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3 **UNITED STATES DISTRICT COURT**

4 EASTERN DISTRICT OF CALIFORNIA

5
6 MARY J. BRYANT,
7 Plaintiff,

8 v.

9
10 U.S. BANK, et al.,
11 Defendants.

CASE NO. 1:16-CV-1688-AWI-SKO

**ORDER DISMISSING PLAINTIFF’S
AMENDED COMPLAINT WITH 14
DAYS LEAVE TO AMEND**

(Doc. 4.)

12 **I. INTRODUCTION**

13 On November 7, 2016, Plaintiff Mary J. Bryant, proceeding pro se, filed a complaint
14 against U.S. Bank, “Buckley Madole,” N.B.S. Default Services, and Bloom Group, Inc. (Doc. 1
15 (“Compl.”).) Plaintiff also filed an application to proceed *in forma pauperis* (IFP). (Doc. 2.) On
16 November 16, 2016, the assigned district judge dismissed Plaintiff’s complaint for failure to state
17 a claim and granted Plaintiff twenty-one (21) days leave to file an amended complaint curing the
18 pleading deficiencies identified in the Order. (Doc. 3.) On December 8, 2016, Plaintiff filed an
19 amended complaint against U.S. Bank, “Buckley Madole,” and N.B.S. Default Services
20 (collectively “Defendants”).¹ (Doc. 4 (“Am. Compl.”).)

21 After screening Plaintiff’s amended complaint, the Court finds that despite the explicit
22 recitation of the deficiencies of Plaintiff’s original complaint, Plaintiff has failed to demonstrate
23 any violation of federal law. Accordingly, Plaintiff’s amended complaint is DISMISSED with
24 leave to amend.

25 **II. PLAINTIFF’S AMENDED COMPLAINT**

26 Plaintiff’s amended complaint consists of 6 handwritten pages, many of which are
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¹ Plaintiff’s amended complaint no longer names Bloom Group, Inc. as a defendant. (See Doc. 4.)

1 extremely difficult to discern. Plaintiff appears to allege that she is the “Trustee and
2 Administrator” of the “Martha Jayne Cary Living Trust” and a licensed real estate agent since
3 2004. (Am. Compl. at 3.) Plaintiff’s parents purchased a home on March 8, 1976. (*Id.*) On
4 December 26, 2006, a loan on the house was refinanced. (*Id.*) Plaintiff’s parents made every
5 payment on the loan from 1976 until after her father’s death on June 2, 2008. (*Id.*) Someone
6 thereafter filed for Chapter 13 bankruptcy “to attempt in good faith.” (*Id.*) In September 2014, the
7 home was deeded to Plaintiff as trustee and administrator of the Martha Jayne Cary Trust. (*Id.* at
8 5.) The payments on the home “were not made due to Bank Wells Fargo and U.S. Bank[’s]
9 prolonged intentional avoidance to complete loan modification.” (*Id.* at 3.) A Defendant
10 “promised payment reduction and loan modification but must stop Bankruptcy to qualify for loan
11 modification and would not accept payment until loan mod[ification] [was] finalized.” (*Id.*)

12 Foreclosure of the home was initiated before the death of Plaintiff’s mother on August 17,
13 2014. (*Id.* at 5.) On April 10, 2015, a trustee sale of the home was held. (*Id.*) On May 20, 2015,
14 Plaintiff filed a civil lawsuit in Tulare County Superior Court against Defendants, but Defendants
15 never responded. (*Id.*) A Defendant hired Coldwell Banker Premier Real Estate who came onto
16 the property to take pictures. (*Id.*) On December 2, 2015, Plaintiff received a letter from a
17 Defendant to “investigate [sic] rescission of foreclosure and trustee sale.” (*Id.*) That same
18 Defendant shut off utilities that were in Plaintiff’s name. (*Id.*) A second trustee sale was held on
19 April 13, 2016. (*Id.*)

20 Plaintiff alleges that Defendant U.S. Bank “sought to deceive and mislead.” (*Id.* at 4.)
21 Plaintiff appears to assert that Defendant U.S Bank is liable because it did not comply with the
22 Uniform Commercial Code and/or did not conduct a lawful foreclosure. (*Id.* at 4.) Plaintiff
23 claims that Defendant “Buckley Madole” is an attorney to the “[m]ortgage [i]ndustry” and to
24 Defendant U.S. Bank, and “shares the same address and suite [number] as [Defendant] N.B.S.
25 Default Services.” (*Id.* at 6.) Plaintiff alleges that Defendant Buckley Madole “knowingly
26 engaged separate association [Defendant] N.B.S. Default Servicing to fraudulently foreclose and
27 engage 3 real estate agents, brokers, conduct 2 trustee sales, and evict Plaintiff from home
28 establishing RICO pattern to foreclose, trustee sale, and eviction on a collection of unlawful debt.”

1 (*Id.*) Plaintiff claims that this conduct violates 18 U.S.C. § 1962(c). (*Id.*)

2 III. DISCUSSION

3 A. Screening Standard

4 District courts “may authorize the commencement . . . of any suit, action or proceeding,
5 civil or criminal . . . without prepayment of fees or security therefor, by a person who submits an
6 affidavit that includes a statement of all assets such [person] possess that the person is unable to
7 pay such fees or give security therefor.” 28 U.S.C. § 1915(a)(1). A district court “shall dismiss
8 the case at any time if the court determines” that the action is frivolous or malicious, or fails to
9 state a claim on which relief may be granted. 28 U.S.C. § 1915(e)(2)(B); *O’Neal v. Price*, 531
10 F.3d 1146, 1153 (9th Cir. 2008). An action is “frivolous” if it has no arguable basis in fact or law;
11 the term embraces both inarguable legal conclusions and fanciful factual allegations. *Neitzke v.*
12 *Williams*, 490 U.S. 319, 325 (1989); *DeRock v. Sprint-Nextel*, 584 Fed. Appx. 737 (9th Cir. 2014);
13 *see also Tripati v. First Nat’l Bank & Trust*, 821 F.2d 1368, 1370 (9th Cir. 1987). “A district
14 court may deny leave to proceed *in forma pauperis* at the outset if it appears from the face of the
15 proposed complaint that the action is frivolous or without merit.” *Minetti v. Port of Seattle*, 152
16 F.3d 1113, 1115 (9th Cir. 1998); *Tripati*, 821 F.2d at 1370. However, the “denial of leave to
17 proceed *in forma pauperis* is an abuse of discretion unless the district court first provides a
18 plaintiff leave to amend the complaint or finds that amendment would be futile.” *Rodriguez v.*
19 *Steck*, 795 F.3d 1187, 1188 (9th Cir. 2015); *see Tripati*, 821 F.2d at 1370. If a court denies a
20 motion to proceed *in forma pauperis* because the complaint is frivolous and cannot be cured by
21 amendment, then the denial of the motion acts as a dismissal under 28 U.S.C. § 1915(e).
22 *Rodriguez*, 795 F.3d at 1188.

23 A complaint may be dismissed as a matter of law for failure to state a claim for two
24 reasons: (1) lack of a cognizable legal theory; or (2) insufficient facts under a cognizable legal
25 theory. *See Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). Plaintiff must
26 allege a minimum factual and legal basis for each claim that is sufficient to give each defendant
27 fair notice of what plaintiff’s claims are and the grounds upon which they rest. *See, e.g., Brazil v.*
28 *U.S. Dep’t of the Navy*, 66 F.3d 193, 199 (9th Cir. 1995); *McKeever v. Block*, 932 F.2d 795, 798

1 (9th Cir. 1991). In order to properly allege a claim, the complaint must contain sufficient factual
2 matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*,
3 556 U.S. 662, 678 (2009). “A claim has facial plausibility when the plaintiff pleads factual
4 content that allows the court draw the reasonable inference that the defendant is liable for the
5 misconduct alleged.” *Id.* “Plausibility” means “more than a sheer possibility,” but less than a
6 probability, and facts that are “merely consistent” with liability fall short of “plausibility.” *Id.*
7 Further, although a court must accept as true all factual allegations contained in a complaint, a
8 court need not accept a plaintiff’s legal conclusions as true. *Id.* “Threadbare recitals of the
9 elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.*
10 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Allegations of a pro se
11 complainant are held to less stringent standards than formal pleadings drafted by lawyers. *Haines*
12 *v. Kerner*, 404 U.S. 519, 520 (1972).

13 **B. Plaintiff’s RICO Claim is Subject to Dismissal.**

14 Even liberally construed, the amended complaint does not contain “sufficient factual
15 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 556 U.S. at
16 678 (quoting *Twombly*, 550 U.S. at 570). Plaintiff’s sole cause of action, for “collection of
17 unlawful debt” under the Racketeer Influenced and Corrupt Organizations Act (“RICO”), fails to
18 state a claim. RICO prohibits “any person employed by or associated with any enterprise . . . to
19 conduct or participate . . . in the conduct of such enterprise's affairs through . . . collection of
20 unlawful debt.” 18 U.S.C. § 1962(c). RICO defines “unlawful debt” as the result of illegal
21 gambling or usurious lending, which is defined as lending at “at least twice the enforceable rate.”
22 *Id.* § 1961(6).² To make out a “collection of unlawful debt” claim under 18 U.S.C. § 1962(c),
23 Plaintiff must allege facts sufficient to prove (1) the debt was unenforceable in whole or in part

24 ² 18 U.S.C. § 1961(6) reads:

25 “[U]nlawful debt” means a debt (A) incurred or contracted in gambling activity which was in
26 violation of the law of the United States, a State or political subdivision thereof, or which is
27 unenforceable under State or Federal law in whole or in part as to principal or interest because of
28 the laws relating to usury, and (B) which was incurred in connection with the business of
gambling in violation of the law of the United States, a State or political subdivision thereof, or the
business of lending money or a thing of value at a rate usurious under State or Federal law, where
the usurious rate is at least twice the enforceable rate.

1 because of state or federal laws relating to illegal gambling activity or usury, (2) the debt was
2 incurred in connection with “the business of gambling . . . or the business of lending money . . . at
3 a [usurious] rate,” (3) the usurious rate was at least twice the enforceable rate, and (4) as a result of
4 the above confluence of factors, she was injured in her business or property. *Sundance Land*
5 *Corp. v. Cmty. First Fed. Sav. & Loan Ass'n*, 840 F.2d 653, 666 (9th Cir. 1988). Here, while it
6 appears that Plaintiff complains about the enforcement of a residential debt, she does not allege
7 that such debt related to, or was incurred in connection with, illegal gambling or usury. Plaintiff
8 therefore has not alleged the collection of an “unlawful debt” as it is defined by RICO. *See, e.g.,*
9 *Tjaden v. H.S.B.C. Bank USA Nat. Ass'n*, No. 13–cv–3173 JM (DBH), 2015 WL 1644899, at *7
10 (S.D. Cal. Apr. 14, 2015), *aff'd sub nom. Tjaden v. HSBC Bank USA, Nat'l Ass'n*, No. 15-55718,
11 2017 WL 943943 (9th Cir. Mar. 10, 2017).

12 Accordingly, Plaintiff has failed to state a cognizable claim for a violation of RICO, and
13 Plaintiff’s amended complaint is dismissed. However, given the Ninth Circuit’s admonition that
14 leave to amend should be afforded to pro se parties, *see WMX Techs., Inc. v. Miller*, 104 F.3d
15 1133, 1136 (9th Cir. 1997) (en banc), the Court shall grant leave to amend as to only a claim for
16 collection of unlawful debt under RICO.

17 Plaintiff’s second amended complaint must be *legible*, identify the improper actions or
18 basis for liability of *each* defendant,³ and the factual allegations must demonstrate a *plausible*
19 *claim*. If Plaintiff files a second amended complaint, it will be reviewed and a determination
20 regarding *in forma pauperis* status will be made. If Plaintiff does not timely file a second
21 amended complaint or fails to cure the deficiencies identified above, Court will recommend that *in*
22 *forma pauperis* status be denied and the amended complaint be dismissed with prejudice.

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27 ³ It is not sufficient for Plaintiff to use the term “Defendant” without any further identifying information. When
28 multiple defendants are named, the plaintiff must allege the basis of her claims as to each defendant. *See Sebastian*
Brown Prods., LLC v. Muzooka, Inc., 143 F. Supp. 3d 1026, 1040 (N.D. Cal. 2015); *Flores v. EMC Mortg. Co.*, 997
F.Supp.2d 1088, 1103 (E.D. Cal. 2014).

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IV. ORDER

Accordingly, IT IS HEREBY ORDERED that;

1. Plaintiff's amended complaint (Doc. 4) is DISMISSED WITHOUT PREJUDICE and WITH LEAVE TO AMEND;
2. Within **fourteen (14) days** from the date of service of this order, Plaintiff shall file a second amended complaint; and
3. If Plaintiff fails to file a second amended complaint in compliance with this order, the Court will recommend that *in forma pauperis* status be denied and the first amended complaint be dismissed with prejudice.

IT IS SO ORDERED.

Dated: June 12, 2017

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE