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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANGELITO V. NOGALIZA AND ANGELA	)	Case No. 12-1383 SC
F. NOGALIZA,	)	
	)	ORDER GRANTING IN PART AND
Plaintiffs,	)	DENYING IN PART DEFENDANTS'
	)	<u>MOTION TO DISMISS</u>
v.	)	
	)	
U.S. BANK, N.A., AS SUCCESSOR	)	
TRUSTEE TO BANK OF AMERICA BY	)	
MERGER TO LaSALLE BANK, N.A.,	)	
AS TRUSTEE FOR MORGAN STANLEY	)	
MORTGAGE LOAN TRUST 2007-11AR;	)	
REGIONAL TRUSTEE SERVICES	)	
CORPORATION; AND MORTGAGE	)	
ELECTRONIC REGISTRATION	)	
SYSTEMS, INC.,	)	
	)	
Defendants.	)	
	)	
	)	

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**I. INTRODUCTION**

Plaintiffs Angelito V. Nogaliza and Angela F. Nogaliza ("Plaintiffs") bring this action to challenge the foreclosure of their home in Hercules, California. Defendants U.S. Bank N.A. ("U.S. Bank") and Mortgage Electronic Registration Systems, Inc. ("MERS") (collectively, "Defendants") now move to dismiss the action pursuant to Federal Rule of Civil Procedure 12(b)(6). ECF No. 12 ("MTD"). Defendants also move to strike an affidavit attached to Plaintiffs' First Amended Complaint ("FAC") and to expunge a lis pendens filed by Plaintiffs in connection with this action. Id. The motion is fully briefed. ECF Nos. 14 ("Opp'n"),

1 18 ("Reply"). Pursuant to Civil Local Rule 7-1(b), the Court finds  
2 this matter appropriate for determination without oral argument.  
3 As detailed below, Defendants' motion is GRANTED in part and DENIED  
4 in part.

5  
6 **II. BACKGROUND**

7 In March 2007, Plaintiffs borrowed \$453,700, secured by a Deed  
8 of Trust against their home in Hercules, California (the  
9 "Property"). See ECF No. 1 (First Amended Complaint ("FAC")) ¶ 3;  
10 ECF No. 13 (Request for Judicial Notice ("RJN")) Ex. 1 ("Deed of  
11 Trust") at 1. The Deed of Trust was executed by Plaintiffs in  
12 favor of Alliance Bancorp. Deed of Trust at 1. MERS acted as the  
13 beneficiary under the Deed of Trust. Id.

14 A notice of default was recorded on March 26, 2009, which was  
15 later rescinded. RJN Exs. 2, 3. A second notice of default was  
16 recorded on November 20, 2011. RJN Ex. 5 ("2nd NOD"). A  
17 declaration attached to the second notice of default stated that,  
18 pursuant to California Civil Code § 2923.5(a)(2), the beneficiary  
19 had contacted Plaintiffs on three occasions -- July 15, 2011,  
20 August 19, 2011, and September 10, 2011 -- to assess Plaintiffs'  
21 financial situation and explore options to avoid foreclosure. Id.  
22 A third notice of default was recorded on November 21, 2011. RJN  
23 Ex. 6 ("3rd NOD"). A declaration attached to the third notice of  
24 default represented that the beneficiary or its authorized agent  
25 had sent Plaintiffs a certified letter as required by California  
26 Civil Code section 2923.5(g)(3).<sup>1</sup> Id.

27  
28 <sup>1</sup> Section 2923.5(g)(3) provides that, "[i]f the borrower does not respond within two weeks after the telephone call requirements of paragraph (2) have been satisfied, the mortgagee, beneficiary, or

1 In November 2011, several documents were recorded reflecting  
2 changes in the beneficiary and trustee on the Deed of Trust. On  
3 November 10, 2011, an Assignment of Deed of Trust was recorded,  
4 through which MERS assigned its beneficial interests in the Deed of  
5 Trust to U.S. Bank. RJN Ex. 4. Six days later, a Substitution of  
6 Trustee was recorded, substituting Regional Service Corporation<sup>2</sup> as  
7 trustee under the Deed of Trust. RJN Ex. 7.

