

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANGELA L. YBARRA and GABRIEL B. YBARRA,) Case No.: 2:10-cv-01642-GMN-LRL
)
 Plaintiffs,) **ORDER**
 vs.)
)
 OCWEN LOAN SERVICING, LLC; DEUTSCHE)
 BANK NATIONAL TRUST COMPANY, as trustee)
 on behalf of MORGAN STANLEY ABS CAPITAL I)
 INC., on behalf of TRUST 2007-NC3 MORTGAGE)
 PASS THROUGH CERTIFICATES, SERIES 2007-)
 NC3; MORTGAGE ELECTRONIC REGISTRATION)
 SYSTEMS, INC., ET AL.)
)
 Defendants.)
)

Pending before the Court is Defendants’ Motion to Dismiss (ECF No. 21).

Plaintiff Angela Ybarra’s untimely filed Amended Complaint against Defendants Ocwen Loan Servicing, LLC; Deutsche Bank National Trust Company, as Trustee for the registered holders of Morgan Stanley ABS Capital I Inc., Trust 2007-NC3 Mortgage Pass Through Certificates, Series 2007-NC3; and Mortgage Electronic Registration Systems, Inc. (collectively, “Defendants”) (ECF No. 20) was filed on October 26, 2011.

I. BACKGROUND

On April 27, 2011, this Court granted Defendant Ocwen Loan Servicing, LLC’s Motion to Dismiss Plaintiff’s first Complaint (ECF No. 5) and allowed Plaintiff leave to “file an Amended Complaint correcting the deficiencies in her first and second causes of action by May 17, 2011.” (Order, 6:10-11, ECF No. 18.) The Court did not grant Plaintiff leave to add parties. The Court’s Order specifically warned Plaintiff that “[f]ailure to file an Amended Complaint by that date will result [in] the dismissal of this lawsuit.” (Id. at 6:11-12.) However, Plaintiff failed to

1 file an amended complaint before the Court’s deadline. Instead, Plaintiff and her husband
2 Gabriel Ybarra filed a new lawsuit on May 20, 2011, which was adjudicated by Judge Kent
3 Dawson, and closed on October 24, 2011. See *Ybarra v. Home 123 Corporation et al.*, Case No.
4 2:11-cv-00829-KJD-GWF, 2011 WL 5036918, 2011 U.S. Dist. LEXIS 122664 (D. Nev. Oct. 21,
5 2011). Plaintiff then filed her Amended Complaint in this action on October 26, 2011, over five
6 months after the deadline. (AC, ECF No. 20). Defendants have filed a Motion to Dismiss for
7 failure to timely amend under Fed. R. Civ. P. 41(b) and for failure to state a claim upon which
8 relief may be granted under Fed. R. Civ. P. 12(b)(6). (ECF No. 21.)

9 **II. LEGAL STANDARD**

10 If a plaintiff fails to prosecute an action or to comply with a court order, a defendant may
11 move to dismiss the action or any claim against it. Fed. R. Civ. P. 41(b). Unless stated otherwise
12 by the Court, a dismissal under this subdivision (b) operates as an adjudication on the merits. *Id.*
13 Under Ninth Circuit precedent, when a plaintiff does nothing and fails to amend a complaint after
14 a district court dismisses the complaint with leave to amend, “resources continue to be consumed
15 by a case sitting idly on the court’s docket” and dismissal is appropriate as a sanction under Fed.
16 R. Civ. P. 41(b). *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1065 (9th Cir. 2004) (discussing
17 *Yourish v. California Amplifier*, 191 F.3d 983, 986 (9th Cir. 1999) and *Ferdik v. Bonzelet*, 963
18 F.2d 1258, 1260 (9th Cir. 1992)).

19 Before dismissing a claim “for failure to prosecute or failure to comply with a court order,
20 the Court must weigh the following factors: (1) the public’s interest in expeditious resolution of
21 litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to
22 defendants/respondents; (4) the availability of less drastic alternatives; and (5) the public policy
23 favoring disposition of cases on their merits.” *Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir.
24 2002) (citing *Ferdik*, 963 F.2d at 1260-61). “The public’s interest in expeditious resolution of
25 litigation always favors dismissal.” *Id.* (quoting *Yourish*, 191 F.3d at 990). “It is incumbent upon

1 the Court to manage its docket without being subject to routine noncompliance of litigants.” Id.
2 “Unreasonable delay creates a presumption of injury to the defense.” *Henderson v. Duncan*, 779
3 F.2d 1421, 1423 (9th Cir. 1986).

4 Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action
5 that fails to state a claim upon which relief can be granted. See *North Star Int’l. v. Arizona Corp.*
6 *Comm’n.*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule
7 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not
8 give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. See
9 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is
10 sufficient to state a claim, the Court will take all material allegations as true and construe them in
11 the light most favorable to the plaintiff. See *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th
12 Cir. 1986).

