

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

OSCAR VALERO;
BLANCA VALERO,

Plaintiffs,

vs.

BANK OF AMERICA HOME LOANS;
BANK OF NEW YORK MELLON;
RECONTRUST COMPANY, N.A.;
and DOES 1-10, inclusive,

Defendants.

No. 2:12-cv-1115-KJM-EFB PS

ORDER AND
FINDINGS AND RECOMMENDATIONS

_____ /
This case, in which plaintiffs are proceeding pro se, is before the undersigned pursuant to Eastern District of California Local Rule 302(c)(21). See 28 U.S.C. § 636(b)(1). Defendants move to dismiss plaintiffs’ second amended complaint for lack of subject matter jurisdiction and, alternatively, failure to state a claim. Dckt. No. 15. For the reasons stated herein, the undersigned recommends that the motion be granted.

I. BACKGROUND

On April 26, 2012, plaintiffs filed a complaint against defendants, alleging wrongful foreclosure and objecting to defendants’ unlawful detainer action. Dckt. No. 1. Plaintiffs asserted claims for breach of contract, fraud and racketeering, usury and racketeering, and fraud,

1 and contended that this court has subject matter jurisdiction because defendants violated
2 plaintiffs' seventh amendment right to a trial by jury, as well as plaintiffs' fifth and fourteenth
3 amendment rights. *Id.* at 2, 5-6. Defendants moved to dismiss that complaint pursuant to
4 Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), arguing that this court lacks jurisdiction
5 and that the complaint fails to state a claim upon which relief may be granted. Dckt. No. 6.

6 Plaintiffs originally filed an opposition to the motion to dismiss on August 14, 2012.
7 Dckt. No. 7. However, because the opposition was late and did not respond to many of the
8 specific arguments made in the motion to dismiss, plaintiffs were directed to file a revised
9 opposition in which they were to respond to the specific arguments set forth in the motion to
10 dismiss. Dckt. No. 9.

11 Plaintiffs then filed a further opposition on August 29, 2012. Dckt. No. 11. Also on
12 August 29, 2012, plaintiffs filed a first amended complaint. Dckt. No. 12. However, because
13 plaintiffs were not entitled to amend their complaint as a matter of course and did not have the
14 stipulation of all parties for leave to amend, the amended complaint was construed as a motion to
15 amend pursuant to Federal Rule of Civil Procedure 15(a)(2) and that motion was granted. Dckt.
16 No. 13. Accordingly, plaintiffs were instructed to file a second amended complaint and
17 defendants' motion to dismiss was denied as moot. *Id.*

18 On September 17, 2012, plaintiffs filed a second amended complaint. Dckt. No. 14. The
19 complaint asserts that jurisdiction is based upon plaintiffs' Seventh Amendment rights, as well as
20 plaintiff's Fifth and Fourteenth Amendment rights. *Id.* at 2. The second amended complaint
21 states claims for violation of 42 U.S.C. § 1983, 18 U.S.C. § 241, wrongful foreclosure, and a
22 violation of plaintiffs' "human rights and due process," and vaguely alleges that defendants
23 violated 18 U.S.C. §§ 1341 and 1343. *Id.* at 6-7.

24 According to the second amended complaint, plaintiffs obtained a \$424,000.00 home
25 loan from Countrywide Home Loans, currently known as Bank of America Home Loans. *Id.* at
26 3. Plaintiffs allege, however that defendant "only lent credit and not lawful money of the United

1 States” in violation of 42 U.S.C. § 1983. *Id.* Plaintiffs contend that the defendants violated “the
2 rule of servicing and the strict rules of foreclosure” by engaging in “unsafe and unsound
3 servicing practices that have caused the plaintiff an unlawful and wrongful foreclosure.” *Id.* at 4.
4 Plaintiffs allege that Countrywide Home Loans, currently known as Bank of America Home
5 Loans, made a false representation and engaged in fraud “as it merely transferred some book
6 entries and never intended to redeem this check in lawful money of the United States but did
7 illegally represent, induce the plaintiff to believe otherwise” *Id.* Plaintiffs assert that this
8 also led “to the illegal securitization of plaintiffs’ deed of trust” and that “[t]he bank did not
9 disclose the fact that after it sold the Note the bank, (Lender), and Servicer gave up all rights,
10 Title, and Interest but is acting illegally in the servicing capacity to foreclose upon the
11 plaintiffs.” *Id.* at 5. Plaintiffs also allege that the Bank of New York Mellon committed illegal
12 “securitization violations” and initiated a “wrongful foreclosure claim and a breach of payments
13 from a debt when there is no debt in bankruptcy.” *Id.* Plaintiffs contend that their property in
14 Woodland, California entered foreclosure on September 22, 2011, and that plaintiffs received an
15 eviction notice on February 2, 2012. *Id.* at 6. Plaintiffs claim that the substituted trustee,
16 Recontrust Company, N.A. filed a fraudulent and misleading “Affidavit of Indebtedness,
17 Ownership of Accounts” in violation of § 1983, 18 U.S.C. § 1621, and plaintiff’s human rights
18 and due process rights. *Id.*

19 II. MOTION TO DISMISS

20 A. Legal Standards Under 12(b)(6)

21 To survive dismissal for failure to state a claim pursuant to Rule 12(b)(6), a complaint
22 must contain more than a “formulaic recitation of the elements of a cause of action”; it must
23 contain factual allegations sufficient to “raise a right to relief above the speculative level.” *Bell*
24 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading must contain something more
25 . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of
26 action.” *Id.* (quoting 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, pp. 235-

1 236 (3d ed. 2004)). “[A] complaint must contain sufficient factual matter, accepted as true, to
2 ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, -- U.S. ---, 129 S. Ct.
3 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when
4 the plaintiff pleads factual content that allows the court to draw the reasonable inference that the
5 defendant is liable for the misconduct alleged.” *Id.*

6 In considering a motion to dismiss, the court must accept as true the allegations of the
7 complaint in question, *Hospital Bldg. Co. v. Rex Hosp. Trs.*, 425 U.S. 738, 740 (1976), construe
8 the pleading in the light most favorable to the party opposing the motion, and resolve all doubts
9 in the pleader’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421, *reh’g denied*, 396 U.S. 869
10 (1969). The court will “‘presume that general allegations embrace those specific facts that are
11 necessary to support the claim.’” *Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 256
12 (1994) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

13 The court may consider facts established by exhibits attached to the complaint. *Durning*
14 *v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987). The court may also consider facts
15 which may be judicially noticed, *Mullis v. U.S. Bankr. Ct.*, 828 F.2d at 1388, and matters of
16 public record, including pleadings, orders, and other papers filed with the court. *Mack v. South*
17 *Bay Beer Distribs.*, 798 F.2d 1279, 1282 (9th Cir. 1986).

18 B. Pro Se Standards

19 The court is mindful of plaintiffs’ pro se status. Pro se pleadings are held to a less
20 stringent standard than those drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520-21
21 (1972). Unless it is clear that no amendment can cure its defects, a pro se litigant is entitled to
22 notice and an opportunity to amend the complaint before dismissal. *Lopez v. Smith*, 203 F.3d
23 1122, 1127-28 (9th Cir. 2000); *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987). The court
24 must construe the pleadings of a pro se litigant liberally. *Bretz v. Kelman*, 773 F.2d 1026, 1027
25 n. 1 (9th Cir. 1985). However, that liberal interpretation may not supply essential elements of a
26 claim that are not plead. *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992); *Ivey v. Bd. of*

1 *Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir.1982). Furthermore, “[t]he court is not
2 required to accept legal conclusions cast in the form of factual allegations if those conclusions
3 cannot reasonably be drawn from the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d
4 752, 754-55 (9th Cir. 1994). Neither need the court accept unreasonable inferences, or
5 unwarranted deductions of fact. *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

6 C. Discussion

7 Defendants argue that the second amended complaint fails to state a claim upon which
8 relief may be granted. Dckt. No. 15. Specifically, they contend that the second amended
9 complaint (1) fails to comply with Federal Rule of Civil Procedure 8; (2) fails to allege claims
10 for violation of 42 U.S.C. § 1983 and/or 18 U.S.C. § 241; (3) fails to state a claim for wrongful
11 foreclosure; (4) fails to state a claim for violation of plaintiffs’ human rights; and (5) fails to state
12 a claim under 18 U.S.C. §§ 1341 and 1343. *Id.*

13 1. 42 U.S.C. § 1983

14 Throughout their second amended complaint, plaintiffs repeatedly reference defendants’
15 alleged violations 42 U.S.C. § 1983. Plaintiffs also allege that defendants violated plaintiffs’
16 “human rights and due process.”¹ Dckt. No. 14 at 7. Section 1983 does not, itself create
17 substantive rights. Rather, it provides a statutory remedy for the violation by state actors of
18 otherwise federally protected rights. *Anderson v. Warner*, 451 F.3d 1063, 1067 (9th Cir. 2006).

19 To state a claim under § 1983, plaintiffs must allege: (1) the violation of a federal
20 constitutional or statutory right; and (2) that the violation was committed by a person acting
21 under the color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988). Here, except for a
22 vague reference to due process, plaintiffs have not alleged specific violations of a federal
23 constitutional or statutory right. Nor have they alleged conduct showing that any of the
24 defendants acted under color of state law. *See Sutton v. Providence St. Joseph Med. Ctr.*, 192

25 ¹ Plaintiffs have not asserted any statutory, constitutional, or international law basis for their
26 alleged “human rights violations.”

1 F.3d 826, 835 (9th Cir. 1999) (The party charged with a constitutional deprivation under § 1983
2 must be a person who may fairly be said to be a governmental actor) (citation and quotations
3 omitted). Section “1983 excludes from its reach merely private conduct, no matter how
4 discriminatory or wrong.” *Id.* (citing *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999)
5 (citation and internal quotation marks omitted)). Plaintiffs’ failure to allege facts, which if true,
6 satisfy the required elements to a claim under § 1983 requires dismissal. To proceed the
7 complaint must contain sufficient factual matter, which if accepted as true, “state[s] a claim to
8 relief that is plausible on its face.” *Ashcroft v. Iqbal*, -- U.S. ---, 129 S. Ct. 1937, 1949.

9 The remaining question is whether the dismissal should be with leave to amend.
10 Ordinarily courts permit a plaintiff to amend to cure pleading deficiencies, but leave to amend
11 should not be granted where it appears amendment would be futile. Here, plaintiffs’ amended
12 complaint, without explanation, references the Seventh and Fourteenth amendments but fails to
13 provide any clue as to what acts by these defendants violated any of plaintiffs’ federally
14 protected rights.² The Seventh Amendment preserves the right to jury trial. The Fourteenth
15 Amendment, among other things, protects the right to due process of law. But nothing alleged in
16 the amended complaint demonstrates any conduct by the defendants that shows state action in
17 violation of plaintiffs’ due process rights nor suggests that an amendment to the allegations could
18 establish such state action in violation of plaintiffs’ federally protected rights. Moreover, when
19 plaintiffs’ amended complaint is informed by their earlier complaint it is clear that the gravamen
20

21 ² Plaintiffs’ amended complaint is incomplete on its face. It appears to simply supplement
22 rather than replace the earlier complaint. As such, it violates Local Rule 220. An amended
23 complaint must be redrafted so that it is complete in itself without reference to any earlier filed
24 complaint. The complaint may not be amended in a piecemeal fashion by filing separate documents
25 that are intended to be read together as a single complaint. Where plaintiffs intend to add, omit, or
26 correct information in the operative complaint, they must file an amended complaint that is complete
within itself. This is because an amended complaint supersedes any earlier filed complaint, and once
an amended complaint is filed, the earlier filed complaint no longer serves any function in the case.
See Forsyth v. Humana, 114 F.3d 1467, 1474 (9th Cir. 1997) (the “‘amended complaint supersedes
the original, the latter being treated thereafter as non-existent.’”) (quoting *Loux v. Rhay*, 375 F.2d
55, 57 (9th Cir. 1967)).

1 of their claims against these defendants is that plaintiffs were allegedly defrauded in the
2 origination and/or servicing and ultimate foreclosure of their mortgage. These claims are
3 addressed below and, as noted, none implicate federally protected rights actionable under
4 § 1983. Therefore, plaintiffs' claim for violation of § 1983 must be dismissed without leave to
5 amend. *See Noll*, 809 F.2d at 1448 (while the court ordinarily would permit a pro se plaintiff to
6 amend, leave to amend should not be granted where it appears amendment would be futile).

7 2. 18 U.S.C. §§ 241, 1341, 1343, and 1621

8 Plaintiffs also purport to state claims under 18 U.S.C. §§ 241, 1341, 1343, and 1621.
9 However, those are criminal statutes which do not provide for a private right of action. *See*
10 *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980) (18 U.S.C. §§ 241 and 242 are "criminal
11 provisions [which] provide no basis for civil liability"); *Sordean v. United States*, 1995 WL
12 86548 at *2 (N.D. Cal. Feb. 24, 1995) (no private right of action under 18 U.S.C. §§ 1621 or
13 1622); *Wilcox v. First Interstate Bank*, 815 F.2d 522, 533 n. 1 (9th Cir. 1987) ("Other than in the
14 context of RICO, federal appellate courts hold that there is no private right of action for mail
15 fraud under 18 U.S.C. § 1341.")³; *Napper v. Anderson*, 500 F.2d 634, 636 (5th Cir. 1974)
16 (similar to mail fraud, Congress did not intend to create a federal cause of action for wire fraud
17 under 18 U.S.C. § 1343). Therefore, plaintiffs' claims under those statutes must be dismissed
18 without leave to amend. *See Noll*, 809 F.2d at 1448.

19 3. Wrongful Foreclosure

20 Finally, plaintiffs attempt to state a claim for wrongful foreclosure. Dckt. No. 14 at 7.
21 Although defendants move to dismiss that claim on the merits, because all of plaintiffs' federal
22 claims must be dismissed, this court should decline supplemental jurisdiction over plaintiffs'
23

24 ³ Nor have plaintiffs alleged any facts that would support a civil RICO claim under 18 U.S.C.
25 § 1962(c). In order to state a civil RICO claim, a plaintiff must allege the following elements: (1)
26 conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as predicate
acts) (5) causing injury to a party's business or property. *Living Designs, Inc. v. E.I. Dupont de
Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005) (internal citations omitted).

1 state law wrongful foreclosure claim.⁴ See *Carlsbad Tech., Inc. v. HIF BIO, Inc.*, 556 U.S. 635,
2 639-40 (2009); *Albingia Versicherungs A.G. v. Schenker Int'l Inc.*, 344 F.3d 931, 936 (9th Cir.
3 2003); 28 U.S.C. § 1367(c) (“The district courts may decline to exercise supplemental
4 jurisdiction over a claim under subsection (a) if . . . the district court has dismissed all claims
5 over which it has original jurisdiction.”). “[I]n the usual case in which all federal-law claims are
6 eliminated before trial, the balance of factors to be considered under the pendent jurisdiction
7 doctrine – judicial economy, convenience, fairness, and comity – will point toward declining to
8 exercise jurisdiction over the remaining state-law claims.” *Carnegie-Mellon Univ. v. Cohill*, 484
9 U.S. 343, 351 (1988). Indeed, “[n]eedless decisions of state law should be avoided both as a
10 matter of comity and to promote justice between the parties, by procuring for them a surer-footed
11 reading of the applicable law.” *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726
12 (1966). Here, because all of plaintiffs’ federal claims will be eliminated at the pleadings phase,
13 it is in the interests of judicial economy, convenience, fairness, and comity to dismiss plaintiffs’
14 state law wrongful foreclosure claim without prejudice pursuant to 28 U.S.C. § 1367(c).

15 III. CONCLUSION

16 Accordingly, IT IS HEREBY ORDERED that the status (pretrial scheduling) conference
17 currently set for hearing on December 19, 2012 is vacated.⁵

18 ////

19
20 ⁴ Nor does this court have diversity jurisdiction since plaintiffs and ReconTrust Company,
21 N.A. are citizens of California. See Dckt. No. 14 at 1; see also Defs.’ Mot. to Dismiss Pls.’ Initial
22 Compl., Dckt. No. 6, at 4-6. Additionally, contrary to plaintiffs’ assertions otherwise, the Seventh
23 Amendment is not an independent basis for federal jurisdiction. See *Turczynski v. Friedman*, 2007
24 WL 4556923, at *5 (E.D. Cal. Dec. 20, 2007) (“[P]laintiff does not have the right to a civil jury trial
under the Seventh Amendment in the absence of a federal claim.”); *Davis v. Citibank West, FSB*,
2011 WL 1086055, at *2 (N.D. Cal. Mar. 24, 2011) (“[T]he Seventh Amendment right to a jury trial
does not give this Court jurisdiction over Plaintiffs’ claims.”).

25 ⁵ As a result, the parties are not required to submit status reports as provided in the August
26 17, 2012 minute order. See Dckt. No. 9; see also Dckt. No. 3. However, if the recommendation of
dismissal herein is not adopted by the district judge, the undersigned will reschedule the status
conference and require the parties to submit status reports.

1 Further, IT IS HEREBY RECOMMENDED that:

- 2 1. Defendants' motion to dismiss, Dckt. No. 15, be granted;
- 3 2. Plaintiffs' federal claims be dismissed without leave to amend;
- 4 3. Plaintiffs' wrongful foreclosure claim be dismissed without prejudice under 28 U.S.C.
- 5 § 1367; and
- 6 4. The Clerk be directed to close this case.

7 These findings and recommendations are submitted to the United States District Judge

8 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days

9 after being served with these findings and recommendations, any party may file written

10 objections with the court and serve a copy on all parties. Such a document should be captioned

11 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections

12 within the specified time may waive the right to appeal the District Court's order. *Turner v.*

13 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

14 DATED: November 29, 2012.

15 

16 EDMUND F. BRENNAN

17 UNITED STATES MAGISTRATE JUDGE

18

19

20

21

22

23

24

25

26