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7 UNITED STATES DISTRICT COURT
8 SOUTHERN DISTRICT OF CALIFORNIA
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10 HYUN HWA CHUNG,
11 Plaintiff,
12 v.
13 SETERUS, INC.; QUALITY LOAN
14 SERVICE CORP.,
15 Defendants.

Case No.: 17-cv-0541 BTM(KSC)

**ORDER GRANTING DEFENDANT
SETERUS, INC.'S MOTION TO
DISMISS**

[ECF NO. 2]

16
17 Before the Court is Defendant Seterus, Inc.'s ("Seterus") Motion to Dismiss.
18 (ECF No. 2.) For the reasons discussed below, Seterus's motion will be granted
19 with leave to amend.

20 **I. BACKGROUND**

21 On February 2, 2017, Plaintiff commenced this foreclosure relief action in
22 state court. On March 17, 2017, Seterus removed the action on the basis of federal
23 question jurisdiction.

24 Plaintiff alleges that on March 24, 2008, he obtained a residential loan
25 secured by real property located at 11545 Caminito La Bar Unit 65, San Diego, CA
26 92126. (Compl. ¶¶ 1, 6.) The Complaint identifies Seterus as the alleged lender,
27 and defendant Quality Loan Service Corp. as the alleged trustee. (*Id.* ¶¶ 2, 3.)
28 Defendants thereafter recorded a notice of default indicating Plaintiff was in default

1 on the loan. (Id. ¶ 7.)

2 Plaintiff alleges material defects in the notice of default and underlying loan.
3 He states claims against Defendants for violation of California Civil Code §§ 1572,
4 2923.5 and 2923.6, common law fraud, intentional misrepresentation, California
5 Business & Professions Code § 17200, and the federal Truth in Lending Act
6 (“TILA”), 15 U.S.C. § 1601, and seeks damages, declaratory and injunctive relief.

7 On March 24, 2017, Seterus filed the instant motion to dismiss pursuant to
8 Federal Rule of Civil Procedure 12(b)(6). The motion is unopposed.

9 **II. REQUEST FOR JUDICIAL NOTICE**

10 Seterus has filed a request for judicial notice (“RJN”) of five records filed with
11 the San Diego County Recorder: the Notice of Default (Exhibit 1), Deed of Trust
12 (Exhibit 2), Corporate Assignment of Deed of Trust (Exhibit 3), Assignment of Deed
13 of Trust (Exhibit 4), and Notice of Trustee’s Sale (Exhibit 5). Pursuant to Federal
14 Rule of Evidence 201, a federal court may take judicial notice of documents
15 incorporated by reference in the complaint as well as matters of public record. U.S.
16 ex rel Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th
17 Cir.1992); Gamboa v. Tr. Corps & Cent. Mortg. Loan Servicing Co., No. 09-0007
18 SC, 2009 U.S. Dist. LEXIS 19613, at *7-9 (N.D. Cal. Mar. 12, 2009) (taking judicial
19 notice of deed of trust, notice of default, and notice of trustee’s sale as public
20 records). Judicial notice of official records extends to the “existence of those
21 matters of public record[, the] existence of a motion or of representations having
22 been made therein,” but does not encompass the veracity of disputed facts and
23 opinions contained in such records. United States v. S. Cal. Edison Co., 300 F.
24 Supp. 2d 964, 974 (E.D. Cal. 2004). Accordingly, the Court grants the RJN, but
25 the scope of judicial notice extends only to the existence of Exhibits 1 through 5,
26 and not to the truth of any disputed facts they contain.

