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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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GARY L. FOSTER, NO. CIV. 2:10-518 WBS GGH
Plaintiff,
v. MEMORANDUM AND ORDER RE:
MOTIONS TO DISMISS AND TO
STRIKE
SCME MORTGAGE BANKERS, INC.,
et. al.,
Defendants.

_____ /

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Plaintiff Gary L. Foster brought this action against
defendants SCME Mortgage Bankers, Inc. ("SCME"), Clever Key
Financial, LLC, Clever Key Financial, Inc., West Coast Mortgage,
Homecomings Financial, LLC f/k/a Homecomings Financial Network,
Inc. ("Homecomings"), Mortgage Electronic Registration Systems
Inc. ("MERS"), Deutsche Bank Trust Co. Americas, Aurora Loan
Services LLC ("Aurora"), Cal-Western Reconveyance Corporation,
Frederick Winston Williams II, and Deborah Diaz, arising out of
defendants' allegedly wrongful conduct relating to a loan

1 agreement. Presently before the court are Homecomings' motion to
2 dismiss plaintiff's First Amended Complaint ("FAC") pursuant to
3 Federal Rule of Civil Procedure 12(b)(6) and Aurora and MERS's
4 motion to dismiss and to strike portions of the FAC pursuant to
5 Rule 12(f).

6 I. Factual and Procedural Background

7 On April 1, 2006, plaintiff entered into an Option
8 Adjustable Rate Note loan agreement for \$496,000.00 with SCME to
9 refinance an existing loan. (FAC ¶¶ 22, 31.) The loan was
10 secured by plaintiff's residence. (Id. ¶ 22.) Plaintiff alleges
11 that he did not receive copies of the loan documents from SCME at
12 closing or any time thereafter. (Id. ¶ 23.) He alleges that he
13 was not provided with a meaningful opportunity to review the
14 documents, and that the documents contained blank spaces when he
15 signed them. (Id. ¶¶ 32-33.) After the closing, he allegedly
16 tried to ask Diaz, the notary present at the closing, for copies
17 of the documents, but he could not locate her. (Id. ¶¶ 33-34.)
18 He also attempted to obtain copies from Diaz's employer and from
19 an escrow officer, but did not succeed. (Id. ¶¶ 35-36.)
20 Plaintiff alleges that he finally received a copy of the loan
21 documents from Aurora, the loan servicer, in December of 2009.
22 (Id. ¶ 23.) He alleges numerous irregularities in the loan
23 documents, including falsified information on the loan
24 application. (Id. ¶¶ 27-29.)

25 On July 9, 2009, a Notice of Default on plaintiff's
26 property was recorded in the San Joaquin County Recorder's
27 Office. (Homecomings' Req. for Judicial Notice in Supp. of Reply
28 in Supp. of Mot. to Dismiss Pl.'s FAC (Docket No. 129) Ex. B.)

1 On January 15, 2010, a Notice of Trustee's Sale was recorded.
2 (Id. Ex. C.) On July 29, 2010, a Trustee's Deed upon Sale for
3 the property was recorded. (Id. Ex. E.) Plaintiff has since
4 been evicted. (Pl.'s Opp'n to Defs.' Mots. to Dismiss (Docket
5 No. 119) at 1:13-14.)

6 As relevant to these motions, plaintiff's FAC (Docket
7 No. 50 Ex. 1) alleges claims against Homecomings for violations
8 of the Truth in Lending Act ("TILA"), against Aurora for
9 violations of California's Unfair Competition Law ("UCL"), Cal.
10 Bus. & Prof. Code §§ 17200-17210, and against Homecomings and
11 MERS for wrongful foreclosure and quiet title. Aurora, MERS, and
12 Homecomings now move to dismiss the claims against them under
13 Rule 12(b)(6) and Aurora and MERS also move to strike plaintiff's
14 claims for punitive damages.¹

15 II. Discussion

16 On a motion to dismiss, the court must accept the
17 allegations in the complaint as true and draw all reasonable
18 inferences in favor of the plaintiff. Scheuer v. Rhodes, 416
19 U.S. 232, 236 (1974), overruled on other grounds by Davis v.
20 Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322
21 (1972). "To survive a motion to dismiss, a complaint must
22 contain sufficient factual matter, accepted as true, to 'state a
23 claim to relief that is plausible on its face.'" Ashcroft v.
24 Iqbal, --- U.S. ----, ----, 129 S. Ct. 1937, 1949 (2009) (quoting
25 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). This

26
27 ¹ Aurora and MERS's motion to strike plaintiff's claims
28 for punitive damages is moot, as plaintiff does not request
punitive damages against these defendants. (See FAC ¶¶ 121-123,
141, 144.)

1 "plausibility standard," however, "asks for more than a sheer
2 possibility that a defendant has acted unlawfully," and where a
3 complaint pleads facts that are "merely consistent with" a
4 defendant's liability, it "stops short of the line between
5 possibility and plausibility." Iqbal, 129 S. Ct. at 1949
6 (quoting Twombly, 550 U.S. at 556-57) (internal quotation mark
7 omitted).

8 In general, a court may not consider items outside the
9 pleadings upon deciding a motion to dismiss, but may consider
10 items of which it can take judicial notice. Barron v. Reich, 13
11 F.3d 1370, 1377 (9th Cir. 1994). A court may take judicial
12 notice of facts "not subject to reasonable dispute" because they
13 are either "(1) generally known within the territorial
14 jurisdiction of the trial court or (2) capable of accurate and
15 ready determination by resort to sources whose accuracy cannot
16 reasonably be questioned." Fed. R. Evid. 201(b).

17 The parties have requested that the court take notice
18 of the Deed of Trust, Notice of Default, Notice of Trustee's
19 Sale, Assignment of Deed of Trust, and Trustee's Deed upon Sale
20 for the subject property. The court will take judicial notice of
21 these documents, since they are matters of public record whose
22 accuracy cannot be questioned. See Lee v. City of L.A., 250 F.3d
23 668, 689 (9th Cir. 2001). The parties also request that the
24 court take judicial notice of the Truth in Lending Disclosure
25 Statement and the Adjustable Rate Mortgage Program Disclosure
26 executed on April 1, 2006, letters between plaintiff and Aurora,
27 and documents related to the federal stock charter for Lehman
28 Brothers Bank. These documents are not judicially noticeable,

1 and the court declines to consider them for purposes of this
2 motion to dismiss.

3 A. TILA Claim against Homecomings

4 Plaintiff brings a claim for damages under TILA,
5 alleging that the parties failed to make required disclosures
6 related to his loan. (FAC ¶¶ 42-58.) While Homecomings contends
7 that it was a loan servicer, not an assignee, plaintiff alleges
8 that Homecomings was an assignee of the deed of trust. (Id. ¶
9 12.) An assignee can only be liable for the initial creditor's
10 failure to give proper TILA disclosures if the violation is
11 apparent on the face of the disclosure statement. 15 U.S.C. §
12 1641(e)(1). A violation is apparent on the face of the
13 disclosure statement if "the disclosure can be determined to be
14 incomplete or inaccurate by a comparison among the disclosure
15 statement, any itemization of the amount financed, the note, or
16 any other disclosure of disbursement" or if the statement does
17 not use the terms and format required by TILA. Id. § 1651(e)(2);
18 see White v. Homefield Fin., Inc., 545 F. Supp. 2d 1159, 1168
19 (W.D. Wash. 2008) ("Although the Ninth Circuit does not appear to
20 have addressed this question, TILA's assignee liability provision
21 has been interpreted by other courts as meaning that a TILA claim
22 may be asserted against an assignee only for 'violations that a
23 reasonable person can spot on the face of the disclosure
24 statement or other assigned documents.'" (quoting Taylor v.
25 Quality Hyundai, Inc., 150 F.3d 689, 694 (7th Cir. 1998)); see
26 also Romero v. Countrywide Bank, N.A., --- F. Supp. 2d ---,
27 ---, 2010 WL 2985539, at *9 (N.D. Cal. July 27, 2010).

28 The alleged violations of TILA complained of by

1 plaintiff are not the sort that could be apparent on the face of
2 the disclosure statement. Plaintiff alleges that the statement
3 provided incorrect information regarding the annual percentage
4 rate ("APR") and the interest rate on which the payment schedule
5 was based, and failed to disclose the facts that the initial rate
6 was discounted and that negative amortization was certain to
7 occur. (FAC ¶¶ 46-58.) Plaintiff does not explain how any of
8 these alleged TILA violations could have been discovered from the
9 face of the disclosure statement or other documents, and the
10 court cannot conceive of any way by which Homecomings could have
11 discovered the violations on the face of the documents.
12 See Romero, 2010 WL 2985539, at *5-10 (finding that assignee
13 could not discover the same four alleged TILA violations on the
14 face of the documents). Homecomings could not have known from
15 looking at the documents that the disclosed APR and payment
16 schedule interest rate were inaccurate. Without looking beyond
17 the documents, it would not have realized that the initial rate
18 was discounted or that negative amortization was certain to
19 occur. Homecomings, as an assignee, cannot be held liable for
20 the initial creditor's failure to give proper TILA disclosures.
21 Accordingly, plaintiff's TILA claim is dismissed as to
22 Homecomings.

23 B. UCL Claim against Aurora

24 Plaintiff brings a UCL claim against Aurora, alleging
25 that Aurora failed to provide plaintiff with the loan documents
26 he requested in July of 2009, only providing them in December of
27 2009. (FAC ¶¶ 112-115.) California's UCL prohibits "any
28 unlawful, unfair or fraudulent business act or practice"

1 Cal. Bus. & Prof. Code § 17200. This cause of action is
2 generally derivative of some other illegal conduct or fraud
3 committed by a defendant, and a plaintiff "must state with
4 reasonable particularity the facts supporting the statutory
5 elements of the violation." Khoury v. Maly's of Cal., Inc., 14
6 Cal. App. 4th 612, 619 (2d Dist. 1993).

7 "Under its 'unlawful' prong, 'the UCL borrows
8 violations of other laws . . . and makes those unlawful practices
9 actionable under the UCL.'" Berryman v. Merit Prop. Mgmt., Inc.,
10 152 Cal. App. 4th 1544, 1554 (4th Dist. 2007) (quoting Lazar v.
11 Hertz Corp., 69 Cal. App. 4th 1494, 1505 (1st Dist. 1999)).

12 "Thus, a violation of another law is a predicate for stating a
13 cause of action under the UCL's unlawful prong." Id. Plaintiff
14 has not alleged that Aurora violated any laws; indeed, this is
15 the only claim pled against Aurora, and it contains no
16 allegations of unlawful conduct.

17 A "fraudulent" business act or practice is one in which
18 members of the public are likely to be deceived. Olsen v.
19 Breeze, Inc., 48 Cal. App. 4th 608, 618 (3d Dist. 1996).
20 Plaintiff has not alleged that Aurora engaged in any fraudulent
21 practices.

22 Finally, a business practice is "unfair" when it
23 "violates established public policy or if it is immoral,
24 unethical, oppressive or unscrupulous and causes injury to
25 consumers which outweighs its benefits." McKell v. Wash. Mut.,
26 Inc., 142 Cal. App. 4th 1457, 1473 (2d Dist. 2006). Even if
27 failing to give plaintiff copies of the loan documents for five
28 months was violative of established public policy, which

1 plaintiff has not shown, plaintiff has not alleged any injury he
2 suffered as a result of Aurora's conduct. The only injury
3 alleged is that plaintiff was delayed in "being able to examine
4 his loan documents to discover false and inaccurate documentation
5 and information." (FAC ¶ 120.) California Business and
6 Professions Code section 17204 sets out the statutory standing
7 requirements for a section 17200 claim, and authorizes a private
8 right of action only "by a person who has suffered injury in fact
9 and has lost money or property as a result of the unfair
10 competition." Cal. Bus. & Prof. Code § 17204. California courts
11 have interpreted this provision as requiring that the plaintiff
12 show that he has: (1) expended money due to the defendant's acts
13 of unfair competition; (2) lost money or property; or (3) been
14 denied money to which he has a cognizable claim. See Hall v.
15 Time, Inc., 158 Cal. App. 4th 847, 854-55 (4th Dist. 2008)
16 (listing cases). Plaintiff has alleged no such injury. Given
17 that plaintiff did not possess the loan documents for three years
18 before requesting them from Aurora, it is unclear what injury
19 could possibly have resulted from Aurora's five-month delay. His
20 loan payments during that time period were entirely unconnected
21 to his request for copies, and he does not allege that the
22 foreclosure somehow occurred as a result of Aurora's inaction.
23 Accordingly, the court will dismiss plaintiff's UCL claim against
24 Aurora.

25 C. Wrongful Foreclosure Claim against Homecomings and MERS
26 Wrongful foreclosure is an action in equity, where a
27 plaintiff seeks to set aside a foreclosure sale. See Karlsen v.
28 Am. Sav. & Loan Ass'n, 15 Cal. App. 3d 112, 117 (2d Dist. 1971).

1 Plaintiff's only allegations of wrongdoing in the foreclosure
2 process are that MERS, the nominee for the lender, is not
3 entitled to do business in California and that MERS lacked
4 authority to substitute the trustee under the Deed of Trust.
5 (FAC ¶¶ 136-139.) As explained in the court's previous orders
6 denying plaintiff's motions for a temporary restraining order and
7 preliminary injunction, these arguments are meritless. MERS is
8 statutorily exempted from the requirement to obtain a certificate
9 of qualification to conduct business in California, and MERS did
10 possess the authority to substitute the trustee. (See June 25,
11 2010, Order at 6:1-24 (Docket No. 85); April 7, 2010, Order at
12 8:6-11:17 (Docket No. 22).)

13 As plaintiff has alleged no wrongful conduct in
14 conjunction with the foreclosure on his home, the court will
15 dismiss plaintiff's claim for wrongful foreclosure as to
16 Homecomings and MERS.

17 D. Quiet Title Claim against Homecomings and MERS

18 The purpose of a quiet title action is to establish
19 one's title against adverse claims to real property. A basic
20 requirement of an action to quiet title is an allegation that
21 plaintiffs "are the rightful owners of the property, i.e., that
22 they have satisfied their obligations under the Deed of Trust."
23 Kelley v. Mortg. Elec. Registration Sys., Inc., 642 F. Supp. 2d
24 1048, 1057 (N.D. Cal. 2009). Plaintiff acknowledges that, now
25 that the home has been foreclosed on and he has been evicted, he
26 can no longer maintain an action to quiet title.

27 IT IS THEREFORE ORDERED that the moving defendants'
28 motions to dismiss plaintiff's First Amended Complaint be, and

1 the same hereby are, GRANTED. Plaintiff's claims for TILA
2 violations as to Homecomings, UCL violations as to Aurora, and
3 wrongful foreclosure and quiet title as to Homecomings and MERS
4 are dismissed.

5 If plaintiff wishes to amend the complaint to cure the
6 defects explained above, he may do so within twenty days from the
7 date of this Order. Otherwise, the case will proceed under the
8 First Amended Complaint on plaintiff's remaining claims.

9 DATED: January 19, 2011

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12 WILLIAM B. SHUBB
13 UNITED STATES DISTRICT JUDGE
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