

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4 KEVIN E. GILMORE,

No. C 14-2389 CW

5 Plaintiff,

ORDER GRANTING
PRELIMINARY
INJUNCTION

6 v.

7 WELLS FARGO BANK N.A., a national
8 bank; NDEX WEST LLC, a Delaware
limited liability company;

(Docket Nos. 12,
17)

9 Defendants.
10 _____/

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12 This is a mortgage foreclosure case in which Plaintiff Kevin
13 E. Gilmore claims that Defendants Wells Fargo Bank, N.A. and NDEX
14 West LLC have engaged in "dual tracking" in violation of
15 California's Homeowner Bill of Rights (HBOR). On June 5, 2014,
16 the Court granted Gilmore's application for a temporary
17 restraining order and ordered Defendants to show cause why a
18 preliminary injunction should not issue. Wells Fargo responded to
19 the OSC and opposed the issuance of a preliminary injunction. On
20 June 18, 2014, the Court held a hearing. On that day, the Court
21 granted a preliminary injunction. See Docket No. 23. The Court
22 explains its reasoning in this written order.
23

24 BACKGROUND

25 Gilmore inherited from his grandfather the property at issue,
26 located in Berkeley, California, and has lived there since he was
27 a child. Gilmore Decl. ¶¶ 2-4. On June 21, 2007, he took out a
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1 loan secured by a promissory note in the principal sum of \$375,000
2 to World Savings Bank, FSB. Id. ¶ 2. Through a series of
3 mergers, the servicing of his loan was transferred to Wachovia
4 Bank and then to Wells Fargo. Id. ¶ 7. Wells Fargo asked Gilmore
5 several times to provide proof of hazard insurance on the
6 property, but because of the several transfers of his loan,
7 Gilmore did not know where he should send proof. Id. ¶ 8. As a
8 result, Gilmore's loan servicer automatically placed insurance on
9 the property and required him to pay, even though Gilmore had his
10 own coverage. See id. ¶ 9.

12 Due in part to the financial burdens of the wrongfully placed
13 insurance, as well as his other financial obligations, in 2010
14 Gilmore became delinquent on his loan. Id. ¶ 10; see also Thomas
15 Decl. ¶ 6. From 2011 to 2013, he submitted a number of
16 applications seeking loan modifications. Gilmore Decl. ¶ 12;
17 Thomas Decl. ¶ 6, Exs. A-I. Each one was denied, almost always
18 due to insufficient documents. Id. On or about March 21, 2012,
19 Wells Fargo recorded and served a Notice of Default. Gilmore
20 Decl. ¶ 15. Around June 2013, Gilmore's loan modification was
21 rejected because he had excessive financial obligations. Id.
22 ¶ 16.

25 In early 2014, Gilmore experienced a material change in his
26 financial circumstances -- his income increased and his financial
27 obligations decreased by about \$1,000 a month. Id. ¶ 17. On
28 March 12, 2014, he attended a home preservation workshop where he

1 submitted a loan modification application to a particular Wells
2 Fargo representative and was told his application was complete.
3 See Gilmore Supp. Decl. ¶¶ 35-36. Gilmore asserts that he asked
4 the Wells Fargo representative if he should add to the application
5 his live-in girlfriend's contribution, but the representative
6 advised against it, so Gilmore submitted the application based
7 only on his own income of \$5,400 a month. Id. ¶ 28. Wells Fargo
8 acknowledges receipt of the loan modification application and
9 provides a copy of what it received. See Thomas Decl. ¶ 9, Ex. M.
10 Gilmore received a letter acknowledging receipt of the loan
11 modification application. Gilmore Decl., Ex. A.

