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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FELIKS KUBIN, et al.,
Plaintiffs,

v.

ABODE SERVICES AGENCY, et al.,
Defendants.

Case No. [18-cv-00658-MEJ](#)

**ORDER GRANTING PLAINTIFFS’
APPLICATIONS TO PROCEED IN
FORMA PAUPERIS AND FOR
REASSIGNMENT;
REPORT & RECOMMENDATION**

INTRODUCTION

On January 30, 2018, Plaintiffs Feliks Kubin and Alena Gavrilenko filed a Complaint and two Applications to Proceed In Forma Pauperis. Compl., Dkt. No. 1; Appls., Dkt. Nos. 3 & 4. A district court may authorize the start of a civil action in forma pauperis if the court is satisfied that the would-be plaintiff cannot pay the filing fees required to pursue the lawsuit. *See* 28 U.S.C. § 1915(a)(1). Plaintiffs submitted the required documentation demonstrating they are unable to pay the costs of this action, and it is evident from the Applications that their assets and income are insufficient to enable them to pay the fees. *See* Appl. Accordingly, the Court **GRANTS** Plaintiffs’ Applications to Proceed In Forma Pauperis.

However, as it appears the Complaint does not state a basis for the exercise of federal jurisdiction, and as Plaintiffs did not yet consent to the jurisdiction of a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c), the Clerk of Court shall **REASSIGN** this case to a District Judge, with the recommendation that the Complaint be **DISMISSED WITH LEAVE TO AMEND**.

SUA SPONTE SCREENING UNDER 28 U.S.C. § 1915(e)(2)

A. Legal Standard

While the Court has granted Plaintiffs’ Applications to Proceed In Forma Pauperis, it must also review the Complaint to determine whether the action may be allowed to proceed. The Court must dismiss the Complaint if it is frivolous, fails to state a claim upon which relief can be granted, or seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B). To make this determination, courts assess whether there is a factual and legal basis for the asserted wrong, “however inartfully pleaded.” *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th Cir. 1984) (quotation omitted). Pro se pleadings are liberally construed. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam). Moreover, the Ninth Circuit has “repeatedly held that a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000). Unless it is clear that no amendment can cure the defects of a complaint, a pro se plaintiff proceeding in forma pauperis is entitled to notice and an opportunity to amend before dismissal. *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

B. Allegations in the Complaint

Plaintiffs filed their Complaint on January 30, 2018. One week later, they filed as an Exhibit a declaration that describes in greater detail the conduct that is alleged in the Complaint, and attaches excerpts from a number of documents that relate to some of their allegations. *See* Ex., Dkt. No. 5.¹ The undersigned construes the Exhibit as an attachment to the Complaint, and thus may consider the allegations therein when evaluating the sufficiency of the Complaint.

Plaintiffs allege Abode Services Agency and four of its employees provided false information to landlords and program participants; illegally modified official documents; created fraudulent documents; performed fake inspections; did not react to a doctor’s demands for

¹ Plaintiffs separated each attachment within this Exhibit, but the document was scanned into ECF in three sections, each of which comprises many attachments. The undersigned cites relevant pages by identifying the ECF docketing number (e.g., 5, 5-1, or 5-2) and the page number that is displayed on the ECF header (e.g., 10).

1 Plaintiffs’ child or for Feliks Kubin; postponed meetings; and performed provocations,
2 intimidation, and harassment for the purpose of misappropriating public funds and illegally taking
3 additional money from program participants. Compl. at 5; *see also* Ex. at ECF 5 pp. 1-15
4 (narrative of events underlying complaint). In doing so, Defendants “violated almost all rules of
5 ‘Abode Services Policy and Procedures manual.’” Compl. at 5; *see also* Ex. at ECF 5 pp. 20-25
6 (Abode Services Policies and Procedures Manual, Jan. 2017). Plaintiffs allege each of the Adobe
7 employee Defendants engaged in unlawful conduct sounding in fraud and/or misrepresentation; in
8 addition Sherry Galahan asked for a bribe, harassed, intimidated, recorded videos, and touched
9 belongings without permission; Rebekah Dennison intimidated; Noelia Vazquez hid “mandatory
10 original docks”; and Katie Fantin did not react properly to a doctor’s demands for Kubin and
11 Plaintiffs’ child, and confirmed the actions of Galahan, Vazquez, and Dennison were correct.
12 Compl. at 5. They further allege Defendant Glenn Wong, their landlord, asked for a bribe, did not
13 provide all requested information about the apartment he rented them, provided false information
14 about the property, and did not react properly to their doctor’s demands for their baby and Kubin.
15 *Id.*

16 Plaintiffs allege Abode Services Agency is a contractor of San Mateo County that receives
17 governmental housing funds and makes agreements between CalWorks housing assistance
18 programs, landlords and program participants. *Id.*; *see also* Ex. at ECF 5 p. 25 (describing various
19 sources of funding for different subsidy programs offered by Abode Services, including HUD and
20 VA, but not alleging which subsidy program applied to Plaintiffs); Ex. at ECF 5-2 p. 39
21 (description of CalWorks Housing Support Program, which indicates the program “is funded by
22 the California Department of Social Services”). Plaintiffs allege Abode Services engaged in
23 wrongful conduct because it “didn’t control [the] fraudulent activities of its employees.” Compl.
24 at 5.

25 Plaintiffs allege that as a result of living in the housing they were provided through
26 Defendants, their baby and Gavrilenko both developed allergies, and/or that the family’s allergies
27 worsened; despite this knowledge, Defendants refused to take actions to improve the allergenic
28 conditions to which Plaintiffs were subjected. Compl. at 5; *see also* Ex. at ECF 5 p. 7 (“Felix said

1 that he has an allergy to carpets, dust and dirt, but landlord said that the carpet is brand new . . .”),
2 ECF 5 p. 69 (doctor’s note explaining Kubin’s severe obstructive sleep apnea is significantly
3 worsened by allergy exposure, and asking apartment complex either to relocate Kubin to an
4 apartment without carpet, or to remove carpet), ECF 5 p. 72 (doctor’s note explaining baby has
5 respiratory distress when inside apartment, likely due to allergens from carpeting, ventilation or
6 mold; doctor recommends removing carpets and installing air purifier until source of problem can
7 be isolated and corrected), ECF 5-2 p. 10 (invoice from carpet cleaning company that inspected
8 carpet and noted: “CARPET IS NOT NEW. Carpet backing is falling apart. Paint stains on
9 edges. Stains visible with UV light.”). In addition, Defendants intimidated Plaintiffs by
10 threatening to take their baby from them. Compl. at 5; Ex. at ECF 5 p. 5. Plaintiffs request
11 \$65,000 for the sake of their baby’s health, and \$9,000 in moral compensation for Kubin and
12 Gavrilenko. *Id.*; *but see* Civil Cover Sheet (Demand: \$75,000), Dkt. No. 1-1.

13 The Complaint alleges this Court may exercise jurisdiction over the action based on the
14 existence of a federal question and of diversity jurisdiction. *Id.* at 3. Plaintiffs allege 5 C.F.R. §
15 2635.702 and 31 U.S.C. §§ 3729-3733 provide bases for federal question jurisdiction. *Id.* They
16 allege diversity of citizenship exists because Kubin is a citizen of the Russian Federation, and
17 Abode Services Agency is a citizen of California. *Id.* at 3-4. Although the Complaint does not
18 allege the citizenship of Gavrilenko or of the other Defendants, it lists addresses for them in
19 California. *Id.* at 1-2, 7.

20 **C. Analysis and Screening**

21 1. False Claims Act

22 “The FCA[, including 31 U.S.C. §§ 3279-3733,] was enacted during the Civil War with
23 the purpose of forfending widespread fraud by government contractors who were submitting
24 inflated invoices and shipping faulty goods to the government. In furthering this goal, the Act
25 attaches liability, not to underlying fraudulent activity, but to the claim for payment. What
26 constitutes the FCA offense is the knowing presentation of a claim that is either fraudulent or
27 simply false.” *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1265-66 (9th Cir. 1996). The
28 FCA “imposes civil penalties and treble damages on persons who submit false or fraudulent

1 claims for payment *to the United States.*” *Schindler Elevator Corp. v. U.S. ex. rel. Kirk*, 563 U.S.
2 401, 405 (2011) (emphasis added). A person who violates acts proscribed by Section 3729 is
3 liable to the United States Government, not to private citizens. *See* 31 U.S.C. § 3729.

4 A private person may bring a qui tam civil action for violation of the False Claims Act
5 under Section 3730 “for the person and for the United States Government. The action shall be
6 brought in the name of the Government.” 31 U.S.C. § 3730(b)(1). However, pro se plaintiffs such
7 as Kubin and Gavrilenko cannot bring such an action: “Because qui tam relators are not
8 prosecuting only their ‘own case’ but also representing the United States and binding it to any
9 adverse judgment the relators may obtain, we cannot interpret § 1654 as authorizing qui tam
10 relators to proceed pro se in FCA actions.” *Stoner v. Santa Clara Cty. Office of Educ.*, 502 F.3d
11 1116, 1126-27 (9th Cir. 2007) (“The FCA itself does not authorize a relator to prosecute a § 3729
12 violation pro se. . . . Given the fact that Congress did not expressly authorize a qui tam relator to
13 proceed pro se when acting on behalf of the United States, it must have had in mind that such a
14 suit would be carried on in accordance with the established procedure which requires that only one
15 licensed to practice law may conduct proceedings in court for anyone other than himself.”
16 (internal quotation marks and citation omitted)).

17 In addition, a private party seeking to file such an action must serve a “copy of the
18 complaint and written disclosure of substantially all material evidence and information the person
19 possesses” on the Government pursuant to Federal Rule of Civil Procedure 4(i); shall file the
20 Complaint in camera, under seal for at least 60 days; and shall not serve the Complaint on any
21 defendant until the Court so orders. 31 U.S.C. § 3730(b)(2). “The Government may elect to
22 intervene and proceed with the action within 60 days after it receives both the complaint and the
23 material evidence and information.” *Id.* Only if the Government notifies the Court that it declines
24 to intervene shall private parties have the right to conduct the action. *Id.* (b)(4). Plaintiffs have
25 not proceeded in the manner required to file a False Claims Act action: they did not bring the
26 action in the name of the Government, did not file the Complaint under seal, and did not serve the
27 Government with the Complaint and “all material evidence and information [they] possess[.]” *See*
28 Docket. The Government also has not notified the Court that it declines to intervene. *See id.* The

1 Court cannot order service of an FCA action upon any defendant until Plaintiffs meet the
2 procedural requirements of the FCA and the Government notifies the Court it declines to
3 intervene.

4 Assuming arguendo that Plaintiffs' failure to comply with the procedural requirements of
5 Section 3730 did not divest the Court with jurisdiction to entertain their False Claims Act claim in
6 the first instance and that they are able to secure counsel to represent them going forward, the
7 Complaint still does not state a claim. The FCA proscribes a number of acts, *see* 31 U.S.C. §
8 3729(a), but Plaintiffs do not identify the subsection(s) of the FCA upon which they premise their
9 Complaint. In any event, to plead a cause of action under the FCA, Plaintiffs must allege that the
10 money or property at issue was spent or used (1) by or on behalf of the United States Government,
11 or (2) to advance a Government program or interest, if the Government provides any portion of the
12 money requested or will reimburse the recipient for any portion of the money requested. 31
13 U.S.C. § 3729(a), (b)(2). Nothing in the Complaint alleges Defendants spent money or used
14 property on behalf of the United States Government or to further a Government program; nor are
15 there allegations that the U.S. Government provided a portion of the money or will reimburse a
16 recipient for such expenditure. *See* Compl. The Complaint alleges Abode Services contracts with
17 San Mateo County and receives government housing funds, but it does not allege it receives funds
18 from the *U.S.* Government. Compl. at 5. Further, one of the documents Plaintiffs attaches as an
19 exhibit to the Complaint indicates CalWorks is funded by the *California* Department of Social
20 Services. *See* Ex. at ECF 5-2 p. 39.

21 For the foregoing reasons, the undersigned recommends the District Judge dismiss
22 Plaintiffs' FCA claim.

23 2. Use of Public Office for Private Gain

24 5 C.F.R. Part 2635 codifies the Standards of Ethical Conduct for Employees of the
25 Executive Branch. Section 2635.702, which Plaintiffs rely upon to establish federal question
26 jurisdiction, prohibits any employee from using his public office for private gain. But there is no
27 private right of action to enforce or obtain relief for any violation of these ethical standards. 5
28 C.F.R. § 2635.106(c) (violation of Part 2635 "does not create any right or benefit, substantive or

1 procedural, enforceable at law by any person against the United States, its agencies, its officers or
2 employees, or any other person.”); *see also McClintic v. U.S. Postal Serv.*, 2013 WL 12123492, at
3 *1 (E.D. Cal. Dec. 19, 2013) (finding cause of action based on ethical standards failed to state a
4 claim); *Allstate Life Ins. Co. v. Estate of Charles Thomas Reed*, 2007 WL 1040507, at *5 (S.D.
5 Miss. Mar. 30, 2007) (“[T]hese ethical regulations do not create a private right of action, such that
6 [a private plaintiff] is entitled to any relief pursuant to these regulations.”). Moreover, the
7 Complaint does not allege facts sufficient to show that the ethical standards would even apply to
8 Defendants. The Complaint alleges only that (1) Abode Services is an agency that is a contractor
9 of San Mateo County that receives governmental housing funds and makes agreements between
10 Calworks housing assistance programs, landlords, and program participants; and (2) the individual
11 Defendants were all employed by Abode Services and/or Plaintiffs’ landlord. *See Compl.* at 5, 7.
12 Thus, the Complaint does not allege facts sufficient to show that Defendants are employees of the
13 Executive Branch of the United States Government.

14 Plaintiffs thus do not state a claim pursuant to 5 C.F.R. § 2635, and this regulation does not
15 establish the existence of a federal question in this action.

16 3. Diversity Jurisdiction

17 To establish the existence of diversity jurisdiction, Plaintiffs must allege (1) the matter in
18 controversy exceeds the sum or value of \$75,000, exclusive of interest and costs; and (2) as is
19 relevant here, that the action is between “citizens of different states” or “citizens of a State and
20 citizens or subjects of a foreign state[.]” 28 U.S.C. § 1332(a). The Complaint does not allege
21 facts sufficient to show the existence of diversity jurisdiction. First, it seeks relief in the amount
22 of \$74,000, and thus is below the \$75,000 jurisdictional threshold. *But see* Civil Cover Sheet
23 (demand is \$75,000). Second, it does not allege Gavrilenko’s citizenship at all, so the undersigned
24 cannot determine whether total diversity exists between the parties. *See Owen Equip. & Erection*
25 *Co. v. Kroger*, 437 U.S. 365, 373-74 (1978) (“[D]iversity jurisdiction is not to be available when
26 any plaintiff is a citizen of the same State as any defendant.”).

27 In addition, the Complaint alleges that both Kubin and Gavrilenko live in California and
28 that Kubin receives benefits through CalWorks. *See Compl.*; *see also* Kubin Appl., Dkt. No. 4 at

1 1 (Kubin has applied for a Social Security Number). If either Kubin or Gavrienko is a permanent
2 resident of the United States and is domiciled in California, that Plaintiff will be considered a
3 citizen of California for purposes of the jurisdictional analysis, and Plaintiffs will be unable to
4 establish diversity jurisdiction in this matter. *See* 28 U.S.C. § 1332(a) (“the district courts shall
5 not have original jurisdiction under this subsection of an action between citizens of a State and
6 citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the
7 United States and are domiciled in the same State.”); *see also Singh v. Daimler-Benz AG*, 9 F.3d
8 303 (3d Cir. 1993) (explaining legislative history of 1988 amendment to diversity jurisdiction
9 statute and confirming statute should be interpreted by its plain language: “Congress directed that
10 permanent resident aliens, who heretofore were considered ‘citizens or subjects of a foreign state’
11 for purposes of diversity jurisdiction’ are not considered ‘citizen[s] of the State in which [they are]
12 domiciled.”).

13 4. Summary

14 The Complaint does not state any basis for this Court to exercise jurisdiction over the
15 action. Plaintiffs do not state a claim under the False Claims Act, there is no private right of
16 action under Ethical Standards regulations, and they do not meet the requirements of the diversity
17 statute. Accordingly, the undersigned recommends dismissal. Given Plaintiffs’ pro se status and
18 because it is not clear that the deficiencies of the Complaint could not be cured by amendment, the
19 undersigned also recommends the District Judge grant Plaintiff leave to amend as follows:

20 Plaintiffs cannot assert an FCA claim in pro per. If they can obtain counsel to represent
21 them and file an amended complaint, and should counsel comply with the requirements of the
22 FCA for filing qui tam actions, Plaintiffs may be able to state an FCA claim.

23 It would be futile to grant Plaintiffs leave to amend their Ethical Standards claim, as this
24 federal regulation does not imply a private right of action.

