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KAYRINKIA J. GILLILAND,

Plaintiff,

v.

CHASE HOME FINANCE, LLC;
CHASE HOME FINANCE, INC.; JP
MORGAN & COMPANY; JP MORGAN
CHASE; CHASE BANK USA; GLENN
J. MOURIDY; THOMAS WIND and
Does I-XX et al.,

Defendants.

No. 2:13-cv-02042 JAM-AC

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS**

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Defendants JPMorgan Chase Bank, N.A. s/b/m to Chase Home Finance, LLC; JPMorgan Chase Bank, N.A.; and Chase Bank USA, N.A.'s (collectively "Defendants") moved to dismiss Plaintiff's complaint (Doc. #7). Plaintiff Kayrinkia J. Gilliland ("Plaintiff") opposed the motion (Doc. #17-3) and Defendants replied (Doc. #19).¹ For the reasons set forth below, Defendants' motion is GRANTED.

¹ This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for December 11, 2013.

1 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

2 Plaintiff filed this action on October 1, 2013 (Doc. #1).

3 In the complaint, Plaintiff alleges seven causes of action
4 against Defendants and Defendants Glenn J. Mouridy, Thomas Wind,
5 Matthew E. Zames, James Dimon, Thomas E. Higgins, and James Bill:
6 (1) breach of a written contract; (2) breach of covenant of good
7 faith and fair dealing, (3) wrongful foreclosure,
8 (4) misrepresentation, (5) unfair business practices pursuant to
9 Business and Professional Code Section 17200 ("UCL claim"),
10 (6) breach of California Civil Code Sections 2923 and 2924, and
11 (7) dual tracking in violation of Civil Code Sections 2923 and
12 2924. Compl. ¶¶ 34-75. On October 29, 2013, Defendants moved to
13 dismiss all seven claims (Doc. #7).

14 Based on the complaint and judicially noticeable facts,
15 Plaintiff purchased the real property located at 1517 Los Robles
16 Blvd, Sacramento, California, in 1982 ("Property"). Compl. ¶ 1;
17 Memorandum of Agreement of Sale, Ex. 1 to Defendants' Request for
18 Judicial Notice ("RJN"), Doc. #8. In 2007, Plaintiff obtained a
19 \$145,000 mortgage loan from Defendants encumbering the Property.
20 Deed of Trust, Ex. 3 to RJN, Doc. #8, at 1, 3. On or about
21 December 2009, Defendants allegedly notified Plaintiff that she
22 was eligible for benefits under the federal government Home
23 Affordable Modification Program ("HAMP"). Compl. ¶ 19. The
24 notice stated that "If you comply with the terms of the Home
25 Affordable Modification Trial Period Plan ('Trial Period Plan'),
26 Defendants promise to modify the terms of your home loan." Id.
27 The trial period required three payments in January, February,
28 and March of 2010, which Plaintiff allegedly made. Id. ¶¶ 20-21.

1 Defendants allegedly accepted the payments. Id. ¶ 22.

2 On or about March 31, 2010, Defendants wrote to Plaintiff
3 and included the Home Affordable Modification Agreement
4 ("Modification Agreement"), which Plaintiff contends she signed
5 and returned on April 13, 2010, as required. Id. ¶ 23.

6 On or about April 16, 2010, Plaintiff allegedly received a
7 phone call from John Pankow on behalf of Defendants who told
8 Plaintiff that her home was not in foreclosure proceedings and
9 promised that Defendants would not foreclose her home. Id. ¶ 26.
10 Plaintiff claims he also told her to stop making payments
11 pursuant to the Modification Agreement because she would lose her
12 money. Id. ¶ 26. Plaintiff allegedly relied on these
13 representations and did not think her home would be foreclosed.

14 Id. ¶ 27. On or about May 29, 2010, Defendants notified
15 Plaintiff in writing that she was in default and would be
16 required within 32 days to pay more than \$5,000 to cure her
17 default. Id. ¶ 28. On or about June 2010, Plaintiff allegedly
18 spoke with Defendants who told her not make payments, that she
19 was being considered for a modification, and promised that
20 Defendants would not foreclose her home. Id. ¶ 29. Plaintiff
21 did not make payments pursuant to the Modification Agreement and
22 her home was foreclosed. Id. ¶ 31. The property was sold at a
23 trustee's sale in September 2011. Trustee's Deed Upon Sale, Ex.
24 8, RJN.

