

1 presumably so that they can proceed with their state law claims. Plaintiffs will be permitted one
2 more opportunity to amend to attempt to allege state law claims only. Therefore, only the
3 findings and recommendations portion of the opinion filed April 20, 2015 will be vacated. The
4 order portion of that opinion will remain intact. Much of that findings and recommendations will
5 be repeated here, as the federal claims must be dismissed without leave to amend.

6 II. Screening of the Amended Complaint

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

12 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
13 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th
14 Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
15 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
16 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
17 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
18 Cir. 1989); Franklin, 745 F.2d at 1227.

19 A complaint must contain more than a “formulaic recitation of the elements of a cause of
20 action;” it must contain factual allegations sufficient to “raise a right to relief above the
21 speculative level.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1965 (2007).
22 “The pleading must contain something more...than...a statement of facts that merely creates a
23 suspicion [of] a legally cognizable right of action.” Id., quoting 5 C. Wright & A. Miller, Federal
24 Practice and Procedure 1216, pp. 235-235 (3d ed. 2004). “[A] complaint must contain sufficient
25 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft
26 v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 570, 127
27 S.Ct. 1955). “A claim has facial plausibility when the plaintiff pleads factual content that allows

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1 the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”

2 Id.

3 Pro se pleadings are liberally construed. See Haines v. Kerner, 404 U.S. 519, 520-21, 92
4 S. Ct. 594, 595-96 (1972); Balistreri v. Pacifica Police Dep’t., 901 F.2d 696, 699 (9th Cir. 1988).

5 Unless it is clear that no amendment can cure the defects of a complaint, a pro se plaintiff
6 proceeding in forma pauperis is entitled to notice and an opportunity to amend before dismissal.

7 See Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987); Franklin, 745 F.2d at 1230.

8 This action was commenced in the Northern District of California on January 28, 2015,
9 and transferred to this court on April 1, 2015. Before this court had an opportunity to screen the
10 complaint, plaintiffs filed an amended complaint.

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

19 The amended complaint contains claims under the Fair Debt Collection Practices Act, 15
20 U.S.C. § 1692d (“FDCPA”), Cal. Bus. & Prof. Code § 17200 (for unfair business practices), 18
21 U.S.C. § 1028(A)(5) (forgery), and § 641 (grand larceny). The amended complaint is difficult to
22 decipher, however, plaintiffs assert that defendants have harassed, intimidated and threatened
23 them with the foreclosure of their property located at 929 Bess Place, Stockton, California,
24 causing plaintiff Murphy “undue physical and mental strain.” (ECF No. 9 at 2.) Plaintiffs refer
25 to attached exhibits; however, the amended complaint contains no exhibits.¹

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27 ¹ In reviewing the exhibits to the original complaint, it has come to the court’s attention that
28 plaintiffs previously filed a lawsuit in this court for TILA violations, as well as fraud and unfair
and deceptive practices under 15 U.S.C. § 45 pertaining to the same property, on January 3, 2011.
(Murphy v. JP Morgan Chase Bank, 2:11-cv-0017 KJM CKD.) That action was dismissed, and

1 It appears from court documents that the foreclosure of the real property at issue has
2 already taken place. A trustee's sale appears to be complete and the purchasers intend to take
3 possession of the property. See Mot. for Prel. Inj., ECF No. 10 at 21-21, 27-28. The motion for
4 injunctive relief was denied by order of April 9, 2015. (ECF No. 15.) Plaintiffs seek damages.

5 III. FDCPA

6 The amended complaint alleges a FDCPA violation under 15 U.S. C. § 1692.

7 In 1977 Congress enacted the Fair Debt Collection Practices Act (FDCPA) in response to
8 national concern over “the use of abusive, deceptive and unfair debt collection practices by many
9 debt collectors.” 15 U.S.C. § 1692(a). The purpose of the FDCPA is “to protect consumers from
10 a host of unfair, harassing, and deceptive debt collection practices without imposing unnecessary
11 restrictions on ethical debt collectors.” S. Rep. No. 382, 95th Cong., 1st Sess. 1-2, reprinted in
12 1977 U.S. Code Cong & Ad. News 1695, 1696.

13 The FDCPA defines debt as “any obligation or alleged obligation of
14 a consumer to pay money arising out of a transaction in which the
15 money, property, insurance, or services which are the subject of the
16 transaction are primarily for personal, family, or household
17 purposes ...” 15 U.S.C. § 1692a(5); see also Bloom v. I.C. Sys. Inc.,
18 972 F.2d 1067, 1068-69 (9th Cir.1992) (explaining that the FDCPA
19 applies to debts incurred for personal rather than commercial
20 reasons). The Act defines “consumer” as “any natural person
21 obligated ... to pay any debt.” Id. § 1692a(3). The Act does not
22 define “transaction,” but the consensus judicial interpretation is
23 reflected in the Seventh Circuit's ruling that the statute is limited in
24 its reach “to those obligations to pay arising from consensual
25 transactions, where parties negotiate or contract for consumer-
26 related goods or services.” Bass v. Stolper, Koritzinsky, Brewster &
27 Neider, S.C., 111 F.3d 1322, 1326 (7th Cir.1997) (citing S. Horts v.
28 Palmer, 155 F.R.D. 172, 175-76 (S.D.Ohio 1994).

29 Turner v. Cook, 362 F.3d 1219, 1227 (9th Cir. 2004).

30 Under the FDCPA, a “debt collector” “means any person who uses any instrumentality of
31 interstate commerce or the mails in any business the principal purpose of which is the collection
32 of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or
33 due or asserted to be owed or due another.” 15 U.S.C.A. § 1692a(6). Excepted is “any person

34 the Ninth Circuit Court of Appeals affirmed the judgment on May 8, 2012. (Id., ECF No. 33, 34.)

1 collecting or attempting to collect any debt owed or due or asserted to be owed or due another to
2 the extent such activity ... (iii) concerns a debt which was not in default at the time it was
3 obtained by such person” 15 U.S.C.A. § 1692a(6)(F).

4 “[A] debt collector does not include the consumer’s creditors, a mortgage servicing
5 company, or an assignee of a debt, as long as the debt was not in default at the time it was
6 assigned.” Perry v. Stewart Title Co., 756 F.2d 1197, 1208 (5th Cir. 1985), mod. on other
7 grounds, 761 F.2d 237 (5th Cir. 1985). Foreclosure on a property based on a deed of trust does
8 not constitute collection of a debt within the meaning of the FDCPA. Hulse v. Ocwen Federal
9 Bank, FSB, 195 F.Supp.2d 1188, 1204 (D.Or. 2002). See also Jelsing v. MIT Lending, 2010 WL
10 2731470, at *5 (S.D.Cal. July 9, 2010) (holding that sending a Notice of Trustee's Sale is not
11 actionable under the FDCPA where a plaintiff does not allege that the sender was a “debt
12 collector” and also because “foreclosing on [a] property pursuant to a deed of trust is not the
13 collection of a “debt” within the meaning of the FDCPA.”) (citing cases); Hepler v. Washington
14 Mut. Bank, F.A., 2009 WL 1045470, at *4–5 (C.D.Cal. April 17, 2009) (“[T]he law is well-
15 settled ... that creditors, mortgagors, and mortgage servicing companies are not debt collectors
16 and are statutorily exempt from liability under the FDCPA.”). In general, a mortgage servicing
17 company foreclosing on a property is not acting as a debt collector within the meaning of the
18 FDCPA. Izenberg v. ETS Servs., 589 F.Supp.2d 1193, 1199 (C.D.Cal.2008); Walker v. Equity 1
19 Lenders Group, 2009 WL 1364430, at *7 (S.D.Cal. May 14, 2009).

20 There is authority contrary to Hulse; see e.g., Wilson v. Draper & Goldberg, 443 F.3d
21 373, 376 (4th Cir. 2006). In Wilson, the Fourth Circuit refused to follow Hulse reasoning that a
22 “debt” remained a “debt” even after foreclosure. Id. While that may be true in the jurisdiction
23 pertinent to the Wilson case, it is not true in California. With exceptions not applicable here, a
24 lender/trustee may *not* seek a deficiency judgment when foreclosing on a property in a non-
25 judicial trustee foreclosure/sale. Cal. Code Civ. P. §§ 580d, 726. Thus, in California, a debt
26 derived from the residential loan transaction does not exist after a non-judicial foreclosure. The
27 court therefore finds Hulse persuasive in its analysis when dealing with California foreclosures.

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1 Based on Hulse and other authority cited above, plaintiffs' claim under the FDCPA must
2 be dismissed without leave to amend.

3 IV. Forgery, Grand Larceny

4 Plaintiffs have no standing to pursue alleged violations of 18 U.S.C. §§ 1028, 641.
5 Criminal statutes do not provide a private right of action. See, e.g., Ellis v. City of San Diego, 176
6 F.3d 1183, 1189 (9th Cir.1999) (district court properly dismissed claims brought under the
7 California Penal Code because the statutes do not create enforceable individual rights). It is also
8 well established that private actions are maintainable under federal criminal statutes in only very
9 limited circumstances. Cort v. Ash, 422 U.S. 66, 79, 95 S.Ct. 2080, 2088, 45 L.Ed.2d 26 (1975);
10 Bass Angler Sportsman Soc. v. United States Steel Corp., 324 F.Supp. 412, 415 (S.D.Ala.1971),
11 citing United States v. Claflin, 97 U.S. 546, 24 L.Ed. 1082 (1878); United States v. Jourden, 193
12 F. 986 (9th Cir.1912). See also Lassetter v. Brand, 2011 WL 4712188, *2 (W.D. Wash. Oct. 4,
13 2011) (holding that 18 U.S.C. § 1028 provides no private right of action and cannot form basis for
14 civil suit); Chilkat Indian Village v. Johnson, 870 F.2d 1469, 1472 (9th Cir.1989) (no private
15 right of action for embezzlement and theft from Indian Tribal equivalent to § 641); Retanan v.
16 California Dept. of Correction & Rehabilitation, 2012 WL 1833888, * 5 (E.D. Cal. May 18,
17 2012) (18 U.S.C. § 641 provides no private right of action). Therefore, plaintiffs may not pursue
18 such claims under these federal criminal statutes which will be dismissed without leave to amend.

19 V. Second Amended Complaint

20 Because the court recommends that all federal claims be dismissed, it no longer has
21 federal question jurisdiction, but will permit plaintiffs to amend to allege diversity jurisdiction
22 and to raise the state law claim under Cal. Bus. & Prof. Code § 17200 for unfair business
23 practices only.²

24 For diversity jurisdiction pursuant to 28 U.S.C. § 1332, each plaintiff's state citizenship
25 must be diverse from each defendant,³ and the amount in controversy must exceed \$75,000. For

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27 ² Courts may properly deny leave to amend where a plaintiff is using Rule 15 to make the
28 complaint "a moving target" in order to salvage a case by adding new claims. Minter v. Prime
Equipment Co., 451 F.3d 1196, 1206 (10th Cir. 2006).

³ A federal court's authority to hear cases in diversity is established by 28 U.S.C. § 1332. "The

1 diversity purposes, a corporation is deemed to be a citizen of every state by which it has been
2 incorporated and of the state where it has its principal place of business. 28 U.S.C. § 1332(c).
3 Plaintiff must allege, in the pleadings, the facts essential to show proper and complete diversity
4 jurisdiction in order to maintain standing in federal district court. See Fifty Associates v.
5 Prudential Ins. Co. of America, 446 F.2d 1187, 1190 (9th Cir. 1970) (citing McNutt v. General
6 Motors Acceptance Corp. Of Indiana, 298 U.S. 178, 189, 56 S.Ct. 780, 80 L.Ed. 1135 (1935).

7 First, plaintiffs must allege a specific state of which defendants are a citizen. Without this
8 information, the undersigned cannot determine whether defendants are, in fact, diverse to
9 plaintiff. Second, given that two of the defendants are corporations, plaintiff must allege both the
10 state(s) of each defendant's incorporation and where it has its principal place of business. See
11 Harris v. Rand, 682 F.3d 846, 850 (9th Cir.2012) (emphasis added), 28 U.S.C. § 1332(c)(1) (a
12 corporation shall be deemed to be a citizen of every state by which it has been incorporated and
13 of the state where it has its principal place of business), Fifty Associates, 446 F.2d at 1190 (facts
14 must be alleged from which it may be determined of which state, or states, the corporation is
15 deemed to be a citizen). In regard to the limited partnership, its citizenship can be determined
16 only by reference to the citizenship of each of its members. Kuntz v. Lamar Corp., 385 F.3d
17 1177, 1182 (9th Cir.2004) (citing Carden v. Arkoma Assoc., 494 U.S. 185, 195, 110 S.Ct. 1015,
18 108 L.Ed.2d 157 (1990)). Limited liability companies are also governed by this citizenship rule.
19 Johnson v. Columbia Props. Anchorage, LP, 437 F.3d 894, 899 (9th Cir.2006); see also Solberg
20 v. NDEx West, L.L.C., 2011 WL 1295940 (N.D.Cal. Mar. 31, 2011).

21 In regard to the amount in controversy, the property at issue and its value can only be the
22 object of the litigation if the purpose of the lawsuit is to enjoin a bank from selling or transferring
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24 diversity jurisdiction statute, as construed for nearly 200 years, requires that to bring a diversity
25 case in federal court against multiple defendants, each plaintiff must be diverse from each
26 defendant. That compliance with the diversity statute, including its complete diversity
27 requirement, is the sine qua non of diversity jurisdiction which was made clear in Newman-
28 Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 109 S.Ct. 2218, 104 L.Ed.2d 893 (1989). In a case
involving claims against multiple defendants, “the plaintiff must meet the requirements of the
diversity statute for each defendant. Id. at 829.” Lee v. American National Insurance Company,
260 F.3d 997, 1004–1005 (9th Cir.2001) (fn. and citations omitted).

1 the property, such as in actions for declaratory or injunctive relief. Reyes v. Wells Fargo Bank,
2 N.A., 2010 WL 2629785, *4 (N.D. Cal. June 29, 2010). Here, the foreclosure has already
3 occurred. See Order, filed April 9, 2015 (ECF No. 15 at 3.) The amended complaint seeks only
4 damages. (ECF No. 9 at 5.) For a claim of unfair business practices, plaintiffs must allege
5 damages separately from the value of their property. Courts have found that when a plaintiff does
6 not seek to rescind the loan at issue or prevent foreclosure, but instead seeks damages in an
7 unspecified amount under claims such as breach of fiduciary duty, negligence, negligent
8 misrepresentation, intentional misrepresentation, fraud, and violation of California Business and
9 Professions Code section 17200, the amount in controversy is “not properly gauged by the loan
10 amount.” See Gaspar v. Wachovia Bank, 2011 WL 577416, at *4 (N.D.Cal. Feb.9, 2011); see
11 also Baskin v. Wells Fargo Bank, N.A., 2011 WL 5369123 (N.D.Cal. Nov.7, 2011); Landa v.
12 Flagstar Bank, FSB, 2010 WL 2772629, at *2 (S.D.Cal. July 13, 2010). Similarly, courts have
13 rejected using the appraised value of the property as a measure of the amount in controversy
14 when Plaintiffs' action is “essentially a common law fraud action rather than a typical mortgage
15 foreclosure action.” Landa, 2010 WL 2772629 (S.D.Cal. July 13, 2010).

16 Although a diversity suit should not be dismissed unless “it is apparent, to a legal
17 certainty, that the plaintiff cannot recover [the requisite amount in controversy].” St. Paul
18 Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289, 58 S.Ct. 586, 590 (1938), “this liberal
19 standard for jurisdictional pleading is not a license for conjecture.” Morrison v. Allstate Indem.
20 Co., 228 F.3d 1255, 1268 (11th Cir. 2000). Furthermore, in private actions, California's unfair
21 business practices law does not expressly provide for attorney's fees, and plaintiffs who prevail
22 are generally limited to injunctive relief and restitution, not damages. Cel-Tech
23 Communications, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal.4th 163, 179, 83 Cal.Rptr.2d 548
24 (1999).

25 Plaintiffs are advised that in their second amended complaint, they must allege that each
26 defendant is diverse in accordance with the outline provided above, and must allege an amount in
27 controversy exceeding \$75,000, in light of the authority provided.

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1 VI. Motion to Change Venue

2 Plaintiffs have filed a motion to change venue and remand the case back to the Northern
3 District of California, whence it came. Plaintiffs claim that they have experienced “bias and
4 prejudice” in this district based on their status as pro se litigants. These claims are conclusory
5 and vague, referring only to plaintiffs’ lack of “confidence in the Court and Legal system in the
6 area and in this District of Sacramento.” (ECF No. 20 at 2.) Because plaintiffs’ action was
7 properly transferred to this district from the Northern District, it shall remain here, where venue is
8 proper. See 28 U.S.C. § 1391, Order filed February 3, 2015 (ECF No. 5.) Plaintiffs’ motion is
9 denied.

10 VII. Conclusion

11 Accordingly, IT IS ORDERED that:

- 12 1. The findings and recommendations portion of this court’s opinion filed April 20, 2015
13 (ECF No. 17), is vacated; the order portion of the opinion remains in full force and effect;
- 14 2. Plaintiff Smith’s request for leave to proceed in forma pauperis (ECF No. 19) is
15 granted;
- 16 3. Plaintiffs’ motion to change venue (ECF No. 20) is denied;
- 17 4. Plaintiff’s claims under the FDCPA (15 U.S.C. § 1692d), and 18 U.S.C. § 1028(A)(5)
18 (forgery), and § 641 (grand larceny) are dismissed for the reasons discussed above, with leave to
19 file a second amended complaint within **twenty-eight (28)** days from the date of service of this
20 Order. If plaintiffs include these federal claims in their second amended complaint, the court will
21 recommend that they be dismissed. The second amended complaint must comply with the
22 requirements of the Federal Rules of Civil Procedure, and the Local Rules of Practice; the second
23 amended complaint must bear the docket number assigned this case and must be labeled “Second
24 Amended Complaint;” plaintiffs must file an original and two copies of the second amended
25 complaint; failure to file a second amended complaint will result in a recommendation that this
26 action be dismissed; and

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5. Plaintiffs are prohibited from filing any other documents with the court unless ordered to do so, and any such filings will be disregarded.

Dated:

May 11, 2015

/s/ Gregory G. Hollows

UNITED STATES MAGISTRATE JUDGE

GGH:076/Murphy0725.2AM