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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Karoly Quintana,

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No. CV 11-2301-PHX-JAT

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Plaintiff,

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**ORDER**

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vs.

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Bank of America, Countrywide Home  
Loans Inc., Countrywide Financial Corp.,  
Mortgage Electronic Registration Systems,

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Defendants.

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Pending before the Court is Plaintiff's motion for preliminary injunction to stop a Trustee Sale of her house scheduled for Tuesday, April 2, 2013. Plaintiff basis this motion is that she was the victim of fraud in her attempted loan modification process. Defendants<sup>1</sup> have opposed the motion.

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**I. Motion for Preliminary Injunction**

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A plaintiff seeking a preliminary injunction must establish that:

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[1] he is likely to succeed on the merits,

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<sup>1</sup> For purposes of the analysis of the motion for preliminary injunction, the Court has used Defendants to mean: (1) Bank of America, as successor in interest to BAC Home Loans Servicing; (2) Bank of America; (3) Countrywide Home Loans, Inc. (4) Countrywide Financial Corporation; (4) Mortgage Electronic Registration Systems, Inc.; and (5) Deutsche Bank National Trust Company, as Trustee for the Holders of the Harborview 2006-5 Trust. Deutsche is not named in the Complaint; however, in the motion for preliminary injunction, Plaintiff now claims that Deutsche now owns the note on Plaintiff's house. Defense counsel filed a response on behalf of all of these Defendants.

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1 [2] he is likely to suffer irreparable harm in the absence of preliminary relief,  
2 [3] the balance of equities tips in his favor, and  
3 [4] an injunction is in the public interest.

4 *American Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir.  
5 2009) (citing *Winter v. Natural Resources Defense Council*, 129 S.Ct. 365, 374 (2008)).

6 If Plaintiff fails to meet the standard to qualify for a preliminary injunction applying  
7 the *Winter* factors, then the Court must use the following alternative formulation to see if  
8 Plaintiff can meet prongs 1 and 3:

9 “A preliminary injunction is appropriate when a plaintiff demonstrates ... that  
10 serious questions going to the merits were raised and the balance of hardships  
11 tips sharply in the plaintiff’s favor. .... Of course, plaintiffs must also satisfy  
12 the other *Winter* factors.”

13 *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (2011) (quoting *Lands Council*  
14 *v. McNair*, 537 F.3d 981, 987 (9<sup>th</sup> Cir. 2008)).

15 **A. Fraud Related to Initial Modification Request**

16 Plaintiff alleges (in her request for a preliminary injunction, not in her complaint), that  
17 Defendant Bank of America misrepresented to her that she needed to be 90 days late on her  
18 mortgage payments to qualify for a loan modification. Doc. 14 at 2.<sup>2</sup> Plaintiff further claims  
19 that in reliance on this representation, she intentionally fell three months behind on her  
20 mortgage payments even though at that time she had the ability to pay. *Id.*

21 In Arizona, a fraud claim requires proof of nine elements: (1) a representation; (2) its  
22 falsity; (3) its materiality; (4) the speaker’s knowledge of its falsity or ignorance of its truth;

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23 <sup>2</sup> In her motion for Preliminary Injunction, Plaintiff states, “Plaintiff filed suit in State  
24 court and alleged among other things, that Bank of America committed fraud when they told  
25 her she had to stop paying to get into a modification program.” Doc. 14 at 2. The Court has  
26 reviewed the complaint, and finds no support for this statement; i.e. the Court cannot find any  
27 allegation of fraud in the complaint. *See* Doc. 1-1 at 8-13. Instead, it appears Plaintiff’s sole  
28 cause of action is based on a theory of a defective assignment of the note and/or deed of trust.  
*Id.* The Court notes that Plaintiff’s memorandum of points and authorities filed in state court  
in support of her original application for a temporary restraining order mentioned the Arizona  
Consumer Fraud Act. Doc. 1-1 at 57. Procedurally, the Court is unclear that it can base a  
preliminary injunction on factual allegations and legal causes of action found only in a  
motion for preliminary injunction and not in the complaint.

1 (5) the speaker's intent that it be acted upon by the recipient in a manner reasonably  
2 contemplated; (6) the hearer's ignorance of the falsity of the representation; (7) the hearer's  
3 reliance on the truth of the representation; (8) the right to rely on it; and (9) consequent and  
4 proximate injury. *Echols v. Beauty Built Homes, Inc.*, 647 P.2d 629, 631 (1982).

5 Here, Plaintiff alleges that she is likely to succeed on the merits because:

6 (1) Bank of America represented to Plaintiff ... that she had to stop paying her  
7 mortgage for 90 days in order to enter into a modification program ...; (2) [the]  
8 representation w[as] false because homeowners did not have to stop paying  
9 their mortgages for 90 days to qualify for any government modification  
10 program and Bank of American had no intention of allowing Plaintiff to  
11 modify her existing loan; (3) the[] misrepresentation[] w[as] material because  
12 [it was] the but-for cause of Plaintiff failing behind on her payments ...; (4)  
13 Bank of America knew the statements that a person had to stop paying for 90  
14 days were false because they knew it was not a government policy and they  
15 did not have an internal written policy that supported any request for the  
16 homeowner to stop payment for 90 days to qualify for a loan modification; (5)  
17 Bank of America[']s statements were made with the intent to induce Plaintiff  
18 to stop paying her mortgage and to have her fall behind in a manner in which  
19 it would be almost impossible to catch up and/or bring her payments current  
20 and Bank of America never intended to allow Plaintiff to enter into a loan  
21 modification program; (6) Plaintiff had no way of knowing that [] there was  
22 no Bank of America policy that guaranteed if one stops paying for 90 days,  
23 they would qualify for a loan modification ...; (7) Plaintiff relied on Bank of  
24 America's statements to her detriment when she stopped paying for 90 days  
25 ...; (8) Plaintiff had a right to rely on Bank of America's statements because  
26 the house was hers and in her name ...; (9) if it were not for Bank of America's  
27 fraudulent actions and misstatements, Plaintiff would never have stopped  
28 paying her mortgage and would not have destroyed her credit rating in an  
attempt to modify her loan ... .

19 Doc. 14 at 3-4.

20 Defendants respond and argue:

21 Plaintiff (at 2) bases the Motion on a claim for "fraud," but fraud is a claim  
22 seeking monetary damages for which equitable relief should not be granted.  
23 Even assuming that Plaintiff has a strong likelihood of succeeding on that  
24 claim, recovering monetary damages for fraud would not be cause to prevent  
25 Defendants from enforcing their contractual rights and selling collateral at a  
26 trustee's sale.

24 Doc. 16 at 3.

25 Thus, Defendants' primary argument is that because fraud is remediable by money  
26 damages it cannot form the basis for equitable relief. The Court agrees that any claim  
27 remediable by money damages cannot be the basis for equitable relief. *See Stanley v. Univ.*  
28 *of Calif.*, 13 F.3d 1313, 1320-21 (9<sup>th</sup> Cir.1994) (to obtain a preliminary injunction the moving

1 party must demonstrate that her remedy at law was inadequate and to the extent she is  
2 seeking money damages, her remedy at law is adequate). However, the claim in this case is  
3 a hybrid because, while Defendants are correct that generally fraud can be remedied by  
4 money damages, under Arizona law Plaintiff's fraud claim will be barred if this Court does  
5 not grant an injunction.

6 Specifically, in *Madison v. Groseth*, 279 P.3d 633, 638 ¶15 (Ariz. App. 2012), the  
7 Arizona Court of Appeals held that failing to obtain an injunction prior to the Trustee's sale  
8 "waives all defenses and objections to the sale." In *Madison*, the plaintiff was bringing  
9 various tort claims after the Trustee sale of her house. *Id.* In applying the waiver provision  
10 of A.R.S. § 33-811(c), the Arizona Court of Appeals stated, "In sum, because Madison's tort  
11 claims depend on her objections to the validity of the trustee's sale, and she has waived those  
12 objections, her tort claims cannot survive as a matter of law." *Id.*

13 Reading *Madison*, it appears that while Plaintiff's fraud claim might be remediable  
14 by money damages, it will be waived and barred if this Court does not grant equitable relief  
15 to preserve the claim. Based on Plaintiff's arguments, there are serious questions going to  
16 the merits as to whether she states a tort claim for fraud, and the balance of equities tips  
17 sharply in her favor because her claim will be waived if this Court does not grant an  
18 injunction. Thus, Plaintiff meets prongs one and three of *Winter* using the *Alliance for the*  
19 *Rockies* test.

20 Next, Plaintiff meets prong two of *Winter*; specifically, she is likely to suffer  
21 irreparable harm. In this case, if an injunction is not granted, Plaintiff will be barred from  
22 litigating her case on the merits because her fraud claim will be waived.

23 Finally, "[i]n cases where the public interest is involved, the district court must also  
24 examine whether the public interest favors the plaintiff." *Fund for Animals, Inc. v. Lujan*,  
25 962 F.2d 1391, 1400 (9th Cir.1992) (citing *Caribbean Marine Servs., Co. v. Baldrige*, 844  
26 F.2d 668, 674 (9th Cir.1988)). In this case, the Court does not see that the public interest is  
27 clearly implicated by granting or denying the preliminary injunction. However, the Ninth  
28 Circuit Court of Appeals has identified a public policy in litigation that favors resolution of

1 cases on their merits. *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir.1986). Granting  
2 the preliminary injunction in this case to prevent Plaintiff's claim(s) from being waived by  
3 a Trustee sale furthers the public policy of allowing this case to be resolved on its merits.

4 Because Plaintiff has met the relevant three prongs for granting a preliminary  
5 injunction, the Court will grant the motion in this case. However, the Court must also  
6 consider the appropriate bond amount, and the status of the complaint.

7 **B. Fraud in the Settlement Process**

8 Plaintiff also argues that Defendant committed fraud in the settlement process. The  
9 Court has recounted these allegations in a prior order. *See* Doc. 17 at 1-2. For purposes of  
10 the motion for preliminary injunction, the Court has not considered these allegations.

11 **II. Amended Complaint**

12 As the Court noted in footnote 2, the Court has concerns about whether the Court can  
13 grant injunctive relief based on a theory that is not pleaded in the complaint. Thus, for this  
14 injunction to take effect, Plaintiff will be required to file an amended complaint, by 8:00 a.m.  
15 Tuesday, April 2, 2013, to include the facts and counts on which she premises her motion for  
16 preliminary injunction. If Plaintiff fails to file an amended complaint by this deadline, the  
17 injunction will dissolve without further order of this Court.

18 **III. Bond**

19 Defendants seek a bond of all of Plaintiff's back payments, plus current monthly  
20 payments. In other words, Defendants argue that the only appropriate bond would be to  
21 make Plaintiff come completely current on her note.

22 However, Arizona applies a different test. Specifically, in eviction actions, the  
23 Arizona Rules of Procedure for Eviction Actions states that when an appeal is taken from  
24 justice court to superior court:

25 If the appellant wants to remain in possession of the premises while the appeal  
26 is pending, the appellant must pay to the clerk of the court any rent due apart  
27 from amounts included in the judgment and continue paying to the clerk  
28 additional rent as it becomes due during the appeal. Failure of the appellant  
to pay any rent due as it accrues is cause for the appellee to seek an order  
allowing it to enforce a writ of restitution, but shall not be cause for the  
dismissal of the appeal. In this event, the appeal will proceed despite the

1 appellant's loss of possession of the premises while it is pending.

2 Arizona Rules of Procedure for Eviction Actions, Rule 17b.(2).

3 Thus, this Court finds that monthly fair market value rent to be a reasonable bond  
4 amount. Accordingly, Plaintiff will be required to post a bond in the amount of \$2,600.00<sup>3</sup>  
5 by 8:15 a.m., Tuesday, April 2, 2013. If Plaintiff fails to post the bond, this injunction will  
6 not go into effect. Further, on the 2<sup>nd</sup> of each month thereafter (or the following Monday, if  
7 the 2<sup>nd</sup> falls on a weekend or holiday) Plaintiff must again post this amount. If Plaintiff fails  
8 in any subsequent month to post the bond, Defendants may move to dissolve the injunction.

9 **IV. Conclusion**

10 Based on the foregoing,

11 **IT IS ORDERED** that Plaintiff's motion for preliminary injunction (Doc. 14) is  
12 granted conditioned on: 1) Plaintiff filing an amended complaint by 8:00 a.m., Tuesday,  
13 April 2, 2013; and 2) Plaintiff posting a bond with the Clerk of the Court in the amount of  
14 \$2,600.00 by 8:15 a.m., Tuesday, April 2, 2013.

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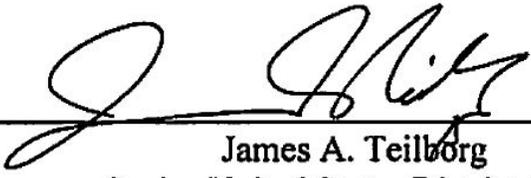
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19 <sup>3</sup> At the request of the Court, at oral argument both parties proposed a bond amount.  
20 (Defendants requested the monthly mortgage payment of \$7,500.00 as a monthly bond  
21 amount; but acknowledged that the Court was seeking a monthly fair market value rent  
22 amount.) First, Plaintiff proposed a nominal bond of \$1,000.00 per month. Alternatively,  
23 Plaintiff presented rental comparables ("comps") for properties in Plaintiff's area ranging  
24 from \$2,600.00 per month to \$8,000.00 per month. Defendants orally said they had evidence  
25 of a monthly fair market value rent of \$4,200.00. Defendants handed evidence to the Court  
26 of a monthly fair market value rent of \$4,696.00. Defendants opined that the \$4,200.00  
27 figure might be up to 20% inaccurate in either direction. Both attorneys conceded that given  
28 the time between the Court's order and the hearing, they did not have as much as they would  
have liked to address this issue.

26 The Court rejects Plaintiff's request for a nominal bond. The Court has set the bond  
27 at the monthly fair market value rent of the lowest comp presented to the Court. However,  
28 Defendants may move to increase the bond amount if they have evidence to support such a  
motion.

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**IT IS FURTHER ORDERED** that Plaintiff shall post another bond in the same amount on the 2<sup>nd</sup> of each month thereafter (or the following Monday, if the 2<sup>nd</sup> falls on a weekend or holiday); failing which, Defendants may move to dissolve the injunction.

DATED this 1<sup>st</sup> day of April, 2013.

  
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**James A. Teilborg**  
**Senior United States District Judge**