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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MEHERET G. BERHE,)
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 Plaintiff,)
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 vs.)
)
 FEDERAL NATIONAL MORTGAGE)
 ASSOCIATION et al.,)
)
 Defendants.)
 _____)

2:13-cv-00552-RCJ-PAL

ORDER

This is a residential foreclosure avoidance case involving one property. Defendants have moved to dismiss. For the reasons given herein, the Court grants the motion in part, with leave to amend in part.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff Meheret G. Berhe gave lender Northern Pacific Mortgage Co. a \$274,000 promissory note to purchase or refinance real property at 9107 Black Maple Ave., Las Vegas, NV 89148 (the "Property"), secured by a deed of trust (the "DOT") against the Property. (See DOT 1-3, Aug. 25, 2005, ECF No. 5-1). Fidelity National Title was the trustee on the DOT, and Mortgage Electronic Registration Systems, Inc. ("MERS") was the lender's "nominee" and the beneficiary of the DOT. (See *id.* 2). MERS later assigned both the note and DOT to Bank of America, N.A., (see Assignment, Sept. 24, 2011, ECF No. 5-2), which it was empowered to do in

1 its dual capacity as the lender’s nominee and beneficiary of the DOT, and which assignment
2 cured any split between the note and security that existed under the terms of the DOT itself, *see*
3 *Edelstein v. Bank of N.Y. Mellon*, 286 P.3d 249, 258–60 (Nev. 2012). Bank of America then
4 assigned both the note and DOT—only the assignment of one instrument was necessary at this
5 point, because Bank of America owned both instruments such that one instrument would follow
6 the other as a matter of law, *see id.* at 257–58 (citing Restatement (Third) of Property: Mortgages
7 § 5.4(a)–(b))—to Defendant Federal National Mortgage Association (“Fannie Mae”).
8 (*See* Assignment, Sept. 11, 2012, ECF No. 5-3). Seterus, Inc. then purported, as attorney-in-fact
9 for Fannie Mae, to substitute Defendant Quality Loan Service Corp. (“QLS”) as trustee on the
10 DOT. (*See* Substitution, Oct. 25, 2012, ECF No. 5-4). QLS then filed a Notice of Default (the
11 “NOD”), along with the required Affidavit of Compliance (the “AC”), which appears to be
12 complete. (*See* NOD and AC, Dec. 3, 2012, ECF No. 5-5). The Director of the Nevada
13 Foreclosure Mediation Program (“FMP”) issued an FMP Certificate indicating the Property was
14 not eligible for mediation, which indicates Plaintiff was either not an owner-occupier, had
15 surrendered the Property, or was in bankruptcy. (*See* FMP Certificate, Feb. 11, 2013, ECF No. 5-
16 6). QLS scheduled a trustee’s sale for April 2, 2013. (*See* Notice of Sale, Mar. 7, 2013, ECF No.
17 5-7).

18 Plaintiff sued Fannie Mae and QLS in this Court on four causes of action that the Court
19 will characterize as follows: (1) quiet title based upon statutorily defective foreclosure under
20 section 107.080; (2) declaratory relief as to alleged securities violations; (3) a qui tam action
21 based upon anti-trust violations by MERS; (3) mortgage fraud under section 207.470.

22 Defendants have moved to dismiss.

23 **II. LEGAL STANDARDS**

24 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the
25 claim showing that the pleader is entitled to relief” in order to “give the defendant fair notice of

1 what the . . . claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47
2 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action
3 that fails to state a claim upon which relief can be granted. A motion to dismiss under Rule
4 12(b)(6) tests the complaint’s sufficiency. *See N. Star Int’l v. Ariz. Corp. Comm’n*, 720
5 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6) for
6 failure to state a claim, dismissal is appropriate only when the complaint does not give the
7 defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell*
8 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is
9 sufficient to state a claim, the court will take all material allegations as true and construe them in
10 the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th
11 Cir. 1986). The court, however, is not required to accept as true allegations that are merely
12 conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden*
13 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action
14 with conclusory allegations is not sufficient; a plaintiff must plead facts pertaining to his own
15 case making a violation plausible, not just possible. *Ashcroft v. Iqbal*, 556 U.S. 662, 677–79
16 (2009) (citing *Twombly*, 550 U.S. at 556) (“A claim has facial plausibility when the plaintiff
17 pleads factual content that allows the court to draw the reasonable inference that the defendant is
18 liable for the misconduct alleged.”). In other words, under the modern interpretation of Rule
19 8(a), a plaintiff must not only specify a cognizable legal theory (*Conley* review), but also must
20 plead the facts of his own case so that the court can determine whether the plaintiff has any
21 plausible basis for relief under the legal theory he has specified, assuming the facts are as he
22 alleges (*Twombly-Iqbal* review).

23 “Generally, a district court may not consider any material beyond the pleadings in ruling
24 on a Rule 12(b)(6) motion. However, material which is properly submitted as part of the
25 complaint may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard Feiner*

1 & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citation omitted). Similarly, “documents
2 whose contents are alleged in a complaint and whose authenticity no party questions, but which
3 are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6)
4 motion to dismiss” without converting the motion to dismiss into a motion for summary
5 judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Moreover, under Federal Rule
6 of Evidence 201, a court may take judicial notice of “matters of public record.” *Mack v. S. Bay*
7 *Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court
8 considers materials outside of the pleadings, the motion to dismiss is converted into a motion for
9 summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir.
10 2001).

11 **III. ANALYSIS**

12 The Court grants the motion as to all claims except the first claim for quiet title based
13 upon statutorily defective foreclosure. There is no wrongful foreclosure claim, because there
14 appears to be no dispute that Plaintiff is in default. As to the statutory requirements, the
15 foreclosure appears to have been proper, except for a single defect: the Substitution of QLS as
16 trustee was executed by an entity (non-party Seterus, Inc.) purporting to be an agent of the
17 beneficiary (Fannie Mae), but there is no evidence that it was in fact an agent of Fannie Mae
18 apart from Seterus’s own claim of agency on the Substitution. Where this is the case, the Court
19 has required defendants to provide evidence of the agency at the summary judgment stage.

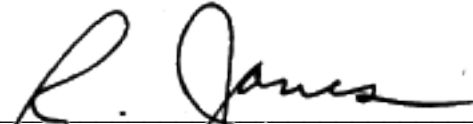
20 The second and third claims for declaratory relief concerning securities violations and
21 anti-trust violations are mostly unintelligible. To the extent they are intelligible, they consist of
22 generalized grievances against the mortgage industry. Plaintiff may attempt to amend these
23 claims to intelligibly plead a viable cause of action. As to the fourth claim, Plaintiff may not
24 privately prosecute the criminal mortgage fraud statutes. The fourth claim is dismissed without
25 leave to amend.

1
2 **CONCLUSION**

3 IT IS HEREBY ORDERED that the Motion to Dismiss (ECF No. 5) is GRANTED IN
4 PART and DENIED IN PART, with leave to amend in part.

5 IT IS SO ORDERED.

6 Dated this 9th day of July, 2013.

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10 ROBERT C. JONES
11 United States District Judge
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