

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4 GREGORY P. DI LORETO and
5 THERESA A. DI LORETO,

6 Plaintiffs,

7 v.

8 CHASE MANHATTAN MORTGAGE
CORPORATION; SPECIALIZED LOAN
9 SERVICING, LLC; NBS DEFAULT
SERVICES, LLC; and DOES 1
through 20, inclusive,

10 Defendants.

Case No. 17-cv-05187-CW

ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS, GRANTING MOTION FOR
PRELIMINARY INJUNCTION, AND
CONTINUING CASE MANAGEMENT
CONFERENCE

(Dkt. Nos. 10, 16, 16-1, 17-
4, 20)

11
12 Defendants Specialized Loan Servicing LLC (SLS) and Chase
13 Manhattan Mortgage Corporation (Chase) (collectively, Defendants)
14 move to dismiss the complaint filed by Plaintiffs Gregory and
15 Theresa Di Loreto.¹ Plaintiffs move for a preliminary injunction
16 against foreclosure of the real property at issue in this case.
17 Each side opposes the other's motion and each has filed a reply.
18 After considering the parties' submissions and oral argument, the
19 Court grants in part and denies in part Defendants' motion to
20 dismiss and grants Plaintiffs' motion for a preliminary
21 injunction.

22 The Court also grants the unopposed requests for judicial
23

24
25 ¹ At the hearing, Plaintiffs represented that prior to
26 removal, the third named Defendant, NBS Default Services (NBS),
27 filed a disclaimer of interest in the action and consent to be
28 bound by any nonmonetary judgment issued. The Court ordered
Plaintiffs to file in this Court proof of service on NBS and the
declaration of nonmonetary status or other disclaimer filed by
NBS. Plaintiffs shall file these documents in this Court within
seven days after the date of this order.

1 notice filed by all parties, and takes judicial notice of the
2 uncontested public documents submitted. The Court does not,
3 however, take judicial notice of the disputed inferences the
4 parties seek to draw from the documents or the parties'
5 respective characterization of those documents. Nor does the
6 Court make any finding about whether other evidence exists
7 regarding the disputed issues.

8 BACKGROUND

9 Plaintiffs own real property in Contra Costa County,
10 California. In December 2004, Plaintiffs obtained a \$1,350,000
11 refinance loan from originating lender Chase. They secured the
12 loan by a deed of trust. Around the same time, Plaintiffs also
13 obtained a \$500,000 home equity line of credit from non-party JP
14 Morgan Chase Bank N.A. (JPMorgan). Shortly thereafter,
15 Plaintiffs transferred title to the subject property into their
16 family trust. In October 2015, the trust then transferred the
17 title back to Plaintiffs and Gregory Di Loreto transferred his
18 interest to Theresa Di Loreto. Oct. 11, 2017 Supp. Decl. of
19 Gregory Di Loreto ¶ 2 & Ex. A.

20 In November 2015, Chase assigned its beneficial interest in
21 the refinance loan to non-party U.S. Bank National Association,
22 as Trustee for J.P. Morgan Mortgage Trust 2006-A3 (U.S. Bank).

23 "Approximately two years" before Plaintiffs filed this
24 action, Plaintiffs submitted an application for loan modification
25 to Chase and/or SLS. Complaint ¶ 11. Defendants requested
26 additional information, which Plaintiffs attempted to provide.
27 The application was still pending in July 2017, when SLS advised
28 Plaintiffs in writing that their loan modification application

1 was "currently under review." Complaint ¶ 14 & Ex. E. SLS
2 informed Plaintiffs that they needed to submit a "Request for
3 Mortgage Assistance Form" but also listed numerous other required
4 documents that it deemed "complete" with no further action
5 needed. Id.

6 Meanwhile, in January 2017, NBS caused to be recorded a
7 notice of default and election to sell the subject property. In
8 July 2017, NBS caused to be recorded a notice of Trustee's Sale.

9 On August 1, 2017, Plaintiffs filed the complaint in this
10 action in Contra Costa Superior Court. They enumerated separate
11 claims seeking: (1) declaratory relief against all Defendants;
12 (2) injunctive relief against Defendants Chase and SLS;
13 (3) accounting against Defendants Chase and SLS; (4) relief under
14 the federal Fair Debt Collection Practices Act (FDCPA), 15 U.S.C.
15 § 1692, against Defendant SLS; and (5) relief under the
16 California Homeowner Bill of Rights (HBOR), Cal. Civil Code
17 §§ 2923.6, 2924.12, 2924.18, against Defendants Chase and SLS.
18 On August 10, 2017, the Superior Court entered an order to show
19 cause why the court should not issue a preliminary injunction
20 prohibiting the sale of the subject property as well as a
21 temporary restraining order prohibiting sale of the property
22 pending the hearing on the order to show cause. On September 8,
23 2017, Defendants Chase and SLS filed a notice of removal.

24 LEGAL STANDARD

25 I. Motion to Dismiss

26 A complaint must contain a "short and plain statement of the
27 claim showing that the pleader is entitled to relief." Fed. R.
28 Civ. P. 8(a). The plaintiff must proffer "enough facts to state

1 a claim to relief that is plausible on its face.” Ashcroft v.
2 Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v.
3 Twombly, 550 U.S. 544, 570 (2007)). On a motion under Rule
4 12(b)(6) for failure to state a claim, dismissal is appropriate
5 only when the complaint does not give the defendant fair notice
6 of a legally cognizable claim and the grounds on which it rests.
7 Twombly, 550 U.S. at 555. A claim is facially plausible “when
8 the plaintiff pleads factual content that allows the court to
9 draw the reasonable inference that the defendant is liable for
10 the misconduct alleged.” Iqbal, 556 U.S. at 678.

11 In considering whether the complaint is sufficient to state
12 a claim, the court will take all material allegations as true and
13 construe them in the light most favorable to the plaintiff.
14 Metzler Inv. GMBH v. Corinthian Colleges, Inc., 540 F.3d 1049,
15 1061 (9th Cir. 2008). The court’s review is limited to the face
16 of the complaint, materials incorporated into the complaint by
17 reference, and facts of which the court may take judicial notice.
18 Id. at 1061. However, the court need not accept legal
19 conclusions, including threadbare “recitals of the elements of a
20 cause of action, supported by mere conclusory statements.”
21 Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 555).

22 When granting a motion to dismiss, the court is generally
23 required to grant the plaintiff leave to amend, even if no
24 request to amend the pleading was made, unless amendment would be
25 futile. Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv.
26 Inc., 911 F.2d 242, 246-47 (9th Cir. 1990). In determining
27 whether amendment would be futile, the court examines whether the
28 complaint could be amended to cure the defect requiring dismissal

1 "without contradicting any of the allegations of [the] original
2 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th
3 Cir. 1990). The court's discretion to deny leave to amend is
4 "particularly broad" where the court has previously granted
5 leave. Chodos v. West Publ'g Co., 292 F.3d 992, 1003 (9th Cir.
6 2002).

7 II. Standing

8 In order to satisfy Article III's standing requirements,
9 plaintiffs must allege that: (1) they suffered an "injury in
10 fact" that is (a) concrete and particularized and (b) actual or
11 imminent, not conjectural or hypothetical; (2) that the injury is
12 fairly traceable to the defendants' challenged conduct; and
13 (3) that it is likely, as opposed to merely speculative, that the
14 injury will be redressed by a favorable decision. Lujan v.
15 Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

16 The Court evaluates a motion to dismiss for lack of Article
17 III standing under Federal Rule of Civil Procedure 12(b)(1). See
18 Maya v. Centex Corp., 658 F.3d 1060, 1067 (9th Cir. 2011); White
19 v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000). The threshold
20 question of whether plaintiffs have standing is distinct from,
21 and precedes, analysis of the merits of their claims. Maya,
22 658 F.3d at 1068. A "plaintiff must demonstrate standing for
23 each claim he seeks to press and for each form of relief that is
24 sought." Davis v. Fed. Election Comm'n, 554 U.S. 724, 734 (2008)
25 (internal quotations omitted).

26 A motion to dismiss under Rule 12(b)(1) may be "facial or
27 factual." White, 227 F.3d at 1242. Where a defendant makes a
28 facial attack on jurisdiction, the court takes the factual

1 allegations of the complaint as true, and construes them in the
2 light most favorable to the plaintiffs. Leite v. Crane Co.,
3 749 F.3d 1117, 1121 (9th Cir. 2014). Where a defendant makes a
4 factual attack, however, the court “need not presume the
5 truthfulness of the plaintiffs’ allegations” and, where the
6 jurisdictional question is separable from the merits of the case,
7 may resolve factual disputes without converting the motion into
8 one for summary judgment. White, 227 F.3d at 1242; see also
9 Thornhill Publ’n Co. v. Gen. Tel. & Elecs. Corp., 594 F.2d 730,
10 733 (9th Cir. 1979). The plaintiff then “bears the burden of
11 proving by a preponderance of the evidence that each of the
12 requirements for subject-matter jurisdiction has been met.”
13 Leite, 749 F.3d at 1121.

14 III. Motion for Preliminary Injunction

15 “A plaintiff seeking a preliminary injunction must establish
16 that he is likely to succeed on the merits, that he is likely to
17 suffer irreparable harm in the absence of preliminary relief,
18 that the balance of equities tips in his favor, and that an
19 injunction is in the public interest.” Winter v. Natural Res.
20 Def. Council, Inc., 555 U.S. 7, 20 (2008). Alternatively, “a
21 preliminary injunction could issue where the likelihood of
22 success is such that serious questions going to the merits were
23 raised and the balance of hardships tips sharply in plaintiff’s
24 favor,” so long as the plaintiff demonstrates irreparable harm
25 and shows that the injunction is in the public interest.
26 Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131
27 (9th Cir. 2011) (citation and internal quotation and editing
28 marks omitted).

1 A court employs a sliding scale when considering a
2 plaintiff's showing as to the likelihood of success on the merits
3 and the likelihood of irreparable harm. Id. "Under this
4 approach, the elements of the preliminary injunction test are
5 balanced, so that a stronger showing of one element may offset a
6 weaker showing of another." Id.

7 DISCUSSION

8 I. Motion to Dismiss

9 A. Untimely Opposition

10 Defendants contend that the Court should disregard
11 Plaintiffs' untimely opposition brief and grant the motion to
12 dismiss as unopposed. Defendants' motion to dismiss was filed on
13 September 26, 2017. Plaintiffs' opposition was due on October
14 10, 2017. On October 17, 2017, Defendants filed a notice that
15 Plaintiffs had not opposed the motion. That same day, Plaintiffs
16 filed a "Memorandum of Points and Authorities in Opposition to
17 Defendant's Motion to Strike," which, despite the title,
18 generally appears to respond to Defendants' motion to dismiss.
19 Plaintiffs' memorandum was not accompanied by a request for leave
20 to file an untimely opposition.

21 In the exercise of discretion, the Court construes
22 Plaintiffs' memorandum as requesting leave to file an untimely
23 opposition, and grants the motion. The Court warns Plaintiffs,
24 however, that in the future they must seek leave to alter
25 deadlines set by the Court.

26 B. Standing

27 Defendants move to dismiss Plaintiffs' claims for lack of
28 standing because Plaintiffs bring this action in their individual

1 capacities even though public records reflect that shortly after
2 the origination of the refinance loan, Plaintiffs conveyed their
3 interest in the property to their family trust. See Defendants'
4 RJN Ex. 3. Defendants argue that Plaintiffs must bring the
5 action in their capacities as trustees of the family trust, not
6 in their individual capacities. In response, Plaintiffs contend
7 that their family trust conveyed the property back to them in
8 their individual capacities in October 2015. Oct. 11, 2017 Supp.
9 Decl. of Gregory Di Loreto ¶ 2 & Ex. A.² The Interspousal Grant
10 Deed submitted by Plaintiffs in support of this argument,
11 however, indicates not only that the trust conveyed its interest
12 to Plaintiffs but also that Gregory Di Loreto conveyed his
13 interest to Theresa Di Loreto as her "sole and separate
14 property." Id. Ex. A. At the hearing, Plaintiff's counsel
15 argued that the property is now the couple's community property,
16 but did not cite any law supporting this proposition in light of
17 the language of the Interspousal Grant Deed.

18 It appears on the present record that only Plaintiff Theresa
19 Di Loreto has standing. The Court will dismiss Plaintiff Gregory
20 Di Loreto's claims, but will permit Mr. Di Loreto leave to amend
21 to plead facts and set forth legal authority supporting his claim
22 of standing.

23
24 ² The Court rejects Defendants' argument that it should not
25 consider the "extrinsic evidence" submitted by Plaintiffs.
26 First, as discussed, the Court may consider such evidence in
27 connection with Defendants' standing argument. Second, the Court
28 may properly consider matters subject to judicial notice without
converting the motion to dismiss into a motion for summary
judgment. Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th
Cir. 2001). Third, the Court may consider the material submitted
by Plaintiffs to determine whether Defendants' request for
judicial notice is subject to reasonable dispute. Id. at 689-90.

1 C. Claims Against Chase

2 Defendants allege that the four claims against Chase must be
3 dismissed because Chase assigned its beneficial interest in
4 Plaintiffs' loan to U.S. Bank in 2015, before SLS commenced the
5 foreclosure proceedings against Plaintiffs that allegedly violate
6 HBOR. Plaintiffs respond that Chase was their originating
7 lender, and had no authority to assign away its interest in
8 Plaintiffs' loan in November 2015, because in July 2015, it had
9 surrendered its right to transact intrastate business in the
10 State of California. Oct. 10, 2017 Plaintiffs' RJN. However,
11 Plaintiffs offer no legal authority in support of their
12 contention that Chase's July 2015 Certificate of Surrender of
13 Right to Transact Intrastate Business renders void its assignment
14 of its interest in Plaintiffs' loan to U.S. Bank. Defendants,
15 however, have provided authority that similar transfers may be
16 "within the permissible scope for an unregistered foreign
17 corporation." Baidoobonso-Iam v. Bank of Am. (Home Loans),
18 No. 10-cv-09171-CAS, 2011 WL 5870065, at *4 (C.D. Cal. Nov. 22,
19 2011).

20 Moreover, although Plaintiffs plead facts supporting their
21 contention that Chase was the originating lender for their loan,
22 they do not plead any facts in support of a claim that Chase
23 participated in the 2017 foreclosure of Plaintiffs' real
24 property. Plaintiffs plead group allegations, such as that
25 "Defendants, and each of them have improperly recorded the Notice
26 of Default." Complaint ¶ 17. These allegations are
27 contradicted, however, by the notice of default document attached
28 to the complaint and incorporated into it by reference. See

1 Complaint Ex. C (notice of default that does not name Chase); see
2 also Complaint ¶¶ 7-8 (alleging that NBS caused to be recorded
3 the notice of default and election to sell and notice of
4 trustee's sale and that SLS as nominal beneficiary elected to
5 sell, but not alleging any involvement by Chase). The Court will
6 dismiss all claims against Chase, but will grant Plaintiffs leave
7 to amend to plead facts supporting their claims against Chase.
8 If Plaintiffs cannot presently plead facts supporting a claim
9 against Chase, they may seek leave to amend if they obtain such
10 facts during discovery.

11 In addition, as discussed at the hearing, the parties must
12 meet and confer in an attempt to reach a stipulation regarding
13 whether Chase retains any interest in Plaintiffs' loan.

14 D. Dual Tracking Claim

15 In their fifth cause of action, Plaintiffs claim that
16 Defendants violated the HBOR's prohibition on "dual-tracking,"
17 the practice of a mortgage servicer continuing to pursue
18 foreclosure of a property while a complete loan modification
19 application is pending. See Cal. Civ. Code ¶ 2923.6(c).
20 Defendants argue that this claim should be dismissed because
21 Plaintiffs do not adequately allege that they had submitted a
22 complete loan modification application at the time that
23 Defendants proceeded with the foreclosure process.

24 Section 2923.6(c) protects a borrower who "submits a
25 complete application for a first lien loan modification." Cal.
26 Civ. Code § 2923.6(c). The statute provides, "For purposes of
27 this section, an application shall be deemed 'complete' when a
28 borrower has supplied the mortgage servicer with all documents

1 required by the mortgage servicer within the reasonable
2 timeframes specified by the mortgage servicer." Cal. Civ. Code
3 § 2923.6(h).

4 In the complaint, Plaintiffs allege:

5 11. Approximately two years ago, Plaintiffs made and
6 submitted a completed application for a loan
7 modification of the loan referred to in Paragraph 5
8 herein. At the time of the initial submittal,
9 Plaintiffs provided each and every document and all
10 information initially required of them by CHASE for
11 consideration of such loan application. At the time of
12 the submittal, the loan modification fully complied
13 with all of the requirements of Defendants CHASE and
14 SLS and was complete.

15 12. Thereafter, and over the course of the next two
16 years, Defendants CHASE and SLS made repeated demands
17 for further and additional information in support of
18 Plaintiffs [sic] previously completed application,
19 often requesting information and documentation that had
20 been previously provided. . . .

21 Complaint ¶¶ 11-12; see also id. ¶¶ 13-16.

22 Defendants argue that Plaintiffs do not adequately allege
23 that their loan modification application was complete because
24 they also allege that Defendants later informed them that they
25 needed additional documents to complete their application. In
26 other words, Defendants contend that the determination of when an
27 application is complete does not depend on when the borrower
28 submits all the documentation required in advance by the
servicer, but rather, is left to the servicer's "after-the-fact
discretion." Mace v. Ocwen Loan Servicing, LLC, 252 F. Supp. 3d
941, 946 (N.D. Cal. 2017).

Section 2923.6(h) does not support Defendants' position.
"The statutory language does not permit a mortgage servicer to
create a moving target so borrowers have no way of knowing
whether a loan modification application is complete until the

1 mortgage servicer tells them so.” Id. Rather, “the clear
2 implication of section 2923.6(h) is that a mortgage servicer must
3 tell the borrowers in advance what documents are required and
4 specify ‘reasonable timeframes’ for the submission of those
5 documents.” Id. (quoting Cal. Civ. Code § 2923.6(h)). If the
6 “borrower has supplied the mortgage servicer with all documents
7 required by the mortgage servicer within the reasonable
8 timeframes specified by the mortgage servicer,” then the
9 application is complete. Cal. Civ. Code § 2923.6(h). Plaintiffs
10 have clearly alleged that they had provided all documents
11 required by Defendants for a complete application both at the
12 time of their initial submittal and at the time when Defendants
13 commenced foreclosure proceedings, with sufficient detail to
14 state a claim.

15 Although Defendants do not raise this issue, the Court notes
16 that Plaintiffs do not allege in the complaint that the subject
17 real property is their home, much less that it is their principal
18 residence. California Civil Code section 2924.15 provides that
19 section 2923.6 of the HBOR, the dual-tracking provision at issue
20 here, applies “only to first lien mortgages or deeds of trust
21 that are secured by owner-occupied residential real property
22 containing no more than four dwelling units.” Cal. Civ. Code
23 § 2924.15. Further, “[f]or these purposes, ‘owner-occupied’
24 means that the property is the principal residence of the
25 borrower and is security for a loan made for personal, family, or
26 household purposes.” Id. Courts have held that a plaintiff must
27 allege that the subject property is owner-occupied as a principal
28 residence to state a HBOR claim. See, e.g., Mulato v. Wells

1 Fargo Bank, N.A., 76 F. Supp. 3d 929, 957 (N.D. Cal. 2014)
2 (citing cases). At the hearing, Plaintiffs' counsel represented
3 that the real property is Plaintiffs' principal residence. In
4 any amended Complaint, Plaintiffs must allege whether the real
5 property was, at all relevant times, their principal residence.

6 Defendants further contend that Plaintiffs' dual-tracking
7 claim fails because they seek monetary damages, but no
8 foreclosure has yet occurred. Under the HBOR, a prevailing
9 borrower may claim injunctive relief before a trustee's sale has
10 occurred, but may only claim monetary damages after a trustee's
11 sale has occurred. Cal. Civ. Code § 2923.12(a). Because
12 Plaintiffs have not alleged that a trustee's deed upon sale has
13 been recorded, they have not stated a claim for damages. They
14 have, however, stated a claim for injunctive relief, which they
15 request in their prayer for relief.

16 E. Fair Debt Collection Practices Act

17 Plaintiffs' fourth cause of action seeks relief against SLS
18 under the FDCPA. 15 U.S.C. § 1692. Plaintiffs do not oppose
19 Defendants' motion to dismiss this claim, and agree to dismiss it
20 voluntarily. Accordingly, the Court will dismiss this claim.

21 In their opposition to the motion to dismiss, Plaintiffs
22 contend that because the FDCPA claim was the only basis for
23 Defendants' removal of this action, the Court should decline to
24 exercise supplemental jurisdiction and remand this case to
25 California Superior Court. See 28 U.S.C. §1367. In reply,
26 Defendants do not address this contention.

27 The Court declines to remand based on Plaintiffs' request in
28 the opposition brief. However, this denial is without prejudice

1 to Plaintiffs promptly filing a motion to remand.

2 F. Accounting

3 Defendants move to dismiss Plaintiffs' cause of action for
4 an accounting, which claims that the "amount of money Plaintiff
5 [sic] owes to defendants CHASE and SLS, or, alternatively, the
6 amount of money owed to Plaintiffs by defendants CHASE and SLS is
7 unknown to Plaintiffs and cannot be determined without an
8 accounting." Complaint ¶ 26. Defendants argue that Plaintiffs
9 plead no facts in support of this claim. In particular,
10 Defendants contend that Plaintiffs do not plead that Defendants
11 owe Plaintiffs any money, that the parties are in a fiduciary
12 relationship or that Plaintiffs cannot make the accounting by
13 reference to their own records. Plaintiffs respond that Chase
14 recently acknowledged an unspecified error in the servicing of
15 Plaintiffs' loan, which makes an accounting necessary. Oct. 17,
16 2017 Gregory Di Loreto Declaration in Opposition ¶ 3 & Ex. B.
17 The facts concerning this error are not plead in the complaint,
18 however. The Court will dismiss Plaintiffs' claim for an
19 accounting, but will grant Plaintiffs leave to amend to plead
20 facts supporting all elements of this claim.

21 G. Declaratory and Injunctive Relief

22 Defendants move to dismiss Plaintiffs' claims for
23 declaratory and injunctive relief because they seek only remedies
24 and do not constitute independent theories of recovery.
25 Plaintiffs do not oppose dismissal of their free-standing claim
26 for injunctive relief, but respond that a claim for declaratory
27 relief is a recognized cause of action under California law.
28 However, because this action is redundant of Plaintiffs' "fully

1 matured" HBOR claims, it is unnecessary as a separate cause of
2 action. Jolley v. Chase Home Fin., LLC, 213 Cal. App. 4th 872,
3 909-10 (2013). Plaintiffs may pursue declaratory and injunctive
4 relief as remedies, not independent claims.

5 II. Motion for Preliminary Injunction

6 A. Winter Factors

7 Plaintiffs move for a preliminary injunction against the
8 foreclosure sale of their property pending this action. The
9 first factor to be considered is Plaintiffs' likelihood of
10 success on the merits. The Court has found that Plaintiffs have
11 stated a dual-tracking claim under the HBOR. In ruling on the
12 motion for preliminary injunction, the Court also considers the
13 additional evidence submitted by the parties.

14 The Court finds that Plaintiff Theresa Di Loreto has made a
15 strong showing of likelihood of success on the merits of her HBOR
16 claim against Defendant SLS. On the disputed question of the
17 completeness of Plaintiffs' application for a loan modification,
18 Plaintiffs have submitted declarations and evidence that the
19 application was complete when submitted, and that SLS initiated
20 foreclosure proceedings while the application was pending. See
21 Cal. Civil Code § 2923.6(c)(1)-(3).³ Defendants contend that

22
23 ³ This section provides:

24 (c) If a borrower submits a complete application
25 for a first lien loan modification offered by, or
26 through, the borrower's mortgage servicer, a mortgage
27 servicer, mortgagee, trustee, beneficiary, or
28 authorized agent shall not record a notice of default
or notice of sale, or conduct a trustee's sale, while
the complete first lien loan modification application
is pending. A mortgage servicer, mortgagee, trustee,
beneficiary, or authorized agent shall not record a
notice of default or notice of sale or conduct a

1 Plaintiffs never completed their loan modification application,
2 and that documents submitted earlier became "stale" while
3 Plaintiffs delayed in submitting missing documents. However,
4 although Defendants submit evidence regarding demands for
5 additional information from Plaintiffs, see, e.g., October 3,
6 2017, Decl. of Cynthia Wallace, they do not submit any evidence
7 of what information they required Plaintiffs to submit in their
8 initial loan modification application, how Plaintiffs knew what
9 was required, or what information Plaintiffs submitted in their
10 initial application.

11 Plaintiffs, on the other hand, submit Mr. Di Loreto's
12 declaration, under penalty of perjury, that at the time
13 Plaintiffs submitted their initial loan modification some time
14 during or before August 2015, they "provided each and every
15 document and all information initially required by CHASE for
16 consideration" of the application and that the application "fully
17 complied with all the requirements of Defendants [sic] CHASE and
18 was complete." September 19, 2017 Decl. of Gregory Di Loreto
19 ¶ 8. The Court overrules Defendants' objections to this
20 declaration. Mr. Di Loreto's testimony regarding the submission
21

22 trustee's sale until any of the following occurs:

23 (1) The mortgage servicer makes a written
24 determination that the borrower is not eligible for a
25 first lien loan modification, and any appeal period
26 pursuant to subdivision (d) has expired.

27 (2) The borrower does not accept an offered first
28 lien loan modification within 14 days of the offer.

(3) The borrower accepts a written first lien loan
modification, but defaults on, or otherwise breaches
the borrower's obligations under, the first lien loan
modification.

1 of the loan modification application is within his personal
2 knowledge. Defendants' evidence that they later demanded
3 additional information in support of the application is not
4 sufficient to overcome Plaintiffs' showing that their application
5 was legally complete because, when filed, it included all the
6 documents previously required by Defendants.⁴

7 Defendants contend that Plaintiffs' earlier applications
8 were denied as incomplete via a telephone call due to Plaintiffs'
9 failure to provide requested documents. Wallace Decl. ¶ 12. But
10 Defendants do not contend that they satisfied any of the
11 conditions of California Civil Code section 2923.6(c)(1)-(3),
12 such as a compliant written denial, before conducting foreclosure
13 proceedings. Accordingly, the first Winter factor weighs heavily
14 in favor of a preliminary injunction.

15 With regard to the remaining factors to be considered, a
16 foreclosure sale would impose immediate and irreparable injury
17 because Plaintiffs would lose unique real property and would be
18 deprived of a meaningful opportunity to be considered for loss
19 mitigation options. See Mace v. Ocwen Loan Servicing, LLC,
20 No. 16-cv-05840 CW, 2016 WL 9275406, at *4 (N.D. Cal. Dec. 29,
21 2016). The balance of the harms tips sharply in their favor and
22 they have shown that there is strong public interest in
23

24 ⁴ At the hearing, Plaintiffs relied heavily on a July 6, 2017
25 letter from SLS providing a list of "complete" items of
26 information, with "no action needed," provided by Plaintiffs to
27 SLS. This letter, in and of itself, is not persuasive, however,
28 because Plaintiffs mention only the list of complete documents
and ignore the text at the beginning of the letter stating "Core
Documents Needed: Request for Mortgage Assistance Form." On the
other hand, the fact that SLS required an additional form in July
2017 also does not mean that Plaintiffs' initial application was
not complete when filed.

1 preventing unlawful foreclosures. Id. Plaintiffs have satisfied
2 their burden of showing that the Winter factors are met.

3 B. Bond

4 Defendants request that the Court either impose a bond in
5 the amount of \$200,000.00 to cover reasonable rental value, lost
6 interest, attorneys' fees and depreciation in the value of the
7 property, or require Plaintiffs to submit monthly bond payments
8 to Defendants in the amount of the monthly payment on the loan
9 for the pendency of the injunction. Plaintiffs respond that the
10 value of the property is sufficiently higher than the loan amount
11 that no further security should be required and that they should
12 not be required to pay any arrearages.

13 In lieu of posting a bond, the Court orders Plaintiffs to
14 make monthly payments of \$6500.00 per month. The parties
15 represented at the hearing that this amount is approximately the
16 same as the monthly payments on the loan. The monthly payments
17 shall be sent by Plaintiffs to their counsel who shall forward
18 them to Defendants' counsel by the first business day of each
19 month, beginning December 1, 2017.

20 CONCLUSION

21 The Court grants the unopposed requests for judicial notice
22 filed by all parties (Docket Nos. 16-1, 17-4, 20).

23 Within seven days after the date of this order, Plaintiffs
24 shall file in this Court proof of service on NBS, or waiver of
25 service by NBS, and any declaration of nonmonetary status or
26 other disclaimer filed by NBS.

27 The Court GRANTS IN PART AND DENIES IN PART Defendants'
28 motion to dismiss (Docket No. 16). The Court DISMISSES all

1 claims brought by Gregory Di Loreto; dismisses all claims against
2 Chase; dismisses Plaintiffs' separate claims for an accounting
3 and for declaratory and injunctive relief; and dismisses
4 Plaintiffs' fourth cause of action under the FDCPA. The Court
5 DENIES the motion to dismiss Theresa Di Loreto's HBOR claim for
6 injunctive and declaratory relief against SLS.

7 The Court ORDERS the parties to meet and confer in an
8 attempt to reach a stipulation regarding whether Chase retains
9 any interest in Plaintiffs' loan.

10 The Court GRANTS Plaintiffs' motion for a preliminary
11 injunction (Docket No. 10). Defendants Chase and SLS, their
12 officers, agents, employees, partners, successors,
13 representatives and all other persons acting in concert or
14 participating with them, are hereby restrained and enjoined from
15 taking any further action in pursuit of a foreclosure sale of
16 Plaintiffs' real property located at 1155 Redfern Court, Contra
17 Costa County, California, Contra Costa County Assessor's Parcel
18 Number 121-190-019-4. This preliminary injunction is conditioned
19 upon Plaintiffs making monthly payments of \$6500.00 per month.
20 If Defendants believe that Plaintiffs have breached this
21 condition, they must first ask the Court to lift the injunction
22 before taking any action related to the property.

23 The Court having dismissed Plaintiffs' FDCPA claim,
24 Plaintiffs may file a properly-noticed motion to remand. The
25 filing of a motion to remand shall not, however, stay any other
26 deadline absent further Court order.

27 The Court grants leave to amend the dismissed claims. Any
28 amended complaint is due within twenty-one days after the date of

1 this order, and must be accompanied by a redline version showing
2 all changes made in the amended complaint.

3 In any amended Complaint, Plaintiffs must allege whether the
4 subject real property was, at all relevant times, their principal
5 residence.

6 All Defendants that have been served shall respond to any
7 amended complaint within twenty-one days after it is filed. If
8 Defendants file a further motion to dismiss, the motion should be
9 noticed for February 27, 2018, at 2:30 p.m.

10 The Court CONTINUES the initial case management conference
11 currently scheduled for December 19, 2017 to February 27, 2018 at
12 2:30 p.m. The joint case management statement is now due
13 February 20, 2018.

14 If Plaintiffs do not timely file an amended complaint,
15 Defendants' answer to Theresa Di Loreto's HBOR claim in the
16 current complaint shall be due within forty-two days after the
17 date of this order.

18 IT IS SO ORDERED.

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20 Dated: November 20, 2017



CLAUDIA WILKEN
United States District Judge

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