UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MANUEL A. JUDAN, et al.,

Plaintiffs,

v.

WELLS FARGO BANK, NATIONAL ASSOCIATION, AS LENDER, et al.,

Defendants.

Case No. 15-cv-05029-HSG

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

Re: Dkt. No. 30

This case was originally filed in state court on September 30, 2015, and was removed to federal court on November 2, 2015. Dkt. No. 1 at 2. Plaintiffs Manuel A. Judan and Marylyn Callejo-Judan filed their first amended complaint on August 22, 2016. Dkt. No. 27 ("FAC"). On September 13, 2016, Defendant Wells Fargo Bank, N.A. filed a motion to dismiss. Dkt. No. 30 ("Mot."). On September 27, 2016, Plaintiffs opposed the motion. Dkt. No. 34 ("Opp."). On October 4, 2016, Defendant replied. Dkt. No. 35 ("Reply"). On November 17, 2016, the Court heard arguments regarding the motion. Dkt. No. 39. Upon careful consideration, the Court **GRANTS** in part and **DENIES** in part the motion to dismiss.

I. REQUESTS FOR JUDICIAL NOTICE

The Court first addresses Defendant's requests for judicial notice because they are relevant to the facts of the case. On September 14, 2016, Defendant filed an amended request for judicial notice, Dkt. No. 32 ("RJN"), which Plaintiffs opposed on September 27, 2016, Dkt. No. 34-2 ("RJN Opp."). On October 7, 2016, Defendant filed a supplemental request for judicial notice. Dkt. No. 36 ("Supp. RJN").

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1989). "A court may, however, consider certain materials—documents

attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). Courts may take judicial notice of facts outside the pleadings on a motion to dismiss. *Mack v. S. Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986), *abrogated on other grounds by Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991). Federal Rule of Evidence 201 allows a court to take judicial notice of a fact that is "not subject to reasonable dispute because it: (1) is generally known within the trial court's jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." A court may judicially notice "matters of public record outside the pleadings." *See Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988) (internal quotation marks omitted). Furthermore, under the "incorporation by reference" doctrine, a court may "take into account documents 'whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading.'" *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). The Ninth Circuit has extended the doctrine to "situations in which the plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint." *Id.*

Defendant requests judicial notice of five documents related to its corporate status: (1) the Certificate of Corporate Existence, issued by the Department of Treasury's Office of Thrift Supervision ("OTS"), certifying that World Savings Bank, FSB is a federal savings bank, RJN, Ex. A; (2) a letter from OTS dated November 19, 2007, approving the request to amend the bank's charter and bylaws to change its name to Wachovia Mortgage, FSB, *id.*, Ex. B; (3) the Charter of Wachovia Mortgage, FSB, dated December 31, 2007, reflecting in Section 4 that it is subject to the Home Owners' Loan Act ("HOLA") and the orders of OTS, *id.*, Ex. C; (4) Official Certification of the Comptroller of the Currency ("OCC"), stating that effective November 1, 2009, Wachovia Mortgage, FSB converted to Wells Fargo Bank Southwest, N.A., which then merged with and into Wells Fargo Bank, N.A., RJN, Ex. D; and (5) a printout from the Federal

Deposit Insurance Corporation ("FDIC") website dated December 15, 2010, showing the history of Wachovia Mortgage, FSB; *id.*, Ex. E. The Court finds these five documents are properly subject to judicial notice. Plaintiffs do not dispute the authenticity of these documents, which are also capable of accurate and ready determination from sources whose accuracy cannot reasonably be questioned. *See* Rule 201(b)(2); *Paralyzed Veterans of Am. v. McPherson*, 2008 U.S. Dist. LEXIS 69542, at *17–18 (N.D. Cal. Sept. 8, 2008) (taking judicial notice of information on official government websites); *Ibarra v. Loan City*, No. 09-CV-02228-IEG POR, 2010 WL 415284, at *3 (S.D. Cal. Jan. 27, 2010) (taking judicial notice of documents related to defendant's status as an operating subsidiary of a federal savings association); *Gens v. Wachovia Mortg. Corp.*, No. CV10-01073 JF (HRL), 2010 WL 1924777, at *2 & n.4 (N.D. Cal. May 12, 2010) (taking judicial notice of a letter issued by OTS confirming World Savings' request to change its name to Wachovia); *Biggins v. Wells Fargo & Co.*, 266 F.R.D. 399, 408 (N.D. Cal. 2009) (taking judicial notice of an order from OTS as the order is available on the OTS website and plaintiffs do not dispute its authenticity); *Hammons v. Wells Fargo Bank, N.A.*, No. 15-CV-04897-RS, 2015 WL 9258092, at *4 (N.D. Cal. Dec. 18, 2015) (taking judicial notice of nearly identical documents, including bank charter); *Hines v. Wells Fargo Home Mortgage, Inc.*, No. 14-CV-01386 JAM KJN, 2014 WL 5325470, at *3 (E.D. Cal. Oct. 17, 2014) (taking judicial notice of similar documents).

