IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI`I

CHRISTOPHER BAKER, Plaintiffs, vs. LOUIS KEALOHA, as an individual and in his official capacity as Honolulu Chief of Police; STATE OF HAWAII; CITY AND COUNTY OF HONOLULU; HONOLULU POLICE DEPARTMENT; NEIL ABERCROMBIE, in his official capacity as Hawaii Governor, Defendants.	)	CIVIL NO. CV11-00528 KSC MEMORANDUM IN SUPPORT OF MOTION Trial Date: None

MEMORANDUM IN SUPPORT OF MOTION

Defendants LOUIS KEALOHA ("Kealoha"), the CITY AND COUNTY OF HONOLULU ("City") and the HONOLULU POLICE DEPARTMENT ("HPD") (hereinafter collectively referred to as the "City Defendants"), by and through their attorneys, Robert Carson Godbey, Corporation Counsel, and Curtis E. Sherwood, Deputy Corporation Counsel, submit this memorandum in support of their motion to dismiss Plaintiffs' First Amended Complaint filed September 21, 2011.

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I. INTRODUCTION

Plaintiff filed his Complaint in the instant action on August 30, 2011, and served the same on Defendant City the following day. The complaint takes issue with a number of state laws regulating the use and possession of firearms, as well those regulating the use and possession of less-than-lethal weapons. It also purports to raise thirteen (13) different claims. However, the Complaint is exceedingly long, confusing, redundant and full of conclusory statements. It also raises improper claims and names improper parties. For these reasons, City Defendants bring the instant motion seeking dismissal of Plaintiff's Complaint.

II. APPLICABLE LAW

Fed. R. Civ. P. 8(a) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Dismissal for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) can be based on either: (1) the lack of a cognizable legal theory; or (2) insufficient facts to support a cognizable legal claim. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988) (9th Cir.1990. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (*citing* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (emphasis added). Although the "plausibility standard" does

not rise to the level of a "probability requirement," it does require plaintiff plead sufficient facts that show more than the mere "possibility" of defendant liability; and facts that are more than merely "consistent" with liability. Id. [1] Moreover, a plaintiff's obligation to provide the "grounds" of his "entitlement to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Twombly at 1964-65 [citations and brackets deleted].

III. ARGUMENT

A. Plaintiff's Complaint Fails to Comply with Fed. R. Civ. P. 8(a) in that It Is Needlessly Long, Highly Repetitious and Confusing

Plaintiffs' Complaint is largely argumentative and conclusory. Fed. R. Civ. P. 8(a) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). In fact, the Ninth Circuit has affirmed dismissal of complaints that do not comply with Fed. R. Civ. P. 8(a) in this manner. *See, e.g.*, McHenry v. Renne, 84 F.3d 1172, 1177-80 (9th Cir. 1996) (upholding a Fed. R. Civ. P. 8(a) dismissal of a complaint that was "argumentative, prolix, replete with redundancy, and largely irrelevant"); Hatch v. Reliance Ins. Co., 758 F.2d 409, 415 (9th Cir. 1985) (upholding a Fed. R. Civ. P. 8(a) dismissal of a complaint that "exceeded 70 pages in length, [and was] confusing and conclusory"); Nevijel v. N. Coast Life Ins. Co., 651 F.2d 671, 674

[1] "Where the complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitled to relief." Id. (internal quotes and cite omitted).

(9th Cir. 1981) (holding that Fed. R. Civ. P. 8(a) is violated when a complaint is excessively "verbose, confusing and almost entirely conclusory"); Schmidt v. Herrmann, 614 F.2d 1221, 1224 (9th Cir. 1980) (upholding a Fed. R. Civ. P. 8(a) dismissal of "confusing, distracting, ambiguous, and unintelligible pleadings"); McHenry, 84 F.3d, 1180 ("Prolix, confusing complaints such as the ones plaintiffs filed in this case impose unfair burdens on litigants and judges"); Hearns v. San Bernardino Police Dept., 530 F.3d 1124, 1130-31 (9th Cir. 2008) (reviewing circumstances where prolix complaints may be dismissed if exceedingly "verbose, confusing and conclusory" and indicating that dismissal with leave to amend to cure such verbosity is appropriate); *see also* Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1058-1059 (9th Cir. 2011) ("our district courts are busy enough without having to penetrate a tome approaching the magnitude of *War and Peace* to discern a plaintiff's claims and allegations").

While "the proper length and level of clarity for a pleading cannot be defined with any great precision," Fed. R. Civ. P. 8(a) has "been held to be violated by a pleading that was needlessly long, or a complaint that was highly repetitious, or confused, or consisted of incomprehensible rambling." 5 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1217 (3d ed.2010).

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In this case, Plaintiff's Complaint is indeed needlessly long, consisting of forty-nine (49) pages in length, one-hundred and sixty-five (165)[2] paragraphs and containing thirteen (13) causes of action. Despite that fact, all but one claim[3] is brought under 42 U.S.C. § 1983, and alleges a violation of either his 2nd, 5th or 14th Amendment rights. Consequently, the bulk of Plaintiff's allegations, rather than providing notice to defendants as to how each purportedly violated Plaintiff's rights, or otherwise acted tortiously, simply restates the same tired, conclusory allegations. For example, one paragraph describes how defendants "maintain[ ] and enforc[e] a set of customs, practices and policies prohibiting Mr. Baker from keeping and bearing firearms…" Complaint, p. 24-25, ¶ 83. This same paragraph is repeated, verbatim, eleven (11) times thereafter. Similarly, rather than confine his prayer for relief to the twenty (20) paragraphs set forth on pages 45 through 49, Plaintiff states, and restates, the forms of relief that he believes are available to him throughout his complaint. *See* Complaint, ¶¶ 80, 81, 82, 86, 87, 88, 94, 95, 96, 100, 101, 102, 108, 109, 110, 114, 115, 116, 124, 125, 126, 130, 131, 132, 139, 140, 141, 145, 146, 147, 152, 153, 154, 158, 159, 160, 163, and 164. The result is that the particular allegations made against each defendant are lost among the vague, conclusory and repetitive statements. Indeed, it is obvious that Plaintiff's

[2] Not including Plaintiff's prayer for relief, which contains an additional twenty (20) paragraphs.
[3] Plaintiff's "Count XIII" is entitled simply "Preliminary Injunction". Complaint, p. 44. As discussed *infra*, this cause of action is improper.

chief complaint is with this state's gun laws, but there is no effort made to parse his claims between those laws and the particular actions of City Defendants of which he complains. Moreover, many of the counts are similarly labeled (compare counts I & II, III & IV and V and VI) and the language used therein makes it difficult, if not impossible, to discern how a different claim is being alleged. Consequently, because Plaintiffs' Complaint is excessively prolix, conclusory and argumentative, the City Defendants request that it be dismissed and that Plaintiff be ordered to file a complaint which complies with Fed. R. Civ. P. 8(a). Failing compliance with further orders of this Court, City defendants ask that the instant action be dismissed *in totem*.

B. Plaintiff's § 1983 Claims for Violation of His Fifth Amendment Rights Are Ill-Founded

Four (4) of Plaintiff's claims allege that his right to due process under the Fifth Amendment was violated by defendants. *See* Complaint, pp. 34-41 (counts VII, VIII, IX, and X). However, the Fifth Amendment's due process clause "applies to the actions of the federal government, not a municipality." Low v. City of Sacramento, *slip copy*, 2010 WL 3714993 (E.D.Cal. 2010).[4] *See also* Lee v. City of Los Angeles, 250 F.3d 668, 687 (9th Cir.2001); Bingue v. Prunchak, 512 F.3d 1169, 1174 (9th Cir.2008) ("The Fifth Amendment's due process clause

[4] A true and correct copy of this case is attached hereto as Exhibit "A."

only applies to the federal government."); *and* Castillo v. McFadden, 399 F.3d 993, 1002 n. 5 (9th Cir.2005). Therefore, these claims are improper.

C. HPD Is Not A Proper Party To The Instant Action

HPD is not a proper party here because it is not *sui juris*. *See* McCoy v. Corbett, 35 Haw. 743 (1940) (holding no jurisdiction where political entity not authorized to sue or be sued). *See also* Ruggiero v. Litchfield, 700 F.Supp. 863, 865 (M.D.La.1988) (sheriff's office is not legal entity subject to suit); Shelby v. City of Atlanta, 578 F.Supp. 1368, 1370 (N.D.Ga.1984) (police department not proper party); Baker v. Willett, 42 F.Supp.2d 192, 197 (N.D.N.Y.1999) ("A police department cannot sue or be sued because it does not exist separate and apart from the municipality and does not have its own legal identity").

Article VI, Chapter 1, Section 6-102 and Chapter 16, Section 16-601 of the City Charter establish that the Honolulu Police Department is an executive department which is under the supervision of the managing director of the City. *See* relevant portions of the 1973 Revised Charted of the City & County of Honolulu (2000 Ed.) attached hereto as Exhibit "B".

In City and County of Honolulu v. Toyama, 61 Haw. 156, 161, 598 P.2d 168, 172 (1979), the Hawaii Supreme Court held that different departments within the City are not considered separate entities. In the Toyama case, in which the City and County of Honolulu was the appellee, the Court ruled that:

> Appellee's Building Department and appellee's Department of Housing and Community Development are both departments of the executive branch of appellee and are both supervised by appellee's managing director. CHARTER OF THE CITY AND COUNTY OF HONOLULU, ART. VI §4-1021, 6-102 (1973). The different departments do not constitute legal entities which are separate and apart from appellee.

Toyama, 61 Haw. at 161, 598 P.2d at 172. Therefore, as a matter of law, the Complaint should be dismissed as against HPD.

D. Because the City Is Named Separately, Plaintiff's Claims Against Chief Kealoha, in His Official Capacity, Are Duplicitous, Unnecessary and Should Be Dismissed

According to Plaintiff's Complaint, Chief Kealoha "is being sued as an individual and in his official capacity as Chief of Police, at the Honolulu Police Department." *See* Complaint, at p. 6, ¶ 14. However, "a suit against a governmental officer 'in his official capacity' is the same as a suit against the entity of which the officer is an agent." McMillian v. Monroe County, Ala., 520 U.S. 781, 785 fn.2, 117 S.Ct. 1734, 1737 fn.2 (1997) [quoted in part, internal quotes and ellipses omitted]. *See also* Satterfield v. Borough of Schuylkill Haven, 12 F.Supp.2d 423 (E.D. Pa.1998) (holding that public official sued in his official capacity is "legally indistinct from the municipality for which he serves.").

Some courts have specifically dealt with the situation where a municipality and its police chief, named in his official capacity, are sued under the same causes of action. In those cases, the courts have found the chiefs unnecessary

parties and dismissed them. *See* Beverly v. Casey, [5] 2006 WL 298810 (D.Neb. 2006) attached hereto as Exhibit "C" ("Because suing a municipal official in his official capacity is equivalent to suing the municipality, the police chief is an unnecessary party."); and Admiral Theatre v. City of Chicago, 832 F.Supp. 1195, 1200 (N.D.Ill.1993) ("Where the unit of local government is sued as well, the suit against the officials is redundant and should therefore be dismissed.").

Plaintiff has included the City and County of Honolulu as an additional defendant and has included both the City and Kealoha in all of his causes of action. *See* Complaint, pp. 23-43, ¶¶ 76-161. Any allegation of an unlawful policy or custom against Kealoha in his official capacity would necessarily run against City. Therefore, Plaintiff's allegations against Kealoha are duplicitous, unnecessary and should be dismissed. In Robinson v. District of Columbia, the District Court addressed this issue, stating:

> Based upon the understanding that it is duplicative to name both a government entity and the entity's employees in their official capacity, courts have routinely dismissed corresponding claims against individuals named in their official capacity as "redundant and an inefficient use of judicial resources."

403 F.Supp.2d 39 (D.D.C. 2005) (*quoting* Cooke-Seals v. Dist. Of Columbia, 973 F.Supp. 184, 187 (D.D.C. 1997). The Robinson court cited a number of other cases in support of this proposition. *See* Robinson at 49-50. In addition to such

[5] This case was not reported in F.Supp.2d and is offered as persuasive authority only pursuant to Arakaki v. Cayetano, 299 F.Supp.2d 1090, 1094 fn. 3 (D.Hawaii. 2002).

precedent, *see also* Doe v. Rains Independent School Dist., 865 F.Supp. 375, 378 (E.D.Texas 1994) (holding that "Plaintiffs' claims against [government official] in her *official capacity* [we]re redundant and unnecessary because any disputed issues that [needed to] be resolved in conjunction with the official capacity claims [we]re the same as those requiring resolution in the claims against the school district"); *and* Does v. Covington County School Bd. of Educ., 930 F.Supp. 554, 574 (M.D.Ala., 1996) (where plaintiff alleged independent claims for discrimination under Title IX and 42 U.S.C. § 1983, § 1983 claim was duplicitous and unnecessary and was properly dismissed).

Therefore, "Plaintiff's claims against Defendant [Kealoha] in his *official* capacity are clearly duplicative of [his] claims against [the City] itself." Robinson at 49 [emphasis in original]. These claims should be dismissed from the instant action.

E. Plaintiff's Claim for Injunctive Relief Is Improper as a Separate Cause of Action

As stated in Marzan v. Bank of Am., 2011 WL 915574 (D. Haw. 2011)[6], a claim for "injunctive relief" standing alone is not a cause of action. *See, e.g.*, Jensen v. Quality Loan Serv. Corp., 702 F. Supp. 2d 1183, 1201 (E.D. Cal. 2010) ("A request for injunctive relief by itself does not state a cause of action"); Henke v. Arco Midcon, L.L.C., 750 F. Supp. 2d 1052, 1059-60 (E.D. Mo. 2010)

[6] A true and correct copy of this case is attached hereto as Exhibit "D."

("Injunctive relief, however, is a remedy, not an independent cause of action."); Plan Pros, Inc. v. Zych, 2009 WL 928867 (D. Neb. 2009) ("no independent cause of action for injunction exists");[7] Motley v. Homecomings Fin., LLC, 557 F. Supp. 2d 1005, 1014 (D. Minn. 2008) (same). Injunctive relief may be available if Plaintiffs are entitled to such a remedy on an independent cause of action.

Because it is inappropriate to plead "injunctive relief" as a separate cause of action, the City Defendants request that the Court also dismiss this claim in its entirety.

IV. CONCLUSION

Based on the foregoing, the City Defendants respectfully request that this Honorable Court grant this motion and dismiss the instant complaint.

DATED: Honolulu, Hawai'i, September 21, 2011.

ROBERT CARSON GODBEY
Corporation Counsel

By: /s/ Curtis E. Sherwood
CURTIS E. SHERWOOD
Deputy Corporation Counsel

Attorney for Defendants
LOUIS KEALOHA, CITY AND COUNTY OF HONOLULU and the HONOLULU POLICE DEPARTMENT

[7] A true and correct copy of this case is attached hereto as Exhibit "E."

Westlaw Delivery Summary Report for SHERWOOD,CURTIS

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Slip Copy, 2010 WL 3714993 (E.D.Cal.)
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United States District Court,
E.D. California.
Monte L. LOW, Plaintiff,
v.
CITY OF SACRAMENTO, Defendant.

No. 2:10-cv-01624 JAM KJN PS.
Sept. 17, 2010.

West KeySummary**Civil Rights 78 1352(4)**

78 Civil Rights
78III Federal Remedies in General
78k1342 Liability of Municipalities and Other Governmental Bodies
78k1352 Lack of Control, Training, or Supervision; Knowledge and Inaction
78k1352(4) k. Criminal Law Enforcement; Prisons. Most Cited Cases

Plaintiff failed to allege that city had a policy that amounted to deliberate indifference of his constitutional rights, as necessary to impose civil municipal liability for the actions of individual police officers. Although plaintiff claimed that he was beaten by an off-duty police officer and unjustifiably jailed by on-duty officers, he failed to allege that city had a policy that was the moving force behind officers' actions. 42 U.S.C.A. § 1983.

Monte L. Low, Sacramento, CA, pro se.

Marcos Alfonso Kropf, Sacramento City Attorney's Office, Sacramento, CA, for Defendant.

ORDER

KENDALL J. NEWMAN, United States Magistrate Judge.

***1** Presently before the court are defendant's motions to dismiss and strike plaintiff's Second Amended Complaint. (Dkt. No. 5.) The court heard this matter on its law and motion calendar on September 16, 2010. Attorney Kathy Rogan appeared on behalf of defendant. Plaintiff, who is proceeding without counsel, appeared on his own behalf. For the reasons that follow, the undersigned will: (1) grant defendant's motion to dismiss without prejudice, and (2) deny defendant's motion to strike plaintiff's prayer for punitive damages.

I. *BACKGROUND*

Plaintiff's Second Amended Complaint, which is the operative complaint, alleges that defendant, a municipality, violated plaintiff's constitutional rights and seeks recovery pursuant to 42 U.S.C. § 1983. (Second Am. Compl., Dkt. No. 2 at 5-9.) Specifically, it alleges that defendant violated plaintiff's rights secured by the First, Fourth, **Fifth**, and Fourteenth **Amendments** to the United **States** Constitution as a result of the actions of its employees. (Second Am. Compl. ¶¶ 1, 4.)