12
13 Wells Fargo later determined the application was incomplete
14 and required three additional documents: (1) a valid profit and
15 loss statement covering ninety days for Gilmore's business (the
16 one submitted covered a period ending after the date of
17 submission; (2) a profit and loss statement for Gilmore's live-in
18 girlfriend, the non-borrower contributor; and (3) proof of
19 occupancy and a paystub for the girlfriend. Thomas Decl. ¶ 9.
20 Notably, the copy of Gilmore's application provided by Wells Fargo
21 does not list Gilmore's live-in girlfriend as a co-borrower, nor
22 does it list any of her information. See Thomas Decl., Ex. M. On
23 March 25, 2014, Wells Fargo called Gilmore advising him that he
24 was missing several documents, while at the same time notifying
25 him of the active foreclosure. See id. ¶ 9, Ex. N (call log).
26 After that, Wells Fargo representatives contacted Gilmore a few
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1 more times advising him of the same, sometimes leaving him voice
2 messages if they could not reach him. Id. Gilmore did not
3 provide the requested documents. Id. ¶ 10. Wells Fargo alleges
4 that, on May 28, 2014, it sent Gilmore a letter denying his
5 application due to insufficient documents, but it did not provide
6 the letter in its papers opposing this motion. Id. ¶ 11.¹

7
8 Gilmore received a subsequent letter from Wells Fargo in
9 response to his request for the status of his loan. On April 21,
10 2014, Wells Fargo sent Gilmore a letter stating:

11 As of the date of this letter, your mortgage loan is due for
12 the December 15, 2010, through April 15, 2014 monthly
13 installments. **Foreclosure is active and a foreclosure sale**
14 **date is currently scheduled for May 19, 2014. However, your**
15 **mortgage loan is currently being reviewed for possible**
16 **payment assistance**, and you will want to continue working
17 with Sarah Nuncio during the review process.

18 Gilmore Decl., Ex. B (emphasis added). Gilmore alleges he wishes
19 to obtain a loan modification so he can complete loan payments but
20 has not been given a fair chance to do so. Gilmore Decl. ¶ 24.

21 LEGAL STANDARD

22 To obtain a preliminary injunction under Federal Rule of
23 Civil Procedure 65, the moving party must demonstrate "(1) a
24 likelihood of success on the merits; (2) a significant threat of

25 ¹ This letter has since been provided in conjunction with
26 Wells Fargo's separate motion to dismiss the complaint. See
27 Docket No. 30 (Request for Judicial Notice), Ex. 9. Although the
28 Court need not consider this document because it was presented
after the present motion was already submitted, the letter appears
to be a form letter responding to Gilmore's request for assistance
and noting that the application has been closed due to
insufficient documents.

1 irreparable injury; (3) that the balance of hardships favors the
2 applicant; and (4) whether any public interest favors granting an
3 injunction." Raich v. Ashcroft, 352 F.3d 1222, 1227 (9th Cir.
4 2003); see also Winter v. Natural Res. Def. Council, Inc., 129 S.
5 Ct. 365, 374 (2008). The Ninth Circuit has recognized that an
6 injunction could issue if "serious questions going to the merits
7 were raised and the balance of hardships tips sharply in
8 plaintiff's favor," so long as the plaintiff demonstrates
9 irreparable harm and shows that the injunction is in the public
10 interest. Alliance for the Wild Rockies v. Cottrell, 632 F.3d
11 1127, 1131 (9th Cir. 2011) (citation and internal quotation marks
12 omitted). Injunctive relief is "an extraordinary remedy that may
13 only be awarded upon a clear showing that the plaintiff is
14 entitled to such relief." Winter, 555 U.S. at 22.

DISCUSSION

I. Likelihood of success on the merits

18 Gilmore alleges that Wells Fargo violated California's HBOR.
19 The purpose of the act, which came into effect on January 1, 2013,
20 is to ensure that borrowers "have a meaningful opportunity to
21 obtain available loss mitigation options," including "loan
22 modifications or other alternatives to foreclosure." Cal. Civ.
23 Code § 2923.4. One of the HBOR's provisions prohibits mortgage
24 servicers from engaging in what is known as "dual-tracking," or
25 the practice of continuing to pursue foreclosure of a property
26 while review of a loan modification application is still pending.
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1 See Cal. Civ. Code § 2923.6(c).² Accordingly, if the borrower
2 submits a loan modification application, the mortgage servicer
3 must first make a written determination that the borrower is not
4 eligible for a loan modification before recording a notice of
5 default or conducting a trustee's sale. Id. Denial of the loan
6 modification triggers a thirty-day appeal period. Cal. Civ. Code
7 § 2923.6(d). If a loan modification is offered, and the borrower
8 either rejects the offer or accepts the offer but breaches the
9 loan modification agreement, then the mortgage servicer may
10 initiate foreclosure proceedings. Id. subsection (c).

12 Wells Fargo disputes whether the HBOR provision applies to
13 this case. A settlement was reached in a case entitled, United
14 States of America v. Bank of America Corp., Case No. 1:12-cv-00361
15 RMC, called the National Mortgage Settlement (NMS). The terms of
16 the NMS were memorialized in a Settlement Term Sheet, which
17 imposes a number of requirements on NMS signatories. The HBOR
18 provides a safe harbor provision insulating an NMS signatory from
19 liability so long as the signatory "is in compliance with the
20 relevant terms of the Settlement Term Sheet of that consent
21

24 ² The statute provides in relevant part: "If a borrower
25 submits a complete application for a first lien loan modification
26 offered by, or through, the borrower's mortgage servicer, a
27 mortgage servicer . . . or authorized agent shall not record a
28 notice of default or notice of sale, or conduct a trustee's sale,
while the complete first lien loan modification application is
pending."

1 judgment with respect to the borrower who brought an action
2 pursuant to this section." Cal. Civ. Code § 2924.12(g).

3 Wells Fargo argues that its compliance can only be determined
4 according to the report issued by the monitor appointed to
5 administer the Consent Judgment in the District of Columbia case.
6 The Consent Judgment itself is concerned with mortgage servicing,
7 origination, and certification in general, rather than with
8 respect to any particular mortgage. The monitor has found Wells
9 Fargo to be in compliance. See RJN, Ex. 8. Wells Fargo argues
10 that the California statute "creates an ambiguity and reveals a
11 lack of understanding of the compliance and enforcement provisions
12 of the NMS." Wells Fargo's Response to OSC, 7. To the extent
13 that the California statute is interpreted to create a different
14 standard of "compliance" that is not in the NMS, Wells Fargo
15 argues that allowing California courts to interpret the NMS would
16 invade the District of Columbia court's exclusive jurisdiction for
17 interpreting its own Consent Judgment.
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20 Wells Fargo's argument is unpersuasive. Section 2924.12(g)
21 unequivocally and unambiguously states that the compliance
22 required for immunity from California's HBOR statutory provisions
23 is "with respect to the borrower who brought an action pursuant to
24 this section." It is a cardinal principle of statutory
25 construction "that a statute ought, upon the whole, to be so
26 construed that, if it can be prevented, no clause, sentence, or
27 word shall be superfluous, void, or insignificant." Duncan v.
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1 Walker, 533 U.S. 167, 174 (2001). Wells Fargo's reading of the
2 statute would render the phrase noted above to be superfluous.
3 The plain meaning of that phrase demonstrates that a defendant
4 must comply with the terms with respect to the borrower in
5 question, or else the borrower may sue under the HBOR.³ This does
6 not invade the jurisdiction of the District of Columbia court to
7 enforce its own consent decree, monitoring signatories according
8 to its own provisions. Conversely, the monitor in the District of
9 Columbia court does not govern the administration of California
10 law. The California legislature chose to incorporate the NMS'
11 Settlement Term Sheet into the safe harbor provision of the HBOR
12 but did not delegate to the NMS monitor the determination of the
13 state's safe harbor provision.
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15 Wells Fargo has not shown that it has complied with the terms
16 of the Settlement Term Sheet with respect to the servicing of the
17 loan in question.⁴ Gilmore presents evidence showing that Wells
18 Fargo failed to provide him with an online portal which, among
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21 ³ Although the issue has not been discussed extensively,
22 courts in this district have applied the safe harbor provision
23 with respect to the borrower bringing the suit. See, e.g.,
24 Penermon v. Wells Fargo Bank, N.A., __F.Supp.2d__, 2014 WL
2754596, at *7 (N.D. Cal.); Bowman v. Wells Fargo Home Mortgage,
2014 WL 1921829, at *4 (N.D. Cal.).

25 ⁴ Although Wells Fargo asserted at the hearing that Gilmore
26 had the burden to prove the NMS did not apply, safe harbor under
27 the HBOR is "an affirmative defense . . . for which Wells Fargo
28 has the burden of proof." Bowman, 2014 WL 1921829, at *4 (quoting
Rijhwani v. Wells Fargo Home Mortgage, Inc., 2014 WL 890016, at *9
(N.D. Cal.)).

1 other things, would allow him to check the status of his loan
2 modification application. Gilmore Decl. ¶ 22; Pivtorak Decl., Ex.
3 A (Settlement Term Sheet), A-25. Wells Fargo does not dispute
4 this allegation with any valid evidence. At the hearing, Wells
5 Fargo's counsel asserted there was an online portal, but did not
6 say whether the portal satisfied the conditions of the Settlement
7 Term Sheet or provide any admissible evidence to back up that
8 claim. June 18, 2014 Transcript, 6:18-7:22. Attorney argument is
9 not evidence. Thus, it is likely that Wells Fargo has violated
10 the provisions of the NMS with respect to Gilmore's mortgage and
11 is not protected by the safe harbor provision of the HBOR.

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13 Gilmore additionally demonstrates that it is likely that
14 Wells Fargo has engaged in dual tracking in violation of the HBOR
15 and the NMS, which would be an alternative ground for finding that
16 the HBOR's safe harbor provision does not apply. The NMS
17 provides:
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19 If, after an eligible borrower has been referred to
20 foreclosure, Servicer receives a complete loan modification
21 application more than 30 days after the Post Referral to
22 Foreclosure Solicitation letter, but more than 37 days before
23 a foreclosure sale is scheduled, then while such loan
24 modification application is pending, Servicer shall not
25 proceed with the foreclosure sale.

26 Settlement Term Sheet, A-19 ¶ 6. If the loan modification
27 requested by the borrower is denied, and more than ninety days
28 remain until a scheduled foreclosure date or a date when
foreclosure could reasonably occur, then a borrower is entitled to
an appeal process. Id. at ¶ 7. The servicer cannot foreclose

1 until the expiration of a thirty-day appeal period or, if the
2 borrower appeals, the termination of the appeal process. Id. If
3 the borrower completes a loan modification application between
4 thirty-seven to fifteen days before a foreclosure sale is
5 scheduled, then the servicer need only conduct an expedited review
6 of the application. Id. at A-19-A-20 ¶ 8. Even if the borrower
7 completes a loan modification application less than fifteen days
8 before a foreclosure sale is scheduled, the servicer must
9 nevertheless notify the borrower of its determination or inability
10 to complete its review of the application. Id. at A-20 ¶ 9.
11 Notice of a denial shall inform the borrower that he has thirty
12 days to provide evidence that the decision was in error. Id. at
13 A-27 ¶ 2.
14

15 California's HBOR prohibits the mortgage servicer or
16 authorized agent from recording a notice of default, recording a
17 notice of sale, or proceeding to foreclosure while review of a
18 complete loan modification application is pending. Cal. Civ. Code
19 § 2923.6(c).⁵ If the borrower has previously been reviewed for a
20 loan modification and has been denied, then the servicer is not
21 required to evaluate a new application unless it includes a
22 documented change of the borrower's financial circumstances. Id.
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25 ⁵ The provision uses the term "first lien loan modification,"
26 which means a modification of the loan on "the most senior
27 mortgage or deed of trust on the property," not the first
28 submitted application for a loan modification. See Cal. Civ. Code
§ 2920.5(d) (defining the term "first lien" for purposes of the
article).

1 subsection (g). The servicer must provide the borrower with
2 written notice identifying the reasons for the denial and other
3 applicable information, which triggers a thirty-day appeal
4 process. Id. subsections (c)-(f).

5 Gilmore submits evidence that the loan modification
6 application he completed at the home preservation workshop was
7 based on his income information only. His application materials,
8 which Wells Fargo submitted to the Court, corroborate his claim.
9 It appears that no final rejection was ever provided to Gilmore,
10 which would likely have triggered an appeal process. The April
11 21, 2014 letter that Wells Fargo sent Gilmore informed him that
12 the foreclosure process was proceeding, but that review of his
13 application was ongoing. Because the letter does not provide a
14 clear denial of Gilmore's application with notice of his options
15 going forward, this would appear to be a violation of the
16 provisions of both the NMS and the HBOR.

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19 Wells Fargo contends that Gilmore's loan modification
20 application was never complete. While Wells Fargo alleges that
21 Gilmore failed to submit certain documents, Gilmore points out
22 that this deficiency was noted in error because the documents
23 identified by Wells Fargo were either unnecessary for his
24 application (the girlfriend's documents, which the Wells Fargo
25 representative stated were unnecessary, and upon which Gilmore did
26 not rely), or were not communicated clearly to Gilmore. Further,
27 although Wells Fargo alleges it called Gilmore several times to
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1 obtain the requested documents, Gilmore points out this was a
2 departure from Wells Fargo's typical practice over the years,
3 which was to send letters requesting additional documents. See,
4 e.g., Gilmore Decl., Ex. A; Thomas Decl., Ex. I. The result is
5 that there are at least serious questions going to whether Gilmore
6 completed his loan modification application.⁶

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8 II. Irreparable Harm, Balance of the Hardships, and Public
9 Interest

10 As noted in the TRO, the other factors weigh heavily in favor
11 of Gilmore. The foreclosure sale currently scheduled would impose
12 immediate and irreparable injury because Gilmore would lose real
13 property, which is always considered unique. Sundance Land Corp.
14 v. Cmty. First Fed. Sav. & Loan Ass'n, 840 F.2d 653, 661 (9th Cir.
15 1988). Gilmore's loss would be particularly significant because
16 the property at issue is his childhood home. He would also be
17 deprived of a meaningful opportunity to be considered for
18 available loss mitigation options, which is his right under the
19 HBOR. This situation is exactly the sort of harm that the HBOR
20 was intended to prevent -- borrowers unable to achieve a
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23 ⁶ Indeed, under the statutory scheme requiring a detailed
24 denial and appeal process, it might have been in Wells Fargo's
25 interest to avoid providing a final rejection letter and instead
26 allege that Gilmore's application was "incomplete." As Gilmore's
27 counsel notes, the fact that Gilmore has attempted to modify his
28 loan numerous times without success could cut both ways. It could
reflect on the difficult nature of Wells Fargo's loan modification
process and the fact that servicers are incentivized to allege
that applications are incomplete in order to move forward with
foreclosure. See June 18, 2014 Transcript, 8:5-17.

1 meaningful and clear review of their loan modification
2 applications. See Penermon, 2014 WL 2754596, at *6.

3 On the other hand, the potential harm to Wells Fargo is
4 unlikely to be substantial. If it is revealed at the end of the
5 litigation that injunctive relief was wrongly issued, Wells Fargo
6 could then foreclose on the property and gain from the substantial
7 value of the property. In that case, a preliminary injunction
8 would have only delayed foreclosure for a relatively short period
9 of time. The terms of an injunction also may be tailored to
10 minimize any potential harm to Wells Fargo. Because the
11 irreparable injury to Gilmore is comparatively severe, the balance
12 of hardships weighs in Gilmore's favor.

14 The last factor also weighs in favor of granting an
15 injunction. Due to the "adverse impact foreclosures have on
16 households and communities," there is a "strong public interest in
17 preventing unlawful foreclosures." Sharma v. Provident Funding
18 Associates, LP, 2010 WL 143473, at *2 (N.D. Cal.). Loan
19 modifications and other non-foreclosure alternatives can help
20 borrowers avoid foreclosures. See Penermon, 2014 WL 2754596,
21 at *6. As acknowledged by the California legislature in enacting
22 the HBOR, there is a strong public interest in offering borrowers
23 a meaningful opportunity to explore available loss mitigation
24 options. See id. ("This law was created to combat the foreclosure
25 crisis and hold banks accountable for exacerbating it.").
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1 In sum, because Gilmore has satisfied his burden of showing
2 all the Winter factors are met, the Court preliminarily enjoins
3 Wells Fargo from foreclosing on the property.

4 III. Bond amount

5 Wells Fargo contends that if a preliminary injunction were to
6 issue, a bond of \$65,000 should be required. Federal Rule of
7 Civil Procedure 65(c) states that a court may issue a preliminary
8 injunction only if the movant gives security in the amount the
9 court considers proper to pay the costs and damages sustained if
10 any party is found to be wrongly restrained or enjoined. However,
11 a court nevertheless has the discretion to waive the bond
12 requirement if there is a high probability of success that equity
13 compels waiving the bond, the balance of the equities
14 overwhelmingly favors the movant, it appears unlikely that the
15 defendant will suffer any harm as a result of the preliminary
16 injunction, or the requirement of a bond would negatively impact
17 the movant's constitutional rights. Baca v. Moreno Valley Unified
18 Sch. Dist., 936 F. Supp. 719, 738 (C.D. Cal. 1996).
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21 Wells Fargo alleges that Gilmore has not made a payment since
22 2010 and that he owes up to \$415,100.14. Wells Fargo additionally
23 asserts that, if it is prevented from foreclosing, it will lose
24 interest payments due on the loan, taxes and insurance premiums
25 paid on the property, and attorneys' fees. Gilmore responds that
26 his property is worth at least \$630,000, as determined by Wells
27 Fargo in a valuation dated March 8, 2014. Pivtorak Supp. Decl.,
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1 Ex. C. Consequently, Wells Fargo should be protected fully by the
2 value of the property.

3 In order to minimize the potential harm to Wells Fargo, the
4 Court will require a bond for the preliminary injunction to stay
5 in effect. The bond shall take the form of monthly payments in
6 the amount of Gilmore's last mortgage payment, or \$1,800, which
7 will be held in trust. See June 18, 2014 Transcript, 2:11-3:11,
8 14:24-15:6. As Gilmore will be paying the full amount of his
9 mortgage every month to keep the preliminary injunction in place,
10 a payment which Wells Fargo was not receiving at the time the suit
11 was filed, Wells Fargo will not suffer undue harm.

13 CONCLUSION

14 Defendant Wells Fargo, its agents, and all persons acting in
15 concert or participating with Wells Fargo, are hereby restrained
16 and enjoined from engaging in, committing, performing, or
17 conducting, directly or indirectly, any and all of the following
18 acts: commencing, continuing, maintaining, or conducting a
19 trustee's sale or other foreclosure proceeding with regards to
20 Plaintiff Kevin E. Gilmore's home located at 955 Virginia St.,
21 Berkeley, CA 94710, APN #058-2124-0193.

23 This preliminary injunction is conditioned upon Gilmore
24 making monthly payments to Wells Fargo in the amount of \$1,800,
25 payable on the twenty-third day of every month, beginning Monday,
26 June 23, 2014. The payment must be sent to Wells Fargo's counsel
27 in this case, who must place the payment in its firm's trust
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1 account. If Wells Fargo believes that Gilmore has breached this
2 condition, then Wells Fargo must first ask the Court to lift the
3 injunction before taking any action related to the property.

4 IT IS SO ORDERED.

5 Dated: 7/29/2014

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CLAUDIA WILKEN
United States District Judge

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