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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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GARY L. FOSTER,  
Plaintiff,

v.

SCME MORTGAGE BANKERS, INC. a  
California corporation; CLEVER  
KEY FINANCIAL, LLC, a  
California limited liability  
company; WEST COAST MORTGAGE,  
a business entity of unknown  
form, HOMECOMING FINANCIAL,  
LLC, a Delaware limited  
liability company f/k/a  
HOMECOMINGS FINANCIAL NETWORK,  
INC.; MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC. a  
Delaware corporation; AURORA  
LOAN SERVICERS, LLC a Delaware  
limited liability company;  
CAL-WESTERN RECONVEYANCE  
CORPORATION, a California  
corporation; FREDERICK WINSTON  
WILLIAMS II, an individual;  
and DEBORAH DIAZ, an  
individual,

Defendants.

NO. CIV. 2:10-518 WBS GGH

ORDER RE: APPLICATION FOR A  
TEMPORARY RESTRAINING ORDER  
AND MOTION FOR PRELIMINARY  
INJUNCTION

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3 This matter came on for hearing on plaintiff's  
4 application for a temporary restraining order and motion for a  
5 preliminary injunction (Docket No. 3 ("TRO App.") at 2:00 p.m. on  
6 April 5, 2010. Plaintiff was represented by Robert A. Spanner.  
7 Counsel has failed to submit any declaration setting forth the  
8 manner in which notice was given, or attempted to be given, to  
9 any of the defendants and admitted at oral argument that he made  
10 no effort to serve any party other than Homecoming. Defendant  
11 Homecoming Financial, LLC ("Homecoming"), which disavows any  
12 interest in the allegedly threatened foreclosure, filed an  
13 Opposition to the motion for a temporary restraining order along  
14 with a series of documents related to plaintiff's mortgage.  
15 (Docket No. 15.)

16 I. Standard

17 In order to obtain a temporary restraining order or a  
18 preliminary injunction, the moving party "must establish that he  
19 is likely to succeed on the merits, that he is likely to suffer  
20 irreparable harm in the absence of preliminary relief, that the  
21 balance of equities tips in his favor, and that an injunction is  
22 in the public interest." Winter v. NRDC, --- U.S. ---, ---, 129  
23 S. Ct. 365, 374 (2008).<sup>1</sup> As the Supreme Court has repeatedly  
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25 <sup>1</sup> Plaintiff's citation to Save Strawberry Canyon v. Dep't  
26 of Energy, 613 F. Supp. 2d 1177, 1180 & n.2 (N.D. Cal. 2009), is  
27 neither binding on this court nor applicable to this case. Save  
28 Strawberry Canyon cites a Ninth Circuit case issued months before  
Winter that follows the now-discredited dual-prong test for  
injunctive relief. See The Lands Council v. McNair, 537 F.3d  
981, 987 (9th Cir. 2008) (articulating the traditional Ninth

1 recognized, injunctive relief is "an extraordinary and drastic  
2 remedy, one that should not be granted unless the movant, by a  
3 clear showing, carries the burden of persuasion." Mazurek v.  
4 Armstrong, 520 U.S. 968, 972 (1997); see Winter, 129 S. Ct. at  
5 375-76.

6 Further, "[i]n considering a motion for a temporary  
7 restraining order, the Court will consider whether the applicant  
8 could have sought relief by motion for preliminary injunction at  
9 an earlier date without the necessity for seeking last-minute  
10 relief by motion for temporary restraining order. Should the  
11 Court find that the applicant unduly delayed in seeking  
12 injunctive relief, the Court may conclude that the delay  
13 constitutes laches . . . and may deny the motion solely on [that]  
14 ground." E.D. Cal. R. 231(b).

15 II. Discussion

16 A. Undue Delay

17 Plaintiff "could have sought relief by motion for  
18 preliminary injunction at an earlier date without the necessity  
19 for seeking last-minute relief by motion for [a TRO]." E.D. Cal.  
20 R. 231(b). Plaintiff has been aware of defendants' desire to  
21 initiate foreclosure proceedings on his property, at a minimum,  
22 since July 9, 2009 when MERS recorded the Notice of Default.

23 \_\_\_\_\_  
24 Circuit test as requiring a showing of either (1) likelihood of  
25 success and possibility of irreparable injury; or (2) serious  
26 questions going to the merits and a balance of hardships that  
27 tips sharply in the applicant's favor). This court finds no need  
28 to deviate from Winters's clear directive that applicants for  
preliminary injunctive relief must satisfy all four elements  
listed above. Regardless, for the reasons described below,  
plaintiff has failed to raise a serious merits issue with respect  
to his causes of action that plead equitable relief.

1 (Request for Judicial Notice in Supp. of Opp'n to App. for TRO &  
2 Mot. for Prelim. Inj. ("RJN"), Ex. 1.) Yet plaintiff did not  
3 seek injunctive relief until March 3, 2010, five days before the  
4 scheduled sale date of his property. (Docket No. 3.) When  
5 plaintiff discovered that the sale was postponed until April 7,  
6 2010, plaintiff moved for, and was granted, a continuance of his  
7 application for a temporary restraining order until April 5,  
8 2010. (Docket Nos. 11, 14.) Plaintiff has not sufficiently  
9 demonstrated that his delay in seeking injunctive relief was  
10 justified. Accordingly, plaintiff's "undu[e] delay[]"  
11 "constitutes laches" and provides a basis for denying his TRO  
12 request.

13 B. Irreparable Harm and Likelihood of Success on the  
14 Merits

15 Plaintiff has not established a likelihood of success  
16 on the merits sufficient to warrant the extraordinary remedy of a  
17 temporary restraining order. Although plaintiff's Complaint  
18 consists of twelve causes of action, plaintiff only argues he is  
19 entitled to a temporary restraining order on the basis of the  
20 following four claims: (1) violations of the Truth in Lending Act  
21 ("TILA"), 15 U.S.C. §§ 1601-1667f, (2) violations of the Real  
22 Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. §§  
23 2601-2617, (3) violations of Cal. Civ. Code section 2943, and (4)  
24 plaintiff's contention that defendants cannot foreclose upon the  
25 Deed of Trust because the substitution of trustee is void and  
26 therefore the notice of default is also void. Plaintiff bases  
27 his claim of irreparable harm on the fourth cause of action.  
28 While plaintiff failed to so much as mention his other causes of

1 action in his motion for a temporary restraining order, out of  
2 caution the court will evaluate plaintiff's likelihood of success  
3 on all those claims for which plaintiff requests equitable relief  
4 in the Complaint.

5 1. TILA Claim

6 As a preliminary matter, the court notes that plaintiff  
7 does not request any equitable relief under TILA. Rather,  
8 plaintiff's first cause of action only seeks damages for the  
9 alleged disclosure failures that occurred during the origination  
10 of plaintiff's loan. (Compl. (Docket No. 2), at ¶¶ 36-42.) Nor  
11 does plaintiff's prayer for relief seek rescission of the loan.  
12 (Id. at 20.) Plaintiff has not alleged any facts to support a  
13 finding that the damages prayed for in the Complaint are  
14 insufficient to remedy the alleged TILA violations or that he  
15 will suffer irreparable harm related to his TILA claim in the  
16 absence of injunctive relief. Plaintiff's TILA claim therefore  
17 cannot provide the basis for alleging irreparable harm necessary  
18 to warrant injunctive relief. See Northern Cheyenne Tribe v.  
19 Norton, 503 F.3d 836, 843 (9th Cir. 2007).

20 Even if the court does construe plaintiff's TILA claim  
21 to allege a demand for rescission, it is time-barred. In a  
22 consumer credit transaction where the creditor acquires a  
23 security interest in the borrower's principal dwelling, TILA  
24 provides the borrower with "a three-day cooling-off period within  
25 which [he or she] may, for any reason or for no reason, rescind"  
26 the transaction. McKenna v. First Horizon Home Loan Corp., 475  
27 F.3d 418, 421 (1st Cir. 2007) (citing 15 U.S.C. § 1635). A  
28 creditor must "clearly and conspicuously disclose" this right to

1 the borrower along with "appropriate forms for the [borrower] to  
2 exercise his right to rescind." 15 U.S.C. § 1635(a). If a  
3 creditor fails to provide the borrower with the required notice  
4 of the right to rescind, the borrower has three years from the  
5 date of consummation to rescind the transaction. 15 U.S.C. §  
6 1635(f); see 12 C.F.R. § 226.23(a)(3) ("If the required notice or  
7 material disclosures are not delivered, the right to rescind  
8 shall expire 3 years after consummation."). "[Section] 1635(f)  
9 completely extinguishes the right of rescission at the end of the  
10 3-year period." Beach v. Ocwen Fed. Bank, 523 U.S. 410, 412,  
11 (1998); see also Miguel v. Country Funding Corp., 309 F.3d 1161,  
12 1164 (9th Cir. 2002) ("[S]ection 1635(f) represents an 'absolute  
13 limitation on rescission actions' which bars any claims filed  
14 more than three years after the consummation of the transaction."  
15 (quoting King v. California, 784 F.2d 910, 913 (9th Cir. 1986))).

16 Plaintiff signed the deed of trust on April 1, 2006,  
17 and filed this action on March 3, 2010, more than three years  
18 after closing. Even if plaintiffs were legally entitled to  
19 equitable tolling of their claim, plaintiffs have not alleged any  
20 facts in the Complaint that would warrant tolling the statute of  
21 limitations. In his Reply brief, plaintiff argues that the one-  
22 year statute of limitations for his TILA damages claim should be  
23 tolled because he never received his TILA disclosures. (Reply  
24 Mem. in Supp. of TRO (Docket No. 17), at 4-5.) As previously  
25 stated, however, plaintiff's TILA damages claim does not provide  
26 support for a temporary restraining order because plaintiff will  
27 not suffer irreparable injury should injunctive relief not issue.  
28 It is therefore unlikely that plaintiff will be able to establish

1 that his TILA claim is timely, and accordingly he has not  
2 demonstrated a likelihood for success on his TILA claim.

3           2.    RESPA Claim

4           In his application for a temporary restraining order,  
5 plaintiff alleges that multiple defendants conspired to provide  
6 defendants with a kickback for plaintiff's loan in violation of  
7 12 U.S.C. § 2607. Again, plaintiff makes no connection between  
8 the alleged illegal "kickback" that occurred at the origination  
9 of his loan and the impending foreclosure sale. Indeed, like  
10 plaintiff's first cause of action for TILA violations,  
11 plaintiff's second action for RESPA violations seeks only damages  
12 and does not seek equitable relief. Nor does plaintiff make any  
13 showing that he will suffer irreparable injury related to his  
14 claim for damages under RESPA if injunctive relief does not  
15 issue. For the same reasons explained above, plaintiff's RESPA  
16 claim does not provide a basis for a finding of likely  
17 irreparable harm needed to warrant injunctive relief.

18           Even if plaintiff could show irreparable harm, his  
19 RESPA cause of action is likely barred by the one-year statute of  
20 limitations. 12 U.S.C. § 2614. For the same reasons explained  
21 above, plaintiff has not shown that, if it is available,  
22 equitable tolling is warranted. It is therefore unlikely that  
23 plaintiff will be able to establish that his RESPA claim is  
24 timely, and accordingly he has not demonstrated a likelihood for  
25 success on his RESPA claim.

26           3.    Cal. Civ. Code Section 2943 Claim

27           At oral argument, counsel for plaintiff acknowledged  
28 that under subsection(g) section 2943 does not become operative

1 until Jan. 1, 2014, and abandoned the cause of action under that  
2 section. Therefore, this cause of action cannot sustain a motion  
3 for a temporary restraining order.

4 4. Plaintiff's Claim That the Foreclosure Sale Is  
5 Illegal

6 a. Wrongful Foreclosure

7 The fourth allegation in plaintiff's application for a  
8 temporary restraining order appears to be a recital of the basis  
9 for plaintiff's ninth cause of action for wrongful foreclosure  
10 and quiet title. (See Compl. ¶¶ 112-124.) Plaintiff alleges  
11 that because the original lender on his deed of trust, SCME,  
12 ceased to exist in 2008, MERS lacked authority to substitute the  
13 trustee under the Deed of Trust and the Notice of Default and  
14 Notice of Trustee's Sale are therefore void. (See Id.; TRO App.  
15 6-7.) Plaintiff asserts that "none of the entities identified in  
16 the Notice of Default or Notice of Trustee's Sale have the right  
17 to direct the foreclosure trustee to foreclose under the deed of  
18 trust, and the trustee has no authority because it was improperly  
19 appointed." (Compl. ¶ 121.) Furthermore, plaintiff argues that  
20 "none of the Defendants has authority to make or deliver [a  
21 demand for sale], since none of the Defendants hold the Note nor  
22 is any Defendant acting on behalf of HOMECOMINGS, the owner of  
23 the loan, and the trustee has no authority to act." (Id. ¶ 122.)

24 Wrongful foreclosure is an action in equity, where a  
25 plaintiff seeks to set aside a foreclosure sale that has already  
26 occurred. See Abdallah v. United Sav. Bank, 43 Cal. App. 4th  
27 1101, 1009 (1996); Karlsen v. American Sav. & Loan Assn., 15 Cal.  
28 App. 3d 112, 117 (1971). Because plaintiff's house has not yet

1 been sold, a claim for wrongful foreclosure is not yet ripe.

2           Even if plaintiff's wrongful foreclosure claim was  
3 ripe, the theory advanced by plaintiff is incorrect as a matter  
4 of law. "Financing or refinancing of real property is generally  
5 accomplished in California through a deed of trust. The borrower  
6 (trustor) executes a promissory note and deed of trust, thereby  
7 transferring an interest in the property to the lender  
8 (beneficiary) as security for repayment of the loan." Bartold v.  
9 Glendale Fed. Bank, 81 Cal. App. 4th 816, 821 (2000). A deed of  
10 trust "entitles the lender to reach some asset of the debtor if  
11 the note is not paid." Alliance Mortg. Co. v. Rothwell, 10 Cal.  
12 4th 1226, 1235 (1995). The California Court of Appeal for the  
13 Fourth District has explained that California's non-judicial  
14 foreclosure statute, California Civil Code section 2924, is a  
15 "comprehensive statutory framework established to govern  
16 nonjudicial foreclosure sales [and] is intended to be  
17 exhaustive." Moeller v. Lien, 25 Cal. App. 4th 822, 834 (1994);  
18 see I.E. Assoc. v. Safeco Title Ins. Co., 39 Cal. 3d 281 (1985)  
19 ("These provisions cover every aspect of exercise of the power of  
20 sale contained in a deed of trust."). Because of the exhaustive  
21 nature of this scheme, California appellate courts have refused  
22 to read any additional requirements into the non-judicial  
23 foreclosure statute. See Moeller, 25 Cal. App. 4th at 834; see  
24 also, I.E. Assocs. v. Safeco Title Ins. Co., 39 Cal. 3d 281, 288  
25 (1985).

26           Under California Civil Code section 2924(a)(1), a  
27 "trustee, mortgagee or beneficiary or any of their authorized  
28 agents" may conduct the foreclosure process. Under California

1 Civil Code section 2924b(4), a "person authorized to record the  
2 notice of default or the notice of sale" includes "an agent for  
3 the mortgagee or beneficiary, an agent of the named trustee, any  
4 person designated in an executed substitution of trustee, or an  
5 agent of that substituted trustee." "Upon default by the  
6 trustor, the beneficiary may declare a default and proceed with a  
7 nonjudicial foreclosure sale." Moeller, 25 Cal. App. 4th at 830.  
8 There is no stated requirement in California's non-judicial  
9 foreclosure scheme that requires a beneficial interest in the  
10 Note to foreclose. Rather, the statute broadly allows a trustee,  
11 mortgagee, beneficiary, or any of their agents to initiate non-  
12 judicial foreclosure. Under the deed of trust, MERS explicitly  
13 was granted the power, as the lender's agent, to exercise any of  
14 the lender's interests and to take any action required of the  
15 lender. (RJN Ex. 3, at 3.) This power explicitly includes the  
16 right to foreclose the property, (Id.) and extends to the  
17 lender's right to appoint a successor trustee. (Id. ¶ 24.)

18           Furthermore, under California law there is no  
19 requirement for the production of the original note to initiate a  
20 non-judicial foreclosure. Oliver v. Countrywide Home Loans,  
21 Inc., No. 09-1381, 2009 WL 3122573, at \*3 (E.D. Cal. Sept. 29,  
22 2009) (Damrell, J.) (citing Alvara v. Aurora Loan Servs., No. 09-  
23 1512, 2009 WL 1689640, at \*6 (N.D. Cal. Jun. 16, 2009)); Kamp v.  
24 Aurora Loan Servs., No. 09-00844, 2009 WL 3177636, at \*4, (C.D.  
25 Cal. Oct. 1, 2009); Putkkuri v. Recontrust Co., No. 08-1919, 2009  
26 WL 32567, at \*2 (S.D. Cal. Jan. 5, 2009). Plaintiff's assertion  
27 that the foreclosure is illegal because no defendant is in  
28 possession of the note must therefore fail as a matter of law.

1 Plaintiff admits that the Deed of Trust specified that  
2 MERS would act "solely as the nominee for the Lender, SCME, and  
3 Lender's successors and assigns." (Compl. ¶ 117) (emphasis  
4 added); (see also RJN Ex. 3, at 2(E).) Plaintiff also admits  
5 that SCME assigned its beneficial interest to Homecomings in  
6 2006, two years before it allegedly ceased to exist. (Compl. ¶  
7 118.) After the transfer from SCME to Homecomings, therefore,  
8 MERS would act as the nominee for Homecoming. Plaintiff's ninth  
9 cause of action implicitly requires that SCME's 2008 closing  
10 somehow invalidated SCME's 2006 assignment of its interest in the  
11 loan. This is incomprehensible on its face. Rather, MERS  
12 could--and did--substitute the trustee as an agent of Homecomings  
13 from the time SCME transferred its interest to Homecomings in  
14 2006. Plaintiff has failed as a matter of law to allege any  
15 facts that would support a finding that he will likely prevail on  
16 his claim that the Notice of Default and Notice of Trustee's Sale  
17 were illegal.

18 b. Quiet Title

19 To the extent that plaintiff's ninth cause of action  
20 also alleges a claim for quiet title, plaintiff cannot sustain a  
21 quiet title claim as a matter of law. The purpose of a quiet  
22 title action is to establish one's title against adverse claims  
23 to real property. A basic requirement of an action to quiet  
24 title is an allegation that plaintiffs "are the rightful owners  
25 of the property, i.e., that they have satisfied their obligations  
26 under the Deed of Trust." Kelley v. Mortgage Elec. Reg. Sys.,  
27 Inc., No. C 09-01538 SI, --- F. Supp. 2d ----, 2009 WL 2475703,  
28 at \*7 (N.D. Cal. Aug. 12, 2009). "[A] mortgagor cannot quiet his

1 title against the mortgagee without paying the debt secured."  
2 Watson v. MTC Fin., Inc., No. Civ. 2:09-01012 JAM KJM, 2009 WL  
3 2151782 (E.D. Cal. Jul. 17, 2009) (quoting Shimpones v. Stickney,  
4 219 Cal. 637, 649 (1934)). As plaintiff has not pled that he has  
5 the ability to pay the debt secured by the mortgage, he cannot  
6 sustain a quiet title action against defendants.

7           Accordingly, plaintiff has not shown a likelihood of  
8 success on his theories for wrongful foreclosure, for quiet  
9 title, and that defendants may not foreclose on his home because  
10 the substitution of trustee was illegal.

11           5. California's Unfair Competition Law Claims

12           California's Unfair Competition Law ("UCL"), Cal. Bus.  
13 & Prof. Code §§ 17200-17210, prohibits "any unlawful, unfair, or  
14 fraudulent business act or practice." Cal-Tech Commc'ns, Inc. v.  
15 L.A. Cellular Tel. Co., 20 Cal. 4th 163, 180 (1999). Plaintiff  
16 alleges three UCL causes of action against defendants. All three  
17 seek "injunctive relief enjoining Defendants from engaging in the  
18 unlawful business acts and/or practices described herein."

19 (Compl. ¶¶ 77, 90, 103.) Plaintiff's fifth cause of action for  
20 UCL violations is premised on alleged TILA and RESPA violations,  
21 which also provide for liability under California Financial Code  
22 section 50505(a)-(b). For the reasons explained above, neither  
23 of plaintiff's TILA or RESPA causes of action provide a basis on  
24 which to grant injunctive relief, nor has plaintiff shown a  
25 likelihood of success for those claims. Plaintiff has therefore  
26 not shown a likelihood of success for his fifth cause of action  
27 for violation of the UCL.

28           Plaintiff's sixth cause of action for violation of the

1 UCL is premised on alleged falsifications by Williams, SCME, and  
2 Clever Key at the loan origination stage. (Compl. ¶¶ 79-91.)  
3 Plaintiff's seventh cause of action for UCL violations is  
4 premised on Aurora's alleged delay in providing plaintiff with  
5 copies of his loan documents for six months in late 2009.  
6 (Compl. ¶¶ 92-104.) Plaintiff makes no connection between the  
7 alleged falsifications or delay and the pending foreclosure sale  
8 that would support a finding that he is likely to suffer  
9 irreparable injury should injunctive relief not issue. These  
10 causes of action, therefore, cannot support an application for a  
11 temporary restraining order to prevent the foreclosure of  
12 plaintiff's house.

13 None of plaintiff's other causes of action pray for  
14 equitable relief. Because plaintiff has not shown a likelihood  
15 of irreparable harm or of success on the merits for any of the  
16 claims which are listed in the temporary restraining order or  
17 which request equitable relief, his motion for a temporary  
18 restraining order must be denied. See Winter, 129 S. Ct. at 374.

19 IT IS THEREFORE ORDERED that plaintiffs' motion for a  
20 temporary restraining order be, and the same hereby is, DENIED.

21 DATED: April 6, 2010

22  
23 

24 WILLIAM B. SHUBB  
25 UNITED STATES DISTRICT JUDGE  
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