UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 15-4853 PA (GJSx)	Date	December 14, 2016
Title	Mortgage Electronic Registration Systems Inc., et al. v. Timothy J. Johnston		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE	
Stephen Montes Kerr	Not Reported	N/A
Deputy Clerk	Court Reporter	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	
None	None	

Proceedings: IN CHAMBERS - COURT ORDER

Before the Court is a Motion for Partial Summary Judgment (Docket No. 86) filed by plaintiffs Mortgage Electronic Registrations Systems, Inc. ("MERS"), MERSCORP Holdings, Inc. ("MERSCORP"), and The Bank of New York Mellon, f/k/a The Bank of New York, as Trustee for Structured Asset Mortgage Investments II Trust 2006-AR8, Mortgage Pass-Through Certificates, Series 2006-AR8 ("BNYM") (collectively "Plaintiffs"). Defendant Timothy J. Johnston ("Johnston") has filed an Opposition. (Docket No. 95.) Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds this matter appropriate for decision without oral argument. The hearing calendared for November 7, 2016 is vacated, and the matter taken off calendar.

I. Background

On July 27, 2006, Johnston obtained a residential mortgage loan on the real property located at 1622 Janelle Lane, Santa Maria, California, 93548 (the "Property") for $408,700.00, secured by a recorded deed of trust ("DOT"). (Request for Judicial Notice in Support of Plaintiffs' Motion for Partial Summary Judgment ("RJN"), Ex. A.)[1/] The DOT identified Southstar Funding, LLC ("Southstar") as the "Lender" on the loan, and MERS as a separate corporation acting as a nominee for Lender and Lender's successors and assigns. (Id.) The DOT further provided that "Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument." (Id.)

[1/] Plaintiffs request judicial notice of six documents which were either recorded in the Santa Barbara County Recorder's Office or filed in a state court action. The Court has previously taken judicial notice of each of these documents (see Docket Nos. 26 at 3-4, 118 at 6 n.2) and once again finds that these documents are matters of public record which are properly subject to judicial notice. See Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001); Wise v. Wells Fargo Bank, N.A., 850 F. Supp. 2d 1047, 1057 (C.D. Cal. 2012); Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir. 2006); Fed. R. Evid. 201. Accordingly, Plaintiffs' Request for Judicial Notice is granted.

On May 15, 2012, Johnston filed an action in Santa Barbara Superior Court to quiet title to the Property. (Id., Ex. B) Johnston named Southstar as a defendant in the quiet title action, as well as "unknown persons and entities" claiming any right or interest in the Property adverse to Johnston's claim. (Id.) Johnston did not name MERS, MERSCORP, or BNYM as defendants in the quiet title action, and Plaintiffs have no record of receiving notice of the action during its pendency. (See id.; Declaration of Elizabeth M. Powell in Support of Plaintiffs' Motion for Partial Summary Judgment ("Powell Decl."), ¶ 8.)[2/] When Southstar failed to appear and defend the action, Johnston secured a default judgment for quiet title on April 17, 2013 (the "Quiet Title Default Judgment"). (RJN, Exs. C, D.) Johnston recorded the Quiet Title Default Judgment in the Santa Barbara Recorder's Office. (Id., Ex. D.)

On June 26, 2015, Plaintiffs filed the instant action seeking to set aside Johnston's Quiet Title Default Judgment. (Docket No. 1.) After the Court found, sua sponte, that it lacked subject matter jurisdiction over the Complaint, Plaintiffs filed a First Amended Complaint. (Docket No. 27.) The First Amended Complaint asserts claims for: (1) declaratory judgment for violation of California's quiet title statutes (Cal. Civ. Proc. Code §§ 760.010–764.045) and to set aside the void quiet title judgment; and (2) declaratory judgment for violation of due process and to set aside the void quiet title judgment. Johnston filed a Motion to Dismiss the First Amended Complaint. (Id.) In denying the Motion, the Court found that Plaintiffs had capacity and standing to bring their claims, that the claims were not barred by the doctrine of res judicata, that all indispensable parties had been joined under Federal Rule of Civil Procedure 19, and that the FAC adequately stated a claim for violation of Plaintiffs' statutory and due process rights. (Docket No. 39.)

On April 18, 2016, Johnston filed an Answer and Amended Counterclaims ("ACC") against MERS, MERSCORP, BNYM, JPMorgan Chase Bank, N.A. ("Chase"), and National Debt Servicing Corporation ("NDSC") (collectively "Counterdefendants"). (Docket No. 57.) The ACC alleges claims for: (1) invalidity of contract against MERS; (2) negligent misrepresentation against MERS, MERSCORP, NDSC, and Chase; (3) violation of 15 U.S.C. § 1641(g) against BNYM; (4) breach of contract and estoppel against MERS, Chase, BNYM, and NDSC; (5) cancellation of instruments against Counterdefendants; (6) slander of title against MERS, BNYM, Chase, and NDSC; (7) violation of the California Homeowner Bill of Rights against Counterdefendants; (8) violation of Cal. Bus. & Prof. Code § 17200 against Counterdefendants; and (9) RICO and civil conspiracy against Counterdefendants.

[2/] Johnston has filed Evidentiary Objections to portions of Powell's declaration. (Docket No. 95-5.) In particular, Johnston objects to Paragraph 8 on the grounds that the proffered testimony lacks foundation, lacks personal knowledge, assumes facts not in evidence, is speculative, constitutes hearsay, and offers a legal conclusion. The Court finds that Johnston's boilerplate objections lack merit. Powell's declaration establishes that she has been employed by MERSCORP since 2004 and has reviewed its records pertaining to this matter. The declaration lays a foundation and establishes Powell's personal knowledge, and does not assume facts not in evidence, speculate, contain hearsay, or offer a legal conclusion. Johnston's evidentiary objection to ¶ 8 of the Powell declaration is therefore overruled.

Counterdefendants filed a Motion to Dismiss the ACC, which the Court granted. (Docket No. 118.) On November 22, 2016, the Court granted Counterdefendants' Motion to Dismiss, and dismissed each of Johnston's counterclaims without leave to amend.

Presently before the Court is Plaintiffs' Motion for Partial Summary Judgment.

II. Legal Standard

Summary judgment is proper where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden of demonstrating the absence of a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S. Ct. 2505, 2514, 91 L. Ed. 2d 202 (1986). "[T]he burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986); see also Musick v. Burke, 913 F.2d 1390, 1394 (9th Cir. 1990). The moving party must affirmatively show the absence of such evidence in the record, either by deposition testimony, the inadequacy of documentary evidence, or by any other form of admissible evidence. See Celotex, 477 U.S. at 322. The moving party has no burden to negate or disprove matters on which the opponent will have the burden of proof at trial. See id. at 325.

