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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

JOYCE A. BLAND; MICHAEL BLAND,  
Plaintiffs,  
v.  
THE CARONE FAMILY TRUST, *et al.*,  
Defendants.

Civil No. 07-CV-418-L(RBB)

**ORDER GRANTING PLAINTIFFS’  
APPLICATION FOR TEMPORARY  
RESTRAINING ORDER [doc. #11];  
REQUIRING THE POSTING OF A  
BOND; SETTING BRIEFING ON  
PRELIMINARY INJUNCTION; and  
SETTING PRELIMINARY  
INJUNCTION HEARING**

Plaintiffs filed this action on March 6, 2007, alleging violations of the Truth in Lending Act (“TILA”) and Home Ownership and Equity Protection Act of 1994 (“HOEPA”). Plaintiffs seek a TRO to prevent a foreclosure sale of their home on March 20, 2007 by defendants.

**Factual and Procedural Background**

Plaintiffs entered into a consumer credit transaction (“Transaction”) to refinance their principle dwelling/residence located at 14236 Caminito Vistana, San Diego (“plaintiffs’ home”) with Pitkin Hopkins, Inc. in the amount of \$430,000.00 secured by a deed of trust of plaintiffs’ home and deeds of trust against four other properties owned by plaintiffs.<sup>1</sup> The Transaction refinanced, *inter alia*, an existing purchase money loan secured by plaintiffs’ home held by Home Equity Funding.

<sup>1</sup> The four other properties are located at 13333 Powers Road, Poway; 15590 Paseo Ajanta, San Diego; 12852 War Horse, San Diego; and 14304 Minya Lane, Poway.

1 The Transaction was a high rate mortgage (an annual percentage rate of 24.39% with total  
2 points and fees payable by plaintiffs at or before closing in excess of \$43,000). Additional terms  
3 of the loan included 11 interest only monthly payments of \$5,863.64, with a final balloon  
4 payment of \$435,863.64 on the thirteenth month. On August 2, 2005, Pritkin Hopkins, Inc.  
5 assigned the loan to the Carone Family Trust (“Trust”), James or Gwendolyn Carone, Co-  
6 Trustees of the Trust.

7 On December 7, 2005, by separate agreement, the loan was modified (“modification”) to  
8 remove the security interest in the 15590 Paseo Ajanta, San Diego property. The modification  
9 cost plaintiff Joyce Bland, \$10,586.00 to be paid by note secured by a deed of trust against  
10 plaintiffs’ residence. The modification note provided for one balloon payment of \$10,586.00 on  
11 June 6, 2006.

12 On May 16, 2006 – before the modification note was due – defendant James Carone  
13 recorded a Notice of Default and Election to Sue Under Deed of Trust relating to the  
14 modification note.

15 Plaintiff Joyce Bland filed a Chapter 11 Bankruptcy Petition. Defendants then sought  
16 relief from the automatic bankruptcy stay. Plaintiffs allege that at the time of the filing of the  
17 Petition, plaintiffs were unaware of their claims under TILA and HOEPA. Plaintiff, as debtor-  
18 in-possession has filed a motion to dismiss her pending bankruptcy petition.

19 Plaintiffs contend that on July 23, 2005, they signed but did not receive required  
20 Transaction documents, including but not limited to, two copies of the Notice of Right to Cancel  
21 containing the date the cancellation period expires. Plaintiffs state that they also did not receive  
22 specific disclosures as required by HOEPA, 15 U.S.C. § 1639(b).

23 Plaintiffs argue that under 15 U.S.C. § 1635 and 15 C.F.R. § 226.15 (“Reg Z”), failure to  
24 provide material disclosures extends plaintiffs’ right to rescission to three years.

25 Because of these alleged irregularities, on January 12, 2007, plaintiffs allegedly rescinded  
26 the Transaction under 15 U.S.C. § 1635 by sending the Rescission Notice as required by  
27 Regulation Z to the Carone Family Trust, Pitkin Hopkins, Inc. and James Carone. Additionally,  
28 on January 12, 2007, plaintiff Joyce Bland rescinded the modification by sending the Rescission

1 Notice to James Carone.

2 On January 22, 2007, plaintiffs' counsel received a copy of the Notice of Right to Cancel  
3 and Home Ownership and Equity Protection Act of 1994, Regulation Z, Section 32 Notice, that  
4 plaintiffs signed but allege they never received. Moreover, plaintiffs contend that the Notice of  
5 Right to Cancel does not comply with the requirements of TILA in that it does not contain the  
6 date the cancellation period expires. (*See* Exh. 3 to Complaint). Finally, plaintiffs assert that the  
7 Home Ownership and Equity Protection Act of 1994, Regulation Z, Section 32 Notice does not  
8 comply with HOEPA in that the date of acknowledgment of receipt shows that it was not given  
9 in a timely manner.

