

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis  
Bankruptcy Judge  
Sacramento, California

August 8, 2013 at 1:30 p.m.

- 
1. [09-34904-E-13](#) WILLIAM/DIANE METZELAAR MOTION FOR ENTRY OF DEFAULT  
[13-2015](#) PGM-3 JUDGMENT  
METZELAAR ET AL V. UNITED 7-10-13 [[44](#)]  
GUARANTY RESIDENTIAL INSURANCE

Local Rule 9014-1(f)(1) Motion - No Opposition.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant JPMorgan Chase Bank, N.A., Chapter 13 Trustee and the office of the U.S. Trustee on April 9, 2013. By the court's calculation, 16 days' notice was provided. 14 days' notice is required.

**Final Ruling:** The Motion for Entry of Default Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

**The Motion for Entry of Default Judgment is continued to 1:30 p.m. on August 29, 2013.** No appearance at the August 8, 2013 hearing required.

Plaintiffs William & Diane Metzelaar, seek entry of a default judgment against United Guaranty Residential Insurance Company of North Carolina, the Defendant, in this adversary proceeding. Entry of a default judgment is authorized by Federal Rule of Civil Procedure 55(b)(2), as made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7055.

Debtors seek to continue the hearing to August 29, 2013, based on a Notice of Continued Hearing filed August 1, 2013. Though titled "Notice," the pleading is actually an *ex parte* motion requesting that the court continue the hearing. L.R.B.P. 9014-1(j). This "ex parte motion" states, "The parties request a continuance in order to discuss settlement with Defendant United Guaranty Residence Insurance Company fo North Carolina."

August 8, 2013 at 1:30 p.m.

The court accepts Plaintiff's representation that the continuance is requested for the purpose of conducting settlement discussions and is not interposed for an improper purpose. This Adversary Proceeding is one to determine that a deed of trust recorded against property of the Debtors is void following the completion of payments through the Debtors' Chapter 13 Plan. In such a situation, the creditor has both a statutory and contractual obligation to reconvey the deed of trust. *In re Frazier*, 448 B.R. 803 (Bankr. ED Cal. 2011), *affd.*, 469 B.R. 803 (ED Cal. 2012) (discussion of "lien stripping" in Chapter 13 case), *Martin v. CitiFinancial Services, Inc. (In re Martin)*, Adv. No. 12-2596, 2013 LEXIS 1622 (Bankr. E.D. CA 2013). If a creditor fails to so do, in addition to attorneys' fees and costs, statutory penalties arise under California law.

The court continues the hearing on the Motion for Entry of Default Judgment to 1:30 p.m. on August 29, 2013.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Entry of Default Judgment filed by the Plaintiff having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the hearing on the Motion for Entry of Default Judgment is continued to 1:30 p.m. on August 29, 2013.

2. [13-24512-E-13](#) AMOS SNELL  
[13-2171](#) SF-1  
SNELL V. DEUTSCHE BANK  
NATIONAL TRUST COMPANY ET AL

MOTION TO DISMISS ADVERSARY  
PROCEEDING  
6-20-13 [[14](#)]

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) on June 20, 2013. By the court's calculation, 49 days' notice was provided. 28 days' notice is required.

**Final Ruling:** The Motion to Dismiss Adversary Proceeding has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See *Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

**The Motion to Dismiss Adversary Proceeding is continued to 1:30 p.m. on August 29, 2013.** No appearance required at the August 6, 2013.

Defendant Deutsche Bank National Trust Company, as Trustee for GSAMP Trust 2005-WMC1 (erroneously sued as Deutsche Bank National Trust Company, as Trustee for GSAMO Trust 2005-WMCI, Pooling and Servicing Agreement dated, as of September 1, 2-5) and Ocwen Loan Servicing, LLC, ("Movant") seeks dismissal of the adversary proceeding because Plaintiff failed to state a claim upon which relief can be granted.

However, the pleading titled motion is actually a combined notice of hearing and points and authorities. There is no actual "Motion" filed but rather a pleading in which the grounds upon which the motion is based are buried in detailed citations, quotations, legal arguments, and factual arguments (the pleading being a "Mothorities") in which the court and Plaintiff are put to the challenge of de-constructing the Mothorities, divining what are the actual grounds upon which the relief is requested (Fed. R. Civ. P. 7(b) and Fed. R. Bankr. P. 7007), restate those grounds, evaluate those grounds, consider those grounds in light of Fed. R. Bankr. P. 9011, and then rule on those grounds for the Defendant. The court has declined the opportunity to provide those services to a movant in other cases and adversary proceedings, and has required debtors, plaintiffs, defendants, and creditors to provide those services for the moving party.

