

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

KENG HEE PAIK, an individual,

Plaintiff,

v.

No. C 10-04016 WHA

WELLS FARGO BANK, N.A., Successor by  
Merger to Wells Fargo Bank Southwest, NA  
formerly known as Wachovia Mortgage FSB  
formerly known as World Savings Bank FSB,  
WELLS HOME LOAN SERVICING, LP, a  
Texas Limited Partnership, and NDEX WEST,  
LLC, a California Corporation,

Defendants.

**MEMORANDUM OPINION  
AND ORDER GRANTING  
PRELIMINARY INJUNCTION**

**INTRODUCTION**

Plaintiff filed an application for a temporary restraining order and order to show cause regarding a preliminary injunction. Because the application indicated that a foreclosure sale was set for January 10, 2011, expedited briefing was ordered, and a hearing held on January 7. Plaintiff's request for a preliminary injunction was granted at that hearing and a written order issued that same day. This opinion was withheld to give the parties an opportunity to meet and confer. Given that they have not resolved the matter, this opinion is issued in support of the order granting a preliminary injunction.

**STATEMENT**

Plaintiff filed this action in state court asserting five claims: (1) unfair business practices under California Business and Professions Code Section 17200; (2) wrongful foreclosure under

1 California Civil Code Sections 2923.5, 2923.52, 2923.53, and 2924, *et seq.*; (3) breach of  
2 contract; (4) quiet title; and (5) declaratory relief.

3 The complaint alleges that on January 20, 2006, plaintiff entered into written loan  
4 agreements with World Savings Bank FSB, and that the loan was later assigned to Wells Fargo  
5 Bank, N.A. (Compl. ¶ 13). “Wells” agreed to loan plaintiff \$750,000.00, secured by the  
6 property (*ibid.*). Wells is named as the beneficiary under the deed of trust. Golden West  
7 Savings Association Service Co. was listed as trustee under the deed of trust. “Wells,  
8 using[]the name Wachovia Home Loans,” is the servicer for the loans (*ibid.*). A copy of the  
9 deed of trust is attached to the complaint.

10 The complaint further alleges that plaintiff was not provided with “any documents  
11 whatsoever” at or before “the closing” (Compl. ¶ 14). Plaintiff “performed dutifully under the  
12 Loan until 2010 when Plaintiff’s income was severely reduced” (Compl. ¶ 16). As a result she  
13 was unable to make all of the required payments (*ibid.*). On April 16, 2010, NDeX, as trustee  
14 for Wells, recorded a notice of default and election to sell under the deed of trust on plaintiff’s  
15 property (Compl. ¶ 17). At no time prior to recording the notice of default did “Wells, NDeX,  
16 the beneficiary, or their agents” contact plaintiff to notify her of her rights with regard to the  
17 recording or to provide notices required by law (*ibid.*). Therefore, the complaint asserts that the  
18 notice of default — a copy of which was also attached to the complaint — was void.

19 On May 13, NDeX was substituted as trustee under the deed of trust for Golden West  
20 (Compl. ¶ 19 and Exh. C). “Sometime thereafter,” plaintiff contacted Wells to request a loan  
21 modification or work out plan (Compl. ¶ 20). It was “at this time” that she learned that  
22 defendants had initiated the foreclosure process (*ibid.*). Wells informed plaintiff that defendants  
23 were going to proceed with the foreclosure process even though plaintiff never received notice  
24 (*ibid.*). “Shortly thereafter,” plaintiff requested an accounting, but she has yet to receive one  
25 (Compl. ¶ 21). “Shortly thereafter,” plaintiff initiated a loan modification plan with Wells,  
26 submitted a loan modification package, and submitted all information requested by Wells in a  
27 timely and complete manner (Compl. ¶ 22–25). Thereafter, Wells represented to plaintiff  
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1 without justification that it would not enter into any loan modification plan with plaintiff and  
2 continued with foreclosure proceedings (Compl. ¶ 26).

3 On July 22, NDeX, “as trustee for Wells,” set a date for the foreclosure sale of the  
4 property for August 9 (Compl. ¶ 27 and Exh. D). “Plaintiff stands ready, willing, and able to  
5 pay the amounts due under the Loan and Deed of Trust, and is ready, willing, and able to make  
6 such payment at the times required of her by law” (Compl. ¶ 33). The complaint seeks relief in  
7 the form of an order that plaintiff has legal title to the property and quieting title, an order  
8 enjoining defendants from selling the property, damages, fees, costs, and interest.

9 Plaintiff filed suit in state court and defendants removed, asserting diversity jurisdiction.  
10 Defendant Wachovia Mortgage, a division of Wells Fargo Bank, N.A., filed a motion to  
11 dismiss, which will be resolved by separate order.

12 Plaintiff filed an application for a temporary restraining order and order to show cause  
13 regarding a preliminary injunction. The application represented that a foreclosure sale of the  
14 property was scheduled to occur on January 10. Plaintiff argued that she has a likelihood of  
15 success on the merits and that she will suffer irreparable injury if her home is sold. In support  
16 of her application, plaintiff submitted a declaration which corroborates factual allegations in the  
17 complaint, including that she was not contacted by defendants prior to their recording the notice  
18 of default to notify her of her rights.

19 Along with its opposition to the application, defendant Wachovia Mortgage, a division  
20 of Wells Fargo Bank, N.A., submitted two letters from plaintiff from her loan file. One is dated  
21 December 28, 2009. It includes financial information submitted by plaintiff seemingly because  
22 she was told that she “need[s] to change [her] REO schedule.” The other correspondence from  
23 plaintiff submitted by defendants is a fax transmittal dated April 21, 2010, in which she stated:  
24 “I’d like to resubmit for loan modification. Please advise me what is needed.” Defendant  
25 argued that this evidence (and the complaint itself) support its contention that “there was  
26 extensive contact with Wachovia concerning loan modification” and that “plaintiff’s  
27 modification review occurred **prior to** the filing of the [notice of default]” (Opp. 1–2 (bold in  
28

1 original)). Defendant stated in briefing that this denial occurred in February 2010 but there is  
2 nothing in the record to verify (*see ibid.*).

3 As stated, expedited briefing on the application was ordered, and argument was heard on  
4 January 7. A preliminary injunction was granted at the hearing. Counsel discussed the issue of  
5 an undertaking, but were unprepared to fix an appropriate amount. Counsel requested time to  
6 meet and confer to resolve the entire matter before this opinion issued. It was agreed that a  
7 short written order would issue to memorialize the ruling at the hearing, that counsel would  
8 have until the close of business on Wednesday, January 12, to meet and confer and submit a  
9 statement regarding their resolution or an amount for an undertaking, and that if they failed to  
10 resolve the matter this opinion would issue on Thursday, January 13. On January 12 defense  
11 counsel filed an application to delay the filing of this opinion, continue the hearing on the  
12 motion to dismiss, and advance a settlement conference. Plaintiff did not submit anything.  
13 Defense counsel did not address an undertaking.

#### 14 ANALYSIS

15 A plaintiff seeking a preliminary injunction must show that she is likely to succeed on  
16 the merits, that she is likely to suffer irreparable harm in the absence of preliminary relief, that  
17 the balance of equities tips in her favor, and that an injunction is in the public interest. *Winter v.*  
18 *Nat'l Res. Def. Council*, 129 S.Ct. 365, 374 (2008). In balancing these factors, “‘serious  
19 questions going to the merits’ and a hardship balance that tips sharply towards the plaintiff can  
20 support issuance of an injunction, so long as the plaintiff also shows a likelihood of irreparable  
21 injury and that the injunction is in the public interest.” *Alliance for Wild Rockies v. Cottrell*,  
22 622 F.3d 1045, 1053 (9th Cir. 2010).

#### 23 1. LIKELIHOOD OF SUCCESS ON THE MERITS

24 Plaintiff has presented a serious question on the merits. California Civil Code Section  
25 2923.5 requires:

26 [B]efore a notice of default may be filed, that a lender contact the borrower in  
27 person or by phone to ‘assess’ the borrower’s financial situation and ‘explore’  
28 options to prevent foreclosure. . . . ‘A mortgagee, beneficiary, or authorized  
agent shall contact the borrower in person or by telephone in order to assess the  
borrower’s financial situation and explore options for the borrower to avoid

1           *foreclosure.* There is nothing in section 2923.5 that requires the lender to  
2           rewrite or modify the loan.

3           *Mabry v. Superior Court*, 185 Cal. App. 4th 208, 213–14 (2010) (footnote omitted) (emphasis  
4           added). In other words, the lender must notify the borrower and help her assess her options for  
5           modification but need not automatically provide modification. “[T]he remedy for  
6           noncompliance [with Section 2932.5] is a simple postponement of the foreclosure sale, nothing  
7           more.” *Id.* at 214. The borrower need not tender the full amount of indebtedness to be entitled  
8           to her rights under Section 2923.5, and the remedy of postponement is not preempted by federal  
9           law. *Id.* at 225–31.

