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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ELLINGTON DANIELS and DIANE DANIELS,

Plaintiffs,

vs.
COMUNITY LENDING, INC.; NEW CENTURY MORTGAGE; THE BANK OF AMERICA HOME LOANS; COUNTRYWIDE HOME LOANS; BANK OF AMERICA, N.A.; GINNIE MAE; THE BANK OF NEW YORK; MORTGAGE ELECTRONIC REGISTRATIONS SYSTEMS (MERS); and RECONTRUST COMPANY, N.A.,

Defendants.

CASE NO. 13cv488-WQH-JMA
ORDER

HAYES, Judge:

The matters before to Court are (1) the Motion for Leave to File Second Amended Complaint (ECF No. 64); (2) the Motion to Strike Plaintiffs’ “Response in Opposition to Motion to Dismiss Leave to File Second Amended Complaint” (ECF No. 75); and (3) the failure to effectuate service on Defendants ComUnity Lending, Inc. and New Century Mortgage.

I. Background

On January 6, 2014, the Court issued an Order granting a motion to dismiss filed by Defendants Bank of New York Mellon, Bank of America, N.A., Countrywide Home

1 Loans, Inc., ReconTrust Company, N.A., and Mortgage Electronic Registration
2 Systems, Inc. (collectively, “moving Defendants”), and dismissing the First Amended
3 Complaint without prejudice as to the moving Defendants. (ECF No. 60). In the same
4 Order, the Court ordered Plaintiffs to file a proof of service within 120 days indicating
5 that Defendants ComUnity Lending, Inc., New Century Mortgage, and Ginnie Mae
6 (collectively, “unserved Defendants”) have been served with the First Amended
7 Complaint pursuant to Federal Rule of Civil Procedure 4. *Id.* at 14. The Court ordered
8 the U.S. Marshal to serve the unserved Defendants as directed by Plaintiffs pursuant to
9 Rule 4(c)(3).

10 On February 4, 2014, Plaintiffs, proceeding pro se and in forma pauperis, filed
11 a Motion for Leave to File Second Amended Complaint. (ECF No. 64). Attached to
12 the motion is a proposed second amended complaint and exhibits. *Id.* at 4-49.

13 On February 6, 2014, the U.S. Marshal filed unexecuted returns of service
14 indicating that Defendants ComUnity Lending, Inc. and New Century Mortgage were
15 no longer at the address provided by Plaintiffs and no forwarding address was known.
16 (ECF Nos. 67, 68).

17 On February 24, 2014, the moving Defendants filed an opposition to the Motion
18 for Leave to File Second Amended Complaint. (ECF No. 64). The moving Defendants
19 contend that the proposed amendment is futile.

20 On March 10, 2014, Plaintiffs filed a “Response in Opposition to the Motion to
21 Dismiss Leave to File Second Amended Complaint.” (ECF No. 74). Plaintiffs assert
22 that “[t]he Defendants’ Motion to Dismiss Plaintiffs’ Second Amended Complaint
23 should be denied.” *Id.* at 3.

24 On March 18, 2014, the moving Defendants filed the “Motion to Strike Plaintiffs’
25 ‘Response in Opposition to the Motion to Dismiss Leave to File Second Amended
26 Complaint.’” (ECF No. 75). The moving Defendants contend that Plaintiffs’ response
27 brief filed on March 10, 2014 “appear[s] to oppose a motion to dismiss,” which “is not
28 before the Court.” (ECF No. 75-1 at 2). The moving Defendants contend that

1 Plaintiffs’ response brief “should be deemed a reply in support of their motion for leave
2 to amend, and it should be stricken as untimely.” *Id.*

3 On April 18, 2014, the U.S. Marshal filed an executed return of service indicating
4 that Defendant Ginnie Mae was served. (ECF 77).

