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6 **UNITED STATES DISTRICT COURT**  
7 **EASTERN DISTRICT OF CALIFORNIA**  
8

9 **GLENN W. BEVER,**

10 **Plaintiff**

11 **v.**

12 **CAL-WESTERN RECONVEYANCE**  
13 **CORP., et al.,**

14 **Defendants**

**CASE NO. 1:11-CV-1584 AWI SKO**

**ORDER ON DEFENDANT CITI'S  
MOTION FOR SUMMARY  
JUDGMENT; ORDER DISSOLVING  
PRELIMINARY INJUNCTION; ORDER  
FOR FINAL JUDGMENT UNDER RULE  
54(b); and ORDER FOR STATUS  
REPORT FROM DEFENDANT CAL-  
WESTERN**

(Doc. No. 138)

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18 This is a mortgage related case brought by Plaintiff Glenn Bever (“Bever”) against *inter*  
19 *alia* CitiMortgage, Inc. (“Citi”).<sup>1</sup> Following a series of Rule 12(b)(6) motions to dismiss, the only  
20 claim left against Citi is for violation of Civil Code § 2923.5. A preliminary injunction against  
21 Citi that prohibits it or its agents from foreclosing upon Bever’s property is currently in place. See  
22 Doc. No. 76. Citi now moves for summary judgment. For the reasons that follow, the motion will  
23 be granted. Further, the Court will dissolve the preliminary injunction, and issue final judgments  
24 in favor of MERS and Citi pursuant to Federal Rule of Civil Procedure 54(b).  
25  
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27 <sup>1</sup> Bever also brought suit against Mortgage Electronic Registration Services, Inc. (“MERS”) and Cal-Western  
28 Reconveyance Corp. (“Cal-Western”). All claims against MERS have been dismissed. See Doc. No. 75. The only  
remaining claim against Cal-Western is for violation of 15 U.S.C. § 1692, but the case against Cal-Western is  
currently stayed pursuant to a mandatory bankruptcy stay. See Doc. Nos. 71, 75.

1 **I. DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

2 Summary Judgment Framework

3 Summary judgment is proper when it is demonstrated that there exists no genuine issue as  
4 to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R.  
5 Civ. P. 56; Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Fortyune v. American Multi-  
6 Cinema, Inc., 364 F.3d 1075, 1080 (9th Cir. 2004). The party seeking summary judgment bears  
7 the initial burden of informing the court of the basis for its motion and of identifying the portions  
8 of the declarations (if any), pleadings, and discovery that demonstrate an absence of a genuine  
9 issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Soremekun v. Thrifty  
10 Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007). A fact is “material” if it might affect the outcome  
11 of the suit under the governing law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49  
12 (1986); United States v. Kapp, 564 F.3d 1103, 1114 (9th Cir. 2009). A dispute is “genuine” as to  
13 a material fact if there is sufficient evidence for a reasonable jury to return a verdict for the non-  
14 moving party. Anderson, 477 U.S. at 248; Freecycle Sunnyvale v. Freecycle Network, 626 F.3d  
15 509, 514 (9th Cir. 2010).

16 Where the moving party will have the burden of proof on an issue at trial, the movant must  
17 affirmatively demonstrate that no reasonable trier of fact could find other than for the movant.  
18 Soremekun, 509 F.3d at 984. Where the non-moving party will have the burden of proof on an  
19 issue at trial, the movant may prevail by presenting evidence that negates an essential element of  
20 the non-moving party’s claim or by merely pointing out that there is an absence of evidence to  
21 support an essential element of the non-moving party’s claim. See James River Ins. Co. v. Herbert  
22 Schenk, P.C., 523 F.3d 915, 923 (9th Cir. 2008); Soremekun, 509 F.3d at 984. If a moving party  
23 fails to carry its burden of production, then “the non-moving party has no obligation to produce  
24 anything, even if the non-moving party would have the ultimate burden of persuasion.” Nissan  
25 Fire & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1105-06 (9th Cir. 2000). If the moving party  
26 meets its initial burden, the burden then shifts to the opposing party to establish that a genuine  
27 issue as to any material fact actually exists. See Matsushita Elec. Indus. Co. v. Zenith Radio  
28 Corp., 475 U.S. 574, 586 (1986); Nissan Fire, 210 F.3d at 1103. The opposing party cannot “rest

1 upon the mere allegations or denials of [its] pleading’ but must instead produce evidence that ‘sets  
2 forth specific facts showing that there is a genuine issue for trial.’” Estate of Tucker v. Interscope  
3 Records, 515 F.3d 1019, 1030 (9th Cir. 2008).

4 The opposing party’s evidence is to be believed, and all justifiable inferences that may be  
5 drawn from the facts placed before the court must be drawn in favor of the opposing party. See  
6 Anderson, 477 U.S. at 255; Matsushita, 475 U.S. at 587; Narayan v. EGL, Inc., 616 F.3d 895, 899  
7 (9th Cir. 2010). While a “justifiable inference” need not be the most likely or the most persuasive  
8 inference, a “justifiable inference” must still be rational or reasonable. See Narayan, 616 F.3d at  
9 899. “If conflicting inferences may be drawn from the facts, the case must go to the jury.” Holly  
10 D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1175 (9th Cir. 2003). Inferences are not drawn out of the  
11 air, and it is the opposing party’s obligation to produce a factual predicate from which the  
12 inference may be drawn. See Sanders v. City of Fresno, 551 F.Supp.2d 1149, 1163 (E.D. Cal.  
13 2008); UMG Recordings, Inc. v. Sinnott, 300 F.Supp.2d 993, 997 (E.D. Cal. 2004). “A genuine  
14 issue of material fact does not spring into being simply because a litigant claims that one exists or  
15 promises to produce admissible evidence at trial.” Del Carmen Guadalupe v. Agosto, 299 F.3d  
16 15, 23 (1st Cir. 2002); see Bryant v. Adventist Health System/West, 289 F.3d 1162, 1167 (9th Cir.  
17 2002). Further, a “motion for summary judgment may not be defeated . . . by evidence that is  
18 ‘merely colorable’ or ‘is not significantly probative.’” Anderson, 477 U.S. at 249-50; Hardage v.  
19 CBS Broad. Inc., 427 F.3d 1177, 1183 (9th Cir. 2006). If the nonmoving party fails to produce  
20 evidence sufficient to create a genuine issue of material fact, the moving party is entitled to  
21 summary judgment. Nissan Fire, 210 F.3d at 1103.

