

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF  
CALIFORNIA

Sewell v. Franklin Credit Management Corporation; Bosco Credit,  
LLC; and Prestige Default Services, LLC

Sewell v. Franklin Credit Management Corporation, No. 2:24-cv-1788-TLN-SCR (E.D. Cal. Mar. 17, 2025) ·  
No. 2:24-cv-1788-TLN-SCR · Decided March 18, 2025

SUMMARY

The document contains findings and recommendations on defendants’ motion to dismiss claims arising from a mortgage loan and foreclosure process. The magistrate judge recommends dismissal without leave to amend of the fifth and sixth causes of action, dismissal with leave to amend of the first through third causes of action, dismissal of the seventh, ninth, and tenth causes of action with leave to reassert them after amendment, and denial of dismissal as to the eighth cause of action. The recommendations were issued for review by the assigned district judge under 28 U.S.C. § 636(b)(1).

CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
|-----------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | United States District Court for the Eastern District of California                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| WRITING FOR THE COURT | Sean C. Riordan                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| JURISDICTION          | United States District Court for the Eastern District of California                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| DECIDED               | March 18, 2025                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| DOCKET                | 2:24-cv-1788-TLN-SCR                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| DISPOSITION           | other                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| PROCEDURAL POSTURE    | Findings and recommendations by a magistrate judge on defendants' Rule 12(b)(6) motion to dismiss nine of plaintiff's ten causes of action in a removed mortgage-foreclosure action.                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| STANDARD OF REVIEW    | Under Federal Rule of Civil Procedure 12(b)(6), the court accepts well-pleaded factual allegations as true, draws reasonable inferences for the nonmoving party, and determines whether the complaint states a facially plausible claim for relief. A complaint may be dismissed on an affirmative defense apparent from the complaint and judicially noticeable or incorporated documents, but dismissal is improper when those materials raise disputed issues of fact. Pro se allegations are construed liberally, subject to the limitation that the plaintiff was represented by counsel when the complaint and opposition were filed. |

## TOPICS

motions to dismiss

wrongful foreclosure

mortgages

contracts

civil procedure

## PRACTICE AREAS

civil procedure

mortgages

wrongful foreclosure

contracts

consumer protection

torts

## QUESTIONS PRESENTED

1. Whether the notice of default and recorded foreclosure documents could be considered through judicial notice or incorporation by reference on the Rule 12(b)(6) motion.
2. Whether a deed of trust may serve as the contractual basis for breach-of-contract and implied-covenant claims under California law.
3. Whether plaintiff's alleged nonperformance under the deed of trust defeated his breach-of-contract, negligence, and implied-covenant claims at the pleading stage.
4. Whether plaintiff's fifth and sixth causes of action should be dismissed based on his concession that the notice of default contained the allegedly missing statutory language.
5. Whether the seventh, ninth, and tenth causes of action were derivative of claims subject to dismissal.
6. Whether the eighth California Unfair Competition Law cause of action adequately alleged an underlying violation of 12 C.F.R. § 1026.41.

## HOLDINGS

1. The court may judicially notice the existence, recordation, date, parties, and legally operative language of recorded foreclosure documents when their authenticity is not genuinely disputed, and may consider a document incorporated by reference when the complaint necessarily relies on it, refers to it, and the document is central to the claims.
2. For purposes of the pleaded claims, a deed of trust is a contract that can provide a basis for breach-of-contract and implied-covenant claims under California law.
3. The breach-of-contract, negligence, and implied-covenant claims should be dismissed because the complaint and incorporated notice of default establish plaintiff's nonperformance under the deed of trust and do not adequately allege that his nonperformance was excused.
4. The fifth and sixth causes of action should be dismissed without leave to amend because plaintiff did not oppose dismissal after defendants demonstrated that the notice of default contained the required statutory language.
5. The seventh, ninth, and tenth causes of action should be dismissed, with leave to reassert them after amendment of an underlying first, second, or third cause of action, because they were pleaded as derivative of predicate claims subject to dismissal.

6. The eighth cause of action should not be dismissed because the alleged violation of 12 C.F.R. § 1026.41 was sufficient to plead a California UCL claim.

