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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 KOPOPELLI COMMUNITY WORKSHOP  
12 CORPORATION, et al.,

13 Plaintiffs,

14 vs.

15 SELECT PORTFOLIO SERVICING, INC.,  
16 et al.,

Defendants.

CASE NO. 10CV1605 DMS (RBB)

**ORDER DENYING PLAINTIFF  
BETTY BRYAN'S MOTION FOR  
SUMMARY JUDGMENT**

17 Pending before the Court is Plaintiff Betty Bryan's (herein, "Plaintiff") motion for summary  
18 judgment on her claim against Defendants for elder abuse pursuant to California Welfare and  
19 Institutions Code § 15600, *et seq.* For the following reasons, Plaintiff's motion is denied.

20 **I.**

21 **BACKGROUND**

22 On November 7, 2005, Plaintiffs obtained a refinance mortgage loan from Novelle Financial  
23 Services ("Novelle") in the amount of \$649,000.00, secured by a Deed of Trust on the subject  
24 property, which Plaintiff Betty Bryan purchased in 1950. (Goldman RJN Ex. 1.)<sup>1</sup> Plaintiff claims to  
25 have sent a notice of rescission to certain Defendants pursuant to the Truth in Lending Act, dated

26  
27 <sup>1</sup> In support of its opposition to Plaintiff's motion for summary judgment, Goldman  
28 requests the Court to take judicial notice of certain documents. (Doc. 76.) As these documents have  
either been recorded in San Diego County or are publicly-filed legal documents, they are capable of  
accurate and ready determination and are therefore subject to judicial notice under Federal Rule of  
Evidence 201. Accordingly, Goldman's request for judicial notice is granted.

1 February 5, 2007. Subsequent to the alleged notice of rescission, Plaintiff made an additional  
2 approximately \$80,000 in payments to Defendant Select Portfolio Servicing, Inc. (“SPS”).  
3 Nonetheless, Quality Loan Service Corporation, as agent for Beneficiary Novelle, issued a Notice of  
4 Default, which was recorded on June 19, 2008. (*Id.* at Ex. 2.) Plaintiffs filed a Complaint in San  
5 Diego Superior Court on November 3, 2008. (*Id.* at Ex. 6.) An Assignment of the Deed of Trust  
6 transferring the Deed to MTGLQ Investors, LP was signed on October 21, 2008 and recorded on  
7 December 15, 2008. (*Id.* at Ex. 3.) Plaintiff Betty Bryan filed for Chapter 13 bankruptcy on  
8 November 4, 2008. On March 23, 2009, Plaintiffs Betty Bryan and Catherine Bryan recorded a Grant  
9 Deed deeding their interest in the subject property to Kokopelli Community Workshop Corporation.  
10 (*Id.* at Ex. 4.) A Trustee’s Deed Upon Sale was recorded on October 30, 2009, granting to MTGLQ  
11 Investors, LP all interest in the subject property under the Deed of Trust. (*Id.* at Ex. 5.) This action  
12 was removed to this Court on August 2, 2010. (Doc. 1.)

## 13 II.

### 14 LEGAL STANDARD

15 “A party may move for summary judgment, identifying each claim or defense—or the part of  
16 each claim or defense—on which summary judgment is sought. The court shall grant summary  
17 judgment if the movant shows that there is no genuine dispute as to any material fact and the movant  
18 is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A fact is material when, under the  
19 governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*,  
20 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if “the evidence is such that a  
21 reasonable jury could return a verdict for the nonmoving party.” *Id.* “A party asserting that a fact  
22 cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of  
23 materials in the record . . . ; or (B) showing that the materials cited do not establish the absence or  
24 presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support  
25 the fact.” Fed. R. Civ. P. 56(c)(1). “A party may object that the material cited to support or dispute  
26 a fact cannot be presented in a form that would be admissible in evidence.” Fed. R. Civ. P. 56(c)(2).  
27 The moving party “always bears the initial responsibility of informing the district court of the basis  
28 for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories,

1 and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of  
2 a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)(citation omitted).  
3 Where the moving party fails to carry its initial burden of production, the opposing party has no  
4 obligation to produce anything in opposition to the motion. *See Nissan Fire & Marine Ins. Co., Ltd.*  
5 *v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102-03 (9th Cir. 2000).

### 6 III.

### 7 DISCUSSION

8 Plaintiff moves for summary judgment solely on her claim for elder abuse pursuant to  
9 California Welfare and Institutions Code § 15600, *et seq.* Plaintiff argues “records show all defendants  
10 were fully informed as to plaintiff Betty Bryan[‘s] fragile state and challenging medical condition; yet  
11 nonetheless engaged in and continue to engage in an unfair pattern and practice of tortious actions of  
12 wrongfully depriving Plaintiff Betty Bryan of her equity, home and property, thereby establishing  
13 Plaintiff Betty Bryan[‘s] case for punitive damages and further unfairly deprived Plaintiff Betty Bryan  
14 of costly medical care and persisted in tormenting plaintiff with a wrongful attempt to evict her from  
15 her home of 60 years while knowing that she lay in her sickbed recovering from painful surgery.”  
16 (MSJ at 7.) Plaintiff further argues, without citation, that SPS has “admitted to some liability for elder  
17 financial abuse, so it is only the amount of defendant SPS liability which must be judicially  
18 determined.” (*Id.* at 4.)

19 “Abuse of an elder or a dependent adult” means either “(a) Physical abuse, neglect, financial  
20 abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or  
21 mental suffering. [or] (b) The deprivation by a care custodian of goods or services that are necessary  
22 to avoid physical harm or mental suffering.” Cal. Welf. & Inst. Code § 15610.07. Financial abuse of  
23 an elder occurs when an entity “[t]akes, secretes, appropriates, obtains, or retains real or personal  
24 property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.” *Id.* at §  
25 15610.30.

26 In her moving papers, Plaintiff makes no citations to portions of the record which she believes  
27 demonstrate the absence of a genuine issue of material fact. Plaintiff’s argument in support of her  
28 motion for summary judgment is essentially that she sent a notice of rescission and qualified written

1 request to Defendant SPS on February 5, 2007, as well as subsequent notices of rescission to various  
2 Defendants,<sup>2</sup> which automatically rescinded the loan and that Defendants' subsequent conduct in  
3 failing to adequately respond to her rescission and in initiating and proceeding with the nonjudicial  
4 foreclosure process was fraudulent and constituted financial elder abuse in light of Plaintiff's  
5 rescission of the loan. (See MSJ, Reply to Goldman Opp.) Plaintiff's argument, however, is  
6 fundamentally flawed. Contrary to Plaintiffs' assertion, rescission under TILA is not automatic unless  
7 the creditor acquiesces to the rescission, which clearly did not occur here. Rather, "rescission under  
8 § 1635(b) is an ongoing process consisting of a number of steps." *Yamamoto v. Bank of New York*,  
9 329 F.3d 1167, 1173 (9th Cir. 2003). "[U]nder the statute and the regulation, the security interest  
10 'becomes void' only when the consumer 'rescinds' the transaction. In a contested case, this happens  
11 when the right to rescind is determined in the borrower's favor." *Id.* at 1172. Although the Court has  
12 held that Plaintiff has stated a plausible claim for rescission in her Third Amended Complaint,  
13 Plaintiff's rescission was not automatic and, accordingly, there are genuine issues of material fact as  
14 to whether the conduct of Defendants subsequent to Plaintiff's alleged rescission of her loan  
15 constituted elder abuse within the meaning of the California Welfare and Institutions Code.  
16 Furthermore, a claim for elder financial abuse requires a showing that Defendants took Plaintiff's  
17 property "for a wrongful use or with intent to defraud, or both." Cal. Welf. & Inst. Code § 15610.30.  
18 Plaintiff alleges and concludes Defendants did so, but points to no evidence in the record establishing  
19 such motive on behalf of Defendants.

