UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**EDCV 14-1591-JGB (KKx)**	Date	October 24, 2014
Title	***Donald Ray Shapiro v. Sage Point Lender Services et al.***		

Present: The Honorable JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ	Not Reported
Deputy Clerk	Court Reporter

Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: Order (1) GRANTING IN PART and DENYING IN PART Defendant's Motion to Dismiss (Doc. No. 12); (2) VACATING the October 27, 2014 hearing (IN CHAMBERS)

Before the Court is Defendant Residential Credit Solutions, Inc.'s Motion to Dismiss the Complaint for failure to state a claim upon which relief can be granted. (Doc. No. 12.) The Court finds this matter suitable for resolution without a hearing pursuant to Local Rule 7-15. After considering the papers timely filed in support of and in opposition to the motion, the Court GRANTS IN PART and DENIES IN PART the motion.

I. BACKGROUND

On July 31, 2013, Plaintiff Donald Ray Shapiro ("Plaintiff") filed a Complaint in the Riverside County Superior Court against Defendants Sage Point Lender Services, Residential Credit Solutions, Inc. ("Defendant" or "RCS"), and fictitious entities. Plaintiff states claims for relief for (1) violation of California Civil Code § 2923.5, (2) violation of California Civil Code § 2923.6, (3) violation California Civil Code § 2923.7, (4) violation of California Civil Code § 2923.10, (5) violation of Cal. Bus. & Prof. Code § 17200 ("UCL") (6) negligence, and (7) punitive damages under California Civil Code § 3294. (Compl., Not. of Removal, Ex. B, Doc. No. 1-2.) On August 4, 2014, RCS removed the action to this Court. (Not. of Removal.)

On September 10, 2014, RCS filed a motion to dismiss ("Motion," Doc. No. 12) and requested judicial notice of five documents in support thereof ("RJN," Doc. No. 12-1).[1] ("MTD," Doc. No. 12.) Plaintiff opposed on January 6, 2014. ("Opp'n," Doc. No. 15.) Defendant replied on January 13, 2014. ("Reply," Doc. No. 16.)

The following facts are taken from the Complaint, exhibits attached to the Complaint[2], and the judicially noticeable documents supplied by RCS. Plaintiff purchased his home with the help of a mortgage loan for $396,400.00. (RJN, Exh. 1.) RCS is the mortgage servicer. (Compl. ¶ 9.)

Due to economic troubles, Plaintiff began to default on the mortgage in early 2012. (Id. ¶ 12.) On July 18, 2013, Plaintiff faxed a loan modification application and 40 pages of supporting documentation to RCS. (Id. ¶ 15.) On August 20, 2013, RCS sent Plaintiff a letter requesting 13 additional documents, including Plaintiff's 2012 tax return. (Id. ¶ 17; Exh. 2.) Plaintiff faxed RCS all the requested documents on September 17, 2013. (Id. ¶ 18.) Since Plaintiff had not yet filed his taxes for 2012, he instead included a copy of the deadline extension granted by the IRS. (Id.) Plaintiff alleges an agent of RCS informed him this was an acceptable substitute. (Id.)

On September 24, 2013, RCS sent Plaintiff a letter stating that Plaintiff had not provided all the requested documentation. (Id. ¶ 19; Exh. 4) This letter did not identify which documents were lacking. (Id. ¶ 20.) Upon receiving the letter, Plaintiff called RCS to ask what documents he needed to supply. (Id. ¶ 20.) An agent of RCS told Plaintiff that the September 24 letter was a form letter – automatically generated by the computer system – that Plaintiff could ignore because RCS had received the documents and was reviewing Plaintiff's application. (Id. 21.)

On October 8, 2013, RCS recorded a Notice of Default ("NOD") with the Riverside County Recorder's Office. (Id. ¶ 24; Exh. 5.) On the same day, RCS filed a Declaration of Compliance in accordance with California Civil Code § 2923.55(c) ("Compliance Declaration"). (Id. ¶ 26) The Compliance Declaration – dated August 1, 2013 and signed under penalty of perjury – states that the mortgagee's agent has been unable to contact the borrower to discuss the

[1] Defendant requests judicial notice of various publicly filed documents in support of the motion to dismiss, including the deed of trust, the assignment of the deed of trust, the substitution of trustee, the notice of default, and the notice of trustee's sale. (RJN, Exhs. 1-5.) The documents included in Defendant's request for judicial notice are publically recorded documents and court filings. As such, they are properly judicially noticeable under Federal Rule of Evidence 201. Therefore, to the extent necessary to rule on the pending motion, the Court takes judicial notice of those documents. See Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006); Woodring v. Ocwen Loan Servicing, LLC, 2014 WL 3558716, at *2-3 (C.D. Cal. July 18, 2014).

[2] In evaluating a 12(b)(6) motion, review is "limited to the contents of the complaint." Clegg v. Cult Awareness Network, 18 F.3d 752, 754 (9th Cir.1994). However, exhibits attached to the complaint may be considered in determining whether dismissal is proper without converting the motion to one for summary judgment. See Parks School of Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995); Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279, 1282 (9th Cir. 1986).

borrower's financial situation. (Id.; Exh. 6) Plaintiff alleges this statement is false, as Plaintiff had been communicating with RCS since at least July 18, 2013, when he faxed RCS his loan modification application. (Id.)

On November 20, 2013, Plaintiff called RCS to ask whether RCS had ever sent a letter denying Plaintiff's loan modification application. (Id. ¶ 27) RCS told Plaintiff that it would send one. (Id.) When Plaintiff asked why he had not received a denial letter, RCS stated that the letter was never printed or scanned into the RCS imaging system. (Id. ¶ 28.) Plaintiff called RCS again on December 4, 2013 to ask why he still had not received a denial letter. (Id. ¶ 29.) RCS responded that there was no record of the letter having been scanned into the RCS imaging system. On December 9, 2013, Plaintiff sent a detailed letter to RCS explaining his concerns about RCS's potential violations of California's Homeowner's Bill of Rights ("HBOR") during the foreclosure process. (Id.)

RCS sent Plaintiff a letter denying his loan modification on December 31, 2013. (Id. ¶ 32.) The letter stated that Plaintiff was not eligible for a loan modification because he did not provide "the required documents." (Id., Exh. 8.) The letter did not specify which documents were lacking. (Id.) On January 10, 2014, RCS sent Plaintiff a Single Point of Contact letter ("SPOC letter"). (Id. ¶ 33.) RCS sent another SPOC letter on February 14, 2014. (Id. 34.)

On July 1, 2014, RCS recorded a Notice of Trustee's Sale ("NOTS") in the Riverside County Recorder's Office. (Id. ¶ 36.) The sale has yet to occur.

II. LEGAL STANDARD[3]

Federal Rule of Civil Procedure 12(b)(6) allows a party to bring a motion to dismiss for failure to state a claim upon which relief can be granted. Rule 12(b)(6) is read in conjunction with Rule 8(a), which requires only a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2); Conley v. Gibson, 355 U.S. 41, 47 (1957) (holding that the Federal Rules require that a plaintiff provide "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests") (quoting Fed. R. Civ. P. 8(a)(2)); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). When evaluating a Rule 12(b)(6) motion, a court must accept all material allegations in the complaint — as well as any reasonable inferences to be drawn from them — as true and construe them in the light most favorable to the non-moving party. See Doe v. United States, 419 F.3d 1058, 1062 (9th Cir. 2005); ARC Ecology v. U.S. Dep't of Air Force, 411 F.3d 1092, 1096 (9th Cir. 2005); Moyo v. Gomez, 32 F.3d 1382, 1384 (9th Cir. 1994).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (citations omitted). Rather, the allegations in the complaint "must be enough to raise a right to relief above the speculative level." Id.

[3] Unless otherwise noted, all mentions of "Rule" refer to the Federal Rules of Civil Procedure.

To survive a motion to dismiss, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570; Ashcroft v. Iqbal, 556 U.S. 662, 697 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 556). Recently, the Ninth Circuit clarified that (1) a complaint must "contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively," and (2) "the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011).

III. DISCUSSION

A. California Civil Code Section 2923.5

Plaintiff's first cause of action seeks redress under both Section 2923.5(a)[4] and Section 2923.5(b). Defendant argues that Section 2923.5 does not apply to it. (Motion at 3.) Defendant is correct.

Section 2923.5(g), effective January 1, 2013, modified Section 2923.5 to pertain only to "entities described in subd. (b) of Section 2924.18." Section 2924.18 states "[t]his section shall apply only to [a servicer] . . . that, during its immediately preceding annual reporting period . . . foreclosed on 175 or fewer residential real properties." RCS concedes in its Motion that it conducts more than 175 qualifying foreclosures annually. (Motion at 3.) Plaintiff does not challenge this concession in its Opposition, and states that "the violation enumerated in Plaintiff's complaint under CC 2923.5 can be amended to cite the correct section." (Opp'n at 9.) Plaintiff argues that RCS nonetheless violated the applicable section, 2923.55.

1. Section 2923.55

Although the Complaint incorrectly references Section 2923.5(b) – the section applying to smaller mortgage servicers – the Complaint and Plaintiff's Opposition make clear that Plaintiff believes RCS violated Section 2923.55(c).[5] Section 2923.55(c) requires that the notice

[4] Plaintiff's cause of action under this subsection seeks a remedy for Defendant's alleged "dual tracking" – recording a notice of default while the loan modification application was still pending. Thus, it is properly analyzed under Section 2923.6, which applies to larger servicers like RCS.

[5] Defendant argues that Plaintiff's first cause of action also seeks redress under Section 2923.55(a)(2) and should be dismissed. Section 2923.55(a)(2) prevents mortgage servicers from recording a notice of default until thirty days after making contact with the borrower or unsuccessfully attempting "with due diligence" to contact the borrower. However, the Complaint

of default include a "declaration that the mortgage servicer has contacted the borrower, has tried with due diligence to contact the borrower as required by this section, or that no contact was required …" (emphasis added).

Plaintiff argues that RCS filed a perjured declaration. (Opp'n at 10.) The Complaint alleges that RCS filed the Compliance Declaration on October 8, 2013, along with the NOD. (Compl. ¶ 25.) The Compliance Declaration is dated August 1, 2013. (Id., Exh. 6) It is signed by an RCS agent under penalty of perjury. (Id.) The box is checked that states: "the mortgagee, beneficiary, or authorized agent tried with due diligence but has been unable to contact the borrower to discuss the borrower's financial situation." (Id.) Plaintiff alleges that the Compliance Declaration is false, since Plaintiff had been communicating with RCS since at least July 18, 2013. (Compl. ¶ 26.)

Defendant does not contest the declaration's falsity. Defendant instead argues that Plaintiff cannot establish prejudice based on the Declaration of Compliance. (Motion at 7.)

RCS's incorrect statement in the Compliance Declaration is one of several instances that suggest Defendant rushed carelessly through the foreclosure process. Nevertheless, Plaintiff fails to allege facts to show that Defendant's purported violation of § 2923.55(c) caused him prejudice. Courts generally reject claims of a deficient NOD where no prejudice was suffered as the result of a procedural irregularity. See Pantoja v. Countrywide Home Loans, Inc., 640 F. Supp. 2d 1177, 1186 (N.D. Cal. 2009)

For the foregoing reasons, the Court finds that Plaintiff has failed to adequately allege his first cause of action and therefore DISMISSES WITH LEAVE TO AMEND Plaintiff's Section 2923.55(c) claim.

B. California Civil Code Section 2923.6 (HBOR)

Plaintiff's second cause of action alleges a violation of Section 2923.6. (Compl. ¶ 49.) This section was enacted as part of HBOR, a California state law designed to both provide protections for homeowners facing foreclosure and reform aspects of the foreclosure process. See generally Cal. Civ. Code § 2923.4(a), "Purpose of Act". Section 2923.6(c) addresses the problem of "dual tracking," in which financial institutions continue to pursue foreclosure even while evaluating a borrower's loan modification application. Jolley v. Chase Home Finance, LLC, 213 Cal. App. 4th 872, 904 (2013).

Section 2923.6(c) provides in relevant part:

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does not allege a violation of this subsection, nor does Plaintiff argue in his Opposition that RCS violated this subsection. Furthermore, the Complaint references multiple communications between Plaintiff and RCS regarding Plaintiff's financial situation and alternatives to foreclosure at least 30 days before the NOD was recorded that would contradict such a claim. (Complaint ¶¶ 13-20 (referencing numerous modification review communications with RCS from July through September 2013).) Therefore, Defendant's arguments as to Section 2923.55(a)(2) are irrelevant.

> "If a borrower submits a complete application for a first lien loan modification offered by, or through, the borrower's mortgage servicer, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or notice of sale, or conduct a trustee's sale, while the complete first lien loan modification application is pending. A mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or notice of sale or conduct a trustee's sale until any of the following occurs:
>
> (1) The mortgage servicer makes a written determination that the borrower is not eligible for a first lien loan modification, and any appeal period pursuant to subdivision (d) has expired."

Plaintiff alleges he faxed a loan modification application to RCS on July 18, 2013. (Compl. ¶ 15; Exh. 1.) On August 20, RCS responded to the application with a letter listing 13 additional required documents. (Id. ¶ 17; Exh. 2.) On September 17, Plaintiff faxed the requested documents to RCS. (Id. ¶ 18; Exh. 3.) Plaintiff then received a letter from RCS stating Plaintiff had not provided all the information requested. (Id. ¶ 19; Exh. 4.) Plaintiff called RCS to ask what additional documents were necessary. (Id. ¶ 20.) An agent told Plaintiff that the second letter was a form letter that could be ignored; RCS had received Plaintiff's documents and was reviewing his loan modification application. (Id. ¶ 21.) Plaintiff alleges he never received any more letters from RCS stating his application was deficient or listing any additional document requirements. (Id. ¶ 22.) On October 8, 2013, RCS recorded a NOD with the Riverside County Recorder's Office. (Id. ¶ 25; Exh. 6.)

Defendant argues that Plaintiff never submitted a "complete" loan modification application, and thus was not entitled to the statute's protection. (Motion at 10.) This argument borders on absurd. Plaintiff submitted an application. When asked to submit additional documents, Plaintiff complied. Defendant then informed Plaintiff he had not submitted required documents, without identifying which documents were missing. Defendant, in effect, prevented Plaintiff from submitting a complete application.

Defendant's argument would render HBOR's protections meaningless. Mortgage servicers could deny every application for a loan modification, citing missing documents as an excuse. Even better, the servicer would not have to identify which documents were missing. The California legislature could not have intended to allow the rigged game that Defendant's argument suggests.

However, Plaintiff's allegations allow the Court to infer Plaintiff did submit a complete application. When Plaintiff called to ask which documents were missing, a representative told Plaintiff to disregard the second letter – which stated documents were missing. The representative also told Plaintiff that RCS had received the documents and was reviewing the application. Defendant argues "there is nothing in this statement to suggest that all the requested documents had in fact been submitted." (Motion at 10.) The Court disagrees, as the

representative's alleged statement suggests exactly the opposite – that all necessary documents had been submitted.

Accordingly, the Court DENIES the Motion as to Plaintiff's claim under Section 2923.6.

C. California Civil Code Section 2923.7 (HBOR)

Plaintiff's third cause of action alleges a claim under Section 2923.7, another HBOR provision. Section 2923.7 requires that once a borrower requests a foreclosure prevention alternative, "the mortgage servicer shall promptly establish a single point of contact" ("SPOC").

Plaintiff alleges that RCS did not officially designate a SPOC until January 10, 2014, three months after RCS recorded the NOD. (Compl. ¶ 56.) Defendant argues that (1) the statute does not prevent a servicer from recording the NOD before assigning a SPOC, (2) RCS did provide a SPOC by providing a "team of personnel", and (3) if there was a violation, RCS corrected it by assigning a SPOC in 2014.

Defendant's first argument, while technically correct, misses the point. The statute does not specifically state that a SPOC be assigned before the NOD can be recorded. However, the SPOC's responsibilities include: telling the borrower about the process for applying for foreclosure prevention alternatives and any deadlines, coordinating the documents the borrower submits and notifying the borrower of any missing documents, and having access to sufficient information to be able to inform the borrower about the status of their foreclosure prevention alternative. See Cal. Civ. Code § 2923.7(b)(1-3). These responsibilities, when read in conjunction with the "dual tracking" prohibitions of Section 2923.6 – which does prevent a NOD from being recorded – show that the SPOC must necessarily be appointed before the NOD is recorded.

Defendant next argues that RCS actually did comply with Section 2923.7, which allows a "team of personnel" if each has the ability and authority to perform all the SPOC's responsibilities. Cal. Civ. Code § 2923.7(e). Defendant argues "as evidenced by exhibits '2' and '4' of the Complaint, Plaintiff was at all times working with a representative of RCS' 'Loss Mitigation' team." (Motion at 12) These two exhibits – the letters from RCS in August and September – are not signed by human beings. (Compl., Exh. 2; Exh. 4.) They are signed "Sincerely, Loss Mitigation Representative." (Id.) The letters appear to be computer generated. (Id.) These letters are in stark contrast to the later "SPOC Notification" letter RCS sent Plaintiff, in which RCS identifies an actual person and provides a specific telephone extension. (Compl., Exh. 10) Additionally, Plaintiff has alleged that he received contradictory information from RCS representatives. Specifically, when Plaintiff called RCS, he was told to disregard the September letter as it was a computer generated form letter. (Compl. ¶ 21.) This allegation both negates Defendant's argument that the letters demonstrate a SPOC was assigned and allows the Court to infer that RCS had not assigned one.

Finally, RCS argues that even if a violation occurred, it was remedied in January 2014 by the "SPOC Notification" letter. (Id., Exh. 10.) However, RCS sent this letter three months after it had recorded the NOD, and six months after Plaintiff initially submitted a loan modification

application. (Compl. ¶ ¶ 15, 33.) One of the SPOC's responsibilities is notifying the borrower of any missing documents necessary to complete the loan modification application. Cal. Civ. Code § 2923.7(b)(2). Plaintiff has alleged that after the August letter, he was never notified of any specific documents missing from his application before RCS recorded the NOD. (Compl. ¶ 22.) If Defendant had provided a SPOC, as it was required, the SPOC's responsibility would have been to provide Plaintiff such notification. Thus, appointing the SPOC after recording the NOD did not remedy Defendant's error.

Accordingly, the Court DENIES the Motion as to Plaintiff's claim under Section 2923.7. See Segura v. Wells Fargo Bank, N.A., 2014 WL 4798890 (C.D. Cal. Sept. 26, 2014). ("The failure to assign a SPOC, and the alleged wrongful foreclosure, therefore, deprived them of the opportunity to obtain the modification. Had they obtained a modification, they may have been able to keep their house and lower their mortgage payments")

D. California Civil Code Section 2924.10 (HBOR)

Plaintiff also alleges that Defendant took over a month to respond to his loan modification application. (Compl. ¶¶ 17, 18.) Section 2924.10 requires that mortgage servicers provide "written acknowledgement of the receipt of the documentation within five business days of receipt." Cal. Civ. Code § 2924.10(a).

Plaintiff alleges he faxed RCS a loan modification application on July 18, 2014. (Compl. 17.) Defendant does not contest its August 20 letter was late, but instead argues the violation was not material – since Defendant's August letter acknowledged Plaintiff's application, notified Plaintiff of the foreclosure process, and notified Plaintiff what further materials were needed.[6] (Motion at 14.) Since RCS took no foreclosure action before sending the August letter and Plaintiff has alleged no harm specific to the delay, the Court agrees the delay was not material.

Accordingly, the Court DISMISSES Plaintiff's Fourth Cause of Action for violation of Civil Code Section 2924.10 WITH LEAVE TO AMEND.

E. California Civil Code Section 17200 (UCL)

Plaintiff brings his fifth cause of action under California Business and Professions Code 17200. (Compl. ¶¶ 66-73) Section 17200, also known as California's Unfair Competition Law ("UCL") concerns unfair competition and prohibited activities. It states that "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. Each prong of the UCL is a separate and distinct theory of liability. Lozano v. AT & T Wireless Servs., Inc., 504 F.3d 718, 731 (9th Cir. 2007). In order to state a claim for

[6] California Civil Code Section 2924.12 provides remedies for HBOR violations. Section 2924.12(a)(1) allows a borrower to bring an action for injunctive relief to enjoin material violations of HBOR provisions. (emphasis added)

a UCL violation, Plaintiff must identify an underlying statute that Defendant violated. Ingels v. Westwood One Broad. Servs., Inc., 129 Cal. App. 4th 1050, 1060 (2005) (no § 17200 liability "for committing 'unlawful business practices' without having violated another law"). A business practice is "unlawful," in violation of the California Unfair Competition Law (UCL), if it violates another state or federal law; the UCL "borrows" violations of other laws and treats them as independently actionable. Perea v. Walgreen Co., 939 F. Supp. 2d 1026, 1040 (C.D. Cal. 2013).

Defendant first argues that Plaintiff's UCL claim is premised on Plaintiff's HBOR causes of action and therefore the UCL claim must fail as well. (Motion at 14.) Since the Court has found Plaintiff sufficiently alleged claims that RCS violated California's HBOR laws – specifically Section 2923.6 and 2923.7 – Defendant's argument fails.

Defendant also argues that Plaintiff lacks legal standing to pursue a UCL claim, because he has not "lost money or property" as a result of any unfair competition. (Motion at 15.) Defendant is correct that the UCL requires such a loss. See Cal. Bus. & Prof. Code § 17204. California voters implemented this requirement through Proposition 64, in order to remove standing for private litigants acting for the interest of the general public. See Segura v. Wells Fargo Bank, N.A., 2014 WL 4798890, at *8 (C.D. Cal. Sept. 26 2014). "The intent of this change was to confine standing to those actually injured by a defendant's business practices and to curtail the prior practice of filing suits on behalf of clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant...." Kwikset Corp. v..Super. Ct., 51 Cal.4th 310, 321 (2011).

The California Supreme Court in Kwikset found "there are innumerable ways in which economic injury from unfair competition may be shown [including having] a present or future property interest diminished." Id. at 323. Plaintiff has alleged that RCS filed both a Notice of Default and a Notice of Trustee's sale. (Compl. ¶¶ 24, 36.) These foreclosure proceedings diminish Plaintiff's property interest in his home. See Sullivan v. Washington Mut. Bank, FA, 2009 WL 3458300, at *4 (N.D. Cal. Oct. 23, 2009) ("it is indisputed that foreclosure proceedings have been initiated which puts [plaintiff's] interest in the property in jeopardy. The Court concludes that this fact is sufficient to establish standing"); Woodring v. Ocwen Loan Servicing, LLC, 2014 WL 3558716, at *9 (C.D. Cal. July 18, 2014) ("This Court agrees with the courts in this Circuit that have on multiple occasions found that the initiation of foreclosure proceedings may suffice to establish an injury under the UCL")

Accordingly, Defendant's Motion to Dismiss Plaintiff's UCL claim is DENIED.

F. Negligence

Plaintiff's sixth cause of action is for negligence. Plaintiff alleges that Defendant owes Plaintiff "an ordinary duty of care in performance of their business practices as it relates to the servicing of the mortgage and the conduct of the mortgage foreclosure process." (Compl. ¶ 76.) Plaintiff also alleges RCS is required to comply with HBOR under California law, and its failure to follow HBOR's procedures show a breach of Defendant's duty to Plaintiff. (Id. ¶ 77.) Defendant contends that it has not exceeded the scope of its conventional role as a loan servicer,

and therefore has breached no duty to Plaintiff. (Motion at 18.) Defendant also argues that Plaintiff has failed to identify Defendant's negligent act or identify how the harm suffered was proximately caused by RCS. (Id.)

To state a claim for relief for negligence, a plaintiff must allege (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, and (3) the breach proximately caused the plaintiff's damages or injuries. Thomas v. Stenberg, 206 Cal. App. 4th 654, 662 (2012). As a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money. Nymark v. Heart Fed. Savings & Loan Assn., 231 Cal. App. 3d 1089, 1095–1096 (1991). Courts have extended this rule to loan servicers as well. Khan v. CitiMortgage, Inc., 975 F .Supp. 2d 1127, 1147 (E.D. Cal. 2013). However, California courts have found that the general rule is not absolute: "Nymark and the cases cited therein do not purport to state a legal principle that a lender can never be held liable for negligence in its handling of a loan transaction within its conventional role as a lender of money." Jolley v. Chase Home Finance, LLC, 213 Cal. App. 4th 872, 902 (2013); Alvarez v. BAC Home Loans Servicing, L.P., 228 Cal. App. 4th 941, 946 (2014) (citing Jolley).

An important distinction in the case law arises in cases of loan modification. A lender does not owe a borrower a common law duty to offer or approve a loan modification. Lueras v. BAC Home Loans Servicing, LP, 221 Cal. App. 4th 49, 62 (2013). However, there is recent authority that a duty may arise once a lender agrees to consider a modification. In Alvarez, the California court of appeal held that once a lender had agreed to conduct a loan modification, it owed the borrower a duty to use reasonable care in the processing of the loan modification. 213 Cal. App. 4th at 951. The court came to this holding through a well-reasoned and thorough analysis, using the Biakanja factors.[7] Id. at 948-51. The court examined the development of the current mortgage lending industry, and stated that "the borrower's lack of bargaining power coupled with conflicts of interest that exist in the modern loan servicing industry provide a moral imperative that those with the controlling hand be required to exercise reasonable care in their dealings with borrowers seeking a loan modification." Id. at 949. The court also noted that the California legislature, through HBOR, has expressed "a strong preference for fostering more cooperative relations between lenders and borrowers who are risk of foreclosure." Id. at 950 (citing Jolley).

Defendant cites to numerous district court cases in its Motion for the proposition that a loan modification is only a renegotiation of the loan's terms and therefore cannot lead to a duty. (Opp'n at 17-18, citing Morgan v. U.S. Bank Nat. Ass'n, 2013 WL684932, at *3 (N.D. Cal. Feb. 25, 2013; Settle v. World Sav. Bank, F.S.B., 2012 WL 1026103 (C.D. Cal. Jan. 11, 2012); Karimi v. Wells Fargo, 2011 WL 10653746, at *3 (C.D. Cal. May 4, 2011)) However, these

[7] Biakanja laid out five balancing factors used to analyze whether a duty exists: (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to him, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct, and (6) the policy of preventing future harm." Biakanja v. Irving, 49 Cal. 2d 647 (1958).

cases were decided before Alvarez and Lueras. As this Court sits in diversity, it is bound by these California appellate court decisions. Ryman v. Sears, Roebuck & Co., 505 F.3d 993, 994 (9th Cir. 2007) (reiterating the rule that when a federal court is required to apply state law, and no relevant precedent exists from the state's highest court, the court must follow the state intermediate appellate court decision unless there is convincing evidence that the state's supreme court would not follow it).

Moreover, Defendant's attempts to distinguish Alvarez are unavailing. Defendant argues that Plaintiff does not allege any material misrepresentations or mishandling of his application, as were present in Alvarez. (Reply at 10.) However, Plaintiff has alleged he received contradictory information from RCS, that an RCS representative told him his documents had been received and his application was being considered when it was later denied because of missing documents, and that RCS failed to ever notify him which documents were missing.[8] (See generally Compl.) These support an inference that RCS made material misrepresentations or mishandled Plaintiff's application. Furthermore, Defendant argues that Lueras requires dismissal of Plaintiff's claim. (Reply at 11.) However, Lueras concluded that a lender does owe "a duty to a borrower not to make material misrepresentations about the status of an application." 221 Cal. App. 4th at 68. (emphasis added).

Moreover, these allegations support an inference that Defendant's actions deprived Plaintiff of an opportunity to obtain a loan modification, and thereby avoid foreclosure. This is sufficient to allege proximate cause at the motion-to-dismiss stage.

Accordingly, the Court DENIES the Motion to Dismiss Plaintiff's negligence claim. See Segura, 2014 WL 4798890 at *14 ("In light of Alvarez, Jolley, and the statutory scheme established by HBOR . . . the court determines that having offered plaintiffs an opportunity to apply for a modification, [defendant] owed them a duty of reasonable care in considering their application.")

G. Punitive Damages

Finally, Plaintiff seeks punitive damages under Cal. Civil Code § 3294. Defendant argues that this is actually a "misguided fraud cause of action." (Motion at 19.) Plaintiff concedes the cause of action to be for fraud, and argues that Defendant's allegedly perjured Compliance Declaration was a fraudulent statement that justifies punitive damages. (Opp'n)

Pleadings of fraud are subject to a heightened standard, which requires pleading "with particularity the circumstances constituting fraud or mistake." Fed.R.Civ.P. 9(b). While Rule 9(b) is a federally imposed rule, "a federal court will examine state law to determine whether the elements of fraud have been pled sufficiently to state a cause of action." Vess, 317 F.3d at 1103. In California, the elements of a fraud claim are: (1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. Small v. Fritz Cos., 30 Cal.4th 167, 173 (2003). "In order to establish fraud it must be shown

[8] These allegations also rebut Defendant's argument that Plaintiff failed to identify a negligent act by Defendant. (Motion at 18.)

that the defendant thereby intended to induce the plaintiff to act to his detriment in reliance upon the false representation." Conrad v. Bank of Am., 45 Cal. App. 4th 133, 157 (1996)

Plaintiff alleges that Defendant filed the Compliance Declaration and the NOD with the Riverside County Recorder's Office. (Compl. ¶ 25.) The Compliance Declaration, while possibly false, could not have been meant to induce reliance by Plaintiff. Thus, Plaintiff has not sufficiently alleged a cause of action for fraud.

Accordingly, Plaintiff's seventh cause of action is DISMISSED WITHOUT LEAVE TO AMEND.[9]

IV. CONCLUSION

For the forgoing reasons, the Court GRANTS IN PART and DENIES IN PART Defendants' Motion to Dismiss. Plaintiff may file a First Amended Complaint that attempts to correct the deficiencies identified in this Order. The First Amended Complaint must be filed on or before November 14, 2014. If Plaintiffs choose instead to proceed on the valid portions of the Complaint, they should so notify the Court.

IT IS SO ORDERED.

[9] Where further amendment would be futile, the court may exercise its discretion and deny leave to amend. Lopez v. Smith, 203 F.3d 1122, 1129 (9th Cir. 2000).