### 22 Factual Background<sup>2</sup>

23 In 2003, Bever obtained a loan that was secured by a deed of trust. See Doc. No. 141 at  
24 Ex. A. The deed of trust encumbers real property located in Clovis, California, which is Bever’s  
25 homestead (“the Property”). See id.; First Amended Complaint (“FAC”) ¶¶ 45, 46. It appears that  
26 Bever eventually fell behind on the loan in 2009. See DUMF 4.

27 On June 16, 2009, Citi spoke to Bever over the telephone in order to assess his financial

28 <sup>2</sup> “DUMF” refers to “Defendant’s Undisputed Material Fact.”

1 situation and to explore options to avoid foreclosure. See id. Bever explained that he was  
2 experiencing financial difficulties due to a business failure. DUMF 5. Citi advised Bever that he  
3 had the right to request a subsequent meeting, and provided Bever with a toll-free United States  
4 Department of Housing and Urban Development (“HUD”) telephone number in order to find a  
5 housing counseling agency. DUMF 6.

6 On September 15, 2009, Citi again spoke to Bever over the telephone. DUMF 7. The  
7 purpose of the September 15 call, as well as the information conveyed between Citi and Bever,  
8 were the same as the June 16, 2009 call. See DUMF’s 8, 9.

9 On June 4, 2010, Citi spoke to Bever, who advised that the reason for the delinquency was  
10 the result of being “overextended.” DUMF 14.

11 Numerous calls were made by Citi to Plaintiff in late June, all of July, and two days in  
12 August 2010. See DUMF 16. No messages were left. See id. It is unclear whether Citi actually  
13 spoke to Bever in June or July 2010. See Bever Decl. ¶¶ 5-8.

14 On August 10, 2010, Citi spoke to Bever, who advised that a servicing/misapplication of  
15 payment was the reason for the delinquency. See Bever Dec. ¶ 9; DUMF 17.

16 In a call on October 8, 2010, Bever advised Citi that the reason for the delinquency was  
17 due to slow receivables. DUM F 18.

18 In a telephone call on November 9, 2010, Bever advised Citi that the reason for the  
19 delinquency was due to slow business. DUMF 19.

20 On February 11 and 15, 2011, Citi spoke with Bever over the telephone. See Bever Dec.  
21 ¶¶ 10-13.

22 On February 22, 2011, Citi sent Bever a letter. See DUMF 25; Alsiweadi Dec. Ex. C. The  
23 letter indicates that Bever’s account was delinquent and that approximately \$1,800 was owed. See  
24 Alsiweadi Dec. Ex. C. The letter states that if Bever had not made arrangements for payment,  
25 then he should contact Citi at a toll-free number to discuss the possibility of alternative  
26 arrangements. See id. It appears that Bever did not receive this letter. See Bever Dec. ¶ 14.

27 Citi e-mailed Bever 5 times in March 2011, 4 times in April 2011, and 2 times in May  
28 2011. See DUMF 24.

1 On March 4, 2011, Citi sent Bever a letter. See DUMF 25; Alsiweadi Dec. Ex. C. The  
2 letter indicates that it was sent to Bever at the Property address. See Alsiweadi Dec. Ex. C. The  
3 letter indicates in part that: (1) the account is in default; (2) approximately \$3,300 is past due; (3)  
4 a credit bureau has been informed of the delinquency; (4) a phone payment option is available; (5)  
5 a toll-free number for HUD homeownership counseling is provided; (6) an exterior inspection of  
6 the house will be conducted and may continue to be conducted during delinquency; (6) a toll-free  
7 number for a Citi collections specialist is provided for Bever to call if he is unable to make a  
8 payment; and (7) the letter is an attempt to collect a debt. See id. Bever did not receive this letter.  
9 See Supp. Bever Dec. ¶¶ 2, 3.

10 On March 15, 2011, Citi sent Bever another letter. See DUMF 25; Alsiweadi Dec. Ex. C.  
11 The letter was sent to Bever at the Property address and stated that Citi was extremely concerned  
12 that the account had not been kept current, Bever could lose the Property through acceleration,  
13 Bever has options, Bever could call Citi at a toll free number, and foreclosure was possible. See  
14 Alsiweadi Dec. Ex. C. Bever did not receive this letter. See Supp. Bev. Dec. ¶¶ 2, 3.

15 Between March 5, 2011, and April 1, 2011, Citi attempted to contact Bever by telephone  
16 22 times, and each call was made at a different time and on different days. See DUMF 26. Each  
17 of the calls was met by an answering machine, and no messages were left. See id.<sup>3</sup>

18 On April 4, 2011, Citi sent a letter to Bever via certified mail return receipt requested. See  
19 DUMF 25; Alsiweadi Ex. B. The letter indicates that it was sent to Bever at the Property address,  
20 and states that it is regarding “Foreclosure Avoidance Notice.” Alsiweadi Dec. Ex. C. In  
21 pertinent part, the letter states: (1) California law requires Citi to contact Bever in order to explore  
22 options to avoid foreclosure; (2) a letter was sent several weeks prior to make Bever aware of this  
23 requirement and that Citi would be calling Bever to discuss his financial situation and whether any  
24 alternatives to foreclosure were possible; (3) Citi made three or more attempts to call Bever  
25 without success; (4) California law requires the sending of the letter to complete a diligent effort to  
26 contact Bever to discuss alternatives to foreclosure; (5) Citi intends to continue the foreclosure

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28 <sup>3</sup> Bever disputes DUMF 26 by declaring that he did not receive any messages from Citi from March 5 to April 1,  
2011. However, DUMF 26 expressly states that no messages were left on the answering machine. DUMF 26 is  
undisputed.

