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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DENNL Y R. BECKER, et al.,
Plaintiffs,
v.
WELLS FARGO BANK, NA, INC., et al.,
Defendant.

No. 2:10-cv-2799-TLN-KJN-PS

FINDINGS AND RECOMMENDATIONS

Presently pending before the court is defendants Wells Fargo Bank NA, Inc. and Wachovia Mortgage Corporation’s (collectively “defendant”)¹ Motion for Attorneys’ Fees. (ECF No. 213.) Plaintiff Denny Becker (“plaintiff”) filed an opposition to this motion and defendant filed a reply. (ECF Nos. 220, 222.)

On the court’s own motion, this matter was taken under submission without oral argument. The undersigned has fully considered the parties’ briefs and appropriate portions of the record. For the reasons that follow, the court recommends that defendant’s Motion for Attorneys’ Fees be granted, and defendant be awarded attorneys’ fees in the amount of \$146,493.50.

¹As noted in previous orders, defendant Wachovia Mortgage Company converted to Wells Fargo Bank Southwest, N.A., which merged into and operates as part of defendant Wells Fargo Bank, N.A., Inc. Because both named defendants are actually a single entity, the court refers to both as a single defendant.

1 I. BACKGROUND²

2 Plaintiff initiated this action against defendant in the San Joaquin County Superior court
3 on September 15, 2010, alleging four state law causes of action based on fraud and violations of
4 California’s Business and Professions Code against defendant concerning defendant’s actions in
5 connection with plaintiff’s mortgage loan modifications efforts for three rental properties located
6 at: 865 Shelborne Drive in Tracy, California; 2416 Third Street in Lincoln, California; and 1895
7 Larkflower Way in Lincoln, California. (ECF No. 1-1.) Defendant removed this case to this
8 court on October 15, 2010, on the basis of this court’s diversity jurisdiction and subsequently
9 filed a motion to dismiss the complaint. (ECF Nos. 1, 11.)

10 Plaintiff subsequently filed his first amended complaint on November 29, 2010. (ECF
11 No. 19.) Plaintiff also filed a motion for a preliminary injunction seeking to enjoin defendant
12 from foreclosing on the three properties during the pendency of this litigation, which was granted
13 by the District Judge on December 12, 2010. (ECF Nos. 14, 21.) Defendant filed a motion to
14 dismiss the first amended complaint, which was granted by the court. (ECF Nos. 26, 49.) When
15 granting defendant’s motion to dismiss, the court also granted plaintiff leave to amend with
16 respect to some of his claims. (ECF No. 49.) Plaintiff filed a second amended complaint on
17 September 12, 2011, and defendant subsequently filed a motion to dismiss this complaint. (ECF
18 Nos. 68, 71.) Plaintiff then sought the court’s leave to amend his complaint for a third time. (ECF
19 No. 89.)

20 Plaintiff alleged the following thirteen claims against defendant in his proposed third
21 amended complaint: (1) fraud; (2) “promissory estoppel [sic]”; (3) violations of the Real Estate
22 Settlement Procedures Act (“RESPA”), 12 U.S.C. §§ 2605 et seq.; (4) violations of 12 C.F.R. §
23 560.101 and California Civil Code § 2923.6; (5) “preempted/unlawful foreclosure”; (6) “improper
24 foreclosure process”; (7) defamation; (8) negligence and negligent infliction of emotional
25 distress; (9) violations of the Racketeer Influenced and Corrupt Organizations (“RICO”) Act, 18

26 ² Given the voluminous procedural history of this case and parties’ familiarity with the facts and
27 proceedings, the court limits its recitation of the background facts and procedural history to a
28 brief outline of the major filings and rulings that were made in this case concerning the merits of
plaintiff’s claims.

1 U.S.C. §§ 1962 et seq.; (10) intentional infliction of emotional distress; (11) elder abuse; (12)
2 violations of the Truth in Lending Act (“TILA”), 15 U.S.C. §§ 1601 et seq.; and (13) violations of
3 California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code §§ 17200, et seq. (ECF
4 No. 98.) On September 19, 2014, the court granted plaintiff’s motion for leave to amend in part,
5 and denied it in part. (ECF Nos. 115, 123.) Specifically, the court granted plaintiff leave to
6 amend his claims for fraud, promissory estoppel, RESPA violations, defamation, negligence and
7 negligent misrepresentation, RICO violations, intentional infliction of emotional distress, and
8 UCL violations. (Id.) The court denied plaintiff leave to amend with respect to all of his other
9 proposed claims. (Id.)

10 On September 28, 2012, defendant filed a motion to dismiss plaintiff’s remaining claims
11 asserted in the third amended complaint. (ECF No. 125.) This motion was denied. (ECF No.
12 137.) Defendant subsequently filed its answer to the third amended complaint on December 12,
13 2012. (ECF No. 138.) The parties initiated discovery in February of 2013.

14 On February 27, 2014, three days after the discovery cutoff, defendant filed a motion for
15 summary judgment with respect to plaintiff’s remaining claims. (ECF No. 179.) The court
16 granted this motion in full on September 9, 2014, and entered judgment for defendant on that
17 same day. (ECF Nos. 197, 202, 203.) Plaintiff subsequently appealed the court’s grant of
18 summary judgment. (ECF No. 205.) This appeal is currently pending before the Ninth Circuit
19 Court of Appeals.³ On October 7, 2014, defendant filed the present motion for attorneys’ fees.
20 (ECF No. 213.)

