

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

Everett L. Thomas; Martha A.
Thomas,

Plaintiffs,

v.

Wells Fargo Bank, N.A.; Wells Fargo
Bank Home Mortgage; Barrett Daffin
Frappier & Weiss, LLP; and DOES 1
through 10, INCLUSIVE,

Defendants.

CASE NO. 3:15-cv-02344-GPC-JMA

**ORDER GRANTING DEFENDANT
WELLS FARGO BANK, N.A.'s
MOTION TO DISMISS**

[ECF No. 6]

Before the Court is Defendant Wells Fargo Bank, N.A.'s ("Defendant" or "Wells Fargo") Motion to Dismiss. Def. Mot. Dismiss ("Def. Mot."), ECF No. 3. The motion has been fully briefed. Pl. Resp., ECF No. 12; Def. Reply, ECF No. 13. Upon consideration of the moving papers and the applicable law, and for the reasons set forth below, the Court **GRANTS** Defendant's Motion to Dismiss without prejudice.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of a \$695,000 loan obtained by Plaintiffs on June 12, 2007 from Defendant's predecessor-in-interest, World Savings Bank, FSB ("WSB"), which was secured by a deed of trust on Plaintiffs' home. ECF No. 1, Ex. B. On July 7, 2009, Plaintiffs obtained a modification on this loan that reduced the

1 principal balance from \$724,920.30 to \$579,936.24. ECF No. 1, Ex. C. Plaintiffs
2 subsequently defaulted on their loan, and on November 12, 2014, the trustee under
3 the deed of trust, Defendant Barrett Daffin Frappier Treder & Weiss, LLP,
4 (“Barrett”), recorded a notice of default. ECF No. 1, Ex. D. Plaintiffs did not cure
5 their default, and on June 12, 2015, Barrett recorded a notice of trustee sale, which
6 scheduled a foreclosure sale for July 9, 2015. ECF No. 1, Ex. E.

7 Plaintiff Everett L. Thomas filed for Chapter 7 Bankruptcy on July 7, 2015.
8 ECF No. 1, Ex. F. This bankruptcy was dismissed without prejudice on July 28,
9 2015. *Id.* On July 30, 2015, Plaintiffs submitted a loan modification application to
10 Defendant. Plaintiffs allege that Defendant violated state law by (1) refusing to
11 provide a single point of contact (“SPOC”) during the loan modification process
12 and (2) engaging in “dual tracking” by conducting a nonjudicial foreclosure sale of
13 Plaintiffs’ home while Plaintiffs’ loan modification application was pending.

14 **PROCEDURAL BACKGROUND**

15 On September 1, 2015, Plaintiffs, residents of California, brought suit against
16 Defendant, a national banking association with its main office located in South
17 Dakota, in San Diego Superior Court. Notice of Removal 2–5, ECF No. 1. Plaintiffs
18 alleged violations of (1) Cal. Civ. Code § 2923.7 and (2) Cal. Civ. Code § 2923.6,
19 and (3) common law breach of contract. *Id.* at 6–9.

20 On October 16, 2015, Defendant removed the case to federal court on the
21 basis of diversity jurisdiction. Notice of Removal 2. On November 16, 2015,
22 Plaintiffs filed an ex parte motion for a temporary restraining order (“TRO”) to
23 restrain Defendant from selling Plaintiffs’ home through a nonjudicial foreclosure
24 sale, on the basis that such sale would be in violation of a September 9, 2015
25 temporary restraining order restraining the sale issued by the San Diego Superior
26 Court. TRO Mot. 2–3, ECF No. 6. Defendant conceded that Plaintiffs’ home had
27 been sold on November 6, 2015, but argued that the sale was proper because the
28 TRO had expired no later than 14 days after the case was removed pursuant to Fed.

1 R. Civ. P. Rule 65(b)(2), and Plaintiff had not renewed it. TRO Opp. 3–5. At the
2 November 20, 2015 hearing on Plaintiffs’ TRO motion, the Court denied the
3 motion, finding that the state court TRO was no longer in effect. ECF No. 11.

4 On October 22, 2015, Defendant filed this motion to dismiss. ECF No. 3. On
5 December 3, 2015, Plaintiffs responded. ECF No. 12. On December 10, 2015,
6 Defendant replied. ECF No. 13.

7 LEGAL STANDARD

8 A Rule 12(b)(6) dismissal may be based on either a “‘lack of a cognizable
9 legal theory’ or ‘the absence of sufficient facts alleged under a cognizable legal
10 theory.’” *Johnson v. Riverside Healthcare System, LP*, 534 F.3d 1116, 1121–22 (9th
11 Cir. 2008) (quoting *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.
12 1990)).

13 “To survive a motion to dismiss, a complaint must contain sufficient factual
14 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”
15 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*,
16 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads
17 factual content that allows the court to draw the reasonable inference that the
18 defendant is liable for the misconduct alleged.” *Id.* at 679 (citing *Twombly*, 550 U.S.
19 at 556). “Threadbare recitals of the elements of a cause of action, supported by mere
20 conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at
21 555 (noting that on a motion to dismiss the court is “not bound to accept as true a
22 legal conclusion couched as a factual allegation.”). “The pleading standard . . . does
23 not require ‘detailed factual allegations,’ but it demands more than an unadorned,
24 the defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678 (citations
25 omitted). “Review is limited to the complaint, materials incorporated into the
26 complaint by reference, and matters of which the court may take judicial notice.”
27 *See Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1061 (9th Cir.
28 2008).

1 In analyzing a pleading, the Court sets conclusory factual allegations aside,
2 accepts all non-conclusory factual allegations as true, and determines whether those
3 nonconclusory factual allegations accepted as true state a claim for relief that is
4 plausible on its face. *Iqbal*, 556 U.S. at 676–84; *Turner v. City & Cty. of San*
5 *Francisco*, 788 F.3d 1206, 1210 (9th Cir. 2015) (noting that “conclusory allegations
6 of law and unwarranted inferences are insufficient to avoid a Rule 12(b)(6)
7 dismissal.”) (internal quotation marks and citation omitted). And while “[t]he
8 plausibility standard is not akin to a probability requirement,” it does “ask[] for
9 more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S.
10 at 678 (internal quotation marks and citation omitted). In determining plausibility,
11 the Court is permitted “to draw on its judicial experience and common sense.” *Id.* at
12 679.

13 DISCUSSION

14 I. Judicial Notice

15 “Although generally the scope of review on a motion to dismiss for failure to
16 state a claim is limited to the Complaint, a court may consider evidence on which
17 the complaint necessarily relies if: (1) the complaint refers to the document; (2) the
18 document is central to the plaintiff[’s] claim; and (3) no party questions the
19 authenticity of the copy attached to the 12(b)(6) motion.” *Daniels–Hall v. Nat’l*
20 *Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010) (internal quotation marks and
21 citations omitted). Fed. R. Evid. 201(b) permits judicial notice of a fact when it is
22 “not subject to reasonable dispute because it: (1) is generally known within the trial
23 court’s territorial jurisdiction; or (2) can be accurately and readily determined from
24 sources whose accuracy cannot reasonably be questioned.” The court may take
25 notice of such facts on its own, and “must take judicial notice if a party requests it
26 and the court is supplied with the necessary information.” Fed. R. Evid. 201(c).

27 Defendant seeks judicial notice of: (a) WSB’s certificate of corporate
28 existence as a federal savings bank, issued by the Office of Thrift Supervision,

1 Department of the Treasury (“OTS”) on April 21, 2006; a November 19, 2007 letter
2 from OTS authorizing a name change from World Savings Bank, FSB, to Wachovia
3 Mortgage, FSB (“Wachovia”); Wachovia’s charter, signed by the Director of OTS
4 on December 31, 2007; a certification from the Comptroller of the Currency stating
5 that, effective November 1, 2009, Wachovia converted to Wells Fargo Bank
6 Southwest, N.A., which then merged with Wells Fargo Bank, N.A.; and a printout
7 from the website of the Federal Deposit Insurance Corporation, showing the history
8 of WSB; (b) the deed of trust, recorded in the official records of the San Diego
9 County Recorder’s Office on June 19, 2007; (c) the previous loan modification
10 agreement between Plaintiffs and Wachovia, dated July 7, 2009; (d) a notice of
11 default issued by the trustee of the deed of trust, Defendant Barrett, dated November
12 7, 2014 and recorded in the official records of the San Diego County Recorder’s
13 Office on November 12, 2014; (e) a notice of trustee’s sale issued by Defendant
14 Barrett, dated June 11, 2015 and recorded in the official records of the San Diego
15 County Recorder’s Office on June 12, 2015; (f) the docket for the bankruptcy
16 petition filed by Plaintiff Everett L. Thomas in the United States Bankruptcy Court
17 for the Southern District of California on July 7, 2015; and (g) the loan modification
18 application at issue in the present case. *See* Def. Request for Judicial Notice, ECF
19 No. 3, Exs. A–G.

