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8 **UNITED STATES BANKRUPTCY COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10 **LOS ANGELES DIVISION**

11 In re:

CHAPTER 13

12 Suzanne Marie Takowsky,

Case No.: 2:08-bk-14149-NB
Adv No: 2:11-ap-02468-NB

13
14
15 Debtor.

**MEMORANDUM DECISION ON
DEFENDANTS' MOTIONS TO DISMISS AND
MOTION TO EXPUNGE *LIS PENDENS***

16
17 Suzanne Takowsky,

Status conference

Date: March 20, 2012

Time: 1:00 p.m.

Courtroom: 1545

18 Plaintiff,

19 v.

Trial

Date: June 18, 2012

Time: 10:00 a.m.

Courtroom: 1545

20
21 Del Toro Loan Servicing, Inc., a California
corporation; Alan I. Sherman and Rachel
22 Sherman, Trustees of the Alan I.
Sherman and Rachel Sherman Trust
23 dated 11/22/1994; Arden Management,
LLC, a limited liability company; and
24 Borkes Capital Management, LLC, a
25 limited liability company,

26 Defendants.

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1 **I. INTRODUCTION**¹

2 A foreclosure sale of the residence at 1931 North Beverly Drive, Beverly Hills,
3 California 90210 (the “House”) occurred on July 18, 2011. This adversary proceeding
4 seeks to recover the House so that it can be sold or refinanced to pay creditors (Dkt. 41
5 at 16:7), or alternatively other relief including compensatory and punitive damages.

6 According to the first amended complaint (“FAC”) (Dkt. 21) one or more of the
7 defendants promised that the loan at issue (the “Loan”) would be reinstated upon
8 payment of \$14,158.20, but the foreclosure sale occurred despite timely payment of that
9 sum. The defendants do not deny receiving those funds, but they argue that the plaintiff
10 could not reinstate the Loan without also bringing a senior lien and real property taxes
11 current. This Memorandum Decision addresses the defendants’ motions to dismiss the
12 FAC and to expunge a related *lis pendens*.

13 For simplicity the term “Plaintiff” refers to both the above-captioned debtor and,
14 as the context may suggest, her non-debtor husband, Pedro Ferre. “Defendants” are
15 the loan servicer, the lender with the junior deed of trust (“DOT”) on the House, and the
16 purchasers at the foreclosure sale – namely Del Toro Loan Servicing, Inc. (“Servicer”),
17 Alan I. Sherman and Rachel Sherman, Trustees of the Alan I. Sherman Trust dated
18 11/22/1994 (“Lender”), and Arden Management, LLC and Borkes Capital Management,
19 LLC (“Purchasers”).

20 For the reasons set forth below, I will issue orders (a) denying the motions to
21 dismiss as to Plaintiff’s claim for fraud, (b) granting the motions to dismiss as to the
22 remaining claims but with leave to amend the complaint because it appears possible
23 (indeed likely) that Plaintiff can amend the complaint to state such claims, (c) denying
24 the motion to expunge the *lis pendens*, setting the amount of the undertaking at \$-0-,
25 and denying the request for attorneys’ fees, (d) denying as moot Plaintiff’s request to
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27
28 ¹ Unless the context suggests otherwise, references to a “Chapter” or “Section” (“§”) refer to the United States
Bankruptcy Code, 11 U.S.C. § 101 et seq. (the “Code”), a “Rule” means the Federal Rules of Bankruptcy Procedure
 (“FRBP”), Federal Rules of Civil Procedure (“FRCP”), Federal Rules of Evidence (“FRE”), or Local Bankruptcy Rules
 (“LBR”), and other terms have the meanings provided in the Code and the rules.

1 deem her FAC to be amended to allege a demand for a “beneficiary statement” (see
2 Dkt. 41 at 11:15-27), and (e) granting Plaintiff’s request to file a verification of the FAC
3 *nunc pro tunc* (see Dkt. 33 at 14).

4 **II. BACKGROUND**

5 **A. Procedural background**

6 On March 31, 2008 (the “Petition Date”) Plaintiff filed her chapter 13 petition.
7 Plaintiff’s amended chapter 13 plan, which was confirmed on September 17, 2008,
8 provides for a 100% dividend to creditors, partly through payments during the term of
9 the plan and, as to any remainder, through a sale or refinance of the House (Main Case
10 Dkt. 32).

11 Plaintiff attempted to stop the foreclosure process by filing a motion for a
12 temporary restraining order and preliminary injunctive relief, but her motion was denied
13 (Dkt. 5). On July 13, 2011 she filed a Notice of Action Pending with the Los Angeles
14 County Recorder (the “*lis pendens*”) (Dkt. 9).

