

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

3
 4 FAIYAZ KHAN and REHANA A. KHAN,

No. C 11-03853 CW

5 Plaintiffs,

ORDER GRANTING IN
 PART, AND DENYING

6 v.

IN PART,
 DEFENDANTS' MOTION
 TO DISMISS

7 BANK OF AMERICA, N.A., BAC HOME
 8 LOANS SERVICING, L.P., and DOES
 1-10,

9 Defendants.

10 _____/

11
 12 Defendants Bank of America, N.A. and BAC Home Loan Servicing,
 13 L.P. (collectively, Bank of America) move pursuant to Federal Rule
 14 of Civil Procedure 12(b)(6) to dismiss Plaintiffs Faiyaz Khan and
 15 Rehana A. Khan's first amended complaint (FAC). Docket No. 5.
 16 Plaintiffs oppose the motion. Having considered all of the
 17 parties' submissions and oral argument, the Court GRANTS IN PART
 18 Bank of America's motion to dismiss, and DENIES IT IN PART.

19 BACKGROUND

20 On May 23, 2007, Plaintiffs obtained a home loan on a
 21 property that they owned in Pinole, California from Bank of
 22 America, secured by a deed of trust listing Bank of America as the
 23 beneficiary and PRLAP, Inc. as the Trustee. FAC ¶ 2; Defs.'

1 Request for Judicial Notice (RJN), Ex. C, 1.¹ Plaintiffs rented
2 this property to a tenant and received rental income from that
3 tenant. FAC ¶ 13.

4 On September 15, 2009, Bank of America sent a letter
5 addressed solely to Faiyaz Khan that stated in relevant part,

6 This letter constitutes our offer to modify the Mortgage
7 identified above, subject to the terms and conditions
8 agreement [attached]. When signed by you, this letter
9 will also constitute your acceptance and agreement to
10 these terms and conditions.

11 Your mortgage is currently in default. Collection
12 activities, which may include foreclosure, may continue.
13 If you sign the attached acceptance and perform as
14 required in this commitment, we will cease any
15 collection activity when the mortgage is modified.

16 Indicate your acceptance of this offer for a Modified
17 Mortgage . . . by signing the attached acceptance, which
18 must be signed by each borrower and returned within
19 seven days from the date of this letter.

20 FAC, Ex. A, 1. The terms and conditions attached to the letter
21 also listed several contingencies and required Plaintiffs to agree
22 to some additional terms, including

23 * The commitment for a Modified Mortgage will not be
24 considered a waiver of or defense to the right of Bank
25 of America, N.A. to commence or continue any collection

26 ¹ Bank of America submitted a Request for Judicial Notice,
27 wherein it requested judicial notice of five documents recorded in
28 the Contra Costa County Clerk-Recorder's Office. RJN 2-3.
Plaintiffs oppose this request as to one of the documents, Exhibit
A of the request, on the basis that the document that Bank of
America attached to its request as Exhibit A is not the document
it described as Exhibit A in its request and is instead a Deed of
Trust that is unrelated to this case. Obj. to RJN 1. Plaintiffs
do not oppose Bank of America's request as to the remaining
documents. The Court therefore DENIES Bank of America's request
as to Exhibit A and GRANTS the request as to Exhibits B through E.

1 action, including foreclosure. Even when signed by Bank
2 of America, N.A. and us, it will not prevent collection
3 actions continuing if we fail to fulfill any of its
4 terms and conditions. . .

5 * This commitment is contingent on those listed in
6 Section C. Bank of America, N.A. shall determine if
7 those contingencies have been satisfied. . .

8 * We will sign all documents necessary to complete the
9 Modification. . .

10 Id. at 2-3.

11 On September 22, 2009, Faiyaz Khan signed the Acceptance page
12 of the Offer for Modification. Id. at 4. On September 23, 2009,
13 a notary signed an acknowledgement of Faiyaz Khan's signature,
14 stating that on that date, Faiyaz Khan appeared before the notary
15 and "proved to me on the basis of satisfactory evidence to be the
16 person whose name is subscribed to the within instrument and
17 acknowledged to me that he executed the same in his authorized
18 capacity." Id. at 5.

19 For about a year after this, Plaintiffs sent Bank of America
20 payments in the amount called for in the loan modification
21 agreement, and Bank of America accepted these payments without
22 protest. FAC ¶ 6. At some point after about a year, Bank of
23 America began to reject some monthly payments tendered by
24 Plaintiffs. Id. ¶ 16.

25 On September 17, 2010, Recontrust Company, "acting as an
26 agent for" Bank of America, recorded a Notice of Default on the
27 loan. RJN, Ex. B, 1. This notice was dated September 16, 2010
28 and stated that Plaintiffs were \$61,072.48 in arrears as of that
date. Id. at 3. This arrearage amount was the difference between
the amount of the payments that Plaintiffs had been sending to

1 Bank of America pursuant to the loan modification and the amount
2 of the payments that would have been due under the unmodified
3 mortgage agreement. FAC ¶ 7.

4 On September 23, 2010, Bank of America recorded a
5 Substitution of Trustee substituting Recontrust Company as Trustee
6 under the Deed of Trust. RJN, Ex. C, 1. This Substitution was
7 dated September 16, 2010 and notarized on September 21, 2010. Id.

8 On December 27, 2010, Recontrust Company recorded a Notice of
9 Trustee's Sale of Plaintiffs' property. RJN, Ex. D, 1.

10 After exchanging several letters and telephone calls over several
11 months, Bank of America sent Plaintiffs' counsel a letter on
12 January 20, 2011, stating that the loan modification agreement was
13 void because the notary's acknowledgment of Faiyaz Khan's
14 signature was dated the day after Faiyaz Khan had signed the
15 Acceptance. FAC ¶¶ 8-9. In response, Plaintiffs' counsel pointed
16 out that the notary did not have to witness the actual act of
17 signing the document; he did not receive a response. Id. ¶ 10.

18 On April 8, 2011, Bank of America sent Plaintiffs another
19 offer of a loan modification, the terms of which were less
20 favorable than the prior offer. Id. ¶ 11. Plaintiffs rejected
21 this offer. Id. ¶ 11.

22 On June 7, 2011, Recontrust Company, as Trustee, held a
23 public auction and sold the Deed of Trust to Bank of America. RJN,
24 Ex. E at 1-2. The Trustee's Deed stated that the amount of unpaid
25 debt as of that date was \$551,927.53. Id. at 1.

26 On the day of the Trustee's sale, Plaintiffs filed a
27 complaint against Bank of America in Superior Court in Contra
28 Costa County, which they later amended. Notice of Removal, Exs.

1 1-2. In their FAC, Plaintiffs stated that they were ready,
2 willing and able to make all of any missing or rejected payments
3 pursuant to the 2009 loan modification agreement and asserted the
4 following causes of action: (1) breach of contract;
5 (2) injunction; and (3) slander of title. FAC ¶¶ 14-22. As
6 relief, Plaintiffs asked for the Trustee's Sale to be set aside
7 and the Trustee's Deed voided, specific performance of the
8 modified mortgage agreement, damages to compensate for loss of
9 rent, punitive damages, attorneys' fees and costs and other
10 appropriate relief. FAC 4-5.² At the hearing, Plaintiffs stated
11 that, because the property was a rental property and not their
12 home, they would be willing to accept monetary damages in lieu of
13 the set aside of the Trustee's sale and specific performance of
14 the agreement.

15 LEGAL STANDARD

16 A complaint must contain a "short and plain statement of the
17 claim showing that the pleader is entitled to relief." Fed. R.
18 Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to
19 state a claim, dismissal is appropriate only when the complaint
20 does not give the defendant fair notice of a legally cognizable
21 claim and the grounds on which it rests. Bell Atl. Corp. v.
22 Twombly, 550 U.S. 544, 555 (2007). In considering whether the
23 complaint is sufficient to state a claim, the court will take all
24 material allegations as true and construe them in the light most
25

26 ² Plaintiffs also sought an injunction preventing the
27 "pending foreclosure of the Property." FAC 4. However, because
28 the foreclosure has already taken place, FAC 12, this request is
moot.

1 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d
2 896, 898 (9th Cir. 1986). However, this principle is inapplicable
3 to legal conclusions; "threadbare recitals of the elements of a
4 cause of action, supported by mere conclusory statements," are not
5 taken as true. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009)
6 (citing Twombly, 550 U.S. at 555).

7 Although the court is generally confined to consideration of
8 the allegations in the pleadings, when the complaint is
9 accompanied by attached documents, such documents are deemed part
10 of the complaint and may be considered in evaluating the merits of
11 a Rule 12(b)(6) motion. Durning v. First Boston Corp., 815 F.2d
12 1265, 1267 (9th Cir. 1987). The court may also consider documents
13 incorporated by reference in the complaint, even if the document
14 is not attached to the complaint, or matters of judicial notice.
15 United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003). See
16 also MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 504 (9th Cir.
17 1986) ("On a motion to dismiss, we may take judicial notice of
18 matters of public record outside the pleadings.").

19 DISCUSSION

20 Bank of America moves to dismiss each of the causes of action
21 and Plaintiffs' claims for punitive damages and attorneys' fees,
22 and seeks to have the lis pendens on the property expunged.

23 I. Breach of Contract

24 Bank of America moves to dismiss Plaintiffs' first cause of
25 action for breach of contract. To assert a cause of action for
26 breach of contract, a plaintiff must plead: (1) the existence of a
27 contract; (2) the plaintiff's performance or excuse for non-
28 performance; (3) the defendant's breach; and (4) damages to the

1 plaintiff as a result of the breach. Armstrong Petrol. Corp. v.
2 Tri-Valley Oil & Gas Co., 116 Cal. App. 4th 1375, 1391 n.6 (2004).

3 Plaintiffs' complaint alleges that the 2009 loan modification
4 agreement constituted a contract, that Plaintiffs complied with
5 their obligations or were excused from compliance due to Bank of
6 America's refusal to accept their payments, that Bank of America
7 breached the contract by refusing to honor the modification, and
8 that Plaintiffs were harmed because of the loss of their property
9 and rental income, and their inability to obtain another mortgage
10 with similar terms on the market. FAC ¶¶ 4-17. Bank of America
11 argues that no contract was formed or, alternatively, that it was
12 not enforceable against Bank of America.

13 Bank of America first argues that Plaintiffs did not accept
14 its offer in the manner specified, because they returned the
15 acceptance letter a day late and Rehana A. Khan did not sign the
16 acceptance letter. However, Bank of America was not prejudiced in
17 any way by Plaintiffs returning the acceptance letter eight days,
18 instead of seven days, after the date of the offer letter and the
19 variance from this requirement was de minimis. Further, the offer
20 letter was addressed to only Faiyaz Khan, and it is not clear that
21 both signatures were required. Finally, Defendants have not
22 countered Plaintiffs' argument that Defendants waived any
23 requirement for strict compliance by accepting Plaintiffs'
24 mortgage payments for a year without protesting or providing
25 notice of any inadequacy. See Cal. Civ. Pro. § 2076 (when a
26 tender of payment is made, the recipient "must, at the time,
27 specify any objection he may have to the [tender] or he must be
28 deemed to have waived it"); see also Goffney v. Downey Sav. & Loan

1 Ass'n, 200 Cal. App. 3d 1154, 1166 (1988) (stating that this code
2 section is "intended to enable a debtor to pay his debt without
3 being later confronted with hidden objections which could have
4 been obviated"). Thus, Plaintiffs have plead facts sufficient to
5 find that a complaint was formed.

6 Bank of America also argues that any contract for a loan
7 modification that was formed is unenforceable against Bank of
8 America. However, the modification contract was not an illusory
9 "agreement to agree;" it contained sufficiently definite terms,
10 with no essential terms omitted or left open for future agreement,
11 and had language suggesting that the parties intended to be bound.
12 Cf. Wilcox v. EMC Mortg. Corp., 2011 U.S. Dist. LEXIS 82128, at
13 *15 n.3 (C.D. Cal.) (finding that a loan modification could have
14 sufficiently definite terms for enforceability when essential
15 terms can be calculated using a formula). Further, by attaching a
16 copy of the agreement letter to the complaint, with Bank of
17 America's electronic signature, Plaintiffs have sufficiently plead
18 that Bank of America signed the contract as required by the
19 statute of frauds. See Cal. Civ. Code § 1633.7(a), (b) (in
20 California, a "signature may not be denied legal effect or
21 enforceability solely because it is in electronic form" and a
22 "contract may not be denied legal effect or enforceability solely
23 because an electronic record was used in its formation"); see also
24 Marks v. Walter G. McCarty Corp., 33 Cal. 2d 814, 820 (1949)
25 (citations omitted) ("The statute of frauds does not demand that
26 the signature of the party to be charged be placed at the end of
27 the writing relied upon if a proper signature be found elsewhere
28 on the instrument. . . Furthermore the signature need not be

1 manually affixed, but may in some cases be printed, stamped or
2 typewritten.").

3 Because Plaintiffs have sufficiently plead their claim for
4 breach of contract against Bank of America, its motion to dismiss
5 this claim is DENIED.

6 II. Injunction

7 Plaintiffs' second cause of action seeks injunctive relief to
8 void the Trustee's Deed and set aside the Trustee's Sale. As both
9 parties recognize in their filings, "[i]njunctive relief is a
10 remedy, not a cause of action." Guessous v. Chrome Hearts, LLC,
11 179 Cal. App. 4th 1177, 1187 (2009) (quoting City of South
12 Pasadena v. Dep't of Transp., 29 Cal. App. 4th 1280, 1293 (1994)).

13 It is granted as "an equitable remedy for certain torts or
14 wrongful acts of a defendant where a damage remedy is inadequate."
15 City of South Pasadena, 29 Cal. App. 4th at 1293. Here,
16 Plaintiffs have conceded that they could be adequately compensated
17 through monetary damages. Accordingly, Bank of America's motion
18 to dismiss Plaintiffs' second cause of action is GRANTED without
19 leave to amend.

20 III. Slander of Title

21 Plaintiffs' third cause of action alleges that Bank of
22 America publicly recorded, or caused to be publicly recorded,
23 notices regarding the foreclosure of the property, with actual
24 knowledge or reckless disregard for the facts that Plaintiffs were
25 not actually in default and that the Notice of Default was void.
26 In their opposition to the Motion to Dismiss, Plaintiffs point
27 only to the publication of "the Trustee's Deed" as being the basis
28 for this claim. Opp. to Mot. to Dismiss, 10.

1 The elements of a claim for slander of title under California
2 law are (1) publication, (2) falsity, (3) absence of privilege and
3 (4) "'disparagement of another's land which is relied upon by a
4 third party and which results in a pecuniary loss.'" Smith v.
5 Commonwealth Land Title Ins. Co., 177 Cal. App. 3d 625, 630 (1986)
6 (quoting Appel v. Burman, 159 Cal. App. 3d 1209, 1214 (1984)).
7 Because, under California law, the "mailing, publication, and
8 delivery of notices" required as part of the nonjudicial
9 foreclosure process are considered privileged communications, see
10 Cal. Civ. Code § 2924(d)(1), Plaintiffs must also allege that the
11 recording was done with malice, that is, that it "was motivated by
12 hatred or ill will" or "the defendant lacked reasonable grounds
13 for belief in the truth of the publication and therefore acted in
14 reckless disregard of the plaintiff's rights." Kachlon v.
15 Markowitz, 168 Cal. App. 4th 316, 336 (2008) (internal quotations
16 omitted).

17 Assuming without deciding that Bank of America could be held
18 liable for the recording of the Trustee's Deed by Recontrust
19 Company, the lawful Trustee at the time of this recording, see
20 McFadden v. Deutsche Bank Nat'l Trust Co., 2011 U.S. Dist. LEXIS
21 91010, at *40 (E.D. Cal.) (holding that only the lawful Trustee or
22 the actor who recorded the Trustee's Deed Upon Sale may be liable
23 for slander of title for this publication), Plaintiffs' claim
24 fails for multiple reasons.

