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4 UNITED STATES DISTRICT COURT  
5 NORTHERN DISTRICT OF CALIFORNIA  
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7 IMHOTEP SALAT,  
8 Plaintiff,  
9 v.  
10 EBAY INC, et al.,  
11 Defendants.

Case No. [15-cv-00066-PSG](#)

**ORDER GRANTING MOTION TO  
DISMISS SECOND AMENDED  
COMPLAINT**

**(Re: Docket No. 34)**

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13 This case revolves around an eBay sale that ended with Defendant PayPal, Inc. initiating  
14 collection proceedings to recover \$4,251.92 from Plaintiff Imhotep Salat.<sup>1</sup> In the process, Salat  
15 claims that Defendants eBay, Inc. and PayPal failed to disclose various terms of the transaction  
16 and violated the Truth in Lending Act,<sup>2</sup> the Fifth Amendment and the “Disability Discrimination  
17 Act.”<sup>3</sup>

18 Defendants move to dismiss Salat’s Second Amended Complaint.<sup>4</sup> Salat opposes the  
19 motion on procedural grounds.<sup>5</sup> The court GRANTS Defendants’ motion, without leave to  
20 amend.  
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23 <sup>1</sup> See Docket No. 33 at 3-4, Ex. B.

24 <sup>2</sup> 15 U.S.C. §§ 1601-1667.

25 <sup>3</sup> Docket No. 33 at 4-5.

26 <sup>4</sup> See Docket No. 34.

27 <sup>5</sup> See Docket No. 37.

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**I.**

This court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. The parties further consented to the jurisdiction of the undersigned magistrate judge under 28 U.S.C. § 636(c) and Fed. R. Civ. P. 72(a).

**II.**

A complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>6</sup> When a plaintiff fails to proffer “enough facts to state a claim to relief that is plausible on its face,” the complaint may be dismissed for failure to state a claim upon which relief may be granted.<sup>7</sup> A claim is facially plausible “when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”<sup>8</sup> Under Fed. R. Civ. P. 12(b)(6), “dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.”<sup>9</sup> Dismissal with prejudice and without leave to amend is appropriate if it is clear that the complaint could not be saved by amendment.<sup>10</sup>

At this stage of the case, the court must accept all material allegations in the complaint as true and construe them in the light most favorable to the non-moving party.<sup>11</sup> The court’s review is limited to the face of the complaint, materials incorporated into the complaint by reference and matters of which the court may take judicial notice.<sup>12</sup> However, the court need not accept as true

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<sup>6</sup> Fed. R. Civ. P. 8(a)(2).

<sup>7</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

<sup>8</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009).

<sup>9</sup> *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

<sup>10</sup> *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

<sup>11</sup> *See Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008).

<sup>12</sup> *See id.*

1 allegations that are conclusory, unwarranted deductions of fact or unreasonable inferences.<sup>13</sup> “A  
2 document filed *pro se* is ‘to be liberally construed,’ and ‘a *pro se* complaint, however inartfully  
3 pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.”<sup>14</sup>  
4 But, even if the court construes Salat’s pleading as liberally as possible, none of his claims can  
5 survive against the standards above.

6 Salat does not allege facts sufficient to state a TILA claim. As Defendants point out, TILA  
7 applies only to “creditors” and to transactions “primarily for personal, family or household  
8 purposes” and not “business, commercial, or agricultural purposes.”<sup>15</sup> Salat does not allege that  
9 Defendants extended him credit or that the transaction was personal and not commercial in nature.  
10 To the contrary, he alleges that he “never signed any disclosures or agreements with [eBay] for  
11 financial lending [or] financial borrowing,”<sup>16</sup> and his description of a typical PayPal transaction  
12 could not be characterized as a consumer credit transaction either.<sup>17</sup> Salat’s TILA claim is  
13 dismissed.

14 So is his Fifth Amendment claim. The Due Process Clause of the Fifth Amendment only  
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17 <sup>13</sup> See *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); see also *Twombly*,  
18 550 U.S. at 561 (“a wholly conclusory statement of [a] claim” will not survive a motion to  
dismiss).

19 <sup>14</sup> *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (quoting *Estelle v. Gamble*, 429 U.S.  
20 97, 106 (1976)).

