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**MEMORANDUM\* OPINION OF THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT  
(SEPTEMBER 27, 2022)**

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NOT FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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PRISCILLA McMANUS,

*Plaintiff-Appellant,*

v.

NBS DEFAULT SERVICES, LLC;  
BANK OF AMERICA, N.A.; NATIONSTAR  
MORTGAGE, LLC; MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC.,

*Defendants-Appellees.*

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No. 21-16211

D.C. No. 2:18-cv-02047-JAM-AC

Appeal from the United States District Court  
for the Eastern District of California  
John A. Mendez, District Judge, Presiding

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

Submitted September 14, 2022\*\*

Before: O'SCANNLAIN, RAWLINSON,  
and OWENS, Circuit Judges.

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**MEMORANDUM**

Priscilla McManus appeals pro se from the district court's summary judgment in her diversity action alleging wrongful foreclosure. We have jurisdiction under 28 U.S.C. § 1291. We affirm.

In her opening brief, McManus fails to address the district court's summary judgment on her wrongful foreclosure claims, and she has therefore waived her challenge to the district court's orders on these claims. *See Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) ("[W]e will not consider any claims that were not actually argued in appellant's opening brief."); *Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1993) (issues not supported by argument in pro se appellant's opening brief are waived).

The district court did not abuse its discretion in denying McManus's motion for an order to show cause why defendants failed to respond to her settlement offer. *See Kelly v. Wengler*, 822 F.3d 1085, 1094 (9th Cir. 2016) (setting forth standard of review).

Contrary to McManus's contentions, there was no basis for the district court to enter default against defendants.

**AFFIRMED.**

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

**ORDER OF THE UNITED STATES  
DISTRICT COURT FOR THE EASTERN  
DISTRICT OF CALIFORNIA  
(JUNE 28, 2021)**

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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

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PRISCILLA McMANUS,

*Plaintiff,*

v.

NBS DEFAULT SERVICES, LLC, ET AL.,

*Defendants.*

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No. 2:18-cv-02047 JAM AC PS

Before: Hon. John A. MENDEZ,  
United States District Court Judge.

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**ORDER**

Plaintiff is proceeding in this action in pro per. The matter was referred to a United States Magistrate Judge pursuant to Local Rule 302(c)(21).

On April 16, 2021, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty-one

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days. ECF No. 117. Plaintiff has filed objections to the findings and recommendations. ECF No. 118.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed April 16, 2021, are adopted in full; and

2. Defendants' motions for summary judgment (ECF No. 108 and 110) are GRANTED, the judgment is entered in favor of all defendants, and this case is CLOSED.

/s/ Hon. John A. Mendez  
United States District Court Judge

Dated: June 28, 2021



**FINDINGS AND RECOMMENDATIONS OF  
THE MAGISTRATE JUDGE  
(APRIL 16, 2021)**

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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

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PRISCILLA McMANUS,

*Plaintiff,*

v.

NBS DEFAULT SERVICES, LLC, ET AL.,

*Defendants.*

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No. 2:18-cv-02047 JAM AC PS

Before: Allison CLAIRE,  
United States Magistrate Judge.

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**FINDINGS AND RECOMMENDATIONS**

Plaintiff is proceeding in this action pro se and the case was accordingly referred to the undersigned by Local Rule 302(c)(21). Pending before the court are two motions for summary judgment: one from defendant Bank of America (ECF No. 108) and one from defendants Mortgage Electronic Registration Systems, Inc. ("MERS") and Nationstar Mortgage, LLC (ECF No. 110). The only other defendant in this case, NBS Default Services, LLC, has not made a motion but is similarly situated to the moving defendants. Plaintiff

filed an opposition to each motion. ECF Nos. 113, 114. Defendants replied. ECF Nos. 115, 116. For the reasons explained below, defendants' motions should be GRANTED, and this case should be CLOSED.

## **I. Complaint and Procedural Background**

### **A. Procedural History**

Plaintiff Priscilla McManus initiated this wrongful foreclosure action in pro se on June 20, 2018, by filing a complaint against defendants in the County of El Dorado Superior Court. ECF No. 1-1 at 14-30. Defendants removed the case to district court based on subject matter and diversity jurisdiction under 28 U.S.C. §§ 1332 and 1441. ECF No. 1. On August 2, 2018, defendants Mortgage Electronic Registration Systems, Inc. ("MERS"), and Nationstar Mortgage filed a motion to dismiss. ECF No. 8. The court granted the motion in part, but denied it as to plaintiff's claims for (1) breach of implied covenant of good faith and fair dealing, (2) violation of California business and professions code § 17200 et seq.; (3) quiet title; and (4) wrongful foreclosure. ECF No. 28 at 2. The court granted the motion to dismiss but granted leave to amend on plaintiff's claims of (5) fraud; and (6) void or cancel assignments of deed of trust. *Id.* Defendants' motion was granted without leave to amend on several other claims. *Id.*

On January 11, 2019, plaintiff filed a First Amended Complaint ("FAC")<sup>1</sup> stating the six claims which had been permitted to move forward. ECF No. 31

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<sup>1</sup> This document is labeled incorrectly on the docket as a Second Amended Complaint.

at 1. Two of those claims, “fraud” and “void or cancel assignments of deed of trust” were later dismissed without further leave to amend. ECF Nos. 44, 45.

**B. Allegations of the FAC**

On April 26, 2004, plaintiff financed the loan on the “Subject Property” through Fidelity Home Mortgage Corp. and executed a promissory note (“the Note”) in favor of Fidelity. The Note was secured by a deed of trust (“DOT”) with MERS as the beneficiary. ECF No. 31 at 2. Plaintiff alleges that shortly after financing, Fidelity sold its interest in the note to Fannie Mae and attempted to sell its property security interest in plaintiff’s DOT. *Id.* On March 14, 2011, a Loan Modification Agreement was signed by plaintiff stating that BAC Home Loan Servicing LP was the lender. *Id.*

On March 14, 2012, MERS sold BAC Home Loan Servicing all beneficial interest under the deed of trust and filed the notice with the El Dorado County Recorder’s Office on March 29, 2012. *Id.* An Assignment of Deed of Trust dated June 20, 2013 is attached to the complaint, showing the DOT conveyed onto Nationstar Mortgage, LLC. *Id.* at 137, FAC Ex. F. An assignment of DOT was signed on November 23, 2015 in which Nationstar Mortgage LLC conveyed onto the Federal National Mortgage Association (“Fannie Mae”) the beneficial interest under the DOT. FAC Ex. G. The assignment was recorded on December 22, 2015. *Id.* Plaintiff attaches another Assignment of the DOT, signed December 7, 2015, in which Nationstar Mortgage again assigned its interest in the DOT to Fannie Mae; this Assignment was recorded on February 10, 2016. FAC Ex. H. Plaintiff alleges that no Substitutions of Trustee have been executed or filed

in the public record with respect to the subject property, and the current trustee remains Fannie Mae. ECF No. 31 at 3.

On December 17, 2014, a Notice of Default on the subject property was recorded listing contact information for Nationstar and NBS Default Services. FAC Ex. I. In early June 2017 plaintiff received a Notice of Trustee's Sale in the mail from NBS Default Service, LLC, as the purported duly appointed trustee. *Id.* at 17. A copy of a Notice of Trustee's Sale dated June 30, 2017, listing contact information for NBS Default Services, is attached to the complaint. FAC Ex. J. On April 19, 2018 the subject property was sold to Fannie Mae pursuant to purported Assignments recorded by Nationstar Mortgage. FAC Ex. L. The same day, at 9:24 a.m. and prior to the scheduled sale of the Subject Property, plaintiff filed for Chapter 13 Bankruptcy. FAC Ex. K. Plaintiff is informed and believes that there has never been any substation of trustee with respect to the DOT, none of the foreclosing defendants are the holder of the Note, and none of the foreclosing defendants were ever entitled to enforce the Note. ECF No. 31 at 4. Plaintiff is informed and believes that defendants never knew who the actual beneficiary of the DOT was, and the actual beneficiary of the DOT never provided a declaration to NBS Default Services, LLC stating that plaintiff was in default, and thus the non-judicial foreclosure of the subject property was invalid. *Id.*

## **II. Standard for Summary Judgment**

Summary judgment is appropriate when the moving party "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). Under summary judgment practice, “[t]he moving party initially bears the burden of proving the absence of a genuine issue of material fact.” *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The moving party may accomplish this by “citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials” or by showing that such materials “do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.” Fed. R. Civ. P. 56(c)(1).

Summary judgment should be entered, “after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322. “[A] complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Id.* at 323. In such a circumstance, summary judgment should “be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied.” *Id.*

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). In attempting

to establish the existence of this factual dispute, the opposing party may not rely upon the allegations or denials of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. *See* Fed. R. Civ. P. 56(c). The opposing party must demonstrate that the fact in contention is material, *i.e.*, a fact “that might affect the outcome of the suit under the governing law,” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, *i.e.*, “the evidence is such that a reasonable jury could return a verdict for the nonmoving party,” *Anderson*, 477 U.S. at 248. In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at trial.” *T.W. Elec. Service, Inc.*, 809 F.2d at 630 (quoting *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968)). Thus, the “purpose of summary judgment is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.” *Matsushita*, 475 U.S. at 587 (citation and internal quotation marks omitted).

“In evaluating the evidence to determine whether there is a genuine issue of fact, [the court] draw[s] all inferences supported by the evidence in favor of the non-moving party.” *Walls v. Cent. Costa County Transit Auth.*, 653 F.3d 963, 966 (9th Cir. 2011) (citation omitted). It is the opposing party’s obligation to produce

a factual predicate from which the inference may be drawn. *See Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing party “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita*, 475 U.S. at 586 (citations omitted). “Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Id.* at 587 (quoting *First Nat’l Bank*, 391 U.S. at 289).

### **III. Statement of Undisputed Facts**

Unless otherwise specified, the following facts are either expressly undisputed by the parties or have been determined by the court, upon a full review of the record, to be undisputed by competent evidence. Defendant Bank of America’s statement of undisputed facts is located at ECF No. 108-5, and is supported by the declarations of Bank of America Vice President Ryan Dansby (ECF No. 108-1) and attorney Joel C. Spann (ECF No. 108-3), along with records including the Multistate Fixed Rate Note for the property at 1600 Starbuck Road, Rescue, CA (ECF No. 108-2 at Ex. 1), the Deed of Trust for the same property (*id.* at Ex. 2), servicing communications from Bank of America (*id.* at Ex. 3), a notice of servicing transfer from Bank of America to Nationstar Mortgage LLC effective April 1, 2013 (*id.* at Ex. 4), home loan balance sheets (*id.* at Ex. 5), and deposition testimony with exhibits (ECF No. 108-4). Bank of America filed a separate request for judicial notice containing several public

records. ECF No. 109.<sup>2</sup> Defendants MERS and Nationstar submitted a separate statement of undisputed facts located at ECF No. 110-1. This statement is supported by the declaration of Justin D. Balser (ECF No. 110-2), deposition testimony with exhibits (ECF No. 110-3 through 110-5), copies of the plaintiff's bankruptcy petitions filed in the United States District Court for the Eastern District of California on August 7, 2017 and December 18, 2017 (ECF No. 110-6), and copies of the dockets from plaintiff's bankruptcy actions (ECF No. 110-7). Plaintiff did not submit separate statements of undisputed facts, though she includes "disputes of material fact" in her opposition briefing. ECF Nos. 113 at 2-4, 114 at 2-6.

On or about April 26, 2004, plaintiff Priscilla McManus obtained a loan in the amount of \$333,700.00 from Fidelity Home Mortgage Corp. Declaration of Bank of America ("BANA Dec."), ¶ 2, Ex. 1 (Promissory Note); Declaration of Joel C. Spann ("JCS Dec."), ¶ 4(h), Ex. 2 (Promissory Note); First Amended Complaint ("FAC"), ¶ 2. The loan was secured by a Deed of Trust recorded on real property located at 1600 Starbuck Road, Rescue, California 95672, which named

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<sup>2</sup> The court takes judicial notice of the documents submitted in Bank of America's request because the documents include publicly recorded documents. "A court shall take judicial notice if requested by a party and supplied with the necessary information." Fed. R. Evid. 201(d). "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). The existence and contents of these publicly recorded documents can be accurately and readily determined, and judicial notice is appropriate.



MERS as the “nominee for Lender and Lender’s successors and assigns” and beneficiary under the Deed of Trust. BANA Dec., ¶ 3, Ex. 2 (Deed of Trust); Request for Judicial Notice (“RJN”), Ex. 1 (Deed of Trust); FAC, ¶ 2. BAC CHL Countrywide Home Loans was the investor of the Loan from May 19, 2004 through May 24, 2004, at which point the Federal National Mortgage Association (“Fannie Mae”) became the investor. BANA Dec., ¶ 4. BAC Home Loans Servicing, LP serviced the Loan from May 19, 2004 through June 30, 2011, at which point servicing of the Loan was transferred to Bank of America, N.A; this was a transfer from a subsidiary to a parent company. BANA Dec., ¶ 4, Ex. 3 (Service Change Letter).

On March 29, 2012 an Assignment of Deed of Trust was recorded, stating that MERS’ interest under the Deed of Trust had been transferred to Bank of America, N.A., successor by merger to BAC Home Loans Servicing. RJN, Ex. 2 (Assignment of Deed of Trust); FAC, ¶ 5. On March 9, 2013, Bank of America sent plaintiff a notice that, as of April 1, 2013, servicing of the Loan would be transferred to Nationstar Mortgage LLC. BANA Dec., ¶ 5, Ex. 4 (Service Change Letter), Nationstar Affidavit ¶¶ 8-10. As of the date that servicing of the Loan transferred to Nationstar Mortgage LLC, plaintiff was current on the payments on the Loan. BANA Dec., ¶ 6, Ex. 5 (Loan Payment History). On June 20, 2013 an Assignment of Deed of Trust was recorded, stating that Bank of America, N.A.’s interest under the Deed of Trust had been transferred to Nationstar Mortgage, LLC. RJN, Ex. 3 (Assignment of Deed of Trust); FAC, ¶ 6. A Substitution of Trustee was recorded on December 15, 2014, stating that the trustee under

the Deed of Trust had been changed to NBS Default Services LLC (“NBS”). RJN, Ex. 4 (Substitution of Trustee).

On December 17, 2014, NBS recorded a Notice of Default on the property. RJN, Ex. 5 (Notice of Default); FAC, ¶ 10. On December 22, 2015, a Corporate Assignment of Deed of Trust was recorded, stating that Nationstar Mortgage LLC’s interest under the Deed of Trust had been transferred to Fannie Mae. RJN, Ex. 6 (Corporate Assignment of Deed of Trust); FAC, ¶ 7. On June 30, 2017, NBS recorded a Notice of Trustee’s Sale on the property. RJN, Ex. 7 (Notice of Trustee’s Sale); FAC, ¶ 11. Plaintiff received the foreclosure notices from NBS. JCS Dec., ¶ 4(s); FAC, ¶ 11.

Plaintiff filed Chapter 13 bankruptcy petitions on August 7, 2017, and December 18, 2017. Declaration of Justin D. Balser (Balser Dec.) at Ex. B. Plaintiff listed the property value as \$325,000.00 in her Chapter 13 bankruptcy schedules. Balser Dec. Ex. A at 53:9-54:14 and deposition Ex. 9. The bankruptcy court dismissed both bankruptcy actions. Balser Dec. Ex. C. Plaintiff filed another Chapter 13 bankruptcy petition on April 19, 2018 in an attempt to stop the sale of the property, but when she arrived to file the clerk told her the property was “already transferred.” Balser Dec. Ex. A at 159:4-19, 160:7-22 and Ex. 15. On April 25, 2018, a Trustee’s Deed of Sale was recorded on the property stating that NBS, as trustee, conveyed the property to Fannie Mae, which was also identified as the foreclosing beneficiary. RJN Ex. 8 (Trustee’s Deed Upon Sale); FAC, ¶ 13. NBS was the entity that sold the property at the sale. JCS Dec., ¶ 4(f); FAC, ¶ 13. Fannie Mae purchased the property at the sale

for the full debt amount: \$380,847.89. RJN Ex. 8, Nationstar Aff. ¶ 17, Ex. J. At the time of the sale, the loan was not paid off. JCS Dec., ¶ 4(e). At the time of the sale, plaintiff was in default. JCS Dec., ¶ 4(v).

#### IV. Analysis

Plaintiff's remaining claims are: (1) breach of the implied covenant of good faith and fair dealing; (2) violation of California business and professions code section 17200 et. seq.; (3) quiet title; and (4) wrongful foreclosure. FAC at 4-14, ECF No. 45. The theory underlying each of plaintiff's causes of action is that there is a broken chain of title on the subject property that resulted in an improper sale. Specifically, the FAC alleges plaintiff's belief that there has never been any substation of trustee with respect to the DOT, none of the foreclosing defendants are the holder of the Note, and none of the foreclosing defendants were ever entitled to enforce the Note. FAC at 4. Plaintiff further believes that defendants never knew who the actual beneficiary of the DOT was, and the actual beneficiary of the DOT never provided a declaration to NBS Default Services, LLC stating that plaintiff was in default, and thus the non-judicial foreclosure of the subject property was invalid. *Id.*

Each of these claims was addressed on the first motion to dismiss this case. ECF No. 22. The undersigned declined to recommend dismissal at the pleading stage because plaintiff had attached documents, of which the court took judicial notice, which appeared to indicate that Nationstar was not the beneficiary under the DOT at the time the foreclosure sale took place, and it was unclear whether NBS was attempting to foreclose as trustee on behalf of

Nationstar. ECF No. 1-1 at 139 (Corporate Assignment of Deed of Trust dated December 22, 2016 transferring interest in DOT from Nationstar Mortgage to Fannie Mae), 141 (Corporate Assignment of Deed of Trust dated February 10, 2016 transferring interest in DOT from Nationstar Mortgage to Fannie Mae). The court concluded that “only the actual beneficiary would be able to initiate foreclosure proceedings [and insofar as] NBS Default acted on behalf of Nationstar to sell the subject property it acted without authority because the beneficial interest in the DOT had already been assigned to Fannie Mae.” ECF No. 22 at 11-12, citing ECF No. 1-1 at ¶ 39. The undersigned repeated that “the complaint’s allegations and attachments cast doubt on defendant Nationstar’s right to foreclose on the subject property, because it is unclear whether it was the beneficiary under the DOT at the time its agent, NBS Default Services, completed the foreclosure sale.” *Id.* at 13, citing ECF No. 1-1 at 139, 141. Each of plaintiff’s remaining claims rest on this theory of broken title, which defendants were unable to properly dispute at the motion to dismiss phase.

It is now clear from undisputed facts presented in the Rule 56 context that the foreclosing beneficiary was properly authorized, that Fannie Mae was in fact the foreclosing beneficiary with the authority to foreclose, and that the chain of title was unbroken. A Substitution of Trustee was recorded on December 15, 2014, stating that the trustee under the Deed of Trust had been changed to NBS. RJN, Ex. 4 (Substitution of Trustee). This evidence belies plaintiff’s claim that the foreclosing trustee was not properly substituted in. NBS continued to act as trustee even as the beneficial interest in the property was assigned from Nationstar

Mortgage to Fannie Mae in 2015. RJN, Ex. 6 (Corporate Assignment of Deed of Trust); FAC, ¶ 7. The Trustee's Deed Upon Sale recognizes that Fannie Mae is both the Foreclosing Beneficiary and the Grantee, with NBS acting as the Trustee. ECF No. 110-8 at 81. The undisputed facts demonstrate that defendants are entitled to summary judgment on each of the remaining claims, and that this case should be closed.

**(1) Wrongful Foreclosure**

“A beneficiary or trustee under a deed of trust who conducts an illegal, fraudulent or willfully oppressive sale of property may be liable to the borrower for wrongful foreclosure; a foreclosure initiated by one with no authority to do so is wrongful for purposes of such an action.” *Yvanova v. New Century Mort. Corp.*, 62 Cal. 4th 919, 929 (2016). The basic elements of wrongful foreclosure are: “(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering.” *Miles v. Deutsche Bank Nat’l Tr. Co.*, 236 Cal. App. 4th 394, 408 (2015). A wrongful foreclosure suit may also be brought under the allegation that foreclosure was conducted by one who had no legal right to do so. *Sciaratta v. U.S. Bank Nat’l Ass’n*, 247 Cal. App. 4th 552, 566 (2016). Those who possess a legal right are the trustee, mortgagee, beneficiary, or any of their authorized agents. Cal. Civ. Code § 2924(a)(1). The trustee under a trust deed “may be substituted by the recording in the county in which the property is

located of a substitution executed and acknowledged by: (A) all of the beneficiaries under the trust deed.” Cal. Civ. Code. § 2934a(a)(1). A trustee of a deed of trust acts at the direction of the lender-beneficiary. *Yvanova*, 62 Cal. 4th at 927. As a result, the trustee may formally initiate nonjudicial foreclosure only at the direction of the person that currently holds the note and beneficial interest under the DOT. *Id.*

As discussed above and as demonstrated in the Statement of Undisputed Facts, NBS was properly substituted in as the Trustee, and NBS foreclosed on Fannie Mae’s behalf as the duly appointed substitute trustee. Fannie Mae was authorized to foreclose as the lender and deed of trust beneficiary. The undisputed facts thus demonstrate that there was, in fact, no wrongful foreclosure in this case. The moving defendants are entitled to summary judgment.

