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United States District Court  
For the Northern District of California

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

ANILECH SHARMA and PARMA SHARMA, No C 09-5968 VRW

Plaintiffs,

ORDER

v

PROVIDENT FUNDING ASSOCIATES, LP,  
a California limited partnership;  
PREFERRED MORTGAGE, a California  
business entity, form unknown;  
MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC, a California  
corporation; MAX DEFAULT SERVICES  
CORPORATION, a California  
corporation; and DOES 1-100,  
inclusive,

Defendants.

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On December 22, 2009, the court issued a temporary  
restraining order against defendants foreclosing on plaintiffs'  
property and issued an order to show cause on the issuance of a  
preliminary injunction. Doc #9. Defendants filed a response to  
the court's order to show cause on January 5, 2010. Doc #11. The  
application of plaintiffs for preliminary injunction was scheduled  
for hearing on January 7, 2010. Due to illness, counsel for one of

1 the parties was unable to appear. The court, therefore, submitted  
2 the application for a preliminary injunction on the papers filed  
3 herein. For the following reasons, the court GRANTS plaintiffs'  
4 request for a preliminary injunction.

5  
6 I

7 "A preliminary injunction is an extraordinary remedy  
8 never awarded as of right." Winter v Natural Res Def Council, Inc,  
9 --- US ----, 129 S Ct 365, 376 (2008). The sole purpose of a  
10 preliminary injunction is to "preserve the status quo ante litem  
11 pending a determination of the actions on the merits." Sierra  
12 Forest Legacy v Rey, 577 F3d 1015, 2009 WL 2462216 (9th Cir 2009).  
13 "In brief, the bases for injunctive relief are irreparable injury  
14 and inadequacy of legal remedies. In each case, a court must  
15 balance the competing claims of injury and must consider the effect  
16 on each party of the granting or withholding of the requested  
17 relief." Amoco Production Co v Village of Gambell, 480 US 531, 542  
18 (1987).

19 Recently, the Supreme Court clarified the proper standard  
20 for granting or denying a preliminary injunction by stating that  
21 "[a] plaintiff seeking a preliminary injunction must establish that  
22 he is likely to succeed on the merits, that he is likely to suffer  
23 irreparable harm in the absence of preliminary relief, that the  
24 balance of equities tips in his favor, and that an injunction is in  
25 the public interest." Winter, 129 S Ct at 374. In doing so, the  
26 Winter Court rejected the former "possibility of irreparable  
27 injury" analysis utilized by the Ninth Circuit. See The Lands  
28 Council v McNair, 537 F3d 981, 987 (2008).

1           The Winter Court, however, did not address the second  
2 prong of the McNair analysis, which deemed granting a preliminary  
3 injunction appropriate where "serious questions going to the merits  
4 were raised and the balance of hardships tips sharply in  
5 [plaintiffs'] favor." McNair, 537 F3d at 987. As this court has  
6 observed, this "second prong is relevant where irreparable injury  
7 is likely and imminent—for example, in the case of imminent  
8 foreclosure or deportation—and the plaintiff has demonstrated a  
9 serious merits issue but may be unable to determine a likelihood of  
10 success on the merits." Save Strawberry Canyon v Department of  
11 Energy, 613 F Supp 2d 1177, 1180 n2 (ND Cal 2009).

12           The court first considers plaintiffs' assertion that they  
13 will suffer irreparable injury if defendants are able to foreclose  
14 on their property before the conclusion of this action. Doc #7.  
15 Property is considered unique, and therefore the court finds that  
16 plaintiffs' remedy at law, damages, would be inadequate. See  
17 Sundance Land Corp v Community First Federal Sav and Loan Ass'n,  
18 840 F2d 653, 662 (9th Cir 1988). It is also clear that if  
19 defendants foreclosed on the property, plaintiffs' injury would be  
20 irreparable because they might be unable to reacquire it. See  
21 Taylor v Westly, 488 F3d 1197, 1202 (9th Cir 2007). This fact  
22 weighs heavily in favor of plaintiffs.

23           Additionally, defendants will not suffer a high degree of  
24 harm if a preliminary injunction is ordered. While it is true that  
25 defendants will not be able to sell the property immediately and  
26 will expend costs in further litigating this action, when balanced  
27 against plaintiffs' potential loss, defendants' harm appears  
28 outweighed.

1           Having found plaintiffs' potential injury to be  
2 essentially irreparable and imminent, the court considers whether  
3 plaintiffs are likely to succeed on the merits. Plaintiffs  
4 contend, among other things, that defendants failed to comply with  
5 the communication requirements set forth in California Civil Code  
6 section 2923.5 ("section 2923.5").

7           Section 2923.5 requires a lender or its agent to attempt  
8 to contact a defaulted borrower prior to foreclosure. Section  
9 2923.5(a)(2) requires a "mortgagee, beneficiary or authorized  
10 agent" to "contact the borrower in person or by telephone in order  
11 to assess the borrower's financial situation and explore options  
12 for the borrower to avoid foreclosure." Section 2923.5(b) requires  
13 a default notice to include a declaration "from the mortgagee,  
14 beneficiary, or authorized agent" of compliance with section  
15 2923.5, including attempt "with due diligence to contact the  
16 borrower as required by this section."

17           Plaintiffs allege that "at no time prior to issuing the  
18 [notice of default] did PROVIDENT or anyone acting on its behalf  
19 contact Plaintiffs to discuss options to pay the loan or to access  
20 their financial situation. Doc #1 at 7-8. Plaintiffs further  
21 contend that each defendant "proceeded to notice the default and  
22 pending sale of the Subject Property without \* \* \* (1) evaluat[ing]  
23 Plaintiff's financial condition regarding foreclosure avoidance;  
24 (2) advis[ing] Plaintiffs of their statutory right to meet with  
25 Defendants regarding such foreclosure avoidance; and (3) advis[ing]  
26 Plaintiffs of the toll-free federal Department of Housing and Urban  
27 Development ("HUD") telephone number regarding counseling  
28 opportunities to avoid the subject foreclosure." Id at 9-10.

1 While defendants contend that a "true and correct letter [was]  
2 provided by Defendant Provident Funding to Plaintiffs \* \* \* setting  
3 forth all the required information," (Doc #11 at 6), section  
4 2923.5(a)(2) requires that some such communication occur "in person  
5 or by telephone." Cal Civ Code §2923.5(a)(2). Accordingly,  
6 plaintiffs' unrebutted allegation that no such telephonic or  
7 personal contact was made raises a serious merits issue.

8           Lastly, the adverse impact foreclosures have on  
9 households and communities, as well as the societal benefits of  
10 home ownership, demonstrate the strong public interest in  
11 preventing unlawful foreclosures.

12  
13                           II

14           On proof made to the court's satisfaction that the  
15 matters giving rise to plaintiffs' complaint relate to plaintiffs'  
16 real property and that sale of the property at issue by defendants  
17 likely will cause plaintiff irreparable injury for which plaintiffs  
18 have no adequate remedy at law and good cause therefore appearing:

19           IT IS ORDERED that during the pendency of this action  
20 defendants Provident Funding Associates, LP; Preferred Mortgage;  
21 Mortgage Electronic Registration Systems, Inc; Max Default Services  
22 Corporation, their agents, employees, representatives and all  
23 persons acting in concert or participating with them, are enjoined  
24 and restrained during the pendency of this action from selling,  
25 transferring, conveying, evicting or any other conduct adverse to  
26 plaintiffs regarding the real property located at 22169 Betlen Way,  
27 Castro Valley, California 94546.

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The reason for the preliminary injunction is to protect plaintiff from irreparable harm caused by a sale of their unique real property that may be unlawful.

The court reserves jurisdiction to modify this injunction as the ends of justice may require.

IT IS SO ORDERED.



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VAUGHN R WALKER  
United States District Chief Judge