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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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PAUL GRILEY, individually and
on behalf of the General
Public of the State of
California,

NO. CIV. 2:10-1204 WBS KJM

MEMORANDUM AND ORDER RE:
MOTION TO DISMISS

Plaintiff,

v.

NATIONAL CITY MORTGAGE, a
division of NATIONAL CITY BANK
OF INDIANA; NATIONAL CITY BANK
OF INDIANA; PNC MORTGAGE
GROUP; GREEN TREE SERVICING,
LLC; FANNIE MAE, and DOES 1 to
50,

Defendants.

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Plaintiff Paul Griley brought this action against
defendants National City Mortgage, National City Bank of Indiana
("National City Bank") (both defendants sometimes collectively
referred to as "National"), PNC Mortgage Group ("PNC"), Green

1 Tree Servicing, LLC ("Green Tree"), and Fannie Mae, arising out
2 defendants' allegedly wrongful filing of a notice of default
3 ("NOD") on plaintiff's home. Presently before the court is
4 defendants Green Tree and Federal National Mortgage Association
5 (Fannie Mae)'s motion to dismiss the Complaint pursuant to
6 Federal Rule of Civil Procedure 12(b)(6).

7 I. Factual and Procedural Background

8 Plaintiff entered into a mortgage with National for
9 approximately \$220,273.80 on January 30, 2006 for his property
10 located at 7071 Demaret Drive in Sacramento, California. (Compl.
11 ¶¶ 20-21.) The loan held a fixed interest rate of 5.170 percent,
12 with total monthly payments of \$1,532.71. (Id. ¶ 21.) Plaintiff
13 alleges that Fannie Mae may be the actual note holder. (Id.)
14 Green Tree allegedly sent plaintiff a letter on November 13,
15 2009, stating that National had sold it the servicing rights to
16 plaintiff's loan. (Id. ¶ 23.) Plaintiff alleges that Green Tree
17 subsequently sent plaintiff monthly billing statements which did
18 not reflect the true monthly payment owed under the loan and
19 varied in amount month to month. (Id. ¶¶ 24, 26, 27.) Plaintiff
20 allegedly made contact with Green Tree over the phone to correct
21 the billing statement error, and was told that the error would be
22 corrected. (Id. ¶ 25.) Plaintiff alleges that he continued
23 making his monthly payments of \$1,532.71. (Id. 24.)

24 Green Tree allegedly began sending plaintiff letters
25 indicating he was behind on his monthly mortgage payments, and
26 sent plaintiff a NOD on February 11, 2010. (Id. ¶¶ 28, 30-31.)
27 Plaintiff alleges he made contact with Green Tree regarding these
28 discrepancies, was told the errors were due to the transfer of

1 the servicing rights of his loan from National, and was told the
2 errors on his account would be fixed and that he was current on
3 his loan. (Id. ¶¶ 28-29, 35.)

4 In March of 2010, Green Tree allegedly continued
5 sending plaintiff incorrect monthly billing statements that
6 indicated plaintiff was behind on his mortgage. (Id. ¶¶ 37-38.)
7 Plaintiff alleges that he made contact with Green Tree and was
8 again told his account was in good standing and that the errors
9 on his account would be fixed. (Id. ¶¶ 39-40.) In April of
10 2010, plaintiff was allegedly told by Green Tree that he was
11 behind on his mortgage by over \$7,000, but was subsequently told
12 that they were trying to repair his account. (Id. ¶¶ 41-43.)
13 Plaintiff alleges he remains current on his mortgage. (Id. ¶
14 45.)

15 Plaintiff filed this action on May 17, 2010, alleging
16 causes of action for fraud and conspiracy to commit fraud,
17 violation of California Civil Code section 2923.5, violation of
18 California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof.
19 Code §§ 17200-17210, violation of the Fair Credit Reporting Act,
20 16 U.S.C. §§ 1681-1681x, defamation, false light, and breach of
21 contract and anticipatory repudiation. Defendants Green Tree and
22 Fannie Mae now move to dismiss those claims against them in the
23 Complaint.¹

24
25 ¹ Plaintiff has conceded that his third, fourth and fifth
26 causes of action for violation of the UCL and Fair Credit
27 Reporting Act are insufficient as pled, and requests leave to
28 amend. The court must accordingly grant Green Tree and Fannie
Mae's motion to dismiss these claims and will give plaintiff an
opportunity to amend his complaint to correct the deficiencies
identified by defendants.

1 II. Discussion

2 On a motion to dismiss, the court must accept the
3 allegations in the complaint as true and draw all reasonable
4 inferences in favor of the plaintiff. Scheuer v. Rhodes, 416
5 U.S. 232, 236 (1974), overruled on other grounds by Davis v.
6 Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322
7 (1972). To survive a motion to dismiss, a plaintiff needs to
8 plead "only enough facts to state a claim to relief that is
9 plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S.
10 544, 570 (2007). This "plausibility standard," however, "asks
11 for more than a sheer possibility that a defendant has acted
12 unlawfully," and where a complaint pleads facts that are "merely
13 consistent with" a defendant's liability, it "stops short of the
14 line between possibility and plausibility." Ashcroft v. Iqbal,
15 129 S. Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 556-
16 57).

17 In general a court may not consider items outside the
18 pleadings upon deciding a motion to dismiss, but may consider
19 items of which it can take judicial notice. Barron v. Reich, 13
20 F.3d 1370, 1377 (9th Cir. 1994). A court may take judicial
21 notice of facts "not subject to reasonable dispute" because they
22 are either "(1) generally known within the territorial
23 jurisdiction of the trial court or (2) capable of accurate and
24 ready determination by resort to sources whose accuracy cannot
25 reasonably be questioned." Fed. R. Evid. 201. Green Tree and
26 Fannie Mae submitted a request for judicial notice, asking the
27 court to take judicial notice of two publically recorded
28 documents related to plaintiff's mortgage. (Docket No. 7.) The

1 court will take judicial notice of these documents, since they
2 are matters of public record whose accuracy cannot be questioned.
3 See Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir.
4 2001).

5 A. Fraud and Conspiracy To Commit Fraud Claim

6 In California, the essential elements of a claim for
7 fraud are "(a) a misrepresentation (false representation,
8 concealment, or nondisclosure); (b) knowledge of falsity (or
9 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d)
10 justifiable reliance; and (e) resulting damage." In re Estate of
11 Young, 160 Cal. App. 4th 62, 79 (2008). Under the heightened
12 pleading requirements for claims of fraud under Federal Rule of
13 Civil Procedure 9(b), "a party must state with particularity the
14 circumstances constituting the fraud." Fed. R. Civ. P. 9(b). A
15 plaintiff must include the "who, what, when, where, and how" of
16 the fraud. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106
17 (9th Cir. 2003) (citation omitted); Decker v. Glenfed, Inc., 42
18 F.3d 1541, 1548 (9th Cir. 1994).

19 Conspiracy is simply a legal doctrine that establishes
20 joint and several liability by the conspirators for an underlying
21 tort. See Entm't Research Group v. Genesis Creative Group, 122
22 F.3d 1211, 1228 (9th Cir. 1997). A conspiracy to commit a tort
23 therefore requires the commission of the actual underlying tort,
24 although every member of the conspiracy need not commit all
25 elements of the tort individually so long as a conspiracy has
26 been formed and he or she acts in furtherance of its design. See
27 Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503,
28 510-11 (1994); see also Doctors' Co. v. Superior Court, 29 Cal.

1 3d 39, 44 (1989). In a case like this, "[w]here multiple
2 defendants are asked to respond to allegations of fraud, the
3 complaint must inform each defendant of his alleged participation
4 in the fraud." Ricon v. Reonstrust Co., No. 09-937, 2009 WL
5 2407396, at *3 (S.D. Cal. Aug. 4, 2009) (quoting DiVittorio v.
6 Equidyne Extractive Indus., 822 F.2d 1242, 1247 (2d Cir. 1987)).

7 Plaintiff alleges that Green Tree committed fraud when
8 it conspired with the other defendants to harm plaintiff by never
9 intending to properly service his loan and eventually foreclose
10 on him. (Compl. ¶¶ 47-48.) By incorporating the first forty-
11 five paragraphs of his Complaint, plaintiff also alleges that
12 Green Tree through its representatives made multiple
13 representations to plaintiff that his account was in good
14 standing and that they were trying to fix his account. (Id. ¶¶
15 1-45.) Plaintiff identifies the dates and contents of multiple
16 phone calls and identifies the customer service representative he
17 spoke with for several of those phone calls. (Id. ¶¶ 29, 35, 39-
18 41, 43-44.) Plaintiff alleges that he continued to make his
19 monthly mortgage payments despite the continued errors on his
20 account because he was assured that the problems with his account
21 would be fixed and that his account was in good standing. (Id.
22 25.) Plaintiff's pleading therefore satisfies both the elements
23 of fraud and the heightened pleading standard of Rule 9(b).

24 Outside of the conclusory allegation that Fannie Mae
25 may be the owner of the note securing plaintiff's loan, the
26 Complaint does not plead precisely how Fannie Mae participated in
27 the alleged fraud. All of the fraudulent actions alleged in
28 plaintiff's claim were allegedly taken by Green Tree and

1 National. The Complaint does not specify what, if any,
2 independent fraudulent representations Fannie Mae made to
3 plaintiff, who made them, or when they were made. Without
4 greater factual enhancement, the mere assertion that Fannie Mae
5 conspired with Green Tree and other defendants to defraud
6 plaintiff fails to inform Fannie Mae of how it participated in
7 the fraudulent conspiracy, and accordingly fails to meet the
8 heightened pleading standards of Rule 9(b). See Ricon, 2009 WL
9 2407396, at *3.

10 Nor does Asis Internet Services v. Subscriberbase Inc.,
11 No. 09-3503, 2009 WL 4723338 (N.D. Cal. Dec. 4, 2009), hold
12 otherwise. In Asis, the court held the plaintiffs had
13 sufficiently alleged a false advertising claim against multiple
14 defendants when the plaintiffs "have gone to great lengths to
15 establish that the Defendants mentioned in the Complaint are
16 related" so to "eschew the need to plead the specific role of
17 each closely-related entity." Id. at *4 (finding a sufficient
18 link between defendants who had several web sites registered in
19 their name and the defendants who sent plaintiff e-mails which
20 provided links to those web sites). Plaintiff here fails to make
21 any such close connection between Fannie Mae and Green Tree. The
22 court therefore must dismiss plaintiff's fraud claim against
23 Fannie Mae. See Vess, 317 F.3d at 1106.

24 B. Violation of California Civil Code section 2923.5 and
25 Request for Declaratory Relief Claim

26 Plaintiff's second claim requests cancellation of the
27 NOD filed against his property because he allegedly was not in
28 default when the NOD was filed and because "defendants" failed to

1 comply with section 2923.5's requirements that, inter alia, the
2 lender contact the borrower and pursue options to adjust
3 mortgages before filing a NOD. (Compl. ¶¶ 30-34, 53-64.)
4 Plaintiff's claim is best interpreted as a claim for cancellation
5 of instrument rather than a claim for violation of California
6 Civil Code section 2923.5 and for declaratory relief.

7 "A written instrument, in respect to which there is a
8 reasonable apprehension that if left outstanding it may cause
9 serious injury to a person against whom it is void or voidable,
10 may, upon his application, be so adjudged, and ordered to be
11 delivered up or canceled." Cal. Civ. Code § 3412. "To 'cancel'
12 a contract means to abrogate so much of it as remains
13 unperformed. It differs from 'rescission,' which means to
14 restore the parties to their former position. The one refers to
15 the state of things at the time of the cancellation; the other to
16 the state of things existing when the contract was made." Young
17 v. Flickinger, 75 Cal. App. 171, 174 (1925); accord Phleger v.
18 Countrywide Home Loans, Inc., No. C 07-01686, 2009 WL 537189, at
19 *15 (N.D. Cal. Mar. 3, 2009).

20 In his general allegations plaintiff alleges that Green
21 Tree sent him a NOD on February 11, 2010, which stated that he
22 was behind on his mortgage payments in the amount of \$2,402.00.
23 (Id. ¶ 31.) Plaintiff contends that the Notice of Default
24 supplied by defendants is inaccurate and that he never made any
25 late payments on his loan. Plaintiff has sufficiently alleged
26 irregularities with the filing of the NOD under California Civil
27 Code section 2923.5 to withstand a motion to dismiss by Green
28 Tree. While 2923.5 allows a NOD to be filed if the lender shows

1 due diligence in attempting to make contact with the borrower,
2 plaintiff's Complaint incorporates some of the actions required
3 for the "due diligence" requirement to be satisfied. (See id. ¶
4 33 (never received HUD telephone number)); Cal. Civ. Code section
5 2923.5(g)(1) (mandating that mortgagee send first-class letter
6 that includes HUD telephone number). This alleged failure
7 defeats any claim of "due diligence" under the statute, and
8 plaintiff has therefore adequately pled this claim. See Cal.
9 Civ. Code section 2923.5(g) (stating that "'due diligence' shall
10 require and mean all of the following" actions).

11 Finally, defendants argue plaintiff has failed to
12 allege prejudice resulting from the allegedly improper filing of
13 the NOD. Plaintiff has, however, repeatedly stated that Green
14 Tree misrepresented his account standing and told him his account
15 would be fixed, only to have the NOD filed--the first stage in
16 initiating a foreclosure--stating that he owes over two thousand
17 dollars on his mortgage. (See Compl. ¶ 31.) Because plaintiff
18 maintains that he has always been current on his account,
19 prejudice is sufficiently pled.

20 Plaintiff does not, however, state how Fannie Mae
21 participated in the improper filing of the NOD. Fannie Mae
22 should not be forced to guess as to how it violated section
23 2923.5. See Gauvin v. Trombatore, 682 F. Supp. 1067, 1071 (N.D.
24 Cal. 1988). Defendants' motion to dismiss will therefore be
25 granted with respect to Fannie Mae and denied with respect to
26 Green Tree.

27 C. Defamation Claim

28 Defamation is the tort of making an intentional false

1 statement to another--either by libel or slander--that damages
2 the subject's reputation. See Raghavan v. Boeing Co., 133 Cal.
3 App. 4th 1120, 1132 (2005). In California,

4 no consumer may bring any action or proceeding in the
5 nature of defamation . . . with respect to the reporting
6 of information against any consumer reporting agency, any
7 user of information, or any person who furnishes
information to a consumer reporting agency . . . except
as to false information furnished with malice or willful
intent to injure such consumer.

8 Cal. Civ. Code section 1785.32. Plaintiff's sixth cause of
9 action for defamation alleges that "defendants" defamed him when
10 they made false statements to credit reporting agencies, the
11 result of which damaged his credit and reputation. (Compl. ¶
12 80.) Incorporating the preceding paragraphs of his Complaint by
13 reference, plaintiff alleges that Green Tree reported to the
14 various credit reporting agencies that he was late on his
15 mortgage. (Id. ¶ 76.) As recounted above, plaintiff repeatedly
16 alleges that he was and remains current on his mortgage, and that
17 Green Tree told him he was current on his account. He also
18 alleges that defendants intended to harm him and acted with
19 malice when they made the false statements. (Id. ¶¶ 81, 88.)
20 Plaintiff has therefore sufficiently alleged a defamation cause
21 of action against Green Tree.

22 Plaintiff again fails to allege any facts indicating
23 that Fannie Mae was involved in the alleged defamation by
24 reporting plaintiff's late mortgage payments to credit reporting
25 agencies. Plaintiff's cause of action will therefore be
26 dismissed as against Fannie Mae.

27 D. False Light Claim

28 False light invasion of privacy requires (1) a public

1 disclosure, (2) which places plaintiff in a false light, (3) in a
2 manner highly offensive to a reasonable person. Fellows v.
3 National Enquirer, 42 Cal. 3d 234, 238 (1986). In addition,
4 plaintiff must allege facts showing that defendants acted
5 negligently in failing to learn whether the publicized fact
6 placed him in a false light. See Fellows, 42 Cal.3d at 248
7 (holding that the restrictions on liability for defamation apply
8 equally to false light claims); Khawar v. Globe Internet, 19 Cal.
9 4th 254, 274 (1998) ("In California, this court has adopted a
10 negligence standard for private figure plaintiffs seeking
11 compensatory damages in defamation actions.").

12 Defendants' challenge to plaintiff's sixth cause of
13 action amounts to an argument without legal support that false
14 negative creditworthiness information would not be highly
15 offensive to a reasonable person if released and that plaintiff
16 fails to state what statements are allegedly false. With respect
17 to the first argument, Green Tree's alleged report to credit
18 reporting agencies that plaintiff was delinquent on his mortgage
19 payments "publicly accused plaintiff of the very conduct that
20 would make h[im] appear undesirable to the intended audience" of
21 the credit report, including credit card companies, potential
22 landlords, creditors, and other persons authorized to access his
23 credit report. Semper v. JBC Legal Group, No. 04-2240, 2005 WL
24 2172377, at *7 (W.D. Wash. Sept. 6, 2005). Plaintiff's Complaint
25 on its face therefore satisfies the "highly offensive" element of
26 false light.

27 However,, plaintiff fails to identify any statements
28 made by Fannie Mae that placed him in a false light, and for the

1 same reasons explained above this cause of action will
2 accordingly be dismissed with respect to Fannie Mae.

3 E. Breach of Contract/Anticipatory Repudiation Claim

4 Plaintiff's eighth cause of action for breach of
5 contract and anticipatory repudiation alleges that plaintiff had
6 a loan mortgage contract with "defendants," that defendants
7 breached their contractual obligations and that plaintiff was
8 harmed. Even incorporating the previous paragraphs of the
9 Complaint by reference, plaintiff's pleading amounts to bare
10 recitation of the elements of breach of contract and fails to
11 cross "the line between possibility and plausibility," Iqbal, 129
12 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 556-57) or to allege
13 sufficient facts to put either Green Tree or Fannie Mae on notice
14 as to how they breached the loan contract. See Gauvin, 682 F.
15 Supp. at 1071. Defendants' motion to dismiss this cause of
16 action will therefore be granted.

17 IT IS THEREFORE ORDERED that defendants' motion to
18 dismiss the Complaint as against Fannie Mae be, and the same
19 hereby is, GRANTED.

20 IT IS FURTHER ORDERED that defendants' motion to
21 dismiss the Complaint as against Green Tree is GRANTED as to
22 plaintiff's claims for violations of the UCL, Fair Credit
23 Reporting Act, and breach of contract/anticipatory repudiation
24 and DENIED in all other respects.

25 Plaintiff has twenty days from the date of this Order
26 to file an amended complaint, if he can do so consistent with
27 this Order.

1 DATED: September 13, 2010

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WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE