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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARIBEL DOMANTAY,
Plaintiff,
v.
NDEX WEST, LLC, et al.,
Defendants.

No. 2:15-cv-0788-MCE-KJN PS

FINDINGS AND RECOMMENDATIONS

Presently before the court is defendant Wells Fargo Bank, N.A.’s (“defendant”) motion to dismiss plaintiff Maribel Domantay’s (“plaintiff”) complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). (ECF No. 7.) Plaintiff filed an opposition and defendant filed a reply. (ECF Nos. 12, 13.) The undersigned has fully considered the parties’ written briefing, appropriate portions of the record, and the applicable law.¹ For the reasons that follow, the court recommends that defendant’s motion to dismiss be granted in full and this action be dismissed with prejudice.

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¹ This motion was submitted on the record and briefs without oral argument pursuant to Local Rule 230(g). (ECF No. 14.)

1 I. Background

2 A. *Procedural History*

3 Plaintiff, who is proceeding without counsel in this action, filed her complaint on January
4 20, 2015, in the Solano County Superior Court naming NDEX West, LLC and World Savings
5 Bank, FSB² as defendants. (ECF No. 1-1.) While the case was pending in the state court, NDEX
6 West, LLC timely filed a declaration of non-monetary status pursuant to California Civil Code §
7 29241 (ECF No. 1-1 at 58-87), and, therefore, is only a nominal party to this action not subject to
8 monetary damages.³

9 The action was subsequently removed to this court by defendant pursuant to this court's
10 diversity jurisdiction.⁴ (ECF No. 1.) On April 17, 2015, defendant filed a motion to dismiss

11 ² World Savings Bank, FSB merged into Wells Fargo Bank, N.A. on November 1, 2009, as the
12 result of a series of name changes and mergers. (ECF No.1-1 at 88-98.) Defendant documents
13 this merger through its request for judicial notice, which is discussed in more detail below.

14 ³ Pursuant to California Civil Code § 29241, a trustee may file a declaration of nonmonetary status
15 “[i]n the event that it is named in an action in which that deed of trust is the subject, and in the
16 event that the trustee maintains a reasonable belief that it has been named in the action solely in
17 its capacity as trustee, and not arising out of any wrongful acts or omissions on its part in the
18 performance of its duties as trustee.” Cal. Civ. Code § 29241(a). In the event that no objection is
19 served within 15 days plus 5 days from the date of service, the trustee shall not be required to
20 participate in the action and shall not be subject to any damages. *Id.* at § 29241(b), (d). Here,
21 plaintiff allegations indicate that NDEX West, LLC was acting as trustee with regard to the deed
22 of trust at issue in this action. (*E.g.*, ECF No. 1-1 at 3-4, 8.) Furthermore, NDEX West, LLC’s
23 declaration demonstrates that it was appointed as the substitute trustee under the deed of trust at
24 issue in this action through a document recorded with the Solano County Recorder’s Office on
25 January 20, 2015. (*Id.* at 71.) The record reflects that plaintiff never objected to NDEX West,
26 LLC’s declaration of nonmonetary status. Accordingly, the court recognizes that NDEX West,
27 LLC is a nominal party to this action not subject to plaintiff’s claims for monetary damages.

28 ⁴ In her opposition to defendant’s motion to dismiss, plaintiff asserts that this action was
improperly removed to federal court because the court does not have subject matter jurisdiction
over this case. This argument is not well taken as this action clearly falls within this court’s
diversity of citizenship jurisdiction under 28 U.S.C. § 1332. The mortgage loan secured by the
deed of trust at issue in this action is alleged to have been \$1,230,000.00, well in excess of the
over \$75,000 amount in controversy requirement. (ECF No. 1-1 at 8.) Furthermore, the parties
are of diverse citizenship; plaintiff is a resident of California and defendant is a resident of South
Dakota. (ECF No. 1-1 at 3, 93-98.) While NDEX West, LLC’s citizenship is not considered for
purposes of diversity due to its nominee status under Cal. Civ. Code § 29241, *see e.g.*, Shawcroft
v. Roundpoint Mortgage Servicing Corp., 2015 WL 6875097, at *3 (E.D. Cal. Nov. 10, 2015)
 (“A defendant filing a [declaration of nonmonetary status] to which no objection is made is

1 pursuant to Federal Rules of Civil Procedure 12(b)(6). (ECF No. 7.) On May 11, 2015, after
2 failing to file an opposition to defendant's motion to dismiss, the court extended plaintiff's
3 deadline to make such a filing. (See ECF No. 10.) On June 9, 2015, after plaintiff again failed to
4 timely file an opposition to defendant's motion, the court recommended that this action be
5 dismissed with prejudice pursuant to Federal Rule of Procedure 41(b). (ECF No. 11.) On June
6 11, 2015, plaintiff filed an untimely opposition to defendant's motion to dismiss. (ECF No. 12.)
7 Thereafter, Wells Fargo filed a response to plaintiff's opposition. (ECF No. 13.) The court
8 subsequently vacated its June 9, 2015 finding and recommendations in light of plaintiff's late
9 opposition and pro se status in order to address defendant's motion to dismiss on the merits.
10 (ECF No. 14.)

11 B. *Factual Allegations*

12 The background facts are taken from plaintiff's complaint, the documents attached to the
13 complaint, and documents properly subject to judicial notice.⁵ On July 20, 2007, plaintiff
14 borrowed \$1,230,000.00 from World Savings Bank, FSB, pursuant to a written promissory note
15 secured by a deed of trust on real property located at 814 Bridle Ridge Drive, Fairfield, California
16 94534-6743 ("Bridle Ridge Property"). (ECF No. 1-1 at 8, 32-47.) The deed of trust names
17 "World Savings Bank, FSB, its successors and/or assignees" as the lender and beneficiary,⁶ and
18 names "Golden West Savings Association Service Co." as the trustee.⁷ (*Id.* at 33-34.)

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21 deemed a nominal party whose citizenship need not be considered for purposes of diversity
22 jurisdiction."), its status as a citizen of Delaware, Texas, and New Hampshire (ECF No. 1 at 3-4)
23 would not defeat the existence of complete diversity in this action. Furthermore, as discussed in
24 more detail below, it also appears that plaintiff attempts to assert several federal law claims, thus
25 also invoking this court's federal question jurisdiction pursuant to 28 U.S.C. § 1331.

26 ⁵ The court's discussion of defendant's request for judicial notice in support of its motion to
27 dismiss (ECF No. 8) is set forth below.

28 ⁶ As discussed in more detail below, defendant became the lender and beneficiary under the deed
of trust after it acquired World Savings Bank, FSB via a series of mergers and name changes.

⁷ The nominal defendant NDEX West, LLC was later substituted as trustee under the deed of
trust.

