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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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KIRA B. CHRISTENSEN,  
Plaintiff,

NO. CIV. 2:10-CV-01024-FCD-KJN

v.

MEMORANDUM AND ORDER

AMERICAN HOME MORTGAGE  
SERVICING, INC., DEUTSCHE BANK  
NATIONAL TRUST COMPANY AS  
TRUSTEE FOR AMERICAN HOME  
MORTGAGE ASSETS TRUST 2006-1  
MORTGAGE-BACKED PASS THROUGH  
CERTIFICATES, SERIES 2006-1  
and DOES 1 THROUGH 100,  
INCLUSIVE,

Defendants.

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This matter is before the court on the motion of defendants' American Home Mortgage Servicing, Inc. ("AHMSI"), Deutsche Bank National Trust Company ("Deutsche Bank"), as trustee for American Home Mortgage Assets Trust (collectively "defendants", and Mortgage Electronic Registration Systems, Inc. ("MERS") to dismiss plaintiff Kira B. Christensen's ("plaintiff" or "Christensen") second amended complaint ("SAC") pursuant to

1 Federal Rules of Civil Procedure 12(b)(6), 8(a), and 9(b).<sup>1</sup>  
2 Plaintiff opposes the motion.<sup>2</sup> For the reasons set forth below,  
3 defendants' motion is GRANTED.<sup>3</sup>

4 **BACKGROUND<sup>4</sup>**

5 Plaintiff originally filed a complaint against defendants in  
6 April 2010 arising out of allegations that defendants knowingly  
7 entered false information on the application relating to  
8 plaintiff's monthly income, misstated the value of the property,  
9 and misrepresented, *inter alia*, the desirability of the loan, the  
10 loan's premium, and plaintiff's ability to modify the loan in the  
11 future. On August 3, 2010, the court granted defendants' motion  
12 to dismiss because it concluded that plaintiff did not allege any  
13 facts to demonstrate the applicability of equitable tolling to  
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15 <sup>1</sup> Defendants also move to strike plaintiff's request for  
16 punitive damages and attorneys' fees. Because the court  
17 dismisses all claims against defendants, the court does not  
address the merits of their motion to strike.

18 <sup>2</sup> Plaintiff simultaneously filed a dismissal of her fifth  
19 and sixth claims for relief for violation of Civil Code § 2923.5  
20 and for declaratory relief against all defendants and a dismissal  
21 of all claims against defendant MERS pursuant to Federal Rule of  
Civil Procedure Rule 41(a)(1). See Fed. R. Civ. Proc. 41(a)  
(providing that a plaintiff may dismiss an action where the  
opposing party has not filed an answer or a motion for summary  
judgment); Swedberg v. Marotzke, 339 F.3d 1139 (9th Cir. 2003)  
(defendant's filing of a motion to dismiss, pursuant to FRCP  
12(b), does not prevent the plaintiff from later filing a  
voluntary dismissal). Plaintiff's request to dismiss her fifth  
22 and sixth claims for relief against all defendants and to dismiss  
23 all claims against defendant MERS is granted without prejudice.  
24

25 <sup>3</sup> Because oral argument will not be of material  
26 assistance, the court orders these matters submitted on the  
briefs. E.D. Cal. L.R. 230(g).

27 <sup>4</sup> The factual allegations in the complaint are set forth  
28 fully in the court's orders on defendants' two prior motions to  
dismiss. (See Mem. & Order [Docket #20], filed Aug. 3, 2010;  
Mem. & Order [Docket #27], filed Oct. 19, 2010.)

1 her facially time barred claims for relief. Plaintiff filed her  
2 first amended complaint on August 23, 2010. The court again  
3 granted defendants' motion to dismiss, concluding that plaintiff  
4 had failed to allege facts supporting equitable tolling and  
5 rejecting plaintiff's legally unsupported argument that the  
6 continuing violation doctrine applied to her claims.<sup>5</sup> On  
7 November 5, 2010, plaintiff filed a second amended complaint,  
8 alleging that equitable tolling should apply even though she knew  
9 the representations on the application were false at the time of  
10 the origination of the loan because she did not know it gave rise  
11 to a possible claim. (See Second Am. Compl. ("SAC"), filed Nov.  
12 5, 2010, ¶¶ 32-34.)

13 Under Federal Rule of Civil Procedure 12(b)(6), a claim may  
14 be dismissed because of the plaintiff's "failure to state a claim  
15 upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A  
16 dismissal under Rule 12(b)(6) may be based on the lack of a  
17 cognizable legal theory or on the absence of sufficient facts  
18 alleged under a cognizable legal theory. Johnson v. Riverside  
19 Healthcare Sys., 534 F.3d 1116, 1121 (9th Cir. 2008); Navarro v.  
20 Block, 250 F.3d 729, 732 (9th Cir. 2001). On a 12(b)(6) motion  
21 to dismiss, the factual allegations of the complaint must be  
22 accepted as true. Cruz v. Beto, 405 U.S. 319, 322 (1972). The  
23 court is bound to give plaintiff the benefit of every reasonable  
24 inference to be drawn from the "well-pleaded" allegations of the  
25 complaint. Retail Clerks Int'l Ass'n v. Schermerhorn, 373 U.S.

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27 <sup>5</sup> Plaintiff expressly noted in her opposition that she  
28 did not amend her complaint to allege facts supporting the  
application of the continuing tort doctrine. (Pl.'s Opp'n, filed  
Jan. 3, 2011, at 6.)

1 746, 753 n.6 (1963).

