

\*\*E-Filed 3/29/2011\*\*

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

CHRIS MONET

Plaintiff,

v.

COUNTRYWIDE HOME LOANS and/or its assigns; BANK OF AMERICA and/or its assigns, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; ALL PERSONS UNKNOWN CLAIMING ANY LEGAL OR EQUITABLE RIGHT, TITLE, ESTATE, LIEN, OR INTEREST IN THE PROPERTY DESCRIBED IN THE COMPLAINT ADVERSE TO PLAINTIFFS' TITLE OR ANY CLOUD ON PLAINTIFFS' TITLE THERETO; AND DOES 1-20, INCLUSIVE,

Defendants.

Case Number 5:10-cv-04400-JF (HRL)

ORDER<sup>1</sup> DENYING PLAINTIFF'S APPLICATION FOR ENTRY OF TEMPORARY RESTRAINING ORDER

[Re: Docket No. 32]

This action arises from a loan secured by the residence of Plaintiff Chris Monet ("Monet"). The residence is located at 25111 Soquel San Jose Road Los Gatos, California 95033 ("the Property"). Monet seeks a temporary restraining order ("TRO") to enjoin Defendants Countrywide Home Loans ("Countrywide"), Bank of America, N.A., ("BOA"), and

<sup>1</sup> This disposition is not designated for publication in the official reports.

1 Mortgage Electronic Registration Systems, Inc. (“MERS”) (collectively, “Defendants”) from  
2 conducting a non-judicial foreclosure on the Property. For the reasons set forth below, the  
3 application will be denied.

#### 4 **I. LEGAL STANDARD**

5 The standard for issuing a TRO is the same as that for issuing a preliminary injunction.  
6 *Brown Jordan Int’l, Inc. v. Mind’s Eye Interiors, Inc.*, 236 F. Supp. 2d 1152, 1154 (D. Hawaii  
7 2002); *Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co.*, 887 F. Supp. 1320, 1323  
8 (N.D. Cal. 1995). A preliminary injunction is “an extraordinary remedy that may only be  
9 awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Natural Res.*  
10 *Def. Council, Inc.*, 129 S.Ct. 365, 376 (2008). “The proper legal standard for preliminary  
11 injunctive relief requires a party to demonstrate [1] ‘that he is likely to succeed on the merits, [2]  
12 that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the  
13 balance of equities tips in his favor, and [4] that an injunction is in the public interest.’”  
14 *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) (citing *Winter*, 129 S. Ct. at  
15 374)). Recently, the Ninth Circuit reaffirmed that within this framework a preliminary  
16 injunction also is appropriate when a plaintiff demonstrates “that serious questions going to the  
17 merits were raised and the balance of the hardships tips sharply in the plaintiff’s favor,” thereby  
18 allowing district courts to preserve the status quo where difficult legal questions require more  
19 deliberate investigation. *Alliance for the Wild Rockies v. Cottrell*, 613 F.3d 960 (2010).

#### 20 **II. DISCUSSION**

21 On February 22, 2011, Defendants conducted a trustee’s sale of the Property. Monet  
22 seeks to set aside the sale and enjoin Defendants from taking any right in the Property that is  
23 adverse to his interests. His TRO application is based on several legal theories.

24 His primary claim appears to be that Defendants lack standing to foreclose on the  
25 Property. The loan at issue was made by Countrywide in July 2006. Second Amended  
26 Complaint (“SAC”) at 2:21-26. MERS was listed as a beneficiary on the deed of trust. *Id.* at  
27 3:13-21. According to the SAC, at some point MERS authorized Recon Trust Company, N.A.  
28 (“Recon Trust”) to serve as its agent in conducting the trustee’s sale. *Id.* at 8:5-6, 12:14-13:15;

1 Application for TRO at 5, Dkt. 32. Monet argues that MERS lacked authority to enlist Recon  
2 Trust because MERS was not a true beneficiary according to the terms and conditions listed on  
3 its website, which state that “[s]ince MERS acts as nominee for the true beneficiary, it is  
4 important that the Trustee’s Deed upon Sale be made in the name of the true beneficiary and not  
5 MERS.” SAC at 12:8-10.

