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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

JEFFREY BENKO, et al.,

Plaintiffs,

v.

QUALITY LOAN SERVICE CORP. et al.,

Defendants.

Case No. 2:12-cv-00224-MMD-GWF

ORDER

(Defendant MTC's Motion to Dismiss – dkt. no. 10)

Defendant Quality Loan's Motion to Dismiss – dkt. no. 13)

Defendant Meridian's Motion to Dismiss – dkt. no. 16)

(Defendant California Reconveyance Corporation's Motion to Dismiss – dkt. no. 17)

(Defendant Appleton Properties' Joinder to dkt. nos. 10, 13, 16, & 17, Partial Motion to Dismiss, and Motion to Expunge Lis Pendens – dkt. no. 31)

(Plaintiff's Motion to Remand – dkt. no. 34)

(Plaintiff's Motion for Leave to File a Second Amended Complaint – dkt. no. 45)

(Defendant Appleton's *Ex Parte* Motion for Order Shortening Time – dkt. no. 89)

**I. SUMMARY**

Before the Court are Defendants MTC Financial, Quality Loan, Meridian, and California Reconveyance Corporation's Motions to Dismiss. (Dkt. nos. 10, 13, 16 and 17.) Also before the Court is Defendant Appleton Properties' ("Appleton") Joinder to those Motions, Partial Motion to Dismiss, and Motion to Expunge Lis Pendens (dkt. no. 31), and *Ex Parte* Motion for an Order Shortening Time to hear its Motion (dkt. no. 89.)

1 Also before the Court are Plaintiffs' Motion to Remand (dkt. no. 34) and Motion for Leave  
2 to File a Second Amended Complaint (dkt. no. 45).

## 3 **II. BACKGROUND**

4 Plaintiffs, the proposed class members, are mortgage loan debtors who defaulted  
5 on their loan obligations. Defendant trustees filed foreclosures against Plaintiffs. In their  
6 First Amended Complaint ("FAC"), Plaintiffs assert that the act of filing a non-judicial  
7 foreclosure constitutes debt collection activity under NRS § 649. Plaintiffs argue that the  
8 trustees must be licensed under that statute, but are not, and that the failure to be  
9 licensed constitutes a deceptive trade practice under NRS § 598.023(1). Plaintiffs also  
10 allege unjust enrichment, trespass, quiet title, and Plaintiffs Kuhn and Gill allege elder  
11 abuse against Defendant Meridian.

12 Defendant Meridian Foreclosure Service ("Meridian") removed the action on  
13 February 13, 2012, under the Class Action Fairness Act ("CAFA").

## 14 **III. MOTION TO REMAND**

### 15 **A. Legal Standard**

16 If, prior to final judgment, the district court discovers its lack of subject matter  
17 jurisdiction, it must remand the case. 28 U.S.C. § 1447(c). A defendant seeking  
18 removal of an action to federal court bears the burden of establishing grounds for federal  
19 jurisdiction. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). Removal statutes are  
20 construed restrictively. *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1393 (9th  
21 Cir. 1988).

### 22 **B. CAFA and the Local Controversy Exception**

23 Plaintiffs seek to remand their Complaint under the "local controversy" exception  
24 to CAFA.

25 "Congress passed the Class Action Fairness Act primarily to curb perceived  
26 abuses of the class action device which, in the view of CAFA's proponents, had often  
27 been used to litigate multi-state or even national class actions in state courts." *United*  
28 *Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union,*

1 *AFL-CIO, CLC v. Shell Oil Co.*, 602 F.3d 1087, 1090 (9th Cir. 2010) (citation and  
2 quotation marks omitted). “To achieve its purposes, CAFA provides expanded original  
3 diversity jurisdiction for class actions meeting the amount in controversy and minimal  
4 diversity and numerosity requirements set forth in 28 U.S.C. § 1332(d)(2). *Id.* at 1090-91  
5 (citation and quotation marks omitted). “CAFA also covers more than traditional class  
6 actions by providing for removal of mass actions.” *Id.* at 1091 (citation and quotation  
7 marks omitted).

