

1 I. PROCEDURAL HISTORY

2 On February 22, 2016, Mr. Palma filed suit in the Superior Court for the County of
3 Sacramento. ECF No. 2. After defendants removed the case to this court, *id.*, Mr. Palma filed the
4 operative First Amended Complaint, FAC, ECF No. 16, naming as defendants Select Portfolio
5 Services, Inc. (SPS) and National Default Servicing Corporation (National Default), Wells Fargo
6 Bank (Wells Fargo). FAC ¶¶ 2–5.¹

7 Mr. Palma alleges defendants (1) violated California Civil Code § 2923.6
8 (prohibiting “dual tracking”); (2) violated California Civil Code § 2923.7 (requiring a “single
9 point of contact”); (3) were negligent in servicing Mr. Palma’s loan modification application; and
10 (4) violated California Business and Professions Code § 17200, *et seq.*, by engaging in unfair
11 business practices. FAC ¶¶ 27–56. Mr. Palma also files claims to (5) quiet title on the subject
12 Property, *id.* ¶¶ 57–62, and (6) to cancel the trustee’s deed upon sale on the subject Property, *id.*
13 ¶¶ 63–68.

14 II. FACTUAL ALLEGATIONS

15 Mr. Palma lives on Riding Trail Drive in the County of Sacramento (the
16 “Property”). FAC ¶ 1. On or about July 18, 2006, he refinanced his home, and as evidence of
17 this loan, executed a promissory note and a deed of trust as security for the note. *Id.* ¶ 17. The
18 deed of trust was recorded in the “Official Records” of the Sacramento County Recorder’s Office.

19
20 ¹ Plaintiff also names Doe defendants. The Ninth Circuit provides “[plaintiffs] should be
21 given an opportunity through discovery to identify [] unknown defendants” “in circumstances . .
22 . ‘where the identity of the alleged defendant[] [is] not [] known prior to the filing of a
23 complaint.’” *Wakefield v. Thompson*, 177 F.3d 1160, 1163 (9th Cir. 1999) (quoting *Gillespie v.*
Civiletti, 629 F.2d 637, 642 (9th Cir. 1980)) (modifications in original).

24 Plaintiff is cautioned that such defendants will be dismissed where “it is clear that
25 discovery would not uncover the identities, or that the complaint would be dismissed on other
26 grounds.” *Id.* (quoting *Gillespie*, 629 F.2d at 642). Federal Rule of Civil Procedure 4(m), as
27 recently amended, provides for dismissal of defendants not served within 90 days of filing of the
28 complaint unless plaintiff shows good cause. *See Glass v. Fields*, No. 09–00098, 2011 U.S. Dist.
LEXIS 97604, at *3 (E.D. Cal. Aug. 31, 2011); *Hard Drive Prods. v. Does*, No. 11–01567, 2011
U.S. Dist. LEXIS 109837, at *2–4 (N.D. Cal. Sep. 27, 2011).

1 *Id.* The named trustee in the deed of trust was “American General Financial Services,” and the
2 named lender in the deed of trust was “Countrywide Financial Corporation.” *Id.* SPS was the
3 servicer of Mr. Palma’s loan, Wells Fargo was the beneficiary, and National Default was the
4 foreclosure trustee. *Id.* ¶ 19.

5 In 2013, Mr. Palma found himself in financial distress. *Id.* ¶ 20. As a result, he
6 submitted a complete first lien loan modification application to SPS in or about October 2013. *Id.*
7 ¶ 21. SPS remained in contact with Mr. Palma to service his loan modification application by
8 informing him of the supplemental documents needed to review the application. *Id.* ¶ 24.
9 However, when Mr. Palma contacted SPS to inquire about the status of the loan modification
10 application, Mr. Palma did not speak with the same person, or team of persons, as to the
11 application’s status. *Id.* ¶ 38.

12 On April 1, 2014, without issuing a written letter either approving or denying Mr.
13 Palma’s loan modification application, defendants² recorded a Notice of Default (NOD) against
14 the Property. *Id.* ¶ 21. Defendants then recorded a Notice of Trustee’s Sale on November 12,
15 2014. *Id.* ¶ 22. On or about September 2, 2015, defendants foreclosed on the Property. *Id.* ¶ 23.

