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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
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7 HP DEBT EXCHANGE, LLC,
8 Plaintiff,

Case No. 13-cv-04717-EDL

9 v.

10 WELLS FARGO BANK, N.A.,
11 Defendant.

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS AND DENYING
AS MOOT DISCOVERY MOTIONS
AND SANCTIONS MOTIONS**

Re: Dkt. No. 53, 54, 55, 62, 63, 64, 74, 75

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United States District Court
Northern District of California

In this tort action, Plaintiff alleges that Defendant breached contracts with Plaintiff with respect to the sale of mortgage loans. Following two motions to dismiss in this case, a single claim for conversion remains. Plaintiff alleges that Defendant has unlawfully exercised ownership rights over the subject loans, and that even though the notes were sold to Plaintiff, Defendant has collected on at least one of them in the amount of \$2,675.00. Am. Compl. ¶ 92. Plaintiff alleges that in settling that debt and in engaging in other conduct, Defendant converted the borrowers' monies, which should have gone to Plaintiff. Am. Compl. ¶ 93.

On August 27, 2014, Defendant filed a third motion to dismiss. Subsequently, the parties filed a total of seven discovery motions and sanctions motions. On October 14, 2014, the Court held a hearing on the parties' motions. For the reasons stated at the hearing and in this Order, Defendant's Motion to Dismiss is granted. The parties' discovery motions and sanctions motions (docket nos. 53, 54, 55, 63, 64, 74, 75) are denied as moot.

Discussion

A jurisdictional challenge may be facial or factual. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir.2004). Where, as here, the attack is factual, "the court need not presume the truthfulness of the plaintiff's allegations." Safe Air for Everyone, 373 F.3d at 1039. In

1 resolving a factual dispute as to the existence of subject matter jurisdiction, a court may review
2 extrinsic evidence beyond the complaint without converting a motion to dismiss into one for
3 summary judgment. See id.; McCarthy v. United States, 850 F.2d 558, 560 (9th Cir.1988) (holding
4 that a court “may review any evidence, such as affidavits and testimony, to resolve factual
5 disputes concerning the existence of jurisdiction”). Once a party has moved to dismiss for lack of
6 subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), the opposing party
7 bears the burden of establishing the Court's jurisdiction. See Kokkonen v. Guardian Life Ins. Co.,
8 511 U.S. 375, 377 (1994); Chandler v. State Farm Mut. Auto. Ins. Co., 598 F.3d 1115, 1122 (9th
9 Cir. 2010).

10 Conversion is “the wrongful exercise of dominion over the property of another.” Oakdale
11 Vill. Grp. v. Fong, 43 Cal.App.4th 539, 543 (1996). The elements of a conversion claim are: (1)
12 that the plaintiff owns or has a right to possess the property at issue; (2) that the defendant
13 intentionally prevented the plaintiff from having access to the property for a significant period of
14 time, refused to return the property upon plaintiff's demand, or otherwise wrongfully disposed of
15 the property; (3) that the plaintiff did not consent, and (4) damages. Burlesci v. Peterson, 68
16 Cal.App.4th 1062, 1066 (1998); Enterprise Leasing Corp. v. Shugart Corp., 231 Cal.App.3d 737,
17 748 (1991). “Money cannot be the subject of a cause of action for conversion unless there is a
18 specific, identifiable sum involved[.]” PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser,
19 Weil & Shapiro, LLP, 150 Cal.App.4th 384, 395 (2007). While a specific sum must be capable of
20 identification, the law does not require a plaintiff to identify the physical coins or notes allegedly
21 converted. Haigler v. Donnelly, 18 Cal.2d 674, 681 (1941). California courts generally permit
22 actions for conversion where a readily ascertainable sum has been misappropriated, commingled,
23 or misdirected. PCO, 150 Cal.App.4th at 396.

24 Plaintiff's conversion claims states:

25 91. HP Debt repeats and re-alleges each and every allegation
26 above as if fully set forth herein.

27 92. Defendant has unlawfully exercised ownership rights
28 over the subject loans. Even though the promissory notes were sold
to HP Debt, Defendant has been collecting on some of those notes
and has settled at least one. Defendant has collected a certain sum

1 which the amount is unknown to Plaintiff at this time. Defendant
2 settled one of the subject loan debt with a borrower, Victor
3 Milbourne, for \$2,675.

4 93. Defendant, in accepting that settlement payment,
5 converted Milbourne's and the other borrowers monies, which
6 should have gone to HP Debt.

