

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

SAMUEL RODRIGUEZ,

Plaintiff,

v.

WELLS FARGO BANK, N.A.; NDEX  
WEST LLC; and DOES 1 through 20,  
inclusive,

Defendants.

No. 2:16-cv-00232-MCE-AC

**MEMORANDUM AND ORDER**

Plaintiff Samuel Rodriguez originally filed this action in the San Joaquin County Superior Court, alleging five causes of action against Defendants Wells Fargo Bank, N.A. and NDEX West, LLC (collectively, "Defendants"). Defendant Wells Fargo removed the case shortly thereafter. On February 11, 2016, Defendants filed a Motion to Dismiss Plaintiff's Complaint in its entirety, arguing that none of Plaintiff's five causes of action stated a claim upon which relief could be granted. ECF No. 5. In its May 5, 2016 Memorandum and Order, this Court granted Defendants' motion, dismissing Plaintiff's Third and Fourth Causes of Action without leave to amend, and dismissing Plaintiff's First, Second, and Fifth Causes of Action with leave to amend. Order, ECF No. 16.<sup>1</sup> Plaintiff thereafter filed a First Amended Complaint ("FAC"), re-alleging what were

---

<sup>1</sup> By the same Order, the Court denied Plaintiff's Motion to Remand (ECF No. 9).

1 previously his First, Second, and Fifth Causes of Action. FAC, ECF No. 17. Presently  
2 before the Court is Defendants' Motion to Dismiss Plaintiff's FAC.<sup>2</sup> Def.'s Mot., ECF  
3 No. 19. For the following reasons, Defendants' Motion to Dismiss is GRANTED with  
4 final leave to amend.

### 6 **BACKGROUND**<sup>3</sup>

7  
8 Plaintiff obtained a mortgage loan from Wells Fargo's predecessor in November  
9 2006. The loan was memorialized in a promissory note and secured by a deed of trust  
10 recorded against the real property known as 15255 6th Street, Lathrop, CA 95330  
11 ("Subject Property"). In his FAC, Plaintiff alleges that a trustee's sale initially took place  
12 in 2011, but that the foreclosure was unwound at some point and Plaintiff learned in  
13 2013 that he was still on title and still in default. At that time, Plaintiff claims he  
14 requested foreclosure prevention and assistance. In April 2013, Plaintiff was more than  
15 \$77,000 in arrears on the loan, and Defendant NDEX accordingly recorded a Notice of  
16 Default ("NOD") on the Subject Property, and further recorded an Election to Sell Under  
17 Deed of Trust.

18 Attached to the NOD was a Declaration of Compliance representing that  
19 Defendant Wells Fargo had contacted Plaintiff to "assess the borrower's financial  
20 situation and explore options for the borrower to avoid foreclosure" at least thirty days  
21 before the NOD was recorded. Plaintiff alleges that the declaration is "false" because  
22 "the required contacts with Plaintiff had not been met," in violation of California Civil  
23 Code § 2924.55. Plaintiff also claims he was never reviewed for a first lien loan  
24 modification and believes that if he had been reviewed for loan modification, Defendant  
25 Wells Fargo would have concluded that he qualified for a permanent loan modification.

---

26 <sup>2</sup> Because oral argument would not have been of material assistance in deciding these motions,  
27 the Court ordered that they be submitted on the briefs pursuant to Local Rule 230(g).

28 <sup>3</sup> The following recitation of background facts is taken, sometimes verbatim, from Plaintiff's First Amended Complaint.

1 Plaintiff further alleges that even though he submitted a loan modification  
2 application, Defendants continued to tell him they never received it. He claims  
3 Defendants repeatedly asked for documents that he had already submitted, and that  
4 throughout the process, Defendants recorded NODs and at least one Notice of Trustee's  
5 Sale. Plaintiff claims Defendants have not made a written determination that Plaintiff is  
6 not eligible for a first lien loan modification, in violation of California Civil Code § 2923.6.

