COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

08-J-118

COMMONWEALTH OF MASSACHUSETTS

vs.

FREMONT INVESTMENT & LOAN & another.[1]

ORDER

Pursuant to G. L. c. 231, § 118 (first par.), defendant Fremont Investment & Loan (Fremont) has timely filed (1) a petition for interlocutory relief from a February 25, 2008, order of the Superior Court entering a preliminary injunction (the initial order), and (2) a supplemental petition for interlocutory relief from a March 31, 2008, order of the Superior Court modifying the injunction (the modification order).[2] Fremont's sole request is that the single justice reverse the orders in question. For the reasons that follow, I decline to do so.

1. Background. On October 4, 2007, the Commonwealth, acting through the Attorney General, commenced this action against Fremont, a California state-chartered industrial bank, alleging

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[1] Fremont General Corporation.

[2] I acknowledge the amicus briefs filed by: (1) The American Financial Services Association, The Consumer Mortgage Coalition, The Housing Policy Council of the Financial Services Roundtable, and the Mortgage Bankers Association; and (2) The Securities Industry and Financial Markets Association and the American Securitization Forum.

that Fremont engaged in unfair and deceptive acts and practices in violation of G. L. c. 93A, § 2, in its origination and servicing of subprime mortgage loans in Massachusetts.[3] Thereafter, on December 28, 2007, the Commonwealth moved for a preliminary injunction barring Fremont, during the pendency of this action, from initiating or advancing any foreclosure on any of its residential mortgage loans in Massachusetts without the written consent of the Attorney General's office. At that time, approximately 2500 such loans were at issue.

On February 25, 2008, a judge of the Superior Court granted a preliminary injunction, the terms of which are discussed below and duplicated in Appendix A. Applying the balancing test set forth in Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609, 616-617 (1980), and taking into account the public interest, as is required when it is the Attorney General who seeks a preliminary injunction pursuant to her authority under G. L. c. 93A, § 4, see Commonwealth v. Mass. CRINC, 392 Mass. 79, 88-89 (1984); Commonwealth v. ELM Medical Laboratories, Inc., 33 Mass. App. Ct. 71, 83 (1992), the judge found (1) that the Commonwealth is likely to prevail in proving that many of the subprime mortgage loans offered by Fremont to finance its borrowers' principal residences and bearing each of four specific

[3] Also sued was Fremont's parent corporation, Fremont General Corporation, but this defendant has not joined in the petition.

characteristics, are "unfair" under G. L. c. 93A, because Fremont knew or reasonably should have expected that these loans were unduly vulnerable to foreclosure; (2) that the balance of harms favored the granting of the injunction; and (3) that injunctive relief would serve the public interest.

The four loan characteristics identified by the judge are as follows: (1) the loan is an adjustable rate mortgage with an introductory period of three years or less; (2) the loan has an introductory or "teaser" rate for the initial period that is at least 3% lower than the fully indexed rate; (3) the borrower has a debt-to-income ratio that would have exceeded 50% if the debt were measured under the fully indexed rate, as opposed to the introductory rate; and (4) the loan-to-value ratio of the loan is 100%, or the loan carries a substantial prepayment penalty or the loan carries a prepayment penalty that extends beyond the introductory penalty. The judge reasoned that where loans have the first three characteristics, it is to be expected that the borrower will not be able to meet the scheduled payments once the "teaser" rate expires at the close of the introductory period, and that the loan will be "doomed to foreclosure" unless the borrower is able to refinance the loan at or around the close of the introductory period; and where loans also have the fourth characteristic, the borrower has no realistic prospect of being able to refinance should housing prices decline. The judge

concluded that, "[g]iven the fluctuations in the housing market and the inherent uncertainties as to how that market will fluctuate over time, this Court finds that it is unfair for a lender to issue a home mortgage loan secured by the borrower's principal dwelling that the lender reasonably expects will fall into default once the introductory period ends unless the fair market value of the home has increased at the close of the introductory period. To issue a home mortgage loan whose success relies on the hope that the fair market value of the home will increase during the introductory period is as unfair as issuing a home mortgage loan whose success depends on the hope that the borrower's income will increase during the same period."

As interim relief, and with the stated objective of crafting a "carefully measured preliminary injunction," the judge established a protocol for the initiation or advancement by Fremont of foreclosures on its Massachusetts mortgage loans. The protocol distinguishes between loans that are "presumptively unfair," and those that are not. A "presumptively unfair" loan is one that possesses each of the four characteristics set out above, and is secured by the borrower's principal dwelling, which is neither vacant nor uninhabitable.

As to any mortgage loan that Fremont contends is not presumptively unfair, Fremont must give written notice of its intent to initiate or advance foreclosure, in order to give the

Attorney General the opportunity to dispute whether the loan indeed falls within this category. If the Attorney General does not object to Fremont's categorization, Fremont may proceed with the foreclosure, but if the Attorney General disagrees with Fremont's categorization, and the parties are unable to resolve their differences, Fremont may proceed with foreclosure only with the prior approval of the court.

As to loans that Fremont acknowledges to be within the "presumptively unfair" category, Fremont must give the Attorney General 45 days advance written notice of proposed foreclosure, identifying the reasons why foreclosure nevertheless is reasonable under the circumstances.[4] Again, the Attorney General has the opportunity to object, and the parties have a window in which to resolve their differences. Failing that, Fremont may proceed with foreclosure only with the prior approval of the court.

In situations where the court must decide whether or not to approve a foreclosure, the judge will consider the following factors: (a) whether the loan is actually unfair and actually secured by the borrower's primary residence, which is both

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[4] Fremont may demonstrate that a presumptively unfair loan is not actually unfair, e.g., by showing that the borrower had other assets that realistically could have enabled the borrower to meet the scheduled payments and avoid foreclosure, or had other reasonable means of obtaining refinancing even if the fair market price of the mortgaged home had fallen.

inhabited and inhabitable; (b) whether Fremont has taken reasonable steps to "work out" the loan and avoid foreclosure; and (c) whether there is any fair or reasonable alternative to foreclosure. As the judge further explained in the modification order, the injunction is intended to operate only to "ensure that Fremont take all reasonable steps to help borrowers avoid foreclosure on unfair loans it issued, and explore fair and reasonable alternatives to foreclosure. If Fremont has taken such reasonable steps (which Fremont contends it routinely takes), then this Court will approve the foreclosure."

On March 20, 2008, less than one month after the entry of the preliminary injunction, Fremont issued a press release announcing that it had entered into an asset purchase agreement with Carrington Mortgage Services, LLC (Carrington), whereby Fremont would sell its rights to service mortgage loans currently owned by certain securitization trusts sponsored by Carrington's parent company. Pursuant to this agreement, approximately 300 Massachusetts mortgage loans that were serviced, but not owned, by Fremont were scheduled to be sold to Carrington at a closing on April 1, 2008. Under the terms of the agreement, Carrington expressly did not agree to accept the obligations imposed upon Fremont under the preliminary injunction.

On March 21, 2008, the Commonwealth filed an emergency motion to modify the preliminary injunction to prohibit Fremont

from selling, transferring or assigning any Massachusetts residential mortgage loan originated by Fremont unless Fremont and the assignee agreed in writing that the assignment would be subject to the preliminary injunction, the obligations of the injunction were assigned, and the Commonwealth was provided with the written agreement of the proposed assignee in advance of the sale. On March 31, 2008, the judge issued the modification order, augmenting the injunction to include terms (set out in Appendix B), which are substantially the same as those sought by the Commonwealth; however, he declined to impose these conditions upon Carrington or to enjoin the scheduled sale.

The judge found that the Carrington sale was part of an effort by Fremont to return to adequate capitalization as mandated by a Directive of the Federal Deposit Insurance Corporation (FDIC), that the sale involved only 300 of the approximately 2,500 borrowers whose loans Fremont owned or serviced, and that enjoining the sale might prompt the FDIC to place Fremont under receivership, an eventuality which, the judge concluded, would not be in the public interest. The judge also noted that Carrington had offered two alternative proposals to the Attorney General in keeping with the spirit, if not the letter, of the initial order.

2. Discussion. When a single justice is called upon to review the grant of a preliminary injunction by a judge of the

trial court, the applicable standard is whether the judge abused his discretion, that is, whether the judge applied proper legal standards and whether the record discloses reasonable support for his evaluation of factual questions. See Packaging Industries Group, Inc. v. Cheney, supra at 615; Edwin R. Sage Co. v. Foley, 12 Mass. App. Ct. 20, 26 (1981). The single justice must take care not to substitute his or her judgment for that of the trial court judge when the record discloses reasoned support for the judge's action. See Edwin R. Sage Co. v. Foley, supra. The single justice independently may draw conclusions from the record to the extent that the order was based upon documentary evidence. See Alexander & Alexander, Inc. v. Danahy, 21 Mass. App. Ct. 488, 490 (1986).

