

1 92126. [Complaint, ¶ 7.] Prior to that mortgage contract, Plaintiff refinanced the property two or
2 three times from approximately July 2001 through April 2005. [Id.] In these refinance
3 transactions, the lenders utilized the Mortgage Electronic Registration System, Inc. (“MERS”).
4 Based upon the involvement of MERS, Plaintiff alleges there exists a cloud on title. [Complaint,
5 ¶¶ 8-9.] Plaintiff alleges Defendants were aware of the cloud on title resulting from MERS’
6 involvement in the refinance transactions prior to April 7, 2005. [Id.]

7 On September 17, 2009, through attorney John Bakhit, Plaintiff entered into a “Making
8 Home Affordable” (“MHA”) loan modification with Defendant. [Complaint, ¶ 10.] Plaintiff was
9 unaware of the cloud on title when he entered into the MHA program, and would not have entered
10 into the agreement and made monthly payments under that agreement had he known of the cloud
11 on title. [Complaint, ¶ 11.]

12 Based upon the foregoing facts, Plaintiff alleges Defendants breached their real estate
13 mortgage contract because the contract restricted the downward adjustment of his rate of interest
14 in violation of Cal. Civ. Code § 1916.7.² [Complaint, ¶¶ 14-15.] Plaintiff further alleges bad faith
15 breach of the mortgage contract, arguing he received only one copy of the “right of rescission”
16 notice required by 12 C.F.R. § 226.23. [Complaint, ¶¶ 17-19.] Plaintiff alleges fraud and requests
17 the imposition of a constructive trust, arguing Defendants were aware of the involvement of
18 MERS in the earlier refinance transactions and did not inform him of the cloud on his title.
19 [Complaint, ¶ 21.] Plaintiff alleges misrepresentation, arguing under TILA and RESPA that the
20 finance charges used calculate the loan amount is \$1,140.68 greater than the charges set forth in
21 the estimated settlement statement. [Complaint, ¶¶ 23-24.] Finally, Plaintiff alleges constructive
22 fraud and breach of fiduciary duty arising out of the negotiations between himself and JP Morgan
23 Chase Bank beginning on September 17, 2009, related to his efforts to obtain a loan modification
24 under the MHA program. [Complaint, ¶¶ 26-33.]

25 Discussion

26 Under Rule 65(b) of Federal Rules of Civil Procedure, the Court may issue a temporary

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²Plaintiff does not allege there was any instance during the loan period when the interest rate decreased such that the contract provision impacted his payments.

1 restraining order (“TRO”) if “specific facts in an affidavit or a verified complaint clearly show that
2 immediate and irreparable injury, loss, or damage will result to the movant before the adverse
3 party can be heard in opposition” and “the movant’s attorney certifies in writing any efforts made
4 to give notice and the reasons why it should not be required.” The purpose of the TRO is
5 “preserving the status quo and preventing irreparable harm just so long as necessary to hold a
6 hearing, and no longer.” Granny Goose Foods, Inc. v. Brotherhood of Teamsters Local No. 70,
7 415 U.S. 423, 439 (1974) (citations omitted). In order to obtain a TRO or a preliminary injunction,
8 the plaintiff must show that he is “likely to prevail on the merits.” Ashcroft v. Am. Civil Liberties
9 Union, 542 U.S. 656, 666 (2004).

10 Upon review, the Court concludes Plaintiff has not demonstrated a likelihood of success on
11 the merits sufficient to justify a TRO. As described above, the majority of Plaintiff’s claims are
12 state law breach of contract, misrepresentation, fraud, and breach of fiduciary duty claims.
13 Plaintiff states no separate cause of action for violation of TILA or RESPA. Instead, Plaintiff’s
14 Second Cause of Action for bad faith breach of contract includes citations to the Federal
15 Regulations requiring lenders to give notice of a right of rescission. Plaintiff also cites both TILA
16 and RESPA under his Fourth Cause of Action for misrepresentation. Unfortunately, any claims
17 Plaintiff may have had under these two statutes with regard to the April 7, 2005 mortgage contract
18 are now time barred.

19 TILA provides that the consumer has an unconditional right to change his mind and cancel
20 the transaction for any reason, or for no reason at all, provided it is done within a three-day period.
21 See 15 U.S.C. § 1635(a). Moreover, where the creditor fails to provide the consumer with proper
22 notice concerning his right of rescission, the consumer’s right to rescind is extended to three years.
23 See id. § 1635(f); 12 C.F.R. § 226.23(a)(3). Under RESPA, any claim under 12 U.S.C. §§ 2607 or
24 2608 must be brought within one year and any claim under § 2605 must be brought within three
25 years of the “date of the occurrence of the violation.” 12 U.S.C. § 2614; Lewis v. Diamond
26 Essentials, Inc., 2010 WL 3070365 (S.D. Cal. 2010). Here, the mortgage transaction occurred
27 more than five years ago, far beyond the time periods set forth in 15 U.S.C. § 1635(f) and 12
28 U.S.C. § 2614. Furthermore, to the extent Plaintiff relies upon the alleged misstatement of

1 estimated costs in his Fourth Cause of Action for misrepresentation, the remedy for a violation of
2 RESPA is monetary damages and costs, not injunctive relief. Gray v. Central Mortg. Co., 2010
3 WL 1526451 (N.D. Cal. 2010) (citing 12 U.S.C. § 2605, which provides for the payment of actual
4 damages, costs, and attorneys fees for plaintiffs alleging a violation of that section).


5 Even assuming Plaintiff's complaint adequately sets forth claims against Defendants based
6 upon the failure to consummate the restructuring of his loan under the MHA³ program, Plaintiff
7 has not demonstrated he is entitled to injunctive relief on those claims. Plaintiff has not alleged
8 facts in his complaint demonstrating Defendants owed him a fiduciary duty or that Defendants
9 were required to modify the loan. See Domnie v. Saxon Mortg., 2010 WL 2991250 (N.D. Cal.
10 2010) (dismissing plaintiff's complaint, finding plaintiff failed to state a claim based upon the
11 defendant borrower's failure to modify a loan under the Making Home Affordable Program);
12 Simmons, 2010 WL 2636220 at *5 (finding that borrowers who entered into an agreement with
13 their lender under the Making Home Affordable Plan "cannot reasonably rely on a manifested
14 intent to confer rights upon them since the Agreement does not require that [the lender] modify all
15 eligible loans.")

16 **Conclusion**

17 For the reasons explained herein, the Court concludes Plaintiff has failed to demonstrate a
18 likelihood of success on the merits warranting the issuance of a temporary restraining order.
19 Plaintiff's motion is DENIED.

20 IT IS SO ORDERED.

21 **DATED: September 15, 2010**

22 
23 **IRMA E. GONZALEZ, Chief Judge**
24 **United States District Court**

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27 ³Congress passed the Emergency Economic Stabilization Act in October of 2008, which
28 included the Making Home Affordable Plan. The Making Home Affordable Plan consists of two
parts, the Home Affordable Refinance Program and the Home Affordable Modification Program.
Simmons v. Countrywide Home Loans, Inc., 2010 WL 2636220 (S.D. Cal. 2010).