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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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No. 39763-3-II

IN THE COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

DANIEL SZMANIA

Appellant,

Vs.

COUNTRYWIDE HOME LOANS INC.

Respondent.

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APPEAL FROM THE SUPERIOR COURT  
OF WASHINGTON FOR CLARK COUNTY  
The Honorable Barbara D. Johnson

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BRIEF OF APPELLANT

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## **TABLE OF AUTHORITIES**

### **Table of Cases**

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- 2) *Dannie R. Carter and Dorothy M. Carter v. Countrywide Home Loans Inc., et al.*, (Civil No. 3:07CV651). Page 11.

### **Statutes**

- 1) RCW 4.28.328 Lis Pendens — Liability of claimants — Damages, costs, attorneys' fees. Pages 2, 6, 14, 17 & 21.
- 2) RCW 19.36.010 Contracts etc. void unless in writing. Pages 2, 8 & 22.
- 3) RCW 61.16.010 Assignments, how made -- Satisfaction by assignee. Page 16, 19 & 21.
- 4) RCW 65.08.070 Real Property Conveyances to be Recorded. P. 19.
- 5) 12 U.S.C. Section 2605 (e) Duty of loan servicer to respond to borrower inquiries, Pages 2 & 7.
- 6) 12 U.S.C. Section 2605 (e) (3) Protection of credit rating. Pages 1, 9 & 21.
- 7) 12 U.S.C. Chapter 27, 2614 Jurisdiction of courts; limitations. Page 10.

### **Regulations and Rules**

- 1) Washington Court Rules, Discovery CR 26, Page 5.
- 2) Washington Court Rules, Summary Judgment CR 56, Page 19.

**A. Introduction**

Appellant filed said case after the Respondent did a “bait & switch” in October 2008, on the terms of a loan modification the parties verbally agreed to in June 2008. Appellant has 3 errors for consideration: #1, **Damages**, #2, **Lis Pendens** and #3 **Discharging Debt**. Each numbered respectively, that follows.

**B. Assignments of Error**

1. **Damages:** The court erred in denying Plaintiffs Motion for Summary Judgment for Damages under (**RESPA 2605, 12 U.S.C. Section 2605 (e) (3) Protection of credit rating**), on November 18, 2008 & Reconsideration on February 10, 2009, entered on February 3, 2009 & Reconsideration entered on February 27, 2009.
2. **Lis Pendens:** The court erred in denying Plaintiffs Motion to Quash Respondent’s Motion to Cancel Lis Pendens, January 13, 2009 & Reconsideration on February 10, 2009, entered on January 23, 2009 & Reconsideration entered on February 27, 2009.
3. **Discharging Debt:** The court erred in denying Plaintiff’s Motion for Summary Judgment, Discharging Debt, on February 24, 2009, & Reconsideration on July 17, 2009, entered on February 27, 2009 & for Reconsideration entered on August 14, 2009.

**C. Issues Pertaining to Assignments of Error**

1. **Damages:** The court erred and referenced the wrong law in its ruling. The court referenced: Code of Federal Regulations, 24 CFR 3500.21 (e) (2) (ii). “Transferring of Mortgages Servicing”. The correct section of law is **12 U.S.C. Section 2605 (e) “Duty of loan servicer to respond to borrowers inquiries, & (3) Protection of credit rating.”** (Clerks Log# 53, Courts letter to counsel with ruling; February. 3, 2009). (RP, Volume II, page 122 line 25 to page 123 line 7).
2. **Lis Pendens:** The court erred in it’s understanding and application of **RCW 4.28.328(1) (c) “Lis Pendens-Liability of claimants-Damages, cost, attorneys’ fees.” (Aggrieved Party). (ii) a person having an interest...provided that the claimant has actual or constructive knowledge of such interest or right when the Lis Pendens was filed.**
3. **Discharging Debt:** The court erred in its understanding and application of **RCW 19.36.010. “Contracts etc., void unless in writing.” In the following cases, specified in this section, any agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, ...”**

**D. Statement of the Case**

- 1) 1. On 3 November 2006, the Appellant and E-Loan Inc. enter into an "Adjustable Note Agreement". The terms of this agreement were: Plaintiff has a promise to pay \$787,500.00. At the rate of 6.25% for a term of 7 years, than adjustable there after. This is an interest only loan with no prepayment penalties. *See* Ex A, Respondents Motion to Dismiss; December 26, 2008. (Clerks Log # 18). RESPA is expressly incorporated into this loan document. (Page 2, {Q}).
- 2) On November 13, 2006, deed of trust is filed in the Clark County Auditor in the names of the Appellant and E-Loan Inc. *See* Ex A, Appellant Motion for Reconsideration attorney fees & Lis Pendens; February 10, 2009. (Clerks Log #54).
- 3) On February 01, 2007 the right to collect payments was transferred from E-Loan Inc. to Countrywide Home Loans Inc. *See* Ex 5, Appellant's amended compliant; January 12, 2009. (Clerks Log # 22).

- 4) September 9 2008, qualified written request sent to Respondent.  
*See* Ex 3, Plaintiff's Amended Compliant; January 8, 2009. (Clerks Log #22).
- 5) On October 15, 2008, Appellant receives loan modification documents from Respondent. With the "bait and switch" terms in them that are different from what the parties verbally agreed to in June 2008. (Documents available upon request).
- 6) On November 12, 2008 a compliant was filed against Countrywide Home Loans Inc., with a Stipulated Amended Complaint filed January 12, 2009. Appellant sought multiple reliefs; failure to modify loan, Damages for failing to respond to qualified written request and proof of any loan existence of the parties etc. (Clerks Log # 2).
- 7) December 8, 2008 Appellant files Lis Pendens in the Clark County Auditors office and files Notice of Lis Pendens in case. (Clerks Log #16 & 17).

8) On December 23, 2008 Respondent declares that they are only a sevcier of the loan. This was declared in the **Declaration of Melissa A. Henderson**, reads in part: **“On January 19, 2007 E-Loan transferred the Loan to Countrywide. At that time, Countrywide also began to service the Loan and Mr. Szmania’s first payment to Countrywide was due on February 1, 2007. Countrywide subsequently pooled and securitized the Loan but continued to service the Loan. Under the terms of the servicing agreement, Countrywide did not have the delegated authority to modify the Loan. This means that Countrywide was required to obtain advance approval from JP Morgan Chase, the master sevicer of the Loan, to modify the Loan.”** *See* page 2 line 23 to page 3 line 3. (Clerks Log # 20).

Discover request under CR 26 were unanswered by Respondent. *See* Ex 2, Plaintiffs Motion for Summary Judgment Discharging Debt; March 17, 2009. (Clerks Log #19). However, the Respondent previously sent loan modification papers in October 2008. What is true? The material facts of the RESPA letters and the deed of trust are true! Respondent is only a loan servicer!

On January 21, 2009 Respondent than declares in the **Declaration of Mindy Joy Scheller**, that Countrywide now purchased the loan. This change in “status” made the Respondent an “Aggrieved Party” per **RCW 4.28.328**. It reads in part: **“On January 19, 2007 the Loan was purchased by Countrywide, servicing released. This means that Countrywide purchased the Adjustable Rate Note evidencing Plaintiff’s Debt and the Deed of Trust which secured the note. It also means that Countrywide acquired the right to service the Loan...”** See page 1 line 24 to page 2 line 2. (Clerks Log # 37). What is true? The material facts of the RESPA letters and the deed of trust are true! Respondent is only a loan servicer!

- 9) February 1, 2009, qualified written request sent to Respondent. See Ex 3, Plaintiff’s Amended Compliant; January 8, 2009. (Clerks Log #22).

**E. Summary of Argument**

1. **Damages:** A correct ruling is impossible when the court does not reference the correct section of the law, which is: **12 U.S.C. Section 2605 (e) “Duty of loan servicer to respond to borrowers inquiries.” And subsection (3) “Protection of credit rating.”**  
The court was made aware of the proper law in: Plaintiff’s Amended Complaint, page 7; January 12, 2009. (Clerks Log # 22). Also in the Plaintiff’s Motion for Reconsideration on Ruling for Damages, page 2; February 10, 2009. (Clerks Log # 54). Along with a February 6, 2009 letter to the court that was purposely omitted from the record? (Copy enclosed as Appellant’s Exhibit A).
2. **Lis Pendens:** The Respondent can’t merely change their “Title” of duty and call themselves an “Aggrieved Party”, by merely stating this pivotal fact in a Declaration. The Respondent offered no material facts to back this Declaration up and court failed to enforce Appellants request for discovery to that end. In fact, the only proof of any loan submitted by the Respondent was their Exhibit A, filed with their Motion to dismiss; December 23, 2008. (Clerks Log #20).

And that contract is between the Appellant and E-Loan Inc., not the Respondent. **“Imposition of Damages and attorneys fees are not automatic if there is substantial justification for filing the Lis Pendens.”** In (1) *Keystone Land & Development v. Xerox Corp.*, 353 F.3d 1070, 2003 U.S. App, Lexis 26462 (9th Cir. 2003). Therefore; Respondent never made a Prima Facie Case that they actually purchased said loan from E-Loan, or that their claim of any assignment even exists. Thus an Issue of Material Fact does exist in favor of the Appellant.

3. **Discharging Debt: RCW 19.36.010** and the statute of frauds are very clear. There needs to be a written contract signed by both parties. In this case none exists. Therefore; Respondent never made a Prima Facie Case, that there is any loan agreement between the parties or that any loan assignment truly occurred as they claim. Thus an Issue of Material Fact does exist in favor of the Appellant. Respondent furthermore declares in open court by Mr. Yates on 23 January 2009: “there hasn’t been any valid loan modification.” (RP; Volume I, page 7 lines 14 & 15).

**F. Argument**

1. **Damages:** The Respondent clearly violated **12 U.S.C. Section 2605 (e) (3). “Protection of credit rating.” (RESPA)** Thus; causing damage to the Appellant’s credit rating. It reads:

**(3) Protection of credit rating**

**During the 60-day period beginning on the date of the servicer's receipt from any borrower of a qualified written request relating to a dispute regarding the borrower's payments, a servicer MAY NOT provide information regarding any overdue payment, owed by such borrower and relating to such period or qualified written request, to any consumer reporting agency (as such term is defined under section 1681a of title 15). (Emphasis added).**

**(f) Damages and costs**

**Whoever fails to comply with any provision of this section shall be liable to the borrower for each such failure in the following amounts:**

**(1) Individuals:**

**In the case of any action by an individual, an amount equal to the sum of--**

**(A) ANY ACTUAL Damages to the borrower as a result of the failure; and (*Emphasis added*).**

**(B) Any additional Damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed \$1,000.**

Furthermore: **12 U.S.C. Chapter 27, 2614 Jurisdiction of courts;**

**limitations:** clearly says that provision under **U.S.C. 2605,**

**Jurisdiction of courts;** have 3 years for a time limit. (RP, Volume II, page 107 lines 13-18, & page 118 line 18 to page 121 line 17).

Appellant made the verbally agreed upon 3% payments the parties agreed to from June 1, 2008 thru February 1, 2009. However, the Respondent still reported to the credit agencies that the Appellant was 30, 60, and 90 days late. After 5 qualified written request were sent to the Respondent by the Appellant. *See* Ex 1, 2 & 3 with Plaintiff's Motion for Damages; November 18, 2008. (Clerks Log #11).

Dates of qualified written request are:

- 1) 20 August 2008.
- 2) 9 September 2008.
- 3) 14 November 2008.
- 4) 15 December 2008.
- 5) 17 February 2009.

(RP, Volume 1, page 45, lines 7-25 & page 46, lines 1-6). (RP, Volume II, page 108, lines 8-18). Also *See* Ex 8 & 9 shows damage and credit reporting.

The Respondent clearly state the Appellant made above payments by Mr. Yates on 23 January 2009, “ Mr. Szmania, you know, has made partial payments following what he claims-- claims as a modification.” (RP, Volume I, page 9 lines 23-25).

The Court clearly states the correct law, **12 U.S.C. 2605**.

(RP, Volume I, page 52, line 15, & page 92 line 6). “**RESPA is a consumer protection statute**”<sup>\*3</sup>. (2) *Dannie R. Carter and Dorothy M. Carter v. Countrywide Home Loans Inc., et al., (Civil No. 3:07CV651)*. We further see that “RESPA provides for relief in the form of **any actual damages to the borrower** arising from a violation of said section.” <sup>\*3</sup> *Id.* (*Emphasis added*).

Thus the Respondent owes the Appellant \$1,319,600.00 in Damages for the fair value of the credit worth of Appellant before falsely and maliciously reporting to the credit agencies. As of March 9, 2010; the Respondent still has NOT corrected the false reporting to my credit report. (Copy enclosed as Appellant's Exhibit B).

2. **Lis Pendens:** December 8, 2008 Appellant files Lis Pendens in the Clark County Auditors office and files Notice of Lis Pendens in case. Appellant knowledge of the Respondents role is only one of servicer, based on the deed filed with the Clark County Auditor; November 13, 2006, in the names of Daniel G. Szmania and E-Loan Inc. *See Ex A*, in Plaintiff's Motion for Reconsideration on Ruling for Attorney's Fees and Removing Lis Pendens. (Clerks Log #16 & 17). And due to Respondents & E-Loan Inc. own RESPA letters dated 16 & 19 January 2007. *See Ex 5*, Appellant's amended compliant; January 12, 2009. (Clerks Log # 22).

This fact that the Respondent was only a servicer of this loan was further substantiated by the RESPA notices the Appellant received in January 2007 from E-Loan Inc. and the Respondent. *See* Ex 5 Plaintiff's Amended Complaint; January 5, 2009. (Clerks Log #22).

Both of these RESPA notices clearly state that the Respondent merely has the right to collect payments. In fact, on the Respondent's RESPA notice, the first line reads;

**"Welcome! The servicing of your mortgage, that is the right to collect payments from you, has been transferred to Countrywide.."**

Only the right to **collect payments** was given to the Respondent!

All other rights of said contract remain with E-Loan Inc., period!

Thus under **RCW 4.28.328 Lis Pendens — Liability of claimants — Damages, costs, attorneys' fees. Reads: (c) "Aggrieved party"** means **(i) a person against whom the claimant asserted the cause of action in which the Lis Pendens was filed, but does not include parties fictitiously named in the pleading; or (ii) a person having an interest or a right to acquire an interest in the real property against which the Lis Pendens was filed, provided that the claimant had actual or constructive knowledge of such interest or right when the Lis Pendens was filed. (Emphasis added).**

The evidence is quite clear, the Appellant's name is on the deed of trust and the loan documents, the Respondents are not! Thus the Appellant was acting in good faith and with substantial justification in filing the Lis Pendens. **"Where a claimant has a reasonable, good faith basis in fact or law for believing they have an interest in the property, a Lis Pendens is justified."** (1). Based upon the material facts of this case, there is no way the Appellant would have any constructive knowledge that the Respondent could have any legal standing or interest or assignment in said property.

It was only after the Lis Pendens was filed, and three days before our hearing. That then, the Respondent claims to have purchased the loan in the **Declaration of Mindy Joy Scheller** it reads: “**On January 21, 2009 Respondent than declares, that Country wide now purchased the loan.**” See page 1 line 24. (Clerks Log # 37). (RP, Volume II, page 102, lines 24-25 & page 103, lines 1-4, & page 113 line 8 to page 115 line 1).

What is the truth? The material facts of the RESPA letters and the deed of trust are true! The above Declaration is **FRAUD!** Along with Mr. Yates comments on 23 January 2009 that the Respondent purchased the note and deed of trust. (RP, Volume I, lines 19 & 20).

The court abused it’s discretion by not making a finding of fact on the 3 above noted Declarations. (RP Volume I, Page 16 line 23 to page 20 line 13). Furthermore; if the above statement were indeed true that the Respondent purchased said loan, they would have offered said document in my discovery request. (RP Volume II, page 103, lines 15-18).

Also, Respondent would satisfy this supposed assignment, per **RCW 61.16.010**, by properly recording said assignment with the Clark County Auditor's office, the county where said property is located. Therefore in the absence of any documents of assignment, the Respondent does not have any legal standing or any assignable interest in said property.

No such satisfaction of assignment has been filed with the Clark County Auditor or offered to the court as a material fact. Thus the Respondent has failed to make a Prima Facie Case, that they truly are an "aggrieved party". The court's ruling on February 28, 2009, leaving the current deed in place (Names of Appellant & E-Loan Inc.). Redresses (RP, Volume III, page 175, line 18 to page 176, line 4).

Further speaks to the importance of said Lis Pendens Appellant filed and substantiates that this case was about title. (Clerks Log # 104 A). Any ridiculous claims that the respondent use of MERS for its filings, in lieu of the law is as noted in **RCW 61.16.010**, is pure negligence on its part.

The Court was made aware for a third time that per the **RCW 4.28.328**, the Respondent is NOT an aggrieved party per the material facts. (RP, Volume IV, page 186 line 25 to page 187, line 15).

The court in its January 23, 2009 ruling said “Attorney fees are mandatory”, also in (RP Volume I, page 91, line 2, & in Volume II, page 99, line 16).

This “assumption” of mandatory fee award is fueled by Mr. Yates as well. (RP, Volume I, page 82 & Volume II, page 100, lines 4 & 5, and page 115 lines 4-6). “We see the **U.S. 9<sup>th</sup> circuit court** sees it otherwise: “**Imposition of Damages and attorneys fees ARE NOT automatic if there is substantial justification for filing the Lis Pendens.**” In (1) *Keystone Land & Development v. Xerox Corp.*, 353 F.3d 1070, 2003 U.S. App, Lexis 26462 (9th Cir. 2003) (*Emphasis added*).

Therefore, the Final Judgment for Attorneys’ Fees; July 09, 2009, for \$4,000.00 must be vacated and the Lis Pendens remain in effect.

3. **Discharging Debt:** There is NO written contract between the Appellant and the Respondent. The only contract the Respondent has offered as a material fact is the one between the Appellant and E-Loan Inc., dated: November 6, 2006. *See* Ex A, Respondent's Motion to Dismiss; December 23, 2008. (Clerks Log #20). The court ruled on January 23, 2009; "The parties never reached a legally enforcing contract." The court was referring to any loan modifications between the parties. (Clerks Log # 40, line 5, enclosed with Notice of Appeal).

The Respondent concurs with Mr. Yates statement on 23 January 2009: "there hasn't been any valid loan modification." (RP; Volume I, page 7 lines 14 & 15).

The Respondent has never offered any proof or material facts that the said assignment or any transfer of agency truly occurred between E-Loan Inc. and it self. (RP, Volume III page 144 line 19 to page 164, line 13 & page 168 line 2 to page 171 line 10).

The total absence of any assignment being filed in the Clark County Auditors office concludes in total certainty that no assignment exist! The Respondent misleads the Court by saying assignments do not need to be recorded to be effective. (RP Volume II, Page 129, lines 4-7).

Respondent's statement is not in line with **RCW 61.16.010 "Assignments, how made -- Satisfaction by assignee"** and **RCW 65.08.070 "Real Property Conveyances to be Recorded"**.

Thus the Respondent did not make Prima Facie Case that any loan agreement exists between the parties.

The Court again abused it's discretion by saying that it can rule under CR 56, Summary Judgment. (RP, Volume II, page 139, lines 1-8). Than, further more by claiming it cannot rule on the above. (RP, Volume III, page 173 line 3 to page 174, line 7): The court was given an opportunity to not contradict its own ruling on 9 July 2009. (RP, Volume IV, page 181 line 21 to page 185, line 1).

Thus an issue of Material Fact does exist in favor of the Appellant.  
Thus the Appellant and the Respondent have no loan agreement  
and further more, the Appellant has no Debt with the Respondent  
either. The Respondent has no proof of any legal standing or  
assignment in the Appellants property, period!

**G. Conclusion**

1. **Damages:** Appellant seeks \$1,319,600.00 in Damages from Respondent for damaging credit. Per: **12 U.S.C. Section 2605 (e) (3) Protection of credit rating.** Appellant sent in 5 qualified written request, after which Respondent maliciously and falsely reported to credit agencies, during the 60 day window of protection, damaging Appellant's credit. Along with Respondent correcting Appellant's credit reports.

2. **Lis Pendens:** Appellant seeks the vacating of the \$4,000.00 Judgment for Attorneys' Fees; July 09, 2009 and the Lis Pendens remain in effect. Per: **RCW 4.28.328 Lis Pendens — Liability of claimants — Damages, costs, attorneys' fees.** The lack of any assignment from E-Loan Inc. to the Respondent per **RCW 61.16.010 Assignments, how made -- Satisfaction by assignee,** is defiantly a "genuine issue of material fact" in favor of the Appellant. The Respondent has no proper legal standing to any interest in said property; therefore they are not an aggrieved party per the above **RCW 4.28.328 Lis Pendens — Liability of claimants — Damages, costs, attorneys' fees.**

3. **Discharging Debt:** Appellant seeks a Discharging of the “supposed” Debt between the parties. Per: **RCW 19.36.010 Contracts etc. void unless in writing.** The court erred in awarding Summary Judgment to the Respondent. The lack of any loan agreement or assignment per *Id.* is defiantly a “genuine issue of material fact” in favor of the Appellant. With no signed contract by both parties, the Respondent has no proper legal standing on any supposed Debt of the Appellant.
4. Under **RAP 18.1;** That no attorney fees or cost be awarded to the Respondent, due to the lower court not upholding the law and obviously Respondent not making a Prima Facie Case and do to the fact there are Genuine Issue’s of Material Facts on errors #1, #2 and #3, in favor of the Appellant.
5. This court reverses the lower court on the above 3 issues.
6. Appellant is available for oral arguments.

Date 23 MARCH 2010

Respectfully submitted,

Appellant:

  
\_\_\_\_\_  
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## H. Appendix

### Table of cases

- 1) *Keystone Land & Development v. Xerox Corp.*, 353 F.3d 1070, 2003 U.S. App, Lexis 26462 (9th Cir. 2003). Pages 8 & 17.
- 2) *Dannie R. Carter and Dorothy M. Carter v. Countrywide Home Loans Inc., et al.*, (Civil No. 3:07CV651). Page 11.

### Statutes

- 3) RCW 4.28.328 Lis Pendens — Liability of claimants — Damages, costs, attorneys' fees. Pages 2, 6, 14, 17 & 21.
- 4) RCW 19.36.010 Contracts etc. void unless in writing. Pages 2, 8 & 22.
- 5) RCW 61.16.010 Assignments, how made -- Satisfaction by assignee. Page 16, 19 & 21.
- 6) RCW 65.08.070 Real Property Conveyances to be Recorded. P. 19.
- 7) 12 U.S.C. Section 2605 (e) Duty of loan servicer to respond to borrower inquiries, Pages 2 & 7.
- 8) 12 U.S.C. Section 2605 (e) (3) Protection of credit rating. Pages 1, 9 & 21.
- 9) 12 U.S.C. Chapter 27, 2614 Jurisdiction of courts; limitations. Page 10.

### **Exhibits**

- A.** Appellant's 6 February 2009 letter to the Court, pointing out it's error in ruling on damages due to quoting wrong section of the law. Page 7.
- B.** Appellant's 9 March 2010 credit report showing Respondent's negative reporting still on report. Page 12.

## **Table of Cases**

## Recent Developments

### Real Property

by Scott B. Osborne, Preston Gates & Ellis LLP, Seattle

Two recent cases decided by the Ninth Circuit Court of Appeals are of interest to real estate practitioners in Washington. The first case, which resulted in two opinions, *Keystone Land & Development v. Xerox Corporation*, 353 F.3d 1070, 2003 U.S. App. LEXIS 26462 (9<sup>th</sup> Cir. 2003), and a companion opinion, *Keystone Land & Development v. Xerox Corporation*, 353 F.3d 1093, 2003 U.S. App. LEXIS 26463 (9<sup>th</sup> Cir. 2003), involved litigation arising out of a letter of intent. The second case, *Redback Networks, Inc., v. Mayan Networks Corp. (In re Mayan Networks Corp.)*, 2004 Bankr. LEXIS 184 (Bankr. Panel 9<sup>th</sup> Cir. 2004), involved an attempt to retain a letter of credit given as a lease deposit by a bankrupt tenant.

*Keystone, supra*, arose from a common sequence of events in a proposed sale of real estate. Xerox owned a commercial building in Tukwila, Washington. Xerox engaged two brokerage firms to sell the property as part of a sale-leaseback transaction. The brokers prepared offering packages describing the property, which were then sent to prospective buyers, including Keystone Land & Development Company. The offering packages solicited responses in the form of a "signed Letter of Intent which includes the net purchase price and key deal points." *Id.* at 1073.

Keystone responded through its broker. The initial letter response had several contingencies, including the execution of a purchase and sale agreement within thirty days following the full execution of the letter of intent by both buyer and seller. Xerox's broker replied to the initial letter seeking clarification of certain points. Keystone responded by increasing the proposed purchase price. Xerox's brokers responded again, stating that, subject to two changes in the offer,

"... Xerox was 'prepared to negotiate a Purchase and Sale Agreement with Keystone,' and that Xerox would 'proceed immediately to draft' the Agreement if Keystone would accept the modifications. Keystone accepted the modifications ..."*Id.*

As due diligence proceeded, Xerox became concerned that Keystone would not be able to finance the acquisition. Xerox requested assurances from Keystone's lender that there was a commitment for financing, but "[f]aced with vague answers given by an officer of Key Bank, Keystone's financier, Xerox became concerned about Keystone's suitability as purchaser and landlord." *Id.* at 1074. Twelve days after Keystone had accepted Xerox's additional conditions to the sale, Xerox received an offer from the City of Tukwila to buy the building for \$500,000 more than Keystone had offered. Xerox accepted that offer, and no further negotiations were conducted with Keystone.

Keystone fielded an action to enforce what it claimed was an agreement to sell the property and filed a *lis pendens* against the property. Xerox removed the case to U.S. District Court. After

Xerox counterclaimed for damages, the *lis pendens* was released. The trial court dismissed the Keystone complaint on a motion for summary judgment, and also awarded attorneys' fees based upon a wrongful filing of the *lis pendens*.

On appeal, the judgment dismissing the Keystone claim was affirmed. The court noted that although it was possible under Washington law to enter into a contract even in contemplation of a more formal agreement, whether or not Keystone and Xerox intended that result in this case was a question of the intent of the parties. Viewing the exchange of letters in a light most favorable to Keystone, the court concluded that no rational trier of fact could conclude that the parties intended the letters to constitute a binding agreement. This was true, even though the letters did not include the normal disclaimer found in letters of intent that the parties were not binding themselves until a formal purchase agreement was drafted. The letters did, however, clearly contemplate a final purchase agreement to be drafted, and there was no intent for the parties to be contractually bound until that agreement had been drafted and executed.

The court did reverse the judgment against Keystone based on the filing of the *lis pendens*. **The court noted that under RCW 4.28.328, imposition of damages and attorneys fees was not automatic if there was substantial justification for filing the *lis pendens*.** In this case, Keystone was in fact making a claim affecting the title to the property, and even though the claim was not meritorious, Keystone had substantial justification in filing the action. If an agreement to sell the property had been established, Keystone could have asserted an estoppel argument to avoid the further defense of the statute of frauds, so the court was unwilling to conclude that Keystone's claim had no substantial justification. This result is probably justified under RCW 4.28.328, particularly in light of the different treatment of damage claims for filing a *lis pendens* in an action not related to a claim affecting title versus a claim that does in fact relate to the title to real property (*compare* RCW 4.28.328(2) *with* RCW 4.28.328(3)).

In the companion *Keystone* case, the court confronted the remaining issue of whether Washington law recognizes a claim based on a breach of an agreement to negotiate. The trial court had dismissed this claim asserted by Keystone against Xerox. Although the court takes a brief journey through Washington case law dealing with the duty of good faith and fair dealing and whether an agreement to agree is enforceable under Washington law, the court ultimately determined that it was unable to articulate Washington law on this topic. The court certified two questions to the Washington State Supreme Court—first, does Washington contract law recognize and enforce an agreement to negotiate a future agreement and second, if Washington does recognize and

*continued on next page*

United States District Court, E.D. Virginia,  
Richmond Division.  
Dannie R. CARTER and Dorothy M. Carter, Plaintiffs,  
v.  
Countrywide Home Loans, Inc., et al, Defendant.  
**Civil No. 3:07CV651.**

April 14, 2009.

Leonard Anthony Bennett, Robin A. Abbott, Gary L. Abbott, Consumer Litigation Assoc. PC, Newport News, VA, for Plaintiffs.

Reginald Maurice Skinner, Harry Margerum Johnson, III, Hunton & Williams LLP, Michael Todd Freeman, Samuel I. White PC, Richmond, VA, Jason Hamlin, Ronald James Guillot, Jr., Samuel I. White PC, Virginia Beach, VA, for Defendant.

***MEMORANDUM OPINION***

DENNIS W. DOHNAL, United States Magistrate Judge.

\*1 This matter is before the Court on Defendants Countrywide Home Loans, Inc. (“Countrywide”) and Samuel I. White, P.C.’s (“White”) Motions for Partial Summary Judgment against Plaintiff Dannie Ray Carter and Dorothy Marie Carter’s (collectively, “the Carters”) claim for actual damages. (Docket Nos. 105 & 108). The issues have been fully briefed and the Court concludes that oral argument would not be of additional assistance in the decisional process. For the reasons set forth herein, the motion is DENIED.

***I. Procedural History***

On September 17, 2007, the Carters initiated an action in the Circuit Court of Henrico County, Virginia against Countrywide for several claims relating to Countrywide’s alleged failure to properly credit payments that the Carters made towards their mortgage loan with Countrywide. The case was later removed to this Court in October 2007. The Carters seek actual and statutory damages for violations of the Real Estate Settlement Procedures Act (“RESPA”), 12 U.S.C. § 2601 et seq., and the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692 et seq., and for attorneys’ fees and costs. (Compl. at 5-6).<sup>FN1</sup> Following a discovery conference with all parties, this Court provided the defendants with the opportunity to file cross motions for summary judgment on the limited issue of whether “actual damages” as defined under RESPA and the FDCPA include or exclude claims for economic loss and emotional distress.

<sup>FN1</sup>. All citations to the Complaint refer to Plaintiff’s Second Amended Complaint filed on October 2, 2008. (Docket No. 83).

***II. Standard of Review***

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(c). The relevant inquiry in a summary judgment analysis is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). In reviewing a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party. Id. at 255.

Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact. Anderson, 477 U.S. at 247-48 (emphasis in original). Indeed, summary judgment must be granted if the nonmoving party “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). To defeat an otherwise properly supported motion for summary judgment, the nonmoving party must rely on more than conclusory allegations, “mere speculation,” the “building of one inference upon another,” the “mere existence of a scintilla of evidence,” or the appearance of some “metaphysical doubt” concerning a material fact. Lewis v. City of Va. Beach Sheriff’s Office, 409 F.Supp.2d 696, 704 (E.D.Va.2006) (citations omitted). Of course, the Court cannot weigh the evidence or make credibility determinations in its summary judgment analysis. Williams v. Staples, Inc., 372 F.3d 662, 667 (4th Cir.2004).

\*2 Furthermore, a “material fact” is a fact that might affect the outcome of a party’s case. Anderson, 477 U.S. at 247-48; JKC Holding Co. LLC v. Wash. Sports Ventures, Inc., 264 F.3d 459, 465 (4th Cir.2001). Whether a fact is considered to be “material” is determined by the substantive law, and “[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” Anderson, 477 U.S. at 248; *see also* Hooven-Lewis v. Caldera, 249 F.3d 259, 265 (4th Cir.2001). A “genuine” issue concerning a “material” fact only arises when the evidence, when viewed in the light most favorable to the non-moving party, is sufficient to allow a reasonable jury to return a verdict in that party’s favor. Anderson, 477 U.S. at 248.

### III. Analysis

Plaintiffs allege that they are entitled to recover actual damages, additional statutory damages, and attorneys’ fees and costs for Defendants’ alleged RESPA and FDCPA violations. (Compl. at 5-6). Included in the Plaintiffs’ list of actual damages are the loss of equity in their home resulting from the foreclosure, economical damages, and damages for emotional and mental distress, frustration, humiliation, and damage to their reputation. (Second Amend. Compl. at 5-6). This

Court has previously ruled, however, that “any actual damages claimed by Plaintiffs that are related to the foreclosure of Plaintiffs’ home are barred by the Rooker-Feldman doctrine” where the state court has already ruled on such issues. Mem. Op., Sept. 3, 2008, at 16. Therefore, the issue remains whether or not Plaintiffs’ claims for economical damages and emotional distress constitute actual damages that are recoverable in the present action.

Countrywide seeks partial summary judgment on the issue of actual damages, arguing that Plaintiffs have no evidence to support their claims. (Countrywide Mem. in Supp. of Mot. for Partial Summ. J. “Countrywide Mem.” at 10.). White likewise requests dispositive relief on the issue based on Plaintiffs’ alleged failure to provide evidence to support their claim for actual damages. (White Mem. in Supp. of Mot. for Partial Summ. J. “White Mem.” at 1.). However, Countrywide does not argue, as was suggested at the conference with the Court, that the Carters’ claims for economic loss and emotional distress are not available under RESPA or the FDCPA. At the same time, White does argue in its motion that Plaintiffs’ claims should fail as a matter of law. (White Mem. at 1.).

#### **A. Damages for Emotional Distress Under RESPA**

Section 2605(f) of RESPA provides:

Whoever fails to comply with any provision of this section shall be liable to the borrower for each such failure in the following amounts:

(1) Individuals

In the case of any action by an individual, an amount equal to the sum of-

(A) any actual damages to the borrower as a result of the failure; and

\*3 (B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed \$1,000.”

12 U.S.C. § 2605(f). Thus, RESPA does allow recovery of “actual damages.” Accordingly, the issue before this Court is whether actual damages under § 2605(f)(1)(A) may include compensation for economic loss and/or emotional and mental distress.