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1 **III. STANDARD**

2 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should
3 be granted only where a plaintiff's complaint lacks a "cognizable legal theory" or
4 sufficient facts to support a cognizable legal theory. Balistreri v. Pacifica Police
5 Dept., 901 F.2d 696, 699 (9th Cir. 1988). When reviewing a motion to dismiss, the
6 allegations of material fact in plaintiff's complaint are taken as true and construed
7 in the light most favorable to the plaintiff. See Parks Sch. of Bus., Inc. v.
8 Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). Pursuant to Rule 12(b)(6), the
9 court "may generally consider only allegations contained in the pleadings, exhibits
10 attached to the complaint, and matters properly subject to judicial notice." Outdoor
11 Media Group, Inc. v. City of Beaumont, 506 F.3d 895, 899 (9th Cir. 2007) (citation
12 and quotation marks omitted). Although detailed factual allegations are not
13 required, factual allegations "must be enough to raise a right to relief above the
14 speculative level." Bell Atlantic v. Twombly, 550 U.S. 544, 555 (2007). "A plaintiff's
15 obligation to prove the 'grounds' of his 'entitle[ment] to relief' requires more than
16 labels and conclusions, and a formulaic recitation of the elements of a cause of
17 action will not do." Id. "[W]here the well-pleaded facts do not permit the court to
18 infer more than the mere possibility of misconduct, the complaint has alleged - but
19 it has not 'show[n]'—'that the pleader is entitled to relief.'" Ashcroft v. Iqbal, 556
20 U.S. 662, 679 (2009) (quoting Fed. R. Civ. P. 8(a)(2)). Only a complaint that states
21 a plausible claim for relief will survive a motion to dismiss. Id.

22 A pro se plaintiff's pleadings are liberally construed. Hebbe v. Pliler, 627
23 F.3d 338, 342 (9th Cir. 2010).

24 Under this District's Local Rules, failure to file an opposition "may constitute
25 a consent to the granting of a motion" CivLR 7.1.f.3.c. However, even when a
26 motion is unopposed, the Court reviews it on the merits to determine if there is
27 good cause to grant the motion. Fry v. Wachovia Mortg. FSB, No. 09cv2662
28 L(NLS), 2010 U.S Dist. LEXIS 95634, at *2 (S.D. Cal. Sept. 13, 2010).

1 **IV. DISCUSSION**

2 Seterus seeks dismissal of the Complaint in its entirety for failure to state a
3 claim. As discussed below, the Court concludes the motion should be granted.

4 A. Plaintiff's Causes of Action for Common Law Fraud, Intentional
5 Misrepresentation, and Violation of California Civil Code § 1572

6 Plaintiff's second cause of action for common law fraud, third cause of action
7 for intentional misrepresentation, and fifth cause of action for violation of Civil Code
8 § 1572 (defining "actual fraud"), all sound in fraud. In California, fraud claims have
9 five elements: (1) misrepresentation (false representation, concealment, or
10 nondisclosure); (2) knowledge of falsity; (3) intent to defraud, i.e., to induce
11 reliance; (4) justifiable reliance; and (5) resulting damage. Small v. Fritz Cos., Inc.,
12 30 Cal. 4th 167, 173 (2003); City Solutions Inc. v. Clear Channel Communications,
13 Inc., 365 F.3d 835, 839 (9th Cir. 2004).

14 The heightened pleading standard of Federal Rule of Civil Procedure 9(b)
15 applies to fraud claims. See Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir.
16 2007); Meridian Project Sys., Inc. v. Hardin Constr. Co., 404 F. Supp. 2d 1214,
17 1219 (E.D. Cal. 2005) ("It is well-settled in the Ninth Circuit that misrepresentation
18 claims are a species of fraud, which must meet Rule 9(b)'s particularity
19 requirement."). Under Rule 9(b), fraud allegations must include the "time, place,
20 and specific content of the false representations as well as the identities of the
21 parties to the misrepresentations." Swartz, 476 F.3d at 764.

22 Seterus contends Plaintiff's fraud claims are not pled with sufficient
23 specificity, and the Court agrees. The allegations of Plaintiff's Complaint, which
24 are taken as true for purposes of this motion, identify Seterus as the lender that
25 issued Plaintiff's residential mortgage and refer to Seterus as "LENDER"
26 throughout. Compl. ¶ 2. Plaintiff's fraud claim asserts that the "LENDER"—
27 meaning Seterus—was not the legal owner of the Note and Deed of Trust and
28 therefore lacked standing to foreclose. Id. ¶¶ 27-30. However, Plaintiff also

1 alleges that Seterus (“LENDER”) was the “only party entitled to enforce the Note
2 and any security interest in it.” Id. ¶ 33. Plaintiff’s fraud claim thus simultaneously
3 alleges that Seterus both possessed, and lacked, authority to foreclose. These
4 contradictory positions fail to convey in a sufficiently coherent fashion the actual
5 nature of Seterus’s allegedly false representations.