1 Plaintiff alleges that defendant failed to perfect a security interest in the loan because it
2 subsequently attempted but failed to lawfully assign the promissory note to an unknown third
3 party. (Id. at 8.) Plaintiff also alleges that defendant and its agents have attempted to collect on
4 the promissory note and enforce the deed of trust despite the fact that they did not have any legal
5 right to do so. (Id.) Plaintiff further alleges that defendant does not have a security interest in the
6 mortgage loan because the promissory note and deed of trust were never properly assigned to
7 defendant as a result of the mortgage loan being securitized and pooled with other mortgages
8 pursuant to a Pooling and Servicing Agreement (“PSA”), the terms of which defendant violated.
9 (Id. at 10-13.)

10 Plaintiff also alleges that NDEX West, LLC, acting as defendant’s agent, unlawfully
11 recorded a “Notice of Default and Election to Sell Under the Deed of Trust” for the Bridle Ridge
12 Property in the County Recorder’s Office for Solano County on December 22, 2009, in an attempt
13 to deprive plaintiff of her interest in the property. (Id. at 9.) Plaintiff further claims that during
14 the 30 day period prior to the date the notice of default was recorded, defendant failed to contact
15 plaintiff “in order to assess her financial situation or to explore options to avoid foreclosure and
16 consider or offer a possible permanent loan modification.” (Id. at 14.) In addition, she contends
17 that defendant concealed the fact that the mortgage on the Bridle Ridge Property would be
18 securitized and the terms of any agreements underlying that securitization when she entered into
19 the loan contract. (Id. at 17-18.)

20 Based on these allegations, plaintiff alleges the following nine causes of action: (1)
21 violations of California Civil Code § 2923.5; (2) injunctive relief; (3) fraud in the concealment;
22 (4) intentional infliction of emotional distress; (5) slander of title; (6) quiet title; (7) declaratory
23 relief; (8) rescission; and (9) violation of California’s Unfair Competition Law, California
24 Business & Professions Code §§ 17200, *et seq.* (Id. at 13-30.) Plaintiff also appears to assert
25 claims for violations under the Real Estate Settlement Procedures Act (“RESPA”), Truth in
26 Lending Act (“TILA”), and Fair Debt Collection Practices Act (“FDCPA”). (Id. at 7-8.)

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1 II. Legal Standards

2 A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6)
3 challenges the sufficiency of the pleadings set forth in the complaint. Vega v. JP Morgan Chase
4 Bank, N.A., 654 F. Supp. 2d 1104, 1109 (E.D. Cal. 2009). Under the “notice pleading” standard
5 of the Federal Rules of Civil Procedure, a plaintiff’s complaint must provide, in part, a “short and
6 plain statement” of the plaintiff’s claims showing entitlement to relief. Fed. R. Civ. P. 8(a)(2);
7 see also Paulsen v. CNF Inc., 559 F.3d 1061, 1071 (9th Cir. 2009). “To survive a motion to
8 dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to
9 relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl.
10 Corp. v. Twombly, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff
11 pleads factual content that allows the court to draw the reasonable inference that the defendant is
12 liable for the misconduct alleged.” Id.

13 In considering a motion to dismiss for failure to state a claim, the court accepts all of the
14 facts alleged in the complaint as true and construes them in the light most favorable to the
15 plaintiff. Corrie v. Caterpillar, Inc., 503 F.3d 974, 977 (9th Cir. 2007). The court is “not,
16 however, required to accept as true conclusory allegations that are contradicted by documents
17 referred to in the complaint, and [the court does] not necessarily assume the truth of legal
18 conclusions merely because they are cast in the form of factual allegations.” Paulsen, 559 F.3d at
19 1071. The court must construe a *pro se* pleading liberally to determine if it states a claim and,
20 prior to dismissal, tell a plaintiff of deficiencies in her complaint and give the plaintiff an
21 opportunity to cure them if it appears at all possible that the plaintiff can correct the defect. See
22 Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir. 2000) (en banc); accord Balistreri v. Pacifica
23 Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990) (stating that “pro se pleadings are liberally
24 construed, particularly where civil rights claims are involved”); see also Hebbe v. Pliler, 627 F.3d
25 338, 342 & n.7 (9th Cir. 2010) (stating that courts continue to construe *pro se* filings liberally
26 even when evaluating them under the standard announced in Iqbal).

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1 In ruling on a motion to dismiss filed pursuant to Rule 12(b)(6), the court “may generally
2 consider only allegations contained in the pleadings, exhibits attached to the complaint, and
3 matters properly subject to judicial notice.” Outdoor Media Grp., Inc. v. City of Beaumont, 506
4 F.3d 895, 899 (9th Cir. 2007) (citation and quotation marks omitted). Although the court may not
5 consider a memorandum in opposition to a defendant’s motion to dismiss to determine the
6 propriety of a Rule 12(b)(6) motion, see Schneider v. Cal. Dep’t of Corr., 151 F.3d 1194, 1197
7 n.1 (9th Cir. 1998), it may consider allegations raised in opposition papers in deciding whether to
8 grant leave to amend, see, e.g., Broam v. Bogan, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003).

9 Before turning to defendant’s motion to dismiss, the court first considers defendant’s
10 request for judicial notice.

11 III. Defendant’s Request for Judicial Notice

12 Defendant requests that the court take judicial notice of documents allegedly related to
13 plaintiff’s claims. Plaintiff does not dispute defendant’s request. Specifically, defendant requests
14 that the court take judicial notice of the following: (1) Documents from the Office of Thrift
15 Supervision, Federal Deposit Insurance Corporation, and Comptroller of the Currency
16 Administrator of National Banks demonstrating a series of mergers and name changes that
17 resulted in World Savings Bank, FSB merging into Wells Fargo Bank, N.A, consisting of the
18 following: (i) Certificate of Corporate Existence dated April 21, 2006, issued by the Office of
19 Thrift Supervision, Department of the Treasury (“OTS”), certifying that World Savings Bank,
20 FSB, was a federal savings bank; (ii) OTS Letter dated November 19, 2007; (iii) Charter of
21 Wachovia Mortgage, FSB, effective December 31, 2007, and signed by the Director of the OTS,
22 reflecting in Section 4 that Wachovia was subject to the Home Owner’s Loan Act and the OTS;
23 (iv) Official Certification of the Comptroller of the Currency (“OCC”) stating that effective
24 November 1, 2009, Wachovia Mortgage, FSB converted to Wells Fargo Bank Southwest, N.A.,
25 which then merged with and into Wells Fargo Bank, N.A.; (iv) Federal Deposit Insurance
26 Corporation (“FDIC”) profile and history of World Savings Bank, FSB, dated March 14, 2012,
27 from the FDIC’s official website, reflecting its primary regulator as the OTS; (2) Adjustable Rate
28 Mortgage Note, Pick-A-Payment Loan dated July 20, 2007 for the Bridle Ridge Property; (3)

1 Deed of Trust dated July 20, 2007 for the Bridle Ridge Property, recorded July 26, 2007 in the
2 Solano County Recorder's Office as Document No. 200700082078; (4) Notice of Default and
3 Election to Sell Under Deed of Trust for the Bridle Ridge Property, dated December 22, 2009,
4 and recorded December 23, 2009, in the Solano County Recorder's Office as Document No.
5 200900109645; and (5) Notice of Rescission of Notice of Default for the Bridle Ridge Property,
6 dated April 29, 2010 and recorded May 3, 2010 in the Solano County Recorder's Office as
7 Document No. 201000040070. (ECF No. 8, Exhs. A-E.)

8 A judicially noticed fact must be one not subject to reasonable dispute in that it is either
9 "(1) generally known within the territorial jurisdiction of the trial court or (2) can be accurately
10 and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R.
11 Evid. 201(b). "A court shall take judicial notice if requested by a party and supplied with the
12 necessary information." Fed. R. Evid. 201(d) (1984). Judicially noticed facts often consist of
13 matters of public record. For instance, "[j]udicial notice is appropriate for records and 'reports of
14 administrative bodies.'" United States v. 14.02 Acres of Land More or Less in Fresno County,
15 547 F.3d 943, 955 (9th Cir. 2008) (quoting Interstate Natural Gas Co. v. Southern California Gas
16 Co., 209 F.2d 380, 385 (9th Cir. 1954)).

17 Generally, a court may not consider material beyond the complaint in ruling on a motion
18 to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Lee v. City of Los Angeles, 250
19 F.3d 668, 688 (9th Cir. 2001). "However, '[a] court may take judicial notice of 'matters of public
20 record' without converting a motion to dismiss into a motion for summary judgment,' as long as
21 the facts noticed are not 'subject to reasonable dispute.'" Intri-Plex Technologies, Inc. v. Crest
22 Grp., Inc., 499 F.3d 1048, 1052 (9th Cir. 2007) (quoting Lee, 250 F.3d at 689 (citation omitted));
23 see also United States v. Ritchie, 342 F.3d 903, 908-09 (9th Cir. 2003).

24 Furthermore, under the doctrine of incorporation by reference, the court may consider a
25 document that a plaintiff "necessarily" relied on in the complaint if "(1) the complaint refers to
26 the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the
27 authenticity of the copy attached to the 12(b)(6) motion." Marder v. Lopez, 450 F.3d 445, 448
28 (9th Cir. 2006). "The defendant may offer such a document, and the district court may treat such

1 a document as part of the complaint, and thus may assume that its contents are true for purposes
2 of a motion to dismiss under Rule 12(b)(6).” United States v. Ritchie, 342 F.3d 903, 908 (9th Cir.
3 2003).

4 The court finds that judicial notice of the documents from the OTC, FDIC, and OCC
5 regarding the merger of World Savings Bank, FSB into Wells Fargo Bank, N.A is proper. See,
6 e.g., Hines v. Wells Fargo Home Mortgage, Inc., 2014 WL 5325470, at *3 (E.D. Cal. Oct. 17,
7 2014) (taking judicial notice of the exact documents defendant seeks to have judicially noticed in
8 this action); Hite v. Wachovia Mortgage, 2010 WL 10065632 (E.D. Cal. June 11, 2010) (taking
9 judicial notice of nearly identical documents and collecting sources noticing similar documents).
10 Accordingly, it takes judicial notice of them.

11 Similarly, the documents recorded in the Solano County Recorder’s Office, i.e., the Deed
12 of Trust, Notice of Default and Election to Sell Under Deed of Trust, and Notice of Rescission of
13 Notice of Default, are in the public record; therefore they are the proper subject of judicial notice.
14 See, e.g., Grant v. Aurora Loan Servs., Inc., 736 F. Supp. 2d 1257, 1264 (C.D. Cal. 2010) (taking
15 judicial notice of records of county recorder); Fimbres v. Chapel Mortgage Corp., 2009 WL
16 4163332, at *3 (S.D. Cal. Nov. 20, 2009) (taking judicial notice of a deed of trust, notice of
17 default, notice of trustee’s sale, assignment of deed of trust, and substitution of trustee, as each
18 was a public record); Maguca v. Aurora Loan Services, 2009 WL 3467750, at *2 n. 2 (C.D. Cal.
19 Oct. 28, 2009) (“The Court takes judicial notice of the notice of default, as it is a public record”);
20 Angulo v. Countrywide Home Loans, Inc., 2009 WL 3427179, at *3 n. 3 (E.D. Cal. Oct. 26,
21 2009) (“The Deed of Trust and Notice of Default are matters of public record. As such, this court
22 may consider these foreclosure documents.”).

23 Finally, defendant contends that the Adjustable Rate Mortgage Note, Pick-A-Payment
24 Loan for the Bridle Ridge Property is properly subject to consideration by the court under the
25 incorporation by reference doctrine because this document “is attached to, referred to in, and/or
26 forms the basis of the allegations in plaintiff’s complaint .” (ECF No. 8 at 3.) The court takes
27 consideration of this document because it meets the requirements set forth in Marder, 450 F.3d at
28 448.

1 IV. Defendant's Motion to Dismiss

2 A. *Wells Fargo's Ownership Interest in the Subject Property*

3 As an initial matter, many of plaintiff's claims against defendant appear to be premised on
4 the conclusory allegations that defendant has no ownership interest in the mortgage loan on the
5 Bridle Ridge Property and that it unlawfully sold and/or assigned plaintiff's ownership interest in
6 the property to an unspecified third party by securitizing the underlying loan in violation of the
7 terms of the PSA governing that securitization. Based on these allegations, plaintiff alleges that
8 defendant lacked the standing of a beneficiary to enforce the deed of trust when the notice of
9 default was recorded.

10 First, the documents attached to the complaint and the judicially-noticed documents show
11 that defendant is the lender and beneficiary under the loan as World Savings Bank's successor in
12 interest. The note and deed of trust attached as Exhibit B to the complaint identify "World
13 Savings Bank, FSB, its successors and/or assignees" as the lender and beneficiary of the
14 mortgage, and the judicially-noticed documents demonstrate that World Savings Bank, FSB
15 ultimately merged into Wells Fargo Bank, N.A. Accordingly, to the extent plaintiff premises her
16 claim that defendant has no interest in the mortgage at issue on this basis, it is without factual
17 support. See Paulsen v. CNF, Inc., 559 F.3d 1061, 1071 (9th Cir. 2009) ("[The court is] not . . .
18 required to accept as true conclusory allegations that are contradicted by documents referred to in
19 the complaint, and [the court does] not necessarily assume the truth of legal conclusions merely
20 because they are cast in the form of factual allegations.").

21 Similarly, plaintiff's assertion that defendant has no interest in the loan or has no standing
22 to enforce the deed of trust based on the allegations that defendant securitized the loan and
23 violated the terms of the PSA underlying that securitization fails to provide a basis on which to
24 assert a cognizable claim against defendant. Indeed, as one California court has noted:

25 Courts have rejected homeowners' claims that securitization inherently changes
26 the roles of the original parties. The securitization of a loan does not in fact alter
27 or affect the legal beneficiary's standing to enforce the deed of trust.
28 Securitization merely creates a separate contract, distinct from plaintiffs' debt
obligations under the note and does not change the relationship of the parties in

1 any way.
2 Mendoza v. JPMorgan Chase Bank, N.A., 228 Cal. App. 4th 1020, 1029-30 (Cal. Ct. App. 2014)
3 (citations and quotation marks omitted); see also Brown v. U.S. Bancorp, 2012 WL 665900, at *4
4 (C.D. Cal. Feb. 27, 2012) (“[T]he Court finds that plaintiffs lack standing to challenge the process
5 by which their mortgage was securitized because they are not a party to the PSA.”). Accordingly,
6 plaintiff’s factual allegations fail to demonstrate that defendant was not the beneficiary under the
7 deed of trust or otherwise did not have the authority to foreclose due to its alleged securitization
8 of the loan and violation of the terms of the PSA.

9 California courts have recognized that the comprehensive California foreclosure scheme
10 does not permit a general challenge to the authority of an entity to foreclose on a deed of trust,
11 absent a specific factual basis that demonstrates no authority. See Hinojosa v. Wells Fargo Bank,
12 2012 WL 3313554, at *3 (N.D. Cal. Aug. 13, 2012); Mueller v. Bank of Am., N.A., 2012 WL
13 3134243, at *9 (S.D. Cal. Aug. 1, 2012); Visendi v. Bank of Am. Corp., 2012 WL 2377086, at
14 (E.D. Cal. June 21, 2012); Brown, 2012 WL 665900, at *4; Siliga v. Mortgage Electronic
15 Registration Systems, 219 Cal. App. 4th at 82-85 (Cal. Ct. App. 2013); Jenkins v. JPMorgan
16 Chase Bank, N.A., 216 Cal. App. 4th 497, 512-13 (Cal. Ct. App. 2013); Gomes v. Countrywide
17 Home Loans, Inc., 192 Cal. App. 4th 1149, 1154-55 (Cal. Ct. App. 2011). Here, plaintiff’s
18 allegations fail to provide a factual basis demonstrating that defendant did not have such
19 authority. To the contrary, the documents attached to the complaint and judicially-noticed
20 documents demonstrate that defendant was the beneficiary under the deed of trust, and therefore
21 had the authority to foreclose under the circumstances alleged in the complaint. Accordingly, the
22 court finds that the complaint should be dismissed insofar as it attempts to assert any claim or
23 claims based on the theory that defendant was not the beneficiary under the deed of trust or
24 otherwise did not have the authority to initiate foreclosure proceedings.

25 B. *Claim for Violations of California Civil Code § 2923.5*

26 In addition to her general allegations regarding defendant’s lack of interest in the
27 mortgage, plaintiff also asserts nine discrete causes of action. Plaintiff alleges in her first claim
28 that defendant failed to contact her in order to assess her financial situation or explore options to

1 avoid foreclosure during the 30-day period prior to the recording of the notice of default on
2 December 22, 2009.

3 Section 2923.5 requires a mortgage servicer, mortgagee, trustee, beneficiary, or authorized
4 agent to contact a borrower “in order to assess the borrower’s financial situation and explore
5 options for the borrower to avoid foreclosure” before recording a notice of default against the
6 borrower. Cal. Civ. Code § 2923.5(a)(2). Failure to comply with this requirement is excused if
7 the borrower could not be reached despite “due diligence,” as defined in the statute. Id. §
8 2923.5(g). A mortgagee or beneficiary has satisfied the due diligence requirement if it was not
9 able to contact the borrower after (1) mailing a letter containing certain information; (2) then
10 calling the borrower “by telephone at least three times at different hours and on different days”;
11 (3) mailing a certified letter, with return receipt requested, if the borrower does not call back
12 within two weeks; (4) providing a telephone number to a live representative during business
13 hours; and (5) posting a link on the homepage of its Internet Web site with certain information.
14 Id.

15 Under section 2923.5, a mortgagee may file a notice of default only thirty days after it
16 either made the initial contact with the borrower or satisfied the due diligence requirements. Id. §
17 2923.5(a)(1). A mortgagee must also provide a declaration stating that the buyer has been
18 contacted or could not be reached despite due diligence along with the notice of default. Id. §
19 2923.5(b). The sole remedy for noncompliance with the procedural requirements of section
20 2923.5 is postponement of a foreclosure sale until there has been compliance with the statute.
21 Argueta v. J.P. Morgan Chase, 787 F. Supp. 2d 1099, 1107 (E.D. Cal. 2011) (The only remedy
22 for violation of [California Civil Code § 2923.5] is postponement of a foreclosure sale until there
23 has been compliance with the statute.”); Skov v. U.S. Bank Nat. Assn., 207 Cal. App. 4th 690,
24 696 (6th Dist. 2012) (“The only remedy for noncompliance with [California Civil Code § 2923.5]
25 is the postponement of the foreclosure sale.”); Mabry v. Super. Ct., 185 Cal. App. 4th 208, 223
26 (4th Dist. 2010) (“If section 2923.5 is not complied with, then there is no valid notice of default,
27 and without a valid notice of default, a foreclosure sale cannot proceed. The available, existing
28 remedy is . . . to postpone the sale until there has been compliance with section 2923.5.”); see also

1 Benson v. Ocwen Loan Servicing, LLC, 562 Fed. App'x 567, 570 (9th Cir. 2014) (unpublished)
2 (“[Plaintiff’s section 2923.5] claim fails because the foreclosure sale has already occurred, and
3 therefore [plaintiff] has no available remedy.”).

4 Here, there is no allegation that a foreclosure sale of the Bridle Ridge Property is pending,
5 or even that defendant or another party ever initiated non-judicial foreclosure proceedings beyond
6 the recording of a notice of default on December 22, 2009. Moreover, the judicially noticed facts
7 demonstrate that defendant recorded a notice of rescission of the notice of default on May 3, 2010
8 (ECF No. 8 at 45), and nothing in the complaint indicates that defendant later filed a second
9 notice of default or made any other attempts to initiate foreclosure proceedings on the Bridle
10 Ridge Property. Because plaintiff’s sole recourse under section 2923.5 would be to obtain a
11 postponement of an impending foreclosure, and the allegations and judicially noticed facts
12 establish that there is no impending foreclosure, plaintiff cannot successfully assert a claim for
13 violations of that statute. Accordingly, the court recommends that plaintiff’s first cause of action
14 be dismissed with prejudice.