As required on a motion for summary judgment, the facts are construed "in the light most favorable to the party opposing the motion." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). However, the nonmoving party's allegation that factual disputes persist between the parties will not automatically defeat an otherwise properly supported motion for summary judgment. See Fed. R. Civ. P. 56(c). A "mere 'scintilla' of evidence will be insufficient to defeat a properly supported motion for summary judgment; instead, the nonmoving party must introduce some 'significant probative evidence tending to support the complaint.'" Fazio v. City & County of San Francisco, 125 F.3d 1328, 1331 (9th Cir. 1997) (quoting Anderson, 477 U.S. at 249, 252). Otherwise, summary judgment shall be entered.

III. Discussion

The crux of Plaintiffs' claims is that the Quiet Title Default Judgment is void and should be vacated because it violates either California statutory laws governing quiet title actions or the Due Process Clause of the Fifth and Fourteenth Amendments. As explained below, the Court finds that Plaintiffs are entitled to summary judgment on their claim that the Quiet Title Default Judgment should be vacated because it was obtained in violation of California Civil Code § 762, and therefore does not reach Plaintiffs' due process claim.

A quiet title action may be brought "to establish title against adverse claims to real or personal property or any interest therein." Cal. Civ. Proc. Code § 760.020. As such, a plaintiff in a quiet title action must "name as defendants in the action the persons having adverse claims to the title of the

plaintiff against which a determination is sought." Id. § 762.010. The statute defines a "claim" to include "a legal or equitable right, title, estate, lien, or interest in property or could upon title." Id. § 760.010(a). Although a plaintiff may also elect to "name as defendants 'all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title, or any cloud upon plaintiff's title thereto,'" Id. § 762.060(a), this does not limit his duty to "name as defendants the persons having adverse claims that are of record or known to the plaintiff or reasonably apparent from an inspection of the property." Id. § 762.060(b).

Here, the Deed of Trust provides that "Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument." (RJN, Ex. A.) In construing identical language in a deed of trust, at least one court in this district has found that MERS was required to be named in any quiet title action initiated by the "Borrower," and that the failure to do so voids any judgment obtained in MERS's absence. See Mortgage Elec. Registration Sys., Inc. v. Robinson, No. CV 13-7142 PSG (ASx), 2015 WL 993319, at *5-8 (C.D. Cal. Feb. 27, 2015) (motion for summary judgment); see also Mortgage Elec. Registration Sys. v. Robinson, 45 F. Supp. 3d 1207, 1211 (C.D. Cal. 2014) (motion for judgment on the pleadings). Other federal courts have reached similar conclusions. E.g., Mortg. Elec. Registration Sys., Inc. v. Bellistri, No. 4:09-CV-731 CAS, 2010 WL 2720802, at *12-14 (E.D. Mo. July 1, 2010); see also Renkemeyer v. Mortg. Elec. Registration Sys., Inc., No. 10-2415-JWL, 2010 WL 3878582, at *3 (D. Kan. Sept. 28, 2010). The Court previously relied on Robinson to deny Johnston's motion to dismiss Plaintiffs' claims (Docket No. 39 at 11-12) and to dismiss some of Johnston's counterclaims (Docket No. 118 at 8-9).

Robinson is nearly identical to the present case. There, as here, an individual obtained a default judgment in a state court quiet title action after failing to name MERS as a defendant despite the fact that MERS was listed as a beneficiary under the deed of trust. Robinson, 45 F. Supp. 3d at 1208-09. When deciding whether MERS was entitled to be named in the quiet title action, the Robinson court reasoned that "[w]hatever the full scope of MERS's rights and interests under the [deed of trust], it can hardly be disputed that by those provisions MERS made some adverse 'claim' against Defendants' title." Id. at 1121. Thereafter, on the basis of the borrower's failure to name MERS as a defendant in the quiet title action, the Robinson court found the offending quiet title default judgment was null and void. Robinson, 2015 WL 993319 at *9.

The Court is persuaded by Robinson's interpretation of California's quiet title statutes. The purpose of a quiet title action is to determine "all conflicting claims to the property in controversy." Newman v. Cornelius, 3 Cal. App. 3d 279, 284, 83 Cal. Rptr. 435, 437 (Ct. App. 1970). The term "claim," as used in the statute, was "intended in the broadest possible sense." Cal. Civ. Proc. Code § 760.010, 1980 Law Revision Commission Comments. Here, the Deed of Trust provides that MERS "holds legal title" and has the right to foreclose upon or sell the Property. (RJN, Ex. A.) Affording the broadest possible construction to the tem "claim," the Court finds that MERS had an adverse claim

against Johnston's title which was known to Johnston when he filed the quiet title action. As a result of Johnston's failure to name MERS as a defendant, the Quiet Title Default Judgment is null and void.

Johnston advances a number of arguments in an attempt to avoid this conclusion. First, Johnston contends that Mortg. Elec. Registration Sys., Inc. v. Ditto, 488 S.W.3d 265 (Tenn. 2015) compels a contrary result. There, the Tennessee Supreme Court held that MERS, in its capacity as nominee for a lender and the lender's assigns, did not have a sufficiently protected property interest under a deed of trust to trigger federal due process concerns when it was not informed of the tax sale of the property secured by the deed of trust. 488 S.W.3d at 292. However, Johnston overlooks a critical footnote, which states:

> MERS asserts that a recent decision from our Court of Appeals can be counted among the courts holding that MERS has a protected property right arising out of a similar deed of trust, citing EverBank v. Henson, No. W2013–02489-COA-R3-CV, 2015 WL 129081 (Tenn. Ct. App. Jan. 9, 2015). We disagree. The issue before the court in Henson was whether MERS was a "part[y] interested" in a foreclosure proceeding so as to entitle MERS to notice under Tennessee Code Annotated section 35–5104(d). In that situation, the Henson court held that MERS was a "part[y] interested" under the statute because it had "a lien that would be extinguished or adversely affected by the sale." Henson, 2015 WL 129081, at *4. Thus Henson interpreted the foreclosure statutes, not the tax sale statutes, and dealt with statutory interpretation, not whether MERS has a "protected property interest" under the Due Process Clause.

Id. at 289 n.21.

As a result, Ditto expressly distinguished itself from the instant case. See id. This action, like Henson, deals with statutory interpretation of a state statute, and does not implicate the Due Process Clause. Ditto is therefore inapposite because it does not provide guidance on interpretation of California's quiet title statutes.

