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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PHIMPHA THEPVONGSA,
Plaintiff,

v.

REGIONAL TRUSTEE SERVICES
CORPORATION, et al.,
Defendants.

No. C10-1045 RSL

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS

I. INTRODUCTION

This matter comes before the Court on Motions to Dismiss filed jointly by defendants Ocwen Loan Servicing, LLC (“Ocwen”), Deutsche Bank National Trust Company, as trustee, (“Deutsche”) and Mortgage Electronic Registration Systems, Inc. (“MERS”) (dkt. # 15), which was joined by defendant Regional Trustee Services Corporation (“RTS”) (dkt. #16), and by defendant Saxon Mortgage Services, Inc. (“Saxon”) (dkt. #24). In his amended complaint, pro se plaintiff alleges claims of intentional infliction of emotional distress, slander of title, breach of fiduciary or quasi-fiduciary duty, violation of the Consumer Protection Act (“CPA”), violation of the Fair Debt Collection Practices Act (“FDCP”), violation of the Fair Credit Reporting Act (“FCRA”), and violations of the Real Estate Settlement Procedures Act (“RESPA”). Dkt. #7. Plaintiff has raised several claims for the first time in his oppositions for violation of the Deed of Trust Act (“DTA”), violation of the Truth in Lending Act (“TILA”),

ORDER GRANTING IN PART AND DENYING
IN PART MOTION TO DISMISS - 1

1 fraud and conspiracy that the Court will address as if plead in his amended complaint. Having
2 reviewed the memoranda, exhibits, and the record herein, the Court GRANTS in part and
3 DENIES in part defendants’ motion to dismiss for the reasons set forth below.

4 **II. BACKGROUND**

5 On January 19, 2007, plaintiff applied for and obtained a home loan from defendant
6 New Century Mortgage Corporation (“New Century”).¹ Dkt. #7, Am. Compl. at 4 ¶2. In
7 connection with the loan, plaintiff executed a deed of trust for defendant New Century, which
8 was recorded on January 24, 2007. Id. A deed of trust is, in essence, a three-party mortgage
9 through which the borrower gives a third party a lien on the real property to hold in trust as
10 security until the obligation to the lender is discharged. Wn. House of Rep. Bill Report, 2008
11 Reg. Sess. S.B. 5378 (March 6, 2008). The third party is called the trustee, and the lender is
12 generally identified as the beneficiary of the trust. Through this arrangement, title to the real
13 property passes to the borrower, but the lender is protected under the trust agreement. If the
14 borrower defaults on his loan, the beneficiary need not file a civil suit to foreclose on the
15 mortgage. Pursuant to the DTA, the beneficiary may direct the trustee to initiate non-judicial
16 foreclosure proceedings. The beneficiary may also replace the trustee with a successor trustee
17 to handle the foreclosure. RCW 61.24.010(2). As long as the trustee complies with the DTA’s
18 requirements, the lender can foreclose on the property inexpensively and efficiently. If the
19 borrower objects, the burden is on him to seek judicial protection from wrongful foreclosure.

20 Plaintiff attached a copy of the deed of trust to his original complaint. Dkt. # 3, Ex. 1.
21 However, the deed of trust attached to plaintiff’s complaint purports to be the second mortgage
22 and secures plaintiff’s loan in the amount of \$65,000.00 (“Deed 2”). Id. Defendant Saxon
23 attached a copy of a deed of trust securing \$260,000.00 (“Deed 1”) to the declaration of Mary
24 Gutierrez, an employee of Saxon. Dkt. #25-2, Ex. B. Both Deed 1 and Deed 2 identify four
25 parties: the borrower (plaintiff), the lender (New Century), the trustee (Old Republic Title), and
26 the lender’s nominee to act as the beneficiary (MERS). The Court has not been provided with
a copy of any promissory notes, or any purported transfers of the notes.

¹Defendants New Century, Old Republic Title LTD, and Morgan Stanley ABS Capital Inc.
have not appeared in this action.

1 After obtaining the loan in 2007, plaintiff made monthly payments toward the loan to
2 defendant New Century. Dkt. # 7, Am. Compl. at 4 ¶3. Plaintiff alleges that at some point,
3 “the mortgage had been apparently sold to Saxon Mortgage Services which also held itself out
4 as the owner and/or servicer.” Id. Plaintiff claims that he did not receive notice of any
5 “sale/transfer of any kind in regards to the purported change in Ownership and/or servicing of
6 the mortgage loan including the alleged transfer to Ocwen.” Id.

