

United States District Court  
For the Northern District of California

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  
27  
28

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

FREDERICK CASISSA,  
Plaintiff,  
v.

No. C 09-04129 CW  
ORDER GRANTING  
DEFENDANT'S MOTION  
TO DISMISS  
(Docket No. 21)

FIRST REPUBLIC BANK, also known as,  
MERRILL LYNCH BANK & TRUST COMPANY,  
FSB,  
Defendant.

ELIZABETH RIGGINS,  
Plaintiff,  
v.

(consolidated with  
09-4129)

FIRST REPUBLIC BANK, also known as,  
MERRILL LYNCH BANK & TRUST COMPANY,  
FSB,  
Defendant.

Pursuant to Federal Rule of Civil Procedure 12(b)(6),  
Defendant First Republic Bank moves to dismiss Plaintiffs Frederick  
Cassisa's and Elizabeth Riggins's claims. Plaintiffs oppose the  
motion. The motion was taken under submission on the papers.  
Having considered all the papers submitted by the parties, the  
Court GRANTS Defendant's Motion and dismisses Plaintiffs' claims

1 with leave to amend.

2 BACKGROUND

3 Plaintiffs are California residents who were employees of  
4 Defendant, a Nevada banking corporation with a principal place of  
5 business located in San Francisco, California. They bring state  
6 law claims related to Defendant's termination of their employment.  
7 The following allegations are contained in their complaints.

8 Defendant employed Mr. Casissa as a Secrecy Act officer and  
9 Secrecy Act compliance officer. Mr. Casissa supervised Ms.  
10 Riggins, who ended her employment with Defendant as an anti-money-  
11 laundering manager. Plaintiffs maintain that they were under legal  
12 duties to, among other things, report evidence of suspicious money  
13 laundering activity to the Financial Crimes Enforcement Network  
14 (FCEN), a bureau of the U.S. Department of the Treasury.

15 In 2007 and 2008, Plaintiffs learned of "irregularities in the  
16 banking operations of the Bank." Casissa First Am. Compl. (FAC)  
17 ¶ 11; Riggins FAC ¶ 11. Ms. Riggins reported her observations to  
18 Mr. Casissa, who reported the irregularities to Edward Dobranski.  
19 Mr. Dobranski was Mr. Casissa's immediate supervisor and vice  
20 president and general counsel for Defendant. Mr. Dobranski  
21 instructed Plaintiffs "to disregard such irregularities and do  
22 nothing about them." Casissa FAC ¶ 12; Riggins FAC ¶ 13. Mr.  
23 Casissa informed Mr. Dobranski that he "refused to participate in  
24 any conduct contrary to law and regulations governing" his  
25 responsibilities, Casissa FAC ¶ 11; Ms. Riggins informed Mr.  
26 Casissa and other unnamed individuals of the same, Riggins FAC  
27 ¶ 12.

28 On or about March 11, 2008, Plaintiffs learned that, in

1 August, 2007, Defendant had been served with a subpoena for banking  
2 records. Mr. Casissa asked Mr. Dobranski whether he should take  
3 any action concerning the subpoena. Mr. Dobranski told Mr. Casissa  
4 and/or Ms. Riggins "not to worry about the subpoena and to do  
5 nothing about it." Casissa FAC ¶ 11; Riggins FAC ¶ 12. Plaintiffs  
6 again stated that they refused to participate in any conduct  
7 contrary to law.

8 On March 14, 2008, Mr. Casissa informed Robert Werner at M-L  
9 Bank<sup>1</sup> of his concerns regarding the subpoena. Mr. Werner stated  
10 that he had no prior knowledge of the subpoena. Later that day,  
11 Ms. Riggins spoke with Mr. Werner and Joanna Hendon, "inside  
12 counsel" for Merrill Lynch & Co., Inc. During their respective  
13 conversations, Plaintiffs repeated that they refused to participate  
14 in any conduct contrary to law.

15 Beginning in or about March, 2008, Defendant engaged in acts  
16 of retaliation against Plaintiffs, which culminated in the  
17 termination of their employment on May 29, 2009. Defendant  
18 indicated to Plaintiffs that the terminations were the result of  
19 restructuring and reorganization.

20 Plaintiffs bring claims under California law, asserting that  
21 Defendant violated California Labor Code section 1102.5(c) and  
22 terminated their employment in violation of public policy.

23 LEGAL STANDARD

24 A complaint must contain a "short and plain statement of the  
25 claim showing that the pleader is entitled to relief." Fed. R.

26

---

27 <sup>1</sup> Defendant indicates that Plaintiffs are likely referring to  
28 Merrill Lynch Bank and Trust, FSB, which was Defendant's parent  
company at that time.

1 Civ. P. 8(a). Dismissal under Rule 12(b)(6) for failure to state a  
2 claim is appropriate only when the complaint does not give the  
3 defendant fair notice of a legally cognizable claim and the grounds  
4 on which it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555  
5 (2007). In considering whether the complaint is sufficient to  
6 state a claim, the court will take all material allegations as true  
7 and construe them in the light most favorable to the plaintiff. NL  
8 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).  
9 However, this principle is inapplicable to legal conclusions;  
10 "threadbare recitals of the elements of a cause of action,  
11 supported by mere conclusory statements," are not taken as true.  
12 Ashcroft v. Iqbal, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1937, 1949-50 (2009)  
13 (citing Twombly, 550 U.S. at 555).

14 When granting a motion to dismiss, the court is generally  
15 required to grant the plaintiff leave to amend, even if no request  
16 to amend the pleading was made, unless amendment would be futile.  
17 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911  
18 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment  
19 would be futile, the court examines whether the complaint could be  
20 amended to cure the defect requiring dismissal "without  
21 contradicting any of the allegations of [the] original complaint."  
22 Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).  
23 Leave to amend should be liberally granted, but an amended  
24 complaint cannot allege facts inconsistent with the challenged  
25 pleading. Id. at 296-97.

26 DISCUSSION

27 I. Claims under California Labor Code Section 1102.5  
28 California Labor Code section 1102.5(c) forbids an employer

1 from taking retaliatory action against an employee for "refusing to  
2 participate in an activity that would result in a violation of  
3 state or federal statute, or a violation or noncompliance with a  
4 state or federal rule or regulation." The California Legislature  
5 intended "to protect employees who refuse to act at the direction  
6 of their employer or refuse to participate in activities of an  
7 employer that would result in a violation of law." Act of Sep. 22,  
8 2003, ch. 484, § 1, 2003 Cal. Legis. Serv. 484.

9 To plead a prima facie case under section 1102.5, Plaintiffs  
10 must allege that (1) they engaged in a protected activity,  
11 (2) Defendant subjected them to adverse employment actions and  
12 (3) there is a causal link between the two. Mokler v. County of  
13 Orange, 157 Cal. App. 4th 121, 138 (2007).

14 Plaintiffs do not sufficiently plead that they engaged in a  
15 protected activity. They appear to allege that they refused to  
16 follow Mr. Dobranski's instruction to disregard their legal duties  
17 to report suspicious activity. However, Plaintiffs' complaints do  
18 not identify the statutes or regulations from which their purported  
19 legal duties arose. They cite the Bank Secrecy Act of 1970 and the  
20 Money Laundering Control Act of 1986, but they do not point to any  
21 provisions of these laws that imposed upon them a personal legal  
22 duty to report suspicious activity to the FCEN. Although the Court  
23 generally takes factual assertions as true, it need not accept  
24 Plaintiffs' legal conclusion that they were subject to such  
25 obligations. As Plaintiffs themselves plead, these statutes  
26 "relate to the obligation of the Bank to create and file Suspicious  
27 Activity Reports with" the FCEN. Casissa FAC ¶ 11; Riggins FAC  
28 ¶ 11. Thus, the reporting obligation runs to Defendant, not

1 Plaintiffs. Therefore, to state a claim under section 1102.5(c),  
2 Plaintiffs would have to plead that Mr. Dobranski instructed them  
3 to prevent or to participate in preventing Defendant from filing a  
4 Suspicious Activity Report (SAR). Alternatively, they could aver  
5 that a specific statute or regulation imposes on them a personal  
6 legal duty, by virtue of their position or otherwise, to report the  
7 irregularities and that Defendant instructed them to disregard this  
8 duty. Plaintiffs plead neither.

9       Assuming Plaintiffs had a personal obligation, they do not  
10 allege how these so-called irregularities triggered a duty to  
11 report. Citing 12 C.F.R. § 21.11(k), Plaintiffs argue that they  
12 cannot provide additional factual support because doing so would  
13 reveal confidential information. This argument is unavailing;  
14 Plaintiffs could move for leave to file portions of their  
15 complaints under seal and therefore preserve confidentiality.  
16 Plaintiffs also assert that the information concerning the  
17 irregularities is in Defendant's control. The Court disagrees.  
18 Plaintiffs base their complaints on allegations that they knew of  
19 these irregularities, which they claim they were required to  
20 report, but Defendant prevented them from doing so. Thus, under  
21 the facts as plead, Plaintiffs knew what these irregularities were  
22 and why they were wrong. Discovery is not required for Plaintiffs  
23 to find this information. Therefore, Plaintiffs' reasons for the  
24 lack of facts in their complaints are unpersuasive.

25       Plaintiffs' allegations concerning the grand jury subpoena  
26 also fail to provide a basis for their claim. Plaintiffs do not  
27 allege that they were under a legal duty to respond to the subpoena  
28 or that they were required to do so on behalf of Defendant. Nor do

1 they even plead that Defendant unlawfully failed to respond to the  
2 subpoena.

3 Even if they sufficiently plead protected activity, Plaintiffs  
4 do not allege facts to support causation. Plaintiffs claim that  
5 they engaged in protected activity from sometime in 2007 through  
6 March, 2008. However, Defendant did not terminate their employment  
7 until May 29, 2009. Plaintiffs offer no allegations concerning  
8 Defendant's acts of retaliation for the fourteen months, at the  
9 least, between when they reported the purported irregularities and  
10 when their employment ended. Thus, they do not adequately support  
11 their claims that their protected activity proximately caused  
12 Defendant to terminate their employment.

13 Plaintiffs do not allege in their complaints that Defendant  
14 directed them to engage in conduct that would have violated federal  
15 or state law.<sup>2</sup> Nor do they sufficiently plead causation.  
16 Accordingly, the Court dismisses Plaintiffs' section 1102.5(c)  
17 claims with leave to amend. Should they choose to file amended  
18 complaints, Plaintiffs must allege an instruction by Defendant,  
19 with which they refused to comply, that would have resulted in the

---

20  
21 <sup>2</sup> In their opposition, Plaintiffs allege that they engaged in  
22 protected activity by refusing to "acquiesce in the alleged  
23 violations of the Bank Secrecy Act and the Money Laundering Control  
24 Act." Opp'n at 13. However, because these allegations were not  
25 included in Plaintiffs' complaints, the Court does not consider  
26 them. Schneider v. Cal. Dep't of Corrections, 151 F.3d 1194, 1197  
27 n.1 (9th Cir. 1998) ("In determining the propriety of a Rule  
28 12(b)(6) dismissal, a court may not look beyond the complaint to a  
plaintiff's moving papers, such as a memorandum in opposition to a  
defendant's motion to dismiss."). Even if these allegations were  
plead in their complaints, Plaintiffs do not allege facts  
supporting their contention that Defendant violated the Bank  
Secrecy Act or the Money Laundering Control Act. Thus, these  
statements constitute legal conclusions that the Court need not  
accept as true.

1 violation of federal or state law. Plaintiffs must also allege  
2 facts to support their claim that their protected acts caused the  
3 termination of their employment. If it is necessary for Plaintiffs  
4 to plead confidential information to support their claims, they may  
5 move for leave to file portions of their complaints under seal.

6 II. Claims for Wrongful Termination in Violation of Public Policy

7 Under California law, an employee may maintain a tort cause of  
8 action against his or her employer when the employer's discharge of  
9 the employee contravenes fundamental public policy. Foley v.