10           Defendant Wachovia Mortgage, a division of Wells Fargo Bank, N.A., the only  
11           defendant to oppose the application, submitted no evidence that it complied with Section 2923.5  
12           before a notice of default was entered. Again, the notice was recorded on April 16, 2010.  
13           Defendant claims, however, that “there was extensive contact with Wachovia concerning loan  
14           modification” (Opp. 1). Defendant points to the allegations in the complaint in support, but it  
15           misleads the reader because, *first*, such allegations indicate the parties were in contact after  
16           entry of the notice of default, and *second*, they indicate plaintiff’s efforts to contact defendants  
17           and not the other way around. Moreover, defendant states that “plaintiff’s modification review  
18           occurred **prior to** the filing of the [notice of default]” (Opp. 2 (bold in original)), but defendant  
19           *submitted no evidence or statements under oath to support this statement.*

20           As stated, defendant submitted two letters from plaintiff from her loan file. One, dated  
21           December 28, 2009, includes financial information submitted by plaintiff seemingly because  
22           she was told that she “need[s] to change [her] REO schedule.” Based on this evidence  
23           defendant argues that plaintiff was aware of foreclosure proceedings prior to the entry of the  
24           notice of default. There is no such indication in the correspondence, however. The letter  
25           includes financial information from plaintiff but gives no indication that defendant was  
26           considering loan modification or that statutorily-required notice was given. The other  
27           correspondence is a fax transmittal dated April 21, 2010, in which plaintiff stated: “I’d like to  
28           resubmit for loan modification. Please advise me what is needed.” Defendant argues that this  
          is proof that it considered an initial loan modification application prior to entry of notice of

1 default. Not so. Defendant asks us to take it at its word about what this fax means, but its  
2 inference goes too far and does not prove up the point. Defendant submits no declarations  
3 indicating that the notice required by Section 2923.5 was given. In fact, the dearth of evidence  
4 from defendant, in the face of plaintiff's clear statement to the contrary that defendants did not  
5 contact her to notify her of her rights prior to the recording of the notice of default, speaks  
6 volumes.

7 "If section 2923.5 is not complied with, then there is no valid notice of default, and  
8 without a valid notice of default, a foreclosure sale cannot proceed. The available, existing  
9 remedy is found in the ability of a court in section 2924g, subdivision (c)(1)(A), to postpone the  
10 sale until there has been compliance with section 2923.5." *Mabry*, 185 Cal. App. 4th at 223.

11 On the current record it appears likely that — at the least — defendants did not comply  
12 with their legal obligations attending contacting plaintiff prior to entry of notice of default, and  
13 that failure must be cured before any foreclosure sale can proceed. This failure can be the basis  
14 of plaintiff's California Business and Professions Code Section 17200 and breach of contract  
15 claims, and act as an independent right of action until such problems of notice have been cured.

16 Accordingly, other stated predicates to plaintiff's Section 17200, breach of contract, and  
17 wrongful foreclosure claims do not necessarily have to be meritorious for plaintiff to have a  
18 likelihood of success. Defendant argues that plaintiff's claim that she qualifies for a loan  
19 modification is a dud, because entities that have comprehensive loan modification programs —  
20 as defendant Wells Fargo does — are exempt from California Civil Code Section 2923.52.  
21 Section 2923.52 is different from Section 2923.5. Section 2923.52 sets forth a delay of notice  
22 of sale "to allow the parties to pursue a loan modification to prevent foreclosure." A mortgage  
23 loan servicer that has implemented a qualifying comprehensive loan modification program is  
24 exempt from Section 2923.52. Yet defendant is not exempt from Section 2923.5. So even  
25 assuming its exemption from Section 2923.52, such exemption does not cure the problems  
26 identified above.

27 At the same time, defendant ignores other potential predicates in the complaint for  
28 plaintiff's claims. For example, the complaint states that plaintiff long ago requested an

1 accounting but has yet to receive one. It may be that at the end of the day plaintiff will not be  
2 entitled to loan modification. But plaintiff has presented at least “serious questions going to the  
3 merits” based on her preliminary demonstration of other violations of California law by  
4 defendants. *See Alliance*, 622 F.3d at 1052–53.

5 **2. IRREPARABLE HARM**

6 It is the plaintiff’s burden to prove that “[s]he is likely to suffer irreparable harm in the  
7 absence of preliminary relief.” *Winter*, 129 S.Ct. at 374. In the context of preliminary  
8 injunctive relief, irreparable harm is established when a plaintiff is unlikely to be made whole  
9 by an award of monetary damages or some other legal remedy at a later date, in the ordinary  
10 course of litigation. *See Cal. Pharmacists Ass’n v. Maxwell-Jolly*, 563 F.3d 847, 851–52 (9th  
11 Cir. 2009).

12 Plaintiff is likely to suffer irreparable harm if the foreclosure sale goes forward. “There  
13 is nothing in section 2923.5 that even hints that noncompliance with the statute would cause any  
14 cloud on title after an otherwise properly conducted foreclosure sale. . . . [T]he *only* remedy  
15 provided is a postponement of the sale before it happens.” *Mabry*, 185 Cal. App. 4th at 235  
16 (emphasis in original). Plaintiff’s application states, “If the trustee’s sale is allowed to proceed  
17 before this action is resolved, the Plaintiff will . . . be rendered homeless, and she may lose her  
18 right in this action to any claim to the Property.” Money damages will not compensate plaintiff  
19 for this potential loss.

20 **3. BALANCING THE EQUITIES AND THE PUBLIC INTEREST**

21 Finally, the two remaining factors weigh in favor of granting the relief sought by  
22 plaintiff. Defendants’ interests are secured by the property and the undertaking set out below.  
23 There is not a great danger of damage to the property as it is plaintiff’s residence. And,  
24 importantly, plaintiff is entitled to her day in court to vindicate her right to statutorily-required  
25 notice. If in fact defendants did not comply with their obligations and we had not granted  
26 preliminary relief, we would have turned plaintiff out — potentially without recourse. This  
27 would not be the first time that a bank shirked its legal responsibilities to aid a struggling  
28 borrower trying to pay back her loan. It is in the public interest to allow such borrowers a full

1 and fair opportunity to show that they were not given all the benefits that the law afforded when  
2 they make a preliminary showing that something was amiss.

3 \* \* \*

4 For the foregoing reasons, this order finds that plaintiff has established serious questions  
5 going to the merits, that the hardship balance tips sharply towards the plaintiff, a likelihood of  
6 irreparable injury, and that an injunction is in the public interest. As such, a preliminary  
7 injunction is warranted.

8 **4. REQUEST FOR JUDICIAL NOTICE**

9 Concurrent to her filing an application for a temporary restraining order and order to  
10 show cause regarding a preliminary injunction, plaintiff filed a request for judicial notice of  
11 state court filings that preceded removal (Dkt. No. 24). FRE 201 states: “A judicially noticed  
12 fact must be one not subject to reasonable dispute in that it is either (1) generally known within  
13 the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by  
14 resort to sources whose accuracy cannot reasonably be questioned.” Moreover, “[a] court shall  
15 take judicial notice if requested by a party and supplied with the necessary information.”

16 It is unclear what plaintiff would judicially notice — The existence of these documents?  
17 The fact that they were filed in state court? The arguments in them? Plaintiff has not supplied  
18 necessary information for this Court to take judicial notice, so her request is denied.

19 **5. UNDERTAKING**

20 Plaintiff is required to provide an undertaking in the amount of \$8,000, plus the security  
21 in the house. At the end of 60 days, defendants can make a motion to increase this amount if it  
22 is inadequate to protect defendants.

23 The preliminary injunction will be deemed vacated without further order of the Court  
24 unless the undertaking is provided by January 27, 2011. Plaintiff must file proof that she has  
25 provided the undertaking by that date.



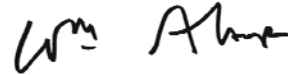
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**CONCLUSION**

Based upon the foregoing , plaintiff’s application for a preliminary injunction is **GRANTED.**\* Defendants are enjoined from conducting a deed of trust sale of or foreclosing on 114 Sutro Heights in San Francisco, California, without further order of this Court.

**IT IS SO ORDERED.**

Dated: January 13, 2011.



\_\_\_\_\_  
WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE

United States District Court  
For the Northern District of California

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\* Defendant’s application to delay the filing of this order, continue the hearing on the motion to dismiss, and advance a settlement conference with Magistrate Judge Zimmerman is **DENIED.** At the hearing on the preliminary injunction, the undersigned said he would delay issuing this order until Thursday, January 13, to give the parties an opportunity to meet and confer. A settlement did not materialize. The Magistrate Judge cannot advance the settlement conference as defendant requests.