16 At the foreclosure auction, after nobody appeared to purchase the Property, the
17 Property reverted to the loan’s beneficiary, Wells Fargo, and a Trustee’s Deed upon Sale was
18 recorded. *Id.* Mr. Palma alleges Wells Fargo then “moved” to evict him, but does not clarify
19 how. *Id.* ¶ 25. In any event, Mr. Palma alleges he now faces the loss of possession of the
20 Property, which he considers his home. *Id.*

21 Mr. Palma alleges, because of defendants’ conduct, he did not get the benefit of a
22 permanent modification and his loan balance has increased with arrears, penalties, and fees.
23 *Id.* ¶ 26.

24 III. JUDICIAL NOTICE

25 Defendants request the court take judicial notice of Mr. Palma’s Complaint, First
26 Amended Complaint, and Summons filed in *Ray Palma v. Bank of America, N.A., et al.*, No. 34–

27 _____
28 ² Wherever the court uses the plural, plaintiff does not specify a particular defendant.

1 2015–00180154 (Cal. Super. Ct. Sacramento filed June 5, 2015). Defs.’ Req. J. Notice (RJN),
2 ECF No. 20. In the state case, Mr. Palma filed suit against Bank of America and SPS. *See* Defs.’
3 RJN Ex. A at 4 (Complaint), ECF No. 20-1. On February 2, 2016, the state court dismissed Mr.
4 Palma’s suit against SPS with prejudice. *Ray Palma v. Bank of America, N.A., et al.*, No. 34–
5 2015–00180154 (Dkt. Nos. 33–36), and Mr. Palma has otherwise requested dismissal of the entire
6 state suit. *Id.* (Dkt. No. 47).

7 Defendants also request the court judicially notice the following statements made
8 in Mr. Palma’s state court complaint:

- 9 • On or about November 27, 2012, SPS offered Plaintiff a loan modification
10 with respect to the Loan. State Court Compl. ¶ 11.
- 11 • On or about March 3, 2014, SPS contacted Plaintiff and informed him that he
12 prequalified for a repayment plan that would enable him to become current on
13 the Loan. SPS’s approval of the repayment was contingent upon Plaintiff
14 submitting certain financial-related documents. *Id.* ¶ 17.
- 15 • On or about September 2014, SPS informed Plaintiff that his repayment plan
16 was being dissolved and that Plaintiff would instead be reviewed for another
17 loan modification. Plaintiff submitted the necessary documents in order to be
18 reviewed for SPS’ proposed loan modification. *Id.* ¶ 24.
- 19 • On or about October 21, 2014, SPS advised Plaintiff that it had not received
20 the documentation needed for SPS to review Plaintiff for its proposed loan
21 modification. *Id.* ¶ 25.
- 22 • On or about November 7, 2014, Plaintiff resent all of the documentation
23 needed for SPS to review Plaintiff for its proposed loan modification. *Id.* ¶ 26.
- 24 • On or about November 11, 2014, SPS denied Plaintiff’s request for a loan
25 modification without providing a reason. *Id.* ¶ 27.

26 Defs.’ RJN Ex. A at 4–8; Mot. at 8.

27 The court generally confines itself to the four corners of a complaint in ruling on a
28 Rule 12(b)(6) motion. *See Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (“[A] court

1 may generally consider only allegations contained in the pleadings.”). However, the court can
2 consider documents incorporated into the complaint by reference, as well as any relevant matters
3 subject to judicial notice. *Perkins v. Linked In Corp.*, 53 F. Supp. 3d 1190, 1203–04 (N.D. Cal.
4 2014). A court may take judicial notice of an adjudicative fact if requested by a party and
5 “supplied with the necessary information.” Fed. R. Evid. 201(c)(2).

6 A court “may take judicial notice of matters of public record, including duly
7 recorded documents, and court records available to the public through the PACER system³ via the
8 internet.” *Peviani v. Hostess Brands, Inc.*, 750 F. Supp. 2d 1111, 1116 (C.D. Cal. 2010) (citing
9 *C.B. v. Sonora Sch. Dist.*, 691 F. Supp. 2d 1123, 1138 (E.D. Cal. 2009) (internal citations
10 omitted)). Documents are judicially noticeable, however, only for the purpose of determining
11 what statements are contained therein, not to prove the truth of the contents or any party’s
12 assertion of what the contents mean. *United States v. S. Cal. Edison Co.*, 300 F. Supp. 2d 964,
13 975 (E.D. Cal. 2004).