7 On or about June 2008, plaintiff stopped receiving monthly statements from defendant
8 New Century. Id. at 5 ¶4. Around November 4, 2008, MERS purported to transfer its
9 beneficial interest in the deed of trust to defendant Deutsche, and Deutsche, as the purported
10 beneficiary, appointed RTS as the successor trustee. Id. ¶5. Plaintiff attached the Assignment
11 of the Deed of Trust (“Assignment”)² and Appointment of Successor Trustee (“Appointment”)³
12 to his original complaint. Dkt. #3, Exs. 4 & 5. It is unclear to the Court whether the
13 Assignment and Appointment applies to Deed 1, Deed 2, or both. Although plaintiff alleges
14 that no assignment of the deed of trust was filed in King County records (dkt. #7, Am. Compl.
15 at 4 ¶3), the Assignment and Appointment show a recording date of November 7, 2008 in King
16 County (dkt. #3, Exs. 4 & 5).⁴

17 RTS filed a Notice of Trustee Sale on December 5, 2008, which “stated several charges
18 including ‘Beneficial Advances’ in the amount of \$346.17.” Dkt. #7, Am. Compl. at 5 ¶6.
19 Plaintiff alleges that he was not advised how the term Beneficial Advances was defined. The
20 sale was discontinued without explanation or notice to plaintiff. Id. On December 31, 2009,
21 RTS filed another Notice of Trustee Sale, and stated several charges, including “‘Beneficial
22 Advances’ in the amount of \$4,749.77.” Id. ¶7. Plaintiff was not advised how the term was
23 defined, and the sale was discontinued without explanation or notice to plaintiff. Id.

24 ²The Assignment identifies defendant Deutsche as Trustee for Morgan Stanley ABS, and
25 purports to transfer MERS’s beneficial interest to Deutsche.

26 ³The Appointment identifies defendant Deutsche as Trustee for Morgan Stanley and as the
present beneficiary, and appoints RTS as successor trustee to have all the powers of the original
trustee.

⁴For purposes of this Order, the Court will assume that any reference by plaintiff to the deed of
trust means Deed 2, which was attached to plaintiff’s original complaint.

1 On March 23, 2010, plaintiff served on defendants Ocwen, RTS, New Century, Old
2 Republic, and MERS “a Dispute of Debt as defined in Fair Credit Reporting Act 15 USC §
3 1681 et seq., a Demand of Validation under Fair Debt Collection Practices Act 15 USC §1601,
4 and a Qualified Written Request - Real Estate Settlement Procedures Act (RESPA) 12 U.S.C. §
5 2605(e) . . . to determine what, if any, interest Defendant Ocwen claimed in plaintiff’s home
6 loan.” Id. ¶8. Plaintiff alleges that there is “no documentation of record” that defendant Saxon
7 acquired any beneficial interest in plaintiff’s home loan filed with the King County Auditor’s
8 office, or of the transfer from Saxon to Ocwen. Id. ¶9. Plaintiff alleges that he did not receive
9 notice of these transfers either. Id. Plaintiff alleges that Ocwen sent plaintiff a response stating
10 that it acquired his home loan from Saxon on November 19, 2009, and included documentation
11 that he claims he did not initial, “leading to further suspicion that these documents may have
12 been altered without Plaintiff’s knowledge after his submission to Defendant New Century.”
13 Id. Plaintiff further alleges that defendant Ocwen refused to answer specific questions relating
14 to the accounting and servicing of his loan, and failed to provide any documentation relating to
15 how Ocwen obtained plaintiff’s loan documents. Id. Plaintiff also alleges that he “did not
16 receive formal written notice of the purported change in ownership and/or servicing of the
17 mortgage loan from any of the defendants” and, instead, RTS began foreclosure proceedings
18 “without properly verifying that it was being instructed to do so by a party with the appropriate
19 authority to do so.” Id. at 7 ¶12.

17 Plaintiff filed his complaint on June 24, 2010, and RTS continued the pending trustee
18 sale to June 25, 2010. Id. ¶10; dkt. #3. The sale was again continued to July 23, 2010, and
19 plaintiff moved for a temporary restraining order and preliminary injunction to stop the sale.
20 The Court denied plaintiff’s motion because he filed it the same day as the scheduled sale, and
21 it was logistically impossible to restrain the sale. See dkt. #10.⁵

24 ⁵It is unclear to the Court whether the sale has been continued again, or whether the
25 trustee sale occurred on July 23, 2010 as scheduled. Accordingly, the Court will not grant
26 defendants’ request to dismiss plaintiff’s request for injunctive relief at this time.

1 **III. ANALYSIS**

2 **A. Legal Standard**

3 Pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court construes the complaint
4 in the light most favorable to the non-moving party. Livid Holdings Ltd. v. Salomon Smith
5 Barney, Inc., 416 F.3d 940, 946 (9th Cir. 2005). The Court must accept all well-pleaded
6 allegations of material fact as true and draw all reasonable inferences in favor of the plaintiff.
7 Wyler Summit P’ship v. Turner Broad. Sys., 135 F.3d 658, 661 (9th Cir. 1998). “To survive a
8 motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state
9 a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, __ U.S. __, 129 S. Ct. 1937,
10 1949 (2009). “A claim has facial plausibility when the plaintiff pleads factual content that
11 allows the court to draw the reasonable inference that the defendant is liable for the misconduct
12 alleged.” Id. Dismissal can be based on the lack of a cognizable legal theory or the absence of
13 sufficient facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dep’t, 901
14 F.2d 696, 699 (9th Cir. 1990). Dismissal is inappropriate unless it appears beyond a doubt that
15 plaintiff can prove no set of facts in support of the claim entitling him to relief. Livid
16 Holdings, 416 F.3d at 946. This Court holds the pleadings of pro se complainants to less
17 stringent standards than those of licensed attorneys. Haines v. Kerner, 404 U.S. 519, 520
18 (1972). Nevertheless, every complainant must demonstrate some claim upon which relief can
19 be granted. Fed. R. Civ. P. 12(b)(6).

20 The Court generally may not consider material beyond the pleadings in ruling on a
21 motion to dismiss. Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001). However,
22 the Court may consider material properly submitted as part of the complaint, may consider
23 documents whose contents are alleged in the complaint and whose authenticity is not
24 questioned, and may take judicial notice of matters of public record without converting the
25 motion to dismiss to a motion for summary judgment. Id. In deciding this 12(b)(6) motion, the
26 Court has considered Deed 1, Deed 2, the Assignment, and the Appointment.

23 **B. Intentional Infliction of Emotional Distress**

24 Defendants move to dismiss plaintiff’s claim for intentional infliction of emotional
25 distress because plaintiff failed to plead the elements of the claim.

1 The tort of intentional infliction of emotional distress, also called outrage, requires proof
2 of (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional
3 distress, and (3) actual result to plaintiff of severe emotional distress. Kloepfel v. Bokor, 149
4 Wn. 2d 192, 195 (2003). The first element requires proof that the conduct was “so outrageous
5 in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to
6 be regarded as atrocious, and utterly intolerable in a civilized community.” Robel v. Roundup
7 Corp., 148 Wn. 2d 35, 51 (2002). The Court makes the initial determination of whether
8 “reasonable minds could differ on whether the conduct was sufficiently extreme to result in
9 liability.” Dombrosky v. Farmers Ins. Co. of Wn., 84 Wn. App. 245, 261 (1996).

10 The conduct plaintiff complains of predominately relates to the foreclosure process.
11 Plaintiff argues in his opposition to defendant Saxon’s motion to dismiss that an “***unlawful and***
12 ***wrongful*** foreclosure which is brought about by false and fraudulent documentation causing
13 significant hardship and damages to Plaintiff mental state [sic], credit and financial standing,
14 and public reputation is extreme and outrageous conduct which has caused severe emotional
15 distress upon Plaintiff.” Dkt. #29 [Opp’n to Saxon] at 7-8 (emphasis in original). However,
16 plaintiff has not plead any facts from which the Court could reasonably infer that any of the
17 defendants committed any “extreme and outrageous” conduct in their dealings with plaintiff, or
18 that the emotional distress complained of was inflicted intentionally or recklessly. See e.g.,
19 Bain v. Metro. Mortgage Group Inc., 2010 U.S. Dist. LEXIS 22690, *11 (W.D. Wn. 2010) (no
20 outrageous conduct in foreclosure process).

21 Accordingly, the Court dismisses plaintiff’s claim for intentional infliction of emotional
22 distress with prejudice.

23 **C. Slander of Title**

24 In plaintiff’s slander of title claim, he alleges that defendants recorded false documents,
25 including Deed 2 which contained “false statements with regards to MERS’[s] beneficial
26 interest,” and other “false assignments” of the Note and substitute trustee. Dkt. #7, Am.
Compl. at 8-9; dkt. #17 [Opp’n] at 11; dkt. #29 [Opp’n to Saxon] at 8.

1 Here, both Deed 1 and Deed 2 identify the beneficiary as MERS “solely as nominee for
2 Lender.” Dkt. #3, Ex. 1, Dkt. #25-2, Ex. B at 2. Deed 1 provides: “MERS is a separate
3 corporation that is acting solely as a nominee for Lender and Lender’s successors and assigns.
4 MERS is the beneficiary under this Security Instrument.” Dkt. #25-2, Ex. B at 2. Deed 1 and
5 Deed 2 also provide:

6 Borrower understands and agrees that MERS holds only legal title
7 to the interests granted by Borrower in this Deed of Trust, but, if
8 necessary to comply with law or custom, MERS, (as nominee for
9 Lender and Lender’s successors and assigns), has the right: to
10 exercise any or all of those interests, including, but not limited to,
11 the right to foreclose and sell the Property; and to take any action
12 required of Lender including, but not limited to, releasing and
13 cancelling this Deed of Trust.

14 Dkt. #3, Ex. 1; Dkt. #25-2, Ex. B at 3 (using “Security Instrument” instead of “Deed of Trust”).

15 To establish slander of title, plaintiff must allege (1) false words, (2) that were
16 maliciously published, (3) with reference to some pending sale or purchase of property, (4)
17 which defeat’s plaintiff’s title, and (5) result in plaintiff’s pecuniary loss. Brown v. Safeway
18 Stores, Inc., 94 Wn. 2d 359, 375 (1980). Malice is not present when the allegedly slanderous
19 statements were made in good faith and were prompted by a reasonable belief in their veracity.
20 Id.

21 The Court finds that plaintiff has not plead sufficient facts to survive dismissal. With
22 respect to false statements, the only allegedly false statement identified by plaintiff is MERS’s
23 role as beneficiary in Deed 2. Plaintiff’s allegations that MERS, acting as nominee for the
24 lender, is not the beneficiary is a conclusion, not a factual allegation. Dkt. #7, Am. Compl. at
25 4; Bell v. Twombly, 550 U.S. 544, 555 (2007) (labels, conclusions and formal recitation of
26 causes of action insufficient). Plaintiff also fails to allege any facts supporting the purported
malicious conduct. See Krienke v. Chase Home Fin., LLC, 2007 Wn. App. LEXIS 2668, *13
(2007) (“the initiation of foreclosure proceedings cannot be deemed malicious in the context of
a bona fide dispute over mortgage payments.”).

