

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  
SOUTHERN DISTRICT OF CALIFORNIA**

QUINTERO FAMILY TRUST; GEORGE HANNIBAL QUINTERO & CELIA G. QUINTERO, as Trustees; GEORGE HANNIBAL QUINTERO, an individual; and CELIA G. QUINTERO, an individual,

Plaintiffs,

vs.

ONEWEST BANK, F.S.B. as successor to INDYMAC BANK, F.S.B., a Federally Chartered Savings and Loan Association; IDNYMAC BANKCORP, INC., a California corporation; INDYMAC MORTGAGE SERVICES, a division of ONEWEST BANK, F.S.B.; QUALITY LOAN SERVICE CORP., a California corporation; CLARION MORTGAGE CAPITAL, INC., a Colorado corporation; BILL LANEY, an individual; and BREAKTHROUGH MARKETING, INC., a California corporation d/b/a HOME ASSET MORTGAGE,

Defendants.

CASE NO. 09-CV-1561 - IEG (WVG)

ORDER DENYING PLAINTIFFS' EX PARTE APPLICATION

[Doc. No. 45]

Currently before the Court is Plaintiffs' Ex Parte Application, filed on December 9, 2009, seeking another continuance of the hearing on Defendants' Motions to Dismiss and an order for a mandatory settlement conference. [Doc. No. 44]. On December 10, 2009, Defendants OneWest Bank, F.S.B. and Indymac Mortgage Services (collectively, "OneWest") and Clarion Mortgage Capital, Inc.

1 (“Clarion”) filed their oppositions to Plaintiffs’ Ex Parte Application. [Doc. Nos. 48, 49]. Having  
2 considered the parties’ arguments, and for the reasons set forth below, the Court hereby DENIES  
3 Plaintiffs’ Ex Parte Application.

#### 4 **BACKGROUND**

5 The facts of this case are known to the Court and the parties and need not be repeated herein.

##### 6 **I. Procedural History**

7 Plaintiffs commenced the present action on July 17, 2009, and filed a First Amended  
8 Complaint on August 20, 2009, alleging fifteen causes of action against Defendants. [Doc. No. 2].  
9 Since then, three Motions to Dismiss have been filed by: (1) OneWest; (2) Clarion; and (3) Bill Laney  
10 and Breakthrough Marketing, Inc. [Doc. Nos. 8, 11, 22]. The hearings on these motions were first  
11 consolidated and scheduled to be heard on December 7, 2009, and were then rescheduled upon a joint  
12 motion for January 12, 2010, at 10:30 a.m. [Doc. Nos. 14, 26]. In the interim, Plaintiffs filed an Ex  
13 Parte Application seeking expedited discovery to allow them to respond to the Motions to Dismiss.  
14 [Doc. No. 15]. On October 16, 2009, the Court granted in part and denied in part Plaintiffs’ Ex Parte  
15 Application. [Doc. No. 23]. Specifically, the Court granted Plaintiffs’ request for “disclosure of the  
16 complete mortgage loan files in the Defendants’ possession, including but not limited to the  
17 promissory note and the trust deed.” (Order on Ex Parte Appl. for Expedited Discovery, at 3.)

18 On November 12, 2009, Plaintiffs filed a Motion for Temporary Restraining Order (“TRO”)  
19 and Preliminary Injunction, asking the Court to enjoin Defendants from conducting a trustee’s sale  
20 of the Property, at least until the matter can be considered on the merits. (Pl. P. & A. in support of  
21 TRO Motion, at 12.) The Court granted Plaintiffs’ motion on the same day, entering a TRO and setting  
22 November 25, 2009 as the hearing date on the preliminary injunction. [Doc. No. 33]. On November  
23 25, 2009, after holding a hearing on the preliminary injunction, the Court granted Plaintiffs’ request  
24 for a preliminary injunction as to all Defendants, except Defendant Clarion. [Doc. No. 43].

25 On November 20, 2009, Plaintiffs filed a Motion for Sanctions against several Defendants and  
26 their respective counsel. [Doc. No. 39]. Subsequently, to promote judicial efficiency and for the  
27 parties’ convenience, the Court scheduled the hearing on the Motion for Sanctions to be heard on the  
28 same day as the three Motions to Dismiss currently pending before the Court. [Doc. No. 41].

1 **II. Current Ex Parte Application**

2 **A. Plaintiffs' arguments**

3 In their Ex Parte Application, Plaintiffs allege that in light of the documents produced by  
4 Defendants in the limited discovery, Plaintiffs will now have to “add the real parties in interest  
5 previously concealed as new defendants.” (Pl. Ex Parte Appl., at 2.) Specifically, Plaintiffs assert that  
6 contrary to OneWest counsel’s representations at the hearing on the preliminary injunction, OneWest  
7 is no longer the owner of the subject loan, and therefore has no ownership interest in it. (Id. at 3-5.)  
8 Accordingly, Plaintiffs argue another continuance is necessary because, once the new parties are  
9 added as defendants, they will likely bring their own Motions to Dismiss, and therefore it will be  
10 judicially beneficial to coordinate those new motions with already pending Motions to Dismiss. (Id.  
11 at 5.)

