

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
SOUTHERN DISTRICT OF CALIFORNIA

KIMTHU TRINH,

Plaintiff,

v.

WELLS FARGO & COMPANY *et al.*,

Defendants.

Case No.: 3:16-cv-2985-L-BGS

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

Pending before the Court in this mortgage foreclosure action is a motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), filed by Defendant Wells Fargo & Company ("Wells Fargo" or "Defendant"). Plaintiff filed an opposition and Defendant replied. For the reasons which follow, the motion is granted in part and denied in part. Plaintiff's request for leave to amend is granted.

I. Background

Plaintiff owns a residence in San Diego, California ("Property"). (Compl. at 2.) She financed it with a \$500,000 mortgage loan issued by Wells Fargo's predecessor. (*Id.* at 8.) She made regular monthly payments until August 2012, when she was laid off. (*Id.*) From March 2014 through February 2015, Keep Your Home California made the

1 payments on Plaintiff's behalf. (*Id.*) In mid-2015, Plaintiff applied for a loan
2 modification, which was denied. (*Id.*) She applied again in May 2016, but her
3 application was again denied, and her appeal of the denial was unsuccessful. (*Id.*)
4 Plaintiff maintains that Wells Fargo wrongfully denied her application and related appeal
5 because it was relying on erroneous income amounts. (*Id.* at 8-9.) On July 7, 2016,
6 Plaintiff made a loan modification application under Defendant's Unemployment
7 Program, based on "substantially changed financial circumstances." (*Id.* at 9.) With the
8 assistance of the Urban League of San Diego, she reapplied on July 26, 2016. (*Id.*) She
9 received no acknowledgment of, or response to, her July 2016 applications. Instead, on
10 August 2, 2016, she received a Notice of Default, and on August 8, 2016, she received a
11 Notice of Foreclosure. (*Id.*)

12 Plaintiff filed a complaint in state court alleging state law claims for violation of
13 the California Homeowner's Bill of Rights ("HBOR"), specifically Civil Code Sections
14 2923.6 and 2924.10.¹ She also asserts negligence, quiet title, violation of California's
15 Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.* ("UCL"), and requests
16 an accounting. Defendant removed the action to this Court based on diversity of
17 citizenship under 28 U.S.C. § 1332, and then moved to dismiss pursuant to Rule 12(b)(6)
18 for failure to state a claim.

19 II. Discussion

20 A motion under Rule 12(b)(6) tests the sufficiency of the complaint. *Navarro v.*
21 *Block*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is warranted where the complaint
22 lacks a cognizable legal theory. *Shroyer v. New Cingular Wireless Serv., Inc.*, 622 F.3d
23 1035, 1041(9th Cir. 2010) (internal quotation marks and citation omitted). Alternatively,
24 a complaint may be dismissed where it presents a cognizable legal theory, yet fails to
25

26 ¹ Plaintiff listed § 2923.10 in the complaint. This appears to be a typographical error
27 because Section 2923.10 does not appear in the California Civil Code. Defendant
28 addresses the claim as a § 2924.10 claim (Mot. at 7), which Plaintiff adopts in her
opposition (*see* Opp'n at 4).

1 plead essential facts under that theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749
2 F.2d 530, 534 (9th Cir. 1984).

3 In reviewing a Rule 12(b)(6) motion, the Court must assume the truth of all factual
4 allegations and construe them most favorably to the nonmoving party. *Huynh v. Chase*
5 *Manhattan Bank*, 465 F.3d 992, 997, 999 n.3 (9th Cir. 2006). However, legal
6 conclusions need not be taken as true merely because they are couched as factual
7 allegations. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Similarly,
8 "conclusory allegations of law and unwarranted inferences are not sufficient to defeat a
9 motion to dismiss." *Pareto v. Fed. Deposit Ins. Corp.*, 139 F.3d 696, 699 (9th Cir. 1998).

10 A. Violation of California Civil Code Section 2923.6

11 In her first cause of action Plaintiff contends that Defendant violated § 2923.6(c)
12 when it recorded a Notice Default while her application for loan modification was
13 pending. Section 2923.6(c) states:

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

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

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

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

1 (Emphasis added.) Plaintiff's theory is that because she did not receive any response to
2 or acknowledgement of her July 2016 applications, Defendant was prohibited from
3 recording a Notice of Default or Notice of Foreclosure.

4 Defendant counters based on the exception provided in § 2923.6(g), which states in
5 pertinent part:

6 In order to minimize the risk of borrowers submitting multiple
7 applications for first lien loan modifications for the purpose of
8 delay, the mortgage servicer shall not be obligated to evaluate
9 applications from borrowers who have already been evaluated
10 . . . , unless there has been a material change in the borrower's
11 financial circumstances since the date of the borrower's
12 previous application and that change is documented by the
13 borrower and submitted to the mortgage servicer.

14 Plaintiff alleged that prior to her July 2016 applications, she had applied twice and was
15 denied. (Compl. at 8-9). With respect to her July 2016 applications, she alleges that she
16 had "substantially changed financial circumstances" in that her "employment situation
17 [was] in flux until [she and the other borrowers could] find steady work." (*Id.* at 9.) She
18 also alleged that she faxed a "completed application and all documents."

19 Plaintiff's allegations are sufficient to state a claim for a § 2923.6(c) violation
20 despite her previous loan modification applications. Plaintiff's July 2016 applications are
21 not before the Court as a part of the complaint, and Defendant has not sought judicial
22 notice, *see United States v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011), to
23 determine whether Plaintiff documented a material change in her financial circumstances.
24 Defendant may raise the issue and supporting evidence on an appropriate motion or at
25 trial. Defendant's motion is denied with respect to the first cause of action.

26 B. Violation of California Civil Code Section 2924.10

27 In the second cause of action Plaintiff alleges that Defendant violated § 2924.10
28 because it did not provide a written acknowledgment of either one of the July 2016 loan
modification applications, as required by § 2924.10(a). Defendant does not dispute that
acknowledgment was required, but argues that to state a viable claim, § 2924.12(a) and

1 (b) require that a violation be material. Plaintiff does not allege that the violation was
2 material, and does not offer any argument to address this issue. Defendant's motion to
3 dismiss is therefore granted as to the second cause of action.

4 Plaintiff requests leave to amend to the extent Defendant's motion is granted. Rule
5 15 advises leave to amend shall be freely given when justice so requires. Fed. R. Civ. P.
6 15(a)(2). "This policy is to be applied with extreme liberality." *Eminence Capital, LLC*
7 *v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (internal quotation marks and
8 citation omitted).

9 In the absence of any apparent or declared reason – such as
10 undue delay, bad faith or dilatory motive on the part of the
11 movant, repeated failure to cure deficiencies by amendments
12 previously allowed, undue prejudice to the opposing party by
13 virtue of allowance of the amendment, futility of the
14 amendment, etc. – the leave sought should, as the rules require,
15 be freely given.

16 *Foman v. Davis*, 371 U.S. 178, 182 (1962) (internal quotation marks and citation
17 omitted). Dismissal without leave to amend is not appropriate unless it is clear the
18 complaint cannot be saved by amendment. *Id.* Because it appears that Plaintiff may be
19 able to amend her second cause of action, the claim is dismissed with leave to amend.

19 C. Negligence

20 Plaintiff alleges Defendant was negligent in denying her loan modification
21 applications in 2015 and May 2016 because it misapplied the information she had
22 provided, and failed to process the applications, including the July 2016 request for
23 unemployment program, with due care. Defendant argues that it owed no duty of care
24 and that Plaintiff failed to allege causation and damages.

25 California law applies to the issue whether Defendant owed a duty of care.² Under
26 California law, "[w]hether a duty of care exists is a question of law to be determined on a
27

28 ² "In diversity cases, a federal court must conform to state law to the extent
mandated by the principles set forth in the seminal case of *Erie R.R. v. Tompkins*, 304

1 case-by-case basis." *Alvarez v. BAC Home Loans Servicing, L.P.*, 228 Cal. App. 4th 941,
2 944 (2014). *Alvarez v. BAC Home Loans Servicing, L.P.* addresses a mortgage servicer's
3 duty of care where the plaintiff alleged, among other things, that the servicer mishandled
4 his loan modification applications by relying on incorrect income information. *Id.* at
5 944-45. Upon considering the facts of the case and weighing the *Biakanja* factors, *see*
6 *Biakanja v. Irving*, 49 Cal.2d 647, 650 (1958), the court in *Alvarez* concluded that, "while
7 a lender does not have a duty to offer or approve a loan modification," it owes a duty,
8 once it begins considering an application, not to mishandle the borrower's documents. *Id.*
9 at 945-51. Here, Plaintiff alleged that her application was denied because Defendant
10 used incorrect income information and failed to correct the error, when it was brought to
11 its attention. (Compl. at 8 & 12.) This is sufficient to allege a duty of care.

12 With respect to causation and damages, Plaintiff alleged that Defendant's error
13 regarding Plaintiff's income caused her application to be denied. (Compl. at 8 & 12.)
14 Causation and damages can be established by showing that the defendant's mishandling
15 of the application caused denial of the application and loss of the opportunity to modify
16 the loan. *Alvarez*, 228 Cal. App.4th at 948 ("mishandling of the documents deprived
17 Plaintiff of the possibility of obtaining the requested relief[,as] he lost the opportunity of
18 obtaining loan modification") & 951 ("Plaintiffs have also alleged that the improper
19 handling of their applications deprived them of the opportunity to obtain loan
20 modification"). Defendant argues *Alvarez* is distinguishable by pointing out that the
21 plaintiff's home in *Alvarez* was foreclosed. Although this fact contributed to the finding
22 of causation and damage, the Court did not single it out as the determinative factor. *See*
23 *id.* at 948 & 951. Defendant's motion to dismiss the negligence claim is therefore denied.

24 //

25
26
27 U.S. 64 ... (1938). Pursuant to *Erie* and its progeny, federal courts sitting in diversity
28 apply state substantive law and federal procedural law." *Feldman v. Allstate Ins. Co.*, 322
F.3d 660, 666 (9th Cir. 2003), citing *Erie*, 304 U.S. at 78.

1 D. Quiet Title

2 Plaintiff's quiet title claim is derivative of Plaintiff's HBOR claims. (Compl. ¶ 52.)
3 Plaintiff's first cause of action for HBOR violation of Civil Code Section 2923.6 survives
4 Defendant's motion, and is not based on averments of fraud. Defendant's initial
5 argument, that the claim should be dismissed because Plaintiff did not include sufficient
6 allegations of fraud to meet Rule 9(b) specificity requirements, is therefore rejected.

7 Next, Defendant argues that HBOR provides a safe harbor for violations, which are
8 remedied prior to foreclosure. In pertinent part, section 2924.12 provides:

9 (a)(1) If a trustee's deed upon sale has not been recorded, a
10 borrower may bring an action for injunctive relief to enjoin a
11 material violation of Section ... 2923.6

12 (2) Any injunction shall remain in place and any trustee's sale
13 shall be enjoined until the court determines that the mortgage
14 servicer, mortgagee, trustee, beneficiary, or authorized agent
15 *has corrected and remedied the violation* or violations giving
16 rise to the action for injunctive relief. An enjoined entity may
17 move to dissolve an injunction based on a showing that the
18 material violation has been corrected and remedied.

17 (Emphasis added.) It appears from the allegations that Defendant has not recorded a deed
18 upon sale (*see* Compl. ¶36 (seeking to prevent Defendant from conducting a trustee's
19 sale)), and that Defendant has not remedied the alleged violation (*see id.* ¶35
20 ("uncorrected violation")). Defendant's safe harbor argument is therefore rejected.

21 Defendant also argues that Plaintiff failed to allege she "has or can tender her
22 indebtedness." (Mot. at 11.) This is incorrect. Plaintiff alleged that she "will be able to
23 tender the amount due to discharge the debt or the amount necessary to cure the
24 purported deficiency." (Compl. ¶54.) Although this allegation seems tenuous at best
25 given the allegations regarding her apparent lack of steady employment, at this stage in
26 the proceedings, the Court does not judge the credibility of Plaintiff's allegations. *See*
27 *Twombly*, 550 U.S. at 556 ("a well-pleaded complaint may proceed even if it strikes a
28

1 savvy judge that actual proof of those facts is improbable, and that a recovery is very
2 remote and unlikely” (internal quotation marks and citation omitted)).

3 For the first time in the reply, Defendant argues that quiet title is not available as a
4 remedy for HBOR violations. (Reply at 5 n.1.) The Court declines to consider the
5 argument at this time, as it would deprive Plaintiff of an opportunity to respond. *See*
6 *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (“The district court need not
7 consider arguments raised for the first time in a reply brief.”) For the foregoing reasons,
8 Defendant's motion to dismiss the quiet title claim is denied.

9 Finally, Defendant argues the action should be dismissed under Rule 12(b)(7) for
10 failure to join Plaintiff's co-borrowers as indispensable parties under Rule 19. In her
11 complaint, Plaintiff suggests that she took out the loan with co-borrowers. (*See* Compl.
12 ¶28 (“Plaintiff and the other borrowers’ [*sic*] have all been working at new and different
13 jobs”); *see also* Defendant's Request for Judicial Notice Ex. A (Deed of Trust listing three
14 borrowers).) It is unclear whether the co-borrowers are also co-owners of the Property.
15 Plaintiff does not name any of the other borrowers as parties to this action.

16 A Rule 12(b)(7) motion to dismiss for failure to join will be granted only if the
17 court determines: (1) joinder of the party is not possible, and (2) the party is
18 “indispensable.” *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992).

19 To determine whether a party is 'indispensable' under Rule 19, a
20 court must undertake a two-part analysis: it must first determine
21 if an absent party is ‘necessary’ to the suit; if [the party is
22 necessary but] cannot be joined, then the court must determine
23 whether the party is ‘indispensable’ so that in ‘equity and good
24 conscience’ the suit should be dismissed.

24 *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990) (quoting Fed. R. Civ.
25 Proc. 19).

26 An absent party is “necessary” under Rule 19(a) when:

27 (A) in that person's absence, the court cannot accord complete
28 relief among existing parties; or (B) that person claims an

1 interest relating to the subject of the action and is so situated
2 that disposing of the action in the person's absence may: (i) as a
3 practical matter impair or impede the person's ability to protect
4 the interest; or (ii) leave an existing party subject to a
5 substantial risk of incurring double, multiple, or otherwise
6 inconsistent obligations because of the interest.

7 Fed. R. Civ. Proc. 19(a)(1).

8 Defendant contends joinder of the co-borrowers is necessary because Plaintiff
9 seeks to quiet title, and an adjudication without joinder of the co-borrowers could expose
10 it to conflicting obligations. (Mot. at 15.) According to Defendant, failure to join could
11 create a risk of multiple litigation and inconsistent rulings because the co-borrowers
12 could bring independent lawsuits against Defendant.

13 Plaintiff does not address the joinder arguments in her opposition. Based on the
14 allegations in the complaint, and without Plaintiff's input, Defendant's arguments support
15 the conclusion that the co-borrowers may be necessary parties. Even so, Defendant has
16 provided no reason for the Court to conclude that the co-borrowers cannot be joined.
17 Only if a necessary party cannot be joined, and is deemed indispensable to the action, can
18 the action be dismissed for non-joinder. Fed. R. Civ. Proc. 19(b); *Shermoen*, 982 F.2d at
19 1317. Accordingly, Defendant has not met its burden to dismiss this action for non-
20 joinder. *See Shermon*, 982 F.2d at 1317 ("the moving party has the burden of
21 persuasion in arguing for dismissal").

22 Although Defendant has not met its burden to warrant dismissal of the quiet title
23 claim, Defendant has shown that Plaintiff should comply with Rule 19(c) to "state (1) the
24 name, if known of any person who is required to be joined if feasible but is not joined;
25 and (2) the reasons for not joining that person." Accordingly, Plaintiff shall amend the
26 complaint to include the allegations required by Rule 19(c). Failure to timely comply
27 with this order will result in the dismissal of the quiet title claim.

28 E. Unfair Competition Law

Plaintiff alleges that Defendant violated the UCL because it violated the HBOR.
(Compl. at 13-14.) California law "establishes three varieties of unfair competition - acts

1 or practices which are unlawful, or unfair, or fraudulent." *Cal-Tech. Commc'ns, Inc. v.*
2 *Los Angeles Cellular Tel. Co.*, 20 Cal.4th 163, 180 (1999). Because the claim for
3 violation of Civil Code § 2923.6 survives Defendant's motion, Defendant's initial
4 argument, that Plaintiff has alleged no basis for a UCL violation, is rejected.

5 Next, Defendant argues that Plaintiff has no standing to allege a UCL violation.
6 To have standing, a plaintiff must have suffered an economic injury-in-fact. *Hinojos v.*
7 *Kohl's Corp.*, 718 F.3d 1098, 1104 (9th Cir. 2013). Defendant argues that Plaintiff does
8 not allege she suffered any economic loss or that any loss was caused by Defendant.
9 Plaintiff's theory of § 2923.6(c) violation is that Defendant recorded a Notice of Default
10 while her loan modification application was still pending. Neither the first cause of
11 action, nor the fifth cause of action for UCL violation, alleges damages or causation.

12 Accordingly, Defendant's motion to dismiss the UCL claim is granted. Plaintiff is
13 granted leave to amend the complaint to allege damages and causation as required to state
14 a claim under UCL.

15 F. Accounting

16 In her sixth cause of action, Plaintiff alleges that accounting is necessary because
17 she has received conflicting information from Defendant regarding the amount she owes
18 on the loan. (Compl. ¶63.) This alone is insufficient to state a claim for accounting.

19 An accounting is an equitable proceeding which is proper
20 where there is an unliquidated and unascertained amount owing
21 that cannot be determined without an examination of the debits
22 and credits on the books to determine what is due and owing.
23 ... If an ascertainable sum is owed, an action for an accounting
is not proper.

24 *Prakashpalan v. Engstrom, Lipskomb & Lack*, 223 Cal. App. 4th 1105, 1136-37 (2014).
25 Even against a fiduciary, "the action does not lie merely because the books and records
26 are complex." *Id.* at 1137. Furthermore, to state a claim, money must be owed Plaintiff.
27 *Teselle v. McLoughlin*, 173 Cal. App. 4th 156, 179, 180 (2009).

1 It is undisputed that Plaintiff's loan was for a sum certain. (*See* Compl. ¶23.)
2 Although Plaintiff sufficiently alleges that there appears to be some confusion regarding
3 the amount she currently owes Defendant, she has not alleged that the sum cannot be
4 ascertained by calculation. When the sum is ascertainable or could be made ascertainable
5 by calculation, accounting is not available. *See Prakashpalan*, 223 Cal. App. 4th at 1137;
6 *Teselle*, 173 Cal. App. 4th at 180.

7 For the foregoing reasons, Defendant's motion to dismiss the claim for accounting
8 is granted. Based on Plaintiff's allegations, amendment would be futile. Leave to amend
9 is therefore denied.

10 G. Specificity of Factual Allegations

11 Finally, Defendant makes a general argument that the facts of the case are not
12 alleged with sufficient specificity. "Federal Rule of Civil Procedure 8(a)(2) requires only
13 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in
14 order to give the defendant fair notice of what the claim is and the grounds upon which it
15 rests." *Twombly*, 550 U.S. at 555 (quoting Fed. R. Civ. Proc. 8(a)(2), other quotation
16 marks, citation and ellipsis omitted). The rule does "not require heightened fact pleading
17 of specifics, but only enough facts to state a claim to relief that is plausible on its face."
18 *Id.* at 570. Although "detailed factual allegations" are not required, "a plaintiff's
19 obligation to provide the grounds of his entitlement to relief requires more than labels and
20 conclusions, and a formulaic recitation of the elements of a cause of action will not do."
21 *Id.* at 555 (quotation marks, brackets and citations omitted).

22 Except as noted above in relation to specific causes of action, Plaintiff has met the
23 notice pleading standard. As is apparent from the motion briefs, Defendant was
24 sufficiently appraised of the factual basis for Plaintiff's claims to formulate its arguments
25 for dismissal.

26 For the foregoing reasons, Defendant's motion is granted in part and denied in part.
27 Plaintiff is granted leave to amend as provided herein. If Plaintiff chooses to file an
28 amended complaint, she must file and serve it no later than **December 11, 2017**.

1 Defendant shall file its response, if any, as provided by Rule 15(a)(3). If Plaintiff does
2 not file an amended complaint, Defendant shall file its answer, if any, no later than
3 **December 26, 2017.**

4 **IT IS SO ORDERED.**

5
6 Dated: November 16, 2017

7 
8 Hon. M. James Lorenz
9 United States District Judge

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28