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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

ELLINGTON DANIELS and DIANE DANIELS,  
  
Plaintiff,  
  
v.  
COMUNITY LENDING, INC.; BANK OF NEW YORK; BANK OF AMERICA, N.A.; RECONTRUST COMPANY, N.A.; GINNIE MAE; ET. AL; NEW CENTURY MORTGAGE; BAC HOME LOANS SERVICING, LP; COUNTRYWIDE HOME LOANS; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS; CLEAR RECON CORP.; and JOHN DOES (Investors) 1-10,000,  
  
Defendant.

CASE NO. 13cv488 WQH-JMA  
ORDER

HAYES, Judge:

The matters before the Court are the “Motion for Leave to Amend Complaint, FRCP 20(a) to Permissively Add Additional Defendant to Lawsuit, Present Newly Discovered Evidence” (ECF No. 163) and the “Motion to Enforce Amended Complaint” (ECF No. 168), both filed by Plaintiffs Ellington Daniels and Diane Daniels.

**I. Background**

On February 28, 2013, Plaintiffs Ellington and Diane Daniels commenced this action by filing a Complaint in this Court. (ECF No. 1). The Complaint asserted claims

1 for violation of the Fair Debt Collection Practices Act (“FDCPA”), violation of the  
2 Telephone Consumer Protection Act (“TCPA”), and violations of the U.S. Constitution.  
3 On April 16, 2013, Defendants Bank of New York, Bank of America, N.A. (“Bank of  
4 America”), ReconTrust Copany, N.A. (“ReconTrust”), and Mortgage Electronic  
5 Registration Systems, Inc. (“MERS”) filed a motion to dismiss the Complaint. (ECF  
6 No. 10). On June 5, 2013, the Court granted the motion to dismiss and dismissed the  
7 Complaint without prejudice. (ECF No. 30).

8 On July 9, 2013, Plaintiffs filed the First Amended Complaint (“FAC”). (ECF  
9 No. 34). The FAC reasserted claims for violation of the FDCPA, violation of TCPA,  
10 and constitutional violations, and added a claim for violation of the Fair Credit  
11 Reporting Act (“FCRA”) and various state law claims. On August 26, 2013,  
12 Defendants The Bank of New York, Bank of America, Countrywide Home Loans, Inc.  
13 (“Countrywide”), ReconTrust, and MERS filed a motion to dismiss. (ECF No. 45). On  
14 January 6, 2014, the Court granted the motion to dismiss and dismissed the FAC  
15 without prejudice. (ECF No. 60).

16 On May 14, 2014, Plaintiffs filed the Second Amended Complaint (“SAC”).  
17 (ECF No. 79). On May 28, 2014, Defendants The Bank of New York, Bank of  
18 America, Countrywide, ReconTrust, and MERS filed a motion to dismiss. (ECF No.  
19 80). On July 21, 2014, the Court granted the unopposed motion to dismiss and  
20 dismissed the SAC without prejudice. (ECF No. 82). On September 29, 2014,  
21 Plaintiffs filed the Third Amended Complaint. (ECF No. 90).

22 On November 14, 2014, Plaintiffs filed the Fourth Amended Complaint (“Fourth  
23 AC”). (ECF No. 97). The Fourth AC named ComUnity Lending , Inc., New Century  
24 Mortgage, BAC Home Loans Servicing, LP, Countrywide, Bank of America, Ginnie  
25 Mae, The Bank of New York, MERS, ReconTrust, and Clear Recon Corp. as  
26 defendants. On December 3, 2014, Defendants Bank of New York Mellon (formerly  
27 known as The Bank of New York), Bank of America, Countrywide, ReconTrust, and  
28 MERS filed a motion to dismiss Plaintiff’s Fourth AC. (ECF No. 103). On January

1 5, 2015, Plaintiffs filed a document titled “Response in Accordance with F.R.C.P.  
2 15(a)(1)(B) to Defendants 12(b) Motion Amended Complaint” that included a one-  
3 paragraph memorandum of points and authorities. (ECF No. 109).

4 On January 5, 2015, Plaintiffs filed a Fifth Amended Complaint. (ECF No. 113).  
5 On January 7, 2015, the Court issued an Order striking the Fifth Amended Complaint  
6 because Plaintiffs did not obtain leave of Court or consent of Defendants. (ECF No.  
7 114). The January 7, 2015 Order stated: “Within fifteen (15) days of this Order,  
8 Plaintiffs shall file a response to Defendants’ Motion to Dismiss Fourth Amended  
9 Complaint.” *Id.* at 2.

