

1 that show the absence of a genuine issue of material fact (Fed. R. Civ. P. 56(c)(1)). Once the
2 moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party
3 fails to identify specific factual disputes that must be resolved at trial. Hexcel Corp. v. Ineos
4 Polymers, Inc., 681 F.3d 1055, 1059 (9th Cir. 2012). The mere existence of a scintilla of
5 evidence in support of the non-moving party's position will not preclude summary judgment,
6 however, unless a reasonable jury viewing the evidence in the light most favorable to the non-
7 moving party could return a verdict in its favor. U.S. v. Arango, 670 F.3d 988, 992 (9th Cir.
8 2012).

9 Plaintiff's First Amended Complaint tells the story of how the mortgage industry
10 created and used MERS to reduce its costs, increase efficiency and the liquidity of mortgages,
11 and circumvent the traditional system of public recordation of mortgages. The Washington State
12 Supreme Court tells much the same story in Bain v. Metropolitan Mortg. Group, Inc., 175 Wn.2d
13 83 (2012), and specifically notes that there may be serious consequences arising from the
14 industry's arrangement (such as the deed of trust becoming unenforceable, the unavailability of
15 the nonjudicial foreclosure procedures set forth in the DTA, and/or potential liability under the
16 Washington Consumer Protection Act). The question before the Court, however, is whether
17 MERS violated a contractual promise, not whether MERS or other entities complied with the
18 DTA.

19 Plaintiff's complaint is virtually silent regarding the contract at issue and/or the
20 promise that was breached. Plaintiff focuses his attention on the assignment of the deed of trust
21 recorded in March 2011, arguing that MERS had no interest to assign and therefore lied in a
22 publicly-recorded document. The assignment is not, however, a contract: even if MERS'
23 representations therein were false, a breach of contract action would not exist. The only contract
24 potentially at issue is the deed of trust itself, but it is not clear what provision MERS is supposed
25 to have breached. Plaintiff objects to the fact that MERS is identified as the "beneficiary" of the
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1 deed of trust when it never had possession of the underlying debt instrument. The fact that the
2 parties to the contract called MERS the “beneficiary” is simply a label: it does not, in and of
3 itself, constitute a promise, give rise to a breach, or cause damage. Subsequent acts taken in the
4 role of “beneficiary” may have been unauthorized if, in fact, “beneficiary” status did not exist,
5 but plaintiff has not shown that MERS breached a promise made in either the deed of trust or the
6 assignment document.

7 Because plaintiff failed to raise a genuine issue of material fact regarding his
8 breach of contract claim, MERS is entitled to summary judgment.

9 **B. Plaintiff’s Motion to Amend**

10 Plaintiff seeks to add Rebecca Higley, an employee of MERS, as a named
11 defendant, arguing that MERS’ breach of contract may have been innocent and attributable to a
12 fraud or misrepresentation perpetrated by Ms. Higley. Plaintiff alleges that Ms. Higley executed
13 and caused to be recorded a false and ineffective assignment of deed of trust. The assignment is
14 invalid, according to plaintiff, because MERS had no beneficial interest to convey. Plaintiff
15 alleges that Ms. Higley either knew or should have known at the time she signed the assignment
16 that MERS did not have possession of the note and was not, therefore, a proper beneficiary
17 under the DTA. The assignment set in motion a course of events which ultimately deprived
18 plaintiff of his property through a nonjudicial foreclosure sale. Plaintiff argues that Ms. Higley
19 should be added as a named defendant because she may have been acting outside the scope of
20 her employment contract with MERS or in conjunction with MERS.¹

21 Courts “should freely give leave [to amend] when justice so requires.” Fed. R.
22 Civ. P. 15(a)(2). There is a “strong policy in favor of allowing amendment” after “considering
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24 ¹ Plaintiff requests that the undersigned refer this matter to the United States Department of
25 Justice or a federal grand jury for investigation. The Court will not interfere in the Executive Branch’s
26 prosecutorial and investigative decisions.

1 four factors: bad faith, undue delay, prejudice to the opposing party, and the futility of
2 amendment.” Kaplan v. Rose, 49 F.3d 1363, 1370 (9th Cir. 1994).² The underlying purpose of
3 Rule 15 is “to facilitate decision on the merits, rather than on the pleadings or technicalities.”
4 Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000). Amendment will be denied, however,
5 “when the movant presented no new facts but only new theories and provided no satisfactory
6 explanation for his failure to fully develop his contentions originally.” Vincent v. Trend W.
7 Tech. Corp., 828 F.2d 563, 570-71 (9th Cir. 1987) (internal quotation marks omitted).

8 Plaintiff is proceeding *pro se* in this litigation. Although he mentions the phrase
9 “indispensable party” in the heading of his argument (Dkt. # 40 at 8), he does not cite Fed. R.
10 Civ. P. 19 and the gist of his argument is clearly a request for leave to amend his complaint to
11 add Ms. Higley as a defendant and to assert a claim of common law fraud against her. Such
12 motions are governed by Fed. R. Civ. P. 15. Defendant, however, chose to oppose the motion to
13 amend solely on the ground that the pending breach of contract claim can be resolved without
14 Ms. Higley’s participation. Defendant did not address the timing of plaintiff’s motion, the
15 sufficiency of the allegations in support of the fraud claim, or issues of bad faith or delay. The
16 Court declines to *sua sponte* consider the factors that are relevant to a Rule 15 motion to amend
17 and will therefore allow plaintiff to amend his complaint.


18 19 CONCLUSION

20 For all of the foregoing reasons, MERS’ motion for summary judgment on
21 plaintiff’s breach of contract claim (Dkt. # 39) and plaintiff’s motion to amend the complaint
22 (Dkt. # 40) are GRANTED. Plaintiff shall, within 21 days of the date of this Order, file a second
23 amended complaint adding Rebecca Higley as a defendant and asserting a common law fraud

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25 ² The Ninth Circuit also takes into consideration whether plaintiff has previously amended the
26 complaint. Nunes v. Ashcroft, 375 F.3d 805, 808 (9th Cir. 2004).

1 claim against her. Failure to file a timely amended complaint will result in the termination of
2 this action. All existing claims against all other defendants have been dismissed and will not be
3 revived through this amendment.

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5 Dated this 6th day of December, 2012.

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7 Robert S. Lasnik
8 United States District Judge
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