14 Where a party requests judicial notice of the existence of certain statements, and
15 not the accuracy of such statements, judicial notice of the statements’ existence is appropriate. *In*
16 *re Seracare Life Scis., Inc.*, No. 05–2335, 2007 WL 935583, at *3 (S.D. Cal. Mar. 19, 2007). To
17 the extent defendants seek judicial notice of the veracity or authenticity of any arguments or
18 conclusions of fact or law contained in documents, the request should be denied. *See S. Cal.*
19 *Edison Co.*, 300 F. Supp. 2d at 976 (judicially noticing the existence of a document entitled
20 “Forest Service Handbook” but not conclusions of fact or law within it).

21 Here, to the extent defendants seek judicial notice of the veracity or authenticity of
22 any arguments or conclusions of fact or law contained in the state court documents, the request is
23 denied. *See id.* However, the fact that the state court complaint, First Amended Complaint and
24 summons exist, and that plaintiff made certain statements in the complaint, can and will be
25 judicially noticed. *See id.*

26
27 ³ The PACER system is a court generated database that provides public access to court
28 electronic records. *Black’s Law Dictionary* 550 (4th Pocket ed. 2011).

1 IV. LEGAL STANDARD

2 A party may move to dismiss for “failure to state a claim upon which relief can be
3 granted.” Fed. R. Civ. P. 12(b)(6). The motion may be granted only if the complaint lacks a
4 “cognizable legal theory” or if its factual allegations do not support a cognizable legal theory.
5 *Hartmann v. Cal. Dep’t of Corr. & Rehab.*, 707 F.3d 1114, 1122 (9th Cir. 2013). The court
6 assumes these factual allegations are true and draws reasonable inferences from them. *Ashcroft v.*
7 *Iqbal*, 556 U.S. 662, 678 (2009).

8 A complaint need contain only a “short and plain statement of the claim showing
9 that the pleader is entitled to relief,” Fed. R. Civ. P. 8(a)(2), not “detailed factual allegations,”
10 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). But this rule demands more than
11 unadorned accusations; “sufficient factual matter” must make the claim at least plausible. *Iqbal*,
12 556 U.S. at 678. Accordingly, conclusory or formulaic recitations of a cause’s elements do not
13 alone suffice. *Id.* (quoting *Twombly*, 550 U.S. at 555).

14 Evaluation under Rule 12(b)(6) is a context-specific task drawing on “judicial
15 experience and common sense.” *Id.* at 679. Aside from the complaint, and information judicially
16 noticed, district courts have discretion to examine documents incorporated by reference. *Davis v.*
17 *HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1160 (9th Cir. 2012); *W. Radio Servs. Co. v. Qwest*
18 *Corp.*, 678 F.3d 970, 976 (9th Cir. 2012). The court need not accept as true allegations that
19 contradict matters properly subject to judicial notice or by exhibit.
20 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

21 V. DISCUSSION

22 A. State Court Filings vs. Operative First Amended Complaint

23 Throughout their motion, defendants argue the operative First Amended
24 Complaint should be dismissed because its allegations contradict statements made in the
25 complaint filed in state court, in *Ray Palma v. Bank of America, N.A., et al.*, No. 34–2015–
26 00180154. *See generally* Mot. Defendants seek to undermine the operative complaint’s
27 allegations in two ways: (1) pointing to judicially noticed statements to undermine the allegations
28 of the operative complaint, and (2) invoking the doctrine of judicial estoppel to preclude Mr.

1 Palma from proceeding on the allegations of the First Amended Complaint. *See id.* at 10. Mr.
2 Palma contends defendants cannot challenge the veracity of Mr. Palma’s complaint by
3 pointing to allegations made in a prior suit. Opp’n at 4. The court addresses each of defendants’
4 arguments in turn.

5 1. Judicially Noticeable Statements

6 Defendants argue that Mr. Palma’s “prior allegations demonstrate that he did not
7 submit any loan modification application to SPS until November 7, 2014,” Mot. at 10, he was
8 provided with a Single Point of Contract (SPOC), *id.* at 12, and SPS did not take an “excessive
9 [amount of] time to make a determination [on Plaintiff’s application],” *id.* at 14. The court
10 considers these statements not for their truth but as statements Mr. Palma made to a state tribunal.

11 2. Judicial Estoppel

12 Defendants cite to legal authority standing for the proposition that the doctrine of
13 judicial estoppel should be applied to dismiss the operative complaint. *See* Mot. at 10 (citing
14 *Fredenburg v. Contra Costa Cnty. Dep’t of Health Servs.*, 172 F.3d 1176, 1179 (9th Cir. 1999)
15 (“The doctrine of judicial estoppel [] . . . precludes litigants from asserting inconsistent positions
16 in different forums.”)).

17 “[W]here a party assumes a certain position in a legal proceeding, and succeeds in
18 maintaining that position, he may not thereafter, simply because his interests have changed,
19 assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in
20 the position formerly taken by him.” *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (citing
21 *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)). This judicial estoppel rule “generally prevents a
22 party from prevailing in one phase of a case on an argument and then relying on a contradictory
23 argument to prevail in another phase.” *Id.* (citation omitted).

24 Courts have uniformly recognized that the purpose of judicial estoppel is “to
25 protect the integrity of the judicial process . . . by “prohibiting parties from deliberately changing
26 positions according to the exigencies of the moment.” *Id.* (internal citations omitted). Timing
27 and outcome matter. “Absent success in a prior proceeding, a party’s later inconsistent position
28

1 introduces no risk of inconsistent court determinations . . . and thus poses little threat to judicial
2 integrity.” *Id.* at 750–51.

3 Generally, three factors “inform the decision whether to apply the doctrine in a
4 particular case.” *Id.* at 750. “First, a party’s later position must be ‘clearly inconsistent’ with its
5 earlier position.” *Id.* “Second, courts regularly inquire whether the party has succeeded in
6 persuading a court to accept that party’s earlier position, so that judicial acceptance of an
7 inconsistent position in a later proceeding would create ‘the perception that either the first or the
8 second court was misled.’” *Id.* (citation omitted). “Third, courts ask whether the party seeking to
9 assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on
10 the opposing party if not estopped.” *Id.* at 751.

11 Assuming without deciding the statements made in Mr. Palma’s complaint filed in
12 the state court are “clearly inconsistent” with the allegations made in the operative complaint,
13 judicial estoppel does not apply here. First, defendants cannot contend Mr. Palma succeeded in
14 the prior proceeding because the state court case was dismissed, and no court decision in that case
15 otherwise establishes Mr. Palma succeeded in his representations to the state court. Defendants
16 do not contend Mr. Palma would otherwise derive an unfair advantage from proceeding with the
17 operative complaint.

18 3. Summary

19 To the extent defendants’ motion relies on the theory that the First Amended
20 Complaint impermissibly contradicts statements made in the state court pleadings, the motion is
21 DENIED.

22 B. California Civil Code § 2923.6

23 Defendants contend that even assuming SPS engaged in dual tracking, SPS cured
24 any violation by reviewing and denying Mr. Palma’s application for loan modification. Mot. at
25 11. Mr. Palma contends he properly alleges a violation here because he submitted a complete
26 loan application in October 2013, after which defendants commenced foreclosure proceedings
27 without issuing a decision on or notifying Mr. Palma of the application’s status. Opp’n at 5.
28

1 California Civil Code § 2923.6 prohibits dual tracking, which is the practice of
2 pursuing foreclosure proceedings while a borrower’s complete loan modification application is
3 still pending. *See Jolley v. Chase Home Finance, LLC*, 213 Cal. App. 4th 872, 904 (2013). In
4 particular, section 2923.6(c)(1) provides:

5 If a borrower submits a complete application for a first lien loan
6 modification offered by, or through, the borrower’s mortgage
7 servicer, a mortgage servicer, mortgagee, trustee, beneficiary, or
8 authorized agent shall not record a notice of default or notice of
9 sale, or conduct a trustee’s sale, while the complete first lien loan
modification application is pending . . . until . . . the mortgage
servicer makes a written determination that the borrower is not
eligible for a first lien loan modification, and any appeal period . . .
has expired.

10 Cal. Civ. Code § 2923.6(c)(1). The statute further provides that “the borrower shall have at least
11 30 days from the date of the written denial to appeal the denial and to provide evidence that the
12 mortgage servicer’s determination was in error.” Cal. Civ. Code § 2923.6(d). An application is
13 “complete” when “a borrower has supplied the mortgage servicer with all documents required by
14 the mortgage servicer within the reasonable timeframes specified by the mortgage servicer.” Cal.
15 Civ. Code § 2923.6(h).