5 **II. Discussion**

6 **A. Service on ComUnity Lending, Inc. and New Century Mortgage**

7 Plaintiffs have failed to effectuate service on Defendants ComUnity Lending, Inc.
8 and New Century Mortgage as ordered by the Court in the January 6, 2014 Order. “It
9 is plaintiff’s responsibility to provide accurate addresses for defendants in order that
10 they can be served by the United States Marshal.” *Furnace v. Knuckles*, No. 09-6075-
11 MMC, 2011 WL 3809770 at *2 (N.D. Cal. Aug. 29, 2011); *see also Petty v. Shojaei*,
12 No. 12-1220-JAK, 2013 WL 5890136, at *15 (C.D. Cal. Oct. 31, 2013) (collecting
13 cases). Federal Rule of Civil of Procedure 4(m) provides that “[i]f a defendant is not
14 served within 120 days after the complaint is filed, the court—on motion or on its own
15 after notice to the plaintiff—must dismiss the action without prejudice against that
16 defendant or order that service be made within a specified time.” Fed. R. Civ. P. 4(m).
17 This Order constitutes notice to Plaintiffs that the Court will dismiss this action without
18 prejudice as to Defendants ComUnity Lending, Inc. and New Century Mortgage on
19 June 2, 2014, unless, before that date, Plaintiffs file a declaration under penalty of
20 perjury showing good cause for failure to timely serve Defendants ComUnity Lending,
21 Inc. and New Century Mortgage, accompanied by a motion for leave to serve process
22 outside of the 120-day period.

23 **B. Motion for Leave to File Second Amended Complaint**

24 Federal Rule of Civil Procedure 15 mandates that leave to amend “be freely given
25 when justice so requires.” Fed. R. Civ. P. 15(a). “This policy is to be applied with
26 extreme liberality.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th
27 Cir. 2003) (quotation omitted). In determining whether to allow an amendment, a court
28 considers whether there is “undue delay,” “bad faith,” “undue prejudice to the opposing

1 party,” or “futility of amendment.” *Foman v. Davis*, 371 U.S. 178, 182 (1962). “Not
2 all of the [*Foman*] factors merit equal weight.... [I]t is the consideration of prejudice
3 to the opposing party that carries the greatest weight.” *Eminence Capital*, 316 F.3d at
4 1052 (citation omitted). “The party opposing amendment bears the burden of showing
5 prejudice.” *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987).
6 “Absent prejudice, or a strong showing of any of the remaining *Foman* factors, there
7 exists a *presumption* under Rule 15(a) in favor of granting leave to amend.” *Eminence*
8 *Capital*, 316 F.3d at 1052.

9 After review of the Motion for Leave to File Second Amended Complaint and
10 the filings of the parties, the Court concludes that the moving Defendants have not
11 made a sufficiently strong showing of the *Foman* factors to overcome the presumption
12 under Rule 15(a) in favor of granting leave to amend. *See Eminence Capital*, 316 F.3d
13 at 1052. The Court will defer consideration of any challenge to the merits of the
14 proposed second amended complaint until after the amended pleading is filed. *See*
15 *Netbula v. Distinct Corp.*, 212 F.R.D. 534, 539 (N.D. Cal. 2003) (“Ordinarily, courts
16 will defer consideration of challenges to the merits of a proposed amended pleading
17 until after leave to amend is granted and the amended pleading is filed.”). The Motion
18 for Leave to File Second Amended Complaint is granted, and the Motion to Strike
19 Plaintiffs’ “Response in Opposition to the Motion to Dismiss Leave to File Second
20 Amended Complaint” is denied.

21 **III. Conclusion**

22 IT IS HEREBY ORDERED that the Court will dismiss this action without
23 prejudice as to Defendants ComUnity Lending, Inc. and New Century Mortgage on
24 June 2, 2014, unless, before that date, Plaintiffs file a declaration under penalty of
25 perjury showing good cause for failure to timely serve Defendants ComUnity Lending,
26 Inc. and New Century Mortgage, accompanied by a motion for leave to serve process
27 outside of the 120-day period.

28 IT IS FURTHER ORDERED that Motion for Leave to File Second Amended

1 Complaint is GRANTED (ECF No. 64), and the Motion to Strike Plaintiffs' "Response
2 in Opposition to the Motion to Dismiss Leave to File Second Amended Complaint" is
3 DENIED (ECF No. 75). The Clerk of the Court shall file the document entitled
4 "Plaintiffs' Second Amended Complaint" (ECF No. 64 at 4-49) as a new docket entry,
5 and this document will be construed as the Second Amended Complaint and the
6 operative pleading in this case. The moving Defendants shall respond to the Second
7 Amended Complaint no later than fourteen (14) days from the date this Order is filed.
8 *See* Fed. R. Civ. P. 15(a)(3).

9 DATED: May 14, 2014

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12 **WILLIAM Q. HAYES**
13 United States District Judge
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