15 C. *Claim for Injunctive Relief*

16 Second, plaintiff requests both preliminary and permanent injunctive relief preventing
17 defendant from foreclosing on the Bridle Ridge Property. As an initial matter, plaintiff’s request
18 for a preliminary injunction fails to comply with this court’s Local Rule 231(d). Furthermore, in
19 order to obtain preliminary injunctive relief, plaintiff must show that she is likely to succeed on
20 the merits of her claims. See Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008).
21 For the reasons discussed both above and below, the court finds that plaintiff’s complaint fails to
22 state a cognizable claim for relief. Accordingly, plaintiff fails to demonstrate that she is entitled
23 to preliminary injunctive relief.

24 With regard to plaintiff’s claim for permanent injunctive relief, numerous federal courts
25 have held that “injunctive relief is a remedy that derives from the underlying claims, not an
26 independent claim.” Bridgeman v. United States, 2011 WL 221639, at *17 (E.D. Cal. Jan. 21,
27 2011); see also Lane v. Vitek Real Estate Indus. Group, 713 F. Supp. 2d 1092, 1104 (E.D.
28 Cal.2010); Hafiz v. Greenpoint Mortgage Funding, Inc., 652 F. Supp. 2d 1039, 1049 (N.D. Cal.

1 2009); Schimsky v. U.S. Ofc. of Personnel Mgmt., 587 F. Supp. 2d 1161, 1168 (S.D. Cal. 2008);
2 Cox Comm'n PCS, L.P. v. City of San Marcos, 204 F. Supp. 2d 1272, 1283 (S.D. Cal. 2002);
3 accord Marlin v. Aimco Venezia, LLC, 154 Cal. App. 4th 154, 162 (Cal. Ct. App. 2007). For this
4 reason alone, plaintiff's "claim" for injunctive relief is not cognizable. Furthermore, as discussed
5 both above and below, plaintiff's other claims do not provide an underlying basis to support her
6 request for injunctive relief. Accordingly, the court recommends plaintiff's second cause of
7 action be dismissed with prejudice.

8 D. *Claim for Fraud in the Concealment*

9 Third, plaintiff asserts a claim for fraud in the concealment against defendant based on
10 allegations that defendant concealed from plaintiff the fact that her mortgage loan for the Bridle
11 Ridge Property was securitized and the terms of the agreements underlying that securitization
12 when she entered into the mortgage in 2007. Specifically, plaintiff alleges that "Defendant
13 concealed the fact that Borrower's loan changed in character inasmuch as no single party would
14 hold the Note but rather the Notes would be included in a pool with other notes, split into
15 tranches, and multiple investors would effectively buy shares of the income stream from the
16 loans." (ECF No. 1-1 at 18.)

17 The elements of a fraud claim under California law are: (1) misrepresentation (false
18 representation, concealment or nondisclosure); (2) knowledge of the falsity (or "scienter"); (3)
19 intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. Lazar
20 v. Superior Court, 12 Cal.4th 631, 638 (1996). "[T]o establish a cause of action for fraud a
21 plaintiff must plead and prove in full, factually and specifically, all of the elements of the cause of
22 action." Conrad v. Bank of America, 45 Cal.App.4th 133, 156 (1996). "The absence of any one
23 of these required elements will preclude recovery." Wilhelm v. Pray, Price, Williams & Russell,
24 186 Cal.App.3d 1324, 1332 (1986). To establish fraud through concealment, a plaintiff must
25 show that the defendant had a duty to disclose the concealed facts. OCM Principal Opportunities
26 Fund v. CIBC World Mkts. Corp., 157 Cal. App. 4th 835, 845 (Cal Ct. App. 2007). "In addition,
27 for a viable cause of action for fraud, the pleading must show a cause and effect relationship
28 between the fraud and damages sought; otherwise no cause of action is stated." Nagy v. Nagy,

1 210 Cal. App. 3d 1262, 1269 (Cal. Ct. App. 1989); Zumbrun v. University of Southern
2 California, 25 Cal. App. 3d 1, 12 (Cal. Ct. App. 1972).

3 Here, plaintiff cannot, as a matter of law, establish that she suffered damages as a result of
4 defendant's concealment of the fact that her mortgage was securitized. "[S]ecuritization merely
5 creates a separate contract, distinct from plaintiff[s] debt obligations under the note and does not
6 change the relationship of the parties in any way." Reyes v. GMAC Mortgage LLC, 2011 WL
7 1322775, at *3 (D. Nev. Apr. 5, 2011) (dismissing fraud claim based on defendant's failure to
8 disclose securitization of plaintiffs' home loans because securitization "merely creates a separate
9 contract, distinct from plaintiffs' debt obligations under the note and does not change the
10 relationship of the parties in any way"). Therefore, the parties' rights and obligations regarding
11 the Bridle Ridge Property mortgage loan were not impacted in any manner by the fact that
12 defendant securitized that loan or the terms of the separate agreement underlying that
13 securitization. The mere fact that defendant allegedly concealed the information concerning
14 securitization of the loan could not have caused the damages plaintiff alleges, which are based on
15 defendant's actions in seeking to enforce the deed of trust. Accordingly, the information plaintiff
16 alleges defendant concealed has no causal connection to the damages she alleges in the complaint.
17 See Nagy, 210 Cal. App. 3d at 1269 ("[T]he pleading must show a cause and effect relationship
18 between the fraud and damages sought . . ."). Therefore, the court recommends that plaintiff's
19 claim for fraud in the concealment be dismissed with prejudice.⁸ See id. ("Fraudulent
20 representations which work no damage cannot give rise to an action at law.").

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24 ⁸ In addition, plaintiff also fails to plead the alleged fraud with the particularity required under
25 Federal Rule of Civil Procedure 9(b). Furthermore, plaintiff does not allege that defendant had a
26 duty to disclose the information it allegedly concealed, which is necessary to sustain a fraud claim
27 based on a theory of concealment. OCM Principal Opportunities Fund, 157 Cal. App. 4th at 845.
28 Finally, plaintiff fails to show that her fraud claim falls within the three year statute of limitations
period for fraud claims pursuant to California Code of Civil Procedure § 338(d). Plaintiff alleges
that she entered into the mortgage loan in 2007, but did not file this action until January 20, 2015,
well beyond the three year limitations period.

1 E. *Intentional Infliction of Emotional Distress Claim*

2 Plaintiff's fourth cause of action against defendant is based on a theory of intentional
3 infliction of emotional distress ("IIED"). Specifically, plaintiff alleges that defendant initiated
4 fraudulent foreclosure proceedings against the Bridle Ridge Property with the intent to cause
5 plaintiff emotional distress, and which caused plaintiff such distress. (ECF No. 1-1 at 19-20.)

6 The elements of a claim for IIED are as follows: "(1) extreme and outrageous conduct by
7 the defendant with the intention of causing, or reckless disregard of the probability of causing,
8 emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3)
9 actual and proximate causation of the emotional distress by the defendant's outrageous conduct."

10 Ess v. Eskaton Props., Inc., 97 Cal.App.4th 120, 129 (2002) (quoting Cervantez v. J.C. Penney
11 Co., 24 Cal.3d 579, 593, 156 (1979)). Outrageous conduct must be "so extreme as to exceed all
12 bounds of that usually tolerated in a civilized community." Potter v. Firestone Tire & Rubber
13 Co., 6 Cal. 4th 965, 1001 (1993). Emotional distress is "severe" when it is "of such substantial
14 quantity or enduring quality that no reasonable man in a civilized society should be expected to
15 endure it." Fletcher v. W. Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 397 (1970). The defendant's
16 conduct must have been intended to inflict injury or be done with the realization that injury will
17 result. Christensen v. Superior Court, 54 Cal.3d 868, 903 (1991). Moreover, the defendant's
18 conduct must have been "directed at the plaintiff, or occur in the presence of a plaintiff of whom
19 the defendant is aware." Id. Similarly, if the defendant had another stated purpose for his or her
20 behavior, the other, lawful purpose may preclude a finding of intent to inflict distress. See
21 Davidson v. City of Westminster, 32 Cal. 3d 197, 209 (1982). The California Supreme Court has
22 further explained:

23 "The law limits claims of intentional infliction of emotional distress to egregious
24 conduct toward plaintiff proximately caused by defendant." . . . The only
25 exception to this rule is that recognized when the defendant is aware, but acts with
26 reckless disregard, of the plaintiff and the probability that his or her conduct will
27 cause severe emotional distress to that plaintiff. . . . Where reckless disregard of
28 the plaintiff's interests is the theory of recovery, the presence of the plaintiff at the
time the outrageous conduct occurs is recognized as the element establishing a
higher degree of culpability which, in turn, justifies recovery of greater damages
by a broader group of plaintiffs than allowed on a negligent infliction of emotional

1 distress theory. . . .

2 Christensen, 54 Cal. 3d at 905-06 (citations omitted).

3 Here, plaintiff fails to allege facts demonstrating that defendant engaged in the sort of
4 extreme or outrageous conduct necessary to state a cognizable IIED claim. Plaintiff alleges that
5 defendant attempted to initiate fraudulent foreclosure proceedings on the Bridle Ridge Property,
6 but the documents attached to the complaint and the judicially noticed documents demonstrate
7 that defendant did not attempt to foreclose on the property at any time. Indeed, Exhibit B to the
8 complaint demonstrates that defendant recorded a notice of default against the Bridle Ridge
9 Property on December 22, 2009, and the judicially noticed Notice of Rescission of Notice of
10 Default (ECF No. 8, Exh., E.) shows that defendant rescinded that notice of default on April 29,
11 2010. There are no allegations that defendant at any time actually initiated the foreclosure
12 process beyond asserting that it had the right to do so in the notice of default that it subsequently
13 rescinded. It cannot be said that defendant’s act of recording a notice of default and subsequent
14 rescission of that notice amounted conduct “so extreme as to exceed all bounds of that usually
15 tolerated in a civilized community” under the circumstances alleged in the complaint. Potter, 6
16 Cal. 4th at 1001. Because plaintiff’s allegations do not show that defendant engaged in
17 sufficiently extreme or outrageous conduct, plaintiff fails to state a cognizable claim for IIED.
18 Accordingly, the court recommends that plaintiff’s IIED claim be dismissed with prejudice.

19 F. *Slander of Title Claim*

20 Fifth, plaintiff claims that defendant slandered her title to the Bridle Ridge Property when
21 it recorded the notice of default.

22 “[S]lander or disparagement of title occurs when a person, without a privilege to do so,
23 publishes a false statement that disparages title to property and causes the owner thereof some
24 special pecuniary loss or damage.” Sumner Hill Homeowners’ Assn., Inc. v. Rio Mesa Holdings,
25 LLC, 205 Cal. App. 4th 999, 1030 (Cal. Ct. App. 2012). In order to successfully allege a claim
26 for slander of title under California law, the plaintiff must be able to allege facts demonstrating
27 the following elements: (1) publication; (2) falsity; (3) absence of privilege; (4) disparagement of
28 the plaintiff’s land which is relied upon by a third party and which results in (5) pecuniary loss.

1 Gudger v. Manton, 21 Cal.2d 537, 541, 134 P.2d 217 (1943), overruled on other grounds by
2 Albertson v. Raboff, 46 Cal.2d 375, 381, 295 P.2d 405 (1956).

3 “Any statutorily required mailings, publication, and delivery of notices in connection with
4 a non-judicial foreclosure, and the performance of any statutory procedures by a trustee and
5 beneficiary, are ““privileged communications under the qualified, common-interest privilege of
6 [California Civil Code] Section 47, subdivision (c)(1).”” Ismail v. Wells Fargo Bank, N.A., 2013
7 WL 930611, at *6 (E.D. Cal. Mar. 8, 2013) (quoting Kachlon v. Markowitz, 168 Cal. App. 4th
8 316, 333 (Cal. Ct. App. 2008)). Accordingly, a defendant is protected by a qualified privilege
9 when it publishes and delivers any notices in the foreclosure of a property, and in performing any
10 statutory foreclosure procedures. In order to overcome this privilege, a plaintiff must make
11 affirmative allegations of actual malice. See Smith v. Hatch, 271 Cal. App. 2d 39, 47 (Cal. Ct.
12 App. 1969). Actual malice exists when “the publication was motivated by hatred or ill will
13 towards the plaintiff or by a showing that the defendant lacked reasonable grounds for belief in
14 the truth of the publication and therefore acted in reckless disregard of the plaintiff’s rights.”
15 Kachlon, 168 Cal. App. 4th at 336 (citing Sanborn v. Chronicle Pub. Co., 18 Cal. 3d 406, 413
16 (1976)).

17 Here, the complaint presents no allegations beyond conclusory statements to indicate
18 defendant or its agents acted with malice. (See ECF No. 1-1 at 22 (“Defendants knew the
19 documents were false and created and published them with malicious intent to injure Plaintiff
20 and deprive them [sic] of their [sic] exclusive right, title, and interest in the Property . . . ”)).
21 Accordingly, plaintiff fails to demonstrate that defendant did not have a qualified privilege to
22 publish and deliver the foreclosure notice.

23 More importantly, the allegations of the complaint and the judicially noticed documents
24 show that plaintiff cannot plausibly demonstrate that she suffered pecuniary harm as a result of
25 defendant’s publication of the notice of default. Indeed, the judicially noticed facts demonstrate
26 that the notice of default was rescinded on April 29, 2010, therefore demonstrating that plaintiff
27 could not have suffered monetary damages as a result of the notice of default after that date
28 because it could no longer disparage plaintiff’s title to the land. Furthermore, plaintiff does not

1 allege that she attempted to sell the Bridle Ridge Property but was unable to do so, or was offered
2 less money as a result of the recorded notice of default while it was in place. Nor does plaintiff
3 allege anything indicating that she suffered any other form of pecuniary harm as a result of the
4 recorded notice of default prior to its rescission.

5 Moreover, even if plaintiff were capable of alleging that she suffered from pecuniary
6 damages resulting from the publication of the notice of default during the time between the date
7 of its initial recording on December 22, 2009, and the date on which it was rescinded, such a
8 claim would be barred by the three year statute of limitations period applicable to claims for
9 slander of title under California law. Cal. Code Civ. Proc. § 338(g). The last date on which the
10 plaintiff's pecuniary interest could have been harmed was April 29, 2010, the date on which
11 defendant rescinded its notice of default. Plaintiff did not file this action in the Solano County
12 Superior Court until January 20, 2015, almost five years later. While the court acknowledges
13 that, under California law, a cause of action for slander or libel, including slander of title, does not
14 accrue until the plaintiff "could reasonably be expected to discover its existence," Arthur v.
15 Davis, 126 Cal. App. 3d 684, 692 (Cal. Ct. App. 1981), and the complaint here gives no
16 indication as to when plaintiff allegedly discovered the alleged slander to her property's title, the
17 court finds that plaintiff could not allege facts plausibly stating a cause of action for slander of
18 title that falls within the applicable limitations period under the circumstances alleged in the
19 complaint. Under the facts alleged, the only way in which plaintiff could have conceivably
20 realized a pecuniary loss would have been during the roughly four month window of time when
21 the notice of default was clouding the title to the subject property, which was roughly 5 years
22 prior to the commencement of this action. The court finds that it is simply not plausible that
23 plaintiff could have suffered such pecuniary loss as a result of the notice of default without
24 reasonably being expected to have discovered its existence during that same four month period,
25 therefore placing the claim outside the applicable 3-year statute of limitations. Accordingly, the
26 court recommends that plaintiff's claim for slander of title be dismissed with prejudice.

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1 G. *Claim for Quiet Title*

2 Sixth, plaintiff seeks to quiet title to the Bridle Ridge Property on the basis that defendant
3 has no interest in the property. The purpose of a quiet title action is to establish one's title against
4 adverse claims to real property. Cal. Code Civ. Proc. § 760.020. A basic requirement of an
5 action to quiet title is an allegation that plaintiffs "are the rightful owners of the property, i.e., that
6 they have satisfied their obligations under the Deed of Trust." Kelley v. Mortgage Elec. Reg.
7 Sys., Inc., 642 F.Supp.2d 1048, 1057 (N.D. Cal. 2009). "[A] mortgagor cannot quiet his title
8 against the mortgagee without paying the debt secured." Watson v. MTC Financial, Inc., 2009
9 WL 2151782 (E.D. Cal. Jul.17, 2009) (quoting Shimpones v. Stickney, 219 Cal. 637, 649
10 (1934)). As discussed above, the allegations and judicially-noticed documents establish that
11 defendant holds an interest in the Bridle Ridge Property as the lender and beneficiary under the
12 deed of trust. Because plaintiff does not allege that she has paid the debt secured by the mortgage
13 held by defendant in full, she cannot sustain a quiet title action. Accordingly, the court
14 recommends plaintiff's claim for quiet title be dismissed with prejudice.

15 H. *Claim for Declaratory Relief*

16 Seventh, plaintiff requests declaratory relief in the form of a determination that plaintiff
17 holds exclusive possession of the Bridle Ridge Property and that defendant holds no interest in
18 that property. Declaratory is not an independent claim, rather it is a form of relief. Santos v.
19 Countrywide Home Loans, 2009 WL 3756337, at *5 (E.D. Cal. Nov. 6, 2009) ("Declaratory and
20 injunctive relief are not independent claims, rather they are forms of relief."). Therefore,
21 plaintiff's seventh cause of action fails to state a valid claim. Moreover, because the court finds
22 that plaintiff fails to allege another cognizable cause of action, plaintiff is not entitled declaratory
23 relief sought in the complaint. Accordingly, the court recommends that plaintiff's claim for
24 declaratory relief be dismissed with prejudice.

25 I. *Claim for Rescission*

26 For her eighth cause of action, plaintiff asserts that she "is entitled to rescind the loan and
27 all accompanying documents." (ECF No. 1-1 at 26.) "However, rescission is not a freestanding
28 cause of action, but rather relief that may be granted as a result of unlawful conduct." Moreno v.

1 Citibank, N.A., 2010 WL 1038222, at *4 (N.D. Cal. Mar. 19, 2010) (unpublished); see also Cal.
2 Civ. Code §§ 1689, 1691-92. Accordingly, a claim for rescission, standing by itself, cannot
3 constitute a cognizable cause of action. If plaintiff intends to seek rescission, she must state a
4 claim for which rescission could be granted and plead for such relief as a remedy for that claim.
5 However, because the allegations of the complaint fail to state a cognizable claim for the reasons
6 discussed both above and below, plaintiff cannot plausibly plead a cause of action warranting
7 such relief. Therefore, the court recommends this claim be dismissed with prejudice.

