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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SASHA FAUGHT,

Plaintiff,

v.

WELLS FARGO BANK, N.A.; BARRET
DAFFIN FRAPIER TREDER & WEISS,
LLP; and DOES 1-10, inclusive,

Defendant.

No. 2:17-cv-01706-MCE-KJN

MEMORANDUM AND ORDER

Plaintiff Sasha Faught (“Plaintiff”) originally filed this action in the Sacramento County Superior Court, alleging four causes of action against Defendants Wells Fargo Bank, N.A. (“Wells Fargo”) and Barret Daffin Frapier Treder & Weiss, LLP (“BDFT&W”). Specifically, Plaintiff alleges negligence and violation of Cal. Civ. Code § 2924.10¹ against Wells Fargo in her first and third claims for relief, respectively, and violations of Cal. Civ. Code § 2923.6(c)² against both Wells Fargo and BDFT&W in her second and

¹ The California Legislature repealed Cal. Civ. Code § 2924.10 in January 2018, but the statute still governs events that occurred from January 1, 2013, through December 31, 2017, and therefore it applies to this case. See Cal. Civ. Code § 2924.10 (West 2013) (“This section shall remain in effect only until January 1, 2018”).

² Similarly, the California Legislature amended Cal. Civ. Code § 2923.6(c) effective January 1, 2018, but the prior version of the statute governs events that took place before the time of enactment, including the events underlying this case. The prior version of the California Homeowner Bill of Rights explicitly provided that it was effective from January 1, 2013, through January 1, 2018. See Cal. Civ. Code § 2923.6 (West 2013) (“This section shall remain in effect only until January 1, 2018”). Therefore, the prior version of § 2923.6(c) will be applied in this case.

1 fourth claims for relief. Defendant Wells Fargo removed the case to this Court.
2 Presently before the Court are Defendant Wells Fargo's Motion to Dismiss, ECF No. 3,
3 and Plaintiff's Motion to Remand, ECF No. 7.³ For the following reasons, Plaintiff's
4 Motion to Remand is DENIED and Defendant's Motion to Dismiss is GRANTED.⁴

6 REQUESTS FOR JUDICIAL NOTICE

7
8 Defendant submits a Request for Judicial Notice ("RJN") in support of its Motion
9 to Dismiss, ECF No. 4, and another RJN in support of its Opposition to Plaintiff's Motion
10 to Remand, ECF No. 11. Many of the documents in the first RJN explain how Defendant
11 became the successor-in-interest to World Savings Bank ("WSB"), Federal Savings
12 Bank ("FSB"), later renamed Wachovia Mortgage ("Wachovia") FSB, through several
13 mergers and acquisitions. Other documents in this RJN include documents in the public
14 record regarding Plaintiff's default on her real property known as 5659 Los Pueblos Way,
15 Sacramento, CA 95835 (the "Subject Property"), as well as the correspondence between
16 Plaintiff and Defendant regarding the Subject Property. A court may judicially notice
17 documents that are referenced in the complaint and that are not questioned by the
18 parties. See London v. Wells Fargo Bank, N.A., 2018 WL 621262 (E.D. Cal. Jan. 29,
19 2018). Because the correspondence between Wells Fargo and Plaintiff forms much of
20 the substance of Plaintiff's complaint, and because Plaintiff does not oppose this RJN,
21 the Court GRANTS Defendant's RJN in support of Defendant's Motion to Dismiss.

22 The second RJN consists of the complaint filed with the Sacramento Superior
23 Court in the Aguilar v. Wells Fargo Bank, N.A. case, and a judicial order in another case,
24 Ogamba v. Wells Fargo Bank, N.A. The Court may judicially notice court documents

25
26 ³ Because oral argument would not have been of material assistance in deciding these motions,
the Court ordered that they be submitted on the briefs pursuant to Local Rule 230(g).

27 ⁴ Defendant argues for dismissal on various additional grounds but as discussed below, because
28 the Court finds that Plaintiff's claims are preempted by Home Owners' Loan Act, the Court does not
address Defendant's additional grounds for relief.

1 such as these. See Fed. R. Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331,
2 333 (9th Cir. 1993). Because Plaintiff does not oppose this RJN, either, Defendant's
3 RJN in support of its Opposition to Plaintiff's Motion to Remand is also GRANTED.

4
5 **BACKGROUND⁵**
6

7 On August 15, 2005, Plaintiff obtained a mortgage loan with WSB, FSB. The loan
8 succeeded to Wachovia Mortgage, FSB, and ultimately to Defendant Wells Fargo in
9 October 2008. The loan was memorialized in a promissory note and secured by a Deed
10 of Trust recorded against the "Subject Property". The loan was in the amount of
11 \$393,600.00, and the Deed of Trust was recorded on August 22, 2005.

12 In 2010, Plaintiff filed for Chapter 13 bankruptcy, and she was laid off from her job
13 in 2011. After again obtaining gainful employment in 2013, Plaintiff claims she received
14 a discharge in her bankruptcy in 2016. Plaintiff states she contacted Defendant Wells
15 Fargo after receiving that discharge to request a loan modification to avoid foreclosure
16 on her home. Plaintiff alleges Defendant Wells Fargo "invited" her to submit a loan
17 modification application.

18 Plaintiff alleges that Defendant Wells Fargo mishandled the documents she sent
19 in as part of her loan modification request. She claims that she repeatedly sent Wells
20 Fargo the required documents, but Wells Fargo responded that the documents were
21 "[n]ot yet received." Plaintiff alleges that she ultimately sent Wells Fargo a "complete
22 application," but Wells Fargo never communicated a "determination" to her on the status
23 of her application. Wells Fargo recorded a Notice of Default on the Subject Property on
24 February 14, 2017.

25 ///

26 ///

27 ⁵ Unless otherwise noted, the following recitation of background facts is taken from Plaintiff's
28 Complaint (ECF No. 1-1), her Opposition to Defendants' Motion to Dismiss (ECF No. 8), and the judicially
noticed documents contained in ECF Nos. 4 and 11.

1 **B. Motion to Dismiss**

2 On a motion to dismiss for failure to state a claim under Federal Rule of Civil
3 Procedure 12(b)(6), all allegations of material fact must be accepted as true and
4 construed in the light most favorable to the nonmoving party. Cahill v. Liberty Mut. Ins.
5 Co., 80 F.3d 336, 337-38 (9th Cir. 1996). Rule 8(a)(2) “requires only ‘a short and plain
6 statement of the claim showing that the pleader is entitled to relief’ in order to ‘give the
7 defendant fair notice of what the . . . claim is and the grounds upon which it rests.” Bell
8 Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41,
9 47 (1957)). A complaint attacked by a Rule 12(b)(6) motion to dismiss does not require
10 detailed factual allegations. However, “a plaintiff’s obligation to provide the grounds of
11 his entitlement to relief requires more than labels and conclusions, and a formulaic
12 recitation of the elements of a cause of action will not do.” Id. (internal citations and
13 quotations omitted). A court is not required to accept as true a “legal conclusion
14 couched as a factual allegation.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting
15 Twombly, 550 U.S. at 555). “Factual allegations must be enough to raise a right to relief
16 above the speculative level.” Twombly, 550 U.S. at 555 (citing 5 Charles Alan Wright &
17 Arthur R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004) (stating that the
18 pleading must contain something more than “a statement of facts that merely creates a
19 suspicion [of] a legally cognizable right of action”)).

20 Furthermore, “Rule 8(a)(2) . . . requires a showing, rather than a blanket
21 assertion, of entitlement to relief.” Twombly, 550 U.S. at 555 n.3 (internal citations and
22 quotations omitted). Thus, “[w]ithout some factual allegation in the complaint, it is hard
23 to see how a claimant could satisfy the requirements of providing not only ‘fair notice’ of
24 the nature of the claim, but also ‘grounds’ on which the claim rests.” Id. (citing Wright &
25 Miller, supra, at 94, 95). A pleading must contain “only enough facts to state a claim to
26 relief that is plausible on its face.” Id. at 570. If the “plaintiffs . . . have not nudged their
27 claims across the line from conceivable to plausible, their complaint must be dismissed.”
28 Id. However, “[a] well-pleaded complaint may proceed even if it strikes a savvy judge

1 that actual proof of those facts is improbable, and ‘that a recovery is very remote and
2 unlikely.’” Id. at 556 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

3 A court granting a motion to dismiss a complaint must then decide whether to
4 grant leave to amend. Leave to amend should be “freely given” where there is no
5 “undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice
6 to the opposing party by virtue of allowance of the amendment, [or] futility of the
7 amendment” Foman v. Davis, 371 U.S. 178, 182 (1962); Eminence Capital, LLC v.
8 Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (listing the Foman factors as those to
9 be considered when deciding whether to grant leave to amend). Not all of these factors
10 merit equal weight. Rather, “the consideration of prejudice to the opposing party . . .
11 carries the greatest weight.” Id. (citing DCD Programs, Ltd. v. Leighton, 833 F.2d 183,
12 185 (9th Cir. 1987)). Dismissal without leave to amend is proper only if it is clear that
13 “the complaint could not be saved by any amendment.” Intri-Plex Techs. v. Crest Group,
14 Inc., 499 F.3d 1048, 1056 (9th Cir. 2007) (citing In re Daou Sys., Inc., 411 F.3d 1006,
15 1013 (9th Cir. 2005); Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir.
16 1989) (“Leave need not be granted where the amendment of the complaint . . .
17 constitutes an exercise in futility”)).

18 ANALYSIS

19 A. Plaintiff’s Motion to Remand

20
21 Plaintiff challenges diversity jurisdiction on the grounds that the amount in
22 controversy requirement of 28 U.S.C. § 1332 has not been met. As laid out below,
23 Plaintiff’s argument lacks merit.

24
25 First, it is clear and undisputed that there is complete diversity of citizenship
26 between the parties. For purposes of diversity jurisdiction, a national bank like Wells
27 Fargo is considered a citizen only of the state in which its main office is located.
28 Wachovia Bank v. Schmidt, 546 U.S. 303, 318 (2006). The Ninth Circuit has ruled that,

1 for purposes of diversity jurisdiction, Wells Fargo is a citizen “only of South Dakota,
2 where its main office is located....” Rouse v. Wachovia Mortgage, FSB, 747 F.3d 707,
3 715 (9th Cir. 2014). Plaintiff is domiciled in California. Therefore, diversity of citizenship
4 is satisfied.

5 Next is the amount in controversy, which must be more than \$75,000. Defendant
6 has met its burden of establishing that it is more likely than not that the amount in
7 controversy here exceeds \$75,000. Plaintiff argues that that amount in controversy for
8 her negligence claim should be measured as “the value lost in being deprived of an
9 opportunity to have her application for a loan modification evaluated and determined.”
10 ECF No. 7-1 at 4. As for the other three statutory claims for relief, Plaintiff argues that
11 the amount in controversy “is an indivisible value of the injunction to postpone a trustee’s
12 sale,” which is presumably less than \$75,000. ECF No. 7-1 at 4. Defendant contends
13 that the mortgage value of \$393,600 is the amount in controversy because Plaintiff’s
14 primary purpose in her lawsuit is to stop Wells Fargo from foreclosing on the Subject
15 Property, making the Subject Property the object of the litigation. ECF No. 10 at 3-4.

16 Defendant’s position is supported by the relevant case law. As this Court
17 determined in Jerviss v. Select Portfolio Servicing, Inc., 2015 WL 7572130 (Nov. 25,
18 2015), the court “conducts a functional analysis of the amount in controversy based on
19 the plaintiff’s primary objective in bringing suit.” The Court particularly looks to determine
20 whether the plaintiff “primarily seeks to enjoin a foreclosure or instead primarily seeks
21 damages under what essentially constitutes a common law fraud action.” Id. at *4.
22 Three factors help determine the plaintiff’s primary purpose: “whether the plaintiff is in
23 default on its loan, whether a notice of default has been filed, and whether foreclosure
24 proceedings are imminent.” Id. If the court determines that it is the plaintiff’s primary
25 goal to prevent foreclosure of the property, then the loan amount “is the proper measure
26 of the amount in controversy.” Id.

27 Application of the Jerviss factors to this case reveals that it is indeed Plaintiff’s
28 main goal in her lawsuit to prevent foreclosure of the Subject Property. Plaintiff is in

1 default on the loan, satisfying the first Jerviss factor, and Wells Fargo has filed a Notice
2 of Default on the Subject Property, satisfying the second. ECF No. 1-1 at 7. Finally,
3 Plaintiff specifically requests that Defendants be “preliminarily and/or permanently
4 enjoined from conducting any further foreclosure proceedings” on the Subject Property.
5 ECF No. 1-1 at 16. Although it is not clear how imminent a foreclosure sale of the
6 Subject Property is, the first two Jerviss factors, together with Plaintiff’s request for
7 injunctive relief, all support the conclusion that the value of the mortgage on the Subject
8 Property is the proper measure of the amount in controversy. Accordingly, the amount
9 in controversy here is the amount of Plaintiff’s loan: \$393,600.

10 Because the parties in this case satisfy 28 U.S.C. § 1332, including the amount in
11 controversy requirement, this Court has jurisdiction over Plaintiff’s claims for relief.
12 Plaintiff’s Motion for Remand is therefore DENIED.

13 **B. Motion to Dismiss**

14 Defendant Wells Fargo argues that Plaintiff’s Complaint fails to state a claim
15 under Fed. R. Civ. P. 12(b)(6), and that her claims under Cal. Civ. Code §§ 2923.6(c)
16 and 2924.10 in the California Homeowner Bill of Rights (“HBOR”) are preempted by the
17 federal Home Owners’ Loan Act (“HOLA”). As mentioned above, because the Court
18 finds that all four of Plaintiff’s claims are preempted by HOLA, it need not reach
19 Defendant’s other grounds for dismissal.

20 **1. Background on HOLA**

21 By passing HOLA, Congress gave the Office of Thrift Supervision (“OTS”) the
22 authority to regulate thrifts. Silvas v. E*Trade Mortg. Corp., 514 F.3d 1001, 1005
23 (9th Cir. 2008). Pursuant to this authority, OTS promulgated Code of Federal
24 Regulations Section 540.2, a preemption regulation that explicitly provides for field
25 preemption of lending regulation: “OTS hereby occupies the entire field of lending
26 regulation for [federal savings banks].” 12 C.F.R. § 560.2(a); see also Silvas, 514 F.3d
27 at 1005. The Ninth Circuit has adopted OTS’s analytical framework for determining
28 whether HOLA preempts a state law claim through § 560.2. Silvas, 514 F.3d at 1005.

1 Section 560.2, as promulgated by OTS and accepted by the Ninth Circuit, provides that
2 it preempts most state laws regarding lending regulation, including “[p]rocessing,
3 origination, servicing, sale or purchase of, or investment or participation in, mortgages.”
4 12 C.F.R. § 560.2(b)(10).

5 To determine if a specific state law is preempted by HOLA, a court must first look
6 to the list of specific examples provided in § 560.2(b). If that inquiry is not dispositive,
7 the court must then determine whether the law in question nonetheless affects lending,
8 keeping in mind the Ninth Circuit’s mandate that “[a]ny doubt should be resolved in favor
9 of preemption.” Silvas, 514 F.3d at 1005.

10 Here, the Court first determines whether HOLA and § 560.2 apply to Plaintiff’s
11 loan, and if so, how HOLA preemption affects Plaintiff’s claims.

12 **2. HOLA Preemption Applies to Plaintiff’s Loan**

13 Pursuant to § 560.2, HOLA only regulates lending for FSBs. Wells Fargo itself is
14 not an FSB, but Plaintiff’s loan originated with WSB, which is a FSB. As a preliminary
15 matter, Plaintiff contends that Wells Fargo did not “inherit” HOLA protection through its
16 merger with Wachovia (which had previously subsumed WSB) for loans that originated
17 at those banks. ECF No. 8 at 7-8. Defendant Wells Fargo argues that HOLA
18 preemption “runs with the loan,” noting that courts, including this one, have repeatedly
19 applied HOLA preemption to identical claims against Wells Fargo regarding loans that
20 originated with WSB and Wachovia. ECF No. 3 at 6-7.

21 Although there is a split among courts on the matter, this Court has previously
22 been persuaded, and has not since changed its position, that HOLA preemption runs
23 with the loan. See, e.g., Heagler v. Wells Fargo Bank. N.A., No. 2:16-cv-01963-MCE-
24 KJN, 2017 WL 1213370 (E.D. Cal. Mar. 31, 2017) (“This Court finds...that HOLA
25 preemption attaches to the loan.”). Despite the several cases that Plaintiff cited in her
26 brief, the persuasive weight of authority supports the conclusion that HOLA preemption
27 attaches to the loan, and thus that Wells Fargo can raise that defense here. Therefore,
28 HOLA does apply to Plaintiff’s loan with Wells Fargo.

1 **3. Each of Plaintiff’s Claims Are Preempted by HOLA**

2 The Court now turns to analyze the impact of HOLA preemption on Plaintiff’s
3 specific claims against Defendants. Plaintiff seeks relief by way of four California state
4 law claims: (1) negligence; (2) violation of section 2923.6(c) of California’s HBOR;
5 (3) violation of section 2924.10 of the HBOR; and (4) a second violation of section
6 2923.6(c) of the HBOR.⁶

7 The Court first looks to § 560.2(b) to see if the state law in question is specifically
8 listed as an example of a HOLA-preempted state law. Silvas, 514 F.3d at 1005.
9 Section 560.2(b)(10) provides that state laws related to the “[p]rocessing, origination,
10 servicing, sale or purchase of, or investment or participation in, mortgages” are
11 preempted. Because Plaintiff’s HBOR claims pertain to the processing and servicing of
12 a mortgage, her claims therefore fall under HOLA preemption. See Villareal v. Seneca
13 Mortg. Servs., No. 1:14-cv-02033-MCE-GSA, 2015 U.S. Dist. LEXIS 64868, at *16-17
14 (E.D. Cal. May 16, 2015). Therefore, Plaintiff’s second, third, and fourth claims are
15 preempted by HOLA.

16 Remaining is Plaintiff’s negligence claim against Wells Fargo. Section 560.2(b)
17 does not include generally applicable state laws like negligence, so it is not immediately
18 apparent that Plaintiff’s negligence claim activates HOLA preemption. However, the
19 Court must “consider the functional effect upon lending operations of maintaining the
20 cause of action,” and not “look merely to [the] abstract nature” of the claim. Vargas v.
21 Wells Fargo Bank, N.A., 2015 WL 10791959 (C.D. Cal. Aug. 17, 2015). The Court must
22 determine whether Plaintiff’s negligence cause of action “affect[s] lending” such that it is
23 preempted by HOLA. Villareal, 2015 U.S. Dist. LEXIS 64868, at *14-15 (“If a state law
24 does not fall within the list of proscribed areas, the court must determine whether the law

25 ⁶ See Cal. Civ. Code § 2923.6(c) (West 2013) (“If a borrower submits a complete application for a
26 first lien loan modification...the borrower’s mortgage servicer...shall not record a notice of default or notice
27 of sale or conduct a trustee’s sale, while the complete first lien loan modification application is pending.”);
28 Cal. Civ. Code § 2924.10 (West 2013) (“When a borrower submits a complete first lien modification
application or any document in connection with a first lien modification application, the mortgage servicer
shall provide written acknowledgment of the receipt of the documentation within five business days of
receipt.”).

1 affects lending....”) (internal citations omitted). As explained below, the Court finds that
2 Plaintiff’s claim does affect lending, and thus that it is preempted by HOLA.

3 Plaintiff’s negligence claim arises out of Defendant’s alleged mishandling of her
4 loan modification request and application. If a negligence claim would, “as applied,
5 impose heightened requirements on lenders, most district courts have concluded it is
6 preempted.” Lewis v. Wells Fargo Bank, N.A., 2015 WL 12778412, at *6 (C.D. Cal.
7 Dec. 23, 2015). As this Court has previously held, negligence claims such as Plaintiff’s
8 that arise out of loan modification processing do “affect lending” and are therefore
9 preempted by HOLA. Heagler, 2017 WL 1213370, at *5. See also Poyorena v. Wells
10 Fargo Bank, N.A., 2014 U.S. Dist. LEXIS 49319, at *16-18 (C.D. Cal. Apr. 3, 2014)
11 (“While Plaintiff’s claims are of general applicability, claims for negligence arising out of
12 loan modifications plainly fall within the scope of [§ 560.2(b)].”). Therefore, Plaintiff’s
13 negligence claim against Wells Fargo is preempted by HOLA.

14 Because HOLA applies to Plaintiff’s loan and preempts each of her claims against
15 Wells Fargo, Wells Fargo’s Motion to Dismiss is GRANTED.

17 CONCLUSION

18
19 For the reasons stated above, Plaintiff’s Motion to Remand, ECF No. 7, is
20 DENIED, and Defendant’s Motion to Dismiss, ECF No. 3, is GRANTED. Because the
21 Court finds that each of Plaintiff’s claims is preempted by HOLA, granting leave to amend
22 would be futile, and, consequently, Plaintiff’s claims are DISMISSED with prejudice.

23 IT IS SO ORDERED.

24 Dated: February 26, 2018

25
26 
27 MORRISON C. ENGLAND, JR.
28 UNITED STATES DISTRICT JUDGE