November 2014 Newsletter

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New TILA Periodic Mortgage Statement Rule[1]

An important TILA regulation that requires consumers to receive periodic mortgage statements went into effect on January 10, 2014. If prepared in accordance with the regulation, these periodic statements will give consumers helpful information about their mortgage accounts. The disclosures will also provide a treasure trove of information for advocates that will help them figure out whether an account is actually in default and whether a servicer has properly applied payments or improperly charged unauthorized fees. Violations may lead to TILA claims for actual damages and attorney fees.

Servicers of conventional mortgages typically have provided consumers with either monthly statements or preprinted coupon books containing payment information. However, federal law has never required such statements or regulated their content. Even when servicers do provide monthly statements, they often stop providing

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them when the borrower is in default or in a bankruptcy proceeding, times when the information is potentially most needed.[2] Information that would assist a borrower in discovering account errors and avoiding default, such as the assessment of fees or diversion of payments into suspense accounts, is also generally not provided by servicers on monthly statements.

The Dodd-Frank Act and the 2013 TILA Servicing Rule have changed this by requiring that periodic statements be sent to borrowers on residential mortgage loans, other than fixed rate loans in which coupon books are given to borrowers containing information substantially similar to that required by the rule.[3] Detailed account information, including helpful disclosures for borrowers who are in default, must now be provided.

Application of Periodic Statement Requirement

The monthly statement requirement generally applies to mortgage loans that are closed-end consumer credit transactions secured by a dwelling, subject to certain exemptions discussed below.[4] A servicer of such a mortgage loan is required to provide the consumer, for each billing cycle, a periodic statement that meets the requirements discussed below.[5] If a mortgage loan has a billing cycle shorter than a period of thirty-one days, such as a bi-weekly billing cycle, a periodic statement covering an entire month may be used.[6] The periodic statement must be delivered or placed in the mail within a "reasonably prompt time" after the payment due date or the end of any "courtesy"

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[2] *See In re* Monroy, 650 F.3d 1300 (9th Cir. 2011) (approving local form plan language requiring secured creditors to continue sending periodic statements to debtors if they were provided prepetition).

[3] 15 U.S.C. § 1638(f); Reg. Z, 12 C.F.R. § 1026.41.

[4] Reg. Z, 12 C.F.R. § 1026.41(a)(1).

[5] Reg. Z, 12 C.F.R. § 1026.41(a)(2).

[6] *Id. See also* Official Interpretation, Supplement 1 to Part 1026, ¶ 41(a)-2 ("Such a statement would separately list the upcoming payment due dates and amounts due, as required by § 1026.20(d)(1), and list all transaction activity that occurred during the related time period, as required by paragraph (d)(4). Such statement may aggregate the information for the explanation of amount due, as required by paragraph (d)(2), and past payment breakdown, as required by paragraph (d)(3).").

or grace period provided for the previous billing cycle.[7] The commentary notes that delivering, emailing or placing the periodic statement in the mail within four days of the close of the courtesy period of the previous billing cycle generally would be considered reasonably prompt.[8]

When two consumers are joint obligors on a covered mortgage loan, the periodic statement may be sent to either one of them. The commentary provides an example of a married couple who jointly own a home and notes that the servicer need not send statements to "both the husband and the wife; a single statement may be sent."[9] The commentary does not address how the servicer should comply when it is notified that the joint obligors are separated or divorced, and living apart.

The periodic statement requirement under Regulation Z § 1026.41 applies to servicers. However, for purposes of the regulation, a "servicer" includes the "creditor, assignee, or servicer, as applicable."[10] All of these parties are subject to the requirement, though only one statement must be sent to the consumer each billing cycle. When two or more parties are subject to the requirement, "they may decide among themselves which of them will send the statement."[11] A creditor or assignee that does not currently own the mortgage loan or the mortgage servicing rights is not subject to the § 1026.41 requirement to provide a periodic statement.[12]

The servicer can provide the periodic statements electronically, but only if the consumer gives affirmative consent to receive them in this manner.[13] If statements are provided electronically, the servicer may send a notification in lieu of the statement indicating that a consumer's statement is available, with a link to where the statement can be accessed. Consumers who are currently receiving disclosures electronically from their servicer for their mortgage account or some

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[7] Reg. Z, 12 C.F.R. § 1026.41(b).
[8] *See* Official Interpretation, Supplement 1 to Part 1026, ¶ 41(b)-1.
[9] *See* Official Interpretation, Supplement 1 to Part 1026, ¶ 41(a)-1.
[10] Reg. Z, 12 C.F.R. § 1026.41(a)(2).
[11] *See* Official Interpretation, Supplement 1 to Part 1026, ¶ 41(a)-3.
[12] *Id.*
[13] *See* Official Interpretation, Supplement 1 to Part 1026, ¶ 41(c)-3.

other account with the servicer shall be deemed to have consented to receiving electronic statements and will not be sent paper statements unless they withdraw consent.[14]

A consumer is not permitted to opt out of receiving periodic statements. However, the commentary provides that "consumers who have demonstrated the ability to access statements online" may opt out of receiving only the notifications that the statements are available.[15] The CFPB suggests that this ability may be demonstrated, for example, by consumers going to the servicer's website after receiving notification that their statements are available, viewing the information about their account, and selecting a link or option to indicate they no longer wish to receive notifications when new statements are available.

Form and Content of Periodic Statement

The disclosures required by the periodic statement rule must be made by the servicer clearly and conspicuously in writing, or electronically if the consumer agrees, and in a form that the consumer may keep.[16] The CFPB has provided sample forms for periodic statements that are found in appendix H-30 to Regulation Z.[17] If a servicer makes proper use of these forms, it is deemed to have complied with the form and layout requirements of sections 1026.41(c) and (d).[18]

The regulation does not prohibit a servicer from adding to the disclosures or including additional information or disclosures required by other laws, as long as the additional information does not "overwhelm or obscure the required disclosures."[19]

The regulation requires that the statements contain information in the following categories: amount due for the billing period, explanation of amount due on the account including fees imposed, past

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[14] *See* Official Interpretation, Supplement 1 to Part 1026, ¶ 41(c)-4.
[15] *See* Official Interpretation, Supplement 1 to Part 1026, ¶ 41(a)-4.
[16] Reg. Z, 12 C.F.R. § 1026.41(c).
[17] These sample forms are reprinted in NCLC's *Foreclosures*, Appx. C.3.
[18] Reg. Z, 12 C.F.R. § 1026.41(c).
[19] *See* Official Interpretation, Supplement 1 to Part 1026, ¶ 41(c)-1.

payment breakdown, transaction activity, partial payment information, contact and account information, and delinquency information if applicable.[20] Each of these categories is discussed more fully here:

(1) *Amount due*.[21] This category must include: (i) payment due date; (ii) amount of any late payment fee, and the date when that fee will be imposed if payment is not received; and (iii) amount due, shown more prominently than other disclosures on the page (if the transaction has multiple payment options, the amount due under each payment option). The information for this category must be grouped together in close proximity and located at the top of the statement's first page.

(2) *Explanation of amount due*.[22] This category must include: (i) monthly payment amount, including a breakdown showing how much, if any, will be applied to principal, interest, and escrow (if a mortgage loan has multiple payment options, a breakdown of each of the payment options along with information on whether the principal balance will increase, decrease, or stay the same for each option listed); (ii) total sum of any fees or charges imposed since the last statement; and (iii) any payment amount past due. The information for this category must be grouped together in close proximity and located on the statement's first page.

(3) *Past payment breakdown*.[23] This category must include: (i) total of all payments received since the last statement, including a breakdown showing the amount, if any, that was applied to principal, interest, escrow, fees and charges, and the amount, if any, sent to any suspense or unapplied funds account and (ii) total of all payments

[20] Reg. Z, 12 C.F.R. § 1026.41(d). *See* Official Interpretation, Supplement 1 to Part 1026, ¶ 41(d)-1 ("Paragraph (d) requires several disclosures to be provided in close proximity to one another. To meet this requirement, the items to be provided in close proximity must be grouped together, and set off from the other groupings of items. This could be accomplished in a variety of ways, for example, by presenting the information in boxes, or by arranging the items on the document and including spacing between the groupings. Items in close proximity may not have any intervening text between them.").
[21] Reg. Z, 12 C.F.R. § 1026.41(d)(1).
[22] Reg. Z, 12 C.F.R. § 1026.41(d)(2).
[23] Reg. Z, 12 C.F.R. § 1026.41(d).

received since the beginning of the current calendar year, including a breakdown of that total showing the amount, if any, that was applied to principal, interest, escrow, fees and charges, and the amount, if any, currently held in any suspense or unapplied funds account. The information for this category must be grouped together in close proximity and located on the statement's first page.

(4) ***Transaction activity***. This category must include a list of all the transaction activity that occurred since the last statement. Transaction activity means any activity that causes a credit or debit to the amount currently due. This list must include the date of the transaction, a brief description of the transaction, and the amount of the transaction for each activity on the list. Examples of the transactions that must be disclosed would include payments received and applied, payments received and held in a suspense account, the imposition of any fees such as late fees, and the imposition of any charges such as private mortgage insurance.[24] The description of any late fee charges includes the date and amount of the late fee, and the fact that a late fee was imposed.[25] If a partial payment is sent to a suspense or unapplied funds account, this fact must be disclosed in the transaction description along with the date and amount of the payment.[26]

(5) ***Partial payment information***.[27] If a statement reflects a partial payment that was placed in a suspense or unapplied funds account, the statement must provide information explaining what must be done for the funds to be applied. The information for this category must be on the front page of the statement or, alternatively, may be included on a separate page enclosed with the periodic statement or in a separate letter.

(6) ***Contact information***.[28] The servicer must provide a toll-free telephone number and, if applicable, an electronic mailing address that

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[24] *See* Official Interpretation, Supplement 1 to Part 1026, ¶ 41(d)(4)-1.
[25] *See* Official Interpretation, Supplement 1 to Part 1026, ¶ 41(d)(4)-2.
[26] *See* Official Interpretation, Supplement 1 to Part 1026, ¶ 41(d)(4)-3.
[27] Reg. Z, 12 C.F.R. § 1026.41(d)(4).
[28] Reg. Z, 12 C.F.R. § 1026.41(d)(6).

may be used by the consumer to obtain information about the consumer's account. The information for this category must be located on the front page of the statement.

(7) *Account information*.[29] This category must include: (i) amount of the outstanding principal balance; (ii) current interest rate in effect for the mortgage loan; (iii) date after which the interest rate may next change; (iv) existence of any prepayment penalty that may be charged;[30] (v) website to access either the CFPB list or the HUD list of homeownership counselors and counseling organizations and the HUD toll-free telephone number to obtain contact information for homeownership counselors or counseling organizations.

(8) *Delinquency information*.[31] If the consumer is more than 45 days delinquent, the statement must include: (i) date on which the consumer became delinquent; (ii) notification of possible risks, such as foreclosure, and expenses, that may be incurred if the delinquency is not cured; (iii) account history showing, for the previous six months or the period since the last time the account was current, whichever is shorter, the amount remaining past due from each billing cycle or, if any such payment was fully paid, the date on which it was credited as fully paid; (iv) notice indicating any loss mitigation program to which the consumer has agreed, if applicable; (v) notice of whether the servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, if applicable; (vi) total payment amount needed to bring the account current; and (vii) reference to the homeownership counselor information disclosed in the above account information category. Although not expressly stated in the regulation or commentary, the disclosure of the "total payment amount needed to bring the account current" should include all monetary amounts owed by the consumer to cure the delinquency, including amounts paid to third-party providers that are being assessed to the mortgage account, such as attorneys fees and fees for property inspections or broker price opinions. This amount to bring the

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[29] Reg. Z, 12 C.F.R. § 1026.41(d)(7).
[30] Prepayment penalty is defined in 12 C.F.R. § 1026.32(b)(6)(i).
[31] Reg. Z, 12 C.F.R. § 1026.41(d)(8).

account current also should be consistent with any notices stating a cure amount that are required to be sent to the consumer under the mortgage documents or state law, assuming the same time period is reflected in the statement and notice. Information in this category must be grouped together in close proximity and located on the first page of the statement or, alternatively, on a separate page enclosed with the periodic statement or in a separate letter.

Coupon Book Exemption

The CFPB was compelled to include some form of exemption for creditors, assignees, and servicers that provide coupon books to consumers, because the Dodd-Frank Act amendment to TILA explicitly includes this exemption.[32] However, to qualify for the exemption, the statutory language requires the servicer to provide a coupon book that includes "substantially the same information" required the statute.[33] The Regulation X provision that implements the exemption provides that the periodic statement requirement does not apply to fixed-rate loans if the servicer provides the consumer with:

- a coupon book that includes on each coupon in the book the amount due information required by § 1026.41(d)(1);

- a coupon book that includes anywhere in the coupon book: (i) the account information listed in § 1026.41(d)(7);[34] (ii) the contact information for the servicer required by § 1026.41(d)(6); and (iii) information on how the consumer can obtain the explanation of amount due, past payment breakdown, transaction activity and partial payment categories of information required by § 1026.41(d)(2) though (5);[35]

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[32] 15 U.S.C. § 1638(f)(3).
[33] *Id.*
[34] Section 1026.41(d)(7)(i) requires the disclosure of the outstanding principal balance. If the servicer makes use of a coupon book, it need only disclose the principal balance at the beginning of the time period covered by the coupon book. *See* Official Interpretation, Supplement 1 to Part 1026, ¶ 41(e)(3)-4.
[35] This information need not be provided on each coupon, but should be provided somewhere in the coupon book, such as on or inside the front or back cover, or on filler pages in the coupon book. *See* Official Interpretation, Supplement 1 to Part 1026, ¶ 41(e)(3).

- upon request to the consumer by telephone, in writing, in person, or electronically if the consumer consents, the explanation of amount due, past payment breakdown, transaction activity and partial payment categories of information required by § 1026.41(d)(2) though (5); and

- the delinquency information required by § 1026.41(d)(8) in writing, for any billing cycle during which the consumer is more than forty-five days delinquent.[36]

Importantly, the CFPB did not draft the exemption so broadly as to exclude the additional information provided to consumers who are having payment problems. If the coupon book exclusion otherwise applies, but the consumer is more than forty-five days delinquent, the servicer must provide the required delinquency information separately in writing, including an account history for the delinquency period.

The commentary provides a description of a coupon book for purposes of the exemption.[37] A coupon book is a booklet provided to the consumer with a page for each billing cycle during a set period of time, typically a one year period. The pages are designed to be torn off and returned to the servicer with a payment. Additional information about the loan is often included on or inside the front or back cover, or on filler pages in the coupon book.

Other Exemptions

Servicers are not required to provide periodic statements to consumers with reverse mortgages,[38] and timeshare plans.[39] The regulation applies only to closed-end mortgage loans, so open-end home loans such as HELOCs are exempted from coverage of the regulation.[40] In addition, mortgage loans that are serviced by small servicers are

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[36] Reg. Z, 12 C.F.R. § 1026.41(e)(3) (effective Jan. 10, 2014).
[37] *See* Official Interpretation, Supplement 1 to Part 1026, ¶ 41(e)(3)-2.
[38] Reg. Z, 12 C.F.R. § 1026.41(e)(1). The definition of a reverse mortgage is provided at 12 C.F.R. § 1026.33(a).
[39] Reg. Z, 12 C.F.R. § 1026.41(e)(2).
[40] Reg. Z, 12 C.F.R. § 1026.41(a).

exempt from the requirements of the periodic statement regulation.[41] Importantly there is no exemption for a consumer in default.

Interim Final Rule Adds Bankruptcy Exemption[42]

Industry commenters suggested during the rulemaking proceeding that the periodic statement rule should not apply to consumers in bankruptcy because accounting issues related to the treatment of prepetition arrearages were problematic. The CFPB's initial response was practical--complexity alone does not justify a complete exemption, but may warrant certain adjustments. In fact, the CFPB noted that it is the "complexities" of the bankruptcy scenario that "necessitate" the periodic statement information be provided to consumers.[43] Applying a conflict analysis similar to that set out in *Randolph v. IMBS, Inc.*,[44] the CFPB stated that while certain laws such as the Bankruptcy Code and the Fair Debt Collection Practices Act may prevent the collection of a debt, these laws do not prevent a servicer from sending a periodic statement that is tailored to the particular circumstances of the bankruptcy case.

The final rule as initially promulgated allowed servicers to make changes to the statement as they believe necessary when a consumer is in bankruptcy, so as to reflect the payment obligations of the debtor in the bankruptcy proceeding. The CFPB even provided a sample message servicers may add to the statement to avoid conflict with the automatic stay and discharge injunction.[45]

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[41] Reg. Z, 12 C.F.R. § 1026.41(e)(4). A "small servicer" is defined as an entity that "services, together with any affiliates, 5,000 or fewer mortgage loans, for all of which the servicer (or an affiliate) is the creditor or assignee" or is a "Housing Finance Agency, as defined in 24 CFR 266.5." The definition of small servicer is discussed in NCLC Foreclosures, § 9.1.4.3.

[42] As of November 12, 2014, the Interim Final Rule docket is still open and the CFPB has not issued a permanent regulation on the bankruptcy exemptions.

[43] *See* Section-by-Section Analysis, § 1026.41(d)(2), 78 Fed. Reg. 10,966 (Feb. 14, 2013).

[44] 368 F.3d 726 (7th Cir. 2004).

[45] *See* Section-by-Section Analysis, § 1026.41(d)(2), 78 Fed. Reg. 10,966, note 125 (Feb. 14, 2013) ("For example, servicers may include a statement such as: 'To the extent your original obligation was discharged, or is subject to an automatic stay of bankruptcy under Title 11 of the United States Code, this statement is for compliance and/or informational purposes only and does not constitute an attempt to

However, after the final rule was published and without using the advance notice and comment procedure, the CFPB issued an "Interim Final Rule" that granted a bankruptcy exemption that applies to the periodic statement requirements.[46] The CFPB has indicated that the bankruptcy exemption is still under consideration and that some portions of it may be revised or repealed when a final exemption rule is issued.

Section 1026.41(e)(5) provides that a servicer is exempt from the periodic statement requirements for a mortgage loan while the consumer is a debtor in a bankruptcy case.[47] The CFPB's Official Interpretations for this section provide that the exemption applies for any portion of the mortgage debt that is discharged in bankruptcy.[48] This fails to recognize that many consumers file chapter 7 for non-mortgage related reasons and continue to maintain payments on the mortgage after receiving a discharge. These consumers typically do not enter into a reaffirmation agreement with the mortgage holder because there is an exception to the discharge injunction under § 524(j) of the Bankruptcy Code that permits the mortgage holder to accept payments and service the loan in the ordinary course.[49] Thus, the CFPB's commentary is inconsistent with this bankruptcy policy, and hopefully will be reconsidered by the CFPB.

In addition, the CFPB's Official Interpretations provide that if there are joint obligors on a mortgage, the exemption applies if any of the obligors is in bankruptcy. An example is given of a husband and wife who jointly own a home, stating that if "the husband files for bankruptcy, the servicer is exempt from providing periodic statements to both the husband and the wife."[50] If the husband in this example filed a chapter 7 bankruptcy case, the automatic stay in his case does not apply to his spouse or any other joint obligors as there is no co-obligor stay in chapter 7. The commentary would appear to prevent the

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collect a debt or to impose personal liability for such obligation. However, Creditor retains rights under its security instrument, including the right to foreclose its lien.'").

[46] *See* 78 Fed. Reg. 62,993 (Oct. 23, 2013).

[47] 12 C.F.R. § 1026.41(e)(5).

[48] *See* Official Interpretations, Supplement 1 to Part 1026, ¶ 41(e)(5) - 2(ii).

[49] 11 U.S.C. § 524(j); *see also* § 10.11.2.1, *infra*.

[50] *See* Official Interpretations, Supplement 1 to Part 1026, ¶ 41(e)(5) - 3.

wife in the example provided by the Bureau from receiving periodic statements even if the husband filed a chapter 7 case years after the couple were separated or divorced and it is the wife who is making the ongoing mortgage payments.

Private Remedies for Violation of the TILA Servicing Requirements

The Dodd-Frank Act's mortgage servicing provisions are within Part B of TILA.[51] Part B violations generally lead to TILA private remedies of actual and statutory damages and attorney fees, in both individual and class actions.[52] While § 1640 of TILA lists certain TILA violations for which statutory damages are not available, Congress did not add any of the new mortgage servicing requirements to this list of claims not entitled to statutory damages. However, § 1638(f) of TILA is not listed in § 1640 as one of the § 1638 violations leading to statutory damages, so recovery of statutory damages is not permitted for violations of the periodic statement requirements. In addition, TILA liability involving servicer violations (as opposed to creditor violations) leads to complexities examined in NCLC's *Truth in Lending* § 11.6.9 (8th ed. 2012 and 2013 Supp.).

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[51] TILA Part B encompasses 15 U.S.C. §§ 1631 through 1649.
[52] 15 U.S.C. § 1640(a). *See generally* NCLC, *Truth in Lending* § 11.6, (8th ed. 2010)(discussing availability of statutory damages under Part B).

Summaries of Recent Cases

Published State Cases

"One Form of Action" & "Security First" Rules Applied to Two Parcels & Multiple Debtors

First Cal. Bank v. McDonald, __ Cal. App. 4th __, 2014 WL 5408418 (Oct. 24, 2014): This case involves several interdependent anti-deficiency and contract rules. The "one form of action" and "security first" rules require creditors to exhaust *all* real property security through "a single judicial foreclosure lawsuit" before going after a deficiency judgment against the debtor personally. CCP § 726. If a creditor chooses to recover its interests through a channel other than judicial foreclosure (like agreeing to a private sale of the property, for example), it forgoes its right to a deficiency judgment against the debtor. Debtors can waive this anti-deficiency protection, however, by consenting to both the sale of the property and to continued personal liability for the deficiency. Co-debtors complicate this waiver issue: "When one debtor and the creditor agree to the disposition of real property collateral without the consent of codebtors, their agreement does not amend the codebtors' contractual obligations or the conditional nature of the codebtors' promise to pay the debt." In other words, if a creditor agrees to a private sale of the property securing the debt with only *one* of the codebtors (who also agreed to waive their anti-deficiency protection), the creditor still loses its right to a deficiency judgment against the non-consenting codebtors because they did not agree to the transaction or waive their anti-deficiency protections. Here, a husband and wife took out a loan secured by two parcels of real property. After the husband died, his wife did *not* become the representative of his estate. Rather, his heirs represented his estate and became, in essence, codebtors to the original loan. After husband's death, the bank agreed—*with the wife only*—to the private sale of one of the two parcels. The bank then sued to judicially foreclose on the second parcel and to obtain a deficiency judgment against the husband's estate (his heirs). The trial court granted summary adjudication to the bank, granting the judicial foreclosure and allowing the deficiency judgment. The Court of Appeals reversed, finding that the bank had violated the "one form of action" and "security first" rules in at least two respects. First, the bank did not use one action to recover its interest in *all* the property at issue: the two parcels. Instead, it agreed to the private sale of just *one* of the parcels, waiving its right to a deficiency judgment. Second, the bank only obtained the consent of one debtor, the wife, to the sale of the first parcel. Had she been the only debtor, her waiver of her anti-deficiency protections would have ensured a deficiency for the bank, despite its use of multiple actions to recover its interests. But she was *not* the only debtor, as her husband's heirs inherited his interest in the loan. The bank then, had to obtain the consent of all debtors to successfully preserve its right to a deficiency judgment after the sale of the first parcel. In sum, the court found "that [b]ank was required to include both parcels of real property security in its judicial foreclosure action unless [it] can show that all the debtors consented to the release of the [first parcel] as security for the loan."

Davis-Stirling Act: HOA Must Accept Partial Payments on Delinquent Assessments

Huntington Cont'l Homeowner Ass'n v. Miner, 230 Cal. App. 4th 590 (2014):[53] The Davis-Stirling Act governs HOA-initiated judicial foreclosures on assessment liens. Here, the homeowners tendered a payment to their HOA during foreclosure litigation that more than covered their delinquent assessments but was less than the "total" amount owed, which included the assessments, late fees, interest, and

[53] Refer to the HBOR Collaborative's Case Compendium on calhbor.org for summaries of the previous iterations of this case, *Huntington Cont'l Town House Ass'n, Inc. v. Miner*, No. 2013-00623099 (Cal. Super. Ct. App. Div. Sept. 26, 2013) (The Appellate Division reversed the trial court's grant of foreclosure, finding that the Davis-Stirling Act required the HOA to accept partial payments on delinquent assessments.); *Huntington Cont'l Town House Ass'n, Inc. v. JM Tr.*, 222 Cal. App. 4th Supp. 13 (2014) (The Appellate Division published its first opinion (above) and remanded to the trial court to correctly assess damages.).

attorney's fees. The HOA refused to accept this "partial payment" and the trial court allowed foreclosure. The appellate division found, however, that the plain language of the Davis-Stirling Act "allows for partial payments and delineates to what debts, and in which order, payments are to be applied." *See* CC § 1367.4(b).[54] The HOA should have accepted the partial payment, which would have brought homeowners' delinquency below the minimum threshold that can trigger an HOA foreclosure. The first appellate division panel accordingly reversed and remanded to the trial court. The Court of Appeal agreed that the statutory language is clear: partial payments must be accepted and applied in a particular manner. The language "unambiguously permits partial payments" and "does not state an [HOA] has the discretion to decline to follow the procedure set forth in the statute." Importantly, the court also agreed that the HOA's duty to accept partial payments and apply them according to the statute does not evaporate when it records a lien against the homeowner. The Court of Appeal remanded the case to the trial court in accordance with the judgment of the Appellate Division.

Pre-Foreclosure Quiet Title Claim: *Glaski* Inapplicable

Kan v. Guild Mortg. Co., 230 Cal. App. 4th 736 (2014): In general, California borrowers do not have standing to allege violations of pooling and servicing agreements (PSAs), contracts between their lender and a third party trust. Here, borrower cited *Glaski v. Bank of Am., N.A.*, 218 Cal. App. 4th 1079 (2013), a California Court of Appeal case that *did* grant borrower standing to challenge a foreclosure based on PSA violations and New York trust law. Borrower alleged the exact same claim as in *Glaski*: that because his loan was transferred to the

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[54] Effective Jan. 1, 2014, the provisions governing HOAs (or "common interest developments)" have been re-codified at CAL. CIV. CODE §§ 4000 – 6150, but are still referred to as the Davis-Stirling Common Interest Development Act. Former CC 1367.4 is now CC 5655 and reads: "(a) Any payments made by the owner of a separate interest toward a debt described in [CC 5650(a)] shall first be applied to the assessments owed, and, only after the assessments owed are paid in full shall the payments be applied to the fees and costs of collection, attorney's fees, late charges, or interest."

trust after the trust's closing date, the assignment violated the PSA and is therefore void under New York trust law. This court noted the *Glaski* plaintiff sued for wrongful foreclosure *post*-sale, as opposed to this plaintiff who sued to quiet title before a sale occurs. The difference is notable because, according to this court, even the *Glaski* court did not take issue with the long-standing principle that borrowers may not bring pre-foreclosure actions that impose additional requirements to the statutory foreclosure structure. The court followed *Gomes* and *Jenkins* in finding borrower is unable to bring a pre-sale claim attacking a PSA. Finally, the court declined to weigh-in on the propriety of the *Glaski* holding, "because the opinion has no direct applicability to this preforeclosure action." The court affirmed the trial court's grant of demurrer to borrower's quiet title action.

Promissory Estoppel: Detrimental Reliance Requires a Change in Position

Jones v. Wachovia Bank, __ Cal. App. 4th __, 2014 WL 5341995 (Sept. 22, 2014): There are four elements to a promissory estoppel claim: 1) a clear and unambiguous promise; 2) reliance on that promise; 3) reliance that is reasonable and foreseeable; and 4) damages. Elements (2) and (4) are referred to collectively as "detrimental reliance." If a borrower alleges that a servicer promised and then refused to postpone a foreclosure sale, a borrower must show detrimental reliance by demonstrating a change in their activity instigated by the promise. They can do this by showing "preliminary steps" (like filing at TRO to stop the foreclosure, or initiating a bankruptcy petition) which they then withdrew because of servicer's promise not to foreclose. It would be insufficient for a borrower to claim that they *would* have taken different action *if* the promise to postpone the sale had not been made. Here, borrowers had requested and received two previous postponements of their foreclosure sale. Before the third sale date, borrowers were assured by a servicer representative that the sale would be postponed again, to June 18. The sale, however, actually occurred on June 8. Borrowers alleged that, in reliance on a June 18 sale date, they had made "preparations to timely submit" funds, borrowed from a friend, that would have cured the default (or paid the entire loan, according to borrower's opposition to summary judgment) by June 18. Alternatively, they planned to again ask, three or four days before June 18, that the sale be postponed. The Court of Appeal agreed with the trial court that neither of these "plans" demonstrated detrimental reliance. Borrowers did not change their position based on a promised June 18 sale date. "[Borrowers] did not formally seek money from [the friend], and their discussions were not reduced to a formal agreement." Further, an "informal agreement to borrow money from a friend is not a change of position, must less a substantial change of position needed to establish an estoppel." Nor could borrowers show that servicer "reasonably expected to induce *inaction* by the postponement of the June 18 date." Borrower's promissory estoppel claim therefore failed.

Unpublished & Trial Court Decisions[55]

Servicer's Rescission of NTS Alone May Not "Remedy" an HBOR Violation; Pleading Standards for CC 2924.11(f) Violation; Negligence

Leonard v. JP Morgan Chase, No. 34-2014-00159785-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Oct. 21, 2014):[56] A servicer "shall not be liable for any [HBOR] violation that it has corrected and remedied prior to the recordation of a trustee's deed upon sale." CC § 2924.12(c). Here, servicer argued borrower's dual tracking claim was mooted because servicer corrected its violation by rescinding the NTS, but not the NOD. The court disagreed. The statute is silent about what

[55] Cases without Westlaw citations can be found at the end of the newsletter. Please refer to Cal. Rule of Ct. 8.1115 before citing unpublished decisions.
[56] A summary of an earlier iteration of this case appears in our Case Compendium as *Leonard v. JP Morgan Chase Bank, N.A.*, No. 34-2014-00159785-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Mar. 27, 2014). There, the court granted a preliminary injunction based on borrower's dual tracking, negligence, and UCL claims, despite servicer's on-going NTS rescission efforts.

constitutes a "corrected" or "remedied" violation, and certainly does not say that rescission of a dual tracked NTS, alone, allows a servicer to escape HBOR liability. Here, the NOD is still "live," and "there is still currently foreclosure activity against the property as to which, at minimum, [borrower] can seek injunctive relief." Even if servicer is correct, and an NOD need not be rescinded if recording the NOD, by itself, did not violate HBOR's dual tracking prohibitions, whether it *did* violate dual tracking is a question of fact inappropriate for resolution at the demur stage. The court overruled servicer's demurrer on borrower's dual tracking claim.

A servicer "shall not collect any late fees for periods during which a complete first lien loan modification application is under consideration or a denial is being appealed, the borrower is making timely modification payments, or a foreclosure prevention alternative is being evaluated or exercised." CC § 2924.11(f). Here, borrower pled he was notified his application was in "underwriting" and that his account was "incurring delinquency related fees and charges." The court determined that, at the pleading stage, this adequately states a violation of CC 2924.11(f). Whether or not servicer *actually* collected fees during borrower's modification attempt is a question to be resolved later in litigation. Servicer's demurrer was denied.

Negligence per se is a rule of evidence, not a cause of action. Nevertheless, borrowers successfully pled a negligence per se claim, which the court re-framed as a negligence claim. The court cited *Lueras* and *Alvarez* to support its finding that borrowers had adequately alleged a duty of care because servicer agreed to consider borrower's modification application and borrower was in the middle of a review when servicer continued with the foreclosure process. "Such a duty [and breach] is supported by [HBOR]." The court also agreed that borrower had adequately pled damages to support his negligence claim by citing "'excessive interest accumulation, negative amortization, loss of equity, destruction of credit standing.'" Borrower's default does not insulate a servicer from negligence liability related to servicer's handling of the loan modification application. Servicer's demurrer was overruled.

Federal Cases

Good Faith & Fair Dealing Claim Based on DOT: Original Servicer Liability, Relationship to Statute of Frauds

Boring v. Nationstar Mortg., LLC, 2014 WL 5473118 (E.D. Cal. Oct. 28, 2014):[57] Breach of the implied covenant of good faith and fair dealing claims require borrowers to show they either performed under the contract at issue, or their performance was excused, and that servicer did something "which . . . injure[d] the right of the [borrower] to receive the benefits of the agreement." Here, borrower alleged he was current on his mortgage until his original servicer induced him to breach his DOT, instructing him to become delinquent to obtain a modification. Further, if borrower did become delinquent, servicer promised not to foreclose and assured borrower he would face no negative consequences while he pursued a modification. Borrower became delinquent, applied for a modification, but his servicer sold its servicing rights to a second servicer, who initiated the foreclosure process. The court found borrower to have adequately pled excused non-performance and a valid breach of good faith and fair dealing claim against borrower's original servicer. The court also rejected servicer's statute of frauds defense. Ordinarily, an oral agreement that modifies a contract relating to land is invalid. Courts, however, recognize and exception to this rule if the other party provides "sufficient consideration" for the oral modification. Here, borrower went through the trouble of submitting another modification application after he became delinquent, following servicer's instructions. Because this "expenditure of time and energy . . . was not originally part of the [DOT] . . . [and] has not been shown to be

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[57] Refer to the HBOR Collaborative's Case Compendium on calhbor.org for summaries of the previous iterations of this case, *Boring v. Nationstar Mortg.*, 2014 WL 66776 (E.D. Cal. Jan. 7, 2014) (dismissing borrower's SPOC claim, but allowing borrower's dual tracking and UCL claims to survive servicer's MTD), and *Boring v. Nationstar Mortg., LLC*, 2014 WL 2930722 (E.D. Cal. June 27, 2014) (dismissing borrower's amended SPOC claim, refusing to allow servicer, a bank, to invoke HOLA preemption to defend against borrower's remaining HBOR claims).

insufficient . . . consideration," borrower's good faith claim was not subject to the statute of frauds and survived the MTD.

Egregious Misapplication of Payments & Erroneous "Default": Viable Breach of Contract, CC 2924.17, and Good Faith & Fair Dealing Claims

Henderson v. Ocwen Loan Servicing, 2014 WL 5461955 (N.D. Cal. Oct. 27, 2014): Breach of contract claims require borrowers to show: 1) a contract; 2) borrower's performance or excused non-performance; 3) servicer's breach; and 4) damages. This case involved a series of servicer missteps, all relating to the improper application of funds to borrower's account and improperly charged fees and interest. While borrower's first loan modification was in place, the servicing rights to her loan were sold. Instead of adhering to the modified interest rate, the new servicer charged substantially more interest. Servicer also put borrower's account into "default," even though borrower never missed a modified payment. Even after borrower and her new servicer entered into the *second* modification agreement, the servicer continued to consider borrower late and charge fees. Eventually, servicer imposed an improper escrow account and prohibited borrower from making automated payments because of her "default." It even insisted it had returned a couple mortgage payments to borrower when it had in fact cashed those checks. Ultimately, servicer recorded an NOD, citing borrower's default and accrued late charges. The court rejected servicer's claim that the second modification superseded the first, rendering borrower's breach of contract claim on the first modification invalid. The court found borrower had adequately pled servicer breached the first modification agreement (which it was bound to follow, having purchased the servicing rights to that modified loan) by charging excessive interest and putting borrower in "default" when she was current on her payments. Borrower also adequately pled her performance, asserting she never missed a payment under either modification agreement. Her failure to continue making payments at a certain point was excused since it was servicer that improperly barred borrower from making automated payments. Borrower's breach of contract claim therefore survived the MTD.

One of the most well-known aspects of HBOR is its "robo-signing" statute, CC 2924.17. Specifically, section (b) requires a servicer to "ensure that it has reviewed competent and reliable evidence to substantiate . . . [its] right to foreclose." But the lesser-known section (a) also mandates that foreclosure documents, including NODs and NTSs, be "accurate and complete and supported by competent and reliable evidence." Here, borrower alleged servicer could not have ensured the NOD was supported by competent and reliable evidence, as she was never in default. The court agreed, denying servicer's MTD and rejecting its argument that a CC 2924.17 claim requires robo-signing allegations or "multiple and repeated uncorrected violations."

Breach of the implied covenant of good faith and fair dealing claims require borrowers to show they either performed under the contract at issue, or their performance was excused, and that servicer unfairly interfered with borrower's rights to see the benefits of the contract. Here, borrower adequately alleged servicer's refusal to allow automated mortgage payments because of borrower's erroneous "default" resulted in a valid good faith and fair dealing claim: servicer interfered with borrower's ability to make payments under her modified DOT. Further, servicer lied about returning two mortgage payments when it had actually cashed those checks. Finally, servicer failed to correct the improper default. The court denied servicer's MTD borrower's good faith and fair dealing claim.

Servicer's Pre-NOD Outreach Violation & Failure to Timely Acknowledge Borrower's Application Claim Must Prejudice Borrower; Servicer Cannot Prevent Borrower from Submitting a "Complete" Application; A Human SPOC Must be Assigned Pre-NOD; Valid Negligence Claim under *Alvarez*

Shapiro v. Sage Point Lender Servs., 2014 WL 5419721 (C.D. Cal. Oct. 24, 2014): Before recording an NOD, a servicer must reach out –or diligently attempt to reach out—to the delinquent borrower to discuss foreclosure alternatives. In recording the NOD, a servicer must also record a declaration, signed under penalty of perjury, attesting to its successful attempts to contact borrower, or to its diligent, but failed attempts, to contact the borrower. Here, servicer and borrower had been communicating about loan modifications for at least two weeks before the declaration was completed, and months before it was eventually recorded. Nevertheless, the servicer swore in the declaration it had tried but failed to contact the borrower. At the motion to dismiss stage, the servicer did not argue the declaration was true; rather, servicer argued its falsity did not prejudice borrower in any way. The court agreed that though the declaration was false, and non-compliant with CC 2923.55, "courts generally reject claims of a deficient NOD where no prejudice was suffered as the result of a procedural irregularity." The court granted the MTD to borrower's claim, with leave to amend to plead prejudice.

HBOR also requires servicers to acknowledge a borrower's modification application within five business days of receipt, to describe the loan modification process, and to request any missing documents. CC § 2924.10. Here, borrower submitted his application and did not receive any communication from servicer for over a month. Though this was a clear violation, the court nevertheless dismissed borrower's claim because borrower did not plead he suffered a specific harm due to this delay, rendering the delay immaterial. The court granted leave to amend this claim.

Servicers may not move forward with foreclosure while a borrower's complete, first lien loan modification is pending. An "application shall be deemed 'complete' when a borrower has supplied the mortgage servicer with all documents required by the mortgage servicer within the reasonable timeframes specified by the mortgage servicer." CC § 2923.6(h). Here, borrower submitted an application and servicer requested additional documents. Borrower supplied the documents but servicer responded with a form letter stating that all requested documents were not received. Borrower called servicer and was told to ignore this form letter, servicer had received the documents and was reviewing the application. Without further communication to borrower, servicer recorded an NOD. Servicer argued borrower's dual tracking claim should be dismissed because servicer never received a "complete" application. The court strongly disagreed: "This argument borders on absurd . . . [and] would render HBOR's protections meaningless. Mortgage servicers could deny every application for a loan modification, citing missing documents as an excuse. Even better, the servicer would not have to identify which documents were missing. The California legislature could not have intended to allow the rigged game that [servicer's] argument suggests." Rather, borrower's pleading allowed the court to "infer" he submitted a complete application. The court denied servicer's MTD borrower's dual tracking claim.

HBOR requires servicers to provide a single point of contact (SPOC) "[u]pon request from a borrower who requests a foreclosure prevention alternative." CC § 2923.7(a). SPOCs may be an individual or a "team" of people and have several responsibilities, including informing borrowers of missing documents and the status of their applications. Here, borrower submitted a modification application and received computer-generated form letters in response. He was never formally assigned a SPOC until three months after the NOD was recorded, which was months after his initial application. Servicer argued these allegations failed to support a SPOC claim because CC 2923.7 does not specify that a SPOC be assigned before the NOD is recorded, and that borrower was being serviced by a "team" of personnel, as evidenced by the letters he received. The court disagreed. While the statute does not specify that a SPOC be assigned pre-NOD, a SPOC's statutory responsibilities, "when read in conjunction with the 'dual tracking' prohibitions . . . which does prevent a NOD from being recorded—show that the SPOC must necessarily be appointed before the NOD is recorded." Further, the form letters "not signed by human beings." Comparatively, the letter borrower ultimately received that *did* appoint him a SPOC, lists an actual person with a specific phone extension. Also, when borrower spoke with a servicer representative, he was told to ignore one of the form letters—which makes clear that a dedicated SPOC was *not* sending borrower these improper letters. Borrower's SPOC claim survived the MTD.

Negligence claims require a duty of care owed from servicer to borrower. Generally, banks owe no duty to borrowers within a typical lender-borrower relationship. A recently published Court of Appeal decision, *Alvarez v. BAC Home Loans Servicing*, 228 Cal. App. 4th 941 (2014) found that while servicers have no duty to initiate the modification process or to grant a modification, once they agree to negotiate a modification they owe a duty to borrowers not to mishandle that process. This court agreed with *Alvarez*. Because borrower was told contradictory information after he submitted his application (that documents were missing and that this assertion should be ignored), and was not told what documents were missing, the court inferred that servicer mishandled the application and "deprived [borrower] of an opportunity to obtain a loan modification, and thereby avoid foreclosure." The court denied servicer's MTD borrower's negligence claim.

HBOR: Importance of Specific, Factual Pleading of "Material" Violations; Negligence Pleading Requirements

Colom v. Wells Fargo, 2014 WL 5361421 (N.D. Cal. Oct. 20, 2014): Borrowers may obtain injunctive relief pre-sale and damages post-sale for a servicer's "material violation" of HBOR. CC § 2924.12(a)-(b). This enforcement statute does not define a "material" violation. Here, borrower received a denial letter that did no specify the Net Present Value (NPV) numbers used in the application review, or list other, non-modification foreclosure alternatives, both of which violate HBOR's dual tracking provisions. Additionally, borrower's SPOC failed to return several of borrower's phone calls and emails during the loan modification process, and transferred borrower's file to another SPOC. None of these allegations gave rise to a viable HBOR claim. First, servicer's failure to cite to NPV numbers in a denial letter only violates dual tracking prohibitions if the denial was *predicated* on the NPV test, which borrower did not plead here. Second, even if the denial letter failed to list foreclosure alternatives, borrower did not explain why such a failure is a material violation of the dual tracking statute. Borrower did not, for example, allege "that in connection with the subject denial, he was not otherwise given a document providing notice of other foreclosure prevention alternatives" not specifically provided in the denial letter. On borrower's SPOC claim, the court found it fatal that borrower did not allege his SPOC failed to provide information about the loan modification process, deadlines, or additional documents, all requirements of the SPOC statute. Further, borrower did not allege how not returning phone calls and emails constitutes a material violation of the SPOC statute, which is especially problematic since borrower was "ultimately informed of the status of the application" through the denial. Lastly, even assuming reassigning borrower's file to a different SPOC violated CC 2923.7, the borrower was by that time in active bankruptcy, rendering him *not* a "borrower" under HBOR, and therefore unprotected by any HBOR statute. *See* CC § 2920.5. The court dismissed all of borrower's HBOR related claims, mostly because of borrower's vague pleading.

Negligence claims require a duty of care owed from servicer to borrower. Generally, banks owe no duty to borrowers within a typical lender-borrower relationship. A recently published Court of Appeal decision, *Alvarez v. BAC Home Loans Servicing*, 228 Cal. App. 4th 941 (2014) found that while servicers have no duty to initiate the modification process or to grant a modification, once they agree to negotiate a modification they owe a duty to borrowers not to mishandle that process. While acknowledging *Alvarez*, this court dismissed borrower's negligence claim, citing his failure to allege specific facts "to support a finding that any delay in communicating [servicer's] decision [to deny the modification] caused [borrower] injury."

FDCPA: Failure to Report a Disputed Debt; "Debt Collector" Definition

Lohse v. Nationstar Mortg., 2014 WL 5358966 (N.D. Cal. Oct. 20, 2014): The Fair Debt Collection Practices Act (FDCPA) prohibits debt collectors from "communicat[ing] to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed." Here, borrowers alleged they informed their servicer they disputed their debt but that when they obtained a credit reporting over a year later, it did not note the dispute. These allegations, the court determined, adequately pled an FDCPA violation. In so finding, the court rejected servicer's argument that because borrower's federal suit disputing the debt was dismissed with prejudice *before* borrowers obtained their credit report, there was no improperly reported "dispute." While the report was technically accurate at the time borrower's requested it, that does not overcome the inference that servicer might *never* have reported the dispute. Unearthing the particular timing of servicer's reporting of (or failure to report) the dispute requires additional facts and is inappropriately resolved at the pleading stage.

Even if servicer had engaged in activity that violated the FDCPA, the court still needed to find that the servicer was a "debt collector" as defined by the statute: 1) an entity whose principal business or purpose is debt collecting, or 2) an entity that regularly collects or attempts to collect debts owed to another. Generally, servicers engaged in foreclosure activities are not considered "debt collectors" because foreclosure activity is not considered "debt collection." When a servicer goes beyond providing the borrower with statutorily required foreclosure notices, however, they may be classified as a "debt collector" and liable under the FDCPA. Here, servicer had not demonstrated to the court that, as a matter of law, it had not overstepped these bounds. Specifically, borrowers claimed servicer failed to accurately report a debt dispute to credit reporting agencies. This failure has nothing to do with providing borrowers with regular foreclosure notices, and so at the pleading stage, borrowers adequately pled servicer was a "debt collector" under the FDCPA. The court also rejected servicer's MTD borrower's Rosenthal claim–the California analogue to the FDCPA—for the same reasons.

Preliminary Injunction Granted on Dual Tracking Claim; Bond

Gonzales v. Citimortgage, No. C-14-4059 EMC (N.D. Cal. Oct. 10, 2014): To win a preliminary injunction in a California federal court, a borrower must show: 1) at least serious questions going to the merits of his claim; 2) imminent and irreparable harm if the PI does not issue; 3) that the balance of harms tips in their favor; and 4) the PI is in the public interest. This borrower sought a PI based on his dual tracking claim. A servicer may not move forward with a foreclosure sale while a borrower's complete, first lien loan modification application is pending. The "completeness" of an application is determined by the servicer. CC § 2923.6(h). Dual tracking protections do not protect borrowers, however, who have already been reviewed for a foreclosure alternative—unless the borrower can show he or she documented and submitted a "material change in financial circumstances" to the servicer. Here, borrower alleged that after experiencing a material change in her financial circumstances, she submitted a complete application to her servicer, never receiving notice that the application used an incorrect form, as servicer alleged. The court found "serious questions" going toward the merits of borrower's claim. Whether borrower received notice about the improper application, submitted enough information to constitute a "complete" application *despite* using an incorrect form, and experienced a material change in her financial condition, are all factual issues raising serious questions on the merits of her claim. Further, the loss of borrower's home is imminent and irreparable and, because a minor foreclosure delay "pales in comparison" to borrower's potential loss, the court found the balance of equities and public interest weighs in favor of granting the PI. The court set a bond of $2,000 per month, payable to the court registry with proof of payment due to servicer.

TRO Granted on Dual Tracking Claim; Zero Bond Appropriate Where Servicer Has No Potential Damages

Lane v. Citimortgage, 2014 WL 5036512 (E.D. Cal. Oct. 7, 2014): To win a temporary restraining order in a California federal court, a borrower must show: 1) at least serious questions going to the merits of his claim; 2) imminent and irreparable harm if the TRO does not issue; 3) that the balance of harms tips in their favor; and 4) the TRO is in the public interest. Here, borrower's TRO is based on her dual tracking claim. If a servicer denies a borrower's modification application, it cannot proceed with foreclosure until the borrower's time to appeal the denial has passed or, if the borrower appeals the denial, until the servicer denies the appeal. CC § 2923.6(e). Here, servicer denied borrower's complete application, but miscalculated the property value and failed to include borrower's income. Borrower then appealed the denial. Because servicer plans to continue with foreclosure and has not provided borrower with a determination on her appeal, borrower was forced to move for a TRO. The court found that borrower established a likelihood of success on the merits of her dual tracking claim: her complete application deserved dual tracking protections, she timely appealed the denial and received no response, and servicer may have denied her a modification based on incorrect information. Additionally, the potential loss of borrower's home is imminent and irreparable and outweighs any potential loss by servicer, which only amounts to reviewing borrower's appeal. Finally, granting the TRO serves the public interest by ensuring that any foreclosure, if called for, is done correctly and based on accurate information. Using its broad discretion, the court found that no cash bond was necessary here because "'there is no evidence [servicer] will suffer damages from the injunction.'"

Inaccurate Reinstatement Quote: Negligent Misrepresentation, RESPA, & FCRA Claims

Rothman v. US Bank, 2014 WL 4966907 (N.D. Cal. Oct. 3, 2014): Negligent misrepresentation claims require a borrower to show, *inter alia*, that servicer did not have a reasonable ground for believing that the alleged misrepresentation was true. Here, borrower alleged a servicer representative misrepresented the amount required to reinstate his loan. After borrower paid the quoted amount, he was informed it did not include an overdue escrow account and that foreclosure would continue. Borrower alleged that because the representative had access to servicer's records, including borrower's escrow payment records, she knew or should have known about the escrow account and that the amount quoted would not actually reinstate his loan. The court found these allegations conclusory and insufficient to state a negligent misrepresentation claim. Even if the representative *had* access to borrower's escrow records, this would not, by itself, establish that she lacked a reasonable ground for believing her reinstatement quote to be accurate. The court therefore dismissed borrower's negligent misrepresentation claim without leave to amend.

RESPA requires a servicer to timely respond to a borrower's qualified written request (QWR). 12 U.S.C. § 2605(e). To recover damages, a borrower must show that their loss is "related to the RESPA violation itself." *See* 12 U.S.C. § 2605(f). Here, borrower reinstated his account according to the amount quoted by a servicer representative. His account, however, remained delinquent and servicer continued with foreclosure. After servicer recorded the NOD, borrower sent servicer a QWR, requesting itemized statements and an explanation as to why servicer felt borrower had not reinstated his mortgage. Although servicer responded to the QWR, it did not provide the requested itemizations or explanation. Borrower alleged servicer's continued refusal to provide accurate account information worsened his already damaged credit (which he acknowledged was originally damaged by his default) and prevented him from fully reinstating his loan earlier than he eventually did. Because injury to a borrower's credit score sufficiently constitutes damages under RESPA, the court found borrower to have adequately alleged a RESPA violation and damages.

The Fair Credit Reporting Act (FCRA) requires that, upon notice from a credit reporting agency (CRA), "furnishers" of credit information must "modify, delete, or permanently block the reporting of information the furnisher finds to be 'inaccurate or incomplete.'" To do so, furnishers must reasonably investigate a borrower's dispute. Here, borrower hired a "credit cleaning service" to inform the CRAs that he disputed servicer's report of his delinquency after his attempted reinstatement. No apparent changes were ever made to his credit scores, so borrower accused servicer of never reporting the results of its internal investigation to the CRAs. The court rejected servicer's argument that because borrower did not alert the CRAs of his credit dispute *himself*, but rather hired a service to do so, he failed to allege a valid FCRA claim. Servicer presented no authority requiring the dispute notice to come from the consumer personally, rather than from an appointed agent. The court also found borrower adequately pled that servicer had not reported the results of its required investigation to the CRAs. "Whatever the results of its investigation, [servicer] was required to report *something* to the CRA," and allegedly reported nothing. The court denied servicer's motion to dismiss borrower's FCRA claim.

HAMP Eligibility is Not Required for a Promissory Estoppel Claim Based on TPP

Natan v. Citimortgage, 2014 WL 4923091 (C.D. Cal. Oct. 1, 2014): Promissory estoppel claims require a clear and unambiguous promise. Under *Corvello v. Wells Fargo, N.A.*, 728 F.3d 878 (9th Cir. 2013), servicers that enter HAMP trial period plans with borrowers are contractually obligated to offer TPP-compliant borrowers permanent modifications. The *Corvello* court, however, relied on the *language* in the TPP to reach this conclusion, not the fact that a *HAMP* TPP was at issue. Here, borrowers in a class action entered into proprietary TPPs with servicer, complied with the TPP terms, but were not granted permanent modifications. Borrowers then brought a promissory estoppel claim against servicer for failing to fulfill its promises to modify. The court found the TPP at issue “so hopelessly ambiguous and poorly drafted” that it could not bar the PE claim even if, as servicer contended, borrowers were not HAMP eligible. Nothing in *Corvello* suggests that borrowers must be HAMP eligible to bring contract-related claims based on TPPs. The court denied servicer’s MTD borrowers’ PE claims.

Servicing Transfer: Cross Summary Judgment Motions Denied on Breach of Contract Claim

Rampp v. Ocwen Fin. Corp., 2014 WL 4912930 (S.D. Cal. Sept. 29, 2014): Breach of contract claims require borrowers to show the existence of an enforceable contract, borrower’s performance or excused non-performance, servicer’s breach, and damages. A servicer may defend a breach of contract claim by showing it agreed to a modification based on borrower’s “misrepresentation, concealment, circumvention, or unfair practice.” *See* CC § 3391(3). Here, borrowers entered into a permanent loan modification (which included a principal reduction) with their original servicer, signing modification documents asserting they occupied the property as their primary residence. At a subsequent deposition, each borrower admitted they were living elsewhere when they signed the modification agreement. Once the modification was in place, borrowers’ original servicer transferred its servicing rights. The new servicer refused to honor the modification and rejected borrowers’ modified payments. Borrowers brought a breach of contract claim and moved for summary judgment, as did the transferee servicer, arguing the modification agreement was unenforceable because borrowers lied about living at the property. While the court agreed with servicer that borrowers misrepresented their use of the home, and therefore denied borrowers summary judgment on their breach claim, it also found that servicer had not established that this misrepresentation actually induced the original servicer to agree to the modification, or that it was a material aspect of the modification agreement. Accordingly, the court also denied servicer's summary judgment motion. Transferee servicer and the loan beneficiary also argued that neither entity could honor the modification because the controlling pooling and servicing agreement (PSA) prohibits principal reductions. The court also rejected this argument. As the beneficiary's agent, transferee servicer bound both itself and the beneficiary to the existing modification agreement when it purchased the servicing rights. Further, even if the terms of the modification ran afoul of the PSA, honoring the modification was not impossible or inequitable. The court denied servicer's SJM based on this defense as well.

FCRA Class Action: Short Sales Inaccurately Reported as Foreclosure & Bankruptcies

Shaw v. Experian Information Solutions, Inc., __ F. Supp. 3d __, 2014 WL 4824720 (S.D. Cal. Sept. 29, 2014): The Fair Credit Reporting Act (FCRA) requires "furnishers" of credit information—like mortgage servicers—to report accurate information to credit reporting agencies (CRAs). If a borrower disputes credit information with a CRA, the CRA notifies the furnisher, which must then conduct an investigation and correct any inaccuracies. *See* 15 U.S.C. § 1681s-2(b)(1). Here, borrowers brought suit against their mortgage servicers on behalf of various classes of borrowers who all completed short sales of their property. The three named plaintiffs each alleged their servicers incorrectly coded their short sales, inaccurately reporting to CRAs that borrowers had instead undergone bankruptcies and foreclosures. Borrowers reported the inaccuracies to the CRAs, which notified the servicers. Borrower claimed servicers then failed to conduct reasonable investigations, as evidenced by their failure to correct the inaccurate information. As a result, borrowers were denied credit and mortgage loan opportunities. The court decided these allegations sufficiently state a viable FCRA claim against servicers, as furnishers of credit information, and denied servicer's MTD. The court also concluded it was too early in litigation to “test . . . the propriety of class allegations,” and so denied servicer’s request to strike those allegations.

Recent Regulatory Updates

Fannie Mae Servicing Announcement 2014-17 (Oct. 1, 2014)

Streamlined Modification Eligibility Requirements (effective Dec. 1, 2014)

Previously, Fannie Mae required that a mortgage loan be no more than 720 days delinquent to be eligible for a streamlined modification. That restriction no longer exists: any mortgage loan that was previously ineligible for a modification because of the 720-day limit, but that is otherwise eligible, must be evaluated for a streamlined modification. If the loan is determined eligible, the servicer must send the borrower a streamlined modification offer within 15 days of the eligibility determination.

Freddie Mac Bulletin 2014-17 (Oct. 1, 2014)

Streamlined Modification Eligibility Requirements (effective for evaluations conducted on or after Apr. 1, 2015)

Currently, a borrower must be between 90 and 720 days delinquent to be eligible for a streamlined modification. The 720-day cap will not exist after April 15, 2015. Servicers must then evaluate borrowers who have either never been evaluated for a streamlined modification or who were previously determined to be ineligible due to the 720-day cap. If a borrower is determined eligible, the servicer must send at least one solicitation that includes the Streamlined Modification Solicitation Letter and the Streamlined Modification Trial Period Plan Notice no later than 15 days after the eligibility determination, as long as it is not at least 60 days prior to the foreclosure sale date for a judicial foreclosure, or at least 30 days prior to the sale date for a non-judicial foreclosure.

HAMP Supplemental Directive 14-03 (effective Sept. 30, 2014 unless otherwise noted)

Consideration of HAMP Loans Prior to Loss of Good Standing (effective Jan. 1, 2015)

Previously, a servicer could not re-modify a loan that was permanently modified under HAMP until either the loan lost good standing or more than five years had passed since the modification's effective date. Now, a loan that was permanently modified may be re-modified, regardless of loss of good standing, as long as the borrower has experienced a change in circumstances, or at least 12 months have passed since the modification's effective date. The servicer must notify the borrower of the impact of a re-modification, and must also maintain evidence of such notice. Any loan that was permanently modified under HAMP Tier 1 must be considered for HAMP Tier 2 before being considered for other loss mitigation alternatives. Note that if a borrower with a permanently modified loan enters a trial period for another modification, the borrower may no longer receive borrower, servicer, or investor incentives under the existing, permanent modification. This is true even if the loan is not ultimately re-modified and remains subject to the terms of the existing, permanent modification.

Evaluation of Borrowers with Interest Rate Step-Ups (effective for HAMP evaluations conducted on or after Jan. 1, 2015)

For borrowers who have an interest rate step-up scheduled *within* 120 days after the date of the HAMP evaluation, the monthly mortgage payment used to determine HAMP eligibility is the new monthly payment *after* the interest rate step-up, not the payment in effect at the time of the evaluation. Also, the interest rate used to determine eligibility will be the stepped-up interest rate, not the rate in effect at the time of evaluation. This guidance will particularly affect borrowers with Tier 1 modifications who are approaching the five-year anniversary of the modification. For borrowers who have an interest rate step-up scheduled *more than* 120 days after the date of the evaluation, the monthly mortgage payment and interest rate used to determine HAMP eligibility will be the borrower's current scheduled monthly payment and the interest rate in effect at the time of evaluation.

Borrower Solicitation

Before September 30, 2014, servicers could—but were not required to—proactively solicit a borrower for HAMP Tier 2 if the borrower has lost good standing under a Tier 1 permanent modification. Now, servicers *must* solicit these borrowers.

MHA Outreach and Borrower Intake Project

As of September 30, 2014, counseling agencies can no longer submit borrower Initial Packages via Hope LoanPort. Servicers must complete underwriting determinations on submitted applications by December 15, 2014.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

DATE: 10/21/2014 TIME: 02:00:00 PM DEPT: 53

JUDICIAL OFFICER PRESIDING: Steven Rodda
CLERK: E. Brown
REPORTER/ERM:
BAILIFF/COURT ATTENDANT: Green, J., C. Chambers

CASE NO: **34-2014-00159785-CU-OR-GDS** CASE INIT.DATE: 03/06/2014
CASE TITLE: **Leonard vs. JPMorgan Chase Bank NA**
CASE CATEGORY: Civil - Unlimited

EVENT ID/DOCUMENT ID: ,11620098
EVENT TYPE: Hearing on Demurrer - Civil Law and Motion - Demurrer/JOP
MOVING PARTY: JPMorgan Chase Bank NA
CAUSAL DOCUMENT/DATE FILED: Demurrer, 07/31/2014

APPEARANCES
Ted A Greene, counsel, present for Plaintiff(s).
Jennifer M Porter, counsel, present for Defendant(s) telephonically.
Christopher Fry, counsel present for plaintiff
Marvin Adviento, counsel present for National Default Servicing, telephonically

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Nature of Proceeding: Hearing on Demurrer (Joinder by National Default Servicing Corporation)

TENTATIVE RULING

Defendant JPMorgan Chase Bank, N.A.'s demurrer to Plaintiff Perry Leonard's complaint is ruled upon as follows.

In this foreclosure action, Plaintiff alleges causes of action for violations of Civil Code §§ 2923.6, 2924.11, negligence per se and for violations of Bus. & Prof. Code § 17200. The Court previously granted a preliminary injunction precluding Defendant from foreclosing.

Defendant National Default Servicing Corporation's joinder is granted.

Defendant's request for judicial notice is granted. (*See Poseidon Devel., Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117-18; see also *Stratford Irrig. Dist. v. Empire Water Co.* (1941) 44 Cal.App.2d 61, 68 [recorded land documents, not contracts, are the subject of judicial notice on demurrer].) The court, however, does not accept the truth of any facts within the judicially noticed documents except to the extent such facts are beyond reasonable dispute. (*See Poseidon Devel*., 152 Cal. App.4th at 1117-18.) *see also Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal. App.4th 256, 265 ("[A] court may take judicial notice of the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in the recorded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity.")

First Cause of Action (Violation of Civil Code § 2923.6, et seq.)

Defendant's demurrer is overruled. Defendant argues that the instant cause of action is moot because it has since rescinded the notice of trustee's sale. (RJN Exh. 8.) Defendant argues that pursuant to Civil

Code §§ 2924.12(c) and 2924.19(c), a lender/servicer may avoid liability if it rescind a notice of trustee's sale prior to a trustee's deed upon sale being recorded.

As of January 1, 2013, "The California Homeowner Bill of Rights went into effect and it offers homeowners greater protection during the foreclosure process. Cal.
Civ. Code § 2923.6(b) (2013). Section 2923.6(b) states "it is the intent of the
legislature that the mortgage servicer offer the borrower a loan modification or work out a plan if such a modification or plan is consistent with its contractual or
other authority." The statute further provides that "if a borrower submits a complete application for a first lien loan modification . . . the mortgage servicer . . . shall not record a notice of default or notice of sale, or conduct a trustee's sale, while the complete first lien loan modification application is pending." Cal. Civ. Code § 2923.6(c) (2013). See also § 2924.12, which provides, in part: "(a) (1) If a trustee's deed upon sale has not been recorded, a borrower may bring an action for injunctive relief to enjoin a material violation of Section 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17.

Civil Code §§ 2924.12(c), 2924.19(c) both provide that a lender/servicer "shall not be liable for any violation that it has corrected and remedied prior to the recordation of a trustee's deed upon sale..." However, the statutes do not, as Defendant argues, provide that a lender/servicer avoids liability in the event it rescinds a notice of trustee's sale alone. Indeed, liberally construed, the Complaint can be read to allege that Defendant improperly recorded a notice of default and a notice of trustee's sale in violation of Civil Code § 2923.6. (Comp. 4:12-16.) While it may be that Defendant may not be liable for monetary damages given that a notice of trustee's sale has not been recorded, the very authority cited by Defendant confirms that the cause of action may be maintained, given that the request for judicial notice does not reflect that the notice of default has been rescinded. (*Ellis v. Bank of America, N.A*. (C.D.Cal. Oct. 28, 2013) 2013 U.S.Dist.LEXIS 157173 *10-11) There, the HOBR cause of action failed because the Plaintiff alleged that a notice of rescission of both a notice of default and the notice of sale had been executed and thus there was no current foreclosure activity against the property. By contrast, here, only the notice of sale has been rescinded, not the notice of default and there is still currently foreclosure activity against the property as to which, at a minimum, Plaintiff can seek injunctive relief. Defendant cannot, on this pleading motion, demonstrate as a matter of law that the first cause of action is moot.

Defendant's argument that it is not required to rescind the notice of default because Plaintiff cannot demonstrate that it was recorded while a complete loan modification application was pending is a factual one not appropriately resolved on a demurrer. Indeed, while he alleged that he submitted a loan modification request in 2013 which he rescinded, he does not allege the specific date it was submitted. Thus, the defect that Defendant urges, specifically, that the modification request was rescinded before the notice of default was recorded in October 2013, does not appear on the face of the complaint. The argument that a request for modification assistance is not a complete loan modification application with all the necessary documents as defined by the statutes is a factual issue.

The Court need not address Defendant's argument that Section 2923.6 does not impose any duty to modify a loan as Plaintiff does not allege such a theory in the first cause of action. Though to the extent that Defendant argues that there is no private right of action to seek relief pursuant to Section 2923.6, for example, by seeking to enjoin Defendant from foreclosing, as Plaintiff has done here, Defendant is incorrect. The statutes clearly allow a borrower to seek such relief. (Civ. Code § 2924.12(a) [allowing action for injunctive relief for violation of § 2923.6 when a trustee's deed upon sale has not been recorded].)

As a result, the demurrer to the first cause of action is overruled.

<u>Second Cause of Action (Violation of Civil Code § 2924.11, et seq.)</u>

Defendant's demurrer is overruled. Section 2924.11(f) provides that "[t]he mortgage servicer shall not collect any late fees for periods during which a complete first lien loan modification is under consideration or a denial is being appealed, the borrower is making timely modification payments, or a foreclosure prevention alternative is being evaluated or exercised." For pleading purposes, Plaintiff's allegations that he has been advised that the modification is in 'underwriting,' and is incurring delinquency related fees and charges" (Comp. 5:4-6) is sufficient to state a violation of § 2924.11(f). An allegation that Defendant is charging late fees while the complete loan modification is under consideration is sufficient to demonstrate for pleading purposes that Defendant is seeking to "collect" late fees in violation of § 2924.11(f). The non-binding authority cited by Defendant does not, as it asserts, hold that a borrower must actually allege that it paid late fees. (*Stokes v. CitiMortgage, Inc*. (C.D.Cal. Sept. 3, 2014) U.S.Dist. LEXIS 125655 *29 [finding a Section 2924.11(f) cause of action deficient only because the borrowers failed to allege they submitted a complete loan modification application].) While Defendant argues that Plaintiff has not alleged that any fees have actually been collected or provide any specific details regarding the nature of the fees allegedly incurred, the Court finds that no further specificity is required at this stage. In addition, while Defendant again argues that Plaintiff has not alleged he submitted a complete loan modification at the relevant time is rejected for the same reasons discussed above.

<u>Third Cause of Action (Negligence Per Se)</u>

Defendant's demurrer is overruled. Defendant is correct that negligence per se is a rule of evidence. However, that does not require that the demurrer be sustained. The label on the cause of action is not controlling and thus the Court analyzes whether Plaintiff has properly alleged a negligence cause of action. The Court finds that Plaintiff adequately alleged a duty of care based upon the requirements of the HOBR.

Defendant argues that the cause of action simply involves allegations regarding its conventional role as a lender or otherwise involves duties that would only arise from the contractual relationship between the parties. "[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." (*Nymark v. Heart Federal Sav. & Loan Assoc.* (1991) 231 Cal.App.3d 1089, 1096.)

However, as recent cases have recognized, *Nymark* is but a general rule, as a "lender owes a duty to a borrower not to make material misrepresentations about the status of an application for a loan modification...It is foreseeable that a borrower might be harmed by an inaccurate or untimely communication about a foreclosure sale or about the status of a loan modification application, and the connection between the misrepresentation and the injury suffered could be close." (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.Ap.4th 49, 68-69.) In addition, recent authority has recognized that a financial institution owes a duty of reasonable care in processing a loan modification at least where it was alleged that the defendants agreed to consider loan modifications. (*Alvarez v. BAC Home Loans Servicing, L.P*. (2014) 228 Cal.App.4th 941, 949-951.) Such duty is supported by the HOBR. Here, Plaintiff alleged that he was under a loan modification review and thus has alleged facts which would allow the for the Court to find that Defendant owed them a duty of reasonable care in connection with the loan modification review.

The Court rejects Defendant's argument that Plaintiff has not demonstrated damages because he admitted he defaulted on the loan in 2013. Indeed, he alleged that based on Defendant's conduct, he suffered "excessive interest accumulation, negative amortization, loss of equity, destruction of credit standing, [etc.]." (Comp. 5:23-25.) While Plaintiff may have been in default, this does not preclude him from seeking damages based on a negligence theory arising out of the loan modification process itself.

Fourth Cause of Action (Bus. § Prof. Code § 17200)

Defendant's demurrer is overruled. Defendant argues that Plaintiff failed to allege standing and any violation of § 17200. The Court disagrees on both counts.

To demonstrate standing for purposes of § 17200, Plaintiff must show he suffered (1) an economic injury, and (2) show that the injury was caused by the alleged unfair business practice. (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 322.) While Defendant argues that Plaintiff cannot make such a showing because his house has not been sold and he defaulted on the loan, Plaintiff alleged that he was injured as a result of Defendant's conduct in connection the alleged dual tracking in violation of the HOBR. Again, for example, he alleged that despite the fact that he was under complete loan review, he is incurring late fees despite the HOBR's prohibition of collecting late fees during such time. This is a sufficient allegation of standing.

In addition, given that Plaintiff sufficiently stated violations of Civil Code §§ 2923.6 and 2924.11(f) as set forth above, contrary to Defendant's argument, he has necessarily stated a cause of action for a violation of § 17200 under the unlawful prong of the statute.

The Court need not also determine whether a causes of action has been stated under the unfair or fraudulent prongs of § 17200.

The demurrer is overruled in its entirety. Defendant shall file and serve its answer no later than October 31, 2014.

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or other notice is required.

COURT RULING

The matter was argued and submitted. The Court affirmed the tentative ruling.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ELIZABETH GONZALES,

Plaintiff,

v.

CITIMORTGAGE, INC, *et al.*,

Defendants.
___________________________________/

No. C-14-4059 EMC

ORDER GRANTING PRELIMINARY INJUNCTION

On September 12, 2014, the Court granted Plaintiff's ex parte application for a temporary restraining order, prohibiting Defendant CitiMortgage, Inc. from foreclosing on Plaintiff's home until the Court had an opportunity to receive briefing and hold a hearing on whether a preliminary injunction should issue. Dkt. No. 15. The Court held a hearing on this question on October 10, 2014. For the reasons stated on the record, as supplemented herein, Plaintiff's request for a preliminary injunction will be **GRANTED**.

"'A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tip in his favor, and that an injunction is in the public interest.'" *Network Automation, Inc. v. Advanced Sys. Concepts*, 638 F.3d 1137, 1144 (9th Cir. 2011) (quoting *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7 (2008)). Where the balance of equities tip sharply in plaintiff's favor and the irreparable harm and public interest factors are satisfied, a preliminary injunction may issue where plaintiff shows the existence of "serious questions going to the merits" of her claim. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

Plaintiff has established a likelihood of irreparable harm. *See Saba v. Caplan*, No. C10-02113 SBA, 2010 WL 2681987, at *5 (N.D. Cal. July 6, 2010) ("The loss of one's home through foreclosure generally is considered sufficient to establish irreparable harm."). Further, the balance of equities and public interest weigh in favor of granting a preliminary injunction as cost to the defendant of the injunction – the delaying of foreclosure by a matter of months – pales in comparison to the risk of irreparable harm should Plaintiff lose her home. *See, e.g., Brinker v. JP Morgan Chase, N.A.*, No. 13-CV-01344-LHK, 2013 WL 7798675 (N.D. Cal. May 17, 2013) ("Moreover, the balance of equities tips in Plaintiff's favor because, in the absence of preliminary injunctive relief, Plaintiff faces the sale of his property. In contrast, injunctive relief will only delay Defendant's sale of the Property."); *Sencion v. Saxon Mortg. Servs., LLC*, No. 10-cv-3108-JF, 2011 WL 1364007, at *3 (N.D. Cal. Apr. 11, 2011) ("[I]t is in the public interest to allow homeowners an opportunity to pursue what appear to be valid claims before being displaced from their homes.").

Finally, Plaintiff has established that serious questions exist as to her claim under California Civil Code § 2923.6. Specifically, a factual dispute exists as to whether Plaintiff completed the documentation Defendant required and needed. While Defendant maintains that the package she submitted was on the wrong form, Plaintiff contends she did not see the request to submit the package on a different form. Nor has Defendant established on the current record that the completed forms submitted by Plaintiff were not adequate to complete the modification application. Finally, there is a factual dispute as to whether Plaintiff suffered a material change in her financial condition after the date of her last loan modification. Thus, serious questions exist as to whether the exception contained at § 2923.6(g) applied to excuse Defendant of the duty to consider Plaintiff's loan modification application.[1]

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[1]Defendant currently has a motion to dismiss and a motion to strike which, in part, argue for dismissal of the § 2923.6 claim based on the application of § 2323.6(g). This motion is currently set for hearing on November 13, 2014 and briefing has not yet completed. This Court's finding that serious questions exist on the merits of this claim essentially establishes that Plaintiff could state a claim under § 2323.6. However, the Court relied on a number of documents and facts that are not contained in the complaint. Accordingly, in order to avoid needless expense and motion practice in light of this Court's ruling, the briefing on Defendant's motions is **SUSPENDED** and the hearing date is **VACATED**. The parties are **ORDERED** to meet and confer in an attempt to reach a stipulation as to the filing of an amended complaint that would address some, if not all, of Defendant's arguments. If a stipulation is reached, Plaintiff shall file an amended complaint by

Accordingly, Plaintiff's request for a preliminary injunction is **GRANTED**. Under Federal Rule of Civil Procedure 65(c), a court may only issue a preliminary injunction "if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). "Despite the seemingly mandatory language, 'Rule 65(c) invests the district court with discretion as to the amount of security required, *if any*.'" *Johnson v. Couturier*, 572 F.3d 1067, 1086 (9th Cir. 2009) (quoting *Jorgensen v. Cassiday*, 320 F.3d 906, 919 (9th Cir. 2003) (emphasis in original)). For the reasons stated on the record, the Court orders Plaintiff to submit $2,000 a month to the Court's registry as security for any damage the Defendant may suffer should it eventually be shown that they have been wrongfully enjoined. Plaintiff's first payment will be due within 10 days of this order and subsequent payments will be made on the same date every month. Plaintiff shall provide Defendant with evidence of each payment made. Failure to make timely payments will result in the dissolution of the preliminary injunction.

IT IS SO ORDERED.

Dated: October 10, 2014

EDWARD M. CHEN
United States District Judge

October 22, 2014 and Defendant shall have 21 days to respond.

The Case Management Conference in this matter is rescheduled for Thursday, November 13, 2014 at 9:30am.