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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 CHANDRA M. BELISO,

11 Plaintiff,

No. CIV S-10-2131 JAM GGH PS

12 vs.

13 WELLS FARGO BANK, N.A. dba as
14 AMERICA'S SERVICING COMPANY, et al.,

15 Defendants.

FINDINGS AND RECOMMENDATIONS

16 _____/
17 Presently before the court is plaintiff's application for temporary restraining order.
18 Defendants have filed responses. Also pending are defendant T.D. Service Company's motion to
19 dismiss, and defendant Wells Fargo Bank's motion to dismiss, or for more definite statement.¹
20 For the reasons set forth herein, plaintiff's application should be denied, and defendants' motions
21 should be granted.

22 BACKGROUND

23 Plaintiff filed this action on August 10, 2010. Plaintiff alleges that she was misled
24 into obtaining a fraudulent mortgage loan from defendant Wells Fargo Bank, N.A., dba
25 _____

26 ¹ Because oral argument is not of material assistance, these matters are submitted on the
briefs. E.D. Cal. L.R. 230(g).

1 America's Servicing Company ("Wells Fargo") on or around September 29, 2004. (Compl. at ¶
2 5.) Plaintiff claims that defendants noticed a trustee sale, and refused her offer to pay. The
3 complaint also alleges that defendants "wrongfully proceed[ed] with foreclosure and Trustee's
4 Sale of Plaintiff's property without production of either the original note or being the 'holder in
5 due course' or giving proper notice of foreclosure." (*Id.* at 2.) According to defendants, plaintiff
6 defaulted on the note in October, 2009, and notice of default was recorded by T.D. Service
7 Company ("T.D. Service"), foreclosure trustee, on May 13, 2010. (Wells Fargo's Opp'n at 2.)
8 Defendants proceeded with the trustee sale on September 8, 2010, and the property was sold on
9 that date. (*Id.*)

10 The complaint contains claims for violation of the Truth in Lending Act, Fair
11 Debt Collection Practices Act, and California's Rosenthal Act, and for fraud, breach of implied
12 covenant of good faith and fair dealing, and "unlawful and wrongful foreclosure." Plaintiff seeks
13 declaratory and injunctive relief, and compensatory and punitive damages.

14 DISCUSSION

15 I. Legal Standards

16 A. Temporary Restraining Order / Preliminary Injunction

17 The standards governing the issuance of temporary restraining orders are
18 "substantially identical" to those governing the issuance of preliminary injunctions. Stuhlbarg
19 Intern. Sales Co., Inc. v. John D. Brushy and Co., Inc., 240 F.3d 832, 839 n. 7 (9th Cir.2001).
20 Therefore, "[a] plaintiff seeking a [TRO] must establish that he is likely to succeed on the merits,
21 that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of
22 equities tips in his favor, and that an injunction is in the public interest." Am. Trucking Ass'n,
23 Inc. v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir.2009) (quoting Winter v. Natural Res.
24 Def. Council, Inc., ___ U.S. ___, ___, 129 S. Ct. 365, 374 (2008)). "A preliminary injunction is
25 appropriate when a plaintiff demonstrates . . . that serious questions going to the merits were
26 raised and the balance of hardships tips sharply in the plaintiff's favor." Alliance for the Wild

1 Rockies v. Cottrell, 622 F.3d 1045, 1049-50 (9th Cir. 2010) (quoting Lands Council v. McNair,
2 537 F.3d 981, 97 (9th Cir. 2008) (en banc)). A TRO is “an extraordinary remedy that may only
3 be awarded upon a clear showing that the plaintiff is entitled to such relief.” Winter, 129 S. Ct.
4 at 376.

5 The Ninth Circuit has reiterated that under either formulation of the principles, if
6 the probability of success on the merits is low, preliminary injunctive relief should be denied:

7 Martin explicitly teaches that “[u]nder this last part of the
8 alternative test, even if the balance of hardships tips decidedly in
9 favor of the moving party, it must be shown as an irreducible
minimum that there is a fair chance of success on the merits.”

10 Johnson v. California State Bd. of Accountancy, 72 F.3d 1427, 1430 (9th Cir. 1995) (quoting
11 Martin v. International Olympic Comm., 740 F.2d 670, 675 (9th Cir. 1984)).

12 B. Motion to Dismiss

13 In order to survive dismissal for failure to state a claim pursuant to Rule 12(b)(6),
14 a complaint must contain more than a “formulaic recitation of the elements of a cause of action;”
15 it must contain factual allegations sufficient to “raise a right to relief above the speculative
16 level.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1965 (2007). “The
17 pleading must contain something more...than...a statement of facts that merely creates a suspicion
18 [of] a legally cognizable right of action.” Id., quoting 5 C. Wright & A. Miller, Federal Practice
19 and Procedure § 1216, pp. 235-236 (3d ed. 2004). “[A] complaint must contain sufficient factual
20 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal,
21 ___ U.S. ___, 129 S.Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 570, 127 S.Ct. 1955).
22 “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to
23 draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id.

24 In considering a motion to dismiss, the court must accept as true the allegations of
25 the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 740, 96 S.
26 Ct. 1848, 1850 (1976), construe the pleading in the light most favorable to the party opposing the

1 motion and resolve all doubts in the pleader's favor. Jenkins v. McKeithen, 395 U.S. 411, 421,
2 89 S. Ct. 1843, 1849, reh'g denied, 396 U.S. 869, 90 S. Ct. 35 (1969). The court will ““presume
3 that general allegations embrace those specific facts that are necessary to support the claim.””
4 National Organization for Women, Inc. v. Scheidler, 510 U.S. 249, 256, 114 S.Ct. 798, 803
5 (1994), quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 2137 (1992).
6 Moreover, pro se pleadings are held to a less stringent standard than those drafted by lawyers.
7 Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 596 (1972).

8 The court may consider facts established by exhibits attached to the complaint.
9 Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987). The court may also
10 consider facts which may be judicially noticed, Mullis v. United States Bankruptcy Ct., 828 F.2d
11 1385, 1388 (9th Cir. 1987); and matters of public record, including pleadings, orders, and other
12 papers filed with the court, Mack v. South Bay Beer Distributors, 798 F.2d 1279, 1282 (9th Cir.
13 1986). The court need not accept legal conclusions “cast in the form of factual allegations.”
14 Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

15 II. Motions to Dismiss

16 Both Wells Fargo and T.D. Service bring their motions on various grounds. Only
17 those grounds commonly raised by both defendants which pertain to the federal claims will be
18 addressed here.

19 A. TILA

20 1. Rescission

21 Rescission claims under TILA “shall expire three years after the date of
22 consummation of the transaction or upon the sale of the property, whichever occurs first.” 15
23 U.S.C. § 1635(f).

24 Further, equitable tolling does not apply to rescission under this provision of
25 TILA. If the borrower files his or her suit over three years from the date of a loan's
26 consummation, a court is powerless to grant rescission. Miguel v. Country Funding Corp., 309

1 F.3d 1161, 1164 (9th Cir. 2002) (“[S]ection 1635(f) represents an ‘absolute limitation on
2 rescission actions’ which bars any claims filed more than three years after the consummation of
3 the transaction.” (quoting King v. California, 784 F.2d 910, 913 (9th Cir. 1986)); accord Beach v.
4 Ocwen Fed. Bank, 523 U.S. 410, 412 (1998) (“[Section] 1635(f) completely extinguishes the
5 right of rescission at the end of the 3-year period.”). If a borrower exercises her right to rescind
6 within the three-year limitation period, such action only entitles the borrower to damages, not
7 rescission. Cazares v. Household Fin. Corp., No. CV 04-6887 DSF, 2005 WL 6418178, *8
8 (C.D. Cal. 2005).

9 In this case, plaintiff alleges she consummated the Subject Loan on or about
10 September 29, 2004. (Compl. ¶ 5.) Plaintiff did not bring the instant action until August 10,
11 2010; accordingly, more than five years have passed since the alleged TILA violations. 15
12 U.S.C. (Id. at) 1640(e). As such, defendants’ motion to dismiss plaintiff’s rescission claim
13 under TILA should be granted without leave to amend.

14 2. Damages

15 TILA provides that a plaintiff can bring an action to recover damages “within one
16 year from the date of the occurrence of the violation.” 15 U.S.C. § 1640(e). As stated above,
17 plaintiff brings this action more than five years after consummation of the loan; accordingly, her
18 TILA claim is time-barred. Plaintiff does not argue that equitable tolling should apply.
19 Therefore, defendants’ motion to dismiss this damages claim should be granted without leave to
20 amend.

21 B. FDCPA

22 The complaint also alleges a violation of the Fair Debt Collection Practices Act
23 (“FDCPA”). (Compl. ¶ 17.) Both Wells Fargo and T.D. Service argue, *inter alia*, that
24 foreclosures are not covered by this act. “[F]oreclosing on [a] property pursuant to a deed of
25 trust is not the collection of a debt within the meaning of the FDCPA.” Izenberg v. ETS
26 Services, LLC, 589 F. Supp.2d 1193, 1199 (C.D. Cal. 2008) (quoting Ines v. Countrywide Home

1 Loans, 2008 WL 4791863, at *2 (S.D. Cal. Nov. 3, 2008)). This claim should be dismissed
2 without leave to amend.

3 C. State Law Claims

4 As there are no federal claims remaining, this court declines to exercise
5 supplemental jurisdiction over plaintiff's possible state law claims. See 28 U.S.C. § 1367(c)(3)
6 (The district courts may decline to exercise supplemental jurisdiction over a claim ...if – the
7 district court has dismissed all claims over which it has original jurisdiction"); see also, Acri v.
8 Varian Associates, Inc., 114 F.3d 999, 1000-1001 (9th Cir. 1997) (“ ‘in the usual case in which
9 all federal-law claims are eliminated before trial, the balance of factors . . . will point toward
10 declining to exercise jurisdiction over the remaining state-law claims’ ”) (quoting
11 Carnegie-Mellon University. v. Cohill, 484 U.S. 343, 350, n. 7, 108 S. Ct. 614, 619, n. 7 (1988)).

12 III. Temporary Restraining Order

13 As demonstrated by the previous discussion, there is no probability of success on
14 the merits; therefore preliminary injunctive relief should be denied.

15 CONCLUSION

16 Accordingly, IT IS RECOMMENDED that:

17 1. The motions to dismiss, filed August 30, 2010 by T.D. Service Company, (dkt.
18 #4), and September 10, 2010 by Wells Fargo Bank, (dkt. #5), be granted;

19 2. Plaintiff's ex parte application for temporary restraining order, filed November
20 24, 2010, (dkt. #13), be denied; and

21 3. This action be dismissed.

22 These findings and recommendations are submitted to the United States District
23 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
24 fourteen (14) days after being served with these findings and recommendations, any party may
25 file written objections with the court and serve a copy on all parties. Such a document should be
26 captioned “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the

1 objections shall be served and filed within fourteen (14) days after service of the objections. The
2 parties are advised that failure to file objections within the specified time may waive the right to
3 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

4 DATED: 12/09/2010

/s/ Gregory G. Hollows

U. S. MAGISTRATE JUDGE

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