

United States District Court  
Northern District of California

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

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

LEO DULAY,  
Plaintiff,  
v.  
SPECIALIZED LOAN SERVICING, LLC,  
et al.,  
Defendants.

Case No. [18-cv-01488-DMR](#)

**ORDER ON MOTION TO DISMISS  
FIRST AMENDED COMPLAINT**

Re: Dkt. No. 10

Defendants Specialized Loan Servicing, LLC (“SLS”) and The Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificateholders of the CWABS, Inc., Asset-Backed Certificates, Series 2006-13 (“Bank of New York”) move the court to dismiss Plaintiff Leo Dulay’s first amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. [Docket No. 10.] The court held a hearing and ordered the parties to submit supplemental briefing, which the parties timely filed. [Docket Nos. 22, 23, 26, 27.] For the following reasons, Defendants’ motion is granted in part and denied in part.

**I. BACKGROUND**

In this mortgage-related case, Dulay challenges Defendants’ conduct with respect to his efforts to obtain a short sale of his property following Defendants’ institution of foreclosure proceedings. He makes the following allegations in his first amended complaint (“FAC”), all of which are taken as true for purposes of this motion.<sup>1</sup> Dulay owned real property at 5100

---

<sup>1</sup> When reviewing a motion to dismiss for failure to state a claim, the court must “accept as true all of the factual allegations contained in the complaint.” Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam) (citation omitted).

1 Deerspring Way in Antioch, California (“the property”). FAC ¶ 8. In June 2006, Dulay obtained  
2 a first lien loan for the property from Countrywide Home Loans, Inc. in the amount of \$594,000.  
3 In March 2012, Bank of New York assumed the beneficial interest in the loan. SLS became the  
4 loan servicer in September 2014. Id. at ¶ 9.

5 In January 2016, Dulay fell behind on his mortgage payments. He submitted a loss  
6 mitigation application to SLS in April 2016. Id. at ¶ 10. In July 2016, Dulay sent SLS a request to  
7 conduct a short sale of the property. Following Dulay’s submission of documents requested by  
8 SLS, SLS informed Dulay in October 2016 that he was approved for a short sale as long as he  
9 listed the property at fair market value, allowed an appraisal, and provided documentation of any  
10 offers to purchase the property. Id. at ¶¶ 10, 11. Dulay complied with all of these conditions. Id.  
11 at ¶ 11. Dulay received multiple offers to purchase the property in 2017; however, SLS rejected  
12 each offer as too low. SLS closed the short sale review in July 2017. Id.

13 In September 2017, SLS reopened Dulay’s short sale review at his request. Id. at ¶ 12. On  
14 September 19, 2017, SLS notified Dulay that he was “contingently approved for the short sale  
15 program.” Thereafter, Dulay submitted a short sale offer for the property of \$420,000. Id. Dulay  
16 alleges that SLS sent him a letter dated September 28, 2017 “which stated that the short sale offer  
17 was approved.” Id. The letter also stated that Dulay “may also be required to provide offer  
18 approval from any additional lien holders on the property.” Id. (emphasis in original).<sup>2</sup> Dulay

19 \_\_\_\_\_  
20 <sup>2</sup> Defendants submitted a September 28, 2017 letter from SLS to Dulay with the heading, “Short  
21 Sale Contingent Approval.” McMahon Decl., Mar. 15, 2018 ¶ 4, Ex. 1. Defendants ask the court  
22 to consider it, because its contents are alleged in the FAC. See *Branch v. Tunnell*, 14 F.3d 449,  
23 454 (9th Cir. 1994), overruled on other grounds by *Galbraith v. Cty. of Santa Clara*, 307 F.3d  
1119 (9th Cir. 2002) (courts may consider “documents whose contents are alleged in a complaint  
and whose authenticity no party questions, but which are not physically attached to the pleading,”  
without converting a motion to dismiss under Rule 12(b)(6) into a motion for summary judgment).

24 As noted, Dulay alleges that he received a September 28, 2017 letter from SLS that stated  
25 that Dulay “may also be required to provide offer approval from any additional lien holders on the  
26 property.” FAC ¶ 12 (emphasis in original). That statement does not appear in the letter  
27 submitted by Defendants. At the hearing, Dulay’s counsel confirmed the existence of two  
28 additional letters dated September 28, 2017, one of which contains the statement “may also be  
required . . .” and another letter that identified a new single point of contact, “Marcum.” See FAC  
¶ 13. In other words, Dulay received at least three letters from Defendants dated September 28,  
2017, but Dulay alleges the contents of only two such letters in the FAC. See *id.* at ¶¶ 12, 13.  
Accordingly, the court declines to consider the letter submitted by Defendants with their motion,  
as its contents are not alleged in the FAC.

1 admits that there was a second lien holder on his loan, Trinity Financial. See FAC ¶ 14.  
2 Following his receipt of the September 28, 2017 letter, Dulay accepted the short sale offer from  
3 the buyer and submitted to SLS the buyer’s proof of funds. Thereafter, escrow was opened for the  
4 sale of the property. Id. at ¶ 12.

5 Dulay alleges that he “was given numerous single points of contact to assist him with the  
6 short sale.” Id. at ¶ 13. Dulay received three letters dated September 27, 2017, September 28,  
7 2017, and September 29, 2017, each identifying a different individual (“Noe,” “Marcum,” and  
8 “Tricinda,” respectively) as his single point of contact, and each providing only the general SLS  
9 phone number as the individuals’ contact information. Id. Dulay alleges that he was never able to  
10 speak with any of these three individuals. Id.

11 On November 7, 2017, two days before the November 9, 2017 closing date, Trinity  
12 Financial “requested that SLS provide a payoff quote for its loan and reinstatement figures for the  
13 loan, so that the short sale of the property could be completed.” Id. at ¶ 14. On the same day,  
14 Dulay “contacted Defendant and requested to speak with his single point of contact to obtain an  
15 update on the short sale.” Id. However, he was unable to speak with his single point of contact.  
16 Instead, he “spoke with another representative regarding the short sale offer and the request of the  
17 second lien holder and was informed that there were no issues with the short sale.” Id. The  
18 individual with whom Dulay spoke “did not mention that the property was scheduled to be sold on  
19 November 15, 2017.” Id.

20 On November 14, 2017, SLS sent Dulay two letters stating that his short sale request was  
21 still under review. It sent Dulay a third letter on the same day requesting that Dulay authorize  
22 Trinity Financial to receive information about his loan. Id. at ¶ 15. Before Dulay received these  
23 letters, Defendants caused the property to be sold at a foreclosure sale on November 15, 2017. Id.

24 Dulay filed this lawsuit on December 28, 2017. [Docket No. 1 (Notice of Removal) ¶ 2.]  
25 He alleges three claims for relief in the FAC: 1) violation of California Civil Code section  
26 2924.11; 2) violation of California Civil Code section 2923.7; and 3) violation of 12 C.F.R. §  
27

1 1024.41(g). Defendants move to dismiss.

2 **II. LEGAL STANDARD**

3 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims alleged in  
4 the complaint. See *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).  
5 When reviewing a motion to dismiss for failure to state a claim, the court must “accept as true all  
6 of the factual allegations contained in the complaint,” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)  
7 (per curiam) (citation omitted), and may dismiss a claim “only where there is no cognizable legal  
8 theory” or there is an absence of “sufficient factual matter to state a facially plausible claim to  
9 relief.” *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (citing  
10 *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009); *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.  
11 2001). A claim has facial plausibility when a plaintiff “pleads factual content that allows the court  
12 to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*,  
13 556 U.S. at 678 (citation omitted). In other words, the facts alleged must demonstrate “more than  
14 labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”  
15 *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286  
16 (1986)); see *Lee v. City of L.A.*, 250 F.3d 668, 679 (9th Cir. 2001), overruled on other grounds by  
17 *Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002).

18 As a general rule, a court may not consider “any material beyond the pleadings” when  
19 ruling on a Rule 12(b)(6) motion. *Lee*, 250 F.3d at 688 (citation and quotation marks omitted).  
20 However, “a court may take judicial notice of ‘matters of public record,’” *id.* at 689 (citing *Mack*  
21 *v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986)), and may also consider “documents  
22 whose contents are alleged in a complaint and whose authenticity no party questions, but which  
23 are not physically attached to the pleading,” without converting a motion to dismiss under Rule  
24 12(b)(6) into a motion for summary judgment. *Branch*, 14 F.3d at 454. The court need not accept  
25 as true allegations that contradict facts which may be judicially noticed. See *Mullis v. U.S. Bankr.*  
26 *Ct.*, 828 F.2d 1385, 1388 (9th Cir. 1987).

27 **III. REQUEST FOR JUDICIAL NOTICE**

28 Defendants request that the court take judicial notice of document titled “Voluntary

1 Petition for Individuals Filing for Bankruptcy,” which was filed by Dulay and Charlynn Rose  
2 Dulay on February 24, 2017 in Case No. 17-40531 before the United States Bankruptcy Court for  
3 the Northern District of California. [Docket No. 10-1 (Request for Judicial Notice) Ex. 1  
4 (Bankruptcy Petition).] It appears that this document was filed to initiate Chapter 7 bankruptcy  
5 proceedings.

6 Defendants ask the court to take judicial notice of the document, in which Dulay and  
7 Charlynn Rose Dulay represent that there were three sets of lienholders with interests secured by  
8 the property: Defendant SLS; Trinity Financial; and Virgil and Sandra Burton. Bankruptcy  
9 Petition at 21-22. According to Defendants, this information is relevant because the September  
10 28, 2017 letter submitted with their motion listed “Junior Lien Approval Letter[s]” as required  
11 documentation, due 48 hours in advance of closing the short sale of the property, and Dulay does  
12 not allege that he submitted written approval by either set of lienholders by that deadline.  
13 However, as discussed above, the court cannot consider the September 28, 2017 letter Defendants  
14 submitted with their motion, as its contents were not alleged in the FAC. Since the existence of  
15 multiple lienholders is not relevant to Dulay’s claims, the court declines to take judicial notice of  
16 the bankruptcy petition.

17 **IV. DISCUSSION**

18 **A. Claim One—Violation of California Civil Code § 2924.11(d)**

19 Dulay’s first claim for relief alleges a violation of California Civil Code section  
20 2924.11(d). On December 28, 2017, the date Dulay filed his complaint, section 2924.11(d)  
21 provided the following:

22 A mortgagee, beneficiary, or authorized agent shall record a  
23 rescission of a notice of default or cancel a pending trustee’s sale, if  
24 applicable, upon the borrower executing a permanent foreclosure  
25 prevention alternative. In the case of a short sale, the cancellation of  
the pending trustee’s sale shall occur when the short sale has been  
approved by all parties and proof of funds or financing has been  
provided to the mortgagee, beneficiary, or authorized agent.

26 Cal. Civ. Code § 2924.11(d) (2017) (emphasis added). This section remained in effect until  
27 January 1, 2018, and was repealed as of that date. Cal. Civ. Code § 2924.11(j) (2017). Effective  
28 January 1, 2018, the language cited above in section 2924.11(d) was removed from the statute.

1 See Cal. Civ. Code § 2924.11 (2018).

2 Defendants initially argued that Dulay has not pleaded sufficient facts to state a claim  
3 under section 2924.11, because he does not allege that the short sale was “approved by all parties,”  
4 as required by the statute. According to Defendants, the term “all parties” includes all affected  
5 lienholders. Defendants pointed out that Dulay admits in the FAC that there was a second lien  
6 held by Trinity Financial. See FAC ¶ 14. Although he alleges that “the short sale was approved  
7 by Defendants, [himself] and the buyer,” FAC ¶ 21, he does not allege that he obtained the  
8 required approval from Trinity Financial, the other lienholder. Accordingly, Defendants argued,  
9 Dulay has failed to state a claim under section 2924.11(d).

10 The pre-2018 version of the statute does not define the terms “approved” and “by all  
11 parties” as used in the phrase, “when the short sale has been approved by all parties.” At the  
12 hearing, the court ordered the parties to submit supplemental briefing regarding the meaning of  
13 that phrase as used in section 2924.11(d). [Docket No. 21.]

14 In their supplemental brief, Defendants argued for the first time that Dulay’s section  
15 2924.11(d) claim was terminated when that statute was repealed without a savings clause.  
16 [Docket No. 22 at 9-10.] The court ordered Dulay to file a supplemental brief responding to  
17 Defendants’ argument, which he timely filed. [Docket No. 23.] Having reviewed the parties’  
18 briefing and the relevant authority, the court finds that it need not resolve the meaning of the  
19 phrase “when the short sale has been approved by all parties” as used in section 2924.11(d),  
20 because Dulay’s claim was terminated upon repeal of the statute.

21 Under California law, “absent a savings clause, repeals of statutory enactments must apply  
22 retroactively to pending cases.” *Jacobik v. Wells Fargo Bank, N.A.*, No. 17-CV-05121, 2018 WL  
23 1184812, at \*3 (N.D. Cal. Mar. 7, 2018) (quoting *Palmer v. Stassinis*, 419 F. Supp. 2d 1151, 1155  
24 (N.D. Cal. 2005 (citing Cal. Gov’t Code § 9606)). The California Supreme Court has explained  
25 that “[a]lthough the courts normally construe statutes to operate prospectively, the courts  
26 correlatively hold under the common law that when a pending action rests solely on a statutory  
27 basis, and when no rights have vested under the statute, a repeal of [the] statute without a saving  
28 clause will terminate all pending actions based thereon.” *Palmer*, 419 F. Supp. 2d at 1156

1 (quoting *Governing Board v. Mann*, 18 Cal. 3d 819, 829 (1977) (quotation omitted)). “The  
2 justification for this rule is that all statutory remedies are pursued with full realization that the  
3 legislature may abolish the right to recover at any time.” *Id.* “Repeal of a statute terminates all  
4 claims under that statute, even for alleged violations of the statute that occurred before the repeal.”  
5 *Jacobik*, 2018 WL 1184812, at \*3 (citing *Beverly Hilton Hotel v. Workers’ Comp. Appeals Bd.*,  
6 176 Cal. App. 4th 1597, 1602, 1611 (2009)).

7 Notwithstanding the foregoing principle, “[w]here the Legislature repeals a statute but  
8 intends to save the rights of litigants in pending actions, it may accomplish that purpose by  
9 including an express saving clause in the repealing act.” *Bourquez v. Super. Ct.*, 156 Cal. App.  
10 4th 1275, 1284 (2007). However, “[a]n express saving clause in a repealing statute is not required  
11 in order to prevent the destruction of rights existing under a former statute, if the intention to  
12 preserve and continue such rights is otherwise clearly apparent. Thus, if it can be gathered from  
13 any act on the same subject passed by the [L]egislature at the same session that it was the  
14 legislative intent that pending proceedings should be saved, it will be sufficient to effect that  
15 purpose.” *Id.* (quotation omitted); see also *In re Pedro T.*, 8 Cal. 4th 1041, 1049 (1994) (“what is  
16 required is that the Legislature demonstrate its intention with sufficient clarity that a reviewing  
17 court can discern and effectuate it.” (emphasis removed)).

18 Here, section 2924.11(d) was repealed on January 1, 2018 and does not contain an express  
19 savings clause. See Cal. Civ. Code § 2924.11(j) (2017) (“This section shall remain in effect only  
20 until January 1, 2018, and as of that date is repealed . . . unless a later enacted statute . . . deletes or  
21 extends that date.”). The pre-2018 version of section 2924.11 included three substantive  
22 provisions that governed circumstances prohibiting a mortgage servicer, mortgagee, trustee, or  
23 beneficiary from taking certain actions when a foreclosure prevention alternative is approved or  
24 executed. These provisions were subsections (a), (b), and (d), which is the subsection under which  
25 Dulay seeks relief. In the version that became effective on January 1, 2018, subsections (a) and  
26 (b) remained in the statute but were relabeled to become subsections (c) and (d), respectively.

27  
28

1 However, subsection (d) was completely removed from the statute.<sup>3</sup> Thus, the operative version  
2 of section 2924.11 has no provision that requires a mortgagee, beneficiary, or authorized agent to  
3 cancel a pending trustee’s sale in the case of a short sale if certain requirements have been met.

4 “As a general rule, in construing statutes, [courts] presume the Legislature intends to  
5

---

6 <sup>3</sup> The pre-2018 version of section 2924.11(a) states the following:  
7

8 (a) If a foreclosure prevention alternative is approved in writing  
9 prior to the recordation of a notice of default, a mortgage servicer,  
10 mortgagee, trustee, beneficiary, or authorized agent shall not record  
11 a notice of default under either of the following circumstances:

12 (1) The borrower is in compliance with the terms of a written  
13 trial or permanent loan modification, forbearance, or  
14 repayment plan.

15 (2) A foreclosure prevention alternative has been approved  
16 in writing by all parties, including, for example, the first lien  
17 investor, junior lienholder, and mortgage insurer, as  
18 applicable, and proof of funds or financing has been  
19 provided to the servicer.

20 Cal. Civ. Code § 2924.11(a) (2017). The pre-2018 version of section 2924.11(b) states the  
21 following:

22 (b) If a foreclosure prevention alternative is approved in writing  
23 after the recordation of a notice of default, a mortgage servicer,  
24 mortgagee, trustee, beneficiary, or authorized agent shall not record  
25 a notice of sale or conduct a trustee’s sale under either of the  
26 following circumstances:

27 (1) The borrower is in compliance with the terms of a written  
28 trial or permanent loan modification, forbearance, or  
29 repayment plan.

30 (2) A foreclosure prevention alternative has been approved  
31 in writing by all parties, including, for example, the first lien  
32 investor, junior lienholder, and mortgage insurer, as  
33 applicable, and proof of funds or financing has been  
34 provided to the servicer.

35 Cal. Civ. Code § 2924.11(b) (2017).

36 As noted above, the version of section 2924.11 that went into effect on January 1, 2018  
37 retained these two provisions in renumbered form: the current, operative versions of sections  
38 2924.11(c) and 2924.11(d) are identical to the former sections 2924.11(a) and 2924.11(b).

39 The pre-2018 version of section 2924.11 contained several other provisions regarding  
40 foreclosure prevention alternatives, none of which are relevant to the question of whether claims  
41 under the pre-2018 version of section 2924.11(d) survived its repeal.



1 change the meaning of a law when it alters the statutory language, as for example when it deletes  
2 express provisions of the prior version.” Jacobik, 2018 WL 1184812, at \*4 (quoting *Charton v.*  
3 *Harkey*, 247 Cal. App. 4th 730, 741 (2016) (quotation omitted)). “The Legislature’s repeal of a  
4 prior statute together with its enactment of a new statute on the same subject . . . with significant  
5 differences in language, strongly suggests the Legislature intended to change the law.” Jacobik,  
6 2018 WL 1184812, at \*4 (quoting *Charton*, 247 Cal. App. 4th at 741 (quotation omitted)). Here,  
7 the Legislature’s decision to repeal section 2924.11(d) while retaining the other substantive  
8 provisions of the pre-2018 version of the statute indicate that the Legislature did not intend to  
9 preserve the right to cancellation of a pending trustee’s sale in the event of a short sale in certain  
10 circumstances.

11 Without citing any legislative history, Dulay argues that the post-2018 version of section  
12 2924.11 “was enacted in the same legislative bill as the pre-2018 version of Section 2924.11  
13 passed by the Legislature in 2012,” which somehow demonstrates that violations of the former  
14 section 2924.11(d) “were preserved” in the new version. Unsurprisingly, Dulay provides no  
15 support for this argument, and it is difficult to find any merit in it, given the fact that section  
16 2924.11(d) indisputably went off the books as of January 1, 2018. If anything, the fact that the  
17 pre- and post-2018 versions of the statute were enacted at the same time tends to support that the  
18 Legislature intended to automatically repeal subsection (d) as of January 1, 2018, absent further  
19 legislative action.

20 The court concludes that the Legislature repealed the 2017 version of section 2924.11(d)  
21 without an express savings clause or other indication of its intent to maintain the rights conferred  
22 therein. Accordingly, the January 1, 2018 repeal of section 2924.11(d) terminated Dulay’s claim  
23 under that statute. His section 2924.11(d) claim is therefore dismissed with prejudice. In his  
24 supplemental brief, Dulay requests leave to amend to state a claim under the 2018 versions of  
25 sections 2924.11(a) and 2924.11(d). [Docket No. 27 at 2-3.] Dulay is granted leave to amend the  
26 complaint to state a claim under the operative version of section 2924.11.

27 **B. Claim Two—Violation of California Civil Code § 2923.7**

28 Dulay’s second claim for relief alleges a violation of California Civil Code section 2923.7.

1 The California legislature enacted a “single point of contact provision” (“SPOC”) in order “to  
2 prevent borrowers from being given the run around.” *Rockridge Trust v. Wells Fargo, N.A.*, 985  
3 F. Supp. 2d 1110, 1151 (N.D. Cal. 2013) (citing *Jolley v. Chase Home Fin., LLC*, 213 Cal. App.  
4 4th 872, 904-05 (2013)). Specifically, section 2923.7 provides: “Upon request from a borrower  
5 who requests a foreclosure prevention alternative, the mortgage servicer shall promptly establish a  
6 [SPOC] and provide to the borrower one or more direct means of communication with the  
7 [SPOC].” Cal. Civ. Code § 2923.7(a). The SPOC is responsible for timely and adequately  
8 assisting the borrower, such as communicating “the process by which a borrower may apply for an  
9 available foreclosure prevention alternative,” coordinating the receipt of documents, notifying the  
10 borrower if any documents are missing, and adequately informing the borrower of the status of a  
11 foreclosure prevention alternative. Cal. Civ. Code § 2923.7(b). Section 2923.7 does not itself  
12 contain a private right of action. See, e.g., *Taylor v. CitiMortgage, Inc.*, No. 1:17-cv-01231-DAD-  
13 JLT, 2017 WL 6055837, at \*4 (E.D. Cal. Dec. 7, 2017) (citing cases). Instead, California Civil  
14 Code section 2924.12 provides that a borrower may bring an action for “material” violations of  
15 section 2923.7. Cal. Civ. Code § 2924.12(a)(1), (b).

16 At the hearing, Dulay’s counsel stated that his section 2923.7 claim is based upon an  
17 alleged violation of subsection (b)(3). Section 2923.7(b)(3) provides that an SPOC must “[have]  
18 access to current information and personnel sufficient to timely, accurately, and adequately inform  
19 the borrower of the current status of the foreclosure prevention alternative.” Dulay alleges that  
20 Defendants violated this SPOC requirement by failing to provide him with an SPOC who could  
21 provide him with information about the status of the short sale or the existence of the scheduled  
22 foreclosure sale. FAC ¶¶ 25-26. According to Dulay, he contacted SLS on November 7, 2017 and  
23 asked to speak with his SPOC “to obtain an update on the short sale.” *Id.* at ¶ 26. However, he  
24 was unable to speak with his SPOC, and instead spoke with another representative “regarding the  
25 short sale offer and the request of the second lien holder and was informed that there were no  
26 issues with the short sale.” *Id.* The individual with whom he spoke did not mention the upcoming  
27 trustee’s sale scheduled for November 15, 2017. Dulay alleges that if he had ever been informed  
28 that Defendants required a written approval of the short sale from Trinity Financial, he “would

1 have provided it and would not have lost his property to foreclosure.” Id.

2 Defendants move to dismiss this claim on the ground that Dulay does not allege a material  
3 violation of the statute. According to Defendants, Dulay waited to contact SLS on the day that his  
4 pre-closing documents were due, citing the September 28, 2017 letter attached to their motion.  
5 Mot. 5. They also argue that SLS had informed Dulay of the steps he needed to take to avoid  
6 foreclosure in the same September 28, 2017 letter, including submitting certain “Pre Closing  
7 documents.” Id. at 6. Therefore, Defendants argue, Dulay “fails to allege how the single point of  
8 contact materially affected Plaintiff’s failure to submit the required Pre Closing documents to SLS  
9 on time.” Id. These arguments rest entirely on the September 28, 2017 letter attached to their  
10 motion, which the court may not consider for the reasons previously discussed.

11 A violation of the Homeowners’ Bill of Rights is “material” if it “affected [the plaintiff’s]  
12 loan obligations” or the loan modification process. *Cardenas v. Caliber Home Loans, Inc.*, 281 F.  
13 Supp. 3d 862, 869 (N.D. Cal. 2017) (quoting *Johnson v. PNC Mortg.*, No. C 14-02976 LB, 2014  
14 WL 6629585, at \*9 (N.D. Cal. Nov. 21, 2014)). Dulay alleges that he attempted to contact his  
15 SPOC on November 7, 2017 but was unable to speak with the SPOC. Instead, he spoke with  
16 another representative who informed him that there were “no issues with the short sale” and failed  
17 to inform him of the trustee’s sale. These facts are sufficient to allege a material violation of  
18 section 2923.7(b)(3), because Dulay alleges that if he had been informed that he needed to submit  
19 written approval of the short sale from Trinity Financial, he “would have provided it and would  
20 not have lost his property to foreclosure.” FAC ¶ 26.

21 Dulay’s counsel further stated at the hearing that the SPOC’s failure to inform him on  
22 November 7, 2017 that additional documents were needed in order to proceed with the short sale  
23 violated subsections (b)(4) and (b)(5). Section 2923.7(b)(4) provides that an SPOC is responsible  
24 for “ensuring that a borrower is considered for all foreclosure prevention alternatives offered by,  
25 or through, the mortgage servicer, if any.” Section 2923.7(b)(5) provides that an SPOC must  
26 “[have] access to individuals with the ability and authority to stop foreclosure proceedings when  
27 necessary.” Counsel acknowledged that the FAC does not clearly plead these violations and asked  
28 for leave to amend the complaint to allege additional facts in support of these claims. Dulay is

1 granted leave to amend to plead violations of sections 2923.7(b)(4) and (b)(5).

2 **C. Claim Three—Violation of 12 C.F.R. § 1024.41(g)**

3 Dulay’s third claim for relief alleges a violation of 12 C.F.R. § 1024.41(g). That provision  
4 states the following:

5 If a borrower submits a complete loss mitigation application after a  
6 servicer has made the first notice or filing required by applicable law  
7 for any judicial or non-judicial foreclosure process but more than 37  
8 days before a foreclosure sale, a servicer shall not move for  
foreclosure judgment or order of sale, or conduct a foreclosure sale,  
unless:

9 (1) The servicer has sent the borrower a notice pursuant to paragraph  
10 (c)(1)(ii) of this section that the borrower is not eligible for any loss  
11 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 (2) The borrower rejects all loss mitigation options offered by the  
13 servicer; or

14 (3) The borrower fails to perform under an agreement on a loss  
15 mitigation option.

16 12 C.F.R. § 1024.41(g). A “loss mitigation option” is defined as “an alternative to foreclosure  
17 offered by the owner or assignee of a mortgage loan that is made available through the servicer to  
18 the borrower.” 12 C.F.R. § 1024.31.

19 Dulay alleges that he submitted, and Defendants approved, his loss mitigation application  
20 seeking a short sale of the property on or around September 28, 2017. However, Defendants sold  
21 the property at a foreclosure sale on November 15, 2017, which was more than 37 days after the  
22 application was approved. FAC ¶ 32. Accordingly, Dulay argues that Defendants violated section  
23 1024.41(g).

24 Defendants argue that Dulay’s section 1024.41(g) claim fails because he “fail[ed] to  
25 perform” under the parties’ agreement on the short sale. See 12 C.F.R. § 1024.41(g)(3).  
26 Specifically, they argue that SLS expressly conditioned its approval of the short sale “on the  
27 fulfillment of the conditions” listed in the September 28, 2017 letter, and that it reserved “the right  
28 to terminate the short sale” if the final closing instructions were “not followed in their entirety.”

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

Mot. 7. This argument is solely based on the September 28, 2017 letter attached to Defendants’ motion. As discussed above, the court cannot consider the letter attached to Defendants’ motion as its contents were not alleged in the FAC. Moreover, the September 28, 2017 letter that is alleged in the FAC did not condition SLS’s approval of the short sale on approval from all lien holders on the property; it stated only that Dulay “may also be required to provide offer approval from any additional lien holders on the property.” See FAC ¶ 12. Since Trinity Financial’s approval was not listed as a mandatory condition of SLS’s approval, Defendants’ argument that Dulay “failed to perform” under the parties’ agreement is without merit. Defendants make no other arguments in support of their motion to dismiss this claim. Accordingly, the motion is denied as to Dulay’s third claim for relief.

**V. CONCLUSION**

For the foregoing reasons, Defendants’ motion to dismiss is granted in part and denied in part. Any amended complaint must be filed within 14 days of the date of this order.

**IT IS SO ORDERED.**

Dated: July 30, 2018

