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United States District Court  
Central District of California

DARRELL ASBERRY, MICHAEL F.  
CORDES, SHIRLEY PIATT, on behalf of  
themselves and all others similarly  
situated,

Plaintiffs,

v.

THE MONEY STORE, TMS  
MORTGAGE, INC., HOMEQ  
SERVICING CORP., WELLS FARGO  
BANK, N.A.,

Defendants.

Case No 2:18-CV-01291-ODW (PLAx)

**ORDER DENYING PLAINTIFFS'  
MOTION FOR  
RECONSIDERATION AND  
FOR LEAVE TO ADD A NEW  
CAUSE OF ACTION [45]**

**I. INTRODUCTION**

This matter comes before the Court on Plaintiffs' Motion for Reconsideration of the Court's August 8, 2018, Order ("Order") and for Leave to Add a New Cause of Action ("Motion"). (Mot., ECF No. 45.) After reviewing the materials submitted by the parties in connection with the Motion and considering the arguments therein, the Court **DENIES** Plaintiffs' Motion. (ECF No. 45.)<sup>1</sup>

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<sup>1</sup> After considering the papers filed in connection with the Motion, the Court deemed the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78(b); C.D. Cal. L.R. 7-15.

## II. BACKGROUND

The Court addressed the relevant history and factual allegations in its August 8, 2018, Order Granting, In Part, Defendants’ Motion To Dismiss, and incorporates that discussion here by reference. (Order, ECF No. 41.) Darrel Asberry, Michael F. Cordes, and Shirley Piatt (“Plaintiffs”) bring this putative class action on behalf of themselves and two subclasses seeking damages for Defendants’ allegedly fraudulent lending practices. (*See generally* First Am. Compl. (“FAC”), ECF No. 13.) Plaintiffs’ action here follows a jury trial and subsequent appeal in the Second Circuit involving the same defendants and similarly situated plaintiffs. (Order 3–6 (discussing the history of the first action, *Mazzei v. The Money Store* (“*Mazzei Action*”), No. 01-cv-5684(JGK) (S.D.N.Y. filed June 22, 2001).) On May 10, 2018, The Money Store, TMS Mortgage, Inc., Homeq Servicing Corp., and Wells Fargo Bank, N.A. (“Defendants”) moved to dismiss Plaintiffs’ FAC. (Mot. to Dismiss, ECF No. 23.)

On August 8, 2018, the Court granted, in part, Defendants’ motion. (*See* Order.) The Court found Plaintiffs’ Fee Split Class II<sup>2</sup> claims barred by res judicata and Late Fee Class II claims<sup>3</sup> barred by the applicable statutes of limitation, absent some form of tolling. (*Id.* at 12, 14.) The Court found tolling unavailable under *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538 (1974), but possibly available for California residents under California’s equitable tolling laws. (Order 14–17.) Accordingly, the Court dismissed the Late Fee Class II’s claims of non-California residents and the individual claims of Shirley Piatt, a non-California resident, without leave to amend. (*Id.* at 18–19.) The Court granted leave to amend to Asberry, Cordes, and the California members of the Late Fee Class II, to the extent they could “allege

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<sup>2</sup> Plaintiffs sought to certify two classes: The Fee Split Class II and the Late Fee Class II, as defined in Plaintiffs’ FAC. (*See* FAC ¶ 19; Order 7–8.)

<sup>3</sup> Plaintiffs’ Late Fee Class II claims include breach of contract, breach of the covenant of good faith and fair dealing, unfair competition, fraud, and “restitution to avoid unjust enrichment,” which the Court construed as a claim in quasi-contract seeking restitution. (Order 1, 13; *see generally* FAC.)

1 additional facts that would bring their claims within the reach of California’s equitable  
2 tolling laws.” (*Id.* at 18.)

3 Plaintiffs now seek reconsideration of the Court’s dismissal, without leave to  
4 amend, of the Fee Split Class II, the Late Fee Class II as to class members who reside  
5 outside California, Shirley Piatt’s individual claims, and Plaintiffs’ California Unfair  
6 Competition Law (“UCL”) claims. (*See Mot.*) In addition, Plaintiffs seek leave to  
7 add a new cause of action for spoliation under California law. (*Id.* at 1, 11.)

