

1 Plaintiff to either (1) file an amended complaint or (2) notify the Court that she wishes to stand on
2 the Complaint, within thirty (30) days from the date of service of the order. *Id.* at 8. The order
3 also provided that if Plaintiff fails to file an amended complaint or to notify the Court that she
4 wishes to stand on the Complaint within the specified time, “the Court will issue findings and
5 recommendations to the assigned district judge recommending that the case be dismissed for
6 failure to state a claim and failure to comply with a Court order.” *Id.*

7 The thirty-day period has expired, and Plaintiff has neither filed an amended complaint
8 nor notified the Court that she wishes to stand on the Complaint. Therefore, as described below,
9 the Court recommends that this action be dismissed, with prejudice, for Plaintiff’s failure to state
10 a claim, failure to comply with a court order, and failure to prosecute. Plaintiff may file
11 objections to these findings and recommendations within twenty-one days from the date of
12 service of this order.

13 **II. LEGAL STANDARD**

14 Under 28 U.S.C. § 1915(e)(2), the Court must conduct a review of a *pro se* complaint to
15 determine whether it “state[s] a claim on which relief may be granted,” is “frivolous or
16 malicious,” or “seek[s] monetary relief against a defendant who is immune from such relief.” If
17 the Court determines that the complaint fails to state a claim, it must be dismissed. *Id.* An action
18 is frivolous if it is “of little weight or importance: having no basis in law or fact” and malicious if
19 it was filed with the “intention or desire to harm another.” *Andrews v. King*, 398 F.3d 1113, 1121
20 (9th Cir. 2005). Leave to amend may be granted to the extent that the deficiencies of the
21 complaint can be cured by amendment. *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

22 A complaint must contain “a short and plain statement of the claim showing that the
23 pleader is entitled to relief . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
24 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
25 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell*
26 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Plaintiff must set forth “sufficient factual
27 matter, accepted as true, to ‘state a claim that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S.
28 at 663 (quoting *Twombly*, 550 U.S. at 555). While factual allegations are accepted as true, legal

1 conclusions are not. *Id.* at 678.

2 In determining whether a complaint states an actionable claim, the Court must accept the
3 allegations in the complaint as true, *Hosp. Bldg. Co. v. Trs. of Rex Hospital*, 425 U.S. 738, 740
4 (1976), construe *pro se* pleadings liberally in the light most favorable to the Plaintiff, *Resnick v.*
5 *Hayes*, 213 F.3d 443, 447 (9th Cir. 2000), and resolve all doubts in the Plaintiff’s favor. *Jenkins*
6 *v. McKeithen*, 395 U.S. 411, 421 (1969). Pleadings of *pro se* Plaintiff “must be held to less
7 stringent standards than formal pleadings drafted by lawyers.” *Hebbe v. Pliler*, 627 F.3d 338, 342
8 (9th Cir. 2010) (holding that *pro se* complaints should continue to be liberally construed after
9 *Iqbal*).

10 **III. PLAINTIFF’S ALLEGATIONS**

11 Plaintiff states that this action arises under 15 U.S.C. § 1692 *et seq.* and 28 U.S.C. §
12 2409a. Plaintiff alleges that Mary J. Bryant is the trustee of the Martha Jayne Cary Living Trust
13 (‘the Trust’). On April 7, 2014, the Trust became the owner of the real property commonly
14 known as 4620 West Tulare Avenue, Visalia, CA 93277-1563 (‘the real property’). The previous
15 owners of the real property, Donald E. Cary and Martha Jayne Cary, obtained a securitized loan
16 from Downey Savings.

17 The real property was subject to foreclosure in 2016. Plaintiff alleges that U.S. Bank
18 foreclosed on the real property while Plaintiff was waiting for a loan modification due to Donald
19 E. Cary’s death in 2008. The loan modification was never approved or denied, despite loan
20 documents being sent several times. Plaintiff further alleges that in 2015 and/or 2016, U.S. Bank
21 shut off her utilities, commenced an illegal unlawful detainer proceeding, and illegally seized her
22 personal property. In 2017, an illegal unlawful detainer proceeding was commenced against a
23 deceased person, and the process server seized personal property and refused to disclose or
24 release it.

25 Plaintiff also alleges that Donald Elith Cary has committed fraud by signing a listing
26 agreement with a realtor, and has “close[d] bank accounts – [illegible] Martha Jayne Cary, Social
27 Security.” Plaintiff further alleges that Donald Elith Cary has made claims to personal property
28 located at the real property though he was disinherited, and has shut off the utilities to the real

1 property though he is not executor of the estate.

