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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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FRANK E. FREEMAN and ARLENE F.  
FREEMAN,

Plaintiffs,

v.

SELECT PORTFOLIO SERVICING,  
INC.; NATIONAL DEFAULT SERVICING  
CORPORATION; THE BANK OF NEW  
YORK MELLON FKA THE BANK OF NEW  
YORK AS TRUSTEE FOR THE  
CERTIFICATEHOLDERS OF THE CWABS,  
INC., ASSET-BACKED CERTIFICATES,  
SERIES 2005-IM-3; and DOES 1-20,

Defendants.

CIV. No. 2:15-1359 WBS EFB

MEMORANDUM AND ORDER RE:  
MOTION FOR TEMPORARY  
RESTRAINING ORDER

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On Friday, June 26, 2015, plaintiffs Frank Freeman and  
Arlene Freeman filed an ex parte application for a temporary  
restraining order enjoining defendants Select Portfolio  
Servicing, Inc. ("SPS"), National Default Servicing Corporation  
("National Default"), and the Bank of New York Mellon ("BNY

1 Mellon") from foreclosing on plaintiffs' residence at 410 Trotter  
2 Drive, Vallejo, California 94591 (the "residence"). The  
3 foreclosure sale is scheduled for Monday, June 29, 2015, at 2:30  
4 p.m. (Pls.' Mot. ¶ 6 (Docket No. 2).) Defendants submitted an  
5 opposition to plaintiffs' motion. (Defs.' Opp'n (Docket No. 5).)  
6 The court heard arguments at 10:30 a.m. on June 29, 2015.

7 I. Factual Background

8 Plaintiffs' case arises from a loan of \$535,000 they  
9 received from Finance America, LLC to purchase the residence.  
10 (Compl. ¶ 14 (Docket No. 1).) The loan was secured by a  
11 Promissory Note and Deed of Trust that were recorded in Solano  
12 County, California, on August 8, 2005. (See Compl. Ex. A.) The  
13 original Deed of Trust listed plaintiffs as the "borrowers,"  
14 Finance America, LLC as the "Lender," Julia L. Greenfield, Esq.  
15 as "Trustee," and the Mortgage Electronic Registration System  
16 ("MERS") as "beneficiary" under the security agreement as nominee  
17 for the lender. (Compl. ¶ 15, Ex. A.)

18 Finance America, LLC allegedly ceased operations on or  
19 before August 7, 2006. (Compl. ¶ 5.) Sometime in 2009,  
20 defendants say plaintiffs stopped making payments on their  
21 mortgage. (Defs.' Opp'n at 2.) Then-loan servicer BAC Home  
22 Loans Servicing, LP issued a Notice of Intent to Accelerate on  
23 February 10, 2010. (Decl. of Joseph A. Aguilar ("Aguilar Decl.")  
24 Ex. A (Docket No. 5-1).) The loan was later transferred to SPS  
25 for loan servicing. (See Aguilar Decl. Ex. A.)

26 Two years later, MERS assigned a beneficial interest in  
27 the Deed of Trust along with the Promissory Note to BNY Mellon by  
28 an Assignment of Deed of Trust recorded in Solano County on March

1 29, 2012. (Compl. Ex. B.) MERS also executed a Corporate  
2 Assignment of Trust, recorded March 30, 2012, conveying its  
3 beneficial interest in the Deed of Trust and Promissory Note to  
4 BNY Mellon. (Compl. Ex. C.)

5 On January 2, 2015, a Substitution of Trustee was  
6 recorded appointing National Default as trustee. (Compl. Ex. E.)  
7 National Default then filed a Notice of Default on January 7,  
8 2015. (Compl. Ex. D.) It stated that plaintiffs were behind on  
9 their payments in an amount of \$264,415.65 and warned that their  
10 residence may be sold at foreclosure approximately ninety days  
11 from the date the notice was recorded. (Id.)

12 National Default attached a "California Declaration of  
13 Compliance" to the Notice of Default. (Id.) That declaration  
14 contained several options with checkboxes to one side. The first  
15 checkbox is marked, next to a statement certifying that, on July  
16 14, 2014, contact was made with the borrower to assess the  
17 borrower's financial situation and explore options to avoid  
18 foreclosure as required by California Civil Code section  
19 2923.55(b)(2). (Id.)

