February 2014 Newsletter

In this issue—

RESPA's "Continuity of Contact" Requirements

Recent case summaries (including *Nativi*, *Robinson*, *Quintero*, *Dick*, *Copeland*, and *Lewis*), and IRS update

Announcement—

The HBOR Collaborative is hosting two upcoming live trainings. Sign-up information is at the end of this newsletter and on our website.

FRESNO: February 25. Registration Closes February 18!

INLAND EMPIRE: March 3-4. Registration closes February 24!

New RESPA "Continuity of Contact" Requirements for Borrowers in Default[1]

Regulation X contains three sections that became effective January 10, 2014 that address how a servicer should attempt to assist a borrower in default. In addition to the early intervention notification requirements in § 1024.39,[2] and the loss mitigation procedures in § 1024.41,[3] § 1024.40 is intended to maintain, for a borrower who seeks assistance after falling into default, a "continuity of contact" with their servicer.[4] The requirement is similar to the "single point of contact" that is a feature of many government sponsored loan modification programs. In general, it is intended to avoid the frustration many borrowers face when they are forced to repeatedly contact a servicer and speak with personnel who are unfamiliar with their situation,

[1] This article is the second in a two-part series authored by John Rao for the National Consumer Law Center's *eReports* service. Printed here with permission of the author and NCLC. *Copyright 2014 National Consumer Law Center, Inc. All rights reserved.*
[2] *See* NCLC *eReports*, Jan. 2014, No. 5; NCLC *Foreclosures*, § 9.2.6 (4th ed. and 2013 Supp.).
[3] *See* NCLC *Foreclosures*, § 9.2.8 (4th ed. and 2013 Supp.).
[4] Reg. X, 12 C.F.R. § 1024.40 (effective Jan. 10, 2014).

This project was made possible by a grant from the Office of the Attorney General of California, from the National Mortgage Fraud Settlement, to assist California consumers.

requiring borrowers to have the same conversations over and over again.

Although the requirement had been generally referred to before the CFPB rule as a "single point of contact," the practice of servicers had not been to assign a single person to assist the borrower. The CFPB regulation is consistent with this practice by providing that a servicer is given discretion to determine whether to assign a single person or a team of personnel to respond to a delinquent borrower.[5]

Duty to Assign Personnel to Borrower

The regulation requires that a servicer maintain policies and procedures that are reasonably designed to achieve the following:

- Assign personnel to a delinquent borrower by the time the servicer provides the borrower with the early intervention notice required by § 1024.39(b), but in any event, not later than the forty-fifth day of the borrower's delinquency;

- Make available to a delinquent borrower, via telephone, the assigned personnel to respond to the borrower's inquiries, and as applicable, assist the borrower with available loss mitigation options until the borrower has made, without incurring a late charge, two consecutive mortgage payments under a permanent loss mitigation agreement;

- If a borrower contacts the assigned personnel and does not immediately receive a live response from such personnel, ensure that the servicer can provide a live response in a timely manner.[6]

The servicer is also required to maintain policies and procedures reasonably designed to ensure that the servicer personnel assigned to a delinquent borrower provide the borrower with accurate information about available loss mitigation options.[7] This includes actions the

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[5] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 40(a)–2 (effective Jan. 10, 2014).
[6] Reg. X, 12 C.F.R. § 1024.40(a) (effective Jan. 10, 2014).
[7] Reg. X, 12 C.F.R. § 1024.40(b)(1)(i) (effective Jan. 10, 2014).

borrower must take to be evaluated for these loss mitigation options, to submit a complete loss mitigation application,[8] and, if applicable, to appeal[9] the servicer's denial of the borrower's loss mitigation application.[10] The assigned personnel are also required to provide the borrower with accurate information about the status of the borrower's loss mitigation application, the circumstances under which the servicer may make a referral to foreclosure, and any applicable loss mitigation deadlines established by an owner or assignee of the borrower's mortgage loan or under section 1024.41.[11]

Assistance in Completing the Loss Mitigation Application

The continuity of contact regulation also requires that the personnel assigned to the borrower obtain the information needed to properly evaluate the borrower for loss mitigation options. The assigned personnel are required to retrieve, in a timely manner, a complete record of the borrower's payment history, and all written information the borrower has provided to the servicer, and prior servicers if applicable, in connection with a loss mitigation application.[12] This information is to be provided by the assigned personnel to the other servicer personnel who are required to evaluate a borrower for loss mitigation options.[13] The assigned personnel are also required to provide a delinquent borrower with information about the procedures for submitting a notice of error under § 1024.35 or an information request under § 1024.36.[14]

For purposes of responding to a borrower's inquiries and assisting a borrower with loss mitigation options, the term "borrower" includes a person authorized by the borrower to act on the borrower's behalf, such

[8] *See* NCLC *Foreclosures*, § 9.2.8.2.2 (4th ed. and 2013 Supp.) (discussing loss mitigation applications).
[9] *See* NCLC *Foreclosures*, § 9.2.8.5 (4th ed. and 2013 Supp.) (discussing appeal rights).
[10] Reg. X, 12 C.F.R. § 1024.40(b)(1)(ii) (effective Jan. 10, 2014).
[11] Reg. X, 12 C.F.R. § 1024.40(b)(1)(iii), (iv), and (v) (effective Jan. 10, 2014).
[12] Reg. X, 12 C.F.R. § 1024.40(b)(2)(i) and (ii) (effective Jan. 10, 2014).
[13] Reg. X, 12 C.F.R. § 1024.40(b)(3) (effective Jan. 10, 2014).
[14] Reg. X, 12 C.F.R. § 1024.40(b)(4) (effective Jan. 10, 2014).

as a housing counselor or the borrower's attorney.[15] A servicer may adopt reasonable procedures to determine if the person that claims to be the borrower's agent has authority to act on behalf of the borrower, such as by requiring an authorization from the borrower or other documentation.

Scope of the Rule

The continuity of contact requirements, as well as the early intervention and loss mitigation requirements, apply only to a mortgage loan that is secured by a property that is the debtor's principal residence.[16] In addition, these requirements do not apply to: 1) a servicer that qualifies as a small servicer;[17] 2) a servicer with respect to a reverse mortgage transaction;[18] and 3) a servicer with respect to a mortgage loan for which the servicer is a "qualified lender."[19]

Borrowers in Bankruptcy

The CFPB's Official Bureau Interpretation to Regulation X explains that if the continuity of contact requirement would otherwise apply to a borrower who has filed bankruptcy, a servicer may assign personnel with specialized knowledge in bankruptcy law to assist the borrower.[20] A servicer is given discretion to assign a single person or a team of personnel, and they may be "single-purpose or multi-purpose

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[15] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 40(a)–1 (effective Jan. 10, 2014).

[16] Reg. X, 12 C.F.R. § 1024.30(c)(2) (effective Jan. 10, 2014).

[17] Reg. X, 12 C.F.R. § 1024.30(b)(1). A small servicer, as defined by Regulation Z section 1026.41(e)(4), is a servicer that "services 5,000 or fewer mortgage loans, for all of which the servicer (or an affiliate) is the creditor or assignee." Reg. Z, 12 C.F.R. § 1026.41(e)(4)(ii)(A) (effective Jan. 10, 2014). The small servicer definition also includes "Housing Finance Agencies, as defined in 24 C.F.R. § 266.5," without regard to the number of mortgage loans serviced by such agencies. Reg. Z, 12 C.F.R. § 1026.41(e)(4)(ii)(B) (effective Jan. 10, 2014).

[18] Reg. X, 12 C.F.R. § 1024.30(b)(2) (effective Jan. 10, 2014). A reverse mortgage transaction is defined at 12 C.F.R. § 1026.33(a).

[19] Reg. X, 12 C.F.R. § 1024.30(b)(3) (effective Jan. 10, 2014). A "qualified lender" is defined at 12 C.F.R. § 617.7000, which covers mortgage loans made under the Farm Credit System.

[20] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 40(a)–2 (effective Jan. 10, 2014).

personnel."[21] Thus, the rule may be complied with even if a servicer transfers the borrower's file to a separate bankruptcy unit with personnel who are not part of the servicer's loss mitigation unit or to outside bankruptcy counsel.[22]

No Private Remedy for Violations

In contrast with the early intervention requirements under § 1024.39 and the loss mitigation procedures under § 1024.41, violations of the continuity of contact requirements are not enforceable by the borrower under RESPA's private remedies. Although the CFPB had initially proposed that the rule would have a private right of action, it concluded when promulgating the final rule that the continuity of contact requirements should be an "objectives-based policies and procedures requirement" and that "private liability is not compatible" with such requirements.[23] Consistent with this approach, § 1024.40 merely requires servicers to "maintain policies and procedures" that are "reasonably designed" to achieve the "objectives" or "functions" imposed on servicers by the section.[24] Asserting a failure to comply with the regulation, however, could help to bolster claims for violations of § 1024.39 and § 1024.41, or possibly could be pursued together with other servicing abuses as a state UDAP statute violation.[25]

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[21] *Id.* ("Single-purpose personnel are personnel whose primary responsibility is to respond to a delinquent borrower's inquiries and, as applicable, assist the borrower with available loss mitigation options. Multi-purpose personnel can be personnel that do not have a primary responsibility at all, or personnel for whom responding to a delinquent borrower's inquiries, and as applicable, assisting the borrower with available loss mitigation options is not the personnel's primary responsibility.").

[22] *See* Section-by-Section Analysis, § 1024.39(b), 78 Fed. Reg. 10,811 (Feb. 14, 2013).

