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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

GLENN W. BEVER, Case No. 1:11-cv-01584-AWI-SKO  
Plaintiff, **ORDER DENYING PLAINTIFF'S**  
v. **MOTION TO AMEND**  
(Doc. Nos. 91, 98)  
CITIMORTGAGE, INC, et al.,  
Defendants.

**I. INTRODUCTION**

This is a mortgage-related case brought by Plaintiff Glenn Bever ("Plaintiff") against Cal-Western Reconveyance Corp. ("Cal-Western"), Citi Mortgage, Inc. ("Citi"), and Mortgage Electronic Registration Services, Inc. ("MERS"). On February 7 and on February 20, 2014, Plaintiff filed a motion to amend the complaint to add eleven new claims and name four new defendants (the Federal National Mortgage Association; Lehman Brothers Bank, FSB; Lehman Brothers Holdings, Inc.; and First Pacific Financial, Inc.), as well as reassert claims against MERS and Cal-Western. On March 12, 2014, Citi filed a brief in opposition (Doc. 101); on March 19, 2014, Plaintiff filed a reply brief (Doc. 102). For the reasons set forth below, Plaintiff's motion to amend is DENIED.

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## II. FACTUAL BACKGROUND

In June 2003, Plaintiff obtained a loan for approximately \$212,000 for the purchase of real property located in Fresno County (the "Property"). The loan was secured by a Deed of Trust. The Deed of Trust identified First Pacific Financial, Inc. ("First Pacific") as the lender, Carriage Escrow, Inc. as the trustee, and MERS as the beneficiary and nominee of First Pacific. The Deed of Trust was recorded in the Fresno County Recorder's Office on June 20, 2003.

On March 20, 2006, Plaintiff and his wife deeded the Property to themselves in their capacity as trustees of "The Bever Family Trust."

On May 27, 2011, an assignment of the deed of trust was recorded in the Fresno County Recorder's Office. The document purported to assign MERS' beneficial interest in the Deed of Trust to Citi. The assignment is signed by Brenda Enriquez as an Assistant Secretary of MERS. On June 1, 2011, a Substitution of Trustee form was executed by Citi. This document substituted Cal-Western as the trustee on the Deed of Trust in place of Carriage Escrow, Inc. The Substitution of Trustee was recorded in the Fresno County Recorder's Office on June 28, 2011.

On June 3, 2011, a notice of default and election to sell was sent to Plaintiff by Cal-Western. On September 6, 2011, Cal-Western sent Plaintiff a notice of trustee's sale, which set the sale of the Property for September 27, 2011. The sale was later moved to October 27, 2011. On September 23, 2011, a second assignment of the Deed of Trust was recorded in the Fresno County Recorder's Office, assigning Citi's interest in the Deed of Trust to Fannie Mae, also known as the Federal National Mortgage Association. (*See* Doc. 99, Proposed Third Amended Complaint ("TAC"), p. 85, Exhibit I.)

## III. PROCEDURAL BACKGROUND

### A. Plaintiff's Original Complaint Filed On September 20, 2011

On September 20, 2011, Plaintiff filed suit against Cal-Western, Citi, and MERS alleging claims for (1) quiet title; (2) violation of the Fair Debt Collection Practices Act ("FDCPA"); (3) violation of the Real Estate Settlement Procedures Act ("RESPA") pursuant to 12 U.S.C. § 2605; (4) unjust enrichment; and (5) "fraud and injurious falsehood." (Doc. 1.)

1 Plaintiff alleged a number of irregularities and violations by Cal-Western, Citi, and MERS  
2 in the foreclosure process. Plaintiff alleged that Cal-Western failed, in a "loan payment  
3 confirmation" letter dated June 13, 2010, to state the name of the creditor to whom the debt was  
4 owed and Plaintiff's right to dispute the debt within 30 days, in violation of the FDCPA pursuant  
5 to 15 U.S.C. § 1692g(a)(2). With his complaint, Plaintiff submitted a verification request he sent  
6 to Cal-Western, which references a letter from Cal-Western dated June 15, 2011. The letter from  
7 Cal-Western included a statement indicating that it was "an attempt to collect a debt." Plaintiff  
8 alleged that Cal-Western failed to verify the debt as requested by Plaintiff and failed to cease  
9 collection after his request, in contravention of Section 1692g(b) of the FDCPA.

10 Plaintiff also asserted that, with respect to the notice of default he received, Cal-Western  
11 violated Sections 1692e and 1692f of the FDCPA because it did not actually possess the  
12 promissory note secured by the Deed of Trust and therefore deceptively and unfairly sought  
13 collection of the debt. Additionally, Plaintiff alleged Citi untimely and inadequately responded to  
14 a "Qualified Written Request" made by Plaintiff, violating 12 U.S.C. §2605(e).

15 Ostensibly pursuant to a theory of unjust enrichment, Plaintiff alleged that federal bailout  
16 money or other means were used to repay Plaintiff's loan, and that collection of Plaintiff's debt by  
17 Cal-Western, Citi, and MERS would unjustly enrich them.

18 Finally, Plaintiff alleged that MERS acted to conceal its true identity and purpose, thereby  
19 inducing Plaintiff into a fraudulent loan. Plaintiff challenged MERS' authority to make an  
20 assignment to Citi and claimed MERS knew the assignment would wrongly divest Plaintiff of title  
21 to the property.

22 Plaintiff filed a motion for a temporary restraining order precluding Cal-Western, Citi, and  
23 MERS from selling the Property pursuant to the Deed of Trust. The request for a temporary  
24 restraining order was denied.

25 On October 12, 2011, Citi and MERS filed a joint motion to dismiss the complaint. (Doc.  
26 13.) Plaintiff filed a renewed motion for a temporary restraining order, which was granted. (Doc.  
27 19.) On March 14, 2012, Cal-Western filed a motion to dismiss. (Doc. 31.)

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1 **B. The Court's Order Dismissing Plaintiff's Original Complaint with Leave to Amend**

2 On June 28, 2012, the Court issued an order granting Citi and MERS' joint motion to  
3 dismiss as well as Cal-Western's Motion to Dismiss. (Doc. 39.) With respect to Plaintiff's claim  
4 against Cal-Western under the FDCPA, the Court found it was not cognizable because Plaintiff  
5 failed to allege that Cal-Western: (1) acquired the debt when it was in default, as defined by the  
6 Deed of Trust or relevant California law, and (2) took on that debt solely for the purpose of  
7 facilitating collection of the debt. As Plaintiff had alleged neither element, Cal-Western's motion  
8 to dismiss as to the FDCPA claim was granted.

9 As to Plaintiff's RESPA claim against Citi, the Court determined that 12 U.S.C.  
10 § 2605(k)(1)(D), under which Plaintiff appeared to be alleging a violation, was not effective at the  
11 time Plaintiff made his Section 2605(k) request. Further, even to the extent that Section 2605(k)  
12 was in effect at the time of the complained-of events, Plaintiff failed to plead any actual damage  
13 under RESPA, which is a necessary element.

14 Regarding Plaintiff's unjust enrichment claim, the Court noted such a claim was an action  
15 in quasi-contract and not cognizable in the face of a valid and enforceable contract between the  
16 parties. The Court concluded that the Deed of Trust between the parties precluded an unjust  
17 enrichment theory of recovery, and the claim was dismissed.

18 Plaintiff's claim for fraud against MERS was dismissed for lack of specificity under  
19 Federal Rule of Civil Procedure 9(b). Plaintiff's claim for injurious falsehood was deemed similar  
20 to the tort of defamation. However, because Plaintiff's Deed of Trust clearly granted MERS the  
21 authority to assign the lender's interest in the Deed on behalf of the lender, Plaintiff failed to  
22 provide facts to support a claim that MERS knew it was making a false statement or acting with  
23 reckless disregard of the truth, which are necessary elements of an injurious falsehood claim.

24 Finally, Plaintiff's claim for quiet title was dismissed without prejudice because Plaintiff  
25 had failed to allege that he was the rightful owner of the property.