16 The court finds Mr. Palma adequately alleged dual tracking in violation of section
17 2923.6. Specifically, he alleges he submitted a completed loan modification application in
18 October 2013 and communicated with defendants regarding supplemental materials necessary for
19 an adequate review. FAC ¶¶ 20, 24. Without informing him of the status of this application,
20 defendants initiated foreclosure proceedings in April 2014, and foreclosed on the Property in
21 September 2015. *Id.* ¶ 22. The court concludes Mr. Palma may proceed on these allegations.
22 Defendants’ motion is DENIED.

23 C. California Civil Code § 2923.7

24 Defendants contend that even if Mr. Palma was not properly provided a SPOC, he
25 has not alleged any harm or injury. Mot. at 12. Mr. Palma contends his First Amended
26 Complaint sufficiently alleges defendants did not provide a SPOC. Opp’n at 6. He alleges no
27 harm or prejudice outside defendants’ failure to identify a SPOC. *Id.*

28

1 Section 2923.7(a) provides when a borrower requests a foreclosure prevention
2 alternative, “the mortgage servicer shall promptly establish a single point of contact and provide
3 to the borrower one or more direct means of communication with the single point of contact.”

4 Cal. Civ. Code § 2923.7(a). The SPOC shall be responsible for:

5 (1) Communicating the process by which a borrower may apply for
6 an available foreclosure prevention alternative and the deadline for
any required submissions to be considered for these options.

7 (2) Coordinating receipt of all documents associated with available
8 foreclosure prevention alternatives and notifying the borrower of
any missing documents necessary to complete the application.

9 (3) Having access to current information and personnel sufficient to
10 timely, accurately, and adequately inform the borrower of the
current status of the foreclosure prevention alternative.

11 (4) Ensuring that a borrower is considered for all foreclosure
12 prevention alternatives offered by, or through, the mortgage
servicer, if any.

13 (5) Having access to individuals with the ability and authority to
14 stop foreclosure proceedings when necessary.

15 Cal. Civ. Code § 2923.7(b). Section 2923.7(e) provides: “[S]ingle point of contact’ means an
16 individual or team of personnel each of whom has the ability and authority to perform the
17 responsibilities [of a SPOC].” Cal. Civ. Code § 2923.7(e). The SPOC requirement helps prevent
18 borrowers from being “given the run-around, being told one thing by one bank employee while
19 something entirely different is being pursued by another.” *Jolley, LLC*, 213 Cal. App. 4th at 905.

20 Mr. Palma alleges that although SPS remained in contact with him throughout the
21 loan modification process by informing him of the supplemental documents he needed to submit
22 to continue with loan modification review, he did not speak with the same person or team of
23 persons when he called to inquire about the status of his application. FAC ¶¶ 24, 38. He also
24 alleges that without informing him of the status of his application, defendants recorded a notice of
25 default on the Property. *Id.* ¶¶ 21, 24. However, Mr. Palma does not allege any injury flowing
26 from not being able to speak with the same person or team of persons, and the allegations of the
27 complaint do not plausibly lead to the inference that Mr. Palma was prejudiced as a result of not
28 having a SPOC. Rather, he kept in consistent contact with SPS, and had his loan modification

1 application processed. *See Cordero v. U.S. Bank, N.A.*, No. 14–1709, 2014 WL 4658757, at *1
2 (S.D. Cal. Sept. 17, 2014) (no § 2923.7 injury where plaintiff, despite not having SPOC, was able
3 to contact loan servicer and submit loan modification application); *Boring v. Nationstar Mortg.,*
4 *LLC*, No. 13–01404, 2014 WL 66776, at *4 (E.D. Cal. Jan. 7, 2014) (no § 2923.7 injury where
5 plaintiffs, despite not having a SPOC, were able to submit loan modification application); *but see*
6 *Mann v. Bank of Am., N.A.*, No. 13–02293, 2014 WL 495617, at *4 (C.D. Cal. Feb. 3, 2014)
7 (allowing § 2923.7 claim where plaintiffs alleged defendant “shuffled them from SPOC to
8 SPOC” and, as result, plaintiffs were required to repeatedly reinform new individuals about
9 details of their loan and received contradictory information from different SPOCs).