[23] *See* Section-by-Section Analysis, § 1024.40, 78 Fed. Reg. 10,808 (Feb. 14, 2013).

[24] Reg. X, 12 C.F.R. § 1024.40(a) and (b) (effective Jan. 10, 2014).

[25] *See* NCLC *Foreclosures*, § 8.2 (4th ed. and 2013 Supp.).

Summaries of Recent Cases

Published State Cases

PTFA: Purchasers of Foreclosed Properties Must Honor Existing, Bona Fide Leases; Basis for Affirmative State-law Causes of Action

Nativi v. Deutsche Bank Nat'l Tr. Co., __ Cal. App. 4th __, 2014 WL 255587 (Jan. 23, 2014): The Protecting Tenants at Foreclosure Act requires that all tenants in foreclosed properties receive a 90-day notice to vacate before the purchaser of a property can initiate eviction proceedings. It further provides that bona fide tenants with fixed-term leases entered into before foreclosure may maintain their tenancy through the lease term. Specifically, "any immediate successor in interest in such property pursuant to the foreclosure shall *assume such interest subject to* . . . *the rights of any bona fide tenant* . . . *under any bona fide lease* entered into before the notice of foreclosure to occupy the premises until the end of the remaining term of the lease, except that a successor in interest may terminate a lease effective on the date of sale . . . to a purchaser who will occupy the unit as a primary residence" (emphasis added). Finding that the PTFA only gave tenants the right to a 90-day notice, the trial court granted summary judgment to defendant bank, which purchased the subject property at foreclosure and forcibly evicted bona fide tenants holding a fixed-term lease. The California Court of Appeal disagreed: not only are bona fide tenants holding a fixed-term lease allowed to occupy the property for the remainder of that lease, but a purchaser of foreclosed property steps into the shoes of the previous landlord and assumes ownership *subject to* any existing lease. The court found this conclusion borne out by the plain language in the PTFA, legislative history, and administrative construction of the statute. And while the PTFA does not include a private right of action, nothing in the statute prohibits tenants from using it as a basis for affirmative state-law claims as the tenants did here, asserting wrongful eviction and breach of the covenant of quiet enjoyment. Defendants were therefore not entitled to summary judgment and the judgment was reversed.

Davis-Stirling Act: Homeowners' Association (HOA) Must Accept Partial Payments on Delinquent Assessments

Huntington Cont'l Town House Ass'n, Inc. v. JM Tr., __ Cal. Rptr. 3d __, 2014 WL 173800 (Jan. 13, 2014):[26] The Davis-Stirling Act governs HOA-initiated judicial foreclosures on assessment liens. Here, the homeowners tendered a payment to their HOA, during foreclosure litigation, that more than covered their delinquent assessments but was less than the "total" amount owed, which included the assessments, late fees, interest, and attorney's fees. The HOA refused to accept this "partial payment" and the trial court allowed foreclosure. The appellate division found, however, that the plain language of the Act "allows for partial payments and delineates to what debts, and in which order, payments are to be applied." *See* CC § 1367.4(b).[27] The HOA should have accepted the payment, which would have brought homeowners current and tolled the 12-month clock that allows HOAs to proceed with foreclosures. The first appellate division panel accordingly reversed and remanded to the trial court, also ruling that homeowner's appeal of the HOA's damage award was moot. The HOA admitted it had failed to apply part of homeowner's assessment payment but, in recalculating damages, the trial court allowed the HOA to calculate interest based on the original, incorrect amount. In this second, published, version of the case, the same appellate division panel restated its first opinion as a published opinion with

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[26] The first, unpublished version of this case is summarized in our October 2013 Newsletter. *See* Huntington Cont'l Town House Ass'n, Inc. v. JM Trust, 2013 WL 5507658 (Cal. Super. Ct. App. Div. Sept. 26, 2013).

[27] Effective Jan. 1, 2014, the provisions governing HOAs (or "common interest developments)" have been re-codified at CAL. CIV. CODE §§ 4000 – 6150, but are still referred to as the Davis-Stirling Common Interest Development Act. Former CC § 1367.4 is now CC § 5655 and reads: "(a) Any payments made by the owner of a separate interest toward a debt described in [CC § 5650(a)] shall first be applied to the assessments owed, and, only after the assessments owed are paid in full shall the payments be applied to the fees and costs of collection, attorney's fees, late charges, or interest."

modifications *and* reversed and remanded (again), instructing the trial court to correct the damage calculations.

Unpublished & Trial Court Decisions[28]

Servicer's Failure to Notify Borrower of Increased Property Taxes Breached Modification Agreement

Robinson v. Bank of Am., N.A., 2014 WL 265714 (Cal. Ct. App. Jan. 24, 2014): Borrower brought breach of contract and wrongful foreclosure claims against former servicer based on its alleged breach of a permanent modification agreement. Accordingly, the court looked to the language of that agreement and its accompanying cover letter. The letter and agreement specified borrower's modified monthly payment as consisting of a "principal and interest" portion *and* an "escrow/option ins." portion. The letter also stated: "This payment is subject to change if your escrow payment changes. Escrow includes amounts to pay taxes and insurance on your home." Per the agreement, servicer used borrower's monthly payments to pay the property taxes directly. Borrower made all timely payments for the full amount specified in the agreement until servicer initiated foreclosure proceedings one year later. Servicer had declared borrower in default for not making monthly payments that covered her increasing property taxes. Servicer never *notified* borrower of any tax increase, or asked for any increased monthly payments. These allegations establish valid breach of contract and wrongful foreclosure claims and the Court of Appeal reversed the trial court's sustaining of servicer's demurrer and dismissal of borrower's case.

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[28] Cases without Westlaw citations can found at the end of the newsletter. Please refer to Cal. Rule of Ct. 8.1115 before citing unpublished decisions.

Unauthorized Practice of Law in a "Modification Mill;" Disciplinary Analysis

***In re* Huang**, 2014 WL 232686 (State Bar Ct. Review Dep't Jan. 16, 2014): California attorneys may not "aid any person or entity in the unauthorized practice of law" (UPL). Cal. Rules of Prof. Conduct 1—300(A). "Practicing law" is generally acknowledged as the "application of legal knowledge and technique." The State Bar brought this disciplinary action against an attorney who employed non-attorneys to perform client intake, give legal advice, accept fees, and otherwise walk clients through the loan modification process. In the original proceeding, the attorney stipulated to and was found to have violated Senate Bill 94 (codified at CC §§ 2944.6 & 2944.7) by failing to provide the required notice and by charging upfront fees for modification work. The hearing judge dismissed the charges of "aiding and abetting" UPL. The Review Department thought that inappropriate and found attorney's business plan determinative: non-attorney employees were instructed to only consult the attorney if a client specifically requested a meeting with the attorney. He therefore knew and intended non-attorneys to perform the vast majority of legal services. Their duties, "[c]ase analysis, financial analysis, [modification] package preparation, 'live' calls to the lender, negotiation, and follow-up," constitute the practice of law and the attorney should not have permitted these activities. "In essence, [he] created a lay negotiating service that permitted nonlawyers to practice law and elevated profit above the clients' interests." The Review Department found attorney guilty of aiding and abetting the unauthorized practice of law in all relevant client matters.

Bar discipline is determined by weighing the mitigating and aggravating factors specific to each case. Here, the hearing judge disciplined attorney with a six-month suspension for violations of SB 94 and for failing to competently perform. The Review Department accounted for its UPL determination, increasing the attorney's suspension to two years. The department found attorney's control over his situation, and his intentions, especially disturbing: "[attorney] implemented office procedures so he could run a high-volume loan modification practice with little or no personal involvement."

Majority & Dissent: Standing to Challenge Nonjudicial Foreclosure

Holmes v. HSBC Bank, 2014 WL 99018 (Cal. Ct. App. Jan. 10, 2014): "If Lender invokes the power of sale, Lender shall execute or cause Trustee to execute a written notice of the occurrence of an event of default and of Lender's election to cause the Property to be sold." Here, the borrower argued this DOT excerpt meant that only the original lender, or its successors or assigns, could initiate foreclosure. Following the now routine fact pattern, MERS was ordered by a third party to initiate foreclosure by instructing the trustee to record an NOD and foreclose. Defendants argued, and the Court of Appeal agreed, that MERS possessed the requisite authority because it was acting as beneficiary (agent) of a successor to the original lender (the third party) under the terms of the DOT. Borrower argued, conversely, that according to the above-quoted portion of the DOT, only the original lender, or its successor or assign, can pull the foreclosure trigger—even if that is to instruct MERS to instruct the trustee to foreclose. But, MERS cannot act: 1) independently, or 2) under the instruction of a third party that was *not* the original lender or the lender's successor. Further, borrower argued, because the original lender never assigned the note or DOT *to anyone*, the original lender still owned the DOT. The third party "interloper" had no authority to instruct MERS to initiate foreclosure, so the foreclosure was void. The majority disagreed, relying on precedent and other language in the DOT to affirm the trial court's sustaining of defendant's demurrer. Much of its reasoning rested on the principle that, absent irregularity in the foreclosure process, a foreclosing entity like MERS does not have to *prove* its authority to foreclose.

