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11  
12 UNITED STATES DISTRICT COURT

13 NORTHERN DISTRICT OF CALIFORNIA - SAN FRANCISCO DIVISION

14  
15 LATASHA McLAUGHLIN, on behalf of  
herself and all others similarly situated,

16  
17 Plaintiff,

18 vs.

19 WELLS FARGO BANK, N.A., d/b/a WELLS  
20 FARGO HOME MORTGAGE,

21 Defendant.  
22  
23  
24  
25  
26  
27  
28

Case No.: 3:15-cv-02904-WHA

**WELLS FARGO BANK, N.A.'S RESPONSE  
BRIEF RE IMPACT OF SPOKEO  
DECISION**

*Declaration of Ashley L. Shively filed  
concurrently*

Honorable William H. Alsup

Date: June 16, 2016

Time: 8:00 a.m.

Dept.: Courtroom 8 – 19<sup>th</sup> Floor

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**I. INTRODUCTION**

Plaintiff Latasha McLaughlin (“Plaintiff”) is mistaken to claim that the U.S. Supreme Court’s decision in *Spokeo* does not affect class certification in this matter. *See Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (May 16, 2016). Specifically, Plaintiff contends she has “sufficiently alleged and shown both concrete and particularized harm due to Defendant’s failure to provide an accurate payoff statement,” and therefore she need not “alleg[e] any additional injury beyond the violation of a procedural right determined by Congress.” Pltf.’s Brief (Dkt. 111) at 1. Plaintiff errs in assuming harm by virtue of the procedural violation of TILA. Nor can Plaintiff establish her own concrete harm traceable to the April 2015 payoff statement at issue. Even if Plaintiff could establish standing through a procedural violation in her April 2015 payoff statement, however, that violation is provable only through individualized proof that the insurance funds were available to be applied towards her loan balance. Such an inquiry is not feasible as part of a class-wide trial, and for that reason, the Court should deny Plaintiff’s motion for class certification.

**A. Plaintiff Overstates The Court’s Holding On What TILA Requires.**

As a preliminary matter, Plaintiff continues to overstate this Court’s holding in its ruling on Wells Fargo’s motion to dismiss. Specifically, Plaintiff contends that the “Court has already found that a payoff statement must disclose the existence of insurance claim funds in order to be accurate.” Pltf.’s Brief (Dkt. 111) at 2 (citing Order on Mot. to Dismiss (Dkt. 36) at 2:3-6). In fact, the Court ruled that a payoff statement should disclose property insurance funds “that could be applied” as a credit to the loan balance. Order on Mot. to Dismiss (Dkt. 36) at 2. In ignoring the Court’s complete statement, Plaintiff avoids addressing the individualized issues that necessarily would predominate a class-wide trial. *See Opp. to Class Cert.* (Dkt. 95) at 16-18 (individualized issues would predominate a class trial). As explained in Wells Fargo’s opposition to class certification, these individual issues are fatal to the class analysis. *Id.*

**B. Spokeo Confirms That Plaintiff Cannot Prove Concrete Harm Caused By The Payoff Statement At Issue.**

Plaintiff contends that because she has alleged concrete harm, she has standing to represent the putative class. Pltf.’s Brief (Dkt. 111) at 3:9-20 (citing to Plaintiff’s opposition to motion to stay,

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1 which refers back to allegations of complaint). Allegations of harm, however, are insufficient to  
 2 demonstrate standing at the class certification stage. *Moore v. Apple Inc.*, 309 F.R.D. 532, 539-40  
 3 (N.D. Cal. 2015) (on motion for class certification, plaintiff must show standing “through  
 4 evidentiary proof.”) (quoting *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1432 (2013)); *see also*  
 5 *Nelsen v. King Cnty.*, 895 F.2d 1248, 1249-50 (9th Cir. 1990) (“Standing is a jurisdictional element  
 6 that must be satisfied prior to class certification.”); *Evans v. Linden Research, Inc.*, No. 11-1078,  
 7 2012 WL 5877579, at \*6 (N.D. Cal. Nov. 20, 2012) (at class certification, “Plaintiffs must  
 8 demonstrate, not merely allege, that they have suffered an injury-in-fact to establish Article III  
 9 standing to bring the claims asserted on behalf of the [class].”). Here, there is no evidence in the  
 10 record of the type of concrete and particularized injury contemplated by the Supreme Court in  
 11 *Spokeo*. Any harm Plaintiff may have incurred, moreover, is not traceable to the payoff statement at  
 12 issue.

13 First, Plaintiff contends she was harmed by the fact foreclosure attorneys “pursu[ed] inflated  
 14 amounts due under the loan.” Pltf.’s Brief (Dkt. 111) at 3. Plaintiff does not and cannot show that the  
 15 amounts sought were not due under the loan. The evidence in the record confirms that Plaintiff’s  
 16 contractor claimed an interest in the insurance proceeds through October 2015. Shively Decl. (Dkt.  
 17 92), Ex. 2 (correspondence between Plaintiff and her contractor detailing dispute over payment); *see*  
 18 *also id.*, Ex. 3-5. Plaintiff therefore cannot show the funds were available to be applied to her  
 19 default. *See* MSJ (Dkt. 93) at 9 (showing how no amounts were definitively available to be applied  
 20 to Plaintiff’s arrears). Neither is there any authority that routine servicing correspondence on  
 21 Plaintiff’s default somehow falls within the scope of TILA’s payoff provision, nor any evidence to  
 22 suggest default servicing was based on a payoff statement covered by TILA.

23 Second, Plaintiff contends Wells Fargo rejected her loan modification application even  
 24 though the insurance funds in restricted escrow “could have brought her loan current.” Pltf.’s Brief  
 25 (Dkt. 111) at 3. Again, Plaintiff ignores the inconvenient fact that her own contractor claimed a  
 26 substantial interest in the funds and for that reason the funds could not have been used to cure her  
 27 default. Furthermore, there is no evidence a payoff statement was part of Plaintiff’s 2014  
 28 modification application. Even if it was, detailing the insurance funds on a payoff statement would

1 have had no bearing on the denial of her application.<sup>1</sup> Wells Fargo denied Plaintiff's loan  
 2 modification application in 2014 because Plaintiff's income was insufficient to make any monthly  
 3 payment schedule manageable. *See, e.g.*, Shively Decl. (Dkt. 92), Ex. 6 ("we previously reviewed the  
 4 account and were unable to approve payment assistance options."). Plaintiff cannot plausibly trace  
 5 her inability to modify her mortgage loan in 2014 to Wells Fargo's omission of insurance funds in  
 6 the April 2015 payoff statement.

7 Third, Plaintiff claims that the absence of insurance funds in the April 2015 payoff statement  
 8 "impeded [] her efforts to refinance or explore a short sale" of the Property. Pltf.'s Brief (Dkt. 111)  
 9 at 3. The record is clear, however, that Plaintiff never seriously pursued either option. Avery Decl.  
 10 (Dkt. 52), Ex. A (McLaughlin Depo.) at 112-13, 135-36.<sup>2</sup> Any online "exploration" of potentially  
 11 refinancing or a short sale, moreover, occurred in 2014, months before Plaintiff requested the April  
 12 2015 payoff statement at issue. *Id.* Thus, any harm Plaintiff suffered in being unable to refinance her  
 13 loan or sell the Property for less than what she owed was not traceable to Wells Fargo's omission of  
 14 insurance funds in the April 2015 payoff statement.

15 **C. A Bare Procedural Violation Of TILA Does Not Satisfy The Injury In Fact**  
 16 **Requirement Of Article III.**

17 With no concrete traceable harm of her own, Plaintiff is left with only a bare procedural  
 18 violation of TILA's accuracy requirement, as interpreted by this Court. *See* Pltf.'s Brief (Dkt. 111) at  
 19

20 <sup>1</sup> Plaintiff's allegation of a wrongful 2014 payoff statement is barred by TILA's one year  
 21 statute of limitations. 15 U.S.C. § 1641(e).

22 <sup>2</sup> Q: At this point in time, March, April 2015, had you spoken with any other lenders about  
 23 refinancing your loan?

A: I know in order to actually - - I had gone on several different sites, yes. I had not spoken  
 24 to them, but I actually had gone to several different sites on the - on the Internet.

25 ...

26 Q: Did you apply to any other lenders to refinance or "take over your loan," as you say?

A: No.

27 ...

28 McLaughlin Depo. at 112:20-113:8.

Q: Did you put - was the house listed [for sale]?

A: No.

McLaughlin Depo. at 137:3-4.

1 2-3 (Plaintiff seeks to represent a class of borrowers who “affirmatively requested payoff statements  
 2 and received inaccurate documents that failed to disclose Claim Funds.”). A procedural violation  
 3 “divorced from any concrete harm,” however, is insufficient to satisfy the injury in fact requirement  
 4 of Article III standing. *Spokeo, supra*, at 1549. An injury sufficient to confer standing must be “real,  
 5 and not abstract.” It must “cause harm or present a[] material risk of harm.” *Id.* (internal quotations  
 6 omitted).

7 Inaccurate payoff statements do not, on their own, cause or pose a risk of harm unless and  
 8 until statements are used for some purpose. Even where a payoff statement is provided to a potential  
 9 refinance lender, the risk of harm possibly associated with a payoff statement that does not itemize  
 10 insurance funds is materially different from the actual harm associated with a payoff statement that  
 11 includes, for example, “false fees.” *See* Pltf.’s Brief (Dkt. 111) at 3 (citing to 73 Fed. Reg. 55422,  
 12 44570 (July 30, 2008)). The inclusion of false fees would unquestionably inflate the total outstanding  
 13 balance required to terminate a borrower’s loan obligation. By contrast, the omission of insurance  
 14 proceeds “potentially available” “as a credit” against a borrower’s balance would not. Compl. ¶ 39.  
 15 Moreover, where the underlying loan is paid off while insurance monies are held, the omission of  
 16 such funds from a payoff statement would not result in actual concrete harm to the borrower.<sup>3</sup> Wells  
 17 Fargo’s procedure is to release insurance funds held in restricted escrow to the borrower at the time  
 18 of the pay off. Declaration of A. Shively, filed concurrently, Ex. 1 at WELLSFARGO\_003186-87.  
 19 Simply put, a borrower is not harmed by the absence of insurance funds in a payoff statement.

20 **D. A Finding That Plaintiff Has Standing Does Not Assist The Court In**  
 21 **Determining Whether Proposed Class Members’ Insurance Funds Are Available**  
 22 **As A Credit To Their Loan Balance At The Time Of The Payoff Statement.**

23 Even assuming the Court finds that Plaintiff herself has standing, her standing does not  
 24 eliminate individualized inquiries in a class trial. Plaintiff’s standing is provable only through  
 25 individualized proof that the insurance funds were available as a credit towards her debt, and hence  
 26

27 <sup>3</sup> Insurance funds serve as security for the damaged property. At the lender’s option, proceeds  
 28 are applied to “restoration or repair of the damaged [p]roperty” or applied to reduce the outstanding  
 debt. *See* RJN (Dkt. 21), Ex. A (Plaintiff’s deed of trust) ¶ 4.

1 required to be listed on the payoff statement to make that statement accurate. As to other members  
 2 of the putative class, however, the mere existence of insurance funds at the time a payoff statement  
 3 was issued does not establish a TILA violation.

4 In ruling on Wells Fargo's motion to dismiss, the Court held that a violation of TILA's  
 5 payoff provision occurs only where insurance funds that "could be applied" to the loan are omitted  
 6 from the statement. *See* Order on Mot. to Dismiss (Dkt. 36) at 2. Under the Court's interpretation of  
 7 TILA, therefore, a violation does not occur where funds earmarked for repairs or subject to third  
 8 party claims are omitted. *See generally* Opp. to Class Cert. (Dkt. 95) at Sections V.A (adequacy),  
 9 V.B.4 (commonality) & V.C.1 (predominance); MSJ (Dkt. 93). Plaintiff, however, does not advance  
 10 any mechanism employing generalized proof to establish liability with respect to her proposed  
 11 classes. *Gene And Gene LLC v. BioPay LLC*, 541 F.3d 318, 328 (5th Cir. 2008) (discussing  
 12 predominance in context of TCPA). Nor can she.

13 The record is clear that the Court cannot determine on a class-wide basis whether individual  
 14 class members' insurance funds are available to be applied to their loan balances and hence must be  
 15 listed on payoff statements. *See* Opp. to Class Cert. (Dkt. 95) at 16-17. To make that determination,  
 16 the Court would need to examine members' individual loan files and the circumstances surrounding  
 17 the disposition of insurance proceeds at the time payoff statements are generated. *See id.* at 15-18;  
 18 *see also* Decl. of H. Phillips (Dkt. 64). Under these circumstances, the Court can and should  
 19 conclude that judicial economy is not be served by class treatment. *See In re Wells Fargo Home*  
 20 *Mortgage Overtime Pay Litig.*, 571 F.3d 953, 958 (9th Cir. 2009) ("Whether judicial economy will  
 21 be served in a particular case turns on close scrutiny of the relationship between the common and  
 22 individual issues.") (internal quotation and citation omitted).

23 Plaintiff's cursory citation to the Supreme Court's recent decision in *Tyson Foods* does not  
 24 alter the analysis. *See* Pltf.'s Brief (Dkt. 111) at 3 (citing *Tyson Foods, Inc. v. Bauaphakeo*, 136 S.Ct.  
 25 1036, 1050 (Mar. 22, 2016)). The decision in *Tyson Foods* concerned the use of representative and  
 26 statistical evidence by the trier of fact to establish liability in that action. *Tyson Foods*, 136 at 1049  
 27 ("the fairness and utility of statistical methods in contexts other than those presented here will  
 28

1 depend on facts and circumstances particular to those cases”).<sup>4</sup> Here, by contrast, the evidence in the  
 2 record and Plaintiff’s own circumstances confirm that determining whether insurance proceeds are  
 3 available is an individual question not susceptible to common proof. *See generally* MSJ (Dkt. 93);  
 4 *Opp. to Class Cert.* (Dkt. 95); *see also* Decl. of H. Phillips (Dkt. 64).

## 5 **II. CONCLUSION**

6 The Supreme Court’s decision in *Spokeo* confirms that Plaintiff herself suffered no concrete  
 7 harm traceable to the payoff statement at issue. It is clear, moreover, that Plaintiff’s proposed  
 8 damages and injunctive relief classes do not satisfy the requirements of Rule 23 because, *inter alia*,  
 9 the common question of whether class members’ insurance funds are available to be applied to their  
 10 loan balance cannot be answered by proof common and individual issues in making that  
 11 determination will overwhelm the class analysis. For that reason, and as discussed in Wells Fargo’s  
 12 opposition, Wells Fargo respectfully requests the Court deny Plaintiff’s motion for class  
 13 certification.

14 DATED: May 31, 2016

14 **REED SMITH LLP**

15  
 16 By: /s/ Ashley L. Shively  
 Ashley L. Shively  
 Attorneys for Defendant  
 Wells Fargo Bank, N.A.  
 17  
 18

19 \_\_\_\_\_  
 20 <sup>4</sup> The second question presented to the Supreme Court in *Tyson Foods* was framed as  
 21 “whether a class may be certified if it contains ‘members who were not injured and have no legal  
 22 right to any damages.’” 136 S.Ct. at 1049. Tyson abandoned the argument in briefing, however, and  
 23 the Court declined to address the question. *Id.* (“the Court need not, and does not, address it.”) Tyson  
 24 instead argued on appeal that “‘where class plaintiffs cannot offer’ proof that all class members are  
 25 injured, ‘they must demonstrate instead that there is some mechanism to identify the uninjured class  
 26 members prior to judgment and ensure that uninjured members (1) do not contribute to the size of  
 27 any damage award and (2) cannot recover such damages.’” *Id.* (quoting Brief for Petitioner Tyson).  
 28 Tyson based its new argument on the assumption that the jury’s damages award could not be  
 apportioned to just those class members who suffered a FLSA violation, because the jury had  
 implicitly rejected the premise underlying the expert’s mechanism for identifying those in the class.  
*See id.* In ruling on the issue, the Supreme Court acknowledged that “the question whether uninjured  
 class members may recover is one of great importance.” *Id.* at 1050. But the Court summarily  
 disposed of the issue, finding that the question was not “presented by this case, because the damages  
 award has not yet been disbursed, nor does the record indicate how it will be disbursed.” *Id.* at 1050  
 (emph. added).