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6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 THOMAS J. TUTTLE,

9 Plaintiff,

10 v.

11 THE BANK OF NEW YORK MELLON,
12 as Trustee for CIT Home Equity Loan
13 Trust 2002-2, NORTHWEST TRUSTEE
SERVICES, INC., and VERICREST
FINANCIAL INC.,

14 Defendants.

CASE NO. C11-1048-RSM

ORDER DENYING MOTION FOR
TEMPORARY RESTRAINING
ORDER

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16 **I. INTRODUCTION**

17 Plaintiff, proceeding *pro se*, has filed a “Verified Complaint and Request for Declaratory
18 and Injunctive Relief.” Dkt. #1. Out an abundance of caution, the Court will construe portions
19 of the complaint relating to demands for temporary injunctive relief as a motion for a temporary
20 restraining order. For the reasons set forth below, Plaintiff’s motion is DENIED.

21 **II. BACKGROUND**

22 Plaintiff and his wife, Kathy R. Tuttle, own property in Federal Way, Washington. On
23 January 1, 2001, Mr. and Mrs. Tuttle executed a promissory note secured by a Deed of Trust, for
24 the sum of \$215,525 in favor of non-party CIT Group/Consumer Finance, Inc. Dkt. #1, Ex. B.

1 The Deed of Trust was recorded in King County, Washington. *Id.* On or about September 9,
2 2010, the Tuttle received a Notice of Default alleging that they were in default for failing to
3 make payments as required by the note and deed of trust. Dkt. #1, Ex. C. The Notice of Default
4 indicated that the Tuttle owed \$12,897.58 in arrears and costs, beginning with the 4/18/2010
5 installment. *Id.* The beneficiary of the deed of trust was listed as Defendant “The Bank of New
6 York Mellon, as Trustee for CIT Home Equity Loan Trust 2002-2, by Vericrest Financial, Inc. as
7 attorney in fact.” *Id.*

8 On or about October 25, 2010, the Tuttle sent Vericrest Financial a Qualified Written
9 Request (“QWR”) pursuant to the Real Estate Settlement Procedures Act (“RESPA”), 12
10 U.S.C. §§ 2601–2617. Dkt. #1, Ex. D. Vericrest Financial responded on October 29, 2010 by
11 providing a number of documents related to the servicing of the Tuttle’s home loan. *Id.*
12 Vericrest Financial indicated that it was not required under RESPA to provide documents
13 requested related to the creation or modification of the loan. *Id.*

14 On December 2, 2010, Northwest Trustee Services, Inc. recorded a Notice of Trustee’s
15 Sale. Dkt. #1, Ex. G. The trustee’s sale was originally scheduled for March 4, 2011, and has
16 since been postponed twice. *Id.* The current sale date is June 24, 2011, the date of this order. *Id.*

17 Plaintiff alleges a number of deficiencies with respect to the documentation supporting
18 his obligation to pay under the promissory note. The thrust of Plaintiff’s complaint is that the
19 note “no longer exists because it may have been written over/taken over and unilaterally
20 changed” by an unknown entity and that by doing so, the entity “effectively discharged the
21 Plaintiff from the obligation and took the entire obligation upon its self of its own accord.” Dkt.
22 #1, ¶¶ 9, 11. Plaintiff also alleges claims for Erroneous Default, Mistaken Beneficiary, Erroneous
23 Credit Reporting in violation of the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.*, and
24

1 | violations of RESPA. Plaintiff seeks temporary, preliminary, and permanent injunctive relief, as
2 | well as money damages.

3 | **III. DISCUSSION**

4 | Under the Federal Rules of Civil Procedure, a temporary restraining order may be granted
5 | without notice only if (1) it clearly appears from the specific facts shown by affidavit or by the
6 | verified complaint that immediate and irreparable injury, loss, or damage will result to the
7 | applicant before the adverse party or that party's attorney can be heard in opposition and (2) the
8 | applicant or applicant's attorney certifies to the court in writing the efforts, if any, which have
9 | been made to give the notice and the reasons supporting the claim that notice should not be
10 | required. Fed.R.Civ.P. 65(b)(1). The basic function of such injunctive relief is to preserve the
11 | *status quo* pending a determination of the action on the merits. *Los Angeles Memorial Coliseum*
12 | *Com'n v. National Football League*, 634 F.2d 1197, 1200 (9th Cir.1980). Plaintiff has not
13 | provided the Court with any certification regarding efforts made to give notice or reasons why
14 | notice should not be required to the other party. A temporary restraining order cannot issue
15 | without such certification.

16 | Moreover, nonjudicial foreclosures in Washington are governed by the Deed of Trust Act
17 | (“DTA”), chapter 61.24 RCW. *Cox v. Helenius*, 103 Wash.2d 383, 693 P.2d 683, 685
18 | (Wash.1985). The procedure set forth in RCW 61.24.130 for restraining a trustee's sale initiated
19 | pursuant to the DTA is “the only means by which a grantor may preclude a sale once foreclosure
20 | has begun with receipt of the notice of sale and foreclosure.” *Cox*, 693 P.2d at 686. Under the
21 | statute, a court must “require as a condition the granting of a restraining order or injunction that
22 | the applicant pay to the clerk of the court the sums that would be due on the obligation secured
23 | by the deed of trust if the deed of trust was not being foreclosed.” RCW 61.24.130(1). In
24 |

1 addition, the individual seeking the restraint must give “five days notice to the trustee of the time
2 when, place where, and the judge before whom the application for the restraining order or
3 injunction is to be made.” RCW 61.24.130(2). “No judge may act upon such application unless
4 it is accompanied by proof, evidenced by return of a sheriff, the sheriff’s deputy, or by any
5 person eighteen years of age or over who is competent to be a witness, that the notice has been
6 served on the trustee.” *Id.*

7 Plaintiff has not provided any evidence that he has complied with the provisions of the
8 DTA. He has not paid to the clerk the sums that would be due on the obligation if the deed of
9 trust was not being foreclosed. Nor has plaintiff provided the court with certification that he has
10 provided the trustee with five days notice of the instant motion for temporary restraining order.
11 Since the trustee’s sale is scheduled to occur today, it is no longer feasible for Plaintiff to comply
12 with this requirement. Accordingly, the Court cannot grant the relief requested.

13 IV. CONCLUSION

14 Having reviewed the relevant pleadings, the declarations and exhibits attached thereto,
15 and the remainder of the record, the Court hereby finds and ORDERS:

- 16 (1) Plaintiff’s motion for temporary restraining order is DENIED.
17 (2) The Clerk is directed to forward a copy of this order to Plaintiff.

18 Dated this 24th day June 2011.

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22 RICARDO S. MARTINEZ
23 UNITED STATES DISTRICT JUDGE
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