10 On January 5, 2015, Plaintiffs filed a “Motion to Strike Defendants’ Documents  
11 Dispute Authenticity.” (ECF No. 107). On January 8, 2015, Plaintiffs filed a Motion  
12 for Default Judgment. (ECF No. 118). On January 12, 2015, Plaintiffs filed a Motion  
13 to Strike Defendants’ Answer to Plaintiffs’ Fourth Amended Complaint. (ECF No.  
14 119). On January 12, 2015, Plaintiffs filed an Amended Motion for Default Judgment.  
15 (ECF No. 120). On January 12, 2015, Plaintiffs filed an “Amended Motion to Strike  
16 Defendants Immaterial Evidence Dispute Authenticity.” (ECF No. 121).

17 On January 20, 2015, Plaintiffs filed a Motion for Ex Parte Temporary  
18 Restraining Order (ECF No. 122-1) and Permanent Injunction (ECF No. 122-2). On  
19 January 21, 2015, the Court issued an Order stating:

20 To the extent that the Motion for Ex Parte Temporary Restraining Order  
21 and Permanent Injunction requests a temporary restraining order (ECF No.  
122-1), the Motion is denied.

22 To the extent that the Motion for Ex Parte Temporary Restraining Order  
23 and Permanent Injunction requests a permanent injunction, the motion for  
24 permanent injunction (ECF No. 122-2) remains pending. Defendants shall  
file any response to Plaintiffs’ motion for permanent injunction by  
February 3, 2015. Plaintiffs shall file any reply by February 9, 2015.

25 Defendants’ motion to dismiss Plaintiffs’ Fourth Amended Complaint  
26 (ECF No. 103) remains pending. Plaintiffs shall file any response by January 22, 2015,  
as ordered by the Court on January 7, 2015. (ECF No. 114). Defendants shall file any  
reply by February 3, 2015.

27 (ECF No. 123 at 4).

28 On January 28, 2015, Plaintiffs filed an opposition to the Motion to Dismiss.

1 (ECF No. 125). On February 3, 2015, Defendants filed a reply. (ECF No. 127).

2 On February 3, 2015, Defendant Clear Recon Corp. filed an opposition to the  
3 Motion for Permanent Injunction. (ECF No. 126).

4 On February 9, 2015, the Court issued an Order (ECF No. 132), denying the  
5 “Motion to Strike Defendants Documents Dispute Authenticity” (ECF No. 107); the  
6 “Amended Motion to Strike Defendants Immaterial Evidence Dispute Authenticity”  
7 (ECF NO. 121); the Motion to Strike Defendants Answer to Plaintiff’s Fourth Amended  
8 Complaint (ECF No. 119); and the Motion for Ex Parte Temporary Restraining Order  
9 and Permanent Injunction (ECF No. 122) and granting Defendants’ Motion to Dismiss  
10 Plaintiffs’ Fourth Amended Complaint (ECF No. 103). The Court dismissed Plaintiffs’  
11 FDCPA, TCPA, FRCA, Fifth Amendment, and Fourteenth Amendment claims with  
12 prejudice. (ECF No. 132). The Court dismissed Plaintiffs’ TILA and RICO claims  
13 without prejudice. *Id.*

14 On the same day, Plaintiffs filed a “Response in Opposition to Support a Motion  
15 to Dismiss Plaintiffs Fourth Amended Complaint” (ECF No. 133) and a reply to the  
16 Motion for Ex Parte Temporary Restraining Order and Permanent Injunction. (ECF No.  
17 134).

18 On February 18, 2015, Plaintiffs filed the “Motion for Order to Show Cause  
19 Vacation of Judgment/Order.” (ECF No. 137). On March 4, 2015, the Defendants filed  
20 a response to Plaintiffs’ motion. (ECF No. 139). On March 5, 2015, Defendant Clear  
21 Recon Corp. filed a response to Plaintiffs’ motion. (ECF No. 140). On March 12,  
22 2015, Plaintiff filed a reply. (ECF No. 142).

23 On April 8, 2015, Plaintiffs filed a Notice of Appeal to the Ninth Circuit. (ECF  
24 No. 144). Plaintiffs appealed the Order issued by this Court on February 9, 2015 (ECF  
25 No. 132). On May 12, 2015, the Court of Appeals issued an order dismissing Plaintiffs’  
26 appeal. The order stated, in part,

27 To the extent this appeal also challenges the portion of the district court’s  
28 February 9, 2015, order denying preliminary injunctive relief, the appeal  
is untimely because the April 8, 2015 notice of appeal was not filed within  
30 days after entry of the district court’s February 9, 2015 order.

1 (ECF No. 152).

2 On May 12, 2015, the Court issued an Order denying Plaintiffs' "Motion for  
3 Order to Show Cause Vacation of Judgment/Order." (ECF No. 153). The Order stated,  
4 "Plaintiff shall file any motion to file an amended pleading, relating to any claims not  
5 dismissed with prejudice, within twenty (20) days of the date this order is filed." *Id.* at  
6 10.

7 On May 26, 2015, Plaintiffs filed a Notice of Appeal to the Ninth Circuit. (ECF  
8 No. 154). On November 17, 2015 the Court of Appeals issued an order affirming this  
9 Court's denial of Plaintiffs' motion for a preliminary injunction and affirming this  
10 Court's denial of Plaintiffs' motion for reconsideration.

11 On November 12, 2015, Plaintiffs filed the "Motion for Leave to Amend  
12 Complaint, FRCP 20(a) to Permissively Add Additional Defendant to Lawsuit, Present  
13 Newly Discovered Evidence." (ECF No. 163). On December 3, 2015, Defendants  
14 Bank of America Home Loans, Bank of America, The Bank of New York, Countrywide  
15 Home Loans, MERS, and ReconTrust filed an opposition to Plaintiffs' motion for leave  
16 to amend. (ECF No. 165). On December 7, 2015, Plaintiffs filed a reply. (ECF No.  
17 166). On December 10, 2015, Defendant Clear Recon Corp. Filed a Notice of Joinder  
18 to the response in opposition to Plaintiff's motion. (ECF No. 167).

19 On December 28, 2015, Plaintiffs filed a "Motion to Enforce Amended  
20 Complaint." (ECF No. 168).

## 21 **II. Discussion**

22 Federal Rule of Civil Procedure 15 mandates that leave to amend "be freely given  
23 when justice so requires." Fed. R. Civ. P. 15(a). In *Foman v. Davis*, 371 U.S. 178  
24 (1962), the Supreme Court offered several factors for district courts to consider in  
25 deciding whether to grant a motion to amend under Rule 15(a):

26 In the absence of any apparent or declared reason—such as undue delay,  
27 bad faith or dilatory motive on the part of the movant, repeated failure to  
28 cure deficiencies by amendments previously allowed, undue prejudice to  
the opposing party by virtue of allowance of the amendment, futility of  
amendment, etc.—the leave sought should, as the rules require, be 'freely  
given.'

1 *Foman*, 371 U.S. at 182; *see also Smith v. Pac. Prop. Dev. Co.*, 358 F.3d 1097, 1101  
2 (9th Cir. 2004) (citing *Foman* factors).

3 “[T]he grant or denial of an opportunity to amend is within the discretion of the  
4 District Court . . . .” *Foman*, 371 U.S. at 182. “[L]eave to amend need not be given if  
5 a complaint, as amended, is subject to dismissal.” *Moore v. Kayport Package Express,*  
6 *Inc.*, 885 F.2d 531, 538 (9th Cir. 1989) (internal citation and quotation marks omitted).  
7 “[W]here the plaintiff has previously been granted leave to amend and has subsequently  
8 failed to add the requisite particularity to its claims, the district court’s discretion to  
9 deny leave to amend is particularly broad.” *Zucco Partners, LLC v. Digimarc Corp.*,  
10 552 F.3d 981, 1007 (9th Cir. 2009). “A district court does not abuse its discretion when  
11 it denies leave to amend where a plaintiff . . . did not propose any new facts or legal  
12 theories for an amended complaint and therefore give the Court any basis to allow an  
13 amendment.” *Boehm v. Shemaria*, 478 Fed. Appx. 457, 457 (9th Cir. 2012). When  
14 amendment would be futile, the district court need not grant leave to amend. *Gompper*  
15 *v. VISX, Inc.*, 298 F.3d 893, 898 (9th Cir. 2002).

16 The Court has previously dismissed Plaintiffs’ Complaint, FAC, SAC, and Fourth  
17 AC and has granted Plaintiffs multiple opportunities to amend their claims. The  
18 proposed fifth amended complaint cites to the following federal laws: 26 U.S.C. § 951  
19 et seq. Intentional Misrepresentation; 26 U.S.C. § 951 et seq. Negligent  
20 Misrepresentation; 11 U.S.C. §506(d) Secured Status and Validity and Priority of Lien;  
21 TILA, 15 U.S.C. § 1601, et seq; RESPA, 12 U.S.C. § 2601 et seq., as well as multiple  
22 state laws.

### 23 **A. TILA**

24 In the Order filed on February 9, 2015, dismissing Plaintiffs’ Fourth AC, the  
25 Court stated “The Fourth AC fails to identify the provision(s) of TILA allegedly  
26 violated by Defendants, and fails to allege facts showing how any TILA provision was  
27 violated so as to put Defendant Bank of America on ‘fair notice’ of the claim against  
28 it.” (ECF No. 132 at 16). Plaintiff’s proposed fifth amended complaint fails to identify

1 the provision(s) of TILA allegedly violated by Defendants and does not correct the  
2 deficiencies of the Fourth AC.

3 **B. 15 U.S.C. § 1601**

4 Plaintiffs' newly alleged causes of action in the proposed fifth amended  
5 complaint for "Intentional Misrepresentation" and "Negligent Misrepresentation" under  
6 26 U.S.C. § 951 fail to state a cognizable legal claim. Section 951 of 26 U.S.C. defines  
7 "Amounts included in gross income of United States Shareholders" and does not  
8 establish a federal cause of action for misrepresentation. *See* 26 U.S.C. § 951.

9 **C. 11 U.S.C. § 506(d)**

10 Plaintiffs' fifth amended complaint alleges a cause of action against Defendants  
11 for violation of 11 U.S.C. § 506(d) "Secured Status and Validity and Priority of Lien."  
12 Section 506(d) of 11 U.S.C. states

13 To the extent that a lien secures a claim against the debtor that is not an  
14 allowed secured claim, such lien is void, unless— (1) such claim was  
15 disallowed only under section 502(b)(5) or 502(e) of this title; or (2) such  
claim is not an allowed secured claim due only to the failure of any entity  
to file a proof of such claim under section 501 of this title.

16 11 U.S.C. § 506(d). The Court concludes that the proposed fifth amended complaint  
17 does not state a cognizable legal claim under 11 U.S.C. § 506(d).

18 **D. RESPA**

19 The proposed fifth amended complaint asserts that Defendants violated Plaintiffs'  
20 rights under 12 U.S.C. § 2601, the "Congressional Findings and Purpose" section of  
21 RESPA. The Court concludes that the reference to 12 U.S.C. § 2601 in the proposed  
22 fifth amended complaint could not put Defendants on notice of any RESPA violations  
23 alleged against them.

24 **E. State Law Claims**

25 The remaining claims of the proposed fifth amended complaint assert violations  
26 of state law. Plaintiffs do not allege that this Court has diversity jurisdiction over this  
27  
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1 action.<sup>1</sup> Plaintiffs allege that this Court has supplemental jurisdiction over the state law  
2 claims pursuant to 28 U.S.C. § 1367. (ECF No. 163 at 2). The federal supplemental  
3 jurisdiction statute provides, “in any civil action of which the district courts have  
4 original jurisdiction, the district courts shall have supplemental jurisdiction over all  
5 other claims that are so related to claims in the action within such original jurisdiction  
6 that they form part of the same case or controversy under Article III of the United States  
7 Constitution.” 28 U.S.C. § 1367(a).


8 Having concluded that Plaintiffs’ proposed fifth amended complaint does not  
9 state a valid federal legal claim, the Court declines to exercise supplemental jurisdiction  
10 over the state law claims against the Defendants pursuant to 28 U.S.C. § 1367(c). *See*  
11 *San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d 470, 478 (9th Cir. 1998).

### 12 **III. Conclusion**

13 In Plaintiffs’ motion for leave to file a fifth amended complaint, the proposed  
14 fifth amended complaint remains subject to dismissal because it does state a valid  
15 federal claim.

16 IT IS HEREBY ORDERED that Plaintiffs’ motion for leave to file a fifth  
17 amended complaint (ECF No. 163) is denied. The Clerk of the Court shall close the  
18 case.

19 DATED: January 11, 2016

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21 **WILLIAM Q. HAYES**  
22 United States District Judge

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<sup>1</sup> The proposed fifth amended complaint alleges that Plaintiffs and five  
28 Defendants reside in California. (ECF No. 163 at 3-4). Accordingly, Plaintiffs have  
failed to allege complete diversity exists between the parties. *See* 28 U.S.C. §  
1332(a)(2).