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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

GUSTAVO VILLAGRANA, an individual, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
RECONTRUST COMPANY, N.A.; MORTGAGE )  
ELECTRONIC REGISTRATION SYSTEM, )  
INC.; EAGLE HOME MORTGAGE OF )  
CALIFORNIA INC.; FIRST CENTENNIAL )  
TITLE; JLM TITLE, LLC; DOE )  
INDIVIDUALS I-X; and ROE COMPANIES )  
I-X, inclusive )  
 )  
Defendants. )  
 )  
 )  
 )

3:11-cv-00652-ECR-WGC

Order

This case arises out of allegations that Defendants wrongfully foreclosed on Plaintiff's home. Now pending before the Court is a motion to dismiss (#7) filed by Defendants Countrywide Home Loans, Inc. ("Countrywide"), Mortgage Electronic Registration System, Inc. ("MERS"), and Recontrust Company, N.A. ("Recontrust"); Plaintiff's motion to remand (#9); Plaintiff's motion to strike and for sanctions and attorney's fees (#16); Defendants First Centennial Title ("First Centennial") and JLM Title, LLC's ("JLM") motion to dismiss (#22); Defendants Countrywide, MERS, and Recontrust's second motion to dismiss (#24); Plaintiff's motion to strike (#26); Plaintiff's motion for a preliminary injunction (#30); and Plaintiff's motion to amend complaint (#34). The motions are ripe and we now rule on them.

1 **I. Factual Background**

2 On or about June 1, 2007, Plaintiff and another individual  
3 executed a promissory note in the amount of \$250,000.00, Loan  
4 #A975008, in favor of Defendant Eagle Home Mortgage of California  
5 Inc. ("Eagle") in order to purchase the property located at 1004  
6 Stanford Drive, Carson City, Nevada 89701. (Amd. Compl. ¶¶ 1-2, 16-  
7 17 (#15); Deed of Trust<sup>1</sup> (#24-8).) The loan was secured with a Deed  
8 of Trust recorded on June 4, 2007 as document #368427. (Amd. Compl  
9 ¶ 2 (#15); Deed of Trust (#24-8).) The Deed of Trust names  
10 Defendant First Centennial as the trustee and Defendant MERS as the  
11 nominee of the lender and beneficiary. (Deed of Trust (#24-8).)  
12 The Deed of Trust allows the lender to appoint a substitute trustee  
13 and provides that "MERS holds only legal title to the interests  
14 granted by Borrower in this Security Instrument," but has the right  
15 to exercise the right to foreclose and sell the Property as a  
16 nominee of the lender. (Id.)

17 On February 24, 2009, Defendant MERS substituted Defendant  
18 Recontrust as trustee under the Deed of Trust via a Substitution of  
19 Trustee recorded on February 26, 2009. (Substitution of Trustee  
20 (#24-9).) Also on February 24, 2009, Defendant Recontrust executed  
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23 <sup>1</sup> Defendants Countrywide, MERS, and Recontrust have requested  
24 that the Court take judicial notice of relevant publicly recorded  
25 documents, copies of which are attached to their second motion to  
26 dismiss (#24). This Court takes judicial notice of these public  
27 records. See Disabled Rights Action Comm. v. Las Vegas Events, Inc.,  
375 F.3d 861, 866 n.1 (9th Cir. 2004) (the court may take judicial  
notice of the records of state agencies and other undisputed matters  
of public record under Fed. R. Evid. 201).

1 and recorded a Notice of Default and Election to Sell Under Deed of  
2 Trust. (Notice of Default (#24-10).)

3 On November 26, 2010, MERS executed an Assignment of Deed of  
4 Trust (the "2010 Assignment"), assigning the Deed of Trust and the  
5 underlying note to BAC Home Loans Servicing, LP f/k/a Countrywide  
6 Home Loans Servicing, LP ("BAC/Countrywide"). (2010 Assignment  
7 (#24-11).) The 2010 Assignment was recorded on November 30, 2010.  
8 (Id.) Also on November 30, 2010, BAC/Countrywide substituted  
9 Defendant Recontrust as trustee under the deed of trust. (Second  
10 Substitution of Trustee (#30-10).)