**(2) Breach of the Implied Covenant of Good Faith and Fair Dealing**

The implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation. *Racine & Laramie, Ltd. v. Department of Parks & Recreation*, 11 Cal. App. 4th 1026, 1032 (1992). The scope of conduct prohibited is circumscribed by the purposes and express terms of the contract. *Ellis v. Chevron, U.S.A. Inc.*, 201 Cal. App. 3d 132, 139 (1988). “It is universally recognized the scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract.” *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.*, 2 Cal. 4th 342, 372-73 (1992); *see also* Cal. Civ. Jury Instructions no. 325 (2017) (establishing a five-part test).

Here, plaintiff claims the Note and DOT were not properly assigned and that defendants acted in bad faith by foreclosing the subject property without having the proper rights under the DOT. The undisputed facts demonstrate that this is not the case. Because plaintiff cannot demonstrate that defendants broke any contract or acted improperly, the moving defendants are entitled to summary judgment on this claim.

**(3) Violation of California Business and Professions Code §§ 17200 et. seq. (California's Unfair Competition Law)**

Proposition 64 restricts standing to assert a cause of action under California's Unfair Competition Law. *Trujillo v. First American Registry, Inc.*, 157 Cal. App. 4th 628, 639 (2007). In order to bring a claim under UCL, a plaintiff must establish: (1) a loss or deprivation of money or property sufficient to qualify as injury in fact, that is, economic injury, and (2) that the economic injury was the result of, that is, caused by, the unfair business practice or false advertising that is the gravamen of the claim. *Obesity Research Institute, LLC v. Fiber Research International, LLC*, 165 F. Supp. 3d 937, 947 (S.D. Cal. 2016); Cal. Bus. & Prof. Code §§ 17204, 17535. Because the undisputed facts demonstrate that there was no unfair business practice or false advertising here that caused plaintiff injury, the moving defendants are entitled to summary judgment.

**(4) Quiet Title**

Because the undisputed facts demonstrate that the property at issue was properly sold to Fannie

Mae at Trustee's Sale, the court cannot quiet title in plaintiff's favor. The moving defendants are entitled to judgment on this cause of action.

### **V. Remaining Defendant**

The court notes that defendant NBS Default Services is the only defendant that did not participate in any of the motions for summary judgment. Although NBS did not join in the summary judgment motions, summary judgment should be granted in its favor because it is similarly situated to the moving defendants vis-a-vis plaintiff's claims.

It is well established that a court may grant summary judgment *sua sponte* in favor of a non-moving party so long as the party that had moved for summary judgment had reasonable notice that the court might do so and so long as the party against whom summary judgment was rendered had "a full and fair opportunity to ventilate the issues involved in the motion." *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 312 (9th Cir. 1982); *see also Columbia Steel Fabricators v. Ahlstrom Recovery*, 44 F.3d 800, 802-803 (9th Cir. 1995); *Abagninin v. AMVAC Chemical Corp.*, 545 F.3d 733, 742 (9th Cir. 2008). Here, the interests of the moving and non-moving defendants are entirely aligned, and plaintiff has had a full and fair opportunity to ventilate all the issues. It has been clear throughout that the grounds for judgment forwarded by the moving defendants applied equally to NBS, and the undisputed facts demonstrate that plaintiff cannot maintain any claim for relief against any defendant including NBS.



Accordingly, summary judgment should be granted in favor of NBS as well as the moving defendants, and this case should be closed.

## VI. Conclusion

Accordingly, for the reasons explained above, IT IS RECOMMENDED that defendants' motions for summary judgment (ECF Nos. 108 and 110) be GRANTED, that judgment be entered in favor of all defendants, and that this case be CLOSED.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1). Within twenty-one days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. *Id.*; *see also* Local Rule 304(b). Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any response to the objections shall be filed with the court and served on all parties within fourteen days after service of the objections. Local Rule 304(d). Failure to file objections within the specified time may waive the right to appeal the District Court's order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

IT IS SO ORDERED.

/s/ Allison Claire

United States Magistrate Judge

Dated: April 16, 2021

**ORDER OF THE UNITED STATES  
DISTRICT COURT FOR THE EASTERN  
DISTRICT OF CALIFORNIA  
(FEBRUARY 23, 2021)**

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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

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PRISCILLA McMANUS,

*Plaintiff,*

v.

NBS DEFAULT SERVICES, LLC, ET AL.,

*Defendants.*

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No. 2:18-cv-02047 JAM AC

Before: Allison CLAIRE,  
United States Magistrate Judge.

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Pending before the court is plaintiff's motion to compel defendant Bank of America to respond to her Second Request for Production and Second Set of Interrogatories. ECF No. 99. Also before the court is plaintiff's motion to extend time for discovery. ECF No. 100. These matters are referred to the undersigned pursuant to E.D. Cal. R. ("Local Rule") 302(c)(1) and 302(c)(21).

Plaintiff has filed previous motions to compel that were denied without prejudice because she failed to

follow the Local Rules, the requirements of which were explained to her by court order. ECF No. 97. Local Rule 251(b) establishes requirements for any party bringing a motion pursuant to Federal Rules of Civil Procedure 26 through 37, including the requirement that the parties meet and confer and file a joint discovery statement. Once again, no joint discovery statement has been filed with respect to the pending motion. Additionally, there is no indication that the parties have met and conferred regarding the disputes—it still appears clear they have not. Because plaintiff, the moving party, did not satisfy Local Rule 251(b)'s meet and confer requirement and the joint discovery statement requirement, the motion to compel discovery is denied. *See e.g., United States v. Molen*, 2012 WL 5940383, at \*1 (E.D.Cal. Nov. 27, 2012) (where a party fails to comply with Local Rule 251, discovery motions are denied without prejudice to re-filing). The denial at this juncture is with prejudice, because as explained below, the motion is also untimely and the discovery deadline has passed.

The deadline to file a discovery motion in this case was February 5, 2021. ECF No. 78. Plaintiff's pending motion to compel and motion for an extension of time were filed on February 10, 2021. The motion for an extension of time cites general non-responsiveness of defendants and general COVID pandemic delays. ECF No. 11 at 2. The motion is not persuasive; plaintiff has had ample time to conduct discovery.

For the reasons state above, IT IS HEREBY ORDERED that plaintiff's motion to compel (ECF No. 99) and motion for an extension of time (ECF No. 100) are each DENIED.

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IT IS SO ORDERED.

/s/ Allison Claire  
United States Magistrate Judge

Dated: February 22, 2021 [ filed February 23, 2021 ]

**ORDER OF THE UNITED STATES  
DISTRICT COURT FOR THE EASTERN  
DISTRICT OF CALIFORNIA  
(JANUARY 8, 2021)**

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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

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PRISCILLA McMANUS,

*Plaintiff,*

v.

NBS DEFAULT SERVICES, LLC, ET AL.,

*Defendants.*

---

No. 2:18-cv-02047 JAM AC

Before: Allison CLAIRE,  
United States Magistrate Judge.

---

Pending before the court is plaintiff's motion to compel defendant Bank of America to respond to her Second Request for Production and Second Set of Interrogatories. ECF No. 89. The motion was taken under submission. ECF No. 91. Defendant Bank of America opposed the motion. ECF No. 92. Plaintiff recently filed an identical motion against defendant Nationstar Mortgage. ECF No. 95. These matters are referred to the undersigned pursuant to E.D. Cal. R. ("Local Rule") 302(c)(1) and 302(c)(21).

Local Rule 251(b) establishes requirements for any party bringing a motion pursuant to Federal Rules of Civil Procedure 26 through 37, including the requirement that the parties meet and confer and file a joint discovery statement. Here, no joint discovery statement has been filed with respect to either motion. Additionally, there is no indication that the parties have met and conferred regarding the disputes—it appears clear they have not, in both cases. Indeed, Bank of America states that plaintiff filed her motion before its deadline to respond to the discovery requests and without any attempt to meet and confer. ECF No. 92 at 2. Because plaintiff, the moving party, did not satisfy Local Rule 251(b)'s meet and confer requirement and the joint discovery statement requirement with respect to either motion, the motions to compel discovery are each denied without prejudice. *See e.g., United States v. Molen*, 2012 WL 5940383, at \*1 (E.D.Cal. Nov. 27, 2012) (where a party fails to comply with Local Rule 251, discovery motions are denied without prejudice to re-filing). Should plaintiff choose to re-file these motions, she must comply with the Local Rules and the Federal Rules of Civil Procedure.

For the reasons state above, IT IS HEREBY ORDERED that plaintiff's motions to compel ECF Nos. 89 and 95) are each DENIED without prejudice.

IT IS SO ORDERED.

/s/ Allison Claire

United States Magistrate Judge

Dated: January 7, 2021 [ filed January 8, 2021 ]

**ORDER OF THE UNITED STATES  
DISTRICT COURT FOR THE EASTERN  
DISTRICT OF CALIFORNIA  
(DECEMBER 22, 2020)**

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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

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PRISCILLA McMANUS,

*Plaintiff,*

v.

NBS DEFAULT SERVICES, LLC, ET AL.,

*Defendants.*

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No. 2:18-cv-02047 JAM AC PS

Before: Hon. John A. MENDEZ,  
United States District Court Judge.

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Plaintiff, proceeding pro se, filed the above-entitled action. The matter was referred to a United States Magistrate Judge pursuant to Local Rule 302(c)(21).

On November 25, 2020, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within fourteen days. ECF No. 87. Neither party has filed objections to the findings and recommendations.

App.28a

The court has reviewed the file and finds the findings and recommendations to be supported by the record and by the magistrate judge's analysis. Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed November 25, 2020, are adopted in full; and

2. Plaintiff's motion to strike (ECF No. 81) is DENIED.

IT IS SO ORDERED.

/s/ John A. Mendez  
United States District Court Judge

Dated: December 21, 2021 [ filed December 22, 2021 ]



**MINUTE ORDER  
(DECEMBER 9, 2020)**

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Docket 91: MINUTE ORDER Issued by Courtroom Deputy V. Callen for Magistrate Judge Allison Claire on 12/09/2020: re 89 Motion to Compel. The motion is ordered submitted without appearance and without argument pursuant to Local Rule 230 (g). If the Court subsequently concludes that oral argument is necessary, a hearing will be set, and the parties notified accordingly.(Text Only Entry) (Callen, V.) (Entered: 12/09/2020)

**MINUTE ORDER  
(OCTOBER 13, 2020)**

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Docket 36: MINUTE ORDER: in view of local rule 302(c) (21), all motions in pro se actions are to be heard before the assigned Magistrate Judge, and in this instance that is the Hon. Allison Claire. As a consequence, the defendants motion to dismiss the plaintiff's amended complaint 34 is improperly noticed for hearing before Judge Mendez and will not be calendared for hearing on March 5, 2019. (TEXT ENTRY ONLY) (Vine, H.) (Entered: 01/28/2019)

**CONSENT ORDER GRANTING  
SUBSTITUTION OF ATTORNEY  
(JANUARY 10, 2020)**

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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PRISCILLA McMANUS,

*Plaintiff,*

v.

NBS DEFAULT SERVICES, LLC, ET AL.,

*Defendant(s).*

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Case No. 2:18-cv-02047-JAM-AC

Before: Hon. John A. MENDEZ,  
United States District Court Judge.

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Notice is hereby given that, subject to approval by the court, Mortgage Electronic Registration Systems, Inc. (Party (s) Name), substitutes Justin D. Balser, (Name of New Attorney) State Bar No. 213478 as counsel of record in place, place of Sevana Zadourian (Name of Attorney (s) Withdrawing Appearance).

Contact information for new counsel is as follows:

Firm Name:	Akerman LLP
Address:	601 West Fifth Street, Suite 300
Telephone:	213.688.9500
Facsimile:	213.627.6342

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E-Mail (Optional): justin.balser@akerman.com

I consent to the above substitution.

/s/ Fay Janati  
(Signature of Party (s))

Date: 01/09/2020

I consent to the above substitution.

/s/ Sevana Zadourian  
(Signature of Former Attorney (s))

Date: 01/09/2020

I consent to the above substitution.

/s/ Justin D. Balser  
(Signature of New Attorney

Date: 01/09/2020

The substitution of attorney is hereby approved  
and so ORDERED.

/s/ John A. Mendez  
Judge

Dated: 1/10/2020

[Note: A separate consent order of substitution must  
be filed by each new attorney wishing to enter an  
appearance.]

**CONSENT ORDER GRANTING  
SUBSTITUTION OF ATTORNEY  
(JANUARY 9, 2020)**

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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PRISCILLA McMANUS,

*Plaintiff(s),*

v.

NBS DEFAULT SERVICES, LLC, ET AL.,

*Defendant(s).*

---

Case No. 2:18-cv-02047-JAM-AC

Before: Hon. John A. MENDEZ,  
United States District Court Judge.

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Notice is hereby given that, subject to approval by the court, Nationstar Mortgage LLC (Party (s) Name), substitutes Katalina Baumann, (Name of New Attorney) State Bar No. 278606 as counsel of record in place, place of Sevana Zadourian (Name of Attorney (s) Withdrawing Appearance).

Contact information for new counsel is as follows:

Firm Name:	Akerman LLP
Address:	601 West Fifth Street, Suite 300
Telephone:	213.688.9500
Facsimile:	213.627.6342

App.34a

E-Mail (Optional): justin.balser@akerman.com

I consent to the above substitution.

/s/  
(Signature of Party (s))

Date: January 2, 2020

I consent to the above substitution.

/s/  
(Signature of Former Attorney (s))

Date: January 2, 2020

I consent to the above substitution.

/s/  
(Signature of New Attorney

Date: January 2, 2020

The substitution of attorney is hereby approved  
and so ORDERED.

/s/ John A. Mendez  
Judge

Dated: 1/9/2020

[Note: A separate consent order of substitution must  
be filed by each new attorney wishing to enter an  
appearance.]

**ORDER OF THE UNITED STATES  
DISTRICT COURT FOR THE EASTERN  
DISTRICT OF CALIFORNIA  
(DECEMBER 30, 2019)**

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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

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PRISCILLA McMANUS,

*Plaintiff,*

v.

NBS DEFAULT SERVICES, LLC,  
BANK OF AMERICA, N.A., NATIONSTAR  
MORTGAGE, LLC and MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC.,

*Defendants.*

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No. 2:18-cv-2047 JAM AC (PS)

Before: Allison CLAIRE,  
United States Magistrate Judge.

---

**ORDER**

Plaintiff Priscilla McManus initiated this wrongful foreclosure action in pro se on June 20, 2018, by filing a complaint against defendants in the County of El Dorado Superior Court. ECF No. 1-1 at 14-30. Defendants removed the action to this court on July 26, 2018. ECF No. 1. The matter was referred to the court's

voluntary dispute resolution program. ECF No. 49. Two appointed neutrals have withdrawn due to conflicts of interest. ECF Nos. 51, 53. A new neutral was appointed on November 14, 2019. ECF No. 55. Plaintiff now moves the court to issue an order to show cause, expressing frustration with the delay in this case. ECF No. 56 at 2.

The motion for an order to show cause (ECF No. 56) is DENIED. Pursuant to Local Rule 271(j)(1), the parties have 91 days to complete the VDRP process once a neutral is appointed. That deadline in this case has not yet passed. If there is a conflict of interest, a neutral has an obligation to withdraw, and this may cause delay. While the court is sympathetic to plaintiff's frustration, there is no reason to issue an order to show cause.

IT IS SO ORDERED.

/s/ Allison Claire  
United States Magistrate Judge

Dated: December 30, 2019



**ORDER OF THE UNITED STATES  
DISTRICT COURT FOR THE EASTERN  
DISTRICT OF CALIFORNIA  
(APRIL 17, 2019)**

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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

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PRISCILLA McMANUS,

*Plaintiff,*

v.

NBS DEFAULT SERVICES, LLC,  
BANK OF AMERICA, N.A., NATIONSTAR  
MORTGAGE, LLC and MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC.,

*Defendants.*

---

No. 2:18-cv-2047 JAM AC (PS)

Before: Hon. John A. MENDEZ,  
United States District Court Judge.

---

Plaintiff, proceeding pro se, filed the above-entitled action. The matter was referred to a United States Magistrate Judge pursuant to Local Rule 302(c)(21).

On March 13, 2019, the magistrate judge filed findings and recommendations herein which were served on the parties and which contained notice to

the parties that any objections to the findings and recommendations were to be filed within twenty-one days. ECF No. 44. No objections to the findings and recommendations have been filed.

The court has reviewed the file and finds the findings and recommendations to be supported by the record and by the magistrate judge's analysis. Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed March 13, 2019 are adopted in full;

2. Defendants' motion to dismiss (ECF No. 37) is GRANTED and plaintiff's causes of action for (1) fraud and (2) to void or cancel assignment are dismissed from this case without further leave to amend;

3. The court declines to dismiss defendant Mortgage Electronic Registration Systems from this action; and

4. Defendants are directed to file their answer to the remaining causes of action within the time provided by Rule 12(a)(4)(A) of the Federal Rules of Civil Procedure.

/s/ John A. Mendez  
United States District Court Judge

Dated: April 17, 2019

**FINDINGS AND RECOMMENDATIONS OF  
THE MAGISTRATE JUDGE  
(MARCH 13, 2019)**

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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

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PRISCILLA McMANUS,

*Plaintiff,*

v.

NBS DEFAULT SERVICES, LLC,  
BANK OF AMERICA, N.A., NATIONSTAR  
MORTGAGE, LLC and MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC.,

*Defendants.*

---

No. 2:18-cv-02047 JAM AC (PS)

Before: Allison CLAIRE,  
United States Magistrate Judge.

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**FINDINGS AND RECOMMENDATIONS**

Plaintiff is proceeding in this matter pro se, and pre-trial proceedings are accordingly referred to the magistrate judge pursuant to Local Rule 302(c)(21). Pending is a second motion to dismiss from defendants Mortgage Electronic Registration Systems ("MERS"), Inc., and Nationstar Mortgage. ECF No. 37. The court granted in part and denied in part a prior motion to

dismiss from the same defendants, giving plaintiff leave to amend certain claims. ECF No. 28. Plaintiff filed a First Amended Complaint ("FAC")<sup>1</sup> on January 11, 2019. ECF No. 31. The motion at bar seeks to dismiss the first two counts of plaintiff's FAC: (1) fraud; and (2) "to void or cancel assignments of deed of trust." ECF No. 37. Moving defendants request that if the motion is granted, defendant MERS be dismissed from this action. ECF No. 37 at 3. Defendant NBS Default Services has not been served and has not appeared. ECF No. 15. Defendant Bank of America N.A. has appeared but did not participate in the motion. Plaintiff opposed the motion. ECF No. 40. Participating defendants replied. ECF No. 41. Based on a review of the record, the court recommends the motion to dismiss be GRANTED but defendant MERS will remain in the lawsuit because it is implicated in remaining causes of action.

## **I. BACKGROUND**

### **A. Procedural History**

Plaintiff Priscilla McManus initiated this wrongful foreclosure action pro se on June 20, 2018, by filing a complaint against defendants in the County of El Dorado Superior Court. ECF No. 1-1 at 14-30. Defendants removed the case to district court based on subject matter and diversity jurisdiction under 28 U.S.C. §§ 1332 and 1441. ECF No. 1. On August 2, 2018, defendants Mortgage Electronic Registration Systems, Inc. ("MERS"), and Nationstar Mortgage filed a motion

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<sup>1</sup> This document is labeled "Second Amended Complaint" on the docket but is in fact a First Amended Complaint, and is referred to as such herein.

to dismiss. ECF No. 8. The court granted the motion in part, but denied it as to plaintiff's claims for (1) breach of implied covenant of good faith and fair dealing, (2) violation of California business and professions code § 17200 et seq.; (3) quiet title; and (4) wrongful foreclosure. ECF No. 28 at 2. The court granted the motion to dismiss but granted leave to amend on plaintiff's claims of (5) fraud; and (6) void or cancel assignments of deed of trust. *Id.* Defendants' motion was granted without leave to amend on several other claims. *Id.* On January 11, 2019, plaintiff filed a First Amended Complaint ("FAC") alleging the six claims which had been permitted to move forward. ECF No. 31 at 1.

#### **B. Allegations in the FAC**

On April 26, 2004, plaintiff financed the loan on the "Subject Property" through Fidelity Home Mortgage Corp. and executed a promissory note ("the Note") in favor of Fidelity. The Note was secured by a deed of trust ("DOT") with MERS as the beneficiary. ECF No. 31 at 2. Plaintiff alleges that shortly after financing, Fidelity sold its interest in the note to Fannie Mae and attempted to sell its property security interest in plaintiff's DOT. *Id.* On March 14, 2011, a Loan Modification Agreement was signed by plaintiff stating that BAC Home Loan Servicing LP was the lender. *Id.*

On March 14, 2012, MERS sold BAC Home Loans Servicing all beneficial interest under the deed of trust and filed the notice with the El Dorado County Recorder's Office on March 29, 2012. *Id.* An Assignment of Deed of Trust dated June 20, 2013 is attached to the complaint, showing the DOT conveyed onto Nationstar Mortgage, LLC. *Id.* at 137, FAC Ex.

F. An assignment of DOT was signed on November 23, 2015 in which Nationstar Mortgage LLC conveyed onto the Federal National Mortgage Association the beneficial interest under the DOT. FAC Ex. G. The assignment was recorded on December 22, 2015. *Id.* Plaintiff attaches another Assignment of the DOT, signed December 7, 2015, in which Nationstar Mortgage again assigned its interest in the DOT to Federal National Mortgage Association ("Fannie Mae"); this Assignment was recorded on February 10, 2016. FAC Ex. H. Plaintiff alleges that no Substitutions of Trustee have been executed or filed in the public record with respect to the subject property, and the current trustee remains Fannie Mae. ECF No. 31 at 3.

On December 17, 2014, a Notice of Default on the subject property was recorded listing contact information for Nationstar and NBS Default Services. FAC Ex. I. In early June 2017 plaintiff received a Notice of Trustee's Sale in the mail from NBS Default Service, LLC, as the purported duly appointed trustee. *Id.* at 17. A copy of a Notice of Trustee's Sale dated June 30, 2017, listing contact information for NBS Default Services, is attached to the complaint. FAC Ex. J. On April 19, 2018 the subject property was sold to Fannie Mae pursuant to purported Assignments recorded by Nationstar Mortgage. FAC Ex. L. The same day, at 9:24 a.m. and prior to the scheduled sale of the Subject Property, plaintiff filed for Chapter 13 Bankruptcy. FAC Ex. K. Plaintiff is informed and believes that there has never been any substitution of trustee with respect to the DOT, none of the foreclosing defendants are the holder of the Note, and none of the foreclosing defendants were ever entitled to enforce the Note. ECF No. 31 at 4. Plaintiff is informed and believes

that defendants never knew who the actual beneficiary of the DOT was, and the actual beneficiary of the DOT never provided a declaration to NBS Default Services, LLC stating that plaintiff was in default, and thus the non-judicial foreclosure of the subject property was invalid. *Id.*

Plaintiff brings claims for (1) fraud; (2) to void or cancel assignments of deed of trust; (3) breach of the implied covenant of good faith and fair dealing; (4) violation of California business and professions code section 17200 et. seq.; (5) quiet title; and (6) wrongful foreclosure. ECF No. 31 at 4-14

## **II. MOTION TO DISMISS**

Moving defendants seeks to dismiss the FAC's first two causes of action under Federal Rule of Civil Procedure 12(b)(6). ECF No. 37. Defendants do not challenge the remaining claims in the FAC at this time. Defendants include a request for judicial notice of several documents. ECF No. 38.

### **A. Standards under Rule 12(b)(6)**

"The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the legal sufficiency of the complaint." *N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1990).

In order to survive dismissal for failure to state a claim, a complaint must contain more than a "formulaic recitation of the elements of a cause of

action;" it must contain factual allegations sufficient to "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). It is insufficient for the pleading to contain a statement of facts that "merely creates a suspicion" that the pleader might have a legally cognizable right of action. *Id.* (quoting 5 *C. Wright & A. Miller*, Federal Practice and Procedure § 1216, pp. 235-35 (3d ed. 2004)). Rather, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

In reviewing a complaint under this standard, the court "must accept as true all of the factual allegations contained in the complaint," construe those allegations in the light most favorable to the plaintiff, and resolve all doubts in the plaintiffs' favor. See *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 3055 (2011); *Hebbe v. Pliler*, 627 F.3d 338, 340 (9th Cir. 2010). However, the court need not accept as true legal conclusions cast in the form of factual allegations, or allegations that contradict matters properly subject to judicial notice. See *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981); *Spewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.), as amended, 275 F.3d 1187 (2001).

Pro se pleadings are held to a less stringent standard than those drafted by lawyers. *Haines v.*



*Kerner*, 404 U.S. 519, 520 (1972). Pro se complaints are construed liberally and may only be dismissed if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Nordstrom v. Ryan*, 762 F.3d 903, 908 (9th Cir. 2014). A pro se litigant is entitled to notice of the deficiencies in the complaint and an opportunity to amend, unless the complaint's deficiencies could not be cured by amendment. *See Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

#### **B. Request for Judicial Notice**

A court may take judicial notice of certain facts. Fed. R. Evid. 201. "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Even where a document is not subject to judicial notice, however, the court may still consider a document proffered for judicial notice, if it qualifies under the "incorporation by reference" doctrine. "[T]he 'incorporation by reference' doctrine . . . permits us to take into account documents 'whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading.'" *Kniewel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (quoting *Janas v. McCracken (In re Silicon Graphics Inc. Sec. Litig.)*, 183 F.3d 970, 986 (9th Cir. 1999)). The Ninth Circuit has extended the doctrine to situations in which the plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity

of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint. *Kniesel*, 393 F.3d at 1076.

The court takes judicial notice of all exhibits incorporated into plaintiff's complaint. ECF No. 31. With the exception of an affidavit, they are all matters of the public record. *Id.* The exhibits include exhibits: (A) Affidavit of Joseph Esquivel and Chain Title Analysis; (B) Deed of Trust; (C) Trust Pooling and Servicing Agreement; (D) Loan Modification dated March 14, 2011; (E) Assignment of Deed of Trust to Bank of America NA, recorded March 29, 2012; (F) Assignment of Deed of Trust to Nationstar Mortgage, recorded June 20, 2013; (G) Corporate Assignment of Deed of Trust to Federal National Mortgage Association, recorded December 22, 2015; (H) Corporate Assignment of Deed of Trust to Federal National Mortgage Association, recorded February 10, 2016; (I) Notice of Default recorded December 17, 2014; (J) Notice of Sale recorded June 30, 2017; (K) Voluntary Petition for Individuals Filing Bankruptcy dated April 19, 2018; (L) Trustee's Deed Upon Sale.

Defendants seek judicial notice for several of these same documents (defendant's Ex. A (Trustee's Deed Upon Sale); Ex. B (Deed of Trust); Ex. C (March 29, 2012 recording), D (June 20, 2013 recording); E (December 17, 2014 recording); and F (November 9, 2015 Notice of Trustee's Sale). The court takes judicial notice of each of these documents.

### **C. Discussion of Claims**

Defendants seek to dismiss the FAC on grounds that each of plaintiff's individual causes of action fail

to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). ECF No. 37.

### **1. Fraud**

Plaintiff brings a claim of fraud, alleging that the defendants “engaged in a pattern and practice of defrauding Plaintiff in that, during the life of the mortgage loan, the Defendant failed to properly credit payments made and on the Subject Property based on Plaintiff’s alleged nonpayment which they knew to be false.” ECF No. 31 at 4. Plaintiff maintains that she did not become aware of the failure to properly credit payments until April 19, 2018, when she learned that her property which was scheduled to be sold in foreclosure at 1:00 p.m. had already been sold at 9:10 a.m. without ever being offered at public auction as stated on the Notice of Sale. *Id.* at 45. Plaintiff states that the improper sale “reconfirmed to Plaintiff that Defendants were not following the Rule of Law.” *Id.* at 5.

Fraud claims in California are subject to a three-year statute of limitations. California Code of Civil Procedure § 338(d) sets a three-year statute of limitations for “[a]n action for relief on the ground of fraud or mistake. The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.” In general, “[a] cause of action accrues when the claim is complete with all of its elements.” *Slovensky v. Friedman*, 142 Cal. App. 4th 1518, 1528 (2006), as modified (citation omitted). “Although this ordinarily occurs on the date of the plaintiff’s injury, accrual is postponed until the plaintiff either discovers or has reason to discover the existence

of a claim, *i.e.*, at least has reason to suspect a factual basis for its elements.” *Id.* at 1528–29 (citations omitted). “Plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation.” *Id.* at 1529 (citation and alteration omitted). “So long as there is a reasonable ground for suspicion, the plaintiff must go out and find the facts; she cannot wait for the facts to find her.” *Id.* (citation omitted).

The Notice of Default was recorded on the subject property on December 17, 2014. FAC Ex. I. Ordinarily, the Notice of Default would be construed to have put plaintiff on notice that, if she was making payments as she alleges, they were not being credited. Plaintiff seeks to avoid this presumption by stating that “Defendants concealed material facts known to them but not to plaintiff regarding payments, notices, assignments, transfers, late fees and charges with the intent to defraud Plaintiff.” Plaintiff further asserts she did not discover the fraud until filing for bankruptcy on April 19, 2018, when the bankruptcy court advised her that before the intended time of sale, the bank had already transferred the Deed of Trust on the Subject Property. ECF No. 31 at 5. This explanation does not save plaintiff’s fraud claim from the time bar, because plaintiff’s claim fraud claim is based on the fact that her payments were not being properly credited, and the Notice of Default clearly indicated that from the lender’s perspective, plaintiff was not making the required payments. As of the December 17, 2014 Notice, plaintiff had enough information to prompt an investigation on her part; she was on notice that the bank considered her in default.

At hearing, plaintiff explained her failure to investigate upon receiving the Notice of Default by alleging that she had been misled by lenders. Specifically, upon receiving a Notice of Default in the past she had been advised by her lender to allow the default to take effect so that she could participate in a loan modification program. In light of plaintiff's allegations of special circumstances, the court asked counsel for defendants whether California makes any provision for equitable tolling in a case like this. In light of defendants' response, ECF No. 43, and the court's independent legal research, it is clear that the doctrine of equitable tolling does not save plaintiff's fraud claim.

Equitable tolling "halts the running of the limitations period so long as the plaintiff uses reasonable care and diligence in attempting to learn the facts that would disclose the defendant's fraud or other misconduct." (4 Wright & Miller, Federal Practice and Procedure (3d ed. 2002) Commencement of Action, § 1056, p. 255.) The doctrine "focuses primarily on the plaintiff's excusable ignorance of the limitations period. [Citation.] [It] is not available to avoid the consequences of one's own negligence." (*Lehman v. U.S.* (9th Cir.1998) 154 F.3d 1010, 1016, italics in original.) "To establish that equitable tolling applies, a plaintiff must prove the following elements: fraudulent conduct by the defendant resulting in concealment of the operative facts, failure of the plaintiff to discover the operative facts that are the basis of its cause of action within the limita-

tions period, and due diligence by the plaintiff until discovery of those facts. [Citations.]” (*Federal Election Com’n v. Williams* (9th Cir.1996) 104 F.3d 237, 240–241.)

*Sagehorn v. Engle*, 141 Cal. App. 4th 452, 460–61 (2006) (footnote omitted). On its face, plaintiff’s fraud claim is not subject to equitable tolling because plaintiff’s misunderstanding as to the significance of the Notice of Default does not excuse her failure to investigate why her lender was apparently not crediting payments she claims that she made; plaintiff does not allege that she was affirmatively told to ignore the Notice of Default or that it was issued in error. Plaintiff’s ignorance of the law or the legal remedies available to her does not postpone the statute of limitations. *See, Bonyadi v. CitiMortgage, Inc.*, No. CV 12-5239 CAS (JCGx), 2013 WL 2898143, at \*5 (C.D. Cal. June 10, 2013).

Plaintiff’s cause of action for fraud accrued upon receipt of the Notice of Default because that it when she “at least ha[d] a reason to suspect a factual basis” for a fraud claim. *Slovensky*, 142 Cal. App. 4th at 1528. Plaintiff filed her case in El Dorado Superior Court on June 20, 2018, over three years since receiving the Notice of Default. ECF No. 1-1 at 12. For this reason, plaintiff’s fraud claim fails as a matter of law and defendants’ motion to dismiss must be GRANTED as to fraud without further leave to amend.

## **2. “Void or Cancel Assignment” (Homeowner’s Bill of Rights)**

Plaintiff asserts, without citation to any authority, that the Corporate Assignment of Deed of Trust recorded March 29, 2012 was invalid for “the reasons

set forth above including, inter alia, the fact the MERS did not have standing or the legal authority to assign the deed of trust which purportedly secured the Note, and which served as the basis for a claim to have the right to conduct a non-judicial foreclosure sale.” ECF No. 31 at 7. Plaintiff separately cites a provision of the California Homeowners Bill of Rights which states that “Lenders that record and file multiple unverified documents will be subject to a civil penalty up to \$7,500 per loan in an action brought by a civil prosecutor.” *Id.* at 22. Plaintiff’s claim fails because it lacks a legal basis for relief.

The court previously dismissed this claim in plaintiff’s original complaint, with leave to amend, because it identified no cognizable cause of action. ECF No. 22 at 9-10. The court noted that the claim’s label, “To Void or Cancel Assignment of Deed of Trusts” suggests a desired remedy but does not provide a legal basis for a claim. *Id.* at 10. The court found that without a clear basis in law, the claim did not comply with Rule 8, but gave plaintiff the opportunity to provide clarity through amendment. *Id.* Plaintiff’s FAC does not provide the required clarity. Even as re-drafted, the cause of action lacks an identifiable basis in law. Because this cause of action does not state a claim pursuant to Fed. R. Civ. P. 12(b)(6), defendants’ motion on this point must be granted and the claim dismissed without further leave to amend.

#### **D. Status of Defendant MERS**

The moving defendants suggest that dismissal of plaintiff’s first and second claims should result in the dismissal of MERS from the case. ECF No. 37 at 3.

However, MERS is specifically named in plaintiff's third cause of action for the breach of implied covenant of good faith and fair dealing (ECF No. 31 at 9-10), which the motion at bar does not address. There is no cause to dismiss MERS from this lawsuit when at least one active claim is pending against it.

### III. CONCLUSION

It is hereby recommended that defendants' motion to dismiss (ECF No. 37) be GRANTED and that plaintiff's causes of action for fraud and void or cancel assignment be dismissed from this case without further leave to amend. The court should decline to dismiss defendant MERS from the action.

These findings and recommendations are submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1). Within twenty-one (21) days after being served with these findings and recommendations, any party may file written objections with the court. Such document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Local Rule 304(d). Failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

/s/ Allison Claire  
United States Magistrate Judge

Dated: March 12, 2019 [ filed March 13, 2019 ]



**MINUTE ORDER  
(JANUARY 28, 2019)**

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Docket 36: MINUTE ORDER: in view of local rule 302(c) (21), all motions in pro se actions are to be heard before the assigned Magistrate Judge, and in this instance that is the Hon. Allison Claire. As a consequence, the defendants motion to dismiss the plaintiff's amended complaint 34 is improperly noticed for hearing before Judge Mendez and will not be calendared for hearing on March 5, 2019. (TEXT ENTRY ONLY) (Vine, H.) (Entered: 01/28/2019)

**MINUTE ORDER  
(JANUARY 7, 2019)**

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Docket 30: MINUTE ORDER: (Text only) Re 29 Minute Order, Pursuant to ECF No. 29, the Initial Scheduling Conference currently set on January 23, 2019 is hereby vacated from the calendar subject to the filing of the amended complaint. (Callen, V) (Entered: 01/07/2019)

**ORDER OF THE UNITED STATES  
DISTRICT COURT FOR THE EASTERN  
DISTRICT OF CALIFORNIA  
(DECEMBER 11, 2018)**

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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

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PRISCILLA McMANUS,

*Plaintiff,*

v.

NBS DEFAULT SERVICES, LLC,  
BANK OF AMERICA, N.A., NATIONSTAR  
MORTGAGE, LLC and MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC.,

*Defendants.*

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No. 2:18-cv-02047 JAM AC (PS)

Before: John A. MENDEZ,  
United States District Court Judge.

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Plaintiff is proceeding in this action in pro per. The matter was referred to a United States Magistrate Judge pursuant to Local Rule 302(c)(21).

On September 10, 2018, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all

parties that any objections to the findings and recommendations were to be filed within twenty-one days. ECF No. 22. Defendants have filed objections to the findings and recommendations. ECF 25.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed September 10, 2018 are adopted in full;
2. Defendants' motion to dismiss is GRANTED in part and DENIED in part as follows:
  - a) Defendants' motion to dismiss is granted as to (1) negligence; (3) cancellation of voidable contract under Rev. & Tax Code §§ 233304.1, 23305A, and Cal. Corp. Code §§ 191(c)(7); and (8) slander of title; these claims are dismissed without leave to amend;
  - b) Defendants' motion to dismiss is GRANTED as to (2) fraud; and (4) to void or cancel assignments of deed of trust, but plaintiff is allowed to amend these claims; and
  - c) Defendants' motion is DENIED as to (5) breach of implied covenant of good faith and fair dealing; (6) violation of California business and professions code section 17200 et seq.; (7) quiet title; and (9) wrongful foreclosure.

App.57a

/s/ John A. Mendez  
United States District Court Judge

Dated: December 10, 2018 [ filed December 11, 2018 ]

**MINUTE ORDER  
(DECEMBER 11, 2018)**

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Docket 29: MINUTE ORDER re 28 Order adopting Findings and Recommendations, Order on Motion to Dismiss, Findings and Recommendations (Order), 27 Order. In light of the District Judge's adoption of the Findings and Recommendations recommending partial dismissal with leave to amend (ECF) Nos. 27, 28), Plaintiff may now file an amended complaint consistent with these orders. Plaintiff's amended complaint is due no later than January 11, 2019. (Callen, V.) (Entered 12/11/2018)

**ORDER OF THE UNITED STATES  
DISTRICT COURT FOR THE EASTERN  
DISTRICT OF CALIFORNIA  
(OCTOBER 2, 2018)**

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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

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PRISCILLA McMANUS,

*Plaintiff,*

v.

NBS DEFAULT SERVICES, ET AL.,

*Defendants.*

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No. 2:18-cv-02047 JAM AC (PS)

Before: Allison CLAIRE,  
United States Magistrate Judge.

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**ORDER**

On September 10, 2018, the undersigned issued Findings and Recommendations to District Judge John A. Mendez recommending, in part, that portions of plaintiff's case be dismissed with leave to amend. ECF No. 22. Before Judge Mendez had the opportunity to rule on the Findings and Recommendations, plaintiff submitted an amended complaint. ECF No. 26. Plaintiff's amended complaint is premature and improperly filed, and is therefore STRICKEN. Plaintiff's

App.60a

opportunity to amend will arise only if Judge Mendez adopts the submitted Findings and Recommendations; plaintiff must await a ruling from Judge Mendez before any amended complaint can be filed. Accordingly, IT IS HEREBY ORDERED that plaintiff's first amended complaint (ECF No. 26) is STRICKEN.

/s/ Allison Claire  
United States Magistrate Judge

Dated: October 2, 2018



**FINDINGS AND RECOMMENDATIONS OF  
THE MAGISTRATE JUDGE  
(SEPTEMBER 10, 2018)**

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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

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PRISCILLA McMANUS,

*Plaintiff,*

v.

NBS DEFAULT SERVICES, LLC,  
BANK OF AMERICA, N.A., NATIONSTAR  
MORTGAGE, LLC, and MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC.,

*Defendants.*

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No. 2:18-cv-02047 JAM AC (PS)

Before: Allison CLAIRE,  
United States Magistrate Judge.

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**FINDINGS AND RECOMMENDATIONS**

Plaintiff is proceeding in this matter pro se, and pre-trial proceedings are accordingly referred to the magistrate judge pursuant to Local Rule 302(c)(21). Pending is a motion to dismiss from defendants Mortgage Electronic Registration Systems, Inc. and Nationstar Mortgage, LLC. ECF No. 8. Defendant NBS Default Services was only recently served, on

August 31, 2018, and has not yet appeared. ECF No. 18. Defendant Bank of America N.A. has appeared but did not participate in the motion. Plaintiff opposed the motion, ECF No. 11, and the moving defendants replied. ECF No. 16. The parties appeared for a hearing on the motion on September 5, 2018. ECF No. 19. Based on a review of the record, the court recommends that the motion be granted in part and denied in part.

## **I. BACKGROUND**

### **A. Procedural History**

Plaintiff Priscilla McManus initiated this wrongful foreclosure action in pro se on June 20, 2018, by filing a complaint against defendants in the County of El Dorado Superior Court. ECF No. 1-1 at 14-30. Defendants removed the case to district court based on subject matter and diversity jurisdiction under 28 U.S.C. §§ 1332 and 1441. ECF No. 1. On August 2, 2018, defendants Mortgage Electronic Registration Systems, Inc. ("MERS"), and Nationstar Mortgage, LLC ("Nationstar") filed a motion to dismiss. ECF No. 8.

### **B. Allegations of the Complaint**

Plaintiff alleges that she is the proper title holder to the real property located at 1600 Starbuck Rd., Rescue, CA 95672 ("subject property"). ECF No. 1-1 at 15. On April 26, 2004, plaintiff financed the loan on the subject property through Fidelity Home Mortgage Corp. and executed a promissory note ("the Note") in favor of Fidelity. The Note was secured by a deed of trust ("DOT") with MERS as the beneficiary. *Id.* at 16. Plaintiff alleges that shortly after financing, Fidelity sold its interest in the note to Fannie Mae and

attempted to sell its property security interest in plaintiff's DOT. *Id.* Plaintiff alleges that on March 14, 2011, a Loan Modification Agreement was signed by plaintiff stating that BAC Home Loan Servicing LP was the lender. *Id.*

Plaintiff alleges that on March 14, 2012, MERS sold BAC Home Loans Servicing all beneficial interest under the deed of trust and filed the notice with the El Dorado County Recorder's Office on March 29, 2012. *Id.* An Assignment of Deed of Trust dated June 20, 2013 is attached to the complaint, showing the DOT conveyed onto Nationstar Mortgage, LLC. *Id.* at 137, Complaint Ex. F. An assignment of DOT was signed on November 23, 2015 in which Nationstar Mortgage LLC conveyed onto the Federal National Mortgage Association ("Fannie Mae") the beneficial interest under the DOT. *Id.* at 139, Complaint Ex. G. The assignment was recorded on December 22, 2015. *Id.* Plaintiff attaches another Assignment of the DOT, signed December 7, 2015, in which Nationstar Mortgage again assigned its interest in the DOT to Fannie Mae; this Assignment was recorded on February 10, 2016. *Id.* at 141, Complaint Ex. H. Plaintiff alleges that no Substitutions of Trustee have been executed or filed in the public record with respect to the subject property, and the current trustee remains Fannie Mae. *Id.*

On December 17, 2014, a Notice of Default on the subject property was recorded listing contact information for Nationstar and NBS Default Services. *Id.* at 144, Complaint Ex. I. Plaintiff alleges that in early June 2017 plaintiff received a Notice of Trustee's Sale in the mail from NBS Default Service, LLC, as the purported duly appointed trustee. *Id.* at 17. A

copy of a Notice of Trustee's Sale dated June 30, 2017, listing contact information for NBS Default Services, is attached to the complaint. *Id.* at 148-49, Complaint Ex. J. On April 19, 2018 the subject property was sold to Fannie Mae pursuant to purported Assignments recorded by Nationstar Mortgage. *Id.* at 153-53, Complaint Ex. K. Plaintiff alleges that there has never been any substation of trustee with respect to the DOT, none of the foreclosing defendants are the holder of the Note, and none of the foreclosing defendants were ever entitled to enforce the Note. *Id.* at 17. Plaintiff alleges, based on information and belief, that the defendants never knew the identity of the actual beneficiary of the DOT, that the actual beneficiary of the DOT never provided a declaration to NBS Default Services, LLC stating that plaintiff was in default, and that the non-judicial foreclosure of the subject property therefore was invalid. *Id.* at 18.

Plaintiff brings claims for (1) negligence; (2) fraud; (3) cancellation of a voidable contract under Rev. & Tax Code §§ 23304.1, 23305A, and Cal. Corp. Code §§ 191(c)(7); (4) to void or cancel assignments of deed of trust; (5) breach of the implied covenant of good faith and fair dealing; (6) violation of California business and professions code section 17200 et. seq.; (7) quiet title; (8) slander of title; and (9) wrongful foreclosure. ECF No. 1-1 at 14.

## II. MOTION TO DISMISS

Defendant seeks to dismiss the complaint against it in its entirety under Federal Rule of Civil Procedure 12(b)(6).

**A. Standards under Rule 12(b)(6)**

“The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the legal sufficiency of the complaint.” *N. Star Int’l v. Ariz. Corp. Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983). “Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t.*, 901 F.2d 696, 699 (9th Cir. 1990).

In order to survive dismissal for failure to state a claim, a complaint must contain more than a “formulaic recitation of the elements of a cause of action;” it must contain factual allegations sufficient to “raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). It is insufficient for the pleading to contain a statement of facts that “merely creates a suspicion” that the pleader might have a legally cognizable right of action. *Id.* (quoting 5 *C. Wright & A. Miller*, Federal Practice and Procedure § 1216, pp. 235-35 (3d ed. 2004)). Rather, the complaint “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*

In reviewing a complaint under this standard, the court “must accept as true all of the factual allegations contained in the complaint,” construe those allegations in the light most favorable to the plaintiff, and resolve all doubts in the plaintiffs’ favor. See *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Von Saher*

*v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010), *cert. denied*, 564 U.S. 1037 (2011); *Hebbe v. Pliler*, 627 F.3d 338, 340 (9th Cir. 2010). However, the court need not accept as true legal conclusions cast in the form of factual allegations, or allegations that contradict matters properly subject to judicial notice. *See Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.), as amended, 275 F.3d 1187 (2001).

Pro se pleadings are held to a less stringent standard than those drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Pro se complaints are construed liberally and may only be dismissed if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Nordstrom v. Ryan*, 762 F.3d 903, 908 (9th Cir. 2014). A pro se litigant is entitled to notice of the deficiencies in the complaint and an opportunity to amend, unless the complaint's deficiencies could not be cured by amendment. *See Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

#### **B. Request for Judicial Notice**

A court may take judicial notice of certain facts. Fed. R. Evid. 201. "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Even where a document is not subject to judicial notice, however, the court may still consider a document proffered for judicial notice, if it qualifies

under the “incorporation by reference” doctrine. “[T]he “incorporation by reference” doctrine . . . permits us to take into account documents “whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff’s] pleading.” *Kniewel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (quoting *Janas v. McCracken (In re Silicon Graphics Inc. Sec. Litig.)*, 183 F.3d 970, 986 (9th Cir. 1999)). The Ninth Circuit has extended the doctrine to situations in which the plaintiff’s claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint. *Kniewel*, 393 F.3d at 1076.

The court takes judicial notice of all exhibits incorporated into plaintiff’s complaint. ECF No. 1-1 at 31-153. With the exception of an affidavit, they are all matters of the public record. *Id.* The exhibits include exhibits: (A) Affidavit of Joseph Esquivel and Chain Title Analysis; (B) Deed of Trust; (C) Trust Pooling and Servicing Agreement; (D) Loan Modification dated March 14, 2011; (E) Assignment of Deed of Trust to Bank of America NA, recorded March 29, 2012; (F) Assignment of Deed of Trust to Nationstar Mortgage, recorded June 20, 2013; (G) Corporate Assignment of Deed of Trust to Federal National Mortgage Association, recorded December 22, 2015; (H) Corporate Assignment of Deed of Trust to Federal National Mortgage Association, recorded February 10, 2016; (I) Notice of Default recorded December 17, 2014; (J) Notice of Sale recorded June 30, 2017; (K) Trustee’s Deed Upon Sale. Defendants seek judicial

notice for several of these same documents (defendant's Ex. A (Trustee's Deed Upon Sale), Ex. B (Deed of Trust), C (March 29, 2012 recording), D (June 20, 2013 recording), and E (December 17, 2014 recording). Defendants additionally seek judicial notice of the following public record: Defendant's Ex. F (November 9, 2015 Notice of Trustee's Sale). The court takes judicial notice of each of these documents.

### **C. Discussion of Claims**

Defendant contends that each of plaintiff's individual causes of action fails to state a claim. ECF No. 8.

#### **1. Negligence**

Plaintiff asserts that defendants had a duty of care to plaintiff as plaintiff's lender and loan servicer, but breached that duty through failure "to properly and accurately credit payments made by Plaintiff toward the loan, preparing and filing false documents, and foreclosing on the Subject Property without having the legal authority and/or proper documentation to do so." ECF No. 1-1 at 18. This claim fails.

Negligence requires "(a) a legal duty to use due care; (b) a breach of such legal duty; [and] (c) the breach as the proximate or legal cause of the resulting injury." *Ladd v. County of San Mateo*, 12 Cal. 4th 913 (1996). As a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money. Cal. Civ. Code § 3434; *Wagner v. Benson*, 101 Cal. App. 3d 27, 35 (1980). Liability to a borrower for negligence arises only when the lender "actively participates" in the financed enterprise



“beyond the domain of the usual money lender.” *Nymark v. Heart Fed. Savings & Loan Ass’n*, 231 Cal. App. 3d 1089, 1096 (1991) (quoting *Connor v. Great Western Sav. & Loan Assn.*, 69 Cal. 2d 850, 864 (1968)). Acting in a conventional role as a lender of money or supervision for the protection of a security interest in loan collateral does not constitute active participation. *Wagner*, 101 Cal. App. 3d at 35; *Nymark*, 231 Cal. App. 3d at 1096. This principle has been extended to loan servicers. *Castaneda v. Saxon Mortg. Servs.*, 687 F. Supp. 2d 1191, 1198 (E.D. Cal. 2009).

Here, all defendants were acting in their capacity as financial institutions. Plaintiff does not give any indication that any defendant in this case stepped outside its role as a money lender or loan servicer, stating only that defendants were negligent in “failing to properly and accurately credit payments toward the loan, preparing and filing false documents, and foreclosing on the Subject Property without having the legal authority and/or proper documentation to do so.” ECF No. 1-1 at 18. Accordingly, the motion to dismiss should be GRANTED as to the negligence claim. Because the judicially noticed documents confirm that all defendants acted within their capacities as financial institutions, roles which cannot support negligence liability as a matter of law, amendment would be futile and plaintiff should not be granted leave to amend.

## **2. Fraud**

Plaintiff brings a claim of fraud, alleging that the defendants “engaged in a pattern and practice of defrauding Plaintiff in that, during the life of the mortgage loan, the Defendant failed to properly credit

payments made and on the Subject Property based on Plaintiff's alleged non-payment which they knew to be false." ECF No. 1-1 at 19. Plaintiff's fraud claim, as stated in her complaint, fails because it is time-barred. Fraud claims in California are subject to a three-year statute of limitations. California Code of Civil Procedure § 338(d) sets a three-year statute of limitations for "[a]n action for relief on the ground of fraud or mistake. The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." In general, "[a] cause of action accrues when the claim is complete with all of its elements." *Slovensky v. Friedman*, 142 Cal. App. 4th 1518, 1528 (2006), as modified (citation omitted). "Although this ordinarily occurs on the date of the plaintiff's injury, accrual is postponed until the plaintiff either discovers or has reason to discover the existence of a claim, *i.e.*, at least has reason to suspect a factual basis for its elements." *Id.* at 1528–29 (citations omitted). "Plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation." *Id.* at 1529 (citation and alteration omitted). "So long as there is a reasonable ground for suspicion, the plaintiff must go out and find the facts; she cannot wait for the facts to find her." *Id.* (citation omitted).

The Notice of Default was recorded on the subject property on December 17, 2014. ECF No. 1-1 at 143, Plaintiff's Ex. I. The Notice of Default put plaintiff on notice that, if she was making payments as she alleges, they were not being credited. Plaintiff's cause of action for fraud accrued at this point because upon

receiving the Notice, she “at least ha[d] a reason to suspect a factual basis” for a fraud claim. *Slovensky*, 142 Cal. App. at 1528. Plaintiff filed her case in El Dorado Superior Court on June 20, 2018, over three years after receiving the Notice of Default. ECF No. 1-1 at 12. For this reason, plaintiff’s fraud claim fails as stated cannot survive and defendant’s motion to dismiss on this point must be GRANTED.

However, at the hearing, plaintiff clarified that she believes there was additional fraud in the actual sale of the subject property, and that she did not have reason to know that factual basis until the day the property was scheduled to be auctioned, April 19, 2018. Because plaintiff has indicated the existence of additional facts which might establish a timely fraud claim, the undersigned recommends that this cause of action be dismissed but plaintiff be granted leave to amend.<sup>1</sup>

### **3. Cancellation of a Voidable Contract**

Plaintiff’s claim for cancellation of a voidable contract under Rev. & Tax Code §§ 23304.1 and violation of Cal. Corp. Code §§ 191(c)(7) cannot survive. This cause of action is brought only against MERS; plaintiff alleges that MERS was operating in the State of California during the time of the relevant transactions without registering as a foreign corporation, to avoid paying taxes into the state. ECF No. 1-1 at 20. Plaintiff alleges that because “MERS did not have the legal

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<sup>1</sup> The court expresses no opinion regarding the potential viability or timeliness of such a claim. It finds only that plaintiff’s proffer indicates that leave to amend, which must be afforded generously to a pro se plaintiff, is appropriate.

capacity to enter into a contract with Plaintiff or anyone else, [ ] Plaintiff has the option of voiding the contract. Therefore, any action that MERS took with regard to assigning the deed of trust would be ultra vires and void." *Id.* at 21.

In relevant part, Cal. Rev. & Tax. Code § 23304.1 states that "[i]f a foreign taxpayer that neither is qualified to do business nor has an account number from the Franchise Tax Board, fails to file a tax return required under this part, any contract made in this state by that taxpayer during the applicable period specified in subdivision (c) shall, subject to Section 23304.5, be voidable at the request of any party to the contract other than the taxpayer." California Corporate Code § 191(c)(7) includes in the definition of "transacting business" the act of "[c]reating evidences of debt or mortgages, liens or security interests on real or personal property." Cal. Corp. Code § 191 (West).

Plaintiff's claim fails as a matter of law. The courts have recognized that "MERS is statutorily exempted from the requirement to obtain a certificate of qualification to conduct business in California. MERS registered as a Delaware corporation, which is a foreign corporation under California law. Cal. Corp. Code §§ 167, 171. MERS is not required to obtain a certificate of qualification from the Secretary of State because it does not 'transact intrastate business' within the meaning of the statute." *Castaneda v. Saxon Mortg. Servs., Inc.*, 687 F. Supp. 2d 1191, 1195, n.3 (E.D. Cal. 2009). Further, in 2010 MERS registered to conduct intrastate business in California and is therefore "entitled to have its prior transactions given full effect." *Perlas v. Mortg. Elec. Registration Sys., Inc.*, No. C 09-4500 CRB, 2010 WL 3079262, at \*7 (N.D. Cal.

2010). Plaintiff's "voidable contract" claim therefore fails as a matter of law, and the motion to dismiss should be GRANTED as to this claim without leave to amend.

#### **4. Void or Cancel Assignment (Homeowner's Bill of Rights)**

Plaintiff asserts, without citation to any authority, that the Corporate Assignment of Deed of Trust recorded March 29, 2012 was invalid for "the reasons set forth above including, inter alia, the fact the MERS did not have standing or the legal authority to assign the deed of trust which purportedly secured the Note, and which served as the basis for a claim to have the right to conduct a non-judicial foreclosure sale." ECF No. 1-1 at 21. Plaintiff separately cites a provision of the California Homeowners Bill of Rights which states that "Lenders that record and file multiple unverified documents will be subject to a civil penalty up to \$7,500 per loan in an action brought by a civil prosecutor." *Id.* at 22. Plaintiff's claim fails because its legal basis is unclear. Federal Rule of Civil Procedure 8 sets forth the basic pleading standard in federal courts. To comply with Rule 8, a complaint must contain (1) a "short and plain statement" of the basis for federal jurisdiction (that is, the reason the case is filed in this court, rather than in a state court), (2) a short and plain statement showing that plaintiff is entitled to relief (that is, who harmed the plaintiff, and in what way), and (3) a demand for the relief sought. Fed. R. Civ. P. 8(a). Plaintiff's claims must be set forth simply, concisely and directly. Fed. R. Civ. P. 8(d)(1). It is well settled that an effective pleading should provide the defendant with a basis for assessing the initial strength of the plaintiff's claim, for preserving relevant evidence, for identifying any related counter-or cross-

claims, and for preparing an appropriate answer. *Grid Systems v. Texas Instruments. Inc.*, 771 F.Supp. 1033, 1037 (9th Cir. 1991). Pleadings filed by pro se litigants are held to "less stringent standards than formal pleadings by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (internal citations omitted). Nonetheless, to avoid dismissal under Rule 8, pro se pleadings "must [still] meet some minimum threshold in providing a defendant with notice of what it is that it allegedly did wrong." *Brazil v. U.S. Dep't of Navy*, 66 F.3d 193, 199 (9th Cir. 1995).

Based on the complaint, the court cannot determine the basis for plaintiff's fourth cause of action. It's label, "To Void or Cancel Assignment of Deed of Trusts" suggests a desired remedy, but does not provided a legal basis for a claim. Without an identifiable basis in law, the claim must be dismissed for failure to comply with Rule 8. However, because it is not clear whether a claim can be stated on this point, dismissal should be with leave to amend. Defendant's motion to dismiss should be GRANTED, but plaintiff should be permitted to amend this cause of action to clarify its legal basis.

#### **5. Implied Covenant of Good Faith and Fair Dealing**

Plaintiff properly states a claim under the Implied Covenant of Good Faith and Fair Dealing. ECF No. 1-1 at 6. The implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation. *Racine & Laramie, Ltd. v. Department of Parks & Recreation*, 11 Cal. App. 4th 1026, 1032 (1992). The scope of conduct prohibited is circumscribed by the purposes and express terms of

the contract. *Ellis v. Chevron, U.S.A. Inc.*, 201 Cal. App. 3d 132, 139 (1988). “It is universally recognized the scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract.” *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.*, 2 Cal. 4th 342, 372-73 (1992); *see also* Cal. Civ. Jury Instructions no. 325 (2017) (establishing a five-part test). While some federal district courts have held that “to state a claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must identify the specific contractual provision that was frustrated,” this notion does not appear to be supported by California law. *Plastino v. Wells Fargo Bank*, 873 F. Supp. 2d 1179, 1191 (N.D. Cal. 2012) (internal quotation omitted). Indeed, the California Supreme Court has held that “breach of a specific provision of the contract is not a necessary prerequisite” to bring an implied covenant claim. *Carma Developers*, 2 Cal. 4th at 373.

Here, plaintiff claims the Note and DOT were not properly assigned to defendants, and that defendants acted in bad faith by foreclosing the subject property without having the proper rights under the DOT. Plaintiff contends that defendants engaged in conduct to drive plaintiff into foreclosure so they could acquire the subject property “at a bargain basement price.” Indeed, plaintiff attached documents, of which the court took judicial notice, which appear to demonstrate that Nationstar was not the beneficiary under the DOT at the time the foreclosure sale took place. ECF No. 1-1 at 139, 141. Defendant focuses on the fact that plaintiff does not identify any specific contractual provision that was frustrated, but as discussed

above, so long as her allegations are within the bounds and expectations of the contracts at issue, she need not identify breach of a specific contractual provision. Surely it was within the expectations of the DOT that only the actual beneficiary would be able to initiate foreclosure proceedings.

At the hearing on this motion, defendant argued that the issue was one of standing: that plaintiff as borrower does not have standing to challenge assignments of a deed of trust. ECF No. 8 at 14. The cases defendant cites clearly provide that a borrower does have standing to maintain certain claims where, as alleged here, transfers of the DOT rendered the foreclosure sale void. While it is true that a borrower “lacks standing to challenge the assignment of her loan and deed of trust,” *Mendoza v. JPMorgan Chase Bank, N.A.*, 6 Cal. App. 5th 802, 820 (2016), it is also true “that a borrower who has suffered a nonjudicial foreclosure does not lack standing to sue for wrongful foreclosure based on an allegedly void assignment merely because he or she was in default on the loan and was not a party to the challenged assignment.” *Id.* at 810 (quoting *Yvanova v. New Century Mortg. Corp.*, 62 Cal. 4th 919, 924 (2016)). Here, plaintiff does not simply challenge the fact of assignment of her DOT. Her allegations are not merely that Nationstar could not transfer the DOT to Fannie Mae. The argument is, instead, that when NBS Default acted on behalf of Nationstar to sell the subject property it acted without authority because the beneficial interest in the DOT had already been assigned to Fannie Mae. ECF No. 11 at ¶ 39. Defendants’ standing argument is inapposite. Defendant’s motion accordingly should be DENIED as to plaintiff’s fifth cause of action.



**6. California's Unfair Competition Law (Cal. Bus. & Prof. Code § 1700 et. seq.)**

Plaintiff has injury sufficient to establish standing for a claim under California's Unfair Competition Law (UCL). Proposition 64 restricts standing to assert a UCL cause of action. *Trujillo v. First American Registry, Inc.*, 157 Cal. App. 4th 628, 639 (2007). In order to bring a claim under UCL, a plaintiff must establish: (1) a loss or deprivation of money or property sufficient to qualify as injury in fact, that is, economic injury, and (2) that the economic injury was the result of, that is, caused by, the unfair business practice or false advertising that is the gravamen of the claim. *Obesity Research Institute, LLC v. Fiber Research International, LLC*, 165 F. Supp. 3d 937, 947 (S.D. Cal. 2016); Cal. Bus. & Prof. Code §§ 17204, 17535. Economic injury may be demonstrated through (1) surrender in a transaction more, or acquire in a transaction less, than he or she otherwise would have; (2) have a present or future property interest diminished; (3) be deprived of money or property to which he or she has a cognizable claim; or (4) be required to enter into a transaction, costing money or property, that would otherwise have been unnecessary. *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 323 (2011). Proposition 64 "added a requirement that a UCL plaintiff's 'injury in fact' specifically involve 'lost money or property.'" *Id.* at 324.

Here, plaintiff is able to show a significant loss, as her property was foreclosed upon and sold. Complaint Ex. K (Deed Upon Sale). Unless defendants can explain how the Corporate Assignment of the DOT to Fannie Mae did not remove Nationstar as the beneficiary under the DOT, plaintiff has stated a

claim that defendant “[i]nstituted improper or premature foreclosure proceedings” against her. ECF No. 1-1 at 24. Defendants were asked at the hearing for an explanation of the legal effect of the Corporate Assignments on the beneficiary interests and attendant foreclosure rights, and had no explanation to offer. Accordingly, the motion should be DENIED as to this claim.

### **7. Claim to Quiet Title**

Defendant’s motion to dismiss is inadequate to defeat plaintiff’s quiet title claim. Plaintiff alleges that the defendants have no right to title or interest in the property because Nationstar, through its agent NBS, improperly foreclosed. ECF No. 1-1 at 26. A borrower may not quiet title against a secured lender without first paying the outstanding debt on which the mortgage or deed of trust is based; the cloud on title remains until the debt is paid. *Luceras v. BAC Home Loans Servicing, LP.*, 221 Cal. App. 4th 49, 86 (2013). While it is undisputed that plaintiff did not pay off the mortgage on the subject property prior to its sale, the complaint alleges she “is willing to tender the amount received subject to equitable adjustment for the damages caused to the Plaintiff by the Title Defendants’ activities.” ECF No. 1-1 at 26. When the court asked defendant whether such a post-sale offer, made in a complaint, can constitute “tender” within the meaning of California law governing quiet title, defendant had no response. Defendant’s briefing and argument at hearing gives the court no reason to dismiss plaintiff’s claim for a failure of tender when an offer is clearly made in the complaint.

As stated above, the complaint's allegations and attachments cast doubt on defendant Nationstar's right to foreclose on the subject property, because it is unclear whether it was the beneficiary under the DOT at the time its agent, NBS Default Services, completed the foreclosure sale. ECF No. 1-1 at 139, 141. Because plaintiff has tendered payment of the mortgage balance owed at the time of sale, and the moving party has not demonstrated that this tender is ineffective as a matter of law, the motion to dismiss on the seventh cause of action should be DENIED.<sup>2</sup>

### 8. Slander of Title

Plaintiff cannot bring a claim for slander of title based on the recording of a notice of default and notice of trustee sale on the subject property, because these are privileged recordings. Plaintiff asserts that defendants wrongfully caused the recording of the notice of default and notice of trustee's sale because they did not have lawful authority in the Subject Property. ECF No. 1-1 at 27-28. Slander or disparagement of title is accomplished if a publication is reasonably understood to cast doubt upon the existence or extent of another's interest in land. *Fearon v. Fodera*, 169 Cal. 370, 379-80 (1915); *Hill v. Allan*, 259 Cal. App. 2d 470, 489 (1968). The elements of the tort are: (1) a publication, (2) without privilege or justification, (3) falsity, and (4) direct pecuniary loss. *Trucks Ins. Exchange v. Bennett*, 53 Cal. App. 4th 75, 84 (1997). Under Cal. Civ. Code § 2924(a), a trustee, mortgagee

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<sup>2</sup> The court expresses no opinion on the question whether a post-sale offer of payment constitutes a tender under governing California law. The undersigned finds that the moving party has not met its burden to demonstrate the deficiency of plaintiff's claim.

or beneficiary or any of their authorized agents may commence the foreclosure process. In initiating the nonjudicial foreclosure process, a trustee must record a notice of default and a notice of sale. *Id.* Recordation of a notice of default and a notice of sale *are privileged* and cannot form a basis of liability in court. Cal. Civ. Code § 2924(d)(1). Plaintiff cannot bring a slander of title claim based on the recording of the notice of default and sale. *Id.* Therefore, defendant's motion to dismiss should be GRANTED on this matter.

### **9. Wrongful Foreclosure**

Plaintiff asserts that NBS Default Services did not have the authority to initiate and complete foreclosure proceedings on the subject property because NBS was not the beneficiary or the representative of the proper beneficiary under the DOT. ECF No. 1-1 at 28-29. Defendant moves to dismiss on grounds that plaintiff has not made a credible tender of the secured debt. ECF No. 8 at 28. Defendant's motion is DENIED on this point.

"A beneficiary or trustee under a deed of trust who conducts an illegal, fraudulent or willfully oppressive sale of property may be liable to the borrower for wrongful foreclosure; a foreclosure initiated by one with no authority to do so is wrongful for purposes of such an action." *Yvanova v. New Century Mort. Corp.*, 62 Cal. 4th 919, 929 (2016). The basic elements of wrongful foreclosure are: "(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor

or mortgagor tendered the amount of the secured indebtedness or was excused from tendering.” *Miles v. Deutsche Bank Nat’l Tr. Co.*, 236 Cal. App. 4th 394, 408 (2015). A wrongful foreclosure suit can also be brought under the allegation that foreclosure was conducted by one who had no legal right to do so. *Sciaratta v. U.S. Bank Nat’l Ass’n*, 247 Cal. App. 4th 552, 566 (2016). Those who possess a legal right are the trustee, mortgagee, beneficiary, or any of their authorized agents. Cal. Civ. Code § 2924(a)(1). The trustee under a trust deed “may be substituted by the recording in the county in which the property is located of a substitution executed and acknowledged by: (A) all of the beneficiaries under the trust deed.” Cal. Civ. Code. § 2934a(a)(1). A trustee of a deed of trust acts at the direction of the lender-beneficiary. *Yvanova*, 62 Cal. 4th at 927. As a result, the trustee may formally initiate nonjudicial foreclosure only at the direction of the person that currently holds the note and beneficial interest under the DOT. *Id.*

In general “[w]hen a debtor is in default of a home mortgage loan, and a foreclosure is either pending or has taken place, the debtor must allege a credible tender of the amount of the secured debt to maintain any cause of action for wrongful foreclosure.” *Alicea v. GE Money Bank*, No. C 09-00091 SBA, 2009 WL 2136969, at \*3 (N.D. Cal. 2009). There are exceptions to this rule: no tender is required when (1) where the borrower attacks the validity of the underlying debt; (2) when a plaintiff has a counterclaim or setoff against the beneficiary; (3) when tender would be an inequitable condition to impose; and (4) “no tender will be required when the trustor is not required to rely on equity to attack the deed because the trustee’s

deed is void on its face.” *Lona v. Citibank, N.A.*, 202 Cal. App. 4th 89, 113 (2011).

Defendant argues that plaintiff failed to make a credible tender, and therefore she cannot bring a wrongful foreclosure claim. ECF No. 8 at 28. This argument does not withstand scrutiny. First, plaintiff did make a tender in her complaint as part of her Quiet Title cause of action. ECF No. 1-1 at 26; *see supra* at p. 13 & n. 2. On a motion to dismiss, the court will construe that offer as equally applicable to the Wrongful Foreclosure claim. Second, even if plaintiff had not made such a tender, it would be inequitable to impose a tender requirement if, as plaintiff alleges, Nationstar and NBS did in fact foreclose on the subject property without any authority to do so. The “void on its face” exception would also apply under such circumstances. Defendants’ motion to dismiss should be DENIED as to plaintiff’s wrongful foreclosure claim.

### III. CONCLUSION

It is hereby recommended that defendants’ motion to dismiss be GRANTED in part and DENIED in part as follows:

1. Defendant’s motion to dismiss should be GRANTED as to (1) negligence; (3) cancellation of a voidable contract under Rev. & Tax Code §§ 23304.1, 23305A, and Cal. Corp. Code §§ 191(c)(7); and (8) slander of title; these claims should be dismissed without leave to amend;
2. Defendant’s motion to dismiss should be GRANTED as to (2) fraud; and (4) to void or

cancel assignments of deed of trust, but plaintiff should be allowed to amend as to these claims; and

3. Defendant's motion should be DENIED as to (5) breach of the implied covenant of good faith and fair dealing; (6) violation of California business and professions code section 17200 et. seq.; (7) quiet title; and (9) wrongful foreclosure.

These findings and recommendations are submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one (21) days after being served with these findings and recommendations, any party may file written objections with the court. Such document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Local Rule 304(d). Failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

/s/ Allison Claire  
United States Magistrate Judge

Dated: September 10, 2018

**ORDER OF THE UNITED STATES COURT  
OF APPEALS FOR THE NINTH CIRCUIT  
DENYING PETITION FOR REHEARING  
(JANUARY 6, 2023)**

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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PRISCILLA McMANUS,

*Plaintiff-Appellant,*

v.

NBS DEFAULT SERVICES, LLC; ET AL.,

*Defendants-Appellees.*

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No. 21-16211

D.C. No. 2:18-cv-02047-JAM-AC  
Eastern District of California, Sacramento

Before: O'SCANNLAIN, RAWLINSON,  
and OWENS, Circuit Judges.

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**ORDER**

McManus petition for panel rehearing (Docket Entry No. 26) is denied.

No further filings will be entertained in this closed case.



**NOTICE OF MOTION AND MOTION TO  
EXPUNGE *LIS PENDENS*; MEMORANDUM OF  
POINTS AND AUTHORITIES: DECLARATION  
OF JUSTIN D. BALSER  
(JANUARY 19, 2023)**

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Troutman Pepper Hamilton Sanders LLP  
Justin D. Balser, SBN 213478  
justin.balser@troutman.com  
5 Park Plaza, Suite 1400  
Irvine, California 92614-2545  
Telephone: 949.622.2700  
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Attorneys for Defendants  
NATIONSTAR MORTGAGE LLC AND MORTGAGE  
ELECTRONIC REGISTRATION SYSTEMS, INC.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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PRISCILLA McMANUS,

*Plaintiff,*

v.

NBS DEFAULT SERVICES, LLC; BANK OF  
AMERICA, N.A.; NATIONSTAR MORTGAGE, LLC;  
MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC.,

*Defendants.*

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Case No. 2:18-cv-02047-JAM-AC

Hon. John A. Mendez

NOTICE OF MOTION AND MOTION TO  
EXPUNGE *LIS PENDENS*; MEMORANDUM OF  
POINTS AND AUTHORITIES; DECLARATION OF  
JUSTIN D. BALSER

Hearing Information:

Date: February 28, 2023

Time: 1:30 p.m.

Ctrm: 6, 14<sup>th</sup> Floor

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TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on February 28, 2023 at 1:30 p.m. in Courtroom 6 on the 14th floor of the above-entitled Court located at 501 "I" Street, Sacramento, California 95814, Defendant Nationstar Mortgage LLC d/b/a Mr. Cooper will and hereby does move to expunge from the public record the notice of pendency of action (*lis pendens*) related to this action and recorded by Plaintiff Priscilla McManus in the Official Records of El Dorado County on July 6, 2018 as Document Number 2018-0026089-00.

This motion is made under Code of Civil Procedure section 405.30, *et seq.* and based on this notice of motion and motion, the attached memorandum of points and authorities, all documents filed herewith, and such other evidence and argument as may be presented at the hearing on this matter.

Dated: January 19, 2023

TROUTMAN PEPPER  
HAMILTON SANDERS LLP

By: /s/ Justin D. Balser

Attorneys for Defendants  
Nationstar Mortgage LLC  
d/b/a Mr. Cooper and  
Mortgage Electronic  
Registration Systems, Inc.

**MEMORANDUM OF POINTS  
AND AUTHORITIES**

Plaintiff Priscilla McManus filed her complaint in El Dorado County Superior Court on June 20, 2018. She recorded a Notice of Pendency of Action (*lis pendens*) in the El Dorado County Recorder's Office on July 6, 2018 as document number 2018-000026089-00. (See Declaration of Justin D. Balser, Ex. 1). The complaint was removed to this Court on July 26, 2018. (Dkt. 1).

At close of discovery, all defendants moved for summary judgment. (Dkts. 108, 110). On April 16, 2021, Magistrate Judge Claire issued her report and recommendation to grant the two motions. (Dkt. 117). The report and recommendations were adopted by District Judge Mendez, and judgment was entered for defendants. (Dkts. 121, 122). Plaintiff appealed the judgment on July 20, 2021. (Dkt. 123). The Ninth Circuit affirmed the judgment, and after Plaintiff's petition for panel rehearing was denied, mandate issued. (Dkt.

129). The only issue remaining is expunging the *lis pendens* from the El Dorado County public records.

A *lis pendens* must base on a real property claim. *Urez Corp. v. Superior Court*, 190 Cal.App.3d 1141, 1149 (1987). Code of Civil Procedure section 405.31 mandates that “the court shall order the notice expunged if the court finds that the pleading on which the notice is based does not contain a real property claim.” Section 405.4 defines “[r]eal property claim’ [as] the cause or causes of action in a pleading which would, if meritorious, affect [ ] title to, or the right to possession of, specific real property . . .” *BGJ Associates v. Superior Court*, 75 Cal.App.4th 952, 956 (1999). Probable validity means “more likely than not that the claimant will obtain a judgment against the defendant on the claim.” *Mix v. Superior Court*, 124 Cal.App.4th 987, 993 (2004).

Judgment entered against Plaintiff on her complaint and the Ninth Circuit affirmed the judgment. There is no real property claim—let alone any claim—to support maintenance of a *lis pendens*. The *lis pendens* recorded in the Official Records of El Dorado County on July 6, 2018 as Document Number 2018-0026089-00 should be expunged.

TROUTMAN PEPPER  
HAMILTON SANDERS LLP

By: /s/ Justin D. Balser

Attorneys for Defendants  
Nationstar Mortgage LLC  
d/b/a Mr. Cooper and

App.89a

Mortgage Electronic  
Registration Systems, Inc.

Dated: January 19, 2023

**DECLARATION OF JUSTIN D. BALSER**

I, Justin D. Balser,

1. I am an attorney at law, duly licensed to practice before all the Courts of the State of California, before the United States District Court for the Northern, Central, Eastern, and Southern Districts of California, and before the United States Court of Appeals for the Ninth Circuit. I am a resident of the State of Colorado and am over eighteen years of age. I have personal knowledge of the facts set forth in this declaration, and I can and will competently testify to such facts under oath.

2. I am a partner of Troutman Pepper Hamilton Sanders LLP, attorneys of record for defendant Nationstar Mortgage LLC d/b/a Mr. Cooper. I make this declaration in support of Nationstar motion to expunge *lis pendens*.

3. Attached hereto as Exhibit 1 is a true and accurate copy of the Notice of Pendency of Action (*lis pendens*) recorded by Plaintiff Priscilla McManus in the Official Records of El Dorado County on July 6, 2018 as Document Number 2018-0026089-00. The Court can take judicial notice of this document.

4. I declare, under penalty of perjury under the laws of California and the United States of America, that the foregoing is true and correct to the best of my knowledge. This declaration was executed on January 19, 2023.

/s/ Justin D. Balser

Declarant

**PROOF OF SERVICE**

STATE OF CALIFORNIA,  
COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 5 Park Plaza, Suite 1400, Irvine, California 92614-2545.

On January 19, 2023, I served the following document(s) described as:

**NOTICE OF MOTION AND MOTION TO EXPUNGE LIS  
PENDENS; MEMORANDUM OF POINTS AND  
AUTHORITIES; DECLARATION OF JUSTIN D. BALSER**

on the persons below as follows:

Priscilla McManus  
P.O. Box 8  
Rescue, CA 95672  
Tel: 530.672.9898  
*Plaintiff in Pro Se*

VIA U.S. MAIL

Michael R. Gonzales  
Nabeel Muzaffer Zuberi  
MCCALLA RAYMER LEIBERT PIERCE, LLP  
301 E. Ocean Blvd., Suite 1720  
Long Beach, CA 90802  
Tel: 562.983.5377  
Fax: 562-983-5377  
Email: michael.gonzales@mccalla.com  
*Attorney for Defendant,  
NBS Default Services, LLC*

VIA CM/ECF ELECTRONIC FILING

Joel C. Spann  
SEVERSON & WERSON, APC  
One Embarcadero Center, Suite 2600  
San Francisco, CA 94111  
Tel: 415.398.3344  
Fax: 415.956.0439  
Email: jcs@severson.com  
*Attorney for Defendant*  
*Bank of America, N.A.*

VIA CM/ECF ELECTRONIC FILING

Stephen D. Britt  
SEVERSON & WERSON  
19100 Von Karman Ave., Suite 700  
Irvine, CA 96212  
Tel: 949.442-7110  
Email: sxb@severson.com  
*Attorney for Defendant*  
*Bank of America, N.A.*

VIA CM/ECF ELECTRONIC FILING

- ☒ **(CM/ECF Electronic Filing):** I caused the above document(s) to be transmitted to the office(s) of the addressee(s) listed above by electronic mail at the e-mail address(es) set forth above pursuant to Fed.R.Civ.P.5(d)(1). "A Notice of Electronic Filing (NEF) is generated automatically by the ECF system upon completion of an electronic filing. The NEF, when e-mailed to the e-mail address of record in the case, shall constitute the proof of service as required by Fed.R.Civ.P.5(d)(1). A copy of the NEF shall be attached to any document served in the traditional manner upon any party appearing pro se."



☒ **BY MAIL:** As follows: I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Irvine, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on January 19, 2023, at Irvine, California.

/s/ Evelyn S. Duarte

**EXHIBIT 1**  
**NOTICE OF PENDENCY OF ACTION**  
**(JUNE 20, 2018)**

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When recorded return to:  
Priscilla McManus, Plaintiff Pro Se  
P.O. Box 8  
Rescue, CA 95672  
Telephone: (530) 672-9898  
percy@healthexcellence.com

**SUPERIOR COURT OF STATE OF CALIFORNIA -  
FOR THE COUNTY OF EL DORADO**

---

**PRISCILLA McMANUS, PRO SE,**

*Plaintiffs,*

**v.**

**NBS DEFAULT SERVICES, LLC; BANK OF  
AMERICA, N.A.; NATIONSTAR MORTGAGE, LLC;  
MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS INC.; ET AL.,**

*Defendants.*

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**Case No.: PC 20180307**

**Notice of Pendency of Action**

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**NOTICE IS HEREBY GIVEN** that the above-entitled action concerning and affecting real property as described herein was commenced on June 20, 2018 in

the above-entitled Court by Plaintiff, Priscilla McManus against Defendants.

The action includes a cause of action to Negligence, Fraud, Cancellation of a Voidable Contract Under Rev & Tax Code §§ 23304.1, 23305A and Violation of CAL. CORP. CODE §§ 191(C)(7), To Void or Cancel Assignments of Deed of Trust, Breach of Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing, Violation of California Business and Professions Code Sections 17200 Et Seq., Quiet Title, Slander of Title, and Wrongful Foreclosure to the real property as described herein. The reputed owner of the real property as described herein is Priscilla McManus.

The object of this action is to show that the Defendants are have wrongfully foreclosed on the Plaintiff's property and slandered her title when the contract was breached, to the following real property located in Rescue, California, County of El Dorado, State of California and described as follows:

The real property commonly known as and located at 1600 Starbuck Rd., Rescue, CA 95672 and legally described as:

Parcel 1 of that certain parcel map filed in the county of El Dorado on December 19, 1996 in book 46 of parcel maps at page 8.

Parcel No: 102-070-51-100

/s/ Priscilla McManus  
Plaintiff Pro Se  
P.O. Box 8  
Rescue, CA 95672  
Telephone (530) 672-9898

App.96a

percy@healthexcellence.com

Dated: 20, June 2018

**ORDER APPROVING RECORDING OF  
NOTICE OF PENDENCY OF ACTION**

Priscilla McManus, Pro Se, having shown good cause and the Court having reviewed the complaint and this Notice of Pendency of Action, the Court hereby finds as follows:

The complaint filed on June 20, 2018 by Priscilla McManus, states a real property claim and pursuant thereto;

**IT IS HEREBY ORDERED THAT:**

Pursuant to Code of Civil Procedure § 405.21 this Notice of Pending Action is hereby approved, and the County Recorder of El Dorado County is hereby ordered to record a Court Certified Copy of this Notice of Pendency of Action.

/s/ {Illegible}

Judge/Commissioner of the  
Superior Court

Dated: 7/6/18

**CERTIFICATE OF SERVICE**

I, the undersigned, declare that I am a resident of El Dorado County, State of California, and that I am over the age of eighteen (18) years and not a party to the hereinabove referenced cause of action, and that my business address is 9801 Mosquito Road, Placerville, California 95667. I declare that on the 5th day of July, 2018, I served a copy of this said Declaration and the aforesaid Notice of Pendency of Action on the below named Defendants and caused a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, via Certified Mail, Return Receipt Requested, to be deposited in the United States Mail, first class, at Shingle Springs, California, addressed as follows:

NBS Default Services  
818 West Seventh Street, Suite 930  
Los Angeles, California 90017

Bank of America, N.A.  
Legal Order Processing/Christiana IV,  
800 Samoset Drive  
Newark, DE 19713, DE5-024-02-084.4

Nationstar Mortgage, LLC  
2710 Gateway Oaks Drive, Suite 150  
Sacramento, California 95833

Mortgage Electronic Registration Systems, Inc.  
Sharon Horstkamp  
1818 Library Street, Suite 300  
Reston, VA 20190

App.98a

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 5 2018, at Shingle Springs, California 95682.

/s/ John Bisagno

I certify under the penalty of perjury that the portion(s) of the document that will not reproduce a readable copy to which this statement is attached, read as follows;

This is a true certified copy of the record if it bears the seal, imprinted in purple ink, the date of issuance and an original signature.

Superior Court of California  
County of El Dorado

By S. Have  
Deputy

Pictured:  
Great Seal of California

/s/ Priscilla McManus

Dated: 7-6-18

**[PROPOSED] ORDER GRANTING  
MOTION TO EXPUNGE *LIS PENDENS*  
AND EXPUNGING *LIS PENDENS*  
(JANUARY 19, 2023)**

---

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

---

PRISCILLA McMANUS,

*Plaintiff,*

v.

NBS DEFAULT SERVICES, LLC;  
BANK OF AMERICA, N.A.; NATIONSTAR  
MORTGAGE, LLC; MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC.,

*Defendants.*

---

Case No. 2:18-cv-02047-JAM-AC

Before: Hon. John A. MENDEZ,  
United States District Court Judge

---

**[PROPOSED] ORDER GRANTING  
MOTION TO EXPUNGE *LIS PENDENS*  
AND EXPUNGING *LIS PENDENS***

Presently before the Court is Defendant Nationstar Mortgage LLC d/b/a Mr. Cooper's motion to expunge from the public record the notice of pendency of action (*lis pendens*) related to this action and recorded by

Plaintiff Priscilla McManus in the Official Records of El Dorado County on July 6, 2018 as Document Number 2018-0026089-00. Having considered the motion and any opposition and reply papers filed in connection with the motion, IT IS HEREBY ORDERED that:

1. Nationstar's motion to expunge is GRANTED.

2. The Notice of Pendency of Action (*lis pendens*) recorded by Plaintiff Priscilla McManus in the El Dorado County Recorder's Office on July 6, 2018 as document number 2018-000026089-00 against the real property located at 1600 Starbuck Road, Rescue, California 95672, and more particularly described as:

PARCEL 1 OF THAT CERTAIN PARCEL  
MAP FILED IN THE COUNTY OF EL  
DORADO DECEMBER 19, 1996, IN BOOK  
46 OF PARCEL MAPS AT PAGE 8.

Assessor's Parcel Number: 102-070-51-100

is hereby ordered EXPUNGED from the public record. This order may be recorded in the El Dorado County Recorder's Office to evidence such expungement in the public real property records.

IT IS SO ORDERED.

---

Judge John A. Mendez  
United States District Court Judge

Date: \_\_\_\_\_



**PROOF OF SERVICE**

STATE OF CALIFORNIA,  
COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 5 Park Plaza, Suite 1400, Irvine, California 92614-2545.

On January 19, 2023, I served the following document(s) described as:

**[PROPOSED] ORDER GRANTING MOTION TO EXPUNGE  
LIS PENDENS AND EXPUNGING LIS PENDENS**

on the persons below as follows:

Priscilla McManus  
P.O. Box 8  
Rescue, CA 95672  
Tel: 530.672.9898  
*Plaintiff in Pro Se*

VIA U.S. MAIL

Michael R. Gonzales  
Nabeel Muzaffer Zuberi  
MCCALLA RAYMER LEIBERT PIERCE, LLP  
301 E. Ocean Blvd., Suite 1720  
Long Beach, CA 90802  
Tel: 562.983.5377  
Fax: 562-983-5377  
Email: michael.gonzales@mccalla.com  
*Attorney for Defendant,  
NBS Default Services, LLC*

VIA CM/ECF ELECTRONIC FILING

Joel C. Spann  
SEVERSON & WERSON, APC  
One Embarcadero Center, Suite 2600  
San Francisco, CA 94111  
Tel: 415.398.3344  
Fax: 415.956.0439  
Email: jcs@severson.com  
*Attorney for Defendant*  
*Bank of America, N.A.*

VIA CM/ECF ELECTRONIC FILING

Stephen D. Britt  
SEVERSON & WERSON  
19100 Von Karman Ave., Suite 700  
Irvine, CA 96212  
Tel: 949.442-7110  
Email: sxb@severson.com  
*Attorney for Defendant*  
*Bank of America, N.A.*

VIA CM/ECF ELECTRONIC FILING

- ☒ **(CM/ECF Electronic Filing):** I caused the above document(s) to be transmitted to the office(s) of the addressee(s) listed above by electronic mail at the e-mail address(es) set forth above pursuant to Fed.R.Civ.P.5(d)(1). "A Notice of Electronic Filing (NEF) is generated automatically by the ECF system upon completion of an electronic filing. The NEF, when e-mailed to the e-mail address of record in the case, shall constitute the proof of service as required by Fed.R.Civ.P.5(d)(1). A copy of the NEF shall be attached to any document served in the traditional manner upon any party appearing pro se."

☒ **BY MAIL:** As follows: I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Irvine, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on January 19, 2023, at Irvine, California.

/s/ Evelyn S. Duarte

**MOTION TO ORDER TO SHOW CAUSE  
(DECEMBER 20, 2019)**

---

Priscilla McManus  
P.O. Box 8  
Rescue, CA 95672  
Telephone: (530) 672-9898  
percy@healthexcellence.com  
Pro Se

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA  
SACRAMENTO DIVISION

---

PRISCILLA McMANUS,

*Plaintiff,*

v.

NBS DEFAULT SERVICES, LLC; BANK OF  
AMERICA, N.A.; NATIONSTAR MORTGAGE, LLC;  
MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC.,

*Defendants.*

---

Case No. 2:18-cv-02047-JAM-AC

---

**MOTION OF ORDER TO SHOW CAUSE**

Pursuant to court order issued May 15, 2019, by  
Magistrate Judge Allison Claire which states, it part,  
"The parties are directed to promptly meet and confer  
to discuss settlement of this action.. . . Plaintiff should

initiate settlement discussions by providing a written itemization of damages and a meaningful settlement demand that includes an explanation of why the demand is appropriate. Defendant should respond with an acceptance of the offer or with a meaningful counteroffer, and which includes an explanation of why the counteroffer is reasonable. The parties should continue this way until they reach settlement or have exhausted informal settlement efforts. If the parties have not been able to informally reach a settlement within 45 days, the parties shall initiate participation in the court's Voluntary Dispute Resolution Program. . . ." Plaintiff Priscilla McManus then initiated settlement discussions on June 10, 2019. by sending Defendants Nationstar, MERS and Bank of America her written Itemization of Damages per court order. To date, there has been no response whatsoever from the Defendants. Mediation has not commenced due to neutrals opting out, citing conflict of interest.

Plaintiff is asking for relief by requesting the court enforce Specific Performance in this case, by requiring the Defendants to accept Plaintiffs settlement demand submitted to them June 11, 2019.

Dated 20 December, 2019.

Respectfully Submitted,

/s/ Priscilla McManus  
Plaintiff Pro Se  
P.O. Box 8  
Rescue, CA 95672  
Telephone: (530) 672-9898  
[percy@healthexcellence.com](mailto:percy@healthexcellence.com)

**EXHIBIT A**  
**ORDER OF THE UNITED STATES**  
**DISTRICT COURT FOR THE**  
**EASTERN DISTRICT OF CALIFORNIA**  
**(MAY 15, 2019)**

---

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

---

PRISCILLA MCMANUS,

*Plaintiff,*

v.

NBS DEFAULT SERVICES, LLC; BANK OF  
AMERICA, N.A.; NATIONSTAR MORTGAGE, LLC;  
MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC.,

*Defendants.*

---

Case No. 2:18-cv-2047-JAM AC (PS)

Before: Allison CLAIRE,  
United States Magistrate Judge.

---

Plaintiff Priscilla McManus initiated this wrongful foreclosure action pro se on June 20, 2018, by filing a complaint against defendants in the County of El Dorado Superior Court. ECF No. 1.1 at 14-30. Defendants Mortgage Electronic Registration Systems, Inc. ("MERS"), and Nationstar Mortgage removed the case to district court based on diversity jurisdiction under 28

U.S.C. §§ 1332 and 1441. ECF No. 1. On May 1, 2019, defendants MERS and Nationstar filed an answer to the remaining claims of plaintiff's First Amended Complaint.<sup>1</sup> ECF No. 47. Defendant Bank of America has filed a notice of appearance, ECF No. 6, but otherwise has not participated in the litigation thus far. Defendant NBS Default Services has indicated that it does not intend to participate in this action due to its non-monetary status obtained in state court. ECF No. 23 at 2.

In the interest of avoiding the accumulation of fees and costs through potentially unnecessary discovery and motion practice, and to allow the parties sufficient time to pursue an early informal resolution of this matter, the court finds a referral to the Voluntary Dispute Resolution Program is appropriate. Based on the foregoing, IT IS HEREBY ORDERED that:

1. This action is STAYED pending further order of the court.
2. The Initial Scheduling Conference currently set for 7/31/2019 is hereby VACATED from the calendar and will be re-scheduled if necessary.
3. The parties are directed to promptly meet and confer to discuss settlement of this action. Settlement discussions require focus and preparation and should involve the attorneys who will try the case and the person or persons having full authority to negotiate and settle the case on any terms. Plaintiff should initiate settlement discussions by

---

<sup>1</sup> This document was docketed as a "Second Amended Complaint" but is in fact plaintiff's First Amended Complaint. ECF No. 31.

providing a written itemization of damages and a meaningful settlement demand that includes an explanation of why the demand is appropriate. Defendant should respond with an acceptance of the offer or with a meaningful counteroffer, and which includes an explanation of why the counteroffer is reasonable. The parties should continue in this way until they reach settlement or have exhausted informal settlement efforts.

4. If the parties have not been able to informally reach a settlement within 45 days, the parties shall initiate participation in the court's Voluntary Dispute Resolution Program ("VDRP") by contacting the court's VDRP administrator, Sujean Park, at (916) 930-4278 or SPark@caed.uscourts.gov.<sup>2</sup>
5. The parties shall carefully review and comply with Local Rule 271, which outlines the specifications and requirements of the VDRP.
6. No later than fourteen (14) days after completion of the VDRP session, the parties shall jointly file their VDRP Completion Report, consistent with Local Rule 271(o).

---

<sup>2</sup> The resources of the VDRP program are limited, and the parties are expected to make good faith efforts to timely and fully exhaust informal settlement efforts prior to initiating participation in the VDRP. The court will look with disfavor upon parties stalling or failing to participate in the above-mentioned initial informal discussions, prompting potentially unnecessary participation in the VDRP and straining the program's resources.



App.109a

IT IS SO ORDERED.

/s/ Allison Claire  
United States Magistrate Judge

DATED: May 15, 2019

**NOTICE OF ELECTRONIC FILING**

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**U.S. DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA—LIVE SYSTEM**

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The following transaction was entered on 5/16/2019  
at 11:00 AM PDT and filed on 5/16/2019

Case Name:

(PS) *McManus v. NBS Default Services, LLC et al*

Case Number: 2:18-cv-02047-JAM-AC

Document Number: 48

Docket Text:

ORDER signed by Magistrate Judge Allison Claire on 5/15/2019 IT IS SO ORDERED This action is STAYED pending further order of the court. The Initial Scheduling Conference currently set for 7/31/2019 is hereby VACATED from the calendar and will be rescheduled if necessary. The parties are directed to promptly meet and confer to discuss settlement of this action. CASE STAYED (Reader, L)

2:18-cv-02047-JAM-AC Notice has been electronically mailed to:

Abraham J. Colman &nbsp; &nbsp; acolman@reedsmith.com, gilda—anderson-2815@ecf.pacerpro.com, gsanderson@reedsmith.com

Nabeel Muzaffer Zuberi &nbsp; &nbsp; nabeel.zuberi@mccalla.com, angela.merring@mccalla.com, kyle.dillon@mccalla.com

App.111a

Raffi L. Kassabian &nbsp; &nbsp; rkassabian@  
reedsmith.com, davina—bernal-0080@ecf.  
pacerpro.com, dbernal@reedsmith.com, maria  
—carranza-9823@ecf.pacerpro.com,  
mariacarranza@reedsmith.com

Sevana Zadourian &nbsp; &nbsp; szadourian@  
reedsmith.com, jmardorf@reedsmith.com,  
julie—mardorf-7786@ecf.pacerpro.com

William A. Aspinwall &nbsp; &nbsp; waa@  
severson.com

2:18-cv-02047-JAM-AC Electronically filed docu-  
ments must be served conventionally by the filer to:

Priscilla McManus  
P.O. Box 8  
Rescue, CA 95672

The following document(s) are associated with  
this transaction:

App.112a

**EXHIBIT B**  
**ReedSmith LLP Mail Receipt**

Priscilla McManus  
P.O. Box 8  
Rescue, Calif. 95672

Sevana Zadourian  
ReedSmith LLP  
355 South Grand Avenue  
Suite 2900  
Los Angeles, Calif. 90071-1514

June 11, 2019

Ms. Zadourian:

Per our telephone conversation on Monday, June 10, 2019, I e-mailed you the following day the Plaintiff's Written Itemization of Damages document, Case No.: 2:18-cv-02047-JAM-AC.

For your convenience I am also enclosing a paper copy of it with this note.

Regards,

/s/ Priscilla McManus  
Plaintiff

App.113a

7018 3090 0001 8959 7270

U.S. Postal Service™ CERTIFIED MAIL® RECEIPT Domestic Mail Only	
For delivery information, visit our website at <a href="http://www.usps.com">www.usps.com</a>	
<b>OFFICIAL USE</b>	
Certified Mail Fee	\$3.50
Extra Serv. & Fees (check box, add fee as appropriate)	\$0.00
<input type="checkbox"/> Return Receipt (hardcopy)	\$0.00
<input type="checkbox"/> Return Receipt (electronic)	\$0.00
<input type="checkbox"/> Certified Mail Restricted Delivery	\$0.00
<input type="checkbox"/> Adult Signature Required	\$0.00
<input type="checkbox"/> Adult Signature Restricted Delivery	\$0.00
Postage	\$0.55
Total Postage and Fees	\$4.05
Sent To: <u>Sevana Zadourian/Reed Smith</u>	
Street and Apt. No., or PO Box No. <u>355 South Grand Ave. Suite 2900</u>	
City, State, ZIP+4® <u>Los Angeles, Calif. 90071-1314</u>	

0682 03  
SHINGI STRINGS C.C.  
6102 1/10/09  
06/11/2009

PS Form 3800, April 2015 PSN 7530-02-000-9017 See Reverse for Instructions

App.114a

**Stephen D. Britt Mail Receipt**

Priscilla McManus  
P.O. Box 8  
Rescue, Calif. 95672

Stephen D. Britt  
The Atrium  
19100 Von Karman Avenue  
Suite 700  
Irvine, Calif. 92612

June 11, 2019

Mr. Britt:

Per our telephone conversation on Monday, June 10, 2019, I e-mailed you the following day the Plaintiff's Written Itemization of Damages document, Case No.: 2:18-cv-02047-JAM-AC.

For your convenience I am also enclosing a paper copy of it with this note.

Regards,

/s/ Priscilla McManus  
Plaintiff

App.115a

7018 3090 0000 060E 8T02

U.S. Postal Service<sup>®</sup>  
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Extra Services & Fees (check box, add fee as appropriate)	
<input type="checkbox"/> Return Receipt (hardcopy)	\$0.00
<input type="checkbox"/> Return Receipt (electronic)	\$0.00
<input type="checkbox"/> Certified Mail Restricted Delivery	\$0.00
<input type="checkbox"/> Adult Signature Required	\$0.00
<input type="checkbox"/> Adult Signature Restricted Delivery	\$0.00
Postage	\$0.55
Total Postage and Fees	\$4.05

Sent To: Stephen D. Britt  
Street and Apt. No., or PO Box No. 19100 Van Karmen Ave. Suite 700  
City, State, ZIP+4<sup>®</sup> Irvine Calif. 92612

PS Form 3800, April 2015 PSN 7-30-02-000-9047 See Reverse for Instructions

SHINGLE CREEK SPRINGS CA  
2019 JUN 11  
Postmark  
H010  
28956

06/11/2019

**PROOF OF SERVICE**

I am over the age of 18 and not a party to this action.

I am not a process server.

On December 20, 2019, I served the foregoing document(s) described as:

**MOTION OF ORDER TO SHOW CAUSE**

To the following party(ies):

Sevana Zadourian  
ReedSmith LLP  
355 South Grand Ave  
Suite 2900  
Los Angeles, Ca 90071-1514

Stephen D. Britt  
The Atrium  
19100 Von Karman Ave  
Suite 700  
Irvine, CA 92612

X] By U.S. Mail, I deposited such envelope in the mail at Shingle Springs California with postage thereon fully prepaid

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct

Dated: December 20, 2019

/s/ Tracy Wickstrom  
6340 North St  
El Dorado, CA 95623



**PROPOSED ORDER OF THE UNITED STATES  
DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA**

---

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA  
SACRAMENTO DIVISION

---

PRISCILLA McMANUS,

*Plaintiff,*

v.

NBS DEFAULT SERVICES, LLC; BANK OF  
AMERICA, N.A.; NATIONSTAR MORTGAGE, LLC;  
MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC.,

*Defendants.*

---

Case No. 2:18-cv-02047-JAM-AC

---

Plaintiff is asking for relief by requesting the court enforce Specific Performance in this case, by requiring the Defendants to accept Plaintiff's settlement demand submitted to them June 11, 2019.

IT IS SO ORDERED

/s/

\_\_\_\_\_  
United States Magistrate Judge

Dated: \_\_\_\_\_

**DEFENDANTS NATIONSTAR MORTGAGE  
LLC AND MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC'S  
OBJECTIONS TO MAGISTRATE JUDGE'S  
FINDINGS AND RECOMMENDATIONS-  
LOCAL RULE 304(D)  
(OCTOBER 1, 2018)**

---

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA  
SACRAMENTO DIVISION**

---

**PRISCILLA McMANUS, PRO SE,**

*Plaintiffs,*

**v.**

**NBS DEFAULT SERVICES, LLC; BANK OF  
AMERICA, N.A.; NATIONSTAR MORTGAGE, LLC;  
MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC.,**

*Defendants.*

---

**Case No. 2:18-cv-02047-JAM AC (PS)**

**[Removal from Superior Court, El Dorado,  
Case No.: PC20180307]**

**Before: The Honorable John A. MENDEZ, Judge.**

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**DEFENDANTS NATIONSTAR MORTGAGE  
LLC AND MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC'S  
OBJECTIONS TO MAGISTRATE JUDGE'S  
FINDINGS AND RECOMMENDATIONS-  
LOCAL RULE 304(D)**

Defendants Nationstar Mortgage, LLC and Mortgage Electronic Registration Systems, Inc., ("Defendants"), by counsel and pursuant to 28 U.S.C. § 636, Federal Rule of Civil Procedure 72, and Local Rule 304(D), respectfully objects to the Magistrate Judge's Findings and Recommendations granting in part and denying in part the Defendants' Motion to Dismiss the Complaint filed by the Plaintiff, Priscilla McManus ("Plaintiff"). In support thereof, Defendants state as follows:

**I. INTRODUCTION**

In her Findings and Recommendations ("F&R"), the Magistrate Judge recommends dismissal without leave to amend several claims in the Complaint-including the counts for: (1) negligence; (3) cancellation of a voidable contract under Rev. & Tax Code §§ 23304.1, 23305A and Cal.Corp. Code §§ 191(c)(7); and (8) slander of title. (ECF No. 22) Defendants do not object to the F&R with respect to these claims. However, Defendants do object to the F&R's remaining findings and recommendations. Specifically, Defendants do not agree with the F&R's recommendation to grant leave to amend the counts for (2) fraud, and (4) to void or cancel assignments of deed of trust; and Defendants do not agree with the recommendation to deny the Motion to Dismiss the claims for (5) breach of the implied covenant of good faith and fair dealing; (6)

violation of California Business and Professions Code section 17200 et. seq.; (7) quiet title; and (9) wrongful foreclosure. *Id.*

The rationale underlying the F&R is premised on the erroneous proposition that the Complaint somehow established that Nationstar did not have the authority to foreclose because it assigned the Deed of Trust to Fannie Mae. *Id.* However, as the loan servicer, Nationstar had authority to foreclose, and Plaintiff—absent any prejudice—lacks standing to challenge the foreclosure or any assignment of the deed of trust. See RJN Ex. E at p. 4 (Declaration of Mortgage Servicer signed by Nationstar). The F&R also mistakenly determined that the Complaint adequately alleged a claim for quiet title because borrower alleged she, “is willing to tender the amount [obtained by the foreclosure sale] subject to equitable adjustment for the damage caused to Plaintiff by the Defendants’ activities.” (*Id.* at p. 13). However, because Plaintiff did not allege an unconditional tender of the full amount due under the loan, she did not sufficiently allege a quiet title claim.

For these reasons, as well as others discussed more fully herein, the Complaint and all claims asserted therein should be dismissed with prejudice.

In the alternative, the claims that the Magistrate Judge is recommending move forward—(5) breach of the implied covenant of good faith and fair dealing; (6) violation of California Business and Professions Code section 17200 et. seq.; (7) quiet title; and (9) wrongful foreclosure all relate to the foreclosure proceedings. The facts giving rise to these purported claims occurred well after MERS transferred its beneficial interest under the Deed of Trust to Bank of America,

N.A., Successor by Merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP ("BACHLS"), via an Assignment of Deed of Trust recorded on March 29, 2012. Compl. Ex. E; RJN Ex C. As there is no allegation that MERS not involved in the foreclosure proceedings, MERS requests complete dismissal of all claims against it.

## II. PROCEDURAL HISTORY

On June 20, 2018, Plaintiff filed a Complaint in the Superior Court of California for El Dorado County, California. *See* Complaint (ECF No. 1). On July 26, 2018, Nationstar and MERS removed the case to the district court based on subject matter and diversity jurisdiction under 28 U.S.C. §§ 1332 and 1441. On August 2, 2018, Nationstar and MERS filed a motion to dismiss Plaintiff's Complaint. (ECF No. 8). On August 14, 2018, Plaintiff filed an Opposition to Defendants' Motion to Dismiss. (ECF No. 11). On August 24, 2018, Nationstar and MERS filed a Reply in support of Defendants' Motion to Dismiss (ECF No. 17). Oral argument on the Motion to Dismiss was held on September 5, 2018 (ECF No. 18). On September 10, 2018, the Magistrate Judge issued its Findings and Recommendations (the "F&R") (ECF No. 22).

The F&R recommended granting in part and denying in part Defendants' Motion to Dismiss. *Id.* Specifically the F&R recommended: dismissal without leave to amend the counts for (1) negligence; (3) cancellation of a voidable contract under Rev. & Tax Code 23304.1, 23305A, and Cal. Corp. Code §§ 191(c)(7); and (8) slander of title; dismissal with leave to amend the counts for (2) fraud; and (4) to void or cancel assignments of deed of trust; and denial of Nationstar

and MERS' Motion to Dismiss the claims for (5) breach of the implied covenant of good faith and fair dealing; (6) violation of California business and professions code section 17200 et seq.; (7) quiet title; and (9) wrongful foreclosure. (*Id.*)

### III. STANDARD OF REVIEW

Under 28 U.S.C. § 636, a district court may “designate a magistrate judge to conduct hearings . . . and to submit to a judge of the court proposed . . . recommendations for the disposition” of a motion to dismiss. When a party objects to a magistrate judge’s recommendation, the district court conducts a de novo review. *McDonnell Douglas Corp. v. Commodore Bus. Mach. Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981), *cert. denied*, 455 U.S. 920 (1982). “In exercising its independent judgment, ‘[t]he district judge is free to follow [the magistrate judge’s recommendation] or wholly to ignore it, or, if he is not satisfied, he may conduct the review in whole or in part anew.’” *United States v. Rivera-Guerrero*, 377 F.3d 1064 (9th Cir. 2004) (quoting *Mathews v. Weber*, 423 U.S. 261, 271 (1976)).

Because the court’s review is de novo, the court applies the standard applicable to the underlying motion, which in this case is a motion to dismiss. A motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim “tests the legal sufficiency of the claims asserted in the complaint.” *Friedman v. 24 Hour Fitness USA, Inc.*, 580 F.Supp.2d 985, 989 (C.D. Cal. 2008). To withstand such a motion, “the plaintiff must allege ‘enough facts to state a claim to relief that is plausible on its face.’” *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008) (quoting *Bel Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

A court should grant a motion to dismiss if the complaint fails to allege “enough facts to state a claim to relief that is plausible on its face . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

While the plaintiff need not include detailed factual allegations, the complaint must set forth “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]” *Bell Atl. Corp.*, 550 U.S. at 555. In determining whether the plaintiff has satisfied this burden, the court accepts “all facts alleged in the complaint as true.” *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004). However, the court is not “required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Id.*

In general, the court’s inquiry on a Rule 12(b)(6) motion is limited to the “allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice.” *Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Leasehold*, 524 F.3d 1090, 1096 (9th Cir. 2008). However, the court “need not accept as true [any] allegations contradicting documents that are referenced in the complaint.” *Lazy Y Ranch*, 546 F.3d at 588. Nor is the court required to “assume the truth of legal conclusions merely because they are cast in the form of factual allegations.” *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136 1139 (9th Cir. 2003). Moreover, the court may consider “documents attached to the complaint, documents incorporated by reference

in the complaint or matters of judicial notice without converting the motion to dismiss into a motion for summary judgment.” *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

#### IV. ARGUMENT

##### **A. The F&R Erroneously Determined That Defendants Had No Authority to Foreclose and That Plaintiff Had Standing to Challenge an Assignment of the Note and Deed of Trust**

As a threshold matter, the portions of the F&R favorable to Plaintiff are entirely premised on the assignment of the Deed of Trust to Fannie Mae, and on the rationale that Defendants had no right to participate in the foreclosure process. *See F&R generally*. According to the F&R, the relevant documents, “appear to demonstrate that Nationstar was not the beneficiary under the DOT at the time the foreclosure sale took place,” and that “it was within the expectations of the DOT that only the actual beneficiary would be able to initiate foreclosure proceedings.” *Id.* at p. 11. However, Nationstar did not need to be the beneficiary under the DOT to participate in foreclosure. It is undisputed that “[t]he authority to enforce the mortgage on the holder’s behalf may be granted to an agent.” *In re Kang Jin Hwang*, 393 B.R. 701, 710 (Bankr. C.D. Cal. 2008). There is no valid allegation or indication that Nationstar was not acting on behalf of the “trustee, mortgagee or beneficiary” pursuant to Civ. Code § 2924. Indeed, Nationstar was acting pursuant to its duties and responsibilities as servicer. Because there is no void assignment of the Deed of Trust, and



because Plaintiff cannot establish prejudice, Plaintiff cannot challenge the foreclosure.

**1. Nationstar Serviced the Loan and Instituted and Conducted the Foreclosure Process on Behalf of the Trustee, Mortgagee and/or Beneficiary**

A “trustee, mortgagee or beneficiary or any of their authorized agents” may institute the foreclosure process. Civ. Code § 2924(a)(1) (emph. added). A “person authorized to record the notice of default or the notice of sale” includes “an agent for the mortgagee or beneficiary, an agent of the named trustee, any person designated in an executed substitution of trustee, or an agent of that substituted trustee.” Civ. Code § 2924b(b)(4). Therefore, if Nationstar is an authorized agent of the trustee, mortgagee, or beneficiary, then it can foreclose on the Property—whether or not it has its own independent rights under the Deed of Trust.

Nowhere in the Complaint or the F&R is there any allegation or finding that Nationstar was not acting as servicer of Plaintiff’s loan. Indeed, the Complaint specifically alleges the contrary—that “Defendants [were] acting as Plaintiff’s . . . loan servicer.” Compl. ¶ 16 (emphasis added). *See also* RJN Ex. E at p. 4 (Declaration of Mortgage Servicer signed by Nationstar). Accordingly, as a servicer that was to act on behalf of those who held the Note, Nationstar was authorized by statute to initiate non-judicial foreclosure proceedings. *See e.g. Carswell v. JP Morgan Chase Bank N.A.*, 500 F. App’x 580, 582 (9th Cir. Nov. 21, 2012), citing Cal. Civ. Code § 2924(a)(1). *See also Wasjutin v. Countrywide Bank N.A.*, 2018 WL

1918194, at \*2 (9th Cir. Apr. 24, 2018) (Finding that borrower's theory that the mortgage servicer is not the beneficiary of the Deed of Trust and had no authority to record a notice of default or initiate foreclosure proceedings "fail as a matter of law"). Plaintiff has not and cannot allege that Nationstar was not acting pursuant to its rights and responsibilities as servicer, or that Nationstar was not acting on behalf of the Trustee.

The rationale behind the F&R focuses on the assignment of the DOT, which allegedly "cast doubt on defendant Nationstar's right to foreclose on the subject property, because it is unclear whether it was the beneficiary under the DOT at the time its agent, NBS Default Services, completed the foreclosure sale." F&R at p. 13 (ECF 22). However, the Notice of Default, filed by NBS Default Services, LLC ("NBS") explained that NBS "is either the original trustee, the duly appointed substituted trustee, or acting as agent for the trustee or beneficiary." Compl. Ex. I; RJN Ex E. "[A] trustee, mortgagee, beneficiary, or any of their authorized agents" may institute the non-judicial foreclosure process. *See* Cal. Civ. Code § 2924(a)(1). Under California Civil Code § 2924b(4), a "person authorized to record the notice of default or the notice of sale" includes "an agent for the mortgagee or beneficiary, an agent of the named trustee, any person designated in an executed substitution of trustee, or an agent of that substituted trustee." *Saldate*, 711 F. Supp. 2d at 1139.

The Notice of Default clearly explains that NBS is "acting as agent for the trustee or beneficiary." Compl. Ex. I; RJN Ex E. As an authorized agent to the trustee or beneficiary (*i.e.* Fannie Mae or Nationstar),

NBS was permitted to participate in the non-judicial foreclosure. Civ. Code § 2924(a)(1). This, alone, defeats Plaintiff's argument. Plaintiff's allegations to the contrary rely on nothing more than conclusions of law, unsupported by authorities or factual allegations. Plaintiff fails to sufficiently allege that either Nationstar or NBS were not or could not be acting as an agent for the mortgagee, beneficiary, or named trustee. Importantly, "Plaintiffs have no standing to contest the agency relationship between the trustee and the beneficiary under the Deed of Trust." *Madarang v. U.S. Bank N.A.*, 2011 WL 4470536, \*4 (Cal. App. 2d Dist. Sept. 28, 2011). *See also Fazio v. New Penn Fin., LLC*, 2018 WL 3454883, \*5 (Cal. App. 1st Dist. July 18, 2018) (finding "no authority for the notion that [the plaintiffs], as borrowers, have standing to complain about the agency relationship between an entity representing the note holder and that entity's mortgage servicer").

Neither Bank of America, Nationstar, Fannie Mae, nor MERS have challenged NBS's authority to act as an agent in this regard. As an authorized agent, Nationstar was permitted to participate in the non-judicial foreclosure, and Plaintiff has no standing to challenge that agency relationship. Civ. Code § 2924(a)(1). This, alone, defeats Plaintiff's argument

## **2. Plaintiff has no Standing to Contest the Foreclosure Process**

The F&R relies on the rationale that "a borrower who has suffered a nonjudicial foreclosure does not lack standing to sue for wrongful foreclosure based on an allegedly void assignment" F&R at p. 11 (emphasis Added) (quoting *Mendoza v. JPMorgan Chase Bank*,

N.A., 6 Cal. App. 5th 802, 820 (2016)). However, the complaint does not allege with requisite specificity—and the F&R does not find—that any assignments were actually void. Instead, the focus of both the Complaint and the F&R is on whether the foreclosure sale—not the assignment—was void based on Nationstar’s alleged lack of authority to foreclose.

The F&R cites *Yvanova v. New Century Mort. Corp.*, 62 Cal. 4th 919, 929 (2016) to support the proposition that Plaintiff may challenge the foreclosure. F&R at p. 11. However, the reliance on *Yvanova* is misplaced. There, the court was presented with a single question: “under what circumstances, if any, may the borrower challenge a nonjudicial foreclosure on the ground that the foreclosing party is not a valid assignee of the original lender? Put another way, does the borrower have standing to challenge the validity of an assignment to which he was or she was not a party?” *Id.* at 928. The *Yvanova* court held that a borrower may challenge the validity of the assignment if such assignment is void, but not if it is merely voidable under applicable law. *Id.* at 923. (emphasis added). “[O]nly the entity holding the beneficial interest under the deed of trust—the original lender, its assignee, or an agent of one of these—may instruct the trustee to commence and complete a nonjudicial foreclosure.” *Id.* at 935 (emphasis added). “If a purported assignment necessary to the chain by which the foreclosing entity claims that power is absolutely void, meaning of no legal force or effect whatsoever, the foreclosing entity has acted without legal authority by pursuing a trustee’s sale, and such an unauthorized sale constitutes a wrongful foreclosure.” *Id.* (internal citations omitted). A voidable assignment, on the other

hand, is one that the parties thereto may ratify or extinguish at their election, rights that the borrower has no power to assert or to challenge. *Id.* at 929-30.

Here, the F&R recommends dismissal of Plaintiff's claim "To Void or Cancel Assignment of Deed of Trusts" because it "does not provided [*sic*] a legal basis for a claim." F&R at p. 10. There F&R makes no determination that the complaint properly alleged an assignment is void, and there is no allegation that a void assignment somehow affected the foreclosure sale. Accordingly, *Yvanova* does not apply here because Plaintiff's challenge to the foreclosure sale is not actually based on a void assignment—rather Plaintiff alleges the foreclosure sale was void because an apparently valid assignment transferred an interest in the property away from the foreclosing entity.

### **3. Plaintiff Has Not Alleged Prejudice Sufficient to Challenge the Foreclosure Process**

There is persuasive authority in California that absent any allegation of prejudice, plaintiffs do not have standing to complain about irregularities in the foreclosure process post-foreclosure. *See e.g., Siliga v. Mortgage Electronic Registrations Systems, Inc.*, 219 Cal.App. 4th 75 (2013) (borrowers lacked standing to complain about loan servicer's and assignee's alleged lack of authority to foreclose on deed of trust where borrowers were in default under the note, absent evidence that the original lender would have refrained from foreclosure); *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal.App. 4th 256, 272 (2011) (to recover on wrongful foreclosure claim, borrower must demonstrate that the alleged imperfection in the foreclosure process

was prejudicial; no prejudice exists where borrower was in default and the assignment of the loan did not interfere with the borrower's ability to pay).

Here, Plaintiff has not alleged any facts showing that any alleged irregularities in the foreclosure process caused her any harm – in particular, plaintiff does not dispute the underlying debt, and does not dispute that she defaulted on the payments. Further, she does not claim that more than one entity concurrently attempted to collect mortgage payments or foreclose on the Property. Instead, plaintiff contends (and the F&R appears to agree) that the foreclosure process may be invalid because it should have been initiated by Fannie Mae—the same entity that purchased the property at the foreclosure sale. See Trustee's Deed Upon Sale was recorded on April 25, 2018. Compl. Ex. K.

Here, Plaintiff is attempting to rewind the foreclosure based on some perceived technicality that has absolutely no effect on her whatsoever. If, as she contends, Fannie Mae was the only entity who could conduct the foreclosure, it stands to reason that Fannie Mae would still have obtained the property at the foreclosure sale. Absent any allegation of prejudice, Plaintiff does not have standing to complain about irregularities in the foreclosure process. See *Siliga*, 219 Cal. App. 4th at 85; *Fontenot*, 198 Cal. App. 4th at 272.

**B. The F&R Recommended Leave to Amend the Claim for Fraud**

The F&R recommended that Plaintiff's Claim for Fraud should be time-barred because the December 17, 2014 Notice of Default put Plaintiff on notice that

she “at least had a reason to suspect a factual basis” for a fraud claim. F&R pp.7-8. The F&R recommended dismissal, but also recommended granting leave to amend. *Id.* At the hearing, Plaintiff vaguely indicated that she believes there was additional fraud in the actual sale of the subject property, and that she did not have reason to know that factual basis until the day the property was scheduled to be auctioned, April 19, 2018. *Id.* Based on this, the F&R suggested that there may be additional facts which might establish a timely fraud claim, and recommended that Plaintiff should be granted leave to amend. *Id.*

Federal Rule of Civil Procedure 9(b) requires that fraud claims must be pled with particularity. To satisfy the particularity requirement of Rule 9(b), “[a]llegations of fraud must be accompanied by ‘the who, what, when, where and how’ of the misconduct charged.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003) (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)). The speculative nature of the Plaintiff’s representations, “which *might* establish a timely fraud claim (*emphasis added*),” does not satisfy the Fed.R.Civ.P. 9(b) requirement that fraud claims be pled specifically. Nationstar and MERS’ Motion to Dismiss Plaintiff’s fraud claim should be granted in its entirety without leave to amend.

**C. The F&R Erroneously Recommended Leave to Amend the Claim to Void or Cancel Assignments (Homeowner’s Bill of Rights)**

The F&R explains in detail the failure of Plaintiff’s Complaint to successfully plead a valid claim for a violation of the Homeowner’s Bill of Rights. F&R pp. 9-10. The F&R noted Plaintiff’s failure to cite authority

in support of the claim and Plaintiff's failure to provide a clear legal basis in accordance with Rule 8. *Id.* Despite specifically outlining all of the shortcomings of Plaintiff's claim, the Court determined that amendment of Plaintiff's claim for violation of Homeowner's Bill of Rights is appropriate. *Id.*

Plaintiff has no standing to challenge the assignments of the Deed of Trust. "Standing is a threshold issue necessary to maintain a cause of action, and the burden to allege and establish standing lies with the plaintiff[s]." *Mendoza v. JPMorgan Chase Bank, N.A.*, 6 Cal. App. 5th 802, 810 (2016) (citing *Saterbak v. JPMorgan Chase Bank, N.A.*, 245 Cal. App. 4th 497, 813-14 (2016)) (additional citation omitted). "District courts have held that borrowers who were not parties to the assignment of their deed—and whose rights were not affected by it—lacked standing to challenge the assignment's validity because they had not alleged a concrete and particularized injury that is fairly traceable to the challenged assignment." *Marques v. Federal Home Loan Mortg. Corp.*, No. 12-cv-1873, 2012 WL 6091412, at \*4 (S.D. Cal. Dec. 6, 2012). Where, as here, a borrower claims that a foreclosure is void, they must establish standing with facts showing they had "a beneficial interest in the assignment and substitution that is concrete and actual, not conjectural or hypothetical." *See Mendoza*, 6 Cal. App. 5th at 810 (alterations omitted) (quoting *Saterbak*, 245 Cal. App. 4th at 814). Plaintiff's Complaint is vague and confusing. However, to the extent Plaintiff attempts to challenge any entity's right to assign an interest in the DOT, she lacks standing to do so and no amendment will cure that defect.



**D. The F&R Erred in Recommending Denial of the Motion to Dismiss the Claims for Breach of the Implied Covenant of Good Faith and Fair Dealing**

The F&R concluded that “Plaintiff properly states a claim under the Implied Covenant of Good Faith and Fair Dealing.” F&R; p. 10. The F&R determined that “it was within the expectations of the DOT that only the actual beneficiary would be able to initiate foreclosure proceedings.” *Id.* at p. 11. This assumption, however, goes beyond the four corners of the complaint and the facts actually alleged.

The implied covenant “rests upon the existence of some specific contractual obligation” and there “is no obligation to deal fairly or in good faith absent an existing contract.” *Sipe v. Countrywide Bank*, 690 F.Supp.2d 1141, 1160 (E.D. Cal. 2010). Under California contract law, the covenant “is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated by the contract.” *Pasadena Live, LLC v. City of Pasadena*, 8 Cal.Rptr.3d 233, 237 (2004) (emphasis in original). Nor can the implied covenant contradict the express terms of a contract. *Storek & Storek, Inc. v. Citicorp Real Estate, Inc.*, 100 Cal. App. 4th 44, 55 (2002). Accordingly, courts have consistently held that for an action under the implied covenant to withstand a motion to dismiss under Rule 12(b)(6), Plaintiff must cite a specific provision of the contract that was frustrated. *Lingad v. Indymac Fed. Bank*, 682 F.Supp.2d 1142, 1154 (E.D. Cal. 2010).

Here, Plaintiff’s claim for breach of the implied covenant of good faith and fair dealing is legally insufficient for several reasons. Plaintiff has failed to

allege the express provision of the contract breached and has not stated which contract applies. Compl. ¶¶ 37-52. Presumably, she relies on the Note and Deed of Trust as the applicable written contracts which allegedly contain an implied duty of good faith and fair dealing. *Id.* ¶ 38. However, Plaintiff fails to allege which provision of the Note or the Deed of Trust was breached by Defendants. Plaintiff does not allege that she performed her obligations under the Note or Deed of Trust, nor does she allege that Defendants unfairly interfered with Plaintiffs' benefits under the Note or Deed of Trust. *See Rocha v. CIT Bank, N.A.*, 2018 WL 1609636, \*6 (N.D. Cal. April 3, 2018, citing *Pasadena Live, LLC v. City of Pasadena*, 8 Cal. Rptr. 3d 233, 237 (Ct. App. 2004) ("the implied covenant of good faith and fair dealing is limited to assuring compliance with the express terms of the contract" and holding that the claim fails as plaintiffs did not allege any express terms of the loan agreement which were breached) (emphasis in original). Instead, Plaintiff alleges—vaguely—that Defendants "did not deal fairly" (Compl. ¶ 39), which is insufficient to state a claim as a matter of law.

The F&R premised its recommendation with respect to this claim on the mistaken belief that the foreclosure sale was invalid. However, as previously set forth herein, the assignment and sale were valid and Plaintiff has no standing to challenge either. Nationstar was permitted to act as a servicing agent and participate in the foreclosure. The foreclosure was proper and Defendants' motion to dismiss the claim for implied covenant of good faith and fair dealing should be dismissed in its entirety without leave to amend.

**E. The F&R Erroneously Recommended Denial of Defendants' Motion to Dismiss the Claim for Violation of California Business and Professions Code Section 17200 Et Seq.**

The F&R recommended denial of Defendants' Motion to Dismiss as to the Claim for Violation of California Business and Professions Code Section 17200 Et Seq. F&R pp. 9-10. In coming to this determination, the F&R relied on the proposition that Plaintiff was able to show a significant loss because her property was foreclosed upon and sold. *Id.* The F&R stated that "Unless defendants can explain how the Corporate Assignment of the DOT to Fannie Mae did not remove Nationstar as the beneficiary under the DOT, plaintiff has stated a claim that defendant '[i]nstituted improper or premature foreclosure proceedings' against her." *Id.* However, as set forth at length in Section IV.A. *supra*, the foreclosure proceedings were properly performed by the servicer and agent of the Trustee. *See* RJN Ex. E at p. 4 (Declaration of Mortgage Servicer signed by Nationstar). Accordingly, Plaintiff is unable to prove the second prong of her UCL claim, that Defendants performed an unfair, unlawful or deceptive act.

Additionally, to have standing to pursue a claim under the UCL, plaintiff must allege they have "suffered injury in fact and have lost money or property" as a result of the alleged unfair practices by defendants. Bus. & Prof. Code § 17200 et seq.; *see R&B Auto Ctr., Inc. v. Famers Group, Inc.*, 140 Cal.App. 4th 327, 360 (2006). This requires that the plaintiff "(1) establish a loss or deprivation of money or property sufficient to qualify as . . . economic injury, and (2) show that the economic injury was . . . caused by [ ] the unfair business

practice . . . that is the gravamen of the claim.” *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 322 (2011) (emphasis in original). The F&R incorrectly determined that Plaintiff was able to show a significant loss because her property was foreclosed upon and sold. F&R p. 12 However, the foreclosure and loss of property resulted from Plaintiff’s own default—not from any action of Defendants. She suffered no injury as a result of Defendants’ conduct. Based on the foregoing, Defendants’ Motion to Dismiss should be granted as to Plaintiff’s claim for violation of California Business and Professions Code Section 17200 et seq. and the claim dismissed with prejudiced.

**F. The Findings Erroneously Recommended Denial of Defendants’ Motion to Dismiss the Claim for Quiet Title**

The F&R recommended that Plaintiff’s quiet title claim survive Defendants’ motion to dismiss. F&R p. 13. This recommendation is based on the improper determinations that (1) Nationstar did not have the right to participate in the foreclosure of the property because it wasn’t the beneficiary under the DOT, and (2) that Plaintiff sufficiently alleged tender. *Id.*

As discussed above in Section IV.A, Plaintiff’s complaint fails to establish that she has standing to challenge the foreclosure or assignment of the DOT. Nationstar was acting in its capacity as loan servicer and agent of the Trustee. RJN Ex. E at p. 4 (Declaration of Mortgage Servicer signed by Nationstar). Borrower alleges no prejudice from the foreclosure proceedings and has no standing to challenge any assignment of the Deed of Trust. There is absolutely

no indication that the foreclosure was wrongfully conducted or that it should be void.

In addition to the above, Plaintiff has not adequately alleged tender. "It is settled in California that a mortgagor cannot quiet his title against the mortgagee without paying the debt secured." *Shimpones v. Stickney*, 219 Cal. 637, 649, 28 P.2d 673 (1934); see *Mix v. Sodd*, 126 Cal.App.3d 386, 390, 178 Cal.Rptr. 736 (1981) ("a mortgagor in possession may not maintain an action to quiet title, even though the debt is unenforceable"); *Aguilar v. Bocci*, 39 Cal.App.3d 475, 477, 114 Cal.Rptr. 91 (1974) (trustor is unable to quiet title "without discharging his debt"). "A tender is an offer of performance made with the intent to extinguish the obligation." *Arnolds Management Corp. v. Eischen*, 158 Cal.App.3d 575, 580, 205 Cal.Rptr. 15 (1984) (citing Cal. Civ. Code, § 1485; *Still v. Plaza Marina Commercial Corp.*, 21 Cal.App.3d 378, 385, 98 Cal.Rptr. 414 (1971)). "A tender must be one of full performance . . . and must be unconditional to be valid." *Arnolds Management*, 158 Cal.App.3d at 580, 205 Cal.Rptr. 15 (emphasis added). "Nothing short of the full amount due the creditor is sufficient to constitute a valid tender, and the debtor must at his peril offer the full amount." *Rauer's Law etc. Co. v. S. Proctor Co.*, 40 Cal.App. 524, 525, 181 P. 71 (1919).

A defaulted borrower is "required to allege tender of the amount of [the lender's] secured indebtedness in order to maintain any cause of action for irregularity in the sale procedure." *Abdallah v. United Savings Bank*, 43 Cal.App.4th 1101, 1109, 51 Cal.Rptr.2d 286 (1996), cert. denied, 519 U.S. 1081, 117 S.Ct. 746, 136 L. Ed. 2d 684 (1997). "The rules which govern tenders are strict and are strictly applied."

*Nguyen v. Calhoun*, 105 Cal.App.4th 428, 439, 129 Cal. Rptr.2d 436 (2003). "The tenderer must do and offer everything that is necessary on his part to complete the transaction, and must fairly make known his purpose without ambiguity, and the act of tender must be such that it needs only acceptance by the one to whom it is made to complete the transaction." *Gaffney v. Downey Savings & Loan Assn.*, 200 Cal. App.3d 1154, 1165, 246 Cal.Rptr. 421 (1988). The debtor bears "responsibility to make an unambiguous tender of the entire amount due or else suffer the consequence that the tender is of no effect." *Gaffney*, 200 Cal.App.3d at 1165, 246 Cal.Rptr. 421.

Here, Plaintiff's Complaint is devoid of an unambiguous and unconditional assertion that she paid, offered to pay, or was even able to pay the outstanding debt due and owing on her mortgage loan. At best, her complaint claims that Plaintiff was willing to tender the foreclosure sale price of the property, less any damages she allegedly suffered. Compl. ¶ 55. This is distinctly different from offering to pay off the entire debt owed, and this allegation is insufficient to constitute tender. *Abdallah*, 43 Cal.App.4th at 1109. Plaintiff has not alleged an unconditional offer of full performance, and has therefore not adequately alleged tender. *Arnolds Management Corp*, 158 Cal.App.3d at 580. For this reason, Plaintiff's quiet title claim fails and Defendants' Motion to Dismiss should be granted with prejudice.

**G. The F&R Erroneously Recommend Denial of Defendants' Motion to Dismiss the Claim for Wrongful Foreclosure**

In support of its recommended denial of Defendants' Motion to Dismiss the Claim for Wrongful Foreclosure, the F&R again mistakenly concludes that Plaintiff sufficiently alleged tender in her Complaint as part of her Quiet Title cause of action. F&R pp 14-15. The F&R also premises its analysis on the erroneous conclusion that Nationstar participated in foreclosure without authority to do so. *Id.*

In California, a wrongful foreclosure occurs "where there has been an illegal, fraudulent or willfully oppressive sale of property under a power of sale contained in a mortgage or deed of trust." *Munger v. Moore*, 11 Cal. App. 3d 1, 7 (Cal. Ct. App. 1970). "When a debtor is in default of a home mortgage loan, and a foreclosure is either pending or has taken place, the debtor must allege a credible tender of the amount of the secured debt to maintain any cause of action for wrongful foreclosure." *Alicea v. GE Money Bank*, 2009 WL 2136969, at \*3 (N.D. Cal. 2009) (citing California law); see also *U.S. Cold Storage of Cal. v. Great W. Sav. & Loan Ass'n*, 165 Cal. App. 3d 1214, 1222 (1985) (same). "The California Court of Appeal has held that the tender rule applies in an action to set aside a trustee's sale for irregularities in the sale notice or procedure." *Barrionuevo v. Chase Bank, N.A.*, 885 F. Supp. 2d 964, 969 (N.D. Cal. 2012) (quoting *Cohn v. Bank of Am.*, No. 2:10-cv-00865 MCE KJN PS, 2011 WL 98840, at \*9 (E.D. Cal. Jan. 12, 2011)).

As previously set forth herein, Plaintiff lacks standing to challenge the assignment of the Deed of Trust (Section IV.A.) and has failed to tender the

outstanding mortgage debt. Accordingly, Defendants' Motion to Dismiss should be granted and this claim should be dismissed with prejudice.

## V. CONCLUSION

Plaintiff's Complaint is insufficiently pled and fails to state claims for relief. For the reasons discussed above, each of Plaintiff's claims should be dismissed with prejudice in their entirety. Additionally, MERS requests complete dismissal of all claims against it because the remaining claims do not relate to any of MERS' alleged conduct.

Reed Smith LLP

By: /s/ Raffi Kassabian  
Sevana Zadourian  
Abraham J. Colman  
Raffi Kassabian  
*Attorneys for Defendant*  
*Nationstar Mortgage LLC;*  
*Mortgage Electronic*  
*Registration Systems, Inc.*

DATED: October 1, 2018



**PROOF OF SERVICE**

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, 355 South Grand Avenue, Suite 2900 Los Angeles, CA 90071. On October 1, 2018, I served the following document(s) by the method indicated below:

**DEFENDANTS NATIONSTAR MORTGAGE LLC  
AND MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC'S OBJECTIONS TO MAGISTRATE  
JUDGE'S FINDINGS AND RECOMMENDATIONS-  
LOCAL RULE 304(D)**

- ☒ by placing the document(s) listed above in a sealed envelope(s) and consigning it to an express mail service for guaranteed delivery on the next business day following the date of consignment to the address(es) set forth below.

Priscilla McManus  
1600 Starbuck Road  
P.O. Box 8  
Rescue, CA 95672  
Telephone: (530) 672-9898  
*Plaintiff Pro Se*

- ☒ by Electronic Mail I caused the above referenced documents to be emailed to the addressee below through the Court's CM/ECF system.

William A. Aspinwall, Esq  
Severson & Werson, P.C.  
One Embarcadero Center  
Suite 2600  
San Francisco, CA 94111  
*Counsel for Defendant, Bank of America N.A.*

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Nabeel M Zuberi  
McCalla Raymer Leibert Pierce, LLP  
301 E. Ocean Dr., Ste 1720  
Long Beach, CA 90802  
*Counsel for Defendant, NBS Default Services, LLC*

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct. Executed on October 1, 2018, at Los Angeles, California.

/s/ Julie Mardorf  
Julie Mardorf

App.143a

**CIVIL LIMITED – MINUTES,  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF EL DORADO  
(FEBRUARY 6, 2023)**

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**IN THE SUPERIOR COURT OF CALIFORNIA  
COUNTY OF EL DORADO  
DEPARTMENT 9**

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**FEDERAL NATIONAL  
MORTGAGE ASSOCIATION,**

*Plaintiff/Petitioner,*

**v.**

**PRISCILLA McMANUS,**

*Defendant/Respondent.*

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Case No. 22UD0352  
Event Date: 02/06/2023 1:30 pm  
Department: Department 9  
Event Type: Court Trial: Short Cause  
Judge: Gary Slossberg  
Clerk: Tara Young  
Reporter: For the Record – Recording Device

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**Civil Limited – Minutes**

**Appearances:**

Attorney: Gary Decker on behalf of Plaintiff,  
Representative of plaintiff is present

Respondent: Priscilla McManus is present  
appearing Pro Per.

**Nature of Proceedings:**

Case is regularly called for hearing.

The clerk conducts a mass swearing for the parties testifying today.

Both sides present argument.

The court takes judicial notice of the defendant's unfiled Motion to Quash.

The court finds:

The defendant's Motion to Quash cannot be considered by the court.

The court grants the defendant Leave to file an Answer.

The court grants the defendant 5 calendar days to file an Answer.

The Court, on its own motion, orders this matter continued as follows:

DATE/TIME	DEPT.	PURPOSE
02/15/2023 1:30 PM	Department 9	Court Trial: Short Cause

App.145a

**CIVIL LIMITED – MINUTES,  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF EL DORADO  
(FEBRUARY 15, 2023)**

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IN THE SUPERIOR COURT OF CALIFORNIA  
COUNTY OF EL DORADO  
DEPARTMENT 9

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FEDERAL NATIONAL  
MORTGAGE ASSOCIATION,

*Plaintiff/Petitioner,*

v.

PRISCILLA McMANUS,

*Defendant/Respondent.*

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Case No. 22UD0352  
Event Date: 02/15/2023 1:30 pm  
Department: Department 9  
Event Type: Court Trial: Short Cause  
Judge: Gary Slossberg  
Clerk: Courtney Abila  
Reporter: For the Record – Recording Device

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**Civil Limited – Minutes**

**Appearances:**

Attorney: Gary Decker is present specially  
appearing for Glenn Navis on behalf of  
Plaintiff Federal National Mortgage  
Association

Also present: Kent Sutton – Authorized Agent for  
Plaintiff

Defendant: Priscilla McManus is present appearing  
Pro Per.

**Nature of Proceedings:**

Case is regularly called for hearing.

The Court has read and considered the contents  
of the Court's file.

At time 1:39pm, Mr. Decker gives opening state-  
ment.

At time 1:41pm, Court takes judicial notice of  
Judgment in a Civil Case, Order, and Findings and  
Recommendations from the United States District  
Court for the Eastern District of California received  
from Plaintiff in Court on 2/15/23.

All parties are sworn.

Parties address the Court regarding Proof of  
Service.

At time 1:46pm, Plaintiff's Witness, D'Angelo  
Contreras previously sworn, takes the stand. Direct  
examination by Mr. Decker.

Examination by Court.

At time 1:56pm, D'Angelo Contreras presents Proof of Service from October 20, 2022 for Notice to Quit.

At time 1:58pm, direct examination by Mr. Decker resumes.

The Court confirms with Defendant whether the Proof of Service for the Notice to Quit or the Proof of Service of Summons and Complaint is being contested. Defendant contests both Proofs of Service.

At time 2:05pm, Defendant waives cross-examination and D'Angelo Contreras is excused from the stand subject to recall.

At time 2:07pm, Defendant testifies.

Examination by Court.

The Court finds:

The decision made by the District Court of California in case# 2:18-CV-02047-JAM-AC is binding on this Court.

At time 2:15pm, Defendant's testimony resumes.

At time 2:20pm, Mr. Decker presents Closing Argument.

At time 2:22pm, Defendant presents Closing Argument.

At time 2:23pm, D'Angelo Contreras, previously sworn, is recalled to the stand and is further examined.

At time 2:24pm, D'Angelo Contreras is thanked and excused from the stand.

At time 2:25pm, Court directs a recess.

At time 2:28pm, Court reconvenes.

The Court and counsel discuss D'Angelo Contreras' last name listed on the Proof of Service for Notice to Quit is listed as "D'Angelo Emilian".

At time 2:35pm, Court is in recess.

Clerk is directed to call D'Angelo Contreras.

At time 2:43pm, Court reconvenes.

The Court speaks with D'Angelo Contreras on speaker phone to confirm his last name listed on the Proof of Service for Notice to Quit.

Court makes its findings as set forth on the record.

The Court Orders:

The Court enters judgment on named Defendant. Writ of Possession to be issued.

The Court will grant a Stay of Judgment and Writ of Possession for 30 days in light of Defendant's intent to file an appeal with the Supreme Court.

The stay will be lifted on 3/17/23 and the Judgment will be entered and Writ of Possession will be issued.



App.149a

**NOTICE OF COURT TRIAL  
SETTING — UNLAWFUL DETAINER  
(JANUARY 24, 2023)**

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SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF EL DORADO

3321 Cameron Park Drive

Cameron Park, CA 95682

Title of Case: FEDERAL NATIONAL MORTGAGE  
ASSOCIATION, v. PRISCILLA McMANUS,

Case No. 22UD0352

**NOTICE OF COURT TRIAL SETTING –  
UNLAWFUL DETAINER**

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TO: EACH DEFENDANT AND TO THE ATTORNEY  
OF RECORD for each party in this action:

THIS CASE IS SET FOR TRIAL on 02/06/2023 at  
1 :30 PM at 3321 Cameron Park Drive, Cameron Park,  
CA 95682, Department 9. This case is not set for  
Mandatory Settlement Conference.

/s/ Lito Guzman  
Deputy Clerk

January 24, 2023

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I declare under penalty of perjury that I am over the age of 18 and not a party to the above action; that a copy of NOTICE OF COURT TRIAL SETTING was placed for mailing through either the United States Post Office or Inter-Departmental mail on the parties at the address shown herein. Executed on January 24, 2023 in Cameron Park, California.

William Jarrell  
8880 RIO SAN DIEGO DRIVE 725  
SAN DIEGO, CA 92108

PRISCILLA MCMANUS  
P.O. BOX 8  
RESCUE, CA 95672

By: /s/ Lito Guzman  
Deputy Clerk



SUPREME COURT  
PRESS