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

JACOB BARR, et al.,

No. 2:13-CV-2087-JAM-CMK

Plaintiffs,

vs.

FINDINGS AND RECOMMENDATIONS

WELLS FARGO BANK, N.A.,

Defendant.

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Plaintiffs, who are proceeding pro se, bring this civil action for damages and declaratory relief. Pending before the court is defendant's motion to dismiss (Doc. 15).

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1 **I. PLAINTIFFS' ALLEGATIONS**

2 Plaintiffs accept the following statement of facts drawn from plaintiffs' complaint
3 and as set forth in defendant's brief:¹

4 **A. Plaintiff' Financing History**

5 Plaintiffs Jacob P. Barr and Shawna L. Barr (the "Barrs")
6 purchased the real property at 507 South Old Stage Road in Mt. Shasta,
7 California, in June 2008. (citations to defendant's request for judicial
8 notice, Doc. 29, omitted).² The Barrs financed their purchase with a loan
9 secured by a deed of trust.

10 At the same time, the Barrs obtained a home equity line of
11 credit ("HELOC") evidenced by an account agreement and secured
12 by a short-term, open-ended deed of trust, which by its terms
13 incorporated a master form deed of trust recorded in 2007.

14 In December 2008, the Barrs refinanced their original loan with a
15 \$417,000 loan from Wells Fargo (the "First Loan"), evidenced by a
16 promissory note and secured by a deed of trust.

17 **B. Plaintiffs' "Offer to Pay the Claim": The HELOC**

18 On or about June 20, 2013, plaintiff Robert Warren ("Warren")
19 sent Wells Fargo a letter with a subject line that began, "Offer to pay the
20 claim. . .," that referred to the Barrs' HELOC. Enclosed with this letter
21 was a document titled "International promissory note" bearing the Barrs'
22 HELOC account number and a payment coupon.

23 On July 30, 2013, Warren "tendered" a document asserting that
24 Wells Fargo "has accepted the OFFER as of June 28, 2013."

25 On or about August 5, 2013, Wells Fargo responded with a letter to
26 the Barrs advising:

The document that you submitted for payoff or
elimination of the above reference[d] loan does not
meet the terms of your note and mortgage loan that

20 ¹ In their motion to strike portions of defendant's motion as well as their brief in
21 opposition to defendant's motion, plaintiffs state: "We include the factual history here as stated
22 in the complaint and include the factual history as stated in the DEFENDANTS-
MEMORANDUM."

23 ² Defendant requests (Doc. 16) that the court judicially notice various documents
24 which are either matters of public record or attached to or referred to in the complaint. Plaintiffs
25 have not filed any objection to defendant's request. Because the court may take judicial notice
26 pursuant to Federal Rule of Evidence 201 of matters of public record, see U.S. v. 14.02 Acres of
Land, 530 F.3d 883, 894 (9th Cir. 2008), and because the court may consider documents
incorporated by reference in or attached to the complaint, see Branch v. Tunnell, 14 F.3d 449,
454 (9th Cir. 1994); Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001), defendant's
request should be granted.

1 obligates you as the borrowers to repay the loan in
2 US currency. The item you submitted is not legal
3 tender and will not be accepted now or in the future
4 as payment on the note and mortgage.

5 In communications to Wells Fargo dated August 19, 2013, the
6 Barrs wrote, "We have been notified by Mr. Robert Warren that Wells
7 Fargo has accepted the payment of \$219,284.42 on the ACCOUNT. This
8 payment has not been credited to the ACCOUNT."

9 Wells Fargo responded by letter dated August 27, 2013, advising
10 the Barrs that their prior correspondence provided "no basis for any debt
11 relief, set-off, or payment" and that their HELOC account was past-due by
12 one month.

13 The Barrs tendered a check to bring their HELOC current one
14 week later.

15 **C. Plaintiffs' "Offer to Pay the Claim": The First Loan**

16 On or about June 24, 2013, Warren sent Wells Fargo a letter with a
17 subject line that began, "Offer to pay the claim. . .," that referenced the
18 account number for the Barrs' First Loan. Enclosed with this letter was a
19 document titled "International promissory note" that bore the Barrs' names
20 and the account number for the Loan.

21 Wells Fargo responded to the foregoing with a letter dated July 10,
22 2013, that advised the Barrs that the document they had submitted to pay
23 off their loan "is not legal tender and will not be accepted now or in the
24 future as payment on the note. . . ."

25 On July 30, 2013, Warren "tendered" a document titled "Notice of
26 Acceptance of OFFER" asserting that Wells Fargo's "failure to return or
dishonor" the "International promissory note" operated as an acceptance of
the "offer."

When plaintiffs received statements for their Loan that did not
reflect the amounts shown in the "International promissory note" as having
been credited to their account, they engaged in a further correspondence
with Wells Fargo, requesting a "certified electronic forensic audit" of their
account "to determine the disposition of the payment" made by way of the
"International promissory note."

27 **II. STANDARD FOR MOTION TO DISMISS**

28 In considering a motion to dismiss, the court must accept all allegations of
29 material fact in the complaint as true. See Erickson v. Pardus, 551 U.S. 89, 93-94 (2007). The
30 court must also construe the alleged facts in the light most favorable to the plaintiff. See Scheuer
31 v. Rhodes, 416 U.S. 232, 236 (1974); see also Hosp. Bldg. Co. v. Rex Hosp. Trustees, 425 U.S.
32 738, 740 (1976); Barnett v. Centoni, 31 F.3d 813, 816 (9th Cir. 1994) (per curiam). All

1 ambiguities or doubts must also be resolved in the plaintiff's favor. See Jenkins v. McKeithen,
2 395 U.S. 411, 421 (1969). However, legally conclusory statements, not supported by actual
3 factual allegations, need not be accepted. See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50
4 (2009). In addition, pro se pleadings are held to a less stringent standard than those drafted by
5 lawyers. See Haines v. Kerner, 404 U.S. 519, 520 (1972).

6 Rule 8(a)(2) requires only “a short and plain statement of the claim showing that
7 the pleader is entitled to relief” in order to “give the defendant fair notice of what the . . . claim is
8 and the grounds upon which it rests.” Bell Atl. Corp v. Twombly, 550 U.S. 544, 555 (2007)
9 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). However, in order to survive dismissal for
10 failure to state a claim under Rule 12(b)(6), a complaint must contain more than “a formulaic
11 recitation of the elements of a cause of action;” it must contain factual allegations sufficient “to
12 raise a right to relief above the speculative level.” Id. at 555-56. The complaint must contain
13 “enough facts to state a claim to relief that is plausible on its face.” Id. at 570. “A claim has
14 facial plausibility when the plaintiff pleads factual content that allows the court to draw the
15 reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal, 129 S. Ct. at
16 1949. “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more
17 than a sheer possibility that a defendant has acted unlawfully.” Id. (quoting Twombly, 550 U.S.
18 at 556). “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability,
19 it ‘stops short of the line between possibility and plausibility for entitlement to relief.’” Id.
20 (quoting Twombly, 550 U.S. at 557).

21 In deciding a Rule 12(b)(6) motion, the court generally may not consider materials
22 outside the complaint and pleadings. See Cooper v. Pickett, 137 F.3d 616, 622 (9th Cir. 1998);
23 Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994). The court may, however, consider: (1)
24 documents whose contents are alleged in or attached to the complaint and whose authenticity no
25 party questions, see Branch, 14 F.3d at 454; (2) documents whose authenticity is not in question,
26 and upon which the complaint necessarily relies, but which are not attached to the complaint, see

1 Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001); and (3) documents and materials
2 of which the court may take judicial notice, see Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir.
3 1994).

4 Finally, leave to amend must be granted “[u]nless it is absolutely clear that no
5 amendment can cure the defects.” Lucas v. Dep’t of Corr., 66 F.3d 245, 248 (9th Cir. 1995) (per
6 curiam); see also Lopez v. Smith, 203 F.3d 1122, 1126 (9th Cir. 2000) (en banc).

8 III. DISCUSSION

9 Defendant argues that the complaint fails to state any claim upon which relief can
10 be granted. The court agrees. In the complaint, plaintiffs assert jurisdiction based on the
11 existence of a federal question. Plaintiffs allege the following under the heading “Claim for
12 Relief”: (1) the documents they tendered are “deposits” under federal treaty law; and (2) by
13 refusing to accept the documents as payments, defendant violated various provisions of the
14 California Commercial Code. Plaintiffs do not allege anywhere in the complaint how
15 defendant’s conduct violated any federal law or the U.S. Constitution. Accepting as true
16 plaintiffs’ allegation that their financial documents are in fact “deposits” under valid federal law,
17 plaintiffs allege only violations of California law with respect to defendant’s refusal to accept
18 those documents as payment on either the HELOC or First Loan.³

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25 ³ The court expresses no opinion as to whether the complaint states any claims
26 under state law.

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IV. CONCLUSION

Based on the foregoing, the undersigned recommends that:

1. Defendant's unopposed request for judicial notice (Doc. 16) be granted;
2. Defendant's motion to dismiss (Doc. 15) be granted; and
3. This action be dismissed with prejudice.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days after being served with these findings and recommendations, any party may file written objections with the court. Responses to objections shall be filed within 14 days after service of objections. Failure to file objections within the specified time may waive the right to appeal. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: August 14, 2014



CRAIG M. KELLISON
UNITED STATES MAGISTRATE JUDGE