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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LINDA BRYER,

Plaintiff,

v.

U.S. BANK NATIONAL ASSOCIATION,
et al.,

Defendants.

Case No. [15-cv-00378-PSG](#)

**ORDER GRANTING MOTION TO
DISMISS FIRST AMENDED
COMPLAINT**

(Re: Docket No. 47, 49, 55)

This mortgage foreclosure action arises out of a loan to Plaintiff Linda Bryer from First Magnus Financial Corporation, a company that no longer exists.¹ Now, Bryer claims, entities that have no right to foreclose on her property are trying to do so.² Defendants U.S. Bank National Association and Select Portfolio Servicing, Inc., two of those entities, move to dismiss Bryer’s first amended complaint.³ Bryer opposes the motion.⁴ Defendants’ motion is GRANTED, but with partial leave to amend.

I.

Bryer has owned a piece of real property in Capitola, California since 1994.⁵ In 2006, she

¹ See Docket No. 42 at ¶¶ 14, 16.

² See *id.* at ¶¶ 22-36.

³ See Docket No. 47. Defendant ALAW moves to join the motion to dismiss and provides its own independent grounds for dismissal. See Docket Nos. 49, 55. The motions for joinder are GRANTED. The court does not reach the defenses particular to ALAW.

⁴ See Docket No. 53.

⁵ See Docket No. 42 at ¶ 6.

1 obtained a loan of \$596,000 from First Magnus, securing the loan with a deed of trust on the
2 Capitola property.⁶ The deed of trust also named Mortgage Electronic Registration Systems, Inc.
3 as the “nominee for Lender and Lender’s successors and assigns” and First American Title
4 Company as the “Trustee.”⁷ Less than two years later, First Magnus went under.⁸

5 The mortgage apparently remained in limbo until 2011. On May 25 of that year, however,
6 an assignment of the deed of trust purported to transfer “all beneficial interest under” the deed of
7 trust from First American Title to U.S. Bank.⁹ Colleen Irby, an Assistant Secretary at MERS,
8 signed the document.¹⁰ Another document executed on the same day by Irby “substitute[d]
9 California Reconveyance Company . . . as Trustee.”¹¹ On June 2, CRC recorded the assignment
10 and the substitution with the Santa Cruz County Recorder’s Office—along with a notice of default
11 signed by a CRC employee.¹²

12 Bryer identifies several problems with this course of conduct. First, she disputes the
13 validity of the assignment. By 2011, First Magnus was defunct, and Bryer alleges that MERS had
14 no authority to assign the deed of trust on First Magnus’ behalf.¹³ Second, Bryer argues that the
15 notice of default also was invalid. She cites various procedural defects and claims that CRC never
16 had authority from First Magnus to initiate foreclosure.¹⁴ Citing these problems, Bryer’s operative
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18 ⁶ See *id.* at ¶¶ 2, 6, 14; *id.*, Ex. A (deed of trust); *id.*, Ex. B (promissory note).

19 ⁷ *Id.*, Ex. A at 2; see *id.* at ¶ 15.

20 ⁸ See *id.* at ¶¶ 16-17, 22.

21 ⁹ *Id.*, Ex. C; see *id.* at ¶ 18.

22 ¹⁰ See *id.*, Ex. C.

23 ¹¹ *Id.*, Ex. D.

24 ¹² See *id.* at ¶¶ 18, 20; *id.*, Exs. C-E.

25 ¹³ See *id.* at ¶¶ 22-26.

26 ¹⁴ See *id.* at ¶¶ 27-37.

1 complaint raises seven causes of action based in California law and against all Defendants: (1)
2 cancellation of the assignment, the substitution and the notice of default under Cal. Civ. Code
3 § 3412; (2) unfair competition under Cal. Bus. & Prof. Code § 17200; (3) procedural failures in
4 the foreclosure process in violation of Cal. Civ. Code § 2924(a)(6) and (f); (4) declaratory relief
5 against all Defendants; (5) failure to verify foreclosure documents for accuracy, in violation of
6 Cal. Civ. Code § 2924.17; (6) failure to satisfy the foreclosure due diligence requirements of Cal.
7 Civ. Code § 2923.5 and (7) quiet title.¹⁵

8 **II.**

9 This court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332. The parties further
10 consented to the jurisdiction of the undersigned magistrate judge under 28 U.S.C. § 636(c) and
11 Fed. R. Civ. P. 72(a).

