

1 LARRY ROTHMAN & ASSOCIATES
2 LARRY ROTHMAN – State Bar No. 72451
3 City Plaza
4 1 City Boulevard West, Suite 850
5 Orange, California 92868
6 (714) 363 0220 Telephone
7 (714) 363 0229 Facsimile
8 tocollect@aol.com E-Mail

9 Attorneys for the Defendants:
10 STEVEN D. SILVERSTEIN, RON ELTER, and GRE
11 DEVELOPMENT, INC. as agents and Trustee of the
12 Via Corbina Trust #4

13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**
15 **SOUTHERN DIVISION**

16 CHARLES EDWARD LINCOLN, III

17 Plaintiff,

18 vs.

19 STEVEN D. SILVERSTEIN, RON ELTER,
20 GRE DEVELOPMENT, INC., Individually
21 and as agents for and Trustee of the Via
22 Corbina Trust #4 JOHN MURK, DIANNE
23 D'AGNOLO, The Honorable, SANDRA
24 HUTCHENS, THE SHERIFF OF ORANGE
25 COUNTY, CAL-WESTERN
26 RECONVEYANCE, WELLS FARGO
27 BANK, N.A., DENNIS STACY,
28 COLDWELL BANKER, and JOHN &

CASE NO: SACV09-1072 DOC(Ex)

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS BASED
UPON RULES 12(b)(1) AND
12(b)(6) OF THE FEDERAL RULES
OF CIVIL PROCEDURE
(F.R. C.P. RULE 12)

DATE: November 16, 2009
TIME: 8:30 a.m.
COURTROOM: 9D

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JANE DOES 1-20,

Defendants.

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:
the Defendants, , STEVEN D. SILVERSTEIN, RON ELTER, and GRE
DEVELOPMENT, INC. as agents and Trustee of the Via Corbina Trust #4
Submit the following Memorandum of Points and Authorities in support of
their Motion to Dismiss:

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PAGE

1	INTRODUCTION	5
2	STATEMENT OF FACTS	5
3	THE COMPLAINT MUST BE DISMISSED WHEN PLAINTIFF'S ALLEGATIONS FAIL TO STATE A CAUSE OF ACTION	6
4	ALL CLAIMS AGAINST MOVANTS SHOULD BE DISMISSED SINCE THEY ARE BASED UPON A CONSPIRACY BETWEEN SILVERSTEIN AND HIS CLIENT AND PLAINTIFF FAILED TO OBTAIN PERMISSION FROM THIS COURT TO FILE THIS LAWSUIT	7
5	COUNT I FOR "VOID TRUSTEE'S SALE & TRANSFER OF TITLE" DOES NOT STATE A CAUSE OF ACTION	9
6	COUNT II, III, AND VIII FOR "SLANDER OF TITLE" AND "TORTUOUS INTERFERENCE" DO NOT STATE A CAUSE OF ACTION	11
7	COUNT IV FOR "FORCIBLE DETAINER" DOES NOT STATE A CAUSE OF ACTION	12
8	COUNT V FOR "BREACH OF CONTRACT" DOES NOT STATE A CAUSE OF ACTION	12
9	COUNT VI AND VII FOR "WRONGFUL EVICTION AS TORT AND CONSTITUTIONAL DECLARATORY JUDGMENT RE: STATE LAW, CUSTOM, PRACTICE & POLICY" DOES NOT STATE A CAUSE OF ACTION	13
10	COUNT IX FOR "CIVIL RIGHTS DECLARATORY JUDGMENT" DOES NOT STATE A CAUSE OF ACTION	13
	CONCLUSION	14

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Cases	Page
<u>Abdallah v. United Sav. Bank</u> , (1996) 43 Cal.App.4th 1101, 1109.....	9
<u>Aguilar v. Bocci</u> (1974) 39 Cal.App.3d 475, 477.....	9
<u>Arnolds Mgmt. Corp. v. Eischen</u> , (1984) 158 Cal.App.3d at 579.....	9
<u>Burns v. Hiatt</u> (1906) 149 Cal. 617, 620.....	9
<u>Devereaux v Latham & Watkins</u> (1995) 32 Cal. App 4 th 1571, 1582.....	8
<u>Guerro v Gates</u> (2006) 442 F.2d 697, 703.....	6
<u>Jackson v Carey</u> (2003) 353 F.3d 750, 758.....	6
<u>Karlsen v. Am. Sav. & Loan Ass’n</u> , (1971) 15 Cal.App.3d 112.....	10
<u>Lopez v Smith</u> (2000) 203 F.3d 1122, 1127.....	6
<u>Nguyen v. Calhoun</u> , (2003) 105 Cal.App.4th 428, 439.....	10
<u>Seeley v. Seymour</u> (1987) 190 Cal.App.3d 844, 858, 237 Cal.Rptr. 282.....	11
<u>Stalberg v. Western Title Ins. Co.</u> (1994) 27 Cal.App.4th 925, 929, 32 Cal.Rptr.2d 750.....	11
<u>United States Cold Storage v. Great W. Sav. & Loan Ass’n</u> , (1985) 165 Cal.App.3d 1214, 1225.....	9
<u>Wilton v. Mountain Wood Homeowners Assn.</u> (1993) 18 Cal.App.4th 565, 568, 22 Cal.Rptr.2d 471.....	11
 Statutes and Rules	
28 <u>USC</u> Section 1331.....	5
28 <u>USC</u> Section 1332.....	5
<u>California Civil Code</u> Section 47.....	11, 13
<u>California Civil Code</u> § 1486.....	10
<u>California Civil Code</u> Section 1714.10.....	7, 8
<u>California Code of Civil Procedure</u> Section 1160.....	11
<u>Federal Rules of Civil Procedure</u> , Rule 12(b)(1).....	6
<u>Federal Rules of Civil Procedure</u> , Rule 12(b)(6).....	6

1
2 **1 INTRODUCTION**

3 CHARLES EDWARD LINCOLN, III, (“Lincoln”) has filed another lawsuit
4 with respect to the property located at 4 Via Cobina, Rancho Santa Margarita,
5 California 92688 (“the Property”). This Court has been requested to take judicial
6 notice of Lincoln v Cal-Western Reconveyance Corporation filed in this district as
7 case SACV08-1334 DOC(Ex). In this case, Lincoln claims to request Class
8 Action status against the purchasers of this property at a trustee sale and its
9 unlawful detainer attorney, the foreclosure company, bank, Orange County Sheriff,
10 and others.
11
12
13

14 This Motion has been filed on behalf of Steven D. Silverstein, the unlawful
15 detainer attorney for the purchaser at the trustee sale (“Silverstein”), the Trustee of
16 a Trust which was the purchaser at the trustee sale for the property, Gre
17 Development, Inc. (“Gre”), and its shareholder, Ron Elter, (“Elter”).
18
19

20
21 **2 STATEMENT OF FACTS**

22 Lincoln claims subject matter jurisdiction for this case based upon a
23 “Federal Question” 28 USC Section 1331 and “Diversity” 28 USC Section 1332
24 even though he admits to be a resident of California (See paragraph 1 of the
25 Complaint).
26
27
28

1 The gravamen of the complaint against these Movants is based upon a
2 *conspiracy* between Silverstein and his client, Gre to evict Plaintiff from property
3
4 purchased by Gre at a trustee sale. Lincoln is requesting that the eviction be
5 stopped and that he regains title to the property.
6
7

8 **3 THE COMPLAINT MUST BE DISMISSED WHEN PLAINTIFF'S**
9 **ALLEGATIONS FAIL TO STATE A CAUSE OF ACTION**

10 A Complaint (or its causes of action) must be dismissed under the Federal
11 Rules of Civil Procedure, Rule 12(b)(6), when a plaintiff's allegations fail to state a
12 claim upon which relief can be granted. The Court must accept as true all factual
13 allegations in the complaint and must draw all reasonable inference from those
14 allegations, construing the complaint in the light most favorable to the plaintiff.
15 See Guerro v Gates (2006) 442 F.2d 697, 703. Dismissal without leave to amend
16 is appropriate only when the Court is satisfied that the deficiencies in the complaint
17 could not possibly be cured by amendment. See Jackson v Carey (2003) 353
18 F.3d 750, 758 and Lopez v Smith (2000) 203 F.3d 1122, 1127.
19
20
21
22

23 A Complaint must also be dismissed if this Court does not have subject
24 matter jurisdiction. See Federal Rules of Civil Procedure, Rule 12(b)(1).
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**4 ALL CLAIMS AGAINST MOVANTS SHOULD BE DISMISSED
SINCE THEY ARE BASED UPON A CONSPIRACY BETWEEN
SILVERSTEIN AND HIS CLIENT AND PLAINTIFF FAILED
TO OBTAIN PERMISSION FROM THIS COURT TO FILE
THIS LAWSUIT**

According to California Civil Code Section 1714.10, (a) No cause of action against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney's representation of the client, shall be included in a complaint or other pleading unless the court enters an order allowing the pleading that includes the claim for civil conspiracy to be filed after the court determines that the party seeking to file the pleading has established that there is a reasonable probability that the party will prevail in the action. The court may allow the filing of a pleading claiming liability based upon such a civil conspiracy following the filing of a verified petition therefor accompanied by the proposed pleading and supporting affidavits stating the facts upon which the liability is based. The court shall order service of the petition upon the party against whom the action is proposed to be filed and permit that party to submit opposing affidavits prior to making its determination. The filing of the petition, proposed pleading, and accompanying affidavits shall toll the running of any applicable statute of

1 limitations until the final determination of the matter, which ruling, if favorable to
2 the petitioning party, shall permit the proposed pleading to be filed.

3
4 In this case, Lincoln failed to Petition this Court for the right to file his
5 claim for conspiracy. See Complaint paragraphs 1 through 8, 13, and 19 for the
6 charging allegations against the Movants.

7
8 (b) Failure to obtain a court order where required by subdivision (a) shall be a
9 defense to any action for civil conspiracy filed in violation thereof. The defense
10 shall be raised by the attorney charged with civil conspiracy upon that attorney's
11 first appearance by demurrer, motion to strike, or such other motion or application
12 as may be appropriate. Failure to timely raise the defense shall constitute a waiver
13 thereof.....
14

15
16 See also Devereaux v Latham & Watkins (1995) 32 Cal. App 4th 1571,
17 1582 which holds that California Civil Code Section 1714.10 "which requires a
18 judicial determination of reasonable probability of success prior to permitting the
19 filing of an action against an attorney based on a claim of civil conspiracy with a
20 client."
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COUNT I FOR “VOID TRUSTEE’S SALE & TRANSFER OF TITLE” DOES NOT STATE A CAUSE OF ACTION

This cause of action appears to be based upon a cause of action for quiet title. Lincoln first has to prove that he has standing to bring this action. To set aside the sale, Lincoln first has to tender the funds owed. Under California law, Plaintiff cannot properly allege a quiet title claim unless Plaintiff tenders all amounts due because a Plaintiff may not “quiet title without discharging [the] debt ... the cloud upon his title persists until the debt is paid.” See Aguilar v. Bocci (1974) 39 Cal.App.3d 475, 477 citing Burns v. Hiatt (1906) 149 Cal. 617, 620.) In this instance, Lincoln has not alleged either a proposal to tender or the ability to tender and therefore fails to state sufficient facts to constitute a cause of action for quiet title. Before any liability or damages can be imposed upon the Movants, Lincoln first must support his contention that he is or should be the owner of the premises. However, a party seeking to set aside a foreclosure sale must plead and prove the ability to tender the obligation.

California courts have expanded the application of the tender rule to “any cause of action” that is based upon allegations of wrongful foreclosure or that seeks redress from foreclosure. (Abdallah v. United Sav. Bank, (1996) 43 Cal.App.4th 1101, 1109 [in affirming the sustaining of a demurrer without leave to amend the court explained that the tender rule applies to “any cause of action for

1 irregularity in the sale procedure”]; United States Cold Storage v. Great W. Sav. &
2 Loan Ass’n, (1985) 165 Cal.App.3d 1214, 1225 [affirming judgment of non-suit];
3 Arnolds Mgmt. Corp. v. Eischen, (1984) 158 Cal.App.3d at 579 [affirming
4 sustaining of demurrer without leave to amend on claims of wrongful foreclosure,
5 fraud, and negligence relating to defective notice of foreclosure sale.])
6

7
8 The tender rule is strictly applied. (Nguyen v. Calhoun, (2003) 105 Cal.App.4th
9 428, 439) Absent an alleged and actual tender, the complaint in its entirety fails to
10 state a cause of action. (Karlsen v. Am. Sav. & Loan Ass’n., (1971) 15 Cal.App.3d
11 112.) “A tender must be one of full performance (California Civil Code § 1486)
12 and must be unconditional to be valid.” (Arnolds Mgmt. Corp., supra, 158
13 Cal.App.3d at 580.) Lincoln may not just recite the language, but must actually
14 have the means to make the tender, “if the offeror ‘... is without the money
15 necessary to make the offer good and knows it ...’ the tender is without legal force
16 or effect.” (Karlsen, supra, 15 Cal.App.3d at 118.) Lincoln has not tendered, nor
17 has he offered to tender, the full amount owing. Therefore, Lincoln has no
18 standing to challenge the foreclosure sale or any related claims.
19
20
21
22
23
24
25
26
27
28

1 **6 COUNT II, III, AND VIII FOR "SLANDER OF TITLE" AND**
2 **"TORTUOUS INTERFERENCE" DO NOT STATE A CAUSE OF**
3 **ACTION**
4

5 The elements of slander of title occur when a person, without a privilege to
6 do so, publishes a false statement that disparages title to property and causes
7 pecuniary loss. (Stalberg v. Western Title Ins. Co. (1994) 27 Cal.App.4th 925, 929,
8 32 Cal.Rptr.2d 750.) "The elements of the tort are (1) publication, (2) absence of
9 justification, (3) falsity and (4) direct pecuniary loss." (Seeley v. Seymour (1987)
10 190 Cal.App.3d 844, 858, 237 Cal.Rptr. 282.) What makes conduct actionable is
11 not whether a defendant succeeds in casting a legal cloud on plaintiff's title, but
12 whether the defendant could reasonably foresee that the false publication might
13 determine the conduct of a third person buyer or lessee. (Wilton v. Mountain Wood
14 Homeowners Assn. (1993) 18 Cal.App.4th 565, 568, 22 Cal.Rptr.2d 471.)
15
16
17
18

19
20 In the case before this Court and as discussed above, Lincoln would have to
21 have tendered the funds owed prior to the foreclosure sale. Once the trustee sale
22 occurred, the trustee's deed's recitals validate the sale and the purchaser at the sale
23 cannot disparage the title of the property nor its unlawful detainer attorney . See
24 also California Civil Code Section 47.
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**7 COUNT IV FOR “FORCIBLE DETAINER” DOES NOT STATE A
 CAUSE OF ACTION**

The elements of forcible detainer require a person to take possession of real property without permission or right. See California Code of Civil Procedure Section 1160. The only claims made in the complaint that relate to this cause of action refer to Lincoln’s contention that Gre does not have legal title. Based upon the arguments set forth above, Lincoln has to first state a cause of action in Counts I through III in order to prove that he has standing and a right to possession of the property.

**8 COUNT V FOR “BREACH OF CONTRACT” DOES NOT STATE
 A CAUSE OF ACTION**

There is no allegation of any contract between Lincoln and the Movants so there can be no cause of action for breach of contract. In Paragraph 47, Lincoln further alleges that the Movants induced a breach of contract or breached the implied covenant of good faith. Lincoln fails to allege any facts supporting this conduct.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**9 COUNT VI AND VII FOR “WRONGFUL EVICTION AS TORT AND
CONSTITUTIONAL DECLARATORY JUDGMENT RE: STATE
LAW, CUSTOM, PRACTICE & POLICY” DOES NOT STATE
A CAUSE OF ACTION**

There are many statements in this combined Cause of Action and most are
conclusionary allegations and citations which do not make any sense.

Furthermore, they clearly don't support this non-existent cause of action.

**10 COUNT IX FOR “CIVIL RIGHTS DECLARATORY JUDGMENT”
DOES NOT STATE A CAUSE OF ACTION**

There are many statements in this Cause of Action and most are
conclusionary allegations and citations which do not make any sense.

Furthermore, they clearly don't support this non-existent cause of action.

Apparently, there are also RICO allegations relating to e-mails to Lincoln's
attorney purportedly during the eviction action which are also privileged under
California Civil Code Section 47.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

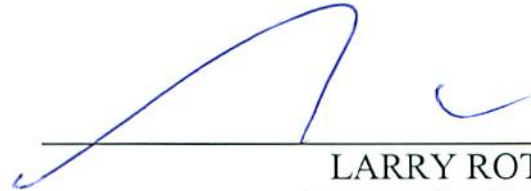
CONCLUSION

Based upon the arguments set forth in this Motion to dismiss, the
Complaint should be dismissed without leave to amend.

Respectfully submitted,

LARRY ROTHMAN & ASSOCIATES

Dated: October 13, 2009



LARRY ROTHMAN,
Attorney for Defendants:

STEVEN D. SILVERSTEIN, RON ELTER, and GRE DEVELOPMENT, INC. as
agents and Trustee of the Via Corbina Trust #4

PROOF OF SERVICE

State of California, County of Orange:

I am employed in the county and state aforesaid. I am over the age of 18 and not a party to the within action; my business address is: City Plaza, 1 City Boulevard West, Suite 850, Orange, California 92868

On October 13, 2009, served the foregoing document described as:

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS BASED UPON RULES 12(b)(1) AND
12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE**

on the parties listed below in this action by placing a true copy thereof or the originals in a sealed envelope sent first class mail and addressed as follows:

**Charles Edward Lincoln, III
c/o Dr. Orly Taitz, Attorney At Law
29839 S. Margarita Parkway
Rancho Santa Margarita, California 92688**

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 13, 2009, at Orange, California.



LARRY ROTHMAN