

1 Not., ECF No. 14-1 at 2.)

2 On May 6, 2009, Defendant BANA recorded a Notice of Default in the County of
3 Sacramento on the Subject Property. (ECF No. 14-1 at 2.) On April 11, 2011, Defendant BANA
4 foreclosed on the Subject property and sold it on April 12, 2011. (ECF No. 14-1 at 2.) However,
5 Defendant BANA executed the foreclosure in error due to its failure to communicate timely with
6 Plaintiff about conditions which would have warranted cancelation of the foreclosure sale. (ECF
7 No. 14-1 at 2.) As a result, on June 5, 2012, Defendant BANA executed a rescission, which
8 Plaintiff and Defendant BANA agree removed all force and effect of the foreclosure. (ECF No.
9 14-1 at 3.)

10 In or around 2012, Plaintiff filed a lawsuit in the Superior Court of California, County of
11 Sacramento against Defendant BANA regarding the April 11, 2011 foreclosure of the Subject
12 Property. (Motion to Dismiss, ECF No. 13-1 at 3.) On January 29, 2014, the parties entered a
13 settlement agreement concerning the aforementioned lawsuit. (ECF No. 13-1 at 3.) The
14 settlement agreement provided that Defendant BANA had to pay Plaintiff \$395,000. (ECF No.
15 14-2 at 2.) Plaintiff also alleges that the settlement agreement provided that Defendant BANA
16 “assist in any and all reviews of the home loan” and “to correct negative credit references to their
17 credit.” (ECF No. 10 at ¶ 4.) Throughout the settlement negotiations, Plaintiff continued to live
18 at the Subject Property and alleges that the parties were never able to successfully negotiate a
19 rental payment. (ECF No. 10 at ¶ 3.) Plaintiff further asserts that Defendant BANA failed to
20 engage in the home loan modification process, ultimately denying Plaintiff’s attempted
21 modification. (ECF No. 10 at ¶¶ 20–21.) Defendant BANA alleges that Plaintiff owes
22 approximately \$100,000 in monthly mortgage payments, which “accrued between the time when
23 the [Subject Property] was sold at foreclosure (April 12, 2011) and when the sale was rescinded
24 (June 5, 2012).” (ECF No. 13-1 at 3–4.) Plaintiff alleges that the amount Defendant BANA
25 claims he owes on the mortgage is incorrect and “[Defendant BANA] failed to clarify a correct
26 pay off amount to Plaintiff” to this date. (ECF No. 10 at ¶ 3.)

27 Subsequently, Plaintiff’s home loan was sold to FNMA. (ECF No. 10 at ¶ 25.)

28 Subsequently, FNMA filed an unlawful detainer against Plaintiff in the Superior Court of

1 California, Sacramento County seeking eviction. (ECF No. 22-3 at 3.) The Sacramento County
2 Sheriff's Office then issued a notice that Plaintiff must vacate the property on Sunday, August 14,
3 2016. (ECF No. 22-3 at 2.) Based on this action, Plaintiff seeks the instant temporary restraining
4 order.

5 II. LEGAL STANDARD

6 A temporary restraining order is an extraordinary and temporary "fix" that the court may
7 issue without notice to the adverse party if, in an affidavit or verified complaint, the movant
8 "clearly show[s] that immediate and irreparable injury, loss, or damage will result to the movant
9 before the adverse party can be heard in opposition." Fed. R. Civ. P. 65(b)(1)(A). The purpose of
10 a temporary restraining order is to preserve the status quo pending a fuller hearing. *See* Fed. R.
11 Civ. P. 65. It is the practice of this district to construe a motion for temporary restraining order as
12 a motion for preliminary injunction. Local Rule 231(a); *see also Aiello v. One West Bank*, No.
13 2:10-cv-0227-GEB-EFB, 2010 WL 406092 at *1 (E.D. Cal. Jan. 29, 2010) ("Temporary
14 restraining orders are governed by the same standard applicable to preliminary injunctions.")
15 (internal quotation and citations omitted).

16 Therefore, the party requesting injunctive relief must show that "he is likely to succeed on
17 the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
18 balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v.*
19 *Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). The propriety of a request for injunctive relief
20 hinges on a significant threat of irreparable injury that must be imminent in nature. *Caribbean*
21 *Marine Serv. Co. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988).

22 Alternatively, under the so-called sliding scale approach, as long as the plaintiff
23 demonstrates the requisite likelihood of irreparable harm and can show that an injunction is in the
24 public interest, a preliminary injunction may issue so long as serious questions going to the merits
25 of the case are raised and the balance of hardships tips sharply in plaintiff's favor. *Alliance for*
26 *Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-36 (9th Cir. 2011) (concluding that the "serious
27 questions" version of the sliding scale test for preliminary injunctions remains viable after
28 *Winter*).

1 **III. ANALYSIS**

2 Plaintiff moves the Court ex parte for a temporary restraining order seeking to halt the
3 order to vacate Defendant FNMA obtained from the Superior Court. However, the Court finds
4 that Plaintiff has failed to demonstrate a likelihood of success on the merits. The sum total of
5 Plaintiff’s analysis on this first requirement as set forth in his motion is as follows:

6 Plaintiff is likely to succeed on the merits of the underlying Federal Case.
7 Defendants took Mr. Mountjoy out of title and did not place him back in title until
8 close to trial. Not only did Bank of America not have title, but they made a
9 strategic decision not to seek occupancy payments or negotiate for them before
10 settlement of the case. Bank of America had no legal right to demand three years
11 of payment from Mr. Mountjoy after settlement of the case. The federal court just
12 recently denied Bank of America’s request to dismiss Plaintiff’s case.

13 (ECF No. 22-2 at 3.) Plaintiff provides no legal analysis, nor does he even make direct reference
14 to his claims in the instant action. However, the Court’s independent analysis finds that Plaintiff
15 could not meet this threshold requirement.

16 First, Plaintiff states that this Court “recently denied Bank of America’s request to dismiss
17 Plaintiff’s case.” (ECF No. 22-2 at 3.) Plaintiff is incorrect. The Court granted the motion in
18 part, dismissing three of Plaintiff’s seven counts. (Order on Def’s Mot. to Dismiss, ECF No. 21.)
19 Plaintiff has not yet amended those causes of action, therefore the only causes of action at issue in
20 this instant motion are: Count III - Fraudulent Misrepresentation; Count IV - Negligence; Count
21 V – Negligent Misrepresentation; Count VI - Violation of Business and Professions Code §
22 17200. (ECF No. 21.) Moreover, the mere fact that the Court declined to dismiss these claims is
23 not evidence of Plaintiff’s success on the merits. The standard for a motion to dismiss requires
24 only that the complaint give the defendant fair notice of what the claim . . . is and the grounds
25 upon which it rests.” *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations
26 omitted). This bare minimum requirement is not sufficient to show a likelihood of success on the
27 merits.

28 The burden in this instance is on Plaintiff to establish that these four remaining claims
carry a likelihood of success on the merits. *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118,
1123 (9th Cir. 2014). However, even the Court’s independent analysis cannot find such
likelihood. To begin, the Court’s order made clear that Count V and Count VI are reliant on

1 Counts III and IV and are viable claims only so long as those two causes of action are successful.
2 (ECF No. 21 at 14–16.) With respect to Counts III and IV, Count III, Plaintiff’s claim for
3 fraudulent misrepresentation, requires that Plaintiff allege Defendant BANA “willfully and
4 knowingly misrepresented” the amount Plaintiff owed on his home loan. (ECF No. 21 at 11.)
5 There is no indication in the record that Plaintiff is able to establish the requisite scienter for this
6 claim. While discovery may bear out these facts, the Court cannot determine the likelihood of
7 such a reality at this juncture.

8 A similar problem arises with respect to Count IV, Plaintiff’s negligence claim. Plaintiff
9 asserts that Defendant BANA breached its duty of care by failing to service the loan truthfully
10 and accurately. (ECF No. 21 at 13.) Defendant BANA responds that Plaintiff is factually
11 mistaken in his understanding of the loan amount and payments owed. (ECF No. 21 at 13.) At
12 this juncture, insufficient information has been provided for the Court to determine which party is
13 correct as to this factual issue. Indeed, this matter may ultimately be one that may only be
14 determined by the jury and not a legal issue upon which the Court can determine the likelihood of
15 success.

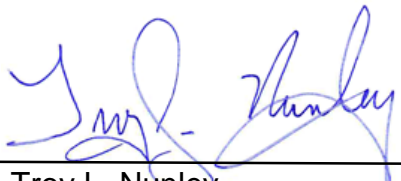
16 For these reasons, the Court finds that Plaintiff has not met his burden of showing a
17 likelihood of success on the merits in this case. Because Plaintiffs cannot meet the first prong, the
18 Court need not address the rest of the prongs. *See Winter*, 555 U.S. at 20; *Alliance for the Wild*
19 *Rockies*, 632 F.3d at 1135 (*Winter* requires a plaintiff to make a showing on all of the *Winter*
20 factors).

21 **IV. CONCLUSION**

22 For the foregoing reasons, Plaintiff’s Application for Temporary Restraining Order (ECF
23 No. 22) is hereby DENIED.

24 IT IS SO ORDERED.

25
26 Dated: August 11, 2016

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Troy L. Nunley
United States District Judge