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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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11 MARY GENEVIEVE TATOLA,
12 Plaintiff,
13 v.
14 HSBC BANK USA, et al.,
15 Defendants.
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No. C-11-3994 MMC

**ORDER GRANTING DEFENDANT
WELLS FARGO'S MOTION TO DISMISS;
DENYING AS MOOT WELL FARGO'S
MOTION TO STRIKE; AFFORDING
PLAINTIFF LEAVE TO FILE AMENDED
COMPLAINT**

17 Before the Court are two motions filed by defendant Wells Fargo Bank, N.A. ("Wells
18 Fargo"): (1) "Motion of Wells Fargo to Dismiss Complaint," filed September 19, 2011; and
19 (2) "Motion of Wells Fargo to Strike Portions of Complaint," filed September 19, 2011.
20 Defendant HSBC Bank USA has filed a joinder in each motion. Plaintiff Mary Genevieve
21 Tatola ("Tatola"), who proceeds pro se, has not filed opposition. Having read and
22 considered the papers filed in support of the motions, the Court rules as follows.¹

23 **BACKGROUND**

24 On April 16, 2007, Tatola executed an Adjustable Rate Mortgage Note ("Note"), in
25 which she promised to repay World Savings Bank, FSB ("World") the sum of \$672,000,
26 with interest, under the terms set forth in the Note. (See Def.'s Req. for Judicial Notice Ex.
27 A.) Also, on April 16, 2007, Tatola executed a Deed of Trust, by which she secured the
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¹By order filed October 11, 2011, the Court took the matters under submission.

1 Note by certain real property in Belmont, California. (See Compl. Ex. A; Def.'s Req. for
2 Judicial Notice Ex. B.) In November 2007, World changed its name to Wachovia Mortgage,
3 FSB ("Wachovia"). (See Def.'s Req. for Judicial Notice Ex. D.) On November 1, 2009,
4 Wachovia changed its name to Wells Fargo Bank Southwest, N.A., and merged with
5 defendant Wells Fargo. (See id. Ex. E.)

6 On February 19, 2010, Cal-Western Reconveyance Corp. ("Cal-Western"), a trustee,
7 recorded with the County of San Mateo a document titled "Notice of Default," which
8 document stated Tatola was in breach of her obligations under the Note and that the real
9 property identified in the Deed of Trust would be sold to satisfy Tatola's obligations to the
10 beneficiary, identified as "World Savings Bank, FSB, its Successors and/or Assignees."
11 (See id. Ex. F.) Thereafter, on May 20, 2010, Cal-Western recorded with the County of
12 San Mateo a document titled "Notice of Trustee's Sale," which document stated the subject
13 real property would be sold on June 9, 2010. (See id. Ex. G.) On June 8, 2010, the date
14 before the scheduled trustee's sale, Tatola filed a petition for bankruptcy protection. (See
15 id. Ex. H.)

16 In her complaint, initially filed in state court and removed by Wells Fargo, Tatola
17 alleges five causes of action arising under state law.² In particular, Tatola challenges the
18 enforceability of the Note and Deed of Trust, and seeks damages, declaratory relief, and
19 injunctive relief. Tatola names as defendants Wells Fargo, which entity, as discussed
20 above, is the successor to the initial lender, and HSBC, which entity, according to Tatola, is
21 or was the trustee.

22 LEGAL STANDARD

23 Dismissal for failure to state a claim, pursuant to Rule 12(b)(6) of the Federal Rules
24 of Civil Procedure, can be based on the lack of a cognizable legal theory or the absence of
25 sufficient facts alleged under a cognizable legal theory. See Balistreri v. Pacifica Police
26 Dep't, 901 F.2d 696, 699 (9th Cir. 1990). Rule 8(a)(2), however, "requires only 'a short and

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28 ²The parties are diverse in citizenship.

1 plain statement of the claim showing that the pleader is entitled to relief.” See Bell Atlantic
2 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2)).

3 Consequently, “a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need
4 detailed factual allegations.” See id. Nonetheless, “a plaintiff’s obligation to provide the
5 grounds of his entitlement to relief requires more than labels and conclusions, and a
6 formulaic recitation of the elements of a cause of action will not do.” See id. (internal
7 quotation, citation, and alteration omitted).

