

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

TERRY MORELAND,

Plaintiff,

v.

U.S. BANK, N.A. AS TRUSTEE
FOR LB-UBS COMMERCIAL
MORTGAGE TRUST 2004-C6
COMMERCIAL MORTGAGE PASS-
THROUGH CERTIFICATES SERIES
2004-C6; LB-UBS 2004-C6
STOCKDALE OFFICE LIMITED
PARTNERSHIP; LB-UBS STOCKDALE
OFFICE GP; LNR PARTNERS
CALIFORNIA MANAGER, LLC; LNR
PARTNERS, LLC, and DOES 1
THROUGH 10, inclusive,

Defendants.

LBUBS 2004-C6 STOCKDALE
OFFICE LIMITED PARTNERSHIP, a
Delaware limited partnership,

Counter-Claimant,

v.

TERRY L. MORELAND, an
individual, and PEGGY J.
MORELAND, an individual,

Counter-Defendants.

No. 1:14-cv-01836 JAM JLT

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS, GRANTING
DEFENDANTS' MOTION TO EXPUNGE
LIS PENDENS, AND DENYING
COUNTER-DEFENDANTS' MOTIONS TO
DISMISS**

1 This matter is before the Court on Defendants U.S. Bank,
2 N.A., as trustee for LB-UBS Commercial Mortgage Trust 2004-C6
3 Commercial Mortgage Pass-through Certificates Series 2006-C6, LB-
4 UBS 2004-C6 Stockdale Office Limited Partnership, LB-UBS
5 Stockdale Office GP, LNR Partners California Manager, LLC, and
6 LNR Partners, LLC's ("Defendants") Motion to Dismiss (Doc. #3)
7 Plaintiff Terry Moreland's ("Plaintiff") Complaint (Doc. #1), and
8 Defendants' Motion to Expunge Lis Pendens (Doc. #5). Plaintiff
9 opposed Defendants' Motion to Dismiss (Doc. #43) and Defendants'
10 Motion to Expunge (Doc. #44). Defendants replied to both
11 oppositions (Doc. #45; Doc. #47). For the following reasons,
12 Defendants' Motion to Dismiss is granted without leave to amend,
13 and Defendants' Motion to Expunge is granted.

14 Also before the Court are Counter-Defendant Terry Moreland's
15 Motion to Dismiss (Doc. #19) and Counter-Defendant Peggy
16 Moreland's Motion to Dismiss (Doc. #34) Counter-Claimant LBUBS
17 2004-C6 Stockdale Office Limited Partnership's ("Counter-
18 Claimant") Counterclaim (Doc. #9). Counter-Claimant opposed both
19 motions to dismiss (Doc. #50; Doc. #52). Neither Counter-
20 Defendant filed a reply. For the following reasons, Counter-
21 Defendants' motions to dismiss are denied.¹

22 23 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

24 On August 2, 2004, UBS Real Estate Investments, Inc.
25 ("Original Lender") made a loan to Stockdale Tower I, LLC
26

27 ¹ These motions were determined to be suitable for decision
28 without oral argument. E.D. Cal. L.R. 230(g). The hearings
were scheduled for March 25, 2015 and April 8, 2015.

1 ("Borrower") in the amount of \$24,000,000 ("the Loan"). In
2 connection to the Loan, Borrower executed a Deed of Trust Note
3 and a Deed of Trust (collectively, "Loan Documents"), which
4 encumbered the commercial office building located at 5060
5 California Avenue, Bakersfield, California ("Stockdale Tower").
6 DRJN, Ex. 1 and 2.

7 Soon thereafter, the Loan was transferred from Original
8 Lender to a real estate mortgage investment conduit ("REMIC")
9 trust, LaSalle Bank National Association, in its capacity as
10 trustee for the registered holders of LB-UBS Commercial Mortgage
11 Trust 2004-C6, Commercial Mortgage-Pass Through Certificates,
12 Series 2004-C6 ("the Trust"). Compl. Ex. 1. For ease of
13 reference, this transfer is hereinafter referred to as "the 2004
14 transfer."

15 In connection with the 2004 transfer, the Loan was
16 securitized pursuant to a pooling and servicing agreement ("the
17 PSA"). Compl. ¶ 1; DRJN, Ex. 3. The parties to the PSA were as
18 follows: (1) LaSalle Bank National Association, in its capacity
19 as trustee; (2) Structured Asset Securities Corporation II, as
20 depositor ("Depositor"); (3) Lennar Partners, Inc., as special
21 servicer; (4) Wachovia Bank, National Association, as master
22 servicer; and (5) ABN Amro Bank, N.V., as fiscal agent.