12 Moreover, Plaintiffs assert that at least some of Defendants have expressed an interest in  
13 exploring settlement. (Id. at 6.) Thus, Plaintiffs also ask the Court to order a mandatory settlement  
14 conference “at least with respect to the parties that are interested in exploring settlement.” (Id.)

15 **B. Defendant Clarion’s opposition**

16 Defendant Clarion opposes Plaintiffs’ Ex Parte Application on a number of grounds. First,  
17 Clarion asserts that the attorney filing the application on behalf of Plaintiffs, Mr. Pines, is no longer  
18 with the firm of Legal Objective but is with the firm of Pines & Associates. (Clarion’s Opp., at 7.)  
19 According to Clarion, Mr. Pines should be required to submit proof that he is counsel for Plaintiffs  
20 before his Ex Parte Application can be considered. (Id.)

21 Second, Clarion argues Plaintiffs have failed to show good cause for the continuance of the  
22 hearing on Clarion’s Motion to Dismiss. According to Clarion, addition of new defendants is  
23 irrelevant as to the consideration of its Motion to Dismiss because Clarion “claims no interest in the  
24 loan, the note, the deed of trust, or Plaintiffs’ property.” (Id. at 8.) Moreover, Clarion asserts that no  
25 further continuance should be granted because Plaintiffs have already been given two continuances.  
26 (Id.)

27 Clarion also takes issue with Plaintiffs’ request that, while the motions to dismiss be continued,  
28 their motion for sanctions against some of Defendants and their respective counsel (including Clarion

1 and its counsel) remain on calendar for January 12, 2010. (Id. at 10.) According to Clarion, it would  
2 be improper for the Court to rule on whether the Motions to Dismiss were brought in bad faith before  
3 the Court even hears the Motions to Dismiss on their merits. (Id.)

4 Finally, Clarion asserts that Plaintiffs' request for a mandatory settlement conference is  
5 premature because its Motion to Dismiss has yet to be heard and because no discovery has been  
6 permitted on the part of Defendants to date. (Id.)

7 C. OneWest's arguments

8 OneWest similarly opposes Plaintiffs' Ex Parte Application. First, OneWest argues there is  
9 no basis for hearing Plaintiffs' application on an expedited basis. According to OneWest, when its  
10 counsel contacted Plaintiffs' counsel on December 9, 2009 to "meet and confer," he was advised that  
11 "'there was no hurry' and that it could wait until the following week." (Hester Decl., at 2.)  
12 Accordingly, seeing as there is no apparent urgency, OneWest asserts there is no reason why the  
13 present Ex Parte Application cannot be heard through the normal course. (OneWest Opp., at 3.)

14 Moreover, OneWest asserts that it is not clear from Plaintiffs' application why the hearing on  
15 its Motion to Dismiss should be delayed. Notably, OneWest argues that any allegations of "fraud" do  
16 not support further delay in this case. According to OneWest, "[i]f Plaintiffs' positions on the merits  
17 of the case [and with regard to fraud] are correct and valid, presumably they would prevail on the  
18 Motion to Dismiss." (Id. at 4.) Therefore, OneWest argues that Plaintiffs' allegations of "fraud" are  
19 merely an attempt "to paint Defendants as sinister parties." (Id.)

20 OneWest does concede, however, that the subject deed of trust in this case has already been  
21 assigned and recorded with the County Recorder's Office on November 2, 2009, assigning the  
22 beneficial interest in the deed of trust to HSBC BANK USA. (Id. at 5.) According to OneWest, this  
23 does not change the analysis on its Motion to Dismiss, "and certainly does not rise to fraud."<sup>1</sup> (Id.)

24 Finally, OneWest indicates that although it is not opposed to settlement discussions, such

---

26 <sup>1</sup> The Court, however, notes that at the preliminary injunction hearing, which was held on  
27 November 25, 2009—three weeks after the purported assignment—counsel for OneWest indicated to  
28 the Court that "to his knowledge" OneWest still owned the loan. In light of OneWest's present  
concession, the Court has some reservations as to the veracity of that statement. The Court, however,  
leaves the determination of this issue for the hearing on Plaintiffs' Motion for Sanctions. [See Doc.  
No. 39].

1 discussions appear to be premature in light of their currently pending Motion to Dismiss. (Id. at 6.)  
2 Accordingly, OneWest believes that the Court should not order a mandatory settlement conference  
3 at this time. (Id.)

## 4 **DISCUSSION**

### 5 **I. Defendant Clarion’s Objections**

6 As an initial matter, the Court addresses Defendant Clarion’s objections to the propriety of  
7 Plaintiffs’ Ex Parte Application. Clarion contends that the attorney filing the application on behalf of  
8 Plaintiffs, Mr. Pines, is no longer with the firm of Legal Objective but is with the firm of Pines &  
9 Associates. (Clarion’s Opp., at 7.) According to Clarion, Mr. Pines should be required to submit proof  
10 that he is counsel for Plaintiffs before his Ex Parte Application can be considered. (Id.) The Court,  
11 however, is not persuaded by this argument. Apart from Clarion’s own statements, there is nothing  
12 to support this allegation. Mr. Pines is currently the attorney-of-record for Plaintiffs and is presumed  
13 to act on their behalf until he withdraws or a substitution of counsel is executed by Plaintiffs. See Civ.  
14 L.R. 83.3(g). As the Civil Local Rules provide, until any such withdrawal or substitution is approved  
15 by the Court, “the authority of the attorney of record shall continue for all proper purposes.” (Id.)

### 16 **II. Request for Continuance**

17 The matter of whether to grant a continuance is traditionally within the discretion of the court.  
18 Avery v. Alabama, 308 U.S. 444, 446 (1940). Whether a continuance is appropriate is determined  
19 based on the particular circumstances present in the case. Ungar v. Sarafite, 376 U.S. 575, 589-90  
20 (1964). Accordingly, the court can consider such factors as: (1) the amount of time already allowed  
21 for preparation, (2) the likelihood of prejudice from either the grant or denial, (3) either party’s role  
22 in shortening the effective preparation time, (4) the degree of complexity of the case, and (5) the  
23 availability of discovery. See United States v. Bush, 820 F.2d 858, 860 (7th Cir. 1987).

24 In the present case, the Court is convinced that the totality of the above factors weighs against  
25 allowing a further continuance in this case. First, the Court notes that Plaintiffs already had sufficient  
26 amount of time to prepare their responses to the pending Motions to Dismiss, which were filed on  
27 September 14, 2009, September 29, 2009, and October 15, 2009. [Doc. Nos. 8, 11, 22]. Moreover, the  
28 Court has already continued the hearing on these motions twice: once at Plaintiffs’ request, and once

1 at the joint request of the parties. [Doc. Nos. 14, 26].

2 Second, Plaintiffs fail to indicate exactly what prejudice they would suffer if the continuance  
3 is not granted. Their own application, and the declaration of their attorney, indicates that most of the  
4 documents that they requested in expedited discovery have now been produced. (See Pl. Ex Parte  
5 Appl., at 2; Pines Decl., at 2.) Moreover, as Defendants correctly contend, the mere fact that new  
6 parties will be added as defendants does not support further continuing the hearing on *these*  
7 Defendants' Motions to Dismiss. In addition, with some of the Motions to Dismiss already pending  
8 for couple of months, the Court finds that Defendants will be prejudiced by further delay.

9 Third, the Court believes all of the concerned parties are equally responsible for the delays that  
10 have plagued this case. Accordingly, this factor does not weigh in anyone's favor.

11 Finally, although this case raises somewhat complex issues, both factually and legally, as well  
12 as serious questions of misconduct, Plaintiffs have already been provided with expedited discovery  
13 and sufficient time to help them respond to the pending Motions to Dismiss. Accordingly, this factor  
14 also weighs against granting another continuance in the case.

### 15 **III. Request for Mandatory Settlement Conference**

16 The Court also finds that a mandatory settlement conference is premature at this stage of the  
17 proceedings. The district court possesses ample power to compel participation in a mandatory  
18 settlement conference if the circumstances of the case so require. For example, Rule 16(c) provides  
19 that "[i]f appropriate, the court may require that a party or its representative be present or reasonably  
20 available by other means to consider possible settlement." FED. R. CIV. P. 16(c); see also CIV. L.R.  
21 16.3. Moreover, the district courts have inherent power "to manage their own affairs so as to achieve  
22 the orderly and expeditious disposition of cases." Hoffman-La Roche Inc. v. Sperling, 493 U.S. 165,  
23 172-73 (1989) (quoting Link v. Wabash R. Co., 370 U.S. 626, 630-31 (1962)). In the present case,  
24 however, the pendency of three Motions to Dismiss and the corresponding lack of any determination  
25 on the merits to date weigh against ordering a mandatory settlement conference at this time.

### 26 **CONCLUSION**

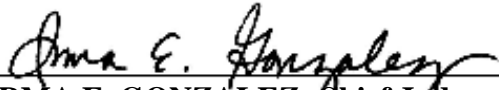
27 For the foregoing reasons, the Court **DENIES** Plaintiffs' Ex Parte Application both with  
28 respect to their request for a continuance and their request for the Court to order a mandatory

1 settlement conference.

2 Accordingly, the hearing on the three Motions to Dismiss, as well as the hearing on Plaintiffs'  
3 Motion for Sanctions, shall remain scheduled for **January 12, 2010 at 10:30 a.m.**

4 **IT IS SO ORDERED.**

5  
6 **DATED: December 11, 2009**

7   
8 **IRMA E. GONZALEZ, Chief Judge**  
9 **United States District Court**

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28