



1 (“Countrywide”). A Countrywide employee, Barry Varshay, collected Plaintiff’s information for the  
2 loan application over the telephone. Plaintiff informed Varshay that he earned \$66,019.00 from a  
3 sales job in 2004, as well as \$5,666.00 from occasional acting/modeling work. Plaintiff also informed  
4 him that he was currently unemployed. According to Plaintiff, Varshay recorded in the loan  
5 application that Plaintiff had been a “self-employed actor” for two years, with a monthly income of  
6 \$6,000.00. Plaintiff was not provided a copy of the loan application for his review and signature.  
7 Plaintiff does not recall seeing the loan application until he requested a forensic audit of the  
8 transaction. (McCallum Decl. ¶ 9.) Subsequently, his application was approved for a loan in the  
9 amount of \$260,000.00, and the loan closed on June 29, 2005.

10 According to Plaintiff, he was sold a loan he could not afford, based on untruthful and  
11 inaccurate income figures on his application. Plaintiff also alleges failure to provide mandatory  
12 disclosures and failure to make good faith efforts to avoid foreclosure.

### 13 **PROCEDURAL HISTORY**

14 On March 11, 2010, Plaintiff filed this diversity action against Defendant Bank of America  
15 Corporation (“BAC”), which currently owns the loan at issue.<sup>2</sup> Plaintiff’s Complaint sets forth nine  
16 causes of action: (1) set aside trustee sale, (2) violation of the Perata Mortgage Relief Act, California  
17 Civil Code § 2923.5, (3) unfair business practices in violation of California Business and Professions  
18 Code § 17200, (4) quiet title, (5) declaratory relief, (6) injunctive relief, (7) intentional  
19 misrepresentation, (8) negligent misrepresentation, and (9) rescission.

20 On April 9, 2010, Plaintiff filed the instant TRO Motion seeking this Court’s order enjoining  
21 BAC from proceeding with the foreclosure sale. (Doc. No. 3.) Plaintiff’s counsel filed a declaration  
22 stating that the Summons, Complaint, and TRO Motion were served on BAC’s registered agent for  
23 service on April 9, 2010. (Hewell Decl. ¶¶ 4-5.)

24 On April 13, 2010, the Court issued an Order giving BAC the opportunity to file a response  
25 to the TRO Motion. (Doc. No. 5.) Pursuant to the Court’s Order, Plaintiff served a copy of the Order  
26 on BAC and filed a proof of service. (Doc. No. 6.) On April 19, 2010, BAC filed a response. (Doc.

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28 <sup>2</sup>According to Plaintiff, Bank of America Home Loans (“BAHL”), formally Countrywide, was  
acquired by BAC and is how a wholly-owned subsidiary of BAC.

1 No. 7.)

2 **LEGAL STANDARD**

3 Rule 65 of the Federal Rules of Civil Procedure authorizes the Court to issue a preliminary  
4 injunction or a TRO upon a proper showing. Fed. R. Civ. P. 65. A party seeking a temporary  
5 restraining order must demonstrate: (1) the likelihood of success on the merits; (2) the likelihood of  
6 irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor;  
7 and (4) that an injunction is in the public interest. See Winter v. Nat. Res. Def. Council, Inc., — U.S.  
8 —, 129 S.Ct. 365, 374 (2008).

9 **DISCUSSION**

10 Plaintiff has failed to show the requisite likelihood of success on the merits to warrant  
11 equitable relief.

12 Plaintiff seeks rescission of the loan agreement and to quiet title against BAC.<sup>3</sup> However, as  
13 BAC argues, Plaintiff has not demonstrated that he is likely to succeed, because the Complaint fails  
14 to allege tender. Under California law, “[i]n obtaining rescission or cancellation, the rule is that the  
15 complainant is required to do equity, as a condition to his obtaining relief, by restoring to the  
16 defendant everything of value which the plaintiff has received in the transaction. Fleming v. Kagan,  
17 11 Cal. Rptr. 737, 740 (Ct. App. 1961); see also Karlsen v. Am. Sav. & Loan Assn., 92 Cal. Rptr. 851,  
18 854 (Ct. App. 1971) (“A valid and viable tender of payment of the indebtedness owing is essential to  
19 an action to cancel a voidable sale under a deed of trust.”) “The rule applies although the plaintiff was  
20 induced to enter into the contract by the fraudulent representations of the defendant.” Fleming, 11  
21 Cal. Rptr. at 740. Also, “[i]t is settled in California that a mortgagor cannot quiet his title against the  
22 mortgagee without paying the debt secured.” Shimpones v. Stickney, 219 Cal. 637, 649 (1934).