In the present case, Fremont claims that the judge abused his discretion by committing two "fundamental" errors of law. Put in terms of the standards for a preliminary injunction, see Packaging Industries Group, Inc. v. Cheney, supra at 616-617, this argument amounts to a contention that the judge incorrectly assessed the Commonwealth's likelihood of success on the merits, because Fremont's conduct could not, as matter of law, constitute a violation of G. L. c. 93A. Fremont also claims, with respect to the modification order, that the harm inflicted upon Fremont outweighs any potential benefit to the public interest, because requiring assignees to abide by the injunction will impede

Fremont in its efforts to exit the subprime residential mortgage industry and to improve its financial condition as required by the FDIC.

a. Alleged errors of law. The two legal errors alleged by Fremont are as follows. First, Fremont maintains that the judge impermissibly expanded the reach of the Massachusetts Predatory Home Loan Practices Act, G. L. c. 183C, when he determined that loans bearing the characteristics in question may be found to be unfair. Second, Fremont claims that loans bearing these characteristics are expressly permitted by both federal and Massachusetts law, and that they therefore are exempt under G. L. c. 93A, § 3. Neither argument has merit.

i. Chapter 183C. Chapter 183C prohibits a lender from making a so called "high cost mortgage loan," unless the lender reasonably believes at the time the loan is consummated that the borrower will be able to repay it, based upon the borrower's current and expected income, obligations, employment status and resources other than the equity in the dwelling that secures the loan. A "high cost mortgage loan" is defined as a loan secured by the borrower's principal dwelling in which the interest rate for a first mortgage exceeds by more than eight percentage points the yield on United States Treasury securities having comparable maturity periods, or the total points and fees exceed five percent of the total loan or $400, excluding up to two "bona fide

loan discount points paid by the borrower to lower the benchmark rate of interest." G. L. c. 183C, § 2. Among other things, Chapter 183C prohibits a lender from adding prepayment fees or penalties to high cost mortgage loans, G. L. c. 183C, § 5, and employs a debt-to-loan ratio of 50 percent as the cut off point for a statutory presumption that the borrower is able to make the scheduled payments. G. L. c. 183C, § 4. A violation of Chapter 183C is expressly deemed a violation of Chapter 93A. G. L. c. 183C, § 18.

Although the Commonwealth's complaint alleges that Fremont issued de facto high cost loans within the scope of Chapter 183C, for purposes of the motion for a preliminary injunction, the Commonwealth did not argue, and the judge did not find that any of Fremont's loans were "high cost mortgage loans." Rather, the judge consulted Chapter 183C solely for the purpose of ascertaining whether Fremont's conduct may be said to be unfair under Chapter 93A. This was not error.

It has long been understood that a factor to be considered in determining whether a practice should be deemed unfair is whether it is "within at least the penumbra of some common-law, statutory, or other established concept of unfairness." PMP Associates, Inc. v. Globe Newspaper Co., 366 Mass. 593, 596 (1975); Datacomm Interface, Inc. v. Computerworld, Inc., 396 Mass. 760, 778 (1986). The judge therefore could look to Chapter

183C as an established, statutory expression of public policy that it is unfair for a lender to make a home mortgage loan secured by the borrower's principal residence in circumstances where the lender does not reasonably believe that the borrower will be able to make the scheduled payments and avoid foreclosure.

Furthermore, the judge did not rely solely upon Chapter 183C in reaching the conclusion that the loans in question may be found to be unfair. He also relied upon guidance from federal agencies cautioning lenders about making loans that had high loan to value ratios, that were based predominantly on the foreclosure value of the collateral, or that were adjustable rate loans issued without evaluation of the borrower's ability to repay the debt at the fully indexed rate. Thus, whether or not the loans subject to the injunction can be found to be "high cost loans" within the ambit of Chapter 183C, there was reasoned support in law and fact for the judge's determination that the Commonwealth was likely to succeed in proving that these loans were unfair.

ii. Chapter 93A, § 3. Fremont contends that its conduct in issuing the subject loans is exempt pursuant to G. L. c. 93A, § 3, because the four characteristics that troubled the judge were and are expressly legal. As an initial matter, the Commonwealth points out that Fremont did not assert the exemption in its answer, as it was required to do. See Fleming v. National

Union Fire Ins. Co., 445 Mass. 381, 389 (2005) ("The exemption enunciated in § 3 is an affirmative defense that must be asserted in the pleadings and proved at trial.") Nevertheless, because Fremont argued the applicability of § 3 in opposition to the Commonwealth's motion for a preliminary injunction, and because the question is an important one, I consider it on its merits.

Section 3 provides: "Nothing in this chapter shall apply to transactions or actions otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of the [C]ommonwealth or of the United States. For the purpose of this section, the burden of proving exemptions from the provisions of this chapter shall be upon the person claiming the exemptions." It has been emphasized that this burden is a "difficult one to meet." Fleming v. National Union Fire Ins. Co., supra at 390, quoting from Bierig v. Everett Square Plaza Assocs., 34 Mass. App. Ct. 354, 367 (1993).

In his memorandum of decision, the judge did not explicitly address Fremont's § 3 argument. However, the judge considered and decided a related issue, i.e. whether Fremont's conduct could be found to be unfair even if the four loan characteristics in question were and are legal. In that context, the judge correctly relied upon established caselaw holding that "[t]he fact that particular conduct is permitted by statute or by common law principles should be considered, but it is not dispositive on

the question of unfairness." Schubach v. Household Finance Corp., 375 Mass. 133, 137 (1978). See also Kattar v. Demoulas, 433 Mass. 1, 12-13 (2000); Billingham v. Dornemann, 55 Mass. App. Ct. 166, 176 (2002).

The issue of exemption under Chapter 93A, § 3, is, however, somewhat different. Presumably, if challenged conduct qualifies as "exempt," it is not subject to Chapter 93A whether or not it conceivably could be shown to be unfair. However, consistent with the principle that conduct compliant with law nevertheless may be found to be unfair, legality alone does not trigger the exemption. The availability of the exemption depends upon whether the conduct is specifically authorized by another regulatory regimen. A defendant "'must show more than the mere existence of a related or even overlapping regulatory scheme that covers the transaction. Rather, a defendant must show that such scheme affirmatively permits the practice which is alleged to be unfair or deceptive.'" Bierig v. Everett Square Plaza Assocs., supra at 367 n.14, quoting from Greaney, Chapter 93A Rights and Remedies 6-4 (1992) (emphasis in original). See also Commonwealth v. DeCotis, 366 Mass. 234, 239-240 (1974) (defendants did not show that under laws as administered by board of health they were permitted to impose and collect mobile home resale fees); Lowell Gas Co. v. Attorney General, 377 Mass. 37, 42 (1979) (Chapter 93A may apply even where other statutes and

regulatory systems provide concurrent coverage of common subject matter).

This test is to be applied to the particular practice at issue, as illustrated by DePasquale v. Ogden Suffolk Downs, Inc., 29 Mass. App. Ct. 658, 662-663 (1990). In that case, it was held that the plaintiff's claims based upon the right to recover winnings on wager were exempt from Chapter 93A, because they were exclusively governed by G. L. c. 128A, (including its private right of action provision) and racing commission regulations promulgated thereunder. However, the plaintiff was permitted to go forward with his Chapter 93A action to the extent that he alleged other conduct -- the surrender and issuance of winning tickets -- that was not shown by the defendant to be regulated or permitted by the racing statute and regulations, even though this conduct related to activity generally addressed by Chapter 128.

Given the narrow scope of § 3, I conclude that Fremont has not shown that is likely to meet its burden of proving that its conduct is exempt, and that the injunction therefore should not be disturbed on this basis. Significantly, the unfair practice at issue here is the combination of loan characteristics used by Fremont, which, the judge determined, operate together to "doom" a loan to foreclosure unless there is an increase in the fair market value of the home during the introductory period of the loan. Fremont has pointed to no law, regulation or advisory that

affirmatively permits this combination of loan characteristics. At most, Fremont has cited regulations that authorize the use of individual mortgage features, or that are directed to an aggregation of risk factors different from the combination relied upon by the judge.[5] Furthermore, far from affirmatively permitting the aggregation of loan features at issue here, one guidance cited by Fremont actually warns lenders that when they combine certain risk factors they must show that they employ other mitigating features such as lower loan-to-value and debt-to-income ratios, in order to ensure that borrowers can repay their loans and avoid default. See Interagency Guidance on Nontraditional Mortgage Product Risks, 71 Fed. Reg. 58,609 (Oct. 4, 2006) at 58,614. In short, Fremont has not shown that it will be able to carry the difficult burden of proving the applicability of the § 3 exemption to the loans at issue here.

b. Balancing of harms. Fremont claims that the modification order extending the injunction to assignees will impede its

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[5] One such guidance focuses on the combination of three risk factors: (1) adjustable rate; (2) underwriting on reduced documentation; and (3) use of second-lien loans. See Interagency Guidance on Nontraditional Mortgage Product Risks, 71 Fed. Reg. 58,609 (Oct. 4, 2006), at 58,611 and 58,613. Another guidance adds prepayment penalties to these factors, permitting their use only where the lender offers a reasonable time for the borrower to refinance prior to the loan's adjustment to a higher interest rate, and such penalties do not extend beyond the introductory period. See Statement on Subprime Mortgage Lending, 72 Fed. Reg. 37,569 (July 10, 2007), at 37,571-572.

ability to sell its loans and servicing obligations and thereby interfere with its efforts to improve its deteriorating financial condition as required by the FDIC. According to Fremont, this harm outweighs any potential benefit to the public, and the judge therefore should not have issued the modification order.

It is evident from the judge's March 31, 2008, memorandum, that the judge thoroughly considered the consequences of modifying the injunction. After taking into account Fremont's concerns and the potential impact upon all of Fremont's Massachusetts borrowers, the judge chose not to enjoin the Carrington sale or to require that Carrington agree to abide by the preliminary injunction. Instead, the judge modified the injunction only as to future sales. The judge noted that Fremont's contention that it would have difficulty selling its loans and servicing obligations was supported only by the affidavits of Fremont's own employees, rather than by any impartial expert in the mortgage industry.[6] He correctly observed that the protocol established by the preliminary

[6] In support of the position that its ability to sell loans and servicing obligations would be impaired by extending the injunction to assignees, Fremont presented the affidavit of Vice President of Secondary Marketing, Michael Koch. The Koch affidavit is not convincing. It states only that unidentified potential buyers have been unwilling to purchase Massachusetts loans due to the pending litigation and that even if Fremont were able to identify a potential purchaser, "I believe that the price offered for such loans or the MSRs relating to such loans, together with demands for indemnification would make the sale of such loans or MSRs relating to such loans highly impractical."

injunction is modest and designed merely to ensure that fair and reasonable alternatives to foreclosure be explored; that Fremont has yet to test the protocol; and that the protocol can be modified if it turns out to be onerous. The judge concluded that while third parties may be wary of purchasing loans or servicing obligations that require them to accept the obligations of the injunction, "this Court is confident that they will be increasingly willing to do so once they see that the obligations are eminently workable." He further concluded that any discount that Fremont may be required to offer to assignees is "simply the price that Fremont must pay for having entered into the unfair loans in the first place."

It is evident from the judge's decision that he carefully took into account potential prejudice to Fremont but determined that Fremont's concerns were ill-founded and that the public interest would best be served by modifying the injunction to ensure that Massachusetts borrowers retain the benefits of the injunction if and when Fremont assigns loans and servicing obligations in the future. The judge's decision to modify the injunction in this fashion was reasoned and supported. It was not an abuse of discretion.

3. Conclusion. For the foregoing reasons, the petition and supplemental petition are denied. I note that Fremont has not put this case in a posture where plenary review of the

preliminary injunction is available as of right;[7] nor has it requested in its petition that the single justice authorize plenary review. I therefore will not facilitate further review on my own initiative, on the assumption that Fremont may prefer that the case remain in the hands of the trial judge, who is in the best position to respond rapidly to changing factual circumstances or new legislative or regulatory developments. Nevertheless, in view of the public importance of the issues involved, if this assumption is incorrect, Fremont may request that the single justice report this matter so that it may receive full panel review. See Cassidy v. Comm'r. of Environmental Management, 7 Mass. App. Ct. 898, 899 (1979). Any such request shall be made by motion filed on or before May 15, 2008, and shall set forth a proposed timetable for briefing and argument. The Commonwealth shall have ten days in which to respond to the motion.

By the Court (Cohen, J.),

Clerk

Entered: May 2, 2008.

[7] Fremont did not file a notice of appeal pursuant to the second paragraph of G. L. c. 231, § 118.

APPENDIX A

February 25, 2008 - ORDER

For the reasons stated above, this Court hereby **ALLOWS** the Attorney General's motion for a preliminary injunction to the extent that, pending final adjudication or further order of this Court, this Court **ORDERS** as follows:

1. Before initiating or advancing a foreclosure on any mortgage loan originated by Fremont that is (a) NOT presumptively unfair, because it does not possess each of the four characteristics identified above, or (b) NOT secured by the borrower's principal dwelling, or (c) that is secured by a dwelling that is vacant or uninhabitable, Fremont shall first give the Attorney General 30 days advance written notice so that the Attorney General can verify that the proposed foreclosure falls outside the scope of this Preliminary Injunction. If the Attorney General has not given written notice of an objection to Fremont by the 30th day, based on her finding that the loan is presumptively unfair and is secured by the borrower's principal dwelling and that the dwelling is both inhabited and inhabitable, Fremont may proceed with the foreclosure. If the Attorney General has given written notice of an objection, Fremont shall proceed in accordance with paragraph 2 below.

2. Before initiating or advancing a foreclosure on any mortgage loan originated by Fremont (1)(a) that is presumptively unfair, because it possesses each of the four characteristics identified above, and (b) secured by the borrower's principal dwelling, and (c) where the dwelling is neither vacant nor uninhabitable, or, (2) in which the Attorney General has provided a written objection in accordance with paragraph 1 above, Fremont shall give the Attorney General 45 days advance written notice of the proposed foreclosure, identifying the reasons why foreclosure is reasonable under the circumstances and/or why the Attorney General's written objection under paragraph 1 above is in error. If the Attorney General has not given written notice of an objection to Fremont by the 45th day, Fremont may proceed with the foreclosure.

3. If the Attorney General has timely given a written objection under paragraph 2 above, the Attorney General and Fremont

shall within the next 15 days attempt to resolve their differences regarding the foreclosure. If these differences have been resolved, the Attorney General will notify Fremont in writing that she has withdrawn her written objection. If these differences are not resolved, Fremont may proceed with the foreclosure only with the prior approval of this Court (or a special master appointed by this Court, (which it may seek on the 16th day.

4. In considering whether to approve the foreclosure, this Court will determine (a) whether the loan is actually unfair and is actually secured by the borrower's primary residence that is both inhabited and inhabitable, (b) whether Fremont has taken reasonable steps to "work out" the loan and avoid foreclosure, and (c) whether there is any fair or reasonable alternative to foreclosure. This Court will seek to expedite these decisions but, if the number of such matters grows too large, this Court may need to appoint a special master to assist the Court.

APPENDIX B

March 31, 2008 - ORDER

For the reasons stated above, this Court hereby **ALLOWS** the Attorney General's motion to modify the preliminary injunction to the extent that, pending final adjudication of this action or further order of this Court, this Court **ORDERS** as follows:

1. Pending final adjudication of this action or further order of this Court, Fremont shall not sell, transfer, or assign (i) any mortgage loan originated by Fremont that is secured by any residential property in Massachusetts, or (ii) the legal obligation to service any mortgage loan originated by Fremont that is secured by any residential property in Massachusetts, unless:

   a. Fremont gives the Massachusetts Attorney General written notice of its intent to enter into such an assignment, including a copy of the proposed agreement, at least five business days before executing the purchase agreement,

   b. the obligations of this Court's Preliminary Injunction, including but not limited to this restriction upon further sale, transfer, or assignment, are also assigned with the sale or assignment of the loans or servicing rights,

   c. the assignee agrees in the written assignment to be governed by the terms of the Preliminary Injunction and its obligations, and

   d. a copy of the executed written assignment is provided within five business days of its execution to the Attorney General.

2. Notwithstanding this modification, Fremont is not enjoined from closing on the Asset Purchase Agreement entered into with Carrington on March 17, 2008, provided this Agreement closes before May 25, 2008.