In the

Court of Appeal

of the

State of California

THIRD APPELLATE DISTRICT

C076727

TERRY M. RATTERREE,

Plaintiff-Appellant,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION, et al.,

Defendants-Respondents.

APPEAL FROM THE SUPERIOR COURT OF GLENN COUNTY
HON. PETER B. TWEDE · NO. 13CV01174

BRIEF OF APPELLANT

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, Third APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: C076727
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APPELLANT/PETITIONER: Terry Ratterree RESPONDENT/REAL PARTY IN INTEREST: Federal National Mortgage Association	

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(Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party (*name*): Terry Ratterree

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

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The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: May 7, 2015

Janice D. Dudensing ▶ _____

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I. STATEMENT OF THE CASE

This is a case of first impression in the appellate court. No reported state or federal appellate decision has addressed the specific issues raised in this case. This is an appeal from a judgment of dismissal entered after the trial court sustained a demurrer to appellant's complaint without leave to amend. (CT 218:11-12) Appellant Terry Ratterree ("Ratterree") is the plaintiff alleging violations of the Homeowner Bill of Rights ("HBOR") and wrongful foreclosure. (CT 57–69) Respondents Fannie Mae and Seterus, Inc. (collectively "Fannie Mae") are the defendants. (CT 1-12)

On July 22, 2013, Ratterree initially sued *in pro per* against Fannie Mae, Seterus, and First American Trustee Servicing Solutions, LLC, for their conduct in wrongfully foreclosing on his home. (CT 1-12)

Defendant First American Trustee Servicing Solutions, LLC ("First American") demurred to Ratterree's complaint. (CT 13-52) Ultimately, Ratterree retained counsel and obtained leave to amend. The second amended complaint ("SAC"), filed September 26, 2013, narrowed the causes of action to violations of HBOR and wrongful foreclosure. (CT 57-69) Specifically, SAC allegations included facts regarding violations of HBOR's prohibition against dual tracking, the unlawfulness of "robo-signing" and wrongful foreclosure. (CT 61:10-22; 62:11-24) While Ratterree did not allege tender, he did allege facts to support an exception to the tender rule. (CT 62:19-23) Ratterree alleged he had a "set-off"

because defendants engaged in a material violation of HBOR. (*Id.*) Moreover, Ratterree alleged that, because the foreclosure process was procured by fraud, he was excused from alleging tender. (*Id.*)

On October 11, 2013, Fannie Mae demurred, arguing, among other things, preemption under the federal Home Owners Loan Act ("HOLA") and an inadequate pleading of the tender rule. (CT 71-82) Ratterree dismissed First American. (CT 173A) The demurrer was argued December 6, 2013 before Hon. Angus Saint-Evens of the Superior Court, County of Glenn. (*Id.*) The matter was taken under submission. (*Id.*)

The final ruling was entered March 26, 2014 by Hon. Peter Billiou Twede of the Superior Court, County of Glenn. (CT 204) The court found Ratterree's SAC did not state a cause of action for dual-tracking and therefore confined its ruling to Ratterree's claims for robo-signing (Civil Code §2924.17)[1]. (CT 206:28; 207:1-2) The court found HOLA preempted Ratterree's robo-signing causes of action. (CT 206-216) The court conceded there was no binding authority to address whether HBOR should be preempted by HOLA, but found *Kenery v. Wells Fargo, N.A* (N.D. Cal., Jan. 14, 2014, 5:13-CV-02411-EJD) 2014 WL 129262 ("*Kenery*

[1] All further statutory references are to the Civil Code unless otherwise noted.

I')[2] "squarely addresses" whether HOLA preempts HBOR.[3] (CT 215:4-6) Based solely on *Kenery I,* the trial court concluded HBOR's requirement that documents executed to initiate a foreclosure proceeding in California are "acts involving loan 'processing' and 'servicing'" and therefore Ratterree's claims based on violations of §2924.17 are preempted by HOLA. (CT 216:4-27) The court further held §2924.17 provisions that require lenders and servicers to verify that all foreclosure initiating documentation are accurate and complete and supported by competent and reliable evidence are laws that "affect lending" and are therefore preempted by Title 12 C.F.R. §560.2. (CT 216:10-14) Based on this reasoning, the trial court dismissed Ratterree's HBOR causes of action. (CT 216:6-14)

The trial court also dismissed Ratterree's common law wrongful foreclosure action, finding the tender requirement or tender exception had not been pled. (CT 216-218) In reaching this conclusion, it found that a HBOR "set-off" (the greater of $50,000 or treble damages) would not be sufficient to tender the full amount owed and the elements of a fraud-based

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[2] Pursuant to Cal. Rules of Court, Rule 8.1115(c), attached hereto is a copy of each federal district court decision referenced herein which is not available in the official reporter.

[3] Following the trial court's ruling, *Kenery II* was decided (*Kenery v. Wells Fargo, N.A.* (N.D. Cal. Aug. 22, 2014, 5:13-CV-02411-BLF) 2014 WL 4183274). *Kenery I* had already decided HOLA preempted the field. *Kenery II* considered whether HOLA preemption applied to the specific defendants in the case. As discussed below, *Kenery II* supports Ratterree's contention that HOLA preemption does not apply to Fannie Mae.

exception to the tender rule were not properly pled. (CT 217:22-28; 218:1-6) The trial court declined to grant leave to amend and the entire action was ultimately dismissed. (CT 218:11-12)

On March 21, 2014, Ratterree timely sought reconsideration (CT 174-203) Fannie Mae opposed. (CT 219-250) Ratterree replied. (CT 251-256) The court denied Ratterree's motion. (CT 258-260) On May 12, 2014, a judgment was entered in favor of Fannie Mae. (CT 261-262) Ratterree filed a notice of appeal on May 28, 2014. (CT 271)

II. STATEMENT OF APPEALABILITY

A trial court's judgment of dismissal of a complaint following the sustaining of a demurrer without leave to amend is appealable as a final judgment pursuant to Code of Civil Procedure §904.1(a)(1). *(Daar v. Yellow Cab. Co.* (1967) 67 Cal.2d 695, 699.)

III. ISSUES PRESENTED

1) Did the trial court err when it found HBOR's prohibition against "robo-signing" documents (§2924.17) preempted by the federal HOLA?
2) Did the trial court err in applying HOLA preemption to Fannie Mae when Fannie Mae is *not* a federal savings association (FSA) regulated by HOLA?
3) Did the trial court err when it dismissed Ratterree's wrongful foreclosure action?

4) Did the trial court err when it sustained Defendant's demurrer without leave to amend?

IV. STATEMENT OF FACTS

On May 14, 2008, Ratterree purchased the subject single family dwelling at 6705 County Road 20, in Orland, California for $343,500. (CT 59:17-18) To finance purchase of the property, he obtained a purchase money loan of $309,150 secured by a deed of trust in favor of IndyMac Bank. (CT 59: 18-20)

A federally chartered savings bank (CT 225:12-16), IndyMac Bank was taken into receivership by the FDIC on May 20, 2008. (CT 12) On June 24, 2008, Fannie Mae became the new investor of the note. (CT 12) Fannie Mae is not a federal savings association. (CT 178:20-25; 179:1-3) Servicing rights switched hands several times, but ultimately ended with Seterus, Inc. at the time of the alleged misconduct. (CT 12)

In late 2012, Ratterree's income was drastically reduced. (CT 60:1) He contacted his servicer and requested a loan modification review. (CT 60:1-2) Ratterree submitted a complete loan modification application and supporting documents on several different occasions. (CT 60:2-4)

On or about January 7, 2013, Ratterree was offered a loan modification. (CT 60:5) However, the monthly payments were entirely unaffordable. (CT 60:6-7) He contacted his servicer and explained this. (CT 60:7-11) He also exercised his rights under HBOR and formally

appealed the decision. (CT 60:11-12) Meanwhile, Fannie Mae scheduled a trustee sale. (CT 60:13-15) Ratterree's home was sold at a trustee sale on May 24, 2013 while his application for loan modification was still under review. (CT 60:15-18)

After learning the trustee's sale had occurred, Ratterree requested a copy of the Trustee's Deed Upon Sale. (CT 61:7-9) Ratterree learned that document was signed by Robert Bourne, a "robo-signer" (CT 61:10-12), under penalty of perjury. (CT 65-66) Robo-signing is expressly prohibited under HBOR. (CT 61:18-22)

V. ARGUMENT

A. Standard of Review

A demurrer tests the legal sufficiency of the complaint. (*Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal.App.4th 72, 78.) Therefore, the appellate court applies the *de novo* standard of review to determine whether the complaint pleads facts sufficient to state a cause of action. (*Id.; Holiday Matinee, Inc. v. Rambus, Inc.* (2004) 118 Cal.App.4th 1413, 1420.) The court assumes the truth of all facts alleged in the complaint. (*Grinzi* at 78; *Aubry v. Tri–City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)

Because appeal from a judgment of dismissal after sustaining of a demurrer without leave to amend requires consideration whether the allegations state a cause of action under any legal theory, new theories may be advanced for the first time on appeal. (*Grinzi* at 85.)

It is error for the trial court to sustain a demurrer if the plaintiff has stated a cause of action under any possible legal theory, and it is an abuse of discretion for the court to sustain a demurrer without leave to amend if the plaintiff has shown a reasonable possibility a defect can be cured by amendment. (*California Logistics, Inc. v. State* (2008) 161 Cal.App.4th 242, 247.)

B. The Homeowner Bill of Rights

Courts are charged with ascertaining the intent of the Legislature to effectuate the purpose of the law. (*Klajic v. Castaic Lake Water Agency* (2001) 90 Cal.App.4th 987, 997.)

California's HBOR took effect January 1, 2013. HBOR was created to combat the national mortgage and foreclosure crisis and to hold lenders and servicers accountable for exacerbating it. HBOR ensures homeowners have some modicum of protection in foreclosure proceedings and qualified homeowners are considered for, and have a meaningful opportunity to obtain, available loss mitigation options, such as loan modifications or other alternatives to foreclosure. (*Penermon v. Wells Fargo Bank, N.A.* (N.D. Cal. 2014) 47 F.Supp.3d 982, 992.)

HBOR was adopted to implement the terms of a $25 billion settlement agreement between 49 state attorneys general, the U.S. Department of Justice, the U.S. Department of Housing and Urban Development and the nation's five largest mortgage servicers ("the

Agreement"). (RJN, Exh. 1, Vol. 1, p.1) The Agreement settled allegations that the servicers had engaged in abusive foreclosure practices and required them to comply with specific servicing standards by October 2, 2012 (RJN, Exh. 1, Vol. 1, p.184, ¶1), that, among other things, ended dual tracking and required borrowers be assigned a SPOC to assist them in their loan modification efforts. (RJN, Exh. 1, Vol. 1, p.104-110) Enforcement under the Agreement was limited to an independent monitor and the state signatories, omitting provisions for individual enforcement. (RJN, Exh. 1, Vol. 1, p.184-186)

Before passage of HBOR, the California Legislature had considered numerous bills to bring about foreclosure reform and address the state's foreclosure crisis. (SB1137 (Perata), Ch. 69, Stats. of 2008; SB729 (Leno) of 2011; AB1639 (Nava) of 2010.) In 2012, legislative leaders formed a Conference Committee to address foreclosure issues and homeowner protections in the wake of the foreclosure settlement. Once a frequent occurrence, the conference committee process is rarely used today.

The Conference Committee was co-chaired by Senator Noreen Evans[4] and Assemblymember Mike Eng. It held numerous hearings and countless hours of stakeholder meetings, hearing from a wide range of witnesses, including: consumer advocates, economists, financial

[4] At the time, Evans was the Chair of the Senate Committee on Judiciary, and attorney Saskia Kim was Chief Counsel of that committee.

institutions, four signatories to the settlement agreement, homeowners, and trustees. The Conference Committee's work culminated in two identical bills, SB900 (Leno, Evans, Corbett, DeSaulnier, Pavley, Steinberg), Ch. 87, Stats. of 2012, and AB278 (Eng, Feuer, Mitchell, John A. Pérez), Ch. 86, Stats. of 2012, that were enacted into law. (RJN, Exh. 2, Vol. 2, p.311; Exh. 3, Vol. 3, p.336)

When California lawmakers approved HBOR, the state faced the economic downturn, crippled housing market, and countless foreclosures. HBOR contained extensive legislative findings and declarations, emphasizing its statewide importance:

> "California is still reeling from the economic impacts of a wave of residential property foreclosures that began in 2007. From 2007 to 2011 alone, there were over 900,000 completed foreclosure sales. In 2011, 38 of the top 100 hardest hit ZIP Codes in the nation were in California, and the current wave of foreclosures continues apace. All of this foreclosure activity has adversely affected property values and resulted in less money for schools, public safety, and other public services. In addition, according to the Urban Institute, every foreclosure imposes significant costs on local governments, including an estimated nineteen thousand two hundred twenty-nine dollars ($19,229) in local government costs. And the foreclosure crisis is not over; there remain more than two million "underwater" mortgages in California." (§1, SB900 (Leno), Ch. 87, Stats. of 2012.) (RJN, Exh. 2, Vol. 2, p. 313)

California is one of a number of states that permit lenders to use the non-judicial foreclosure process to foreclose on a home. (§2924 et seq.) Before adoption of HBOR, California homeowners had few statutory remedies in foreclosure proceedings. (See, e.g., *Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 77.) HBOR reformed and amended California's non-judicial foreclosure process as follows[5]:

Under §2924.17, certain recorded documents, and documents filed in court in relation to a foreclosure proceeding, must be accurate and complete and supported by competent and reliable evidence. Section 2924.17 also requires servicers to review evidence to verify the homeowner is in default and the servicer has the right to foreclose.

Section 2924.12 expressly permits a homeowner to bring an action for a "material violation." If the home has not yet been sold, the homeowner can sue to stop the sale until the violation is corrected. If the home has been sold, the homeowner can sue for actual economic damages, plus attorney's fees. If the violation was willful, reckless, or intentional, the court may award the homeowner triple actual damages or $50,000, whichever is greater. (§2924.12.)

HBOR's express language makes clear the Legislature intended only to impact California's non-judicial foreclosure process:

[5] The following references are to those sections that apply to entities that foreclosed on more than 175 residences within the past year.

> "The purpose of the act that added this section is to ensure that, as part of the non-judicial foreclosure process, borrowers are considered for, and have a meaningful opportunity to obtain, available loss mitigation options, if any, offered by or through the borrower's mortgage servicer, such as loan modifications or other alternatives to foreclosure. Nothing in the act that added this section, however, shall be interpreted to require a particular result of that process." (§2923.4(a).)

Furthermore, HBOR's findings and declarations provide:

> "It is essential to the economic health of this state to mitigate the negative effects on the state and local economies and the housing market that are the result of continued foreclosures by modifying the foreclosure process to ensure that borrowers who may qualify for a foreclosure alternative are considered for, and have a meaningful opportunity to obtain, available loss mitigation options. These changes to the state's foreclosure process are essential to ensure that the current crisis is not worsened by unnecessarily adding foreclosed properties to the market when an alternative to foreclosure may be available. Avoiding foreclosure, where possible, will help stabilize the state's housing market and avoid the substantial, corresponding negative effects of foreclosures on families, communities, and the state and local economy." (§1, SB900 (Leno), Ch. 87, Stats. of 2012.) (RJN, Exh. 2, Vol. 2, p. 313)

The legislative analysis notes HBOR would make "changes to California's non-judicial foreclosure process to provide stability to California's statewide and regional economies and housing market by

facilitating opportunities for borrowers to pursue loss mitigation options." (Sen. Rules Com., Off. of Sen. Floor Analyses, Conference Report No. 1, SB900 (Leno), as amended June 27, 2012, p. 1.) (RJN, Exh. 4, Vol. 2, p.361)

Courts have also recognized HBOR "only provides procedural protections to foster alternatives to foreclosure; it does not entitle a borrower to a loan modification." (*Penermon v. Wells Fargo Bank, N.A.*, *supra,* 47 F.Supp.3d 982, 993.) Therefore, the Legislature clearly stated its intent to regulate the state's foreclosure procedure and to stabilize the state's housing market by providing qualified borrowers with meaningful opportunities to pursue loss mitigation options and alternatives to foreclosure.

C. California's Non-Judicial Foreclosure Procedure

The purpose of California's comprehensive statutory scheme for non-judicial foreclosure sale pursuant to the power of sale contained in a deed of trust is to provide creditors with a quick, inexpensive, and efficient remedy against defaulting debtors, to protect debtors from wrongful loss of property, and to ensure a properly conducted foreclosure sale is final between parties and conclusive as to bona fide purchaser. (*Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830.) *Moeller* summarizes California's statutory non-judicial foreclosure scheme, with all citations omitted:

> Upon default by the trustor, the beneficiary may declare a default and proceed with a non-judicial foreclosure sale. The foreclosure process is commenced by the recording of a Notice of Default and Election to Sell by the trustee. After the Notice of Default is recorded, the trustee must wait three calendar months before proceeding with the sale. After the three-month period has elapsed, a Notice of Sale must be published, posted and mailed 20 days before the sale and recorded 14 days before the sale. The trustee may postpone the sale at any time before the sale is completed. If the sale is postponed, the requisite notices must be given. The conduct of the sale, including any postponements, is governed by Civil Code section 2924g. The property must be sold at public auction to the highest bidder. (*Moeller* at 830.)

The purchaser at a foreclosure sale takes title by a trustee's deed, free and clear of any right, title or interest of the trustor. (*Moeller* at 830.) Section 2924(c) requires specific recitals in the deed executed pursuant to the power of sale. The trustee's deed upon sale is signed at the end of the foreclosure proceedings and its contents are mandated by the specific language of §2924(c).

D. Preemption

1. Section 2924.17 Is Not Preempted By HOLA Because Congress Did Not Intend To Preempt State Foreclosure Laws

a) Courts Disfavor Preemption In Areas Traditionally Left To State Regulation, Such As Foreclosure

Preemption is disfavored. Courts are reluctant to infer preemption, and it is the burden of the party claiming Congress intended to preempt state law to prove it. (*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 815.) State law should be construed, whenever possible, to be in harmony with federal law, so as to avoid having state law invalidated by federal preemption. (*Greater Westchester Homeowners Assn. v. City of Los Angeles* (1979) 26 Cal.3d 86, 93; *California ARCO Distributors, Inc. v. Atlantic Richfield Co.* (1984) 158 Cal.App.3d 349, 359.) California courts do not favor constructions of statutes rendering them advisory only, or a dead letter. (*Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 218.)

Foreclosure is an area of law traditionally occupied by the states, a point noted by the United States Supreme Court, California courts, and academic commentators. (*BFP v. Resolution Trust Corp.* (1994) 511 U.S. 531, 541–542, *Mabry, supra,* at 230-231; Alexander, Federal Intervention in Real Estate Finance: Preemption and Federal Common Law (1993) 71 N.C. L.Rev. 293, 293.)