8 The substituted trustee recorded a Notice of Trustee's Sale on  
9 February 23, 2012, setting a sale date of March 15, 2012. RJN Ex.  
10 9. The sale date was later postponed to April 26, 2012. It  
11 appears that the Property has yet to go to sale.

12 On January 13, 2012, Plaintiffs commenced the instant action  
13 in the Superior Court of the State of California in and for the  
14 County of Contra Costa. ECF No. 1 ("Not. of Removal"). On the  
15 same day, Plaintiffs recorded a lis pendens referring to the  
16 instant action. RJN Ex. 9.

17 The case was subsequently removed to federal court on  
18 diversity grounds. Id. On April 6, 2012, Plaintiffs filed their  
19 FAC in federal court. The gravamen of the FAC is that Defendants  
20 lack legal standing to initiate foreclosure proceedings against the  
21 property. See FAC ¶¶ 24, 26, 29, 41. Plaintiffs allege that,  
22 contrary to the statements made in the recorded documents, MERS was  
23 not the true beneficiary under the Deed of Trust and, thus, any  
24 purported assignment of the Deed of Trust from MERS is invalid.

25 \_\_\_\_\_  
26 authorized agent shall then send a certified letter, with return  
receipt requested."

27 <sup>2</sup> Regional Services Corporation's substitution was recorded by  
28 Defendant Regional Trustee Services Corporation. RJN Ex. 7. The  
two entities share the same address, id., but their relationship is  
not explained in the papers.

1 See id. ¶ 22. Plaintiffs also allege that Defendants failed to  
2 contact them in accordance with California Civil Code section  
3 2923.5 prior to initiating foreclosure proceedings. See id. ¶ 41.  
4 Plaintiffs assert four causes of action: (1) slander of title, (2)  
5 wrongful foreclosure, (3) violation of California Civil Code  
6 section 2923.5, and (4) violation of California's Unfair  
7 Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 et seq.  
8 Id. ¶¶ 20-43. Plaintiffs seek damages and an injunction  
9 prohibiting Defendants from proceeding with the foreclosure sale.  
10 Id. at 10.

11 Attached to the FAC is an affidavit by Terri L. Petit  
12 ("Petit") concerning her investigation of Plaintiffs' mortgage  
13 documents. Among other things, Petit concludes that Plaintiffs'  
14 promissory note has been securitized and sold.

15  
16 **III. LEGAL STANDARD**

17 A motion to dismiss under Federal Rule of Civil Procedure  
18 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.  
19 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based  
20 on the lack of a cognizable legal theory or the absence of  
21 sufficient facts alleged under a cognizable legal theory."  
22 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.  
23 1988). "When there are well-pleaded factual allegations, a court  
24 should assume their veracity and then determine whether they  
25 plausibly give rise to an entitlement to relief." Ashcroft v.  
26 Iqbal, 556 U.S. 662, 664 (2009). However, "the tenet that a court  
27 must accept as true all of the allegations contained in a complaint  
28 is inapplicable to legal conclusions. Threadbare recitals of the

1 elements of a cause of action, supported by mere conclusory  
2 statements, do not suffice." Id. at 663 (citing Bell Atl. Corp. v.  
3 Twombly, 550 U.S. 544, 555 (2007)). The allegations made in a  
4 complaint must be both "sufficiently detailed to give fair notice  
5 to the opposing party of the nature of the claim so that the party  
6 may effectively defend against it" and "sufficiently plausible"  
7 such that "it is not unfair to require the opposing party to be  
8 subjected to the expense of discovery." Starr v. Baca, 633 F.3d  
9 1191, 1204 (9th Cir. 2011).

