2011 WL 2648656 (S.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, S.D. California.

Margaret CRUICKSHANK, an individual, Plaintiffs,
v.
WELLS FARGO BANK, N.A.; Wells Fargo Bank Southwest N.A.; Wachovia Mortgage F.S.B.; World Savings Bank, F.S.B.; Golden West Savings Association Service Co.; Executive Trustee Services; and Does 1 to 10, Inclusive, Defendants.

No. 10CV01545.
April 28, 2011.

Date: May 26, 2011
Time: 10:30 a.m.
Courtroom: 7
Courtroom 7

Plaintiff's Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction

Audrey Powers Thornton (SBN 118870), Thornton Koller, 2100 Palomar Airport Road, Ste. 213, Carlsbad, CA 92011, Tel. 760-688-0600, Fax 760-688-0610, Attorneys for Plaintiff Margaret Cruickshank.

The Honorable Judge Thomas J. Whelan.

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I. INTRODUCTION

Plaintiff, Margaret Cruickshank (hereinafter "Plaintiff") has brought this action for **financial** **elder** **abuse** against Defendants, and their predecessors, for engaging in fraudulent, and unfair predatory real estate practices targeting the Plaintiff, an **elderly** woman, a victim of such behavior and placing her in jeopardy of losing her home through foreclosure. This is a case of outright fraud by Defendants Wachovia Mortgage, a division of Wells Fargo Bank, N.A., formerly known as, Wachovia Mortgage, FSB, formerly known as, World Savings Bank, FSB, (collectively hereafter, "WACHOVIA"), and its agents who took advantage of the Plaintiff's age and of her deafness, and trapped her into two toxic loans which she did not understand and who sent her into a spiral of default and foreclosure, resulting in her admission into the hospital. Mrs. Cruickshank seeks damages caused by defendants' predatory lending practices and seeks equitable relief from the court.

Plaintiff requests that the Court issue a Preliminary Injunction to prevent Defendants from conducting a forced sale of Plaintiffs' home before a full trial on the merits of her claims is conducted or the case is otherwise disposed.

II. THE SECOND AMENDED COMPLAINT AND RECENT DEVELOPMENTS

Plaintiff has filed a Second Amended Complaint ("FAC") which alleges ten causes of action against Defendants seeking legal and equitable remedies based upon the unethical, unfair, predatory and otherwise unscrupulous conduct and practices of Defendants in their lending transactions with Plaintiff. Plaintiff has revised the complaint as directed by the court in its ruling on the previous Motion to Dismiss, (addressing the court's finding s concerning the statute of limitations, and the HOLA preempted acts, raised therein) and has refilled this Motion for Preliminary Injunction as directed by the court. Plaintiff has revised her complaint, as well, to include the plaintiffs recent discovery of facts concerning this subject loan transaction which were concealed by the defendants and, due to the defendant's refusal to produce any loan records to the plaintiff, were only discovered recently through investigation by her counsel, subsequent to the filing of the Complaint and First Amended Complaint.

II. STATEMENT OF FACTS

Plaintiff Margaret Cruickshank is currently 84 years of age, and at all times relevant was legally deaf and physically disabled. Plaintiff owns the real property located at 17470 Plaza Animado #161, San Diego, California 92128 (hereinafter "the subject property"). Plaintiff purchased the subject property in 1999 for the price of One Hundred Thirty-Eight Thousand Dollars ($138,000.00) with the intention of living in the home for the remainder of her life.

At all times herein, Defendant WACHOVIA had a practice of intentionally targeting unsophisticated, low-income or **elderly** people to sell them toxic loans that would create a substantial profit for defendants and which the borrowers would never be able to repay.

Defendants Wachovia had saddled the Plaintiff with a predatory Option ARM loan in 2005 that was unsafe for her and unsuitable. (Second Amended Complaint ("SAC"), Par.'s 16-19 Exhibits A and B to SAC.) This loan was an Adjustable Rate Mortgage with potential Negative Amortization, more commonly known as a Pay Option ARM. The minimum mortgage payments are calculated with a low teaser interest rate. The interest accruing is based on a much higher fully indexed rate, which amount is not explained in the loan documents. (See Declaration of Heather Yellen, par. 3.) Interest was accruing on Plaintiffs loan at a minimum of 4.930% and the low teaser payment only covered a portion of that amount. The interest rate could adjust as high as 11.95%. The fully indexed rate in February 2005 was 5.13% and increased to 7.64% in August 2007 (and it could adjust up to 11.95%). The unpaid principal balance could not exceed 125% of the principal amount originally borrowed by Plaintiff, and if the balance exceeded $312,000, the payment would recast and the minimum and interest only payment options would no longer be available. Plaintiffs monthly mortgage payment was $917.82, which reflects the minimum payment amount, and was the only payment amount disclosed on the Loan Note, in addition to a monthly escrow amount of approximately $142.00. (See Declaration of Heather Yellen, par. 4, 5, SAC Par. 17.)

In or about February 2005, Plaintiff was unemployed and lived on a fixed monthly income of approximately $1,660, which derived from a combination of Social Security payments and a surviving spouse pension benefit through Ford Motor Company. The standard housing and debt to income ratios are 33% for housing and 38% for debt to income. Based on the fully indexed mortgage payment and using Plaintiff's income, including taxes and insurance, Plaintiff's debt to income ratio would have exceeded 126.94% which would have disqualified Plaintiff from obtaining this loan. The loan was procedurally and substantively unconscionable because the true payment on the loan exceeded the amount that Plaintiff could afford to pay.

