



1 records of San Joaquin County, California where MERS consequently designated itself as both  
2 “beneficiary” and “lienholder” in said records. (ECF No. 1 at ¶ 10.)

3 On or about August 8, 2008, a “Notice of Default” was recorded in San Joaquin County,  
4 stating that Plaintiffs were “in default” with regard to the subject loan, and that MERS is the  
5 “beneficiary” of the subject Deed of Trust. (ECF No. 1 at ¶ 11.)

6 On or about January 30, 2009, an “Assignment of Deed of Trust” was recorded in San  
7 Joaquin County, in which instrument MERS purported to “assign” all its rights, title and interest  
8 regarding the subject loan to HSBC Bank USA, N.A., as Trustee on behalf of Ace Securities  
9 Corp. Home Loan Trust and for the Registered Holders of Ace Securities Corp, Home Equity  
10 Loan Trust Series 2006-H3, Asset Backed Pass-through Certificates whose address in in care of  
11 Ocwen Loan Servicing, LLC. (ECF No. 1 at ¶ 12.)

12 On or about January 30, 2009, a “Notice of Trustee’s Sale” was recorded in San Joaquin  
13 County, which document states that the purported “beneficiary,” Mortgage Electronic  
14 Registration Systems, Inc., under said Deed of Trust, recorded February 9, 2006 as Instrument  
15 No. 2006-032215, “will proceed to auction on a specified date, the property commonly known as,  
16 736 North Golden Avenue, Lodi, California 95240, if the defaulted amount is not brought  
17 current.” (ECF No. 1 at ¶ 13.)

18 On or about April 22, 2014, a “Notice of Substitution of Trustee” was recorded in San  
19 Joaquin County stating that “the undersigned, HSBC Bank USA, N.A., as Trustee on behalf of  
20 Ace Securities Corp. Home Equity Loan Trust and for the registered holders of Ace Securities  
21 Corp. Home Equity Loan Trust, Series 2006-HE3, Asset Backed Pass-through Certificates, by its  
22 Servicer Ocwen Loan Servicing, LLC, is the present Beneficiary under the certain Deed of Trust  
23 dated 02/01/2006 and recorded 02/09/2006 as Instrument No. 2006-032215 of the official records  
24 of San Joaquin County, California, and does so substitute Western Progressive LLC as Trustee.”  
25 (ECF No. 1 at ¶ 14.)

26 On or about May 1, 2014, a second “Notice of Default and Election to Sell under Deed of  
27 Trust” was recorded in San Joaquin, which states “by reason thereof, the present beneficiary  
28 under such Deed of Trust, has executed and delivered to said duly appointed Trustee, a written

1 Declaration of Default and Demand for same, and has deposited with said duly appointed Trustee,  
2 such Deed of trust and all documents evidencing obligations secured thereby, and has declared  
3 and does hereby elect to cause the trust property to be sold to satisfy the obligations secured  
4 thereby.” (ECF No. 1 at ¶ 15.)

5 On or about May 12, 2014, Plaintiffs received a “Debt Validation Notice” from Defendant  
6 Western Progressive, LLC (“Western Progressive”) which contained the aforementioned Default  
7 recorded on May 2014. (ECF No. 1 at ¶ 16.) In response, Plaintiffs submitted a “Qualified  
8 Written Request” to Western Progressive, LLC on or about September 13, 2014. (ECF No. 1 at ¶  
9 17.) During the period of September 30 to October 6, 2014, Plaintiffs received numerous  
10 responses to the request from Ocwen which included: a general response letter dated September  
11 30, 2014, a Payment History dated September 30, 2014, and a Payoff Quote dated October 3,  
12 2014. (ECF No. 1 at ¶ 18.)

13 Plaintiffs seek to retain possession of their home and allege claims for Intentional  
14 Misrepresentation, Unjust Enrichment, Civil Conspiracy, Wrongful Foreclosure, Quiet Title, as  
15 well as federal claims relating to the Truth in Lending Act (“TILA”) and the Real Estate  
16 Settlement Procedures Act (“RESPA”). In doing so, Plaintiffs have asked this Court to enter a  
17 temporary restraining order to prevent the pending sale of their home.

## 18 II. LEGAL STANDARD

19 Plaintiff seeks a temporary restraining order. A temporary restraining order is an  
20 extraordinary and temporary “fix” that the court may issue without notice to the adverse party if,  
21 in an affidavit or verified complaint, the movant “clearly show[s] that immediate and irreparable  
22 injury, loss, or damage will result to the movant before the adverse party can be heard in  
23 opposition.” Fed. R. Civ. P. 65(b)(1)(A). The purpose of a temporary restraining order is to  
24 preserve the status quo pending a fuller hearing. *See* Fed. R. Civ. P. 65. It is the practice of this  
25 district to construe a motion for temporary restraining order as a motion for preliminary  
26 injunction. Local Rule 231(a); *see also Aiello v. One West Bank*, No. 2:10-cv-0227-GEB-EFB,  
27 2010 WL 406092 at \*1 (E.D. Cal. Jan. 29, 2010) (“Temporary restraining orders are governed by  
28 the same standard applicable to preliminary injunctions.”) (internal quotation and citations

1 omitted).

2 Therefore, the party requesting injunctive relief must show that “he is likely to succeed on  
3 the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the  
4 balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v.*  
5 *Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). Although pro se pleadings are liberally  
6 construed, *see Haines v. Kerner*, 404 U.S. 519, 520–21 (1972), they are not immune from the  
7 Federal Rules of Civil Procedure. *See Ghazali v. Moran*, 46 F.3d 52, 53–54 (9th Cir. 1995). The  
8 propriety of a request for injunctive relief hinges on a significant threat of irreparable injury that  
9 must be imminent in nature. *Caribbean Marine Serv. Co. v. Baldrige*, 844 F.2d 668, 674 (9th  
10 Cir. 1988).

11 Alternatively, under the so-called sliding scale approach, as long as the plaintiff  
12 demonstrates the requisite likelihood of irreparable harm and can show that an injunction is in the  
13 public interest, a preliminary injunction may issue so long as serious questions going to the merits  
14 of the case are raised and the balance of hardships tips sharply in plaintiff’s favor. *Alliance for*  
15 *Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–36 (9th Cir. 2011) (concluding that the “serious  
16 questions” version of the sliding scale test for preliminary injunctions remains viable after  
17 *Winter*).

### 18 **III. ANALYSIS**

19 Because the weight of the Court’s decision depends on Plaintiffs’ likelihood of success,  
20 the Court addresses the merits of Plaintiffs’ case first.

21 At the outset, the Court notes that Plaintiffs are not arguing that the foreclosure is  
22 wrongful because they are current on their mortgage payments. Instead, Plaintiffs argue that the  
23 foreclosure is wrongful due to illegalities involving whether the assignment of the beneficial  
24 interest in the Deed of Trust to Defendant HSBC Bank (“HSBC Bank”) as trustee of the  
25 securitized trust is valid. Specifically, Plaintiffs assert that Defendant MERS who recorded the  
26 “Assignment of Deed of Trust”: (1) was acting as a nominee for the originator of the loan and  
27 could not do so because the originator (Encore Credit Corporation) had ceased to exist two years  
28 prior to the assignment; (2) MERS attempted an assignment to the securitized trust long after the

1 last legally allowable date it could accept the transfer of any loans, according to the trust’s own  
2 agreements and representations it made to investors and any regulating state and/or federal  
3 government agencies; and (3) the attempted transfer bypassed other entities that were required to  
4 purchase and then sell the loan, thus creating a defect in the title. (ECF No. 10 at 8–9.) The  
5 Court addresses each of these contentions separately below.

6 As to Plaintiffs’ first assertion, that MERS could not act as nominee, Plaintiffs cite to  
7 cases in both Texas and Nebraska in support of this contention. However, the Court finds that the  
8 case law in California is inapposite. In *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal. App.  
9 4th 1149, 1151 (2011) (“Gomes”), the court explained that:

10 MERS is a private corporation that administers the MERS System,  
11 a national electronic registry that tracks the transfer of ownership  
12 interests and servicing rights in mortgage loans. Through the MERS  
13 System, MERS becomes the mortgagee of record for participating  
14 members through assignment of the members’ interests to MERS.  
15 MERS is listed as the grantee in the official records maintained at  
16 county register of deeds offices. The lenders retain the promissory  
17 notes, as well as the servicing rights to the mortgages. The lenders  
18 can then sell these interests to investors without having to record  
19 the transaction in the public record. MERS is compensated for its  
20 services through fees charged to participating MERS members.

21 *Id.* at 1151 (internal quotations omitted). Thus, the Forth District Court of Appeals rejected the  
22 argument presented by Plaintiffs. *Id.*; *see also Jenkins v. JPMorgan Chase Bank, N.A.* 216 Cal.  
23 App. 4th 497, 511 (2013) (“California courts have refused to delay the nonjudicial foreclosure  
24 process by allowing trustor-debtors to pursue preemptive judicial actions to challenge the right,  
25 power, and authority of a foreclosing ‘beneficiary’ or beneficiary’s ‘agent’ to initiate and pursue  
26 foreclosure.”). Moreover, the Court notes that the Deed of Trust signed by Plaintiffs and attached  
27 to their Complaint states: “[t]he beneficiary of this Security Instrument is MERS (solely as  
28 nominee for Lender and Lender’s successors and assigns) and the successors and assigns of  
MERS.” (ECF No. 1 at 108.) Plaintiffs have not presented any arguments that would support  
that MERS was divested of its ability to transfer such interest to the Lender’s (Encore Credit  
Corporation) successors and assigns. Thus, the Court is unconvinced that Plaintiffs can succeed  
on this ground.

1 As to Plaintiffs' second argument concerning defects in the securitization of the loan, this  
2 argument is also a nonstarter. The majority of California courts have found that arguments  
3 dealing with the legality of a loan's securitization will not support a claim in which a Plaintiff in  
4 default challenges the validity of a foreclosure. *See Patel v. Mortgage Elec. Registration Sys.,*  
5 *Inc.*, No. 4:13-CV-1874 KAW, 2013 WL 4029277, at \*4 (N.D. Cal. Aug. 6, 2013) (finding that  
6 the transfer of the Note and the beneficial interest through the securitization process does not  
7 constitute a sale of the Property, and therefore, there is no requirement that it be recorded);  
8 *McGough v. Wells Fargo Bank, N.A.*, No. C12-0050 TEH, 2012 WL 2277931, at \*4 (N.D. Cal.  
9 June 18, 2012) ("Theories that securitization undermines the lender's right to foreclose on a  
10 property have been rejected by the courts."); *Sami v. Wells Fargo Bank, et al.*, No. 12-00108,  
11 2012 WL 967051 at \*4-\*6 (N.D. Cal. March 21, 2012) (rejecting arguments that securitization  
12 invalidates standing to foreclose and finding that a borrower has no standing to challenge  
13 violations of the terms of a Pooling and Service Agreement ("PSA") as improper securitization);  
14 *Wadhwa v. Aurora Loan Servs., LLC*, No. 11-1784, 2011 WL 2681483 at \*4 (E.D. Cal. July 8,  
15 2011) (rejecting argument that securitization, and assignment of the note to a REMIC invalidates  
16 interests other than the borrower's); *Hafiz v. Greenpoint Mortgage Funding, Inc.*, 652 F. Supp. 2d  
17 1039, 1043 (N.D. Cal. 2009) (rejecting argument that defendants' power of sale is lost by  
18 assignment of original promissory note to a trust pool); *Benham v. Aurora Loan Servs.*, No. 09-  
19 2059, 2009 WL 2880232, at \*3 (N.D. Cal. Sept. 1, 2009) (rejecting same argument regarding  
20 trust pool); *Reyes v. GMAC Mortgage LLC*, No. 11-0100, 2011 WL 1322775, at \*2 (D. Nev. Apr.  
21 5, 2011) ("securitization of a loan does not in fact alter or affect the legal beneficiary's standing  
22 to enforce the deed of trust"); *see also Lane v. Vitek Real Estate Indus. Group*, 713 F. Supp. 2d  
23 1092, 1099 (E.D. Cal. 2010) (noting that "[t]here is no stated requirement in California's non-  
24 judicial foreclosure scheme that requires a beneficial interest in the Note to foreclose. Rather, the  
25 statute broadly allows a trustee, mortgagee, beneficiary, or any of their agents to initiate non-  
26 judicial foreclosure").

27 Finally, as to Plaintiffs' third contention—that the attempted transfer bypassed other  
28 entities that were required to purchase then sell the loan and thus created a defect in the title—this

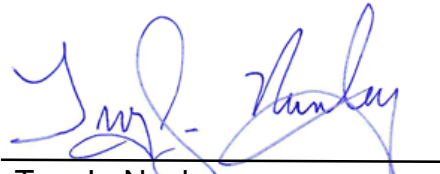
1 argument has also been rejected by most California courts. As stated above, the *Gomes* court  
2 found that the MERS System allows lenders to sell these interests to investors without having to  
3 record the transaction in the public record. *Gomes*, 192 Cal. App. 4th at 1151. Thus, this  
4 argument also fails, and Plaintiffs have not shown a likelihood of success. Because Plaintiffs  
5 cannot meet the first prong, the Court need not address the rest of the prongs. *See Winter*, 555  
6 U.S. at 20; *Alliance for the Wild Rockies*, 632 F.3d at 1135 (*Winter* requires a plaintiff to make a  
7 showing on all on the *Winter* factors).

8 **IV. CONCLUSION**

9 For the reasons stated above, the Court hereby DENIES Plaintiffs' application for a  
10 temporary restraining order (ECF No. 10).

11 IT IS SO ORDERED.

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13 Date: December 1, 2014

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17 Troy L. Nunley  
18 United States District Judge  
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