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8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN FRANCISCO DIVISION**

11 TINA DIAMOS,

12 Plaintiff,

13 v.

14 SPECIALIZED LOAN SERVICING LLC,
15 and others,

16 Defendants.

Case No. 13-cv-04997 NC

**ORDER GRANTING MOTION TO
DISMISS**

Re: Dkt. No. 38

17
18 Plaintiff Tina Damos brings this action as a borrower under California's Homeowner
19 Bill of Rights, alleging violations by defendant Specialized Loan Servicing in processing
20 her application for a loan modification. Specifically, Damos first claims that SLS failed to
21 provide her with a single point of contact regarding the status of her property; instead,
22 Damos alleges that SLS directed her over a period of time to multiple representatives, each
23 of whom gave her conflicting information regarding what it would take to avoid
24 foreclosure. Secondly, Damos brings a claim for attorneys' fees as a remedy for SLS's
25 alleged violation of another provision of the California homeowner's rights statute. SLS
26 now moves to dismiss Damos' claims for lack of subject matter jurisdiction and for failure
27 to state a claim.
28

Case No. 13-cv-04997 NC
ORDER GRANTING MOTION TO
DISMISS

1 Because Damos failed to properly allege complete diversity between the parties, the
2 Court dismisses her Second Amended Complaint with leave to amend due to lack of subject
3 matter jurisdiction. To prevent a fourth deficient complaint, the Court also addresses the
4 merits of SLS’s motion to dismiss Damos’ two claims under the state Homeowner Bill of
5 Rights.

6 I. BACKGROUND

7 In March 2007, Damos took out a loan secured by her home property in Woodside,
8 CA. Dkt. No. 27-2, Ex. 1. On August 20, 2012, Damos submitted a complete loan
9 modification application to SLS. Dkt. No. 37 at ¶ 3. A month later, she spoke with an SLS
10 agent who informed her that the application had not been recorded in SLS’s system. *Id.*
11 Given this information, Damos then completed and submitted a second application to SLS,
12 which SLS confirmed it received. *Id.*

13 While awaiting the results from this application, Damos received a letter from SLS
14 informing her that her property was being referred for foreclosure. *Id.* at ¶ 5. When she
15 attempted to clarify the situation, Damos received conflicting information from multiple
16 SLS employees. *Id.* at ¶¶ 5-6. Confused as to the real status of her application, Damos
17 finally spoke with a SLS supervisor on March 14. *Id.* at ¶ 6. The supervisor told her that
18 certain documents essential to her previous application had “expired”; she therefore needed
19 to complete a third application. *Id.* at ¶ 7. While this third completed application was still
20 pending, SLS recorded a notice of default on September 12, 2013. *Id.* at ¶ 9.

21 After receiving notification of this default notice, Damos contacted SLS, which
22 informed her that her application was still under review. *Id.* Supposedly, no foreclosure
23 procedures were pending against her property. *Id.* Still, SLS asked her to submit a new—
24 her fourth—application for a loan modification. *Id.* at ¶ 10. Damos then filed her original
25 complaint in this action on October 24, 2013. *Id.* SLS subsequently rescinded the notice of
26 default. *Id.* at ¶ 17.

27 SLS moved to dismiss Damos’ original complaint for failure to state a claim. Dkt.
28 No. 9. But before addressing the merits of SLS’s motion, this Court determined it lacked

1 subject matter jurisdiction and dismissed the original complaint with leave to amend. Dkt.
2 No. 27. Damos filed a First Amended Complaint on February 13, 2014. Dkt. No. 26. The
3 Court granted SLS's motion to dismiss that complaint as well, again for lack of subject
4 matter jurisdiction. Dkt. No. 36.

5 **II. JURISDICTION**

6 As an initial matter, both parties have consented to the jurisdiction of a magistrate
7 judge under 28 U.S.C. § 636(c). Dkt. No. 17.

8 **A. Diversity Jurisdiction**

9 Federal courts are courts of limited jurisdiction and are presumptively without
10 jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Federal
11 courts have original jurisdiction over "all civil actions arising under the Constitution, laws,
12 or treaties of the United States," and over "all civil actions where the matter in controversy
13 exceeds the sum or value of \$75,000 . . . and is between citizens of different states."
14 28 U.S.C. § 1331; 28 U.S.C. § 1332(a). Thus, for this Court to maintain jurisdiction,
15 Damos' complaint must involve either a federal question or establish complete diversity
16 between the parties. Here, Damos seeks to establish diversity jurisdiction.

17 The Court previously dismissed the injunctive relief claims in Damos' First
18 Amended Complaint on jurisdictional grounds for two reasons: first, because she failed to
19 allege that the amount in controversy requirement exceeded \$75,000; and second, because
20 she had failed to plead complete diversity of citizenship. *See* Dkt. No. 36. Although her
21 Second Amended Complaint now includes a claim that satisfies the amount in controversy
22 requirement, Damos still fails to properly allege diversity of citizenship.

