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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

NELSON LAC,  
  
  Plaintiff,  
  
  v.  
  
NATIONSTAR MORTGAGE LLC,  
DOES 1-10,  
  
  Defendant.

No. 2:15-cv-00523-KJM-AC (TEMP)

ORDER

Nelson Lac alleges Nationstar Mortgage LLC is attempting to conduct a foreclosure sale of his Sacramento, California home without first following the requirements of California law. He also alleges Nationstar made misrepresentations and engaged in unfair business practices. Nationstar did not file a timely responsive pleading, and the Clerk entered Nationstar’s default. Nationstar now moves to set aside the Clerk’s entry of default, and Lac opposes the motion.

In addition, Lac filed a motion for attorneys’ fees he incurred pursuing a temporary restraining order to enjoin the foreclosure sale. If Nationstar’s motion to set aside the entry of default is granted, Lac requests an award of the attorneys’ fees he incurred in obtaining the entry of default and in opposing Nationstar’s motion.

1 Both motions were submitted for decision without a hearing. As explained below,  
2 Nationstar's motion is granted, and Lac's motion is granted in part.

3 I. BACKGROUND

4 Lac filed a complaint in this court in early 2015. ECF No. 1. He alleges  
5 Nationstar ignored several requests he made for a home mortgage loan modification before it  
6 recorded a notice of default in late 2014, which he claims was a violation of the California Civil  
7 Code. *See id.* ¶¶ 3–11 (citing Cal. Civ. Code § 2923.55 and *Intengan v. BAC Home Loans*  
8 *Servicing LP*, 214 Cal. App. 4th 1047, 1057 (2013)). He also alleges Nationstar made  
9 misrepresentations to him when it “robo-signed” a declaration attached to the notice of default,  
10 *id.* ¶¶ 14–15, and he seeks relief under California's Unfair Competition Law, Cal. Bus. & Prof.  
11 Code §§ 17200 *et seq.*

12 The court granted Lac's motion to proceed *in forma pauperis*, ECF No. 4, and the  
13 United States Marshals Service completed service of the complaint on August 19, 2015. ECF  
14 No. 10. Nationstar's responsive pleading was due September 9, 2015, *see* Fed. R. Civ. P.  
15 12(a)(1)(A), but it did not appear. On September 17, 2015, Lac filed a motion for the entry of  
16 Nationstar's default. ECF No. 12.

17 In September 2015, Lac filed an *ex parte* application for a temporary restraining  
18 order, notifying the court a foreclosure sale had been scheduled for mid-October. TRO App. 3,  
19 ECF No. 13. The court set a hearing on the motion and instructed Lac's counsel to contact  
20 Nationstar and notify it of Lac's application and the hearing. ECF No. 15. Counsel complied  
21 with that order. ECF No. 16.

22 In October 2015, Nationstar appeared in this action by filing a belated motion to  
23 dismiss. ECF No. 17. It asserted defenses against Lac's claims but did not justify its delay. *See*  
24 *generally id.* A few days later, the court held a hearing on Lac's *ex parte* application. Minutes,  
25 ECF No. 23. Following a discussion with counsel, the court issued an order granting the  
26 application for a temporary restraining order as unopposed and enjoining any foreclosure sale for  
27 sixty days. Order Oct. 14, 2015, ECF No. 24. The court also ordered the parties to participate in  
28 a court-convened settlement conference. *Id.* In a separate order, the court struck Nationstar's

1 untimely motion to dismiss and instructed the Clerk's Office to enter Nationstar's default. ECF  
2 No. 30. Following the court's order, the Clerk's Office entered default and Lac moved for default  
3 judgment. Clerk's Entry of Default, ECF No. 31; Mot. Default J., ECF No. 32. Lac also filed a  
4 request for an award of the attorneys' fees he incurred in obtaining the temporary restraining  
5 order. *See* ECF Nos. 34, 36.

6 Both parties participated in the settlement conference, but the case did not settle.  
7 ECF No. 37. A week later, Lac applied *ex parte* for an order extending the injunction of the sale  
8 of his home. ECF No. 38. The court granted that application, noting Nationstar's opposition  
9 papers represented the sale had been postponed until February 2016. ECF No. 41.