6 It is unclear from the SAC or from the TRO application why MERS—the named  
7 beneficiary on the deed of trust—lacked authority to commence foreclosure proceedings. Case  
8 law suggests strongly that MERS did in fact possess such authority. *See Roybal v. Countrywide*  
9 *Home Loans, Inc.*, No. 2:10-CV-750-ECR-PAL, 2010 WL 5136013, at \*4, (D. Nev. Dec. 9,  
10 2010) (“there is a near consensus among district courts in this circuit that while MERS does not  
11 have standing to foreclose as a beneficiary, because it is not one, it does have standing as an  
12 agent of the beneficiary where it is the nominee of the lender, who is the true beneficiary”);  
13 *Morgera v. Countrywide Home Loans, Inc.*, No. 2:09-cv-01476-MCE-GGH, 2010 WL 160348,  
14 \*8 (E.D. Cal. Jan. 11, 2010) (“Courts have consistently found that MERS does in fact have  
15 standing to foreclose as the nominee of the lender.”) (citations omitted); *Gomes v. Countrywide*  
16 *Home Loans, Inc.*, No. D057005, 2011 WL 566737, at \*5 (Cal. App. 4 Dist. Feb. 18, 2011)  
17 (“MERS is the owner and holder of the note as nominee for the lender, and thus MERS can  
18 enforce the note on the lender’s behalf.”) (citing *Morgera* at \*8). Monet also claims that actual  
19 possession of the promissory note is a condition precedent to enforcing the note. “However,  
20 under California law, there is no requirement that the trustee have possession of the physical note  
21 before initiating foreclosure proceedings.” *Gandrup v. GMAC Mortg.*, No. 11-CV-0659-LHK,  
22 2011 WL 703753, at \*2 (N.D. Cal. Feb. 18, 2011).

23 Separately, Monet argues that Defendants fraudulently withheld or misrepresented key  
24 information regarding his loan in violation of the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.*  
25 (“TILA”). SAC 6:5-20. He claims that as a consequence of this alleged fraud, he is entitled to  
26 rescind the loan, and that he has attempted to pursue this right by delivering a rescission letter to  
27 Defendants. *Id.*; Application for TRO at 8, Dkt. 32. However, TILA rescission claims are  
28 subject to a three-year statute of limitations. 15 U.S.C. § 1635(f) (“An obligor’s right of

1 rescission shall expire three years after the date of consummation of the transaction or upon the  
2 sale of the property, whichever occurs first”); *See also* Reg. Z §§ 226.15(a)(3), 226(a)(3). The  
3 loan transaction at issue here occurred in 2006. While Monet is correct that the statute of  
4 limitations is subject to equitable tolling when fraudulent concealment is alleged, *See Reynolds*  
5 *v. Applegate*, No. C 10-04427 CRB, 2011 WL 560757, at \*2 (N.D. Cal. Feb. 14, 2011)  
6 (“Equitable tolling of civil damages claims under TILA may suspend the limitations period until  
7 the borrower discovers or had a reasonable opportunity to discover the fraud or  
8 nondisclosures.”), Monet has not alleged sufficient facts to permit the application of equitable  
9 tolling here. Conclusory allegations that Defendants made untrue statements and otherwise  
10 omitted material information are not enough. Fed. R. Civ. P. 9(b) requires that “[i]n all  
11 averments of fraud . . . the circumstances constituting fraud . . . shall be stated with  
12 particularity.”

13 Monet argues that Defendants cannot foreclose on the Property because they have  
14 violated the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.* (“RESPA”) by  
15 failing to respond to his Qualified Written Request (“QWR”). Under RESPA, loan servicers  
16 “ha[ve] a duty to respond to a borrower’s inquiry or ‘qualified written request.’ 12 U.S.C.  
17 § 2605(e).” *Keen v. Amer. Home Mortgage Servicing, Inc.*, 664 F. Supp. 2d 1086 (E.D. Cal.  
18 2009). To qualify as a QWR, correspondence must meet particular requirements. *See* 12 U.S.C.  
19 § 2605(e). Although Monet alleges conclusorily that he sent a QWR to Defendants to determine  
20 how and when payments were made and/or applied, he does not allege facts indicating that his  
21 correspondence satisfied any of the elements of a QWR.

