any one of three entities (a "mortgagee,
21 beneficiary, or authorized agent") to contact the borrower, and such entities may employ
different people for that purpose. And the option under the statute of no contact being
required (per subdivision (h)) further involves individuals who would, in any commercial
operation, probably be different from the people employed to do the contacting.

22 The Indymac Mortgage Servicing declaration attached to the default notice was executed under
23 penalty of perjury in declaration form. A purported section 2923.5 violation is irrelevant in that "the
24 remedy for noncompliance is a simple postponement of the foreclosure sale, nothing more." *Mabry*, 185
25 Cal.App.4th at 214, 110 Cal.Rptr.3d 201. Since the foreclosure sale occurred in December 2009, an
26

27 ³ The presumption is further bolstered by the Trustee's Deed of Sale, which provides: "All requirements of
28 law regarding the mailing of copies of notices or the publication of a copy of the Notice of Default or the personal delivery
of the Notice of Default and the posting and publication of copies of the Notice of a Sale have been complied with."

1 alleged section 2923.5 violation fails to satisfy a claim for wrongful foreclosure.

2 **Absence Of Subject Matter Jurisdiction**

3 The complaint fails to allege a basis of this Court’s jurisdiction to further warrant dismissal of
4 this action.

5 F.R.Civ.P. 8(a)(1) requires “a short and plain statement of the grounds for the court’s
6 jurisdiction.”

7 F.R.Civ.P. 12(b)(1) authorizes a motion to dismiss for lack of subject matter jurisdiction.
8 Fundamentally, federal courts are of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S.
9 375, 377, 114 S.Ct. 341 (1994). A “court of the United States may not grant relief absent a
10 constitutional or valid statutory grant of jurisdiction.” *U.S. v. Bravo-Diaz*, 312 F.3d 995, 997 (9th Cir.
11 2002). “A federal court is presumed to lack jurisdiction in a particular case unless the contrary
12 affirmatively appears.” *Stock West, Inc. v. Confederated Tribes*, 873 F. 2d 1221, 1225 (9th Cir. 1989).
13 Limits on federal jurisdiction must neither be disregarded nor evaded. *Owen Equipment & Erection Co.*
14 *v. Kroger*, 437 U.S. 365, 374, 98 S.Ct. 2396 (1978). “The plaintiff always bears the burden of
15 establishing subject matter jurisdiction. In effect, the court presumes lack of jurisdiction until the
16 plaintiff proves otherwise.” *Valdez v. U.S.*, 837 F.Supp. 1065, 1067 (E.D. Cal. 1993).

17 The complaint fails to raise a relevant federal question, to assert diversity among the parties, or
18 to present a basis for this Court’s subject matter jurisdiction to warrant further dismissal of this action.

19 **Attempt At Amendment And Malice**

20 Since the complaint’s claims are barred as a matter of law, Mr. Geren is unable to cure his claims
21 by allegation of other facts and thus is not granted an attempt to amend.

22 Moreover, this Court surmises that Mr. Geren has brought this action in absence of good faith
23 and that Mr. Geren seeks to exploit the court system solely for delay or to vex defendants. The test for
24 maliciousness is a subjective one and requires the court to “determine the . . . good faith of the
25 applicant.” *Kinney v. Plymouth Rock Squab Co.*, 236 U.S. 43, 46 (1915); *see Wright v. Newsome*, 795
26 F.2d 964, 968, n. 1 (11th Cir. 1986); *cf. Glick v. Gutbrod*, 782 F.2d 754, 757 (7th Cir. 1986) (court has
27 inherent power to dismiss case demonstrating “clear pattern of abuse of judicial process”). A lack of
28 good faith or malice also can be inferred from a complaint containing untrue material allegations of fact

1 or false statements made with intent to deceive the court. *See Horsey v. Asher*, 741 F.2d 209, 212 (8th
2 Cir. 1984). An attempt to vex or delay provides further grounds to dismiss this action.

3 **CONCLUSION AND ORDER**

4 For the reasons discussed above, this Court:

- 5 1. DISMISSES with prejudice this action against all defendants; and
- 6 2. DIRECTS the clerk to enter judgment in favor of defendants and against plaintiff Ron
7 Geren and to close this action.

8
9
10
11
12
13
14
15 IT IS SO ORDERED.

16 **Dated:** August 12, 2011

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