### 8 **III. MOTION FOR RECONSIDERATION**

9 Plaintiffs argue that the Court’s dismissal of certain claims, without leave to  
10 amend, is clear error and contrary to controlling authority. (*Id.* at 1.) Defendants  
11 respond that the Court committed no error, and that Plaintiffs’ Motion is procedurally  
12 improper and merely rehashes arguments previously made, or which could have been  
13 made, in Plaintiffs’ opposition to Defendants’ motion to dismiss. (*See Opp’n*, ECF  
14 No. 48.)

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

16 “Motions for reconsideration are disfavored and rarely granted.” *Collins v.*  
17 *Fua*, No. CV 17-00606-VAP(PLAx), 2017 WL 8161087, at \*1 (C.D. Cal. July 11,  
18 2017). “When a party seeks reconsideration of an interlocutory order rather than a  
19 final judgment,” Local Rule 7-18 governs. *McKinsty v. Swift Transp. Co., of Ariz.*,  
20 No. ED 15-cv-01317-VAP-SP, 2017 WL 8943524, at \*2 (C.D. Cal. Sept. 18, 2017)  
21 (quoting *United States v. Curiel*, No. 2:05-cr-00889-RSWL, 2015 WL 143897, at \*1  
22 (C.D. Cal. Jan. 12, 2015)); *see also Union Pac. R.R. Co. v. Coast Packing Co.*, 236 F.  
23 Supp. 2d 1130, 1137 (C.D. Cal. 2002) (“Because we did not enter a judgment against  
24 Union Pacific, we construe its motion as one for reconsideration pursuant to Local  
25 Rule 7–18.”); *In re Benham*, No. CV13-00205-VBF, 2013 WL 3872185, at \*2 (C.D.  
26 Cal. May 29, 2013).

27 Local Rule 7-18 prohibits a movant from “repeat[ing] any oral or written  
28 argument made in support of or in opposition to the original motion.” C.D. Cal. L.R.

1 7-18. Further, a party may move for reconsideration only where the party  
2 demonstrates:

3 (a) a material difference in fact or law from that presented to the Court  
4 before such decision that in the exercise of reasonable diligence could  
5 not have been known to the party moving for reconsideration at the time  
6 of such decision, or

7 (b) the emergence of new material facts or a change of law occurring  
8 after the time of such decision, or

9 (c) a manifest showing of a failure to consider material facts presented to  
10 the Court before such decision.

11 *Id.* “Whether to grant a motion for reconsideration under Local Rule 7-18 is a matter  
12 within the court’s discretion.” *Daghlian v. DeVry Univ., Inc.*, 582 F. Supp. 2d 1231,  
13 1251 (C.D. Cal. 2007). A district court does not abuse its discretion by disregarding  
14 arguments made for the first time in a motion for reconsideration. *Rosenfeld v. U.S.*  
15 *Dep’t of Justice*, 57 F.3d 803, 811 (9th Cir. 1995). “A mere attempt by the moving  
16 party to reargue its position by directing [the] Court to additional case law and  
17 arguments which it clearly could have made earlier, but did not is not the purpose of  
18 motions for reconsideration under Local Rule 7-18.” *McKinsty*, 2017 WL 8943524, at  
19 \*2 (quoting *Duarte v. J.P. Morgan Chase Bank*, No. cv 13-1105-GHK (MANx), 2014  
20 WL 12567787, at \*1 (C.D. Cal. May 19, 2014)) (original alterations omitted); *Novato*  
21 *Fire Prot. Dist. v. United States*, 181 F.3d 1135, 1142 n.6 (9th Cir. 1999).

## 22 **B. Discussion**

23 Plaintiffs move for reconsideration under Federal Rule of Civil Procedure 59(e)  
24 and Local Rule 7-18. (Notice of Mot. 1, ECF No. 45.)

