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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

JOHN J. WITTRIG,)
)
Plaintiff,)
)
vs.)
)
FIRST NATIONAL BANK OF NEVADA;)
)
FIRST AMERICAN TITLE INSURANCE)
COMPANY; MORTGAGE ELECTRONIC)
REGISTRATION SYSTEMS, INC. [MERS];)
QUALITY LOAN SERVICE CORP.;)
AMERICA'S SERVICING COMPANY; LSI)
TITLE AGENCY, INC.; ROBERT STONE;)
U.S. BANK NATIONAL ASSOCIATION AS)
TRUSTEE FOR CSMC MORTGAGE-BACKED)
PASS-THROUGH CERTIFICATES, SERIES)
2007-3; and DOES 1-25)
CORPORATIONS, DOES and ROES 1-25)
Individuals, Partnerships, or)
anyone claiming any right, title,)
estate, lien or interest in the)
real property described herein.)
)
Defendants.)
)
)

3:11-cv-00131-ECR-VPC
Order

Plaintiff is a homeowner who alleges that he is the victim of a predatory lending scheme perpetuated by Defendants. Now pending are Plaintiff's Motion to Remand (#6), Defendants' Motion to Dismiss (#5), and Defendants' Motion to Dismiss Plaintiff's Complaint to Quiet Title and Other Equitable Relief and to Expunge Lis Pendens (#17).
///

1 I. Background

2 On May 3, 2005, Plaintiff executed a note in the amount of
3 \$458,500.00 secured by a deed of trust on the property located at
4 870 Rojo Way, Gardnerville, Nevada ("Subject Property"). (Deed of
5 Trust, Ex. 1 at 1 (#5-1).)¹ The lender on the deed of trust was
6 First National Bank of Nevada. (Id.) The trustee on the deed of
7 trust was First American Title Insurance Company. (Id. at 2.)
8 Mortgage Electronic Registration Systems, Inc. ("MERS") was named as
9 "a nominee for Lender and Lender's successors and assigns" and "the
10 beneficiary" under the deed of trust. (Id.)

11 On March 24, 2010, LSI Title Agency, Inc., as agent for Quality
12 Loan Service Corporation ("Quality"), acting as agent for the
13 beneficiary, recorded a notice of default and election to sell.
14 (Notice of Default, Ex. 4 (#5-4).) On May 5, 2010, MERS as nominee
15 for First National Bank of Nevada assigned the deed of trust to U.S.
16 Bank National Association, as Trustee for CSMC Mortgage Pass-Through
17 Certificates, series 2007-3 ("U.S. Bank"). (Assignment of Deed of
18 Trust, Ex. 2 (#5-2).) On May 27, 2010, U.S. Bank recorded a
19 substitution of trustee appointing Quality as the foreclosure
20 trustee. (Substitution of Trustee, Ex. 3 (#5-3).) On December 21,
21 2010, Quality recorded a notice of sale scheduling the Subject
22 Property for auction on January 12, 2011. (Notice of Trustee's
23 Sale, Ex. 5 (#5-5).)

24
25 ¹ Defendants request judicial notice of the deed of trust and
26 other exhibits. Under Federal Rule of Evidence 201, a court may
27 judicially notice matters of public record. Disabled Rights Action
28 Comm. v. Las Vegas Events, Inc., 375 F.3d 861, 866 n. 1 (9th Cir
2004). Therefore, we take judicial notice of these public records in
the Douglas County Recorder's office.

1 On February 1, 2011, Plaintiff filed this action in state
2 court. (Compl. (#1-1).) On February 22, 2011, Quality removed the
3 action to this Court. (Pet. Remov. (#1).) On March 20, 2011, LSI
4 Title Agency, Inc. filed a Joinder In Removal and Quality Loan
5 Service Corporation's Motion to Dismiss (#7).

6 On March 7, 2011, Defendant Quality filed a Motion to Dismiss
7 (#5). On March 25, 2011, Plaintiff filed an opposition (#12) to
8 Defendants' Motion to Dismiss (#5). On March 26, 2011, Defendants
9 Quality and LSI Title Agency, Inc. filed a reply (#13) in support of
10 the Motion to Dismiss (#5).

11 On March 9, 2011, Plaintiff filed a Motion to Remand to State
12 Court (#6). On March 20, 2011, LSI Title Agency, Inc. and Quality
13 filed an opposition (#9) to Plaintiff's Motion to Remand (#6). On
14 March 24, 2011, Defendant Wells Fargo Bank, N.A. d/b/a America's
15 Servicing Company, sued as America's Servicing Company ("Wells
16 Fargo") joined in the opposition (#9) to Plaintiff's Motion to
17 Remand (#6). On March 30, 2011, Plaintiff filed a reply (#15) in
18 support of his Motion to Remand (#6). On April 15, 2011, Defendant
19 Wells Fargo filed a Motion to Dismiss and to Expunge Lis Pendens
20 (#17). Plaintiff opposed (#20), and Defendant replied (#21).

21

22 **II. Plaintiff's Motion to Remand (#6)**

23 Quality removed the action to this Court on the basis of
24 diversity jurisdiction pursuant to 28 U.S.C. § 1332. (Pet. Remov. ¶
25 3 (#1).) Quality asserted that the citizenship of First American
26 Title Insurance Company and Robert Stone "does not impact diversity

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1 because they was [sic] fraudulently joined to this action." (Id. ¶
2 6.)

3 Plaintiff seeks to remand this case to state court on the basis
4 that there is not complete diversity. 28 U.S.C. § 1332 provides
5 that district courts "shall have original jurisdiction of all civil
6 actions where the matter in controversy exceeds the sum or value of
7 \$75,000" and is between "citizens of different States." When a
8 defendant has been fraudulently joined, complete diversity with
9 respect to that defendant is not necessary for diversity
10 jurisdiction. Hunter v. Philip Morris USA, . 582 F.3d 1039, 1043
11 (9th Cir. 2009). Joinder is fraudulent "if the plaintiff fails to
12 state a cause of action against a resident defendant, and the
13 failure is obvious according to the settled rules of the state."
14 Id. (internal citations omitted.)

15 Pursuant to Nevada law, a person signing an instrument as a
16 representative is not personally liable on the instrument so long as
17 the "signature shows unambiguously that the signature is made on
18 behalf of the represented person who is identified in the
19 instrument." NEV. REV. STAT. § 104.3402(2) (a); see also Seigworth v.
20 State, 539 P.2d 464, 539 (Nev. 1975) ("Unless otherwise agreed, a
21 person making or purporting to make a contract with another as agent
22 for a disclosed principal does not become a party to the
23 contract."). Because Plaintiffs freely admit that Robert Stone
24 signed the document as an agent, Plaintiffs have no claim against
25 Robert Stone. Therefore, we find that Robert Stone was fraudulently
26 joined solely to defeat complete diversity and decline to remand the
27 matter based on Robert Stone's citizenship.

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1 First American Title Insurance Company was the original trustee
2 on the deed of trust. On May 27, 2010, Quality was substituted as
3 the new trustee. (Substitution of Trustee, Ex. 3 (#5-3).)
4 Defendants assert that Fire American Title Insurance Company no
5 longer has any record interest in the deed of trust or the Subject
6 Property, and therefore Plaintiff has no causes of action against
7 it. (Defs' Opp. Mot. Remand at 4 (#9).) Plaintiff responds that
8 the appointment of Quality as new trustee was invalid, and therefore
9 First American Title Insurance Company is the present trustee of the
10 deed of trust. (Pl's Reply at 3 (#15).) This argument is addressed
11 below with respect to the Motion to Dismiss (#5). However, we note
12 that Plaintiff has not yet served First American Title Insurance
13 Company. A Notice Regarding Intention to Dismiss Pursuant to Rule
14 4(m) (#28) was issued on September 16, 2011, providing that the
15 action shall be dismissed with respect to First American Title
16 Insurance Company unless Plaintiff files a proof of service by
17 October 16, 2011. Plaintiff has not done so, nor has he shown good
18 cause for failure to serve, and therefore, First American Title
19 Insurance Company, along with the other defendants named in the 4(m)
20 Notice (#28), Robert Stone, U.S. Bank National Association, and
21 First National Bank of Nevada, shall be dismissed.

22 Because Robert Stone and First American Title Insurance Company
23 shall be dismissed due to lack of service and because Plaintiff has
24 not stated plausible claims against them, Plaintiff's Motion to
25 Remand (#6) shall be denied.