13 However, the Court is not required to accept as true allegations that are merely
14 conclusory, unwarranted deductions of fact, or unreasonable inferences. See *Sprewell v. Golden*
15 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action
16 with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a violation
17 is plausible, not just possible. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*,
18 550 U.S. at 555).

19 A court may also dismiss a complaint pursuant to Federal Rule of Civil Procedure 41(b)
20 for failure to comply with Federal Rule of Civil Procedure 8(a). *Hearns v. San Bernardino Police*
21 *Dept.*, 530 F.3d 1124, 1129 (9th Cir.2008). Rule 8(a)(2) requires that a plaintiff's complaint
22 contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”
23 Fed. R. Civ. P. 8(a)(2). “Prolix, confusing complaints” should be dismissed because “they
24 impose unfair burdens on litigants and judges.” *McHenry v. Renne*, 84 F.3d 1172, 1179 (9th
25 Cir.1996). Mindful of the fact that the Supreme Court has “instructed the federal courts to

1 liberally construe the ‘inartful pleading’ of pro se litigants,” *Eldridge v. Block*, 832 F.2d 1132,
2 1137 (9th Cir. 1987), the Court will view Plaintiffs’ pleadings with the appropriate degree of
3 leniency.

4 “Generally, a district court may not consider any material beyond the pleadings in ruling
5 on a Rule 12(b)(6) motion However, material which is properly submitted as part of the
6 complaint may be considered on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner
7 & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Similarly, “documents
8 whose contents are alleged in a complaint and whose authenticity no party questions, but which
9 are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6)
10 motion to dismiss” without converting the motion to dismiss into a motion for summary
11 judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Under Federal Rule of Evidence
12 201, a court may take judicial notice of “matters of public record.” *Mack v. S. Bay Beer Distrib.*,
13 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court considers materials outside
14 of the pleadings, the motion to dismiss is converted into a motion for summary judgment. See
15 *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001).

16 If the court grants a motion to dismiss, it must then decide whether to grant leave to
17 amend. The court should “freely give” leave to amend when there is no “undue delay, bad
18 faith[,] dilatory motive on the part of the movant . . . undue prejudice to the opposing party by
19 virtue of . . . the amendment, [or] futility of the amendment” Fed. R. Civ. P. 15(a); *Foman v.*
20 *Davis*, 371 U.S. 178, 182 (1962). Generally, leave to amend is only denied when it is clear that
21 the deficiencies of the complaint cannot be cured by amendment. See *DeSoto v. Yellow Freight*
22 *Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

23 **III. DISCUSSION**

24 Plaintiff’s Amended Complaint may be dismissed under Fed. R. Civ. P. 41(b) and under
25 12(b)(6). Weighing the five factors for dismissal under Rule 41(b), the Court finds that the

1 public interest in expeditious resolution of litigation, the Court’s need to manage its docket, and
2 the risk of prejudice to defendants all favor dismissal. Plaintiff’s Amended Complaint was filed
3 over five months after the court’s deadline, and over a year from the initial filing of the lawsuit.
4 Plaintiff has had two opportunities to file her Complaint in this action, and the only less drastic
5 alternative available is to allow Plaintiff to re-file her Amended Complaint. Therefore, the Court
6 will grant Defendants’ motion to dismiss under Rule 40(b).

7 It should be noted that Plaintiff’s Amended Complaint also fails to state a claim upon
8 which relief may be granted, and Plaintiff fails to amend her complaint according to the
9 instructions of the Court. This Court weighs seriously the public policy favoring disposition of
10 cases on their merits. Upon further analysis, the Court finds that Plaintiff’s claims fail on the
11 merits as well. Plaintiff’s Amended Complaint fails under Rule 12(b)(6). In the previous Order,
12 the Court allowed Plaintiff to file an Amended Complaint to correct the deficiencies in her first
13 and second causes of action under the Truth in Lending Act (“TILA”). (Order, ECF No. 18.) In
14 the 60-page Amended Complaint, Plaintiff makes no attempt to address the deficiencies noted by
15 the Court, instead choosing to survey current events and to allege violations of 18 U.S.C. 1962,
16 the Racketeer Influenced and Corrupt Organizations Act (“RICO”), conspiracy and fraud.
17 Plaintiff’s Amended Complaint fails to state a claim under which relief may be granted pursuant
18 to Fed. R. Civ. P. 12(b)(6), fails to comply with Fed. R. Civ. P. 8(a), and fails to comply with the
19 Court’s Order. Therefore, even if the Court allowed Plaintiff’s Amended Complaint to be
20 determined on the merits, Plaintiff’s claims would fail.

21 **IV. CONCLUSION**

22 For the reasons discussed above,

23 **IT IS HEREBY ORDERED** that Defendants’ Motion to Dismiss (ECF No. 21) is

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1 **GRANTED, with prejudice.**

2 DATED this 30th day of November, 2011.

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6 Gloria M. Navarro
7 United States District Judge
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