

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

REYNA U. ZACHARIAS,	)	Case No. 12-06525 SC
	)	
Plaintiff,	)	ORDER GRANTING MOTION TO
	)	<u>DISMISS</u>
v.	)	
	)	
JP MORGAN CHASE BANK, N.A.,	)	
BANK OF AMERICA, N.A.,	)	
	)	
Defendants.	)	

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**I. INTRODUCTION**

Plaintiff Reyna U. Zacharias ("Plaintiff") brings this action in connection with foreclosure proceedings commenced against her San Francisco home. Specifically, she asserts claims for: (1) slander of title, (2) wrongful foreclosure, and (3) violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). ECF No. 1 Ex. 1 ("Compl."). Defendants JP Morgan Chase Bank, N.A. ("Chase") and Bank of America, N.A. ("BoFA") (collectively, "Defendants") now move to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). ECF No. 5 ("MTD").<sup>1</sup> The motion is fully briefed, ECF Nos. 22 ("Opp'n"), 27

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<sup>1</sup> Defendants first noticed their motion on December 26, 2012 and re-noticed the motion after the matter was re-assigned to the undersigned. ECF Nos. 3, 20.

1 ("Reply"), and appropriate for resolution without oral argument.  
2 For the reasons set forth below, the Court GRANTS the motion.

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4 **II. BACKGROUND**

5 In April 2007, Plaintiff obtained a loan from Washington  
6 Mutual Bank, F.A. ("WaMu"), secured by a deed of trust (the "DOT")  
7 encumbering her San Francisco home. Compl. ¶ 9; ECF No. 6 (Request  
8 for Judicial Notice ("RJN")) Ex. 1 ("DOT").<sup>2</sup> The DOT identifies  
9 WaMu as the beneficiary and indicates that WaMu lent Plaintiff  
10 \$947,500. The federal government later closed WaMu and appointed  
11 the Federal Deposit Insurance Corporation ("FDIC") as the bank's  
12 receiver. See RJN Ex. 2 ("Purchase Agreement"). On September 25,  
13 2008, Chase acquired certain assets and liabilities of WaMu through  
14 an asset purchase agreement with the FDIC. Id. On September 21,  
15 2009, an "Assignment of Deed of Trust" was recorded with the San  
16 Francisco Assessor-Recorder. Compl. ¶ 10; RJN Ex. 3 ("DOT  
17 Assignment"). The document states that Chase, as successor in  
18 interest to WaMu, assigned its interest in the DOT to BofA. DOT  
19 Assignment.

20  
21 \_\_\_\_\_  
22 <sup>2</sup> Plaintiff's objections to Defendants' RJN, ECF No. 23, are  
23 OVERRULED and the Court takes judicial notice of the deed of trust  
24 and the other publicly filed documents attached to the RJN, but not  
25 the truth of the matters asserted by those documents. Pursuant to  
26 Federal Rule of Evidence 201, the Court may take judicial notice of  
27 "a fact that is not subject to reasonable dispute" because, among  
28 other things, it "can be accurately and readily determined from  
sources whose accuracy cannot reasonably be questioned."  
Accordingly, the Court "may properly take notice of public facts  
and public documents." Cactus Corner, LLC v. U.S. Dept. of Agric.,  
346 F. Supp. 2d 1075, 1098 (E.D. Cal. 2004). Additionally,  
Plaintiff references many of the documents attached to the RJN in  
her complaint and, under the "incorporation by reference doctrine,"  
a court may properly consider such documents. See Kniewel v. ESPN,  
393 F.3d 1068, 1076 (9th Cir. 2005)

1 A notice of default was also recorded on September 21, 2009,  
2 indicating that Plaintiff was \$13,873.88 in arrears on her loan  
3 payments. RJN Ex. 4. Two notices of trustee's sale were later  
4 recorded, the first on December 23, 2009, and the second on  
5 November 5, 2012. RJN Exs. 5, 6. According to the second notice,  
6 a trustee's sale was scheduled for November 26, 2012, and the  
7 unpaid balance and other charges on Plaintiff's loan totaled  
8 \$1,082,141.68. It is unclear whether the trustee's sale has yet  
9 occurred.

10 On November 19, 2012, Plaintiff filed the instant action in  
11 California Superior Court and the case was subsequently removed on  
12 diversity and federal question grounds. ECF No. 1. Plaintiff  
13 asserts three causes of action: (1) slander of title, (2) wrongful  
14 foreclosure, and (3) violation of the RICO statute. Compl. ¶¶ 15-  
15 57. The first two claims are predicated on the allegation that  
16 Defendants falsely recorded the DOT Assignment and the notice of  
17 default. See id. ¶¶ 25, 28. Plaintiff pleads that Chase asserted  
18 an interest in the DOT based on the false claim that it was  
19 "entitled to any loan ever made by [WaMu], especially those loans  
20 NOT owned by [WaMu] at the time that the Federal Government gave  
21 all of the assets of the defunct [WaMu] to Chase without a public  
22 auction or any bidding process." Id. Plaintiff further alleges  
23 that Defendants violated the RICO statute by perpetrating a similar  
24 fraud against a large number of WaMu's other former borrowers. See  
25 id. ¶¶ 31-58.