Moreover, no authority holds that federal law preempts states' foreclosure authority. Ratterree's claims are based upon fraud in the execution of the trustee's deed upon sale, which occurs at the *end* of the foreclosure process. Fannie Mae's position in this case is inherently contradictory: it wants to take advantage of California's non-judicial foreclosure process but, at the same time, claims that California law regulating that process (i.e., prohibiting fraud in the trustee's deed upon sale) is preempted by federal law. Fannie Mae cannot have it both ways.

b) Congress Did Not Intend To Preempt California's Non-Judicial Foreclosure Process

The first step in a preemption analysis is an examination of congressional intent. No authority establishes congressional intent to preempt state foreclosure proceedings.

Congressional intent is the ultimate touchstone in every preemption case. (*Wyeth v. Levine* (2009) 555 U.S. 555, 565.) In analyzing preemption, courts assume that historic police powers of the States are not to be superseded by federal law, unless that was the clear and manifest purpose of Congress. (*Id.; Olszewski, supra,* 30 Cal.4th at 815.) Preemption is applied only to the extent necessary to serve the objectives of Congress. (*Greater Westchester Homeowners Assn., supra,* 26 Cal.3d at 94.)

HOLA and the now defunct Office of Thrift Supervision (OTS)[6] historically governed the lending and servicing practices of FSAs, but not foreclosure proceedings. OTS was authorized to promulgate regulations that "preempt state laws affecting the operations of federal savings associations when deemed appropriate to facilitate the safe and sound operation of federal savings associations, to enable federal savings associations to conduct their operations in accordance with the best practices of thrift institutions in the United States, or to further other purposes of HOLA." (12 C.F.R. 560.2(a)) Pursuant to HOLA, OTS issued regulations stating "OTS hereby occupies the entire field of lending regulation for federal savings associations. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation. Accordingly, federal savings associations may extend credit as authorized under federal law, including this part, without regard to state laws purporting to regulate

[6] In 2011, Congress dismantled the OTS and transferred it to the Office of the Comptroller of the Currency (OCC) pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), Pub. L. No. 111-203, §§312(b)(2)(B) & 313, 124 Stat. 1376, 1520, 1523 (2010) (codified at 12 U.S.C. §§5412 & 5413). As the trial court points out, the Dodd-Frank Act provides that HOLA no longer occupies the field and instead specifies that preemption is governed by "the laws and legal standards applicable to national banks regarding the preemption of State law." (12 U.S.C. §1465(a),(b)) As the trial court further notes, however, this change in HOLA preemption is not retroactive to any contracts entered into on or before July 21, 2010 (such as Ratterree's mortgage). (12 U.S.C. §5553)

or otherwise affect their credit activities, except to the extent provided in [§560.2(c) or §560.110]." (12 C.F.R. §560.2(a).)

Title 12 C.F.R. §560.2(b) lists the types of laws that are preempted, including "state laws purporting to impose requirements" with respect to "[p]rocessing, origination, servicing, sale or purchase of, or investment or participation in, mortgages." (12 C.F.R. §560.2(b)(10).) Other state laws, such as contract, property and tort laws, are not preempted as long as they only incidentally affect the lending operations of FSAs. (12 C.F.R. §560.2(c).)

Historically, as noted above, real property law has been the exclusive domain of the states, and the process of foreclosure has traditionally been a matter of state real property law. (*BFP v. Resolution Trust Corp., supra,* 511 U.S. 531, 541–542; *Mabry*, *supra*, 185 Cal.App.4th at 230; *Skov v. US Bank Natl. Assn.* (2012) 207 Cal.App.4th 690, 702.) Nothing in the express language of 12 C.F.R. §560.2 refers to regulation of foreclosure and, in fact, §560.2 specifically does not apply to any law that furthers a vital state interest. No controlling authority holds that HBOR is preempted by federal law. Regulation of foreclosure remains an "essential state interest." (*BFP* at 541–545.) As intended by the California Legislature, HBOR provides significant reform of state foreclosure proceedings to regulate the stability of the state's housing market and economy.

Congress has established its intention to regulate lending practices. (*Bank of Am. v. City and County of San Francisco* (9th Cir. 2002) 309 F.3d 551, 558-559; *Conference of Fed. Sav. & Loan Assn's v. Stein* (9th Cir.1979) 604 F.2d 1256, 1257, 1260, aff'd, 445 U.S. 921(1980); *Taguinod v. World Sav. Bank, FSB* (C.D. Cal. 2010) 755 F.Supp.2d 1064, 1069.) But, Congress has not expressed an intent to regulate foreclosure. As noted in *Mabry*, *supra*, had the OTS wanted to preempt state regulation of foreclosure within the definition of servicing, it could have easily done so. (See also *Skov*, *supra*, 207 Cal.App.4th 690, 700-701.) This omission is revealing and does not demonstrate a "clear and manifest" congressional purpose to preempt state regulation of foreclosure. (*Wyeth*, *supra*, 555 U.S. 555, 565.)

Furthermore, federal law does not establish any federal foreclosure process, further evidencing a lack of intent on Congress' part to preempt state foreclosure laws. The doctrine of *expressio unius est exclusio alterius* as applied to statutory interpretation creates a presumption that, when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions. (*Estate of Banerjee* (1978) 21 Cal.3d 527, 532, 539; *Boudette v. Barnette* (9th Cir., 1991) 923 F.2d 754, 756-757.) Indeed, courts have recognized that this omission indicates Congress did not intend for HOLA to supplant well-established state foreclosure laws. (*Mabry*, *supra*, 185 Cal.App.4th 208, 231.) As *Mabry*

notes, nothing in the federal regulations governs such things as initiation of foreclosure, notice of foreclosure sales, allowable times until foreclosure, or redemption periods. (*Id.* at 230-31.)

Mabry addressed the issue of whether §2923.5, requiring a lender contact the borrower to explore alternatives to foreclosure, was preempted by federal law. *Mabry* noted that §2923.5 had been carefully crafted to avoid bumping into federal law, because it was limited only to affording borrowers more time when lenders failed to comply with the statute. (185 Cal.App.4th at 226.) *Mabry* applied a very narrow reading to §2923.5, noting the statute afforded no right to loan modification and required nothing more than an assessment of the borrower's financial situation and exploration of options to avoid foreclosure. (*Id*. at 231-232.) Similarly, HBOR's robo-signing provision, §2924.17, does not give a borrower the right to a loan modification and requires nothing more than that non-perjured documents be used in non-judicial foreclosure proceedings. Under the reasoning of *Mabry*, this court should similarly find §2924.17 is not preempted by HOLA.

c) Section 2924.17 Is A State Foreclosure Law And Thus Is Not Preempted

Under these authorities, it is clear Congress intended to preempt lending and servicing, but not foreclosure. Ratterree's complaint alleges

robo-signing in the trustee's deed upon sale in violation of §2924.17. (CT 61:10-12; 18-22)

If the trustee's deed upon sale recites that all statutory notice requirements and procedures required by law for conduct of the foreclosure have been satisfied, a rebuttable presumption arises that the sale was conducted regularly and properly; this presumption is conclusive as to a bona fide purchaser. (§2924(c)*; Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 87; 4 Miller and Starr, California Real Estate (3d ed.) §10:254.) The trustee's deed upon sale is, therefore, part and parcel of the non-judicial foreclosure process.

Ratterree alleged this trustee's deed upon sale, certifying that all statutory requirements and procedures required by law were satisfied, was "robo-signed" in violation of §2924.17. (CT 61:10-27) No reasonable reading of §2924.17 could conclude that signature of the trustee's deed upon sale *after the foreclosure sale* occurs outside of, or prior to, the initiation of foreclosure proceedings. Signature of the trustee's deed upon sale manifestly occurs *during* the foreclosure process and, in fact, is the defining act that concludes the process. The trustee's deed upon sale is specifically provided for and regulated by California's statutes regulating foreclosure.

Further, recording the trustee's deed upon sale is the final step in California's non-judicial foreclosure process, and therefore begs the

question: how could robo-signing the trustee's deed upon sale be construed as "lending and servicing the loan" when, at the time of the robo-signing, the note has, by definition, already been sold?

Ratterree's allegations of robo-signing thus affect foreclosure only. Because foreclosure procedure has been left to the states to regulate, his cause of action under §2924.17 has not been preempted by federal law. The trial court's judgment should therefore be reversed as to Ratterree's First Cause of Action for violations of HBOR.

2. The Trial Court Erred In Finding Ratterree's Loan Was Subject To HOLA Preemption Protection

Even if this court finds that §2924.17 goes beyond regulation of foreclosure, Fannie Mae is not entitled to HOLA preemption protection. HOLA applies only to FSAs, and Fannie Mae is not a FSA.

The initial step in any preemption analysis should be whether or not HOLA even applies to the defendants in the case. (*Roque v. Wells Fargo Bank, N.A.* (C.D. Cal. Feb. 3, 2014, 2:14-CV-00040-ODW) 2014 WL 904191, at *3.)[7] Here, the trial court largely skipped over this initial step by finding, with little analysis, that HOLA applied to Ratterree's loan and to defendants. (CT 207:2-5)

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[7] State courts of appeal are not bound by the decisions of federal district courts. (*Skov, supra,* 207 Cal.App.4th 690, 702, fn.9.) Because of a dearth of reported California cases interpreting HBOR, appellant references federal district court decisions not as binding on this court, but as persuasive in their analysis.

This case presents the novel question whether HBOR is preempted by HOLA when the loan was originated by a FSA but later assumed and foreclosed by a non-FSA.

There is no binding authority on this point. The only reported cases are from federal district courts which—absent controlling authority—have taken three different approaches to addressing this question: (1) there is no HOLA preemption protection when the defendant is not a FSA subject to HOLA; (2) HOLA preemption protection applies to those claims arising from actions taken by a FSA but not to claims arising from actions taken by a non-FSA; or (3) HOLA preemption protection applies where the loan originated with a FSA.

The recent trend of decisions, as well as logic and the demands of public policy of the State of California, compel the application of the first two lines of cases identified above. [8]

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[8] The Federal Housing Finance Agency (FHFA), Fannie Mae's regulator, wrote a letter to the members of the Conference Committee during its deliberations on HBOR. (Alfred Pollard, General Counsel, Federal Housing Finance Agency, May 11, 2012 (available at http://www.goodwinprocter.com/~/media/975FCC70944A40CE9E6B7FA96A0CD77C.pdf) (RJN, Exh. 5, Vol. 2, p.392-396); see also "Federal regulator questions California mortgage bills," Don Thompson, Associated Press, May 15, 2012 (available at http://www.businessweek.com/ap/2012-05/D9UPF5BG2.htm).) (RJN, Exh. 6, Vol. 2, p.397-398) In that letter, the FHFA raised concerns about provisions of HBOR but never raised the issue of preemption. Surely, if state restrictions on Fannie Mae's conduct were preempted by federal law, FHFA—its *regulator*—would have raised that at the time it expressed its concerns with HBOR.

a) No HOLA Preemption Protection When The Defendant Is Not A FSA Regulated by HOLA

HOLA preemption was created solely for the benefit of FSAs. (12 C.F.R. §560.2(a).) In return for protections afforded under the broad scope of federal preemption, FSAs are subject to an array of regulations proscribing their conduct and protecting consumers in general. They must submit to OTS (now OCC) supervision and regulation. A servicer may not avail itself of the benefits of HOLA without bearing corresponding burdens. (*Kenery II*, *supra,* 2014 WL 4183274, at *6.) "[P]reemption is not some sort of asset that can be bargained, sold, or transferred. HOLA preemption was created by the OTS for the benefit of federal savings associations ...." (*Gerber v. Wells Fargo Bank, N.A.* (D.Ariz. Feb. 9, 2012, CV 11-01083-PHX-NVW) 2012 WL 413997, at *4.)

Because the plain language of HOLA and the OTS regulations apply only to FSAs, federal district courts have held non-FSAs may not use HOLA preemption protection as a defense. (*Roque, supra,* 2014 WL 904191; *Gerber*, *supra,* 2012 WL 413997.)

Furthermore, courts have found the OTS regulations themselves do not focus on the origin of the loan; rather, the nature of the bank at issue is the defining criterion and the fact that a loan originated with a FSA is irrelevant. (*Roque, supra,* 2014 WL 904191, at *4.) A HOLA defense will not preempt state law where there is no indication the defendant is subject

to HOLA. (*Stolz v. OneWest Bank* (D. Or., Jan. 13, 2012, 03:11-CV-00762-HU) 2012 WL 135424.) Again, it is defendant's burden to make the threshold showing that the HOLA preemption applies. (*Falcocchia v. Saxon Mortg., Inc.* (E.D.Cal. 2010) 709 F.Supp.2d 873, 886; *Albizo v. Wachovia Mortgage* (E.D. Cal. Apr. 20, 2012, 2:11-CV-02991 KJN) 2012 WL 1413996, at *16.)

The *Roque* plaintiff brought an action alleging, among other things, violation of HBOR's dual tracking and SPOC requirements. (*Roque, supra,* 2014 WL 904191, at *1.) The plaintiff's loan originated with a FSA and then transferred to a non-FSA when Wachovia Mortgage, FSB converted itself into Wells Fargo Bank, N.A. (*Id.*) The court held it was required to follow the plain language of HOLA and the OTS regulation which, by its own terms, applies only to FSAs. (*Id.* at *3.) ("The preemption provision therefore also only applies to federal savings associations. OTS recognized as much when it repeatedly used the term in the regulation." (*Id.*)

Here, it is undisputed that Fannie Mae is not a FSA[9]. In fact, at least one federal district court has held just that: Fannie Mae is *not* subject to HOLA where the loan in question was originated by a FSA, not by Fannie Mae. (*Stolz v. OneWest Bank supra,* 2012 WL 135424, at *11.)

[9] Respondent never argued that Seterus, a specialty loan servicing company, was a FSA.

Therefore, by its express terms, HOLA does not apply to Fannie Mae, and Fannie Mae should not be allowed to use HOLA preemption as a defense because it is not a FSA. To do so would allow Fannie Mae to take advantage of a federal law meant to benefit only FSAs in order to shield itself from violations of HBOR, a statute enacted to address California's vital state interests of reducing unnecessary foreclosures (an area of law left unregulated by Congress). Allowing Fannie Mae to use HOLA to shield its wrongful conduct is a result not only *not* intended by Congress, but would violate the clear expressed intention of the California Legislature to regulate the state's non-judicial foreclosure process. No public policy compels such a result and, in fact, public policy considerations should lead this court to find against preemption in this case.

And, as in *Kenery II*, Fannie Mae should not be allowed to take advantage of HOLA protections without also subjecting itself to HOLA regulations. Fannie Mae has not shown it submitted itself to OTS supervision. Rather, Fannie Mae seeks to take advantage of HOLA's benefits without bearing any corresponding burdens.

Because HOLA applies only to FSAs and Fannie Mae is not a FSA, the trial court erred in applying HOLA preemption protection to Fannie Mae.

b) HOLA Preemption Should Not Apply To Claims Arising From Actions By A Non-FSA

HOLA preemption applies only to conduct occurring *before* a loan changes hands from the FSA to the non-FSA. (*Rijhwani v. Wells Fargo Home Mortg., Inc.* (N.D. Cal. Mar. 3, 2014, C 13-05881 LB) 2014 WL 890016, at *7; *Penermon v. Wells Fargo Bank, N.A., supra,* 47 F.Supp.3d 982, 994; *Hixson v. Wells Fargo Bank NA* (N.D. Cal. Aug. 6, 2014, C 14-285 SI) 2014 WL 3870004 at *3.)

A growing number of federal district courts, including several within the Eastern District, have held a non-FSA cannot claim HOLA preemption to defend its own conduct. (E.g., *Valtierra v. Wells Fargo Bank, N.A.* (E.D.Cal. Feb. 10, 2011, CIV-F-10-0849) 2011 WL 590596, at *4.) The important consideration is the nature of the alleged claims in the suit. (*Rhue v. Wells Fargo Bank, N.A.* (C.D. Cal. Nov, 27, 2012, CV 12-05394 DMG VBKX) 2012 WL 8303189, at *2-3.) Courts have rejected the argument that HOLA preemption protection should trickle down from a FSA to its successor entities. (*Albizo v. Wachovia Mortg., supra,* 2012 WL 1413996, at *15-16.) Whether HOLA governs depends on when the alleged conduct occurred. *(Rodriguez v. U.S. Bank Nat'l Ass'n,* (N.D. Cal. June 4, 2012, C 12-00989 WHA) 2012 WL 1996929, at *7.) The test is whether the defendant was a FSA at the time of the conduct at issue.

(*Taguinod v. World Savings Bank, FSB, supra,* 755 F.Supp.2d 1064, 1068–69.)

The trial court here relied considerably on *Kenery I, supra,* to find HOLA preempted Ratterree's §2924.17 cause of action. Subsequent to the trial court's decision, however, *Kenery II* was decided, holding HOLA should not apply when the actions complained of were taken by an entity not covered by HOLA:

> "Having considered the legal rationales supporting each of the three approaches to HOLA preemption, this Court finds most persuasive the rationale supporting application of HOLA preemption only to those actions taken by a federal savings association covered by HOLA. In the present case, Plaintiff alleges that the loan originated with Wachovia in 2008 (FAC 10), at which time Wachovia was subject to OTS supervision (RJN Exhs. B, C). Thus, Wells Fargo may assert HOLA preemption with respect to claims arising out of Wachovia's conduct. However, claims arising out of conduct subsequent to Wachovia's November 1, 2009 conversion to a national bank are not subject to HOLA preemption." (*Kenery II, supra,* 2014 WL 4183274, at *5.)

Here, Ratterree's Complaint alleges actionable conduct performed solely by Fannie Mae, which is not a FSA. Ratterree's note was issued by IndyMac on May 14, 2008. (CT 59:18-20) On May 20, 2008, IndyMac Bank was taken into receivership by the FDIC. (CT 12) On June 24, 2008, Fannie Mae became the new investor of the note. (CT 12) Thus, the

Complaint alleges actionable conduct well after IndyMac, a FSA, released the loan to Fannie Mae.

In a similar case, *Penermon v. Wells Fargo Bank, N.A., supra,* 47 F.Supp.3d 982, the plaintiff brought an action against Wells Fargo, a national bank that had merged with Wachovia (a federal savings bank). Wells Fargo moved to dismiss, asserting plaintiff's HBOR claims were preempted by HOLA. Holding Wells Fargo did not inherit HOLA preemption from Wachovia, the court reasoned:

> "HOLA concerns laws "affecting the operations ... of federal savings associations, with an aim to ... facilitate the safe and sound operation" of those associations. 12 C.F.R. §560.2(a). As discussed above, the reason for HOLA's enactment was to encourage lending and to ensure stability in federal savings loans. HOLA was not enacted to provide a defense to actions that would otherwise violate consumer protection laws. Moreover, it is unlikely that HOLA contemplated the subsequent mortgage crisis and the resulting mergers of federal savings banks into national banks or loan servicing as it exists today." (*Id.* at p. 995.)

Accordingly, *Penermon* found the court must consider whether the alleged violations took place when the banking entity was covered by HOLA. (*Id.*) Courts in other jurisdictions have made similar findings. (*In re Tolliver*, (Bankr. E.D. Ky. Feb. 2, 2012) 464 B.R. 720, 739 ("Defendants should not be allowed to hide behind a defense created solely for the [FSA], a non-party, in order to defeat allegations made against the Defendants that

are unrelated to any acts of that non-party"); *Rijhwani*, *supra,* 2014 WL 890016, at *7 (causes of action based on conduct by a national bank after acquisition of a federal savings loan do not implicate HOLA).)

A 2003 opinion letter from the Office of Thrift Supervision supports this view as well. (OTS, Opinion Letter No. P–2003–5 (July 22, 2003); available at http://www.occ.gov/static/news-issuances/ots/legal-opinions/ots-lo-07-22-2003.pdf.) (RJN, Exh. 7, Vol. 2, p.399-406) Courts have held the OTS opinion letter stands for the proposition that an assignee of a FSA-originated loan may raise HOLA preemption as a defense to *origination* claims. (*Hixson v. Wells Fargo Bank NA, supra,* 2014 WL 3870004, at *4; *Penermon v. Wells Fargo Bank, N.A., supra,* 47 F.Supp.3d 982, 993.) In so holding, these courts have rejected arguments from non-FSA defendants who argue that the OTS letter supports the contention that HOLA preemption protection transfers to successors in interest.

The OTS letter is better read to reflect that HOLA preemption should not apply to claims arising from conduct by a non-FSA. In other words, if the FSA did something for which it could assert preemption, the purchaser of the loan originated by that FSA may step into the FSA's shoes and use the same claims and defenses. (*In re Tolliver*, *supra,* 464 B.R. 720, 739.) Here, however, Ratterree makes no allegations against IndyMac, the FSA that originated his loan. The only allegations made by Ratterree relate to Fannie Mae's wrongful conduct years later. Therefore, like *Tolliver* ,

"with no claims against it, [IndyMac] has no need of any defenses and thus [Fannie Mae] has no shoes to fill." (*Id.*)

Here, just like in *Penermon*, *Tolliver,* and *Rijhwani, supra,* Fannie Mae's violations of HBOR and wrongful foreclosure happened years after it acquired the loan from IndyMac. In fact, OTS closed IndyMac in 2008, just months after it issued Ratterree's loan. The acts alleged in Ratterree's complaint took place four years later. No public policy interest is served by allowing Fannie Mae to assert HOLA's protection simply by accident of IndyMac's brief ownership of Ratterree's note. No IndyMac conduct is implicated in Ratterree's complaint. Ratterree's injuries all arise from Fannie Mae's conduct alone. Fannie Mae is liable for Ratterree's harm, and Fannie Mae should not be able to assert HOLA preemption to immunize its wrongful conduct.

c) Admittedly, Some Courts Have Held—Often With Little Analysis—HOLA Preemption Applies Solely Because The Loan Originated With An FSA

While not controlling, some courts have held—often with little or no analysis—a successor to a FSA may assert HOLA preemption when the loan at issue was originated by a FSA, even if the successor is not itself a federal savings association. (*Valverde v. Wells Fargo Bank, N.A.* (N.D. Cal. Aug. 25, 2011, C-11-2423 SC) 2011 WL 3740836; *Parmer v. Wachovia* (N.D. Cal. Apr. 22, 2011, C 11-0672 PJH) 2011 WL 1807218;

DeLeon v. Wells Fargo Bank, N.A. (N.D. Cal. 2010) 729 F.Supp.2d 1119, 1126.)

In most cases, the plaintiffs either failed to argue otherwise or conceded the issue, "the upshot being that the courts never had to grapple with it; instead, the courts simply concluded, without much analysis, that HOLA preemption applied." (*Rijhwani, supra,* 2014 WL 890016, at *6.) And, as *Gerber* famously noted, "as authority for that proposition, these cases cite either (a) nothing, (b) each other, or (c) generic statements of law about corporations succeeding to the rights of the entities they acquire." (*Gerber v. Wells Fargo Bank, N.A., supra,* 2012 WL 413997, at *4.)

Penermon also noted that allowing a non-FSA to enjoy HOLA preemption protection turns the purpose of HOLA on its head:

> "To find that some homeowners cannot avail themselves of HBOR protection based solely on their original lender, and without regard to the entity engaging in the otherwise illegal conduct, is arbitrary at best, and, at worst, could result in a gross miscarriage of justice, while also running afoul of one of the original purposes of HOLA enactment: consumer protection." (*Penermon, supra,* 47 F.Supp.3d 982, 995.)

Finally, allowing a successor to a FSA to enjoy HOLA preemption protection simply because the loan was originated by a FSA is contrary to the legislative intent of HBOR to modify California's foreclosure process to reduce fraud, protect the chain of title, and ensure qualified homeowners

had a meaningful opportunity to remain in their homes. Adoption of the holdings of this string of cases, supported by little, if any, logic or analysis, would render HBOR a dead letter.

The trial court erred by focusing solely on Ratterree's original lender, IndyMac, and not on the entity engaging in the unlawful conduct, Fannie Mae. The court committed a miscarriage of justice by preventing Ratterree from enjoying HBOR protections meant to protect homeowners just like him. This court should therefore adopt the more reasoned view and hold HOLA preemption protection does not apply where the defendant is not a FSA.

d) Conclusion

In sum, Fannie Mae is not a FSA and therefore its conduct is not subject to HOLA. Moreover, Fannie Mae did not inherit HOLA preemption protection for its own violations of State law. Thus, the trial court erred when it permitted Fannie Mae, a non-FSA, to invoke HOLA preemption to defend its own conduct violating HBOR. The judgment should be overturned.

3. Even If a Court Could Find §2924.17 Goes Beyond Regulation Of Foreclosure And Fannie Mae Was Entitled To HOLA Preemption, The Trial Court Erred In Finding §2924.17 Was Preempted Under 12 C.F.R. §560.2

a) Preemption Generally

Courts have recognized four species of federal preemption: express, conflict, obstacle, and field. (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 935.) *Express* preemption arises when Congress defines explicitly the extent to which its enactments pre-empt state law. *Conflict* preemption is found when simultaneous compliance with both state and federal directives is impossible. *Obstacle* preemption arises when the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Field* preemption applies where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation. (*Id.*, at 935-936.)

Here, the trial court determined Ratterree's HBOR causes of action were preempted by HOLA using a field preemption analysis under former OTS regulation 12 C.F.R. §560.2. (CT 211:8-14)

Because it is clear Congress did not intend to preempt state law solely regulating the process of foreclosure and because Fannie Mae—as a non-FSA—is not entitled to HOLA preemption protection, this court need

not address the trial court's analysis under 12 C.F.R. §560.2. However, assuming *arguendo* that the court finds HBOR's provisions go beyond regulation of foreclosure and Fannie Mae is entitled to HOLA preemption protection, Ratterree will address the provisions of 12 C.F.R. §560.2.

b) Preemption Under 12 C.F.R. §560.2

As set forth above, state laws are not preempted "to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section." (12 C.F.R. §560.2(c).) For example, state contract, property and tort laws are not preempted if they meet the above requirements. (*Id.)* Preemption also does not apply to any other law OTS reviews and finds "[f]urthers a vital state interest" and "[e]ither has only an incidental effect on lending operations or is not otherwise contrary to the purposes expressed in paragraph (a)" of 12 C.F.R. §560.2." (*Penermon v. Wells Fargo Bank, N.A., supra,* 47 F.Supp.3d 982, 990.)

In determining whether a state law is preempted under 12 C.F.R. §560.2, the court should determine whether the type of law in question is listed in paragraph (b). If so, the analysis ends there; the law is preempted. If the law is not covered by paragraph (b), the next question is whether the law affects lending. If it does, then the presumption arises that the law is preempted. This presumption can be reversed only if the law can clearly be shown to fit within the confines of paragraph (c). For these purposes,

paragraph (c) is interpreted narrowly. Any doubt should be resolved in favor of preemption. (OTS, Final Rule, 61 Fed.Reg. 50951, 50966–67 (Sept. 30, 1996); *Silvas v. E*Trade Mortg. Corp.* (9th Cir. 2008) 514 F.3d 1001, 1005.)

c) Ratterree's Causes Of Action Are Based On State Laws That Do Not Fall Under 12 C.F.R. §560.2(b)

The trial court erroneously held Ratterree's causes of action based upon §2924.17 were preempted under HOLA because the acts required under that section constitute "processing" or "servicing" of a mortgage, thereby falling within the list of laws set out in 12 C.F.R. §560.2(b). (CT 215: 25-27)

Section 2924.17 mandates that documents required to initiate or complete the *foreclosure* process must be accurate and complete and supported by competent and reliable evidence. It also requires that, prior to recording or filing *foreclosure* documents, the mortgage servicer must ensure it has reviewed competent and reliable evidence to substantiate the borrower's default and the right to foreclose, including the borrower's loan status and loan information. Courts have held 'servicing' concerns the collection of mortgage payments whereas 'foreclosure' concerns the termination of a borrower's interest in property. Thus, the definition of 'servicing' does not include 'foreclosure.' *(Higley v. Flagstar Bank, FSB*, (D. Or. 2012) 910 F. Supp. 2d 1249, 1258-59.) In another context, the

United States Supreme Court has held servicing is "essentially the administrative tasks associated with collecting mortgage payments." (*Morrison v. Nat'l Australia Bank Ltd.* (2010) 561 U.S. 247, 251.) If "servicing" means everything a loan servicer might hypothetically do, including conducting a foreclosure sale, this broad definition would render some of the other categories within 12 C.F.R. §560.2(b), such as escrow accounts and due-on-sale clauses, unnecessary. (*Sovereign Bank v. Sturgis* (D. Mass. 2012) 863 F.Supp.2d 75, 100.)

While the OTS regulations do not define "servicing," *Sovereign Bank* looked to other relevant definitions such as the one contained in the Real Estate Settlement Procedures Act (RESPA) which states:

> [t]he term 'servicing' means receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan . . . and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan. (12 U.S.C. §2605(i)(3).)

The OTS' Regulatory Handbook also proves instructive:

> Servicing or loan administration consists of collecting the monthly payments, forwarding the proceeds to the investors who have purchased the mortgages, maintaining escrow accounts for payment of taxes and insurance, and acting as the investor's representative for other issues and problems. (OTS, *OTS Regulatory Handbook: Thrift Activities* 571.1 (Jan. 1994), *cited in In re Ocwen Loan Servicing,*

LLC Mortg. Servicing Litig. (7th Cir. 2007) 491 F.3d 638, available at http://www.lb7.uscourts.gov/documents/06-31321.pdf.)

The Regulatory Handbook also describes the different stages of mortgage banking and clearly differentiates the stage of "servicing or loan administration" from the stage of "foreclosure and property disposition." (*Id.)*

By its express terms, §2924.17 regulates "foreclosure." "Foreclosure" is the "legal proceeding to terminate a mortgagor's interest in property, instituted by the lender (the mortgagee) either to gain title or to force a sale in order to satisfy the unpaid debt secured by the property." (*Higley v. Flagstar Bank, FSB, supra,* 910 F. Supp. 2d 1249, 1258-1259.) Foreclosure is the process of repossessing a home to satisfy the note for which the home is security. As discussed, no federal foreclosure process exists and no authority establishes that Congress has preempted the field of foreclosure. To the contrary, foreclosure has been left to the states and is considered a vital state interest. (*BFP*, *supra*, 511 U.S. 531, 541–545.)

Because the requirements of §2924.17 do not regulate the "servicing" or "processing" of a mortgage loan, §2924.17 does not fall under 12 C.F.R. §560.2(b).

Nevertheless, the trial court characterized the document authentication process required under §2924.17 for initiating a non-judicial foreclosure process as acts involving loan "processing" and "servicing."

(CT 215:22-25) The trial court's ruling confuses mortgage servicing and processing with foreclosure proceedings. As acknowledged by the federal authorities above, servicing stops where foreclosure begins. Foreclosure is the very *reverse* of origination or investment.

To support its decision, the trial court relied on *Kenery I's* summary conclusion that §2924.17 "is preempted because it imposes requirements on the processing and servicing of mortgages." (*Kenery I, supra,* 2014 WL 129262, at *4 citing *Marquez v. Wells Fargo Bank, N.A.* (N.D. Cal. Sept. 13, 2013, C 13-2819 PJH) 2013 WL 5141689, at *5). Other courts have declined to follow *Marquez*, however. The *Penermon* court noted that *Marquez* concluded several California non-judicial foreclosure statutes were preempted under HOLA without a full analysis, "undoubtedly due, in part, to Plaintiff's opposition, which, while advocating against HOLA preemption, was stricken as untimely filed." (*Penermon, supra,* 47 F.Supp.3d 982, 991 (citing *Marquez, supra,* at *3).)

Moreover, the plaintiffs in *Marquez* never actually alleged the defendant Wells Fargo engaged in robo-signing. (*Marquez, supra,* at *5.) As a result, *Marquez* is not even on point because it does not address the alleged wrongful conduct in Ratterree's case. In fact, the trial court in this case acknowledged the same. "Thus, *Marquez* can be fairly read as finding a HBOR violation of Civil Code section 2923.55 (pre-notice of default obligations) to be preempted under HOLA, but not a 'robo-signing' claim

under Section 2924.17(a) as presented here." (CT:213:19-22) Thus, the trial court's reliance on *Kenery I* and *Marquez*, was entirely misplaced.

Furthermore, the trial court's broad interpretation of what it means to 'service' or 'participate in' a mortgage would preempt most all California foreclosure statutes when the foreclosing entity is a national lender. Such a holding is contrary to the clear intention of Congress to allow the states to regulate the foreclosure process.

Thus, the trial court's judgment should be overturned.

d) Section 2924.17 Only Incidentally Affects Lending, If At All

Because §2924.17 falls outside the list of preempted state laws under 12 C.F.R. §560.2(b), the analysis next looks at whether the state law in question affects lending and, if so, to what extent. (OTS, Final Rule, 61 Fed.Reg. 50951, 50966–67; *Silvas v. E*Trade Mortg. Corp., supra,* 514 F.3d 1001, 1005.) The trial court ruled, with little analysis:

> [e]ven if the Court's HOLA preemption analysis instead proceeded to the second step in Part 560.2, it would still find preemption. . . . There can be little question that the additional requirements placed upon lenders under Section 2924.17(a) to verify that all foreclosure initiating documentation is 'accurate and complete and supported by competent and reliable evidence' subject to monetary penalties up to $50,000, are laws that "affect lending." (CT 216:6-14)

Little or no authority supports the trial court's conclusory finding that foreclosure laws such as §2924.17 affect lending, however:

> Whether state laws governing the foreclosure process are seen as 'affecting' lending depends on how broadly that term is construed. While lenders conceivably could make lending decisions and policies based at least in part on the state foreclosure laws that would apply where the loans are made, the foreclosure rules have no direct application to what lenders can or must do or not do when making loans. Given that state regulation of foreclosure proceedings in no way inhibits lenders from extending credit 'as authorized under federal law,' it is far from self-evident that even a presumption of preemption should arise." (*Ortiz v. Wells Fargo Bank, N.A.* (N.D. Cal. May 27, 2011, C 10-4812 RS) 2011 WL 4952979, at *3; *Quintero v. Wells Fargo Bank, N.A.* (N.D. Cal. Jan. 17, 2014, C-13-04937 JSC) 2014 WL 202755, at *5 (§2923.5 does not in any way inhibit lenders from extending credit).)

As in *Ortiz,* §2924.17 has "no direct application to what lenders can or must do when making loans," and it does not "in any way inhibit lenders from extending credit." Rather, the section regulates what happens after credit has been extended, the borrower stops paying, and the creditor resorts to foreclosing on the security for the note, a process regulated solely by state law.

Even assuming §2924.17 affects lending, which it does not, it only incidentally affects lending and is otherwise consistent with the purposes of 12 C.F.R. §560.2(a) because, at its core, it is a prohibition on fraudulently signing documents as a part of the non-judicial foreclosure process. It is

therefore not preempted by HOLA. (OTS, Final Rule, 61 Fed.Reg. 50951, 50966–67; *Silvas v. E*Trade Mortg. Corp., supra,* 514 F.3d 1001, 1005.)

e) Section 2924.17 Is A State Contract Or Real Property Law Listed In 12 C.F.R. §560.2(c) And Is Thus Not Preempted

Assuming for the sake of argument that §2924.17 affects lending, which it does not, the next step in the analysis is whether §2924.17 is nonetheless not preempted because it is one of the types of state laws listed in 12 C.F.R. §560.2(c) that only incidentally affect lending operations of FSAs. (OTS, Final Rule, 61 Fed.Reg. 50951, 50966–67.)

The trial court here skipped this step of the analysis and instead stopped after finding §2924.17 "affects lending" and was thus preempted. The trial court should have looked to see whether any presumption of preemption could be reversed because §2924.17 could "clearly be shown to fit within the confines of paragraph (c)." (OTS, Final Rule, 61 Fed.Reg. 50951, 50966–67; *Silvas v. E*Trade Mortg. Corp, supra,* 514 F.3d 1001, 1005.)

As noted earlier, 12 C.F.R. §560.2(c) specifically lists "contract law" and "real property law" as types of laws that are not preempted to the extent they only incidentally affect lending operations of FSAs. California's statutes regulating foreclosure are properly characterized as "contract law" and "real property law" because they govern the permissibility of power of sale provisions in deeds of trust. (*Quintero v. Wells Fargo Bank, N.A.*,

supra, 2014 WL 202755, at *5 citing *Ortiz*, *supra,* 2011 WL 4952979, at *3 n.2) Here, §2924.17 can properly be characterized as both types of laws.

Had the trial court properly followed the preemption analysis, it should have found §2924.17 fits squarely within 12 C.F.R. §560.2(c) and thus the presumption against preemption should be reversed.

f) Ratterree's Allegations Of Robo-Signing In Violation Of §2924.17 Are Practices Of Fraud And Therefore Not Preempted

OTS regulations specifically provide state tort laws are not preempted by HOLA to the extent they only incidentally affect the lending operations of FSAs. (12 CFR §560.2(c)(4).) Here, Fannie Mae's wrongful conduct violating §2924.17 was a practice involving fraud, a tort, and therefore not preempted.

In determining whether a claim based on a state law of general application is saved from preemption under HOLA, the OTS employed, and courts have followed, an "as applied" approach. They consider whether the state law, as applied, imposes specific requirements on any activities listed in paragraph (b) of the preemption regulation. (*Akopyan v. Wells Fargo Home Mortgage, Inc.* (2013) 215 Cal.App.4th 120, 144; see *In re Ocwen, supra,* 491 F.3d 638, 643) (OTS' "plenary regulatory authority does not deprive persons harmed by the wrongful acts of savings and loan associations of their basic state common-law-type remedies"); *Gibson v. World Savings & Loan Assn.* (2002) 103 Cal.App.4th 1291.)

In *Gibson*, the borrowers brought claims under California Business and Professions Code ("UCL") alleging that the defendant engaged in unfair business practices in charging plaintiffs for replacement hazard insurance in an amount that reflected not only the cost of replacement insurance, but also the cost of general administrative services provided to the defendant by the insurer. The trial court dismissed the action finding HOLA preemption, and the Court of Appeal, Fourth District reversed, finding that the borrower's UCL action was not preempted by HOLA. (*Gibson, supra,* 103 Cal.App.4th 1291, 1299.) In reversing, the court relied in part on *Fenning v. Glenfed, Inc.* (1995) 40 Cal.App.4th 1285:

> The Bank's argument that, by permitting fraud and unfair trade practices suits, the state is regulating the Bank's conduct, is off the mark. Plaintiffs' ability to sue the Bank for fraud does not interfere with what the Bank may do, that is, how it may conduct its operations; it simply insists that the Bank cannot misrepresent how it operates, or employ fraudulent methods in its operations. Put another way, the state cannot dictate to the Bank how it can or cannot operate, but it can insist that, however the Bank chooses to operate, it do so free from fraud and other deceptive business practices. (*Fenning*, *supra,* 40 Cal.App.4th 1285, 1299, fn. omitted.)

Like *Gibson* and *Fenning*, Ratterree's action for violation of California law is premised on fraud. Fannie Mae's robo-signing of Ratterree's deed upon sale (signed under penalty of perjury) was a practice involving fraud, a tort, and therefore not preempted under 12 C.F.R.

§560.2. Ratterree's action does not seek to regulate Fannie Mae's conduct in servicing his loan. Instead, he simply seeks to hold Fannie Mae accountable for employing fraudulent methods in foreclosing on his home. Thus, like the *Gibson* and *Fenning* court found, this Court should find that Ratterree's action is not preempted by HOLA.

g) Section 2924.17 Is A Law Furthering A Vital State Interest And Is Thus Not Preempted

The OTS regulations also specifically provide that state laws that OTS[10], upon review, finds "further a vital state interest" and either only have an incidental effect on lending operations or are not otherwise contrary to 12 C.F.R. §560.2(a) are not preempted. (12 C.F.R. §560.2(c)(6).)

Section 2924.17 without a doubt furthers vital state interests. As noted in the HBOR Conference Report, the Legislature was concerned servicers were using unverified documents to proceed with foreclosure. (Sen. Rules Com., Off. of Sen. Floor Analyses, Conference Report No. 1, SB900 (Leno), as amended June 27, 2012, p. 22-26.) (RJN, Exh. 4, Vol. 2, p.382-386) Media and other reports indicated that, in some instances, servicer employees signed numerous foreclosure documents without looking at them. (*Id.* at p. 22.) (RJN, Exh. 4, Vol. 2, p.382)

[10] As noted earlier, OTS no longer exists in its previous form.

Section 2924.17 enacts a common sense requirement that the documents executed under penalty of perjury to initiate a foreclosure proceeding outside of judicial review —such as the trustee's deed upon sale, in Ratterree's case (CT 65)— must indeed be accurate, complete and supported by competent evidence. Surely it is a vital state interest to ensure documents executed under penalty of perjury are not fraudulent. This interest is especially intense when the documents will be recorded and enter the chain of title. Prohibitions against perjury have been fundamental fixtures of Western jurisprudence for centuries. Particularly when perjured documents have been used in extra-judicial proceedings to undermine home ownership and the California economy, it must be a vital state interest to put a stop to the practice. Certainly the California Legislature declared it to be so. In fact, ensuring the sanctity of the non-judicial foreclosure process was so important to the Legislature that §2924.17 does not expire, as do some other provisions of HBOR.

Thus, California has a vital state interest in prohibiting robo-signing that should balance in favor of finding that §2924.17 is not preempted by HOLA.

h) If Allowed To Stand, The Trial Court's Ruling Would Permit Lenders To Pick And Choose Which State Law Requirements To Follow

Fannie Mae wants to take advantage of California's streamlined non-judicial foreclosure process, while immunizing itself from California's

procedural requirements designed to protect homeowners such as Ratterree. A lender should not be allowed to rely on California law as the foundation for its right to conduct a non-judicial foreclosure, and then ignore the procedural requirements that are part of that process under California law. (*Quintero v. Wells Fargo Bank, N.A., supra,* 2014 WL 202755; *Ortiz v. Wells Fargo Bank, N.A., supra,* 2011 WL 4952979, at *3; *Stowers v. Wells Fargo Bank, N.A.* (N.D. Cal. Mar. 25, 2014, 3:13-CV-05426-RS) 2014 WL 1245070, at *3 (no basis to find HOLA preempts plaintiff's claims relating to non-judicial foreclosure).)

Put another way, Fannie Mae should not be allowed to avail itself of the protection of California's laws while denying the same protection to California homeowners like Ratterree. Surely that is not what Congress intended. If the shoe were on the other foot, would the court allow Ratterree to argue California's foreclosure processes have been preempted by HOLA to prevent Fannie Mae from pursuing non-judicial foreclosure?

Permitting a lender to take advantage of the non-judicial foreclosure process but then allowing the lender to ignore requirements that are part of that process by claiming preemption is illogical. Once an entity avails itself of California's non-judicial foreclosure laws, it cannot simply pick-and-choose which of those laws it will follow: A lender's ability to resort to non-judicial foreclosure arises from the fact that California has enacted laws permitting the use of deeds of trust containing the power of sale and

setting out the procedure for such foreclosures. Such rights do not derive from HOLA—they derive from California law.

i) Conclusion

In sum, even if Fannie Mae inherited HOLA preemption, Ratterree's claims under §2924.17 are not preempted by HOLA because §2924.17 does not regulate mortgage servicing or processing. To the extent §2924.17 affects lending operations at all, that effect is merely incidental and is expressly exempted from HOLA preemption because it is a type of law that is not preempted under §560.2(c). Moreover, California has a vital state interest in ensuring documents used in the non-judicial foreclosure process are not fraudulent. For these reasons, the trial court's judgment should be overturned.

E. The Trial Court Erred When It Dismissed Ratterree's Cause of Action For Wrongful Foreclosure

The elements of an equitable cause of action to set aside a foreclosure sale are (1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering. (*Lona v. Citibank, N.A*. (2011) 202 Cal. App.

4th 89, 104.) As described below, Ratterree should have been excused from tendering.

1. Ratterree Pled All Of The Elements Of Wrongful Foreclosure And Thus The Trial Court Erred In Dismissing His Suit

As an initial matter, neither the trial court nor Fannie Mae dispute Ratterree properly pled the first element of a suit for wrongful foreclosure. That is, the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust. Instead, the defendant argued Ratterree's cause of action for wrongful foreclosure failed because he did not allege tender or an exception to the tender rule.

a. Ratterree Properly Pled Exceptions To The Tender Rule

A defaulted borrower who seeks to set aside a trustee's sale ordinarily is required to tender the full amount of the debt for which the property was secured. "The rationale behind the rule is that if the [borrower] could not have redeemed the property had the sale procedures been proper, any irregularities in the sale did not result in damages to the [borrower]." (*Lona v. Citibank, N.A., supra,* 202 Cal. App. 4th 89, 112.) There are important exceptions to this rule, however. A tender is not required if: (1) a borrower attacks the underlying debt; (2) the person seeking to set aside the trustee's sale has a counter-claim or set-off against

the beneficiary; (3) requiring a tender would be inequitable; or (4) the trustee's deed is void on its face. (*Id*.)

Here, as will be shown, Ratterree properly pled *two* exceptions to the tender rule, and equity clearly balances in favor of not binding him to any payment in redemption.

(i) Ratterree Pled A Set-Off And Therefore The Trial Court Erred When It Found Ratterree Was Not Excused From Pleading Tender

The California Supreme Court has recognized that tender is not required when the plaintiff has a counter-claim or set-off against the beneficiary and the offset is equal to, or greater than, the amount due. (*Hauger v. Gates* (1954) 42 Cal.2d 752, 755.)

Here, Ratterree brought an action for violation of §2924.17, HBOR's prohibition of "robo-signing." Under HBOR, such a material violation entitles Ratterree to the greater of $50,000 or treble damages. The actual damages Ratterree suffered because of Fannie Mae's unlawful conduct will be determined during the discovery period, but can easily be in an amount (once tripled) equal to that owed under the deed of trust, which would support a "set-off," excusing him from alleging a tender.

Unfortunately, the trial court mistakenly found that even if HOLA did not preempt HBOR that $50,000 would not constitute a sufficient amount to support a set-off exception to the tender rule. (CT 217) However, the trial court failed to recognize that, under HBOR, a plaintiff is

entitled to the *greater* of $50,000 or treble damages. (§2924.12.) Thus, Ratterree's claim for monetary damages against Fannie Mae, for purposes of the pleading stage, should have been sufficient to establish a set-off. But, instead, the trial court essentially determined the value of Ratterree's cause of action could never meet or exceed the value of the property. However, it was improper for the trial court to make such a determination as a matter of law since at this early stage of litigation, there simply is no evidence to support such a finding. Under the trial court's reasoning, no plaintiff could ever sufficiently plead an offset in a wrongful foreclosure case, given the inability to prove up the amount of damages sought at the pleading stage. Such a result would render the exception to the tender rule based on a set-off meaningless.

Allegations in Ratterree's complaint must be assumed true for purposes of demurrer. (*Grinzi, supra,* 120 Cal.App.4th 72, 78.)

Ratterree's complaint alleged causes of action against Fannie Mae and sought monetary damages. Because Ratterree properly pled a set-off, thereby excusing him from the tender rule, the trial court erred in finding that he had not properly pled an exception to the tender rule.

(ii) Equity Balances In Favor Of Excusing Ratterree From Tendering Because The Sale Was Procured By Fraud

Generally, courts can vacate a foreclosure sale when there has been fraud in procurement of the foreclosure decree or when sale has been

improperly, unfairly, or unlawfully conducted, or is tainted by fraud, or when there has been such a mistake that allowing the sale to stand would be inequitable to purchaser and parties. Sham bidding and restriction of competition are condemned, and inadequacy of price when coupled with other circumstances of fraud may constitute ground for setting aside foreclosure sale. (*Bank of America Nat. Trust & Savings Ass'n v. Reidy* (1940) 15 Cal.2d 243, 248.)

Several courts have recognized a general *equitable* exception to applying the tender rule when it would be inequitable to do so. (*Humboldt Sav. Bank v. McCleverty* (1911) 161 Cal. 285, 291 (cases hold that "where a party has the right to avoid a sale, he is not bound to tender any payment in redemption . . . viewing the question generally, it is certainly not the law that an offer to pay the debt must be made, where it would be inequitable to exact such offer of the party complaining of the sale"); *Onofrio v. Rice* (1997) 55 Cal.App.4th 413, 424; *Barrionuevo v. Chase Bank, N.A.* (N.D. Cal. 2012) 885 F. Supp.2d 964, 969.)

Here, Fannie Mae failed to follow HBOR's requirements and engaged in "robo-signing." "Robo-signing" is perjury. It is fraud on its face because these individuals, as alleged in Ratterree's complaint, have no idea whether the state foreclosure law has been complied with; nor do they know the truth of the contents of the documents to which they are swearing. Robo-signers simply sign documents under oath, which are then recorded,

or submitted to the court in some cases, in an effort to proceed with foreclosure. Such conduct is expressly forbidden by §2924.17 and should support an exception to the tender rule since equity clearly weighs in favor of excusing tender when the foreclosure was procured by fraud.

Because Ratterree has alleged exceptions to the tender rule, the trial court erred when it dismissed Ratterree's wrongful cause of action for failing to allege tender.

b. The Trial Court Erred When It Ruled Ratterree Was Not Harmed By Fannie Mae's Unlawful Conduct

Failure to comply with California's foreclosure statutes would render the foreclosure either void or voidable. (*Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047.) Moreover, "[t]he threat of foreclosure by the wrong party would certainly be sufficient to constitute prejudice to the homeowner because there is no power of sale without a valid notice of default." (*Tamburri v. Suntrust Mortg., Inc.* (N.D Cal. Dec. 15, 2011, C-11-2899 EMC) 2011 WL 6294472, at *14; *Barrionuevo, supra*, 885 F.Supp.2d 964, 971–974 (no discussion of prejudice in wrongful foreclosure analysis, but finding impairment to the vendibility of the plaintiff's home coupled with legal costs were sufficient pecuniary harms to support a slander of title cause of action).)

Here, the trial court erred in finding Ratterree failed to suffer harm at the hands of Fannie Mae. Fannie Mae conceded Ratterree properly pled

that its conduct harmed and prejudiced him when it failed to deny the same in its demurrer. As alleged in Ratterree's complaint, because Fannie Mae engaged in fraud (robo-signing), Ratterree suffered harm. Simply put, but for Fannie Mae's unlawful conduct, Ratterree's home would have not been sold. He would have had an opportunity to either complete his loan modification review and/or other alternatives to foreclosure. He lost this opportunity, thus he suffered harm and/or prejudice.

Because Ratterree clearly suffered harm/prejudice when Fannie Mae unlawfully sold his home at a trustee's sale, this Court should find the trial court erred in finding Ratterree did not meet the second element of wrongful foreclosure. Since Ratterree properly pled each element for wrongful foreclosure, the trial court erred in dismissing his action.

F. The Trial Court Erred In Not Granting Ratterree Leave To Amend After Sustaining Its Demurrer To The Entire Action

1. Standard of Review For Sustaining A Demurrer Without Leave To Amend

Because the function of a demurrer is to test the sufficiency of a pleading as a matter of law, the appellate courts apply the de novo standard of review following the sustaining of a demurrer without leave to amend. (*Holiday Matinee, Inc. v. Rambus, Inc.* (2004) 118 Cal.App.4th 1413, 1420.) We assume the truth of allegations in the complaint, but do not assume the truth of contentions, deductions, or conclusions of law. (*Aubry v. Tri–City Hospital Dist., supra,* 2 Cal.4th 962, 967.) It is error

for the trial court to sustain a demurrer if plaintiff has stated a cause of action under any possible legal theory, and it is an abuse of discretion for the court to sustain a demurrer without leave to amend if the plaintiff has shown there is a reasonable possibility a defect can be cured by amendment. (*Id.*; *California Logistics, Inc. v. State* (2008) 161 Cal.App.4th 242, 247.)

2. Ratterree Should Have Been Granted Leave To Amend To Add A Cause Of Action For Dual Tracking Based On Facts Alleged In His Complaint

While motions for leave to amend the pleadings are directed to the sound discretion of the court, California cases repeatedly have stated the well-established principle that the court's discretion must be exercised *liberally* to *permit* amendment of the pleadings. (*Mabie v. Hyatt* (1998) 61 Cal. App.4th 581, 596; *Morgan v. Superior Court* (1959) 172 Cal.App.2d 527, 530 ("[I]t is a rare case in which a court will be justified in refusing a party leave to amend his pleadings so that he may properly present his case.")) Ordinarily, the court will *not* consider the validity of the proposed amended pleading in deciding whether to grant leave to amend. (*Kittredge Sports Co. v. Sup. Ct. Marker U.S.A.* (1989) 213 Cal.App.3d 1045, 1048.) After leave to amend is granted, the opposing party has the opportunity to attack the validity of the amended pleading. (*Id.)*

Here Ratterree's complaint properly alleged a cause of action for "dual tracking" in violation of HBOR. Notwithstanding the trial court's error in finding HOLA preempted HBOR, it also failed to address the "dual tracking" cause of action because it was not listed as a cause of action in the caption. (CT 206) However, Ratterree's complaint specifically alleged "dual tracking." (CT 60:9-13) Because the law is clear that leave to amend should be granted when the complaint, liberally read, supports a cause of action, the trial court erred when it failed to grant leave to amend to allege a cause of action for dual tracking.

3. The Trial Court Erred When It Did Not Grant Leave To Amend Allowing Ratterree To Cure Defects Regarding The Exception To The Tender Rule Based On Fraud

As stated above, an exception to the tender rule is when the foreclosure is procured by fraud. (*Bank of America Nat. Trust & Savings Ass'n v. Reidy, supra,* 15 Cal.2d 243.)

Here, Ratterree has pled the foreclosure was procured by fraud ("robo-signing"). (CT 62) While the court reasoned the equitable exception was not viable because Ratterree failed to plead "that either of the "robo-signed documents . . . contained any falsehoods, that Plaintiff relied upon any such falsehoods, or that Plaintiff was harmed by such reliance," Ratterree, if given the opportunity, could have cured these defects by way of an amendment to his pleading for the reasons set forth above. (CT 218)

Since courts liberally grant leave to amend and because this was the first substantive challenge to Ratterree's complaint, thereby giving guidance as to what the trial court felt needed to be cured, the trial court erred in sustaining the demurrer without leave to amend.

VI. CONCLUSION

Section 2924.17 is a state foreclosure law and is thus not preempted because Congress did not intend to preempt foreclosure laws. The trial court erred when it permitted Fannie Mae, a non-FSA, to invoke HOLA preemption to defend its own conduct violating HBOR simply because the originator of the loan was a FSA. Furthermore, even if Fannie Mae inherited HOLA preemption, Ratterree's claims under §2924.17 are not preempted by HOLA because §2924.17 does not regulate mortgage servicing or processing. To the extent §2924.17 affects lending operations at all, that effect is only incidental and is expressly exempted from HOLA preemption because it is a type of law that is not preempted (contracts, real property and tort law and a law furthering a vital state interest).

The trial court erred when it did not recognize that Ratterree had properly pled *two* exceptions to the tender rule, thus excusing him from alleging tender. Moreover, the trial court further erred when it sustained the entire action without leave to amend. Ratterree's complaint, when read liberally, supports a cause of action for "dual tracking" and any possible deficiencies in his wrongful foreclosure action could have been cured by

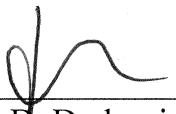
amendment. By dismissing Ratterree's complaint in its entirety, he was prejudiced as he lost the ability to prosecute his case.

VII. RELIEF REQUESTED

Ratterree respectfully requests this Court to remand this case to the Superior Court with an Order directing Fannie Mae to answer Plaintiff's Second Amended Complaint or, in the alternative, allowing Plaintiff leave to amend his complaint.

Dated: May 7, 2015

Respectfully submitted,



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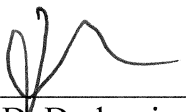
VIII. CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.504(d)(1) of the California Rules of Court, the enclosed Brief of Appellant is produced using 13-point or greater Roman type, including footnotes, and contains 12,884 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: May 7, 2015

Respectfully submitted,



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County of Los Angeles)
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On 5/8/2015 declarant served the within: Brief of Appellant

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