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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

GREG EDWARDS,  
  
vs.  
  
WACHOVIA MORTGAGE, a division of  
Wells Fargo Bank, N.A., WORLD SAVINGS  
BANK, FSB, IRVINE FUNDING  
CORPORATION, CAL-WESTERN  
RECONVEYANCE CORPORATION,  
DOES 1-10,  
  
Defendants.

CASE NO. 10CV1763 WQH (POR)  
**ORDER**

HAYES, Judge:

The matter before the Court is the Ex Parte Application for a Temporary Restraining Order Re: a Preliminary Injunction filed by Plaintiff. (ECF No. 31).

**BACKGROUND**

On August 24, 2010, this case was removed from the Superior Court for the County of San Diego. (ECF No. 1). On August 31, 2010, Defendant Wells Fargo, who was “sued erroneously” as Wachovia Mortgage and World Savings Bank, FSB, filed a Motion to Dismiss. (ECF No. 6).

On February 10, 2011, the Motion to Dismiss was granted and Plaintiff was given leave to file a First Amended Complaint. (ECF No. 16). On March 11, 2011, Plaintiff filed a First Amended Complaint. (ECF No. 18).

1 On March 28, 2011, a Joint Motion to Grant Plaintiff Leave to File Second Amended  
2 Complaint was filed (ECF No. 22) which was granted (ECF No. 23).

3 On April 7, 2011, Plaintiff filed a Second Amended Complaint. (ECF No. 24). On  
4 April 8, 2011, Defendant Wells Fargo filed a Motion to Dismiss the Second Amended  
5 Complaint. (ECF No. 26). On April 24, 2011, Plaintiff filed an Opposition. (ECF No. 29).  
6 On May 2, 2011, Defendant filed a Reply. (ECF No. 30).

7 On May 16, 2011, Plaintiff filed the Ex Parte Application for a Temporary Restraining  
8 Order Re: a Preliminary Injunction. (ECF No. 31). On May 20, 2011, Defendant Wells Fargo  
9 filed an Opposition. (ECF No. 33).

### 10 ALLEGATIONS OF THE COMPLAINT

11 Plaintiff owns a house located at 3343 Bayside Walk #B, San Diego, CA 92109 (“the  
12 Property”). (ECF No. 24 at 2 ¶ 3). In July 2007, Defendants Irvine Funding Corp. and Derek  
13 Taber offered to refinance Plaintiff’s loan to provide Plaintiff with a lower monthly mortgage  
14 payment of about \$3,000 and a fixed-interest rate. *Id.* at 3 ¶¶ 11,14-15. Plaintiff listed his  
15 accurate income on his application, but Defendants did not show him “what exact amounts  
16 were actually stated in respect to his income on the loan application.” *Id.* at 4 ¶¶ 21, 23.  
17 Plaintiff’s loan application lists his employer as “California Aerospace Manufacturing,” but  
18 Plaintiff has never been employed by “California Aerospace Manufacturing.” *Id.* at ¶ 24. The  
19 debt-to-income ratio on the loan was in excess of the industry standard of 35%, the approval  
20 of the loan was “unreasonably outside of industry standard guidelines in underwriting  
21 procedures,” and the actual finance charge “well outside tolerance limits.” *Id.* at ¶¶ 28, 30, 35.  
22 “Based on the foregoing facts, Plaintiff began having difficulty paying his mortgage.” *Id.* at  
23 ¶ 39.

24 Plaintiff requested a loan modification. Defendant Wells Fargo’s agent “informed  
25 Plaintiff that they would not review his account unless [Plaintiff] stopped making mortgage  
26 payments.” *Id.* at 5 ¶ 41. Defendant Wells Fargo’s agent “assured Plaintiff that his account  
27 would not go into a ‘default status while [his] account was in review but that he had to stop  
28 making payments’ or words to that effect.” *Id.* at ¶ 42. Plaintiff stopped making payments but

1 he has not been offered a loan modification. A Notice of Default was recorded, which “clearly  
2 misrepresent[ed] that [Defendant] had made contact as necessary under [California Civil]  
3 Code. [section] 2923.5 and provided options to avoid foreclosure.” *Id.* at ¶ 43.

