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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

DONALD CHARLES and THERESA M. BLAIR,

Plaintiffs,

v.

OCWEN LOAN SERVICING, LLC, NATIONWIDE CREDIT INC., U.S. BANK NATIONAL ASSOCIATION, and DEUTSCHE BANK NATIONAL TRUST COMPANY, as indenture trustee under the indenture dated as of March 1, 2006 Accredited Mortgage Loan Trust 2006-1,

Defendants.

No. 1:15-cv-01451-DAD-JLT

ORDER GRANTING MOTION TO DISMISS, DISMISSING THE FIRST AMENDED COMPLAINT WITH PREJUDICE, DENYING PLAINTIFF'S MOTION FOR LEAVE TO AMEND AND DIRECTING CLERK TO CLOSE CASE

(Doc. Nos. 10, 15, 20)

Plaintiffs filed a complaint in the instant case on September 24, 2015. (Doc. No. 1.) Following a motion to dismiss filed by defendants Ocwen Loan Servicing, Nationwide Credit Inc., and U.S. Bank National Association<sup>1</sup> (hereinafter “defendants”) on November 23, 2015 (Doc. No. 4), plaintiffs filed a first amended complaint (“FAC”) on December 4, 2015. (Doc. No. 10.) Defendants filed a motion to dismiss the FAC on December 30, 2015. (Doc. No. 15.) Plaintiffs did not file an opposition to the motion to dismiss. A hearing was held on March 1,

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<sup>1</sup> Defendant Deutsche Bank has not appeared in this matter, presumably because it was not properly served. *See infra*.

1 2016. (Doc. No. 21.) At that hearing pro se plaintiffs Donald Blair and Theresa Blair appeared  
2 telephonically on their own behalf and attorney Nicole King appeared telephonically on behalf of  
3 defendants. For the reasons discussed below, the court will grant defendants' motion to dismiss.<sup>2</sup>

4 **A. Legal Standard**

5 The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the legal  
6 sufficiency of the complaint. *N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir.  
7 1983). "Dismissal can be based on the lack of a cognizable legal theory or the absence of  
8 sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901  
9 F.2d 696, 699 (9th Cir. 1990). A plaintiff is required to allege "enough facts to state a claim to  
10 relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A  
11 claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw  
12 the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v.*  
13 *Iqbal*, 556 U.S. 662, 678 (2009).

14 In determining whether a complaint states a claim on which relief may be granted, the  
15 court accepts as true the allegations in the complaint and construes the allegations in the light  
16 most favorable to the plaintiff. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Love v.*  
17 *United States*, 915 F.2d 1242, 1245 (9th Cir. 1989). In general, pro se complaints are held to less  
18 stringent standards than formal pleadings drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519,  
19 520-21 (1972). However, the court need not assume the truth of legal conclusions cast in the  
20 form of factual allegations. *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th  
21 Cir. 1986). While Rule 8(a) does not require detailed factual allegations, "it demands more than  
22 an unadorned, the defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. A  
23 pleading is insufficient if it offers mere "labels and conclusions" or "a formulaic recitation of the  
24 elements of a cause of action." *Twombly*, 550 U.S. at 555. *See also Iqbal*, 556 U.S. at 676  
25 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory  
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27 <sup>2</sup> On February 29, 2016, the day before the hearing on the motion to dismiss, plaintiffs filed a  
28 second amended complaint. (See Doc. Nos. 19, 20.) This filing will be addressed separately  
below.

1 statements, do not suffice.”). Moreover, it is inappropriate to assume that the plaintiff “can prove  
2 facts which it has not alleged or that the defendants have violated the . . . laws in ways that have  
3 not been alleged.” *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*,  
4 459 U.S. 519, 526 (1983).

5 In ruling on a motion to dismiss brought pursuant to Rule 12(b)(6), the court is permitted  
6 to consider material which is properly submitted as part of the complaint, documents that are not  
7 physically attached to the complaint if their authenticity is not contested and the plaintiffs’  
8 complaint necessarily relies on them, and matters of public record. *Lee v. City of Los Angeles*,  
9 250 F.3d 668, 688–89 (9th Cir. 2001). Additionally, the court may consider arguments that the  
10 complaint is time-barred on a motion to dismiss, provided it does so with the required liberality in  
11 construing pleadings in favor of the plaintiffs and does not require the court to consider evidence  
12 beyond the plaintiffs’ initial filings. *See Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th  
13 Cir. 1980); *E.E.O.C. v. ABM Industries Inc.*, 249 F.R.D. 588, 591 (E.D. Cal. 2008). *Compare*  
14 *Bates v. Bankers Life and Cas. Co.*, 993 F. Supp. 2d 1318, 1352 (D. Ore. 2014) (noting a motion  
15 which “require[d] consideration of evidence beyond the four corners of plaintiffs’ complaint” was  
16 better left for summary judgment stage).

