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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Joseph M. Hamilton,

No. CV-14-00708-PHX-GMS

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Plaintiff,

ORDER

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v.

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Tiffany & Bosco PA, Seterus Incorporated,

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Defendants.

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Pending before this Court are Defendant Seterus, Inc.’s Motion to Dismiss (Doc. 6) and its accompanying Request for Judicial Notice (Doc. 6-1). Also before the Court is Plaintiff’s Motion for this Court to Take Judicial Notice. (Doc. 9.) For the following reasons Seterus’s Request for Judicial Notice is granted, the Plaintiff’s Motion to Take Judicial Notice is granted in part and denied in part, and Seterus’s Motion to Dismiss is granted in part and denied in part. Hamilton is further ordered to show cause why Tiffany & Bosco should not be dismissed.

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BACKGROUND

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On February 1, 2007, Joseph M. Hamilton obtained a loan of \$356,250.00 to purchase a home in Anthem, Arizona. (Doc 6-1, Ex. 1.) The loan was secured by a Deed of Trust (“DOT”) identifying: Provident Funding Associated, LP, as the Lender; Mortgage Electronic Registry Systems, Inc. (“MERS”) as the nominee beneficiary; and First American Title Company as the Trustee. (*Id.*)

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On September 3, 2009, a Substitution of Trustee was recorded in which CitiMortgage, Inc. appointed Michael A. Bosco, Jr. as Successor Trustee under the DOT.

1 (*Id.* at Ex. 2.) On September 22, 2009, MERS recorded an Assignment of DOT which
2 assigned all beneficial interest in the note and DOT to CitiMortgage, Inc. (*Id.* at Ex. 3.)
3 On December 1, 2010, CitiMortgage recorded a Corporate Assignment of DOT,
4 assigning all beneficial interest in the note and DOT to Federal National Mortgage
5 Association (“FNMA”). (*Id.* at Ex. 4.)

6 Hamilton filed a Complaint on April 4, 2014 alleging various defects relating to
7 the trustee’s sale of his home. (Doc. 1.) This was not the first lawsuit he filed concerning
8 his home and mortgage. He has unsuccessfully litigated issues related to his home and
9 mortgage on three previous occasions in three different courts.

10 First, Hamilton filed an Objection to Proof of Claim against IBM – Lender
11 Business Process Services on April 26, 2011 in his bankruptcy case before the
12 bankruptcy court of this district. (Doc 6-1, Ex. 14.) He argued that it did not have the
13 authority to submit a claim in relation to his mortgage and home, but the court overruled
14 his objection without prejudice. (*Id.* at Ex. 15.) IBM – Lender Business Process Services
15 apparently now operates under the name Seterus and is the moving defendant.

16 Second, Hamilton filed a complaint on July 10, 2012 in an Arizona state court
17 against Federal National Mortgage Association seeking to quiet title. (*Id.* at Ex. 9.) In that
18 case, Hamilton failed to respond to a motion to dismiss and the court dismissed the case
19 without prejudice in September 2012. (*Id.* at Ex. 10.)

20 Third, Hamilton filed a complaint on November 6, 2012 in this Court against
21 FNMA again seeking to quiet title. (*Id.* at Ex. 11.) In that case, this Court granted a
22 motion to dismiss with prejudice in February 2013 (*Id.* at Ex. 12) and denied a motion for
23 reconsideration (*Id.* at Ex. 13).

24 **DISCUSSION**

25 **I. Legal Standard**

26 Federal Rule of Civil Procedure 12(b)(6) is designed to “test[] the legal sufficiency
27 of a claim.” *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). To survive dismissal
28 for failure to state a claim pursuant to Rule 12(b)(6), a complaint must contain more than

1 “labels and conclusions” or a “formulaic recitation of the elements of a cause of action”;
2 it must contain factual allegations sufficient to “raise a right to relief above the
3 speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While “a
4 complaint need not contain detailed factual allegations; . . . it must plead ‘enough facts to
5 state a claim to relief that is plausible on its face.’” *Clemens v. DaimlerChrysler Corp.*,
6 534 F.3d 1017, 1022 (9th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570). “A claim has
7 facial plausibility when the plaintiff pleads factual content that allows the court to draw
8 the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft*
9 *v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). The plausibility
10 standard “asks for more than a sheer possibility that a defendant has acted unlawfully.”
11 *Id.*

12 When analyzing a complaint for the failure to state a claim under Rule 12(b)(6),
13 “[a]ll allegations of material fact are taken as true and construed in the light most
14 favorable to the nonmoving party.” *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996).
15 However, legal conclusions couched as factual allegations are not given a presumption of
16 truthfulness, and “conclusory allegations of law and unwarranted inferences are not
17 sufficient to defeat a motion to dismiss.” *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir.
18 1998).

19 As a general rule, “a district court may not consider any material beyond the
20 pleadings in ruling on a Rule 12(b)(6) motion.” *Branch v. Tunnell*, 14 F.3d 449, 453 (9th
21 Cir. 1994), *overruled on other grounds by Galbraith v. Cnty. of Santa Clara*, 307 F.3d
22 1119 (9th Cir. 2002) (citation omitted). Under the incorporation by reference doctrine,
23 the court may also consider documents “whose contents are alleged in a complaint and
24 whose authenticity no party questions, but which are not physically attached to the
25 pleading.” *Branch*, 14 F.3d at 454.

26 Additionally, Federal Rule of Evidence 201 allows the court to take judicial notice
27 of certain items without converting the motion to dismiss into one for summary
28 judgment. *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994). The court may take

1 judicial notice of facts “not subject to reasonable dispute” because they are either: “(1)
2 generally known within the territorial jurisdiction of the trial court or (2) capable of
3 accurate and ready determination by resort to sources whose accuracy cannot reasonably
4 be questioned.” Fed. R. Evid. 201; *see also Lee v. City of L.A.*, 250 F.3d 668, 689 (9th
5 Cir. 2001) (noting that the court may take judicial notice of undisputed “matters of public
6 record”). The court may disregard allegations in a complaint that are contradicted by
7 matters properly subject to judicial notice. *Daniels–Hall v. Nat’l Educ. Ass’n*, 629 F.3d
8 992, 998 (9th Cir. 2010).

9 **II. Judicial Notice**

10 Seterus’s Request for Judicial Notice contains public records including documents
11 from the county recorder’s office and court filings. These documents are “not subject to
12 reasonable dispute” because they are “capable of accurate and ready determination by
13 resort to sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201.
14 Hamilton raises no objection or dispute in relation to them; in fact several of them are the
15 same documents that Hamilton attached to his Complaint. The Court grants Seterus’s
16 request and takes judicial notice of all of the records Seterus submitted for purposes of
17 the Motion to Dismiss.

18 Most of Hamilton’s Motion for Judicial Notice does not identify or provide
19 necessary information for this Court regarding any adjudicative facts. He refers to the
20 Consumer Financial Protection Bureau (“CFPB”). Hamilton cites a statute giving the
21 CFPB its authority and argues about what the CFPB and the statute are supposed to
22 regulate. Beyond this, the motion only reiterates allegations from the Complaint. Apart
23 from the existence of the CFPB, Hamilton’s Motion does not establish any facts of which
24 the Court can take notice. The legal arguments about the authority of the CFPB and the
25 regulations from the statute are not facts. Hamilton’s reply does not clarify what facts
26 were intended and instead raises additional legal arguments based on Arizona statutes and
27 cases in Arizona courts and the Ninth Circuit. The Court does not preclude Hamilton
28 from raising any of these legal arguments at the appropriate time, but those portions of

1 the Motion establish no adjudicative facts.

2 Hamilton also includes a CFPB Bulletin as an attachment to his Motion for
3 Judicial Notice. The Bulletin is a matter of public record and Seterus challenges only the
4 relevancy and not the accuracy of it. The Court will take judicial notice of it as being a
5 document produced by the CFPB. Accordingly, the Plaintiff's Motion to Take Judicial
6 Notice is granted in part and denied in part.

7 **III. Dismissal**

8 Seterus argues that the entire Complaint should be dismissed for two reasons.
9 First, that the action is barred by *res judicata* in light of the previous actions. Second, that
10 Hamilton's attempt to assert these claims after the trustee's sale is precluded under
11 Arizona Revised Statutes ("A.R.S.") § 33-811(C).

12 In addition to these arguments against the entire Complaint, Seterus also argues
13 various reasons why the individual claims should be dismissed including that Seterus is
14 not a debt collector for purposes of the Fair Debt Collection Practices Act. ("FDCPA").
15 For the following reasons, the Court finds that the Complaint is not entirely barred by *res*
16 *judicata* or A.R.S. § 33-811(C), but some of the individual claims are dismissed.

17 **A. Dismissal of Entire Complaint**

18 **1. *Res Judicata***

19 Seterus first alleges that the entire action is barred by *res judicata*. State law
20 governs the application of *res judicata* and collateral estoppel in federal courts wherein
21 the jurisdiction of a case is based upon diversity of citizenship. *Jacobs v. CBS Broad.,*
22 *Inc.*, 291 F.3d 1173, 1177 (9th Cir. 2002). In Arizona, *res judicata* will preclude a claim
23 when a former judgment on the merits was rendered by a court of competent jurisdiction
24 and the matter now at issue between the same parties was, or might have been,
25 determined in the former action. *Hall v. Lalli*, 194 Ariz. 54, 57, 977 P.2d 776, 779
26 (1999); *accord Blonder-Tongue Labs. v. Univ. of Ill. Found.*, 402 U.S. 313, 323–24
27 (1971).

28 The bankruptcy and state court actions were both decided without prejudice and

1 this Court will not apply *res judicata* on the basis of either of those determinations. The
2 previous federal court action was dismissed with prejudice and so can be considered a
3 final judgment on the merits by a court of competent jurisdiction. However, FNMA was
4 the defendant in that quiet title action. Seterus and Tiffany and Bosco are different parties
5 although Seterus alleges privity with FNMA. The Court will not address that issue at this
6 stage because there is no identity of claims. At issue in this case are the trustee's sale and
7 the FDCPA regulations implemented by the CFPB. Both of those occurred in 2014 after
8 the filing and conclusion of the previous lawsuit. Seterus has not shown that the current
9 claims might have been brought in the previous action.

10 Hamilton seeks different relief based on additional circumstances and so *res*
11 *judicata* is not appropriate. However, the relief sought here does appear to be based in
12 part on similar factual allegations and legal theories to those raised in the previous case.
13 Although the Court declines to apply *res judicata* to preclude the entire claims, it leaves
14 open the question of whether collateral estoppel may preclude some of the issues in this
15 case.

16 2. A.R.S. § 33-811(C)

17 Seterus next alleges that the entire action is precluded by statute. Arizona law
18 governing trustee's sales provides that "[t]he trustor . . . shall waive all defenses and
19 objections to the sale not raised in an action that results in the issuance of a court order
20 granting relief . . . before 5:00 p.m. mountain standard time on the last business day
21 before the scheduled date of the sale." Ariz. Rev. Stat. § 33-811(C). In interpreting this
22 statute, the Arizona Supreme Court has unequivocally held that a trustor "has one avenue
23 for challenging the sale: filing for injunctive relief." *BT Capital, LLC v. TD Serv. Co. of*
24 *Arizona*, 229 Ariz. 299, 301, 275 P.3d 598, 600 (2012). After "a trustee's sale is
25 completed, a person subject to § 33-811(C) cannot later challenge the sale based on pre-
26 sale defenses or objections." *Id.* This limitation also applies to tort claims that are based
27 on objections to the validity of the trustee's sale. *Madison v. Groseth*, 230 Ariz. 8, 12,
28 279 P.3d 633, 637 (App. 2012). It does not restrict claims for relief that are independent

1 of voiding the trustee’s sale, *Snyder v. HSBC Bank, USA, N.A.*, 913 F. Supp. 2d 755, 770
2 (D. Ariz. 2012), *appeal dismissed* (Dec. 10, 2013).

3 The waiver under A.R.S. § 33–811(C) applies to “[t]he trustor, its successors or
4 assigns, and all persons to whom the trustee mails a notice of a sale under a trust deed
5 pursuant to § 33-809.” The Arizona Court of Appeals held that the language of the statute
6 does not require a proof of mailing of notice to the trustor, because the requirement to
7 provide notice pursuant to § 33-809 is only in relation to other persons. *Madison*, 230
8 Ariz. at 12, 279 P.3d at 637. Regardless of whether the trustor receives notice, the statute
9 waives the trustor’s defenses and objections. *See id.*

10 Here, Hamilton filed this action after the completion of the trustee’s sale and he
11 failed to obtain injunctive relief before the sale as required by § 33-811(C). Therefore, the
12 statute provides that all defenses and objections to the sale are now barred, as are claims
13 based on them. In his response, Hamilton argues that two cases support the permissibility
14 of his claims despite § 33-811(C).

15 The first case is *Morgan AZ Financial, L.L.C. v. Gotses*, which held that under §
16 33-811(C) the trustor does not waive defenses against a post-sale deficiency claim by the
17 lender. 235 Ariz. 21, 326 P.3d 288, 291 (App. 2014). This is merely an extension of the
18 principle from *Snyder* and other cases that claims of relief and defenses and objections
19 that are independent from the trustee’s sale are not covered by § 33-811(C). This case is
20 not a deficiency action, and so *Morgan* is not applicable and does not mitigate the waiver
21 of defenses and objections “to the sale” or related claims.

22 The second case raised by Hamilton is *Steinberger v. McVey ex rel. Cnty. of*
23 *Maricopa*, which allowed a cause of action to avoid a trustee’s sale. 234 Ariz. 125, 318
24 P.3d 419, 428–30 (App. 2014). Hamilton at one point mistakenly quotes that the case
25 recognized a “cause of action to *void* a trustee sale” when the actual word used is *avoid*.
26 In *Steinberger*, the trustor obtained injunctive relief before the trustee’s sale, which was
27 cancelled and never occurred. The court specifically noted that it was limited to cases
28 where the trustor “obtain[s] a TRO or injunction prior to the trustee’s sale.” *Id.* Here,

1 Hamilton did not avoid the trustee sale by obtaining injunctive relief and there is no cause
2 of action under *Steinberger* to void a trustee sale after it occurs.

3 Accordingly, neither *Morgan* nor *Steinberger* eliminates the waiver and § 33-
4 811(C) would seem to require that Hamilton’s Complaint be dismissed for failing to state
5 a claim to the extent that his claims are based on defenses or objections to the trustee’s
6 sale. Despite this, Hamilton argues that he is not barred by § 33-811(C) because the sale
7 was conducted without his knowledge or proper notice. (Doc. 1, ¶¶ 1, 50–51.) Although
8 the court in *Madison* held that notification to the trustor was not a statutory prerequisite
9 to waiver, in that case the court observed that it was clear from the record that the trustor
10 had received notice. 230 Ariz. at 12. In dicta, the Court “recognize[d] that, under other
11 circumstances, § 33–811(C) may apply to deprive a trustor of due process if that trustor is
12 not given sufficient notice of the trustee’s sale to obtain an injunction of the sale.” *Id.*

13 Hamilton’s Complaint raises this issue of a lack of notice or knowledge in the
14 Statement of the Case and in the Third Claim. The Court is obliged to read Complaints by
15 pro se parties with liberality. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972) (pro se
16 pleadings are “h[e]ld to less stringent standards than formal pleadings drafted by
17 lawyers”). The Court recognizes that the Complaint contains a claim that the application
18 of the waiver from § 33–811(C) would deprive Hamilton of due process because he
19 received no notice. Therefore, the entire action is not precluded by state law because
20 Hamilton has stated a claim challenging the application of the waiver in this case.

21 **B. Dismissal of Individual Claims**

22 **1. First Claim**

23 The First Claim for relief asks for injunctive and declaratory relief. The request
24 for these remedies is based on two causes of action.

25 First, Hamilton alleges that the defendants were not the true beneficiary and
26 misrepresented recorded instruments. This cause of action is based on an Arizona false
27 documents statute which authorizes “the owner or beneficial title holder of the real
28 property” to bring an action against someone recording documents against their property.