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III. Defendants' Motions to Dismiss (## 5, 17)

Defendants move this Court to dismiss Plaintiff's Complaint with prejudice for failure to state a claim upon which relief can be granted. We address Defendants' arguments with respect to each of Plaintiff's claims in the Complaint (#1-1) below.

A. Claim for Debt Collection Violations

Plaintiff's first cause of action is for debt collection violations. Plaintiff alleges that Defendants violated Nev. Rev. Stat. § 649.370, which provides that violations of the Federal Fair Debt Collection Practice Act ("FDCPA") are violations of Nevada law. Plaintiff's claim fails as a matter of law because foreclosure pursuant to a deed of trust does not constitute debt collection under the FDCPA. Camacho-Villa v. Great W. Home Loans, No. 3:10-cv-00210, 2011 WL 1103681 at *4 (D. Nev. Mar. 23, 2011). Therefore, Plaintiff's first claim must be dismissed without leave to amend.

B. Violation of Unfair and Deceptive Trade Practice Act

Plaintiff's second cause of action for violation of the Nevada Unfair and Deceptive Trade Practice Act, Nev. Rev. Stat. § 598.0923, also fails as a matter of law. The statute provides that a person engages in deceptive trade practices when he or she knowingly conducts his or her business or occupation without all required state, county, or city licenses. NEV. REV. STAT. § 598.0923(1). However, the statutes explicitly state that the following activities do not constitute doing business in Nevada: (1) maintaining, defending or settling any proceeding; (2) creating or acquiring indebtedness, mortgages and security interests in real or personal property; and (3) securing or collecting debts or enforcing

1 mortgages and security interests in property securing the debts.
2 NEV. REV. STAT. § 80.015(1)(a), (g), (h). Because Defendants are
3 explicitly exempted from the need to acquire licenses, the Court
4 dismisses Plaintiff's second cause of action without leave to amend.

5 **C. Violation of Unfair Lending Practices**

6 Plaintiff's third cause of action for unfair lending practices
7 in violation of Nev. Rev. Stat. § 598D.100 is time-barred. The
8 statute of limitations for "[a]n action upon a liability created by
9 statute" is three years. NEV. REV. STAT. § 11.190(3)(a). Plaintiff
10 obtained the loan at issue in 2005, and filed this action in 2011.
11 Plaintiff's claim for unfair lending practices is therefore untimely
12 and must be dismissed without leave to amend.

13 **D. Violation of the Covenant of Good Faith and Fair Dealing**

14 Plaintiff's fourth cause of action for breach of the covenant
15 of good faith and fair dealing also fails as a matter of law. In
16 Nevada, "[e]very contract imposes upon each party a duty of good
17 faith and fair dealing in its performance and execution." A.C. Shaw
18 Constr. v. Washoe Cty., 784 P.2d 9, 9 (Nev. 1989) (quoting
19 Restatement (Second) of Contracts § 205). This duty requires each
20 party not to do anything to destroy or otherwise injure the rights
21 of the other to receive the benefits of the contract. Hilton Hotels
22 Corp. v. Butch Lewis Prods., Inc., 808 P.2d 919, 923 (Nev. 1991).
23 To prevail on a cause of action for breach of the covenant of good
24 faith and fair dealing, a plaintiff must show that (1) the plaintiff
25 and defendant were parties to a contract; (2) the defendant owed
26 plaintiff a duty of good faith and fair dealing; (3) the defendant
27 breached the duty by performing in a manner unfaithful to the

1 purpose of the contract; and (4) the plaintiff's justified
2 expectations were denied. Perry v. Jordan, 900 P.2d 335, 338 (Nev.
3 1995) (citing Hilton Hotels, 808 P.2d at 922-23).

4 Plaintiff asserts that Defendants breached the covenant of good
5 faith and fair dealing because Defendants "offered the Plaintiff
6 consideration for loan modifications, told him that the foreclosures
7 would be postponed but they were not." (Compl. ¶ 95 (#1-1).)
8 Because there is no loan modification contract, and because none of
9 these actions, even if true, contravene the intention or spirit of
10 the existing contract between Plaintiff and Defendants, Plaintiff's
11 claim for breach of the covenant of good faith and fair dealing must
12 be dismissed without leave to amend.