25 Rule 59(e) provides “[a] motion to alter or amend a judgment must be filed no  
26 later than 28 days after the entry of the judgment.” Fed. R. Civ. P. 59(e). “Rule 59(e)  
27 clearly contemplates entry of judgment as a predicate to any motion.” *Balla v. Idaho*  
28 *State Bd. of Corr.*, 869 F.2d 461, 466, 467 (9th Cir. 1989) (“the requirement of a  
judgment as a prerequisite to moving for reconsideration under Rule 59(e) protects  
against the specter of piecemeal review”) (internal quotation marks omitted).

1 Plaintiffs seek reconsideration of the Court’s Order on Defendants’ motion to dismiss,  
2 which is an interlocutory order, not a judgment. *See id.* at 467 (finding that an order  
3 that does not “end[] the litigation on the merits and leave[] nothing for the court to do  
4 but execute the judgment” does not fall within the meaning of Rule 59(e).) Because  
5 Plaintiffs seek reconsideration of an interlocutory order rather than a judgment, Rule  
6 59(e) is not an appropriate basis for Plaintiffs’ Motion. *See McKinsty*, 2017 WL  
7 8943524, at \*2; *Ellis v. Penn. Higher Educ. Assistance Agency*, No. CV 07-04498  
8 DDP (CTx), 2008 WL 4351746, at \*2 (C.D. Cal. Sept. 23, 2008). Accordingly, the  
9 Court considers Plaintiffs’ Motion against the standard imposed by Local Rule  
10 7-18.

11 Plaintiffs fail to address Local Rule 7-18’s requirements. Plaintiffs do not  
12 provide a “material difference in fact or law” from that initially presented to the Court  
13 or claim the emergence of new material facts. Nor do Plaintiffs establish a manifest  
14 failure of the Court to consider material facts presented to it before issuing its Order.  
15 *See* C.D. Cal. L.R. 7-18. Instead, Plaintiffs argue only that the Court erred,  
16 improperly rehashing arguments asserted in their prior opposition or raising new  
17 arguments or authority that could have been raised previously. “[A] motion for  
18 reconsideration cannot be used to ask the Court to rethink what the Court has already  
19 thought through merely because a party disagrees with the Court’s decision.” *In re*  
20 *Benham*, 2013 WL 3872185, at \*9; *Pegasus Satellite Television, Inc. v. DirecTV, Inc.*,  
21 318 F. Supp. 2d 968, 981 (C.D. Cal. 2004) (“Under L.R. 7-18, a motion for  
22 reconsideration may not be made on the grounds that a party disagrees with the  
23 Court’s application of legal precedent.”).

24 Plaintiffs do precisely what Local Rule 7-18 prohibits. Disagreement with the  
25 rulings of this Court is not a proper ground for reconsideration. Accordingly,  
26 Plaintiffs’ Motion for Reconsideration is **DENIED**.

1           **IV.    MOTION FOR LEAVE TO ADD NEW CAUSE OF ACTION FOR**  
2                                   **SPOILIATION UNDER CALIFORNIA LAW**

3           Plaintiffs also “seek leave to amend to add a cause of action for damages caused  
4 by Defendants’ spoliation under California law.” (Mot. 10–11.) Defendants oppose,  
5 noting Plaintiffs’ failure to comply with local rules and arguing that any amendment  
6 would be futile and would severely prejudice Defendants. (Opp’n 15–19.)

7           **A.    Legal Standard**

8           Although leave to amend should be freely given when justice so requires, leave  
9 may be denied on the basis of bad faith, undue delay, prejudice to the opposing party,  
10 or if amendment would be futile. Fed. R. Civ. P. 15(a); *Carrico v. City and Cty. of*  
11 *San Francisco*, 656 F.3d 1002, 1008 (9th Cir. 2011); *Union Pac. R.R. Co.*, 236 F.  
12 Supp. 2d at 1139. Local Rule 15-1 requires that “[a]ny proposed amended pleading  
13 must be filed as an attachment to the related motion or stipulation.” C.D. Cal.  
14 L.R. 15-1.

15           **B.    Discussion**

16           To begin, Plaintiffs failed to attach or submit a proposed amended complaint as  
17 required. Instead, Plaintiffs assert they “are prepared to file an Amended Complaint  
18 within two days of the grant of leave to amend.” (Mot. 11.) This is insufficient under  
19 Local Rule 15-1 and undermines Defendants’ ability to respond effectively to  
20 Plaintiffs’ Motion. *See Baker v. Firstcom Music*, No. 2:16-cv-08931-VAP (JPRx),  
21 2017 WL 9500980, at \*4 (C.D. Cal. Nov. 3, 2017); *Solo v. Dawson*, No. cv 09-05623-  
22 MMM (RCx), 2010 WL 11509232, at \*5 (C.D. Cal. May 6, 2010) (“[P]laintiffs’  
23 failure to comply with Local Rule 15-1 constitutes an[] independent reason to deny  
24 their motion.”) Accordingly, Plaintiffs’ Motion for Leave to Amend to Add a New  
25 Cause of Action is denied.

26           Even if Plaintiffs’ disregard for the local rules did not preclude the relief they  
27 seek, amendment would be futile. Plaintiffs seek to add a cause of action for  
28 spoliation under California law. (Mot. 10–11.) However, such an amendment would

1 be futile as California provides no cause of action for spoliation. *See Cedars–Sinai*  
2 *Med. Ctr. v. Superior Court*, 18 Cal. 4th 1, 17 (1998) (no tort remedy for the  
3 intentional spoliation of evidence by a party to the cause of action); *Temple Cmty.*  
4 *Hosp. v. Superior Court*, 20 Cal. 4th 464, 466 (1999) (no tort cause of action for  
5 intentional spoliation against person who is not a party to lawsuit); *Coprigh v.*  
6 *Superior Court*, 80 Cal. App. 4th 1081, 1083 (2000) (no tort remedy for negligent  
7 spoliation). While these cases do not foreclose the potential of a duty to preserve  
8 evidence based on a theory of contract or promissory estoppel, *see Coprich*, 80 Cal.  
9 App. 4th at 1092, Plaintiffs’ Motion states only that a cause of action exists “where  
10 parties have represented that they were preserving evidence, and then failed to do so.”  
11 (Mot. 11.) Absent a proposed amended complaint, the Court is left to speculate as to  
12 how Plaintiffs’ proposed additional cause of action is other than a claim of spoliation,  
13 barred by California law, or an attempt to relitigate discovery disputes previously  
14 resolved by the *Mazzei* action. (*See* Order 3–6.) The Court declines to engage in such  
15 speculation and Plaintiffs’ general reference to unidentified “represent[at]ions” is  
16 insufficient to raise a plausible claim. *See e.g., Luis v. Metro. Life Ins. Co.*, 142 F.  
17 Supp. 3d 873, 882 (N.D. Cal. 2015) (“Plaintiff[s]’ general reference to unidentified  
18 ‘misrepresentations’ from MetLife is not enough to raise the possibility of a plausible  
19 estoppel claim.”)

20 “Where the legal basis for a cause of action is tenuous, futility supports the  
21 refusal to grant leave to amend.” *Lockheed Martin Corp. v. Network Solutions, Inc.*,  
22 194 F.3d 980, 986 (9th Cir. 1999). Plaintiffs’ motion for leave to amend is denied for  
23 this reason as well.

24 Accordingly, Plaintiffs’ Motion for Leave to Amend to Add a New Cause of  
25 Action is **DENIED**.

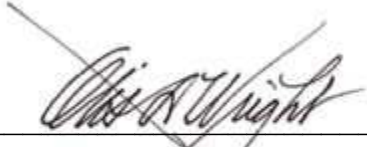
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**V. CONCLUSION**

For the reasons discussed above, the Court **DENIES** Plaintiffs' Motion for Reconsideration and for Leave to Add a New Cause of Action. (ECF No. 45.)

**IT IS SO ORDERED.**

December 27, 2018



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**OTIS D. WRIGHT, II**  
**UNITED STATES DISTRICT JUDGE**