10 The assigned magistrate judge held a hearing on Lac's motion for default  
11 judgment in January 2016. ECF No. 45. Neither Lac nor his attorney appeared. ECF No. 45.  
12 The magistrate judge denied the motion without prejudice and allowed Nationstar thirty days to  
13 move for an order setting aside its default. ECF No. 46. Nationstar filed its motion on February  
14 5, 2016. ECF No. 47. Lac opposed the motion, ECF No. 48, and Nationstar replied, ECF No. 50.  
15 In short, Nationstar explained that it had not referred this case to local counsel, as is its normal  
16 practice, because the complaint was served on its Texas office rather than its California office.  
17 Mot. Set Aside at 2-3; Bruner Decl. ¶¶ 3-5, ECF No. 47-1. In opposition, Lac protests that  
18 Nationstar has strategically ignored this litigation and attempted to go forward with the  
19 foreclosure of his home. Opp'n at 1-2. Should the court disagree and grant the motion, he  
20 requests his attorneys' fees incurred in obtaining the default. *Id.* at 2.

21 While Nationstar's motion was pending, Lac again moved *ex parte* for an order  
22 extending the injunction on the sale of his home, attaching a notice that a sale had been set for  
23 March 8, 2016. ECF No. 49. In opposition, Nationstar's counsel averred the sale had been  
24 postponed until May 10, 2016, ECF No. 52, so the court again granted the motion as unopposed  
25 and enjoined any sale before that date. ECF No. 54. Lac also recently moved for a preliminary  
26 injunction. ECF No. 56.

1       II.       MOTION TO SET ASIDE DEFAULT

2               A clerk’s entry of default may be set aside for “good cause.” Fed. R. Civ. P. 55(c).  
3       “To determine ‘good cause,’ a court must consider three factors: (1) whether the party seeking to  
4       set aside the default engaged in culpable conduct that led to the default; (2) whether it had no  
5       meritorious defense; or (3) whether reopening the default judgment would prejudice the other  
6       party.” *United States v. Signed Pers. Check No. 730 of Yubran S. Mesle*, 615 F.3d 1085, 1091  
7       (9th Cir. 2010) (citations, quotation marks, and alterations omitted). This is the same standard  
8       that applies to motions to set aside default judgment under Rule 60(b), and is a specific  
9       application of the oft-stated general rule that whenever possible, cases should be decided on their  
10       merits. *Id.*

11              Because the test described above is disjunctive, a motion to set aside the entry of  
12       default may be refused in the presence of any one of the three factors. *Brandt v. Am. Bankers Ins.*  
13       *Co. of Fla.*, 653 F.3d 1108, 1111 (9th Cir. 2011). The court therefore reviews each.

14              First, a defaulting defendant acts “culpably” if it had notice of the lawsuit but  
15       intentionally declined to answer. *TCI Grp. Life Ins. Plan v. Knoebber*, 244 F.3d 691, 697 (9th  
16       Cir. 2001), *overruled on other grounds*, *Egelhoff v. Egelhoff* ex rel. *Breiner*, 532 U.S. 141, 147  
17       (2001). “Intentional” conduct in this sense is “willful,” “deliberate,” or in “bad faith,” rather than  
18       neglectful. *Id.* at 697–98. If the defendant’s explanations for its default are all consistent with a  
19       willful or bad faith failure to respond, the court may refuse to set aside its default. *Id.* (collecting  
20       cases). Here, Nationstar explains that its staff did not refer the case to local counsel because it  
21       received service in an out-of-state office. This explanation is not suggestive of a willful,  
22       deliberate, or bad faith failure to respond, but of the type of inadvertence, neglect, or oversight  
23       courts often excuse. *See, e.g., Mesle*, 615 F.3d at 1093 (the defendant was not culpable, but  
24       simply “ignorant of the law and unable to understand correctly his legal obligations”); *TCI Grp.*,  
25       244 F.3d at 699 (exigent personal circumstances and unfamiliarity with legal matters did not  
26       suggest intentional conduct); *Gregorian v. Izvestia*, 871 F.2d 1515, 1525–26 (9th Cir. 1989) (the  
27       defendant did not act culpably by refusing to respond on the basis of its erroneous belief it was  
28       protected by sovereign immunity); *Falk v. Allen*, 739 F.2d 461, 464 (9th Cir. 1984) (the defendant

