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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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DONNA RUTH O'CONNOR ROSE, an individual,

NO. CIV. 2:12-225 WBS CMK

Plaintiff,

MEMORANDUM AND ORDER RE:
MOTION TO REMAND AND MOTION TO
DISMISS

v.

J.P. MORGAN CHASE, N.A., a corporation,

Defendant.

_____ /

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Plaintiff Donna Ruth O'Connor-Rose brought action against defendant J.P. Morgan Chase ("Chase") in state court, stating claims for breach of contract, fraud, violation of California Civil Code section 1788.2, violation of California Business and Professions Code section 17200 et seq., accounting, and injunctive relief arising from Chase's allegedly wrongful conduct related to a residential loan. After Chase removed the proceeding to this court on the basis of diversity jurisdiction, plaintiff brought a motion to remand. (Docket No. 8.) Chase has

1 filed a motion to dismiss plaintiff's claims for fraud, violation
2 of the Rosenthal Act, accounting, and injunctive relief for
3 failure to state a claim upon which relief can be granted
4 pursuant to Rule 12(b)(6). (Docket No. 5.)

5 I. Factual and Procedural Background

6 In approximately January of 2006, plaintiff purchased a
7 home located at 3794 Mario Ave, Redding, California (the "Mario
8 Avenue property") with a loan of \$349,400 from Chase. (Notice of
9 Remand Ex. A ("Compl.") ¶ 6 (Docket 1).) In connection with the
10 loan, plaintiff executed a Promissory Note in favor of Chase,
11 which was secured by a Deed of Trust encumbering the property.
12 (Def.'s Req. for Judicial Notice Ex. A (Docket No. 6).) As of
13 November of 2011, the principle balance on the loan was
14 \$321,581.93. (Compl. ¶ 9.)

15 Plaintiff alleges that she had cured a prior deficiency
16 on her loan, and was current with required payments as of
17 December 2010. (Id. ¶ 10.) She further alleges that although
18 she made payments that were more than adequate to cover the
19 monthly installments due under her loan, defendant failed to
20 properly credit payments to her account throughout 2011. (Id. ¶¶
21 11-46.). As a result of defendant's "crooked accounting," she
22 claims that defendant repeatedly falsely represented that her
23 loan was in default when in fact she had paid more than was due
24 on the loan. (Id.)

25 According to plaintiff, in November of 2011, she
26 received a Notice of Default from Chase falsely indicating that
27 \$5,185.58 was past due on her loan. (Id. ¶ 39.) In reality,
28 plaintiff contends that as of November 2011 she had paid

1 approximately \$5,000 more than was due on her loan. (Id. ¶ 40.)
2 When she alerted Chase to its accounting errors, Chase allegedly
3 continued to misrepresent the amount due on her loan. (Id. ¶¶
4 43-44.)

5 On December 6, 2011, plaintiff claims that another
6 notice of default in the amount of \$5,185.58 was served on her,
7 when in fact she had paid "at least through February 2012." (Id.
8 ¶¶ 45-46.) When plaintiff again complained to Chase about its
9 alleged failure to properly credit her payments to her account,
10 she contends that it responded that it was "investigating" the
11 matter. (Id. ¶ 47.)

12 Plaintiff filed her Complaint on December 28, 2011, and
13 the proceeding was removed to this court on January 27, 2012.
14 (Docket No. 1.) Plaintiff has filed a motion to remand and Chase
15 has filed a motion to dismiss.

16 II. Discussion

17 A. Remand to State Court

18 "[A]ny civil action brought in a State court of which
19 the district courts of the United States have original
20 jurisdiction, may be removed by the defendant or the defendants,
21 to the district court of the United States for the district . . .
22 where such action is pending." 28 U.S.C. § 1441(a). The Ninth
23 Circuit strictly construes the removal statute against removal
24 jurisdiction, and the party seeking removal bears the burden of
25 establishing federal jurisdiction. Geographic Expeditions, Inc.
26 v. Estate of Lhotka, 599 F.3d 1102, 1107 (9th Cir. 2010) (citing
27 Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992)). Any
28 questions regarding the propriety of removal are resolved in

1 favor of the party moving for remand. Matheson v. Progressive
2 Speciality Ins. Co., 319 F.3d 1089, 1090 (9th Cir. 2003). If
3 removal was improper, "the district court lack[s] subject matter
4 jurisdiction, and the action should [be] remanded to the state
5 court." Toumajian v. Frailey, 135 F.3d 648, 653 (9th Cir. 1998)
6 (citing 28 U.S.C. § 1447(c)).

7 Federal courts have original jurisdiction over cases
8 where complete diversity exists between the parties and the
9 amount in controversy exceeds \$75,000. 28 U.S.C. § 1332. Here,
10 the parties do not dispute that diversity exists between all
11 parties. The remaining issue, therefore, is whether the amount
12 in controversy exceeds \$75,000.

13 One of the remedies requested by plaintiff is a
14 permanent injunction barring Chase from initiating or completing
15 any foreclosure proceedings related to the Mario Avenue property.
16 "In actions seeking declaratory or injunctive relief, it is well
17 established that the amount in controversy is measured by the
18 value of the object of the litigation." Cohn v. Petsmart, 281
19 F.3d 837, 840 (9th Cir. 2002) (citing Hunt v. Wash. State Apple
20 Adver. Comm'n, 432 U.S. 333, 347 (1977)). Where the state court
21 complaint does not specify an exact damages figure, the defendant
22 must establish that the amount in controversy exceeds the
23 statutory minimum by a preponderance of the evidence. Sanchez v.
24 Monumental Life Ins. Co., 102 F.3d 398, 404 (9th Cir. 1996).

25 In cases where, as here, plaintiff seeks to enjoin a
26 foreclosure sale, "the value of the property is the object of the
27 litigation for the purposes of determining whether the
28 amount-in-controversy requirement has been met." Reyes v. Wells

1 Fargo Bank, N.A., No. C-10-01667, 2010 WL 2629785, at *5 (N.D.
2 Cal. June 29, 2010); see also Garcia v. Citibank, N.A., No.
3 2:09-CV-03387, 2010 WL 1658569, at *2 (E.D. Cal. Apr. 23, 2010);
4 Cabriales v. Aurora Loan Servs., No. C 10-161, 2010 WL 761081, at
5 *4 (N.D. Cal. Mar. 2, 2010).

6 Chase has shown that the Mario Avenue property was used
7 to secure a loan of \$349,000. (Def.'s Req. for Judicial Notice
8 Ex. A.) Although its property value may have decreased somewhat
9 since then, it is likely that the Mario Avenue property's current
10 value exceeds \$75,000. See Cabriales, 2010 WL 761081, at *3
11 (absent evidence to the contrary, property used to secure a loan
12 of \$465,000 satisfied amount-in-controversy). The court also
13 notes that as of November 2011, the total principle balance on
14 the loan is over \$300,000. See Reyes, 2010 WL 2629785, at *5
15 (noting that in foreclosure cases, some courts determine the
16 amount in controversy according to the amount of indebtedness on
17 the loan). This is sufficient to suggest by a preponderance of
18 the evidence that the amount in controversy is above \$75,000.

19 In arguing that the statutory minimum is not met,
20 plaintiff represents that she has abandoned her requests for
21 injunctive relief, so that the value of the house should no
22 longer be considered in calculating the amount in controversy.¹

24 ¹ In her Motion to Remand, plaintiff also suggests that
25 the court should not consider the value of the Mario Avenue
26 property in determining the amount in controversy in light of the
27 fact that her request to enjoin foreclosure proceedings is no
28 longer relevant because there is no current Notice of Default or
other "foreclosure document" filed. (Mot. to Remand at 9:15-21.)
This is clearly in contradiction with the allegations in her
Complaint suggesting that her property is in jeopardy of being
wrongfully foreclosure upon absent judicial action. It also does

1 This argument fails to demonstrate that remand would be
2 appropriate for two primary reasons. First, plaintiff has not
3 amended the complaint or otherwise taken steps to eliminate her
4 request for injunctive relief. Second, "diversity jurisdiction
5 is determined at the time the action commences, and a federal
6 court is not divested of jurisdiction . . . if the amount in
7 controversy subsequently drops below the minimum jurisdictional
8 level." Hill v. Blind Indus. & Servs. of Md., 179 F.3d 754, 757
9 (9th Cir. 1999). Plaintiff cannot rely on "[e]vents occurring
10 subsequent to the institution of suit which reduce the amount
11 recoverable below the statutory limit" to show that removal was
12 improper because such events "do not oust jurisdiction." Budget
13 Rent-A-Car, Inc. v. Higashiguchi, 109 F.3d 1471, 1473 (9th Cir.
14 1997) (citing St. Paul Mercury Indem. Co. v. Red Cab Co., 303
15 U.S. 283, 289 (1938)). Accordingly, the court will deny
16 plaintiff's motion to remand.

17 B. Motion to Dismiss

18 To survive a motion to dismiss, a plaintiff must plead
19 "only enough facts to state a claim to relief that is plausible
20 on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570
21 (2007). This "plausibility standard," however, "asks for more
22 than a sheer possibility that a defendant has acted unlawfully,"
23 Ashcroft v. Iqbal, 556 U.S. 662, ---, 129 S. Ct. 1937, 1949
24 (2009), and "[w]here a complaint pleads facts that are 'merely
25 consistent with' a defendant's liability, it 'stops short of the
26 _____
27 nothing to change the fact that plaintiff's Complaint is drafted
28 to include a request for a permanent injunction barring Chase
from foreclosing on the Mario Avenue property.

1 line between possibility and plausibility of entitlement to
2 relief.'" Id. (quoting Twombly, 550 U.S. at 557). In deciding
3 whether a plaintiff has stated a claim, the court must accept the
4 allegations in the complaint as true and draw all reasonable
5 inferences in favor of the plaintiff. Scheuer v. Rhodes, 416
6 U.S. 232, 236 (1974), overruled on other grounds by Davis v.
7 Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322
8 (1972).

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

18 Chase requests that the court judicially notice several
19 publically recorded documents. (See Def.'s Request for Judicial
20 Notice Exs. A-E.) The court will take judicial notice of these
21 documents, since they are matters of public record whose accuracy
22 cannot be questioned. See Lee v. City of Los Angeles, 250 F.3d
23 668, 689 (9th Cir. 2001).

24 1. Fraud

25 In California, the elements of a claim for fraud are
26 "(a) a misrepresentation (false representation, concealment, or
27 nondisclosure); (b) knowledge of falsity (or 'scienter'); (c)
28 intent to defraud, i.e., to induce reliance; (d) justifiable

1 reliance; and (e) resulting damage." In re Estate of Young, 160
2 Cal. App. 4th 62, 79 (4th Dist. 2008) (quoting Lazar v. Super.
3 Ct., 12 Cal. 4th 631, 638 (1996)) (internal quotation marks
4 omitted). Under the heightened pleading requirement for claims
5 of fraud under Federal Rule of Civil Procedure 9(b), "a party
6 must state with particularity the circumstances constituting
7 fraud or mistake." Fed. R. Civ. P. 9(b). A plaintiff must
8 include the "who, what, when, where, and how" of the fraud. Vess
9 v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)
10 (quoting Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997)).

11 Plaintiff claims that Chase engaged in fraud by making
12 various misrepresentations related to the amount due on her
13 mortgage. Nowhere in her Complaint, however, does she allege any
14 facts indicating that Chase had any knowledge of the falsity of
15 these misrepresentations or that Chase acted with an intent to
16 defraud her. Accordingly, plaintiff has failed to state a claim
17 for fraud.

18 2. Violation of the Rosenthal Act

19 Plaintiff's third cause of action alleges that Chase
20 violated the Rosenthal Fair Debt Collection Practices Act
21 ("Rosenthal Act"). The Rosenthal Act prohibits a variety of
22 unfair and oppressive methods of collecting debt, but to be
23 liable under the act, a defendant must fall under its definition
24 of a "debt collector." Izenberg v. ETS Servs., LLC, 589 F. Supp.
25 2d 1193, 1199 (C.D. Cal. 2008). A "debt collector" under the
26 Rosenthal Act is "any person who, in the ordinary course of
27 business, regularly, on behalf of himself or herself or others,
28 engages in debt collection." Cal. Civ. Code § 1788.2(c) (2008).

1 A residential home loan, however, is not a "debt" under
2 the Rosenthal Act. Morgera v. Countrywide Home Loans, Inc., No.
3 2:09-cv-1476, 2010 WL 160348, at *3 (E.D. Cal. Jan. 11, 2010);
4 see also Ricon v. Recontrust Co., No. 09-937, 2009 WL 2407396, at
5 *4 (S.D. Cal. Aug. 4, 2009) (dismissing with prejudice
6 plaintiff's unfair debt collection claims in foreclosure case);
7 Rosal v. First Fed. Bank of Cal., No. C 09-1276, 2009 WL 2136777,
8 at *18 (N.D. Cal. July 15, 2009) (dismissing Rosenthal Act claim
9 as to all defendants in foreclosure case); Pittman v. Barclays
10 Capital Real Estate, Inc., No. 09-0241, 2009 WL 1108889, at *3
11 (S.D. Cal. Apr. 24, 2009) (dismissing with prejudice plaintiff's
12 Rosenthal Act claim in foreclosure case because a "residential
13 mortgage loan does not qualify as a 'debt' under the statute").
14 Since residential mortgage loans are not covered by the Rosenthal
15 Act, the court will grant Chase's motion to dismiss plaintiff's
16 claim for violations of the Rosenthal Act.

17 3. Claims for Accounting and Injunctive Relief

18 Plaintiff's fifth and sixth causes of action are for
19 accounting and injunctive relief. Under California law, a claim
20 for accounting is not considered a stand-alone claim. Batt v.
21 City & Cnty. of S.F., 155 Cal. App. 4th 65, 82 (1st Dist. 2007)
22 (Accounting "is not an independent cause of action but merely a
23 type of remedy, an equitable remedy at that."). Because
24 plaintiff's accounting claim is related to her breach of contract
25 claim, which defendant does not address in its motion to dismiss,
26 the court will interpret this claim as a prayer for relief
27 attached to her breach of contract claim and will not dismiss it
28 at this time.


1 Claims for injunctive relief have been consistently
2 classified under California law as remedies and not valid causes
3 of action in their own rights. See e.g., Shell Oil Co. v.
4 Richter, 52 Cal. App. 2d 164, 168 (4th Dist. 1942) ("Injunctive
5 relief is a remedy and not, in itself, a cause of action.").
6 Accordingly, the court will dismiss plaintiff's sixth cause of
7 action.

8 IT IS THEREFORE ORDERED that plaintiff's motion to
9 remand be, and the same hereby is, DENIED.

10 IT IS FURTHER ORDERED that Chase's motion to dismiss
11 be, and the same hereby is, GRANTED as to plaintiff's claims for
12 fraud, violation of the Rosenthal Act, and injunctive relief and
13 DENIED as to plaintiff's claim for accounting.

14 Plaintiff has twenty days from the date of this Order
15 to file an amended complaint, if she can do so consistent with
16 this Order.

17 DATED: March 13, 2012

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19 WILLIAM B. SHUBB
20 UNITED STATES DISTRICT JUDGE
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