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16**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

ERIK ROTHENBERG,

Plaintiff,

v.

CATHERINE MARIE FRAZIER; BANK  
OF AMERICA, N.A.; and DOES 1–10,  
inclusive,

Defendants.

Case No. 2:13-cv-5729-ODW(JEMx)

**ORDER DISMISSING CASE**

On August 12, 2013, the Court ordered Plaintiff Erik Rothenberg to file an amended complaint to address the jurisdictional problems in his Complaint. His First Amended Complaint (“FAC”) advances five causes of action: two under federal law and three under state law. Once again, the two federal causes of action are insufficiently plead to invoke federal-question jurisdiction. And though he added Bank of America, N.A. as a Defendant, this is insufficient to invoke diversity jurisdiction. Thus, the Court concludes that it lacks subject-matter jurisdiction in this case and must dismiss the case. Fed. R. Civ. P. 12(h)(3).

**I. LEGAL STANDARD**

Dismissal under Rule 12(b)(6) can be based on “the lack of a cognizable legal theory” or “the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). A complaint

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1 need only satisfy the minimal notice pleading requirements of Rule 8(a)(2)—a short  
2 and plain statement—to survive a motion to dismiss for failure to state a claim under  
3 Rule 12(b)(6). *Porter v. Jones*, 319 F.3d 483, 494 (9th Cir. 2003); Fed. R. Civ.  
4 P. 8(a)(2). For a complaint to sufficiently state a claim, its “[f]actual allegations must  
5 be enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v.*  
6 *Twombly*, 550 U.S. 544, 555 (2007). While specific facts are not necessary so long as  
7 the complaint gives the defendant fair notice of the claim and the grounds upon which  
8 the claim rests, a complaint must nevertheless “contain sufficient factual matter,  
9 accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v.*  
10 *Iqbal*, 556 U.S. 662, 678 (2009).

11 *Iqbal*’s plausibility standard “asks for more than a sheer possibility that a  
12 defendant has acted unlawfully,” but does not go so far as to impose a “probability  
13 requirement.” *Id.* Rule 8 demands more than a complaint that is merely consistent  
14 with a defendant’s liability—labels and conclusions, or formulaic recitals of the  
15 elements of a cause of action do not suffice. *Id.* Instead, the complaint must allege  
16 sufficient underlying facts to provide fair notice and enable the defendant to defend  
17 itself effectively. *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). The  
18 determination whether a complaint satisfies the plausibility standard is a “context-  
19 specific task that requires the reviewing court to draw on its judicial experience and  
20 common sense.” *Iqbal*, 556 U.S. at 679.

21 When considering a Rule 12(b)(6) motion, a court is generally limited to the  
22 pleadings and must construe “[a]ll factual allegations set forth in the complaint . . . as  
23 true and . . . in the light most favorable to [the plaintiff].” *Lee v. City of L.A.*, 250 F.3d  
24 668, 688 (9th Cir. 2001). Conclusory allegations, unwarranted deductions of fact, and  
25 unreasonable inferences need not be blindly accepted as true by the court. *Sprewell v.*  
26 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Yet, a complaint should be  
27 dismissed only if “it appears beyond doubt that the plaintiff can prove no set of facts”  
28 supporting his claim for relief. *Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999).

1 As a general rule, leave to amend a complaint that has been dismissed should be  
2 freely granted. Fed. R. Civ. P. 15(a). However, leave to amend may be denied when  
3 “the court determines that the allegation of other facts consistent with the challenged  
4 pleading could not possibly cure the deficiency.” *Schreiber Distrib. Co. v. Serv-Well*  
5 *Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986); *see Lopez v. Smith*, 203 F.3d  
6 1122, 1127 (9th Cir. 2000).

7 A court may dismiss a claim *sua sponte* under Federal Rule of Civil  
8 Procedure 12(b)(6) for failure to state a claim, so long as it affords the plaintiff notice  
9 and an opportunity to be heard on the matter. *Wong v. Bell*, 642 F.2d 359, 361–62  
10 (9th Cir. 1981).

## 11 II. DISCUSSION

12 Rothenberg’s FAC alleges two federal causes of action: Declaratory Relief  
13 under 28 U.S.C. § 2201, 2202; and Violation of the Fair Debt Collection Practices Act  
14 (“FDCPA”), 15 U.S.C. § 1692. The first is insufficient by itself to invoke federal-  
15 question jurisdiction, and the second is insufficiently plead to properly state a claim.

### 16 **A. Rothenberg’s FDCPA claim fails because Bank of America and Frazier are** 17 **not creditors as a matter of law**

18 The purpose of the FDCPA is to eliminate abusive debt collection practices,  
19 including the harassment and abuse of consumers. 15 U.S.C. § 1692(e). “To  
20 effectuate this purpose, the Act prohibits a ‘debt collector’ from making false or  
21 misleading representations and from engaging in various abusive and unfair  
22 practices.” *Izenberg v. ETS Servs., LLC.*, 589 F. Supp. 2d 1193, 1198 (C.D. Cal.  
23 2008); 15 U.S.C. §§ 1692(d)–(f). Accordingly, “[t]o state a claim for violation of the  
24 FDCPA, a plaintiff must allege that the defendant is a ‘debt collector’ collecting a  
25 debt.” *Izenberg*, 589 F. Supp. 2d at 1199.

26 A “debt collector” under the FDCPA is defined as  
27 any person who uses any instrumentality of interstate commerce or the  
28 mails in any business the principal purpose of which is the collection of

1 any debts, or who *regularly* collects or attempts to collect, directly or  
2 indirectly, debts owed or due or asserted to be owed or due another.

3 15 U.S.C. § 1692a(6) (emphasis added).

4 The FDCPA expressly excludes from this definition any person collecting or  
5 attempting to collect a debt originated by that person. *Id.* § 1692a(6)(F)(ii).  
6 Moreover, “[t]he law is well-settled that creditors, mortgagors, and mortgage  
7 servicing companies are not debt collectors and are statutorily exempt from liability  
8 under the FDCPA.” *Costantini v. Wachovia Mortg. FSB*, No. 2:09-cv-0406-MCE-  
9 DAD, 2009 WL 1810122, at \*3 (E.D. Cal. June 24, 2009) (internal alterations  
10 omitted) (quoting *Hepler v. Wash. Mut. Bank, F.A.*, No. CV 07-4804 CAS (Ex), 2009  
11 WL 1045470 at \*4, (C.D. Cal. Apr. 17, 2009)). And even more broadly, “most courts  
12 to examine this issue have concluded that foreclosure activity does not constitute ‘debt  
13 collection’” under the FDCPA. *Trinh v. Citibank, NA*, No. 5:12-cv-03902 EJD, 2012  
14 WL 6574860, at \*7 (N.D. Cal. Dec. 17, 2012) (collecting cases).

15 Here, Rothenberg’s allegations fall precisely within that exclusion. He alleges  
16 that Bank of America is a “debt collector” because it attempted to collect mortgage  
17 payments and mortgage arrears from him, and initiated a foreclosure proceeding on  
18 his property. (FAC ¶¶ 54–55.) But Bank of America was at the relevant times, a  
19 trustee and a beneficiary under the deed of trust, and not a debt collector as defined by  
20 the statute. (FAC Exs. A, B.) Rothenberg offers nothing other than legal conclusions  
21 of fraud to show that Bank of America was not a creditor, mortgagor, or mortgage  
22 servicing company. Fraud pleadings are subject to an elevated standard, requiring a  
23 party to “state with particularity the circumstances constituting fraud or mistake.”  
24 Fed. R. Civ. P. 9(b). “Particularity” means that fraud allegations must be accompanied  
25 by “the who, what, when, where, and how” of the misconduct charged. *Vess v. Ciba-*  
26 *Geigy Corp. USA*, 317 F.3d 1097, 1103–06 (9th Cir. 2003).

27 Simply alleging that the assignments are fraudulent is not enough—Rothenberg  
28 must demonstrate how Bank of America is not his mortgagor and creditor. But in

1 light of the prima facie evidence that Bank of America is a mortgagor and creditor of  
2 Rothenberg, the Court does not see how Rothenberg can provide sufficient factual  
3 content to cast Bank of America outside the statutory exclusion.

4 Further, Rothenberg alleges that Frazier fraudulently notarized documents and  
5 participated in a conspiracy to deprive Rothenberg of his real property. (FAC ¶ 19.)  
6 But there are no allegations suggesting that Frazier is a debt collector as defined under  
7 the FDCPA—she is a mere notary. (FAC ¶ 8.) Even if Frazier’s alleged forging of  
8 documents is true, the Court does not see how one could construe that conduct into  
9 acts that could be redressed under the FDCPA.

10 **B. The Declaratory Judgment Act does not confer original jurisdiction**

11 It is well settled that the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, is  
12 “procedural only” and does not extend the original jurisdiction of the federal courts.  
13 *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671–72 (1950). Having  
14 discussed the defects in the FDCPA cause of action, this Declaratory Judgment cause  
15 of action alone is insufficient to invoke federal-question jurisdiction.

16 **C. Rothenberg fails to establish diversity jurisdiction**

17 Without a federal cause of action, only a sufficient showing establishing  
18 diversity jurisdiction can save this lawsuit from dismissal for lacking subject-matter  
19 jurisdiction. But Rothenberg fails to do so despite his conclusion that this case is a  
20 suit “between diverse citizens that involve an amount in controversy in excess of  
21 \$75,000.00.” (Compl. ¶ 4.) In fact, Rothenberg pleads himself out of diversity  
22 jurisdiction—he alleges that he an individual residing in California, and that Frazier is  
23 also an individual residing in California. (Compl. ¶¶ 6, 8.) Diversity of citizenship  
24 requires that the parties be “citizens of different States.” 28 U.S.C. § 1332(a)(1).

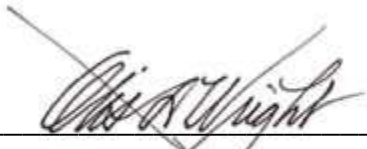
25 **III. CONCLUSION**

26 For the reasons discussed, the Court hereby **DISMISSES WITH PREJUDICE**  
27 Rothenberg’s FDCPA claim. The Court declines supplemental jurisdiction on the  
28 remaining state-law claims because there is no independent basis for subject-matter

1 jurisdiction over these claims. Accordingly, the Court also **DISMISSES**  
2 Rothenberg's claim under the Declaratory Judgment Act. This Clerk of Court is  
3 ordered to close this case.

4 **IT IS SO ORDERED.**

5 September 11, 2013



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8 **OTIS D. WRIGHT, II**  
9 **UNITED STATES DISTRICT JUDGE**

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