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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 DIANE DANIELS, In rem UCC File
12 DOC#2015-0655389/16-754122183,
13 Plaintiff,
14 v.
15 THE BANK OF NEW YORK MELLON
16 et al.,
17 Defendants.

Case No.: 17-CV-1303-CAB-WVG

**ORDER GRANTING MOTION TO
DISMISS**

[Doc. Nos. 13, 16, 18]

18
19 This matter is before the Court on a motion to dismiss filed by Defendants The Bank
20 of New York Mellon (“BONY”) and Specialized Loan Servicing (“SLS”) [Doc. No. 13],
21 and (1) a demand of entry of default against all defendants [Doc. No. 15], (2) a motion
22 objecting to Defendants’ attorney Megan E. Lees’ participation in this case [Doc. No. 16],
23 and (3) an ex parte application for a temporary restraining order and preliminary injunction
24 [Doc. No. 18], filed by Plaintiff Diane Daniels. For the following reasons, the motion to
25 dismiss is granted, Plaintiffs’ motions are all denied, and the amended complaint is
26 dismissed as to BONY and SLS without prejudice to Plaintiff re-filing her state law claims
27 against them in state court.
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1 **I. Background**

2 On February 16, 2017, Plaintiff, proceeding *pro se*, filed a complaint in case number
3 17-CV-0319-CAB-WVG (the “First Action”), against defendants (1) The Bank of New
4 York Mellon (“BONY”), (2) BONY as Trustee for the certificate holders of the CWABS,
5 Inc., asset-backed certificates, Series 2006-13, (3) Specialized Loan Servicing (“SLS”),
6 and (4) Bank of America, N.A. (“BoA”). Along with this complaint, Plaintiff moved for
7 leave to proceed in forma pauperis (“IFP”), which the Court denied without prejudice based
8 on a lack of particularity, definiteness, and certainty in the information provided in support
9 of her motion. In the same order, the Court conducted a *sua sponte* screening of the
10 complaint, noting that it was “unable to discern what claim Plaintiff intends to assert and
11 on whose behalf,” and that the complaint did not “contain (1) ‘a short and plain statement
12 of the grounds for the court’s jurisdiction,’” and (2) ‘a short and plain statement of the
13 claim showing that the pleader is entitled to relief.’” [Doc. No. 3 in Case No. 17cv319.]
14 Thus, the Court held that the complaint was subject to dismissal for lack of subject matter
15 jurisdiction and for failure to state a claim upon which relief can be granted. The Court
16 advised Plaintiff that if she wished to proceed, she would have to file an amended complaint
17 and either pay the full filing fee or file a new motion to proceed IFP.

18 On March 22, 2017 (five days after the deadline set in the Court’s order), Plaintiff
19 filed an amended complaint in the First Action and a new motion for leave to proceed IFP.
20 The Court once again denied the motion to proceed IFP for lack of particularity,
21 definiteness, and certainty, noting that the motion did not explain how Plaintiff subsists
22 and did not remedy the deficiencies of the first motion. The order gave Plaintiff until April
23 21, 2017 to pay the filing fee if she wanted to proceed with her lawsuit.

24 On April 18, 2017, the Clerk of Court received a check from Plaintiff, ostensibly
25 intended to pay the filing fee for the First Action. However, the check was returned to
26 Plaintiff because it was received with various phrases containing restrictions including the
27 words “void” and “do not deposit.” [Doc. No. 7 in Case No. 17cv319.] At the same time,
28 Plaintiff attempted to file what appeared to be a second amended complaint in the First

1 Action, which the Court rejected from filing because Plaintiff had failed to pay the filing
2 fee and had not obtained leave to amend. [Doc. No. 8 in Case No. 17cv319.] The First
3 Action was then terminated for failure to pay the filing fee.

4 Two months later, on June 26, 2017, Plaintiff initiated the instant lawsuit with a new
5 twenty-six paged small font, single-spaced, and unsigned “complaint”, identifying the
6 plaintiff as “Diane Daniels, In Rem, UCC File Doc#2015-0655387/16-7541422183,” and
7 with the following description in the caption:

8 Verified Claim: Quiet Title; Tax Evasion; violation Daniels sovereign rights;
9 SEC Fraud; Mortgage Fraud; Criminal Trespass; violation of UCC; violation
10 of Fee Simple, Allodial Title Land Patent; NO ARGUMENT; NO THIRD
11 PARTIES ALLOWED; Compensatory; Punitive and Treble Damages;
Restitution; Injunctive; Declaratory and Equitable Judgment.

12 [Doc. No. 1.] This new complaint named as defendants (1) BONY, (2) SLS, (3) “Gerald
13 L Hassell Public and Private Capacity,” (4) “IRS EIN# 13-2614959, Commission File
14 #001-35651 for the Certificate Holders of the CWABS,” (5) “Brian Richard, Public and
15 Private Capacity,” (6) “William D. Gore Public and Private Capacity,” and (7) John
16 Beggins Public and Private Capacity.” [Id.] The complaint was accompanied by an
17 application for leave to proceed IFP, which the Court again denied for same reasons it had
18 denied Plaintiff’s IFP motions in the First Action. [Doc. No. 3] Because Plaintiff had now
19 filed three incomplete and inadequate IFP motions, the Court declined to give Plaintiff
20 another opportunity. The Court ordered Plaintiff to pay the filing fee by August 4, 2017,
21 and to refile her complaint in 14-point font, with no more than 28 lines per page, and signed
22 by Plaintiff.

23 On July 18, 2017, Plaintiff paid the filing fee and filed a signed amended complaint,¹
24 which is the operative complaint in this action. The amended complaint is rambling and
25 replete with odd and indecipherable language and punctuation that renders it nearly
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28 ¹ The amended complaint was actually signed with the words “redeem in lawful money” following the
signature. The Court does not know what this disclaimer means.

1 impossible to discern which defendants are allegedly liable for what. Even the identity of
2 the plaintiff is not entirely clear. By way of example, the first sentence of the complaint
3 states:

4 Now comes, DANIELS, DIANE, aka DIANE DANIELS (DANIELS),
5 transmitting utility, UCC FILE DOC#2018-0655389/16-7541422183,
6 operating in commerce for Diane Deliah: Daniels, party to this Verified Claim
7 by and through the undersigned authorized representative, I, Diane Deliah:
8 Daniels, sovereign and creditor, by special appearance, being competent with
9 firsthand knowledge, have all rights and authority all property, corporeal and
10 incorporeal belonging to DANIELS, DIANE aka DIANE DANIELS, legal
11 fiction, transmitting utility, Trust, now forever belongs to Diane Deliah:
12 Daniels, sovereign and creditor, without restriction, utilizing own credit to
13 cancel, discharge and charge off debt.

14 [Doc. No. 6 at 1.] As for a statement of the grounds for this Court’s jurisdiction, the
15 amended complaint contains a lengthy recitation of allegations about how “the subject
16 matter of this action and Claim all occurred within the County of San Diego, State of
17 California,” but does not articulate why federal subject matter jurisdiction exists. [*Id.* at 2-
18 3.]

19 As for substantive factual allegations, Plaintiff’s claims all appear to arise out of the
20 foreclosure of her residence at 6391 Medio Street, San Diego, California (the “Property”),
21 and the San Diego County Sherriff’s efforts to remove her from the premises after the
22 foreclosure occurred. Generally, Plaintiff argues in her complaint that the BONY and SLS
23 did not have the right to foreclose and did so fraudulently, and that the San Diego County
24 Sherriff’s office used excessive force and violated her rights when removing her. The
25 amended complaint itemizes the following four “claims for relief,” each of which includes
26 numerous possible claims:

- 27 • “Claim I for Relief- Contract Law: fraudulent misrepresentation, abuse of
28 process –Quiet Title and permanent injunction.” [*Id.* at 25.]
- “Claim II for Relief- Protect Rights, Deprivation Rights- Daniels sovereign
rights, unlawful arrest, searches and confinement in custody.” [*Id.* at 26.]

- 1 • “Claim II for Relief- Tax Fraud-BNY and other named defendants willfully
2 failed to pay taxes due, intentionally failed to report all income received,
3 fraudulent claims, Tax Evasion, willfully underreported income, falsification
4 of documents, concealment of income.” [*Id.* at 27.]
- 5 • “Claim IV for Relief- Securities Exchange Fraud against Daniels.” [*Id.* at 28.]

6 On August 31, 2017, BONY and SLS filed a motion to dismiss for failure to state a
7 claim. The following day, Plaintiff filed a demand that the clerk enter default against each
8 defendant.

9 On September 11, 2017, Plaintiff filed a document titled: “Title 28 Rule 17(a) NO
10 THIRD PARTIES ALLOWED ATTORNEY MEGAN E. LEES#277805 no BOND
11 provided THIRD party, not real party in interest in this case, and demand denial of
12 ATTORNEY MEGAN E. LEES and any other ATTORNEY attempt to join this case No
13 Argument, No Controversy.” [Doc. No. 16.]

14 On September 19, 2017, Plaintiff filed an ex parte application for temporary
15 restraining order and preliminary injunction, enjoining BONY and SLS from “selling,
16 attempting to sell, or causing to be sold” the Property. [Doc. No. 18 at 2.] On September
17 25, 2017, Plaintiff filed an opposition to the motion to dismiss. The Court finds all of the
18 pending motions suitable for submission without oral argument.

19 **II. Motion to Dismiss²**

20 To survive a motion to dismiss under Rule 12(b)(6), “a complaint must contain
21 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its
22 face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v.*
23 *Twombly*, 550 U.S. 544, 570 (2007)). Thus, the Court “accept[s] factual allegations in the
24 complaint as true and construe[s] the pleadings in the light most favorable to the
25 nonmoving party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031

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27 ² SLS and BONY filed a request for judicial notice along with their motion to dismiss. Because the Court
28 did not need to consider these documents in connection with the motion to dismiss, the request is denied
as moot.

1 (9th Cir. 2008). On the other hand, the Court is “not bound to accept as true a legal
2 conclusion couched as a factual allegation.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550
3 U.S. at 555). Nor is the Court “required to accept as true allegations that contradict exhibits
4 attached to the Complaint or . . . allegations that are merely conclusory, unwarranted
5 deductions of fact, or unreasonable inferences.” *Daniels-Hall v. Nat’l Educ. Ass’n*, 629
6 F.3d 992, 998 (9th Cir. 2010). “In sum, for a complaint to survive a motion to dismiss, the
7 non-conclusory factual content, and reasonable inferences from that content, must be
8 plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*,
9 572 F.3d 962, 969 (9th Cir. 2009) (quotation marks omitted).

10 Federal Rule of Civil Procedure 8 requires a pleader to put forth “a short and plain
11 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2).
12 In general, “[e]ach allegation must be simple, concise, and direct.” Rule 8(d)(1). The
13 Ninth Circuit has affirmed dismissal on Rule 8 grounds where the complaint is
14 “argumentative, prolix, replete with redundancy, and largely irrelevant,” *McHenry v.*
15 *Renne*, 84 F.3d 1172, 1177-80 (9th Cir. 1996), “verbose, confusing and conclusory,”
16 *Nevijel v. North Coast Life Ins. Co.*, 651 F.2d 671, 674 (9th Cir. 1981), or where it is
17 “impossible to designate the cause or causes of action attempted to be alleged in the
18 complaint,” *Schmidt v. Herrmann*, 614 F.2d 1221, 1223 (9th Cir. 1980).