23 **i. Amount in Controversy**

24 Damos brings an action for injunctive relief under the state Homeowner Bill of
25 Rights based on SLS's failure to provide Damos with a single point of contact. Cal. Civ.
26 Code § 2923.7. Damos also seeks attorneys' fees under California Civil Code § 2923.6,
27 which prohibits a practice known as "dual tracking." *See* Section IV.B.

28 In order to measure the amount in controversy for these claims, the Court looks to the

1 value of the property Damos seeks to protect. 28 U.S.C. § 1332(a); *Hunt v. Wash. State*
2 *Apple Adver. Comm'n*, 432 U.S. 333, 347 (1977) (“In actions seeking declaratory or
3 injunctive relief, it is well established that the amount in controversy is measured by the
4 value of the object of the litigation.”); see *Graham v. U.S. Bank, N.A.*, No. 13-cv-04613 NC,
5 2013 WL 2285184, *3 (N.D. Cal. May 23, 2013) (holding in an action seeking injunctive
6 relief against foreclosure of property, that the amount in controversy requirement was met
7 upon a showing that the value of the property at issue and the total amount the plaintiff
8 owed on his loan were each in excess of \$75,000).

9 Here, though Damos alleges neither the exact value of the property nor the amount
10 owed on the mortgage, she does state that the real property at issue is “valued well in excess
11 of seventy-five thousand dollars, and the promissory note secured by the real property also
12 exceeds seventy-five thousand dollars.” Dkt. No. 37 at 2. This statement satisfies the
13 amount in controversy requirement. See *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303
14 U.S. 283, 288-89 (1938) (“[T]he sum claimed by the plaintiff controls if the claim is
15 apparently made in good faith. It must appear to a legal certainty that the claim is really for
16 less than the jurisdictional amount to justify dismissal.”).

17 Of course, while Damos does go on to state in her response to SLS’s motion to
18 dismiss that the property’s value is \$1.7 million, the Court focuses primarily on what she
19 states in her complaint. See *Crum v. Circus Circus Enters.*, 231 F.3d 1129, 1131 (9th Cir.
20 2000) (“Generally, the amount in controversy is determined from the face of the
21 pleadings.”).

22 ii. Citizenship

23 Additionally, Damos must allege the citizenship of all of SLS’s members to establish
24 total diversity of citizenship among the parties. That’s because, as an LLC, SLS is a
25 “citizen of every state of which its owners/members are citizens.” Dkt. No. 36 (quoting
26 *Johnson v. Columbia Props. Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006)). Yet, as
27 this Court stated in its prior order, if “the information necessary to establish the diversity of
28 the citizenship of [SLS is] not reasonably available to [Damos],” she may plead the

1 citizenship of SLS upon information and belief. Dkt. No. 36 at 4 (quoting *Carolina Cas.*
2 *Ins. Co. v. Team Equip., Inc.*, 741 F.3d 1082, 1086 (9th Cir. 2014)).

3 Here, Damos has alleged neither the citizenship of SLS’s members nor that this
4 information is not reasonably available to her. Instead she alleges on information and belief
5 that all members of the LLC are citizens of states other than California because the
6 citizenship of SLS’s members is “not presently available.” Dkt. No. 37 at ¶ 2. However,
7 “not presently available” is not tantamount to “not reasonably available.” Because Damos
8 has not alleged that this information is “not reasonably available” to her, she has not
9 satisfied the complete diversity requirement.

10 Therefore, the Court dismisses Damos’ Second Amended Complaint with leave to
11 amend.

12 III. LEGAL STANDARD

13 A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests the legal
14 sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). On a
15 motion to dismiss, all allegations of material fact are taken as true and construed in the light
16 most favorable to the non-movant. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th
17 Cir. 1996). The Court, however, need not accept as true “allegations that are merely
18 conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis.*
19 *Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). Although a complaint need not allege
20 detailed factual allegations, it must contain sufficient factual matter, accepted as true, to
21 “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S.
22 544, 570 (2007). A claim is facially plausible when it “allows the court to draw the
23 reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v.*
24 *Iqbal*, 556 U.S. 662, 678 (2009).

25 If a court grants a motion to dismiss, leave to amend should be granted unless the
26 pleading could not possibly be cured by the allegation of other facts. *Lopez v. Smith*, 203
27 F.3d 1122, 1127 (9th Cir. 2000).

1 **IV. DISCUSSION**

2 **A. California Civil Code § 2923.7: Single Point of Contact**

3 Damos’ first cause of action alleges SLS violated the California Homeowner Bill of
4 Rights by failing to provide a “single point of contact.” Indeed, the statute states: “*Upon*
5 *request* from a borrower who requests a foreclosure prevention alternative, the mortgage
6 servicer shall promptly establish a single point of contact and provide to the borrower one
7 or more direct means of communication with the single point of contact.” Cal. Civ. Code §
8 2923.7 (emphasis added). The requirement is intended to “prevent borrowers from being
9 given the run around.” *Rockridge Trust v. Wells Fargo, N.A.*, No. 13-cv-01457 JCS, 2013
10 WL 5428722, *26 (N.D. Cal. Sept. 25, 2013).

