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

BRIAN M. and JANELLE R. PAVEY,

Plaintiffs,

No. CIV S-11-1477 GEB DAD PS

vs.

RECONTRUST COMPANY, N.A.,
and DOES 1 through 10,

FINDINGS AND RECOMMENDATIONS

Defendants.

_____ /
This matter came before the court on August 26, 2011, for hearing of a motion to strike and a motion to dismiss plaintiffs' complaint filed on behalf of defendant Recontrust Company, N.A. Plaintiffs, who are proceeding pro se, did not appear at the hearing.¹ Attorney Michael Peng appeared telephonically for defendant Recontrust Company, N.A. Oral argument was heard, and defendant's motions were taken under submission.

Upon consideration of the briefing on file, defendant's arguments at the hearing, and the entire file, the undersigned will recommend that defendant's motion to dismiss be granted in part.

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¹ On September 6, 2011, plaintiffs filed a letter with the court apologizing for their absence and promising to attend any future hearings. (Doc. No. 22.)

1 BACKGROUND

2 Plaintiffs commenced this action by filing a complaint on June 1, 2011, (Doc. No.
3 1), and paying the required filing fee. In their complaint, plaintiffs allege that defendant violated
4 the Fair Credit Reporting Act (“FCRA”), 15 U.S.C. § 1681 et seq, in connection with plaintiffs’
5 home loan which was taken out in 2005. Specifically, plaintiffs allege that the defendant failed
6 to provided them with credit scores, failed to provide “Notice to Home Loan Applicant,” failed to
7 provide “Notices of Adverse Action,” failed to provide “Risk-Based Pricing Notice,” and failed
8 to make an “Investigative Consumer Report Disclosure.”² (Id. at 35.³)

9 On July 18, 2011, counsel for defendant filed a motion to strike portions of
10 plaintiffs’ complaint pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, (Doc. No.
11 16), and also filed a motion to dismiss pursuant to Rule 12(b)(6). (Def.’s MTD (Doc. No. 17.))
12 Plaintiffs filed an opposition to defendant’s motion on July 29, 2011, (Pl.’s Opp.’n (Doc. No.
13 18)), and defendant filed a reply on August 19, 2011. (Def.’s Reply (Doc. No. 19.))

14 LEGAL STANDARDS APPLICABLE TO DEFENDANT’S MOTION

15 The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the legal
16 sufficiency of the complaint. N. Star Int’l v. Ariz. Corp. Comm’n, 720 F.2d 578, 581 (9th Cir.
17 1983). “Dismissal can be based on the lack of a cognizable legal theory or the absence of
18 sufficient facts alleged under a cognizable legal theory.” Balistreri v. Pacifica Police Dep’t, 901
19 F.2d 696, 699 (9th Cir. 1990). A plaintiff is required to allege “enough facts to state a claim to
20 relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Thus,

21
22 ² Plaintiffs also allege several state law causes of action. Specifically, plaintiffs allege
23 that defendant, as well as the appraiser, closing trustee, underwriter, and lender involved in the
24 May 2005 purchase of plaintiffs’ home breached their fiduciary duties and the implied covenant
25 of good faith and fair dealing, intentionally inflicted emotional distress, committed fraud and
26 conversion, were negligent, incurred unjust enrichment and committed all of these acts as part of
a conspiracy. (Compl. (Doc. No. 1) at 17-40.)

³ Page number citations such as this one are to the page number reflected on the court’s
CM/ECF system and not to page numbers assigned by the parties.

1 a defendant's Rule 12(b)(6) motion challenges the court's ability to grant any relief on the
2 plaintiff's claims, even if the plaintiff's allegations are true.

3 In determining whether a complaint states a claim on which relief may be granted,
4 the court accepts as true the allegations in the complaint and construes the allegations in the light
5 most favorable to the plaintiff. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Love v.
6 United States, 915 F.2d 1242, 1245 (9th Cir. 1989). In general, pro se complaints are held to less
7 stringent standards than formal pleadings drafted by lawyers. Haines v. Kerner, 404 U.S. 519,
8 520-21 (1972). However, the court need not assume the truth of legal conclusions cast in the
9 form of factual allegations. W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). The
10 court is permitted to consider material which is properly submitted as part of the complaint,
11 documents not physically attached to the complaint if their authenticity is not contested and the
12 plaintiff's complaint necessarily relies on them, and matters of public record. Lee v. City of Los
13 Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001).

14 ANALYSIS

15 I. Rule 8

16 Counsel for defendant argues that plaintiffs' complaint should be dismissed due to
17 its failure to comply with the requirements of Rule 8 of the Federal Rules of Civil Procedure. In
18 this regard, defense counsel argues that plaintiffs' complaint fails to set forth a short and plain
19 statement of any claim showing that plaintiffs are entitled to relief. (Def.'s MTD (Doc. No. 17)
20 at 13-14.)

21 The minimum requirements for a civil complaint in federal court are as follows:

22 A pleading which sets forth a claim for relief . . . shall contain (1) a
23 short and plain statement of the grounds upon which the court's
24 jurisdiction depends . . . , (2) a short and plain statement of the
claim showing that the pleader is entitled to relief, and (3) a
demand for judgment for the relief the pleader seeks.

25 Fed. R. Civ. P. 8(a).

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1 Although the Federal Rules of Civil Procedure adopt a flexible pleading policy, a
2 complaint must give the defendant fair notice of the plaintiff’s claims and must allege facts that
3 state the elements of each claim plainly and succinctly. Fed. R. Civ. P. 8(a)(2); Jones v.
4 Community Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984). “A pleading that offers ‘labels
5 and conclusions’ or ‘a formulaic recitation of the elements of cause of action will not do.’ Nor
6 does a complaint suffice if it tenders ‘naked assertions’ devoid of ‘further factual
7 enhancements.’” Ashcroft v. Iqbal, 556 U.S. 662, ---, 129 S. Ct. 1937, 1949 (2009) (quoting
8 Twombly, 550 U.S. at 555, 557). A plaintiff must allege with at least some degree of
9 particularity overt acts which the defendants engaged in that support the plaintiff’s claims.
10 Jones, 733 F.2d at 649. A complaint must also contain “a short and plain statement of the
11 grounds for the court’s jurisdiction” and “a demand for the relief sought.” Fed. R. Civ. P. 8(a)(1)
12 & 8(a)(3).

13 Here, the allegations found in plaintiffs’ complaint are vague, conclusory, and
14 nearly incomprehensible. The complaint fails to allege facts that state the elements of the claims
15 both plainly and succinctly, and fails to allege with any degree of particularity the specific acts
16 allegedly engaged in that would support plaintiffs’ claims. The complaint is also almost entirely
17 devoid of reference to the most basic facts, such as the dates on which alleged incidents occurred
18 and the names of individuals involved in the acts alleged. Accordingly, defendant’s motion to
19 dismiss could be properly granted for this reason alone.⁴

21 ⁴ Moreover, with respect to plaintiffs’ attempt to allege a claim of fraud, when a plaintiff
22 raises claims of fraud, “the circumstances constituting fraud . . . shall be stated with
23 particularity.” Fed. R. Civ. P. 9(b). “Rule 9(b) serves not only to give notice to defendants of the
24 specific fraudulent conduct against which they must defend, but also ‘to deter the filing of
25 complaints as a pretext for the discovery of unknown wrongs, to protect [defendants] from the
26 harm that comes from being subject to fraud charges, and to prohibit plaintiffs from unilaterally
imposing upon the court, the parties and society enormous social and economic costs absent
some factual basis.” Bly-Magee v. California, 236 F.3d 1014, 1018 (9th Cir. 2001) (quoting In
re Stac Elec. Sec. Litig., 89 F.3d 1399, 1405 (9th Cir. 1996)). Pursuant to Rule 9(b), a plaintiff
alleging fraud at a minimum must plead evidentiary facts such as the time, place, persons,
statements and explanations of why allegedly misleading statements are misleading. In re

1 II. FCRA

2 Counsel for defendant also argues that plaintiffs' claim under the FCRA must be
3 dismissed for failure to state a claim on which relief can be granted. Specifically, defense
4 counsel contends that plaintiffs have failed to allege any specific facts involving defendant that
5 would constitute a violation of the FCRA. Moreover, counsel for defendant argues that
6 plaintiffs cannot allege such facts because the alleged violations of the FCRA stem from
7 plaintiffs' 2005 home loan and defendant Reconstruct Company, N.A. was not a party to that
8 loan transaction. (Def.'s MTD (Doc. No. 17) at 25-26.) Defendant's arguments are persuasive.

9 Congress enacted the FCRA "to ensure fair and accurate credit reporting, promote
10 efficiency in the banking system, and protect consumer privacy." Safeco Ins. Co. of Am. v. Burr,
11 551 U.S. 47, 52 (2007). The FCRA requires consumer reporting agencies to "adopt reasonable
12 procedures for meeting the needs of commerce for consumer credit . . ." 15 U.S.C. § 1681(b). A
13 consumer reporting agency ("CRA") is one that "regularly engages in whole or in part in the
14 practice of assembling or evaluating consumer credit information or other information on
15 consumers for the purpose of furnishing consumer reports to third parties . . ." 15 U.S.C. §
16 1681a(f). As the Ninth Circuit has recognized:

17 [T]o ensure that credit reports are accurate, the FCRA imposes
18 some duties on the sources that provide credit information to
19 CRAs, called "furnishers" in the statute. Section 1681s-2 sets forth
20 responsibilities of furnishers of information to consumer reporting
21 agencies delineating two categories of responsibilities. Subsection
22 (a) details the duty to provide accurate information, and includes
23 the following duty:

24 (3) Duty to provide notice of dispute

25

GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1547 n.7 (9th Cir. 1994); see also Vess v. Ciba-Geigy
26 Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003); Fecht v. Price Co., 70 F.3d 1078, 1082 (9th
27 Cir. 1995). Likewise, "[u]nder California law, the 'indispensable elements of a fraud claim
28 include a false representation, knowledge of its falsity, intent to defraud, justifiable reliance, and
29 damages.'" Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1105 (9th Cir. 2003) (quoting
30 Moore v. Brewster, 96 F.3d 1240, 1245 (9th Cir. 1996)). Here, plaintiffs have failed to plead the
31 minimum facts required under Rule 9(b).

1 If the completeness or accuracy of any information furnished by
2 any person to any consumer reporting agency is disputed to such
3 person by a consumer, the person may not furnish the information
4 to any consumer reporting agency without notice that such
5 information is disputed by the consumer.

6 § 1681s-2(a)(3).

7 Section 1681s-2(b) imposes a second category of duties on
8 furnishers of information. These obligations are triggered upon
9 notice of dispute—that is, when a person who furnished information
10 to a CRA receives notice from the CRA that the consumer disputes
11 the information. [] Subsection 1681s-2(b) provides that, after
12 receiving a notice of dispute, the furnisher shall:

13 (A) conduct an investigation with respect to the
14 disputed information;

15 (B) review all relevant information provided by the
16 [CRA] pursuant to section 1681i(a)(2) ...;

17 (C) report the results of the investigation to the
18 [CRA];

19 (D) if the investigation finds that the information is
20 incomplete or inaccurate, report those results to all
21 other [CRAs] to which the person furnished the
22 information ...; and

23 (E) if an item of information disputed by a
24 consumer is found to be inaccurate or incomplete or
25 cannot be verified after any reinvestigation under
26 paragraph (1) ... (i) modify ... (ii) delete[or] (iii)
permanently block the reporting of that item of
information [to the CRAs].

§ 1681s-2(b)(1). These duties arise only after the furnisher
receives notice of dispute from a CRA; notice of a dispute received
directly from the consumer does not trigger furnishers' duties
under subsection (b).

22 Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147, 1153-54 (9th Cir. 2009). The FCRA also
23 limits the disclosure of “investigative consumer reports.” See 15 U.S.C. § 1681d.

24 Analysis of plaintiffs' complaint is complicated by their failure, discussed above,
25 to state the element of their FCRA claim both plainly and succinctly or to allege with any degree
26 of particularity the specific acts allegedly engaged in that would support such a claim.

1 Nonetheless, it is apparent that plaintiffs have not alleged that defendant Reconstruct Company,
2 N.A. is a consumer reporting agency, that defendant furnished information about plaintiffs to a
3 consumer reporting agency, or even that any furnisher of information received a notice of dispute
4 from a CRA. Nor have plaintiffs alleged any facts relating to the disclosure of an investigative
5 consumer report.

6 Plaintiffs do, however, allege that the violations of the FCRA occurred “in the
7 course and conduct of offering and making” their 2005 home loan. (Compl. (Doc. No. 1) at 35.)
8 Any such claim would appear to be time-barred, since the FCRA requires that a plaintiff plead
9 violations of the statute “not later than the earlier” of two years “after the date of discovery” by
10 plaintiff of the violation, or within five years of the date “on which the violation that is the basis
11 for such liability occurs.” 15 U.S.C. § 1681p. Plaintiff’s did not file this action regarding their
12 May of 2005 home loan until June 1, 2011.

13 Accordingly, for the reasons stated above, plaintiffs FCRA claim should be
14 dismissed for failure to state a claim upon which relief can be granted. See Zirelli v. BAC Home
15 Loan Servicing, L.P., No. 2:11-cv-00305-GEB-DAD, 2011 WL 6100442, at *4 (E.D. Cal. Dec.
16 7, 2011) (dismissing FCRA claim where plaintiff failed to “allege that he disputed any negative
17 information with a CRA or that notice of such dispute was provided to any Defendant.”); Clark
18 v. FLA Card Services, N.A., No. C 09-5240 SBA, 2010 WL 2232161, at *3 (N.D. Cal. June 3,
19 2010) (dismissing FCRA claim where there were no allegations in the complaint that plaintiff
20 “disputed any charges with any credit reporting bureau or that notice of such dispute was
21 provided”); Permpoon v. Wells Fargo Bank Nat. Ass’n, No. 09-CV-01140-H (BLM), 2009 WL
22 3214321, at *11 (S.D. Cal. Sept. 29, 2009) (dismissing FCRA claim where complaint failed to
23 allege that defendant “was involved in the loan origination and therefore had a duty to provide
24 the alleged documents” and where plaintiff did not “identify who failed to provide the alleged
25 documents.”).

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1 CONCLUSION

2 For the reasons explained above, plaintiffs’ sole claim for relief based upon an
3 alleged violation of federal law should be dismissed for failure to state a claim upon which relief
4 may be granted. The undersigned has carefully considered whether plaintiffs could file an
5 amended complaint that states a cognizable federal claim that would not be subject to dismissal.
6 “Valid reasons for denying leave to amend include undue delay, bad faith, prejudice, and
7 futility.” California Architectural Bldg. Prod. v. Franciscan Ceramics, 818 F.2d 1466, 1472 (9th
8 Cir. 1988). See also Klamath-Lake Pharm. Ass’n v. Klamath Med. Serv. Bureau, 701 F.2d 1276,
9 1293 (9th Cir. 1983) (holding that, while leave to amend shall be freely given, the court does not
10 have to allow futile amendments). In light of obvious deficiencies noted above, the undersigned
11 finds that it would be futile to grant plaintiffs leave to amend.

12 If these findings and recommendations are adopted, only plaintiffs’ claims based
13 on alleged violation of state law will remain. A district court may decline to exercise
14 supplemental jurisdiction over state law claims if the district court has dismissed all claims over
15 which it has original jurisdiction. 28 U.S.C. § 1367(c)(3). The court’s discretion to decline
16 jurisdiction over state law claims is informed by the values of judicial economy, fairness,
17 convenience, and comity. Acri v. Varian Associates, Inc., 114 F.3d 999, 1001 (9th Cir. 1997) (en
18 banc). In addition, “[t]he Supreme Court has stated, and [the Ninth Circuit] ha[s] often repeated,
19 that ‘in the usual case in which all federal-law claims are eliminated before trial, the balance of
20 factors . . . will point toward declining to exercise jurisdiction over the remaining state-law
21 claims.’” Acri, 114 F.3d at 1001 (quoting Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.
22 7 (1988)). See also Satey v. JP Morgan Chase & Co., 521 F.3d 1087, 1091 (9th Cir. 2008)
23 (recognizing this principle but noting that dismissal of the remaining state law claims is not
24 mandatory).

25 Here, eight of the nine causes of action alleged in plaintiffs’ complaint are based
26 on alleged violations of state law. Those include state law causes of action for breach of

1 fiduciary duty, breach of the implied covenant of good faith and fair dealing, intentional
2 infliction of emotional distress, fraud, conversion, negligence, unjust enrichment and conspiracy.
3 (Compl. (Doc. No. 1) at 26-40.) Of course, “primary responsibility for developing and applying
4 state law rests with the state courts.” Curiel v. Barclays Capital Real Estate Inc., Civ. No. S-09-
5 3074 FCD/KJM, 2010 WL 729499, at *1 (E.D. Cal. Mar. 2, 2010). Here, as in the usual case,
6 consideration of judicial economy, fairness, convenience, and comity all point toward declining
7 to exercise supplemental jurisdiction. Therefore, the undersigned will also recommend that the
8 assigned district judge decline to exercise supplemental jurisdiction over plaintiffs’ various state
9 law claims and that they be dismissed without prejudice under 28 U.S.C. § 1367(c)(3).

10 Accordingly, IT IS HEREBY RECOMMENDED that:

- 11 1. Defendant’s July 18, 2011 motion to strike (Doc. No. 16) be denied as moot;
- 12 2. Defendant’s July 18, 2011 motion to dismiss (Doc. No. 17) be granted in part;
- 13 3. Plaintiffs’ claim based on alleged violation of the FCRA (15 U.S.C. § 1681 et
14 seq.) be dismissed with prejudice;
- 15 4. The court decline to exercise supplemental jurisdiction over plaintiffs’ state
16 law claims;
- 17 5. Plaintiff’s state law claims be dismissed without prejudice under 28 U.S.C. §
18 1367(c)(3); and
- 19 6. This action be closed.

20 These findings and recommendations are submitted to the United States District
21 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
22 days after being served with these findings and recommendations, any party may file written
23 objections with the court and serve a copy on all parties. Such a document should be captioned
24 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
25 shall be served and filed within seven days after service of the objections. The parties are

26 ////

1 advised that failure to file objections within the specified time may waive the right to appeal the
2 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: February 10, 2012.

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6 _____
7 DALE A. DROZD
8 UNITED STATES MAGISTRATE JUDGE

7 DAD:6
8 orders.pro se/pavey1477.mtd

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