8 “CAFA vests federal courts with ‘original’ diversity jurisdiction over class actions  
9 if: (1) the aggregate amount in controversy exceeds \$5,000,000, and (2) any class  
10 member is a citizen of a state different from any defendant.” *Serrano v. 180 Connect,*  
11 *Inc.*, 478 F.3d 1018, 1020-21 (9th Cir. 2007) (citing 28 U.S.C. § 1332(d)(2); footnote  
12 omitted). Under CAFA, complete diversity is not required; minimal diversity is sufficient.  
13 *Id.* at 1021 (citing *Bush v. Cheaptickets, Inc.*, 425 F.3d 683, 684 (9th Cir. 2005)).

14 There are, however, statutory exceptions to CAFA’s jurisdictional grant, one of  
15 which is known as the “local controversy” exception, 28 U.S.C. § 1332(d)(4) (A). See  
16 *Serrano*, 478 F.3d at 1019. “The ‘local controversy’ exception provides that a district  
17 court *shall* decline to exercise jurisdiction over a class action in which the plaintiff class  
18 and at least one defendant meet certain characteristics that essentially make the case a  
19 local controversy.” *Id.* at 1022 (italics in original; footnote omitted).

20 Under the local controversy exception, “a federal district court shall decline to  
21 exercise [removal] jurisdiction . . . over a class action in which—”

22 (I) greater than two-thirds of the members of all proposed plaintiff classes in  
23 the aggregate are citizens of the State in which the action was originally  
filed;

24 (II) at least 1 defendant is a defendant—

25 (aa) from whom significant relief is sought by members of the  
26 plaintiff class;

27 (bb) whose alleged conduct forms a significant basis for the claims  
28 asserted by the proposed plaintiff class; and

1 (cc) who is a citizen of the State in which the action was originally  
filed; and

2 (III) principal injuries resulting from the alleged conduct or any related  
3 conduct of each defendant were incurred in the State in which the action  
was originally filed[.]

4 *Coleman v. Estes Exp. Lines, Inc.*, 631 F.3d 1010, 1013 (9th Cir. 2011) (citing 28  
5 U.S.C. § 1332(d)(4)(A)). “A plaintiff seeking remand has the burden of showing that the  
6 local controversy exception applies.” *Id.* (citing *Serrano*, 478 F.3d at 1024).

7 “CAFA’s language favors federal jurisdiction over class actions and CAFA’s  
8 legislative history suggests that Congress intended the local controversy exception to be  
9 a narrow one, with all doubts resolved ‘in favor of exercising jurisdiction over the case.’”  
10 *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1163 (11th Cir. 2006) (citing S. Rep. No.  
11 109-14 at 42, U.S. Code Cong. & Admin. News 3, 40). The Senate Report on CAFA  
12 states that the local controversy exception

13 is a narrow exception that was carefully drafted to ensure that it does not  
14 become a jurisdictional loophole. Thus, the Committee wishes to stress  
15 that in assessing whether each of these criteria is satisfied by a particular  
16 case, a federal court should bear in mind that the purpose of each of these  
criteria is to identify a truly local controversy—a controversy that uniquely  
affects a particular locality to the exclusion of all others.

17 S. Rep. 109-14, at 39, U.S. Code Cong. & Admin. News at 38.

### 18 **C. Analysis<sup>1</sup>**

19 The Court determines that Plaintiffs fail to satisfy their burden of establishing an  
20 essential requirement of the local controversy exception – that at least one Nevada  
21 defendant is a “significant defendant.”

22 Plaintiff alleges that Defendants Meridian and Appleton are Nevada citizens.<sup>2</sup>  
23 The Complaint also alleges that Defendant Appleton is a Nevada resident, but Plaintiffs

24 \_\_\_\_\_  
25 <sup>1</sup>The Court considers whether sub-sections (aa) and (bb) to the “significant local  
26 defendant” test are satisfied by looking to the FAC alone, without considering extrinsic  
evidence. See *Coleman v. Estes Exp. Lines, Inc.*, 631 F.3d at 1016-17. The Court may  
rely on extrinsic evidence in determining sub-section (cc). *Id.*

27 <sup>2</sup>Plaintiffs allege that Meridian is a Nevada citizen, though acknowledge that it  
28 may also be a California citizen. Plaintiffs provide an authenticated e-mail  
communication from defense counsel stating that he does not challenge Meridian’s  
(fn. cont...)

