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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DALE LOGUE LONG,

Plaintiff,

v.

GREENTREE SERVICING, LLC, a
business entity; DITECH FINANCIAL,
LLC, a business entity; NORTHWEST
TRUSTEE SERVICES, INC.; and DOES 1
through 100, inclusive,¹

Defendants.

No. 2:17-cv-02374-KJM-EFB

ORDER

Defendant Ditech Financial, LLC moves to dismiss plaintiff's first amended complaint. For the following reasons, the court GRANTS in part and DENIES in part defendant's motion.

I. FACTUAL BACKGROUND

Plaintiff Dale Logue Long ("Long") purchased the property at issue in 2006. First Am. Compl. ("FAC"), ECF No. 8 ¶ 14. In 2014 and early 2015, Long fell behind on her

¹ If defendants' identities are unknown when the complaint is filed, plaintiffs have an opportunity through discovery to identify them. *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980). But the court will dismiss such unnamed defendants if discovery clearly would not uncover their identities or if the complaint would clearly be dismissed on other grounds. *Id.* at 642. The federal rules also provide for dismissing unnamed defendants that, absent good cause, are not served within 90 days of the complaint. Fed. R. Civ. P. 4(m).

1 mortgage payments. *Id.* ¶ 15. In early 2015, she paid \$10,000 to her then-loan servicer,
2 defendant Greentree Servicing, LLC (“Greentree”), to cure the arrears. *Id.* After Long’s \$10,000
3 payment, servicing of her loan was assigned to defendant Ditech Financial, LLC (“Ditech”). *Id.*;
4 *see* Ditech’s Req. for Jud. Not. (“RJN”), Exs. 5-8 (assignment of deed of trust dated Feb. 9, 2015
5 and subsequent corrective assignments dated Dec. 30, 2015, Jan. 14, 2016 and March 4, 2016,
6 respectively). Although Long’s complaint refers to Ditech and Greentree as separate defendants,
7 the parties agreed at hearing that the two are a single entity for purposes of this suit.

8 On an unspecified date, Long applied for a loan modification. FAC ¶ 16. On
9 December 8, 2016, Ditech sent Long a “Modification Trial Plan Period Notice” offering Long a
10 permanent loan modification in exchange for three \$1,609.17 Trial Period Plan (“TPP”)
11 payments. *Id.* ¶ 17. Although Long made the three TPP payments, her loan was not permanently
12 modified. *Id.* Furthermore, her \$10,000 payment was not credited to her account. *Id.* ¶¶ 15, 18.
13 On January 5, 2017,² a notice of default was recorded on Long’s property. *Id.* ¶ 17; *see* RJN
14 Ex. 9 (notice of default and election to sell indicating \$26,278.98 past due). On August 30, 2017,
15 a notice of trustee’s sale was recorded, indicating a \$214,513.93 unpaid balance and setting a
16 September 25, 2017 foreclosure sale. RJN Ex. 10. The sale did not go forward. Although
17 Long’s complaint suggests the foreclosure sale may remain on calendar, *see* FAC ¶ 19, Long’s
18 counsel confirmed at hearing that the sale is no longer pending.

19 On September 25, 2017, Long sued Greentree, Ditech and Northwest in state court
20 and on November 13, 2017, Ditech removed the action to this court. *See* ECF No. 1 (notice of
21 removal). Long filed her operative first amended complaint on December 4, 2017, alleging
22 breach of contract, “negligence per se,” wrongful foreclosure, California Homeowners Bill of
23 Rights violations and California Business and Professions Code § 17200, *et seq.*, violations. *See*
24 *generally* FAC.

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27 ² In an apparent typographical error, Long alleges the notice of default was recorded on
28 “January 5, 3017.” *See* FAC ¶ 17.

1 On December 21, 2017, Ditech moved to dismiss Long’s claims and certain
2 damages requests. Mot., ECF No. 9. The court submitted the motion after oral argument on
3 February 9, 2018, Hr’g Mins., ECF No. 16.

4 II. JUDICIAL NOTICE

5 Ditech requests the court take judicial notice of the following documents:

6 Exhibit 1: Deed of trust (“DOT”), recorded October 31, 2006;

7 Exhibit 2: Assignment of DOT, recorded August 13, 2010;

8 Exhibit 3: Notice of default and election to sell under DOT (“NOD”), recorded
9 August 13, 2010;

10 Exhibit 4: Notice of rescission of NOD, recorded October 12, 2010;

11 Exhibit 5: Corporate assignment of DOT, recorded February 9, 2015;

12 Exhibit 6: Corrective assignment of DOT, recorded December 30, 2015;

13 Exhibit 7: Corrective assignment of DOT, recorded January 14, 2016;

14 Exhibit 8: Corrective assignment of DOT, recorded March 4, 2016;

15 Exhibit 9: NOD, recorded January 5, 2017; and

16 Exhibit 10: Notice of trustee’s sale, recorded August 30, 2017.

17 RJN, ECF No. 10.

18 A court may judicially notice adjudicative facts “not subject to reasonable dispute”
19 because they “can be accurately and readily determined from sources whose accuracy cannot
20 reasonably be questioned.” Fed. R. Evid. 201(b)(2). This may include matters of public record.
21 *Lee v. Cty. of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001), *overruled on other grounds by*
22 *Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002).

23 Here, the court judicially notices each exhibit as a matter of public record. As to
24 Exhibits 9 and 10, however, the court judicially notices only their existence, not the truth of their
25 content, which remains “subject to reasonable dispute.” *See id.* at 689 (quoting Fed. R. Evid.
26 201(b)); *see also* Opp’n at 6 (arguing “the amount on the NOD is incorrect” because it does not
27 reflect Long’s \$10,000 payment made in early 2015); *see also* FAC ¶ 15 (alleging Long’s
28 “account has yet to be credited for [her] \$10,000.00 payment[.]”).

1 III. LEGAL STANDARD

2 A party may move to dismiss for “failure to state a claim upon which relief can be
3 granted.” Fed. R. Civ. P. 12(b)(6). A complaint must contain a “short and plain statement of the
4 claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Although “detailed
5 factual allegations” are not required at the pleading stage, *Bell Atl. Corp. v. Twombly*, 550 U.S.
6 544, 555 (2007), the complaint must contain more than conclusory or formulaic recitations of
7 elements, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555). The
8 complaint must contain “sufficient factual matter” to make the alleged claim at least plausible.
9 *Ashcroft*, 556 U.S. at 678; *see also Hartmann v. Cal. Dep’t of Corr. & Rehab.*, 707 F.3d 1114,
10 1122 (9th Cir. 2013) (explaining plausibility requires that the complaint depict a cognizable legal
11 theory and sufficient factual allegations to support that theory) (citation omitted). Aside from
12 external facts properly subject to judicial notice, the court restricts its analysis to the face of the
13 complaint, construing the complaint in plaintiff’s favor and accepting well-pled factual
14 allegations as true. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citations omitted).

15 Furthermore, under Rule 15 “[t]he court should freely give leave [to amend] when
16 justice so requires.” Fed. R. Civ. P. 15(a)(2). “This policy is to be applied with extreme
17 liberality.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (citation
18 and internal quotation marks omitted). Before granting leave to amend, a court considers any
19 undue delay, bad faith, dilatory motive, futility or undue prejudice posed by allowance of the
20 amendment. *Id.* at 1051-52 (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). Potential
21 prejudice to the opposing party “carries the greatest weight,” *id.* at 1052, and “[t]he party
22 opposing amendment bears the burden of showing prejudice,” *DCD Programs, Ltd. v. Leighton*,
23 833 F.2d 183, 187 (9th Cir. 1987). Absent prejudice, there is a strong presumption in favor of
24 granting leave to amend. *Eminence Capital*, 316 F.3d at 1052.

25 IV. DISCUSSION

26 A. Jurisdiction

27 At hearing, the court asked the parties their position on subject matter jurisdiction.
28 *See* Feb. 9, 2018 Min. Order, ECF No. 15 (ordering parties to prepare to discuss whether the

1 amount in controversy requirement is satisfied at hearing). The parties agreed and, following
2 discussion with the parties, the court at this point does not doubt it has diversity jurisdiction. The
3 court may revisit this question upon review of Ms. Long’s second amended complaint.

4 B. Breach of Contract

5 Plaintiff alleges Ditech breached its contractual promise to permanently modify
6 her loan after she made three TPP payments. FAC ¶¶ 20-24. “To allege a cause of action for
7 breach of contract, a plaintiff must allege, ‘(1) the contract, (2) plaintiff’s performance or excuse
8 for nonperformance, (3) defendant’s breach, and (4) the resulting damages to plaintiff.’” *Bushell*
9 *v. JPMorgan Chase Bank, N.A.*, 220 Cal. App. 4th 915, 921 (2013) (quoting *Reichert v. General*
10 *Ins. Co.*, 68 Cal.2d 822, 830 (1968)).

11 Ditech faults Long for not “attach[ing] the written contract or plead[ing] its terms
12 verbatim.” Mot. at 6. But the California Supreme Court has held that “a plaintiff may plead the
13 legal effect of the contract rather than its precise language.” *Constr. Protective Servs., Inc. v. TIG*
14 *Specialty Ins. Co.*, 29 Cal. 4th 189, 199 (2002), *as modified* (Nov. 14, 2002); *Miles v. Deutsche*
15 *Bank Nat’l Trust Co.*, 236 Cal. App. 4th 394, 402 (2015). Long has done so here. She alleges
16 Ditech offered her a “Modification Trial Plan Period Notice” on December 8, 2016, promising to
17 permanently modify her loan in exchange for three TPP payments of \$1,609.17. FAC ¶ 21. She
18 has sufficiently pled the existence of a contract. *See Wilkins v. Bank of Am.*, No.
19 215CV02341KJMEFB, 2016 WL 5940082, at *9 (E.D. Cal. Aug. 19, 2016) (same).

20 Ditech alternatively argues for dismissal because Long “merely alleged that she
21 made three TPP payments but has not alleged that she fulfilled all of her obligations under the
22 TPP.” Mot. at 6. But Long alleges she “complied and performed all that was required to obtain
23 the loan modification by making the three (3) Trail [*sic*] Period Plan payments of \$1,609.17.”
24 FAC ¶ 22. Long sufficiently alleges performance. *See Wilkins*, 2016 WL 5940082, at *9 (same).

25 Ditech’s motion to dismiss Long’s breach of contract claim is DENIED.

26 C. California Civil Code § 2924.11(f)

27 At hearing, Long’s counsel confirmed Long has abandoned this claim. Long’s
28 California Civil Code § 2924.11 claim is thus DISMISSED without prejudice.

1 D. “Negligence Per Se”

2 At hearing, Long’s counsel conceded that negligence per se is not an independent
3 claim, but requested leave to amend. *See Wilkins*, 2016 WL 5940082, at *11 (“[A]n underlying
4 claim of ordinary negligence must be viable before the presumption of negligence of [California]
5 Evidence Code section 669 can be employed.”) (citations omitted). Accordingly, this claim is
6 DISMISSED with leave to amend.

7 E. Wrongful Foreclosure

8 At hearing, Long’s counsel explained that Long has abandoned this claim because
9 no foreclosure sale is pending. Accordingly, this claim is DISMISSED without prejudice.

10 F. California Business & Professions Code § 17200

11 At hearing, Long’s counsel confirmed Long has abandoned this claim.
12 Accordingly, this claim is DISMISSED without prejudice.

13 G. Motion to Dismiss Certain Requests for Damages

14 At hearing, Long’s counsel conceded damages for pain, suffering and emotional
15 distress are not available for Long’s breach of contract claim. Accordingly, Ditech’s motion to
16 dismiss those damages requests is GRANTED. *See Whittlestone, Inc. v. Handi-Craft Co.*, 618
17 F.3d 970, 974 (9th Cir. 2010) (holding a court may not strike claims for damages under Federal
18 Rule of Civil Procedure 12(f), but suggesting dismissal of such claims may be appropriate under
19 Federal Rule of Civil Procedure 12(b)(6)). Considering Long’s concessions at hearing, the
20 balance of Ditech’s motion is DENIED as MOOT.

21 V. CONCLUSION

22 The court GRANTS in part and DENIES in part Ditech’s motion to dismiss. Long
23 may file an amended complaint consistent with the court’s findings above within 21 days.

24 IT IS SO ORDERED.

25 DATED: March 5, 2018.

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UNITED STATES DISTRICT JUDGE