6 Moreover, even if Plaintiff’s allegations were not contradictory, his fraud
7 claim would still fail. It relies on the theory that there was no assignment of the
8 mortgage note to Defendants, that Defendants therefore lacked standing to initiate
9 the foreclosure process, and the NOD and Notice of Sale fraudulently asserted
10 otherwise. Compl. ¶¶ 25-42. However, courts have consistently held that
11 borrowers lack standing to assert a claim that the wrong entity sought to foreclose
12 on a note without the loan owner’s consent, because they are not the party injured
13 by the error. See, e.g., Neal v. Select Portfolio Servicing, Inc., No. 5:15-cv-03212-
14 EJD, 2016 WL 48124, at *3 (N.D. Cal. Jan. 5, 2016) (citing, inter alia, Flores v.
15 GMAC Mortg., LLC, 2013 WL 2049388, at *3 (N.D. Cal. May 14, 2013) (“[I]t would
16 be the loan’s owner, not plaintiffs, who was harmed by another party foreclosing
17 on its loan without its consent.”)); see In re Cedano, 470 B.R. 522, 530 (9th Cir.
18 B.A.P. 2012) (“Under Cal. Civ. Code § 2924, the party initiating foreclosure
19 proceedings is not required to have a beneficial or economic interest in the note in
20 order to foreclose.”). Plaintiff therefore cannot establish the necessary element
21 that he was injured by the allegedly false assertion that Defendants were not
22 authorized to initiate the foreclosure process.

23 To the extent Plaintiff contends the declaration of due diligence in the NOD
24 was inaccurate, his scienter allegations are conclusory (“Defendants, and each of
25 them, falsely represented that the Notice of Default was validly executed ... [and]
26 knew at the time they made these representations to Plaintiffs [*sic*] that they were
27 untrue....”) and thus lack the particularity required by Rule 9(b). See id. ¶¶ 36, 41.

28 Plaintiff’s third cause of action for intentional misrepresentation and fifth

1 cause of action for violation § 1572 are also deficient. The third cause of action
2 alleges the trustee executed a false Notice of Default, and that Seterus knew the
3 trustee lacked authority to commence the foreclosure process. However, Plaintiff
4 does not identify any representations by Seterus on which he allegedly relied. See
5 id. ¶¶ 43-44. Plaintiff's fifth cause of action relies on generalized (and therefore
6 insufficient under Rule 9(b)) allegations that Defendants made misrepresentations
7 "with the intent to induce Plaintiff to obligate himself in reliance" and that "as a
8 proximate result of Defendants, [*sic*] Plaintiff has suffered damage...." Id. ¶¶ 57,
9 60.

10 Accordingly, the Court will dismiss Plaintiff's second, third, and fifth causes
11 of action for failure to state a claim.

12 B. Plaintiff's Cause of Action for Violation of California Civil Code § 2923.6

13 Plaintiff's fourth cause of action is for alleged violations of California Civil
14 Code § 2923.6. Although unclear, it appears Plaintiff's claim is based on an
15 asserted right to enforce his "willingness to execute a modification of their loan,"
16 an option that "was not explored with Plaintiffs [*sic*]." Compl. ¶ 51.

17 However, § 2923.6 does not support such a claim. Section 2923.6 provides,
18 in pertinent part, that "[i]f a borrower submits a complete application for a first lien
19 loan modification offered by, or through, the borrower's mortgage servicer, a
20 mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not
21 record a notice of default or notice of sale, or conduct a trustee's sale, while the
22 complete first lien loan modification application is pending." Cal. Civ. Code §
23 2923.6(c). Here, Plaintiff has not alleged he submitted an application for a loan
24 modification, so he has not established that he is entitled to invoke the statutory
25 protections of § 2923.6(c). See Penermon v. Wells Fargo Bank, N.A., 47 F. Supp.
26 3d 982, 998-99 (N.D. Cal. 2014) (dismissing claim under § 2923.6 where plaintiff
27 failed to allege she submitted a complete loan modification application).
28 Accordingly, this claim will be dismissed for failure to state a claim.