20 Neither party questions the authenticity of these documents. The Court finds
21 that these items are appropriate for judicial notice because they are matters of public
22 record, the parties do not dispute their authenticity, and they are central to Plaintiff’s
23 claims. *See, e.g., Hite v. Wachovia Mortgage*, 2010 U.S. Dist. LEXIS 57732, at
24 *6–9 (E.D. Cal. June 10, 2010) (judicial notice of same documents concerning the
25 history of WSB above), *Paralyzed Veterans of Am. v. McPherson*, 2008 U.S. Dist.
26 LEXIS 69542, at *17–18 (N.D. Cal. Sept. 8, 2008) (judicial notice of information
27 appearing on and printed from official government websites); *Gamboia v. Trustee*
28 *Corps & Cent. Mortgage Loan Servicing Co.*, 2009 U.S. Dist. LEXIS 19613, at

1 *4-*10 (N.D. Cal. Mar. 12, 2009) (judicial notice of recorded documents related to
2 the foreclosure sale, including grant deed and deed of trust). Therefore, the Court
3 **GRANTS** Defendant’s requests for judicial notice. However, the Court also takes
4 judicial notice that the bankruptcy docket proffered by Defendant is incomplete,
5 because it does not include the latest entry on September 16, 2015, which closed the
6 case. *See* Bankruptcy Petition #15-04528-MM7, U.S. Bankruptcy Court for the
7 Southern District of California, ECF No. 24.

8 **II. Motion to Dismiss**

9 Defendant argues that the case should be dismissed because the claims are
10 preempted by federal law. *See* Def. Mot. 3–7.¹ Plaintiffs respond that no court has
11 held that federal law preempts the application of the California Homeowners Bill of
12 Rights (“HBOR”). Pl. Resp. 11–13. Plaintiffs also argue that the Court lacks subject
13 matter jurisdiction because the amount in controversy is not satisfied. *Id.* at 3.²

14
15 ¹Defendant also argues that Plaintiff Everett Thomas’ pending bankruptcy negates Plaintiffs’
16 claims. Def. Mot. 2–3 (citing *Cloud v. Northrop Grumman Corp.*, 67 Cal. App. 4th 995, 1001 (1998)).
17 However, as Plaintiffs point out, this bankruptcy proceeding was closed on September 16, 2015, and
18 hence can no longer be considered “active” or “pending.” Defendant point to no authority supporting
19 the proposition that a closed bankruptcy proceeding impacts the standing of a debtor.

20 ²Plaintiffs also argue that (1) the motion to dismiss is barred by “collateral estoppel” and “res
21 *judicata*” because the Court is bound by the state court’s prior issuance of the TRO, and (2) the
22 Defendant has “unclean hands” and has committed “fraud on the court.” Pl. Resp. at 3–11. Neither of
23 these arguments withstand scrutiny.

24 First, Plaintiffs argue that the state court’s determination that Plaintiffs’ case “present[ed]
25 serious questions of law worthy of litigation” for the purposes of granting a TRO bars the Court from
26 determining Defendant’s motion to dismiss. Pl. Resp. 5–7. Plaintiffs cite no authority for the
27 proposition that a state court’s grant of a TRO has any relevance to a federal district court’s
28 determination of a motion to dismiss.

29 Second, Plaintiffs argue that Defendant has behaved unethically and that Plaintiffs are therefore
30 entitled to equitable relief. Pl. Resp. 7–11. However, the Court finds Plaintiffs accusations to be largely
31 meritless or unsupported. As established at the November 20, 2015 hearing, Defendant did not violate
32 the state court TRO, which lapsed no later than 14 days following the removal of the case to federal
33 court—it was the responsibility of Plaintiffs to file a new TRO before this Court before the state court
34 TRO expired. Plaintiffs accuse Defendant of making false representations to them and colluding with
35 an “entity consisting of former Wells Fargo employees” with whom they “enjoy a ‘special’
36 relationship” to whom they sold Plaintiffs’ home, but provide no evidence of these assertions. Pl.
37 Resp. 10. Defendant’s statement as of the October 22, 2015 motion to dismiss that Plaintiff’s home
38 had not been foreclosed upon was not a misrepresentation, since at that time Plaintiff’s home had not
39 been sold. *Id.* And while Defendant erred in their description of Plaintiff’s bankruptcy status, the
40 failure to include a single docket entry is not sufficient grounds, standing alone, to support the charge
41 that Defendant has engaged in misconduct with regards to the overall prosecution of the case.

1 Because the Court finds that the Court has subject matter jurisdiction and
2 Plaintiffs’ state law claims are preempted by the federal Home Owners’ Loan Act,
3 the Court **GRANTS** the motion to dismiss.³

4 **A. Subject Matter Jurisdiction**

5 Plaintiffs argue that the Court lacks subject matter jurisdiction because the
6 amount in controversy does not meet the \$75,000 jurisdictional requirement. *Id.* at
7 3. Plaintiffs argue that they seek damages for two counts of violations of Cal. Civ.
8 Code. § 2923, which caps damages at \$25,000 per violation, and thus seeks no more
9 than \$50,000 in damages. *Id.* at 3–4. Defendants reply that although Plaintiffs only
10 seek \$50,000 in monetary damages, they also seek injunctive relief concerning the
11 foreclosure of their home, in which Defendant has a secured interest arising from
12 the \$695,000 loan. Def. Reply 2.

13 It is well-established that where injunctive relief is sought, “the amount in
14 controversy is measured by the object of the litigation.” *Major v. Wells Fargo Bank,*
15 *N.A.*, 2014 WL 4103936, at *1 (S.D. Cal. Aug. 18, 2014) (citing *Cohn v. Petsmart,*
16 *Inc.*, 281 F.3d 837, 840 (9th Cir. 2002)). Moreover, “in actions arising out of the
17 foreclosure of a plaintiff’s home, the amount in controversy may be established by
18 the value of the property or by the value of the loan.” *Id.* (citing *Chapman v.*
19 *Deutsche Bank Nat’l Trust Co.*, 651 F.3d 1039, 1045 n.2 (9th Cir. 2011) (“The
20 object in litigation is the Property, which was assessed at a value of more than
21 \$200,000, and therefore satisfies the amount-in-controversy requirement.”); *Ngoc*
22 *Nguyen v. Wells Fargo Bank, N.A.*, 749 F. Supp. 2d 1022, 1028 (N.D. Cal. 2010)

24 ³Since the Court so finds, the Court need not address Defendant’s additional arguments that
25 (1) the first claim regarding SPOC should be dismissed because Plaintiff’s claim lacks particularity,
26 the allegations show Defendant satisfied the requirements of § 2923.7 when assigning a “team” to
27 serve as the SPOC, and any violation of § 2923.7 was not material; (2) the second claim regarding dual
28 tracking should be dismissed because Defendant’s alleged actions did not constitute dual tracking, §
2923.6 applies only to a first loan modification, not a subsequent loan modification, and Plaintiffs had
not demonstrated a material change in financial circumstances; and (3) the third claim regarding breach
of contract should be dismissed because Plaintiffs may not base an implied covenant of good faith
claim on statutory duties imposed on the Defendant, nor a contract duty that exceeds what is in the
parties’ contract. *See* Def. Mot. 7–12.

1 (“Numerous courts have held that, where a complaint seeks to invalidate a loan
2 secured by a deed of trust, the amount in controversy is the loan amount.”)).

3 In this case, the deed of trust indicates that Plaintiffs initially borrowed
4 \$695,000 against their home, far exceeding the \$75,000 threshold for diversity
5 jurisdiction. ECF No. 1, Ex. B. Following the loan modification, the balance of the
6 loan was adjusted downwards, but only to \$579, 936.24. ECF No. 1, Ex. C.
7 Plaintiffs do not allege that the value of the home has dropped below \$75,000. Thus,
8 Defendant has established by a preponderance of the evidence that the amount in
9 controversy exceeds \$75,000. *See Sanchez v. Monumental Life Ins. Co.*, 102 F.3d
10 398, 404 (9th Cir. 1996) (holding “that in cases where a plaintiff’s state court
11 complaint does not specify a particular amount of damages, the removing defendant
12 bears the burden of establishing, by a preponderance of the evidence, that the
13 amount in controversy exceeds” the statutory requirement).

14 **B. Federal Preemption**

15 Defendants argue that Plaintiffs’ state-law claims are preempted by the
16 federal Home Owners’ Loan Act (“HOLA”). Def. Mot. 3–7. Federal savings
17 associations, including federal savings banks, are subject to HOLA and are
18 regulated by the Treasury Department’s Office of Thrift Supervision (“OTS”).
19 *Osorio v. Wachovia Mortgage, FSB*, 2012 WL 1610110, at *3 (S.D. Cal. May 8,
20 2012) (citing 12 U.S.C. § 1464; *Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001,
21 1005 (9th Cir. 2008)).

22 Under HOLA, the OTS enjoys “plenary and exclusive authority . . . to
23 regulate all aspects of the operations of Federal savings associations” and its
24 authority “occupies the entire field of lending regulation for federal savings
25 associations.” 12 C.F.R. §§ 545.2, 560.2(a). The Ninth Circuit has stated that the
26 enabling statute and subsequent agency regulations are “so pervasive as to leave no
27 room for state regulatory control.” *Conference of Fed. Sav. & Loan Ass’ns v. Stein*,
28 604 F.2d 1256, 1260 (9th Cir.1979), *aff’d*, 445 U.S. 921 (1980). OTS Regulation

1 560.2(b) expressly preempts state regulation of federal thrift activities dealing with,
2 *inter alia*, terms of credit, loan-related fees, servicing fees, disclosure and
3 advertising, loan processing, loan origination, and servicing of mortgages. 12 C.F.R.
4 § 560.2(b). Federal courts have held that claims for violations of Cal. Civ. Code. §§
5 2923.6 and 2923.7, the provisions of the California Homeowner Bill of Rights
6 (“HBOR”) at issue here, are preempted by HOLA. *See Sato v. Wachovia Mortg.*,
7 *FSB*, 2011 U.S. Dist. LEXIS 75418, at *19–20, 2011 WL 2784567 (N.D. Cal. Jul.
8 13, 2011) (finding claim that lender violated California Civil Code § 2923.6 by
9 failing to modify her loan preempted by HOLA); *see also Campos v. Wells Fargo*
10 *Bank, N.A.*, No. CV151200JVSDBTX, 2015 WL 5145520, at *7 (C.D. Cal. Aug.
11 31, 2015) (citing *Meyer v. Wells Fargo Bank, N.A.*, No. C 13-03727 WHA, 2013
12 WL 6407516, at *4 (N.D. Cal. Dec. 6, 2013); *Marquez v. Wells Fargo Bank, N.A.*,
13 No. C 13-2819 PJH, 2013 WL 5141689, at *5 (C.D. Cal. Sept. 13, 2013)).

14 Plaintiff’s loan originated with WSB, a federal savings bank that was
15 subsequently acquired by Defendant Wells Fargo, a national banking association. A
16 majority of district courts to address the issue have found that “HOLA preemption
17 continues to apply to conduct related to loans originated by a federally-chartered
18 savings association even after those banks are merged into national banking
19 associations.” *See, e.g., Campos*, 2015 WL 5145520, at *5 (citation omitted);
20 *Penermon v. Wells Fargo Bank, N.A.*, 47 F. Supp. 3d 982, 995 (N.D. Cal. 2014)
21 (acknowledging that holding otherwise constitutes the “minority view”).

22 Therefore, the Court concludes that Plaintiffs’ claims for violation of California
23 Civil Code §§ 2923.6, and 2923.7 are preempted by HOLA. Moreover, Plaintiffs’
24 state law breach of contract claim is based on the SPOC and dual tracking
25 allegations, rather than any conduct of the Defendant unrelated to these contested
26 provisions of HBOR. *See Compl.* 9. Thus, Plaintiffs’ state law claims are

27 **DISMISSED WITH PREJUDICE.**

28

1 DATED: January 14, 2016

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

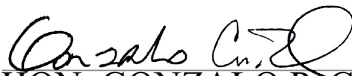
24

25

26

27

28


HON. GONZALO P. CURIEL
United States District Judge