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**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

GLENN W. BEVER,

Plaintiff,

v.

**CAL-WESTERN RECONVEYANCE
CORP., CITIMORTGAGE, INC., and
REGISTRATION SERVICES, INC.,**

Defendants.

1:11-CV-1584 AWI-SKO

**AMENDED ORDER
GRANTING DEFENDANTS'
MOTIONS TO DISMISS**

(Docs. No. 13, 31, and 38)

On June 25, 2012 the court issued an order resolving Defendants’ motions to dismiss. This was Document Number 38 in the court’s docket. However, this order was issued in error as it included surplus language at the end of the document reflecting background research on related legal issues. As such the court will strike Document Number 38 and issue the present order, which resolves Defendants’ motions to dismiss.

INTRODUCTION

On Sept. 20, 2011, Glenn Bever (“Plaintiff”) filed a complaint against Defendants CitiMortgage, Inc. (“Citi”), Mortgage Electronic Registration Services (“MERS”) and Cal-Western Reconveyance Corp. (“Cal-Western”) (collectively, “Defendants”). Plaintiff also filed

1 an ex parte motion for a temporary restraining order to enjoin Defendant Cal-Western from
2 selling Plaintiff's home in Clovis, Cal. (the "Property"). Based upon evidence presented by
3 Plaintiff that Defendants failed to comply with Cal. Civ. Code § 2923.5, the temporary
4 restraining order was granted on Oct. 26, 2011.

5 On Oct. 12, 2011, Defendants Citi and MERS filed a motion to dismiss Plaintiff's claim
6 pursuant to Fed. R. Civ. P. 12(b)(6).¹

8 **FACTUAL BACKGROUND**

9 In his complaint, Doc. 1, Plaintiff alleges a number of irregularities and violations by
10 Defendants in the foreclosure process. Plaintiff claims violations of the Fair Debt Collection
11 Practices Act (FDCPA), 15 U.S.C. § 1692 et seq., and the Real Estate Settlement Procedures Act
12 (RESPA), 12 U.S.C. § 2605 et seq. Plaintiff also makes claims under California common law of
13 unjust enrichment, fraud, and injurious falsehood, and seeks to quiet title to the Property.

14 Plaintiff first alleges under the FDCPA that Cal-Western failed, in a "loan payment
15 confirmation" letter dated June 13, 2010,² to state the name of the creditor to whom the debt was
16 owed and Plaintiff's right to dispute the debt within 30 days, in violation of 15 U.S.C. §
17 1692g(a)(2). Doc. 1 ¶¶ 74-75. Plaintiff also includes a verification request he sent to Cal-
18 Western, which cites a letter from Cal-Western dated June 15, 2011, including the statement that
19 "This letter is an attempt to collect a debt." *Id.* at 27. Plaintiff also alleges that Cal-Western
20 failed to verify the debt as requested by Plaintiff and failed to cease collection after the request,
21 in contravention of § 1692g(b). *Id.* ¶¶ 79-81. Plaintiff further claims – apparently in connection

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23 ¹ Plaintiff filed a motion on Dec. 9, 2011, to file an out of time response to Citi and
24 MERS' motion to dismiss. The motion is granted.

25 ² Plaintiff's allegations under the FDCPA stem from a communication that the complaint
26 says was dated June 13, 2010. Because Plaintiff includes a letter that he wrote in response to a
27 June 15, 2011, Cal-Western communication with language identical to that quoted in the
complaint, and because Cal-Western was not associated with the Deed until June 2011, the court
will assume that the initial communication referred to in ¶ 74 was dated in June 2011 and not
June 2010. Plaintiff's claims, therefore, are not time-barred by 15 U.S.C. 1692k(d).

1 to the Notice of Default – that Cal-Western violated §§ 1692e and 1692f because it did not
2 actually possess the promissory note for the Deed and therefore deceptively and unfairly sought
3 collection of the debt. *Id.* ¶¶ 82-85. Plaintiff seeks unspecified damages. *Id.* ¶ 86.

4 Plaintiff alleges under RESPA that Citi responded to a Qualified Written Request in an
5 untimely and inadequate manner, thus violating 12 U.S.C. § 2605(e). *Id.* ¶¶ 88-89.

6
7 Under a theory of unjust enrichment, Plaintiff seems to allege that federal bailout dollars
8 or other means have been used to repay Plaintiff’s loan, and that collection of Plaintiff’s debt by
9 Defendants would therefore unjustly enrich them. *Id.* ¶¶ 92-96.

10 Plaintiff further alleges that MERS acted to conceal its true identity and purpose, thereby
11 inducing Plaintiff into a fraudulent loan. *Id.* ¶ 98. Plaintiff also appears to challenge MERS’
12 authority to make an assignment to Citi and claims that MERS knew the assignment would
13 wrongly divest Plaintiff of title to the Property. *Id.* ¶¶ 99-100.

14 15 LEGAL STANDARD

16 A claim may be dismissed under Fed. R. Civ. P. 12(b)(6) if the claim states no cognizable
17 legal theory or alleges insufficient facts to support a valid allegation. *Balistreri v. Pacifica Police*
18 *Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

19 For purposes of the 12(b)(6) motion, all well-pleaded allegations are accepted as true and
20 are construed in the light most favorable to the non-moving party. *Manzarek v. St. Paul Fire &*
21 *Marine Ins. Co.*, 519 F.3d 1025, 1031-32 (9th Cir. 2008). A well-pleaded allegation contains
22 sufficient facts to state a claim that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S.
23 544, 570 (U.S. 2007). Allegations that are merely conclusory, unwarranted deductions of fact, or
24 unreasonable inferences do not meet this standard and need not be accepted as true. *Daniels-Hall*
25 *v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010).

1 **A. Judicial Notice** – Generally, the court considers only the complaint and attached documents in
2 deciding a motion to dismiss, but the court may also take judicial notice of matters of public
3 record without converting the motion into a motion for summary judgment. *Lee v. City of Los*
4 *Angeles*, 250 F.3d 668, 689 (9th Cir. 2001). Defendants Citi and Cal-Western have requested
5 judicial notice of officially recorded documents. These documents include the deed of trust (the
6 “Deed”) executed on the Property by Plaintiff and his wife on June 4, 2003, which lists the
7 trustee as Carriage Escrow, Inc. (“Carriage”) and the beneficiary as MERS. Doc. 13-2 at 4; Doc.
8 32 at 4. Defendants further included the assignment of the Deed to Citi by MERS on behalf of
9 lender First Pacific Financial, Inc. (“First Pacific”), recorded on May 27, 2011. Doc. 13-2 at 26;
10 Doc. 32 at 23. Cal-Western includes the document, dated June 1, 2011, and recorded June 28,
11 2011, that substitutes Cal-Western as trustee under the Deed. Doc. 32 at 27. Defendants also
12 requested notice of a Notice of Default and Notice of Default and Election to Sell, both recorded
13 on June 3, 2011. Doc. 13-2 at 23-24; Doc. 32 at 30-31. A Notice of Trustee’s Sale, recorded on
14 Sept. 5, 2011, was also included. Doc. 13-2 at 29-30; Doc. 32 at 33-34. Such documents are
15 properly the subject of judicial notice, Fed. R. Evid. 201(b); *Permito v. Wells Fargo Bank*, 2012
16 U.S. Dist. LEXIS 55977 at *7-8 (N.D. Cal. Apr. 20, 2012), and the court will take notice of the
17 undisputed facts contained in these documents. *Lee, supra*, at 690.

18 DISCUSSION

19 **A. Plaintiff’s FDCPA claim against Cal-Western** – The Fair Debt Collection Practices Act, 15
20 U.S.C. § 1692 et seq., prohibits certain abusive or deceptive practices by debt collectors.
21 Creditors collecting their own debts are generally not subject to the FDCPA. *Brooks v. Citibank*,
22 345 Fed. Appx. 260, 262 (9th Cir. 2009). A necessary element to an FDCPA claim is the
23 allegation that the adverse party fits the definition of a debt collector under § 1692a(6) or that the
24 party is liable under 1692a(4), which defines the extent to which creditors are subject to the
25 FDCPA.

26 Courts have construed mortgage servicing companies and assignees of debt as being like
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1 creditors within the meaning of the FDCPA. *Perry v. Stewart Title Co.*, 756 F.2d 1197, modified
2 on other grounds, 761 F.2d 237 (5th Cir.1985). Trustees of deeds of trust are likewise treated
3 like creditors under the FDCPA. *Crane v. Bank of N.Y. Mellon*, 2012 U.S. Dist. LEXIS 68660,
4 *14 (E.D. Cal. May 16, 2012); *Mansour v. Cal-Western Reconveyance Corp.*, 618 F. Supp. 2d
5 1178, 1182 (D. Ariz. 2009). Cal-Western, acting here as trustee, is therefore subject to the same
6 standards as creditors within the meaning of the Act.

7 Under § 1692a(4), creditors are subject to the FDCPA to the extent that they “receive[] an
8 assignment or transfer of a debt in default solely for the purpose of facilitating collection of such
9 debt for another.” The Ninth Circuit has construed “in default” to reflect the meanings found in
10 relevant contractual agreements and state law. *De Dios v. Int'l Realty & RC Invs.*, 641 F.3d 1071,
11 1074-75 (9th Cir. 2011). Even if a creditor obtains a debt that is already in default, in order for
12 the FDCPA to apply, a plaintiff must also allege that the debt was acquired solely for facilitating
13 collection. *Schlegel v. Wells Fargo Bank*, 799 F. Supp. 2d 1100, 1104 (N.D. Cal. 2011).

14 Plaintiff bases his FDCPA claims on a “loan payment confirmation” letter he received in
15 June 2011 from Cal-Western, which had been substituted as trustee under the Deed on June 1,
16 2011. The letter stated that it was “an attempt to collect a debt.” Doc. 1 ¶ 74. Plaintiff avers that
17 Cal-Western failed to follow up this letter with a statement of his rights as required by § 1692g(a)
18 and also that Cal-Western failed to validate the debt upon Plaintiff’s request, as required by
19 § 1692g(b).

20 Because Cal-Western is treated like a creditor under the FDCPA, Plaintiff must first
21 allege that Cal-Western both acquired the debt when it was in default, as defined by the Deed or
22 relevant California law, and took on the debt solely for the purpose of facilitating collection of
23 the debt. Plaintiff has alleged neither. Cal-Western’s motion to dismiss will therefore be granted,
24 without prejudice, as to the FDCPA claims.

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26 **B. Plaintiff’s RESPA claim against Citi** – The Real Estate Settlement Practices Act, 12 U.S.C.
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1 § 2605 et seq., establishes and defines the duty of a loan servicer to respond to “qualified written
2 requests.” 12 U.S.C. § 2605(e). The Dodd-Frank Wall Street Reform and Consumer Act, Pub. L.
3 111-203, 124 Stat. 1376 (2010) (“Dodd-Frank Act”), passed in 2010, amended certain provisions
4 and added subsections (k)-(m).

5 Plaintiff includes with his complaint a letter dated Aug. 12, 2011, that states “we believe
6 the account is in error because it misidentifies the party owed, and we are uncertain as to who is
7 the current owner of the mortgage and/or note” and seeks the identifying information of the loan
8 owner. Doc. 1 at 30. Plaintiff alleges in his complaint that Citi responded with a “form letter” and
9 “failed to respond adequately within 10 business days.” *Id.* ¶ 89. Plaintiff appears to be referring
10 to § 2605(k)(1)(D), one of the Dodd-Frank additions, which provides that federally-related
11 mortgage servicers shall not “fail to respond within 10 business days to a request from a
12 borrower to provide the identity, address, and other relevant contact information about the owner
13 or assignee of the loan.” Pub. L. No. 111-203, § 1463, 124 Stat 1376 (July 21, 2010).

14 *Williams v. Wells Fargo Bank*, 2011 U.S. Dist. LEXIS 105513 at *14-19 (S.D. Fla. Sept.
15 19, 2011), extensively analyzed the question of the effective date for § 2605(k)-(m). The court
16 found that the effective date for these subsections (§ 1463 of the Dodd-Frank Act) was governed
17 by § 1400(c) of the Dodd-Frank Act, which provides that they do not become effective until final
18 implementing regulations are passed, or 18 months after a designated “transfer date.” *Patton v.*
19 *Ocwen Loan Servicing*, 2011 U.S. Dist. LEXIS 82789 at *13 n.6 (M.D. Fla. July 28, 2011) notes
20 that the transfer date referred to in § 1400(c) was set at July 21, 2011, by 75 Fed. Reg. 57,252
21 (Sept. 20, 2010) (making the latest effective date Jan. 21, 2013). On Dec. 14, 2011, the
22 Consumer Financial Protection Bureau published a notice of rulemaking in the Federal Register.
23 It stated:

24 The Dodd-Frank Wall Street Reform and Consumer Protection
25 Act, Public Law No. 111-203, Title XIV (the “Dodd-Frank Act”),
26 requires CFPB to publish, in final form, certain mortgage servicing
27 rules by January 21, 2013. These rules implement ... [section] 1463
28 ... of the Dodd-Frank Act. The CFPB has determined that model
forms and disclosures are required for these rules.

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2 76 Fed. Reg. 77,766. This indicates that no rule implementing § 2605(k) had been passed as of
3 Dec. 2011. Plaintiff's request under § 2605(k) was made on Aug. 12, 2011, and § 2605(k) was
4 therefore not then in effect. Because Plaintiff's RESPA claims all stem from this subsection, they
5 will be dismissed.

6 Even were § 2605(k) in effect at the time of Plaintiff's request, Plaintiff fails to plead
7 actual damages under RESPA, a necessary element to such a claim. *Amaral v. Wachovia Mortg.*
8 *Corp.*, 692 F. Supp. 2d 1226, 1232 (E.D. Cal. 2010); *Lemieux v. Litton Loan Servicing*, 2009
9 U.S. Dist. LEXIS 123833 at *7 (E.D. Cal. Dec. 21, 2009); *Garcia v. Wachovia Mortg. Corp.*,
10 676 F. Supp. 2d 895, 909 (C.D. Cal. 2009). Plaintiff's complaint provides only the conclusory
11 statement that "[a]s a result of these wrongful actions, Plaintiff suffered damages to be
12 determined at trial." Citi's motion to dismiss will therefore be granted, without prejudice, as to
13 the RESPA claims.

14 ***C. Plaintiff's unjust enrichment claims against Defendants*** – The elements of unjust
15 enrichment are "receipt of a benefit and unjust retention of the benefit at the expense of another."
16 *Cont'l Cas. Co. v. Enodis Corp.*, 417 Fed. Appx. 668, 670 (9th Cir. 2011) (quoting *Lectrodryer v.*
17 *SeoulBank*, 91 Cal. Rptr. 2d 881, 883 (Cal. App. 2d Dist. 2000)). Under California law, unjust
18 enrichment is an action in quasi-contract and is not cognizable when there is a valid and
19 enforceable contract between the parties. *Id.* at 670.

20 Plaintiff claims that Defendants were unjustly enriched because federal bailout money
21 paid the balance of Plaintiff's debt. Plaintiff's mortgage payments, therefore, would serve to pay
22 Defendants twice for Plaintiff's loan. Doc. 1 ¶ 93.

23 Despite this allegation, Plaintiff's Deed precludes him from arguing that Defendants have
24 unjustly retained his loan payments. In *Macris v. Bank of Am.*, 2012 U.S. Dist. LEXIS 10633 at
25 *33-34 (E.D. Cal. Jan. 27, 2012), plaintiffs claimed that their mortgage lender had been unjustly
26 enriched by payments from the federal government, but the court struck the claim because it
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1 found the plaintiffs' loan documents to be binding agreements and thus not affected by the
2 actions of nonparties. Plaintiff makes no supported allegation that the Deed is not valid and
3 enforceable, so a claim in quasi-contract based upon actions by nonparties to the Deed does not
4 state a cognizable legal theory. Defendants' motions to dismiss will therefore be granted, without
5 prejudice, as to the unjust enrichment claims.

6
7 **D. Plaintiff's claims of fraud against MERS** – Fed. R. Civ. P. 9(b) requires that a party alleging
8 fraud “must state with particularity the circumstances constituting fraud.” The Ninth Circuit has
9 construed this standard as requiring that the pleader “state the time, place, and specific content of
10 the false representations as well as the identities of the parties to the misrepresentation.”
11 *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

12 Under California law, the elements of fraud are “(1) a misrepresentation (false
13 representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent
14 to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage.” *Robinson*
15 *Helicopter Co., Inc., v. Dana Corp.*, 34 Cal. 4th 979, 990 (2004).

16 Plaintiff appears to claim that the lender listed on the Deed was not actually the lender
17 and that MERS was an active participant in the concealment of the true lender, thereby inducing
18 Plaintiff's reliance on a false deed of trust and causing him damage. Doc. 1 ¶ 98. Although
19 Plaintiff identifies the alleged misrepresentation – that the listed lender was not the true lender –
20 the claim lacks sufficient facts to raise the allegation above the level of speculation. The
21 heightened pleading standard of Fed. R. Civ. P. 9(b) further requires that Plaintiff plead the
22 specific content of the alleged misrepresentation, which this bare claim fails to provide.

23
24 **E. Plaintiff's injurious falsehood claim against MERS** – The claim of injurious falsehood is a
25 tort similar to defamation, but directed at statements that are intended or clearly likely “to result
26 in harm to interests of the other having a pecuniary value” and which are known to be false or
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1 made in reckless disregard of the truth. Restatement (Second) of Torts § 623A(a)-(b) (1977);
2 *McCullough v. Clausen*, 2004 Cal. App. Unpub. LEXIS 5545 at *37 (Cal. App. 4th Dist. June 9,
3 2004) (unpublished) (adopting the Restatement’s definition of injurious falsehood).

4 Plaintiff appears to allege that MERS’ recorded assignment of the Deed to Citi was a
5 false statement because MERS lacked the authority to execute a valid assignment, thus making
6 the document invalid and false. Doc. 1 ¶ 100.

7 To be liable for injurious falsehood, a party must knowingly make a false statement or act
8 in reckless disregard of the truth. But Plaintiff’s Deed explicitly states that MERS, acting as the
9 lender’s nominee, may exercise “any or all of those interests [granted to the lender].” Doc. 13-2
10 at 6. Courts examining similar deeds have rejected claims that MERS lacks authority to act on
11 behalf of the lender and to assign the lender’s interest in deeds of trust. *Lane v. Vitek Real Estate*
12 *Indus. Group*, 713 F. Supp. 2d 1092, 1099 (E.D. Cal. 2010) (“[T]his court, along with many
13 others, [has ruled] that MERS has standing to foreclose as the nominee for the lender and
14 beneficiary of the Deed of Trust and may assign its beneficial interest to another party); *Herrera*
15 *v. Federal National Mortgage Assn.*, 205 Cal. App. 4th 1495, 1504-05 (Cal. App. 4th Dist. 2012)
16 (finding that a deed of trust with language identical to the instant Deed conclusively gave MERS
17 authority to exercise the legal rights of the lender, including assignment of the deed); *Fontenot v.*
18 *Wells Fargo Bank*, 198 Cal. App. 4th 256, 270-71 (Cal. App. 1st Dist. 2011) (“[T]he assignment
19 of deed of trust states that MERS was acting as nominee for the lender, which did possess an
20 assignable interest. ... Accordingly, the allegation that MERS was merely a nominee is
21 insufficient to demonstrate that MERS lacked authority to make a valid assignment of the note
22 on behalf of the original lender.”).

23 Because Plaintiff’s Deed clearly grants MERS the authority to assign the lender’s interest
24 in the Deed on behalf of the lender, Plaintiff has failed to provide facts to support a claim that
25 MERS knew it was making a false statement or acted in reckless disregard of the truth, a
26 necessary element to an injurious falsehood claim. MERS’ motion to dismiss will therefore be
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1 granted, without prejudice, as to the injurious falsehood claims.

2 **F. Plaintiff's claim against Defendants to quiet title** – Under Cal. Civ. Code § 761.020, a
3 complaint seeking to quiet title must contain “(a) A description of the property that is the subject
4 of the action. ... (b) The title of the plaintiff as to which a determination under this chapter is
5 sought and the basis of the title. ... (c) The adverse claims to the title of the plaintiff against
6 which a determination is sought. (d) The date as of which the determination is sought[; and]
7 (e) A prayer for the determination of the title of the plaintiff against the adverse claims.
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9 California courts have also held that a party seeking to quiet title to a property on which
10 he owes a debt must first offer payment of that debt in full. *Gjurovich v. California*, 2010 U.S.
11 Dist. LEXIS 118797 at *8 (E.D. Cal. Oct. 26, 2010); *Kozhayev v. America's Wholesale Lender*,
12 2010 U.S. Dist. LEXIS 77553 (E.D. Cal. July 30, 2010). Plaintiff, however, fails to allege in his
13 complaint that he has offered a full tender of his debt.

14 In order to properly plead element (b), the basis of title, Plaintiff must allege he is the
15 rightful owner of the property, which includes satisfaction of the obligations under the Deed.
16 *Adegbenga Adesokan v. U.S. Bank*, 2012 U.S. Dist. LEXIS 15192, 9-10 (E.D. Cal. Feb. 6, 2012);
17 *Kelley v. Mortg. Elec. Resgistration Sys.*, 642 F. Supp. 2d 1048, 1057 (N.D. Cal. 2009).
18 Plaintiff's Deed states that “Borrower shall pay when due the principal of, and interest on, the
19 debt evidenced by the Note” Doc. 13-2 at 7. The Notice of Election to Sell, dated June 3,
20 2011, and of which the court has taken notice, states that Plaintiff failed to make all payments
21 due on and after Feb. 1, 2011. Plaintiff has therefore failed to sufficiently allege that he is the
22 rightful owner of the Property. Defendants' motions to dismiss will be granted, without
23 prejudice, as to the claim to quiet title.
24

25 **G. Leave to amend** – “If a complaint is dismissed for failure to state a claim, leave to amend
26 should be granted unless the court determines that the allegation of other facts consistent with the
27 challenged pleading could not possibly cure the deficiency.” *Schreiber Distributing Co. v.*
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1 *Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th Cir. 1986). Plaintiff will therefore be
2 given the opportunity to provide the facts and allegations needed for a well-pleaded complaint, as
3 described above.

4
5 **CONCLUSION AND ORDER**

6 Document Number 38 is STRICKEN. Defendants' motions to dismiss are GRANTED as
7 to the claims against each. Plaintiff is given leave to amend his complaint within 21 days of this
8 Order.

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10 IT IS SO ORDERED.

11 Dated: June 27, 2012

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14 CHIEF UNITED STATES DISTRICT JUDGE
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