1 do not discuss Defendant Appleton in their Motion to Remand. Because Plaintiffs bear  
2 the burden of demonstrating that Appleton is a significant citizen-defendant, see  
3 *Serrano*, 478 F.3d at 1024, and fails to meet this burden by not discussing Appleton in  
4 their Motion, the Court only considers whether Defendant Meridian is a significant local  
5 defendant.<sup>3</sup>

6 CAFA “does not expressly define what constitutes significant relief.” *Haynes v.*  
7 *EMC Mortg. Corp.*, No. C 10-00372 WHA, 2010 WL 1445650, at \*4 (N.D. Cal. Apr. 12,  
8 2010). “Significant relief” and “significant basis” as used in CAFA “require a comparison  
9 between the local defendant’s significance and the significance of all the defendants.”  
10 *Id.* (citing *Kaufman v. Allstate N.J. Ins. Co.*, 561 F.3d 144, 156 (3d Cir. 2009) (“[I]f the  
11 local defendant’s alleged conduct is a significant part of the alleged conduct of all the  
12 Defendants, then the significant basis provision is satisfied.”); *Evans v. Walter Indus.,*  
13 *Inc.*, 449 F.3d 1159 (11th Cir. 2006) (analyzing comparative significance of relief sought  
14 against local defendant relative to relief sought from co-defendants)). “Thus, rather than  
15 look to whether the relief or conduct of the local defendant is significant in an absolute  
16 sense, a court must undertake a ‘substantive analysis comparing the local defendant’s  
17 alleged conduct to the alleged conduct of all the Defendants.’” *Id.* (citing *Kaufman*, 561  
18 F.3d at 156); see also *Robinson v. Cheetah Transp.*, No. 06-0005, 2006 WL 468820, at  
19 \*3-4 (W.D. La. Feb. 27, 2006); *Kearns v. Ford Motor Co.*, No. 05-5644, 2005 WL  
20 3967998, at \*8-10 (C.D. Cal. Nov. 21, 2005) (recognizing that the term “significant relief”  
21 is ambiguous, and determining the legislative history dictated that “significant relief”  
22 should be measured with respect to the relief sought by the entire class) (*impliedly*  
23 *reversed on other grounds by Serrano*, 478 F.3d at 1021).

24  
25 \_\_\_\_\_  
26 (...*fn. cont.*)

26 status as a Nevada citizen. (Dkt. no. 44-3 at 2.) See *Haynes v. EMC Mortg. Corp.*, *infra*,  
27 No. C 10-00372 WHA, 2010 WL 1445650, at \*4 (N.D. Cal. Apr. 12, 2010).

27 <sup>3</sup>Further, because only one Plaintiff, Gill, brings only one cause of action against  
28 Appleton, Plaintiffs would not be able to establish that Appleton is a “significant  
defendant” under CAFA. See *Evans*, 449 F.3d at 1159.

1           In *Haynes v. EMC Mortg. Corp.*, C 10-00372 WHA, 2010 WL 1445650, at \*4 (N.D.  
2 Cal. Apr. 12, 2010), a case concerning California foreclosure proceedings, the court  
3 determined that the case fell under CAFA's local controversy exception. In that case,  
4 the plaintiffs alleged that the foreclosing beneficiary failed to record the transfer of  
5 property in violation of California statute. The plaintiffs alleged that Defendant EMC had  
6 a policy of foreclosing on properties without recording the assignment of title of the  
7 property. *Id.* at \*1. Local Defendant Quality Loan was one of three named defendants,  
8 and the complaint alleged four claims against Quality Loan. *Id.* at \*4. The central claim  
9 against defendant Quality Loan was that it improperly foreclosed upon the plaintiffs'  
10 residence, following directions from EMC. *Id.* The court determined that Quality Loan's  
11 conduct was "deeply intertwined with that of defendant EMC," and therefore it was a  
12 significant defendant. *Id.* (citing *Kaufman*, 561 F.3d at 157).

13           In contrast, the *Kearns* court declined to remand under the local controversy  
14 exception. 2005 WL 3967998, \*8-10. "The plaintiffs in *Kearns* brought a putative class  
15 action lawsuit against Ford, a California Ford dealership, and doe defendants for  
16 misrepresenting Ford certified pre-owned vehicles." *Haynes*, 2010 WL 1445650, at \*5.  
17 The *Kearns* court determined that the local Ford dealership was not a significant  
18 defendant under Part II(aa), the significant relief element, because the local dealership  
19 sold cars to only a fraction of the class. 2005 WL 3967998, at \*10.

20           Plaintiffs assert that they request significant relief from Meridian because they  
21 seek general, special, and punitive damages from Meridian as well as disgorgement and  
22 injunctive relief.<sup>4</sup> Plaintiffs also point to Meridian's Statement Regarding Removal (dkt.  
23 no. 18), where Meridian states that the amount in controversy is \$5 million to  
24 demonstrate that Meridian is a significant Defendant.

25  
26           <sup>4</sup>Plaintiffs also address whether Meridian is a "significant defendant" by  
27 referencing their proposed SAC, but the Court does not consider these arguments  
28 because jurisdictional facts are assessed at the time of removal. *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC v. Shell Oil Co.*, 602 F.3d 1087, 1091 (9th Cir. 2010).

1           The \$5 million figure listed in Meridian’s Statement Regarding Removal clearly  
2 concerned the *total* amount in controversy, which Meridian argued met the \$5 million  
3 CAFA amount-in-controversy minimum, *not* Plaintiffs’ relief sought from Meridian  
4 specifically.

5           Further, when compared to the other named Defendants, Meridian does not stand  
6 out as a significant Defendant or one in which significant relief is sought. Quality  
7 foreclosed upon four homes, Meridian foreclosed upon four homes, and MTC, National  
8 Default, and CRC all foreclosed upon one home. (Dkt. no. 1-2 at ¶¶ 1-11.) All  
9 Defendants except Appleton are parties to counts 1-3, Appleton alone is a party to count  
10 4, and only Meridian is a party to the fifth cause of action for elder abuse, brought by a  
11 purported sub-class. Given that the nature of the FAC merely alleges that several  
12 different Defendants foreclosed upon several different Plaintiffs’ homes without licenses,  
13 it would appear as if none of the Defendants are “significant,” though Meridian’s actions  
14 and the relief sought against Meridian for the home foreclosures is not a significant  
15 portion of the whole (for example, while eleven homes were foreclosed upon, Meridian  
16 was involved in five foreclosures).

17           Further, the proposed class is “[a]ll Nevada residents [thousands, mostly in Clark  
18 County] who were subject to debt collection activity by defendants while defendants did  
19 not hold a Nevada license to engage in debt collection activities in Nevada.” (Dkt. no. 1-  
20 2 at ¶¶ 21(a), 23.) Nothing in the FAC demonstrates that Defendant Meridian played a  
21 role in these thousands of foreclosures. To the contrary, the Complaint makes clear that  
22 several *different* Defendants were involved in the alleged debt collection practices on the  
23 various Plaintiffs’ homes.

24           Finally, “[w]hile assessing the quantity of claims based on the local defendant’s  
25 alleged conduct may be useful to the analysis, the significant basis provision does not  
26 establish an absolute quantitative requirement.” *Kaufman*, 561 F.3d at 155-56. “Nor is it  
27 necessary to imply such a quantitative requirement to make sense of the provision, for a  
28 party’s conduct may form a significant basis of an entire set of claims even if some

1 claims within the set are not based on that conduct.” *Id.* To that end, the Court notes  
2 that while Meridian is not a minimal Defendant like Appleton, *see supra, n.3*, this case is  
3 unlike *Haynes*. Meridian’s conduct does not form a significant basis of an entire set of  
4 claims. Plaintiffs here do not allege a systematic policy or practice of Meridian’s that  
5 affected all, most, or many of the Plaintiffs. Rather, the FAC demonstrates that Meridian  
6 was but one player in an uncoordinated wave of foreclosures that hit Clark County. The  
7 only practice common to all Defendants is that they foreclosed upon homes without a  
8 state license to do so. And Meridian’s foreclosure practices did not uniquely affect a  
9 significant portion of the Plaintiffs.