## 17 **B. Arguments**

18 Plaintiffs’ FAC raised four claims, one against each defendant, for violation of the Fair  
19 Debt Collection Practices Act (“FDCPA”). (Doc. No. 10, at 1–21.) The FAC alleges each of the  
20 defendants is a debt collector as defined in 15 U.S.C. § 1692a, and that there “is no evidence,  
21 indication or record that the defendant is part of the chain of title for the note and trust deed that  
22 are the subject matter of this complaint.” (*See, e.g.*, Doc. No. 10, at 17.) Further, in their FAC  
23 plaintiffs allege the defendants engaged in “unfair and deceptive collection practices involving  
24 collateral against which the defendant have falsely asserted various rights or claims.” (*Id.*)  
25 According to the FAC, defendants “began sending written communication to the plaintiff stating  
26 [they were] representing various parties having rights under the same trust deed,” and ultimately  
27 “complete[d] a foreclosure sale of the plaintiff’s property.” (*See, e.g., id.* at 18–19.) “The  
28 purported debt is not a debt held or collected under the name of the defendant,” per the FAC, and

1 the defendants made false representations regarding their status as the holder of the notes in  
2 question, the amount allegedly owed, and the defendants' right to foreclose against the plaintiffs'  
3 home. (*See, e.g., id.* at 19.) Further, plaintiffs allege in the FAC that the defendants purportedly  
4 refused to provide an accounting of the unpaid balances, falsely represented the names of the  
5 creditors to whom the debt was owed, threatened to undertake a foreclosure action despite having  
6 no right to do so, falsified documents so they appeared to be issued by "a court, official, or  
7 agency of the United States or the state" (though which state in particular is not specified), and  
8 falsely represented that the plaintiffs' credit accounts were sold for value. (*See, e.g., id.* at 20.)  
9 At hearing on the pending motion to dismiss, plaintiffs clarified that their complaint is essentially  
10 that they did not borrow money from the named defendants, who now represent that they own the  
11 debt and corresponding mortgage and are attempting to collect the debt and/or foreclose on the  
12 property pursuant to the mortgage. Plaintiffs allege that the simple fact defendants are attempting  
13 to do these things violates the FDCPA.

14         Additionally, plaintiffs have raised four claims — again, one against each defendant —  
15 alleging "identity theft." (Doc. No. 10, at 21–44.) These claims, which are substantively  
16 identical, save for the named defendants, allege generally that plaintiffs have "a right to keep  
17 [their] private information and records from third parties" and "a right to rely upon the third party  
18 to only request such information for legitimate and legal purposes." (*See, e.g., Doc No. 10, at*  
19 *36.*) Plaintiffs further allege that each defendant "falsely presented itself and impersonated itself  
20 to the plaintiff as another person to obtain the plaintiff's property." (*See, e.g., id.*) According to  
21 the FAC, defendants "had an affirmative duty to disclose the purposes for which it coerced  
22 plaintiff's [sic] banking, personal, financial and identifying information," and "intentionally and  
23 willfully violated the plaintiff's [sic] rights to privacy and to keep his private and personal records  
24 private." (*See, e.g., id.* at 36–37.) According to plaintiffs' FAC, defendants are "using the  
25 plaintiff's [sic] private identifying information for the purpose of taking the plaintiff's [sic] home  
26 as if [they] had the right as a creditor of the plaintiff to foreclose." (*See, e.g., id.*, at 37.) Further,  
27 per the FAC, the defendants intend "to use the plaintiff's [sic] private information to sell or trade  
28 with third parties." (*See, e.g., id.*)

1 Plaintiffs have cited neither statutes nor cases in these claims for “identity theft.” (*See*  
2 Doc. No. 10, at 21–44.) Plaintiff Donald Blair clarified at the hearing that plaintiffs’ claim for  
3 identity theft is simply based on their allegation that they did not provide defendants with any  
4 personal information, and yet defendants apparently possess it, and therefore identity theft must  
5 have occurred.

