APPENDICES

APPENDIX A
March 15, 2019, Order of the
U.S. District Court, Central District of California,
case no. 18-CV-00409

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CENTRAL DIVISION

SEPIDEH CIRINO, an individual; THE CIRINO FAMILY TRUST, an Irrevocable Trust PLAINTIFFS, vs. OCWEN LOAN SERVICING , LLC; WESTERN PROGRESSIVE, LLC; WELLS FARGO BANK, N.A., as Trustee for holders of IMPAC SECURED ASSETS CORP. MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2004-4; ALL PERSONS UNKNOWN CLAIMING ANY LEGAL OR EQUITABLE RIGHT, TITLE, ESTATE, LIEN OR INTEREST IN THE	Case No.: SA CV 18-00409 DOC (JDEx) ORDER

PROPERTY DESCRIBED IN THE COMPLAINT ADVERSE TO PLAINTIFFS' TITLE, OR ANY CLOUD ON PLAINTIFFS' TITLE THERETO; AND DOES 1-10 inclusive,

DEFENDANTS.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 18-0409-DOC (JDEx) Date: March 15, 2019

Title: SEPIDEH CIRINO, ET AL V. OCWEN LOAN SERVICING LLC, ET AL.

PRESENT:

THE HONORABLE DAVID O. CARTER, JUDGE

Deborah Lewman Not Present

Courtroom Clerk Court Reporter

ATTORNEYS PRESENT FOR

PLAINTIFF:

None Present

ATTORNEYS PRESENT FOR

DEFENDANT:

None Present

PROCEEDINGS (IN CHAMBERS): ORDER GRANTING DEFENDANTS

OCWEN LOAN SERVICING LLC,

WELLS FARGO BANK, N.A., AND

WESTERN PROGRESSIVE LLC'S

MOTION TO DISMISS [25]

Before the Court are Ocwen Loan Servicing, LLC ("Ocwen"), Wells Fargo Bank,N.A. ("Wells Fargo"), and Western Progressive, LLC's ("Western Progressive") (collectively, "Defendants") Motion to Dismiss First Amended Complaint Pursuant to Rule 12(b)(6) ("Motion") (Dkt. 25). The Court finds this matter appropriate for resolution without oral argument. See Fed. R. Civ. P. 78; L.R. 7–15. Having considered the papers in support of and in opposition to the Motion, the Court GRANTS IN PART WITH PREJUDICE AND GRANTS IN PART WITHOUT PREJUDICE the Motion.

I. Background

A. Facts

The Court adopts the facts as set out by Plaintiff Sepideh Cerino ("Plaintiff"), as an individual and as the trustee for the Cirino Family Trust, in the First Amended Complaint ("FAC") (Dkt. 23).

Page 2

Plaintiff has possessory interest in the real property located at 27495 Hidden Trail Road, Laguna Hills, California, 92653-5875 (the

"Property"). FAC ¶ 1. On or about October 29, 2004, Plaintiff and her husband John Cirino executed a promissory note ("Note") on the Property in the amount of $1,320,000.00. FAC ¶ 29. This Note was to secure a loan ("Loan") from Alliance Bancorp on behalf of GMAC Mortgage, LLC, and funded as part of a trust for which Defendant Wells Fargo, N.A. is trustee. FAC ¶ 30. On or about October 29, 2004, a deed of trust ("Deed") was executed in the names of John Cirino and Plaintiff in the amount of $1,320,000.00. FAC ¶ 31. On or about October 29, 2004, Plaintiff and her husband executed a grant deed conveying the Property to the Cirino Family Trust ("Trust"). FAC ¶ 35.

Plaintiff alleges that the Note was discharged in multiple ways. First, Plaintiff alleges that the Note was "discharged by the Secretary of Treasury as authorized by 12 U.S.C. § 5211 as the Note was a troubled asset." FAC ¶ 32.

Plaintiff also alleges that the Note was discharged in bankruptcy proceedings pursuant to 11 U.S.C. § 524. FAC ¶ 33. On or about February 27, 2012, Plaintiff's husband received a discharge of his Chapter 7 Bankruptcy, and Plaintiff alleges that the Note was discharged as to him at this time. FAC ¶¶ 36, 38. On or about December 21, 2012, Plaintiff received a discharge of her Chapter 7 Bankruptcy, case number 8:11-bk22081-MW, and Plaintiff alleges that the Note was discharged as to her at this time. FAC ¶¶ 37, 39. Plaintiff alleges that at the time of her discharge, the Note "ceased to exist" and "[o]nly the Deed remains in effect." FAC ¶ 40.

In June 2014, John Cirino passed away, and at that time, the Trust became irrevocable. FAC ¶

50. On November 14, 2016, Defendant Western caused to be recorded a Notice of Default ("NOD") and Election to Sell under the Deed of Trust. FAC ¶ 51. The NOD stated that the delinquency amount for the Property was $501,728.00 as of November 25, 2016. FAC ¶ 51. The NOD included a Debt Validation Notice ("DVN") stating the reinstatement amount was "$1,351,485.55 plus interest from 08/01/2010." FAC ¶ 52. The NOD stated this amount included the original sum of $1,320,000.00, plus interest and late charges, and also informed Plaintiff she was "responsible to pay all payments and charges due under the terms and conditions of the loan documents which come due subsequent to the date of this notice including, but not limited to, foreclosure trustee fees and costs, advances and late charges." FAC ¶ 53. The DVN also stated Defendants Ocwen and Western were "attempting to collect a debt, and any information [they obtained would] be used for that purpose." FAC ¶ 57.

On April 7, 2017, Defendants recorded a Notice of Trustee Sale, no. 2017000139885, and a trustee sale of the Property was calendared for May 25, 2017.

