

1 court”). (ECF No. 56 at 8). On August 22, 2011, plaintiff filed an amended plan of
2 reorganization (the “POR”), which was confirmed on October 18, 2011. Id. The POR provided
3 the following with respect to Wells Fargo’s loan:

4 **CLASS TWO - HSBC BANK/WELLS FARGO HOME MORTGAGE**
5 **CLAIM AGAINST 1938 GREY EAGLE STREET** - This first mortgage shall be
6 reamortized and rescheduled based on a property value, and therefore the amount
7 due under the reamortized schedule, of \$360,000. The interest rate shall be 4.5
percent over a 30 year fixed schedule. Monthly payments of \$1,824.07 shall begin
on the effective date of the Plan and shall continue for a total term of 360 months.

8 (ECF No. 56-1 at 3–4).

9 Following confirmation of the POR, plaintiff asserts that she sent Wells Fargo monthly
10 checks for the plan-mandated mortgage payment amount of \$1,824.07, in December 2011 and
11 January 2012. (ECF No. 56-6 at 3) (plaintiff’s interrogatory responses). However, Wells Fargo
12 never accepted the payments or applied them to plaintiff’s account. Id. Wells Fargo disputes
13 that it ever received the alleged payments. (ECF No. 45 at 39) (Wells Fargo deposition
14 testimony).

15 In May 2012, after receiving notice that Wells Fargo had initiated foreclosure
16 proceedings on the property, plaintiff reached out to the law firm that represented her in her 2011
17 bankruptcy and asked them to contact Wells Fargo regarding her missing payments. (ECF No.
18 56-15). After plaintiff’s counsel made numerous attempts to make meaningful contact with
19 Wells Fargo regarding plaintiff’s payment schedule, all to no avail, Wells Fargo foreclosed on
20 the property on June 25, 2012. Id. (ECF No. 56 at 12).

21 In response, on July 10, 2012, plaintiff filed a motion with the bankruptcy court, seeking
22 to vacate the foreclosure sale on the grounds that plaintiff had attempted to make payments under
23 the POR, which were all refused by Wells Fargo. (ECF No. 56-13). Thereafter, on October 12,
24 2012, plaintiff and Wells Fargo filed a stipulated order vacating the foreclosure sale and
25 imposing sanctions against Wells Fargo to reimburse plaintiff and the purchaser at the
26 foreclosure for their attorneys’ fees and costs. (ECF No. 56-14).

27 In January 2013, plaintiff made a payment of \$21,888.84 (“January 2013 payment”) to
28 cure her 2012 deficiency. (ECF No. 45 at 4). Plaintiff also made two separate payments of

1 approximately \$2,500 in 2013, which were received and deposited by Wells Fargo. (ECF No. 45
2 at 42–43).

3 Plaintiff testified at her deposition that she did not send any payments between 2014 and
4 2018 because Wells Fargo refused to deposit her checks. (ECF No. 45 at 27). However, in lieu
5 of sending her payments, plaintiff testified that she had been storing her monthly payments in her
6 home safe. *Id.* As a result of plaintiff’s continued failure to pay her mortgage, Wells Fargo
7 initiated another foreclosure proceeding on the property in January 2016. (ECF No. 56 at 15);
8 (ECF No. 56-16). Plaintiff elected to participate in the State of Nevada Foreclosure Mediation
9 Program (“FMP”). *Id.* The FMP declined to issue a certificate of foreclosure, as Wells Fargo
10 failed to send a representative with the authority to speak on its behalf. *Id.* The FMP declined to
11 issue a certificate of foreclosure again in January of 2017, for Wells Fargo’s failure to attend the
12 mediation. (ECF No. 56-17).

13 Plaintiff initiated this action on May 28, 2017. (ECF No. 1). In her sole remaining claim
14 for breach of contract, plaintiff asserts that Wells Fargo has breached the POR by failing to
15 accept her monthly mortgage payments, continuing to initiate foreclosure proceedings on the
16 property, and reporting that plaintiff is in default of her mortgage. *Id.* Additionally, plaintiff has
17 filed the instant motion for preliminary injunction to prevent defendants from foreclosing upon
18 her home pending resolution of her breach of contract claim. (ECF No. 74).

19 **II. Legal Standard**

20 a. Summary judgment

21 The Federal Rules of Civil Procedure allow summary judgment when the pleadings,
22 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if
23 any, show that “there is no genuine dispute as to any material fact and the movant is entitled to a
24 judgment as a matter of law.” Fed. R. Civ. P. 56(a). A principal purpose of summary judgment
25 is “to isolate and dispose of factually unsupported claims.” *Celotex Corp. v. Catrett*, 477 U.S.
26 317, 323–24 (1986).

27 For purposes of summary judgment, disputed factual issues should be construed in favor
28 of the non-moving party. *Lujan v. Nat’l Wildlife Fed.*, 497 U.S. 871, 888 (1990). However, to

1 be entitled to a denial of summary judgment, the nonmoving party must “set forth specific facts
2 showing that there is a genuine issue for trial.” *Id.*

3 In determining summary judgment, a court applies a burden-shifting analysis. The
4 moving party must first satisfy its initial burden. “When the party moving for summary
5 judgment would bear the burden of proof at trial, it must come forward with evidence which
6 would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case,
7 the moving party has the initial burden of establishing the absence of a genuine issue of fact on
8 each issue material to its case.” *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d
9 474, 480 (9th Cir. 2000) (citations omitted).

10 By contrast, when the nonmoving party bears the burden of proving the claim or defense,
11 the moving party can meet its burden in two ways: (1) by presenting evidence to negate an
12 essential element of the non-moving party’s case; or (2) by demonstrating that the nonmoving
13 party failed to make a showing sufficient to establish an element essential to that party’s case on
14 which that party will bear the burden of proof at trial. See *Celotex Corp.*, 477 U.S. at 323–24. If
15 the moving party fails to meet its initial burden, summary judgment must be denied and the court
16 need not consider the nonmoving party’s evidence. See *Adickes v. S.H. Kress & Co.*, 398 U.S.
17 144, 159–60 (1970).

18 If the moving party satisfies its initial burden, the burden then shifts to the opposing party
19 to establish that a genuine issue of material fact exists. See *Matsushita Elec. Indus. Co. v. Zenith*
20 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the
21 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient
22 that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’
23 differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*,
24 809 F.2d 626, 631 (9th Cir. 1987).

25 In other words, the nonmoving party cannot avoid summary judgment by relying solely
26 on conclusory allegations that are unsupported by factual data. See *Taylor v. List*, 880 F.2d
27 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and
28 allegations of the pleadings and set forth specific facts by producing competent evidence that

1 shows a genuine issue for trial. See *Celotex*, 477 U.S. at 324.

2 At summary judgment, a court’s function is not to weigh the evidence and determine the
3 truth, but to determine whether there is a genuine issue for trial. See *Anderson v. Liberty Lobby, Inc.*,
4 477 U.S. 242, 249 (1986). The evidence of the nonmovant is “to be believed, and all
5 justifiable inferences are to be drawn in his favor.” *Id.* at 255. But if the evidence of the
6 nonmoving party is merely colorable or is not significantly probative, summary judgment may be
7 granted. See *id.* at 249–50.

8 b. Preliminary injunction

9 Under Federal Rule of Civil Procedure 65, a court may issue a temporary restraining
10 order when the moving party provides specific facts showing that immediate and irreparable
11 injury, loss, or damage will result before the adverse party's opposition to a motion for
12 preliminary injunction can be heard. Fed. R. Civ. P. 65. “Injunctive relief is an extraordinary
13 remedy and it will not be granted absent a showing of probable success on the merits and the
14 possibility of irreparable injury should it not be granted.” *Shelton v. Nat'l Collegiate Athletic*
15 *Assoc.*, 539 F.2d 1197, 1199 (9th Cir. 1976). “The purpose of a temporary restraining order is to
16 preserve the status quo before a preliminary injunction hearing may be held; its provisional
17 remedial nature is designed merely to prevent irreparable loss of rights prior to judgment.” *Estes*
18 *v. Gaston*, No. 2:12-cv-1853-JCM-VCF, 2012 U.S. Dist. LEXIS 164045, 2012 WL 5839490, at
19 *2 (D. Nev. Nov. 16, 2012); see also *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d
20 1415, 1422 (9th Cir. 1984).

21 This court must consider the following elements in determining whether to issue a
22 temporary restraining order and preliminary injunction: (1) a likelihood of success on the merits;
23 (2) likelihood of irreparable injury if preliminary relief is not granted; (3) balance of hardships;
24 and (4) advancement of the public interest. *Winter v. N.R.D.C.*, 555 U.S. 7, 20, 129 S. Ct. 365,
25 172 L. Ed. 2d 249 (2008); *Stanley v. Univ. of S. California*, 13 F.3d 1313, 1319 (9th Cir. 1994);
26 Fed. R. Civ. P. 65 (governing both temporary restraining orders and preliminary injunctions).

27 The party seeking the injunction must satisfy each element; however, “the elements of the
28 preliminary injunction test are balanced, so that a stronger showing of one element may offset a

1 weaker showing of another.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th
2 Cir. 2011). “Serious questions going to the merits and a balance of hardships that tips sharply
3 towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also
4 shows that there is a likelihood of irreparable injury and that the injunction is in the public
5 interest.” *Id.* at 1135 (internal quotations marks omitted).

6 Finally, to obtain injunctive relief, plaintiff must show it is “under threat of suffering
7 ‘injury in fact’ that is concrete and particularized; the threat must be actual and imminent, not
8 conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant;
9 and it must be likely that a favorable judicial decision will prevent or redress the injury.” *Ctr. for*
10 *Food Safety v. Vilsack*, 636 F.3d 1166, 1171 (9th Cir. 2011) (quoting *Summers v. Earth Island*
11 *Inst.*, 555 U.S. 488, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009)).

12 **III. Discussion**

13 a. *Defendants’ motion for summary judgment*

14 Defendants now move for summary judgment, arguing that plaintiff has failed to
15 establish sufficient evidence to support her sole remaining claim for breach of contract. (ECF
16 No. 45). The court agrees.

17 To prevail on a claim for breach of contract, a plaintiff must demonstrate (1) the
18 existence of a valid contract; (2) that plaintiff performed or was excused from performance; (3)
19 that the defendant breached the contract; and (4) that the plaintiff sustained damages. *Calloway*
20 *v. City of Reno*, 993 P.2d 1259, 1263 (Nev. 2001); see also *Sierra Dev. Co. v Chartwell Advisory*
21 *Group, Ltd.*, 223 F. Supp. 3d 1098, 1103 (D. Nev. 2016).

22 The contract that plaintiff seeks to enforce through this breach of contract action is her
23 POR, which the bankruptcy court confirmed on October 18, 2011. See (ECF No. 1). Plaintiff
24 attempts to show that Wells Fargo breached the POR by failing to accept her monthly mortgage
25 payments, continuing to initiate foreclosure proceedings on the property, and reporting that
26 plaintiff is in default of her mortgage. *Id.*

27 Defendants argue in their motion for summary judgment that plaintiff cannot establish
28 that she performed under the terms of her POR, and thus cannot prevail on her claim for breach

1 of contract.¹ (ECF No. 45 at 8). Indeed, it is undisputed that plaintiff has not mailed any
2 mortgage payments to Wells Fargo since 2014. (ECF No. 45 at 27) (plaintiff's deposition).
3 Plaintiff submits that her nonperformance is excused by Wells Fargo's alleged failure to accept
4 the payments she did attempt to mail prior to 2014. (ECF No. 56 at 17).

5 The court finds that the record in this case does not clearly demonstrate that either party
6 is entitled to summary judgment. The parties have set forth a convoluted history of events, each
7 blaming the other for the series of performance issues under the POR. Plaintiff has testified that
8 she sent Wells Fargo mortgage payments that it refused to cash. This testimony, while self-
9 serving, is substantiated by Wells Fargo's history of refusing to accept plaintiff's mortgage
10 payments, which resulted in the bankruptcy court's vacating the 2012 foreclosure sale and
11 imposing sanctions upon Wells Fargo. (ECF No. 56-14). On the other hand, Wells Fargo's
12 representative has testified that Wells Fargo has no record of plaintiff's alleged payments, and
13 that it would have accepted such payments had it received them. (ECF No. 63-1 at 7).

14 At summary judgment, the court is not permitted to weigh the credibility of conflicting
15 testimony and evidence. See *Anderson*, 477 U.S. at 249. Rather, the court must determine
16 whether there is a genuine dispute of material fact for trial. *Id.* Such is the case here. Indeed,
17 absent any documentary evidence tending to substantiate the parties' contradicting testimony, the
18 court finds that these issues of fact must be submitted to a jury at trial. Accordingly, Wells
19 Fargo's motion for summary judgment is denied.

20 b. Motion for preliminary injunction

21 While the court has denied Wells Fargo's motion for summary judgment, it nevertheless
22 finds that plaintiff has not demonstrated that she is entitled to a preliminary injunction in this
23 case. Plaintiff has set forth just enough evidence to preclude summary judgment in this case;
24 however, the court finds that she has fallen far short of demonstrating a "likelihood of success on
25 the merits," as is required to obtain a preliminary injunction. *Winter*, 555 U.S. at 20; *Stanley*, 13

26
27 ¹ Wells Fargo offers other arguments in favor of its motion; however, these arguments are based
28 on mischaracterizations of the factual premises of plaintiff's breach of contract claim against it.
See (ECF No. 45).

1 F.3d at 1319.

2 Moreover, the court finds that plaintiff's motion fails to adequately address the remaining
3 factors of the Winter test, all of which the court must find are satisfied prior to granting a
4 preliminary injunction. See (ECF No. 74). Plaintiff cites one Ninth Circuit case, which plaintiff
5 submits in support of her argument that "the irreparable harm, balance of equities, and public
6 interest elements are usually satisfied" in cases such as these. (ECF No. 74). This vague,
7 boilerplate statement is not sufficient to warrant granting the extraordinary relief of a preliminary
8 injunction, especially in light of plaintiff's failure to demonstrate a likelihood of success on the
9 merits.

10 c. Motion to strike

11 Wells Fargo filed a motion to strike the declaration of Phil Neuman, which plaintiff
12 submitted in support of her opposition to defendants' motion for summary judgment (ECF No.
13 64). Because the court did not rely on Phil Neuman's declaration in ruling on defendants'
14 motion for summary judgment, defendant's motion to strike is denied as moot. (ECF No. 64).

15 **IV. Conclusion**


16 Accordingly,

17 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendants' motion for
18 summary judgment (ECF No. 45) be, and the same hereby is, DENIED.

19 IT IS FURTHER ORDERED that plaintiff's motion for preliminary injunction (ECF No.
20 74) be, and the same hereby is, DENIED.

21 IT IS FURTHER ORDERED that defendants' motion to strike (ECF No. 64) be, and the
22 same hereby is, DENIED as moot.

23 DATED THIS 11th day of July 2019.

24
25 
26 JAMES C. MAHAN
27 UNITED STATES DISTRICT JUDGE
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