10 Defendants’ motion is GRANTED, but Mr. Palma’s claim is dismissed with leave
11 to amend to allege injury flowing from the lack of a SPOC, if he is able to so amend.

12 D. Negligence

13 Defendants contend they do not owe Mr. Palma a duty of care in the servicing of
14 his modified loan application. Mot. at 13. Mr. Palma contends California law imposes a duty of
15 care and he has adequately alleged negligence. Opp’n at 6–7.

16 To state a claim for negligence, the plaintiff must plead: (1) defendants’ duty of
17 care to plaintiff; (2) breach of that duty; (3) causation; and (4) damages. *Truong v. Nguyen*,
18 156 Cal. App. 4th 865, 875 (2007). “The existence of a legal duty to use reasonable care in a
19 particular factual situation is a question of law for the court to decide.” *Vasquez v. Residential*
20 *Invs., Inc.*, 118 Cal.App.4th 269, 278 (2004).

21 The general rule is that “a financial institution owes no duty of care to a borrower
22 when the institution’s involvement in the loan transaction does not exceed the scope of its
23 conventional role as a mere lender of money.” *Nymark v. Heart Fed. Sav. & Loan Ass’n*, 231
24 Cal. App. 3d 1089, 1096 (1991). But “*Nymark* does not support the sweeping conclusion that a
25 lender never owes a duty of care to a borrower.” *Jolley*, 213 Cal. App. 4th at 901 (internal
26 quotation marks omitted). Rather, the court weighs six factors to decide whether a financial
27 institution owes a borrower a duty of care:

1 [1] the extent to which the transaction was intended to affect the
2 plaintiff, [2] the foreseeability of harm to him, [3] the degree of
3 certainty that the plaintiff suffered injury, [4] the closeness of the
4 connection between the defendant's conduct and the injury
5 suffered, [5] the moral blame attached to the defendant's conduct,
6 and [6] the policy of preventing future harm.

7 *Nymark*, 231 Cal. App. 3d at 1098 (quoting *Biakanja v. Irving*, 49 Cal. 2d 647, 650 (1958)).

8 These six factors are commonly referred to as the “*Biakanja* factors” after the *Biakanja* case on
9 which *Nymark* relies.

10 California courts have not settled on a uniform application of the *Biakanja* factors
11 in mortgage cases. Further, neither the California Supreme Court nor the Ninth Circuit has taken
12 up this question. This court recently considered the issue in *Martinez v. Flagstar Bank, FSB*, and
13 concluded a lender “does owe a duty of care to a borrower not to make material misrepresenta-
14 tions about the status of an application for a loan modification,” and that a borrower would
15 foreseeably be harmed “by an inaccurate or untimely communication . . . about the status of a
16 loan modification application.” No. 15–01934, 2016 WL 3906810, at *8 (E.D. Cal. July 19,
17 2016) (citing *Alvarez v. BAC Home Loans Servicing, L.P.*, 228 Cal. App. 4th 941, 947 (2014)).
18 Seeing no reason to deviate from its prior ruling, this court concludes Mr. Palma’s claim can
19 proceed if he plausibly alleges defendants made material misrepresentations by neglecting to
20 inform him foreclosure proceedings would commence at the same time his loan modification
21 application was being considered. *Martinez*, 2016 WL 3906810, at *8.

22 Turning to the operative complaint, the court is able to draw the reasonable
23 inference that defendants owed and breached a duty of care to Mr. Palma. That defendants
24 remained in contact by informing Mr. Palma of the supplemental documents needed to complete a
25 loan modification review suggested that foreclosure would not go forward until his application
26 was adequately considered. Foreclosure nonetheless proceeded, without defendants’ providing
27 notice or discussion regarding the status of Mr. Palma’s application. Further, defendants initiated
28 and completed the foreclosure sale despite the pending application, without informing Mr. Palma
of its status.

1 Mr. Palma has adequately pleaded breach of a duty of care, and defendants'
2 motion is DENIED.

3 E. California Unfair Competition Law (UCL)

4 Defendants contend Mr. Palma's UCL claim should be dismissed because it relies
5 on his flawed section 2923.6 and 2923.7 claims. Mot. at 14–15. Defendants also contend
6 Mr. Palma has not alleged any damages and therefore cannot satisfy the UCL's injury-in-fact
7 requirement. *Id.* at 15. Mr. Palma contends he has properly pleaded a UCL violation based on
8 the statutory violations of sections 2939.6 and 2923.7. Opp'n at 8–9.

