

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

United States District Court

	)	Case No.: 13-CV-04040-LHK
MARK BINGHAM, an individual,	)	
	)	
Plaintiff,	)	ORDER DENYING DEFENDANTS'
v.	)	MOTION TO DISMISS
	)	
OCWEN LOAN SERVICING, LLC, a Delaware	)	
Limited Liability Company; TD SERVICE	)	
FINANCIAL CORPORATION, a California	)	
Corporation; and DOES 1 through 100,	)	
inclusive,	)	
	)	
Defendants.	)	
	)	

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Ocwen Loan Servicing, LLC, ("Ocwen") and TD Service Financial Corporation ("TD") (collectively, "Defendants") move to dismiss Plaintiff Mark Bingham's Complaint. ECF No. 10. Plaintiff opposes the motion, ECF No. 13, and Defendant has filed a reply, ECF No. 14. Pursuant to Civil Local Rule 7-1(b), the Court finds this matter suitable for decision without oral argument and accordingly VACATES the hearing on this motion set for May 22, 2014, at 1:30 p.m. The Case Management Conference scheduled for May 22, 2014 remains as set. Having considered the submissions of the parties and the relevant law, the Court for the reasons stated below DENIES Defendants' motion to dismiss.

1 **I. BACKGROUND**

2 **A. Factual Allegations**

3 On or about December 8, 2006, Plaintiff received a \$500,000 loan from American Home  
4 Mortgage (“AHM”) secured by a Deed of Trust encumbering the real property located at 185  
5 Aquila Way, Boulder Creek, CA 95006 (“Subject Property”). *See* Complaint ¶ 12; Request for  
6 Judicial Notice (“RJN”) Ex. 1, at 2. Plaintiff failed to make payments under the terms of the Note  
7 and Deed of Trust, and on August 21, 2012, with the loan at \$47,415.36 in arrears, foreclosure  
8 proceedings were initiated with the recordation of a Notice of Default (“NOD”). RJN Ex. 2, at 1–2.  
9 The following day, August 22, 2012, the Deed of Trust was assigned and all beneficial interest  
10 under the Deed was transferred to Deutsche Bank National Trust Company (“Deutsche Bank”), as  
11 Trustee for American Mortgage Assets Trust 2007-2, Mortgage-Backed Pass-Through Certificates  
12 Series 2007-2. RJN Ex. 3, at 1. Plaintiff alleges that in approximately February 2013, Defendant  
13 Ocwen acquired Plaintiff’s loan and the Deed of Trust to the Subject Property. Complaint ¶ 12.

14 In February 2013, Plaintiff was notified that Ocwen would be Plaintiff’s loan servicer as of  
15 March 1, 2013. *Id.* ¶ 13. On May 17, 2013, a Substitution of Trustee was recorded wherein  
16 Homeward Residential, Inc., acting as attorney-in-fact for Deutsche Bank, named Power Default  
17 Services, Inc. as the substitute trustee under the Deed of Trust. RJN Ex. 4, at 1–2. Sometime in  
18 May of 2013, Plaintiff received notice that Ocwen had scheduled a trustee’s sale to take place on  
19 June 12, 2013. *Id.*; RJN Ex. 5, at 2.

20 Plaintiff alleges that he visited Ocwen’s website in May 2013. Complaint ¶ 14. Ocwen  
21 solicited loan modifications on its website with a link (“Click here and you can start a loan mod”)  
22 that directed users to forms which the user could fill out and fax to Ocwen to apply for a loan  
23 modification. *Id.* Plaintiff filled out and printed the forms, and attempted to fax them to Ocwen. *Id.*  
24 Despite Plaintiff’s repeated attempts, the fax contact listed on the website did not work. *Id.*

25 On approximately June 5, 2013, Plaintiff again attempted to fax the documents, but after his  
26 attempt once again failed, Plaintiff scanned and emailed the documents to Mod@Ocwen.com. *Id.* ¶  
27 15. Plaintiff thereafter received no requests for documents from Ocwen, and seven days later on  
28

1 June 12, 2013, Plaintiff's property sold at a trustee's sale conducted by Defendant TD, acting as  
 2 trustee for Ocwen. *Id.* Plaintiff alleges that Ocwen reacquired the property at the sale. *Id.* No  
 3 trustee's deed upon sale was or has been recorded. Defendants' Motion to Dismiss ("Mot.") at 7,  
 4 ECF No. 10.

5 On or about June 14, 2013, Plaintiff received a letter dated June 11, 2013, informing him  
 6 that Ocwen had received Plaintiff's application for loan modification, but that Ocwen had denied  
 7 the application because a foreclosure sale date was scheduled within seven days of Ocwen's receipt  
 8 of the application. *Id.* ¶ 16.

9 **B. Procedural History**

10 Plaintiff filed his Complaint against Defendants in Santa Cruz County Superior Court on  
 11 July 17, 2013 ("Complaint"), and Defendants removed the case to this Court on August 30, 2013.  
 12 ECF No. 1. After the parties declined to proceed before a Magistrate Judge, the case was  
 13 reassigned to the undersigned judge on September 17, 2013. ECF No. 8. After reassignment,  
 14 Defendants moved to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6) for  
 15 failure to state a claim. ECF No. 10.<sup>1</sup> On October 3, 2013, Plaintiff filed an opposition to  
 16 Defendants' motion to dismiss, ("Opp'n"), ECF No. 13, and Defendants filed a reply on October  
 17 10, 2013 ("Reply"), ECF No. 14.

18 Defendants accompanied their motion to dismiss with a request that the Court take judicial  
 19 notice of the following documents relating to the Subject Property: (1) a Deed of Trust recorded on  
 20 December 16, 2006; (2) a Notice of Default and Election to Sell Under Deed of Trust recorded on  
 21 August 21, 2012; (3) an Assignment of Deed of Trust recorded on August 22, 2012; (4) a  
 22 Substitution of Trustee recorded on May 17, 2013; and (5) a Notice of Trustee's Sale recorded on  
 23 May 17, 2013. ECF No. 11. The Court GRANTS Defendants' unopposed request, and has taken  
 24 notice of the attached undisputed public documents, on which both parties rely in their briefs. *See*  
 25 *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 866 n.1 (9th Cir. 2004)  
 26 (granting judicial notice over "undisputed matters of public record"); *see also* Fed. R. Evid. 201(d)

27 <sup>1</sup> Defendants had moved to dismiss the Complaint before reassignment. ECF No. 4. In light of the  
 28 fact that the motion was re-noticed, the Court denies as moot the pre-reassignment motion.

1 (providing that upon request a court shall take notice of adjudicative facts if such facts “are not  
2 subject to reasonable dispute”).

## 3 **II. LEGAL STANDARD**

4 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss an  
5 action for failure to allege “enough facts to state a claim to relief that is plausible on its face.” *Bell*  
6 *Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff  
7 pleads factual content that allows the court to draw the reasonable inference that the defendant is  
8 liable for the misconduct alleged. The plausibility standard is not akin to a ‘probability  
9 requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.”  
10 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citation omitted). For purposes of ruling on a  
11 Rule 12(b)(6) motion, the Court “accept[s] factual allegations in the complaint as true and  
12 construe[s] the pleadings in the light most favorable to the nonmoving party.” *Manzarek v. St. Paul*  
13 *Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

14 However, a court need not accept as true allegations contradicted by judicially noticeable  
15 facts, *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000), and a “court may look beyond  
16 the plaintiff’s complaint to matters of public record” without converting the Rule 12(b)(6) motion  
17 into one for summary judgment, *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995). Nor is a  
18 court required to “assume the truth of legal conclusions merely because they are cast in the form  
19 of factual allegations.” *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per curiam)  
20 (quoting *W. Min. Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981)). Mere “conclusory  
21 allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss.”  
22 *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004); accord *Iqbal*, 556 U.S. at 678.  
23 Furthermore, “a plaintiff may plead [him]self out of court” if he “plead[s] facts which establish that  
24 he cannot prevail on his . . . claim.” *Weisbuch v. Cnty. of L.A.*, 119 F.3d 778, 783 n.1 (9th Cir.  
25 1997) (internal quotation marks and citation omitted).

1 **III. DISCUSSION**

2 Plaintiff's Complaint alleges that Defendants violated Section 2923.6 of the California  
 3 Homeowner Bill of Rights ("HBOR") by foreclosing on Plaintiff's home while Plaintiff was  
 4 eligible for and sought a loan modification. Complaint ¶¶ 18–23; Cal. Civ. Code § 2923.6.<sup>2</sup> This  
 5 practice is known as "dual track foreclosure," and is specifically prohibited by Section 2923.6(c) of  
 6 the HBOR. § 2923.6(c); *see also Jolley v. Chase Home Finance, LLC*, 213 Cal. App. 4th 872, 904  
 7 (2013); *Rockridge Trust v. Wells Fargo NA*, No. 13-1457, 2014 WL 688124 (N.D. Cal. Feb. 19,  
 8 2014). Plaintiff brings this action under Section 2924.12, which provides a cause of action for  
 9 material violation of Section 2923.6, and seeks injunctive and monetary relief under subsections (a)  
 10 and (b), respectively. *See* § 2924.12. However, the statutory scheme under 2924.12(a) contemplates  
 11 injunctive relief only to prevent a foreclosure sale before it occurs. § 2924.12(a)(2) (providing that  
 12 "[a]ny injunction shall remain in place and any trustee's sale shall be enjoined until the court  
 13 determines that" the underlying violation has been remedied). Here, the Subject Property was sold  
 14 at a trustee's sale on June 12, 2013. Accordingly, to the extent Plaintiff seeks to set aside the  
 15 completed sale, Plaintiff's claim for injunctive relief amounts to an action in equity for wrongful  
 16 foreclosure. *See Lona v. Citibank, N.A.*, 202 Cal. App. 4th 89, 103 (2011) ("After a nonjudicial  
 17 foreclosure sale has been completed, the traditional method by which the sale is challenged is a suit  
 18 in equity to set aside the trustee's sale.").

19 Defendants move to dismiss the Complaint on several grounds. First, Defendants contend  
 20 that Section 2923.6 does not provide a private right of action, and therefore that Plaintiff has failed  
 21 to state a claim upon which relief may be granted. Mot. at 6. Second, Defendants assert that  
 22 because Ocwen did not offer loan modifications, Section 2923.6 is inapplicable. *Id.* Third,  
 23 Defendants argue that a trustee's deed upon sale must be recorded to recover damages under  
 24 Section 2924.12(b), and that because no such deed has been recorded, Plaintiff's claim for damages  
 25 fails. *Id.* at 7. Finally, Defendants argue that to set aside or cancel a foreclosure sale, Plaintiff must  
 26 tender or offer to tender a sum sufficient to cure default, and that because Plaintiff has failed do so,

27 \_\_\_\_\_  
 28 <sup>2</sup> All statutory references are to the California Civil Code unless otherwise indicated.

1 the Complaint fails to state a cause of action. Mot. at 3–5. The Court rejects each of Defendants’  
 2 arguments. Specifically, for the reasons stated below the Court finds that Section 2924.12 provides  
 3 a private right of action for violation of Section 2923.6, that Plaintiff has sufficiently alleged a  
 4 claim for violation of Section 2923.6 and 2924.12, and that Plaintiff’s claim for damages is  
 5 sufficient to survive a motion to dismiss. The Court also declines to dismiss the Complaint for  
 6 failure to tender. Accordingly, the Court DENIES Defendants’ motion to dismiss. Before turning to  
 7 Defendants’ arguments in their motion to dismiss, the Court briefly discusses the relevant  
 8 provisions of the HBOR.

9 **A. The Homeowner Bill of Rights**

10 California’s HBOR, which took effect January 1, 2013, reformed aspects of the state’s  
 11 nonjudicial foreclosure process by amending the California Civil Code to prohibit deceptive and  
 12 abusive home foreclosure practices. *See Flores v. Nationstar Mortgage LLC*, No. 13-3898, 2014  
 13 WL 304766, at \*3 (C.D. Cal. Jan. 6, 2014); *Singh v. Bank of America, N.A.*, No. 13-729, 2013 WL  
 14 1858436, at \*2 (E.D. Cal. May 2, 2013). Before these recent amendments, the statute at issue in  
 15 this case, Section 2923.6, contained only the first two current subsections, (a) and (b), which  
 16 “merely express the hope that lenders will offer loan modifications on certain terms.” *Mabry v.*  
 17 *Superior Court*, 185 Cal. App. 4th 208, 222 (2010). The HBOR added to these preexisting  
 18 aspirational provisions several express prohibitions in subsections (c) through (k). *See Vasquez v.*  
 19 *Bank of Am., N.A.*, No. 13-2902, 2013 WL 6001924, at \*7 (N.D. Cal. Nov. 12, 2013) (explaining  
 20 the effects of the HBOR on Section 2923.6).

21 The relevant subsection here, 2923.6(c), now provides that “[i]f a borrower submits a  
 22 complete application for a first lien loan modification offered by, or through, the borrower’s  
 23 mortgage servicer, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall  
 24 not record a notice of default or notice of sale, or conduct a trustee’s sale, while the complete first  
 25 lien loan modification application is pending.” After a complete loan modification application has  
 26 been submitted, a servicer “shall not record a notice of default or notice of sale or conduct a  
 27 trustee’s sale until any of the following occurs: (1) The mortgage servicer makes a written  
 28

1 determination that the borrower is not eligible for a first lien loan modification, and any appeal  
 2 period pursuant to subdivision (d) has expired; (2) The borrower does not accept an offered first  
 3 lien loan modification within 14 days of the offer; (3) The borrower accepts a written first lien loan  
 4 modification, but defaults on, or otherwise breaches the borrower's obligations under, the first lien  
 5 loan modification." *Id.* Subsection (d) states that "the borrower shall have at least 30 days from the  
 6 date of the written denial to appeal the denial and to provide evidence that the mortgage servicer's  
 7 determination was in error." *Id.*

8 The HBOR also added Section 2924.12, which expressly provides a private cause action for  
 9 violations of the new provisions, including 2923.6. *See* § 2424.12. Available remedies under  
 10 Section 2924.12 depend upon whether a trustee's deed has or has not been recorded:

11 (a) (1) If a trustee's deed upon sale has not been recorded, a borrower may bring an action  
 12 for injunctive relief to enjoin a material violation of Section . . . 2923.6.

13 (2) Any injunction shall remain in place and any trustee's sale shall be enjoined until the  
 14 court determines that the mortgage servicer, mortgagee, trustee, beneficiary, or authorized  
 agent has corrected and remedied the violation or violations giving rise to the action for  
 injunctive relief. An enjoined entity may move to dissolve an injunction based on a  
 showing that the material violation has been corrected and remedied.

15 (b) After a trustee's deed upon sale has been recorded, a mortgage servicer, mortgagee,  
 16 trustee, beneficiary, or authorized agent shall be liable to a borrower for actual economic  
 damages pursuant to Section 3281, resulting from a material violation of Section . . . 2923.6  
 . . . by that mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent where  
 17 the violation was not corrected and remedied prior to the recordation of the trustee's deed  
 upon sale. If the court finds that the material violation was intentional or reckless, or  
 18 resulted from willful misconduct by a mortgage servicer, mortgagee, trustee, beneficiary, or  
 authorized agent, the court may award the borrower the greater of treble actual damages or  
 19 statutory damages of fifty thousand dollars (\$50,000).

20 § 2924.12.

21 Here, Plaintiff alleges he submitted an application for a loan modification on June 5, 2013,  
 22 and that despite his pending loan modification application, Defendants continued with nonjudicial  
 23 foreclosure proceedings. Complaint ¶ 15. On June 14, 2013, two days after his home was sold at a  
 24 foreclosure auction, Plaintiff received a written denial of his application for a loan modification,  
 25 dated June 11, 2013. Plaintiff contends that Defendants were prohibited by 2923.6 from foreclosing  
 26 upon and selling Plaintiff's property until Defendants had issued a written determination regarding  
 27 Plaintiff's application for loan modification and the 30-day statutory appeals period had expired.  
 28

**B. Existence of a Private Right of Action under 2923.6**

In their motion to dismiss, Defendants contend that “Section 2923.6 does not provide a private right of action.” Mot. at 7. Defendants are incorrect, and the authorities to which Defendants cite are inapposite. The previous version of Section 2923.6 provided no private right of action, and the cases cited by Defendants interpret this prior version of the law. *Id.* at 6–7 (citing *Pitre v. Wells Fargo Bank, N.A. Mortgage Servicer*, 2013 WL 2156315, at \*3 (N.D. Cal. May 17, 2103) (applying pre-HBOR Section 2923.6 to acts which occurred prior to the effective date of the new provisions, and finding no private right of action under the former statute)).<sup>3</sup> Following the HBOR amendments, which took effect as of January 1, 2013, Section 2923.6 now explicitly prohibits dual tracking and other practices, and Section 2924.12 provides actions for both injunctive and monetary relief for violations of, *inter alia*, Section 2923.6. *See* §§ 2923.6, 2924.12; *Vasquez*, 2013 WL 6001924, at \*7 (explaining the effects of the HBOR on Section 2923.6). As Judge Tigar has held, Section 2924.12 provides “explicit borrower right of action provisions” for violations of the amended Section 2923.6. *Vasquez*, 2013 WL 6001924, at \*7. Here, all of the allegedly wrongful conduct occurred in June 2013, after the effective date of the HBOR. Accordingly, Defendants’ argument is based on what is now inapplicable case law, and the Court finds that Section 2924.12 provides a private right of action to enforce Section 2923.6.

**C. Application for a Loan Modification Offered by a Mortgage Servicer**

Defendants also contend that because “Ocwen did not offer [loan] modifications less than seven days before the foreclosure sale[,]” Section 2923.6(c) is inapplicable. Mot. at 6. Defendants base this argument on the language of Section 2923.6(c)(1), which provides that “[i]f a borrower

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<sup>3</sup> Defendants also cite three cases which, in addition to all having been decided under the pre-HBOR version of the statute, all hold that there is no duty under Section 2923.6 to agree to a loan modification. *See, Hamilton v. Greenwich Investors UUVI, LLC*, 195 Cal. App. 4th 1602, 1617 (2011); *Farner v. Countrywide Home Loans*, 2009 WL 189025, at \*2 (S.D. Cal. Jan. 26, 2009); *Bulaoro v. Oro Real, Inc.*, 2011 WL 6372458, at \*9 (N.D. Cal. Dec. 20, 2011). Although these cases remain good law after the recent amendments to Section 2923.6, they too are inapposite. Plaintiff does not bring his action because his application for a loan modification was denied, but rather because Defendants violated the mandatory procedural requirements in Section 2923.6(c) by not suspending foreclosure proceedings upon receiving Plaintiff’s application and by failing to afford him the statutory period of 30 days to appeal Defendant’s denial. *See* Complaint ¶¶ 13–16.



1 submits a complete application for a first lien modification *offered by*, or through, the borrower’s  
 2 mortgage servicer[.]” no notice of default or notice of sale shall be recorded, or trustee’s sale  
 3 conducted, while the loan modification application is pending. § 2923.6(c)(1) (emphasis added).  
 4 Defendants’ argument appears to be that no loan modification was “offered by” Ocwen, so Section  
 5 2923.6(c) does not apply. Mot. at 6. The assertion that Ocwen did not offer loan modifications is  
 6 contradicted by Plaintiff’s allegations that he: (1) followed a link on Ocwen’s website titled “Click  
 7 here and you can start a loan mod”; and (2) filled out the loan modification application found  
 8 through that link. Complaint ¶ 14. Defendants’ assertions to the contrary are unavailing on a  
 9 motion to dismiss, which requires the Court to consider only the well-pleaded allegations in the  
 10 Complaint. Construing such allegations in Plaintiff’s favor, the Court finds Plaintiff has sufficiently  
 11 stated a claim for relief under Section 2923.6.<sup>4</sup>

#### 12 **D. Appropriate Remedies**

13 Plaintiff seeks both injunctive and monetary relief under Section 2924.12. Complaint at 6.  
 14 As discussed above, to the extent that Plaintiff seeks to set aside the completed foreclosure sale of  
 15 the Subject Property, Plaintiff’s claim for injunctive relief amounts to a common law action for  
 16 wrongful foreclosure as well. Defendants move to dismiss the action for want of available relief.  
 17 Mot. at 7. Defendants challenge Plaintiff’s statutory claims on the ground that no trustee’s deed  
 18 upon sale has been recorded. *Id.* Under 2924.12(a) injunctive relief is available to enjoin violation  
 19 of, *inter alia*, 2923.6, before a trustee’s deed of sale is recorded, and following the recordation of  
 20 such a deed a plaintiff may seek post-sale damages under 2924.12(b). § 2924.12. Because here the  
 21 Subject Property was sold at a foreclosure sale, injunctive relief under the statute may no longer be  
 22 available to Plaintiff, despite the fact that no trustee’s deed upon sale has been recorded.  
 23 Defendants also argue that no injunctive relief is available under 2924.12(a) because Plaintiff has  
 24 not tendered or offered to tender a sum sufficient to cure default. Mot. at 3. As for monetary  
 25

26 <sup>4</sup> Defendants’ argument is not entirely clear, and to the extent that Defendants contend that Ocwen  
 27 did not affirmatively offer a loan modification, and that instead Plaintiff *sought* a loan modification  
 28 through Ocwen’s website, Defendants cite no authority that suggests the statute should be read so  
 narrowly, nor is the Court aware of any decisions interpreting the statute in this way.

1 damages, Defendants contend that because they did not record a deed upon sale, Plaintiff may not  
2 seek damages under Section 2924.12(b). *Id.* at 7.

3 For the reasons set forth below, the Court denies Defendants' motion to dismiss. The Court  
4 begins by discussing statutory remedies and then turns to common law remedies.

### 5 **1. Statutory Claim**

6 Section 2924.12 provides actions for homeowners to seek both damages and injunctive  
7 relief for violations of Section 2923.6. As discussed above, if a trustee's deed upon sale has been  
8 recorded, Section 2924.12(b) provides an action for economic and statutory damages. If a trustee's  
9 deed upon sale has not been recorded, Section 2924.12(a) authorizes injunctive relief.

10 Defendants move to dismiss on the ground that neither statutory remedy is available to  
11 Plaintiff. Mot. at 3, 7. First, Defendants contend that Plaintiff may not seek injunctive relief  
12 because Plaintiff failed to tender a sum sufficient to cure default. *Id.* at 3. Second, Defendants  
13 assert in their motion to dismiss that because Defendants have not yet recorded a trustee's deed  
14 upon sale, Plaintiff cannot recover damages under Section 2924.12(b). *Id.* at 7. The Court rejects  
15 both arguments for the reasons set forth below and therefore denies the motion to dismiss on the  
16 basis of lack of statutory remedies.

17 First, Section 2924.12(a) provides that if "a trustee's deed upon sale has not been recorded,  
18 a borrower may bring an action for injunctive relief to enjoin a material violation of Section . . .  
19 2923.6 . . . ." § 2924.12(a)(1); *see also* § 2924.12(a)(2) (providing that any such injunction shall  
20 remain in place until any violations have been remedied). Because Section 2924.12(a) contains no  
21 tender requirement, Plaintiff need not tender insofar as his prayer for injunctive relief is based upon  
22 this statute. *See Mojanoff v. Select Portfolio Servicing Inc.*, No. LC100052 (Cal. Super. Ct. May  
23 28, 2013) (finding that "the California Home Owner Bill of Rights . . . imposes no tender  
24 requirement."). Here, no trustee's deed upon sale has been recorded, and thus Plaintiff may seek  
25 injunctive relief under Section 2924.12(a), regardless of tender.<sup>5</sup>

26 \_\_\_\_\_  
27 <sup>5</sup> Few courts have specifically addressed the question of tender in post-HBOR Section 2923.6  
28 actions, and the results have been inconsistent among the courts that have. At least two federal  
courts have dismissed actions for failure to tender when a Section 2923.6 claim is brought in

1 Second, Plaintiff seeks relief under 2924.12(b), which provides an action to recover  
 2 monetary damages for violation of 2923.6 and related subsections once a trustee's deed upon sale  
 3 has been recorded. Complaint at 6.<sup>6</sup> Defendants argue that because no such trustee's deed has yet  
 4 been recorded, Plaintiff cannot recover damages under the statute. Mot. at 7.

5 A recent decision from the Central District of California involving the Defendants in this  
 6 case suggests that despite the literal language of Section 2924.12(b), failure to record a trustee's  
 7 deed upon sale may not necessarily preclude recovery of monetary damages. *See Copeland v.*  
 8 *Ocwen Loan Servicing, LLC*, No. 13-5708, 2014 WL 304976, at \*5 (C.D. Cal. Jan. 3, 2014). In  
 9 *Copeland*, Ocwen argued that because Ocwen served notice of sale on the plaintiff but did not  
 10 actually record the notice, Ocwen had not violated Section 2923.6. *Id.* Judge Reess observed that  
 11 "[b]y simply not recording any instruments, Defendants seem to believe they can circumvent the  
 12 ban on dual tracking." *Id.* Judge Reess denied the motion to dismiss, finding that to bar recovery in  
 13 such a case "would be a perversion of the spirit of the HBOR, which seeks to prohibit foreclosure  
 14 while a borrower is simultaneously being considered for loan modifications." *Id.*

15  
 16  
 17  
 18  
 19 conjunction with other claims that require tender, such as common law actions for wrongful  
 20 foreclosure. *See Salcido v. Vericrest Fin. & Summit Mgmt. Co. LLC*, No. 13-3450, 2013 WL  
 21 5946090, at \*3 (N.D. Cal. Nov. 5, 2013) (dismissing with prejudice claims under Section 2923.5  
 22 and 2923.6 because the plaintiff did not qualify as a borrower under the statute, and noting the  
 23 claims were also defective because plaintiff had failed to tender); *Valenzuela v. Wells Fargo Bank*  
 24 *Nat. Ass'n*, No. 13-1620, 2014 WL 309438 (E.D. Cal. Jan. 28, 2014) (holding that absent a  
 25 "credible, legitimate tender, [plaintiff sought] empty remedies, not capable of being granted," and  
 26 that "failure to require a tender of [plaintiff's] indebtedness would provide him an unjustified  
 27 windfall"). However, the Court is aware of three recent state courts decisions refusing to require  
 28 tender where plaintiffs brought dual tracking claims like those in this case. *See Senigar v. Bank of*  
*Am.*, No. MSC13-00352 (Cal. Super. Ct. Feb. 20, 2013) (rejecting tender argument for a dual  
 tracking and Section 2923.7 single-point-of-contact claim); *Pearson v. Green Tree Servicing*, No.  
 13-01822 (Cal. Super. Ct. Contra Costa Cnty. Sept. 10, 2013) (same); *Mojanoff*, No. LC100052  
 (Cal. Super. Ct. May 28, 2013) (finding that the HBOR contains no tender requirement).

<sup>6</sup> Section 2924.12(b) authorizes an award of actual damages, or upon a finding of willful, reckless,  
 and/or intentional material violation, the greater of treble damages or \$50,000. Section 2924.12(b).

1 Because under the Complaint as plead, Plaintiff is entitled to some remedy, the Court  
 2 denies Defendants motion to dismiss Plaintiff's statutory claims on the basis of lack of statutory  
 3 remedies.<sup>7</sup>

## 4 2. Common Law Claim

5 Defendants also contend Plaintiff's action amounts to an action in equity for wrongful  
 6 foreclosure, and move to dismiss the Complaint for failure to tender or offer to tender a sum  
 7 sufficient to cure default. Mot. at 3–5. Defendants argue that absent full tender or an offer to  
 8 tender, Plaintiff is barred from seeking injunctive relief. *Id.* The Court declines to dismiss the  
 9 Complaint for failure to tender because the tender rule may be excused where it would be  
 10 inequitable to require tender, and the Court finds that the equities cannot be resolved on the  
 11 pleadings alone.

12 In California, a foreclosure sale may be set aside by bringing a common law action in  
 13 equity for wrongful foreclosure, “a proper claim for [which] is comprised of the following  
 14 elements: (1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of  
 15 real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the  
 16 sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases  
 17 where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of  
 18 the secured indebtedness or was excused from tendering.” *Rockridge Trust*, 2014 WL 688124, at  
 19 \*18; *Lona*, 202 Cal. App. 4th at 103 (“After a nonjudicial foreclosure sale has been completed, the  
 20 traditional method by which the sale is challenged is a suit in equity to set aside the trustee's  
 21 sale.”).

22  
 23  
 24 <sup>7</sup> Defendants contend that because Plaintiff failed to cite to the first subsection in Section 2924.12,  
 25 which provides injunctive relief for violations of Section 2923.6, he cannot seek injunctive relief  
 26 under that subsection. Reply at 4. Defendants are correct that Plaintiff did not cite to Section  
 27 2924.12(a), but fail to note Plaintiff prays for injunctive relief “pursuant to statute.” Complaint at 6.  
 28 On a motion to dismiss, the Court views the pleadings in the light most favorable to the nonmoving  
 party—the Plaintiff. *See Manzarek*, 519 F.3d at 1031. Accordingly, the Court concludes that  
 Plaintiff's invocation of the “statute” in his prayer for injunctive relief sufficiently encompasses  
 Section 2924.12(a).

1           The tender rule thus provides that an equitable wrongful foreclosure “action to set aside a  
2 trustee’s sale for irregularities in sale notice or procedure should be accompanied by an offer to pay  
3 the full amount of the debt for which the property was security.” *Arnolds Mgmt. Corp. v. Eischen*,  
4 158 Cal. App. 3d 575, 578, 205 Cal. Rptr. 15 (1984); *see also Karlsen v. Am. Sav. & Loan Assn.*,  
5 15 Cal. App. 3d 112, 117, 92 Cal. Rptr. 851 (1971) (“valid and viable tender of payment of the  
6 indebtedness owing is essential to an action to cancel a voidable sale under a deed of trust”). “This  
7 rule is rooted in equity and premised on the notion that it would be futile to set aside a foreclosure  
8 sale on the technical ground that notice was improper, if the party making the challenge did not  
9 first make full tender and thereby establish his ability to purchase the property.” *Alvarez v. Wells*  
10 *Fargo Bank, N.A.*, No. 12-9661, 2013 WL 425097, at \*4 (C.D. Cal. Jan. 31, 2013) (internal  
11 quotation marks and citation omitted).

12           But the tender rule is not absolute, and is not without exceptions. *See Lona*, 202 Cal. App.  
13 4th at 112 (listing four well-established exceptions to the tender rule, including excusing tender  
14 where it would be inequitable to require it). California courts have long recognized that although  
15 “[t]he rules which govern tenders are strict and are strictly applied,” *Nguyen v. Calhoun*, 105 Cal.  
16 App. 4th 428, 439 (2003), “viewing the question generally, it is certainly not the law that an offer  
17 to pay the debt must be made, where it would be inequitable to exact such offer of the party  
18 complaining of the sale.” *Humboldt Sav. Bank v. McCleverty*, 161 Cal. 285, 291 (1911); *see also*  
19 *Onofrio v. Rice*, 55 Cal. App. 4th 413, 424, (Cal. Ct. App. 1997) (“Tender may not be required  
20 where it would be inequitable to do so.”).

21           Because tender is an equitable concept, courts have held that “[w]hether Plaintiffs are  
22 required to tender is a matter of discretion left up to the Court,” and that “failure to allege tender is  
23 not decisive at [the pleading] stage.” *Storm v. Am.’s Servicing Co.*, No. 0911206, 2009 WL  
24 3756629, at \*6 (S.D. Cal. Nov. 6, 2009); *accord Nguyen v. JP Morgan Chase Bank N.A.*, No. 12-  
25 4183, 2013 WL 2146606, at \*6 (N.D. Cal. May 15, 2013) (exercising discretion to decline to apply  
26 tender at pleadings state). *But see Wilson v. Household Fin. Corp.*, No. 12-1413, 2013 WL  
27 1310589, at \*8 (E.D. Cal. Mar. 28, 2013) (holding that tender is not a matter of discretion, and that  
28

1 “when a foreclosure has occurred, a party must tender the amount of the indebtedness to challenge  
2 a voidable sale for irregularities in the sale procedure”). In *Nguyen v. JP Morgan Chase*, noting  
3 that “[t]he tender element of wrongful foreclosure is an equitable concept,” Judge Grewal  
4 “decline[d] to apply the tender rule at [the] pleading stage without an ‘opportunity to undertake a  
5 more informed analysis of the equities.’” 2013 WL 2146606, at \*6 (quoting *Tamburri v. Suntrust*  
6 *Mortgage, Inc.*, No. 11-2899, 2011 WL 6294472, at \*5 (N.D. Cal. Dec. 15, 2011)).

7 Here, the Court finds that further factual development is needed to enable the Court to  
8 adequately assess the equities. The Court notes that even at this stage, there are two factors that  
9 suggest that excusing tender would be appropriate in this case. First, it remains unclear at this point  
10 in the litigation whether Plaintiff is entitled to relief under the statute, either in the form of  
11 monetary remedies under Section 2924.12(b), or injunctive relief under 2924.12(a). *See supra* Part  
12 III.D. If Defendants’ failure to record a trustee’s deed upon sale precludes Plaintiff from seeking  
13 monetary damages, the only other remedy available to Plaintiff would be injunctive relief. *See* §  
14 2924.12(a), (b). However, if, as Defendants contend, injunctive relief under 2924.12(a) is limited to  
15 *pre-sale* postponement of foreclosure proceedings, then Plaintiff’s only available remedy would be  
16 injunctive relief at common law, because the statutory injunctive relief would have no force where,  
17 as here, the sale has already occurred. In this circumstance, requiring tender for injunctive relief at  
18 common law could effectively leave Plaintiff with no remedy whatsoever for Defendants’ violation  
19 of 2923.6, which the Court likely would be inclined to view as sufficiently inequitable to excuse  
20 tender.

21 Second, the Court notes that in cases where monetary damages are unavailable due to a  
22 defendant’s failure to record a trustee’s deed upon sale, requiring full tender would render the  
23 mandatory language in Section 2923.6 meaningless, and if no trustee’s deed upon sale is ever  
24 recorded, leave homeowners with no remedy at all. Lenders could simply ignore the statute and  
25 foreclose upon homeowners who appear unable to tender the full amount of the debt for which the  
26 property was security while a loan modification application is still pending. *See* § 2923.6(c) (a  
27 servicer “*shall* not record a notice of default or notice of sale, or conduct a trustee’s sale, while the  
28

1 complete first lien loan modification application is pending”); *see also* § 2924.12(b) (“After a  
 2 trustee’s deed upon sale has been recorded [a servicer] *shall* be liable to a borrower for actual  
 3 economic damages.”) (emphasis added). The end result is that by refusing to record a deed upon  
 4 sale, lenders could effectively immunize themselves from liability under 2924.12. In such a case,  
 5 with no available statutory remedy, plaintiffs will be left with the option of pursuing an action at  
 6 common law for wrongful foreclosure. However, because Section 2923.6 and related provisions  
 7 provide rights for homeowners who are in danger of foreclosure, it likely will often be the case that  
 8 for plaintiffs bringing such actions, tender will be infeasible, if not impossible. To require tender in  
 9 such cases would leave plaintiffs with no recourse for clear statutory violations.

10 For the foregoing reasons, the Court declines to dismiss the Complaint on the basis of  
 11 failure to allege tender. If after further factual development the Court determines that Plaintiff must  
 12 tender to recover in equity, the Court has the discretion to condition any eventual rescission of the  
 13 foreclosure sale upon tender of the unpaid debt. *See* Cal. Civ. Code § 1692 (“If in an action or  
 14 proceeding a party seeks relief based upon rescission, the court may require the party to whom  
 15 such relief is granted to make any compensation to the other which justice may require and may  
 16 otherwise in its judgment adjust the equities between the parties.”). In other words, should Plaintiff  
 17 eventually prevail on his common law claim for wrongful foreclosure, “the court may make a  
 18 tender of restoration a condition of its judgment” setting aside the foreclosure sale. § 1693.

#### 19 **IV. CONCLUSION**

20 For the foregoing reasons, the Court DENIES Defendants’ motion to dismiss. The Court  
 21 finds that Section 2924.12 authorizes a private right of action to enforce violations of 2923.6, and  
 22 that the Complaint states a claim for relief under these two statutes. The Court also declines to  
 23 dismiss the Complaint for failure to tender, finding further factual development is needed to  
 24 determine the equities.

25 **IT IS SO ORDERED.**

26 Dated: April 16, 2014

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 LUCY H. KOH  
 United States District Judge