



## Travis v. Amerihome Mortgage Company LLC

2023 | Cited 0 times | E.D. California | November 22, 2023

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ERIC TRAVIS,

Plaintiff, v. AMERIHOM MORTGAGE COMPANY LLC,

Defendant.

Case No. 1:23-cv-01267-ADA-SAB FINDINGS AND RECOMMENDATIONS RECOMMENDING GRANTING IN PART MOTION TO DISMISS (ECF Nos. 3, 4, 7, 8) OBJECTIONS DUE WITHIN FOURTEEN DAYS

I. INTRODUCTION Currently before the Court is Defendant Amerihome Mortgage Company, LLC motion to dismiss Plaintiff Eric Travis with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6). Based on the moving, opposition, and reply papers, the information presented by counsel at the hearing held on October 18, 2023, and the recommends Defendants motion to dismiss be granted in part and denied in part.

II. BACKGROUND On July 20, 2023, Eric Travis Plaintiff filed this action in the Superior Court of the State of California, County of Fresno, Case No. 23CECG02934 against Amerihome Mortgage Company, LLC . (ECF No. 1.) Defendant removed this action to this Court on August 23, 2023 on the basis of federal question jurisdiction. (Id. at 2-3.) In May 2017, Plaintiff alleges he obtained a mortgage loan on his real property located at 1627 Jordan Avenue, Clovis, California for \$332,000.00 by deed of trust from Country Club Mortgage, Inc. (Compl. ¶¶ 1, 9, Exhibit A.) Plaintiff alleges an assignment of deed of trust which assigned the deed of trust from Country Club Mortgage, Inc. to Defendant. (Compl. ¶ 10,

Exhibit B.) On February 24, 2023, Defendant recorded a notice of default and election to sell under a deed of t notice of d (Compl. ¶ 11, Exhibit C.) The notice of default included a declaration from Defendant dated December 2, 2022, and signed on December 8, 2022, which detailed purported unsuccessful attempts to contact Plaintiff by mail and telephone. (Id.) Plaintiff alleges the foreclosure trustee recorded a notice of sale on May 22, 2023. (Compl. ¶ 12, Exhibit D.) Plaintiff contends the Property was unlawfully sold on June 21, 2023. (Compl. ¶ 12.) On August 30, 2023, Defendant filed a



## Travis v. Amerihome Mortgage Company LLC

2023 | Cited 0 times | E.D. California | November 22, 2023

motion to dismiss this action with prejudice. 3.) On September 13, 2023, Plaintiff filed an opposition to Defendants 7.) On September 25, 2023, Defendant filed a reply to s Reply , ECF No. 8.) The Court held a hearing on the matter on October 18, 2023. (ECF No. 9.) Anthony Cara appeared via video on behalf of Plaintiff and Eric Houser appeared via video on behalf of Defendant. (Id.) The Court took the matter under submission.

III. LEGAL STANDARD Under Federal Rule of Civil Procedure 12(b)(6), a party may file a motion to

complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In deciding a motion to *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337 38 (9th Cir. 1996). The pleading standard under Rule 8 does not require but it demands more than an unadorned, the-defendant-unlawfully-harmed- *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S.

544, 555 (2007)). In assessing the sufficiency of a complaint, all well-pleaded factual allegations must be accepted as true. *Iqbal*, 556 U.S. at 678- elements of a cause of action, supported by mere Id. at

*Twombly*, 550 U.S. at 570.

In deciding whether a complaint states a claim, the Ninth Circuit has found that two principles apply. First, to be entitled to the presumption of truth, the allegations in the complaint

of underlying facts to give fair notice and to enable the opposing party to defend itself *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). Second, so that it is not unfair to require the defendant to be subjected to the expenses associated with discovery and continued litigation, the factual allegations of the complaint, which are taken as true, must plausibly suggest an entitlement to relief. Id theory or an absence of sufficient *Navarro*,

250 F.3d at 732 (citing *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988)).

IV. DISCUSSION In his complaint, Plaintiff alleges seven causes of action: violations of the California California Civil Code §§ 2923.5, 2924(a)(1), and 2924.9 (the first through third causes of action, respectively); negligence; wrongful foreclosure; under California Business and Professions Code § 17200, et seq.; and cancellation of instruments. Notably, Plaintiff federal claim is not alleged as an independent cause of action; rather, Plaintiff alleges as a []hat Defendant violated 15 U.S.C. § 1641(g), a provision of the erves both as an alleged underlying statutory duty for his fourth cause of action for negligence and predicate claim for his sixth cause of action for violation of UCL.

Defendant seeks to dismiss 1641(g) and each complaint. Defendant first argues Plaintiff

received timely notice that the deed of trust was assigned to Defendant, in compliance with 15 U.S.C. § 1641(g). Further, Defendant argues its December 2022 declaration attached to the notice of default



## Travis v. Amerihome Mortgage Company LLC

2023 | Cited 0 times | E.D. California | November 22, 2023

confirms Defendant complied with HBOR notice requirements. Defendant alternatively argues that even if the declaration does not demonstrate compliance, Plaintiff is not entitled to any relief under the first cause of action because the Property has already been sold. Defendant avers matter of law because recent California Supreme Court precedent has found that lenders and loan servicers do not owe borrowers a duty. Finally, Defendant contends that Plaintiff UCL, and cancellation of instruments causes of action fail because each is TILA, HBOR, and negligence claims. Defendant also avers that Plaintiff lacks standing to assert a claim under the UCL.