26 Plaintiff was granted 21 days to amend his complaint.

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1 **C. Plaintiff's First Amended Complaint Filed on July 23, 2012**

2 On July 23, 2012, Plaintiff filed a First Amended Complaint ("FAC"). (Doc. 42.) Plaintiff  
3 again named MERS, Citi, and Cal-Western as defendants and stated the following claims:  
4 (1) quiet title; (2) violations of the FDCPA under 15 U.S.C. §1692; (3) violations of RESPA under  
5 12 U.S.C. § 2605; (4) unjust enrichment; and (5) fraud and injurious falsehood.

6 On August 7, 2012, Cal-Western filed a motion to dismiss (Doc. 45); on August 9, 2012,  
7 MERS and Citi filed a joint motion to dismiss. (Doc. 47.)

8 **D. The Court's Order Granting Defendants' Motions to Dismiss the FAC**

9 **1. Citi and MERS' Motion to Dismiss**

10 As to the quiet title action against MERS and Citi, the Court determined Plaintiff's claim  
11 rested largely on two premises – that MERS did not have the authority or the ability to assign the  
12 beneficial interest in the Deed of Trust, and MERS did not assign its interest in the Deed of Trust  
13 to Citi. As to the first premise, the Court noted California courts have routinely recognized that  
14 MERS, as a nominee and beneficiary under a deed of trust, has the authority to assign its interest  
15 in the deed of trust and that such assignment is valid. (Doc. 75, 5:20-25.) Here, "[b]ecause the  
16 deed of trust in this case identifies MERS as a nominee and beneficiary, and provides MERS the  
17 ability to exercise any and all interests, MERS had the authority to assign the beneficial interest in  
18 Bever's deed of trust." (Doc. 75, 6:1-3.)

19 Relating to the second premise, the FAC did not plausibly show that MERS' assignment to  
20 Citi was ineffective. As there were no plausible allegations showing that the transfer from MERS  
21 to Citi was invalid, there were no plausible allegations that Citi did not have a beneficial interest in  
22 Bever's Deed of Trust. As a result, Plaintiff's claim was subject to the tender rule, and the Court  
23 concluded Plaintiff had not made a credible tender offer. Plaintiff's quiet title claim was dismissed  
24 with prejudice. (Doc. 75, 9:3.)

25 As to the RESPA claim pursuant to Section 2605 against Citi, the Court determined  
26 Plaintiff had failed to cure the defects of his initial complaint: the allegations of the FAC "again  
27 continue to appear to rely on §2605(k)(1)(D), even though the Court explained that that section  
28 had no application to this case." (Doc. 75, 9:20-21.) Further, the letter Plaintiff alleged

1 constituted a Qualified Written Request asked only about the owner of the loan, rather than any  
2 request concerning payments or fees – thus, the letter was not a Qualified Written Request.  
3 Finally, Plaintiff again failed to sufficiently allege actual damages. This claim was dismissed with  
4 prejudice. (Doc. 75, 10:27-28.)

5 Plaintiff's claim for unjust enrichment against MERS and Citi was also dismissed because  
6 the Court found the Deed of Trust indicated Plaintiff "owe[d] money and regular payments under  
7 the loan and deed of trust. When there is a valid and enforceable contract between the parties,  
8 unjust enrichment is not cognizable." (Doc. 75, 11:23-25.) This claim was dismissed with  
9 prejudice. (Doc. 75, 12:7-8.)

10 Regarding Plaintiff's claim for fraud and injurious falsehood against MERS, the Court  
11 determined that the prior deficiencies of the original complaint were not corrected, and the FAC  
12 did not sufficiently allege each of the necessary elements of fraud. This claim was dismissed with  
13 prejudice. (Doc. 75, 13:17-18.)

14 Finally, although there was no formal cause of action in the original complaint pursuant to  
15 California Civil Code § 2923.5, the Court held there were allegations in the FAC that "directly  
16 address[ed] § 2923.5." A notice of default cannot be filed until 30 days after the mortgage  
17 servicer/lender has met the requirements of Section 2923.5. Section 2923.5 requires that "a  
18 mortgagee, trustee or beneficiary, or authorized agent must contact the borrower in person or by  
19 telephone in order to assess the borrower's financial situation and explore options for the borrower  
20 to avoid foreclosure or satisfy due diligence requirements before a notice of default is filed."  
21 *Intengan v. BAC Home Loans Servicing LP*, 214 Cal. App. 4th 1047 (2013).

22 The Court noted that it had granted a temporary restraining order on the basis of a  
23 declaration from Plaintiff indicating he had not been contacted by Citi prior to the filing of the  
24 notice of default. (Doc. 19.) The FAC quoted from Section 2923.5 and alleged that no one  
25 contacted Plaintiff about this matter, thus the Court construed the allegations as stating a claim  
26 pursuant to Section 2923.5. (FAC, ¶ 51-2.) Because Citi was the only entity attempting to  
27 foreclose and because the briefing on Plaintiff's motion for a preliminary injunction showed that  
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1 Citi was the entity that previously made contact or attempted to make contact with Plaintiff about  
2 his payments, the claim was construed to be alleged only against Citi. (Doc. 75, 14:8-17.)

3 **2. Cal-Western's Motion to Dismiss**

4 On October 2, 2013, in conjunction with its consideration of MERS and Citi's joint motion  
5 to dismiss, the Court found as follows with regard to Cal-Western's motion to dismiss:

6 There are three causes of action alleged in the FAC against Cal-Western. Quiet  
7 title, unjust enrichment, and 15 U.S.C. § 1692. Cal-Western is the only Defendant  
8 under Bever's 15 U.S.C. § 1692 cause of action. As discussed above, the quiet title  
9 and unjust enrichment causes of action are invalid. However, on June 28, 2013,  
10 Cal-Western filed a notice of bankruptcy. Pursuant to 11 U.S.C. § 362, an  
11 automatic stay is in place as to Cal-Western. Because of the automatic stay, the  
12 Court cannot address the 15 U.S.C. § 1692 claim. A status conference with the  
13 Magistrate Judge has been set for December 5, 2013. The parties will discuss  
14 further proceedings, including periodic status reports, with the Magistrate Judge at  
15 that time. In the mean[t]ime, the Court will stay Cal-Western's motion to dismiss.

16 (Doc. 75, 14:20-28.)

17 **E. Plaintiff's Request for a Preliminary Injunction**

18 On October 2, 2013, the Court granted Plaintiff's request for a preliminary injunction  
19 enjoining Citi and its agents, servants, and employees from permitting or conducting a foreclosure  
20 sale with respect to the Property. (Doc. 76.) Plaintiff was required to submit a monthly security  
21 on the eleventh day of each month that the litigation is pending. (Doc. 76.) Citi was permitted to  
22 submit additional evidence demonstrating compliance with California Civil Code § 2923.5 in 2011  
23 or evidence demonstrating current compliance with Section 2329.5. (Doc. 76.) Currently, the  
24 preliminary injunction remains in place.

25 **F. Scheduling Conference**

26 A scheduling and status conference was held on December 5, 2013. Plaintiff appeared  
27 telephonically pro se, and Jillian Benbow, Esq., appeared telephonically on behalf of Citi. (Doc.  
28 87.) The parties agreed that the litigation could proceed against Citi, while the case against Cal-  
Western would remain stayed pursuant to automatic stay under 11 U.S.C. § 362. (Doc. 87, 2:1-4.)

The Court set deadlines for the case against Citi, including a deadline to amend the  
pleadings, which was set for February 7, 2014. (Doc. 87.) These scheduling deadlines were given

1 to the parties during the course of the scheduling conference. A scheduling order was issued on  
2 December 6, 2013, but due to clerical error, was not served on Plaintiff at that time.<sup>1</sup>

3 **G. Plaintiff's Motion to Amend the Complaint**

4 On February 7, 2014, Plaintiff filed a motion to amend the complaint and filed a proposed  
5 second amended complaint. (Docs. 91, 92.) Because Plaintiff's motion was not properly noticed  
6 and set for a hearing, Plaintiff was ordered to file and serve a new notice of motion setting forth  
7 the proper time and date for a hearing on the motion to amend. (Docs. 93, 97.) On February 20,  
8 2014, Plaintiff filed an amended motion and noticed a hearing for March 26, 2014; he also filed a  
9 proposed "Third Amended Complaint." (Docs. 98, 99.)

10 This action currently proceeds on only one claim against Citi pursuant to California Civil  
11 Code § 2395.5. Plaintiff seeks to amend the complaint to add eleven additional claims and to add  
12 as defendants MERS, Fannie Mae, Lehman Brothers Bank, FSB, Lehman Brothers Holdings, Inc.  
13 (collectively, "Lehman Brothers"), and First Pacific.

14 Plaintiff's request to amend is based, in part, on his allegation that an allonge<sup>2</sup> to the  
15 original Note of indebtedness on the Property indicates that the Note was transferred from First  
16 Pacific to Lehman Brothers and that the Note remains with Lehman Brothers, or it was "probably  
17 sold" to Aurora Bank, FSB. (Doc. 99, Proposed TAC, ¶ 2.) Plaintiff also contends that, as it  
18 pertains to the Deed of Trust, First Pacific, MERS, and Citi were all dissolved, suspended, or  
19 surrendered at the time that assignments of the Deed of Trust were negotiated, and thus the  
20 assignments of the Deed of Trust from MERS to Citi and then from Citi to Fannie Mae are invalid.  
21 (Doc. 99, Proposed TAC, ¶ 2.) Additionally, Plaintiff offers a copy of a second assignment of the  
22 Deed of Trust in 2011 from Citi to Fannie Mae that he contends fails to state the title of the person  
23 executing the document or the corporate or representative capacity of that person, rendering that  
24 assignment invalid. (Doc. 99, Proposed TAC, ¶ 2.)

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27 <sup>1</sup> The scheduling order has since been served on Plaintiff.

28 <sup>2</sup> An allonge is a "slip of paper sometimes attached to a negotiable instrument for the purpose of receiving further  
indorsements when the original paper is filled with indorsements." Black's Law Dictionary (9th ed. 2009) (West).



1 Based on these and other facts already alleged, Plaintiff seeks to reassert his dismissed-  
2 with-prejudice quiet title claim against First Pacific, Citi, Fannie Mae, and Lehman Brothers.  
3 Plaintiff also seeks to reassert his claim under the FCDPA against Citi, and to restate his pending,  
4 but stayed, FCDPA claim against Cal-Western. Plaintiff's fourth cause of action proposes a new  
5 claim pursuant to Truth in Lending Act ("TILA") against Citi. Plaintiff's proposed fifth, sixth, and  
6 eighth causes of action are for cancellation of a voidable contract under the California Revenue &  
7 Tax Code §§ 23304.1 and 23305A and for violation of the California Corporation Code §  
8 191(C)(7) against the "Foreclosing Defendants," whom Plaintiff identifies as First Pacific, Cal-  
9 Western, Citi, MERS, and Fannie Mae. (Doc. 99, Proposed TAC, ¶ 66.) Plaintiff's seventh cause  
10 of action seeks to render void or cancel the first assignment of the Deed of Trust on the Property  
11 as to the Foreclosing Defendants. Plaintiff's proposed ninth cause of action is for breach of the  
12 implied covenant of good faith and fair dealing against the Foreclosing Defendants. Plaintiff's  
13 proposed tenth cause of action is for violation of the California Business & Professions Code  
14 Section 17200 against the Foreclosing Defendants for fraudulent business practices. Plaintiff's  
15 proposed eleventh cause of action is for slander of title against the Foreclosing Defendants.  
16 Finally, Plaintiff's proposed twelfth cause of action<sup>3</sup> is for civil conspiracy under 18 U.S.C. § 1965  
17 against the Foreclosing Defendants.

#### 18 IV. DISCUSSION

##### 19 A. Status of Cal-Western and Discovery

20 Cal-Western filed bankruptcy proceedings; thus the case as to Cal-Western is stayed.  
21 (Doc. 75, 14:20-28.) Although Plaintiff contends "discovery was stayed until the motion to  
22 [d]ismiss [filed by Cal-Western] was ruled on" (Doc. 102, p. 2), this is an incorrect statement of  
23 the posture of the case. As discussed at the December 5, 2013, scheduling conference, while the  
24 motion to dismiss filed by Cal-Western is stayed, the case is proceeding against Citi on the one  
25 claim the district court deemed cognizable. Discovery between Plaintiff and Citi has been  
26 proceeding since December 6, 2013, and non-expert discovery will close on June 6, 2014. (Doc.  
27 87.)

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<sup>3</sup> Plaintiff identifies two "eleventh" causes of action. The final claim, however, is the twelfth cause of action.

1 **B. Plaintiff has not established good cause to modify the scheduling order under**  
2 **Federal Rule of Civil Procedure 16(b)**

3 Federal Rule of Civil Procedure 16(b) provides that the district court must issue a  
4 scheduling order that limits the time to join other parties, amend the pleadings, complete  
5 discovery, and file motions. Fed. R. Civ. P. 16(b)(1)-(3). Once in place, "[a] schedule may be  
6 modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). The "good  
7 cause" requirement of Rule 16 primarily considers the diligence of the party seeking the  
8 amendment. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). "The  
9 district court may modify the pretrial schedule if it cannot reasonably be met despite the diligence  
10 of the party seeking the extension." *Id.* (internal citation and quotation marks omitted).

11 Good cause may be found to exist where the moving party shows, for example, that it:  
12 (1) diligently assisted the court in recommending and creating a workable scheduling order, *see In*  
13 *re San Juan Dupont Plaza Hotel Fire Litig.*, 111 F.3d 220, 228 (1st Cir. 1997), (2) is unable to  
14 comply with the deadlines contained in the scheduling order due to issues not reasonably  
15 foreseeable at the time of the scheduling order, *see Johnson*, 975 F.3d at 609, and (3) was diligent  
16 in seeking an amendment once the party reasonably knew that it could not comply with the  
17 scheduling order, *see Eckert Cold Storage, Inc. v. Behl*, 943 F. Supp. 1230, 1233 (E.D. Cal. 1996).  
18 *See Jackson v. Laureate, Inc.*, 186 F.R.D. 605, 608 (E.D. Cal. 1999). "If [the] party was not  
19 diligent, the inquiry should end." *Johnson*, 975 F.2d at 609. If the Court finds there is good cause  
20 to modify the schedule, the court then turns to Rule 15(a) to determine whether the amendment  
21 sought should be granted. *Jackson*, 186 F.R.D. at 607 ("As the Ninth Circuit explained in  
22 [*Johnson*], once the district court has filed a pretrial scheduling order pursuant to Rule 16 which  
23 establishes a timetable for amending pleadings, a motion seeking to amend pleadings is governed  
24 first by Rule 16(b), and only secondarily by Rule 15(a).").

25 Plaintiff filed a motion to amend the complaint on February 7, 2014, but it was not  
26 properly noticed. The Court ordered Plaintiff to file and serve a new notice of motion in  
27 compliance with Local Rule 230(b). (Docs. 93, 97.) On February 20, 2014, Plaintiff refiled his  
28 motion to amend, but proposed a complaint different from that attached to his February 7, 2014,

1 motion to amend. Accordingly, Plaintiff's proposed amendment was not filed until February 20,  
2 2014.

3 As Plaintiff notes, due to clerical error, the scheduling order was not served on him timely  
4 following the scheduling conference. Nevertheless, Plaintiff appeared at the scheduling  
5 conference and was provided with the deadline to amendment to the pleadings. Because Plaintiff  
6 filed his original motion to amend the pleadings on February 7, 2014, and on February 20, 2014, it  
7 was noticed and set for a hearing on March 26, 2014, the Court construes Plaintiff's motion as  
8 timely under the February 7, 2014, deadline to amend the pleadings.

9 Although Plaintiff's request to amend his complaint is considered timely under the  
10 scheduling order, the broad scope of the requested amendment would nonetheless require  
11 extensive modification to the existing schedule, including the trial date. Thus, the Court considers  
12 whether Plaintiff has established good cause to permit modification to the scheduling order that  
13 will be necessitated by the newly proposed amendment. *See Paz v. City of Aberdeen*, No C13-  
14 5104 RJB, 2013 WL 6163016, at \*3 (W.D. Wash. Nov. 25, 2013) (although the court had not set a  
15 deadline to amend the pleadings, an amendment that would necessarily require amendment to the  
16 Rule 16(b) scheduling order is governed by the good cause standard).

17 Plaintiff seeks to amend the complaint, despite that the original complaint was filed in  
18 September 2011, amended in July 2012, and the Court has previously ruled upon motions to  
19 dismiss the original complaint *and* the FAC. In his motion, Plaintiff asserts he has obtained new  
20 information not previously available to him. He contends the proposed TAC contains  
21 "amendments about Aurora, the Allonge and Lehman Brothers (¶¶ 12, 16, 17) [that] are the result  
22 of information produced by Citimortgage in response to a Qualified Written Request and could not  
23 have been alleged sooner." (Doc. 98, p. 8.) Plaintiff asserts the new allegations show that Citi has  
24 no interest in the Note, as its claimed interest came from MERS, who never had a "substantive  
25 financial interest," and neither of those parties was qualified to do business at crucial times.  
26 Further, Plaintiff contends the allegations of the proposed TAC establish that "the Note went to  
27 Aurora, and also went to Lehman Brothers and thence to (blank)." (Doc. 98, p. 8.)

1 Plaintiff has not established this information was newly received through the discovery  
2 process or that it was only available to him recently. Plaintiff contends the information about the  
3 allonge, Aurora, and Lehman Brothers was produced by Citi in response to a Qualified Written  
4 Request, but the proposed amended complaint indicates Citi mailed Plaintiff a copy of the allonge  
5 on August 31, 2011. (Doc. 99, Proposed TAC, ¶ 176.) The "additional information" about  
6 Lehman Brothers appears to originate from the allonge which reflects a payment of \$211,850 from  
7 First Pacific (on behalf of borrowers Glenn and Karen Bever) to Lehman Brothers pursuant to the  
8 Note on the Property. The allonge to the original 2003 Note may be newly submitted, but there is  
9 nothing establishing that it is newly discovered. Additionally, the allonge does not plausibly show  
10 Plaintiff's Note was transferred to Lehman Brothers.

11 The "information" about Aurora appears to be a copy of the Deed of Trust recorded on  
12 June 20, 2003, that has the word "Aurora" handwritten near the top of the document along with  
13 what appears to be an account number. (Doc. 99, Proposed TAC, p. 83, Exhibit H.) The copy of  
14 the 2003 Deed of Trust ostensibly was provided to Plaintiff in 2011. However, even to the extent  
15 this particular copy of the 2003 Deed of Trust is newly obtained, the handwritten word "Aurora"  
16 and the account number at the top of the document do not establish Aurora's involvement as there  
17 is no information regarding who wrote these items on this copy of the Deed of Trust, when they  
18 were written, or for what purpose.

19 Plaintiffs' summary of the rest of the proposed amended facts relates to the corporate status  
20 of First Pacific, MERS, and Citi in California; MERS' assignment to Citi and its status as a  
21 "nominee"; MERS' website showing Fannie Mae as an investor and Citi listed as a servicer only;  
22 that Brenda Enriquez is an employee of Citi and not MERS; that Citi transferred any interest in the  
23 Deed of Trust prior to this lawsuit waiving any right to foreclose; Citi has never held the Note;  
24 Ben Torres was not authorized to sign the Notice of Default; James Davis was not authorized to  
25 sign the Notice of Trustee Sale; the assignment from Citi to Fannie Mae is invalid; the Note is still  
26 held by Lehman Brothers; and Jason Jenkins was not authorized to sign the Substitution of  
27 Trustee. (Doc. 98, Motion to Amend, ¶¶ 1-18.)  
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1 Citi's opposition to Plaintiff's Motion to Amend correctly notes that the FAC already  
2 included allegations regarding MERS' corporate status in California (*see* FAC, ¶ 10), which was  
3 considered and rejected by the district court in its October 2013 order. Plaintiff's allegations  
4 regarding MERS as a nominee of First Pacific, MERS signing as nominee the assignment to Citi,  
5 and MERS' lack of authority to sign the assignment (*see* Doc. 98, Motion to Amend ¶¶ 9-10), were  
6 all previously and unsuccessfully alleged in the FAC at paragraphs 27 and 33. Plaintiff's  
7 allegations regarding Citi's interest in the loan were raised in the FAC at paragraphs 50-10 through  
8 50-16 and 66; Plaintiff's allegations regarding Brenda Enriquez were previously pled in the FAC  
9 at paragraphs 50-4 through 50-8; Plaintiff's allegations regarding James Davis and Jason Jenkins  
10 were previously pled in the FAC at paragraphs 53-2, 53-3, and 57; Plaintiff's challenges to the  
11 ability of MERS to assign the Note because the interest had been sold to a securitized trust was  
12 raised in the FAC at paragraph 30-37; and Plaintiff's challenge to the Substitution of Trustee was  
13 previously pled in the FAC at paragraphs 50-1 through 58.

14 In sum, the allegations Plaintiff seeks to add to the complaint are not comprised of newly  
15 discovered facts, but facts that have already been known and pled by Plaintiff in the FAC or facts  
16 that Plaintiff has known, or should have known since the inception of the lawsuit or at the time he  
17 amended his complaint in 2012, but failed to raise. Thus, the basis for amendment does not  
18 establish Plaintiff's diligence in seeking to amend the complaint to include these allegations. *See*  
19 *JP Morgan Chase Bank, N.A. v. KB Home*, 2010 WL 3862086, at \*5 (D. Nev. Sept. 26, 2010) (no  
20 good cause to amend where basis for amendment was known long before amendment sought and  
21 when prior motion to amend was considered). Rather, Plaintiff's request to amend his complaint  
22 appears to be an attempt at an end-run around the district court's dismissal of all but one of  
23 Plaintiff's claims.

24 As to allegations about the allonge, Lehman Brothers, and Aurora, Plaintiff has not  
25 established this information was not available to him since the inception of the lawsuit. Even to  
26 the extent this information is newly discovered, Plaintiff has not shown how the allonge and/or the  
27 handwriting on the copy of the 2003 Deed of Trust establish anything with regard to the validity or  
28 invalidity of any documents. The recorded assignment of the Deed of Trust in 2011 from Citi to

1 Fannie Mae may be newly submitted, but Plaintiff has not refuted the fact that this document has  
2 been publicly available since 2011. For these reasons, the Court concludes Plaintiff has not been  
3 diligent in seeking amendment and has failed to establish good cause to amend the scheduling  
4 order to allege eleven new claims and add additional defendants to the suit.

5 **C. Amendment Is Not Appropriate Under Federal Rule of Civil Procedure 15(a)**

6 Beyond that good cause to amend the scheduling order is not shown under Rule 16,  
7 amendment is likewise not appropriate under Rule 15(a).

8 Federal Rule of Civil Procedure 15 provides that a party may amend its pleading only by  
9 leave of court or by written consent of the adverse party and that leave shall be freely given when  
10 justice so requires. Fed. R. Civ. P. 15(a)(1)-(2). The Ninth Circuit has instructed that the policy  
11 favoring amendments "is to be applied with extreme liberality." *Morongo Band of Mission*  
12 *Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990). Nevertheless, leave to amend is not  
13 unlimited. The factors commonly considered to determine the propriety of a motion for leave to  
14 amend include the following: (1) bad faith, (2) undue delay, (3) repeated failure to cure  
15 deficiencies by amendments previously allowed; (4) prejudice to the opposing party, and  
16 (5) futility of amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

17 The Ninth Circuit has held that prejudice to the opposing party carries the greatest weight.  
18 *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). Absent prejudice, or  
19 a strong showing of any of the remaining *Foman* factors, a presumption in favor of granting leave  
20 to amend exists under Rule 15(a). *Id.* Further, undue delay alone is insufficient to justify denial  
21 of a motion to amend. *Bowles v. Reade*, 198 F.3d 752, 758 (9th Cir. 1999). Finally, "liberality in  
22 granting leave to amend is not dependent on whether the amendment will add causes of action or  
23 parties." *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987). *Contra Union Pac.*  
24 *R.R. Co. v. Nev. Power Co.*, 950 F.2d 1429, 1432 (9th Cir. 1991) ("Amendments seeking to add  
25 claims are to be granted more freely than amendments adding parties.").

26 While the scheduling order set a deadline of February 7, 2014, to seek amendment of the  
27 pleadings, this deadline was not an invitation to attempt to amend the complaint to re-state claims  
28 that have already been dismissed with prejudice. Plaintiff was provided an opportunity to amend

1 his complaint in 2012, and the district court has ruled upon motions to dismiss both the original  
2 complaint and the FAC. For this reason, the Court takes a dim view of Plaintiff's attempt to  
3 amend the complaint to reassert claims that the district court has already dismissed with prejudice.  
4 With respect to allegations or claims not previously alleged, Plaintiff has unduly delayed in  
5 attempting to include these in his complaint, amendment would be prejudicial to Citi and the  
6 defendants Plaintiff seeks to add, and the claims are not cognizable and are futile.

7 **1. Attempt to Restate Quiet Title Claim Previously Dismissed With Prejudice**

8 Notwithstanding that Plaintiff's quiet title cause of action has twice been dismissed as  
9 insufficiently pled, and most recently dismissed with prejudice, Plaintiff seeks to reassert a quiet-  
10 title claim against First Pacific, Cal-Western, Citi, Fannie Mae, and Lehman Brothers.

11 Although Plaintiff's theory appears to have shifted somewhat, the gravamen of the  
12 allegations of his proposed amended complaint is that Citi has no interest in the underlying loan  
13 and therefore cannot seek to sell the property under the Deed of Trust – a theory of recovery  
14 already considered by the Court. Moreover, to the extent Plaintiff's proposed amended quiet title  
15 action rests on a new theory, he has not established the underlying facts were not known to him or  
16 could not have been known to him when he filed the action. Because this claim was previously  
17 dismissed with prejudice, Plaintiff may not attempt to amend the complaint to reassert the claim  
18 based on facts already known, or that should have been known to him at the inception of this suit  
19 or at the time the complaint was amended in 2012.

20 **2. Undue Delay Weighs Against Amendment**

21 As with the facts underlying Plaintiff's amended quiet title claim, the remainder of the  
22 claims Plaintiff seeks to add rely on facts that were known or should have been known to Plaintiff  
23 over two years ago when he filed this lawsuit.

24 "A party unduly delays seeking amendment by failing to seek amendment reasonably  
25 promptly after it 'knew or should have known' that amendment was called for." *Johnson v.*  
26 *Hewlett-Packard Co.*, 809 F. Supp. 2d 1114, 1120 (N.D. Cal. 2011) (quoting *AmerisourceBergen*  
27 *Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 953 (9th Cir. 2006); see also *Jackson v. Bank of Hawaii*,  
28 902 F.2d 1385, 1388 (9th Cir. 1990) ("Relevant to evaluating the delay issue is whether the

1 moving party knew or *should have known* the facts and theories raised by the amendment in the  
2 original pleading."). A party's undue delay and failure to explain the reasons for delay weigh  
3 against leave to amend under Rule 15. *Swanson v. U.S. Forest Serv.*, 87 F.3d 339, 345 (9th Cir.  
4 1996); *see also Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir.  
5 1999) ("Although delay is not a dispositive factor in the amendment analysis, it is relevant . . .  
6 especially when no reason is given for the delay."). "While delay alone does not justify denial of  
7 leave to amend, 'late amendments to assert new theories are not reviewed favorably when the facts  
8 and theory have been known to the party seeking amendment since the inception of the cause of  
9 action.'" *Stearns v. Select Comfort Retail Corp.*, 763 F. Supp. 2d 1128, 1159 (N.D. Cal. 2010).

10 Although Plaintiff's proposed amended complaint contains new allegations, he fails to  
11 establish that the facts alleged could not have been known to him at an earlier time. Rather, the  
12 allegations are simply a re-tooling of theories relating to facts known or that should have been  
13 known when Plaintiff filed suit in September 2011 or when he filed a First Amended Complaint in  
14 July 2012. (*See* Doc. 42.)<sup>4</sup> As discussed above, Plaintiff's attempt to state facts or theories that  
15 were known or should have been known demonstrates undue delay. *See id.* Plaintiff's delay in  
16 alleging these facts, theories, and claims weighs against permitting amendment.

### 17 **3. Prejudice to Citi and Defendants Plaintiff Seeks to Add**

18 The scope of the proposed amendment to Plaintiff's complaint is highly prejudicial to Citi  
19 for several reasons. First, Citi has already defended against the bulk of these claims in two  
20 separate motions to dismiss. All but one of Plaintiff's claims were dismissed without leave to  
21 amend. The claims Plaintiff seeks to add are largely a restatement of claims that have previously  
22 been dismissed, particularly as they relate to the quiet-title action.

23 Second, amendment of the pleadings in the manner sought would significantly expand the  
24 scope of the litigation and the parties involved, requiring additional discovery and an extension of  
25 all the remaining deadlines. *See Jackson*, 902 F.2d at 1388 (prejudice may arise when new  
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27 <sup>4</sup> Even to the extent the handwriting on the copy of the 2003 Deed of Trust is newly discovered (although it is not  
28 clear how or when Plaintiff obtained this document), Plaintiff has not established how it can adequately support a new  
claim or theory.



1 theories require a party to re-litigate issues or significantly alter the circumstances of the  
2 litigation). Citi would suffer prejudice from delay of the litigation.

3 If the schedule was not modified, the new parties would be prejudiced because discovery  
4 closes on June 6, 2014, the dispositive motion deadline is set for July 14, 2014, and the trial date is  
5 set for November 18, 2014. Newly added parties would have little to no time to respond to the  
6 complaint, conduct discovery, and file dispositive motions. *DCD Programs, Ltd. v. Leighton*, 833  
7 F.2d 183, 187 (9th Cir. 1987) ("Amending a complaint to add a party poses an especially acute  
8 threat of prejudice to the entering party."). Notably, the claims against MERS were all dismissed  
9 with prejudice and are no longer part of the action. Permitting amendment would require MERS  
10 to once again defend against claims and allegations it has already litigated. In sum, prejudice to  
11 the defendants weighs strongly against the proposed amendment.

#### 12 **4. Legal Insufficiency of the Proposed Claims**

13 Futility is a recognized basis for denying a proposed amendment to the pleadings. *Kiser v.*  
14 *General Elec. Corp.*, 831 F.2d 423, 428 (3d Cir. 1987). The test for futility "is identical to the one  
15 used when considering the sufficiency of a pleading challenged under Rule 12(b)(6)." *Miller v.*  
16 *Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988). "[T]o survive a motion to dismiss, a  
17 complaint must contain sufficient factual matter to state a facially plausible claim to relief."  
18 *Shroyer v. New Cingular Wireless Serv., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (citing *Ashcroft*  
19 *v. Iqbal*, 556 U.S. 662, 677 (2009)).

20 As discussed below, the claims Plaintiff seeks to add are legally insufficient, and thus it  
21 would be futile to amend the complaint to include them.

#### 22 **a. Quiet Title Claim Against Other Defendants**

23 Notwithstanding the dismissal of this claim with prejudice as to Citi, MERS, and Cal-  
24 Western, the amended version of the claim is legally insufficient for essentially the same reasons  
25 the claim was previously dismissed. Plaintiff's theory of recovery rests, in large part, on the notion  
26 that MERS had no authority to assign the Deed of Trust and/or that MERS' transfer to Citi was not  
27 effective. Both these theories of invalidity of the transfer of the Deed of Trust to Citi have been  
28 held to be insufficient by the district court. (Doc. 75, 5:17-6:24.)

1 Plaintiff asserts in his reply brief that, although the Court found that MERS had a  
2 beneficial interest to assign, the cases the district court cited are distinguishable from this case.  
3 (Doc. 102, p. 3-5.) He contends that the Deed of Trust does not identify MERS as a beneficiary  
4 and thus MERS had no beneficial interest to assign to Citi. (Doc. 102, p. 4.) In this regard,  
5 Plaintiff's attempt to amend evidences only his disagreement with the district court's dismissal of  
6 his claim, which is insufficient.