12 **III.**

13 A complaint must contain “a short and plain statement of the claim showing that the
14 pleader is entitled to relief.”¹⁶ When a plaintiff fails to proffer “enough facts to state a claim to
15 relief that is plausible on its face,” the complaint may be dismissed for failure to state a claim upon
16 which relief may be granted.¹⁷ A claim is facially plausible “when the pleaded factual content
17 allows the court to draw the reasonable inference that the defendant is liable for the misconduct
18 alleged.”¹⁸ Under Fed. R. Civ. P. 12(b)(6), “dismissal can be based on the lack of a cognizable
19 legal theory or the absence of sufficient facts alleged under a cognizable legal theory.”¹⁹
20 Dismissal with prejudice and without leave to amend is appropriate if it is clear that the complaint
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23 ¹⁵ See *id.* at ¶¶ 38-91.

24 ¹⁶ Fed. R. Civ. P. 8(a)(2).

25 ¹⁷ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

26 ¹⁸ *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009).

27 ¹⁹ *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

1 could not be saved by amendment.²⁰

2 At this stage of the case, the court must accept all material allegations in the complaint as
3 true and construe them in the light most favorable to the non-moving party.²¹ The court’s review
4 is limited to the face of the complaint, materials incorporated into the complaint by reference and
5 matters of which the court may take judicial notice.²² However, the court need not accept as true
6 allegations that are conclusory, unwarranted deductions of fact or unreasonable inferences.²³

7 As a preliminary matter, Defendants request judicial notice of several notices of trustee’s
8 sale.²⁴ The court may take judicial notice of a “fact that is not subject to reasonable dispute
9 because it is generally known” or “can be accurately and readily determined from sources whose
10 accuracy cannot reasonably be questioned.”²⁵ Because Bryer disputes the legal effects of these
11 documents,²⁶ the court will take judicial notice only of the fact that these documents were recorded
12 in the public record.

13 **First**, many of Bryer’s allegations rest on the allegedly invalid assignment of the deed of
14 trust.²⁷ But in fact, California law allowed MERS to assign the deed of trust even after First
15 Magnus went out of business. *Herrera v. Federal National Mortgage Ass’n* is directly apposite.²⁸

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17 ²⁰ See *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

18 ²¹ See *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008).

19 ²² See *id.*

20 ²³ See *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); see also *Twombly*,
21 550 U.S. at 561 (holding that “a wholly conclusory statement of [a] claim” will not survive a
22 motion to dismiss).

23 ²⁴ See Docket No. 48.

24 ²⁵ Fed. R. Evid. 201(b).

25 ²⁶ See Docket No. 53-1.

26 ²⁷ See Docket No. 42 at ¶¶ 22-26.

27 ²⁸ See 205 Cal. App. 4th 1495 (2012).

1 In that case, the lender named on the plaintiffs’ deed of trust had dissolved, but the California
2 Court of Appeal held that MERS nevertheless had the right to assign the deed of trust.²⁹ And,
3 contrary to Bryer’s assertion, the *Herrera* court explicitly rejected plaintiffs’ argument that
4 “MERS lacked authority to assign the [deed of trust].”³⁰ Here, as in *Herrera*, the deed of trust
5 specifically granted MERS the right “to exercise any or all of” the lender’s interests.³¹ This
6 included the authority to assign the note.³² As a matter of law, the assignment was valid.

7 **Second**, Bryer also alleges that the notice of default is void because CRC, the foreclosing
8 party, was not authorized to initiate foreclosure and failed to comply with other statutory
9 requirements.³³ A notice of default may only be entered by “the holder of the beneficial interest
10 . . . , the original trustee or the substituted trustee under the deed of trust, or the designated agent
11 of the holder of the beneficial interest.”³⁴ State law requires a notice of default to contain, among
12 other things, a statement identifying the deed of trust and the trustor, a statement explaining the
13 breach and information about how to cure the breach.³⁵ The notice also must include a declaration
14 stating that the declarant has contacted the borrower to explain the situation or that the declarant
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17 ²⁹ *See id.* at 1501-07.

