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UNITED STATES DISTRICT COURT

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EASTERN DISTRICT OF CALIFORNIA

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11 GORDON MCMAHON, an
12 individual;

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13 Plaintiff,

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14 v.

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15 JPMORGAN CHASE BANK, N.A.;
16 SELECT PORTFOLIO SERVICING,
17 INC.; and DOES 1 through 10
18 inclusive,

17

Defendants.

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No. 2:16-cv-1459-JAM-KJN

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT SELECT
PORTFOLIO SERVICING'S MOTION TO
DISMISS**

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Plaintiff Gordon McMahon ("McMahon") sued Defendant Select Portfolio Servicing ("SPS") and other defendants seeking to save his home from foreclosure. ECF No. 1. SPS moves to dismiss McMahon's First Amendment Complaint ("FAC"), ECF No. 26, with prejudice. ECF No. 30. McMahon opposes the motion. ECF No. 36.¹

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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 April 4, 2017.

1 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

2 The Court takes the facts alleged by McMahon as true for
3 purposes of this motion.

4 McMahon obtained a mortgage loan in 2005. FAC ¶ 1. The
5 interest rate and monthly payment increased about two years
6 later, and by the end of 2007, McMahon could not make his
7 mortgage payments. Id.

8 SPS began servicing McMahon's loan in June 2013. FAC ¶ 49.
9 McMahon submitted his first Request for Mortgage Assistance
10 ("RMA") to SPS two months later. FAC ¶ 52. SPS offered McMahon
11 a Trial Period Plan ("TPP"), but calculated that plan using an
12 incorrect amount for McMahon's monthly income. FAC ¶ 57.
13 McMahon informed SPS of this inaccuracy, and SPS revoked the
14 TPP. FAC ¶ 60. In revoking the TPP, SPS used another
15 inaccurate monthly income. Id. McMahon appealed SPS's denial
16 of his RMA, but SPS never responded to the appeal. FAC ¶ 61.

17 In May 2015, Keep Your Home California approved McMahon for
18 up to \$100,000 in Principal Reduction Program funds. FAC ¶ 84.
19 McMahon submitted an RMA notifying SPS of his change in
20 circumstances. Id. SPS denied the RMA, stating that McMahon's
21 "account would not qualify for another government program such
22 as HAMP." FAC ¶¶ 86, 89.

23 McMahon submitted another application in June 2016, which
24 SPS did not respond to. FAC ¶¶ 96-97. McMahon then filed this
25 suit against SPS, seeking a temporary restraining order ("TRO")
26 and preliminary injunction. FAC ¶ 98.

27 The Court granted McMahon's application for TRO on June 29,
28 2016, enjoining SPS from foreclosing on McMahon's property. ECF

1 No. 7. On July 11, the Court stayed the case pending the
2 outcome of McMahon's pending RMA. ECF No. 10. SPS denied the
3 application nine days later. FAC ¶ 99. McMahon appealed SPS's
4 denial, and SPS denied the appeal. FAC ¶¶ 100, 101. On August
5 23, 2016 the Court granted McMahon's motion for preliminary
6 injunction. ECF No. 17

7 McMahon filed another RMA in November 2016. FAC ¶ 102.
8 SPS denied the application and the appeal. FAC ¶¶ 103, 107.
9 McMahon alleges that over the past four years, SPS has failed to
10 appropriately consider his loan modification applications and
11 otherwise comply with the law. FAC ¶ 108.

12 McMahon brings six causes of action against SPS in his FAC:
13 (1) violation of the Homeowners Bill of Rights ("HBOR") at
14 California Civil Code § 2924.12, (2) violation of the Equal
15 Credit Opportunity Act ("ECOA") at 15 U.S.C. § 1691(d)(1),
16 (3) violation of the Real Estate Settlement Procedures Act
17 ("RESPA"), Regulation X at 12 C.F.R. § 1024.41, (4) violation of
18 Regulation X at 12 C.F.R. §§ 1024.35, 1024.36, (5) negligence,
19 and (6) violation of California Business and Professions Code
20 § 17200.