A. D Defendant requests this Court take judicial notice of four documents: (1) a deed of trust recorded on May 9, 2017 in the Fresno County ; (2) an assignment of deed of trust recorded on October 20, 2021 in the Fresno County ; (3) a notice of default and election to sell recorded on February 24, 2023 in the Fresno County Office; and (4) a notice of sale recorded on June 21, 2023, in the Fresno County . (Req. Jud. Not., ECF No. 4.) A hearing held in this matter, the same four documents are also attached and incorporated in

int in identical sequential order. (See ECF No. 1, Exhibits A-D).

take judicial notice of documents, they take judicial notice of facts. The existence of a document could be such a fact, but only if the other requirements of Rule 201 are met. *Cruz v. Specialized Loan Servicing, LLC*, No. SACV2201610CJCJDEX, 2022 WL 18228277, at \*2 (C.D. Cal. Oct. 14, 2022) (internal citation and quotations omitted). As a general matter, judicial notice may be taken of recorded instruments because they are public records whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201; see *Perez v. Am. Home Mortg. Servicing, Inc.*, No. 12-cv-009323-WHA, 2012 WL 1413300, at \*2 (N.D. Cal. Apr. 23, 2012) (taking judicial notice of deed of trust, notice of default, assignment of deed of trust, and substitution). However, while matters of public record are proper subjects for judicial notice, a court may not take judicial notice of a fact within a public record. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (citing Fed. R. Evid. 201(b)).

Here, the Court has authority under Rule 201 to take judicial notice that the (1) deed of trust; (2) assignment of deed of trust; (3) notice of default; and (4) notice of sale were recorded on the dates indicated by the receipt stamp; however, the Court takes judicial notice of the existence of these documents and not to their contents. *Givens v. Newsom*, 629 F. Supp. 3d 1020, 1024 (E.D. Cal. 2022). Accordingly, the Court grants judicial notice limited to the facts that the four documents exist and the respective dates reflected on each document. 1

B. First Cause of Action for Violation of California Civil Code section 2923.5.2 Plaintiff alleges Defendant violated California Civil Code section 2923.5(a)(2), which requires a lender to provide a borrower with a copy of the deed of trust and assignment of deed of trust

prior to recording a notice of default.

1 Because Plaintiff filed the (1) deed of trust; (2) assignment of deed of trust; (3) notice of default; and



## Travis v. Amerihome Mortgage Company LLC

2023 | Cited 0 times | E.D. California | November 22, 2023

(4) notice of sale as exhibits to his complaint, Plaintiff has incorporated by reference certain facts contained in the documents, rendering Defendant. See Lee court may consider material which is properly submitted as part of the complaint on a motion to dismiss without converting the motion to dismiss into a motion for . Any analysis of the facts by reference to the recorded documents in his complaint, rather than section 2923.5, yet motion repeatedly cites section 2923.55. mortgage servicer Warren v. PNC Bank Nat'l Ass'n, No. 22- CV-07875-WHO, 2023 WL 3182952, at \*4 (N.D. Cal. Apr. 30, 2023) (citing Billesbach v. Specialized Loan Servicing, LLC, 63 Cal. App. 5th 830, 844 n.7 (2021)). Because Plaintiff relies on section 2923.5 in both his complaint and opposition, the Court herein addresses the claim under section 2923.5.

Defendant argues cause of action should be dismissed for two reasons: (1) Plaintiff fails to state a cognizable claim because Defendant confirms Defendant fully complied with section 2923.5 and (2) as a matter

of law because the Property has already been sold and the only remedy for a violation of section 2923.5 is postponement of an impending foreclosure. (Mot. 10-11.) 3

### 1. December 2022 Declaration Does Not Prove Plaintiff Fails State a

#### Cognizable Claim Under Section 2923.5(a)(2)

Plaintiff alleges that despite residing at the Property when the Notice of Default was recorded on February 24, 2023, he to assess financial situation and explore options to avoid foreclosure, in violation of section 2923.5(a)(2). (Compl. ¶ 19.) In response, Defendant points to its December 2022 declaration which was both recorded with the notice of default on February 24, 2023, and attached as an

that details Defendant's diligent attempts to contact Plaintiff in conformance with section 2923.5. (Mot. 9.) Defendant argues Plaintiff fails to state a claim under section 2923.5(a)(2) because his allegations that he did not receive proper notice is contradicted by the recorded December 2022 declaration.

Defendant cites both *Kamp v. Aurora Loan Services*, No. SACV09008440CJC(RNBx), 2009 WL 3177636 (C.D. Cal. October 1, 2009) and *Juarez v. Wells Fargo Bank, N.A.*, No. CV093104AHM(AGRx), 2009 WL 3806325 (C.D. Cal. Nov. 11, 2009) to support its proposition that a declaration recorded with the notice of default is sufficient obligations under section 2923.5. (Mot. 10.) However, the Court notes that both the *Kamp* and *Juarez* plaintiffs were specifically challenging California Civil Code section 2923.5(c), which requires that a recorded notice of default include a declaration that the servicer has contacted or attempted to contact the borrower with due diligence to attempt to avoid foreclosure. Here, Plaintiff has not alleged that Defendant failed record the December 2022 declaration; rather, Plaintiff is indirectly challenging the content of the declaration. 3 All references to pagination of specific documents pertain to those as indicated on the upper right corners via the



## Travis v. Amerihome Mortgage Company LLC

2023 | Cited 0 times | E.D. California | November 22, 2023

CM/ECF electronic court docketing system.

The Court similarly finds *Cabanilla v. Wachovia Mortg.*, No. SACV1200228CJC(JPRx), 2012 WL 13020028 (C.D. Cal. March 20, 2012) to be unavailing. Unlike the instant case, the *Cabanilla* plaintiffs alleged that the defendant mortgage servicer contacted the plaintiffs via telephone prior to filing the notice of default. (Id. at 3.) However, the crux of the *Cabanilla* claim was that the contact from the mortgage servicer merely a . (Id.) Thus, the plaintiffs were challenging the extent to which a servicer must advise borrowers during the initial contact. Conversely, Plaintiff in the instant action challenges the existence of the initial contact. Specifically, Plaintiff alleges in his complaint he prior to notice of default.

The Court finds in favor of dismissal of action to be unavailing at the pleadings stage because it is rooted entirely on a factual challenge.

See *Lee*, 250 F.3d at Defendant proffers by way of its recorded December 2022 declaration that it attempted to contact Plaintiff numerous times in compliance with section 2935.5(a)(2); however, Plaintiff alleges Defendant did not contact Plaintiff at all, in violation of section 2935.5(a)(2). (Mot. 10; Compl. 19.) The Court cannot resolve such a factual disagreement at the pleadings stage. See, e.g., *Kennedy v. Bank of Am., N.A.*, No. 12-CV-952 YGR, 2012 WL 1458196, at \*5 (N.D. Cal. Apr. 26, 2012) (noting the truthfulness of a declaration stating a servicer tried with due diligence to contact the borrower in accordance with section 2923.5 cannot be established on the pleadings); *Barrionuevo v. Chase Bank, N.A.* the validity of defendant's declaration of compliance in a Notice of Default ... the plaintiff has . Here, Plaintiff has plausibly alleged that Defendant did not contact him prior to recording the notice of default to assess financial situation and explore options to avoid foreclosure in violation of section 2923.5(a)(2). Accordingly, the Court finds Plaintiff has properly pled a violation of section 2923.5(a)(2).

2. Plaintiff Is Not Entitled to Any Relief Under Section 2923.5 Defendant alternatively argues that even if Plaintiff states a cognizable claim under section 2923.5, Plaintiff has no available relief because the only remedy for a violation of section 2923.5 is postponement of an impending foreclosure. (Mot. 11.) Because it is undisputed the Property was already sold in June 21, 2023, Defendant argues Plaintiff has failed to state a claim upon which any relief can be granted. (Id.; Compl. ¶ 12.) The Court agrees. See *Mabry v. Superior Court*, 185 Cal. App. 4th 408, 214 (2010) (clarifying that the only remedy available under Section 2923.5 to permit the lender to comply with [section 2923.5 ]); *Herrejon v. Ocwen Loan Servicing LLC*,

990 F. Supp. 2d 1186, 1210 (E.D. Cal. Nov. 1, 2013) (noting At the hearing held in this matter on

October 18, 2023, Plaintiff conceded no remedy is available to Plaintiff under section 2923.5. Because it is undisputed Plaintiff has no available remedy for violation of section 2923.5, first cause of action without leave to amend.



## Travis v. Amerihome Mortgage Company LLC

2023 | Cited 0 times | E.D. California | November 22, 2023

C. Second Cause of Action for Violation of California Civil Code § 2924(a)(1) In his opposition leave to amend.

D. Third Cause of Action for Violation of California Civil Code § 2924.9 alleges Defendant violated California Civil Code section 2924.9, which requires that a mortgage servicer send the borrower a written communication containing specific information regarding foreclosure prevention alternatives within five business days after recording a notice of default. The remedy for section 2924.9 is governed by section 2924.12, which states:

After a trustee's deed upon sale has been recorded, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall be liable to a borrower for actual economic damages ... resulting from a material violation of section 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17 by that mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent where the violation was not corrected and remedied prior to the recordation of the trustee's deed upon sale. Cal. Civ. Code 2924.12(b) (emphasis added).

### 1. Plaintiff Has Adequately Alleged He Received No Communications from

Defendant After the Notice of Default Was Recorded Defendant avers that section 2924.9 applies to discussions about foreclosure alternatives after the notice of default is recorded, not before the nonjudicial foreclosure process is commenced. (Id.) any phone calls or phone messages and did not receive any pieces of mail that referred to discussions about alternatives [to foreclosure] before it was commenced. (Mot. 13 (citing Compl. ¶ 33).) Plaintiff maintains in his opposition that he was not contacted by Defendant within five days after the recording of the notice of default.

While Plaintiff alleges that he did not receive any communication prior to the notice of default being recorded, Plaintiff also alleges he did not receive the requisite communication regarding foreclosure prevention alternatives after the notice of default was recorded. Specifically, Plaintiff expressly alleges Defendant failed to notify him of any foreclosure prevention alternatives within five business days after the Notice of Default was recorded. (Compl. ¶ 32.) Plaintiff further (Id. at ¶ 33.) Accordingly, the Court finds Plaintiff has adequately pled he received no communication from Defendant following the recording of the notice of default in violation of section 2924.9.

### 2. Plaintiff Has Adequately Alleged a Material Violation of Section 2924.9 section 2924.9. A material violation occurs where the violation: (1) affects the borrower's loan

obligations, (2) disrupts the borrower's loan modification process, or (3) causes the borrower to suffer harm that he would not have otherwise suffered related to his right to be considered for loss mitigation options. Mountjoy v. Seterus, Inc., No. 2:15-CV-02204-DJC-DB, 2023 WL 4086763, at \*11 (E.D. Cal. June 20, 2023) (citing Morris v. JPMorgan Chase Bank, N.A., 78 Cal. App. 5th 279, 304 05





## Travis v. Amerihome Mortgage Company LLC

2023 | Cited 0 times | E.D. California | November 22, 2023

n.14 (2022)); see also *Cornejo v. Ocwen Loan Servicing, LLC*, 151 F. Supp. 3d 1102, 1113 (E.D. Cal. 2015) (noting that in the context of HBOR, a material violation is one . ome [district courts within the Ninth Circuit] have held that materiality is a

question that cannot be resolved at the pleading stage, Plaintiff still must plead something to satisfy 2924.12's materiality requirement. *Galvez v. Wells Fargo Bank, N.A.*, No. 17-CV- 06003-JSC, 2018 WL 4849676, at \*5 (N.D. Cal. Oct. 4, 2018) (citing *Cardenas v. Caliber Home Loans, Inc.*, 281 F. Supp. 3d 862, 869 (N.D. Cal. 2017) (noting courts take divergent approaches with some concluding that materiality cannot be resolved at the pleading stage and others finding that a violation is only material if it is plausible the violation caused Plaintiff to suffer some harm).

Defendant argues that even if it ability to obtain a

loan modification pursuant to section 2924.12. (Mot. 13.) In opposition, Plaintiff fails to argument. However, Plaintiff argues under his first cause of action for another HBOR violation

that Defendant failed to give Plaintiff any loss mitigation options after recording the notice of default. material violation because Plaintiff

suffered harm because he & late charges and fees associated with inspection on the property which servicers normally do

Turning to Plaintiff , Plaintiff alleges the notice of default was recorded, as required by section 2924.9. (Compl. ¶¶ 31-32.) Plaintiff further alleges that had he received the contact and communication required under section 2924.9, he would have taken action to avoid the foreclosure of the Subject Property with other (Id. at ¶ 33.) Instead, Plaintiff alleges Defendant foreclosed on the property and recorded the notice of sale in May 2023. (Id. at ¶ 12.)

Two District Courts in California have each recently found identical allegations by plaintiffs to be plausible to allege a material violation of section 2924.9. First, in *Warren v. PNC Bank National Association*, a Northern District of California Court found a failure to communicate about foreclosure prevention alternatives disrupted the p an modification process or otherwise harmed him by closing the door to anything but foreclosure. 2023 WL 3182952, at \*5. The complaint in *Warren* any phone calls or phone messages and did not receive any piece of mail that referred to

would have taken action to avoid the foreclosure of the subject property with other lending

Id. The court noted that filing a notice of default is the first step in the foreclosure process and therefore found it plausible that the defendant- failure to contact plaintiff about the first step hat process off before it could even begin) or caused [plaintiff] harm (by foreclosing upon his home without proper notice) Id. at \*4. The court therefore found the plaintiff sufficiently alleged a material



## Travis v. Amerihome Mortgage Company LLC

2023 | Cited 0 times | E.D. California | November 22, 2023

violation of section 2924.9. Similarly, in *Scott v. Cenlar FSB*, a Central District of California Court found the defendant-servicer alleged violation of section 2924.9 affected the loan modification process. *Id.* No. 2:23-cv-05473- SVW-MRW, 2023 WL 6881906, at \*2 (C.D. Cal. September 28, 2023). The court relied on the Eastern District decision, *Hsin-Shawn Sheng v. Select Portfolio Servicing, Inc.*, which found a defendant's alleged violation of section 2924.10(a) which requires mortgage servicers to provide written acknowledgment of documents received from borrowers within five days of receiptification process by making it difficult for the borrower to determine whether her application was complete. No. 2:15 cv 0255 JAM KJN, 2015 WL 4508759, at \*3 (E.D. Cal. July 24, 2015). The court in *Scott* reasoned that the communication required by section 2924.9, which specifically requires that the servicer communicate (1) that the borrower may be evaluated for foreclosure prevention alternatives, (2) whether an application must be submitted to be considered for such alternatives, and (3) how the borrower can obtain an found in *Hsin-Shawn Sheng*, it informed the borrower about the foreclosure process and the

required documents. *Id.* The court in *Scott* therefore determined that plaintiff had sufficiently alleged a material violation because *Id.*

The Court finds the reasoning in *Warren* and *Scott* persuasive in the instant action wherein Plaintiff pleads an identical allegation that he would have taken action to avoid the foreclosure of the Subject (Compl. ¶ 33.) allegations plausibly demonstrate that by alleged violation of section 2924.9 because precluded Plaintiff from taking action for example, modifying the loan through other lending sources. (See Plaintiff lost the chance to receive a loan modification that he would otherwise have been eligible for .)

Defendant also briefly taken with other lending sources, coupled with the substantial length of time between the

notice of default being recorded in February 2023 and the June 2023 sale of the Property, equates plead (emphasis added).) The Court disagrees. First, the pleading standard under Rule 8 does not require such detailed factual allegations. *Iqbal*, 556 U.S. at 678. would have taken action to avoid the (Compl. ¶ 33.) As discussed, this is sufficient to state a plausible claim for a material violation of section 2924.9 without the need for a laundry list of other actions Plaintiff would have taken had he received the required communication from Defendant regarding foreclosure alternatives. Further, the Court finds Defendants argument regarding the length of time between the notice of default and the actual sale goes to proving materiality rather than the instant relevant inquiry of whether Plaintiff has pled a material violation. See, e.g., *Warren*, 2023 WL 3182952, at \*4 prove materiality

; *Scott*, 2023 WL 6881906, at \*2 (noting ; *Garcia v. PNC Mortgage*, No. C 14 3543 PJH, 2015 WL 534395, at \*4 (N.D. Cal. Feb. 9, 2015) (finding materiality raises issues of fact that cannot be determined on a Rule 12(b)(6) motion); *Hestrin v. CitiMortgage, Inc.*, No. 2:14-CV-9836-SVW-AJW, 2015 WL 847132, at \*3 n.4 (C.D. Cal. Feb. 25, 2015) (noting materiality is often a question of fact





## Travis v. Amerihome Mortgage Company LLC

2023 | Cited 0 times | E.D. California | November 22, 2023

inappropriate for resolution on a Rule 12 motion . The Court therefore finds Plaintiff allegation that had he received the communication required under section 2924.9, he would

have taken action to avoid the foreclosure of the Subject at this motion to dismiss stage.

Construing the facts as alleged in the light most favorable to Plaintiff, the Court finds that Plaintiff has plausibly alleged a material violation of section 2924.9 by Defendant. The Court therefore recommends third cause of action.

E. Fourth Cause of Action for Negligence At the hearing held in this matter on October 18, 2023, Plaintiff informed the Court that Plaintiff does not oppose Defendant that should be dismissed. Accordingly, the Court recommends g fourth cause of action without leave to amend.

### F. Fifth Cause of Action for Wrongful Foreclosure

for damages resulting from the sale, on the basis that that the foreclosure was *Sciarratta v. U.S. Bank Nat'l Ass'n*, 247 Cal. App. 4th 552, 561 (2016). The elements of the tort of wrongful foreclosure are as follows:

(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale...was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering.

Id. at 561-62. elements.

1. Illegal, Fraudulent, or Willfully Oppressive Defendant first argues that Plaintiff failed to plead facts sufficient to show an illegal, fraudulent, or willfully oppressive sale. Defendant avers Plaintiff aim necessarily fails because it is based on allegations that Defendant violated California Civil Code sections 2923.5, 2924(a)(1), 2934a(a)(1), 2924a(e), and 2924.9, which Defendant contends are failed claims. (Mot. 15.)

As previously discussed, the Court recommends claims under section 2923.5 (first cause of action) and 2924(a)(1), 2934a(a)(1), and 2924a(e) (second cause of action) be dismissed with prejudice. However, because the Court recommends finding Plaintiff has sufficiently alleged a claim under section 2924.9 . See *Santana v. BSI Fin. Servs., Inc.*, 495 F. Supp. 3d 926 at 948 (S.D. Cal. 2020) (finding a properly alleged claim for wrongful foreclosure based on alleged violations of HBOR).

However, the Court notes that in his sparse opposition his wrongful foreclosure claim, Plaintiff argues recorded the notice of default so defendant could claim Plaintiff was in default and thereafter file



## Travis v. Amerihome Mortgage Company LLC

2023 | Cited 0 times | E.D. California | November 22, 2023

Plaintiff further argues equity and knew foreclosing on the property would quickly pay off the entire Id.) Given

this opposition, the Court notes that to the extent Plaintiff is pleading a violation of the in his complaint, it falls short. Rule 9(b) Fed. R. Civ. P. 9(b). Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal quotations omitted). Plaintiff has not met the heightened pleading standards under Rule 9, as he fails to allege any facts in his complaint that support his argument in his opposition that Defendant has engaged in a fraudulent sale of the Property. Should Plaintiff elect to amend his complaint, more specificity is required to plausibly allege that Defendant caused a fraudulent sale of the Property under a wrongful foreclosure claim. Accordingly, the Court finds only that Plaintiff has sufficiently alleged that Defendant engaged in an unlawful sale of his Property based on its alleged violation of section 2924.9.

2. Prejudice or Harm to Plaintiff Defendant next argues Plaintiff failed to plead facts demonstrating he was prejudiced or violation of section 2924.9. (Mot. 15.) Indeed, Plaintiff only generally alleges within his fifth cause of action in his complaint that result of the wrongful foreclosure, which is conclusory and devoid of factual allegations.

(Compl. ¶ 44.) However, Plaintiff (Compl. ¶ 41.) See Mountjoy, 2018 WL

339060, at \*15 (liberally construing the complaint and holding the plaintiff sufficiently alleged harm caused by the wrongful foreclosure by incorporating by reference the allegations made in multiple places in the complaint). Plaintiff alleges in preceding causes of action that he suffered harm including immediate damage to his credit and emotional and mental suffering as a result of . 4

(Compl. ¶¶ 28, 39); see Miles Trust Co., 236 Cal. App. 4th 394, 409 (2015) (finding damages for wrongful foreclosure include damage to credit and emotional distress). Accordingly, the Court finds Plaintiff plausibly alleged he suffered harm alleged wrongful foreclosure.

3. Tender Rule Defendant argues Plaintiff 4 The Court notes that the specified harm incorporated in fifth cause of action is only alleged in the elect to amend his fifth cause of action, he must reallege how he was prejudiced or what harm he suffered as a result because Plaintiff failed to allege that he tendered the full amount of the loan. (Mot. 15; Reply 9.) Where tendering is required and not excused, a plaintiff seeking to set aside an irregular sale must allege tender of the full amount of the loan to maintain any cause of action that either is based on the wrongful foreclosure allegations or seeks redress from that foreclosure. Turner v. Seterus, Inc., 27 Cal. App. 5th 516, 525 (2018). See also Medrano v. Caliber Homes Loans, Inc., No. EDCV 14-02038-VAP (DTBx), 2014 WL 7236925, at \*8 (C.D. Cal. July 28, 2016) (noting seeking to set aside a wrongful foreclosure, a plaintiff must either tender the entire amount of the defaulted debt [] or raise one of four exceptions to the tender (citation omitted). Although Plaintiff never alleges in his complaint whether he tendered the full amount of the loan, he specifically alleges that violations of Civ. Code 2924.9 (Compl. ¶ 45.) Because Plaintiff is



## Travis v. Amerihome Mortgage Company LLC

2023 | Cited 0 times | E.D. California | November 22, 2023

alleging excuse from tender, the Court finds Plaintiff must allege that he tendered the full amount of the loan unavailing.

Defendant also briefly argues that Plaintiff fails to allege any legitimate excuse for failure to tender. (Mot. 15.) The Court agrees. A full tender may not be required if the plaintiff alleges equitable exceptions to the tender rule, such as:

(1) where the borrower's action attacks the validity of the underlying debt, tender is not required since it would constitute affirmation of the debt; [citations] (2) when the person who seeks to set aside the trustee's sale has a counter-claim or set-off against the beneficiary, the tender and the counter-claim offset each other and if the offset is greater than or equal to the amount due, tender is not required; [citations] (3) a tender may not be required if it challenging the sale; [citations] (4) tender is not required where the trustor's attack is based not on principles of equity but on the basis that the trustee's deed is void on its face (such as where the original trustee had been substituted out before the sale occurred); [citations] [ (5) ] when the loan was made in violation of substantive law, or in breach of the loan agreement or an agreement to modify the loan; [citations] [and (6) ] when the borrower is not in default and there is no basis for the Turner, 27 Cal. App. 5th at 525 26 (internal quotations and citations omitted).

Here, Plaintiff only generally tendering the full amount of the loan. (Compl. ¶ 45.) Plaintiff provides no authority to support his general allegation that violation of section 2924.9 is itself a decisive equitable exception to the tender rule under a claim for wrongful foreclosure. Notably, violations of the foreclosure process will not give rise to a tort claim; the foreclosure must have

been entirely unauthorized on the facts of the case. Miles, 236 Cal. App. 4th at 409 (emphasis added). Iqbal, 556 U.S. at 678. Because plead facts demonstrating he is excused from tender, the Court with leave to amend.

### G. Sixth Cause of Action for Violation of California Business and Professions

Code § 17200

from other laws by making them independently actionable as unfair competitive pra Korea Supply Co. v. Lockheed Martin Corp., 29 Cal.

Rubio v. Cap. One

Bank, 613 F.3d 1195, 1203 (9th Cir. 2010) (citing Kearns v. Ford Motor Co., 567 F.3d 1120, 1127 (9th Cir. 2009).

deprivation of money or property sufficient to qualify as injury in fact, i.e., economic injury, and



## Travis v. Amerihome Mortgage Company LLC

2023 | Cited 0 times | E.D. California | November 22, 2023

(2) show that economic injury was the result of, i.e., caused by Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 322 (2011) (emphasis in original). Economic injuries from unfair competition include:

(1) surrender in a transaction more, or acquire in a transaction

less, than [Plaintiff] otherwise would have; (2) have a present or future property interest diminished; (3) be deprived of money or property to which [Plaintiff] has a cognizable claim; or (4) be required to enter into a transaction, costing money or property, that would otherwise have been unnecessary. Id. To show the economic injury was the result of an unlawful, unfair, or fraudulent business practice, t wrongful conduct. Id. mplied with the In re Turner, 859 F.3d 1145, 1151 (9th Cir. 2017) (citation omitted).

Plaintiff alleges violations of the unfair, unlawful, and fraudulent prongs of the UCL as a C. § 1641(g). (Compl. ¶¶ 52-53.) The Court will address the predicate state law and federal law claims separately.

1. CL Cause of Action Predicated on HBOR Violations the UCL resulting in injury and economic loss to Plaintiff when it purposefully violated [Cal.]

Civ Code §§ 52.) Plaintiff further

and the costs of seeking a remedy fo Id. ¶¶ 54, 57.)

Defendant argues should be dismissed for two reasons. First, Defendant avers Plaintiff has not properly alleged any unlawful business practice undertaken by Defendant because Plaintiff has failed to properly state a claim for a violation of any law. (Mot. 16.) The Court rejects this argument because the Court finds Plaintiff has sufficiently alleged that Defendant violated Cal. Civ. Code section 2924.9 by failing to send Plaintiff a written communication containing specific information regarding foreclosure alternatives within five business days after recording the notice of default. 5

Accordingly, Plaintiff has alleged sufficient facts to support a cause of action against Defend

Second, Defendant argues that Plaintiff lacks standing to assert a UCL claim because he has not pled a loss of money or property that was caused by wrongful conduct. (Mot. 17.) Defendant emphasizes that there is no dispute that Plaintiff was in default

5 2923.5 claim with prejudice and Plaintiff has withdrawn his 2924(a)(1) and 2934a(a)(1) section 2925.9 claim under his UCL cause of action. the Property was caused by any unfair competition by Defendant. (Id.) Rather, Defendant argues that Id.) In such, lost their [sic] home and have [sic] had to endure the expenses of the instant litigation as a

caused by the



## Travis v. Amerihome Mortgage Company LLC

2023 | Cited 0 times | E.D. California | November 22, 2023

alleged UCL violation because nothing in the mortgage or the law guarantees Plaintiff a Instead, Defendant maintains the initiation of property foreclosure. (Id.)

The Court finds Plaintiff has sufficiently alleged an economic injury to satisfy the first prong of standing under the UCL. Plaintiff allegation that of section 2924.9 resulted in satisfies the economic injury requirement as a diminution of a present or future property interest. Kwikset, 51 Cal. 4th at 323. As to his second alleged economic injury, Plaintiff proffers no facts under his UCL cause of action regarding the costs of seeking a remedy that Plaintiff allegedly suffered. (Compl. ¶ 57.) In opposition, Plaintiff clarifies that Defendant he Court notes that within his UCL cause of action. (Id. at ¶ 49.) fourth cause

of action which Plaintiff conceded at the October 18, 2023 hearing alleges Plaintiff suffered , damage to credit, higher arrears, and ultimately foreclosure of the Property. (Id. at ¶ 39.) While not stated within his UCL claim, such damages could also constitute economic injury to support standing under the UCL if properly realleged upon amendment. See Avnieli v. Residential Credit Sols., Inc., No. 2:15-CV-02877-ODW, 2015 on [a] home, harm to their credit, and payment of interest, legal fees, and other costs...easily satisfy the California Supreme Court's interpretation of [Cal. Bus. & Prof. Code] section ; Gilliam v. Bank of America, N.A., SA CV 17-1296-DOC (JPRx), 2018 WL 6537160, at \*29 (June 22, 2018) ( money due to the de . The Court therefore finds Plaintiff

has pled a sufficient injury in fact.

The Court then turns to the issue of whether alleged failure to send Plaintiff a written communication regarding foreclosure alternatives in violation of 2924.9 and s loss of equity in the value of the Property. As Defendant points out, Plaintiff neither alleges in his complaint nor disputes in his opposition that he defaulted on his loan. (Reply 9.) Some district courts conclude the analysis on that point, finding that borrowers who default on loan payments before foreclosure proceedings commence and therefore before a defendant allegedly commits an HBOR violation fail to satisfy the causality prong d the otherwise lawful foreclosure proceedings to begin. See, e.g., Herrejon, 980 F. Supp. 2d at 1205 ; Cornejo default occurred significantly prior to the alleged unlawful acts, the actions could not have

Petrey v. Wells Fargo Bank, N.A., 2:17-CV-00503-TLN-DB, 2018 WL 5099279, at \*12 (E.D. Cal. Oct. 17, 2018) - alleged unlawful conduct] and served to trigger foreclosure proceedings ); Ramirez v. U.S.

Bank, N.A., No. CV1701949RGKASX, 2017 WL 8223378, at \*7 (C.D. Cal. May 26, 2017) suggest that the imminent foreclosure of his property was not the result of his own failure to

Flynn v. Wells Fargo Bank, N.A., 2:19-cv-00116 WBS

KJN, 2019 WL 2249600, at \*15 (E.D. Cal. May 24, 2019) (finding the plaintiff failed to ; Gilliam, 2018



## Travis v. Amerihome Mortgage Company LLC

2023 | Cited 0 times | E.D. California | November 22, 2023

WL 6537160, at \*29 but see Cruz, 2022 WL 18228277, at \*6

would have remained in possession of their property as a result of a loan

Here, prongs of the UCL resulting in injury and economic loss to Plaintiff when it purposely violated

ition claim is derivative of his third cause of action and incorporates the wrongful conduct alleged therein. However, even when incorporating the facts alleged in his third cause of action, the Court is still strained to find loss of the Property. While Plaintiff does not allege that he defaulted on the loan, the complaint tends to show that the cause of the foreclosure was his inability to meet his obligations under the loan subsequent purported HBOR violation. Thus, in the absence of allegations that the loss of his home or even his wrongful actions alleged violation of section 2429.5. See

Herrejon, 980 F. Supp. 2d at 1205. Accordingly but recommends granting leave to amend to allow Plaintiff to clarify the causal connection between each alleged injury in fact. 6

6 Because the Court finds Plaintiff has not adequately alleged standing, the Court will not address prongs in length. However, the Court notes -taken. Specifically, Plaintiff's factual allegations were certainly misleading and not consistent as to the status of the loan modification and what she [sic] was supposed to do to satisfy the loan without the requisite specific particularity, but the Court agrees with Defendant that it is also inconsistent with act by Defendant following the recorded notice of

2. UCL Cause of Action Predicated on a Violation of 15 U.S.C. § 1641(g) Plaintiff also alleges 15 U.S.C. § 1641(g) under TILA as a predicate violation of law to support a UCL claim. Section 1641(g) provides that when a mortgage loan is sold, transferred, or assigned to a third party, the new owner of the debt must notify the borrower of certain information in writing within thirty days of the transfer. 15 U.S.C. § 1641(g). A creditor that fails to comply with section 1641(g) is liable in an individual action for actual damages or specified statutory damages. 15 U.S.C. § 1640(a)(1)-(2). TILA imposes a one-year statute of limitations on private actions for damages. Kelley v. Mortg. Elec. Registration Sys., Inc., 642 F. Supp. 2d 1048, 1059 (N.D. Cal. 2009) (citing 15 U.S.C. § 1640(e)).

Defendant argues it sent Plaintiff a notice of assignment on or about October 20, 2021, and therefore avers Plaintiff cannot plead a violation of section 1641(g) because Defendant (Mot. 9.) Although Plaintiff failed to mention his section 1641(g) claim in his opposition general TILA claim factual contention is improper at the motion to

s first cause of action. See Lee

However, the Court Plaintiff has not pled sufficient facts to state a claim under section 1641(g). Plaintiff only generally alleges in his complaint that Trust was transferred or assigned to a third party, and that it is the new owner or assignee of the





## Travis v. Amerihome Mortgage Company LLC

2023 | Cited 0 times | E.D. California | November 22, 2023

debt [sic] is illegal in violation of Title 15 U.S.C. Parsing through his conclusory allegation, Plaintiff appears to base his general TILA claim on the allegation that the assignment of deed of trust recorded on October 20, 2021 obligations under section 1641(g). (Compl. ¶ 10.) However, section 1641(g) notice

requirements only apply when a mortgage loan not simply a deed of trust is transferred or

default. (See Compl. ¶ 19, 31, 33.) Kearns v. Ford Motor Co., 567 F.3d at 1125 (noting any claim under the . assigned to a third party. instrument securing t Cheatham v. Real Time

Resolutions, Inc., No. 2:19-cv-08911-RGK-JPR, 2020 WL 1000606, at \*3 (C.D. Cal, Jan. 7, 2020) (finding plaintiff insufficiently pled a section 1641(g) claim when she merely pled Defendant failed to notify her that her deed of trust was assigned to a third party, not that a mortgage loan or underlying debt was transferred); see also Orosco v. Specialized Loan Servicing, LLC, No. 2:20-cv-00743-KJM-EFB, 2020 WL 4898054, at \*4 (E.D. Cal. Aug. 20, 2020) (finding plaintiffs insufficiently pled a section 1641(g) claim when they identically alleged the defendant failed to advise plaintiffs that the third party, and that it is the new owner of assignee of the debt is [sic] illegal in violation of Title

15 U.S.C. § 1641(g) ). Without an allegation that Defendant, as the new owner or assignee of Court finds Plaintiff has not sufficiently pled a claim for violation of 15 U.S.C. § 1641(g). 7

Given as unfair competitive practices, the Court also insufficiently pled TILA violation cannot serve as a Korea Supply Co., 29 Cal. 4th at 1143. (See Compl. 53 ( business practices of failing to advise homeowners in writing within 30 days that his Deed of Trust was transferred or assigned to a third party, and that it is the new owner or assignee of the debt is illegal in violation of Title 15 U.S.C. § 1641(g) Further, similar to his predicate state law violations, Plaintiff fails to allege any injury in fact caused by purported TILA violation in order to establish standing under the UCL. 7 The Court notes Defendant removed the instant action to this court on the sole basis of federal question jurisdiction. (See ECF No. 1 at 3 ( Specifically, plaintiff alleges at paragraphs 16 and 53 of the Complaint that Defendant has violated Title 15 U.S.C. Section 1641(g) concerning alleged violation of federal law related to the .) Given the lack of rally alleged TILA claim. that Plaintiff has failed to sufficiently allege a violation of 15 U.S.C. § 1641(g), the Court has no pending federal question before it. As discussed with the parties at the hearing held in this matter on October 18, 2023, the Court recommends remanding the action to state court should Plaintiff elect not to amend his complaint to sufficiently allege a violation of 15 U.S.C. § 1641(g). general allegations contained in paragraphs 16 and 53 for failure to state a claim for violation of 15 U.S.C. § 1641(g) with leave to amend. Further, because Plaintiff has failed to properly state a

Plaintiff alleges 15 U.S.C. § 1641(g) as a predicate violation of law with leave to amend to the extent Plaintiff also amends his complaint to establish standing under the UCL.



## Travis v. Amerihome Mortgage Company LLC

2023 | Cited 0 times | E.D. California | November 22, 2023

H. Seventh Cause of Action for Cancellation of Instruments seventh cause of action seeks cancellation of the recorded notice of default and notice of sale. (Compl. ¶ 61.) Under California Civil Code section 3412, a court may order the cancellation of a written instrument if there is a reasonable apprehension that if left outstanding Accordingly, to must show that he will be injured or prejudiced if the instrument is not cancelled, and that such instrument is void or voidable. *Zendejas v. GMAC Wholesale Mortg. Corp.*, No. 1:10-CV-0184 OWW GSA, 2010 WL 2629899, at \*7 (E.D. Cal. June 29, 2010). Cancellation of an instrument is essentially a request for rescission of the instrument. *Deutsche Bank Nat'l Tr. Co. v. Pyle*, 13 Cal. App. 5th 513, 523 (2017).

alleges that he has reasonable belief the notice of default and notice of sale are voidable or void ab initio. (Compl. ¶ 61). However, as Defendant argues, Plaintiff fails to plead any facts to support the allegation that In his opposition, Plaintiff only reiterates the notice

of default and

of the a cognizable claim. *Iqbal*, 556 U.S. at 678. plead facts

demonstrating the notice of default and notice of tru and would , the seventh cause of action with leave to amend.

I. The Court Recommends Granting Leave to Amend Fifth, Sixth,

and Seventh Causes of Action. decisions *Lopez v. Smith*, 203 F.3d

1122, 1127 (9th Cir. 2000) (en banc) (alterations and internal quotation marks omitted). Nevertheless, a district court need not grant leave to amend where the amendment would unduly prejudice the opposing party, cause undue delay, or be futile, or if the party seeking amendment has acted in bad faith. , 512 F.3d 522, 532 (9th Cir. 2008) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1 Id.

Ano remedy is available to Plaintiff under his first cause of action for violation of California Civil Code section 2923.5 because the property has already been sold. Accordingly, because the claim cannot be cured by amendment of action without leave to amend. Further, Plaintiff conceded in his opposition that he was no

longer pursuing his second cause of action for violation of California Civil Code section also conceded at the hearing that Plaintiff did not oppose Given concessions, the Court also second and fourth causes of action without leave to amend.

fifth cause of action for wrongful foreclosure, sixth cause of action for UCL violations, and seventh cause of action for cancellation of instruments, the Court finds Plaintiff has not acted in bad faith and it would not prejudice Defendant or be futile to grant another opportunity to cure deficiencies in



## Travis v. Amerihome Mortgage Company LLC

2023 | Cited 0 times | E.D. California | November 22, 2023

the complaint. The Court therefore recommends that Plaintiff be granted leave to amend his complaint to address the deficiencies in his fifth, sixth, and seventh causes of action as noted in these findings and recommendations.

V. RECOMMENDATION AND ORDER For the above explained reasons, IT IS HEREBY RECOMMENDED that:

1. 2. Defendants motion to dismiss first, second, and fourth causes of

action, be GRANTED without leave to amend; 3. 4. fifth and seventh causes of action be

GRANTED with leave to amend; and 5. Defend be granted in part

and denied in part as follows: a. violations predicated on California Civil Code sections 2923.5, 2924(a)(1),

and 2934a(a)(1) be GRANTED without leave to amend; and b. violations predicated on California Civil Code section 2924.9 and 15 U.S.C. §

1641(g) be GRANTED with leave to amend. /// /// /// /// /// /// /// /// /// /// These findings and recommendations are submitted to the district judge assigned to this Rule 304. Within fourteen (14) days of service of these recommendations, the parties may file written objections to the findings and recommendations with the Court. Such a document should be captioned District Judge will review the findings and recommendations pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within the specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED. Dated: November 21, 2023 UNITED STATES MAGISTRATE JUDGE

