

1 leave to proceed *in forma pauperis* (“IFP”) is granted by the Court. *See Rodriguez v. Cook*, 169 F.3d
2 1178, 1177 (9th Cir. 1999). The Court has reviewed the application and finds Plaintiff satisfies the
3 requirements of 28 U.S.C. § 1915(a). Therefore, Plaintiff’s motion to proceed *in forma pauperis* is
4 **GRANTED.**

5 **II. Screening Requirementx**

6 When a plaintiff proceeds *in forma pauperis*, the Court is required to review the complaint, and
7 shall dismiss the case at any time if the Court determines that the allegation of poverty is untrue, or the
8 action or appeal is “frivolous, malicious or fails to state a claim on which relief may be granted; or . . .
9 seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. 1915(e)(2). A
10 claim is frivolous “when the facts alleged arise to the level of the irrational or the wholly incredible,
11 whether or not there are judicially noticeable facts available to contradict them.” *Denton v. Hernandez*,
12 504 U.S. 25, 32-33 (1992).

13 **III. Pleading Standards**

14 General rules for pleading complaints are governed by the Federal Rules of Civil Procedure. A
15 pleading stating a claim for relief must include a statement affirming the court’s jurisdiction, “a short
16 and plain statement of the claim showing the pleader is entitled to relief; and . . . a demand for the relief
17 sought, which may include relief in the alternative or different types of relief.” Fed. R. Civ. P. 8(a).
18 The Federal Rules adopt a flexible pleading policy, and *pro se* pleadings are held to “less stringent
19 standards” than pleadings by attorneys. *Haines v. Kerner*, 404 U.S. 519, 521-21 (1972).

20 A complaint must give fair notice and state the elements of the plaintiff’s claim in a plain and
21 succinct manner. *Jones v. Cmty Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984). Further, a
22 plaintiff must identify the grounds upon which the complaint stands. *Swierkiewicz v. Sorema N.A.*, 534
23 U.S. 506, 512 (2002). The Supreme Court noted,

24 Rule 8 does not require detailed factual allegations, but it demands more than an
25 unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers
26 labels and conclusions or a formulaic recitation of the elements of a cause of action will
not do. Nor does a complaint suffice if it tenders naked assertions devoid of further
factual enhancement.

27 *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (internal quotation marks and citations omitted).

28 Conclusory and vague allegations do not support a cause of action. *Ivey v. Board of Regents*, 673 F.2d

1 266, 268 (9th Cir. 1982). The Court clarified further,

2 [A] complaint must contain sufficient factual matter, accepted as true, to “state a claim
3 to relief that is plausible on its face.” [Citation]. A claim has facial plausibility when
4 the plaintiff pleads factual content that allows the court to draw the reasonable
5 inference that the defendant is liable for the misconduct alleged. [Citation]. The
6 plausibility standard is not akin to a “probability requirement,” but it asks for more than
7 a sheer possibility that a defendant has acted unlawfully. [Citation]. Where a complaint
8 pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of
9 the line between possibility and plausibility of ‘entitlement to relief.’”

10 *Iqbal*, 556 U.S. at 679 (citations omitted). When factual allegations are well-pled, a court should
11 assume their truth and determine whether the facts would make the plaintiff entitled to relief; legal
12 conclusions in the pleading are not entitled to the same assumption of truth. *Id.*

13 The Court has a duty to dismiss a case at any time it determines an action fails to state a claim,
14 “notwithstanding any filing fee that may have been paid.” 28 U.S.C. § 1915e(2). Accordingly, a court
15 “may act on its own initiative to note the inadequacy of a complaint and dismiss it for failure to state a
16 claim.” *See Wong v. Bell*, 642 F.2d 359, 361 (9th Cir. 1981) (citing 5 C. Wright & A. Miller, *Federal
Practice and Procedure*, § 1357 at 593 (1963)). However, leave to amend a complaint may be granted
17 to the extent deficiencies of the complaint can be cured by an amendment. *Lopez v. Smith*, 203 F.3d
18 1122, 1127-28 (9th Cir. 2000) (en banc).

19 **IV. Factual Allegations**

20 Plaintiff alleges she is the owner of a real property commonly referred to as 1011 Laurel Park
21 Avenue in Bakersfield, California. (Doc. 1 at 1.) Plaintiff asserts that she received a notice of trustee
22 sale on the property dated September 24, 2014, indicating a sale was scheduled for October 21, 2014.
23 (*Id.* at 5.) Plaintiff alleges Defendant Ocwen Loan Servicing, LLC (“Ocwen”) “demanded a payment
24 to pay the entire balance” of her loan, despite the fact that Ocwen “is not a party to the trust deed or
25 note or any assignee thereby and has no legal interest in the plaintiff’s property.” (*Id.* at 2.) Further,
26 Plaintiff asserts the defendants “failed to meet the notice requirements,” and “the foreclosing party was
27 not the holder of the note and mortgage or trust deed.” (*Id.* at 5.) According to Plaintiff, Defendants
28 “threatened to sue[] the Plaintiff without any intention of doing so,” “threatened to garnish their wages,”
and “failed to provide the Plaintiff with validation of debt within five business days.” (*Id.* at 9.) Thus,
Plaintiff asserts the defendants have taken “actions to intimidate the plaintiff.” (*Id.*)

1 Based upon the facts alleged, Plaintiff asserts Defendants are in violation of the Fair Debt
2 Collection Practices Act, California’s Rosenthal Fair Debt Collection Practices Act, disclosure
3 requirements of the Real Estate and Settlement Procedures Act, the Truth in Lending Act, and the
4 California Homeowner Bill of Rights Act. (Doc. 1 at 6, 8-12, 16-18.) Further, Plaintiff seeks to set
5 aside or vacate the foreclosure sale, and state a claim for replevin. (*Id.* at 13-16.)

6 **V. Discussion and Analysis**

7 **A. Tender and Standing**

8 As an initial matter, is not clear that Plaintiff has standing to proceed on claims premised upon a
9 wrongful foreclosure—such as the claim to set aside or vacate the foreclosure sale—because Plaintiff
10 has not alleged tender. A tender is an offer of performance made with the intent to extinguish the
11 obligation.” *Arnolds Mgmt. Corp. v. Eischen*, 158 Cal. App. 3d 575, 580 (1984) (internal citations and
12 quotations omitted). “A tender must be one of full performance . . . and must be unconditional to be
13 valid.” *Id.*

14 Under California law, the “tender rule” requires that an action to set aside a sale “for
15 irregularities in sale notice or procedure” must be “accompanied by an offer to pay the full amount of
16 the debt for which the property was security.” *Arnolds Management Corp. v. Eischen*, 158 Cal. App. 3d
17 575, 578 (1984) (citing *Karlsen v. American Savings and Loan Association*, 15 Cal.App.3d 112, 117
18 (1971)). Thus, any “cause of action ‘implicitly integrated’ with the irregular sale fails unless the trustor
19 can allege and establish a valid tender.” *Id.* at 589. (citing *Karlsen*, 15 Cal.App.3d at 121.) The Third
20 District Court of Appeal explained:

21 [G]enerally “an action to set aside a trustee’s sale for irregularities in sale notice or
22 procedure should be accompanied by an offer to pay the full amount of the debt for which
23 the property was security.” This rule . . . is based upon the equitable maxim that a
24 court of equity will not order a useless act performed. . . . “A valid and viable tender of
25 payment of the indebtedness owing is essential to an action to cancel a voidable sale
under a deed of trust.” . . . The rationale behind the rule is that if plaintiffs could not have
redeemed the property had the sale procedures been proper, any irregularities in the sale
did not result in damages to the plaintiffs.

26 *FPCI RE-HAB 01 v. E & G Investments, Ltd.*, 207 Cal.App.3d 1018, 1021(1989) (citations omitted).

27 The “tender rule” is meant to prevent courts “from uselessly setting aside a foreclosure sale on a
28 technical ground when the party making the challenge has not established his ability to purchase the

1 property.” *Keen v. Am. Home Mortg. Servicing, Inc.*, 664 F. Supp. 2d 1086, 1101 (E.D. Cal. 2009).

2 “The rules which govern tenders are strict and are strictly applied.” *Nguyen v. Calhoun*, 105
3 Cal.App.4th 428, 439 (2003). “The tenderer must do and offer everything that is necessary on his part
4 to complete the transaction, and must fairly make known his purpose without ambiguity, and the act of
5 tender must be such that it needs only acceptance by the one to whom it is made to complete the
6 transaction.” *Gaffney v. Downey Savings & Loan Assoc.*, 200 Cal.App.3d 1154, 1165 (1988). Because
7 Plaintiff fails to allege tender, the claim to set aside the sale or vacate the foreclosure sale fails. *See*
8 *Karlsen*, 15 Cal.App.3d at 117; *United States Cold Storage v. Great Western Savings & Loan Assn.*,
9 165 Cal.App.3d 1214, 1224 (1985) (“It would be futile to set aside a foreclosure sale on the technical
10 ground that notice was improper, if the party making the challenge did not first make full tender and
11 thereby establish his ability to purchase the property”).

12 Moreover, Plaintiff lacks standing to challenge the assignments because, as a borrower, she
13 was not a party to the assignments, and the assignments were not made for her benefit. *See Jenkins*,
14 216 Cal.App.4th at 515; *see also Fontenot v. Wells Fargo Bank.*, 198 Cal.App.4th 256, 272-73 (2011)
15 (stating the borrower had no cause of action for irregularities in the assignment process); *Gieseke v.*
16 *Bank of Am., N.A.*, 2014 WL 718463, at *5 (N.D. Cal. Feb. 23, 2014) (holding the plaintiff’s claims
17 for wrongful disclosure, quiet title, slander of title, and cancellation of instruments could be dismissed
18 for lack of standing because the plaintiff was a third-party borrower). Consequently, Plaintiff lacks
19 standing to proceed on causes of action premised on irregularities in the assignment and securitization
20 of the loan, and Plaintiff’s claim to set aside or vacate the foreclosure sale is **DISMISSED**.

21 **B. Violations of the Fair Debt Collection Practices Act and Rosenthal Act**

22 Under the provisions of the Fair Debt Collection Practices Act (“FDCPA”), debt collectors are
23 prohibited “from making false or misleading representations and from engaging in various abusive and
24 unfair practices.” *Heintz v. Jenkins*, 514 U.S. 291, 292 (1995); *Donohue v. Quick Collect, Inc.*, 592
25 F.3d 1027, 1030 (9th Cir. 2010). California’s Rosenthal Fair Debt Collection Practices Act (“Rosenthal
26 Act”), “like its federal counterpart, is designed to protect consumers from unfair and abusive debt
27 collection practices.” *Robinson v. Managed Accounts Receivable Corp.*, 654 F.Supp.2d 1051, 1060
28 (C.D. Cal. 2009) (citing Cal. Civ. Code § 1788.1). The provisions of FDCPA are incorporated into the

1 Rosenthal Act under Cal. Civ. Code § 1788.17. Consequently, conduct by a debt collector that violates
2 the FDCPA violates Rosenthal Act as well. *See Hosseinzadeh v. M.R.S. Assocs.*, 387 F. Supp. 2d 1104,
3 1118 (C.D. Cal. 2005); *Abels v. JBC Legal Group, P.C.*, 227 F.R.D. 541, 548 (N.D. Cal. 2005).

4 To establish a violation of the FDCPA and the Rosenthal Act, Plaintiff must allege: (1) she was
5 a consumer (2) who was the object of a collection activity arising from a consumer debt, and (3) the
6 defendant is a “debt collector,” (4) who engaged in an act or omission prohibited by the FDCPA or
7 Rosenthal Act. *Miranda v. Law Office of D. Scott Carruthers*, 2011 WL 2037556, at *4 (E.D. Cal. May
8 23, 2011) (citing *Turner v. Cook*, 362 F.3d 1219, 1227-28 (9th Cir. 2004)). Here, Plaintiff alleges
9 Defendants’ actions constituted violations of the fair debt collection acts. (*See* Doc.1 at 9-10, 17-18.)

10 1. FDCPA

11 Notably, it is not clear that Defendants meet the statutory definition of “debt collector” or were
12 engaged in “debt collection activity.” The FDCPA defines the term “debt collector” as including: (1)
13 “any person who uses any instrumentality of interstate commerce or the mails in any business the
14 principal purpose of which is the collection of any debts,” and (2) any person “who regularly collects or
15 attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due to another.”
16 15 U.S.C. § 1692a(6). To adequately plead this claim, a plaintiff must allege specific facts showing
17 that a defendant is a “debt collector” within the meaning of the statute. *Schlegel v. Wells Fargo Bank*,
18 NA, 720 F.3d 1204, 1208 (9th Cir. 2013). However, Plaintiff fails to allege facts sufficient to support a
19 determination that Defendants are debt collectors. Moreover, it appears Plaintiff is unable to meet this
20 burden because the FDCPA does not apply to actions taken in nonjudicial foreclosures. *See Usher v.*
21 *Chase Home Fin. LLC*, 2010 WL 4008496, *4 (E.D. Cal. 2010) (action taken in foreclosure “does not
22 constitute collection of a debt within the meaning of the FDCPA”); *Arostegui v. Bank of Am.*, 2014 WL
23 1230762, at *6 (N.D. Cal. Mar. 21, 2014) (same). Therefore, Plaintiff’s claim for a violation of the
24 FDCPA is **DISMISSED**.

25 2. Rosenthal Act

26 The Rosenthal Act definition of “debt collector” “broader than that contained in the FDCPA.”
27 *Izenberg v. ETS Servs., LLC*, 589 F. Supp.2d 1193, 1199 (C.D. Cal. 2008). Under the Rosenthal Act, a
28 “debt collector” is defined as “any person who, in the ordinary course of business, regularly, on behalf

1 of himself or herself or others, engages in debt collection.” Cal. Civ. Code § 1788.2(c). “Thus, a
2 mortgage servicer may be a ‘debt collector’ under the Rosenthal Act even if it is the original lender,
3 whereas, such an entity would be excluded from the definition of debt collector under the federal act.”
4 *Reyes v. Wells Fargo Bank, N.A.*, 2011 WL 30759, at *19 (N.D. Cal. Jan. 3, 2011).

5 Here, Plaintiff alleges Defendants violated the Rosenthal Act by “misrepresenting the status of
6 the debt;” “using unfair and unconscionable means to collect or attempt to collect a debt;” and “using
7 deceptive means to collect or attempt to collect a debt from the plaintiff.” (Doc. 1 at 18.) These
8 general allegations are legal conclusions, and are insufficient to give Defendants fair notice of the
9 wrongful acts. For example, Plaintiff fails to allege which Defendant contacted her and when, who
10 falsely stated the amount of debt and when, how the debt was increased, or what “unfair and
11 unconscionable means” were used in the course of debt collection. *See Jacobsen v. Balboa Arms Drive*
12 *Trust*, 2011 WL 3328487 (S.D. Cal. Aug. 1, 2011) (finding the same allegations as those alleged here
13 were “vague” and did not meet the minimal pleading standards of Rule 8).

14 Moreover, to the extent Plaintiff alleges fraudulent activity by misrepresentation of a debt, the
15 allegations are insufficient to meet the pleading standards of Rule 9(b), which requires a plaintiff to
16 state “with particularity the circumstances constituting fraud.” Fed. R. Civ. P. 9(b). In other words, the
17 plaintiff must articulate the “who, what, when, where, and how” of the fraud alleged. *Kearns v. Ford*
18 *Motor Co.*, 567 F.3d 1120, 1126 (9th Cir. 2009). Because Plaintiff’s claims a violation of the
19 Rosenthal Act is based upon alleged fraudulent conduct, the standards of Rule 9(b) are applicable. *See*
20 *e.g., Smith v. Bank of Am. Corp.*, 485 Fed. Appx. 749 (6th Cir. 2012) (applying Rule 9(b) where the
21 plaintiffs alleged the defendant “committed fraud, in one form or another, leading up to the foreclosure
22 proceeding”). Accordingly, Plaintiff’s claim for a violation of the Rosenthal Act is **DISMISSED** with
23 leave to amend.

24 **C. Real Estate and Settlement Procedures Act (“RESPA”)**

25 RESPA imposes a duty upon loan servicers to respond to “qualified written requests” within a
26 certain time frame. 12 U.S.C. § 2605(e). “Qualified written requests” are written inquiries that include
27 “a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in
28 error or provides sufficient detail to the servicer regarding other information sought by the borrower.”