21 22 II. OPINION

23 A. Request for Judicial Notice

24 SPS asks the Court to take judicial notice of eight
25 documents submitted with its motion to dismiss. ECF No. 31.
26 The first seven documents concern the real property at issue and
27 are recorded with the Solano County Recorder's Office. Request
28 for Judicial Notice ("RJN") at 2-3. The Court may take judicial

1 notice of publically recorded documents. Sullivan v. JP Morgan
2 Chase Bank, N.A., 725 F. Supp. 2d 1087, 1091 (E.D. Cal. 2010).
3 The eighth document is McMahon's First Amended Complaint in the
4 case he filed in superior court in December 2014. RJN at 3. A
5 district court may take judicial notice of records in a state
6 court case. Simpson v. Best W. Int'l, Inc., 2012 WL 5499928, at
7 *1 (N.D. Cal. Nov. 13, 2012). The Court therefore grants SPS's
8 request for judicial notice in full.

9 B. Analysis

10 1. First Cause of Action

11 California Civil Code § 2924.12 permits a borrower to bring
12 a lawsuit based upon a violation of the HBOR "[a]fter a
13 trustee's deed upon sale has been recorded" if "actual economic
14 damages . . . result[ed] from a material violation of
15 [s]ection[s] . . . 2923.55, 2923.6 . . . or 2924.17." Cal. Civ.
16 Code § 2924.12(b). Under his first cause of action, McMahon
17 alleges SPS has violated §§ 2923.55, 2923.6, and 2924.17.

18 a. California Civil Code § 2923.55

19 Section 2923.55 states that a servicer may not record a
20 notice of default until after the servicer sends the borrower a
21 statement notifying the borrower that he may request a copy of
22 the promissory note, deed of trust, any assignment, and payment
23 history. Cal. Civ. Code § 2923.55(b)(1)(B).

24 SPS argues McMahon has not plead a § 2923.55 claim because
25 he has not alleged that a *material* violation occurred. Mot. at
26 4. McMahon does not point to any allegation in the FAC
27 indicating how any alleged violation of § 2923.55 was material.

28 Because the need to plead materiality is evident from the

1 face of statute, McMahon has already amended his complaint once,
2 and McMahon brought similar claims in his state court case, the
3 Court finds that granting leave to further amend the complaint
4 would be futile. Centeno v. Wilson, 2010 WL 1980157, at *1
5 (E.D. Cal. May 17, 2010) (“[L]eave to amend may be denied if it
6 appears to be futile.”). The Court therefore dismisses
7 McMahon’s § 2923.55 claim with prejudice.

8 b. California Civil Code § 2923.6

9 Section 2923.6(c) states that a servicer cannot record a
10 notice of default or a notice of trustee’s sale while a complete
11 first lien loan modification is pending. Cal. Civ. Code
12 § 2923.6(c). Section 2923.6(f)(2) states that “[f]ollowing the
13 denial of a first lien loan modification application, the
14 mortgage servicer shall send a written notice to the borrower
15 identifying the reasons for the denial, including . . . [i]f the
16 denial was based on investor disallowance, the specific reasons
17 for the investor disallowance.” Cal. Civ. Code § 2923.6(f)(2).

18 SPS argues it did not violate § 2923.6 because “the
19 operative Notice of Trustee’s Sale was recorded on June 6,
20 2016,” before McMahon sent in his loan application. Mot. at 5.

21 McMahon does not address SPS’s argument in his opposition
22 brief, nor does he indicate in the FAC when the alleged § 2923.6
23 violation occurred. McMahon does not clarify whether any
24 § 2923.6 violation occurred in the context of the June 6, 2016
25 Notice of Trustee’s Sale or at some other point. The Court
26 dismisses McMahon’s § 2923.6(c) claim with prejudice.

27 c. California Civil Code § 2924.17

28 Section 2924.17(a) requires that any document filed in the

1 context of a foreclosure proceeding "shall be accurate and
2 complete and supported by competent and reliable evidence."
3 Cal. Civ. Code § 2924.17(a). McMahon alleges SPS violated
4 § 2924.17 because it "failed to ensure Plaintiff's loan is
5 subject to the [Pooling and Servicing Agreements ("PSA")] in
6 question, because the PSA lacks Exhibit B, which identifies the
7 loans subject into the PSA in question." FAC at 20.

8 SPS argues "Plaintiff's allegations . . . are predicated on
9 his challenge to ownership of the loan. However, Section
10 2924.17 does not pertain to authority to foreclose, but rather
11 to declarations substantiating the default precipitating the
12 foreclosure." Mot. at 6.

13 McMahon does not respond to this argument in his
14 opposition. McMahon also does not clarify which document was
15 inaccurate or incomplete or indicate how any alleged § 2924.17
16 violation was material. McMahon cannot go forward on this claim
17 with such vague allegations, and he has not indicated that he
18 has any more specific allegations to support this claim. The
19 Court dismisses McMahon's § 2924.17 claim with prejudice.

20 2. Second Cause of Action

21 McMahon brings his second claim under 15 U.S.C.
22 § 1691(d)(1), which states "[w]ithin thirty days . . . after
23 receipt of a completed application for credit, a creditor shall
24 notify the applicant of its action on the application." FAC at
25 20. However, the ECOA's notice requirements do not apply to a
26 creditor's "refusal to extend additional credit under an existing
27 credit arrangement where the applicant is delinquent or otherwise
28 in default." Vasquez v. Bank of Am., N.A., 2013 WL 6001924, at

1 *12 (N.D. Cal. Nov. 12, 2013) (quoting 15 U.S.C. § 1691(d)(6)).
2 Exhibit C to SPS's RJN shows McMahon defaulted on his mortgage in
3 September 2010. Exh. C to RJN. Accordingly, the ECOA notice
4 requirements do not apply here, and the Court dismisses McMahon's
5 second cause of action with prejudice.

6 3. Fourth Cause of Action²

7 McMahon alleges SPS violated Regulation X of RESPA because
8 SPS "failed to evaluate and make a determination on each of
9 Plaintiff's [RMAs]³ within thirty days and failed to acknowledge
10 that Plaintiff's application was complete or . . . provide an
11 incomplete information notice." FAC § 145.

12 Regulation X states:

13 (i) If a servicer receives a loss mitigation
14 application [the] servicer shall . . .

15 (B) Notify the borrower in writing within 5
16 days . . . after receiving the loss mitigation
17 application that the servicer acknowledges
18 receipt of the loss mitigation application and
19 that the servicer has determined that the loss
20 mitigation application is either complete or
incomplete. If a loss mitigation application is
incomplete, the notice shall state the
additional documents and information the
borrower must submit to make the loss
mitigation application complete.

21 12 C.F.R. § 1024.41(b)(2)(i). Regulation X also states that "[a]
22 servicer is only required to comply with the requirements of this
23 section for a single complete loss mitigation application for a
24 borrower's mortgage loan account." 12 C.F.R. § 1024.41(i).

25 _____
26 ² McMahon brings his third cause of action against only JPMorgan
Chase—not SPS—and therefore it is not at issue in this Order.

27 ³ McMahon alleges he submitted RMAs on January 29, 2014, November
28 12, 2014, May 29, 2015, June 20, 2016, and November 25, 2016.
FAC § 144.

1 SPS argues that the safe harbor provisions of this statute
2 are applicable in that McMahon has admitted that the required
3 written notifications were given after the January 10, 2014
4 effective date of the regulation. In McMahon's state court
5 complaint, attached to SPS's request for judicial notice as
6 Exhibit 8, McMahon states that he sent SPS a loan modification on
7 January 29, 2014. Compl. ¶ 58, RJN Exh. 8. McMahon then states
8 that "SPS acknowledged Plaintiff's submission of documents" four
9 days later. Id. ¶ 59. McMahon also states that SPS sent McMahon
10 a letter indicating SPS had received his complete application.
11 Id. ¶ 60.

12 In light of McMahon's allegations in his state court
13 complaint, the Court finds that McMahon is unable to set forth a
14 viable claim for a violation of 12 C.F.R. § 1024.41 and dismisses
15 this claim with prejudice.

16 4. Fifth Cause of Action

17 Under his heading for the fifth cause of action, McMahon
18 alleges violations of three different provisions of Regulation
19 X: 12 C.F.R. § 1024.35(d), (e) and 12 C.F.R. § 1024.36(d).

20 a. Sections 1024.35(d), (e)

21 Under § 1024.35(d), a servicer who receives a notice of
22 error ("NOE") from a borrower "shall provide to the borrower a
23 written response acknowledging receipt of the notice of error."
24 12 C.F.R. § 1024.35(d).

25 Section 1024.35(e) states that a "servicer must respond to
26 a notice of error by either:

- 27 (A) Correcting the error or errors identified by
28 the borrower and providing the borrower with
a written notification of the correction,

1 the effective date of the correction, and
2 contact information, including a telephone
number, for further assistance; or

3 (B) Conducting a reasonable investigation and
4 providing the borrower with a written
notification that includes a statement that
5 the servicer has determined that no error
occurred, a statement of the reason or
6 reasons for this determination, a statement
of the borrower's right to request documents
7 relied upon by the servicer in reaching its
determination, information regarding how the
8 borrower can request such documents, and
contact information, including a telephone
9 number, for further assistance.

10 12 C.F.R. § 1024.35(e)(1)(i).

11 A servicer need not comply with these sections, however, if
12 an "asserted error is substantially the same as an error
previously asserted by the borrower." 12 C.F.R.

13 § 1024.35(g)(1)(i). If a servicer determines it does not need
14 to comply with paragraphs (d) or (e) because the asserted error
15 is duplicative of a previously asserted error, "the servicer
16 shall notify the borrower of its determination in writing." 12
17 C.F.R. § 1024.35(g)(2).

18 McMahan alleges he sent "an NOE and/or RFI" on May 26,
19 2014, December 5, 2015, December 29, 2016, and January 20, 2017.
20 FAC ¶ 153. SPS contends it responded to McMahan's December 5,
21 2015 NOE. Mot. at 8. SPS argues after it responded to
22 McMahan's December 5 NOE, it did not need to respond to the
23 subsequent NOEs because the assertions of error were duplicative
24 of the December 5 NOE. Mot. at 8-9. McMahan responds that even
25 if SPS found the asserted errors duplicative, SPS had to notify
26 McMahan of its decision, which McMahan alleges SPS did not do.

27 SPS's argument ignores the plain text of the regulation,
28

1 which states that a servicer has to notify a borrower in writing
2 if the servicer determines an NOE is duplicative. 12 C.F.R.
3 § 1024.35(g)(2). According to McMahon's allegations, SPS did
4 not respond to his subsequent NOEs, even to tell him they were
5 duplicative, and therefore SPS violated § 1024.35(g)(2).

6 The Court denies SPS's motion to dismiss McMahon's claim
7 based on 12 C.F.R. §§ 1024.35(d), (e).

8 b. Section 1024.36(d)

9 Under § 1024.36(d), "a servicer must respond to an
10 information request by either:

- 11 (i) Providing the borrower with the requested
12 information and contact information, including
a telephone number, for further assistance in
writing; or
- 13 (ii) Conducting a reasonable search for the
14 requested information and providing the
15 borrower with a written notification that
16 states that the servicer has determined that
17 the requested information is not available to
the servicer, provides the basis for the
servicer's determination, and provides contact
information, including a telephone number, for
further assistance.

18 12 C.F.R. § 1024.36(d)(1).

19 A servicer need not comply with this section if the
20 information requested "is substantially the same as

21 information previously requested by the borrower." 12

22 C.F.R. § 1024.36(f)(1)(i). But a servicer still has to

23 notify the borrower of its determination that it is not

24 required to comply with § 1024.36(d). 12 C.F.R.

25 § 1024.36(f)(2). McMahon alleges that SPS did not send the

26 requested information or notify McMahon that SPS did not

27 need to send him the information. FAC ¶ 155. SPS does not

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1 dispute this allegation.

2 The Court denies SPS's motion to dismiss McMahon's
3 § 1024.36(d) claim.

4 5. Sixth Cause of Action

5 McMahon alleges SPS negligently handled his loan
6 modification applications. FAC at 26-27. SPS argues McMahon
7 cannot establish a negligence claim because he cannot show that
8 SPS owed McMahon a duty of care. Mot. at 9-10.

9 "[A]s a general rule, a financial institution owes no duty
10 of care to a borrower when the institution's involvement in the
11 loan transaction does not exceed the scope of its conventional
12 role as a mere lender of money." Nymark v. Heart Fed. Savings &
13 Loan Assn., 231 Cal. App. 3d 1089, 1096 (1991). But "[o]nce a
14 lender agrees to consider a modification of a borrower's loan .
15 . . the lender owes the borrower a duty to exercise reasonable
16 care in reviewing a loan modification application." Hawkins v.
17 Bank of Am. N.A., 2017 WL 590253, at *4 (E.D. Cal. Feb. 14,
18 2017) (citing Alvarez v. BAC Home Loans Servicing, LP, 228 Cal.
19 App. 4th 941, 948 (2014)); see also Clinton v. Select Portfolio
20 Servicing, Inc., 2016 WL 7034895, at *4 (E.D. Cal. Dec. 2, 2016)
21 (holding that SPS as the loan servicer owed a duty of care to
22 the borrower in processing his loan modification application).

23 McMahon alleges SPS invited him to apply for a loan
24 modification and SPS at least began considering his application
25 several times. FAC ¶¶ 51, 77. The Court finds McMahon's
26 allegations sufficient to plead SPS owed a duty of care to
27 McMahon.

28 SPS also argues that McMahon fails to allege damages

1 because he does not allege that he "would have received [a loan
2 modification] had the application been 'properly' reviewed."
3 Mot. at 11. But McMahon alleges SPS calculated his monthly
4 income incorrectly twice and that SPS should have offered him a
5 modification based on his correct income. FAC ¶¶ 57-61, 82, 86.
6 McMahon also alleges SPS damaged him by "causing [him] to forego
7 other options for addressing the default and/or unaffordable
8 mortgage payments, injury to credit reputation, [and] costs and
9 expenses incurred to prevent or fight foreclosure." FAC ¶ 165.

10 The Court find McMahon has sufficiently alleged duty,
11 breach, causation, and damages to state a negligence claim and
12 denies SPS's motion to dismiss this claim.

13 6. Seventh Cause of Action

14 McMahon alleges SPS violated California Business and
15 Professions Code § 17200 et seq. FAC at 27-28. "To state a
16 cause of action based on [§ 17200], a plaintiff must allege
17 facts sufficient to show a violation of some underlying law."
18 Dougherty v. Bank of Am., N.A., 177 F. Supp. 3d 1230, 1251 (E.D.
19 Cal. 2016) (citing People v. McKale, 25 Cal.3d 626, 635 (1979)).

20 SPS argues McMahon's § 17200 claim fails because McMahon
21 has not alleged injury-in-fact and because it relies "on his
22 remaining causes of action, all of which fail." Mot. at 12.

23 SPS's arguments lack merit. As discussed above, McMahon has
24 properly alleged injury. See Dougherty, 177 F. Supp. 3d at 1260
25 (finding damage to credit sufficient to allege injury under
26 § 17200). Additionally, McMahon's fifth and sixth claims remain,
27 and he can predicate his § 17200 claim on those remaining claims.
28 The Court denies SPS's motion to dismiss McMahon's § 17200 claim.

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III. ORDER

For the reasons set forth above, the Court GRANTS SPS's motion to dismiss McMahon's first, second, and fourth claims with prejudice and DENIES SPS's motion to dismiss McMahon's fifth through seventh claims. SPS shall file its Answer to the FAC within twenty days of the date of this Order.

Additionally, the Court's Order re Filing Requirements ("Order"), ECF No. 5-2, limits memoranda in support of and opposition to motions to dismiss to fifteen pages. Order at 1. A violation of the Order requires the offending counsel (not the client) to pay \$50.00 per page over the page limit to the Clerk of Court. Id. The Court does not consider arguments made past the page limit. Id. McMahon's opposition brief exceeded the page limit by 5 pages. McMahon's counsel must therefore pay monetary sanctions in the amount of \$250.00 no later than seven days from the date of this Order.

IT IS SO ORDERED.

Dated: April 25, 2017



JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE