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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

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LETICIA LUCERO,

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Plaintiff,

No. C13-0602RSL

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v.

MEMORANDUM OF DECISION

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CENLAR FSB, *et al.*,

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Defendants.

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This matter was heard by the Court in a bench trial commencing on September 24, 2015, and, after a month's recess to allow defendant Cenlar FSB to produce its witness, concluding on October 27, 2015. Plaintiff Leticia Lucero brought this action against her mortgage loan servicer alleging that it violated the Real Estate Settlement Procedures Act ("RESPA"), breached its contractual and good faith obligations, and committed the tort of outrage when it charged attorney's fees and costs to plaintiff's mortgage account and refused to explain the charges upon request. Plaintiff seeks compensatory damages and attorney's fees in this litigation.

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**FINDINGS OF FACT**

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By a preponderance of the evidence, the Court finds as follows:

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In August 2006, plaintiff and her then-husband took out a mortgage in the amount of \$391,000. Plaintiff fell behind on the payments in 2010, and a Notice of Default was issued on behalf of defendant Cenlar, the loan servicer, on August 27, 2012. Plaintiff had a number of

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MEMORANDUM OF DECISION

1 concerns regarding the validity and appropriateness of the Notice of Default under the  
2 Washington Deed of Trust Act and was unsatisfied with Cenlar’s responses to her request for  
3 information. Plaintiff hired an attorney to help her navigate the foreclosure and mediation  
4 process. She was able to negotiate a permanent loan modification in January 2013, effectively  
5 bringing the loan current and clearing the default as of March 2013.

6 Based on information plaintiff was receiving from other lenders and servicers in the  
7 marketplace, she believed that Cenlar was continuing to report her loan as delinquent despite the  
8 modification. She was unable to resolve this issue over the phone and, in April 2013, filed this  
9 lawsuit alleging that Cenlar had violated its credit reporting obligations and seeking damages  
10 related to the way in which Cenlar (and others) had sought to foreclose on her mortgage. Over  
11 the course of many months, Cenlar and the other defendants successfully defended themselves  
12 from all of the original claims. In December 2013, however, Cenlar sent plaintiff a letter stating  
13 “Dear Mortgagor(s): In keeping with Washington law, please be advised that we have charged  
14 your loan account for the fee described, on the date and in the amount indicated on the below  
15 list.” Plaintiff’s Exhibit 13. Consistent with the letter, Cenlar imposed a charge of \$1,261.42 in  
16 attorney’s fees and costs on plaintiff’s mortgage account. Plaintiff, with the help of counsel,  
17 contested the charge by letter dated December 29, 2013, and requested information regarding  
18 the fees and costs. Over the next few months, Cenlar acknowledged receipt of her inquiry and  
19 clarified the nature of her request, but was unable or unwilling to provide any additional  
20 explanation for the disputed charges.

21 Plaintiff’s regular monthly mortgage payment following the loan modification was  
22 \$1,525.37, but between January 16, 2014, and October 16, 2014, the “Amount Due” varied  
23 greatly and included thousands of dollars of attorney’s fees, reaching a high of \$19,809.03 in  
24 September 2014. Plaintiff sent a notice of error and a second request for information in March  
25 2014. Cenlar did not respond for three months, but continued sending letters telling plaintiff that  
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1 attorney's fees were being charged to her account and statements demanding payment of  
2 thousands of dollars in attorney's fees and costs. It was not until June 18, 2014, when Cenlar's  
3 litigation counsel responded to plaintiff's December 2013 inquiries, that plaintiff learned that  
4 Cenlar was charging her for the attorney's fees and costs the servicer was incurring in defending  
5 this litigation. Cenlar also stated that the fees were charged pursuant to the Deed of Trust and  
6 that notification of the account activity was required by a federal regulation. Until then, plaintiff  
7 had no idea what fees and costs were being levied against her account or the legal basis for  
8 those charges.

9 At trial, Cenlar provided only the barest information regarding the decision-making  
10 process that resulted in the imposition of Cenlar's attorney's fees and costs on plaintiff's  
11 monthly mortgage statements. Cenlar's sole witness had no personal knowledge of the process  
12 and did not participate in the decision. All he could say was that Cenlar's in-house counsel must  
13 have made a determination that the fees could be collected from plaintiff. In-house counsel did  
14 not testify at trial, nor is there any admissible evidence regarding what motivated Cenlar to start  
15 charging plaintiff for its litigation costs or under what legal theory those costs were included in  
16 the "Amount Due" portion of the statement. During the course of this litigation, Cenlar has  
17 offered no less than eight different justifications for its actions. Three of the purported  
18 justifications (paragraphs 14 and 22 of the Deed of Trust and paragraph 6(e) of the Note) were  
19 raised in response to plaintiff's inquiries but have never been pursued. Some of the justifications  
20 (such as that Cenlar was simply tracking the fees in case they decided to collect them in the  
21 future) are factually unsupported, and none of them is particularly persuasive. More  
22 importantly, there is no evidence that Cenlar actually relied on any of these justifications when  
23 it demanded payment for amounts far and above that specified in the recently negotiated  
24 modification agreement.

25 In late September 2014, the Court issued an order finding that plaintiff had plausibly  
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1 alleged a contract and outrage claim based on the attorney's fee charges imposed on her  
2 account. Cenlar promptly stopped adding fees to the "Amount Due" line on her loan statements,  
3 but continued to note the fees that had been charged during the preceding month. Cenlar's  
4 witness testified that the loan history shows that Cenlar removed over \$40,000 in fees and costs  
5 from plaintiff's account and designated them as nonrecoverable. He acknowledged, however,  
6 that plaintiff was never informed that the amounts had been waived or deleted. On October 28,  
7 2014, Cenlar responded to one of plaintiff's requests for information with an itemized list of the  
8 attorney's fees and costs it had charged to plaintiff's account from February 2013<sup>1</sup> to October  
9 2014, totaling \$26,724. When Cenlar transferred the servicing of plaintiff's loan to NationStar  
10 Mortgage LLC in March 2015, the loan history included \$26,724 in lender-paid expenses.

11 Plaintiff testified that this amount continues to appear on her loan statements from NationStar.

12 The Court finds that plaintiff's testimony at trial regarding the existence and extent of her  
13 emotional distress related to Cenlar's conduct was entirely credible. In particular, the Court  
14 finds that plaintiff's mental state deteriorated markedly when the attorney's fees began  
15 appearing on her mortgage statements and she could not get any explanation or justification  
16 from Cenlar. While the preceding years had been tough, she had been able to work through  
17 personal issues and financial troubles, achieving an amicable divorce and the modification of  
18 her mortgage loan. In 2013, she was relieved, excited, and ready to move on, happy to know  
19 that she could keep the home for her two boys (they were fourteen and eight at the time of trial).  
20 Plaintiff had negotiated a monthly mortgage payment that, while uncomfortable, was  
21 manageable if she FedEx'd her payment to Cenlar mid-month and paid a late fee. When she got  
22 the December 2013 letter notifying her that Cenlar had charged her loan account an extra  
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24 <sup>1</sup> The first letter and statement notifying plaintiff that attorney's fees had been charged to her  
25 account were dated December 2013. The belated disclosure of charges from February 2013 – which  
26 predates this litigation – is largely unexplained, but most of those charges appear to relate to services  
provided by Northwest Trustee Services during the foreclosure and modification process.

1 \$1,261.42 in attorney's fees and costs, however, she got a sick feeling in the pit of her stomach.  
2 There were no specifics, nothing but a vague reference to "Washington law" that she did not  
3 understand. Having no idea what activities had generated these fees or why they were her  
4 obligation, she panicked and called the attorney who had helped her through the modification  
5 process. Unfortunately, she could not meet with counsel until the last week of December.  
6 Meanwhile, plaintiff was overwhelmed with worry, not knowing how to budget for such a large  
7 expense or whether she could spend any money over the holidays.

8 Although plaintiff, with counsel's help, sent a request for information before the year  
9 ended, Cenlar did not substantively respond until June 2014. Plaintiff testified that Cenlar's  
10 failure to respond to her requests for information, the thousands of dollars added to her  
11 "Amount Due" each month, and her realization that she was past due and could not possibly  
12 afford to pay what was demanded of her caused extreme emotional distress. She had already  
13 been in default, and from her perspective the situation looked like she was on the verge of  
14 another foreclosure action, with no idea why it was happening or what she could do about it. In  
15 March 2014, Cenlar notified plaintiff that it had charged another \$5,885.21 in fees and costs to  
16 her mortgage account. She was once again informed that the charges were "in keeping with  
17 Washington law." She did not know what law Cenlar was relying on, her attorney could not tell  
18 her, and Cenlar had refused to answer her December inquiry. Nevertheless, the fees kept  
19 coming, and there was no way to predict or stop them.

20 Plaintiff sent another round of inquiries to Cenlar in March 2014. No explanation for the  
21 fees and costs was forthcoming. Without knowing how or why, she was again delinquent, just as  
22 she had been in 2012, and was again in danger of losing her home. She tried to figure out what  
23 was going on by studying the monthly statements, but the amounts did not add up from one  
24 month to the next. Without Cenlar's help, she could not understand what was going on. Every  
25 time she received a notice letter, deficiency letter, or statement, plaintiff spent the day distracted  
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1 and worried.

2 Still having no idea that this lawsuit had anything to do with the fees she was seeing on her  
3 statements or how she was going to avoid another default, plaintiff was worried. She knew  
4 exactly how much she could afford each month and had worked that into the mortgage  
5 modification, including all outstanding fees. And yet the new fees, unpredictable and out of  
6 control, kept being added to her account and the “Amount Due.” Although counsel told her not  
7 to worry, it was impossible. Plaintiff found it too much and had a nervous breakdown in May  
8 2014. She sought counseling to help deal with her uncontrollable emotions. Plaintiff testified  
9 that she would shake, she could not function, she was numb and dazed, she was not sleeping,  
10 she could not control her emotions, and she had crying sessions in the car to hide it from her  
11 children. Although she tried to keep it together, the stress began to interfere with her work. She  
12 had to take breaks to go for walks and asked a supervisor for permission to use his office so that  
13 she could get some space and regain concentration. It was a small firm, and her troubles  
14 impacted the office. Plaintiff was fired in October 2014 for a lack of focus and remained  
15 unemployed until February 2015.

16 In June 2014, Cenlar finally responded to plaintiff’s December 2013 inquiry and disclosed  
17 that the fees that were charged to her account had been incurred in this litigation, that they are  
18 recoverable under the Deed of Trust, and that the notifications were required by a federal  
19 regulation. While the explanation raised concerns (with the Deed of Trust in play, plaintiff had  
20 concerns that the lender might choose to foreclose), plaintiff’s primary emotion was anger. For  
21 six months, she had been asking about the fees and requesting an explanation regarding what  
22 Washington law she was supposedly breaking, only to find out that Cenlar viewed the fees as  
23 some sort of accounting exercise. When the loan was transferred to NationStar with over  
24 \$26,000 in fees associated with her account, she realized the charges were not going away.

25 Plaintiff has shown by the preponderance of the evidence that she has incurred the  
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1 following losses/damages:

2 \$26,724 in charges to her account with NationStar

3 \$1,950 (6.5 hours x \$300/hour) in attorney's fees for drafting and sending requests for  
4 information to Cenlar

5 \$208 (6.5 hours x \$32/hour) in time spent reviewing documents regarding charges  
6 imposed on her mortgage account

7 \$30 in gas traveling to and from her attorney's office

8 \$12 in copying and postage expenses related to the requests for information

9 \$2,700 in counseling expenses

10 \$21,504 (\$32/hour x 40 hours/week x 4.2 weeks/month x 4 months) in lost wages  
11 from November 2014 to February 2015

12 \$13,760 ((\$32/hour x 40 hours/week x 4.2 weeks/month - \$4,000/month) x 10 months) in  
13 reduced wages from March 2015 to December 2015

14 \$55,000 (\$500/day for 110 days) in emotional distress damages from December 4, 2013,  
15 to March 24, 2014

16 \$42,500 (\$500/day for 85 days) in emotional distress damages from March 25, 2014, to  
17 June 18, 2014

18 \$49,500 (\$100/day for 495 days) in emotional distress damages from June 19, 2014, to  
19 October 27, 2015 (the end of trial)

## 20 CONCLUSIONS OF LAW

### 21 **A. Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq.***

22 Plaintiff alleges that Cenlar violated § 2605(e)(2) of RESPA when it failed to timely and  
23 fully respond to her March 25, 2014, requests for information regarding the nature of and  
24 justification for the fees that were appearing on her monthly statements. RESPA is a consumer  
25 protection statute enacted to regulate real estate settlement processes. It requires mortgage loan  
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1 servicers to respond to a qualified written request (“QWR”) for information within specified  
2 time frames. 12 U.S.C. § 2605(e)(1)(A) (five business days to acknowledge receipt of the  
3 QWR); 12 U.S.C. § 2605(e)(2) (thirty business days to investigate and provide a substantive  
4 response). In the summary judgment context, the Court determined that Cenlar did not  
5 adequately respond to the March 25, 2014, requests for information and therefore violated  
6 RESPA.

7 Failure to comply with the requirements of RESPA exposes a servicer to an award of  
8 “actual damages” resulting from the failure. 12 U.S.C. § 2605(f)(1)(A).<sup>2</sup> “Actual damages”  
9 recoverable under RESPA include compensation for both economic losses and emotional  
10 distress. Marais v. Chase Home Finance LLC, 736 F.3d 711, 720-21 (6th Cir. 2013) (lost  
11 interest and the costs associated with preparing the QWR are cognizable damages under  
12 § 2605(f)(1)); Houston v. U.S. Bank Home Mortg. Wis. Servicing, 505 Fed. App’x. 543, 548  
13 n.6 (6th Cir. 2012) (“We find nothing in the text of § 2605(f), or in RESPA more broadly, to  
14 preclude ‘actual damages’ from including emotional damages, provided they are adequately  
15 proven.”).

16 Based on the foregoing facts, the Court concludes that plaintiff has suffered \$4,900 in  
17 economic losses and \$42,500 in emotional distress damages arising from Cenlar’s failure to  
18 adequately and timely respond to the March 25, 2014, requests for information.

19 **B. Breach of Contract and Breach of Implied Duty of Good Faith and Fair Dealing**

20 Throughout the course of this litigation, Cenlar pointed to five different contractual  
21 provisions as justification for charging its attorney’s fees and costs directly to the “Amount  
22 Due” on plaintiff’s mortgage statements. In its June 18, 2014, response to plaintiff’s requests for  
23 information, Cenlar stated that “[t]hese are fees and costs that have been incurred in litigation  
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25 <sup>2</sup> The Court previously found that plaintiff had failed to establish “a pattern or practice of  
26 noncompliance” that could justify an award of statutory damages under 12 U.S.C. § 2605(f)(1)(B).



1 [and] are authorized by the Deed of Trust, more specifically Paragraphs 9, 14, and 22 and  
2 Paragraph 6(e) of the Note.” Plaintiff’s Exhibit 40. In 2015, however, Cenlar switched gears and  
3 argued that paragraph 26 of the Deed of Trust justified the charges. By the time of trial, the only  
4 provision relied upon was paragraph 9 which states that if “there is a legal proceeding that might  
5 significantly affect Lender’s interest in the Property and/or rights under this Security Instrument  
6 (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of  
7 a lien which may attain priority over this Security Instrument or to enforce laws or  
8 regulations),” the Lender may take whatever steps are reasonable and appropriate, including  
9 “paying reasonable attorneys’ fees to protect its interest in the Property and/or rights under this  
10 Security Instrument” which “shall become additional debt of Borrower secured by this Security  
11 Instrument” payable upon notice and request from the lender to the borrower.

12 Cenlar cites twelve unpublished district court cases from around the country for the  
13 proposition that “lawsuits that challenge the foreclosure process and/or question the note-  
14 holder’s right to foreclose” trigger paragraph 9. Dkt. # 258 at 7; Dkt. # 289 at 4. Most of these  
15 cases (1) involved requests for relief or proceedings which, if successful, would invalidate the  
16 underlying security interest,<sup>3</sup> (2) awarded fees under the equivalent of paragraph 26 of the Deed  
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22 <sup>3</sup> Kahn v. Wells Fargo Bank, N.A., 2014 WL 794193 (S.D. Texas Feb. 26, 2014) (a review of the  
23 docket shows that plaintiff asserted a quiet title claim alleging that the Deed of Trust was invalid);  
24 Moseley v. CitiMortg., Inc., 2011 WL 6151414 (W.D. Wash. Dec. 12, 2011); Coppes v. Wachovia  
25 Mortg. Corp., 2011 WL 4852259 (E.D. Cal. Oct. 12, 2011); Moore v. ING Bank FSB, 2011 WL  
26 3586152 (W.D. Wash. Aug. 16, 2011); Smith v. World Savings and Loan Assoc., 2011 WL 1833088  
(E.D. Cal. May 12, 2011) (a review of the docket shows that plaintiff asserted that the underlying loan  
was fraudulently induced or originated); Argys v. Greenpoint Mortg. Funding, Inc., 2009 WL 16550077  
(D. Colo. June 12, 2009).

1 of Trust,<sup>4</sup> and/or (3) were unopposed.<sup>5</sup> Plaintiff’s original and amended complaints, in contrast,  
2 simply seek a declaration that Cenlar’s conduct violated certain statutes and request damages  
3 and attorney’s fees related to the violations: there was no request for quiet title or invalidation of  
4 the security interest. Dkt. # 1 at 15; Dkt. # 32 at 30-31; Dkt. # 34 at 31; Dkt. # 78 at 39; Dkt.  
5 # 172 at 43.

6 One of the cases cited by defendant (and the cases cited therein), arguably stands for the  
7 proposition that a lawsuit which delays or seeks to undo a foreclosure sale “significantly  
8 affects” the lender’s rights and therefore triggers the fee provision of paragraph 9. Wivell v.  
9 Wells Fargo Bank, N.A., 2013 WL 6512487 (W.D. Mo. Dec. 12, 2013). Even if that were the  
10 law in Washington, no such claim has been asserted here. Plaintiff’s complaint was filed after  
11 Cenlar had abandoned its foreclosure attempts and modified the loan – it in no way delayed the  
12 nonjudicial foreclosure process. While plaintiff objected to the way Cenlar went about enforcing  
13 the Note and reporting the default, she did not request that the Court undo the loan modification  
14 agreement, invalidate the lender’s security interest, or release her from the agreed-upon  
15 payments on the loan, or enjoin future foreclosures. Cenlar has not explained how demands for  
16 compensatory damages and attorney’s fees related to alleged statutory violations would  
17 “significantly affect” the lender’s interest in the property or rights under the Deed.

18 Just as importantly, the Wivell court’s application of paragraph 9 whenever the borrower  
19 initiates a suit that delays or thwarts a nonjudicial foreclosure does not comport with  
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21 <sup>4</sup> Malin v. JP Morgan Chase Bank, N.A., 2014 WL 820003 (Mar. 3, 2014); Moseley, 2011 WL  
22 6151414; Fromkin v. IndyMac Bank FSB, 2010 WL 3614650 (D. Ariz. Sept. 9, 2010). Paragraph 26  
23 does not justify the unilateral imposition of attorney’s fees on a borrower’s loan account in the  
24 circumstances presented here. See Dkt. # 118 at 12.

25 <sup>5</sup> Castiblanco v. Wells Fargo Bank, N.A., 2013 WL 6079519 (S.D. Tex. Nov. 19, 2013); Schmidt  
26 v. Wells Fargo Bank, N.A., 2013 WL 5529711 (N.D. Cal. Oct. 7, 2013); Coppes, 2011 WL 4852259;  
Argys, 2009 WL 16550077; Zimmerman v. Aurora Loan Servs., 2009 WL 81392 (N.D. Cal. Jan. 12,  
2009).

1 Washington’s principles of contract interpretation. The goal of contract interpretation in this  
2 state is to ascertain the intent of the parties. Dice v. City of Montesano, 131 Wn. App. 675, 683  
3 (2006). The contract must be viewed as a whole, interpreting particular language in the context  
4 of the surrounding contract provisions (Weyerhaeuser Co. v. Commercial Union Ins. Co., 142  
5 Wn.2d 654, 669-70 (2000)) and construing any remaining ambiguities against the drafter  
6 (Viking Bank v. Firgrove Commons 3, LLC, 183 Wn. App. 706, 713 (2014)). Under the  
7 established interpretive canons of *noscitur a sociis* and *ejusdem generis*, the types of events that  
8 trigger paragraph 9 are known by the particular subjects mentioned, namely “a proceeding in  
9 bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain  
10 priority over this Security Instrument or to enforce laws or regulations.” In re Marriage of  
11 Tahat, 182 Wn. App. 655, 671 (2014).

12 The Deed of Trust at issue here contains two attorney’s fee provisions, paragraphs 9 and  
13 26. Determining which one applies requires consideration of both provisions. The claims  
14 asserted in this litigation fall squarely within the language of paragraph 26. Rather than seek to  
15 recover its reasonable fees in this action, however, Cenlar chose to impose the fees directly on  
16 plaintiff’s mortgage account, without judicial oversight, based on the apparently post hoc  
17 rationalization that paragraph 9 applies. The two attorney’s fee provisions are not duplicative:  
18 they address different circumstances. Whereas paragraph 26 may allow the servicer to recover  
19 attorney’s fees when the servicer prevails in a mortgage-related action between the borrower  
20 and lender, paragraph 9 gives the lender the ability to react quickly and without judicial process  
21 to deal with more immediate, extraneous threats to its underlying security interest and rights.  
22 The threats which trigger paragraph 9 are significant and in the nature of bankruptcy  
23 proceedings, probate, liens, and condemnation actions. An action to compel a lender to comply  
24 with the terms and conditions of the Deed of Trust is not of the same kind as the listed  
25 proceedings because there is no threat to the lender’s priority position in the property or its  
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1 contractual rights (which are cabined by the Deed of Trust Act). If such claims are meritless and  
2 the lender prevails, its fees can be recovered, in good time and after the court considers various  
3 factors, under paragraph 26. Considering the contract as a whole and the language of paragraph  
4 9, the Court concludes that Cenlar’s reliance on that provision to unilaterally charge attorney’s  
5 fees incurred in litigation between the parties simply because the borrower has asserted claims  
6 that may delay or thwart a foreclosure is misplaced. Where the only thing in jeopardy is the  
7 lender’s ability to foreclose unhindered and allegedly in contravention of statutory requirements,  
8 the fee award is appropriately considered by the presiding court under paragraph 26.

9 If Cenlar’s decision to charge its litigation expenses to plaintiff’s mortgage account in this  
10 case was not an outright breach of the Deed of Trust, the Court alternatively finds that it was a  
11 breach of the implied duty of good faith and fair dealing. “Under Washington law, there is in  
12 every contract an implied duty of good faith and fair dealing that obligates the parties to  
13 cooperate with each other so that each may obtain the full benefit of performance.” Rekhter v.  
14 Dep’t of Social and Health Servs., 180 Wn.2d 102, 112-13 (2014) (internal quotation marks  
15 and citations omitted). The duty of good faith arises in the performance of specific contractual  
16 obligations. Johnson v. Yousoofian, 84 Wn. App. 755, 762 (1996). It is not a free-floating  
17 obligation to be nice to each other, but rather a check on whatever discretionary authority is  
18 granted to the parties under the contract. Scribner v. Worldcom, Inc., 249 F.3d 902, 910 (9th  
19 Cir. 2001); Rekhter, 180 Wn.2d at 113.<sup>6</sup>

20 In this case, paragraph 9 of the Deed of Trust gave the lender (and, presumably, Cenlar  
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22 <sup>6</sup> To clarify, abuse of discretion granted under the contract is simply one type of conduct that  
23 violates the duty of good faith and fair dealing. “[T]he duty varies somewhat with the context in which it  
24 arises. See Restatement (Second) of Contracts § 205, cmt. d. It may violate the duty of good faith and  
25 fair dealing to, for example, (1) evade the spirit of a bargain; (2) willfully render imperfect performance;  
26 (3) interfere with or fail to cooperate in the other party’s performance; (4) abuse discretion granted  
under the contract; or (5) perform the contract without diligence. Id.” Microsoft Corp. v. Motorola, Inc.,  
963 F. Supp.2d 1176, 1184 (W.D. Wash. 2013) (internal footnote omitted). The first and fourth  
considerations are relevant here.

1 acting as the lender's attorney in fact) discretion in evaluating and responding to threats to the  
2 lender's interest in the property. The determination that plaintiff's lawsuit regarding the manner  
3 in which the servicer initiated non-judicial foreclosure proceedings, negotiated her loan  
4 modification, and reported the default was "a legal proceeding that might significantly affect  
5 Lender's interest in the Property and/or rights under this Security Interest" was in no way  
6 compelled by the contract. Because Cenlar had the discretionary authority to interpret and apply  
7 the contract provision, it was bound to do so in good faith. Cenlar's discretionary decision to  
8 impose unpredictable and enormous fees effectively made the negotiated terms of the loan  
9 irrelevant. Cenlar's interpretation of paragraph 9 erased at least one of the primary benefits  
10 plaintiff hoped to obtain out of the modification agreement, namely a manageable and regular  
11 monthly payment amount, thereby abusing its discretion and evading the spirit of the bargain.

12 Cenlar argues that it had no choice but to charge its attorney's fees to plaintiff's mortgage  
13 account because it had to act in the best interests of its principal, Freddie Mac. The agent has no  
14 greater rights or privileges than the principal, however. Had Freddie Mac charged its litigation  
15 expenses to plaintiff's mortgage account in the circumstances presented here, it too would have  
16 exercised its discretion in bad faith and deprived plaintiff of the benefit of the parties' bargain.  
17 Cenlar cannot do what its principal could not simply because it fears doing too little.

18 Finally, Cenlar argues that plaintiff suffered no damages cognizable in contract because it  
19 did not actually collect the fees and costs that were charged to her account. The outstanding debt  
20 remains on the books, however. Although Cenlar's representative testified at trial that the  
21 offending charges had been removed from plaintiff's account history in or around October 2014,  
22 \$26,724 in attorney's fees and costs – the exact same amount as was disclosed in an itemized  
23 list in response to plaintiff's information requests – remain and were transferred to the new  
24 servicer, NationStar Mortgage LLC, as lender-paid expenses. This amount continues to appear  
25 on plaintiff's loan statements. In these circumstances, a contract remedy exists. If Cenlar were  
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1 still the servicer of plaintiff's loan, the Court would simply order it to remove the last vestiges  
2 of the improper charges and enjoin it from collecting those charges. As it is, however, the loan  
3 was transferred during the pendency of this action and the new servicer is not before the Court  
4 or otherwise bound by the rulings herein. Nor was there any indication at trial that NationStar  
5 had agreed not to collect on the charges or that Cenlar could prospectively affect NationStar's  
6 recordkeeping, servicing, or collection decisions. Thus, plaintiff remains burdened by a \$26,724  
7 charge that was not authorized by contract and which violated the implied duty of good faith  
8 and fair dealing. A damage award in that amount is appropriate.

### 9 **C. Outrage**

10 The elements of the tort of outrage are "(1) extreme and outrageous conduct,  
11 (2) intentional or reckless infliction of emotional distress, and (3) severe emotional distress on  
12 the part of plaintiff." Rice v. Janovich, 109 Wn.2d 48, 61 (1987). Based on the evidence  
13 submitted at trial, plaintiff has raised a reasonable inference and the Court finds that Cenlar,  
14 annoyed that plaintiff had sued it after obtaining a loan modification and looking for leverage to  
15 force her to abandon this litigation, adopted a strained and unprincipled analysis of the Deed of  
16 Trust<sup>7</sup> to justify the imposition of unpredictable and enormous charges directly onto plaintiff's  
17 mortgage statements as "Amounts Due." Cenlar, having reviewed plaintiff's financial situation  
18 less than a year before and being fully aware that plaintiff was paying late charges every month,  
19 had no reason to believe that she could cope with these charges. Cenlar reasonably should have  
20 known (and was likely counting on the fact) that these charges would cause immense emotional  
21 distress, which they did. Cenlar compounded the distress by denying plaintiff information about  
22 these charges or the justification therefore. The first notice of the charges stated that they were  
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24 <sup>7</sup> The evidence shows only that Cenlar's in-house counsel, who did not testify at trial, made the  
25 decision to charge Cenlar's litigation expenses directly to plaintiff's mortgage account. It is not clear  
26 how the issue came before her, what facts she reviewed, or the nature of her analysis. Nor do we know  
which of the many justifications offered by Cenlar throughout the litigation seemed persuasive to her.

1 charged “in keeping with Washington law.” This assertion is wholly unsupported: Cenlar’s  
2 witness acknowledges that the letter was a form into which the reference to “Washington law”  
3 was inserted simply because the loan originated in Washington. No Washington case law,  
4 statute, or regulation has been identified that authorize the charges levied against plaintiff’s  
5 mortgage account. When plaintiff requested information regarding the charges, she was ignored  
6 for months. Eventually various contract provisions were identified, and Cenlar asserted that it  
7 was simply keeping track of charges it might eventually seek to recover from plaintiff.<sup>8</sup>  
8 Regardless of whether Cenlar was demanding immediate payment or was simply threatening to  
9 collect them in the future, the message was clear: continue this litigation and we will take your  
10 home. Such conduct is beyond the bounds of decency and is utterly intolerable.

11 Damages caused by Cenlar’s outrageous conduct include:

12 \$26,724 in charges to her account with NationStar

13 \$1,950 in attorney’s fees for drafting and sending requests for information to Cenlar

14 \$208 time spent reviewing documents regarding charges imposed on her mortgage account

15 \$30 in gas traveling to and from attorney’s office

16 \$12 in copying and postage expenses related to the requests for information

17 \$2,700 in counseling expenses

18 \$21,504 in lost wages from November 2014 to February 2015

19 \$13,760 in reduced wages from March 2015 to December 2015

20 \$55,000 in emotional distress damages from December 4, 2013, to March 24, 2014

21 \$42,500 in emotional distress damages from March 25, 2014, to June 18, 2014

22 \$49,500 in emotional distress damages from June 19, 2014, to October 27, 2015

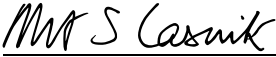
23 for a total of \$213,888.

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25 <sup>8</sup> This particular contention is contradicted by the documents plaintiff was receiving from Cenlar  
26 on a regular basis which indicated that the fees and charges were part of the “Amount Due.”

1 For all of the foregoing reasons, the Clerk of Court is directed to enter judgment in favor  
2 plaintiff and against defendant in the amount of \$213,888.<sup>9</sup> To the extent plaintiff has a  
3 contractual or statutory right to attorney's fees, she may file a motion pursuant to Fed. R. Civ. P.  
4 54(d)(2).

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6 Dated this 28th day of January, 2016.

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9 Robert S. Lasnik  
10 United States District Judge  
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26 <sup>9</sup> Duplicative recoveries have been reduced appropriately.