23 Aside from Plaintiff’s failure to allege tender, Plaintiff is unlikely to succeed on the merits  
24 for additional reasons. First, there are unresolved issues as to the underlying alleged

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28 <sup>3</sup> Plaintiff alleges he is entitled to this relief because of misrepresentations made by  
Countrywide during the loan origination and failure to provide disclosures required by federal and  
state law.

1 misrepresentation.<sup>4</sup> Plaintiff alleges Countrywide falsely represented on the loan application that  
2 Plaintiff was a self-employed actor earning \$6,000.000 per month, and that the loan was affordable  
3 and could readily be repaid. (Compl. ¶ 66.) According to Plaintiff, he was not provided a copy of the  
4 loan application for his review and signature. (Compl. ¶ 18.) Plaintiff states that he did not recall  
5 seeing the loan application until he requested a forensic audit of the transaction. (McCallum Decl. ¶  
6 9.) However, in response, BAC submits the loan application, which is signed and dated by Plaintiff,  
7 and states a current monthly income of \$5,000.00.<sup>5</sup> (Request for Judicial Notice in Supp. of Opp'n  
8 to TRO Motion ("RJN"), Ex. B.) Based on the parties' submissions, the Court cannot determine that  
9 Plaintiff is likely to succeed in proving intentional misrepresentation or negligent misrepresentation.

10 In addition, to the extent Plaintiff bases its claims for rescission or quiet title on violation of  
11 the California Perata Mortgage Relief Act, California Civil Code § 2923.5, there are also unresolved  
12 issues. Section 2923.5(a)(2) provides that "[a] mortgagee, beneficiary, or authorized agent shall  
13 contact the borrower in person or by telephone in order to assess the borrower's financial situation and  
14 explore options for the borrower to avoid foreclosure." Cal.Civ.Code § 2923.5. Plaintiff alleges  
15 neither BAC nor Countrywide complied with the requirements of Section 2923.5(a)(2) at any time.  
16 (Compl. ¶¶ 37, 42.) However, in response, BAC submits the Notice of Default and Election to Sell  
17 Under Deed of Trust, with an attached declaration. (Declaration of Rachelle Wickware in Supp. of  
18 Def.'s Opp'n to TRO Motion ("NOD"), Ex. C.) The declarant checked the box which states: "BAC  
19 Home Loans Servicing, LP tried with due diligence to contact the borrower in accordance with  
20 California Civil Code Section 2923.5." (NOD.) Because of the parties' contradictory submissions,  
21 the Court cannot determine that Plaintiff is likely to succeed as to this claim.

22 Because Plaintiff has failed to show the requisite likelihood of success on the merits, the Court

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24 <sup>4</sup> BAC also contends that Plaintiff has not sufficiently alleged that BAC, as the parent  
25 company, is liable for the actions of its subsidiary, BAML, formally Countrywide. As BAC argues,  
26 as a general rule, a subsidiary and the parent are separate entities, and Plaintiff does not plead specific  
27 facts to support imputing BAML's or Countrywide's actions to BAC on an agency or alter ego theory.  
28 However, BAC fails to address Plaintiff's allegation that BAC acquired Countrywide's pre-acquisition  
liabilities. (Compl. ¶ 10.)

<sup>5</sup> The Court may consider "a writing referenced in a complaint but not explicitly incorporated  
therein if the complaint relies on the document and its authenticity is unquestioned." *Id.* (quoting  
*Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir.1998), *superseded by statute on other grounds as  
stated in Abrego v. Dow Chem. Co.*, 443 F.3d 676 (9th Cir. 2006)).

1 does not consider the remaining three factors.

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**CONCLUSION**

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For the foregoing reasons, the Court finds that Plaintiff has not carried his burden of showing that a temporary restraining order should be issued. Accordingly, the Court DENIES Plaintiff's motion.

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**IT IS SO ORDERED.**

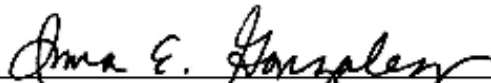
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**DATED: April 20, 2010**

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IRMA E. GONZALEZ, Chief Judge  
United States District Court

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