In early 2006. Plaintiff received an unsolicited telephone call from an individual named Phillip Franklin representing himself as a loan officer and/or agent of Defendant World Savings Bank. Plaintiff had not requested World Savings Bank or any

other **financial** entity to contact her about obtaining a new loan or refinancing her current loan. (See Declaration of Margaret Cruickshank, par. 3.)

At the time Phillip Franklin contacted Plaintiff, her fixed monthly income still totaled at most $1,660. There was substantial equity in her home and she was current on her mortgage. (See Declaration of Margaret Cruickshank, par. 4.)

During the 2006 phone conversation, in response to his questions, Plaintiff informed Phillip Franklin that her income had become insufficient to cover her escalating living and medical expenses, and inquired whether acquiring a “reverse mortgage” would allow her to use the equity in her home as income. (See Declaration of Margaret Cruickshank, par. 5.) During this phone call Plaintiff informed Mr. Franklin that she was 81 and had a severe hearing disability. (Dec. Margaret Cruickshank, par. 5, SAC Par. 21.) To further their Defendants' own predatory interests, when the Plaintiff requested a reverse mortgage from Defendants so that she could use the substantial equity in her home as income Defendants' agent, Mr. Franklin, falsely represented to her that she did not qualify for a reverse mortgage. (Dec. Margaret Cruickshank, par. 5, SAC Par. 22). However, contrary to Mr. Franklin's representations, reverse mortgages are specially designed for senior homeowners such as Plaintiff, and in this case would have been beneficial to helping the Plaintiffs **financial** circumstances. (SAC Par. 22).

Phillip Franklin instead coerced Mrs. Cruickshank into a new refinance package, that included another Pay Option ARM loan, and, in addition, a home equity line of credit in order to pull out equity in the Subject Property to pay for her living and medical expenses. (Dec. Margaret Cruickshank, par. 5.)

Mr. Franklin falsely dissuaded the Plaintiff from getting a reverse mortgage because it was in Mr. Franklin's best interest to convince Plaintiff to complete this loan transaction so he would make the commission on the loan which he would have forfeited by referring her to a reverse mortgage lender. Mr. Franklin also lied to Mrs. Cruickshank regarding her ability to qualify for a reverse mortgage because qualification for a reverse mortgage is contingent solely upon the equity in the property and the age of the applicant. When her home was appraised by World Savings for the Loan Approval of the new refinance loan, they used an appraised value of $400,000.00 to compute the Loan to Value Ratio of 77.5% which was based upon her age of 81 and the equity in her property, as established by the World Savings appraisal, which would have qualified the Plaintiff for a reverse mortgage. (SAC Par. 23, see Declaration of Heather Yellen, par. 6, Exhibit “C” to SAC - the refinance loan approval.) When the Plaintiff told Defendants that she was concerned and wanted their best **financial** advice on how to proceed. Mr. Franklin lied and fraudulently represented to her that the Loan Package were very safe low risk loans which was better than a reverse mortgage because it would protect the equity in her home unlike a reverse mortgage and that the loans were well suited for someone of her age at 81 being on a fixed income. (SAC Par. 26, Dec. Margaret Cruickshank, par. 5.) Believing Phillip Franklin, Plaintiff directed him to prepare the paperwork for what she believed was a Loan Package with two loans: (1) a refinance of her original Loan; and (2) a home equity line of credit (HELOC). (SAC Par. 26, see Dec. Margaret Cruickshank, par. 5.)

Plaintiff has just recently discovered, subsequent to the filing of her First Amended Complaint, that her original Loan was never refinanced by defendants, the refinance loan was never funded. (Dec. Margaret Cruickshank, par. 9.)

In order to induce Plaintiff to enter into the HELOC, WORLD SAVINGS and its' agents, including Mr. Franklin intentionally misrepresented to Plaintiff that she was receiving the HELOC as a part of a package deal, which should have included a refinance loan on her original 2005 Loan. (See Exhibit C to SAC.) Defendants concealed from the Plaintiff that they did not fund the refinance loan that she thought she would be getting at the loan's closing. Instead, unbeknownst to the Plaintiff, after the closing Defendants left the 2005 predatory loan in place, as well as saddling her with a home equity line of credit. (SAC Par. 28.)

Defendants lied to Mrs. Cruickshank about the transaction as a package of two loans, and about its benefit to her, so that they could sell her the HELOC, which would provide them with a substantial profit and would spiral her into foreclosure. The facts surrounding this loan transaction were purposefully hidden by WORLD SAVINGS and its agents and Does 1-10, to prevent Plaintiff, who was already susceptible to coercion due to her age and physical condition, from discovering the true nature of the transaction. Plaintiff was never informed that the promised refinance of the Loan secured by the first trust deed was never

funded and that she continued to be saddled with her original Loan and had only acquired a burdensome and deleterious home equity line of credit. (Dec. Margaret Cruickshank, par.12.)

Plaintiff repeatedly informed Mr. Franklin and WORLD SAVINGS that her monthly income was approximately $1,660.00. However, this information was disregarded by WORLD SAVINGS and its agents, including Mr. Franklin. Mr. Franklin instead misstated her monthly Plaintiff directed him to prepare the paperwork for what she believed was a Loan Package with two loans: (1) a refinance of her original Loan; and (2) a home equity line of credit (HELOC). (SAC Par. 26, see Dec. Margaret Cruickshank, par. 5.)

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Plaintiff repeatedly informed Mr. Franklin and WORLD SAVINGS that her monthly income was approximately $1,660.00. However, this information was disregarded by WORLD SAVINGS and its agents, including Mr. Franklin. Mr. Franklin instead misstated her monthly income as $6,000.00 on her Loan Application in order to secure Plaintiff the home equity line of credit. A true and correct copy of the final (unsigned) Loan Application for the home equity line of credit is attached to the SAC as Exhibit “D”. During the loan closing the Defendants took advantage of Mrs. Cruickshank's age and infirmities. Defendants only gave her a few minutes to review the massive stack of other loan documents given to her before they rushed her through the closing process. (See Dec. Margaret Cruickshank, par. 10.) Plaintiff has no knowledge that she signed or received the Loan Application that stated an income of $6000.00, but believes that the unsigned Loan Application could have been contained and intentionally embedded in the bundle of documents she received from Defendants' agents at closing in order to prevent her from becoming aware of Defendants' misconduct. Plaintiff was unaware that the loan documents falsely overstated her income. (See Declaration of Margaret Cruickshank, par. 11.)

World Savings Bank's agents concealed from the plaintiff that the HELOC combined with the existing 2005 toxic Option ARM loan they had previously sold to her was unsuitable for her and that she would never be able to afford this, and it would damage her **financially**. World Savings Bank's agents concealed from her that the monthly payments would be significantly higher than she was able to afford, and did not disclose to her that they had inflated her income on the loan application so that she would qualify for this loan. (See Declaration of Margaret Cruickshank, par. 11.)

In late 2008 Mrs. Cruickshank discovered that her debt obligation on her mortgage was actually increasing and realized that in order to prevent her balance from going negative she was going to have to make larger monthly payments on the loan. (See Declaration of Margaret Cruickshank, par. 13.) The plaintiff had to use the money from her HELOC to pay the monthly payments on the loans. When she exhausted her line of credit and there was no equity left in the home, Mrs. Cruickshank was

forced to use the maximum amount available on her credit card to make her monthly payments on the loans. (See Declaration of Margaret Cruickshank, par. 14.) This caused Mrs. Cruickshank extreme anxiety and stress.

Mrs. Cruickshank was admitted to the hospital on September 3, 2008 because her **financial** stress caused a life threatening flare up of her rheumatoid arthritis which resulted in septic arthritis with stress being the only identifiable cause. After numerous hospital stays she was released from a skilled nursing facility in December 2008 back to her home. (Declaration of Ian Cruickshank, par. 2, Dec. Margaret Cruickshank, par. 15.) Because her health is very fragile and because of her lack of **financial** resources she has volunteer home help. She is unable to relocate her residence because of her age and her health. (See Declaration of Margaret Cruickshank, par. 15, Declaration of Ian Cruickshank, par. 6.)

After Mrs. Cruickshank returned to her home and was in a stabilized condition, in early 2009 her sons Ian and Colin explained the negative amortization terms of the 2005 loan to her and explained why her loan balance was increasing. (See Dec. Margaret Cruickshank, par. 16, Declaration of Ian Cruickshank, par.4.) Mrs. Cruickshank discovered that the loans she had received from WACHOVIA included terms she was not aware of and had not asked for, and that it was not **financially** feasible. (Dec. Margaret Cruickshank, par. 16.) She discovered that the minimum monthly loan payment she had been making was an amount that was insufficient to cover the interest accruing. (Dec. Margaret Cruickshank, par. 16.) Mrs. Cruickshank had been receiving billing coupons from WACHOVIA which showed the minimum monthly amount she could pay, with no explanation that it was insufficient to cover the interest accruing. (Dec. Margaret Cruickshank, par. 16.)The burdensome and oppressive terms of the loan prevented the Plaintiff from staying current with the loan payment obligations. Mrs. Cruickshank' sons, Colin and Ian Cruickshank helped her apply to WACHOVIA for a short sale in the form of a reverse mortgage to pay off the present mortgage loans which bank refused to consider. Her sons helped her apply to WACHOVIA for a loan modification to fix the problems with the toxic loans she had been sold and to lower her monthly payments, which was ignored and then subsequently denied by the bank. (See Declaration of Ian Cruickshank, par. 5.)

The defendants' wrongful fraudulent conduct continued to the present. WACHOVIA, using the **financial** advantage they had gained over Mrs. Cruickshank, on February 4, 2010, prior to receiving a written denial of her application for a loan modification, recorded a Notice of Default and Election to Sell under Deed of Trust. Plaintiff subsequently received a Notice of Trustee's Sale on May 4, 2010. On May 3, 2010, in order to prevent the impending foreclosure sale of her home, Plaintiff was forced to file for Bankruptcy relief under Chapter 13 (Case No. 10-07665-PB13). (See Declaration of Margaret Cruickshank, par. 17.) Wachovia refused to consider a loan modification to 31%, refused to consider a short sale in the form of a reverse mortgage to pay off her present mortgage loans, denied a request for modification although the MAP2R modification program was required to be offered by WACHOVIA as part of its Assurance Agreement with California Attorney General Jerry Brown to modify and assist homeowners who had been sold the predatory Option ARM loans, and proceeded with foreclosure. (See Declaration of Ian Cruickshank, par. 5, SAC Par.'s 39-40.)

III. ARGUMENT

A. A PRELIMINARY INJUNCTION SHOULD BE GRANTED

Mrs. Cruickshank seeks to enjoin the sale of the subject property until after a full trial on the merits of her legitimate claims. Plaintiffs intent in requesting a preliminary injunction is consistent with the usual purpose of a preliminary injunction, which is to preserve the status quo as it is until after trial and judgment.

