

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 JAMES L. POTTER and CHARLENE E. POTTER,)
4)
5 Plaintiffs,)

6 vs.)

Case No.: 2:10-cv-02095-GMN-GWF

ORDER

7 BANK OF AMERICA, N.A.; BAC HOME LOANS)
8 SERVICING, LP; TREASURY BANK, N.A.; and)
9 MORTGAGE ELECTRONIC REGISTRATION)
10 SYSTEMS, INC.,)
11 Defendants.)

12 Pending before the Court is the Motion to Dismiss (ECF No. 38) filed by Defendants
13 Bank of America, N.A. (“Bank of America”), BAC Home Loans Servicing, LP (“BAC Home
14 Loans”), and Mortgage Electronic Registration Systems, Inc. (“MERS”) (collectively,
15 “Defendants”). Also before the Court is the Motion for Sanctions (ECF No. 45) filed by pro se
16 Plaintiffs James L. Potter and Charlene E. Potter, husband and wife. Both motions have been
17 fully briefed.

18 **I. BACKGROUND**

19 In 2010 Plaintiffs initiated this action in state court, alleging claims related to the
20 mortgage on their property, located at 5721 Tropic Mist Street, Las Vegas, Nevada, 89130,
21 APN #: 125-25-414-004 (“the property”), and styling their pleading as a “Complaint Pursuant
22 to 42 U.S.C. § 1983” (Compl., ECF No. 1-2.) Defendant BAC Home Loans removed the
23 action to this Court (Notice of Removal, ECF No. 1), and two weeks later Plaintiffs filed an
24 Amended Complaint (ECF No. 8), alleging four causes of action: (1) Declaratory Judgment;
25 (2) Quiet Title; (3) Accounting; and (4) Refund, Fees and Costs.

In July 2011, the Court dismissed Plaintiffs’ Amended Complaint (ECF No. 8), denying

1 Plaintiffs’ causes of action without prejudice and explaining that “[b]ecause Plaintiffs have
2 failed to plead any cognizable legal claims, their additional requests for declaratory judgment,
3 quiet title, accounting, and refund of fees and costs will not be addressed here.” (Order, July 19,
4 2011, 13:7-9, 15-21, ECF No. 25.) The Court gave Plaintiffs leave to amend “claims regarding
5 TILA damages, fraud, failure to accept tender of payment, and breach of fiduciary duty.” (Id. at
6 13:16-17.)

7 Over a year later, in August 2012, Plaintiffs filed a Second Amended Complaint (ECF
8 No. 32), styled as a “Second Amended Complaint for Declaratory Judgment – 28 U.S.C.A.
9 Chapter 151,” stating a single cause of action for declaratory judgment pursuant to 28 U.S.C.
10 § 2201. Plaintiffs do not allege any “claims regarding TILA damages, fraud, failure to accept
11 tender of payment, and breach of fiduciary duty,” and instead state that they “expressly reserve
12 our right to add these elements to be invoked as we choose in accordance with 28 U.S.C.A.
13 § 2202’s provision for ‘Further necessary or proper relief.’” (Second Am. Compl., 2-3:¶3, ECF
14 No. 32.)

15 **II. DISCUSSION**

16 **A. Motion to Dismiss**

17 **1. Legal Standard**

18 Rule 12(b)(6) of the Federal Rules of Civil Procedure mandates that a court dismiss a
19 cause of action that fails to state a claim upon which relief can be granted. *See North Star Int’l*
20 *v. Ariz. Corp. Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to
21 dismiss under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the
22 complaint does not give the defendant fair notice of a legally cognizable claim and the grounds
23 on which it rests. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering
24 whether the complaint is sufficient to state a claim, the Court will take all material allegations
25 as true and construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v.*

1 Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

2 The Court, however, is not required to accept as true allegations that are merely
3 conclusory, unwarranted deductions of fact, or unreasonable inferences. See *Sprewell v. Golden*
4 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action
5 with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a
6 violation is plausible, not just possible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing
7 *Twombly*, 550 U.S. at 555) (emphasis added).

8 A court may also dismiss a complaint pursuant to Federal Rule of Civil Procedure 41(b)
9 for failure to comply with Federal Rule of Civil Procedure 8(a). *Hearns v. San Bernardino*
10 *Police Dept.*, 530 F.3d 1124, 1129 (9th Cir.2008). Rule 8(a)(2) requires that a plaintiff's
11 complaint contain "a short and plain statement of the claim showing that the pleader is entitled
12 to relief." Fed. R. Civ. P. 8(a)(2). "Prolix, confusing complaints" should be dismissed because
13 "they impose unfair burdens on litigants and judges." *McHenry v. Renne*, 84 F.3d 1172, 1179
14 (9th Cir.1996). Mindful of the fact that the Supreme Court has "instructed the federal courts to
15 liberally construe the 'inartful pleading' of pro se litigants," *Eldridge v. Block*, 832 F.2d 1132,
16 1137 (9th Cir. 1987), the Court will view Plaintiffs' pleadings with the appropriate degree of
17 leniency.

18 "Generally, a district court may not consider any material beyond the pleadings in ruling
19 on a Rule 12(b)(6) motion However, material which is properly submitted as part of the
20 complaint may be considered on a motion to dismiss." *Hal Roach Studios, Inc. v. Richard*
21 *Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Similarly,
22 "documents whose contents are alleged in a complaint and whose authenticity no party
23 questions, but which are not physically attached to the pleading, may be considered in ruling on
24 a Rule 12(b)(6) motion to dismiss" without converting the motion to dismiss into a motion for
25 summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Under Federal Rule

1 of Evidence 201, a court may take judicial notice of “matters of public record.” Mack v. S. Bay
2 Beer Distrib., 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court considers
3 materials outside of the pleadings, the motion to dismiss is converted into a motion for
4 summary judgment. See Fed. R. Civ. P. 12(d); Arpin v. Santa Clara Valley Transp. Agency, 261
5 F.3d 912, 925 (9th Cir. 2001).

6 If the court grants a motion to dismiss, it must then decide whether to grant leave to
7 amend. Pursuant to Rule 15(a), the court should “freely” give leave to amend “when justice so
8 requires,” and in the absence of a reason such as “undue delay, bad faith or dilatory motive on
9 the part of the movant, repeated failure to cure deficiencies by amendments previously allowed,
10 undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the
11 amendment, etc.” Foman v. Davis, 371 U.S. 178, 182 (1962). Generally, leave to amend is
12 only denied when it is clear that the deficiencies of the complaint cannot be cured by
13 amendment. See DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992).

14 **2. Analysis**

15 Plaintiffs request a declaration of rights pursuant to 28 U.S.C. § 2201, relating to the
16 mortgage loan Note and Deed of Trust on the property, as well as “any and all other
17 instruments, agreements or contracts upon which any Defendant or Defendants may base any
18 claim to, or enforce anything against, our property” under Nevada law, including a declaration
19 of “who are and are not the real parties in interest to the Note and Deed of Trust.” (Second Am.
20 Compl., 2:¶2, ECF No. 32.)

21 Plaintiffs allege that “[a]ll defendants are parties to the instruments before this court,”
22 and the existence of “an actual controversy within the meaning of the federal Declaratory
23 Judgment Act and the Federal Constitution,” relating to “Defendants’ claims against our
24 property.” (Id. at 1-2:¶1.) Plaintiffs also request reinstatement of their lis pendens, and “all
25 other relief as this court finds lawful, just and equitable.” (Id. at 3:¶6.)

1 The copies of the Deed of Trust and mortgage loan Note attached to Plaintiffs' Second
2 Amended Complaint show that Plaintiffs borrowed \$424,000.00 from Lender Prado Mortgage
3 on July 25, 2005, secured by a Deed of Trust for which Nevada Title Company was the named
4 Trustee and Defendant MERS was named as beneficiary "solely as nominee for Lender and
5 Lender's successors and assigns." (ECF No. 32.)

6 The Federal Declaratory Judgment Act, as codified by 28 U.S.C. § 2201, provides:

7 In a case of actual controversy within its jurisdiction, . . . any court of the United
8 States, upon the filing of an appropriate pleading, may declare the rights and other
9 legal relations of any interested party seeking such declaration, whether or not
further relief is or could be sought.

10 28 U.S.C. § 2201(a). The procedure for obtaining a declaratory judgment under this statute is
11 governed by Rule 57 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 57. "Basically,
12 the question in each case is whether the facts alleged, under all the circumstances, show that
13 there is a substantial controversy, between parties having adverse legal interests, of sufficient
14 immediacy and reality to warrant the issuance of a declaratory judgment." Maryland Casualty
15 Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941).

16 In the Response, Plaintiffs point to Defendants' erroneous statement in the Motion to
17 Dismiss (ECF No. 38) that Plaintiffs were in default in their mortgage payments as evidence of
18 an actual controversy. (ECF No. 44.) However, in the Reply (ECF No. 46), Defendants
19 formally retract that statement, and argue that no other facts exist to support Plaintiffs'
20 allegation of the existence of an actual controversy. The Court agrees.

21 Here, having reviewed Plaintiff's Second Amended Complaint and the briefs on the
22 motion, the Court cannot find that "there is a substantial controversy, between parties having
23 adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a
24 declaratory judgment" as required for the Court to issue a declaratory judgment. Even if the
25 Court were to find that Defendants' erroneous statement presented such a controversy, that

1 issue is now moot.

2 Therefore, because no other instance of an actual controversy is shown or even argued
3 by Plaintiffs, the Court cannot issue a declaratory judgment. Accordingly, Plaintiffs' Second
4 Amended Complaint fails to state a claim upon which relief may be granted, and it will be
5 dismissed.

6 Because it is clear that the deficiencies described above cannot be cured by amendment,
7 and because Plaintiffs have now had the opportunity to amend their pleadings three times, and
8 were given over a year to file their Second Amended Complaint, the Court finds that undue
9 prejudice would result by virtue of allowance of any additional amendments. Therefore, no
10 leave to amend will be granted at this time.

11 **B. Motion for Sanctions**

12 **1. Legal Standard**

13 Plaintiffs' Motion for Sanctions (ECF No. 45) is brought pursuant to Rule 11 of the
14 Federal Rules of Civil Procedure. Rule 11(b) provides, in relevant part:

15 By presenting to the court a pleading, written motion, or other paper – whether by
16 signing, filing, submitting, or later advocating it – an attorney or unrepresented
17 party certifies that to the best of the person's knowledge, information, and belief,
formed after an inquiry reasonable under the circumstances:

18 (1) it is not being presented for any improper purpose, such as to harass, cause
unnecessary delay, or needlessly increase the cost of litigation; [and]

19 (3) the factual contentions have evidentiary support or, if specifically so
20 identified, will likely have evidentiary support after a reasonable opportunity
for further investigation or discovery

21 Fed. R. Civ. P. 11(b).

22 A motion for sanctions under this rule “must be made separately from any other
23 motion . . . and must be served under Rule 5, but it must not be filed or be presented to the
24 court if the challenged paper, claim, defense, contention, or denial is withdrawn or
25 appropriately corrected within 21 days after service or within another time the court sets.” Fed.

1 R. Civ. P. 11(c)(2). “If, after notice and a reasonable opportunity to respond, the court
2 determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on
3 any attorney, law firm, or party that violated the rule or is responsible for the violation.” Fed. R.
4 Civ. P. 11(c)(1).

5 “A sanction imposed under this rule must be limited to what suffices to deter repetition
6 of the conduct or comparable conduct by others similarly situated,” and “may include
7 nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and
8 warranted for effective deterrence, an order directing payment to the movant of part or all of the
9 reasonable attorney’s fees and other expenses directly resulting from the violation.” Fed. R.
10 Civ. P. 11(c)(4).

11 **2. Analysis**

12 Here, the Court agrees that Defendants’ repetition of the false assertion that Plaintiffs
13 defaulted on their loan is irresponsible and an apparent violation of Rule 11(b)(3)’s requirement
14 that “the factual contentions have evidentiary support.” As noted by Plaintiffs, Defendants
15 previously made this false assertion in violation of Rule 11(b)(3) as early as January 2011, and
16 apparently corrected themselves in February 2011. Therefore, Defendants’ repetition of this
17 exact erroneous statement in their Motion to Dismiss (ECF No. 38) appears to be a more blatant
18 failure to comply with Rule 11(b)(3). Notwithstanding this, Plaintiffs’ Motion for Sanctions
19 (ECF No. 45) appears to be the first motion filed that complies with Rule 11(c)(2), and
20 Defendants have again corrected this error in their Reply to the Motion to Dismiss (ECF No.
21 46). Accordingly, the Court finds that Defendants have appropriately withdrawn and corrected
22 their error within the required time, and the Motion for Sanctions (ECF No. 45) will be denied.

23 Nevertheless, in order to prevent any future harm to Plaintiffs as a result of the repetition
24 of the false statement that Plaintiffs defaulted on their loan, the Court will order Defendants to
25 file in the docket of this action a short statement of correction that clearly corrects the

1 erroneous statements that Plaintiffs defaulted on their loan. This statement should be filed as a
2 “Notice of Correction.”

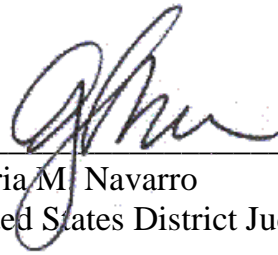
3 **III. CONCLUSION**

4 **IT IS HEREBY ORDERED** that the Motion to Dismiss (ECF No. 38) is **GRANTED**.
5 Plaintiffs’ Second Amended Complaint is **DISMISSED with prejudice**. The Clerk shall enter
6 judgment accordingly.

7 **IT IS FURTHER ORDERED** that the Motion for Sanctions (ECF No. 45) is **DENIED**.

8 **IT IS FURTHER ORDERED** that Defendants shall file a “Notice of Correction” as
9 described in this Order by **June 27, 2013**.

10 **DATED** this 8th day of June, 2013.

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14 Gloria M. Navarro
15 United States District Judge
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