Page 3

FAC ¶ 59. The Notice of Trustee Sale stated the total "unpaid balance of the obligation secured by the property...is $1,792,486.20." FAC ¶ 60. Defendants later continued the Trustee Sale to March 23, 2018, and served Plaintiff with a new Notice of Trustee Sale listing the total obligation as $1,804,184.99. FAC ¶ 66.

B. Procedural History

Plaintiff filed the Complaint (Dkt. 1) on March 14, 2018 against Ocwen Loan Servicing, LLC, Wells Fargo Bank, N.A., Western Progressive, LLC, All Persons Unknown Claiming, and Does 1 through 10, inclusive. Plaintiff filed an Ex Parte Application for Order Enjoining a Trustee Sale (Dkt. 8) on March 19, 2018, but withdrew the Application (Dkt. 13) on March 21, 2018.

On April 10, 2018, Defendants Ocwen Loan Servicing, LLC and Wells Fargo Bank, N.A. filed a Motion to Dismiss the Complaint Pursuant to Fed. Rule Civ. Pro. 12(b)(6) (Dkt. 16). Plaintiff filed the instant FAC on April 23, 2018 (Dkt. 23). As such, the Court Denied as Moot Defendants Ocwen and Wells Fargo's Motion to Dismiss (Dkt.24) on April 25, 2018.

Plaintiff's First Amended Complaint ("FAC") (Dkt. 23) asserts the following

fifteen claims:

(1) violation of 11 U.S.C. § 524;

(2) violation of 12 U.S.C. § 5211;

(3) violation of the Fair Debt Collection Practices Act;

(4) negligence;

(5) intentional misrepresentation;

(6) negligent misrepresentation;

(7) fraudulent concealment;

(8) constructive fraud;

(9) civil conspiracy;

(10) defamation;

Page 4

(11) intentional infliction of emotional distress;

(12) negligent infliction of emotional distress;

(13) quiet title;

(14) violation of California Business & Professions Code § 17200 et seq.; and

(15) demand for an accounting.

See generally FAC.

Defendants Ocwen Loan Servicing, LLC, Wells Fargo, N.A., and Western Progressive, LLC (collectively, "Defendants") filed the instant Motion to Dismiss ("Motion") (Dkt. 25) on May 4, 2018. Plaintiff opposed ("Opposition") (Dkt. 30) on May 21, 2018, and Defendants replied ("Reply") (Dkt. 32) on May 29, 2018.

Plaintiff filed two additional Ex Parte Applications for Temporary Restraining Order to Enjoin Trustee Sale on May 14, 2018 (Dkt. 26) and June 21, 2018 (Dkt. 35), both of which the Court denied (Dkt. 29, Dkt. 40).

On June 28, 2018, Plaintiff filed a Notice of Filing Bankruptcy (Dkt. 41), and the Court accordingly stayed the action (Dkt. 42).

On November 16, 2018, Defendants filed a Request to Reopen Case and Decide Motion to Dismiss Under Submission (Dkt. 43), as Plaintiff had requested a voluntary dismissal of her Chapter 13 case. The Court Granted Defendants' Request

(Dkt. 44) and reopened the case on November 19, 2018.

On November 28, 2018, Plaintiff filed a Supplemental Declaration in Support of Plaintiff's Opposition ("Supplemental Declaration") (Dkt. 46) and on November 30, 2018, Defendants filed an Objection to the Supplemental Declaration ("Objection") (Dkt.47).

On February 25, 2019, Plaintiff filed a second Notice of Filing Bankruptcy (Dkt.49), and the Court again stayed the action accordingly (Dkt. 50). On March 4, 2019, Defendants filed a second Request to Reopen Case (Dkt. 51). The Court lifted the stay and granted Defendants' Request to Reopen Case (Dkt. 52) on March 6, 2019, finding that, under 11 U.S.C. § 362(c)(3)(A), the stay should terminate 30 days after Plaintiff filed the second bankruptcy petition.

Page 5

II. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a complaint must be dismissed when a plaintiff's allegations fail to set forth a set of facts that, if true, would entitle the complainant to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v.Iqbal*, 556 U.S. 662, 679 (2009) (holding that a claim must be facially plausible in order to survive a motion to dismiss). The pleadings must raise the right to relief beyond the speculative level; a plaintiff must provide "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 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). On a motion to dismiss, a court

accepts as true a plaintiff's well-pleaded factual allegations and construes all factual inferences in the light most favorable to the plaintiff. See *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). A court is not required to accept as true legal conclusions couched as factual allegations. *Iqbal*, 556 U.S. at 678.

In ruling on a motion to dismiss, the court need not accept as true allegations contradicted by judicially noticeable facts, see Schwarz v. United States, 234 F.3d 428, 435 (9th Cir. 2000), and it "may look beyond the plaintiff's complaint to matters of public record" without converting the motion into a motion for summary judgment. *Shaw v. Hahn*, 56 F.3d 1128, 1229 n.1 (9th Cir. 1995).

When a motion to dismiss is granted, the court must decide whether to grant leave to amend. The Ninth Circuit has a liberal policy favoring amendments and, thus, leave to amend should be freely granted. See, e.g., *DeSoto v. Yellow Freight System, Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). However, a court need not grant leave to amend when permitting a plaintiff to amend would be an exercise in futility. See, e.g., *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("Denial of leave to amend is not an abuse of discretion where the pleadings before the court demonstrate that further amendment would be futile.").

III. Requests for Judicial Notice

Defendants ask the Court to take judicial notice of the following documents:

A. "Discharge of Debtor Ch. 7," filed in United States Bankruptcy Court, Central District of California, on February 22, 2012, Case No. 8:11-bk22081-MW.

B. "Notice of Motion and Motion for Relief from the Automatic Stay under 11 U.S.C. § 362 (with Supporting Documents) Regarding Real Property," filed

Page 6

in United States Bankruptcy Court, Central District of California, on October 18, 2011, Case No. 8:11-bk-22081-MW.

C. "Order Granting in Part Motion for Relief from the Automatic Stay under 11 U.S.C. § 362 (Real Property)," filed in United States Bankruptcy Court, Central District of California, on November 22, 2011, Case No. 8:11-bk22081-MW.

D. Deed of Trust, recorded with the Orange County Recorder, Document No. 2004000976411, recorded October 29, 2004.

E. Complaint filed by Plaintiffs Sepideh Cirino and the Cirino Family Trust on October 31, 2017, Case No. 30-2017-00948886 in the Superior Court of the State of California for the County of Orange.

Request for Judicial Notice ("RJN") (Dkt. 25-2).

Judicial notice is a court's recognition of the existence of a fact without the necessity of formal proof. See *Castillo–Villagra v. I.N.S.*, 972 F.2d 1017, 1026 (9th Cir. 1992). Under Federal Rule of Evidence 201, a court may take judicial notice of court filings and other matters of public record.

Harris v. Cnty. of Orange, 682 F.3d 1126, 1132 (9th Cir. 2012) (noting that a court may take judicial notice of "undisputed matters of public record"); see also *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746, n.6 (9th Cir. 2006) (taking judicial notice of pleadings, memoranda, and other court filings). A court can also appropriately take judicial notice of copies of "records and reports of administrative bodies," *U.S. v. Richie*, 342 F.3d 903, 908 (9th Cir. 2003), as well as legislative history. **Anderson v. Holder**, 673 F.3d 1089, 1094, n.1 (9th Cir. 2012). The Court does not, however, take judicial notice of reasonably disputed facts contained within the judicially-noticed documents. See *Lee v. City of L.A.*, 250 F.3d 668, 688–89 (9th Cir. 2001).

As the above documents in Defendants' RJN fall into the aforementioned categories, the Court GRANTS Defendants' Request for Judicial Notice.

IV. Discussion

In the instant Motion, Defendants ask the Court to dismiss all of Plaintiff's claims in the First Amended Complaint for failure to state a claim pursuant to Rule 12(b)(6). See generally Mot. The Court examines each of Plaintiff's fifteen claims in turn.

Page 7

A. First Claim for Violation of 11 U.S.C. § 524

Plaintiff's first claim argues that Plaintiff's obligation under the Note was discharged in bankruptcy proceedings, and thus that Defendants violated 11 U.S.C. § 524 in attempting to collect on discharged debt. FAC ¶¶ 77–116.

"It is well settled that valid, perfected liens and other secured interests pass through bankruptcy unaffected." *In re Marriage of Walker*, 240 Cal. App. 4th 986, 994 (2015) (citations omitted). "[A] bankruptcy discharge extinguishes only one mode ofenforcing a claim—namely, an action against the debtor in personam—while leaving intact another—namely, an action against the debtor in rem." *Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991). "Even after the debtor's personal obligations have been extinguished, the creditor still retains a 'right to payment' in the form of its right to the proceeds from the sale of the debtor's property." *Id.*

Here, the discharge of Plaintiff's Chapter 7 Bankruptcy states: "a creditor may have the right to enforce a valid lien, such as a mortgage or security instrument . . . if that lien was not avoided or eliminated in the bankruptcy case." See RJN, Discharge of Debtor Ch. 7, filed in United States Bankruptcy Court, Central District of California, on February 22, 2012, Case No. 8:11-bk-22081-MW (Dkt. 25-3). The instant the Deed of Trust was not eliminated in the bankruptcy case; the Bankruptcy Court's November 22, 2011 Order (Dkt. 25-5) specifically exempts the debts relating to the Property from discharge, and notes that "[m]ovant may enforce its remedies to foreclose upon and obtain possession of the Property in accordance with applicable nonbankruptcy law, but may not pursue any deficiency claim against the Debtor or property of the estate..." See RJN, Exh. C. (25-5) [Fn 1: Further, as the Court noted in its May 18, 2018 Order Denying Plaintiff's Ex Parte Application for Temporary Restraining Order ("May 18 Order") (Dkt. 29), "Plaintiff has not demonstrated that the

bankruptcy discharge extinguishes Defendants' ability to pursue foreclosure on the secured interest in this case." May 18 Order at 10].

Accordingly, Plaintiff cannot succeed on a claim pursuant to 11 U.S.C. § 524, as the lien "pass[ed] through bankruptcy unaffected." *In re Marriage of Walker*, 240 Cal. App. 4th at 994.

Accordingly, the Court DISMISSES WITH PREJUDICE Plaintiff's first claim for violation of 11 U.S.C. § 524.

B. Second Claim for Violations of 12 U.S.C. § 5211

Plaintiff's second claim alleges that, during the financial crisis in 2008, the Emergency Economic Stabilization Act ("EESA"), 12 U.S.C. §§ 5201–5261, which

includes the Troubled Asset Relief Program ("TARP"), discharged all promissory notes for all troubled assets the United States, including Plaintiffs' Note, and that Defendants are violating the EESA by seeking to collect on this discharged debt. FAC ¶¶ 10–15,117–35.

The "EESA, including various programs created under it . . . has been consistently construed to create no private rights or private causes of action on the part of borrowers." *Bank of Am., N.A. v. Roberts*, 217 Cal. App. 4th 1386, 1399 (2013) (citing *Miller v. Chase Home Finance, LLC* 677 F.3d 1113, 1116 (11th Cir. 2012); *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 559 n.4 (7th Cir. 2012); *Lucia v. Wells Fargo Bank, N.A.*, 798 F. Supp. 2d 1059,

1070–71 (N.D. Cal. 2011)). Thus, Plaintiff cannot prevail on a claim against Defendants under the EESA.

Accordingly, the Court DISMISSES WITH PREJUDICE Plaintiff's second claim for violation of 12 U.S.C. § 5211.

C. Third Claim for Violation of the Fair Debt Collection Practices Act

Defendants argue that Plaintiff's third claim for violation of the Fair Debt Collection Practices Act ("FDCPA") must be dismissed because the activities of loan servicers and lenders in the foreclosing of a home does not constitute "debt collection" per the FDCPA. Motion at 9. Plaintiff argues the FDCPA allows for causes of action against debt collectors. Opp'n at 8–9.

Ninth Circuit precedent makes clear that Defendants are subject to 15 U.S.C. §1692f(6) of the FDCPA. See *Dowers v. Nationstar Mortg., LLC*, 852 F.3d 964, 971 (9th Cir. 2017). The Dowers court explained:

"Unlike under [15 U.S.C. §§] 1692c(a)(2), 1692d, and 1692e, the definition of debt collector under Section 1692f(6) includes a person enforcing a security interest. 15 U.S.C. § 1692a(6). Section 1692f(6) regulates more than just the collection of a money debt. It prohibits:

[t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest; (B) there is

no present intention to take possession of the property; or (C) the property is exempt by law from such dispossession or disablement. 15 U.S.C. § 1692f(6) . . . . Section 1692f(6) regulates nonjudicial foreclosure activity. . . . Here, Plaintiffs alleged that [the mortgage servicer] threatened to take

Page 9

non-judicial action to dispossess Plaintiffs of their home without a legal ability to do so. Such conduct is exactly what Section 1692f(6) protects borrowers against. As a result, the district court should not have dismissed Count Four on the ground that [the mortgage servicer] was engaging in conduct related to non-judicial foreclosure."

Dowers, 852 F.3d at 971. Still, while the FDCPA "regulates security interest enforcement activity, it does so only through Section 1692f(6). As for the remaining FDCPA provisions, 'debt collection' refers only to the collection of a money debt." *Dowers*, 852 F.3d at 970 (citing *Ho v. ReconTrust Co., N.A.*, 840 F.3d 618, 621 (9th Cir. 2016)). Under these remaining FDCPA provisions, as the object of a nonjudicial foreclosure sale is to retake and resell the security and not to collect money from the borrower, actions taken to facilitate a non-judicial foreclosure "are not attempts to collect 'debt.'" *Ho v. ReconTrust*, 840 F.3d at 621.

Defendants' actions thus do not constitute "debt collection" within its meaning under the FDCPA, and Plaintiff's third claim as under Sections 1692c and Section 1692d of the FDCPA necessarily fails [FN 2: The Court construes Plaintiff's third claim in the FAC as, in part, under Sections 1692(c)

and 1692(d)]. In contrast, the FDCPA could prohibit Defendants from conducting a nonjudicial foreclosure through section 1692f, but only if Plaintiffs can make a serious showing that: "(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest; (B) there is no present intention to take possession of the property; or (C) the property is exempt by law from such dispossession or disablement." *Id.* (quoting 15 U.S.C. § 1692f(6)). Plaintiff's FAC did not allege any of the necessary aforementioned criteria under Section 1692f. See FAC ¶¶ 136–69.

Accordingly, the Court DISMISSES WITH PREJUDICE Plaintiff's third claim for violation of the Fair Debt Collection Practices Act under Sections 1692c and 1692 d of the FDCPA. However, the Court DISMISSES WITHOUT PREJUDICE Defendants' Motion to Dismiss with respect to Plaintiff's third claim under 15 U.S.C. § 1692f(6) of the FDCPA.

D. Fourth Claim for Negligence

Plaintiff's FAC alleges Defendants were negligent because they had a legal duty of care to Plaintiff to exercise reasonable care in maintaining, accounting, and servicing of loan records. FAC ¶ 173. Plaintiff alleges Defendants breached their duty by: (1) wrongfully recording a Notice of Default; (2) failing to sufficiently train loss mitigation

staff and failing to maintain accurate records; and (3) "engaging in foreclosure proceedings on the

Subject Property without having the legal authority to do so." FAC ¶¶174–77.

Defendants argue the negligence claim should be dismissed because the allegations of breach are not adequately pled, and because Defendants did not owe Plaintiff a duty of care. Mot. at 11–13.

In California, "a financial institution owes no duty of care to a borrower when the institutions' involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." *Nymark v. Heart Fed. Savings & Loan Ass'n.*, 231 Cal. App. 3d 1039, 1096 (Cal. App. 1991). Liability to the borrower of a loan for negligence "arises only when the lender actively participates in the financed enterprise beyond the domain of the usual money lender.'" Id. at 1096 (quoting *Wagner v. Benson*, 101 Cal. App. 3d 27, 35 (1980)) (internal citations omitted).

Here, Plaintiff alleges that Defendants did not maintain accurate records and wrongfully initiated foreclosure, but does not allege any facts to suggest that Defendants took action that is out of the scope of a lender or, in other words, that Defendants exceeded "the domain of the usual money lender." *Nymark*, 231 Cal. App. 3d at 1096. As such, Plaintiff cannot make a claim for negligence against the lender-defendants. Further, Plaintiff premises the alleged breaches of duty on the contention that the Note has been discharged, which is not the case. See RJN, Discharge of Debtor Ch. 7, filed in United States Bankruptcy Court, Central District of California, on February 22, 2012, Case No. 8:11-bk-22081-MW (Dkt. 25-3).

Accordingly, Plaintiff cannot make a claim for negligence against Defendants. The Court DISMISSES WITH PREJUDICE Plaintiff's fourth claim for negligence.

