

1 (“ELOC”) agreement with World Savings with a credit limit of \$54,300. The ELOC, like the
2 initial mortgage, was secured by a deed of trust against the subject property.

3 In 2004, a dispute arose between Plaintiff and World Savings Bank regarding fire and
4 liability insurance required for the subject property. Plaintiff claims that World Savings
5 wrongfully took money from his escrow impound account to pay for insurance on the Subject
6 Property, even though he had already obtained the required insurance. Plaintiff objected to World
7 Savings that he had already purchased insurance, provided proof, and the money was apparently
8 refunded. The issue of the property insurance came up again in 2006. Plaintiff claims that at some
9 point in 2006, World Savings took money from Plaintiff’s escrow impound account to pay for
10 property insurance. Plaintiff claims that he again provided World Savings with proof of insurance,
11 but the money was never refunded. Plaintiff claims that he has been continually insured since
12 2003.

13 World Savings Bank was renamed Wachovia Mortgage, FSB on December 31, 2007.
14 Effective November 1, 2009, Wachovia Mortgage, FSB was converted to a national bank and
15 eventually became Wells Fargo Bank, N.A.

16 In 2009, Plaintiff attempted to open a business checking account with Wachovia from
17 which his mortgage payments could be automatically deducted. Plaintiff funded this account with
18 over \$40,000, but encountered difficulties in setting up the automatic payments. After failing to set
19 up the automatic mortgage payments, Plaintiff then demanded a return of funds. He encountered
20 difficulties in retrieving his money from the account, but succeeded on March 25, 2009.

21 During this same period, Plaintiff fell behind on his ELOC, allegedly because of difficulties
22 with the automatic payments, and Plaintiff’s ELOC was suspended. In August 2009, Plaintiff
23 visited a bank branch and attempted to pay down the balance on the ELOC, but was told he lacked
24 documentation as to the amount owed. Plaintiff requested and later received a documentation
25 letter, which listed the payoff balance as \$450.04. The documentation letter also explained that the
26 offer allowing him to pay off the equity credit line was “void after 8/17/09,” the same day that the
27 letter was dated, and three days before the letter was post-marked. Wells Fargo claims that it sent
28 multiple letters to Plaintiff regarding the ELOC loan payoff before the attempted August

1 resolution. Plaintiff alleges multiple unspecified attempts to resolve the ELOC delinquency after
2 August 2009.

3 According to Wells Fargo's records it appears that Plaintiff began making late payments on
4 his initial mortgage in October 2009. Starting in February 2010, Plaintiff withheld three monthly
5 payments on his initial mortgage, instructing Wells Fargo/Wachovia that the payments should be
6 made using the monies wrongfully withdrawn from the escrow impound account in 2006.

7 Plaintiff's last payment was made in mid-February 2010 and was intended as a payment on the
8 initial mortgage payment originally due January 1, 2010. In May 2010, Plaintiff visited a Wells
9 Fargo/Wachovia bank branch and attempted to make a monthly payment. Plaintiff claims that this
10 payment was refused. Under the terms of the initial mortgage contract, Defendant had the right to
11 demand payment of the full outstanding balance on the loan.

12 Several times in 2011, Plaintiff claims that he was told by Wells Fargo during phone
13 conversations that no foreclosure would result from failure to pay off his ELOC, and that the most
14 severe consequence would be placement of a "lien on the first deed of trust." Plaintiff received
15 letters contradicting these representations. The ELOC is currently in foreclosure and a notice of
16 trustee's sale was sent by Defendant. In addition, between February 4, 2010 and July 26, 2011, the
17 bank sent at least seven notifications to Plaintiff concerning the delinquency on the ELOC, and
18 since October 2009, Wells Fargo has written at least seventeen times regarding the delinquency on
19 the initial mortgage. Plaintiff declares that he received multiple phone calls from Defendant, in
20 which Wells Fargo sought to collect the delinquent payments. Plaintiff declares that he responded
21 by seeking to recapture the money taken from his escrow impound account, but declined to pay the
22 delinquent amounts until Defendant remedied the alleged breach. Plaintiff has made no payments
23 on either the ELOC or the initial mortgage since February 2010.

24 Because the ELOC requires that the initial mortgage be kept current, Defendant requires
25 payment of delinquencies on both the ELOC and the initial mortgage to forestall foreclosure. In
26 total, Plaintiff has failed to make 21 payments on his Initial Mortgage and the total past due is
27 \$80,507.52. The total due to reinstate the ELOC is \$2,855.98. The parties have stipulated to a stay
28 of foreclosure pending the outcome of this motion.

1 Plaintiff now seeks a preliminary injunction to prevent foreclosure based upon his claim for
2 breach of the covenant of good faith and fair dealing. Plaintiff alleges that Defendant and its
3 predecessors in interest and their employees breached the covenant when they (1) repeatedly made
4 false statements of fact to plaintiff regarding whether or not his home was in foreclosure, (2) failed
5 to perform loan servicing functions consistent with their responsibilities, (3) failed to properly
6 supervise their agents and employees including without limitation, their loss mitigation and
7 collection personnel, (4) demanded information already in their files, (5) made inaccurate
8 calculations and determinations of the sums owed by plaintiff under his loans with defendant and
9 its predecessors, and (6) failed to follow through on written and implied promises.

10 **II. Legal Standard**

11 “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on
12 the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
13 balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v.*
14 *Natural Res. Def. Council, Inc.*, 129 S.Ct. 365, 374 (2008). “[S]erious questions going to the
15 merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a
16 preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable
17 injury and that the injunction is in the public interest.” *Alliance for the Wild Rockies v. Cottrell*, 632
18 F.3d 1127, 1135 (9th Cir. 2011) (internal quotations omitted). The issuance of a preliminary
19 injunction is at the discretion of the district court. *Indep. Living Ctr. v. Maxwell-Jolly*, 572 F.3d
20 644, 651 (9th Cir. 2009). The party seeking the injunction bears the burden of proving these
21 elements. *Klein v. City of San Clemente*, 584 F. 3d 1196, 1201 (9th Cir. 2009).

22 **III. Discussion**

23 Plaintiff must establish that he is either likely to succeed on the merits of his claim for
24 breach of covenant of good faith and fair dealing or that he raises serious questions going to the
25 merits of his claims in order to obtain a preliminary injunction. Plaintiff has not met his burden.

26 Under California law, a claim for breach of the covenant of good faith and fair dealing
27 requires (1) that a contract exists between the parties, (2) that the plaintiff performed his contractual
28 duties or was excused from nonperformance, (3) that the defendant deprived the plaintiff of a

1 benefit conferred by the contract in violation of the parties' expectations at the time of contracting,
2 and (4) that the plaintiff's damages resulted from the defendant's actions. *Boland, Inc. v. Rolf C.*
3 *Hagen (USA) Corp.*, 685 F. Supp. 2d 1094, 1101 (E.D. Cal. 2010) (citing *Reichert v. General Ins.*
4 *Co.*, 68 Cal. 2d 822, 830 (1968)). Specifically, Plaintiff has not met his burden because he has not
5 established (1) that he has performed his contractual duties or that he was excused from
6 nonperformance, or (2) that the foreclosure of his home is a result of the defendant's actions.¹

7 A. Plaintiff's Failure to Perform

8 Plaintiff must establish that he has performed his contractual duties or was excused from
9 nonperformance. Plaintiff has not performed under his contractual duties as he has not made any
10 monthly payments on either his ELOC or his initial mortgage since February 2010 as he is required
11 to do under the terms of the contract.

12 Plaintiff's initial failure to pay may be excused by Wells Fargo's alleged breach of
13 withdrawal of money from Plaintiff's impound account for the purposes of paying for property
14 insurance. However, "[u]nder basic contract principles, when one party to a contract feels that the
15 other contracting party has breached its agreement, the non-breaching party may either stop
16 performance and assume the contract is avoided or continue its performance and sue for damages.
17 Under no circumstances may the non-breaching party stop performance and continue to take
18 advantage of the contract's benefits." See *Jay Bharat Developers, Inc. v. Minidis*, 167 Cal.App.4th
19 437, 443 (2008) (internal quotation marks omitted). Thus, if Plaintiff believed in 2006 that Wells
20 Fargo's predecessor breached the terms of the agreement he could have initiated court action to
21 recoup the amount withdrawn, terminated the contract, or paid his mortgage and ELOC payments
22 into an escrow account. See, e.g. *Wilson v. Wells Fargo Bank*, No. 11-03394, 2011 WL 3443635 at
23 *3 (N.D. Cal. Aug. 5, 2011). He was not allowed to stop making payments while continuing to
24 take advantage of the contract's benefits by remaining in possession of the home.

25 B. The Damage Has Not Resulted From Defendant's Actions

26
27
28 ¹ Because Plaintiff has not established these elements of his breach of covenant of good faith and
fair dealing claims, the Court need not address the remaining arguments presented by Defendant.

1 Breach of the covenant of good faith and fair dealing requires that the remedy must flow
2 from the breach. *Carma Developers, Inc. v. Marathon Development California, Inc.*, 2 Cal. 4th
3 342, 372-73 (1992). If the foreclosure does not result from the wrongs that form the basis of
4 Plaintiff's claims, an injunction against the foreclosure is not an appropriate remedy. *See Avila v.*
5 *Countrywide Home Loans, Inc.*, No. 10-05485, 2011 U.S. Dist. LEXIS 34071 (N.D. Cal. Mar. 29,
6 2011) (plaintiffs must show that "the plaintiff's damages resulted from the defendant's actions");
7 *see also Lewis Jorge Const. Mgmt., Inc. v. Pomona Unified Sch. Dist.*, 34 Cal. 4th 960, 969
8 (contract damages must represent "loss[es] that occurred by reason of injuries following from the
9 breach") (citations and internal quotation marks omitted).

10 Plaintiff does not appear to base his claim upon the 2006 allegedly wrongful withdrawal of
11 money to pay for property insurance presumably because such a claim would be time-barred. *See*
12 *Esoimeme v. Wells Fargo Bank*, No. 10-2259, 2011 WL 3875881 (E.D. Cal. Sept. 1, 2011) (four
13 year statute of limitation for breach of covenant of good faith and fair dealing in California).
14 Plaintiff asserts six other bases for his claim for breach of the covenant of good faith and fair
15 dealing. These include claims that Defendant (1) repeatedly made false statements of fact to
16 plaintiff regarding whether or not his home was in foreclosure, (2) failed to perform loan servicing
17 functions consistent with their responsibilities, (3) failed to properly supervise their agents and
18 employees including without limitation, their loss mitigation and collection personnel, (4)
19 demanded information already in their files, (5) made inaccurate calculations and determinations of
20 the sums owed by plaintiff under his loans with defendant and its predecessors, and (6) failed to
21 follow through on written and implied promises. None of these alleged breaches, however,
22 resulted in the foreclosure of the subject property.

23 (1) **False statements.** The false statements made to Plaintiff that his home was not going
24 into foreclosure did not cause the foreclosure – Plaintiff's non-payment of his ELOC balance and
25 initial mortgage payments caused the foreclosure. There is no indication by Plaintiff that he was or
26 is prepared to pay the sum required to reinstate the Initial Mortgage and ELOC, as would have
27 been required to avoid default on his ELOC. *See DeLeon v. Wells Fargo Bank, N.A.*, 2011 U.S.
28 Dist. LEXIS 8296 (N.D. Cal., Jan. 28, 2011).

1 (2)-(3) **Loan Servicing Functions/Failure to Supervise.** Plaintiff also asserts vague
2 allegations that Wells Fargo failed to perform loan servicing functions consistent with their
3 responsibilities and failed to properly supervise their agents and employees including without
4 limitation, their loss mitigation and collection personnel. To the extent that they do not overlap
5 with other allegations, these allegations likely refer to two occurrences. The first occurrence, in
6 May 2009, was Defendants’ refusal to allow Plaintiff to resume normal monthly payments on his
7 initial mortgage after he had deliberately withheld mortgage payments for three months (and had
8 apparently fallen behind in his mortgage payments several months prior to that). This cannot be
9 the basis for a claim, since the deed of trust explicitly permits the bank to “demand immediate
10 payment of all sums secured.”

11 The second possible basis is Defendants’ 2011 failure to refund over \$17,000 that Wells
12 Fargo has admitted has been withdrawn from Plaintiff’s escrow account to pay for property
13 insurance. Although the contract permits such withdrawals, there appears to be a factual dispute as
14 to whether Plaintiff actually has insurance on the subject property and whether Plaintiff has
15 adequately provided this proof of insurance to Wells Fargo. Nonetheless, Wells Fargo’s failure to
16 refund is not the cause of the foreclosure sale. This is because the money Wells Fargo withheld is
17 less than one quarter of the amount owed on the two notes, both of which would have to be paid to
18 avoid foreclosure on the ELOC.

19 (4) **Information Demand.** Plaintiff also asserts that Defendants repeatedly demanded
20 information allegedly in their files. This apparently refers to Defendants’ August 2009 demand for
21 documentation of the precise amount owed on the ELOC before allowing Plaintiff to pay down the
22 balance. It is apparent from the record, however, that Plaintiff received several notices of the
23 amount due prior to August 2009, and could have paid down his ELOC at that time. Plaintiff also
24 received notices after August 2009, which he declined to pay unless Defendants remedied their
25 alleged wrongful withdrawal of money to purchase property insurance. Again, Plaintiff’s ongoing
26 failure to pay the balance of his Initial Mortgage and ELOC is the cause of foreclosure on his
27 ELOC, rather than a specific demand for more documentation in August 2009.
28

1 (5) **Inaccurate Calculations.** Plaintiff also alleges that Wells Fargo made inaccurate
2 calculations in July 2011 regarding the amount owed on the ELOC. Plaintiff apparently received
3 conflicting information as to the precise sum owed as foreclosure proceedings progressed, and
4 submits notices he received from Defendants that support this allegation. *See* Beutel Decl. ¶ 18,
5 19, 20. This basis for Plaintiff’s claim, however, did not cause the impending foreclosure sale.
6 Indeed, Plaintiff admitted that in June 2011, after receiving a notice of default on the ELOC for
7 \$864.03, he told Wells Fargo that he wanted to pay the ELOC balance, “but was not going to pay
8 for double insurance.” *Id.* ¶ 14. Thus, Plaintiff explicitly refused to pay an outstanding balance
9 regardless of any of the alleged miscalculations as recently as June 2011. Furthermore, it does not
10 appear that Plaintiff has attempted to make any payment since the initiation of the foreclosure
11 process.

12 (6) **Failure to Follow Promise.** Finally, Plaintiff’s allegation that Wells Fargo failed to
13 follow through on written and implied promises is too vague to support a finding that the plaintiff’s
14 damages result from the defendant’s conduct. To the extent that such promises are included in the
15 original contracts, the Court has already addressed them. To the extent that any such contractual
16 promise postdates the original contracts and are written, they have not been included as evidence
17 and thus cannot be evaluated. Finally, any oral agreement altering the contracts would be invalid
18 under the statute of frauds. *See* Cal. Civil Code § 1624, 1698.

19 In sum, the reason for Plaintiff’s impending foreclosure is not the breach of Wells Fargo’s
20 duty of good faith and fair dealing, but rather Plaintiff’s failure to keep current with his mortgage
21 and ELOC payments. Although Plaintiff alleges that Wells Fargo rejected a mortgage payment in
22 May of 2010, it does not appear that he has made any other attempts to make payments on the past
23 due amounts or to bring his accounts into compliance with the terms of the ELOC or initial
24 mortgage deeds. While the Court is sympathetic to the issues that Plaintiff has faced in dealing
25 with Wells Fargo and its predecessors, they are not the cause of the impending foreclosure. Rather,
26 it is Plaintiff’s failure to timely make his payments on his loan obligations that is the cause of the
27 foreclosure sale.
28

1 Because Plaintiff has neither established a likelihood of success on the merits nor raised any
2 serious question going to the merits of the claim asserted, no preliminary injunction may issue.
3 The Court recognizes that Plaintiff's loss of his home is an irreparable harm. *Reed v. Wells Fargo*
4 *Bank*, No. 11-00194, 2011 WL 1793340 *6 (N.D. Cal. May 11, 2011). Nonetheless, the balance of
5 the equities do not necessarily favor Plaintiff because he has not shown a likelihood of success on
6 the merits, and "[e]quity does not favor allowing Plaintiff[] to avoid foreclosure having ceased
7 making payments of any kind to anyone." *Wilson*, 2011 WL 3443635 *3. Finally, while
8 homeownership is in the public interest, as evidenced by the tax benefits and other subsidies
9 provided to home owners, it is not in the public interest to delay a foreclosure and afford relief to
10 those deserving security on a defaulted loan. *Id.* Therefore, after weighing all the factors, the
11 Court denies the motion for a preliminary injunction.

12 The Court notes that parties have stipulated to a delay of the foreclosure sale from
13 September 14, 2011 until October 31, 2011. Notice of Default and Election to Sell recorded on
14 May 3, 2011 states that Plaintiff has "the legal right to stop the sale of [his] property by paying the
15 entire amount demanded by [his] creditor." The July 29, 2011 Notice of Trustee's Sale at 10:00
16 a.m. on August 24, 2011 was predicated upon this earlier Notice of Default and Election to Sell.
17 Although any Notice of Trustee's Sale on September 14, 2011 has not been submitted into
18 evidence, such sale may also be conditional on the recorded Notice. Defendants have continuously
19 demanded the delinquent payments, plus penalties and fees, at this point totaling \$83,363.50, to
20 reinstate Plaintiff's loans. Plaintiff's counsel has represented to the Court that Plaintiff has the
21 funds to pay off the full amount in arrears. Although the Court has denied Plaintiff's Motion for a
22 Preliminary Injunction, the Court notes that legal remedies may exist for Plaintiff to avoid the
23 pending foreclosure sale.

24 **IV. Conclusion**

25 For the foregoing reasons, Plaintiff's motion for a preliminary injunction is DENIED.

26 **IT IS SO ORDERED.**

27 Dated: October 20, 2011

28 
LUCY H. KOH
United States District Judge