9 The UCL authorizes actions for injunctive relief to enjoin "unfair competition."
10 Cal. Bus. & Prof. Code § 17203. Unfair competition includes "any unlawful, unfair or fraudulent
11 business act or practice." *Id.* § 17200. Of particular relevance here, the UCL treats violations of
12 other laws as actionable under the UCL. *Farmers Ins. Exch. v. Sup.Ct.*, 2 Cal.4th 377, 383
13 (1992). In addition to alleging an unlawful, unfair, or fraudulent act, a private party may only
14 sue if it "has suffered injury in fact and has lost money or property as a result of such unfair
15 competition." Cal. Bus. & Prof. Code § 17204; *Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d
16 718, 731 (9th Cir. 2007) ([A] a person asserting an unfair competition claim must allege that (1)
17 he or she "suffered injury in fact," and (2) "lost money or property as a result of such unfair
18 competition.").

19 As to defendants' first argument, the court has already concluded Mr. Palma may
20 proceed on his section 2923.6 claim. Regarding defendants' second argument, the court finds the
21 First Amended Complaint states a claim under the "unlawful" prong of the UCL based, at least,
22 on defendants' alleged dual-tracking in violation of section 2923.6. *See, e.g., Farmers Ins. Exch.*,
23 2 Cal.4th at 383 (the UCL treats violations of other laws as actionable under the UCL).
24 Defendants' argument that plaintiff has not alleged he suffered an injury in fact is not sustainable
25 in the face of plaintiff's allegations that his house was actually foreclosed upon. *See Sullivan v.*
26 *Wash. Mutual Bank*, 2009 WL 3458300, at *4 (N.D.Cal. Oct. 23, 2009) (injury for standing
27 purposes established where defendants were in process of conducting wrongful foreclosure).

28 Mr. Palma may proceed on this claim, and defendants' motion is DENIED.

1 F. Quiet Title

2 Defendants contend the quiet title claim should be dismissed because Mr. Palma
3 has not shown he met the preconditions to claiming ownership of the Sacramento home. Mot. at
4 15. Without specification, plaintiff contends he has adequately alleged a quiet title claim. Opp'n
5 at 10.

6 An action to quiet title may be brought to establish title against adverse claims to
7 real property or any interest therein. Cal. Code Civ. Proc. § 760.020. A quiet title action must
8 plead: (1) a description of the property in question; (2) the basis for plaintiff's title; and (3) the
9 adverse claims to plaintiff's title. *Id.*; *Sowinski v. Wells Fargo Bank, N.A.*, No. 11-6431, 2012
10 WL 5904711, at *2 (N.D. Cal. Nov. 26, 2012). "In order to satisfy the second requirement,
11 plaintiff must allege that he has discharged his debt, regardless to whom it is owed." *Id.* (citing
12 *Kelley v. Mort. Elec. Registration Sys., Inc.*, 642 F. Supp. 2d 1048, 1057 (N.D. Cal. 2009)). Thus,
13 regarding the second prong, "a borrower may not assert 'quiet title' against a mortgagee without
14 first paying the outstanding debt on the property." *Rosenfeld v. JPMorgan Chase Bank, N.A.*,
15 732 F. Supp. 2d 952, 975 (N.D. Cal. 2010) (citation omitted).

16 Mr. Palma nowhere alleges he discharged the debt on the subject Property.
17 Rather, Mr. Palma alleges at the time of foreclosure, he still had an unfulfilled financial
18 obligation encumbering the subject Property. FAC ¶ 26. Because Mr. Palma has not alleged he
19 satisfied his obligations under the deed of trust, he has not stated a claim to quiet title. *See Kelley*,
20 642 F. Supp. 2d at 1057.

21 Defendants' motion on this claim is GRANTED.

22 G. Cancellation of Trustee's Deed upon Sale

23 Defendants contend Mr. Palma's request to cancel the trustee's deed upon sale
24 must be denied because there is no law prohibiting a beneficiary from purchasing the Property
25 where valuable consideration was paid for the note. Mot. at 16. Mr. Palma, without explanation,
26 simply says he properly pled a claim for the cancellation of the trustee's deed upon sale. Opp'n at
27 10.

1 There is “a common law rebuttable presumption that a foreclosure sale has been
2 conducted regularly and fairly.” *6 Angels, Inc. v. Stuart-Wright Mortg., Inc.*, 85 Cal. App. 4th
3 1279, 1284 (2001). Accordingly, “[a] successful challenge to the sale requires evidence of a
4 failure to comply with the procedural requirements for the foreclosure sale that caused prejudice
5 to the person attacking the sale.” *Knapp v. Doherty*, 123 Cal. App. 4th 76, 96 (2004). Ultimately,
6 “the presumption must prevail when the record lacks substantial evidence of a prejudicial
7 procedural irregularity.” *Id.* The touchstone question is whether there is “a substantial defect in
8 the statutory procedure that is prejudicial to the interests of the trustor and claimants.” *Id.*

9 Mr. Palma alleges defendant and mortgage beneficiary Wells Fargo was not a
10 “bona fide” purchaser because it was the beneficiary to the loan and did not pay valuable
11 consideration for the Property at the foreclosure action. FAC ¶ 66. But a beneficiary of a
12 mortgage may purchase the subject property at a trustee’s sale without creating a defect in the
13 deed. *See Davenport v. Seattle Bank*, No. 15–04475, 2015 WL 4886393, at *2, *6 (C.D. Cal.
14 Aug. 14, 2015) (declining to set aside trustee sale where mortgage beneficiary purchased the
15 subject property). The trustee’s deed upon sale, attached to Mr. Palma’s complaint, shows Wells
16 Fargo paid the entire debt of \$1,377,512.85 encumbering the subject property. *See* FAC Ex. B,
17 ECF No. 16-2. Based on the complaint and documents Mr. Palma himself provides, it is not
18 plausible to infer Wells Fargo was not a bona fide purchaser or failed to pay valuable
19 consideration for the Property. *Cf. Knapp*, 123 Cal. App. 4th at 93 (“It is settled that a great
20 disparity between the foreclosure price and the value of the property, by itself, is insufficient to
21 set aside the sale.”). Defendants’ motion as to this claim is GRANTED.

22 VI. LEAVE TO AMEND

23 Under Rule 15 of the Federal Rules of Civil Procedure, leave to amend is to be
24 granted freely. Fed. R. Civ. P. 15(a). The Ninth Circuit has “repeatedly held that a district court
25 should grant leave to amend even if no request to amend the pleading was made, unless it
26 determines that the pleading could not possibly be cured by the allegation of other facts.” *Doe v.*
27 *United States*, 58 F.3d 494, 497 (9th Cir. 1995).

1 Here, the court grants defendants' motion only with respect to the following three
2 claims: (1) violation of 2923.7, (2) quiet title claim, and (3) claim to cancel the trustee's deed
3 upon sale. Regarding the 2923.7 claim, the court grants leave to amend to allege injuries flowing
4 from the defendants' failure to provide an SPOC. Accordingly, this claim is dismissed without
5 prejudice.

6 Regarding the balance of claims, amendment would be futile because Mr. Palma
7 cannot allege he paid the outstanding debt encumbering his Property, or that Wells Fargo was not
8 a bona fide purchaser. Accordingly, these claims are dismissed WITH PREJUDICE.

9 VII. CONCLUSION

10 In light of the foregoing, defendants' motion is DENIED as to Mr. Palma's claims
11 of (1) violation of California Civil Code § 2923.6; (2) negligence; and (3) violation of the UCL.
12 Defendants' motion is GRANTED WITHOUT PREJUDICE on Mr. Palma's claims of (4)
13 violation of California Civil Code § 2923.7. Defendants' motion is GRANTED WITH
14 PREJUDICE on Mr. Palma's claims to quiet title and (6) cancel trustee's deed upon sale. An
15 amended complaint remedying the 2923.7 claim deficiencies shall be filed within fourteen (14)
16 days.

17 In accordance with this court's minute order at ECF No. 38, in light of plaintiff's
18 pro se status, this case is referred to Magistrate Judge Carolyn K. Delaney for handling of pre-
19 dispositive matters.

20 This order resolves ECF No. 19.

21 IT IS SO ORDERED.

22 DATED: April 13, 2017.

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UNITED STATES DISTRICT JUDGE