21 <sup>15</sup> *Thorns v. Sundance Properties*, 726 F.2d 1417, 1418 (9th Cir. 1984). The statute defines a  
22 “creditor” as one who “(1) regularly extends . . . consumer credit which is payable by agreement in  
23 more than four installments or for which the payment of a finance charge is or may be required  
and (2) is the person to whom the debt . . . is initially payable on the face of the evidence of the  
indebtedness.” 15 U.S.C. § 1602(g). The statute defines “credit” as “the right granted by a  
24 creditor to a debtor to defer payment of debt or to incur debt and defer its payment.” *Id.* § 1602(f).

25 <sup>16</sup> Docket No. 33 at 4.

26 <sup>17</sup> See *id.* at 2 (“[eBay] and [PayPal] are both Public Companies that provide public financial  
27 transactions for consumer goods online. Funds are transferred from [PayPal] to [eBay] to sellers  
by [PayPal’s] online system.”).

1 applies to actions of the federal government.<sup>18</sup> Since Defendants are not the government, Salat  
2 may not bring a claim against Defendants for constitutional violations.<sup>19</sup>

3 Finally, Salat fails to state a claim under the Americans with Disabilities Act.<sup>20</sup> Because  
4 Defendants are private entities, the court assumes that Salat’s claim falls under Title III of the  
5 ADA,<sup>21</sup> which “prohibits discrimination by public accommodations.”<sup>22</sup> “To prevail on a Title III  
6 discrimination claim, the plaintiff must show that (1) she is disabled within the meaning of the  
7 ADA; (2) the defendant is a private entity that owns, leases, or operates a place of public  
8 accommodation; and (3) the plaintiff was denied public accommodations by the defendant because  
9 of her disability.”<sup>23</sup> Salat alleges only that Defendants failed to provide “reasonable  
10 accommodations to allow him to resolve the conflict.”<sup>24</sup> He does not allege sufficient facts to  
11 show that he is disabled under the ADA, that Defendants operate a public accommodation or that  
12 he was denied public accommodations because of his disability. Moreover, “[m]onetary damages  
13 are not available in private suits under Title III of the ADA,”<sup>25</sup> and Salat does not identify what, if  
14 any, injunctive relief he seeks.

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16 <sup>18</sup> See *Lee v. City of Los Angeles*, 250 F.3d 668, 687 (9th Cir. 2001).

17 <sup>19</sup> Even if the court liberally construes Salat’s claim to be brought under the Fourteenth  
18 Amendment, the complaint still fails. “Because the [Fourteenth] Amendment is directed at the  
19 States, it can be violated only by conduct that may be fairly characterized as ‘state action.’” *Lugar*  
20 *v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 924 (1982). Salat does not allege that Defendants acted  
21 on behalf of a state.

22 <sup>20</sup> As noted earlier, Salat’s complaint brings a claim under the “Disability Discrimination Act.”  
23 Docket No. 33 at 5. The court liberally construes this to mean a claim under the ADA. See 42  
24 U.S.C. §§ 12101-12213.

25 <sup>21</sup> See 42 U.S.C. §§ 12181-12189.

26 <sup>22</sup> *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 730 (9th Cir. 2007).

27 <sup>23</sup> *Id.*

28 <sup>24</sup> Docket No. 33 at 5.

<sup>25</sup> *Molski*, 481 F.3d at 730 (citing *Wander v. Kaus*, 304 F.3d 856, 858 (9th Cir. 2002)).

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Salat’s only argument in opposition is that Defendants failed to provide him proof of service before they filed this motion.<sup>26</sup> This argument is meritless because there is no such requirement under the Federal Rules of Civil Procedure.<sup>27</sup> In any case, Salat obviously did receive the moving papers—he moved on July 15 for an extension of time to respond to them,<sup>28</sup> and the court granted his request in part.<sup>29</sup> Defendants’ motion comported with the appropriate procedures.

**III.**

Defendants’ motion to dismiss is GRANTED. Dismissal without leave to amend is only appropriate if it is clear that the complaint could not be saved by amendment such as after a plaintiff’s “repeated failure to cure deficiencies by amendments previously allowed.”<sup>30</sup> Salat already has amended his complaint twice,<sup>31</sup> but he has come no closer to stating a viable claim. Further leave to amend would be futile and therefore is DENIED.

**SO ORDERED.**

Dated: November 30, 2015

  
PAUL S. GREWAL  
United States Magistrate Judge

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<sup>26</sup> See Docket No. 37 at 2.  
<sup>27</sup> See Fed. R. Civ. P. 5(a).  
<sup>28</sup> See Docket No. 35.  
<sup>29</sup> See Docket No. 36.  
<sup>30</sup> *Eminence Capital*, 316 F.3d at 1052 (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).  
<sup>31</sup> See Docket Nos. 1, 17, 33.