Second, Johnston contends that the Quiet Title Default Judgment is valid because neither the DOT itself nor MERS' membership rules required Johnston to give notice of the quiet title action to MERS. However, this argument misses the mark. Even if the contractual provisions contained in the DOT or MERS' membership rules did not require Johnston to provide notice of the quiet title action to MERS, California's Civil Code did. See Cal. Civ. Code § 762.060(b). Accordingly, compliance with the notice requirements of the DOT or MERS' membership rules is irrelevant.

Third, Johnston contends that the quiet title action met the notice requirements of the California Civil Code because MERS was Southstar's agent, and Southstar was provided with notice of the quiet title action. Relying on California Civil Code § 2332, Johnston contends that notice provided to a principal can be imputed to its agent. However, Johnston's argument is based on a flawed reading of

§ 2332, which provides: "As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other." Cal. Civ. Code § 2332 (emphasis added). The clear statutory text limits its application to imputing an agent's knowledge to a principal, and not the other way around. Therefore, unsurprisingly, the only case cited by Johnston applies the statute to impute an agent's knowledge to his principal. See Lazzarevich v. Lazzarevich, 244 P.2d 1, 2 (Cal. 1952) (finding that a client had constructive knowledge of facts known by his attorney).

Finally, Johnston briefly asserts that Plaintiffs cannot bring this action – and are actually violating California Law by doing so – because Southstar is a dissolved corporation. The Court previously considered and rejected this argument because "Southstar's corporate status has no bearing upon MERS' . . . capacity to bring this suit." (Docket No. 39 at 8.)

Accordingly, the Court finds that the Quiet Title Default Judgment was obtained in violation of California Civil Code § 762, and is therefore void.

Conclusion

Based on the foregoing, the Court grants Plaintiffs' Motion for Partial Summary Judgment.

The Court notes that on November 28, 2016, Plaintiffs filed a Second Amended Complaint ("SAC"). (Docket No. 121.) The SAC added Equity Holdings Corporation, as Trustee for the Popoagie Trust Dated December 20, 2010 as a defendant, and seeks the same relief as Plaintiffs' First Amended Complaint – namely a declaratory judgment that the Quiet Tittle Default Judgment was null and void from its inception, and an order requiring the cancellation of the Quiet Title Default Judgment from the Santa Barbara County Recorder's Office. (See FAC, Prayer for Relief, ¶¶ 1-6; SAC, Prayer for Relief, ¶¶ 1-6.) The Court finds that Plaintiffs would be entitled to the relief they seek irrespective of Equity Holdings Corporation's presence in this action, and therefore finds that the recent addition of Equity Holdings Corporation as a defendant in this action is not a barrier to granting Plaintiffs' Motion for Partial Summary Judgment.

The Court will enter a Judgment consistent with this Order.[3/]

IT IS SO ORDERED.

[3/] Johnston's Request for Judicial Notice (Docket No. 95-6) is denied as moot. Johnston's Motion to File Objection to Sandifer Declaration Late (Docket No. 103) is denied as moot because the Court has not relied on Ms. Sandifer's declaration. The parties' Evidentiary Objections (Docket Nos. 95-5, 110-112) are overruled as moot because, except as specifically noted and ruled on, the Court has not relied on any evidence to which an evidentiary objection has been lodged.

Miller, Lynette

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UNITED STATES DISTRICT COURT for the CENTRAL DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 15-4853 PA (GJSx)	Date	November 22, 2016
Title	Mortgage Electronic Registration Systems Inc., et al. v. Timothy J. Johnston		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE	
Stephen Montes Kerr	Not Reported	N/A
Deputy Clerk	Court Reporter	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	
None	None	

Proceedings: IN CHAMBERS - COURT ORDER

Before the Court is a Motion to Dismiss Counterclaimant Timothy J. Johnston's Amended Counterclaims (Docket No. 64) filed by counterdefendants Mortgage Electronic Registrations Systems, Inc. ("MERS"), MERSCORP Holdings, Inc. ("MERSCORP"), The Bank of New York Mellon, f/k/a The Bank of New York, as Trustee for Structured Asset Mortgage Investments II Trust 2006-AR8, Mortgage Pass-Through Certificates, Series 2006-AR8 ("BNYM"), and JPMorgan Chase Bank, N.A. ("Chase") (collectively, "Counterdefendants").[1/] Defendant and counterclaimant Timothy J. Johnston ("Johnston") has filed an Opposition. (Docket No. 67.) Also before the Court is a Motion for Leave to File a Second Amended Complaint (Docket No. 82) filed by MERS, MERSCORP and BNYM (collectively, "Plaintiffs"), to which no Opposition has been filed. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds these matters appropriate for decision without oral argument. The hearings calendared for July 25, 2016 and September 12, 2016, are vacated, and the matters taken off calendar.

I. Background

On February 15, 2005, Johnston acquired title to the real property located at 1622 Janelle Lane, Santa Maria, California, 93548 (the "Property") by means of a recorded quitclaim deed. (FAC ¶¶ 13-14.) On July 27, 2006, Johnston obtained a residential mortgage loan on the Property for $408,700.00, secured by a recorded deed of trust ("DOT"). (Id. ¶ 32.) The DOT identified Southstar Funding, LLC ("Southstar") as the "Lender" on the loan, and MERS as a separate corporation acting as a nominee for Lender and Lender's successors and assigns. (Id. ¶ 34.) The DOT further provided that "Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument." (Id. ¶ 37, Ex. A at 2.)

[1/] Although not specifically named as a counterdefendant, Johnston appears to also assert claims against National Default Servicing Corporation ("NDSC").

On May 15, 2012, Johnston filed an action in Santa Barbara Superior Court to quiet title to the Property. (Id. ¶ 42.) Johnston named Southstar as a defendant in the quiet title action, as well as "unknown persons and entities" claiming any right or interest in the Property adverse to Johnston's claim. (Id. ¶¶ 42, 49.) Johnston did not name MERS, MERSCORP, or BNYM as defendants in the quiet title action. (See id.) When Southstar failed to appear and defend the state court quiet title action, Johnston secured a default judgment for quiet title on April 17, 2013 (the "Quiet Title Default Judgment"). (Id. ¶¶ 50, 53.) Johnston recorded the Quiet Title Default Judgment with the Santa Barbara Recorder's Office. (Id. ¶ 54.) On the same day that the Quiet Title Default Judgment was entered, MERS assigned its rights and interests under the DOT to BNYM, as trustee. (Id. ¶ 52.)

On June 26, 2015, Plaintiffs filed the instant action seeking to set aside Johnston's Quiet Title Default Judgment. (Docket No. 1.) After the Court found, sua sponte, that it lacked subject matter jurisdiction over the Complaint, Plaintiffs filed a First Amended Complaint. (Docket No. 27.) The First Amended Complaint asserts claims for: (1) declaratory judgment for violation of California's quiet title statutes (Cal. Civ. Proc. Code §§ 760.010–764.045) and to set aside the void quiet title judgment; and (2) declaratory judgment for violation of due process and to set aside the void quiet title judgment. Johnston filed a Motion to Dismiss the First Amended Complaint. In denying the Motion, the Court found that Plaintiffs had capacity and standing to bring their claims, that the claims were not barred by the doctrine of res judicata, that all indispensable parties had been joined under Federal Rule of Civil Procedure 19, and that the FAC adequately stated a claim for violation of Plaintiffs' statutory and due process rights. (Docket No. 39.)

Johnston filed an Answer and Amended Counterclaims ("ACC") on April 18, 2016. (Docket No. 57.) The ACC alleges claims for: (1) invalidity of contract against MERS; (2) negligent misrepresentation against MERS, MERSCORP, NDSC, and Chase; (3) violation of 15 U.S.C. § 1641(g) against BNYM; (4) breach of contract and estoppel against MERS, Chase, BNYM, and NDSC; (5) cancellation of instruments against Counterdefendants; (6) slander of title against MERS, BNYM, Chase, and NDSC; (7) violation of the California Homeowner Bill of Rights against Counterdefendants; (8) violation of Cal. Bus. & Prof. Code § 17200 against Counterdefendants; and (9) RICO and civil conspiracy against Counterdefendants.

Presently before the Court are two motions: Counterdefendants' Motion to Dismiss Johnston's ACC, and Plaintiffs' Motion for Leave to File a Second Amended Complaint.

II. Motion to Dismiss

A. Legal Standard

Generally, plaintiffs in federal court are required to give only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). While the Federal Rules allow a court to dismiss a cause of action for "failure to state a claim upon which relief can be granted," they also require all pleadings to be "construed so as to do justice." Fed. R. Civ. P. 12(b)(6), 8(e). The

purpose of Rule 8(a)(2) is to "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80 (1957)).

However, in Twombly, the Supreme Court rejected the notion that "a wholly conclusory statement of a claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery." Twombly, 550 U.S. at 561, 127 S. Ct. at 1968 (internal quotation omitted). Instead, the Court adopted a "plausibility standard," in which the complaint must "raise a reasonable expectation that discovery will reveal evidence of [the alleged infraction]." Id. at 556, 127 S. Ct. at 1965. For a complaint to meet this standard, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." Id. at 555, 127 S. Ct. at 1965 (citing 5 C. Wright & A. Miller, Federal Practice and Procedure §1216, pp. 235-36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action") (alteration in original)); Daniel v. County of Santa Barbara, 288 F.3d 375, 380 (9th Cir. 2002) ("'All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party.'") (quoting Burgert v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir. 2000)). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555, 127 S. Ct. at 1964-65 (internal quotations omitted). In construing the Twombly standard, the Supreme Court has advised that "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 556 U.S. 662, 679, 664 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009).

B. First Counterclaim: Invalidity of Contract against MERS

Johnston's first counterclaim asserts that the Deed of Trust securing the Property was invalid at inception because: (1) in violation of either California Revenue and Tax Code § 22304.1 or California Corporations Code § 2105, MERS was not registered to do business in the State of California when the Deed of Trust was executed in July 2006; and (2) MERS did not hold an interest in the loan secured by the Deed of Trust. (ACC ¶¶ 41-45.) Johnston's argument fails for two reasons.

First, MERS asserts that it was not required to register to do business in California because the relevant statuory provisions exempt MERS from being required to register, and, even if they did not, MERS has now cured its failure to register. In considering similar arguments, California courts have "routinely recognized" that borrowers, such as Johnston, cannot invalidate their deeds of trust on this basis. E.g., Wallace v. Mortgage Elec. Registration Sys., Inc., No. CV 11-8039 ODW (MRWx), 2012 WL 94485, at *4 (C.D. Cal. Jan. 11, 2012) ("[C]ourts have routinely recognized that MERSs conduct in California is within the permissible scope for an unregistered foreign corporation and thus is not

governed by § 23304.1."); Baidoobonso-Iam v. Bank of Am. (Home Loans), No. CV 10-9171 CAS (MANx), 2011 WL 5870065, at *4 (C.D. Cal. Nov. 22, 2011) (same); Rodriguez v. Bank of New York Mellon, No. 13CV1830-GPC-BLM, 2014 WL 229274, at *8 (S.D. Cal. Jan. 17, 2014); Mortgage Elec. Registration Sys., Inc. v. Robinson, No. CV 13-7142 PSG (ASx), 2015 WL 993319, at *7 (C.D. Cal. Feb. 27, 2015) ("[T]he Deed of Trust is not voidable under § 23304.1 of the California Revenue and Tax Code because MERS cured its failure to register and that even if the Deed of Trust was voidable, under § 23304.5 of the same Code the Deed of Trust cannot be voided without first giving MERS the opportunity to cure its failure to register."); see also Swift v. Barclays Capital Real Estate, Inc., No. E053917, 2013 WL 5348330, at *3 (Cal. Ct. App. Sept. 25, 2013) (unpublished).

Second, California case law interpreting similar deeds of trust confirms that MERS has the right to enforce the Deed of Trust. E.g., Fontenot v. Wells Fargo Bank, N.A., 198 Cal. App. 4th 256, 268 (1st Dist. 2011), disapproved of on other grounds by Yvanova v. New Century Mortgage Corp., 365 P.3d 845, 199 Cal. Rptr. 3d 66 (2016). And, even if case law was insufficiently clear on this point, California Civil Procedure Code § 2924 provides that a lender's agent, such as MERS, may initiate foreclosure proceedings. See Gomes v. Countrywide Home Loans, Inc., 192 Cal. App. 4th 1149, 1157 n.9, 121 Cal. Rptr. 3d 819, 826 n.9 (2011). Finally, the Deed of Trust itself expressly authorizes MERS to initiate foreclosure proceedings or exercise any interests held by the Lender. (FAC, Ex. A at 2.) As such, Johnston cannot now deny that MERS has the right to enforce the Deed of Trust. See Pantoja v. Countrywide Home Loans, Inc., 640 F. Supp. 2d 1177, 1189 (N.D. Cal. 2009); Gomes, 192 Cal. App. 4th at 1157, 121 Cal. Rptr. 3d at 826.

Accordingly, because Johnston has not identified any grounds upon which the Deed of Trust can be invalidated, and further amendment would be futile, Johnston's first counterclaim is dismissed without leave to amend.

C. Second Counterclaim: Negligent Misrepresentation against MERS, MERSCORP, NDSC, and Chase

1. MERS and MERSCORP

Johnston's second counterclaim alleges that MERS and MERSCORP misrepresented that MERS had the authority and right to conduct business in California on July 26, 2006, when the Deed of Trust was executed. (ACC ¶ 47.) In his Opposition, Johnston contends that this was a "misrepresentation that MERS and MERSCORP concede by admitting that MERS did not register as a corporation until 2010." (Opp'n, 11.)

In addition to advancing multiple meritorious arguments attacking the insufficiencies in Johnston's allegations of a negligent misrepresentation, MERS and MERSCORP assert that any possible claim for negligent misrepresentation is now barred by the statute of limitations. In California, a claim for negligent misrepresentation is subject to "either a two- or three-year statute of limitations." Fanucci v. Allstate Ins. Co., 638 F. Supp. 2d 1125, 1133 n.5 (N.D. Cal. 2009); see also Cal. Civ. Proc. Code

§ 338(d); id. § 339(1). Johnston first asserted his counterclaims on January 22, 2016. (See Docket No. 43.) Because Johnston's counterclaim concerns alleged misrepresentations made on or before July 26, 2006, when the Deed of Trust was executed, Johnston's counterclaim is now time barred.

To avoid this conclusion, Johnston asserts that "[s]o long as a person continues to commit wrongful acts in furtherance of a conspiracy to harm another, he can neither claim unfair prejudice at the filing of a claim against him nor disturbance of any justifiable repose built upon the passage of time." (Opp'n, 12 (citing Wyatt v. Union Mortg. Co., 598 P.2d 45, 53 (Cal. 1979).) Wyatt is distinguishable from the instant case because it concerned a properly alleged and proven claim for civil conspiracy, for which "the statute of limitations does not begin to run . . . until the 'last overt act' pursuant to the conspiracy has been completed." Wyatt, 598 P.2d at 53. Because Johnston's claim is for negligent misrepresentation, rather than civil conspiracy, the more applicable standard is that a "cause of action accrues when the claim is complete with all of its elements," including damages. Slovensky v. Friedman, 142 Cal. App. 4th 1518, 1528, 49 Cal. Rptr. 3d 60, 68 (2006); Platt Elec. Supply, Inc. v. EOFF Elec., Inc., 522 F.3d 1049, 1054 (9th Cir. 2008). Johnston alleges that MERS and MERSCORP's misrepresentations caused him to "enter[] a contract with MERS as a party and suffer[] harm and prejudice in having the real party in interest concealed from him." (ACC ¶ 51.) Therefore, Johnston's negligent misrepresentation claim began to accrue when he executed the Deed of Trust, and his claim against MERS and MERSCORP is barred by the statute of limitations.

Accordingly, Johnston's negligent misrepresentation counterclaim is dismissed without leave to amend as to MERS and MERSCORP.

2. Chase and NDSC

Although not entirely clear, Johnston's negligent misrepresentation claim against Chase and NDSC appears to be premised on the fact that, through the Notice of Default, Chase and NDSC have falsely represented that they have a valid interest under the Deed of Trust. (ACC ¶¶ 55-56.) "The elements of negligent misrepresentation are (1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage." Apollo Capital Fund, LLC v. Roth Capital Partners, LLC, 158 Cal. App. 4th 226, 243, 70 Cal. Rptr. 3d 199, 213 (2007). "Actual reliance occurs when a misrepresentation is an immediate cause of a plaintiff's conduct, which alters his legal relations, and when, absent such representation, the plaintiff would not, in all reasonable probability, have entered into the contract or other transaction." Beckwith v. Dahl, 205 Cal. App. 4th 1039, 1062-63, 141 Cal. Rptr. 3d 142, 161-62 (2012) (internal quotations and brackets omitted).

Johnston does not allege that he justifiably relied on the allegedly false representations contained in the Notice of Default. (See ACC ¶¶ 55-58.) To the contrary, Johnston asserts that he knows these statements to be false because he has quieted title to the Property. (See id. ¶¶ 83-86.) Johnston has not pleaded – and could not amend his ACC to plausibly allege – that he relied on these alleged

misrepresentations to enter into a course of conduct which caused him damage. See Beckwith, 205 Cal. App. 4th at 1062-63, 141 Cal. Rptr. 3d at 161-62. Accordingly, Johnston's negligent misrepresentation counterclaim is dismissed without leave to amend as to Chase and NDSC.

D. Third Counterclaim: Violation of 15 U.S.C. § 1641(g) against BNYM

Johnston's third counterclaim asserts that BNYM has violated the Truth in Lending Act ("TILA"), 15 U.S.C. § 1641(g). Counterdefendants assert that Johnston's TILA claim fails, inter alia, because it is time barred. Section 1641(g) requires a new creditor to provide a borrower notice of assignment of a mortgage within 30 days of the assignment. Any claim under § 1641(g) is subject to a one year statute of limitations running from the date of the alleged violation. See 15 U.S.C. § 1640(e); King v. Cal., 784 F.2d 910, 915 (9th Cir. 1986).

Johnston contends that his TILA claim is not time barred because it is unclear when BNYM acquired an interest under the Deed of Trust, and as a result it is also unclear when the statute of limitations began to accrue. However, the Corporate Assignment of Deed of Trust (Request for Judicial Notice in Support of Motion to Dismiss ACC ("RJN"), Ex. 2)[2/] shows that, by at least April 17, 2013, BNYM had acquired an interest under the Deed of Trust. As such, Johnston's TILA claim, filed more than two years later, is time barred.

The Court therefore dismisses Johnston's TILA claim without leave to amend.

E. Fourth Counterclaim: Breach of Contract and Estoppel against MERS, Chase, BNYM, and NDSC

Johnston's fourth counterclaim alleges that if the Deed of Trust is valid and the Quiet Title Default Judgment is invalid, Counterdefendants, with the exception of MERSCORP, breached the Deed

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[2/] Counterdefendants request judicial notice of four documents recorded in the Santa Barbara County Recorder's Office: the Deed of Trust, a Corporate Assignment of the Deed of Trust, a Substitution of Trustee, and a Notice of Default. When ruling on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court may consider documents not physically attached to the complaint if "the documents' authenticity is not contested and the plaintiff's complaint necessarily relies on them." Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001) (internal quotations and ellipsis omitted). The Court may also take judicial notice of matters of public record. Id. (citing Fed. R. Evid. 201). Except for the Deed of Trust, Johnston objects to the Court judicially noticing these documents because they contain inadmissible hearsay. However, the title documents which Johnston seeks to judicially notice are matters of public record which are the proper subject of judicial notice. Wise v. Wells Fargo Bank, N.A., 850 F. Supp. 2d 1047, 1057 (C.D. Cal. 2012); (Docket No. 26); see also Zamora v. PNC Bank, N.A., 2014 WL 3389106, at *8 (Cal. Ct. App. July 11, 2014) (unpublished). Accordingly, Counterdefendants' Request for Judicial Notice is granted.

of Trust by "failing to notify Johnston of his right to bring forth an action to dispute the default and any other defense he may have to the acceleration of the loan and sale of his property." (ACC ¶ 65.) Johnston asserts that this constitutes a breach of Paragraph 22 of the Deed of Trust, which provides:

> Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument . . . . The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further Inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale.

(FAC, Ex. A at 10.) Johnston alleges that Counterdefendants breached these contractual provisions and are now estopped from taking any further acts until they discharge their notice obligation. (Opp'n, 15.)

To state a claim for breach of contract, Johnston must allege "the contract, plaintiffs' performance (or excuse for nonperformance), defendant's breach, and damage to plaintiff therefrom." Gautier v. General Tel. Co., 234 Cal. App. 2d 302, 305, 44 Cal.Rptr. 404, 406 (1965). "Causation of damages in contract cases requires that the damages be proximately caused by the defendant's breach." St. Paul Fire & Marine Ins. Co. v. Am. Dynasty Surplus Lines Ins. Co., 101 Cal. App. 4th 1038, 1060, 124 Cal. Rptr. 2d 818, 834 (2002). To be actionable, contractual damages must constitute something more than nominal damages. Buttram v. Owens Corning Fiberglas Corp., 941 P.2d 71, 77 n.4 (Cal. 1997).

Johnston has not alleged facts demonstrating that Counterdefendants breached the notice provision contained in the Deed of Trust. The Notice of Default contains all of the provisions required by the Deed of Trust. (See RJN, Ex. 4.) Moreover, to the extent that Johnston's counterclaim is limited to the contention that he never actually received the Notice of Default (ACC ¶ 67), this is insufficient to state a claim for breach of contract. Paragraph 15 of the Deed of Trust provides that "[a]ny notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means." (FAC, Ex. A at 8.) This clause creates a crucial distinction in what Johnston must plead to allege a breach of contract. See Roman v. Wells Fargo Bank, 143 So. 3d 489, 490 (Fla. Dist. Ct. App. 2014) (collecting cases).

Additionally, Johnston does not allege any damages which have been caused by his failure to receive the notice required by Paragraph 22. Nor does Johnston allege that he would have cured the amount he was in arrears had he been given notice. Cf. Siqueiros v. Fed. Nat. Mortgage Ass'n, No.

EDCV 13-01789 VAP, 2014 WL 3015734, at *5 (C.D. Cal. June 27, 2014). And, because no foreclosure sale has yet taken place, the Court finds that it would be futile to grant Johnston leave to amend to attempt to plead damages caused by the lack of notice. Accordingly, Johnston's fourth counterclaim for breach of contract is dismissed without leave to amend.

F. Fifth and Sixth Counterclaims

Johnston's Fifth, and Sixth claims are for cancellation of instruments and slander of title. Both claims are premised on the validity of the Quiet Title Default Judgment and assert, as legal wrongs, actions taken by Counterdefendants which are inconsistent with Johnston's Quiet Title Default Judgment. (See ACC ¶¶ 75, 88.) Despite having pleaded legal conclusions to the contrary, Johnston has not pleaded facts demonstrating that the Quiet Title Default Judgment is valid against Counterdefendants.

A quiet title action may be brought "to establish title against adverse claims to real or personal property or any interest therein." Cal. Civ. Proc. Code § 760.020. As such, a plaintiff in a quiet title action must "name as defendants in the action the persons having adverse claims to the title of the plaintiff against which a determination is sought." Id. § 762.010. Although a plaintiff may also elect to "name as defendants 'all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title, or any cloud upon plaintiff's title thereto,'" Id. § 762.060(a), this does not limit his duty to "name as defendants the persons having adverse claims that are of record or known to the plaintiff or reasonably apparent from an inspection of the property." Id. § 762.060(b).

Here, it is undisputed that the Deed of Trust provides that "Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument." (FAC, Ex. A at 2.) In construing identical language in a deed of trust, at least one court in the Central District has found that MERS was required to be named in any quiet title action initiated by the Borrower, and that the failure to do so voids any judgment obtained in MERS's absence. E.g., Mortgage Elec. Registration Sys., Inc. v. Robinson, No. CV 13-7142 PSG (ASx), 2015 WL 993319, at *5-8 (C.D. Cal. Feb. 27, 2015) (motion for summary judgment); see also Mortgage Elec. Registration Sys. v. Robinson, 45 F. Supp. 3d 1207, 1211 (C.D. Cal. 2014) (motion for judgment on the pleadings). The Court previously relied on Robinson to deny Johnston's motion to dismiss Counterdefendants' claim for quiet title. (Docket No. 39 at 11-12.)

Robinson is nearly identical to the present case. There, as here, an individual obtained a default state court quiet title judgment after failing to name MERS as a defendant, despite the fact that MERS was listed as a beneficiary under the deed of trust. Robinson, 45 F. Supp. 3d at 1208-09. When deciding whether MERS was entitled to be named in the quiet title action, the court reasoned that "[w]hatever the

full scope of MERS's rights and interests under the [deed of trust], it can hardly be disputed that by those provisions MERS made some adverse 'claim' against Defendants' title." Id. at 1121. Thereafter, on the basis of the failure to name MERS as a defendant, the Robinson court held the offending default quiet title judgment null and void. Robinson, 2015 WL 993319 at *9. The Court therefore finds, as a matter of law, that in order for the Quiet Title Default Judgment to be valid as to MERS, Johnston was required to name MERS as a defendant in the quiet title action. As a result, Johnston's ACC fails to plead facts demonstrating that the Quiet Title Default Judgment was valid. Because Johnston's fifth and sixth counterclaims are predicated on the validity of the Quiet Title Default Judgment, the Court dismisses Johnston's fifth and sixth counterclaims without leave to amend.[3/]

H. Seventh Counterclaim: Violation of California Homeowner Bill of Rights against Counterdefendants

Johnston's seventh counterclaim asserts that, in the event the Quiet Title Default Judgment is found to be void, Counterdefendants violated the California Homeowner Bill of Rights ("HBOR"). (ACC ¶ 103.) Specifically, Johnston asserts that when NDSC recorded the Notice of Default on behalf of Chase, it failed to include a declaration of any attempts to discuss alternatives to foreclosure in violation of California Civil Code § 2923.5, and failed to review competent evidence to substantiate Johnston's debt before recording the Notice of Default in violation of California Civil Code §§ 2924.17(a) and (b). (Id.) Johnston asserts that he is entitled to compensatory and statutory damages for these violations. (Id. ¶ 110.) Johnston's HBOR claim, which is asserted against Counterdefendants, does not allege any action by parties other than NDSC or Chase. (See id. ¶¶ 103-110.)

[3/] Johnston's counterclaim for slander of title fails for the additional reason that Johnston has failed to plead facts plausibly demonstrating the required elements of the claim. The tort of slander of title requires "publication, falsity, absence of privilege, and disparagement of another's land which is relied upon by a third party and which results in a pecuniary loss." Smith v. Commonwealth Land Title Ins. Co., 177 Cal. App. 3d 625, 630, 223 Cal. Rptr. 339, 342 (1986). Johnston has alleged only in the most conclusory terms that a third party has relied on the alleged slander which has resulted in a pecuniary loss to Johnston, and that he has been damaged because of the cloud upon his title. (ACC ¶¶ 93-94.) These allegations are insufficient to state a claim. Frazier v. Aegis Wholesale Corp., No. C-11-4850 EMC, 2011 WL 6303391, at *9 (N.D. Cal. Dec. 16, 2011) ("Simply because Plaintiffs have a cloud on their title and that have incurred expenses to clear title is not sufficient."). Additionally, under California Civil Code §§ 47(c) and 2924(d), Johnston has not shown that the alleged slander was made in the absence of privilege. Even at the pleading stage, Johnston must plausibly allege that Counterdefendants acted with malice to overcome the § 47(c) qualified privilege. See Consumer Sols. Reo, LLC v. Hillery, 658 F. Supp. 2d 1002, 1018 (N.D. Cal. 2009); Frazier, 2011 WL 6303391 at *8. The conclusory allegations of Johnston's ACC (See ACC ¶ 92) fail to meet this burden.

1. California Civil Code § 2923.5

California Civil Code § 2923.5(b) requires a notice of default to "include a declaration that the mortgage servicer has contacted the borrower, [or] has tried with due diligence to contact the borrower as required by this section . . . ." Cal. Civ. Code § 2923.5(b). Counterdefendants' Motion to Dismiss points out that the Notice of Default contains the required declaration. (See RJN, Ex. 4 at 3.) Johnston's Opposition asserts that Counterdefendants' Request for Judicial Notice "does not make their false statements true." (Opp'n, 19.) However, even if the contents of NDSC's declaration is untrue, the plain text of § 2923.5 requires nothing more than for a notice of default to include the required declaration. Because the Notice of Default indisputably includes the required declaration, Johnston's HBOR claim under § 2923.5(b) is dismissed without leave to amend.

2. California Civil Code § 2924.17

California Civil Code § 2924.17(a) requires any notice of default, notice of sale, assignment of a deed of trust, or substitution of trustee to be "accurate and complete and supported by competent and reliable evidence." In turn, California Civil Code § 2924.17(b) requires the mortgage servicer to "ensure that is has reviewed competent and reliable evidence to substantiate the borrower's default and the right to foreclose, including the borrower's loan status and loan information." Johnston's ACC alleges that "the Notice of Default by a party claiming to be the Trustee for a party that is not the owner of the debt cannot be based on competent or reliable evidence." (ACC ¶ 107.)

A prerequisite to bringing a claim for damages under the HBOR is the recording of a trustee's deed upon sale. See Cal. Civ. Code § 2924.12(b). Johnston has not alleged that a trustee's deed upon sale has been recorded, and therefore his claim for damages under §§ 2924.17(a) and (b) is deficient at this time. The Court therefore dismisses Johnston's HBOR claim for damages without prejudice.

I. Eighth Counterclaim: Violation of Bus. & Prof. Code § 17200 against Counterdefendants

Johnston's eighth counterclaim asserts that Counterdefendants violated California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, by engaging in a variety of deceptive business practices, such as: recording forged and false instruments into to the official land records, encouraging lenders to conceal themselves from borrowers through the use of MERS, concealing purchases of mortgage debts in violation of TILA, and by representing nonexistent real estate mortgage investment conduits by accepting late assignments. (ACC ¶¶ 114-118.)

Counterdefendants contend that Johnston lacks standing to assert a UCL claim. California's UCL prohibits "any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. To establish standing under the UCL, Johnston must:

(1) establish a loss or deprivation of money or property sufficient to

> qualify as injury in fact, i.e., economic injury, and (2) show that that economic injury was the result of, i.e., caused by, the unfair business practice or false advertising that is the gravamen of the claim.

Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 322, 120 Cal. Rptr. 3d 741, 750 (2011); see also Cal. Bus. & Prof. Code § 17204 ("Actions for relief . . . shall be prosecuted . . . by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition."). "[A] plaintiff alleging unfair business practices under the unfair competition statutes must state with reasonable particularity the facts supporting the statutory elements of the violation." Fortaleza v. PNC Fin. Servs. Grp., Inc., 642 F. Supp. 2d 1012, 1019 (N.D. Cal. 2009) (quoting Silicon Knights, Inc. v. Crystal Dynamics, Inc., 983 F. Supp. 1303, 1316 (N.D. Cal. 1997)).

Here, Johnston does not allege specific conduct by Counterdefendants that proximately caused an economic injury to him. Although Johnston attempts to point to a diminution in value of the subject property's value, the unmarketability of his title, his diminished credit score, and attorneys' fees that he has incurred, each of these asserted economic injuries were caused by Johnston's default, rather than by actions taken by Counterdefendants. See Duenas v. Ocwen Loan Servicing, LLC, No. 1:14-CV-00406-JLT, 2014 WL 4627203, at *14 (E.D. Cal. Sept. 16, 2014); DeLeon v. Wells Fargo Bank, N.A., No. 10-CV-01390-LHK, 2011 WL 311376, at *7 (N.D. Cal. Jan. 28, 2011) ("Although the Court understands Plaintiffs' frustrations with Wells Fargo's seemingly contradictory statements and actions, it does not appear that this conduct resulted in a loss of money or property."). Additionally, to the extent Johnston's UCL counterclaim is predicated on violations of TILA or the HBOR, his derivative UCL claim also fails. See Aleksick v. 7-Eleven, Inc., 205 Cal. App. 4th 1176, 1185, 140 Cal. Rptr. 3d 796, 801 (2012).

