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28IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DEMAN SALOMON MYVETT, et al.,

No. C-08-5797 MMC

Plaintiffs,

**ORDER GRANTING PLAINTIFFS'
MOTION FOR LEAVE TO FILE FOURTH
AMENDED COMPLAINT; STRIKING
FIFTH AMENDED COMPLAINT**

v.

LITTON LOAN SERVICING, LP,

Defendant.

Before the Court is plaintiffs' Motion for Leave to File Amended Complaint ("Motion for Leave"), which motion was filed March 6, 2009 and by which plaintiffs seek leave to file their proposed Fourth Amended Complaint ("4AC"). On April 9, 2009, defendant Litton Loan Servicing, LP ("Litton") filed opposition to the Motion for Leave. No reply has been filed. Instead, on April 16, 2009, plaintiffs filed a "Fifth Amended Complaint." Having read and considered the papers filed in support of and in opposition to the motion, the Court deems the matter appropriate for decision thereon, hereby VACATES the hearing scheduled for May 8, 2009, and rules as follows.

DISCUSSION**A. Motion for Leave**

Leave to amend should be freely given when justice so requires. See Fed. R. Civ. P. 15(a)(2). "[F]our factors are commonly used" in determining whether leave to amend is

1 appropriate, specifically, “bad faith, undue delay, prejudice to the opposing party, and futility
2 of amendment.” See DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987).
3 The factors, however, “are not of equal weight in that delay, by itself, is insufficient to justify
4 denial of leave to amend,” see id., and “it is the consideration of prejudice to the opposing
5 party that carries the greatest weight,” see Eminence Capital, LLC v. Aspeon, Inc., 316
6 F.3d 1048, 1052 (9th Cir. 2003); see also DCD Programs, 833 F.2d at 187 (noting “[t]he
7 party opposing amendment bears the burden of showing prejudice”).

8 Here, Litton does not assert it will be prejudiced by the timing of plaintiffs’ proposed
9 amendment, nor does Litton assert the proposed amendment is brought in bad faith or that
10 plaintiffs unduly delayed in seeking leave to amend. Rather, Litton argues that the
11 proposed 4AC “relates largely to loan origination issues, which do not apply to Litton as
12 merely the loan servicer, not lender” and that the proposed 4AC “still contains pleading
13 deficiencies pointed out in Litton’s previously filed Motion to Dismiss.”¹ (See Opp’n at 1:9-
14 11.) Litton has failed to show, however, the proposed amendment is futile. In particular,
15 even assuming, arguendo, plaintiffs’ First Amended Complaint (“FAC”) was deficient for the
16 reasons stated in Litton’s motion to dismiss, the proposed 4AC contains numerous factual
17 allegations that were not present in the FAC, and Litton has failed to demonstrate no such
18 allegation is sufficient to state a claim. See Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214
19 (9th Cir. 1988) (holding “a proposed amendment is futile only if no set of facts can be
20 proved under the amendment to the pleadings that would constitute a valid and sufficient
21 claim or defense”).

22 Accordingly, plaintiffs’ Motion for Leave will be granted.²

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25 ¹Litton’s previously filed motion to dismiss was directed to plaintiffs’ First Amended
26 Complaint. On February 19, 2009, in light of plaintiffs’ having filed a Second Amended
27 Complaint, the Court denied the motion without prejudice. (See Order filed Feb. 19, 2009
28 at 3.)

²In its opposition to the Motion for Leave, Litton requests “at least thirty days” to
move to dismiss “in the event [the Court] grants [p]laintiffs’ motion.” Good cause
appearing, such request will be granted.

1 **B. Fifth Amended Complaint**

2 Plaintiffs have not filed a motion for leave to file their 5AC, nor have plaintiffs filed a
3 stipulation indicating Litton has consented to the filing thereof. See Fed. R. Civ. P. 15(a)(2)
4 (providing, after party has amended its pleading once, "a party may amend its pleading only
5 with the opposing party's written consent or the court's leave"). A party may file only one
6 amended complaint without leave of court. As noted, plaintiffs availed themselves of that
7 one opportunity when they filed their FAC.

8 Accordingly, the 5AC will be stricken.

9 **CONCLUSION**

10 For the reasons stated above:

11 1. Plaintiffs' Motion for Leave is hereby GRANTED, and plaintiffs' 4AC, submitted as
12 a Proposed 4AC on March 20, 2009, is hereby deemed filed as of the date of this order.

13 2. Plaintiffs' 5AC is hereby STRICKEN.

14 3. Litton shall respond to plaintiffs' 4AC no later than June 1, 2009.

15 **IT IS SO ORDERED.**

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17 Dated: May 1, 2009


MAXINE M. CHESNEY
United States District Judge

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