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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DEBRA LYNN MEDFORD,

Plaintiff,

v.

U.S. BANK NATIONAL
ASSOCIATION, as Trustee for CMALT
REMIC 2006-A2, REMIC PASS-
THROUGH CERTIFICATES, SERIES
2006-A2; CITIMORTGAGE, INC.;
CITICORP MORTGAGE SECURITIES,
INC.; NORTHWEST TRUSTEE
SERVICES, INC.; and DOES 1 through
20 inclusive,

Defendants.

No. 2:17-cv-01783-MCE-GGH

MEMORANDUM AND ORDER

By way of the present action, Plaintiff Debra Lynn Medford (“Plaintiff”) seeks declaratory and injunctive relief as well as restitution and other costs from Defendants U.S. Bank Association (“US Bank”), CitiMortgage Inc. (“CITI”), Citicorp Mortgage Securities, Inc. (“CMSI”), and Northwest Trustee Services (“Trustee”) related to the parties’ rights and duties under Plaintiff’s mortgage loan. Generally speaking, Plaintiff alleges that there are major defects in the assignments of the Deed of Trust (“DOT”) and Substitution of Trustee to her mortgage loan. The Complaint sets forth three causes of action: (1) cancellation of instruments; (2) violation of California Business and

1 Professions Code section 17200, et seq.; and (3) declaratory relief. Presently before the
2 Court is Defendants' Motion to Dismiss. ECF No. 6. For the reasons stated below,
3 Defendants' Motion is GRANTED with leave to amend.¹
4

5 **BACKGROUND**

6
7 On or about January 31, 2006, Plaintiff executed a Note and Deed of Trust in the
8 amount of \$500,000 (collectively "the loan"). Complaint, ¶ 12. The DOT names Plaintiff
9 as the borrower, American Brokers Conduit ("ABC") as the lender, North American Title
10 Company as the trustee, and Mortgage Electronic Registration Systems, Inc. ("MERS")
11 as the beneficiary acting as "a nominee for the Lender and Lender's successors and
12 assigns." Id., ¶ 13.

13 ABC was a fictitious business name used by American Home Mortgage
14 Corporation ("AHM"). AHM filed for Chapter 11 bankruptcy on or about August 6, 2007.
15 Id., ¶ 14. Plaintiff alleges that the loan was an AHM asset put into a liquidation trust as
16 part of the bankruptcy proceedings and was later sold to an unidentified party by the
17 trustee of the liquidation trust.² Id.

18 On July 25, 2012, MERS as nominee for ABC and its successors and assigns,
19 assigned the DOT to CITI. Id., ¶ 16. CITI recorded the assignment on July 30, 2012.
20 Id. About a month later, on August 28, 2012, CITI substituted Defendant Northwest
21 Trustee Services, Inc. as Trustee. This substitution was recorded on September 11,
22 2012. Id., ¶ 17. Plaintiff claims this 2012 assignment is void because MERS had no
23 authority to act as ABC's agent since ABC had ceased operations and filed for
24 bankruptcy in 2007. Id., ¶ 16.

25
26 ¹ Additionally, the Court takes judicial notice of Defendants' Exhibits A and C through E under
27 Federal Rule of Evidence 201 as they are official public records, and of Exhibit B as it is an official court
record. Defs' RJN, ECF Nos. 6-1, 6-2.

28 ² Plaintiff alternatively alleges that the loan was transferred or assigned to CITI, and that CITI sold
the loan to CMSI, but that the sale agreement did not actually include Plaintiff's loan. See Compl. ¶ 15.

1 Subsequently, on January 15, 2014, CITI assigned the DOT to Defendant US
2 Bank. Id., ¶ 18. CITI recorded this assignment on January 27, 2014. Id. Plaintiff
3 alleges this assignment is void for two reasons: (1) on or about May 1, 2006, CITI had
4 sold the loan to CMSI; and/or (2) MERS did not have the authority to make the 2012
5 assignment to CITI. Id., ¶ 17.

6 This action was originally filed in the San Joaquin County Superior Court against
7 US Bank, CITI, CMSI and Trustee on June 29, 2017. Defendants successfully removed
8 the action to this Court on August 25, 2017.

9
10 **STANDARD OF REVIEW**
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12 On a motion to dismiss for failure to state a claim under Federal Rule of Civil
13 Procedure 12(b)(6), all allegations of material fact must be accepted as true and
14 construed in the light most favorable to the nonmoving party. Cahill v. Liberty Mut. Ins.
15 Co., 80 F.3d 336, 337-38 (9th Cir. 1996). Rule 8(a)(2) requires only “a short and plain
16 statement of the claim showing that the pleader is entitled to relief” in order to “give the
17 defendant fair notice of what the . . . claim is and the grounds upon which it rests.” Bell
18 Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41,
19 47 (1957)). A complaint attacked by a Rule 12(b)(6) motion to dismiss does not require
20 detailed factual allegations. However, “a plaintiff’s obligation to provide the grounds of
21 his entitlement to relief requires more than labels and conclusions, and a formulaic
22 recitation of the elements of a cause of action will not do.” Id. (internal citations and
23 quotations omitted). A court is not required to accept as true a “legal conclusion
24 couched as a factual allegation.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009)
25 (quoting Twombly, 550 U.S. at 555). “Factual allegations must be enough to raise a right
26 to relief above the speculative level.” Twombly, 550 U.S. at 555 (citing 5 Charles Alan
27 Wright & Arthur R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004) (stating
28 ///

1 that the pleading must contain something more than “a statement of facts that merely
2 creates a suspicion [of] a legally cognizable right of action.”)).

3 Furthermore, “Rule 8(a)(2) . . . requires a showing, rather than a blanket
4 assertion, of entitlement to relief.” Twombly, 550 U.S. at 556 n.3 (internal citations and
5 quotations omitted). Thus, “[w]ithout some factual allegation in the complaint, it is hard
6 to see how a claimant could satisfy the requirements of providing not only ‘fair notice’ of
7 the nature of the claim, but also ‘grounds’ on which the claim rests.” Id. (citing 5 Charles
8 Alan Wright & Arthur R. Miller, *supra*, at § 1202). A pleading must contain “only enough
9 facts to state a claim to relief that is plausible on its face.” Id. at 570. If the “plaintiffs . . .
10 have not nudged their claims across the line from conceivable to plausible, their
11 complaint must be dismissed.” Id. However, “[a] well-pleaded complaint may proceed
12 even if it strikes a savvy judge that actual proof of those facts is improbable, and ‘that a
13 recovery is very remote and unlikely.’” Id. at 556 (quoting Scheuer v. Rhodes, 416 U.S.
14 232, 236 (1974)).

15 A court granting a motion to dismiss a complaint must then decide whether to
16 grant leave to amend. Leave to amend should be “freely given” where there is no
17 “undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice
18 to the opposing party by virtue of allowance of the amendment, [or] futility of the
19 amendment” Foman v. Davis, 371 U.S. 178, 182 (1962); Eminence Capital, LLC v.
20 Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (listing the Foman factors as those to
21 be considered when deciding whether to grant leave to amend). Not all of these factors
22 merit equal weight. Rather, “the consideration of prejudice to the opposing party . . .
23 carries the greatest weight.” Id. (citing DCD Programs, Ltd. v. Leighton, 833 F.2d 183,
24 185 (9th Cir. 1987)). Dismissal without leave to amend is proper only if it is clear that
25 “the complaint could not be saved by any amendment.” Intri-Plex Techs. v. Crest Group,
26 Inc., 499 F.3d 1048, 1056 (9th Cir. 2007) (citing In re Daou Sys., Inc., 411 F.3d 1006,
27 1013 (9th Cir. 2005); Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir.
28 ///

1 1989) (“Leave need not be granted where the amendment of the complaint . . .
2 constitutes an exercise in futility . . .”).

3 4 ANALYSIS

5
6 Defendants move to dismiss Plaintiff’s claims against them on the basis that
7 Plaintiff (1) lacks standing to challenge the assignment, (2) fails to plead facts sufficient
8 to state a claim under any of the three pleaded causes of action.