10 Plaintiffs have not satisfied their burden of showing that the local controversy  
11 exception under CAFA applies. The Court accordingly denies Plaintiffs’ Motion to  
12 Remand.<sup>5</sup>

#### 13 **IV. MOTIONS TO DISMISS<sup>6</sup>**

##### 14 **A. Legal Standard**

15 On a 12(b)(6) motion, the court must determine “whether the complaint’s factual  
16 allegations, together with all reasonable inferences, state a plausible claim for relief.”  
17 *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys.*, 637 F.3d 1047, 1054 (9th Cir. 2011)  
18 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009)). “A claim has facial plausibility  
19 when the plaintiff pleads factual content that allows the court to draw the reasonable  
20 inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678  
21 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

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22 <sup>5</sup>While the proposed sub-class concerning the elder abuse cause of action  
23 involves only Nevada citizens (Meridian, Gill, and Kuhn), the Court declines to remand  
24 that cause of action. Plaintiffs do not request remanding solely that cause of action.  
25 Further, Plaintiffs have yet to demonstrate that this is a viable sub-class under Rule  
26 23(a)’s “rigorous analysis.” *In re Taco Bell Wage & Hour Actions*, No. 1:07-CV-01314,  
2011 WL 4479730, at \*2 (E.D. Cal. Sept. 26, 2011). The Court declines to *sua sponte*  
remand this cause of action.

27 <sup>6</sup>Each of Defendants’ Motions to Dismiss and Joinders to those Motions make  
28 essentially the same arguments. Accordingly, unless the arguments apply to only certain  
Plaintiffs or Defendants, the Court does not specifically differentiate between the parties’  
arguments.



1           When determining the sufficiency of a claim, “[w]e accept factual allegations in the  
2 complaint as true and construe the pleadings in the light most favorable to the non-  
3 moving party[; however, this tenet does not apply to] . . . legal conclusions . . . cast in the  
4 form of factual allegations.” *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011)  
5 (citation and internal quotation marks omitted). “Therefore, conclusory allegations of law  
6 and unwarranted inferences are insufficient to defeat a motion to dismiss.” *Id.* (citation  
7 and internal quotation marks omitted); see also *Iqbal*, 556 U.S. at 678 (quoting *Twombly*,  
8 550 U.S. at 555) (“A pleading that offers ‘labels and conclusions’ or ‘a formulaic  
9 recitation of the elements of a cause of action will not do.’”).

10           **B. Consumer Fraud**

11           As mentioned, Plaintiffs allege that Defendants are liable for consumer fraud  
12 because they were each acting as collection agencies as defined by NRS § 649.020 but  
13 were not licensed to do so. Plaintiffs assert that Defendants’ conduct violated NRS §  
14 649.075 and/or NRS § 649.171, and therefore constituted a deceptive trade practice  
15 under NRS chapter 598, Nevada’s Fair Debt Collection Practices Act (“FDCPA”).

16           NRS § 649.075(1) holds that “[e]xcept as otherwise provided in this section, a  
17 person shall not conduct within this State a collection agency or engage within this State  
18 in the business of collecting claims for others, . . . without having first applied for and  
19 obtained a license from the Commissioner.”<sup>7</sup>

20           This claim must be dismissed as a matter of law because home foreclosure is not  
21 a debt collection under the FDCPA. “[F]oreclosing on a property pursuant to a deed of  
22 trust is not the collection of a debt within the meaning of the FDCPA.” *Duran v. Aurora*  
23 *Loan Servs.*, No. A09CV0138, 2009 WL 1110643, at \*2 (E.D. Cal. Apr. 24, 2009) *report*  
24 *and recommendation adopted by* No. 109CV0138, 2009 WL 1740567 (E.D. Cal. June  
25 18, 2009)(citations omitted); see also *Camacho-Villa v. Great W. Home Loans*, No. 3:10-

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27           <sup>7</sup>Section (2) of the statute states that “[a] person is not required to obtain a license  
28 if the person holds a certificate of registration as a foreign collection agency issued by  
the Commissioner pursuant to NRS 649.171.”

1 CV-210, 2011 WL 1103681, at \*4 (D. Nev. Mar. 23, 2011) (“Foreclosure pursuant to a  
2 deed of trust does not constitute debt collection under the FDCPA.”); *Hulse v. Ocwen*  
3 *Fed. Bank, FSB*, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002); *Izenberg v. ETS Servs.,*  
4 *LLC*, 589 F. Supp. 2d 1193, 1199 (C.D. Cal. 2008); *Heinemann v. Jim Walter Homes,*  
5 *Inc.*, 47 F. Supp. 2d 716, 722 (N.D. W. Va. 1998).

6 Defendants’ Motions to Dismiss are accordingly granted. The FDCPA/consumer  
7 fraud causes of action are dismissed with prejudice.

8 **C. Unjust Enrichment**

9 “An action based on a theory of unjust enrichment is not available when there is  
10 an express, written contract, because no agreement can be implied when there is an  
11 express agreement.” *Leasepartners Corp. v. Robert L. Brooks Trust Dated November*  
12 *12, 1975*, 942 P.2d 182, 187 (Nev. 1997) (citing 66 Am. Jur. 2d Restitution § 6 (1973)).  
13 “The doctrine of unjust enrichment or recovery in quasi-contract applies to situations  
14 where there is no legal contract but where the person sought to be charged is in  
15 possession of money or property which in good conscience and justice he should not  
16 retain but should deliver to another [or should pay for].” *Leasepartners*, 942 P.2d at 187.

17 Mortgages are express written documents. *Goodwin v. Exec. Trustee Servs.,*  
18 *LLC*, 680 F. Supp. 2d 1244, 1255 (D. Nev. 2010). Accordingly, Plaintiffs’ unjust  
19 enrichment claim must be dismissed with prejudice.

20 **D. Quiet Title—Plaintiff Gill and Defendant Appleton**

21 Only Plaintiff Antoinette Gill sues only Defendant Appleton on this cause of action.  
22 NRS § 40.010 provides that “[a]n action may be brought by any person against another  
23 who claims an estate or interest in real property, adverse to him, for the purpose of  
24 determining such adverse claim.” A quiet title action in court is the method by which to  
25 adjudicate disputed ownership of real property rights. *Howell v. Ricci*, 197 P.3d 1044,  
26 1046 (Nev. 2008). The purpose of a quiet title action is to settle all conflicting claims to  
27 the property and to declare each interest or estate to which the parties are entitled.  
28 *Newman v. Cornelius*, 3 Cal. App. 3d 279, 284 (1970).

1 A quiet title action must include: (1) a description of the property in question; (2)  
2 the basis for plaintiff's title; (3) the adverse claims to plaintiff's title; (4) the date as of  
3 which the determination is sought; and (5) a prayer for determination of plaintiff's title  
4 against the adverse claims. Cal. Civ. Proc. Code § 761.020(a-e). "In addition to the  
5 required elements for a quiet title action, a borrower cannot quiet title to a property  
6 without discharging any debt owed." *Zendejas v. GMAC Wholesale Mortg. Corp.*, 2010  
7 WL 2490975, at \*8 (E.D. Cal. 2010); *see also Distor v. U.S. Bank NA*, 2009 WL  
8 3429700, at \*6 (N.D. Cal. 2009) (a plaintiff has no basis to quiet title without first  
9 discharging the debt on the property).

