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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Cindy Morales & Mark Morales, wife and
husband,

No. CV 2010-1464-PHX-JAT

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Plaintiffs,

ORDER

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vs.

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Forster & Garbus, LLP,

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Defendant.

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Pending before the Court is Defendant's Motion to Dismiss. (Doc. 37.) Plaintiff filed a Response to Defendant's Motion to Dismiss (Doc. 41), and Defendant filed a Reply to Response to Motion to Dismiss (Doc. 43).

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I. FACTS

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Plaintiffs Mark and Cindy Morales owed Bank of America approximately \$57,868.90. (Doc. 35 at 2.) Defendant Forster and Garbus, LLP, acted as counsel for Bank of America to collect Plaintiffs' debt. (*Id.*) Plaintiffs, with the assistance of Persels & Associates, LLC, entered a settlement agreement with Defendant for \$22,000.00. (*Id.*)

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As outlined in the settlement agreement, Plaintiffs would make the following payments to Defendant: \$471.00 due on or before October 28, 2009; \$471.00 due on or before November 28, 2009; \$1,250.00 due every month thereafter, beginning on December 28, 2009; and final payment of \$1,058.00 due on or before April 28, 2011. (*Id.* at Exhibit A.)

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1 Plaintiffs claim that Persels & Associates paid the initial installment by phone on
2 October 28. (*Id.* at 3.) Plaintiffs claim that Persels & Associates sent an installment check
3 for the second payment on November 16. (*Id.*) On December 3, Defendant returned the
4 second installment check to Persels & Associates because, according to Defendant,
5 Defendant did not receive the first payment until October 30, which was two days after the
6 payment was due. (Doc. 43 at 3.) According to Defendant, Plaintiffs breached the settlement
7 agreement by submitting payment two days after the due date. (*Id.*)

8 On January 8, 2010, Plaintiffs received notice that their account had been turned over
9 to Gurstel, Staloch & Chargo, P.A. (Doc. 35 at 3.) A month later, Gurstel, Staloch & Chargo
10 filed a complaint seeking the full principle balance of Plaintiffs' account. (*Id.*) Gurstel,
11 Staloch & Chargo then offered a new settlement of \$39,578.04, which Persels & Associates
12 accepted on behalf of Plaintiffs. (*Id.* at 3,4.) Persels & Associates sent Gursel, Staloch &
13 Chargo the first payment of \$300 but did not send any additional payments. (*Id.* at 4.)

14 Plaintiffs claim that they did not breach the original settlement with Defendant and
15 that Defendant violated the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§
16 1692-1692p. Defendant filed a Motion to Dismiss under Fed. R. Civ. P. 12(b)(6) because
17 Plaintiffs "failed to allege any action taken by it or its employees which would entitle them
18 to relief under the [FDCPA]." (Doc. 37 at 1.)

19 II. ANALYSIS

20 The Court may dismiss a complaint for failure to state a claim under Rule 12(b)(6) for
21 two reasons: 1) lack of a cognizable legal theory or 2) insufficient facts alleged under a
22 cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.
23 1990).

24 To survive a Rule 12(b)(6) motion for failure to state a claim, a complaint must meet
25 the requirements of Fed. R. Civ. P. 8(a)(2). Rule 8(a)(2) requires a "short and plain statement
26 of the claim showing that the pleader is entitled to relief," so that the defendant has "fair
27 notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v.*
28 *Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

1 Although a complaint attacked for failure to state a claim does not need detailed
2 factual allegations, the pleader’s obligation to provide the grounds for relief requires “more
3 than labels and conclusions, and a formulaic recitation of the elements of a cause of action
4 will not do.” *Twombly*, 550 U.S. at 555 (internal citations omitted). The factual allegations
5 of the complaint must be sufficient to raise a right to relief above a speculative level. *Id.*
6 Rule 8(a)(2) “requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief.
7 Without some factual allegation in the complaint, it is hard to see how a claimant could
8 satisfy the requirement of providing not only ‘fair notice’ of the nature of the claim, but also
9 ‘grounds’ on which the claim rests.” *Id.* (citing 5 C. Wright & A. Miller, Federal Practice
10 and Procedure §1202, pp. 94, 95(3d ed. 2004)).

11 Rule 8’s pleading standard demands more than “an unadorned, the-defendant-
12 unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)(citing
13 *Twombly*, 550 U.S. at 555). A complaint that offers nothing more than naked assertions will
14 not suffice. To survive a motion to dismiss, a complaint must contain sufficient factual
15 matter, which, if accepted as true, states a claim to relief that is “plausible on its face.” *Iqbal*,
16 129 S.Ct. at 1949. Facial plausibility exists if the pleader pleads factual content that allows
17 the court to draw the reasonable inference that the defendant is liable for the misconduct
18 alleged. *Id.* Plausibility does not equal “probability,” but plausibility requires more than a
19 sheer possibility that a defendant has acted unlawfully. *Id.* “Where a complaint pleads facts
20 that are ‘merely consistent’ with a defendant’s liability, it ‘stops short of the line between
21 possibility and plausibility of entitlement to relief.’” *Id.* (citing *Twombly*, 550 U.S. at 557).

22 In deciding a motion to dismiss under Rule 12(b)(6), the Court must construe the facts
23 alleged in the complaint in the light most favorable to the drafter of the complaint and the
24 Court must accept all well-pleaded factual allegations as true. *See Shwarz v. United States*,
25 234 F.3d 428, 435 (9th Cir. 2000). Nonetheless, the Court does not have to accept as true
26 a legal conclusion couched as a factual allegation. *Papasan v. Allain*, 478 U.S. 265, 286
27 (1986).

28 Plaintiffs’ Amended Complaint pleads insufficient facts under the FDCPA. The

1 Amended Complaint does not outline which actions, if any, of Defendant violated the
2 FDCPA. Defendant correctly argues in the Motion to Dismiss that any communications
3 Defendant made exclusively to Plaintiffs' counsel are not subject to the FDCPA. *Guerrero*
4 *v. RJM Acquisitions LLC*, 499 F.3d 926, 939 (9th Cir. 2007). However, Plaintiffs do not
5 make any factual allegations that Defendant made communications in violation of the
6 FDCPA. Plaintiffs also do not make any factual allegations regarding how Defendant's
7 conduct might have violated the FDCPA. Plaintiffs merely assert conclusory statements that
8 Defendant violated the FDCPA. Plaintiffs fail to meet Rule 8's pleading standard, and
9 therefore, the Court grants Defendant's Motion to Dismiss.


10 The Court will give Plaintiffs leave to amend the Amended Complaint because the
11 Court cannot determine that granting leave to amend would be futile. *Thinket Ink Info. Res.,*
12 *Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004). However, the Court
13 notes that Plaintiffs have already amended their complaint once. The Court therefore
14 cautions Plaintiffs that it will grant no more *sua sponte* leave to amend and will look with
15 disfavor on any further requests to amend.

16 Accordingly,

17 **IT IS ORDERED** that Defendant's Motion to Dismiss (Doc. 37) is **GRANTED**.

18 **IT IS FURTHER ORDERED** granting Plaintiffs leave to amend. Plaintiffs must file
19 their Second Amended Complaint within ten (10) days of the date of this Order. If Plaintiffs
20 do not file their Second Amended Complaint within ten days, then the Clerk will dismiss this
21 case without further notice.

22 DATED this 19th day of September, 2011.

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26 James A. Teilborg
27 United States District Judge
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