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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KEITH HARD,

Plaintiff,

v.

BANK OF NEW YORK MELLON, AS
TRUSTEE OF FIRST HORIZAON
ALTERNATIVE MORTGAGE
SECURITIES TRUST 2006-FA7
MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2006-FA7;
FIRST HORIZON HOME LOAN
CORPORATION; and DOES 1 through
50, inclusive,

Defendants.

No. 2:14-cv-01948-TLN-CMK

ORDER

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS PORTIONS OF
PLAINITFF'S SECOND AMENDED
COMPLAINT**

This matter is before the Court pursuant to Bank of New York Mellon, as Trustee of First Horizon Alternative Mortgage Securities Trust (“BNY Mellon”), and First Horizon Home Loan Corporation’s (“Horizon”) (collectively, “Defendants”)¹ Motion to Dismiss Portions of Second Amended Complaint. (Mot. to Dismiss Second Am. Compl., ECF Nos. 34.) Plaintiff Keith Hard (“Plaintiff”) opposes the Motion. (Opp’n, ECF No. 37.) For the reasons set forth below, Defendants’ Motion to Dismiss Portions of Second Amended Complaint is GRANTED.

¹ Defendants contend they were sued under erroneous names. For clarity, the Court will denote the Defendants as those listed in the Second Amended Complaint.

1 **I. FACTUAL BACKGROUND**

2 The facts of this case were addressed in great detail in this Court’s prior Order and are
3 incorporated herein by reference. (See Order, ECF No. 31.) Therefore, the Court provides below
4 only the factual allegations relevant to the current motion.

5 The Second Amended Complaint (“SAC”) alleges the following. Around December 13,
6 2005, Plaintiff obtained a residential mortgage loan for the property located at 4211 Leftout Lane,
7 Chico, California 95973 (“Subject Property”). (Second Am. Compl., ECF No. 32 ¶ 2.) On
8 March 2, 2010, Defendants attempted to transfer Plaintiff’s Deed of Trust on the Subject Property
9 to a securitized trust (“Trust”) “that alleges to own all of the beneficial interest in [Plaintiff’s]
10 Deed of Trust.”² (ECF No. 32 ¶¶ 4, 20.) Pursuant to the terms of the Trust’s pooling and
11 servicing agreement (“PSA”), the Trust’s closing date was October 30, 2006. (ECF No. 32 ¶ 17.)
12 Under the PSA and under New York law, which governs the Trust, each loan was required to be
13 transferred into the Trust within 90 days of the closing date. (ECF No. 32 ¶¶ 17–18.)

14 On September 12, 2011, the Subject Property was sold at a foreclosure sale. (ECF No. 32
15 ¶ 32.) However, Plaintiff alleges that because Defendants’ transfer of Plaintiff’s Deed of Trust
16 occurred years after the closing date of the Trust, it violates both the PSA and New York law, and
17 is thus void. (ECF No. 32 ¶¶ 20–21, 77–78.) Therefore, Plaintiff alleges that Defendants never
18 possessed the right to enforce the terms of Plaintiff’s Deed of Trust and wrongfully foreclosed on
19 the Subject Property. (ECF No. 32 ¶ 21.)

20 **II. PROCEDURAL HISTORY**

21 On July 16, 2014, Plaintiff filed a Complaint in the Superior Court of California in Butte
22 County. (ECF No. 1-1 at 2.) On August 21, 2014, Defendants filed a Notice of Removal to this
23 Court. (ECF No. 1.) Thereafter, on August 28, 2014, Defendants filed a Motion to Dismiss
24 Plaintiff’s Complaint. (ECF No. 6.) On March 5, 2015, Plaintiff requested leave to file an
25 amended complaint (ECF No. 16), and the Court granted his request on March 26, 2015, (ECF
26 No. 20). Plaintiff filed a First Amended Complaint (“FAC”) on March 31, 2015 (ECF No. 21),

27 ² The SAC alleges that BNY Mellon is the purported trustee of the Trust. (ECF No. 32 ¶ 3.) Horizon was the
28 purported Master Servicer of Plaintiff’s loan, as appointed by the Trust. (ECF No. 32 ¶ 5.) For clarity, the Court will refer to activity by BNY Mellon or Horizon solely as activity by Defendants.

1 and on April 24, 2015, Defendants filed a Motion to Dismiss the entire FAC, (ECF No. 22). On
2 May 4, 2016, the Court granted in part and denied in part Defendants’ Motion to Dismiss with
3 leave to amend. (ECF No. 31.) The Court granted Defendants’ Motion to Dismiss with leave to
4 amend as to the following claims: Third Cause of Action for Breach of the Implied Covenant of
5 Good Faith and Fair Dealing pursuant to tort; Sixth Cause of Action for Intentional Infliction of
6 Emotional Distress; Seventh Cause of Action for Negligence; and Eighth Cause of Action for
7 Wrongful Foreclosure. (ECF No. 31 at 21.) On June 3, 2016, Plaintiff filed the SAC (ECF No.
8 32), and on July 8, 2016, Defendants filed the instant Motion to Dismiss, (ECF No. 34).

9 III. STANDARD OF LAW

10 A motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure
11 12(b)(6) tests the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.
12 2001). Federal Rule of Civil Procedure 8(a) requires that a pleading contain “a short and plain
13 statement of the claim showing that the pleader is entitled to relief.” See *Ashcroft v. Iqbal*, 556
14 U.S. 662, 678–79 (2009). Under notice pleading in federal court, the complaint must “give the
15 defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell Atlantic*
16 *v. Twombly*, 550 U.S. 544, 555 (2007). “This simplified notice pleading standard relies on liberal
17 discovery rules and summary judgment motions to define disputed facts and issues and to dispose
18 of unmeritorious claims.” *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002).

19 On a motion to dismiss, the factual allegations of the complaint must be accepted
20 as true. *Cruz v. Beto*, 405 U.S. 319, 322 (1972). A court is bound to give plaintiff the benefit of
21 every reasonable inference to be drawn from the “well-pleaded” allegations of the complaint.
22 *Retail Clerks Int’l Ass’n v. Schermerhorn*, 373 U.S. 746, 753 n.6 (1963). A plaintiff need not
23 allege “‘specific facts’ beyond those necessary to state his claim and the grounds showing
24 entitlement to relief.” *Twombly*, 550 U.S. at 570. “A claim has facial plausibility when the
25 plaintiff pleads factual content that allows the court to draw the reasonable inference that the
26 defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S.
27 544, 556 (2007)).

28 Nevertheless, a court “need not assume the truth of legal conclusions cast in the

1 form of factual allegations.” *United States ex rel. Chunie v. RingrosHee*, 788 F.2d 638, 643 n.2
2 (9th Cir. 1986). While Rule 8(a) does not require detailed factual allegations, “it demands more
3 than an unadorned, the defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678. A
4 pleading is insufficient if it offers mere “labels and conclusions” or “a formulaic recitation of the
5 elements of a cause of action.” *Twombly*, 550 U.S. at 555; see also *Iqbal*, 556 U.S. at 678
6 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory
7 statements, do not suffice.”). Moreover, it is inappropriate to assume that the plaintiff “can prove
8 facts that it has not alleged or that the defendants have violated the . . . laws in ways that have not
9 been alleged.” *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459
10 U.S. 519, 526 (1983).

11 Ultimately, a court may not dismiss a complaint in which the plaintiff has alleged
12 “enough facts to state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 697
13 (quoting *Twombly*, 550 U.S. at 570). Only where a plaintiff fails to “nudge[] [his or her] claims .
14 . . . across the line from conceivable to plausible,” is the complaint properly dismissed. *Id.* at 680.
15 While the plausibility requirement is not akin to a probability requirement, it demands more than
16 “a sheer possibility that a defendant has acted unlawfully.” *Id.* at 678. This plausibility inquiry is
17 “a context-specific task that requires the reviewing court to draw on its judicial experience and
18 common sense.” *Id.* at 679.

19 If a complaint fails to state a plausible claim, “[a] district court should grant leave to
20 amend even if no request to amend the pleading was made, unless it determines that the pleading
21 could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130
22 (9th Cir. 2000) (en banc) (quoting *Doe v. United States*, 58 F.3d 484, 497 (9th Cir. 1995)); see
23 also *Gardner v. Marino*, 563 F.3d 981, 990 (9th Cir. 2009) (finding no abuse of discretion in
24 denying leave to amend when amendment would be futile). Although a district court should
25 freely give leave to amend when justice so requires under Federal Rule of Civil Procedure
26 15(a)(2), “the court’s discretion to deny such leave is ‘particularly broad’ where the plaintiff has
27 previously amended its complaint.” *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d
28 502, 520 (9th Cir. 2013) (quoting *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 622 (9th Cir.

1 2004)).

2 **IV. ANALYSIS**

3 Plaintiff asserts the following claims against Defendant: (1) Breach of Written Contract;
4 (2) Promissory Estoppel; (3) Breach of the Implied Covenant of Good Faith and Fair Dealing; (4)
5 Fraud – False Promise; (5) Unlawful Business Practices; and (6) Wrongful Foreclosure.

6 Defendants move to dismiss Plaintiff’s Sixth Cause of Action for Wrongful Foreclosure on the
7 basis that Plaintiff lacks standing. (ECF No. 35 at 4.) Defendants contend that Plaintiff lacks
8 standing to assert a cause of action for wrongful foreclosure because the assignment of Plaintiff’s
9 Deed of Trust to the Trust is voidable, rather than void. (ECF No. 35 at 4–5.) Plaintiff argues
10 that the assignment is void, and therefore Plaintiff has properly asserted a claim for wrongful
11 foreclosure. (ECF No. 37 at 9.)

12 “Wrongful foreclosure is an action in equity where a plaintiff seeks to set aside a
13 foreclosure sale.” *Lane v. Vitek Real Estate Industries Group*, 713 F. Supp. 2d 1092, 1097 (E.D.
14 Cal. 2010). “A trustee or mortgagee may be liable to the trustor or mortgagor for damages
15 sustained where there has been an illegal, fraudulent, or willfully oppressive sale of property
16 under the power of sale contained in the mortgage or deed of trust.” *Munger v. Moore*, 11 Cal.
17 App. 3d 1, 7 (1970); see also *Alvarado v. Bank of America, N.A.*, No. CV F 12–2078 LJO GSA,
18 2013 WL 28584, at *9 (E.D. Cal. 2013). Under California law, “a borrower [has] standing to
19 challenge an assignment of her note and deed of trust on the basis of defects allegedly rendering
20 the assignment void.” *Morgan v. Aurora Loan Services, LLC*, No. 14–55203, 2016 WL
21 1179733, at *2 (9th Cir. March 28th, 2016) (citing *Yvanova v. New Century Mortg. Corp.*, 62
22 Cal. 4th 919, 931 (2016)).

23 However, a borrower does not have standing to challenge defects in trust assignments
24 that are merely voidable. *Morgan*, No. 14–55203 at *3; *Yvanova*, 62 Cal. 4th at 939. As the
25 California Supreme Court stated, “[w]hen an assignment is merely voidable, the power to ratify
26 or avoid the transaction lies solely with the parties to the assignment” and consequently, a
27 plaintiff who sets forth a claim on defects within the assignment that render it voidable is
28 attempting to “assert an interest belonging solely to the parties to the assignment rather than to

1 herself.” *Id.* at 936; see also *Lundy v. Selene Finance, LP*, Case No. 15-cv-05676-JST, 2016 WL
2 1059423, at *9 (N.D. Cal. March, 17, 2016).

3 Plaintiff alleges that on March 2, 2010, Defendants attempted to transfer Plaintiff’s Deed
4 of Trust on the Subject Property to the Trust. (ECF No. 32 ¶ 20.) Plaintiff alleges that this
5 assignment is void, and therefore Defendants did not own the Deed of Trust to the Subject
6 Property and had no legal right to foreclose upon the Subject Property. (ECF No. 32 ¶ 21.)
7 Plaintiff argues that the assignment is void for two reasons. First, Plaintiff argues that the
8 purported assignment is contrary to the requirements of the PSA and consequently invalid. (ECF
9 No. 37 at 4–8.) Second, Plaintiff alleges that the Trust is a Real Estate Mortgage Investment
10 Conduit (“REMIC”), and the Internal Revenue Code requires “that a REMIC maintains its loan
11 pool with loans received not later than 90 days of its creation.” (ECF No. 37 at 1–4.) Thus,
12 Plaintiff argues that because the purported assignment was “made well after the 90-day period set
13 forth by the Internal Revenue Code,” it is a “prohibited transaction” under 26 U.S.C. 860, et seq.,
14 and thus, is void. (ECF No. 32 ¶ 78; ECF No. 37 at 2–3.) The Court will discuss each in
15 argument in turn.

16 First, Plaintiff argues that Defendants’ assignment after the 90-day period was in
17 violation of the Trust, and that a violation of the Trust renders the assignment void. (ECF No. 37
18 at 4–8.) As discussed in detail in its previous order, this Court held that Defendants’ alleged
19 violation of the Trust creates a voidable, rather than a void assignment. (ECF No. 31 at 20–21.)
20 Thus, the fact that Defendants’ actions may have violated the Trust does not render the
21 assignment void.

22 Second, Plaintiff advances a new argument, contending that the late assignment is void
23 because the purported late assignment is a “prohibited transaction” under the Internal Revenue
24 Code. (ECF No. 32 ¶ 78; ECF No. 37 at 2–3.) Plaintiff argues that courts have failed to
25 “analyze the effect of an external impetus – such as the Internal Revenue Code – that expressly
26 prohibits and penalizes specific transactions with respect to a REMIC.” (ECF No. 37 at 2.)
27 Because these transactions allegedly violate the Internal Revenue Code, Plaintiff argues that “a
28 REMIC’s certificate holders should have no power to ratify [the assignment] and thus it is void

1 and not voidable.” (ECF No. 37 at 3.) This argument lacks merit.

2 “The tax implications of securitization simply do not render a voidable transaction void.”
3 *Mendoza v. JPMorgan Chase Bank, N.A.*, 6 Cal. App. 5th 802, 818 (2016). Moreover, Plaintiff
4 provides no authority for his argument that potential tax implications would somehow void
5 Defendants’ assignment. Indeed, courts have explicitly rejected “the notion that an untimely
6 transfer to a REMIC automatically voids the transaction.” *Id.* (“[W]e do not believe that losing
7 favorable tax treatment renders a transaction void as a matter of law.”); see *Williams v. GMAC*
8 *Mortg., Inc.*, No. 13 CIV. 4315 (JPO), 2014 WL 2560605, at *4 (S.D.N.Y. June 6, 2014)
9 (“While transferring a note to the REMIC might have negative tax consequences for the REMIC
10 investors, Plaintiffs have not argued any reason why such a transfer would be ‘meaningless and
11 legally unenforceable.’”); *Elliott v. Mortg. Elec. Registration Sys.*, No. 12-CV-4370 YGR, 2013
12 U.S. 2013 WL 1820904, at *3 (N.D. Cal. Apr. 30, 2013) (“[T]he alleged breach seems to affect
13 only the trust’s ability to claim a certain tax status, a matter wholly irrelevant to Plaintiffs’
14 claims.”). Accordingly, the Court concludes that Plaintiff has failed to allege facts
15 demonstrating that the assignment was void, and thus, lacks standing to bring a wrongful
16 foreclosure claim.

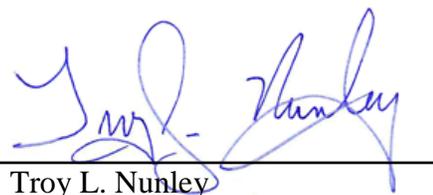
17 Therefore, Defendants’ Motion to Dismiss Plaintiff’s Sixth Cause of Action is
18 GRANTED without leave to amend.

19 **V. CONCLUSION**

20 For the foregoing reasons, the Court hereby GRANTS Defendants’ Motion to Dismiss
21 Plaintiff’s Sixth Cause of Action for Wrongful Foreclosure. Defendants are afforded twenty-one
22 (21) days from entry of this Order to answer the SAC.

23 IT IS SO ORDERED.

24 Dated: April 9, 2018

25
26 
27 Troy L. Nunley
United States District Judge