Additionally, Defendant seeks judicial notice of the following real estate documents: (1) Deed of Trust dated August 25, 2003, and recorded in the San Mateo County Recorder's Office ("Recorder's Office") on August 28, 2003, RJN, Ex. F; (2) Adjustable Rate Mortgage Note dated August 25, 2003, *id.*, Ex. G; and (3) Notice of Default and Election to Sell Under Deed of Trust dated April 28, 2016, and recorded in the Recorder's Office on May 2, 2016, *id.*, Ex. H. Plaintiffs do not dispute the authenticity of these documents or oppose taking judicial notice of them. The Dead of Trust and the Mortgage Note were both attached to the complaint, so may properly be considered. *See* Compl. Exs. A–B; *Ritchie*, 342 F.3d at 908. Furthermore, the Deed of Trust and 2016 Notice of Default are subject to judicial notice as publicly-recorded real estate instruments not subject to reasonable dispute. *See, e.g.*, *Laconico v. Cal-Western Reconveyance Corp.*, No.

17-cv-00698-BLF, 2017 WL 2877098, at *4 (N.D. Cal. 2017); *Petrovich v. Ocwen Loan Servicing*, LLC, No. 15-cv-00033-EMC, 2016 WL 555959, at *3 (N.D. Cal. 2016), *appeal filed*, No. 16-15396 (9th Cir. 2016); *Distor v. U.S. Bank NA*, No. C 09-02086 SI, 2009 WL 3429700, at *2 (N.D. Cal. 2009), *abrogated on other grounds by Beaver v. Tarsadia Hotels*, 816 F. 3d. 1170, 1180 n. 5 (9th Cir. 2016); *see also Mir*, 844 F.2d at 649 (judicial notice of public records).

Defendant also seeks judicial notice of the Modification Agreement dated June 23, 2005. RJN, Ex. I. Plaintiffs oppose judicial notice of this document. RJN Opp. As Defendant notes with relation to the Modification Agreement, RJN at 3, the Ninth Circuit has held that "[a] court may consider evidence on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion." *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). However, the Court agrees with Plaintiffs that the Modification Agreement is not referenced by the operative complaint and "does not form the basis of Plaintiffs' claims." *See id.*; FAC ¶¶ 10–25 (statement of facts). Moreover, Plaintiffs contest the validity and authenticity of the Modification Agreement. RJN Opp. Therefore, the Court does not consider this document in assessing the motion to dismiss.

Finally, Defendant requests judicial of the Notice of Default dated August 23, 2011, and recorded in the official records of the Recorder's Office on that same day. Supp. RJN, Ex. J. The Court declines to take judicial notice of this document because Defendant's supplemental request for judicial notice was filed after the briefing on the motion to dismiss was complete. *See* Civil L.R. 7-3(d) (stating that "[o]nce a reply is filed, no additional memoranda, papers or letters may be filed without prior Court approval[,]" with two exceptions not relevant here); *Torbov v. Cenlar Agency, Inc.*, No. 14-CV-00130-BLF, 2015 WL 1940301, at *2 (N.D. Cal. Apr. 29, 2015) (denying request for judicial notice as untimely under Civil Local rule 7-3(d), where request was filed after reply brief); *see also in re Atossa Genetics, Inc. Sec. Litig.*, No. C13-1836 RSM, 2014 WL 4983551, at *4 (W.D. Wash. Oct. 6, 2014) (denying as untimely request for judicial notice filed after completion of briefing on motion to dismiss).

Accordingly, in assessing the motion to dismiss, the Court may consider Exhibits A to H,

but not Exhibits I or J. *See* RJN, Exs. A–I; Supp. RJN, Ex. J.[1]

II. BACKGROUND

In assessing the motion to dismiss, the Court takes the following facts as true.

On or around August 28, 2003, Plaintiffs purchased the real property located at 11 Lone Mountain Court, Pacifica, CA 94044 (hereinafter the "Property"). FAC ¶ 10. To secure the financing, Plaintiff executed a first-lien deed of trust and a promissory note in favor of World Savings Bank, FSB. *Id.* & Exs. A–B. The loan for the Property was in the amount of $548,000. *Id.*, Ex. A at 2; Ex. B at 1. The Deed of Trust stated that the maximum aggregate principal balance secured by it was $685,000 (125% of the "Note Amount"). *Id.*, Ex. A at 1. Similarly, the Note stated that Plaintiffs' unpaid principal balance could never exceed 125% of the principal originally borrowed. *Id.*, Ex. B at 3.

Defendant Wells Fargo Bank, N.A. is the successor in interest to World Savings Bank, FSB as the beneficiary and servicer of Plaintiffs' loan. *Id.* ¶ 10. Specifically, World Savings Bank changed its name to Wachovia Mortgage, FSB on December 31, 2007, but remained chartered under the HOLA and overseen by the OTS. RJN, Exs. A–C. Effective November 1, 2009, Wachovia Mortgage, FSB became a division of Wells Fargo Bank, N.A., and changed its primary regulatory agency from OTS to Comptroller of the Currency. RJN, Exs. D–E.

At all relevant times, the Property has been the Plaintiffs' principal residence, a single-family home containing only one dwelling unit. FAC ¶ 12. Plaintiffs appear to have defaulted on their loan on August 15, 2009. *See* RJN, Ex. H at 2–3 (Notice of Default, dated April 28, 2016, stating that Plaintiffs failed to make the loan payment which became due on August 15, 2009). In or around 2010, Plaintiffs experienced a financial hardship and contacted their lender regarding a loan modification. FAC ¶ 13. Based on their lender's advice to miss three payments in order to pursue a loan modification, Plaintiffs missed their mortgage payments and submitted a loan modification application. *Id.* On or around August 23, 2011, Defendant caused to be recorded a

[1] In footnote 2 of the motion to dismiss, Defendant requests that the Court take judicial notice of five bankruptcy actions filed in the U.S. Bankruptcy Court for the Northern District of California. Mot. at 2 n.2. The Court does not rely on the existence of these filings in reaching its disposition, and therefore denies Defendant's request as moot.

Notice of Default regarding Plaintiffs' Property. *Id.* ¶ 14. From 2011 to 2013, Plaintiffs continued trying to obtain a loan modification from Defendant. *Id.* ¶ 15. During this period, Plaintiffs received no determination on their loan modification application. *Id.* Each time Plaintiffs attempted to contact Defendant regarding the application, they were told that they had a new processor or that they needed to submit a new application because the representatives had no record of their previous application. *Id.* In January 2015, Defendant denied Plaintiffs application for a loan modification because of the net present value calculation and Defendant's inability to reduce Plaintiffs' principal and interest payment by 10% or more. *Id.* ¶ 16. The calculation used Plaintiffs' monthly income of $10,662.13. *Id.*

Plaintiffs subsequently appealed the denial of their loan modification application within the prescribed appeal period. *Id.* ¶ 17. On or around January 14, 2015, Defendant acknowledged the receipt of Plaintiffs' documents, but requested that Plaintiff provide additional financial information. *Id.* Thereafter, Plaintiffs timely submitted documents requested by Defendant in support of Plaintiffs' loan modification application. *Id.* ¶ 18–19. In or around March 2015, Justin Mcgee was assigned as Plaintiffs' new single point of contact ("SPOC"). *Id.* ¶ 19.

In or around August 2015, still not having received any determination on their appeal, Plaintiffs timely submitted another Request for Mortgage Assistance form, documenting an increase in their monthly income. *Id.* ¶ 20. On or around November 27, 2015, Plaintiffs received a letter from Defendant's representative, Brian Sloan, stating that the company could not identify or process the request without the last four digits of the borrower's social security numbers or tax identification numbers. *Id.* ¶ 21. On or around December 9, 2015, Plaintiffs sent in the requested social security numbers for each of the borrowers, thereby completing their loan modification application. *Id.* As of the filing of the operative complaint, Plaintiffs had yet to receive any determination on their appeal or on the new Request for Mortgage Assistance form. *Id.* ¶ 22.

On May 2, 2016, the Notice of Default and Election to Sell under Deed of Trust, dated April 28, 2016, was recorded in the records of the Recorder's Office. RJN, Ex. H. The document described past due payments in the amount of $381,218.10. *Id.* at 1. In or around June 2016, Defendant informed Plaintiffs that the current loan balance was over $800,000. FAC ¶ 23. On or

around August 10, 2016, Defendant caused to be recorded a Notice of Trustee's Sale regarding Plaintiffs' Property with the San Mateo County Recorder, with a sale date of August 31, 2016. FAC ¶ 24. The Notice of Trustee's Sale stated that the total amount of unpaid balance and reasonable costs, expenses and advances was $848,721.71 as of August 12, 2016. *Id.*

III. LEGAL STANDARD

A. Rule 12(b)(6)

Federal Rule of Civil Procedure 8(a) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" A defendant may move to dismiss a complaint for failing to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). To survive a Rule 12(b)(6) motion, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when a plaintiff pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In reviewing the plausibility of a complaint, courts "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Nonetheless, Courts do not "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). And even where facts are accepted as true, "a plaintiff may plead [him]self out of court" if he "plead[s] facts which establish that he cannot prevail on his . . . claim." *Weisbuch v. Cnty. of Los Angeles*, 119 F.3d 778, 783 n.1 (9th Cir. 1997) (quotation marks and citation omitted).

IV. DISCUSSION

Defendant moves to dismiss each of the seven causes of action pled in the operative complaint. The Court addresses each of the causes of action below.

A. Causes of Action under Homeowners Bill of Rights ("HBOR")[2]

Plaintiffs' first cause of action alleges that Defendant violated section 2923.6(c) and (e)(2) of the California Civil Code by recording a Notice of Trustee's Sale while Plaintiffs' first lien loan modification application was pending and prior to fifteen days after denial of the appeal. FAC ¶ 31. Defendant recognizes that under certain circumstances, section 2923.6(c) requires the lender to halt foreclosure proceedings pending review of the borrower's loan modification application. Mot. at 2. However, Defendant argues that the exception of subsection (c)(3) applies because "Plaintiffs received a modification in 2005, but subsequently defaulted." *Id.* Defendant's legal argument is sound. *See, e.g.*, *Deschaine v. IndyMac Mortg. Servs.*, 617 F. App'x 690, 693 (9th Cir. 2015) ("[S]ection 2923.6(c)(3) specifically authorizes a lender to pursue foreclosure against a defaulted borrower if '[t]he borrower accepts a written first lien loan modification, but defaults on, or otherwise breaches the borrower's obligations under, the first lien loan modification'" (second set of brackets in original) (quoting Cal. Civ. Code § 2923.6(c)(3))).[3] However, the factual support for Defendant's argument is Exhibit I, which cannot be considered by the Court in assessing this motion. *See supra* Part II. Therefore, the Court cannot find at this juncture that Plaintiffs accepted a written first lien modification prior to defaulting.

Plaintiffs' second cause of action alleges that Defendant violated section 2923.7(b)(4) and (b)(5) by failing to ensure that (1) Plaintiffs were considered for all foreclosure prevention alternatives offered by Defendant and (2) the SPOC had access to individuals with the ability and the authority to stop foreclosure proceedings. FAC ¶¶ 41, 47. First, relying on subsection (a), Defendant asserts that the second cause of action is barred because "the FAC does not allege that Plaintiffs requested a SPOC." *See* Mot. at 2; Cal. Civ. Code § 2923.7(a) ("Upon request from a borrower who requests a foreclosure prevention alternative, the mortgage servicer shall promptly

[2] Sections 2923.6 and 2923.7 are part of the HBOR. *See, e.g.*, *Duran v. World Sav. Bank, FSB*, CV 16-01938 SJO (GJSx), 2016 U.S. Dist. LEXIS 67280, at *3 (C.D. Cal. Apr. 29, 2016); *Green v. Cent. Mortg. Co.*, 148 F. Supp. 3d 852, 862, 871, 873 (N.D. Cal. 2015).

[3] *Deschaine* and the other unpublished Ninth Circuit decisions cited in this order are not precedent, but may be considered for their persuasive value. *See* Fed. R. App. P. 32.1; CTA9 Rule 36-3.

establish a single point of contact and provide to the borrower one or more direct means of communication with the single point of contact."). Federal district courts have split on whether a borrower must specifically request a SPOC to trigger section 2923.7, or whether it is enough to request a foreclosure prevention alternative. *See Green v. Cent. Mortg. Co.*, 148 F. Supp. 3d 852, 874 (N.D. Cal. 2015) (collecting cases). The Court agrees with decisions finding that the latter interpretation is more consistent with the statute's plain meaning and purpose. *See, e.g.*, *id.* at 874; *Mancheno v. Servis One, Inc.*, No. 15-CV-04901-WHO, 2015 WL 9489749, at *3 (N.D. Cal. Dec. 30, 2015). "The phrase 'upon request' simply indicates *when* the SPOC must be assigned (i.e., upon the borrower's *request* for a foreclosure prevention alternative, as opposed to the borrower's *selection* of a foreclosure prevention alternative)." *Mungai v. Wells Fargo Bank*, No. C-14-00289 DMR, 2014 WL 2508090, at *9 (N.D. Cal. June 3, 2014) (emphasis in original). Moreover, "[t]o read the statute as requiring an explicit request [for a SPOC] would at best place an unnecessary technical burden on borrowers and at worst defeat the intent of the statute altogether: most borrowers are unlikely to be aware of the language of § 2923.7 and are therefore unlikely to demand their right to a single point of contact." *Mora v. US Bank*, No. CV 15-02436-DDP (AJWx), 2015 WL 4537218, at *5 (C.D. Cal. July 27, 2015). Accordingly, the Court rejects Defendant's argument.

Defendant also makes arguments that tend to misconstrue the gravamen of Plaintiff's allegations as to the second cause of action. *See* Mot. at 3 (arguing that this cause of action must be dismissed because "[t]he FAC does not plead facts showing that Plaintiffs tried but were unable to communicate with Wells Fargo regarding their application" and because pleading that Defendant "did not render a final decision on Plaintiffs' most recent application" does not show Defendant failed to fulfill any duty outlined in section 2923.7). Plaintiffs have pled that after the initial denial of their loan modification application in January 2015, they submitted a timely appeal, were assigned to SPOC McGee, submitted all documents that were requested, and ultimately submitted another Request for Mortgage Assistance form documenting an increase in their monthly income. FAC ¶¶ 17-21. Nonetheless, without ever notifying Plaintiffs of any determination on their appeal or new request for mortgage assistance, Defendant allegedly caused

a notice of trustee's sale to be recorded as to Plaintiffs' property with a sale date of August 31, 2016. *Id.* ¶¶ 22, 24. Construed in the light most favorable to Plaintiffs, the facts alleged could plausibly demonstrate that Defendant violated the duties of section 2923.7(b)(4) and (5).

Finally, Defendant contends at to both the first and second causes of action that "[t]he FAC does not plead facts showing that Wells Fargo's alleged violations were material." Mot. at 4. Under section 2924.12(a)(1) of the California Civil Code, "[i]f a trustee's deed upon sale has not been recorded, a borrower may bring an action for injunctive relief to enjoin a material violation of Section . . . 2923.6 [or] 2923.7 . . . ." Moreover, subsection (a)(2) declares that "[a]ny injunction shall remain in place and any trustee's sale shall be enjoined until the court determines that the mortgage servicer . . . has corrected and remedied the violation or violations giving rise to the action for injunctive relief."[4] Therefore, Plaintiffs "may only obtain injunctive relief if (1) [Defendant] violated the statute, (2) that violation was material, and (3) the violation has not been corrected." *Montes v. Wells Fargo Bank, N.A.*, No. 2:16-CV-01405-KJM-AC, 2017 WL 1093940, at *4 (E.D. Cal. Mar. 23, 2017); *Foote v. Wells Fargo Bank, N.A.*, No. 15-CV-04465-EMC, 2016 WL 2851627, at *5 (N.D. Cal. May 16, 2016). "A violation is material where it 'deprive[s]' the plaintiff 'of the opportunity to obtain a loan modification.'" *Montes*, 2017 WL 1093940, at *4 (brackets in original) (quoting *Boone v. Specialized Loan Servicing LLC*, No. 15-CV-02224-DMR, 2015 WL 4572429, at *4 (N.D. Cal. July 29, 2015)); *Foote*, 2016 WL 2851627, at *5 (same); *see also Castillo v. Wells Fargo Bank, N.A.*, 2015 U.S. Dist. LEXIS 94176, at *1 (N.D. Cal. July 17, 2015) (finding that to be "material," the violation must have "prejudiced [the plaintiff's] ability to obtain a loan modification"). Here, Plaintiffs' allegations plausibly show that the notice of trustee sale was recorded while their first lien loan modification application was still pending and as a result of their SPOC not ensuring that they were considered for all foreclosure prevention alternatives offered by Defendant as well as not having access to individuals who could prevent foreclosure proceedings. Consequently, Plaintiffs were plausibly deprived of the opportunity to

[4] Section 2924.12(a) applies here because a trustee's deed upon sale has not been recorded. The operative complaint, filed on August 22, 2016, pleads that the Notice of Trustee's Sale listed a sale date of August 31, 2016. However, the Court cannot assume that the planned sale actually occurred and that a trustee's deed upon sale was recorded.

obtain a loan modification, and their HBOR allegations are not barred as to injunctive relief.

B. Causes of Action under Consumer Financial Protection Bureau ("CFPB") Regulations[5]

Plaintiffs' third and fourth causes of action allege that Defendant violated 12 C.F.R. § 1024.41(g) and (h)(4). FAC ¶¶ 49–68. The relevant portion of subsection (g) states as follows:

> If a borrower submits a complete loss mitigation application after a servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process but more than 37 days before a foreclosure sale, a servicer shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale, unless: (1) The servicer has sent the borrower a notice pursuant to paragraph (c)(1)(ii) of this section that the borrower is not eligible for any loss mitigation option and the appeal process in paragraph (h) of this section is not applicable, the borrower has not requested an appeal within the applicable time period for requesting an appeal, or the borrower's appeal has been denied . . . .

12 C.F.R. § 1024.41(g). In addition, the relevant portion of subsection (h)(4) requires that "[w]ithin 30 days of a borrower making an appeal, the servicer shall provide a notice to the borrower stating the servicer's determination of whether the servicer will offer the borrower a loss mitigation option based upon the appeal . . . ."

In seeking dismissal of these causes of action, Defendant first argues that subsection (i)'s prohibition on duplicative requests bars Plaintiffs' claim for violation of subsections (g) or (h) "in connection with applications submitted in 2015." Mot. at 5; *see also* 12 C.F.R. § 1024.41(i) ("A servicer is only required to comply with the requirements of this section for a single complete loss mitigation application for a borrower's mortgage loan account."). However, these causes of action are premised not on Plaintiffs' 2015 Request for Mortgage Assistance form, but rather on Defendant's alleged failure to make a determination on the appeal of Plaintiffs' first complete loss mitigation application. *See* FAC ¶¶ 67, 79. Thus, subsection (i) is inapplicable.

Next, Defendant contends that Plaintiffs failed to state a claim under subsection (g)

[5] The Dodd-Frank Act of 2010 broadened the scope of the Real Estate Settlement Procedures Act ("RESPA") to include additional requirements as to residential mortgage loan servicing, and these requirements were implemented by CFPB regulations issued in 2013, including 12 C.F.R. 1024.41. *See* Karl E. Grier, *Miller & Starr California Real Estate*, 11 Cal. Real Est. § 36:23 & n.4 (4th ed., May 2017).

because Defendant has not recorded a notice of default. Mot. at 5–6. Plaintiffs respond that this cause of action is premised on Defendant having recorded a notice of trustee's sale that placed the Property at imminent risk of foreclosure. Opp. at 10 (citing FAC ¶ 67). Defendant replies that doing so does not violate subsection (g) either. Reply at 4. Neither party cites any case law in support of their positions, but the plain language of the regulation prohibits Defendant from "conduct[ing] a foreclosure sale" (not recording a notice), *see* 12 C.F.R. § 1024.41(g), such that the legal issue is whether injunctive relief is available to prevent Defendant from executing the sale. As courts in this district have repeatedly held, RESPA does not provide for injunctive relief. *See e.g.*, *Laine v. Wells Fargo Bank & Co.*, No. C 13-4109 SI, 2014 WL 12579637, at *1 (N.D. Cal. Jan. 9, 2014); *Tamburri v. Suntrust Mortg., Inc.*, 875 F. Supp. 2d 1009, 1013 (N.D. Cal. 2012); *Roussel v. Wells Fargo Bank*, No. C 12-04057 CRB, 2012 WL 5301909, at *8 (N.D. Cal. Oct. 25, 2012); *Serrano v. World Sav. Bank, FSB*, No. 11-CV-00105-LHK, 2011 WL 1668631, at *3 (N.D. Cal. May 3, 2011); *Rivera v. BAC Home Loans Servicing, L.P.*, No. C 10-02439 RS, 2010 WL 2757041, at *4 (N.D. Cal. July 9, 2010); *see also* 12 C.F.R. § 1024.41(a) ("A borrower may enforce the provisions of this section pursuant to section 6(f) of RESPA (12 U.S.C. § 2605(f))."); 12 U.S.C. 2605(f) (no mention of injunctive relief). Plaintiff has therefore failed to state a claim under subsection (g).

Finally, Defendant asserts with relation to both causes of action that Plaintiff has failed to plead facts to support actual damages attributable to the alleged violations. Mot. at 6; *see also* 12 U.S.C. § 2605(f)(1) (providing for recovery of "any actual damages to the borrower as a result of the [defendant's] failure" to comply); *Flate v. Nationstar Mortg., LLC*, No. 16-55500, 2017 WL 2829531, at *1 (9th Cir. June 30, 2017) (affirming dismissal of causes of action under several provisions of 12 C.F.R. § 1024.41 because "Plaintiffs plead nothing more than conclusory allegations that Defendant's alleged violations caused actual damages"). Plaintiff responds by pointing to two portions of the operative complaint as allegedly pleading actual damages. Opp. at 10 (citing FAC ¶¶ 67, 94). However, paragraph 94 is unrelated to these causes of action, instead focusing on the harm that Plaintiff allegedly suffered as a result of "Defendant's interference with Plaintiffs' contractual rights" by failing to make a determination on Plaintiffs' original loan

modification application between approximately 2011 and January 2015. *See* FAC ¶¶ 15–16, 92–94. Consequently, the legal issue boils down to whether actual damages for the alleged violation of 12 C.F.R. § 1024.41(g) are plausibly supported by the allegation that recording the notice "plac[ed] the Property in imminent risk of foreclosure." *See* FAC ¶ 67. Plaintiff cites no authority in support of this proposition, and the Court has found authority to the contrary. *See Padayachi v. Indymac Bank*, No. C 09-5545 JF (PVT), 2010 WL 1460309, at *1, 4 (N.D. Cal. Apr. 9, 2010) (dismissing for failure to allege actual damages resulting from Defendant's alleged RESPA violations, where the defendant had recorded a notice of trustee's sale that was scheduled to occurr within weeks of when the complaint was filed); *Allen v. United Fin. Mortg. Corp.*, 660 F. Supp. 2d 1089, 1097 (N.D. Cal. 2009) ("[A] number of courts have read [12 U.S.C. § 2605(f)] as requiring a showing of pecuniary damages in order to state a claim."). Consequently, the third and fourth causes of action are dismissed for failure to state facts plausibly showing that actual damages resulted from the alleged violations.

C. Negligence

Plaintiffs assert a fifth cause of action for negligence. FAC ¶¶ 69–80. The allegations have two essential bases, each of which is insufficient to state a claim.

First, to the extent that Plaintiffs premise their negligence claim on Defendants having charged Plaintiffs for an unpaid principal balance exceeding the limit impose by the Deed of Trustee and the Adjustable Rate Mortgage Note, *see id.* ¶¶ 72-74, the Court agrees with Defendant that this allegation involves an entirely contractual duty, *see* Mot. at 11. "[C]onduct amounting to a breach of contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law." *Erlich v. Menezes*, 21 Cal. 4th 543, 551, 981 P.2d 978 (1999). Consequently, outside of the context of insurance, a tortious breach of contract generally can be found under the following circumstances:

> (1) the breach is accompanied by a traditional common law tort, such as fraud or conversion; (2) the means used to breach the contract are tortious, involving deceit or undue coercion or; (3) one party intentionally breaches the contract intending or knowing that such a breach will cause severe, unmitigable harm in the form of mental anguish, personal hardship, or substantial consequential damages.

Id. at 553–54, 981 P.2d 978 (1999). As currently pled, this is not such a case.

Second, Plaintiffs fail to state a negligence claim with allegations that Defendant took approximately four years to make a determination on their 2011 loan modification application and then failed to make a determination on their subsequent appeal or their new Request for Mortgage Assistance form. *See* FAC ¶¶ 75–79. Lenders do not owe borrowers a duty of care to process a pending loan-modification application within a particular period of time, where "the borrowers' negligence claims are based on allegations of delays in the processing of their loan modification applications." *See Anderson v. Deutsche Bank Nat. Trust Co. Americas*, 649 F. App'x 550, 552 (9th Cir.), *cert. denied sub nom. Anderson v. Aurora Loan Servs., LLC*, 137 S. Ct. 496 (2016). Plaintiffs contend that these allegations show "misrepresentation" by Defendant with relation to the status of Plaintiffs' application, *see* Opp. 11–12, but this is unsupported by the operative complaint, *see* FAC ¶¶ 75-79. Plaintiffs cite paragraph 75, but the only non-conclusory allegations therein do not plausibly show any misrepresentation, much less meet Rule 9(b)'s heightened pleading standard (which likely applies to these allegations). *See* FAC ¶ 75 ("In fact, each time Plaintiffs attempted to contact Defendant WELLS FARGO to follow up on their loan modification application, Plaintiffs were told that they had a new processor or that Plaintiffs would need to submit a new application as the representatives had no record of their previous application."); Fed. R. Civ. P. 9(b); *Berkeley v. Wells Fargo Bank*, No. 15-CV-00749-JSC, 2016 WL 67221, at *9 (N.D. Cal. Jan. 6, 2016) ("The Ninth Circuit has not yet decided whether Rule 9(b)'s heightened pleading standard applies to a claim for negligent misrepresentation, but most district courts in California hold that it does."); *United States v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1180 (9th Cir. 2016) (stating that under Rule 9(b)'s particularity requirement, "the plaintiff must allege the who, what, when, where, and how of the misconduct charged" (internal quotation marks omitted)). Therefore, the Court finds that the rule from *Anderson* applies here.[6]

[6] Because the foregoing analysis disposes of Plaintiffs' negligence claim, the Court does not reach Defendant's argument as to the damages that may be recoverable pursuant to that claim. *See* Mot. at 12; Reply at 6–7.

D. Breach of the Covenant of Good Faith and Fair Dealing

Plaintiffs' seventh cause of action alleges breach of the covenant of good faith and fair dealing. Covenant 1 of the Deed of Trust (Borrower's Promise to Pay) states, "I will pay to Lender, on time, all principle and interest due under the Secured Notes and any prepayment and late charges due under the Secured Notes." FAC, Ex. A at 3. Plaintiffs assert that "implicit in this covenant, is the obligation of Defendant not to hinder or prevent Plaintiffs' ability to make monthly payments under the Deed of Trust." *Id.* ¶ 87. They allege that "Defendant dealt with Plaintiffs in bad faith and unfairly interfered with their ability to perform under Covenant 1 of the Deed of Trust by inducing Plaintiffs to miss payments in pursuit of a loan modification, inducing Plaintiffs to repeatedly submit documents or new loan modification applications and dragging out the loan modification process for over four years." *Id.* ¶ 93.

Under California law, "[t]he covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made*." *Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317, 349 (2000) (emphasis in original). The covenant "cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." *Id.* at 349–50. That is, the covenant "is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purposes." *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 690 (1988). To show breach of the covenant of good faith and fair dealing, the following elements are required: "(1) the parties entered into a contract; (2) the plaintiff fulfilled his obligations under the contract; (3) any conditions precedent to the defendant's performance occurred; (4) the defendant unfairly interfered with the plaintiff's rights to receive the benefits of the contract; and (5) the plaintiff was harmed by the defendant's conduct." *Evenfe v. Esalen Inst.*, No. 15-CV-05457-LHK, 2016 WL 3965167, at *6 (N.D. Cal. July 24, 2016); *Harvey v. Bank of Am., N.A.*, 906 F. Supp. 2d 982, 991 (N.D. Cal. 2012); *Rosenfeld v. JPMorgan Chase Bank*, N.A., 732 F. Supp. 2d 952, 968 (N.D. Cal. 2010); *see also* CACI 325 (California civil jury instructions, updated July 2017) (stating substantively identical requirements).

Here, Plaintiff has failed to state a claim for breach of the implied covenant of good faith and fair dealing. As a threshold matter, Plaintiffs appear to have defaulted on their loan on August 15, 2009. *See* RJN, Ex. H at 2–3 (stating that Plaintiff failed to make the loan payment that became due on August 15, 2009). Plaintiffs apparently contacted their lender regarding a loan modification "[i]n or around 2010." *See* FAC ¶ 90. Thus, it appears likely that prior to any of the relevant allegations, Plaintiffs had already failed to fulfill their obligations under the contract. Even interpreting "in or around 2010" to encompass a date prior to August 15, 2009, Plaintiffs still fail to state a claim. As Plaintiffs recognize, the benefit of the contract was to receive the loan funds on the terms originally specified. *See* Opp. at 14 ("*The purpose of a deed of trust is that the borrower will have the use of funds loaned on specific terms* and the lender will have the right to a specified repayment that is secured by the deed of trust." (emphasis added) (quoting *Schoolcraft v. Ross*, 81 Cal. App. 3d 75, 80 (1978))). Plaintiffs contacted their lender regarding a loan modification, and ultimately decided, based upon the advice of the lender's representative, to miss three payments and submit a loan modification application. *See* FAC ¶ 90. Had Plaintiffs sought to continue receiving the benefits of the existing contract, they could have continued fulfilling their obligations. Thus, the facts alleged do not plausibly show that Defendant unfairly interfered with Plaintiffs' rights to receive the benefits of the existing contract. And to the extent that Defendant interfered with Plaintiffs' desire to change the terms of that contract, that goes well beyond that contract's purpose and terms, and therefore cannot support the implied covenant claim here.

Similar circumstances produced a similar conclusion in *Harvey*:

> The problem is that Defendant's alleged conduct is not related to the contract between the parties, that is, the [deed of trust ("DOT")] and related note. Plaintiff alleges not a violation of his standing contracts with Defendant, but of the entirely separate promises Defendant allegedly made to forego foreclosure and other penalties while the loan modification was pending. Plaintiff alleges that Defendant breached the implied covenant
>
> > when it instructed him to miss loan payments in order to be considered for a loan modification, promised not to count Plaintiff late or foreclose on his property for missing payments in pursuit of a loan modification, and then unreasonably strung out the loan modification process until late fees and attorneys' fees grew to an insurmountable amount.

> That might form the basis for some cause of action, but not for breach of the implied covenant in the deed of trust and mortgage. Plaintiff alleges breaches of promises that are independent from the ones contained in the DOT and note and which therefore cannot sustain a claim for a breach of the covenant implied in the DOT and note.

906 F. Supp. at 991 (internal quotation marks and citations omitted). Here, Plaintiffs make analogous allegations: to be considered for a loan modification, they missed payments with the promise that arrears would be added to the new loan during modification, and then they were allegedly strung along for years, leading to various types of financial harm and the imminent loss of the Property. *See* FAC ¶90–94. Here too, the allegations go to promises independent from those contained in the deed of trust and note. The claim for breach of the covenant of good faith and fair dealing is therefore dismissed.[7]

E. Declaratory Relief

Plaintiffs plead a "sixth cause of action" for declaratory relief. FAC ¶¶ 81–84. As a threshold matter, the Court must determine whether the federal Declaratory Judgment Act ("DJA"), 28 U.S.C. § 2201, or the California Declaratory Relief Act ("CDRA"), Cal. Civ. Proc. Code § 1060, applies. The court finds that the DJA applies, based upon its procedural nature. *See in re Adobe Sys., Inc. Privacy Litig.*, 66 F. Supp. 3d 1197, 1219 (N.D. Cal. 2014).[8] The DJA states in part as follows:

> In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a).[9] In assessing whether to award declaratory relief, courts generally assess "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S.

[7] Given that the analysis above disposes of Plaintiffs' claim, the Court does not reach Defendant's argument that the claim is time barred. *See* Mot. at 12; Reply at 7.

[8] That said, the Court recognizes that "whether the state or federal [declaratory relief] statute applies makes little difference as a practical matter, as the two statutes are broadly equivalent." *See Adobe Sys.*, 66 F. Supp. 3d at 1219.

[9] Section 2201(a) includes several exceptions, but none are relevant here.

118, 127 (2007) (internal quotation marks omitted).

Defendant first argues that "declaratory relief is not a theory of recovery; it is a type of remedy." Mot. at 13. This is true: as a procedural statute dependent on an underlying cause of action, the DJA makes available an "*additional remedy* to litigants" without creating an independent "theory of recovery." *See Team Enters., LLC v. W. Inv. Real Estate Trust*, 721 F. Supp. 2d 898, 911 (E.D. Cal. 2010) (emphasis in original) (citations omitted), *aff'd*, 446 Fed. App'x. 23 (9th Cir. 2011); *Hamilton v. Bank of Blue Valley*, 746 F. Supp. 2d 1160, 1181 (E.D. Cal. 2010). However, the two causes of action under the HBOR survive the motion to dismiss, such that Plaintiffs' request for declaratory relief is not barred for lack of an underlying claim.

Next, Defendant contends that "Plaintiffs' request for declaratory relief fails because it seeks to remedy past wrongs, not to secure a declaration of future rights between the parties." Mot. at 13. Some federal court opinions stating this proposition rely entirely on California case law and do not specify whether they apply the DJA or CDJA. *See, e.g.*, *Amaral v. Wachovia Mortg. Corp.*, 692 F. Sup. 2d 1226, 1235–36 (E.D. Cal. 2010). Nonetheless, the Court recognizes that the DJA and CDRA are "broadly equivalent." *See Adobe Sys.*, 66 F. Supp. 3d at 1219. Moreover, the Ninth Circuit has declared that the DJA "brings to the present a litigable controversy, which otherwise might only be tried in the future." *See Societe de Conditionnement en Aluminium v. Hunter Eng'g Co.*, 655 F.2d 938, 943 (9th Cir. 1981). Finally, numerous federal district courts have found that the DJA operates prospectively, not to redress past wrongs. *See, e.g.*, *Park Townsend, LLC v. Clarendon Am. Ins. Co.*, No. 12-CV-04412-LHK, 2013 WL 3475176, at *5 (N.D. Cal. July 10, 2013); *Travelers Cas. & Sur. Co. of Am. v. Desert Gold Ventures, LLC*, No. CV 09-4224 PSG (AJWx), 2010 WL 5017798, at *7 (C.D. Cal. Nov. 19, 2010); *Lai v. Quality Loan Serv. Corp.*, No. CV 10-2308 PSG (PLAx), 2010 WL 3419179, at *3 (C.D. Cal. Aug. 26, 2010); *Ruiz v. Mortg. Elec. Registration Sys., Inc.*, No. CIV S-09-0780 FCD DAD, 2009 WL 2390824, at *5 (E.D. Cal. Aug. 3, 2009). While Plaintiffs' request for declaratory relief is phrased in terms of determining the parties' respective rights and duties with relation to the Deed of Trust, the essential issue posed is actually whether Defendant had the right to increase Plaintiffs' principal balance to over $685,000 (125% of the original principal balance of

$548,000)—as it has *already* done. *See* FAC ¶¶ 23–24, 82–84. Therefore, Plaintiffs' request for declaratory relief is dismissed.

V. LEAVE TO AMEND

Here, the Court is dismissing the third, fourth, fifth, sixth, and seventh causes of action. If dismissal is appropriate under Rule 12(b)(6), a court "should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (internal quotation marks omitted). Applying this standard, the Court finds that granting leave to amend is appropriate as to all of these causes of action, with the caveat that declaratory relief may only be requested as a *remedy*, not a separate cause of action. Nonetheless, the Court's decision to grant leave to amend is not an invitation for Plaintiffs to replead substantially similar facts in the hope of a different result. To the contrary, Plaintiffs should not file an amended complaint unless they can plead facts that remedy the deficiencies identified by the Court. Furthermore, Plaintiffs should carefully consider their obligations under Federal Rule of Civil Procedure 11 when deciding whether to file an amended complaint and, if so, what claims to allege therein. Any amended complaint must clearly and concisely state the basis for all claims alleged.

VI. CONCLUSION

For the foregoing reasons, the Court **GRANTS** in part and **DENIES** in part Defendant's motion to dismiss. Any amended complaint must be filed within 28 days of the date of this Order.

IT IS SO ORDERED.

Dated: 07/21/2017

HAYWOOD S. GILLIAM, JR.
United States District Judge