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24 ³ Plaintiff timely appealed the court’s order granting summary judgment to defendant, (ECF No.
25 204), and that appeal is currently pending before the Ninth Circuit Court of Appeals. Although
26 the filing of an appeal typically divests a district court of jurisdiction over the action while the
27 appeal is pending, “the Ninth Circuit has made it clear that district courts retain jurisdiction to
28 decide issues regarding attorney’s fees after an appeal is taken.” United States v. Real Property
Located at 475 Martin Lane, 727 F. Supp. 2d 876, 882 (C.D. Cal. 2010) (citing Masalosalo ex rel.
Masalosalos v. Stonewall Ins. Co., 718 F.2d 955, 956-57 (9th Cir. 1983)).

1 II. Defendant's Motion for Attorneys' Fees

2 As an initial matter, the court addresses plaintiff's argument that defendant's motion for
3 attorneys' fees should be summarily dismissed for failure to file an affidavit in support of the
4 motion that meets the requirements set forth in Local Rule 293. Local Rule 293 requires that all
5 motions for awards of attorneys' fees filed in this court include an affidavit showing the
6 following: (1) "that the moving party was a prevailing party"; (2) "that the moving party is
7 eligible to receive an award of attorneys' fees, and the basis of such eligibility"; (3) "the amount
8 of attorneys' fees sought"; (4) "the information pertaining to each of the criteria set forth in
9 [Local Rule 293](c)";⁴ and (5) "such other matters as are required under the statute under which
10 the fee award is claimed." E. Dist. L.R. 293(b).

11 Defendant has filed two declarations in support of its motion, one made by David
12 Newman, defense counsel in this action, and the other made by Mark Flewelling, the billing
13 attorney assigned to this case by the firm representing defendant. (ECF Nos. 213-1, 213-2.)
14 Plaintiff claims that neither of these declarations state that defendant was the prevailing party in
15 this action, that defendant is eligible to receive an award of attorneys' fees, the basis for
16 defendant's eligibility for such an award, or information pertaining to each of the criteria set out

17 ⁴ The criteria set forth in Local Rule 293(c) include the following:

- 18 (1) the time and labor required of the attorney(s);
19 (2) the novelty and difficulty of the questions presented;
20 (3) the skill required to perform the legal service properly;
21 (4) the preclusion of other employment by the attorney(s) because of the
22 acceptance of the action;
23 (5) the customary fee charged in matters of the type involved;
24 (6) whether the fee contracted between the attorney and the client is fixed or
25 contingent;
26 (7) any time limitations imposed by the client or the circumstances;
27 (8) the amount of money, or the value of the rights involved, and the results
28 obtained;
29 (9) the experience, reputation, and ability of the attorney(s);
30 (10) the "undesirability" of the action;
31 (11) the nature and length of the professional relationship between the attorney and
32 the client;
33 (12) awards in similar actions; and
34 (13) such other matters as the Court may deem appropriate under the
35 circumstances.

1 in Local Rule 293(c). Plaintiff concedes that these items were included in defendant's motion,
2 but argues that the inclusion of such information in the motion itself does not satisfy the
3 requirements of Local Rule 293 because it was not filed under penalty of perjury.

4 Contrary to plaintiff's contentions, a review of defendant's declarations in support of its
5 motion shows that defendant's motion complies with Local Rule 293. As defendant notes in its
6 reply, the two declarations clearly demonstrate that defendant was the prevailing party in this
7 action, that defendant is eligible to receive an award of attorneys' fees, and the basis for that
8 award. Furthermore, the declarations provide information concerning the time and labor required
9 of the attorneys; the novelty and difficulty of the questions presented; the skill required to
10 perform the legal service properly; the customary fee charged in matters of the type involved in
11 this case; whether the contracted fee was contingent or fixed; the amount of money, or the value
12 of the rights involved, and the results obtained; the experience, reputation, and ability of
13 defendant's attorneys; the "undesirability" of the action; and the nature and length of the
14 professional relationship between the attorneys and the client. Defendant also notes in its reply
15 brief that information regarding the preclusion of other employment by the attorneys and a time
16 limit imposed by defendant or the circumstances was not included in either declaration because
17 these issues were not applicable to the fees as no such limitations were imposed in this case.

18 While defendant admits in its reply brief that neither declaration addresses attorneys' fees
19 that have been awarded in similar cases, such an omission does not warrant the dismissal of
20 defendant's motion on procedural grounds as suggested by plaintiff. Even though this
21 information is not included in the declarations, defendant devotes an entire section of its motion
22 to this topic. Plaintiff argues that defendant's failure to present this information under penalty of
23 perjury is prejudicial to plaintiff because "he does not have the experience to challenge the
24 statements made in the motion that were not made under penalty of perjury." (ECF No. 220 at 4.)
25 However, the case law cited to by defendant in its motion regarding attorneys' fee awards in other
26 similar actions is readily accessible and verifiable. Accordingly, plaintiff's ability to address
27 defendant's assertion that the case law supports its argument that the requested fees are
28 reasonable has not been prejudiced by the fact that defendant did not address this particular factor

1 through the attached declarations. Plaintiff’s argument is, therefore, unpersuasive. The court
2 finds that defendant’s motion and supporting declarations satisfy the affidavit requirements set
3 forth in Local Rule 293.

4 a. Legal Standards for an Award of Attorneys’ Fees

5 “In a diversity case, the law of the state in which the district court sits determines whether
6 a party is entitled to attorney fees, and the procedure for requesting an award of attorney fees is
7 governed by federal law.” Carnes v. Zamani, 488 F.3d 1057, 1059 (9th Cir. 2007). Generally,
8 “[u]nder the American Rule, ‘the prevailing litigant ordinarily is not entitled to collect a
9 reasonable attorneys’ fee from the loser.’” Travelers Casualty & Surety Co. of Am. v. Pacific
10 Gas & Electric Co., 549 U.S. 443, 448 (2007) (quoting Alyeska Pipeline Service Co. v.
11 Wilderness Society, 421 U.S. 240, 247 (1975)). However, a statute or enforceable contract
12 allocating attorneys’ fees can overcome this general rule. Id. (citing Fleischmann Distilling
13 Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967)). California law permits parties to
14 allocate attorneys’ fees by contract. See Cal. Code Civ. Proc. § 1021 (“Except as attorney’s fees
15 are specifically provided for by statute, the measure and mode of compensation of attorneys and
16 counselors at law is left to the agreement, express or implied, of the parties . . .”).

17 California Civil Code Section 1717 governs the recovery of attorneys’ fees pursuant to an
18 underlying contract. Section 1717 authorizes an award of reasonable attorneys’ fees “in any
19 action on a contract” where the contract “specifically provides that attorney’s fees and costs,
20 which are incurred to enforce that contract, shall be awarded . . .” Cal. Civ. Code § 1717(a). An
21 attorneys’ fees provision “shall be construed as applying to the entire contract,” even if its
22 language ostensibly permits recovery of attorneys’ fees only under more limited circumstances.
23 Id.; see Kangarlou v. Progressive Title Co., 128 Cal. App. 4th 1174, 1178 (2005) (noting that
24 under section 1717(a), “parties may not limit recovery of attorney fees to a particular type of
25 claim”). “Although Section 1717 limits the court’s ability to enforce an attorneys’ fees clause to
26 ‘any action on the contract,’ California courts liberally construe ‘on a contract’ to extend to any
27 action ‘[a]s long as an action ‘involves’ a contract and one of the parties would be entitled to
28 recover attorney fees under the contract if that party prevails in its lawsuit” In re Baroff,

1 105 F.3d 439, 442-43 (9th Cir. 1997) (quoting Milman v. Shukhat, 22 Cal. App. 4th 538, 544-45
2 (1994)); see Barrientos v. 1801-1825 Morton LLC, 583 F.3d 1197, 1216 (9th Cir. 2009)
3 (interpreting the language of Section 1717 liberally to find that an action is “on a contract”
4 whenever “the underlying contract between the parties is not collateral to the proceedings but
5 plays an integral part in defining the rights of the parties”). “California law is settled that an
6 obligation to pay attorneys’ fees incurred in the enforcement of a contract includes attorneys’ fees
7 incurred in defending against a challenge to the underlying validity of the obligation.” Siligo v.
8 Castellucci, 21 Cal. App. 4th 873, 878 (1994).

9 To recover attorneys’ fees pursuant to a contractual provision under Section 1717, the
10 moving party must be able to show that: (1) the underlying contract authorizes such fees, (2) the
11 moving party is the prevailing party, and (3) the attorneys’ fees incurred are reasonable. First
12 Nat. Ins. Co. of Am. v. MBA Const., 2005 WL 3406336, at *2 (E.D. Cal. Dec. 12, 2005). “The
13 California Supreme Court has emphasized that a trial court is ‘obligated to award attorney fees[]
14 whenever the statutory conditions have been satisfied.’” Hopkins v. Wells Fargo Bank, N.A.,
15 2014 WL 2987753, at *1 (E.D. Cal. July 1, 2014) (quoting Hsu v. Abbara, 9 Cal. 4th 863, 872
16 (1995)).

17 b. The Underlying Contracts Authorize the Attorneys’ Fees Requested by Defendant

18 Defendant argues that the loan instruments concerning each of plaintiff’s three properties
19 at issue in this action contain language that entitles defendant to attorneys’ fees with respect to all
20 of the claims that were asserted by plaintiff in this action. The promissory notes for each of the
21 three properties contain the following identical fees provision:

22 The Lender will have the right to be paid back by me for all of its costs and
23 expenses in enforcing this Note to the extent not prohibited by applicable law.
24 Those expenses may include, for example, reasonable attorneys’ fees and court
costs.

25 (ECF No. 179-4 at 5 [Shelborne property], 29 [Third Street property], 53 [Larkflower property].)

26 Similarly, the deeds of trust for each of the three parcels of property identically provide:

27 If: (A) I do not keep my promises and agreements made in this Security
28 Instrument, or (B) someone, including me, begins a legal proceeding that may

1 significantly affect Lender’s rights in the Property (such as a legal proceeding in
2 bankruptcy, in probate, for condemnation or to enforce laws or regulations), then
3 Lender may do and pay for whatever it deems reasonable or appropriate to protect
4 the Lender’s rights in the Property. Lender’s actions may, without limitation,
5 include appearing in court, paying reasonable attorneys’ fees

6 (ECF No. 179-4 at 14 [Shelborne property], 38 [Third Street property], 62 [Larkflower
7 property].)⁵

8 Defendant argues that all of the claims plaintiff asserted in this action “challenged
9 [defendant’s] rights under the parties’ agreements” in a manner that, if meritorious, would have
10 “significantly affected [defendant’s] rights in the Propert[ies].” (ECF No. 213 at 9.)
11 Furthermore, defendant asserts that the attorneys’ fees incurred in defending this action were
12 incurred in furtherance of defendant’s efforts to “enforc[e] th[e] Note[s]” regarding the three
13 properties at issue. (*Id.*)

14 The plain language of the above-quoted provisions in the promissory notes and the deeds
15 of trust entitle defendant to attorneys’ fees in this action if defendant was “enforcing th[e] Note”
16 or if this proceeding could “significantly affect [defendant’s] rights in the Property.” Both of
17 these prerequisites are met. In the third amended complaint, plaintiff sought relief in the form of
18 an order enforcing the alleged promise that defendant would modify the terms of plaintiff’s loans,
19 which would materially and permanently alter defendant’s rights under the loan contracts for each
20 property. (ECF No. 98 at ¶ 56 (“This injustice can be avoided only through enforcement of the
21 promise to permanently modify plaintiff’s Shelborne, Larkflower, and 3rd Street loans to lower
22 each by \$500 per month”)) Furthermore, plaintiff also sought and obtained preliminary
23 injunctive relief in this case that precluded defendant from foreclosing on the three properties
24 during the pendency of this action, and sought additional injunctive relief that would have further

25 ⁵ All three promissory notes and deeds of trust were attached to the declaration of Michael Dolan
26 in support of defendant’s motion for summary judgment. (ECF No. 179-4.) As these documents
27 are matters of public record properly subject to judicial notice pursuant to Federal Rule of
28 Evidence 201, and plaintiff does not dispute that any of these documents are authentic, the court
takes judicial notice of such documents. *See Cartmill v. Sea World, Inc.*, 2010 WL 4569922, at
*1 (S.D. Cal. Nov. 5, 2010) (taking judicial notice of documents filed in that case and other court
proceedings).

1 restricted defendant's right to non-judicially foreclose on the properties. (ECF Nos. 21, 126.)

2 Moreover, all of plaintiff's causes of action are either based on the contract, concern
3 alleged actions significantly related to the contract, or seek to substantially modify the terms of
4 the contract with respect to each of the three properties at issue in this case. Other courts have
5 found claims similar to those asserted by plaintiff to fall squarely within the exact same language
6 provided by the above fee-shifting provisions. E.g., Hopkins v. Wells Fargo Bank, N.A., 2014
7 WL 2987753, at *2 (E.D. Cal. July 1, 2014) (holding that the above attorneys' fees provisions at
8 issue here entitled the "prevailing defendant in a foreclosure action to attorney's fees under
9 section 1717," and citing to other cases finding the same); Smith v. World Sav. & Loan Ass'n,
10 2011 WL 1833088, at *2 (E.D. Cal. May 12, 2011) (finding that defendant was entitled to
11 attorneys' fees under the contractual provisions at issue in the current action "[b]ecause Plaintiff's
12 lawsuit attacked the mechanics of Defendant's ownership of the [Promissory Note], the non-
13 judicial foreclosure, and the mechanism by which Defendant became the beneficiary under the
14 [Deed of Trust]," which required defendant "to protect its interests in the Property."); Nguyen v.
15 Wells Fargo Bank, N.A., 2011 WL 9322, at *3 (N.D. Cal. Jan. 3, 2011) (construing the same
16 attorneys' fees provisions at issue here, and holding that all of the plaintiff's claims, including his
17 fraud and other non-contract claims, were "inextricably intertwined with the contract claim and
18 fees need not be apportioned claim by claim" because all of the plaintiff's claims directly related
19 to Wells Fargo's enforcement of the note through foreclosure); see also Bonner v. Redwood
20 Mortgage Corp., 2010 WL 2528962, at *3 (N.D. Cal. June 18, 2010) (holding that the defendant
21 was entitled to attorneys' fees with respect to the plaintiff's fraudulent misrepresentation, UCL,
22 RESPA, TILA, Civil RICO, and emotional distress claims because of "their significant relation to
23 the parties' mortgage contract," which contained a fee-shifting provision similar to the ones at
24 issue in this case).

25 Here, all of plaintiff's claims relate either to defendant's servicing of the three loans or to
26 defendant's attempts to non-judicially foreclose on those loans. Thus, plaintiff's causes of
27 actions are intertwined with the contracts at issue such that they could not be separated out and
28 defendant mounted its defense of this case in order to protect its interest in the properties at issue.

1 Accordingly, defendant is entitled to attorneys' fees for its defense of this case under the above
2 fee-shifting provisions.

3 Plaintiff does not contest defendant's argument that the claims asserted in this action
4 would significantly affect defendant's interest in the three properties or that plaintiff's claims
5 were intertwined with the contracts containing the above fee-shifting provisions.⁶ Instead,
6 plaintiff argues that defendant's attempts at foreclosing on the three properties subject to this
7 action have been pursuant to the non-judicial foreclosure procedure set forth in California Civil
8 Code Section 2924, which plaintiff asserts is preempted by the federal Home Owners Lending
9 Act ("HOLA"). Plaintiff further asserts that because of this preemption, the attorneys' fees for
10 which defendant seeks to recover do not fall within the language of the above contractual
11 provisions because defendant's fees have been incurred in pursuit of a foreclosure "process that is
12 prohibited by applicable law." (ECF No. 220 at 7.) Plaintiff's arguments are unpersuasive.

13 As defendant notes in its reply, plaintiff asserted similar arguments regarding HOLA
14 preemption of the non-judicial foreclosure procedure set forth in California Civil Code Section
15 2924 at previous points during this litigation and the court found those arguments unavailing.
16 (See ECF No. 129 at 3-5; ECF No.130 at 7.) Plaintiff's preemption argument is equally
17 unpersuasive in the present context. The case law plaintiff cites to in his opposition in support of
18 this contention does not stand for plaintiff's suggested proposition that California's entire non-
19 judicial foreclosure scheme under Section 2924 is preempted by HOLA. Rather, those cases
20 generally hold that claims based on alleged violations of Section 2924 brought against federal
21 savings banks operating under HOLA are preempted to the extent that the plaintiff seeks to hold
22 the defendant bank liable for activities relating to the "processing, origination, servicing [or] sale
23 of mortgages" when the alleged violations are with respect to standards that differ from those
24 provided by HOLA. Nguyen, 749 F. Supp. 2d at 1032; see DeLeon v. Wells Fargo Bank, N.A.,
25 2011 WL 311376, at *7 (N.D. Cal. Jan. 28, 2011). Furthermore, plaintiff's preemption argument
26

27 ⁶ Plaintiff twice states the following in his opposition to defendant's motion: "Plaintiff agrees
28 with [defendant] that, in the instant case, all of plaintiff's claims directly relate to [defendant's]
enforcement of the note through non-judicial foreclosure." (ECF No. 220 at 6-7.)