Generally, plaintiff's claims arise from events that ultimately resulted in his arrest for public intoxication by law enforcement officers alleged to be employed by defendant, the City of Sacramento. (*See id.* ¶ 12.) Plaintiff alleges that on or about January 11, 2008, he was attacked by "an assailant" who, without warning, pushed him through the door of a pizza restaurant in Sacramento, California and "proceeded to severely beat [him], causing severe, potentially life threatening injuries." (*Id.* ¶ 7.) He further alleges that "[d]uring the beating, the assailant yelled at the plaintiff that he was an off-duty police officer." (*Id.* ¶ 8.)

The Second Amended Complaint alleges that "[o]fficers from the City of Sacramento Police Department responded to the assault," but "refused to take a complaint by the plaintiff." (*Id.* ¶¶ 9, 10.) Plaintiff alleges that, instead, the responding officers handcuffed him and placed him into a police car without telling him why he was being arrested or "reading him his rights." (*Id.* ¶ 10.) He alleges that once in the police car, he informed the officers that he was scared by their behavior and inquired

"if they were 'going to finish the job, and kill me?' " (*Id.*) Plaintiff contends that the officers repeatedly refused to answer plaintiff's questions and, because of the officers' silence and refusal to "alleviate" plaintiff's fears, plaintiff believed that he would be killed. (*Id.*)

Plaintiff further alleges that upon arrival at the jail, the officers " 'waved [*sic*] away' the jail's medic" and withheld treatment, despite his serious injuries. (*Id.* ¶ 11.) Plaintiff alleges that he remained "unobserved and untreated for approximately fifteen hours" and, additionally, was "not permitted to have a phone call or any other contact with the outside world." (*Id.*) He alleges that he was "released from jail without charges on January 12, 2008," and that upon release he learned that he had been arrested for " 'public intoxication' from inhalants despite the fact that he was not intoxicated, and no sobriety or other tests had been administered." (*Id.* ¶ 12.)

***2** On January 15, 2008, plaintiff allegedly attempted to file a complaint with the "Sacramento County Police," but the "police refused to file the complaint for assault" and indicated that they had completed their investigation. (*Id.* ¶ 13.) Plaintiff alleges that "defendant's police officers additionally refused to allow [him] to file a complaint against the responding officers" and "refused to provide [him] with any information regarding his attacker, so the identity of this person remains unknown to plaintiff to this date." (*Id.*)

Plaintiff asserts that "the actions of the defendant were intentionally undertaken to prevent [him] from discovering the identity of the off-duty police officer that attacked him, to punish [him] for having been assaulted by an off-duty police officer, and to deny the plaintiff access to justice for the crimes committed against him." (*Id.* ¶ 14.) Plaintiff alleges that he: (1) has suffered physical pain and suffering as a result of the assault and the subsequent refusal of medical treatment; (2) has suffered mental pain and suffering as a result of the assault, "his unalleviated fear of being killed," the lack of medical treatment, and "the subsequent denial of any meaningful access to justice"; and (3) has been "denied employment due to the unfounded allegations of drug use in his arrest." (*Id.* ¶ 15.) FN1

FN1. Plaintiff's written opposition to defendant's pending motions contains several additional factual assertions in support of this claims, including, among other things, details about the alleged assault, comments made by plaintiff to a nurse, documents completed at the jail, an "Internal Affairs" investigation, and denials of plaintiff's requests pursuant to the California Public Records Act, California Government Code §§ 6250 et seq. However, those factual allegations have not been considered or recounted here insofar as the sufficiency of plaintiff's operative complaint is concerned because, in ruling on a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court "may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 899 (9th Cir.2007) (citation and quotation marks omitted). Plaintiff has not appended any exhibits to his Second Amended Complaint that the court may consider and has not requested that the court take judicial notice of any matters. However, the undersigned has considered these additional factual allegations in evaluating whether plaintiff should be granted leave to file an amended complaint.

Plaintiff subsequently filed a complaint in California Superior Court, County of Sacramento, on July 8, 2009, alleging that defendant was liable for intentional torts and general negligence. (Compl., Dkt. No. 2 at 23-30.) On May 10, 2010, plaintiff filed a First Amended Complaint in the Superior

Court, which, for the first time, indicated that plaintiff was seeking relief against defendant pursuant to 42 U.S.C. § 1983. (First Am. Compl., Dkt. No. 2 at 11-15.) On May 14, 2010, plaintiff filed the Second Amended Complaint in the Superior Court, which seeks recovery against defendant for violations of 42 U.S.C. § 1983. (Second Am. Compl., Dkt. No. 2 at 5-9.) Plaintiff seeks compensatory damages, punitive damages, attorney's fees to the extent plaintiff retains an attorney, and costs.

On June 25, 2010, defendant removed plaintiff's action to federal court pursuant to 28 U.S.C. § 1441(b).[FN2] (Notice of Removal, Dkt. No. 1.) Defendant subsequently filed its motions to dismiss and/or strike plaintiff's Second Amended Complaint that are pending before this court. (Dkt. No. 5.)

> FN2. Defendant's notice of removal states that defendant was never served with plaintiff's initial complaint, and was served with plaintiff's Second Amended Complaint on June 14, 2010. (Notice of Removal at 2.) Plaintiff has not challenged the timeliness of defendant's removal.

II. *LEGAL STANDARDS*

A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges the sufficiency of the pleadings set forth in the complaint. *Vega v. JPMorgan Chase Bank, N.A.*, 654 F.Supp.2d 1104, 1109 (E.D.Cal.2009). Under the "notice pleading" standard of the Federal Rules of Civil Procedure, a plaintiff's complaint must provide, in part, a "short and plain statement" of plaintiff's claims showing entitlement to relief. Fed.R.Civ.P. 8(a)(2); *see also Paulsen v. CNF, Inc.*, 559 F.3d 1061, 1071 (9th Cir.2009). "A complaint may survive a motion to dismiss if, taking all well-pleaded factual allegations as true, it contains 'enough facts to state a claim to relief that is plausible on its face.' " *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1034 (9th Cir.2010) (quoting *Ashcroft v. Iqbal*, --- U.S. ----, ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009)). " '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.' " *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 812 (9th Cir.2010) (quoting *Iqbal*, 129 S.Ct. at 1949). The court accepts "all facts alleged as true and construes them in the light most favorable to the plaintiff." *County of Santa Clara v. Astra USA, Inc.*, 588 F.3d 1237, 1241 n. 1 (9th Cir.2009). The court is "not, however, required to accept as true conclusory allegations that are contradicted by documents referred to in the complaint, and [the court does] not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Paulsen*, 559 F.3d at 1071 (citations and quotation marks omitted).

***3** The court must construe a pro se pleading liberally to determine if it states a claim and, prior to dismissal, tell a plaintiff of deficiencies in his complaint and give plaintiff an opportunity to cure them if it appears at all possible that the plaintiff can correct the defect. *See Lopez v. Smith*, 203 F.3d 1122, 1130-31 (9th Cir.2000) (en banc); *see also Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.1990) (stating that "pro se pleadings are liberally construed, particularly where civil rights claims are involved"). As noted above, in ruling on a motion to dismiss pursuant to Rule 12(b)(6), the court "may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Outdoor Media Group, Inc.*, 506 F.3d at 899 (citation and quotation marks omitted).

Federal Rule of Civil Procedure 12(f) provides that a district court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." "[T]he function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues." *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir.1983); *see also Am-*

aral v. Wachovia Mortgage Corp., 692 F.Supp.2d 1226, 1230 (E.D.Cal.2010). Motions to strike are generally disfavored, and this court has previously stated that a motion to strike brought pursuant to Rule 12(f) "should not be granted unless it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation." *Neveu v. City of Fresno*, 392 F.Supp.2d 1159, 1170 (E.D.Cal.2005) (citation and quotation marks omitted); *see also Osei v. Countrywide Home Loans*, 692 F.Supp.2d 1240, 1255 (E.D.Cal.2010); *Shabaz v. Polo Ralph Lauren Corp.*, 586 F.Supp.2d 1205, 1209 (C.D.Cal.2008); *Wolk v. Green*, 516 F.Supp.2d 1121, 1134 (N.D.Cal.2007); *Wilkins v. Ramirez*, 455 F.Supp.2d 1080, 1112 (S.D.Cal.2006) .

III. *DISCUSSION*

A. *Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint*

1. *Dismissal of Plaintiffs Claims For Failure to Allege Facts Supporting Municipal Liability Under Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)*

Defendant first argues that plaintiff's Second Amended Complaint should be dismissed because plaintiff has not sufficiently alleged facts that support a cognizable claim that defendant, a municipality, is liable under 42 U.S.C. § 1983. (Def.'s Memo. of P. & A. in Supp. of Mots. to Dismiss/Strike ("Def.'s Memo.") at 2-3, Dlt. No. 5, Doc. No. 5-1.) It relies on the United States Supreme Court's decision in *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), and its progeny.

Generally, with respect to *individual* defendants, "Section 1983 imposes civil liability upon an individual who under color of state law subjects or causes, any citizen of the United States to the deprivation of any rights, privileges or immunities secured by the Constitution and laws." *Franklin v. Fox*, 312 F.3d 423, 444 (9th Cir.2002) (citing 42 U.S.C. § 1983). "To state a claim under § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of State law." *Long v. County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir.2006) (citing *West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988)). Here, plaintiff has not named as a defendant any of defendant's individual employees who allegedly violated plaintiff's constitutional rights; he only named defendant City of Sacramento, a municipality.

***4** Municipalities may be liable under Section 1983. However, the standards governing the liability of a municipality differ from those that govern the liability of individuals who acted under color of state law. Relevant here, in *Monell* the Supreme Court limited municipal liability and held that "a municipality cannot be held liable *solely* because it employs a tortfeasor-or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." 436 U.S. at 691. Instead, "[l]ocal governing bodies ... can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where ... the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* at 690 (footnote omitted). The Court further stated that "it is when execution of a [local] government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 693; *see also Bd. of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 403, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997) ("[W]e have required a plaintiff seeking to impose liability on a municipality under § 1983 to identify a municipal 'policy' or 'custom' that caused the plaintiff's injury."); *Levine v. City of Alameda*, 525 F.3d 903, 907 (9th Cir.2008) ("A city can be sued for monetary damages under 42 U.S.C.

§ 1983 if the constitutional violation was a product of a policy, practice, or custom adopted and promulgated by the city's officials.").

The Ninth Circuit Court of Appeals has held that in order to establish municipal liability, "the plaintiff must establish: (1) that he [or she] possessed a constitutional right of which he [or she] was deprived; (2) that the municipality had a policy; (3) that this policy amounts to deliberate indifference to the plaintiff's constitutional right; and (4) that the policy was the moving force behind the constitutional violation." *Miranda v. City of Cornelius,* 429 F.3d 858, 868 (9th Cir.2005) (citation and quotation marks omitted, modification in original); *see also Levine,* 525 F.3d at 907 (" "To establish [municipal] liability, a plaintiff must establish that he was deprived of a constitutional right and that the city had a policy, practice, or custom which amounted to 'deliberate indifference' to the constitutional right and was the 'moving force' behind the constitutional violation.") (citing *Van Ort v. Estate of Stanewich,* 92 F.3d 831, 835 (9th Cir.1996)). With respect to the last element, "[t]here must be a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." *Villegas v. Gilroy Garlic Festival Ass'n,* 541 F.3d 950, 957 (9th Cir.2008) (en banc) (citation and quotation marks omitted).[FN3]

> FN3. There exist various formulations of the types of policies that may support a claim of municipal liability. However, the Ninth Circuit Court of Appeals has stated that in addition to showing that a constitutional violation resulted from an express municipal policy or custom, "[a] plaintiff may also establish municipal liability by demonstrating that (1) the constitutional tort was the result of a 'longstanding practice or custom which constitutes the standard operating procedure of the local government entity;' (2) the tortfeasor was an official whose acts fairly represent official policy such that the challenged action constituted official policy; or (3) an official with final policy-making authority 'delegated that authority to, or ratified the decision of, a subordinate.' " *Price v. Sery,* 513 F.3d 962, 966 (9th Cir.2008) (citing *Ulrich v. City & County of San Francisco,* 308 F.3d 968, 984-85 (9th Cir.2002)); *accord Villegas,* 541 F.3d at 964 (Thomas, J., dissenting).

***5** Here, plaintiff alleged that employees of the City of Sacramento violated his rights provided by the First, Fourth, **Fifth**, and Fourteenth **Amendments** to the U.S. Constitution. However, he has **not** identified any policy or custom in support of his claim that the City of Sacramento, *as opposed to any of its individual employees,* is liable under 42 U.S.C. § 1983. He has only alleged that individual employees of the City of Sacramento acted in derogation of his constitutional rights. Such allegations, by themselves, do not state a cognizable claim for municipal liability. Moreover, plaintiff has not alleged that any such policy or custom was the "moving force" behind the alleged constitutional violations. Accordingly, the undersigned will grant defendant's motion to dismiss. However, such dismissal will be without prejudice, and plaintiff will be afforded an opportunity to file an amended complaint that cures the pleading deficiencies in the Second Amended Complaint.

2. *Plaintiff's Claim of A Violation of His First Amendment Rights*

In addition to its arguments in favor of dismissal based on plaintiff's failure to state a cognizable claim of municipal liability under *Monell* liability, defendant moves to dismiss plaintiff's claims to the extent that they allege a violation of plaintiff's First Amendment rights. (Def.'s Memo. at 4.) It argues that plaintiff "has not alleged any facts ... demonstrating or inferring that any of his rights under the First Amendment were violated by the City or any of its employees." (*Id.*)

Plaintiff's Second Amended Complaint does not specifically identify which of his alleged facts

give rise to a First Amendment claim or the precise nature of the First Amendment violation. For these additional reasons, the undersigned will dismiss plaintiff's claim of a First Amendment violation. However, the undersigned concludes that, based on the allegations in the Second Amended Complaint and plaintiff's written opposition to defendant's motions, plaintiff should be given an additional opportunity to plead a claim for a violation of his First Amendment rights in an amended complaint.

The Second Amended Complaint alleges, however tersely, that "the police refused to file the complaint for the assault" that plaintiff allegedly suffered at the hands of an off-duty police officer. (Second Am. Compl. ¶ 13.) It also alleges that "defendant's police officers ... refused to allow the plaintiff to file a complaint against the responding officers." (*Id.*) Although there does not appear to be case law on point in the Ninth Circuit, the Tenth Circuit Court of Appeals has held, in the context of a First Amendment retaliation claim, "that 'filing a criminal complaint with law enforcement officials constitutes an exercise of the First Amendment right' to petition the government for the redress of grievances." *Meyer v. Bd. of County Comm'rs of Harper County, Okla.*, 482 F.3d 1232, 1243 (10th Cir.2007) (citing *Estate of Morris v. Dapolito*, 297 F.Supp.2d 680, 692 (S.D.N.Y.2004)); *see also Jackson v. New York*, 381 F.Supp.2d 80, 89 (N.D.N.Y.2005) (stating, in the context of a First Amendment retaliation claim, that "[i]t is axiomatic 'that filing a criminal complaint with law enforcement officials constitutes an exercise of the First Amendment right' to petition government for the redress of grievances") (citing *Lott v. Andrews Ctr.*, 259 F.Supp.2d 564, 568 (E.D.Tex.2003). At this point in the proceedings, it is unclear whether plaintiff is alleging a First Amendment retaliation claim or some other infringement of his First Amendment rights. However, plaintiff has alleged enough facts to suggest to the court that given an opportunity to amend his complaint, he might be able to sufficiently plead a violation of his First Amendment right to petition the government for a redress of grievances. This is, of course, assuming plaintiff can overcome the dismissal of his Second Amended Complaint based on a failure to plead a policy or custom in support of a claim of municipal liability against defendant. Accordingly, the undersigned rejects, at this time, defendant's alternate ground for dismissal of plaintiff's First Amendment claim.

***6** Additionally, the Second Amended Complaint alleges that defendant intentionally prevented plaintiff from learning the identity of the off-duty police officer who allegedly assaulted him and, as a result, plaintiff was denied "access to justice." (Second Am. Compl. ¶¶ 13, 14.) As pled, this allegation does not state a cognizable First Amendment claim. However, plaintiff's opposition brief provides additional information that is material to evaluating whether plaintiff should be given leave to amend his First Amendment claim. Plaintiff conveys that his First Amendment claim relates, at least in part, to defendant's alleged denials of his requests, made pursuant to the California Public Records Act, for "the Incident Report 08-13304." (Pl.'s Opp'n to Mot. to Dismiss/Strike at 6, Dkt. No. 11.) The public has a limited, qualified right to inspect and copy public records and documents that is grounded in the First Amendment and common law. *See United States v. Higuera-Guerrero (In re Copley Press, Inc.),* 518 F.3d 1022, 1029 (9th Cir.2008) (citing *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978)); *Phoenix Newspapers v. U.S. Dist. Court*, 156 F.3d 940, 946 (9th Cir.1998). Accordingly, plaintiff will be permitted an opportunity to attempt to plead facts in an amended complaint that substantiates a violation effectuated by the denial of access to public records.

The undersigned reiterates, however, that even if plaintiff is able to clarify his First Amendment claims in an amended complaint, plaintiff's pleading will still be subject to dismissal by defendant if he is unable to plead a sufficient claim for municipal liability, as discussed above. In addition, nothing

in this order precludes defendant from challenging any subsequently alleged First Amendment claims on the same grounds asserted here.

3. *Plaintiff's Claim of A Violation of His **Fifth Amendment** Rights*

In addition to its successful argument that plaintiff has failed to meet the pleading requirements to sufficiently allege municipal liability, defendant also moves to dismiss plaintiff's Second Amended Complaint to the extent that it alleges that defendant violated plaintiff's rights of due process provided by the **Fifth Amendment** to the U.S. Constitution. (Def.'s Memo. at 4.) Defendant contends that the **Due Process Clause** of the **Fifth Amendment** does **not apply** to the actions of local governments or their employees. The undersigned agrees and concludes that plaintiff's **Fifth Amendment** claim should be dismissed for this reason, in addition to the reasons **stated** above that relate to plaintiff's failure to adequately plead a claim for municipal liability under *Monell*. However, out of an abundance of caution, such dismissal will be without prejudice.

Defendant is correct that the **Fifth Amendment applies** to the actions of the federal government, **not** a municipality. The Ninth Circuit Court of Appeals has plainly held that "[t]he **Due Process Clause** of the **Fifth Amendment** [**applies**] only to actions of the federal government-**not** to those of **state** or local governments." *Lee v. City of Los Angeles*, 250 F.3d 668, 687 (9th Cir.2001); *see also Bingue v. Prunchak*, 512 F.3d 1169, 1174 (9th Cir.2008) ("The **Fifth Amendment's due process clause** only **applies** to the federal government."); *Castillo v. McFadden*, 399 F.3d 993, 1002 n. 5 (9th Cir.2005) ("The **Fifth Amendment** prohibits the federal government from depriving persons of due process, while the Fourteenth Amendment explicitly prohibits deprivations without due process by the several **States** ").

***** Here, plaintiff has only named the City of Sacramento, a local government, as a defendant and has **not** alleged that the federal government or another federal actor played any part in the events that give rise to his **Fifth Amendment** claim. Accordingly, the undersigned will dismiss plaintiff's Section 1983 claim to the extent it alleges a violation of the **Due Process Clause** of the **Fifth Amendment**. It is highly doubtful that plaintiff will be able to amend his Second Amended Complaint to **state** a viable claim of a **Fifth Amendment** due process violation given that plaintiff only alleges constitutional violations based on the acts of the City of Sacramento and its employees. Nevertheless, the dismissal of plaintiff's **Fifth Amendment** claim will be without prejudice. Plaintiff is warned, however, that he should **not** re-plead a claim premised on the **Fifth Amendment's Due Process Clause** if he cannot allege any action by the federal government or a federal actor relative to his claims. Such a claim would be subject to dismissal.

4. *Plaintiff's Claim of A Violation of His Fourteenth Amendment Rights*

Defendant also separately argues to dismiss plaintiff's claims to the extent they rely on the Fourteenth Amendment on the grounds that: (1) it is duplicative of his Fourth Amendment claim, and (2) it fails to demonstrate how, if at all, plaintiff was denied equal protection of the laws. (Def.'s Memo. at 5.) The Second Amendment Complaint does not clearly identify the nature of plaintiff's Fourteenth Amendment claim. However, plaintiff asserts in his opposition brief that he was denied due process of law and equal protection of the laws under the Fourteenth Amendment because: (1) defendant's employees refused to investigate plaintiff's report of an assault "because the perpetrator of the crime was a police officer"; (2) impermissibly denied plaintiff's California Public Records Act requests seeking the names of the off-duty officer who allegedly assaulted plaintiff, the responding officers, and those who allegedly engaged in a cover-up of the incident. (*See* Pl.'s Opp'n to Mot. to Dismiss/ Strike at 5-6.)

Defendant is correct that plaintiff's Fourteenth Amendment claim is duplicative of his Fourth

Amendment claim to the extent that it relates to a claim of excessive force during a pretrial detention. *See Gibson v. County of Washoe*, 290 F.3d 1175, 1197 (9th Cir.2002) (stating that "we have determined that the Fourth Amendment sets the 'applicable constitutional limitations' for considering claims of excessive force during pretrial detention") (citing *Pierce v. Multnomah County*, 76 F.3d 1032, 1043 (9th Cir.1996) ("We are persuaded by precedent which **applies** the Fourth Amendment standard to assess the constitutionality of the *duration* of or *legal justification* for a prolonged warrantless, post-arrest, pre-arraignment custody, that the Fourth Amendment should also **apply** to evaluate the *condition* of such custody" (citations omitted).), *cert. denied*, 519 U.S. 1006, 117 S.Ct. 506, 136 L.Ed.2d 397 (1996)). However, plaintiff's Fourteenth Amendment claims are **not** limited to the duration, legal justification, or condition of his alleged warrantless, post-arrest, pre-arraignment custody.

***8** Plaintiff's opposition clarifies, at least to some degree, that plaintiff's Fourteenth Amendment claim relates to the period of time *after* his release from jail. Specifically, it states that plaintiff's claim or claims relate to defendant's employees' alleged, intentional refusal to investigate his claim and disclose the identities of his alleged attacker and other law enforcement officers involved in his arrest. (*See* Pl.'s Opp'n to Mot. to Dismiss/Strike at 5-6; Second Am. Compl. ¶¶ 13-15.) Plaintiff asserts that this treatment was based on the fact that his assailant was an off-duty police officer. The undersigned is not convinced at this early stage that, assuming plaintiff overcomes the pleading deficiencies related to allegations of municipal liability against defendant, he could not allege a "class of one" equal protection claim, which may generally lie where an individual has been irrationally singled out for discrimination by the government. *See Enquist v. Ore. Dep't of Agric.*, 553 U.S. 591, 128 S.Ct. 2146, 2153, 170 L.Ed.2d 975 (2008) ("[A]n equal protection claim can in some circumstances be sustained even if the plaintiff has not alleged class-based discrimination, but instead claims that she has been irrationally singled out as a so-called 'class of one.' "); *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) (per curiam) ("Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."); *N. Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 486 (9th Cir.2008) ("In order to claim a violation of equal protection in a class of one case, the plaintiff must establish that the City intentionally, and without rational basis, treated the plaintiff differently from others similarly situated."). Accordingly, the undersigned rejects, in part, defendant's request that plaintiff's Fourteenth Amendment claim be dismissed with prejudice. FN4

FN4. Again, however, plaintiff's primary hurdle is his failure to sufficiently allege municipal liability on the part of defendant, and it is this failure that is the basis for the dismissal of the Second Amended Complaint.

B. *Motion to Strike Plaintiff's Prayer for Punitive Damages*

Finally, defendant moves to strike, pursuant to Federal Rule of Civil Procedure 12(f), plaintiff's request for relief in the form of punitive damages on the grounds that a Section 1983 plaintiff may not recover punitive damages from a municipality as a matter of law. (Def.'s Memo. at 5; *see also* Pl.'s Second Am. Compl. at 5:7.) The undersigned will deny defendant's motion to strike.

Defendant is correct insofar as it argues that a plaintiff may not recover punitive damages from a municipality on a claim brought pursuant to 42 U.S.C. § 1983. The Supreme Court has squarely held that "a municipality is immune from punitive damages under 42 U.S.C. § 1983." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981); *accord Jefferson v.*

City of Tarrant, Ala., 522 U.S. 75, 79, 118 S.Ct. 481, 139 L.Ed.2d 433 (1997); *see also Bell v. Clackamas County*, 341 F.3d 858, 868 n. 4 (9th Cir.2003). However, the Ninth Circuit Court of Appeals recently held, in a case of first impression, that Rule 12(f) does "not authorize district courts to strike claims for damages on the ground that such claims are precluded as a matter of law." *Whittlestone, Inc. v. HandiCraft Co.*, No. 09-16353, 2010 WL 3222417, at *4 (9th Cir. Aug.17, 2010) (reversing the district court's order striking, pursuant to Rule 12(f), plaintiff's claim for lost profits and consequential damages where the defendant had argued that such categories of damages were precluded as a matter of law). Defendant is attempting to do exactly what the Court of Appeals has held was impermissible in that it seeks to strike plaintiff's prayer for punitive damages on the grounds that a plaintiff may not, as a matter of law, recover punitive damages against a municipality in a Section 1983 action. This court lacks authority to strike plaintiff's prayer for punitive damages pursuant to Rule 12(f) and, accordingly, the undersigned will deny defendant's motion to strike.

IV. *CONCLUSION*

***9** For the foregoing reasons, IT IS HEREBY ORDERED that:

1. Defendant's motion to dismiss plaintiff's Second Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) is granted.

2. Plaintiff's Second Amended Complaint is dismissed without prejudice.

3. Plaintiff shall have thirty (30) days from the date of entry of this order within which to file and serve an amended complaint entitled "Third Amended Complaint." Plaintiff is informed that the court cannot refer to prior pleadings in order to make an amended complaint complete. An amended complaint must be complete in itself. *See* E. Dist. Local Rule 220. This is because, as a general rule, an amended complaint supersedes the original complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.1967). Accordingly, once plaintiff files an amended complaint, the prior complaints no longer serve any function in the case. Therefore, "a plaintiff waives all causes of action alleged in the original complaint which are not alleged in the amended complaint." *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir.1981).

4. Defendant's motion to strike plaintiff's prayer for punitive damages pursuant to Federal Rule of Civil Procedure 12(f) is denied.

IT IS SO ORDERED.

E.D.Cal.,2010.
Low v. City of Sacramento
Slip Copy, 2010 WL 3714993 (E.D.Cal.)

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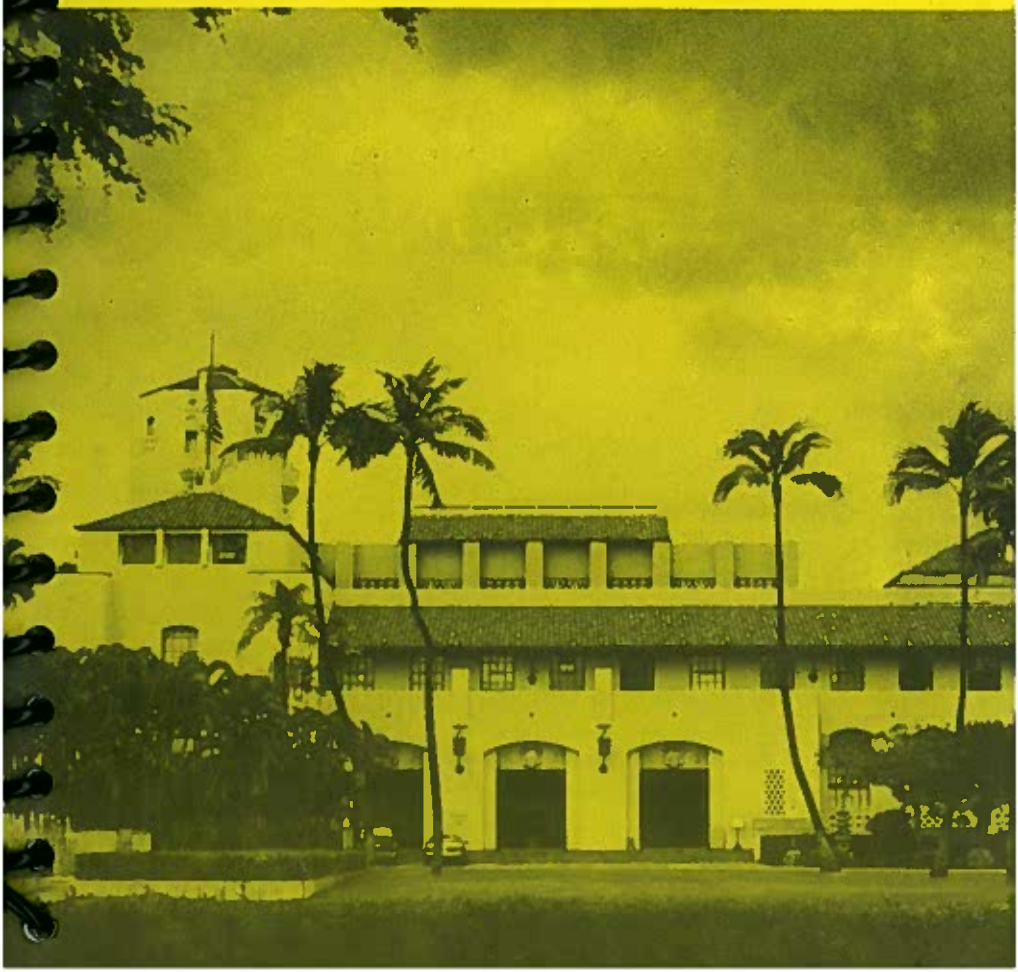
REVISED CHARTER

OF THE CITY & COUNTY OF HONOLULU

(2000 EDITION)



ARTICLE VI[14]
EXECUTIVE BRANCH -- MANAGING DIRECTOR AND AGENCIES DIRECTLY UNDER THE MANAGING DIRECTOR[15]

CHAPTER 1
MANAGING DIRECTOR

Section 6-101. Managing Director --

1. There shall be a managing director who shall be appointed and may be removed by the mayor. The managing director shall be the principal management aide of the mayor. The managing director shall have had at least five years of such training and experience, either in public service or private business, as shall qualify the managing director to perform the executive duties of the managing director's office.

2. The position of the managing director shall be in the office of the mayor.

3. The salary of the managing director shall be established by ordinance. The salary of any incumbent shall be reduced only in the event that a general reduction in salaries of all city officers and employees is simultaneously effected.

4. Should the mayor fail to appoint a managing director within ninety days of the occurrence of any vacancy in the position, unless such period is extended by the council, the council shall make the appointment, but the power to remove the managing director shall nevertheless be vested in the mayor. *(Reso. 83-357)*

Section 6-102. Powers, Duties and Functions --

The managing director shall:

(a) Supervise the heads of all executive departments and agencies assigned to the managing director by Section 4-102 of this charter.

(b) Evaluate the management and performance of each executive agency, including the extent to which and the efficiency with which its operating and capital program and budget have been implemented, appoint the necessary staff to assist in such evaluation and analyses and to assist the executive agencies in improving their performance and make reports to the mayor on the findings and recommendations of such evaluation and

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[14]In addition to showing amendments to this Charter adopted by the electorate at the 1998 General Election, this article has been extensively rewritten by the corporation counsel pursuant to the authority granted at the 1998 General Election and incorporated into Sections 4-202 and 16-120 hereof. The corporation counsel's redraft was undertaken for the purpose of reflecting the reorganization of these departments proposed by the mayor and agreed to by the council in 1998 pursuant to Resolution No. 98-117, CD-1.

[15]The different departments do not constitute legal entities which are separate and apart from the City and County of Honolulu. City and County of Honolulu v. Toyama, 61 Haw. 156, 598 P.2d 168 (1979).

analyses. A report also shall be made to the police commission when an evaluation and analysis is performed on the police department. A report also shall be made to the fire commission when an evaluation and analysis is performed on the fire department.

(c) Prescribe standards of administrative practice to be followed by all agencies under the managing director's supervision.

(d) Attend meetings of the council and of any board, commission or committee, when requested by the mayor.

(e) Attend meetings of the council and its committees upon request and make available such information as they may require.

(f) Perform all other duties required by this charter or assigned in writing by the mayor.

(Reso. 83-357 and 94-267)

Section 6-103. Civil Defense Agency --

There shall be a civil defense agency headed by a civil defense administrator who shall be appointed and may be removed by the mayor in accordance with law.[16] The civil defense administrator shall:

(a) Develop, prepare and, under disaster or emergency situations, assist in the implementation of civil defense plans and programs to protect and promote the public health, safety and welfare of the people of the city.

(b) Coordinate the civil defense activities and functions of the city with those of the state and federal governments and other public or private organizations for civil defense within the state.

(1998 General Election Charter Amendment Question No. 3(III), section and subsequent sections renumbered)

Section 6-104. Citizens Advisory Commission on Civil Defense --

There shall be a citizens advisory commission on civil defense which shall consist of five members. The commission shall advise the mayor, the council, and the civil defense administrator on matters pertaining to civil defense, and to the promotion of community understanding and interest in such matters. The commission shall be governed by the provisions of Section 13-103 of this charter. *(Reso. 88-196)*

Section 6-105. Royal Hawaiian Band --

There shall be a Royal Hawaiian Band headed by a band director who shall be appointed and may be removed by the mayor. The band director shall perform such duties as may be required by law. *(Reso. 83-357 and 88-196)*

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[16]The position of civil defense administrator is a civil service position. Malcolm A. Sussel v. City and County of Honolulu, et al., U.S.D.C. Civil Nos. 86-1136 and 88-00375, judgments entered May 4 and May 8, 1989, affirmed by U.S.C.A. (9th Circuit) May 9, 1991; Sussel v. City and County of Honolulu Civil Service Commission, 71 Haw. 101, 784 P.2d 867 (1989); Sussel v. Civil Service Commission of the City and County of Honolulu, 74 Haw. 599, 851 P.2d 311 (1993).

the director shall hold a public hearing thereon. The director shall specify the particular evidence which supports the granting of a variance. *(Reso. 83-357; 1992 General Election Charter Amendment Question No. 5; 1998 General Election Charter Amendment Question No. 1(III))*

CHAPTER 16
POLICE DEPARTMENT

Section 6-1601. Organization --

There shall be a police department which shall consist of a chief of police, a police commission and the necessary staff. The chief of police shall be the administrative head of the police department.

Section 6-1602. Statement of Policy --

It is hereby declared to be the purpose of this chapter of the charter to establish in the city a system of law enforcement which shall be based on due regard for the constitutional rights of all persons, which shall promote the highest possible degree of mutual respect between law enforcement officers and the people of the city and which shall provide for the expeditious apprehension of those who violate the law. In order that these purposes may be achieved, the police department shall be conducted in accordance with the following:

(a) Standards of recruitment shall be designed to attract into the service persons with high degrees of education, intelligence and personal stability.

(b) Promotions shall be based upon fair standards of merit and ability which shall include peacekeeping and law enforcement criteria.

(c) Grievance procedures for the people and police officers of the city shall be based on due regard for their constitutional rights.

Section 6-1603. Chief of Police --

1. The chief of police shall be appointed by the police commission for a term of five years. The chief shall have had a minimum of five years of training and experience in law enforcement work, at least three years of which shall have been in a responsible administrative capacity. The chief shall not serve beyond the expiration of a term unless appointed again by the police commission. If desiring to do so, the police commission may appoint an incumbent chief to a new term without first engaging in an applicant solicitation and selection process.

2. Before the expiration of a term to which appointed, the chief may be removed by the police commission only for cause. As prerequisites to removal, the chief shall be given a written statement of the charge and an opportunity for a hearing before the police commission.

3. Gross or continuous maladministration shall be a cause sufficient for removal of the chief. Before removing the chief for such cause, the commission shall give the chief written notice of and a reasonable period to cure the gross or continuous maladministration. If the gross or continuous

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Not Reported in F.Supp.2d, 2006 WL 298810 (D.Neb.)
(Cite as: 2006 WL 298810 (D.Neb.))

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Only the Westlaw citation is currently available.

United States District Court,
D. Nebraska.
Reginald BEVERLY, an incapacitated person, by Ronald Beverly, Conservator, Plaintiff,
v.
Chuck CASEY, John Bahle, Jason Slosson, Doug Herout, and Sgt. Russ Horine, Individually and in their official capacities as police officers for the City of Omaha, and the City of Omaha, Individually, Defendants.

No. 8:05CV393.
Feb. 6, 2006.

Natalie Osorio Nowak, Schicker Law Firm, Omaha, NE, for Plaintiffs.

Thomas O. Mumgaard, City of Omaha, Omaha, NE, for Defendants.

MEMORANDUM AND ORDER

CAMP, J.

***1** This matter is before the Court on the Defendants' Motion to Dismiss. (Filing No. 4). For the reasons stated below, the Motion will be granted in part and denied in part.

BACKGROUND

The Plaintiff Reginald Beverly ("Beverly"), an incapacitated person, through his conservator, filed this action in the District Court of Douglas County, Nebraska, on July 8, 2005, and the Defendants removed the case to this Court on August 10, 2005. The Complaint (Filing No. 1) alleges that on August 1, 2003, the Defendants Chuck Casey, John Bahle, Jason Slosson, Doug Herout, and Sgt. Russ Horine, all employed by the Omaha Police Department, attempted to arrest Beverly at 813 North 47th Street in Omaha, Nebraska, for use of an "illicit substance." (*Id.* ¶ 8-9). When Beverly refused repeated commands to exit the building, Horine directed other Defendants to deploy pepper spray and pepper balls. (*Id.* ¶¶ 11-13). As Defendant Slosson fired pepper balls at Beverly, he exited the residence. (*Id.* ¶ 14). The Complaint implies that one or more of the Defendants then tackled Beverly, wrestled him to the ground, placed him in a chokehold, and handcuffed him. (*Id.* ¶ 17). The Complaint states that Beverly was taken to a hospital by medics, examined by a physician, medicated, and later found to be unresponsive and incapacitated. (*Id.* ¶¶ 18-20). The Complaint alleges that Defendants Casey, Bahle, Slosson, and Herout knowingly used excessive force [FN1] by deploying pepper spray or pepper balls at Beverly who was in a drug-intoxicated state, and by attempting to restrain him; and that Defendants Horine and the City of Omaha provided improper training and supervision for the other Defendants. (*Id.* ¶ 21). The Complaint asserts claims under 42 U.S.C. §§ 1983 and 1988; Neb.Rev.Stat. § 20-148 (Reissue 1997) and 25-2165 (Reissue 1995); and state tort-based claims against Defendants Casey, Bahle and Slosson for assault and battery; against Herout, Casey, Bahle and Slosson for "outrage;" and against Homine for negligent supervision. (*Id.* at ¶¶ 2, 23, and Prayer for Relief).

FN1. Nebraska's use-of-force standards are set forth in Neb.Rev.Stat. § 28-1406 *et seq.* (Reissue 1995). Section 28-1412 describes the circumstances under which the use of force is justifiable in effecting an arrest.

This Court has jurisdiction pursuant to 28 U.S.C. § 1331, which grants original jurisdiction to federal district courts over federal questions; 28 U.S.C. § 1367(a), which grants supplemental jurisdiction to federal district courts over claims that are so related to the original jurisdiction claims that they form part of the same case or controversy; and 28 U.S.C. § 1441, which permits removal of claims to federal court when arising under the Constitution or laws of the United States. The Defendants have moved under Fed.R.Civ.P. 12(b)(6) to dismiss

Beverly's tort-based claims and his allegations of liability under Neb.Rev.Stat. § 20-148.

STANDARD OF REVIEW

When considering a motion to dismiss under Rule 12(b)(6), the Court must view the factual allegations in the light most favorable to the plaintiff. *Young v. City of St. Charles,* 244 F.3d 623, 627 (8th Cir.2001). The Court must liberally construe the complaint, accept all its factual allegations as true, and draw all reasonable inferences in favor of the plaintiff. *Howard v. Coventry Healthcare,* 293 F.3d 442, 444 (8th Cir.2002); *Turner v. Holbrook,* 278 F.3d 754, 757 (8th Cir.2002). A complaint must contain "sufficient facts, as opposed to mere conclusions, to satisfy the legal requirements of the claim to avoid dismissal." *DuBois v. Ford Motor Credit Co.* 276 F.3d 1019, 1022 (8th Cir.2002).

DISCUSSION

***2** The Defendants assert that Beverly's tort-based claims (Complaint ¶ 23) are barred by the provisions of Nebraska's Political Subdivisions Tort Claims Act, Neb.Rev.Stat. §§ 13-901 *et seq.* (Reissue 1997). The Defendants also move for dismissal of any claims raised by Beverly under Neb.Rev.Stat. § 20-148.[FN2] Beverly agrees that his claim against Horine alleging negligent supervision should be dismissed, and that any claims under Neb.Rev.Stat. § 20-148 should be dismissed. (Plaintiff's Brief in Resistance to Defendants' Motion to Dismiss, Filing No. 8, pp. 3-6). Beverly resists dismissal of his other state tort-based claims against Casey, Bahle, Slosson and Herout.

> FN2. "Any person or company ... except any political subdivision, who subjects or causes to be subjected any citizen of this state or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the United States Constitution or the Constitution and laws of the State of Nebraska, shall be liable to such injured person in a civil action or other proper proceeding for redress brought by such injured person." Neb.Rev.Stat. § 20-148(1)(Reissue 1997). "[Section] 20-148 is a procedural statute which does not create any new substantive rights." *Goolsby v. Anderson,* 250 Neb. 306, 549 N.W.2d 153, 157 (Neb.1996).

Nebraska's Political Subdivisions Tort Claims Act provides that "no suit shall be maintained against [a] political subdivision or its officers, agents, or employees on any tort claim except to the extent, and only to the extent, provided by the Political Subdivisions Tort Claims Act." Neb.Rev.Stat. § 13-902 (Reissue 1997). The Act also states:

> No suit shall be commenced against any employee of a political subdivision for money on account of damage to or loss of property or personal injury to or the death of any person caused by any negligent or wrongful act or omission of the employee while acting in the scope of his or her office or employment occurring after May 13, 1987, unless a claim has been submitted in writing to the governing body of the political subdivision within one year after such claim accrued in accordance with section 13-905.

Neb.Rev.Stat. § 13-920(1) (Reissue 1997). The Political Subdivisions Tort Claims Act, however, *does not apply* to "[a]ny claim arising out of assault, battery, false arrest, false imprisonment, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." Neb Rev. Stat. § 13-910(7) (Reissue 1997).

Because Nebraska's Political Subdivisions Tort Claims Act *does not apply* to claims arising out of assault and battery, any immunity to which the City of Omaha would otherwise be entitled has not been waived through the Act. *See, e.g., Johnson v. State of Nebraska,* 270 Neb. 316, 700 N.W.2d 620, 623 (Neb.2005), construing comparable provisions of Nebraska's State Tort Claims Act, Neb.Rev.Stat. §§ 81-8,8209 to 81,8235 (Reissue 1996 &

Cum.Supp.1998).[FN3] The Nebraska Supreme Court has interpreted the exemptions in § 13-910 as a listing of those actions for which the state *has not* waived the sovereign immunity of its political subdivisions. *See, e.g., Talbot v. Douglas County,* 249 Neb. 620, 544 N.W.2d 839, 843 (Neb.1996) (political subdivisions retain immunity against any claim based upon the exercise of a discretionary function); and *Hall v. Abel Investment Co.,* 192 Neb. 256, 219 N.W.2d 760, 761 (Neb.1974) (political subdivisions retain immunity for actions based on allegations of misrepresentation and deceit).

FN3. The immunity to which a political subdivision is entitled is not necessarily the same as the sovereign immunity enjoyed by the parent state. *Board of Trustees of University of Alabama v. Garrett,* 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001)(Eleventh Amendment does not extend immunity to units of local government); Neb.Rev.Stat. § 14-101 (Reissue 1997)(Nebraska cities of the metropolitan class have the power to "sue and be sued.").

Beverly's Complaint names Casey, Bahle, Slosson, Herout, and Horine as Defendants in their individual and official capacities (*id.* ¶ 7, 219 N.W.2d 760), and seeks monetary damages, not injunctive relief (*id.,* Prayer for Relief). Suits against governmental employees in their official capacities are effectively suits against the government. "State officers sued for damages in their official capacity ... assume the identity of the government that employs them." *Hafer v. Melo,* 502 U.S. 21, 26, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991), citing *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). Therefore, Beverly's state tort-based claims against the individual Defendants in their official capacities are in effect actions against the City of Omaha, and are barred by sovereign immunity.

***3** With respect to Beverly's state tort-based claims against the individual Defendants in their individual capacities,[FN4] the Complaint alleges that Casey, Bahle, Slosson and Herout knowingly used excessive force that was objectively unreasonable. (*Id.* ¶ 21). Although the Complaint alleges that the Defendants were at all relevant times acting "under color and pretense of the law," it does not allege that they were at all times acting in the scope of their employment. (*Id.* ¶ 4). By their very nature, the intentional torts listed in § 13-910(7) are of the sort that, if proven, would occur outside the scope of public employment.[FN5] The claims against the individual Defendants in their individual capacities, arising out of alleged assault and battery, are not subject to the provisions of the Nebraska Political Subdivisions Tort Claims Act, nor are they barred by sovereign immunity.

FN4. I recognize that the provisions of the Political Subdivisions Tort Claims Act apply when an individual is sued in his or her individual capacity, as long as he or she was acting within the scope of employment. *Bohl v. Buffalo County,* 251 Neb. 492, 557 N.W.2d 668 (Neb.1997); *Cole v. Wilson,* 10 Neb.App. 156, 627 N.W.2d 140 (Neb.Ct.App.2001). With respect to claims arising out of alleged assault and battery, however, the Act is inapplicable.

FN5. Most of the exemptions in § 13-910 refer to governmental functions that are routine, or require the exercise of discretion. It is reasonable to infer that the State chose to retain immunity for its political subdivisions in these areas to limit litigation and to enable employees to exercise judgment without generating liability. With respect to the exemptions in § 13-910(7), however, the rationale appears to be the fact that any employee committing such intentional torts *could not* be acting within the scope of employment. While I recognize that the state may through legislation eliminate common law causes of

> action (see, *e.g.*, Neb.Rev.Stat. § 25-21, 188 (Reissue 1995), the Defendants have presented no legislative history or other evidence that persuades me that Nebraska's legislature intended to eliminate common law causes of action for assault and battery, simply because the alleged perpetrator was in the employ of the government at the time of the assault.

For the reasons stated in this memorandum,

IT IS ORDERED:

1) The Defendants' Motion to Dismiss (Filing No. 4) is granted in part and denied in part;

2) The Plaintiff's claim against Defendant Sgt. Russ Horine based on alleged negligent supervision is dismissed;

3) The Plaintiff's claims against all Defendants based on Neb.Rev.Stat. § 20-148 are dismissed;

4) The Plaintiff's state tort-based claims against all Defendants in their official capacities are dismissed; and

5) The Motion to Dismiss is otherwise denied.

D.Neb.,2006.
Beverly ex rel. Beverly v. Casey
Not Reported in F.Supp.2d, 2006 WL 298810 (D.Neb.)

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--- F.Supp.2d ----, 2011 WL 915574 (D.Hawai'i)
(Cite as: 2011 WL 915574 (D.Hawai'i))

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Only the Westlaw citation is currently available.

United States District Court,
D. Hawai'i.
Alfred MARZAN, an individual; Adelaida Liwanag Marzan, an individual, Plaintiffs,
v.
BANK OF AMERICA, Business Entity, et al., Defendants.

Civil No. 10–00581 JMS/BMK.
March 10, 2011.

Background: Mortgagors brought pro se action against mortgagees, escrow agent, and others, seeking declaratory and injunctive relief, damages, and rescission of mortgage transaction, asserting claims for violation of the Truth in Lending Act (TILA), the Equal Opportunity Credit Act, and the Real Estate Settlement Procedures Act (RESPA). Defendants moved to dismiss.

Holdings: The District Court, J. Michael Seabright, J., held that:
(1) mortgagors failed to state claim for declaratory judgment that mortgagees had no right to foreclose;
(2) mortgagees did not breach any implied duty of good faith and fair dealing;
(3) escrow agent had no TILA liability;
(4) mortgagees' approval of mortgage loan was not an unfair or deceptive business practice;
(5) mortgagees owed no fiduciary duty to mortgagors;
(6) mortgagors failed to raise unconscionability defense to enforcement of mortgage; and
(7) mortgagors failed to state claim against mortgagees for quiet title to mortgaged property.

Motions granted.

West Headnotes

[1] Federal Civil Procedure 170A 657.5(1)

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(A) Pleadings in General
170Ak654 Construction
170Ak657.5 Pro Se or Lay Pleadings
170Ak657.5(1) k. In General. Most Cited Cases

Court liberally construes pro se pleadings on motion to dismiss for failure to state a claim upon which relief can be granted. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[2] Federal Civil Procedure 170A 657.5(1)

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(A) Pleadings in General
170Ak654 Construction
170Ak657.5 Pro Se or Lay Pleadings
170Ak657.5(1) k. In General. Most Cited Cases

Federal Civil Procedure 170A 1826

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)5 Proceedings
170Ak1826 k. Notice. Most Cited Cases

Unless it is absolutely clear that no amendment can cure pro se complaint's defect, a pro se litigant is entitled to notice of the complaint's deficiencies and an opportunity to amend prior to dismissal of the action for failure to state a claim upon which relief can be granted. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[3] Federal Civil Procedure 170A 657.5(1)

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(A) Pleadings in General
170Ak654 Construction
170Ak657.5 Pro Se or Lay Pleadings

170Ak657.5(1) k. In General. Most Cited Cases

Federal Civil Procedure 170A 1824

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)5 Proceedings
170Ak1824 k. Dismissal on Court's Own Motion. Most Cited Cases

Despite the liberal pro se pleading standard, the court may dismiss a pro se complaint on its own motion for failure to state a claim upon which relief can be granted. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[4] Antitrust and Trade Regulation 29T 358

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(E) Enforcement and Remedies
29TIII(E)5 Actions
29Tk356 Pleading
29Tk358 k. Particular Cases. Most Cited Cases

Consumer Credit 92B 66

92B Consumer Credit
92BII Federal Regulation
92BII(C) Effect of Violation of Regulations
92Bk64 Actions for Violations
92Bk66 k. Pleading and Evidence. Most Cited Cases

Fraud 184 41

184 Fraud
184II Actions
184II(C) Pleading
184k41 k. Allegations of Fraud in General. Most Cited Cases

Mortgages 266 216

266 Mortgages
266IV Rights and Liabilities of Parties
266k215 Actions for Damages
266k216 k. Between Parties to Mortgage or Their Privies. Most Cited Cases

Mortgagors' complaint as written failed to state a claim for fraud or for violation of the Equal Opportunity Credit Act, the "Fair Lending/Fair Debt Collection Act," or the Federal Trade Commission Act; although complaint mentioned federal laws and made generalized allegations regarding fraud, mortgagors asserted no claims for relief for alleged violations of federal laws or for stand-alone fraud claim. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[5] Declaratory Judgment 118A 42

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(C) Other Remedies
118Ak42 k. Adequacy of Other Remedy. Most Cited Cases

Mortgagors failed to state claim for declaratory judgment that mortgagees had no right to foreclose due to defendants' alleged violations of federal and state laws designed to protect borrowers; mortgagors' declaratory judgment claim was based on allegations regarding defendants' past wrongs, which essentially duplicated mortgagors' other independent causes of action for which court would provide appropriate remedies if mortgagors prevailed. 28 U.S.C.A. § 2201(a).

[6] Injunction 212 1

212 Injunction
212I Nature and Grounds in General
212I(A) Nature and Form of Remedy
212k1 k. Nature and Purpose in General. Most Cited Cases

A claim for injunctive relief standing alone is not a cause of action.

[7] Injunction 212 1

212 Injunction
212I Nature and Grounds in General
212I(A) Nature and Form of Remedy
212k1 k. Nature and Purpose in General. Most Cited Cases

Injunctive relief may be available if plaintiffs are entitled to such a remedy on an independent cause of action.

[8] Mortgages 266 ⚿211

266 Mortgages
266IV Rights and Liabilities of Parties
266k211 k. Dealings and Transactions Between Parties. Most Cited Cases

Even if mortgage loan contract imposed an implied duty of good faith and fair dealing under Hawaii law, mortgagees did not breach implied duty to mortgagors by failing to disclose mortgage terms, failing to conduct proper underwriting, or making improper loan; defendants' alleged wrongdoing occurred before parties entered into mortgage loan contract.

[9] Torts 379 ⚿433

379 Torts
379V Other Miscellaneous Torts
379k431 Bad Faith
379k433 k. Contractual Relations; Implied Covenants. Most Cited Cases

Under Hawaii law, although commercial contracts for sale of goods contain an obligation of good faith in their performance and enforcement, this obligation does not create an independent cause of action for the tort of bad faith.

[10] Mortgages 266 ⚿211

266 Mortgages
266IV Rights and Liabilities of Parties
266k211 k. Dealings and Transactions Between Parties. Most Cited Cases

Even if mortgage loan contract imposed an implied duty of good faith and fair dealing under Hawaii law, mortgagees' foreclosure in accordance with contractual did not breach implied duty.

[11] Consumer Credit 92B ⚿63

92B Consumer Credit
92BII Federal Regulation
92BII(C) Effect of Violation of Regulations
92Bk61 Civil Liabilities and Penalties for Violations
92Bk63 k. Persons Liable; Assignees. Most Cited Cases

Escrow agent that performed only escrow services for mortgage loan transaction was neither a "creditor" from which damages could be sought nor an "assignee" from which rescission could be sought by mortgagors under TILA. Truth in Lending Act, §§ 130, 131(c), 15 U.S.C.A. §§ 1640, 1641(c).

[12] Limitation of Actions 241 ⚿58(1)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(A) Accrual of Right of Action or Defense
241k58 Liabilities Created by Statute
241k58(1) k. In General. Most Cited Cases

For violations of TILA's disclosure requirements, one-year period for seeking damages generally begins to run from the date of consummation of the loan. Truth in Lending Act, § 130(e), 15 U.S.C.A. § 1640(e).

[13] Federal Civil Procedure 170A ⚿636

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(A) Pleadings in General
170Ak633 Certainty, Definiteness and Particularity
170Ak636 k. Fraud, Mistake and Condition of Mind. Most Cited Cases

Where the basis of equitable tolling of limitations period is fraudulent concealment, it must be pled with particularity. Fed.Rules Civ.Proc.Rule

9(b), 28 U.S.C.A.

[14] Limitation of Actions 241 104.5

241 Limitation of Actions
241II Computation of Period of Limitation
241II(G) Pendency of Legal Proceedings, Injunction, Stay, or War
241k104.5 k. Suspension or Stay in General; Equitable Tolling. Most Cited Cases

Mortgagors insufficiently alleged that mortgagees prevented them from discovering alleged violations of TILA disclosure requirements in connection with mortgage transaction, as required for equitable tolling of one-year limitations period for seeking damages. Truth in Lending Act, § 130(e), 15 U.S.C.A. § 1640(e).

[15] Limitation of Actions 241 104.5

241 Limitation of Actions
241II Computation of Period of Limitation
241II(G) Pendency of Legal Proceedings, Injunction, Stay, or War
241k104.5 k. Suspension or Stay in General; Equitable Tolling. Most Cited Cases

Three-year period after consummation of loan transaction in which consumer may seek rescission of transaction under TILA when required disclosures are not provided is not subject to equitable tolling. Truth in Lending Act, § 125(a, f), 15 U.S.C.A. § 1635(a, f).

[16] Consumer Credit 92B 30

92B Consumer Credit
92BII Federal Regulation
92BII(A) In General
92Bk30 k. Regulations in General. Most Cited Cases

RESPA does not prohibit excessive fees for mortgage loans. Real Estate Settlement Procedures Act of 1974, § 8, 12 U.S.C.A. § 2607.

[17] Consumer Credit 92B 65

92B Consumer Credit
92BII Federal Regulation
92BII(C) Effect of Violation of Regulations
92Bk64 Actions for Violations
92Bk65 k. Time to Sue and Limitations. Most Cited Cases

One-year period of limitations applies to RESPA claim alleging illegal fees at closing. Real Estate Settlement Procedures Act of 1974, §§ 8, 16, 12 U.S.C.A. §§ 2607, 2614.

[18] Cancellation of Instruments 69 1

69 Cancellation of Instruments
69I Right of Action and Defenses
69k1 k. Nature and Scope of Remedy. Most Cited Cases

Under Hawaii law, rescission is only a remedy, not a cause of action.

[19] Antitrust and Trade Regulation 29T 209

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(C) Particular Subjects and Regulations
29Tk209 k. Finance and Banking in General; Lending. Most Cited Cases

Under Hawaii law, mortgagees' approval of mortgage loan which defendants knew that mortgagors could not afford, without more, was not an unfair or deceptive business practice. HRS § 480–2(a).

[20] Mortgages 266 211

266 Mortgages
266IV Rights and Liabilities of Parties
266k211 k. Dealings and Transactions Between Parties. Most Cited Cases

Under Hawaii law, absent special circumstances, mortgagees owed no fiduciary duty to mortgagors to advise mortgagors regarding their likelihood of defaulting, to disclose mortgagees' financial relationships, or to provide material dis-

closures.

[21] Deposits and Escrows 122A 13

122A Deposits and Escrows
122AII Conditional Deposits or Escrows
122Ak13 k. Depositaries. Most Cited Cases

Under Hawaii law, the general rule is that an escrow depository occupies a fiduciary relationship with parties to the escrow agreement or instructions and must comply strictly with the provisions of such agreement or instructions.

[22] Deposits and Escrows 122A 13

122A Deposits and Escrows
122AII Conditional Deposits or Escrows
122Ak13 k. Depositaries. Most Cited Cases

Under Hawaii law, an escrow holder has no general duty to police the affairs of its depositors; rather, an escrow holder's obligations are limited to faithful compliance with the depositors' instructions.

[23] Mortgages 266 75.5

266 Mortgages
266I Requisites and Validity
266I(D) Validity
266k75.5 k. In General. Most Cited Cases

Under Hawaii law, mortgagors failed to raise unconscionability defense to enforcement of mortgage based on allegations of mortgagees' deception, unfair bargaining position, or failure to comply with regulations; mortgagors failed to challenge any particular term as unconscionable in an independent affirmative claim where the unconscionable terms would be relevant to that particular claim.

[24] Contracts 95 1

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k1 k. Nature and Grounds of Contractual Obligation. Most Cited Cases

Under Hawaii law, to the extent unconscionability can be addressed affirmatively as part of an independent cause of action, such a claim is asserted to prevent the enforcement of a contract whose terms are unconscionable.

[25] Consumer Credit 92B 3.1

92B Consumer Credit
92BI In General
92Bk3 License and Regulation in General
92Bk3.1 k. In General. Most Cited Cases

Under Hawaii law as predicted by district court, predatory lending itself is not a common-law cause of action.

[26] Quieting Title 318 35(1)

318 Quieting Title
318II Proceedings and Relief
318k33 Pleading
318k35 Allegations as to Title and Possession
318k35(1) k. In General. Most Cited Cases

Under Hawaii law, mortgagors failed to sufficiently allege the interests of the parties as required to state claim against mortgagees for quiet title to mortgaged property. HRS § 669–1(a).

[27] Quieting Title 318 10.5

318 Quieting Title
318I Right of Action and Defenses
318k9 Title of Plaintiff
318k10.5 k. Mortgagors and Mortgagees. Most Cited Cases

Quieting Title 318 35(1)

318 Quieting Title
318II Proceedings and Relief
318k33 Pleading
318k35 Allegations as to Title and Possession
318k35(1) k. In General. Most Cited Cases

Under Hawaii law, in order to assert a claim for quiet title against a mortgagee, a borrower must allege they have paid, or are able to tender, the amount of indebtedness. HRS § 669–1(a).

Alfred Marzan, Waipahu, HI, pro se.

Adelaida Liwanag Marzan, Waipahu, HI, pro se.

Brandon M. Segal, Jade L. Ching, Alston Hunt Floyd & Ing, Patricia J. McHenry, Cades Schutte, Honolulu, HI, for Defendants.

ORDER: (1) GRANTING DEFENDANT OLD REPUBLIC TITLE & ESCROW OF HAWAII, LTD.'S MOTION TO DISMISS; (2) GRANTING DEFENDANT MORTGAGE ELECTRONIC REGISTRATION SYSTEM'S MOTION TO DISMISS; (3) DISMISSING OTHER CLAIMS; AND (4) GRANTING LEAVE TO AMEND

J. MICHAEL SEABRIGHT, District Judge.

I. *INTRODUCTION*

***1** On October 6, 2010, Plaintiffs Alfred Marzan and Adelaida Liwanag Marzan ("Plaintiffs"), proceeding *pro se,* filed this action against Defendants Bank of America ("BOA"); Countrywide Home Loans, Inc. ("Countrywide"), First Magnus Financial ("First Magnus"), Old Republic Title & Escrow, Ltd. ("Old Republic"), and Mortgage Electronic Registration Systems ("MERS") (collectively, "Defendants") alleging federal and state law claims stemming primarily from a March 14, 2006 mortgage transaction concerning real property located at 94–102 Heahea Street, Waipahu, Hawaii 96797 (the "subject property").

Plaintiffs seek declaratory and injunctive relief, as well as damages and rescission of the mortgage transaction. In separate motions, Old Republic and MERS each seek dismissal of all counts against them. For the reasons set forth below, the court GRANTS the Motions and dismisses the Complaint with leave to amend as to certain counts. Given obvious defects as to all Defendants, the dismissal is as to all claims against all Defendants.

II. *BACKGROUND*

A. Factual Background

The court assumes the Complaint's factual allegations are true for purposes of this Motion. *See, e.g., Savage v. Glendale Union High Sch.,* 343 F.3d 1036, 1039 n. 1 (9th Cir.2003).

According to the Complaint and documents of which the court takes judicial notice, on March 10, 2006, Plaintiffs entered into a loan repayment and security agreement with First Magnus, which was subsequently transferred to Countrywide and/or BOA. *See* Compl. ¶ 2. Plaintiffs' claims stem from the consummation of this transaction.

Plaintiffs assert, among other things, that (1) First Magnus qualified Plaintiffs for a loan which it knew Plaintiffs were not qualified for and could not repay, and that Plaintiffs "should have been declined for this loan," Compl. ¶¶ 21, 27–28, 34; (2) the terms of the transaction were not clear and Defendants [FN1] never explained the transaction to them, *id.* ¶¶ 24, 29; (3) the loan was more expensive than alternative financing arrangements for which Plaintiffs were qualified, *id.;* and (4) Defendants charged excessive or illegal fees. *Id.* ¶¶ 22, 31.

Plaintiffs assert that Defendants failed to provide forms and disclosures required under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.;* the Equal Opportunity Credit Act; "Fair Lending/Fair Debt Collection Act"; and the Real Estate Settlement Practices Act ("RESPA"), 12 U.S.C. § 2601 *et seq.* Compl. ¶¶ 11, 13. Defendants allegedly "intentionally concealed the negative implications of the loan they were offering," *id.* ¶ 18, and "failed to perform due diligence," *id.* ¶¶ 20, 27, such that Plaintiffs were sold "a deceptive loan product" and the acts of deception created an illegal loan and constituted predatory lending. *Id.* ¶¶ 26–27, 39. Defendants' acts allegedly were in violation of federal and state law, including bad faith, breach of fiduciary duty, and unfair and deceptive trade practices.

B. Procedural Background

***2** Plaintiffs' October 6, 2010 Complaint alleges twelve separate counts, entitled: "(1) Declaratory Relief; (2) Injunctive Relief; (3) Contractual Breach of Implied Covenant of Good Faith and Fair Dealing; (4) Violations of TILA; (5) Violations of RESPA; (6) Rescission; (7) Unfair and Deceptive Acts and Practices (UDAP); (8) Breach of Fiduciary Duty; (9) Unconscionability; (10) Predatory Lending; (11) Quiet Title; and (12) Lack of Standing (MERS)."

On November 19, 2010, Old Republic filed its Motion to Dismiss seeking dismissal of all counts. FN2 On December 6, 2010, MERS filed its Motion to Dismiss. On February 4, 2011, Plaintiffs filed an Opposition. Replies were filed on February 7, 2011. A hearing was held on February 28, 2011.

III. *STANDARD OF REVIEW*

Federal Rule of Civil Procedure 12(b)(6) permits a motion to dismiss a claim for "failure to state a claim upon which relief can be granted[.]"

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, —— U.S. ——, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)); *see also Weber v. Dep't of Veterans Affairs*, 521 F.3d 1061, 1065 (9th Cir.2008). This tenet—that the court must accept as true all of the allegations contained in the complaint—"is inapplicable to legal conclusions." *Iqbal*, 129 S.Ct. at 1949. Accordingly, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955). Rather, "[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.* (citing *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955). Factual allegations that only permit the court to infer "the mere possibility of misconduct" do not show that the pleader is entitled to relief. *Id.* at 1950.

[1][2] The court liberally construes pro se pleadings. *See Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir.1987). "Unless it is absolutely clear that no amendment can cure the defect ... a pro se litigant is entitled to notice of the complaint's deficiencies and an opportunity to amend prior to dismissal of the action." *Lucas v. Dep't of Corr.*, 66 F.3d 245, 248 (9th Cir.1995).

[3] Despite the liberal pro se pleading standard, the court may dismiss a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on its own motion. *See Omar v. Sea–Land Serv., Inc.*, 813 F.2d 986, 991 (9th Cir.1987) ("A trial court may dismiss a claim *sua sponte* under [Rule] 12(b)(6). Such a dismissal may be made without notice where the claimant cannot possibly win relief."); *Ricotta v. California*, 4 F.Supp.2d 961, 968 n. 7 (S.D.Cal.1998) ("The Court can dismiss a claim *sua sponte* for a Defendant who has not filed a motion to dismiss under Fed.R.Civ.P. 12(b)(6)."); *see also Baker v. Director, U.S. Parole Comm'n*, 916 F.2d 725, 727 (D.C.Cir.1990) (holding that a district court may dismiss cases *sua sponte* pursuant to Rule 12(b)(6) without notice where plaintiff could not prevail on complaint as alleged).

IV. *DISCUSSION*

***3** Many of the arguments raised by Old Republic and MERS were addressed in this court's recent Order in *Phillips et al. v. Bank of America et al.*, 2011 WL 240813 (D.Haw. Jan. 21, 2011), regarding a similar complaint. FN3 The court draws extensively from that Order.

[4] Both Motions address each of the Counts as they relate to MERS and Old Republic, and the court therefore addresses the arguments as to each specific Count. FN4

A. Counts I and II—Declaratory and Injunctive Relief

[5] Both MERS and Old Republic contend,

among other things, that Count I (Declaratory Relief) and Count II (Injunctive Relief), fail to state claims upon which relief can be granted because the claims are remedies, not independent causes of action. MERS Mot. 5–6; Old Republic Mot. 6. The court agrees that these Counts fail to state a claim.

[6][7] Initially, the court follows the well-settled rule that a claim for "injunctive relief" standing alone is not a cause of action. *See, e.g., Jensen v. Quality Loan Serv. Corp.*, 702 F.Supp.2d 1183, 1201 (E.D.Cal.2010) ("A request for injunctive relief by itself does not state a cause of action"); *Henke v. ARCO Midcon, L.L.C.*, 750 F.Supp.2d 1052, 1059–60 (E.D.Mo.2010) ("Injunctive relief, however, is a remedy, not an independent cause of action."); *Plan Pros, Inc. v. Zych*, 2009 WL 928867, at *2 (D.Neb. Mar. 31, 2009) ("no independent cause of action for injunction exists"); *Motley v. Homecomings Fin., LLC*, 557 F.Supp.2d 1005, 1014 (D.Minn.2008) (same). Injunctive relief may be available if Plaintiffs are entitled to such a remedy on an independent cause of action.