1 process; (6) Bever can contact Citi at a toll-free number (which was provided) in order to explore  
2 available options to avoid foreclosure; (7) a toll-free HUD number for housing counseling  
3 agencies was provided; and (8) further delay in contacting Citi to explore alternatives to  
4 foreclosure could cause the amount owed to Citi to increase. See id. Bever did not receive this  
5 letter. See Supp. Bev. Dec. ¶¶ 2, 3.

6 On May 23, 2011, Citi spoke to Bever on the telephone. See Bever Dec. ¶ 27; DUMF 27.  
7 Bever advised that he did not have time to provide his income and expenses, but that he would  
8 bring the account current by June 17, 2011. See DUMF 28.<sup>4</sup> The account was not brought current  
9 on June 17, 2011. DUMF 29.<sup>5</sup>

10 On June 3, 2011, Citi recorded a Notice of Default regarding Bever's Clovis property in  
11 the Fresno County Recorder's office. See DUMF 30. The amount of default is identified as  
12 \$6,862.60. See Doc. No. 141 at Ex. B.

13 A notice of trustee's sale was recorded on September 6, 2011, in the Fresno County  
14 Recorder's office. See id. at Ex. D.

15 On October 26, 2011, this Court granted Bever a Temporary Restraining Order that  
16 restrained the trustee's sale. See Doc. No. 16. The Court later granted Bever a preliminary  
17 injunction based on allegations regarding a violation of California Civil Code § 2923.5 by Citi.  
18 See Doc. No. 76.

19 At all pertinent times, when accessing Citi's website, the public could find the following  
20 information at [www.citimortgage.com](http://www.citimortgage.com): (1) options that may be available to borrowers who are  
21 unable to afford their mortgage payments and who wish to avoid foreclosure, and instructions to  
22 borrowers advising them on steps to take to explore those options; (2) a list of financial documents

23 \_\_\_\_\_  
24 <sup>4</sup> Bever disputes DUMF 28 by citing Paragraphs 58-1, 58-2, and 58-3 in the verified FAC and stating that the account  
25 was never in default. See Doc. No. 148 at ¶ 28. Paragraphs 58-1, 58-2, and 58-3 describe Bever's attempt to pay off  
26 the loan on January 18, 2012 through an Electronic Funds Transfer ("EFT"). See Doc. No. 42 at ¶¶ 58-1, 58-2, 58-3.  
The EFT is described as an instrument that was sent via certified mail to Citi. See id. However, as the Court has  
previously held, Bever's EFT was illegitimate and not a credible attempt at tender. See Bever v. Cal-Western  
Reconveyance, Inc., 2013 U.S. Dist. LEXIS 143939, \*13-\*15 (E.D. Cal. Oct. 2, 2013). DUMF 28 is undisputed.

27 <sup>5</sup> Bever disputes DUMF 29 by referencing Paragraphs 58-1, 58-2, and 58-3 of the FAC and stating that the account  
28 was never in default. See Doc. No. 148 at ¶ 29. As just discussed, Paragraphs 58-1, 58-2, and 58-3 represents an  
illegitimate attempt to tender. DUMF 29 is undisputed.

1 borrowers should collect and be prepared to present to the mortgage servicer when discussing  
2 options for avoiding foreclosure; (3) a toll-free telephone number for borrowers who wish to  
3 discuss options for avoiding foreclosure; and (4) the toll-free telephone number made available by  
4 HUD to find a HUD-certified housing counseling agency. DUMF 33.

5 Defendant's Argument

6 Citi argues that it complied with Civil Code § 2923.5 prior to filing the notice of default.  
7 Section 2923.5 can be followed either by contacting the borrower and discussing options to avoid  
8 foreclosure, informing the borrower of the right to request a subsequent meeting, and providing a  
9 toll-free HUD number, or meeting § 2923.5(g)'s due diligence requirements. Citi argues that it  
10 met both methods of compliance. First, Citi argues that it had telephone contact with Bever that  
11 met these requirements § 2923.5(a)(2) from June 16, 2009 through February 15, 2011. Second,  
12 Citi argues that it met the due diligence requirements of § 2923.5(g) because it sent Bever a letter  
13 on March 4, 2011, made more than 3 attempts to contact Bever by telephone on different dates and  
14 at different times, and sent Bever a certified letter return receipt requested on April 4, 2011. Both  
15 letters provided a toll-free number for Bever to contact a live Citi representative, and at all  
16 pertinent times Citi's website contained all statutorily required information. Because the  
17 requirements of § 2923.5 were met, summary judgment should be granted.

18 Plaintiff's Argument

19 Bever argues *inter alia* that Citi did not actually contact him to assess his financial  
20 situation or discuss options to avoid foreclosure. Bever explains that during the February 15, 2011  
21 telephone call Citi did not ask why Bever could not make his payments and did not tell him about  
22 deeds in lieu, workouts, short sales, or any such thing. That is, Bever argues that he did not  
23 receive telephone calls prior to June 3 about exploring options to avoid foreclosure. Bever also  
24 declares that he did not receive any letters from Citi in March 2011 or April 2011.

25 Bever also objects to the declaration of Elina Alsiweadi. Bever argues that the declaration  
26 does not demonstrate personal knowledge, is not a proper declaration under 28 U.S.C. § 1746, and  
27 does not meet the requirements of California Evidence Code § 1271 or Federal Rule of Evidence  
28 803(6). Since Alsiweadi's declaration is inadmissible, Citi has not met its burden.