13 **E. Wrongful Foreclosure under Nev. Rev. Stat. § 107.080**

14 In general:

15 [W]rongful foreclosure will lie if the trustor or mortgagor
16 can establish that at the time the power of sale was
17 exercised or the foreclosure occurred, no breach of
18 condition or failure of performance existed on the
19 mortgagor's or trustor's part which would have authorized
20 the foreclosure or exercise of the power of sale.

21 Collins v. Union Fed. Sav. & Loan Ass'n, 662 P.2d 610, 623 (Nev.
22 1983); see also Cervantes, 656 F.3d at 1044 (plaintiffs cannot state
23 a claim for wrongful foreclosure while in default). "Even if MERS
24 were a sham beneficiary, the lenders would still be entitled to
25 repayment of the loans and would be the proper parties to initiate
26 foreclosure after the plaintiffs defaulted on their loans."
27 Cervantes, 656 F.3d at 1044. Because Plaintiff admits that he is in
28 default (Opp. Mot. Dismiss at 14 (#20)), Plaintiff has not satisfied

1 the requirements for bringing a general claim for wrongful
2 foreclosure.

3 Plaintiff's fifth cause of action, violation of Nev. Rev. Stat.
4 § 107.080 et seq., appears to allege that Defendants foreclosed
5 without authority to do so under Nev. Rev. Stat. § 107.080, a
6 variation of wrongful foreclosure based on violation of state
7 recording and foreclosure statutes. Specifically, Plaintiff alleges
8 that Quality should not have initiated foreclosure proceedings
9 before being substituted as trustee, that Plaintiff needs to see the
10 "original note with proper endorsements" in order to determine who
11 the true holder of the note is, and that Wells Fargo, the servicer
12 of the Note, was not a holder in due course of the note, holder of
13 the security interest, or the agent of the party that is the holder
14 in due course and holds the security interest in the Subject
15 Property.

16 Nevada Revised Statutes § 107.080 provides that the power of
17 sale in real property may not be exercised until:

18 The beneficiary, the successor in interest of the
19 beneficiary or the trustee first executes and causes to be
20 recorded in the office of the recorder of the county
21 wherein the trust property, or some part thereof, is
situated a notice of the breach and of the election to
sell or cause to be sold the property to satisfy the
obligation.

22 NEV. REV. STAT. § 107.080 2.(c). The "Notice of Breach and Default
23 and of Election to Cause Sale of Real Property Under Deed of Trust"
24 was signed by Quality as agent for beneficiary. (Notice of Sale,
25 Ex. 4 (#5-4).) Plaintiff complains that Quality did so "without
26 referencing a single document establishing any such association."
27 (Compl. ¶ 91 (#1-1).) Quality was not formally substituted as the

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1 foreclosure trustee until after it issued the notice of sale. This
2 timeline, however, appears to be fairly common in foreclosure
3 scenarios, and Plaintiff does not dispute that an agent of the
4 beneficiary may record the notice of sale. Plaintiff is arguing
5 that there is not enough evidence that Quality was an agent
6 authorized to record the notice of sale.

7 In Karl v. Quality Loan Service Corp., this district noted that
8 Quality was neither the trustee nor the beneficiary when it recorded
9 the notice of default, but claimed on the notice of default to be
10 the agent for the beneficiary. 759 F.Supp.2d 1240, 1246 (D. Nev.
11 2010). The court in Karl stated that “[a]lthough MERS is not a
12 beneficiary, its agency for the beneficiary under the [deed of
13 trust] extends to administering the [deed of trust] for purposes of
14 foreclosure.” Id. The court further stated that:

15 [T]here is no defect in foreclosure here under section
16 107.080(2)(c), as there is in cases where a purported
17 trustee who is named nowhere on the [deed of trust], and
18 for whom evidence of substitution as trustee appears
19 nowhere, files a [notice of default]. . . . There is no
question of fact that [Quality] filed the [notice of
20 default] as the agent of MERS, who was the agent of the
beneficiary UAMC, and the foreclosure was therefore not
improper under section 107.080(2)(c).

21 Id. No party on whose behalf agency was claimed has come forth
22 disputing that fact. Furthermore, Quality’s formal substitution as
23 trustee after signing the notice as an agent appears to show, at the
least, ratification of the previously-claimed agency.

24 Plaintiff cites Kartman v. Ocwen Lan Servicing, LLC as support
25 for its claim. No. 2:09-cv-02404-GMN-PAL, 2010 WL 3522268 (D. Nev.
26 Sep. 1, 2010). Kartman, however, is distinguishable. The court
27 stated that “[i]n Nevada, the power of sale cannot be exercised

1 until one of two particular entities-the beneficiary or the trustee-
2 or an agent thereof, records the [notice of default]." Id. at *1.
3 The court finds a defect in the foreclosure because the foreclosing
4 entity in that case was neither the beneficiary nor the trustee, nor
5 an agent thereof. In our case, Quality signs as agent of the
6 beneficiary. Because Quality was not signing as a stranger to the
7 note or deed of trust, we reject Plaintiff's argument that Quality
8 did not have the authority to record the notice of sale.

9 Plaintiff also states that the assignment of deed of trust by
10 MERS to U.S. Bank National Association as trustee for CSMC Mortgage-
11 backed Passthrough Certificates, Series 2007-3 was improper because
12 MERS has no authority to transfer such interests. This district has
13 held that while the attempts to label MERS as a beneficiary are
14 improper because MERS is not a beneficiary and does not hold legal
15 title, the intention of the parties is clear that MERS was to be
16 given "the broadest possible agency on behalf of the owner of the
17 beneficial interest in the underlying debt. Such agency would
18 include the ability to sell the interest in the debt." Smith v.
19 Cmty. Lending, Inc., 773 F.Supp.2d 941, 944 (D. Nev. 2011). In
20 Smith, the court further noted that MERS may "directly transfer the
21 interest in the deed of trust itself, and the interest in the note
22 may follow the interest in the deed of trust as a matter of law."
23 Id. (citing Restatement (Third) of Property (Mortgages) § 5.4(b).)

24 In Cervantes v. Countrywide Home Loans, Inc., the Ninth Circuit
25 considered wrongful foreclosure claims based on alleged procedural
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1 defects. 656 F.3d 1034, 1044 (9th Cir. 2011).² The Ninth Circuit
2 held that “[e]ven if we were to accept the plaintiffs’ premises that
3 MERS is a sham beneficiary and the note is split from the deed, we
4 would reject the plaintiffs’ conclusion that, as a necessary
5 consequence, no party has the power to foreclose.” Id. Plaintiff’s
6 arguments that Nevada’s foreclosure statutes were violated by the
7 facts that the note was never presented, the note was split from the
8 deed, and other similar arguments have been repeatedly rejected in
9 this Court, and shall be dismissed without leave to amend.

10 **F. Quiet Title**

11 Plaintiff’s sixth cause of action is for quiet title. In
12 Nevada, a quiet title action may be brought “by any person against
13 another whom claims an estate or interest in real property, adverse
14 to the person bringing the action, for the purpose of determining
15 such adverse claim.” NEV. REV. STAT. § 40.010. “In a quiet title
16 action, the burden of proof rests with the plaintiff to prove good
17 title in himself.” Breliant v. Preferred Equities Corp., 918 P.2d
18 314, 318 (Nev. 1996). “Additionally, an action to quiet title
19 requires a plaintiff to allege that she has paid any debt owed on
20 the property.” Lalwani v. Wells Fargo Bank, N.A., No. 2-11-cv-
21 00084, 2011 WL 4574388 at *3 (D. Nev. Sep. 30, 2011) (citing
22 Ferguson v. Avelo Mortg., LLC, No. B223447, 2011 WL 2139143 at *2
23 (Cal. App. 2d June 1, 2011). Plaintiff has failed to allege that he
24 is not in breach of the loan agreement. While Plaintiff does not
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26 ² The Ninth Circuit case reviewed a case brought under Arizona
27 law. The conclusions of the Ninth Circuit, however, are equally
28 applicable under Nevada law.

1 expressly admit to being in default on the loan, the complaint, read
2 as a whole, and taking all allegations in favor of Plaintiff, does
3 not show even the barest hint of a dispute over whether Plaintiff
4 was in default. Rather, Plaintiff is challenging the procedure with
5 which foreclosure was initiated against him, not that the loan was
6 not in default. Accordingly, the quiet title claim must be
7 dismissed without leave to amend.

8 **G. Fraud in the Inducement and Through Omission**

9 Plaintiff claims that Defendant First National Bank of Nevada
10 committed fraud in the inducement by luring Plaintiff into the loan
11 under false pretenses, that is, by declaring him qualified for the
12 loan when it was not supported by Plaintiff's ability to pay. In
13 order to state a claim for fraud in the inducement, a plaintiff must
14 show that the defendant knowingly made a false representation with
15 the intent to induce the plaintiff to consent to the contract's
16 formation. J.A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc.,
17 89 P.3d 1009, 1017 (Nev. 2004).

18 Defendants were under no obligation to disclose the risks of
19 the loan and whether Plaintiffs could afford it:

20 Although the Nevada Supreme Court has not ruled on the
21 issue, this Court and the Ninth Circuit Court of Appeals
22 have predicted that the Nevada Supreme Court would hold
23 that a lender does not owe a fiduciary duty, as "an arms-
length lender-borrower relationship is not fiduciary in
nature, absent exceptional circumstances."

24 Megino v. Linear Financial, No. 2:09-CV-00370, 2011 WL 53086 at *5
25 (D. Nev. Jan. 6, 2011) (quoting Yerington Ford, Inc. v. Gen. Motors
26 Acceptance Corp., 359 F.Supp.2d 1075, 1090 (D.Nev. 2004), overruled
27 on other grounds by Giles v. Gen. Motors Acceptance Corp., 494 F.3d

1 865 (9th Cir. 2007)); see also Renteria v. United States, 452
2 F.Supp.2d 910, 922-23 (D. Ariz. 2006) (holding that borrowers cannot
3 establish the reliance element of their claim because lenders have
4 no duty to determine the borrower's ability to repay the loan); Oaks
5 Mgmt. Corp. v. Superior Court of San Diego Cty., 51 Cal. Rptr. 3d
6 561, 570 ("[A]bsent special circumstances . . . a loan transaction
7 is at arms-length and there is no fiduciary relationship between the
8 borrower and the lender.") (citations omitted).

9 Furthermore, a party alleging fraud "must state precisely the
10 time, place, and nature of the misleading statements,
11 misrepresentations, and specific acts of fraud." Kaplan v. Rose, 49
12 F.3d 1363, 1370 (9th Cir. 1994). Because a claim for fraud in the
13 inducement cannot depend upon Plaintiff's allegations, Plaintiff's
14 claim for fraud in the inducement must be dismissed. Nor has
15 Plaintiff shown that there are any facts upon which a proper fraud
16 claim may be brought against Defendants, and therefore, Plaintiff
17 shall not be granted leave to amend this claim.

18 Plaintiff also alleges fraud by omission. Under Nevada law, a
19 claim for fraudulent concealment must plead that defendant concealed
20 or suppressed a material fact that he or she was under a duty to
21 disclose to the plaintiff. Nev. Power Co. v. Monsanto Co., 891 F.
22 Supp. 1406, 1415 (D. Nev. 1995) (citing Nevada Jury Instruction
23 9.03). Like many of Plaintiff's claims, this claim fails on its
24 face because it is well-settled that lenders and servicers owe no
25 fiduciary duties to mortgage borrowers. Megino, 2011 WL 53086 at *5
26 (quoting Yerington Ford, 359 F.Supp.2d at 1090, overruled on other
27 grounds by Giles, 494 F.3d 865; see also Kwok v. Recontrust Co., No.

1 2:09-cv-02298, 2010 WL 255615, at *5 (D. Nev. June 23, 2010); Saniel
2 v. Recontrust Co., No. 2:09-cv-2290, 2010 WL 2555625, at *5 (D. Nev.
3 June 23, 2010); Renteria, 452 F.Supp.2d at 922-23 (holding that
4 borrowers cannot establish the reliance element of their claim
5 because lenders have no duty to determine the borrower's ability to
6 repay the loan); Oaks Mgmt. Corp, 51 Cal. Rptr. 3d at 570.

7 Plaintiff's allegations in support of these claims are vague
8 and conclusory, asserting only that Defendants failed to disclose
9 certain facts about the inner workings of the mortgage industry,
10 that Plaintiffs were not qualified for the loans, and that
11 Defendants had no right to foreclose on Plaintiffs' property.
12 Moreover, Plaintiff cannot show that Defendants owed him a duty to
13 disclose these alleged facts. For this reason, Plaintiff's claim
14 for fraud through omission must be dismissed without leave to amend.

15 **H. Slander of Title**

16 Plaintiff's eighth cause of action is slander of title against
17 Quality, Wells Fargo, and LSI Title Agency. Plaintiff asserts that
18 Defendants "disparaged the title to the Plaintiff's properties
19 pursuant to recording Notices of Default that were defective"
20 because Defendants did not have the authority to record those
21 notices, and did not serve those notices upon Plaintiff.

22 To succeed on a slander of title claim, a plaintiff must show
23 "false and malicious communications, disparaging to one's title in
24 land, and causing special damages." Exec. Mgmt., Ltd. v. Ticor
25 Title Co., 963 P.2d 465, 478 (Nev. 1998). However, Plaintiffs have
26 failed to state a claim because it is undisputed that Plaintiffs are
27 in default. See Sexton v. IndyMac Bank FSB, No. 3:11-cv-437, 2011

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1 WL 4809640, at *5 (D. Nev. Oct. 7, 2011) (“Plaintiffs have failed to
2 state a claim because it is undisputed that Plaintiffs are in
3 default.”); Ramos v. Mortg. Elec. Registrations Sys., Inc., No.
4 2:08-CV-1089, 2009 WL 5651132, at *4 (D. Nev. Mar. 5, 2009)
5 (dismissing slander of title claim where Plaintiffs failed to
6 dispute that they were in default on their loan, nor was it false
7 that the property was to be sold at a trustee’s sale). In filing
8 the Notice of Default, Defendants stated that Plaintiff was in
9 breach of the loan agreement due to nonpayment. Plaintiff does not
10 dispute that he is in fact in default. Because the statement is not
11 false, Defendants cannot be liable for slander of title. Leave to
12 amend to include a slander of title claim will therefore be denied
13 as futile.

14 **I. Abuse of Process**

15 Plaintiff’s claim for abuse of process fails as a matter of law
16 because non-judicial foreclosure is not the type of “process”
17 addressed by the abuse of process tort as it does not involve
18 judicial action. Riley v. Greenpoint Mortg. Funding, Inc., No.
19 2:10-cv-01873, 2011 WL 1979831 at *5 (D. Nev. May 20, 2011); see
20 also Barlow v. BNC Mortg., Inc., No. 3:11-CV-0304, 2011 WL 4402955
21 at *4 (D. Nev. Sept. 21, 2011) (“[T]he process at issue in this
22 action is a non-judicial foreclosure which is not the characteristic
23 legal action contemplated by an abuse of process claim . . .
24 Therefore, the court finds that [Plaintiff] has failed to state a
25 claim for abuse of process.”) (citation omitted). Accordingly,
26 Plaintiff’s claim for abuse of process shall be dismissed without
27 leave to amend.

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IV. Leave to Amend

A court may grant a motion to dismiss without leave to amend if "it determines that the pleading could not possibly be cured by the allegation of other facts." Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 247 (9th cir. 1990). Because we find that the pleadings cannot be cured by additional facts, Plaintiff shall not be granted leave to file an amended complaint in this action.

V. Motion to Expunge Lis Pendens

Defendants request that we expunge the notice of lis pendens if the motion to dismiss is granted. Nevada law provides that the party who recorded the notice must establish that the party is likely to prevail in the action. NEV. REV. STAT. § 14.015(3). Because all of Plaintiff's claims have been dismissed for failure to state a claim upon which relief can be granted, and because the court has found that leave to amend would be futile, we grant Defendants' request that the notice of lis pendens be expunged.

VI. Conclusion

IT IS, THEREFORE, HEREBY ORDERED that Plaintiff's Motion to Remand (#6) is **DENIED**.

IT IS FURTHER ORDERED that Plaintiff having failed to show good cause for failure to serve, despite the 4(m) Notice (#28), Defendants First National Bank of Nevada, First American Title

1 Insurance Company, U.S. Bank National Association, and Robert Stone
2 shall be **DISMISSED**.

3 **IT IS FURTHER ORDERED** that Quality's Motion to Dismiss (#5) and
4 Wells Fargo's Motion to Dismiss (#17) are **GRANTED** with respect to
5 all of Plaintiff's claims without leave to amend.

6 **IT IS FURTHER ORDERED** that Wells Fargo's Motion to Expunge Lis
7 Pendens (#17) is **GRANTED**.

8 The Clerk shall enter judgment accordingly.

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10 DATED: November 15, 2011.

11 
12 UNITED STATES DISTRICT JUDGE

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