A plaintiff seeking a preliminary injunction must establish that she is likely to succeed on the merits, that she likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in her favor, and that an injunction is in the public interest. (*Winter v. Natural Resources Defense Council, Inc.*, 129 S.Ct. 365, 374 (2008). However, "[a] preliminary injunction, of course, *is not a preliminary adjudication of the merits.*" [Emphasis added.] (*Sierra On-Line Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984).) The court does not make binding findings or conclusions. All it need find is a probability that the necessary facts can be proved at trial, i.e., "...a fair chance for success at trial." (Id. at 1421.)

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing...." (*University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).) In this case, the Plaintiff's request meets the requirements to support a preliminary injunction.

B. NEED FOR INJUNCTION TO COMPLETE DISCOVERY

As set forth below, there is substantial merit to this action and there is already good evidence that a wrong has been committed by defendants for which plaintiff is entitled to compensation and, for which reason, her home should not be sacrificed. However, at this early stage in the litigation the plaintiffs need for discovery of information including the loan file, held solely in the control and custody of defendants is great. Plaintiff seeks an order for immediate discovery in conjunction with a preliminary injunction to postpone the scheduled trustee's sale while discovery is completed. Such an order is recommended by the court in *Stanley v. University of So. Calif.*,13 F.3d 1313, 1326, (9th Cir. 1994) which held that the parties may need to engage in discovery in order to prepare for the preliminary injunction hearing.

C. LIKELIHOOD OF SUCCESS ON THE MERITS

Plaintiffs SAC pleads ten causes of action against defendants alleging: 1.Breach Of Fiduciary Duty; 2. Fraud; 3. Negligence; 4. Negligent Misrepresentation; 5. Violation Of California Business And Professions Code §17200; 6. **Financial Elder Abuse**: Welfare & Institutions Code §15610.30(A)(1); 7. Intentional Infliction of Emotional Distress; 8. Restitution (Unjust Enrichment); 9. Injunctive Relief; and 10. Declaratory Relief. For the purposes of this Motion for a Preliminary Injunction Plaintiffs will concentrate on the causes of action for **Financial Elder Abuse**, Fraud, Violation Of California Business And Professions Code §17200, and Negligence. The remaining causes of action are sufficiently pled and are valid, however, Plaintiffs need to complete discovery to present evidence on their merits.

1. Financial Elder Abuse

The plaintiff has offered evidence, through the Declarations of Margaret Cruickshank, her son Ian Cruickshank and Heather Yellen, of Defendants' predatory lending practices targeted at the **elderly** and at her, which meets her prima facie burden of proof of **Financial Elder Abuse** as set forth in California Welfare & Institutions Code §15610.30. **Financial elder abuse**, as codified by California Welfare & Institutions Code §15610.30(a)(1) as a situation in which any person, including, *but not limited to,* one who has the care or custody of, or who stands in a position of trust to, an **elder** or a dependent adult, takes, secretes, or appropriates their money or property, to any wrongful use, or with the intent to defraud. [1] Under this statute any person may be liable for **financial elder abuse**, it is not limited to those who have a fiduciary relationship with the **elder**. Thus, Phillip Franklin and Wachovia may be held liable for **financial elder abuse**, regardless of whether it is proven at trial that they held a fiduciary relationship to the plaintiff.

Cal. Wel. & Inst. Code §5610.30 (b) provides that: "(b) A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or *should have known that this conduct is likely to be harmful to the **elder*** or dependent adult. §15610.30 (c) provides that: (c) For purposes of this section, a person or entity takes, secretes, appropriates, obtains, or retains real or personal property when an **elder** or dependent adult *is deprived of any property right,...*"

The California Attorney General's Office has issued a "Citizen's Guide to Preventing and Reporting **Elder Abuse**" In this guide, (which you can find at the Attorney General website: http://ag.ca.gov/bmfea/pdfs/citizens_guide.pdf), under Part B. **Financial**

Elder **Abuse**, it states: "**Financial** **elder** **abuse** is the theft of money or property from an **elder**...it can be as simple as taking money from a wallet and as complex as manipulating a victim into turning over property to an **abuser**." The publication goes on to state: "This form of **abuse** can be devastating because an **elder** victim's life savings can disappear in the blink of an eye, leaving them unable to provide for their needs and afraid of what an uncertain tomorrow will bring." The guide recognizes that "the most widespread **abuses** include telemarketing fraud, identity theft, *predatory lending*,..."

In this case, the evidence set forth above shows sufficient facts to support the plaintiff's claim for **financial** **elder** **abuse** resulting in huge **financial** damages to Mrs. Cruickshank and the unjust enrichment of the defendants. In March 2006 agents of World Savings Bank ("WACHOVIA"), targeted and solicited the **elderly** Mrs. Cruickshank to enter into a loan agreement that would provide defendants with substantial **financial** reward through incentives at the beginning and throughout the life of the loans (ending in a noticed foreclosure). The Defendants had monetary incentives to sell her this loan, obtain a deed of trust to her property, and take the money they would extract from her, in interest, penalties, fees and commissions, over and above the amount loaned. Mrs. Cruickshank trusted Defendants were providing her with sound **financial** advice and believed it was reasonable to rely on the integrity and professionalism of Phillip Franklin because he was an agent of World Savings, and believed defendants' promises that these two loans would be in her best interests. However, as shown in the affidavits, the facts surrounding this loan transaction were purposefully hidden by Defendants WACHOVIA to prevent Plaintiff, who was already susceptible to coercion due to her age and physical condition, from discovering the true nature of the loan transaction.

