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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

KOSAL VONG, an individual,

Plaintiff,

NO. CIV. S-12-2860 LKK/DAD

v.

O R D E R

BANK OF AMERICA, N.A.,  
(for itself and as the  
successor to COUNTRYWIDE  
HOME LOANS, INC., d/b/a  
America's Wholesale Lender,  
Inc., and as successor to  
BAC Home Loans Servicing, LP);  
and DOES 1 through 100,  
inclusive,

Defendants.

\_\_\_\_\_ /

This is a foreclosure case. For the reasons set forth below:  
defendant's motion to dismiss the federal claim will be granted;  
and the motion to dismiss the state claims will be granted in part,  
and denied in part.<sup>1</sup>

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<sup>1</sup> Although the sole federal claim will be dismissed, the court will retain diversity jurisdiction.

1 **I. THE FACTS**

2 **A. The Promissory Note and Deed of Trust.**

3 Plaintiff financed the purchase of his home with a "negotiable  
4 promissory note" ("note") for \$364,000 from non-party Countrywide  
5 Home Loans ("Countrywide"), aka "America's Wholesale Lender."<sup>2</sup>  
6 Complaint at 5 ¶ 15; Request for Judicial Notice ("RfJN") Exh. F  
7 ("State Complaint") (ECF No. 9-1, pp. 32-45) ¶ 5.<sup>3</sup> Defendant Bank  
8 of America ("defendant") is the successor in interest to  
9 Countrywide. Complaint at 3 ¶ 8. The original servicer on the  
10 loan was non-party BAC Home Loans Servicing, LP. Id. Defendant  
11 Bank of America is the successor in interest to BAC Home Loans.  
12 Id.

13 \_\_\_\_\_  
14 <sup>2</sup> The note has not been submitted to the court by either  
15 party.

16 <sup>3</sup> Defendant has filed a Request for Judicial Notice ("RfJN")  
17 of the following documents recorded in the official records of San  
18 Joaquin County:

- 19 October 19, 2005 Deed of Trust (Doc. No. 2005-276606)  
20 (ECF No. 9-1 at 1-17);  
21 August 26, 2011 Assignment (Doc. No. 2011-105328)  
22 (ECF No. 9-1 at 18-19);  
23 September 15, 2011 Assignment (Doc. No. 2011-112328)  
24 (ECF No. 9-1 at 27-28);  
25 September 24, 2011 Notice of Default (Doc. No. 2011-112329)  
26 (ECF No. 9-1 at 20-24);  
December 22, 2011 Notice of Trustee's Sale (Doc. No. 2011-  
160722)  
(ECF No. 9-1 at 25-26); and  
March 26, 2012 Superior Court Complaint, Vong v. BAC Home  
Loans Servicing, Case No. 39-2012-00278522-CU-  
OR-STK (Super. Ct. San Joaquin Cty.)  
(ECF No. 9-1 at 29-79).

25 The documents appear to be properly subject to judicial notice, and  
26 plaintiff has not objected to the request. Accordingly, the  
request is **GRANTED**, pursuant to Fed. R. Evid. 201(b)(2) & (c)(2).

1 To secure repayment of the note to Countrywide, plaintiff  
2 executed a Deed of Trust. Complaint at 5 ¶¶ 16-17; Deed of Trust,  
3 RfJN Exh. A ("Trust Deed" or "Security Instrument") (ECF No. 9-1,  
4 pp. 2-17) at 3. ReconTrust Co., N.A., is listed as the "Trustee."  
5 Complaint at 5 ¶ 17; Trust Deed at 3 ¶ (D). The Trust Deed secures  
6 the repayment of the note by transferring title of the property,  
7 in trust, to the Trustee. Trust Deed at 4. The Trustee is also  
8 granted the "power of sale," which enables the Trustee to sell the  
9 property in satisfaction of the debt, in the event of a default.  
10 Id.

11 The Trust Deed lists Countrywide as the "Lender." Trust Deed  
12 at 3 ¶ (C). An entity called the Mortgage Electronic Registration  
13 Systems, Inc. ("MERS"), is listed as the "Beneficiary" of the Trust  
14 Deed. Trust Deed at 3 ¶ (C) & (F).

15 The Trust Deed goes on to set forth the relationship between  
16 the Lender and the Beneficiary.<sup>4</sup> Specifically, MERS (the  
17 Beneficiary), acts "solely as a nominee for Lender."<sup>5</sup> Id. at 3

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19 <sup>4</sup> As discussed further below, a deed of trust "typically  
20 secures a debt owed the beneficiary," which is typically the same  
21 entity as the Lender. Monterey S. P. Partnership v. W. L. Bangham,  
22 Inc., 49 Cal. 3d 454, 461 (1989) (emphasis added). Here, the  
23 Beneficiary and the Lender are separate entities (although the  
Beneficiary is stated to be a "nominee" of the Lender), and the  
Trust Deed secures a debt owed to the Lender (Countrywide), not to  
the Beneficiary (MERS). Complaint at 4 ("This Security Instrument  
secures to Lender ... the repayment of the loan ...").

24 <sup>5</sup> A "nominee" is "a person or entity designated to act for  
25 another in a limited role – in effect, an agent." Fontenot v.  
26 Wells Fargo Bank, N.A., 198 Cal. App. 4th 256, 270-271 (1st Dist.  
2011). As an agent, the nominee, in general, "can be authorized  
to do any act the principal may do." Id., at 480 n.9, citing Cal.  
Civ. Code §§ 2304 & 2305.

1 ¶ (E). The Trust Deed goes on to state that "MERS (as nominee for  
2 Lender ...) has the right: to exercise any or all of those  
3 interests, including, but not limited to, the right to foreclose  
4 and sell the Property; and to take any action required of Lender  
5 including, but not limited to, releasing and cancelling this  
6 Security Instrument." Id. at 4-5.

7 **B. Sale and Assignment of the Note and Trust Deed.**

8 Soon after the loan was executed, Countrywide sold its  
9 interest in the note to "the FANNIE MAE Guaranteed REMIC Pass-  
10 Through Certificates, FANNIE MAE REMIC Trust 2005-123 (the "REMIC  
11 Trust"). Complaint at 5 ¶ 18. Plaintiff alleges in some detail  
12 that the sale to the REMIC Trust was beset with problems: that  
13 there are no documents to prove that this sale occurred; that the  
14 transfer of interests to the REMIC Trust are "void" under "New York  
15 trust law" and a certain "Pooling and Servicing Agreement ('PSA');"  
16 that the sale to the REMIC Trust was not a "true sale;" that the  
17 security interest in the note was never "perfected;" and that the  
18 note was never actually transferred to the REMIC Trust entities.  
19 Complaint at 5-8 ¶¶ 18-28.

20 In August 2011, MERS executed an assignment of "all beneficial  
21 interest" under the Trust Deed, together with the promissory note  
22 it secured, to defendant Bank of America. Complaint at 9 ¶ 32;  
23 Assignment, RfJN Exh. B (ECF No. 9-1, p. 19) at 19.<sup>6</sup> Defendant

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24  
25 <sup>6</sup> On September 15, 2011, MERS executed a second assignment of  
26 the Trust Deed to defendant, which was also recorded by defendant.  
ECF No. 9-1 at 28. Neither side discusses this or explains what  
to make of it.

1 recorded the Assignment. Assignment at 19.

2 In September 2011, ReconTrust, the Trustee on the Deed of  
3 Trust, recorded a Notice of Default. Complaint at 9 ¶ 33; RfJN  
4 Exh. C ("Default") (ECF No. 9-1, pp. 21-23). In December 2011,  
5 ReconTrust recorded a Notice of Sale. Complaint at 9 ¶ 34; RfJN  
6 Exh. D (ECF No. 9-1, p. 26).

7 Plaintiff does not allege that the property has been sold, nor  
8 that a sale is imminent.

9 **II. MOTION TO DISMISS STANDARDS**

10 A dismissal motion under Fed. R. Civ. P. 12(b)(6) challenges  
11 a complaint's compliance with the federal pleading requirements.  
12 Under Fed. R. Civ. P. 8(a)(2), a pleading must contain a "short and  
13 plain statement of the claim showing that the pleader is entitled  
14 to relief." The complaint must give the defendant "fair notice  
15 of what the ... claim is and the grounds upon which it rests."'  
16 Bell Atlantic v. Twombly, 550 U.S. 544, 555 (2007), quoting Conley  
17 v. Gibson, 355 U.S. 41, 47 (1957).

18 To meet this requirement, the complaint must be supported by  
19 factual allegations. Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.  
20 Ct. 1937 (2009). Moreover, this court "must accept as true all of  
21 the factual allegations contained in the complaint." Erickson v.  
22 Pardus, 551 U.S. 89, 94 (2007).<sup>7</sup>

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23  
24 <sup>7</sup> Citing Twombly, 556 U.S. at 555-56, Neitzke v. Williams, 490  
25 U.S. 319, 327 (1989) ("[w]hat Rule 12(b)(6) does not countenance  
26 are dismissals based on a judge's disbelief of a complaint's  
factual allegations"), and Scheuer v. Rhodes, 416 U.S. 232, 236  
(1974) ("it may appear on the face of the pleadings that a recovery  
is very remote and unlikely but that is not the test" under

1           “While legal conclusions can provide the framework of a  
2 complaint,” neither legal conclusions nor conclusory statements are  
3 themselves sufficient, and such statements are not entitled to a  
4 presumption of truth. Iqbal, 556 U.S. at 678. Iqbal and Twombly  
5 therefore prescribe a two step process for evaluation of motions  
6 to dismiss. The court first identifies the non-conclusory factual  
7 allegations, and then determines whether these allegations, taken  
8 as true and construed in the light most favorable to the plaintiff,  
9 “plausibly give rise to an entitlement to relief.” Iqbal, 556 U.S.  
10 at 664.

11           “Plausibility,” as it is used in Twombly and Iqbal, does not  
12 refer to the likelihood that a pleader will succeed in proving the  
13 allegations. Instead, it refers to whether the non-conclusory  
14 factual allegations, when assumed to be true, “allow[ ] the court  
15 to draw the reasonable inference that the defendant is liable for  
16 the misconduct alleged.” Iqbal, 556 U.S. at 663. “The  
17 plausibility standard is not akin to a ‘probability requirement,’  
18 but it asks for more than a sheer possibility that a defendant has  
19 acted unlawfully.” Id. (quoting Twombly, 550 U.S. at 557).<sup>8</sup> A

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20  
21 Rule 12(b)(6)).

22           <sup>8</sup> Twombly imposed an apparently new “plausibility” gloss on  
23 the previously well-known Rule 8(a) standard, and retired the  
24 long-established “no set of facts” standard of Conley v. Gibson,  
25 355 U.S. 41 (1957), although it did not overrule that case  
26 outright. See Moss v. U.S. Secret Service, 572 F.3d 962, 968 (9th  
Cir. 2009) (the Twombly Court “cautioned that it was not outright  
overruling Conley . . .,” although it was retiring the “no set of  
facts” language from Conley). The Ninth Circuit has acknowledged  
the difficulty of applying the resulting standard, given the  
“perplexing” mix of standards the Supreme Court has applied in

1 complaint may fail to show a right to relief either by lacking a  
2 cognizable legal theory or by lacking sufficient facts alleged  
3 under a cognizable legal theory. Balistreri v. Pacifica Police  
4 Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

5 **III. ANALYSIS**

6 **A. First Cause of Action: Slander of Title.**

7 Plaintiff alleges "slander of title" based on the recording  
8 of the Assignment by MERS to defendant, and the subsequent  
9 recording of the Notice of Default and the Notice of Sale.

10 The elements of a cause of action for slander of title  
11 are (1) a publication, which is (2) without privilege or  
justification, (3) false, and (4) causes pecuniary loss.

12 La Jolla Group II v. Bruce, 211 Cal. App. 4th 461, 472 (5th  
13 Dist. 2012).<sup>9</sup> "False" in this context means "without legal

14 \_\_\_\_\_  
15 recent cases. See Starr v. Baca, 652 F.3d 1202, 1215 (9th  
16 Cir. 2011) (comparing the Court's application of the "original,  
17 more lenient version of Rule 8(a)" in Swierkiewicz v. Sorema N.A.,  
18 534 U.S. 506 (2002) and Erickson v. Pardus, 551 U.S. 89 (2007) (per  
19 curiam), with the seemingly "higher pleading standard" in Dura  
Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336 (2005), Twombly and  
Iqbal), cert. denied, 132 S. Ct. 2101 (2012). See also Cook v.  
Brewer, 637 F.3d 1002, 1004 (9th Cir. 2011) (applying the "no set  
of facts" standard to a Section 1983 case).

20 <sup>9</sup> Plaintiff sufficiently alleges "publication" by alleging  
21 that the documents were "recorded" at the County Recorder's office.  
22 Accord, Albertson v. Raboff, 46 Cal. 2d 375 (1956) (recording a lis  
pendens is a "publication"). In any event, defendant does not  
challenge "publication" for purposes of this motion. Defendant's  
Motion To Dismiss ("Motion") (ECF No. 8) at 14.

23 Also, plaintiff sufficiently alleges "pecuniary loss" when he  
24 alleges that the slander of title "impairs the vendibility of  
25 Plaintiff's Subject Property on the open market," and caused him  
26 "to retain attorneys to bring this action to cancel the instruments  
casting doubt on Plaintiff's title." Complaint at 10-11 ¶¶ 4-5.  
See Davis v. Wood, 61 Cal. App. 2d 788, 798, 143 P.2d 740, 745 (3rd  
Dist. 1943) ("From the foregoing statements of the law relating to

1 foundation." Gudger v. Manton, 21 Cal. 2d 537, 54 (1943) ("in  
2 order that the elements of that tort may exist, the lien must be  
3 false, that is without legal foundation"). The basis for  
4 plaintiff's claim is his assertion that MERS did not have the  
5 authority to transfer the "beneficial interest" in the Deed of  
6 Trust to defendant. He then asserts that the subsequent recordings  
7 of the Notice of Default and Sale were also false, because they are  
8 based upon the allegedly false Assignment.

9 **1. Falsity.**

10 **(a) The "Assignment."**

11 **(i) MERS is a mere "nominee."**

12 Plaintiff alleges that MERS, although named as the beneficiary  
13 on the Trust Deed, is authorized to act "solely as nominee" for  
14 Lender. Complaint at 10 ¶ 3. "[A]s such," plaintiff alleges,  
15 "MERS did not have the requisite authority to make a valid  
16 assignment of the beneficial interest in the Plaintiff's Deed of  
17 Trust to Defendant Bank of America." Id.

18 This claim is precluded by Fontenot v. Wells Fargo Bank, N.A.,  
19 198 Cal. App. 4th 256, 270-271 (1st Dist. 2011). Fontenot involved  
20 a deed of trust which listed MERS as the "beneficiary," and also  
21 as the "nominee" of the Lender, using language identical to the  
22 Trust Deed at issue here. Id., at 262-63. The plaintiff in  
23 Fontenot asserted, as plaintiff does here, that "MERS lacked the

24 \_\_\_\_\_  
25 damages for slander of title ... it is apparent that the elements  
26 of damages are the loss caused by the impairment of vendibility and  
the cost of clearing the title").



1 authority to assign the note because it was merely a nominee of the  
2 lender and had no interest in the note." Id., at 270. The Court  
3 of Appeal rejected the claim, explaining that MERS did not purport  
4 to assign the beneficial interest in its own right, but rather "as  
5 nominee for the lender," which did have an assignable interest.  
6 Id. As nominee, or agent, for the lender, MERS had as much  
7 authority to make an assignment as its principal gave it, as  
8 determined by the agency agreement between them. Id., at 270-71.  
9 There is no allegation here (and apparently none in Fontenot), that  
10 the agency agreement precluded the assignment. The court  
11 concluded:

12 the allegation that MERS was merely a nominee is  
13 insufficient to demonstrate that MERS lacked authority  
14 to make a valid assignment of the note on behalf of the  
15 original lender.

15 Id., at 271.

16 **(ii) Other possible bases for MERS's lack of**  
17 **authority.**

18 Plaintiff asserts that additional bases for MERS's lack of  
19 authority to make the assignment are "for the reasons set forth in  
20 [sic] herein above." Complaint at 10 ¶ 3. Although plaintiff does  
21 not explain what those reasons are, it appears likely that  
22 plaintiff is complaining that there is something about MERS itself  
23 that precludes it from making the assignment.<sup>10</sup> Plaintiff's

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24 <sup>10</sup> If plaintiff has some other reason for alleging this lack  
25 of authority, the court does not know what it is. Although  
26 plaintiff is only required to provide a "short and plain statement"  
of his claim, the court is not required to guess which factual  
allegations plaintiff believes support his claim.

1 description of MERS in the complaint (at 10 ¶ 2), is consistent  
2 with the description given that entity by the Ninth Circuit, and  
3 by California appellate courts:

4 As case law explains, "MERS is a private corporation  
5 that administers the MERS System, a national electronic  
6 registry that tracks the transfer of ownership interests  
7 and servicing rights in mortgage loans. Through the  
8 MERS System, MERS becomes the mortgagee of record for  
9 participating members through assignment of the members'  
10 interests to MERS. MERS is listed as the grantee in the  
11 official records maintained at county register of deeds  
12 offices. The lenders retain the promissory notes, as  
13 well as the servicing rights to the mortgages. The  
14 lenders can then sell these interests to investors  
15 without having to record the transaction in the public  
16 record. MERS is compensated for its services through  
17 fees charged to participating MERS members."

12 Gomes v. Countrywide Home Loans, Inc., 192 Cal. App. 4th 1149, 1151  
13 (4th Dist.) (citations omitted), cert. denied, 132 S. Ct. 419  
14 (2011); Cervantes v. Countrywide Home Loans, Inc., 656 F.3d 1034,  
15 1038-40 (9th Cir. 2011).

16 The point of using MERS is to avoid the "cumbersome" process  
17 of recording each assignment of the beneficial interest under the  
18 deed of trust, and the note it secures. See Cervantes, 656 F.3d  
19 at 1039 ("This recording process became cumbersome to the mortgage  
20 industry, particularly as the trading of loans increased"); Gomes,  
21 192 Cal. App. 4th at 1151 ("A side effect of the MERS system is  
22 that a transfer of an interest in a mortgage loan between two MERS  
23 members is unknown to those outside the MERS system").<sup>11</sup> This

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24  
25 <sup>11</sup> Another "side-effect" of the MERS system is that  
26 participants do not have to pay recording taxes each time the  
promissory note is traded and the deed of trust is transferred.  
See Cal. Gov't Code § 27201(a) (County Recorder shall accept

1 enables the securitization of the underlying mortgages, and  
2 facilitates their sale for investment - and speculation - on Wall  
3 Street. See Herrera v. Federal Nat. Mortg. Assn., 205 Cal. App.  
4 4th 1495, 1503 (4th Dist. 2012) ("As explained in Fontenot, the  
5 'MERS System' is 'a method devised by the mortgage banking industry  
6 to facilitate the securitization of real property debt  
7 instruments'").

8 By eliminating the practice of recording transfers of deeds  
9 of trust, as the note is sold from lender to lender,<sup>12</sup> the MERS  
10 system may well undermine the protections afforded debtors by  
11 California's comprehensive system of non-judicial foreclosure, Cal.  
12 Civ. Code §§ 2924-2928k. Cf. Garfinkle v. Superior Court, 21 Cal.  
13 3d 268, 279 (1978) ("these statutory regulations were enacted  
14 primarily for the benefit of the trustor and for the greatest part  
15 limit the creditors' otherwise unrestricted exercise of the  
16 contractual power of sale upon default by the trustor").<sup>13</sup>

17 \_\_\_\_\_  
18 documents for recording "upon payment of proper fees and taxes").

19 <sup>12</sup> When a promissory note is sold, "any assignment of the  
20 beneficial interest under a deed of trust may be recorded." Cal.  
21 Civ. Code § 2934. See Cervantes, 656 F.3d at 1039 ("State laws  
22 require the lender to record the deed in the county in which the  
23 property is located. Any subsequent sale or assignment of the deed  
24 must be recorded in the county records, as well") (emphases added);  
25 but see Wilson v. Pacific Coast Title Ins. Co., 106 Cal. App. 2d  
26 599, 602 (4th Dist. 1951) (assignment of beneficial interest of the  
deed of trust three years prior to recording it "was a valid  
transfer of title").

24 <sup>13</sup> For example, by removing any public record of who really  
25 owns the promissory note, the MERS system appears to undermine a  
26 homeowner's ability to make sound financial decisions. A  
homeowner, especially one in serious financial distress, may  
approach a lender who is a community bank or credit union, seeking

1 The participation of MERS also adds complexity to the deed of  
2 trust. Normally, the "beneficiary" and the "lender" are the same  
3 entity. See Huckell v. Matranqa, 99 Cal. App. 3d 471, 481 (1979)  
4 ("The deed of trust is an agreement between three parties, to wit,  
5 a trustor (usually the debtor), the trustee (a neutral party), and  
6 the beneficiary (usually a creditor)"). With MERS, the lender is  
7 now a separate entity from the beneficiary (although the  
8 beneficiary acts as a "nominee," or agent, for the lender), thus  
9 making it more difficult to understand which rights attach to which  
10 party.<sup>14</sup>

11 Having said as much, the court recognizes that it is too late  
12 in the day for this federal district court, exercising diversity  
13 jurisdiction, to find that an assignment of MERS's beneficial  
14 interest to a defendant is false based solely upon a general  
15 critique of the MERS system. Although it appears that the  
16 California Supreme Court has not spoken on the role of MERS, it

17 \_\_\_\_\_  
18 to work out his financial difficulties. The homeowner might have  
19 an entirely different approach if the lender is an overseas  
20 multinational bank, or Wall Street investors. On the other hand,  
21 it must be acknowledged that these protections are diminished in  
22 California by the use of deeds of trust to secure promissory notes,  
23 rather than mortgages. When a promissory note is secured by a  
24 mortgage, in which the lender has been granted the power of sale,  
25 each assignment of the note must be recorded in order to pass along  
26 the power of sale to the assignee. See Cal. Civ. Code § 2932.5.  
This mandatory recording process does not apply to deeds of trust,  
where the power of sale is vested in a third party, the trustee.  
See Herrera, 205 Cal. App. 4th at 1509 (Section 2932.5 "does not  
apply to trust deeds, in which the power of sale is granted to a  
third party, the trustee").

<sup>14</sup> For example, the Trust Deed cryptically states that "MERS  
holds only legal title to the interests granted by Borrower in this  
Security Interest." Trust Deed at 4.

1 also appears that the Courts of Appeal have reviewed its role, and  
2 approved it.<sup>15</sup> See, e.g., Herrera, 205 Cal. App. 4th at 1498 (4th  
3 Dist. 2012) ("The courts in California have universally held that  
4 MERS, as nominee beneficiary, has the power to assign its interest  
5 under a deed of trust"). Indeed, the specific practice of making  
6 MERS the beneficiary and also the nominee for the lender has been  
7 specifically approved by a California Court of Appeal:

8       There is nothing inconsistent in MERS's being designated  
9       both as the beneficiary and as a nominee, i.e., agent,  
10       for the lender. The legal implication of the  
11       designation is that MERS may exercise the rights and  
12       obligations of a beneficiary of the deed of trust, a  
13       role ordinarily afforded the lender, but it will  
14       exercise those rights and obligations only as an agent  
15       for the lender, not for its own interests. ... [T]here  
16       is nothing ambiguous or unusual about the legal  
17       arrangement.

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19 Fontenot, 198 Cal. App. 4th at 273.

20       The "slander of title" claim regarding the Assignment, will  
21 be dismissed for failure to successfully allege falsity.

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<sup>15</sup> Where, as here, "the district court sits in diversity, or hears state law claims based on supplemental jurisdiction, the court applies state substantive law to the state law claims." Mason and Dixon Intermodal, Inc. v. Lapmaster Intern. LLC, 632 F.3d 1056, 1060 (9th Cir. 2011). This court is "bound by pronouncements of the California Supreme Court on applicable state law, but in the absence of such pronouncements," this court must "follow decisions of the California Court of Appeal unless there is convincing evidence that the California Supreme Court would hold otherwise." Carvalho v. Equifax Information Services, LLC, 629 F.3d 876, 889 (9th Cir. 2010); Stoner v. New York Life Ins. Co., 311 U.S. 464, 467 (1940) ("in cases where jurisdiction rests on diversity of citizenship, federal courts ... must follow the decisions of intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently").

1                                   **(b) The Notices of Default and Sale.**

2           As for the Notice of Default and the Notice of Sale, plaintiff  
3 does not explain what was false about them, except that they are  
4 based upon the Assignment, and therefore "any subsequent documents  
5 relying on such assignment would be invalid." Complaint at 10 ¶¶ 3  
6 & 4. The problem with this allegation, is that there is nothing  
7 in the Complaint to support the assertion that the Assignment is  
8 false, as discussed above, and so the allegedly consequent falsity  
9 of the Notices has no basis.

10           Plaintiff makes no other allegation of falsity attaching to  
11 the Notice of Default, either. However, an independent look at the  
12 Notice of Default reveals that it includes a sworn declaration that  
13 Bank of America Home Loan "tried with due diligence to contact the  
14 borrower in accordance with California Civil Code Section 2923.5."  
15 Trust Deed at 24. This declaration is required by law to be  
16 attached to the Notice of Default. Cal. Civ. Code § 2923.5(b).  
17 Plaintiff elsewhere in the complaint adequately alleges that this  
18 declaration is "false." Complaint at 13 ¶ 14. If the declaration  
19 is false - and defendant did not actually use the required "due  
20 diligence" in trying to contact plaintiff - then the Notice of  
21 Default itself is false, since the declaration must be attached to  
22 the Notice. Cal. Civ. Code § 2923.5(b). Moreover, the Notice is  
23 invalid, since "due diligence" is a statutory prerequisite to  
24 filing the Notice of Default. Cal. Civ. Code § 2923.5(a), (e).

25           The Notice of Trustee's Sale asserts that the Trustee will  
26 sell the property at auction on a specified date. Trust Deed at

1 26. It is sufficiently alleged to be false, because - accepting  
2 as true plaintiff's allegation regarding the falsity of the Notice  
3 of Default and defendant's failure to use "due diligence" - the  
4 Trustee could not sell the property at auction. Id., §§ 2923.5(a)  
5 (cannot record notice of default prior to performing due diligence)  
6 & 2924 (cannot exercise power of sale prior to filing the notice  
7 of default).

## 8 **2. Privilege.**

9 Defendant argues that the filing of the Notice of Default and  
10 the Notice of Sale, even if they are false, are "privileged"  
11 pursuant to Cal. Civ. Code § 2924(d)(1). That section provides  
12 that the "mailing, publication, and delivery" of any notice  
13 "required by this section" is privileged. As discussed above, the  
14 recording of a Notice of Default and a Notice of Sale are  
15 "required" by Section 2924 before a non-judicial foreclosure can  
16 proceed. Id., § 2924(a)(1) & (3).

17 The problem for defendant is that the recording of the Notice  
18 of Default and the Notice of Sale are not required - indeed they  
19 are prohibited - if defendant has not first completed its "due  
20 diligence" under Section 2923.5. Since plaintiff has adequately  
21 alleged that defendant did not do the required "due diligence," the  
22 privilege cannot apply.<sup>16</sup>

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23  
24 <sup>16</sup> The court notes that the Notices of Default and Sale appear  
25 to have been recorded at the request of the Trustee, not the  
26 defendant. See Default at 21; Sale at 26. However, defendant's  
motion does not assert that it did not record these documents, and  
since the Trustee presumably did not act independently and on its  
own behalf, the court will not consider the matter further.

1           **B. Second Cause of Action: Wrongful Foreclosure.**

2           "California recognizes a cause of action for wrongful  
3 foreclosure under equitable principles." Barroso v. Ocwen Loan  
4 Servicing, LLC, 208 Cal. App. 4th 1001, 1016 (2nd Dist. 2012). The  
5 elements of this claim are:

6           (1) the trustee or mortgagee caused an illegal,  
7 fraudulent, or willfully oppressive sale of real  
8 property pursuant to a power of sale in a mortgage or  
9 deed of trust; (2) the party attacking the sale (usually  
10 but not always the trustor or mortgagor) was prejudiced  
or harmed; and (3) in cases where the trustor or mortgagor  
tendered the amount of the secured indebtedness or was  
excused from tendering.

11 Lona v. Citibank, N.A., 202 Cal. App. 4th 89, 104 (6th Dist. 2011).

12 Defendant argues that plaintiff's claim fails because: (1) the  
13 Complaint fails to establish that the defendants lacked the  
14 authority to foreclose, presumably an attack on the first element;  
15 (2) plaintiff does not allege a sale occurred, and therefore he  
16 alleges no "prejudice" or "harm;" and (3) plaintiff does not allege  
17 a "credible tender."

18           Because plaintiff adequately pleads a claim for wrongful  
19 foreclosure, defendant's motion to dismiss this claim will be  
20 denied.

21           **1. Authority to foreclose; illegality of foreclosure.**

22           Defendant's attack on the first element fails because  
23 plaintiff adequately alleges that defendant lacks the authority to  
24 foreclose, and that foreclosure at this point would be illegal for  
25 failure to comply with a statutory condition precedent, namely Cal.  
26 Civ. Code § 2923.5. Hidden away in his Third Cause of Action (and



1 completely missing from the "wrongful foreclosure" allegations),  
2 is plaintiff's allegation that defendant "violated California Civil  
3 Code Section 2923.5 by failing to contact Plaintiff, in person or  
4 by telephone, at least thirty (30) days prior to causing ReconTrust  
5 to record the Notice of Default." Complaint at 12 ¶ 14.<sup>17</sup> This  
6 allegation is plainly sufficient to state "a cause of action for  
7 wrongful foreclosure based on the purported failure to comply with  
8 Civil Code section 2923.5 before recordation of the notice of  
9 default." Intengan v. BAC Home Loans Servicing LP, 214 Cal. App.  
10 4th 1047, 1058 (1st Dist. 2013).

11 Under California law, the trustee may not exercise its power  
12 of sale until it has first filed a notice of default in the county  
13 recorder's office. Cal. Civ. Code § 2924(a)(1). However, the  
14 trustee "may not record a notice of default" until it has first  
15 contacted the borrower "in person or by telephone in order to  
16 assess the borrower's financial situation and explore options for  
17 the borrower to avoid foreclosure." Cal. Civ. Code  
18 § 2923.5(a)(1)(A), (a)(2).

19 If the trustee cannot contact the borrower, it may record the  
20 notice of default only if it conducts "due diligence," as defined  
21 in the statute. Id., § 2923(e). Specifically, the servicer must  
22

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23 <sup>17</sup> The allegations found in the "wrongful foreclosure" claim  
24 itself do not support the claim. Plaintiff alleges that the  
25 foreclosure is wrongful because defendant failed to comply with  
26 Cal. Civ. Code § 2932.5. However, Section 2932.5 is not applicable  
to this case, as "It is well established that section 2932.5 does  
not apply to trust deeds, in which the power of sale is granted to  
a third party, the trustee." Herrera, 205 Cal. App. 4th at 1509.

1 first send the borrower a letter by first class mail, and it must  
2 contain information specified in the statute. Id., § 2923(e)(1).  
3 Next, the servicer must call the borrower by phone "at least three  
4 times at different hours and on different days." Id.,  
5 § 2923.5(e)(2)(A). Next, the servicer must send the borrower a  
6 certified letter, return receipt requested. Id., § 2923.5(e)(3).  
7 Even if all that fails, the servicer still has not satisfied its  
8 "due diligence" requirements unless it also has provided "a means  
9 for the borrower to contact it in a timely manner" via a toll-free  
10 telephone call, id., § 2923.5(e)(4), and also provided on its  
11 internet home page, a "prominent link" to certain sources of  
12 information as specified in the statute, id., § 2923.5(e)(5).

13 Plaintiff's allegation that defendant did not comply with this  
14 condition precedent is plainly sufficient to state a claim for  
15 wrongful foreclosure. Intengan, 214 Cal. App. 4th at 1056  
16 (allegation that respondents "'did not comply with such contact and  
17 due diligence requirements pursuant to Civil Code section 2923.5,'"  
18 when broadly construed on demurrer, "stated a cause of action for  
19 wrongful foreclosure based on respondents' alleged noncompliance  
20 with Civil Code section 2923.5").

21 Defendant argues that plaintiff's allegation is  
22 "conclusionary" and should not survive a motion to dismiss. The  
23 court disagrees. It is a sufficient allegation under notice  
24 pleading standards. See Dumas v. First Northern Bank, 2011 WL  
25 4906412 at \*10, 2011 U.S. Dist. LEXIS 119107 at \*27-\*28 (E.D. Cal.  
26 2011) (Karlton, J.) ("In this case, plaintiff asserts that he was

1 never contacted by the defendants prior to the Notice of Default.  
2 Defendant Chase ... argues that plaintiff fails to state a claim  
3 under § 2923.5 because plaintiff did not specifically allege that  
4 the lender did not practice due diligence in trying to contact the  
5 borrower. However, the court concludes that the FAC is adequate  
6 under the notice pleading requirements that govern this cause of  
7 action").

8 Defendant argues that the declaration it attached to the  
9 Notice of Default - as it was required to do by statute -  
10 completely rebuts plaintiff's allegation. The declaration states,  
11 in its entirety: "Bank of America Home Loan ... tried with due  
12 diligence to contact the borrower in accordance with California  
13 Civil Code Section 2923.5." Default at 24. In fact, the  
14 declaration - which is itself purely a statement of conclusion -  
15 at most creates a factual issue which should not be resolved on  
16 this dismissal motion.<sup>18</sup> The declaration sets forth no facts to  
17 support its "due diligence" conclusion, even though the defendant  
18 is the one in a position to know whether any of the elements of  
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21 <sup>18</sup> "Civil Code section 2923.5 requires not only that a  
22 declaration of compliance be attached to the notice of default, but  
23 that the bank actually perform the underlying acts (i.e.,  
24 contacting the borrower or attempting such contact with due  
25 diligence) that would constitute compliance. While judicial notice  
26 could be properly taken of the existence of Jones' declaration, it  
could not be taken of the facts of compliance asserted in the  
declaration, at least where, as here, Intengan has alleged and  
argued that the declaration is false and the facts asserted in the  
declaration are reasonably subject to dispute." Intengan, 214 Cal.  
App. 4th at 1057.

1 "due diligence" were actually carried out.<sup>19</sup>

2 **2. Prejudice or harm.**

3 Defendant attacks the second element of this claim by arguing  
4 that plaintiff has not alleged prejudice or harm, since he has  
5 failed to allege that the sale has even occurred. However, this  
6 is a claim to enjoin the foreclosure, and to avoid the harm that  
7 would occur if plaintiff lost his house.<sup>20</sup> See Intengan, 214 Cal.  
8 App. 4th (reversing demurrer on a wrongful foreclosure claim that  
9 is filed prior to the foreclosure, and collecting state and federal  
10 cases permitting the claim prior to foreclosure).

11 **3. Tender of the amount owed.**

12 Defendant asserts that the wrongful foreclosure claim must be  
13 dismissed because plaintiff failed to tender the amount of the  
14 secured debt. Motion at 14-15. However, the only cases defendant  
15 cites are those in which the borrower is attempting to set aside  
16 a foreclosure sale that has already occurred.<sup>21</sup> Plaintiff here

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17  
18 <sup>19</sup> Plaintiff, in any event, rebuts defendant's conclusory  
19 declaration "is false." See Complaint at 13 ¶ 14.

20 <sup>20</sup> To the degree plaintiff seeks damages arising from a  
21 wrongful foreclosure due to an alleged lack of authority to  
22 foreclose, such a claim is premature, and not cognizable prior to  
23 a foreclosure sale. Robinson v. Countrywide Home Loans, Inc., 199  
24 Cal. App. 4th 42, 46 (4th Dist. 2011) ("We agree with the Gomes  
25 court that the statutory scheme (§§ 2924-2924k) does not provide  
26 for a preemptive suit challenging standing").

24 <sup>21</sup> Abdallah v. United Savings Bank, 43 Cal. App. 4th 1101,  
25 1105 (1st Dist. 1996) ("The property was sold under the deed of  
26 trust," and plaintiffs sued "seeking to set aside the trustee's  
sale"), cert. denied, 519 U.S. 1081 (1997); Arnolds Management  
Corp. v. Eischen, 158 Cal. App. 3d 575, 577 (2d Dist. 1984)

1 seeks to enjoin the trustee's sale, not to set it aside. Moreover,  
2 he seeks to enjoin it for failure of the defendant to comply with  
3 a condition precedent to the sale, namely, the requirements of Cal.  
4 Civ. Code § 2923.5, discussed below. In such a case, tender is not  
5 required. See Intengan, 214 Cal. App. 4th at 1053 (collecting  
6 cases holding that "[w]hile the tender requirement may apply to  
7 causes of action to set aside a foreclosure sale, a number of  
8 California and federal courts have held or suggested that it does  
9 not apply to actions seeking to enjoin a foreclosure sale—at least  
10 where the lenders had allegedly not complied with a condition  
11 precedent to foreclosure") (emphasis in text); Pfeifer v.  
12 Countrywide Home Loans, Inc., 211 Cal. App. 4th 1250, 1280-1281  
13 (1st Dist. 2012) (plaintiffs "do not need to allege that they will  
14 tender or have tendered the full amount due on their note," in line  
15 with other courts that "have not required tender when the lender  
16 has not yet foreclosed and has allegedly violated laws related to  
17 avoiding the necessity for a foreclosure").

18 The rationale for not requiring a full tender, specifically  
19 in the case where a violation of Section 2923.5 is alleged, is set  
20 forth in Mabry v. Superior Court:

21 \_\_\_\_\_  
22 ("before a junior lienor may set aside a nonjudicial foreclosure  
23 of real property under a deed of trust because of irregularities  
24 in the sale, the junior lienor must first tender the full amount  
25 owing on the senior obligation"); Nguyen v. Calhoun, 105 Cal. App.  
26 4th 428 (6th Dist. 2003) (involving "competing claims of ownership  
to residential real property. ... The defendants claim their title  
as a result of purchasing the property ... at the lender's  
foreclosure sale"); Alicea v. GE Money Bank, 2009 WL 2136969 at \*3,  
2009 U.S. Dist. LEXIS 60813 (N.D. Cal. 2009) (dismissing  
plaintiff's claim to "set aside Trustee's sale").

1 The right conferred by section 2923.5 is a right to be  
2 contacted to "assess" and "explore" alternatives to  
3 foreclosure prior to a notice of default. It is  
4 enforced by the postponement of a foreclosure sale.  
5 Therefore it would defeat the purpose of the statute to  
6 require the borrower to tender the full amount of the  
7 indebtedness prior to any enforcement of the right to –  
8 and that's the point – the right to be contacted prior  
9 to the notice of default.

10 185 Cal. App. 4th 208, 225 (4th Dist. 2010) (emphasis in text).

11 **C. Third Cause of Action: Cal. Civ. Code § 2923.5.**

12 Plaintiff alleges that the Notice of Default and the Notice  
13 of Trustee's Sale are void and invalid because defendant failed to  
14 contact him, as required by Cal. Civ. Code § 2923.5, 30 days before  
15 recording the Notice of Default. As discussed above, plaintiff  
16 adequately pleads under Section 2923.5, which in turn, provides  
17 plaintiff with a private right of action. Mabry v. Superior Court,  
18 185 Cal. App. 4th at 214 ("May section 2923.5 be enforced by a  
19 private right of action? Yes. Otherwise the statute would be a  
20 dead letter"). Plaintiff's remedy under that section is limited  
21 to a postponement of the foreclosure sale until defendant has  
22 complied with the statute. Id. ("The right of action is limited  
23 to obtaining a postponement of an impending foreclosure to permit  
24 the lender to comply with section 2923.5").

25 **D. Fourth Cause of Action: Real Estate Settlement  
26 Procedures Act ("RESPA"), 12 U.S.C. § 2605.<sup>22</sup>**

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23 <sup>22</sup> Plaintiff asserts this claim against "Wells Fargo,"  
24 Complaint at 13, which is not a defendant. The court presumes that  
25 this is a typographical error, as the fact section of the complaint  
26 is clear that the request was sent to "Bank of America." The claim  
also asserts that the RESPA violation is under "1 U.S.C. § 2601 et  
seq." The presumes that the title plaintiff is referring to "12  
U.S.C. § 2601 et seq."

1 Plaintiff alleges that he sent defendant a "qualified written  
2 request" raising "certain issues" about the note and the Deed of  
3 Trust. Complaint at 9 ¶ 35. He alleges that defendant failed to  
4 provide a meaningful reply.

5 RESPA provides that if the loan servicer receives a "qualified  
6 written request" from the borrower, the servicer "shall provide a  
7 written response." 12 U.S.C. § 2605(e)(1)(A). A "qualified  
8 written request" is a letter that: (1) requests "information  
9 relating to the servicing of" the note, *id.*, § 2605(e)(1)(B); and  
10 (2) sets forth the reasons the borrower believes his account is in  
11 error, or "provides sufficient detail to the servicer regarding  
12 other information sought by the borrower." *Id.*,  
13 § 2605(e)(1)(B)(ii).<sup>23</sup>

14 Defendant moves to dismiss this claim on the grounds that it  
15 provided an adequate response to plaintiff's letter. The court  
16 will dismiss the claim, but for an entirely different reason.  
17 Plaintiff's own allegations reveal that his letter to defendant  
18 only made inquiries about the promissory note and the Deed of Trust  
19 itself - including its assignment and transfer, its securitization  
20 into the REMIC Trust, and alleged "robo-signing" of documents  
21 (which he does not identify). Thus, plaintiff's letter is not a  
22 "qualified written request" for information about the servicing of  
23 the loan, rather it is a request for information about the loan  
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26 <sup>23</sup> The request must also properly identify the borrower. 12  
U.S.C. § 2605(e)(1)(B)(i).

1 itself.<sup>24</sup> As such, it is not a "qualified written request," and  
2 did not trigger defendant's obligation to respond to it, at least  
3 not under RESPA. Medrano v. Flagstar Bank, FSB, 704 F.3d 661, 666-  
4 67 (9th Cir. 2012) petition for cert. filed, 81 U.S.L.W. 3582 (Apr.  
5 13, 2013) (No. 12-1205), quoting 12 U.S.C. § 2605(i)(3). Although  
6 Medrano dealt with a challenge to a loan's "validity or its terms,"  
7 its logic applies to all aspects of the loan that are not  
8 encompassed within the "servicing" of the loan. Here, those other  
9 aspects include securitizing the loan, and transferring or  
10 assigning the deed of trust. Those matters relate to who is the  
11 Trustee, and who is the beneficial owner of the interest in the  
12 note, not anything relating to payment to the loan servicer.

13 This claim will be dismissed, with prejudice.

14 **E. Fifth Cause of Action: Cal. Bus. & Prof. Code § 17200**

15 Plaintiff asserts a claim under Cal. Bus. & Prof. Code  
16 § 17200, et seq., which provides a remedy for "any unlawful ...  
17 business act." Defendant moves to dismiss on the ground that  
18 plaintiff has not alleged any wrongful conduct.

19 Defendant is wrong. Plaintiff has properly alleged that  
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21 <sup>24</sup> The term "servicing" is defined to be:

22 receiving any scheduled periodic payments from a  
23 borrower pursuant to the terms of any loan, including  
24 amounts for escrow accounts described in section 2609 of  
25 this title, and making the payments of principal and  
26 interest and such other payments with respect to the  
amounts received from the borrower as may be required  
pursuant to the terms of the loan.

12 U.S.C.A. § 2605(i)(3).



1 defendant violated Cal. Civ. Code § 2923.5. That is enough to  
2 survive dismissal. Skov v. U.S. Bank Nat. Assn., 207 Cal. App. 4th  
3 690, 694 (6th Dist. 2012) (reversing demurrer for Section 17200  
4 claim which was based upon the allegation that "U.S. Bank failed  
5 to comply with section 2923.5 because it did not contact or attempt  
6 to contact her to discuss her options to avoid foreclosure prior  
7 to filing the notice of default").

8 The motion to dismiss the Section 17200 claim will be denied.

9 **IV. CONCLUSION**

10 For the reasons set forth above, IT IS HEREBY ORDERED THAT:

11 1. Defendant's motion to dismiss the First Claim  
12 ("slander of title"), is **GRANTED IN PART, WITHOUT PREJUDICE**, as it  
13 relates to the recording of the Assignment only;

14 2. Defendant's motion to dismiss the First Claim  
15 ("slander of title"), is **DENIED IN PART**, as it relates to the  
16 recording of the Notices of Default and Sale only;

17 3. Defendant's motion to dismiss the Second Claim  
18 ("wrongful foreclosure"), is **DENIED**;

19 4. Defendant's motion to dismiss the Third Claim (Cal.  
20 Civ. Code § 2923.5), is **DENIED**

21 5. Defendant's motion to dismiss the Fourth Claim  
22 (federal Real Estate Settlement Procedures Act ("RESPA")), is  
23 **GRANTED WITH PREJUDICE**;

24 6. Defendant's motion to dismiss the Fifth Claim  
25 ("Unfair Competition"), is **DENIED**; and


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7. All dates currently set in this matter are  
**CONFIRMED.**

IT IS SO ORDERED.

DATED: May 21, 2013.

  
LAWRENCE K. KARLTON  
SENIOR JUDGE  
UNITED STATES DISTRICT COURT