1 *Id.*, § 2605(e)(1)(B)(ii). Such written requests must relate to the servicing of the loan; inquiries
2 regarding the validity of the loan are not subject to RESPA. *Medrano v. Flagstar Bank, FSB*, 704 F.3d
3 661, 666-67 (9th Cir. 2012). A claimant is able to recover “actual damages to the borrower as a result
4 of the failure” to comply with any provision of RESPA. 12 U.S.C. § 2605(f)(1)(A).

5 Here, Plaintiff alleges that she made “requests for the identity of the creditors of Plaintiff’s
6 mortgage loans.” (Doc. 1 at 11.) However, Plaintiff does not allege how the inquiries were made or
7 the information she provided to Defendants, such that the Court may conclude the inquiries were
8 “qualified written requests” under RESPA. Furthermore, Plaintiff has not alleged any pecuniary loss
9 resulting from Defendants’ failure to respond to any inquiries. As a result, Plaintiff is unable to state a
10 claim under RESPA. *See Lal v. American Home Servicing, Inc.*, 680 F.Supp.2d 1218, 1223 (E.D. Cal.
11 2010) (finding a borrower may not recover damages for non-pecuniary losses under RESPA); *Allen v.*
12 *United Financial Mortgage Corp.*, 660 F.Supp.2d 1089, 1097 (N.D. Cal. 2009) (dismissing a RESPA
13 claim with prejudice where the plaintiff alleged only harm as a result of the foreclosure and did not
14 allege facts showing “the alleged RESPA violations caused any kind of pecuniary loss”). Because
15 Plaintiff alleges damages arising from the foreclosure, and does not identify any damages as a result of
16 the alleged RESPA violations, the RESPA claim is **DISMISSED**.

17 **D. California’s Homeowner Bill of Rights**

18 The Homeowner Bill of Rights, which took effect January 1, 2013, reformed aspects of the
19 state’s nonjudicial foreclosure process by amending the California Civil Code to prohibit deceptive and
20 abusive home foreclosure practices. *See Flores v. Nationstar Mortgage LLC*, 2014 WL 304766 at *3
21 (C.D. Cal. Jan. 6, 2014). Plaintiff asserts Defendants are liable for violations of the Homeowner Bill of
22 Rights because they “recorded a notice of default along with other public records and initiated a
23 foreclosure process” without verifying the documents; Defendants “failed to review competent and
24 reliable evidence substantiating a borrower’s default and the right to foreclose;” and “robo-signed” the
25 affidavits filed in support of the default. (Doc. 1 at 16-17.)

26 Under the Homeowner Bill of Rights, any declaration recorded pursuant to Cal. Civ. Code
27 §2923.5 must “be accurate and complete and supported by competent and reliable evidence.” *Id.*, §
28 2934.17(a). Further, “a mortgage servicer shall ensure that it has reviewed competent and reliable

1 evidence to substantiate the borrower's default and the right to foreclose, including the borrower's loan
2 status and loan information.” *Id.* § 2924.17(b). The failure to conduct such review before signing is
3 known as “robo-signing.” *Michael J. Weber Living Trust v. Wells Fargo Bank, N.A.*, 2013 WL
4 1196959, at *4 (N.D. Cal. Mar. 25, 2013). A borrower may bring a cause of action for injunctive relief
5 based on robo-signing allegations prior to foreclosure sale. Cal. Civ. Code § 2924.12(a). To state a
6 cognizable claim, Plaintiff must plead “(1) a material violation of one of the enumerated code sections;
7 (2) by a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent; (3) that causes actual
8 economic damages.” *Rockridge Trust v. Wells Fargo, N.A.*, 985 F. Supp. 2d 1110, 1149 (N.D. Cal.
9 Sept. 25, 2013).

10 Although Plaintiff asserts Defendants are liable for robo-signing the documents recorded in
11 support of foreclosure, she does not make any factual allegations supporting to this claim. Plaintiff
12 asserts the affidavits were “written by unknown attorneys and placed in front of these employees to
13 sign in front of a notary,” and the documents were signed by individuals who had “no personal
14 knowledge or competence of the statements therein.” (Doc. 1 at 17.) However, there is no factual
15 support for Plaintiff’s conclusion that the individuals lacked personal knowledge nor does she allege
16 that these employees lacked the authority to sign the documents; without these factual allegations, the
17 claim fails. *See, e.g., Sohal v. Federal Home Loan Mortg. Corp.*, 2011 WL 3842195 at *5 (N.D. Cal.
18 Aug. 30, 2011) (granting motion to dismiss in part because “Plaintiffs [did] not allege[] facts setting
19 forth the basis on which they [were] informed and believe [the robo-signing] allegations [were] true”).

20 Moreover, Plaintiff makes no factual allegations setting forth how a violation of the code
21 sections caused harm. Plaintiff must allege actual economic harm to state a claim pursuant to Cal. Civ.
22 Code § 2924.12(a). The Court cannot assume Plaintiff suffered actual damages from the violations of
23 the Homeowners Bill of Rights. *See Heflebower v. JPMorgan Chase Bank, NA*, 2014 WL 897352
24 (E.D. Cal. Mar. 6, 2014) (a plaintiff “must allege actual economic harm” to state a claim under §
25 2924.12) Consequently, Plaintiff’s claim for violations of the Homeowner Bill of Rights is
26 **DISMISSED.**

27 **E. Requests for Relief Characterized as Causes of Action**

28 Plaintiff asserts “claims” to set aside or vacate sale (count five) and for replevin (count six).

1 However, these are remedies, not independent claims.¹ See *Capodiece v. Wells Fargo Bank*, 2013 WL
2 1962310 at *7 (N.D. Cal. May 10, 2013) (noting the plaintiffs’ requests for injunctive relief and for an
3 order setting aside the trustee’s sale “cannot be independent claims [because] they are types of
4 remedies”); *Adler v. Taylor*, 2005 WL 465811 at *3 (C.D. Cal. Feb. 2, 2005) (explaining replevin is a
5 common law remedy through which a plaintiff may “Recover both personal property and incidental
6 damages”). Accordingly, these “claims” are **DISMISSED**.

7 **VI. Conclusion and Order**

8 Plaintiff lacks standing to proceed on claims premised upon a wrongful foreclosure, because
9 Plaintiff has not alleged tender. Further, Plaintiff has not alleged facts sufficient to support the claims
10 presented. The Court will provide Plaintiff with **one** opportunity to file an amended complaint that sets
11 forth facts sufficient to support the claims. See *Noll v. Carlson*, 809 F.2d 1446, 1448-49 (9th Cir. 1987)
12 (“A pro se litigant must be given leave to amend his or her complaint unless it is absolutely clear that
13 the deficiencies of the complaint could not be cured by amendment”). The amended complaint must
14 reference the docket number of assigned to this case and must be labeled “First Amended Complaint.”

15 Plaintiff is advised that the Court cannot refer to a prior pleading in order to make an amended
16 complaint complete, because an amended complaint supersedes the original complaint. *Forsyth v.*
17 *Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997); *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).
18 The amended complaint must be “complete in itself without reference to the prior or superseded
19 pleading.” Local Rule 220. Thus, once Plaintiff files an amended complaint, Plaintiff’s original
20 complaint will not serve any function in the case. Plaintiff is warned that “[a]ll causes of action alleged
21 in an original complaint which are not alleged in an amended complaint are waived.” *King*, 814 F.2d at
22 567 (citing *London v. Coopers & Lybrand*, 644 F2d 811, 814 (9th Cir. 1981)); *accord. Forsyth*, 114
23 F.3d at 1474.

24 Based upon the foregoing, **IT IS HEREBY ORDERED:**

- 25 1. Plaintiff’s motion to proceed in forma pauperis (Doc. 2) is **GRANTED**;
- 26 2. Plaintiff’s complaint is **DISMISSED WITH LEAVE TO AMEND**;

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28 ¹ Indeed, California Code of Civil Procedure 512.010 sets forth the procedure for a plaintiff to seek an application for a writ of possession of the wrongfully withheld property.

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3. Within twenty-one days from the date of service of this order, Plaintiff **SHALL** file an amended complaint curing the deficiencies identified by the Court in this order;
4. Plaintiff's motion to amend the complaint (Doc. 10) is **DENIED** as **MOOT**;
5. Defendants' motion to dismiss (Doc. 7) is **DISREGARDED** as **MOOT**; and
6. **If Plaintiff fails to comply with this order, the action will be dismissed for failure to obey a court order.**

IT IS SO ORDERED.

Dated: December 29, 2014

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE