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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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Holly Martenson,

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No. CV-09-01314-PHX-NVW

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Plaintiff,

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**ORDER**

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vs.

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RG Financing, et al.,

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Defendants.

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Before the Court is Plaintiff’s Motion for Preliminary Injunction, part of which was previously denied (Docs. 92, 93).

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**I. Background**

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On November 29, 2006, Martenson refinanced her home loan through a mortgage broker, Buy America Real Estate, by executing a Deed of Trust and Note for which JL Financing is the beneficiary and lender. RG Financing is the loan servicer for Martenson’s loan. In May 2007, Martenson fell behind on her loan payments, and on June 8, 2009, the property subject to the Deed of Trust was sold at a trustee’s sale to JL Financing. The factual and procedural history of this case before February 2010 is described more fully in the Court’s January 22, 2010 Order (Doc. 56).

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On February 5, 2010, the Court enjoined JL Financing and RG Financing from enforcing a state justice court order granting JL Financing immediate possession of Martenson’s residence (Doc. 62). The preliminary injunction was conditioned upon

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1 Martenson posting a bond in the nominal amount of one hundred dollars because the  
2 Court found that “Defendants are more than fully secured by the Property (*Id.*; Doc. 56).”  
3 In support of her request for a preliminary injunction, Martenson contended the trustee’s  
4 sale was unlawful and invalid (Doc. 34 at 4 n.4, 7). One of the findings supporting  
5 injunctive relief was that Defendants had not complied with the Deed of Trust’s  
6 requirement that the lender provide the borrower with notice and thirty days to cure the  
7 default (Doc. 56).

8 On May 6, 2010, JL Financing recorded a Notice of Rescission of Trustee’s Deed  
9 Upon Sale, which states that the Trustee’s Sale and the purported Trustee’s Deed Upon  
10 Sale are rescinded (Docs. 74 at 6, 74-2 at 43-45). The Notice also states:

11 3) THE TRUSTEE has been informed by the Beneficiary that the  
12 Trustor has contested the Trustee’s Sale and that the Beneficiary desires to  
13 rescind the Trustee’s Deed recorded upon the foreclosure sale on June 8,  
2009, in order to resolve any contest made by the Trustor regarding the sale  
without acknowledging any fault in the conduct of the foreclosure sale;

14 4) THE EXPRESS PURPOSE of this Notice of Rescission is to return  
15 the priority and existence of all title and lien holders to the status quo-ante  
as existed prior to the Trustee’s Sale.

16 (Doc. 74-2 at 43) By letter dated May 7, 2010, JL Financing notified Martenson she was  
17 in default, itemized the amounts due, and demanded payment of \$290,638.34 by June 11,  
18 2010 (Doc. 92, Exh. A). The amount due includes \$49,541.23 for “Legal Fees to enforce  
19 Note & Deed of Trust.” (*Id.*) A Notice of Trustee’s Sale for September 29, 2010, also  
20 was recorded (Doc. 92, Exh. B).

21 On August 20, 2010, the Court denied Plaintiff’s Motion to Enforce Preliminary  
22 Injunction to Enjoin Second Sale of Plaintiff’s Home or Alternatively to Modify Its  
23 Terms (Doc. 89). The Court found that Defendants had rescinded the trustee’s deed  
24 emanating from the disputed trustee’s sale and abandoned the trustee’s sale in dispute,  
25 thus nullifying the predicate for the forcible entry and detainer judgment. The Court  
26 found that Martenson “remains liable for whatever her obligations are and were under the  
27 note and deed of trust, but no additional obligations grounded in the rescinded deed of  
28 trust sale.” The Court expressly refrained from determining whether the amounts

1 demanded in the May 7, 2010 demand and cure letter are correct or the amount of the  
2 demand invalidated the current notice of trustee's sale because no such claim had been  
3 pled.

4         On August 24, 2010, Martenson moved for leave to file a Third Amended  
5 Complaint (Doc. 90). The proposed Third Amended Complaint alleges that the May 7,  
6 2010 Notice of Default includes in its demand interest, fees, taxes, insurance, and costs  
7 accrued during the period of JL Financing's record ownership and the period covered by  
8 the preliminary injunction and that Defendants "demand illegal, retroactive payments  
9 from plaintiff as a condition to cure the 'new' default under threat of sale of her home."  
10 It further alleges that "on the first sale of plaintiff's property on June 8, 2009, plaintiff's  
11 personal obligation on the note was extinguished under A.R.S. § 33-814(G) and the note  
12 and mortgage were merged with the deed vesting JL Financing with fee simple title to the  
13 property."

14         On August 26, 2010, Martenson filed another motion for preliminary injunction.  
15 (Doc. 92). The Court denied Martenson's motion in all respects except for her challenge  
16 to the inclusion in the cure amount of attorneys' fees incurred in unsuccessfully defending  
17 against the first motion for preliminary injunction (Doc. 93).

18         On September 2, 2010, JL Financing and RG Financing stated that, "for the  
19 purposes of the foreclosure sale, scheduled for September 29, 2010, Defendants will  
20 stipulate and agree to include only those post-injunction fees in the cure amount," which  
21 is \$14,978, instead of \$49,541.23 (Doc. 95 at 2). They further stated that, alternatively,  
22 they "will withdraw any claim for attorneys' fees in the computation of the cure amount  
23 necessary for Plaintiff to cure her default and redeem her property, while reserving the  
24 right to litigate the amount of fees properly awarded to Defendants in the substantive case  
25 filed in this action." (*Id.*) Martenson did not respond to JL Financing and RG  
26 Financing's response that the Court limited to the narrow issue regarding attorneys' fees.

1 **II. Analysis**

2 Arizona courts strictly construe deeds of trust and related statutes in favor of the  
3 borrower. *Patton v. First Fed. Sav. & Loan Ass'n*, 118 Ariz. 473, 477, 578 P.2d 152, 156  
4 (1978). Paragraph 21 of the Deed of Trust requires the lender to give notice to the  
5 borrower of the default, the action required to cure the default, and a date not less than  
6 thirty days from the date of notice by which the default must be cured. It also provides:

7 If the default is not cured on or before the date specified in the notice,  
8 Lender, at its option, may require immediate payment in full of all sums  
9 secured by this Security Instrument without further demand and may invoke  
10 the power of sale and any other remedies permitted by applicable law.  
11 Lender shall be entitled to collect all expenses incurred in pursuing the  
12 remedies provided in this paragraph 21, including, but not limited to,  
13 reasonable attorneys' fees and costs of title evidence.

14 (Doc. 90-2)

15 After default, a trustor may reinstate by paying to the beneficiary, trustee, or the  
16 trustee's agent the entire amount then due under trust deed, payment of costs and expenses  
17 incurred in enforcing the terms of the trust deed, payment of the recording fee for a  
18 cancellation of notice of sale, payment of the trustee's fees, and payment of expenses and  
19 reasonable attorney fees "incurred in protecting and preserving the beneficiary's interest in  
20 the trust property." A.R.S. § 33-813(A), (B). "On request from the trustor . . . at any time  
21 that the trust deed is subject to reinstatement, the trustee shall provide a good faith  
22 estimate of the sums that appear necessary to reinstate the trust deed." A.R.S. § 33-  
23 813(C). Upon written request from the trustor, the trustee must inform the trustor of the  
24 exact amount necessary to reinstate the trust deed, separately specifying costs, fees, and  
25 any other amounts that are required to be paid as a condition to reinstatement of the trust  
26 deed. A.R.S. § 33-813(D). The trustee must provide the information within five days of  
27 receipt of the written request unless it is received during the five business days before the  
28 day of the sale, in which case the trustee must provide the information "as soon as  
practicable." *Id.* Subsection D, however, does not require extension of the period for  
reinstatement of the trust deed to accommodate providing information regarding the  
amount of the payment required for reinstatement. *Id.*