1 C. Plaintiff's Cause of Action for Violation of California Civil Code § 2923.5

2 California Civil Code § 2923.5 provides that a mortgage servicer, mortgagee,
3 trustee, beneficiary, or authorized agent may not record a notice of default until,
4 among other things, 30 days have passed since the mortgage servicer made initial
5 contact with the borrower or satisfied the due diligence requirements set forth in
6 the statutes. Cal. Civ. Code § 2923.5(a)(1)(A). During initial contact, the mortgage
7 servicer must advise the borrower that he or she has the right to request a
8 subsequent meeting (to occur within 14 days of the request), may assess the
9 borrower's financial situation and discuss options (or may wait to do this until any
10 subsequent meeting), and must provide the toll-free telephone number to find a
11 HUD-certified housing counseling agency. Cal. Civ. Code § 2923.5(a)(2). But
12 actual contact with the borrower is excused if the mortgage servicer acted with
13 "due diligence," as defined by the statutes. Cal. Civ. Code § 2923.5(e).¹ Section
14 2923.5 additionally requires that the NOD include a declaration attesting that the
15 contact or due diligence requirements were met. Cal. Civ. Code § 2923.5(b).

16 Plaintiff alleges Seterus violated § 2923.5 by failing to contact him, or use
17 due diligence to contact him, at least 30 days before the NOD was filed. Compl.
18 ¶¶ 14, 15. However, with regard to Defendants' purported failure to use due
19 diligence, Plaintiff simply copies the due diligence statute into the Complaint and
20 then alleges "The mortgagee, beneficiary, or authorized agent never complied with
21 the provisions" of the statute. Compl. ¶ 15. Such allegations are too conclusory
22 to satisfy Twombly/Iqbal pleading standards. Twombly, 550 U.S. at 555 ("A
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25 ¹ Among other things, due diligence requires the mortgage servicer to: (1) provide certain information on the
26 homepage of its website, if any; (2) provide a means for the borrower to contact it in a timely manner, including a
27 toll-free telephone number; (3) send a first-class letter that includes the toll-free telephone number made available
28 by HUD to find a HUD-certified housing counseling agency; (4) attempt to contact the borrower by telephone at
least three times at different hours and on different days (after the letter has been sent); and (5) send a certified
letter that includes the toll-free telephone number to find a HUD-certified housing counseling agency if the borrower
does not respond within two weeks after the telephone call requirements have been satisfied. Cal. Civ. Code §
2923.5(e).

1 plaintiff's obligation to prove the 'grounds' of his 'entitle[ment] to relief' requires
2 more than labels and conclusions, and a formulaic recitation of the elements of a
3 cause of action will not do."'). Since § 2923.5(a)(1)(A) is violated only where the
4 mortgage servicer fails to comply with both the contact and the due diligence
5 requirements, Plaintiff's failure to sufficiently plead a due diligence violation
6 necessitates dismissal of this aspect of his claim.²

7 Plaintiff also alleges the NOD is void because the due diligence declaration
8 was not signed under penalty of perjury and failed to indicate the declarant had
9 personal knowledge of its contents. Compl. ¶¶ 18-24. However, there is no
10 requirement that the due diligence declaration be made under penalty of perjury,
11 and its contents may simply "track the statute," which contains no personal
12 knowledge provision. In re Cedano, 470 B.R. at 532 (citing Mabry v. Superior
13 Court, 185 Cal. App. 4th 208, 233 (2010)). Accordingly, Plaintiff's allegations
14 regarding purported flaws in the due diligence declaration fail to state a claim for
15 violation of § 2923.5(b).

16 Finally, Plaintiff's claim includes a contention that Defendants violated Cal.
17 Civ. Code § 2924 by failing to comply with its deadlines for mailing the NOD and
18 publishing the Notice of Sale. Compl. ¶ 16. However, his allegations in this regard
19 are made "on information and belief" and consist only of legal conclusions, see id.,
20 and thus fail Twombly/ Iqbal muster. Therefore, this aspect of the first claim will
21 also be dismissed.

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24 ² Seterus submits a declaration with two letters attached, which it contends it sent to Plaintiff prior to recording
25 the NOD, and which it contends show that contrary to Plaintiff's allegations, it complied with the due diligence
26 requirements of § 2923.5(e). When ruling on a Rule 12(b)(6) motion to dismiss, if a district court considers
27 evidence outside the pleadings, it must normally convert the 12(b)(6) motion into a Rule 56 motion for summary
28 judgment, and it must give the nonmoving party an opportunity to respond. See Fed. R. Civ. P. 12(b); Parrino v.
FHP, Inc., 146 F.3d 699, 706 n.4 (9th Cir. 1998). Seterus contends the letters are judicially noticeable pursuant to
the doctrine of incorporation by reference. However, contrary to Seterus's argument, Plaintiff's complaint alleges
Plaintiff was never contacted, and that there was a failure of due diligence. Thus, the complaint does not refer to
or otherwise incorporate Seterus's letters, and they are not subject to judicial notice. However, the Court need
not, and does not, consider converting the motion into one for summary judgment, since the Court finds Plaintiff's
allegations insufficient to show a violation of § 2923.5 even without considering Seterus's evidence.

1 In sum, Plaintiff's first cause of action will be dismissed, because none of its
2 supporting allegations are sufficient to state a claim on which relief can be granted.

3 D. Plaintiff's Cause of Action for Violation of the Federal Truth in Lending Act

4 Plaintiff's seventh cause of action for violation of the TILA, 15 U.S.C. § 1601
5 et seq., is based on the allegation that Defendants failed to disclose certain finance
6 charges in his mortgage, which was issued on March 24, 2008. Compl. ¶¶ 6, 66-
7 71. Seterus contends that this claim, as currently pled, violates the one-year
8 statute of limitations applicable to TILA claims, and the Court agrees.

9 A claim barred by the statute of limitations may be dismissed under Rule
10 12(b)(6) where running of the statute apparent on the face of the complaint. Huynh
11 v. Chase Manhattan Bank, 465 F.3d 992, 997 (9th Cir. 2006). "[T]he limitations
12 period in Section 1640(e) runs from the date of consummation of the transaction
13 but ... the doctrine of equitable tolling may, in the appropriate circumstances,
14 suspend the limitations period until the borrower discovers or had reasonable
15 opportunity to discover the fraud or nondisclosures that form the basis of the TILA
16 action." King v. State of Cal., 784 F.2d 910, 915 (9th Cir. 1986). Based on the
17 allegations of the Complaint, the statute of limitations on his TILA claim ran on
18 March 24, 2009. Plaintiff has not alleged facts showing delayed discovery or
19 otherwise supporting equitable tolling. His cause of action pursuant to the TILA
20 will therefore be dismissed.

21 E. Plaintiff's Cause of Action for Violation of Cal. Bus. & Prof. Code § 17200

22 Plaintiff's claim for violation of Cal. Bus. & Prof. Code § 17200 is premised
23 on his theories regarding Defendants' violation of Cal. Civ. Code § 2923.5, 2924,
24 fraud, and violation of the TILA, which fail for the reasons discussed above.
25 Accordingly, this claim is also dismissed for failure to state a claim.

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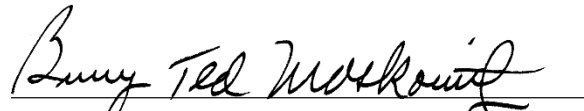
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1 **IV. CONCLUSION AND ORDER**

2 For the reasons discussed above, Seterus's motion to dismiss is GRANTED.
3 Plaintiff's Complaint is dismissed in its entirety for failure to state a claim.³ The
4 Court grants Plaintiff leave to file an amended complaint. Any amended complaint
5 must be filed no later than September 15, 2017. Failure to file an amended
6 complaint by the foregoing deadline will result in the closing of this case.

7 IT IS SO ORDERED.

8 Dated: August 18, 2017

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10 Barry Ted Moskowitz, Chief Judge
11 United States District Court
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27 _____
28 ³ It is unclear whether defendant Quality Loan Service Corp. has been served with the complaint, because no proof of service has been filed and it has not made an appearance or filed a response to the Complaint. However, the reasons for dismissing the Complaint against Seterus apply equally to Quality Loan Service Corp.