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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JAMES MCDONALD,

Plaintiff,

v.

ONEWEST BANK, FSB, *et al.*,

Defendants.

No. C10-1952RSL

PRELIMINARY INJUNCTION

Plaintiff James McDonald seeks an order restraining defendants from foreclosing on his house until his objections to the foreclosure procedure can be resolved. Having reviewed the papers submitted by the parties and heard argument on January 18, 2011,<sup>1</sup> the Court finds as follows:

**BACKGROUND**

In January 2007, plaintiff borrowed money from IndyMac Bank, F.S.B. The note memorializing the mortgage identifies plaintiff as the borrower and IndyMac as the lender. Dkt. # 1, Ex. B. A separate deed of trust was entered on the same date. Dkt. # 1, Ex. A. A deed of trust is, in essence, a three-party mortgage through which the borrower gives a third party a lien on the real property to hold in trust as security until the obligation to the lender is discharged.

<sup>1</sup> At oral argument, counsel for defendants agreed to postpone the trustee's sale for a third time, until January 28, 2011, to accommodate the Court's schedule.

PRELIMINARY INJUNCTION

1 Wash. House of Rep. Bill Report, 2008 Reg. Sess. S.B. 5378 (March 6, 2008). The third party is  
2 called the trustee and the lender is generally identified as the beneficiary of the trust. Through  
3 this arrangement, title to the real property passes to the borrower, but the lender is protected  
4 under the trust agreement. If the borrower defaults on his loan, the beneficiary need not file a  
5 civil suit to foreclose on the mortgage: pursuant to the Deed of Trust Act (“DTA”), RCW  
6 61.24.005 *et seq.*, the trustee may initiate non-judicial foreclosure proceedings. As long as the  
7 trustee complies with the DTA’s procedural requirements, the lender can foreclose on the  
8 property inexpensively and efficiently. If the borrower objects, the burden is on him to seek  
9 judicial protection from wrongful foreclosure.

10 The deed of trust at issue in this case identifies four parties. Plaintiff is the  
11 borrower. The lender is IndyMac. The trustee is Pacific Northwest Title Insurance Company.  
12 And Mortgage Electronic Registration Systems, Inc. (“MERS”) is identified as the lender’s  
13 nominee to act as the beneficiary.

14 On or about January 12, 2010, defendant Northwest Trustee Services, Inc., acting  
15 as the agent of defendant OneWest Bank, FSB, sent plaintiff a Notice of Default under the DTA.  
16 The document identifies OneWest as the beneficiary of the deed of trust and the servicer of the  
17 mortgage. Dkt. # 17, Ex. C. Two weeks after the Notice of Default was issued, Brian Burnett,  
18 an employee of OneWest, signed a document purporting to assign MERS’ interests as  
19 beneficiary to OneWest. Dkt. # 1, Ex. D. The signature block identifies Mr. Burnett as an  
20 “Assistant Vice President” of MERS. On the same day, January 27, 2010, Suchan Murray,  
21 acting on behalf of OneWest, appointed Northwest Trustee Services as successor trustee under  
22 the deed of trust. Dkt. # 1, Ex. F. Both the assignment and the appointment were recorded in  
23 the King County Auditor’s files on February 4, 2010.

24 On February 15, 2010, Northwest Trustee Services issued a Notice of Trustee’s  
25 Sale informing plaintiff that his house would be sold at auction on May 21, 2010. Dkt. # 12, Ex.  
26 5. In April, plaintiff disputed the alleged mortgage debt and demanded that IndyMac and

1 Northwest Trustee Services provide evidence that one of them or their assigns had possession of  
2 the original signed promissory note. Dkt. # 17, Ex. F. On May 18, 2010, OneWest confirmed  
3 that Freddie Mac had purchased/invested in plaintiff's mortgage, but declined to provide most of  
4 the other information plaintiff had requested. OneWest particularly noted that "[o]riginal  
5 documents – or at least the original promissory note and deed of trust/mortgage – are not  
6 available for inspection although if you would like to obtain a certified copy please fill out the  
7 order form enclosed." Dkt. # 1, Ex. G. Northwest Trustee Services sent out a second Notice of  
8 Trustee's Sale on or about November 1, 2010.

9 This action was filed on December 3, 2010, one week before the foreclosure sale  
10 was scheduled to begin. Plaintiff alleges that defendants have violated the DTA, slandered  
11 plaintiff's title to real property, and initiated an unlawful foreclosure action. Plaintiff seeks  
12 preliminary and permanent injunctive relief to prevent defendants from selling his home.

### 13 DISCUSSION

14 In order to obtain preliminary injunctive relief, plaintiff must establish "that he is  
15 likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of  
16 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the  
17 public interest." Winter v. Natural Res. Def. Council, 555 U.S. 7, 129 S. Ct. 365, 374 (2008).  
18 In addition, "serious questions going to the merits and a hardship balance that tips sharply  
19 towards the plaintiff can support issuance of an injunction, so long as the plaintiff also shows a  
20 likelihood of irreparable injury and that the injunction is in the public interest." Alliance for the  
21 Wild Rockies v. Cottrell, 622 F.3d 1045, 1053 (9th Cir. 2010) (internal quotation marks  
22 omitted).

23 The Court finds that plaintiff has raised serious questions going to the merits of his  
24 DTA claim. Based on the evidence provided by the parties, whether OneWest had authority to  
25 appoint a successor trustee on January 27, 2010, whether the Notice of Default issued on or  
26 about January 12, 2010, complied with the statutory requirements, and whether OneWest is the

1 beneficiary as that term is defined in the DTA cannot be determined. Pursuant to the DTA, only  
2 the beneficiary has the power to appoint a trustee or successor trustee (RCW 61.24.010(2)), and  
3 the written notice of default must be provided by the beneficiary or the trustee (RCW  
4 61.24.030(8)). The main issue in this case is whether OneWest, as a service provider to Freddie  
5 Mac, is “the holder of the instrument or document evidencing the obligations secured by the  
6 deed of trust,” *i.e.*, the beneficiary. OneWest has taken the position that, at some point before  
7 January 27, 2010, it became the holder of the debt instrument by virtue of its servicing  
8 agreement with Freddie Mac and automatically succeeded MERS as the beneficiary. The Court  
9 is willing to assume for purposes of this motion that the identity of the beneficiary can change  
10 without requiring a formal assignment.<sup>2</sup> OneWest has not, however, shown that it actually  
11 possessed the note at the time it appointed Northwest Trust Services as successor trustee or  
12 issued the Notice of Default. Instead, it relies on an expansive definition of “holder” that would  
13 allow any number of parties to claim simultaneous beneficiary status based on their potential, but  
14 unexercised, ability to obtain possession of the note. Such a situation is in conflict with the  
15 policy and practical considerations that underlie bearer paper and the DTA. Because OneWest  
16 has not identified any case law in support of its constructive and/or multiple holder theory, the  
17 Court finds that this unresolved issue gives rise to serious questions regarding the merits of  
18 plaintiff’s DTA claim.

19 The failure to issue an injunction will result in the sale of plaintiff’s home, a loss  
20 that would be irreparable and would not be adequately compensated through an award of money  
21 damages. The balance of hardships tips decidedly in favor of issuing an injunction: defendants’  
22 financial interests can be adequately protected by requiring payments on the loan while this

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24 <sup>2</sup> Plaintiff argues that the designation of a beneficiary constitutes a transfer of an interest in real  
25 property, and that such transfers must be recorded if they are to be valid against subsequent purchasers  
26 in good faith. Dkt. # 20 at 2. The Court has not determined whether these statutory provisions apply in  
this instance.

Defendant’s motion to strike plaintiff’s post-hearing memorandum (Dkt. # 21) is DENIED.

1 matter is pending, whereas plaintiff's interests would be substantially destroyed if the  
2 foreclosure sale were to proceed. Nor is the public interest on defendants' side in this matter.  
3 By enacting the DTA, the legislature provided lenders with an efficient and cost-effective means  
4 by which to foreclose defaulted loans. The lenders must, however, strictly comply with the  
5 procedural requirements of the act to ensure that homeowners are given a meaningful  
6 opportunity to correct deficiencies and are protected from competing claims and additional  
7 liabilities. Having chosen to initiate a non-judicial foreclosure process without having actual  
8 possession of the debt instrument, the public interest supports a measured and substantive  
9 evaluation of the legal impact of defendants' business practices.

10 Pursuant to RCW 61.24.130(1), "[t]he court shall require as a condition of granting  
11 the restraining order or injunction that the applicant pay to the clerk of the court the sums that  
12 would be due on the obligation secured by the deed of trust if the deed of trust was not being  
13 foreclosed . . . ." Both the statute and equitable considerations require that plaintiff make  
14 monthly payments on the loan. There is no real dispute regarding plaintiff's obligation to  
15 discharge the underlying debt. The Court is willing to exercise its equitable powers in plaintiff's  
16 favor only if defendants' legitimate business interests can be protected, and the Court is assured  
17 that plaintiff is not using the judicial process to avoid an existing and, until recently, undisputed  
18 legal obligation.

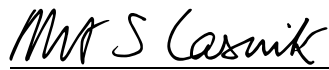
19 The Court recognizes that plaintiff's loan has an adjustable interest rate and that  
20 plaintiff believes he is entitled to certain offsets related to insurance receipts that defendants may  
21 or may not have obtained. Having reviewed the loan documents and the remainder of the record,  
22 the initial monthly payment amount will be \$2,347.56 as requested by defendants in their  
23 opposition memorandum. This amount shall be paid into the registry of the Court on or before  
24 February 15, 2011, with a similar payment made on or before the 15th of every month in which  
25 this matter is pending. The funds shall be accepted into the registry of the Court and placed into  
26 an interest-bearing account until further order of the Court. If either party believes the amount

1 should be adjusted to more accurately reflect the amounts that would then be due under the  
2 adjustable rate note, they should attempt to reach agreement with the opposing party and submit  
3 a stipulation and proposed order specifying the new amount. If the parties cannot agree on the  
4 amount due, they may file a motion to amend the payment amount.

5 **CONCLUSION**

6 For all of the foregoing reasons, plaintiff's request for preliminary injunctive relief  
7 is GRANTED. Defendants are hereby enjoined from foreclosing on plaintiff's property. This  
8 injunction is contingent on plaintiff making monthly payments into the registry of the Court as  
9 described above. Failure to make timely payments into the registry may result in the expedited  
10 sale of the property.

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12 Dated this 25th day of January, 2011.

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14 Robert S. Lasnik

15 United States District Judge  
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