UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BRENDA WARREN, an individual,

Plaintiff,

v.

SPECIALIZED LOAN SERVICING, LLC, a business entity; and DOES 1-50, inclusive,

Defendants.

Case No. 5:23-cv-00887-SPG-SHK

ORDER GRANTING, IN PART, AND DENYING, IN PART, DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT [ECF NO. 32]

Before the Court is Defendant Specializing Loan Servicing, LLC's ("Defendant") Motion to Dismiss Plaintiff's Second Amended Complaint ("SAC"). (ECF No. 32 ("Mot.")). Plaintiff Brenda Warren opposes. (ECF No. 34). The Court has read and considered the matters raised with respect to the Motion and concludes that this matter is suitable for decision without oral argument. *See* Fed. R. Civ. P. 78(b); C.D. Cal. L.R. 7-15. Having considered the parties' submissions, the record in this case, and the relevant law, the Court grants, in part, and denies, in part, Defendants' Motion.

I. BACKGROUND

A. Factual Background

In its previous orders granting dismissal of the complaint and first amended complaint ("FAC"), the Court set forth more fully the facts alleged in Plaintiff's pleadings and thus will not recount all those facts here. *See* (ECF No. 17; ECF No. 30). As relevant to the present Motion, Plaintiff's SAC alleges, as follows:

Plaintiff is the owner of property located at 80867 Calle Azul, La Quinta, CA 92253. (ECF No. 32 ("SAC") ¶ 12). In 2006, Plaintiff obtained a home equity revolving line of credit loan ("HELOC") in the amount of $57,500 from Greenpoint Mortgage Fund, Inc. (*Id.* ¶ 13). Under the terms of the HELOC Agreement, Plaintiff's unpaid loan principal was subject to a variable interest rate that would change monthly, and the lender/servicer was to provide Plaintiff with a monthly statement. (*Id.*).

Shortly after obtaining the loan, Plaintiff defaulted on it. (*Id.* ¶ 14). In January 2009, Greenpoint, charged off the debt and stopped sending Plaintiff monthly statements. (*Id.* ¶ 15). According to Plaintiff, shortly after receiving notice that Greenpoint had charged off the loan, Greenpoint "shuttered its business operations." (*Id.* ¶ 16). Based on the charge-off and lack of monthly statements, Plaintiff believed that, while she still owed the outstanding principal balance, the loan would stop accruing interest. (*Id.* ¶¶ 15–16).

From January 2009 until March 2021, Plaintiff received no communications about the loan. (*Id.* ¶ 17). In March 2021, Plaintiff received a letter from Defendant indicating that it was the new servicer of her loan and requesting that Plaintiff contact Defendant to address her default (the "March 2021 Letter"). (*Id.* ¶ 18). Although the March 2021 Letter stated that Plaintiff's loan was in delinquency status, it did not indicate the amounts purportedly due on the loan. (*Id.* ¶¶ 18–19). When Plaintiff contacted Defendant, she learned that the loan had been accruing interest every month since 2009, leaving her with a total debt of $101,091.39 in accrued interest. (*Id.* ¶ 20). Plaintiff alleges that sometime between April 12, 2020, and April 12, 2023, Defendant obtained the servicing rights and obligations to the loan but failed to notify Plaintiff. (*Id.* ¶ 21). Plaintiff concludes that the

March 2021 Letter was "not a mortgage servicing transfer notice pursuant to 12 C.F.R. § 1024.33." (*Id.* ¶ 18).

B. Procedural Background

On April 12, 2023, Plaintiff filed in the Riverside County Superior Court her Complaint in this action. (ECF No. 1-1). After being served, on May 17, 2023, Defendant removed the case to federal court. (ECF No. 1). On May 24, 2023, Defendant filed its first motion to dismiss the complaint, (ECF No. 9), which this Court granted, (ECF No. 17). Plaintiff filed the FAC on August 8, 2023. (ECF No. 18). On August 22, 2023, Defendant moved to dismiss the FAC, (ECF No. 19), which the Court also granted, (ECF No. 30). On November 9, 2023, Plaintiff filed the SAC, and the instant Motion followed. (SAC; Mot.).