8 In analyzing a motion to dismiss, a district court must accept as true all material
9 allegations in the complaint, and construe them in the light most favorable to the
10 nonmoving party. See NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).
11 “To survive a motion to dismiss, a complaint must contain sufficient factual material,
12 accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal,
13 129 S. Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 570). “Factual allegations
14 must be enough to raise a right to relief above the speculative level[.]” Twombly, 550 U.S.
15 at 555. Courts “are not bound to accept as true a legal conclusion couched as a factual
16 allegation.” See Iqbal, 129 S. Ct. at 1950 (internal quotation and citation omitted).

17 Generally, a district court, in ruling on a Rule 12(b)(6) motion, may not consider any
18 material beyond the complaint. See Hal Roach Studios, Inc. v. Richard Feiner & Co., 896
19 F.2d 1542, 1555 n. 19 (9th Cir. 1990). Documents whose contents are alleged in the
20 complaint, and whose authenticity no party questions, but which are not physically attached
21 to the pleading, however, may be considered. See Branch v. Tunnell, 14 F.3d 449, 454
22 (9th Cir. 1994). In addition, a district court may consider any document “the authenticity of
23 which is not contested, and upon which the plaintiff’s complaint necessarily relies,”
24 regardless of whether the document is referenced in the complaint. See Parrino v. FHP,
25 Inc., 146 F.3d 699, 706 (9th Cir. 1998). Finally, the Court may consider matters that are
26 subject to judicial notice. See Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279,
27 1282 (9th Cir. 1986).

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DISCUSSION

Wells Fargo, joined by HSBC, argues that each of the five causes of action in Tatola's complaint fails to state a claim upon which relief can be granted. The Court considers the five causes of action in turn.

A. First Cause of Action (Conspiracy to Commit Fraud and Conversion)

In the First Cause of Action, Tatola alleges "defendants" engaged in "fraud." (See Compl. ¶ 11.) In particular, Tatola alleges "defendants" did not "properly disclose[]" to Tatola the terms in the Note pertaining to "escalating payments and/or increases in the interest rate" and, additionally, "misrepresent[ed] [Tatola's] qualifications" for the loan. (See Compl. ¶¶ 11, 12.)

Wells Fargo argues the First Cause of Action does not comply with Rule 9(b). The Court agrees.

Rule 9(b) requires a plaintiff alleging a claim of fraud to "state with particularity the circumstances constituting the fraud." See Fed. R. Civ. P. 9(b). Particularity requires the plaintiff to allege "the who, what, when, where, and how of the misconduct charged," see Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir.2003), and, if the misconduct is an alleged false statement, to "plead evidentiary facts" to establish the "statement was untrue or misleading when made," see Fecht v. Price Co., 70 F.3d 1078, 1082 (9th Cir.1995).

Here, with respect to the asserted failure to disclose terms in the Note, Tatola fails to allege the identity of the person(s) who she contends should have but did not make the proper representation, fails to allege the specific misrepresentation made or specific information such person(s) should have disclosed, and, most importantly, fails to allege any facts to support a finding that any omission regarding the terms constituted fraud, particularly given Tatola's allegation that the subject terms were in the Note, a document the law presumes Tatola to have read. See Brown v. Wells Fargo Bank, NA, 168 Cal. App. 4th 938, 958–59 (2008) (holding, where parties to contract do not have fiduciary relationship, plaintiff cannot establish fraud claim based on theory defendant

1 “misrepresented the nature of the contract”; noting such plaintiff is presumed to have read
2 contract).³

3 With respect to the asserted misrepresentation concerning Tatola’s qualifications,
4 Tatola fails to allege the actual statement(s), the identity of the person(s) who made the
5 statement(s), to whom the statement(s) was/were made, and when and where the
6 statement(s) was/were made. Further, Tatola fails to allege any facts, let alone the
7 requisite evidentiary facts, to support a finding that any statement made regarding
8 qualifications was false at the time such statement was made.

9 Accordingly, the First Cause of Action is subject to dismissal.⁴

10 **B. Second Cause of Action (Void Sale from Ultra Vires Act)**

11 In the Second Cause of Action, Tatola alleges that on June 1, 2007, “defendants”⁵
12 improperly “sold the rights and interests in [Tatola’s] loan instruments as un-registered
13 securities” under a “master pooling and servicing agreement” that “ostensibly transferred”
14 World’s interests to “certificate holders.” (See Compl. ¶ 8.) According to Tatola, such sale
15 was improper because “defendants” did not have the “power under their charter” to “sell
16 their rights and interests in [Tatola’s] loan instruments as unregistered securities.” (See
17 Compl. ¶¶ 8, 14.) Because such transfer of rights and interests was “illegal,” Tatola
18 alleges, “no legal and equitable interest in [Tatola’s] debt instruments were transferred to
19 the certificate holders.” (See Compl. ¶ 9.) Consequently, Tatola alleges, she is entitled to
20 an order “releas[ing] the lien and restor[ing] title to [Tatola].” (See Compl. ¶ 17.)