22 Finally, Monet claims that the trustee’s sale was procedurally defective because  
23 Defendants failed to notify him of the sale in accordance with Cal. Civ. Code. § 2923.5 and  
24 failed to offer him a loan modification pursuant to Cal. Civ. Code § 2923.6. As an initial matter,  
25 “[t]here is nothing in section 2923.5 that even hints that noncompliance with the statute would  
26 cause any cloud on title after an otherwise properly conducted foreclosure sale.... [T]he *only*  
27 remedy provided is a postponement of the sale before it happens.” *Paik v. Wells Fargo Bank,*  
28 *N.A.*, No. C 10-04016 WHA, 2011 WL 109482, at \*4 (N.D. Cal. Jan. 13, 2011) (citing *Mabry v.*

1 *Superior Court*, 185 Cal.App.4th 208, 235 (2010) (emphasis in original)). Here, Monet alleges  
2 that the sale already has occurred. Moreover, “[n]umerous district courts have concluded that  
3 Section 2923.6 does not require loan servicers to modify loans and does not create a private right  
4 of action for borrowers.” *Roberts v. JP Morgan Chase Bank, N.A.*, Nos. 09-CV-01855-LHK,  
5 09-CV-01879, 2011 WL 864949, at \*4 (N.D. Cal. Mar. 11, 2011) (citing *Jacobs v. Bank of*  
6 *America, N.A.*, No. C10-04596 HRL, 2011 WL 250423, at \*3 (N.D. Cal. Jan.25, 2011);  
7 *Washington v. Nat’l City Mortgage Co.*, No. C 10-5042 SBA, 2010 WL 5211506, at \*5 (N.D.  
8 Cal. Dec.16, 2010); *Pantoja v. Countrywide Home Loans, Inc.*, 640 F.Supp.2d 1177, 1188 (N.D.  
9 Cal. 2009)). “[Section] 2923.6 imposes no duty on lenders, enforceable by borrowers, to offer or  
10 execute a loan modification, but merely expresses the hope that lenders will do so when a  
11 modification may be beneficial to all parties.” *Roberts* at \*4.

12 Because Monet has not shown that he is likely to succeed on the merits in his attempt to  
13 set aside the trustee’s sale, he has not shown that he is entitled to injunctive relief.

14 **III. ORDER**

15 The application for entry of a temporary restraining order is DENIED. Should he choose,  
16 Monet may file a properly noticed motion for preliminary injunction pursuant to Civ. L.R. 7-2.  
17 Any such motion should be calendared for May 13, 2011, concurrent with the scheduled hearing  
18 on Defendants’ motion to dismiss.

19  
20 **IT IS SO ORDERED.**

21  
22 DATED: March 29, 2011

23   
24 JEREMY FOGEL  
25 United States District Judge  
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6 **SAN JOSE DIVISION**

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18 PROPERTY DESCRIBED IN THE  
19 COMPLAINT ADVERSE TO PLAINTIFFS'  
20 TITLE OR ANY CLOUD ON PLAINTIFFS'  
21 TITLE THERETO; AND DOES 1-20,  
22 INCLUSIVE,

23 Defendants.

Case Number 5:10-cv-04400-JF (HRL)

CERTIFICATE OF SERVICE

24 I, the undersigned, hereby certify that I am an employee of the Office of the Clerk,  
25 United States District Court, Northern District of California.

26 On March 29, 2011, I served a true and correct copy of the attached document to each of  
27 the persons hereinafter listed by placing said copy in a postage paid envelope and depositing  
28 said envelope in the United States mail, or by placing said envelope in the outgoing mail  
delivery receptacle located in the Clerk's Office:

Chris Monet  
Po Box 63765  
Scots Valley, CA 95067

DATED: March 29, 2011

For the Court  
Richard W. Weiking, Clerk

By: \_\_\_\_\_/s/  
Diana Munz  
Courtroom Deputy Clerk