Accordingly, the Court dismisses plaintiff’s claim for slander of title with prejudice.

1 **D. Breach of Fiduciary or Quasi-Fiduciary Duty**

2 In order to prevail on his breach of fiduciary duty claim, plaintiff must establish (1) the
3 existence of a duty owed, (2) a breach of that duty, (3) a resulting injury, and (4) that the
4 claimed breach was the proximate cause of the injury. Miller v. U.S. Bank, 72 Wn. App. 416,
5 426 (1994). Whether a legal duty exists is a question of law. Hansen v. Friend, 118 Wn. 2d
6 476, 479 (1992). In Washington, a lender is not a fiduciary of its borrower unless a special
7 relationship exists to impose a fiduciary duty. Miller, 72 Wn. App. at 426-27.

8 Plaintiff argues that defendants owed him a fiduciary or quasi-fiduciary duty based on
9 Cox v. Helenius, 103 Wn. 2d 383 (1985), the Mortgage Broker Practices Act (RCW 19.146),
10 and RCW 19.144.080, which prohibits any person in connection with making, brokering,
11 obtaining, or modifying a residential mortgage loan to knowingly make misstatements,
12 misrepresentations, or omissions during the mortgage lending process knowing that it may be
13 relied on by a mortgage lender, borrower, or other party to the process. Dkt. #17 [Opp'n] at 4-
14 5; Dkt. #29 [Opp'n to Saxon] at 7. The Court disagrees.

15 Pursuant to the DTA, the “trustee or successor trustee shall have no fiduciary duty or
16 fiduciary obligation to the grantor or other persons having an interest in the property subject to
17 the deed of trust.” RCW 61.24.010(3). This subsection became effective on June 12, 2008,
18 and was intended to address ambiguities regarding the duties of trustee after the Washington
19 Supreme Court imposed dual (and in many ways competing) obligations in Cox. See Wn.
20 Senate Bill Report, 2008 Reg. Sess. S.B. 5378 (Feb. 9, 2008); Wn. House Rep. Bill Report,
21 2008 Reg. Sess. S.B. 5378 (March 6, 2008). Accordingly, when defendant MERS executed an
22 assignment of plaintiff’s deed of trust to defendant Deutsche as trustee on November 5, 2008,
23 Deutsche owed no fiduciary duty to plaintiff. Likewise, RTS, who was later appointed as
24 successor trustee, owed no fiduciary duty to plaintiff.

25 The Court also finds that plaintiff has not plead sufficient facts to demonstrate the
26 existence of a fiduciary or quasi-fiduciary duty pursuant to RCW 19.146.010(14) or RCW

1 19.144.080.⁶ Plaintiff has not alleged any facts demonstrating that any of the moving parties
2 fall within the meaning of “mortgage brokers” by alleging that they assisted him in obtaining or
3 applying to obtain a residential mortgage loan or held themselves out as being able to assist
4 him in obtaining or applying for a residential mortgage loan. RCW 19.146.010(14). Plaintiff
5 alleges that he applied for and obtained a home loan from defendant New Century. Am.
6 Compl. at 4 ¶2. According to plaintiff’s amended complaint, the only possible entity who
7 could qualify as a “mortgage broker” is New Century, who has not yet appeared in this action.

8 Accordingly, the Court dismisses plaintiff’s breach of fiduciary duty claim with
9 prejudice as to all defendants.

10 **E. Violation of the DTA**

11 The DTA required the trustee and successor trustee to “act impartially between the
12 borrower, grantor, and beneficiary.” RCW 61.24.010(4) (effective June 12, 2008, amended
13 July 26, 2009 to provide that the trustee “has a duty of good faith to the borrower, beneficiary,
14 and grantor”). Pursuant to the DTA, the trustee must have proof that the beneficiary is the
15 owner of the note or obligation secured by the deed of trust prior to the trustee sale. RCW
16 61.24.030(7)(a). Plaintiff has alleged that RTS “began foreclosure proceeding without properly
17 verifying that it was being instructed to do so by a party with the appropriate authority to do
18 so.” Am. Compl. at 7 ¶12. Defendants fail to address this allegation. In the absence of a
19 complete record of all relevant documents, including the promissory notes, and all purported
20 transfers of the notes, Deed 1 and Deed 2, the Court cannot determine who held the promissory
21 note and under what authority the default and sale was to occur. Additionally, pursuant to the
22 DTA, the beneficiary or trustee was required to provide plaintiff written notice of default thirty
23 days prior to the recording of the notice of sale, including the name and address of the owner of
24 any promissory notes or other obligations secured by the deed of trust and the contact
25 information of any entity acting as servicer of the obligations secured by the deed of trust.

25 ⁶There is no private right of action under RCW 19.144.080. RCW 19.144.120 (only director
26 may “enforce, investigate, or examine persons covered by this chapter.”)

1 RCW 61.24.030(8)(1). Plaintiff has not alleged any facts regarding the written notice of
2 default, however, he has made general allegations that defendants, other than Ocwen, have not
3 responded to his requests to determine what interests each defendant has in his loan and deed of
4 trust, and that the present holder of the note is “unknown,” which suggests that MERS, Deutsche
5 or RTS did not provide the required notice.

