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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 HANS D'OLEIRE, as individual,  
12 Plaintiff,

13 v.

14 SELECT PORTFOLIO SERVICING,  
15 INC; BANK OF AMERICA, N.A. aka  
16 BOFA Home Loans Servicing, LP  
17 formerly known as Countrywide Home  
18 Loans Servicing LP; AMERICA'S  
19 WHOLESALE LENDER, a New York  
20 Corporation; THE BANK OF NEW  
21 YORK MELLON FKA THE BANK OF  
22 NEW YORK AS TRUSTEE FOR THE  
23 CERTIFICATEHOLDERS OF CWALT,  
24 INC. ALTERNATIVE LOAN TRUST  
25 2005-56 MORTGAGE PASSTHROUGH  
26 CERTIFICATES, SERIES 2005-56;  
27 NATIONAL DEFAULT SERVICING  
28 CORPORATION; and DOES 1 through  
29 20, inclusive,

Defendants.

Case No.: 3:16-cv-02520-GPC-NLS

**ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS  
PLAINTIFF'S COMPLAINT  
PURSUANT TO FED. R. CIV. P. 41(b)**

**[ECF No. 10.]**

On February 16, 2017, Defendants Select Portfolio Servicing, Inc. ("SPS") and The Bank of New York Mellon, f/k/a The Bank of New York, as Trustee, on Behalf of

1 the Holders of the Alternative Loan Trust 2005-56, Mortgage Pass-Through Certificates,  
2 Series 2005-56 (“BNYM as Trustee”) (collectively “Defendants”) filed a motion to  
3 dismiss Plaintiff Hans D’Oleire’s (“Plaintiff’s”) Complaint pursuant to Federal Rule of  
4 Civil Procedure 41(b) for failure to prosecute and failure to comply with an order of this  
5 Court. (Dkt. No. 10.) Plaintiff did not file a response, and Defendants did not file a  
6 reply. The Court deems Plaintiff’s motion suitable for disposition without oral argument  
7 pursuant to Civil Local Rule 7.1(d)(1).

8 Having reviewed Defendants’ motion and the applicable law, and for the reasons  
9 set forth below, the Court **GRANTS** Defendants’ motion to dismiss Plaintiff’s Complaint  
10 pursuant to Federal Rule of Civil Procedure 41(b).

### 11 **BACKGROUND**

12 On August 18, 2005, Plaintiff obtained a loan from AWL for \$826,550.00 to  
13 purchase real property (“Property”) located at 1045 White Alder Avenue, Chula Vista,  
14 California 91914. (Dkt. No. 1-4, Compl. ¶¶ 2, 12; Def.’s RJN Ex. A.) Plaintiff executed  
15 a deed of trust (“DOT”) and a promissory note (“Note”), securing the Note with the  
16 Property. The DOT, recorded on August 25, 2005, lists Plaintiff as the borrower, AWL  
17 as the lender, Mortgage Electronic Registration Systems, Inc. (“MERS”) as beneficiary in  
18 nominee capacity for AWL and AWL’s successors and assigns, and ReconTrust  
19 Company, N.A. (“ReconTrust”) as the trustee. (Compl. ¶12; Def.’s RJN Ex. A at 3.)  
20 Plaintiff defaulted on his loan at some point in time before April 3, 2008. (Compl. ¶ 26.)

21 Plaintiff alleges a number of problems with the 2005 loan transaction. Plaintiff  
22 alleges on information and belief that AWL was a nonexistent entity, and that the actual  
23 lender, Countrywide Bank, maintained a practice of misrepresentation to borrowers that  
24 they were borrowing from AWL. (*Id.* ¶¶ 13–14, 20.) In addition to Defendants’ failure  
25 to identify the true identity of the lender in loan documents and disclosures, Plaintiff  
26 further alleges on information and belief that Defendants falsified Plaintiff’s income and  
27 employment on loan documents, made a loan to Plaintiff with knowledge that Plaintiff  
28 could not afford to repay the loan, concealed Plaintiff’s obligations pursuant to the loan,

1 and ignored Plaintiff's debt-to-income ratio. (*Id.* ¶ 19.) Plaintiff maintains that he  
2 discovered the misrepresentation about AWL's identity and the falsification of his  
3 income, profession, employment history, and ability to repay the loan on August 28,  
4 2012. (*Id.* ¶ 20.) Plaintiff alleges that prior to August 28, 2012, Countrywide Bank and  
5 its successors and assignees "concealed" the misrepresentations. (*Id.*)

6 On August 28, 2012, MERS executed and recorded an Assignment of Deed of  
7 Trust ("ADOT) to BNYM as Trustee. (Compl. ¶ 24; Def.'s RJN Ex. C at 2.) Plaintiff  
8 alleges that BNYM as Trustee is not and was not the holder of the Note or the beneficiary  
9 of the DOT. (Compl. ¶ 23.)

10 On August 11, 2014, SPS recorded a Substitution of Trustee ("SOT") and  
11 substituted NDSC as the trustee in place of ReconTrust. (Def.'s RJN Ex. D at 2.) On the  
12 same day, NDSC recorded a Notice of Default and Election to Sell Under Deed of Trust  
13 ("NOD") against the Property, notifying Plaintiff that he was \$585,228.38 in arrears on  
14 his loan as of August 7, 2014. (Def.'s RJN Ex. E at 2.) On December 10, 2014, NDSC  
15 recorded a Notice of Trustee's Sale ("NOTS"). (Def.'s RJN Ex. F at 2.) On September  
16 12, 2016, Plaintiff's Property was sold at public auction to a Sierra Equity Acquisitions,  
17 LLC, a third party. (Def.'s RJN Ex. J at 2-3.)

18 Plaintiff filed a verified complaint on August 5, 2016, in San Diego Superior Court  
19 against SPS, Bank of America, N.A. ("BANA"), America's Wholesale Lender ("AWL"),  
20 BNYM as Trustee, National Default Servicing Corp. ("NDSC"), and Does 1 through 20,  
21 inclusive. (Dkt. No. 1-4, Compl. at 2.) Plaintiff asserts six causes of action:

- 22 1. Declaratory relief determining that Plaintiff is the owner of the Property, and  
23 that the August 25, 2010 and August 28, 2012 Assignments of Deed of Trust  
24 are invalid and void (Compl. ¶¶ 28-33);
- 25 2. Wrongful foreclosure in violation of Cal. Civ. Code §§ 2924 *et seq.* (*Id.* ¶¶ 34-  
26 41);
- 27 3. Violations of the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601 *et seq.* (*Id.*  
28 ¶¶ 42-47);

- 1 4. Quiet title (*Id.* ¶¶ 48–56);
- 2 5. Cancellation of written instruments (*Id.* ¶¶ 57–59); and
- 3 6. Breach of contract (*Id.* ¶¶ 60–70).

4 Plaintiff’s first claim is against all Defendants; his second through fifth claims are  
5 against BANA, SPS, BNYM as Trustee, and NDSC; and his sixth claim is against AWL.  
6 Defendants SPS and BNYM as Trustee removed the action to federal court on October 7,  
7 2016 (Dkt. No. 1) and filed a motion to dismiss on October 13, 2016 (Dkt. No. 3).

8 On October 13, 2016, Defendants filed a motion to dismiss Plaintiff’s Complaint  
9 for failure to state a claim. (Dkt. No. 3.) The Court granted Defendants’ motion to  
10 dismiss on December 12, 2016 and granted Plaintiff leave to amend his Complaint on or  
11 by January 6, 2017. (Dkt. No. 9.) In its Order, the Court specified the reasons for which  
12 Plaintiff’s Complaint was dismissed and explained how Plaintiff should cure the  
13 deficiencies in his Complaint. (*See id.*) Plaintiff has not filed an amended Complaint.

14 Defendants brought the instant motion on February 16, 2017. (Dkt. No. 10.)

#### 15 **LEGAL STANDARD**

16 Federal Rule of Civil Procedure 41(b) provides, in pertinent part, that “[i]f the  
17 plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may  
18 move to dismiss the action or any claim against it.” Fed. R. Civ. P. 41(b). A district  
19 court has discretion to dismiss an action “for failure to comply with the court’s order  
20 requiring submission of an amended complaint in a timely manner.” *Yourish v.*  
21 *California Amplifier*, 191 F.3d 983, 988 (9th Cir. 1999).

22 Under Ninth Circuit precedent, district courts must consider five factors before  
23 dismissing a case as a sanction: “(1) the public’s interest in expeditious resolution of  
24 litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to the  
25 defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the  
26 availability of less drastic alternatives.” *Id.* at 990 (internal citations and quotation marks  
27 omitted). Moreover, “[a] dismissal for lack of prosecution must be supported by a  
28 showing of unreasonable delay,” which “creates a presumption of injury to the defense.”

1 *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986).

## 2 **DISCUSSION**

3 Defendants contend that Plaintiff has failed to diligently prosecute his case, citing  
4 Plaintiff's failure to properly serve Defendants after filing his Complaint in state court,  
5 failure to oppose Defendants' motion to dismiss, and failure to amend his Complaint on  
6 or by January 6, 2017. (Dkt. No. 10 at 7.) Presently, four months after the Court  
7 dismissed Plaintiff's Complaint and granted Plaintiff leave to amend, Plaintiff has not  
8 responded in any way to the Court's Order. (*See generally* Dkt.) Indeed, Plaintiff has  
9 not appeared or litigated his case at all after filing his Complaint in state court. (*See*  
10 *generally* Dkt.)

11 The balance of the five factors weighs in favor of dismissal. First, the public's  
12 interest in expeditious resolution of litigation weighs in favor of dismissing Plaintiff's  
13 case. *See Yourish*, 191 F.3d at 990 (“[T]he public’s interest in expeditious resolution of  
14 litigation always favors dismissal.”). Second, the Court’s need to manage its docket  
15 weighs in favor of dismissal, as Plaintiff’s failure to amend his Complaint has caused the  
16 instant case to remain stagnant on the Court’s docket for months. *See id.* (affirming  
17 dismissal where “Plaintiffs’ failure to amend had caused ‘the action to come to a  
18 complete halt”). Third, the risk of prejudice to the Defendants weighs in favor of  
19 dismissal. Defendants have incurred “unnecessary expenses” in bringing this instant  
20 motion. (Dkt. No. 10 at 7.) Plaintiff’s failure to litigate his case is not merely  
21 unreasonable, but unexplained—Plaintiff has not proffered any reasons for failing to  
22 timely amend, and has not attempted to rebut the presumption of injury to Defendants.  
23 *See Yourish*, 191 F.3d at 991 (“[T]he risk of prejudice to the defendant is related to the  
24 plaintiff’s reason for defaulting in failing to timely amend.”); *Henderson*, 779 F.2d at  
25 1423. Fourth, “[a]lthough there is indeed a policy favoring disposition on the merits, it is  
26 the responsibility of the moving party to move towards that disposition at a reasonable  
27 pace, and to refrain from dilatory and evasive tactics.” *Morris v. Morgan Stanley & Co.*,  
28 942 F.2d 648, 652 (9th Cir. 1991). Here, Plaintiff has made no effort since filing his

1 Complaint to move his case toward disposition on the merits. The fourth factor is thus at  
2 best neutral. Finally, the availability of less drastic alternatives weighs in favor of  
3 dismissal. The Court allowed Plaintiff leave to amend his Complaint, and Plaintiff has  
4 not filed an amended Complaint or sought an extension of time to do so. Nor has he  
5 opposed the instant motion to dismiss, inquired about or sought less drastic remedies, or  
6 attempted to file any documents in support of his case.

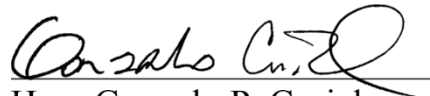
7 The Court finds that the balance of the five factors weighs in favor of dismissing  
8 Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 41(b).

9 **CONCLUSION**

10 For the foregoing reasons, the Court **GRANTS** Defendants' motion to dismiss  
11 Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 41(b).

12 **IT IS SO ORDERED.**

13 Dated: April 14, 2017

14   
15 Hon. Gonzalo P. Curiel  
16 United States District Judge  
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