7 Plaintiff also appears to predicate his theory of recovery on the fact that none of the  
8 assignments of the Deed of Trust were valid because First Pacific, MERS, and Citi all executed  
9 assignments at a time when their corporate status in California was "dissolved," "suspended," or  
10 "surrendered." First, the Court has already considered Plaintiff's allegation as to the corporate  
11 status of MERS. (*See* FAC, ¶ 10.) Second, as discussed below, the facts alleged with regard to  
12 these companies' corporate status in California are conclusory. Finally, the documents Plaintiff  
13 attaches to his proposed amended complaint do not plausibly show that any of these corporations'  
14 corporate status in California was dissolved, suspended, or surrendered at the time of assignment  
15 or execution of relevant documents in this case. Plaintiff's amended complaint fails to allege facts  
16 sufficient to state a cognizable claim for quiet title against any new defendant Plaintiff seeks to  
17 add.<sup>5</sup>

18 **b. 15 U.S.C. § 1641(f)**

19 **(i) Allegations of Plaintiff's Original Complaint**

20 In the original complaint, Plaintiff alleged that on August 12, 2011, he mailed a "Qualified  
21 Written Request" to Citi seeking the name, address, and telephone number of the owner or  
22 assignee of the loan. (Doc. 1, ¶ 88.) Plaintiff attached a copy of his August 12, 2011, letter to his  
23 complaint. Plaintiff claimed Citi's failure to respond was a violation of 12 U.S.C. § 2605. (Doc.  
24 1, ¶¶ 87-90.)

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26  
27 <sup>5</sup> Plaintiff's attempt to re-plead this claim with respect to Citi and Cal-Western (Plaintiff does not name MERS under  
28 his proposed amended quiet title claim, *see* Doc. 99, p. 29) is inappropriate as this claim has already been dismissed  
with prejudice as to those entities. (Doc. 75, 16:4-5 (quite title action dismissed in its entirety without leave to  
amend).)

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**(ii) Court's Order of June 28, 2012**

On June 28, 2012, in granting Citi's motion to dismiss as to the claim pursuant to Section 2605, the Court determined Plaintiff's August 12, 2011, request did not provide a basis for suit under that section because, at the time the letter was sent, the effective date for the regulations implementing Section 2605 had not yet become effective. Moreover, even had Section 2605(k) been in effect at the time of Plaintiff's August 12, 2011, letter, the Court found Plaintiff had failed to plead actual damages under RESPA, which is a necessary element of a claim pursuant to this section. While Plaintiff alleged "damages to be determined at trial," the Court concluded this was too conclusory to adequately allege damages. Thus, the Court dismissed this claim with leave to amend. (Doc. 39, 7:10-13.).

**(iii) Plaintiff's FAC**

On July 23, 2012, Plaintiff filed an amended complaint again setting forth a claim pursuant to Section 2605 predicated upon his August 12, 2011, letter to Citi. (Doc. 42, ¶¶ 87-90.) Plaintiff alleged that, as a result of Citi's failure to appropriately respond to his August 12, 2011, letter, he suffered "emotional distress, loss of reputation, and other actual damages to be determined at trial." (Doc. 42, ¶ 90.)

**(iv) The Court's Order of October 2, 2013**

Citi filed a motion to dismiss the FAC, and with respect to Plaintiff's claim pursuant to Section 2605, the Court determined the FAC did not adequately address the previous dismissal. Specifically, the allegations in the FAC with regard to Section 2605 "again continue to appear to rely on §2605(k)(1)(D), even though the Court explained that that section has no application to this case." (Doc. 75, 9:19-21.) Further, the Court noted that the August 12, 2011, letter did not constitute a "qualified written request." (Doc. 75, 10:5-7.) Finally, as it pertained to damages, the Court determined Plaintiff's allegations were conclusory and did not plausibly show that Citi's failure to respond to his letter caused him any damages. The Court concluded that because Plaintiff had been given a chance to amend, and because Plaintiff's opposition failed to address Citi's arguments, further leave to amend was not warranted.



1 actually possess the promissory note for the Deed of Trust and therefore deceptively and unfairly  
2 sought collection of the debt.

3 On June 28, 2012, the district court dismissed this claim because Plaintiff had failed to  
4 allege that Cal-Western acquired the debt when it was in default *and* took on the debt solely for  
5 the purpose of facilitating collection of the debt. Plaintiff was granted leave to amend this claim.

6 On July 23, 2012, Plaintiff reasserted this claim against Cal-Western in the FAC. Cal-  
7 Western filed a motion to dismiss and initiated bankruptcy proceedings; the motion to dismiss has  
8 been stayed since October 2013 pursuant to the automatic bankruptcy stay.

9 In his "Third Amended Complaint," Plaintiff again asserts a FDCPA claim against Cal-  
10 Western, but additionally seeks to add a claim under the FDCPA against Citi. Plaintiff alleges that  
11 Citi falsely claimed to be owed money on account of the disputed loan, but that Citi is merely a  
12 servicer of the loan and, as such, its activities constitute unfair and unconscionable means to  
13 collect or attempt to collect the alleged mortgage debt in violation of Section 1692f.

14 The FDCPA seeks to curtail abusive collection practices by debt collectors. 15 U.S.C.  
15 §1692. Courts have construed mortgage servicing companies and assignees of debt as creditors  
16 within the meaning of the FDCPA. *Perry v. Stewart Title Co.*, 756 F.2d 1197, *modified on other*  
17 *grounds*, 761 F.2d 237 (5th Cir. 1985). Trustees of deeds of trust are likewise treated like  
18 creditors under the FDCPA. *Crane v. Bank of N.Y. Mellon*, 2012 (E.D. May 16, 2012).

19 Under Section 1692a(4), creditors are subject to the FDCPA to the extent they "receive[]"  
20 an assignment or transfer of a debt in default solely for the purpose of facilitating collection of  
21 such debt for another." The Ninth Circuit has construed "in default" to reflect the meanings found  
22 in relevant contractual agreements and state law. *De Dios v. Int'l Realty & RC Invs.*, 641 F.3d  
23 1071, 1074-75 (9th Cir. 2011). Even if a creditor obtains a debt that is already in default, for the  
24 FDCPA to apply, a plaintiff must also allege that the debt was acquired solely for facilitating  
25 collection. *Schlegel v. Wells Fargo Bank*, 799 F. Supp. 2d 1100, 1104 (N.D. Cal. 2011).

26 As discussed in the Court's June 28, 2012, order on Cal-Western's motion to dismiss  
27 Plaintiff's claim under the FDCPA (*see* Doc. 39, 4:19-5:24), Plaintiff fails to allege that the debt  
28 was acquired by Citi when it was already in default and solely to facilitate collection. As with

1 Plaintiff's original complaint, the allegations against Citi in the proposed TAC fail to state a  
2 legally sufficient claim under Section 1692 against Citi.

3 As it pertains to the Section 1692 claim against Cal-Western, Cal-Western's motion to  
4 dismiss this claim is stayed and remains pending before the Court until Cal-Western's bankruptcy  
5 proceeding has concluded.<sup>7</sup>

6 **d. Plaintiff's Proposed Claim for Breach of the Implied Covenant of Good**  
7 **Faith and Fair Dealing**

8 Plaintiff alleges a claim for breach of the implied covenant against the "Foreclosing  
9 Defendants." (Doc. 99, Proposed TAC ¶¶ 254-59.) Plaintiff alleges that the Foreclosing  
10 Defendants enjoyed substantial discretionary power affecting Plaintiff's rights during the events  
11 alleged, and the Foreclosing Defendants engaged in "such conduct to drive Plaintiff into  
12 foreclosure so that they could acquire the Subject property with its large equity at a bargain  
13 basement price." (Doc. 99, Proposed TAC, ¶ 257.) Plaintiff alleges that MERS willfully breached  
14 the covenant when it "allowed [its] alleged agent to execute the Assignment of the Deed of Trust  
15 in order to appoint a new Trustee to begin foreclosure of the Subject Property." (Doc. 99,  
16 Proposed TAC, ¶ 258.)

