

1  
2 UNITED STATES DISTRICT COURT  
3 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
4 OAKLAND DIVISION

5 AVEL C. CAIREL and RODOLFO C.  
6 CAIREL, wife and husband as Joint Tenant,

7 Plaintiffs,

8 vs.

9 HSBC MORTGAGE CORPORATION, a  
10 Business Entity, form unknown; et al.,

11 Defendants.

Case No: C 10-04172 SBA

**ORDER DISMISSING ACTION  
WITHOUT PREJUDICE**

Docket 6

12  
13 The parties are presently before the Court on Defendant First American Lenders  
14 Advantage's motion to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6). Dkt.  
15 6. Having read and considered the papers filed in connection with this motion, which is  
16 unopposed, and being fully informed, the Court hereby GRANTS the motion and dismisses  
17 the action. The Court, in its discretion, finds this matter suitable for resolution without oral  
18 argument. See Fed. R. Civ. P. 78(b); N.D. Cal. Civ. L.R. 7-1(b).

19 **I. BACKGROUND**

20 Plaintiffs, acting pro se, filed the instant mortgage fraud action in this Court on  
21 September 16, 2010, against First American Lenders Advantage ("First American") and  
22 several other defendants. Dkt. 1. The Complaint alleges federal claims for violations of the  
23 federal Truth in Lending Act and the Real Estate Settlement Procedures Act, as well as  
24 various state law causes of action.

25 The case initially was assigned to Magistrate Judge Laurel Beeler. First American,  
26 the only defendant served with a summons and complaint, consented to the jurisdiction of a  
27 magistrate judge. Dkt. 5. On November 15, 2010, Magistrate Judge Beeler issued an order  
28

1 noting that Plaintiffs had not consented or declined to proceed before her, and therefore,  
2 ordered them to file the consent/declination form by no later than November 26, 2010. Dkt.  
3 9. Plaintiffs failed to comply with that order, which resulted in the reassignment of the case  
4 to this Court on December 13, 2010. Dkt. 13.

5 First American has now filed a motion to dismiss, which is noticed for hearing on  
6 March 15, 2011. Dkt. 6. Under Local Rule 7-3, any opposition or statement of non-  
7 opposition must be filed by no later than twenty-one days before the noticed hearing date.  
8 As such, Plaintiffs' response to the instant motion should have been filed by no later than  
9 February 22, 2011. Paragraph 8 of the Court's Standing Orders expressly warns as follows:  
10 **"Effect of Failing to Oppose a Motion:** The failure of the opposing party to timely file a  
11 memorandum of points and authorities in opposition to any motion or request shall  
12 constitute a consent to the granting of the motion." Dkt. 14 at 2. Notwithstanding the  
13 requirements of Civil Local Rule 7-3, and the Court's warning, Plaintiffs have filed nothing  
14 in response to First American's motion.

## 15 **II. DISCUSSION**

16 "Pursuant to Federal Rule of Civil Procedure 41(b), the district court may dismiss an  
17 action for failure to comply with any order of the court." Ferdik v. Bonzelet 963 F.2d  
18 1258, 1260 (9th Cir. 1992). As such, the failure to file an opposition to a motion to dismiss  
19 in the manner prescribed by the Court's Local Rules is grounds for dismissal. Ghazali v.  
20 Moran, 46 F.3d 52, 53 (9th Cir. 1995) (per curiam). "In determining whether to dismiss a  
21 claim for failure to prosecute or failure to comply with a court order, the Court must weigh  
22 the following factors: (1) the public's interest in expeditious resolution of litigation; (2) the  
23 court's need to manage its docket; (3) the risk of prejudice to defendants/respondents;  
24 (4) the availability of less drastic alternatives; and (5) the public policy favoring disposition  
25 of cases on their merits." Pagtalunan v. Galaza, 291 F.3d 639, 642 (9th Cir. 2002).

26 In the instant case, the Court finds that the above-referenced factors weigh in favor  
27 of dismissal. With regard to the first factor, "[t]he public's interest in expeditious  
28 resolution of litigation always favors dismissal." Yourish v. Cal. Amplifier, 191 F.3d 983,

1 990 (9th Cir. 1999). This is particularly true in the instant case, where Plaintiffs have failed  
2 to oppose First American’s motion to dismiss, failed to file the consent/declination form as  
3 ordered by Magistrate Judge Beeler, and failed to effect service on any of the other  
4 defendants.

5 The second factor, which concerns the Court’s need to manage its docket, also  
6 militates in favor of dismissal. See Pagtalunan, 291 F.3d at 642 (“It is incumbent upon the  
7 Court to manage its docket without being subject to routine noncompliance of litigants”);  
8 Yourish, 191 F.3d 983, 990 (9th Cir. 1999) (recognizing court’s need to control its own  
9 docket); see also Ferdik, 963 F.2d at 1261 (non-compliance with a court’s order diverts  
10 “valuable time that [the court] could have devoted to other major and serious criminal and  
11 civil cases on its docket.”).

12 The third factor, the risk of prejudice to the defendants, generally requires that “a  
13 defendant ... establish that plaintiff’s actions impaired defendant’s ability to proceed to trial  
14 or threatened to interfere with the rightful decision of the case.” Pagtalunan, 291 F.3d at,  
15 642. At the same time, the Ninth Circuit has “related the risk of prejudice to the plaintiff’s  
16 reason for defaulting.” Id. Here, Plaintiffs have offered no explanation for their failure to  
17 respond nor is any apparent from the record. These facts also weigh strongly in favor of  
18 dismissal. See Yourish, 191 F.3d at 991; Ghazali, 46 F.3d. at 54.

19 As to the fourth factor, the Court has already considered less drastic alternatives to  
20 dismissal. As noted, the Court’s Standing Orders warn that as a consequence of a party’s  
21 failure to oppose a motion, the Court will construe such inaction as a consent to the  
22 granting of the unopposed motion. “[A] district court’s warning to a party that failure to  
23 obey the court’s order will result in dismissal can satisfy the ‘consideration of [less drastic  
24 sanctions]’ requirement.” Ferdik, 963 F.2d at 1262.

25 The final factor, which favors disposition of cases on the merits, by definition,  
26 weighs against dismissal. Pagtalunan, 291 F.3d at 643 (“Public policy favors disposition of  
27 cases on the merits. Thus, this factor weighs against dismissal.”).

1 **III. CONCLUSION**

2 In sum, the Court concludes that four of the five relevant factors weigh strongly in  
3 favor of granting First American’s unopposed motion and dismissing the action in its  
4 entirety. Id. (affirming dismissal where three factors favored dismissal, while two factors  
5 weighed against dismissal).<sup>1</sup> Accordingly,

6 IT IS HEREBY ORDERED THAT Defendant First American’s unopposed motion  
7 to dismiss is GRANTED, and the instant action is DISMISSED without prejudice. The  
8 Clerk shall close the file and terminate all pending matters and deadlines. The hearing  
9 scheduled for March 15, 2011, is VACATED.

10 IT IS SO ORDERED.

11 Dated: March 4, 2011

  
SAUNDRA BROWN ARMSTRONG  
United States District Judge

13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

---

27 <sup>1</sup> The rationale for dismissing this action applies equally to the remaining, unserved  
28 defendants. See Abagninin v. AMVAC Chem. Corp., 545 F.3d 733, 742-43 (9th Cir. 2008)  
 (“As a legal matter, we have upheld dismissal with prejudice in favor of a party which had  
 not appeared, on the basis of facts presented by other defendants which had appeared.”).

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

AVEL C. CAIREL et al,  
Plaintiff,

v.

HSBC MORTGAGE CORPORATION et al,  
Defendant.

\_\_\_\_\_ /

Case Number: CV10-04172 SBA

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on March 4, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Avel C. Cairel  
705 Nightingale Street  
Livermore, CA 94551

Rodolfo N. Cairel  
705 Nightingale Street  
Livermore, CA 94551

Dated: March 4, 2011

Richard W. Wieking, Clerk

By: LISA R CLARK, Deputy Clerk