E. Fifth Through Eight Claims for Intentional Misrepresentation, Negligent Misrepresentation, Fraudulent Concealment, and Constructive Fraud

Defendants argue Plaintiff's fifth through eight claims should be dismissed because Plaintiff does not make sufficient allegations with respect to Defendants' intent to deceive or defraud, and because these claims hinge on the incorrect presumption that the Note was discharged due to Plaintiff's bankruptcy. Mot. at 13–15. Plaintiff argues that the FAC sufficiently states Defendants made false representations to Plaintiff and that the fifth through eight claims are sufficiently pled as based on the discharge of the Note. Opp'n at 11–12.

Page 11

1. Intentional Misrepresentation and Negligent Misrepresentation Claims

Under California law, to plead a cause of action for intentional misrepresentation, a plaintiff must allege: (1) false representation, concealment or nondisclosure; (2) knowledge of falsity; (3) intent to defraud; (4) justifiable reliance; and (5) damage resulting from the conduct. Philipson & Simon v. Gulsvig, 154 Cal. App. 4th 347, 363 (2007). To plead a cause of action for negligent misrepresentation, a plaintiff must allege: "(1) a misrepresentation of a past or existing material fact, (2) without reasonable

grounds for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) ignorance of the truth and justifiable reliance thereon by the party to whom the misrepresentation was directed, and (5) damages." *Fox v. Pollack*, 181 Cal.App. 3d 954, 962 (1986).

Plaintiff's intentional misrepresentation claim is premised on the contention that the Note was discharged, and thus Defendants intentionally made misrepresentations regarding the NOD. FAC ¶¶ 184–188. Plaintiff's negligent misrepresentation claim is similarly premised on the contention that the Note was discharged but that Defendants made misrepresentations based on that discharge. FAC ¶¶ 205–211. As it is established that the Note was not discharged by Plaintiff's bankruptcy, the FAC does not sufficiently allege that Defendants made a "false representation, concealment, or nondisclosure" or a "misrepresentation," as required for intentional or negligent misrepresentation. *Philipson & Simon*, 154 Cal. App. 4th at 363; Fox, 181 Cal. App. 3d at 962.

Accordingly, the Court DISMISSED

WITHOUT PREJUDICE Plaintiff's fifth claim for intentional misrepresentation and sixth claim for negligent misrepresentation.

2. Fraudulent Concealment and Constructive Fraud Claims

"In order to establish fraudulent concealment, the complaint must show: (1) when the fraud was discovered; (2) the circumstances under which the fraud was discovered; and (3) that the plaintiff was not at fault for failing to discover it or had no actual or presumptive knowledge of facts to put him on

inquiry." *Baker v. Beech Aircraft Corp.*, 39 Cal. App. 3d. 315, 321 (1974).

For a claim for constructive fraud, the pleading must allege: "(1) any breach of duty which, without an actual fraudulent intent, (2) gains an advantage to the person in fault. . . by misleading another to his prejudice." Cal. Civ. Code § 1573.

In addition, "[t]he requirement of specificity in a fraud action against a corporation requires the plaintiff to allege the names of the persons who allegedly made the

fraudulent representation, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." *Tarmann v. State Farm Mutual Auto Insurance Co.*, 2 Cal. App. 4th. 153, 157 (1991). "Plaintiffs must not only specify how alleged statements were false, but must specify how statements were false when they were made." *Mlejnecky v. Olympus Imaging Am., Inc.*, 2011 WL 1497096 (E.D. Cal. Apr. 19, 2011).

Plaintiff does not allege facts regarding: (i) the names of Defendants' representatives who made material representations or concealed facts, or the authority that those representatives purported to have when such misrepresentations or concealed facts occurred; (ii) that Defendants had an intent to induce reliance or conceal material facts; and (iii) that Plaintiff had actually relied on any misrepresentation made by any particular individual employed by Defendants. FAC ¶¶ 238–58. Accordingly, Plaintiff has failed to plead the fraudulent concealment and constructive fraud

claims with the specificity required under these circumstances. Moreover, as noted above, Plaintiff's seventh and eighth claims rely on the incorrect premise that Plaintiff's obligation on the Note was discharged in her bankruptcy proceedings. Thus, Plaintiff has not identified a breach of duty or fraud under these claims, and the claims necessarily fail.

Accordingly, the Court DISMISSES WITHOUT PREJUDICE Plaintiff's seventh claim for constructive fraud and Plaintiff's eighth claim for fraudulent concealment.

F. Ninth Claim for Civil Conspiracy

Defendant argues Plaintiff's ninth claim for civil conspiracy should be dismissed because it is uncertain what conspiracy Plaintiff is alleging, and because the claim is not pled with particularity. Mot. at 19–20. Plaintiff alleges she has pled sufficient facts of a scheme by Defendants to dispossess Plaintiff of her property. Opp'n at 15.

"To support a conspiracy claim, a plaintiff must allege the following elements: (1) the formation and operation of the conspiracy, (2) wrongful conduct in furtherance of the conspiracy, and (3) damages arising from the wrongful conduct." *AREI II Cases*, 216 Cal. App. 4th 1004, 1022 (2013) (internal quotations and citations omitted).

Similar to her fraud and concealment claims, Plaintiff's civil conspiracy claim relies on her allegation that her obligations under the Note were discharged in her bankruptcy proceedings. FAC ¶¶ 261–68. She argues that because the Note was

discharged, Defendants' actions in pursuit of foreclosure and repayment on the Note were wrongful conduct in furtherance of a conspiracy between them. See id. Because the Note was not discharged, Plaintiff cannot allege "wrongful conduct in furtherance of a

conspiracy" based on attempted collection on the note by Defendants. See *AREI II Cases,* 216 Cal. App. 4th at 1022. Accordingly, the Court DISMISSES WITHOUT PREJUDICE Plaintiff's ninth claim for civil conspiracy.