1 has no bearing on the issue of whether plaintiff's claims asserted in the third amended complaint
2 are on the contract or otherwise intertwined with the contracts at issue. In sum, the fee-shifting
3 provisions in the promissory notes and deeds of trust provide a proper contractual basis for
4 defendant to seek the requested attorneys' fees.

5 c. Defendant is the Prevailing Party in this Action

6 Defendant is indisputably the prevailing party. When "the results of the litigation are
7 mixed," the court may decline to award fees to either party. Hsu v. Abbara, 9 Cal. 4th 863, 876
8 (1995). Here, however, defendant achieved a "simple, unqualified win." Id. The court granted
9 summary judgment in defendant's favor with respect to all of plaintiff's remaining claims
10 asserted in the third amended complaint. (See ECF Nos. 115, 123, 197, 202.) Accordingly, it is
11 clear that defendant is the prevailing party in this action.

12 Because defendant is the prevailing party, and the promissory notes and deeds of trust for
13 each property entitle it to reasonable attorneys' fees, plaintiff is obligated to pay reasonable
14 attorneys' fees to defendant.

15 d. The Fees Sought by Defendant are Reasonable

16 After the court determines that an award of fees is warranted, it must then determine
17 whether the amount requested is reasonable. Fees awarded under section 1717(a) are "fixed by
18 the court," Cal. Civ. Code § 1717(a), which "has broad authority to determine the amount of a
19 reasonable fee," PLCM Grp. v. Drexler, 22 Cal. 4th 1084, 1095 (2000). The starting point for
20 determining reasonable attorneys' fees under Section 1717 is the "lodestar," which is calculated
21 by multiplying the number of hours reasonably expended on litigation by a reasonable hourly
22 rate. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); PLCM Grp., 22 Cal. 4th at 1095 ("[T]he
23 fee setting inquiry in California ordinarily begins with the 'lodestar,' i.e., the number of hours
24 reasonably expended multiplied by the reasonable hourly rate."). Furthermore, "[i]n calculating
25 reasonable attorney fees the court must [also] consider the following factors: (1) the time and
26 labor required, (2) the novelty and difficulty of the questions involved, (3) the skill necessary to
27 perform the legal services properly, (4) the preclusion of other employment by the attorney due to
28 acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time

1 limitations imposed by the client or circumstances, (8) the amount involved and the results
2 obtained, (9) the experience, reputation and ability of the attorneys, (10) the “undesirability” of
3 the case, (11) the nature and length of the professional relations with the client, and (12) awards
4 in similar cases.” LaFarge Conseils Et Etudes, S.A. v. Kaiser Cement & Gypsum Corp., 791 F.2d
5 1334, 1341-42 (9th Cir. 1986) (citing Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 69-70 (9th
6 Cir. 1975)). Based on a consideration of these factors, the court may then adjust the lodestar
7 figure. Hopkins, 2014 WL 2987753, at *3 (quoting PLCM Grp., 22 Cal. 4th at 1096). A
8 complete failure to consider these factors is an abuse of discretion, but a court may properly deem
9 that some factors are not relevant to the present case. LaFarge Conseils Et Etudes, S.A., 791 F.2d
10 at 1342.

11 1. The Number of Hours Expended is Reasonable

12 Under California law, a court determining the number of hours reasonably expended on a
13 case “must carefully review attorney documentation of hours expended.” Ketchum v. Moses, 24
14 Cal.4th 1122, 1132 (2001) (quoting Serrano v. Priest, 20 Cal.3d 25, 48 (1977)). The court must
15 exclude hours that “were not reasonably expended in pursuit of successful claims,” Harman v.
16 City & County of San Francisco, 158 Cal.App.4th 407, 417 (2007), “[a]ttorney time spent on
17 services which produce no tangible benefit for the client,” Meister v. Regents of Univ. of Cal., 67
18 Cal. App. 4th 637, 652 (1998), or any otherwise “duplicative or excessive” hours. Graciano v.
19 Robinson Ford Sales, Inc., 144 Cal.App.4th 140, 161 (2006). “[T]he party seeking attorneys’ fees
20 bears the burden of submitting detailed time records which justify the hours spent working on the
21 claims.” Phillips v. IMS Loans, Inc., 2010 WL 3958653, at *3 (E.D. Cal. Oct. 8, 2010) (citing
22 Hensley v. Eckerhart, 461 U.S. 424, 434 (1983)).

23 Here, defendant has attached to the declaration of Mark Flewelling copies of the billing
24 statements sent to defendant by Anglin, Flewelling, Rasmussen, Campbell, & Trytten LLP
25 (“AFRCT”) detailing the hours billed, the nature of the professional services rendered, and the
26 customary hourly rate of each attorney. (See Flewelling Decl. Exhibit A.) The Flewelling and
27 Newman declarations state that defendant only seeks to recover attorneys’ fees incurred by
28 attorneys David Newman, Robert Little, and Christopher Carr, the three attorneys who had

1 primary responsibility over this case at AFRCT at various points throughout this action.
2 (Flewelling Decl. ¶ 3; Newman Decl. ¶ 3.) Defendant does not seek to recover any fees incurred
3 for the time other attorneys, paralegals, or other staff at AFRCT spent on this case. (Flewelling
4 Decl. ¶ 7; Newman Decl. ¶ 3.) Furthermore, Mark Flewelling states in his declaration that
5 defendant has declined to recover \$5,000 in fees incurred in January 2011 and \$1,007 in fees
6 incurred in August and September 2013 in connection with an unsuccessful discovery motion
7 filed by defendant. (Newman Decl. ¶ 7.)

8 Plaintiff has not objected to any of the time entries listed in the attached billing statements
9 as unreasonable. Furthermore, a review of these records shows that hours for which defendant
10 seeks recovery are not excessive in light of the circumstances presented by this case. As noted
11 above, defendant only seeks to recover fees for three of the attorneys who worked on this case
12 even though other attorneys and paralegals at AFRCT also billed defendant for time spent
13 working on this case. Furthermore, defendant has also omitted certain attorneys' fees associated
14 with unsuccessful motions filed by defendant over the course of this litigation. In sum, the billing
15 statements submitted by defendant show that defendant seeks to recover only fees incurred for
16 work performed by Carr, Newman, and Little in connection with the extensive law and motion
17 practice that occurred at the pleading stages of this case, discovery and discovery-related motions,
18 and the preparation of its motion for summary judgment. Based on a careful review of the billing
19 records attached to the Flewelling declaration, the court determines that Carr reasonably billed
20 51.7 hours, Newman reasonably billed 457.9 hours, and Little reasonably billed 22.3 hours for
21 services rendered to defendant in connection with these actions in litigating this case.

22 David Newman also states in his declaration that he will have spent "at least six hours in
23 connection with [the present] fee motion" beyond those hours accounted for in the billing
24 statements. (Newman Decl. ¶ 7.) Specifically, he states that he spent three hours of billable time
25 preparing the current motion, two hours reviewing and responding to plaintiff's opposition
26 briefing, and "expect[s] to spend an additional hour preparing for and attending a hearing on this
27 motion." (Id.) Because the present motion was taken under submission without oral argument,
28 no hearing was held. Therefore, the court will not take into account the additional hour of billable

1 time that Newman anticipates he would have spent preparing for such a hearing. Nevertheless,
2 the court finds that the other five hours of additional time spent in connection with the present
3 motion constitute a reasonable amount of time to draft the present motion, review the plaintiff's
4 opposition to the motion, and draft a reply brief. Accordingly, these hours will be computed into
5 the lodestar.

6 2. Counsel's Hourly Rates are Reasonable

7 In order to determine what rate is "reasonable," courts look at "prevailing market rates in
8 the relevant community." Blum v. Stenson, 465 U.S. 886, 895 (1984); Davis v. City of San
9 Francisco, 976 F.2d 1536, 1545 (9th Cir. 1992) (a reasonable hourly rate should be determined
10 "by reference to the fees that private attorneys of an ability and reputation comparable to that of
11 prevailing counsel charge their paying clients for legal work of similar complexity"). Generally,
12 the relevant community is the forum in which the district court sits. Davis v. Mason County, 927
13 F.2d 1473, 1488 (9th Cir. 1991).

14 Here, defendant requests the court's approval of rates ranging from \$265 to \$330 per
15 hour and represents that those rates are reasonable in light of the nature of the services rendered.⁷
16 In support of this position, the Flewelling and Newman declarations detail the qualifications and
17 rates for each of the three attorneys at AFRCT who worked on the case, as well as the detailed
18 billing records for the case showing the fees and costs incurred by defendant. Plaintiff submitted
19 no evidence to contest these rates.

20 ///

21 ⁷ Specifically, defendant seeks the court's approval of the following rates: \$330 per hour for
22 Christopher Carr, an attorney with 38 years' experience in commercial and real estate litigation;
23 \$275 per hour for David Newman, an attorney with eight years' litigation experience; and \$320
24 per hour for Robert Little, an attorney with 15 years' experience in civil litigation and appellate
25 matters. (Flewelling Decl. at ¶ 3.) While defendant requests a rate of \$275 per hour with respect
26 to all hours spent by David Newman, the billing records submitted by defendant show that
27 Newman billed at only \$265 for all of the hours outside of the five associated with the present
28 motion. Accordingly, the court uses the \$265 for purposes of determining the lodestar for the
work performed by Newman for all but the five hours associated with the present motion.
Similarly, defendant requests a rate of \$330 per hour for all of the hours worked by Christopher
Carr. However, the billing records show that he billed at variable rates during the course of this
litigation. Specifically, he billed 13.9 hours at \$300 per hour, 37.3 hours at \$330 per hour, and
0.5 hours at \$320 per hour. Therefore, the court will calculate the fees for Carr's services in this
manner in determining the lodestar rather than the \$330 per hour rate for all hours that is
suggested by defendant.

1 The hourly rates defendant charged by Carr, Newman, and Little are consistent with those
2 awarded in similar cases within this district for the work of attorneys of similar skill levels. See
3 e.g., Hopkins, 2014 WL 2987753 (finding defense attorneys’ hourly rates ranging between \$240
4 and \$496 per hour to be reasonable in a foreclosure action brought against Wells Fargo Bank,
5 N.A.); Coppes v. Wachovia Mortgage Corp., 2011 WL 4852259, at *3 (E.D. Cal. Oct. 12, 2011)
6 (collecting cases holding hourly rates between \$250 and \$320 for attorneys to be reasonable when
7 defending against causes of action similar to those asserted by plaintiff in the present case);
8 Phillips, 2010 WL 3958653, at *3 (holding that the hourly rates of \$320 per hour for . . . an
9 attorney with 29 years of litigation experience; \$300 per hour for . . . an attorney who graduated
10 24 years ago; [and] \$250 per hour for . . . an attorney with 8 years of litigation experience . . .
11 reflect[ed] the prevailing rate[s] for similar work in the relevant legal community of Sacramento
12 in the Eastern District of California” in 2010). Accordingly, the court finds these rates to be
13 reasonable.

14 In sum, the court finds that the billing records and declarations provided by defendant in
15 support of its motion show that Carr reasonably billed 13.9 hours at \$300 per hour, 37.3 hours at
16 \$330 per hour, and 0.5 hours at \$320 per hour; that Newman reasonably billed 547.9 hours at
17 \$265 per hour and 5 hours at \$275 per hour; and that Little reasonably billed 22.3 hours at \$320
18 per hour. Overall, these billings result in a lodestar of \$146,493.50, calculated as follows:

19 Carr:	13.9 x \$300 = \$4,170.00
	37.3 x \$330 = \$12,309.00
	0.5 x \$320 = \$160.00
22 Newman:	457.9 x \$265 = \$121,343.50
	5 x \$275 = \$1,375
24 Little:	22.3 x \$320 = \$7,136.00
25 Total:	\$146,493.50 ⁸

26 ⁸ Defendant states in its motion that it seeks to recover \$144,349 in fees, but Mark Flewelling
27 states in his declaration that the total fees requested by defendant is \$144,250. (compare ECF No.
28 213 at 25 with Flewelling Decl. ¶ 8.) In addition to this incongruity, a close review of the billing
records attached to Flewelling’s declaration shows that those records do not correspond with the

1 3. Other Factors Demonstrate that the Amount Requested is Reasonable

2 “After calculating the lodestar, the court must ‘consider whether the total fee award so
3 calculated under all of the circumstances is more than a reasonable amount’; if so, it must ‘reduce
4 the . . . award so that it is a reasonable figure.’” Hopkins, 2014 WL 2987753, at *4 (quoting
5 PLCM Grp., 22 Cal. 4th at 1095-96). The court may then adjust the lodestar figure after a
6 consideration of the above-listed LaFarge factors. “While the court may rely on any of these
7 factors to increase or decrease the lodestar figure, there is a ‘strong presumption’ that the lodestar
8 is the reasonable fee.” Hopkins, 2014 WL 2987753, at *4 (quoting Crawford v. Astrue, 586 F.3d
9 1142, 1149 (9th Cir. 2009)); accord Harman v. City & County of San Francisco, 158 Cal.App.4th
10 407, 416 (2007).

11 Here, defendant asserts that the LaFarge factors do not warrant an adjustment to the
12 requested fees. The court agrees.

13 While the legal questions posed in this action were not particularly novel or difficult, the
14 number of claims at issue in the case and amount of time and labor required to defend this action
15 was unusually great. The law and motion practice at the pleading stage in this case was
16 remarkably extensive, lasting over two years and including, among other filings, several
17 successful motions to dismiss filed by defendant and numerous motions to amend the complaint
18 and motions for reconsideration filed by plaintiff. Furthermore, the docket in this case generally
19 indicates that defendant did not litigate this case in an inefficient or artificially expensive manner.
20 Generally, defendant limited its own filings in this case to dispositive motions and spent much of
21 its time and effort opposing plaintiff’s many filings. Defendant filed its successful motion for
22 summary judgment with respect to all of plaintiff’s remaining claims immediately after the close

24 amounts listed for each billing period in Flewelling’s declaration. Nor does the sum total of the
25 fees stated in the billing records correspond to the total requested in the motion. Nevertheless, a
26 close review of the billing records shows that the three attorneys billed for the number of hours
27 and at the hourly rates noted in the above lodestar computation. Because there is a “strong
28 presumption” that the lodestar amount based on reasonable hours and hourly fees is the
 reasonable fee, Hopkins, 2014 WL 2987753, at *5 (citing Crawford, 586 F.3d at 1149), the court
 uses the above lodestar figure totaling \$146,493.50 as the base fees total rather than either of the
 conflicting amounts requested by defendant.

1 of discovery. Furthermore, the billing records submitted by defendant demonstrate that the fees
2 defendant seeks to recover are primarily attributable to the hours spent by its attorneys drafting its
3 dispositive motions, engaging in reasonable discovery efforts, and responding to plaintiff's
4 various motions and other filings.

5 Defendant's potential liability in this action was rather large for a case of this nature. This
6 action involved mortgage loans concerning three separate parcels of residential real property to
7 which defendant was the mortgagee. Had plaintiff succeeded in this action and received his
8 requested relief, defendant would have been enjoined from foreclosing on all three loans.
9 Plaintiff also sought compensatory, statutory, and punitive damages that, by plaintiff's own
10 calculations, would have amounted to a recovery of many millions of dollars.⁹ Defendant
11 successfully defended against this potential liability when it obtained summary judgment in its
12 favor.

13 While other courts have awarded smaller sums in other foreclosure cases presenting
14 claims and issues similar to those present here, those cases were resolved at the pleading stages,
15 involved fewer claims than were at issue in this case, and were ultimately far less protracted in
16 nature. See, e.g., Hopkins, 2014 WL 2987753 (awarding the defendant \$49,410 in attorneys' fees
17 in foreclosure case involving some complex issues concerning bankruptcy law that was resolved
18 on defendant's motion for judgment on the pleadings); Coppes, 2011 WL 4852259 (awarding
19 \$13,071.50 in attorneys' fees after defendant's successful motion to dismiss the first amended
20 complaint); Nguyen, 2011 WL 9322 (awarding \$19,302.50 in costs and fees to defendant after
21 successful motion to dismiss and opposition to plaintiff's motion for remand); Rivera v.
22 Wachovia Bank, 2009 WL 3423743 (S.D. Cal. Oct. 23, 2009) (awarding \$19,055 in attorneys'

23
24 ⁹ Defendant attaches a copy of a portion plaintiff's initial disclosures to the declaration of David
25 Newman detailing plaintiff's calculations of the damages sought with respect to each of his
26 claims. (Newman Decl. ¶ 8, Exhibit A.) These calculations indicate that plaintiff sought over
27 \$200,000,000 in damages, with the majority of the total consisting of punitive damages. While
28 the court notes that the potential monetary liability defendant realistically faced in this action was
far less than this amount, it also notes that the potential liability for a case of this nature was still
abnormally great given that it involved three residential mortgage loans and a large number of
claims.

1 fees to defendant after dismissal of the first amended complaint). Furthermore, the present case
2 required defendant to respond to the many motions filed by plaintiff and to engage in unusually
3 extensive discovery efforts for a case of this nature. When these additional efforts defendant had
4 to undertake in order to obtain a favorable judgment in this case are taken into account, the
5 lodestar amount is reasonable in light of the awards granted in similar cases.

6 The court also finds that the fees are reasonable in light of the experience, reputation and
7 ability of the attorneys given that their hourly rates appear to be in line with the rates of other
8 attorneys of similar experience and skill that have been approved by other courts in this district
9 with regard to similar actions. See, e.g., Hopkins, 2014 WL 2987753; Coppes, 2011 WL
10 4852259; Phillips, 2010 WL 3958653. Finally, the court finds that the other LaFarge factors
11 concerning whether this case precluded defendant's counsel from handling other matters, the
12 undesirability of this action, time limitations imposed on counsel by defendant, and the nature and
13 length of the professional relationship between defendant and its counsel also do not warrant an
14 adjustment to the lodestar amount because they were largely irrelevant to the fees incurred in this
15 case.

16 In light of these factors and the strong presumption that the lodestar is the reasonable fee,
17 the court need not adjust the lodestar figure. Accordingly, the court recommends that defendant
18 be awarded \$146,493.50 in attorneys' fees.

19 e. A Deferred Ruling on Defendant's Motion is Not Warranted

20 Plaintiff asserts that if the court does not deny defendant's motion on the merits, the court
21 should deny defendant's motion without prejudice in light of plaintiff's appeal of the court's grant
22 of summary judgment in defendant's favor, which is currently pending before the Ninth Circuit
23 Court of Appeals. Plaintiff argues that the court should decline to hear this motion at this time
24 because there is uncertainty as to who will prevail on appeal. Plaintiff cites to the Advisory
25 Committee Notes to the 1993 Amendments to Federal Rule of Civil Procedure 54 in support of
26 this argument, which provides that subdivision (d)(2)(B) of Rule 54 permits a district court to
27 defer its ruling on a motion for attorneys' fees or deny the motion without prejudice and direct the
28 moving party to refile the motion after the resolution of the appeal. The court finds plaintiff's

1 reasoning unpersuasive.

2 While it is true that the Federal Rules of Civil Procedure permit a district court to delay
3 ruling on a motion for attorneys' fees during the pendency of an appeal on the merits, nothing
4 requires the court to do so. In this case, the more prudent course of action would be to address
5 defendant's motion at this juncture rather than at some later time. As defendant highlights, the
6 Advisory Committee Notes to Federal Rule 58 provide that:

7 If the claim for fees involves substantial issues or is likely to be affected by the
8 appellate decision, the district court may prefer to defer consideration of the claim
9 for fees until after the appeal is resolved. However, in many cases it may be more
10 efficient to decide fee questions before an appeal is taken so that appeals relating
11 to the fee award can be heard at the same time as appeals relating to the merits of
12 the case.

13 This case clearly falls into the latter category. Plaintiff in no way demonstrates how the
14 court's decision on this motion will likely be affected by the Court of Appeals' decision on
15 plaintiff's appeal of summary judgment, or even why there is a plausible uncertainty as to which
16 party will prevail on that appeal. Therefore, plaintiff has not provided a compelling reason for the
17 court to withhold judgment on defendant's motion for attorneys' fees until after plaintiff's appeal
18 of summary judgment has been fully adjudicated. Accordingly, defendant's motion should be
19 ruled on at this juncture instead of after plaintiff's merits appeal has concluded.

20 Based on the foregoing, IT IS HEREBY RECOMMENDED that:

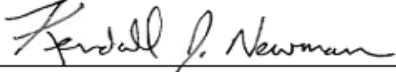
- 21 1. Defendant's motion for attorneys' fees (ECF No. 213) be GRANTED.
- 22 2. Defendant be awarded \$146,493.50 in attorneys' fees.

23 These findings and recommendations are submitted to the United States District Judge
24 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14)
25 days after being served with these findings and recommendations, any party may file written
26 objections with the court and serve a copy on all parties. Such a document should be captioned
27 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
28 shall be served on all parties and filed with the court within fourteen (14) days after service of the
objections. The parties are advised that failure to file objections within the specified time may

1 waive the right to appeal the District Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th
2 Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

3 IT IS SO RECOMMENDED.

4 Dated: December 29, 2014

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KENDALL J. NEWMAN
7 UNITED STATES MAGISTRATE JUDGE
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