

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

Department 3

Honorable William J. Monahan, Presiding

Allison Croft, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2130

DATE: 4/2/2024 TIME: 9:00 A.M.

TO CONTEST THE RULING: Before 4:00 p.m. today (Friday 3/29/2024) you must notify the:

- (1) Court by calling (408) 808-6856 and
- (2) Other side by phone or email that you plan to appear and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

NOTE: Monday 4/1/2024 is a Court holiday (Ceasar Chavez Day).

TO APPEAR AT THE HEARING: The Court prefers in person appearances. If you must appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to **Department 3**.

https://www.sccscourt.org/general_info/ra_teams/video_hearings_teams.shtml

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. Phone lines are now open for you to call and reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Where to call for your hearing date: **408-882-2430** When you can call: **Monday to Friday, 8:30 am to 12:30 pm**

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.) **Please Note:** Any proposed orders must be submitted with the Judicial Council Form EFS-020 Proposed Order (Cover Sheet). Please include the date, time, dept. and line number.

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

LINE #	CASE #	CASE TITLE	RULING
LINE 1	20CV366698	Lee Harris vs Joseph Nader et al	Hearing: Order of Examination against Defendant Joseph Nader, individually & dba Greenlight Motors (C/F 6-15-23, 7/25/23, 8-24-23, 10-12-23 c/f 2/13/2024, **continued per 3/12/2024 minute order** Appear in person in Dept. 3 (not by Teams).

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LINE 2	23CV420889	Can Capital, Inc. et al vs Kevin Johnson et al	Hearing: Order of Examination of Kevin J. Johnson (Stuart A. Katz) Appear in person in Dept. 3 (not by Teams). POS filed 1/18/2024.
LINE 3	23CV423278	William Fales vs Select Portfolio Servicing, Inc. et al	Motion: Strike Plaintiff's First Amended Complaint (FAC) by Defendant US Bank ** Continued from 3/19/2024 per Court ** Ctrl click (or scroll down) on Lines 3-4 for tentative ruling. The court will prepare the order.
LINE 4	23CV423278	William Fales vs Select Portfolio Servicing, Inc. et al	Hearing: Demurrer to the Plaintiff's FAC by Defendant US Bank ** Continued from 3/19/2024 per Court ** Ctrl click (or scroll down) on Lines 3-4 for tentative ruling. The court will prepare the order.
LINE 5	23CV427371	Weiting Zhan vs Shuaiqi Ge	Hearing: Demurrer [** FAC FILED 1/16/24**] to Plaintiff's complaint on the grounds that the complaint fails to state facts sufficient to constitute a cause of action by Defendant Shuaiqi Ge ** Continued from 3/19/2024 per Court ** OFF CALENDAR. Demurrer to complaint is MOOT by First Amended Complaint (FAC) filed 1/16/2024 (so it is off calendar).
LINE 6	22CV403019	Christina Meyers vs Super Los Gatos LLC	Motion: Withdraw as attorney by Norman Gregory Fernandez for Plaintiff Christina Meyers Unopposed and GRANTED. Moving attorney to update proposed order to show hearing on OSC Re: Dismissal is May 16, 2024, at 10:00 a.m. in Dept. 3. If Plaintiff fails to appear, complaint may be stricken. If Defendant fails to appear, answer may be stricken.
LINE 7	22CV408831	Thomas White vs Ariana Gabriel et al	Hearing: Motion hearings for Atty Fees/costs by Defendants James Wall and Mya Harris ** Continued from 3/19/2024 per Court ** APPEAR in person or by Teams.

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LINE 8	22CV408831	Thomas White vs Ariana Gabriel et al	Hearing: Motion hearings for attorney fees by Defendants Ariana Gabriel and Julia Thompson ** Continued from 3/19/2024 per Court ** APPEAR in person or by Teams.
LINE 9	23CV422976	JPMorgan Chase Bank N.A. vs Thomas Wilkus	Motion (Amended): Order that matters in request for admission of truth of facts be admitted by defendant Thomas G Wilkus to request for admissions ("RFA") set one, Nos. 1 to 5, filed by Plaintiff CA Debt Collection ** Continued from 3/19/2024 per Court ** Unopposed and GRANTED.
LINE 10	23CV423451	Elizabeth Remulla et al vs Cherry Bagunas et al	Motion: Order for Further Bill of Particulars by Defendant Cherry Bagunas ** Continued from 3/12/2024 per Court ** OFF CALENDAR per moving party's request. Counsel has indicated that this issue is moot because of the First Amended Complaint.
LINE 11			
LINE 12			

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Calendar Line 1

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Calendar Line 2

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Calendar Line Nos. 3 -4

Case Name: *William N. Fales v. Select Portfolio Servicing, Inc., et al.*

Case No.: 23-CV-423278

Demurrer to the First Amended Complaint by Defendants U.S. Bank National Association, as Trustee, on Behalf of the Colt 2021-HX1 Mortgage Loan Trust, a New York Common Law Trust and Select Portfolio Servicing, Inc.

Factual and Procedural Background

This is a wrongful foreclosure action brought by plaintiff William N. Fales (“Plaintiff”) against defendants U.S. Bank National Association, as Trustee, on Behalf of the Colt 2021-HX1 Mortgage Loan Trust, a New York Common Law Trust (“U.S. Bank”), Select Portfolio Servicing, Inc. (“SPS”), and Clear Recon Corp. (“Clear Recon”) (collectively, “Defendants”).

Plaintiff is the owner of real properties located at 1128 Dean Avenue, San Jose, CA 95125 (“Dean Property”) and 236 Bean Avenue, Los Gatos, CA 95030 (“Bean Property”) (collectively, “Properties”). (First Amended Complaint [“FAC”] at ¶ 12.)

On June 7, 2021, Plaintiff secured two loans. (FAC at ¶ 13.) The first loan was for \$600,000, pursuant to a note and deed of trust recorded on the Dean Property with Homeexpress Mortgage Corp. (“HMC”) being the original beneficiary of the loan (“Dean Loan”). (Ibid.)

The second loan was for \$975,000 pursuant to a note and deed of trust recorded on the Bean Property with HMC being the original beneficiary of the loan. (FAC at ¶ 14.)

On August 10, 2022, the Dean Loan was assigned to U.S. Bank. (FAC at ¶ 15.) There was also an alleged substitution of the Trustee of the loans to Clear Recon. (Id. at ¶ 16.)

In September 2021, SPS began servicing the loans. (FAC at ¶¶ 17, 21.) Thereafter, SPS misapplied Plaintiff’s payments on the two loans. (Id. at ¶ 21.) For example, on the first payment in September 2021, Plaintiff made out two checks for each loan, clearly stating which check applies to each loan. (Ibid.) SPS however erroneously misapplied both checks to the loans. (Id. at ¶ 22.) Plaintiff notified SPS of the misapplication of his checks to both loans upon receipt of his next statement received in October 2021. (Ibid.) Ultimately, the misapplication of payments caused the Dean Property to be in default starting in May 2022. (Id. at ¶ 23.)

In 2022, Plaintiff hired Titan Credit to represent him to put a stop to the misapplication of his loan. (FAC at ¶ 24.) Despite these efforts, SPS continued to erroneously apply Plaintiff’s payments to the wrong loan account. (Id. at ¶ 26.)

Plaintiff then proceeded to hire Ms. Pamela Simmons (“Ms. Simmons”), a lawyer, to assist him in putting an end to the erroneous accounting of his loan payment by defendant SPS. (FAC at ¶¶ 27-28.) Ms. Simmons was able to get SPS to acknowledge that all payments were made timely and that there was an error in the application of the payments. (Id. at ¶ 28.)

Plaintiff alleges the endless erroneous application of his payments by defendant SPS caused the Dean Loan to be falsely in default. (FAC at ¶ 29.) By contrast, SPS contends that, because Plaintiff missed a mortgage payment in May 2022, the Dean Property is in default status and facing foreclosure. (Id. at ¶¶ 30, 32.) Nevertheless, Plaintiff continued to diligently make payments knowing he never defaulted on the loans. (Id. at ¶ 33.) SPS however refused to honor Plaintiff's subsequent payments on the loans. (Ibid.)

On May 10, 2023, SPS caused Clear Recon to record a notice of default on the Dean Property. (FAC at ¶ 34, Ex. F.)

On September 14, 2023, Defendants recorded a notice of trustee's sale scheduled to be held on November 1, 2023. (FAC at ¶ 35, Ex. G.)

Defendants also willfully and falsely reported to the Credit Reporting Agencies TransUnion, Equifax, and Experian that the Dean Property is in default from May 2022, when in fact Plaintiff is not in default and remains current on his loans. (FAC at ¶ 37.)

Because of Defendants' misconduct, Plaintiff has suffered and continues to suffer various damages and injuries including but not limited to, the imminent foreclosure of his Properties, late fees and additional charges on the loan account, and damage to his credit. (FAC at ¶ 39.)

On September 20, 2023, Plaintiff filed a complaint against Defendants alleging causes of action for:

- (1) Violation of Civil Code Section 2924.17;
- (2) Violation of Civil Code Section 2924(a)(1)(B);
- (3) Violation of Business and Professions Code Section 17200 et seq.;
- (4) Negligence;
- (5) Cancellation of Instruments.

On January 3, 2024, Plaintiff filed a motion for preliminary injunction. The court (Hon. Arand) granted the motion as to the Dean Property to preserve the status quo. The court denied the motion as to the Bean Property.

On January 18, 2024, Plaintiff filed the operative FAC against Defendants setting forth causes of action for:

- (1) Violation of Civil Code Section 2924.17;
- (2) Violation of Civil Code Section 2924(a)(1)(B);
- (3) Intentional Misrepresentation;
- (4) Negligent Misrepresentation;
- (5) Defamation;
- (6) Breach of Fiduciary Duty;
- (7) Negligence;
- (8) Violation of Business and Professions Code Section 17200 et seq.;
- (9) Cancellation of Instruments;
- (10) Declaratory Relief.

Currently before the court is a demurrer and motion to strike portions of the FAC by defendants U.S. Bank and SPS (collectively, “Loan Defendants”). The Loan Defendants filed a request for judicial notice in conjunction with the motions. Plaintiff filed written opposition.

Demurrer to the FAC

The Loan Defendants argue each cause of action in the FAC is subject to demurrer for failure to state a valid claim. (Code Civ. Proc., § 430.10, subd. (e).)

Request for Judicial Notice

“Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter.” (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117.)

Here, the Loan Defendants request judicial notice of the following:

- (1) Deed of Trust recorded on June 14, 2021 in the Santa Clara County Recorder’s Office as Document Number 24994290 (Ex. 1);
- (2) Corporate Assignment of Deed of Trust recorded on August 10, 2022 in the Santa Clara County Recorder’s Office as Document Number 25355819 (Ex. 2);
- (3) Substitution of Trustee recorded on May 10, 2023 in the Santa Clara County Recorder’s Office as Document Number 25473280 (Ex. 3).

Exhibits 1-3 are subject to judicial notice as real property documents recorded in Santa Clara County. (See Evid. Code, § 452, subd. (h); see also *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264-265, disapproved on other grounds in *Yvanova v. New Century Morg. Corp.* (2016) 62 Cal.4th 919 [court may take judicial notice of the existence and recordation of real property records]; *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 803 [“A court may take judicial notice of a recorded deed.”].) Plaintiff does not oppose the request and the exhibits are relevant to arguments raised in support of the demurrer. (See *Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301 [judicial notice is confined to those matters which are relevant to the issue at hand].)

Accordingly, the request for judicial notice is GRANTED.

Legal Standard

“In reviewing the sufficiency of a complaint against a general demurer, we are guided by long settled rules. ‘We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. We also consider matters which may be judicially noticed.’ ” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) “A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations

in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213–214.)

"The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. The court does not, however, assume the truth of contentions, deductions or conclusions of law. ... [I]t is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (*Gregory v. Albertson's, Inc.* (2002) 104 Cal.App.4th 845, 850.)

Fair Credit Reporting Act

According to the notice of motion, the Loan Defendants generally demur to each cause of action in the FAC as Plaintiff's claims contain credit reporting allegations that are preempted by the Fair Credit Reporting Act ("FCRA"). (See Demurrer at pp. 2:10-12, 12:15-13:26.)

"The FCRA (15 U.S.C. § 1681 et seq.) was adopted by Congress to ensure accuracy and fairness in credit reporting and to protect the rights of individual consumers." (*Sanai v. Saltz* (2009) 170 Cal.App.4th 746, 763 (*Sanai*).) The FCRA imposes two general requirements: (1) the duty to provide accurate information (15 U.S.C. § 1681s-2(a)) and the duty to investigate the accuracy of reported information upon receiving notice of a dispute (15 U.S.C. § 1681s-2(b)). (*Id.* at pp. 763-764.) In particular, Section 1681t(b) preempts all state claims to the extent that they regulate the responsibilities of persons who furnish information to consumer reporting agencies. (*Gorman v. Wolpoff & Abramson, LLP* (N.D. Cal. 2005) 370 F.Supp.2d 1005, 1009.)

As stated above, the FAC alleges in relevant part:

"Defendants have also willfully and falsely reported to the Credit Reporting Agencies TransUnion, Equifax, and Experian that the Dean Property is in default from May 2022, when in fact Plaintiff is not in default and is current on his Loans." (FAC at ¶ 37.)

While this contention is included in the statement of facts, not every cause of action arises from credit reporting allegations. In fact, as addressed in the moving papers, the only claims at issue which contain credit report allegations are the third, fourth, fifth and sixth causes of action. (See Demurrer at pp. 18:12-17, 20:7-11, 21:15-19; FAC at ¶¶ 89, 96, 103, 110.) Thus, the court will consider the preemption argument in connection with these claims on demurrer. But, to the extent that the Loan Defendants challenge the entire pleading on the basis of preemption, the demurrer is not sustainable on that ground. (See *Lord v. Garland* (1946) 27 Cal.2d 840, 850 ["[A] demurrer which attacks an entire pleading should be overruled if one of the counts therein is not vulnerable to the objection."].)

Therefore, the demurrer to the entire FAC on the ground that the pleading is preempted by the FCRA is OVERRULED.

First Cause of Action: Violation of Civil Code Section 2924.17

The first cause of action is a claim for violation of Civil Code section 2924.17 which provides in pertinent part:

- (a) A declaration recorded pursuant to Section 2923.5 or pursuant to Section 2923.55, a notice of default, notice of sale, assignment of a deed of trust, or substitution of trustee recorded by or behalf of a mortgage servicer in connection with a foreclosure subject to the requirements of Section 2924, or a declaration or affidavit filed in any court relative to a foreclosure proceeding shall be accurate and complete and supported by competent and reliable evidence.
- (b) Before recording or filing any of the documents described in subdivision (a), a mortgage servicer shall ensure that it has reviewed competent and reliable evidence to substantiate the borrower's default and the right to foreclose, including the borrower's loan status and loan information. (Civ. Code, 2924.17, subds. (a)-(b).)

In summary, "section 2924.17, requires that certain documents recorded in connection with a foreclosure 'be accurate and complete and supported by competent and reliable evidence' and that a mortgage servicer review 'competent and reliable evidence' to substantiate the default and right to foreclose before recording such documents." (*Adams v. Bank of America, N.A.* (2020) 51 Cal.App.5th 666, 674.)

As a general matter, the FAC must plead facts supporting the statutory elements of a statutory violation, with reasonable particularity. (*Covenant Care, Inc. v. Super. Ct.* (2004) 32 Cal.4th 771, 790; *Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 619.) And, while section 2924.17 does not state the level of specificity with which a plaintiff must identify the inaccuracies contained in the notice of default, a plaintiff must plead sufficient facts "to raise a right to relief above the speculative level" in order for his or her claim to survive a defendant's motion to dismiss. (*Davis v. U.S. Bank N.A.* (C.D. Cal. 2015) 2015 U.S. Dist. LEXIS 62606, at pp. *16-17; see *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 64, fn. 4 ["We may cite and rely on unpublished federal district court decisions as persuasive authority."].)

The allegations in support of the first cause of action are incorporated in paragraphs 41-63 of the FAC. Plaintiff fails to allege facts with reasonable particularity supporting the statutory elements to establish a violation under section 2924.17. Thus, the demurrer is sustainable on this ground but, as this is the first challenge to the sufficiency of the pleadings, the court will grant Plaintiff an opportunity for leave to amend. (See *City of Stockton v. Super. Ct.* (2007) 42 Cal.4th 730, 747 [if the plaintiff has not had an opportunity to amend the pleading in response to a motion challenging the sufficiency of the allegations, leave to amend is liberally allowed as a matter of fairness, unless the pleading shows on its face that it is incapable of amendment].)

Consequently, the demurrer to the first cause of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND for failure to state a claim.

Second Cause of Action: Violation of Civil Code Section 2924(a)(1)(B)

The second cause of action seeks relief in connection with Civil Code section 2924, subdivision (a)(1)(B) which provides that a notice of default shall include, among other things, “[a] statement that a breach of the obligation for which the mortgage or transfer in trust is security has occurred.”

The allegations in support of the second cause of action are contained in paragraphs 64-86 of the FAC. Like the prior claim, Plaintiff fails to allege facts with reasonable particularity supporting the statutory elements to establish a violation under section 2924(a)(1)(B) and thus the demurrer is sustainable on this ground.

Therefore, the demurrer to the second cause of action is SUSTAINED WITH 20 DAYS’ LEAVE TO AMEND for failure to state a claim.

Third Cause of Action: Intentional Misrepresentation

“The essential elements of fraud that give rise to a cause of action for deceit or intentional misrepresentation are: (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or scienter); (c) intent to defraud, i.e., to induce reliance; (d) actual and justifiable reliance; and (e) resulting damage.” (*Berry v. Frazier* (2023) 90 Cal.App.5th 1258, 1268.)

“Fraud must be pleaded with specificity rather than with general and conclusory allegations. The specificity requirement means a plaintiff must allege facts showing how, when, where, to whom, and by what means the representations were made, and, in the case of a corporate defendant, the plaintiff must allege the names of the persons who made the representations, their authority to speak on behalf of the corporation, to whom they spoke, what they said or wrote, and when the representation was made.” (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 793 (*West*), citation and quotation marks omitted.)

Courts enforce the specificity requirement in consideration of its two purposes. (*West, supra*, 214 Cal.App.4th at p. 793.) The first purpose is to give notice to the defendant with sufficiently definite charges that the defendant can meet them. (*Ibid.*) The second is to permit a court to weed out meritless fraud claims on the basis of the pleadings; thus, the pleading should be sufficient to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud. (*Ibid.*)

Here, the third cause of action for intentional misrepresentation arises from allegations of false credit reporting by Defendants. (See FAC at ¶ 89.) The Loan Defendants argue such allegations are preempted by the FCRA. (See Demurrer at p. 18:12-17; see also *Roybal v. Equifax* (E.D. Cal. 2005) 405 F.Supp.2d 1177, 1181 (*Roybal*) [“On its face, the FCRA precludes all state statutory or common law causes of action that would impose any ‘requirement or prohibition’ on the furnishers of credit information. Because Plaintiffs’ State Claims are based on alleged injury arising purely from the reporting of credit information by a furnisher of credit, they are completely preempted.”].) They also contend the fraud claim has not been pled with the required specificity to state a cause of action. (See Demurrer at p. 18:23-25.) Plaintiff appears to concede these points as he does not address them in opposition. (See *Herzberg v. County of Plumas* (2005) 133 Cal.App.4th 1, 20 [failure to oppose issue raised in demurrer deemed abandonment of the issue]; see also *Schulster Tunnels/Pre-Con v.*

Traylor Brothers, Inc./Obayashi Corp. (2003) 111 Cal.App.4th 1328, 1345, fn. 16 [failure to address point is equivalent to a concession].)

Accordingly, the demurrer to the third cause of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND for failure to state a claim.

Fourth Cause of Action: Negligent Misrepresentation

“The elements of a negligent misrepresentation are “(1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another’s reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage.” (*Apollo Capital Fund LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 243.) Negligent misrepresentation does not require knowledge of falsity, unlike a cause of action for fraud. (*Ibid.*)

Like the fraud claim, the negligent misrepresentation cause of action arises also from allegations of false credit reporting and thus is preempted by the FCRA. (See Demurrer at p. 18:12-17; FAC at ¶ 96.) Nor has the negligent misrepresentation been pled with the required specificity to state a cause of action. (See *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1166, disapproved on other grounds in *Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905 [intentional and negligent misrepresentation claims must be pleaded with specificity].) Plaintiff again fails to address these points in opposition and therefore the demurrer is sustainable on these grounds.

Consequently, the demurrer to the fourth cause of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND for failure to state a claim.

Fifth Cause of Action: Defamation

“The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage.” (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1369.)

Like the third and fourth causes of action, the defamation claim is based on allegations of false credit reporting and thus is preempted by the FCRA. (See Demurrer at p. 20:7-11; FAC at ¶ 103; see also *Sanai, supra*, 170 Cal.App.4th at p. 774 [FCRA preempts state law claims for defamation, invasion of privacy, and negligence]; *Lafferty v. Wells Fargo Bank* (2013) 213 Cal.App.4th 545, 568 [same].) Plaintiff appears to concede this argument as he does not address this point in opposition.

Therefore, the demurrer to the fifth cause of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND for failure to state a claim. Having sustained the demurrer on this ground, the court declines to consider the other arguments raised in connection with the defamation claim.

Sixth Cause of Action: Breach of Fiduciary Duty

“To establish a cause of action for breach of fiduciary duty, a plaintiff must demonstrate the existence of a fiduciary relationship, breach of that duty and damages.” (*Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 182.)

Here, the Loan Defendants persuasively argue there are no facts pled establishing a fiduciary duty between them and Plaintiff. Nor does a fiduciary duty exist, as a matter of law, between a lending institution and a borrower. (See *Marks v. Ocwen Loan Servicing* (N.D. Cal. 2009) 2009 U.S. Dist. LEXIS 35251 at p. *20 [“a loan servicer does not owe a fiduciary duty to a borrower beyond the duties set forth in the loan contract”]; see also *Rufini v. CitiMortgage, Inc.* (2014) 227 Cal.App.4th 299, 312 [no fiduciary duty exists between a borrower and lender in arm’s length transaction].) The sixth cause of action arises also from allegations of false credit reporting and thus is preempted by the FCRA. (See Demurrer at p. 21:15-19; FAC at ¶¶ 110-111; *Roybal, supra*, 405 F.Supp.2d at p. 1181.) Plaintiff does not submit any substantive argument in opposition addressing these points and thus the demurrer is sustainable on these grounds.

Accordingly, the demurrer to the sixth cause of action is SUSTAINED WITH 20 DAYS’ LEAVE TO AMEND for failure to state a claim.

Seventh Cause of Action: Negligence

“To state a cause of action 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.” (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 62 (*Lueras*).)

The Loan Defendants contend there is no duty, as a matter of law, to support negligence as no such duty exists between a loan servicer and a borrower.

“Lenders and borrowers operate at arm’s length. [Citations.] ‘[A]s 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.’ [Citation.]” (*Lueras, supra*, 221 Cal.App.4th at p. 63.)

But, as is the case here, statutory duties may be used to support negligence. (See OPP at pp. 9:24-10:2.) Statutes may be borrowed to support negligence for one of two purposes: (1) to establish a duty of care; or (2) to establish a standard of care. (*Turner v. Seterus, Inc.* (2018) 27 Cal.App.5th 516, 535 (*Turner*).) For example, in *Turner*, the Third Appellate District concluded a negligence claim could be supported by a statutory duty under the nonjudicial foreclosure statutes. (*Ibid.* [“Accordingly, to the extent a negligence cause of action arises from a statutory duty under the nonjudicial foreclosure statutes (Civ. Code, § 2924 et seq.), we believe the duty is sufficient to support a negligence cause of action.”].)

Here, Plaintiff alleges the following in relevant part to support negligence:

¶ 138: It is established that statutory duties exist, and Defendants owe those duties to the Plaintiff to carry out those statutory obligations diligently. Defendants breached that duty when they put Plaintiff’s loan account in a false default status, invoked their

power of sale without accurate documentation, and recorded a NOD and NOTS in violation of California Civil Code § 2924(a)(1)(B) and § 2923.17.

¶ 139: The breach of these statutory duties caused Plaintiff's loans to be in default and Plaintiff is facing the imminent loss of his Properties. (FAC at ¶¶ 138-139.)

Plaintiff's negligence claim however appears to be duplicative of the first and second causes of action for violations under Civil Code sections 2923.17 and 2924(a)(1)(B). The court sustained the demurrer with leave to amend as to the first and second causes of action for reasons stated above. If there is no claim stated for violation of these sections, there is also no breach to support Plaintiff's cause of action for negligence.

Consequently, the demurrer to the seventh cause of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND for failure to state a claim.

Eighth Cause of Action: Violation of Business and Professions Code Section 17200 et seq.

"The UCL defines 'unfair competition' to 'mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising' and any act prohibited by [Business and Professions Code] section 17500. [Citation.]" (*Searle v. Wyndham Int'l* (2002) 102 Cal.App.4th 1327, 1332-1333 (*Searle*).) "Section 17200 'is not confined to anticompetitive business practices, but is also directed toward the public's right to protection from fraud, deceit, and unlawful conduct. [Citation.] Thus, California courts have consistently interpreted the language of section 17200 broadly.' [Citation.]" (*South Bay Chevrolet v. General Motors Acceptance Corp.* (1999) 72 Cal.App.4th 861, 877-878.) "The statute prohibits 'wrongful business conduct in whatever context such activity might occur.' [Citation.]" (*Searle, supra*, at 102 Cal.App.4th at p. 1333.)

Here, Plaintiff's unfair business practices claim is based on violations of Civil Code sections 2923.17 and 2924(a)(1)(B). (See FAC at ¶ 144.) But, as stated above, the court sustained the demurrer with leave to amend as to the first and second causes of action. Thus, there is no unlawful, unfair, or fraudulent conduct to support a claim under the UCL. (See *Becerra v. McClatchy Co.* (2021) 69 Cal.App.5th 913, 951 [where an unfair business practices claim "is derivative of an underlying violation of law, it must stand or fall with the underlying claim"].)

Therefore, the demurrer to the eighth cause of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND for failure to state a claim.

Ninth Cause of Action: Cancellation of Instruments

Under Civil Code section 3412, "[a] written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled."

"To prevail on a claim to cancel an instrument, a plaintiff must prove (1) the instrument is void or voidable due to, for example, fraud, and (2) there is a reasonable apprehension of serious injury including pecuniary loss or prejudicial alteration of one's position." (*U.S. Bank National Association v. Naifeh* (2016) 1 Cal.App.5th 767, 778.)

“To obtain cancellation under this section, a plaintiff must allege the instrument is ‘void or voidable’ and would cause ‘serious injury’ if not canceled. [Citation.] Cancellation of an instrument is essentially a request for rescission of the instrument. [Citation.] The effect of a decree cancelling an instrument is to place the parties where they were before the instrument was made, as if it had never been made. [Citation.]” (*Deutsche Bank National Trust Co. v. Pyle* (2017) 13 Cal.App.5th 513, 523.)

Here, Plaintiff seeks to cancel the notice of default and notice of trustee’s sale in connection with the Properties for violations under Civil Code sections 2923.17 and 2924(a)(1)(B). (See FAC at ¶¶ 151-152.) But, as stated above, the court sustained the demurrer with leave to amend as to the first and second causes of action. Therefore, there is no factual basis to support a claim for cancellation of instruments.

Accordingly, the demurrer to the ninth cause of action is SUSTAINED WITH 20 DAYS’ LEAVE TO AMEND for failure to state a claim.

Tenth Cause of Action: Declaratory Relief

Code of Civil Procedure section 1060 provides in relevant part:

“Any person interested under a written instrument ... or under a contract, or who desires a declaration of his or her rights or duties with respect to another, or in respect to, in, over or upon property ... may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties in the premises, including a determination of any question of construction or validity arising under the instrument or contract. He or she may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at the time. ...”

To qualify for declaratory relief under section 1060, a plaintiff’s action must present two essential elements: (1) a proper subject of declaratory relief, and (2) an actual controversy involving justiciable questions relating to the rights or obligations of a party. (*Lee v. Silveira* (2016) 6 Cal.App.5th 527, 546.) “The ‘actual controversy’ language in ... section 1060 encompasses a probable future controversy relating to the legal rights and duties of the parties.’ [Citation.] It does not embrace controversies that are ‘conjectural, anticipated to occur in the future, or an attempt to obtain an advisory opinion from the court.’ [Citation.]” (*Ibid.*)

Here, Plaintiff alleges the following in pertinent part to support declaratory relief:

¶ 154: An actual controversy has arisen between the parties concerning the ownership of the Property. Defendants claim to have the authority to have effectuate a sale of the Property.

¶ 155: Plaintiff contends that the notice of default and notice of trustee’s sale were illegally recorded on his Property and Defendants do not have the power or authority to effectuate a sale. (FAC at ¶¶ 154-155.)

Here, Plaintiff's declaratory relief allegations are a restatement of his prior claims which did not survive demurrer for reasons stated above. As there is no valid underlying claim to support declaratory relief, the tenth cause of action also fails. (See *Faunce v. Cate* (2013) 222 Cal.App.4th 166, 173 [trial court properly sustained the demurrer as to these claims because they were "wholly derivative of" other nonviable causes of action]; see also *Ball v. FleetBoston Financial Corp.* (2008) 164 Cal.App.4th 794, 800 ["[W]here a trial court has concluded the plaintiff did not state sufficient facts to support a statutory claim and therefore sustained a demurrer as to that claim, a demurrer is also properly sustained as to a claim for declaratory relief which is 'wholly derivative' of the statutory claim."].)

Consequently, the demurrer to the tenth cause of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND for failure to state a claim.

Motion to Strike Portions of the FAC

The Loan Defendants also move to strike portions of the FAC regarding allegations of emotional distress, attorney's fees, damages, and credit impairment damages. As explained above, the court sustained the demurrer to the FAC in its entirety with leave to amend. Therefore, the motion to strike portions of the FAC is MOOT.

Disposition

The demurrer to the entire FAC on the ground that the pleading is preempted by the FCRA is OVERRULED.

The demurrer to the 1st – 10th causes of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND for failure to state a claim.

The motion to strike portions of the FAC is MOOT.

The court will prepare the Order.

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