The facts of this case show defendants not only took and appropriated Mrs. Cruickshank's money (interest, penalties, fees and commissions) and property (the pending sale of her residence), to a "wrongful use", but also with the intent to defraud her. Defendant WACHOVIA acted fraudulently in Plaintiff's refinance loan transaction by: falsely represented to her that she did not qualify for a reverse mortgage, leading the Plaintiff to believe, based upon their fraudulent misrepresentations, that they would sell her a refinance loan package which would be better than a reverse mortgage, lying to her about the safe low-risk nature of the HELOC to induce her to agree to it, misrepresenting to her that she qualified for the HELOC when they had intentionally inflated her income to procure the loan, lying to her about the transaction as a package of two loans, a refinance of her original Loan and a HELOC, and concealing from the Plaintiff that they did not fund the refinance of her original loan.

In *Negrete v. Fid. & Guar. Life Ins. Co.* 444 F. Supp. 2d 998 (C.D. Cal. 2006) the plaintiff sufficiently alleged a claim under California's **Elder** **Abuse** Act, for wrongful "taking" pursuant to Welf. & Inst. Code §15610.30 because she alleged that the company fraudulently acquired millions of dollars by engaging in a "churning" scheme, specifically, using deceptive practices to deplete the accumulated cash value from existing life insurance policy or annuity or the sale of other asserts. In *Harnedy v. Whitty* (2003) 110 Cal. App. 4th 1333 the court of appeals affirmed the judgment for the plaintiff, and affirmed the cancellation of a deed, on a complaint alleging causes of action for fraud, constructive fraud and **financial** **elder** **abuse** under §§15610.30 and 15657 of the **Elder** **Abuse** Act.

In *Zimmer v. Nawabi*, 566 F. Supp.2d 1025, 2008 WL 7123093, (E.D. Cal. 2008) the Plaintiff an **elderly** homeowner (79 years old), who was facing foreclosure, filed a lawsuit against a mortgage broker for **financial** **elder** **abuse** and other legal claims. Plaintiff alleged that the Broker lied about the amount of cash-out proceeds that would be tendered to Plaintiff at the close of the loan, other non-disclosure of material terms of the loan. The court granted summary judgment to the Plaintiff holding that the lender, Golden State, was liable for **financial** **elder** **abuse** because: "[w]ith respect to plaintiffs refinance, Golden State received $10,700.00 in fees, which it wrongfully obtained as a result of Nawabi's false statements about the terms of plaintiffs refinance, which it knew were less favorable to plaintiff than her previous mortgage." (Id. at 1034.) The court discussed the broker's duties to the plaintiff, holding the defendants liable for breach of fiduciary duty as follows: "When brokering a loan for a borrower of "modest means and limited experience in **financial** affairs," a mortgage broker also has "duties of oral disclosure and counseling," which require the broker to "disclose orally the true rate of interest, the penalty for late payments or [other material terms of the loan] .... (*Id.* at 1032.) "As plaintiff was a seventy-nine-year-old with only fourteen years of formal education and was of "modest means and limited experience in **financial** affairs," her broker also had the duty to orally disclose the terms of her refinance to her." (*Id.*)

Plaintiff has alleged and states in her Declaration and her moving papers that Defendants' predatory and **abusive** conduct was committed by a lending officer and agents of Wachovia (Phillip Franklin) as well as other Does and alleges in her SAC that Defendant Wachovia authorized and ratified the conduct of its agents, (SAC, Par.'s 9, 13, 27, 28).

In the case at hand, there is sufficient evidence at this time of the defendant's wrongful conduct targeting the **elderly** plaintiff to obtain her money and property in violation of the **Elder** **Abuse** Act, Cal. Welf. & Inst.Code §§ 15600-15675, to find a probability that the necessary facts can be proved at trial, i.e., "...a fair chance for success at trial." (*Sierra On-Line, Inc. v. Phoenix Software, Inc.*, supra, 739 F.2d at 1421.)

2. Fraud

The evidence that the Plaintiff submits with this motion satisfies both the elements of fraud under California law and the pleading requirements of the Federal Rules. Under California law the well-established common law elements of fraud which give rise to the tort action for deceit are: (1) misrepresentation of a material fact (consisting of false representation, concealment or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to deceive and induce reliance; (4) justifiable reliance on the misrepresentation; and (5) resulting damage. (California Civ. Code sections 1572, 1709-1710.) Under the Federal Rules a heightened level of pleading is imposed for fraud claims: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). "This Court interprets Rule 9(b) strictly, requiring a plaintiff pleading fraud to specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent." (Herrmann Holdings Ltd. v. Lucent Techs. Inc., 302 F.3d 552, 564-65 (5th Cir. 2002) (internal quotations omitted).)

The defendants' multiple false representations made with the knowledge that they were false, and the concealment of the true terms and characteristics of this loan from Mrs. Cruickshank are clearly evidenced by the affidavits attached hereto. The defendants' intent to induce reliance is borne out by their commissions and fees earned by manipulating the sale of this loan. The evidence shows that in 2006 to further their own predatory interests, Defendants preyed upon this senior citizen and solicited her on the telephone to induce her to purchase another loan and generate more fees and profit for defendants. When Plaintiff inquired into and requested a reverse mortgage, Defendants' agent, Mr. Franklin, falsely represented to her that she did not qualify for a reverse mortgage, when in fact, reverse mortgages are specially designed for senior homeowners such as Plaintiff, and in this case would have been beneficial to helping the Plaintiff's **financial** circumstances.

The evidence shows that Defendants led the Plaintiff to believe, based upon their fraudulent misrepresentations, that they would sell her a refinance loan package which would be better than a reverse mortgage. When the Plaintiff told Defendants that she was concerned and wanted their best **financial** advice on how to proceed, Defendants lied and fraudulently represented to her that: the Loan Package was a very safe low risk loans which was better than a reverse mortgage because it would protect the equity in her home unlike a reverse mortgage and that the loans were well suited for someone of her age at 81 being on a fixed income. Based on their representations, Plaintiff agreed to apply for, what she believed were two loans, the Loan Package: (1) a refinance of her original Loan; and (2) a home equity line of credit.

