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NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Michael Edward Haskins and Barbara Ann Haskins,
Plaintiffs,
vs.
Brian T. Moynihan, *et al.*,
Defendants.

No. CV-10-1000-PHX-GMS

ORDER

Pending before the Court are Plaintiffs’ Motion for Leave to File a Second Amended Complaint (Doc. 51) and Plaintiffs’ Motion for Temporary Restraining Order (“TRO”) (Doc. 50). For the following reasons, the Court grants the Motion for leave to amend and denies the Motion for temporary restraining order.

This case arises out of a lending transaction, in which Plaintiffs sought to finance their home with a note and deed of trust. Plaintiffs generally allege that various entities failed to provide accurate disclosures as required by Arizona and federal law, engaged in a series of fraudulent acts related to the securitization of their mortgage, and attempted to foreclose on the deed of trust without proper authorization. On July 6, 2010, the Court entered an Order denying Plaintiffs’ previous motion for temporary restraining order and preliminary injunction because Plaintiffs had failed to show a likelihood of success on the merits. (Doc. 44). In the same Order, the Court dismissed claims against several Defendants and granted

1 a motion to quash service with respect to the remaining Defendants. The Court also denied
2 Plaintiffs' previous motion to amend for failure to comply with Local Rule of Civil
3 Procedure 15.1. Therefore, after the July 6 Order, Plaintiffs had no claims asserted against
4 any served Defendants.

5 On August 10, Plaintiffs filed a new Motion for leave to amend, along with their
6 Motion for a temporary restraining order. The new proposed amended complaint brings
7 claims against multiple individuals, who are officers of various corporations alleged to have
8 been involved in Plaintiffs' lending transaction.

9 DISCUSSION

10 As a preliminary matter, the Court grants Plaintiffs' Motion for leave to amend
11 because amendment should be freely granted and because the July 6 Order granted dismissal
12 of Plaintiffs' claims without prejudice. Nonetheless, granting amendment does not render
13 Plaintiffs' request for a TRO proper.

14 A preliminary injunction or TRO generally may issue "only on notice to the adverse
15 party." Fed. R. Civ. P. 65(a). The Court may issue a TRO without notice only if:

- 16 (A) specific facts in an affidavit or a verified complaint clearly show
17 that immediate and irreparable injury, loss, or damage will result to the movant
18 before the adverse party can be heard in opposition; and
19 (B) the movant's attorney certifies in writing any efforts made to give
20 notice and the reasons why it should not be required.

21 Fed. R. Civ. P. 65(b)(1). Here, it appears that Plaintiffs have failed to provide notice to any
22 of the Defendants or their attorneys. Plaintiffs also do not include an affidavit or a verified
23 complaint that shows how immediate and irreparable injury would result before Plaintiffs had
24 a chance to serve the Defendants. Plaintiffs also do not certify in writing any efforts to give
25 notice or reasons why notice should not be required. Accordingly, the Court denies the
26 Motion for TRO.

27 Even if Plaintiffs had provided proper notice, a TRO would still be improper. "The
28 standard for issuing a [temporary restraining order] is the same as that for issuing a
preliminary injunction." *Phillips v. Fremont Inv. & Loan*, 2009 WL 4898259, at *1 (D. Ariz.
Dec. 11, 2009) (citing *Brown Jordan Int'l, Inc. v. The Mind's Eye Interiors, Inc.*, 236 F.

1 Supp. 2d 1152, 1154 (D. Haw. 2007)). Therefore, a district court may grant a preliminary
2 injunction or temporary restraining order under two sets of circumstances. *Guzman v.*
3 *Shewry*, 552 F.3d 941, 948 (9th Cir. 2009). Under the traditional criteria, a plaintiff must
4 demonstrate: “(1) a strong likelihood of success on the merits, (2) the possibility of
5 irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships
6 favoring the plaintiff, and (4) advancement of the public interest (in certain cases).” *Id.*
7 (internal quotations omitted). Alternatively, a temporary restraining order or preliminary
8 injunction is appropriate “if the plaintiff demonstrates *either* a combination of probable
9 success on the merits and the possibility of irreparable injury *or* that serious questions are
10 raised and the balance of the hardships tips sharply in [its] favor.” *Id.* (internal quotations
11 omitted). While a showing of serious questions on the merits is a lower standard than
12 showing probable success, Plaintiffs nonetheless must demonstrate at least a “fair chance of
13 success.” *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987).

14 Plaintiffs’ Motion for TRO does not explain how they have either demonstrated
15 probable success on the merits or raised serious questions on the merits. Without
16 commenting on the underlying issue of whether some entities may have failed to provide
17 proper disclosures, engaged in various fraudulent schemes, and/or initiated wrongful
18 foreclosure proceedings, the face of the second amended complaint indicates that Plaintiffs
19 are unlikely to demonstrate liability against any of the Defendants.¹ Unlike the initial
20 complaint, which sued several corporate entities that were allegedly involved in Plaintiffs’
21 loan transaction, the second amended complaint sues only the *individual* officers of these
22 corporations. A corporation, however, is a “separate legal entity from its shareholders,
23

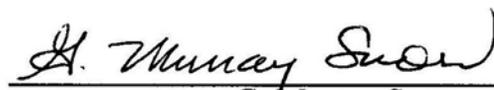
24 ¹ While the Court need not decide whether Plaintiffs’ claims would have merit if
25 properly pled against the corporations and individuals involved in the loan transaction, the
26 Court is likely to follow the reasoning explained in the July 6 Order with respect to at least
27 three types of arguments: (1) any argument that Arizona law requires presentation of the
28 original note before commencing foreclosure proceedings, (2) any claims based solely on the
fact that Plaintiffs’ note was “securitized,” and (3) any assertion that certain entities were not
the true source of the money loaned to Plaintiffs for their mortgage. (Doc. 44).

1 directors, and officers.” *State v. Angelo*, 166 Ariz. 24, 27, 800 P.2d 11, 14 (Ct. App. 1990).
2 “Corporate officers and directors are generally shielded from liability for acts done in good
3 faith on behalf of the corporation” unless they commit “intentionally harmful or fraudulent
4 conduct,” *see Albers v. Edelson Technology Partners L.P.*, 201 Ariz. 47, 52, 31 P.3d 821,
5 826 (Ct. App. 2001), or unless the corporation is the “alter ego or business conduit of a
6 person, and . . . to observe the corporation would work an injustice[.]” *Ize Nantan Bagowa,*
7 *Ltd. v. Scalia*, 118 Ariz. 439, 442, 577 P.2d 725, 728 (Ct. App. 1978). Plaintiffs allege no
8 facts and make no argument suggesting that the individual Defendants are liable for any acts
9 allegedly committed by the various corporations mentioned in the second amended
10 complaint. To the contrary, the second amended complaint focuses almost entirely on the
11 actions of the corporations, which are not listed as Defendants. Accordingly, Plaintiffs have
12 not demonstrated a probable success on the merits, nor have Plaintiffs raised serious
13 questions regarding the merits. Should Plaintiffs seek leave to file a third amended
14 complaint, it would have to demonstrate the bases for liability against all entities and
15 individuals named as defendants.

16 **IT IS THEREFORE ORDERED** that Plaintiffs’ Motion for Leave to File a Second
17 Amended Complaint (Doc. 51) is **GRANTED**. Plaintiffs are directed to file and serve the
18 amended pleading on all parties under Rule 5 of the Federal Rules of Civil Procedure **within**
19 **14 days** of the date of this Order.

20 **IT IS FURTHER ORDERED** that Plaintiffs’ Motion for Temporary Restraining
21 Order (“TRO”) (Doc. 50) is **DENIED** without prejudice to Plaintiffs’ filing of a motion for
22 leave to file a third amended complaint in compliance with this Order.

23 DATED this 12th day of August, 2010.

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26 G. Murray Snow
United States District Judge
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