1 did not act culpably by missing a hearing because she was preoccupied with her departure to a  
2 foreign country the next day, where she would receive medical treatment). The court also  
3 disagrees with Lac that Nationstar has ignored this litigation. Since appearing, Nationstar has  
4 consistently participated in the case. Though initially careless, Nationstar has not acted culpably.

5           Second, a meritorious defense: “All that is necessary to satisfy the ‘meritorious  
6 defense’ requirement is to allege sufficient facts that, if true, would constitute a defense.” *Mesle*,  
7 615 F.3d at 1094. This is not an “extraordinarily heavy” burden. *TCI Grp.*, 244 F.3d at 700.  
8 Here, Nationstar alleges it has now begun reviewing Lac’s application for a loan modification and  
9 rescinded the notice of default on which his lawsuit is based. As a result, it argues his mortgage  
10 claims are moot. Mot. Set Aside at 3–4. Nationstar also alleges that contrary to the allegations in  
11 the complaint, it fulfilled its obligations under the Civil Code by contacting Lac before issuing the  
12 notice of default and providing him with a single point of contact. *Id.* at 4–5. And it cites  
13 authority to show it had no legal obligation to offer him a modification. *Id.* at 5 (citing, *inter alia*,  
14 *Rey v. OneWest Bank, FSB*, No. 12-02078, 2013 WL 127829, at \*4 (E.D. Cal. Jan. 9, 2013)  
15 (California law imposes “no mandate that the lender extend an offer of loan modification to the  
16 borrower or that the lender acquiesce to a request by the borrower for loan modification” (citation  
17 and quotation marks omitted))). Nationstar addresses Lac’s allegations of negligent  
18 misrepresentation by arguing they are insufficiently particular under the standard of Federal Rule  
19 of Civil Procedure 9(b), which applies to claims of fraud. *Id.* at 5–6. *But see, e.g., Green v. Cent.*  
20 *Mortg. Co.*, \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 7734213, at \*18 (N.D. Cal. Dec. 1, 2015) (noting a split  
21 of authority on the question of whether Rule 9(b) applies to California-law claims of negligent  
22 misrepresentation).<sup>1</sup> These arguments and allegations, if sustained, could allow Nationstar a  
23 defense. Lac does not argue otherwise. *See generally* Opp’n. This factor cannot support the  
24 denial of Nationstar’s motion.

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26 \_\_\_\_\_  
27 <sup>1</sup> The undersigned previously has acknowledged the split in authority but has not needed  
28 to resolve the question. *See, e.g., Ferguson v. JPMorgan Chase Bank, N.A.*, No. 14-00328, 2014  
WL 2118527, at \*9 (E.D. Cal. May 21, 2014).

1           Lastly, the court may refuse to set aside the entry of default if doing so would  
2 prejudice Lac’s case. “To be prejudicial, the setting aside of a judgment must result in greater  
3 harm than simply delaying resolution of the case.” *TCI Grp.*, 244 F.3d at 701. Only tangible  
4 harm, such as the loss of evidence, complication of discovery, or the risk of fraud or collusion,  
5 will support the denial of a motion to set aside the entry of default. *Id.* A plaintiff is not  
6 prejudiced if forced only to litigate the merits of his case. *Id.* Here, Lac has described no  
7 prejudice, and the court is aware of none.

8           In summary, nothing suggests that Nationstar acted culpably, that it lacks a  
9 meritorious defense, or that Lac will be prejudiced if the default is set aside. Nationstar’s motion  
10 is granted.

### 11   III.   REQUESTS FOR ATTORNEYS’ FEES

12           As noted above, Lac requests attorneys’ fees in two instances: first, under  
13 California Civil Code section 2924.12, for time spent obtaining a temporary restraining order, and  
14 second, for time spent procuring the entry of Nationstar’s default. The court addresses first his  
15 request for fees under section 2924.12.

