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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LARRY MACE, ET AL.,
Plaintiffs,
v.
OCWEN LOAN SERVICING, LLC, et al.,
Defendants.

Case No. [16-cv-05840-MEJ](#)
**ORDER RE: MOTION FOR
JUDGMENT ON THE PLEADINGS**
Re: Dkt. No. 80

INTRODUCTION

Defendant Ocwen Loan Servicing, LLC moves for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). Mot., Dkt. No. 80. Plaintiffs Larry and Sharon Mace oppose the Motion. Opp’n, Dkt. Nos. 83-84.¹ Ocwen filed a Reply. Dkt. No. 85. The Court previously vacated the hearing on this matter. Dkt. No. 87. Having considered the parties’ argument, the relevant legal authority, and the record in this case, the Court **GRANTS** the Motion.

BACKGROUND

A. Factual History

Plaintiffs, as trustees of the Larry Mace Family Trust, own real property located at 247 Poplar Avenue in Hayward, California (the “Property”). Compl. ¶ 1, Dkt. No. 1-2. On April 25, 2006, Plaintiffs executed a trust deed in favor of Ocwen and Defendant Western Progressive LLC, which was recorded in Alameda County, California. *Id.* ¶ 9.

On October 28, 2015, Plaintiffs applied for a loan modification with Ocwen. *Id.* ¶ 11.

¹ Plaintiffs twice filed their Opposition. *See* Dkt. Nos. 83-84. For purposes of this Order, citations to the Opposition refer to Docket Nos. 83 and 84.

1 Ocwen required more information, which Plaintiffs submitted on April 26, 2016. *Id.* Plaintiffs
2 allege, “on information and belief,” that Ocwen has not denied the loan modification. *Id.*

3 On April 8, 2016, Ocwen recorded a Notice of Default in Alameda County. *Id.* ¶ 10; *see*
4 *id.*, Ex. A (Notice of Default). On August 25, 2016, Ocwen recorded a Notice of Trustee’s Sale.
5 *Id.* ¶ 12; *see id.*, Ex. B (Notice of Trustee’s Sale). The Notice of Trustee’s Sale listed a sale date
6 of September 21, 2016. *Id.* ¶ 13 & Ex. B at 1.

7 On September 2, 2016, Plaintiffs’ counsel spoke with Ocwen’s Escalation Manager, who
8 was unable to address counsel’s allegation that Plaintiffs’ loan modification application was still
9 pending. *Id.* ¶ 13. The Escalation Manager also represented that, contrary to the Notice of
10 Trustee’s Sale, the sale was scheduled for September 13, 2016. *Id.* The Escalation Manager
11 further stated that the sale would be postponed if Plaintiffs submitted an updated application via
12 facsimile. *Id.* Plaintiffs did so on September 9, 2016. *Id.*; *see id.*, Ex. C (facsimile cover sheet).

13 **B. Procedural History**

14 On September 14, 2016, Plaintiffs initiated this litigation in Alameda County Superior
15 Court, naming as defendants Ocwen and Western Progressive. *Id.* ¶¶ 2-3. They assert two causes
16 of action: (1) “Declaratory Relief” pursuant to California’s Homeowner’s Bill of Rights
17 (“HBOR”), Cal. Civ. Code § 2920 et. seq.; and (2) “Injunction” from selling the Property. *Id.*

18 On September 20, 2016, the state court granted Plaintiffs’ ex parte application for a
19 temporary restraining order (“TRO”) and enjoined Defendants from conducting the foreclosure
20 sale until September 29, 2016 or, if Plaintiffs filed a motion for a preliminary injunction, until the
21 court issued an order on such motion. Dkt. No. 1-7 (state court order granting TRO). On
22 September 27, 2016, Plaintiffs filed a motion for a preliminary injunction. Dkt. No. 1-9 (motion
23 for preliminary injunction). Defendants were served with the Complaint on September 28, 2016
24 and removed the case to this court on October 11, 2016. Notice of Removal ¶ 2, Dkt. No. 1.
25 Ocwen filed an Answer on October 13, 2016. Dkt. No. 7.

