

APPENDIX

**APPENDIX A — OPINION OF THE UNITED
STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT, FILED OCTOBER 29, 2018**

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 17-55355

LPP MORTGAGE LTD., LP,

Plaintiff-counter-defendant-Appellee,

v.

DAVID W. GATES, Trustee of the David W. Gates
Trust dated August 5, 1996,

Defendant-counter-claimant-Appellant.

October 22, 2018, Submitted*
October 29, 2018, Filed

Judges: Before: SILVERMAN, GRABER, and GOULD,
Circuit Judges.

Appeal from the United States District Court for the
Central District of California Dale S. Fischer, District
Judge, Presiding

* The panel unanimously concludes this case is suitable for
decision without oral argument. See Fed. R. App. P. 34(a)(2).

*Appendix A***MEMORANDUM****

David W. Gates appeals from the district court's summary judgment for LPP Mortgage Ltd., LP in its diversity action seeking judicial foreclosure and order dismissing Gates's counterclaim. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Doe v. Abbott Labs.*, 571 F.3d 930, 933 (9th Cir. 2009). We affirm.

The district court properly dismissed as time-barred Gates's Truth in Lending Act ("TILA") counterclaim because Gates filed his action after the applicable statute of limitations had run. *See* 15 U.S.C. § 1635(f) (three-year period to exercise right of rescission under TILA); *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1164 (9th Cir. 2002) (three-year limitation period under TILA is a statute of repose that once expired completely extinguishes the underlying right).

The district court properly granted summary judgment on LPP's judicial foreclosure claim because LPP established each of the required elements for judicial foreclosure by competent evidence at summary judgment, and Gates failed to raise a genuine dispute as to any material fact. *See* Cal. Civ. Proc. Code § 725a, § 726; *Arabia v. BAC Home Loans Servicing, L.P.*, 208 Cal. App. 4th 462, 145 Cal. Rptr. 3d 678, 685 (Ct. App. 2012) (requirements for judicial foreclosure).

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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The district court did not abuse its discretion by awarding attorney's fees in the amount of \$17,474.50, jointly and severally, as a sanction against Gates and his attorney. *See Christian v. Mattel, Inc.*, 286 F.3d 1118, 1126-28 (9th Cir. 2002) (setting forth standard of review and describing grounds for Rule 11 sanctions); *see also Riverhead Sav. Bank v. Nat'l Mortg. Equity Corp.*, 893 F.2d 1109, 1113 (9th Cir. 1990) (concluding that jurisdiction to hear an appeal exists where a sanctions award was imposed jointly and severally on the defendants and their non-party counsel). Contrary to Gates's contention, there are no nonfrivolous arguments to support his theory that the Supreme Court's decision in *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790, 190 L. Ed. 2d 650 (2015), revived his time-barred claim for rescission. *See* Fed. R. Civ. P. 11(b) & advisory committee's note to 1993 amendment (arguments for modification or reversal of existing law do not violate Rule 11(b)(2) if they are nonfrivolous under an objective standard).

In his opening brief, Gates fails to challenge the district court's determination under Rule 11 that he brought his counterclaim for an improper purpose, and he has therefore waived any such challenge. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("[O]n appeal, arguments not raised by a party in its opening brief are deemed waived."); *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We will not manufacture arguments for an appellant . . .").

AFFIRMED.

**APPENDIX B — MEMORANDUM OF THE
UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA,
DATED FEBRUARY 17, 2017**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MEMORANDUM

Case No. CV 15-10008 DSF (PLAx)

Date 02/17/17

Title LPP Mortgage Ltd., L.P. v. David W. Gates,
et al.