10 Interactive Data Corp., 47 Cal. 3d 654, 666 (1988). Such claims

11 are often referred to as Tameny claims, after the decision in

12 Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 176-177 (1980).

13 A claim for wrongful termination in violation of public policy must  
14 be based on a fundamental policy established by a constitutional,  
15 statutory or regulatory provision. Green v. Ralee Eng'g Co., 19  
16 Cal. 4th 66, 76, 90 (1998).

17 Plaintiffs analogize their case to Collier v. Superior Court,  
18 in which the court concluded that an employee stated a cause of  
19 action for wrongful termination. 228 Cal. App. 3d 1117 (1991).

20 There, the plaintiff reported to higher management that he had  
21 suspicions that fellow employees were engaged in illegal conduct.

22 Id. at 1120-21. Thereafter, the plaintiff was fired, purportedly

23 for poor performance. Id. at 1120. The court held that the

24 plaintiff's termination was in violation of public policy because

25 "reporting suspicions of illegal conduct to the employer" advances

26 the public interest. Id. at 1127.

27 Here, unlike Collier, Plaintiffs have not plead that Defendant  
28 terminated their employment based on reports of suspicions of

1 illegal conduct.<sup>3</sup> Instead, they allege that they recognized  
2 unspecified irregularities and reported them to Mr. Dobranski, who  
3 instructed them to take no independent action. They do not contend  
4 that the irregularities constituted illegal conduct or that  
5 Defendant unlawfully failed to report the irregularities. Without  
6 alleging that they reported illegal conduct, Plaintiffs have not  
7 plead that their termination was contrary to a "fundamental"  
8 policy interest." Green, 19 Cal. 4th at 85. Although Plaintiffs  
9 "need not prove an actual violation of law," they must plead that  
10 they reported "reasonably based suspicions" of illegal activity."  
11 Id. at 87. As noted above, if it is necessary for Plaintiffs to  
12 plead confidential information, they may do so and seek leave to  
13 file portions of their complaints under seal.

14 Accordingly, Plaintiffs' wrongful termination claims are  
15 dismissed with leave to amend. If they choose to amend these  
16 claims, Plaintiffs must allege in their complaints that the  
17 termination of their employment violated a fundamental public  
18 policy.

19 CONCLUSION

20 For the foregoing reasons, the Court GRANTS Defendant's Motion  
21 to Dismiss. (Docket No. 21.) Plaintiffs' claims are dismissed  
22 with leave to amend to cure the deficiencies discussed above.  
23 Plaintiffs shall file amended complaints within fourteen days of

---

24  
25 <sup>3</sup> As above, Plaintiffs make allegations in their opposition  
26 that are not contained in their complaints. For instance, they  
27 assert that they suspected "violations of the Bank's reporting  
28 obligations," Opp'n at 15, and that Defendant failed "to  
investigate and/or report potentially criminal activity," Opp'n at  
16. Plaintiffs do not make these allegations in their complaints.  
If they intend to allege as much, they must do so explicitly in  
their complaints.

1 the date of this order. In any amended complaint, Plaintiffs must  
2 also assert a basis for jurisdiction. Currently, Plaintiffs'  
3 complaints do not cite a statute under which this Court has  
4 jurisdiction. The Court notes that Plaintiffs, who are California  
5 residents, bring state law claims and that they plead that  
6 Defendant, a corporation, has a principal place of business in  
7 California. Based on these allegations, jurisdiction under 28  
8 U.S.C. § 1332 would not be proper. Plaintiffs' failure to file  
9 amended complaints in accordance with this Order will result in the  
10 dismissal of their claims.

11 If Plaintiffs file amended pleadings, Defendant may file a  
12 motion to dismiss three weeks thereafter.

13 The case management conference, scheduled for April 20, 2010,  
14 is continued to June 24, 2010.

15 IT IS SO ORDERED.

16  
17 Dated: April 16, 2010



CLAUDIA WILKEN  
United States District Judge

18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28