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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ELIZABETH GONZALES,

No. C-14-4059 EMC

Plaintiff,

v.

**ORDER GRANTING DEFENDANT’S
MOTION TO STRIKE, AND DENYING
DEFENDANT’S MOTION TO DISMISS**

CITIMORTGAGE, INC, *et al.*,

(Docket Nos. 38-39)

Defendants.

I. FACTUAL & PROCEDURAL BACKGROUND

In 1997, Plaintiff purchased a property located in Rodeo, California. FAC at ¶ 8. Since then, Plaintiff has lived on that property with her children. *See* FAC at ¶ 8, 11. Following her divorce, Plaintiff encountered financial difficulties which made it harder for her to pay her mortgage. FAC at ¶ 11. After continued difficulties and entering default, Plaintiff contacted Citimortgage (“Defendant”) regarding foreclosure prevention options on May 12, 2014. FAC at ¶ 14. In the course of discussions, Defendant’s employee, Susan Polcyn, represented that Plaintiff was pre-qualified for a loan modification, and provided Plaintiff with a list of documents that would be necessary to complete her loan modification. *Id.* As of June 13, 2014, Plaintiff had provided every document requested by Defendant pursuant to Plaintiff’s loan modification application. FAC at ¶ 22.

On August 15, 2014, Defendant caused to be recorded a Notice of Trustee’s Sale for Plaintiff’s Property which indicated that Plaintiff’s property is scheduled to sell on September 15, 2014. FAC at ¶ 23. At no point before August 15, 2014 did Plaintiff receive a response regarding her loan modification application. *Id.*

1 On October 22, 2014, Plaintiff filed an amended complaint, alleging that Defendant's
2 recordation a Notice of Trustee Sale violated Sections 2923.6 and 2924.17 of the California Civil
3 Code. Docket No. 34. Currently pending before the Court is Defendant's motion to (1) strike
4 Plaintiff's request for damages; and (2) dismiss Plaintiff's claims as legally deficient.

5 **II. DISCUSSION**

6 A. Motion to Strike

7 1. Legal Standard

8 Rule 12(f) of the Federal Rules of Civil Procedure provides that a court may strike "from any
9 pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter".
10 Fed. R. Civ. P. 12. Motions to strike are generally not granted unless it is clear that the matter to be
11 stricken could have no possible bearing on the subject matter of the litigation. *Colaprico v. Sun*
12 *Microsystems, Inc.*, 758 F. Supp. 1335, 1339 (N.D. Cal.1991).

13 2. Request for Damages

14 Plaintiff's complaint provides two causes of action for violations of Sections 2923.6 and
15 2924.17 of the California Civil Code. Both of these code sections are a part of the Home Owner's
16 Bill of Rights (HBOR) and regulate foreclosure proceedings.

17 Section 2923.6 provides, in relevant portion:

18 (c) If a borrower submits a complete application for a first lien loan
19 modification offered by, or through, the borrower's mortgage servicer,
20 a mortgage servicer, mortgagee, trustee, beneficiary, or authorized
21 agent shall not record a notice of default or notice of sale, or conduct a
22 trustee's sale, while the complete first lien loan modification
application is pending. A mortgage servicer, mortgagee, trustee,
beneficiary, or authorized agent shall not record a notice of default or
notice of sale or conduct a trustee's sale until any of the following
occurs:

23 (1) The mortgage servicer makes a written
24 determination that the borrower is not eligible for a first
lien loan modification, and any appeal period pursuant
to subdivision (d) has expired.

25 (2) The borrower does not accept an offered first lien
26 loan modification within 14 days of the offer.

27 (3) The borrower accepts a written first lien loan
28 modification, but defaults on, or otherwise breaches the
borrower's obligations under, the first lien loan
modification.

1 Cal. Civ. Code § 2923.6

2 Section 2924.17 provides, in relevant portion:

3 [A] notice of default, notice of sale, assignment of a deed of trust, or
4 substitution of trustee recorded by or on behalf of a mortgage servicer
5 in connection with a foreclosure subject to the requirements of Section
6 2924, or a declaration or affidavit filed in any court relative to a
foreclosure proceeding shall be accurate and complete and supported
by competent and reliable evidence.

7 (b) Before recording or filing any of the documents
described in subdivision

8 (a), a mortgage servicer shall ensure that it has
9 reviewed competent and reliable evidence to
10 substantiate the borrower’s default and the right to
foreclose, including the borrower’s loan status and loan
information.

11 Cal. Civ. Code § 2924.17.

12 Defendant argues that neither of these causes of action entitle Plaintiff to the punitive, actual,
13 compensatory or statutory damages it requests. Specifically, Defendant argues that because a
14 foreclosure sale has not – and will not – take place, the Plaintiff is statutorily limited to injunctive
15 relief, attorney’s fees, and costs.

16 The HBOR provides a claim for monetary damages for any material violations of Sections
17 2923.6 and 2924.17 that go uncorrected prior to the recordation of a trustee deed upon sale. *See id.*
18 § 2924.12(b) (“**After** a trustee’s deed upon sale has been recorded, a mortgage servicer, mortgagee,
19 trustee, beneficiary, or authorized agent shall be liable to a borrower for actual economic damages
20 pursuant to Section 3281, resulting from a material violation of Section 2923.55, **2923.6**, 2923.7,
21 2924.9, 2924.10, 2924.11, or **2924.17**. . .”); *see also id.* § 2924.12(c) (“A mortgage servicer,
22 mortgagee, trustee, beneficiary, or authorized agent **shall not be liable** for any violation that it has
23 corrected and remedied **prior to the recordation of a trustee’s deed upon sale**, or that has been
24 corrected and remedied by third parties working on its behalf prior to the recordation of a trustee’s
25 deed upon sale.”). HOBOR further provides that “[a] court may award a prevailing borrower
26 reasonable attorney’s fees and costs[.]” *Id.* § 2924.12(i). The law defines a “prevailing borrower” as
27 one who has “obtained injunctive relief or was awarded damages pursuant to this section.” *Id.*

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1 Here, it is undisputed that no trustee’s deed upon sale was filed and that no foreclosure has
2 taken place. *See* Docket No. 30. Because a foreclosure sale has not taken place, and thus a trustee
3 deed upon sale has not been recorded, Plaintiff has not stated a claim for damages under §
4 2924.12(b) and (c). *See Vasquez v. Bank of Am. , N.A.*, No. 13-CV-02902-JST, 2013 WL 6001924,
5 at *7 (N.D. Cal. Nov. 12, 2013) (“Plaintiff’s claims in FAC ¶ 27 for actual damages, attorneys’ fees,
6 and treble damages are unavailable until such time as the deed upon sale has been recorded.”).
7 Hence, Plaintiff’s request for damages must be stricken, but it is without prejudice should a
8 foreclosure take place in violation of § 2923.6.

9 Plaintiff’s counter-arguments are mistaken. First, Plaintiff argues that its request for
10 damages should survive because it will seek leave to add a claim for wrongful foreclosure – which
11 could support its request for damages. However, a future and contingent amendment does not cure
12 the defective request for damages in the *current* operative complaint – which is the subject of the
13 motion. *See* Fed. Rule Civ. Proc., R. 12(f).

14 Second, Plaintiff argues that it is entitled to punitive damages because it alleged that
15 Defendant committed its violations with a conscious disregard of the Plaintiff’s rights. Docket No.
16 42 at 2 (citing *Tomaselli v. Transamerica Ins. Co.*, 25 Cal. App. 4th 1269, 1286 (1994) (stating that
17 punitive damages can, in some cases, be supported by a showing that a violation was carried out “by
18 the defendant with a willful and conscious disregard of the rights or safety of others”). This
19 argument is unavailing because it does not address the statutory lack of authority to award damages
20 prior to a foreclosure sale as discussed above.

21 Accordingly, the Court **GRANTS** Defendant’s motion to strike Plaintiff’s request for
22 disgorgement, actual, compensatory, statutory, exemplary and punitive damages, without prejudice.

23 B. Motion to Dismiss

24 1. Legal Standard

25 Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss based on the
26 failure to state a claim upon which relief may be granted. *See* Fed. R. Civ. P. 12(b)(6). A motion to
27 dismiss based on Rule 12(b)(6) challenges the legal sufficiency of the claims alleged. *See Parks*
28 *Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). In considering such a motion, a court

1 must take all allegations of material fact as true and construe them in the light most favorable to the
2 nonmoving party, although “conclusory allegations of law and unwarranted inferences are
3 insufficient to avoid a Rule 12(b)(6) dismissal.” *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir.
4 2009). While “a complaint need not contain detailed factual allegations . . . it must plead ‘enough
5 facts to state a claim to relief that is plausible on its face.’” *Id.* “A claim has facial plausibility when
6 the plaintiff pleads factual content that allows the court to draw the reasonable inference that the
7 defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *see*
8 *also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). “The plausibility standard is not akin to
9 a ‘probability requirement,’ but it asks for more than sheer possibility that a defendant acted
10 unlawfully.” *Iqbal*, 129 S. Ct. at 1949.

11 2. California Civil Code Section 2923.6

12 California Civil Code Section 2923.6(c) provides, in relevant portion:

13 (c) If a borrower submits a complete application for a first lien
14 loan modification offered by, or through, the borrower’s mortgage
15 servicer, a mortgage servicer, mortgagee, trustee, beneficiary, or
16 authorized agent **shall not** record a notice of default or notice of sale,
17 or conduct a trustee’s sale, while the complete first lien loan
modification application is pending. A mortgage servicer, mortgagee,
trustee, beneficiary, or authorized agent shall not record a notice of
default or notice of sale or conduct a trustee’s sale until any of the
following occurs:

18 (1) The mortgage servicer makes a written determination
19 that the borrower is not eligible for a first lien loan modification, and
any appeal period pursuant to subdivision (d) has expired.

20 (2) The borrower does not accept an offered first lien loan
21 modification within 14 days of the offer.

22 (3) The borrower accepts a written first lien loan
23 modification, but defaults on, or otherwise breaches the borrower’s
obligations under, the first lien loan modification.

24 Cal. Civ. Code § 2923.6(c) (emphasis added).

25 Plaintiff alleges that Defendant violated § 2923.6 by doing what that section say its “shall
26 not.” Specifically, Plaintiff alleges that Defendant recorded a notice of sale *after* Plaintiff submitted
27 a complete application for a loan modification, but *before* the modification plan was rejected by
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1 either party or defaulted upon by the Plaintiff. FAC ¶ 29. These facts are sufficient to state a claim
2 for violation of § 2923.6.

3 In response, Defendant argues that it is insufficient for a plaintiff to plead a mere violation of
4 § 2923.6; rather, a plaintiff “must plead a *material* violation of § 2923.6” to state an actionable
5 claim. Docket No. 38 at 3 (emphasis added). According to Defendant, § 2924.12(a)(1) creates a
6 materiality element. That section provides, in relevant portion:

7 If a trustee’s deed upon sale has not been recorded, a borrower may
8 bring an action for injunctive relief to enjoin a *material violation* of
9 Section 2923.55, **2923.6**, 2923.7, 2924.9, 2924.10, 2924.11, or
10 2924.17.

10 Cal. Civ. Code § 2924.12(a)(1) (emphasis added).

11 Defendant argues that the premature recording of a foreclosure-related document – such as a
12 Notice of Trustee Sale – is a “material” violation only if the borrower was in fact *qualified* for the
13 modification. According to Defendant, Plaintiff’s claims are insufficient because she has not alleged
14 that she was actually qualified for a modification.

15 However, Defendant’s proposed reading imposing such a “materiality” requirement of
16 Section 2923.6(c) makes little sense and would conflict with the intent of the California Legislature
17 in its drafting and passage of the Home Owner’s Bill of Rights (HOBR) – in which Section
18 2923.6(c) is codified. There are a number of technical procedural provisions of 2923.6, violations of
19 which might not materially affect the borrower. For example, a lender could violate 2923.6(f)(3) if
20 it denies a lender’s modification application on the basis of a net present value (NPV) calculation,
21 but fails to include the gross income used to carry out the calculation in its formal letter of denial.
22 Such a violation might not materially effect the borrower if the gross income used is undisputed and
23 the borrower’s application for modification received meaningful consideration.

24 In contrast, Section 2923.6(c) prohibits the recording of foreclosure documents prior to even
25 the *determination* of whether a borrower will receive a modification to its loan. Given the specific
26 directive of Section 2923.6(c), any violation of its prescribed sequence would appear to be
27 inherently prejudicial; initiating foreclosure before processing a loan modification request deprives
28 the borrower of the opportunity expressly preserved by Section 2923.6.

1 Moreover, the preamble to the Home Owner’s Bill of Rights (HOBR) makes clear why
2 Defendant’s construction is wrong. That preamble provides, in relevant portion:

3 It is essential to the economic health of this state to mitigate the
4 negative effects on the state and local economies and the housing
5 market that are the result of continued foreclosures by modifying the
6 foreclosure process *to ensure that borrowers who **may qualify** for a
7 foreclosure alternative **are considered** for, and have a meaningful
8 opportunity to obtain, available loss mitigation options.* These
9 changes to the state’s foreclosure process are essential to ensure that
10 the current crisis is not worsened by unnecessarily adding foreclosed
11 properties to the market *when an alternative to foreclosure **may be***
12 *available.* Avoiding foreclosure, *where possible*, will help stabilize the
13 state’s housing market and avoid the substantial, corresponding
14 negative effects of foreclosures on families, communities, and the state
15 and local economy.

16 Cal. Senate Bill No. 900, Ch. 87 (emphasis added). This preamble expresses the legislature’s clear
17 intent that HOBR protect homeowners that *may* qualify for a foreclosure alternative, and to ensure
18 that homeowners that *might* qualify have a “meaningful *opportunity to obtain*” “foreclosure
19 alternative[s].” When read in conjunction with Section 2923.6(c), the Court finds that the intent of
20 the legislature in creating the claim for injunctive relief in Section 2924.12 was to provide California
21 homeowners a right to preserve their “opportunity” to be “considered for” a loan modification or
22 other foreclosure alternative. Defendant’s reading would limit its protection to those who can prove
23 *qualification* for a modification, not those who “may qualify” therefor. This reading conflicts with
24 the intent of the California legislature manifested in the preamble to the HOBR.

25 Furthermore, the remedial structure of Section 2923.6 makes clear the statute’s protection of
26 those who may qualify for modification is not limited to those who are in fact qualified. Prior to
27 recording of the trustee deed of sale, the plaintiff is entitled only to injunctive relief to stop
28 foreclosure. Cal. Civ. Code § 2924.12(a)(1). Once enjoined, a lender may then dissolve the
injunction by making the determination of whether the borrower qualifies for a modification. *Id.* §
2924.12(a)(2) The right to a pre-foreclosure injunction thus obtains *prior* to any determination by
the lender of the borrower’s qualification for modification. It makes no sense to require a plaintiff to
prove qualification for a modification, in order to obtain an injunction meant to preserve the
opportunity to prove he or she qualifies for a modification.

1 In support of its reading, Defendant cites *Johnson v. PNC Mortgage*, No. C 14-02976 LB,
2 2014 WL 6629585, at *10 (N.D. Cal. Nov. 21, 2014). In *Johnson*, the Johnsons brought suit against
3 PNC mortgage for – among other things – “robo-signing” an assignment of their mortgage in
4 violation of § 2924.17. *Id.* at *10. Section 2924.17 provides:

5 Before recording or filing any of the documents described in
6 subdivision (a), a mortgage servicer shall ensure that it has reviewed
7 competent and reliable evidence to substantiate the borrower’s default
and the right to foreclose, including the borrower’s loan status and
loan information.

8 Cal. Civ. Code § 2924.17. The Johnsons argued that PNC’s “robo-signing” of the assignment – a
9 document described in subdivision (a) – constituted an actionable violation of Section 2924.17
10 because it was done without reviewing “competent and reliable evidence” to ensure the Johnsons
11 had defaulted on their loan before selling the Johnson’s foreclosed property. *Id.* The court rejected
12 this argument, and held that Section 2924.19 mandated that only “material” violations of Section
13 2924.17 were actionable. *Id.*

14 Similar to Section 2924.12, Section 2924.19 provides:

15 (a)(1) If a trustee’s deed upon sale has not been recorded, a borrower
16 may bring an action for injunctive relief to enjoin a **material violation**
of Section 2923.5, 2924.17, or 2924.18 . . .

17 (b) After a trustee’s deed upon sale has been recorded, a mortgage
18 servicer, mortgagee, beneficiary, or authorized agent shall be liable to
19 a borrower for actual economic damages pursuant to Section 3281,
20 resulting from a **material violation** of Section 2923.5, 2924.17, or
2924.18 by that mortgage servicer, mortgagee, beneficiary, or
authorized agent where the violation was not corrected and remedied
prior to the recordation of the trustee’s deed upon sale.

21 Cal. Civ. Code § 2924.19.

22 The *Johnson* court read this code section to limit actionable violations of “[s]ection[s]
23 2923.5, 2924.17, or 2924.18” to those that are material to the claimant’s loan modification process.
24 *Id.* The court reasoned that the “qualifier ‘material’ must mean something” and that damages
25 provided under Section 2924.17 must be limited to violations that result in harm – not any and all
26 violations. *Id.*

27 Unlike the instant case where Plaintiff seeks a pre-foreclosure injunction, a materiality
28 requirement to obtain damages for violation of Section 2924.17 may make sense; if the lender had

1 not reviewed “competent and reliable evidence” to substantiate the right to default, but the lender
2 did in fact have such a right, the legislature could logically have provided that no money damages
3 should be awarded to the defaulting buyer. *Johnson* might be more persuasive to argue a similar
4 materiality requirement (as suggested by Defendant) be applied to an action for damages under §
5 2924.12(b) for violation of § 2923.6(c). Here, however, Plaintiff seeks an injunction to preserve
6 prospectively its procedural right – the *opportunity* to obtain a loan modification. As noted, the
7 materiality requirement advocated by Defendant would undercut the core of Section 2923.6(c).

8 The Court **DENIES** the motion to dismiss Plaintiff’s Section 2923.6 claim.

9 C. California Civil Code Section 2924.17

10 California Civil Code Section 2924.17 provides, in relevant portion:

11 Before recording or filing any of the documents described in
12 subdivision (a), a mortgage servicer shall ensure that it has reviewed
13 competent and reliable evidence to substantiate the borrower’s default
and the right to foreclose, including the borrower’s loan status and
loan information.

14 Cal. Civ. Code § 2924.17(b). One of the documents “described in subdivision (a)” of § 2924.17 is a
15 notice of trustee sale.

16 Here, Plaintiff alleges that Defendant caused a notice of trustee sale to be filed “without
17 substantiating its right to foreclose.” FAC ¶ 32. Similar to Plaintiff’s allegations regarding §
18 2923.6, Plaintiff alleges conduct that violates the explicit requirement of § 2924.17. Cal. Civ. Code
19 § 2924.17(b) (“Before recording or filing [a notice of trustee sale] a mortgage servicer shall ensure
20 that it has . . . substantiate[d] . . . [its] right to foreclose”). Taken as true, and viewed in the light
21 most favorable to the Plaintiff, these allegations are sufficient to state a plausible cause of action for
22 violation of § 2924.17.

23 Defendant argues that Plaintiff’s claim is insufficient because it “does not allege that NBS
24 Default Services LLC was acting as an agent for [Defendant]” when it recorded the prohibited
25 notice. This argument is unpersuasive because Plaintiff alleges that Defendant *caused* the notice to
26 be filed. Thus, irrespective of the identity of the entity that physically filed the notice of trustee sale,
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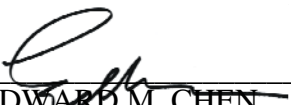
1 Plaintiff's allegations indicate that the notice of trustee sale was filed by an agent of the Defendant
2 acting on Defendant's behalf. Such allegations are sufficient to state a claim under Section 2924.17.

3 Accordingly, the Court **DENIES** Defendant's motion to dismiss Plaintiff's § 2924.17 claims.

4 This order disposes of Docket Nos. 38 and 39.

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6 IT IS SO ORDERED.

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8 Dated: June 3, 2015

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11 EDWARD M. CHEN
12 United States District Judge
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