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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

SAMIR IBRAHIM MARCOSS,
Plaintiff,
v.
JPMORGAN CHASE BANK, N.A.,
Defendant.

No. 1:18-cv-00489-DAD-EPG

ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS AND DIRECTING
PLAINTIFF TO FILE A FIRST AMENDED
COMPLAINT

(Doc. No. 9)

This matter is before the court on defendant’s motion to dismiss. (Doc. No. 9.) A hearing on the motion was held on July 17, 2018. (Doc. No. 15.) Attorney Brian Folland appeared telephonically on behalf of plaintiff Samir Ibrahim Marcoss (“plaintiff”), and attorney Jonathan Bond appeared telephonically on behalf of defendant JPMorgan Chase Bank, N.A. (“defendant”). (*Id.*) Having reviewed the parties’ briefing and heard oral arguments, and for the reasons that follow, defendant’s motion to dismiss will be granted.

BACKGROUND

In his complaint, plaintiff alleges as follows. Defendant systematically failed to adequately communicate alternatives to foreclosure with defaulted borrowers, including properly noticing foreclosure sales and reviewing completed loan modification applications in violation of California pre-foreclosure statutes. (Doc. No. 1-1.) On January 11, 2002, plaintiff purchased real

1 property located at 2338 E. Rush Ave., Fresno, CA 93720. (*Id.* at ¶ 7.) The property was
2 refinanced by Washington Mutual on February 16, 2006, after which defendant purchased the
3 loan. (*Id.*) Plaintiff defaulted on the loan in August 2010. (*Id.* at ¶ 8.) On August 22, 2011,
4 defendant recorded a notice of default (“NOD”) in the Fresno County Recorder’s Office. (*Id.* at ¶
5 9.) Prior to recording the NOD, defendant failed to contact plaintiff to assess plaintiff’s financial
6 situation and explore options for avoiding foreclosure. (*Id.* at ¶ 10.) Defendant did not advise
7 plaintiff of his right to request a meeting regarding foreclosure alternatives that would be
8 scheduled within fourteen days, nor did defendant provide plaintiff with a toll-free phone number
9 to contact a United States Department of Housing and Urban Development (“HUD”) certified
10 counseling agency. (*Id.*)

11 After receipt of the NOD, plaintiff submitted a completed loan modification application to
12 defendant. (*Id.* at ¶ 12.) Plaintiff provided defendant with the following documents: a completed
13 request for modification assistance (“RMA”) application, a completed borrower and co-borrower
14 acknowledgement and agreement, detailed accounts of plaintiff’s household income and
15 expenses, an affidavit explaining financial hardship, a Tax Form 4506T, and a Dodd-Frank
16 certification (hereinafter “the Application”). (*Id.*) Following receipt of the Application,
17 defendant withheld determination on plaintiff’s modification application, though plaintiff had
18 satisfied all the required conditions in receiving and securing the requested relief. (*Id.* at ¶¶ 13–
19 14.)

20 According to plaintiff, defendant repeatedly failed to review plaintiff’s submitted
21 Application and, nonetheless, would request new iterations of the same documents to replace ones
22 that had aged beyond their usefulness. (*Id.* at ¶ 15.) Plaintiff complied with these requests with
23 responsive documentation and within the timeframe required by the request. (*Id.* at ¶ 16.)

24 On August 26, 2016, a Notice of Trustee’s Sale (“NTS”) was recorded against the
25 property, even though plaintiff’s completed Application was pending a determination on the
26 merits. (*Id.* at ¶ 18.) Defendant failed to render a final determination on plaintiff’s eligibility for
27 a loan modification and completed the foreclosure process on May 15, 2017, at which point the
28 property in question was sold at an auction. (*Id.* at ¶ 19.)

1 Plaintiff seeks general damages, compensatory damages of at least \$250,000,
2 consequential damages, punitive damages, attorneys' fees, and any other relief that the court
3 deems proper. (*Id.* at 12.)

4 LEGAL STANDARD

5 The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the legal
6 sufficiency of the complaint. *N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir.
7 1983). "Dismissal can be based on the lack of a cognizable legal theory or the absence of
8 sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901
9 F.2d 696, 699 (9th Cir. 1990). A plaintiff is required to allege "enough facts to state a claim to
10 relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A
11 claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw
12 the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v.*
13 *Iqbal*, 556 U.S. 662, 678 (2009).

14 In determining whether a complaint states a claim on which relief may be granted, the
15 court accepts as true the allegations in the complaint and construes the allegations in the light
16 most favorable to the plaintiff. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Love v.*
17 *United States*, 915 F.2d 1242, 1245 (9th Cir. 1989). However, the court need not assume the truth
18 of legal conclusions cast in the form of factual allegations. *United States ex rel. Chunie v.*
19 *Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir. 1986). While Rule 8(a) does not require detailed
20 factual allegations, "it demands more than an unadorned, the defendant-unlawfully-harmed-me
21 accusation." *Iqbal*, 556 U.S. at 678. A pleading is insufficient if it offers mere "labels and
22 conclusions" or "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S.
23 at 555; *see also Iqbal*, 556 U.S. at 676 ("Threadbare recitals of the elements of a cause of action,
24 supported by mere conclusory statements, do not suffice."). Moreover, it is inappropriate to
25 assume that the plaintiff "can prove facts which it has not alleged or that the defendants have
26 violated the . . . laws in ways that have not been alleged." *Associated Gen. Contractors of Cal.,*
27 *Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

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1 **DISCUSSION**

2 **A. Request for Judicial Notice**

3 Defendant requests that the court take judicial notice of the following documents found in
4 the official records of the Fresno County Recorder: 1) deed of trust recorded on February 16,
5 2006; 2) deed of trust recorded on October 27, 2016; 3) NOD recorded on April 1, 2016; 4) NTS
6 recorded on February 15, 2017; 5) trustee’s deed upon sale recorded on May 19, 2017; and 6)
7 special/limited warranty deed executed on December 15, 2017 and recorded January 30, 2018.
8 (Doc. No. 9-1.) Plaintiff does not object to the court taking judicial notice of these documents.

9 Ordinarily, the court considers only the complaint and attached documents in deciding a
10 motion to dismiss; however, the court may also take judicial notice of matters of public record
11 without converting the motion into one for summary judgment. *Lee v. City of Los Angeles*, 250
12 F.3d 668, 689 (9th Cir. 2001). Pursuant to the Federal Rule of Evidence 201(b), a court may
13 “judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally
14 known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily
15 determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid.
16 201(b). Public records are properly the subject of judicial notice because the contents of such
17 documents contain facts that are not subject to reasonable dispute, and the facts therein “can be
18 accurately and readily determined from sources whose accuracy cannot reasonably be
19 questioned.” *Id.*; *see also Intri-Plex Techs. v. Crest Grp., Inc.*, 499 F.3d 1048, 1052 (9th Cir.
20 2007).

21 The exhibits defendant requests that judicial notice be taken of are all matters of public
22 record, duly recorded with the Fresno County Recorder. (*See* Doc. No. 9-1.) The fact of their
23 recording can be “accurately and readily determined” because the accuracy of the source of the
24 records—the Fresno County Recorder—cannot reasonably be questioned. Fed. R. Evid. 201(b).
25 Defendant’s unopposed request for judicial notice will therefore be granted.

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1 **B. California Civil Code § 2923.6**

2 Plaintiff's first cause of action is for violation of California Civil Code § 2923.6(c), which
3 prohibited "dual tracking," a practice in which a lender would pursue foreclosure simultaneously
4 with consideration of a borrower's loan modification application. (Doc. No. 1-1 at ¶¶ 23–36.)
5 However, plaintiff brings the claim under a repealed version of the statute that was only effective
6 until December 31, 2017. *See* Cal. Civ. Code § 2923.6 (repealed Jan. 1, 2018, effective Jan. 1,
7 2013–Dec. 31, 2017). On January 1, 2018, the prohibition on "dual tracking" codified in §
8 2923.6 was repealed. Plaintiff's complaint was filed in Fresno County Superior Court on
9 February 9, 2018. (*See* Doc. No. 1-1 at 2.) Section 2924.11, which modified the prior legislation
10 addressing dual tracking, became effective on January 1, 2018. *See* Cal. Civ. Code § 2924.11.

11 Defendant argues that plaintiff cannot state a claim under the repealed § 2923.6 and that
12 plaintiff's claim cannot be construed as being brought under § 2924.11 because § 2923.6 does not
13 contain a savings clause. (Doc. No. 9 at 10–11.) Additionally, defendant argues that even under
14 § 2924.11, plaintiff's claim fails because plaintiff's allegations of the completeness of the loan
15 modification application are insufficient as a matter of law. (*Id.* at 12.) At the hearing, plaintiff
16 requested leave to amend the complaint to re-allege this cause of action under § 2924.11. The
17 court finds this to be appropriate and plaintiff's claim brought under § 2923.6 will therefore
18 dismissed without prejudice and with leave to amend.

19 **C. California Civil Code § 2923.7**

20 Plaintiff's second cause of action is for violation of § 2923.7 based on defendant's alleged
21 failure to provide plaintiff with a "single point of contact" ("SPOC") regarding communication
22 about foreclosure prevention alternatives. (Doc. No. 1-1 at ¶¶ 37–42.) Plaintiff alleges that his
23 calls were "always routed to alternative individuals, one [sic] of whom had the power or available
24 information to address [plaintiff's] concerns regarding the status of his loan modification or the
25 foreclosure sale of the property." (*Id.* at ¶ 40.) In moving to dismiss this claim, defendant argues
26 that the statute expressly permits a team of individuals to operate as a SPOC, and that plaintiff
27 fails to allege any conduct constituting a violation of the provision in sufficiently specific terms.
28 (Doc. No. 9 at 14.)

1 California Civil Code § 2923.7 provides, in relevant part, that “[u]pon request from a
2 borrower who requests foreclosure prevention alternative, the mortgage servicer shall promptly
3 establish a single point of contact and provide to the borrower one or more direct means of
4 communication with the single point of contact.” The section then defines a “single point of
5 contact” as “an individual or team of personnel, each of whom has the ability and authority to
6 perform the responsibilities described” Cal. Civ. Code § 2923.7(e).

7 Here, plaintiff alleges that he had to speak with different individuals regarding the status
8 of his loan modification application and received conflicting information from those various
9 individuals. (Doc. No. 1-1 at ¶ 41.) Plaintiff also alleges that he requested a SPOC from
10 defendant numerous times but was denied. (*Id.* at ¶¶ 39–40.) As pled, it is not clear whether this
11 claim is based on the allegation that plaintiff did not have one designated individual point of
12 contact, or whether the SPOC did not satisfy the requirements of § 2923.7. At the hearing on the
13 pending motion, plaintiff’s counsel indicated that he could provide additional specific facts to
14 support the allegations that plaintiff attempted to communicate with a SPOC regarding the status
15 of his loan modification application. Plaintiff’s counsel also stated that, if permitted, plaintiff
16 could amend the complaint to cure any deficiencies with respect to § 2924.15, which provides
17 that any claims brought under § 2923.7 are only applicable to “first lien mortgages or deeds of
18 trust that are secured by owner-occupied residential real property containing no more than four
19 dwelling units.” Cal. Civ. Code § 2924.15. Due to these deficiencies, defendant’s motion to
20 dismiss the second cause of action will be granted with leave to amend.

21 **D. California Business and Professions Code § 17200**

22 Plaintiff’s final cause of action alleges that defendant’s pattern and practice of failing to
23 review “a submitted and complete loan modification application while simultaneously pursuing
24 foreclosure of the loan is designed to cause serviceable debt to increase to an amount where
25 reinstatement is impossible and loan modification no longer available to otherwise qualified
26 applicants” and is therefore a violation of California’s Unfair Competition Law (“UCL”),
27 Business and Professions Code § 17200. (Doc. No. 1-1 at ¶¶ 43–46.) Defendant argues that
28 plaintiff does not state a cognizable claim under § 17200 because his first two causes of action are

1 subject to dismissal. (Doc. No. 9 at 15.) Defendant also argues that to the extent plaintiff claims
2 that defendant acted fraudulently as prohibited by § 17200, such a claim must be supported by
3 specific factual allegations indicating what representations were made and how the public would
4 be deceived by them. (*Id.*)

5 California’s UCL prohibits false advertising and “any unlawful, unfair, or fraudulent
6 business act or practice.” Cal. Bus. & Prof. Code § 17200. “The unlawful category of the UCL
7 borrows violations of other laws and treats them as unlawful practices that the unfair competition
8 law makes independently actionable.” *Haynish v. Bank of Am., N.A.*, 284 F. Supp. 3d 1037, 1051
9 (N.D. Cal. 2018) (citing *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th
10 163, 180 (1999). “To state a claim based on an unlawful business act or practice, a plaintiff must
11 allege facts sufficient to show a violation of some underlying law.” *Haynish*, 284 F. Supp. 3d at
12 1051 (citing *Johnson v. PNC Mortg.*, No. C 14-02976 LB, 2014 WL 3962662, at *11 (N.D. Cal.
13 2014) (citations omitted).

14 As indicated above, plaintiff’s claims brought under §§ 2923.6 and 2323.7 will both be
15 dismissed. “A UCL cause of action cannot be maintained if other causes of action based on the
16 same factual allegations fail.” *Palmer v. MTC Financial, Inc.*, No. 1:17-cv-00043-DAD-SKO,
17 2017 WL 2311680, at *11 (E.D. Cal. May 26, 2017). To the extent that plaintiff wishes to bring a
18 claim under the “fraud” prong of § 17200, the complaint must allege facts indicating “that
19 members of the public are likely to be deceived” by specific business practices. *Podolsky v. First*
20 *Healthcare Corp.*, 50 Cal. App. 4th 632, 648 (1996), *as modified* (Nov. 5, 1996), *as modified*
21 (Nov. 20, 1996) (citing *Comm. on Children’s Television, Inc. v. General Foods Corp.*, 35 Cal.3d
22 197, 211 (1983)). Plaintiff has not alleged that any of defendant’s specific business practices are
23 likely to deceive members of the public. For these reasons, plaintiff’s third cause of action will
24 also be dismissed with leave to amend.

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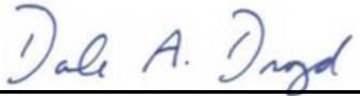
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CONCLUSION

Defendant’s motion to dismiss (Doc. No. 9) is granted in its entirety, with leave to amend being granted as well. Plaintiff is directed to file and serve any amended complaint no later than twenty-eight days from the service of this order.

IT IS SO ORDERED.

Dated: July 20, 2018


UNITED STATES DISTRICT JUDGE