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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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TERESA LOPEZ, JAMES ROBINSON, BERTHA CLINTON, and WILFRED LONEY, on behalf of themselves and all others similarly situated,

Plaintiffs,

- against -

DELTA FUNDING CORPORATION, DELTA FINANCIAL CORPORATION, ALL STATE CONSULTANTS, INC., a/k/a CITY MORTGAGE BANKERS, DOE CORPORATIONS 1 through X, DELTA FUNDING HOME EQUITY LOAN TRUST, and BANKERS TRUST COMPANY OF CALIFORNIA, N.A., as trustee for the DELTA FUNDING HOME EQUITY LOAN TRUST,

Defendants.
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CV 98-7204 (CPS)

MEMORANDUM DECISION AND ORDER

APPEARANCES:

ABBEY, GARDY & SQUITIERI, L.L.P.
New York, New York
Attorneys for Plaintiffs:
By: Linda Cahn, Esq.
Lee Squitieri, Esq.

KIRKPATRICK & LOCKHART, L.L.P.
Boston, Massachusetts
Attorneys for Defendants Delta Funding Corporation, Delta Financial Corporation, Delta Funding Home Equity Loan Trust, and Bankers Trust Company of California
By: R. Bruce Allensworth, Esq.
Thomas J. Noto, Esq.

SIFTON, Chief Judge

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This is a class action brought by plaintiff Teresa Lopez and plaintiffs-intervenors James Robinson, Bertha Clinton, and Wilfred Loney against defendants Delta Funding Corporation, Delta Financial Corporation, All State Consultants, Inc., a/k/a City Mortgage Bankers, Doe Corporations 1 through X, Delta Funding Home Equity Loan Trust, and Bankers Trust Company of California, N.A., as trustee for the Delta Funding Home Equity Loan Trust. Plaintiffs assert claims, on behalf of themselves and all others similarly situated, for relief for: (i) violations of the Home Ownership and Equity Protection Act, 15 U.S.C. § 1639 ("HOEPA"); (ii) violations of the Truth in Lending Act, 15 U.S.C. § 1601 et seq. ("TILA"); (iii) violations of New York State General Business Law § 349 ("the Deceptive Practices Act") and 3 New York Code of Rules and Regulations Part 38; and (iv) unconscionability. This Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1331.

Plaintiffs-intervenors James Robinson, Bertha Clinton, and Wilfred Loney now move by order to show cause for a preliminary injunction against defendants enjoining defendants from proceeding with the foreclosure sales of properties owned by the three plaintiffs-intervenors, currently scheduled to take place in Kings and Queens Counties, New York. For the reasons

set forth below, plaintiffs-intervenors' motion for a preliminary injunction with respect to the foreclosure sales of properties owned by James Robinson, Bertha Clinton, and Wilfred Loney is granted. A hearing was held on December 22, 1998, for the purpose of hearing the testimony of an expert to assist the Court in making the calculations required under the regulations.[1] What follows sets forth the findings of fact and conclusions of law on which the determination to grant a preliminary injunction is based, as required by Rule 65 of the Federal Rules of Civil Procedure.

BACKGROUND

The following facts are drawn from the submissions of the parties and are undisputed except where noted.

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[1] The purpose of the December 22, 1998 hearing was to hear the expert testimony which plaintiffs' counsel had previously informed the Court, on December 14, 1998, that it would like to present. Defendants presented no witnesses to rebut the testimony of plaintiff's expert, and instead offered only the Declarations of William J. Horan and Lee Miller. Defendants made a motion in limine to bar the admission of and/or to strike the testimony of plaintiffs' expert, Gary Klein, Esq. This motion is denied since Mr. Klein's testimony at the hearing was by and large confined and will be received solely to assist this Court in making the somewhat complex mathematical calculations required under the regulations at issue here. At the hearing, plaintiffs also made a motion to strike the Declarations of William J. Horan and Lee Miller, because plaintiffs did not have an opportunity to cross-examine these individuals. Since defendants did not identify these individuals whose testimony they wished to present at the evidentiary hearing, the more appropriate course is that followed below, namely, to give greater weight to evidence in the record from the plaintiffs which these uncalled witnesses were, according to their declarations, in a position to explain, in other words to treat them for the purposes of this application as missing witnesses. *See Felice v. Long Island R.R. Co.*, 426 F.2d 192 (2d Cir. 1970).

Defendant Delta Funding Corporation is a consumer finance company engaged in originating, acquiring, selling, and servicing home equity loans. Defendant Delta Funding Corporation is a wholly owned subsidiary of defendant Delta Financial Corporation, a publicly held company traded on the New York Stock Exchange (both defendants are collectively referred to as "Delta"). Defendant All State Consultants, Inc., a/k/a City Mortgage Bankers ("All State") and defendants Doe Corporations 1 through X are corporations which act as mortgage brokers and correspondents and receive mortgage brokerage fees from Delta or Delta's clients. Defendant Bankers Trust Company of California, N.A. ("Bankers Trust") is the trustee for defendant Delta Funding Home Equity Loan Trust (the "Trust"), to which Delta sells virtually all of its loans. The Trust raises the cash payments to purchase loans from Delta through the sale of asset-backed, pass-through securities.

Plaintiff Teresa Lopez, a seventy-one year old Hispanic widow, is the owner of the property located at 111-11 142nd Street, Jamaica, New York 11435. In approximately January 1996, Ms. Lopez was solicited by a door-to-door salesman from Delta who offered to refinance her existing mortgage. In approximately March 1996, Ms. Lopez entered a mortgage loan transaction with

Delta for a second mortgage on her property in the amount of $85,000.00. Ms. Lopez has since defaulted on this mortgage loan. Defendants' counsel has told this Court that, to his knowledge, defendants have not yet scheduled a foreclosure sale of Ms. Lopez's property.

Plaintiff-intervenor James Robinson, a thirty year old African-American man, is the owner of the property located at 137-80 Southgate Street, Springfield Gardens, New York. In approximately August 1996, Mr. Robinson was solicited by telephone by a salesman who offered to refinance his existing mortgage with a Delta loan. On or about September 26, 1996, Mr. Robinson entered a mortgage loan transaction with Delta for a second mortgage on his property in the amount of $156,000.00. That mortgage loan was assigned by defendant Delta to defendant Bankers Trust. Mr. Robinson has since defaulted on this mortgage loan. Mr. Robinson's property was scheduled to be sold by defendants at a foreclosure sale in Queens County, New York on December 11, 1998.

Plaintiff-intervenor Bertha Clinton, a sixty-seven year old African-American widow, is the owner of the property located at 4406 Snyder Avenue, Brooklyn, New York, 11203. In the winter of 1995-1996, Mrs. Clinton was solicited by a door-to-door

salesman who offered to refinance her existing mortgage with a Delta mortgage loan. On or about March 29, 1996, Mrs. Clinton entered a mortgage loan transaction with Delta for a second mortgage on her property in the amount of $116,000.00 to refinance her existing mortgage. That mortgage loan was reassigned by defendant Delta to defendant Bankers Trust, as trustee under the Pooling and Servicing Agreement, dated as of April 30, 1996, for the Delta Funding Home Equity Loan Trust 1996-1. Mrs. Clinton has since defaulted on this mortgage loan. Mrs. Clinton's property was scheduled to be sold by defendants at a foreclosure sale in Kings County, New York on December 15, 1998.

Plaintiff-intervenor Wilfred Loney, a sixty-two year old African-American man, is the owner of the property located at 882 East New York Avenue, Brooklyn, New York. In late September or early October 1996, Mr. Loney responded to an advertisement he had received by mail regarding homeowner loans. On or about November 27, 1996, Mr. Loney entered a mortgage loan transaction with Delta for a second mortgage on his property in the amount of $110,000.00 to refinance his existing mortgage. This mortgage was assigned by defendant Delta to defendant Bankers Trust, as trustee under the Pooling and Servicing Agreement dated as of

November 30, 1996, for the Delta Funding Home Equity Loan Trust 1996-3. Mr. Loney has since defaulted on this mortgage loan. Mr. Loney's property was scheduled to be sold by defendants at a foreclosure sale in Kings County, New York on December 15, 1998.

In the instant lawsuit, plaintiffs assert that their mortgage loans with Delta are mortgage loans within the definition of 15 U.S.C. § 1602(aa)(1)(B), and thus are subject to the restrictions of HOEPA and TILA. Plaintiffs assert that defendants have violated HOEPA, 15 U.S.C. § 1639, because their mortgage loans contain provisions for increased default interest rates and/or pre-payment penalties in violation of 15 U.S.C. § 1639(c) and (d), respectively. Plaintiffs accordingly contend that, due to defendants' failure to comply with 15 U.S.C. § 1639, they have a right to rescind their mortgage loan transactions pursuant to 15 U.S.C. § 1635(a),[2] and a cause of action for actual and statutory damages pursuant to 15 U.S.C. § 1640.

On November 4, 1998, plaintiff Teresa Lopez notified defendant Delta and its counsel of her intent to rescind her

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[2] 15 U.S.C. § 1635(f) provides that a borrower's right of rescission expires three years after the date of the consummation of the transaction or upon the sale of the property, whichever occurs first. Because plaintiff Lopez and plaintiffs-intervenors Robinson, Clinton, and Loney entered into their loan transactions less than three years ago, their rights of recission have not yet expired.

mortgage loan pursuant to 15 U.S.C. § 1635. Defendant Delta failed to return any money given on Ms. Lopez's behalf and to take the action necessary to terminate its security interest in her property within twenty days after receipt of her notice, as required by 15 U.S.C. § 1635(b). Plaintiff Lopez contends that defendant Delta's failure to terminate its security interest in her property constitutes an additional violation of HOEPA, giving rise to a right of rescission pursuant to 15 U.S.C. § 1635(a) and a cause of action for damages pursuant to 15 U.S.C. § 1640.

On November 18, 1998, plaintiff Lopez filed an initial complaint in this action. On December 4, 1998, plaintiff Lopez filed a first amended complaint.

On December 7, 1998, plaintiff Lopez moved by order to show cause for an ex parte temporary restraining order enjoining defendants from proceeding with eleven foreclosure sales of properties owned by putative class members which were scheduled to take place in Kings and Queens Counties, New York from December 10, 1998 through December 18, 1998. At that same time, plaintiff Lopez also moved by order to show cause for a preliminary injunction enjoining defendants from proceeding with the eleven foreclosure sales and an expedited discovery order. This Court declined to issue a temporary restraining order on

December 7, 1998, and instead directed defendants to show cause at a hearing on December 9, 1998 why the relief requested by plaintiff Lopez should not be granted.

On December 9, 1998, defendants agreed to postpone two of the three foreclosure sales scheduled for December 10 and December 11, 1998, including the foreclosure sale of the property owned by plaintiff-intervenor Robinson. After questioning the standing of the eleven putative class members, this Court further directed plaintiffs' counsel to file a motion to intervene or a motion for class certification in connection with its request for a temporary restraining order by 5:00 p.m. on December 11, 1998. On December 10, 1998, this Court ordered defendants to produce, by 5:00 p.m. on December 11, 1998, complete copies of all loan files related to the eleven properties owned by the eleven putative class members. After defendants moved on December 11, 1998 for an amendment of this Court's December 10, 1998 order and for the entry of a protective order, this Court issued an amended order requiring defendants to produce all documents, except communications between defendants' and defendants' attorneys, contained in the loan files relating to the eleven properties owned by the eleven putative class members, and issued a protective order.

On December 11, 1998, plaintiff Lopez and plaintiffs-intervenors moved pursuant to Rules 23 and 24(b) of the Federal Rules of Civil Procedure for an order permitting James Robinson, Bertha Clinton, and Wilfred Loney to intervene in this action. The intervenors are three of the eleven homeowners whose properties were scheduled to be sold at the foreclosure sales between December 10, 1998 and December 18, 1998.

On December 14, 1998, this Court heard arguments from both parties[3] on plaintiffs' motion to intervene and motion for a temporary restraining order. On that same day, this Court issued an order permitting James Robinson, Bertha Clinton, and Wilfred Loney to intervene in this action as plaintiffs pursuant to Rule 24(b). On that same day, this Court also issued a temporary restraining order pursuant to Rule 65 of the Federal Rules of Civil Procedure temporarily restraining the defendants, their agents, servants, attorneys, employees, and all those in active concert or participation with them from proceeding with the foreclosure sales currently scheduled in Kings and Queens Counties, New York, for the properties owned by James Robinson, Bertha Clinton, and Wilfred Loney. By its terms, the temporary

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[3] Defendants All State and the Doe Corporations have not yet appeared in this action.

restraining order issued by this Court is to remain in effect for ten days, unless extended for a like period for good cause shown.

DISCUSSION

To prevail on a motion for a preliminary injunction, the party requesting relief must demonstrate: (1) that it is subject to irreparable harm; and (2) either (a) that it is likely to succeed on the merits or (b) that there are sufficiently serious questions going to the merits to make them a fair ground for litigation, and that a balance of the hardships tips decidedly in favor of the moving party. *Genesee Brewing Co., Inc. v. Stroh Brewing Co.*, 124 F.3d 137, 142 (2d Cir. 1997). Injunctive relief cannot be granted unless the party can satisfy both prongs of the test. *See, e.g., PDL Vitari Corp. v. Olympus Indus., Inc.*, 718 F. Supp. 197, 203 (S.D.N.Y. 1989).

Irreparable Harm

The showing of irreparable harm is the "single most important prerequisite for the issuance of a preliminary injunction," *Bell & Howell Mamiya Co. v. Masel Supply Co.*, 719 F.2d 42, 45 (2d Cir. 1983), and the movant must show that injury is likely before the other requirements for an injunction will be considered. Irreparable harm must be shown to be "likely and

imminent, not remote and speculative," and the injury must be such that it cannot be fully remedied by monetary damages. *NAACP v. Town of East Haven*, 70 F.3d 219, 224 (2d Cir. 1995); *see also JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 79 (2d Cir. 1990) (the "possibility" of harm is insufficient).

Plaintiffs-intervenors Robinson, Clinton, and Loney have shown that they will suffer irreparable injury if the requested injunctive relief is not granted and defendants are permitted to proceed with foreclosure sales of their homes. Defendants do not dispute that plaintiffs-intervenors are likely to suffer irreparable injury. The harm to plaintiffs-intervenors is likely and imminent because the foreclosure sales of their homes are currently scheduled. *See Thomas v. F.F. Fin., Inc.*, No. 88 Civ. 7178, 1989 WL 37658, at *1 (S.D.N.Y. Apr. 12, 1989) (mortgage foreclosure would cause immediate and irreparable damage). Once the properties are sold at a foreclosure sale, plaintiffs-intervenors would have little or no chance of ever regaining title to their homes. Moreover, plaintiffs-intervenors have developed equity in their homes, and thus stand to lose not only their homes but also years of investment. Plaintiff-intervenor Clinton, with her deceased husband, has owned her home

and lived in it since 1971; plaintiff-intervenor Robinson's family has owned his house for approximately thirty-five years and he himself has owned it for the last seven years; plaintiff-intervenor Loney has lived in and owned his home for the past twenty-two years. *Cf.* Senate Rep. No. 103-169, 103rd Cong., 1st Sess. 1993, *reprinted in* 1994 U.S.C.C.A.N. 1881. Because plaintiffs-intervenors Robinson, Clinton, and Loney have lived in their homes for substantial periods of time, the injuries they would suffer if they lost those homes cannot be fully remedied by monetary damages.

Moreover, if defendants were permitted to proceed with the foreclosure sales of their homes, plaintiffs-intervenors Robinson, Clinton, and Loney would lose any rights to rescind their mortgage loan transactions to which they may be entitled under 15 U.S.C. § 1635. 15 U.S.C. § 1635(f) expressly provides that a consumer's right to rescission expires upon the sale of the property.

Accordingly, I find that plaintiffs-intervenors Robinson, Clinton, and Loney have shown that they will suffer irreparable injury if the requested injunctive relief is not granted.

Likelihood of Success or Substantial Question

Likelihood of success is judged by whether the moving party makes "a showing that the probability of prevailing is better than fifty percent." *Eng v. Smith*, 849 F.2d 80, 82 (2d Cir. 1988). Where plaintiffs "assert[] multiple claims upon which the [requested] relief may be granted, the plaintiff[s] need only establish a likelihood of success on the merits of one of the claims." *Eve of Milady v. Impression Bridal, Inc.*, 957 F. Supp. 484, 487 (S.D.N.Y. 1997). Here, plaintiffs-intervenors base their request for injunctive relief on their probability of prevailing on the merits of their claims that defendants have violated HOEPA.

To prevail on the merits of their HOEPA claims, plaintiffs-intervenors Robinson, Clinton, and Loney must first establish that their mortgage loans with defendant Delta are mortgage loans within the definition set forth in 15 U.S.C. § 1602(aa) and thus are subject to the provisions of HOEPA. To qualify as a mortgage loan within the definition at 15 U.S.C. § 1602(aa) (or, a "HOEPA loan"), a mortgage loan must satisfy the following five requirements. First, the mortgage loan must be a "consumer credit transaction," as defined in 15 U.S.C. §

1602(h).[4] Second, the mortgage loan must be a consumer credit transaction with a "creditor," as defined in 15 U.S.C. § 1602(f).[5] Third, the mortgage loan must be secured by the "consumer's principal dwelling," as defined with reference to the definition of "dwelling" in 15 U.S.C. § 1602(v).[6] Fourth, the mortgage loan must be a second or subordinate residential mortgage, not a "residential mortgage transaction,"[7] a "reverse

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[4] A "consumer credit transaction" is defined as a transaction "in which the party to whom credit is offered or extended is natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes." 15 U.S.C. § 1602(h).

[5] A "creditor" is defined as a person who regularly extends consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the indebtedness or by agreement. Any person who originates 2 or more § 1602(aa) mortgages in any 12-month period or who originates 1 or more § 1602(aa) mortgages through a mortgage broker is considered a "creditor." 15 U.S.C. § 1602(f).

[6] A "dwelling" is defined as "a residential structure or mobile home which contains one to four family housing units, or individual units of condominiums or cooperatives." 15 U.S.C. § 1602(v).

[7] A "residential mortgage transaction" is defined as "a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling." 15 U.S.C. § 1602(w).

mortgage transaction,"[8] or a transaction under an "open credit plan."[9]

Fifth, the mortgage loan must satisfy either of two tests set forth in 15 U.S.C. § 1602(aa)(1). The first test applies when the annual percentage rate of interest for the loan transaction exceeds certain levels. *See* 15 U.S.C. § 1602(aa)(1)(A). The second test applies when the total "points and fees" payable by the borrower at or before closing will exceed the greater of – (i) 8 percent of the total loan amount; or (ii) $400.[10] *See* 15 U.S.C. § 1602(aa)(1)(B). It is this latter test, set forth in 15 U.S.C. § 1602(aa)(1)(B), that is at issue here.

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[8] A "reverse mortgage transaction" is defined as "a nonrecourse transaction in which a mortgage, deed of trust, or equivalent consensual security interest is created against the consumer's principal dwelling" securing one or more advances and with respect to which the payment of any principal, interest, and shared appreciation or equity is due and payable only after the transfer of the dwelling, the consumer ceases to occupy the dwelling as a principal dwelling, or the death of the consumer. 15 U.S.C. § 1602(bb).

[9] An "open end credit plan" is defined as "a plan under which the creditor reasonably contemplates repeated transactions, which prescribes the terms of such transactions, and which provides for a finance charge which may be computed from time to time on the outstanding unpaid balance." 15 U.S.C. § 1602(i).

[10] This amount was $400 when the regulations were first promulgated. *See* 60 Fed. Reg. 15,463, 15,472 (Mar. 24, 1995). This amount is increased annually based on the rate of inflation, and for 1998, the amount is $435. *See* 12 C.F.R. § 226.32(a)(1)(ii) n.*.

If a mortgage loan satisfies these five requirements, it is considered a HOEPA loan under 15 U.S.C. § 1602(aa) and is subject to the requirements of HOEPA, 15 U.S.C. § 1639, and TILA, 15 U.S.C. § 1601 et seq. To prevail on the merits of their HOPEA claims, plaintiffs-intervenors Robinson, Clinton, and Loney would next have to show that their mortgage loans violated the statute because the creditor failed to provide the disclosures required under 15 U.S.C. § 1639(a)-(b), or because the loan documents contain terms prohibited by 15 U.S.C. § 1639(c)-(g). Pursuant to 15 U.S.C. § 1639(d), a mortgage loan may not provide for an increased rate of interest upon default. Pursuant to 15 U.S.C. § 1639(c), a mortgage loan may not contain a pre-payment penalty, unless it falls within the limited exception in § 1639(c)(2). Finally, a creditor violates HOEPA if it "engages in a pattern or practice of extending credit to consumers under mortgages referred to in section § 1602(aa) . . . based on the consumer's collateral without regard to the consumers' repayment ability, including the consumers' current and expected income,, current obligations, and employment." 15 U.S.C. § 1602(h).

Plaintiffs-intervenors Robinson, Clinton, and Loney have demonstrated a likelihood that they can prove that their mortgage loans violate the provisions of HOEPA because those

loans include provisions for an increased rate of interest upon default in violation of 15 U.S.C. § 1639(d). It should be noted that it is not disputed that the mortgage loans for plaintiffs-intervenors Robinson, Clinton, and Loney, copies of which were submitted by plaintiffs-intervenors, each contain provisions for increased default interest rates and thus violate HOEPA, 15 U.S.C. § 1639(d), on the face of the loan documents.

Accordingly, the only issue remaining is whether plaintiffs-intervenors Robinson, Clinton, and Loney have demonstrated a likelihood that they will prevail on the merits of their claims that their mortgage loans fall within the definition of 15 U.S.C. § 1602(aa) and thus are subject to the restrictions of HOEPA. Plaintiffs-intervenors contend, and defendants dispute, that their mortgage loans fall within 15 U.S.C. § 1602(aa)(1)(B) because the total points and fees they paid at or prior to closing exceed 8% of their total loan amounts.

First, plaintiffs-intervenors Robinson, Clinton, and Loney have clearly established, and defendants do not dispute, that defendant Delta is a "creditor" within the meaning of § 1602(f). Delta's Form 10-K for the year 1997 shows that Delta regularly extends consumer credit which is payable by agreement in more than four installments or for which the payment of a

finance charge is required. In the case of the mortgage loans of plaintiffs-intervenors, Delta is the person to whom the debt arising from the mortgage loan transaction was initially payable on the face of the mortgage documents. Moreover, the evidence submitted by plaintiffs-intervenors suggests that Delta originates two or more § 1602(aa) mortgages in any 12-month period.

Second, plaintiffs-intervenors Robinson, Clinton, and Loney have clearly established, and defendants do not dispute, that their mortgage loan transactions were "consumer credit transactions." Third, the affidavits of plaintiffs-intervenors clearly establish, and defendants do not dispute, that the mortgage loans were secured by plaintiffs-intervenors' "principal dwelling[s]." Fourth, the affidavits of plaintiffs-intervenors clearly establish, and defendants do not dispute, that their mortgage loans were second or subordinate mortgage loans intended to refinance their existing mortgage loans.

Finally, plaintiffs-intervenors Robinson, Clinton, and Loney have demonstrated a likelihood of success on the merits of their claims that their mortgage loans fall within the definition in 15 U.S.C. § 1602(aa)(1)(B) because the total points and fees they paid at or before closing exceeded eight percent of their

total loan amounts. Alternatively, plaintiffs-intervenors Robinson, Clinton, and Loney have shown that there are sufficiently serious questions going to the merits of their claims that their mortgage loans fall within the definition in 15 U.S.C. § 1602(aa)(1)(B), because the total points and fees they at or before closing exceeded eight percent of their total loan amounts, to make them fair grounds for litigation and that the balance of hardships tips decidedly in their favor.

HOEPA, its implementing regulations, Regulation Z, 12 C.F.R. § 226.32 (hereinafter referred to as "Regulation Z"), and the Official Staff Commentary of the Federal Reserve Board staff to Regulation Z, 12 C.F.R. § 226, Supp. I,[11] provide a uniform method for calculating whether the "total points and fees" payable by the consumer at or before the closing exceed 8% of the "total loan amount" (referred to as the "points and fees threshold requirement").

First, for the purposes of determining whether the points and fees threshold requirement of 15 U.S.C. §

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[11] The Official Staff Commentary to Regulation Z, unless demonstrably irrational, is binding. *See Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980).

1602(aa)(1)(B) is met, "points and fees" are defined by Regulation Z § 226.32(b)(1)[12] to mean:

(i) All items required to be disclosed under §§ 226.4(a) and 226.4(b), except interest or time-price differential;

(ii) All compensation paid to mortgage brokers;

(iii) All items listed in § 226.4(c)(7) (other than amounts held for future payment of taxes) unless the charge is reasonable, the creditor receives no direct or indirect compensation in connection with the charge, and the charge is not paid to an affiliate of the creditor.

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[12] The statute, 15 U.S.C. § 1602(aa)(4) defines "points and fees" to mean:

(A) All items included in the finance charge, except interest or time-price differential;

(B) all compensation paid to mortgage brokers;

(C) each of the charges listed in § 1605(e) of this title (except an escrow for future payment of taxes), unless –
(i) the charge is reasonable;
(ii) the creditor receives no direct or indirect compensation; and
(iii) the charge is paid to a third party unaffiliated with the creditor; and

(D) such other charges as the Board determines to be appropriate.

15 U.S.C. § 1605(a), in turn, defines what is included in the "finance charge." The charges listed in 15 U.S.C. § 1605(e) are excluded from the "finance charge" and include:

(1) fees for premiums for title examination, title insurance, or similar purposes.
(2) fees for preparation of loan-related documents.
(3) escrows for future payments of taxes and insurance.
(4) fees for notarizing deeds and other documents.
(5) appraisal fees, including fees related to any pest infestation or flood hazard inspections conducted prior to closing.
(6) credit reports.

Regulation Z §§ 226.4(a) and 226.4(b), in turn, require a creditor to disclose items included in the "finance charge," as defined in that section. The items listed in Regulation Z § 226.4(c)(7), in turn, include the following real-estate related fees, if bona fide and reasonable in amount:

> (i) fees for title examination, abstract of title, title insurance, property survey, and similar purposes;
>
> (ii) fees for preparing loan-related documents, such as deeds, mortgages, and reconveyance or settlement documents.

Second, for the purposes of determining whether the points and fees threshold requirement of 15 U.S.C. § 1602(aa)(1)(B) is met, the Official Staff Commentary to Regulation Z § 226.32(a)(1)(ii) provides that "the total loan amount"

> is calculated by taking the amount financed, as determined according to § 226.18(b), and deducting any cost listed in § 226.32(b)(1)(iii) that is both included as points and fees under § 226.32(b)(1) and financed by the creditor.

Regulation Z § 226.18(b), in turn, provides that the "amount financed" is calculated by:

> (1) determining the principal loan amount or the cash price (subtracting any downpayment);

(2) adding any other amounts that are financed by the creditor and are not part of the finance charge; and

(3) subtracting any prepaid finance charge.

The "prepaid finance charge" is defined by the Official Staff Commentary to Regulation Z § 226.32(a) to include any portion of the "finance charge," as defined by Regulation Z § 226.4, paid by the consumer prior to or at closing or settlement.

I find that plaintiff-intervenor Clinton has demonstrated by a preponderance of the evidence that, following the uniform method of calculation described above, she will be likely to prove that the total points and fees she paid at or before closing exceeded eight percent of her total loan amount and that her mortgage loan thus falls within the definition of a HOEPA loan in 15 U.S.C. § 1602(aa)(1)(B).

First, the "total points and fees" payable by Mrs. Clinton at or before closing equal $9,071. This is calculated as follows:

1. **Clinton Loan — Total "Points and Fees":**[13]

Application Fee	$ 295
Tax Service Fee	76
Origination Fee	1,160
Brokerage Fee	7,540

[13] The parties do not dispute the "total points and fees" for the Clinton loan.

Total	$9,071

Based on the information provided, it is unclear if any other fees paid by Mrs. Clinton should be included in the "total points and fees" pursuant to Regulation Z § 226.32(b)(1)(iii) because it is unclear if Delta either received any direct or indirect compensation in connection with these charges or if the charges were paid to a Delta affiliate.

Second, the "total loan amount" for the Clinton loan equals $106,929. This is calculated as follows:

2. **Clinton Loan – Total Loan Amount**

Amount Financed =		$106,929
	principal loan amount	$116,000
+	amounts financed by creditor and not part of finance charge	$ 0
-	*prepaid finance charges:*	
	application fee	$ 295
	tax service	76
	origination fee	1,160
	brokerage fee	7,540[14]
	Total Amount Financed	$106,929
-	costs listed in § 226.32(b)(1)(iii) included in points & fees and creditor financed	$ 0

[14] As discussed supra, this is the only fee disputed by defendants with respect to the "total loan amount" for the Clinton loan.

Total Loan Amount $106,929

The "total points and fees" payable by plaintiff-intervenor Clinton at or before closing thus exceed 8% of her total loan amount ($9,071 divided by $106,929 = 8.483199%).

Defendants dispute the inclusion of the mortgage brokerage fee of $7540 in the calculation of the "total loan amount" for the Clinton loan. For mortgage loans which closed prior to September 30, 1996,[15] a fee paid to a mortgage broker is included as a part of the "finance charge" only if the charge is "imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit." 12 C.F.R. § 226.4(a)(1994).[16]

Plaintiff-intervenor Clinton has demonstrated by a preponderance of the evidence that she will be likely to prove that the $7540 brokerage fee she paid was "imposed directly or indirectly by [Delta] as an incident to or a condition of the extension of credit" and thus should be included in the finance

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[15] The Clinton loan closed on or about March 29, 1996.

[16] Regulation Z was amended to provide that, effective September 30, 1996, all "fees charged by a mortgage broker (including fees paid directly to the broker or to the creditor for delivery to the broker) are finance charges even if the creditor does not require the consumer to use a mortgage broker and even if the creditor does not retain any portion of the charge." 12 C.F.R. § 226.4(a)(3) (1998). This amendment to Regulation Z was mandated by the 1995 Amendments to TILA, Pub. L. No. 104-29 § 2(b)(1), 109 Stat. 271, 272 (1995).

charge for purposes of determining the "total loan amount." First, the brokerage agreement signed by Mrs. Clinton at the closing of her loan on or about March 29, 1996, which is included in defendants' loan file for the Clinton loan, explicitly states that the brokerage "fee is a cost of obtaining the loan."[17] Second, Delta Financial Corporation's publicly filed Form 10-K for the year ended December 31, 1996, suggests that Delta directly or indirectly imposed brokerage fees as an incident to or a condition of the extension of credit in all, or the vast majority, of the mortgage loan transactions it entered in 1996. According to the information disclosed in Delta's 1996 Form 10-K, all Delta mortgage loans were originated either through mortgage brokers or correspondent banks.[18] The Delta 1996 Form 10-K also

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[17] Exhibit D to the December 21, 1998 Affirmation of Linda Cahn (hereinafter "Cahn Aff. II").

[18] Through the Declaration of Lee Miller, defendants contend that the information disclosed in Delta 1996 Form 10-K does not fully and accurately disclose the origination of Delta's mortgage loans in 1996. In a statement which directly conflicts with the information provided in Delta's Form 10-K, Mr. Miller contends that the Delta funded a total of 443 loans totaling approximately $31.1 million directly to borrowers in 1996 and, accordingly, did not require these borrowers to use or pay a broker as a condition of these loans. Mr. Miller contends that the financial reporting for these 443 loans was grouped together with the broker originations for reporting purposes in the 1996 Form 10-K because these loans were not a "predominant percentage" of Delta's originations and direct-to-consumer solicitation was not a major component of Delta's business strategy. Because plaintiffs were not provided with an opportunity to cross-examine Mr. Miller at the December 22, 1998 hearing, I have given little weight to Mr. Miller's Declaration. In all events, defendants offer no evidence that the Clinton loan was one of the 443 loans in which no broker was used or required as a condition of the loan. Moreover, for the purposes of deciding the instant motion for a preliminary injunction, this Court is entitled to rely on the

indicates that all mortgage loans which were originated through correspondent banks were originated, funded, and closed in the name of the correspondent bank and then sold to Delta as an assignee. This information suggests that in 1996, a consumer could only obtain a mortgage loan with Delta through a mortgage broker and, accordingly, that the mortgage brokerage fee imposed on Mrs. Clinton's loan was "imposed directly or indirectly" as an incident to Delta's extension of credit.

I note that, for the purposes of deciding the instant motion for a preliminary injunction, this case is distinguishable from *Johnson v. Fleet Finance, Inc.*, 4 F.3d 946 (11th Cir. 1993). In *Johnson*, the Eleventh Circuit held that, for the purposes of defendants' summary judgment motion, plaintiffs' submission of evidence showing that 83.5% of the loan transactions by defendant Tower Financial Services, Inc. involved broker-originators did not raise a genuine issue of material fact as to whether Tower required borrowers to use mortgage brokers. The Eleventh Circuit accordingly found that the brokerage fee paid by plaintiffs could not be included in the finance charge as a charge "imposed

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statements provided in Delta's publicly filed 1996 Form 10-K and to assume that the information provided to the Securities and Exchange Commission within that Form 10-K is accurate.

directly or indirectly as an incident to the extension of credit" under Regulation Z. *Johnson*, 4 F.3d at 950. In the instant case, however, plaintiffs-intervenors' submission of standard-form brokerage agreements[19] which state that the brokerage fee is "a cost of obtaining the loan" provides the additional evidence which the Eleventh Circuit found missing in *Johnson* and provides a reasonable basis for this Court to infer that the $7540 brokerage fee was imposed by Delta as an incident to the extension of credit to Mrs. Clinton. *Cf. id.* at 950 (finding no genuine issue of material fact where plaintiffs submitted no evidence other than defendants' general practices).

Accordingly, I find that plaintiffs-intervenors have shown a likelihood of success on the merits of their claim that the $7540 mortgage brokerage fee payable by Mrs. Clinton was "imposed directly or indirectly by [Delta] as an incident to or a condition of the extension of credit" and thus should be included in the finance charge. Accordingly, plaintiff-intervenor Clinton has demonstrated by a preponderance of the evidence that she will

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[19] In addition to the brokerage agreement signed by plaintiff-intervenor Clinton, plaintiffs-intervenors have also submitted the brokerage agreements signed by plaintiffs-intervenors Robinson and Loney, as well as six additional brokerage agreements signed by putative class members. Each of these brokerage agreements states that the brokerage fee is "a cost of obtaining the loan." (Cahn Aff. II, Exs. D & E).

be likely to prove that the total points and fees she paid at or before closing exceeded eight percent of her total loan amount.

I find that plaintiff-intervenor Robinson has also demonstrated by a preponderance of the evidence that, following the uniform method of calculation described above, he will be likely to prove that the total points and fees he paid at or before closing exceeded eight percent of his total loan amount and that his mortgage loan thus falls within the definition of a HOEPA loan in 15 U.S.C. § 1602(aa)(1)(B).

First, the "total points and fees" payable by Mr. Robinson at or before closing equal $11,706. This is calculated as follows:

1. **Robinson Loan – Total "Points and Fees":**

Application Fee	$ 295
Tax Service Fee	76
Closing Fee	135
Horan Fee	700[20]
Brokerage Fee	10,500
Total	$11,706

Based on the information provided, it is unclear if any other fees paid by Mr. Robinson should be included in the "total points and fees" pursuant to Regulation Z § 226.32(b)(1)(iii) because it

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[20] As discussed infra, defendants dispute the inclusion of Mr. Horan's legal fee in the "total points and fees" for the Robinson loan.

is unclear if Delta either received any direct or indirect compensation in connection with these charges or if the charges were paid to a Delta affiliate.

Second, "total loan amount" for the Robinson loan is $144,294. This is calculated as follows:

2. Robinson Loan – Total Loan Amount

Amount Financed =		$144,429
	principal loan amount	$156,000
+	amounts financed by creditor and not part of finance charge	$ 0
-	*prepaid finance charges:*	
	application fee	$ 295
	tax service	76
	attorney's fee to Horan	700[21]
	brokerage fee	10,500[22]
	Total Amount Financed	$144,429
-	costs listed in § 226.32(b)(1)(iii) included in points & fees and creditor financed	$ 135
	Total Loan Amount	$144,294

[21] As discussed infra, defendants dispute the inclusion of Mr. Horan's fee in the "total loan amount" for the Robinson loan.

[22] Defendants also dispute the inclusion of the mortgage brokerage fee in the "total loan amount" for the Robinson loan.

Finally, the "total points and fees" payable by Mr. Robinson at or before closing thus exceed eight percent of his total loan amount ($11,706 divided by $144,294 = 8.1126034%).

Because the Robinson loan also closed before September 30, 1996, defendants dispute the inclusion of the $10,500 mortgage brokerage fee in the "total loan amount." However, plaintiffs-intervenors have submitted a standard-form brokerage agreement which appears to have been signed by Mr. Robinson at the closing of his loan on or about September 25, 1996 and which states that the brokerage fee "is a cost of obtaining the loan." (Cahn Aff. II, Ex. D). Accordingly, for the reasons discussed above with respect to the Clinton loan, I find that plaintiffs-intervenors have demonstrated a likelihood of success on the merits of their claim that the $10,500 mortgage brokerage fee should be included in the "total loan amount" for the Robinson loan.

Defendants also dispute the inclusion of William Horan's $700 attorney's fee for the purposes of calculating both the "total loan amount" and the "total points and fees" for the Robinson loan. Pursuant to 15 U.S.C. § 1605(e) and Regulation Z § 226.32(b)(1), an attorney's fee should be included in "total points and fees" if it is included in the "finance charge."

Under the regulations in effect at the time of the closing of the Robinson loan, the finance charge was defined as "any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit." 12 C.F.R. § 226.4(a) (1994). Even if an attorney's fee is excluded from the finance charge, it should be included in the "total points and fees" pursuant to Regulation Z § 226.32(b)(1)(iii) and 15 U.S.C. § 1605(e) as a real-estate related fee, unless the following three requirements are met: (i) the charge is reasonable; (ii) the creditor receives no direct or indirect compensation in connection with the charge, and (iii) the charge is not paid to an affiliate of the creditor.

Plaintiff-intervenor Robinson has demonstrated a likelihood of success on the merits, or at least serious questions going to the merits of his claim that Mr. Horan's attorney's fee should be included in his "total points and fees." First, it appears that Mr. Horan's attorney's fee may be included in the "finance charge" as an amount "imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit." The evidence submitted suggests that defendant Delta imposed Mr. Horan's attorney's fee "as an

incident to or a condition of the extension of credit." In his December 11, 1998 affidavit, plaintiff-intervenor Robinson states that the closing of his loan was run by a Delta attorney and a title closer, both of whom were present in the closing room at all times (Robinson Aff. ¶ 10). In the same affidavit, Mr. Robinson also states that when he asked if he should hire an attorney for the closing, a Delta representative told him that "the closing was 'relatively simple' and I wouldn't need one." (Robinson Aff. ¶ 8). Neither of these statements by Robinson as to what he was told has been disputed, except by affidavit that such statements would be contrary to Delta's general practices. (Wagner Aff. III ¶ 14). A contemporaneous affidavit signed by Mr. Robinson on September 25, 1996, which appears to be a standard form affidavit provided to borrowers by Delta at its loan closings, states that Robinson "was advised that the Law Office of William J. Horan is the attorney for the lender, Delta Funding Corporation, and that the Horan office does not represent me in this transaction." (Wagner Aff. III, Ex. D). Finally, plaintiffs-intervenors submit a deposition transcript of William Horan taken in connection with another lawsuit,[23] in which Mr.

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[23] This deposition of Mr. Horan was taken in connection with the case captioned, *Delta Funding v. Theresa Leonardi*, Index No. 47561/92, Kings County Supreme Court. The date of the deposition is unclear because it appears to have

Horan states that it is Delta's general practice that most Delta loans are closed by paralegals or attorneys from his office. (Mem. of Law in support of Motion to Intervene, Ex. A).

Even if the $700 attorney's fee for Mr. Horan's services should be excluded from the finance charge as a real-estate related fee pursuant to Regulation Z § 226.4(c)(7), plaintiffs-intervenors have demonstrated that it is likely that they will be able to establish at trial that the $700 fee should be included in the "total points and fees" for the Robinson loan because the three requirements listed in Regulation Z § 226.32(b)(1)(iii) are not satisfied. Plaintiffs-intervenors have submitted evidence demonstrating that there are sufficiently serious questions going to the merits concerning the nature of Mr. Horan's relationship with Delta to make them a fair ground for litigation.[24] This evidence suggests that, at the very

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been initially dated January 16, 1994, but the "1994" was then crossed out and replaced with "1996." While the reporter signed a certification dated May 16, 1994, Mr. Horan signed an attached "errata sheet" on January 16, 1996. (Cahn Aff. II, Ex. A). Given defendants' admission at the hearing on December 22, 1998, that Mr. Horan became Delta's General Counsel in 1998, this deposition remains relevant to the issue of Mr. Horan's relationship with Delta in 1996 even if it was taken in 1994.

[24] Defendants have submitted a Declaration of William J. Horan, in which Mr. Horan states that prior to March 1998, he was not an employee of Delta Funding and that at the time of the three intervenors' loan transactions in 1996 he was engaged in the private practice of law operating as a sole proprietorship. Because plaintiffs-intervenors were not afforded the opportunity to cross-examine Mr. Horan at the hearing on December 22, 1998, I have given little, if any weight, to Mr. Horan's Declaration. Moreover, defendants failed to call Mr.

least, Mr. Horan had apparent authority to act as Delta's agent.[25] Based on this evidence, plaintiffs-intervenors have demonstrated a likelihood of success on the merits, or at least sufficiently serious questions going to the merits, of their claims that Delta receives either direct or indirect compensation

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Horan as a witness at the December 22, 1998 hearing. Where an uncalled witness' relationship with one of the parties is such that the witness would ordinarily be expected to favor him and if such party does not produce his testimony, greater weight should be accorded evidence in the record which the absent witness was in a position to contradict or explain. *Felice v. Long Island R.R. Co.*, 426 F.2d 192, 195 (2d Cir. 1970).

[25] The deposition testimony submitted by plaintiffs-intervenors raises substantial and serious questions about whether Mr. Horan may be considered an employee or agent of Delta, and thus whether Delta receives any direct or indirect compensation in connection with the charge for his services. Mr. Horan testified that he is not employed by any entity, including Delta, and is self-employed as a sole practitioner. However, Mr. Horan also testified that his office was located inside Delta's main headquarters, at 1000 Woodbury Road, Woodbury, Long Island, NY. He testified that he did not formally lease space from Delta or pay them rent each month, instead stating that they "trade off, in effect, services for rent." He testified that he was the only attorney who had offices inside of Delta's headquarters who had a similar relationship with Delta. He further testified that there is no sign in the lobby indicating that his firm is a separate entity. Mr. Horan's previous office was also located inside the offices of Delta Funding's former headquarters, at 130 Steamboat Road, Great Neck, New York. In the Great Neck offices, his entire staff had offices within Delta's offices, there was one combined reception area for Mr. Horan and Delta, and no sign indicated that his firm was a separate entity. Mr. Horan also testified that for the last seven or eight years, 98 to 99% of his business was for Delta and its entities. He testified that he manages a staff of attorneys and paralegals which handle a substantial percentage of Delta's closings. In addition, Mr. Horan's department issues and signs the checks that Delta Funding writes to third parties in connection with mortgage loan closings, drawing off funds that Delta deposits in a mortgage closing account, and his office maintains the checkbook for that account. Based on these facts, it appears that Mr. Horan has apparent, if not actual, authority to act as Delta's agent. Based on these facts, plaintiffs have also demonstrated a likelihood of success on the merits, or at least sufficiently serious questions going to the merits, of their claims that Delta receives direct or indirect compensation in connection with the charge for Mr. Horan's services and that the $700 charge for his services should thus be included in the total points and fees for the Robinson loan. Moreover, at the hearing on December 22, 1998, this Court was advised that Mr. Horan now holds the position of General Counsel at Delta Funding and is now an "employee" of Delta.

in connection with the charge for Mr. Horan's services and that the $700 charge for his services should thus be included in the total points and fees for the Robinson loan.[26] The "total points and fees" for the Robinson loan would thus equal $11,706.

Plaintiffs-intervenors have also demonstrated that a likelihood of success on the merits, or sufficiently serious questions going to the merits to make them a fair ground for litigation with respect to their claim that Mr. Horan's attorney's fee should also be included in the calculation of the "total loan amount" for the Robinson loan. As discussed above, it appears, based on the evidence submitted, that Mr. Horan's attorney's fee may be included in the "finance" charge as an

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[26] Plaintiffs-intervenors have also shown that there are sufficiently serious questions going to the merits of their alternative claim that Mr. Horan may be considered an "affiliate" of Delta, and thus, that the charge for his services may be included in the "total points and fees" for the Robinson loan pursuant to Regulation Z § 226.32(b)(1)(iii) as a charge paid to an affiliate of the creditor.

Regulation Z § 226.32(b)(2) defines "affiliate" by reference to the following definition of a "bank holding company" in the Bank Holding Company Act of 1956, 12 U.S.C. § 1841 et seq.: "any company that controls, is controlled by, or is under common control with another company." For the purposes of 12 U.S.C. § 1841, a "company" is defined as "any corporation, partnership, business trust, association, or similar organization." 12 U.S.C. § 1841(b). Defendants contend that Mr. Horan should not be considered an "affiliate" of Delta because Mr. Horan is not a "company." Based on the evidence submitted to this Court, the formal corporate organization of Mr. Horan's law practice is unclear. However, even if Mr. Horan may not be considered an agent or an employee of Delta, the evidence submitted by plaintiffs raises sufficiently serious questions going to the merits of whether Mr. Horan may properly be considered a "company" and thus whether he may be considered an "affiliate" of Delta. In his deposition, Mr. Horan testified that he employed sixteen people and that he pays his employees' benefits (although he did not know if these employees were covered separately, or as part of Delta Funding's benefits coverage).

amount "imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit."

If Mr. Horan's $700 charge is included in the "amount financed" for the purposes of determining the total loan amount of the Robinson loan, the total loan amount would be $144,294 and his total points and fees would be $11,706. Robinson's total points and fees would exceed eight percent of his total loan amount: 8.1126034%. Even if Mr. Horan's $700 fee is excluded from the amount financed for the purposes of determining the total loan amount of the Robinson loan, it would still be included in the total points and fees under Regulation Z § 226.32(b)(1)(iii) because Delta receives direct or indirect compensation in connection with the charge. The total points and fees paid by Robinson would still exceed eight percent of his total loan amount: 8.0734375% ($11,706 divided by $144,994). Accordingly, plaintiff-intervenor Robinson has demonstrated a likelihood of success on the merits, or at least sufficiently serious questions going to the merits, of his claim that the total points and fees he paid at or before closing exceed eight percent of his total loan amount.

I find that plaintiff-intervenor Loney has also demonstrated by a preponderance of the evidence that, following

the uniform method of calculation described above, he will be likely to prove at trial that the total points and fees he paid at or before closing exceeded eight percent of his total loan amount and that his mortgage loan thus falls within the definition of a HOEPA loan in 15 U.S.C. § 1602(aa)(1)(B).

First, the "total points and fees" payable by Loney at or before closing equal $8,151. This is calculated as follows:

1. **Loney Loan – Total "Points and Fees":**

Application Fee	$ 250
Tax Service Fee	76
Credit Report	25
Horan Legal Fee	100[27]
Brokerage Fee	7,700
Total	$8,151

Based on the information provided, it is unclear if any other fees paid by Mr. Loney should be included in the "total points and fees" pursuant to Regulation Z § 226.32(b)(1)(iii) because it is unclear if Delta either received any direct or indirect compensation in connection with these charges or if the charges were paid to a Delta affiliate.

Second, the "total loan amount" for the Loney loan is $101,849. This is calculated as follows:

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[27] As discussed supra, defendants dispute the inclusion of Mr. Horan's legal fee in the "total points and fees" for the Loney loan.

2. **Loney Loan – Total Loan Amount**

Amount Financed =		$101,849
	principal loan amount	$110,000
+	amounts financed by creditor and not part of finance charge	$ 0
-	*prepaid finance charges:*	
	application fee	$ 250
	tax service fee	76
	credit report	25
	brokerage fee	7,700[28]
	attorney's fee to Horan	100[29]
	Total Amount Financed	$101,849
-	Costs listed in § 226.32(b)(1)(iii) included in points & fees and creditor financed	$ 0
	Total Loan Amount	$101,849

The "total points and fees" payable by plaintiff-intervenor Loney at or before closing thus exceed eight percent of his total loan amount ($8,151 divided by $101,849 = 8.003024%).

Defendants also dispute the inclusion of Mr. Horan's $100 fee in either the calculation of the total loan amount or

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[28] Because the Loney loan closed after September 30, 1996, defendants do not dispute that the mortgage brokerage fee must be included in the finance charge under Regulation Z § 226.4(a)(3).

[29] As discussed supra, defendants dispute the inclusion of Mr. Horan's fee in the "total loan amount" for the Loney loan.

the total points and fees for the Loney loan. However, as discussed above with respect to the Robinson loan, plaintiffs-intervenors have submitted evidence which raises serious questions going to the merits of the nature of Mr. Horan's relationship with Delta and which suggests that Mr. Horan may be considered either an affiliate or an agent of Delta. Based on this evidence, plaintiffs-intervenors have demonstrated a likelihood of success on the merits, or at least sufficiently serious questions going to the merits, of their claim that Mr. Horan's legal fee should be included in either the total loan amount or the total points and fees, or both, for the Robinson and Loney loans. If Mr. Horan should be considered either an affiliate or an agent of Delta, and Delta thus receives direct or indirect compensation in connection with the charge, and his fee did not relate solely to the preparation of loan-related documents,[30] his $100 fee should be included in the finance charge for the purposes of determining both the total loan amount and the total points and fees charged. The total loan amount for the Loney loan would then be $101,849 and the total points and fees charged would be $8,151. However, if Mr. Horan should be

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[30] The Delta Settlement Statement, however, lists the $100 fee under the category "document preparation," not under the categories "settlement or closing fee" or "legal fee." (Loney Aff., Ex. A).

considered an affiliate or agent of Delta and his fee relates solely to document preparation, his $100 fee would not be included in the total loan amount (then $101,859) under Regulation Z § 226.4(c)(7), but it should be included in the total points and fees paid (then $8,151) under Regulation Z § 226.32(b)(1)(iii). In that case, the total points and fees paid by plaintiff-intervenor Loney at or before closing would still exceed 8% of his total loan amount: 8.0022383% ($8,151 divided by $101,859).[31]

Accordingly, I find that plaintiffs-intervenors Robinson, Clinton, and Loney have demonstrated a likelihood of success on the merits, or at least sufficiently serious questions going to the merits, of their claims that the total points and fees they paid at or before closing exceeded eight percent of

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[31] While this issue has not been raised by the parties, it is also possible that the attorney's fee charged by Ida D. Angelo should be included in the finance charge for the Loney loan, for the purposes of determining both the total loan amount and the points and fees charged, as either a third party charge under Regulation Z § 226.4(a)(1) or a closing agent charge under § 226.4(a)(2). On the face of the documents, Ida D. Angelo appears to be a third party. In his December 11, 1998 affidavit, Mr. Loney stated that the mortgage broker representative told him that he did not need to hire an attorney because a Delta attorney would be present at the closing. In addition, in a second affidavit signed by Loney on November 27, 1996, which appears to be a standard form affidavit provided by Delta to borrowers at all of its closings, states that Loney "was advised that "Ida D. Angelo is the settlement agent for the lender, Delta Funding Corporation, and that this office does not represent me in this transaction." (Wagner Aff. III, Ex. H). Based upon Mr. Horan's deposition testimony that it is Delta's standard practice to have an attorney or paralegal present for loan closings, it is possible that Mr. Angelo's fee was charged for services provided at the closing.

their total loans amount and that their mortgage loans thus fall within the definition of a HOEPA loan in 15 U.S.C. § 1602(aa)(1)(B).

Because their mortgage loan documents violate HOEPA on their face, plaintiffs-intervenors Robinson, Clinton, and Loney have shown a likelihood of success on the merits of their HOEPA claims. The mortgages and notes for plaintiffs-intervenors Robinson, Clinton, and Loney, copies of which were submitted by plaintiffs-intervenors, each include provisions for an increased rate of interest upon default (24%). Because 15 U.S.C. § 1639(d) provides that a mortgage loan covered by HOEPA "may not provide for an interest rate applicable after default that is higher than the interest rate that applies before default," the mortgage loans of plaintiffs-intervenors Robinson, Clinton, and Loney violate HOEPA on their face. Accordingly, plaintiffs-intervenors have demonstrated a likelihood of success on the merits of their claims that defendants have violated HOEPA.

Even if plaintiffs-intervenors Robinson, Clinton, and Loney have not satisfied the threshold showing that their probability of prevailing on their HOEPA claims is better than fifty percent, I find that they have presented sufficiently serious questions going to the merits of their claims that their

mortgage loans are HOEPA loans under 15 U.S.C. § 1602(aa) and that defendants have violated HOEPA to make those claims a fair ground for litigation. Because the balance of hardships also tips decidedly in their favor, they are entitled to a preliminary injunction.

Balance of Hardships

The balance of hardships tips decidedly toward plaintiffs-intervenors Robinson, Clinton, and Loney in this case. Plaintiffs-intervenors have clearly demonstrated that they will suffer irreparable injury if defendants are permitted to sell their homes at foreclosure sales. In contrast, defendants will not suffer any significant injury if a preliminary injunction is issued in this case. If the foreclosure sales are postponed and it is later determined that there is no legal reason for invalidating defendants' security interest in the properties, defendants will be able to reschedule those foreclosure sales. *Cf.* N.Y. Real Prop. Acts. § 231(3) (postponement of foreclosure sales). Any additional monetary costs that defendants incur as a result of the postponement, such as the per-diem interest that has accrued and the costs of advertising the additional foreclosure sale, can be added to the reimbursement costs to be paid to defendants out of the costs of the sale. Accordingly, I

find that the balance of hardships in this case tips decidedly in favor of plaintiffs-intervenors Robinson, Clinton, and Loney.

Security

Because it appears that plaintiffs-intervenors are indigent persons in such circumstances that they should not be required to post a bond under Rule 65(c), this preliminary injunction is granted without condition that a bond be filed by plaintiffs-intervenors. *See Bass v. Richardson*, 338 F. Supp. 478, 490 (S.D.N.Y. 1971).

CONCLUSION

Accordingly, plaintiffs-intervenors' application for a preliminary injunction is granted.

The docket clerk is directed to furnish a copy of the within to all parties and to the magistrate judge.

SO ORDERED.

Dated: Brooklyn, New York
December 23, 1998

United States District Judge