8 J. *Claims under RESPA, TILA, and FDCPA*

9 Plaintiff also vaguely alleges throughout her complaint that defendant violated RESPA,
10 TILA, and the FDCPA without clearly stating what alleged conduct forms the basis for each of
11 these claims. Accordingly, dismissal of these claims on the basis that they fail to meet the
12 pleading standards set forth in Federal Rule of Civil Procedure 8 is warranted. More importantly,
13 however, any claims plaintiff could make under these Acts regarding any of the conduct alleged
14 in the complaint would be barred by the relevant statutes of limitations applicable to each of these
15 three Acts. With regard to TILA, Title 15 U.S.C. § 1640(e) states: “Any action under this section
16 [creating a claim for damages] may be brought ... within one year from the date of occurrence of
17 the violation” The Ninth Circuit Court of Appeals has held that any failure to disclose as
18 required by TILA occurs when the loan documents are signed. Meyer v. Ameriquet Mortg. Co.,
19 342 F.3d 899, 902 (9th Cir. 2003). Similarly, depending on the nature of the alleged violation,
20 RESPA requires a claim to be brought either within 1 year or 3 years “from the date of the
21 occurrence of the violation.” 12 U.S.C. § 2614; Pedersen v. Greenpoint Mortg. Funding, Inc.,
22 2011 WL 3818560, at *7 (E.D. Cal. Aug. 29, 2011) (quoting Brewer v. Indymac Bank, 609 F.
23 Supp. 2d 1104, 1117 (E.D. Cal. 2009)) (“[A] claim under § 2607 must be brought within a year
24 after the ‘date of the occurrence of the violation’”). Finally, 15 U.S.C. § 1692k(d) requires
25 that an action under the FDCPA must be commenced “within one year from the date on which the
26 violation occurs.”

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1 Here, the most recent conduct plaintiff alleges in her complaint took place on December
2 22, 2009, when the notice of default was alleged to have been unlawfully recorded in the Solano
3 County Recorder’s Office. Plaintiff filed her complaint in state court on January 20, 2015, over 5
4 years after this conduct occurred. Accordingly, any claim under RESPA, TILA, or the FDCPA
5 arising from the conduct alleged in the complaint would necessarily be barred by the relevant
6 limitations periods. Accordingly, the court recommends plaintiff’s complaint be dismissed with
7 prejudice to the extent it attempts to allege claims under RESPA, TILA, or the FDCPA.

8 K. *Claim for Violations of California Business & Professions Code § 17200*

9 Finally, plaintiff alleges that defendant violated California’s Unfair Competition Law
10 (“UCL”) as her ninth cause of action. To prove a claim under the UCL, California Business &
11 Professions Code §§ 17200, *et seq.*, a plaintiff must show “that the defendant committed a
12 business act that is either fraudulent, unlawful, or unfair.” Levine v. Blue Shield of California,
13 189 Cal. App. 4th 1117, 1136 (2010). “A defendant cannot be liable under § 17200 for
14 committing ‘unlawful business practices’ without having violated another law.” Ingels v.
15 Westwood One Broad. Servs., Inc., 129 Cal. App. 4th 1050, 1060 (2005). Accordingly, a UCL
16 claim must rest on a violation of some independent substantive statute, regulation or case law. See
17 Farmers Ins. Exch. v. Superior Court, 2 Cal.4th 377, 383 (1992) (action under section 17200
18 borrows violations of other laws). Because plaintiff’s UCL claim is predicated on the same
19 conduct giving rise to plaintiff’s other causes of action and the complaint fails to state a
20 cognizable action for any of those claims, plaintiff’s UCL claim should also be denied with
21 prejudice.

22 V. Conclusion

23 In sum, the court finds defendant’s motion to dismiss well taken and that the allegations of
24 plaintiff’s complaint fail to state a cognizable cause of action. Accordingly, the court
25 recommends that defendant’s motion to dismiss be granted and this case be dismissed with
26 prejudice. While the court would ordinarily allow an opportunity to amend the complaint to
27 address its inadequacies, the court finds that such a course of action is not warranted in this
28 instance because the factual allegations of the complaint and the judicially-noticed documents

1 make it clear that amendment would not cure the deficiencies in plaintiff's claims discussed
2 above.⁹ See Moore v. Kayport Package Exp., Inc., 885 F.2d 531, 538 (9th Cir. 1989) (citing
3 Foman v. Davis, 371 U.S. 178, 182 (1962) ("In deciding whether justice requires granting leave
4 to amend, factors to be considered include the presence or absence of undue delay, bad faith,
5 dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to
6 the opposing party and *futility of the proposed amendment.*" (emphasis added)).

7 Based on the foregoing, IT IS HEREBY RECOMMENDED that:

- 8 1. Defendant's motion to dismiss (ECF No. 7) be granted.
- 9 2. This action be dismissed with prejudice.
- 10 3. The Clerk of Court be directed to vacate all dates and close this case.

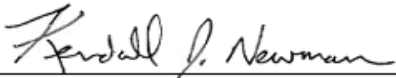
11 These findings and recommendations are submitted to the United States District Judge
12 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14)
13 days after being served with these findings and recommendations, any party may file written
14 objections with the court and serve a copy on all parties. Such a document should be captioned
15 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections

16 ⁹ The court also notes that while NDEX West, LLC is a nominal party to this action pursuant
17 to California Civil Code § 29241, dismissal of this entire action with prejudice would still be
18 proper even if it did not have such status because plaintiff's claims against this defendant are
19 integrally related to those asserted against Wells Fargo Bank, N.A. "A District Court may
20 properly on its own motion dismiss an action as to defendants who have not moved to dismiss
21 where such defendants are in a position similar to that of moving defendants or where claims
22 against such defendants are integrally related." Silverton v. Dep't of Treasury, 644 F.2d 1341,
23 1345 (9th Cir. 1981). "Such a dismissal may be made without notice where the [plaintiffs] cannot
24 possibly win relief." Omar v. Sea-Land Serv., Inc., 813 F.2d 986, 991 (9th Cir. 1987). The
25 court's authority in this regard includes *sua sponte* dismissal as to defendants who have not been
26 served and defendants who have not yet answered or appeared. Columbia Steel Fabricators, Inc.
27 v. Ahlstrom Recovery, 44 F.3d 800, 802 (9th Cir. 1995) ("We have upheld dismissal with
28 prejudice in favor of a party which had not yet appeared, on the basis of facts presented by other
defendants which had appeared."); see also Bach v. Mason, 190 F.R.D. 567, 571 (D. Idaho 1999);
Ricotta v. California, 4 F. Supp. 2d 961, 978-79 (S.D. Cal. 1998). Here, all of plaintiff's claims
against Wells Fargo Bank, N.A. are either also directed against NDEX West, LLC on the same
alleged factual basis or are based on NDEX West, LLC's actions as trustee on Wells Fargo Bank,
N.A.'s behalf. Accordingly, even if NDEX West, LLC was not a nominal party to this action,
and despite the fact that it has not moved to dismiss itself from this action as of this time,
dismissal of this party would be proper for the reasons discussed above with regard to Wells
Fargo Bank, N.A.

1 shall be served on all parties and filed with the court within fourteen (14) days after service of the
2 objections. The parties are advised that failure to file objections within the specified time may
3 waive the right to appeal the District Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th
4 Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

5 IT IS SO RECOMMENDED.

6 Dated: December 18, 2015

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9 KENDALL J. NEWMAN
10 UNITED STATES MAGISTRATE JUDGE
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