10 Nevertheless, defendants have sought to immediately foreclose on plaintiffs' residence by  
11 obtaining an Order for relief from the stay from the bankruptcy court and filing a Notice of  
12 Trustee's Sale Under Deed of Trust with a scheduled sale date of March 20, 2007.

### 13 **TRO Legal Standard**

14 A party seeking injunctive relief under Federal Rule of Civil Procedure 65 must show  
15 either (1) a combination of probable success on the merits and the possibility of irreparable  
16 harm, or (2) that serious questions are raised and the balance of hardships tips sharply in the  
17 moving party's favor. *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 731 (9th Cir. 1999); *Sun*  
18 *Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1119 (9th Cir. 1999); *Roe v. Anderson*,  
19 134 F.3d 1400, 1402 (9th Cir. 1998). “These two formulations represent two points on a sliding  
20 scale in which the required degree of irreparable harm increases as the probability of success  
21 decreases.” *Roe*, 134 F.3d at 1402 (*quoting United States v. Nutri-cology, Inc.*, 982 F.2d 394,  
22 397 (9th Cir. 1992)); *accord Sun Microsystems*, 188 F.3d at 1119. “Thus, ‘the greater the  
23 relative hardship to the moving party, the less probability of success must be shown.’” *Sun*  
24 *Microsystems*, 188 F.3d at 1119 (*quoting National Ctr. for Immigrants Rights v. INS*, 743 F.2d  
25 1365, 1369 (9th Cir. 1984)). Under the second standard, “‘serious questions’ refers to questions  
26 which cannot be resolved one way or the other at the hearing on the injunction and as to which  
27 the court perceives a need to preserve the *status quo* lest one side prevent resolution of the  
28 questions or execution of any judgment by altering the *status quo*.” *Gilder v. PGA Tour, Inc.*,

1 936 F.2d 417, 422 (9th Cir. 1991) (*quoting Republic of Philippines v. Marcos*, 862 F.2d 1355,  
2 1362 (9th Cir. 1988) (*en banc*)). Furthermore, "serious questions" are substantial, difficult, and  
3 doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation."  
4 *Id.*

## 5 Discussion

6 The Truth-in-Lending Act ("TILA"), which is contained in Title I of the Consumer Credit  
7 Protection Act, as amended (15 U.S.C. § 1601, et seq.), is intended to assure a meaningful  
8 disclosure of credit terms so that consumers can compare more readily various available terms  
9 and avoid the uninformed use of credit. 15 U.S.C. § 1601(a). TILA requires that creditors  
10 disclose to borrowers specific information, including finance charges, annual percentage rate,  
11 and the right to rescind a transaction. *See, e.g.*, 15 U.S.C. §§ 1635, 1638. Regulation Z, 12  
12 C.F.R. Part 226, is issued by the Board of Governors of the Federal Reserve System to  
13 implement TILA. *See* 12 C.F.R. § 226.1(a).

### 14 1. Irreparable Harm

15 Plaintiffs contend that they will suffer from irreparable harm because their residence is  
16 unique and is their home. In other words, if the home is sold in foreclosure, they will not be able  
17 to obtain another house that has the unique features of their current home. The Court finds  
18 irreparable harm if plaintiffs' residence is sold prior to determining the merits of plaintiffs'  
19 claims.

### 20 2. Probable Success on the Merits

21 Plaintiffs contend that they have demonstrated violations of TILA and HOEPA which  
22 shows probable success on the merits. Defendants argue, however, that whether plaintiffs  
23 received the requisite notification forms is hotly contested. Cunningham, in his declaration,  
24 states that plaintiffs received the documents in a timely manner which would defeat plaintiffs'  
25 claims.

26 Defendants contend that plaintiffs' cause of action for damages under TILA is subject to a  
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1 one-year statute of limitations, 15 U.S.C. § 1640(e)<sup>2</sup>, which runs from the time the loan transaction  
2 is consummated, and a three-year limitation for rescission under TILA, 15 U.S.C. § 1635(f).  
3 The loan was obtained in the summer of 2005 so defendants contend this action is untimely. The  
4 failure to make the required disclosures occurred, if at all, at the time the loan documents were  
5 signed. Plaintiffs were in full possession of all information relevant to the discovery of a TILA  
6 violation and a § 1640(a) damages claim on the day the loan papers were signed. Therefore, any  
7 damage claim plaintiffs may be making under either TILA or HOEPA is likely time barred.

8 But here, plaintiffs are seeking rescission, not TILA damages. Rescission of contract is to  
9 result in the return of both parties to the status quo ante: each side is to be restored to the  
10 property and legal attributes that it enjoyed before the contract was entered and performed.  
11 Here, plaintiffs provided a Notice of Rescission and plaintiffs assert that defendants have failed  
12 to respond to their notice of rescission. Under 15 U.S.C. § 1640, a creditor may be liable for  
13 damages if it fails to respond to the debtor's notice of rescission as required under 15 U.S.C. §  
14 1635. While a debtor normally has three days to rescind the transaction after it has been  
15 consummated, the debtor has up to three years to rescind the transaction if the required notice or  
16 material disclosures are not delivered. 12 C.F.R. § 226.23(a)(3); see also 15 U.S.C. § 1635(f).

17 Understandably, the statute of limitations issue is not fully developed by either party in  
18 this application and will need to be addressed at the time of the hearing on the application for  
19 preliminary injunction.

### 20 **3. Serious Questions**

21 There are serious questions concerning the statute of limitations and whether plaintiffs did  
22 or did not receive the requisite information when their loan closed.

### 23 **4. Balance of Hardships**

24 Although defendants contend that they have and will continue to suffer significant injury  
25 because they are not being repaid on the loan, plaintiffs will lose their home. It is true that  
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27 <sup>2</sup> Any action under this section may be brought in any United States district court,  
28 or in any other court of competent jurisdiction, within one year from the date of the occurrence  
of the violation.

1 plaintiffs have put themselves in this position by not repaying the loan as they promised but loss  
2 of a primary residence is a more significant hardship than lack of timely repayment of a loan.  
3 Plaintiffs are facing loss of their real property and primary residence. If plaintiffs prevail on  
4 their claims in this case, they face the possibility that, by that time, defendants may have already  
5 sold their property. Defendants, on the other hand, have the right to the payment required under  
6 their loan contracts with plaintiffs. Balancing defendants' right to proceeds under the loan  
7 contract against plaintiffs' potential loss of real property, the Court finds that the balance of  
8 hardships tips in plaintiffs' favor.

### 9 **5. Setting of Bond**

10 Pursuant to Rule 65(c) of the Federal Rules of Civil Procedure, a successful movant for a  
11 TRO or preliminary injunction must post security "for the payment of such costs and damages as  
12 may be incurred or suffered by any party who is found to have been wrongfully enjoined or  
13 restrained." Generally, the amount of the bond required prior to issuance of a temporary  
14 restraining order (TRO) or preliminary injunction should be sufficient to protect the restrained or  
15 enjoined party from loss in the event that future proceedings prove that the injunction issued  
16 wrongfully.

17 Plaintiffs argue that no bond should be required because of the value of the property is  
18 sufficient to cover any costs that may arise if the TRO is wrongfully granted. Defendants have  
19 not suggested an amount for a bond. On the facts as presented, the Court will require a bond in  
20 the amount of \$5,000.

### 21 **Conclusion**


22 Plaintiffs present a possibility of success on the merits and the loss of their home presents  
23 irreparable harm. Similarly, the issues presented are fact and credibility intensive and/or can be  
24 determined by the statute of limitation. The balance of hardship tips in plaintiffs' favor.  
25 Accordingly, the Court will grant the application for a TRO. The parties have agreed to extend  
26 the time for the preliminary injunction hearing so that some discovery may occur.

27 Based on the foregoing, **IT IS ORDERED** granting plaintiffs' application for temporary  
28 restraining order. **IT IS FURTHER ORDERED** that plaintiffs shall post a \$5,000.00 bond. **IT**

1 **IS FURTHER ORDERED** setting hearing on plaintiffs' application for preliminary injunction  
2 for **Tuesday, April 10, 2007 at 10:00 a.m.** **IT IS FURTHER ORDERED** that defendants  
3 shall file and serve an opposition to plaintiffs' application for preliminary injunction no later  
4 than April 3, 2007. **IT IS FURTHER ORDERED** that plaintiffs shall file and serve a reply  
5 memorandum no later than April 6, 2007 at noon.

6 **IT IS SO ORDERED.**

7 DATED: March 19, 2007

8   
9 M. James Lorenz  
United States District Court Judge

10  
11 COPY TO:

12 HON. RUBEN B. BROOKS  
13 UNITED STATES MAGISTRATE JUDGE

14 ALL PARTIES/COUNSEL  
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