23 The PSA purports to create a REMIC trust, consisting, in
24 part, of mortgage loans purchased from Original Lender. Section
25 2.01(a) of the PSA provides as follows:

26 "[t]he Depositor, concurrently with the execution and
27 delivery hereof, does hereby assign, sell, transfer,
28 set over and otherwise convey to the Trustee in trust,
without recourse, for the benefit of the
Certificateholders, all the right, title and interest

1 of the Depositor in, to, and under (i) the Trust
2 Mortgage Loans, (ii) the UBS/Depositor Mortgage Loan
3 Purchase Agreement, (iii) the respective Co-Lender
4 Agreements; and (iv) all other assets included or to be
5 included in the Trust Fund." DRJN, Ex. 3.

6 Section 2.01(b) of the PSA further provides that:

7 "[i]n connection with the Depositor's assignment
8 pursuant to Section 2.01(a) above, . . . the UBS
9 Mortgage Loan Seller has (pursuant to the UBS/Depositor
10 Mortgage Loan Purchase Agreement) agreed, in the case
11 of each UBS Trust Mortgage Loan, to deliver to and
12 deposit with, on or before the Closing Date: (i) the
13 Trustee or a Custodian appointed thereby, the Mortgage
14 File for such Trust Mortgage Loan." DRJN, Ex. 3.

15 Section 1.01 of the PSA defines "Mortgage File" as including,
16 among others, the following two documents:

17 "the original executed Mortgage Note for such Trust
18 Mortgage Loan, endorsed (without recourse,
19 representation, or warranty, express or implied) to the
20 order of 'LaSalle Bank National Association, as trustee
21 for the registered holders of LB-UBS Commercial
22 Mortgage Trust 2004-C6, Commercial Mortgage Pass-
23 Through Certificates, Series 2004-C6' or in blank . . .
24 [and] an original executed assignment [of the Deed of
25 Trust] in favor of 'LaSalle Bank National Association,
26 in its capacity as trustee for the registered holders
27 of LB-UBS Commercial Mortgage Trust 2004-C6, Commercial
28 Mortgage Pass-Through Certificates, Series 2004-C6.'"
DJRN, Ex. 3.

1 In June 2010, the Trust assigned its rights under the Loan
2 to Defendant LBUBS 2004-C6 Stockdale Office Limited Partnership
3 ("Defendant Owner"). Compl., Ex. 2. On August 3, 2010,
4 Defendant Owner caused a Notice of Default and Election to Sell
5 under Deed of Trust ("Notice of Default") to be recorded against
6 Borrower, due to its failure to make timely payments under the
7 Loan. Compl., Ex. 3. In February 2013, Defendant Owner
8 completed a non-judicial foreclosure proceeding against Stockdale
9 Tower. Defendant Owner was the successful bidder at the
10 Trustee's Sale with a credit bid of \$20,000,000, leaving an

1 unpaid balance owing on the Loan of \$11,306,472.73. DRJN, Ex. 4.

2 In January 2013, Plaintiff and Borrower filed a lawsuit
3 against Defendants in state court, alleging that Defendants had
4 interfered with Borrower's ability to pay off the Loan. DRJN,
5 Ex. 5. In February 2013, Defendant Owner filed an action against
6 Plaintiff and his wife to collect the unpaid balance owing on the
7 Loan, pursuant to the personal guaranty that Plaintiff and his
8 wife had executed in connection with the Loan. DRJN, Ex 6. In
9 August 2013, Plaintiff and Defendants executed a written
10 settlement agreement, which contained a mutual general release as
11 to all known and unknown claims between the parties to the
12 agreement. DRJN, Ex. 7.

13 On October 14, 2014, Plaintiff filed the Complaint in Kern
14 County Superior Court. On November 21, 2014, Defendants removed
15 the matter to this Court. On December 3, 2014, Defendant Owner
16 filed the Counter-Claim against Terry Moreland and Peggy
17 Moreland.

18 19 II. OPINION

20 A. Judicial Notice

21 1. Legal Standard

22 Generally, the Court may not consider material beyond the
23 pleadings in ruling on a motion to dismiss. However, the Court
24 may take judicial notice of matters of public record, provided
25 that they are not subject to reasonable dispute. See, e.g.,
26 Sherman v. Stryker Corp., 2009 WL 2241664 at *2 (C.D. Cal. 2009)
27 (citing Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir.
28 2001) and Fed. R. Evid. 201). The Court may also take judicial

1 notice of documents whose "authenticity . . . is not contested"
2 and which are referenced in the complaint. Lee v. City of Los
3 Angeles, 250 F.3d 668, 688 (9th Cir. 2001); In re Calpine Corp.
4 Sec. Litig., 288 F. Supp. 2d 1054, 1075 (N.D. Cal. 2003).

5 2. Defendants' Request for Judicial Notice

6 In support of their motion to dismiss, Defendants request
7 that the Court take judicial notice of seven documents.

8 Defendants' Request for Judicial Notice ("DRJN"), Doc. #4.

9 Specifically, Defendants request judicial notice of: (1) a Deed
10 of Trust Note, dated August 2, 2004, executed by Stockdale Tower
11 I, LLC; (2) a Deed of Trust, recorded in Kern County, California
12 on August 3, 2004; (3) pertinent pages of the Pooling and
13 Servicing Agreement, referenced in the Complaint; (4) a Trustee's
14 Deed Upon Sale, recorded in Kern County, California on February
15 6, 2013; (5) a complaint filed by Stockdale Tower I, LLC in Kern
16 County Superior Court on January 11, 2013; (6) a complaint filed
17 by LBUBS 2004-C6 Stockdale Office Limited Partnership in this
18 Court on February 26, 2013; and (7) the Settlement Agreement and
19 Mutual General Release, referenced in the Complaint.

20 Additionally, in support of their motion to expunge the lis
21 pendens, Defendants request that the Court take judicial notice
22 of three documents. Defendants' Request for Judicial Notice in
23 support of the Motion to Expunge ("DRJN Mot. to Expunge"), Doc.
24 #6. Specifically, Defendants request judicial notice of: (1)
25 pertinent pages of the Pooling and Servicing Agreement,
26 referenced in the Complaint; (2) the declaration of Don Kerr,
27 filed on May 23, 2012, in the United States Bankruptcy Court for
28 the Eastern District of California; and (3) a Trustee's Deed Upon

1 Sale, recorded in Kern County, California on February 6, 2013.

2 Plaintiff objects to both of these requests, arguing that
3 they relate to matters outside the pleadings, and that judicial
4 notice of the facts contained within the documents would be
5 improper. Opp. to MTD at 3.

6 All of these documents are proper subjects of judicial
7 notice. The August 2, 2004 Deed of Trust Note, the Pooling and
8 Servicing Agreement, and the Settlement Agreement and Mutual
9 General Release are all referenced in the complaint. Compl.
10 ¶¶ 1, 3, 29. The remaining documents are all public records,
11 having been either filed as public court records or recorded in a
12 county recorder's office. Accordingly, Defendants' requests for
13 judicial notice (Doc. #4; Doc. #6) are GRANTED in their entirety.
14 However, as urged by Plaintiff, the Court merely takes notice of
15 the *existence* of these documents, not the truth of any facts
16 contained therein.

17 3. Counter-Defendants' Request for Judicial Notice

18 In support of their motions to dismiss, Counter-Defendants
19 request that the Court take judicial notice of eight documents.
20 Counter-Defendants' Request for Judicial Notice ("CDRJN"), Doc.
21 #35; Doc. #20. Specifically, Counter-Defendants request judicial
22 notice of the following documents: (1) a "Mortgage Loan Purchase
23 Agreement;" (2) the Pooling and Servicing agreement, referenced
24 in the Counter-Complaint; (3) an underwriting agreement; (4) a B5
25 prospectus; (5) an assignment of deed of trust, recorded in Kern
26 County, California on December 13, 2004; (6) an assignment of
27 deed of trust, recorded in Kern County, California on June 1,
28 2010; (7) the state-court complaint originally filed by Plaintiff

1 in this action; and (8) a document identified by Counter-
2 Defendants as "Loan Level Files as published by US Bank." CDRJN
3 at 2.