1            Legal Standard<sup>6</sup>

2            “Section 2923.5 concerns the crucial first step in the foreclosure process: The recording of  
3 a notice of default as required by section 2924.” Mabry v. Superior Court, 185 Cal.App.4th 208,  
4 220 (2010). Section 2923.5 precludes the recording of a notice of default “until 30 days after the  
5 loan servicer has made initial contact with the borrower to assess the borrower’s financial situation  
6 and explore options for avoiding foreclosure, or has satisfied the due diligence requirements of the  
7 statute.” Intengan v. BAC Home Loans Servicing LP, 214 Cal.App.4th 1047, 1056 (2013); see  
8 also Argueta v. J.P. Morgan Chase, 787 F.Supp.2d 1099, 1107 (E.D. Cal. 2011); Rosberg v. Bank  
9 of America, N.A., 219 Cal.App.4th 1481, 1494 n.8 (2013); Skov v. U.S. Bank Nat’l Assn., 207  
10 Cal.App.4th 690, 695 (2012). Thus, “§ 2923.5 actually provides two ways for lenders to comply:  
11 they can either contact the borrower in person or by phone, or they can satisfy [statutory] due  
12 diligence requirements in attempting to make such contact.” Miller v. Bank of N.Y., 2013 U.S.  
13 Dist. LEXIS 24764, \*7 (N.D. Cal. Feb. 22, 2013); see Frias v. Wells Fargo Bank, 2013 U.S. Dist.  
14 LEXIS 11287, \*4-\*5 (N.D. Cal. Jan. 28, 2013).

15            With respect to the first method of compliance, actual contact in person or by telephone,  
16 the lender is required to both assess the borrower’s financial condition and explore options for  
17 avoiding foreclosure. Cal. Civ. Code § 2923.5(a)(2); Skov, 207 Cal.App.4th at 701; Mabry, 185  
18 Cal.App.4th at 221. The borrower is also to be told that he has a right to request a subsequent  
19 meeting, and is to be provided with the HUD toll-free telephone number for locating a certified  
20 housing counseling agency. See Cal. Civ. Code 2923.5(a)(2). However, the “assess” and  
21 “explore” aspects of § 2923.5 are to be construed “narrowly.” Skov, 207 Cal.App.4th at 702;  
22 Mabry, 185 Cal.App.4th at 232. “[A]ny ‘assessment’ must necessarily be simple—something on  
23 the order of, ‘why can’t you make your payments?’” Mabry, 185 Cal.App.4th at 232. Further,  
24 “any ‘exploration’ of options to avoid foreclosure must necessarily be limited to merely telling the  
25 borrower the traditional ways that foreclosure can be avoided (e.g., deeds ‘in lieu,’ workouts, or  
26 short sales), as distinct from requiring the lender to engage in a process that would be functionally  
27 indistinguishable from taking a loan application in the first place.” Skov, 207 Cal.App.4th at 702;

28 \_\_\_\_\_  
<sup>6</sup> This legal standard relates to § 2923.5 as it existed in 2011, which is when Citi filed the Notice of Default.



1 Mabry, 185 Cal.App.4th at 232. Section 2923.5 does not require the lender to modify the loan.

2 See Skov, 207 Cal.App.4th at 695-96.

3 With respect to the second method of compliance, statutory due diligence, in a nutshell the  
4 statute “requires sending a letter by first class mail, making three attempts to contact the borrower  
5 by telephone, and sending a certified letter if no response is received within two weeks of the  
6 telephone attempts.” Intengan, 214 Cal.App.4th at 1056; see Cal. Civ. Code § 2923.5(g). More  
7 specifically, to meet the statutory “due diligence” requirement a mortgagee, beneficiary, or  
8 authorized agent must: (1) mail a letter to the borrower that includes the toll-free HUD telephone  
9 number to find a certified housing counseling agency; (2) then call the borrower “by telephone at  
10 least three times at different hours and on different days” using the borrower’s primary telephone  
11 number; (3) then, if the borrower has not responded to the telephone calls within 2 weeks, mail a  
12 certified letter return receipt requested; (4) provide the borrower with a means of contact in a  
13 timely manner, including a telephone number to a live representative during business hours; and  
14 (5) post a link on the homepage of its Internet Web site that has (a) options to avoid foreclosure  
15 for those who may be unable to afford their current payments, (b) a list of financial documents that  
16 borrowers should collect and be prepared to present when discussing options to avoid foreclosure,  
17 (c) a toll free telephone number for those who wish to discuss options to avoid foreclosure, and (d)  
18 the toll free HUD telephone number to find a certified counseling agency. See Cal. Civ. Code  
19 § 2923.5(g); see Barrionuevo v. Chase Bank, N.A., 885 F.Supp.2d 964, 976-977 (N.D. Cal. 2012);  
20 Argueta, 787 F.Supp.2d at 1107.

21 Discussion

22 a. Evidentiary Objection

23 As indicated above, Bever makes 3 evidentiary objections against Alsiweadi’s declaration.  
24 Bever objects that the declaration does not comply with 28 U.S.C. § 1746, is not made on personal  
25 knowledge, and does not comply with California Evidence Code § 1271 or Federal Rule of  
26 Evidence 803(6). The Court does not find merit to these objections.

27 First, the express representation of personal knowledge and the description of Alsiweadi’s  
28 employment with Citi are sufficient to demonstrate personal knowledge. See Fed. R. Evid. 602;

1 See-Land Serv. v. Lozen Int'l, LLC, 285 F.3d 808, 819 (9th Cir. 2002); In re Kaypro, 218 F.3d  
2 1070, 1075 (9th Cir. 2000). Alsiweadi's declaration states, "I have personal knowledge of the  
3 facts stated within this declaration . . . ." See Alsiweadi Dec. ¶ 1. Alsiweadi's declaration also  
4 explains that she is a Business Operations Analyst, at all relevant times she has had access to  
5 Citi's records regarding Bever's loan, she is familiar with Citi's methods for maintaining loan  
6 files, and she has personally reviewed the relevant loan files. See id. at ¶¶ 2-6. There is nothing to  
7 indicate that Alsiweadi's declaration is not based on personal knowledge. Bever's objection is  
8 overruled. See Sea-Land, 285 F.3d at 819.

