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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

PETE AGRAAN, JR., ALICIA AGRAAN,

No. 2:17-cv-02163-KJM-CKD

Plaintiffs,

v.

ORDER

SELECT PORTFOLIO SERVICING, INC.
J.P. MORGAN CHASE BANK, N.A., and
DOES 1 through 50, inclusive,

Defendants.

Plaintiffs Pete Agraan and Alicia Agraan (“the Agraans” or “plaintiffs”), proceeding *pro se*, seek a temporary restraining order (“TRO”) against defendant Select Portfolio Services (“SPS”) preventing the trustee sale of the Agraans’ home. Ex Parte TRO Request, ECF No. 12; TRO Mem., ECF No. 12-1. The trustee sale is currently scheduled for tomorrow, December 6, 2017. TRO Mem. at 1. For the following reasons, the court GRANTS the request.

I. BACKGROUND

SPS offered the Agraans a loan modification on June 22, 2017 and requested they begin making trial period payments. TRO Mem. at 3. Due to insufficient income at the time, the Agraans could not accept the offer. *Id.* Their financial circumstances changed “[s]hortly thereafter,” and they requested SPS reconsider their modification request, but because SPS’s prior modification offer “had lapsed, the loan modification was no longer offered.” *Id.*

1 In September 2017, the Agraans again notified SPS of a change in financial
2 circumstances and requested a loan modification. *Id.* SPS directed the Agraans to submit a new
3 modification application, which the Agraans submitted on September 15, 2017. *Id.*

4 On September 18, 2017, SPS sent the Agraans a letter stating no loss mitigation
5 options were available and foreclosure would occur within the next 23 business days. *Id.*; Sept.
6 18 Letter, ECF No. 12-3 at 7. This letter provided no substantive basis for the denial. *See* Sept.
7 18 Letter. A week later, plaintiffs sent SPS a letter demanding an appeal of the denial. TRO
8 Mem. at 3; Appeal Letter, ECF No. 12-3 at 9. The letter explains the Agraans submitted a
9 modification application “as [they] were told,” and that the application “shows our circumstances
10 have changed along with the supporting evidence.” Appeal Letter at 9. The Agraans offered to
11 “submit additional documents that support our income now.” *Id.*

12 On September 27, 2017, SPS sent the Agraans two letters. TRO Mem. at 3. The
13 first stated SPS would send a written response to the Agraans’ “inquiry” within 30 days. ECF
14 No. 12-3 at 11. The second letter noted SPS had “forwarded” the Agraans’ “correspondence to
15 the appropriate department for handling.” ECF No. 12-3 at 13. To date, the Agraans represent
16 they have not received further communication from SPS regarding their application or appeal.
17 TRO Mem. at 4.

18 The Agraans sued SPS and J.P. Morgan Chase Bank, N.A., on October 6, 2017 in
19 Yolo County Superior Court alleging violations of the California Homeowner’s Bill of Rights
20 (“HBOR”), negligence, and fraudulent and unfair business practices. Compl., Ex. A, ECF No.
21 1-1. On October 10, 2017, that court issued a TRO restraining SPS from conducting a trustee sale
22 of the Agraans’ property. *See* SPS Notice of TRO Expiration, ECF No. 10 at 4-5 (copy of
23 Superior Court order). That court also ordered SPS to show cause why a preliminary injunction
24 should not issue and set an October 26, 2017 hearing on the order to show cause. *Id.* at 5. One
25 week after the state court issued the TRO, defendants removed the case to this court. *See*
26 Removal Notice, ECF No. 1. Defendants’ notice stated, “[t]he removal of this action limits the
27 duration of the Temporary Restraining Order issued in the State Action to 14 days following
28 removal.” *Id.* at 4 (citing Fed. R. Civ. P. 65(b)). SPS then notified the Agraans that the trustee

1 sale was postponed to December 6, 2017. ECF No. 12-3 at 16 (notice dated Oct. 19, 2017). On
2 November 27, 2017, defendants filed their official notice here, confirming its position the TRO
3 issued by the state court had expired under Federal Rule of Civil Procedure 65(b). SPS Notice of
4 TRO Expiration.

5 On December 2, 2017, Alicia Agraan contacted SPS's foreclosure department "to
6 stop the foreclosure sale." Pls.' Decl., ECF No. 12-2, at 2. As instructed, she then contacted
7 SPS's legal department on December 4 and contacted SPS's attorney of record. *Id.* The Agraans
8 filed this ex parte TRO application on December 4, 2017, requesting the court issue (1) an order
9 temporarily restraining SPS from conducting a trustee sale of their property, and (2) an order to
10 show cause to SPS as to why the court should not issue a preliminary injunction. Ex Parte TRO
11 Request at 1.

12 On December 5, 2017, SPS filed an opposition to the Agraans' request. Opp'n,
13 ECF No. 14. SPS argues that, rather than seeking a TRO now, the Agraans should have sought a
14 preliminary injunction after defendants removed this case to federal court. *Id.* at 2. SPS further
15 argues it "is fully within its rights to refuse to consider serial loan modification applications from
16 Plaintiffs." *Id.* at 2, 4. SPS does not substantively address the status of the Agraans' appeal,
17 suggesting that SPS's September 27 letters to the Agraans "simply acknowledged . . . that more
18 letters were received from Plaintiffs." *Id.* at 5. Should the court issue a TRO, SPS requests the
19 court condition the TRO on financial conditions, including a bond. *Id.* at 6. Finally, SPS's
20 attorney notes he has been contacted by a disbarred attorney, Pitor or Piotr Reysner, on several
21 occasions on the Agraans' behalf regarding this matter. Decl., ECF No. 14-1. ¶ 4

22 II. LEGAL STANDARD

23 The purpose of a TRO is to preserve the status quo pending the complete briefing
24 and thorough consideration contemplated by full proceedings pursuant to a preliminary
25 injunction. *See Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 438-39 (1974) (TROs
26 "should be restricted to serving their underlying purpose of preserving the status quo and
27 preventing irreparable harm just so long as is necessary to hold a hearing, and no longer"); *see*

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1 also *Reno Air Racing Ass’n., Inc. v. McCord*, 452 F.3d 1126, 1131 (9th Cir. 2006); *Dunn v. Cate*,
2 No. CIV 08-873-NVW, 2010 WL 1558562, at *1 (E.D. Cal. April 19, 2010).

3 Issuing a TRO is an extraordinary remedy, and plaintiffs have the burden of
4 proving the propriety of such a remedy. See *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). In
5 general, the showing required for a TRO and a preliminary injunction are the same. *Stuhlberg*
6 *Int’l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). The
7 party requesting preliminary injunctive relief must show that “he is likely to succeed on the
8 merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
9 balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v.*
10 *Natural Res. Defense Council*, 555 U.S. 7, 20 (2008); *Stormans, Inc. v. Selecky*, 586 F.3d 1109,
11 1127 (9th Cir. 2009) (quoting *Winter*). The propriety of a TRO hinges on a significant threat of
12 imminent, irreparable injury. *Caribbean Marine Serv. Co. v. Baldrige*, 844 F.2d 668, 674 (9th
13 Cir. 1988).

14 Alternatively, courts may analyze a TRO request using a sliding scale approach
15 through which the elements of the “test are balanced, so that a stronger showing of one element
16 may offset a weaker showing of another.” *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127,
17 1131 (9th Cir. 2011). This test requires plaintiffs to demonstrate the requisite likelihood of
18 irreparable harm, show that an injunction is in the public interest, raise “serious questions” going
19 to the merits, and show a balance of hardships that “tips sharply” in plaintiffs’ favor. *Id.* at 1131-
20 36 (concluding that the “serious questions” version of the sliding scale test for preliminary
21 injunctions remains viable after *Winter*).

22 III. ANALYSIS

23 Applying the sliding scale approach, the court finds a TRO is appropriate here to
24 preserve the status quo pending a hearing on the Agraans’ request for preliminary injunction. The
25 Agraans have established a likelihood of irreparable harm, as they risk losing their home should
26 the December 6, 2017 trustee sale proceed. See TRO Mem. at 8; see also *Castellanos v.*
27 *Countrywide Bank NA*, No. 15-CV-00896-BLF, 2015 WL 914436, at *2 (N.D. Cal. Feb. 27,
28 2015) (citing cases and noting “[c]ourts have repeatedly concluded that the loss of one’s home is

1 sufficient to satisfy the element of irreparable injury”). A TRO is also in the public interest, as it
2 will allow the court time to ensure compliance with home-protection laws designed to protect the
3 public. *See id.* (“[I]t is in the public interest to allow homeowners an opportunity to pursue what
4 appear to be valid claims before being displaced from their homes.”) (quoting *Sencion v. Saxon*
5 *Mortg. Servs., LLC*, 2011 WL 1364007, at *1 (N.D. Cal. Apr. 11, 2011)).

6 The court also finds the balance of hardships tips sharply in the Agraans’ favor. A
7 TRO merely prevents SPS from conducting a trustee sale until the court has determined whether
8 such sale is appropriate in light of complete briefing and thorough consideration. While SPS
9 complains that the sale is long overdue, see Opp’n at 5, this hardship does not overcome the
10 Agraans’ potential loss of their home should the sale proceed, *see Castellanos*, 2015 WL 914436,
11 at *2. Moreover, the court can act promptly to consider the merits more fully on an expedited
12 schedule, set below.

13 Finally, the court finds the Agraans have raised serious questions as to the merits
14 of their HBOR dual-tracking claim. TRO Mem. at 5 (arguing they “are likely to prevail on their
15 legal theory that no trustee sale can be had until SPS fully complies with its legal obligations.”).
16 Under HBOR, “a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not
17 record a notice of default or notice of sale, or conduct a trustee’s sale, while the [borrower’s]
18 complete first lien loan modification application is pending.” Cal. Civ. Code § 2923.6(c). Doing
19 so is referred to as “dual tracking.” *Haltom v. NDEx W., LLC*, No. 2:16-cv-00086-TLN-KJN,
20 2016 U.S. Dist. LEXIS 5656, at *6 (E.D. Cal. Jan. 15, 2016). HBOR’s dual tracking protections
21 persist until, as relevant here, “[t]he mortgage servicer makes a written determination that the
22 borrower is not eligible for a first lien loan modification, and any appeal period pursuant to
23 subdivision (d) has expired,” or “[t]he borrower does not accept an offered first lien loan
24 modification within 14 days of the offer.” Cal. Civ. Code § 2923.6(c)(1)-(2). At that point, a
25 servicer is not “obligated” to evaluate a borrower’s subsequent modification application “unless
26 there has been a material change in the borrower’s financial circumstances since the date of the
27 borrower’s previous application and that change is documented by the borrower and submitted to
28 the mortgage servicer.” Cal. Civ. Code § 2923.6(g).

1 Here, plaintiffs did not accept SPS's June 22, 2017 modification offer. TRO Mem.
2 at 3. Thus, the Agraans did "not accept an offered first lien loan modification," *see* Cal. Civ.
3 Code § 2923.6(c)(2), and SPS was "obligated" to consider their subsequent September 15, 2017
4 application only if they documented and submitted to SPS a "material change in [their] financial
5 circumstances since the date of [their] previous application[,]" *see* Cal. Civ. Code § 2923.6(g).
6 The Agraans argue they informed SPS of their change in financial circumstances in September of
7 2017, and SPS instructed them to submit a new modification application. TRO Mem. at 3. The
8 Agraans did so on September 15, providing "all requested documentation." *Id.* Thus, the
9 Agraans argue SPS was obligated to consider their subsequent application under § 2923.6(g).
10 The Agraans' communications with SPS following their September application indicate they
11 documented a material change in financial circumstances as § 2923.6(g) requires. For example,
12 in their September 25, 2017 letter to SPS, the Agraans explain their application "shows our
13 circumstances have changed" and provided "supporting evidence." Appeal Letter. The Agraans
14 requested SPS "[p]lease reconsider the [application,]" and offered to "submit additional
15 documents that support our income now." *Id.* SPS argues the Agraans have not substantively
16 described their material financial change or provided a copy of their application. Opp'n at 4. The
17 court notes, however, SPS also does not provide a copy of the Agraans' modification application
18 to show the Agraans did not document a material financial change. More importantly, SPS does
19 not argue the application did not include such documentation. Rather, SPS argues only that it had
20 no obligation to consider the Agraans' repeated requests for modification. *Id.* at 2, 4. The
21 parties' competing arguments raise serious questions as to the merits of the Agraan's dual
22 tracking claim. *See Vasquez v. Bank of Am., N.A.*, No. 13-CV-02902-JST, 2013 WL 6001924, at
23 *8 (N.D. Cal. Nov. 12, 2013) (holding plaintiff's allegations that she informed defendant of her
24 new employment and higher income, submitted a new modification application "including
25 documentation of her increased income," and later confirmed documents were being reviewed
26 sufficiently alleged compliance with § 2923.6(g)).

27 There is also a serious question regarding whether SPS's September 18, 2017 letter
28 was a valid rejection of the Agraans' September 15, 2017 application. *See* TRO Mem. at 7; *see* §

1 2923.6(c)(1) (permitting trustee sale after servicer’s “written determination that the borrower is
2 not eligible” and expiration of § 2923.6(d) appeal period). The Agraans argue denial of a valid
3 modification application must comply with § 2923.6(f), which sets forth written denial
4 requirements. Section 2923.6(f)(1) requires written notice of “[t]he amount of time from the date
5 of the denial letter in which the borrower may request an appeal of the denial of the first lien loan
6 modification and instructions regarding how to appeal the denial.” Here, SPS’s denial letter does
7 not mention the Agraans’ right to appeal. TRO Mem. at 7. Further, SPS’s September 27
8 response to the Agraans’ appeal indicated SPS would provide “a written response and resolution
9 regarding this matter within 30 days from the date we received your inquiry[.]” ECF No. 12-3 at
10 11. Yet another SPS letter sent that same day notified the Agraans their “correspondence” was
11 “forwarded . . . to the appropriate department for handling.” *Id.* at 13. These letters send
12 different messages and give rise to confusion about the process SPS followed, further supporting
13 the conclusion that a serious question is raised as to whether SPS properly denied the Agraans’
14 application. If not, the application remains pending and thus triggers HBOR’s dual tracking
15 protections. SPS’s opposition does not clarify the post-appeal record. Rather, SPS attributes its
16 post-appeal letters to “acknowledg[ment] . . . that more letters were received from Plaintiffs.”
17 *Opp’n* at 5. This bare argument does not tip the balance in SPS’s favor. The court thus finds
18 there is a serious question as to the merits of the Agraans’ claim.

19 IV. PRO SE STATUS

20 In light of SPS’s representations that its counsel was contacted by someone who is
21 not an attorney and who purported to be acting on the Agraans’ behalf, the Agraans are reminded
22 that they each must be prepared to speak on his and her own behalf in the course of litigating this
23 matter, including in any courtroom proceedings.

24 V. CONCLUSION

25 For these reasons, the court GRANTS plaintiffs’ TRO application. No bond shall
26 be required at this time. A preliminary injunction hearing is set for **Tuesday, December 19, 2017**

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1 **at 1:30 p.m.** The Agraans shall file any additional brief with supporting declarations by **4 p.m.**
2 **on December 12, 2017.** SPS shall file any opposition briefing by **4 p.m. on December 15, 2017.**
3 All briefing is subject to this court's page limitations set forth in its standing order.

4 SO ORDERED.

5 DATED: December 5, 2017.

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8 UNITED STATES DISTRICT JUDGE
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