As for declaratory relief, Count I is apparently seeking relief under the Declaratory Judgment Act, 28 U.S.C. § 2201.[FN5] Count I alleges that "[a]n actual controversy has arisen and now exists between Plaintiffs and Defendants regarding their respective rights and duties, in that Plaintiffs contend[ ] that Defendants did not have the right to foreclose on the Subject Property[.]" Compl. ¶ 43. Plaintiffs ask the court to declare that "the purported power of sale contained in the Loan [is] of no force and effect at this time" because of "numerous violations of State and Federal laws designed to protect borrowers[.]" *Id.* ¶ 44. "As a result of Defendants' actions, Plaintiffs have suffered damages ... and seek[ ] declaratory relief that Defendants' purported power of sale is void[.]" *Id.* ¶ 45.

Given these allegations, Plaintiffs' declaratory relief claim is not cognizable as an independent cause of action under the Declaratory Relief Act. *See Seattle Audubon Soc. v. Moseley*, 80 F.3d 1401, 1405 (9th Cir.1996) ("A declaratory judgment offers a means by which rights and obligations may be adjudicated in cases brought by any interested party involving an actual controversy that has not reached a stage at which either party may seek a coercive remedy and in cases where a party who could sue for coercive relief has not yet done so." (citation and quotation signals omitted)). That is, because Plaintiffs' claims are based on allegations regarding Defendants' past wrongs, a claim under the Declaratory Relief Act is improper and in essence duplicates Plaintiffs' other causes of action. *See, e.g., Ballard v. Chase Bank USA, NA*, 2010 WL 5114952, at *8 (S.D.Cal. Dec. 9, 2010) ("A claim for declaratory relief "rises or falls with [the] other claims." ") (citation omitted); *Mangindin v. Washington Mut. Bank*, 637 F.Supp.2d 700, 707 (N.D.Cal.2009) ("A claim for declaratory relief is unnecessary where an adequate remedy exists under some other cause of action."); *Ruiz v. Mortg. Elec. Registration Sys., Inc.*, 2009 WL 2390824, at *6 (E.D.Cal. Aug. 3, 2009) (dismissing claim for declaratory judgment where foreclosure already occurred such that the plaintiff was seeking "to redress past wrongs"); *Edejer v. DHI Mortg. Co.*, 2009 WL 1684714, at *11 (N.D.Cal. June 12, 2009) ("Plaintiff's declaratory relief cause of action fails because she seeks to redress past wrongs rather than a declaration as to future rights.").

***4** Accordingly, the court DISMISSES Counts I and II without leave to amend. If Plaintiffs eventually prevail on an independent claim, the court will necessarily render a judgment setting forth (*i.e.*, "declaring") as such and providing appropriate remedies. Similarly, if injunctive relief is proper, it will be because Plaintiffs prevail—or have met the necessary test for such relief under Rule 65 of the Federal Rules of Civil Procedure—on an independent cause of action. Although only MERS and Old Republic have moved to dismiss, this dismissal is as to all Defendants because Plaintiffs cannot prevail on these Counts as to any Defendant.

B. Count III—Covenant of Good Faith and Fair Dealing

[8] Count III is entitled "Contractual Breach of the Implied Covenant of Good Faith and Fair Dealing." Plaintiffs allege that every contract imposes a duty of good faith and fair dealing "in its performance and its enforcement," Compl. ¶ 52, and that Defendants "willfully breached their implied duty of good faith and fair dealing" by engaging in the acts alleged in the Complaint (such as withholding disclosures or information, and "willfully plac[ing] Plaintiffs in a loan that [they] did not qualify for"). *Id.* ¶ 55.

This claim asserts the tort of "bad faith." *See Best Place v. Penn Am. Ins. Co.*, 82 Hawai'i 120, 128, 920 P.2d 334, 342 (1996) (adopting tort of bad faith or breach of implied covenant of good faith and fair dealing in an insurance contract). But, although bad faith is an accepted tort where the plaintiff is a party to an insurance contract, the tort has not been recognized in Hawaii based upon a mortgage loan contract.

"In *Best Place*, the Hawaii Supreme Court noted that although Hawaii law imposes a duty of good faith and fair dealing in all contracts, whether a breach of this duty will give rise to a bad faith tort cause of action depends on the duties inherent in a particular type of contract." *Jou v. Nat'l Interstate Ins. Co. of Haw.*, 114 Hawai'i 122, 129, 157 P.3d 561, 568 (Haw.App.2007) (citing *Best Place*, 82 Hawai'i at 129, 920 P.2d at 334). "The court concluded that special characteristics distinguished insurance contracts from other contracts and justified the recognition of a bad faith tort cause of action for the insured in the context of first- and third-party insurance contracts." *Id.* (citing *Best Place*, 82 Hawai'i at 131–32, 920 P.2d at 345–46). Indeed, "the Hawaii Supreme Court emphasized that the tort of bad faith, as adopted in *Best Place*, requires a contractual relationship between an insurer and an insured." *Id.* (citing *Simmons v. Puu*, 105 Hawai'i 112, 120, 94 P.3d 667, 675 (2004)).

[9] Moreover, although commercial contracts for "sale of goods" also contain an obligation of good faith in their performance and enforcement, this obligation does not create an independent cause of action. *See Stoebner Motors, Inc. v. Automobili Lamborghini S.P.A.*, 459 F.Supp.2d 1028, 1037–38 (D.Haw.2006). And Hawaii courts have noted that "[o]ther jurisdictions recognizing the tort of bad faith ... limit such claims to the insurance context or situations involving special relationships characterized by elements of fiduciary responsibility, public interest, and adhesion." *Id.* at 1037 (quoting *Francis v. Lee Enters.*, 89 Hawai'i 234, 238, 971 P.2d 707, 711 (1999)). It is thus unlikely that Plaintiffs could recover for bad faith as alleged in Count III.

***5** Importantly, even assuming a bad faith tort exists outside the insurance context, it is well-settled that "[a] party cannot breach the covenant of good faith and fair dealing before a contract is formed." *Contreras v. Master Fin., Inc.*, 2011 WL 32513, at *3 (D.Nev. Jan. 4, 2011) (citing *Indep. Order of Foresters v. Donald, Lufkin & Jenrette, Inc.*, 157 F.3d 933, 941 (2d Cir.1998) ("[A]n implied covenant relates only to the performance under an extant contract, and not to any pre-contract conduct."). Hawaii follows this distinction. *See Young v. Allstate Ins. Co.*, 119 Hawai'i 403, 427, 198 P.3d 666, 690 (2008) (indicating the covenant of good faith does not extend to activities occurring before consummation of an insurance contract).

Thus, because all of Count III's allegations concern pre-contract activities (failing to disclosure terms, failing to conduct proper underwriting, making an improper loan to Plaintiffs), Defendants cannot be liable for bad faith. *See id.; see also Larson v. Homecomings Fin., LLC*, 680 F.Supp.2d 1230, 1237 (D.Nev.2009) ("Because Plaintiffs' claim revolves entirely around alleged misrepresentations made before the [mortgage loan] contract was entered into, [the bad faith claim] fails as a matter of law.").

[10] And, even if Plaintiffs are attempting to assert bad faith in the performance of a contractual right to foreclose, "a court should not conclude that a foreclosure conducted in accordance with the terms of a deed of trust constitutes a breach of the

implied covenant of good faith and fair dealing." *Davenport v. Litton Loan Servicing, LP*, 725 F.Supp.2d 862, 884 (N.D.Cal.2010) (citation omitted). "The covenant [of good faith] does not 'impose any affirmative duty of moderation in the enforcement of legal rights.' " *Id.* (quoting *Price v. Wells Fargo Bank*, 213 Cal.App.3d 465, 479–80, 261 Cal.Rptr. 735, 742 (1989)).

Accordingly, Count III is DISMISSED. Because further amendment would be futile, dismissal of Count III is without leave to amend. This dismissal is as to all Defendants.

C. Count IV—TILA

MERS and Old Republic make different arguments on this claim and the court therefore addresses these arguments separately.

1. TILA Claim Against Old Republic

[11] Old Republic argues that its only role in the loan transaction was as escrow agent such that it cannot be held liable for TILA violations. The court agrees.

TILA allows a plaintiff to seek damages from a "creditor," 15 U.S.C. § 1640, or rescission from an assignee. 15 U.S.C. § 1641(c). Old Republic only performed escrow services for the loan transaction, *see* Compl. Ex. A, and was neither a creditor nor an assignee. As such, Old Republic cannot be liable for TILA violations. *See, e.g.*, *In re Ameriquest Mortg. Co. Mortg. Lending Practices Litig.*, 589 F.Supp.2d 987, 992 (N.D.Ill.2008) (dismissing TILA claims against escrow company reasoning that TILA "imposes no such duty" and "TILA burdens only *creditors* with disclosure obligations") (citations omitted); *Manuel v. Discovery Home Loans, LLC*, 2010 WL 2889510, at *3 (N.D.Cal. July 22, 2010) (reasoning that because "neither [escrow holder nor loan servicer] was obligated to make TILA disclosures in connection with Plaintiffs' loan, neither party can be liable for violations of TILA"); *Phleger v. Countrywide Home Loans, Inc.*, 2008 WL 65771, at *6 (N.D.Cal. Jan. 4, 2008) (dismissing TILA claim because "[a]n escrow agent is not ... a creditor for purposes of TILA") (citations omitted).

***6** Accordingly, the court GRANTS Old Republic's Motion to Dismiss Count IV of the Complaint against it without leave to amend as to Old Republic.

2. TILA Claim Against Other Defendants

MERS argues, among other things, that Plaintiffs' TILA claims for damages and for rescission are time-barred.

a. Damages under TILA

[12][13] Any claim for damages under TILA must be brought "within one year from the date of the occurrence of the violation." 15 U.S.C. § 1640(e). For violations of TILA's disclosure requirements, this one-year period generally begins to run from the date of consummation of the loan. *King v. California*, 784 F.2d 910, 915 (9th Cir.1986). Equitable tolling may nonetheless apply in certain circumstances:

> [T]he limitations period in Section 1640(e) runs from the date of consummation of the transaction but ... the doctrine of equitable tolling may, in the appropriate circumstances, suspend the limitations period until the borrower discovers or had reasonable opportunity to discover the fraud or nondisclosures that form the basis of the TILA action. Therefore, as a general rule, the limitations period starts at the consummation of the transaction. The district courts, however, can evaluate specific claims of fraudulent concealment and equitable tolling to determine if the general rule would be unjust or frustrate the purpose of the Act and adjust the limitations period accordingly.

Id. Where the basis of equitable tolling is fraudulent concealment, it must be pled with particularity under Rule 9(b) of the Federal Rules of Civil Procedure. *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 662 (9th Cir.1999).

[14] On its face, Plaintiffs' TILA claim for damages against MERS is time-barred unless equitable tolling applies—it was brought over four years from consummation of the loan transaction. The Complaint asserts only that the statute of limitations was tolled "due to Defendants' failure to effectively provide the required disclosures and notices." Compl. ¶ 62. Even if true, this allegation is insufficient to satisfy equitable tolling because it would establish no more than the TILA violation itself. *See, e.g.*, *Garcia v. Wachovia Mortg. Corp.*, 676 F.Supp.2d 895, 906 (C.D.Cal.2009) ("[T]he mere existence of TILA violations and lack of disclosure does not itself equitably toll the statute of limitations."); *Jacob v. Aurora Loan Servs.*, 2010 WL 2673128, at *3 (N.D.Cal. July 2, 2010) ("Plaintiff cannot rely on the same factual allegations to show that Defendants violated federal statutes and to toll the limitations periods that apply to those statutes. Otherwise, equitable tolling would apply in every case where a plaintiff alleges violations of TILA ... and the statutes of limitations would be meaningless.").

The Complaint pleads no facts indicating that MERS (or any Defendant) prevented Plaintiff from discovering the alleged TILA violation or caused Plaintiff to allow the filing deadline to pass. *See, e.g.*, *O'Donnell v. Vencor Inc.*, 466 F.3d 1104, 1112 (9th Cir.2006) ("Equitable tolling is generally applied in situations 'where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.' ") (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990)). Without any factual allegations that support the inference that Plaintiffs did not have a reasonable opportunity to discover the TILA violations, the Complaint, even when liberally construed, does not support tolling the statute of limitations. *See Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 969 (9th Cir.2010) (granting leave to amend complaint to allege lack of reasonable notice to establish diligence where the facts alleged did not foreclose lack of reasonable notice as a matter of law); *see also Meyer v. Ameriquest Mortg. Co.*, 342 F.3d 899, 902–03 (9th Cir.2003) (rejecting argument for equitable tolling of the TILA claim because plaintiff was in full possession of all loan documents and did not allege any actions that would have prevented discovery of the alleged TILA violations).

***7** Accordingly, the court DISMISSES Plaintiffs' TILA claim for damages, but grants Plaintiffs leave to amend as to all Defendants except for Old Republic.

b. Rescission under TILA

[15] As to Plaintiffs' claim for rescission pursuant to TILA, Compl. ¶ 65, TILA provides a right to rescind a loan transaction "until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing [the required material disclosures.]" 15 U.S.C. § 1635(a). If the required disclosures are not provided, however, the right to rescission expires "three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first [.]" 15 U.S.C. § 1635(f).[FN6] Section 1635(f) is an absolute statute of repose barring "any [TILA rescission] claims filed more than three years after the consummation of the transaction." *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1164 (9th Cir.2002) (citing *King*, 784 F.2d at 913). That is, the three-year period is not subject to equitable tolling. *See Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412, 118 S.Ct. 1408, 140 L.Ed.2d 566 (1998) (stating that " § 1635(f) completely extinguishes the right of rescission at the end of the 3–year period," even if a lender failed to make the required disclosures).

Plaintiffs' TILA claim for rescission as to MERS is based on a March 10, 2006 loan transaction. Plaintiffs filed this action over four years later. Given that equitable tolling cannot apply to this

claim, any amendment seeking rescission would be futile.

Accordingly, the court DISMISSES Plaintiffs' claim for rescission pursuant to TILA as time-barred without leave to amend. This dismissal is as to all Defendants.

D. Count V—RESPA

Count V alleges a violation of RESPA. Specifically, the Complaint alleges against all Defendants that (1) "the fees for this loan were ... egregious," Compl. ¶ 74, (2) a Yield Spread Premium was "excessive," *id.* ¶ 75, and (3) "Defendants, and each of them, did give, provide or receive a hidden fee or thing of value for the referral of settlement business, including but not limited to, kickbacks, hidden referral fees, and/or Yield Spread Premiums." *Id.* ¶ 76. The Complaint, therefore, is making a RESPA claim under 12 U.S.C. § 2607, for illegal fees at closing.[FN7]

[16] Initially, to the extent that Count V claims Defendants received "excessive" fees, that claim under RESPA fails as a matter of law— § 2607 does not prohibit "excessive" fees. *See Martinez v. Wells Fargo Home Mortg., Inc.*, 598 F.3d 549, 554 (9th Cir.2010) (concluding that § 2607 "cannot be read to prohibit charging fees, excessive or otherwise, when those fees are for services that were actually performed").

As to other aspects of § 2607, MERS and Old Republic assert that a RESPA claim is time-barred and the allegations otherwise fail to state a claim upon which relief can be granted. The court agrees that the allegations of the Complaint are wholly conclusory and fail to state a claim that is plausible on the face of the Complaint. Further, as pled, the claim appears time-barred.

***8** [17] Specifically, the statute of limitations for a RESPA claim is either one or three years from the date of the violation, depending on the type of violation. The one-year period applies to a claim under § 2607. Specifically, 12 U.S.C. § 2614 provides:

> Any action pursuant to the provisions of section 2605, 2607, or 2608 of this title may be brought in the United States district court or in any other court of competent jurisdiction, for the district in which the property involved is located, or where the violation is alleged to have occurred, within 3 years in the case of a violation of section 2605 of this title and 1 year in the case of a violation of section 2607 or 2608 of this title from the date of the occurrence of the violation....

Although the Ninth Circuit has not addressed the precise issue, other courts—including this court—have found that equitable tolling may apply to a RESPA claim. *See Sakugawa v. IndyMac Bank, F.S.B.*, 2010 WL 4909574, at *4 (D.Haw. Nov. 24, 2010) (citing cases).

As with Plaintiffs' claim for damages under TILA, Plaintiffs brought this action well past either the applicable statute of limitations for RESPA violations. Any illegal fee would have occurred in 2006; this action was filed in 2010. Moreover, the Complaint includes no allegations suggesting that equitable tolling may apply.

Accordingly, the court DISMISSES Plaintiffs' RESPA claim. The dismissal is without leave to amend as to (1) any claim under § 2607 asserting a fee was "excessive" or otherwise for services that were actually performed, or (2) any claim under §§ 2603 or 2604. Allowing such amendments would be futile. *See Martinez*, 598 F.3d at 554, 557. Otherwise, the dismissal is with leave to amend. Again, the dismissal—without leave to amend as to claims for "excessive" fees or under §§ 2603 or 2604, and with leave to amend otherwise—is as to all Defendants.

E. Count VI—Rescission

[18] Count VI asserts that "Plaintiffs are entitled to rescind the loan for all of the foregoing reasons: 1) TILA Violations; 2) RESPA; 3) Fraudulent Concealment; 4) Deceptive Acts and Practices

(UDAP) and 5) Public Policy Grounds, each of which provides independent grounds for relief." Compl. ¶ 79. Like Counts I and II, generally "[r]escission is only a remedy, not a cause of action." *Bischoff v. Cook*, 118 Hawai'i 154, 163, 185 P.3d 902, 911 (Haw.App.2008). The remedy thus "rises or falls with [the] other claims." *Ballard*, 2010 WL 5114952, at *8. Indeed, as alleged here, Count VI specifically acknowledges that it is seeking rescission based upon "independent grounds for relief."

Accordingly, Count VI is DISMISSED without leave to amend. The court addresses the merits of rescission separately, when addressing any independent claims allowing rescission. The dismissal is as to all Defendants.

F. Count VII—Unfair and Deceptive Acts and Practices

[19] Count VII alleges that all Defendants are liable for Unfair and Deceptive Acts and Practices "by consummating an unlawful, unfair, and fraudulent business practice, designed to deprive Plaintiffs of [their] home, equity, as well as [their] past and future investment." Compl. ¶ 86. Plaintiffs allege that Defendants "failed to undergo a diligent underwriting process," failed to disclose matters, should not have approved their loan because they could not afford it, and had "knowledge of these facts, circumstances and risks but failed to disclose them." *Id.* ¶ 84. By alleging "Unfair and Deceptive Acts and Practices," Plaintiffs are making a claim under HRS § 480–2(a) ("Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.").

***9** Without more, Plaintiffs' theory of an unfair practice does not state a claim under § 480–2. In granting summary judgment against a borrower on a § 480–2 claim, this court in *McCarty v. GCP Management, LLC*, 2010 WL 4812763 (D.Haw. Nov. 17, 2010), relied on the rule that "lenders generally owe no duty to a borrower 'not to place borrowers in a loan even where there was a foreseeable risk borrowers would be unable to repay.' " *Id.* at *6 (quoting *Champlaie v. BAC Home Loans Servicing, LP*, 706 F.Supp.2d 1029, 1061 (E.D.Cal.2009)).

And, as cited in *McCarty*, ample authority supports this proposition. *See Sheets v. DHI Mortg. Co.*, 2009 WL 2171085, at *4 (E.D.Cal. July 20, 2009) (reasoning that no duty exists "for a lender 'to determine the borrower's ability to repay the loan.... The lender's efforts to determine the creditworthiness and ability to repay by a borrower are for the lender's protection, not the borrower's.' ") (quoting *Renteria v. United States*, 452 F.Supp.2d 910, 922–23 (D.Ariz.2006) (finding that borrowers "had to rely on their own judgment and risk assessment to determine whether or not to accept the loan")). "[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." *Nymark v. Heart Fed. Sav. & Loan Ass'n*, 231 Cal.App.3d 1089, 283 Cal.Rptr. 53, 56 (1991). Nothing in the Complaint indicates that any Defendant "exceed [ed] the scope of [a] conventional role as a mere lender of money." The claims fails on that basis alone.

MERS also argues that this claim is barred by the applicable four-year statute of limitations. *See* HRS § 480–24(a) (barring a chapter 480 claim "unless commenced within four years after the cause of action accrues"). Because the cause of action here accrued on March 14, 2006, the four-year statute of limitations has run unless Plaintiffs can take benefit of tolling the statute of limitations. *See, e.g., Rundgren v. Bank of N.Y. Mellon*, ––F.Supp.2d ––––, –––– – ––––, 2011 WL 768800, at *5–7 (D.Haw. Feb. 28, 2011) (finding that claims brought pursuant to Ch. 480 may take benefit of the fraudulent concealment doctrine to toll the statute of limitations). The § 480–2 claim was filed over six months late, and the Complaint includes no allegations suggesting that equitable tolling may apply. The court, however, cannot conclude at this time that further amendment is futile

and will allow Plaintiffs an opportunity to amend Count VII to attempt to state a § 480–2 claim.

Accordingly, Count VII is DISMISSED with leave to amend. The dismissal is as to all Defendants.

G. Count VIII—Breach of Fiduciary Duty

[20] Count VIII alleges, without distinguishing between various Defendants, that Defendants owe Plaintiffs a fiduciary duty and breached that duty by failing "to advise or notify Plaintiffs ... that Plaintiffs would or had a likelihood of defaulting on the loan." Compl. ¶ 89. Defendants also allegedly breached a fiduciary duty owed to Plaintiffs by "exercis[ing] a greater level of loyalty to each other by providing each other with financial advantages under the loan without disclosing their relation to one another[.]" *Id.* ¶ 90. Plaintiffs also allege that failure to provide material disclosures "while in the capacity of [Plaintiffs'] Lender" and "fail[ure] to fully comply with TILA and RESPA ... are violations of a fiduciary responsibility owed to Plaintiffs by Defendants." *Id.* ¶¶ 91–92.

***10** These allegations fail to state a claim against MERS and any Defendant lenders. In *McCarty*, this court set forth a myriad of case law for the well-settled proposition that generally a borrower-lender relationship is not fiduciary in nature:

> Lenders generally owe no fiduciary duties to their borrowers. *See, e.g., Nymark v. Heart Fed. Sav. & Loan Ass'n* [231 Cal.App.3d 1089], 283 Cal.Rptr. 53, 54 n. 1 (Cal.App.1991) ("The relationship between a lending institution and its borrower-client is not fiduciary in nature."); *Miller v. U.S. Bank of Wash.* [72 Wash.App. 416], 865 P.2d 536, 543 (Wash.App.1994) ("The general rule ... is that a lender is not a fiduciary of its borrower."); *Huntington Mortg. Co. v. DeBrota*, 703 N.E.2d 160, 167 (Ind.App.1998) ("A lender does not owe a fiduciary duty to a borrower absent some special circumstances."); *Spencer v. DHI Mortg. Co.*, 642 F.Supp.2d 1153, 1161 (E.D.Cal.2009) ("Absent 'special circumstances' a loan transaction 'is at arms-length and there is no fiduciary relationship between the borrower and lender.' ") (quoting *Oaks Mgmt. Corp. v. Super. Ct.* [145 Cal.App.4th 453], 51 Cal.Rptr.3d 561 (Cal.App.2006)); *Ellipso, Inc. v. Mann*, 541 F.Supp.2d 365, 373 (D.D.C.2008) ("[T]he relationship between a debtor and a creditor is ordinarily a contractual relationship ... and is not fiduciary in nature.") (citation omitted).
>
> *McCarty*, 2010 WL 4812763, at *5.

Given this rule, Plaintiffs fail to state a claim for breach of fiduciary duty against MERS and several of the other Defendants (First Magnus, Bank of America, and Countrywide).[FN8] As with a § 480–2 claim, nothing in the Complaint alleges "special circumstances" that might impose a fiduciary duty in this mortgage-lending situation against these Defendants. *See, e.g., Shepherd v. Am. Home Mortg. Servs., Inc.*, 2009 WL 4505925, at *2 (E.D.Cal. Nov. 20, 2009) ("Plaintiff cites no authority for the proposition that AHMSI or Deutsche owed a duty to not cause plaintiff harm in their capacities as servicer and [successor] to the original lender in ownership of the loan, respectively.... In fact, loan servicers do not owe a duty to the borrowers of the loans they service.").

[21][22] As to Old Republic, a title and escrow company, the "[g]eneral rule is that [an] escrow depository occupies [a] fiduciary relationship with parties to [the] escrow agreement or instructions and must comply strictly with the provisions of such agreement or instructions." *Stanton v. Bank of Am., N.A.*, 2010 WL 4176375, at *3 (D.Haw. Oct. 19, 2010) (quoting *DeMello v. Home Escrow*, 4 Haw.App. 41, 47, 659 P.2d 759, 763 (1983) (citation omitted)). But, "an escrow holder has no general duty to police the affairs of its depositors; rather, an escrow holder's obligations are limited to faithful compliance with [the depositors'] instructions." *Id.* (quoting *Summit Fin. Holdings, Ltd. v. Continental Lawyers Title, Co.*, 27 Cal.4th 705, 711, 117 Cal.Rptr.2d 541, 41 P.3d 548 (Cal.2002)). The Hawaii Supreme Court has found that where a

party to a transaction in which an escrow is utilized engages in fraudulent activity, an escrow is not liable when it acts in good faith and does not have actual knowledge of wrongdoing. *Matter of Bishop, Baldwin, Rewald, Dillingham & Wong, Inc.*, 69 Haw. 523, 529, 751 P.2d 77, 78, 81 (Haw.1988). The Complaint includes no allegations supporting that Old Republic breached any fiduciary duty to Plaintiffs, by, for example, failing to follow the provisions of any particular agreement or instructions.

***11** Accordingly, Count VIII is DISMISSED with leave to amend as to all Defendants.

H. Count IX—Unconscionability

[23] MERS and Old Republic next argue that Count IX entitled "Unconscionability–UCC–2–3202 (sic 2–302)" fails to state a claim. Count IX asserts that courts may refuse to enforce a contract or portions of a contract that are unconscionable, Compl. ¶ 97, and courts are to give parties an opportunity to present evidence regarding a contract's "commercial setting, purpose and effect" to determine if a contract is unconscionable. *Id.* ¶ 98. It alleges the following facts:

> Here, based on the deception, unfair bargaining position, lack of adherence to the regulations, civil codes and federal standards that the Defendants were required to follow; coupled with the windfall that the Defendants reaped financially from their predatory practices upon Plaintiff's (sic), the court may find that the loan agreement and trust deed are unconscionable and of no force or effect.
>
> *Id.* ¶ 99.

"Unconscionability" is generally a defense to the enforcement of a contract, and is not a proper claim for affirmative relief. *See, e.g., Gaitan v. Mortg. Elec. Registration Sys.*, 2009 WL 3244729, at *13 (C.D.Cal. Oct. 5, 2009) ("Unconscionability may be raised as a defense in a contract claim, or as a legal argument in support of some other claim, but it does not constitute a claim on its own."); *Carey v. Lincoln Loan Co.*, 203 Or.App. 399, 125 P.3d 814, 829 (2005) ("[U]nconscionability is not a basis for a separate claim for relief."); *see also Barnard v. Home Depot U.S.A., Inc.*, 2006 WL 3063430, at *3 n. 3 (W.D.Tex. Oct. 27, 2006) (citing numerous cases for the proposition that neither the common law or the UCC allows affirmative relief for unconscionability).

[24] To the extent unconscionability can be addressed affirmatively as part of a different—that is, independent—cause of action, such a claim "is asserted to prevent the enforcement of a contract whose *terms* are unconscionable." *Skaggs v. HSBC Bank USA, N.A.*, 2010 WL 5390127, at *3 (D.Haw. Dec. 22, 2010) (emphasis in original).[FN9] *Skaggs* dismissed a "claim" for unconscionability because it challenged only conduct such as "obtaining mortgages under false pretenses and by charging Plaintiff inflated and unnecessary charges," and "failing to give Plaintiff required documents in a timely manner," but not any specific contractual term. *Id.* Likewise, Count IX fails to challenge any particular term as unconscionable in an affirmative claim where the unconscionable terms may be relevant to that particular claim. Further, as to Old Republic, it was not part of the contract process but rather only the escrow agent.

Accordingly, Count IX is DISMISSED with leave to amend as to all Defendants except Old Republic. The claim against Old Republic is dismissed without leave to amend.

I. Count X—Predatory Lending

MERS and Old Republic also challenge Count X entitled "Predatory Lending." Count X repeats a variety of allegations (*e.g.*, failure to disclose terms and conditions or material facts, targeting of unsophisticated persons, unfair loan terms, and improper underwriting) that form the basis of other causes of action.

***12** Courts, however, have found that there is

no common law claim for "predatory lending." *See Haidar v. BAC Home Loans Servicing, LP*, 2010 WL 3259844, at *2 (E.D.Mich. Aug. 18, 2010) (agreeing that "there is no cause of action for predatory lending"); *Pham v. Bank of Am., N.A.*, 2010 WL 3184263, at *4 (N.D.Cal. Aug. 11, 2010) ("There is no common law claim for predatory lending"). To the extent such "predatory" practices provide a claim for relief, they appear to be grounded in another statutory or common-law cause of action such as fraud—the term "predatory lending" is otherwise too broad. *See Vissuet v. Indymac Mortg. Servs.*, 2010 WL 1031013, at *3 (S.D.Cal. Mar. 19, 2010) (dismissing claim for "predatory lending" with leave to amend—agreeing that the term is expansive and fails to provide proper notice, where Defendants "are left to guess whether this cause of action is based on an alleged violation of federal law, state law, common law, or some combination"); *see also Hambrick v. Bear Stearns Residential Mortg.*, 2008 WL 5132047, at *2 (N.D.Miss. Dec. 5, 2008) (dismissing a claim for predatory lending where plaintiffs failed to cite any "[state] or applicable federal law, precedential or statutory, creating a cause of action for 'predatory lending.' The court is unaware of any such cause of action.").

[25] The court finds these authorities persuasive. Count X fails to state a cause of action. The court does not mean to imply that "predatory lending" is proper and cannot form the basis of some cause of action. But Hawaii courts have not recognized "predatory lending" itself as a common-law cause of action, and the precise elements of such a claim are undefined. The ambiguous term "predatory lending" potentially encompasses a wide variety of types of alleged wrongdoing. Recognizing a cause of action here would thus fail to provide proper notice. *See Vissuet*, 2010 WL 1031013, at *3 .

Accordingly, Count X is DISMISSED with leave to amend to allow an opportunity for Plaintiffs to attempt to state a cause of action based on specific activities (which others might otherwise describe as "predatory") under a recognized statutory or common-law theory as to all Defendants except Old Republic. The dismissal as to Old Republic is without leave to amend because as an escrow agent, Old Republic was not involved in the transaction as a lender and therefore its acts will not support such claim.

J. Count XI—Quiet Title

[26] Count XI alleges that Defendants have "no legal or equitable right, claim, or interest in the Property," Compl. ¶ 113, and therefore Plaintiffs are entitled to a declaration that "the title to the Subject Property is vested in Plaintiff's (sic) alone[.]" *Id.* ¶ 114.

The court infers that Plaintiffs are making a claim under HRS § 669–1(a) ("[Quiet title] [a]ction may be brought by any person against another person who claims, or who may claim adversely to the plaintiff, an estate or interest in real property, for the purpose of determining the adverse claim."). The court agrees with MERS and Old Republic that Plaintiffs have not alleged sufficient facts regarding interests of various parties to make out a cognizable claim for "quiet title." Plaintiffs have merely alleged elements of § 669–1, and thus the Count fails to state a claim. *See Iqbal*, 129 S.Ct. at 1949 ("A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action' " is insufficient.).

***13** [27] Further, in order to assert a claim for "quiet title" against a mortgagee, a borrower must allege they have paid, or are able to tender, the amount of indebtedness. "A basic requirement of an action to quiet title is an allegation that plaintiffs 'are the rightful owners of the property, *i.e.*, that they have satisfied their obligations under the deed of trust.' " *Rosenfeld v. JPMorgan Chase Bank, N.A.*, 732 F.Supp.2d 952, 975 (N.D.Cal.2010) (quoting *Kelley v. Mortg. Elec. Registration Sys.*, 642 F.Supp.2d 1048, 1057 (N.D.Cal.2009)). "[A] borrower may not assert 'quiet title' against a mortgagee without first paying the outstanding debt on

the property." *Id.* (applying California law- *Miller v. Provost*, 26 Cal.App.4th 1703, 1707, 33 Cal.Rptr.2d 288, 290 (1994) ("a mortgagor of real property cannot, without paying his debt, quiet his title against the mortgagee") (citation omitted), and *Rivera v. BAC Home Loans Servicing, L.P.*, 2010 WL 2757041, at *8 (N.D.Cal. July 9, 2010)).

Applying this law here, which the court finds persuasive, Plaintiffs have not indicated that they have paid their outstanding loan balance, much less that they are able to do so. In short, they fail to state a claim for quiet title.

Accordingly, Count XI is DISMISSED with leave to amend as to all Defendants except Old Republic. As to Old Republic, this dismissal is without leave to amend because as an escrow agent, it is not asserting any right to the subject property.

K. Count XII—Lack of Standing (MERS)

Count XII, entitled "Lack of Standing; Improper Fictitious Entity" fails to state a claim because a claim for "lack of standing" makes no sense against a defendant. Rather, standing is a requirement for a plaintiff in order to proceed in a lawsuit.

Count XII alleges generally that MERS is an "artificial entity" "designed to circumvent certain laws and other legal requirements dealing with mortgage loans." Compl. ¶ 118. Plaintiffs assert that an assignment of the note or mortgage to MERS is illegal, *id.* ¶ 119, and therefore "MERS has no legal standing to foreclose." *Id.* ¶ 122. Plaintiffs appear to be alleging that MERS may not foreclose, or has improperly foreclosed, because it is not a holder of the note. If this is the purpose of Count XII, the court will allow Plaintiffs an opportunity to clarify the factual allegations as to MERS, but not to do so as now written in this Count. Plaintiffs may, if appropriate, attempt in an Amended Complaint to assert alleged illegalities as to MERS' status in an independent cause of action—not in a count entitled "Lack of Standing; Improper Fictitious Entity."

Accordingly, Count XII is DISMISSED with leave to amend as to MERS only.

L. Plaintiffs' Opposition

Plaintiffs filed an Opposition to MERS' and Old Republic's Motions, but it is largely unhelpful because it fails to address the specific claims of the Complaint. Instead, the Opposition asserts in conclusory fashion that the pleadings are sufficiently detailed to give notice to Defendants and that equitable remedies can exist even where claims are otherwise time-barred. Contrary to Plaintiffs' assertions, as explained above, the allegations in the Complaint do not meet the *Iqbal* requirements of including "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Iqbal*, 129 S.Ct. at 1949 (citation omitted). Further, Plaintiffs are mistaken in their assertion that they can receive equitable relief where they cannot state a valid claim for relief. The court therefore rejects that Plaintiffs' Opposition raises any argument that counters the analysis above explaining why each of the claims of the Complaint must be dismissed.

***14** Further, after the hearing, Plaintiffs filed an "Affidavit" on March 8, 2011. To the extent this Affidavit is directed to Defendants' Motion to Dismiss, it is improper—Plaintiffs may not file additional documents in support of this Motion without leave of court. Even considering this Affidavit, however, it does not change the analysis above. In their Affidavit, Plaintiffs express frustration regarding how long the loan modification process takes, and assert that Defendants have committed fraud in foreclosing on the subject property. As explained above, however, the Complaint does not include a claim for fraud.

The court will nonetheless grant leave for Plaintiffs to include a fraud claim in an amended complaint. Should Plaintiffs choose to file an amended complaint with a fraud claim, they must allege the circumstances of fraud with particularity as required by Federal Rule of Civil Procedure 9(b). Plaintiffs must explain the time, place, and nature

of the alleged fraud, and how each Defendant participated in the fraud. *See Destfino v. Kennedy*, 630 F.3d 952, 958 (9th Cir.2011) (citation omitted); *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547–48 (9th Cir.1994) (en banc).

V. *CONCLUSION*

The Motions are GRANTED and the Complaint is DISMISSED with leave to amend as to specific counts as explained above.

To be clear, Plaintiffs are granted leave to amend as to all Defendants as to Counts V (for violating 12 U.S.C. § 2607, if equitably tolled), VII (for unfair and deceptive trade practices, if equitably tolled), and VIII. Plaintiffs may also bring a separate claim for fraud. Plaintiffs are further granted leave to amend Counts IV (for damages under TILA, if equitably tolled), and IX through XI as to all Defendants except Old Republic, and are granted leave to amend Count XII as to MERS. But Counts I, II, III, IV (for rescission against all Defendants and for damages against Old Republic), V, and VI are DISMISSED *without* leave to amend.

Plaintiffs are GRANTED until April 8, 2011 to file an Amended Complaint attempting to cure the identified deficiencies. If Plaintiffs choose to file an Amended Complaint they must clearly state how each named Defendant has injured them. In other words, Plaintiffs should explain, in clear and concise allegations, what each Defendant did and how those specific facts create a plausible claim for relief. Plaintiffs should not include facts that are not directly relevant to their claims. In other words, to provide proper notice, the Amended Complaint should allege necessary facts against specific Defendants, *i.e.*, tie each claim to a Defendant or specific Defendants and explain how each Defendant is liable. Failure to file an Amended Complaint by April 8, 2011 will result in automatic dismissal of this action as to all Defendants.

Plaintiffs are also notified that an Amended Complaint supercedes the prior Complaint and must be complete in itself without reference to prior or superceded pleadings. *E.g.*, *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir.1987) (citation omitted). That is, the Amended Complaint, if any, must stand alone, without reference to prior pleadings or documents in the record.

***15** IT IS SO ORDERED.

FN1. The Complaint often improperly fails to distinguish between Defendants as to alleged causes of action. To provide proper notice, any Amended Complaint should allege necessary facts against specific Defendants, *i.e.*, tie each claim to a Defendant and explain how each Defendant is liable.

FN2. Bank of America, Countrywide, and First Magnus have not appeared in the action.

FN3. Multiple complaints have been filed with the court by pro se plaintiffs, all alleging the same twelve causes of action and attaching a "Forensic Audit Report" by Francha Services, LLC.

FN4. The Complaint also mentions the Equal Opportunity Credit Act, Compl. ¶ 25; the "Fair Lending/Fair Debt Collection Act," *id.* ¶ 11; and the Federal Trade Commission Act, *id.* ¶¶ 11, 40, and makes generalized allegations regarding "fraud" or "fraudulent" conduct. *Id.* ¶¶ 43, 57, 86, 99, 100. Plaintiffs, however, assert no claims for relief (*i.e.*, no Counts) for any alleged violations of those federal laws or for a stand-alone fraud claim. The Complaint as written therefore fails to state a claim for violations of those statutes or for fraud. *Cf. Bautista v. Los Angeles County*, 216 F.3d 837, 840–41 (9th Cir.2000) ("Courts have required separate counts where multiple claims are asserted, where they arise out of separate transactions or occurrences, and where separate statements will facilitate a clear presentation.") (citations omitted).

FN5. The Declaratory Judgment Act provides in pertinent part:

> a) In a case of actual controversy within its jurisdiction ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a).

FN6. A transaction is "consummated" when a consumer becomes contractually obligated. *See Jackson v. Grant,* 890 F.2d 118, 120 (9th Cir.1989) (citing 12 C.F.R. § 226.2(a)(13)).

FN7. Any possible claims for violations of 12 U.S.C. §§ 2603 or 2604 for failing to provide a "good faith estimate" or "uniform settlement statement" necessarily fail because there is no private cause of action for a violation of those sections. *See Martinez v. Wells Fargo Home Mortg., Inc.*, 598 F.3d 549, 557 (9th Cir.2010).

FN8. Unlike lenders, brokers generally owe fiduciary duties to their clients. *See, e.g.*, *Mortensen v. Home Loan Ctr., Inc.*, 2009 WL 113483, at *4 (D.Ariz. Jan. 16, 2009) (citing cases indicating that mortgage brokers have fiduciary duties to their clients); *Brewer v. Indymac Bank,* 609 F.Supp.2d 1104, 1119 (E.D.Cal.2009) (same); *cf. Han v. Yang,* 84 Hawai'i 162, 172, 931 P.2d 604, 614 (Haw.App.1997) ("A real estate broker is a fiduciary and consequently must exercise the 'utmost good faith, integrity, honesty, and loyalty,' and must diligently uphold a legally imposed duty of due care.") (citations omitted). Because Plaintiffs do not assert any allegations establishing that any of the Defendants were acting in the capacity as a broker, the court need not determine if Plaintiffs could state a claim against a broker.

FN9. In *Skaggs,* this court noted in dicta that "at least one Hawaii court has addressed unconscionability when raised as a claim seeking rescission." 2010 WL 5390127, at *3 n. 2 (citing *Thompson v. AIG Hawai'i Ins. Co.*, 111 Hawai'i 413, 142 P.3d 277 (2006)). The court did not mean to suggest that an affirmative claim for "unconscionability" without more is a proper cause of action. Even in *Thompson,* the operative complaint did not assert a separate *count* for rescission or unconscionability. *See Thompson,* 111 Hawai'i at 417, 142 P.3d at 281 (indicating the specific counts were for negligence, fraud, breach of duty, and unfair and deceptive trade practices under HRS 480–2). In *Thompson,* the remedy of rescission was based on an independent claim.

D.Hawai'i,2011.
Marzan v. Bank of America
--- F.Supp.2d ----, 2011 WL 915574 (D.Hawai'i)

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Not Reported in F.Supp.2d, 2009 WL 928867 (D.Neb.)
(Cite as: 2009 WL 928867 (D.Neb.))

United States District Court,
D. Nebraska.
PLAN PROS, INC., Plaintiff,
v.
Brian ZYCH, d/b/a Zych Construction, Tracy Zych, Zych Construction L.L.C., Kenneth Tinnes, d/b/a KT Design and Ken Tinnes Residential Design, CBS Home Real Estate Company, Wilson Martinez and Cora Martinez, Defendants.

No. 8:08CV125.
March 31, 2009.

Dana A. Lejune, Lejune Law Firm, Houston, TX, for Plaintiff.

Joseph E. Jones, Patrick S. Cooper, Fraser, Stryker Law Firm, Brent W. Nicholls, Douglas W. Ruge, II, Ruge Law Firm, Omaha, NE, for Defendants.

MEMORANDUM AND ORDER

LYLE E. STROM, Senior District Judge.

I. INTRODUCTION

***1** This matter is before the Court on defendants Wilson Martinez and Cora Martinez's motion to dismiss plaintiff's amended complaint pursuant to Fed.R.Civ.P. 12(b)(6) (Filing No. 59) and on defendants Brian Zych, Tracy Zych, and Zych Construction, L.L.C.'s (the "Zych Defendants") and the Martinezes' motion to strike plaintiff's expert witness designation (Filing No. 70). Upon review of the motion, the plaintiff's first amended complaint, the briefs and evidentiary submissions of the parties, and the applicable law, the Court finds that the motion to dismiss should be granted and the motion to strike the expert witness designation should be denied.

II. BACKGROUND

The following facts are presumed to be true for the purposes of this motion. Plan Pros, Inc. ("Plan Pros") is in the business of publishing architectural house plans (Pl.'s First Amended Compl., Filing No. 56, at ¶ 10). Among the plans published by Plan Pros are the "Leftwich" and "Elway" designs, in which it has valid and persisting copyrights. (*Id.* at ¶¶ 10, 13, 14.) In early summer, 2007, Plan Pros became aware that defendants Brian Zych, Zych Construction, L.L.C., and/or Kenneth Tinnes, had copied from at least one of its plans, that Brian Zych and Zych Construction, L.L.C., had built a house conforming to the copied plan, and that Tracy Zych and CBS Home Real Estate Company ("CBS") had begun to advertise it for sale. (*Id.* at ¶ 15.) Plan Pros sent the Zych Defendants a cease and desist letter, after which Brian Zych asked the attorney for CBS to try to resolve Plan Pros's concerns on the telephone. (*Id.* at ¶¶ 17, 19.) Later, Brian Zych attempted to purchase construction and promotional licenses from a company which markets Plan Pros's designs, but the request to purchase was declined. (*Id.* at ¶ 18.) Traci Zych and CBS sold the infringing structure to Wilson Martinez and Cora Martinez on or about February 8, 2008. (*Id.* at ¶ 19.)

Plan Pros sued the defendants on March 20, 2008, alleging willful and nonwillful copyright infringement (Filing No. 1). Plan Pros filed its first amended complaint for copyright infringement in this matter on November 24, 2008 (Filing No. 56). The only mention of Wilson or Cora Martinez in plaintiff's first amended complaint is that they purchased a house (*Id.* at ¶ 19) and that they be "permanently enjoined from leasing, renting, selling and/or otherwise placing into the stream of commerce the infringing structures...." (*Id.* at 39). On December 12, 2008, three days before this Court's deadline of December 15, 2008, Plan Pros filed its expert witness disclosure in this case. The Zych Defendants and the Martinezes object to Plan Pros's disclosure as being incomplete.

III. DISCUSSION

A. Motion to Dismiss Standard

After a plaintiff files a complaint, the Federal Rules of Civil Procedure permit certain defenses to be asserted by motion. Fed.R.Civ.P. 12(b). Among these defenses is the motion to dismiss for failure to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6). When considering a motion to dismiss under Rule 12(b)(6), well-pled allegations are considered to be true and are viewed in the light most favorable to the plaintiff. *Riley v. St. Louis County,* 153 F.3d 627, 629 (8th Cir.1998); *Carney v. Houston,* 33 F.3d 893, 894 (8th Cir.1994) . The issue in resolving a motion to dismiss is whether the plaintiff is entitled to offer evidence in support of his claim, not whether he will ultimately prevail. *United States v. Aceto Chems. Corp.,* 872 F.2d 1373, 1376 (8th Cir.1989). In viewing the facts in the light most favorable to the plaintiff, the Court must determine whether the complaint states any valid claim for relief. *Jackson Sawmill Co. v. United States,* 580 F.2d 302, 306 (8th Cir.1978), *cert. denied,* 439 U.S. 1070 (1979). Thus, a dismissal under Rule 12(b)(6) is likely to be granted "only in the unusual case in which a plaintiff includes allegations which show on the face of the complaint that there is some insuperable bar to relief." *Jackson Sawmill,* 580 F.2d at 306. "At the very least the complaint must contain facts which state a claim as a matter of law and must not be conclusory." *Briehl v. General Motors Corp.,* 172 F.3d 623, 627 (8th Cir.1999).

***2** Although the complaint must contain facts, an extensive factual statement is unnecessary. "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.' " *Erickson v. Pardus,* 551 U.S. 89, ----, 127 S.Ct. 2197, 2200 (2007) (citing *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, ----, 127 S.Ct. 1955, 167 (2007)). "In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Erickson,* 127 S.Ct. at 2200 (citing *Twombly,* 127 S.Ct. at 1955). Although the truth of factual allegations is accepted for the purposes of ruling on a motion to dismiss, courts give "no effect to conclusory allegations of law. The plaintiff must assert facts that affirmatively and plausibly suggest that the pleader has the right he claims ... rather than facts that are merely consistent with such a right." *Stalley v. Catholic Health Initiatives,* 2007 WL 4165751, *2 (8th Cir.2007) (internal citations omitted).

B. Wilson and Cora Martinez

Plan Pros admits that it did not sue the Martinezes for infringement (Filing No. 67, at 3). Instead, it argues that it is entitled to injunctive relief against them based solely on the fact of their ownership of an infringing structure. However, in order to be entitled to injunctive relief, a plaintiff must establish, among other things, that it has a valid claim against the defendant. *See Avery Dennison Corp. v. Sumpton,* 189 F.3d 868, 881 (9th Cir .1999) ("Actual success on the merits of a claim is required for a permanent injunction."). Here, Plan Pros has not asserted any claim against the Martinezes, and therefore is not entitled to any remedy. *See Klay v. United Healthgroup, Inc.,* 376 F.3d 1092, 1097 n. 5 (11th Cir.2004) ("[A] party may not obtain a 'traditional' injunction if he lacks a cognizable, meritorious claim."). Because Plan Pros does not allege a cause of action against the Martinezes for anything other than injunctive relief, the Court finds that the Martinezes should be dismissed from this case. Moreover, because no independent cause of action for injunction exists, it is unnecessary for the Court to consider how the factors articulated in *Dataphase Sys., Inc. v. C L Sys., Inc.,* 640 F.2d 109 (8th Cir.1981), would apply in this case if a cause of action had been asserted. Plan Pros argues that this motion is premature because although "the Martinezes *appear* to claim that they bought the house not knowing it was an infringing structure" they may have actually known about the infringement (Filing No. 67, at 2-3 (emphasis in original)). Plan Pros "requests leave of Court to take discovery and develop the facts on this issue." (*Id.*

at 3.) However, this lawsuit has been pending for over a year, and nothing has prevented Plan Pros from conducting discovery on this issue to date. The Court therefore declines to grant leave for further discovery on this issue. Lacking fair notice of the claims against them, Wilson and Cora Martinez will be dismissed as defendants.

C. Motion to Strike Expert Witness Designation

***3** The Zych Defendants and the Martinezes move to strike the expert designation of Herbert Lyon (Filing No. 71). The Court notes that Plan Pros has stated that Lyon "will be used solely to rebut defendants' experts' opinions concerning 'deductible expenses, and elements of profits attributable to factors other than the copyrighted work.' " (Filing No. 74, at 1.) The Court finds this proposed use of Lyon by Plan Pros to be uncontroversial. It is similarly clear that Lyon may not testify regarding matters outside the scope of rebuttal which were not properly disclosed to the defendants pursuant to Fed.R.Civ.P. 26. Matters attending to the scope of Lyon's rebuttal testimony are more appropriately addressed when the evidence is introduced at trial. The motion to strike Lyon's testimony, therefore, will be denied as overbroad without prejudice to reassertion upon appropriate motion at a later point in this litigation.

IV. CONCLUSION

For the foregoing reasons, the motion to dismiss Wilson and Cora Martinez from this action should be granted and the motion to strike plaintiff's expert witness designation should be denied. Accordingly,

IT IS ORDERED:

1) Defendants Wilson and Cora Martinez's motion to dismiss plaintiff's amended complaint (Filing No. 59) is granted; Wilson Martinez and Cora Martinez are terminated as party defendants herein;

2) Defendants' motion to strike plaintiff's expert witness designation (Filing No. 70) is denied;

3) Defendants' motion to file affidavit under seal (Filing No. 76) is granted.

D.Neb.,2009.
Plan Pros, Inc. v. Zych
Not Reported in F.Supp.2d, 2009 WL 928867 (D.Neb.)

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