

1 enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*,
2 550 U.S. 544, 555 (2007) (internal quotation marks, brackets and citations omitted). Federal
3 Rule of Civil Procedure 8(a) requires a complaint to contain "a short and plain statement of the
4 claim showing that the pleader is entitled to relief" FED. R. CIV. P. 8(a).

5 In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume the truth of
6 all factual allegations and must construe them in the light most favorable to the nonmoving
7 party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). Legal conclusions
8 need not be taken as true merely because they are cast in the form of factual allegations. *Roberts*
9 *v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987); *W. Mining Council v. Watt*, 643 F.2d 618,
10 624 (9th Cir. 1981). Similarly, "conclusory allegations of law and unwarranted inferences are
11 not sufficient to defeat a motion to dismiss." *Pareto v. Fed. Deposit Ins. Corp.*, 139 F.3d 696,
12 699 (9th Cir. 1998).

13 In determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond
14 the complaint for additional facts, *e.g.*, facts presented in plaintiff's memorandum in opposition
15 to a defendant's motion to dismiss or other submissions. *United States v. Ritchie*, 342 F.3d 903,
16 908 (9th Cir. 2003); *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998); *see also* 2
17 MOORE'S FEDERAL PRACTICE, § 12.34[2] (Matthew Bender 3d ed.) ("The court may not . . . take
18 into account additional facts asserted in a memorandum opposing the motion to dismiss, because
19 such memoranda do not constitute pleadings under Rule 7(a).").

20 A court may, however, consider items of which it can take judicial notice without
21 converting the motion to dismiss into one for summary judgment. *Barron v. Reich*, 13 F.3d
22 1370, 1377 (9th Cir. 1994). Judicial notice may be taken of facts "not subject to reasonable
23 dispute" because they are either "(1) generally known within the territorial jurisdiction of the
24 trial court or (2) capable of accurate and ready determination by resort to sources whose
25 accuracy cannot reasonably be questioned." FED. R. EVID. 201. Additionally, a court may take
26 judicial notice of "‘matters of public record’ without converting a motion to dismiss into a
27 motion for summary judgment.'" *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001)
28 (quoting *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986)). Under the

1 incorporation by reference doctrine, courts may also consider documents "whose contents are
2 alleged in a complaint and whose authenticity no party questions, but which are not physically
3 attached to the [plaintiff's] pleading." *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 986
4 (9th Cir.1999) (quoting *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) (alteration in
5 original)).

6 **2. Background**

7 In September 2006, plaintiffs obtained a home mortgage loan from defendant
8 Homecomings Financial Network for property located in Oceanside, California and executed a
9 Deed of Trust as security for the loan. When plaintiffs failed to make payments as required, a
10 Notice of Default and Election to Sell under the Deed of Trust was recorded on January 12,
11 2009. A Notice of Trustee Sale was recorded on August 17, 2009, which set the sale of the
12 property for September 3, 2009. The record does not disclose whether the Trustee Sale has been
13 conducted.

14 Plaintiffs' initial complaint contained 18 causes of action. After the filing of Aurora's
15 motions to dismiss and to expunge lis pendens, plaintiffs filed an amended complaint that
16 alleged nine causes of action to which Aurora filed the present motions. In response to
17 defendant's motion, plaintiffs withdrew their sixth and seventh causes of action: violation of
18 California Civil Code § 1632 and Business & Professions Code § 17200. The second cause of
19 action, breach of fiduciary duty, is not brought against Aurora.

20 **3. Motion to Dismiss**

21 **A. Intentional Misrepresentation**

22 As Aurora correctly notes, the allegations concerning intentional misrepresentation refer
23 to actions of defendants Finance West and Homecoming. For example, plaintiffs contend
24 Finance West and Homecoming inserted inflated income for the plaintiffs in the loan
25 application, failed to inform plaintiffs of their rights to rescind, and misstated the APR and
26 finance charge. (Amended Complaint at 6.) Plaintiffs offer no facts to suggest that Aurora, the
27 later-added loan servicer, was involved in any manner with alleged misrepresentations at the
28 time of the loan origination. Because plaintiffs have had an opportunity to amend the complaint

1 to assert facts showing involvement by Aurora with the alleged misrepresentations, this claim
2 will be dismissed with prejudice.

3 **B. Quiet Title**

4 The purpose of a quiet title action is to establish one's title against adverse claims to real
5 or personal property or any interest therein. *See* CAL. CIV. PROC. CODE § 760.020(a). Plaintiffs
6 contend that Quality Loan Services recorded the Notice of Default before it was substituted in as
7 trustee for the Deed of Trust. As a result, plaintiffs contend that the notice of default was invalid
8 because it was filed by a stranger, who was not the trustee, mortgagee or beneficiary.

9 The persons who can validly file a notice of default are "[t]he trustee, mortgagee, or
10 beneficiary, or any other authorized agents." CAL. CIV. CODE § 2924(a)(1). The notice of
11 default here was filed by Quality Loan Services. The notice identifies Quality Loan Services as
12 "either the original trustee, the duly appointed substituted trustee, or acting as agent for the
13 trustee or beneficiary." Plaintiffs argue that there was "no evidence on the public record that
14 Defendants Quality Loan services was acting as an authorized agent for Defendant Aurora."
15 (Opp. at 3.) There is no statutory requirement that the authorized agent must be recorded.
16 Nothing in the record indicates that the notice of default was invalid. Furthermore, the proposed
17 amended complaint does not include any factual allegations to support the legal conclusion that
18 the notice of default is invalid. *See Roberts*, 812 F.2d at 1177. Plaintiffs' argument that the
19 notice of default was invalid is rejected. Accordingly, plaintiffs' quiet title claim is dismissed
20 with prejudice.

21 **C. TILA**

22 The applicable statute of limitations for a claim for damages under TILA is "one year
23 from the date of the occurrence of the violation." 15 U.S.C. § 1640(e). "[T]he limitations period
24 in Section 1640(e) runs from the date of consummation of the transaction but . . . the doctrine of
25 equitable tolling may, in the appropriate circumstances, suspend the limitations period until the
26 borrower discovers or had reasonable opportunity to discover the fraud or nondisclosures that
27 form the basis of the TILA action." *King v. California*, 784 F.2d 910, 915 (9th Cir. 1986).
28 Because the transaction was consummated on September 25, 2006 and this action was filed on

1 January 15, 2010, the statute of limitations has long expired. Plaintiffs have not provided any
2 allegations in their amended complaint that would support equitable tolling. Accordingly,
3 defendant's motion to dismiss the TILA cause of action is dismissed with prejudice.

4 **D. RESPA**

5 Defendant contends plaintiffs' RESPA claims fail as a matter of law because there are no
6 factual allegation directed at Aurora. Plaintiffs do not address this contention but instead argue
7 that the RESPA claim is not time-barred. Having reviewed the amended complaint, there are no
8 allegations of RESPA violations on the part of Aurora. The RESPA claim must be dismissed as
9 to Aurora.

10 **E. California Civil Code 2923.5**

11 Plaintiffs allege defendants failed to contact them, or perform the required due diligence
12 to make contact, to discuss plaintiffs' financial situation and explore options for the borrower to
13 avoid foreclosure at least 30 days prior to recording the notice of default, in violation of
14 California Civil Code § 2923.5. In response, defendant correctly argues this cause of action
15 must be dismissed because it is preempted by the Home Owner's Loan Act ("HOLA"), 12 U.S.C.
16 § 1464. The state law's requirements dealing with contacting the borrower and including a
17 specific declaration in the Notice of Default fall squarely within the scope of HOLA's Section
18 560.2(b)(10), which deals with the "[p]rocessing, origination, servicing, sale or purchase of, or
19 investment or participation in, mortgages." *See, e.g., Parcay v. Shea Mortgage, Inc.*, 2010 WL
20 1659369, at *9 (E.D.Cal. Apr.23, 2010) (concluding that HOLA preempts plaintiff's claim based
21 on the alleged violation of § 2923.5); *Murillo v. Aurora Loan Servs., LLC.*, 2009 WL 2160579,
22 at *4 (N.D.Cal. July 17, 2009) (same). Therefore, the RESPA claim is preempted and will be
23 dismissed with prejudice.

24 **4. Motion to Expunge Lis Pendens**

25 Last, Aurora moved to expunge *lis pendens*. "[T]he court shall order the notice expunged
26 if the court finds that the pleading on which the notice is based does not contain a real property
27 claim." Cal. Code Civ. Proc. § 405.31; *see also Id.* § 405.5 & 28 U.S.C. § 1964 (state law *lis*
28 *pendens* provisions apply in federal court). A plaintiff bears the burden of establishing, by a

1 preponderance of the evidence, the probable validity of the claims.

2 Because the operative complaint has been dismissed with prejudice, plaintiffs have
3 alleged no "real property claim." Accordingly, the lis pendens is properly expunged.

4 Based on the foregoing, **IT IS ORDERED**

5 1. Defendant Aurora Loan Services LLC's motion to dismiss the first amended
6 complaint is **GRANTED WITH PREJUDICE**

7 2. Defendants' motion to expunge lis pendens is **GRANTED.**

8 3. The Lis Pendens recorded on the property located at 3922 Genine Drive,
9 Oceanside, California in the official records of San Diego County shall be expunged from the
10 official records, and a copy of this Order may be recorded in the official records.

11 4. The Clerk of the Court is directed to enter judgment in accordance with this Order.

12 **IT IS SO ORDERED.**

13 DATED: September 22, 2010

14 
15 M. James Lorenz
United States District Court Judge

16 COPY TO:

17 HON. ANTHONY J. BATTAGLIA
18 UNITED STATES MAGISTRATE JUDGE

19 ALL PARTIES/COUNSEL
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