4 The Complaint asserts seven claims as follows: (1) intentional misrepresentation  
5 seeking monetary damages; (2) fraudulent concealment seeking monetary damages; (3)  
6 constructive fraud seeking monetary damages; (4) breach of fiduciary duty seeking monetary  
7 damages; (5) violation of the Real Estate Settlement Procedures Act seeking monetary  
8 damages and rescission; (6) violation of California Civil Code Sections 2923.5 and 2923.6  
9 seeking declaratory relief; (7) violation of California Business and Professions Code Section  
10 17200 seeking monetary damages. *Id.* at 13-23.

#### 11 **CONTENTIONS OF THE PARTIES**

12 Plaintiff moves the Court for an Order that “Defendants are ordered to refrain from  
13 foreclosing upon and selling Plaintiff’s home until the Court can hold a hearing on whether a  
14 preliminary injunction should issue.” (ECF No. 31-1 at 11). Plaintiff contends that a Trustee’s  
15 Sale is set for May 31, 2011. Plaintiff contends that there was fraud in the origination of the  
16 loan as alleged in the Complaint. Plaintiff contends that Defendant failed to strictly comport  
17 with California’s non-judicial foreclosure requirements on the grounds that the Notice of  
18 Trustee Sale was posted on Plaintiff’s door on May 12, 2011, giving him 19 instead of the  
19 required 20 days notice and the Notice of Trustee Sale did not include a specific declaration.  
20 Plaintiff contends that he has alleged facts to support a claim of fraud in the factum, fraud in  
21 the inducement, and fraudulent concealment. Plaintiff contends that he intends to name the  
22 agent broker of Defendant Irvine Funding as a Defendant and assert a claim of fraudulent  
23 concealment against him. Plaintiff contends that his claim of promissory estoppel is now ripe  
24 because his loan modification was denied, and he intends to include the claim in an amended  
25 complaint. Plaintiff contends that he is likely to suffer irreparable injury if he loses his home,  
26 the public interest would be served by preventing a wrongful foreclosure, and the balance of  
27 hardships tips in his favor.

28 Plaintiff has submitted his declaration which states that he was promised a fixed-interest

1 rate loan, that he never worked for California Aerospace Manufacturing, that his loan  
2 application stated that he had \$100,000 in an account but he never had that amount of money,  
3 that he relied on a statement that he was getting a good loan, and that he signed the loan  
4 application on reliance that Defendants were properly representing his interests. Plaintiff  
5 states, "I defaulted on my payments in reliance on the Defendants' promise of a modification."  
6 (ECF No. 31-2 at 2). Plaintiff states that on May 6, 2011, his attorney was informed that he  
7 had been declined a loan modification. Plaintiff states: "On Thursday May 12th 2011 [he]  
8 found a Notice of Trustee's Sale posted to [his] door with a sale date of May 31st 2011 ...."  
9 *Id.* at 3. Plaintiff has submitted a copy of the Notice of Trustee's Sale dated May 11, 2011.

10 Defendant Wells Fargo contends that Plaintiff fails to state a claim of fraud in the  
11 Second Amended Complaint. Defendant contends that there was no "continuing fraud" on the  
12 grounds that Plaintiff's loan modification review was completed on May 10, 2011, and the  
13 Notice of Trustee Sale was not recorded until May 11, 2011. (ECF No. 33 at 9). Defendant  
14 contends that Plaintiff was provided the required 20 days notice. Defendant contends that a  
15 sworn declaration is not required. Defendant contends that Plaintiff's fraud claim raised in his  
16 Ex Parte Application against Defendant Irvine Funding's broker fails on the grounds that the  
17 broker was an agent of the borrower not the lender. Defendant contends that Plaintiff's claim  
18 raised in his Ex Parte Application of promissory estoppel fails on the grounds that the Second  
19 Amended Complaint does not allege that Plaintiff was promised loan modification, but instead  
20 that he was told that certain programs were only available if the loan was in default. Defendant  
21 contends that any reliance on a loan modification was not reasonable. Defendant also contends  
22 that Plaintiff cannot challenge the trustee sale without tendering the outstanding debt and he  
23 has failed to allege an ability to tender. Defendant contends that Plaintiff should be required  
24 to post a bond in the amount of \$1,091,160 which represent the outstanding debt.

25 Defendant has submitted a Request for Judicial Notice of the Notice of Trustee's Sale  
26 which was recorded on May 11, 2011. (ECF No. 33-2 at 2). The Notice of Trustee's Sale is  
27 identical to the Notice of Trustee's Sale submitted by Plaintiff except that it contains the  
28 recordation information from the San Diego County Recorder's Office and was signed by

1 “Frank Berumen, Agent.” *Id.* at 6. Defendant has also submitted a “Certificate of Posting  
2 Property and Public Place” which states that the Notice of Trustee’s Sale was placed on  
3 Plaintiff’s front door on May 11, 2011, and was placed on the bulletin board at the El Cajon  
4 County Courthouse on that same day.

### 5 DISCUSSION

6 When the nonmovant has received notice, as here, the standard for issuing a temporary  
7 restraining order is the same as that for issuing a preliminary injunction. *See Brown Jordan*  
8 *Int’l, Inc. v. Mind’s Eye Interiors, Inc.*, 236 F. Supp. 2d 1152, 1154 (D. Haw. 2002); *Franklin*  
9 *v. Scribner*, Civil No. 07-0438, 2007 WL 1491100, at \*3 (S.D. Cal., May 21, 2007); *Bronco*  
10 *Wine Co. v. U.S. Dep’t of Treasury*, 997 F. Supp. 1309, 1313 (E.D. Cal. 1996); *Lockheed*  
11 *Missile & Space Co., Inc. v. Hughes Aircraft Co.*, 887 F. Supp. 1320, 1323 (N.D. Cal. 1995).  
12 “[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be  
13 granted unless the movant, *by a clear showing*, carries the burden of persuasion.” *Mazurek v.*  
14 *Armstrong*, 520 U.S. 968, 972 (1997) (quotation omitted)(emphasis in original).

15 To obtain preliminary injunctive relief, a movant must show “that he is likely to succeed  
16 on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief,  
17 that the balance of equities tips in his favor, and that an injunction is in the public interest.”  
18 *Winter v. NRDC*, 555 U.S. 7 (2008); *see also Am. Trucking Ass’n, Inc. v. City of L.A.*, 559 F.3d  
19 1046, 1052 (9th Cir. 2009). If the moving party fails to make “minimum showing” that the  
20 moving party suffers a significant threat of irreparable injury, the Court “need not decide  
21 whether [the movant] is likely to succeed on the merits.” *Oakland Tribune, Inc. v. Chronicle*  
22 *Pub. Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985); *see also Arcamuzi v. Continental Air*  
23 *Lines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987) (citation omitted).

24 “[E]conomic injury alone does not support a finding of irreparable harm, because such  
25 injury can be remedied by a damage award.” *Rent-A-Center, Inc. v. Canyon Television &*  
26 *Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) (citing *Los Angeles Mem’l Coliseum*  
27 *Comm’n v. Nat’l Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980)); *see also Sampson v.*  
28 *Murray*, 415 U.S. 61, 90 (1974) (“Mere injuries, however substantial, in terms of money, time

1 and energy necessarily expended are not enough” to constitute irreparable injury) (quotation  
2 omitted).

3 Although Plaintiff has alleged several fraud claims, Plaintiff seeks only monetary  
4 damages as relief for the fraud claims. An injury that can be remedied by a damage award  
5 does not support a finding of irreparable harm. *See Rent-A-Center, Inc.*, 944 F.2d at 603.  
6 Plaintiff has failed to make “minimum showing” that he suffers a significant threat of  
7 irreparable injury on his fraud claims; thus, the Court “need not decide whether [the movant]  
8 is likely to succeed on the merits.” *Oakland Tribune, Inc.*, 762 F.2d at 1377; *see also*  
9 *Arcamuzi*, 819 F.2d at 937.

10 With regard to Plaintiff’s claims that Defendant failed to adhere to the requirements of  
11 non-judicial foreclosure by failing to provide Plaintiff with 20 days notice, failing to include  
12 a specific declaration, and failing to properly sign the Notice of Trustee’s Sale, Plaintiff  
13 contends: “If the foreclosure sale of Plaintiff’s property proceeds on May 31, 2011, as  
14 scheduled, Plaintiff will lose his home.” (ECF No. 31-1 at 9). The threat of loss of Plaintiff’s  
15 home is sufficient to show irreparable injury. *See Alcaraz v. Wachovia Mortg. FSB*, 592 F.  
16 Supp. 2d 1296, 1302 (E.D. Cal. 2009) (“Losing one’s home through foreclosure is an  
17 irreparable injury.”) (citing *Wrobel v. S.L. Pope & Associates*, Case No. 07CV1591 IEG  
18 (BLM), 2007 WL 2345036, at \*1 (S.D. Cal. Aug. 15, 2007); *Cronkhite v. Kemp*, 741 F. Supp.  
19 822, 825 (E.D. Wash. 1989)).

20 Under California common law, “to enjoin a foreclosure sale due to non-judicial  
21 foreclosure defects, the trustor must in good faith tender amounts to cure the default.” *Lopez*  
22 *v. Chase Home Fin., LLC*, No. CV 09-449, 2009 WL 981676, at \*8 (E.D. Cal. Apr. 9, 2009)  
23 (citing *Karlsen v. Am. Sav. & Loan Ass’n*, 15 Cal. App. 3d 112, 117 (1971) (“A valid and  
24 viable tender of payment of the indebtedness owing is essential to an action to cancel a  
25 voidable sale under a deed of trust.”)); *see also Yamamoto v. Bank of N.Y.*, 329 F.3d 1167,  
26 1171 (9th Cir. 2003) (courts have the discretion to condition rescission upon the satisfaction  
27 of the tender requirement); *Garcia v. Wachovia Mortg. Corp.*, 676 F. Supp. 2d 895, 901 (C.D.  
28 Cal. 2009) (collecting cases) (“By far, the majority of Courts to address the issue recently have


1 required that borrowers allege an *ability* to tender ....”). This rule is in recognition of the  
2 principle that “[e]quity will not interpose its remedial power in the accomplishment of what  
3 seemingly would be nothing but an idly and expensively futile act, nor will it purposely  
4 speculate in a field where there has been no proof as to what beneficial purpose may be  
5 subserved through its intervention.” *Karlsen*, 15 Cal. App. 3d at 117.

6 The Court finds that preliminary injunctive relief is not warranted in this case because  
7 Plaintiff has made no showing of an ability to tender. *See Reganit v. Kay-Co. Invs.*, Case No.  
8 2:09cv1120, 2009 U.S. Dist. LEXIS 34883, at \*\*3-4 (E.D. Cal. Apr. 24, 2009) (finding, in  
9 denying an application for a temporary restraining order to enjoin a foreclosure sale, that  
10 success was unlikely because “Plaintiff has not indicated she is able to tender...”); *see also*  
11 *Chen v. PMC Bancorp*, Case No. 09cv2704-WQH-BLM, 2010 WL 596421, at \*4 (S.D. Cal.  
12 Feb. 16, 2010) (same). Even if Plaintiff demonstrated a likelihood of success on the claim that  
13 certain non-judicial foreclosure requirements were not properly complied with, the Court  
14 concludes that Plaintiff has not demonstrated any chance of success on the merits due to the  
15 failure to show the ability to tender.

16 **CONCLUSION**

17 IT IS HEREBY ORDERED that the Ex Parte Application for a Temporary Restraining  
18 Order Re: a Preliminary Injunction filed by Plaintiff is **DENIED**. (ECF No. 31).

19 DATED: May 26, 2011

20   
21 **WILLIAM Q. HAYES**  
22 United States District Judge  
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