11 Here, while the Second Amended Complaint indicates that SLS repeatedly directed
12 Damos to different representatives, the complaint never alleges that Damos made a
13 specific request for a single point of contact as required by § 2923.7. *See, e.g., Williams v.*
14 *Wells Fargo Bank, NA*, 2014 WL 1568857, *1 (C.D. Cal. Jan. 27, 2014) (dismissing
15 California Business and Professions Code § 17200 claim, predicated on violation of §
16 2923.7, because plaintiffs never alleged they requested a single point of contact).

17 Because Damos does not allege that she made such a request, the Court grants SLS’s
18 motion to dismiss with leave to amend.

19 **B. California Civil Code § 2923.6(c): Attorneys’ Fees**

20 This section of the Homeowner Bill of Rights forbids a mortgage servicer from
21 engaging in “dual tracking” or “record[ing] a notice of default . . . while the [borrower’s]
22 complete first loan modification is pending.” Cal. Civ. Code § 2923.6(c).

23 In a previous order, this Court ruled Damos’ dual-tracking claim moot. Dkt. No. 36
24 at 9. SLS had rescinded the most recent notice of default, which limited its exposure to
25 liability stemming from the recording of that notice of default. *Id.* (citing *Jent v. N. Trust*
26 *Corp.*, No. 13-cv-01684 WBS, 2014 WL 172542, *5 (E.D. Cal. Jan. 15, 2014) (holding that
27 liability was precluded when defendants had rescinded the notice of default and no trustee’s
28 deed upon sale had been recorded)). Nonetheless, Damos now argues she is “entitled to

1 attorneys' fees and costs incurred in procuring this correction, as provided under the
2 California HBOR.” Dkt. No. 37 at ¶ 17.

3 Under § 2924.12, the California legislature added specific remedies for borrowers,
4 including injunctive relief and damages, for any material violation of certain sections in the
5 Homeowner Bill of Rights, including § 2923.6 (dual tracking). Cal Civ. Code § 2924.12.
6 The court may also award a “prevailing borrower” reasonable attorneys’ fees and costs.
7 Cal. Civ. Code § 2924.12(i). A borrower “prevails” if he or she “obtained injunctive relief
8 or was awarded damages” under § 2924.12. *Id.* However, the foreclosing entity is not
9 liable for any violation of § 2923.6—or for any of the enumerated sections in § 2924.12—
10 that has been corrected before the recordation of the trustee’s deed. Cal. Civ. Code §
11 2924.12(c).

12 In this case, a trustee’s deed upon sale has not been recorded. Indeed, both parties
13 agree that SLS rescinded the notice of default on Damos’ property. Dkt. No. 38-1 at 7;
14 Dkt. No. 40 at 4.

15 In fact, Damos “may not seek remedies under Section 2924.12 that do not apply to
16 the present status of the property.” *Vasquez v. Bank of America, N.A.*, No. 13-CV-02902
17 JST, 2013 WL 6001924, *7 (N.D. Cal. Nov. 12, 2013) (finding that remedies under §
18 2924.12 for violations of § 2923.6 “depend upon whether a trustee’s deed has or has not
19 been recorded”). Because no trustee’s deed upon sale has been recorded on the property,
20 Damos’ attorneys’ fees claim is unavailable under the Homeowner Bill of Rights.

21 Moreover, Damos does not constitute a “prevailing borrower” under § 2924.12(i), a
22 necessary condition for an attorneys’ fees award; she has neither obtained injunctive relief
23 nor been awarded damages under any part of the sections listed in § 2924.12.

24 In short, because the remedies under § 2924.12 do not apply to the present status of
25 the property, and Damos is not a “prevailing borrower,” Damos does not have a viable
26 claim for attorneys’ fees.

27 **C. Request for Judicial Notice**

28 Along with its motion to dismiss, SLS submits a request for judicial notice of four

1 documents, Dkt. No. 38-2, two of which this Court already took judicial notice of as true
2 and correct copies of official public records, Dkt. No. 36 at 5-6. This includes Exhibit 3, a
3 Deed of Trust recorded with the San Mateo County Recorder Office on March 9, 2007, and
4 Exhibit 2, a notice of recession recorded on November 8, 2013. Because the other two
5 documents—the Notice of Default and the Court’s previous order granting SLS’s motion to
6 dismiss—are irrelevant to the Court’s current analysis, the Court declines to take judicial
7 notice of Exhibits 1 and 4.

8 **V. CONCLUSION**

9 The Court dismisses Damos’ Second Amended Complaint for lack of subject matter
10 jurisdiction. However, the Court grants Damos an additional opportunity to properly allege
11 diversity jurisdiction and to amend her pleadings with regard to her claim under § 2923.7 in
12 accordance with this order. Damos has 14 days to file a third amended complaint without
13 the deficiencies identified above.

14 IT IS SO ORDERED.

15 Date: November 7, 2014

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Nathanael M. Cousins
18 United States Magistrate Judge
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