26 Defendants subsequently moved to dismiss for failure to state  
27 a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).  
28

1 **III. LEGAL STANDARD**

2 A motion to dismiss under Federal Rule of Civil Procedure  
3 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.  
4 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based  
5 on the lack of a cognizable legal theory or the absence of  
6 sufficient facts alleged under a cognizable legal theory."  
7 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.  
8 1988). "When there are well-pleaded factual allegations, a court  
9 should assume their veracity and then determine whether they  
10 plausibly give rise to an entitlement to relief." Ashcroft v.  
11 Iqbal, 556 U.S. 662, 664 (2009). However, "the tenet that a court  
12 must accept as true all of the allegations contained in a complaint  
13 is inapplicable to legal conclusions. Threadbare recitals of the  
14 elements of a cause of action, supported by mere conclusory  
15 statements, do not suffice." Id. at 663. (citing Bell Atl. Corp.  
16 v. Twombly, 550 U.S. 544, 555 (2007)). The allegations made in a  
17 complaint must be both "sufficiently detailed to give fair notice  
18 to the opposing party of the nature of the claim so that the party  
19 may effectively defend against it" and "sufficiently plausible"  
20 such that "it is not unfair to require the opposing party to be  
21 subjected to the expense of discovery." Starr v. Baca, 633 F.3d  
22 1191, 1204 (9th Cir. 2011).

23  
24 **IV. DISCUSSION**

25 **A. Slander of Title and Wrongful Foreclosure**

26 Plaintiff's first two claims are predicated on the allegation  
27 that Chase never had a legal interest in Plaintiff's deed of trust  
28 or the underlying loan, which was made by WaMu. Defendants argue

1 that these claims fail because Chase purchased WaMu's assets,  
2 including its interest in Plaintiff's deed of trust, through its  
3 purchase agreement with WaMu's receiver, FDIC. The purchase  
4 agreement provides that "[Chase] purchases . . . all right, title,  
5 and interest of the Receiver in and to all of the assets (real  
6 personal and mixed, wherever located and however acquired) . . . .  
7 of [WaMu] whether or not reflected on the books of [WaMu] as of  
8 Bank Closing." Purchase Agreement § 3.1. Several types of assets  
9 are excluded from the agreement, but Plaintiff's deed of trust does  
10 not appear to fall into any of these categories. See id. §§ 3.5,  
11 3.6, 4.5.

12 In response to Defendants' arguments concerning the FDIC  
13 purchase agreement, Plaintiff cites to Javaheri v. JPMorgan Chase  
14 Bank, N.A., CV10-08185 ODW FFMX, 2011 WL 2173786 (C.D. Cal. June 2,  
15 2011). Opp'n at 7-9. In Javaheri, as in the instant action, the  
16 plaintiff asserted a claim for wrongful foreclosure on the ground  
17 that Chase had no interest in his promissory note. Javaheri, 2011  
18 WL 2173786, at \*5. While the court denied Chase's motion to  
19 dismiss with respect to Javaheri's wrongful foreclosure claim, it  
20 did not find Chase's asset purchase agreement with the FDIC  
21 defective. Rather, the court held that Javaheri had plausibly  
22 alleged that Chase lacked an interest in his note and deed of trust  
23 by pleading that the note had been securitized and sold to an  
24 investment trust prior to the asset purchase agreement. Id. at \*5-  
25 6. Thus, nothing in the Javaheri opinion suggests that Chase's  
26 asset purchase agreement with FDIC was invalid or did not encompass  
27 mortgages such as Plaintiff's.

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1 In her opposition brief, Plaintiff also suggests that her  
2 promissory note, like Javaheri's, was securitized and sold prior to  
3 the FDIC asset purchase agreement. See Opp'n at 9. However, these  
4 facts are not alleged in the Complaint. Indeed, the only reference  
5 to securitization in the Complaint is a vague and generalized  
6 allegation that the foreclosure crisis was caused by "[Chase] and  
7 [BoFA] and their criminal enterprise and underlying conspiracy as  
8 it related to the fraud involved with the securitization of  
9 mortgage loans and the issuance of unregulated derivative  
10 contracts."<sup>3</sup> Compl. ¶ 36; see also id. ¶ 50 ("[L]oans were grouped  
11 into 'pools' and sold multiple times."). In contrast, in Javaheri,  
12 the plaintiff specifically alleged the security in which his loan  
13 was pooled. 2011 WL 2173786, at \*5.

14 Because Plaintiff has failed to plausibly allege that Chase  
15 has no interest in the note or the deed of trust, her claims for  
16 wrongful foreclosure and slander of title necessarily fail.  
17 Accordingly, these claims are DISMISSED with leave to amend.

18 **B. RICO**

19 Plaintiff's third cause of action is for violation of the RICO  
20 statute, 18 U.S.C. § 1962(c). Section 1962(c) imposes civil  
21 liability on persons and organizations engaged in a "pattern of  
22 racketeering activity." Racketeering activity is defined to

23 \_\_\_\_\_  
24 <sup>3</sup> This is not the only new allegation raised in Plaintiff's  
25 opposition brief. Plaintiff also argues that Defendants failed to  
26 comply with California Civil Code section 2923.5 and that  
27 Defendants' foreclosure proceedings are oppressive and illegal  
28 because the notice of default was not recorded by the true trustee  
on the deed of trust. Opp'n at 10, 14. Because neither of these  
allegations appear in the Complaint, the Court declines to address  
them at this time. If Plaintiff wishes to plead a violation of  
Civil Code section 2923.5, then she should do so in her amended  
complaint, not her opposition papers.

1 include a number of generically specified criminal acts, as well as  
2 the commission of one of a number of listed predicate offenses. 18  
3 U.S.C. § 1961(1). The elements of a civil RICO claim are: "(1)  
4 conduct (2) of an enterprise (3) through a pattern (4) of  
5 racketeering activity (known as 'predicate acts') (5) causing  
6 injury to the plaintiff's 'business or property.'" Grimmett v.  
7 Brown, 75 F.3d 506, 510 (9th Cir. 1996).

8 Here, Plaintiff alleges that "Defendants intentionally  
9 participated in a scheme to defraud everyone" by "sending the  
10 fraudulent affidavits, assignments and pleadings to the clerks of  
11 court, judges, attorneys, and defendants in foreclosure cases."  
12 Compl. ¶ 33 (emphasis added). Plaintiff further alleges that the  
13 predicate acts of fraud are: "[c]laiming ownership of assets on  
14 behalf of entities which were not the real parties in interest,"  
15 "[a]ctively concealing the parties' lack of standing in their  
16 standard documents for foreclosure," and "[t]he drafting of the  
17 fraudulent affidavits and documents and the subsequent execution of  
18 the documents . . . and the filing of fraudulent and forged  
19 affidavits as to loan ownership." Id. ¶ 37.

20 This claim is far from plausible. As discussed in Section  
21 IV.A supra, Plaintiff has failed to allege facts to support the  
22 contention that Defendants lack standing to foreclose on  
23 Plaintiff's property. Nor has she pled any facts to support her  
24 broad and sweeping contention that Defendants defrauded "everyone"  
25 by falsely claiming ownership of any number of other loans.  
26 Further, Plaintiff has failed to plausibly allege racketeering  
27 activity distinct from the alleged RICO enterprise. See Banayan v.  
28 OneWest Bank F.S.B., 11CV0092-LAB WVG, 2012 WL 896206, at \*3 (S.D.

1 Cal. Mar. 14, 2012). In short, Plaintiff's RICO claim appears to  
2 be nothing more than conclusory allegations punctuated by  
3 threadbare recitals of the elements of a RICO cause of action.  
4 Plaintiff's attempt to cast a straightforward foreclosure  
5 proceeding as a pattern of racketeering activity is simply  
6 improper. See Johnson v. Wachovia Bank FSB, 2:10-CV-2839 GEB, 2012  
7 WL 4092426, at \*1 n.2 (E.D. Cal. Sept. 17, 2012).

8 Accordingly, Plaintiff's third cause of action for civil RICO  
9 violations is DISMISSED WITH PREJUDICE.

10

11 **V. CONCLUSION**

12 For the foregoing reasons, the Court GRANTS Defendants JP  
13 Morgan Chase N.A. and Bank of America N.A.'s motion to dismiss.  
14 Plaintiff Reyna U. Zacharias's first and second causes of action  
15 (slander of title and wrongful foreclosure) are DISMISSED WITH  
16 LEAVE TO AMEND. Plaintiff's third cause of action (RICO) is  
17 DISMISSED WITH PREJUDICE. Plaintiff shall file an amended  
18 complaint within thirty (30) days of the signature date of this  
19 Order. Failure to do so may result in the dismissal of this action  
20 with prejudice.

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22 IT IS SO ORDERED.

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24 Dated: February 13, 2013



25 UNITED STATES DISTRICT JUDGE

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