

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

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

CRISANTO U. ACOSTA,  
Plaintiffs,

vs.

No. CIV. S-10-2871 FCD GGH PS

BAC HOME LOANS SERVICING, LP,  
Defendant.

ORDER

\_\_\_\_\_/

Plaintiffs, proceeding in this action pro se, have 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).

Plaintiffs have 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 plaintiffs 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 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an

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

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

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

21           The complaint appears to be pure boilerplate, containing no facts pertinent to  
22 these plaintiffs, other than the address of the property they financed. They do not provide the  
23 date of the financing, whether the transaction was for an initial purchase or a re-finance, whether  
24 it involved a residential mortgage transaction,<sup>1</sup> what notices defendants allegedly failed to make,

---

25  
26           <sup>1</sup> 15 U.S.C. § 1602(w) provides: “The term ‘residential mortgage transaction’ means a  
transaction in which a mortgage, deed of trust, purchase money security interest arising under an

1 why alleged collection procedures were frivolous or illegal, facts supporting their claims that the  
2 lender had no legal standing to bring a collection or foreclosure claim, that the lender had no  
3 valid lien on the property, that defendant intended to defraud plaintiffs, and the contract was  
4 fraudulent.

5 The complaint contains, inter alia, a claim under the Truth in Lending Act  
6 (“TILA”) and the Real Estate Settlement Procedures Act (“RESPA”). Plaintiffs seek equitable  
7 tolling; however, they provide no facts concerning the statute of limitations or why equitable  
8 tolling should apply. (Compl. at 20.)

9 TILA violations include the failure to provide the required disclosures pursuant to  
10 15 U.S.C. § 1631 and the failure to clearly and conspicuously disclose information relating to the  
11 “annual percentage rate” and the “finance charge” pursuant to 15 U.S.C. § 1632. To recover  
12 damages arising from alleged TILA violations, a plaintiff must file an action to recover damages  
13 “within one year from the date of the occurrence of the violation.” 15 U.S.C. § 1640(e).  
14 However, in certain circumstances, equitable tolling of civil damages claims brought under TILA  
15 might be appropriate. See King v. State of California, 784 F.2d 910, 915 (9th Cir. 1986). The  
16 doctrine of equitable tolling may be appropriate when the imposition of the statute of limitations  
17 would be unjust or would frustrate TILA’s purpose “to assure a meaningful disclosure of credit  
18 terms so that the consumer will be able to ... avoid the uninformed use of credit.” Id. (quoting 15  
19 U.S.C. § 1601(a)).

20 12 U.S.C. § 2605(e)(1) requires the servicer to provide information relating to the  
21 servicing of the loan upon a qualified written request by the borrower. Plaintiffs have not  
22 provided any facts indicating that plaintiffs made a qualified written request to BAC Home Loans  
23 Servicing, and that BAC failed to provide information relating to the servicing of the loan.

24 \_\_\_\_\_  
25 installment sales contract, or equivalent consensual security interest is created or retained against  
26 the consumer’s dwelling to finance the acquisition or initial construction of such dwelling.”  
Accord, 12 C.F.R. § 226.2(a)(24).

1 “‘Naked assertion[s]’ devoid of ‘further factual enhancement’” are not sufficient. Ashcroft v.  
2 Iqbal, --- U.S. ----, ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting Bell Atlantic  
3 Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

4 The boilerplate allegations are conclusory in nature with no factual support. For  
5 example, plaintiffs allege under their claim of “criminal conspiracy and theft”:

6 Defendants, by and through Defendant’s Agents, conspired with  
7 other Defendants, et al, toward a criminal conspiracy to defraud  
8 Petitioner. Said conspiracy but [sic] are not limited to acts of  
9 negligence, breach of fiduciary duty, common law fraud, fraud by  
10 non-disclosure, and tortuous acts of conspiracy and theft, to  
include but not limited to, the assessment of improper fees to  
Petitioner by Lender, which were then used to fund the improper  
payment of commission fees to Agent in order to induce Agent to  
violate Agent’s fiduciary duty to Petitioner.

11 (Compl. at 13.) These allegations inform the court of nothing related to plaintiffs’ experience  
12 with defendant or the alleged violations as they pertain to plaintiffs.

13 Further, although plaintiffs recite fees allegedly charged them at settlement, they  
14 claim only that defendant failed to provide documentation to show the fees were proper. They  
15 state that they are “unable to determine whether or not the above fees are valid in accordance  
16 with the restrictions provided by the various consumer protection laws.” (Compl. at 16-17.)  
17 Elsewhere, plaintiffs make the strong accusation that the fees were false. Plaintiffs are informed  
18 that such allegations are serious and that representations to the court must be made and certified  
19 to the best of the plaintiffs’ “knowledge, information, and belief, formed after an inquiry  
20 reasonable under the circumstances” that the claims are warranted by existing law or  
21 nonfrivolous argument to modify the law and that the factual contentions have or will likely have  
22 evidentiary support after further investigation. Fed. R. Civ. P. 11.

23 In sum, the court finds the allegations in plaintiff’s complaint so vague and  
24 conclusory that it is unable to determine whether the current action is frivolous or fails to state a  
25 claim for relief. The court has determined that the complaint does not contain a short and plain  
26 statement as required by Fed. R. Civ. P. 8(a)(2). Although the Federal Rules adopt a flexible

1 pleading policy, a complaint must give fair notice and state the elements of the claim plainly and  
2 succinctly. Jones v. Community Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984). Plaintiffs  
3 must allege with at least some degree of particularity overt acts which defendants engaged in that  
4 support plaintiffs' claim. Id. Because plaintiffs have failed to comply with the requirements of  
5 Fed. R. Civ. P. 8(a)(2), the complaint must be dismissed.

6           If plaintiffs can allege a claim that is not time barred, consonant with their  
7 obligations under Federal Rule of Civil Procedure 11, then they may file an amended complaint.  
8 If plaintiffs choose to amend the complaint, plaintiffs must set forth the jurisdictional grounds  
9 upon which the court's jurisdiction depends. Fed. R. Civ. P. 8(a). Further, plaintiffs must  
10 demonstrate how the conduct complained of has resulted in a deprivation of plaintiffs' federal  
11 rights. See Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980).

12           Finally, plaintiffs are advised that argument is not necessary or desired in a  
13 complaint. The complaint should contain facts which lead to the ultimate conclusion that a  
14 specific law has been violated, by whom, and when.

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

22 ////

23 ////

24 ////

25 ////

26 ////

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

IT IS ORDERED that:

1. Plaintiffs' request for leave to proceed in forma pauperis is granted.

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

DATED: January 18, 2011

/s/ Gregory G. Hollows

---

GREGORY G. HOLLOWES,  
UNITED STATES MAGISTRATE JUDGE

GGH:076/Acosta2871.amd.wpd