20 A foreclosure sale for the residence was originally  
21 scheduled for June 3, 2015, but that sale was cancelled. (Pls.'  
22 Mot. ¶ 6.) On the day of the original sale, plaintiffs  
23 apparently sought an ex parte TRO in Solano County Superior  
24 Court.<sup>1</sup> (See Aguilar Decl. ¶ 3, Ex. B.) The state court issued

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25 <sup>1</sup> Plaintiffs' motion does not mention the state court  
26 case or offer it as an explanation for why the original sale date  
27 was cancelled. However, plaintiffs did file a Notice of Related  
28 Cases with their Complaint, informing the court that they had  
previously filed a related case in Solano County Superior Court,  
Case No. FCS045431. (Docket No. 1-4.)

1 a TRO, conditioned on the four requirements that: (1) plaintiffs  
2 make one month's mortgage payment by June 16, 2015; (2)  
3 plaintiffs pay all taxes current on their property by June 16,  
4 2015; (3) plaintiffs reimburse defendants for all taxes and  
5 insurance that defendants have advanced on the property by June  
6 16, 2015; and (4) plaintiff post a \$5,000 bond by June 10, 2015.  
7 (Id.) The court then set a hearing for a preliminary junction on  
8 June 17, 2015. (Id.) Instead of proceeding to that hearing,  
9 plaintiffs dismissed the lawsuit without prejudice on June 9,  
10 2015. (Id. Ex. C.)

11 Defendants rescheduled the foreclosure sale for June  
12 29, 2015. Plaintiffs say they never received written notice of  
13 this new sale date. (See Pls.' Mot. ¶ 6.) They do not explain  
14 how they learned of the new date.

15 On June 25, 2015, plaintiffs filed a Complaint in this  
16 court asserting five claims: (1) cancellation of instruments  
17 under California Civil Code section 3412; (2) violation of  
18 California Business and Professions Code sections 17200 et seq.;  
19 (3) violation of California Code section 2924(a)(6) and (f)(3);  
20 (4) violation of California Civil Code sections 2923.5 and  
21 2923.55; and (5) breach of contract. (Compl. ¶¶ 31-83.)  
22 Plaintiffs' chief argument alleges that MERS's assignments to BNY  
23 Mellon are invalid because Finance America, LLC could not have  
24 assigned a beneficial interest in the Deed of Trust after going  
25 defunct in 2006. (Compl. ¶¶ 20-22.) As a result, plaintiffs  
26 allege that National Default was not validly substituted as  
27 trustee. (Compl. ¶¶ 23-30.) The Notice of Default filed by  
28 National Default and the resulting foreclosure proceedings are

1 therefore also allegedly invalid. (Id. ¶¶ 27-29.)

2 Plaintiffs further allege they were not contacted by  
3 SPS on July 14, 2014--contrary to the declaration attached to the  
4 Notice of Default--and that, in any event, California law  
5 requires a more substantial affirmation of contact than the  
6 attached "boilerplate" declaration. (Id. ¶¶ 28, 30, 64.)  
7 Defendants also allegedly failed to designate a single point of  
8 contract, as required by California law. (Id. ¶ 65.)

9 II. Standard for Temporary Restraining Order

10 Federal Rule of Civil Procedure 65 authorizes courts to  
11 issue preliminary injunctions and temporary restraining orders.  
12 These orders preserve the relative positions of the parties--the  
13 status quo--until a full trial on the merits can be conducted.  
14 See Univ. of Texas v. Camenisch, 451 U.S. 390, 395 (1981).

15 A temporary restraining order generally requires the  
16 same showing as that required for a preliminary injunction.  
17 Stuhlbarg Int'l Sales Co. v. John D. Brush & Co., 240 F.3d 832,  
18 839 (9th Cir. 2001). A plaintiff must establish that (1) it is  
19 likely to succeed on the merits; (2) it is likely to suffer  
20 irreparable harm in the absence of preliminary relief; (3) the  
21 balance of equities tips in its favor; and (4) an injunction is  
22 in the public interest. Winter v. National Res. Def. Counsel,  
23 Inc., 555 U.S. 7, 20 (2008); Perfect 10, Inc. v. Google, Inc.,  
24 653 F.3d 976, 979 (9th Cir. 2011).

25 III. Discussion

26 A. Undue Delay

27 Before turning to the merits of plaintiffs' motion, the  
28 court finds that denial is warranted on procedural grounds alone.

1 Eastern District Local Rule 231(b) states:

2 In considering a motion for a temporary restraining  
3 order, the Court will consider whether the applicant  
4 could have sought relief by motion for preliminary  
5 injunction at an earlier date without the necessity  
6 for seeking last-minute relief by motion for temporary  
7 restraining order. Should the Court find that the  
8 applicant unduly delayed in seeking injunctive relief,  
9 the Court may conclude that the delay constitutes  
10 laches or contradicts the applicant's allegations of  
11 irreparable injury and may deny the motion solely on  
12 either ground.

13 E.D. Local Rule 231(b). Judges in this district have routinely  
14 denied temporary restraining orders in mortgage cases when a  
15 borrower waited until just before the foreclosure sale to request  
16 emergency injunctive relief. See, e.g., Salazar v. Moynihan,  
17 Civ. No. 2:11-03276 GEB, 2011 WL 6179262, at \*1 (E.D. Cal. Dec.  
18 12, 2011) (denying TRO motion filed one day before foreclosure  
19 sale); Mammoth Specialty Lodging, LLC v. We-Ka-Jassa Inv. Fund,  
20 LLC, Civ. No. S10-0864 LKK JFM, 2010 WL 1539811, at \*2 (E.D. Cal.  
21 Apr. 16, 2010) (denying TRO motion filed four days before  
22 foreclosure sale).

23 Here, National Default recorded a Notice of Default on  
24 January 7, 2015, that should have alerted plaintiffs to the  
25 possibility that their home would be sold within ninety days.  
26 (Compl. Ex. D.) Plaintiffs provide no explanation for why they  
27 waited more than six months to seek emergency relief. As  
28 explained in Local Rule 238(b), plaintiff's delay is inconsistent  
with their allegation of irreparable injury.

Plaintiffs do argue that defendants did not contact  
them before filing the Notice of Default and proceeding with  
foreclosure. Even assuming this to be true, however, plaintiffs

1 clearly knew about the Notice of Default and the foreclosure sale  
2 when they moved for a temporary restraining order in Solano  
3 County Superior Court on June 3, 2015. Yet, they fail to justify  
4 their decision to wait until June 26, 2015, to request emergency  
5 relief in this court.

6           The record before this court supports a finding of  
7 undue delay. It shows that plaintiffs waited until the day of  
8 the initial foreclosure sale to seek emergency relief in state  
9 court. (See Aguilar Decl. ¶ 3, Ex. B.) Plaintiffs then decided  
10 not to fulfill the conditions set by the state court, which  
11 conditions this court finds, and counsel for plaintiffs freely  
12 admits, were entirely reasonable, nor to pursue a more permanent  
13 resolution there. Instead, plaintiffs dismissed their state  
14 court action and again waited until just before the rescheduled  
15 foreclosure sale to request relief from this court. (See id. Ex.  
16 C; Pls.' Mot. ¶ 6.)

17           Plaintiffs' decision to refile substantially the same  
18 action in this court rather than to follow through in the state  
19 court amounts to forum shopping. At oral argument on the motion,  
20 counsel for plaintiffs candidly acknowledged as much. The court  
21 concludes that plaintiffs deliberately delayed filing both  
22 motions in order to frustrate defendants' legitimate attempts at  
23 foreclosure.

24           B. Likelihood of Success on the Merits

25           Even absent a finding of undue delay, plaintiffs have  
26 failed to demonstrate their entitlement to emergency relief.  
27 Plaintiffs argue that BNY Mellon could not have received a  
28 beneficial interest in the Deed of Trust in March 2012 because

1 the original lender, Finance America, LLC, allegedly ceased  
2 operating in 2006. (See Compl. ¶¶ 20-22.) To plaintiffs, it is  
3 unclear how MERS could have assigned a beneficial interest in the  
4 mortgage six years after Finance America, LLC went out of  
5 business. (Pls.' Mot ¶ 10; see Compl. Exs. B-C.)

6           Simply reading the Deed of Trust clears up plaintiffs'  
7 so-called confusion. Although it names Finance America, LLC as  
8 the "lender," the Deed of Trust states--in bolded font--"**MERS is**  
9 **the beneficiary under this Security Instrument.**" (Compl. Ex. A  
10 at 2.) On the third page under the heading "TRANSFER OF RIGHTS  
11 IN THE PROPERTY," the document confirms that "[t]he beneficiary  
12 of this Security Instrument is MERS (solely as nominee for Lender  
13 and Lender's successors and assigns) and the successors and  
14 assigns of MERS." (*Id.* at 3.)

15           This language conforms to the "MERS system" of managing  
16 mortgages. See Fontenot v. Wells Fargo Bank, N.A., 198 Cal. App.  
17 4th 256, 267-68 (1st Dist. 2011) (explaining the MERS system).<sup>2</sup>

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19           <sup>2</sup> The "MERS system" has become common practice in the  
20 mortgage industry. As the Fontenot court explained,

21 MERS is a private corporation that administers a  
22 national registry of real estate debt interest  
23 transactions. Members of the MERS System assign  
24 limited interests in the real property to MERS, which  
25 is listed as a grantee in the official records of  
26 local governments, but the members retain the  
27 promissory notes and mortgage servicing rights. The  
28 notes may thereafter be transferred among members  
without requiring recordation in the public records.  
. . . Under the MERS System, however, MERS is  
designated as the beneficiary in deeds of trust,  
acting as "nominee" for the lender, and granted the  
authority to exercise legal rights of the lender.

Fontenot, 198 Cal. App. 4th at 267.



1 A beneficiary acting as nominee for a lender, such as MERS, "may  
2 exercise the rights and obligations of a beneficiary of the deed  
3 of trust, a role ordinarily afforded the lender." Id. at 273.  
4 California courts have embraced MERS's ability to assign its  
5 interest in a Deed of Trust, even when it acts as a nominal  
6 beneficiary on behalf of a lender. See id.; Herrera v. Fed. Nat.  
7 Mortgage Assn., 205 Cal. App. 4th 1495, 1502-06 (4th Dist. 2012).  
8 Accordingly, MERS likely had the authority to transfer a  
9 beneficial interest to BNY Mellon.

10 Plaintiffs point to two California cases in support of  
11 their argument that MERS lacked the authority to transfer its  
12 rights in the Deed of Trust: Yvanova v. New Centry Mortg. Corp.,  
13 226 Cal. App. 4th 495 (2d Dist. 2014); Glaski v. Bank of America,  
14 218 Cal.App.4th 1079 (5th Dist. 2013). However, these cases  
15 address whether a plaintiff has standing to challenge an  
16 assignment of a note and deed of trust on the basis that defects  
17 allegedly render the assignment void. See Yvanova, 226 Cal. App.  
18 4th at 109-10; Glaski, 218 Cal. App. 4th at 1099. Because the  
19 court concludes that MERS likely had the required authority, the  
20 issue of plaintiffs' standing to challenge the assignment is  
21 beside the point.

22 Having resolved MERS's assignment to BNY Mellon, it is  
23 clear that plaintiffs are not likely to succeed in this action.  
24 California law allows a "trustee, mortgagee, or beneficiary, or  
25 any of their authorized agents" to conduct foreclosure. Cal.  
26 Civ. Code § 2924(a)(1). Under California Civil Code section  
27 2924b(4), a "person authorized to record the notice of default or  
28 the notice of sale" includes "an agent for the mortgagee or

1 beneficiary, an agent of the named trustee, any person designated  
2 in an executed substitution of trustee, or an agent of that  
3 substituted trustee." Id. § 2924b(4).

4           If MERS validly assigned its beneficial interest to BNY  
5 Mellon, BNY Mellon had the authority to substitute National  
6 Default as trustee. National Default then had the authority to  
7 record the Notice of Default and conduct foreclosure. All of  
8 plaintiffs' claims that rely on the theory that MERS could not  
9 assign a beneficial interest in the Deed of Trust must therefore  
10 fail. (See Compl. ¶¶ 33-34, 39, 41-44, 57, 59, 62-64, 68, 83.)

11           Plaintiffs also allege various violations of  
12 California's Homeowners Bill of Rights ("HBOR") during the  
13 foreclosure process that do not rely on their invalid-assignment  
14 theory. Specifically, defendants allegedly failed to designate a  
15 single point of contact as required by California Civil Code  
16 section 2923.7, and defendants allegedly failed to contact  
17 plaintiffs before recording a Notice of Default as required by  
18 California Civil Code section 2923.55. (Compl. ¶¶ 64-65, 71-72.)

19           Plaintiffs have not demonstrated that they are likely  
20 to succeed on these claims either. They offer only declarations  
21 from each plaintiff stating that neither was contacted by  
22 defendants. (See Decl. of Frank Freeman ¶¶ 7-8 (Docket No. 2-1);  
23 Decl. of Arlene Freeman ¶¶ 7-8 (Docket No. 2-2).) These  
24 declarations are contradicted by the declaration attached to the  
25 Notice of Default, (see Compl. Ex. D), and a "contact history  
26 report" provided by defendants that details a conversation  
27 between an agent of SPS and the borrowers, (see Aguilar Decl. Ex.  
28 A at 9-10). Accordingly, because plaintiffs' declarations are

1 contradicted by clearly documented evidence plaintiffs' success  
2 on on these claims appears highly unlikely, plaintiffs have  
3 failed to fulfill the first Winter factor.

4 C. Balance of Equities

5 A temporary restraining order "is an extraordinary  
6 remedy never awarded as of right." Winter, 555 U.S. at 24  
7 (citing Munaf v. Geren, 553 U.S. 674, 688 (2008)). In each case,  
8 courts "must balance the competing claims of injury and must  
9 consider the effect on each party of the granting or withholding  
10 of the requested relief." Id. (quoting Amoco Prod. Co. v. Vill.  
11 of Gambell, AK, 480 U.S. 531, 542 (1987)).

12 Here, plaintiffs' long history of default weighs  
13 against them. Plaintiffs have not only failed to make mortgage  
14 payments for sixty-seven months, but they have also placed the  
15 bank in the position of having to pay plaintiffs' taxes and  
16 insurance for the property during that time. (See Defs.' Opp'n  
17 at 6.) Moreover, when the state court imposed the reasonable  
18 requirements that plaintiffs make a mortgage payment and pay  
19 defendants for their advanced expenses, plaintiffs did not  
20 comply. (See Aguilar Decl. ¶ 5, Exs. B-C.) The court therefore  
21 concludes that the balance of equities favors defendants.

22 D. The Public Interest


23 "In exercising their sound discretion, courts of equity  
24 should pay particular regard for the public consequences in  
25 employing the extraordinary remedy of injunction." Winter, 555  
26 U.S. at 24 (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305,  
27 312 (1982)). "The public interest analysis for the issuance of a  
28 preliminary injunction requires [the court] to consider 'whether

1 there exists some critical public interest that would be injured  
2 by the grant of preliminary relief.'" Indep. Living Ctr. of So.  
3 Cal., Inc. v. Maxwell-Jolly, 572 F.3d 644, 659 (9th Cir. 2009)  
4 (quoting Hybritech Inc. v. Abbott Lab., 849 F.2d 1446, 1458 (Fed.  
5 Cir. 1988)), vacated on other grounds, 132 S.Ct. 1204 (2012).

6 Plaintiffs' failure to make mortgage payments as well  
7 as pay their taxes and insurance on the residence for sixty-seven  
8 months runs counter to the public interest. Preliminary relief  
9 would permit plaintiffs to further extend the time they remain in  
10 their residence without paying, to the detriment of defendants  
11 and the larger community of borrowers who do not ignore their  
12 financial obligations. See Herrejon v. Ocwen Loan Servicing,  
13 LLC, 980 F. Supp. 2d 1186, 1211 (E.D. Cal. 2013) (O'Neill, J.)  
14 ("Granting injunctive relief would be a disservice to public  
15 interest by allowing plaintiffs to preclude foreclosure after  
16 their default and without legitimate tender of outstanding  
17 amounts owed.").

18 IT IS THEREFORE ORDERED that plaintiffs' application  
19 for a temporary restraining order be, and the same hereby is,  
20 DENIED.

21 Dated: June 29, 2015

22   
23 WILLIAM B. SHUBB  
24 UNITED STATES DISTRICT JUDGE  
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