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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSEPH A. DE SOUZA,  
individually and on  
behalf of all others  
similarly situated,

Plaintiff,

NO. CIV. S-08-337 LKK/GGH

v.

O R D E R

PULTE HOME CORPORATION,  
DEL WEBB HOMES; PULTE  
MORTGAGE; DEL WEBB HOME  
FINANCE; DEL WEBB MORTGAGE  
CORPORATION; and DOES 1-1,000,  
inclusive,

Defendants.

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Plaintiff is a homeowner who has sued defendants Pulte Home Corporation, Pulte Homes, Inc., Del Webb Homes, Del Webb California Corp., and Marquette Title Insurance Co., alleging various unlawful conduct surrounding the sale of the home. Plaintiff asserts his causes of action on behalf of himself and a putative class. Pending before the court is plaintiffs' motion to file a Third Amended Complaint, in order to substitute the class representatives. For

1 the reasons stated herein, the court grants the motion.

2 **I. BACKGROUND**

3 The allegations of the complaint were described in detail in  
4 the court's October 9, 2008 order. Briefly, plaintiff alleges that  
5 he and the putative class members purchased homes from Pulte Home  
6 Corporation, Pulte Homes, Inc., Del Webb Homes, Del Webb California  
7 Corp. ("Builder Defendants") and purchased title insurance through  
8 a third party not named as a defendant here. The title insurance  
9 was reinsured through Marquette Title Insurance Company  
10 ("Marquette"). The crux of plaintiff's complaint is that the  
11 Builder Defendants had an unlawful fee splitting arrangement with  
12 Marquette and that they did not disclose this arrangement to home  
13 buyers. In the First Amended Complaint, plaintiff alleged six  
14 causes of action: violation of RESPA, breach of contract,  
15 negligence, fraudulent concealment, unjust enrichment, and unfair  
16 business practices in violation of California Business and  
17 Professions Code § 17200 et seq., seeking injunctive and  
18 declaratory relief and damages.

19 On February 13, 2008, the case was removed to this court.  
20 Plaintiff filed a First Amended Complaint on May 15, 2008.  
21 Plaintiff DeSouza was the sole named plaintiff in that complaint.  
22 On June 17, 2008, defendants moved to dismiss and stay pending  
23 arbitration. The court resolved both motions by order dated October  
24 9, 2008.

25 In that order, the court concluded that the arbitration  
26 agreement included in the plaintiff's purchase contract was

1 enforceable under the Federal Arbitration Act and that it applied  
2 to all of plaintiff's claims except his prayer for injunctive  
3 relief. Nevertheless, because the complaint was pled as a class  
4 action, dismissal in favor of arbitration was not yet appropriate.  
5 The court concluded that it was necessary to resolve class  
6 certification issues before ordering arbitration. Doing so would  
7 allow "the court to determine whose claims are subject to  
8 arbitration under the FAA and whether any differences in the class  
9 members' arbitration agreements warrant certification of  
10 subclasses." Order, Oct. 9, 2008 at 18 (internal citations  
11 omitted). Once the court resolved a class certification motion,  
12 "the court may then determine who must be compelled to participate  
13 in arbitration, including whether there may be a subclass whose  
14 disputes do not require arbitration." Id. Moreover, it was not  
15 clear to the court whether DeSouza could act as a class  
16 representative, due to apparent statute of limitations bars on some  
17 of the causes of action, which further convinced the court that  
18 resolution of class certification should proceed before ordering  
19 arbitration.<sup>1</sup>

20 On October 14, 2008, the court held a scheduling conference.  
21 At that time, the court instructed plaintiffs to bring a motion for  
22 class certification by March 1, 2009. This was reiterated in an

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23  
24 <sup>1</sup>On defendants' motion to dismiss under Rule 12(b)(6), the  
25 court held that the arbitrator would be responsible for resolving  
26 the issues raised in that motion, except for the claim for  
injunctive relief. On that claim, the court held the plaintiff had  
not pled with adequate detail and granted defendants' motion, with  
leave to amend.

1 order issued on October 20, 2009.

2 On November 7, 2008, plaintiff filed a Second Amended  
3 Complaint. DeSouza was named as the sole named plaintiff on this  
4 complaint. On December 15, 2008, the parties filed a stipulation  
5 to extend defendants' time to answer pending resolution of the  
6 instant motion. The court granted this and extended the deadline  
7 for plaintiffs to file a class certification motion to June 1,  
8 2009.

9 **II. STANDARD**

10 The Federal Rules provide that leave to amend pleadings  
11 shall be freely given when justice so requires.<sup>2</sup> Fed. R. Civ. P.  
12 15(a). Although the standard becomes progressively more stringent  
13 as the litigation proceeds, the Circuit has explained that the same  
14 four factors are pertinent to resolution of a motion to amend: (1)  
15 the degree of prejudice or surprise to the non-moving party if the  
16 order is modified; (2) the ability of the non-moving party to cure  
17 any prejudice; (3) the impact of the modification on the orderly  
18 and efficient conduct of the case; and (4) any degree of  
19 willfulness or bad faith on the part of the party seeking the  
20 modification. See Byrd, 137 F.3d at 1132 (citing United States v.  
21 First Nat'l Bank of Circle, 652 F.2d 882, 887 (9th Cir. 1981)). The  
22 burden is on the moving party to show that consideration of these  
23 factors warrants amendment, see id., but "all inferences [should

24 <sup>2</sup>Defendants' argument that plaintiffs' action should be  
25 dismissed under Rule 41 rather than amended under Rule 15 holds no  
26 force. It is proper to substitute named plaintiffs via a Rule 15  
motion. See Griggs, 170 F.3d at 879; Hernandez v. Balakian, 251  
F.R.D. 488 (E.D. Cal. 2008) (Wagner, J.).

1 be drawn] in favor of granting the motion.” Griggs v. Pace American  
2 Group, Inc., 170 F.3d 877, 881 (9th Cir. 1999).

3 Prejudice to the opposing party is the most important factor  
4 to consider in determining whether a party should be granted leave  
5 to amend. See Jackson v. Bank of Hawaii, 902 F.2d 1385, 1387 (9th  
6 Cir. 1990) (citing Zenith Radio Corp. v. Hazeltine Research, Inc.,  
7 401 U.S. 320, 330-31 (1971)). While delay alone is insufficient to  
8 deny amendment, undue delay is a factor to be considered. See  
9 Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th  
10 Cir. 1990) (affirming district court’s denial of motion for leave  
11 to amend to add new claims made two years into litigation).  
12 Amendment may also be denied when it is futile. See Kiser v.  
13 General Electric Corp., 831 F.2d 423, 428 (3d Cir. 1987), cert.  
14 denied, 485 U.S. 906 (1988). The test for futility is identical to  
15 the one used when considering the sufficiency of a pleading  
16 challenged under Rule 12(b)(6). Miller v. Rykoff-Sexton, Inc., 845  
17 F.2d 209, 214 (9th Cir. 1988) (citing Baker v. Pacific Far East  
18 Lines, Inc., 451 F. Supp. 84, 89 (N.D. Cal. 1978)). Accordingly,  
19 a proposed amendment is futile only if no set of facts can be  
20 proved under the amendment to the pleading that would constitute  
21 a valid and sufficient claim or defense. Id.

### 22 **III. ANALYSIS**

23 Plaintiffs seek leave to amend the complaint in order to  
24 substitute four new named class representatives for DeSouza.  
25 Defendants oppose on the grounds that it is prejudicial and an  
26 undue delay. The court grants the motion.

1 As stated above, amendments should be liberally granted. Fed.  
2 R. Civ. P. 15; Griggs, 170 F.3d at 881. The court is guided by four  
3 factors: whether the amendment is in bad faith, whether the  
4 amendment would cause undue delay to the resolution of the case,  
5 prejudice to the opposing party, and whether the amendment would  
6 be futile. Id. Here, there is no evidence of bad faith by the  
7 plaintiff in bringing this motion. Evidence has been tendered that  
8 DeSouza is no longer able to act as class representative for  
9 personal reasons and that this motion was filed promptly upon  
10 plaintiff counsel's discovery of that fact. Declaration of Paul  
11 Stevens In Support of Plaintiffs' Motion For Leave to File A Third  
12 Amended Complaint ("Stevens Decl.") ¶ 2. Defendants' contention  
13 that DeSouza should tender a declaration "explaining what the  
14 supposed changed circumstances are, including when he became aware  
15 of the circumstances that prevented him from continuing to serve  
16 as class representative in this action," is grounded in no  
17 authority and appears contrary to the liberal amendment principle  
18 set forth in Rule 15 and applied by the courts. See, e.g., First  
19 Nat'l Bank of Circle, 652 F.2d at 887; Griggs, 170 F.3d at 881.  
20 Defendants also offer no evidentiary support to their contention  
21 that plaintiffs knew of the need to amend in February 2008. See  
22 Opp'n. at 7.

23 Next, the amendment would appear not to cause undue delay to  
24 the resolution of the case. The case is in its early stages and  
25 discovery has only recently begun. See Griggs, 170 F.3d at 881  
26 (amendment two years after filing of case was not undue delay);

1 Lockheed Martin Corp. v. Network Solutions, Inc., 194 F.3d 980 (9th  
2 Cir. 1999) (whether the amendment would require reopening discovery  
3 is relevant to the Rule 15 analysis). Plaintiff has indicated that  
4 he would serve responses to outstanding discovery directed at  
5 DeSouza on behalf of the new named plaintiffs within fifteen days  
6 of the date of this order, in order to facilitate timely discovery.  
7 Mot. at 5. Given that the deadline to file a class certification  
8 motion has been extended to June 2009, amendment of the pleadings  
9 at this stage is timely and would not serve to unduly delay the  
10 case.

11 Next, the amendment would not unfairly prejudice the  
12 defendants. Defendants inaccurately argue that amendment of the  
13 pleading is an unfair circumvention of the court's order that the  
14 RESPA claim "was barred" and that it would "add a new RESPA claim."  
15 See Opp'n. at 1, 5. In fact, the court did not dismiss DeSouza's  
16 RESPA claim in its October 9, 2008 order, but questioned whether  
17 DeSouza could be an appropriate class representative given that his  
18 RESPA claim seemed barred by the statute of limitations. The lack  
19 of clarity on this issue was one of the reasons the court ordered  
20 plaintiffs to bring a class certification motion. The instant  
21 amendment, therefore, would create no additional burden on  
22 defendants because the timeliness of the RESPA claims of any of the  
23 named plaintiffs, DeSouza or others, has yet to have been resolved  
24 by the court.

25 Moreover, defendants erroneously contend that the amendment  
26 attempts to circumvent the court's order to arbitrate. As described

1 above, the court has not ordered the case to arbitration but rather  
2 ordered that the class certification issues be resolved prior to  
3 arbitration. See Order, Oct. 9, 2008. Amendment of the pleadings  
4 to substitute named plaintiffs is an appropriate step for  
5 plaintiffs to take before moving for class certification, if  
6 plaintiffs believe DeSouza would be an improper class  
7 representative. Additionally, the court observed that prior to  
8 ordering arbitration, the court would need to determine whether  
9 there were claims by subclasses that would not be arbitrable. This  
10 necessarily would involve some of the same inquiry that defendants  
11 now decry in substituting the named plaintiffs.

12 Finally, there is no evidence to indicate that amendment would  
13 be futile. Defendants have not persuaded the court that the  
14 proposed named plaintiffs do not have valid RESPA claims. The fact  
15 that DeSouza's RESPA claim may be time-barred does not preclude an  
16 amendment of the pleadings. On the contrary, if the new named  
17 plaintiffs have RESPA claims that are not time barred, this  
18 militates in favor of granting the amendment so as to permit  
19 resolution of the claims on their merits. See, e.g., Griggs, 170  
20 F.3d at 879 (allowing amendment to substitute the named plaintiffs  
21 because the named plaintiff's causes of action were barred);  
22 Hernandez, 251 F.R.D. at 489-90 (ordering plaintiff's counsel to  
23 substitute new named plaintiffs, when original named plaintiff  
24 could no longer serve as class representative).

#### 25 IV. CONCLUSION

26 For the reasons stated herein, the plaintiff's motion for




1 leave to file a third amended complaint is GRANTED. Plaintiffs  
2 SHALL file and serve a third amended complaint not later than five  
3 (5) days from the date of this order.

4 IT IS SO ORDERED.

5 DATED: February 5, 2009.

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LAWRENCE K. KARLTON  
SENIOR JUDGE  
UNITED STATES DISTRICT COURT