9 A. Standing

10 Defendants argue that Plaintiff lacks standing to challenge the assignment on the
11 basis that a foreclosure has not taken place. Defendants assert that under California
12 law Plaintiff must suffer a harm or particular injury, in this case a foreclosure, in order to
13 have standing to challenge the assignment of the DOT. Because no foreclosure sale
14 has taken place, Defendants argue the Complaint fails and the matter must be
15 dismissed.

16 The Complaint mentions, in passing, foreclosure proceedings under the Second
17 Cause of Action for Unfair Competition, but not under the First Cause of Action for
18 Cancellation of Instruments or under the section reciting general factual allegations.
19 Complaint, ¶¶ 35-36.³ Under California Civil Code § 2924, upon a lender’s request, a
20 trustee starts the nonjudicial foreclosure process by recording a notice of default, and
21 after a three-month waiting period the trustee may then record a notice of sale. Nowhere
22 in her Complaint does Plaintiff allege that foreclosure proceedings have been initiated,
23 and the Complaint is void of allegations discussing a notice of default or notice of sale.

24 In her Opposition, citing Yvanova v. New Century Mortgage Corp., 62 Cal. 4th
25 919 (2016), Plaintiff argues that she has standing because the US Bank assignment is
26 void and therefore US Bank does not have “legitimate authority to order a trustee’s sale.”

27 ³ Plaintiff does vaguely allege that “[t]he written instruments, if left outstanding, will cause
28 reasonable apprehension that they will cause serious injury to Plaintiff . . .” Compl. ¶ 28. An allegation
that something might cause fear of future injury is not a sufficiently alleged injury.

1 Opposition at 4. In Yvanova, a borrower brought a wrongful foreclosure action against
2 the foreclosing entity based on an allegation that the assignment of the deed of trust was
3 void. Id. at 925. Plaintiff is correct that the court there concluded that “a home loan
4 borrower has standing to claim a nonjudicial foreclosure was wrongful because an
5 assignment by which the foreclosing party purportedly took a beneficial interest in the
6 deed of trust was not merely voidable but void, depriving the foreclosing party of any
7 legitimate authority to order a trustee’s sale.” Id. at 942-943. Here, Plaintiff claims that,
8 just like in Yvanova, she has standing on the basis that she is asserting a void
9 assignment and, therefore, US Bank has no authority to order a trustee’s sale. Opp. at 4.

10 Plaintiff is correct that under Yvanova her allegation that the MERS assignment,
11 and therefore the subsequent assignments, are void gives her standing to bring the
12 present suit. But Plaintiff still must allege an injury in order to have standing, and her
13 present allegations say nothing of any injury she has suffered.

14 Even the court in Yvanova specifically stated: “We do not hold or suggest that a
15 borrower may attempt to preempt a threatened nonjudicial foreclosure by a suit
16 questioning the foreclosing party’s right to proceed.” Id. at 924. Plaintiff argues that this
17 is not a pre-emptive suit and that she has provided facts to find that the foreclosure
18 process was initiated by persons (Defendants) who “do not have the required authority
19 because the assignment to them was void.” Opp. at 5. Additionally, Plaintiff argues that
20 “there is no decision which requires a plaintiff to sit back while a futile trustee’s sale of
21 their home occurs.” Opp. at 4.

22 The Court disagrees. As explained above, Plaintiff has not pled facts supporting
23 a claim that foreclosure proceedings have actually been initiated. Indeed, she alleges
24 nothing regarding a notice of default or notice of sale. Nor does Plaintiff’s Complaint
25 include a wrongful foreclosure cause of action. Without alleging an injury, Plaintiff lacks
26 standing to pursue her claims. Defendants’ Motion to Dismiss is therefore GRANTED.
27 Because the Court finds amendment may not be futile under these circumstances,

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1 Plaintiff will be given the opportunity to file an amended complaint that, at a minimum,
2 alleges a harm, such as a foreclosure or an impending trustee sale.