10 In *Wensley v. First Nat. Bank of Nevada*, No. No. 3:11-cv-00809, 2012 WL  
11 1971773, at \*6, 874 F. Supp. 2d 957 (D. Nev. 2012), the plaintiff failed to allege that she  
12 had not defaulted on the loan, and the complaint read as a whole demonstrated that  
13 there was no dispute on this point. The court noted that the plaintiff was "challenging the  
14 procedure with which foreclosure was initiated against her, not that the loan was not in  
15 default," and because she was in default, the court dismissed the cause of action without  
16 leave to amend. *Id.*

17 Likewise, here, Gill admits the "fact" that she is a "mortgagor in default." (Dkt. no.  
18 64 at 4.) Further, the FAC demonstrates that Gill, like the plaintiff in *Wensley*, is  
19 challenging the foreclosure procedure, and does not assert that she has cured her  
20 default. This cause of action is therefore dismissed with prejudice.

21 **E. Elder Abuse – Plaintiffs Kuhn and Gill and Defendant Meridian**

22 Only Plaintiffs Gill and Sandra Kuhn bring this cause of action against Defendant  
23 Meridian. Plaintiffs allege that Defendant's debt collection activities on Kuhn and Gill,  
24 who are over 60 years old, constitutes abuse against elderly persons under NRS §  
25 41.1395 and § 200.5092. Plaintiffs also allege that this abuse was so willful and  
26 malicious as to merit punitive damages.

27 NRS § 41.1395(1) holds that "if an older person or a vulnerable person suffers a  
28 personal injury or death that is caused by abuse or neglect or suffers a loss of money or

1 property caused by exploitation, the person who caused the injury, death or loss is liable  
2 to the older person or vulnerable person for two times the actual damages incurred by  
3 the older person or vulnerable person.” The alleged abuse here would constitute loss of  
4 property caused by exploitation. The statute defines “exploitation” as:

5 (b) any act taken by a person who has the trust and confidence of an older  
6 person or a vulnerable person or any use of the power of attorney or  
guardianship of an older person or a vulnerable person to:

7 (1) Obtain control, through deception, intimidation or undue  
8 influence, over the money, assets or property of the older  
9 person or vulnerable person with the intention of permanently  
10 depriving the older person or vulnerable person of the  
ownership, use, benefit or possession of that person’s  
money, assets or property; or

11 (2) Convert money, assets or property of the older person  
12 with the intention of permanently depriving the older person  
or vulnerable person of the ownership, use, benefit or  
possession of that person’s money, assets or property.

13 NRS § 41.1395(4)(b)(1)-(2).

14 The Complaint fails to allege facts sufficient to support this cause of action.  
15 Plaintiffs do not allege that Meridian has the “trust and confidence of an older person or  
16 a vulnerable person.” Nor could they, as Meridian—merely the entity foreclosing upon  
17 Kuhn and Gill’s homes – have had a relationship of trust with them. Kuhn and Gill have  
18 no viable cause of action under this statute.

19 NRS § 200.5092 is a definitional statute, and includes the definition of  
20 “exploitation.” It does not create an independent cause of action. Kuhn and Gill have no  
21 viable cause of action under this statute.

22 Foreclosing upon the home of an elderly person, without more, is plainly not elder  
23 abuse. Kuhn and Gill cannot tack on an elder abuse cause of action to their FAC, which  
24 wholly regards the foreclosures of their homes, merely because they are over 60 years  
25 old. With age certainly comes many benefits – in fact many legal benefits accrue with  
26 age – but the right to frivolous causes of action is not one of them. This cause of action  
27 is dismissed with prejudice.

28 ///

1 **V. DEFENDANT APPLETON'S MOTION TO EXPUNGE LIS PENDENS**

2 Appleton moves for the Court to expunge the lis pendens on Plaintiff Gill's  
3 Property. NRS § 14.010 allows a notice of pendency or a lis pendens to be filed for an  
4 action in the United States District Court for the District of Nevada when there is "a  
5 notice of an action affecting real property, which is pending," in any such court. NRS §  
6 14.010(2). This Order dismisses Gill's action. Accordingly, the Motion to Expunge Lis  
7 Pendens is granted.