15 On July 18, 2011 the foreclosure sale occurred and Purchasers were the highest
16 bidder (Dkt. 27 Ex.C). On July 28, 2011 Servicer, acting in its capacity as Trustee
17 under the DOT, recorded a Trustee’s Deed Upon Sale conveying the House to
18 Purchasers.

19 Plaintiff’s FAC (Dkt. 21) asserts claims for (1) wrongful foreclosure,
20 (2) cancellation of instrument, (3) quiet title, (4) breach of duty under deed of trust,
21 (5) fraud and deceit, and (6) breach of covenant of good faith and fair dealing.
22 Defendants filed motions to dismiss (“MTD”) and a motion to expunge the *lis pendens*
23 (Dkt. 24-26). Plaintiff filed opposition papers (Dkt. 33-35 & 41), Defendants filed reply
24 papers (Dkt. 38 & 43), and at the direction of the Court all parties filed supplemental
25 briefs relating to this Bankruptcy Court’s jurisdiction and authority to hear the parties’
26 disputes and issue either a final judgment or a report to the United States District Court
27 with recommended findings of fact and conclusions of law (Dkt. 44-45).

28 Hearings were held on December 15, 2011, and January 10 and February 7,

1 2012. At those hearings Defendants generally adopted each others' arguments, and for
2 convenience this Memorandum Decision will speak of all arguments as "Defendants"
3 arguments even if not all of them actually assert such arguments.

4 Tentative rulings on the motions are reflected in a written Tentative Ruling filed
5 on February 6, 2012 (Dkt. 46). On February 10, 2012 a scheduling order was entered
6 setting various deadlines and a trial date of June 18, 2012 at 10:00 a.m.

7 **B. Factual allegations**

8 In 2008 Plaintiff borrowed approximately \$135,000 from Lender, secured by a
9 second lien on her House. FAC (Dkt. 21) at 3:21-4:5. On March 16, 2011, Servicer
10 issued a Notice of Default and Election to Sell Under Deed of Trust (the "NOD") (FAC
11 (Dkt. 21) at 4:23-25; Def. RJN (Dkt. 27) Ex.A). The NOD states in part:

12 ... you may have the legal right to bring current your
13 account in good standing by paying all of your past due
14 payments plus permitted costs and expenses within the time
15 permitted by law for reinstatement of your account, which is
16 normally five business days prior to the date set for the sale
17 of your property. ... [¶] This amount is \$5,722.18 as of
18 3/16/2011, and will increase until your account becomes
19 current. While your property is in foreclosure, you still must
20 pay other obligations (such as insurance and taxes) required
21 by your note and deed of trust or mortgage. ... [T]he
22 beneficiary or mortgagee **may require as a condition of
23 reinstatement** that you provide reliable written evidence that
24 you **paid all senior liens, property taxes**, and hazard
25 insurance premiums. [Def. RJN (Dkt. 27) Ex. A at 1,
26 emphasis added]

21 According to Plaintiff, Servicer subsequently represented that "the sum of
22 \$14,158.20 was required to reinstate the loan ... nor were any other defaults
23 denominated nor other performance demanded." FAC (Dkt. 21) at 5:6-8. Plaintiff relies
24 partly on alleged oral communications with persons at Servicer and partly on a one-
25 page spreadsheet provided by Servicer entitled "Loan Reinstatement Calculation"
26 (which Plaintiff sometimes refers to as a "beneficiary statement") (*id.* at 5:1-9 & Ex.3)
27 (the "Reinstatement Spreadsheet").

28 The Reinstatement Spreadsheet is dated July 1, 2011 and includes the following

1 phrase:

2 **To Reinstate as of 07/01/2011, Please Pay: \$14,158.20**
3 [Complaint, Ex.3, emphasis in original]

4 On July 8, 2011, Plaintiff wired \$14,158.20 to Servicer. Approximately an hour
5 later, however, Plaintiff received a letter stating:

6 [Servicer] is in receipt of a wire as [of] 07/08/2011 in the amount of
7 \$14,158.20 This amount brings the account current; however,
8 it does not cure the default on the account. We have information
9 that the borrower is delinquent on her 1st lien with Wachovia
10 Mortgage in the amount of \$65,582.84 as of 07/06/2011. ...
11 Property taxes are also due on the account for the 2d half of 2010-
12 2011 [¶] ... Reliable written evidence that the foregoing
13 amounts have been paid is required prior to the reinstatement. See
14 Cal. Civ. Code § 2924c(a)(1). [Ferre Decl. (Dkt 35) Ex.4]

15 The foreclosure sale went forward on July 18, 2011. Purchasers were the
16 highest bidder with a bid of \$200,100 (Dkt. 27 Ex.C).

17 **III. ISSUES**

18 **A. Jurisdiction, Authority, and Abstention**

19 Defendants raise several questions regarding which court should hear the
20 parties' disputes: Does this Bankruptcy Court have jurisdiction? Does this Bankruptcy
21 Court have the authority to issue a final judgment, as opposed to issuing proposed
22 findings of fact and conclusions of law for review *de novo* by the District Court? Is
23 abstention warranted?

24 **B. Statute of Frauds**

25 Does the California statute of frauds, Cal. Civ. C. § 1698, bar Plaintiff's assertion
26 that her payment of \$14,158.20 was sufficient to reinstate the loan and/or stop the
27 foreclosure process?

28 **C. Tender**

Does the requirement to tender payment to Lender apply to Plaintiff's claims? If
so, is she excused because the foreclosure sale was void *ab initio*? Alternatively, if a
tender of funds is required, is the \$14,158.20 sufficient rather than the entire
indebtedness?

1
2 **D. Fraud and Deceit**

3 Does Plaintiff state a cognizable claim for fraud and deceit? Are remedies for
4 fraud limited to damages, or can Plaintiff obtain other remedies such as
5 unwinding/avoiding the foreclosure sale?

6 **E. Lis Pendens**

7 Should the *lis pendens* be expunged? If not, what bond/undertaking must
8 Plaintiff provide as a condition of maintaining the *lis pendens*? Should attorneys' fees
9 be awarded?

10 **IV. DISCUSSION**

11 The legal standards on a motion to dismiss are well established. Dismissal for
12 failure to state a claim upon which relief can be granted is appropriate if the complaint
13 does not give the defendant fair notice of a legally cognizable claim and the grounds on
14 which it rests. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); Fed. R. Civ. P.
15 12(b)(6) (incorporated by Fed. R. Bankr. P. 7012). In addition, in alleging fraud or
16 mistake a party must state with particularity the circumstances constituting fraud or
17 mistake. Fed. R. Civ. P. 9(b) (incorporated by Fed. R. Bankr. P. 7009).

18 A complaint survives a motion to dismiss under Rule 12(b)(6) if it contains
19 "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on
20 its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, ___, 129 S.Ct. 1937, 1940, 173 L.Ed.2d. 868
21 (2009) (quoting *Twombly*, 550 U.S. at 570). The court must accept as true all of the
22 factual allegations contained in the complaint and draw all reasonable inferences in
23 favor of the nonmoving party. *al-Kidd v. Ashcroft*, 580 F.3d 949, 956 (9th Cir. 2009).

24 In addition to considering "material which is properly submitted as part of the
25 complaint" (*Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19
26 (9th Cir. 1990)) the Court may consider "documents whose contents are alleged in a
27 complaint and whose authenticity no party questions, but which are not physically
28 attached to the pleading." *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1990).

1 Moreover, under Federal Rule of Evidence 201, the court may take judicial notice of
2 “matters of public record.” *Mack v. S. Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th
3 Cir. 1986). See Servicer and Lender’s Request for Judicial Notice (“RJN”) (Dkt. 27);
4 *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001).

5 Dismissal without leave to amend is appropriate only when the Court is satisfied
6 that the deficiencies in the complaint could not possibly be cured by amendment.
7 *Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir. 2003); *Lucas v. Dep’t of Corr.*, 66 F.3d
8 245, 248 (9th Cir. 1995).

9 **A. Jurisdiction, Authority, and Abstention**

10 This Bankruptcy Court has jurisdiction and has the authority to issue a report and
11 recommendation to the District Court for the reasons set forth in the Tentative Ruling
12 (Dkt 46) at 3:18-6:3. Abstention is not warranted for the reasons also set forth in the
13 Tentative Ruling (Dkt 46) at 6:4-7:18.

14 **B. Statute of Frauds**

15 Plaintiff alleges that Servicer made *oral* statements regarding payment of
16 \$14,158.20 to reinstate the Loan or halt the foreclosure process. Defendants argue that
17 Plaintiff cannot rely on those alleged oral statements because of the California statute of
18 frauds, Cal. Civ. C. § 1698. See *Stafford v. Clinard*, 87 Cal.App.2d 480, 481 (1948);
19 *Justo v. Indymac Bancorp*, 2010 WL 623715 (E.D. Cal.).²

20 Plaintiff’s initial response is to sidestep any reliance on oral statements and
21 attempt to shift the burden to Defendants. She argues that she demanded a
22 “beneficiary statement” from Servicer and she was only required to pay what was set
23

24 ² Defendants’ reliance on the statute of frauds is explicit as to Plaintiff’s third and sixth claims – to quiet title and for
25 alleged breach of the implied covenant of good faith and fair dealing (MTD (Dkt. 26) at 14:5-15 & 20:25-21:5). The
26 statute of frauds argument is also implicit in many of Defendants’ other arguments because they treat the payment of
27 \$14,158.20 as insufficient to halt the foreclosure, and they argue that instead Plaintiff was required to tender the full
28 amount owed to Lender. See MTD (Dkt. 26) at 12:3-21 (first claim, for wrongful foreclosure, must be dismissed
because of non-payment of senior loan and taxes); *id.* at 12:22-13:8 (second claim, for cancellation of instrument,
must be dismissed “because there is no tender of the deficiency owed to [Lender] either before foreclosure or in the
FAC); *id.* at 13:24-14:15 (third claim, to quiet title, must be dismissed because “a mortgagor cannot quiet his title
against the mortgagee without paying the debt secured”); *id.* at 14:16-16:8 (fourth claim, for breach of duty under
deed of trust, must be dismissed because of lack of contractual or other duty to halt foreclosure upon payment of
\$14,158.20).