7 Finally, Plaintiff alleges that Defendants failed to provide certain documents in  
8 connection with his mortgage loan and failed to assign a single point of contact ("SPOC")  
9 to respond to his inquiries about the status of that loan. Plaintiff alleges that the actions  
10 and inactions of Defendants amount to unfair competition under California Business and  
11 Professions Code § 17200.

12 Plaintiff therefore maintains three causes of action in his FAC: (1) violation of  
13 California Civil Code § 2923.55; (2) violation of California Civil Code § 2923.6; and  
14 (3) unfair business practices under California Business and Professions Code §§  
15 17200–17204.

## 17 STANDARD

18  
19 On a motion to dismiss for failure to state a claim under Federal Rule of Civil  
20 Procedure 12(b)(6), all allegations of material fact must be accepted as true and  
21 construed in the light most favorable to the nonmoving party. Cahill v. Liberty Mut. Ins.  
22 Co., 80 F.3d 336, 337-38 (9th Cir. 1996). Rule 8(a)(2) "requires only 'a short and plain  
23 statement of the claim showing that the pleader is entitled to relief' in order to 'give the  
24 defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell  
25 Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41,  
26 47 (1957)). A complaint attacked by a Rule 12(b)(6) motion to dismiss does not require  
27 detailed factual allegations. However, "a plaintiff's obligation to provide the grounds of  
28 his entitlement to relief requires more than labels and conclusions, and a formulaic

1 recitation of the elements of a cause of action will not do.” Id. (internal citations and  
2 quotations omitted). A court is not required to accept as true a “legal conclusion  
3 couched as a factual allegation.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting  
4 Twombly, 550 U.S. at 555). “Factual allegations must be enough to raise a right to relief  
5 above the speculative level.” Twombly, 550 U.S. at 555 (citing 5 Charles Alan Wright &  
6 Arthur R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004) (stating that the  
7 pleading must contain something more than “a statement of facts that merely creates a  
8 suspicion [of] a legally cognizable right of action”)).

9 Furthermore, “Rule 8(a)(2) . . . requires a showing, rather than a blanket  
10 assertion, of entitlement to relief.” Twombly, 550 U.S. at 555 n.3 (internal citations and  
11 quotations omitted). Thus, “[w]ithout some factual allegation in the complaint, it is hard  
12 to see how a claimant could satisfy the requirements of providing not only ‘fair notice’ of  
13 the nature of the claim, but also ‘grounds’ on which the claim rests.” Id. (citing Wright &  
14 Miller, supra, at 94, 95). A pleading must contain “only enough facts to state a claim to  
15 relief that is plausible on its face.” Id. at 570. If the “plaintiffs . . . have not nudged their  
16 claims across the line from conceivable to plausible, their complaint must be dismissed.”  
17 Id. However, “[a] well-pleaded complaint may proceed even if it strikes a savvy judge  
18 that actual proof of those facts is improbable, and ‘that a recovery is very remote and  
19 unlikely.’” Id. at 556 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

20 A court granting a motion to dismiss a complaint must then decide whether to  
21 grant leave to amend. Leave to amend should be “freely given” where there is no  
22 “undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice  
23 to the opposing party by virtue of allowance of the amendment, [or] futility of the  
24 amendment . . . .” Foman v. Davis, 371 U.S. 178, 182 (1962); Eminence Capital, LLC v.  
25 Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (listing the Foman factors as those to  
26 be considered when deciding whether to grant leave to amend). Not all of these factors  
27 merit equal weight. Rather, “the consideration of prejudice to the opposing party . . .  
28 carries the greatest weight.” Id. (citing DCD Programs, Ltd. v. Leighton, 833 F.2d 183,

1 185 (9th Cir. 1987)). Dismissal without leave to amend is proper only if it is clear that  
2 “the complaint could not be saved by any amendment.” Intri-Plex Techs. v. Crest Group,  
3 Inc., 499 F.3d 1048, 1056 (9th Cir. 2007) (citing In re Daou Sys., Inc., 411 F.3d 1006,  
4 1013 (9th Cir. 2005); Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir.  
5 1989) (“Leave need not be granted where the amendment of the complaint . . .  
6 constitutes an exercise in futility . . .”)).

## 8 ANALYSIS

### 10 A. First Cause Of Action For Violation Of California Civil Code § 2924.55

11 California Civil Code § 2923.55 forbids lenders, servicers, and trustees from  
12 recording a notice of default without contacting, or making a good-faith attempt to  
13 contact the borrower to discuss foreclosure avoidance options. Cal. Civ. Code  
14 § 2923.55(b)(2). Plaintiff alleges that Defendants executed and recorded the NOD  
15 without making these contacts, and that the attached Declaration of Compliance—which  
16 represents that Defendant Wells Fargo contacted Plaintiff to “assess the borrower’s  
17 financial situation and explore options for the borrower to avoid foreclosure” at least thirty  
18 days before the Notice of Default was recorded—is false.

19 Though Plaintiff’s FAC has added numerous allegations, including that  
20 Defendants caused confusion by recording various documents presumably in error,  
21 Plaintiff’s new allegations do nothing to substantiate his claim that Defendants failed to  
22 contact him prior to recording the relevant NOD. In fact, Plaintiff specifically alleges that  
23 he was told he could submit a loan modification application and that each time he called,  
24 Defendants told him they had not received all the necessary paperwork. FAC ¶ 22. He  
25 further alleges that he was “working with the Defendants when they decided to file the  
26 NOD.” FAC ¶ 37. These statements directly contradict Plaintiff’s claim that he was not  
27 in contact with Defendants prior to recordation of the NOD.

28 ///

1 As for Plaintiff's allegation that the declaration is false, as explained in this Court's  
2 prior Order dismissing Plaintiff's First Cause of Action (ECF No. 16), a conclusory  
3 allegation that the declaration is false is insufficient to overcome the presumption that  
4 Wells Fargo complied with its statutory obligations. See e.g., Kamp v. Aurora Loan  
5 Services, No. SACV 09-00844-CJC(RNBx), 2009 WL 3177636, at \*2 (C.D. Cal. Oct. 1,  
6 2009) ("[Plaintiffs'] claim fails because their conclusory assertions are contradicted by  
7 the notice of default . . . , which includes the declaration required by § 2923.5.");  
8 Juarez v. Wells Fargo Bank, N.A., No. CV 09-3104 AHM (AGRx), 2009 WL 3806325, at  
9 \*2 (C.D. Cal. Nov. 11, 2009) (holding that the declaration attached to the notice showed  
10 that Wells Fargo did in fact comply with Section 2923.5).<sup>4</sup> Plaintiff's FAC contributes  
11 nothing to this claim, and Plaintiff has therefore failed to state a violation of California  
12 Civil Code § 2923.55.<sup>5</sup>

13 Because Plaintiff has failed to cure the defects present in his original Complaint,  
14 his First Cause of Action is dismissed with final leave to amend.

15 ///

16 ///

17 ///

18 ///

19 ///

---

21 <sup>4</sup> Before 2013, California Civil Code § 2923.5 applied to Wells Fargo and other large lending  
22 institutions. Section 2923.5 has now been replaced by a counterpart provision, California Civil Code  
23 § 2923.55. Fink v. Wells Fargo Bank, N.A., No. 15-cv-0001-YGR, 2015 WL 1204854, at \*4 (N.D. Cal.  
Mar. 16, 2015) ([Section 2923.5] had a sunset date of January 1, 2013, when it was replaced with Civil  
Code § 2923.55. . . .").

24 <sup>5</sup> Plaintiff's FAC states that the "boilerplate declaration was false because (1) Plaintiff was not  
25 reviewed for a first lien loan modification, and (2) had the review been conducted, the Beneficiary would  
26 have assessed Plaintiff for all foreclosure prevention alternatives and concluded that Plaintiff[] did qualify  
27 for a permanent modification as an alternative to foreclosure." FAC, ¶ 21. This argument misses the  
28 mark. California Civil Code § 2923.55(c) simply requires that the NOD include a declaration stating that  
the borrower was contacted, or that such contact was attempted or otherwise not required. As provided  
above, Plaintiff's other allegations indicate that he was in fact appropriately contacted regarding his  
financial situation and the status of his loan. Because there is no right to a loan modification, Cal. Civ.  
Code § 2923.4(a), the outcome of that contact does not render the declaration false.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**B. Second Cause Of Action For Violation Of California Civil Code § 2924.6**

California Civil Code § 2923.6 prohibits a mortgage servicer or trustee from recording an NOD during the pendency of a complete first lien loan modification application. As with his original complaint, Plaintiff’s FAC fails to allege that he had submitted a complete loan modification to Defendant Wells Fargo for review when the NOD was recorded. To the contrary, Plaintiff’s allegations indicate that Defendants informed Plaintiff on more than one occasion that they were not in receipt of a completed application. See FAC ¶¶ 22–24. Though Plaintiff alleges that Defendants requested documents he had already provided, nowhere does Plaintiff allege that he submitted a completed loan modification application. This is a fatal flaw, and Plaintiff’s Second Cause Action must be dismissed with final leave to amend.

**C. Third Cause Of Action For Violation Of California’s Unfair Competition Law**

Lastly, Plaintiff alleges that Defendants violated California’s Unfair Competition Law (“UCL”) by failing to provide certain documents in connection with his mortgage loan and by failing to assign an SPOC to respond to his inquiries about the status of that loan.<sup>6</sup> Defendants argue that Plaintiff lacks standing to bring this claim.

As in the Court’s previous Order, the Court agrees with Defendants. Several courts have held that a plaintiff who has already defaulted on his loan at the time the allegedly unfair actions occurred lacks standing to pursue a UCL claim. See e.g., Greene v. Wells Fargo Bank, N.A., No. C 15-00048 JSW, 2015 WL 12952701, at \*3 (N.D. Cal. Nov. 30, 2015) (“Courts have held that a plaintiff cannot allege the threshold standing requirement of causation when the plaintiff was already in default before the

---

<sup>6</sup> To the extent that Plaintiff’s UCL claim is premised on and derivative of the alleged violations of California Civil Code §§ 2923.55 and 2923.6, Plaintiff’s Third Cause of Action fails for the same reasons that his First and Second fail.

1 alleged misconduct was committed. Any economic injury due to the foreclosure would  
2 be caused by the plaintiff's default and not by the defendant's conduct.”).

3 Even excluding Plaintiff's declaration to the Bankruptcy Court in 2011 in which he  
4 represented that he would be “unable to retain” his home and intended to surrender the  
5 Subject Property due to a reduction in his household income (RJN, Ex. G, ECF  
6 No. 19-1),<sup>7</sup> Plaintiff seems to concede in his FAC that he was in default on his loan at  
7 least as of 2013. FAC, ¶ 19. Indeed, nowhere does Plaintiff deny that he was in default  
8 at the time Defendants recorded the NOD. Rather, he argues that either (1) he was not  
9 contacted prior to the recording of the NOD, or (2) that he was in the process of  
10 attempting to modify his loan at the time the NOD was recorded. Accordingly, Plaintiff's  
11 Third Cause of Action must also be dismissed with final leave to amend.

### 12 13 **CONCLUSION**

14  
15 For the reasons set forth above, Defendants' Motion to Dismiss Plaintiffs' First  
16 Amended Complaint is GRANTED with final leave to amend. Plaintiff shall file any  
17 amended complaint within twenty (20) days of the date this Order is filed electronically.  
18 If no amended complaint is filed within the twenty (20)-day period, without further notice  
19 to the parties, the causes of action dismissed by virtue of this Memorandum and Order  
20 will be dismissed with prejudice.

21 IT IS SO ORDERED.

22 Dated: March 6, 2017

23  
24   
25 MORRISON C. ENGLAND, JR.  
26 UNITED STATES DISTRICT JUDGE

27 <sup>7</sup> With respect to Defendant's Request for Judicial Notice (ECF No. 19-1), Plaintiff does not object  
28 to Defendants' exhibits A, B, C, D, E, H, L, M, N, or O, and the request is therefore GRANTED. The Court  
does not need to consider Exhibits F, G, I, J, or K in making the present ruling, and therefore declines to  
rule on the request as to those exhibits.