#### KEY QUOTATIONS

*“To survive, the plaintiff’s complaint “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” (at 4)*

*“a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.” (at 8)*

*“The status of a DOT as a contract is a question of state law, and the Hatch court appears to have reiterated the law on that question by holding that a DOT is “a contract between the trustor and the beneficiary[.]” (at 9)*

#### FACTUAL BACKGROUND

Plaintiff executed a \$65,000 mortgage loan note and deed of trust secured by residential property in Elk Grove, California. The deed of trust allegedly required written notices to be sent to the borrower's property address. Plaintiff alleged that defendants recorded a notice of default on February 7, 2024, without providing the contractually required notice, proceeded toward a trustee sale, and deprived him of an opportunity to cure. The complaint also admitted that plaintiff had struggled to make required mortgage payments.

#### PROCEDURAL HISTORY

Plaintiff filed suit in Sacramento County Superior Court on June 17, 2024. Defendants removed the action to the Eastern District of California on June 25, 2024, and moved to dismiss nine of ten causes of action. After plaintiff's opposition was filed late and the resulting order to show cause was vacated, plaintiff's counsel withdrew and the matter was referred to Magistrate Judge Sean C. Riordan. The magistrate judge recommended partial dismissal, leave to amend or reassert certain claims, and denial of dismissal as to the eighth cause of action; the recommendation was submitted to the assigned district judge under 28 U.S.C. § 636(b)(1).

#### DISPOSITION

other

#### REMAND INSTRUCTIONS

The magistrate judge recommended that the assigned district judge grant dismissal without leave to amend as to the fifth and sixth causes of action; grant dismissal with leave to amend as to the first, second, and third causes of action; deny dismissal as to the eighth cause of action; and grant dismissal as to the seventh, ninth, and tenth causes of action with leave to reassert them after amendment of the first, second, or third causes of action. Plaintiff may file objections within fourteen days under 28 U.S.C. § 636(b)(1) and Local Rule 304(d).

#### CASES CITED

- Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009)

- Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 570 (2007)
- Boquist v. Courtney, 32 F.4th 764, 773-74 (9th Cir. 2022)
- Retail Property Trust v. United Brotherhood of Carpenters & Joiners of America, 768 F.3d 938, 945 (9th Cir. 2014)
- Weston Family Partnership LLLP v. Twitter, Inc., 29 F.4th 611, 617-18 (9th Cir. 2022)
- Haines v. Kerner, 404 U.S. 519, 520 (1972)
- McQueen v. Alabama Department of Transportation, 17-CV-0215, 2018 WL 2709319, at \*4 (M.D. Ala. June 5, 2018)
- Sams v. Yahoo! Inc., 713 F.3d 1175, 1179 (9th Cir. 2013)
- Jones v. Bock, 549 U.S. 199, 215 (2007)
- Goddard v. Google Inc., 640 F. Supp. 2d 1193, 1199 n.5 (N.D. Cal. 2009)
- ASARCO, LLC v. Union Pacific Railroad Co., 765 F.3d 999, 1004 (9th Cir. 2014)
- Scott v. Kuhlmann, 746 F.2d 1377, 1378 (9th Cir. 1984) (per curiam)
- Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000)
- In re Doe, 58 F.3d 494, 497 (9th Cir. 1995)
- Akhtar v. Mesa, 698 F.3d 1202, 1213 (9th Cir. 2012)
- Hotel Employees & Restaurant Employees Local 2 v. Vista Inn Management Co., 393 F. Supp. 2d 972, 977-78 (N.D. Cal. 2005)
- Fontenot v. Wells Fargo Bank, N.A., 198 Cal. App. 4th 256, 264-67 (Cal. Ct. App. 2011)
- Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006)
- Branch v. Tunnell, 14 F.3d 449, 453-54 (9th Cir. 1994)
- United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003)
- Sgro v. Danone Waters of North America, Inc., 532 F.3d 940, 942 n.1 (9th Cir. 2008)
- Oasis West Realty, LLC v. Goldman, 51 Cal. 4th 811, 821 (2011)
- Reichert v. General Insurance Co., 68 Cal. 2d 822, 830 (1968)
- Gruenberg v. Aetna Insurance Co., 9 Cal. 3d 566, 573 (1973)
- Comunale v. Traders & General Insurance Co., 50 Cal. 2d 654, 658 (1958)
- Egan v. Mutual of Omaha Insurance Co., 24 Cal. 3d 809, 818 (1979)
- Guz v. Bechtel National, Inc., 24 Cal. 4th 317, 327 (2000)
- Faria v. PNC Bank National Association, No. 2:23-cv-02023-DAD-CSK, 2024 WL 1623419, at \*6 (E.D. Cal. Apr. 15, 2024)
- Carter v. Sables, LLC, No. 3:17-cv-00594-MMD-WGC, 2017 WL 6328157, at \*4 (D. Nev. Dec. 11, 2017)
- Hatch v. Collins, 225 Cal. App. 3d 1104, 1111 (Cal. Ct. App. 1990)
- Garfinkle v. Superior Court, 21 Cal. 3d 268, 277 (1978)
- Susilo v. Wells Fargo Bank, N.A., 796 F. Supp. 2d 1177, 1189 (C.D. Cal. 2011)
- Olmstead v. ReconTrust Co., 852 F. Supp. 2d 1318, 1322 (D. Or. 2012)
- Wilson v. Hewlett-Packard Co., 668 F.3d 1136, 1140 (9th Cir. 2012)

- Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 180 (1999)
- National Funding, Inc. v. Commercial Credit Counseling Services, 817 F. App'x 380, 383-84 (9th Cir. 2020)
- Martinez v. Yist, 951 F.2d 1153 (9th Cir. 1991)

## OPINION

(PS) Sewell v. Franklin Credit Mgt. Corp.

PER CURIAM.

1 2 3 4 5 6 7

8 UNITED STATES DISTRICT COURT

9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10

11 MARVIN A. SEWELL, No. 2:24-cv-1788-TLN-SCR

12 Plaintiff,

13 v. FINDINGS AND RECOMMENDATIONS

14 FRANKLIN CREDIT MANAGEMENT

CORPORATION; BOSCO CREDIT, LLC;

15 and PRESTIGE DEFAULT SERVICES,

LLC,

16 Defendants. 17

18 19 Plaintiff Marvin Sewell is proceeding pro se in this action, which was referred to the 20 undersigned in accordance with Local Rule 302(c)(21) and 28 U.S.C. § 636(b)(1). This action 21 concerns a dispute about Plaintiff's mortgage and a foreclosure process. Defendants' motion to 22 dismiss nine of Plaintiff's ten claims is pending before the court (ECF No. 6).<sup>1</sup> For the reasons 23 stated below, the court recommends the motion to dismiss be granted without leave to amend as 24 to the fifth and sixth causes of action; granted with leave to amend the first, second, and third 25 causes of action; granted as to the seventh, ninth, and tenth causes of action with leave to reassert 26 them after such amendment; and denied as to the eighth cause of action. 27 1 Defendants do not move to dismiss the fourth case of action. ECF No. 6 at 2. Accordingly, 28

## 1 BACKGROUND AND PROCEDURAL HISTORY

2 Plaintiff commenced this action on June 17, 2024, in the Sacramento County Superior 3 Court. ECF No. 1 at 5. Defendants removed the case to this Court on June 25, 2024. ECF No. 1. 4 The Complaint alleges that on October 23, 2006, Plaintiff executed a \$65,000 Mortgage 5 Loan Note and Deed of Trust ("Loan") secured by his property at 8217 Oakbriar Circle, Elk 6 Grove, CA 95758 ("Property"). ECF No. 1 at 7 (Compl. at ¶ 11). The original creditor assigned 7 its interest in this Loan to Defendant Bosco Credit, LLC. Compl. at ¶ 12. 8 The Deed of Trust ("DOT") securing the Loan required written notice to the borrower's 9 address. Compl. at ¶ 14. Notwithstanding, the Complaint alleges that when Defendants issued a 10 Notice of Default ("NOD") on February 7, 2024, they failed to send it to Plaintiff as the DOT 11 required. Compl. at

¶¶ 15-16. Instead of giving him the chance to cure his default, Defendants 12 foreclosed on the Property and chose to pursue a Trustee Sale in violation of the DOT. Compl. at 13 ¶¶ 17-18. The Complaint argues such foreclosure is therefore void. Compl. at ¶ 18. 14 Based on these facts, the Complaint alleges the following causes of action: (1) breach of 15 contract, (2) negligence, (3) breach of the covenant of good faith and fair dealing, (4) violation of 16 12 C.F.R. § 1026.41, (5) violation of California Civil Code § 2924(a)(1), (6) violation of 17 California Civil Code § 2924c(b)(1), (7) wrongful foreclosure, (8) violation of California 18 Business & Professions Code § 17200 et seq., (9) cancellation of instruments, and (10) 19 declaratory relief. ECF No. 1 at 9-24. The Complaint seeks damages in excess of \$25,000, an 20 order cancelling the NOD and Notice of Trustee Sale and striking both from the public record, a 21 declaration of the rights and duties of the parties with respect to the Property, an injunction 22 preventing the foreclosure of the Property, and attorney's fees and costs. ECF No. 1 at 25. 23 Defendants filed the instant motion to dismiss on July 2, 2024. ECF No. 6. District Judge 24 Troy Nunley issued an order for Plaintiff to show cause as to why he failed to timely oppose the 25 motion. ECF No. 7. Plaintiff filed an opposition to the motion to dismiss on August 1, 2024, and 26 a declaration from Plaintiff's then-counsel explaining that he had miscalendared the deadline for 27 such an opposition. ECF Nos. 9-10. Judge Nunley vacated the order to show cause on August 6, 28 2024. ECF No. 11. Defendants replied to the opposition on August 8, 2024. ECF No. 13. On

1 August 23, 2024, pursuant to a motion by Plaintiff's then-counsel, Judge Nunley approved 2 counsel's withdrawal and referred the case, including this motion, to the undersigned. ECF Nos. 3 14, 16.

#### 4 LEGAL STANDARD

5 A defendant may move to dismiss a claim under Rule 12(b)(6) if the allegation "fail[s] to 6 state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive, the 7 plaintiff's complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to 8 relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell 9 Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). 10 A claim is facially plausible "when the plaintiff pleads factual content that allows the 11 court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 12 *Iqbal*, 556 U.S. at 678. This standard is a "context-specific task that requires the reviewing court 13 to draw on its judicial experience and common sense," *Iqbal*, 556 U.S. at 679, and to "draw all 14 reasonable inferences in favor of the nonmoving party." *Boquist v. Courtney*, 32 F.4th 764, 773 15 (9th Cir. 2022) (quoting *Retail Prop. Tr. v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 16 938, 945 (9th Cir. 2014) (internal quotation marks omitted). Stating a claim "requires more than 17 labels and conclusions, and a formulaic recitation of the elements." *Twombly*, 550 U.S. at 555. 18 On a Rule 12(b)(6) motion, the court may consider all materials incorporated into the 19 complaint by reference, as well as evidence properly subject to judicial notice. *Weston Fam. 20 P'ship LLLP v. Twitter, Inc.*, 29 F.4th 611, 617-18 (9th Cir. 2022). "Ultimately, dismissal is 21 proper under Rule 12(b)(6) if it appears beyond

doubt that the non-movant can prove no set of 22 facts to support its claims.” Boquist, 32 F.4th at 773–74 (internal citation and quotation marks 23 omitted) (cleaned up). 24 A pro se plaintiff’s factual allegations are interpreted liberally on a 12(b)(6) motion, and 25 the court must apply a less stringent pleading standard than if the plaintiff was represented by 26 counsel. Haines v. Kerner, 404 U.S. 519, 520 (1972). This rule of lenity does not apply, 27 however, if a plaintiff is currently pro se but was represented by counsel both when filing the 28 complaint and when responding to the motion to dismiss. McQueen v. Ala. Dep’t of Trans., 17- 1 CV-0215, 2018 WL 2709319, at \*4 (M.D. Ala. June 5, 2018). 2 The court may dismiss for failure to state a claim when the allegations of the complaint 3 and judicially noticeable materials establish an affirmative defense or other bar to recovery, such 4 as the expiration of the statute of limitations. See Sams v. Yahoo! Inc., 713 F.3d 1175, 1179 (9th

5 Cir. 2013) (quoting Jones v. Bock, 549 U.S. 199, 215 (2007)); see also Goddard v. Google Inc., 6 640 F. Supp. 2d 1193, 1199, n. 5 (N.D. Cal. 2009) (noting that “affirmative defenses routinely 7 serve as a basis for granting Rule 12(b)(6) motions where the defense is apparent from the face of 8 the [c]omplaint”). However, dismissal under Rule 12(b)(6) is improper if the allegations of the 9 complaint and judicially noticeable materials concerning the defense raise disputed issues of fact. 10 ASARCO, LLC v. Union Pacific R. Co., 765 F.3d 999, 1004 (9th Cir. 2014) (citing Scott v. 11 Kuhlmann, 746 F.2d 1377, 1378 (9th Cir. 1984) (per curiam)). 12 “[A] district court should grant leave to amend even if no request to amend the pleading 13 was made, unless it determines that the pleading could not possibly be cured by the allegation of 14 other facts.” Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000) (quoting In re Doe, 58 F.3d 15 494, 497 (9th Cir. 1995)). A pro se litigant is entitled to notice of the deficiencies in the 16 complaint and an opportunity to amend, unless the complaint’s deficiencies could not be cured by 17 amendment. See Akhtar v. Mesa, 698 F.3d 1202, 1213 (9th Cir. 2012).

## 18 ANALYSIS

19 I. Judicial Notice, Incorporation by Reference, and the Fact of Plaintiff’s Default 20 Defendants request judicial notice of (1) the NOD, recorded with the Sacramento County 21 Clerk on February 7, 2024 (ECF No. 6-1 at 4-8) and (2) the Notice of Trustee Sale, recorded May 22 24, 2024 (ECF No. 6-1 at 10-11). 23 A court may judicially notice facts when they are “not subject to reasonable dispute 24 because,” inter alia, they “can be accurately and readily determined from sources whose accuracy 25 cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2). This includes property documents 26 that are recorded with the county clerk. See Hotel Emples. & Rest. Emples. Local 2 v. Vista Inn 27 Mgmt. Co., 393 F. Supp. 2d 972, 977-78 (N.D. Cal. 2005). 28 Plaintiff does not object to judicial notice of the Notice of Trustee Sale. As to the NOD, 1 he argues that this court can only take judicial notice that an NOD exists and was recorded, not of 2 its contents. ECF No. 9 at 7 (citing Fontenot v. Wells Fargo Bank, N. A., 198 Cal.App.4th 256, 3 264-67 (Cal. Ct. App. 2011)). The court in Fontenot held that judicial notice can encompass “a 4 document’s recordation, the date the document was recorded and executed, the parties to the 5

transaction reflected in a recorded document, and the document's legally operative language, 6 assuming there is no genuine dispute regarding the document's authenticity." 198 Cal.App.4th at 7 265. If the legal effect of the document is clear on its face based on these facts, the court can also 8 judicially notice such effect. Id. The court distinguished this from taking judicial notice of any 9 statement of facts in said document or accuracy thereof. Id. at 267. 10 Similarly, here Plaintiff contends that the Court should not rely on the NOD to conclude 11 that Plaintiff defaulted on the DOT. ECF No. 9 at 7. The Complaint undercuts this argument, 12 however, by admitting that Plaintiff struggled to make the mortgage payments required 13 thereunder. Compl. at ¶ 13. Moreover, the truth of the matters contained in the NOD will be 14 assumed under the incorporation by reference doctrine. 15 If a complaint "necessarily relies" on a particular document, the court may consider its 16 contents when ruling on a motion to dismiss if "(1) the complaint refers to the document; (2) the 17 document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy 18 attached to the 12(b)(6) motion." *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) (citing 19 *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir.1994)). The document is then treated as part of 20 the complaint, and its contents generally assumed to be true for purposes of the motion to dismiss. 21 *Marder*, 450 F.3d 445 (quoting *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003)). This 22 presumption does not apply, however, when assuming the truth of the incorporated documents 23 "only serve[s] to dispute facts stated in a well-pleaded complaint[.]" *Sgro v. Danone Waters of N. 24 Am., Inc.*, 532 F.3d 940, 942, n.1 (9th Cir. 2008). 25 Plaintiff attaches a copy of the NOD to his Complaint. ECF No. 1 at 43-47. He then 26 admits that the copy attached to the motion to dismiss is more accurate, insofar as he agrees to 27 dismiss two claims based on language not reflected in the Complaint's copy. ECF Nos. 6 at 6, 6- 28 1 at 3-8, 9 at 8. As with judicial notice, to the extent that Plaintiff contests whether the NOD 1 accurately reflects default, his own Complaint admits that he struggled to make payments on 2 time. Compl. at ¶ 13. 3 Judicial notice of the Notice of Trustee sale is granted. Whether through judicial notice or 4 incorporation into the Complaint, the statements in the NOD are treated as true. 5 II. Conceded Causes of Action 6 The fifth and sixth causes of action cite sections of the California Civil Code that require 7 any recorded NOD to include specific information or statements. See Compl. ¶¶ 65, 76; Cal. Civ. 8 Code §§ 2924(a)(1), 2924c(b)(1). Based on the copy of the NOD attached to the Complaint, 9 Plaintiff argued that the NOD lacked this information. ECF No. 1 at 16, 19, 44-47. Based on the 10 copy of the NOD attached to Defendants' motion, Defendants argue that the NOD did in fact 11 include the require language. ECF Nos. 6 at 6, 6-1 at 4-5. The court need not discuss this in 12 detail because Plaintiff does not oppose the motion as to these causes of action. ECF No. 9 at 8. 13 The court therefore recommends that the motion to dismiss the fifth and sixth causes of action be 14 GRANTED without leave to amend. 15 III. First, Second, and Third Causes of Action 16 Plaintiff's breach of contract, negligence, and implied covenant of good faith and fair 17 dealing claims are closely related and therefore considered together. The Complaint first alleges 18 breach of contract based

on Paragraph 8 of the DOT, which required the lender to send any 19 relevant notice to Plaintiff by first-class mail or actual delivery to the appropriate address, which 20 is the Property's address by default. Compl. at ¶¶ 25-27. The Complaint argues that because 21 Defendants failed to provide Plaintiff such notice of the NOD, any trustee sale thereunder is void. 22 Id. at ¶¶ 28-29. The Complaint then alleges negligence based on the same failure to comply with 23 Paragraph 8 of the DOT, depriving Plaintiff of the chance to cure any default thereunder as a 24 result. Id. at ¶¶ 35-43. Finally, the Complaint alleges that pursuing a trustee's sale without 25 proper notice, when the amount of default at issue is less than a third of the Property's value, 26 violates the implied covenant of good faith and fair dealing that attaches to all contracts. Id. at ¶¶ 27 46-50. 28

1 The elements of a claim for breach of contract are "(1) the existence of the contract, (2) 2 plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the 3 resulting damages to the plaintiff." *Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821 (Cal. 4 2011) (citing *Reichert v. General Ins. Co.*, 68 Cal.2d 822, 830 (Cal. 1968)). Aside from its 5 express terms, every contract includes an implied covenant of good faith and fair dealing, wherein 6 the parties agree not to "do anything which will injure the right of the other to receive the benefits 7 of the agreement." *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 573 (Cal. 1973) (quoting 8 *Comunale v. Traders & General Ins. Co.* 50 Cal.2d 654, 658 (Cal. 1958)). The purpose of the 9 contract will dictate the "precise nature and extent of the duty imposed by" the implied covenant. 10 *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal. 3d 809, 818 (Cal. 1979). Critically, however, while 11 the implied covenant requires fairness in the application of contract terms, it cannot alter those 12 terms to prohibit something that is normally allowed. *Guz v. Bechtel National, Inc.*, 24 Cal. 4th 13 317, 327 (Cal. 2000). A claim for breach of the implied covenant also fails if based on the same 14 allegations as a direct claim for breach of contract. Id. 15 "In order to prove facts sufficient to support a finding of negligence, a plaintiff must show 16 that the defendant had a duty to use due care, that he breached that duty, and that the breach was 17 the proximate or legal cause of the resulting injury." *Hayes v. Cnty. of San Diego*, 57 Cal. 4th 18 622, 629 (Cal. 2013) (alterations omitted). 19

A. The DOT as a Contract 20 As to the first and third causes of action, Defendants argue that a DOT is not a contract 21 under which Plaintiff can sue for either breach thereof or violation of any covenant of good faith 22 and fair dealing. ECF No. 6 at 5 (citing *Faria v. PNC Bank Nat'l Ass'n*, No. 2:23-cv-02023- 23 DAD-CSK, 2024 WL 1623419, at \*6 (E.D. Cal. Apr. 15, 2024); *Carter v. Sables, LLC*, No. 3:17- 24 cv-00594-MMD-WGC, 2017 WL 6328157, at \*4 (D. Nev. Dec. 11, 2017)). Plaintiff argues that 25 aside from case law to the contrary, the rights and obligations under a DOT would be meaningless 26 if Defendants were correct. ECF No. 9 at 7 (citing *Hatch v. Collins*, 225 Cal.App.3d 1104, 1111 27 (Cal. App. Ct. 1990); *Susilo v. Wells Fargo Bank, N.A.*, 796 F. Supp. 2d 1177, 1189 (C.D. Cal. 28 2011); *Olmstead v. ReconTrust Co.*, 852 F.Supp.2d 1318, 1322 (D. Or. 2012)). 1 While there is split authority on the question, the undersigned concludes that a DOT is a 2 contract. The status of a DOT as a contract is a question of state law, and the Hatch court appears 3 to have reiterated the

law on that question by holding that a DOT is “a contract between 4 the trustor and the beneficiary[.]” 225 Cal.App.3d at 1111 (emphasis original) (citing 5 *Garfinkle v. Superior Court*, 21 Cal.3d 268, 277 (Cal. 1978)). Based on this holding, a judge in 6 the Central District held in *Susilo* that a beneficiary’s refusal to disclose the reinstatement amount 7 for a deed of trust may constitute a breach thereof. 796 F. Supp. 2d at 1189 (citing *Hatch*, 225 8 Cal.App.3d at 1111). 9 Other courts have disagreed. A judge in *Carter* held that a DOT “is not a contract between 10 a borrower and lender[.]” but a “document conveying an interest in real property as security for 11 performance of an obligation under a contract.” 2017 WL 6328157, at \*4 (citing Restatement 12 (Third) of Property (Mortgages) § 1.1 (Am. Law Inst. 1997)). It therefore dismissed with 13 prejudice a claim for breach of contract based on the DOT in that case. *Id.* A judge of this 14 District quoted *Carter* when finding that a complaint that quotes portions of a DOT has not pled 15 sufficient facts to support a claim for breach of contract. *Faria*, 2024 WL 1623419, at \*6. 16 However, neither case cites *Hatch* or explains why its conclusion about the status of DOT’s 17 should not be followed. 18 In this case, the DOT provides sufficient basis to bring claims for breach of contract and 19 violation of the implied covenant of good faith and fair dealing. 20 B. Duties Under the DOT 21 Independent of whether the DOT is a contract, Defendants argue that the DOT did not 22 expressly require them to send Plaintiff notice of the NOD. ECF No. 6 at 5. In any case, 23 Defendants further argue, Plaintiff cannot plead performance of the DOT because his default led 24 to the recording of the NOD. *Id.* (citing ECF No. 6-1 at 4-8). 25 Plaintiff responds that Paragraph 8 of the DOT governs notice given “in connection with 26 this Security Instrument[.]” which would include the NOD. ECF No. 9 at 6 (citing ECF No. 1 at 27 30). The court agrees that the NOD qualifies as a notice given “in connection with” the DOT that 28 Plaintiff allegedly defaulted on. See ECF No. 1 at 30. Because the DOT is a contract, as 1 discussed above, it requires Defendants to serve the NOD by either first class mail or delivery to 2 the Property address. Nor do Defendants challenge whether the DOT can create a duty of care for 3 purposes of the negligence claim. 4 Plaintiff further argues that because the allegations of a Complaint are deemed true when 5 ruling on a motion to dismiss, he does not need to establish his full performance under the DOT. 6 ECF No. 9 at 6-7. The Complaint does, at minimum, allege that Plaintiff “fully performed under 7 the Note and Deed of Trust, or performance was prevented by the actions of Defendants, and was 8 therefore excused.” *Id.* at 7 (quoting Compl. at ¶ 31). However, as explained above, the contents 9 of the NOD are taken as true at this stage in the case and demonstrate his nonperformance under 10 the DOT. Defendants further note that earlier in Plaintiff’s opposition brief, he concedes that his 11 nonperformance was due to financial hardship rather than any act or omission by any Defendant. 12 ECF No. 13 at 2 (citing ECF No. 9 at 3). 13 Plaintiff oversimplifies the standard of review and how it applies to affirmative defenses. 14 It is true that a plaintiff need not allege sufficient facts to address every affirmative defense that 15 might be raised to defeats the claims a complaint raises. Dismissal is proper, however, when the 16 complaint’s own allegations plus incorporated or judicially noticed materials demonstrate that 17

recovery is barred. See *Sams*, 713 F.3d at 1179 (quoting *Jones*, 549 U.S. at 215). If the 18 allegations unequivocally demonstrate that Plaintiff did not satisfy an element of his claim, even 19 one the court might otherwise presume was met, the motion to dismiss such a claim should be 20 granted. 21 As a document incorporated into the Complaint, the NOD can serve as proof of Plaintiff's 22 nonperformance under the DOT. Plaintiff admits in the Complaint that he struggled to make 23 payments on time. Compl. at ¶ 13. Although the Complaint then alleges that Defendants did not 24 provide Plaintiff with monthly mortgage statements as the DOT required, Plaintiff does not 25 explain how this frustrated his ability to make payments or otherwise excuses his 26 nonperformance. *Id.* The subsequent allegation that Plaintiff either performed under the DOT or 27 was only prevented from doing so by Defendants' actions, by comparison, is a conclusory 28 statement the court need not assume to be true. See Compl. at ¶ 31. 1 Because of his own nonperformance, Plaintiff has failed to establish that Defendants' 2 purported breach of the DOT entitles him to recovery under either contract or tort law. The court 3 therefore recommends dismissal of the first three causes of action. 4 C. Leave to Amend 5 A pro se litigant is entitled to notice of the deficiencies in the complaint and an 6 opportunity to amend, unless the complaint's deficiencies could not be cured by amendment. See 7 *Akhtar*, 698 F.3d at 1213. 8 As discussed above, the first three causes of action should be dismissed because Plaintiff 9 has failed to show that he either performed under the DOT or was excused from doing so. 10 However, Plaintiff does allege that Defendants previously breached the DOT by not providing 11 monthly mortgage statements. See Compl. at ¶ 13. While insufficient on its own, this suggests 12 that Plaintiff may be able to amend his complaint to explain why Defendants' conduct prior to the 13 NOD excused Plaintiff's duty to make timely payments under the Loan. Leave to amend should 14 therefore be granted to allege such excuses for nonperformance. 15 IV. Derivative Causes of Action 16 When a claim is solely derivative of another claim, dismissal of the predicate claim merits 17 dismissal of the derivative claim. California Business and Professions Code §§ 17200 et seq., or 18 the Unfair Competition Law ("UCL"), "borrows violations of other laws and treats them as ... 19 independently actionable." *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1140 (9th Cir. 2012) 20 (quoting *Cel-Tech Commc'ns, Inc. v. LA. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (Cal. 1999)). As 21 an example of how this works, the complaint in *Nat'l Funding, Inc. v. Commercial Credit* 22 *Counseling Services* alleged both a standalone claim for intentional interference with contractual 23 relations and a UCL claim based on the same intentional interference. 817 Fed. Appx. 380, 383 24 (9th Cir. 2020). Because the claim for intentional interference with contractual relations was 25 dismissed for failure to plead sufficient facts, the UCL claim was dismissed as derivative of the 26 dismissed claim. *Id.* at 383-84. 27 Defendants argue that the seventh, ninth, and tenth causes of action should be dismissed 28 solely because they are derivative of the first, second, third, fifth, and sixth causes of action. ECF

1 No. 6 at 6. The court agrees, but notes that leave to amend the first three causes of action should 2 be granted. See *supra*. Dismissal of only some of the predicate claims is insufficient to 3

demonstrate that the derivative claims should be dismissed. Accordingly, Plaintiff should be 4 allowed to reassert these causes of action upon amendment of the first, second, or third cause of 5 action. 6 Defendant then argues that the eighth cause of action is also derivative of the fifth and 7 sixth causes of action, which the parties have agreed to dismiss. See supra; ECF No. 6 at 6; ECF 8 No. 9 at 8. Plaintiff responds that this cause of action is derivative of the first three causes of 9 action. ECF No. 9 at 8. 10 The eighth cause of action is a UCL claim based on Defendants' alleged violations of 12 11 C.F.R. § 1026.41 and California Civil Code §§ 2924(a)(1) and 2924c(b)(1). Compl. at ¶¶ 91-93. 12 The cited violations mirror the allegations of the fourth, fifth, and sixth causes of action. ECF

13 No. 1 at 14, 16-17. Although the parties agree to the dismissal of the fifth and sixth causes of 14 action, Defendants do not even seek dismissal of the fourth cause of action. ECF No. 6 at 2. The 15 alleged violation of 12 C.F.R. § 1026.41 is sufficient to plead a claim under the UCL. 16 The motion to dismiss should be denied as to the eighth cause of action, but granted as to 17 the seventh, ninth, and tenth, with leave to reassert these claims as appropriate upon amendment 18 of the first, second, or third cause of action in accordance with the court's order.

#### 19 CONCLUSION

20 Accordingly, IT IS HEREBY RECOMMENDED THAT: 21 1. Defendant's Motion to Dismiss (ECF No. 6) be 22 a. GRANTED as to the fifth and sixth causes of action WITHOUT LEAVE TO 23 AMEND; 24 b. GRANTED as to the first, second, and third causes of action WITH LEAVE 25 TO AMEND; 26 c. DENIED as to the eighth cause of action; and 27 d. GRANTED as to the seventh, ninth, and tenth causes of action, but WITH 28 LEAVE TO REASSERT these claims upon amendment of the first, second, or 1 third cause of action in accordance with the court's order. 2 These findings and recommendations are submitted to the United States District Judge 3 || assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14) 4 || days after being served with these findings and recommendations, Plaintiff may file written 5 || objections with the court. Such document should be captioned "Objections to Magistrate Judge's 6 || Findings and Recommendations." Local Rule 304(d). Plaintiff advised that failure to file 7 || objections within the specified time may waive the right to appeal the District Court's order. 8 | Martinez v. Yist, 951 F.2d 1153 (9th Cir. 1991). 9 SO ORDERED. 10 | DATED: March 17, 2025 SEAN C. RIORDAN

13 UNITED STATES MAGISTRATE JUDGE

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