2 Plaintiff also alleges that Lindsay E. Kress, an attorney at Locke Lord LLP, refused to
3 send her an itemized list or location of property documents that belong to Mary J. Bryant and the
4 Trust, despite Plaintiff's attempts to regain the personal property. Plaintiff further states that she
5 has filed a complaint with the State Bar of California.

6 **IV. DISCUSSION**

7 **A. Fair Debt Collection Practices Act**

8 Plaintiff contends that this action arises under 15 U.S.C. § 1692 *et seq.*, the Fair Debt
9 Collection Practices Act ("FDCPA"). The FDCPA "bans a variety of debt collection practices
10 and allows individuals to sue offending debt collectors." *Schlegel v. Wells Fargo Bank, NA*, 720
11 F.3d 1204, 1207 (9th Cir. 2013). To establish a violation of the FDCPA, a plaintiff must show:
12 (1) she was a consumer, (2) who was the object of a collection activity arising from a consumer
13 debt, and (3) the defendant is a "debt collector" as defined by the FDCPA, (4) who engaged in an
14 act or omission prohibited by the FDCPA. *Miranda v. Law Office of D. Scott Carruthers*, 2011
15 WL 2037556 (E.D. Cal. May 23, 2011) (citing *Turner v. Cook*, 362 F.3d 1219, 1227–28 (9th
16 Cir.2004)).

17 A consumer is defined as "any natural person obligated or allegedly obligated to pay any
18 debt." 15 U.S.C. § 1692a(3). An entity may constitute a "debt collector" in one of three ways: (1)
19 the entity's "principal purpose" is debt collection; (2) for the purpose of section 1692f(6), the
20 entity's "principal purpose" is the "enforcement of security interests;" or (3) the entity "regularly
21 collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or
22 due another." 15 U.S.C. § 1692a(6). An entity that regularly collects debts owed to itself is not a
23 debt collector under the FDCPA. *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718
24 (2017).

25 "An entity is [] liable under the FDCPA only when it is attempting to collect debt, §
26 1692(e), debt being defined as an 'obligation ... of a consumer to pay money[,]'" § 1692a(5).
27 *Manos v. MTC Fin., Inc.*, No. SACV1601142CJCKESX, 2017 WL 8240692, at *2 (C.D. Cal.
28 Sept. 28, 2017). "Thus, actions taken to facilitate a non-judicial foreclosure, such as sending the

1 notice of default and notice of sale, are not attempts to collect “debt” as that term is defined by
2 the FDCPA.” *Vien-Phuong Thi Ho v. ReconTrust Co., NA*, 858 F.3d 568, 571–72 (9th Cir.), *cert.*
3 *denied sub nom. Ho v. ReconTrust Co.*, 138 S. Ct. 504 (2017) (reasoning that under the FDCPA,
4 “debt” is synonymous with “money,” and because the “object of a non-judicial foreclosure is to
5 retake and resell the security, not to collect money from the borrower,” actions taken to facilitate
6 non-judicial foreclosure do not give rise to liability under the FDCPA).

7 The FDCPA prohibits debt collection practices, including the use of false or misleading
8 representations, harassment or abuse, or unfair practices. Specifically, 15 U.S.C. § 1692f
9 provides, in relevant part:

10 A debt collector may not use unfair or unconscionable means to
11 collect or attempt to collect any debt. Without limiting the general
12 application of the foregoing, the following conduct is a violation of
13 this section:

14 (6) Taking or threatening to take any nonjudicial action to effect
15 dispossession or disablement of property if--

16 (A) there is no present right to possession of the property claimed as
17 collateral through an enforceable security interest;

18 (B) there is no present intention to take possession of the property;
19 or

20 (C) the property is exempt by law from such dispossession or
21 disablement.

22 Whereas 15 U.S.C. § 1692d provides, “A debt collector may not engage in any conduct the
23 natural consequence of which is to harass, oppress, or abuse any person in connection with the
24 collection of a debt.”

25 Plaintiff fails to allege a claim under the FDCPA. First, as alleged in the Complaint,
26 Plaintiff is not a consumer within the meaning of the statute. Plaintiff does not allege that she was
27 obligated or allegedly obligated to pay any debt. Second, Plaintiff does not allege that she was the
28 object of any collection activity, i.e., that any defendant attempted to collect from her an
obligation to pay money. Plaintiff also does not allege that any defendant meets the definition of a
debt collector. None of the defendants are alleged to be a person or entity whose principal
purpose is debt collection or enforcement of security interests, or “regularly collects or attempts
to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.” Lastly,
Plaintiff does not clearly allege that any defendant engaged in an act or omission prohibited by

1 the FDCPA. Plaintiff alleges that Defendant U.S. Bank foreclosed on the real property, shut off
2 the utilities, seized personal property, served process on a deceased person, and commenced an
3 illegal unlawful detainer proceeding against her. It is unclear, however, whether U.S. Bank
4 engaged in this conduct in an effort to collect a debt, or to exercise its right of possession of the
5 real property after foreclosure proceedings. *See* Cal. Civ. Proc. Code § 1161a(b) (“[A] person
6 who holds over and continues in possession of a . . . real property after a three-day written notice
7 to quit the property has been served upon the person, or if there is a subtenant in actual
8 occupation of the premises, also upon such subtenant, as prescribed in Section 1162, may be
9 removed therefrom”); *Evans v. Superior Court*, 67 Cal. App. 3d 162, 169 (Ct. App. 1977)
10 (finding that the purchaser of a real property at a foreclosure sale, or his successor in interest, may
11 commence an unlawful detainer action to remove an occupant who holds over and continues in
12 possession of the property after sale). Thus, Plaintiff has failed to allege a cognizable claim under
13 the FDCPA.

14 **B. Fraud**

15 Under California law, “[t]he elements of fraud, which gives rise to the tort action for
16 deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b)
17 knowledge of falsity (or “scienter”); (c) intent to defraud, i.e., to induce reliance; (d) justifiable
18 reliance; and (e) resulting damage.” *Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996).

19 Rule 9(b) of the Federal Rules of Civil Procedure requires that, when fraud is alleged, “a
20 party must state with particularity the circumstances constituting fraud” Fed. R. Civ. P. 9(b).
21 “Rule 9(b) demands that the circumstances constituting the alleged fraud be ‘specific enough to
22 give defendants notice of the particular misconduct . . . so that she can defend against the charge
23 and not just deny that she has done anything wrong.’” *Bly–Magee v. California*, 236 F.3d 1014,
24 1019 (9th Cir.2001) (quoting *Neubronner v. Milken*, 6 F.3d 666, 671 (9th Cir.1993)). “Averments
25 of fraud must be accompanied by ‘the who, what, when, where, and how’ of the misconduct
26 charged.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (quoting *Cooper*
27 *v. Pickett*, 137 F.3d 616, 627 (9th Cir.1997)). A party alleging fraud must “set forth more than the
28

1 neutral facts necessary to identify the transaction.” *Vess*, 317 F.3d at 1106 (quoting *Decker v.*
2 *GlenFed, Inc. (In re GlenFed, Inc. Sec. Litig.)*, 42 F.3d 1541, 1548 (9th Cir.1994), *superseded by*
3 *statute on other grounds*).

4 Plaintiff has failed to meet the particularized standard required to plead fraud against
5 Defendant Donald Elith Cary. Plaintiff fails to set forth the who, what, when, where, and how of
6 any misconduct by said defendant. Moreover, Plaintiff fails to set forth any allegations
7 establishing the elements of a claim for fraud. Plaintiff merely provides a list of actions, such as
8 “signs listing agreement with realtor” and “closes bank accounts,” that even taken as true fails to
9 allege any cause of action. Thus, Plaintiff has failed to allege a cognizable fraud claim.

10 **C. Other Claims**

11 Plaintiff also contends that this action arises under 28 U.S.C. § 2409a; however, that
12 statute pertains to quiet title actions in which the United States is a party. The United States is not
13 a party to this action. Thus, Plaintiff fails to allege a cognizable claim under 28 U.S.C. § 2409a.

14 Plaintiff also fails to state any cognizable claims against Buckely Madole, P.C. as she has
15 not set forth any allegations against said defendant.

16 Plaintiff further fails to state any cognizable claims against Lindsey E. Kress. Plaintiff
17 does not allege any relationship with Ms. Kress, or any duty or obligation that Ms. Kress has to
18 provide Plaintiff with information about her personal property.

19 **D. Failure to Prosecute and to Comply with a Court Order**

20 Plaintiff has failed to comply with the screening order, which directed her to file an amended
21 complaint or notify the Court that she wishes to stand on the Complaint, (ECF No. 4), and has failed
22 to otherwise prosecute this action.

23 Courts may impose sanctions, including terminating sanctions, as part of their inherent
24 power “to manage their own affairs so as to achieve the orderly and expeditious disposition of
25 cases” or based on a failure to comply with court orders. *Chambers v. NASCO, Inc.*, 501 U.S. 32,
26 43 (1991); *Pagtalunan v. Galazza*, 291 F.3d 639, 642 (9th Cir. 2002). A court may dismiss an
27 action based on a party’s failure to prosecute an action, failure to obey a court order, or failure to
28 comply with local rules. *See Fed. R. Civ. P. 41(b)*; L.R. 110; *Ghazali v. Moran*, 46 F.3d 52, 53 (9th

1 Cir. 1995) (citing *United States v. Warren*, 601 F.2d 471, 474 (9th Cir. 1979)) (dismissal for
2 noncompliance with local rule); *Malone v. United States Postal Serv.*, 833 F.2d 128, 134 (9th Cir.
3 1987) (dismissal for failure to comply with court order).

4 “In determining whether to dismiss [an action] for failure to prosecute or failure to comply
5 with a court order, the Court must weigh the following factors: (1) the public’s interest in
6 expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of
7 prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5) the
8 public policy favoring disposition of cases on their merits.” *Pagtalunan v. Galaza*, 291 F.3d 639,
9 642 (9th Cir. 2002) (citing *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992)).

10 The public’s interest in expeditious resolution of litigation and the court’s need to manage
11 its docket always favor dismissal. *Id.* (quoting *Yourish v. California Amplifier*, 191 F.3d 983, 990
12 (9th Cir. 1999)). Thus, here, these factors weigh in favor of dismissal.

13 The public policy favoring disposition on the merits always weighs against dismissal. *Id.*
14 Thus, here, these factors weigh against dismissal.

15 Turning to the risk of prejudice, “pendency of a lawsuit is not sufficiently prejudicial in and
16 of itself to warrant dismissal.” *Id.* at 642 (citing *Yourish*, 191 F.3d at 991). However, “delay
17 inherently increases the risk that witnesses’ memories will fade and evidence will become stale,”
18 *id.* at 643, and it is Plaintiff’s failure to file an amended complaint or to notify the Court that she
19 wishes to stand on the Complaint that is causing delay. The Court found that the Complaint fails
20 to state a claim approximately three months ago. The case is now stalled until Plaintiff files an
21 amended complaint or notifies the Court that she wishes to stand on the Complaint. Therefore, the
22 third factor weighs in favor of dismissal.

23 As for the availability of lesser sanctions, at this stage in the proceedings there is little
24 available to the Court that would constitute a satisfactory lesser sanction while protecting the Court
25 from further unnecessary expenditure of its scarce resources. Monetary sanctions are of little use,
26 considering Given Plaintiff’s *in forma pauperis* status and the stage of these proceedings, the
27 preclusion of evidence or witnesses is not available. Furthermore, the Court warned Plaintiff that
28 failure to comply with the screening order’s directive could result in dismissal of this action. Thus,
thus this factor also weighs in favor of dismissal.

1 Four of the five factors strongly favor dismissal of this action. Thus, the Court finds that
2 dismissal with prejudice is appropriate.

3 **V. CONCLUSION AND RECOMMENDATIONS**

4 The Court has found that the Complaint fails to state a claim for relief. Furthermore,
5 Plaintiff has failed to comply with the screening order, and has failed to otherwise prosecute this
6 action.

7 Accordingly, the Court HEREBY RECOMMENDS that:

- 8 1. All claims purportedly brought by the Martha Jayne Cary Living Trust be dismissed
9 as impermissible under Local Ruler 183;
- 10 2. Pursuant to 28 U.S.C. §1915(e)(2)(B)(ii), Fed. R. Civ. P. 41(b), and L.R. 110, this
11 action be DISMISSED, with prejudice, based on Plaintiff's failure to state a claim
12 upon which relief may be granted, as well as Plaintiff's failure to comply with a
13 Court order and failure to prosecute; and
- 14 3. The Clerk of Court be directed to close this case.

15 These findings and recommendations are submitted to the district judge assigned to the case,
16 pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within twenty-one (21) days after being
17 served with these findings and recommendations, Plaintiff may file written objections with the
18 court. Such a document should be captioned "Objections to Magistrate Judge's Findings and
19 Recommendations." Plaintiff is advised that failure to file objections within the specified time may
20 result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014)
(quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

21 IT IS SO ORDERED.

22
23 Dated: July 17, 2018

24 /s/ Eric P. Gray
25 UNITED STATES MAGISTRATE JUDGE
26
27
28