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7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**
9

10 LUIS CORDERO,

11 Plaintiff,

12 vs.

13 U.S. BANK, N.A., et al.,

14 Defendants.

Case No. 14CV1709-MMA (BLM)

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS**

[Doc. No. 4]

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16 Plaintiff Luis Cordero has filed a civil complaint alleging various violations of the
17 California Homeowner Bill of Rights. Defendants U.S. Bank, N.A. (“U.S. Bank”) and
18 Residential Credit Solutions, Inc. (“RCS”) move to dismiss Plaintiff’s complaint in its
19 entirety.¹ [Doc. No. 4.] Plaintiff did not file a response in opposition, and Defendants
20 filed a Notice of Plaintiff’s Non-Opposition to the motion to dismiss. [Doc. No. 10.] The
21 Court determined the matter suitable for decision on the papers and without oral
22 argument pursuant to Civil Local Rule 7.1(d)(1). For the reasons set forth below, the
23 Court **GRANTS** Defendants’ motion to dismiss.

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26 ¹ As noted in Defendants’ motion, Defendant Sage Point Lender Services, LLC (“Sage”) filed a Declaration of Non-
27 Monetary Status prior to the removal of this action to federal court. Plaintiff did not object, therefore, Defendant Sage is not
required to participate further in the proceeding, but is bound by any court order regarding the deed of trust that is the subject
of the action. Cal. Civ. Code § 2924(d) (West).

1 **BACKGROUND**

2 On September 8, 2005, Plaintiff executed a deed of trust against his residence at
3 974 Loma View, Chula Vista, CA 91910 as security for a loan of \$430,400 from
4 Mortgageit, Inc. [Cmpl. ¶¶ 1, 12.] On February 23, 2009, Plaintiff went into default, a
5 Substitution of Trustee was recorded, and a Notice of Default was recorded. [Doc. No.
6 4.] A Notice of Trustee’s Sale was recorded on May 27, 2009. [*Id.*] On October 15,
7 2012, an Assignment of Deed of Trust was recorded wherein all beneficial interest in the
8 deed of trust was assigned to Defendant U.S. Bank [Cmpl. ¶ 13], and on March 8, 2013 a
9 Substitution of Trustee was recorded substituting Defendant Sage, as trustee under the
10 deed of trust. [Doc. No. 4.] A Notice of Default and Election to Sell Under Deed of
11 Trust was recorded on January 16, 2014, and a Notice of Trustee’s Sale was recorded on
12 April 23, 2014. [*Id.*]

13 Plaintiff filed this action in the Superior Court of California, County of San Diego
14 on January 20, 2014 alleging claims for violations of the California Homeowner Bill of
15 Rights, codified as California Civil Code Sections 2923.5, 2924.17, 2924.19, 2924(a)(5),
16 2923.7, and 2923.6. Defendants removed the case to federal court on July 21, 2014, and
17 now move to dismiss Plaintiff’s claims under Federal Rule of Civil Procedure Rule
18 12(b)(6).

19 **LEGAL STANDARD**

20 **A. Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6)**

21 A Rule 12(b)(6) motion to dismiss challenges the legal sufficiency of the
22 complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). “While a complaint
23 attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations,
24 a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more
25 than labels and conclusions, and a formulaic recitation of the elements of a cause of
26 action will not do.

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1 Factual allegations must be enough to raise a right to relief above the speculative level.”
2 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations, brackets, and
3 citations omitted).

4 In reviewing the motion to dismiss under Rule 12(b)(6), the court must assume the
5 truth of all factual allegations, and construe them in the light most favorable to the
6 nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996).
7 However, “conclusory allegations of law and unwarranted inferences are not sufficient to
8 defeat a motion to dismiss,” *Pareto v. Fed. Deposit Ins. Corp.*, 139 F.3d 696, 699 (9th
9 Cir. 1998), and a court generally may not look beyond the complaint for additional facts,
10 *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *Parrino v. FHP, Inc.*, 146
11 F.3d 699, 705–06 (9th Cir. 1998).

12 Where a motion to dismiss is granted, “leave to amend should be granted ‘unless
13 the court determines that the allegation of other facts consistent with the challenged
14 pleading could not possibly cure the deficiency.’” *DeSoto v. Yellow Freight Sys., Inc.*,
15 957 F.2d 655, 658 (9th Cir. 1992) (quoting *Schreiber Distrib. Co. v. ServWell Furniture*
16 *Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986)). Therefore, where leave to amend would be
17 futile, the court may dismiss the claims without leave to amend. *See id.*

18 **B. Unopposed Motions to Dismiss**

19 A district court may properly grant an unopposed motion to dismiss pursuant to a
20 local rule where the local rule permits, but does not require, the granting of a motion for
21 failure to respond. *See Ghazali v. Moran*, 46 F.3d 52, 53-54 (9th Cir. 1995). Southern
22 District of California Civil Local Rule 7.1 provides: “If an opposing party fails to file the
23 papers in the manner required by Civil Local Rule 7.1(e)(2), that failure may constitute a
24 consent to the granting of a motion or other request for ruling by the court.” S.D. Cal
25 Civ. L. R. 7.1(f)(3)(c). “Although there is...a [public] policy favoring disposition on the
26 merits, it is the responsibility of the moving party to move towards that disposition at a

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1 reasonable pace, and to refrain from dilatory and evasive tactics.” *In re Eisen*, 31 F.3d
2 1447, 1454 (9th Cir. 1994) (affirming grant of motion to dismiss for failure to prosecute);
3 *see also Ruiz v. Bank of America, N.A.*, 10-CV-500-MMA(BLM), 2010 WL 8510152
4 (S.D. Cal. Sept 30, 2010) (Anello J.) (dismissing action pursuant to local Rule 7.1 for
5 plaintiff’s failure to respond to a motion to dismiss); *Yueh Chen v. PMC Bancorp*, No.
6 09-CV-2704-WQH(BLM), 2010 WL 2943506 (S.D. Cal. July 23, 2010) (Hayes, J.)
7 (same).

8 **C. Requests for Judicial Notice**

9 Generally, a district court’s review on a 12(b)(6) motion to dismiss is limited to the
10 complaint. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). However, “a
11 court may take judicial notice of matters of public record,” *id.* at 689 (internal quotations
12 and citations omitted), and of “documents whose contents are alleged in a complaint and
13 whose authenticity no party questions, but which are not physically attached to the
14 pleading,” *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other*
15 *grounds by Gailbraith v. Cnty. Of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002). Judicially
16 noticed facts “may be considered on a motion to dismiss.” *Mullis v. United States Bankr.*
17 *Ct.*, 828 F.2d 1385, 1388 (9th Cir. 1987).

18 **DISCUSSION**

19 **I. Unopposed Motion to Dismiss**

20 Although the motion to dismiss in this case may be granted as unopposed pursuant
21 to Civil Local Rule 7.1, the Court finds it appropriate to consider the motion to dismiss
22 on the merits.

23 **II. Requests for Judicial Notice**

24 Defendants filed a Request for Judicial Notice concurrently with the motion to
25 dismiss, requesting the Court take judicial notice of certain public records relating to
26 Plaintiff’s complaint. [Doc. No. 5.] The public records include a Deed of Trust [Exh. 1],
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1 a Substitution of Trustee [Exh. 2], a Notice of Default and Election to Sell under Deed of
2 Trust [Exh. 3], a Notice of Trustee’s Sale [Exh. 4], an Assignment of Deed of Trust [Exh.
3 5], a Substitution of Trustee [Exh. 6], a Notice of Default and Election to Sell under Deed
4 of Trust [Exh. 7], and a Notice of Trustee’s Sale [Exh. 8].

5 Neither party questions the authenticity of these public records, therefore to the
6 extent that the Court references such documents herein, Defendant’s Request for Judicial
7 Notice is **GRANTED**.

8 **III. Motion to Dismiss**

9 **A. First Cause of Action: Violation of Cal. Civ. Code Section 2923.5**

10 Defendants move to dismiss Plaintiff’s Section 2923.5 claim. California Civil
11 Code Section 2923.5 prohibits a “mortgage servicer, mortgage trustee, beneficiary, or
12 authorized agent” from recording a notice of default until the mortgage servicer has
13 satisfied certain statutory outreach requirements.