#### 16       A.   Fees under California Civil Code Section 2924.12

17           In an action involving a substantive question of state law, a federal court applies  
18 the forum state’s law to determine whether a party is entitled to an award of attorneys’ fees.  
19 *MRO Commc’ns, Inc. v. Am. Tel. & Tel. Co.*, 197 F.3d 1276, 1282 (9th Cir. 1999).<sup>2</sup> Under  
20 California law, the court may award reasonable attorneys’ fees and costs to a “prevailing  
21 borrower” in an action challenging a foreclosure. *See* Cal. Civ. Code § 2924.12(i); *Monterossa v.*  
22 *Superior Court of Sacramento Cnty.*, 237 Cal. App. 4th 747, 753, 757 (2015). A borrower is  
23 deemed to have “prevailed” if he or she “obtained injunctive relief or was awarded damages.”  
24 Cal. Civ. Code § 2924.12(i). This provision applies to preliminary injunctive relief, including  
25 temporary restraining orders. *See Monterossa*, 237 Cal. App. 4th at 757; *see also* Cal. Civ. Code  
26 § 2924.12(i) (referring broadly to “injunctive relief”).

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27           <sup>2</sup> This general rule does not apply, however, when state law conflicts with a valid federal  
28 statute or procedural rule. *See id.* That is not the case here.

1                   Here, there is no question Lac obtained “injunctive relief” in response to his  
2 request for a temporary restraining order. Nationstar cannot sidestep this result by offering to  
3 postpone the sale and consider his application, laudable as that offer may be; otherwise a lender  
4 could “violate the statute with impunity” and later correct its violations as a litigation tactic. *Tuan*  
5 *Anh Le v. Bank of N.Y. Mellon*, \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 9319487, at \*11–12 (N.D. Cal.  
6 Dec. 23, 2015). Lac is therefore entitled to his reasonable attorneys’ fees.

7                   When state law allows for an award of attorneys’ fees, state law also supplies the  
8 method of fee calculation. *See Mangold v. Cal. Pub. Utilities Comm’n*, 67 F.3d 1470, 1479 (9th  
9 Cir. 1995). Under California law, a reasonable attorneys’ fee is calculated based on a lodestar  
10 figure, the product of all hours reasonably spent and a reasonable hourly rate. *Ketchum v. Moses*,  
11 24 Cal. 4th 1122, 1131–32 (2001). The court should take care not to award compensation for  
12 inefficient and duplicative efforts. *Id.* at 1132. A reasonable hourly rate is the rate prevailing in  
13 the relevant community. *Id.* This lodestar fee may then be adjusted to account for “(1) the  
14 novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the  
15 extent to which the nature of the litigation precluded other employment by the attorneys, (4) the  
16 contingent nature of the fee award.” *Id.* The court’s goal is to approximate the market value of  
17 the attorneys’ services. *Id.*

18                   Here, Lac has submitted the declaration of his attorney, Aldon Bolanos, who lists  
19 the hours he spent preparing the motion for a temporary restraining order. *See Bolanos Decl.*,  
20 ECF No. 36-1; *id.* Ex. 1, ECF No. 36-2. Bolanos documented his time in this litigation to the  
21 tenth of an hour and attached detailed descriptions to each entry. Except for one entry, the court  
22 concludes his time was spent reasonably: the court declines to award compensation for the entire  
23 7.2 hours Bolanos spent preparing an opposition to Nationstar’s motion to dismiss. In only a  
24 limited sense did the relief Lac obtained depend on this motion; if it had been granted, Lac would  
25 not have been awarded injunctive relief. But because the motion to dismiss was clearly untimely  
26 and its substance at best ancillary to Lac’s request for injunctive relief, the court imposes a  
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1 reduction of 5 hours. Subtracting this amount from the total entries listed, Lac is entitled to an  
2 award for 22.2 hours reasonably spent obtaining injunctive relief.<sup>3</sup>

3 Lac requests compensation for Bolanos’s time at \$300 per hour. He does not  
4 support this request with any evidence other than Bolanos’s declaration that he is “personally  
5 acquainted with another attorney in this area who works for the banks on these kinds of cases and  
6 he earns substantially more than this per hour to defend the banks.” Bolanos Decl. ¶ 4 (emphasis  
7 omitted). On its own motion, the court takes judicial notice of Bolanos’s profile on the California  
8 Bar Association’s website, which reports that Bolanos was admitted to practice in December  
9 2004.<sup>4</sup> Courts in this district have recently approved awards at approximately \$300 per hour for  
10 attorneys with similar experience in cases of comparable complexity, including in the Fresno  
11 division, where rates may often be lower than in Sacramento. *See, e.g., Archer v. Gipson*, No. 12-  
12 00261, 2015 WL 9473409, at \*13 & n.6 (E.D. Cal. Dec. 28, 2015); *Nechitaylo v. Wedum Family*  
13 *Ltd. P’ship*, No. 13-01001, 2015 WL 8479627, at \*1 (E.D. Cal. Dec. 10, 2015); *Estate of Crawley*  
14 *v. Kings Cnty.*, No. 13-02042, 2015 WL 4508642, at \*7 (E.D. Cal. July 24, 2015). The court  
15 therefore finds the requested rate to be reasonable, and awards Lac \$6,660 in fees incurred in  
16 obtaining injunctive relief (22.2 hours at \$300 per hour).

17 B. Fees Incurred Procuring the Entry of Default

18 Lac also requests attorneys’ fees for time spent obtaining the entry of default. A  
19 district court has discretion to impose attorneys’ fees as a condition on the setting-aside of an  
20 entry of default. *See Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. La. Hydrolec*,  
21 854 F.2d 1538, 1546–47 (9th Cir. 1988). “By conditioning the setting aside of a default, any  
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24 <sup>3</sup> The court is unable to calculate the 28.1-hour total Bolanos provided, based on the  
underlying information. *See Bolanos Decl. Ex. 1.*

25 <sup>4</sup> At the time this order was issued, the profile was accessible at  
26 <http://members.calbar.ca.gov/fal/Member/Detail/233915>. Bolanos was temporarily suspended  
27 from practice between November 27, 2015 and February 25, 2016. *See id.* The court has not  
28 awarded fees for his time during this period. The court has also considered his suspension in  
determining a reasonable hourly rate.



1 prejudice suffered by the non-defaulting party as a result of the default and the subsequent  
2 reopening of the litigation can be rectified.” *Id.* at 1546.

3 Here, Bolanos reports that he spent two hours preparing the motion for entry of  
4 default and two hours opposing the motion to set aside that default, and Lac requests fees at  
5 Bolanos’s \$300 rate, in total \$1,200. *See* Bolanos Decl., ECF No. 48-1. This is a relatively  
6 uncomplicated case in a relatively straightforward procedural situation. Moreover, no evidence  
7 suggests Nationstar’s actions were as culpable as in cases where sanctions were awarded. *See,*  
8 *e.g., Nilsson*, 854 F.2d at 1547 (sanctions were imposed after three previous entries of default and  
9 several failures to comply with other court orders); *Wahoo Int’l, Inc. v. Phix Doctor, Inc.*, No. 13-  
10 1395, 2015 WL 410347, at \*3–4 & n.3 (S.D. Cal. Jan. 29, 2015) (two entries of default and  
11 several late filings). And as the court found above, the reopening of this case will not cause Lac  
12 the type of prejudice that militates against moving forward with the litigation. Lac’s absence at  
13 the hearing on his motion for default judgment supports the conclusion that he suffers no  
14 prejudice from the reopening of the case. The court therefore denies his request for an award of  
15 attorneys’ fees incurred in obtaining the default and opposing Nationstar’s motion to set aside the  
16 default.

17 IV. CONCLUSION

18 Nationstar’s motion to set aside the entry of default is GRANTED. Lac’s motion  
19 for attorneys’ fees is GRANTED IN PART, and he is awarded \$6,660 for attorneys’ fees incurred  
20 in obtaining injunctive relief.

21 IT IS SO ORDERED.

22 DATED: March 28, 2016.

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UNITED STATES DISTRICT JUDGE