

E.3.1 Motion Papers for TRO and Preliminary Injunction Against State Non-Judicial Foreclosure

E.3.1.1 Introduction

This appendix includes a set of motion papers seeking a federal court temporary restraining order and preliminary injunction against non-judicial foreclosure of a consumer's home, on the ground of rescission under the Truth in Lending Act. The papers were prepared by Oregon attorney Hope Del Carlo when she was a staff attorney with the Oregon Law Center.

Appendix E.3.2 is another sample set of federal court TRO papers. The companion website for this book includes a third set of federal TRO papers, contributed by Brian Mildenberg, a Pennsylvania attorney, for use in a judicial foreclosure state. Practitioners should consult § 8.4.2, *supra*, before seeking federal injunctive relief against a state judicial foreclosure.

E.3.1.2 Plaintiff's Renewed Motions for Temporary Restraining Order and Preliminary Injunction

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

[plaintiff][PLAINTIFF]

Plaintiff,

[vs]

[defendant][Defendants 1–7]

Defendants

[action]Case No. _____

[action]PLAINTIFF'S MOTIONS FOR TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION

[action]Oral Argument Requested

[action]Expedited Hearing Requested

MOTION

Pursuant to FRCP 65, plaintiff hereby moves the Court for a temporary restraining order forbidding the defendants from conducting the trustee's sale of his home, the property located at [Address], [City and State] (legal description: [Address], in the [City and State]). The sale is currently scheduled for [Date and Time]. The defendants that are conducting the sale and have the ability to stop it are [Defendant 3], the trustee for the investor/owner of the loan secured by the property, and [Defendant 7], the foreclosure trustee.

If the defendants are allowed to conduct the sale of the property, they will cause immediate and irreparable injury to plaintiff in the form of the loss of the family home, and potentially, the loss of the rescission right he is attempting to assert under the Truth in Lending Act. Plaintiff's Second Amended Complaint requests, among other relief, "A court order . . . enjoining [Defendant 3] and [Defendant 7] from conducting the trustee's sale of the property."

Real property is unique and money damages are not adequate to compensate parties for its loss when it is wrongfully conveyed to another.

Plaintiff further moves the court for an order requiring defendants to show cause, if any exists, why a preliminary injunction order should not continue and remain in effect during the entire pendency of this action.

The factual and legal bases for these Motions is set forth in detail in the Plaintiff's Second Amended Complaint, Declarations of counsel and the plaintiff in support of these Motions, and the Memorandum in Support of Plaintiff's Motions for Temporary Restraining Order and Preliminary Injunction.

ATTEMPTS TO NOTIFY DEFENDANTS

In accord with FRCP 65(a)(1), plaintiff's attorney has notified the defendants of the plaintiff's claims, and plaintiff's request for emergency injunctive relief. Counsel for [Defendant 3] has been notified of this Motion and opposes it, as does defendant [Defendant 7]. [Defendant 1] and [Defendant 2] do not take a position on this Motion. Plaintiff has resolved his claims with the remaining defendants, so that they are no longer active in this litigation.

Dated this [Date].

[Attorneys for Plaintiff]

E.3.1.3 Plaintiff's Declaration in Support of Motions for Temporary Restraining Order and Preliminary Injunction

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[plaintiff][PLAINTIFF]

Plaintiff,

[vs]

[defendant][DEFENDANTS 1–7]

Defendants.

[action]Case No. _____

[action]DECLARATION OF [PLAINTIFF] IN SUPPORT OF PLAINTIFF’S MOTIONS FOR
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I, [Plaintiff], hereby declare as follows:

1. I am the plaintiff in this case. I have personal knowledge of the facts set forth in this Declaration.

2. I own the house located at [Address], which my wife and I bought originally in January 2006. This is my family’s home, and the only house I own. I am attempting to save my home, which I am at risk of losing to foreclosure because of the misrepresentations made to me by the mortgage broker who arranged the mortgages on my house.

3. When I signed the documents that obligated me to pay the loans at issue in this case, I was on a shift at work, at the shop I was working at in 2006. To the best of my knowledge, I did not receive copies of what I signed that day, including two copies of the Notices of Right to Cancel for each loan, that were required to be given to me by the Truth in Lending Act.

4. It would be hard on our family to lose our home. My wife, [Plaintiff’s Spouse], has a severe neurological condition that would make it difficult and stressful for her to move. My job is one mile from my house, so I am nearby if my wife needs me in an emergency. We have two children who live with us; one of them attends school in [City of Residence]. If we lose our house, she may have to change schools.

5. Because I am trying to save my home, I am not inclined to damage it. I am willing and able to pay up to \$800.00 per month to my attorney’s trust account, or to the court, in order to keep an injunction in place. A copy of one of my recent paystubs is attached which shows that I am employed and have sufficient income to make this payment.

6. If I eventually am able to rescind my loan, I understand that I will have to pay back the net proceeds. I am willing to do this by making payments on the existing loan under modified terms, or by making payments on a plan administered by the court or someone else, such as through a chapter 13 bankruptcy plan. I am willing and able to make my tender payment in a way that the court deems to be fair under the circumstances of my case.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Dated this [Date].

[Plaintiff]

Plaintiff

E.3.1.4 Attorney Declaration in Support of Motions for Temporary Restraining Order and Preliminary Injunction

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[plaintiff][PLAINTIFF]

Plaintiff,

[vs]

[defendant][DEFENDANTS 1–7]

Defendants

[action]Case No. _____

[action]DECLARATION OF [PLAINTIFF’S ATTORNEY] IN SUPPORT OF PLAINTIFF’S MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I, [Plaintiff’s Attorney], hereby declare as follows:

1. I am one of the attorneys for the plaintiff in this case. I have personal knowledge of the facts set forth in this Declaration.

2. The defendants plaintiff seeks to restrain by filing these motions, [Defendant 3] and [Defendant 7], are already active parties to this action. I filed a similar motion on [Date], which was subsequently withdraw when the defendants informally agreed to postpone the foreclosure. Counsel for both defendants were aware of that motion, and received copies of it through the court’s CM/ECF system. [Judge] held an in-court status conference on [Date], which I attended, along with [Counsel 1], counsel for [Defendant 7], where we discussed the possibility that this motion would be filed. I spoke with [Counsel 2], counsel for [Defendant 3], immediately after the status conference about the fact that I would file these motions if her client did not

voluntarily stop the sale. Counsel were also subsequently notified by email that plaintiff intended to file this motion, and will receive copies of the Motions and supporting documents by CM/ECF.

3. Attached as Exhibit A are copies of documents obtained from defendant [Defendant 1] in discovery.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this [Date].

Respectfully submitted,

By: [Attorneys for Plaintiff]

E.3.1.5 Memorandum in Support of Motions for Temporary Restraining Order and Preliminary Injunction

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[plaintiff][PLAINTIFF]

Plaintiff,

[vs]

[defendant][DEFENDANTS 1–7]

Defendants

[action]Case No. _____

[action]MEMORANDUM IN SUPPORT OF PLAINTIFF’S MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

[action]Oral Argument Requested

[action]Expedited Consideration Requested

I. INTRODUCTION

These Motions request preliminary injunctive relief stopping a foreclosure sale that is schedule to occur on May 16, 2011. Plaintiff has been litigating this action for approximately twenty months. The subject of this lawsuit is a predatory home mortgage refinance that occurred in September 2006, which has put the plaintiff, his wife, and children at grave risk of losing their home. He requests damages and injunctive relief, as described in his Second Amended Complaint, based on a number of violations of state and federal consumer protection laws, including rescission under the Truth in Lending Act (“TILA”).

In spite of the unresolved nature of plaintiff’s claims, the current holder of his first mortgage, defendant [Defendant 3], as trustee for [Bank] (“ the bank”), insists on pursuing non-judicial foreclosure of the property, the trustee’s sale of which is currently set for [Date and Time]. The bank and defendant [Defendant 7], the foreclosure trustee, have both been notified of the filing of this motion. [*Plaintiff Attorney*] Declaration, ¶ 2.

II. LEGAL STANDARD FOR GRANTING PRELIMINARY INJUNCTIVE RELIEF

In the Ninth Circuit, a party seeking a preliminary injunction must meet one of two tests. Under the first, a court may issue a preliminary injunction if it finds that:

- (1) the moving party will suffer irreparable injury if injunctive relief is not granted,
- (2) the moving party will probably prevail on the merits,
- (3) in balancing the equities, the non-moving party will not be harmed more than the moving party is helped by the injunction, and;
- (4) granting the injunction is in the public interest.

National Wildlife Federation, et al. v. Tom Coston, et al., 773 F.2d 1513, 1517 (9th Cir. 1985); *Stanley v. University of Southern California, et al.*, 13 F.3d 1313, 1319 (9th Cir. 1994).

Alternatively, a court may issue a preliminary injunction if the moving party demonstrates either a combination of probable success on the merits and the possibility of irreparable injury, or that serious questions are raised and the balance of hardships tips sharply in the movant’s favor. Under this last part of the alternative test, even if the balance of hardships tips decidedly in favor of the moving party, it must be shown at an irreducible minimum that there is a fair chance of success on the merits. *Id.*

III. ARGUMENT

A. PLAINTIFF IS LIKELY TO PREVAIL ON THE MERITS, OR HAS RAISED SERIOUS QUESTIONS THAT WARRANT GRANTING PRELIMINARY INJUNCTIVE RELIEF

A temporary restraining order is appropriate in this case, where plaintiff’s Second Amended Complaint and the declarations supporting this motion support his *prima facie* case

that he has a valid right to rescind the loan, and is willing to begin paying toward his tender obligation immediately.

In the fall of 2006, plaintiff refinanced his purchase money mortgages into new first and second loans. The terms of the loans were misrepresented to plaintiff, and due to the unorthodox closing of the loans (which occurred while plaintiff was on shift in a repair shop), plaintiff did not receive copies of all of the loan documents when he signed. *Second Amended Complaint*, ¶¶ 15,16; *[Plaintiff] Dec.*, ¶ 3. He has alleged that the refinance violated federal and state consumer protection laws, and involved several predatory features, most of them not at issue in the motion currently before the court.

The lender that made the loans initially, [Original Lender], has filed for Chapter 11 bankruptcy protection, following in the footsteps of many of the subprime lending giants. *Second Amended Complaint*, ¶ 11. Bank admits that it is the current assignee of plaintiff's loan. *[Defendant 3's] Answer and Affirmative Defenses to Second Amended Complaint*, ¶ 6. Under TILA, assignees are fully liable for rescission, to the same extent as the original creditor. 15 U.S.C. § 1641 (c); *Rowland v. Novus Fin. Corp.*, 949 F. Supp. 1447, 1458 (D. Hawaii 1996); *Davis v. Wells Fargo Bank*, 2010 WL 1779927 *5 (E.D.Ca.); *Fullmer v. JPMorgan Chase Bank, NA*, 2010 WL 95206 *3 n. 3 (E.D.Ca.).

The plaintiff has alleged that he did not receive a complete and accurate set of all required, material TILA disclosures when the refinance closed; specifically, that he did not receive two copies of the Notice of Right to Cancel the loan at closing. *[Plaintiff] Dec.*, ¶3.; *Second Amended Complaint*, ¶ 15,16, 31–36. The extended right of rescission is available when a creditor fails to deliver **two** properly completed Notices of the Right to Cancel to each borrower whose home is secured by the loan. 15 U.S.C. §1602(u); *Reg. Z*, § 226.23(a)(3) (“if the required notice or material disclosures are not delivered, the right to rescind shall expire three years after consummation.”) In order to be considered effective disclosure, Notices of Right to Cancel must comply with the content and delivery requirements of *Reg. Z* and the Commentary. *Hauk v. JP Morgan Chase Bank USA*, 552 F.3d 1114 (9th Cir. 2009); *Semar v. Platte Valley Fed. Sav. & Loan Assn.*, 791 F.2d 699, 704 (9th Cir. 1986) (“Technical or minor violations of TILA or *Reg. Z*, as well as major violations impose liability on the creditor and entitle the borrower to rescind.”).

In addition to the violations articulated above, the TILA disclosures created in connection with plaintiff's loan display conflicting information in the boxes that disclose the APR, finance charge and amount financed. TILA disclosures that contain different disclosures of these items were created by both [Defendant 1] and [Original Lender], and were presented to and signed by plaintiff on the same day (although plaintiff was not given copies of the documents to keep). *[Plaintiff's Attorney] Dec.*, *Ex. A*. This error renders inaccurate the numerical TILA disclosures of the finance charge, amount financed, and APR, whether they were delivered to plaintiff to keep or not, and violates TILA's requirement that disclosures be clear and conspicuous, as explained in the following paragraphs.

TILA and *Reg. Z*, its implementing regulation, require that disclosures be given “clearly and conspicuously in writing, in a form that the consumer may keep.” 12 C.F.R. § 226.17(a)(1).

The Federal Reserve Board's Official Staff Interpretation of Regulation Z states that, "[t]his standard requires that disclosures be in a reasonably understandable form. For example, while the regulation requires no mathematical progression or format, the disclosures must be presented in a way that does not obscure the relationship of the terms to each other." 12 C.F.R. 226, Supp. I, at ¶ 17(a)(1).

Several courts have held that giving a borrower additional information at closing that is inconsistent with accurate TILA disclosures violates TILA's "clear and convincing" requirement, giving rise to the extended right to rescind under TILA. This is true when conflicting TILA disclosures are given, such as in *Handy v. Anchor Mortgage Corp.*, 464 F.3d 760, 764 (7th Cir. 2006) (where a lender provided a borrower with two disclosure forms--one correct and one incorrect, the disclosure was unclear) and also when other non-disclosure loan documents are given that contain conflicting information. See, e.g., *Roberts v. Fleet Bank*, 342 F.3d 260, 267-68 (3d Cir. 2003) (in determining whether a required disclosure is clear, the court may consider other information that the lender provided to the borrower); *Shroder v. Suburban Coastal Corp.*, 729 F.2d 1371, 1381 (11th Cir. 1984) (description of loan terms in TILA disclosure statement that conflicts with description of loan terms contained in note is a TILA violation). This approach has been followed in the Ninth Circuit district courts as well. See *Amparan v. Plaza Home Mortg.*, 678 F. Supp. 2d 961; 2008 U.S. Dist. LEXIS 109148 (N.D. Cal., Dec.17, 2008), and cases cited therein, e.g., *Plascencia v. Lending 1st Mortg.*, 2008 U.S. Dist. LEXIS 87300, 18-19 (N.D. Cal. Apr. 28, 2008) (denying motion to dismiss TILA claim based on alleged lack of clarity created by statements made in promissory note compared to disclosure of APR and possibility of negative amortization); *Pham v. T.J. Fin., Inc.*, No. CV-08-275 ABC, 2008 U.S. Dist. LEXIS 72150 (C.D. Cal. Aug. 11, 2008) (similar holding).

It does not matter that some of the conflicting documentary information alleged to have been signed by [Plaintiff] was presented to him at closing but not given to him in a form that he could keep. Additional inconsistent information disrupts clear and conspicuous disclosure even if it is only presented verbally. For example, in *Vasquez Lopez v. Beneficial Or.*, 152 P.3d 940, 946 (Or. App. 2007), the court affirmed an award for attorney fees in conjunction with a TILA claim where "defendant 'made false verbal representations' by telling plaintiffs that the interest rate would be fixed at no more than 7.8 percent when in fact it was much higher and by telling them that their monthly mortgage payment included taxes and insurance. The * * * 'Truth in Lending Act [claim]' alleged that defendant 'failed to clearly and conspicuously deliver all material disclosures required by TILA' by making the same false representations[.]" *Vasquez-Lopez v. Ben. Or., Inc.*, 152 P.3d 940, 946 (Or. App. 2007). A similar result should follow when a borrower is shown inconsistent information while signing loan documents, even if that information is not taken away from the closing table.

For the reasons articulated above, the record shows that the conflicting disclosures render defective every numerical TILA disclosure that should have been delivered. *Second Amended Complaint*, ¶ 34. The documents attached as Exhibit A to the declaration of counsel evidence these violations. Therefore, the plaintiff is highly likely to successfully establish liability against the bank, or has at least raised significant questions of potential liability that warrant granting preliminary relief.

The last issue that is relevant to plaintiff's likelihood of success on the merits is plaintiff's ability to tender back the net proceeds of the loan, once liability under TILA has been proven. The ability to provide tender in a TILA rescission claim is not a question that needs to be resolved at the pleading stage of the case, or even on summary judgment. Instead, the approach taken by many of the judges in our district is that the question of tender should be deferred, where the circumstances warrant it, until a stage of the case when the equities have been fully developed and the court can consider how to fashion an equitable tender plan. 15 U.S.C. 1635(d)(4); *Semar v. Platte Valley Fed. Savings & Loan Association*, 791 F.2d 699 at 705–06 (9th Cir. 1986). The borrower's duty to tender arises only "upon the performance of the creditor's obligations." 15 USC § 1635(b).

Assuming the plaintiff has the right to rescind, the Court is empowered to use its discretion to impose a lenient tender obligation where extremely unfair, unlawful conduct has been alleged in conjunction with the origination of the loan. This approach has been favorably considered in our District. See *James v. Bridge Capital Corp., et al.*, USDC Or. No. 08-CV-397-BR, Opinion and Order filed Jan. 27, 2011, pp. 19–23, and cases cited therein (exercising the court's equitable discretion and deferring ruling on tender issue on summary judgment, in light of TILA's "purpose to protect consumers from predatory lending tactics.", citing *Coleman v. Crossroads Lending Group, Inc.*, 09-CV-0221 (PJS/FLN), 2010 WL 4676984 (D. Minn. Nov. 9, 2010)). See also *Dexter v. Homecomings Financial, Inc.*, D. Or. Case No. 3:09-CV-00493-PK, Findings and Recommendations, April 18, 2011, p.22 (finding that "even if the evidence showed that Dexter will be unable to tender the loan proceeds, this court should exercise its discretion to defer adjudication of Dexter's ability to tender until after resolution of her rescission claim, [due to] evidence suggesting that the lender acted abusively.) Here, plaintiff alleges that he was misled about the terms of the refinance by the mortgage broker who made the loans, also a defendant in this case. [*Plaintiff*] Dec., ¶ 2; *Second Amended Complaint*, ¶¶ 13–21. Coupled with the TILA disclosures, plaintiff has made serious allegations of wrongdoing on the part of those who arranged his loans. These factors need to be taken into account in fashioning the manner in which he ultimately may have to return the net proceeds of his mortgage.

Even if the court is concerned at this stage about plaintiff's ability to tender, plaintiff's Declaration allays those concerns. He has stable employment and the means and willingness to tender back the net proceeds of the loan through a modified loan, a non-interest bearing payment plan, a chapter 13 bankruptcy plan, or any other equitable means of tender ordered by the court. [*Plaintiff*] Dec., ¶ 5–6. In lieu of a bond, and in further support of plaintiff's ability to ultimately tender back the net proceeds of the loan, plaintiff's Declaration indicates his willingness to begin making payment of \$800.00 per month into court. [*Plaintiff*] Dec., ¶ 5–6. (See further discussion at Section E of this Memorandum.)

B. A RISK OF IRREPARABLE INJURY EXISTS THAT WARRANTS A TEMPORARY RESTRAINING ORDER

Circumstances exist in this case that warrant the extraordinary relief of a temporary restraining order. As a matter of black letter property law, Oregon courts have stated that damages are not adequate to compensate for the loss of a home because every piece of land, and especially a home, is unique. *Robertson v Jones*, 280 Or. 507, 571 P.2d 905 (1997).