11 On July 18, 2011, Defendant Recontrust recorded a Notice of  
12 Trustee's Sale, setting the sale date for August 11, 2011. (Notice  
13 of Sale, (#24-12).) On August 9, 2011, BAC/Countrywide assigned the  
14 Deed of Trust and the underlying note to the Federal National  
15 Mortgage Association ("FNMA"), recording the document on August 19,  
16 2011 (the "2011 Assignment"). (2011 Assignment (#24-13).) On  
17 August 11, 2011 the property was sold at a Trustee's Sale, and FNMA  
18 purchased the property with a credit bid of \$236,446.80. (Trustee's  
19 Deed Upon Sale (#24-14).)

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## 21 II. Procedural Background

22 On August 11, 2011, Plaintiff filed the original complaint (#1-  
23 2) in the First Judicial District Court of the State of Nevada in  
24 and for Carson City. Defendants Mortgage Electronic Registration  
25 System, Inc. ("MERS"), Recontrust Company, N.A. ("Recontrust"), and  
26 Countrywide Home Loans, Inc. ("Countrywide") removed the action to

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1 this Court via petition for removal (#1) on September 9, 2011.  
2 Defendants First Centennial Title ("First Centennial") and JLM  
3 Title, LLC ("JLM") filed a joinder (#23) to the petition for  
4 removal(#1) on November 4, 2011.

5 Defendants Countrywide, MERS, and Recontrust filed a motion to  
6 dismiss (#7) on September 30, 2011. Plaintiff responded (#16) on  
7 October 20, 2011 and Defendants replied (#17) on October 25, 2011.  
8 Defendants First Centennial and JLM joined (#28) the motion to  
9 dismiss (#7) and the reply (#17) on December 7, 2011.

10 Plaintiff filed a motion to remand (#9) on October 12, 2011 and  
11 a corrected image (#13) of the motion of October 18, 2011.

12 Defendants Countrywide, MERS, and Recontrust responded (#20) on  
13 October 31, 2011. Plaintiff replied (#25) on November 10, 2011.

14 On October 20, 2011, Plaintiff filed the first amended  
15 complaint (#15) alleging three causes of action: (i) Unlawful or  
16 Fraudulent Foreclosure; (ii) Declaratory Relief; and (iii)  
17 Injunctive Relief.

18 On November 3, 2011, Defendants First Centennial and JLM filed  
19 a motion to dismiss (#22) the first amended complaint (#15).  
20 Plaintiff responded (#26) on November 23, 2011, and Defendants did  
21 not reply.

22 On November 4, 2011, Defendants Countrywide, MERS, and  
23 Recontrust filed a motion to dismiss (#24) the first amended  
24 complaint (#15). Plaintiff responded (#26) on November 23, 2011,  
25 and Defendants replied (#27) on December 5, 2011.

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1 Plaintiff filed a motion for preliminary injunction (#30) on  
2 December 9, 2011 and corresponding errata (#32) on December 21,  
3 2011. Defendants Countrywide, MERS, and Recontrust responded (#35)  
4 on January 3, 2012, and Plaintiff replied (#38) on January 16, 2012.

5 Plaintiff filed a motion to amend complaint (#34) on December  
6 21, 2011. Defendants First Centennial and JLM responded (#36) on  
7 January 6, 2012, and Defendants Countrywide, MERS, and Recontrust  
8 responded (#37) on January 9, 2012. Plaintiff did not file a reply.

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### III. Discussion

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#### **A. Plaintiff's Motion to Amend Complaint (#34)**

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Pursuant to Federal Rule of Civil Procedure 15(a), leave to amend is to be "freely given when justice so requires." In general, amendment should be allowed with "extreme liberality." Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 712 (9th Cir. 2001) (quoting Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990)). If factors such as undue delay, bad faith, dilatory motive, undue prejudice, or futility of amendment are present, leave to amend may properly be denied in the district court's discretion. Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1051-52 (9th Cir. 2003). The futility analysis determines whether the proposed amendment would survive a motion to dismiss pursuant to Rule 12(b)(6). Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988).

Plaintiff seeks leave to amend the first amended complaint (#15) for the following reasons: (i) to remove causes of action

1 previously pled; (ii) to make further allegations against Defendant  
2 First Centennial in its capacity as a trustee under the Deed of  
3 Trust; (iii) to make further allegations against Defendant MERS; and  
4 (iv) to name as a new defendant and make allegations against the  
5 Federal National Mortgage Association ("FNMA") in light of newly  
6 discovered evidence. For the reasons stated below, the Court will  
7 deny leave to amend the complaint.

8       With regard to amending the complaint in order to remove causes  
9 of action for unjust enrichment, slander of title, and civil  
10 conspiracy or alternatively civil rights violation, Plaintiff  
11 seemingly has neglected the fact that the original complaint (#1-2)  
12 has already been amended, and the first amended complaint (#15) has  
13 already eliminated the three causes of action Plaintiff now seeks to  
14 remove. It would therefore prove futile to grant leave to amend in  
15 order to remove these three claims, so we will not grant leave on  
16 this basis.

17       We also find that it would prove futile to allow Plaintiff to  
18 amend the complaint in order to make further allegations against  
19 Defendant First Centennial. In the proposed amended complaint,  
20 Plaintiff alleges that First Centennial, as named trustee in the  
21 Deed of Trust, breached its duties of "independence" and  
22 "impartiality" by failing to warn Plaintiff that the other  
23 Defendants had falsely "usurped" First Centennial's role as trustee.  
24 First, Plaintiff cannot establish that First Centennial owed  
25 Plaintiff any duty to inform him of the conduct of the other  
26 Defendants. See Brown v. Fed. Home Loan Mortg. Corp., No. 2:11-CV-

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1 01228, 2011 WL 5877545, at \*2 (D. Nev. Nov. 23, 2011) (“[The  
2 trustee] asserts that all other claims must also be dismissed,  
3 because a trustee owes no duties other than those required by  
4 statute. . . . [T]he Court agrees that [the trustee] does not owe  
5 special duties to Plaintiff.”); Padilla v. PNC Mortg., No. 3:11-cv-  
6 0326, 2011 WL 3585484, at \*3 (D. Nev. Aug. 15, 2011) (“Because  
7 plaintiffs have failed to allege sufficient facts to establish that  
8 defendants acted outside their capacities as adverse parties -  
9 namely as lender, loan service, trustee and title recordation  
10 company - during the non judicial foreclosure process, which does  
11 not in itself create a fiduciary relationship, plaintiffs’ claim for  
12 breach of fiduciary duty fails to state a claim upon which relief  
13 can be granted.”) (emphasis added). “There is no fiduciary duty  
14 where, as here, the parties engaged in arms-length transactions  
15 while having diverse interests. Absent a duty, there can be no  
16 breach.” Padilla, 2011 WL 3585484, at \*3 (citing A.C. Shaw Constr.  
17 v. Washoe Cty., 784 P.2d 9, 10 (Nev. 1989)). Moreover, the Nevada  
18 Legislature recently ratified the Court’s understanding that  
19 trustees generally have no duties to homeowners in Plaintiff’s  
20 position by amending Chapter 107 of the Nevada Revised Statutes to  
21 include the following: “The trustee does not have a fiduciary  
22 obligation to the grantor or any other person having an interest in  
23 the property which is subject to the deed of trust.” NEV. REV. STAT.  
24 § 107.028(5). For these reasons, a claim that Defendant First  
25 Centennial breached its duty to Plaintiff as a named trustee on the  
26 Deed of Trust would not survive motion to dismiss - without a duty,

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1 there can be no breach. We will therefore deny leave to amend to  
2 include these allegations against First Centennial for reason of  
3 futility.

4 We likewise find that allowing Plaintiff to augment his claims  
5 against Defendant MERS would prove futile. For the most part,  
6 Plaintiff's claim that the foreclosure was "fraudulent" because MERS  
7 held no beneficial interest in the deed or trust and was therefore  
8 without power to assign the beneficial interest in the deed of trust  
9 has been stated exhaustively in the first amended complaint. The  
10 only new allegations with regard to MERS in the proposed amended  
11 complaint contend that the various recorded documents, such as the  
12 substitutions of trustee and the assignments of the deed of trust,  
13 are void because they were not properly notarized. These  
14 allegations are completely without merit: Plaintiff baldly asserts  
15 that the notarizations on the Substitution of Trustee (#24-9) and  
16 the 2010 Assignment (#24-11) do not comply with Nevada law, but  
17 fails to say why or otherwise allege a statutory defect. Moreover,  
18 the Court has examined the judicially noticed documents at issue,  
19 and finds that they comply with Nev. Rev. Stat. § 240.1655 and §  
20 240.166. Because Plaintiff has provided no reason why these notary  
21 acknowledgments are faulty, and because these allegations would not  
22 survive a motion to dismiss, the Court will not permit Plaintiff to  
23 amend the complaint on this basis due to futility.

24 Finally, Plaintiff seeks leave to amend in order to include a  
25 new Defendant, FNMA. Plaintiff claims that he did not know that  
26 FNMA came to own Plaintiff's mortgage until he obtained a copy of  
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1 the Trustee's Deed Upon Sale (#24-14), which was recorded on August  
2 19, 2011, eight days after Plaintiff filed the original complaint  
3 (#1-2) on August 11, 2011. However, Plaintiff was on notice of  
4 FNMA's ownership of the property when Plaintiff filed the first  
5 amended complaint (#15) on October 20, 2011. Plaintiff's motion to  
6 add FNMA as a defendant is therefore unduly delayed.

7 Further, the Court finds that granting Plaintiff leave to amend  
8 to add allegations against FNMA would prove futile. Plaintiff  
9 contends that FNMA and the other Defendants unlawfully concealed  
10 FNMA's interest in the loan in violation of Nevada's non-judicial  
11 foreclosure statute, Nev. Rev. Stat. § 107.080. Plaintiff further  
12 objects that FNMA and the named Defendants did not have authority to  
13 foreclose on Plaintiff's property, also in violation of Nev. Rev.  
14 Stat. § 107.080 and Nevada's statute of frauds, Nev. Rev. Stat. §  
15 111.205. Finally, Plaintiff has obtained evidence that customer  
16 service representatives for FNMA that FNMA acquired Plaintiff's loan  
17 on July 1, 2007. However, as will be described in further detail  
18 below with regard to the pending motions to dismiss, the Court has  
19 reviewed the judicially noticed recorded documents, and finds that  
20 Defendants have complied with the requirements of Nev. Rev. Stat. §  
21 107.080. Trustees were properly substituted, and the beneficial  
22 interest was properly assigned, and Defendants had authority to  
23 foreclose on Plaintiff's property. Moreover, Plaintiff's wrongful  
24 foreclosure claim is foreclosed by Plaintiff's failure of  
25 performance on the mortgage. An action for the tort of wrongful  
26 foreclosure will lie only "if the trustor or mortgagor can establish

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1 that at the time the power of sale was exercised or the foreclosure  
2 occurred, no breach of condition or failure of performance existed  
3 on the mortgagor's or trustor's part which would have authorized the  
4 foreclosure or exercise of the power of sale." Collins v. Union  
5 Fed. Sav. & Loan Ass'n, 662 P.2d 610, 623 (Nev. 1983). The fact  
6 that Plaintiff failed to make the required payments on the loan is  
7 unchanged by affidavits suggesting that FNMA may have acquired the  
8 loan in 2007. Because Plaintiff's claim against FNMA would not  
9 survive a motion to dismiss, the Court will deny leave to amend to  
10 include allegations against FNMA.

11 **B. Plaintiff's Motion to Remand (##9, 13)<sup>2</sup>**

12 Under the federal removal statute, 28 U.S.C. § 1441, "any civil  
13 action brought in a State court of which the district courts of the  
14 United States have original jurisdiction, may be removed by the  
15 defendant or the defendants, to the district court of the United  
16 States for the district and division embracing the place where such  
17 action is pending." 28 U.S.C. § 1441(a). Removal of a case to a  
18 United States District Court may be challenged by motion, and a  
19 federal court must remand a matter if there is a lack of  
20 jurisdiction. 28 U.S.C. § 1441(c). Removal statutes are construed  
21 restrictively and in favor of remanding a case to state court. See

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23 <sup>2</sup> In the motion for leave to file an amended complaint (#34),  
24 Plaintiff's concede that federal jurisdiction is proper because  
25 Plaintiff seeks to include a federal agency, FNMA, as a defendant in  
26 the proposed amended complaint. However, the status of FNMA as a  
27 federal agency has no bearing on this Court's jurisdiction. Further,  
28 a party may not consent to subject matter jurisdiction, and federal  
court have a continuing independent obligation to determine whether  
subject matter jurisdiction exists. Arbaugh v. Y&H Corp., 546 U.S.  
500, 515 (2006) (citations omitted).

1 Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-09 (1941);  
2 Gaus v. Miles, Inc., 980 F.2 564, 566 (9th Cir. 1992). On a motion  
3 to remand, the removing defendant faces a strong presumption against  
4 removal and bears the burden of establishing that removal is proper.  
5 Gaus, 980 F.2d at 566-67; Sanchez v. Monumental Life Ins. Co., 102  
6 F.3d 398, 403-04 (9th Cir. 1996).

7 A district court has original jurisdiction over civil actions  
8 where the suit is between citizens of different states and the  
9 amount in controversy, exclusive of interest and costs, exceeds  
10 \$75,000.00. 28 U.S.C. § 1332(a). Further, an action based on  
11 diversity jurisdiction is "removable only if none of the parties in  
12 interest properly joined and served as defendants is a citizen of  
13 the state in which such action is brought." 28 U.S.C. § 1441(b).  
14 Here, Plaintiff contends the parties are not completely diverse for  
15 the purposes of federal diversity jurisdiction. Specifically,  
16 Plaintiff alleges that Defendant First Centennial Title is a  
17 registered as doing business as JLM Title, LLC ("JLM"), a Nevada  
18 limited liability company. Defendants counter that non-diverse  
19 Defendants First Centennial and JLM are fraudulently joined  
20 defendants whose Nevada citizenship cannot be used to defeat the  
21 exercise of diversity jurisdiction.<sup>3</sup>

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23 <sup>3</sup> Defendants also argue that the motion to remand (#9) is  
24 untimely and that the Court may also exercise federal question  
25 jurisdiction. Their arguments are unavailing. Under 28 U.S.C. §  
26 1447(c) which provides as follows: "A motion to remand the case on the  
27 basis of any defect other than lack of subject matter jurisdiction  
28 must be made within 30 days after the filing of the notice of removal  
under 1446(a)." However, by the very terms of the statute, this time  
limit does not apply where, as here, the motion to remand is based on  
a lack of subject matter jurisdiction. Further, "[t]he presence or

1 A fraudulently joined defendant does not "defeat removal on  
2 diversity grounds." Ritchey v. Upjohn Drug Co., 139 F.3d 1313, 1318  
3 (9th Cir. 1998). Fraudulent joinder "occurs when a plaintiff fails  
4 to state a cause of action against a resident defendant, and the  
5 failure is obvious according to the settled rules of the state."  
6 Id. at 1318; see also Kruso v. Int'l Tel. & Tel. Corp., 872 F.2d  
7 1416, 1426-27 (9th Cir. 1989); McCabe v. Gen. Foods Corp., 811 F.2d  
8 1336, 1339 (9th Cir. 1987). In determining whether a cause of  
9 action is stated against a non-diverse defendant, a court looks only  
10 to a plaintiff's pleadings. Gardner v. UICI, 508 F.3d 559, 561 n.3  
11 (9th Cir. 2007).

12 In the first amended complaint (#15), Plaintiff's only  
13 allegation against Defendants First Centennial, doing business as  
14 Defendant JLM, is that it was the original trustee on the Deed of  
15 Trust. However, First Centennial/JLM was substituted out as the  
16 trustee prior to the filing of the underlying Notice of Default and  
17 the initiation of non judicial foreclosure proceedings. Plaintiff  
18 has failed to allege that First Centennial and/or JLM took any  
19 action in furthering the allegedly wrongful foreclosure of the  
20 property. Furthermore, as stated above with regard to Plaintiff's

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22 absence of federal-question jurisdiction is governed by the 'well-  
23 pleaded complaint rule,' which provides that federal jurisdiction  
24 exists only when a federal question is presented on the face of the  
25 plaintiff's properly pleaded complaint." Caterpillar Inc., 482 U.S.  
26 at 392 (citing Gully v. First Nat'l Bank, 299 U.S. 109, 112-13  
27 (1936)). The first amended complaint (#15) could not possibly be read  
28 to present a federal question as it relies entirely on state  
foreclosure law. Defendants argument that the complaint's reference  
to the Nevada Constitution somehow involves the Federal Constitution  
is nonsensical. Accordingly, federal question jurisdiction is absent.

1 motion to amend the complaint, Plaintiff cannot establish that a  
2 trustee breached any duties to Plaintiff because the trustee owed  
3 Plaintiff no duty as a matter of law. See Brown v. Fed. Home Loan  
4 Mortg. Corp., No. 2:11-CV-01228, 2011 WL 5877545, at \*2 (D. Nev.  
5 Nov. 23, 2011) (“[The trustee] asserts that all other claims must  
6 also be dismissed, because a trustee owes no duties other than those  
7 required by statute. . . . [T]he Court agrees that [the trustee]  
8 does not owe special duties to Plaintiff.”). Plaintiff has  
9 therefore failed to state a cause of action against First Centennial  
10 and JLM. The Court finds that non-diverse defendants First  
11 Centennial and JLM were fraudulently joined defendants whose  
12 citizenship does not defeat the exercise of diversity jurisdiction.  
13 As there is complete diversity among the parties, the exercise of  
14 diversity jurisdiction is appropriate and Plaintiff’s motion to  
15 remand must be denied.

16 **C. Defendants’ Motions to Dismiss (##22, 24)**

17 1. Plaintiff’s First Cause of Action for “Unlawful or  
18 Fraudulent Foreclosure”

19 Plaintiff claims that the foreclosure on his home is unlawful  
20 because Defendants have not produced documents establishing their  
21 authority to foreclose. Plaintiff’s claim is completely without  
22 merit and belied by the judicially noticed documents. The facts  
23 delineated above indicate a statutorily valid foreclosure where in  
24 trustees were properly substituted and beneficial interests were  
25 properly assigned via properly notarized and publicly recorded  
26 documents. To the extent that Plaintiff’s claim rests primarily on  
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1 the theory that MERS did not have the authority to assign the  
2 beneficial interest in the underlying note, Courts in this district  
3 have held otherwise. In Smith v. Community Lending, Inc., the Court  
4 examined language in the deed of trust identical to the language in  
5 the Deed of Trust in this case<sup>4</sup> and found that it was sufficient to  
6 grant MERS authority to assign the beneficial interest in the  
7 underlying debt:

8 [T]his language clarifies the scope of MERS' agency on  
9 behalf of the beneficiary (the lender). It indicates that  
10 not only the trustee, as is the custom, but also MERS  
11 under this deed of trust, may initiate foreclosure. The  
12 Court is also convinced that this language is clear  
13 enough, in conjunction with the (improper) identification  
14 of MERS as the beneficiary, to indicate that the parties  
15 intended MERS would be able to transfer the beneficial  
16 interest in the underlying debt directly. Although MERS  
17 is not in fact the beneficiary, the attempt to name it as  
18 such coupled with the above-quoted language indicates an  
19 intent to give MERS the broadest possible agency on behalf  
20 of the owner of the beneficial interest in the underlying  
21 debt. Such agency would include the ability to sell the  
22 interest in the debt.

23 773 F.Supp.2d 941, 944 (D.Nev. 2011). For this reason, MERS had the  
24 power to assign the beneficial interest in the underlying note from  
25 the original lender, Eagle Mortgage to BAC/Countrywide via the 2010  
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27 <sup>4</sup> The identical language in the deed of trust in Smith and in the  
28 Deed of Trust (#24-8) here provides as follows:

29 Borrower understands and agrees that MERS holds only legal  
30 title to the interests granted by Borrower in this Security  
31 Instrument, but, if necessary to comply with law or  
32 custom, MERS (as nominee for Lender and Lender's successors  
33 and assigns) has the right: to exercise any and all of  
34 those interests, including, but not limited to, the right  
35 to foreclose and sell the Property; and to take any action  
36 required of Lender, including but not limited to, releasing  
37 and cancelling this Security Instrument.

38 Smith, 773 F.Supp.2d at 943-44; Deed of Trust at 3 (#24-8).

1 Assignment (#24-11). Moreover, the 2010 Assignment and the 2011  
2 Assignment meet the requirements of the recent Nevada Supreme Court  
3 decision Levy v. National Default Servicing Corp., which held that  
4 an obligor, such as Plaintiff, has the right to know the identity of  
5 the entity that is entitled to enforce the mortgage note. 255 P.3d  
6 1275, 1279-80 (Nev. 2011). See also Foust v. Wells Fargo, N.A., No.  
7 55520, 2011 WL 3298915, at \*2 (Nev. Jul. 29, 2011) (holding that  
8 plaintiffs stated a claim where foreclosing defendant could not  
9 produce documents establishing a valid assignment of the underlying  
10 debt). Plaintiff was provided with the identities of the entities  
11 with authority to enforce the note via these publicly recorded  
12 assignments.

13 Furthermore, even if the 2010 Assignment or the 2011 Assignment  
14 are invalid, Plaintiff does not have standing to challenge its  
15 validity because Plaintiff is neither a party to nor a third-party  
16 beneficiary of the contract between the assignors and assignees -  
17 only the parties to those transactions would have standing to  
18 challenge their validity. See Smith, 773 F.Supp.2d at 922 ("The  
19 lender or its assigns (the true beneficiary) would of course have  
20 standing to challenge MERS' actions on its behalf - for example, if  
21 MERS absconded with the proceeds of such a sale - but no entity  
22 claiming to hold the underlying debt has made any such challenge  
23 here.").

24 Finally, an action for the tort of wrongful foreclosure,  
25 whether or not Plaintiff properly labels it as such, will lie only  
26 "if the trustor or mortgagor can establish that at the time the  
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1 power of sale was exercised or the foreclosure occurred, no breach  
2 of condition or failure of performance existed on the mortgagor's or  
3 trustor's part which would have authorized the foreclosure or  
4 exercise of the power of sale." Collins, 662 P.2d at 623 (Nev.  
5 1983). The "material issue of fact in a wrongful foreclosure claim  
6 is whether the trustor was in default when the power of sale was  
7 exercised." Id. Plaintiff has failed to allege that he was not in  
8 default.

9 For these three reasons, Plaintiff has failed to state a cause  
10 of action against Defendants for wrongful foreclosure, and  
11 Plaintiff's first cause of action must be dismissed.

12 2. Plaintiff's Second and Third Causes of Action for  
13 Declaratory and Injunctive Relief

14 Injunctive and declaratory relief are remedies, not independent  
15 causes of action. Parker v. Greenpoint Mortg. Funding Inc., No.  
16 3:11-cv-00039-ECR-RAM, 2011 WL 2923949, at \*5 (D. Nev. Jul. 15,  
17 2011); In re Wal-Mart Wage & Hour Emp't Practices Litig., 490  
18 F.Supp.2d 1091, 1130 (D. Nev. 2007). Because we have dismissed  
19 Plaintiff's single substantive cause of action for unlawful  
20 foreclosure, Plaintiff's second and third causes of action for  
21 declaratory and injunctive relief must also be dismissed.

22 Accordingly, Defendants' motions to dismiss (#22, 24) will be  
23 granted.

24 **D. Plaintiff's Motion for Preliminary Injunction (#30)**

25 Plaintiff requests that the Court issue a preliminary  
26 injunction precluding an eviction and allowing Plaintiff to stay on  
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1 the property. "A plaintiff seeking a preliminary injunction must  
2 establish that he is likely to succeed on the merits, that he is  
3 likely to suffer irreparable harm in the absence of preliminary  
4 relief, that the balance of equities tips in his favor, and that an  
5 injunction is in the public interest." Winter v. Natural Res. Def.  
6 Council, Inc., 555 U.S. 7, 20 (2008). In foreclosure cases, because  
7 "real property and its attributes are considered unique and loss of  
8 real property rights generally results in irreparable harm," the  
9 second factor of a requisite for a preliminary injunction is often  
10 satisfied. Dixon v. Thatcher, 742 P.2d 1029, 1029 (Nev. 1987).  
11 However, as discussed with regard to the motions to dismiss,  
12 Plaintiff has failed to show a reasonable probability of success on  
13 the merits. Because we dismiss all of Plaintiff's claims, a  
14 preliminary injunction will not issue.

15 **E. Plaintiff's Requests for Sanctions, Attorney's Fees, and to**  
16 **Strike (#16, 26)**

17 In Plaintiff's responses (##16, 26) to Defendants' motions to  
18 dismiss, Plaintiff requests that Defendants' motions be stricken  
19 pursuant to Federal Rule of Civil Procedure 12(f), that Defendants  
20 be sanctioned, and that Plaintiff be awarded attorney's fees because  
21 Defendants cite to unpublished opinions. First, should Plaintiff's  
22 counsel seek sanctions, fees, or to strike Defendants' motions,  
23 counsel should do so in a proper motion before the Court properly  
24 supported by a memorandum of points and authorities and should not  
25 submit such "requests" in untimely responses to Defendants' motions  
26 to dismiss. See Local Rule 7-2. Second, Plaintiffs' substantive

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1 arguments are completely without merit and borderline frivolous. It  
2 is true that unpublished district court opinions are not  
3 precedential; however, they may be considered for their persuasive  
4 authority. In re Van Wagoner Funds, Inc. Sec. Litig., 382 F.Supp.2d  
5 1173, 1182 n.5 (N.D.Cal. 2004) (citing Herring v. Teradyne, Inc.,  
6 256 F.Supp.2d 1118, 1128 n.2 (S.D.Cal. 2002)). The citation to  
7 unpublished opinions does not run counter to Local Rule 7-3(b),  
8 which merely states the Court's preferred citation form for opinions  
9 that have been reported in the Federal Report System. Rule 7-3(b)  
10 does not speak to unreported cases. Furthermore, the Ninth Circuit  
11 now explicitly allows citation of *its* unpublished decisions. United  
12 States v. Soto-Castelo, 621 F.Supp.2d 1062, 1069 n.2 (D. Nev. 2008)  
13 ("Under Ninth Circuit Rule 36-3, unpublished dispositions and order  
14 of the court issued on or after June 1, 2007 may be cited to the  
15 courts of this circuit in accordance with Fed. R. App. P. 32.1, but  
16 are not precedent except when relevant under the doctrine of law of  
17 the case or rules of claim preclusion and issue preclusion.").  
18 Finally, Plaintiff's motions and citations to authority themselves  
19 often violate Local Rule 7-3(b), as Plaintiff does not provide the  
20 proper citation form for Nevada Supreme cases, and Plaintiff cites  
21 to Westlaw summaries and does not provide the specific pages upon  
22 which the pertinent language appears. (See, e.g. Mot. Prelim. Inj.  
23 at 3, 14 (#30); Opp'n Mot. Dismiss at 5, 7 (#26)). For these  
24 reasons, Plaintiff's "requests" will be denied.

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1 **IV. Conclusion**

2 Plaintiff's motion to amend will be denied as leave to amend  
3 would prove futile: Plaintiff cannot state a cause of action against  
4 First Centennial and JLM in their capacity as the original trustee  
5 on the Deed of Trust, and Plaintiff cannot state a cause of action  
6 against FNMA for wrongful foreclosure. Moreover, the Court may  
7 validly exercise its diversity jurisdiction because non-diverse  
8 Defendants First Centennial and JLM were fraudulently joined.  
9 Plaintiff's wrongful foreclosure claim fails because MERS had the  
10 authority to assign the beneficial interest in the Deed of Trust and  
11 the underlying note and Plaintiff failed to make payments. The  
12 substitutions of trustees and the assignments all comport with the  
13 law and were properly recorded. Plaintiff was advised of the holder  
14 of the note. Because we dismiss all of Plaintiff's claim, we will  
15 not issue a preliminary injunction as Plaintiff cannot demonstrate a  
16 likelihood of success on the merits.

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18 **IT IS, THEREFORE, HEREBY ORDERED** that Defendants Countrywide,  
19 MERS, and Recontrust's motion to dismiss (#7) is **DENIED** as moot due  
20 to the subsequent filing of an amended complaint.

21 **IT IS FURTHER ORDERED** that Plaintiff's motion to remand (#9) is  
22 **DENIED**.

23 **IT IS FURTHER ORDERED** that Plaintiff's motion to strike and for  
24 sanctions and attorney's fees (#16) is **DENIED**.

25 **IT IS FURTHER ORDERED** that Defendants' motions to dismiss (#22,  
26 24) are **GRANTED**.

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IT IS FURTHER ORDERED that Plaintiff's motion to strike (#26) is DENIED.

IT IS FURTHER ORDERED that Plaintiff's motion for a preliminary injunction (#30) is DENIED.

IT IS FURTHER ORDERED that Plaintiff's motion to amend complaint (#34) is DENIED.

The Clerk shall enter judgment accordingly.

DATED: May 22, 2012.

  
UNITED STATES DISTRICT JUDGE