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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARY JULIET NG,
Plaintiff,
v.
US BANK TRUSTEE, NA, et al.,
Defendants.

Case No. [15-cv-04998-PSG](#)

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

(Re: Docket No. 47)

Plaintiff Mary Juliet Ng alleges that Defendants U.S. Bank National Association and Select Portfolio Servicing, Inc. violated various state and federal laws in transferring a deed of trust on Ng’s home and initiating foreclosure proceedings.¹ Defendants now move to dismiss Ng’s first amended complaint on a number of grounds.² The motion is GRANTED, but with partial leave to amend.

I.

In 2007, Ng and her husband took out a \$765,000 mortgage from Washington Mutual on a piece of real property in San Jose.³ On or before May 23, 2007, WaMu sold the note to a securitized trust, the Wamu Pass Through Certificate Series 2007-HY6 Trust, which closed on May 23, 2007.⁴ On April 21, 2010, an assignment of the deed of trust and the note to Bank of

¹ See Docket No. 45.

² See Docket No. 47.

³ See Docket No. 45 at ¶¶ 7-8.

⁴ See *id.* at ¶ 9(a).

1 America, N.A., as trustee of the 2007-HY6 trust, and a notice of default were both recorded.⁵
2 Later that year, California Reconveyance Company recorded a notice of trustee's sale.⁶ Early in
3 2011, another assignment was recorded, which again granted all beneficial interest in the deed of
4 trust to Bank of America, but this time the assignment did not explicitly transfer the note.⁷ Two
5 more notices of trustee's sale followed in April 2013 and May 2014.⁸

6 Ng alleges that these assignments were invalid.⁹ Furthermore, she argues that, because the
7 second assignment failed to transfer the note along with the deed of trust, it rendered Ng's
8 mortgage a nullity.¹⁰ Because of those invalid assignments, Ng claims that none of these parties
9 have the authority to foreclose on her home.¹¹

10 Ng and her husband filed this suit on October 30, 2015.¹² In February of this year, the
11 court granted Defendants' motion to dismiss the initial complaint, but with leave to amend.¹³ Ng
12 then filed the amended complaint at issue here.¹⁴ The operative complaint has eleven causes of
13 action: (1) wrongful foreclosure, (2) violations of California's Homeowner Bill of Rights, (3)
14 slander of title, (4) injunctive relief, (5) violations of the federal Truth in Lending Act, (6)

16 ⁵ See *id.* at ¶¶ 11-12; Docket No. 45-1, Ex. 2; see also Docket No. 48-1, Ex. 3.

17 ⁶ See Docket No. 45 at ¶ 16; see also Docket No. 48-1, Ex. 4.

18 ⁷ See Docket No. 45 at ¶ 17; Docket No. 45-1, Ex. 4.

19 ⁸ See Docket No. 45 at ¶¶ 20, 22; see also Docket No. 48-1, Exs. 6, 7.

20 ⁹ See Docket No. 45 at ¶¶ 11, 14-15.

21 ¹⁰ See *id.* at ¶ 17.

22 ¹¹ See *id.* at ¶¶ 10, 13, 19(a).

23 ¹² See Docket No. 1. Ng's husband voluntarily dismissed his claims shortly thereafter. See
24 Docket No. 17.

25 ¹³ See Docket No. 42.

26 ¹⁴ See Docket No. 45.

1 violations of the Fair Debt Collection Practices Act and the Real Estate Settlement Procedures
2 Act, (7) tolling of the statute of limitations by fraudulent concealment, (8) fraud, (9) unfair
3 competition under Cal. Bus. Prof. Code § 17200, (10) intentional misrepresentation and (11)
4 violation of Cal. Civ. Proc. Code § 726 on sufficiency of pleading.¹⁵ Five of these claims—her
5 second, third, eighth, tenth and eleventh causes of action—are new to the first amended complaint.

