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2 NOT FOR PUBLICATION

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6 IN THE UNITED STATES DISTRICT COURT

7 FOR THE DISTRICT OF ARIZONA

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9 SHERRYL L. MADISON,) No. CV-08-1562-PHX-GMS

10 Plaintiff,) **ORDER**

11 vs.)

12)

13 FIRST MAGNUS FINANCIAL)
CORPORATION, et al.,)

14 Defendants.)

15)

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17 Pending before the Court are: (1) the Motions to Dismiss of Defendants Litton Loan
18 Servicing and U.S. Bank National Association (Dkt. # 189), Defendants HomEq Servicing
19 and Mortgage Electronic Registration Systems (Dkt. # 192), Defendant Washington Mutual
20 Bank (Dkt. # 211), Defendants DHI Title of Arizona and Eva Espinoza (Dkt. # 214), and
21 Defendant Sterling Mortgage (Dkt. # 225); (2) Defendants GMAC Mortgage, Homecomings
22 Financial, and Executive Trustee Services joinder in the Motion to Dismiss of Defendants
23 Fremont Investment & Loan and Mortgage Electronic Registration Systems (Dkt. # 215); (3)
24 the Motions for Summary Disposition of Defendants DHI Title of Arizona and Eva Espinoza
25 (Dkt. # 246) and Defendants HomEq Servicing (Dkt. # 251); (4) Defendants GMAC
26 Mortgage, Homecomings Financial, and Executive Trustee Services joinder in the Motion
27 for Summary Disposition of Defendants DHI Title of Arizona and Eva Espinoza (Dkt. #

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1 248); and (5) the Motion for Protective Order of DHI Title and Eva Espinoza (Dkt. # 249).
2 For the following reasons, the Court grants the motions.

3 **I. Motions to Dismiss/Motions for Summary Disposition**

4 Local Rule 7.2(c) states that “[t]he opposing party shall . . . have ten (10) days after
5 service in a civil or criminal case within which to serve and file a responsive memorandum.”
6 On July 22, 2009, the Court informed Plaintiff that she had failed to comply with Local Rule
7 7.2(c) and extended the time in which Plaintiff could respond to the motions filed by
8 Defendants Litton Loan Servicing, U.S. Bank National Association, HomeEq Servicing,
9 Mortgage Electronic Registration Systems, Washington Mutual Bank, DHI Title of Arizona,
10 Eva Espinoza, Sterling Mortgage, GMAC Mortgage, Homecomings Financial, and Executive
11 Trustee Services, to and including August 7, 2009. (Dkt. # 231.) Plaintiff was warned that
12 failure to file a response brief “may be deemed consent to the . . . granting of the motion and
13 the Court may dispose of the motions summarily” (*id.* at 2), and this “could result in the
14 dismissal of certain claims and defendants” (*id.*). Despite the warning and extension of time,
15 Plaintiff failed to file responses to the motions.

16 Local Rule 7.2(i) provides that an unrepresented party’s failure to respond to a motion
17 “may be deemed consent to the . . . granting of the motion and the Court may dispose of the
18 motion summarily.” LRCiv 7.2(i); *see also Ghazali v. Moran*, 46 F.3d 52, 54 (9th Cir. 1995)
19 (holding that a district court did not err in dismissing a pro se plaintiff’s complaint for failing
20 to comply with a local rule); *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir. 1992)
21 (holding that a district court did not abuse its discretion in dismissing a pro se plaintiff’s
22 complaint for failing to comply with a court order). The Ninth Circuit has made clear that
23 “[p]ro se litigants must follow the same rules of procedure that govern other litigants.” *King*
24 *v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1986); *see also Jacobsen v. Filler*, 790 F.2d 1362,
25 1364-65 (9th Cir. 1986) (stating that pro se litigants should not be treated more favorably
26 than parties represented by attorneys).

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1 The Ninth Circuit has established

2 a five-part test to determine whether the dismissal sanction is
3 just: (1) the public's interest in expeditious resolution of
4 litigation; (2) the court's need to manage its docket; (3) the risk
5 of prejudice to the party seeking sanctions; (4) the public policy
6 favoring disposition of cases on their merits; and (5) the
7 availability of less drastic sanctions.

