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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ALVINA FISCHER, formerly known as
ALVINA BANNISTER,

Plaintiff,

v.

DITECH FINANCIAL LLC, DITECH
MORTGAGE COMPANY, GREEN TREE
SERVICING LLC, and EVERBANK,

Defendants.

No. 1:16-cv-01558-DAD-EPG

ORDER GRANTING DEFENDANTS’
MOTION TO DISMISS WITH LEAVE TO
AMEND

(Doc. No. 5)

This matter is before the court on defendants Ditech Financial LLC (“Ditech Financial”), Ditech Mortgage Company (“Ditech Mortgage”),¹ Green Tree Servicing LLC (“Green Tree”), and EverBank’s motion to dismiss plaintiff Alvina Fischer’s complaint for failure to state a claim. A hearing on the motion was held on December 6, 2016. Plaintiff Fischer, proceeding *pro se*, appeared on her own behalf, and attorney Meagan S. Tom appeared on behalf of the defendants. Having considered the parties’ briefs and oral arguments and for the reasons set forth below, the court will grant defendants’ motion to dismiss with leave to amend.

¹ Defendants note in their motion that defendant Ditech Mortgage has been misidentified in plaintiff’s complaint. (Doc. No. 5 at 3.) For purposes of this motion to dismiss, the court will treat both Ditech Mortgage Corporation and Ditech Mortgage Company as the same entity.

1 **BACKGROUND**

2 According to her complaint, plaintiff Alvina Fischer entered into a mortgage contract with
3 Mission Hills Mortgage Company for the purchase of a property located at 9124 East Herndon
4 Avenue, in Clovis, California. (Doc. No. 1-1 ¶¶ 1, 11.) A deed of trust was recorded, and
5 subsequently transferred to defendants. (*Id.* ¶¶ 12–13.) In 2011, plaintiff filed for bankruptcy
6 protection in the Eastern District of California. (*Id.* ¶ 14.) She continued to make payments on
7 her loan until March 2016. (*Id.* ¶ 17.)

8 At some unspecified time, presumably in or around 2016, defendant Green Tree informed
9 plaintiff that her loan was current. (*Id.* ¶ 18.) Green Tree also allegedly transferred its interest in
10 the loan to either defendant Ditech Financial or defendant Ditech Mortgage,² but plaintiff was not
11 originally informed of the transfer or provided year-end tax information. (*Id.* ¶¶ 19–21.) Plaintiff
12 went to refinance her property and was told by both a representative of defendant Green Tree and
13 an independent broker that the balance due on her loan was \$0.00. (*Id.* ¶¶ 22–23.) When plaintiff
14 contacted defendant Ditech Financial or Ditech Mortgage, she was told they were unaware of any
15 loan in her name. (*Id.* ¶ 24.)

16 In March 2016, plaintiff Fischer, through counsel, sent a letter to defendant Ditech
17 Financial requesting information regarding her loan, and for a reconveyance of the deed of trust
18 on her property. The letter stated that if no response was received within thirty days, plaintiff
19 would believe the loan to be satisfied. (*Id.* ¶¶ 25–26, 28.) Plaintiff did not receive a response.
20 (*Id.* ¶¶ 27, 29.) Plaintiff also alleges that payments she sent to defendant Green Tree were not
21 being cashed, and that in May 2016, she received a letter from defendants stating that her prior
22 payment checks could not be cashed because they were considered stale. (*Id.* ¶¶ 30, 32.)

23 Plaintiff commenced this action in Fresno County Superior Court on September 15, 2016.
24 Plaintiff asserts two causes of action: (1) to quiet title to the subject property at 9124 East
25 Herndon Avenue, and (2) for declaratory relief. On October 14, 2016, defendants Ditech
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27 ² In several allegations throughout the complaint, plaintiff makes reference to defendant
28 “DITECH” without specifying whether she refers to one or both of defendants Ditech Financial
and Ditech Mortgage.

1 Financial, Ditech Mortgage, and Green Tree removed this action to federal court on the basis of
2 diversity jurisdiction. (Doc. No. 1.)

3 **LEGAL STANDARD**

4 The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the legal
5 sufficiency of the complaint. *N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir.
6 1983). “Dismissal can be based on the lack of a cognizable legal theory or the absence of
7 sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep't*, 901
8 F.2d 696, 699 (9th Cir. 1990). A plaintiff is required to allege “enough facts to state a claim to
9 relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A
10 claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw
11 the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v.*
12 *Iqbal*, 556 U.S. 662, 678 (2009).

13 In determining whether a complaint states a claim on which relief may be granted, the
14 court accepts as true the allegations in the complaint and construes the allegations in the light
15 most favorable to the plaintiff. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Love v.*
16 *United States*, 915 F.2d 1242, 1245 (9th Cir. 1989). However, the court need not assume the truth
17 of legal conclusions cast in the form of factual allegations. *United States ex rel. Chunie v.*
18 *Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir. 1986). In ruling on a motion to dismiss brought
19 pursuant to Rule 12(b)(6), the court is permitted to consider material which is properly submitted
20 as part of the complaint, documents that are not physically attached to the complaint if their
21 authenticity is not contested and the plaintiffs’ complaint necessarily relies on them, and matters
22 of public record. *Lee v. City of Los Angeles*, 250 F.3d 668, 688–89 (9th Cir. 2001).

23 **DISCUSSION**

24 **A. Quiet Title**

25 To state a claim for quiet title, a plaintiff must submit a verified complaint that includes
26 the following: (1) a description of the property that is the subject of the action, including both its
27 legal description and its street address or common designation; (2) plaintiff’s title and the basis on
28 which it is asserted; (3) the adverse claims to plaintiff’s title against which a determination is

1 sought; (4) the date as of which the determination is sought; and (5) a prayer for the determination
2 of plaintiff's title against the adverse claims. Cal. Civ. Proc. Code § 761.020. In addition,
3 plaintiff may not proceed on such a claim in the absence of tender. *Shimpones v. Stickney*, 219
4 Cal. 637, 649 (1934) (mortgagor cannot quiet his title against the mortgagee without paying the
5 debt secured); *Aguilar v. Bocci*, 39 Cal. App. 3d 475, 477 (1974); *see also Allen v. U.S. Bank*,
6 *Nat'l Ass'n*, No. 1:13-cv-01527-LJO-SMS, 2013 WL 5587389, at *5 (E.D. Cal. Oct. 10, 2013)
7 (“[A] purported quiet title claim is doomed in the absence of a tender of amounts owed.”);
8 *Deerinck v. Heritage Plaza Mortg. Inc.*, No. 2:11-cv-01735-MCE-EFB, 2012 WL 1085520, at *9
9 (E.D. Cal. Mar. 30, 2012) (“[T]o maintain a quiet title claim, a plaintiff is required to allege
10 tender of the proceeds of the loan at the pleading stage.” (internal quotations omitted)); *Briosos v.*
11 *Wells Fargo Bank*, 737 F. Supp. 2d 1018, 1032 (N.D. Cal. 2010) (“In California it is well-settled
12 that ‘a mortgagor cannot quiet his title against the mortgagee without paying the debt secured.’”
13 (quoting *Shimpones*, 219 Cal. at 649)); *Kelley v. Mortg. Elec. Registration*, 642 F. Supp. 2d 1048,
14 1057 (N.D. Cal. 2009) (“Plaintiffs have not alleged . . . that they have satisfied their obligations
15 under the Deed of Trust. As such, they have not stated a claim to quiet title.”).³

16 Here, without deciding whether plaintiff has met the requirements of California Code of
17 Civil Procedure § 761.020, plaintiff's complaint does not allege that she has tendered, or is able to
18 tender, the debt secured by the subject property.⁴ Accordingly, plaintiff's complaint fails to state

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21 ³ Similarly, to the extent plaintiff by this cause of action is trying to set aside a foreclosure sale of
22 her property, such a claim could not lie absent an allegation that plaintiff tendered the full amount
23 owed on the loan. *See Pantoja v. Countrywide Home Loans, Inc.*, 640 F. Supp. 2d 1177, 1183–84
24 (N.D. Cal. 2009) (“Under California law, in an action to set aside a trustee's sale, a plaintiff must
25 demonstrate that he has made a valid and viable tender [offer] of payment of the indebtedness.”
26 (citations and quotation marks omitted)); *see also Alcaraz v. Wachovia Mortgage FSB*, 592 F.
27 Supp. 2d 1296, 1304 (E.D. Cal. 2009) (“A valid and viable tender of payment of the
28 indebtedness owing is essential to an action to cancel a voidable sale under a deed of trust.”)
(citing *Karlsen v. Am. Sav. & Loan Ass'n*, 15 Cal. App. 3d 112 (1971)).

⁴ At the hearing on this motion, the court ordered defendants to file a sur-reply with a statement of
the approximate amount defendants claim is due and owing on the loan. Defendants filed their
sur-reply on December 13, 2016, attaching a statement showing a total payoff amount of
\$139,236.74 for the referenced loan. (Doc. No. 12.)

1 a cognizable quiet title claim, and the claim should be dismissed.⁵

2 **B. Declaratory Judgment**

3 Plaintiff's complaint purports to state an additional claim for declaratory judgment.
4 Specifically, plaintiff seeks a judicial determination of title with respect to the subject property.
5 (See Doc. No. 1-1 ¶ 59.) It is well recognized that "where a plaintiff has alleged a substantive
6 cause of action, a declaratory relief claim should not be used as a superfluous 'second cause of
7 action for the determination of identical issues' subsumed within the first." *Jensen v. Quality*
8 *Loan Serv. Corp.*, 702 F. Supp. 2d 1183, 1189 (E.D. Cal. 2010) (citing *Hood v. Superior Court*,
9 33 Cal. App. 4th 319, 324 (1995), and *Gen. of Am. Ins. Co. v. Lilly*, 258 Cal. App. 2d 465, 470
10 (1968)); see also *Camillo v. Washington Mut. Bank, F.A.*, No. 1:09-cv-1548-AWI-SMS, 2009
11 WL 3614793, at *13 (E.D. Cal. Oct. 27, 2009) (dismissing declaratory relief claim as redundant
12 where the claim would not resolve issues other than those addressed by way of the substantive
13 claims of the complaint). Accordingly, for reasons set forth above regarding plaintiff's quiet title
14 claim, plaintiff's claim for declaratory relief should also be dismissed.

15 **C. Leave to Amend**

16 For the reasons explained above, defendants' motion to dismiss the complaint will be
17 granted. In her opposition to defendants' motion, plaintiff also seeks to add additional causes of
18 action for breach of contract, fraud, fraudulent concealment, negligent misrepresentation,
19 negligent infliction of emotional distress, and unfair business practices. (Doc. No. 7 at 2.) The
20 court has carefully considered whether plaintiff may further amend her counterclaims to state
21 claims upon which relief can be granted. "The court should freely give leave when justice so
22 requires." Fed. R. Civ. P. 15(a). "Valid reasons for denying leave to amend include undue delay,
23 bad faith, prejudice, and futility." *California Architectural Bldg. Prod. v. Franciscan Ceramics*,
24 818 F.2d 1466, 1472 (9th Cir. 1988); see also *Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv.*
25 *Bureau*, 701 F.2d 1276, 1293 (9th Cir. 1983) (holding that while leave to amend shall be freely
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27 ⁵ The court also notes that to the extent plaintiff seeks to quiet title to the subject property as to all
28 defendants, she has not alleged any facts from which the court could infer a connection between
the property and defendant EverBank.

1 given, the court does not have to allow futile amendments). At this early stage of the litigation,
2 the court cannot conclude amendment would be futile. Accordingly, plaintiff Fischer will be
3 granted an opportunity to amend her complaint as to each of her causes of action and as to the
4 additional causes of action proposed.⁶

5 **CONCLUSION**

6 For the reasons set forth above,

- 7 1. Defendants' motion for to dismiss (Doc. No. 5) is granted; and
8 2. Plaintiff's complaint is dismissed with leave to amend.

9 IT IS SO ORDERED.

10 Dated: December 21, 2016

11 
UNITED STATES DISTRICT JUDGE

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21 ⁶ Plaintiff is advised that allegations involving fraud or mistake are subject to the heightened
pleading requirements of the Federal Rules of Civil Procedure. Specifically,

22 In alleging fraud or mistake, a party must state with particularity the
23 circumstances constituting fraud or mistake. Malice, intent,
knowledge, and other conditions of a person's mind may be alleged
generally.

24 Fed. R. Civ. P. 9(b). Accordingly, pursuant to Rule 9(b), a plaintiff at a minimum must plead
25 evidentiary facts such as the time, place, persons, statements and explanations of why allegedly
26 misleading statements are misleading. *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547 n.7
(9th Cir. 1994); *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003);
27 *Fecht v. Price Co.*, 70 F.3d 1078, 1082 (9th Cir. 1995). In addition, “[u]nder California law, the
‘indispensable elements of a fraud claim include a false representation, knowledge of its falsity,
28 intent to defraud, justifiable reliance, and damages.’” *Vess*, 317 F.3d at 1105 (quoting *Moore v.*
Brewster, 96 F.3d 1240, 1245 (9th Cir. 1996)).