25 26 II. OPINION

27 A. Legal Standard

28 A party may move to dismiss an action for failure to state a

1 claim upon which relief can be granted pursuant to Federal Rule
2 of Civil Procedure 12(b)(6). To survive a motion to dismiss a
3 plaintiff must plead "enough facts to state a claim to relief
4 that is plausible on its face." Bell Atlantic Corp. v. Twombly,
5 556 U.S. 662, 570 (2007). In considering a motion to dismiss, a
6 district court must accept all the allegations in the complaint
7 as true and draw all reasonable inferences in favor of the
8 plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974),
9 overruled on other grounds by Davis v. Scherer, 468 U.S. 183
10 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). "First, to be
11 entitled to the presumption of truth, allegations in a complaint
12 or counterclaim may not simply recite the elements of a cause of
13 action, but must sufficiently allege underlying facts to give
14 fair notice and enable the opposing party to defend itself
15 effectively." Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir.
16 2011), cert. denied, 132 S. Ct. 2101, 182 L. Ed. 2d 882 (U.S.
17 2012). "Second, the factual allegations that are taken as true
18 must plausibly suggest an entitlement to relief, such that it is
19 not unfair to require the opposing party to be subjected to the
20 expense of discovery and continued litigation." Id. Assertions
21 that are mere "legal conclusions" are therefore not entitled to
22 the presumption of truth. Ashcroft v. Iqbal, 556 U.S. 662, 678
23 (2009) (citing Twombly, 550 U.S. at 555). Dismissal is
24 appropriate when a plaintiff fails to state a claim supportable
25 by a cognizable legal theory. Balistreri v. Pacifica Police
26 Department, 901 F.2d 696, 699 (9th Cir. 1990).

27 Upon granting a motion to dismiss for failure to state a
28 claim, a court has discretion to allow leave to amend the

1 complaint pursuant to Federal Rule of Civil Procedure 15(a).
2 "Dismissal with prejudice and without leave to amend is not
3 appropriate unless it is clear . . . that the complaint could not
4 be saved by amendment." Eminence Capital, L.L.C. v. Aspeon,
5 Inc., 316 F.3d 1048, 1052 (9th Cir. 2003).

6 B. Judicial Notice

7 Defendants request judicial notice of (1) a Memorandum
8 Agreement of Sale, (2) a Grant Deed, (3) a Deed of Trust, (4) a
9 Substitution of Trustee, (5) a Notice of Default, (6) an
10 Assignment of Deed of Trust, (7) a Notice of Trustee's Sale, and
11 (8) Trustee's Deed Upon Sale. Ex. 1-8, RJN, Doc. #8. Exhibits 1
12 through 8 are appropriate for judicial notice because they are
13 public records and are "not subject to reasonable dispute." Fed.
14 R. Evid. 201(b). Accordingly, the Court GRANTS Defendants'
15 request for judicial notice.

16 C. Discussion

17 1. First Cause of Action for Breach of Contract

18 Defendants move to dismiss Plaintiff's first cause of action
19 for breach of contract because Plaintiff has not alleged a valid
20 oral contract. Plaintiff argues that Defendants have
21 misconstrued her first cause of action because it is not a cause
22 of action for breach of an oral contract but a cause of action
23 for breach of a written agreement. In their reply, Defendants
24 argue that even if there is a written contract, Plaintiff has
25 failed to allege that Defendants breached it or that Plaintiff
26 suffered any damages as a result.

27 For a breach of contract claim, Plaintiff must allege the
28 following elements: "(1) the contract; (2) plaintiff's

1 performance of the contract or excuse for nonperformance;
2 (3) defendants' breach; and (4) the resulting damage to
3 plaintiff." Lortz v. Connell, 273 Cal. App. 2d 286, 290 (1969).

4 Here, Plaintiff argues that the written contract is the
5 April 2010 Modification Agreement. Opp. at 3 (citing Compl.
6 ¶¶ 23-24). Further, she relies on Barroso v. Ocwen Loan
7 Servicing, LLC, 208 Cal.App.4th 1001 (2012), to argue that her
8 breach of contract claim should not be dismissed. In Barroso,
9 the plaintiff made monthly payments under the modification
10 agreement, and the lender acknowledged receipt of the payments,
11 but her home was nonetheless sold in a foreclosure sale. 208
12 Cal.App.4th at 1005-09. Here, unlike in Barroso, Plaintiff did
13 not make the payments pursuant to the Modification Agreement
14 because she allegedly relied on the statements made by
15 Defendants' representatives assuring her that her home would not
16 be foreclosed if she stopped making her payments. Compl. ¶¶ 26-
17 31. She argues that when Defendants made these statements it was
18 an anticipatory breach by Defendants because these statements
19 give the inference "that Defendants will not perform pursuant to
20 the parties contractual agreement." Opp. at 5.

21 Under California law, "[a]nticipatory breach occurs when one
22 of the parties to a bilateral contract repudiates the contract.
23 The repudiation may be express or implied. An express
24 repudiation is a clear, positive, unequivocal refusal to perform
25 . . . an implied repudiation results from conduct where the
26 promisor puts it out of his power to perform so as to make
27 substantial performance of his promise impossible." Taylor v.
28 Johnston, 15 Cal. 3d 130, 137, 539 P.2d 425, 430 (1975)

1 (citations omitted).

2 Here, Plaintiff alleges that an anticipatory breach occurred
3 on April 16, 2010, when a person representing Defendants called
4 her and told her to stop making payments because any further
5 payments would not be refunded. However, this allegation is not
6 "a clear, positive, unequivocal refusal to perform." Nor has
7 Plaintiff alleged that Defendants did something to put
8 performance out of their power. Therefore, Plaintiff has failed
9 to sufficiently allege an anticipatory breach. Because Plaintiff
10 has not alleged a breach by Defendants, the Court need not
11 address Defendants' other arguments.

12 Accordingly, the Court dismisses Plaintiff's breach of a
13 written contract claim. The Court grants Plaintiff leave to
14 amend because Plaintiff may be able to allege all the required
15 elements of a breach of contract claim.

16 2. Second Cause of Action for Breach of the Covenant
17 of Good Faith and Fair Dealing

18 Defendants move to dismiss Plaintiff's second cause of
19 action for breach of the covenant of good faith and fair dealing,
20 in part, because Plaintiff's allegations are contradictory. Mot.
21 at 5-6. Plaintiff contends that Defendants mischaracterize her
22 claim and the case law cited by Defendants does not apply.

23 Every contract "imposes upon each party a duty of good faith
24 and fair dealing in its performance and its enforcement."
25 Fortaleza v. PNC Fin. Servs. Grp., Inc., 642 F. Supp. 2d 1012,
26 1021-22 (N.D. Cal. 2009)(citing McClain v. Octagon Plaza, LLC,
27 159 Cal.App.4th 784, 798 (2008)). "To establish a breach of an
28 implied covenant of good faith and fair dealing, a plaintiff must

1 establish the existence of a contractual obligation, along with
2 conduct that frustrates the other party's rights to benefit from
3 the contract." Id. (citations omitted). More importantly, "to
4 state a claim for breach of the implied covenant of good faith
5 and fair dealing, a plaintiff must identify the specific
6 contractual provision that was frustrated." Plastino v. Wells
7 Fargo Bank, 873 F. Supp. 2d 1179, 1191 (N.D. Cal. 2012) (quoting
8 Perez v. Wells Fargo Bank, N.A., No. 11-02279, 2011 WL 3809808,
9 at *18 (N.D. Cal. Aug. 29, 2011). As Plaintiff argues, the cases
10 cited by Defendants, Applied Equip. Corp. v. Litton Saudi Arabia
11 Ltd., 7 Cal. 4th 503 (1994) and Bionghi v. Metro. Water Dist. of
12 So. California, 70 Cal.App.4th 1358, 1370 (1999), do not apply
13 because the court in Applied does not directly analyze a breach
14 of the covenant of good faith and fair dealing claim and in
15 Bionghi, the court held that there was no underlying contract.