8 *Valley Eng'rs Inc. v. Elec. Eng'g Co.*, 158 F.3d 1051, 1057 (9th Cir. 1998) (internal
9 quotations omitted); *see also Ferdik*, 963 F.2d at 1260. However, "[t]his 'test' is not
10 mechanical. It provides the district court with a way to think about what to do, not a set of
11 conditions precedent for sanctions or a script that the district court must follow[.]" *Conn.*
12 *Gen. Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091, 1096 (9th Cir. 2007).
13 "[W]here a court order is violated, factors 1 and 2 support sanctions and 4 cuts against case-
14 dispositive sanctions, so 3 and 5 . . . are decisive." *Valley Eng'rs*, 158 F.3d at 1057.

15 **Factor 3 – Risk of Prejudice to Defendants**

16 Here, Defendants will be prejudiced by Plaintiff's ongoing refusal to respond to their
17 motions to dismiss and failure to comply with the Court's orders. Defendants have expended
18 significant amounts of time and finances to timely address Plaintiff's claims. Plaintiff's
19 failure to respond, if permitted to continue, would only frustrate Defendants' efforts and
20 cause them to incur additional expenses.

21 In the Second Amended Complaint ("SAC"), Plaintiff again asserts collective
22 allegations of misconduct giving rise to twenty-two causes of action against all named
23 defendants, despite the fact that the majority of the defendants were apparently involved with
24 only one of Plaintiff's six properties and despite the fact that many of the defendants were
25 not involved during the times in which Plaintiff either refinanced or purchased her properties.
26 (See Dkt. # 181.) Plaintiff included collective allegations and claims in her SAC despite the
27 Court's Order explaining why doing so is improper and despite the Court's explicit direction
28 that she "specifically allege each legal right Plaintiff believes was violated, the specific
defendant(s) who violated the right, a sufficient factual context under *Twombly* to give the
defendant notice of what conduct or omission gives rise to the violation, . . . and the specific

1 injury Plaintiff suffered.” (Dkt. # 143 at 8.) In that Order, the Court also warned Plaintiff
2 that “[i]f [she] elects to file an amended complaint and fails to comply with the provisions
3 of this Order, the action will be dismissed pursuant to Federal Rule of Civil Procedure
4 41(b).” (*Id.*)

5 In their Motions to Dismiss, Defendants seek dismissal with prejudice, arguing that
6 dismissal is warranted because: (1) Plaintiff failed to comply with the Court’s prior orders
7 and the Federal Rules of Civil Procedure; (2) Plaintiff failed to state a claim upon which
8 relief could be granted; (3) Plaintiff’s claims are barred under the doctrine of claim
9 preclusion; and (4) Plaintiff’s claims are barred by the applicable statute of limitations. (Dkt.
10 ## 189, 192, 211, 214, 215, 225.) These arguments are fairly and timely raised in this action
11 and deserve a timely response by Plaintiff. The Court has been flexible in ensuring that
12 Plaintiff has had an opportunity to plead her claims and be heard in response to Defendants’
13 motions. To continue to permit Plaintiff to engage in delay and silence would be to
14 significantly prejudice those defendants actively seeking to clarify and narrow this action.

15 Therefore, factor 3 weighs heavily in favor of dismissal.

16 **Factor 5 – Availability of Less Drastic Sanctions**

17 Factor 5 “involves consideration of three subparts: whether the court explicitly
18 discussed alternative sanctions, whether it tried them, and whether it warned the recalcitrant
19 party about the possibility of dismissal.” *Valley Eng’rs*, 158 F.3d at 1057. While less drastic
20 sanctions may be available, they are not appropriate here. The Court has granted Plaintiff
21 ample time to respond to Defendants’ motions and has explicitly warned her that failure to
22 do so could result in granting of the motion and “could result in the dismissal of certain
23 claims and certain defendants.” (Dkt. # 231 at 1-2.) Plaintiff nonetheless failed to respond
24 or take any other action to prosecute her claims. Therefore, factor 5 weighs in favor of
25 dismissal.

26 With four factors weighing in favor of dismissal and one factor weighing against,
27 dismissal is appropriate here. *See, e.g., Wystrach v. Ciachurski*, 267 F. App’x 606, 607-08
28 (9th Cir. 2008) (upholding dismissal under Local Rule 7.2(i) where the first three factors all

1 weighed in favor of dismissal); *Ghazali*, 46 F.3d at 53-54 (upholding summary dismissal of
2 a pro se plaintiff's action for failure to follow the court's local rules).

3 **II. Motion for Protective Order**

4 On June 15, 2009, Plaintiff noticed depositions on Defendants Monique Yabo, Eva
5 Espinoza, Tony Smart, Latoiya Warrick, and Jessenia Garcia. (Dkt. ## 202-206.) On June
6 18, 2009, Defendants DHI Title, Eva Espinoza, and Monique Maldonado (formerly Monique
7 Yabo) filed their objection to the notices and moved to quash the subpoenas. (Dkt. # 210.)
8 On August 3, 2009, the Court granted the motion to quash reminding Plaintiff that she "is not
9 entitled to engage in premature discovery." (Dkt. # 241 at 3.)

