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

MONICA L. BYRD,

Plaintiff,

vs.

No. CIV. S-10-1914 MCE GGH PS

SAND CANYON CORPORATION, et al.,

Defendants.

ORDER

_____ /

Plaintiff, proceeding in this action pro se, has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. This proceeding was referred to this court by Local Rule 72-302(21), pursuant to 28 U.S.C. § 636(b)(1).

Plaintiff has submitted an affidavit making the showing required by 28 U.S.C. § 1915(a)(1). Accordingly, the request to proceed in forma pauperis will be granted.

The determination that plaintiff may proceed in forma pauperis does not complete the required inquiry. Pursuant to 28 U.S.C. § 1915(e)(2), the court is directed to dismiss the case at any time if it determines the allegation of poverty is untrue, or if the action is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against an immune defendant.

A claim is legally frivolous when it lacks an arguable basis either in law or in fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28

1 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
2 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
3 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
4 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
5 Cir. 1989); Franklin, 745 F.2d at 1227.

6 A complaint must contain more than a “formulaic recitation of the elements of a
7 cause of action;” it must contain factual allegations sufficient to “raise a right to relief above the
8 speculative level.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1965 (2007).
9 “The pleading must contain something more...than...a statement of facts that merely creates a
10 suspicion [of] a legally cognizable right of action.” Id., quoting 5 C. Wright & A. Miller, Federal
11 Practice and Procedure 1216, pp. 235-235 (3d ed. 2004). “[A] complaint must contain sufficient
12 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft
13 v. Iqbal, ___ U.S. ___, 129 S.Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 570, 127
14 S.Ct. 1955). “A claim has facial plausibility when the plaintiff pleads factual content that allows
15 the court to draw the reasonable inference that the defendant is liable for the misconduct
16 alleged.” Id.

17 Pro se pleadings are liberally construed. See Haines v. Kerner, 404 U.S. 519,
18 520-21, 92 S. Ct. 594, 595-96 (1972); Balistreri v. Pacifica Police Dep’t., 901 F.2d 696, 699 (9th
19 Cir. 1988). Unless it is clear that no amendment can cure the defects of a complaint, a pro se
20 plaintiff proceeding in forma pauperis is entitled to notice and an opportunity to amend before
21 dismissal. See Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987); Franklin, 745 F.2d at 1230.

22 Plaintiff alleges, in part, claims under the Truth in Lending Act (“TILA”) and the
23 Real Estate Settlement Procedures Act (“RESPA”) arising out of plaintiff’s refinancing of her
24 mortgage. The complaint alleges that plaintiff “was solicited around May 2005 by Viking
25 Mortgage with a convincing offer through Option One Mortgage to reduce the mortgage
26 payment.” Plaintiff refers to the closing of that refinancing agreement but does not state when it

1 occurred. (Compl. ¶ 23.) This action was filed July 20, 2010.

2 It appears plaintiff's claims may be barred by the statute of limitations if the
3 refinancing referred to was effectuated near the time that plaintiff was solicited. The TILA cause
4 of action would be barred by the one year statute of limitation (15 U.S.C. § 1640(e)) and any
5 claim for rescission would be similarly barred by the three year statute (15 U.S.C. § 1635(f)).
6 The claims under RESPA would be barred by the one year statute of limitation provided under 12
7 U.S.C. § 2614. Because it appears plaintiff's claims are time barred and she has not alleged the
8 date that the mortgage at issue was refinanced, the amended complaint will be dismissed.
9 However, leave to amend will be granted. If plaintiff can allege a claim that is not time barred,
10 consonant with her obligations under Federal Rule of Civil Procedure 11, then she may file an
11 amended complaint.

12 Plaintiff's claims for breach of trust under 18 U.S.C. § 1033 and for "false public
13 recordings," (procuring or offering false or forged instrument for record), under Cal. Penal Code
14 § 115 must fail because criminal statutes do not provide a private right of action. See, e.g., Ellis
15 v. City of San Diego, 176 F.3d 1183, 1189 (9th Cir.1999) (district court properly dismissed
16 claims brought under the California Penal Code because the statutes do not create enforceable
17 individual rights). It is also well established that private actions are maintainable under federal
18 criminal statutes in only very limited circumstances. Cort v. Ash, 422 U.S. 66, 79, 95 S.Ct.
19 2080, 2088 (1975); Bass Angler Sportsman Soc. v. United States Steel Corp., 324 F.Supp. 412,
20 415 (S.D.Ala.1971), *citing* United States v. Claflin, 97 U.S. 546, 24 L.Ed. 1082 (1878); United
21 States v. Jourden, 193 F. 986 (9th Cir.1912). If plaintiff chooses to amend her complaint, she
22 must eliminate these criminal statutes which do not provide a private right of action, or these
23 claims will be dismissed.

24 In regard to the claim for "U.S. mail fraud" under 39 U.S.C. § 3005(a), there
25 appears to be no private right of action under this statute which provides for the Postal Service to
26 intercept and return mail. Rhodes v. Consumers' Buyline, Inc., 868 F. Supp. 368, 378-79 (D.

1 Mass. 1993). Furthermore, proceedings under this statute must first be brought before
2 administrative agencies, not this court. Top Choice Distributors, Inc. v. U.S. Postal Service, 138
3 F.3d 463, 465 (2nd Cir. 1998); U.S. Postal Service v. Notestine, 857 F.2d 989, 992 (5th Cir. 1988).
4 If plaintiff continues to raise this claim in her amended complaint, it will most likely be
5 dismissed.

6 Plaintiff is informed that the court cannot refer to a prior pleading in order to
7 make plaintiff's amended complaint complete. Local Rule 220 requires that an amended
8 complaint be complete in itself without reference to any prior pleading. This is because, as a
9 general rule, an amended complaint supersedes the original complaint. See Loux v. Rhay, 375
10 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended complaint, the original pleading no
11 longer serves any function in the case. Therefore, in an amended complaint, as in an original
12 complaint, each claim and the involvement of each defendant must be sufficiently alleged.

13 Good cause appearing, IT IS ORDERED that:

14 1. Plaintiff's request for leave to proceed in forma pauperis is granted.

15 2. Plaintiff's complaint is dismissed for the reasons discussed above, with leave
16 to file an amended complaint within twenty-eight (28) days from the date of service of this Order.
17 Failure to file an amended complaint will result in a recommendation that this action be
18 dismissed.

19 3. Upon filing an amended complaint or expiration of the time allowed therefor,
20 the court will make further orders for service of process upon some or all of the defendants.

21 DATED: October 7, 2010

/s/ Gregory G. Hollows

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GREGORY G. HOLLOWS,
UNITED STATES MAGISTRATE JUDGE

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