16 In the complaint, Plaintiff alleges that she fully performed
17 under the terms of the Modification Agreement, which obligated
18 Defendants to modify Plaintiff's loan documents to a permanent,
19 thirty-year loan with fixed terms but they allegedly refused.
20 Compl. ¶¶ 40-41. This contradicts the allegation in her
21 complaint that she stopped making monthly payments under the
22 Modification Agreement. Compl. ¶ 31. There are also no
23 allegations in the complaint that the Modification Agreement
24 obligated Defendants to modify Plaintiff's loan documents.
25 Plaintiff alleges that Defendants promised that if she complied
26 "with the terms of the Home Affordable Modification Trial Period
27 Plan ('Trial Period Plan'), Defendants [would] modify the terms
28 of [her] home loan." Compl. ¶ 19. However, that obligation was

1 part of the Trial Period Plan not the Modification Agreement,
2 which, according to Plaintiff, resulted from her compliance with
3 the Trial Period Plan. Therefore, Plaintiff has not alleged a
4 contractual obligation as required to establish a breach of an
5 implied covenant of good faith and fair dealing. See Barroso,
6 208 Cal.App.4th at 1015 (holding that the plaintiff could amend
7 her cause of action for breach of the implied covenant of good
8 faith and fair dealing because under the terms of the
9 Modification Agreement, the defendant was obligated to modify
10 plaintiff's loan documents).

11 Accordingly, the Court dismisses Plaintiff's second cause of
12 action. Because Plaintiff may be able to clarify this cause of
13 action, the Court grants Plaintiff leave to amend.

14 3. Third Cause of Action for Wrongful Foreclosure

15 Defendants move to dismiss Plaintiff's third cause of action
16 for wrongful foreclosure because Plaintiff did not cure the
17 default and did not tender. Plaintiff argues that she stated a
18 cause of action for wrongful foreclosure by alleging that the
19 servicer performed a foreclosure sale when she had made all the
20 payments due, citing Bank of America v. La Jolla Group II (2009)
21 (2005) 129 Cal.App.4th 706, 712, in her complaint, and Barroso,
22 208 Cal.App.4th at 1017, in her opposition. Opp. at 7; compl. ¶¶
23 46-47.

24 For a wrongful foreclosure claim, a plaintiff must allege
25 that "(1) Defendants caused an illegal, fraudulent, or willfully
26 oppressive sale of the property pursuant to a power of sale in a
27 mortgage or deed of trust; (2) Plaintiffs suffered prejudice or
28 harm; and (3) Plaintiffs tendered the amount of the secured

1 indebtedness or were excused from tendering." Nugent v. Fed.
2 Home Loan Mortgage Corp., 2:12-CV-00091-GEB, 2013 WL 1326425, at
3 *7 (E.D. Cal. Mar. 29, 2013). "A full tender must be made to set
4 aside a foreclosure sale, based on equitable principles."
5 Barroso, 208 Cal.App.4th at 1016. A plaintiff may be able to
6 state a wrongful foreclosure claim without full tender, "[i]f,
7 after a default, the trustor and beneficiary enter into an
8 agreement to cure the default and reinstate the loan, no
9 contractual basis remains for exercising the power of sale." Id.
10 (quoting La Jolla Grp. II, 129 Cal.App.4th at 712)). In Barroso,
11 the court held that the plaintiff had made all payments due and
12 therefore the foreclosure was wrongful and it was not necessary
13 to tender. Id. Similarly, in La Jolla Group, someone acting on
14 behalf of the homeowners tendered a payment on the loan and the
15 bank accepted the payment; therefore, the court held that the
16 homeowners and bank had entered into an agreement to cure the
17 default and it followed that the bank could not sell the home.
18 129 Cal.App.4th at 712.

19 In this case, Plaintiff alleges that "[p]ursuant to the
20 Modification Agreement, all arrearages were capitalized and the
21 default was cured." Compl. ¶ 46. However, this contradicts her
22 earlier allegation that "[h]ad Plaintiff known that Defendants
23 intended to foreclose upon her home and did not intend to agree
24 to and perform pursuant to the Modification Agreement, Plaintiff
25 would have cured the default on her home." Id. ¶ 32. Because of
26 these contradictory allegations, it is unclear from the complaint
27 whether the default was cured. Therefore, the Court cannot
28 determine whether full tender is required.

1 Accordingly, the Court dismisses Plaintiff's third cause of
2 action. The Court grants Plaintiff leave to amend this claim
3 because she may be able to clarify her allegations.

4 4. Fourth Cause of Action for Misrepresentation

5 Defendants move to dismiss Plaintiff's fourth cause of
6 action for misrepresentation because she has not alleged
7 knowledge of falsity and intent to defraud with required
8 specificity. Plaintiff argues that she sufficiently alleged the
9 names of the accused, the misrepresentations, dates, and how the
10 misrepresentations were made. She also argues that intent and
11 knowledge may be proven by circumstantial evidence.

12 For an intentional misrepresentation claim, a plaintiff must
13 allege "(1) a misrepresentation; (2) knowledge of falsity;
14 (3) intent to defraud or to induce reliance; (4) justifiable
15 reliance; and (5) resulting damage." McReynolds v. HSBC Bank
16 USA, 5:11-CV-05245 EJD, 2012 WL 5868945, at *2 (N.D. Cal. Nov.
17 19, 2012) (citing Engalla v. Permanente Med. Group, Inc., 15 Cal.
18 4th 951, 974 (1997)). Under Federal Rule of Civil Procedure
19 9(b), claims of fraud must be pleaded with particularity. Fed.
20 R. Civ. Pro. 9; see also Neilson v. Union Bank of Cal., N.A., 290
21 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003) ("It is well established
22 in the Ninth Circuit that both claims for fraud and negligent
23 misrepresentation must meet Rule 9(b)'s particularity
24 requirement.") The heightened pleading requirement of Rule 9(b),
25 however, does not apply to allegations of knowledge or intent.
26 Fed. R. Civ. Pro. 9(b) ("Malice, intent, knowledge, and other
27 conditions of a person's mind may be alleged generally.")
28 However, "[p]laintiffs must still plead facts establishing

1 scienter with the plausibility required under Rule 8(a)" DeLeon
2 v. Wells Fargo Bank, N.A., 10-CV-01390-LHK, 2011 WL 311376, at *8
3 (N.D. Cal. Jan. 28, 2011) (citing Iqbal, 129 S.Ct. at 1954).

4 Here, Plaintiff alleges that the Defendants' representatives
5 misrepresented that Plaintiff's home was not in foreclosure
6 proceedings. Compl. ¶ 49. Plaintiff further alleges that
7 "Defendants knew that Plaintiff's home was in foreclosure
8 proceedings" and "Defendants made these misrepresentations with
9 the intent to mislead Plaintiff for the purpose of obtaining
10 title to Plaintiff's home, thereby surreptitiously 'stealing'
11 Plaintiff's home." Id. ¶¶ 49-50. However, these allegations are
12 conclusory because Plaintiff provides no facts from which the
13 Court can infer intent or knowledge. Moreover, while Plaintiff
14 may prove intent and knowledge through circumstantial evidence,
15 none of those facts are alleged in the complaint. Therefore,
16 Plaintiff's allegations do not meet the pleading requirements.
17 Accordingly, the Court dismisses Plaintiff's fourth cause of
18 action for misrepresentation. Because Plaintiff may be able to
19 allege more facts, the Court grants leave to amend.

20 5. Fifth Cause of Action for Unfair Business
21 Practices

22 Defendants move to dismiss Plaintiff's fifth cause of action
23 for unfair business practices pursuant to Business and
24 Professional Code Section 17200 ("Section 17200") because
25 Plaintiff does not seek an appropriate form of relief, Plaintiff
26 has no standing, and there is no violation of a predicate
27 statute. Plaintiff argues that she has suffered an injury and
28 violations of predicate statutes and law are alleged throughout

1 all causes of action.

2 Under Section 17200, unfair competition is defined as "any
3 unlawful, unfair or fraudulent business act or practice" and
4 "unfair, deceptive, untrue or misleading advertising." See Cal.
5 Bus. & Prof. Code § 17200. An act is "unlawful" if it violates
6 an underlying state or federal statute or common law. See Cel-
7 Tech Communications, Inc. v. Los Angeles Cellular Tel. Co., 20
8 Cal. 4th 163, 180 (1999). An act is "unfair" if the act
9 "threatens an incipient violation of an antitrust law, or
10 violates the policy or spirit of one of those laws because its
11 effects are comparable to or the same as a violation of the law."
12 Id. at 187. A practice is "fraudulent" if members of the public
13 are likely to be deceived. See Committee on Children's
14 Television, Inc. v. Gen'l Foods Corp., 35 Cal.3d 197, 211 (1983).

15 Here, Plaintiff alleges that Defendants violated
16 "[California] Civil Code sections 2923.55, 2923.6, 2923.7, 2924b,
17 2934a, 2924.8, 2923.5." Compl. ¶ 60. Defendants argue that
18 Plaintiff has not stated a claim under any of these statutes. In
19 her opposition, Plaintiff argues that Defendants have violated
20 these statutes but does not address all of Defendants' arguments.
21 Each statute is discussed in turn below.

22 California Civil Code Sections 2923.55, 2923.6, and 2923.7
23 are all part of the Homeowner Bill of Rights (the "HBOR"), which
24 became effective on January 1, 2013. Guglielmelli v. Wells Fargo
25 Bank, N.A., 2013 U.S. Dist. LEXIS 43063, at *10 (C.D. Cal. Mar.
26 26, 2013) (holding that that the HBOR provisions alleged by
27 Plaintiff, including Sections 2923.55, 2923.6, 2923.7, became
28 effective on January 1, 2013). Moreover, these provisions do not

1 apply retroactively. Id. In this case, all the conduct
2 Plaintiff alleges occurred between December 2009 and September
3 2011, when the property was sold. Compl. ¶¶ 19-30; Notice of
4 Trustee's Deed Upon Sale, Ex. 8, RJN. Because Plaintiff has not
5 alleged any conduct by Defendants that occurred after January 1,
6 2013, Plaintiff cannot state a claim under these sections.
7 Accordingly, the Court dismisses Plaintiff's claims for violation
8 of Sections 2923.55, 2923.6, and 2923.7.

9 California Civil Code Section 2924b ("Section 2924b")
10 "governs notices of default in nonjudicial foreclosure
11 proceedings." Banc of America Leasing & Capital, LLC v. 3 Arch
12 Trustee Services, Inc., 180 Cal.App.4th 1090, 1097 (2009)
13 (explaining the duties of a trustee under Section 2924b). The
14 complaint contains no factual allegations regarding the trustee
15 or how Defendants violated Section 2924b and therefore, the claim
16 is not properly alleged. Defendants also argue that Section
17 2924b is preempted by the Home Owners Loan Act ("HOLA"), 12
18 U.S.C. §§ 1461, et seq., citing Fowler v. Wells Fargo Bank, C 12-
19 04869 DMR, 2012 WL 5503538, at *5 (N.D. Cal. Nov. 13, 2012).
20 However, Fowler relies on a case that holds that Section 2924,
21 not Section 2924b, is preempted. See Wienke v. Indymac Bank FSB,
22 CV 10-4082 NJV, 2011 WL 871749, at *4 (N.D. Cal. Mar. 14, 2011).
23 Nevertheless, because Plaintiff has failed to allege sufficient
24 facts, the claim for violation of Section 2924b is dismissed.

25 California Civil Code Section 2934a ("Section 2934a")
26 governs the recording and notices of the substitution of a
27 trustee. Permito v. Wells Fargo Bank, N.A., C-12-00545 YGR, 2012
28 WL 1380322, at *4 (N.D. Cal. Apr. 20, 2012) (explaining the

1 procedure for substitution of trustee under Section 2934a). In
2 the complaint, Plaintiff has not alleged any facts to show that
3 the substitution of trustee failed to meet the statutory
4 requirements. In addition, based on judicially noticeable
5 documents, First American Title, the trustee under the Deed of
6 Trust, recorded a Substitution of Trustee in September 2010,
7 which a trustee may do under Section 2934a. See Deed of Trust,
8 Ex. 3 to RJN, at 2 (listing First American Title as trustee);
9 Substitution of Trustee, Ex. 4 to RJN, at 1 (stating that First
10 American Title filed a Substitution of Trustee). Therefore,
11 Plaintiff's claim for violation of Section 2934a is dismissed.

12 California Civil Code Section 2924.8 ("Section 2924.8")
13 requires that a notice of a trustee's sale be provided to the
14 homeowner twenty days prior to the sale. Cal. Civ. Code
15 § 2924.8(d). This section applies to loans "if the billing
16 address for the mortgage note is different than the property
17 address." Cal. Civ. Code § 2924.8(d). As such, Plaintiff would
18 need to allege that her billing address is different from her
19 property address, which she has not done. In addition, Plaintiff
20 has not alleged that she did not receive notice twenty days
21 before the sale. Therefore, Plaintiff's claim for violation of
22 this statute is dismissed.

23 California Civil Code Section 2923.5 ("Section 2923.5")
24 governs the notice requirements for initiating nonjudicial
25 foreclosure. Defendant argues that that courts evaluating
26 compliance of Section 2923.5 have held that allegations of non-
27 compliance fail in the presence of a declaration of compliance
28 attached to a notice of default. However, the Court need not

1 address this issue because the claim is moot. Although neither
2 party raised this argument, the Court is obligated to raise the
3 mootness argument *sua sponte* because it is a jurisdictional
4 issue. Gator.com Corp. v. L.L. Bean, Inc., 398 F.3d 1125, 1129
5 (9th Cir. 2005) (stating that because mootness is a
6 jurisdictional issue, federal courts are obliged to raise it sua
7 sponte). Under Section 2923.5, the only remedy is the
8 postponement of the foreclosure sale before it occurs. Salcido
9 v. Vericrest Fin. & Summit Mgmt. Co. LLC, C 13-3450 SBA, 2013 WL
10 5946090, at *3 (N.D. Cal. Nov. 5, 2013). "Where a sale has
11 already transpired, a cause of action arising under section
12 2923.5 is moot." Id. Here, the sale has already transpired.
13 Since the Property was sold September 2011 (Notice of Trustee's
14 Deed Upon Sale, Ex. 8, RJN), Plaintiff has no recourse under
15 Section 2923.5. Therefore, the Court dismisses this claim as
16 moot.

17 Thus, Plaintiff has failed to allege a violation of Sections
18 2923.55, 2923.6, 2923.7, 2924b, 2934a, 2924.8, and 2923.5. In
19 the absence of violation of a borrowed law, a UCL claim fails
20 under the unlawful prong of Section 17200. In addition, to the
21 extent Plaintiff relies on breach of contract, breach of good
22 faith and fair dealing, or misrepresentation to serve the basis
23 for the UCL claim (Opp. at 13), the UCL claim fails for the
24 reasons mentioned above. Accordingly, the Court dismisses
25 Plaintiff's UCL claim. The Court grants leave to amend
26 Plaintiff's UCL claim predicated on violation of Sections 2924b,
27 2934a, and 2924.8 because Plaintiff may be able to allege more
28 facts and clarify the claims. However, the Court denies leave to

1 amend Plaintiff's UCL claim to the extent it is predicated on
2 violation of Sections 2823.55, 2923.6, 2923.7, and 2923.5 because
3 amendment would be futile. Because the Court dismisses
4 Plaintiff's UCL claim, the Court need not address Defendants'
5 remedy and standing arguments.

6 6. Sixth Cause of Action for Breach of Civil Code
7 Sections 2923 and 2924

8 Defendants move to dismiss Plaintiff's sixth cause of action
9 for breach of Sections 2923 and 2924 because the sections do not
10 apply retroactively and Plaintiff has failed to allege sufficient
11 facts. Plaintiff argues that Defendants' argument does not
12 preclude an award of damages. Opp. at 14.

13 Specifically, Plaintiff alleges that Defendants violated
14 California Civil Code Sections 2923.5, 2923.55, 2923.6, 2923.7,
15 2924, 2924.17, 2924.18. Plaintiff's claim for violation of
16 Section 2923.5 is moot because the foreclosure sale has already
17 occurred as mentioned above. Plaintiff's claim for violation of
18 Sections 2923.55, 2923.6, and 2923.7, fail because they are part
19 of the HBOR, which took effect on January 1, 2013 and does not
20 apply retroactively, as mentioned above. Similarly, Sections
21 2924.17 and 2924.18 are part of the HBOR. Michael J. Weber
22 Living Trust v. Wells Fargo Bank, N.A., 13-CV-00542-JST, 2013 WL
23 1196959, at *4 (N.D. Cal. Mar. 25, 2013) (holding that plaintiffs
24 sections 2924.17 and 2914.18 failed because the statute did not
25 apply retroactively); Sabherwal v. Bank of New York Mellon,
26 11CV2874 WQH-BGS, 2013 WL 4833940, at *10 (S.D. Cal. Sept. 10,
27 2013) (same). Because Plaintiff has not alleged any conduct by
28 Defendants that occurred after January 1, 2013, Plaintiff's

1 claims fail.

2 Plaintiff argues that Defendants' argument that the HBOR is
3 not retroactive does not preclude an award of damages because the
4 HBOR states that if the foreclosure has not yet occurred, then an
5 injunction is proper relief but if the foreclosure has occurred,
6 then money damages are proper. Opp. at 14. Plaintiff however
7 provides no authority for this argument, and more importantly,
8 fails to acknowledge that HBOR does not apply retroactively.
9 Because the HBOR does not apply, it does not matter whether the
10 foreclosure sale has occurred.

11 Finally, Plaintiff alleges that "Defendants failed to file a
12 Civil Code section 2924 declaration" (Comp. ¶ 65), Defendants
13 "filed a false 2924 declaration" (id.), and "The notice of
14 default filed by Defendants did not contain the required
15 declaration per Code section 2924" (id. ¶ 68). These
16 allegations, as Defendants argue, are contradictory.
17 Furthermore, Section 2924 does not require a declaration. The
18 declaration requirement is found in Section 2923.5, which
19 provides that "a notice of default filed pursuant to Section 2924
20 shall include a declaration that the mortgagee, beneficiary, or
21 authorized agent has contacted the borrower, [or] has tried with
22 due diligence to contact the borrower as required by this
23 section" Cal. Civ. Code § 2923.5(b). However, as
24 mentioned above, claims pursuant to Section 2923.5 are moot.

25 Accordingly, the Court dismisses Plaintiff's sixth cause of
26 action for breach of Sections 2923 and 2924 because the claim
27 does not apply retroactively or is moot. No leave to amend is
28 granted because the claim cannot be saved by amendment.

1 ///

2 7. Seventh Cause of Action for Dual Tracking in
3 Violation of Civil Code Sections 2923 and 2924

4 Defendants move to dismiss Plaintiff's seventh cause of
5 action for dual tracking in violation of Civil Code Sections 2923
6 and 2924² because the statutes do not apply retroactively.
7 Plaintiff argues that the seventh cause of action is proper but
8 provides no grounds. Opp. at 14.

9 Section 2914.18 prohibits the practice of "dual-tracking,"
10 or proceeding with foreclosure while considering a lender's
11 eligibility for loan modifications. Cal. Civ. Code § 2924.18.
12 However, Section 2914.18 became effective on January 1, 2013, and
13 does not apply retroactively. Because Plaintiff has failed to
14 allege actions that she was dual tracked after January 1, 2013,
15 her dual tracking claim fails. Further, Plaintiff cannot allege
16 any facts because the house was sold in 2011.

17 Accordingly, the Court dismisses Plaintiff's seventh cause
18 of action. The Court does not grant Plaintiff leave to amend
19 because Plaintiff cannot allege facts to show dual tracking.

20 III. ORDER

21 For the reasons set forth above, the Court GRANTS WITH
22 PREJUDICE Defendants' Motion to Dismiss:

- 23 (1) Plaintiff's fifth cause of action for unfair business
24

25 ² In the complaint, the header for the seventh cause of action
26 provides, "Dual Tracking in Violation of Civil Code sections 2953
27 and 2954" however the body of complaint states "Defendants'
28 violations under Civil Code sections 2923 and 2924 et. seq."
(Compl. ¶ 75). Accordingly, the Court finds that the header
mistakenly lists the Sections 2953 and 2954 and the correct
sections are Sections 2923 and 2924.

1 practices predicated on violation of Sections 2823.55, 2923.6,
2 2923.7, and 2923.5;

3 (2) Plaintiff's sixth cause of action for breach of
4 Sections 2923 and 2924; and

5 (3) Plaintiff's seventh cause of action for dual tracking
6 in violation of Civil Code Sections 2923 and 2924.

7 The Court DISMISSES WITH LEAVE TO AMEND:

8 (1) Plaintiff's first cause of action for breach of
9 contract;

10 (2) Plaintiff's second cause of action for breach of the
11 covenant of good faith and fair dealing;

12 (3) Plaintiff's third cause of action for wrongful
13 foreclosure;

14 (4) Plaintiff's fourth cause of action for
15 misrepresentation; and

16 (5) Plaintiff's fifth cause of action for unfair business
17 practices predicated on violation of Sections 2924b, 2934a, and
18 2924.8.

19 Plaintiff must file her Amended Complaint within twenty (20)
20 days from the date of this Order. Defendants shall file their
21 responsive pleading within twenty (20) days thereafter. If
22 Plaintiff elects not to file an Amended Complaint, she should
23 file a notice of dismissal within the next twenty (20) days.

24 IT IS SO ORDERED.

25 Dated: January 28, 2014

26
27
28

JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE