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28E-FILED on 1/2/12

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

CAROL G. NELMIDA, an individual,

Plaintiff,

v.

FLAGSTAR BANK, FSB; JOAN H.  
ANDERSON, an individual;  
CITIMORTGAGE, INC., a New York  
Corporation; CAL WESTERN  
RECONVEYANCE CORPORATION, a  
California Corporation; FANNIE MAE A/K/A  
FEDERAL NATIONAL MORTGAGE  
ASSOCIATION; MORTGAGE  
ELECTRONIC REGISTRATION SYSTEMS,  
INC., a Delaware Corporation; and DOES 1  
through 50, inclusive,

Defendants.

No. C-11-01580 RMW

ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS**[Re: Docket No. 19]**

Plaintiff Carol G. Nelmidia ("plaintiff"), proceeding *pro se*, asserts twenty-four federal and state law claims arising from a home loan she obtained on June 10, 2003. Defendants CitiMortgage Inc., Fannie Mae, and Mortgage Electronic Registration Systems, Inc. (collectively the "moving defendants") move to dismiss. Plaintiff has not opposed the motion. For the reasons below, the court GRANTS the motion to dismiss with prejudice.

**I. BACKGROUND**

1  
2 On June 10, 2003, plaintiff obtained a loan for \$322,000 secured by a Deed of Trust on  
3 residential property ("the property") in San Jose, California. Dkt. No. 18 ("FAC") ¶ 18. Defendant  
4 Flagstar Bank, FSB ("Flagstar") was the originating lender, defendant Joan H. Anderson  
5 ("Anderson") was the original trustee, and defendant Mortgage Electronic Registration Systems, Inc.  
6 ("MERS") was the original beneficiary named on the Deed of Trust. *Id.* ¶¶ 8,10,14. On or about  
7 December 9, 2009, the loan was assigned to defendant CitiMortgage, Inc. ("CMI"). *Id.* ¶ 11. CMI  
8 commenced a foreclosure action on the property by filing a Notice of Default on March 2, 2010, and  
9 authorized a Notice of Trustee's Sale to be filed on June 2, 2010. *Id.* Defendant Cal Western  
10 Reconveyance Corporation ("Cal Western") was "the agent for [CMI] ... that helped facilitate the  
11 foreclosure action on [the property.]" *Id.* ¶ 12. Defendant Fannie Mae was named as the Grantee in  
12 the Trustee's Deed upon sale, and is the current owner of the property. *Id.* ¶ 13.

13 On March 6, 2011, plaintiff filed a pro per complaint in Santa Clara County Superior Court  
14 asserting twenty-nine federal and state law claims against all of the above-listed defendants. *See*  
15 Dkt. No. 1, Ex. A. CMI, Fannie Mae and MERS removed the case to this court on March 31, 2011.  
16 *Id.* The notice of removal stated that "all defendants who have been served in the State Court action  
17 ... consent to removal." *Id.*<sup>1</sup> On April 11, 2011, CMI, Fannie Mae and MERS moved to dismiss  
18 plaintiff's complaint. Flagstar, Anderson and Cal Western did not file a motion to dismiss or join the  
19 motion filed by the moving defendants. Plaintiff did not file an opposition.

20 On June 25, 2011, Judge Fogel, who was previously assigned to this case, granted the  
21 unopposed motion to dismiss all claims with leave to amend. He first noted that plaintiff had failed  
22 to comply with Civil Local Rule 7-3(a), which requires a party to file an opposition to a motion to  
23 dismiss at least twenty-one days in advance of the motion hearing date. *See* Dkt. No. 15. Judge  
24 Fogel further concluded that "several" of plaintiff's claims were time-barred because they were  
25 based on allegations surrounding the origination of plaintiff's loan in 2003 and the complaint did not  
26 contain facts "sufficient to allege the relevant statutes of limitations should be tolled." *Id.* at 2. In

27  
28 <sup>1</sup> The court has no evidence that defendants Flagstar, Anderson or Cal Western have been served in this action.

1 addition, he found that "several" other claims were based on the faulty premise that a foreclosing  
2 entity must produce the note prior to foreclosure, which is not required under California law. *See id.*  
3 (citing *Pagtalunan v. Reunion Mortgage Inc.*, No. C-09-00162 EDL, 2009 WL 961995, at \*2 (N.D.  
4 Cal. Apr. 8, 2009).

