

United States District Court  
For the Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

KAHL RODRIGUES,

No. C-12-1243 EMC

Plaintiffs,

**ORDER GRANTING DEFENDANT  
FDIC’S MOTION TO DISMISS;  
GRANTING DEFENDANTS ONEWEST  
AND MERS’S MOTION TO DISMISS;  
AND GRANTING DEFENDANTS  
ONEWEST AND MERS’S MOTION TO  
EXPUNGE LIS PENDENS**

v.

FEDERAL DEPOSIT INSURANCE  
CORPORATION, *et al.*,

Defendants.

**(Docket Nos. 8, 13, 25)**

In October 2011, Plaintiff Kahl Rodrigues filed this foreclosure-related action in state court against Defendants Indymac Bank, Mortgage Electronic Registration Systems (“MERS”), Onewest Bank, and RSM&A Foreclosure Svcs. In December 2011, the state court granted the Federal Deposit Insurance Corporation’s (“FDIC”) motion to be substituted in as a defendant in place of Indymac. The court also granted the FDIC a 90-day stay of proceedings. *See* Docket No. 1 (Not. of Removal, Ex. D) (order). Subsequently, the FDIC removed the state court action to federal court.

Currently pending before the Court are three motions: (1) the FDIC’s motion to dismiss; (2) Onewest and MERS’s motion to dismiss; and (3) Onewest and MERS’s motion to expunge a lis pendens. Mr. Rodrigues failed to file an opposition to any of the three motions. Nor did Mr. Rodrigues appear at the hearing on the motions. Taking into account, *inter alia*, Mr. Rodrigues’s failure to oppose, the Court **GRANTS** each motion.

///  
///

1 **I. FACTUAL & PROCEDURAL BACKGROUND**

2 In his complaint, Mr. Rodrigues alleges as follows. Mr. Rodrigues was the owner of certain  
3 real property in Morgan Hill, California. *See* Compl. ¶ 9. It appears that, to purchase the property,  
4 Mr. Rodrigues took out a loan for \$700,000 from Indymac in April 2007. The deed of trust reflects  
5 that MERS was the beneficiary of the security instrument and was to act solely as the nominee of  
6 Indymac and its successors and assigns. *See* Docket No. 14 (Onewest’s RJN, Ex. A) (deed of trust).  
7 According to Mr. Rodrigues, Indymac “exploited [him] by ‘rushing and pressuring’ [him] into  
8 signing the loan documentation quickly, without any explanation whatsoever of the terms and legal  
9 effect of said loan nor by providing a copy for him to read, study, or understand, so that it could be  
10 given to defendants for review by an attorney.” Compl. ¶ 13 (emphasis omitted). Mr. Rodrigues  
11 also alleges that Indymac

12 failed to verify [his] ability to repay the Subject Loan that it wrote,  
13 manufactured facts and figures that would show [he] had the ability to  
14 repay the Subject Loan, misled [him] as to the terms and conditions of  
15 the Subject Loan, [and] failed to fully disclose the terms and  
conditions of the Subject Loan that [he] should have known to be able  
to make an informed decision about his ability to make the payments  
required . . . .

16 Compl. ¶ 45. Finally, Mr. Rodrigues alleges that Indymac “lowered its own underwriting standards  
17 in order to provide [him] with a loan that was and is financially unbearable and burdensome and  
18 pace [him] in a position where it was likely that he would default on [the] loan and lose the  
19 investment that he made.” Compl. ¶ 46.

20 In 2009, MERS, acting as Indymac’s nominee, assigned the deed of trust to Onewest. *See*  
21 Docket No. 14 (Onewest’s RJN, Ex. C) (assignment). Thereafter, in 2011, Onewest assigned the  
22 deed of trust to Deutsche Bank National Trust Company, as trustee of a securitized trust. *See*  
23 Docket No. 14 (Onewest’s RJN, Ex. E) (assignment). Subsequently, on June 13, 2011, RSM&A,  
24 acting as the agent of the beneficiary of the deed of trust, issued a notice of default to Mr. Rodrigues.  
25 *See* Docket No. 14 (Onewest’s RJN, Ex. F) (notice). A trustee’s sale was scheduled for October  
26 2011. *See* Docket No. 14 (Onewest’s RJN, Ex. H) (notice, dated 9/16/2011). Ultimately, the  
27 property was sold at a public auction on the scheduled date. The property was sold to Deutsche  
28

1 Bank National Trust Company, as trustee of the securitized trust. *See* Docket No. 14 (Onewest’s  
2 RJN, Ex. I) (trustee’s deed upon sale).

3 According to Mr. Rodrigues, Onewest falsely represented to him that the other defendants  
4 were helping him receive a reasonable and fair loan modification. *See* Compl. ¶ 21. According to  
5 Mr. Rodrigues, Onewest and the other defendants also violated California Civil Code §§ 2923.5,  
6 2923.52, and 2923.53 by not qualifying him or attempting to qualify him for a loan modification.  
7 *See* Compl. ¶¶ 22, 25.

8 As for MERS, Mr. Rodrigues seems to argue that its involvement in the foreclosure was  
9 illegal because it “was never licensed to be a Lending Institution nor was MERS ever licensed to do  
10 business in the state of California.” Compl. ¶ 19; *see also* Compl. ¶ 3 (“Defendant MERS is NOT a  
11 lending institution subject to California Corporations Code Section 191 and therefore does not have  
12 legal capacity as a corporation to conduct business within the state of California, and most certainly  
13 cannot authorize or request the foreclosure of any loan, wherein they are the named beneficiary in  
14 the State of California . . . .”) (emphasis omitted).

15 Finally, Mr. Rodrigues seems to assert that the foreclosure was invalid because “Defendants .  
16 . . do not hold the true factual notes securing the property.” Compl. ¶ 20.

17 Based on, *inter alia*, the above allegations, Mr. Rodrigues asserts the following causes of  
18 action:

19 (1) Wrongful foreclosure (against all Defendants). This claim appears to be based on the alleged  
20 violation of California Civil Code §§ 2923.5 and 2924 and California Corporations Code § 191. *See*  
21 Compl. ¶ 29.

22 (2) Conspiracy (against Indymac, MERS, and Onewest).

23 (3) Aiding and abetting (against Indymac, MERS, and Onewest). This claim appears to be based  
24 on the alleged wrongful foreclosure. *See* Compl. ¶¶ 40(b), ¶ 41.

25 (4) Fraud (against all Defendants).

26 (5) Predatory lending practices (against Indymac and MERS). This claim implicates HOEPA,  
27 TILA, and California Business & Professions Code § 17500. *See* Compl. ¶¶ 51-52.

28 (6) Violation of California Civil Code §§ 1916.7, 1920, and 1921 and California Corporations

1 Code § 191 (against all Defendants).

2 (7) Accounting (against all Defendants).

3 (8) Unfair business practice, *i.e.*, violation of California Business & Professions Code § 17200  
4 (against all Defendants).

5 (9) Breach of implied covenant of good faith and fair dealing (against all Defendants). This  
6 claim appears to be based on the alleged fraud by Defendants.

7 (10) Declaratory relief. Here, Mr. Rodrigues seeks to establish that the loan was “void ab initio.”  
8 Compl. ¶ 76.

9 (11) Quiet title.

10 (12) Injunctive relief.

## 11 **II. DISCUSSION**

### 12 A. FDIC’s Motion to Dismiss

13 As a preliminary matter, the Court takes into account how FDIC became involved in the  
14 case. In 2008, the Office of Thrift Supervision (“OTS”) issued an order appointing the FDIC as  
15 receiver for Indymac<sup>1</sup>; approving the creation of a new institution, Indymac Federal, as Indymac’s  
16 successor; approving the transfer of certain assets and liabilities from Indymac to Indymac Federal;  
17 and appointing the FDIC as conservator for Indymac Federal. *See* Docket No. 10 (FDIC’s RJN, Ex.  
18 A) (order). In 2009, the OTS issued an order putting Indymac Federal into a receivership and  
19 appointing the FDIC as its receiver. *See* Docket No. 10 (FDIC’s RJN, Ex. B) (order).

20 Mr. Rodrigues initiated his lawsuit against Indymac after the FDIC had already been  
21 appointed its receiver as well as the receiver of Indymac Federal. Thus, the FDIC moved the state  
22 court to substitute the FDIC in the place of Indymac. The state court granted the motion. *See, e.g.*,  
23 *Esparza v. Indymac Bank, F.S.B.*, No. 4:09-cv-03891-SBA, 2010 U.S. Dist. LEXIS 84843, at \*4  
24 (N.D. Cal. July 26, 2010) (stating that, “when the OTS appointed the FDIC as receiver for IndyMac  
25 on July 11, 2008, the FDIC succeeded to all rights, title, interests, and powers and privileges of

---

26  
27 <sup>1</sup> “Congress has granted the FDIC as receiver express statutory authority to dispose of  
28 receivership assets, thereby reducing the losses borne by federal taxpayers when federally insured  
financial institutions . . . fail.” *Sahni v. American Diversified Partners*, 83 F.3d 1054, 1058 (9th Cir.  
1996).

1 IndyMac, and therefore was entitled to ‘take over the assets of and operate’ IndyMac with all the  
2 powers thereof[;] [t]hus, the appointment placed the FDIC in the shoes of IndyMac in performing  
3 all functions previously attributable to the institution, including defending against plaintiffs’  
4 action”). *See also Destfino v. Reiswig*, 630 F.3d 952, 957 (9th Cir. 2011) (noting that, “[w]hen the  
5 FDIC substituted IndyMac as a party, it filed a timely assertion of removal jurisdiction under 12  
6 U.S.C. § 1819(b)(2)(B), providing an independent basis for federal jurisdiction”). The FDIC also  
7 asked the state court for a 90-day stay of proceedings, which was granted. *See* 12 U.S.C. §  
8 1812(d)(12) (providing that, after the appointment of a receiver for an insured depository institution,  
9 the receiver may request a stay for a period not to exceed 90 days “in any judicial action or  
10 proceeding to which such institution is or becomes a party” and that such a request “as to all parties”  
11 shall be granted); *see also* Docket No. 14 (FDIC’s RJN, Ex. C) (order). Prior to the expiration of the  
12 ninety days, the FDIC removed the state court action to federal court. *See* 12 U.S.C. § 1819(b)(2)  
13 (providing that, with exceptions not applicable here, “all suits of a civil nature at common law or in  
14 equity to which the [FDIC], in any capacity, is a party shall be deemed to arise under the laws of the  
15 United States” and that the FDIC may “remove any action, suit, or proceeding from a State court to  
16 the appropriate United States district court before the end of the 90-day period beginning on the date  
17 the action, suit, or proceeding is filed against the Corporation or the Corporation is substituted as a  
18 party”).

19 Taking into account the authorities cited above, the Court concludes that FDIC is the proper  
20 party in this lawsuit instead of Indymac. The Court also notes that Mr. Rodrigues did not file an  
21 opposition, either in state court or in this Court, challenging FDIC’s participation in the action in  
22 lieu of Indymac.

23 As to FDIC’s motion to dismiss, the Court begins by noting that Mr. Rodrigues failed to file  
24 an opposition. Nor did he make an appearance at the hearing to oppose the motion. In light of the  
25 failure to oppose, the Court finds that it is appropriate to grant the motion. The Court also concludes  
26 the FDIC’s motion has merit.

27  
28

1 First, the Court lacks subject matter jurisdiction over any damages claims predicated on  
2 Indymac’s conduct. “To satisfy Article III’s case or controversy requirement, [the plaintiff] ‘must  
3 have suffered some actual injury that *can be redressed* by a favorable judicial decision.’” *Henrichs*  
4 *v. Valley View Development*, 474 F.3d 609, 615 (9th Cir. 2007) (emphasis added). The FDIC argues  
5 that, in the instant case, any alleged monetary damages suffered by Mr. Rodrigues as a result of  
6 Indymac’s actions are incapable of being redressed because Mr. Rodrigues is simply a general  
7 creditor and, as the FDIC determined in a resolution dated November 12, 2009, Indymac has  
8 “insufficient assets . . . to make any distribution on general unsecured claims . . . and therefore all  
9 such claims, asserted or unasserted, will recover nothing and have no value.” Docket No. 10  
10 (FDIC’s RJN, Ex. E) (resolution, dated 11/12/2009). As explained in the FDIC resolution, there are  
11 insufficient assets to make a distribution to any general creditors because the liability owed to  
12 Indymac’s depositors exceeds the total assets of the bank. *See* Docket No. 10 (FDIC’s RJN, Ex. E)  
13 (resolution, dated 11/12/2009) (noting that “the total assets of the IndyMac Bank receivership are  
14 \$63.131 million and the total deposit liabilities are \$8.738 billion”) (emphasis added). Depositors  
15 get priority over general creditors. *See* 12 U.S.C. § 1821(d)(11) (setting order of priority for  
16 “amounts realized from the liquidation or other resolution of any insured depository institution by  
17 any receiver appointed for such institution”; putting deposit liability ahead of “[a]ny other general or  
18 senior liability of the institution”).

19 *Henrichs* supports the FDIC’s position that its determination of worthlessness out Mr.  
20 Rodrigues’s damages claims. In *Henrichs*, a company took out a construction loan from Capital  
21 Bank of California. Subsequently, the FDIC acquired the loan when it was appointed the receiver of  
22 the bank. The company then defaulted on the loan. Following the default, the company and two  
23 individuals entered into a settlement agreement with the FDIC pursuant to which they would pay the  
24 FDIC \$300,000 and, in exchange, the FDIC would cancel or assign the loan and accompanying  
25 deed. The company ultimately decided that the FDIC should assign the loan. A percentage was  
26 assigned to the plaintiff. *See Henrichs*, 474 F.3d at 612. The plaintiff ended up suing the FDIC for  
27 damages based on an alleged breach of the settlement agreement. The Ninth Circuit noted that the  
28 plaintiff could

1 look only to the assets of the Capital Bank receivership to satisfy any  
2 breach of contract claim. The receivership distributed all of the failed  
3 bank’s assets and was terminated in January 2001, fully three years  
4 before [the plaintiff] raised the claim. *No assets remain in the  
receivership to satisfy a late-filed claim, thus rendering the claim  
moot.*

5 *Id.* at 615 (emphasis added).<sup>2</sup>

6 Second, the Court concludes that Mr. Rodrigues’s claims for equitable relief are barred by 12  
7 U.S.C. § 1821(j), which provides that, “[e]xcept as provided in this section, no court may take any  
8 action, except at the request of the Board of Directors by regulation or order, to restrain or affect the  
9 exercise of powers or functions of the [FDIC] as a conservator or a receiver.” 12 U.S.C. § 1821(j).  
10 In *Russell*, a case in which the FDIC substituted in for Indymac, Judge Fogel dismissed the  
11 plaintiff’s claim for equitable relief on precisely this ground. *See Russell*, 2010 U.S. Dist. LEXIS  
12 38759, at \*3. Similarly, in *Sahni*, the Ninth Circuit held that, “[b]ecause the FDIC was acting  
13 within its statutory powers as receiver for [a bank] when it sold the HUD partnerships, the district  
14 court acted properly in dismissing plaintiff’s action to rescind these sales.” *Sahni*, 83 F.3d at 1058.

15 B. Onewest and MERS’s Motion to Dismiss

16 Similar to above, the Court concludes that dismissal of the claims against Onewest and  
17 MERS is appropriate because Mr. Rodrigues failed to oppose the motion to dismiss in any way.  
18 Moreover, the claims asserted against the companies largely appear lacking in merit on their face.

19 For example, the claim for wrongful foreclosure is predicated on a violation of California  
20 Civil Code §§ 2923.5 and 2924 and California Corporations Code § 191. *See Compl.* ¶ 29.  
21 However, the only remedy for a violation of § 2923.5 is a postponement of the sale and here the sale  
22

---

23 <sup>2</sup> Other cases are in accord with *Henrichs*. *See, e.g., FDIC v. Kooyomjian*, 220 F.3d 10, 15  
24 (1st Cir. 2000) (noting that “[t]he FDIC’s worthlessness determination is unchallenged and, in the  
25 absence of a recoupment remedy, precludes any relief for defendants even if they were successful on  
26 their negligence claim and obtained a favorable judgment”); *Bennett v. One West Bank*, No.  
27 10cv1884-BTM (RBB), 2011 U.S. Dist. LEXIS 67459, at \*8 (S.D. Cal. June 23, 2011) (stating that,  
28 “[d]ue to the FDIC’s no value determination, Plaintiff’s claims for monetary relief cannot be  
redressed by a favorable judicial decision”); *Russell v. IndyMac Bank, F.S.B.*, No. C 09-03134-JF  
(PVT), 2010 U.S. Dist. LEXIS 38759, at \*3 (N.D. Cal. Apr. 20, 2010) (taking note of “the formal  
determination of [FDIC’s] Board of Directors that the total assets of the IndyMac and IndyMac  
Federal receiverships were worthless” and therefore concluding that “Plaintiff’s claims for relief . . .  
are moot as to the FDIC because no effective relief can be granted”).

1 has already taken place. *See Mabry v. Superior Court*, 185 Cal. App. 4th 208, 214 (2010) (stating  
2 that “[t]he right of action is limited to obtaining a postponement of an impending foreclosure to  
3 permit the lender to comply with section 2923.5”). As for the violation of § 2924, the statute  
4 essentially covers the procedure for a nonjudicial foreclosure. To the extent Mr. Rodrigues seeks to  
5 set aside the foreclosure based on an alleged violation of this statute, California courts have typically  
6 required tender “in an action to set aside a trustee’s sale for irregularities in sale notice or  
7 procedure.” *Storm v. America’s Serv’g Co.*, No. 09cv1206-IEG (JMA), 2009 U.S. Dist. LEXIS  
8 103647, at \*23 n.9 (S.D. Cal. Nov. 6, 2009) (emphasis omitted). Finally, while the California  
9 Corporations Code does provide that “[a] foreign corporation shall not transact intrastate business  
10 without having first obtained from the Secretary of State a certificate of qualification,” Cal. Corp.  
11 Code § 2105, and it is questionable whether MERS can invoke the statutory protections of  
12 § 191(d)(3), because any alleged failure of MERS to register in compliance with the California  
13 Corporations Code did not lead to the foreclosure. Furthermore, under § 2203, the remedies for a  
14 failure to register are limited, and a failure to register may be cured. *See Perlas v. Mortgage Elec.*  
15 *Registration Sys.*, No. C 09-4500 CRB, 2010 U.S. Dist. LEXIS 79705, at \*18-19 (N.D. Cal. Aug. 6,  
16 2010).

17 As another example, the conspiracy and injunctive relief claims are without merit because  
18 neither constitutes a claim for relief under California law. *See Applied Equipment Corp. v. Litton*  
19 *Saudi Arabia Ltd.*, 7 Cal. 4th 503, 510-11 (1994) (stating that “[c]onspiracy is not a cause of action,  
20 but a legal doctrine that imposes liability on persons who, although not actually committing a tort  
21 themselves, share with the immediate tortfeasors a common plan or design in its perpetration”);  
22 *Castillo v. Wachovia Mortg.*, No. C-12-0101 EMC, 2012 U.S. Dist. LEXIS 50926 (N.D. Cal. Apr.  
23 11, 2012) (concluding that plaintiff’s “injunctive relief claim fails because injunctive relief is a  
24 remedy, not a separate cause of action”). While a claim for accounting does exist under California  
25 law, the purpose of such a claim is to discovery what “balance is due the plaintiff,” not what money  
26 is owed to the defendant. *See Teselle v. McLoughlin*, 173 Cal. App. 4th 156, 179 (2009) (noting that  
27 “[a] cause of action for an accounting requires a showing that a relationship exists between the  
28 plaintiff and defendant that requires an accounting, and that some balance is due the plaintiff that



1 can only be ascertained by an accounting”); *see also Ricon v. Recontrust Co.*, No. 09cv937-IEG -  
2 JMA, 2009 U.S. Dist. LEXIS 67807, at \*18 (S.D. Cal. Aug. 4, 2009) (noting that, “while Plaintiff  
3 allegedly owes Defendants an amount past due on the underlying mortgage, Defendants do not  
4 allegedly owe Plaintiff any money”; adding that “[t]his failure to plead ‘some balance is due the  
5 plaintiff’ is fatal to Plaintiff’s claim”); *Hafiz v. Aurora Loan Servs.*, No. C 09-1963 SI, 2009 U.S.  
6 Dist. LEXIS 60003, at \* 6 (N.D. Cal. July 14, 2009) (noting that “Plaintiff does not cite any  
7 authority for the proposition that she can maintain a claim for an accounting to determine how much  
8 money she owes defendant”).

9 Finally, as another example, there appear to be statute-of-limitations problems with the  
10 claims for fraud, predatory lending practices (based on TILA, HOEPA, and California Business &  
11 Professions Code § 17500), and violation of California Business & Professions Code § 17200.  
12 These claims, as pled, are all predicated on Indymac’s conduct which took place in April 2007;  
13 however, Mr. Rodrigues did not file this lawsuit until March 2012, *i.e.*, almost five years later. This  
14 is beyond the statute of limitations for any of these claims for relief which is four years or fewer.

15 C. Onewest and MERS’s Motion to Expunge

16 Finally, Onewest and MERS move to expunge the lis pendens that Mr. Rodrigues filed and  
17 (presumably) recorded. Title 28 U.S.C. § 1964 provides:

18 Where the law of a State requires a notice of an action concerning real  
19 property pending in a court of the State to be registered, recorded,  
20 docketed, or indexed in a particular manner, or in a certain office or  
21 county or parish in order to give constructive notice of the action as it  
22 relates to the real property, and such law authorizes a notice of an  
23 action concerning real property pending in a United States district  
24 court to be registered, recorded, docketed, or indexed in the same  
25 manner, or in the same place, those requirements of the State law must  
26 be complied with in order to give constructive notice of such action  
27 pending in a United States district court as it relates to real property in  
28 such State.

28 U.S.C. § 1964. Relying on § 1964, California federal courts have generally held that state law  
provides the standards by which a lis pendens should be expunged. *See, e.g., Thomas v. Deutsche*  
*Bank*, No. C 12-00472 CRB, 2012 U.S. Dist. LEXIS 63871, at \*13-16 (N.D. Cal. May 7, 2012).

California law provides that a lis pendens shall be expunged “if the court finds that the  
claimant has not established by a preponderance of the evidence the probable validity of the real

1 property claim.” Cal. Code Civ. Proc. § 405.32. “‘Probable validity’ . . . means that it is more likely  
2 than not that the claimant will obtain a judgment against the defendant on the claim.” Cal. Code  
3 Civ. Proc. § 405.3.

4 In the instant case, Mr. Rodrigues has not established the probable validity of his claim. As  
5 discussed above, Mr. Rodrigues made no attempt to oppose either motion to dismiss and the claims  
6 asserted in the complaint are largely lacking in merit. *See, e.g., Thomas*, 2012 U.S. Dist. LEXIS  
7 63871, at \*16 (concluding that plaintiff could not demonstrate probable validity because “Plaintiff  
8 has failed to adequately state these claims”; adding that, “even if the Court assumed Plaintiff had  
9 stated a real property claim, he has failed to produce any evidence of its probable validity in his  
10 Opposition [–] Plaintiff provides no evidence at all in his Opposition”). Furthermore, Mr. Rodrigues  
11 failed to oppose the motion to expunge itself. The Court therefore grants Onewest and MERS’s  
12 motion to expunge the lis pendens.

13 **III. CONCLUSION**


14 For the foregoing reasons, the Court hereby grants the motions to dismiss as well as the  
15 motion to expunge.

16 As a result of this ruling, the only defendant remaining in the case is RSM&A (who has not  
17 yet made an appearance). The Court hereby orders Mr. Rodrigues to show cause why his claims  
18 against RSM&A should not be dismissed based on his failure to prosecute this case. Mr. Rodrigues  
19 shall file a response to this order to show cause by June 13, 2012. The Court forewarns Mr.  
20 Rodrigues that, if he fails to file a response to the order to show cause, then his claims against  
21 RSM&A shall automatically be dismissed and, with no other defendants in the case, final judgment  
22 shall be entered against him and in favor of all defendants and the case closed.

23 This order disposes of Docket Nos. 8, 13, and 25.

24 IT IS SO ORDERED.

25 Dated: May 30, 2012

26  
27   
28 EDWARD M. CHEN  
United States District Judge