14 Plaintiff alleges Defendants “did not contact [Plaintiff] with any foreclosure
15 alternatives and proceeded with filing a Notice of Default...Further, [Defendant Sage]
16 made no attempt to contact Plaintiff by phone as required by law.” [Cmpl. ¶ 17.]
17 Plaintiff also alleges that “the only telephonic communication [Plaintiff] was able to
18 maintain was with Defendant RESIDENTIAL CREDIT SOLUTIONS” and that those
19 communications were “both minimal and unhelpful; ultimately providing [Plaintiff] with
20 inadequate foreclosure prevention assistance.” [*Id.*] Plaintiff later contends Defendant
21 RCS “could not provide specifics regarding [Plaintiff’s] home loan or foreclosure
22 prevention alternatives,” but, “acted with bare minimum standards,” and “did send
23 Plaintiff written correspondence.” [Cmpl. ¶ 26.]

24 As a preliminary matter, Section 2923.5 requires a *mortgage servicer* to “contact
25 the borrower in person or by telephone in order to assess the borrower’s financial
26 situation and explore options for the borrower to avoid foreclosure.” Cal Civ. Code §
27 2923.5(a)(2). Although Defendant RCS is a mortgage servicer [Cmpl. ¶ ¶ 2], Defendant

1 U.S. Bank is not [Cmpl. ¶¶ 3], so there is no cause of action against it under this
2 Section.²

3 Furthermore, Plaintiff acknowledges in his complaint Defendant RCS contacted
4 Plaintiff by phone and in writing, and that Defendant RCS acted with minimum standards
5 in providing Plaintiff with information regarding foreclosure alternatives. Indeed, as
6 Defendants note in the motion to dismiss, Plaintiff acknowledges he was permitted to
7 submit a loan modification package after the notice of default was recorded, even though
8 the application was denied. [Cmpl. ¶¶ 15, 19.] There is no requirement Plaintiff be
9 satisfied with the results of the mortgage servicer's contact, as Section 2923.5 merely
10 "contemplates contact and some analysis of the borrower's financial situation." *See*
11 *Davenport v. Litton Loan Servicing, LP*, 725 F. Supp. 2d 862, 877 (N.D. Cal. 2010).

12 Plaintiff fails to state a plausible claim against Defendants under Section 2923.5.
13 Accordingly, this cause of action is **DISMISSED**.

14 **B. Second Cause of Action: Violation of Cal. Civ. Code Section 2924.17**

15 Plaintiff's second claim arises under California Civil Code Section 2924.17, which
16 requires a mortgage servicer to review "competent and reliable evidence to substantiate
17 the borrower's default and the right to foreclose" before recording a notice of default or
18 notice of sale in connection with a foreclosure. Section 2924.17(c) provides an additional
19 civil penalty for "multiple and repeated uncorrected" violations of the review
20 requirement, but only if the action is brought by a government entity. Defendants move
21 to dismiss Plaintiff's second cause of action on grounds the claim "is not brought by a
22 government entity or an administrative proceeding [sic]," and "no sale has occurred to
23 date so the claim is not even ripe for economic damages." [Doc. No. 4.]

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25 ² Plaintiff's complaint also fails to include allegations regarding whether Defendants are the types of entities described in
26 California Civil Code Section 2924.18(b), as required in Section 2923.5(g). If Defendants are not accurately described under
27 Section 2924.18(b), it is likely that Defendants' conduct would instead be governed under Section 2923.55, which contains
provisions largely similar to those in Section 2923.5. However, the Court's analysis would apply with equal force to an
identical claim brought by Plaintiff under Section 2923.5.

1 Defendants' argument misses the mark. Although this provision provides an
2 additional avenue of relief to specified government entities, it is not a prerequisite to a
3 claim under this Section. *See* Cal. Civ. Code § 2924.12(a)(1) (West) (“If a trustee’s deed
4 upon sale has not been recorded, a borrower may bring an action for injunctive relief to
5 enjoin a material violation of Section...2924.17”); *Major v. Wells Fargo Bank, N.A.*, 14-
6 CV-998-LAB-RBB, 2014 WL 4103936 (S.D. Cal. Aug. 18, 2014) (“[Plaintiffs’] claim
7 that Wells Fargo did not ensure that they had reviewed all the information required under
8 Section 2924.17 is an intelligible allegation, but as Wells Fargo argues it lacks
9 materiality. The purpose of the statute is to make sure that lenders determine that they
10 have a right to foreclose before initiating foreclosure proceedings.”).

11 Nonetheless, Plaintiff’s claim is subject to dismissal. Section 2924.17(b) requires
12 a mortgage servicer “ensure that it has reviewed competent and reliable evidence to
13 substantiate the borrower’s default and the right to foreclose, including the borrower’s
14 loan status and loan information” before filing a notice of default or notice of sale. While
15 Plaintiff alleges he was refused a request to reapply for a second loan modification after
16 receiving a substantial increase in income [Cmpl. ¶ 19], there is no further allegation the
17 notices were inaccurate or incomplete, or that the mortgage servicer failed to review
18 “competent and reliable evidence” regarding Plaintiff’s default or the right of Defendants
19 to foreclose. These allegations are insufficient to bring an action under Section 2924.17,
20 therefore the second cause of action is **DISMISSED**.

21 **C. Third Cause of Action: Violation of Cal. Civ. Code Section 2924.19**

22 Pursuant to Section 2924.19(a)(1), “[i]f a trustee’s deed upon sale has not been
23 recorded, a borrower may bring an action for injunctive relief to enjoin a material
24 violation of Section 2923.5, 2924.17, or 2924.18.” Plaintiff makes no allegations for this
25 cause of action, but instead “request[s] damages due to lack of mortgage assistance and
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1 pursuit of foreclosure.”³ [Cmpl. ¶ 22.] Defendants move to dismiss on grounds that
2 Section 2924.19 only authorizes injunctive relief or monetary damages resulting from
3 material violations of Section 2923.5, 2924.17, or 2924.18, and cannot be pled as an
4 independent claim.

5 As discussed above, Plaintiff fails to state a plausible claim under Section 2923.5
6 or Section 2924.17. Plaintiff also fails to allege a violation of Section 2924.18, which
7 prohibits recording a notice of default or notice of sale while a borrower’s first lien loan
8 modification application is pending (commonly referred to as “dual tracking”). As such,
9 Plaintiff’s derivative third cause of action fails and is **DISMISSED**.

10 **D. Fourth Cause of Action: Violation of Cal. Civ. Code Section 2924(a)(5)**

11 Plaintiff’s fourth claim arises under Section 2924(a)(5), which requires written
12 notice be provided to a borrower “whenever a sale is postponed for a period of at least 10
13 business days.” Although Plaintiff alleges “no contact was made to confirm the
14 postponement of the Trustee sale date” [Cmpl. ¶ 24.], Plaintiff does not allege the sale
15 was postponed for at least 10 business days, or prejudice from the lack of formal notice.⁴
16 Therefore, the fourth cause of action is **DISMISSED**.

17 **E. Fifth Cause of Action: Violation of Cal. Civ. Code Section 2923.7**

18 Plaintiff’s fifth claim is brought pursuant to Section 2923.7, which sets forth:
19 “Upon request from a borrower who requests a foreclosure prevention alternative, the
20 mortgage servicer shall promptly establish a single point of contact and provide...direct
21 means of communication with the single point of contact.” Defendants move to dismiss
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23 ³ Plaintiff’s complaint does not contain a specific request for injunctive relief. The Court notes that within three days of
24 filing his complaint in state court, Plaintiff filed an ex parte application requesting a temporary restraining order prohibiting
25 Defendants from proceeding with a trustee’s sale or otherwise disposing of Plaintiff’s property. [See Doc. No. 1, Notice of
26 Removal, Exh. 4.] The record reflects that the ex parte hearing on Plaintiff’s application for a TRO was vacated by the state
27 court judge and not rescheduled prior to the action’s removal by Defendants one month later. Plaintiff did not renew his
request for injunctive relief in this Court subsequent to removal.

⁴ See *Pantoja v. Countrywide Home Loans Inc.*, 640 F. Supp. 2d 1177, 1186 (N.D. Cal. 2009) (notice of default not deficient where notice misidentified beneficiary under California Civil Code Section 2924c(b)(1) because plaintiff did not allege prejudice); *c.f. Lehner v. United States*, 685 F.2d 1187, 1190-91 (9th Cir. 1982) (rejecting claim foreclosure was invalid because notice of sale was sent to incorrect address).

1 the fifth cause of action because Plaintiff acknowledges he was in contact with the
2 mortgage servicer, Defendant RCS, and because other allegations in the complaint appear
3 to indicate there was a “single point of contact” as defined in Section 2923.7. Defendants
4 also argue Plaintiff has failed to allege prejudice resulting from the purported failure to
5 create a single point of contact.

6 Plaintiff claims Defendants “did not provide a single point of contact
7 knowledgeable of both possible foreclosure prevention alternatives and the specifics of
8 Plaintiff’s home loan,” and “Plaintiff was never given the opportunity to contact
9 Defendants US. [sic] BANK or SAGE POINT.” [Cmpl. ¶ 26.] Plaintiff also alleges
10 Defendant RCS “could not provide specifics regarding his home loan or foreclosure
11 prevention alternatives.” [Id.] Section 2923.7 only requires the single point of contact be
12 knowledgeable of possible foreclosure prevention alternatives to ensure “the borrower is
13 considered for all foreclosure prevention alternatives offered by, or through, the mortgage
14 servicer.” Cal. Civ. Code § 2923.7(b) (West). Section 2923.7 does not impose a duty on
15 the single point of contact to “describe the foreclosure process, answer questions in a
16 timely and effective manner, and [provide] updates on the status of [a borrower’s] home.”
17 [Cmpl. ¶ 26]. Plaintiff acknowledges he was in contact with Defendant RCS, and that he
18 was able to submit an application for loan modification. [Cmpl. ¶ 26, 28.] Plaintiff’s
19 additional allegations are irrelevant, therefore, the fifth cause of action is **DISMISSED**.

20 **F. Sixth Cause of Action: Violation of Cal. Civ. Code Section 2923.6**

21 Finally, Plaintiff alleges Defendants violated Section 2923.6, which prohibits
22 recording a notice of default or notice of sale while a first lien loan modification
23 application is pending, and sets forth guidelines regarding denied and subsequent
24 applications.

25 Plaintiff alleges he “was not formally declined for loan modification” and
26 Defendant RCS “did not provide any means of appeal or other foreclosure prevention
27 alternatives with the denial of Plaintiff’s loan modification application.” [Cmpl. ¶ 28.]

1 Defendants argue Plaintiff fails to allege Section 2923.6 applies to Defendants, Plaintiff
2 is not entitled protection under the statute, and that Plaintiff failed to allege prejudice
3 resulting from the procedural irregularity.

4 Section 2923.6 only applies “to mortgages or deeds of trust described in Section
5 2924.15.” Section 2924.15 states Section 2923.6 “shall apply only to first lien mortgages
6 or deeds of trust that are secured by owner-occupied residential real property containing
7 no more than four dwelling units.” Assuming the property at issue contains no more than
8 four dwelling units, Section 2923.6(i) further provides subdivisions (c)-(h) “shall not
9 apply to entities described in subdivision (b) of Section 2924.18,” which include entities
10 that foreclosed on 175 or fewer residential real properties with four or fewer dwelling
11 units in California during the preceding annual reporting period. Plaintiff fails to address
12 these requirements in the complaint, therefore there are insufficient allegations to
13 establish Section 2923.6 applies.

14 Assuming Section 2923.6 does apply, it does not require Plaintiff be provided
15 “means of appeal or other foreclosure prevention alternatives,” but rather it prohibits
16 recording “a notice of default or notice of sale...while the complete first lien loan
17 modification application is pending,” until “[t]he mortgage servicer makes a written
18 determination that the borrower is not eligible for a first lien loan modification, and any
19 appeal period...has expired.” Cal. Civ. Code § 2923.6(c) (West). Additionally, although
20 Plaintiff alleges he “was not given ample opportunity to reapply once a substantial
21 material change in his income occurred,” [Cmpl. ¶ 28], he fails to indicate whether his
22 change in income was documented and submitted to the mortgage servicer as required for
23 borrowers denied a first lien loan modification. Cal. Civ. Code § 2923.6(g) (West).

24 In sum, Plaintiff’s sixth cause of action lacks sufficient allegations to establish
25 grounds to his entitlement of relief. Therefore, it is **DISMISSED**.

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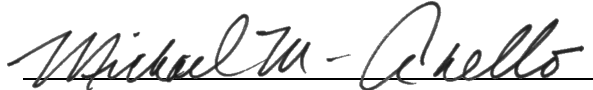
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1 CONCLUSION

2 For the reasons set forth above, the Court **DISMISSES** Plaintiff's complaint in its
3 entirety without prejudice. The Clerk of Court is instructed to close the case.

4 **IT IS SO ORDERED.**

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6 Dated: September 17, 2014

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8 Hon. Michael M. Anello
9 United States District Judge
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