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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,

Plaintiff,

v.

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

Defendants.

_____ /

NO. CIV. 2:10-1204 WBS KJM

MEMORANDUM AND ORDER RE:
MOTION TO DISMISS

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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 Corp, Green Tree
Servicing, LLC ("Green Tree"), and Fannie Mae, arising from
defendants' allegedly wrongful filing of a notice of default on

1 plaintiff's home. Presently before the court is Green Tree and
2 Federal National Mortgage Association's ("Fannie Mae") motion to
3 dismiss the First Amended Complaint ("FAC") pursuant to Federal
4 Rule of Civil Procedure 12(b)(6) for failure to state a claim
5 upon which relief can be granted. Plaintiff's attorney filed no
6 opposition to the motions, and defendants' attorney failed to
7 appear for the hearing. The court accordingly took the motions
8 under submission.

9 I. Factual and Procedural Background

10 Plaintiff entered into a mortgage with National for
11 approximately \$220,273.80 on January 30, 2006, for his property
12 located at 7071 Demaret Drive in Sacramento, California. (FAC ¶¶
13 20-21.) The loan held a fixed interest rate of 5.170 percent,
14 with total monthly payments of \$1,532.71. (Id. ¶ 21.) Plaintiff
15 alleges that Fannie Mae is the actual note holder. (Id.) Fannie
16 Mae allegedly "hired" National to service the loan. (Id. ¶ 22.)
17 Green Tree allegedly sent plaintiff a letter on November 13,
18 2009, stating that National had sold Green Tree the servicing
19 rights to plaintiff's loan. (Id. ¶ 30.) Between November of
20 2009 to February of 2010, Green Tree allegedly sent plaintiff
21 monthly billing statements which did not reflect the correct
22 monthly payment owed under the loan and which varied in amount
23 month from month. (Id. ¶¶ 31, 33-35, 37.) Plaintiff allegedly
24 made contact with Green Tree over the phone to correct the
25 billing statement errors, and was told that the errors would be
26 corrected. (Id. ¶¶ 32-36.) Plaintiff alleges that he continued
27 making his monthly payments of \$1,532.71. (Id. ¶¶ 29, 31.)

28 On or about February 11, 2010, Green Tree allegedly

1 sent plaintiff a notice of default ("NOD"). (Id. ¶¶ 38, 40-41.)
2 Plaintiff alleges that he made contact with Green Tree regarding
3 the billing errors on or about February 12, 2010, and was told
4 that the errors were due to the transfer of the servicing rights
5 of his loan from National, the errors would be fixed, and he was
6 current on his loan. (Id. ¶ 42.)

7 In March of 2010, Green Tree allegedly sent plaintiff a
8 monthly billing statement and letter incorrectly indicating that
9 plaintiff was behind on his payments. (Id. ¶ 44.) Plaintiff
10 alleges that he made contact with Green Tree and was again told
11 his account was in good standing and that the errors on his
12 account would be fixed. (Id. ¶¶ 46-47.) In April of 2010,
13 plaintiff was allegedly told by Green Tree that he was behind on
14 his mortgage by over \$6,000.00, but was subsequently told that
15 they were trying to repair his account. (Id. ¶¶ 48-51.)
16 Plaintiff alleges that he remains current on his mortgage. (Id.
17 ¶ 52.) Green Tree allegedly has reported to various credit
18 reporting agencies that plaintiff has been late on his payments,
19 which has allegedly resulted in damage to plaintiff's reputation.
20 (Id. ¶¶ 84-85, 88, 99, 102.)

21 Plaintiff filed this action on May 17, 2010, alleging
22 claims for fraud and conspiracy to commit fraud, "violation of
23 California Civil Code section 2923.5 et seq./request for
24 declaratory relief,"¹ violations of California's Unfair
25 Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200-17210,

26
27 ¹ The court interpreted the claim for "violation of
28 California Civil Code section 2923.5 et seq./request for
declaratory relief" as a claim for cancellation of instrument.
(Sept. 14, 2010 Order at 8:4-6 (Docket No. 16).)

1 violation of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§
2 1681-1681x, defamation, false light, and breach of
3 contract/anticipatory repudiation. (Docket No. 1.) On September
4 14, 2010, the court granted Green Tree and Fannie Mae's motion to
5 dismiss the initial Complaint as to Fannie Mae with respect to
6 all claims against it, and as to Green Tree with respect to the
7 the UCL, FCRA,² and breach of contract/anticipatory repudiation
8 claims. (Sept. 14, 2010, Order (Docket No. 16).) Plaintiff then
9 filed the FAC. Presently before the court is Green Tree and
10 Fannie Mae's joint motion to dismiss the FAC pursuant to Rule
11 12(b)(6). Fannie Mae moves to dismiss all claims against it, and
12 Green Tree moves to dismiss the UCL, FCRA, and breach of
13 contract/anticipatory repudiation claims.

14 II. Discussion

15 To survive a motion to dismiss, a plaintiff must plead
16 "only enough facts to state a claim to relief that is plausible
17 on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570
18 (2007). This "plausibility standard," however, "asks for more
19 than a sheer possibility that a defendant has acted unlawfully,"
20 Ashcroft v. Iqbal, --- U.S. ----, 129 S. Ct. 1937, 1949 (2009),
21 and where a complaint pleads facts that are "'merely consistent
22 with' a defendant's liability, it 'stops short of the line
23 between possibility and plausibility of entitlement to relief.'" Id.
24 (quoting Twombly, 550 U.S. at 557). In deciding whether a
25 plaintiff has stated a claim, the court must assume that the
26 plaintiff's allegations are true and draw all reasonable

27
28 ² The court did not analyze the UCL and FCRA claims
because plaintiff did not argue against dismissing them.

1 inferences in the plaintiff's favor. Usher v. City of L.A., 828
2 F.2d 556, 561 (9th Cir. 1987). However, the court is not
3 required to accept as true "allegations that are merely
4 conclusory, unwarranted deductions of fact, or unreasonable
5 inferences." In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055
6 (9th Cir. 2008) (internal quotation mark omitted).³

7 A. UCL Claims against Green Tree

8 A private plaintiff has standing under the UCL only if
9 he "suffered injury in fact and . . . lost money or property as a
10 result of the unfair competition." Cal. Bus. & Prof. Code §
11 17204. The UCL requires a loss of "money or property" sufficient
12 to constitute an "injury in fact" under Article III of the
13 Constitution and also requires a "causal connection" between the
14 UCL violation and the injury in fact. Rubio v. Capital One Bank,
15 613 F.3d 1195, 1203 (9th Cir. 2010). In the context of a
16 consumer action under the fraudulent prong of the UCL, the causal
17 connection required is actual reliance. In re Tobacco II Cases,
18 46 Cal. 4th 298, 326 (2009). But see id. at 326 n.1 (limiting
19 the actual reliance definition of causation to circumstances in
20 which "a UCL action is based on a fraud theory involving false
21 advertising and misrepresentations to consumers").

22 The UCL prohibits "any unlawful, unfair, or fraudulent
23

24 ³ Green Tree and Fannie Mae renew their request for
25 judicial notice of the publicly-recorded deeds of trust. (Green
26 Tree & Fannie Mae's Notice of Mot. & Mot. to Dismiss Pl.'s FAC
27 for Failure to State a Claim upon which Relief can be Granted
28 ("Defs.' Mot.") at 2 n.1 (Docket No. 18).) The court has already
judicially noticed the deeds of trust (See Sept. 14, 2010 Order
at 4:28-5:4.), and a court may continue to take judicial notice
of documents that the court previously judicially noticed. See,
e.g., Daughtery v. Wilson, No. 08cv408, 2010 WL 2605811, at *3
n.1 (S.D. Cal. June 25, 2010).

1 business act or practice." Cal-Tech Commc'ns, Inc. v. L.A.
2 Cellular Tel. Co., 20 Cal. 4th 163, 180 (1999). "By proscribing
3 'any unlawful' business practice, section 17200 borrows
4 violations of other laws and treats them as unlawful practices
5 that the unfair competition law makes independently actionable."
6 Id. (internal quotation marks omitted). "Fraudulent" as used in
7 the UCL "does not refer to the common law tort of fraud" but only
8 requires a showing that members of the public "are likely to be
9 deceived." Puentes v. Wells Fargo Home Mortg., Inc., 160 Cal.
10 App. 4th 638, 645 (4th Dist. 2008) (internal quotation marks
11 omitted). "A plaintiff must state with reasonable particularity
12 the facts supporting the statutory elements of the violation."
13 Khoury v. Maly's of Cal., Inc., 14 Cal. App. 4th 612, 619 (2d
14 Dist. 1993).

15 Even though fraud is not a necessary element of a UCL
16 claim, when "the plaintiff [] allege[s] a unified course of
17 fraudulent conduct and rel[ies] entirely on that course of
18 conduct as the basis of a claim," the claim is "said to be
19 'grounded in fraud' or to 'sound in fraud,' and the pleading of
20 that claim as a whole must satisfy the particularity requirement
21 of Rule 9(b)."⁴ Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097,
22 1103-04 (9th Cir. 2003); see also id. 1104 (explaining that when
23 the "plaintiff [] choose[s] not to allege a unified course of
24 fraudulent conduct in support of a claim, but rather to allege
25 some fraudulent and some non-fraudulent conduct," then "only the

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27 ⁴ Fraud can be averred by "specifically alleging fraud"
28 or "by alleging facts that necessarily constitute fraud (even if
the word 'fraud' is not used)." Vess v. Ciba-Geigy Corp. USA,
317 F.3d 1097, 1105 (9th Cir. 2003).

1 allegations of fraud are subject to Rule 9(b)'s heightened
2 pleading requirements"); see, e.g., Kearns v. Ford Motor Co., 567
3 F.3d 1120, 1125 (9th Cir. 2009) (applying Rule 9(b) to UCL
4 claim). Under Rule 9(b), a plaintiff must include "the who,
5 what, when, where, and how" of the misconduct charged. Vess, 317
6 F.3d at 1106 (quoting Cooper v. Pickett, 137 F.3d 616, 627 (9th
7 Cir. 1997)).

8 Here, plaintiff brings a UCL claim under the unlawful
9 prong and a separate UCL claim under the fraudulent prong.
10 Green Tree's only argument against the UCL claim under the
11 unlawful prong is that plaintiff lacks standing because he has
12 not sufficiently alleged a loss of money or property. (Green
13 Tree & Fannie Mae's Notice of Mot. & Mot. to Dismiss Pl.'s FAC
14 for Failure to State a Claim upon which Relief can be Granted
15 ("Def's.' Mot.") at 6:12-7:2 (Docket No. 18).) However, plaintiff
16 has alleged that he continued making what he believed were his
17 correct monthly payments following assurances from Green Tree
18 that his account remained in good standing and Green Tree filed a
19 NOD, the first stage in initiating a foreclosure. These factual
20 allegations plausibly suggest that plaintiff has suffered either
21 a loss of money or property, even if Green Tree has not actually
22 foreclosed on the property. See, e.g., Sullivan v. Washington
23 Mut. Bank, FA, No. C-09-2161, 2009 WL 3458300, at *4 (N.D. Cal.
24 Oct. 23, 2009) ("[N]o foreclosure has taken place and therefore,
25 it may be argued that Ms. Sullivan has not actually lost any
26 property as a technical matter. On the other hand, it is
27 undisputed that foreclosure proceedings have been initiated which
28 puts her interest in the property in jeopardy. Th court

1 concludes that this fact is sufficient to establish standing.").
2 Accordingly, because plaintiff has sufficiently alleged a loss of
3 money or property, the court will deny Green Tree and Fannie
4 Mae's motion to dismiss the UCL claim under the unlawful prong as
5 to Green Tree.

6 As to the UCL claim under the fraudulent prong, by
7 incorporating the general allegations, plaintiff alleges that
8 Green Tree through its representatives made multiple
9 representations to plaintiff that his account was in good
10 standing, despite monthly billing statements and letters
11 indicating otherwise, and that Green Tree was trying to fix the
12 account. (FAC ¶ 1-52.) Plaintiff identifies the dates and
13 contents of multiple phone calls, monthly billing statements, and
14 letters, and also identifies by name some of Green Tree's
15 representatives with whom he spoke. (See, e.g., id. ¶¶ 28-37,
16 42, 44, 46-52.) Despite these representations to plaintiff and
17 plaintiff allegedly continuing to make his monthly payments,
18 Green Tree allegedly filed a NOD. (Id. ¶¶ 28, 30-31). These
19 allegations are sufficiently particular under Rule 9(b) and
20 plausibly suggest under Rule 8(a) that Green Tree made
21 representations that would likely deceive members of the public,
22 Puentes, Inc., 160 Cal. App. 4th at 645, and that plaintiff
23 himself actually relied on the representations, as required for
24 standing to assert a UCL claim under the fraudulent prong. In re
25 Tobacco II Cases, 46 Cal. 4th at 326. Accordingly, the court
26 will deny Green Tree and Fannie Mae's motion to dismiss the UCL
27 claim under the fraudulent prong as to Green Tree.

28 B. FCRA Claim against Green Tree

1 Section 1681s-2 sets forth "[r]esponsibilities of
2 furnishers of information to consumer reporting agencies
3 ["CRAs"]." 15 U.S.C. § 1681s-2. Subsection (a) pertains to the
4 duty "to provide accurate information." Id. 15 U.S.C. § 1681s-
5 2(a). Duties imposed on furnishers under subsection (a) are
6 enforceable only by federal or state agencies. Nelson v. Chase
7 Manhattan Mortg. Corp., 282 F.3d 1057, 1059 (9th Cir. 2002); see
8 also Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147, 1154 (9th
9 Cir. 2009). Subsection (b) imposes a second category of duties
10 on furnishers of information to a CRA and, unlike subsection (a),
11 these duties are enforceable through a private cause of action.
12 Id. at 1059-60. "These obligations are triggered 'upon notice of
13 dispute'--that is, when a person who furnished information to a
14 CRA receives notice from the CRA that the consumer disputes the
15 information." Gorman, 584 F.3d at 1154 (quoting 15 U.S.C. §
16 1681s-2(b)). The duties under subsection (b) arise "only after
17 the furnisher receives notice of dispute from a CRA; notice of a
18 dispute received directly from the consumer does not trigger
19 furnishers' duties under subsection (b)." Gorman, 584 F.3d at
20 1154.

21 Here, plaintiff alleges that defendants knew that their
22 "foreclosure and related debt collection activities were wrongful
23 and improper" and that defendants have reported to CRAs that
24 plaintiff has been late on his mortgage. (FAC ¶ 84.) Plaintiff
25 also alleges that defendants "willfully and/or negligently"
26 failed to remove and delete negative credit information despite
27 knowing that their foreclosure and related debt collection
28 activities were wrongful. (Id. ¶ 85.) However, plaintiff's

1 failure to allege facts that plausibly suggest that he notified a
2 CRA of a dispute and that the CRA subsequently notified Green
3 Tree of the dispute is fatal to his FCRA claim for violation of
4 subsection (b) of 15 U.S.C. § 1681s-2 because only a CRA's
5 notification to a furnisher of information of a dispute triggers
6 duties under subsection (b). Gorman, 584 F.3d at 1154.
7 Moreover, to the extent plaintiff attempts to state a claim for
8 violation of subsection (a), that subsection may not be enforced
9 through a private cause of action. Nelson, 282 F.3d at 1059; see
10 also Gorman, 584 F.3d at 1154. Accordingly, the court will grant
11 Green Tree and Fannie Mae's motion to dismiss the FCRA claim as
12 to Green Tree.

13 C. Breach of Contract/Anticipatory Repudiation Claim
14 against Green Tree

15 A cause of action for breach of contract includes four
16 elements: (1) that a contract exists between the parties, (2)
17 that the plaintiff performed his contractual duties or was
18 excused from nonperformance, (3) that the defendant breached
19 those contractual duties, and (4) that the plaintiff's damages
20 were a result of the breach. Reichert v. General Ins. Co., 68
21 Cal. 2d 822, 830 (1968). Here, plaintiff has cured the
22 deficiencies in the initial Complaint, which merely recited the
23 elements for a breach of contract claim. The allegations now
24 plausibly suggest a direct or anticipatory breach of contract.
25 (See FAC ¶ 106.) Accordingly, the court will deny Green Tree and
26 Fannie Mae's motion to dismiss the breach of
27 contract/anticipatory repudiation claim as to Green Tree.

28 D. Claims against Fannie Mae

1 Plaintiff has asserted the same eight claims against
2 Fannie Mae that he asserts against Green Tree. For the reasons
3 stated above with respect to Green Tree, the motion to dismiss
4 the claim against Fannie Mae for violation of the FCRA will be
5 granted. In the September 14, 2010, Order, the court dismissed
6 all claims against Fannie Mae, holding that plaintiff had failed
7 to sufficiently allege facts as to Fannie Mae to support each
8 claim. (See Sept. 14, 2010, Order at 6:24-7:9 (fraud and
9 conspiracy claim), 9:20-26 ("violation of California Civil Code
10 section 2923.5 et seq./request for declaratory relief"), 10:22-26
11 (defamation claim), 11:27-12:2 (false light claim), 12:4-16
12 (breach of contract/anticipatory repudiation claim).) In the
13 FAC, plaintiff has largely failed to provide additional factual
14 allegations about Fannie Mae's role to support liability under a
15 direct theory.⁵ Nonetheless, plaintiff now provides more
16 allegations to support an agency theory of liability.

17 "An agency is either actual or ostensible." Cal. Civ.
18 Code § 2298. "An agency is actual when the agent is really
19 employed by the principal." Id. § 2299. "An agency is ostensible
20 when the principal intentionally, or by want of ordinary care,
21 causes a third person to believe another to be his agent who is
22 not really employed by him." Id. § 2300. While the initial
23 Complaint only alleged that Fannie Mae "may be the actual note
24 holder" and alleged in conclusory fashion that the other
25 defendants acted as "agents" for Fannie Mae (Compl. ¶ 21 (Docket
26 No. 1)), the FAC alleges that Fannie Mae is the note holder and

27
28 ⁵ Plaintiff did allege additional facts to support his
contract claim under a direct liability theory.

1 "hired" National to "service" the loan and that the servicing
2 rights were then sold to Green Tree. (FAC ¶¶ 21-22.)
3 Plaintiff's allegations of a lender-servicer relationship are
4 sufficient at the pleading stage.⁶ See Palestini v. Homecomings
5 Fin., LLC, No. 10CV1049, 2010 WL 3339459, at *2 (S.D. Cal. Aug.
6 23, 2010) ("[T]he Complaint clearly alleges that Homecomings was
7 hired by GMAC to service Plaintiffs' loan for the benefit of
8 GMAC. This is enough to support an agency theory of
9 liability."); see also Lee v. Equifirst Corp., No. 3:10-cv-809,
10 2010 WL 4320714, at *4 (M.D. Tenn. Oct. 26, 2010); Warden v. PHH
11 Mortg. Corp., No. 3:10-CV-75, 2010 WL 3720128, at *5 (N.D. W.Va.
12 Sept. 16, 2010) (explaining that "[w]hether Fannie Mae had some
13 degree of control over the conduct and activities of [the alleged
14 servicer] is a question to be answered in discovery").
15 Accordingly, the court will deny Green Tree and Fannie Mae's
16 motion to dismiss the claims against Fannie Mae for fraud and
17 conspiracy to commit fraud, "violation of California Civil Code
18 section 2923.5 et seq./request for declaratory relief,"
19 violations of the UCL, defamation, false light, and breach of
20 contract/anticipatory repudiation.

21 IT IS THEREFORE ORDERED that Green Tree and Fannie
22 Mae's motion to dismiss the First Amended Complaint be, and the
23 same hereby is, GRANTED with respect to the FCRA claim and DENIED
24 in all other respects.

25 _____
26 ⁶ Plaintiff's allegations are sufficient at the pleading
27 stage even to support his UCL claims against Fannie Mae, which
28 may not be premised solely on vicarious liability. See Palestini
v. Homecomings Fin., LLC, No. 10CV1049, 2010 WL 3339459, at *2
(S.D. Cal. Aug. 23, 2010) (declining to dismiss UCL claim against
lender).

1 Plaintiff may therefore proceed under the First Amended
2 Complaint on his remaining claims. If plaintiff wishes to amend
3 the complaint to cure the defects explained above, he may do so
4 within twenty days from the date of this Order. Otherwise, the
5 case will proceed under the First Amended Complaint.

6 DATED: January 18, 2011

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9 WILLIAM B. SHUBB
10 UNITED STATES DISTRICT JUDGE
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