Accordingly, Johnston's UCL counterclaim is dismissed without leave to amend.

J. Ninth Counterclaim: RICO and Civil Conspiracy against Counterdefendants

Johnston's ninth counterclaim asserts that Counterdefendants have violated RICO, 18 U.S.C. § 1961. To state a claim for a civil RICO violation, a complaint must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Resolution Trust Corp. v. Keating, 186 F.3d 1110, 1117 (9th Cir. 1999). Conspiracy and RICO allegations are subject to the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). See Tatung Co. v. Shu Tze Hsu, 43 F. Supp. 3d 1036, 1060 (C.D. Cal. 2014). In the Ninth Circuit, courts must "'strive to flush out frivolous RICO allegations at an early stage of the litigation.'" Wagh v. Metris Direct, Inc., 348 F.3d 1102, 1108 (9th Cir.), overruled on other grounds by Odom v. Microsoft Corp., 486 F.3d 541 (9th Cir. 2007) (quoting Figueroa Ruiz v. Alegria, 896 F.2d 645, 650 (1st Cir. 1990)).

As Counterdefendants point out, Courts routinely dismiss, without leave to amend, RICO claims asserted against banks and other mortgage processing entities premised on improper and illegal transfers of deeds of trust and false notices of default. See e.g., Bergman v. Bank of Am., No. C-13-00741 JCS, 2013 WL 5863057, at *29-30 (N.D. Cal. Oct. 23, 2013) (collecting cases). Johnston's ACC alleges

racketeering activity in only the most conclusory of terms (see ACC ¶ 131) and more generally falls far short of plausibly alleging a RICO claim under Rule 9(b)'s heightened pleading requirements. Accordingly, Johnston's RICO claim is dismissed without leave to amend.

III. Motion for Leave to File a Second Amended Complaint

Rule 15 of the Federal Rules of Civil Procedure mandates that leave to amend "be freely given when justice so requires." Fed. R. Civ. P. 15(a). "This policy is to be applied with extreme liberality." Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003) (quotation omitted). In deciding whether to grant leave, it is proper for the district court to consider: (1) whether amendment will prejudice the amending party's adversary; (2) whether the amending party has delayed unnecessarily in requesting leave; (3) whether the allegations to be added would be futile or frivolous; (4) whether the addition of the new claims would "greatly change the nature of the litigation"; and (5) whether the party seeking leave has acted in bad faith. Schlacter-Jones v. General Telephone, 936 F.2d 435, 443 (9th Cir. 1991); Hughes Aircraft Co. v. National Semiconductor Corp., 857 F. Supp. 691, 701 (N.D. Cal. 1994). "Not all of the[se] factors merit equal weight. [Rather], it is the consideration of prejudice to the opposing party that carries the greatest weight." Eminence Capital, 316 F.3d at 1052 (citing DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 185 (9th Cir. 1987)). "The party opposing amendment bears the burden of showing prejudice." DCD Programs, 833 F.2d at 187. "Absent prejudice, or a strong showing of any of the remaining . . . factors, there exists a presumption under Rule 15(a) in favor of granting leave to amend." Eminence Capital, 316 F.3d at 1052.

Plaintiffs' request for leave to amend is timely under the Court's Scheduling Order. (See Docket No. 77.) Plaintiffs seek to amend their Complaint to add Equity Holdings Corporation, as Trustee for the Popagie Trust Dated December 20, 2010 ("Equity") as a defendant, and to remove MERSCORP as a plaintiff. Plaintiffs assert that Equity should be joined as a defendant in this action because Johnston executed a grant deed to the Property in its favor, and it may therefore claim an interest in the Property. Plaintiffs also assert that MERSCORP should be removed as a plaintiff because it simplifies the proceedings given that all of MERSCORP's claims for relief are premised on violations of MERS' statutory and constitutional rights.

The Court finds that Plaintiffs have neither delayed unnecessarily in requesting leave nor acted in bad faith, and that the proposed amendments would not be futile, frivolous, or greatly change the nature of the litigation. Finally, and most importantly, as demonstrated by his failure to oppose this motion, Johnston will not be prejudiced by the proposed amendment. See DCD Programs, 833 F.2d at 187.[4/] Accordingly, Plaintiffs' Motion for Leave to File a Second Amended Complaint is granted.

[4/] Johnston's failure to oppose the Motion for Leave to Amend is an independent and sufficient ground to grant the Motion. See L.R. 7-12 ("The failure to file any required document, or the failure to file it within the deadline, may be deemed consent to the granting or denial of the motion . . . .").

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 15-4853 PA (GJSx)	Date	November 22, 2016
Title	Mortgage Electronic Registration Systems Inc., et al. v. Timothy J. Johnston		

Conclusion

Based on the foregoing, the Court grants Counterdefendants' Motion to Dismiss and Plaintiffs' Motion for Leave to File a Second Amended Complaint. Plaintiffs are ordered to file a Second Amended Complaint by no later than November 29, 2016. All dates in the Court's Scheduling Order remain in effect.[5/]

IT IS SO ORDERED.

[5/] Johnston's Request for Judicial Notice (Docket No. 67-2) is denied as moot.

Miller, Lynette

From: cacd_ecfmail@cacd.uscourts.gov
Sent: Tuesday, November 22, 2016 3:31 PM
To: ecfnef@cacd.uscourts.gov
Subject: Activity in Case 2:15-cv-04853-PA-GJS Mortgage Electronic Registration Systems Inc et al v. Timothy J. Johnston Order on Motion to Dismiss

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UNITED STATES DISTRICT COURT for the CENTRAL DISTRICT OF CALIFORNIA

Notice of Electronic Filing

The following transaction was entered on 11/22/2016 at 1:30 PM PST and filed on 11/22/2016
Case Name: Mortgage Electronic Registration Systems Inc et al v. Timothy J. Johnston
Case Number: 2:15-cv-04853-PA-GJS
Filer:
Document Number: 118

Docket Text:
MINUTES (IN CHAMBERS) by Judge Percy Anderson: Court grants Counterdefendants' Motion to Dismiss [64] and Plaintiffs' Motion for Leave to File a Second Amended Complaint [82]. Plaintiffs are ordered to file a Second Amended Complaint by no later than November 29, 2016. All dates in the Court's Scheduling Order remain in effect. See document for details. (smo)

2:15-cv-04853-PA-GJS Notice has been electronically mailed to:

David D Piper david.piper@kyl.com, karen.stone@kyl.com

JoAnn T Sandifer derek.wiseman@huschblackwell.com, petrina.bailey@huschblackwell.com, joann.sandifer@huschblackwell.com, lynette.miller@huschblackwell.com

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