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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

NANCY EUW-JONG SITANGGANG,

CASE NO. CV F 09-0367 LJO SMS

Plaintiff,

**ORDER TO DISMISS ACTION AND TO
DENY INJUNCTIVE RELIEF**

vs.

(Docs. 6,10.)

INDYMAC BANK, F.S.B., et al.,

Defendants.

BACKGROUND

Plaintiff Nancy Euw-Jong Sitanggang (“plaintiff”) has filed papers, including an Amended Verified Complaint (“AVC”), which claim that her Clovis home is subject to wrongful foreclosure. Plaintiff seeks injunctive relief “to stop” non-judicial foreclosure of her home. Like many before her, plaintiff relies on unsupported factual and legal claims which this and other Courts have rejected and continue to reject routinely.¹ As discussed below, this Court DISMISSES this action and DENIES plaintiff requested injunctive relief.

DISCUSSION

F.R.Civ.P. 12(b)(6) Standards

“A trial court may dismiss a claim sua sponte under Fed.R.Civ.P. 12(b)(6). . . . Such dismissal

¹ Plaintiff appears to pursue wrongful foreclosure and fraud claims against her lender or its assignee, foreclosure trustee, and others involved in her loan and foreclosure.

1 may be made without notice where the claimant cannot possibly win relief.” *Omar v. Sea-Land Service,*
2 *Inc.*, 813 F.2d 986, 991 (9th Cir. 1987); *see Wong v. Bell*, 642 F.2d 359, 361-362 (9th Cir. 1981). Sua
3 sponte dismissal may be made before process is served on defendants. *Neitzke v. Williams*, 490 U.S.
4 319, 324 (1989) (dismissals under 28 U.S.C. § 1915(d) are often made sua sponte); *Franklin v. Murphy*,
5 745 F.2d 1221, 1226 (9th Cir. 1984) (court may dismiss frivolous in forma pauperis action sua sponte
6 prior to service of process on defendants).

7 A F.R.Civ.P. 12(b)(6) dismissal challenges the sufficiency of the pleadings set forth in the
8 complaint. “When a federal court reviews the sufficiency of a complaint, before the reception of any
9 evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether
10 a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the
11 claims.” *Scheurer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683 (1974); *Gilligan v. Jamco Development*
12 *Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). A F.R.Civ.P. 12(b)(6) dismissal is proper where there is either
13 a “lack of a cognizable legal theory” or “the absence of sufficient facts alleged under a cognizable legal
14 theory.” *Balisteri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990); *Graehling v. Village of*
15 *Lombard, Ill.*, 58 F.3d 295, 297 (7th Cir. 1995).

16 In resolving a F.R.Civ.P. 12(b)(6) motion, the court must: (1) construe the complaint in the light
17 most favorable to the plaintiff; (2) accept all well-pleaded factual allegations as true; and (3) determine
18 whether plaintiff can prove any set of facts to support a claim that would merit relief. *Cahill v. Liberty*
19 *Mut. Ins. Co.*, 80 F.3d 336, 337-338 (9th Cir. 1996). Nonetheless, a court is “free to ignore legal
20 conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in
21 the form of factual allegations.” *Farm Credit Services v. American State Bank*, 339 F.3d 765, 767 (8th
22 Cir. 2003) (citation omitted). A court need not permit an attempt to amend a complaint if “it determines
23 that the pleading could not possibly be cured by allegation of other facts.” *Cook, Perkiss and Liehe, Inc.*
24 *v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990). A “plaintiff’s obligation to provide
25 the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic
26 recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
27 127 S. Ct. 1955, 1964-65 (2007) (internal citations omitted). Moreover, a court “will dismiss any claim
28 that, even when construed in the light most favorable to plaintiff, fails to plead sufficiently all required

1 elements of a cause of action.” *Student Loan Marketing Ass'n v. Hanes*, 181 F.R.D. 629, 634 (S.D. Cal.
2 1998).

3 A claim is legally frivolous when it lacks an arguable basis either in law or fact. *Neitzke*, 490
4 U.S. at 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227-1228 (9th Cir. 1984). A frivolous claim
5 is based on an inarguable legal conclusion or a fanciful factual allegation. *Neitzke*, 490 U.S. at 324. A
6 federal court may dismiss a claim as frivolous where it is based on an indisputably meritless legal theory
7 or where the factual contentions are clearly baseless. *Neitzke*, 490 U.S. at 327.

8 With these standards in mind, this Court turns to the AVC’s deficiencies.

9 **Tender To Cure Default**

10 Plaintiff does not deny that she is in default on her \$322,500 refinance home loan. Plaintiff
11 offers nothing to indicate that she is able to tender her debt to warrant disruption of non-judicial
12 foreclosure.

13 A defaulted borrower is “required to allege tender of the amount of [the lender’s] secured
14 indebtedness in order to maintain any cause of action for irregularity in the sale procedure.” *Abdallah*
15 *v. United Savings Bank*, 43 Cal.App.4th 1101, 1109, 51 Cal.Rptr.2d 286 (1996), *cert. denied*, 519 U.S.
16 1081, 117 S.Ct. 746 (1997). In *FPCI RE-HAB 01 v. E & G Investments, Ltd.*, 207 Cal.App.3d 1018,
17 1021, 255 Cal.Rptr. 157 (1989), the California Court of Appeal explained:

18 . . . generally “an action to set aside a trustee’s sale for irregularities in sale notice or
19 procedure should be accompanied by an offer to pay the full amount of the debt for
20 which the property was security.” . . . This rule . . . is based upon the equitable maxim
21 that a court of equity will not order a useless act performed. . . . “A valid and viable
22 tender of payment of the indebtedness owing is essential to an action to cancel a voidable
sale under a deed of trust.” . . . The rationale behind the rule is that if plaintiffs could not
have redeemed the property had the sale procedures been proper, any irregularities in the
sale did not result in damages to the plaintiffs. (Citations omitted.)

23 An action to set aside a foreclosure sale, unaccompanied by an offer to redeem, does not state
24 a cause of action which a court of equity recognizes. *Karlsen v. American Sav. & Loan Assn.*, 15
25 Cal.App.3d 112, 117, 92 Cal.Rptr. 851 (1971). The basic rule is that an offer of performance is of no
26 effect if the person making it is not able to perform. *Karlsen*, 15 Cal.App.3d at 118, 92 Cal.Rptr. 851
27 (citing Cal. Civ. Code, § 1495.) Simply put, if the offeror “is without the money necessary to make the
28 offer good and knows it” the tender is without legal force or effect. *Karlsen*, 15 Cal.App.3d at 118, 92

1 Cal.Rptr. 851 (citing several cases).

2 Plaintiff's inability to make monthly promissory note payments reflects inability to tender
3 amounts owed to bar her claims and requested relief. Plaintiff neither pleads nor offers anything to
4 suggest a tender to pay her debt. Setting aside foreclosure is useless to render plaintiff's claims meritless
5 and subject to dismissal.

6 **Holder Of The Promissory Note**

7 Plaintiff premises her claims on lack of identity of her original promissory note's holder. The
8 AVC alleges: "If the identity of the owner and holder of the Note is not established, someone else may
9 show up later holding the Note and sue Plaintiff or otherwise attempt to collect." The unknown holder
10 of the promissory note theory is meritless.

11 "If the trustee's deed recites that all statutory notice requirements and procedures required by law
12 for the conduct of the foreclosure have been satisfied, a rebuttable presumption arises that the sale has
13 been conducted regularly and properly." *Nguyen v. Calhoun*, 105 Cal.App.4th 428, 440, 129 Cal.Rptr.2d
14 436 (2003). The California Court of Appeal has explained non-judicial foreclosure under California
15 Civil Code sections 2924-2924l:

16 The comprehensive statutory framework established to govern nonjudicial
17 foreclosure sales is intended to be exhaustive. . . . It includes a myriad of rules relating
18 to notice and right to cure. It would be inconsistent with the comprehensive and
19 exhaustive statutory scheme regulating nonjudicial foreclosures to incorporate another
20 unrelated cure provision into statutory nonjudicial foreclosure proceedings.

21 *Moeller v. Lien*, 25 Cal.App.4th 822, 834, 30 Cal.Rptr.2d 777 (1994).

22 Under California Civil Code section 2924(a)(1), a "trustee, mortgagee or beneficiary or any of
23 their authorized agents" may conduct the foreclosure process. Under California Civil Code section
24 2924b(4), a "person authorized to record the notice of default or the notice of sale" includes "an agent
25 for the mortgagee or beneficiary, an agent of the named trustee, any person designated in an executed
26 substitution of trustee, or an agent of that substituted trustee." "Upon default by the trustor, the
27 beneficiary may declare a default and proceed with a nonjudicial foreclosure sale." *Moeller*, 25
28 Cal.App.4th at 830, 30 Cal.Rptr.2d 777.

29 "Under Civil Code section 2924, no party needs to physically possess the promissory note."
30 *Sicairos v. NDEX West, LLC*, 2009 WL 385855, *3 (S.D. Cal. 2009) (citing Cal. Civ. Code, §

1 2924(a)(1)). Rather, “[t]he foreclosure process is commenced by the recording of a notice of default and
2 election to sell by the trustee.” *Moeller*, 25 Cal.App.4th at 830, 30 Cal.Rptr.2d 777.

3 The record reveals no irregularities to preclude non-judicial foreclosure. The California non-
4 judicial foreclosure procedures permit foreclosure to warrant dismissal of plaintiff’s claims.

5 **TILA Rescission**

6 Plaintiff appears to pursue rescission under the Truth in Lending Act (“TILA”), 15 U.S.C. §§
7 1601, et seq., and its implementing regulations 12 C.F.R. §§ 226, et seq. (“Reg. Z”).

8 TILA's “buyer's remorse” provision allows borrowers three business days to rescind, without
9 penalty, a consumer loan that uses their principal dwelling as security. *Semar v. Platte Valley Federal*
10 *Sav. & Loan Ass’n*, 791 F.2d 699, 701 (9th Cir. 1986); 15 U.S.C. § 1635(a). As noted above, plaintiffs’
11 papers make no suggestion of a valid tender of her outstanding loan. The “voiding of a security interest
12 may be judicially conditioned on debtor’s tender of amount due under the loan.” *American Mortgage*
13 *Network, Inc. v. Shelton*, 486 F.3d 815, 821 (4th Cir. 2007).

14 15 U.S.C. § 1635(b) governs the return of money or property when a borrower exercises the right
15 to rescind:

16 . . . Within 20 days after receipt of a notice of rescission, the creditor shall return to the
17 obligor any money or property given as earnest money, downpayment, or otherwise, and
18 shall take any action necessary or appropriate to reflect the termination of any security
19 interest created under the transaction. If the creditor has delivered any property to the
20 obligor, the obligor may retain possession of it. Upon the performance of the creditor's
21 obligations under this section, the obligor shall tender the property to the creditor, except
22 that if return of the property in kind would be impracticable or inequitable, the obligor
shall tender its reasonable value. Tender shall be made at the location of the property or
at the residence of the obligor, at the option of the obligor. If the creditor does not take
possession of the property within 20 days after tender by the obligor, ownership of the
property vests in the obligor without obligation on his part to pay for it. The procedures
prescribed by this subsection shall apply except when otherwise ordered by a court.

23 12 C.F.R. § 226.23(d) address rescission effects and provides:

24 (2) Within 20 calendar days after receipt of a notice of rescission, the creditor
25 shall return any money or property that has been given to anyone in connection with the
26 transaction and shall take any action necessary to reflect the termination of the security
interest.

27 (3) If the creditor has delivered any money or property, the consumer may retain
28 possession until the creditor has met its obligation under paragraph (d)(2) of this section.
When the creditor has complied with that paragraph, **the consumer shall tender the**

1 The AVC merely references a “timely” rescission notice. Plaintiff fails to establish a timely,
2 valid rescission notice and tender of her outstanding debt. “Clearly it was not the intent of Congress to
3 reduce the mortgage company to an unsecured creditor or to simply permit the debtor to indefinitely
4 extend the loan without interest.” *American Mortgage*, 486 F.3d at 820-821. As such, without
5 plaintiff’s tender, TILA rescission is an empty, inappropriate remedy. The absence of a sufficiently
6 alleged notice of rescission and tender of loan proceeds dooms plaintiff’s TILA rescission claim to
7 warrant its dismissal.

8 In the absence of allegations of ability to tender indebtedness and foreclosure irregularities,
9 plaintiffs’ quiet title, TILA and wrongful foreclosure claims fail.

10 **Fraud**

11 The AVC includes a fraud claim based on insufficient allegations.

12 A court may dismiss a claim grounded in fraud when its allegations fail to satisfy F.R.Civ.P.
13 9(b)’s heightened pleading requirements. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1107 (9th Cir.
14 2003). A motion to dismiss a claim “grounded in fraud” under F.R.Civ.P. 9(b) for failure to plead with
15 particularity is the “functional equivalent” of a F.R.Civ.P. 12(b)(6) motion to dismiss for failure to state
16 a claim. *Vess*, 317 F.3d at 1107. As a counter-balance, F.R.Civ.P. 8(a)(2) requires from a pleading “a
17 short and plain statement of the claim showing that the pleader is entitled to relief.”

18 F.R.Civ.P. 9(b)’s heightened pleading standard “is not an invitation to disregard Rule 8’s
19 requirement of simplicity, directness, and clarity” and “has among its purposes the avoidance of
20 unnecessary discovery.” *McHenry v. Renne*, 84 F.3d 1172, 1178 (9th Cir. 1996). “A pleading is
21 sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so that the defendant can
22 prepare an adequate answer from the allegations.” *Neubronner v. Milken*, 6 F.3d 666, 671-672 (9th Cir.
23 1993) (internal quotations omitted; citing *Gottreich v. San Francisco Investment Corp.*, 552 F.2d 866,
24 866 (9th Cir. 1997)). The Ninth Circuit Court of Appeals has explained:

25 Rule 9(b) requires particularized allegations of the circumstances *constituting* fraud. The
26 time, place and content of an alleged misrepresentation may identify the statement or the
27 omission complained of, but these circumstances do not “constitute” fraud. The
28 statement in question must be false to be fraudulent. Accordingly, our cases have
consistently required that circumstances indicating falseness be set forth. . . . [W]e [have]
observed that plaintiff must include statements regarding the time, place, and *nature* of
the alleged fraudulent activities, and that “mere conclusory allegations of fraud are

1 insufficient.” . . . The plaintiff must set forth what is false or misleading about a
2 statement, and why it is false. In other words, the plaintiff must set forth an explanation
as to why the statement or omission complained of was false or misleading. . . .

3 In certain cases, to be sure, the requisite particularity might be supplied with great
4 simplicity.

5 *In Re Glenfed, Inc. Securities Litigation*, 42 F.3d 1541, 1547-1548 (9th Cir. 1994) (en banc) (italics in
6 original) *superseded by statute on other grounds as stated in Marksman Partners, L.P. v. Chantal*
7 *Pharm. Corp.*, 927 F.Supp. 1297 (C.D. Cal. 1996); *see Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir.
8 1997) (“fraud allegations must be accompanied by “the who, what, when, where, and how” of the
9 misconduct charged); *Neubronner*, 6 F.3d at 672 (“complaint must specify such facts as the times, dates,
10 places, benefits received, and other details of the alleged fraudulent activity”).

11 The elements of fraud under California law are:

- 12 1. Misrepresentation (false representation, concealment or nondisclosure);
- 13 2. Knowledge of falsity (“scienter”);
- 14 3. Intent to defraud, i.e., to induce reliance;
- 15 4. Justifiable reliance; and
- 16 5. Resulting damage.

17 *City Solutions, Inc. v. Clear Channel Communications, Inc.*, 365 F.3d 835, 839 (9th Cir. 2004).

18 The AVC merely alleges a defendant misrepresented authority to sign an assignment of deed of
19 trust and substitution of trustee. The AVC lacks specific allegations of fraud elements. The AVC lacks
20 sufficient details of alleged fraud to permit defense of such claim. The time, place and specific nature
21 of fraudulent activities and benefits are missing as are purported damages. The complaint’s conclusory
22 allegations fail to satisfy F.R.Civ.P. 9(b) to support a fraud claim to further warrant its dismissal. No
23 grounds arise for an attempt to amend the fraud claim.

24 **Malice**

25 This Court is concerned that plaintiff brought this action in absence of good faith to stall
26 foreclosure and to vex defendants named in her AVC.

27 The test for maliciousness is a subjective one and requires the court to “determine the . . . good
28 faith of the applicant.” *Kinney v. Plymouth Rock Squab Co.*, 236 U.S. 43, 46 (1915); *see Wright v.*

1 *Newsome*, 795 F.2d 964, 968, n. 1 (11th Cir. 1986). A complaint is malicious if it suggests an intent to
2 vex defendants or abuse the judicial process by relitigating claims decided in prior cases. *Crisafi v.*
3 *Holland*, 655 F.2d 1305, 1309 (D.C. Cir. 1981); *Phillips v. Carey*, 638 F.2d 207, 209 (10th Cir. 1981);
4 *Ballentine v. Crawford*, 563 F.Supp. 627, 628-629 (N.D. Ind. 1983); *cf. Glick v. Gutbrod*, 782 F.2d 754,
5 757 (7th Cir. 1986) (court has inherent power to dismiss case demonstrating “clear pattern of abuse of
6 judicial process”). A lack of good faith or malice also can be inferred from a complaint containing
7 untrue material allegations of fact or false statements made with intent to deceive the court. *See Horsey*
8 *v. Asher*, 741 F.2d 209, 212 (8th Cir. 1984).

9 Plaintiff’s attempt to abuse the judicial process further warrants dismissal of her claims.

10 **Injunctive Relief**

11 Plaintiff fails to demonstrate that she is entitled to requested injunctive relief. The purpose of
12 a preliminary injunction is to preserve the status quo if the balance of equities so heavily favors the
13 moving party that justice requires the court to intervene to secure the positions until the merits of the
14 action are ultimately determined. *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). A
15 preliminary injunction is available to a plaintiff who “demonstrates either (1) a combination of probable
16 success and the possibility of irreparable harm, or (2) that serious questions are raised and the balance
17 of hardship tips in its favor.” *Arcamuzi v. Continental Air Lines, Inc.*, 819 F. 2d 935, 937 (9th Cir.
18 1987). Under either approach the plaintiff “must demonstrate a significant threat of irreparable injury.”
19 *Arcamuzi*, 819 F.2d at 937. Also, an injunction should not issue if the plaintiff “shows no chance of
20 success on the merits.” *Arcamuzi*, 819 F.2d at 937. At a bare minimum, the plaintiff “must demonstrate
21 a fair chance of success of the merits, or questions serious enough to require litigation.” *Arcamuzi*, 819
22 F.2d at 937.

23 Plaintiff makes no showing that justice requires this Court’s intervention on her mere claim that
24 she wishes to remain in her home although she does not pay her loan. Plaintiff makes no attempt to
25 demonstrate even a fair chance of success on the merits or the existence of serious questions to require
26 litigation. As addressed above, her claims are meritless and an unsubstantiated attempt to stall
27 foreclosure. Injunctive relief to delay or preclude foreclosure serves no legitimate purpose.

28 Furthermore, equitable remedies are “unavailable absent a showing of irreparable injury, a

1 requirement that cannot be met where there is no showing of any real or immediate threat that the
2 plaintiff will be wronged again – a ‘likelihood of substantial and immediate irreparable injury.’” *City*
3 *of Los Angeles v. Lyons*, 461 U.S. 95, 111, 103 S.Ct. 1660, 1670 (1983) (quoting *O’Shea*, 414 U.S. at
4 502, 94 S.Ct. at 679). Plaintiff provides no credible, substantiated evidence of identifiable, potentially
5 repeatable wrongs and fails to support her injunctive relief request with adequate legal and factual
6 grounds.

7 **CONCLUSION AND ORDER**

8 For the reasons discussed below, this Court:

- 9 1. DISMISSES without prejudice this action;
- 10 2. DENIES plaintiff injunctive relief;
- 11 3. DIRECTS the clerk to close this action; and
- 12 4. **ADMONISHES plaintiff not to abuse the judicial process to attempt to delay or**
13 **obstruct rightful foreclosure of her home and that plaintiff is subject to sanctions**
14 **if she attempts to do so.**

15 IT IS SO ORDERED.

16 **Dated: May 6, 2009**

/s/ Lawrence J. O’Neill
UNITED STATES DISTRICT JUDGE

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