25 Plaintiffs may be able to amend the Complaint to state facts sufficient to state state law
26 claims and establish diversity jurisdiction as a basis for federal jurisdiction—if Plaintiffs are not
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1 permanent residents of California and if they seek damages greater than \$75,000.²

2 **CONCLUSION**

3 Based on the analysis above, the Court **GRANTS** the Applications to Proceed In Forma
4 Pauperis. As Plaintiffs did not yet consent to the jurisdiction of a United States Magistrate Judge
5 pursuant to 28 U.S.C. § 636(c), the Clerk of Court shall **REASSIGN** this case to a District Judge,
6 with the recommendation that the Complaint be **DISMISSED WITH LEAVE TO AMEND as**
7 **described herein**. To summarize, the undersigned recommends Plaintiffs be granted leave to
8 amend their FCA claim if they are represented by counsel when they file the amended complaint;
9 not be granted leave to amend their claim based on 5 C.F.R. § 2635.702; and be granted leave to
10 amend to allege the existence of diversity jurisdiction, and any state-law claims they can assert
11 thereunder.

12 Pursuant to Federal Rule of Civil Procedure 72, any party may serve and file objections to
13 this Report and Recommendation within 14 days after being served.

14 Plaintiffs may wish to seek assistance from the Legal Help Center, a free service offered by

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16 ² If they amend the Complaint, Plaintiffs will need to meet the requirements of Federal Rule of
17 Civil Procedure 8. Rule 8 requires Plaintiff to provide a “short and plain statement” of the claims,
18 but “more than an unadorned, the defendant-unlawfully-harmed-me accusation” to help the Court
19 logically connect how the defendant caused Plaintiff’s injury and show what claims for relief
20 exist. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted). “[A] plaintiff’s obligation
21 to provide the ‘grounds’ for . . . ‘entitlement to relief’ requires more than labels and conclusions . . .
22 . . .” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). For instance, in *Ashcroft v. Iqbal*, the
23 Supreme Court rejected conclusory assertions that “petitioners ‘knew of, condoned, and willfully
24 and maliciously agreed to subject [him]’ to harsh conditions of confinement ‘as a matter of policy,
25 solely on the account of [his] religion, race, and/or national origin and for no legitimate
26 penological interest.’” 556 U.S. 662, 680 (2009). The Court reasoned that such allegations were
27 akin to the “formulaic recitation of the elements” dismissed in *Twombly*, and therefore,
28 insufficient to meet Rule 8(a). *Id.* In doing so, the Court explained, “[a] claim has facial
plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable
inference that the defendant is liable for the misconduct alleged.” *Id.* at 678.

24 Plaintiffs will need to allege any fraud-based claims with sufficient specificity to satisfy the
25 requirements of Rule 9(b). The Complaint must “state with particularity the circumstances
26 constituting fraud or mistake,” although “[m]alice, intent, knowledge, and other conditions of a
27 person’s mind may be alleged generally.” Fed. R. Civ. P. 9(b). “[W]hen averments of fraud are
28 made, the circumstances constituting the alleged fraud be specific enough to give defendants
notice of the particular misconduct so that they can defend against the charge and not just deny
that they have done anything wrong.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th
Cir. 2003) (internal ellipsis omitted). To satisfy Rule 9(b), “[a]verments of fraud must be
accompanied by ‘the who, what, when, where, and how’ of the misconduct charged.” *Id.* (quoting
Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997)).

1 the Justice & Diversity Center of the Bar Association of San Francisco, by calling 415-782-8982,
2 or by signing up for an appointment on the 15th Floor of the Federal Courthouse in San Francisco,
3 450 Golden Gate Avenue, San Francisco, California. There is also a Legal Help Center in
4 Oakland, located on the 4th Floor, Room 470S, of the United States Courthouse, 1301 Clay Street,
5 Oakland. At the Legal Help Center, you will be able to speak with an attorney who may be able to
6 provide basic legal help but not representation. More information is available at

7 <http://cand.uscourts.gov/helpcentersf>.

8 Plaintiffs may also wish to obtain a copy of the district court's *Handbook for Litigants*
9 *Without a Lawyer*. It provides instructions on how to proceed at every stage of your case,
10 including discovery, motions, and trial. The handbook is available in person at the Clerk's Office
11 and online at: <http://cand.uscourts.gov/prosehandbook>.

12 **IT IS SO ORDERED AND RECOMMENDED.**

13
14 Dated: February 8, 2018



MARIA-ELENA JAMES
United States Magistrate Judge