10  
11 **IV. DISCUSSION**

12 **A. Judicial Notice**

13 As an initial matter, Plaintiffs object to exhibits 1 through  
14 8 to Defendants' RJN, including the Deed of Trust, the notices of  
15 default, the Assignment of Deed of Trust, the Substitution of  
16 Trustee, and the Notice of Trustee's Sale. ECF No. 14-1 ("Pls.'  
17 Obj.") at 1. Plaintiffs argue that, while the Court may take  
18 judicial notice of the fact that these documents were recorded, it  
19 may not take judicial notice of disputed factual matters stated  
20 therein. Id. Plaintiffs do not identify which particular facts  
21 they dispute.

22 Generally, a district court may not consider material outside  
23 the pleadings on a Rule 12(b)(6) motion to dismiss. Hal Roach  
24 Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1550  
25 (9th Cir. 1989). However, under Federal Rule of Evidence 201, "[a]  
26 court may take judicial notice of matters of public record without  
27 converting a motion to dismiss into a motion for summary judgment."  
28 Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001)

1 (internal quotations omitted). There are limits. For example, "a  
2 court may not take judicial notice of a fact that is 'subject to  
3 reasonable dispute.'" Id.

4 Accordingly, the Court takes judicial notice of the fact that  
5 the documents attached to Defendants' RJN have been publicly  
6 recorded. However, the Court does not assume the truth of the  
7 facts asserted in those documents. For example, while the Court  
8 takes judicial notice of the fact that Defendants recorded the  
9 Notice of Default, the Court does not take judicial notice of the  
10 fact that Plaintiffs defaulted on their loan.

11 **B. Slander of Title and Wrongful Foreclosure**

12 Plaintiffs' claims for slander of title and wrongful  
13 foreclosure are based on the allegation that MERS never owned a  
14 beneficial interest in the promissory notes or the Deed of Trust  
15 and, therefore, MERS lacked the legal authority to assign  
16 Plaintiffs' Deed of Trust to U.S. Bank. FAC ¶¶ 21-22, 29-30.  
17 Plaintiffs reason that because U.S. Bank cannot be the true  
18 beneficiary, it lacks standing to initiate foreclosure proceedings  
19 against the Property. Id. ¶¶ 24, 30. Missing from Plaintiffs'  
20 allegations is any cogent explanation of why MERS was not the true  
21 beneficiary under the Deed of Trust.

22 Indeed, Plaintiffs' position is inconsistent with the plain  
23 language of the Deed of Trust, which states: "MERS is a separate  
24 corporation that is acting solely as a nominee for Lender and  
25 Lender's successors and assigns. MERS is the beneficiary under  
26 this Security instrument."<sup>3</sup> Deed of Trust at 1. Faced with

27 \_\_\_\_\_  
28 <sup>3</sup> MERS's status as the beneficiary is not subject to reasonable  
dispute since it is set forth in the Deed of Trust, an agreement  
signed by Plaintiffs. See Section IV.A supra.

1 substantially similar language, courts have rejected the argument  
2 that MERS lacks the legal authority to record a notice of default.  
3 See, e.g., Parcray v. Shea Mortg. Inc., CV-F09-19420WW/GSA, 2010 WL  
4 1659369, at \*9-11 (E.D. Cal. Apr. 23, 2010). Likewise, the Court  
5 rejects Plaintiffs' position that MERS, which was named as the  
6 beneficiary under the Deed of Trust, lacked the authority to assign  
7 its interest to U.S. Bank.

8 The Court finds that MERS's assignment of the Deed of Trust  
9 was valid and, therefore, that U.S. Bank had standing to initiate  
10 foreclosure proceedings against the Property. Accordingly, the  
11 Court DISMISSES Plaintiffs' claims for slander of title and  
12 wrongful foreclosure WITH PREJUDICE.

13 **C. California Civil Code Section 2923.5**

14 California Civil Code section 2923.5 concerns the notice of  
15 default. It requires the "mortgagee, trustee, beneficiary, or  
16 authorized agent" seeking to file a notice of default to first  
17 contact the borrower in person or by telephone "in order to assess  
18 the borrower's financial situation and explore options for the  
19 borrower to avoid foreclosure." Id. § 2923.5(a)(2). The notice of  
20 default may not be filed until thirty days after this initial  
21 contact or after the statute's due diligence requirements are  
22 satisfied. Id. § 2923.5(a)(1). Further, the notice of default  
23 must include a declaration that the mortgagee, beneficiary, or  
24 authorized agent has contacted the borrower. Id. § 2923.5(b).  
25 During this initial contact, the party seeking to file a notice of  
26 default must advise the borrower that he or she has the right to  
27 request a subsequent meeting and, if requested, schedule the  
28 meeting within fourteen days. Id. § 2923.5(a)(2). The remedy

1 available under section 2923.5 is the postponement of a foreclosure  
2 sale until the requirements of the statute have been fulfilled.  
3 Mabry v. Super. Ct., 185 Cal. App. 4th 208, 214 (Cal. Ct. App.  
4 2010).

5 Plaintiffs allege that Defendants violated California Civil  
6 Code section 2923.5 by failing to contact Plaintiffs at least  
7 thirty days prior to recording the Notice of Default. FAC ¶ 37.  
8 Plaintiffs also dispute the truth of the declaration attached to  
9 the second Notice of Default, which states that Defendants complied  
10 with section 2923.5. Id.

11 Defendants argue that the declarations attached to the second  
12 and third notices of default show that Plaintiffs were contacted in  
13 accordance with section 2923.5 and that "Plaintiffs make no  
14 specific allegation that they were not contacted." MTD at 9. This  
15 argument lacks merit. While the Court may take judicial notice of  
16 the declarations cited by Defendants, it is not bound to assume the  
17 truth of the facts asserted in those declarations. Lee, 250 F.3d  
18 at 689. In the FAC, Plaintiffs expressly dispute the veracity of  
19 these declarations and allege that "Plaintiffs were never  
20 contacted." FAC ¶ 37. As this is a motion to dismiss, the Court  
21 must assume that Plaintiffs' allegations are true. In their reply,  
22 Defendants argue that "Plaintiffs fail to allege how or why no  
23 phone calls were received on the dates specified [in the  
24 declarations]." Reply at 4. Plaintiffs need not allege such  
25 facts. They have pled that they were not contacted in accordance  
26 with section 2923.5. That is sufficient.

27 Defendants also argue that Plaintiffs have already been  
28 afforded the only relief available under section 2923.5, a



1 postponement of the noticed foreclosure sale. MTD at 10. The  
2 logic underlying this argument is flawed. It is true that the only  
3 remedy available for section 2923.5 violation is the postponement  
4 of a foreclosure sale. Mabry, 185 Cal. App. 4th at 235. However,  
5 the purpose of such a postponement is to give the lender an  
6 opportunity to comply with the requirements of the statute. See  
7 Shaterian v. Wells Fargo Bank, N.A., 829 F. Supp. 2d 873, 886-87  
8 (N.D. Cal. 2011). A lender may not evade the procedural  
9 requirements of section 2923.5 merely by postponing a scheduled  
10 foreclosure sale. If this were the case, postponement would be an  
11 empty gesture. Here, the foreclosure sale of the Property has been  
12 postponed by several months, but there is no indication that  
13 Defendants have used this additional time to cure the alleged  
14 section 2923.5 violation by contacting Plaintiffs.

15 For these reasons, the Court DENIES Defendants' motion to  
16 dismiss with respect to Plaintiffs' claim under section 2923.5.

17 **D. Unfair Competition Law ("UCL")**

18 Defendants argue that the UCL claim fails for lack of  
19 specificity. MTD at 10-11 (citing Khoury v. Maly's of California,  
20 Inc., 14 Cal. App. 4th 612, 618 (1993)). But the specifics of  
21 Plaintiffs' UCL claim are relatively clear. Plaintiffs allege that  
22 Defendants engaged in an unlawful practice by commencing  
23 foreclosure proceedings without first contacting Plaintiffs in  
24 accordance with section 2923.5 and filing a declaration with the  
25 Notice of Default which falsely states that Plaintiffs were  
26 contacted in accordance with section 2923.5. Compl. ¶ 41.  
27 Defendants also argue that Plaintiffs improperly "lump both  
28 Defendants into one cause of action and allege[] facts that only

1 relate to lending and origination claims." MTD at 11. This  
2 argument misconstrues Plaintiffs' UCL claim, which is predicated on  
3 Defendants' foreclosure procedures, not their loan origination  
4 practices. Accordingly, the Court DENIES Defendants' motion with  
5 respect to Plaintiffs' UCL claim.

6 **E. Motion to Strike**

7 Defendants move to strike the Petit affidavit attached to the  
8 FAC. MTD at 11-12. Plaintiffs do not challenge the motion to  
9 strike.

10 Rule 12(f) provides that a court may, on its own or on a  
11 motion, "strike from a pleading an insufficient defense or any  
12 redundant, immaterial, impertinent, or scandalous matter." Fed. R.  
13 Civ. P. 12(f). A copy of a written instrument that is attached to  
14 a pleading "is a part of the pleading for all purposes." Fed. R.  
15 Civ. P. 10(c). "A written instrument within the meaning of Rule  
16 10(c) is a document evidencing legal rights or duties or giving  
17 formal expression to a legal act or agreement, such as a deed,  
18 will, bond, lease, insurance policy or security agreement."  
19 DeMarco v. DepoTech Corp., 149 F. Supp. 2d 1212, 1220 (S.D. Cal.  
20 2001) (internal quotations omitted). "[W]itness affidavits and  
21 other exhibits containing largely evidentiary material typically do  
22 not fall within Rule 10(c)'s category of 'written instruments.'"  
23 Montgomery v. Buege, CIV. 08-385 WBS KJM, 2009 WL 1034518, at \*3  
24 (E.D. Cal. Apr. 16, 2009). "Affidavits and declarations . . . are  
25 not allowed as pleading exhibits unless they form the basis of the  
26 complaint." United States v. Ritchie, 342 F.3d 903, 908 (9th Cir.  
27 2003).

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1 Here, the Petit affidavit does not form the basis of the  
2 claims alleged in the FAC. The FAC makes no mention of the Petit  
3 affidavit and the central conclusion of the affidavit -- that  
4 Plaintiffs' loan was securitized -- appears to be irrelevant to the  
5 claims asserted in the FAC. Further, the Petit Affidavit does not  
6 constitute documentary evidence and, as such, is not a written  
7 instrument within the meaning of Rule 10(c). Plaintiffs attached  
8 the affidavit to bolster their legal conclusions, not to document  
9 any agreement underlying their claims. Accordingly, the Court  
10 STRIKES the Petit Affidavit.

11  
12 **V. CONCLUSION**

13 For the reasons set forth above, Defendants U.S. Bank and  
14 MERS's Motion to Dismiss is GRANTED in part and DENIED in part.  
15 The Court DISMISSES with prejudice Plaintiffs Angelito V. Nogaliza  
16 and Angela F. Nogaliza's claims for slander of title and wrongful  
17 foreclosure. Plaintiffs' claims for violation of California Civil  
18 Code § 2923.5 and the UCL remain undisturbed and, as such, the  
19 Court declines to expunge the lis pendens filed in connection with  
20 this action. The Court also STRIKES the declaration of Terri L.  
21 Petit.

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23 IT IS SO ORDERED.

24  
25 Dated: July 24, 2012

  
UNITED STATES DISTRICT JUDGE

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