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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

COREY TAYLOR, et al.,	)	1:10cv01138 OWW DLB
	)	
	)	ORDER REQUIRING PLAINTIFFS TO
Plaintiffs,	)	EITHER FILE AMENDED COMPLAINT OR
	)	NOTIFY COURT OF WILLINGNESS TO
v.	)	PROCEED ONLY ON CLAIMS FOUND TO
	)	BE COGNIZABLE
WALMART, INC.,	)	(Doc. 1)
	)	
	)	RESPONSE DUE WITHIN THIRTY DAYS
Defendant.	)	
_____	)	

Plaintiffs Corey Taylor and Jostasha Taylor (“Plaintiffs”), appearing pro se and proceeding in forma pauperis, filed the instant action on June 24, 2010. Plaintiffs name Walmart, Inc. as Defendant.

**DISCUSSION**

A. Screening Standard

Pursuant to 28 U.S.C. § 1915(e)(2), the Court must conduct an initial review of the complaint for sufficiency to state a claim. The Court must dismiss a complaint or portion thereof if the Court determines that the action is legally “frivolous or malicious,” fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). If the Court determines that the complaint fails to state a claim, leave to amend may be granted to the extent that the deficiencies of the complaint can be cured by amendment.

1 B. Failure to State a Claim

2 A complaint, or portion thereof, should only be dismissed for failure to state a claim upon  
3 which relief may be granted if it appears beyond doubt that plaintiff can prove no set of facts in  
4 support of the claim or claims that would entitle him to relief. See Hishon v. King & Spalding,  
5 467 U.S. 69, 73 (1984), citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also Palmer v.  
6 Roosevelt Lake Log Owners Ass'n, 651 F.2d 1289, 1294 (9th Cir. 1981). In reviewing a  
7 complaint under this standard, the court must accept as true the allegations of the complaint in  
8 question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 740 (1976), construe the  
9 pleading in the light most favorable to the plaintiff, and resolve all doubts in the plaintiff's favor.  
10 Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

11 C. Federal Rule of Civil Procedure 8

12 Fed. R. Civ. P. 8(a) provides:

13 A pleading that states a claim for relief must contain: (1) a short and plain  
14 statement of the grounds for the court's jurisdiction, unless the court already has  
15 jurisdiction and the claim needs no new jurisdictional support; (2) a short and  
16 plain statement of the claim showing that the pleader is entitled to relief; and (3) a  
demand for the relief sought, which may include relief in the alternative or  
different types of relief.

17 A complaint must contain a short and plain statement as required by Fed. R. Civ. P.  
18 8(a)(2). Although the Federal Rules adopt a flexible pleading policy, a complaint must give fair  
19 notice and state the elements of the claim plainly and succinctly. Jones v. Community Redev.  
20 Agency, 733 F.2d 646, 649 (9th Cir. 1984). Plaintiffs must allege with at least some degree of  
21 particularity overt acts which the Defendant engaged in that support Plaintiffs' claim. Id.  
22 Although a complaint need not outline all elements of a claim, it must be possible to infer from  
23 the allegations that all elements exist and that there is entitlement to relief under some viable  
24 legal theory. Walker v. South Cent. Bell Telephone Co., 904 F.2d 275, 277 (5th Cir. 1990);  
25 Lewis v. ACB Business Service, Inc., 135 F.3d 389, 405-06 (6th Cir. 1998).

26 D. Summary of Plaintiffs' Allegations

27 Plaintiffs allege that on March 2, 2010, they purchased tires at a Walmart in Odessa,  
28 Texas. "[D]efendants" claimed that the tires were compatible for Plaintiffs' 2002 Pontiac Grand

1 Prix. Plaintiffs paid for the tires, along with a disposal fee, but defendant intentionally installed  
2 cheaper tires, which were “dangerously” incompatible for Plaintiffs’ compact car and were made  
3 for a SUV-style vehicle. Plaintiffs allege that “defendants” also attempted to “extort extra  
4 money” by charging \$10.00 per tire for balancing. Plaintiffs refused “her advances.” The  
5 “defendant” then lied and said “she” gave Plaintiffs a free balance.

6 Plaintiffs allege that “defendants” were aware of the fact that Plaintiff Jotasha Taylor was  
7 in late term pregnancy and the installed tires were fatally incompatible with their family car.  
8 “She also knew” that they were traveling interstate. Plaintiffs further allege that the “she”  
9 attempted to hide the store’s license number, typing “God Bless America” in that section, which  
10 was not a common practice for white customers. The defendant’s last words were “have a  
11 bumpy ride.”

12 Plaintiffs allege that they were forced drive through the night from Odessa, Texas to  
13 Shreveport, Louisiana. The ride allegedly was “brutal” for 7 months pregnant Mrs. Taylor.  
14 Plaintiffs then took their vehicle to Walmart #0448 in Shreveport, Louisiana. The “defendants”  
15 stated that it “was obvious” that a free balancing had not been performed and that it is not a  
16 Walmart policy to charge an extra \$40 for tire balancing after the purchase of 4 new tires. They  
17 were given a free balancing.

18 Thereafter, Plaintiffs allege that they left for their home in Fresno, California. All the  
19 Walmart stores were closed. During the trip, the bumping multiplied at an alarming rate.  
20 Plaintiffs allegedly experienced a “life threatening” blow out of the driver side tire. Mr. Taylor  
21 had to change the tire on a dark highway. Plaintiffs allege that they had no choice but to finish  
22 the trip on 3 defective tires and 1 donut tire, a drive of over 1,000 miles.

23 Plaintiffs allege that they arrived at Walmart Kings Canyon, Fresno. Plaintiffs expressed  
24 to “defendants” the tire problem and its severity. After a short investigation, defendant allegedly  
25 stated “Oh my God! These are definitely the wrong tires!”, “They definitely manipulated you  
26 guys,” and “This is a major safety issue.” Plaintiffs also allege that “she” made calls to  
27 neighboring Walmarts to see if they had the correct brand in stock. Plaintiffs were told that it  
28 was not against store policy to ask another tire store, but it needed supervisor approval.

1 Plaintiffs allege that they waited two hours for Susan, a manager representing defendant,  
2 to arrive. After reading the contract, Plaintiffs allege that Susan immediately lied and said  
3 defendant was not liable for new tires. When Mrs. Taylor pointed out the clause on the back,  
4 Susan allegedly “violently ripped the receipt” from Plaintiffs’ hands and screamed for them to  
5 “Go sit down!” Mrs. Taylor allegedly pleaded for the more sympathetic associate to help put the  
6 receipt back together. Plaintiffs allege that this harsh treatment was not given to white  
7 customers.

8 Plaintiffs allegedly informed Susan that they knew they were entitled to help from  
9 Defendant Walmart Inc. to get the tires that they paid for. Plaintiffs allege that Susan and  
10 another employee verbally attacked Mrs. Taylor and refused to allow Plaintiffs “to view  
11 policies.” Susan reportedly yelled that she did not have to serve them and all she had to do was  
12 refuse service. Plaintiffs allege that defendant denied service and they faced public humiliation.  
13 Plaintiffs also allege that defendant treated their “family of African Americans extremely and  
14 significantly less than whites were treated at the public accommodation.” Plaintiffs further allege  
15 that “defendants” intentionally inflicted emotional harm on them in front of other customers and  
16 employees.

17 Plaintiffs allege that when they asked to speak with a “higher up manager,” Susan lied  
18 and said she had the most authority and no other manager would be there until the next day.  
19 Plaintiffs allege that they called the Odessa location, but the manager there reportedly said it was  
20 out of his hands and Robert Craigo had the duty of care to resolve the issue. The manager  
21 refused to speak to Mr. Craigo. Plaintiffs further allege that after 4 hours, Mr. Craigo, the store  
22 manager, came out of his office. Plaintiffs assert that Mr. Craigo tried to deceive them into  
23 thinking that Defendant Walmart Inc. had “zero liability.” Plaintiffs reportedly informed him  
24 that he was obligated by contract. Plaintiffs allege that he inspected the tires and then phoned the  
25 clerk that did the work, who allegedly stated, “It wasn’t a mix-up, it was intentional.” Mr. Craigo  
26 allegedly responded “Next time cover yourself and make them sign a disclaimer.” He then told  
27 Plaintiffs that he could get the right tire, but just didn’t want to. He offered to take the tires back  
28 for a full refund, leaving Plaintiffs with a tireless car. Plaintiffs allege that this was reckless and

1 unreasonable. Mr. Craigo allegedly invited Plaintiffs to do the work themselves and refused to  
2 work if he or his white staff members had to do the work for Plaintiffs. Plaintiffs allege that it is  
3 very evident they are a black family.

4 Plaintiffs also allege that Mr. Craigo intimidated them by threatening forceful removal of  
5 their car. After Plaintiffs removed their vehicle, they asked an employee to provide the last name  
6 of the store manager. The employee allegedly responded, "I don't know. And if I did I wouldn't  
7 tell your black ass." Plaintiffs allege that they again approached Mr. Craigo, asking for a higher  
8 official to help them get their tires. Mr. Craigo reportedly gave them a telephone number that  
9 turned out to be a leasing company. Plaintiffs allege that they were forced to leave Walmart with  
10 the same tires.

11 Plaintiffs assert causes of action for violation of their civil rights and racial  
12 discrimination. Plaintiffs also assert causes of action for intentional endangerment of a fetus,  
13 unlawful intimidation by use of force, violation of interstate commerce rights, fraud, extortion,  
14 assault and intentional infliction of emotional distress. Plaintiffs seek general and punitive  
15 damages, along with the costs of tire service and court costs in a total amount of  
16 \$111,000,349.00.

17 E. Analysis

18 *Racial Discrimination*

19 In this case, Plaintiffs allege that Defendant Walmart Inc. racially discriminated against  
20 them in violation of their civil rights. Plaintiffs do not identify a statutory basis for this claim.

21 However, Title 42 of the United States Code, section 1981(a) provides:

22 [a]ll persons within the jurisdiction of the United States shall have the same right  
23 in every State and Territory to make and enforce contracts, to sue, be parties, give  
24 evidence, and to full and equal benefit of all laws and proceedings for the security  
25 of persons and property as is enjoyed by white citizens, and shall be subject to like  
26 punishment, pain, penalties, taxes, licenses, and exactions of every kind, and to no  
27 other.

28 To establish a claim under 42 U.S.C. section 1981, a plaintiff must show that: (1) he or  
she is a member of a racial minority; (2) defendant had an intent to discriminate on the basis of  
race; and (3) the discrimination concerned one or more of the activities enumerated in the statute

1 (i.e., the making and enforcing of a contract). Morris v. Office Max, Inc., 89 F.3d 411, 413 (7th  
2 Cir.1996) (citing Green v. State Bar of Texas, 27 F.3d 1083, 1086 (5th Cir.1994); Mian v.  
3 Donaldson, Lifkin & Jenrette Securities Corp., 7 F.3d 1085, 1087 (2d Cir.1993)).

4 Although Plaintiffs' complaint does not expressly identify 42 U.S.C. § 1981 as the legal  
5 basis for their claim of racial discrimination, Plaintiffs have stated a cognizable claim under  
6 section 1981.

7 *Unlawful Intimidation by Use of Force*

8 Plaintiffs have alleged unlawful intimidation by use of force, but have not identified an  
9 underlying statutory or legal basis for this claim. California's Bane Act provides in relevant part  
10 that:

11 Whenever a person or persons, whether or not acting under color of law, interferes  
12 by threats, intimidation, or coercion, or attempts to interfere by threats,  
13 intimidation, or coercion, with the exercise or enjoyment by any individual or  
14 individuals of rights secured by the Constitution or laws of the United States, or of  
15 the rights secured by the Constitution or laws of this state, the Attorney General,  
or any district attorney or city attorney may bring a civil action for injunctive and  
other appropriate equitable relief in the name of the people of the State of  
California, in order to protect the peaceable exercise or enjoyment of the right or  
rights secured.

16 Cal.Civ.Code § 52.1(a). The Bane Act further provides that any person subjected to the  
17 above-described conduct may bring a civil action on his or her own behalf. Cal.Civ.Code §  
18 52.1(b).

19 Plaintiffs' complaint appears to state a cognizable claim.

20 *Fraud*

21 To determine if the elements of fraud have been pleaded to state a claim for relief, district  
22 courts look to state law. Kearns v. Ford Motor Co., 567 F.3d 1120, 1126 (9th. Cir.2009)  
23 (citations omitted). In California, the elements of a cause of action for fraud are: "(a)  
24 misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity  
25 (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e)  
26 resulting damage." Engalla v. Permanente Med. Group, Inc., 15 Cal.4th 951, 974 (1997)  
27 (internal quotation marks omitted). "[W]hile a federal court will examine state law to determine  
28 whether the elements of fraud have been pled sufficiently to state a cause of action, the Rule 9(b)

1 requirement that the circumstances of the fraud must be stated with particularity is a federally  
2 imposed rule.” Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1102 (9th Cir.2003) (citation  
3 omitted, emphasis omitted, brackets in original).

4 Plaintiffs complaint alleges the elements of fraud.

5 *Extortion*

6 Courts have relied on the definition and elements of the criminal code to analyze a civil  
7 extortion claim. See Monex Deposit Co. v. Gilliam, 2009 WL 2870642, at \*1 (C.D.Cal.2009)  
8 (relying on California Penal Code section 518 to define civil extortion as “the obtaining of  
9 property from another, with his consent ... induced by a wrongful use of force or fear ...”).

10 California has recognized a claim of “civil extortion” for the recovery of money obtained by the  
11 wrongful threat of criminal or civil prosecution. See Fuhrman v. Cal. Satellite Sys., Inc., 179  
12 Cal.App.3d 408, 426, 231 Cal.Rptr. 113 (1986). The Court construes the claim as one for civil  
13 extortion. However, the complaint does not adequately allege that Defendant obtained property  
14 or money from Plaintiffs with their consent, at least in part induced by wrongful use of fear, or  
15 that Defendant threatened criminal or civil prosecution. To the extent they can cure this  
16 deficiency, Plaintiffs will be given leave to amend this cause of action.

17 *Assault*

18 An assault is a demonstration of an unlawful intent by one person to inflict immediate  
19 injury on the person of another then present. Lowry v. Standard Oil Co. of California, 63  
20 Cal.App.2d 1, 6-7, 146 P.2d 57 (1944). The tort of assault is complete when the anticipation of  
21 harm occurs. Kiseskey v. Carpenters' Trust for Southern California, 144 Cal.App.3d 222, 232,  
22 192 Cal.Rptr. 492 (1983).

23 Plaintiffs do not allege that defendant (or individuals) intended to inflict immediate injury  
24 on them and that they anticipated harm. Plaintiffs fail to plead facts that the behavior of one or  
25 more of the individuals lead to Plaintiffs’ fear of imminent bodily harm. Having failed to allege  
26 the requisite elements of an assault claim, Plaintiffs are granted leave to amend this cause of  
27 action to the extent that they are able to do so.

1  
2 *Intentional infliction of emotional distress*

3 “Under California law, to make out a cause of action for intentional infliction of  
4 emotional distress, a plaintiff must show, in relevant part, that the defendant engaged in extreme  
5 and outrageous conduct that exceeded the bounds of what is generally tolerated in a civilized  
6 society.” Braunling v. Countrywide Home Loans Inc., 220 F.3d 1154, 1158 (9th Cir. 2000)  
7 (citation omitted). Mere rudeness and insensitivity do not rise to the level required for a showing  
8 of intentional infliction of emotional distress. Id.

9 Plaintiffs’ complaint appears to state a cognizable claim for intentional infliction of  
10 emotional distress.

11 *Violation of Interstate Commerce Rights and Intentional Endangerment of a Fetus*

12 There do not appear to be separate claims under such labels. In other words, there is no  
13 indication that there are such claims or that Plaintiffs may maintain such actions under federal,  
14 state or common law. To the extent that Plaintiffs disagree, they will be given an opportunity to  
15 amend their complaint to state a cognizable claim.

16 F. Amended Complaint

17 If Plaintiffs do not wish to file an amended complaint and are agreeable to proceeding on  
18 their claims of racial discrimination in violation of 42 U.S.C. § 1981, unlawful intimidation by  
19 use of force, fraud, and intentional infliction of emotional distress, Plaintiffs may notify the Court  
20 in writing, and the Court will issue Findings and Recommendations recommending that the  
21 remaining claims be dismissed from this action, and will forward Plaintiffs a summons and  
22 USM-285 form for completion and return. Upon receipt of the forms, the Court will direct the  
23 United States Marshal to initiate service of process.

24 If Plaintiffs opt to amend, they are informed that the Court cannot refer to a prior pleading  
25 in order to make the amended complaint complete. Local Rule 220 requires that an amended  
26 complaint be complete in itself without reference to any prior pleading. This is because, as a  
27 general rule, an amended complaint supercedes the original complaint. See Loux v. Rhay, 375  
28

1 F.2d 55, 57 (9th Cir. 1967). Once Plaintiffs file an amended complaint, the original pleading no  
2 longer serves any function in the case.

3 Based on the foregoing, it is HEREBY ORDERED that:

- 4 1. Within **thirty (30) days** from the date of service of this order, Plaintiffs must  
5 either:  
6 a. File an amended complaint curing the deficiencies identified by the Court  
7 in this order, or  
8 b. Notify the Court in writing that they do not wish to file an amended  
9 complaint and wish to proceed only on their cognizable claims; and  
10 2. If Plaintiffs fail to comply with this order, this action will be dismissed for failure  
11 to obey a court order.

12  
13 IT IS SO ORDERED.

14 **Dated: July 28, 2010**

/s/ Dennis L. Beck  
UNITED STATES MAGISTRATE JUDGE