1 forth in that statement.

2 Plaintiff acknowledges that any items omitted from a beneficiary statement are
3 not *permanently* waived. Rather, she argues, foreclosing based on any omitted items
4 would require commencement of a new foreclosure process that included such items –
5 *i.e.*, the foreclosure sale that actually took place was either void or voidable and
6 presumably, before a new foreclosure process could be completed, she would hope to
7 sell or refinance the House. See Plaintiff’s Opposition (Dkt. 33 at 8:5-9:4) and (Dkt. 41
8 at 8:16-9:14) (citing 4 Miller & Starr, *Cal. Real Estate* (3d ed. 2011, Supp. 2011), §
9 10:189.

10 Plaintiff’s premise is flawed. Assuming for the sake of discussion that she made
11 a timely demand for a beneficiary statement, the form of that statement is established
12 by California law and there is no requirement that it list the dollar amounts owed to third
13 parties, which amounts may be unknown to the lender. See Tentative Ruling (Dkt. 46)
14 at 7:20-8:8. Therefore, Plaintiff’s request to deem her FAC to be amended to allege a
15 demand for a “beneficiary statement” (Dkt. 41 at 11:15-27) will be denied as moot.

16 In the alternative, Plaintiff relies on the written Reinstatement Spreadsheet. She
17 does not explicitly argue that the Reinstatement Spreadsheet is a sufficient writing to
18 overcome the statute of frauds, but she repeatedly insists that the language in the
19 Reinstatement Spreadsheet should be binding on Defendants (apparently meaning,
20 again, that they should have halted the foreclosure process and would have to
21 recommence it in order to be able to foreclose based on non-payment of the senior lien
22 and real property taxes, which would give her time to sell or refinance the House).

23 This argument has some appeal. After all, the Reinstatement Spreadsheet
24 appears to support Plaintiff’s claims. Defendants argue that payment of \$14,158.20
25 was never represented as the “only” requirement to halt foreclosure (MTD (Dkt. 26) at
26 20:13 & 20:34), but in fact the Reinstatement Spreadsheet could be read to state or
27 imply that it was the only requirement. It states, without qualification, “**To Reinstate as**
28 **of 07/01/2011, Please Pay: \$14,158.20**” (emphasis in original). At this stage all

1 reasonable inferences must be drawn in favor of Plaintiff as the nonmoving party. *al*
2 *Kidd v. Ashcroft*, 580 F.3d at 956.³

3 To be precise, although the Reinstatement Spreadsheet and the Servicer's
4 alleged oral statements use terminology such as "reinstatement," it is possible to agree
5 to halt a foreclosure process without requiring reinstatement of the loan. The issue is
6 what the parties intended or represented, not what terminology was used, although the
7 terminology may shed light on what the parties intended or represented. In any event,
8 Plaintiff alleges oral representations regarding the payment of the \$14,158.20 and also
9 points to a writing that may support those allegations.

10 Nevertheless, Plaintiff's allegations, at least as currently expressed in the FAC,
11 are missing one element that is required to overcome the statute of frauds. Although
12 Defendants have not argued this issue, the document on which Plaintiff relies does not
13 appear on its face to be signed or subscribed by Servicer or Lender. True, it seems
14 likely that the Reinstatement Spreadsheet was delivered under cover of some letter or
15 email that contained a signature or the equivalent, but no such allegation appears in the
16 FAC and therefore Defendants have had no opportunity to respond to such allegation.
17 See *Lamle v. Mattel, Inc.*, 394 F.3d 1355, 1362 (Fed. Cir. 2005) (typewritten name on
18 email satisfied statute of frauds); *Donovan v. RRL Corp.*, 26 Cal.4th 261, 277-278 (2001)
19 (printed name in newspaper advertisement satisfied statute of frauds); 1 Witkin,
20 *Summary of California Law* ("Witkin") Contracts § 351 at 397-98.

21 For all of the foregoing reasons, the FAC does not include sufficient allegations
22 to overcome the statute of frauds. Therefore Plaintiff cannot enforce any alleged oral
23 promises regarding the \$14,158.20. As set forth below, the claim for fraud and deceit
24 does not depend on an enforceable oral promise, but the remaining claims in the FAC
25 must be dismissed.

26 Leave to amend should be freely given. See *Jackson v. Carey*, 353 F.,3d at 758;
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28

³ Plaintiff's Opposition papers also set forth in greater detail the alleged oral communications, the substance of which
could be included in a Second Amended Complaint. See Ferre Decl. (Dkt. 35) at 4:1-15.

1 *Lucas*, 66 F.3d at 248. Therefore such dismissal of these claims will be without
2 prejudice to filing a Second Amended Complaint.

3 The remainder of this Memorandum Decision will revisit the effect of the statute
4 of frauds in the context of Defendants' other arguments and each of Plaintiff's claims.

5 **C. Tender**

6 Defendants argue that Plaintiff cannot maintain any of her claims – with the
7 possible exception of her fifth claim for fraud and deceit – without tendering the full
8 amount owed to Lender. See footnote 2 above and MTD (Dkt. 26) (citing authorities). If
9 Defendants are correct then it appears likely that Plaintiff could not tender the full
10 amount owed, which appears likely to be well over \$150,000. See generally Dkt. 27
11 Ex.B (Notice of Trustee's Sale, dated June 21, 2011, reciting \$147,490.40 owed as of
12 that date). As Defendants argue (Reply (Dkt. 43) at 4:10-18), a proposed future
13 payment through the Chapter 13 plan is not a sufficient tender (if tender is required).

14 Plaintiff argues that no tender is required because the foreclosure sale is void.
15 But Plaintiff's argument rests on alleged *oral* representations that the foreclosure
16 process should have been halted based on payment of the \$14,158.20, and as set forth
17 above the allegations in the FAC are insufficient to make the alleged oral
18 representations binding.

19 Nevertheless, further discussion of the law regarding tender is appropriate for
20 several reasons. First, it appears likely that Plaintiff can amend her FAC to assert
21 claims that are not barred by the statute of frauds that that might ordinarily require a
22 tender, such as a claim for wrongful foreclosure or to quiet title. Second, the parties
23 have already briefed and argued the issues and a ruling should help to clarify the issues
24 for trial. Third, for purposes of setting the *lis pendens* undertaking it is appropriate to
25 consider the arguments regarding tender so as to assess the likelihood that Plaintiff
26 ultimately will prevail on the merits.

27 Therefore the discussion in the rest of this section assumes that Plaintiff can
28 overcome the statute of frauds and could establish at trial that Servicer did in fact

1 represent that payment of \$14,158.20 would halt the foreclosure process. The question
2 is whether in these circumstances Plaintiff nevertheless must tender the full amount
3 owed to Lender in order to set aside the foreclosure sale or assert her other claims.

4 The answer is no.

5 By way of background, California laws governing foreclosure make a sharp
6 distinction between reinstatement of a loan prior to the scheduled foreclosure sale and
7 *redemption* of a loan after the foreclosure sale. *Compare* Cal. Civ. C. § 2924c(e)
8 (reinstatement up to five business days *prior to* scheduled trustee's sale) *with* Cal. C.
9 Civ. P. § 729.030 (redemption periods of three months or one year *after* trustee's sale).
10 Reinstatement only involves curing the defaults, not paying the entire indebtedness.
11 See Cal. Civ. C. § 2924c(a)(1). Redemption, in contrast, does require payment of the
12 entire indebtedness. See Cal. C. Civ. P. § 729.030. This context is helpful in examining
13 the cases that require a plaintiff to tender the full amount owed.

14 The tender rule has been summarized as requiring that “an action to set aside a
15 trustee’s sale for irregularities in sale notice or procedure should be accompanied by an
16 offer to pay the full amount of the debt for which the property was security.” *Arnolds*
17 *Management Corp. v. Eischen*, 158 Cal. App. 3d 575, 578 (2d Dist. 1984) (citations
18 omitted). Assuming for the moment that Plaintiff’s actions are based on “irregularities”
19 in the “sale procedure,” the tender rule has an important limitation: it is “premised upon
20 the equitable maxim that a court of equity will not order that a *useless act* be
21 performed.” *Id.* at 578-79 (citation omitted, emphasis added).

22 Why would it be a “useless act” to set aside a foreclosure sale without tender of
23 the full amount owed? Because in typical cases borrowers fail to explain how anything
24 would have been different if the lender had abided by everything it allegedly was
25 supposed to do, and therefore even if those borrowers could prove the alleged
26 procedural irregularities they would not establish an entitlement to anything more than a
27 right to redeem. See *id.* See also *FPCI Re-Hab 01 v. E & G Investments, Ltd.*, 207 Cal.
28 App. 3d 1018, 1023 (2nd Dist. 1989) (similar reasoning in context of alleged bid-chilling:

1 “In order to prove it was damaged by the irregularities in the foreclosure sale which
2 dissuaded or prevented a higher bid, the [party seeking to set aside the foreclosure
3 sale] would have to produce a ready, willing and able buyer who would have paid the
4 higher price but for the wrongful conduct. Otherwise, damages alleged would be
5 speculative.”).

6 This case is different. According to Plaintiff, Servicer orally represented that
7 there would be no present foreclosure at all, under *any* procedures, upon the tender of
8 \$14,158.20. If those alleged oral representations are enforceable then setting aside the
9 foreclosure sale is not a “useless act” because Plaintiff not only was able to pay the
10 \$14,158.20 but actually did so, and therefore the foreclosure process should have
11 stopped (she claims), which could have given her time to refinance or sell the House
12 before a new foreclosure could be completed. In other words, in these circumstances
13 (which include the hypothesis that Plaintiff could overcome the statute of frauds) the
14 tender rule does not apply because its premise does not apply.

15 Alternatively Plaintiff argues, and Defendants do not dispute, that if a foreclosure
16 sale is void *ab initio* then no tender is required. Plaintiff argues persuasively that if
17 Servicer did agree to halt the foreclosure process in exchange for payment of the
18 \$14,158.20 (and if that agreement is not unenforceable under the statute of frauds),
19 then Servicer and Lender had no authority to proceed with foreclosure so the
20 foreclosure sale is void. *See generally Bank of America, N.A. v. La Jolla Group II*, 129
21 Cal.App.4th 706 (2005); *Dimock v. Emerald Props., LLC*, 81 Cal.App.4th 868 (2000);
22 *Little v. CFS Service Corp.*, 188 Cal.App.3d 1354, 1358-59 (1987); *Bisno v. Sax*, 175
23 Cal.App.2d 714, 724 (1959).⁴

24 Defendants argue that the sale is only void when there is a defect in giving
25 notices and the trustee’s deed does not contain the required recitals. Reply (Dkt. 43) at
26

27 ⁴ Plaintiff’s prayer does not explicitly seek a decree that the foreclosure sale is void (*id.* at 15:5-16:3), but other
28 portions of the FAC refer to the sale as “void” (*e.g.*, *id.* at 7:2), and Plaintiff seeks a decree quieting title as well as a
decree canceling and voiding the Trustee’s Deed Upon Sale. FAC (Dkt. 21) at 13:14-20 & 15:5-16:3. Under the
circumstances it seems fair to read the FAC as seeking a judgment that the foreclosure sale is void, although if
Plaintiff files a Second Amended Complaint that should be made explicit.

1 4:19-28 (citing *inter alia* Miller & Starr, *Cal. Real Estate 3d*, § 10:210 (2011)). That is
2 not the law, nor is it what the Miller & Starr treatise says. That treatise gives examples
3 of when a sale is void, but it does not state that those are the only ways in which a sale
4 can be void. See Miller & Starr at § 10:210, text accompanying nn. 21-22.

5 Alternatively, whether a plaintiff is “required to tender is a matter of discretion left
6 up to the Court” and “tender may not be required where it would be inequitable to do
7 so.” *Trapp v. Chase Home Finance, LLC*, 2010 WL 4703864 at *4 (C.D. Cal.) (citations
8 and internal quotation marks omitted). If Plaintiff is able to overcome the statute of
9 frauds, then she might be able to prove at trial the alleged oral representations that the
10 foreclosure sale would be continued upon payment of \$14,158.20, not the full amount
11 owed to Lender. In these circumstances no tender will be required as a precondition to
12 Plaintiff’s assertion of her claims.

13 In sum, under the FAC all of Plaintiff’s claims except her claim for fraud and
14 deceit are barred by the statute of frauds and the tender rule. But Plaintiff will have
15 leave to amend her FAC and may be able to add sufficient allegations to overcome both
16 the statute of frauds and the tender rule.

17 **D. Fraud and Deceit**

18 Defendants do not appear to raise the statute of frauds in connection with
19 Plaintiff’s claim for fraud and deceit. But cf. MTD (Dkt. 26) at 17:4-6 (arguing that the
20 FAC “fails to provide any documentation evidencing the alleged misrepresentation
21 which would have amounted to a modification of the [DOT]”). In any event, the statute
22 of frauds is intended to prevent frauds, not bar claims for fraud.⁵

23 Plaintiff does not specify a particular type of fraud and deceit, but the elements of
24 fraudulent misrepresentation have been stated as follows: (a) misrepresentation (false
25 representation, concealment, or nondisclosure); (b) knowledge of falsity (or “scienter”);
26

27 _____
28 ⁵ The statute of frauds is intended to address potential fraud in connection with oral promises, which are easily
alleged and hard to disprove. But claims for fraud and deceit are more difficult to prove and it is well established that
the statute of frauds does not bar claims for fraud because the statute should not be used to aid in the perpetration of
a fraud. See 5 Witkin, Torts § 783 at 1134-35 & Supp. 2011.

1 (c) intent to defraud, *i.e.*, to induce reliance; (d) justifiable reliance; and (e) resulting
2 damage. Witkin, Torts § 772 at 1121 (citing *inter alia* Cal. Civ. C. § 1709). A promise
3 made without any intention to perform may constitute fraud. See *id.*, Torts § 781 &
4 Supp. 2011.

5 The FAC alleges most of these elements. It alleges that the oral representations
6 by Servicer's representative, Carrie Dickman, were "false, and known by her to be false,
7 in that Defendants asserted that the failure to pay [the senior] note and the property
8 taxes were events of default, and that the Note [for repayment of the Loan] and [the
9 DOT] would not be reinstated unless those obligations were performed." FAC (Dkt. 21)
10 at 12:17-20. The FAC then alleges that Plaintiff "reasonably relied" upon those
11 representations by paying the \$14,158.20. *Id.* at 13:1-6.

12 One problem with the latter allegation is that the elements of fraud include
13 "justifiable" reliance whereas Plaintiff alleges that she "reasonably" relied on the alleged
14 statements. Compare Witkin, Torts § 772 at 1121 with FAC (Dkt. 21 at 13:1). There is
15 a difference: justifiable reliance means that the circumstances were such as to make it
16 reasonable for Plaintiff herself (*not* a hypothetical reasonable person) to accept the
17 defendant's statements without an independent inquiry or investigation. Witkin, Torts
18 § 812 & Supp. 2011.

19 Defendants obliquely allude to this defect (MTD (Dkt. 26) at 17:9-18:4), but do
20 not really argue the issue so this claim will not be dismissed on this basis.
21 Nevertheless, Plaintiff should state the elements of this claim accurately if she files a
22 Second Amended Complaint, and she should be prepared to offer evidence of justifiable
23 reliance at trial.

24 At oral argument Defendants argued that the remedies for fraud are limited to
25 damages, and based on that premise Purchasers argue that their title to the House
26 should be free of any cloud and the *lis pendens* should be expunged. Their premise is
27 incorrect.

28 "[W]hen the legal title to property has been acquired by fraud, the available

1 remedies include ‘quieting title in the defrauded equitable title holder’s name and
2 making the legal title holder the constructive trustee of the property for the benefit of the
3 defrauded equitable titleholder.’” *Walters v. Fidelity Mortg. of CA*, 730 F.Supp.2d 1185,
4 1198 (E.D. Cal. 2010). “It is the general rule that courts have power to vacate a
5 foreclosure sale where there has been fraud in the procurement of the foreclosure
6 decree or where the sale has been improperly, unfairly or unlawfully conducted, or is
7 tainted by fraud, or where there has been such a mistake that to allow it to stand would
8 be inequitable to purchaser and parties.” *Lona v. Citibank, N.A.*, 202 Cal.App.4th 89,
9 103 (2011) (quoting *Lo v. Jensen*, 88 Cal.App.4th 1093, 1097-1098 (2001)) (other
10 citations omitted). *Cf. Munger v. Moore*, 11 Cal.App.3d 1 (1970) (awarding damages on
11 facts apparently similar to those alleged by Plaintiff, but not addressing whether
12 alternative remedies also would be available).

13 For all of the foregoing reasons Plaintiff’s claim for fraud and deceit will not be
14 dismissed. But if Plaintiff files a Second Amended Complaint then she should clarify
15 that she asserts “justifiable” reliance rather than “reasonable” reliance.

16 **E. Lis Pendens**

17 Because Plaintiff’s remedies include possible recovery of the House a *lis*
18 *pendens* was appropriately filed to protect the interests of Plaintiff and her bankruptcy
19 estate in the House. Defendants argue that Plaintiff should be required to post a bond
20 or other undertaking as a condition for continuing the *lis pendens*, but the present
21 record does not support such a requirement.

22 Federal courts look to state law in matters pertaining to *lis pendens*. *DeLeon v.*
23 *Wells Fargo Bank, N.A.*, 2011 WL 311376, at * 11 (N.D. Cal.) (citing 28 U.S.C. § 1964).
24 Under California Code of Civil Procedure section 405.30, a *lis pendens* may be
25 expunged on either of two grounds: (1) plaintiff’s pleading does not contain a real
26 property claim (which Defendants do not argue), or (2) plaintiff has not shown the
27 probable validity of the real property claim by a preponderance of the evidence. *Id.*
28 (citing Cal. C. Civ. P. §§ 405.31, 405.32). Plaintiff as the party seeking to maintain the

1 *lis pendens* has the burden of proof. Cal. C. Civ. P. § 405.32.

2 “Probable validity” exists when “it is more likely than not that the claimant will
3 obtain a judgment on the claim.” *Id.* at § 405.3. To determine probable validity the
4 court must look beyond the Plaintiff’s pleadings and examine the factual merit of the
5 claim – in effect, forecast the probable outcome at trial. *Kirkeby v. Superior Court of*
6 *Orange County*, 33 Cal.4th 642, 651, 15 Cal.Rptr.3d 805, 93 P.3d 395 (2004). As for
7 an undertaking, any party with an interest in the real property may move to require an
8 undertaking by the claimant as a condition to maintaining the *lis pendens* of record, and
9 the court may order an undertaking of a nature and in an amount that it determines to
10 be just. Cal. C. Civ. P. § 405.34.

11 The court may examine declarations and oral testimony and “make any orders it
12 deems just to provide for discovery by any party affected by a motion to expunge the
13 notice.” Cal. C. Civ. P. § 405.30. Neither Plaintiff nor Defendants have sought to
14 present declarations or oral testimony on this issue, and at this stage of the proceedings
15 that seems unwarranted.

16 Based on an examination of the merits, as set forth above, Plaintiff has met her
17 *prima facie* burden to show the probable validity of her claims affecting interests in the
18 House. In addition, although Defendants have requested an undertaking, it appears
19 that their interests in the House are protected by a large equity cushion: Plaintiff alleges
20 that the equity in the House is approximately \$555,000 (FAC (Dkt. 26) at 13:8-12) and,
21 taking judicial notice of both her original and amended bankruptcy Schedule A, it does
22 not appear that Plaintiff has been inconsistent in alleging that there is a substantial
23 equity in the House (Case No. 2:08-bk-14149-NB, Dkt. 9 & 33)). Therefore based on
24 the present record the amount of the undertaking will be set at \$-0-.

25 Defendants also seek an award of attorneys’ fees. A court shall award
26 reasonable attorney’s fees to the party prevailing on an expungement motion, unless it
27 finds that “the other party acted with substantial justification or that other circumstances
28 would make the imposition of attorney’s fees and costs unjust.” Cal. C. Civ. P. §

1 405.38. Under the circumstances both parties have acted with substantial justification
2 and in addition the circumstances would make imposition of attorneys' fees and costs
3 unjust at this stage, prior to a trial on the merits.

4 **V. CONCLUSION**

5 Based on the foregoing all of the claims in the FAC except the claim for fraud and
6 deceit will be dismissed as moot, but with leave to file a Second Amended Complaint. It
7 is conceivable that Plaintiff would choose to proceed based on the one remaining claim
8 in the FAC, and therefore her request to file belatedly her verification of the FAC will be
9 granted (the request was included in her Opposition papers rather than in any separate
10 motion, but Defendants did not object to that less costly procedure).

11 More likely, Plaintiff will choose to file a Second Amended Complaint. It does not
12 appear that Plaintiff needs much time to make such amendments, nor does it appear
13 that Defendants will be surprised by any such amendments. Therefore the dismissal
14 Orders will set brief deadlines to file a Second Amended Complaint and Answers
15 thereto. Unless a party in interest seeks to change the previously agreed trial date and
16 schedule, those things will be deemed to apply to the amended pleadings.

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26 DATED: March 2, 2012



United States Bankruptcy Judge

NOTE TO USERS OF THIS FORM:

- 1) Attach this form to the last page of a proposed Order or Judgment. Do not file as a separate document.
- 2) The title of the judgment or order and all service information must be filled in by the party lodging the order.
- 3) **Category I.** below: The United States trustee and case trustee (if any) will always be in this category.
- 4) **Category II.** below: List **ONLY** addresses for debtor (and attorney), movant (or attorney) and person/entity (or attorney) who filed an opposition to the requested relief. DO NOT list an address if person/entity is listed in category I.

NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (*specify*) MEMORANDUM DECISION ON DEFENDANTS' MOTIONS TO DISMISS AND MOTION TO EXPUNGE LIS PENDENS was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner indicated below:

I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") – Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of 3/2/2012, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below.

Richard T. Baum: rickbaum@hotmail.com, rickbaum@hotmail.com
Coby R. Halavais: coby@halavaislaw.com
Amy E. Martinez: amy.martinez@geracilawfirm.com

Service information continued on attached page

II. SERVED BY THE COURT VIA U.S. MAIL: A copy of this notice and a true copy of this judgment or order was sent by United States Mail, first class, postage prepaid, to the following person(s) and/or entity(ies) at the address(es) indicated below:

Suzanne Marie Takowsky
1931 North Beverly Dr
Beverly Hills, CA 90210

Service information continued on attached page

III. TO BE SERVED BY THE LODGING PARTY: Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile transmission number(s), and/or email address(es) indicated below:

Service information continued on attached page