18 ³⁰ *Id.* at 1505.

19 ³¹ Docket No. 42, Ex. A at 3; *see Herrera*, 205 Cal. App. 4th at 1506 (“[T]he DOT stated MERS
20 held all the rights of the lender, including the right to foreclose.”); *Ogilvie v. Select Portfolio*
21 *Servicing*, Case No. 12-cv-01654, 2012 WL 4891583, at *3 (N.D. Cal. Oct. 12, 2012) (analyzing
identical language in a deed of trust and reaching the same result).

22 ³² *See Herrera*, 205 Cal. App. 4th at 1498 (“MERS, as nominal beneficiary, has the power to
23 assign its interest under a deed of trust.”); *see also Lam v. JPMorgan Chase Bank NA*, 605 F.
24 App’x 600, 603 (9th Cir. 2015) (citing *Herrera*, 205 Cal. App. 4th at 1498) (holding that MERS
had the authority to assign a deed of trust).

25 ³³ *See* Docket No. 42 at ¶¶ 27-36.

26 ³⁴ Cal. Civ. Code § 2924(a)(6).

27 ³⁵ *See id.* § 2924(a)(1).

1 has tried with due diligence to make that contact.³⁶

2 The foreclosure satisfied all of these statutory requirements. The first of the three
3 documents recorded on June 2, 2011 assigned the beneficial interest in the deed of trust to U.S.
4 Bank.³⁷ As above, the deed of trust gave MERS the power to take this action under *Herrera*. In
5 the second document, a representative of U.S. Bank named CRC as the new trustee of Bryer’s
6 deed of trust.³⁸ As the successor in interest of the beneficiary under the trust deed, U.S. Bank had
7 the statutory authority to effect the substitution.³⁹ And in the third document, CRC entered the
8 notice of default.⁴⁰ As “the substituted trustee under the deed of trust,” state law authorized CRC
9 to initiate the foreclosure.⁴¹ As for the notice of default itself, the document as recorded included
10 all of the necessary information.⁴² It also was accompanied by the required declaration from
11 JPMorgan, an agent of the beneficiary, stating that JPMorgan exercised due diligence but failed to
12 contact Bryer to discuss her financial status and options.⁴³

13 ***Third***, Bryer further fails to allege that she has suffered prejudice from any defects in the

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15 ³⁶ *See id.* § 2923.55(c).

16 ³⁷ *See* Docket No. 42, Ex. C.

17 ³⁸ *See* Docket No. 42, Ex. D. In her complaint, Bryer observes that Colleen Irby signed both
18 documents on behalf of different entities, but Bryer offers no basis for her allegation that Irby
lacked the authority to do so. *See* Docket No. 42 at ¶¶ 18-19, 67.

19 ³⁹ *See* Cal. Civ. Code § 2934a(a)(1) (“The trustee under a trust deed . . . may be substituted by the
20 recording . . . of a substitution executed and acknowledged by . . . the beneficiaries under the trust
21 deed, or their successors in interest.”). Bryer points out that the deed of trust reserves to First
Magnus the right to “appoint a successor trustee . . . by an instrument executed and acknowledged
22 by [First Magnus].” Docket No. 42, Ex. A at 13. But MERS—on which the same document
conferred the right to exercise any of First Magnus’ interests, *see id.* at 3—named U.S. Bank as
23 the successor to First Magnus’ rights. *See* Docket No. 42, Ex. C.

24 ⁴⁰ *See* Docket No. 42, Ex. E.

25 ⁴¹ Cal. Civ. Code § 2924(a)(6).

26 ⁴² *See* Cal. Civ. Code § 2924(a)(1); Docket No. 42, Ex. E at 1-2.

27 ⁴³ *See* Cal. Civ. Code § 2923.55(c); Docket No. 42, Ex. E at 3.