26 Ocwen filed a motion for judgment on the pleadings (Dkt. No. 14), and Plaintiffs filed a
27 motion for preliminary injunction (Dkt. No. 27). The Honorable Claudia Wilken denied Ocwen’s
28 motion and granted Plaintiffs’ motion. Dkt. No. 38. Ocwen moved for judgment on the pleadings

1 on the grounds that Plaintiffs failed to allege they submitted a “complete” loan modification
2 application, failed to allege a “material” violation of California Civil Code section 2924.12(a), and
3 failed to allege they are legally entitled to a loan modification. *Id.* at 5-7. Judge Wilken rejected
4 each argument, finding the Complaint sufficiently alleged each ground. *Id.*

5 Judge Wilken also enjoined Defendants from foreclosing on the Property; however, the
6 preliminary injunction was conditioned upon Plaintiffs making monthly payments of \$2,500 to
7 Defendants. *Id.* at 10-11.

8 On May 16, 2017, Judge Wilken denied Ocwen’s motion for summary judgment. Dkt. No.
9 61. Judge Wilken found Plaintiffs identified sufficient evidence to “raise[] a genuine issue of
10 material fact supporting their claim that their application was complete before Ocwen recorded the
11 notice of trustee’s sale on August 25, 2016.” *Id.* at 10-11; *id.* at 9 (citing Cal. Civ. Code §
12 2923.6(c) (2013) (“If a borrower submits a complete application for a first lien loan modification .
13 . . . , a mortgage servicer . . . shall not record a notice of default or notice of sale, or conduct a
14 trustee’s sale, while the complete first lien loan modification application is pending.”)).² Judge
15 Wilken also rejected Ocwen’s arguments that any HBOR violation was not material, as Ocwen
16 failed to show that its denial letters complied with California Civil Code section 2923.6(f) and
17 because Plaintiffs’ entitlement to a loan modification was irrelevant to their HBOR claims. *Id.* at
18 11-12.

19 The case was reassigned to the undersigned on July 19, 2017. Dkt. No. 73. Ocwen filed
20 the instant Motion on December 7, 2017.³

21 **LEGAL STANDARD**

22 “After the pleadings are closed—but early enough not to delay trial—a party may move for
23 judgment on the pleadings.” Fed. R. Civ. P. 12(c). “Judgment on the pleadings is properly

24 _____
25 ² Section 2923.6 was updated on January 1, 2018. Judge Wilken’s citations to this statute refer to
26 prior version, which was in effect at the time Plaintiffs filed their Complaint and Judge Wilken
issued her Orders.

27 ³ Western Progressive did not join the Motion. On October 5, 2016, Western Progressive filed a
28 Declaration of Nonmonetary Status, in which it “agree[d] to be bound by whatever non-monetary
order or judgment is issued by the Court regarding the Deed of Trust.” Dkt. No. 1-12 ¶ 3.

1 granted when there is no issue of material fact in dispute, and the moving party is entitled to
2 judgment as a matter of law.” *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009).

3 “Analysis under Rule 12(c) is substantially identical to analysis under Rule 12(b)(6)
4 because, under both rules, a court must determine whether the facts alleged in the complaint, taken
5 as true, entitle the plaintiff to a legal remedy.” *Chavez v. United States*, 683 F.3d 1102, 1108 (9th
6 Cir. 2012) (internal quotation marks omitted). “Dismissal under Rule 12(b)(6) is appropriate only
7 where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable
8 legal theory.” *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).
9 While a complaint “need not contain detailed factual allegations” to survive a Rule 12(b)(6)
10 motion, “it must plead enough facts to state a claim to relief that is plausible on its face.” *Cousins*
11 *v. Lockyer*, 568 F.3d 1063, 1067-68 (9th Cir. 2009) (internal quotation marks and citations
12 omitted). A claim is facially plausible when it “allows the court to draw the reasonable inference
13 that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
14 (2009) (internal quotation marks omitted).

15 Courts analyzing a Rule 12(c) motion must “accept the factual allegations in the complaint
16 as true, and view them in a light most favorable to the plaintiff.” *LeGras v. AETNA Life Ins. Co.*,
17 786 F.3d 1233, 1236 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1448 (2016). However, “conclusory
18 allegations of law and unwarranted inferences are insufficient to avoid a Rule 12(b)(6) dismissal.”
19 *Cousins*, 568 F.3d at 1067 (internal quotation marks omitted). “[I]t is within [the court’s]
20 wheelhouse to reject, as implausible, allegations that are too speculative to warrant further factual
21 development.” *Dahlia v. Rodriguez*, 735 F.3d 1060, 1076 (9th Cir. 2013).

22 “Where a court grants . . . a motion for judgment on the pleadings under Rule 12(c), leave
23 to amend should be freely given if it is possible that further factual allegations will cure any
24 defect.” *Lopez v. Regents of Univ. of Cal.*, 5 F. Supp. 3d 1106, 1113 (N.D. Cal. 2013).

25 **REQUEST FOR JUDICIAL NOTICE**

26 Before turning to the parties’ substantive arguments, the Court first considers Ocwen’s
27 request for judicial notice (“RJN”). RJN, Dkt. No. 81.

28 Federal Rule of Evidence 201(b) permits courts to “judicially notice a fact that is not

1 subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial
2 jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot
3 reasonably be questioned.” Courts “may take judicial notice of court filings and other matters of
4 public record.” *Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006);
5 *see Rees v. PNC Bank, N.A.*, 308 F.R.D. 266, 271 (N.D. Cal. 2015) (taking judicial notice of
6 recorded deed of trust, recorded assignments of deed of trust, recorded notice of default, and
7 recorded notice of trustee’s sale). But while courts may take judicial notice of undisputed matters
8 of public record, they may not judicially notice “disputed facts stated in public records.” *Lee v.*
9 *City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001) (emphasis in original).

10 Ocwen requests the Court take judicial notice of the following documents:

- 11 1. Deed of Trust recorded in the Official Records of Alameda County, California, on
12 May 5, 2006, as instrument number 2006181413 (RJN, Ex. 1);
- 13 2. Corporate Assignment of Deed of Trust recorded in the Official Records of
14 Alameda County, California, on March 13, 2009, as instrument number
15 2009074932 (RJN, Ex. 2);
- 16 3. Assignment of Deed of Trust recorded in the Official Records of Alameda County,
17 California, on December 7, 2010, as instrument number 2010359699 (RJN, Ex. 3);
- 18 4. Notice of Default and Election to Sell Under Deed of Trust recorded in the Official
19 Records of Alameda County, California on April 8, 2016, as instrument number
20 2016090029 (RJN, Ex. 4).
- 21 5. Notice of Trustee’s Sale recorded in the Official Records of Alameda County,
22 California on August 25, 2016, as instrument number 2016215885 (RJN, Ex. 5);
- 23 6. Notice of Rescission of Notice of Default recorded in the Official Records of
24 Alameda County, California on November 22, 2017, as instrument number
25 2017258349 (RJN, Ex. 6).

26 Plaintiffs do not object to Ocwen’s RJN or question the authenticity of these documents. *See*
27 *Opp’n*. As these documents are matters of public record not subject to reasonable dispute, the
28 Court GRANTS Ocwen’s RJN and takes judicial notice of them.

1 **DISCUSSION**

2 **A. Motion for Judgment on the Pleadings**

3 On November 16, 2017, Western Progressive filed a Notice of Rescission of Notice of
4 Default. Mot. at 5; *see* RJN, Ex. 6 (Notice of Rescission). Ocwen argues the Notice of Rescission
5 “correct[s] and remed[ies]” Plaintiffs’ section 2923.6 claim and “there is no need for an injunction
6 to remain in place.” Mot. at 5.

7 “Article III of the Constitution requires that there be a live case or controversy at the time
8 that a federal court decides the case[.]” *Burke v. Barnes*, 479 U.S. 361, 363 (1987). Because the
9 Notice of Rescission remedies the violation Plaintiffs sought to litigate – the allegedly wrongful
10 foreclosure proceedings – there is no case or controversy for the Court to decide. *See Pearson v.*
11 *Green Tree Servicing, LLC*, 2014 WL 6657506, at *3 (N.D. Cal. Nov. 21, 2014) (“Having
12 remedied the very violation that the complaint sought to cure—rescission of the Notice of
13 Default—there is no remaining case or controversy for the Court to adjudicate based on present
14 circumstances, so dismissal is proper.”); *Diamos v. Specialized Loan Servicing LLC*, 2014 WL
15 3362259, at *5 (N.D. Cal. July 7, 2014) (“[B]y rescinding the . . . notice of default, [the defendant]
16 is currently free of liability stemming from recording that notice of default.”). Dismissal is
17 therefore appropriate.

18 Dismissal is also proper pursuant to HBOR’s safe harbor provision, which provides that
19 “[a] mortgage servicer . . . shall not be liable for any violation that it has corrected and remedied
20 prior to the recordation of the trustee’s deed upon sale, or that has been corrected and remedied by
21 third parties working on its behalf prior to the recordation of the trustee’s deed upon sale.” Cal.
22 Civ. Code § 2924.12(c). Where, as here, a court has issued an injunction, “[a]n enjoined entity
23 may move to dissolve an injunction based on a showing that the material violation has been
24 corrected and remedied.” Cal. Civ. Code § 2924.12(a)(2). The Notice of Rescission corrects and
25 remedies the alleged violation.

26 Indeed, Plaintiffs do not dispute Ocwen’s contention that the Notice of Rescission moots
27 their claims. Plaintiffs instead argue “[t]he question . . . is one of fairness” and the Motion should
28 be denied because Ocwen’s “games . . . run counter to the whole idea of [HBOR].” Opp’n at 3-4;

1 *see id.* (“OCWEN has taken every action imaginable to make life difficult for the MACES both in
2 this proceeding and at home” and “continually noticed the home for sale despite the injunction
3 resulting in harassing conduct by third parties ready to swallow up the home at a foreclosure
4 sale.”). This is unpersuasive. Plaintiffs’ Complaint does not include allegations that Ocwen or a
5 third party noticed a foreclosure sale other than the one scheduled for September 21, 2016, which
6 the state court enjoined. *See* Compl.; Dkt. No. 1-7. Plaintiffs’ assertion in their Opposition that
7 Ocwen “continually noticed the home for sale despite the injunction” is not supported by any
8 evidence in the record. Nothing in the record indicates a foreclosure sale was scheduled after the
9 state court enjoined the September 21, 2016 sale or after Judge Wilken enjoined foreclosure
10 proceedings on December 29, 2016. Plaintiffs do not identify who noticed the ostensible
11 foreclosure sale, identify when such sale was to take place, or otherwise offer evidence that a
12 notice of foreclosure sale was recorded despite the injunctions.

13 Plaintiffs also cite no authority for their proposition that the case should proceed absent a
14 live case or controversy in the interests of “fairness.” To the extent Plaintiffs argue Ocwen’s
15 “harassing conduct” is actionable, the Complaint contains no allegations of harassment, and they
16 fail to offer facts indicating such conduct took place after they initiated this action. Moreover,
17 Plaintiffs’ argument that Ocwen’s actions are contrary to HBOR’s purposes ignores HBOR’s safe
18 harbor provisions allowing a mortgage servicer to correct and remedy a section 2924.6 violation.
19 *See* Cal. Civ. Code § 2924.12(a)(2), (c).

20 Accordingly, the Court GRANTS Ocwen’s Motion for Judgment on the Pleadings. As
21 Plaintiffs’ claims are now moot, leave to amend would be futile. The Court therefore DISMISSES
22 the Complaint in its entirety without leave to amend.

23 **B. Attorneys’ Fees**

24 Plaintiffs request they be allowed an opportunity to file a motion for attorneys’ fees.
25 Opp’n at 4-5. HBOR provides that “[a] court may award a prevailing borrower reasonable
26 attorney’s fees and costs in an action brought pursuant to this section.” Cal. Civ. Code §
27 2924.12(h). A “prevailing borrower” is one who “obtained injunctive relief or was awarded
28 damages pursuant to this section.” *Id.*

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While the Court declines to consider at this time whether Plaintiffs are prevailing borrowers in light of this dismissal, nothing in this order precludes Plaintiffs from seeking attorneys' fees at a later date. *See, e.g., Pearson*, 2014 WL 6657506, at *3-4 (dismissing HBOR claims on mootness grounds but allowing plaintiffs to file motion for attorneys' fees).

CONCLUSION

For the foregoing reasons, the Court **GRANTS** Ocwen's Motion for Judgment on the Pleadings and **DISMISSES** the Complaint. Plaintiffs may file a motion for attorneys' fees no later than February 8, 2018.

IT IS SO ORDERED.

Dated: January 11, 2018



MARIA-ELENA JAMES
United States Magistrate Judge