The court has also observed that the more complex the Mothorities in which the grounds are hidden, the more likely it is that no proper grounds

exist. Rather, the moving party is attempting to beguile the court and other party.

In such situations, the court routinely denies the motion without prejudice and without hearing. Law and motion practice in federal court, and especially in bankruptcy court, is not a treasure hunt process by which a moving party makes it unnecessarily difficult for the court and other parties to see and understand the particular grounds (the basic allegations) upon which the relief is based. The court does not provide a differential application of the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules as between creditors and debtors, plaintiff and defendants, or case and adversary proceedings. The rules are simple and uniformly applied.

#### **CONSIDERATION OF MOTION**

Though Movant has failed to comply with Federal Rule of Civil Procedure 7(b), Federal Rule of Bankruptcy Procedure 7007, and the Revised Guideline for Preparation of Documents in this District, the court will consider this Motion for several reasons.

The Plaintiff-Debtor, now represented by counsel have filed an extensive opposition. It appears that the Plaintiff-Debtor has been able to slog through a 24 page "Motion" to discern the grounds stated with particularity from the extensive citations, quotations, legal arguments, factual arguments, and mere counsel arguments. The Plaintiff-Debtor has also objected to the use of "judicial notice" to properly authenticate a document recorded with a governmental agency (the county recorder).

The court notes that the underlying bankruptcy case was dismissed as of August 2, 2013. Bankr. E.D. Cal. No. 13-24512-13, Dckt. 91. The parties have not addressed the impact of the dismissal of the bankruptcy case on this Adversary Proceeding.

The parties shall file and serve supplemental pleadings addressing the appropriateness of the court conducting any further hearings in this Adversary Proceeding when the Plaintiff-Debtor is not a debtor in any pending bankruptcy case, and whether the court abstaining pursuant to 28 U.S.C. § 1334(c)(1) is necessary and proper. 28 U.S.C. § 1334(c)(1), See *Pineda v. Bank of America, N.A. (In re Pineda)*, 2011 Bankr. LEXIS 5609 (Bankr. E.D. Cal 2011), *affrm. Pineda v. Bank of America, N.A. (In re Pineda)*, 2013 Bankr. LEXIS 1888 (B.A.P. 9th Cir. 2013). The parties supplemental pleadings shall be filed and served by August 15, 2013.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Dismissal of Adversary Proceeding filed by Defendants having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Dismiss is continued to 1:30 p.m. on August 29, 2013.

**IT IS FURTHER ORDERED** that the parties shall file and serve on or before August 20, 2013, supplemental pleadings addressing the appropriateness of the court continuing with the conducting any further hearings in this Adversary Proceeding when the Plaintiff-Debtor is not a debtor in any pending bankruptcy case, and whether the court abstaining pursuant to 28 U.S.C. § 1334(c)(1) is necessary and proper.

3. [10-40523-E-13](#) DAN/CATHERINE SANDERS MOTION FOR ORDER AWARDING  
[12-2098](#) NLG-7 ATTORNEY'S FEES  
SANDERS ET AL V. ONEWEST BANK, 7-10-13 [[111](#)]  
FSB ET AL

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff's Attorney on July 10, 2013. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

**Final Ruling:** The Motion for Attorney Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

**The Motion for Attorney Fees is granted.** No appearance required.

Defendant Onewest Bank, FSB seeks an order awarding attorneys' fees in the amount of \$32,256.00 incurred in adversary proceeding number 12-02098. Defendant brings the instant motion pursuant to California Civil Code § 1717 and Federal Rule of Bankruptcy Procedure 7054(b).

Defendant states that Plaintiff Debtors executed a note in favor of Indymac Bank, FSB on March 15, 2005. Defendant states that on January 16, 2006 Plaintiff executed a modification agreement in favor of Indymac Bank. Defendant states that the modification agreement incorporates the deed of trust.

**BACKGROUND**

Defendant states that both the note and deed of trust contain attorneys' fee provisions, including Paragraph 6(E) of the Note and Paragraph 9 of the Deed of Trust. Defendant states that on August 13, 2012 the court issued a ruling in connection with Defendant's motion to dismiss and narrowed the claims to the following:

1. A claim for declaratory relief to determine Defendant's interests in the note;
2. A claim for declaratory relief to determine current monthly payments on the note and payments due since January 18, 2006; and
3. A claim that the notice of default is invalid because Defendant was not the owner and did not have the right to enforce the note.

Defendant states that on April 25, 2013 the court granted Defendant's motion for summary judgment and ordered Defendant to file a costs bill and motion for attorneys' fees.

Defendant contends that as the prevailing party in the instant adversary proceeding challenging Defendant's right to enforce a loan, Defendant is entitled to attorneys' fees and costs.

First, Defendant argues that all facts set forth in the instant motion are automatically admitted and are conclusively established since Plaintiff failed to respond to a request for admissions within the 30-day time period. Defendant states that it served the request for admissions on Plaintiff on February 14, 2013 with responses due on or before March 19, 2013. Defendant states that the unanswered requests for admissions include statements that Defendant is the current holder and owner of the subject loans. Defendant states that, due to Plaintiff's lack of response, it is established that Defendant is the owner of the loan.

Second, Defendant states it is entitled to recovery attorney fees based on nonbankruptcy law.

Third, Defendant states that because the adversary action is based on contract Defendant is entitled to attorneys' fees pursuant to California Civil Code § 1717. Defendant states that the action is based on Defendant's standing to enforce the subject loan and that, given the allegations in the adversary proceeding and that Defendant has prevailed, an award of attorneys' fees and costs should be granted.

Fourth, Defendant states that total fees of \$32,256.00 are reasonable since Defendant has been forced to incur fees and costs defending this adversary since its inception through the motion for summary judgment. Defendant states it incurred fees for the following services:

#### **Description of Services for Which Fees Are Requested**

Initial Review and Analysis of the Adversary Proceeding: Counsel spent 1.5 hours in this category for total fees of \$1,492.00. Counsel states the entire adversary was premised upon the arguments that the subject loan was improperly securitized and that Defendant does not have standing to enforce the note.

Motion to Dismiss: Counsel spent 38.4 hours in this category for total fees of \$7,732.00. Counsel researched and drafted the 12(b)(6) Motion to Dismiss and Reply Briefs, revised the Motion to Dismiss and appeared for the hearings.

Verified Answer: Counsel spent 8.4 hours in this category for total fees of \$1,732.00. Counsel prepared verified answer to Plaintiff's adversary complaint, which the remaining issues only pertained to the First Cause of Action to determine Defendant's interest in the note.

Discovery: Counsel spent 30.1 hours in this category for total fees of \$6,104.00. Counsel attended Rule 26(f) meeting, prepared initial disclosures, drafted requests for Admissions, special interrogatories, requests for production of documents, notices of deposition, and correspondence regarding discovery. Counsel asserts all efforts were made in attempt to gather information to defeat Plaintiff's challenge to the standing/ownership of the underlying subject loan.

Motion for Summary Judgment: Counsel spent 23.5 hours in this category for total fees of \$4,768.00. Counsel strategized, researched, and drafted the motion for summary judgment and related documents, prepared and appeared for the hearing, reviewed the ruling and prepared the final judgment. Counsel asserts that the only remaining issue in the Summary Judgment Motion was the first cause of action.

Settlement Efforts: Counsel spent 13.3 hours in this category for total fees of \$2,660.00. Counsel prepared emails, calls and correspondence to opposing counsel in an effort to resolve this dispute; offered opposing counsel to inspect the original note; discussed the dismissal of Plaintiff and related stipulations and agreements drafted in connection therewith (settlements never finalized). Counsel asserts these efforts were made to convince Plaintiff that Defendant was the proper party to enforce the Note and Deed of Trust in order to avoid this litigation.

Status Conferences: Counsel spent 4.4 hours in this category for total fees of \$880.00. Counsel prepared statements, communicated with opposing counsel and appeared at the hearings.

Correspondence with Client: Counsel spent 6.8 hours in this category for total fees of \$1,360.00. Counsel sent emails to client regarding status updates and developing a strategy to defeat Plaintiff's claims.

Attorney Fees: Counsel spent 15.4 hours in this category for total fees of \$3,128.00. Counsel researched and prepared Motion for Attorney Fees and attending hearing. Counsel asserts these amounts should be part of the award because they were incurred to enforce Defendants rights under the security instrument.

Counsel states that an additional 12 hours have been incurred in connection with this Amended Motion for Fees in the amount of \$2,400.00.

Defendant states it has been awarded \$5,170 in fees in connection with its motion to compel (\$2,300) and motion for terminating sanctions (\$2,870). Defendant states that it deducted these amounts from total fees incurred in the adversary proceeding.

## REVIEW OF ADVERSARY PROCEEDING

The Plaintiff-Debtors commenced this Adversary Proceeding on February 29, 2012. The Complaint set forth the following causes of action:

- A. First Cause of Action - Declaratory Relief that Defendant OneWest Bank, FSB is not the person entitled to enforce the Promissory Note and Deed of Trust securing the Promissory Note. Various theories were advanced as to why OneWest Bank FSB was not the holder or owner of the Promissory Note, and why it was not entitled to enforce the Deed of Trust.
- B. Second Cause of Action - Fraud for filing a proof of claim based on the assertion that OneWest Bank, FSB did not have any interest in or right to enforce the Promissory Note or Deed of Trust. Further, that OneWest Bank, FSB misrepresented the amount due on the Promissory Note.
- C. Third Cause of Action - Violation of California Business and Professions Code §§ 17200 et seq. for statutory unlawful, unfair, fraudulent business practices. This cause of action was based on OneWest Bank, FSB not being the holder or owner of the Promissory Note, or being a person entitled to enforce the Promissory Note or Deed of Trust. Further, that OneWest Bank, FSB improperly computed the payments due under the Promissory Note.
- D. Fourth Cause of Action - Violation of California Civil Code §§ 2924 et seq. alleging that OneWest Bank, FSB was not entitled to enforce the Deed of Trust, and that the non-judicial foreclosure sale was improperly conducted and did not comply with California law.

Complaint, Dckt. 1.

Defendant filed a motion to dismiss the Complaint (First Motion to Dismiss), which was denied without prejudice by the court. Order, Dckt. 28. The First Motion to Dismiss was denied for failure to Comply with Federal Rule of Civil Procedure 7(b), Federal Rule of Bankruptcy Procedure 7007, Local Bankruptcy Rule 9014-1, and the Revised Guideline for Preparation of Pleadings in the Eastern District of California. Civil Minutes, Dckt. 27.

On May 29, 2012, Defendant filed its second Motion to Dismiss. Dckt. 33. Pursuant to that Motion the court dismissed all claims and Causes of Action except (1) The First Cause of Action to determine the interests of Defendant in the Promissory Note and Deed of Trust, determine what the correctly monthly payments for the obligation, if any, on the Promissory Note if it is to be paid as a secured claim in this case; (2) The Fourth Cause of Action to determine if the alleged nonjudicial foreclosure sale was invalid due to Defendant not having an interest in or the right to enforce the Promissory Note or Deed of Trust. Order, Dckt. 52; Civil Minutes Dckt. 51.

## DISCUSSION

### **Defendant is the Prevailing Party**

Defendant contends that all statements made in the unanswered Requests for Admission are deemed admitted. Federal Rule of Civil Procedure 36, made applicable by Federal Rule of Bankruptcy Procedure 7036, provides that a matter is admitted unless within 30 days after being served the party at whom the request is directed serves a written answer or objection.

In support of its argument Defendant provides a copy of the Request for Admission to Dan Sanders dated February 14, 2013. Dckt. 101, Exhibit. 2.

Here, Plaintiff did not file a written response by the 30-day deadline and the statements in the Requests for Admission are deemed admitted. Upon reviewing the court's entry of judgment in favor of Defendant on May 24, 2013, the court finds that Defendant Onewest Bank, FSB is the prevailing party. Dckt. 104.

### **Request for Attorneys' Fees Made in Complaint**

The Complaint filed on February 29, 2012 states four causes of action, only one of which survived Defendant's motion for summary judgment: the first cause of action for determination of validity, priority or extent of lien or other interest in the property.

On August 13, 2012 the court granted Defendant's motion to dismiss (the state law fraud claim, the Business and Profession statutory claim, and the California Civil Code § 2924 et seq. claim that the foreclosure was conducted improperly), leaving the claims relating to Defendant's rights and ability to enforce the Promissory Note and Deed of Trust. The remaining claims all are based on actions on contract and include Defendant's interest in the note, monthly payment due under the note, and Defendant's ability to enforce the note. (Dckt. 51).

### **Only the Attorneys' Fees Relating to the Contract Action May be Awarded in this Adversary Proceeding**

In this case the legal fees which Plaintiff seeks relate a determination of Defendant's rights to enforce the note. Defendant's motion quotes the following contractual provisions, establishing a contractual right to seek attorneys' fees.

#### Attorneys' Fees Provision in Note

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

Note, Exhb. A, Dckt. 101, Page 18, paragraph 6(E).

#### Attorneys' Fees Provision in Deed of Trust

If...(b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument..., then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument...Lender's actions can include, but are not limited to...(c) paying the reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument...

Deed of Trust, Exhb. C, Dckt. 101, Page 38, paragraph 9.

If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

Deed of Trust, Exhb. C, Dckt. 101, Page 44, paragraph 22.

The contractual provisions expressly allow Defendant, as the lender, to recover reasonable attorneys' fees and costs in protecting Defendant's interest. Here, Defendant correctly asserts that contract issues were at play in the instant litigation as the issues remaining after the partial grant of summary judgment were contract claims as they pertained to Defendant's enforcement rights under the note and deed of trust.

In applying the provisions of Cal. Civ. Code § 1717, the court in *Gil v. Mansano*, 121 Cal. App. 4th 739, 743 considered the distinction between a claim stated "on a contract" and on a tort:

Broad language in a contractual attorney fee provision may support a broader interpretation. (*Exxess Electronixx v. Heger Realty Corp.*, supra, 64 Cal. App. 4th at p. 712.) Thus, for example, an attorney fee provision applicable to "any dispute under the agreement" is sufficiently broad to include the assertion of a contractual defense to fraud and breach of fiduciary duty causes of action. (*Thompson v. Miller*, supra, 112 Cal.App.4th at pp. 335-337.) Such an attorney fee provision is not limited to an action brought to enforce the agreement. Other broad language has also been interpreted broadly to include tort actions. (*Santisas v. Goodin*, supra, 17 Cal.4th at p. 607 ["arising out of the execution of the agreement"]; *Allstate Ins. Co. v. Loo* (1996) 46 Cal.App.4th 1794, 1799 [54 Cal. Rptr. 2d 541] ["relating to the demised premises"]; *Moallem v. Coldwell Banker Com. Group, Inc.* (1994) 25 Cal.App.4th 1827, 1831 [31 Cal. Rptr. 2d 253] ["relating to" the contract]; *Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1342 [5 Cal. Rptr. 2d 154] ["to which 'this Agreement gives rise'"].) *Gil v. Mansano*, 121 Cal. App. 4th at 744. *Moallem v.*

*Coldwell Banker Com. Group, Inc.*, 35 Cal. App. 4th 1827, 1831 (1994), addressed a contractual attorneys' fees provision for any legal action against the other party relating to the agreement.

Such language was determined broad enough to include attorneys' fees for tort claims relating to the contract.

In the present case, the attorneys' fees have been drafted much more narrowly, which may have been intentionally done to "protect" the creditor in the event that tort claims arose relating to the events surrounding the contract. Thus, Defendant may only recover fees related to litigating Defendant's rights under the contract (note and deed of trust). As a result, Defendant cannot recover fees and costs for litigating the second and third causes of action.

### **Task Billing Analysis**

Defendant has provided a sufficient task billing analysis for the court to consider. There are two portions of the fee request in the amount of \$29,856.00 which require further consider. The first relates to \$7,732.00 in fees relating to the Motion to Dismiss, by which the court dismissed the state law fraud claim, Business & Professions Code §§ 17200 et seq. statutory claim, and the Civil Code §§ 2924 et seq. claim that the nonjudicial foreclosure sale was improperly conducted. The contractual attorneys' fees provisions relied on by Defendant go to those "enforcing this note," "to protect [Defendant's] interest in the Property and/or rights under [the Deed of Trust]," and "expenses incurred in pursuing the remedies provided [paragraph 22 of the Deed of Trust], including...attorneys' fees and costs." The Paragraph 22 scope of activities subject to the attorneys' fee provision states,

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified In the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies

provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If Leader invokes the power of sale, Lender shall execute or cause Trustee to execute a written notice of the occurrence of an event of default and of Leader's election to cause the Property to be sold. Trustee shall cause this notice to be recorded in each county in which any part of the Property is located. Lender or Trustee shall mail copies of the notice as prescribed by Applicable Law to Borrower and to the other persons prescribed by Applicable Law. Trustee shall give public notice of sale to the persons and in the manner prescribed by Applicable Law. After the time required by Applicable Law, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Trustee may postpone sale of all or any parcel of the Property by public announcement at the time and place of any previously scheduled sale. Lender or Its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's and attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

Exhibit to Proof of Claim No. 3 filed by OneWest Bank, FSB, Case No. 10-40524.

The Motion to Dismiss stated with particularity the following grounds upon which the specified causes of action should be dismissed.

- A. Second Cause of Action for Fraud because it "fails to state facts essential with the specificity required by FRCP Rule 9(b).
- B. Third Cause of Action for violation of Business and Professions Code §§ 17200 et seq. because "Plaintiff lacks standing [and] it is otherwise insufficiently pled.
- C. Fourth Cause of Action for violation of California Civil Code §§ 2924 et seq. because "Plaintiffs claim is based on a misunderstanding of Civil Code § 2924, et seq. [and] Plaintiffs fails [sic.] to pled [sic.] any resulting prejudice stemming from OWB's alleged lack of standing."

Motion to Dismiss, Dckt. 33. The court granted the motion for the second cause of action based on the Plaintiff not properly pleading a state law fraud claim. Civil Minutes, Dckt. 51. The motion was granted for the Third Cause of Action, Business and Professions Code §§ 17200 et seq. because Plaintiffs failed to sufficiently allege that Defendant engaged in conduct likely to the public or the Plaintiffs. There were no allegations of any pattern of similar actions by Defendant against other consumers. *Id.* While the "facts" alleged relate to why and how Defendant was enforcing rights under the Note and Deed of Trust, there are not causes of action within the scope of the contractual attorneys' fees provisions.

The court concludes that the Fourth Cause of Action, asserting failure to comply with the statutory provisions of California Civil Code § 2924 et seq., does sufficiently relate to the actual enforcement of rights under the Note and Deed of Trust for the court to include reasonable amounts relating thereto for the Motion to Dismiss for attorneys' fees awarded under these contractual provisions. Though there may have been "common allegations" for each cause of action, that does not make everyone cause of action subject to the contractual attorneys' fees provision. The court also denied the Motion to Dismiss as to the First Cause of Action, so Defendant prevailed only on part - those portions not relating to enforcing the rights under the Note and Deed of Trust.

Of the \$7,732.00, the court allows \$3,250.00 in attorneys' fees which relate to the Motion to Dismiss, as the allocated portion for the Fourth Cause of Action (Civ. Code § 2924). The court disallows the balance (\$4,482.00) as relating to the common law fraud claim and the statutory Business and Professions Code §§ 17200 et seq. claim. In addition, this takes into account that Defendant did not prevail on that portion of the motion relation to it having, asserting, and enforcing its rights under the Promissory Note and Deed of Trust. The Defendant's request for fees did not take this into account.

The Defendant also requests \$5,528.00 for filing what should be a simple motion for an award of attorneys' fees to a prevailing party. One reason that the fees are so high is that the Defendant failed to provide the court with a task billing analysis, but merely dumped the raw billing statements on the court (thereby enlisting the court to do Defendant's work in organizing the data to determine what was being requested). Order, Dckt. 110, Civil Minutes, Dckt. 108. There is nothing complex about the fees being requested in this Adversary Proceeding by the prevailing party Defendant. The court allows 11 hours of time for the preparation and appearance (telephonic appearances being permitted without prior authorization of the court) at counsel's \$200.00 an hour billing rate. Therefore, Defendant is allowed \$2,200.00 for the motion for prevailing party attorneys' fee, and (\$3,328.00) of the requested fees are denied.

The court awards OneWest Bank, FSB, as the prevailing party in this Adversary Proceeding, attorneys' fees in the amount of \$24,446.00 (the \$32,256.00 of fees requested minus the (\$7,810.00) of attorneys' fees disallowed by the court).

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Order Awarding Attorneys' Fees and Costs filed by the Defendant having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion for Order Awarding Attorneys' Fees is granted, and OneWest Bank, FSB, the prevailing party, is awarded attorneys' fees of \$24,446.00 against Dan Sanders and Catherine Sanders (the Plaintiffs), and each of them, and Defendants, which attorneys' fees may be enforced as part of the Judgment entered in this Adversary Proceeding. This award does not include the amount of sanctions previously awarded by this court, Order (Dckt. 96), which may be enforced as an additional obligation owed by the Plaintiffs, and each of them.

4. [07-27123](#)-E-13 DOREEN GASTELUM  
[12-2295](#) PGM-1  
GASTELUM V. MORTGAGE  
ELECTRONIC REGISTRATION

CONTINUED MOTION FOR LEAVE TO  
AMEND THE COMPLAINT  
5-2-13 [[133](#)]

**Final Ruling:** At the request of the court, the hearing on this matter is continued to **1:30 p.m.** on **August 29, 2013**. No appearance required at the August 8, 2013 hearing.