G. Tenth Claim for Defamation

Defendants seek to dismiss Plaintiff's tenth claim for defamation because Defendants' acts are privileged under California law, and thus Plaintiff cannot meet the unprivileged requirement of pleading a defamation cause of action. Mot. at 15. Plaintiff argues she can make a defamation claim because Defendants acted with malice. Opp'n at 15–16.

Defamation "involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage." *Smith v. Maldonado*, 72 Cal. App. 4th. 637, 645 (1999). "Publication means communication to some third person who understands the defamatory meaning of the statement and its application to the person to whom reference is made." *Id.* In all cases of alleged defamation, the truth of the offensive statements or communication is a complete defense against civil

liability, regardless of bad faith or malicious purpose. *Id.* at 646.

Under California Civil Code section 2924, "the statutorily required mailing, publication, and delivery of notices in nonjudicial foreclosure, and the performance of statutory nonjudicial foreclosure procedures, to be privileged communications." *Kachlon v. Markowitz*, 168 Cal. App. 4th 316, 333 (2008). Thus, unless a lender has exhibited malice, a plaintiff cannot make a claim of defamation based on such communication. See *Ogilvie v. Select Portfolio Servicing*, 2012 WL 3010986, at *4 (N.D. Cal. July 23, 2012).

Plaintiff alleges that Defendants defamed her when they recorded the Notice of Default and Notice of Trustee Sale, because Plaintiff owed nothing to Defendants as the Note was discharged. FAC ¶¶ 269–77. However, as the recording of the Substitution of Trustee, Notice of Default, and Notice of Trustee Sale with the County Recorder are all privileged acts, their proper publication cannot be the basis for a defamation claim. Cal. Civ. Code § 2924(d); *Kachlon v. Markowitz*, 168 Cal. App. 4th 316, 333 (2008). Plaintiff's opposition argues Defendants exhibited malice, yet the FAC fails to allege any such malice. See FAC ¶¶ 269–77. Moreover, even if Plaintiff had alleged malice, the alleged defamatory statement is in regards to Plaintiff's default, and thus this claim relies on Plaintiff's allegation that the Note was discharged, which Defendants have shown is incorrect. The statements in question are thus not false, and Plaintiff's tenth claim for defamation necessarily fails.

Accordingly, the Court DISMISSES WITH PREJUDICE Plaintiff's tenth claim for defamation.

H. Eleventh and Twelfth Claims for Intentional Infliction of Emotional

Distress and Negligent Infliction of Emotional Distress Defendants argue Plaintiff's eleventh and twelfth claims for intentional and negligent infliction of emotional distress should be dismissed because Plaintiff has not alleged any extreme or outrageous conduct on behalf of the Defendants. Motion at 16. Plaintiff argues her pleading is sufficient because an intentional, unlawful foreclosure can sustain an emotional distress claim. Opp'n at 16–17.

To make a claim of intentional infliction of emotional distress ("IIED"), a plaintiff must plead "extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." *Hughes v. Pair*, 46 Cal. 4th 1035, 1050 (2009). For a claim of negligent infliction of emotion distress ("NIED"), a plaintiff must plead the traditional element of negligence, that is, a duty of care, breach, causation, and damages. *Slaughter v. Legal Process & Courier Service*, 162 Cal. App. 3d 1236, 1249 (1984).

"[C]ourts have recognized that the attempted collection of a debt by its very nature often causes the debtor to suffer emotional distress." *Ross v.*

Creel Printing & Publishing Co., Inc., 100 Cal. App. 4th 736, 745 (2002). Thus, a claim that emotional distress is caused by the execution of a normal foreclosure proceeding, absent outrageous conduct, is insufficient. See *Ramirez v. Barclays Capital Mortgage*, 2010 WL 2605696, at *10 (dismissing intentional infliction of emotional distress claim because "[t]he complaint points to no conduct of [defendant] outside that generally accepted in debt collection and/or the foreclosure process, which is inherently stressful for debtors"); see also *Quinteros v. Aurora Loan Serv.*, 740 F. Supp. 2d 1163, 1172 (E.D. Cal. 2010) (noting that recording, commencing, or continuing foreclosure proceedings does not constitute the extreme or outrageous conduct required to assert negligent infliction of emotional distress claim).

With regard to IIED, the FAC alleges that Defendants' conduct in pursuing nonjudicial foreclosure after alleged discharge of the note. FAC ¶ 282. As mentioned above, the Note was not discharged in Plaintiff's bankruptcy, and thus Plaintiff cannot make a claim of "outrageous" conduct based on Defendants' utilization of foreclosure. Hughes, 46 Cal. 4th at 1050. Plaintiff also fails to allege any particular outrageous

conduct other than collection of the debt itself, which is insufficient to make an IIED claim. Similarly, the FAC alleges NIED based on Defendants' alleged discontinued interest in the property. FAC ¶ 296. Further, the FAC fails to allege a duty and breach of

duty as needed for a cognizable NIED claim. FAC ¶ 289–300.

Accordingly, the Court DISMISSES WITH PREJUDICE Plaintiff's eleventh claim for intentional infliction of emotional distress and Plaintiff's twelfth claim for negligent infliction of emotional distress.

I. Thirteenth Claim for Quiet Title

Defendants move to dismiss Plaintiff's claim for quiet title because Plaintiff fails to allege that she discharged the debt secured by the property. Mot. at 17. Plaintiff counters that a claim for quiet title may move forward because Plaintiff has pled that she has an equitable interest in the deed. Opp'n at 18.

To state a claim for quiet title, a plaintiff is required to discharge the debt secured by the property. *Aguilar v. Bocci*, 39 Cal. App. 3d 475, 477–78 (1974). Here, Plaintiff appears to argue that there is no debt remaining on the property because the Note was discharged. See FAC ¶¶ 301–11. However, as the Note has not been discharged, Plaintiff cannot allege that she has discharged the debt secured by the property in question. As such, Plaintiff's claim for quiet title necessarily fails.

Accordingly, the Court DISMISSES WITH PREJUDICE Plaintiff's thirteenth claim for quiet title.

J. Fourteenth and Fifteenth Claims for Violation of Business & Professions Code § 17200 et seq and Demand for Accounting

Defendants argue Plaintiff's fourteenth claim for violation of California Business & Professions Code § 17200, et seq. and fifteenth claim for demand for accounting for should be dismissed because both claims depend on the false allegation that the Note was extinguished. Mot. at 18–20. Plaintiff argues the FAC sufficiently states both claims because Plaintiff alleges that Defendants violated her rights by seeking payment of debt allegedly discharged in foreclosure. Opp'n 19–21.

1. Business and Professions Code § 17200, et seq. Claim

To state a claim under Business and Professions Code § 17200, et seq. ("UCL"), a plaintiff must allege that a given defendant engaged in an "unlawful, unfair or fraudulent business act or practice" which caused the plaintiff to suffer "injury in fact" and "lost

money or property." Cal. Business & Prof. Code § 17204; *Bernardo v. Planned Parenthood Fed. of America,* 115 Cal. App. 4th 322 (2004).

Plaintiff pleads that Defendants actions in seeking repayment of her obligation under the Note and seeking foreclosure on the Property securing the Note were unlawful, unfair, or fraudulent because the Note was discharged. FAC ¶¶ 312–16. Again, as the Note was not, in fact, discharged due to Plaintiff's bankruptcy, Plaintiff cannot make a claim of "unlawful, unfair or fraudulent" conduct by Defendants based on Defendants' seeking repayment of Plaintiff's debt. Cal. Business & Prof. Code § 17204. As such, Plaintiff's claim for violation of

Business and Professions Code § 17200, *et seq.* necessarily fails. The Court DISMISSES WITH PREJUDICE Plaintiff's fourteenth claim.

2. Demand for Accounting Claim

Plaintiff's demand for accounting claim alleges that Defendants were unjustly enriched due to fraudulent, deceptive, and misleading conduct. FAC ¶ 362. Defendants argue this claim should be dismissed because it depends on the validity of Plaintiff's underlying claims, which are defective, while Plaintiff argues a court-ordered accounting is proper so as to verify the debt Defendants allege that Plaintiff owes. Mot. at 18–19;Opp'n at 20–21.

"The right to an accounting is derivative and depends on the validity of a plaintiff's underlying claims." *Duggal v. G.E. Capital Communications Services, Inc.*, 81Cal. App. 4th 81, 95 (2000). See also *Janis v. California State Lottery Com.*, 68 Cal. App. 4th 824, 833–34 (1998) (dismissing a claim for accounting because all of the plaintiff's other claims failed). Here, because all of Plaintiff's underlying claims fail, so too does Plaintiff's claim for a demand of accounting.

Accordingly, the Court DISMISSES WITHOUT PREJUDICE Plaintiff's Plaintiff's fifteenth claim of a demand for accounting.

V. Disposition

For the foregoing reasons, the Court GRANTS WITH PREJUDICE Defendant's Motion to Dismiss as to Plaintiff's first claim for violation of 11 U.S.C. § 524, second claim for violation of 12 U.S.C. § 5211, Plaintiff's third claim for violation of the Fair Debt

Collection Practices Act under Sections 1692c and 1692d of the FDCPA, fourth claim for negligence, tenth claim for defamation, eleventh claim for IIED, twelfth claim

for NIED, thirteenth claim for quiet title, and fourteenth claim for violation of Business and Professions Code § 17200 et seq.

The Court GRANTS WITHOUT PREJUDICE Defendant's Motion to Dismiss as to Plaintiff's Defendants' Motion to Dismiss with respect to Plaintiff's third claim under 15 U.S.C. § 1692f(6) of the FDCPA, fifth claim for intentional misrepresentation and sixth claim for negligent misrepresentation, seventh claim for constructive fraud and eighth claim for fraudulent concealment, ninth claim for civil conspiracy, and fifteenth claim of a demand for accounting. Plaintiff may file an amended complaint with the Court no later than April 5, 2019.

The Clerk shall serve this minute order on the parties.

APPENDIX B
June 20, 2019, Judgment of Dismissal of the U.S. District Court, Central District of California, case no. 18-CV-00409

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CENTRAL DIVISION

SEPIDEH CIRINO, an individual; THE CIRINO FAMILY TRUST, an Irrevocable Trust PLAINTIFFS, vs. OCWEN LOAN SERVICING , LLC; WESTERN PROGRESSIVE, LLC; WELLS FARGO BANK, N.A., as Trustee for holders of IMPAC SECURED ASSETS CORP. MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2004-4; ALL PERSONS UNKNOWN CLAIMING ANY LEGAL OR EQUITABLE RIGHT, TITLE, ESTATE, LIEN OR INTEREST IN THE	Case No.: SA CV 18-00409 DOC (JDEx) JUDGMENT OF DISMISSAL

PROPERTY DESCRIBED IN THE COMPLAINT ADVERSE TO PLAINTIFFS' TITLE, OR ANY CLOUD ON PLAINTIFFS' TITLE THERETO; AND DOES 1-10 inclusive,

DEFENDANTS.

JUDGMENT OF DISMISSAL

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

The Motion to Dismiss brought by Defendants OCWEN LOAN SERVICING, LLC; WELLS FARGO BANK, N.A., AS TRUSTEE FOR HOLDERS OF IMPAC SECURED ASSETS CORP., MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2004-4; and WESTERN PROGRESSIVE, LLC (collectively "Defendants"), having been granted with prejudice on May 29, 8 | | 2019,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Plaintiffs Sepideh Cirino and the Cirino Family Trust ("Plaintiffs"), shall take nothing by way of the operative Second Amended Complaint; and 2. Judgment on Plaintiffs' Complaint shall be entered in favor of Defendants.

IT IS SO ORDERED.

DATED: June 20, 2019

UNITED STATE DISTRICT COURT

The Honorable DAVID O. CARTER

APPENDIX C
August 7, 2020, Memorandum of Decision of the 9th Circuit Court of Appeal, case no. 19-55817

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEPIDEH CIRINO, an individual; THE CIRINO FAMILY TRUST, an Irrevocable Trust PLAINTIFFS, vs. OCWEN LOAN SERVICING , LLC; WESTERN PROGRESSIVE, LLC; WELLS FARGO BANK, N.A., as Trustee for holders of IMPAC SECURED ASSETS CORP. MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2004-4; ALL PERSONS UNKNOWN CLAIMING ANY LEGAL OR EQUITABLE RIGHT, TITLE, ESTATE, LIEN OR INTEREST IN THE PROPERTY DESCRIBED IN THE COMPLAINT	Case No.: 19-55817 MEMORANDUM

ADVERSE TO PLAINTIFFS' TITLE, OR ANY CLOUD ON PLAINTIFFS' TITLE THERETO; AND DOES 1-10 inclusive,

DEFENDANTS.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

MEMORANDUM*

Appeal from the United States District Court

for the Central District of California

David O. Carter, District Judge, Presiding

Submitted August 6, 2020**

San Francisco, California

Before: THOMAS, Chief Judge, and HAWKINS and McKeown, Circuit Judges

Sepideh Cirino, individually and as trustee of the Cirino Family Trust, appeals pro se from the district court's order dismissing with prejudice her second amended complaint. We have jurisdiction under 28 U.S.C. §1291. We review de novo the district court's grant of a motion to dismiss. *Edwards v. Marin Park, Inc.* 356 F.3d 1058, 1061 (9th Cir. 2004), and we affirm.

Cirino contends that the district court erred by dismissing all claims in her second amended complaint and several claims in her first amended complaint with prejudice because the complaints adequately alleged that the defendants had no ownership rights in the note secured by a deed of trust on certain real property and, as a result, had not legal authority to commence a nonjudicial foreclosure on the property. *See Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012) (en banc) ("For claims dismissed with prejudice and without leave to amend, we will not require that they be repled in a subsequent amended complaint to preserve them on appeal."). The district court did not err by concluding the complaints failed to state causes of action on this theory notwithstanding the conclusory allegations that the note was discharged in bankruptcy or as a result of the Troubled Asset Relief Program and that the defendants, as assignees and agents, are not the true holders of the note. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (explaining claim must be facially plausible to survive motion to dismiss and court need not accept as true legal conclusions presented as factual allegations).

Further, contrary to Cirino's contention, the district court did not make impermissible factual findings and instead permissibly evaluated whether the pleadings contained sufficient factual allegations to plausibly demonstrate the elements of each asserted claim. *See Bell Atl. Corp. v. Twombly*, 330 U.S. 544, 555-56 (2007) (setting forth plausibility pleading standard); *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001) (recognizing court may consider matters of public record and

documents incorporated by reference in complaint without converting motion to dismiss into motion for summary judgment); *Schwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000) ("In reviewing a Rule 12(b)(6) motion . . . [t]he court need not accept as true . . . allegations that contradict facts that may be judicially noticed by the court" (internal citations omitted).

The district court also did not err by dismissing Cirino's misrepresentation based claims predicated on allegedly false statements regarding the amounts owed on the loan because the second amended complaint failed, at minimum, to allege facts plausibly demonstrating detrimental reliance. *See, e.g., Philipson & Simon v. Gulsvig*, 154 Cal.App.4th 347, 363 (2007) (justifiable reliance as an element of intentional misrepresentation); *Fox v. Pollack*, 181 Cal.App.3d 954, 962 (1986) (justifiable reliance as an element of negligent misrepresentation).

Because Cirino's demand of an accounting was a derivative claim, the district court did not err by dismissing it after concluding the second amended complaint failed to state any predicate claims. *See Duggal v. G.E. Capital Commc'ns Serves., Inc.*, 81 Cal.App.4th 8f1, 95 (2000) ("The right to an accounting is derivative and depends on the validity of plaintiff's underlying claims.").

Finally, the district court did not abuse its discretion in resolving defendants' request for judicial notice. *See Khoja v. Orexigen Theraputics, Inc.*, 899 F.3d. 988, 1001 (9th Cir. 2018).

AFFIRMED.

* This disposition is not appropriate for publication and is not precedent except as provided by the Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

APPENDIX D
October 7, 2020, Order
9th Circuit Court of Appeal, case no. 19-55817

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEPIDEH CIRINO, an individual; THE CIRINO FAMILY TRUST, an Irrevocable Trust PLAINTIFFS, vs. OCWEN LOAN SERVICING , LLC; WESTERN PROGRESSIVE, LLC; WELLS FARGO BANK, N.A., as Trustee for holders of IMPAC SECURED ASSETS CORP. MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2004-4; ALL PERSONS UNKNOWN CLAIMING ANY LEGAL OR EQUITABLE RIGHT, TITLE, ESTATE, LIEN OR INTEREST IN THE PROPERTY DESCRIBED IN THE COMPLAINT	Case No.: 19-55817 ORDER

ADVERSE TO PLAINTIFFS' TITLE, OR ANY CLOUD ON PLAINTIFFS' TITLE THERETO; AND DOES 1-10 inclusive,

DEFENDANTS.

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

ORDER

Before: THOMAS, Chief Judge, and HAWKINS and McKeown, Circuit Judges

The Petition for Rehearing (Dkt. Entry #20) is DENIED.