Present: The Honorable DALE S. FISCHER,
United States District Judge

Proceedings: (In Chambers) Order GRANTING
Plaintiff's Motion for Attorney's
Fees (Dkt. 94)

I. BACKGROUND

The Court granted Plaintiff LPP Mortgage Ltd., L.P.'s motion for summary judgment against Defendant David W. Gates, Trustee of the David W. Gates Trust dated August 5, 1996 on its claim seeking to foreclose on real property located in Santa Barbara, California. Dkt. 92. Default was previously entered against Defendant JPMorgan Chase Bank, N.A., as acquirer of certain assets and liabilities of Washington Mutual Bank from

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the Federal Deposit Insurance Corporation, as Receiver for Washington Mutual Bank. Dkt. 38.¹ The Court also dismissed Gates's counterclaim against LPP. Dkt. 54. LPP now moves for an award of attorney's fees and costs. The Court deems this matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; Local Rule 7-15. The hearing set for February 27, 2017 is removed from the Court's calendar. The motion is GRANTED.

II. LEGAL STANDARD

The Court applies California law to determine whether to award attorney's fees and costs, and the amount to award. *See Mangold v. California Pub. Utilities Comm'n*, 67 F.3d 1470, 1478 (9th Cir. 1995). Generally, each party must bear its own attorney fees for litigation in California; however, reasonable attorney fees are permitted when authorized by contract. Cal. Civ. Proc. Code §§ 1021; 1032(b); 1033.5(a)(10)(A). California applies the lodestar/multiplier method to determine the amount of attorney's fees to award. *Ketchum v. Moses*, 24 Cal. 4th 1122, 1134-36 (2001). The Court computes the "lodestar" by multiplying the number of hours reasonably expended by each professional by that professional's reasonable hourly rate. *Id.* at 1131-32; *Serrano v. Unruh*, 32 Cal. 3d 621, 624 (1982).

1. Chase consented to having its default entered. Dkts. 35-37.

*Appendix B***III. DISCUSSION****A. Basis for Fees and Reasonableness of Rates**

LPP contends that, as the prevailing party, fees are authorized here by contract. *See Mot.* at 4-9 (relying on Cal. Civ. Proc. Code §§ 1021, 1032(b); 1033.5(a)(10)(A); Cal. Civ. Code § 1717; and attorney fee provisions in Note and Deed of Trust); *see also Abdallah v. United Sav. Bank*, 43 Cal. App. 4th 1101, 1111, *as modified on denial of reh'g* (March 22, 1996) (finding no apportionment of fees necessary where the contract claim is intertwined with other claims). Gates fails to oppose and so concedes that fees are warranted on this basis. LPP further contends that its counsel's hourly rates are reasonable.² Gates concedes the reasonableness of these rates.

B. Time Entries with Redacted Information

Gates objects that certain time entries contain redacted information precluding him from determining whether certain work was reasonable or necessary. After reviewing the entries with redacted information, the Court finds LPP provided sufficient information to judge whether these fees are appropriate, particularly given most entries constitute privileged communications and request reimbursement for small increments of time. *See Democratic Party of Washington State v. Reed*,

2. These rates are: between \$400 and \$425 per hour for Regina J. McClendon; \$325 per hour for Lindsey Kress; \$190 per hour for Len Shaffer and Nelsene Richards. *See Dkt.* 96 (McClendon Decl., ¶¶ 3, 5, 7 & n.1).

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388 F.3d 1281, 1286 (9th Cir. 2004); *see also Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 255 (2001) (“California case law permits fee awards in the absence of detailed time sheets. An experienced trial judge is in a position to assess the value of the professional services rendered in his or her court.”) (citations omitted). LPP may recover fees for these partially redacted entries.

C. Fees Associated with Including Chase

Gates also objects to fees associated with naming Chase as a defendant. A “judicial sale removes liens from the property junior to the one being foreclosed if the junior lienors are made parties to the action.” *Sumitomo Bank v. Davis*, 4 Cal. App. 4th 1306, 1314 (1992) (citations omitted); *cf. Diamond Benefits Life Ins. Co. v. Troll*, 66 Cal. App. 4th 1, 7-8 (1998) (“The rule that we support here simply requires a foreclosing party in a judicial foreclosure to give notice to persons who have a recorded interest in the real property which is junior to that of the foreclosing party.”). If Chase had not been a party, its interests would be unaffected by the foreclosure and it could have retained a right of redemption. *See Arabia v. BAC Home Loans Servicing, L.P.*, 208 Cal. App. 4th 462, 481 (2012) (“A junior lienholder’s interest in a property that is subject to a judicial foreclosure on a senior lien is not affected if the junior lienholder is not included as a defendant in the judicial foreclosure action.”) (citing Cal. Civ. Proc. Code § 726(c)); *see also Diamond Benefits*, 66 Cal. App. 4th at 5, 8-11.

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While naming Chase was not necessary to validly foreclose its senior lien, by doing so, LPP ensures Chase's junior lien is extinguished in the foreclosure sale. The Court therefore agrees that including Chase was reasonably necessary for LPP to obtain efficient relief in its request for judicial foreclosure. The alternative – finding that LPP or Chase would be required to incur these costs – makes little sense. Gates benefitted from a second loan secured by the property; as a result, LPP then expended effort clearing this junior lien by naming Chase as an incidental defendant. Because LPP chose to pursue its remedy in this way, these fees are encompassed within the attorney fee provisions in the Note and Deed of Trust, particularly given the liberal construction of such provisions under Cal. Civ. Code § 1717(a). See Mot. at 6-7 (lender "may invoke the power of sale and any other remedies permitted by Applicable Law" and "shall be entitled to collect all expenses incurred in pursuing [these] remedies . . . including . . . reasonable attorney's fees"); *see also Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC*, 162 Cal. App. 4th 858, 894 (2008). For these reasons, LPP may recover these fees.

D. Fees for Counterclaim and Sanctions

Gates complains that LPP includes time spent on Banks's counterclaim. The Court previously sanctioned Gates and his counsel \$17,474.50 for fees LPP incurred in moving to dismiss the counterclaim and amended counterclaim and prosecuting the related motion for sanctions. Dkt. 67. LPP has made clear it is not seeking double recovery for these fees. Mot. at 10; Reply at 3-4.

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LPP should not be precluded from seeking other fees not included in that sanction award, but nonetheless related to this work. In seeking sanctions, LPP stated it was seeking recovery of the fees “it has incurred thus far” and fees it “expects to incur.” Dkt. 55 (McClendon Decl. at ¶ 17). At the time the sanctions motion was filed, Ms. McClendon listed her hours between April 1, 2016 and May 30, 2016 and provided an estimate of the minimum hours she expected to spend before these issues were resolved – which did not occur until August 30, 2016. *See id.* At the time LPP requested \$17,474.50, its counsel may not have anticipated that Gates would file a late opposition asking the Court to sanction LPP and its counsel, or that LPP would have to re-serve Gates after his counsel moved without notifying LPP. *See Dkts. 55, 60, 61.* To forbid recovery of fees because they were not included in the sanctions award would have the undesired effect of penalizing a party that brought a meritorious sanctions motion. LPP has provided detailed time entries related to these issues, which the Court finds were reasonably necessary to resolve them, and subtracted the sanctions award to prevent improper double recovery. Gates’s arguments in opposition and blanket objections are therefore misplaced and do not provide the Court with a legitimate reason for denying these fees.

IV. CONCLUSION

After considering the time entries provided and the parties’ briefs, the Court finds the fees requested to be reasonable and necessary. The Court notes, for example, that LPP seeks fees only until November 30,

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2016 – despite having to spend time from December 2016 through February 2017 responding to Gates's opposition to its motion for summary judgment (which was, again, late and relied on a late-disclosed expert), appearing at the hearing on that motion, preparing the necessary judgment for a judicial foreclo-sure, and litigating this fees motion. *See* Dkt. 96 (McClendon Decl. at ¶ 6 & Ex. A). As LPP notes, Gates did not object to LPP's request for \$6,851.98 in costs. *See* Dkt. 95 at 34-36. The Court therefore awards LPP \$69,156.94 in fees and \$6,851.98 in costs, for a total of \$76,008.92.

IT IS SO ORDERED.