Rivas v. Wells Fargo Bank, N.A.

2016 | Cited 0 times | E.D. California | December 9, 2016

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSE RIVAS, Plaintiff, v. WELLS FARGO BANK, N.A. and DOES 1 through 10, inclusive, Defendants.

1:16-cv-01473-LJO-JLT MEMORANDUM DECISION AND ORDER MOTION TO REMAND AND GRANTING IN PART AND DENYING IN PART DEEFENDANT S MOTION TO DISMISS (ECF Nos. 5, 9)

I. INTRODUCTION Plaintiff Jose Rivas Rivas this action against Defendants Wells Fargo Bank, N.A. and Does 1 through 50. Plaintiff alleges violations of the California Homeowner Bill o and as well as breach of the covenant of good faith and fair dealing, negligence, and negligent infliction of emotional distress . This action stems from s to modify his home mortgage loan with Defendant, which ultimately resulted in Defendant initiating foreclosure proceedings against Plaintiff. Now before the Court is Defendants motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) (ECF No. 5). This matter is suitable for disposition without oral argument. See Local Rule 230(g).

II. BACKGROUND A. Factual Allegations

Plaintiff Jose Rivas owns a home in Shafter, a town in Kern County, California. (Complaint -1.) Plaintiff financed his current home for $254,591.00 on or about August 19, 2008. (Id. Deed of Trust as security for the note. (Id.) The Deed of Trust for the home was recorded as Document

No. 0208131663 in the official records of the Kern County R Id.) Wells Fargo was identified as the lender in the Deed of Trust. Plaintiff occupies the home and it is his principal residence. (Id. ¶ 11.)

In October 2015, Plaintiff began experiencing financial hardship and struggled to keep up with his loan payments. (Id. ¶ 12.) Plaintiff contacted Wells Fargo, the servicer of his home loan, to seek assistance and to see if he would qualify for loan modification. (Id. ¶ 13.) A representative of Wells

Id. ¶ 14.) The representative further informed Plaintiff that foreclosure proceedings would not commence during the loan modification review process if Plaintiff chose to apply. (Id. his financial institution, Plaintiff temporarily withheld payments and submitted all requested documents to Wells Fargo to be considered for a loan Id. ¶ 15.)

Plaintiff regularly contacted Wells Fargo to obtain status updates on his application and was

Id. ¶ 16.) Fargo to provide him with a representative he could contact directly for assistance, which WELLS FARGO failed to do. (Id. ¶ 17.) On or about January 28, 2016, Plaintiff called Wells Fargo and was informed that his application had been denied due to insufficient income. (Id. ¶ 18) Despite repeated efforts, Plaintiff was not provided with an explanation for the denial, but was instead advised to apply again if he was able to increase his income. (Id.) Plaintiff was not provided with written notice of the denial, nor was he provided with any information regarding his right to appeal the denial. (Id. ¶ 19.)

On or about February 25, 2016, a Notice of Default and Election to Sell under Deed of Trust (Id. ¶ 20.)

Following denial of his first modification request, Plaintiff worked additional hours to increase his income. (Id. ¶ 21.) In April 2016, Plaintiff informed Wells Fargo that his income had increased and they advised him to reapply for a modification. (Id. modification package to Wells Fargo, including a statement and paystubs showing his increased income. (Id. ¶ 23.) On April 27, 2016, a Wells Fargo representative informed Plaintiff that his application had been denied because his new income was insufficient. (Id. ¶ 24.) The Complaint alleges that Plaintiff did not receive an explanation for the denial, nor did he receive a written notice of denial or information regarding his right to appeal. (Id.)

On April 27, 2016, a rescission of the February 25, 2016 NOD was filed with the Kern County ce as Document No. 000216052779. (Id. ¶ 25.) On April 28, 2016, a new NOD was filed Id. ¶ 26.)

Following the second denial, Plaintiff attempted to resume making his monthly payments, but Wells Fargo refused to accept a payment of less than the full default amount. (Id. ¶ 27.) On August 10, 2016, a Notice of Document No. 00021605436. (Id. ¶ 28.) Defendant is active home. (Id. ¶ 29.) B. Procedural Background

Plaintiff filed the original complaint on September 1, 2016 in the Superior Court of California, County of Kern. (ECF No. 1-1.) On October 3, 2016, Defendant filed a Notice of Removal pursuant to 28 U.S.C. § 1441 and the case was removed to this Court. (ECF No. 1.)

On October 12, 2016, Defendant filed a motion to dismiss the complaint for failure to state a claim. (ECF No. 5.) Defendant also filed a simultaneous request for judicial notice. (ECF. No. 6.) On November 2, 2016, Plaintiff filed an opposition to motion (ECF No. 8), 1

as well as a motion for remand, (ECF No. 9). Defendant filed a reply to the motion to dismiss on November 8, 2016, (ECF No. 10), and an opposition to motion for remand on November 17, 2016, (ECF No. 12). to the motion for remand on November 23, 2016. Both the motion to dismiss and the motion for remand are ripe for review. Because he Court first considers the

motion for remand. Smith v. Mail Boxes, Etc., 191 F. Supp. 2d 1155, 1157 (E.D. Cal. 2002) (internal quotation marks and citations omitted)

III. MOTION FOR REMAND A state-court defendant may remove a case from state to federal court if the federal courts would have original jurisdiction over the case. 28 U.S.C. § 1441(a). To accomplish this task, the removing defendant files a notice of removal in the federal district court in the district and division within which the state court action was pending. 28 U.S.C. § 1446(a). The notice must in a case relying on diversity jurisdiction, that the parties are citizens of different states and the amount in controversy exceeds $75,000, see 28 U.S.C. § 1332(a) defendant. 28 U.S.C. § 1446(a).

The plaintiff may then challenge the removal on the basis that the requirements for subject-

1 Plaintiff See granting of the motion shall be in writing and shall be filed and served not less than fourteen (14) days preceding the noticed Defendant requests that th opposition, arguing that Defendant was prejudiced in preparing its reply brief. See ECF No. 10. Although Plaintiff s filing was untimely, the Court does not believe Defendant was prejudiced in any meaningful way. The Court therefore exercises its discretion to consider the Cotta v. Cty. of Kings, 79 F. Supp. 3d 1148, 1156 (E.D. Cal. 2015), on reconsideration in part on different grounds, No. 1:13-CV-359-LJO-SMS, 2015 WL 521358 (E.D. Cal. Feb. 9, 2015) not to reward an officer of this Court who violates the rules he is obligated to know and follow, but so as not to punish a party who hired a lawyer it thought would know and follow the rules matter jurisdiction have not been met. There are two requirements for th s diversity jurisdiction. Naffe v. Frey, 789 F.3d 1030, 1039 (9th Cir. 2015) (citing 28 U.S.C. § 1332(a)(1)). n of Majestic Ins. Co. v. Allianz Intern. Ins. Co., 133 F. Supp. 2d 1218, 1220 (N.D. Cal. 2001) (citing Strawbridge v. Curtiss, 7 U.S. 267 (1806)). The second requirement is that the amount in controversy must exceed $75,000. Naffe v. Frey, 789 F.3d 1030, 1039 (9th Cir. 2015).

At issue in this case is the second requirement amount in controversy. Plaintiff does not contest complete diversity exists between the parties. (ECF No. 1 at 2-3; ECF No. 9 at 3-4.) Rather, Plaintiff contends that Defendant has failed to meet their burden of showing that the amount at issue in this case is greater than $75,000. Defendant counters that because Plaintiff seeks declaratory relief from repossession of his home, the amount in controversy is the full amount of loan: $254,591. (ECF No. 12 at 2.) Defendant alternatively posits that the amount in controversy is $243,878.81 the amount that Plaintiff is in arrears on his loan payment as of the recording of the NTS in August 2016. (Id.)

injunctive relief, it is well established that the amount in controversy is measured Cohn v. Petsmart, 281 F.3d 837, 840 (9th Cir. 2002) (internal citations omitted). The Ninth Circuit has concluded that the amount in

t value and the outstanding interest on the property exceeds the jurisdictional limit. Garfinkle v. Wells Fargo Bank, 483 F.2d 1074, 1076 (9th Cir. 1973). Similarly, other courts have concluded that the amount in controversy requirement is met where either the loan amount or the market value of the

property exceeds $75,000. Mouri v. Bank of N.Y. Mellon, No. EDCV 14-01643-VAP (DTBx), 2014 U.S. Dist. LEXIS 170365 (C.D. Cal. Dec. 9, 2014) More specifically, in actions seeking to enjoin residential foreclosures the amount in ; see also Reyes v. Wells Fargo Bank, N.A., No. C 10 01667 JCS, 2010 WL 2629785 at *4-5 (E.D. Cal. Apr. 23, 2010) (discussing cases finding that the object of the litigation was the property plaintiff sought to enjoin the defendant from selling at foreclosure); Garcia v. Citibank, N.A., No. 2:09 CV 03387 JAM DAD, 2010 WL 1658569 (E.D. Cal. Apr. 23, 2010) (measuring the amount in controversy according to the original mortgage loan amount in proceedings to enjoin foreclosure). Where original loan amounts greatly exceed $75,000, courts routinely find the amount in controversy requirement met without specific reference in the complaint or notice of removal to the market value of the real property that secures the mortgage. See Rose v. J.P. Morgan Chase, N.A., No. Civ. 2:12-225 WBS (CMKx), 2012 WL 892282, at *2- Cabriales v. Aurora Loan Servs., No. C 10-161, the face of Plaintiffs complaint clearly demonstrates that they seek to enjoin the sale of their ho more than $75,000, the amount in controversy requirement is met).

Here, ¶ 32; see also id.

¶¶ 44-45.) Both the original and outstanding loan amounts on the property at issue are well in excess of the $75,000 statutory amount in controversy requirement. Using either metric, Defendant has met its burden of establishing that the amount in controversy exceeds the statutory requirement and therefore that this Court has diversity jurisdiction over this case.

Plaintiff cites several cases in support of the proposition that this court should not consider the property value or total loan amount as the amount in controversy. See Jauregui v. Nationstar Mortg. LLC, No. EDCV 15-00382-VAP, 2015 WL 2154148, at *4 (C.D. Cal. May 7, 2015); Olmos v. Residential Credit Sols., Inc., 92 F. Supp. 3d 954, 956-57 (C.D. Cal. 2015). These cases are inapposite because in both cases plaintiffs requested only temporary relief pending the outcome of their loan modification applications. In Olmos, plaintiff sought temporary relief pending a loan modification determination, alleging that defendants violated state law by recording a notice of default while Olmos, 92 F. Supp. 3d at 955-56. Similarly, in Jauregui, the court declined to conclude that the entire loan amount was in controversy

modification application is conveyed to h Here, Plaintiff admits that both his requests for a loan modification were denied, (Compl. ¶¶ 24, 27), and acknowledges that foreclosure proceedings have already been initiated. See Cabriales, 2010 WL 761081, at *3 (amount in controversy he sale of their property); Uribe v. Bank, No. CV 15-9053-R, 2016 WL 409666, at *1 (C.D. Cal. Feb. 1, 2016) (finding the amount in controversy was not met but distinguishing cases where foreclosure proceedings had already been initiated). Plaintiff places the entire value of the property at issue by requesting that the Court enjoin the sale of his property. (Compl. ¶ 32). motion for remand is therefore DENIED.

IV. REQUEST FOR JUDICIAL NOTICE In its request for judicial notice in connection with its motion to dismiss, Defendant asked the Court to take judicial notice of the Deed of Trust, NOD, and

NTS. (ECF No. 6, at 1-2.)

Under subject to reasonable dispute because it can be accurately and readily determined from sources whose

Fed. R. Evid. 201(b). In addition, the Court also may take judicial notice of material incorporated by reference into the complaint without converting the motion to dismiss into a motion for summary judgment. Coto Settlement v. Eisenberg, 593 F.3d 1031, 1038 (9th Cir. 2010); Intri Plex Techs., Inc. v. Crest Group, Inc., 499 F.3d 1048, 1052 (9th Cir. 2007). Documents are incorporated into the complai upon a document or the contents of the document are alleged in a complaint, the documents authenticity is not in question and there are no disputed issues as to the documents relevance Coto Settlement, 593 F.3d at 1038; see also United States v. Corinthian Colleges, 655 F.3d 984, 999 (9th Cir. 2011).

All three documents offered by Defendant are copies of official public records filed with the at 2.) These documents are part of the public record and easily verifiable. Castillo-Villagra v. INS, 972 F.2d 1017, 1026 (9th Cir. 1992). Courts regularly consider recorded documents related to a foreclosure sale on a motion to dismiss. See, e.g., Gamboa v. Trustee Corps & Cent Mtg. Loan Serv. Co., No 09-0007, (N.D. Cal. Mar. 12, 2009); Dodd v. Fed. Home Loan Mortg. Corp., No. CIV S-11-1603 JAM, 2011 WL 6370032, at *1 (E.D. Cal. Dec. 19, 2011); Lazo v. Summit Mgmt. Co., LLC, No. 1:13-CV-02015-AWI-JL, 2014 WL 3362289, at *5 (E.D. Cal. July 9, 2014), report and recommendation adopted, No. 1:13-CV-02015-AWI-JL, 2014 WL 3689695 (E.D. Cal. July 24, 2014). Plaintiff does not dispute the authenticity of the records, nor does he object to the Court taking judicial notice of them. Indeed, all three documents are incorporated by reference in the Complaint. (Compl. ¶¶ 10, 20, 25, 26.) The Court takes judicial notice of Exhibits A- request for judicial notice. (ECF No. 6 Exs. A-C.)

V. MOTION TO DISMISS A. Standard of Decision

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is a challenge to the sufficiency of the allegations set forth in the complaint. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). A 12(b)(6) dismissal is proper Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). In determining whether a complaint states a claim upon which relief may be granted, the Court accepts as true the allegations in the complaint, construes the pleading in the light most favorable to the party opposing the motion, and resolves all doubts in the pleaders favor. Lazy Y Ranch Ltd. v. Behrens, 546 F.3d 580, 588 (9th Cir. 2008).

. . . claim is and the grou Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A plaintiff is Id. facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable Ashcroft v. Iqbal, 556 U.S. 662, 678 ore than a Id. (quoting Twombly, 550 U.S. at 556).

unadorned, the defendant-unlawfully-harmed- Iqbal, 556 U.S. at 678. A pleading is

Twombly, 550 U.S. at 555; see also Iqbal, 556 U.S. at 678

elements

have violated the . . . laws in ways that have not Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 526 . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain Twombly, 550 U.S. at 562. In other words, the complaint must describe the alleged misconduct in enough detail to lay the foundation for an identified legal claim.

per if it is clear that the complaint could not be saved by Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1051 (9th Cir. 2008). To the extent that the pleadings can be cured by the allegation of additional facts, the Court will afford the plaintiff leave to amend. Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 247 (9th Cir. 1990) (citations omitted). B. Analysis

1. First Cause of Action: HBOR pursuant to California Civil Code §§ 2923.6, 2923.7,

2923.55 a. California Civil Code § 2923.6 Plaintiff brings a claim under HBOR alleging that Defendant followed improper procedures in in violation of California Civil Code § 2923.6. Plaintiff alleges that ELLS FARGO failed to provide him with the required written notice . . . Plaintiff was never informed of his right to appeal the denials, what calculations were used in review, or what alternatives were available. (Compl. ¶ 38.) Defendant counters that Plaintiff has not pled sufficient facts regarding their loan modification application to support such a claim. (ECF No. 5 at 3-6.)

Section 2923.6 provides that a mortgage servicer may not record a notice of default, a notice of s sale until the servicer make a written determination that the borrower is not eligible for a loan modification. Cal. Civ. Code § 2923.6(c). This provision is only triggered, however, if Id.; see also Gonzales v. Wells Fargo Bank NA, No. C 14-03850 JSW, 2015 WL 877440, at *3 (N.D. Cal. Feb. 27, 2015).

Fargo to be considered f Compl. ¶ 15.) After his initial loan modification request was denied in January of 2016, including a statement and paystubs showing his increased income on April 25, 2016. (Id. ¶ 23.)

allegations that he submitted complete loan modification applications are insufficient to withstand a motion to dismiss. Stokes v. CitiMortgage, Inc., No. CV 14-00278 BRO SHX, 2014 WL 4359193, at *7 (C.D. Cal. Sept. 3, 2014). As one district court explained:

be made by considering the mandates of section 2923.6(h). A bald allegation that a party cations-without sufficient supporting factual allegations-is a conclusory statement, and the Court does not rely on such assertions in evaluati s complaint. Iqbal, 556 U.S. at 679. Id.; see also Cornejo v.

Ocwen Loan Servicing, LLC, 151 F. Supp. 3d 1102, 1111 12 (E.D. Cal. 2015) the asserti complete are conclusions, rather than factual allegations, and not entitled to the assumption of truth); Saridakis v. JPMorgan Chase Bank, No. CV 14-06279 DDP EX, 2015 WL 570116, at *2 (C.D. Cal. Feb. 11, 2015) a completed, legible and satisfactory loan modification application 2923.6); Woodring v. Ocwen Loan Servicing, LLC, No. CV 14-03416 BRO EX, 2014 WL 3558716, at *7 (C.D. Cal. July 18, 2014) (allegation of a complete loan modification application under section the submission of much more robust factual allegations statement that loan application was complete). Here, Plaintiff provided no factual details in connection

with his allegation that he submitted a complete loan application sometime in the fall of 2015. (See Compl. ¶¶ 15-18.) Furthermore, plaintiff did not provide factual allegations regarding the submission of

Id. ¶ 23.) Plaintiff does not allege that the documents included with the second application demonstrated a material change in income in accordance with § 2923(g). These allegations are plainly insufficient to state a claim for relief under § 2923.6. See Cornejo, 151 F. Supp. 3d at 1111-12. GRANTED WITH LEAVE TO AMEND.

b. California Civil Code § 2923.7 Section 2923.7(a) prevention alternative, the mortgage servicer shall promptly establish a single point of contact and

provide to the borrower one or more direct means of communication with the single point of contact. Cal. Civ. Code § 2923.7(a). Subsections (b) through (d) enumerate certain duties of the single point of contac SPOC , including communicating the process for applying for foreclosure prevention alternatives to the buyer, indicating deadlines, informing the borrower of the status of their foreclosure prevention alternative applications, and having access to individuals with the ability to stop foreclosure proceedings when necessary, among others. § 2923(b)-(d). Sub-section (e) individual or team of personnel each of whom has the ability and authority to perform the

under the statute. § 2923(e).

Plaintiff alleges in the Complaint that

of § 2923.7(a). (Id. ¶ 17.) Later in the e] assistance with an alternative to foreclosure, in addition to his specific request for a SPOC, the numerous representatives at Wells Fargo Plaintiff spoke with were unable and/or unwilling to help and consistently

implies that Wells Fargo did not violate § 2923.7, because the statute allows a team of representatives to

serve as the SPOC. (ECF No. 5 at 6.) In his opposition, Plaintiff appears to concede that he was

assigned a SPOC team, but argues that those representatives and i Therefore, the argument continues, Plaintiff does

not adequately allege a violation of § 2923(a), and indeed appears to concede that Defendant did not violate § 2923(a).

However, P s concession that he had been assigned a SPOC does not preclude the possibility of a § 2923.7 violation. See Wilkins v. Bank of Am., N.A., No. 215CV02341KJMEFB, 2016 WL 5940082, at *6-7 (E.D. Cal. Aug. 19, 2016). Mungai v. Wells

Fargo Bank, No. 14-00289, 2014 WL 2508090, at *10 (N.D. Cal. June 3, 2014) (citation omitted). Plaintiff alleges that he requested a SPOC 2

, and that Wells Fargo representatives did not meet the obligations of a SPOC under § 2923.7(b)-(d). (Compl. ¶ 17.); see Hendricks v. Wells Fargo Bank, N.A., No. CV-15-01299-MWF JEMX, 2015 WL 1644028, at *8-9 (C.D. Cal. Apr. 14, 2015) did not obtain information regarding the reason for his loan modification denial were sufficient to state a claim).

Defendant argues allegation that he received denials on his applications. (ECF No. 5 at 6.) This argument misses the mark. Under § 2923.7, the SPOC has a number of obligations to or example, the Plaintiff alleges that Wells Fargo representatives failed to provide him with information regarding the status of his application despite repeated requests, that he was transferred to multiple representatives who could not answer his questions or confirm if his application was being reviewed, and that he was not provided with an explanation for why his applications were denied. (Compl. ¶¶ 15-18, 24.) Plaintiff unable and/or unwilling to help to exercise his right to appeal and ensure the denial was based on accurate calculations and

Id. ¶ 40.) If true, these allegations plausibly allege that Wells Fargo violated § 2923.7(b). See Hixson v. Wells Fargo Bank NA, No. C 14-285 SI, 2014 WL 3870004, at *6 (N.D. Cal. Aug. 6, unable to receive Hernandez v. Specialized Loan Servicing, LLC, No. CV 14-9404-GW JEMX, 2015 WL 1401784, at *4

(C.D. Cal. Mar. 23, 2015) (allegation that ounced from representative to representative;

2 Courts are divided on whether a borrower must specifically request a SPOC or whether a request for foreclosure alternatives Compare Williams v. Wells Fargo Bank, 2014 WL 1568857, at *8 (C.D. Cal. Jan. 27, 2014 with McFarland v. JP Morgan Chase Bank, 2014 WL 4119399, at *11 (C.D.Cal. Aug. 21, 2014). The Court need not address that issue here, as Plaintiff specifically alleges in the Complaint that he requested a SPOC. (Compl. ¶ 17.) that she often received conflicting or inconsistent information; that different representatives repeatedly asked her to re-submit documents she had submitted to other representatives; and that, at times, she §2923.7).

Defendant further argues that even if Plaintiff has pled sufficient facts to state a claim, he has not pled facts to suggest that the violation was material. (ECF No. 5 at 7-8.) However, Plaintiff alleges that denials cost Plaintiff both valuable time and the ability to exercise h

Hendricks, 2015 WL 1644028, at *9. Plaintiff adequately alleges at this stage that had the SPOC acted in accordance with the requirements of § 2923.7, he would have at least been provided a basis for the loan modification denial allowing him to pursue further the loan modification process by, for example, filing an appeal. Id. at the very least, [plaintiff] would have received clear, non-contradictory answers to his inquiries regarding his modification, including the basis for his denial allowing him to appeal ; see also Stinson v. Specialized Loan Servicing, LLC, No. 216CV01903MCEGGH, 2016 WL 6524864, at *4 [defendant Boone v. Specialized Loan

Servicing LLC, No. 15-CV-02224-DMR, 2015 WL 4572429, at *4 (N.D. Cal. July 29, 2015)

. These allegations are sufficient, where, as here, Plaintiff seeks injunctive relief prior to a foreclosure sale. § 2924.12(a).

c. California Civil Code § 2923.55 Plaintiff alleges that Defendant failed to provide the required written information to Plaintiff, including notice of his right to request certain documents, in violation of § 2923.55. Id. (providing that the mortgage servicer must provide the borrower with a statement explaining that the borrower may Defendant counters that these allegations are

not pled with sufficient particularity, and that Plaintiff merely recites the elements of the statute without providing factual allegations to support them. (ECF No. 5 at 7.) In his opposition, Plaintiff does not or his claim under § 2923.55. In its reply, Defendant contends that Plaintiff has abandoned the claim by failing to respond to it. (ECF No. 10 at 6.)

There is some support for the notion that arguments that are not opposed are conceded. Hall v. Mortgage Investors Group, No. 2:11-CV-00925-JAM-GGH, 2011 WL 4374995, *5 (E.D. Cal. Sept. 16, 2011) (failure to oppose argument amounts to a concession as to the truth of the argument); Foster v. City of Fresno, 392 F. Supp. 2d 1140, 1147 n.7 (E.D. Cal. an opposition to a motion for ; Ramirez v. Ghilotti Bros. Inc., 941 F. Supp. 2d 1197, 1210 (N.D. Cal. 2013) (finding that the failure to respond to argument amounts to a concession that the argument has merit).

More importantly, however the allegations merely recite the elements of § 2923.55 without any supporting factual detail. (Compl.¶ ¶

41-42.) Such conclusory allegations are inadequate as a matter of law. Iqbal, 556 U.S. at 678 to state a material violation of one of the Rockridge Trust v. Wells Fargo, N.A., No. C-13-01457 JCS, 2013 WL 5428722 (N.D. Cal. Sept. 25, 2013). Plaintiff fails to offer any factual allegations as to how he suffered harm by, for example, alleging that the outcome of the loan modification process would have been

different if Wells Fargo had provided notice that Plaintiff could request documents pertaining to his loan. Heflebower v. JPMorgan Chase Bank, NA, No. 1:12-CV-1671 AWI SMS, 2014 WL 897352, at *13 (E.D. Cal. Mar. 6, 2014) (dismissing § 2923.55 cl not demonstrate anywhere in the [complaint] s actions in any specific way ; Cornejo, 151 F. Supp. 3d at 1114 (not allege they would have taken any different actions related to seeking loan modification). § 2923.55 allegations are DISMISSED WITH LEAVE TO AMEND.

2. Second Cause of Action: Violation of the UCL, California Business & Professions

Code § 17200 Plaintiff alleges that Wells F ¶¶ 48, 51.) Defendant argues that Plaintiff lacks standing to pursue a UCL claim because he has not

demonstrated that he lost money or property as a result of the alleged UCL violation because no foreclosure sale has yet taken place. (ECF No. 5 at 11.) Defendant further argues that Plaintiff has not pled the requisite underlying violation on which his UCL claim is predicated, and that he has not alleged sufficient facts regarding ongoing unlawful, unfair, and fraudulent business acts on the part of Wells Fargo. (Id. at 9-10.)

a. Standing California Business and Professions Code section 17204 limits standing to bring a UCL claim to

see Birdsong v. Apple, Inc., 590 F.3d 955, 959-60 (9th Cir.

s] alleged UCL violation and Rubio v. Capital One Bank, 613 F.3d 1195, 1204-05 (9th Cir. 2010) (internal citation omitted). causation prong of the statute if he or she would have suffered the same harm whether or not a defendant Jenkins v. JP Morgan Chase Bank, N.A., 216 Cal. App. 4th 497, 523 (2013) (internal quotation marks and citations omitted).

For example, in Jenkins, the court found the plaintiff lacked standing under the UCL because she could not establish a causal link between the foreclosure of her home and the defendant's six unlawful or unfair acts, all of which occurred after the plaintiff defaulted on her loan. 216 Cal. App. 4th at 523. Even if the defendant had not acted unfairly, the plaintiff still would have defaulted and suffered the same economic injury.

Here, Plaintiff has pled concrete economic harm as a result of this practice. Plaintiff alleges that he has incurred foreclosure fees and costs that have already been charged and added to (Compl. ¶ 55); see also Kasramehr v. Wells Fargo Bank N.A., No. CV 11-0551 GAF OPX, 2011 WL

12473383, at *11 (C.D. Cal. May 18, 2011) (plaintiff alleging that she had been charged foreclosure fees and costs had standing to pursue UCL claim against lender). Plaintiff further alleges that unlawful practices by Wells Fargo led him to default on his mortgage. Unlike Jenkins, where the plaintiff

alleged UCL violations that occurred after she defaulted, Plaintiff here has alleged that Wells Farg violations were the reason that he stopped making payments on his home loan and contributed to his inability to secure a modification and to the incurrence of various fees and costs. (Compl. ¶ 15.) has made payments to the mortgage servicer in connection with the business practice that is the subject

Wilkins v. Bank of Am., N.A., No. 215CV02341KJMEFB, 2016 WL 5940082, at *7-8 (E.D. Cal. Aug. 19, 2016); see also Reyes v. Wells Fargo Bank, N.A., No. C-10-01667, 2011 WL 30759, at *21 (N.D. Cal. Jan. 3, 2011) (same). Plaintiff has standing to pursue his UCL claim.

b. Failure to State a Claim ce and unfair, deceptive, unt Blank v. Kirwan, 703 P.2d 58, 69 (Cal. 1985) (quoting Cal. Bus. & Prof. Code, § 17200). The UCL establishes three varieties of unfair competition Shvarts v. Budget Grp., Inc., 81 Cal. App. 4th 1153, 1157 (2000).

An unlawful business activity includes anything that can properly be called a business practice and that at the same time is forbidden by law. Blank, 703 P.2d at 69 (internal quotation marks and citations omitted); see also Walker v. Countrywide Home Loans, Inc., 98 Cal. App. 4th 1158, 1169 (2002) ((internal quotation marks and citations omitted)).The UCL pro federal, state, or municipal, statutory, regulatory, or court- Saunders v. Superior Court, 27 Cal.

App. 4th 832, 838-39 business practice Walker, 98 Cal. App. 4th at 1170. According to the California Supreme Court, actionable under the UCL. Farmers Ins. Exchange v. Superior Court, 826 P.2d 730, 2 Cal. 4th 377, 383

(1992). violation of any other law. Cel- ns, Inc. v. Los Angeles Cellular Telephone Co., 973 P.2d

527, 540 (Cal. violations of other law and treats them as unlawful practices that the unfair competition law makes internal citation omitted). Where a plaintiff cannot state a claim under the See, e.g., Smith v. State Farm Mutual Automobile Ins. Co., 93 Cal. App. n under the unfair competition law if some other statutory provision bars such an action or permits the underlying Rothschild v. Tyco Internat (US), Inc., 83 Cal. App. 4th 488, 494 (2000).

Plaintiff alleges that its UCL claims are predicated on violations of HBOR, specifically sections 2923.6 and 2923.7. (Compl. ¶¶ 51-52.) As previously discussed, Plaintiff fails to state a claim under § 2923.6, but states a claim under § 2923.7. Because Plaintiff has pled a valid claim under a borrowed law, Pla is premised on a violation of § 2923.7. Davis v. HSBC Bank Nevada, N.A. or local law can serve as the predicate for an action under s

UCL is DENIED. 3. Third Cause of Action: Breach of Covenant of Good Faith and Fair Dealing Plaintiff alleges that Defendant breached an implied covenant of good faith and fair dealing by ing the decision of from performing. (Id. ¶ 64.) Defendant counters that the contract between Plaintiff and Defendant

explicitly requires Plaintiff to make timely monthly payments and any implied covenant could not alter the express terms of the contract. (ECF No. 5 at 12-13.)

implied covenant of good faith and fair dealing is the existence of a contractual relationship between the parties, since the covenant is an implied term in Smith v. City and Cnty. of San Francisco, 225 Cal. App. implied covenant of good faith and fair dealing is limited to assuring compliance with the express terms of the Pasadena Live, LLC v. City of Pasadena, 114 Cal. App. 4th 1089, 1093-94 (2004) (internal citation omitted) (emphasis in original). contractual relationship, [plaintiffs] cannot state a cause of action for breach of Smith, 225 Cal. App. 3d at 49.

Plaintiff does not allege that Defendant promised to modify the loan, only that one of its representatives indicated provided by Plaintiff. (Compl. ¶ 15.) Plaintiff provides no evidence to suggest that Defendant was

contractually obligated to modify his loan. ng in the act . . . shall be The express terms of the contract require Plaintiff to make timely monthly payments. (ECF No. 6, Ex. A at 4.) miss monthly payments cannot support a claim based on an implied covenant, because such an . Pasadena Live, 114 Cal. App. 4th at 1093-94.

Most courts that have considered whether an inducement not to make loan payments could support a cause of action for breach of implied covenant have concluded that it does not. See Fevinger v. Bank of Am., N.A., No. 5:13-CV-04 839-PSG, 2014 WL 3866077, at *4 (N.D. Cal. Aug. 4, 2014) ([plaint election to skip payments ultimately was [his] alone to make . . . . The choice to pay or not to pay remained with [plaintiff] ; Ha v. Bank of Am., N.A., No. 5:14-CV-00120-PSG, 2014 WL 3616133, at *9-10 (N.D. Cal. July 22, 2014) (same); Ren v. Wells Fargo Bank, N.A., No. 13-0272 SC, 2013 WL 5340388, at *2 (N.D. Cal. Sept. 24, 2013) Court di s FAC because Defendant never actively interfered with

s payments. It told Plaintiff that she could enter the loan modification process by going late on ; Franczak v. Suntrust Mortg. Inc., No. 5:12-CV-01453 EJD, 2013 WL 843912, at *3-4 (N.D. Cal. Mar. 6, 2013) impression that a particular action is encouraged is something very different than actually being required

to do something . 3

DISMISSED WITH LEAVE TO AMEND.

3 Several courts have reached the opposite conclusion, but the facts in those cases are distinguishable. In Lavarias v. Wells Fargo Home Mortgage, the court distinguished the Franczak line of cases and concluded that plaintiff had pled a claim for r the impression that going into default would secure a loan modification . . . [defendant] instructed her to default and also assured her it

would not initiate foreclosure while No. 216CV00901JAMKJN, 2016 WL 4148300, at *5 (E.D. Cal. Aug. 4, 2016). d Franczak line of cases, the choice of whether or not to continue to make payments rested entirely with Plaintiff. 2013 WL 843912, at *3-4. The cases that Lavarias relies on reached the conclusion that the implied covenant was breached based on similarly distinguishable facts. See Hatton v. Bank of Am., N.A., No. 1:15-CV- 00187-GSA, 2015 WL 4112283, at *5 (E.D. Cal. July 8, 2015) (denying motion to dismiss where plaintiffs alleged they s insistence that payments were not required during the course (emphasis added) (internal quotation marks omitted)); Harvey v. Bank of Am., N.A., No. 12- 3238 SC, 2013 WL 632088, at *3 (N.D. Cal. Feb. 20, 2013) [p]laintiff not to make payments in order to apply for a loan modification and . . . promis[ed] Plaintiff that it would not report . 4. Fourth Cause of Action: Negligence [him] to fall behind on his mortgage, stringing [him] along for months in pursuit of a modification, and

Fargo did not owe plaintiff a legal duty of care in connection with its loan servicing, modification, and foreclosure. (ECF No. 5 at 14.)

lements of a cause of action for negligence are (1) a legal duty to use reasonable care, (2) breach of that duty, and (3) proximate [or legal] cause between t s Mendoza v. City of Los Angeles, 66 Cal. App. 4th 1333, 1339 (1998) existence of a duty of care owed by a defendant to a plaintiff is a prerequisite to establishing a claim for

Nymark v. Heart Fed. Savings & Loan Assn., 231 Cal. App. existence of a legal duty to use reasonable care in a particular factual situation is a question of law for

Vasquez v. Residential Investments, Inc., 118 Cal. App. 4th 269, 278 (2004) (citation omitted). ral types: (a) the duty of a person to use ordinary care in activities from which harm might reasonably be anticipated [, or] (b) [a]n affirmative duty where the person occupies a particular relationship to others . . . . In the first situation, he is not liable unless he is actively careless; in the second, he may be liable for failure to act affirmatively to McGettigan v. Bay Area Rapid Transit Dist., 57 Cal. App. 4th 1011, 1016-17 (1997).

no duty of care to a borrower when the s involvement in the loan transaction does not exceed the scope of its conventional role as a Nymark, 231 Cal. App. 3d at negligence arises only when the lender actively participates in the financed enterprise beyond the

Id. (internal quotations omitted); see also Wagner v. Benson, 101 Cal. App. 3d 27, 35 (1980) d enterprise as something There is a split among California state courts and federal courts interpreting California law as to whether a lender owes a duty of care in processing a loan modification application. See Carbajal v. Wells Fargo Bank, N.A., No. CV 14-7851 PSG PLAX, 2015 WL 2454054, at *5 (C.D. Cal. Apr. 10, 2015) (describing the split and collecting cases). Plaintiff relies on Alvarez v. BAC Home Loans Servicing LP, 228 Cal. App. 4th 941 (2014), for the proposition that when lending institutions mishandle loan applications or make specific representations to borrowers concerning

loans, the lender owes a duty of care to the borrowers. (ECF No. 8 at 11.) However, a growing number of courts, including district courts in this circuit, have concluded that that loan modification does not create a duty of care on behalf of the lender. See Lueras v. BAC Home Loans Servicing, LP, 221 Cal. App. 4th 49, 67 (2013) (disagreeing that a residential lender owes a common law duty of care to offer, consider, or approve a Cornejo, 151 F. Supp. 3d 1102 (declining to follow Alvarez and choosing instead to follow Lueras because even if the plaintiffs were -traditional, special relationship with the lender); Carbajal, 2015 WL 2454054, at *6 The Court fails to discern how considering an application for the renegotiation of loan terms could fall outside the scope of a ; Marques v. Wells Fargo Bank, N.A., No. 16-CV- 03973-YGR, 2016 WL 5942329, at *7 (N.D. Cal. Oct. 13, 2016) (noting the split and concluding that a growing number of courts have adopted the holding in Lueras).

The Court is persuaded by the reasoning in Lueras and Cornejo. As the California Court of Appeal explained in Luerass obligations to offer, consider, or approve loan modifications and to explore foreclosure alternatives are created solely by the loan documents, statutes, regulations, and relevant directives and announcements from the United States Department of the Treasury, Fannie Mae, and other governmental or quasi-governmental agencies. Lueras, 221 Cal. App. 4th at 67. Such activities, as other courts have found, are indistinguishable from the process of providing an original loan, and th See Griffin v. Green Tree Servicing, LLC, No. 14-CV-9408-MMM, 2015 WL 10059081, at *14 (C.D. Cal. Oct. 1, 2015).

Moreover, recently the Ninth Circuit has held that under California law, lenders do not owe borrowers a dut s loan modification application within a particular time frame. Anderson v. Deutsche Bank Nat. Trust Co. Americas, , 552 (9th Cir. May 4, 2016). The Ninth Circuit explained that, while harm to borrowers is a foreseeable result of delays in the processing of loan modi o the Id. Rather, because the borrowers default makes the modification . . . closely connected to the lenders conduct is not morally blameworthy. Id. (quoting Lueras v. BAC Home Loans Servicing, LP, 221 Cal. App. 4th 49, 67 (2013)). Defendant was stringing [him] insufficient to establish a duty.

Because Defendant did not owe Plaintiff a duty of care in connection with its loan modification ction for negligence is DISMISSED WITH LEAVE TO AMEND.

5. Fifth Cause of Action: Negligent Infliction of Emotional Distress Plaintiff alleges wrongfully proceeding with foreclosure of his home. (Compl. ¶¶ 94-

principal reasons. First, NIED claims are predicated on negligence. is no independent tort of negligent infliction of emotional distress tort is negligence, a

cause of action in which a duty to the plaintiff is an essential element Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 807 (Cal. 1993). As noted above, Wells Fargo did not owe Plaintiff a duty, NIED claim must fail for the same reason his negligence claim fails.

Second, under California law, NIED claims generally cannot be predicated on damage to property or financial interests. Erlich v. Menezes, 981 P.2d 978 (Cal. 1999) with rare exceptions, a breach of the duty must threaten physical injury, not simply damage to property or financial interests ; Robinson v. United States, 175 F. Supp. 2d 1215, 1228 (E.D. Cal. 2001) (property damage alone could not form basis for NIED claim). The conditions for that narrow exception, clearly not present here, are assume[s] a duty to [plaintiff] in which the emotional condition of [plaintiff] [i]s an G s Home Centers, LLC, No. 114CV01212DADSKO, 2016 WL 1138175, at *6 (E.D. Cal. Mar. 23, 2016) (internal citations omitted). Specifically, courts have allowed plaintiffs to recover under an NIED theory in cases that involve Erlich, 981 P.2d at 987-88; see also Christensen v. Superior Court, 148 Cal. App. 3d 576, 588 (1983) (plaintiff could recover for NIED

physical injury to plaintiff); Burgess v. Superior Court, 831 P.2d 1197 (Cal. 1992) (mother could Plaintiff that his emotional initiation of foreclosure proceedings on his home does not fit the general rule that NIED claims cannot be predicated on financial or property interests, nor the exception for -being fifth cause of action for NIED is DISMISSED WITH LEAVE TO AMEND.

VI. CONCLUSION AND ORDER For the reasons stated above:

1) motion to remand the case to state court (ECF No. 9) is DENIED. 2) Motion to Dismiss (ECF No. 5) is GRANTED IN PART AND DENIED IN

PART WITH LEAVE TO AMEND:

a.

Civil Code § 2923.6 is GRANTED WITH LEAVE TO AMEND. b.

Civil Code § 2923.7 is DENIED. c.

Civil Code § 2923.55 is GRANTED WITH LEAVE TO AMEND. d.

DENIED. e. on to Dismiss

of good faith and fair dealing is GRANTED WITH LEAVE TO AMEND. f.

GRANTED WITH LEAVE TO AMEND. g. to Dismiss emotional distress is GRANTED WITH LEAVE TO AMEND.

Plaintiff shall have twenty (20) days from electronic service of this Order to file an amended complaint or give notice that he will stand on the current pleading.

IT IS SO ORDERED. Dated: December 9, 2016 /s/ _____ UNITED STATES CHIEF DISTRICT JUDGE