The evidence shows that Defendants lied about the actual loans they sold to the Plaintiff, concealing significant terms of this transaction from her. Defendants lied to her about the transaction as a package of two loans, a refinance of her original Loan and a HELOC, and concealed from the Plaintiff that they did not fund the refinance of her original loan. Defendants lied to her about the safe low-risk nature of the HELOC to induce her to agree to it. Defendants misrepresented to her that she qualified for the HELOC when they had intentionally inflated her income to procure the loan. Defendants concealed from her that the HELOC combined with the existing toxic Option ARM loan they had previously sold to her was unsuitable for the Plaintiff and she would never be able to afford this, and it would damage her **financially**.

The evidence shows Plaintiff reasonably relied on the integrity and professionalism of those Defendants agents when she decided to enter into the subject loan. Plaintiff has been **financially** damaged as a result of this fraud incurring monetary losses

throughout the life of this loan, losing all of the equity in her home within a year, incurring an increased debt obligation, the overpayment of interest to defendants, the **financial** damage to the plaintiff's' credit reputation, and she has been physically damaged, suffering physically from the **financial** stress created by this toxic loan, and from the default and pending foreclosure of her home. Mrs. Cruickshank is asking for punitive damages to be awarded to punish defendants for their intentional harm to the plaintiff.

It is undisputed that at the time defendants solicited Mrs. Cruikshank she was current on her mortgage and had equity in her home. From the undisputed facts concerning the course of events leading to the present foreclosure, the witness affidavits attached and the loan documents themselves, plaintiff has produced enough evidence at this stage to show that she has a fair chance for success at trial on her claim that 1) the loan was procured by fraud and/or negligent misrepresentation and 2) as a logical extension - defendants must be enjoined from selling a property that was wrongfully secured as collateral under fraudulent pretenses.

3. Violation of Business and Professions Code § 17200.

The SAC and the evidence that the Plaintiff submits with this motion illustrates that Defendants have engaged in unlawful, unfair, and fraudulent business practices in violation of California's Unfair Competition Law ("UCL"), California Business and Professions Code § 17200. Defendants' actions constituted common law fraud and misrepresentation as follows:
(a) Defendants intentionally represented to Plaintiff that she did not qualify for a reverse mortgage, when in fact, reverse mortgages are specially designed for senior homeowners such as Plaintiff;

(b) Defendants lied about the actual loans they sold to the Plaintiff and concealed significant terms of this transaction from her;

(c) Defendants lied to her about the transaction as a package of two loans, a refinance of her original Loan and a HELOC, and concealed from the Plaintiff that they did not fund the refinance of her original loan;

(d) Defendants intentionally reported inaccurate information regarding Plaintiff's income and assets on the Loan Application, which qualified Plaintiff for the subject loan;

(e) Defendants refused to attempt a loan modification on its merits and/or restructure the terms of the loan, when Defendants had placed Plaintiff into a toxic loan with false and fraudulent information.

Business and Professions Code § 17200, et seq., which is intended to protect consumers, prohibits "unlawful, unfair OR fraudulent business act[s] or practices[s]." Section 17200 established three distinct varieties of acts or practices which are unlawful" or unfair, or fraudulent; in other words, a practice may be prohibited as "unfair" or "deceptive" even if not "unlawful" and vice versa. (*Puentes v. Wells Fargo Home Mortg., Inc.,* 160 Cal. App. 4th 638 (2008). As set forth above, the facts alleged herein as well as in the SAC, provide sufficient and exhaustive factual detail concerning these fraudulent practices by Defendants, including every fraudulent misrepresentation, where and when it occurred, who stated it, and every fraudulent concealment by the defendant, to show that she has a fair chance for success at trial on her claim for Fraud, Negligent Misrepresentation and Violation of Business And Professions Code § 17200, and therefore defendants must be enjoined from selling the property that was wrongfully secured as collateral under fraudulent pretenses.

4. Negligence

"Negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. [Citations.] Thus, as a general proposition one "is required to exercise the care that a person of ordinary prudence would exercise under the circumstances.... [Footnote] In some instances, statutory or decisional law may impose a standard of

care higher than or different from "ordinary prudence." (*Flowers v. Torrance Memorial Hospital Medical Center,* 8 Cal.4th 992, 997, FN2, (1994)."

Each Defendant had a duty to meet the standard of care for a lender and its agents to the Plaintiff as a borrower. In California the state has codified some of the duties of a lender to a borrower, which in this case were breached by the defendants, creating a liability for their negligence to the plaintiff.

The affidavits submitted by the plaintiff show that Defendants represented to her that she did not qualify for a reverse mortgage, represented to her that: the Loan Package they induced her to take was a very safe low risk loans which was better than a reverse mortgage because it would protect the equity in her home unlike a reverse mortgage and that the loans were well suited for someone of her age at 81 being on a fixed income. The evidence further shows that defendants concealed the fact that they had not funded the refinance loan, and that defendants reported false information on Plaintiffs loan application which they knew or should have known to be inaccurate in order to qualify Plaintiff for the HELOC. The Loans that defendants saddled her with were substantively unconscionable because the payment on the loans exceeded the amount that she could afford to pay, and in fact would eventually be more than her income. This conduct was a breach of the standard of reasonable care that a person of ordinary prudence would exercise under the circumstances, and was a further violation of the defendants' standard of care as set forth in California **Financial** Code section 4973(f)(1) and (3) which prohibits a loan officer or lender from making a loan unless the lender reasonably believes that the consumer, upon a review of their actual income, can repay the obligation.

Defendants' conduct also violated Defendants' standard of care as provided by Cal. Fin. Code §4973(a)2.A, which provides that the person who originates a loan must offer the consumer a choice of another product without a prepayment fee or penalty.

Defendant's conduct evidences a pattern of unlawful, fraudulent, unscrupulous predatory real estate practices against Plaintiff, and not only constitutes a breach of certain duties of care owed to Plaintiff, but is so egregious and morally loathsome that the court should do everything in its power to prevent such future harm. Defendant, a sophisticated lending institution, targeted plaintiff, an **elderly** woman with limited physical and mental capacities. Knowing Plaintiffs limitations, Defendants, in order to obtain fees and commissions, built a relationship of trust and confidence with Plaintiff in order to coerce Plaintiff into entering into a contract she was sure to breach. When alerted of this conduct of their agents, Defendant did nothing to remedy the situation, but instead sought to foreclose on the property, forcing Plaintiff to surrender and vacate her home.

Mrs. Cruikshank's damages resulting from the defendant's breach of their standard of care were reasonably foreseeable, and are well documented. Plaintiff has produced enough evidence at this stage to show that she has a fair chance for success at trial on her claim of negligence.

D. IRREPARABLE INJURY

If the preliminary injunction is not granted, Mrs. Cruickshank will suffer an irreparable injury in that she will lose the ownership of her home. The risk is neither remote nor a mere possibility; rather, it is immediate in nature and scheduled to happen on or after the date of this hearing. The Ninth Circuit has held that the loss of a person's home through foreclosure qualifies as irreparable injury. *(Sundance Land Corp. v. Community First Fed Sav, & Loan Ass'n,* 840 F2d 653, 661 (9th Cir. 1988).) California courts are in agreement. "Given the drastic implications of a foreclosure, it is not surprising to find courts quite frequently granting preliminary injunctions to forestall this remedy while the court considers a case testing whether it is justified under the facts and law." (*Baypoint Mortgage Corp. v. Crest Premium Real Estate etc. Trust,* 168 Cal.App.3d 818, 824-825 (1985) (holding that if a foreclosure takes place before the merits can be assessed, the plaintiffs prayer for relief would be rendered "useless" since the property would have already been sold resulting in much of the other relief [sought] in the main action [being] rendered irrelevant." Thus, because the harm to plaintiff will be immediate and irreparable, this Court should grant Plaintiffs Motion for a Preliminary Injunction to enjoin the foreclosure sale of Mrs. Cruickshank's residence during the pendency of this action.

E. BALANCE OF HARMS

The harm the plaintiff will suffer if the property goes to foreclosure and Mrs Cruickshank is ousted from her home outweighs any harm to the defendants. As discussed previously, the plaintiff will suffer irreparable injury if she loses her home. Mrs. Cruickshank and her sons have been advised by medical professionals that she should not be moved from her residence, and given her age and fragile physical condition, the stress and physical strain of being removed from her primary residence is likely to have grave effects on her health and well being. (Declaration of Ian Cruickshank par. 6.) On the other hand, it is difficult to identify any damages that the defendants would suffer if they are enjoined from foreclosing during the pendency of the suit, as set forth below in the following sections of this brief.

F. A BOND SHOULD NOT BE REQUIRED UNDER THE GENERAL PRINCIPALS OF EQUITY AND FAIRNESS

Fed. R. Civ. P. 65 states that a court may issue preliminary injunction "only 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." Despite this language, which appears to be mandatory, it is well settled that in the Ninth Circuit that a District Court has broad discretion, or especially in view of the phrase 'as the court deems proper,' to "dispense with the filing of a bond when it concludes there is no realistic likelihood of harm to the defendant from enjoining his or her conduct." (*Jorgensen v. Cassidy*, 320 F.3d 906, 919 (9th Cir. 2003); See also, *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999).) In other words, a court has the discretion to waive the Rule 65(c) bond requirement in cases where the balance of the equities of the potential hardships that each party would suffer as a result of a preliminary injunction weighs overwhelmingly in favor of the party seeking the injunction. (*Elliott v. Kiesewetter*, 98 F.3d 47, 60 (3rd Cir. 1996); See also *Connecticut General Life Ins Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882 (9th Cir.2003); *Walczak v. PL, Prolong, Inc.*, 198 F.3d 725, 733-34 (9th Cir.1999).) As such where there is an absence of proof showing a likelihood of harm to Defendants from an issued injunction, no bond is necessary. Here the balance of hardships weigh in favor of granting an injunction, thus as a matter of equity and in the interest of fairness, the court should order a preliminary injunction stopping the foreclosure sale.

Here, granting Plaintiffs Motion will cause little or no harm whatsoever to Defendants, or those working in concert with them. Plaintiff has tendered a monthly mortgage payment to the Defendants. (Declaration of Margaret Cruickshank, par. 19.) Defendants' security interests in the Subject Property will remain intact and any alleged "damages" will simply continue to accrue. In contrast, granting the injunction will preserve the status quo and protect the Plaintiff from the certain and irreparable harm described herein. Thus, the posting of a bond is not a prerequisite to the issuance of the Plaintiffs injunction because the Defendants, and each of them, cannot demonstrate that preserving the status quo will cause them cognizable economic harm.

In light of the forgoing, there is neither proof showing a realistic likelihood of damages to the non-moving parties from an issued injunction nor proof of any circumstances that would otherwise warrant a bond or nominal bond by the Plaintiffs. Any potential risk of harm to the parties to be enjoined is too remote, thus in this instance, the proper bond amount would be zero. Moreover, in the unlikely event that any of the Defendants face a true **financial** hardship requiring the use of these assets, the Court can easily entertain an application for relief. (See, *Anderson v. Cent. Point Sch. Dist. No. 6*, 746 F.2d 505, 507 (9th Cir. 1984) - noting that the district court can "modify the terms of its injunctions in the event that a change in circumstance requires it"; citing Fed. R. Civ. P. 60.) Accordingly, no bond is required under the circumstances of this case, and therefore Plaintiffs respectfully requests this Court exercise its discretion and dispense with the requirement of a bond or require a nominal bond.

Given the circumstances of this case, as outlined above, the Plaintiff respectfully requests that this Court exercise its discretion and not require a bond given that there is no likely damage to the defendants if the foreclosure sale is delayed until the case is resolved.

G. PLAINTIFF IS NOT REQUIRED TO MAKE A TENDER OF THE TOTAL ARREARAGES OWING UNDER THE LOAN

Plaintiff acknowledges that it is inequitable for her to retain ownership in the property "rent-free" while the merits of the case are determined. In order to alleviate this concern, Plaintiff, in a good faith effort to limit any potential harm Defendants may suffer as a result of the injunction has tendered a reasonable monthly mortgage payment in the amount of $500.00 during the pendency of litigation. Defendants will argue that Plaintiffs request for injunction must be denied because Plaintiff has not made a tender of the full amount of the indebtedness owing under the Subject Loan. However, this requirement is improper as applied to the case at hand. Requiring Plaintiff to tender a substantial arrearage orchestrated and created by the defendants' fraud and predatory actions, offends the basic and conventional notions of equity and fairness. The Court's equitable discretion allows it great leeway in fashioning whether the tender rule requirement is appropriate to this case. Mrs. Cruickshank simply does not have the **financial** resources to tender the full amount of indebtedness, and therefore in the Court's equitable discretion should not place this requirement on her.

Plaintiffs claims arise out Defendants' predatory lending practices and fraudulent conduct in the procurement of Plaintiffs loan, so to enforce tender in an amount that is not only unreasonable and unaffordable to Plaintiff, but also an amount that is patently disputed clearly offends the basic principles of equity, and for all purposes herein mentioned would defeat the function of such principles. California case law permits the stay of a foreclosure sale without a plaintiff tendering the full or partial amounts owed. (See, *Mabry v. Superior Court*, 185 Cal.App.4 th 208, 226 (2010); *Arnolds Management Corp. v. Eishchen*, 158 Cal. App. 3d 575. In *Mabry* the court held that where a plaintiff seeks statutory relief from predatory lending practices it would contravene the public policy to require the borrower to tender the full amount of the indebtedness prior to any enforcement of their rights under the statute. (*Mabry v. Superior Court* supra, 185 Cal.App.4 th at 226.) Thus, to deny Plaintiffs injunction on the grounds that she has not fulfilled the full tender requirement, would be unsound and against the principles of equity and public policy.

H. THE PUBLIC INTEREST

Plaintiff submits that the public interest favors the granting of the requested relief. The public interest inquiry primarily addresses impact on nonparties rather than parties. (*Sammartano v. First Judicial Dist. Ct., in & for County of Carson City*, 303 F3d 959, 974 (9th Cir. 2002). As stated above, the California Attorney General has declared predatory lending a form of **financial** **elder** **abuse** which should be stopped. The California legislature and the U.S. Congress has recently gone on the record to declare the urgent public policy of avoiding foreclosures at this time. Senate Bill 1137 ("SB 1137") Stats. 2008, ch. 69 (SB 1137), also known as the "Perata Mortgage Relief Bill" was designed to curb foreclosures. (See Stats. 2008, ch. 69 (SB 1137), and Cal. Civ. Code § 2923.5, annotated, "Historical and Statutory Notes.") In response to many of the **abusive** consumer lending practices that helped lead us into the present **financial** crisis Title X of the Dodd-Frank Act, also known as the Consumer **Financial** Protection Act of 2010, HR 4173, was enacted. Section 1031 of the Dodd-Frank Act (12 USC 5531) provides rules to ensure that the features of a "consumer **financial** product" are fully disclosed so that consumers understand the "risks associated with the product".

Thus, it seems incontestable that an injunction issued by this Court would not run afoul of public policy in any way and, in fact, would seem to further public policy.

IV. CONCLUSION

As Defendant's predatory lending practices are the very cause of Plaintiffs default, it would be inequitable to allow Defendant to cause Plaintiff further injury by foreclosing on Plaintiff's home. A preliminary injunction is proper in this matter to maintain the status quo, as Plaintiff is likely to succeed on her claims at trial and the equitable balancing of potential harms tips drastically in Plaintiff's favor. For the reasons herein, Plaintiff requests that Defendants be restrained and enjoined from conducting a

trustee's sale of, transferring any ownership interest in or further encumbering the property located at 17470 Plaza Animado #161, San Diego, California 92128.

THORNTON KOLLER

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Dated: April 28, 2011

Footnotes

1 The California Legislature enacted the **Elder** **Abuse** Act, Cal. Welf. & Inst.Code §§ 15600-15675, "to protect **elders** by providing enhanced remedies which encourage private, civil enforcement of laws against **elder** **abuse** and neglect." Negrete v. Fid. & Guar. Life Ins. Co., 444 F.Supp.2d 998, 1001 (C.D.Cal.2006). A person is considered an "**elder**" under the Act if the person is sixty-five years of age or older. Cal. Welf. & Inst.Code § 15610.27

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