3 **B. Cancellation of Instruments**

4 The Complaint alleges that the US Bank DOT is void on the basis that the
5 previous assignment (from MERS to CITI) was void. Compl., ¶ 18. Plaintiff claims the
6 previous assignment, made in 2012 from MERS to CITI, is void because the original
7 lender (AHM), for whom MERS held the title, declared bankruptcy in 2007. Compl.,
8 ¶¶ 14-15.

9 Plaintiff's claim for cancellation of instruments focuses on this allegedly void
10 assignment. California Civil Code § 3412 allows for a cancellation of instruments cause
11 of action where "a written instrument, in respect to which there is a reasonable
12 apprehension that if left outstanding it may cause serious injury to a person against
13 whom it is void or voidable, may, upon his application, be so adjudged, and ordered to
14 be delivered up or canceled."

15 One requirement under § 3412 is that Plaintiff states facts supporting that the
16 assignments are void or voidable. As discussed above, Defendants argue that Plaintiff
17 has not pleaded facts to establish that the MERS to CITI assignment, and therefore the
18 US Bank assignment, are void because they contend AHM's bankruptcy did not affect
19 MERS' authority to continue acting as its nominee.

20 In support of this argument, Defendants cite to Siliga v. MERS, Inc.,
21 219 Cal. App. 4th 75 (2013), (disapproved of on other grounds by Yvanova, 62 Cal. 4th
22 919), in which the borrower argued that MERS had no authority to assign the deed
23 because the lender went out of business and filed for bankruptcy. There, the Court held
24 that the bankruptcy did not nullify MERS' authority to assign the deed of trust:
25 "[Lender's] chapter 11 bankruptcy petition, which we have judicially noticed at
26 [borrower's] request, related to a reorganization and shows neither the company's death
27 nor an incapacity to contract. [Borrowers] have not alleged facts showing any lapse in
28 MERS' authority to assign the deed of trust on this basis." Id. at 84. AHM's bankruptcy

1 similarly arose under Chapter 11 and therefore—it appears—related to a reorganization.
2 Thus, Defendants assert that the MERS assignment to CITI is valid absent a showing to
3 the contrary.

4 Like in Siliga, Plaintiff's claim is based on MERS' authority ending after the
5 original lender declared bankruptcy. Also like in Siliga, Plaintiff here fails to show that
6 MERS' authority actually lapsed as a result of the bankruptcy, or otherwise. Indeed,
7 Plaintiff does not plead facts showing that AHM dissolved its relationship with MERS
8 (prior to or during the bankruptcy). Plaintiff also argues that since her loan was in a
9 bankruptcy trust, only the bankruptcy trustee had the power to assign the loan. Again,
10 Plaintiff fails to allege facts that the bankruptcy trustee did not use MERS' services as
11 part of the liquidation process. Alternatively, Plaintiff also fails to allege facts showing
12 that MERS was not acting as nominee to a third party who later assigned the deed to
13 CITI.

14 Finally, Plaintiff's allegation that CITI was not the beneficiary of the DOT because
15 it sold its interest to CMSI fails. Plaintiff fails to allege facts to support the conclusory
16 statement that on May 1, 2006, CITI sold or transferred her loan to CMSI.

17 Consequently, Plaintiff fails to state a claim for cancellation of instruments. The
18 Complaint does not allege facts supporting that MERS' authority lapsed during AHM's
19 bankruptcy or that an exception to this rule exists. The cancellation of instruments cause
20 of action is therefore DISMISSED with leave to amend on this additional ground.

21 **C. California's Unfair Competition Law**

22 California's Business and Professions Code § 17200 et seq., more commonly
23 known as California's Unfair Competition Law ("UCL"), defines unfair competition as "any
24 unlawful, unfair or fraudulent business act or practice." "Unlawful" practices are
25 practices "forbidden by law, be it civil or criminal, federal, state, or municipal, statutory,
26 regulation, or court-made." Saunders v. Superior Court, 27 Cal. App. 4th 832, 838-39
27 (1994) (citing People v. McKale, 25 Cal. 3d 626, 632 (1979)). "The standard for finding
28 an 'unfair' practice in a consumer action is intentionally broad, thus allowing courts

1 maximum discretion to prohibit new schemes to defraud. . . . [A]n ‘unfair’ business
2 practice occurs when that practice ‘offends an established public policy or when the
3 practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to
4 consumers.’” Candelore v. Tinder, Inc., 19 Cal. App. 5th 1138, 1155-56 (2018) (citing
5 Smith v. State Farm Mutual Automobile Ins. Co. (2001) 93 Cal. App. 4th 700, 718–719).
6 A “fraudulent” business act or practice is one in which members of the public are likely to
7 be deceived. Olsen v. Breeze, Inc., 48 Cal. App. 4th 608, 618 (1996) (“‘Fraudulent’ . . .
8 does not refer to the common law tort of fraud but only requires a showing [that]
9 members of the public ‘are likely to be deceived’”). Additionally, “a plaintiff must state
10 with reasonable particularity the facts supporting the statutory elements of the violation.”
11 Khoury v. Maly’s of California, Inc., 14 Cal. App. 4th 612, 619 (1993).

12 Defendants assert that Plaintiff’s UCL claim is premised on the “unlawful” prong of
13 the UCL. As such, they argue the claim must be dismissed because Plaintiff has failed
14 to plead facts supporting her claim that Defendants committed unlawful conduct or that
15 she has suffered an injury. Mot. to Dismiss at 11. Plaintiff’s allegations could possibly
16 be construed as being based on all three prongs of the UCL, but none are sufficient to
17 survive Defendants’ Motion to Dismiss in any event.

18 More specifically, the Complaint alleges unfair competition on the basis that
19 Defendants made “deliberate misstatements and misrepresentations” regarding
20 assignments, facilitated “unlawful foreclosure proceedings,” and engaged in “other
21 unlawful foreclosure practices” in violation of California Penal Code §§ 115 and
22 532(f)(a)(4). Compl., ¶¶ 33-34. Plaintiff further alleges Defendants had knowledge that
23 the assignments were not valid and nonetheless initiated foreclosure proceedings.

24 The Court agrees with Defendants that Plaintiff has not alleged any facts with
25 reasonable particularity demonstrating that Defendants committed any wrongdoing or
26 prohibited conduct. California Penal Code § 115 states in part: “(a) Every person who
27 knowingly procures or offers any false or forged instrument to be filed, registered, or
28 recorded in any public office within this state, which instrument, if genuine, might be filed,

1 registered, or recorded under any law of this state or of the United States, is guilty of a
2 felony.” (Emphasis added.) Even construing the facts alleged in Plaintiff’s favor, Plaintiff
3 fails to sufficiently allege that Defendants knowingly or intentionally recorded invalid
4 assignments as required by § 115. Similarly, Plaintiff fails to allege that anyone has
5 been deceived by any alleged conduct of Defendants, or that Defendants’ conduct was
6 otherwise immoral, unethical, or oppressive.

7 Plaintiff’s UCL claim is plagued by conclusory statements and lacks adequately
8 pleaded facts in support of its conclusions. Thus, Plaintiff’s unfair competition claim is
9 DISMISSED with leave to amend for this additional reason.

10 **D. Declaratory Relief**


11 Finally, the Complaint seeks a declaratory judgment to establish whether US
12 Bank obtained the Note and/or Deed of Trust by any other legal means, and the
13 respective rights and obligations of the parties under the loan. Plaintiff’s claim for
14 declaratory relief is derivative of her other two causes of action and, for the reasons
15 described above, is therefore DISMISSED with leave to amend.

16
17 **CONCLUSION**

18
19 For the reasons set forth above, Defendants’ Motion to Dismiss is GRANTED.
20 Not later than twenty (20) days following the date this Memorandum and Order is
21 electronically filed, Plaintiff may (but is not required to) file an amended complaint. If no
22 amended complaint is timely filed, the complaint will be deemed dismissed with prejudice
23 upon no further notice to the parties.

24 IT IS SO ORDERED.

25 Dated: September 6, 2018

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27 
28 MORRISON C. ENGLAND, JR.
UNITED STATES DISTRICT JUDGE