

1

2

3

4

UNITED STATES DISTRICT COURT

5

DISTRICT OF NEVADA

6

STEVEN R. GILLESPIE and
KATHERINE A. GILLESPIE,

3:09-CV-556 JCM (VPC)

7

8

Plaintiff,

9

10

v.

11

COUNTRYWIDE BANK FSB, et al.,

12

Defendants.

13

14

ORDER

15

Presently before the court is Steven R. Gillespie's motion to remand (doc. # 2). Defendants Countrywide Financial Corp., and Bank of America Corp. N.A. filed an opposition (doc. # 19), and plaintiff file a reply. (Doc. # 22). Also before the court is plaintiff Gillespie's motion to stay until motion to remand is addressed by the court. (Doc. #3).

19

Also before the court is defendants Countrywide Financial Corp., and Bank of America Corp. N.A.'s motion to dismiss. (Doc. #4). Defendants Recontrust Company, N.A., Countrywide Bank FSB, Countrywide Home Loans, Inc., Merscorp, Inc., and Mortgage Electronic Registration Systems, Inc. filed a joinders to the motion to dismiss. (Doc. # #16 and 32).

23

Also before the court is plaintiff Gillespie's third motion to amend complaint. (Doc. # 37). Defendants Bank of America Corp. N.A., Countrywide Bank FSB, Countrywide Financial Corp., and Countrywide Home Loans, Inc. filed an opposition. (Doc. # 38). To date, plaintiff has not filed a reply.

27

Plaintiff filed his complaint in the Third Judicial District Court of Nevada in August 2009,

28

1 against defendants Countrywide Financial Corp., Bank of America Corp. N.A., Recontrust
2 Company, N.A., Countrywide Bank FSB, Countrywide Home Loans, Inc., Merscorp, Inc., and
3 Mortgage Electronic Registration Systems, Inc (hereinafter collectively referred to as “defendants”).
4 (Doc. #1). Defendants Countrywide Financial Corp. (hereinafter “CFC”) and Bank of America, N.A.
5 (hereinafter “BOA”) filed a petition to remove the action to this court (Doc. ## 1 and 18) on
6 September 21, 2009 based on federal question jurisdiction.

7 Plaintiff’s second amended complaint contains the following claims for relief against all
8 defendants: 1) violation of unfair lending practices, N.R.S. 598D.100; 2) conspiracy to commit fraud
9 and conversion; 3) injunctive relief; 4) declaratory relief; 5) wrongful foreclosure; 6) fraud; 7) quiet
10 title; 8) breach of good faith and fair dealing; 9) “tortious breach of implied duty of good faith and
11 fair dealing;” 10) civil conspiracy; 11) racketeering; 12) unjust enrichment; 13) conspiracy to commit
12 fraud “related to MERS system;” and 14) fraud in the inducement. (Doc. #1).

13 Plaintiff’s claims stem from the foreclosure of his property located at 1364 Mountain Rise
14 Drive, Fernley, Nevada 89408. In May 2007, plaintiff executed the notes and corresponding deeds
15 of trust in connection with this property to defendant Countrywide for \$254,185. Plaintiff ceased
16 making mortgage payments on or about July 2009.

17 The judicial panel on multidistrict litigation (“JPML”) consolidated this case (and others) into
18 the *In re Mortgage Electronic Registration Systems, Inc. (“MERS”) MDL*, (MDL No. 2119). *See In*
19 *re MERS Litig.*, 659 F.Supp. 2d 1368, 1371 (J.P.M.L. Dec. 7, 2009) (transferring, in part, pretrial
20 proceedings to Judge James Teilborg of the District of Arizona). In its transfer order, the JPML
21 transferred only claims relating to the “formation and/or operation of MERS system,” while the
22 remaining claims were remanded to this court.

23 A. Motion to Remand and Motion to Stay

24 Plaintiff asserts that the present case improperly removed to this court because the claims
25 asserted in the second amended complaint are not governed by federal law. Under 28 U.S.C.
26 §1441(b), this court has original jurisdiction over claims that arise under federal law. Furthermore,
27 claims brought under state law “arise under” federal law if the state claim turns on a substantial
28

1 question of federal law. *Ultramar America, Ltd. v. Dwell*, 900 F.2d 1412, 1414 (9th Cir. 1990). This
2 court finds that plaintiff's claims arise under the Real Estate Settlement Procedures Act (RESPA),
3 12 U.S.C. §2602, and the Truth in Lending Act (TILA) 15 U.S.C. § 1601. Furthermore, plaintiff's
4 complaint asserts that the claims noted above also violate the Federal Fair Housing Act and the
5 Troubled Asset Relief Program. Therefore, this court finds that removal to this court was proper.

6 Plaintiff also requested that the case be stayed until the motion to remand is addressed by this
7 court. In light of the above, this court shall deny the motion to stay.

8 B. Motion to Dismiss

9 Defendants seek to dismiss plaintiff's complaint for failure to state a claim upon which relief
10 can be granted. See Fed. R. Civ. P. 12(b)(6). A complaint that lacks a cognizable legal theory or
11 states insufficient facts under a cognizable legal theory may be dismissed as a matter of law.
12 *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir.1984).

13 The Supreme Court has held that a complaint's factual allegations must be sufficient "to raise
14 a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct.
15 1955, 1965, 167 L.Ed.2d 929 (2007). Thus, a plaintiff must plead more than conclusory allegations
16 to show "plausible liability" and avoid dismissal. *Id.* at 1966 n. 5.

17 This court finds that the claims listed in plaintiff's second amended complaint allege that the
18 defendants acted in concert with MERS. Furthermore, to date, the court presiding over the MDL
19 case has not yet entered an order indicating which specific claims are remanded to this court, as has
20 been done in other cases. Therefore, this court will deny the defendants' motion to dismiss, without
21 prejudice.

22 C. Motion to Amend

23 Plaintiff's request leave of this court to file a third amended complaint pursuant to Federal
24 Rule of Civil Procedure 15(a)(2). Plaintiff asserts that amendment is necessary to mandate that no
25 federal law is asserted and to present specific conduct of each defendant. Plaintiff also notes that
26 this motion is filed in conjunction with a similar motion in front of Judge Teilborg, presiding over
27 the MDL, who subsequently denied the motion to amend. As noted above, this court is not
28

1 persuaded by plaintiff's argument in favor of amendment, and finds that plaintiff's proposed
2 amendment is an artful attempt to withdraw from the MDL.

3 Accordingly,

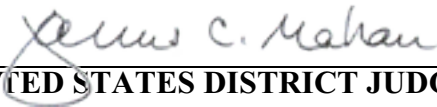
4 IT IS HEREBY ORDERED ADJUDGED AND DECREED that plaintiff's motion to remand
5 (doc. #2), and motion to stay (doc. # 3) are DENIED.

6 IT IS FURTHER ORDERED that defendants' motion to dismiss (doc. # 4) is DENIED,
7 without prejudice.

8 IT IS FURTHER ORDERED that plaintiff's motion to amend (doc. # 37) is DENIED.

9 DATED July 29, 2010.

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28


UNITED STATES DISTRICT JUDGE