19 Plaintiff has filed four complaints between the First Action and this one. Each
20 complaint has been argumentative, verbose, and confusing, and each one fails to clearly
21 identify the causes of action attempted to be alleged against each defendant. This repeated
22 failure to comply with Rule 8(a) prejudices the defendants, who face “the onerous task of
23 combing through [Plaintiff’s lengthy complaint] just to prepare an answer that admits or
24 denies such allegations and to determine what claims and allegations must be defended or
25 otherwise litigated.” *Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1059 (9th
26 Cir. 2011). Plaintiff’s noncompliance also harms litigants in other matters pending before
27 the court. “Rule 8(a) requires parties to make their pleadings straightforward, so that
28 judges and adverse parties need not try to fish a gold coin from a bucket of mud. Federal

1 judges have better things to do, and the substantial subsidy of litigation (court costs do not
2 begin to cover the expense of the judiciary) should be targeted on those litigants who take
3 the preliminary steps to assemble a comprehensible claim.” *U.S. ex rel. Garst v. Lockheed-*
4 *Martin Corp.*, 328 F.3d 374, 378 (7th Cir. 2003). Plaintiff’s failure to comply with Rule
5 8(a) is grounds for dismissal on its own. *See Nevijel*, 651 F.2d at 673 (“A complaint which
6 fails to comply with rules 8(a) and 8(e) may be dismissed with prejudice pursuant to rule
7 41(b).”). Nevertheless, the Court will attempt to decipher whether the amended complaint
8 sufficiently alleges (or could be amended to allege) any claims that would give this Court
9 subject matter jurisdiction over this dispute and warrant allowing Plaintiff an opportunity
10 to file yet another amended complaint against BONY and SLS.

11 **A. Federal Claims Against BONY and SLS**

12 The amended complaint does not articulate a basis for this Court’s subject matter
13 jurisdiction. According to the amended complaint, both Plaintiff and several of the
14 individual defendants “reside” in California, and the amended complaint does not
15 otherwise contain any basis for finding that there is complete diversity among the parties.
16 “The diversity jurisdiction statute, as construed for nearly 200 years, requires that to bring
17 a diversity case in federal court against multiple defendants, each plaintiff must be diverse
18 from each defendant.” *Lee v. Am. Nat. Ins. Co.*, 260 F.3d 997, 1004 (9th Cir. 2001).
19 Therefore, because Plaintiff is not diverse from each defendant, there is no subject matter
20 jurisdiction based on diversity.

21 The only other possible grounds for subject matter jurisdiction would be federal
22 question jurisdiction. “A plaintiff properly invokes [federal question] jurisdiction when
23 she pleads a colorable claim ‘arising under’ the Constitution or laws of the United States.”
24 *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 513 (2006) To that end, although it is hardly clear,
25 the claims for relief in the amended complaint include, without distinguishing among the
26 defendants, several claims that are (or could be construed as) federal claims: (1) violations
27 of Plaintiff’s constitutional rights, (2) “Tax Fraud”, and (3) “Securities Exchange Act
28 Fraud.” Thus, the Court presumes Plaintiff intends to assert federal question subject matter

1 jurisdiction based on these alleged claims and will address them first with respect to the
2 motion to dismiss filed by BONY and SLS.

3 **1. Claims for Violation of Constitutional Rights**

4 The amended complaint includes several conclusory allegations that each of the
5 defendants, including SLS and BONY, violated Plaintiff’s rights under the Constitution.
6 However, “[t]he Constitution does not provide a basis for imposing civil liability on those
7 who violate the rights granted therein; rather, 42 U.S.C. § 1983 provides a cause of action
8 for such violations.” *Evans v. Alliance Funding*, No. 10-03200 MMM (RZx), 2010 WL
9 11479358, at *7 (C.D. Cal. Aug. 12, 2010). Although the amended complaint makes no
10 mention of 42 U.S.C. § 1983, Plaintiff argues in her opposition that “[f]ailure to obtain
11 substantial Justice in state courts lead [sic] to this suit being filed in Federal Court under
12 Title 42 United States Code standard 1983.” [Doc. No. 19 at 19.] Notwithstanding this
13 argument, because the amended complaint only alleges constitutional violations directly,
14 and not pursuant to § 1983, any claims based on violations of the Constitution are subject
15 to dismissal for failure to state a claim on this basis alone.

16 Moreover, allowing Plaintiff to amend her complaint again to assert claims under §
17 1983 would be futile as to BONY and SLS because “[t]he United States Constitution
18 protects individual rights only from *government* action, not from *private* action. Only when
19 the *government* is responsible for a plaintiff’s complaints are individual constitutional
20 rights implicated.” *Single Moms, Inc. v. Montana Power Co.*, 331 F.3d 743, 746-47 (9th
21 Cir. 2003) (*emphasis* in original). As this court has advised Plaintiff in a previous lawsuit,³
22 “[f]oreclosure activity carried out by private entities pursuant to state law does not
23 implicate constitutional interests.” *Daniels v. ComUnity Lending, Inc.*, No. 13CV488-
24 WQH, 2015 WL 541299, at *11 (S.D. Cal. Feb. 9, 2015) (citing *Charmicor v. Deaner*, 572
25 F.2d 694, 696 (9th Cir. 1978) (“Over 40 years ago, this court rejected a challenge to the
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27 ³ This prior lawsuit appears to have been an earlier effort by Plaintiff to stave off foreclosure on the
28 Property. Plaintiff is a frequent litigant in this Court, having been Plaintiff in at least six different lawsuits since 2013.

1 constitutional of former Cal. Civil Code § 2924. The appellant there argued that he had
2 been deprived of due process by virtue of the trustee’s alleged failure to comply strictly
3 with the statutory notice provisions. This court held that there was no state action, and
4 hence no federal claim for relief.”)). The amended complaint does not allege, and could
5 not plausibly allege, that BONY and SLS are government actors or could be considered
6 government actors in connection with their efforts to foreclose on the Property. *Apao v*
7 *Bank of New York*, 324 F.3d 1091, 1094 (9th Cir. 2003) (“[S]elf-help foreclosure remedies
8 have existed since early in the common law, and thus one cannot say that the power of
9 foreclosure is one traditionally belonging only to the government”); *Geist v. Cal.*
10 *Reconveyance Co.*, No C 10-0367 CRB, 2010 WL 1999854, *2 (N.D. Cal. May 18, 2010)
11 (“*Apao* therefore squarely controls this case and compels a finding that Defendants’ use of
12 non-judicial foreclosure procedures does not qualify as ‘state action’”).

13 Because SLS and BONY’s use of California’s non-judicial foreclosure procedures
14 does not constitute government action, Plaintiff cannot assert § 1983 claims against SLS
15 and BONY based their efforts to foreclose on the Property. Accordingly, Plaintiff’s claims
16 against SLS and BONY for constitutional violations are dismissed with prejudice because
17 any amendment to assert claims under § 1983 would be futile. *See Evans*, 2010 WL
18 11479358, at *8 (dismissing with prejudice claims of constitutional violations against bank
19 and mortgage company arising out of non-judicial foreclosure of the plaintiff’s residence).

20 2. “Securities Exchange Fraud”

21 The amended complaint labels the fourth claim for relief as “Securities Exchange
22 Fraud,” but it does not identify any specific code provisions, and the only allegations in the
23 amended complaint or argument conceivably related to securities fraud in the opposition
24 appear to be connected to the securitization of the loan on the Property. Generally,
25 however, “[o]nly a purchaser or seller of securities has standing to bring an action” for
26 securities fraud. *Binder v. Gillespie*, 184 F.3d 1059, 1066 (9th Cir. 1999). Plaintiff does
27 not allege that she was a purchaser or seller of securities connected with SLS or BONY.
28 Rather, Plaintiff appears to base this claim on a belief that the securitization of the loan on

1 the Property was fraudulent because it occurred without her consent. Even if Plaintiff's
2 loan was securitized without her consent, that fact does not qualify her as a purchaser or
3 seller of the security. *Sepehry-Fard v. Nationstar Mortg. LLC*, No. 14-CV-03218-LHK,
4 2015 WL 332202, at *19 (N.D. Cal. Jan. 26, 2015) (“Even assuming that Plaintiff's
5 mortgage loans were securitized, this fact would not qualify Plaintiff as a purchaser or
6 seller of the security.”); *Bello v. Chase Home Fin.*, No. 10CV1913 BTW WVG, 2011 WL
7 133351, at *1 (S.D. Cal. Jan. 14, 2011) (“Even assuming Plaintiff's mortgage was
8 ultimately sold into the secondary mortgage market, Plaintiff does not qualify as a
9 purchaser or seller of the security.”). Accordingly, Plaintiff's claim for “securities
10 exchange fraud” against SLS and BONY related to the securitization of the loan on the
11 Property is dismissed with prejudice because any amendment would be futile.

12 **3. “Tax Fraud”**

13 To the extent Plaintiff's tax fraud claim is premised on alleged federal tax evasion,
14 Plaintiff does not identify, and the Court is unaware of, any private right of action for tax
15 fraud or evasion. Accordingly, any “tax fraud” claim grounded in purported federal income
16 evasion by SLS or BONY is dismissed with prejudice.

17 Plaintiff's “tax fraud” claim also appears to be premised on SLS and BONY
18 allegedly fraudulently billing Plaintiff for taxes that, according to Plaintiff, BONY or SLS
19 owed. [Doc. No. 6 at ¶ 40.] To the extent this is the gravamen the claim, it is merely a
20 common law fraud claim governed by state law over which, as discussed below, the Court
21 declines to exercise supplemental jurisdiction.

22 **B. State Law Claims**

23 “A district court ‘may decline to exercise supplemental jurisdiction’ if it ‘has
24 dismissed all claims over which it has original jurisdiction.’” *Sanford v. MemberWorks,*
25 *Inc.*, 625 F.3d 550, 561 (9th Cir. 2010) (quoting 28 U.S.C. § 1367(c)(3)). “In the usual
26 case in which all federal-law claims are eliminated before trial, the balance of factors to be
27 considered under the pendent jurisdiction doctrine—judicial economy, convenience,
28 fairness, and comity—will point toward declining to exercise jurisdiction over the

1 remaining state-law claims.” *Id.* (internal brackets and citation omitted). Here, most of
2 the claims that the amended complaint conceivably attempts to assert against all
3 defendants, including BONY and SLS, are based on California state law, and “primary
4 responsibility for developing and applying state law rests with the state courts.” *Neal v. E-*
5 *Trade Bank*, No. CIV. S-11-0954 FCD, 2011 WL 3813158, at *4 (E.D. Cal. Aug. 26,
6 2011). Accordingly, having dismissed the federal claims against SLS and BONY, and in
7 consideration of the early stage of these proceedings, the Court declines to exercise
8 supplemental jurisdiction over the remaining state law claims against SLS and BONY. *See*
9 *generally Banayan v. OneWest Bank F.S.B.*, No. 11CV0092-LAB WVG, 2012 WL
10 896206, at *2 (S.D. Cal. Mar. 14, 2012) (“There is no alleged basis for diversity jurisdiction
11 in this case, and the Court is well within its discretion to dismiss a case for lack of
12 jurisdiction when all federal claims have been dismissed and only state law claims over
13 which it has supplemental jurisdiction remain.”); *Keen v. Am. Home Mortg. Servicing, Inc.*,
14 No. CIV. S-09-1026 FCD/KJM, 2010 WL 624306, at *1 (E.D. Cal. Feb. 18, 2010)
15 (“[W]hen federal claims are eliminated before trial, district courts should usually decline
16 to exercise supplemental jurisdiction.”).

17 **III. Ex Parte Application for Temporary Restraining Order**

18 After the motion to dismiss was filed, and three months after filing the complaint in
19 this lawsuit and seven months after filing the First Action, Plaintiff filed an ex parte
20 application for a temporary restraining order. As far as can be discerned from the
21 application, Plaintiff seeks an order preventing BONY, who is now the owner of the
22 Property after foreclosure, from reselling the Property. [Doc. No. 18 at 8-10.]

23 “A preliminary injunction is an extraordinary remedy never awarded as of right.
24 *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 9, 24 (2008). Injunctive relief may
25 only be granted upon a showing of “irreparable injury and the inadequacy of legal
26 remedies.” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); *Stanley v. Univ. of*
27 *So. Calif.*, 13 F.3d 1313, 1320 (9th Cir. 1994). For party to prevail on a motion for
28 preliminary injunction, therefore, it must demonstrate that: “(1) it is likely to succeed on

1 the merits of its claim, (2) it is likely to suffer irreparable harm in the absence of preliminary
2 relief, (3) the balance of hardships tips in its favor, and (4) a preliminary injunction is in
3 the public interest.” *Int’l Franchise Ass’n, Inc. v. City of Seattle*, 803 F.3d 389, 399 (9th
4 Cir. 2015) (citing *Winter*, 555 U.S. at 20).

5 Having dismissed all claims against the SLS and BONY, the Court finds that
6 Plaintiff has failed to establish a likelihood of success on the merits in this Court.
7 Accordingly, the application for a temporary restraining order and preliminary injunction
8 is denied. *See generally Global Horizons, Inc. v. United States Dept. of Labor*, 510 F.3d
9 1054, 1058 (9th Cir. 2007) (“Once a court determines a complete lack of probability of
10 success or serious questions going to the merits, its analysis may end, and no further
11 findings are necessary.”).⁴

12 **IV. Demand for Entry of Default**

13 Plaintiff demands that the Clerk of Court enter the default of all of the defendants.
14 However, BONY and SLS have of course responded to the complaint, making default
15 against them inappropriate. As to the other defendants, Plaintiff filed a proof of service
16 indicating that the amended complaint and summons were “personally served and mailed
17 USPS first class mail certified” on Richard and “San Diego Sheriff”, and that it was mailed
18 to Beggins via first class mail. Pursuant to Federal Rule of Civil Procedure 4:

19 Service upon an individual may be made by following state law for serving a
20 summons where the district court is located or where service is made.
21 Fed.R.Civ.P. 4(e)(1). Service upon an individual may also be made by
22 delivering a copy of the summons and of the complaint to the individual
23 personally; leaving a copy of each at the individual’s dwelling or usual place
24 of abode with someone of suitable age and discretion who resides there; or
25 delivering a copy of each to an agent authorized by appointment or by law to
26 receive service of process. Fed.R.Civ.P. 4(e).

27 *Flint v. Krause*, No. 11CV0480 AJB WMC, 2011 WL 4626149, at *3 (S.D. Cal. Oct. 5,

28 ⁴ *See also Daniels*, 2015 WL 541299, at *13 (denying Plaintiff’s motion for a preliminary injunction,
finding that Plaintiff failed to establish a likelihood of success on the merits in light of the Court’s
dismissal of all claims against the moving defendants for failure to state a claim).

1 2011). Service by first class mail does not satisfy Rule 4(e)(2). It also does not comply
2 with California Code of Civil Procedure Section 410, which allows for personal delivery
3 of the summons, or Section 415.20(b), which states:

4 If a copy of the summons and complaint cannot with reasonable diligence be
5 personally delivered to the person to be served, as specified in Section 416.60,
6 416.70, 416.80, or 416.90, a summons may be served by leaving a copy of the
7 summons and complaint at the person's dwelling house, usual place of abode,
8 usual place of business, or usual mailing address other than a United States
9 Postal Service post office box, in the presence of a competent member of the
10 household or a person apparently in charge of his or her office, place of
11 business, or usual mailing address other than a United States Postal Service
12 post office box, at least 18 years of age, who shall be informed of the contents
thereof, and by thereafter mailing a copy of the summons and of the complaint
by first-class mail, postage prepaid to the person to be served at the place
where a copy of the summons and complaint were left. Service of a summons
in this manner is deemed complete on the 10th day after the mailing.

13 Cal. Civ. Proc. Code § 415.20; *see also Flint*, 2011 WL 4626149, at *3 (granting motion
14 to dismiss for insufficient service when service was made by certified mail to the corporate
15 addresses of the defendants' employers).

16 There is insufficient evidence here that Plaintiff has attempted to properly personally
17 serve any of the defendants. *See generally WFG Nat'l Title Ins. Co. v. Dadyan*, No. CV
18 17-4784-GW(KSX), 2017 WL 3835675, at *4 (C.D. Cal. Aug. 31, 2017) ("Before
19 substitute service may be employed [] reasonable diligence must first be exercised. Two or
20 three attempts to personally serve a defendant at a proper place ordinarily qualifies as
21 reasonable diligence.") (internal quotation marks and citation omitted). The statement in
22 the proof of service [Doc. No. 11] that Richard and the San Diego Sherriff were "personally
23 served" is a legal conclusion. To determine whether these defendants, as well as any of
24 the other defendants, were personally served in compliance with Rule 4, the proof of
25 service should describe the specific circumstances of the service, including the time of day,
26 the location where service occurred, a physical description of the person on whom service
27 was made, and an explanation for the process server's belief that the person being served
28 was in fact the defendant or an agent of the defendant on whom service could be made.

1 Because there is not sufficient evidence in the record that Plaintiff has served any of
2 the defendants in compliance with Rule 4, her demand for entry of default against the non-
3 moving defendants is denied.⁵

4 **V. Disposition**

5 For the foregoing reasons, the motion to dismiss filed by BONY and SLS is
6 **GRANTED** for failure to state a claim with respect to Plaintiff's claims for constitutional
7 violations, federal tax fraud/evasion, and "Securities Exchange Fraud." Because any
8 amendment to these claims would be futile, these claims are **DISMISSED WITH**
9 **PREJUDICE** as to BONY and SLS. The motion to dismiss is **DENIED** without prejudice
10 with respect to the remaining state law claims because the Court declines to exercise
11 supplemental jurisdiction over those claims. Because the Court declines supplemental
12 jurisdiction, the remaining state law claims are **DISMISSED** without prejudice to Plaintiff
13 asserting them in a new action in state court. Further, Plaintiff's motions [Doc. Nos. 16,
14 18] and her demand for entry of default [Doc. No. 15] are each **DENIED**.

15 Finally, as discussed above, there is insufficient evidence on the docket that any of
16 the remaining defendants have been served with the amended complaint and summons in
17 accordance with Rule 4. Failure to serve a complaint and summons on a defendant within
18 ninety days is grounds for dismissal as to that defendant. Fed. R. Civ. P. 4(m).
19 Accordingly, the Court will dismiss this action without prejudice as to Defendants Hassell,
20 Richard, Gore, Beggins, IRS EIN# 13-2614959 Commission File#001-35651 For the
21 Certificate Holders of the CWABS, and the San Diego Sherriff, on **October 27, 2017**,
22 unless, before that date, Plaintiff files either: (1) a separate proof of service as to each of
23 the remaining defendants demonstrating that such defendant has been served with the
24 amended complaint and summons pursuant to Federal Rule of Civil Procedure 4, including
25 the specific circumstances of any service by personal delivery; or, (2) a declaration under
26

27 ⁵ In addition, Plaintiff's motion concerning defense counsel Megan Lees [Doc. No. 16] is unintelligible
28 and does not state any grounds for disqualifying Ms. Lees as defense counsel. Accordingly, the motion
is **DENIED** as well.

1 penalty of perjury showing good cause for her failure to timely serve those defendants.

2 It is **SO ORDERED**.

3 Dated: October 11, 2017



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5 Hon. Cathy Ann Bencivengo
6 United States District Judge
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