10 Nevertheless, on July 31, 2009, Plaintiff again noticed depositions on Defendants
11 Monique Yabo and Eva Espinoza. (Dkt. ## 242-43.) Despite attempts by Defendants DHI
12 Title of Arizona and Eva Espinoza to convince Plaintiff to withdraw the deposition notices,
13 as of August 17, 2009, Plaintiff has failed to do so. Therefore, Defendants DHI Title, Eva
14 Espinoza, and Monique Maldonado (formerly Monique Yabo) again file their objection to
15 the deposition notices and move for a protective order pursuant to Federal Rule of Civil
16 Procedure 26(c). (Dkt. # 249.)

17 Federal Rule of Civil Procedure 26(d)(1) states that "A party may not seek discovery
18 from any source before the parties have conferred as required by Rule 26(f), except . . . when
19 authorized by these rules, by stipulation, or by court order." As previously noted, none of
20 the exceptions to the general rule apply. Rule 26(c)(1) permits parties or persons from whom
21 discovery is sought to "move for a protective order . . . to protect a party or person from
22 annoyance, embarrassment, oppression, or under burden or expense." Pursuant to this rule,
23 Defendants DHI Title, Eva Espinoza, and Monique Maldonado have filed certification that
24 they have in good faith conferred with Plaintiff in an effort to have Plaintiff withdraw the
25 deposition notices. Nevertheless, Plaintiff has failed to do so. Therefore, the Motion for a
26 Protective Order is granted.

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1 **CONCLUSION**

2 Having considered the motions pending before the Court:

3 **IT IS HEREBY ORDERED** that the Motions for Summary Disposition of
4 Defendants DHI Title of Arizona and Eva Espinoza (Dkt. # 246) and Defendant HomeEq
5 (Dkt. # 251) are **GRANTED**.

6 **IT IS FURTHER ORDERED** that the Motions to Dismiss of Defendants Litton
7 Loan Servicing and U.S. Bank National Association¹ (Dkt. # 189); Defendants HomEq
8 Servicing and Mortgage Electronic Registration Systems (Dkt. # 192); Defendant
9 Washington Mutual Bank (Dkt. # 211); Defendants DHI Title of Arizona and Eva Espinoza
10 (Dkt. # 214); Defendant Sterling Mortgage (Dkt. # 225), and Defendants GMAC Mortgage,
11 Homecomings Financial, and Executive Trustee Services (Dkt. # 215) are **GRANTED**.

12 **IT IS FURTHER ORDERED** that Defendants Litton Loan Servicing, U.S. Bank
13 National Association, HomEq Servicing, Mortgage Electronic Registration Systems,
14 Washington Mutual Bank, DHI Title of Arizona, Eva Espinoza, Sterling Mortgage, GMAC
15 Mortgage, Homecomings Financial, and Executive Trustee Services are **DISMISSED**
16 **WITH PREJUDICE**.²

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18 ¹In their Motion, in addition to seeking dismissal, Defendants Litton Loan Servicing
19 and U.S. Bank National Association seek an order expunging the May 29, 2009 Notice of Lis
20 Pendens filed by Plaintiff. (*See* Dkt. # 189 at 1, 17.) The request for an order expunging the
21 May 29, 2009 Notice of Lis Pendens is denied without prejudice because, contrary to
22 Defendants’ suggestion to the contrary, the litigation involving the property located at 18607
23 N. 45th Drive, Glendale, Arizona is still pending against Defendants Tony Smart, Argent
24 Mortgage Company, and AMC Mortgage Services. Should Defendants have a legal basis
authorizing this Court to presently grant their request, they are free to file a new motion
setting forth the legal basis supporting their request. Otherwise, Defendants may reassert
their request once the litigation has been terminated with respect to all relevant parties.

25 Additionally, Defendants seek sanctions against Plaintiff pursuant to Federal Rule of
26 Civil Procedure 11. (*Id.*) However, Defendants fail to set forth any argument in their motion
as to how Plaintiff’s filings were presented for any improper purpose or otherwise violated
Rule 11. Therefore, their request for sanctions is denied.

27 ²In their Joinder, in addition to seeking their own dismissal, Defendants GMAC
28 Mortgage, Homecomings Financial Services, and Executive Trustee Services seek the