22 ³Tatola does not allege she had a fiduciary relationship with World, nor does it
23 appear she could do so. See Price v. Wells Fargo Bank, 213 Cal. App. 3d 465, 476 (1989)
(holding “relationship between a bank and its loan customers” not fiduciary in nature).

24 ⁴Wells Fargo’s argument that all of the causes of action alleged in the complaint are
25 preempted by the Home Owner’s Loan Act is premature, because the precise nature of the
26 alleged wrongful conduct is unclear. See In re Ocwen Loan Servicing, LLC Mortgage
27 Servicing Litig., 491 F.3d 638, 644-45 (7th Cir. 2007) (affirming denial of motion to dismiss
complaint on federal preemption grounds; holding preemption defense “unripe,” where
charges “so vaguely worded” that court could not “guess whether they [were] preempted or
not”).

28 ⁵It appears Tatola’s reference to “defendants” is to World, the initial lender.

1 Under California law, a “written instrument” may be “delivered up or canceled,”
2 where “there is a reasonable apprehension that if left outstanding it may cause serious
3 injury to a person against whom it is void or voidable.” See Cal. Civil Code § 3412.

4 Here, as Wells Fargo correctly asserts, Tatola fails to allege she has incurred or is
5 likely to incur any injury, let alone a “serious injury,” see id., from the alleged transfer of the
6 Note and/or Deed of Trust to “certificate holders.” Moreover, even if, as Tatola asserts, the
7 transfer to the “certificate holders” is void or voidable, Tatola fails to allege any facts to
8 support a finding that she, as opposed to the “certificate holders,” has standing to challenge
9 the transfer. Further, even assuming Tatola could establish the agreement to transfer the
10 Note and/or Deed of Trust is a transaction that Tatola is entitled to rescind, Tatola fails to
11 plead any facts to support the relief sought, specifically, an order cancelling the “lien,” i.e.,
12 the Deed of Trust, as opposed to an order cancelling the transfer of the Note and/or Deed
13 of Trust from one beneficiary to another. Finally, even assuming Tatola conceivably could
14 be entitled to an order cancelling the Deed of Trust, the Second Cause of Action fails to
15 state a claim upon which relief can be granted, because Tatola does not allege she has any
16 ability to repay the outstanding balance; indeed, as noted, Tatola filed for bankruptcy
17 protection when she received notice the property securing the Note would be sold if she
18 failed to meet her obligations under the Note. See Star Pacific Investments, Inc. v. Oro
19 Hills Ranch, Inc., 121 Cal. App. 3d 447, 457 (1981) (holding, where plaintiff seeks
20 rescission of agreement pursuant to § 3412, plaintiff must “restore to the defendant
21 everything of value which the plaintiff has received from defendant under the agreement”).

22 Accordingly, the Second Cause of Action is subject to dismissal.

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24 **C. Third Cause of Action (Improper Conversion and Alteration of the Note and Mortgage Deed)**

25 In the Third Cause of Action, Tatola alleges the Note and/or Deed of Trust are not
26 enforceable because “defendants”⁶ sold without her consent the rights in the Note and/or

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⁶Again, such reference presumably is to World.

1 Deed of Trust to “certificate holders.” (See Compl. ¶¶ 5, 19.) As relief, Tatola alleges she
2 is entitled to “restitution” and “disgorgement of profits earned by [d]efendants,” and to an
3 injunction precluding defendants from enforcing “this contract.” (See Compl. ¶ 34.)

4 For the reasons stated above with respect to the Second Cause of Action, Tatola
5 fails to allege she incurred or is likely to incur any type of injury as a result of a transfer of
6 the Note and/or Deed of Trust from one beneficiary to another. Further, to the extent
7 Tatola seeks relief in the form of an injunction precluding enforcement of the Deed of Trust,
8 Tatola is, in effect, seeking rescission, and, as stated above, she fails to allege sufficient
9 facts to demonstrate she is entitled to such relief.

10 Accordingly, the Third Cause of Action is subject to dismissal.

11 **D. Fourth Cause of Action (Fraudulent Misrepresentation as to Standing to**
12 **Foreclose)**

13 As set forth above, on February 19, 2010, the trustee for “World Savings Bank, FSB,
14 its Successors and/or Assignees” recorded a Notice of Default and Election to Sell under
15 Deed of Trust, and, on May 20, 2010, the trustee recorded a Notice of Trustee’s Sale.
16 (See Def.’s Req. for Judicial Notice, Exs. F, G.) As further set forth above, Wells Fargo, as
17 of November 1, 2009, is the successor to World.

18 In the Fourth Cause of Action, Tatola alleges that “[d]efendants have acted to
19 enforce the mortgage deed” and that “[d]efendants’ actions in foreclosure” were “fraudulent,
20 misleading, and with callous disregard for the rights of [Tatola], with the intention that
21 [Tatola] would be deceived.” (See Compl. ¶¶ 36, 60.)

22 As Wells Fargo correctly notes, Tatola fails to identify any false or misleading
23 statement made in connection with the “actions in foreclosure” (see id.), fails to identify who
24 made any such false or misleading statement, and fails to allege when and where any false
25 or misleading statement was made. Consequently, the Fourth Cause of Action fails to
26 comply with Rule 9(b). Further, as Wells Fargo correctly notes, Tatola fails to allege she
27 incurred any injury by relying on a false or misleading statement made in connection with
28 an attempt to foreclose on the property identified in the Deed of Trust. See Bezaire v.

1 Fidelity & Deposit Co., 12 Cal. App. 3d 888, 892-93 (1970) (“A fraudulent misrepresentation
2 is not actionable unless plaintiff’s conduct in reliance thereon caused the loss for which
3 plaintiff seeks damages.”).

4 Accordingly, the Fourth Cause of Action is subject to dismissal.

5 **E. Fifth Cause of Action (Quiet Title)**

6 In the Fifth Cause of Action, Tatola alleges “[t]he claims of [d]efendants are without
7 any legal or equitable right, and [d]efendants have no right, title, estate, lien, or interest in
8 [Tatola’s] [p]roperty.” (See Compl. ¶ 69.) As relief, Tatola seeks a declaration that “title to
9 the subject property is vested” solely in Tatola’s name. (See Compl. ¶ 70.)

10 As pleaded, the Fifth Cause of Action is derivative of Tatola’s First through Fourth
11 Causes of Action (see Compl. ¶ 66), and, as discussed above, Tatola has failed to allege
12 facts sufficient to support any substantive claim for relief against any defendant.
13 Consequently, Tatola has failed to allege facts sufficient to support her conclusory
14 assertion that “defendants”⁷ lack any right to the real property identified in the Deed of
15 Trust.

16 Accordingly, the Fifth Cause of Action is subject to dismissal.

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28 ⁷In this instance, “defendants” is an apparent reference to Wells Fargo.

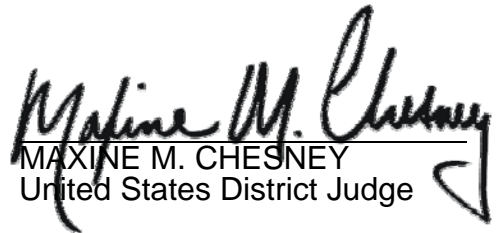
1 **CONCLUSION**

2 For the reasons stated above, Wells Fargo's motion to dismiss is hereby GRANTED,
3 and the complaint is hereby DISMISSED.⁸

4 If Tatola wishes to file a First Amended Complaint for the purpose of amending any
5 or all of her claims in order to cure to deficiencies identified above, Tatola shall file with the
6 Clerk of the Court and serve on defendants a First Amended Complaint, no later than
7 November 10, 2011.⁹

8 **IT IS SO ORDERED.**

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10 Dated: October 21, 2011


MAXINE M. CHESNEY
United States District Judge

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⁸In light of the dismissal of the complaint, Wells Fargo's motion to strike portions of
27 the complaint is DENIED as moot.

28 ⁹If Tatola files a First Amended Complaint, she may not add any new causes of
action or defendants without first obtaining leave of court. See Fed. R. Civ. P. 15(a)(2).