2 A plaintiff need not allege “‘specific facts’ beyond those  
3 necessary to state his claim and the grounds showing entitlement  
4 to relief.” Bell Atlantic v. Twombly, 550 U.S. 544, 570 (2007).

5 “A claim has facial plausibility when the plaintiff pleads  
6 factual content that allows the court to draw the reasonable  
7 inference that the defendant is liable for the misconduct  
8 alleged.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).

9 Ultimately, the court may not dismiss a complaint in which the  
10 plaintiff has alleged “enough facts to state a claim to relief  
11 that is plausible on its face.” Iqbal, 129 S. Ct. at 1949  
12 (citing Twombly, 550 U.S. at 570). Only where a plaintiff has  
13 failed to “nudge [his or her] claims across the line from  
14 conceivable to plausible,” is the complaint properly dismissed.  
15 Id. at 1952. While the plausibility requirement is not akin to a  
16 probability requirement, it demands more than “a sheer  
17 possibility that a defendant has acted unlawfully.” Id. at 1949.  
18 This plausibility inquiry is “a context-specific task that  
19 requires the reviewing court to draw on its judicial experience  
20 and common sense.” Id. at 1950.

21 The application of the equitable tolling doctrine is  
22 dependant on the plaintiff’s “excusable ignorance of the  
23 limitations period” and lack of prejudice to the defendant.  
24 Santa Maria v. Pac. Bell, 202 F.3d 1170, 1176 (9th Cir. 2000).  
25 It is well established that the doctrine of equitable tolling may  
26 be applied in circumstances where a plaintiff’s failure to comply  
27 with the time limitations was because he had neither actual nor  
28 constructive notice of the factual basis for the claim within the

1 filing period. Leorna v. U.S. Dep't of State, 105 F.3d 548, 551  
2 (9th Cir. 1997); see Santa Maria, 202 F.3d at 1178 ("If a  
3 reasonable plaintiff would not have known of the existence of a  
4 possible claim within the limitations period, then equitable  
5 tolling will serve to extend the statute of limitations for  
6 filing suit until the plaintiff can gather what information he  
7 needs."). Equitable tolling focuses on the plaintiff's excusable  
8 ignorance, but the doctrine is not available to avoid the  
9 consequences of a plaintiff's own negligence. Lehman v. U.S.,  
10 154 F.3d 1010, 1016 (9th Cir. 1998); see Scholar v. Pacific Bell,  
11 963 F.2d 264, 268 (9th Cir. 1992) (noting that courts are  
12 generally unforgiving when a civil action is filed late due to  
13 the claimant's failure to "exercise due diligence in preserving  
14 his legal rights") (citations omitted).

15 Like plaintiff's original and first amended complaint, the  
16 allegations in the SAC fail to demonstrate that plaintiff was  
17 unable to obtain the information needed to file her claim until  
18 after the alleged statutory period. Plaintiff's claims are  
19 premised on the alleged wrongful conduct that took place at the  
20 *origination* of her loan, including, *inter alia*, misstating her  
21 monthly income, excessive fees, abusive prepayment penalties,  
22 kickbacks to brokers, and over valuation of the property. (See  
23 SAC ¶ 11-33). Indeed, plaintiff alleges that "she had some  
24 misgivings" and raised "concern" regarding the overstatement of  
25 her income at the time the application was filed. (Id. ¶ 28.)  
26 Plaintiff, however, simultaneously alleges that all the  
27 misrepresentations and allegations made were discovered within  
28 the past year and that she was not aware until within a year

1 before filing the instant lawsuit that overstating her income was  
2 wrongful or that the bank did not verify her income with the IRS.  
3 (Id. ¶¶ 28, 31).

4 As noted by the court in its previous orders, plaintiff's  
5 allegations demonstrate that she was aware of at least some, if  
6 not all, of the alleged wrongful conduct at the time the loan  
7 originated. Plaintiff acknowledges that she "was aware at the  
8 time the application was submitted that it indicated income that  
9 was grossly incorrectly overstated." (Id. ¶ 28). Plaintiff does  
10 not allege that she did not receive documentation regarding her  
11 loan; rather, she conclusorily asserts that review was not  
12 reasonable because "the documents were of such a voluminous  
13 nature that a reasonable person would not be expected to have  
14 them independently reviewed by additional experts beyond her  
15 broker." (Id. ¶ 30).

16 Accepting the allegations in plaintiff's complaint as true  
17 and drawing all reasonable inferences therefrom, the court cannot  
18 conclude that plaintiff's allegations are sufficient to establish  
19 a factual predicate for plaintiff's excusable ignorance of the  
20 factual basis for her claim or the applicable statute of  
21 limitations period. Because plaintiff's allegations fail to  
22 demonstrate the applicability of equitable tolling to her  
23 facially time barred claims for relief, defendants' motion to  
24 dismiss plaintiff's complaint is GRANTED.<sup>6</sup>

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26 <sup>6</sup> In her opposition, plaintiff represents that there are  
27 no further facts that can be pled in support of a theory of  
28 equitable tolling. Accordingly, the dismissal of plaintiff's  
first four claims for relief is granted with prejudice.

Because plaintiff did not allege sufficient facts to support

1 The clerk of Court is directed to close this case.

2 IT IS SO ORDERED.

3 DATED: January 7, 2011



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4 FRANK C. DAMRELL, JR.  
5 UNITED STATES DISTRICT JUDGE  
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28 the doctrine of equitable tolling, the court need not reach the other grounds for defendants' motion to dismiss.