17 The allegations with respect to MERS' appointment of a new trustee have already been  
18 considered by the Court. Plaintiff's proposed claim for breach of the implied covenant appears to  
19 arise from the same factual predicate that has already been rejected – namely, that the signatories  
20 to these documents were not who they claimed to be, and MERS had no authority to make any  
21 assignments. With respect to Plaintiff's theory regarding MERS' execution of the assignment of  
22 the Deed of Trust, the district court held as follows:

23 It appears that Bever is attempting to utilize a quiet title cause of action to prevent  
24 foreclosure on the deed of trust. Bever's specific bases depend on a legally invalid  
25 view of MERS's authority, and allegations that the individuals who signed the  
26 assignment of deed of trust, substitution of trustee, and the notice of default and  
27 election to sell, are not who they claim to be. However, the allegations concerning  
28 the signatories are conclusory and implausible.

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<sup>7</sup> Plaintiff has not proposed any additional amendments to this claim against Cal-Western in any event.

1 (Doc. 75, 8:14-19.) The theory underlying Plaintiff's breach of the implied covenant is essentially  
2 the same as that already considered by the district court and found to be insufficient to state a  
3 claim. Therefore, the proposed claim is not cognizable, and it is futile to amend the complaint to  
4 include it.

5 **e. Plaintiff's Proposed Claims for Cancellation of a Voidable Contract**

6 Plaintiff alleges three causes of action for cancellation of a voidable contract under  
7 California Revenue and Tax Code §§ 23304.1, 23305A and violation of California Corporation  
8 Code §§ 191(C)(7) against First Pacific, MERS, and Citi. (Doc. 99, Proposed TAC, ¶¶ 230-43,  
9 247-53.) Plaintiff asserts that each entity failed to comply with California Franchise tax laws, and  
10 thus the deed of trust is voidable by Plaintiff pursuant to California Revenue and Tax Code §§  
11 23304.1(a) and 23304.1(b) and 23305a.<sup>8</sup> Specifically, Plaintiff asserts that First Pacific was  
12 conducting business and prepared the First Assignment in this case in California at a time when it  
13 was "dissolved." Likewise, Plaintiff asserts that MERS was operating in California at a time when  
14 its status was "suspended." (Doc. 99, Proposed TAC, ¶ 237.) Therefore, MERS could not be a  
15 "nominee" for the defunct First Pacific. (Doc. 99, Proposed TAC, ¶ 238.) Finally, Plaintiff asserts  
16 that Citi was operating in the State of California at a time when it was "suspended."

17 Plaintiff attaches to his proposed TAC printouts from the California Secretary of State  
18 website regarding the status of each of these entities. The printout regarding Citi indicates Citi's  
19 name, number, the "date filed," its "status," jurisdiction, address, agent for service of process, and  
20 the agent's address. (Doc. 99, Proposed TAC, Exhibit B.) Plaintiff asserts this establishes Citi's  
21 status is "surrendered" and that Citi was surrendered on the "date filed," which was October 25,  
22 1979. However, the definitions for the fields provided on the Secretary of State's website indicates  
23 the "date filed" field is the "date of formation of a California (domestic business entity, the date of  
24 qualification or registration of a foreign (out-of-state or out-of-country) business entity doing

25 \_\_\_\_\_  
26 <sup>8</sup> California Revenue and Tax Code §§ 23304.1(a) provides that every contract made in California by a taxpayer when  
27 that taxpayer's corporate powers, rights, and privileges are suspended or forfeited shall be voidable at the instance of  
28 any party to the contract other than the taxpayer. Section 23304.1(b) provides that if a foreign taxpayer is not  
qualified to do business in the state, any contract made in the state by that taxpayer during the applicable period is  
voidable at the instance of any party to the contract other than the taxpayer. Section 23304.5 provides that a party  
who has the right to declare a contract to be voidable pursuant to Section 23304.1 may exercise that right only in a  
lawsuit brought by either party with respect to the contract in a court of competent jurisdiction.

1 business in California, the date of registration of a domestic or foreign limited partnership, or the  
2 date a business entity converted to a California corporation, California limited liability company  
3 or California limited partnership." See [http://www.sos.ca.gov/business/be/cbs-field-status-  
4 definitions.htm](http://www.sos.ca.gov/business/be/cbs-field-status-definitions.htm). The "date filed" field does not indicate that Citi's status was "surrendered" in  
5 1979, but that Citi was registered in California on that date. This documentation does not  
6 establish that Citi was surrendered at the time it took action with respect to Plaintiff's Deed of  
7 Trust. Similarly, Plaintiff's allegation that the "date filed" field with respect to MERS and First  
8 Pacific also shows they were dissolved or surrendered at the time they took actions with respect to  
9 Plaintiff's Deed of Trust lacks merit. As with Citi, these documents show only the date these  
10 companies were registered or formed in California, not the date their current status was updated or  
11 changed. (See Doc. 99, Proposed TAC, Exhibits A, E.)

12 In sum, these allegations fail to establish these entities were doing business in California  
13 when they were suspended, dissolved, or surrendered and that Plaintiff is, therefore, entitled to the  
14 cancellation of any written instrument.

15 **f. Plaintiff's Proposed Claim to Void or Cancel the First Assignment**

16 Plaintiff's seventh proposed cause of action seeks to void or cancel the first assignment  
17 from MERS' to Citi in May 2011. California law authorizes courts to cancel void or voidable  
18 written instruments where their existence creates a "reasonable apprehension [of] serious injury to  
19 a person against whom [the written instrument] is void or voidable." Cal. Civ. Code § 3412.

20 Plaintiff alleges MERS did not have standing or the legal authority to assign the Deed of  
21 Trust, and thus the assignment of the Deed of Trust was void at all times. (Doc. 99, Proposed  
22 TAC, ¶ 245.) Plaintiff alleges that MERS' permission to do business in California has been  
23 suspended since 2002, and MERS acted solely as a nominee for First Pacific, and not as a  
24 beneficiary, and therefore had no interest to assign to Citi. Moreover, Plaintiff contends that First  
25 Pacific was not registered to do business in California on the date the first assignment was signed,  
26 thus its nominee, MERS, could not have lawfully signed or authorized the First Assignment.  
27 (Doc. 99, Proposed TAC ¶ 2.) Plaintiff also again contends that Brenda Enriquez was not  
28 authorized to sign the first assignment of the Deed of Trust to Citi.



1 The allegations underpinning this claim were considered and rejected by the district court  
2 in ruling on Citi and MERS' motion to dismiss in October 2013. (Doc. 75, 5:17-9:4.) The  
3 allegations do not plausibly set forth a claim to void or cancel the first assignment of Plaintiff's  
4 Deed of Trust to Citi.

5 **g. Plaintiff's Proposed Claim Pursuant to California Business &**  
6 **Professions Code § 17200**

7 Plaintiff's proposed claim under Section 17200 alleges the "Foreclosing Defendants"  
8 engaged in deceptive business practices with respect to mortgage loan servicing, assignment of  
9 notes and deeds of trust, foreclosure of residential properties and related matters by executing and  
10 recording false and misleading documents and acting as beneficiaries and trustees without the  
11 requisite legal authority. (Doc. 99, Proposed TAC, ¶ 263.)

12 Section 17200 prohibits "any unlawful, unfair or fraudulent business act or practice and  
13 unfair, deceptive, untrue or misleading advertising." It covers a "wide range of conduct" and  
14 embraces "anything that can properly be called a business practice and that at the same time is  
15 forbidden by law." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1143-33  
16 (2003). Because Section 17200 is written in the disjunctive, it establishes three types of unfair  
17 competition. *Davis v. Ford Motor Credit Co.*, 179 Cal. App. 4th 581, 593 (2009). Therefore, a  
18 practice may be prohibited as unfair or deceptive even if it is not unlawful and vice versa.  
19 *Podolsky v. First Healthcare Corp.*, 50 Cal. App. 4th 632, 647 (1996).

20 To state a claim for fraud under California's unfair competition law, a plaintiff must show  
21 that reasonable members of the public are likely to be deceived. *Bardin v. DaimlerChrysler*  
22 *Corp.*, 136 Cal. App. 4th 1255, 1261 (2006). Plaintiff's proposed amended complaint alleges that  
23 "Defendants' acts and practices are likely to deceive." (Doc. 99, Proposed TAC, ¶ 262.) This  
24 statement, however, merely concludes that deception is likely, but fails to plead any specific facts  
25 showing the basis for that conclusion. *See Khoury v. Maly's of Cal., Inc.*, 14 Cal. App. 4th 612,  
26 619 (1993) ("A plaintiff must state with reasonable particularity the facts supporting the statutory  
27 elements of the violation."). The averments of a non-fraud claim which sound in fraud are subject  
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1 to Federal Rule of Civil Procedure 9(b).<sup>9</sup> Thus, allegations of fraudulent conduct under Section  
2 17200 must satisfy this heightened pleading requirement. To meet Rule 9(b)'s heightened  
3 pleading standard, a plaintiff must allege the who, what, when, where, and how of the fraudulent  
4 conduct. *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125-24 (9th Cir. 2009). Here, there is  
5 only one conclusory allegation that Defendants' practices are likely to deceive, which is  
6 insufficient to meet the heightened pleading requirements. (*See* Doc. 99, Proposed TAC, ¶ 262.)  
7 This claim is not cognizable.

8 **h. Plaintiff's Proposed Claim for Slander of Title**

9 Plaintiff alleges that none of the Foreclosing Defendants was ever a trustee, beneficiary, or  
10 assignee of any beneficiary of a Deed of Trust recorded against the Property. Accordingly, they  
11 all wrongfully caused the recording of the Substitution, Notice of Default, and Notice of Trustee's  
12 Sale. (Doc. 99, Proposed TAC, ¶¶ 268-69.) Further, Plaintiff asserts that Citi has wrongfully  
13 published information that it is the current beneficiary under the Deed of Trust which Plaintiff  
14 contends is untrue; Citi has thus disparaged Plaintiff's interest in the Property.

15 Slander or disparagement of title occurs when a person, without a privilege to do so,  
16 publishes a false statement that disparages title to property and causes the owner thereof "some  
17 special pecuniary loss or damage." *Fearon v. Fodera*, 169 Cal. 370, 379-80 (1915). To state a  
18 claim for slander of title, a plaintiff must allege (1) a publication, (2) without privilege or  
19 justification, (3) falsity, and (4) direct pecuniary loss. *Truck Ins. Exchange v. Bennett*, 53 Cal.  
20 App. 4th 75, 84 (1997). The gravamen of the cause of action is to protect the salability of property  
21 from injury. *Howard v. Schaniel*, 113 Cal. App. 3d 256, 264 (1980). This is ordinarily  
22 established through the loss of a particular sale, impaired marketability, or depreciation in value.  
23 *Hill v. Allan*, 259 Cal. App. 2d 470, 489 (1968). Pecuniary loss is an essential element of the  
24 cause of action. *Manhattan Loft, LLC v. Mercury Liquors, Inc.*, 173 Cal. App. 4th 1040, 1057  
25 (2009).

26  
27 \_\_\_\_\_  
28 <sup>9</sup> Plaintiff has already been informed of the heightened pleading requirements for fraud allegations pursuant to Federal Rule of Civil Procedure 9(b). (*See* Doc. 75, 12:9-13:18 (dismissing Plaintiff's fraud and injurious falsehood claim against MERS as insufficiently pled pursuant to Rule 9(b).))

1 This proposed cause of action is similar to Plaintiff's twice-dismissed claim against MERS  
2 for fraud or injurious falsehood. In Plaintiff's initial complaint and in his amended complaint, he  
3 alleged MERS' recordation of the assignment of the Deed of Trust to Citi was a false statement  
4 because MERS lacked the authority to execute a valid assignment, and thus MERS was liable for  
5 fraud or injurious falsehood.

6 It is futile to amend the complaint to state this cause of action. First, as it pertains to  
7 MERS, the district court has already considered Plaintiff's allegations and rejected them as  
8 insufficient to state a cause of action for fraud or injurious falsehood, which is substantially  
9 similar to the slander of title claim Plaintiff currently proposes. Second, Plaintiff fails to  
10 sufficiently plead pecuniary damages to support his claim. Although Plaintiff asserts the conduct  
11 of the Foreclosing Defendants caused him "to suffer general and special damages in an amount to  
12 be proven at trial" (Doc. 99, Proposed TAC, ¶ 273), this assertion is conclusory. *Bell Atlantic*  
13 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (court is not bound to accept as true labels,  
14 conclusions, formulaic recitations of the elements, or legal conclusions couched as factual  
15 allegations). For these reasons, assertion of this claim is futile.

16 **i. Plaintiff's Proposed Claim for Civil Conspiracy Claim pursuant to 18**  
17 **U.S.C. § 1965**

18 Plaintiff alleges that the "Foreclosing Defendants" violated Section 18 U.S.C. § 1965, part  
19 of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), by conspiring to commit  
20 fraudulent acts in attempting to foreclose on Plaintiff's property. (Doc. 98, ¶¶ 274-84.) Section  
21 1965 itself refers to venue and process related to types of RICO claims; substantive civil  
22 conspiracy claims are not stated under Section 1965. It appears Plaintiff is attempting to state a  
23 civil conspiracy claim under 18 U.S.C. § 1962(c).

24 The civil RICO statute provides:

25 It shall be unlawful for any person employed by or associated with any enterprise  
26 engaged in, or the activities of which affect, interstate or foreign commerce, to  
27 conduct or participate, directly or indirectly, in the conduct of such enterprise's  
28 affairs through a pattern of racketeering activity or collection of unlawful debt.

1 18 U.S.C. § 1962(c). "To state a claim under § 1962(c), a plaintiff must allege '(1) conduct (2) of  
2 an enterprise (3) through a pattern (4) of racketeering activity.'" *Odom v. Microsoft Corp.*,  
3 486 F.3d 541, 547 (9th Cir. 2007) (quoting *Sedima, S.P.R.L. v. Imrex Co., Inc.* 473 U.S. 479, 496  
4 (1985)).

5 The particularity requirements of Rule 9(b) apply to RICO claims. *Moore v. Kayport*  
6 *Package Exp., Inc.*, 885 F.2d 531, 541 (9th Cir. 1989). Absent a statement of the date, time, and  
7 place of the alleged wrongful conduct, as well as identification of the particular defendants who  
8 participated in the wrongful conduct, the claim is not adequately pled. Plaintiff's allegations are  
9 merely conclusions of law that do not meet the heightened pleading requirements of Rule 9.  
10 Because this claim is legally insufficient as proposed and would be subject to dismissal under Rule  
11 12(b)(6), Plaintiff's request to amend his complaint to add a claim under 18 U.S.C. § 1965 would  
12 be futile. *Miller*, 845 F.2d at 214 (citing Moore, *Moore's Federal Practice* ¶ 15.08[4] (2d ed.  
13 1974) (proper test to be applied when determining the legal sufficiency of a proposed amendment  
14 is identical to the one used when considering the sufficiency of a pleading challenged under Rule  
15 12(b)(6)); see also *Baldin v. Wells Fargo Bank, N.A.*, No. 3:12-cv-00648-AC, 2013 WL 6388499,  
16 at \* 7-9 (D.Or. Dec. 6, 2013) (denying leave to amend certain claims as futile where the claims  
17 would be subject to dismissal under Rule 12(b)(6)).

## 18 **5. Conclusion**

19 The proposed amendments to the complaint are not tenable under Rule 15(a). Plaintiff's  
20 proposed amended complaint is predicated on facts that were, or should have been, known to  
21 Plaintiff when his complaint was filed in 2011 or when he filed an amended complaint in 2012.<sup>10</sup>  
22 As a result, Plaintiff has unduly delayed setting forth his new claims. To the extent that  
23 handwriting on a copy of the 2003 Deed of Trust is newly discovered, Plaintiff has failed to  
24 establish how this supports any theory of recovery, who wrote it, when it was written, or for what  
25 purpose it was written.

26

27

28 <sup>10</sup> Plaintiff has not established what facts could only have been obtained in discovery from Citi since December 2013.

