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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

WAGMA SAFI, Trustee of the Wagma
Safi Living Trust dated
September 24, 2008,

Plaintiff,

v.

BANK OF AMERICA, N.A.; QUALIFIED
LOAN SERVICE CORPORATION;
FEDERAL HOME LOAN MORTGAGE
CORPORATION; MORTGAGE ELECTRONIC
REGISTRATION SERVICE, INC.; and
DOES 1-50,

Defendants.

No. 2:12-CV-02280-JAM-AC

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS**

This matter is before the Court on Defendants Bank of America, N.A. ("BANA"), Quality Loan Service Corporation ("Quality"), Federal Home Loan Mortgage Corporation ("Freddie Mac"), Mortgage Electronic Registration Systems, Inc. ("MERS"), and Does 1-50's (collectively "Defendants") Motion to Dismiss (Doc. #16) Wagma Safi's ("Plaintiff") Complaint (Doc. #1) for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

///

1 Plaintiff opposes the motion ("Opposition") (Doc. #20).¹
2 Defendants filed a reply to the Opposition (Doc. #24). For the
3 following reasons, Defendants' motion is GRANTED.
4

5 I. FACTUAL AND PROCEDURAL BACKGROUND

6 This case arises out of a foreclosure action brought against
7 real property commonly known as 9948 Pianella Way, Elk Grove,
8 California ("Subject Property"). Prior to June 2008, Plaintiff
9 was the sole owner of the Subject Property. On or about June 12,
10 2008, Plaintiff and Bob Hugh Hamblen ("Hamblen") allegedly
11 entered into an oral agreement which included the following
12 terms:

13 a. Plaintiff would execute a quitclaim deed to the Subject
14 Property, naming herself and Hamblen as tenants in common.

15 b. Hamblen would obtain a \$240,000 loan from Countrywide
16 Bank, secured by a deed of trust against the Subject Property
17 signed by Plaintiff and Hamblen. The promissory note for the
18 loan would be solely in Hamblen's name.

19 c. Plaintiff would be responsible for paying all
20 principal, interest, and other charges due on the loan.

21 d. If Hamblen predeceased Plaintiff, his estate would pay
22 the balance due on the loan to Countrywide.

23 e. Plaintiff would remain the true equitable owner of the
24 Subject Property and, upon Plaintiff's demand, Hamblen would
25 execute a quitclaim deed to Plaintiff. Upon Hamblen's death, his
26

27 ¹ This motion was determined to be suitable for decision without
28 oral argument. E.D. Cal. L.R. 230(g). The hearing was
originally scheduled for September 11, 2013.

1 legal half interest in the property would pass to Plaintiff.

2 On June 12, 2008, Plaintiff executed a grant deed conveying
3 a half interest in the Subject Property to Hamblen and retaining
4 the other half interest.

5 Also on June 12, 2008, Plaintiff and Hamblen, as trustors,
6 executed a Deed of Trust against the Subject Property in favor of
7 Countrywide Bank. Under the Deed of Trust, MERS was the nominal
8 beneficiary and nominee for Countrywide Bank. The Deed of Trust
9 was security for a \$240,000 loan obtained solely in Hamblen's
10 name from Countrywide Bank.

11 On June 16, 2008, both the grant deed and the Deed of Trust
12 were recorded. On September 19, 2008, Plaintiff and Hamblen
13 signed a written agreement identical in its terms to the oral
14 agreement made on or about June 12, 2008 (described above). In
15 November 2009, Hamblen died intestate.

16 From June 2008 to December 2011, Plaintiff allegedly made
17 all payments on the loan to Countrywide, then to BANA, via
18 electronic withdrawals from her bank checking account. In
19 December 2011, Plaintiff ceased making payments on the advice of
20 prior counsel.

21 From December 2011 to present, Plaintiff allegedly "made
22 numerous attempts to tender performance under the Deed of Trust
23 and cure the arrears on the loan." Compl. ¶ 19. However, she
24 was unable to do so because BANA refused to disclose any
25 information to her, other than the monetary amount required to
26 pay off the loan. Plaintiff was told that she could not obtain
27 any other information because she was not an obligor on the
28 original promissory note.

1 On March 13, 2012, an Assignment of Deed of Trust was
2 recorded, transferring the beneficial interest under the Deed of
3 Trust from MERS to BANA. On May 8, 2012, a Substitution of
4 Trustee was recorded, making Quality the trustee under the Deed
5 of Trust. Also on May 8, 2012, Quality recorded a Notice of
6 Default against the Subject Property. On August 10, 2012,
7 Quality recorded a Notice of Sale against the Subject Property.

8 On August 28, 2012, Plaintiff filed the original Complaint
9 (Doc. #1) in Sacramento County Superior Court.

10 On August 30, 2012, the Sacramento County Superior Court
11 issued a Temporary Restraining Order staying the planned sale of
12 the Subject Property. That order remains in effect pending the
13 outcome of this case.

14 On October 26, 2012, Defendants removed the present case
15 from Sacramento County Superior Court to this Court (Doc. #1).

16 This Court has jurisdiction under 18 U.S.C. § 1452(f), which
17 grants original jurisdiction to United States district courts
18 over civil actions to which Freddie Mac is a party.

19 20 II. OPINION

21 A. Legal Standard

22 A party may move to dismiss an action for failure to state a
23 claim upon which relief can be granted pursuant to Federal Rule
24 of Civil Procedure 12(b)(6). To survive a motion to dismiss a
25 plaintiff must plead "enough facts to state a claim to relief
26 that is plausible on its face." Bell Atlantic Corp. v. Twombly,
27 556 U.S. 662, 570 (2007). In considering a motion to dismiss, a
28 district court must accept all the allegations in the complaint

1 as true and draw all reasonable inferences in favor of the
2 plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974),
3 overruled on other grounds by Davis v. Scherer, 468 U.S. 183
4 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). "First, to be
5 entitled to the presumption of truth, allegations in a complaint
6 or counterclaim may not simply recite the elements of a cause of
7 action, but must sufficiently allege underlying facts to give
8 fair notice and enable the opposing party to defend itself
9 effectively." Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir.
10 2011), cert. denied, 132 S. Ct. 2101, 182 L. Ed. 2d 882 (U.S.
11 2012). "Second, the factual allegations that are taken as true
12 must plausibly suggest an entitlement to relief, such that it is
13 not unfair to require the opposing party to be subjected to the
14 expense of discovery and continued litigation." Id. Assertions
15 that are mere "legal conclusions" are therefore not entitled to
16 the presumption of truth. Ashcroft v. Iqbal, 556 U.S. 662, 678
17 (2009) (citing Twombly, 550 U.S. at 555). Dismissal is
18 appropriate when a plaintiff fails to state a claim supportable
19 by a cognizable legal theory. Balistreri v. Pacifica Police
20 Department, 901 F.2d 696, 699 (9th Cir. 1990).

21 Upon granting a motion to dismiss for failure to state a
22 claim, a court has discretion to allow leave to amend the
23 complaint pursuant to Federal Rule of Civil Procedure 15(a).
24 "Dismissal with prejudice and without leave to amend is not
25 appropriate unless it is clear . . . that the complaint could not
26 be saved by amendment." Eminence Capital, L.L.C. v. Aspeon,
27 Inc., 316 F.3d 1048, 1052 (9th Cir. 2003).

28

1 B. Judicial Notice

2 Defendants request that the Court take judicial notice of
3 five documents: (1) the Deed of Trust referenced in the
4 Complaint; (2) the Assignment of Deed of Trust from MERS to
5 BANA; (3) the Substitution of Trustee naming Quality as
6 substitute trustee; (4) the Notice of Default referenced in the
7 Complaint; and (5) the Notice of Sale referenced in the
8 Complaint. Def.'s Request for Judicial Notice ("DRJN"), Doc.
9 #17, at 2.

10 Generally, the Court may not consider material beyond the
11 pleadings in ruling on a motion to dismiss for failure to state
12 a claim. However, the Court may take judicial notice of
13 material attached to, or relied on by, the complaint so long as
14 authenticity is not disputed, or matters of public record,
15 provided that they are not subject to reasonable dispute. E.g.,
16 Sherman v. Stryker Corp., 2009 WL 2241664 at *2 (C.D. Cal. 2009)
17 (citing Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir.
18 2001) and Fed. R. Evid. 201).

19 Each of the five documents listed above are public records,
20 as they have been recorded in the Sacramento County Recorder's
21 Office. Furthermore, Plaintiff has not opposed Defendants'
22 request, and the documents are not subject to reasonable
23 dispute. Therefore, they are the proper subject of a request
24 for judicial notice. See Fed. R. Evid. 201. Defendants'
25 request is granted.

26 Plaintiff requests that the Court take judicial notice of
27 the Temporary Restraining Order issued by the California
28 Superior Court in this case. Pl.'s Request for Judicial Notice

1 ("PRJN"), Doc. #21, at 2. This document is a public record and
2 Defendants have not opposed Plaintiff's request. Therefore, it
3 is the proper subject of a request for judicial notice. See,
4 e.g., Pistoresi v. Madera Irr. Dist., 2009 WL 256755, at *6
5 (E.D. Cal. Feb. 3, 2009) (taking judicial notice of a Temporary
6 Restraining Order). Plaintiff's request as to the temporary
7 restraining order is granted.

8 Plaintiff also requests judicial notice of the Complaint
9 filed in this action. PRJN, Doc. #21, at 2. Because the
10 Complaint filed in this action is already part of the record,
11 Plaintiff's request as to the Complaint is denied.

12 C. First Cause of Action

13 In her first cause of action, Plaintiff asks for declaratory
14 relief in the form of a judicial declaration that Plaintiff has
15 the right to reinstate the loan for which the Deed of Trust is
16 collateral, and that Defendants are required to provide her with
17 the information necessary to do so. Defendants argue that
18 Plaintiff does not state a claim upon which relief can be granted
19 because she fails to allege that Defendants have withheld any
20 information necessary to Plaintiff's exercise of the right to
21 reinstate and, in fact, her allegations establish that all
22 necessary information has been provided. Plaintiff responds by
23 reiterating her claim that she has "an unconditional right to
24 cure/reinstate[,]" both as a "Borrower" on the Deed of Trust and
25 as a successor-in-interest to Hamblen in the Subject Property.
26 She also continues to contend that she has been unable to tender
27 performance and reinstate the loan because Defendants "have
28 failed and refused to disclose any information to Plaintiff or

1 her counsel regarding the loan, other than the payoff amounts
2 stated in Notice of Default and Notice of Sale." Opp. at 6.
3 Plaintiff alleges that she "stands ready, willing and able to
4 cure the arrears on the promissory note and tender performance
5 under the Deed of Trust, if only she can ascertain the correct
6 amounts now due on the loan, the correct account number, and the
7 correct address for payment." Compl. ¶ 20.

8 The rights and obligations of a trustor in a deed of trust
9 are governed by California Civil Code section 2924 *et seq.* Under
10 section 2924c, the trustor has a statutory right of
11 reinstatement. Specifically, section 2924c provides that "the
12 trustor . . . may pay to the beneficiary . . . the entire amount
13 due . . . and thereby cure the default . . . and the obligation
14 and deed of trust or mortgage shall be reinstated[.]" Cal. Civ.
15 Code § 2924.

16 Accordingly, Plaintiff is entitled to the right to reinstate
17 the loan through full payment of the debt. However, Plaintiff
18 fails to allege that she has exercised this right through a
19 proper tender of payment. In the Complaint, Plaintiff alleges
20 that she "made numerous attempts to tender performance under the
21 Deed of Trust and cure the arrears on the loan" but was unable to
22 do so because Defendants refused to provide the necessary
23 information. Compl. ¶ 19. This naked assertion is insufficient
24 to constitute a specific allegation that Plaintiff has tendered
25 performance or that Defendants have improperly refused a tender
26 of performance. See Gaffney v. Downey Sav. & Loan Assn., 200
27 Cal.App.3d 1154, 1165 (1988) ("The tenderer must do and offer
28 everything that is necessary on his part to complete the

1 transaction[.] [I]t is a debtor's responsibility to make an
2 unambiguous tender of the entire amount due or else suffer the
3 result that the tender is of no effect.").

4 Here, despite Plaintiff's assertion that she "made numerous
5 attempts to tender performance," she fails to state any factual
6 basis for this claim. Compl. ¶ 19. Notably, Plaintiff fails to
7 allege that she actually sent any payment to Defendants, despite
8 the fact that she knew the total amount due (appearing on the
9 Notice of Default and the Notice of Sale) and the proper mailing
10 address of the beneficiary (appearing on the second page of the
11 Notice of Default). Exs. D-E, attached to DRJN, Doc. #17.

12 Nevertheless, Plaintiff contends that such a tender was
13 rendered impossible by Defendants' refusal "to disclose any
14 information to Plaintiff or her counsel regarding the loan, other
15 than the payoff amounts stated in Notice of Default and Notice of
16 Sale." Opp. at 6.

17 Under section 2924c(b)(1), the beneficiary or mortgagee is
18 required to provide the trustor with certain information that is
19 necessary to exercise the right to reinstate the loan.
20 Specifically, section 2924c(b)(1) mandates that a "Notice of
21 Default" be sent to the trustor, containing the following
22 language: "To find out the amount you must pay, or to arrange for
23 payment to stop the foreclosure . . . contact:" followed by the
24 name of the beneficiary or mortgagee, its mailing address, and
25 its telephone number.

26 California courts have determined that "compliance [with
27 section 2924c(b)(1)] necessarily requires that the beneficiary
28 provide accurate information in response to an inquiry from the

1 trustor." Anderson v. Heart Fed. Sav. & Loan Assn., 208
2 Cal.App.3d 202, 216 (1989). However, the beneficiary's duty to
3 provide the trustor with information is quite limited. See
4 Ausulio v. Summit Homeowner's Assn., Inc., 2003 WL 22229550, at
5 *10 (Cal. Ct. App. Sept. 29, 2003) (holding that, as long as
6 there is no "uncertainty regarding the appropriate amount of the
7 debt," the standard Notice of Default is sufficient to satisfy
8 the beneficiary's obligation under section 2924c(b)(1)).

9 Here, Plaintiff acknowledges that she received a Notice of
10 Default, which included a payoff amount. Furthermore, although
11 the copy of the Notice of Default provided in Plaintiff's Exhibit
12 A contains only the first page of the Notice, the full notice
13 appears in Defendants' Exhibit D, and shows that the second page
14 of the Notice includes the statutorily required language and
15 contact information. Ex. A, attached to Complaint, Doc. #1. Ex.
16 D, attached to DJRN, Doc. #17. Specifically, the Notice directs
17 the recipient to contact "BANK OF AMERICA, N.A." and provides a
18 mailing address and a phone number. Ex. D, attached to DJRN,
19 Doc. #17.

20 Accordingly, Plaintiff fails to allege that Defendants did
21 not comply with the statutory mandate that the Notice of Default
22 include sufficient contact information.

23 Nevertheless, Plaintiff contends that Defendants' refusal to
24 disclose any loan information, other than the amount due,
25 prevented Plaintiff from exercising her right to reinstate the
26 loan. However, Plaintiff fails to identify what additional
27 information was needed, or how this information was necessary to
28 her exercising her right to reinstate the loan. By her own

1 allegations, the "payoff amount" was included in the Notice of
2 Default which Plaintiff received. Furthermore, as seen in the
3 full Notice of Default, Plaintiff was provided with Defendant
4 Bank of America's mailing address and telephone number. Even if
5 Defendants refused to disclose any other information, Plaintiff
6 had access to sufficient information to make a full payment and
7 reinstate the loan.

8 Accordingly, Plaintiff's first cause of action for
9 declaratory relief is dismissed. Despite Defendants' alleged
10 refusal to provide Plaintiff with information regarding the loan,
11 their compliance with the notice requirements of section
12 2924c(b)(1) provided Plaintiff with sufficient information to
13 exercise her right to reinstate the loan. No actual controversy
14 exists between Plaintiff and Defendants because Plaintiff's
15 request for information has already been satisfied.

16 However, it is possible that the complaint can be saved by
17 amendment. Namely, Plaintiff must allege specific facts that
18 sufficiently describe either (1) an actual tender of payment to
19 Defendants or (2) exactly what additional information regarding
20 the loan was withheld by Defendants, and how this made payment
21 impossible.

22 As the argument considered above is dispositive, the Court
23 declines to address Defendants' remaining arguments regarding the
24 first cause of action.

25 Plaintiff's first claim for declaratory relief is DISMISSED
26 WITH LEAVE TO AMEND.

27
28

1 D. Second Cause of Action

2 In her second cause of action, Plaintiff asks for
3 declaratory relief, contending that "Bank of America is the sole
4 beneficiary under the Deed of Trust and that MERS has no
5 authority to transfer or assign any rights under the Deed[.]"
6 Compl. ¶ 29. Plaintiff alleges that MERS signed the Deed of
7 Trust "solely as nominee" and therefore lacks the authority to
8 assign its interest to a third party. Compl. ¶ 12. Defendants
9 argue that Plaintiff lacks standing because the foreclosure and
10 sale of her property does not constitute an injury in fact.
11 Plaintiff responds that this argument "misses the gravamen" of
12 the Complaint and that the foreclosure would "constitute a
13 violation of substantive California law."

14 Defendants' argument that Plaintiff lacks standing appears
15 to confuse "prejudicial procedural irregularity" in the context
16 of wrongful foreclosures with "injury" for the purpose of
17 standing. See Fontenot v. Wells Fargo Bank, N.A., 198
18 Cal.App.4th 256, 272 (2011) (noting that "a plaintiff in a suit
19 for wrongful foreclosure has generally been required to
20 demonstrate that the alleged imperfection in the foreclosure
21 process was prejudicial to the plaintiff's interest" in order to
22 overcome the common law presumption that a nonjudicial
23 foreclosure sale was conducted regularly and fairly); see Herrera
24 v. Fed. Nat. Mortgage Assn., 205 Cal.App.4th 1495, 1507 (2012)
25 (noting that "[e]ven if MERS lacked the authority to transfer the
26 note, it is difficult to conceive how plaintiff was prejudiced by
27 MERS' purported assignment" and therefore declining to void a
28 foreclosure sale). The wrongful foreclosure and sale of

1 Plaintiff's home would almost certainly constitute a concrete
2 injury for purposes of establishing standing. See generally
3 Lujan v. Defenders, 504 U.S. 555 (1992).

4 Nevertheless, Plaintiff fails to cite any cases to support
5 her substantive argument that the nominee beneficiary on a Deed
6 of Trust lacks the authority to assign its interest to a third
7 party. This is unsurprising, as "[t]he courts in California have
8 universally held that MERS, as nominee beneficiary, has the power
9 to assign its interest under a deed of trust." Herrera, 205
10 Cal.App.4th 1495, 1498 (2012). For example, in Fontenot, the
11 court held that "the allegation that MERS was merely a nominee is
12 insufficient to demonstrate that MERS lacked authority to make a
13 valid assignment of the note on behalf of the original lender."
14 Fontenot, 198 Cal.Appl.4th 256, 271 (2011).

15 Here, the Deed of Trust states that "[t]he beneficiary of
16 this Security Instrument is MERS (solely as nominee for Lender
17 and Lender's successors and assigns) and the successors and
18 assigns of MERS." Ex. A, attached to DJRN, Doc. #17.

19 Accordingly, the Deed not only identifies MERS as the nominee
20 beneficiary, but also implicitly contemplates the potential
21 future assignment of MERS' interest to a third party.

22 Furthermore, California Civil Code section 2932.5 expressly
23 provides that the "power of sale" may be assigned to and
24 exercised by a third party.

25 As Plaintiff makes no other allegations that would call into
26 question the validity of MERS' assignment, she has failed to
27 state a claim and the second cause of action is dismissed.
28 Furthermore, as it is clear that the complaint can not be saved

1 by amendment, it must be dismissed with prejudice.

2 Plaintiff's second claim for declaratory relief is DISMISSED
3 WITHOUT LEAVE TO AMEND.

4 E. Third Cause of Action

5 Plaintiff also asserts a separate claim for injunctive
6 relief. Defendants move to dismiss this claim on the grounds
7 that injunctive relief is a remedy, not a separate claim.
8 Plaintiff fails to oppose this argument.

9 Defendants are correct that injunctive relief is a remedy,
10 not a separate cause of action. A "separately pled claim or
11 cause of action for injunctive relief is inappropriate." Jensen
12 v. Quality Loan Serv. Corp., 702 F. Supp. 2d 1183, 1201 (E.D.
13 Cal. 2010). Accordingly, Plaintiff's claim for injunctive relief
14 is DISMISSED WITHOUT LEAVE TO AMEND.

15

16 III. ORDER

17 For the foregoing reasons, Defendants' Motion to Dismiss is
18 GRANTED. Defendants' Motion to Dismiss Plaintiff's first cause
19 of action is GRANTED WITH LEAVE TO AMEND. Defendants' Motion to
20 Dismiss Plaintiff's second and third causes of action is GRANTED
21 WITH PREJUDICE. Plaintiff's Amended Complaint must be filed
22 within twenty (20) days from the date of this order. Defendants'
23 responsive pleading is due within twenty (20) days thereafter.
24 If Plaintiff elects not to file an Amended Complaint, she should
25 file a notice of dismissal within the next twenty (20) days.

26 IT IS SO ORDERED.

27 Dated: October 9, 2013

28


JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE