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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

FRANK RUPP et al.,	)	
	)	
Plaintiffs,	)	
	)	3:10-cv-00174-RCJ-RAM
vs.	)	
	)	
THE FIRST AMERICAN TITLE CO. et al.,	)	<b>ORDER</b>
	)	
Defendants.	)	
	)	

This case arises out of the accidental transfer of \$75,400.37 in funds from a title company to Plaintiff after the sale of Plaintiff’s property in San Francisco, California and his subsequent refusal to return the money. Pending before the Court are Defendant’s Motion to Dismiss or for a More Definite Statement (ECF No. 5) and Motion to Strike (ECF No. 15). For the reasons given herein, the Court dismisses the case for lack of subject matter jurisdiction and denies all pending motions.

**I. FACTS AND PROCEDURAL HISTORY**

Plaintiff Frank W. Rupp sold a condominium in San Francisco, California while he and Plaintiff Douglas J. Gould were having a home built in Reno, Nevada. (Compl. 2:2–3, ECF No. 3).<sup>1</sup> After the sale, the District Manager of Defendant The First American Title Co. (“First American”)

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<sup>1</sup>Plaintiffs now reside in California. (*Id.* 1).

1 telephoned Rupp and informed him that First American had accidentally transferred \$75,400.37 too  
2 much to Rupp at closing. (*Id.* 2:4–9). Defendant sued Rupp in state court in Reno, Nevada, and the  
3 court awarded Defendant a judgment and a writ of garnishment. (*Id.* 2:17–23). Defendant executed  
4 against Rupp’s bank account in the amount of nearly \$15,000 and placed a lien against Rupp’s and  
5 Gould’s property in Reno for the remainder owed on the judgment. (*Id.* 2:23–3:1). Plaintiffs allege  
6 that Defendant’s attorney forged the writ of garnishment before the state court judge signed it and  
7 placed a lien on the Reno property before the judge granted summary judgment. (*See id.*).

8         The Complaint then recounts several actions Plaintiffs have filed against Defendant in  
9 various jurisdictions. First, Plaintiffs sued Defendant for breach of contract in the Superior Court  
10 in San Francisco, but they eventually dismissed the suit voluntarily. (*Id.* 3:9–15). Second, the “State  
11 of Nevada Appeals Court” dismissed Plaintiffs’ claims of grand larceny and fraud, leaving claims  
12 of unclean hands and unjust enrichment. (*Id.* 3:17–21).<sup>2</sup> Third, Plaintiffs filed a 42 U.S.C. § 1983  
13 action against “the Citizens of the State of Nevada” in the Northern District of California in San  
14 Francisco that was dismissed for lack of jurisdiction. (*Id.* 4:3–9). Fourth, Plaintiffs then filed a “civil  
15 harassment” complaint against Defendant in the Northern District of California in Oakland that was  
16 also dismissed for lack of jurisdiction. (*Id.* 4:15–25). Fifth, Defendant applied to register the Nevada  
17 state court judgment in the Superior Court in Riverside County, California, but that court denied the  
18 application. (*Id.* 5:4–9). Sixth, in or about February 2009 Plaintiffs filed an action against Defendant  
19 and the California Attorney General in the Superior Court of an unspecified California county. (*Id.*

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21         <sup>2</sup>It is not clear which lawsuit this allegation refers to. Presumably, Plaintiffs mean this  
22 was an appeal from the judgment entered against them in state court in Nevada—the judgment by  
23 which Defendant obtained a writ of garnishment. However, Nevada has no intermediate court of  
24 appeals. The only appeal is taken to the Nevada Supreme Court. The allegation is further  
25 confusing because Defendant is represented by counsel and would not likely have filed a claim of  
“grand larceny,” which is a criminal charge that cannot be pursued in a civil action by a private  
party. Perhaps the claims Plaintiffs identify in this allegation are counterclaims brought by  
Plaintiffs in the Nevada state court action.

1 5:11–17). The Attorney General was dismissed as a party after he allegedly agreed with Plaintiffs  
2 that Defendant had sent them the proper amount of money after the sale of the San Francisco  
3 property. (*Id.* 5:19–6:5). The court then granted Defendant’s motions to require Plaintiffs to file an  
4 amended complaint, to remove Gould as a plaintiff for lack of standing, and to dismiss for lack of  
5 jurisdiction. (*Id.* 6:7–20).

6 Plaintiffs then sued Defendant in this Court. The Complaint does not list causes of action.

7 Two passages contain the allegations of legal wrongs. First, Plaintiffs allege:

8 The Defendant Committed an Corporate Civil Act of Fraud by Judgment in  
9 submitting a Bold Face lie to a Reno District Court Judge, and from said Fabrication,  
10 Committed a Criminal Act of Robbery, and then Committed a Violation of the  
11 Constitution by Removing The Plaintiffs from Their Home in Reno Nevada. The  
12 Name of this Complaint is Fraud by Judgment.

13 (*Id.* 1:19–26). This can be read as pleading allegations of fraud, abuse of process, robbery, and  
14 unspecified constitutional violations. No cause of action can lie for robbery, which is a criminal act;  
15 however, a cause of action can lie for conversion. No cause of action is plausible here for  
16 constitutional violations against Defendant, because it is clearly not a state actor. This passage  
17 therefore attempts to state claims for fraud, conversion, and abuse of process. At the conclusion of  
18 the Complaint, Plaintiffs allege:

19 The Defendant Broke the Law in the State of Nevada under California Statute  
20 and this act caused the Plaintiffs to be removed from their Home where the  
21 Constitution allows the Citizen to be safe, secured from illegal procedure, and the  
22 state of Nevada cannot enforce any violations of California Statute[’]s committed in  
23 their State.

24 (*Id.* 7:1–6). This passage does not allege any additional cognizable claims. Defendant has moved  
25 to dismiss for failure to state a claim or in the alternative for a more definite statement. Defendant  
has also moved to strike the Amended Complaint (“AC”) as untimely.

## 23 **II. LEGAL STANDARDS**

### 24 **A. Rule 12(b)(6)**

25 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the

1 claim showing that the pleader is entitled to relief” in order to “give the defendant fair notice of what  
2 the . . . claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47 (1957).  
3 Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action that fails  
4 to state a claim upon which relief can be granted. A motion to dismiss under Rule 12(b)(6) tests the  
5 complaint’s sufficiency. *See N. Star Int’l v. Ariz. Corp. Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983).  
6 When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, dismissal is  
7 appropriate only when the complaint does not give the defendant fair notice of a legally cognizable  
8 claim and the grounds on which it rests. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).  
9 In considering whether the complaint is sufficient to state a claim, the court will take all material  
10 allegations as true and construe them in the light most favorable to the plaintiff. *See NL Indus., Inc.*  
11 *v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). The court, however, is not required to accept as true  
12 allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.  
13 *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation  
14 of a cause of action with conclusory allegations is not sufficient; a plaintiff must plead facts showing  
15 that a violation is plausible, not just possible. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing  
16 *Twombly v. Bell Atl. Corp.*, 550 U.S. 554, 555 (2007)).

17 “Generally, a district court may not consider any material beyond the pleadings in ruling on  
18 a Rule 12(b)(6) motion . . . However, material which is properly submitted as part of the complaint  
19 may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896  
20 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Similarly, “documents whose contents are  
21 alleged in a complaint and whose authenticity no party questions, but which are not physically  
22 attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss” without  
23 converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d  
24 449, 454 (9th Cir. 1994). Moreover, under Federal Rule of Evidence 201, a court may take judicial  
25 notice of “matters of public record.” *Mack v. S. Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th

1 Cir. 1986). Otherwise, if the district court considers materials outside of the pleadings, the motion  
2 to dismiss is converted into a motion for summary judgment. *See Arpin v. Santa Clara Valley*  
3 *Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001).

4 **B. Rule 12(e)**

5 “A party may move for a more definite statement of a pleading to which a responsive  
6 pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a  
7 response.” Fed. R. Civ. p. 12(e).

8 **C. Subject Matter Jurisdiction**

9 Federal courts are courts of limited jurisdiction, possessing only those powers granted by the  
10 Constitution and statute. *See United States v. Marks*, 530 F.3d 799, 810 (9th Cir. 2008) (citing  
11 *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). The party asserting federal  
12 jurisdiction bears the burden of overcoming the presumption against it. *Kokkonen*, 511 U.S. at 377.  
13 Federal Rule of Civil Procedure 12(b)(1) provides an affirmative defense for lack of subject matter  
14 jurisdiction. Fed. R. Civ. P. 12(b)(1). Additionally, a court may raise the question of subject matter  
15 jurisdiction *sua sponte* at any time during an action. *United States v. Moreno-Morillo*, 334 F.3d 819,  
16 830 (9th Cir. 2003). Regardless of who raises the issue, “when a federal court concludes that it lacks  
17 subject-matter jurisdiction, the court must dismiss the complaint in its entirety.” *Arbaugh v. Y&H*  
18 *Corp.*, 546 U.S. 500, 514 (2006) (citing 16 J. Moore et al., *Moore’s Federal Practice* § 106.66[1],  
19 pp. 106-88 to 106-89 (3d ed. 2005)).

20 **III. ANALYSIS**

21 The AC will be stricken. As Defendant notes, it was filed on August 19, 2010, far beyond  
22 the twenty-one day limit to file an amended complaint as of right in response to the motion to  
23 dismiss, which was filed on June 11, 2010. *See* Fed. R. Civ. P. 15(a)(1)(B). Furthermore, the AC  
24 alleges only fraud, which is already alleged in the Complaint. The AC repeats the argument that  
25 because First American was required by California law to provide coverage for title insurance, First

1 American may not itself allege any mistake in having sent too much money to Rupp upon closing.  
2 This argument cannot be fully understood without reading the facts alleged in Defendant's motion  
3 to dismiss.

4 Defendant explains that when Rupp and another party<sup>3</sup> originally purchased the condominium  
5 in San Francisco in 1997, they obtained approximately \$70,000 of the financing from the Mayor's  
6 Office of Housing-City and County of San Francisco ("the City"). (Mot. Dismiss 2:12-17, ECF No.  
7 5). Under the City's program, repayment was required only upon sale or lease of the property, at  
8 which time the principal plus 56% of any appreciation of the property became due. (*Id.* 2:18-21).  
9 Rupp accepted an offer on the property on or about May 6, 2003 and opened escrow with Defendant  
10 First American in San Francisco. (*Id.* 2:24-26). On June 24, 2003, Defendant sent Rupp a Seller's  
11 Estimate Settlement Statement "that did not reflect the amount required to pay off the City." (*Id.*  
12 3:1-3). This appears to be the crux of Plaintiffs' allegations. They argue that Defendant's Nevada  
13 state court lawsuit, judgment, garnishment(s), and lien(s) against Rupp constituted fraud or some  
14 other tort because Defendant was a title company required under California law to bear the risk of  
15 performing a title search correctly. In other words, Plaintiffs argue that Defendant bore the risk of  
16 a negligent search of encumbrances against the property and cannot allege after the close of escrow  
17 that they sent Plaintiff too much money out of the buyer's loan proceeds based on their late discovery  
18 of the City's encumbrance.

19 Of course, Rupp, who was the seller of the property, presumably gave the buyer a general  
20 warranty deed. His failure to disclose the City's encumbrance on the property to the buyer in the  
21 sales contract was likely a breach of the present covenant against encumbrances, and it is almost  
22 inconceivable that the title policy at issue did not include an exclusion for encumbrances known to  
23 the seller but not disclosed. Furthermore, Defendant likely has a meritorious unclean hands and/or

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24  
25 <sup>3</sup>This party passed away before Rupp sold the property, leaving Rupp the sole owner. (*Id.*  
2:22-23).

1 unilateral mistake defense against Rupp, who was actually aware of an encumbrance he apparently  
2 failed to disclose.

3 The City's payoff statement, dated June 25, 2003, indicated that Rupp owed the City a total  
4 of \$151,300.37. Rupp admitted at a deposition that he authorized Defendant to pay off the loan to  
5 the City with the proceeds of the sale and that he intended for them to do so. (*See* Rupp Dep. 31–32,  
6 June 3, 2004). He also admitted signing a document agreeing that \$151,300.37 was the total amount  
7 he owed the City. (*Id.* 40). He then admitted that \$75,400.37 owed to the City was not deducted  
8 from the proceeds he received, (*id.* 48), and that he ultimately refused to send the money back after  
9 he was notified of the error, (*id.* 51–53).

10 The Court need not sort out the merits of the Complaint, however. Rather, it will dismiss the  
11 Complaint for lack of subject matter jurisdiction and deny all pending motions. Plaintiffs filed the  
12 Complaint while residing in California. The Complaint lists Rupp's address as being in Rancho  
13 Mirage, California and Gould's address as being in San Rafael, California. (*See* Compl. 1). First  
14 American is a California corporation. (*See* Mot. Dismiss 1).<sup>4</sup> Only diversity jurisdiction is  
15 implicated, because all of the possible—this is not to say plausible—claims implicated in the  
16 Complaint are state-law torts: fraud, conversion, and abuse of process. There is no diversity, as the  
17 parties were all California citizens when Plaintiffs filed the Complaint, regardless of whether  
18 Plaintiffs remain California citizens today. *See Grupo Dataflux v. Atlas Global Gp., L.P.*, 541 U.S.  
19 567, 570–71 (2004) (quoting *Mollan v. Torrance*, 22 U.S. 537, 539 (1824) (“[T]he jurisdiction of  
20 the Court depends upon the state of things at the time of the action brought . . .”). The allegations  
21 of constitutional violations are implausible on their face because Defendant is not a state actor, so  
22 federal question jurisdiction is not available.

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25 <sup>4</sup>Plaintiffs do not allege Defendant's citizenship in the Complaint, and they have the  
burden of proving federal jurisdiction. *Kokkonen*, 511 U.S. at 377.

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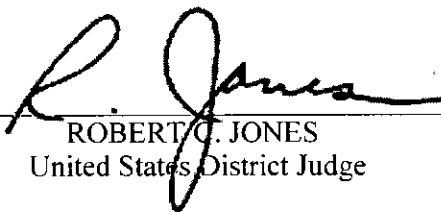
**CONCLUSION**

IT IS HEREBY ORDERED the Complaint is DISMISSED for lack of subject matter jurisdiction.

IT IS FURTHER ORDERED that all pending motions are DENIED.

IT IS SO ORDERED.

Dated this 20<sup>th</sup> day of October, 2010.

  
\_\_\_\_\_  
ROBERT C. JONES  
United States District Judge