If the bank forecloses, and plaintiff and his family are evicted, or the property is sold to a third party, plaintiff will be substantially and irreparably harmed. Assuming he is ultimately found to have validly exercised the right to rescind the loan under TILA, plaintiff is entitled to a court order affirming his valid exercise of the right to rescind, voiding the lender's liens upon the property, and enjoining [Defendant 3] and [Defendant 7], from foreclosing and allowing him to work out a permanent tender plan and keep his home. However, if the bank is allowed to go forward with the sale now, the plaintiff will not only suffer the irreparable injury of losing his home and shelter, he will also face the argument that his right to rescind the loan under TILA has been eliminated by virtue of the sale.

Although significant economic damages would also result, in the form of relocation costs, money damages would not be sufficient or adequate to cure this wrong. Eviction of the plaintiff and his wife and children from their shelter will cause them substantial difficulty and will disrupt the security they have built in their home and neighborhood. *[Plaintiff] Dec.*, ¶ 4.

C. THE BALANCE OF POTENTIAL HARMS TIPS IN FAVOR OF PLAINTIFF

A temporary restraining order or other injunctive relief would not result in any harm to defendants in this matter. Plaintiff initiated this lawsuit in order to save his home, and thus has an interest in preserving the property that overlaps with the defendants' same interest. *[Plaintiff] Dec.*, ¶ 5. If plaintiff's claim for TILA rescission is unsuccessful, defendants can begin the process of selling the property and evicting the plaintiff without incurring any additional damages. In fact, due to the sluggish state of the Portland real estate market, defendants may benefit from having the property occupied longer (and thus maintained) while they wait for market conditions to improve.

When weighing the equities for injunctive relief, the court should take into consideration the fact that even a theoretical injury to the defendants (if any were to occur) would be economic rather than personal and emotional. The risk of harm if a temporary restraining order is not granted is clearly greater for the plaintiff and his family.

D. THE PUBLIC INTEREST WEIGHS IN FAVOR OF GRANTING PRELIMINARY INJUNCTIVE RELIEF

A temporary restraining order is within the public interest in this matter. The state of Oregon has a clear interest in protecting citizens from being dispossessed of their homes in violation of Oregon law, which is evident from the language of the Oregon trust deed foreclosure procedures at ORS 86.705, *et seq.*, and the cases interpreting those statutes. The Truth in Lending Act, also, and its consumer-protective procedures strongly indicate the government's concern for promoting homeownership and deterring unfair lending practices that lead to the loss of homes.

E. PROPOSAL FOR SECURITY OFFERED BY MOVANT

Because of the circumstances presented in this motion, plaintiff requests that the Court accept his proposal that he pay \$800.00 per month into court, beginning on June 1, 2011. This amount is offered as security against any costs and damages that might be sustained by the defendants sought to be restrained, if the injunction is found to be unwarranted and defendants must begin the foreclosure process anew. The property at issue here itself serves as security for the note and trust deed held by the bank, which continues to be in force even if the trustee's sale is enjoined. Plaintiff is the owner of the property, and has an incentive to protect his home; it is not in his financial or other interests to destroy or impair the property in any way. *[Plaintiff Dec., ¶ 5.*

IV. CONCLUSION

Defendants have been unwilling to voluntarily agree with plaintiffs' requests for cooperation in preserving the status quo while the parties attempt to resolve this dispute. Plaintiff has shown his entitlement to preliminary injunctive relief, as explained in this Motion and the supporting documents on file with it. Therefore, plaintiff asks the Court for a temporary restraining order and preliminary injunction as follows:

1. Restraining defendants [Defendant 3] and [Defendant 7], their agents, employees, and any other entities under their control, from conducting a trustee's sale of the plaintiff's home on [Date], or otherwise attempting to dispossess the plaintiff of the property identified in paragraph 1 of the Motions for Temporary Restraining Order and Preliminary Injunction,
2. Restraining the defendants from rescheduling or conducting a later trustee's sale,
3. Ordering the plaintiff to pay \$800.00 per month to the clerk of the court as security, beginning on June 1, 2011, and,
4. Ordering defendants to show cause as soon as is practicable why the temporary restraining order should not persist through the duration of this action.

Respectfully submitted,

Dated this [Date].

[Attorneys for Plaintiff]