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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CHAD MORRIS,

Plaintiff,

v.

RESIDENTIAL CREDIT SOLUTIONS,
INC,

Defendant.

No. 2:14-cv-01460-TLN-CKD

ORDER

This matter is before the Court pursuant to Plaintiff Chad Morris's ("Plaintiff") Motion for Attorneys' Fees. (ECF No. 32.) Defendant Residential Credit Solutions, Inc. ("Defendant") has filed an opposition¹ (ECF No. 32), to which Plaintiff has replied (ECF No. 36). The Court has carefully considered the briefing submitted by both parties. For the reasons set forth below, Plaintiff's motion is hereby DENIED WITHOUT PREJUDICE.

I. FACTUAL AND PROCEDURAL BACKGROUND

On or about August 16, 2005, Plaintiff purchased the property located at 21 Riverscape

¹ Defendant requests that the Court take judicial notice of this Court's Order in this matter dated February 2, 2015 (ECF No. 25), as well as Plaintiff's Motion for Injunctive Relief (ECF No. 17), Plaintiff's Complaint (ECF No. 1-2), and Defendant's Opposition to Plaintiff's Motion for Injunctive Relief (ECF No. 22). (Req. for Jud. Not., ECF No. 34.) The Court may take judicial notice of facts that can be "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). These documents are a matter of public record; "matters of public record, including publicly recorded documents, are appropriate for judicial notice pursuant to Federal Rule of Evidence 201." Therefore, Defendant's request is GRANTED.

1 Court, in Sacramento, California. (Compl., ECF No. 1-2 at ¶ 6.) The purchase price of the
2 property was \$519,000. (ECF No. 1-2 at ¶ 6.) Plaintiff invested \$51,900 as a down payment on
3 the property and took out a first mortgage for \$415,200 with Countrywide Financial. (ECF No. 1-
4 2 at ¶ 6.) Additionally, Plaintiff took out a second mortgage for \$51,900 with Countrywide
5 Financial. (ECF No. 1-2 at ¶ 6.) Plaintiff alleges that he made complete and timely mortgage
6 payments each month for the first seven years of his mortgages. (ECF No. 1-2 at ¶ 7.)

7 In 2008, Countrywide Financial was purchased by Bank of America (“BOA”) and
8 Plaintiff’s mortgage and deed of trust were transferred to BOA. (ECF No. 1-2 at ¶ 9.)
9 Throughout this period, Plaintiff continued to make complete and timely mortgage payments.
10 (ECF No. 1-2 at ¶ 9.) Throughout 2011 and 2012, Plaintiff attempted to receive a loan
11 modification from BOA, but was unable to receive the required information to complete the
12 process. (ECF No. 1-2 at ¶ 10.) In 2013, Plaintiff fell behind on his mortgage payments. (ECF
13 No. 1-2 at ¶ 11.) Afterwards, Plaintiff again began the loan modification process with BOA.
14 (ECF No. 1-2 at ¶ 11.)

15 After months of negotiating a loan modification with BOA, on or about May 28 2013,
16 Plaintiff received a letter from BOA stating that RCS had taken over the servicing rights on
17 Plaintiff’s home loan. (ECF No. 1-2 at ¶ 12.) On or about July 16, 2013, Plaintiff received a
18 letter from RCS stating RCS’s loan modification process and indicating that Plaintiff would have
19 to start over in his search for a home loan modification. (ECF No. 1-2 at ¶ 13.) From July of
20 2013 through February of 2014, Plaintiff attempted to acquire a home loan modification from
21 RCS. (ECF No. 1-2 at ¶ 14.) In doing so, Plaintiff was required to provide the same information
22 several times to RCS. (ECF No. 1-2 at ¶ 14.) Plaintiff alleges that once he provided the
23 information RCS would claim that the information that they had already received was out of date
24 and needed to be updated. (ECF No. 1-2 at ¶ 14.) Plaintiff would then send all the information
25 requested, and RCS would state that it needed additional information that was not previously
26 requested. (ECF No. 1-2 at ¶ 14.) Once the information was again provided, RCS would once
27 again assert that the information previously provided was out of date and needed to be resent.
28 (ECF No. 1-2 at ¶ 14.) During this period, Plaintiff had multiple points of contact. (ECF No. 1-2

1 at ¶ 14.) Each new point of contact was unfamiliar with Plaintiff's loan and his numerous
2 attempts to achieve a loan modification. (ECF No. 1-2 at ¶ 14.)

3 On or about February 26, 2014, Plaintiff received a notice of default from RCS. (ECF No.
4 1-2 at ¶ 15.) Plaintiff immediately contacted RCS to discuss this matter. (ECF No. 1-2 at ¶ 15.)
5 Once again, Plaintiff was given a new point of contact and was told that the notice of default was
6 simply a formality and as long as Plaintiff continued with the loan modification process no further
7 action would be taken. (ECF No. 1-2 at ¶ 15.) Plaintiff continued to provide RCS all the
8 information requested in hopes of achieving a loan modification. (ECF No. 1-2 at ¶ 15.) Each
9 time Plaintiff sent information RCS would either state it needed new information or state that they
10 already received information that was old and needed to be updated. (ECF No. 1-2 at ¶ 15.) At
11 no point during Plaintiff's almost daily discussions with RCS was he informed that a foreclosure
12 was being sought. (ECF No. 1-2 at ¶ 15.)

13 On May 28, 2014, Plaintiff received a notice of foreclosure at his residence. (ECF No. 1-
14 2 at ¶ 16.) The date of sale was scheduled for June 18, 2014, at 2:00 pm. (ECF No. 1-2 at ¶ 16.)
15 Plaintiff again contacted RCS. (ECF No. 1-2 at ¶ 16.) Once again, RCS stated that this was
16 simply a procedural step and that they would continue to work on getting a loan modification for
17 Plaintiff. (ECF No. 1-2 at ¶ 16.)

18 On June 4, 2014, Plaintiff filed a complaint for injunctive relief and damages alleging
19 violations of California Civil Code sections 2923 and 2924, fraudulent mortgage practices and
20 punitive damages. (ECF No. 1-2.) On June 10, 2014, Plaintiff sought an ex parte application for
21 temporary restraining order and preliminary injunction in Sacramento County Superior Court.
22 (ECF No. 1-3.) At the hearing Judge Raymond Cadei granted Plaintiffs temporary restraining
23 order and set a hearing regarding a preliminary injunction. (ECF No. 1-4.) On June 18, 2014,
24 Defendant removed this case to federal court and subsequently filed a motion to dismiss on June
25 25, 2014. (ECF No. 4.) Plaintiff filed a motion for preliminary injunction on July 21, 2014.
26 (ECF No. 17.)

27 On February 5, 2015, this Court granted in part and denied in part Defendant's Motion to
28 Dismiss. (ECF No. 25.) Specifically, the Court granted Defendant's motion to dismiss Plaintiff's

1 First Cause of Action for Injunctive relief and denied Defendant’s motion to dismiss Plaintiff’s
2 Second Cause of Action for Fraud. (ECF No. 25.) The Court found that Plaintiff’s First Cause of
3 Action, entitled injunctive relief, was in fact for violations of the Consumer Financial Protection
4 Bureau Act of 2010 and California Civil Code §2924.11 and that the remedy sought was
5 injunctive relief. (ECF No. 25 at 7.) The Court determined that Plaintiff had not alleged a
6 violation of Cal. Civ. Code § 2924.11 because Plaintiff did not plead that a foreclosure prevention
7 alternative had been approved in writing, as required under this section of the statute. Thus, the
8 Court dismissed Plaintiff’s First Cause of Action, but granted leave to amend. (ECF No. 25 at
9 15.)

10 As to Plaintiff’s Second Cause of Action, Fraud, the Court found that Plaintiff had
11 sufficiently pleaded fraud and determined that Plaintiff had met his burden for preliminary
12 injunctive relief pursuant to Plaintiff’s fraud allegations. (ECF No. 25.) Thus, the Court granted
13 Plaintiff’s request for injunctive relief.

14 On February 23, 2016, Plaintiff filed the instant motion for attorney’s fees based on the
15 Third District Court of Appeal of California’s ruling in *Monterossa v. Superior Court*, 237 Cal.
16 App. 4th 747, 749 (2015), which held that a borrower who obtains a preliminary injunction
17 enjoining the trustee’s sale of his or her home is a “prevailing borrower” within the meaning of
18 section 2924.12 and may recover attorney’s fees. (ECF No. 32.)

19 II. STANDARD OF LAW

20 In an action involving a substantive question of state law, federal courts apply the forum
21 state’s law to determine whether a party is entitled to an award of attorneys’ fees. *MRO*
22 *Commc’ns, Inc. v. Am. Tel. & Tel. Co.*, 197 F.3d 1276, 1282 (9th Cir. 1999). Under California
23 law, the court may award reasonable attorneys’ fees and costs to a “prevailing borrower” in an
24 action challenging a foreclosure. *See* Cal. Civ. Code § 2924.12(i); *Monterossa*, 237 Cal. App. 4th
25 at, 753, 757. A borrower is deemed to have “prevailed” if he or she “obtained injunctive relief or
26 was awarded damages.” Cal. Civ. Code § 2924.12(i).

27 When state law allows for an award of attorneys’ fees, it also supplies the method of fee
28 calculation. *See Mangold v. Cal. Pub. Utilities Comm’n*, 67 F.3d 1470, 1479 (9th Cir. 1995).

1 Under California law, a reasonable attorneys' fee is calculated based on a lodestar figure, the
2 product of all hours reasonably spent and a reasonable hourly rate. *Ketchum v. Moses*, 24 Cal. 4th
3 1122, 1131–32 (2001). Courts should avoid awarding compensation for inefficient and
4 duplicative efforts. *Id.* at 1132. A reasonable hourly rate is the rate prevailing in the relevant
5 community. *Id.* This lodestar fee may be adjusted to account for “(1) the novelty and difficulty
6 of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the
7 nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of
8 the fee award.” *Id.* The court’s goal is to approximate the market value of the attorneys’
9 services. *Id.*

10 III. ANALYSIS

11 Defendant presents four arguments in opposition to Plaintiff’s motion for attorneys’ fees:
12 (1) *Monterossa* is not applicable because Plaintiff did not bring an action under § 2924.12; (2)
13 *Monterossa* cannot be applied retroactively; (3) Plaintiff is foreclosed from moving for attorneys’
14 fees because he failed to request such an award in his motion for injunctive relief; and (4) the late
15 request for attorneys’ fees does not constitute excusable neglect under Federal Rule of Civil
16 Procedure 6(b)(2). Additionally, Defendant asserts that the amount sought by Plaintiff is
17 unreasonable. The Court addresses each argument in turn.

18 A. Monterossa’s Applicability to the Instant Action

19 Defendant asserts that the award of fees in *Monterossa* was based on allegations of
20 violation of § 2923.12, and “the only mention of an alleged violation of HOBR is plaintiff’s claim
21 of a violation of CC §2924.11 which, as this Court pointed out in its Order of 2/2/2015, is not
22 applicable to this fact situation, because plaintiff was quoting from a statute that does not go into
23 effect until 2018.” (ECF No. 33 at 3.) In response, Plaintiff asserts that the *Monterossa* court
24 held “the legislative history demonstrates unequivocally that the Legislature intended to authorize
25 an award of attorney fees and costs when a trial court grants a preliminary injunction as a result of
26 a lender’s violation of sections 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17.”
27 (ECF No. 36 at 2.) Thus, Plaintiff concludes that his claims are within the purview of
28 § 2924.12. This Court agrees.

1 In *Monterossa*, the court stated:

2 the prohibition against dual tracking is given teeth by section
3 2924.12, which provides remedies for a violation of section 2923.6
4 or other specified provisions of the statutory scheme. The remedies
5 are different, depending on whether a trustee's deed upon sale has
6 been recorded. "If a trustee's deed upon sale has not been recorded,
7 a borrower may bring an action for injunctive relief to enjoin a
8 material violation of Section 2923.55, 2923.6, 2923.7, 2924.9,
9 2924.10, 2924.11, or 2924.17."

10 *Monterossa*, 237 Cal. App. 4th at 753 (quoting Cal. Civ. Code § 2924.12(a)(1) (West)). Here,
11 Plaintiff's fraud claim is predicated on Plaintiff's allegations that Defendant illegally had multiple
12 points of contact to help perpetuate their fraud, in violation of § 2923.7. *See* Cal. Civ. Code
13 § 2923.7 (West) (requiring that once a borrower requests a foreclosure prevention alternative the
14 mortgage servicer "shall promptly establish a single point of contact and provide to the borrower
15 one or more direct means of communication with the single point of contact" for the purposes of
16 completing and evaluating a modification application). Additionally, Plaintiff argued that he
17 provided all requested materials sought by RCS for a loan modification and RCS failed to
18 acknowledge receipt of a complete application, in violation of § 2924.10. *See* Cal. Civ. Code §
19 2923.7 (West) ("When a borrower submits a complete first lien modification application or any
20 document in connection with a first lien modification application, the mortgage servicer shall
21 provide written acknowledgment of the receipt of the documentation within five business days of
22 receipt."). In obtaining a preliminary injunction, the Court acknowledged the viability of
23 Plaintiff's fraud cause of action which includes allegations of misrepresentations made by
24 numerous points of contact:

25 Plaintiff further alleges that Defendant promised to participate in
26 the loan modification process (ECF No. 1-2 at ¶ 25), and that while
27 Plaintiff was participating in the loan modification process his
28 home would not be subject to foreclosure. (ECF No. 1-2 at ¶ 26.)
These allegations consisting of false representations, are sufficient
to meet the fraud element of misrepresentation of a material fact.
Plaintiff next alleges that "RCS and BOA knew (the statements) to
be false and were actively participating in the foreclosure process,
including filing a notice of default, notice of foreclosure and notice
of sale." (ECF No. 1-2 at ¶ 26.) Thus, Plaintiff has pleaded the
element of knowledge of falsity. As to the third element, intent to
deceive and induce reliance, the complaint alleges that "[t]hese
promises were made by the defendant[] with the intent to induce

1 Plaintiff into believing he was protected from foreclosure.” (ECF
2 No. 1-2 at ¶ 27.) Plaintiff also alleges that he was ignorant of
3 Defendant’s intentions and relied on Defendant’s promises. (ECF
4 No. 1-2 at ¶ 28.) This clearly meets the fourth element, justifiable
5 reliance. Finally, Plaintiff meets the final element of damages
6 because he states that his house is now subject to foreclosure based
7 upon his reliance on Defendants’ promises. (ECF No. 1-2 at ¶ 28.)
8 Thus, Plaintiff has met the standard articulated in Federal Rule of
9 Civil Procedure 9.

10 (ECF No. 25 at 11.)² Thus, the Court finds that Plaintiff’s fraud claim is predicated on the above
11 HBOR violations of sections 2923.7 and 2924.10, which are specifically enumerated in § 2923.12
12 as being included within the meaning of the section. Accordingly, Defendant’s argument is not
13 persuasive.

14 **B. Monterossa’s Alleged Retroactive Application**

15 Defendant argues that Plaintiff is attempting to retroactively apply the holding in
16 *Monterossa* which was decided after the Plaintiff’s motion for injunctive relief. (ECF No. 33 at
17 4.) Plaintiff contends that Defendant’s argument misinterprets the use of the term retroactive and
18 how it applies to HBOR. (ECF No. 36 at 3.) Again, this Court agrees.

19 Defendant cites the case *Andre v. Bank of Am., N.A.*, No. 5:14-cv-02888-PSG, 2014 U.S.
20 Dist. LEXIS 168978, *11 (N.D. Cal. Dec. 5, 2014), for the proposition that *Monterossa* cannot be
21 applied to the instant case. In *Andre*, the court held that HBOR infractions that occurred prior to
22 the day HBOR became law, January 1, 2013, could not sustain a cause of action because HBOR
23 does not apply retroactively. *Andre* in no way applies to the instant case since the alleged facts
24 occurred in 2014 after HBOR’s effective date. Moreover, *Monterossa* did not create new law, but
25 instead interpreted the legislation that existed. In fact, nothing would have precluded Plaintiff
26 from bringing a motion for attorneys’ fees at the time this Court granted injunctive relief. Thus,
27 the Court turns to Defendant’s next argument.

28 ///

² See also Compl., ECF No. 1-2 at ¶¶ 12–16 (“Once again Plaintiff was given a new point of contact and was told that the notice of default was simply a formality and as long as Plaintiff continues with the loan modification process no further action would be taken. Plaintiff then continued to provide RCS all the information requested in hopes of achieving a loan modification. Each time Plaintiff sent in information, RCS would either state it needed new information or state that they already received information that was old and needed to be updated. At no point during Plaintiff’s almost daily discussions with RCS was he informed that a foreclosure was being sought.”)

1 C. Plaintiff's Failure to Pursue Attorneys' Fees within His Motion for Injunctive Relief

2 Defendant claims that Plaintiff is foreclosed from moving for attorneys' fees because he
3 did not request them in his motion for injunctive relief: "It is black letter law that a party is
4 entitled to due process at all stages of a legal proceeding, which includes notice of all claims
5 brought against him. This axiom applies to motions such as the one plaintiff filed on 7/21/2014,
6 plaintiff's Motion for a Preliminary Injunction [Doc. #17.]" (ECF No. 33 at 5-6.)

7 Interestingly enough, Defendant does not supply this Court with any "black letter law" in
8 support of its motion. The Court is not aware of any California state law or any Federal law
9 requiring a party to seek attorneys' fees within a motion for injunctive relief in order to
10 successfully file a motion for fees. Moreover, Federal Rule of Civil Procedure 54(d)(2) states
11 only that "[a] claim for attorneys' fees and related nontaxable expenses must be made by motion
12 unless the substantive law requires those fees to be proved at trial as an element of damages."
13 The rule does not state that the fees must be requested within the motion that the party prevailed
14 upon.

15 Defendant next argues that the motion for attorneys' fees is not timely and should not be
16 excused as "excusable neglect" under Federal Rule of Civil Procedure 6. (ECF No. 33 at 5.)
17 Plaintiff seems to agree that the motion should have been filed within the fourteen day time
18 period articulated by Federal Rule of Civil Procedure 54(d)(2)(B):

19 (B) Timing and Contents of the Motion. Unless a statute or a court
20 order provides otherwise, the motion must:

21 (i) be filed no later than 14 days after the entry of judgment;

22 (ii) specify the judgment and the statute, rule, or other grounds
entitling the movant to the award;

23 (iii) state the amount sought or provide a fair estimate of it; and

24 (iv) disclose, if the court so orders, the terms of any agreement
25 about fees for the services for which the claim is made.

26 However, Plaintiff asserts that failing to do so is excusable neglect.

27 Although, the parties seem to agree that the rule requires fourteen days from the entry of
28 the judgment, they do not distinguish between the Court's Order, granting injunctive relief, and

1 an order granting final judgment. The 1993 Amendment Notes of the Advisory Committee on
2 Rules explains that the term judgment as referenced in Rule 54(d) applies to the final disposing of
3 the case on the merits:

4 Subparagraph (B) provides a deadline for motions for attorneys’
5 fees—14 days after **final judgment** unless the court or a statute
6 specifies some other time. One purpose of this provision is to
7 assure that the opposing party is informed of the claim before the
8 time for appeal has elapsed. Prior law did not prescribe any specific
time limit on claims for attorneys’ fees. *White v. New Hampshire
Dep’t of Employment Sec.*, 455 U.S. 445 (1982). In many nonjury
cases the court will want to consider attorneys’ fee issues
immediately after rendering its judgment on the merits of the case.

9 (emphasis added). Here, the merits of Plaintiff’s case have not yet been decided. The Court has
10 only made the determination that there is a likelihood of success based on Plaintiff’s allegations
11 which have yet to have been proven. Although section 2924.12 provides for recovery of
12 attorneys’ fees based on obtaining preliminary injunctive relief, it does not specify that the party
13 must seek fees immediately upon obtaining such relief. Section (i) states: “A court may award a
14 prevailing borrower reasonable attorney’s fees and costs in an action brought pursuant to this
15 section. A borrower shall be deemed to have prevailed for purposes of this subdivision if the
16 borrower obtained injunctive relief or was awarded damages pursuant to this section.” The
17 section allows for recovery on fees where injunctive relief is obtained AND where damages are
18 awarded. Here, there has not been a determination as to damages. Thus, assessing fees at this
19 time is premature. To avoid piecemeal litigation of attorneys’ fees in this matter, the Court finds
20 that it would be more prudent to assess fees at the final judgment of this case which is yet to be
21 rendered.

22 In light of the Court’s ruling, assessment of the reasonableness of Plaintiff’s attorneys’
23 fees is inappropriate at this time.

24 **IV. CONCLUSION**

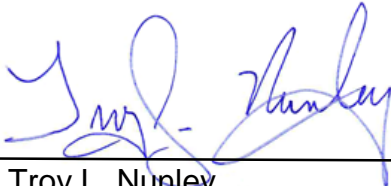
25 For the foregoing reasons, Plaintiff’s Motion for Attorneys’ Fees (ECF No. 32) is hereby
26 DENIED. Plaintiff is welcome to file an amended motion within fourteen (14) days of the entry
27 of final judgment in this matter.

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IT IS SO ORDERED.

Dated: August 1, 2016



Troy L. Nunley
United States District Judge