20 Despite Plaintiff's failure to satisfy her initial burden in moving for summary judgment,  
21 Defendants SPS and Koch filed an opposition to Plaintiff's motion, in which they argue a genuine  
22 issue of fact exists as to whether they took, secreted, appropriated, or retained Plaintiff's property in  
23 bad faith. (Doc. 72) Defendants argue there is a genuine issue of fact as to whether SPS ever received  
24 Plaintiff's alleged February 5, 2007 correspondence and submit a Declaration stating no such

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26 <sup>2</sup> Plaintiff states she sent notices of rescission to MTGLQ on June 12, 2009 and  
27 September 3, 2009. (See Memo. in Opp. to Litton/MTGLQ Mot. for Denial at 22.) Plaintiff also  
28 attaches purported notices of rescission sent to SPS on March 12, 2007 and August 29, 2007 to her  
Reply to Goldman's opposition. (Reply to Goldman Opp. Exs. IV-V.) Plaintiff further states she gave  
Defendants notice of her rescission when she filed an initial Complaint in State Court on November  
3, 2008. (*Id.* at 12.)

1 correspondence was in fact received by them. (Weinberger Decl. ¶¶ 9-10.)<sup>3</sup> Goldman Sachs Mortgage  
2 Company ("Goldman") also filed an opposition, arguing Plaintiff has pointed to no evidence in the  
3 record indicating Goldman was in fact involved in her loan. The only evidence pointed to by Plaintiff  
4 in support of her allegations as to Goldman is a July 6, 2009 letter from Defendant Stephen C.  
5 Wichmann on behalf of The Impac Companies stating it had no records of Plaintiff's mortgage loan  
6 transaction and suggesting Plaintiff contact Goldman Sachs. (See Reply to Goldman Opp. at 25.)  
7 Goldman argues this letter is inadmissible hearsay. (Goldman Sur-Reply at 3.) Regardless, even if  
8 admissible, this single letter is insufficient to support a claim for summary judgment as to Goldman.  
9 Moreover, for the reasons set forth in its Order on Goldman's motion to dismiss, Plaintiff has failed  
10 to allege sufficient facts in support of its claim that Goldman is liable to her based on its agency or  
11 parent/subsidiary relationships with other named Defendants, let alone demonstrated an absence of a  
12 genuine question of material fact as to Goldman's liability.<sup>4</sup>

13 Accordingly, although Plaintiff may ultimately prevail on her claim for elder abuse and  
14 although the Court is sympathetic to Plaintiff's health condition, there are genuine issues of material  
15 fact which prevent the Court from granting Plaintiff's motion for summary judgment at this stage in  
16 the proceedings.

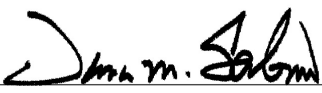
#### 17 IV.

#### 18 CONCLUSION

19 For the foregoing reasons, Plaintiff's motion for summary judgment on her claim for elder  
20 abuse in violation of California Welfare and Institutions Code § 15600, *et seq.* is **denied**.

21 **IT IS SO ORDERED.**

22 DATED: August 9, 2011

23   
HON. DANA M. SABRAW  
United States District Judge

24  
25 <sup>3</sup> Plaintiff filed an *ex parte* motion to strike Defendant SPS's opposition to her motion  
26 for summary judgment and to strike the Declarations of William Idelman and Diane Weinberger filed  
by SPS. (Doc. 84.) Plaintiff's *ex parte* motion is **denied**.

27 <sup>4</sup> Defendants Litton and MTGLQ filed a motion for denial or continuance of Plaintiffs'  
28 motion for summary judgment. (Doc. 71.) Plaintiff filed an opposition to this motion. (Doc. 78.)  
Because the Court herein finds that Plaintiff has failed to meet her burden in showing she is entitled  
to summary judgment, this motion is **denied as moot**.