1 Ariz. Rev. Stat. § 33-420. Trustors are considered owners for purposes of A.R.S. § 33-
2 420. *Sitton v. Deutsche Bank Nat. Trust Co.*, 233 Ariz. 215, 219, 311 P.3d 237, 241 (App.
3 2013). In *Sitton*, the court found that the former trustor retained standing because he had
4 filed the action before the trustee's sale was held. *Id.* Here, Hamilton alleges that he was
5 denied the opportunity to file an objection before the sale because he did not receive
6 notice. Accordingly, this portion of the claim is not dismissed.

7 The second argument in the First Claim is that the trustee's sale be set aside
8 because the substitution of trustees was defective. This would be barred by the waiver in
9 A.R.S. § 33-811(C) because it is a defense or objection to the sale. However as noted
10 above, Hamilton has stated a claim that the waiver should not apply in this case. Based on
11 the records that Seterus submitted for judicial notice, a representative for CitiMortgage
12 substituted Michael A. Bosco, Jr. as the trustee on September 3, 2009. (Doc 6-1, Ex. 2.)
13 However, First American Title Company did not assign its beneficial interest to
14 CitiMortgage until later in September. (*Id.*, Ex. 3.) Although a handwritten note on that
15 assignment reads "Effective Date: 8/27/09," the assignment was otherwise dated, signed,
16 and notarized on September 15 and not recorded until September 22. (*Id.*) The Court will
17 not dismiss the claim of a defective substitution of trustee because the judicially
18 noticeable records provided by Seterus do not convince this Court that it should disregard
19 the factual allegations from the Complaint.

20 The First Claim is not dismissed as to the allegations under A.R.S. § 33-420 or the
21 allegations of a defective substitution of trustee.

22 **2. Second Claim**

23 The Second claim of relief is for a breach of the trustee's obligation. This claim
24 and the allegations in it are all directed at Tiffany & Bosco and have no application to the
25 moving Defendant. Nevertheless, Hamilton has not served Tiffany & Bosco despite the
26 passage of over four months since the filing of the Complaint. Thus, pursuant to Fed. R.
27 Civ. P. 4(m), Hamilton is ordered to show cause, within seven days of the date of this
28 Order, as to why this action against Defendant Tiffany & Bosco should not be dismissed

1 without prejudice.

2 **3. Third Claim**

3 The third claim of relief is for a violation of FDCPA. “As a threshold matter, the
4 FDCPA applies only to a debt collector who engages in practices prohibited by the Act in
5 an attempt to collect a consumer debt.” *Mansour v. Cal-Western Reconveyance Corp.*,
6 618 F. Supp. 2d 1178, 1182 (D. Ariz. 2009). This Court has held in a previous action that
7 “mortgagees and their beneficiaries, including mortgage servicing companies, are not
8 debt collectors subject to the FDCPA.” *Id.* at 1182.

9 Seterus is a mortgage servicing company and is not a debt collector under this
10 Court’s precedent. Hamilton did not respond with any argument as to why Seterus should
11 be considered a debt collector for purposes of the FDCPA. Accordingly, the claim under
12 the FDCPA is dismissed as to Seterus. As discussed above, the arguments that Hamilton
13 received no notice and that the waiver from A.R.S. § 33–811(C) should not apply are not
14 dismissed but are only relevant to the other claims because the FDCPA claim is
15 dismissed on independent grounds.

16 Hamilton also alleges that the Defendants failed to properly communicate with
17 him regarding the foreclosure, alternatives, and loan modifications. This appears to be
18 related to the allegation that Seterus breached the CFPB’s mortgage servicing rules and
19 thereby violated the duty of good faith and fair dealing. Seterus acknowledges that there
20 is a duty of good faith and fair dealing under any contract. However, it argues that
21 Hamilton has not provided sufficient facts that would support a plausible claim of a
22 violation of this duty. Hamilton has at least argued that he received no notice of the
23 foreclosure. The Court will not dismiss the cause of action that lack of notice was a
24 violation of the duty of good faith and fair dealing. This cause of action includes the
25 general argument that Seterus failed to communicate with Hamilton as required by any
26 regulations such as any applicable CFPB requirements.

27 **4. Fourth Claim**

28 Hamilton’s final claim asks for the relief of cancellation of instruments. This cause

1 of action alleges that the transfer of interest to Seterus was invalid base on either
2 unauthorized signatures or the timing of the assignments and transfers of interest. This
3 claim is similar to the surviving claim from the First Claim and for the same reasons
4 described the Court does not dismiss the cause of action.

5 In the factual background, Hamilton refers to splitting the Deed of Trust and the
6 Note. He does not respond to Seterus’s arguments for dismissal of that claim. This Court
7 dismissed the same claim with prejudice in the previous case against FNMA. (Doc 6-1,
8 Ex. 12.) Regardless of whether that claim is barred here by claim preclusion, it has been
9 routinely rejected in this and other courts. *See Mansour*, 618 F. Supp. 2d at 1181.
10 Therefore, to the extent that Hamilton intended to assert such a claim, it is dismissed.

11 **IV. *Lis Pendens***

12 Seterus also asks that the two notices of *lis pendens*, which Hamilton recorded
13 against the property, be expunged pursuant to A.R.S. § 33–420(B). “In an action affecting
14 title to real property, [a party] may file . . . a notice of the pendency of the action or
15 defense.” Ariz. Rev. Stat. § 12–1191(A). “It is well established that a *lis pendens* may not
16 be predicated on an action or suit for a money judgment but applies only to an action or
17 suit which directly affects the title to real property.” *Coventry Homes, Inc. v. Scottscom*
18 *P’ship*, 155 Ariz. 215, 217, 745 P.2d 962, 964, 745 P.2d 962 (App. 1987), *see also Santa*
19 *Fe Ridge Homeowners’ Ass’n v. Bartschi*, 219 Ariz. 391, 395, 199 P.3d 646, 650 (App.
20 2008).

21 Seterus’s request is denied because this Court is not dismissing all of the claims
22 which may directly affect the title of the home.

23 **CONCLUSION**

24 Hamilton must show cause why Tiffany & Bosco should not be dismissed from
25 this case. Hamilton retains the following claims against Seterus:

26 First, there is a cause of action from the First and Fourth Claim that the
27 substitutions of trustee or assignments of rights are invalid based on their timing or the
28 legitimacy of the signatures. This includes a cause of action to object to these

1 substitutions and assignments under Ariz. Rev. Stat. § 33-420. As a threshold matter,
2 Hamilton may only make these arguments if he established that the waiver from A.R.S. §
3 33-811(C) should not apply. It may not apply if he can establish that he received no
4 notice or inadequate notice of the foreclosure sale and that there is a resulting and
5 cognizable due process exception.

6 Second, a cause of action that Seterus violated its duty of good faith and fair
7 dealing by failing to inform Hamilton of the foreclosure or failing to make any other
8 communications required by any regulations or the CFPB.

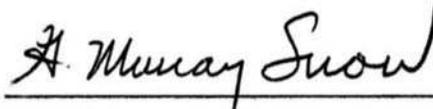
9 **IT IS HEREBY ORDERED** that Plaintiff's Motion for this Court to Take
10 Judicial Notice (Doc. 9) is **GRANTED IN PART AND DENIED IN PART**.

11 **IT IS FURTHER ORDERED** that Defendant Seterus, Inc.'s Motion to Dismiss
12 (Doc. 6) is **GRANTED IN PART AND DENIED IN PART**.

13 **IT IS FURTHER ORDERED** directing Plaintiff to show cause, **within seven (7)**
14 **days** of the date of this Order, as to why Defendant Tiffany & Bosco PA should not be
15 terminated from this action.

16 **IT IS FURTHER ORDERED** directing the Clerk of Court to terminate
17 Defendant Tiffany & Bosco PA should Plaintiff not comply within the time stated and
18 without further notice of the Court.

19 Dated this 20th day of August, 2014.

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21 _____
22 G. Murray Snow
23 United States District Judge
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