7 94. HP Debt has been foreseeably and directly harmed by
8 Defendant's exercise of ownership rights over the subject loans and
9 by Defendant's conversion of monies that should have gone to HP
10 Debt.

11 95. Although currently Plaintiff is only aware of the amount
12 of conversion from Milbourne's loan, the discovery will uncover
13 that certain amounts of money were wrongfully collected and
14 converted by Defendant.

15 Am. Compl. ¶¶ 91-95. Thus, by its terms, the conversion claim is confined to alleged
16 post-sale collection of certain sums on loans owned by Plaintiff. Although Plaintiff's conversion
17 claim focuses on four loans: (1) the Milbourne loan; (2) the Ross loan; (3) the Garcia loan; and (4)
18 the Knapper loan (see Am. Compl. ¶¶ 42-45), it is undisputed that there was only collection
19 alleged as to the Milbourne loan. Further, as stated at the hearing, the Knapper loan is no longer
20 in dispute.

21 Defendant argues that because Plaintiff has admitted in discovery responses that it does not
22 own the Milbourne loan or the other three loans at issue in this case, Plaintiff lacks standing for
23 conversion. "[T]he standing question is whether the plaintiff has 'alleged such a personal stake in
24 the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to
25 justify the exercise of the court's remedial powers on his behalf." Warth v. Seldin, 422 U.S. 490,
26 498-99 (1975) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)). There are three requirements
27 for standing: (1) "a plaintiff must have suffered an 'injury in fact'—an invasion of a legally
28 protected interest which is (a) concrete and particularized and (b) actual or imminent, not
'conjectural' or 'hypothetical;'" (2) "there must be a causal connection between the injury and the
conduct complained of—the injury has to be 'fairly ... trace[able] to the challenged action of the
defendant, and not ... th[e] result [of] the independent action of some third party not before the
court;" and (3) "it must be 'likely' as opposed to merely 'speculative,' that the injury will be
'redressed by a favorable decision.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61

1 (1992) (citations omitted); see also, e.g., Green v. Alliance Title, 2010 U.S. Dist. LEXIS 92203, at
 2 *14 (E.D. Cal. Sept. 2, 2012) (finding that the plaintiff lacked standing for her HOEPA claim
 3 because the plaintiff acknowledged that she was not the owner of the subject property at the time
 4 of the loan origination at issue nor did she obtain the loan at issue).

5 Because “injury” is a requirement under both Article III and Plaintiffs' individual causes of
 6 action, “the threshold question of whether [Plaintiffs have] standing (and the [C]ourt has
 7 jurisdiction) is distinct from the merits of [Plaintiffs'] claim.” Maya v. Centex Corp., 658 F.3d
 8 1060, 1068 (9th Cir.2011). The issue of whether Plaintiff has established standing “in no way
 9 depends on the merits of the plaintiff's contention that particular conduct is illegal.” Warth, 422
 10 U.S. at 500, 95 S.Ct. 2197; accord Equity Lifestyle Props., Inc. v. Cnty. of San Luis Obispo, 548
 11 F.3d 1184, 1189 n. 10 (9th Cir. 2008) (“The jurisdictional question of standing precedes, and does
 12 not require, analysis of the merits.”). In other words “[a] plaintiff may satisfy the injury-in-fact
 13 requirements to have standing under Article III, and thus may be able to ‘bring a civil action
 14 without suffering dismissal for want of standing to sue,’ without being able to assert a cause of
 15 action successfully.” In re Facebook Privacy Litig., 791 F.Supp.2d 705, 712 n. 5 (N.D.Cal.2011)
 16 (citing Doe v. Chao, 540 U.S. 614, 624–25, 124 S.Ct. 1204, 157 L.Ed.2d 1122 (2004)).

17 **Milbourne loan**

18 According to the complaint, the Milbourne loan is the only loan on which Defendant
 19 allegedly wrongfully collected a sum certain. Defendant’s primary argument with respect to the
 20 Milbourne loan is that Plaintiff does not own the loan and so cannot maintain a conversion claim.
 21 In response to discovery requesting that Plaintiff identify the loans it had “sold, or otherwise
 22 transferred any interest in, to any other person or entity,” Plaintiff produced, among other things, a
 23 Loan Status Report of its own creation. Morales Decl. Ex. H. The Loan Status Report contains
 24 columns that indicate for each individual loan whether it had been sold, the name of the entity to
 25 which the loan was sold, and the date of the sale. Id. The Loan Status Report represents that on
 26 December 20, 2010, Plaintiff sold approximately 94 loans, including the Milbourne loan, to
 27 Summit Real Estate Partners L.P. The Loan Status Report also states that the loans were
 28 transferred back to Plaintiff as of May 31, 2012. Morales Decl. Ex. H at WF MTD0107.

1 Defendant argues, however, that the Summit loans have not been transferred back to
2 Plaintiff because in another case between Plaintiff and Summit in Texas, the court ordered
3 Plaintiff to pay Summit approximately \$180,000, and upon payment, the loans were to be
4 transferred back to Plaintiff. Morales Decl. Ex. J. It is undisputed that Plaintiff has not paid the
5 money to Summit. See Morales Decl. ¶ 12; Ex. M. Therefore, Defendant argues that the
6 Milbourne loan has not been transferred back to Plaintiff and was not owned by Plaintiff when the
7 conversion allegedly took place in December 2012.

8 Plaintiff's primary counterargument is that in a conversion action, Plaintiff need show only
9 that he is entitled to possession at the time of conversion, not when the claim is brought or at trial.
10 See Enterprise Leasing Corp. v. Shugart Corp., 231 Cal.App.3d 737, 749 (1991) ("In a conversion
11 action the plaintiff need show only that he was entitled to possession at the time of conversion; the
12 fact that plaintiff regained possession of the converted property does not prevent him from suing
13 for damages for the conversion."); Plummer v. Day/Eisenberg LLP, 184 Cal.App.4th 38, 45
14 (2010) ("Neither legal title nor absolute ownership of the property is necessary. A party need only
15 allege it is entitled to immediate possession at the time of conversion.") (internal citation omitted).
16 Thus, Plaintiff argues that at the time of the December 2012 conversion of the Milbourne loan,
17 Plaintiff owned the loan because the Texas court had previously determined that the loan sale
18 agreement between Plaintiff and Summit was rescinded (Morales Decl. Ex. J), which had the
19 effect of voiding the contract *ab initio*. See Long v. Newlin, 144 Cal.App.2d 509, 512 (1956)
20 ("The effect of a rescission is to void the contract *ab initio*"). Plaintiff cites Asmus v. Pacific
21 Bell, 23 Cal.4th 1, 6, n.1 (2000) for the proposition that rescission extinguishes the contract as if it
22 never existed. However, this statement is contained in dicta in a footnote. Asmus, 23 Cal.4th at 6,
23 n.2 ("A contract rescission is a statutorily governed event that extinguishes a contract as if it never
24 existed."). Asmus did not opine as to whether that dicta would apply to the situation in this case
25 where the judge expressly conditioned the return of the loans to Plaintiff on Plaintiff's payment --
26 a condition that Plaintiff has not met.

27 Plaintiff argues that Summit never had an ownership interest in the loans. Plaintiff states
28 that the Texas court simply ordered the restoration of benefits to restore the *status quo ante*,

1 meaning that Summit could hold on to the documentation until Plaintiff restored the purchase
2 price, but Plaintiff argues that this did not give Summit an ownership interest in the loans as the
3 sale was voided by the court. To the extent that Plaintiff argues that it owns the loans regardless
4 of whether it ever pays Summit the restitution, its argument is not persuasive. The Texas court
5 specifically stated that Summit need only reconvey the loans -- as well as the documentation --
6 after receiving Plaintiff's payment. Morales Decl. Ex. J ("... upon complete satisfaction of this
7 Order by [Plaintiff HP Debt], including payment of \$181,239.77 together with any accrued
8 interest, . . . then Summit shall reconvey all of the mortgage loans contained in the Agreement to
9 Defendant and shall return all documents in Summit's possession related to those mortgage loans.
10 . . ."). Moreover, in a rescission case, a court may make any orders "which justice may require
11 and may otherwise in its judgment adjust the equities between the parties." Cal. Civ. Code §
12 1692. The judge did just that, and Plaintiff cannot read that provision out of the court's order.

13 Therefore, Plaintiff has not shown that it owned the Milbourne loan at the time of the
14 alleged conversion. Plaintiff states that it owned the loan at some time from 2010 to the present,
15 but there has been no showing that it owned the loans, or had a right to possession, as of the
16 December 2012 alleged conversion. Plaintiff sold the loans to Summit, and even though it may
17 become entitled to possession of the loans once it pays Summit, Plaintiff has not shown that it was
18 entitled to possession of or had ownership in the Milbourne loan as of the alleged conversion in
19 December 2012. Thus, Plaintiff lacks standing to proceed on the Milbourne loan.

20 **Ross loan**

21 Plaintiff alleges that the Ross loan was "owned by HP Debt" and was "still secured by
22 property." Am. Compl. ¶ 43. Plaintiff also alleges that Defendant "never informed HP Debt that
23 there was a [quiet title] court action occurring that would extinguish the security associated with
24 the note owned by HP Debt," and that Defendant "only provided an assignment when threatened
25 with a slander of title action by the [tax sale] purchaser's attorney." Am. Compl. ¶ 44.

26 Plaintiff has not alleged a conversion of the Ross loan. First, Plaintiff cannot show
27 ownership or right to possession at the time of conversion, which was December 2010. Plaintiff
28 states that the Ross loan was purchased in December 2010 and at the time it was purchased, it was

1 secured by a second mortgage. Plaintiff also states that at the time the loan was purchased, the
2 property securing the loan was in its redemption period pursuant to a tax sale, but that Plaintiff
3 was never informed of the redemption period or the tax sale, so it was unable to record the
4 assignment in order to receive notice and was unable to redeem the property under the secured
5 note. Ganter Decl. ¶ 2. Thus, Plaintiff's conversion theory is that Defendant interfered with
6 Plaintiff's second mortgage by failing to inform Plaintiff of the tax sale, failing to issue a proper
7 assignment and then releasing all claims, including Plaintiff's claims, in the property, which
8 Defendant had no right to do. Ganter Decl. ¶ 2. Plaintiff further argues that because the property
9 was sold to a third party at a tax sale, and Defendant released Plaintiff's interest, a judgment was
10 entered in favor of the purchaser of the property terminating any future interest in the property.
11 Ganter Decl. ¶ 2.

12 However, Plaintiff sold the Ross loan on March 4, 2011, and the majority of the allegations
13 concerning the loan occurred well over one year after Plaintiff sold the loan, including that
14 Defendant waived all interest in the property in August 2012. Am. Compl. ¶¶ 43-44. Further, the
15 failure to tell Plaintiff of a tax sale does not constitute conversion because conversion requires a
16 right to possession, whereas Plaintiff faced several intervening steps before redemption could
17 occur even if it had received notice. See Home v. Kramer, 7 Cal.2d 361, 363-64 (1936)
18 ("Conversion is a tort, and to establish it there must be a tortious act. On the facts here appearing
19 we fail to find any positive or tortious acts amounting to a conversion. The possession of the
20 property has not been changed by any act of the defendant. There was not a sale of the fixtures in
21 defiance of the claim of plaintiff, if any he had."). In addition, the failure to forward a tax sale
22 notice, without an intent to exercise control over the property, is insufficient to establish
23 conversion. See Jordan v. Talbot, 55 Cal.2d 597, 610 (1961) ("We there stated that '[w]here the
24 conduct complained of does not amount to a substantial interference with the possession or the
25 right thereto, but consists of intermeddling with or use of or damages to the personal property, the
26 owner has a cause of action for trespass or case, and may recover only the actual damages suffered
27 by reason of the impairment of the property or the loss of its use.'") (internal citation omitted).
28 Finally, Defendant notes that Plaintiff filed a bona fide owner affidavit and released the lien on

1 this property in January 2013. Morales Decl. Ex. L. However, the loan did not belong to Plaintiff
2 in January 2013.

3 **Garcia loan**

4 Plaintiff alleges that it “had to intervene in [the Garcia] foreclosure to protect its interest in
5 the property” and “Defendant initially denied that the lien upon which it was foreclosing was
6 inferior to the lien purchased by HP Debt.” Am. Compl. ¶ 45. In particular, Plaintiff alleges that:

7 HP Debt became aware of a Florida foreclosure action (against
8 borrower Octavio Garcia) on a property whose first lien had, in fact,
9 been sold to HP Debt (and assigned by HP Debt to its servicer,
10 Heritage Pacific Financial.). Heritage Pacific Financial had to
11 intervene in the foreclosure to protect its interest in the property.
12 Defendant initially denied that the lien upon which it was
13 foreclosing was inferior to the lien purchased by HP Debt. Although
14 Defendant eventually agreed that HP Debt owned the superior
15 mortgage, HP Debt had to spend a significant amount of money
16 intervening in this foreclosure and protecting its interest in the
17 property. The Octavio Garcia loan was also sold to HP Debt as part
18 of an “unsecured” portfolio, so Defendant failed to provide an
19 assignment of the mortgage securing it.

20 Am. Compl. ¶ 45. Plaintiff also stated that as recently as April 2012, Defendant pursued
21 foreclosure on the Garcia loan, even though Defendant knew that Plaintiff was the rightful owner
22 of the loan. Pl.’s Ex. B.

23 Plaintiff has not alleged facts that show conversion for the Garcia loan, and alternatively,
24 any alleged injury would be speculative. The primary allegation regarding conversion appears to
25 be that Plaintiff had to spend a significant amount of money to protect its interest in the property,
26 which it presumably was able to do. Therefore, Plaintiff alleges at most an attempted conversion,
27 rather than an actual conversion. See Jordan v. Talbot, 55 Cal.2d 597, 610 (1961) (“ . . . [w]here
28 the conduct complained of does not amount to a substantial interference with the possession or the
right thereto, but consists of intermeddling with or use of or damages to the personal property, the
owner has a cause of action for trespass or case,” but not conversion). Plaintiff has not alleged
that Defendant “intentionally prevented the plaintiff from having access to the property for a
significant period of time, refused to return the property upon plaintiff’s demand, or otherwise
wrongfully disposed of the property,” which is the second element of conversion. Plaintiff has
alleged that Defendant tried to, but did not, claim the superior lien on the property. Also, although

1 Plaintiff claims that it incurred legal fees to prevent Defendant from converting the Garcia
2 property, attorney's fees do not appear to be recoverable in a claim for conversion. See Pl.'s Ex.
3 G, Pl.'s Response to Int. 6 (stating its damages for the Garcia loan are its "legal expenses for
4 Octavio Garcia interpleader action in Florida); Directi Internet Solutions Pvt. Ltd v. Dhillon, 2013
5 U.S. Dist. LEXIS 15706, at *16 (E.D. Cal. Feb. 5, 2013) (citing Haines v. Parra, 193 Cal. App.3d
6 1553, 1559, 239 Cal. Rptr. 178 (1987) ("Section 3336 of the Civil Code, which sets out the
7 measure of damages in conversion actions, does not expressly provide for attorneys' fees for the
8 converting of property.")). Thus, Plaintiff does not state a claim for conversion based on this loan,
9 regardless of standing.

10 Defendant also argues that Plaintiff lacks standing because Heritage Pacific Financial, not
11 Plaintiff, owns the loan. The Loan Status Report states that Plaintiff is the owner of the loan
12 (Morales Decl. Ex. H at WF MTD0120), but the complaint states that the loan was assigned to
13 Heritage Pacific Financial, which is the loan servicer. Plaintiff states in the opposition that the
14 Loan Status Report names Heritage as the owner, but that is not correct. Plaintiff also argues that
15 Plaintiff and Heritage are alter egos, citing two filings in this case. See Gatner Decl. Ex. D
16 (2/28/14 Notice of Appearance and Creditor's Judgment Lien against Plaintiff by Maribel
17 Monroy, stating that judgment debtor Heritage is the alter ego of Plaintiff, and attaching a
18 bankruptcy court order to that effect); Gatner Decl. Ex. D (6/2/14 Notice of Lien, attaching the
19 same bankruptcy order). Defendant, however, notes that Plaintiff has also argued that Heritage is
20 *not* its alter ego. In a bankruptcy proceeding, Plaintiff argued that it was independent of Heritage.
21 Morales Supp. Decl. Ex. O at WF MTD0162. Defendant argues persuasively that if Plaintiff and
22 Heritage are alter egos, then Plaintiff's claims against Defendant belong to Heritage's bankruptcy
23 estate, and only the bankruptcy trustee has standing. Thus, Plaintiff lacks standing to bring a
24 conversion claim with respect to the Garcia loan. Further, Plaintiff has not shown that Defendant
25 deprived Plaintiff of access to its property for purposes of conversion.

26 **Conclusion**

27 Plaintiff lacks standing for its conversion claim as to the three loans still at issue.
28 Therefore, Defendant's motion to dismiss is granted. The remaining discovery motions and

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sanctions motions are denied as moot.

IT IS SO ORDERED.

Dated: Oct 20, 2014


ELIZABETH D. LAPORTE
United States Magistrate Judge