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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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KENNETH HUGHES; JEAN HUGHES,)

No. CV 09-2496-PHX-MHM

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Plaintiffs,)

ORDER

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vs.)

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WELLS FARGO BANK, NA; FIRST)
AMERICAN TITLE INSURANCE CO.;)
WELLS FARGO HOME MORTGAGE,)
INC.; TIFFANY & BOSCO, P.A.,)

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Defendants.)

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Currently pending before the Court is Plaintiffs Kenneth and Jean Hughes' Petition for Temporary Restraining Order. (Dkt. #1). After reviewing the pleadings, and determining that oral argument is unnecessary, the Court issues the following Order.

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I. Background

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On December 1, 2009, Plaintiffs lodged the instant petition for a Temporary Restraining Order (TRO) with this Court. (Id.). The petition concerns a Trustee's Sale of Plaintiffs' property located at 22604 N. 31st Ave., Phoenix, AZ 85027, that is scheduled to occur on December 23, 2009. Plaintiff has asked that the Court enjoin the sale, based on the tort of Wrongful Foreclosure, alleging Defendants misled them into defaulting on their loan by telling them loan modification was available only for defaulted loans. On December 4, 2009, this Court ordered Plaintiffs to provide Defendants with proper notice of this action or

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1 else comply with Rule 65(b) of the Federal Rules of Civil Procedure. (Dkt. #4). Plaintiffs
2 complied with this Court's Order on December 15, 2009, filing papers demonstrating notice
3 has been provided to Defendants. (Dkt. #5-8).

4 **II. Discussion**

5 Temporary restraining orders are governed by the same standard applicable to
6 preliminary injunctions." Trachsel v. Buchholz, 2008 WL 2383080, at *2 (N.D. Cal. 2008).
7 The Ninth Circuit has set forth two sets of criteria for determining whether to grant
8 preliminary injunctive relief:

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10 Under the traditional test, a plaintiff must show: (1) a strong likelihood of
11 success on the merits, (2) the possibility of irreparable injury to plaintiff if
12 preliminary relief is not granted, (3) a balance of hardships favoring the
13 plaintiff, and (4) advancement of the public interest (in certain cases). The
alternative test requires that a plaintiff demonstrate either a combination of
probable success on the merits and the possibility of irreparable injury or that
serious questions are raised and the balance of hardships tips sharply in his
favor.

14 Taylor v. Westly, 488 F.3d 1197, 1200 (9th Cir. 2007). In addition, "[b]ecause injunctive
15 relief prior to trial is a harsh and extraordinary remedy, it is to be granted sparingly and only
16 in cases where the issues are clear and well defined and the plaintiff has established a
17 reasonable certainty of prevailing at trial." Watermark, Inc. v. United Stations, Inc., 219
18 U.S.P.Q. 31, 32-33 (C.D. Cal. 1982). Assuming, without deciding, that all of the allegations
19 in Plaintiffs' complaint are true, this Court cannot grant a temporary injunction, as Plaintiffs
20 have not amply demonstrated a strong likelihood of success on the merits.

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22 Plaintiffs' request for a temporary injunction is predicated solely on their belief that
23 Defendants have committed the tort of Wrongful Foreclosure by initiating a trustee sale on
24 their property. Arizona courts have yet to recognize the tort of Wrongful Foreclosure.
25 Mindful, however, that Arizona courts have not refused to recognize the tort either, the
26 District of Arizona has found that Wrongful Foreclosure may be a viable cause of action, and
27 this Court agrees. Herring v. Countrywide Home Loans, Inc., 2007 WL 2051394, at *5
28 (D.Ariz., July 13, 2007). "Wrongful Foreclosure is a tort that 'exists as a statutory duty ...

1 to exercise fairly and in good faith the power of sale in a deed to secure [a] debt.” Id.
2 (quoting Boaz v. Latson, 580 S.E.2d 572, 577 (Ga. Ct. of App.2003)). “A breach of this
3 duty is a tort compensable at law.” Id.

4 Plaintiffs allege that Defendants breached their duty to act fairly and with good faith
5 by initializing their power of sale over the property located at 22604 N. 31st Ave. Arizona
6 Revised Statutes §33-807, titled “Sale of trust property; power of trustee; foreclosure of trust
7 deed,” sets forth the duties owed by the trustee of a trust deed when foreclosing on a
8 property. Under §33-807(A):

9 a power of sale is conferred upon the trustee of a trust deed under which the
10 trust property may be sold, in the manner provided in this chapter, after a
11 breach or default in performance of the contract or contracts, for which the
trust property is conveyed as security, or a breach or default of the trust deed.

12 (emphasis added). In their complaint, Plaintiffs freely admit that their loan is in default.
13 Additionally, they have not alleged any procedural deficiencies or other illegalities relating
14 to the initiation of the trustee sale. Assuming that the foreclosure sale proceeds as scheduled,
15 it is unlikely Plaintiffs could prevail under a Wrongful-Foreclosure theory, as the facts of this
16 case do not suggest that Defendants breached their duties of good faith and fairness in
17 initiating the trustee sale.

18 For example, in the case on which Plaintiffs primarily rely, Herring v. Countrywide
19 Home Loans, the defendant foreclosed on the plaintiff’s property despite the fact “her default
20 was cured when she executed the Repayment Plan Agreement and fully complied with its
21 terms.” Herring, WL 2051394 at *5. In Herring, then, the breach was defendant’s decision
22 to foreclose on a loan that was not in default. In the instant case, unlike in Herring, Plaintiffs
23 admit their loan is in default, and while the Court acknowledges their ongoing attempt to
24 secure a loan modification agreement, no such agreement has been secured. Plaintiffs
25 success on the merits, therefore, is not sufficiently likely to justify the issuance of a
26 temporary restraining order.
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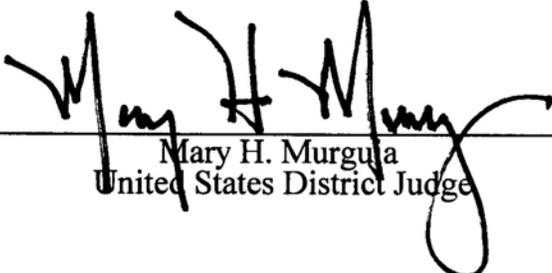
1 In reaching this conclusion, the Court is not unaware of Plaintiffs' allegation that
2 Defendants induced the default by leading them to believe that loan modification was
3 available only to persons that had defaulted on their loan. If true, Plaintiffs could possibly
4 have a separate cause of action, such as fraud or negligent misrepresentation, against some
5 or all of these Defendants. See, e.g., Nielson v. Flashberg, 101 Ariz. 335, 419 P.2d 514
6 (1966) (stating the elements of Fraud as, "(1) a representation; (2) its falsity; (3) its
7 materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the
8 speaker's intent that it be acted upon by the recipient in the manner reasonably contemplated;
9 (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the right to
10 rely on it; (9) his consequent and proximate injury."). The events that caused the default to
11 occur, however, are separate from and do not implicate the trustee's decision or authority
12 under Arizona law to foreclose on the defaulted loan.

13 **Accordingly,**

14 **IT IS HEREBY ORDERED** denying Plaintiff's Petition for a Temporary
15 Restraining Order (Dkt. #1).
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17 DATED this 18th day of December, 2009.

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Mary H. Murgula
United States District Judge