

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DAVID R. GELINAS, et al.,

Plaintiffs,

V.

U.S. BANK, NA, et al.,

Defendants.

CASE NO. 16-1468JLR

ORDER GRANTING MOTIONS TO DISMISS

I. INTRODUCTION

Before the court are Defendants U.S. Bank Trust, NA¹ (“U.S. Bank”) and Caliber Home Loans, Inc.’s (“Caliber Home”) motion to dismiss (1st Mot. (Dkt. # 8)) and Quality Loan Service Corporation of Washington’s (“Quality Loan”) motion to dismiss (2d Mot. (Dkt. # 10)) Plaintiffs David and Karen Gelinas’s complaint (Compl. (Dkt. # 1)).

¹ The complaint names “U.S. Bank, NA, as Trustee for LSF9 Master Participation Trust” as a defendant. (Compl. (Dkt. # 1) ¶ 2.) However, Defendant U.S. Bank responds that the proper entity is “U.S. Bank Trust, N.A.” (Corp. Discl. Statement (Dkt # 7) at 1.) Accordingly, the court uses “U.S. Bank Trust, N.A.”

1 # 1)). The court has considered the motions, the submissions filed in support thereof and
2 opposition thereto, the relevant portions of the record, and the applicable law. Being
3 fully advised,² the court GRANTS U.S. Bank and Caliber Home's motion and GRANTS
4 Quality Loan's motion for the reasons set forth below.

5 **II. BACKGROUND**

6 This case arises out of a planned non-judicial foreclosure—a trustee's sale—of the
7 Gelinases' home and Mr. Gelinas's resulting bankruptcy filing. (Req. (Dkt. # 9) at 2, Ex.
8 F at 2; Compl. ¶¶ 18, 21.) On September 21, 2006, the Gelinases signed a deed of trust³
9 for \$368,000.00 with Washington Mutual Bank, which was recorded against the
10 Gelinases' residence in Marysville, Washington. (Compl. ¶¶ 13, 15; *see also* Req. at 2,
11 Ex. A, at 3.) In the three-way deed of trust transaction, the Gelinases were the borrowers,
12 Washington Mutual Bank was the lender, and Rainier Title was the trustee at the time the
13 parties signed the deed of trust. (Compl. ¶¶ 15, 28.) The balance of the Gelinases'
14 allegations focus on the multiple assignments and transfers of the deed of trust prior to
15 the foreclosure.

16 //

17 //

18

² No party has requested oral argument, and the court deems it unnecessary to the
19 disposition of this motion. *See* Local Rules W.D. Wash. LCR 7(b)(4).

20 ³ A deed of trust is a three-party transaction in which a borrower conveys title to his or
21 her property to a trustee, who holds the title in trust for the lending party, who is the deed of trust
22 beneficiary. *Bain v. Metro. Mortg. Grp., Inc.*, 285 P.3d 34, 38 (Wash. 2012). The deed of trust
grants the beneficiary a power of foreclosure that the beneficiary can invoke if the borrower
defaults on the loan. *Id.* (citing RCW 61.24.020; RCW 61.12.090; RCW 7.28.230(1)). The
Washington Deed of Trust Act empowers the trustee to sell the property at a trustee's sale. *Id.*;
RCW 61.24.020.

1 Although the Gelinases' complaint is not a model of clarity, the court summarizes
2 the Gelinases' allegations as follows.⁴ The Gelinases allege that various banks assigned
3 the deed of trust multiple times after its initial recording. (*Id.* ¶¶ 28-29, 31-34.) First, on
4 August 1, 2008, Deutsche Bank National Trust Company ("Deutsche Bank") recorded an
5 assignment of the deed of trust from Washington Mutual Bank. (*Id.* ¶ 29.) Nearly five
6 years later, on April 4, 2013, JPMorgan Chase Bank ("JPMorgan") recorded an
7 assignment of the deed of trust from Deutsche Bank. (Compl. ¶ 33 (noting that the year
8 is mistakenly listed as 2014 and that exhibit D states the correct date); *see id.* ¶ 33, Ex. D
9 at 2.) JPMorgan then assigned the deed of trust to U.S. Bank and recorded the
10 assignment on August 3, 2015. (*Id.* ¶ 34.)

11 In addition to the multiple assignments of the deed, the Gelinases allege that the
12 trustee of the deed also transferred multiple times. (*Id.* ¶¶ 28-31.) Before Deutsche Bank
13 recorded itself as the beneficiary of the deed of trust,⁵ the bank recorded a substitution of
14 the trustee under the deed of trust by appointing Quality Loan as substitute trustee on July
15 18, 2008. (*Id.* ¶ 28.) On November 16, 2009, JPMorgan recorded J.P. Morgan Chase
16 Custody Services as trustee under the deed of trust. (*Id.* ¶ 32, Ex. C at 2.) On April 24,
17 2013, JPMorgan appointed Quality Loan as the new trustee under the deed of trust. (Req.
18 at 2, Ex. E, at 34.)

19 //

20 ⁴ "Pro se pleadings are liberally construed . . ." *Balistreri v. Pacifica Police Dep't*, 901
21 F.2d 696, 699 (9th Cir. 1988).

22 ⁵ Washington Mutual assigned Deutsche Bank as beneficiary of the deed of trust, and
recorded the assignment on August 1, 2008. (Compl. ¶ 29.)

1 In May, 2016, Quality Loan—the recorded trustee at that time—notified the
2 Gelinases of the pending trustee’s sale. (*Id.*, Ex. F at 37.) On August 12, 2016, Mr.
3 Gelinas filed for bankruptcy, and on August 29, 2016, Mr. Gelinas amended his
4 bankruptcy filing. (Compl. ¶ 18; Req. at 2, Ex. A, at 1.)

5 On September 16, 2016, the Gelinases filed this *pro se* lawsuit against U.S. Bank,
6 Quality Loan, JPMorgan, Long Beach Mortgage Loan Trust 2006-10, Deutsche Bank,
7 Caliber Home, and Does 1-10. In their complaint, the Gelinases assert a claim to quiet
8 title to the subject property. (Compl. ¶ 20.) They allege that there is no evidence that
9 JPMorgan could have a valid “security interest in the Note.” (*Id.* ¶ 20.) Based on this
10 absence of “evidence,” the Gelinases assert that the assignment to JPMorgan is invalid,
11 and as a result “there have been multiplicities of invalid, illegitimate[,] and unauthorized
12 recordings in the Snohomish Country [sic] Recorders’ Office, all of which must be
13 rescinded.” (*Id.* ¶ 21.) The Gelinases also allege that these “illegitimate . . . recordings”
14 constitute slander of title, and they request special damages of \$100,000.00. (*Id.* ¶¶ 26,
15 36.) Finally, the Gelinases allege that Quality Loan is not authorized to collect payments
16 from them or to threaten to foreclose on their property and that Quality Loan’s attempts
17 to do so violate 15 U.S.C. § 1692e(5).⁶ (*Id.* ¶¶ 23-24.)

18 The Gelinases also seek declaratory relief in the form of “a judicial determination
19 of the rights, obligations, and interests of the parties with regard to the Property.” (*Id.*
20

21 ⁶ The Gelinases allege that Quality Loan violated “FDCPA 15 U.S.C. § 1692e 807(5).”
22 (Compl. ¶ 24.) Since Section 807 was re-codified as Section 1692e in 1996, the statute in
question appears to be Section 1692e. *See* Omnibus Consolidated Appropriations Act, 1997 Pub.
L. No. 104-208, § 2305, 110 Stat 3009 (1996).

1 ¶ 38.) Specifically, the Gelinases ask for a determination that U.S. Bank is not the
2 beneficiary under the deed of trust. (*Id.* ¶ 39.) Furthermore, the Gelinases request that
3 “all scheduled foreclosure proceedings be vacated,” and that U.S. Bank “be forever
4 estopped from foreclosing on the subject property.” (*Id.* ¶ 40.)

5 **III. ANALYSIS**

6 U.S. Bank, Caliber Home, and Quality Loan move for dismissal under Federal
7 Rule of Civil Procedure 12(b)(6). (1st Mot. at 1; 2d Mot. at 1.) Because U.S. Bank and
8 Caliber Home’s motion relies, in part, on documents for which they request judicial
9 notice, the court begins by addressing the parties’ requests for judicial notice. The court
10 then addresses the motions to dismiss and whether leave to amend is appropriate.

11 **A. Judicial Notice**

12 Because the motions to dismiss rely on certain documents, the court first addresses
13 U.S. Bank and Caliber Home’s and the Gelinases’ requests for judicial notice. (Req.;
14 Obj. (Dkt. # 12).) U.S. Bank and Caliber Home request that the court notice the
15 recording of the deed of trust of the subject property (Req. at 2, Ex. A), three sequential
16 recordings of the assignment of the deed of trust (*id.*, Exs. B, C, D), a recorded notice of
17 successor trustee (*id.*, Ex. E), a recorded notice of trustee sale (*id.*, Ex. F), and Mr.
18 Gelinas’s amended petition for bankruptcy (*id.*, Ex. G).

19 The Gelinases oppose all of these requests. (*See generally* Obj.) In their
20 opposition, the Gelinases assert that “[t]here are a multiplicity of problems/errors on the
21 documents recorded in the Snohomish County Registry.” (*Id.* at 2.) The Gelinases
22 further argue that the documents in question are in dispute and thus cannot be judicially

1 noticed. (*Id.*) The Gelinases also oppose the court taking judicial notice of the
2 bankruptcy petition, but offer only the assertion that “Plaintiffs[’] schedules have been
3 amended again.” (*Id.* at 3.) U.S. Bank and Caliber Home reply that the Gelinases object
4 only to the “validity of the documents, not the content therein.” (Not. Reply (Dkt. # 14)
5 at 2.) Furthermore, U.S. Bank and Caliber Home assert that the documents are all
6 incorporated by reference into the complaint (*id.* (citing *U.S. v. Ritchie*, 342 F.3d 903,
7 908-09 (9th Cir. 2003))), and that a court can take judicial notice of a public record that
8 contains contested facts, provided that the authenticity of the document is not subject to
9 reasonable dispute (*id.* at 2-3).

10 In their response to U.S. Bank and Caliber Home’s request, the Gelinases also
11 request judicial notice of a document that appears to be a title search by a company called
12 Certified Loan Auditors.⁷ (Obj. at 5-8.) U.S. Bank and Caliber Home oppose this
13 request, arguing that the document is not a public record and that the court should not
14 consider it in ruling on their motion to dismiss. (Not. Reply at 4-5.)

15 “The court may judicially notice a fact that is not subject to reasonable dispute
16 because it . . . can be accurately and readily determined from sources whose accuracy
17 cannot reasonably be questioned.” Fed. R. Evid. 201(b). The court can take judicial
18 notice of public records that are not “subject to reasonable dispute.” *Santa Monica Food
19 Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1025 n.2 (9th Cir. 2006) (citing *Lee*

20 _____
21 ⁷ The Gelinases’ complaint also contains a request for judicial notice. (Compl. at 26.)
22 The Gelinases request that the court take notice of a number of Supreme Court and federal
Circuit Court decisions regarding treatment of *pro se* litigants. (*Id.*) The court duly notes and
applies the standard by which it must assess *pro se* pleadings. *See Balistreri*, 901 F.2d at 699;
see also supra n.4.

1 *v. City of L.A.*, 250 F.3d 668, 689 (9th Cir. 2001), *overruled on other grounds by*
2 *Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119, 1125 (9th Cir. 2002)). Indeed, a court
3 may take judicial notice of a public record when its authenticity is unchallenged, even if a
4 party contests the assertions contained within the document. *See Palmason v.*
5 *Weyerhaeuser*, No. C11-0695RSL, 2013 WL 1788002, at *2-3 (W.D. Wash. Apr. 26,
6 2013) (citing *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other*
7 *grounds by Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119, 127 (9th Cir. 2002)). Courts
8 may also take judicial notice of court filings because their contents cannot be reasonably
9 disputed. *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir.
10 2006).

11 In this case, the court takes judicial notice of the recorded documents that U.S.
12 Bank and Caliber Home present to the court. (*See* Req. at 2.) U.S. Bank and Caliber
13 Home attest that these documents are authentic copies of Snohomish County public
14 records. (Not. Reply at 3.) Although the “factual statements and opinions contained
15 therein have not been conclusively established,” these documents are authentic
16 documents recorded with a governmental agency. *See Palmason*, 2013 WL 1788002, at
17 *3.⁸ The court also takes judicial notice of Mr. Gelinas’s bankruptcy petition. (*See* Req.
18 at 2, Ex. G at 2.)

19
20 ⁸ Additionally, these records are incorporated by reference into the Gelinas’s complaint.
21 (*See* Compl. ¶¶ 21, 31, 35.) A document is “incorporated by reference into a complaint if the
22 plaintiff refers extensively to the document or the document forms the basis of the plaintiff’s
claim.” *Ritchie*, 342 F.3d at 908. In this case, the recording documents for the property form the
basis for the Gelinas’s assertions that Defendants “illegitimate[ly]” recorded the deed of trust
assignments. (Compl. ¶¶ 21, 31, 35.)

1 However, the court denies the Gelinases' request for judicial notice of the title
2 search document. Although this document references public records, the document
3 appears to be the product of a private company that conducted a title search for the
4 Gelinases. (See Obj. at 5-8.) Accordingly, the document is not a public record, and it
5 cannot be "accurately and readily determined from sources whose accuracy cannot
6 reasonably be questioned." Fed. R. Evid. 201(b).

7 The court now addresses the motions to dismiss the Gelinases' complaint. (See 1st
8 Mot.; 2d Mot.)

9 **B. Motions to Dismiss**

10 1. Legal Standard

11 When considering a motion to dismiss under Federal Rule of Civil Procedure
12 12(b)(6), the court construes the complaint in the light most favorable to the nonmoving
13 party. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir.
14 2005). The court must accept all well-pleaded allegations of material fact as true and
15 draw all reasonable inferences in favor of the plaintiff. *See Wyler Summit P'ship v.*
16 *Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). "To survive a motion to
17 dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a
18 claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
19 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Telesaurus*
20 *VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010). "A claim has facial plausibility
21 when the plaintiff pleads factual content that allows the court to draw the reasonable
22 inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

1 The court, however, need not accept as true a legal conclusion presented as a
2 factual allegation. *Id.* Although Federal Rule of Civil Procedure 8 does not require
3 “detailed factual allegations,” it demands more than “an unadorned, the-defendant-
4 unlawfully-harmed-me accusation.” *Id.* (citing *Twombly*, 550 U.S. at 555). A pleading
5 that offers only “labels and conclusions or a formulaic recitation of the elements of a
6 cause of action” will not survive a motion to dismiss under Federal Rule of Civil
7 Procedure 12(b)(6). *Id.* A complaint does not survive dismissal where “it tenders ‘naked
8 assertion[s]’ devoid of ‘further factual enhancement.’” *Id.* (quoting *Twombly*, 550 U.S. at
9 557). In addition, “[a] plaintiff suing multiple defendants ‘must allege the basis of his
10 claim against each defendant to satisfy Federal Rule of Civil Procedure 8(a)(2), which
11 requires a short and plain statement of the claim to put defendants on sufficient notice of
12 the allegations against them.’” *Flores v. EMC Mortg. Co.*, 997 F. Supp. 2d 1088, 1103
13 (E.D. Cal. 2014) (quoting *Gauvin v. Trombatore*, 682 F. Supp. 1067, 1071 (N.D. Cal.
14 1988)). In deciding a motion to dismiss, the court may consider the pleadings,
15 documents attached to the pleadings, documents that are judicially noticed, and
16 documents that the pleadings incorporate by reference. *Ritchie*, 342 F.3d at 908 (citing
17 *Van Buskirk v. CNN*, 284 F.3d 977, 980 (9th Cir. 2002)).

18 2. U.S. Bank and Caliber Home’s Motion to Dismiss

19 a. *Judicial Estoppel*

20 U.S. Bank and Caliber Home first argue that all of the Gelinas’ claims are barred
21 by the doctrine of judicial estoppel. (1st Mot. at 5-6.) Relying on Mr. Gelinas’s
22 bankruptcy petition, U.S. Bank and Caliber Home assert that Mr. Gelinas did not list the

1 claims he asserts in this action in his bankruptcy petition. (*Id.* at 6.) They argue that the
2 failure to list the claims means that the Gelinases have taken a position in this litigation
3 that is inconsistent with their position in the bankruptcy action. (*Id.*) U.S. and Caliber
4 Home further contend that the Gelinases' inconsistent positions have "misled the
5 bankruptcy court about their assets" and "misused judicial resources." (*Id.*) The
6 Gelinases respond to this argument only by noting that Mr. Gelinas filed an amended
7 bankruptcy petition. (Obj. at 3 (noting the updated bankruptcy petition); *see generally*
8 Resp. (Dkt. # 11) (containing no response to the argument).)

9 "Judicial estoppel is an equitable doctrine that precludes a party from gaining an
10 advantage by asserting one position, and then later seeking an advantage by taking a
11 clearly inconsistent position." *Kobold v. Good Samaritan Reg'l Med. Ctr.*, 832 F.3d
12 1024, 1044-45 (9th Cir. 2016) (quoting *Hamilton v. State Farm Fire & Cas. Co.*, 270
13 F.3d 778, 782 (9th Cir. 2001)). Three factors may guide a court's decision whether to
14 apply the doctrine: (1) whether a party's later position is clearly inconsistent with a
15 previous position; (2) whether the party persuaded the prior court to accept the earlier
16 inconsistent position; and (3) whether the inconsistency gave the litigant an unfair
17 advantage in the subsequent suit. *Hamilton*, 270 F.3d at 782 (citing *New Hampshire v.*
18 *Maine*, 532 U.S. 742, 751 (2001)). However, "[a]bsent success in a prior proceeding, a
19 party's later inconsistent position introduces no risk of inconsistent court
20 determinations." *New Hampshire*, 532 U.S. at 750–51 (2001) (internal quotation marks
21 omitted). When there is no such risk, courts often decline to find that judicial estoppel
22 bars a claim. *See Ah Quin v. Cty. of Kauai Dep't of Transp.*, 733 F.3d 267, 272 (9th Cir.

1 2013) (quoting *New Hampshire*, 532 U.S. at 753)). That is in part because judicial
2 estoppel “is not meant to be a technical defense for litigants seeking to derail potentially
3 meritorious claims, especially when . . . there is no evidence of intent to manipulate or
4 mislead the courts.” *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d
5 355, 365 (3d Cir. 1996).

6 In the bankruptcy context, the Ninth Circuit has established a “basic default rule”
7 regarding judicial estoppel: “If a plaintiff-debtor omits a pending (or soon-to-be-filed)
8 lawsuit from the bankruptcy schedules and obtains a discharge (or plan confirmation),
9 judicial estoppel bars the action.” *Ah Quin*, 733 F.3d at 271. However, “dismissal of [a
10 p]laintiff’s bankruptcy case alone, without any showing that the bankruptcy court relied
11 on [the p]laintiff’s incomplete schedules, is insufficient.” *Boatright v. Aurora Loan
12 Servs.*, No. C-12-00009 EDL, 2012 WL 2792415, at *3 (N.D. Cal. July 9, 2012); *see also*
13 *Evans v. Potter*, No. 1:08-CV-1687-TWT, 2009 WL 529599, at *3 (N.D. Ga. Feb. 27,
14 2009). “After an order of dismissal, the debtor’s debts and property are subject to the
15 general laws, unaffected by bankruptcy concepts.” *In re Income Prop. Builders, Inc.*, 699
16 F.2d 963, 965 (9th Cir. 1982). Accordingly, a debtor does not necessarily benefit from
17 the prior inconsistent position where a bankruptcy court dismisses his petition without
18 discharging or reorganizing the debt.

19 In Mr. Gelinas’s August 29, 2016, amended bankruptcy petition, Mr. Gelinas
20 failed to list as potential assets the claims he asserts here. (See Req. at 2, Ex. G at 10.)
21 By bringing this suit, Mr. Gelinas has taken clearly inconsistent positions, which could
22 have given Mr. Gelinas an advantage in the bankruptcy matter. In short, Mr. Gelinas’s

1 failure to list these claims creates the appearance that he has fewer assets than he might
2 actually have.

3 However, on November 9, 2016, the bankruptcy court dismissed Mr. Gelinas's
4 bankruptcy petition. *In re Gelinas*, No. 16-14167MLB, Dkt. ## 39, 40 (Bankr. W.D.
5 Wash. Nov. 9, 2016). There is no indication that the bankruptcy court "certif[ied] or
6 confirm[ed] a bankruptcy plan," or that "the bankruptcy court made any orders at all
7 regarding [Mr. Gelinas's] schedules." *See Boatright*, 2012 WL 2792415, at *3.
8 Therefore, on the facts before the court, it does not appear that Mr. Gelinas's prior
9 inconsistent position benefited him—a key factor in determining whether to apply
10 judicial estoppel.

11 The court's conclusion is bolstered by the cases that U.S. Bank and Caliber Home
12 cite in support of their motion to dismiss. In those cases, the debtor had utilized the prior
13 inconsistent position to the debtor's benefit—the debtor's debts had been discharged in
14 bankruptcy. *See, e.g., Haag v. PNC Bank NA*, No. C13-1746JLR, 2014 WL 1725801, at
15 *3 (W.D. Wash. Apr. 30, 2014) (noting that the plaintiff failed to list potential
16 foreclosure-related claims in a bankruptcy petition and tried to bring those claims after
17 bankruptcy); *Janaszak v. Wells Fargo Bank NA*, No. C12-5427BHS, 2012 WL 4514460,
18 at *2 (W.D. Wash. Oct. 1, 2012) (noting that the plaintiff's debts were discharged via
19 bankruptcy before the plaintiff brought suit); *Hernandez v. Response Mortg. Serv., Inc.*,
20 No. 11-05685RBL, 2011 WL 6884794, at *3 (W.D. Wash. Dec. 29, 2011) (noting that
21 the plaintiff had already completed bankruptcy before bringing suit). In light of this case
22 //

1 law and the fact that the Gelinases are proceeding *pro se* in this matter, the court finds
2 that judicial estoppel does not bar this action on the facts currently before the court.⁹

3 b. *Quiet Title*

4 U.S. Bank and Caliber Home next argue that the Gelinases' failure to fulfill the
5 deed of trust obligations precludes a quiet title action.¹⁰ (1st Mot. at 7) They also argue
6 that the Gelinases lack standing to challenge an assignment of the deed of trust or the
7 appointment of a successor trustee because as the borrowers, the Gelinases are "neither a
8 party to nor an intended beneficiary of the challenged agreements." (*Id.*) In response, the
9 Gelinases assert that "to quiet title to a property you need to eliminate the lien of
10 mortgage. Not pay a non-existent debt." (Resp. at 4 (emphasis omitted).)

11 A quiet title action is an "equitable proceeding to resolve competing claims of
12 ownership." *Washington Fed. v. Azure Chelan LLC*, 382 P.3d 20, 26 (Wash. Ct. App.
13 2016). Washington law provides that "[t]he plaintiff . . . shall set forth in his complaint
14 the nature of his estate, claim or title to the property, and the defendant may set up a legal
15 or equitable defense to plaintiff's claims; and the superior title, whether legal or
16 equitable, shall prevail." RCW 7.28.120. In order to adequately allege a quiet title
17 action, a plaintiff must allege that she has satisfied the deed of trust obligations. *See*
18 *Hummel v. Nw. Tr. Serv.*, 180 F. Supp. 3d 798, 809 (W.D. Wash. 2016); *Evans v. BAC*

19 ⁹ Because the parties have not raised the issue, the court does not address whether Mr.
20 Gelinas's prior inconsistent position in a bankruptcy action in which he was the sole debtor
21 would bar Ms. Gelinas's claims.

22 ¹⁰ The Gelinases allege this claim only against JPMorgan; however, quieting title to the
23 subject property would affect the property interests of other parties to this action, which is
24 presumably why both U.S. Bank and Caliber Home move to dismiss the Gelinases' quiet title
25 action. (Compl. at 6; 1st Mot. at 7-8.)

1 | *Home Loans Servicing LP*, No. C10-0656RSM, 2010 WL 5138394, at *4 (W.D. Wash.
2 | Dec. 10, 2010). To satisfy the deed of trust obligations, the plaintiff must have repaid the
3 | loan. *Hummel*, 180 F. Supp. 3d at 809.

4 The Gelinases make no allegations in their complaint regarding the repayment of
5 | the deed of trust and respond to U.S. Bank and Caliber Home's motion with only
6 | conclusory arguments. (*See generally* Compl.; Resp. at 4.) Construing the facts in the
7 | light most favorable to the Gelinases, the Gelinases appear to allege that because the
8 | recordings are "fraudulent," they do not have to satisfy the loan obligations. (*See*
9 | *generally* Compl.; Resp. at 4.) However, the Gelinases' position does not accurately
10 | reflect the law. *Hummel*, 180 F. Supp. 3d at 809. Indeed, as in *Hummel*, the Gelinases
11 | "conspicuously avoid[] discussing or disputing [their] default" on repayment of the loan.
12 | 180 F. Supp. 3d at 809. By failing to allege that they repaid the debt, the Gelinases fail to
13 | adequately allege a quiet title claim.

14 In addition to failing to allege that they repaid the debt, the Gelinases fail to
15 | include facts sufficient to show they have standing to challenge any assignments of the
16 | deed. "[A] borrower generally lacks standing to challenge the assignment of its loan
17 | documents unless the borrower shows that it is at a genuine risk of paying the same debt
18 | twice." *Hummel*, 180 F. Supp. 3d at 806 (quoting *Andrews v. Countrywide Bank, NA*, 95
19 | F. Supp. 3d 1298, 1302 (W.D. Wash. 2015)). The Gelinases do not allege facts from
20 | which the court can reasonably infer that they will have to pay the debt twice, and the
21 | Gelinases make no argument on this point in their response. (*See generally* Compl.;
22 | Resp. at 11.) Thus, they lack standing to challenge the assignments as a basis for their

1 quiet title claim.

2 For these reasons, the Gelinases fail to state a quiet title claim.

3 *c. Slander of Title*

4 U.S. Bank and Caliber Home also move to dismiss the slander of title claim
5 against them. (1st Mot. at 10.) Specifically, they argue that the Gelinases do not allege
6 any facts supporting malicious publication. (*Id.*) Further, U.S. Bank and Caliber Home
7 argue that “to the extent Plaintiffs’ claim is based on challenging prior Notices of
8 Trustee’s Sale that may have been recorded . . . the claim became moot once those
9 foreclosures were discontinued.” (*Id.*)

10 The Gelinases respond that the “[d]efendants recorded fraudulent documents in the
11 Snohomish County Recorder’s office.” (Resp. at 11.) The Gelinases “consider these
12 documents to be invalid” and assert that the assignments “must be removed from the
13 County Records’ Register.” (*Id.*)

14 In Washington, a plaintiff must allege the following elements to state a claim for
15 slander of title: “(1) false words; (2) maliciously published; (3) with reference to some
16 pending sale or purchase of property; (4) which go to defeat plaintiff’s title; and (5) result
17 in plaintiff’s pecuniary loss.” *Certification from the U.S. Court of Appeals for the Ninth*
18 *Circuit in Centurion Prop. III, LLC v. Chicago Title Ins. Co.*, 375 P.3d 651, 662 (Wash.
19 2016) (citing *Rorvig v. Douglas*, 873 P.2d 492, 496 (Wash. 1994)). “Malice is not
20 present where the allegedly slanderous statements were made in good faith and were
21 prompted by a reasonable belief in their veracity.” *Hummel*, 180 F. Supp. 3d at 809
22 (quoting *Brown v. Safeway Stores, Inc.*, 617 P.2d 704, 713 (1980)); *see also Rorvig*, 873

1 P.2d at 496. Specifically, “the initiation of foreclosure proceedings cannot form the basis
2 of a slander of title claim” because it does not constitute malicious publication. *Beaton v.*
3 *JPMorgan Chase Bank, N.A.*, No. C11-0872RAJ, 2012 WL 909768, at *3 n.5 (W.D.
4 Wash Mar. 15, 2012) (citing *Krienke v. Chase Home Fin., LLC*, No. 35098-0-II, 2007
5 WL 2713737, at *6 (Wash. Ct. App. Sept. 18, 2007)).

6 Here, the Gelinases make only conclusory allegations of Defendants’ bad faith or
7 actions, none of which reasonably support an inference of malice. (See, e.g., Compl. ¶ 26
8 (“The recordation of said documents clearly constitute[s] a Slander of Title!”).) In
9 addition, most of the Gelinases’ allegations stem from the foreclosure proceeding, and the
10 initiation of a foreclosure proceeding alone cannot constitute malice. See *Beaton*, 2012
11 WL 909768, at *3 n.5. For these reasons, the court dismisses the Gelinases’ slander of
12 title claim.¹¹

13 *d. Declaratory Judgment*

14 Finally, U.S. Bank and Caliber Home argue that the Gelinases’ allegations
15 regarding declaratory judgment merely reiterate their “challenge to any of the defendant’s
16 standing to foreclose,” and for this reason, they argue that the Gelinases’ declaratory
17 judgment claim “fail[s] as a matter of law.” (1st Mot. at 10.) The Gelinases do not
18 respond to this argument. (Resp. at 5.)

19 //

20 //

21 _____
22 ¹¹ The court declines to address the remaining elements of the slander of title claim and
U.S. Bank and Caliber Home’s arguments because the Gelinases fail to make sufficient factual
allegations of malicious publication—a key element of their claim.

1 The court agrees with U.S. Bank and Caliber Home. The declaratory judgment
2 section of the Gelinases' complaint merely recites assertions made earlier in the
3 complaint without making any additional allegations.¹² (Compl. ¶¶ 37-21); *see also* 28
4 U.S.C. § 2201. Thus, the Gelinases effectively re-assert the same facts for their
5 "declaratory judgment" claim as for their other claims. (*Compare id.* ¶¶ 19-21; *with id.*,
6 ¶¶ 37-41.) Because the court has already concluded that the Gelinases do not allege
7 sufficient facts to state a quiet title or slander of title claim, the court dismisses the
8 Gelinases' claim for declaratory judgment.¹³

9 3. Quality Loan's Motion to Dismiss

10 a. *Violation of the Fair Debt Collection Practices Act ("the FDCPA")*

11 Quality Loan also moves to dismiss the Gelinases' claim against Quality Loan.
12 (*See* 2d Mot.) Quality Loan argues that it is not a "debt collector" under the FDCPA, and
13 therefore 15 U.S.C. § 1692e(5)'s prohibitions against false or misleading representations
14 do not apply. (2d Mot. (Dkt. # 10) at 2-3.) Additionally, Quality Loan argues that even
15 if it were a debt collector within the meaning of the FDCPA, the Gelinases fail to allege
16 "a deceptive act or misleading representation"—a statutory requirement for bringing a

17 ¹² The Gelinases do not cite a statute in the portion of their complaint where they request
18 declaratory judgment, and it is unclear whether they bring their claim under the state or federal
19 declaratory judgment statute. (*See generally* Compl. ¶¶ 37-41.) Given the similarity of the
20 statutes, the court analyzes the claim as though the Gelinases intended to invoke the federal
21 statute. *See* 28 U.S.C. § 2201. However, under the Washington State Uniform Declaratory
22 Judgment Act, this claim fails for similar reasons. *See* RCW 7.24.010.

23 ¹³ The declaratory judgment section of the complaint may also contain a request for a
24 permanent injunction against U.S. Bank. (*See* Compl. ¶ 40.) The Gelinases request that "any
25 and all scheduled foreclosure proceedings be vacated; and the Defendant be forever stopped
26 from foreclosing on the subject property." (*Id.*) However, the court declines to issue injunctive
27 relief where the Gelinases' underlying claims fail.

1 claim under the FDCPA. (*Id.* at 3-4.) The Gelinases have not responded to Quality
2 Loan's motion. (*See generally* Dkt.)

3 Section 1692e(5) provides that a “debt collector” may not “threat[en] to take any
4 action that cannot legally be taken or that is not intended to be taken.” 15 U.S.C.
5 § 1692e(5). Thus, only a “debt collector” as defined under the FDCPA can violate 15
6 U.S.C. § 1692e(5). *See* 15 U.S.C. 1692a(6); *Cameron v. Acceptance Capital Mort. Corp.*,
7 No. C13-0707RSM, 2013 WL 5664706, at *4 (W.D. Wash. Oct 16, 2013); *Fagerlie v.*
8 *HSBS Bank, NA*, No. C12-2205RSM, 2013 WL 1914395, at *5 (W.D. Wash. May 8,
9 2013); *Fong v. Prof'l Foreclosure Corp.*, No. C05-0123JLR, 2005 WL 3134059, at *2
10 (W.D. Wash. Nov. 22, 2005). The FDCPA defines a “debt collector” as:

11 Any person who uses any instrumentality of interstate commerce or the
12 mails in any business the principal purpose of which is the collection of any
13 debts, or who regularly collects or attempts to collect, directly or indirectly,
14 debts owed or due or asserted to be owed or due another.

15 U.S.C. § 1692a(6). However, the definition of a debt collector “does not include
16 . . . any person collecting or attempting to collect any debt owed or due or asserted to be
17 owed or due another to the extent such activity . . . concerns a debt which was not in
18 default at the time it was obtained by such person.” *Id.* For this reason, judges in the
19 Western District of Washington have consistently concluded that a non-judicial
20 foreclosure action by a trustee does not generally constitute debt collection under the
21 FDCPA. *See Fagerlie*, 2013 WL 1914395, at *5; *Thepvongsa v. Reg'l Tr. Servs. Corp.*,
22 No. C10-1045RSL, 2011 WL 307364, at *8 (W.D. Wash. Jan. 26, 2011); *Fong*, 2005 WL
//

1 3134059, at *2 (“A trustee . . . who commences foreclosure on a property pursuant to a
2 deed of trust is not a debt collector as broadly defined by the FDCPA.”).

3 The Gelinases’ complaint contains no allegations that the debt at issue was not in
4 default when Quality Loan became the trustee under the deed of trust and initiated the
5 non-judicial foreclosure proceeding. (*See generally* Compl.) Viewing the complaint in
6 the light most favorable to the non-moving party, the Gelinases may be attempting to
7 assert that deficiencies in the chain of title led Quality Loan to “threaten” to foreclose on
8 the Gelinases’ property when Quality Loan allegedly had no legal right to do so. (Compl.
9 ¶¶ 21-23.) Even after making this inference in the Gelinases’ favor, however, the
10 Gelinases fail to state an FDCPA claim against Quality Loan because there are no
11 allegations that the loan was not in default. Thus, the court grants Quality Loan’s motion
12 to dismiss.

13 4. Leave to Amend

14 Having concluded that the Gelinases fail to state a claim against U.S. Bank,
15 Caliber Home, and Quality Loan, the court now considers whether it should grant the
16 Gelinases leave to amend. (Resp. at 3.) The Gelinases seek leave to amend “to include
17 new causes of action.” (*Id.*) U.S. Bank and Caliber Home oppose granting leave to
18 amend because the “[c]omplaint offers no suggestion that the defects may be cured by an
19 amended pleading.” (1st Mot. at 10.) They further argue that the Gelinases offer only
20 vague promises of new claims, without showing how these claims will survive dismissal
21 due to the Gelinases’ failure to repay their loan. (Reply (Dkt. # 13) at 4.) Quality Loan
22 does not address amendment. (*See* 2d Mot.)

1 Federal Rule of Civil Procedure 15 states that “the court should freely give leave
2 [to amend pleadings] when justice so requires.” Fed. R. Civ. P. 15(a)(2). In order to
3 determine whether justice requires leave to amend, the court considers: (1) the presence
4 or absence of undue delay, (2) bad faith, (3) dilatory motive, (4) “repeated failure to cure
5 deficiencies” in previous amendments, and (5) futility of the amendment. *Moore v.*
6 *Kayport Package Exp., Inc.*, 885 F.2d 531, 538 (9th Cir. 1989) (citing *Foman v. Davis*,
7 371 U.S. 178, 181, 83 (1962)). “Unless it is absolutely clear that no amendment can cure
8 the defect, . . . a pro se litigant is entitled to notice of the complaint’s deficiencies and an
9 opportunity to amend prior to dismissal of the action.” *Garity v. APWU Nat’l Labor*
10 *Org.*, 828 F.3d 848, 854 (9th Cir. 2016) (quoting *Lucas v. Dep’t of Corr.*, 66 F.3d 245,
11 248 (9th Cir. 1995) (per curiam)).

12 Given Rule 15’s favorable pleading standard, the court grants the Gelinases leave
13 to amend their complaint. At this stage, the court cannot conclude that the Gelinases
14 cannot possibly remedy their complaint to state a claim. Nor is there any indication of
15 undue delay, bad faith, or dilatory motive, and the Gelinases have not previously
16 amended their complaint. Accordingly, the Gelinases’ must file an amended complaint,
17 if any, no later than 20 days of the date from this order. Failure to file an amended
18 complaint within this timeframe may result in the court dismissing the Gelinases’ claims
19 against U.S. Bank, Caliber Home, and Quality Loan.

20 **C. Service of Process on the Remaining Defendants**

21 Although the parties do not raise the issue, the court notes that it does not appear
22 that the other defendants in this action have been served. (See generally Dkt.) Federal

1 Rule of Civil Procedure 4 requires plaintiffs to serve defendants with a summons and a
2 copy of the plaintiff's complaint and sets forth the specific requirements for doing so.
3 *See Fed. R. Civ. P. 4.* Rule 4(m), which provides the timeframe in which service must be
4 effectuated, states in relevant part:

5 If a defendant is not served within 90 days after the complaint is filed, the
6 court—on motion or on its own after notice to the plaintiff—must dismiss
7 the action without prejudice against that defendant or order that service be
made within a specified time. But if the plaintiff shows good cause for the
failure, the court must extend the time for service for an appropriate period.

8 Fed. R. Civ. P. 4(m); *see also* Fed. R. Civ. P. 4(l) (stating requirement of proving
9 service). The Gelinases filed their complaint on September 16, 2016. (Compl. at 1.)
10 However, there is no evidence in the record that the Gelinases properly served Deutsche
11 Bank, Long Beach Mortgage Loan Trust 2006-10, or JPMorgan (“the Remaining
12 Defendants”) with the summons and complaint within the time period that Rule 4(m)
13 provides. (*See generally* Dkt.) Therefore, the Gelinases must show cause within 20 days
14 of this order why their claims against the Remaining Defendants should not be dismissed
15 for failure to comply with Rule 4(m). The Gelinases’ response to the court’s order to
16 show cause should be filed separately from any amended complaint. If the Gelinases fail
17 to show good cause for their failure to serve these defendants, the court will dismiss the
18 claims against the Remaining Defendants without prejudice pursuant to Rule 4(m).

19 **IV. CONCLUSION**

20 For the reasons set forth in this order, the court GRANTS U.S. Bank and Caliber
21 Home’s motion to dismiss (Dkt. # 8) and GRANTS Quality Loan’s motion to dismiss
22 (Dkt. # 10). The court also GRANTS the Gelinases leave to amend their complaint. The

1 Gelinases must file their amended complaint, if any, no later than twenty (20) days of the
2 date of this order. The court further ORDERS the Gelinases to SHOW CAUSE within
3 twenty (20) days of the date of this order why their claims against JPMorgan, Long
4 Beach Mortgage Loan Trust 2006-10, Deutsche Bank, and Does 1-10 should not be
5 dismissed. Any amended complaint and response to the court's order to show cause must
6 be filed separately.

7 Dated this 10th day of February, 2017.

8
9
10 
11 JAMES L. ROBART
12 United States District Judge
13
14
15
16
17
18
19
20
21
22