4 With regard to the state court complaint filed by Plaintiff
5 in this action, this document is already part of the record in
6 this case, and the request for judicial notice is unnecessary and
7 DENIED. With regard to the Pooling and Servicing Agreement, this
8 document is referenced in Counter-Claimant's complaint, and
9 Counter-Defendant's request is GRANTED. With regard to the two
10 assignments of deed of trust, these matters are public documents
11 obtained from a county recorder's office, and the request for
12 judicial notice is GRANTED. With regard to the remaining
13 documents - the Mortgage Loan Purchase Agreement, the
14 underwriting agreement, the B5 prospectus, and the document
15 identified as "Loan Level Files as published by US Bank" -
16 Counter-Defendants have not made an adequate showing that they
17 are public records or explained their source, and the request for
18 judicial notice is DENIED.

19 B. Analysis

20 1. Defendants' Motion to Dismiss

21 a. Plaintiff's Challenge to the PSA

22 Plaintiff's overarching argument, upon which each of his
23 causes of action rests, is that the 2004 transfer was ineffective
24 because Depositor failed to obtain a "beneficial interest in the
25 loan before it was assigned to the trust." Opp. to MTD at 9.
26 According to Plaintiff, the failure of Original Lender to
27 transfer a recorded assignment of the Loan Documents to Depositor
28 was in violation of "the trust's own law and the law of the state

1 of New York and the laws of the Internal Revenue Code." Opp. to
2 MTD at 9. Plaintiff argues that, due to this alleged flaw in the
3 2004 transfer, Defendant Owner "did not acquire any beneficial
4 interest by the sham assignment [during the 2010 transfer] and
5 thus lacked any authority to execute, or direct to execute, the
6 Notice of Default." Compl. ¶ 11.

7 Plaintiff's argument is flawed in two ways. First,
8 Plaintiff lacks standing to challenge the validity of the 2004
9 transfer, as he was not a party to the PSA. See, e.g. Jenkins v.
10 JP Morgan Chase Bank, N.A., 216 Cal. App. 4th 497, 515 (2013)
11 ("As an unrelated third party to the alleged securitization . . .
12 Jenkins lacks standing to enforce any agreements, including the
13 investment trust's pooling and servicing agreement, relating to
14 such transactions). Although one California court had previously
15 indicated that a borrower in Plaintiff's shoes might have
16 standing to challenge an allegedly invalid transfer to a REMIC
17 trust (Glaski v. Bank of Am., Nat'l Ass'n, 218 Cal.App.4th 1079,
18 1099 (2013)), the Ninth Circuit recently rejected this view. In
19 re Davies, 565 F. App'x 630, 633 (9th Cir. 2014). In Davies, the
20 Ninth Circuit noted that "California courts have divided over
21 this issue," but concluded that "the weight of authority holds
22 that debtors in Davies' shoes - who are not parties to the
23 pooling and servicing agreements - cannot challenge them."
24 Davies, 565 F. App'x. at 633. Accordingly, under Davies,
25 Plaintiff lacks standing to challenge the transfer made pursuant
26 to the PSA, unless he can establish that he was a party to that
27 agreement.

28 Plaintiff does not - and cannot - argue that he was a

1 signatory to the PSA. Opp. to MTD at 7. Rather, Plaintiff
2 alleges that he was a third-party "intended beneficiary" to the
3 PSA. Compl. ¶ 4. Under California law, a "contract made solely
4 for the benefit of the contracting parties cannot be enforced by
5 a stranger or one who stands to benefit merely incidentally by
6 its performance." Gordon Bldg. Corp. v. Gibraltar Sav. & Loan
7 Ass'n, 247 Cal.App.2d 1, 8 (1966). However, a third party has
8 standing to sue as a "contract beneficiary where the contracting
9 parties . . . intended to benefit that individual, an intent
10 which must appear in the terms of the agreement." Principal Mut.
11 Life Ins. Co. v. Vars, Pave, McCord & Freedman, 65 Cal.App.4th
12 1469, 1486 (1998). Although Plaintiff contends that the Court
13 must also consider the "surrounding circumstances" of the PSA, in
14 addition to its express terms, in determining the intent of the
15 contracting parties, the plain language of the PSA makes this
16 dispute academic. Opp. to MTD at 17 (citing Septembertide Pub.,
17 B.V. v. Stein & Day, Inc., 884 F.2d 675, 679 (2d Cir. 1989)).
18 Section 11.09 of the PSA ("Successors and Assigns;
19 Beneficiaries") expressly enumerates a number of intended third-
20 party beneficiaries, none of whom are Plaintiff or Borrower.
21 DRJN, Ex. 3. The last sentence of Section 11.09 reads as
22 follows: "No other Person, including any Mortgagor, shall be
23 entitled to any benefit or equitable right, remedy or claim under
24 this Agreement." DRJN, Ex. 3. It is clear that the contracting
25 parties to the PSA did not intend for Borrower (or Plaintiff, as
26 a member of Borrower) to be a third-party beneficiary of the
27 agreement. Accordingly, Plaintiff lacks standing to challenge
28

1 the validity of any assignments made pursuant to the PSA.²

2 Moreover, Plaintiff's central argument - that the assignment
3 to the Trust was invalid - fails on the merits. As quoted above,
4 Section 2.01(a) of the PSA provides that Depositor "does hereby
5 assign, sell, transfer, set over and otherwise convey to the
6 Trustee in trust . . . all the right, title and interest of the
7 Depositor in, to, and under . . . the Trust Mortgage Loans[.]"
8 DRJN, Ex. 3. Immediately thereafter, Section 2.01(b) of the PSA
9 provides that "the UBS Mortgage Loan Seller has (pursuant to the
10 UBS/Depositor Mortgage Loan Purchase Agreement) agreed, in the
11 case of each UBS Trust Mortgage Loan, to deliver to and deposit
12 with, on or before the Closing Date: (i) the Trustee or a
13 Custodian appointed thereby, the Mortgage File for such Trust
14 Mortgage Loan." DRJN, Ex. 3. In other words, Depositor and
15 Original Lender reached a separate agreement - referred to in the
16 PSA as the "UBS/Depositor Mortgage Loan Purchase Agreement" - in
17 which Original Lender agreed to deliver the "Mortgage File" for
18 Plaintiff's Loan. DRJN, Ex. 3. As defined in Section 1.01 of
19 the PSA, the "Mortgage File" includes (1) the original executed
20 Mortgage Note on Plaintiff's Loan, endorsed to the Trust, and
21 (2) an original executed assignment of the Deed of Trust on
22

23 ² Briefly, the Court makes note of Plaintiff's empty assurances
24 that "there are volumes of case law that support Plaintiff's
25 allegation that he is [a third-party intended beneficiary] to the
26 PSA." Opp. to MTD at 8. This statement is especially unhelpful
27 given Plaintiff's failure to cite any specific legal authority in
28 support of this proposition, instead pointing generally to
"[c]ontrolling legal authority establishing that mortgagors are
third-party beneficiaries of PSA's are found in the Restatement
Contracts (Second), as well as New York and Federal case law."
Opp. to Mot. at 8.

1 Stockdale Tower, also endorsed to the Trust.

2 Thus, although Original Lender did not make an assignment of
3 Plaintiff's Loan Documents to Depositor, the PSA - read as a
4 whole and in conjunction with the UBS/Depositor Mortgage Loan
5 Purchase Agreement - provided for Original Lender to make this
6 assignment directly to the Trust, in effect cutting out Depositor
7 as a middle-man. Plaintiff's contention appears to be that this
8 was improper, and violated "the trust's own law and the law of
9 the state of New York and the laws of the Internal Revenue Code."
10 Opp. to MTD at 9. It is unclear what Plaintiff refers to as "the
11 trust's own law," but the transfer of Plaintiff's Loan Documents
12 complied with the procedure set forth in the PSA. See Compl.,
13 Ex. 1 (Assignment of Deed of Trust from Original Lender to the
14 Trust).

15 b. Plaintiff's Claims

16 In light of foregoing analysis, the Court turns to each of
17 Plaintiff's four causes of action. Plaintiff's first cause of
18 action is a claim for breach of contract. Specifically,
19 Plaintiff alleges that Defendants have breached the contract
20 consisting of "Plaintiff's deed of trust, and the note it
21 supports." Compl. ¶ 29. Although not entirely clear from the
22 Complaint, it appears that Plaintiff's breach of contract cause
23 of action is grounded in two distinct claims. First, Plaintiff
24 alleges that Defendants "materially breached the contract's
25 conditions precedent as codified at C.F.R. § 203.606(a) by:
26 lacking contractual authority to declare . . . a breach and
27 falsely declaring a breach where none existed." Compl. ¶ 33
28 (citing Code of Fed. Reg. § 203.606). Section 203.606(a) of the

1 Code of Federal Regulations ("C.F.R."), cited by Plaintiff,
2 provides for certain procedural safeguards which must be followed
3 by a lender, prior to foreclosing on a property. However,
4 Section 203.606(b) provides that those safeguards need not be met
5 "if the property is owned by a corporation or a partnership."
6 C.F.R. § 203.660(b)(4). As Borrower was a limited liability
7 company, and not a private individual, the procedural safeguards
8 set forth in C.F.R. § 203.660(a) do not apply. The first basis
9 for Plaintiff's breach of contract claim is without merit.

10 As a second basis for his breach of contract claim,
11 Plaintiff alleges that "Defendants materially breached the
12 contract by failing to acquire a valid beneficial interest in
13 Plaintiff's loan prior to executing a settlement agreement with
14 Plaintiff." Compl. ¶ 36. As discussed above, the plain terms of
15 the PSA foreclose any argument that the Trust - or Defendant
16 Owner, as its eventual successor-in-interest - "fail[ed] to
17 acquire a valid beneficial interest in Plaintiff's loan." Compl.
18 ¶ 36. Moreover, to the extent that Plaintiff's breach of
19 contract claim relates to an alleged breach of the PSA, Plaintiff
20 lacks standing to make this claim. See supra at 9-10. For all
21 of these reasons, Plaintiff has failed to state a claim for
22 breach of contract, and Defendants' motion to dismiss Plaintiff's
23 first cause of action is GRANTED WITHOUT LEAVE TO AMEND. See
24 Sayegh v. John Enright, Inc., 473 F. App'x 605 (9th Cir. 2012)
25 (denial of leave to amend proper if amendment would be futile).

26 Plaintiff's second cause of action alleges a violation of
27 the Equal Credit Opportunity Act ("ECOA"), codified at 15 U.S.C.
28 § 1691; Compl. ¶ 42. The ECOA protects those applying for credit

1 from discrimination, by prohibiting creditors from taking
2 "adverse actions" for discriminatory reasons. Plaintiff has
3 failed to allege that Defendants acted with a discriminatory
4 motive, nor does he explain how he was subjected to an adverse
5 action, other than a barebones allegation that Defendants
6 "substantially and materially violated Plaintiff's rights under
7 the ECOA by revoking and changing the terms of an existing credit
8 arrangement without cause." Compl. ¶ 45. Plaintiff's
9 explanatory allegation that "Plaintiff points to the Exhibits
10 submitted to this court (Plaintiff's Ex's. 1-3) as proffered
11 evidence of these material violations" is not helpful. Compl. ¶
12 45. These exhibits (two assignments of a deed of trust, and
13 notice of default) do not, on their face, suggest any
14 discriminatory conduct nor do they explain how Defendants' action
15 constituted a violation of the ECOA. As Plaintiff does not
16 propose any additional allegations that would save this claim,
17 Defendants' motion to dismiss Plaintiff's second cause of action
18 is GRANTED WITHOUT LEAVE TO AMEND.

19 Plaintiff's third cause of action alleges a violation of the
20 Fair Credit Reporting Act ("FCRA"), codified at 15 U.S.C. 1681.
21 Compl. ¶ 50. Plaintiff alleges that Defendants breached their
22 duties under the FCRA to "conduct a reasonable investigation of
23 information on a consumer's credit contract when put on notice by
24 the consumer that false information was being used in recorded
25 instruments." Compl. ¶ 52. Plaintiff's allegations necessarily
26 rely on the presence of false information in his Loan Documents
27 or the Notice of Default. Although Plaintiff does not
28 specifically allege what he believes this "false information" to

1 be, it is reasonable to infer from the remainder of Plaintiff's
2 allegations that he believes any representation that Defendant
3 Owner has a beneficial interest in the Loan is false. However,
4 as discussed at length above, Plaintiff's challenge to the 2004
5 transfer is meritless. Accordingly, any representation that
6 Defendant Owner has a beneficial interest in the Loan is not
7 false, and Plaintiff has failed to state a claim for violation of
8 the FCRA. Defendants' motion to dismiss Plaintiff's third cause
9 of action is GRANTED WITHOUT LEAVE TO AMEND. See Sayegh v. John
10 Enright, Inc., 473 F. App'x 605 (9th Cir. 2012) (denial of leave
11 to amend proper if amendment would be futile).

12 Plaintiff's fourth cause of action alleges that Defendants
13 engaged in fraud by "publish[ing] purported facts contained as
14 recitals within the false instruments (NOD and assignment of
15 deed) . . . that are false." Compl. ¶ 58. Again, Plaintiff's
16 claim of falsity relies on his position that "Defendant did not
17 acquire beneficial interest in Plaintiff's loan as a result of
18 the sham assignment of deed of trust." Compl. ¶ 58. As
19 Plaintiff's challenge to the 2004 transfer is without merit, he
20 has failed to establish that Defendants made a "false
21 representation, concealment or nondisclosure," an essential
22 element of fraud. Lazar v. Superior Court, 12 Cal.4th 631, 638
23 (1996). Accordingly, Plaintiff has failed to state a claim for
24 fraud, and Defendants' motion to dismiss Plaintiff's fourth cause
25 of action is GRANTED WITHOUT LEAVE TO AMEND. See Sayegh v. John
26 Enright, Inc., 473 F. App'x 605 (9th Cir. 2012) (denial of leave
27 to amend proper if amendment would be futile).

28 c. Plaintiff's Remaining Arguments

1 In opposing Defendants' motion to dismiss, Plaintiff appears
2 to challenge the Court's jurisdiction over the parties. Opp. to
3 MTD at 2. Specifically, Plaintiff notes that he "hereby objects
4 to this court's subject matter jurisdiction over all Defendant
5 Parties [and that] Defendants are invoking the power of the court
6 through a motion and all Parties lack standing to move this
7 court." Opp. to MTD at 2. To the extent that Plaintiff is
8 challenging the Court's jurisdiction, such an argument is
9 improperly before the Court, and is more appropriately made in a
10 motion to dismiss or a motion to remand. Regardless, Plaintiff's
11 argument is without merit. As discussed in Defendants' Notice of
12 Removal, the Court has both diversity and federal question
13 jurisdiction over Plaintiff's claims. Notice of Removal ¶¶ 9-25.

14 Returning to the merits, Plaintiff also argues that the 2004
15 transfer was invalid because "Defendants have offered no proof of
16 valuable consideration in either of the purported assignments of
17 the deed[.]" Opp. to MTD at 15. As Plaintiff correctly notes,
18 both assignments of the Deed of Trust provide that consideration
19 has passed from the Assignee to the Assignor. Compl., Ex. 1
20 (Assignment of Deed of Trust from Original Lender to Trust,
21 providing that the assignment is made "for good and valuable
22 consideration"); Compl., Ex. 2 (Assignment of Deed of Trust from
23 Trust to Defendant Owner, providing that the assignment is made
24 "for value received"). However, just as Plaintiff lacks standing
25 to challenge the PSA, Plaintiff lacks standing to challenge
26 either Assignment of Deed of Trust. As he is neither a party nor
27 a third-party intended beneficiary to either assignment,
28 Plaintiff cannot enforce the "consideration" requirement

1 contained therein.

2 Finally, Plaintiff extensively cites provisions of the
3 Uniform Commercial Code ("UCC") and New York Estate, Powers and
4 Trusts Law ("New York EPTL"). Opp. to MTD at 11-12 (citing the
5 UCC); Opp. to MTD at 13 (citing N.Y. Est. Powers & Trusts Law §
6 7-2.4). Plaintiff argues that the 2004 transfer violated both of
7 these codes. However, this argument ultimately depends on an
8 interpretation of the PSA that the Court has rejected: The UCC
9 and the New York EPTL are only violated if the PSA itself is
10 violated. As Plaintiff notes, the "PSA terms trump the normal
11 Article 3 and 9" provisions in the UCC. Opp. to MTD at 12.
12 Similarly, the New York EPTL merely provides that the act of a
13 trustee is void if it is taken "in contravention of the trust."
14 N.Y. Est. Powers & Trusts Law § 7-2.4. Thus, these arguments
15 fail for a familiar reason: the express terms of the PSA
16 contradict Plaintiff's position that the assignment from Original
17 Lender to the Trust was invalid. Accordingly, Plaintiff's
18 reliance on the UCC and the New York EPTL is misplaced.

19 2. Defendants' Motion to Expunge Lis Pendens

20 Defendants move the Court to expunge the lis pendens on
21 Stockdale Tower. Mot. to Expunge at 1. In brief, Defendants
22 argue that the lis pendens must be expunged because Plaintiff has
23 failed to establish the "probable validity" of the real property
24 claim upon which the lis pendens is based. Mot. to Expunge at
25 10. Plaintiff filed a *pro forma* opposition to Defendants'
26 motion, which contains the same arguments, verbatim, made in
27 opposition to Defendants' motion to dismiss, and does not
28 separately address Defendants' motion to expunge. See generally

1 Opp. to Expunge.

2 California Code of Civil Procedure § 405.32 provides that
3 the Court "shall order that the [lis pendens] be expunged if the
4 court finds that the claimant has not established by a
5 preponderance of the evidence the probable validity of the real
6 property claim." Cal Code Civ. Proc. § 405.32. Thus, in
7 evaluating Defendants' motion to expunge, the Court must look to
8 the merits of Plaintiff's claims. As the Court has dismissed
9 each of Plaintiff's claims without leave to amend, it follows
10 that Plaintiff "has not established by a preponderance of the
11 evidence the probable validity" of his real property claim.
12 Accordingly, Defendants' motion to expunge is GRANTED.

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14
15
16 3. Counter-Defendants' Motions to Dismiss

17 Counter-Defendants³ (Terry Moreland and Peggy Moreland) move
18 to dismiss Counter-Claimant's complaint against them. Doc. #19;
19 Doc. #34. The bulk of Counter-Defendants' motion is devoted to
20 re-stating the same arguments made in opposition to Defendants'
21 motion to dismiss and motion to expunge. Not only are these
22 arguments based on a flawed interpretation of the PSA and
23 relevant case law, they are also misplaced in a motion to
24 dismiss. To the extent that Counter-Defendants argue that
25 "disputed facts cannot be used as a set of facts that would allow
26

27 ³ Terry Moreland and Peggy Moreland bring separate motions to
28 dismiss. As these motions are identical in substance and nearly
identical in form, they will be addressed collectively.

1 this court to base a right upon which relief may be granted to
2 [Counter-Claimant]," this argument is improper in a motion to
3 dismiss, where the Court must take the non-moving party's
4 allegations as true. Scheuer v. Rhodes, 416 U.S. 232, 236
5 (1974); Ctr-Ds.' MTD at 10. As such, Counter-Defendants'
6 argument that "the Settlement Agreement may, in fact, be judged
7 void" does not warrant dismissal of the Counter-Complaint.
8 Accordingly, the vast majority of Counter-Defendants' memorandum
9 of law, which rehashes their position on why the 2004 transfer
10 was ineffective, does not support their motion.

11 On the last two pages of their briefs, Counter-Defendants
12 briefly address each of Counter-Claimant's causes of action.
13 However, their argument is limited to the cursory statement -
14 repeated with regard to each of Counter-Claimant's claims - that
15 the "claim is subject to determination of validity and legality
16 of Settlement Agreement and may be deemed void" by the Court.
17 Ctr.-Ds.' MTD at 12-13. This argument - in addition to being
18 foreclosed by the Court's foregoing analysis - does not address
19 the elements of each individual cause of action, or otherwise
20 explain why Counter-Claimant has failed to state a claim for
21 relief. Accordingly, Counter-Defendants have failed to satisfy
22 their burden on a motion to dismiss.

23 Finally, to the extent that Counter-Defendants challenge the
24 Court's subject matter jurisdiction over the Counter-Complaint,
25 this argument is not adequately developed. It is unclear how
26 Counter-Claimant's alleged failure to offer "proof of valuable
27 consideration in either of the purported assignments of the deed
28 . . . confirms a complete lack of constitutional or prudential

1 standing to bring" its complaint. Opp. to MTD at 9. Regardless,
2 Counter-Claimant has adequately alleged subject matter
3 jurisdiction for its state law claims under 28 U.S.C. § 1332, as
4 complete diversity exists among the parties, and the amount in
5 controversy exceeds \$75,000. Counter-Complaint ¶¶ 1-6. For all
6 of the above reasons, Counter-Defendants' motion to dismiss is
7 DENIED.

8
9 III. ORDER

10 For the reasons set forth above, the Court GRANTS WITHOUT
11 LEAVE TO AMEND Defendants' Motion to Dismiss, GRANTS Defendants'
12 Motion to Expunge Lis Pendens, and DENIES Counter-Defendants'
13 Motions to Dismiss.

14 IT IS SO ORDERED.

15 Dated: April 15, 2015

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18 JOHN A. MENDEZ,
19 UNITED STATES DISTRICT JUDGE
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