1 foreclosure process. “[A] suit for wrongful foreclosure has generally been required to demonstrate
2 the alleged imperfection in the foreclosure process was prejudicial to the plaintiff’s interests.”⁴⁴
3 The question is not whether the foreclosure harms Bryer; of course it does. The law, however,
4 requires more. The operative inquiry is whether the wrongs that Bryer alleges “chang[ed] her
5 obligations under the note,” “interfered in any manner with her payment of the note” or otherwise
6 affected her position as a borrower.⁴⁵ In short, Bryer must allege “that the foreclosure would have
7 been averted but for the alleged deficiencies in the foreclosure process.”⁴⁶ But Bryer only claims,
8 in conclusory terms, that “payments equal to or more than the required amount were made on a
9 monthly basis when the [notice of default] was recorded”⁴⁷ and that she “denies the allegations
10 contained in the [notice of default] including owing to JPMorgan \$27,752.64 as of May 25,
11 2011.”⁴⁸ Even taking these bare-bones assertions as true, Bryer still fails to show prejudice. She
12 does not allege that CRC—or First Magnus, the original lender—would never have foreclosed on
13 her property if it had followed the proper procedures.⁴⁹ That omission is fatal to her claims.

14 As a result, none of Bryer’s causes of action can survive. Her first, second, fourth and
15 seventh claims—for cancellation of instruments, unfair competition, declaratory judgment and
16 quiet title⁵⁰—depend on her flawed argument that the recorded assignment and substitutions were

18 ⁴⁴ *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256, 272 (2011).

19 ⁴⁵ *Id.*

20 ⁴⁶ *Rockridge Trust v. Wells Fargo, N.A.*, 985 F. Supp. 2d 1110, 1147 (N.D. Cal. 2013) (citing
21 *Natividad v. Wells Fargo Bank, N.A.*, Case No. 12-cv-03646, 2013 WL 2299601, at *16 (N.D.
22 Cal. May 24, 2013)).

23 ⁴⁷ Docket No. 42 at ¶ 29.

24 ⁴⁸ *Id.* at ¶ 83.

25 ⁴⁹ Also, the steadily increasing balances in the notices of sale suggest that Bryer may have stopped
26 paying her mortgage at some point after 2011. *See* Docket No. 48, Exs. G-J. Although the court
27 does not assume the truth of these representations, Bryer’s complaint does not allege otherwise.

28 ⁵⁰ *See* Docket No. 42 at ¶¶ 38-58, 63-70, 84-91.

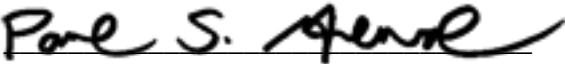
1 void. For the reasons above, those claims are dismissed. Furthermore, because it has become
2 clear that those claims cannot be saved by amendment, leave to amend those claims is denied.⁵¹
3 Bryer’s remaining claims—for violations of Sections 2924f(b)(3), 2924.17 and 2923.5 of the
4 California Civil Code⁵²—fail as well because Bryer has not alleged prejudice. However, the court
5 is not yet convinced that further amendment would be futile.⁵³ The court therefore grants Bryer
6 leave to amend only these claims.

7 **IV.**

8 Defendants’ motion to dismiss is GRANTED. Leave to amend also is GRANTED, but
9 only with respect to Bryer’s third, fifth and sixth claims. Any amended complaint must be filed
10 within 21 days.

11 **SO ORDERED.**

12 Dated: December 22, 2015

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14 PAUL S. GREWAL
15 United States Magistrate Judge
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22 ⁵¹ See *Eminence Capital*, 316 F.3d at 1052 (“Dismissal with prejudice and without leave to amend
23 is not appropriate unless it is clear . . . that the complaint could not be saved by amendment.”).

24 ⁵² See Docket No. 42 at ¶¶ 62, 71-83. Bryer’s third cause of action also raises a claim under Cal.
25 Civ. Code § 2924(a)(6). See *id.* at ¶¶ 59-61. That portion is dismissed with prejudice because it
26 too depends on the argument foreclosed by *Herrera*.

27 ⁵³ See *Eminence Capital*, 316 F.3d at 1052 (quoting *Owens v. Kaiser Found. Health Plan, Inc.*,
28 244 F.3d 708, 712 (9th Cir. 2001)) (requiring district courts to apply “with extreme liberality” the
policy of freely granting at least some leave to amend).