8 **VI. MOTION FOR LEAVE TO AMEND**

9 **A. Legal Standard**

10 Rule 15(a) provides that a party may amend his pleading once as a matter of  
11 course at any time before a responsive pleading is served. Fed. R. Civ. P. 15(a).  
12 However, when a party can no longer amend a pleading as a matter of right under Rule  
13 15(a), the party must either petition the court for leave to amend or obtain consent from  
14 the adverse parties. *Id.*; *Keniston v. Roberts*, 717 F.2d 1295, 1300 (9th Cir. 1983).  
15 Leave to amend under Fed. R. Civ. P. 15(a) "shall be freely given when justice so  
16 requires." *Keniston*, 717 F.2d at 1300. "This policy is to be applied with extreme  
17 liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003);  
18 *Owens v. Kaiser Found Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001).

19 However, leave to amend need not be granted where the amendment: (1)  
20 prejudices the opposing party; (2) is sought in bad faith; (3) produces an undue delay in  
21 litigation; or (4) is futile. *Amerisource Bergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946,  
22 951 (9th Cir. 2006); *Bowles v. Reade*, 198 F.3d 752, 757 (9th Cir. 1999). Prejudice to  
23 the defendant is the most important factor, but amendment may be denied upon a  
24 sufficiently strong showing of the other factors. See *Eminence Capital*, 316 F.3d at 1052;  
25 *Keniston*, 717 F.2d at 1300. The burden of demonstrating prejudice rests on the party  
26 opposing amendment. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir.  
27 1987).

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1           **B.     Analysis**

2           Plaintiffs attempt to amend their Complaint to add several Nevada citizens to the  
3 class so as to ensure that two-thirds of the Plaintiffs are Nevada citizens under the “local  
4 controversy” exception to CAFA. See 28 U.S.C. § 1332(d)(4)(A). Moreover, the SAC  
5 alters the FAC in that (1) Plaintiffs no longer allege trespass; and (2) Plaintiffs add  
6 additional parties and allegations regarding several causes of action.

7           These amendments do not alter the Complaint’s core allegations, and do not  
8 render moot Defendants’ prior arguments in their Motions to Dismiss. In fact, Defendants  
9 primarily oppose amendment because they argue that amendment would be futile, and  
10 base their futility arguments largely on the same arguments proffered in their Motions to  
11 Dismiss.

12           The Court grants the Motion as it regards Plaintiffs’ voluntary decision to no  
13 longer bring the trespass claim. However, the Motion is denied in all other regards. The  
14 allegations as pled in the SAC are essentially the same as those in the FAC. The  
15 cosmetic alterations and additional parties do not change the fact that Plaintiffs have no  
16 legal basis for their Complaint. The Motion for Leave to File the SAC is therefore futile  
17 and must be denied. See *Amerisource*, 465 F.3d at 951.

18           **VII.   CONCLUSION**

19           The Court notes that the parties made several arguments and cited to several  
20 cases not discussed above. The Court has reviewed these arguments and cases and  
21 determines that they do not warrant discussion as they do not affect the outcome of  
22 these Motions.

23           IT IS ORDERED that Plaintiffs’ Motion to Remand (dkt. no. 34) is DENIED.

24           IT IS FURTHER ORDERED that Defendants’ Motions to Dismiss (dkt. nos. 10,  
25 13, 16, 17, and 31) are GRANTED. Plaintiffs’ Complaint is DISMISSED WITH  
26 PREJUDICE.

27           IT IS FURTHER ORDERED that Defendant Appleton’s Motion to Expunge Lis  
28 Pendens (dkt. no. 31) is GRANTED.

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IT IS FURTHER ORDERED that Plaintiffs' Motion for Leave to File a Second Amended Complaint (dkt. no. 45) is GRANTED IN PART and DENIED IN PART as follows:

- The Court GRANTS the Motion as it regards Plaintiffs' voluntary decision to no longer bring the trespass claim;
- The Motion is DENIED in all other respects.

IT IS FURTHER ORDERED that Defendant Appleton's *Ex Parte* Motion for Order Shortening Time (dkt. no. 89) to hear its Motion is DENIED AS MOOT.

The Clerk of the Court is ordered to close the case.

DATED THIS 28<sup>th</sup> day of December 2012.

  
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MIRANDA M. DU  
UNITED STATES DISTRICT JUDGE