The first step in construing a statute is to interpret the statutory language in accordance with its “plain meaning.” *Boulware v. Crossland Mortgage Corp.*, 291 F.3d 261, 266 (4th Cir.2002). Section 2605 of RESPA provides for relief in the form of “any actual damages to the borrower” arising from a violation of said section. The courts that have examined § 2605(f) have consistently found that “actual damages” includes emotional distress damages. See *Wright v. Litton Loan Servicing LP*, No. 05-02611-JF, 2006 U.S. Dist. LEXIS 15691, at \*9-10 (E.D.Pa. Apr. 4, 2006) (concluding that “ ‘actual damages’ includes damages for non-economic loss, such as

pain, suffering, and emotional distress”); Ploog v. HomeSide Lending, Inc., 209 F.Supp.2d 863, 870 (N.D.Ill.2002) (“RESPA’s actual damages provision includes recovery for emotional distress.”); Johnstone v. Bank of America, N.A., 173 F.Supp.2d 809, 814-16 (N.D.Ill.2001) (actual damages may include emotional distress); Rawlings, 64 F.Supp.2d 1156, 1165 (M.D.Ala.1999) (the term “actual damages” includes damages for mental anguish).

The courts which found RESPA’s actual damages provision to include damages for emotional distress did so on the basis that RESPA is a consumer protection statute that should be construed liberally. See, e.g., Johnstone, 173 F.Supp. at 816 (finding that “the express terms of RESPA clearly indicate that it is, in fact, a consumer protection statute”). Even courts that have not had occasion to consider the issue of whether § 2605(f) permits recovery for emotional distress damages have interpreted RESPA as being a consumer protection statute. See Cortez v. Keystone Bank, Inc., 2000 U.S. Dist. LEXIS 5705, at \*38 (comparing RESPA and the Truth in Lending Act (TILA) and finding that “both statutes are consumer protection statutes”) Such authority is persuasive whereby Congress has evinced its intent for RESPA to be a remedial consumer protection statute. Indeed, in the section of the statute entitled “Congressional findings and purpose,” it is stated:

The Congress finds that significant reforms in the real estate settlement process are needed to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are *protected* from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country.

12 U.S.C. § 2601(a) (emphasis added).

Only two courts that have analyzed § 2605(f) have held that its actual damages provision does not encompass emotional distress. See Katz v. Dime Savings Bank, 992 F.Supp. 250, 255-56 (W.D.N.Y.1997); see also In re Tomasevic, 273 B.R. 682, 687 (M.D. Fla.2002) (following Katz). In Katz, the court examined the legislative history of § 2605 and concluded that it “was originally enacted by Congress in 1990 as part of the Affordable Housing Act, the purpose of which was to help provide for more affordable housing in the United States.”*Id.* Therefore, the court reasoned:

\*4 [T]he duty of a loan officer to respond to borrower inquiries is just one small part of a broad statute designed to help facilitate home ownership.... If Congress had intended for this statute to have a remedial purpose, then it would have explained such an intention either in the language of the statute or the accompanying legislative history.”

*Id.* This Court respectfully disagrees with the analysis, however, because it contrasts with the express terms of RESPA.<sup>FN2</sup>As noted earlier, the statutory language is clear that Congress intended for RESPA to be a remedial consumer protection statute. As the court in Rawlings explained:

FN2. It is also worth noting that the U.S. Department of Housing and Urban Development (HUD), the Cabinet-level department responsible for implementing **RESPA**, also interprets **RESPA** as being a consumer protection statute. For example, on its website, HUD advises that “**RESPA** is a HUD consumer protection statute designed to help homebuyers be better shoppers in the home buying process, and is enforced by HUD.” U.S. Dept't of Housing and Urban Development, **RESPA**-Real Estate Settlement Procedures Act, available at [http://www.hud.gov/offices/hsg/sfh/res/respa\\_hm.cfm](http://www.hud.gov/offices/hsg/sfh/res/respa_hm.cfm).

in 1990, Congress purposefully inserted the contents of § 2605 into **RESPA**.... Had Congress intended for this one section of **RESPA** not to serve a remedial purpose, it is the court's belief that Congress would have been explicit with such intention, particularly as it would have been contrary to the purposes of the remainder of the statute. As Congress made no such reference, the court finds that § 2605, like the rest of **RESPA**, is a remedial, consumer-protection statute. 64 F.Supp.2d at 1166. Because this Court finds the rationale of cases like *Rawlings* and *Johnstone* persuasive, and because nothing in the pertinent statutory language limits the scope of actual damages, the Court concludes that § 2605's actual damages provision includes possible recovery for Plaintiffs' emotional distress damages.

#### **B. Damages for Economic Loss Under RESPA**

Countrywide and White do not challenge the fact that Plaintiffs' are entitled to recover damages for out-of-pocket expenses for their **RESPA** claim. However, they each argue that Plaintiffs have failed to prove any economic loss resulting from Defendants' actions. (Countrywide Mem. at 1; White Mem. at 1.). As discussed at the discovery conference, however, the Court is not inclined to rule at this juncture, before trial and a full opportunity to develop the record, whether Plaintiffs' have proven any pecuniary loss. For purposes of resolving the issue at hand, it is simply held that all provable damages, including economic, are permitted under **RESPA**.

#### **C. Actual Damages Under the FDCPA**

The FDCPA's actual damages provision also encompasses emotional distress damages. Section 1692k of the FDCPA provides in pertinent part:

(a) Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such a person in an amount to the sum of-

(1) any actual damages sustained by such a person as a result of such failure;

(2)(A) in the case of an action by an individual, such additional damages as the court may allow, but not exceeding \$1,000, \* \* \* \*

15 U.S.C. § 1692k. The language of § 1692k and § 2605(f) of **RESPA** are essentially identical. Not surprisingly, courts that have analyzed the FDCPA have held that § 1692k's provisions allow for recovery of emotional distress damages. *See, e.g., Davis v. Creditors Interchange Receivable Mgmt., LLC*, 585 F.Supp.2d 968, 971-73 (N.D. Ohio 2008); *McGrady v. Nissan Motor Acceptance Corp.*, 40 F.Supp.2d 1323, 1338 (M.D. Ala. 1998) (finding that damages for mental anguish are recoverable under the FDCPA); *Smith v. Law Offices of Mitchell N. Kay*, 124 B.R. 182, 185 (D. Del. 1991) (noting that both the Fair Credit Reporting Act (FCRA) and the FDCPA provide for actual damages for emotional distress). Moreover, the Federal Trade Commission Commentary to the FDCPA has established that “actual damages” for FDCPA violations include “damages for personal humiliation, embarrassment, mental anguish, or emotional distress” as well as “out-of-pocket expenses.” Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50097, 50109 (Dec. 13, 1988). Finding there to be no statutory language limiting the type of actual damages recoverable, nor persuasive adverse case precedent, while finding compelling supportive precedent, the Court concludes that the FDCPA also allows for the recovery of all provable damages, including those of an emotional nature.

#### IV. Conclusion

\*5 All provable damages, including emotional, are permitted under **RESPA** and the FDCPA. While Countrywide and White argue that the issue of actual damages should be resolved at this stage, based on the conclusory evidence presently available, the Court notes that such evidence as that concerning emotional distress is, by its very nature, not necessarily susceptible to precise quantification and, therefore, the Court declines to preclude, as a matter of law, the ultimate fact finder's consideration of such evidence at trial.

An appropriate Order shall issue.

E.D. Va., 2009.

Carter v. Countrywide Home Loans, Inc.  
Slip Copy, 2009 WL 1010851 (E.D. Va.)

END OF DOCUMENT

## **Statutes**

**RCW 4.28.328****Lis pendens — Liability of claimants — Damages, costs, attorneys' fees.**

(1) For purposes of this section:

(a) "Lis pendens" means a lis pendens filed under RCW 4.28.320 or 4.28.325 or other instrument having the effect of clouding the title to real property, however named, including consensual commercial lien, common law lien, commercial contractual lien, or demand for performance of public office lien, but does not include a lis pendens filed in connection with an action under Title 6, 60, other than chapter 60.70 RCW, or 61 RCW;

(b) "Claimant" means a person who files a lis pendens, but does not include the United States, any agency thereof, or the state of Washington, any agency, political subdivision, or municipal corporation thereof; and

(c) "Aggrieved party" means (i) a person against whom the claimant asserted the cause of action in which the lis pendens was filed, but does not include parties fictitiously named in the pleading; or (ii) a person having an interest or a right to acquire an interest in the real property against which the lis pendens was filed, provided that the claimant had actual or constructive knowledge of such interest or right when the lis pendens was filed.

(2) A claimant in an action not affecting the title to real property against which the lis pendens was filed is liable to an aggrieved party who prevails on a motion to cancel the lis pendens, for actual damages caused by filing the lis pendens, and for reasonable attorneys' fees incurred in canceling the lis pendens.

(3) Unless the claimant establishes a substantial justification for filing the lis pendens, a claimant is liable to an aggrieved party who prevails in defense of the action in which the lis pendens was filed for actual damages caused by filing the lis pendens, and in the court's discretion, reasonable attorneys' fees and costs incurred in defending the action.

[1994 c 155 § 1.]

**RCW 19.36.010**

**Contracts, etc., void unless in writing.**

In the following cases, specified in this section, any agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say: (1) Every agreement that by its terms is not to be performed in one year from the making thereof; (2) every special promise to answer for the debt, default, or misdoings of another person; (3) every agreement, promise or undertaking made upon consideration of marriage, except mutual promises to marry; (4) every special promise made by an executor or administrator to answer damages out of his own estate; (5) an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission.

[1905 c 58 § 1; RRS § 5825. Prior: Code 1881 § 2325; 1863 p 412 § 2; 1860 p 298 § 2; 1854 p 403 § 2.]

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**RCW 61.16.010**

**Assignments, how made — Satisfaction by assignee.**

Any person to whom any real estate mortgage is given, or the assignee of any such mortgage, may, by an instrument in writing, signed and acknowledged in the manner provided by law entitling mortgages to be recorded, assign the same to the person therein named as assignee, and any person to whom any such mortgage has been so assigned, may, after the assignment has been recorded in the office of the auditor of the county wherein such mortgage is of record, acknowledge satisfaction of the mortgage, and discharge the same of record.

[1995 c 62 § 13; 1897 c 23 § 1; RRS § 10616.]

**Notes:**

**Validating -- 1897 c 23:** "All satisfactions of mortgages heretofore made by the assignees thereof, where the assignment was in writing, signed by the mortgagee or assignee, and where the same was recorded in the office of the auditor of the county wherein the mortgage was recorded, are hereby validated, and such satisfactions of mortgages so made shall have the same effect as if made by the mortgagees in such mortgages." [1897 c 23 § 2.]

**RCW 65.08.070**  
**Real property conveyances to be recorded.**

A conveyance of real property, when acknowledged by the person executing the same (the acknowledgment being certified as required by law), may be recorded in the office of the recording officer of the county where the property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his heirs or devisees, of the same real property or any portion thereof whose conveyance is first duly recorded. An instrument is deemed recorded the minute it is filed for record.

[1927 c 278 § 2; RRS § 10596-2. Prior: 1897 c 5 § 1; Code 1881 § 2314; 1877 p 312 § 4; 1873 p 465 § 4; 1863 p 430 § 4; 1860 p 299 § 4; 1858 p 28 § 1; 1854 p 403 § 4.]

**Notes:**

RCW 65.08.070 applicable to rents and profits of real property:  
RCW 7.28.230.

(e) Duty of loan servicer to respond to borrower inquiries

(1) Notice of receipt of inquiry

(A) In general

If any servicer of a federally related mortgage loan receives a qualified written request from the borrower (or an agent of the borrower) for information relating to the servicing of such loan, the servicer shall provide a written response acknowledging receipt of the correspondence within 20 days (excluding legal public holidays, Saturdays, and Sundays) unless the action requested is taken within such period.

(B) Qualified written request

For purposes of this subsection, a qualified written request shall be a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that--

(i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and

(ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.

(2) Action with respect to inquiry

Not later than 60 days (excluding legal public holidays, Saturdays, and Sundays) after the receipt from any borrower of any qualified written request under paragraph (1) and, if applicable, before taking any action with respect to the inquiry of the borrower, the servicer shall--

(A) make appropriate corrections in the account of the borrower, including the crediting of any late charges or penalties, and transmit to the borrower a written notification of such correction (which shall include the name and telephone number of a representative of the servicer who can provide assistance to the borrower);

(B) after conducting an investigation, provide the borrower with a written explanation or clarification that includes--

(i) to the extent applicable, a statement of the reasons for which the servicer believes the account of the borrower is correct as determined by the servicer; and

(ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower; or

(C) after conducting an investigation, provide the borrower with a written explanation or clarification that includes--

(i) information requested by the borrower or an explanation of why the information requested is unavailable or cannot be obtained by the servicer; and

(ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower.

(3) Protection of credit rating

During the 60-day period beginning on the date of the servicer's receipt from any borrower of a qualified written request relating to a dispute regarding the borrower's payments, a servicer may not provide information regarding any overdue payment, owed by such borrower and relating to such period or qualified written request, to any consumer reporting agency (as such term is defined under section 1681a of Title 15).

(f) Damages and costs

Whoever fails to comply with any provision of this section shall be liable to the borrower for each such failure in the following amounts:

(1) Individuals

In the case of any action by an individual, an amount equal to the sum of--

(A) any actual damages to the borrower as a result of the failure; and

(B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed \$1,000.

(3) Protection of credit rating

During the 60-day period beginning on the date of the servicer's receipt from any borrower of a qualified written request relating to a dispute regarding the borrower's payments, a servicer may not provide information regarding any overdue payment, owed by such borrower and relating to such period or qualified written request, to any consumer reporting agency (as such term is defined under section 1681a of Title 15).

(f) Damages and costs

Whoever fails to comply with any provision of this section shall be liable to the borrower for each such failure in the following amounts:

(1) Individuals

In the case of any action by an individual, an amount equal to the sum of--

(A) any actual damages to the borrower as a result of the failure; and

(B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed \$1,000.

## 12 USC 2614 - Jurisdiction of courts; limitations

***U.S. Code > Title 12 > Chapter 27 > § 2614 - Jurisdiction of courts; limitations***

*Current as of: 01/03/2007*

*Check for updates*

Sec. 2614. Jurisdiction of courts; limitations

Any action pursuant to the provisions of section 2605, 2607, or 2608 of this title may be brought in the United States district court or in any other court of competent jurisdiction, for the district in which the property involved is located, or where the violation is alleged to have occurred, within 3 years in the case of a violation of section 2605 of this title and 1 year in the case of a violation of section 2607 or 2608 of this title from the date of the occurrence of the violation, except that actions brought by the Secretary, the Attorney General of any State, or the insurance commissioner of any State may be brought within 3 years from the date of the occurrence of the violation.

**APPEALANT'S EXHIBIT - A**

6 February 2009

To: The Honorable Barbara D. Johnson  
Department 6, c/o  
Clerk Superior Court of Washington for Clark County  
P.O. Box 5000  
1200 Franklin Street, Vancouver, WA 98666-5000

And via fax: 360-397-6078

From: Daniel Szmania  
17005 NE 164<sup>th</sup> Ave.  
Brush Prairie, WA 98606  
360-260-2280, fax 360-604-0566

Re: Daniel Szmania v. Countrywide Home Loans Inc.  
Clark County Superior Court No. 08-2-07251-1  
Ruling on Damages

Dear Judge Johnson;

Foremost, I apologize for misspelling your name in my 3 February 2009 letter to you regarding the attorney fees.

I received your letter today with your ruling. Your Honor, with all due respect I believe you are in error. I will explain. The 24 CFR § 3500.21, has sections (a) thru (h).

You quoted the right chapter (e), however (2) Qualified written request; defined (ii): is in reference to the transfer of a loan from one servicer to another. Yes that happened over a year ago. My written requests were not about that, but about payments from July 2008 to January 2009.

If you go to (4) Protection of credit rating, this is the section I was quoting in my pleadings and in my oral arguments. If I may direct you to your enclosure, it is to the immediate right of were you highlighted for us.

It reads as follows:

24 C.F.R. § 3500.21

(e) Duty of loan servicer to respond to borrower inquiries.

(4) Protection of credit rating. (i) During the 60-business day period beginning on the date of the servicer receiving from a borrower a qualified written request relating to a dispute on the borrower's payments, a servicer may not provide adverse information regarding any payment that is the subject of the qualified written request to any consumer reporting agency (as that term is defined in section 603 of the Fair Credit Reporting Act, 15 U.S.C. 1681a).

(ii) In accordance with section 17 of RESPA (12 U.S.C. <sup>2605</sup> 2615), the protection of credit rating provision of paragraph (e)(4)(i) of this section does not impede a lender or servicer from pursuing any of its remedies, including initiating foreclosure, allowed by the underlying mortgage loan instruments.

(f) Damages and costs. (1) Whoever fails to comply with any provision of this section shall be liable to the borrower for each failure in the following amounts:

(i) Individuals. In the case of any action by an individual, an amount equal to the sum of any actual damages sustained by the individual as the result of the failure and, when there is a pattern or practice of noncompliance with the requirements of this section, any additional damages in an amount not to exceed \$1,000.

[http://classactiondefense.jmbm.com/2007/04/24\\_cfr\\_350021.html](http://classactiondefense.jmbm.com/2007/04/24_cfr_350021.html)

This was enclosed in my Exhibit 5, Page 3, [Complaint Resolution, Section 6 RESPA (12 U.S.C. Section 2605)] all highlighted & submitted with my Amended Complaint on 12 January 2009.

Because I realize these topics can be so confusing, I handed you and the Defendant the same Exhibits during our oral arguments if you recall. This was labeled as point # 1 for my Motion for Damages.

Your Honor, please reevaluate the materials and reconsider your ruling with the correct chapter of the law.

Thank you in advance.

Sincerely,

Daniel Szmania, pro se'

Cc: Mr. John Devlin III, Lane & Powell.  
Fax 206-223-7107 & U.S. Mail

**APPEALANT'S EXHIBIT - B**



Report Number:

**0524-0374-68**

Online Credit Report from Experian for:

**DANIEL G SZMANIA**

Report date: **March 09, 2010**

[Summary of Results](#)

[Details of Investigation Results](#)

[Important Message from Experian](#)

[Know your rights](#)

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We completed any items you disputed with the sources of the information and processed any other requests you made.

The following shows the revision(s) made to your file as a result of our investigation. If you still question an item, then you may want to contact the source of the information personally.

## Results

[Back to top](#)

### How to read your results

- **Deleted** - This item was removed from your credit report
- **Remains** - This item has been verified as accurate
- **Updated** - A change was made to this item; review this report to view the change. If ownership of the item was disputed, then it was verified as belonging to you.
- **Reviewed** - This item was either updated or deleted; review this report to learn its outcome

#### Credit Items

BAC HOME LOANS SERVICE

**Account Number:** 15582....

**Outcome:** Remains

## Details Of Investigation Results

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Potentially Negative Items or items for further review

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This information is generally removed seven years from the initial missed payment that led to the delinquency. Missed payments and most public record items may remain on the credit report for up to seven years, except Chapters 7, 11 and 12 bankruptcies and unpaid tax liens, which may remain for up to 10 years. A paid tax lien may remain for up to seven years. Transferred accounts that have not been past due remain up to 10 years after the date the account was transferred.

#### Credit Items

**BAC HOME LOANS/COUNTRYWIDE**

**Address:**

450 AMERICAN ST #

SV416

SIMI VALLEY, CA

93065

(800) 669-6607

**Account Number:**

15582....

**Address Identification Number:**

0204451876

**Status:**

Open. \$14,325 past due as of Nov 2008.

**Date Opened:**

11/2006

**Type:**

Mortgage

**Credit Limit/Original Amount:**

\$787,500

**Reported Since:**

01/2007

**Terms:**

30 Years

**High Balance:**

NA

**Date of Status:**

10/2008

**Monthly Payment:**

\$4,775

**Recent Balance:**

\$740,000

**Last Reported:**

11/2008

**Responsibility:**

Individual

**Recent Payment:**

\$0

**Account History:**

90 days past due as of Nov 2008, Oct 2008

60 days past due as of Sep 2008

30 days past due as of Aug 2008

Accounts in good standing

[Back to top](#)

These items may stay on your credit report for as long as they are open. Once an account is closed or paid off it may continue to appear on your report for up to ten years

**CERTIFICATE OF SERVICE**

I, Daniel Szmania, certify the following is true:

On 23 March 2010, I served via First Class Mail, a copy of the  
Foregoing:

- 1) Appellant's Brief.

To: Countrywide Home Loans Inc. c/o John Devlin III, Counsel  
Lane Powell P.C., 1420 Fifth Ave, Suite 4100, Seattle WA 98101-2338  
206-223-6280 Fax 206-223-7107.

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BY  DEPUTY

I certify under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that the foregoing is true and correct.

Dated this 23<sup>rd</sup> day of March 2010, at Brush Prairie, Washington.

  
Daniel Szmania

Presented: Daniel Szmania, Plaintiff, pro se.  
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