6 Accordingly, the Court finds that plaintiff has stated sufficient facts to state a claim
7 against MERS, Deutsche, and RTS for violation of the DTA.

8 **F. Violation of the FCRA**

9 The FCRA prohibits a person from furnishing information relating to a consumer to a
10 credit reporting agency that the person knows is inaccurate, and it requires a furnisher to
11 provide written notice to a customer whenever it first reports negative information to a credit
12 reporting agency. 15 U.S.C. §1681s-2(a)(1)(A) & (a)(7)(A)(i). However, the statute explicitly
13 prohibits private suits for violations of section (a), and provides that the exclusive enforcement
14 mechanism is by federal or state agencies. Id. 1681s-2(c)(1) & (d); Nelson v. Chase Manhattan
15 Mortgage Corp., 282 F.3d 1057, 1059 (9th Cir. 2002). The FCRA does create a private right of
16 action for willful noncompliance with its requirements under subsection (b), but only after a
17 consumer reporting agency is notified and offers the furnisher the opportunity to save itself
18 from liability by taking certain steps.⁷ 15 U.S.C. §1681s-2(b), §1681n; Nelson, 282 F.3d at
19 1060; see Tuazon v. HSBC Mortgage Servs., Inc., 2007 U.S. Dist. LEXIS 47703, *4 (W.D.
20 Wn. 2007) (“a consumer who disputes furnished credit information is required to follow a
21 procedure set out in the FCRA which begins with notifying the credit reporting agency directly
22 of the dispute.”).

23 Here, plaintiff alleges that defendants violated the FCRA by reporting his accounts to
24 credit reporting agencies with “erroneous and inaccurate information.” Am. Compl. at 14; dkt.
25 #17 [Opp’n] at 5. Plaintiff also alleges that defendants Saxon and Ocwen had “entered
26

24 ⁷Plaintiff does not claim that he provided a consumer reporting agency with the requisite
25 notice.
26

1 derogatory information” to credit reporting agencies that they “were attempting to collecting
2 [sic] on the alleged account simultaneously and each were also reporting derogatory
3 information that the alleged account was past due and foreclosure has been initiated.” Am.
4 Compl. at 12 ¶9. These allegations, if true, would fall within Section 1681s-2(a), which
5 prohibits a private right of action.

6 Accordingly, plaintiff’s claim for violation of the FCRA fails and is dismissed with
7 prejudice.

8 **G. Violation of the FDCPA**

9 Plaintiff alleges that defendants RTS, Ocwen, MERS, and Deutsche are debt collectors
10 under the FDCPA. Defendants argue that plaintiff has failed to state a claim because the
11 enforcement of a security interest through a nonjudicial foreclosure does not constitute the
12 collection of a debt for purposes of the FDCPA, and because plaintiff fails to plead facts that
13 bring defendants within the meaning of “debt collectors” as defined in the FDCPA.

14 Under the FDCPA, a “debt” is defined as “any obligation or alleged obligation of a
15 consumer to pay money arising out of a transaction in which the money, property, insurance, or
16 services which are the subject of the transaction are primarily for personal, family or household
17 purposes, whether or not such obligation has been reduced to judgment.” 15 U.S.C. §1692a(5).

18 The term “debt collector” means

19 any person who uses any instrumentality of interstate commerce or
20 the mails in any business the principal purpose of which is the
21 collection of any debts, or who regularly collects or attempts to
22 collect, directly or indirectly, debts owed or due or asserted to be
23 owed or due another. . . . For the purpose of section 808(6) [15
24 USCS § 1692f(6)], such term also includes any person who uses
25 any instrumentality of interstate commerce or the mails in any
26 business the principal purpose of which is the enforcement of
security interests.

27 Id. at §1692a(6). Section 1692f(6), referenced in this definition, prohibits a debt collector from
28 taking or threatening to take “non-judicial action to effect dispossession or disablement of
29 property if -- (A) there is no present right to possession of the property claimed as collateral

1 through an enforceable security interest; (B) there is no present intention to take possession of
2 the property; or (C) the property is exempt by law from such dispossession or disablement.”
3 Id. §1692f(6) (emphasis added).

4 The FDCPA exempts from the term “debt collector” “any person collecting or
5 attempting to collect any debt owed or due or asserted to be owed or due another to the extent
6 such activity . . . concerns a debt which was not in default at the time it was obtained by such
7 person.” Id. §1692(a)(6)(F)(iii).⁸

8 The trend among Ninth Circuit District Courts has been to hold that enforcement of a
9 security interest through a nonjudicial foreclosure proceeding does not constitute the collection
10 of a debt. See e.g., Roman v. N.W. Trustee Servs., Inc., 2010 U.S. Dist. LEXIS 131359, *8-9
11 (W.D. Wn. 2010); Barbanti v. Quality Loan Serv. Corp., 2007 U.S. Dist. LEXIS 676, *8 (E.D.
12 Wn. 2007); Fong v. Prof'l Foreclosure Corp., 2005 U.S. Dist. LEXIS 31643, *7 (W.D. Wn.
13 2005) (“Notably, Washington’s Deed of Trust Act provides that a foreclosure action constitutes
14 enforcement of an interest in property via a trustee’s sale. RCW § 61.24.100 et seq; id. §
15 61.24.020.”). The most commonly cited case is Hulse v. Ocwen Fed. Bank, FSB, 195 F. Supp.
16 2d 1188, 1204 (D. Or. 2002), which held that “[f]oreclosing on a trust deed is distinct from the
17 collection of the obligation to pay money. . . . Payment of funds is not the object of the
18 foreclosure action. Rather, the lender is foreclosing its interest in the property.”

19 However, the Fourth and Fifth Circuits have rejected the reasoning in Hulse. The
20 Fourth Circuit has concluded that a “‘debt’ remain[s] a ‘debt’ even after foreclosure
21 proceedings commenced” and that actions “surrounding foreclosure proceeding were attempts
22 to collect that debt.” Wilson v. Draper & Goldberg, P.L.L.C., 443 F.3d 373, 376 (4th Cir. 2006)
23 (citing Romea v. Heiberger & Assocs., 163 F.3d 111, 116 (2d Cir. 1998) (concluding that an
24 eviction notice required by statute could also be an attempt to collect a debt)). The Fourth
25 Circuit reasoned that to conclude otherwise “would create an enormous loophole in the Act

26 ⁸It is unclear from plaintiff’s allegations whether the debt was in default prior to Saxon’s
transfer to Ocwen as servicer, prior to the Assignment to Deutsche of the beneficial interest in the deed
of trust, or prior to Appointment of RTS as successor trustee.

1 immunizing any debt from coverage if that debt happened to be secured by a real property
2 interest and foreclosure proceedings were used to collect the debt.” Id.

3 Similarly, the Fifth Circuit has concluded that “a party who satisfies § 1692a(6)’s
4 general definition of a ‘debt collector’ is a debt collector for the purposes of the entire the
5 FDCPA even when enforcing security interests.” Kaltenbach v. Richards, 464 F.3d 524, 529
6 (5th Cir. 2006). The court reasoned that courts like Hulse simply posit that a party is a debt
7 collector outside of section 1692f only if they were collecting a debt in the particular instance
8 that gave rise to the dispute, which misconstrues section 1692a(6)’s method of defining the
9 term. Id. “Under that subsection, a party’s general, not specific, debt collection activities are
10 determinative of whether they meet the statutory definition of a debt collector.” Id. The court
11 further reasoned that whether “a debt collector’s specific action qualifies as the collection of a
12 debt may or may not be relevant when determining whether the party must comply with other,
13 specific substantive requirements of the FDCPA, but that is a separate inquiry from whether the
14 party meets the general statutory definition of a debt collector.” Id.

15 Defendants have not addressed this countervailing authority that has been cited with
16 approval among some recent district courts in the Ninth Circuit. See e.g., Albers v. Nationstar
17 Mortgage LLC, 2011 U.S. Dist. LEXIS 182, *5-6 (E.D. Wn. 2011); Allen v. United Fin.
18 Mortgage Corp., 2010 U.S. Dist. LEXIS 26503, *18-20 (N.D. Cal. 2010). Nevertheless, the
19 Court finds that plaintiff has not alleged sufficient facts. For instance, plaintiff has not stated
20 any facts that would demonstrate when he defaulted, whether he tendered loan payments after
21 his default, whether defendant Ocwen began servicing his loan before or after his default,
22 whether defendants Deutsche and RTS’s alleged acquisition of their interest in plaintiff’s deed
23 of trust occurred before or after he was in default, or whether any of the defendants repeatedly
24 threatened foreclosure absent payment of the obligation.

25 Accordingly, the Court dismisses plaintiff’s FDCPA claim without prejudice.

26 **H. Violation of the RESPA**

The RESPA provides a private right of action where there are charges for unearned fees.
12 U.S.C. §2607. Section 2607(b) prohibits the practice of giving or accepting money where

1 no service was performed in exchange for money. Martinez v. Wells Fargo Home Mortgage,
2 Inc., 598 F.3d 549, 553 (9th Cir. 2010). This section “cannot be read to prohibit charging fees,
3 excessive or otherwise, when those fees are for services that were actually performed.” Id. at
4 553-54.

5 Here, plaintiff alleges that defendants violated the RESPA by charging improper
6 “Beneficiary Advances” in the Notices of Trustee Sale. Dkt. #7, Am. Compl. at 5-6 ¶¶6-7.
7 Although not pled in his complaint, plaintiff also claims that defendants violated the RESPA by
8 over-charging him with fees that “were simply contrived and not paid to a third party vendor”
9 and that “were a normal part of doing business and should have been included in the finance
10 charge.” Dkt. #17 [Opp’n] at 3. He also claims that the lender charged him a number of false
11 fees (id. at 12-13), and other allegations related to closing⁹ (id. at 13-14). The Court finds that
12 plaintiff has not stated a claim for violation of section 2607(b) because he has not alleged
13 whether the services were actually performed for the fees charged, or which defendants gave or
14 accepted money for the services charged.

15 The RESPA also provides a private cause of action where a loan servicer fails to give
16 proper notice of transfer. 12 U.S.C. §2605. Under the RESPA, if servicing of a mortgage is
17 transferred after the mortgage loan is made, the former servicer must notify the consumer in
18 writing fifteen days before the effective date of the transfer. 12 U.S.C. §2605(b)(2)(A).
19 Additionally, a servicer must provide certain information upon a qualified written request “for
20 information relating to the servicing of such a loan.” Id. §2605(e)(1)(A). “Servicing” is
21 defined as “receiving any scheduled periodic payments from a borrower pursuant to the terms
22 of any loan . . . and making the payments of principal and interest and such other payments
23 with respect to the amounts received from the borrower as may be required pursuant to the
24 terms of the loan. Id. §2605(i)(3). “Qualified written request” is defined as written

25 ⁹Plaintiff claims as RESPA violations: “Good Faith Estimate not within limits, No HUD-1
26 Booklet, Truth In Lending Statement not within limits compared to Note, Truth in Lending Statement
not timely presented, HUD-1 not presented at least one day before closing, No Holder Rule notice in
Note, No 1st Payment Letter.” Id. at 13-14. The Court finds that plaintiff has not provided the factual
predicate for these purported violations.

1 correspondence that include, or otherwise enable the servicer to identify, the name and account
2 of the borrower, and include a statement of the reasons that the borrower believes the account
3 is in error, or that provide sufficient detail to the servicer regarding information relating to the
4 servicing of the loan sought by the borrower. 12 U.S.C. §2605(e)(1)(B); 24 C.F.R.
5 3500.21(e)(2).

6 Plaintiff alleges that defendants violated the RESPA by failing to notify him of certain
7 assignments of the loan and its servicing rights¹⁰ (Am. Compl. at 4 ¶3, at 6 ¶9, at 7 ¶12, at 15 ¶¶
8 2-4), by failing to provide him notice “in writing at least 15 days before the effective date of
9 the transfer” from any of the defendants (Am. Compl. at 15 ¶4), and by failing to adequately
10 and timely respond to a “Dispute of Debt” request (*id.* at 6 ¶8). However, the only moving
11 parties that would be required to provide notice are servicers Ocwen and Saxon.

12 The Court finds that with respect to servicers Ocwen and Saxon, plaintiff has stated
13 sufficient facts to state a claim for violation of the RESPA. The Court further finds that
14 plaintiff has failed to state a RESPA claim under section 2605 against defendants MERS,
15 Deutsche and RTS because plaintiff has not alleged that they were “servicing” his loan.

16 **I. Violation of the CPA**

17 Plaintiff argues that he has plead facts that demonstrate a violation of the CPA because
18 defendants “continue to block, mislead, omit, and deceive Plaintiff by failing to answer any of
19 the demands, requests, or correspondence Plaintiff previously sent to Defendant(s)” and
20 because defendants “failed to properly cause to be recorded ALL of the appropriate
21 assignments and transfers to maintain an accurate chain of title and establish a complete record
22 of who [is] the true and correct party of interest.” Dkt. # 17 [Opp’n] at 15, #29 [Opp’n to
23 Saxon] at 9. Plaintiff also argues that defendants “caused derogatory, erroneous, and

24 ¹⁰Defendant Saxon has attached as Exhibit A to Ms. Gutierrez’s declaration what purports to be
25 the notice given to plaintiff about the change in servicing of plaintiff’s loan. Dkt. #25-1. However,
26 plaintiff claims that he has not previously seen this letter. Dkt. #29 [Opp’n to Saxon] at 3. The Court
declines Saxon’s request to treat its motion as one for summary judgment simply to consider this letter
because the Court does not have before it the complete record of all relevant documents, including the
promissory notes, and all purported transfers of the notes, Deed 1 and Deed 2.

1 inaccurate information to be reported into Plaintiffs [sic] credit file from at least April 2008
2 through November 2009.” Id.

3 To state a claim under the CPA, plaintiff must plead facts demonstrating: (1) an unfair
4 or deceptive act or practice, (2) in trade or commerce, (3) that impacts the public interest, (4)
5 which causes injury to the plaintiff in his or her business or property, and (5) which injury is
6 causally linked to the unfair or deceptive act. Indus. Indem. Co. v. Kallevig, 114 Wn. 2d 907,
7 920-21 (1990). Ordinarily, a breach of a private contract affecting no one but the parties to the
8 contract is not an act or practice affecting the public interest. Hangman Ridge Training
9 Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 790 (1986). However, a private dispute
10 can affect the public interest if it is likely that additional plaintiffs have been or will be injured
11 in exactly the same fashion. Id. The Court must examine several factors to determine whether
12 the public interest is impacted: (1) Were the alleged acts committed in the course of
13 defendant’s business? (2) Did defendant advertise to the public in general? (3) Did defendant
14 actively solicit this particular plaintiff, indicating potential solicitation of others? (4) Did
15 plaintiff and defendant occupy unequal bargaining positions? Id. at 790-91.

16 Here, plaintiff’s allegations concerning purported violations of the CPA are identical for
17 every defendant. Even if the Court assumes that plaintiff has met the first two elements of a
18 CPA claim, he has failed to state facts sufficient to demonstrate the last three elements. No
19 facts are alleged to support plaintiffs claims that the acts alleged impacted the public interest
20 and caused plaintiff’s alleged injuries. Plaintiff also has not plead an actionable injury. It is
21 unclear to the Court whether the trustee sale has occurred, and plaintiff does not dispute his
22 default under the terms of the note.

23 Accordingly, the Court grants defendants’ motion to dismiss the CPA claims as to all
24 moving defendants without prejudice.

25 **J. Violation of the TILA**

26 Plaintiff alleges a violation of the TILA for failing to provide notice of transfer of his
promissory note. Dkt. #17 [Opp’n] at 2; Dkt. #29 [Opp’n to Saxon] at 4, 6. The TILA requires
that if ownership is transferred, the new owner or assignee of a mortgage loan must notify the

1 borrower within thirty days after the loan is sold or assigned of its identity, contact information,
2 and information about any party with authority to act on behalf of the new owner. 15 U.S.C.
3 §§1641(g) (effective May 20, 2009), 1640(a) (private right of action for violation of section
4 1641(f) or (g)). A servicer of a consumer obligation arising out of a credit transaction is not
5 treated as an assignee unless the servicer is or was the owner of the obligation. Id. §1641(f)(1).
6 The Court has not been provided with all relevant documents, including the promissory note
7 and any purported transfers of the note. However, plaintiff has alleged that defendants Saxon
8 and Ocwen became the owner of his loan. Am. Compl. at 4-5 ¶3, 15 ¶2. He also alleges that he
9 has not received any notice of transfer of ownership of the note, or received any response to his
10 written requests seeking the identity of the note holder. Id. at 6 ¶8, 7 ¶12.

11 Accordingly, the Court finds that plaintiff has stated a claim for a TILA violation against
12 defendants Saxon and Ocwen. Plaintiff has not alleged that defendants MERS, Deutsche, or
13 RTS ever held the note, and the Court dismisses the TILA claim against them without
14 prejudice.

14 **K. Fraud**

15 Plaintiff claims that defendants fraudulently induced him to execute the promissory note
16 and deed of trust. Dkt. #17 at 2:12-13, 3:1-3, 11:3-4. Plaintiff claims that the deed of trust
17 contains a false statement because it specified MERS as the beneficiary. Id. at 6:20-26, 10:6-9.
18 Plaintiff also claims that defendants have “committed fraud by representing to the court that
19 Defendant(s) are real party(ies) in interest in the contract of sale and has standing to take said
20 property from defendant when no such claim exists.” Id. 16:25-17:2.

21 To survive a motion to dismiss, a complaint must plead allegations of fraud with
22 particularity. Fed. R. Civ. P. 9(b). The complaint must include an account of the time, place,
23 and specific content of the false representations as well as the identities of the parties to the
24 misrepresentations. Schwartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007). Rule 9(b)
25 does not allow a plaintiff to lump all defendants together, but requires plaintiffs to differentiate
26 their allegations and inform each defendant separately of the allegations surrounding his alleged
participation in the fraud. Id. at 764-65. In Washington, a claim for fraud has the following

1 elements: (1) representation of an existing fact, (2) materiality, (3) falsity, (4) the speaker's
2 knowledge of its falsity, (5) intent of the speaker that it should be acted upon by the plaintiff,
3 (6) plaintiff's ignorance of its falsity, (7) plaintiff's reliance on the truth of the representation,
4 (8) plaintiff's right to rely upon it, and (9) damages suffered by plaintiff. Stiley v. Block, 130
5 Wn. 2d 486, 505 (1996).

6 Here, plaintiff's claims fail to allege any purported fraudulent conduct with specificity.
7 Accordingly, the Court dismisses plaintiff's fraud claims against all defendants without
8 prejudice.

8 **L. Conspiracy**

9 Plaintiff claims that defendants have engaged in an ongoing criminal conspiracy. Dkt.
10 #17 at 17. The Court will construe plaintiff's claim as civil conspiracy. "A conspiracy is a
11 combination of two or more persons who contrive to commit a criminal or unlawful act, or to
12 commit a lawful act for criminal or unlawful purposes." Adams v. King County, 164 Wn. 2d
13 640, 660 (2008). Plaintiff has failed to allege sufficient facts to state a claim for civil
14 conspiracy, and the Court dismisses this claim with prejudice.

15 **IV. CONCLUSION**

16 For all the foregoing reasons, the Court GRANTS in part defendants' motions to dismiss
17 and DISMISSES the following claims WITH PREJUDICE:

- 18 1. Intentional infliction of emotional distress against all moving defendants;
- 19 2. Slander of title against all moving defendants;
- 20 3. Fiduciary duty against all moving defendants;
- 21 4. DTA against defendants Ocwen and Saxon only; and
- 22 5. Conspiracy against all moving defendants.

23 The Court DISMISSES the following claims WITHOUT PREJUDICE:

- 24 1. FDCPA against all moving defendants;
- 25 2. RESPA against defendants MERS, Deutsche, and RTS;
- 26 3. CPA against all defendants;
4. TILA against MERS, Deutsche, and RTS; and

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5. Fraud against all defendants.

The Court DENIES defendants' motion to dismiss the following claims:

- 1. DTA against MERS, Deutsche and RTS only;
- 2. RESPA against defendants Ocwen and Saxon only;
- 3. TILA against defendants Saxon and Ocwen only.

Plaintiff may amend his complaint with respect to claims that the Court has not dismissed with prejudice within thirty days of this Order.

DATED this 26th day of January, 2011.


Robert S. Lasnik
United States District Judge