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

P. ORB HATTON, an individual, and DIANE HATTON, an individual,

Plaintiffs,

v.

BANK OF AMERICA, N.A., a national association; BSI FINANCIAL SERVICES, a business entity; and Does 1 through 100, inclusive,

Defendants.

Case No. 1:15-cv-00187-EPG

ORDER RE: DEFENDANT BSI FINANCIAL SERVICES' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

(ECF No. 56)

I. INTRODUCTION

Defendant BSI Financial Services (“BSI”) has moved to dismiss Plaintiffs’ claim for violation of California Civil Code § 2923.7 on the ground that Plaintiffs did not adequately allege that Plaintiffs requested that BSI establish a single point of contact. On the contrary, Plaintiffs’ First Amended Complaint (the “FAC”) alleges that Plaintiffs “verbally requested that he be transferred to a single point of contact that would be assigned to his loan.” Plaintiffs’ allegations state a claim under § 2923.7 and Defendant’s Motion is thus DENIED.

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1 **II. BACKGROUND**

2 This is BSI’s second attempt to dismiss this case. As explained in the Court’s previous
3 order regarding Defendants’ motions to dismiss the Complaint, this case arises out of the
4 attempted foreclosure of property located in Mariposa County.¹ In March 2008, Plaintiffs
5 refinanced a piece of property located at 10265 Granite Dell Road in Coulterville, California with
6 Countrywide Financial. Plaintiffs secured the \$416,925 loan by executing a Deed of Trust and
7 Promissory Note with Countrywide Financial. In July 2008, the loan was transferred to BofA. In
8 October 2011, Plaintiffs sought a loan modification from Bank of America. In November 2014,
9 the loan was sold to BSI.

10 Plaintiffs attempted to obtain a loan modification with BSI. Upon contacting BSI, Plaintiff
11 P. Orb Hatton “verbally requested that he be transferred to a single point of contact that would be
12 assigned to his loan, so that Plaintiffs could determine what their options were.” (FAC ¶ 26, ECF
13 No. 44.) Eventually, Plaintiffs spoke with Chris Davis at BSI, who told Plaintiffs that he was their
14 “assigned single point of contact for the loan.” *Id.* He informed Plaintiffs that if they provided
15 their financial information to him over the phone and submitted an approval letter for the reverse
16 mortgage for his review, he would obtain a loan modification so that they could accept the reverse
17 mortgage offer.² Davis promised that BSI would either approve the request or make a counter
18 offer within three days. Plaintiffs submitted the requested information, but were never able to
19 contact Davis again. A Notice of Trustee’s Sale was recorded against the property on January 15,
20 2015.

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26 ¹ Because the current Motion is brought solely by Defendant BSI and is not joined by Defendant Bank of America,
N.A., the Court will only recount Plaintiffs’ factual allegations as relevant to BSI’s conduct.

27 ² Plaintiffs had previously attempted to obtain reverse mortgages from a number of different lenders to pay off the
28 mortgage loan. Although Plaintiffs had been approved for multiple reverse mortgages, they had been unable to obtain
a loan modification or pay off quote from Defendants and had thus been unable to apply the various reverse
mortgages to the loan.

1 On August 20, 2015, Defendant BSI Financial Services filed a Motion to Dismiss the
2 FAC.³ After Plaintiffs P. Orb Hatton and Diane Hatton (“Plaintiffs”) failed to file a brief in
3 opposition to the Motion, the Court issued an order to show cause, instructing Plaintiffs to file an
4 opposition brief or otherwise show cause why the Motion should not be granted. Plaintiffs timely
5 filed a response and BSI did not file any brief in reply. The Court has reviewed the papers and
6 determined that this matter is suitable for decision without oral argument pursuant to Local Rule
7 230(g). After a review of the pleadings and for the reasons set forth below, the Court determines
8 that the Motion to Dismiss is DENIED.

9 III. DISCUSSION

10 BSI targets its Motion to Dismiss at Plaintiffs’ Second Cause of Action, which alleges that
11 BSI violated California Civil Code § 2923.7. In the order deciding BSI’s first motion to dismiss,
12 the Court dismissed this cause of action and allowed Plaintiffs leave to amend the Complaint to
13 add the necessary factual allegations to state a claim under § 2923.7. BSI now argues that the
14 amendments that Plaintiffs have made are still inadequate to properly state a claim because: (1)
15 Plaintiffs have not alleged a violation of § 2923.7 with the required particularity; and (2) the
16 amended allegations are contradictory to those in the original Complaint and should thus be
17 rejected as a mere “sham” designed to evade dismissal.

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19 ³ BSI requests the Court take judicial notice of the following documents: Deed of Trust, recorded April 1, 2008;
20 Assignment of Deed of Trust, recorded December 31, 2012; Substitution of Trustee, recorded August 28, 2014;
21 Notice of Default and Election to Sell under Deed of Trust, recorded August 28, 2014; Notice of Trustee’s Sale,
22 dated January 15, 2015; and Plaintiff’s Original Complaint in this action, filed February 4, 2015. The first five
23 documents are lodged in the official records of Mariposa County. Courts may take judicial notice of facts “not
24 subject to reasonable dispute” when they are either: “(1) generally known within the territorial jurisdiction of the trial
25 court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be
26 questioned.” Fed. R. Evid. 201. Plaintiffs do not oppose the request for judicial notice. All the documents attached by
27 Defendant are public records and the Court takes judicial notice of them. *U.S. v. Corinthian Colls.*, 655 F.3d 984, 999
28 (9th Cir. 2011) (courts may “take judicial notice of ‘matters of public record’” and consider them when ruling on a
Rule 12(b)(6) motion). It is unclear, however, what effect BSI expects the notice of these documents to have—
outside of the statement of facts, BSI’s Motion appears to revolve entirely around the allegations in the Complaint
and the FAC. *Rezentes v. Sears, Roebuck & Co.*, 729 F.Supp.2d 1197, 1206 (D. Haw. 2010) (“This court does not
understand why Sears asks this court to take judicial notice of Rezentes’s Complaint or a declaration. If the court
took such notice, it would only notice the existence of the documents, not notice any facts asserted in the documents
as true. What is puzzling is that the documents could have been referred to or attached to the moving papers without
judicial notice”). BSI also appears to have simply printed out and submitted the same documents it filed in its request
for judicial notice in support of its first motion to dismiss in its current Request for Judicial Notice, despite the
Court’s warning in the order dispensing with the original request that some of the documents filed were barely
legible. *BSI is cautioned that the Court will not entertain the submission of illegible documents in future filings.*

1 **A. Legal Standard**

2 To survive a motion to dismiss, a plaintiff must plead “only enough facts to state a claim
3 to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This
4 “plausibility standard,” however, “asks for more than a sheer possibility that a defendant has
5 acted unlawfully,” and “[w]here a complaint pleads facts that are ‘merely consistent with’ a
6 defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement
7 to relief.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The court must “accept all factual
8 allegations in the complaint as true and construe the pleadings in the light most favorable to the
9 nonmoving party.” *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 899-900 (9th
10 Cir. 2007). Legally conclusory statements, when unsupported by actual factual allegations, need
11 not be accepted. *Ashcroft*, 556 U.S. at 678-79. A court may, however, consider documents other
12 than the complaint when they are judicially noticeable under Federal Rule of Evidence 201 or
13 where “no party questions their authenticity and the complaint relies on those documents.” *Harris*
14 *v. Cnty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012).

15 **B. Plaintiffs Have Properly Plead a Violation of California Civil Code Section**
16 **2923.7**

17 In the order deciding BSI’s previous motion to dismiss, the Court described the relevant
18 requirements in § 2923.7:

19 California Civil Code section 2923.7 requires that “[u]pon request from a
20 borrower who requests a foreclosure prevention alternative, the mortgage servicer
21 shall promptly establish a single point of contact and provide to the borrower one
22 or more direct means of communication with the single point of contact.” A
23 “single point of contact” (“SPOC”) “must have authority to stop foreclosure
proceedings.” *Segura v. Wells Fargo Bank, N.A.*, No. CV-14-04195-MWF
(AJWx), 2014 WL 4798890, at *6 (C.D. Cal. Sept. 26, 2014). The SPOC must
also, among other things, be able to “timely, accurately, and adequately inform
the borrower of the current status of the foreclosure prevention alternative.” Cal.
Civ. Code § 2923.7(b)(3).

24 ...

25 Courts have read § 2923.7 to “require a borrower to request a SPOC before the
26 servicer is required to establish one.” *Carbajal v. Wells Fargo Bank, N.A.*, No.
27 CV 14-7851 PSG (PLAx), 2015 WL 2454054, at *7 (C.D. Cal. April 10, 2015).
28 While the Complaint contains an oblique reference to Plaintiffs’ efforts to reach
someone at BSI, the allegations stop short of asserting that Plaintiffs requested a
single point of contact. (Complaint ¶ 26, ECF No. 1 (“Plaintiffs began the process
of trying to contact someone at BSI to find out what his options were. Plaintiffs
were finally able to reach an individual named Chris Davis”).) Plaintiffs may be

1 able to correct this deficit through amendment, however, by clarifying the
2 “process” they went through to contact Davis.

3 (ECF No. 39.)

4 The allegations in the FAC state that Plaintiffs:

5 . . . began the process of trying to contact someone at BSI and verbally requested
6 that he [sic] be transferred to a single point of contact that would be assigned to
7 his loan, so that Plaintiffs could determine what their options were. Plaintiffs were
8 finally able to reach an individual named Chris Davis who identified himself as
9 Plaintiffs’ assigned single point of contact for the loan. Plaintiffs explained the
10 whole frustrating scenario to Mr. Davis who told Plaintiffs that he had the
11 authority to make this right for Plaintiffs. He told Plaintiffs that, if they verbally
12 told him their financial information and submitted the approval letter for the
13 reverse mortgage to him, Mr. Davis would get Plaintiffs a modification with a
14 principal reduction in just a few days so that Plaintiffs could accept the reverse
15 mortgage. Plaintiffs verbally submitted their application through Mr. Davis and he
16 stated that, once he received the approval letter, their application would be
17 complete and he would submit the offer to Defendant BSI and either receive an
18 approval or a counter offer within three days. Plaintiffs submitted the approval
19 letter, as requested, but have been unable to contact Mr. Davis since.

20 (FAC ¶ 26, ECF No. 44.)

21 Based on these allegations, Plaintiffs have adequately alleged that they requested a single
22 point of contact from BSI and have remedied the deficit in the original Complaint. They have also
23 sufficiently alleged the facts needed to state a claim under § 2923.7.

24 Defendant contends that the facts alleged in the FAC are inconsistent with the facts
25 alleged in the Complaint. But this is plainly untrue—the cause of action in the original Complaint
26 was dismissed because the Complaint lacked factual allegations, not because it made factual
27 allegations that were inconsistent with the possibility of a claim. Nor, indeed, does the Motion
28 point to any allegations in the Complaint that contradict allegations in the FAC.

BSI also argues that Plaintiffs have not pled their cause of action with the necessary
particularity. In support of its argument, Defendant cites to *Danesh-Bahreini v. JP Morgan
Chase, N.A.*, No. A135236, 2014 WL 1303643 (Ct. App. Apr. 1, 2014), an unpublished opinion
issued by the California Court of Appeal suggesting that statutory causes of action should be
plead with particularity. In other words, Defendants ask that the claim be dismissed because
Plaintiffs do not allege a specific date when the requests were made or whether request was made
over the phone.

1 As a threshold matter, the Court is not bound by an unpublished California state court
2 decision and BSI offers no reason why the Court should follow the *Danesh-Bahreini* court’s
3 holding in this instance. *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1126 n. 8
4 (9th Cir. 2005) (“Under California Rules of Court . . . an unpublished opinion cannot be cited to
5 or relied on by other courts”).

6 In addition, BSI does not establish that California pleading standards apply to the FAC.
7 “A federal court sitting in diversity must apply state substantive law and federal procedural law.”
8 *Computer Econ., Inc. v. Gartner Group, Inc.*, 50 F.Supp.2d 980, 986 (S.D. Cal. 1999), *citing Erie*
9 *R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). Pleading standards for a complaint are procedural and
10 are thus governed by federal law. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir.
11 2003) (“We therefore reject Vess’s argument that we should refuse to apply Rule 9(b) to his state-
12 law causes of action in this diversity case”); *L’Garde, Inc. v. Raytheon Space & Airborne Sys.*,
13 805 F.Supp.2d 932, 944 (C.D. Cal. 2011) (“While the substantive elements of a fraud claim are
14 determined by state law, the procedural requirements are governed by Rule 9(b)’s heightened
15 pleading standard”); *Clark v. Allstate Ins. Co.*, 106 F.Supp.2d 1016, 1018-19 (S.D. Cal. 2000)
16 (applying Federal Rule of Civil Procedure 8’s notice pleading standard in favor of California
17 heightened pleading standard for punitive damages). Nor does the mere fact that Plaintiffs have
18 pled a separate cause of action alleging fraud mean that their other causes of action must be pled
19 with particularity. *Vess*, 317 F.3d at 1105 (“in a case where fraud is not an essential element of a
20 claim, only allegations (‘averments’) of fraudulent conduct must satisfy the heightened pleading
21 requirements of Rule 9(b). Allegations of non-fraudulent conduct need satisfy only the ordinary
22 notice pleading standards of Rule 8(a)”).

23 Finally, the particularity required by the *Daneshi-Bahreini* court does not imply the
24 demands that BSI asserts should apply to the FAC. In *Danesh-Bahreini*, a statutory cause of
25 action, based on a statute that prohibited excessive charges, was dismissed because the complaint
26 “failed to show ‘what specific charges, in what specific amounts, were miscalculated or were
27 otherwise excessive.’” *Daneshi-Bahreini*, 2014 WL 1303643 at *7. In other words, the court
28 determined that the plaintiff had omitted information that was material to his claims. The

1 information that BSI claims is missing from the FAC, in contrast, makes little difference to
2 Plaintiffs' claims—nothing in § 2923.7 turns on whether the request for a single point of contact
3 occurred telephonically, rather than in writing or in-person. Nor does it matter where Plaintiffs
4 were located when they requested a single point of contact. Plaintiffs have plausibly pled a
5 violation of § 2923.7.

6 **IV. ORDER**

7 The Motion to Dismiss is DENIED.

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10 IT IS SO ORDERED.

11 Dated: November 2, 2015

/s/ Eric P. Gray
12 UNITED STATES MAGISTRATE JUDGE