5 Plaintiff filed a First Amended Complaint ("FAC") on July 7, 2011. CMI, Fannie Mae and  
6 MERS moved to dismiss. Once again, Flagstar, Anderson and Cal Western did not join the motion  
7 or file a separate pleading. Plaintiff also again failed to oppose the motion, and did not appear at the  
8 motion hearing or concurrent case management conference. Defendant's counsel advised the court  
9 that she had not had recent contact with plaintiff.

## 11 II. ANALYSIS

### 12 A. Federal Claims

13 The FAC asserts federal claims under the Truth in Lending Act ("TILA") (claim five) and  
14 the Real Estate Settlement Procedures Act ("RESPA") (claim six). The moving defendants argue  
15 that both claims are time-barred because they are based on allegations surrounding the origination of  
16 plaintiff's loan by defendant Flagstar in 2003. *See Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682  
17 (9th Cir. 1980) ("If the running of the statute is apparent on the face of the complaint, the defense  
18 may be raised by a motion to dismiss.")

#### 19 1. TILA Claim (Claim 5)

20 TILA is governed by a one- or three-year statute of limitations, depending on the type of  
21 relief sought by the plaintiff. *See* 15 U.S.C. §§ 1640(e), 1635(f) (TILA claims subject to one-year  
22 limitations period for damages claims or three-year limitations period for claims seeking rescission).  
23 In this case, plaintiff alleges that defendants "fail[ed] to provide . . . accurate material disclosures  
24 required under TILA . . . to fully inform home buyers of the pros and cons of adjustable rate  
25 mortgages in a language . . . that they can understand and comprehend; and advise them to compare  
26 similar loan products with other lenders." FAC ¶ 85. Absent equitable tolling, the limitations  
27 period on such a claim began to run when plaintiff executed her loan documents. *See* 15 U.S.C. §  
28 1640(e) (the limitations period for a TILA claim begins when the violation occurs); *Cervantes v.*

1 *Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1045 (9th Cir. 2011) (TILA claims based on  
2 allegedly inadequate disclosures began to run upon execution of loan documents because plaintiffs  
3 "could have discovered the alleged disclosure violations and discrepancies at that time"). Because  
4 plaintiff executed her loan documents in 2003 but did not commence this action until 2011, the  
5 running of the limitations period is apparent from the face of the FAC. *See id.*

6 **2. RESPA Claim (Claim 6)**

7 Under RESPA, plaintiff appears to allege that she paid a "Yield Spread Premium" under the  
8 loan agreement which resulted in an illegal "kickback" payment to defendant Flagstar. *See Geraci v.*  
9 *Homestreet Bank*, 347 F.3d 749, 751 (9th Cir. 2003) (noting that "Section 8(a) of RESPA proscribes  
10 giving or accepting 'any fee, kickback, or thing of value pursuant to any agreement or understanding  
11 . . . incident to or a part of a real estate settlement service . . . referred by any person.' "). Such  
12 claims are subject to a one-year statute of limitations period, which commences when the violation  
13 occurs. *See* 12 U.S.C. § 2614. While the FAC does not make clear when the alleged kickbacks took  
14 place, at least one other court has reasonably concluded that a similar cause of action accrued either  
15 when the plaintiff received notice of the Yield Spread Premium or when the last purportedly illegal  
16 payment was made. *See Kmety v. Bank of America, Inc.*, No. 10-1910, 2011 WL 4566441, at \*3  
17 (S.D. Cal. Sept. 30, 2011).

18 Here, the FAC alleges that the Yield Spread Premium was "explain[ed]" to plaintiff in a  
19 misleading fashion, apparently at the time the loan was executed. FAC ¶ 104. The court is therefore  
20 inclined to find that the limitations period began to run in 2003. However, even assuming that  
21 plaintiff had no notice of the Yield Spread Premium when she executed her loan, the FAC indicates  
22 that any "unearned fees" were paid to Flagstar. FAC ¶ 103. Flagstar, through its beneficiary MERS,  
23 allegedly assigned the loan to CMI on December 9, 2009, more than a year before the  
24 commencement of this action. There is no additional allegation of any illegal payment made within  
25 the limitations period. The court thus finds that the running of the statute of limitations on plaintiff's  
26 RESPA claim is also apparent from the face of the complaint.

27 **3. Equitable Tolling**

28

1 "[T]he doctrine of equitable tolling may, in the appropriate circumstances, suspend the  
2 limitations period ... until the borrower discovers or had reasonable opportunity to discover the  
3 fraud or nondisclosures that form the basis of the ... action." *King v. Cal.*, 784 F.2d 910, 915 (9th  
4 Cir. 1986). The focus of the equitable tolling analysis is "whether there was excusable delay by the  
5 plaintiff: If a reasonable plaintiff would not have known of the existence of a possible claim within  
6 the limitations period, then equitable tolling will serve to extend the statute of limitations for filing  
7 suit until the plaintiff can gather what information he needs." *Johnson v. Henderson*, 314 F.3d 409,  
8 414 (9th Cir. 2002).

9 Plaintiff appears to argue that the statute should be tolled because "most, if not all pertinent  
10 documents were left out" of the loan document package so that she could not "find out what exactly  
11 this adjustable rate mortgage was going to turn into." FAC ¶ 88. Plaintiff also alleges that because  
12 she is not a native English speaker, "the standard of care is a low one." *Id.* While plaintiff  
13 references a number of documents allegedly omitted from the loan package, she does not explain  
14 what information such documents contained or why the omission prevented her from discovering the  
15 basis for her claim. *See Carillo v. Citimortgage, Inc.*, No. 09-02404, 2009 WL 3233534, at \*3 (C.D.  
16 Cal. Sept. 30, 2009) (although the pleadings listed sixteen documents allegedly omitted from the  
17 loan package, "the complaint fails to state what information Plaintiffs did not receive and the  
18 opposition provides no additional facts to render it plausible that, for years, Plaintiffs could not have  
19 known that something was missing in the information they received"). Furthermore, even if plaintiff  
20 is not a native English speaker, she has not alleged "circumstances beyond [her] control that  
21 prevented [her] from seeking a translation of the loan documents that [she] signed and received."  
22 *Cervantes*, 656 F.3d at 1045 (fact that native Spanish speakers were not given loan documents in  
23 Spanish did not support a claim for equitable tolling). In addition, both of plaintiff's arguments were  
24 raised in the original complaint and rejected by Judge Fogel as a basis for tolling the statute of  
25 limitations. *See* Dkt. No. 15. The FAC supplies no additional facts supporting plaintiff's tolling  
26 argument. The court therefore finds that plaintiff has failed to plead facts sufficient to support a  
27 claim for equitable tolling.

28 Accordingly, the court GRANTS the motion to dismiss plaintiff's federal claims.

1 **B. State Law Claims**

2 The moving defendants divide plaintiff's state law claims into several categories, including:  
3 (1) claims barred by the statute of limitations, (2) claims based on the faulty premise that possession  
4 of the note is required to initiate foreclosure proceedings, and (3) "other claims." The court  
5 considers each category in turn.

6 **1. Claims barred by the statute of limitations (Claims 4, 15, 16, 17 and 20)**

7 The moving defendants argue that the following state law claims are time-barred because  
8 they relate to conduct surrounding the origination of the subject loan in 2003: (1) Unfair Business  
9 Practices and Predatory Lending under Cal. Bus. & Prof. Code § 17200 (claims 16 and 20); (2)  
10 Breach of the Implied Covenant of Good Faith and Fair Dealing (claim 4); (3) Fraud (claim 15); and  
11 (4) Breach of Fiduciary Duty (claim 17).

12 The longest statute of limitations governing any of the above-cited causes of action is four  
13 years. *See* Cal. Bus. & Prof. Code § 17208 (unfair competition claims subject to four-year  
14 limitations period); Cal. Code Civ. Proc. § 337(1) (contract claims subject to four-year limitations  
15 period); Cal. Code Civ. Proc. § 338(d) (fraud and fraud-based fiduciary claims subject to three-year  
16 limitations period). While plaintiff describes each claim in slightly different language, the essence  
17 of each is that at the time the loan was executed, defendants knew or should have known that  
18 plaintiff would be unable to afford her monthly payments. *See, e.g.*, FAC ¶ 156. The court thus  
19 finds that these claims accrued upon the origination of the subject loan in 2003. As discussed above,  
20 plaintiff has failed to plead facts sufficient to invoke the doctrine of equitable tolling. The court  
21 therefore finds that these claims are barred by the statute of limitations, and GRANTS the motion to  
22 dismiss claims four, fifteen, sixteen, seventeen and twenty.

23 **2. Claims based on the argument that production of the note is a pre-condition of**  
24 **foreclosure (Claims 1, 3 and 21)**

25 The moving defendants argue that claims for declaratory relief (claim 1), under Cal. Com.  
26 Code § 9313 (claim 3), and for quiet title (claim 21) must be dismissed because they are based on  
27 the faulty premise that a foreclosing entity is required to produce the note in order to initiate  
28 foreclosure proceedings. Judge Fogel agreed, noting that "California law does not require  
possession of the note as a precondition to non-judicial foreclosure under a deed of trust." Dkt. No.

1 15 at 2 (quoting *Pagtalunan v. Reunion Mortg. Inc.*, No. 09-00162, 2009 WL 961995, at \*2 (N.D.  
2 Cal. Apr. 8, 2009). The FAC provides no additional factual support for these causes of action.  
3 Indeed, the FAC simply repeats the allegation that the foreclosure is invalid because "neither  
4 Flagstar, Citimortgage, nor Fannie Mae possess the original promissory note." FAC ¶ 72.  
5 Accordingly, the court GRANTS the motion to dismiss claims one, three, and twenty-one.

6 **3. Other Claims**

7 **a. Claim under Cal. Civ. Code §§ 1918.5-1921 (Claim 8)**

8 Cal. Civ. Code § 1920(a) requires that "standards for the adjustment of interest rates or  
9 monthly payments shall consider factors which can reasonably be deemed to affect the ability of  
10 borrowers to meet their mortgage obligations." Plaintiff claims that defendants violated Section  
11 1920 because "no consideration of the ability of plaintiff to repay this loan with a realistic reams test  
12 has been made." FAC ¶ 115.

13 There is no authority supporting a private right of action under Section 1920. *See Nool v.*  
14 *HomeQ Servicing*, 653 F.Supp.2d 1047, 1055 n.5 (E.D. Cal. 2009). While a violation of the statute  
15 might support a claim under Cal. Bus. & Prof Code § 17200, *see id.*, as discussed above, any such  
16 claim would be time-barred because it is clearly based on conduct surrounding the origination of  
17 plaintiff's loan in 2003. Accordingly, the court GRANTS the motion to dismiss claim eight.

18 **b. Claim under Cal. Civ. Code § 2079.16 (Claim 11)**

19 Cal. Civ. Code § 2079.16 describes in great detail the disclosure notice that must be provided  
20 to a prospective purchaser of residential property. *See id.* ("Printed on the back, and on the front of  
21 the disclosure form the following shall appear: . . ."). The FAC does not allege in what manner  
22 defendants purportedly violated such disclosure requirements. The court also agrees with the  
23 moving defendants that to the extent that the FAC could be read to allege any wrongdoing under this  
24 provision, it is focused entirely on Flagstar. Moreover, at least one court has held that there is no  
25 private right of action under Section 2079.16. *See Legrama v. Fremont Inv. & Loan*, No. 10-02945,  
26 2010 WL 5071600, at \*10 (N.D. Cal. Dec. 7, 2010). Accordingly, the court GRANTS the motion to  
27 dismiss claim eleven.

28 **c. Claim under Cal. Civ. Code § 2923.5 (Claim 22)**

1 Plaintiff alleges that defendants wrongfully foreclosed on the subject property in the summer  
2 of 2010 because they failed to include the declaration required by California Civil Code section  
3 2923.5 in the Notice of Default and Notice of Trustee's Sale. FAC ¶¶ 191-92. Section 2923.5,  
4 however, only requires that such a declaration be included with the Notice of Default. Here, the  
5 March 2, 2010 Notice of Default contained the required declaration. *See* Defs.' Mot. to Dismiss, Ex.  
6 A.<sup>2</sup> Accordingly, the court GRANTS the motion to dismiss claim twenty-two.

7 **d. Claim under Cal. Civ. Code § 1632 (Claim 12)**

8 Cal. Civ. Code § 1632 requires certain written agreements to be printed in the language in  
9 which they were "primarily" negotiated. Cal. Civ. Code § 1632(b). The provision applies only to  
10 certain real estate loans secured by real property that are negotiated exclusively by real estate  
11 brokers. *See* Cal. Civ. Code § 1632(b)(4); Cal. Bus. & Prof. Code § 10204. Here, while plaintiff  
12 alleges that she is a native Tagalog speaker, she fails to allege that her mortgage was negotiated in  
13 Tagalog. Furthermore, there is no indication that any of the moving defendants is a "broker" or was  
14 otherwise involved in negotiating or originating plaintiff's loan. *See Delino v. Platinum Community*  
15 *Bank*, 628 F.Supp.2d 1226, 1234 (S.D. Cal. 2009) (dismissing claim under section 1632 because  
16 plaintiff failed to plead that defendant was a broker or loan originator). The court thus GRANTS the  
17 motion to dismiss claim twelve.