The dissent emphasized MERS's apparent lack of authority, noting there was no evidence of an assignment from the original lender to the third party (which instructed MERS to foreclose). But more broadly, the dissent took aim at the majority's failure to account for the ongoing mortgage crisis and the securitization practices that created it. California's nonjudicial foreclosure framework, Judge Rubin wrote, was created in, and for, a "bygone era:" "I believe we have reached a time to make clear a homeowner's right to challenge a foreclosure based on the foreclosing party's absence of authority from the beneficiary of the homeowner's deed of trust." Like the borrowers in *Glaski*, *Herrera*, *Barrionuevo*, *Sacchi*, *Ohlendorf*, and *Javaheri*, this borrower articulated specific reasons why the foreclosing entity—MERS—lacked the authority to foreclose. Namely, the original lender still owned the note and DOT and the original lender did not instruct MERS to initiate foreclosure, as required by the DOT. The dissent would have reversed the trial court's decision.

PTFA Requires a 90-Day Notice for Bona Fide, Periodic Tenants

Wedgewood Cmty. Fund II, LLC v. Sheffield, 2013 WL 6924725 (Cal. Super. Ct. App. Div. San Bernardino Cnty. Dec. 30, 2013): The Protecting Tenants at Foreclosure Act "provides limited relief to a tenant from a [CCP] § 1161a eviction following a foreclosure." Namely, a bona fide tenant with a bona fide lease (entered into before title is transferred to the new owner at the foreclosure sale) is entitled to at least a 90-day notice to vacate before the new owner can initiate unlawful detainer proceedings. Here, the new owner gave the existing bona fide tenants a 3-day notice to vacate. Because this notice was invalid under the PTFA, the subsequent unlawful detainer and default judgment were also improper. The Appellate Division accordingly reversed and remanded to the trial court to vacate and dismiss the UD action.

Attorney Fees Awarded for Injunctive Relief

Roh v. Citibank, No. SCV-253446 (Cal. Super. Ct. Sonoma Cnty Jan. 21, 2014): HBOR explicitly made attorney's fees recoverable based on obtaining injunctive relief: "A court may award a prevailing borrower reasonable attorney's fees and costs in an action brought pursuant to this section. A borrower shall be deemed to have prevailed for purposes of this subdivision if the borrower obtained injunctive relief or was awarded damages pursuant to this section." CC 2924.12(i). The statute does not distinguish between a preliminary injunction and a permanent injunction. Here, borrowers brought HBOR claims against their servicer and obtained a preliminary injunction to stop the foreclosure sale of their home. Accordingly, the court awarded appropriate attorney's fees, relying on the plain language in § 2924.12. Servicer's argument that HBOR's "safe harbor" provision immunizes it from attorney's fee liability was unavailing. While signatories to the National Mortgage Settlement (NMS) may be immune from HBOR liability, that immunity is premised on the servicer's NMS compliance "with respect to the borrower who brought [the] action." CC 2924.12(g). In granting the injunction in the first place, the court had already determined that servicer did *not* qualify for this safe harbor.

Federal Cases

Admissibility of Evidence to Lift Automatic Stay

***In re* Hudson**, __ B.R. __, 2014 WL 128965 (B.A.P. 9th Cir. Jan. 14, 2014): "Bankruptcy court decisions must be supported by admissible evidence." Here, debtor filed his bankruptcy petition minutes after the purported foreclosure sale of his home. The purchaser, allegedly unaware of the bankruptcy, commenced unlawful detainer (UD) proceedings against debtor. To continue with the UD, purchaser eventually moved to lift the automatic stay, submitting a "Sale Report" as evidence that the foreclosure sale occurred pre-petition. The Sale Report was an email prepared by a third-party which listed the time, date, price and other essential information about the sale. The purchaser also submitted a declaration by its employee, and a declaration by an employee of the trustee that conducted the foreclosure sale. Each declarant attested to the timing of the sale, relying only upon the Sale Report, not upon personal knowledge. The bankruptcy court granted the motion to lift the stay, allowing the purchaser to move forward with the UD. The BAP panel reversed. Though the declarants qualified as custodians or other qualified witnesses under the business records exception to the hearsay rule, neither declaration laid the proper foundation for admission of the Sale Report. Specifically, the declarations failed to establish that the purchaser or trustee *kept* and *relied on* the Sale Report in the regular course of business. Without proper authentication, the Sale Report did not satisfy the business records exception and the bankruptcy court abused its discretion considering it. And because this evidence was critical to granting the lift from stay, it prejudiced the debtor.

Balloon Payment as Part of Permanent Modification: Breach of Good Faith & Fair Dealing on the TPP

Reiydelle v. JP Morgan Chase Bank, N.A., 2014 WL 312348 (N.D. Cal. Jan. 28, 2014): The implied covenant of good faith and fair dealing is read into every contract and prevents one party from depriving the other of the benefits imparted by the contract. To state a claim, borrowers must "identify the specific contractual provision that was frustrated." Unambiguous contracts can be resolved on a motion to dismiss, but ambiguous contracts present questions of fact, appropriate for a jury. Here, borrower entered into and performed on a HAMP-TPP agreement. The permanent modification offered by servicer at the conclusion of the TPP included a significant balloon payment. Borrower argued this balloon payment breached the implied covenant of good faith and fair dealing, depriving him of the benefits of the loan modification by eventually forcing him into foreclosure. He pointed to conversations with specific servicer representatives wherein they assured him there would be no balloon payment and that the terms of a permanent modification would vary only slightly from the TPP. The TPP itself, however, controls whether or not borrower stated a claim. Silent on balloon payments, the TPP did specify that "any difference between the amount of the [TPP] payments and regular mortgage payments will be added to the balance of the loan along with any other past due amounts.” The court decided this wording was ambiguous in regards to a balloon payment and denied servicer’s motion to dismiss.

Post-foreclosure Lock-Out & “Trash Out:” Viable Conversion Claim

Ash v. Bank of Am., N.A., 2014 WL 301027 (E.D. Cal. Jan. 28, 2014): Conversion is the “wrongful exercise of dominion over the [personal] property of another.” Wrongful intent is not necessary and plaintiff’s abandonment of the personal property is a defense. Abandonment occurs “when a person relinquishes all title, possession, or claim to personal property.” Here, borrower’s widow became the administrator of his estate, which included the subject property. After borrower’s death and unsuccessful modification negotiations, servicer foreclosed. Ten days post-sale, and without initiating the unlawful detainer process, servicer employed a subcontractor to change the locks on the property. The following month, servicer ordered the “trashing out” of the property, which a contractor accomplished in two instances over the course of six months. All personal property in the home was disposed of or destroyed. During that six-month period, borrower’s survivors communicated with servicer in “post-foreclosure negotiations” and rescission discussions. Indeed, servicer ultimately rescinded the foreclosure sale (though the home then went back into foreclosure after plaintiffs failed to make forbearance payments). Servicer argued plaintiffs had abandoned the personal property, having left it in a house they “knew was in imminent danger of being foreclosed,” and by refusing to act for six months. The court disagreed, reasoning that the post-foreclosure negotiations could have led plaintiffs to believe that foreclosure was not final. The court denied servicer’s motion for summary judgment on the conversion claim and on plaintiffs’ negligence, invasion of privacy and UCL claims—all three of which were based on the facts and legal reasoning of the conversion claim.

"Material Change in Financial Circumstances;" SPOC Pleading Specificity

Saber v. JP Morgan Chase Bank, N.A., 2014 WL 255700 (C.D. Cal. Jan. 23, 2014): A servicer is not obligated to consider a borrower's modification application if it considered a previous application, even one submitted pre-HBOR. If a borrower can show she "documented" and "submitted" a "material change in financial circumstances," in a subsequent application, however, dual tracking protections can again trigger and protect the borrower while that subsequent application is pending. Here, borrower submitted an application in 2009 and was denied. In 2013, borrower re-submitted an application that was still pending when servicer recorded an NTS. Borrower then submitted a third, currently pending application, with updated financial information including bank and income statements. The court had previously dismissed borrower's dual tracking claim with leave to amend because, "although the precise nature of the documentation required under [CC § 2923.6] is not clear, the [borrower] must do more than submit a new loan modification with different financial information." In his amended complaint, borrower based his dual tracking claim solely on his second application—unsupported by any evidence of a material change in financial circumstances. The court dismissed the claim, this time with prejudice. Had borrower based his claim on his third application, the court seems to imply this may have resulted in a valid dual tracking claim, despite the court's previous misgivings that submitting "different financial information" to show a material change in financial circumstances is inadequate.

"Upon request from a borrower who requests a foreclosure prevention alternative . . . servicer shall promptly establish a single point of contact and provide to the borrower one or more direct means of communication with the [SPOC]." CC 2923.7(a). Borrower claimed servicer failed to assign him a SPOC after he requested information about foreclosure alternatives. Without more detail, this fails to state a claim for violation of HBOR's SPOC provision.

Misrepresentation Claims Require Detrimental Reliance; Terms of Modification Must be "Objectively Impossible" to Excuse Nonperformance; Pre-Dodd-Frank HOLA Preemption of HBOR Claims; Defining "Prejudice" in Wrongful Foreclosure Cases

Deschaine v. IndyMac Mortg. Servs., 2014 WL 281112 (E.D. Cal. Jan. 23, 2014): To state claims for both intentional and negligent misrepresentation, borrowers must allege, *inter alia*, justifiable reliance on servicer's misrepresentation. This borrower alleged servicer misrepresented that his modification application was incomplete, that borrower was ineligible for HAMP, and that no foreclosure sale was scheduled, inducing borrower to "*continue* . . . his attempts to obtain a loan modification" rather than "pursuing other options to avert foreclosure," like a short sale, bankruptcy, or borrowing funds to pay off the default (emphasis original). *Continuing* on a modification path that was initiated pre-misrepresentation cannot, by its very nature, constitute reliance. Rather, borrower must allege "facts demonstrating that he changed his position" by relying on the misrepresentation. Further, borrower would have to explain how his forgone, "hypothetical avenues" would have prevented foreclosure. He could not, so borrower's misrepresentation claims were accordingly dismissed.

To allege a breach of contract claim, a borrower must show, *inter alia*, that borrower performed under the contract, or that performance was excused. Only "objectively impossible" terms can excuse non-performance. In other words, "mere unforeseen difficulty or performance . . . ordinarily will not excuse performance." It is somewhat unclear whether this borrower based his contract claim on servicer's promise to provide a HAMP modification (which servicer breached by offering borrower a "Freddie Mac Back-up Modification"), or on the Back-up Modification itself. Either way, the court said, borrower could not allege performance "under any alleged contract," so his claim failed. Borrower claimed his non-performance under the Back-up Modification was excused because its unaffordable payments were based on "inaccurate income" and the agreement did not comply with HAMP rules. Because the terms of agreement were not "impossible for anyone to perform" under, the court determined borrower's non-performance was *not* excused.

The Home Owners' Loan Act (HOLA) and the (now defunct) Office of Thrift Supervision (OTS) governed lending and servicing practices of federal savings associations. HOLA and OTS regulations occupied the field, preempting any state law that regulated the "processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages." The Dodd-Frank Wall Street Reform Act of 2010 dissolved the OTS and transferred its authority to the Office of the Comptroller of the Currency (OCC), explicitly replacing HOLA's field preemption with conflict preemption. Dodd-Frank is not retroactive, so "claims involving [mortgages] formed before July 21, 2010 are [still] subject to [field] preemption," while claims emanating from mortgages formed after that date are subject to conflict preemption. Because the instant mortgage originated before 2010, this borrower's HBOR claims were preempted by HOLA.

Many, if not most, California courts require borrowers to allege prejudice to bring a wrongful foreclosure claim, though there is no consensus on how to define that prejudice. This court concentrated on procedural imperfections: the presumption that a foreclosure was conducted properly "may only be rebutted by substantial evidence of prejudicial procedural irregularity." "On a motion to dismiss, therefore, a [borrower] must allege 'facts showing that [he was] prejudiced by the alleged procedural defects,'" or that a "'violation of the statute[s] themselves, and not the foreclosure proceedings, caused [his] injury.'" Here, borrower's statutory claims were dismissed, but even if they were not, he still did not allege prejudice brought on by any statutory violations. Though not beneficial in this particular case, this seems to be a slightly more borrower-friendly definition of prejudice than used by other courts, like *Dick v. Am. Mortg. Servicing, Inc.* (below).

Punitive Damages: Intrusion upon Seclusion & Slander of Title

McFaul v. Bank of Am., N.A., 2014 WL 232601 (N.D. Cal. Jan. 21, 2014): Punitive damages are appropriate when a defendant has been shown guilty of "oppression, fraud, or malice," by clear and convincing evidence. There is no "per se" rule defining what type of conduct is oppressive, fraudulent, or malicious in regards to an intrusion upon seclusion claim, and determining punitive damages is usually a fact-finding inquiry appropriate for a jury. Prior to the instant matter, borrower and servicer reached a settlement agreement where servicer rescinded its loan under TILA. Servicer then mistakenly mischaracterized borrower's full payoff as a "partial payment," triggering a series of improper debt collection attempts. Borrower brought the instant intrusion upon seclusion claim, demanding punitive damages which servicer moved to preclude. The court found that repeated phone calls, numerous site-visits, reporting a false default to credit reporting agencies, and other servicer tactics may be considered oppressive or malicious, and merit punitive damages. Accordingly, the court denied servicer's motion to preclude punitive damages on borrower's intrusion upon seclusion claim. The court agreed with servicer, however, on the slander of title claim. Mistakenly recording an NOD and rescinding it upon discovery of the error is not oppressive, fraudulent, or malicious behavior worthy of punitive damages, even if the NOD was technically slanderous.

HOLA Does Not Preempt Former CC 2923.5

Quintero v. Wells Fargo Bank, N.A., 2014 WL 202755 (N.D. Cal. Jan. 17, 2014): The Home Owners' Loan Act (HOLA) and the (now defunct) Office of Thrift Supervision (OTS) governed lending and servicing practices of federal savings associations. HOLA and OTS regulations occupied the field, preempting any state law that regulated the "processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages." Many California courts found former CC § 2923.5 preempted by HOLA because the statute required servicers to communicate with borrowers before recording an NOD, apparently falling within the ambit of processing or servicing a mortgage. This court, however, found § 2923.5 a part of California's nonjudicial *foreclosure* framework, unrelated to the processing and servicing of mortgages. Further, the court found, preempting an aspect of this foreclosure framework would produce an absurd result: foreclosing entities could utilize the nonjudicial foreclosure process, but then ignore whichever statutes they chose, claiming preemption. The court therefore denied servicer's motion to dismiss borrower's § 2923.5 claim based on preemption. The court also denied servicer's motion to dismiss borrower's HBOR claims, calling for further briefing on whether HBOR is preempted in light of Dodd-Frank's imposition of conflict, rather than field, preemption standards on federal savings associations and national banks.

Res Judicata Requires a Finding of Claim Preclusion *and* a Final Judgment on the Merits

Rodriguez v. Bank of N.Y. Mellon, 2014 WL 229274 (S.D. Cal. Jan. 17, 2014): Res judicata is the overarching doctrine that prevents the same parties from litigating the same issue twice. Claim preclusion, by contrast, is the first of a two-part analysis used to determine *if* res judicata bars a particular suit. Because this borrower's first action was brought in state court, the federal court applied California's res judicata doctrine. Specifically, California courts determine whether: 1) the same parties litigated the same alleged harm in the first suit; and 2) the first suit resulted in a final judgment on the merits. (Privity between parties is a third element, not relevant here.) If the court answers both (1) and (2) affirmatively, a subsequent suit is barred by res judicata. California courts employ the "primary rights theory" to answer the first inquiry, which is where claim preclusion comes in. Under this theory, the court determines whether the causes of action asserted in the second suit "relate[ ] to the same 'primary right'" as the causes of action in the first suit." "Cause of action" here means "the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory . . . advanced." In other words, if the claims in the second suit *could* have been (but were not) asserted in the first suit, claim preclusion still exists and the first element of res judicata is fulfilled. As to the second element, California law regards judgments based on the sustaining of a general demurrer a "judgment on the merits" for res judicata purposes, "to the extent the judgment ‘adjudicates *that the facts alleged* do not establish a cause of action’” (emphasis added). If “new or additional facts are alleged [in a second suit] that cure the defects in the original pleading, it is settled that the former judgment is not a bar to the subsequent action whether or not plaintiff had an opportunity to amend his complaint.”

This borrower based her first state court action on wrongful foreclosure. That same harm formed the basis of her second, federal suit against the same defendants, though her specific claims were different. The court agreed with defendants that borrower’s claims were precluded because they *could have* been brought in her first state court action since the harm and parties were identical. However, the court disagreed that there was a final judgment on the merits: the state court had sustained the unopposed general demurrer to borrower’s claims and dismissed her case with prejudice. Not only is it unclear whether this situation gives rise to a final judgment on the merits in general, but it was also unclear from this particular trial court record “whether the state court’s order was based on a review or actual determination of the merits of [borrower’s] claims.” Because only one of the two necessary elements was fulfilled, the court did not dismiss the action based on res judicata. (It did dismiss most of borrower’s causes of action based on her failure to state a claim.)

Wrongful Foreclosure Claim Dismissed for Failure to Allege Prejudice

Dick v. Am. Mortg. Servicing, Inc., 2014 WL 172537 (E.D. Cal. Jan. 15, 2014): To state a valid wrongful foreclosure claim, a borrower must show that the problems in the foreclosure process that made it “wrongful” prejudiced borrower in some way, specifically, in their ability to pay their mortgage. *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256, 272 (2011). California courts have failed to find prejudice if a defaulting borrower cannot show that the improper foreclosure procedure (like an invalid assignment) “interfered with the borrower’s ability to pay or that the original lender would not have foreclosed under the circumstances.” If the proper party *could* have foreclosed, in other words, the borrower cannot sue the improper party who *actually* foreclosed. This court had previously dismissed borrowers' wrongful foreclosure claim, with leave to amend, because borrowers had not adequately pled prejudice. The same court now dismisses the second amended complaint on the same grounds. Borrowers attempted to allege prejudice by pleading that, had the loan *not* been improperly assigned, the "original lender would not have foreclosed upon the . . . property as it would have been more profitable to modify the . . . loan." Despite borrowers' admitted default, then, they would not have lost their home to foreclosure because the rightful (would-be) foreclosing party would have modified their loan instead. The court found this too speculative for two reasons: 1) there was no evidence that the original lender would have modified the loan, even if it were more profitable (indeed, the original lender was no longer in the business of servicing mortgages); and 2) even if borrowers *could* show that a modification would definitely have happened, they cannot show that they would have made timely payments and cured their default. Without showing that any improper assignment "adversely affected their ability to pay or to cure their default," borrowers can not allege prejudice. This claim was dismissed.

CC 2924.12: HBOR's Safe Harbor in the Context of Negligence and UCL Claims

Jent v. N. Trust Corp., 2014 WL 172542 (E.D. Cal. Jan. 15, 2014): A foreclosing entity "shall not be liable for any violation that it has corrected and remedied prior to the recordation of a trustee's deed upon sale." CC 2924.12. Here, borrower attempted to base a negligence claim on a statutory violation of HBOR's pre-NOD outreach requirement, claiming servicer never contacted them, and never attempted to make contact, before recording the NOD. Upon notice from the borrower that the NOD was recorded in error, however, servicer rescinded the NOD. Because no foreclosure has occurred, no trustee's deed upon sale has been recorded. The safe harbor provision then protects servicer from a negligence claimed based on a violation of CC 2923.55. Further, because no foreclosure has taken place, borrower cannot sue for damages, precluding a negligence claim based on a statutory violation. "To import a duty of care from this statute would allow plaintiffs to sue for damages where the legislature expressly foreclosed liability." The court dismissed borrower's negligence claim for failure to allege a duty of care.

California's UCL allows borrowers to bring claims against servicers based on unlawful, unfair or fraudulent conduct. Here, borrower attempted to base his UCL claim on violation of § 2923.55. But because servicer complied with the safe harbor provision by rescinding the NOD, the court rejected borrower's argument. The statute applies the safe harbor to "*any* violation" that is corrected pre-foreclosure, not just to unintentional violations. Servicer's corrected violation of HBOR's pre-NOD outreach requirement is not actionable with the UCL. Borrower's claims were dismissed.

Growing Split in Authority on Application of HOLA Preemption to National Banks

Kenery v. Wells Fargo Bank, N.A., 2014 WL 129262 (N.D. Cal. Jan. 14, 2014): The Home Owners' Loan Act (HOLA) and the (now defunct) Office of Thrift Supervision (OTS) governed lending and servicing practices of federal savings banks. HOLA and OTS regulations occupied the field, preempting any state law that regulated lending and servicing. Here, borrower brought state based foreclosure claims against her servicer, a national bank. Normally, national banks are regulated by the National Banking Act and Office of the Comptroller of the Currency (OCC) regulations. Under those rules, state laws are only subject to conflict preemption and stand a much better chance of surviving a preemption defense. Borrower's loan originated with a federal savings association, which then assigned the loan to Wachovia, which merged with Wells Fargo, a national bank. Rather than apply the HOLA preemption analysis to a national bank without evaluating that logic, this court acknowledged the "growing divide in the district courts' treatment of this issue" and explored three different options: 1) HOLA preemption follows the loan, through assignment and merger;

2) national banks can never invoke HOLA; or 3) application of HOLA should depend on the nature of the conduct at issue: "claims arising from actions taken by the federal savings association would be subject to . . . HOLA . . . . [If] the [borrower's] claims arise from actions taken by the national bank, those claims would not be subject to . . . HOLA." Here, the borrower only advocated for the second option and the court declined to deviate from its own precedent—the first option—absent a ruling from a higher court. After finding borrower's HBOR claims preempted by HOLA, the court dismissed borrower's action.

FDCPA & Rosenthal Act: Statute of Limitations & Continuing Violation Doctrine

Sosa v. Utah Loan Servicing, LLC, 2014 WL 173522 (S.D. Cal. Jan. 10, 2014): Under both the FDCPA and California's Rosenthal Act, actions must be brought within one year from the date of the alleged violation. The continuing violation doctrine can apply to debt collection claims, "for actions that take place outside the limitations period if these actions are sufficiently linked to unlawful conduct within the [SOL]." If a borrower can show a pattern of improper conduct, they may bring a claim within one year of the most recent FDCPA or Rosenthal violation. Here, borrower received six letters over the course of two years, falsely stating he owed the balance of a junior lien on his house that was sold at foreclosure. Borrower brought FDCPA and Rosenthal claims two years after receiving the first letter. The statute of limitations clock began when servicer sent its *first* letter, so the court dismissed borrower's FDCPA and Rosenthal claims as time-barred. The continuing violation doctrine did not apply here because servicer's activities were more akin to discrete acts over an extended period of time, rather than a continuing pattern or course of conduct.

Negligence Claim Based on Servicer's Failure to Respond to QWR

Boessenecker v. JP Morgan Chase Bank, 2014 WL 107063 (N.D. Cal. Jan. 10, 2014): Negligence claims require a duty of care owed from servicer to borrower. Generally, banks owe no duty to borrowers within a typical lender-borrower relationship. Many courts use the *Biakanja* test to determine whether a duty of care existed between a financial institution and borrower. Here, borrowers alleged their servicer breached a duty of care by failing to respond to Qualified Written Requests (QWRs), as required by RESPA. This court allowed borrowers' negligence claim to move beyond the pleading stage, relying on *Osei v. Countrywide Home Loans*, 692 F. Supp. 2d 1240, 1249-50 (E.D. Cal. Mar. 3, 2010) (finding a duty of care even though providing RESPA disclosures falls within the scope of "normal" lending activities, because each *Biakanja* factor was fulfilled). The court found determinative that the California Court of Appeal cited *Osei* in its *Jolley* decision. Borrowers' negligence claim survived the motion to dismiss.

Former CCP 580b: Application of Anti-Deficiency Protection to Refi-Construction Loan Hybrid

Farber v. JP Morgan Chase Bank, 2014 WL 68380 (S.D. Cal. Jan. 8, 2014): The current version of CCP § 580b provides anti-deficiency protection to borrowers who sell their homes in short sales, applied to "any loan, refinance, or other credit transaction . . . which is used to refinance a purchase money loan." The previous version, which was operative when this borrower sold his home, did *not* apply to refinance loans ("recourse loans"). Courts did apply it, however, to construction loans if they were "used to pay all or part of the cost of constructing the dwelling occupied by the borrowers." Here, borrower used a construction loan to pay off two existing loans (refinance them) *and* to tear down his existing home and construct a new one. The loan, then, "appears to be a hybrid" refinance-construction loan, which presents a novel issue to the court: whether the former § 580b protects this borrower, with this hybrid loan, from deficiency liability after a short sale. Without more specific briefing, the court found it premature to determine whether anti-deficiency protections apply in this situation and denied lender's motion to dismiss.

HBOR Does Not Require a Consistent SPOC or a SPOC Assigned After Submission of Complete Application; Dual Tracking Protections Apply to Pending Modification Application from 2012; UCL Standing

Boring v. Nationstar Mortg., 2014 WL 66776 (E.D. Cal. Jan. 7, 2014): "Upon request from a borrower who requests a foreclosure prevention alternative . . . servicer shall promptly establish a single point of contact and provide to the borrower one or more direct means of communication with the [SPOC]." CC 2923.7(a). A SPOC must communicate with the borrower about "the process by which a borrower may apply for an available foreclosure prevention alternative and the deadline for any required submissions," and walk the borrower through the application process. Here, borrower alleged his servicer changed his SPOC multiple times and none returned borrower's phone calls. The court found that nothing in HBOR prevented servicers from changing SPOCs and that because borrower had submitted a complete modification application "before any assigned SPOC failed to communicate with him," borrower had no viable SPOC claim. Notably, the court did not cite or discuss § 2923.7(b)(3), requiring SPOCs to have "access to current information and [be able to] inform the borrower of the current status of the foreclosure prevention alternative," even though borrower alleged he could not connect with a SPOC to discover the status of his application.

HBOR is not retroactive, but applies to servicer conduct occurring on or after January 1, 2013. Dual tracking protections specifically apply to post-HBOR servicer conduct occurring *while* a modification application was pending—even if that application was submitted pre-HBOR. Here, borrower submitted his complete modification application in 2012 and alleged he was still awaiting a determination when servicer recorded an NOD and NTS in 2013. Servicer claimed to have denied borrower's application, but the court only looked to the complaint in deciding the motion to dismiss and therefore declined to dismiss borrower's dual tracking claim.

To have UCL standing, borrowers must allege economic injury directly caused by the unfair business practice. This borrower's alleged harm to his credit and the initiation of foreclosure proceedings caused by the NOD and NTS are sufficient to allege UCL standing. Borrower's successfully pled dual tracking claim provided the basis for his UCL unlawful and unfair prong claims.

Causal Link between RESPA Violations & Borrower Damages

Guidi v. Paul Fin., LLC., 2014 WL 60253 (N.D. Cal. Jan. 7, 2014): Before January 10, 2014, RESPA required servicers to acknowledge a valid Qualified Written Request (QWR) within 20 days of receipt and to respond to the QWR within 60 days.[29] Servicers were not permitted to report delinquency-related information to credit reporting agencies for 60 days post-receipt. Violations of these RESPA provisions rendered a servicer liable for damages *directly caused* by the violations. Here, borrowers alleged their servicer failed to timely acknowledge their QWR, failed to adequately respond within 60 days, and improperly reported delinquencies to credit agencies inside the 60-day window. The court, though, found no causal connection between borrower's damages and servicer's QWR violations. First, borrowers submitted their QWR approximately one year after they defaulted on their loan and several months after an NOD and NTS were recorded. Borrowers had therefore already incurred additional penalties, fees and interest brought on by their default, not by servicer's failure to timely respond to a QWR. Second, borrowers alleged that servicer's failure to provide a fee breakdown resulted in borrowers' inability to dispute those fees and in ongoing, additional fees. Borrowers did not explain why this harm was not more directly caused by their delay in submitting a QWR and not by servicer's failure to give a breakdown of fees more than one year post-default. Finally, borrowers' allegation that servicer improperly reported delinquency information also failed to make a causal connection between borrowers' damages (injury to their credit) and servicer's actions. Borrowers did not identify when the

[29] The CFPB's new mortgage servicing rules have overhauled the former QWR process, covered in the HBOR Collaborative's January 2014 Newsletter.

improper reporting occurred, to which agencies the reports were made, or even the contents of those reports. Nor did they allege that a creditor denied them credit in reliance on the improper information provided by servicer. It is more likely that borrowers' default negatively impacted their credit rating. The court dismissed borrowers' RESPA claim.

Ambiguous Modification Terms are not Appropriate for Summary Judgment; Modification Agreements Become Part of the DOT & Note

Robinson v. Bank of Am., N.A., 2014 WL 60969 (N.D. Cal. Jan. 7, 2014): Summary judgment is only appropriate on breach of contract claims where a contract's terms are unambiguous. Here, borrower and servicer entered into a permanent loan modification agreement after borrower defaulted on his loan, in large part due to his delinquent property taxes. Servicer had previously imposed an escrow on borrower's account, paying property taxes directly while borrower allowed his escrow account to fall deeper into delinquency. The modification agreement identified the total amount of borrower's now modified loan, "which *may* include . . . any past due principal payments, interest, *escrow payments*, and fees and/or costs." It also specified borrower's new monthly payments, which borrower attempted to tender. Servicer rejected the payments as insufficient to pay both his modified principal and interest payment *and* to pay down his negative escrow account. Borrower's breach claim was premised on servicer's failure to accept his timely payments, specified in the modification agreement. The court agreed with borrower that the wording of the modification agreement was, at best, ambiguous, because it implied that a negative escrow balance was, or could have been, incorporated into borrower's balance and his new monthly payments. Servicer's argument that borrower's claim must fail because he only based it on the original DOT and note was unconvincing: by the modification's very terms, it "amended and supplemented" the note and DOT, becoming part of them. The court denied servicer's summary judgment motion on borrower's breach of contract claim. Relatedly, it also denied the motion on borrower's CC § 2924 claim because a question of fact remained whether the default amount specified in the NOD should have included borrower's negative escrow account.

"Workout Agreement" & "Foreclosure Alternative Agreement:" *Corvello* Not Directly Applicable to Non-HAMP Agreements

Morgan v. Aurora Loan Servs., LLC, 2014 WL 47939 (C.D. Cal. Jan. 6, 2014): To plead breach of contract, a borrower must establish the existence of a contract. Here, borrower claimed servicer breached two separate contracts, a "Workout Agreement" (WAG) and a "Foreclosure Alternative Agreement" (FAA). The WAG specified that borrower, upon satisfying the agreement, could receive a "loan modification agreement or other loan workout option that [servicer] *may* offer" (emphasis added). The court previously dismissed borrower's breach of contract claim (summarized in our November 2013 Newsletter), but with leave to plead facts similar to those in *Corvello v. Wells Fargo Bank, N.A.*, 728 F.3d 878 (9th Cir. 2013). The court seemed doubtful of borrower's ability to do so, noting the language in the HAMP TPP at issue in *Corvello* guaranteed that servicer "[*would*] provide" a permanent loan modification upon borrower's successful TPP completion (emphasis added). The Ninth Circuit decided the servicer was therefore required to offer borrowers a permanent modification. The WAG and FAA at issue here, by comparison, merely articulated that the servicer *may consider* borrower for a permanent modification. This time, the court again found the WAG and FAA too dissimilar to the HAMP TPP in *Corvello* to adequately allege a breach of contract claim and dismissed the claim, this time with prejudice.

Dual Tracking: "Complete Application"

Flores v. Nationstar, 2014 WL 304766 (C.D. Cal. Jan. 6, 2014): Servicers may not move forward with foreclosure while a borrower's complete, first lien loan modification application is pending. CC 2923.6. Here, borrower submitted his application and timely submitted additional documents requested by his servicer over the next two months. Nevertheless, servicer conducted a foreclosure sale before making a determination on borrower's application. The court determined borrower had successfully alleged he submitted a "complete" application because he had supplemented his initial application with requested information. Further, servicer had clearly not made a determination on borrower's application because borrower received a letter from servicer, just days after the sale, assigning him a "Foreclosure Prevention Specialist." Borrower's UCL claim based on his § 2923.6 claim also survived servicer's motion to dismiss.

Dual Tracking Prohibits *Serving* NOD and NTS, Not Simply Their Recording; Imposing Fraud Liability on a SPOC; Unreasonable Modification Terms Can Constitute an Actionable "Promise"

Copeland v. Ocwen Loan Servicing, LLC, 2014 WL 304976 (C.D. Cal. Jan. 3, 2014): HBOR's dual tracking provisions prevent servicers from "record[ing] a notice of default or notice of sale, or conduct[ing] a trustee's sale, while a complete first lien loan modification is pending." Here, borrower submitted a complete application and servicer agreed to modify borrower's loan, in writing. The pre-modification fees and additional costs were unacceptable, however, and borrower rejected the modification offer. He was assured by servicer that no action would take place for 60 days, after which borrower could "continue with the modification process." Servicer's assurances provided the basis for borrower's adequately pled dual tracking claim based on servicer's *serving* of an NTS only 34 days after borrower's rejection of the modification and rejection of borrower's continued modification efforts. The court rejected servicer's argument –seemingly based on the language of CC § 2923.6—that HBOR only prevents the *recording* of an NOD or NTS while a modification application is pending. "By simply not recording any instruments, [servicer] seem[s] to believe they can circumvent the ban on dual tracking." Because allowing that "would be a perversion of the spirit of HB[O]R," the court denied servicer's motion to dismiss borrower's dual tracking claim based on the *serving*, but not the recording, of an NTS.

Fraud allegations are subject to a heightened pleading standard requiring particularity and: 1) a misrepresentation; 2) servicer's knowledge of its falsity; 3) intent; 4) borrower's justifiable reliance; and 5) damages. Borrower here alleged their SPOC assured him no adverse action would occur for at least 60 days after he rejected the initial loan modification offer and attempted to re-negotiate its terms. The court put particular emphasis on the SPOC's responsibilities under HBOR in finding a valid fraud claim: "given [the SPOC's] position as the sole point person, and the requirements imposed upon such a person by the HB[O]R . . . if the statement was made it would be reasonable to assume that [the SPOC] had knowledge of its falsity, and the Court could therefore infer an intent to deceive." The court also found borrower was justified in relying on his SPOC's information, and that borrower's lost home equity resulting from the delay in the modification process was caused by the SPOC's misleading statements. The SPOC claim also survived.

Promissory estoppel claims require a clear and unambiguous promise, reasonable and foreseeable reliance, and damages. Here, borrower alleged that servicer's written approval granting his loan modification request constituted a promise, and that servicer broke that promise by including fees and penalties in the agreement that were "even more burdensome than those [borrower] already faced." Borrowers also alleged detrimental reliance by pointing to the short sale contract *that had already been signed*, which borrowers then rejected so they could move forward with the loan modification process as promised. Borrower's PE claim also survived the motion to dismiss.

Reverse Mortgages and the "95% Rule:" HUD Regulations vs. HECM Deed Language & the Timing of HUD Regulations

Chandler v. Wells Fargo Bank, N.A., 2014 WL 31315 (N.D. Cal. Jan. 3, 2014): HUD-insured HECMs (Home Equity Conversion Mortgages), or "reverse mortgages," provide elderly homeowners with a stream of income for the remainder of their lives, and require the borrower (their estate) to repay the loan upon their death. Borrowers' estates or heirs have several repayment options: 1) payoff the balance of the mortgage; 2) sell the property for at least 95% of its fair market value (FMV) and apply the proceeds to the mortgage (HUD insurance pays any deficiency); or 3) give their servicer a deed in lieu of foreclosure. The "95% rule" allows estates or heirs to pay-off the reverse mortgage if the home was underwater (if the amount owed exceeds the fair market value of the property). In *Santos v. Reverse Mortg. Solutions, Inc.*, 2013 WL 5568384 (N.D. Cal. Oct. 9, 2013) (summarized in our November 2013 newsletter), the court ruled that servicer had no duty to give the deceased borrower's heir any pre-foreclosure *notice* of the 95% rule (the HECM deed and pertinent HUD regulations only require notice to the *borrower* upon a non-death, loan acceleration-triggering events). The heir may have been, however, *entitled to purchase* the home for 95% FMV.[30] In *Santos*, servicer's refusal to accept the heir's 95% FMV offer presented a triable issue of fact whether servicer violated the 95% rule. The court denied servicer's motion for summary judgment. In *Chandler*, however, the same judge dismissed a complaint based on almost the exact same fact-pattern. Two crucial differences, not obvious in the opinions, made the difference: 1) in *Santos*, the court implied that the HECM deed itself either tracked or explicitly incorporated the language of the 95% rule, whereas in *Chandler*, the court only referenced plaintiff's inability to cite a provision of the HECM that would incorporate HUD regulations; and 2) the *Santos* plaintiff's claims arose after HUD had retracted its 2008 regulation: "If the mortgage is due and payable and the borrower (or estate) desires to retain ownership of the property, the mortgage debt must be repaid in full." The *Chandler* plaintiff's claim arose when this guidance was still effective.

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[30] It is somewhat unclear whether the court meant the 95% rule contained in the HUD regulations, or the version of the 95% rule apparently contained within the borrower's HECM deed itself. After referring to the "terms of the HECM Deed" in describing plaintiff's allegations, the court then uses the term "95% rule" in its holding, which connotes the HUD regulation. In light of *Chandler*, however, it seems more likely that the HECM deed in *Santos* did actually contain 95%-like language.

Diversity Jurisdiction: Wells Fargo is a Citizen of California

Garcia v. Wells Fargo Bank, N.A., __ F. Supp. 2d __, 2014 WL 29354 (C.D. Cal. Jan. 3, 2014): A defendant may remove a state action to federal court if the federal court exercises subject matter jurisdiction (SMJ) over the matter. Federal courts can exercise SMJ in two ways: 1) over a federal claim; or 2) over a state claim arising between citizens of diverse (different) states. If it appears, at any time before final judgment, that the federal court lacks SMJ, that court must remand the case to state court. A corporation is a citizen of both its state of incorporation and where it locates its principal place of business. 28 U.S.C. § 1332(c). Further, "[a]ll national banking associations shall, for the purposes of all other actions by or against them, be deemed *citizens of the States in which they are respectively located*" (emphasis added). § 1348. In considering whether Wells Fargo is a "citizen" of California, this court noted the confusion and lack of consensus on the issue. The most recent Supreme Court decision to address this issue, *Wachovia Bank v. Schmidt,* 546 U.S. 303 (2006), held that a bank is "located" in the state where it maintains its main office, as set forth in its articles of association. This court also turned to *American Surety Co. v. Bank of Cal.,* 133 F.2d 160 (9th Cir. 1943), deeming it binding Ninth Circuit authority and, at least, not totally inconsistent with *Schmidt*: a bank is a citizen of the state where it maintains its principal place of business. *American Surety* did not preclude a finding that a bank is also a citizen of the state housing its main office (*Schmidt*), and this interpretation also seems consistent with congressional intent behind §§ 1332 & 1348 (above). Using the *Schmidt* and *American Surety* standards, the court found Wells Fargo to be a citizen of both South Dakota (main office) and California (principal place of business). It accordingly remanded the case to state court for lack of diversity jurisdiction.

Biakanja Test to Determine Duty of Care

Barber v. CitiMortgage, 2014 WL 321934 (C.D. Cal. Jan. 2, 2014): Negligence claims require a duty of care owed from servicer to borrower. Generally, banks owe no duty to borrowers within a typical lender-borrower relationship. Many courts use the *Biakanja* six-factor test to determine whether a duty of care existed between a financial institution and borrower. The six factors include: 1) whether the servicer intended to affect borrower with the transaction; 2) foreseeability of harm to the borrower; 3) degree of certainty that borrower *did* suffer harm; 4) how directly servicer's conduct caused the harm; 5) moral blame; and 6) policy of preventing future harm. Here, borrower alleged servicer owed her a duty of care because it: 1) threatened her with an imposed escrow if she did not provide proof of property tax payments, received proof and imposed the escrow anyway; 2) misinformed borrower that the only way to remedy the forced escrow was to claim a hardship exception; and 3) mischaracterized borrower's account as in default; and 4) refused to accept payments from borrower and misinformed her that she needed to apply for another loan modification or short sale to correct the escrow situation. If borrower was actually current on her loan and property tax payments, as she claims, then her allegations establish that servicer owed her a duty of care under the *Biakanja* factors. Because borrower could also establish breach (mishandling her loan) and damages (emotional anguish brought on by the threat of foreclosure, damaged credit score and impaired ability to borrower based on the wrongful default), she was able to successfully plead a negligence claim that survived servicer's motion to dismiss.

Principal Residence: Necessary Pleading for HBOR Injunction

Kouretas v. Nationstar Mortg., 2013 WL 6839099 (E.D. Cal. Dec. 26, 2013): In deciding to impose an injunction, California federal courts look to see if a borrower can show, *inter alia*, a likelihood of success on the merits of his claim, and a likelihood of suffering imminent, irreparable harm without the requested relief. The loss of one's home to foreclosure is generally regarded as imminent, irreparable harm. (The court discussed the alternative, California state-court "sliding scale" test, but did not invoke it here.) For HBOR dual tracking claims, borrowers must plead that the subject property is "owner-occupied:" "property [that] is the principal residence of the borrower." CC

2924.15. Here, borrower argued servicer violated HBOR's dual tracking statute, but admitted the subject property was not his principal residence. He could not, therefore, show either a likelihood of success on the merits of his dual tracking claim, *or* that irreparable harm would result without the TRO. The court therefore denied his motion.

Servicing Transferee Must Honor Existing Loan Modification: Declaratory Relief & UCL Claims

Lewis v. Bank of Am., N.A., 2013 WL 7118066 (C.D. Cal. Dec. 18, 2013): "'Any person interested . . . under a contract . . . may . . . bring an original action . . . for a declaration of his or her rights and duties' under that contract." Here, borrowers alleged they executed a permanent loan modification offered by their previous servicer, and made consistent payments, which were accepted by their servicer. At some point, their servicer stopped accepting borrower's payments and sold its servicing rights and the note to a second servicer. The second servicer refused borrower's modified payments. Borrower brought this action against the second servicer and adequately alleged a claim for declaratory relief: borrower alleged second servicer took the note subject to the loan modification, and refused to honor that agreement by accepting modified payments. The court agreed that borrower had sufficiently stated a claim for declaratory relief under the loan modification agreement. Similarly, borrower also stated a viable UCL claim based on the second servicer's "unfair" practice of purchasing a note but refusing to honor the modification of that note.

Valid Promissory Estoppel Claim Based on Servicer's Promise to Refrain from Foreclosure

Caceres v. Bank of Am., N.A., 2013 WL 7098635 (C.D. Cal. Oct. 28, 2013): Promissory estoppel claims require a clear and unambiguous promise, reasonable and foreseeable reliance, and damages. Here, borrowers' servicer promised that if borrowers stopped making monthly mortgage payments to apply for a modification, servicer would not: 1) foreclose; 2) consider them “late” on payments; and 3) report any delinquency to credit agencies. The court found this a clear and unambiguous promise, alleged with specificity: borrowers identified a specific servicer representative who made the promises and the approximate date she made them. Relying on those promises, and on servicer’s assurance that borrowers could *not* apply for a modification while they were current, borrowers stopped making mortgage payments. Because servicer held borrowers’ loan and controlled the foreclosure process, borrowers’ reliance was reasonable and foreseeable. Further, this reliance was detrimental and caused damages, even without a completed foreclosure sale. “Whether or not the foreclosure sale has actually occurred, [borrowers’] allegations encompass injuries beyond potential foreclosure,” including a negatively affected credit score and late excessive fees. The court allowed the PE claim to proceed and, based on the same allegations, denied servicer’s motion to dismiss borrowers’ fraud, negligent misrepresentation, and UCL claims as well.

Removal Jurisdiction

Perez v. Wells Fargo Bank, N.A., 2013 WL 6876445 (C.D. Cal. Apr. 5, 2013): A defendant may remove a state action to federal court if the federal court exercises subject matter jurisdiction (SMJ) over the matter. Federal courts can exercise SMJ in two ways: 1) over a federal claim; or 2) over a state claim arising between citizens of diverse (different) states. If it appears, at any time before final judgment, that the federal court lacks SMJ, that court must remand the case to state court. In this case, the court determined that defendant, “Wells Fargo Home Mortgage, Inc.,” could not simply change its name to “Wells Fargo Bank, N.A” to escape liability. “The boldness of this change by Wells Fargo Bank reveals the recklessness of this removal and runs counter to the Court's duty to determine ‘the propriety of removal . . . solely on the basis of the pleadings filed in state court.’” Clearly annoyed with the bank’s litigation tactics, the court remanded the case.

Recent Regulatory Updates

IRS Rev. Rul. 2014-2: In general, former homeowners who lost their homes to foreclosure and who received payments (about $1,400) under the National Mortgage Settlement (NMS) do not have to report those payments as taxable income. The NMS Monitoring Committee will not send these former homeowners 1099 forms or report the payments to the IRS. There are nuances to this ruling (including different specifications for taxpayers who inherited NMS payments from deceased former homeowners) and taxpayers should consult tax attorneys for more specific information.

California Homeowner Bill of Rights COLLABORATIVE

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Registration [HERE] for Fresno

Registration for this event closes 2/18.

Register [HERE] for the Inland Empire

Registration for this event closes 2/24.

The HBOR Collaborative, a partnership of four organizations, **National Housing Law Project, National Consumer Law Center, Tenants Together and Western Center on Law & Poverty,** offers free training, technical assistance, litigation support, and legal resources to California's consumer attorneys and the judiciary on all aspects of the new California Homeowner Bill of Rights, including its tenant protections.

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The HBOR Collaborative and its services, including this free training for attorneys, are funded by a grant from the Office of the Attorney General of California from the National Mortgage Settlement to assist California consumers.

FILED (20)

JAN 2 1 2014

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SONOMA
By ________
Deputy Clerk

Honorable Arthur A. Wick
Judge of the Superior Court
County of Sonoma
3055 Cleveland Avenue
Santa Rosa, CA 95403
Telephone: (707) 521-6730

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SONOMA

DAVID J. ROH and JULIA M. ROH, Plaintiffs, v. CITIBANK N.A., JP MORGAN CHASE BANK, N.A., and DOES 1-100, Inclusive., Defendants.	CASE NO. SCV-253446 RULING AFTER LAW AND MOTION HEARING

This matter came on the Law and Motion calendar on January 14, 2014 before The Honorable Arthur A. Wick. Counsel Robin D. Shofner was present, via CourtCall, on behalf of Plaintiffs David and Julia Roh. Counsel Roxana Vatanparast was present, via CourtCall, on behalf of Defendants JP Morgan Chase Bank and Wilmington Trust. Upon hearing oral argument from the parties on the Plaintiff's Motion for Attorney Fees, the court rules as follows:

On October 15, 2013, this court found that CC § 2924.12 supported the Plaintiffs' request for interim attorney fees. However, the court also found that the application for interim fees was not supported by adequate evidence and denied it without prejudice.

The Plaintiffs have now filed another application seeking interim attorney fees based on their obtaining a preliminary injunction. The motion is based on the same authorities as the previous motion, however, includes a more detailed declaration from Ms. Shofner with respect to billable rates and hours spent on the case. The Defendants have once again opposed the motion.

The court will grant the request for judicial notice as to the order denying without prejudice the earlier motion for attorney fees, and the consent judgment.

As discussed on October 15, 2013, the court finds that the Plaintiffs are entitled to interim fees under CC § 2924.12(i). The Defendants have raised one issue that needs to be addressed. The Defendants argue that CC § 2924.12(g) provides a "safe harbor" from liability. CC § 2924.12(g) provides:

> A signatory to a consent judgment entered in the case entitled United States of America et al. v. Bank of America Corporation et al., filed in the United States District Court for the District of Columbia, case number 1:12-cv-00361 RMC, that is in compliance with the relevant terms of the Settlement Term Sheet of that consent judgment with respect to the borrower who brought an action pursuant to this section while the consent judgment is in effect shall have no liability for a violation of Section 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17.

The Defendants contend that as signatories to the consent judgment, they are immune from an award of attorney fees. The Defendants read CC § 2924.12 too broadly. CC § 2924.12(g) provides protection only "if it is in compliance with the relevant terms of the Settlement Term Sheet of that consent judgment <u>with respect to the borrower who brought an action</u> …." If the Defendants had been in compliance with the terms of the consent judgment with respect to these Plaintiffs, no preliminary injunction could have issued.

That being said, the declaration filed in support of the motion does not provide adequate foundation for all of the hours claimed. First, the declaration purports to support hours spent by another attorney and paralegal at Ms. Shofner's previous firm. Ms. Shofner provides inadequate foundation for those hours. Further, the declaration provides that her previous firm billed on a "flat monthly fee basis." The Plaintiffs obtained a preliminary injunction within a month of filing their first amended complaint (although the order itself was not signed until June 5, 2013.) Taking that into consideration, the court has reviewed the documents presented by the Plaintiffs' attorney, and will allow 9.5 hours of Ms. Shofner's time at a rate of $295 per hour. This time reflects Ms. Shofner's time from the date of intake to the date the preliminary injunction hearing.

At the oral hearing, the Defendants' attorney suggested that the court order that if the Plaintiffs are not the prevailing party at the end of the case, that this interim fee is refundable back to the Defendants. The Defendants offer no controlling legal authority for their suggestion, nor can the court fathom that Legislature intended that interim attorney fees under CC § 2924.12 are refundable. As such the court will decline to make such a ruling.

Accordingly, the court will not award any paralegal time or time from Mr. Ruehmann, for a total award of interim attorney fees of $2,802.50.

IT IS SO ORDERED.

Date: January 21, 2014.

Arthur A. Wick

Honorable Arthur A. Wick
Judge of the Superior Court
for the State of California

PROOF OF SERVICE BY MAIL

I certify that I am an employee of the Superior Court of California, County of Sonoma, and that my business address is 600 Administration Drive, Room 107-J, Santa Rosa, CA 95403; that I am not a party to this cause; that I am over the age of 18 years; that I am readily familiar with this office's practice for collection and processing of correspondence for mailing with the United States Postal Service; and that on the date shown below I placed a true copy of the foregoing attached papers in an envelope, sealed and addressed as shown below, for collection and mailing at Santa Rosa, California, first class, postage fully prepaid, following ordinary business practices.

Date: January 21, 2014

JOSÉ OCTAVIO GUILLÉN
COURT EXECUTIVE OFFICER

by Kanya Green

Deputy Clerk

--ADDRESSEES--

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LAW & MOTION TENTATIVE RULINGS
TUESDAY, OCTOBER 15, 2013 - 8:30 a.m.
CTRM 19 – Judge Arthur A. Wick
3055 Cleveland Avenue, Santa Rosa, CA 95403

Court Call is available for all Law and Motion appearances, EXCEPT parties in small claims cases and motions for claims of exemption which are mandatory appearances. To set up Court Call, please call CourtCall directly at (888) 882-6878.

The following Tentative rulings will become the ruling of the Court unless a party desires to be heard. If you desire to appear and present oral argument as to any motion, it will be necessary for you to contact Judge Wick's Judicial Assistant by telephone at (707) 521-6730 by **4:00 p.m. FRIDAY, OCTOBER 11, 2013.** Any party requesting an appearance must notify all other parties of their intent to appear.

9. <u>SCV-253446; Roh v. Citibank</u>

This is on calendar for the Plaintiffs' motion for attorney fees. The Plaintiffs argue that pursuant to CC § 2924.12(i), they are entitled to interim attorney fees for successfully obtaining a preliminary injunction which barred an imminent trustee's auction of their home.

The Defendants oppose, arguing that the Plaintiffs are not the "prevailing party" as there has been no determination of success on the merits. The Defendants rely heavily on the notion that there is no express legislative intent which would authorize an interim award. The Defendants, in the alternative, argue that if the court should award attorney fees, that award should be apportioned. Further, the award should be discounted because the Plaintiffs' success was limited.

The Plaintiffs argue, in reply, that the court need not divine the intent of the legislature; because the language of the statute is clear—and that the Defendants' cited authority is inapposite. Further, the Plaintiffs contend that apportionment is not warranted, in that the injunctive relief sought necessitated the drafting and filing of a complaint.

The court notes that this is an issue of first impression, as there are no appellate court cases which have given any guidance on the statutory language relied on by the Plaintiffs. With that being said, the statute itself forecloses the Defendants' arguments that the Plaintiffs were not the "prevailing party" as CC § 2924.12(i) provides:

> A court may award a prevailing borrower reasonable attorney's fees and costs in an action brought pursuant to this section. <u>A borrower shall be deemed to have prevailed for purposes of this subdivision if the borrower obtained injunctive relief</u> or was awarded damages pursuant to this section.

The Defendants' opposition simply does not address this language, which directs that the Plaintiffs, upon obtaining injunctive relief, are the prevailing party.1[1] Further, the plain language of the statute does not require that the "borrower" obtain final relief on the merits—it applies "if a borrower obtained injunctive relief." Here, there is no reasonable dispute that the Plaintiffs obtained injunctive relief.

The question then becomes whether the Plaintiffs are entitled to interim attorney fees. Granting interim fees is consistent with the rule that, in some circumstances, entitlement to fees may not depend on the ultimate resolution of the action. Here, granting interim fees is consistent with the rule that, in some circumstances, entitlement to fees may not depend on the ultimate resolution of the action. (See *Bartling v. Glendale Adventist Med. Ctr.* (1986) 184 Cal.App.3d 97; see also *Bouvia v. County of Los Angeles* (1987) 195 Cal.App.3d 1075 (entitlement to fees not dependent on outcome of plaintiff's damages action); *Boehm v. Superior Court* (1986) 178 CA3d 494, 503, 223 CR 716 (fees awarded after reversal of order denying preliminary injunction). The Defendants' reliance on *Bell v Farmers Ins. Exch.* (2001) 87 Cal.App.4th 805 is misplaced. In *Bell* the court held that because Lab.C §1194 conditioned attorney fees on the

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1[1] While the language of the statute is clear, the idea that a party can claim prevailing party attorney fees on the basis of obtaining a preliminary injunction is supported by significant amount of case law. (See *Vasquez v State* (2008) 45 C4th 243, 257, 85 CR3d 466; *Maria P. v Riles* (1987) 43 C3d 1281, 240 CR 872; *Zuehlsdorf v Simi Valley Unified Sch. Dist.* (2007) 148 CA4th 249, 256, 55 CR3d 467 (plaintiff who obtained preliminary injunction was prevailing party even though permanent injunction denied because case moot); *County of Colusa v California Wildlife Conserv. Bd.* (2006) 145 CA4th 637, 52 CR3d 1 (relief obtained through preliminary injunction qualified plaintiff as prevailing party, even though action ultimately dismissed as part of later settlement).

"recovery" of wages; it did not authorize an award of interim attorney fees based on a summary adjudication of liability. The statute in question, as discussed above, is not dependent on "recovery."

Whether to apportion attorney fees is within the trial court's discretion. (*Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1111.) In general, the trial court need not apportion when the various claims are "inextricably intertwined [citation], making it 'impracticable, if not impossible, to separate the multitude of conjoined activities into compensable or noncompensable time units." (*Abdallah*, *supra*, at 1111, quoting *Fed-Mart Corp. v. Pell Enterprises, Inc.* (1980) 111 Cal.App.3d 215, 227.)

Here, apportionment of the fees would be impracticable, as would determining a proper Lodestar amount, as the Plaintiffs' attorneys are charging on a flat rate basis and have provided no evidence of their hourly rates or the number of hours expended in working on this case. "[T]he fee setting inquiry in California ordinarily begins with the 'lodestar,' i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate.... The reasonable hourly rate is that prevailing in the community for similar work. [Citations.] The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided. [Citation.] Such an approach anchors the trial court's analysis to an objective determination of the value of the attorney's services, ensuring that the amount awarded is not arbitrary." (*PLCM Group Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095; see also *City of Santa Rosa v. Patel* (2010) 191 Cal.App.4th 65.)

Here, the Plaintiffs have simply not provided any evidence of the hourly rate charged, or the number of hours expended. The court cannot, based on the evidence provided in the declaration appended to the instant motion, make "an objective determination of the value of the attorney's services…." (*PLCM Group Inc.*, *supra*, 22 Cal.4th at 1095; see also Press v. Lucky Stores, Inc. (1983) 34 Cal.3d 311, 322.)

Accordingly, the Plaintiffs' motion is denied without prejudice. The Defendants are to draft an order consistent with this ruling.