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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 WITH LEAVE TO
AMEND

(Doc. No. 18)

This matter is before the court on defendant JPMorgan Chase Bank, N.A.’s (“defendant”) motion to dismiss plaintiff Samir Ibrahim Marcoss’ (“plaintiff”) first amended complaint (“FAC”). (Doc. No. 18.) On October 2, 2018, the court held a hearing on the motion. Attorney Brian Folland appeared telephonically on behalf of plaintiff, and attorney Jonathan C. Bond appeared telephonically on behalf of defendant. Having reviewed the parties’ briefing and heard arguments, and for the reasons set forth below, the court grants defendant’s motion to dismiss and grant plaintiff leave to file a second amended complaint within thirty days.

BACKGROUND

In the FAC, 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

1 California pre-foreclosure statutes. (Doc. No. 17.) On January 11, 2002, plaintiff purchased real
2 property located at 2338 E. Rush Ave., Fresno, CA 93720. (*Id.* at ¶ 7.) The property was
3 refinanced by Washington Mutual on February 16, 2006, after which defendant purchased the
4 mortgage loan. (*Id.*) Plaintiff defaulted on the loan in August 2010. (*Id.* at ¶ 8.) On August 22,
5 2011, defendant recorded a notice of default (“NOD”) in the Fresno County Recorder’s Office.
6 (*Id.* at ¶ 9.) Prior to recording the NOD, defendant failed to contact plaintiff to assess plaintiff’s
7 financial situation and explore options for avoiding foreclosure. (*Id.* at ¶ 10.) Defendant did not
8 advise plaintiff of his right to request a meeting regarding foreclosure alternatives that would be
9 scheduled within fourteen days, nor did defendant provide plaintiff with a toll-free phone number
10 to contact a United States Department of Housing and Urban Development (“HUD”) certified
11 counseling agency. (*Id.*)

12 After receipt of the NOD, plaintiff submitted a completed loan modification application to
13 defendant. (*Id.* at ¶ 12.) Plaintiff provided defendant with the following documents: a completed
14 request for modification assistance (“RMA”) application, a completed borrower and co-borrower
15 acknowledgement and agreement, detailed accounts of plaintiff’s household income and
16 expenses, an affidavit explaining financial hardship, a Tax Form 4506T, and a Dodd-Frank
17 certification (hereinafter “the application”). (*Id.*) Following receipt of the application, defendant
18 withheld determination on plaintiff’s modification application, though plaintiff alleged that he
19 satisfied all the required conditions in receiving and securing the requested relief. (*Id.* at ¶¶ 13–
20 14.)

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

25 On August 26, 2016, a Notice of Trustee’s Sale (“NTS”) was recorded against the
26 property, even though plaintiff’s completed application was, and still remains, pending a
27 determination on the merits. (*Id.* at ¶ 18.) Defendant failed to render a final determination on
28 plaintiff’s eligibility for a loan modification and completed the foreclosure process on May 15,

1 2017, at which point the property in question was sold at an auction. (*Id.* at ¶ 19.)

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

5 The court previously granted defendant’s motion to dismiss and granted plaintiff leave to
6 file a FAC on July 20, 2018. (Doc. No. 16.) Plaintiff filed a FAC on August 6, 2018. (Doc. No.
7 17.) Defendant filed a motion to dismiss on August 23, 2018. (Doc. No. 18.) Plaintiff filed an
8 opposition on September 10, 2018. (Doc. No. 20.) Defendant replied on September 25, 2018.
9 (Doc. No. 22.)

10 LEGAL STANDARD

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

20 In determining whether a complaint states a claim on which relief may be granted, the
21 court accepts as true the allegations in the complaint and construes the allegations in the light
22 most favorable to the plaintiff. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Love v.*
23 *United States*, 915 F.2d 1242, 1245 (9th Cir. 1989). However, the court need not assume the truth
24 of legal conclusions cast in the form of factual allegations. *United States ex rel. Chunie v.*
25 *Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir. 1986). While Rule 8(a) does not require detailed
26 factual allegations, “it demands more than an unadorned, the defendant-unlawfully-harmed-me
27 accusation.” *Iqbal*, 556 U.S. at 678. A pleading is insufficient if it offers mere “labels and
28 conclusions” or “a formulaic recitation of the elements of a cause of action.” *Twombly*, 550 U.S.

1 at 555; *see also Iqbal*, 556 U.S. at 676 (“Threadbare recitals of the elements of a cause of action,
2 supported by mere conclusory statements, do not suffice.”). Moreover, it is inappropriate to
3 assume that the plaintiff “can prove facts which it has not alleged or that the defendants have
4 violated the . . . laws in ways that have not been alleged.” *Associated Gen. Contractors of Cal.,
5 Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983).¹

6 DISCUSSION

7 A. Request for Judicial Notice

8 Defendant requests that the court take judicial notice of the following documents: 1) the
9 deed of trust recorded on February 16, 2006 in the official records of the county recorder for the
10 County of Fresno; 2) the deed of trust recorded on October 27, 2016 in the official records of the
11 county recorder for the County of Fresno; 3) the notice of default recorded on April 1, 2016 in the
12 official records of the county recorder for the County of Fresno; 4) the notice of trustee’s sale
13 recorded on February 15, 2017 in the official records of the county recorder for the County of
14 Fresno; 5) the trustee’s deed upon sale recorded on May 19, 2017 in the official records of the
15 county recorder for the County of Fresno; and 6) the special/limited warranty deed executed on
16 December 15, 2017 and recorded January 30, 2018 in the official records of the county recorder
17 for the County of Fresno. (Doc. No. 9-1.) The court has previously granted defendant’s request
18 to take judicial notice of these same documents, and an additional request is unnecessary. (Doc.
19 No. 16 at 4.) Therefore, defendant’s second request for judicial notice is denied as duplicative.

20
21 ¹ The court notes that in opposing the instant motion to dismiss plaintiff has applied the incorrect
22 legal standard. In his opposition, plaintiff states: “Federal Rules of Civil Procedure require only
23 ‘notice’ pleading; that the court should construe plaintiff’s allegations liberally as the complaint
24 need only ‘give the defendant fair notice of what the plaintiff’s claim is and the grounds upon
25 which it rests.’” (Doc. No. 20 at 2.) (*citing Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512–513
26 (2002). *Swierkiewicz* applied the “notice pleading” standing established in *Conley v. Gibson*, 355
27 U.S. 41, 47 (1957), which required only that a complaint “give the defendant fair notice of what
28 the plaintiff’s claim is and the grounds upon which it rests.” However, in *Bell Atl. Corp. v.
Twombly*, 550 U.S. 544, 560 (2007), the Supreme Court abrogated its holding in *Conley* and
adopted a stricter “plausibility” standard, requiring that a plaintiff allege “enough facts to state a
claim to relief that is plausible on its face.” 550 U.S. at 570. The pleading standard established in
Twombly was later upheld in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Plaintiff’s counsel is
directed to apply the correct standard in opposing any future motions to dismiss brought in this
action.

1 **B. California Civil Code § 2924.11**

2 Plaintiff's first claim is for violation of California Civil Code § 2924.11, which prohibits
3 "dual tracking," whereby a lender pursues foreclosure while simultaneously considering a
4 borrower's loan modification application. (Doc. No. 1-1 at ¶¶ 23–36.) Plaintiff initially brought
5 his first cause of action for violation of the California Civil Code § 2923.6(c). (Doc. No. 1-1 at ¶¶
6 23–36.) Plaintiff acknowledged that he brought the claim under a repealed version of the statute
7 that was only effective until December 31, 2017 (Doc. No. 12 at 2–3) and requested leave to
8 amend the complaint to re-allege this cause of action under § 2924.11, which the court granted.²
9 (Doc. No. 16 at 5.)

10 In the FAC, plaintiff realleged nearly verbatim the same dual-tracking claim, this time
11 under California Civil Code § 2924.11 instead of § 2923.6. (Doc. No. 17 at 5–7.) In moving to
12 dismiss, defendant again argues that plaintiff has failed to allege elements of the claim required
13 by § 2924.15,³ including that the loan at issue is a first-lien mortgage, or a deed of trust that is
14 secured by owner-occupied residential real property containing no more than four dwelling units,
15 which are statutory requirements for asserting this claim.⁴ (Doc. No. 18 at 11.) The court finds
16 that plaintiff's dual-tracking claim as plead fails to allege elements required under § 2924.15 and
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18 ² The court notes that some courts "have held that the 2018 repeal-and-replace of the HBOR
19 extinguished certain types of dual-tracking claims under § 2923.6." *Taitano v. Wells Fargo Bank,*
20 *N.A.*, No. 18-CV-03924-NC, 2018 WL 5849005, at *3 (N.D. Cal. Nov. 5, 2018) (citing cases).
21 However, in an unpublished opinion, the Ninth Circuit held that plaintiffs "may still pursue
22 claims under former sections 2923.55 and 2923.6" because "section 2924.11 still protects the
23 same rights [plaintiffs] seek to enforce here." *Travis v. Nationstar Mortg., LLC*, 733 F. App'x
371, 373 (9th Cir. 2018). In this litigation, neither party has raised the issue of whether a savings
clause applies to preserve claims brought under either § 2923.6 or § 2924.11. To the extent that
plaintiff amends his complaint and defendant subsequently files another motion to dismiss, the
parties are directed to address this issue.

24 ³ "Unless otherwise provided, Sections 2923.5, 2923.7, and 2924.11 shall apply only to first lien
25 mortgages or deeds of trust that are secured by owner-occupied residential real property
26 containing no more than four dwelling units. For these purposes, 'owner-occupied' means that
27 the property is the principal residence of the borrower and is security for a loan made for
personal, family, or household purposes." Cal. Civ. Code § 2924.15.

28 ⁴ Defendant also argues that plaintiff fails to allege that the property is the principal residence of
plaintiff, but in fact, this allegation is included in plaintiff's FAC. (*See* Doc. No. 17 at 2.)

1 must, therefore, be dismissed.

2 Additionally, defendant argues that plaintiff makes generalized allegations regarding his
3 dual tracking claim and does not plead with specificity regarding the dates when plaintiff's
4 application was submitted and completed. (*Id.* at 13.) In both the original complaint and the
5 FAC, plaintiff alleges that “[a]t all times material to this action,” plaintiff has provided all
6 documentation required by defendant for review of the loan modification, while defendant has
7 held the pending complete application without issuing either an acceptance or denial. (Doc. Nos.
8 1-1 at ¶ 31–33; 17 at ¶ 31–33.) At the hearing for the instant motion, plaintiff indicated that he
9 could amend the complaint to include when the loan modification application was completed and
10 when updates to the application were submitted.⁵ Therefore, the court directs plaintiff to include
11 these allegations if he elects to file a second amended complaint.

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

13 Plaintiff's second claim is for violations of § 2923.7 based on defendant's alleged failure
14 to provide plaintiff with a “single point of contact” (“SPOC”) regarding communication about
15 foreclosure prevention alternatives. (Doc. No. 17 at 8.) California Civil Code § 2923.7 provides
16 in relevant part that “[u]pon request from a borrower who requests a foreclosure prevention
17 alternative, the mortgage servicer shall promptly establish a single point of contact and provide to
18 the borrower one or more direct means of communication with the single point of contact.” The
19 section defines a “single point of contact” as “an individual or team of personnel, each of whom
20 has the ability and authority to perform the responsibilities described . . .” Cal. Civ. Code §
21 2923.7(e).

22 This claim was dismissed as pled in plaintiff's initial complaint, but plaintiff's counsel
23 indicated he could provide additional specific facts to support the allegations that plaintiff

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25 ⁵ The court notes that it is not aware of any binding authority that states that a plaintiff cannot
26 state a claim under § 2923.7 without alleging specific dates when the loan modification
27 application was completed. Courts have dismissed § 2923.7 claims when plaintiffs fail to allege
28 what documents were requested and subsequently provided as part of the foreclosure prevention
application. *See Taitano v. Wells Fargo Bank, N.A.*, No. 18-CV-03924-NC, 2018 WL 5849005,
at *4 (N.D. Cal. Nov. 5, 2018). Here, however, plaintiff has clearly identified the submitted
documents in a completed loan modification application. (*See* Doc. No. 17 at ¶ 12.)

1 attempted to communicate with a SPOC regarding the status of his loan modification application.
2 (See Doc. No. 16 at 6.) In the first amended complaint, plaintiff has added the following
3 allegations in support of his claim under § 2923.7:

4 The individuals Samir talked to over the phone regarding his loan
5 never had the ability or authority to perform the responsibilities
6 described and required pursuant to Cal. Civ. Code 2923.7(e). These
7 individuals knew no facts regarding Samir’s loan and could not
answer any questions regarding the status of his loan or the
modification thereto.

8 (Doc. No. 17 at ¶ 40.) Defendant argues that these additional allegations are conclusory; they do
9 not indicate what responsibilities the SPOC individuals were unable to perform, nor do they
10 allege what facts or questions the SPOC individuals were unaware of or unable to respond to.

11 (Doc. No. 18 at 15.)

12 Here, plaintiff alleges that, although he has requested one since 2013, he was never
13 assigned to a SPOC. (Doc. No. 17 at ¶ 39.) Further, plaintiff alleges that the different individuals
14 he spoke to provided conflicting information regarding the status of his loan modification
15 application and foreclosure, thus preventing him from obtaining accurate information. (*Id.* at ¶
16 41.) Other courts have found these types of allegations sufficient to state a claim under § 2923.7.
17 See *Green v. Cent. Mortg. Co.*, 148 F. Supp. 3d 852, 873 (N.D. Cal. 2015) (allegations that
18 plaintiff was unable to speak to a designated SPOC, obtain accurate information regarding her
19 loan or foreclosure, and received “contradictory and confusing information” about necessary
20 documents was sufficient to state a claim under § 2923.7); *Penermon v. Wells Fargo Bank, N.A.*,
21 47 F. Supp. 3d 982, 999 (N.D. Cal. 2014) (allegations that the assigned SPOC failed to return any
22 of plaintiff’s phone calls and timely inform plaintiff of the status of her loan modification were
23 sufficient to state a claim under § 2923.7). Therefore, the court does not find that dismissal is
24 warranted solely because the allegations lack specificity.

25 However, dismissal is nonetheless warranted because plaintiff continues to fail to allege
26 that his claims brought under § 2923.7 are with regard to “first lien mortgages or deeds of trust
27 that are secured by owner-occupied residential real property containing no more than four
28 dwelling units.” Cal. Civ. Code § 2924.15. At the initial hearing on defendant’s first motion to

1 dismiss, plaintiff indicated he would be able to remedy this deficiency, but he has failed to do so
2 in his FAC. Therefore, this claim must also be dismissed.

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

4 Plaintiff's final cause of action alleges that defendant's pattern and practice of failing to
5 review "a submitted and complete loan modification application while simultaneously pursuing
6 foreclosure of the loan is designed to cause serviceable debt to increase to an amount where
7 reinstatement is impossible and loan modification is no longer available to otherwise qualified
8 applicants" and is therefore a violation of California's Unfair Competition Law ("UCL"),
9 Business and Professions Code § 17200. (Doc. No. 17 at ¶¶ 43–46.) Defendant argues that
10 plaintiff does not state a cognizable claim under § 17200 because his first two causes of action are
11 subject to dismissal. (Doc. No. 18 at 15.) Defendant also argues that to the extent plaintiff claims
12 that defendant acted fraudulently as prohibited by § 17200, such a claim must be supported by
13 specific factual allegations indicating what representations were made and how the public would
14 be deceived by them. (*Id.* at 16.)

15 California's Business and Professions Code § 17200 broadly defines unfair competition to
16 include any business act or practice that is unlawful, unfair, or misleading. The Ninth Circuit has
17 observed that

18 § 17200 does not proscribe specific practices. Rather, ... it defines
19 "unfair competition" to include "any unlawful, unfair or fraudulent
20 business act or practice." . . . Its coverage is "sweeping, embracing
anything that can properly be called a business practice and that at
the same time is forbidden by law."

21 *Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192, 1203 (9th Cir. 2001) (quoting *Cel-Tech*
22 *Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 180 (1999)).

23 A UCL cause of action cannot be maintained if other causes of actions based on the same
24 factual allegations fail. *See, e.g., Glenn K. Jackson Inc.*, 273 F.3d at 1203 ("[T]he breadth of §
25 17200 does not give a plaintiff license to 'plead around' the absolute bars to relief contained in
26 other possible causes of action by recasting those causes of action as ones for unfair
27 competition."); *Krantz v. BT Visual Images, L.L.C.*, 89 Cal. App. 4th 164, 178 (2001) ("[Claims]
28 for relief under the unfair competition law stand or fall depending on the fate of the antecedent

1 substantive causes of action.”).

2 As indicated above, plaintiff’s claims brought under §§ 2923.6 and 2323.7 will both be
3 dismissed. Therefore, plaintiff’s UCL claim must also be dismissed.

4 However, in the event that one of plaintiff’s claims under § 2924.11 or §2923.7 ultimately
5 survives a motion to dismiss, the court notes that it is not yet convinced that plaintiff’s claim
6 based on fraudulent business practices under the UCL is subject to dismissal. Defendant argues
7 that plaintiff is “required to plead facts indicating what alleged representations were made and
8 how the public would be deceived by those statements.” (Doc. No. 18 at 16.) Plaintiff’s FAC
9 describes a business practice in which defendant failed to review complete loan modification
10 applications and simultaneously pursued foreclosure, specifically to increase serviceable debt.
11 (Doc. No. 17 at ¶ 44.) Plaintiff alleges that this practice is likely to deceive members of the
12 public, including plaintiff. (*Id.*) Accepting as true the allegations in the complaint and construing
13 the allegations in the light most favorable to the plaintiff, the court concludes that a reasonable
14 consumer would likely find such a described practice to be deceptive. *See McKell v. Washington*
15 *Mut., Inc.*, 142 Cal. App. 4th 1457, 1471 (2006) (“The determination as to whether a business
16 practice is deceptive is based on the likely effect such practice would have on a reasonable
17 consumer.”) (citing *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 507 (2003)).

18 **E. Leave to Amend**

19 At oral argument on the pending motion, plaintiff’s attorney requested that in the event the
20 court dismissed plaintiff’s FAC, that further leave to amend be granted. Federal Rule of Civil
21 Procedure 15 instructs courts to “freely give leave when justice so requires” and that rule is “to be
22 applied with extreme liberality.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051
23 (9th Cir. 2003) (internal quotation marks and citations omitted). The court does not find that
24 granting leave to amend in this case would cause “undue prejudice to the opposing party” and,
25 therefore, out of an abundance of caution, the court will grant plaintiff’s request for further leave
26 to amend his complaint. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Accordingly, plaintiff will
27 be given thirty days from the service of this order in which to file a second amended complaint,
28 should he elect to do so. Although the court will grant leave to amend, the court notes that it has

1 already done so once in this case, and that plaintiff's FAC suffers from essentially the same
2 defects as those of his original complaint. As in the court's order dismissing the original
3 complaint, the court here has provided plaintiff with detailed explanations as to how the FAC
4 fails to state a cognizable claim for relief. The court therefore expects that if plaintiff files a
5 second amended complaint, he will have corrected the deficiencies identified herein. If plaintiff
6 and his counsel were to determine that the noted deficiencies cannot be cured, a notice of
7 dismissal should be filed. Moreover, if a second amended complaint is filed, plaintiff is advised
8 that absent the presentation of compelling circumstances, no further leave to amend will be
9 granted in this action.

10 **CONCLUSION**

11 For the reasons set forth above, defendant's motion to dismiss (Doc. No. 18) is granted.
12 Plaintiff is directed to file and serve any amended complaint no later than thirty days from the
13 issuance of this order.

14 IT IS SO ORDERED.

15 Dated: **December 31, 2018**

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18 UNITED STATES DISTRICT JUDGE
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