6 **II.**

7 This court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367. The
8 parties further consented to the jurisdiction of the undersigned magistrate judge under 28 U.S.C.
9 § 636(c) and Fed. R. Civ. P. 72(a).¹⁶

10 **III.**

11 A complaint must contain “a short and plain statement of the claim showing that the
12 pleader is entitled to relief.”¹⁷ When a plaintiff fails to proffer “enough facts to state a claim to
13 relief that is plausible on its face,” the complaint may be dismissed for failure to state a claim upon
14 which relief may be granted.¹⁸ A claim is facially plausible “when the pleaded factual content
15 allows the court to draw the reasonable inference that the defendant is liable for the misconduct
16 alleged.”¹⁹ Under Fed. R. Civ. P. 12(b)(6), “dismissal can be based on the lack of a cognizable
17 legal theory or the absence of sufficient facts alleged under a cognizable legal theory.”²⁰
18 Dismissal with prejudice and without leave to amend is appropriate if it is clear that the complaint
19 could not be saved by amendment.²¹

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21 ¹⁵ See Docket No. 45.

22 ¹⁶ See Docket Nos. 8, 9.

23 ¹⁷ Fed. R. Civ. P. 8(a)(2).

24 ¹⁸ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

25 ¹⁹ *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009).

26 ²⁰ *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

27 ²¹ See *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

1 At this stage of the case, the court must accept all material allegations in the complaint as
2 true and construe them in the light most favorable to the non-moving party.²² The court’s review
3 is limited to the face of the complaint, materials incorporated into the complaint by reference and
4 matters of which the court may take judicial notice.²³ However, the court need not accept as true
5 allegations that are conclusory, unwarranted deductions of fact or unreasonable inferences.²⁴

6 As a preliminary matter, Defendants request judicial notice of several documents,
7 including various deeds of trust and notices of default.²⁵ The court may take judicial notice of a
8 “fact that is not subject to reasonable dispute because it is generally known” or “can be accurately
9 and readily determined from sources whose accuracy cannot reasonably be questioned.”²⁶ In the
10 event that the contents of a matter of public record are in dispute, the court may take notice of the
11 fact of the document at issue but not of the disputed information contained within.²⁷ Not all of the
12 submitted documents were recorded or submitted in a judicial proceeding, but only those
13 documents are material to the court’s decision. And because Ng disputes their contents,²⁸ the
14 court will take judicial notice only of the fact that the documents are in the public record.

15 **First**, Defendants move to dismiss the new causes of action that Ng added in her amended
16 complaint because the court never expressly granted Ng leave to assert new claims. Defendants
17 argue that, absent such an explicit statement, a court’s order granting a motion to dismiss cannot
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20 ²² See *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008).

21 ²³ See *id.*

22 ²⁴ See *Sprowell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); see also *Twombly*,
23 550 U.S. at 561 (holding that “a wholly conclusory statement of [a] claim” will not survive a
24 motion to dismiss).

25 ²⁵ See Docket No. 48.

26 ²⁶ Fed. R. Evid. 201(b).

27 ²⁷ See *Lee v. City of Los Angeles*, 250 F.3d 668, 689-90 (9th Cir. 2001).

28 ²⁸ See Docket No. 50.

1 be construed as granting leave to add new claims that were not pleaded in the first place.²⁹ The
2 court notes that the authority on this point is not as clear as Defendants claim. As another court in
3 this district has observed, “California district courts have occasionally considered new claims
4 submitted in an amended complaint where the prior order of dismissal granted leave to amend
5 without limitation.”³⁰ Nevertheless, Ng does not oppose this portion of Defendants’ motion.³¹
6 These claims are dismissed without leave to amend.

7 **Second**, Defendants seek dismissal of Ng’s claim for wrongful foreclosure. “A beneficiary
8 or trustee under a deed of trust who conducts an illegal, fraudulent or willfully oppressive sale of
9 property may be liable to the borrower for wrongful foreclosure.”³² “[W]hen seeking to set aside
10 the foreclosure sale, the plaintiff must also show prejudice and a tender of the amount of the
11 secured indebtedness, or an excuse of tender.”³³ “Tender has been excused when, among other
12 circumstances, the plaintiff alleges the foreclosure deed is facially void, as arguably is the case
13 when the entity that initiated the sale lacked authority to do so.”³⁴ A plaintiff may bring a claim
14 for wrongful foreclosure only once the foreclosure sale has occurred.³⁵

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16 ²⁹ See *Yau v. Deutsche Bank Nat’l Trust Co. Ams.*, Case No. 11-cv-00006, 2011 WL 8326579, at
17 *2 (C.D. Cal. Aug. 21, 2011).

18 ³⁰ *DeLeon v. Wells Fargo Bank, N.A.*, Case No. 10-cv-01390, 2010 WL 4285006, at *3 (N.D. Cal.
19 Oct. 22, 2010) (collecting cases); see also *Jameson Beach Prop. Owners Ass’n v. United States*,
20 Case No. 13-cv-01025, 2014 WL 4925253, at *3 (E.D. Cal. Sept. 29, 2014) (citation omitted)
21 (“District Courts in this circuit generally allow plaintiffs to add new claims and/or parties to an
22 amended complaint where a prior order of dismissal granted leave to amend without limitation.”).

23 ³¹ See Docket No. 51-1.

24 ³² *Yvanova v. New Century Mortg. Corp.*, 62 Cal. 4th 919, 929 (2016).

25 ³³ *Id.* at 929 n.4.

26 ³⁴ *Id.*

27 ³⁵ See *Saterbak v. JPMorgan Chase Bank, N.A.*, 245 Cal. App. 4th 808, 814-15 (2016). *But see*
28 *Lundy v. Selene Finance, LP*, Case No. 15-cv-05676, 2016 WL 1059423, at *10-13 (N.D. Cal.
Mar. 17, 2016) (concluding that the California Supreme Court would permit pre-foreclosure
challenges to void assignments of a deed of trust).

1 Ng’s claim fails for a number of reasons. Because Ng alleges defects in assignments that
 2 were recorded more than four years before she brought this suit,³⁶ her claim is barred by the statute
 3 of limitations.³⁷ Because “California’s non-judicial foreclosure law rejects the splitting-the-note
 4 theory,”³⁸ Ng cannot claim that her mortgage was rendered void when her deed of trust was
 5 assigned without the note.³⁹ Because the allegedly invalid assignment was, at most, voidable and
 6 not void, Ng does not have standing to challenge it.⁴⁰ Because the foreclosure sale has not yet
 7 occurred, the claim is premature. And because Ng has not alleged that she has tendered the full
 8 loan proceeds, she has failed to satisfy the tender rule. The wrongful foreclosure claim is
 9 dismissed. Further amendment would be futile, so leave to amend the claim is denied.

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 11 ³⁶ See Docket No. 48-1, Exs. 2, 5.

12 ³⁷ See Cal. Civ. Proc. Code § 337. In California, a cause of action accrues when “the plaintiff
 13 either discovers or has reason to discover the existence of a claim.” *Slovensky v. Friedman*, 142
 14 Cal. App. 4th 1518, 1528-29 (2006) (citing *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 397-98
 15 (1999)). Here, Ng had inquiry notice of the transfers as soon as they were recorded. Equitable
 16 tolling does not apply because Ng does not allege that circumstances beyond her control prevented
 17 her from discovering her claims. *Cf. Vargas v. JP Morgan Chase Bank, N.A.*, 30 F. Supp. 3d 945,
 18 949 (C.D. Cal. 2014) (“It is rather unclear how [the plaintiff] can characterize his conduct as
 reasonably diligent when he did not check the recorder’s office.”). And Ng’s bankruptcy did not
 toll the running of the statute of limitations. *See Brunner v. CUSA PCSTC, LLC*, Case No. 14-cv-
 00977, 2015 WL 546685, at *2 (C.D. Cal. Feb. 10, 2015) (citing *Husmann v. TWA*, 169 F.3d
 1151, 1154 (8th Cir. 1999)).

19 ³⁸ *Kramer v. Bank of Am., N.A.*, Case No. 13-cv-01499, 2014 WL 1577671, at *8 (E.D. Cal. Apr.
 20 17, 2014) (citing *Ghuman v. Wells Fargo Bank, N.A.*, 989 F. Supp. 2d 994, 1002-03 (E.D. Cal.
 21 2013); *Lane v. Vitek Real Estate Indus. Grp.*, 713 F. Supp. 2d 1092, 1098-99 (E.D. Cal. 2010));
see also Barbieri v. PWFG REO Owner, LLC, Case No. 12-cv-05252, 2013 WL 57865, at *2-3
 (N.D. Cal. Jan. 2, 2013).

22 ³⁹ In any case, the only assignment that allegedly suffered this defect was a duplicate of another
 23 assignment that did transfer the note with the deed of trust. *See* Docket No. 45-1, Exs. 2, 4.

24 ⁴⁰ *See Saterbak*, 245 Cal. App. 4th at 815 (holding that an untimely or unauthorized transfer to a
 25 securitized trust is only voidable and not void). The California Supreme Court recently held that
 26 “a wrongful foreclosure plaintiff has standing to claim the foreclosing entity’s purported authority
 27 to order a trustee’s sale was based on a void assignment of the note and deed of trust.” *Yvanova*,
 62 Cal. 4th at 939. However, it explicitly declined to extend its holding “to claimed defects that
 would make the assignment merely voidable.” *Id.*

1 **Third**, Ng’s claim under TILA fares no better. TILA imposes a statutory obligation to
 2 notify mortgage borrowers of the sale or transfer of their loans.⁴¹ These claims are subject to a
 3 one-year limitations period.⁴² Here, even assuming that the substitution of U.S. Bank Trustee as
 4 the trustee for the securitized trust resulted in a change of ownership of the loan, the substitution
 5 occurred more than a year before Ng brought this action. Ng argues that she did not have notice of
 6 U.S. Bank Trustee’s involvement until it filed a notice of claim in Ng’s bankruptcy proceeding on
 7 November 7, 2014. But, in light of documents that Defendants have proffered for judicial notice,
 8 Ng’s claim is implausible. U.S. Bank Trustee appeared in the bankruptcy proceeding and
 9 identified itself as the trustee for the Trust on June 19, 2014, and it filed an objection to an
 10 objection to the confirmation of Ng’s bankruptcy plan on October 20, 2014.⁴³ The TILA claim is
 11 dismissed, also without leave to amend.

12 **Fourth**, Ng’s FDCPA and RESPA claims fall short too. An FDCPA plaintiff “must allege
 13 facts that establish the following: (1) the plaintiff has been the object of collection activity arising
 14 from a consumer debt; (2) the defendant attempting to collect the debt qualifies as a ‘debt
 15 collector’ under the FDCPA; and (3) the defendant has engaged in a prohibited act or has failed to
 16 perform a requirement imposed by the FDCPA.”⁴⁴ Ng does not allege precisely what conduct by
 17 which Defendant violated FDCPA. Even if she had, her claim could not survive. A mortgage
 18 servicer or the assignee of a debt is not a “debt collector” under the FDCPA.⁴⁵ And in any case,

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 20 ⁴¹ See 15 U.S.C. § 1641(g) (“In addition to other disclosures required by this subchapter, not later
 21 than 30 days after the date on which a mortgage loan is sold or otherwise transferred or assigned to
 22 a third party, the creditor that is the new owner or assignee of the debt shall notify the borrower in
 23 writing of such transfer . . .”).

24 ⁴² See *id.* § 1640(e).

25 ⁴³ See Docket No. 48-3, Exs. 21, 22.

26 ⁴⁴ *Pratap v. Wells Fargo Bank, N.A.*, 63 F. Supp. 3d 1101, 1113 (2014) (quoting *Gomez v. Wells*
 27 *Fargo Home Mortg.*, Case No. 11-cv-01725, 2011 WL 5834949, at *5 (N.D. Cal. Nov. 21, 2011)).

28 ⁴⁵ See *id.* at 1113-14; *Caballero v. Ocwen Loan Servicing*, Case No. 09-cv-01021, 2009 WL
 1528128, at *1 (N.D. Cal. May 29, 2009).

1 the FDCPA does not apply to foreclosure activities.⁴⁶

2 As for RESPA, that statute “provides plaintiffs with a private right of action for . . . ‘the
3 failure by a loan servicer . . . to respond to a qualified written request [(QWR)] for information
4 about a loan.’”⁴⁷ The QWR must identify the borrower and “include[] a statement of the reasons
5 for the belief of the borrower, to the extent applicable, that the account is in error or provide[]
6 sufficient detail to the servicer regarding other information sought by the borrower.”⁴⁸ Within 30
7 days, the servicer must respond and make any appropriate corrections, explain or clarify why it
8 believes that the account is correct, answer (or explain why it cannot answer) the borrower’s
9 questions and provide contact information for someone who can assist the borrower.⁴⁹ The
10 servicer need not respond, however, if it reasonably determines that the request seeks irrelevant
11 information, is overbroad or is unduly burdensome.⁵⁰ Ng alleges that she sent a QWR to an
12 unspecified Defendant on October 23, 2015 and received a “wholly inadequate response” on
13 December 9, 2015.⁵¹

14 Ng has not stated a claim under RESPA. U.S. Bank Trustee is not a loan servicer. As to
15 SPS, Ng’s complaint does not include a copy of the purported QWR or the response, she does not
16 allege what the QWR contained and she fails to explain how the response was inadequate.⁵²

18 ⁴⁶ See *Colbert v. Sage Point Lender Servs., LLC*, Case No. 14-cv-01626, 2015 WL 779006, at *3
19 (E.D. Cal. Feb. 24, 2015) (citations omitted)

20 .
21 ⁴⁷ *Gomez*, 2011 WL 5834949, at *3 (quoting *Choudhuri v. Wells Fargo Bank, N.A.*, Case No. 11-
22 cv-00518, 2011 WL 5079480, at *8 (N.D. Cal. Oct. 25, 2011)) (citing 12 U.S.C. § 2605(f)).

23 ⁴⁸ 12 U.S.C. § 2605(e)(1)(B).

24 ⁴⁹ See *id.* § 2605(e)(2).

25 ⁵⁰ See 12 C.F.R. § 1024.36(f).

26 ⁵¹ Docket No. 45 at ¶¶ 69-71.

27 ⁵² Ng did attach a copy of her QWR to her opposition to the motion to dismiss, see Docket No. 51-
28 4, Ex. 8, but “a complaint may not be amended by briefs in opposition to a motion to dismiss.”

1 Besides, Ng has not alleged any damages arising from any RESPA violation, and statutory
2 damages are available only for a “pattern or practice of noncompliance,”⁵³ which Ng alleges only
3 in conclusory terms.⁵⁴ Ng’s claim under FDCPA and RESPA is dismissed. However, on the
4 present record, the court cannot yet say whether Ng can make out a claim under RESPA. Leave to
5 amend therefore is granted, but only with respect to the RESPA claim.

6 **Fifth**, Ng’s remaining claims are not independent causes of action and must fail as well.
7 Ng’s complaint includes a claim for equitable tolling of the statute of limitations, but equitable
8 tolling is merely a rebuttal to an affirmative defense. Similarly, declaratory and injunctive relief
9 “are types of relief, not claims to relief,” and they cannot be pled as their own causes of action.⁵⁵
10 These claims are dismissed without leave to amend.

11 Meanwhile, to state a claim under the UCL, Ng must allege that a defendant engaged in an
12 “unlawful, unfair or fraudulent business practice.”⁵⁶ The statute effectively borrows violations of
13 other laws and renders them independently actionable.⁵⁷ Because the court has dismissed all the
14 other claims that might have served as predicate violations, the UCL claim cannot survive either.⁵⁸
15 The latter claim is dismissed, but with leave to amend.

17 *Arevalo v. Bank of Am. Corp.*, 850 F. Supp. 2d 1008, 1020 (N.D. Cal. 2011) (quoting *Tietsworth v.*
18 *Sears*, 720 F. Supp. 2d 1123, 1145 (N.D. Cal. 2010)). In any case, the QWR did not elaborate on
19 why Ng believed the account was in error, and it contained 43 requests for information, most of
20 which were unrelated to the servicing of the loan. *See* Docket No. 51-4, Ex. 8.

21 ⁵³ 12 U.S.C. § 2605(f)(1)(B).

22 ⁵⁴ *See* Docket No. 45 at ¶ 71.

23 ⁵⁵ *Sowinski v. Wells Fargo Bank, N.A.*, Case No. 11-cv-06431, 2012 WL 5904711, at *1 (N.D.
24 Cal. Nov. 26, 2012).

25 ⁵⁶ Cal. Bus. & Prof. Code § 17204.

26 ⁵⁷ *See Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999) (quoting
27 *State Farm Fire & Cas. Co. v. Superior Court*, 45 Cal. App. 4th 1093, 1103 (1996)).

28 ⁵⁸ *See Pantoja v. Countrywide Home Loans, Inc.*, 640 F. Supp. 2d 1177, 1190-91 (N.D. Cal.
2009).

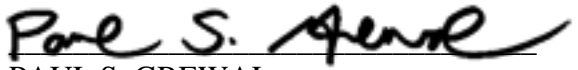
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IV.

Defendants' motion to dismiss is GRANTED. Leave to amend is granted only as to the RESPA portion of her sixth cause of action, as well as her ninth cause of action under Section 17200. Ng may not add any new claims without leave of court. Any amended complaint must be filed within 21 days.

SO ORDERED.

Dated: May 26, 2016


PAUL S. GREWAL
United States Magistrate Judge