18 **e. Claim for Intentional Infliction of Emotional Distress (Claim 24)**

19 To state a claim for intentional infliction of emotional distress, a plaintiff must allege: (1)  
20 extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard  
21 of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme  
22 emotional distress; (3) and actual and proximate causation of the emotional distress by the  
23 defendant's outrageous conduct. *Cervantez v. J. C. Penney Co.*, 24 Cal.3d 579, 593 (Cal. 1979).

24 \_\_\_\_\_  
25 <sup>2</sup> "[D]ocuments whose contents are alleged in a complaint and whose authenticity no party  
26 questions, but which are not physically attached to the pleading, may be considered in ruling on a  
27 Rule 12(6) motion to dismiss." *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir.1994), *overruled on*  
28 *other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002). A court may  
also consider evidence on which the complaint "necessarily relies" if the document is central to the  
plaintiffs' claim. *Id.* at 453-54. Here, because the FAC "necessarily relies" on the Notice of Default  
in alleging a claim for wrongful foreclosure, the court considers the contents of the notice attached  
to the motion to dismiss.



1 Plaintiff's claim for intentional infliction of emotional distress is based on the allegation that  
2 she "thought she could trust Defendants . . . to guide [her] in this extremely important decision of the  
3 refinance<sup>3</sup> of her home, only to be deceived, lied to, victimized by theft, [and] deliberately subjected  
4 to a situation wherein [she] would be forced to incur additional fees . . . and [is] now bring faced  
5 with losing her home." FAC ¶ 205. While plaintiff does not specify to which "defendants" she is  
6 referring, these allegations clearly relate to the origination of the loan by Flagstar in 2003. The FAC  
7 does not allege that any of the moving defendants were involved in the origination of the loan or  
8 engaged in otherwise extreme and outrageous conduct. The court therefore GRANTS the motion to  
9 dismiss claim twenty-four.

10 **f. Claims under Cal. Civ. Code § 1916.7 (Claims 7, 9, 10, and 13)**

11 Plaintiff brings causes of action under four separate subsections of Cal. Civ. Code § 1916.7,  
12 which proscribes certain lending practices with regard to "adjustable-payment, adjustable-rate"  
13 mortgages. Specifically, she asserts violations of: (1) Section 1916.7(b)(2), which provides that  
14 "changes in interest and monthly payment shall not occur more often than twice during any annual  
15 period" (claim 7); (2) Section 1916.7(c), which specifies the type of notice required to be given to an  
16 applicant for an adjustable-rate mortgage (claim 10); (3) Section 1916.7(b)(8), which states that the  
17 borrower must be permitted to prepay the loan in whole or in part at any time without a prepayment  
18 charge (claim 13); and (4) Section 1916.7(b)(4)(B), which states that the loan-to-value ratio resulting  
19 from any increased principal over the life of the loan must never exceed the loan-to-value ratio at the  
20 time of loan origination (claim 9).

21 The moving defendants argue that any claims under Cal. Civ. Code § 1916.7 fail because  
22 section 1916.7, by its own terms, establishes that it only applies to mortgage loans made under that  
23 particular provision. *See* Cal. Civ. Code § 1916.7(b) ("A mortgage loan made *pursuant to the*  
24 *provisions of this section. . .*") (emphasis added); *see also Dorado v. Shea Homes Ltd. P'ship*, 2011  
25 U.S. Dist. LEXIS 97672 (E.D. Cal. Aug. 31, 2011). Plaintiff does not respond to Defendants'

26 \_\_\_\_\_  
27 <sup>3</sup> Paragraph 205 appears to be the only place in the FAC in which plaintiff refers to the fact  
28 that the loan originated by Flagstar was intended to refinance, rather than acquire, the subject  
property. For the purpose of the court's analysis, it is not relevant for what purpose the loan was  
obtained.

1 argument and her Complaint is devoid of any facts asserting that her loan is one to which 1916.7  
2 applies. Accordingly, the court GRANTS the motion to dismiss claims seven, nine, ten and thirteen.

3 **g. Claim under Cal. Civ. Code § 1670.5 (Claim 19)**

4 Plaintiff claims that the loan agreement and trust deed are unconscionable under UCC 2-302,  
5 which has been codified by California Civil Code Section 1670.5, and therefore unenforceable. A  
6 contract or clause is unenforceable only if it is both procedurally and substantively unconscionable.  
7 *See Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003). Here, while plaintiff suggests that she was  
8 placed into an "unfair bargaining position" in negotiating her loan, the FAC does not contain *facts*  
9 indicating that plaintiff was deceived or misled regarding the terms of her loan. *See Rosenfeld v.*  
10 *JPMorgan Chase Bank, N.A.*, 732 F. Supp. 2d 952, 966 (N.D. Cal. 2010) (adjustable-rate mortgage  
11 not unconscionable where the contract given to plaintiff explained the terms of the mortgage). In  
12 addition, the FAC fails to specify which contract terms are substantively unconscionable.  
13 Accordingly, the court GRANTS the motion to dismiss claim nineteen.

14 **f. Asserted Claims That Are Not Causes of Action (Claims 2, 14, 18 and 23)**

15 Defendants argue that plaintiff's claims for injunctive relief (claims 2 and 23), rescission  
16 (claim 14), and unjust enrichment (claim 18) are not cognizable causes of action. This court agrees.  
17 Injunctive relief and rescission are remedies, not causes of action. *See Loder v. World Savings Bank*,  
18 *N.A.*, No. C11-00053 TEH, 2011 WL 1884733, at \*8 (N.D. Cal. May 18, 2011) (citing *Shell Oil Co.*  
19 *V. Richter*, 52 Cal.App.2d 164, 168 (1942)); Cal. Civ. Code § 1689. Most California courts also  
20 agree that there is no cause of action in California for unjust enrichment. *See Ram v. Wachovia*  
21 *Mortg., FSB*, No. CIV S-10-1834, 2011 WL 1135285, at \*9 (E.D. Cal. March 25, 2011) (citing  
22 cases). Furthermore, the complaint's unjust enrichment claim fails because the complaint fails to  
23 state any facts in support of the contention that the moving defendants received and retained benefits  
24 and payments to which they were not entitled. Indeed, because all of plaintiff's substantive claims  
25 have been dismissed, there are no grounds to grant plaintiff's requested remedies. Therefore the court  
26 GRANTS the motion to dismiss claims two, fourteen, eighteen, and twenty-three.

27 **C. Leave to Amend**

28 "A document filed pro se is 'to be liberally construed,' and 'a pro se complaint, however

1 inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by  
2 lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (internal citations omitted). However, a pro  
3 se complaint may be dismissed with prejudice where it is "absolutely clear that the deficiencies of  
4 the complaint could not be cured by amendment." *Noll v. Carlson*, 809 F.2d 1446, 1448-49 (9th Cir.  
5 1987). In making this determination, the court should consider factors such as "the presence or  
6 absence of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous  
7 amendments, undue prejudice to the opposing party and futility of the proposed amendment."  
8 *Moore v. Kayport Package Express*, 885 F.2d 531, 538 (9th Cir. 1989).

9 Plaintiff has already been given an opportunity to amend her complaint and has failed to add  
10 any factual allegation supporting the equitable tolling of her federal claims. Furthermore, she has  
11 twice failed to oppose defendants' motions to dismiss or appear at the hearing on the current motion  
12 to dismiss or for the scheduled case management conference. The court finds that the deficiencies of  
13 the complaint cannot be cured by further amendment. Accordingly, the court dismisses plaintiff's  
14 claims against the moving defendants WITHOUT LEAVE TO AMEND.

15 **D. Proof of Service**

16 As noted above, the court has no evidence that the non-moving defendants, Flagstar,  
17 Anderson and Cal-Western, have been served with a copy of the complaint in this action. Under  
18 Fed. R. Civ. P. 4(m), a plaintiff must serve a defendant within 120 days of the filing of the  
19 complaint. Failure to serve process may result in dismissal. *See* Fed. R. Civ. P. 4(m).

20 The court therefore orders plaintiff to produce proof of service on the non-moving defendants  
21 within 30 days of the date of this order. If plaintiff fails to produce such evidence, the court will  
22 issue an order to show cause why the claims against the non-moving defendants should not be  
23 dismissed for failure to prosecute.

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**III. ORDER**

For the foregoing reasons, the court grants the motion to dismiss all claims against the moving defendants with prejudice. Plaintiff is ordered to produce proof of service on the non-moving defendants within 30 days of the date of this order.

DATED: January 2, 2012



RONALD M. WHYTE  
United States District Judge