9 Second, California Evidence Code § 1271 is California's business records exception to the  
10 hearsay rule. See Cal. Evid. Code § 1271; People v. Beeler, 9 Cal.4th 953, 978 (1995). In federal  
11 court, admissibility of evidence is governed by the federal rules of evidence, not the California  
12 Evidence Code.<sup>7</sup> See Fed. R. Evid. 101; Primiano v. Cook, 598 F.3d 558, 563 (9th Cir. 2010);  
13 United States v. Sacco, 491 F.2d 995, 1003 (9th Cir. 1974). Both parties' discussion of and  
14 reliance on Evidence Code § 1271 is improper. See id.

15 Federal Rule of Evidence 803(6) provides the federal business records exception to the  
16 hearsay rule. Under Rule 803(6), business records are admissible when two foundational facts are  
17 established: "(1) the writing is made or transmitted by a person with knowledge at or near the time  
18 of the incident; and (2) the record is kept in the ordinary course of regularly conduct business  
19 activity." Sea-Land, 285 F.3d at 819; Beyene v. Coleman Sec. Services, Inc., 854 F.2d 1179,  
20 1183 n.4 (9th Cir. 1988). These two foundational facts must be established by the testimony of  
21 the custodian of the records or other qualified witness. See Fed. R. Evid. 803(6); Sea-Land, 285  
22 F.3d at 820; Beyene, 854 F.2d at 1183 n.4. It is immaterial that the business record is maintained  
23 in a computer rather than in company books. U-Haul Int'l v. Lumbermens Mut. Cas. Co., 576  
24 F.3d 1040, 1043 (9th Cir. 2009). Here, Alsiweadi's declaration describes her position within Citi  
25 and states that: (1) she has had access to Bever's loan servicing file, (2) she is familiar with Citi's  
26 methods for maintaining loan files, (3) the file is maintained in the ordinary course of Citi's  
27

28 <sup>7</sup> There are limited exceptions to this rule, but there has been no showing that any exception applies in this case. See  
Primiano, 598 F.3d at 563; Feldman v. Allstate Ins. Co., 322 F.3d 660, 666 (9th Cir. 2003).

1 business, (4) the entries in the file reflect interactions related to Bever's loan, (5) the entries in the  
2 electronic documents are made at or near the time of an interaction in the ordinary course of Citi's  
3 business, and (6) the entries are made by individuals who had personal knowledge of the events  
4 and who were under a duty to accurately record the events. See id. at ¶¶ 5-6. These statements are  
5 sufficient to meet the two foundational requirements of Rule 803(6). See Sea-Land, 285 F.3d at  
6 819-20; Beyene, 854 F.2d at 1183 n.4. Although not entirely clear, it appears that Bever may be  
7 contending that Alsiweadi is not a qualified witness to authenticate Citi's business records.  
8 However, given Alsiweadi's employment with Citi and her knowledge of Citi's practices, there is  
9 nothing to indicate that Alsiweadi is unqualified. Bever's Rule 803(6) objection is overruled. See  
10 Fed. R. Evid. 803(6); Sea-Land, 285 F.3d at 819-20; Beyene, 854 F.2d at 1184 n.4; Frias, 2013  
11 U.S. Dist. LEXIS 11287 at \*8 n.1.

12 Finally, 28 U.S.C. § 1746 provides in part that whenever a matter is required or permitted  
13 to be supported by a sworn declaration, the matter to be proved may be done so by an unsworn  
14 declaration if the declarant dates the declaration and subscribes that the declaration is made "under  
15 penalty of perjury, and is in substantially the following form: . . . (2) If executed in the United  
16 States . . . : 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true  
17 and correct.'" 28 U.S.C. § 1746(2). Here, Alsiweadi's declaration states in relevant part: "I  
18 declare under penalty of perjury under the laws of the State of California that the foregoing is true  
19 and correct. Executed this 14th day of July, 2014, at O'Fallon, Missouri." Doc. No. 138-3. Bever  
20 does not explain how Alsiweadi's declaration violates this statute. To the extent that Bever may  
21 be complaining about the inclusion of "under the laws of the State of California," the declaration  
22 still satisfies § 1746(2). Section 1746 only requires substantial compliance. See CFTC v.  
23 Topworth Int'l, Ltd., 205 F.3d 1107, 1112 (9th Cir. 1999). Courts have held that statements that  
24 identify the law of a particular state as part of the penalty of perjury sentence are sufficient to meet  
25 § 1746(2)'s requirements. See Brantley v. Boyd, 2011 U.S. Dist. LEXIS 38099, \*9 (N.D. Cal.  
26 Apr. 1, 2011); Myrick v. Nationwide Mut. Ins. Co., 2008 U.S. Dist. LEXIS 1708, \*5 n.1 (W.D.  
27 Wash. Jan. 2, 2008); Slaughter v. Stewart Enters., 2007 U.S. Dist. LEXIS 56732, \*6-\*7 (N.D. Cal.  
28 Aug. 1, 2007). Bever's § 1746 objection is overruled. See id.

1           **b.       Civil Code § 2923.5**

2                   **1.       In-Person or Telephone Contact -- § 2923.5(a)(2)**

3           The Court is not satisfied that Citi has shown that it contacted Bever and assessed his  
4 financial condition and explored options to avoid foreclosure. Bever expressly declares that  
5 during the February 11 and 15, 2011 telephone calls, Citi did not provide the HUD toll-free  
6 number to him, did not advise him that he could request a meeting, did not ask him questions  
7 along the line of “why can’t you make your payments?”, and did not mention to him deeds in lieu,  
8 workouts, short sales, “or the like.” See Bever Dec. ¶¶ 10-13. Bever’s declaration affirmatively  
9 negates the required elements of “assessment” and “exploration.” Cf. Mabry, 185 Cal.App.4th at  
10 232. Because this is summary judgment, the Court accepts Bever’s factual assertions as true. See  
11 Narayan, 616 F.3d at 899. Therefore, the February 11 and 15 telephone calls did not fulfill  
12 § 2923.5(a)(2)’s requirements.<sup>8</sup>

13           Citi argues that the prior telephone conversations that it had with Bever in 2009 and 2010  
14 demonstrate that Bever’s financial condition was assessed and options to avoid foreclosure were  
15 explored. The Court is not convinced.

16           Like the February 2011 telephone calls, Bever declares that most of the 2010 calls were not  
17 to discuss loss mitigation, assess his financial condition, or explore options to avoid foreclosure,  
18 nor did Citi ask questions like why he could not make his payments. See Bever Dec. ¶¶ 8, 9.  
19 Some calls in 2010 indicate that Bever explained why he had not made payments, but there is no  
20 evidence that Citi explored options to avoid foreclosure or that Citi informed Bever of his right to  
21 a subsequent meeting or gave Bever the toll-free HUD phone number. Cf. Cal. Civ. Code §  
22 2923.5(a)(2) with DUMF’s 18, 19. There is no undisputed evidence that any telephone calls in  
23 2010 met the requirements of § 2923.5(a)(2). Cf. Mabry, 185 Cal.App.4th at 232.

24           As for the June and September 2009 telephone calls, there is no dispute that these call met  
25 the requirements of § 2923.5(a)(2). See DUMF’s 4-9; Doc. No. 148 at ¶¶ 4-9. Nevertheless, the  
26 Court does not find that reliance on the June and September 2009 calls is appropriate.

27 \_\_\_\_\_  
28 <sup>8</sup> The Court notes that the May 23, 2011, telephone call to Bever could not have satisfied § 2923.5 in this case,  
regardless of the substance of the call, because May 23 is less than 30 days from the June 3, 2011 notice of default.  
See Cal. Civ. Code § 2923.5(a).

1 Viewed in the light most favorable to Bever, the evidence shows that Bever cured the  
2 delinquency in 2009. From September 16, 2009 to March 8, 2010, Citi made no further attempts  
3 to contact Bever, and took no further steps to foreclose on the loan. Given Citi's conduct in 2011,  
4 it is reasonable to infer that from September 2009 to March 2010, Bever's loan was current.

5 If a borrower is once again making loan payments and there is no delinquency, then  
6 foreclosure is no longer an option. The process of foreclosure in essence is back to square one.  
7 Financial conditions and possible alternatives to foreclosure may change over time, in which case  
8 an earlier "assess and explore" call would not fairly reflect the existing conditions relating to a  
9 current delinquency. With a possible change in conditions, a result other than foreclosure may  
10 occur. There is nothing particularly onerous about requiring a lender/lender's agent to contact the  
11 borrower in connection with a new delinquency. Such a call would address existing conditions,  
12 and deal with existing options to avoid foreclosure.

13 The plain language of § 2932.5 is silent as to whether contacts made regarding prior  
14 delinquencies are sufficient for later occurring delinquencies in preparation for filing a notice of  
15 default. See Cal. Civ. Code § 2923.5(a). However, § 2923.5 was enacted in response to the  
16 foreclosure crises. Rossberg, 219 Cal.App.4th at 1493. Section 2923.5's contact requirement was  
17 intended in part "to change the foreclosure process so that avoidable foreclosures could be avoided  
18 successfully." Pantoja v. Countrywide Home Loans, 2013 Cal. App. Unpub. 1529, \*17 (Feb. 28,  
19 2013).<sup>9</sup> An additional call to address the then existing conditions surrounding a current  
20 delinquency appears consistent with the language and purpose of § 2923.5; a contact that is nearly  
21 2-years old and in relation to a different delinquency does not.<sup>10</sup>

22 Given the periods of delinquency followed by a cure in this case, as well as the purpose of  
23 § 2923.5, the Court cannot hold that the June and September 2009 telephone contacts are

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24 <sup>9</sup> Despite state rules, the Court may consider unpublished cases as persuasive authority. See Employers Ins. of  
25 Wausau v. Granite State Ins. Co., 330 F.3d 1214, 1220 n.8 (9th Cir. 2003); Altman v. HO Sports Co., 821 F.Supp.2d  
26 1178, 1189 n.14 (E.D. Cal. 2011).

27 <sup>10</sup> Citi cites Avila v. Wells Fargo Bank, 2012 U.S. Dist. LEXIS 100522 (N.D. Cal. July 18, 2012) and Dias v. JP  
28 Morgan Chase, N.A., 2014 U.S. Dist. LEXIS 87310 (N.D. Cal. June 25, 2014) to argue that as long as some calls were  
received at least 30 days prior to recording the notice of default, then § 2923.5 is satisfied. However, the plaintiffs in  
Avila and Dias never argued that the earlier calls were insufficient because of the passage of time or an intervening  
cure of delinquency. To the extent that Avila and Dias support Citi, the Court respectfully declines to follow them.

1 sufficient for § 2923.5(a)(2) and the February 2011 delinquency. Bever's declaration creates  
2 genuine issues of disputed material fact regarding telephone contact by Citi under § 2923.5(a)(2).  
3 Summary judgment on this issue is inappropriate.

4 2. Due Diligence -- § 2923.5(g)

5 The evidence before the Court indicates that Citi exercised due diligence under  
6 § 2923.5(g). First, on March 4, 2011, Citi sent Bever a letter that stated the account was in  
7 default, provided the HUD toll-free telephone number, and provided a toll-free telephone number  
8 to contact Citi. See DUMF 25; Alsiweadi Dec. Exs. B, C. This letter meets the requirements of  
9 § 2923.5(g)(1).<sup>11</sup> Second, Citi attempted to contact Bever more than three times on different dates  
10 and at different times between March 4 and March 22, 2011. See DUMF 26; Alsiweadi Dec. Ex.  
11 B. This meets the requirements of § 2923.5(g)(2). Third, on April 4, 2011, Citi sent Bever a letter  
12 via certified mail return receipt requested. See DUMF 25; Alsiweadi Dec. Exs. B, C. The letter  
13 indicates that it deals with foreclosure avoidance, that Citi intends to continue with foreclosure,  
14 Citi encouraged Bever to contact Citi at a toll-free number, and provided the toll-free HUD  
15 number. See Alsiweadi Dec. Ex. C. The letter was also sent at least two weeks after Citi had  
16 made at least three telephone attempts to contact Bever. See id.; DUMF 26. This letter meets the  
17 requirements of § 2923.5(g)(3). Fourth, Citi provided Bever with a toll-free telephone number to  
18 contact it in the March 4, March 15, and April 4 letters. See Alsiweadi Dec. Ex. C. The toll-free  
19 numbers in the March 4 and March 15 letters are identical, and those numbers would have  
20 provided Bever with access to a live representative during business hours. See id.; DUMF 25.  
21 Citi met the telephone number requirement of § 2923.5(g)(4). Fifth, it is undisputed that at all  
22 relevant times, Citi maintained a website that had a toll-free HUD telephone number, a telephone  
23 number to call Citi to discuss foreclosure avoidance options, options to avoid foreclosure and  
24 instructions about obtaining information about those options, and a list of documents needed for  
25 discussions about foreclosure avoidance. See DUMF 33. Citi's website met the requirements of  
26 § 2923.5(g)(5). Finally, the notice of foreclosure was filed on June 11, 2011. See RJN Ex. B.

27 \_\_\_\_\_  
28 <sup>11</sup> The Court notes that the March 4 letter was amplified by the March 15 letter. The March 15 letter stated that Citi was concerned about the delinquency, Bever could lose the Property through acceleration and foreclosure, but that Bever had options and should call Citi at a toll-free number. See Alsiweadi Ex. C.

1 June 11 is more than 30 days after the April 4, 2011 letter. Therefore, § 2923.5(a)'s minimum 30-  
2 day time frame was met.

3 Bever has indicated that Citi did not leave messages when it called in March 2011.  
4 However, the express language of § 2923.5 does not require that a telephone message be left. The  
5 requirement is that the lender or its agent call the borrower on three different days and at three  
6 different times. See Cal. Civ. Code § 2923.5(g)(2). Here, Citi met and exceeded that requirement.  
7 Between March 5 and March 21, Citi called Bever on 15 different dates, and each call was at a  
8 different time of the day.<sup>12</sup> See DUMF 26.

9 Bever has declared that he did not receive any letters from Citi between in March 2011 or  
10 April 2011. However, there is no requirement that Bever actually receive the two letters. The  
11 letters were mailed to Bever's address (one via certified mail return receipt request) and contained  
12 the information required by §§ 2923.5(g)(1) and (g)(3). In terms of the letters, that is all that  
13 § 2923.5(g) requires. See Cahill v. Mortgage, 2011 U.S. Dist. LEXIS 141587, \*5-\*7 (C.D. Cal.  
14 Dec. 5, 2011) (denying injunction where lender submitted evidence of letters and call logs  
15 demonstrating compliance with § 2923.5(g) despite borrower's contention that no letters were  
16 received); cf. Gleason v. World Sav. Bank, FSB, 2012 U.S. Dist. LEXIS 133314, \*5-\*6 (N.D. Cal.  
17 Sept. 17, 2012) (denying injunction in part where the lender's evidence tended to show statutory  
18 due diligence requirements despite the absence of any actual contact); Knapp v. Doherty, 123  
19 Cal.App.4t h 76, 88-89 (2004) (holding with respect to other notices required to foreclose that the  
20 "trustor need not receive actual notice of the trustee's sale so long as notice is provided to the  
21 trustor that is in compliance with the statute."); Lupertino v. Carbahal, 35 Cal.App.3d 742, 746-47  
22 (1973) ("... Civil Code sections 2924 – 2924h, inclusive, do not require actual receipt by a trustor  
23 of a notice of default or notice of sale. They simply mandate certain procedural requirements  
24 reasonably calculated to inform those who may be affected by a foreclosure sale . . ."); cf. also  
25 Mabry, 185 Cal.App.4t h at 220 ("[Section 2923.5], of course, has alternative provisions in cases  
26 where the lender tries to contact a borrower, and the borrower simply won't pick up the phone, the  
27 phone has been disconnected, or the borrower hides or otherwise evades contact.").

28 \_\_\_\_\_  
<sup>12</sup> The Court notes that none of the calls were made at inappropriate times. See DUMF 26.

1 Because Citi has shown that it met § 2923.5(g)'s due diligence requirements, summary  
2 judgment on this issue is appropriate. See Cahill, 2011 U.S. Dist. LEXIS 141587 at \*5-\*7; Cal.  
3 Civ. Code § 2923.5(g).

4  
5 **II. RULE 54(b)**

6 Federal Rule of Civil Procedure 54 provides in relevant part, “When an action presents  
7 more than one claim for relief . . . or when multiple parties are involved, the court may direct entry  
8 of a final judgment as to one or more, but fewer than all, claims or parties only if the court  
9 expressly determines that there is no just reason for delay.” Fed. R. Civ. Pro. 54(b). In  
10 determining whether there is “no just reason for delay,” a “pragmatic approach that focuses on  
11 severability and efficient judicial administration” is appropriate. Wood v. GCC Bend, LLC, 422  
12 F.3d 873, 880 (9th Cir. 2005). District courts are to exercise their discretion under Rule 54(b) “in  
13 the interest of sound judicial administration,” and are to be mindful of the historic policy against  
14 piecemeal appeals. Id. at 882. A Rule 54(b) judgment may be entered *inter alia* in connection  
15 with the granting of a Rule 56 summary judgment motion, see Bushie v. Stenocord Corp., 460  
16 F.2d 116, 118 n.2 (9th Cir. 1972), or a Rule 12(6) motion to dismiss. See California E. Labs., Inc.  
17 v. Gould, 896 F.2d 400, 402 (9th Cir. 1990). District courts may enter a Rule 54(b) judgment *sua*  
18 *sponte*. Intergraph Corp. v. Intel Corp., 253 F.3d 695, 699 (Fed. Cir. 2001); State Treasurer v.  
19 Barry, 168 F.3d 8, 14 (11th Cir. 1999); Bank of Lincolnwood v. Federal Leasing, Inc., 622 F.2d  
20 944, 947-948 (7th Cir. 1980); Martinez v. Columbia Sportswear USA Corp., 2011 U.S. Dist.  
21 LEXIS 63840, \*10 (E.D. Cal. June 15, 2011).

22 Here, all claims against MERS were dismissed without leave to amend in October 2013.  
23 See Doc. No. 75.<sup>13</sup> As part of the same order, the Court dismissed all claims against Citi without  
24 leave to amend, except for the single § 2923.5 claim. See id. This order has now resolved the  
25 § 2923.5 claim in favor of Citi. Thus, there are no remaining claims against either Citi or MERS.

26 There is one defendant left in the case – Cal-Western. Cal-Western was substituted as the  
27 trustee by Citi in June 2011. See Doc. No. 46 at Ex. C. The FAC alleged claims of quiet title,

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<sup>13</sup> The dismissal was pursuant to a Rule 12(b)(6) motion that had been filed by MERS and Citi. See Doc. Nos. 47, 75.



1 unjust enrichment, and 15 U.S.C. § 1692 against Cal-Western. In June 2011, Cal-Western filed a  
2 notice of bankruptcy. See Doc. No. 71. As part of the Court's October 2011 dismissal order, the  
3 Court dismissed the entirety of the quiet title and unjust enrichment claims (which had been  
4 alleged against all defendants) as invalid. See Doc. No. 75. Even though Cal-Western had filed a  
5 motion to dismiss, the Court did not address that motion or the § 1692 claim because of the  
6 automatic bankruptcy stay. See Doc. No. 75. To the Court's knowledge, Cal-Western's  
7 bankruptcy proceeding is still on-going, and the automatic stay remains in effect. It is unknown  
8 when the automatic stay will be lifted or when the bankruptcy proceeding will conclude.

9         The only remaining claim in this case is under § 1692, and it is alleged against Cal-  
10 Western only. See FAC at pp. 18-20. The § 1692 claim has no connection to Citi or MERS. It is  
11 true that the quiet title and unjust enrichment claims were made against all defendants, including  
12 Cal-Western. However, the unjust enrichment and quiet title claims against Cal-Western are not  
13 significantly intertwined with Citi and MERS, and would not significantly implicate the danger of  
14 piecemeal appeals. Cal-Western had no involvement with Bever's loan or the deed of trust until  
15 June 2011. See Doc. No. 46 at Ex. C. There is no indication that Bever paid any defendant any  
16 funds in June 2011 or any time thereafter. Thus, Cal-Western could not have been enriched by  
17 Bever. Further, Cal-Western was substituted as trustee to the deed of trust by Citi.<sup>14</sup> See id. For  
18 purposes of quiet title, a mere trustee to a deed of trust does not have an interest in the underlying  
19 real property. See Duenas v. Ocwen Loan Serv'g, Inc., 2014 U.S. Dist. LEXIS 130612, \*34-\*35  
20 (E.D. Cal. Sept. 16, 2014); Farias v. FCM Corp., 2010 U.S. Dist. LEXIS 122238, \*10 (S.D. Cal.  
21 Nov. 18, 2010); Wood v. Aegis Wholesale Corp., 2009 U.S. Dist. LEXIS 57151, \*15 (E.D. Cal.  
22 July 6, 2009); Fonvergne v. First Am. Lonestar, 2012 Cal.App. Unpub. 8149, \*7 (Nov. 6, 2012).  
23 Therefore, even if a reversal occurs as to either Citi or MERS and the unjust enrichment or quiet  
24 title claims, the reversal would not impact Cal-Western.

25         Considering the nature of the dismissals that have occurred, the sole remaining claim  
26 against Cal-Western, and the bankruptcy stay that is in place, the Court concludes that there is no  
27 just reason to delay entry of judgment for Citi and MERS under Rule 54(b). See Wood, 422 F.3d

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28 <sup>14</sup> Given Cal-Western's bankruptcy, it is likely that Citi would substitute Cal-Western out as the trustee.

1 at 880, 882. Soliday v. Miami County, 55 F.3d 1158, 1163 (6th Cir. 1995); Maldonado-Denis v.  
2 Castillo-Rodriguez, 23 F.3d 576, 580-81 (1st Cir. 1994). The Court will *sua sponte* order entry of  
3 judgment in favor of Citi and MERS under Rule 54(b). See Fed. R. Civ. Pro. 54(b); Intergraph,  
4 253 F.3d at 699; Barry, 168 F.3d at 14; Martinez, 2011 U.S. Dist. LEXIS 63840 at \*10.

5  
6  
7 **ORDER**

8 Accordingly, IT IS HEREBY ORDERED that:

- 9 1. Defendant Citi's motion for summary judgment is GRANTED;
- 10 2. Pursuant to Rule 54(b), because there is no just reason for delay, the Clerk shall enter  
11 judgment in favor of Defendants Citi and MERS;
- 12 3. The preliminary injunction issued on October 2, 2013 (Doc. No. 76) is DISSOLVED; and
- 13 4. This case shall remain open, but stayed, as to Defendant Cal-Western.

14  
15 IT IS SO ORDERED.

16 Dated: October 30, 2014

  
17 \_\_\_\_\_  
18 SENIOR DISTRICT JUDGE