25 First, contrary to Plaintiffs' arguments, the Notice of
26 Default was not void. Recontrust Company recorded the Notice of
27 Default, the Notice identifies Recontrust Company as "agent for
28 the Beneficiary," see RJN, Ex. B, 2, 3, and state law authorizes

1 agents of the beneficiary to perform this act, Cal. Civ. Code
2 § 2924b(b)(4).

3 Second, Plaintiffs have not made anything beyond conclusory
4 statements that could support a finding that Bank of America acted
5 with malice. Plaintiffs have not alleged that Bank of America was
6 motivated by ill will or hatred toward them, and have not
7 sufficiently plead that Bank of America lacked reasonable grounds
8 to believe that Plaintiffs were in default. While it may be found
9 that Bank of America breached the contract for the loan
10 modification, the facts conceded by Plaintiffs, including that
11 only Faiyaz Khan signed the acceptance and that it was returned a
12 day late, establish that Bank of America may have had grounds to
13 believe that the contract was unenforceable and that it had the
14 right to foreclose.

15 Accordingly, Bank of America's motion to dismiss Plaintiffs'
16 claim for slander of title is GRANTED. Because the complaint
17 cannot be amended to cure these defects without contradicting the
18 allegations set forth in the FAC, Plaintiffs are not granted leave
19 to amend this claim. See Reddy v. Litton Indus., Inc., 912 F.2d
20 291, 296 (9th Cir. 1990).

21 IV. Punitive Damages

22 Bank of America seeks to dismiss Plaintiffs' request for
23 punitive damages. California Civil Code § 3294, which governs the
24 right to recover punitive damages, makes these damages available
25 only on an "action for the breach of an obligation not arising
26 from contract." Cal. Civ. Code § 3294(a). Because Plaintiffs'
27 only surviving cause of action is for breach of contract, punitive
28 damages are not available to them. Accordingly, Bank of America's

1 motion to dismiss Plaintiffs' request for punitive damages is
2 GRANTED.

3 V. Attorneys' Fees

4 Bank of America seeks to dismiss Plaintiffs' request for
5 attorneys' fees. Attorneys' fees may be recovered only where
6 provided by statute or contract. Cal. Civ. Proc. Code § 1021;
7 Amtower v. Photon Dynamics, Inc., 158 Cal. App. 4th 1582, 1601
8 (2008). Bank of America argues that Plaintiffs have not pointed
9 to any "specific term" of a statute or contract that provides for
10 attorneys' fees. However, Plaintiffs allege in their FAC that the
11 promissory note and deed of trust provide for attorneys' fees to
12 be awarded to a prevailing party for an action thereon and that
13 these terms were not modified by the loan modification agreement.
14 Accordingly, Bank of America's motion to dismiss Plaintiffs'
15 request for attorneys' fees is DENIED.

16 VI. Lis Pendens

17 Bank of America seeks to have the lis pendens on the property
18 expunged. California Code of Civil Procedure § 405.31 states that
19 "the court shall order the notice expunged if the court finds that
20 the pleading on which the notice is based does not contain a real
21 property claim." A "real property claim" refers to a cause of
22 action "which would, if meritorious, affect title to, or the right
23 to possession of, specific real property." Cal. Code Civ. Pro.
24 § 405.4. Because Plaintiffs' claims which would affect the title
25 to, or right to possession of, the property at issue have been
26 dismissed and Plaintiffs have conceded that they could be
27 adequately compensated through monetary damages for the remaining
28 claim, the lis pendens should be expunged. Accordingly, Bank of

1 America's request for an order expunging the lis pendens is
2 GRANTED.

3 CONCLUSION

4 For the foregoing reasons, Bank of America's motion to
5 dismiss is GRANTED IN PART and DENIED IN PART. Plaintiffs' claims
6 for an injunction and slander of title and request for punitive
7 damages are hereby dismissed without leave to amend. Further, the
8 Court orders that the lis pendens on the property be expunged.

9 A case management conference is scheduled for February 15,
10 2012 at 2:00 p.m. The parties are referred to court-connected
11 mediation to occur before the case management conference.

12 IT IS SO ORDERED.

13
14 Dated: **10/25/2011**

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16 _____
17 CLAUDIA WILKEN
18 United States District Judge

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24 cc: ADR

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