II. LEGAL STANDARD

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." A complaint that fails to meet this standard may be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). "Dismissal under Rule 12(b)(6) is proper when the complaint either (1) lacks a cognizable legal theory or (2) fails to allege sufficient facts to support a cognizable legal theory." *Somers v. Apple, Inc.*, 729 F.3d 953, 959 (9th Cir. 2013). To survive a 12(b)(6) motion, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (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." *Id.* (internal quotation mark and citation omitted). When ruling on a Rule 12(b)(6) motion, the Court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

However, the Court is not "required to accept as true allegations that contradict exhibits attached to the Complaint or matters properly subject to judicial notice, or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Seven Arts Filmed Ent., Ltd. v. Content Media Corp. PLC*, 733 F.3d 1251, 1254 (9th Cir. 2013) (citing *Daniels–Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010)). Furthermore, where dismissal is appropriate, a court should grant leave to amend unless the plaintiff could not possibly cure the defects of the pleading. *Knappenberger v. City of Phoenix*, 566 F.3d 936, 942 (9th Cir. 2009).

III. DISCUSSION

A. Motion to Dismiss

Both the complaint and the FAC asserted causes of action for breach of contract, a violation of California Civil Code § 2954.5, Unfair Business Practices in violation of California's Unfair Competition Law ("UCL"), and declaratory relief. *See* (ECF Nos. 1-1, 18). The Court previously dismissed these causes of action twice, but granted leave to amend to cure the deficiencies in these claims.

The SAC continues to assert the same four causes of action as the original complaint and FAC, but also adds new causes of action for breach of the covenant of good faith and fair dealing, (SAC ¶¶ 40–48), and violations of 12 C.F.R. § 1024.33 and California Civil Code § 2937, (*id.* ¶¶ 49–55).

The Motion seeks dismissal of Plaintiff's new causes of action because Plaintiff failed to seek leave to add these claims. *See* (FAC Order at 10). In addition, the Motion argues Plaintiff's remaining causes of action should be dismissed pursuant to Rule 12(b)(6) for failing to state a claim.[1]

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[1] Defendant asks the Court to take judicial notice of four exhibits in support of its Motion to Dismiss: (1) a Deed of Trust recorded June 16, 2006, in the Official Records of Riverside County as Document No. 2006-0437446; (2) a Deed of Trust recorded June 16, 2006, in the Official Records of Riverside County as Document No. 2006-0437447; (3) a Deed of Trust recorded August 3, 2006, in the Official Records of Riverside County as Document No. 2006-0570695; and (4) a Deed of Trust recorded August 3, 2006, in the Official

1. Plaintiff's Newly Asserted Third and Fourth Causes of Action

In the SAC, Plaintiff asserts two new causes of action. *See* (Compl. ¶¶ 40–48 (breach of covenant of good faith and fair dealing); ¶¶ 49–55 (violation of C.F.R. § 1024.33 and Cal. Civil. Code § 2937). Defendant argues that Plaintiff is barred from bringing these new claims because the Court's prior orders provided leave to amend only the noted deficiencies and not to add new claims. The Court agrees.

Courts in this Circuit routinely strike or dismiss parties and claims that exceed the scope of an order granting leave to amend. *See Strifling v. Twitter*, Case No. 22-cv-07739-JST, 2024 WL 54976, at *1 (N.D. Cal. Jan. 4, 2024) (collecting cases); *Peguero v. Toyota Motor Sales, USA, Inc.*, No. 2:20-CV-05889-VAP (ADSx), 2021 WL 2910562, at *5 (C.D. Cal. Apr. 26, 2021) ("Plaintiff's addition of three new parties and seven new claims exceeds the scope of the leave to amend the Court granted. . . . The Court finds it appropriate to strike the newly added parties and claims on this basis."); *Benton v. Baker Hughes*, 2013 WL 3353636, at *3 (C.D. Cal. June 30, 2013) ("The addition of [the plaintiff's] new claims . . . exceeds the scope of the leave to amend granted, and it is appropriate to strike the newly added claims on this basis."), *aff'd sub. nom.*, *Benton v. Hughes*, 623 F. App'x 888 (9th Cir. 2015); *Sifuentes v. Google Inc.*, No. 22-cv-03102-JCS, 2023 WL 4181267, at *8 (N.D. Cal. June 26, 2023) (striking claims "on the basis that they fall outside of the scope of the Court's order permitting [the plaintiff] to amend his complaint"); *DeLeon v. Wells Fargo Bank*, No. 10-CV-01390-LHK, 2010 WL 4285006, at *3 (N.D. Cal. Oct. 22, 2010) ("[W]here leave to amend is given to cure deficiencies in certain specified claims, courts have agreed that new claims alleged for the first time in the amended pleading should be dismissed or stricken."); *PB Farradyne, Inc. v. Peterson*, No. C 05-3447 SI, 2006 WL 2578273, *3 (N.D. Cal. Sept.6, 2006) (striking claims and allegations that were "outside the scope of the leave to amend granted in the [order granting

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Records of Riverside County as Document No. 2006-0570696. The Court has already taken judicial notice of these documents. *See* (ECF No. 30 at 4). Defendant's request for judicial notice is therefore denied as moot.

motion to dismiss]"); *Aikins v. St. Helena Hosp.*, No. C 93-3933 FMS, 1994 WL 794759, at *2 (N.D. Cal. Apr. 4, 1994) (dismissing new plaintiff where the "plaintiffs were given leave to amend their complaint to supplement their allegations," the plaintiffs "did not request leave to name a new plaintiff, and the Court's order cannot be reasonably construed as having granted plaintiffs such leave").

Here, the Court conducted an analysis of each of the four claims in its order dismissing Plaintiff's FAC, stated in dismissing each claim that it was granting leave to amend one last time, and ordered that, if Plaintiff filed an amended complaint, it had to be in accordance with the order. (ECF No. 30 at 6, 8, 10). The Court did not grant Plaintiff leave to add additional claims, but only leave to amend to allege facts that would support a cognizable legal theory as to each of the four dismissed claims.

Further, leave to amend under the circumstances would not otherwise be warranted under Rule 15. Plaintiff's new causes of action are predicated on the same set of facts as her previously dismissed claims. Thus, Plaintiff has been aware of the facts upon which her new causes of action are based since the beginning of the case. *See Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994) ("[L]ate amendments to assert new theories are not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action." (alteration in original) (citation omitted)); *Allen v. City of Beverly Hills*, 911 F.2d 367, 374 (9th Cir. 1990) ("[A] district court does not abuse its discretion in denying a motion to amend a complaint . . . when the movant presented no new facts but only new theories and provided no satisfactory explanation for his failure to fully develop his contentions originally.") (internal quotations omitted and citation omitted)). The Court thus strikes Plaintiff's third and fourth causes of action in the SAC.[2]

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[2] Even if the Court were to reach the new claims, Plaintiff's allegations are not sufficient. First, Plaintiff alleges essentially the same conduct for her implied covenant of good faith and fair dealing claim as underlies her breach of contract claim. *See* (SAC ¶¶ 36–38 (breach of contract), ¶¶ 44–46 (implied covenant)). "Although a defendant's implied duty of good faith and fair dealing may be entirely independent of the plaintiff's duty to perform

2. Plaintiff's Claim for Violation of California Civil Code § 2954.5

As in its prior motions to dismiss, Defendant argues that the allegations of Plaintiff's first cause of action for a violation of California Civil Code § 2954.5 are too conclusory to state a claim for relief. Defendant maintains that Plaintiff has failed to allege a plausible claim that Defendant assessed late payment charges or that its predecessor, Greenpoint, waived its right to collect interest such that the interest charges amount to a penalty. The Court agrees.

California Civil Code § 2954.5 states that a lender must provide notice of late charges before a borrower may be held responsible for payment of those charges. *See* Cal. Civ. Code § 2954.5. Section 2954.4 places certain limitations on lenders imposing such late charges. *See* Cal. Civ. Code § 2954.4. The Court pointed out in both of its prior orders dismissing Plaintiff's Cal. Civ. Code § 2954.5 cause of action that Cal. Civ. Code § 2954.5 does not govern the charging of interest on a loan and that Plaintiff's allegations that "Defendant SLS assessed late-payment fees on this account without live contact" were too conclusory to allow the Court to draw the reasonable inference that late charges had, in

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under the contract, such is not the case [ ] when the [ ] implied covenant cause of action is essentially based on the same allegations as the breach of contract cause of action." *Durell v. Sharp Health Care*, 183 Cal. App. 4th 1350, 1369 (2010) (holding that the plaintiff "cannot state a cause of action for breach of the implied covenant without adequately pleading an excuse for his nonperformance"). Second, Plaintiff also fails to sufficiently allege statutory damages for her fourth cause of action. The Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2605, only permits individuals to collect damages for a "fail[ure] to comply with any provision of this section . . . an amount equal to the sum of [ ] any actual damages to the borrower as a result of the failure" and any additional damages. § 2605(f)(1)(A). Plaintiff, however, fails to plausibly allege that the interest charges that accrued after her default, starting in approximately 2009, are a result of Defendant's failure to properly notify Plaintiff of the servicer change that occurred sometime between "April 12, 2020, and April 12, 2023[.]" *See* (SAC ¶ 52); *Catherine v. Wells Fargo Bank, N.A.*, No. 20-16975, 2021 WL 5850915, at *1 (9th Cir. Dec. 9, 2021) (affirming dismissal of a RESPA claim under Rule 12(b)(6) because the plaintiff "failed to allege facts sufficient to show that he suffered actual damages as a result of Wells Fargo's purported RESPA violations, a required element of a RESPA claim").

fact, been imposed under § 2954.5. *See* (ECF No. 30 at 4–6; ECF No. 17 at 5-6). Indeed, the Court noted that the FAC's "only factual allegations regarding the amount of money levied on the account by Defendant between 2009 and 2021 deal[t] with interest" in the amount of $101,091.39 that accrued on the loan, not late charges or fees, and thus Plaintiff's allegations were not sufficient to state a cognizable claim under § 2954.5. (ECF No. 30 at 5–6).

The Court also rejected the penalty and waiver conclusions set forth in the FAC and repeated in the SAC— namely, that the interest that accrued on the loan after the debt was charged off amounts to a penalty under § 2954.5 and that Greenpoint waived its right to collect post charge-off interest. *See* (*id.* at 6, FAC ¶ 26, SAC ¶ 31). The Court explained that "[w]hen a creditor charges off a debt, the creditor declares the debt is unlikely to be collected and takes a tax deduction on the debt," (ECF No. 30 at 6); *Cavlary SPV I, LLC v. Watkins*, 36 Cal. App. 5th 1070, 1075 n.1 (2019) (citing *Frost v. Resurgent Capital Servs., L.P.*, No. 5:15-cv-03987-EJD, 2016 WL 3479087, at *1 n.1 (N.D. Cal. June 27, 2016); 35A Am. Jur. 2d Fed. Taxation, par. 17126), and that the charge-off generally occurs after six months of nonpayment by the debtor, *Cavlary*, 36 Cal. App. 5th at 1075 n.1. However, the charge-off of the debt, on its own, does not mean that the debt is no longer valid. *Id.* at 1075. Therefore, Plaintiff could not—and cannot—simply allege that the charge-off of the debt dictates that interest accrued after that date was a penalty. *See id.* (explaining waiver of right to post charge-off interest); (ECF No. 30 at 6). Similarly, the Court explained that while some companies may waive the right to collect post charge-off interest as a general course of business, a plaintiff alleging such waiver must do more than simply conclude, based on that practice, that the company waived its right to collect interest. *Cavlary*, 36 Cal. App. 5th at 1075 (examining bank's choice to send statement stating that it would continue to add interest after charge-off, but then failing to do so thereby waiving the right to that interest); *see Frost*, 2016 WL 3479087, at *4 ("There are no factual allegations present in the complaint that state GE applied its alleged business practice of ceasing the collection of post charge-off interest to Plaintiff's debt.").

The SAC does not add any further factual allegations demonstrating that Defendant imposed late payment fees. As with the FAC, the SAC continues to allege on information and belief that "Defendant SLS assessed late-payment fees on this account without live contact . . . " in violation of § 2954.5. (SAC ¶ 30). And the SAC continues to allege in conclusory fashion that Greenpoint "waived its right to collect post charge-off interest . . . ." (SAC ¶ 31; FAC ¶ 26). The Court does not need to accept as true such allegations that are merely legal conclusions, absent sufficient factual allegations to support them. *See Terech v. First Resol. Mgmt. Corp*., 854 F. Supp. 2d 537, 541–43 (N.D. Ill. 2012) ("[T]he critical question is whether Plaintiff has alleged sufficient facts, taken as true, to show that U.S. Bank and Unifund waived interest that otherwise would have accrued after charge-off, such that First Resolution likewise cannot collect that interest.").[3] As Plaintiff has failed to cure the deficiencies discussed in the Court's prior orders, despite being given two opportunities to do so and it appears further amendment would be futile under the circumstances, the Court dismisses this claim with prejudice. *See Allen*, 911 F.2d at 373 ("The district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint.")

3. Plaintiff's Breach of Contract Claim

Defendant argues that Plaintiff has not stated a claim for breach of contract because the SAC continues to allege that Plaintiff breached the contract by defaulting on the loan before Defendant's alleged breaches of the contract. Defendant also contends that, because Plaintiff defaulted before any breach by Defendant, Plaintiff has not plausibly alleged that she was excused from non-performance. Based on the allegations in the SAC, the Court agrees.

To state a claim for breach of contract, a plaintiff must show: (1) existence of a "contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's

[3] While *Terech* is only persuasive authority, California courts have found the case instructive. *See Cavalry*, 36 Cal. App. 5th at 1088 ("Accordingly, *Terech's* discussion of the relevant legal principles is instructive here.").

breach, and (4) damage to plaintiff therefrom." *Wall St. Network, Ltd. v. NY Times*, 164 Cal. App. 4th 1171, 1178 (2008). A "plaintiff who has not performed under a contract is foreclosed from suing another for breach of that agreement," unless the plaintiff has adequately alleged excuse. *Ford v. Lehman Bros. Bank, FSB*, No. C 12-00842 CRB, 2012 WL 2343898, at * 6 (N.D. Cal. Jun. 20, 2012) (citing *Davoodi v. Imani*, No. 11–0260, 2011 WL 577414, at *4 (N.D.Cal. Feb.9, 2011); *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1367 (2010)). While a plaintiff's performance of a contract "can be satisfied by allegations in general terms, [ ] excuses must be pleaded specifically." *Durell*, 183 Cal. App. 4th at 1367 (citation omitted).

Here, Plaintiff asserts excuse of nonperformance based on Defendant allegedly frustrating her ability to perform under the contract. *See* (SAC ¶ 37 (citing Cal. Civ. Code § 1512)). Such an excuse would only conceivably apply if Defendant actually prevented Plaintiff from meeting her obligations under the contract. *See Becker v. Bank of New York Mellon*, No. 2:15-cv-2240-MCE-KJN PS, 2016 WL 2743497, at *5 (E.D. Cal. May 11, 2016), *report and recommendation adopted sub nom. Becker v. Bank of New York*, No. 2:15-cv-2240-MCE-KJN PS, 2016 WL 3743182 (E.D. Cal. July 13, 2016) (citing Cal. Civ. Code §§ 1511, 1512). However, the SAC continues to allege that Plaintiff defaulted before any alleged breach by Defendant. Specifically, it alleges that Plaintiff defaulted on her loan in 2009 and thereafter Greenpoint charged off the debt. *See* (SAC ¶¶ 14–15, 36). The SAC does not allege facts to demonstrate Plaintiff was excused from defaulting on the loan in 2009, only that Plaintiff's default at that time was due to circumstances unrelated to Defendant's performance— namely, "the Great Recession hit[ting] the United States and the economy toppl[ing]." (*Id.* ¶ 14). Plaintiff's failure to perform on the contract before Defendant's alleged breach precludes Plaintiff from stating a plausible breach of contract claim. *See e.g.*, *Ford*, 2012 WL 2343898, at *6–7 (dismissing plaintiff's breach of contract claim where she defaulted on loan and did not allege excuse for nonperformance); *see also Cabanilla v. Machovia Mortgage*, No. SACV 12-00228-CJC(JPRx), 2012 WL 13020028,

at *3 (C.D. Cal. Mar. 20, 2012) (dismissing breach of contract claim where plaintiffs had not alleged they could tender amount outstanding on defaulted loan).

While the SAC now alleges in conclusory fashion that Plaintiff is excused from nonperformance under California Civil Code § 1512 because of Defendant's post-charge-off conduct, it fails to allege sufficient facts to support that conclusion because her default still occurred before Defendant's alleged failure to provide Plaintiff with notice that her mortgage was transferred to a different servicer and failure to provide monthly statements after the charge-off. *See Becker*, 2016 WL 2743497, at *5 (finding that the defendants' alleged violation of a civil code "did not prevent plaintiff from performing his payment obligations under the loan or otherwise render performance impossible" because "plaintiff admittedly defaulted on his loan payments even *before* the requested payoff demand statement was due to be delivered" (emphasis in original)). Thus, Plaintiff does not plausibly allege that Defendant's purported actions "actually prevented plaintiff from meeting [her] contractual obligations." *Id.*; *see also Ha v. Bank of Am.*, N.A., No. 5:14-CV-00120-PSG, 2014 WL 3616133, at *6 (N.D. Cal. July 22, 2014) (granting a motion dismiss based on, in part, no plausible allegations of excuse of nonperformance because "[plaintiff] breached her loan obligations before any alleged statement by [the defendant]"); *cf. Harris v. Wells Fargo Bank, N.A.*, No. 12-CV-05629-JST, 2013 WL 1820003, at *8 (N.D. Cal. Apr. 30, 2013) (finding the plaintiff adequately alleged excuse for nonperformance when the plaintiff alleged that the defendant "breached its obligations under [the deed of trust] by inducing [the] [p]laintiff not to pay her monthly mortgage payments and then charging her late fees").[4] Thus, because Plaintiff's SAC fails to

[4] Although Plaintiff also argues that Defendant was required to provide her with notice "of the installment payments owed so that she could perform[,]" Plaintiff does not allege facts demonstrating that she would have performed under the contract even if Defendant had provided the disputed notices and statements. *See* (Opp. at 34); *cf. Harris*, 2013 WL 1820003, at *8. And her allegations that she defaulted on the loan shortly after receiving it due to the recession indicate that she could not have performed, even if she had received the notices.

sufficiently allege a breach of contract claim, despite Plaintiff twice being given an opportunity to do so, and because further amendment appears to be futile, the Court dismisses Plaintiff's breach of contract claim with prejudice.

4. Plaintiff's Unfair Business Practices Claim

Defendant argues Plaintiff cannot allege an unlawful business practice under the UCL because the SAC fails to allege an actual violation of a law. Defendant also argues that any purported failure to deliver mortgage statements to Plaintiff is a personal matter, and thus could not be a fraudulent practice under the UCL. Finally, as to any purported unfair practices, Defendant contends Plaintiff submits only conclusory allegations about Defendant failing to deliver mortgage statements.

As Plaintiff acknowledges in the SAC, the allegations of her fifth cause of action for a violation of the UCL based on an "unlawful" business practice, (SAC ¶ 57) are "tethered" to the violations alleged in her first through fourth causes of action—namely, her claims for breach of contract, violations of the California Civil Code and RESPA, and breach of the implied covenant, (*id.* ¶ 58). Thus, because the Court has already found that the first through fourth causes of action fail to sufficiently allege claims, Plaintiff's fifth cause of action as to an unlawful business practice also fails, insofar as it is based on the first through fourth causes of action in the SAC.

However, the SAC's fifth cause of action now sets forth additional factual allegations to show that Defendant's conduct in failing to notify Plaintiff of a change in loan servicer and in failing to send monthly statements, despite Plaintiff's loan still accruing interest, constitutes an "unfair" business practice under the UCL based on a violation of public policy. (SAC ¶¶ 59–63). Specifically, the fifth cause of action now cites to *Jolley v. Chase Home Financial, LLC*, 213 Cal. App. 4th 872, 903 (2013), *see* (SAC ¶ 60), and an advisory bulletin issued by the Consumer Financial Protections Bureau ("CFPB") discussing "long-dormant second mortgages," *see* (SAC ¶ 23), in support of the claim that Defendant's conduct violates public policy and is thus, an unfair business practice under the UCL. In *Jolley,* the California appellate court stated that "the California

Legislature has expressed a strong preference for fostering more cooperative relations between mortgage lenders and borrowers to avoid foreclosures." 213 Cal. App. 4th at 903. Per the advisory bulletin quoted in the SAC, the CFPB discussed the practice of second mortgage holders charging off defaulted loans as uncollectible, ceasing communication with the borrower, and sometimes selling the loan to debt buyers. Based on these practices, the CFPB expressed "concern[ ] about homeowners . . . who are now facing foreclosure threats and other collection activity because of long-dormant second mortgages." *See* (SAC ¶ 23). Referencing these statements, the SAC alleges Defendant's conduct violates "legislatively stated public policy" and thus constitutes an unfair business practice under the UCL. (SAC ¶¶ 60-62). The Court thus considers whether the SAC's allegations state a plausible claim under the unfair prong of the UCL.

California's UCL prohibits "any unlawful, unfair, or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. "Because [the UCL] is written in the disjunctive, it establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent." *Hodsdon v. Mars, Inc.*, 891 F.3d 857, 865 (9th Cir. 2018) (quoting *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co*., 20 Cal.4th 163 (1999).

Regarding the unfair prong, the California Supreme Court has noted that it has yet to establish a definitive test under the UCL for determining when a business practice is "unfair" in actions brought by or on behalf of consumers rather than competitors. *Nationwide Biweekly Administration, Inc. v. Superior Court of Alameda County*, 9 Cal. 5th 279, 303 (2020). In *Cel-Tech*, an action involving a cell phone vendor suing a defendant cell phone company under the UCL for unfair business practices, the court adopted a test under the unfair prong, but the *Cel-Tech* court made clear that its discussion and the test were limited to the context of the case before it. Specifically, it described the case as involving "an action by a competitor alleging anticompetitive practices" and stated, our discussion and this test are limited to that context." *Cel-Tech*, 20 Cal.4th at 187 n.12. Further, it emphasized, "[n]othing we say relates to actions by consumers or by competitors

alleging other kinds of violations of the unfair competition law such as "fraudulent" or "unlawful" business practices or "unfair, deceptive, untrue or misleading advertising." *Id.*

Since *Cel-Tech*, the California Supreme Court "has not addressed the question whether, in actions under the UCL brought on behalf of consumers rather than competitors, the term 'unfair' in the UCL needs to be similarly defined in a more prescribed standard or test, and, if so, what that test should be." *Nationwide*, 9 Cal. 5th at 303. However, among the California appellate courts, a split of authority has developed in the years since *Cel-Tech* regarding the proper test for determining in consumer cases whether a particular business practice is unfair, with these decisions adopting three different tests. *Id.*; *Drum v. San Fernando Valley Bar Assn.*, 182 Cal. App. 4th 247, 256–57 (2010) (applying all three tests, without express preference, to the plaintiff's allegations).

The test relied upon by the first line of cases (the "tethering test") requires "the public policy which is a predicate to a consumer unfair competition action under the 'unfair' prong of the UCL [to] be tethered to specific constitutional, statutory, or regulatory provisions." *Nationwide*, 9 Cal. 5th at 303 n.10; *Drum*, 182 Cal. App. at 257 (citing cases). Another test (the "immoral test"), relied upon in the second line of cases considers whether "the alleged business practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers," *Drum*, 182 Cal. App. at 257 (internal quotation marks and citation omitted), and requires the court to "weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim," *Nationwide*, 9 Cal. 5th at 303 n.10 (citation omitted). Finally, a third line of cases uses the definition of "unfair" set forth in section 5 of the Federal Trade Commission Act (15 U.S.C. § 45, subd. (n)), (the "FTC test"), and requires that "(1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided." *Id.* (citation omitted).

Here, Plaintiff's allegations and arguments only raise the applicability of the first tests.[5] The Court is unaware of any binding authority that sets forth a preferred test, and notes that the Ninth Circuit has recently applied the tethering test in at least two consumer actions. *See Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1215 (9th Cir. 2020); *Hodsdon*, 891 F.3d at 866 (9th Cir. 2018). Therefore, the Court will apply the first test to Plaintiff's allegations.

Under the first test, Plaintiff has sufficiently tethered her allegations regarding Defendant's actions to a regulatory provision, California Civil Code § 2923.6. Section 2923.6(b) states: "It is the intent of the Legislature that the mortgage servicer offer the borrower a loan modification or workout plan if such a modification or plan is consistent with its contractual or other authority." *See generally Jolley v. Chase Home Fin., LLC,* 213 Cal. App. 4th 872, 903 (2013), *as modified on denial of reh'g* (Mar. 7, 2013) (noting that "the California Legislature has expressed a strong preference for fostering more cooperative relations between lenders and borrowers who are at risk of foreclosure . . . [and] require[s] lenders to negotiate with borrowers in default to seek loss mitigation solutions"). Plaintiff alleges that, upon learning of the accruing interest on her debt, she called Defendant to try and resolve her debt but Defendant was unwilling to work with her. *See* (SAC ¶¶ 20, 24, 62). According to the SAC, because foreclosure is looming rather than the parties working to resolve the debt, Plaintiff filed this lawsuit. (*Id.* ¶ 24). Plaintiff's allegations that Defendant is attempting to foreclose on her home rather than work with her to resolve her debt sufficiently tether her claim to the identified regulatory provision. *Cf. Hodsdon*, 891 F.3d 857, 867 (9th Cir. 2018) (finding too attenuated allegations of a failure to label chocolate bar from a possibility of "indirectly exacerbat[ing]

[5] While Plaintiff uses the phrase "immoral, unethical, and oppressive practice," Plaintiff does not actually set forth any allegations that would make the second test applicable. For example, Plaintiff does not allege the "gravity" of the harm or suggest any balancing of the "utility of the defendant's conduct." *See Drum*, 182 Cal. App. 4th at 257. Thus, the Court finds this test inapplicable.

slave labor in the supply chain"); *CVS Pharmacy*, 982 F.3d at 1215 ("[Plaintiffs] do not mention the public policy allegedly violated, either in the complaint or the briefing, nor do they explain how, the Program violated that policy."). Assuming all allegations to be true, the Court finds that Plaintiff has plausibly alleged that Defendant's actions are unfair under the public policy test. *See Bevia v. Select Portfolio Servicing, Inc.*, Case No. SACV 17-1535 JVS(JDEx), 2018 WL 3740524, at *6 (C.D. Cal. June 7, 2018) (denying motion to dismiss unfair conduct claim based § 2923.6).

Defendant's motion to dismiss Plaintiff's UCL claim, insofar as it asserts a claim under the unfair prong of the UCL, is therefore denied. However, the Court dismisses Plaintiff's UCL claim, insofar as it purports to assert a claim under the unlawful and fraudulent prongs of the UCL, with prejudice.

5. Plaintiff's Declaratory Relief Claim

Defendant argues that Plaintiff's declaratory relief claim is improper because it "seeks to remedy a past wrong," such as whether the assessment of interest and fees was proper, which Defendant contends is "unnecessary because the issues will be determined by other claims." (Mot. at 17). Essentially, Defendant argues that Plaintiff is seeking a declaration regarding whether and how Defendant breached its contractual obligations. In response, Plaintiff contends her claim for declaratory relief is sufficiently alleged because there is an actual controversy before the Court, and Plaintiff seeks a declaration concerning the "respective rights and duties pursuant to the Deed of Trust and Promissory Note." (SAC ¶ 13). The Court agrees with Defendant.

"In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of the appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201. "Declaratory relief should be denied when it will neither serve a useful purpose in clarifying and settling the legal relations in issue nor terminate the proceedings and afford relief from the uncertainty and controversy faced by the parties." *United States v. State of Wash.*, 759 F.2d 1353, 1357 (9th Cir. 1985).

Here, Plaintiff's declaratory relief claim is predicated on her dismissed claims. Indeed, Plaintiff argues that she seeks a declaration concerning the "Deed of Trust and Promissory Note," specifically regarding "the status of the debt, the amount of the debt, [and] who serviced the debt . . ." (Opp. at 18; SAC ¶ 67). However, Plaintiff's only remaining claim relates to whether Defendant's conduct is unfair under the UCL because it violates public policy. The current action is no longer a controversy over Plaintiff's rights as articulated in the Deed of Trust or Promissory Note, nor about the status of the debt. Therefore, a clarification of the Deed of Trust and Promissory note would not "serve a useful purpose in clarifying and settling the legal relation in issue nor terminate the proceedings and afford relief from the uncertainty and controversy faced by the parties." *State of Wash*., 759 F.2d at 1357; *see also Bell v. Wells Fargo Bank, N.A*., Case No. CV 14–4316–JFW (MRWx), 2014 WL 12603123, at *8 (C.D. Cal. Sept. 2, 2014), (dismissing a claim that sought a declaration "as to whether Defendants have any authority to foreclose and Defendants' rights to title of the [property]" because it was "duplicative of Plaintiff's claim for violation of Cal. Civ. Code § 2924(a)(6), and thus it fails for the same reasons" (citing *Swartz v. KPMG LLP*, 476 F.3d 756, 765–66 (9th Cir.2007)) *aff'd sub nom. Bell v. Wells Fargo Bank, NA*, 663 F. App'x 549 (9th Cir. 2016). As such, the Court dismisses Plaintiff's declaratory relief claim with prejudice.

IV. CONCLUSION

For the reasons stated herein, Defendant's Motion to Dismiss is DENIED, as to Plaintiff's claim regarding unfair conduct under the UCL; and otherwise GRANTED. The

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dismissed claims are dismissed with prejudice. In light of the Court's order, the parties should proceed in accordance with the Federal Rules of Civil Procedure and Local Rules.

IT IS SO ORDERED.

DATED: March 1, 2024

HON. SHERILYN PEACE GARNETT
UNITED STATES DISTRICT JUDGE