6 Finally, the FAC includes one count against Deutsche Bank for damages under 15 U.S.C.  
7 § 1635. (Doc. No. 10, at 45.) For reasons discussed below, all of plaintiffs’ claims against  
8 Deutsche Bank will be dismissed since that defendant has not been served.

9 Defendants move to dismiss the FAC, pursuant to Federal Rule of Civil Procedure  
10 12(b)(6). (*See* Doc. No. 15.) Concerning plaintiffs’ FDCPA claims, defendants maintain they  
11 should be dismissed for four reasons: (1) the plaintiffs’ claims are time-barred; (2) defendants  
12 Ocwen Loan Servicing, Nationwide Credit Inc., and U.S. Bank National Association are not debt  
13 collectors under the FDCPA; (3) foreclosure related conduct is not subject to the FDCPA; and (4)  
14 in their FAC plaintiffs have failed to allege any specific facts which, if proven, would show that  
15 the FDCPA has been violated. (Doc. No. 15, at 12–18.) Concerning plaintiffs’ identity theft  
16 claims, defendants move to dismiss under Rule 12(b)(6), noting that plaintiffs have not specified  
17 any legal theory under which they could recover for “identity theft” against the defendants. (Doc.  
18 No. 15, at 18.)

19 As noted above, plaintiffs have filed no opposition to the pending motion to dismiss,  
20 though they noted at the hearing that they do oppose the granting on of the motion based upon  
21 their comments at the hearing.

## 22 **C. Analysis**

### 23 *1. FDCPA Claims are Time-Barred and Fail to State a Cognizable Claim*

24 Concerning the FDCPA claims, defendants appear to be correct, at least in regard to  
25 defendants Ocwen and Nationwide, that plaintiffs’ claim is time-barred. Title 15 U.S.C. § 1692k  
26 (d) states an action to enforce any liability created by 15 U.S.C. § 1692, *et seq.* must be brought  
27 within one year of the date of the violation. Here, the documents attached to the FAC show  
28 plaintiffs have been receiving documents from Ocwen since at least June 2012 (*see* Doc. No. 10

1 at 49), and from Nationwide since at least October 29, 2013. (*see* Doc. No. 10, at 104.) As  
2 clarified at the hearing, plaintiffs object generally to defendants’ involvement in their mortgage,  
3 since their original mortgage was incurred via a debt from Morgan Stanley, who apparently no  
4 longer owns the debt. If plaintiffs believed the very fact of Ocwen and/or Nationwide’s  
5 involvement in the collection of the debt owed on their mortgage somehow violated the FDCPA,  
6 they should have brought suit against Ocwen by June 2013 and Nationwide by October 2014.  
7 However, the instant action was not filed until September 24, 2015. (Doc. No. 1.) Further, at the  
8 hearing on the motion, plaintiffs conceded they had been submitting requests to Ocwen to modify  
9 the terms of their loan repayment for at least two years prior to filing this action. This concession  
10 does indicate that plaintiffs knew Ocwen was involved in processing the mortgage loan. Because  
11 of this, any claims plaintiffs raised under the FDCPA in relation to the simple fact of Ocwen and  
12 Nationwide’s involvement in plaintiffs’ mortgage are time-barred under the applicable statute.<sup>3</sup>

13 As clarified by defendants’ counsel at the hearing, U.S. Bank National Association is the  
14 investor in plaintiffs’ mortgage, and presumably the current owner of the debt owed. Plaintiffs  
15 have not stated a cognizable claim in their FAC under the FDCPA against U.S. Bank National  
16 Association. Plaintiffs merely asserted boilerplate claims against each of the named defendants in  
17 their FAC and failed even to identify in the documents submitted to the court how U.S. Bank  
18 National Association was involved in their mortgage, let alone provide any specific factual  
19 allegations which, if proven, would show that defendant U.S. Bank National Association violated  
20 any of the FDCPA’s subsections. Since “[t]hreadbare recitals of the elements of a cause of  
21 action, supported by mere conclusory statements, do not suffice” under Rule 12(b)(6), plaintiffs’

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23 <sup>3</sup> The court acknowledges that the FDCPA obviously protects consumers from numerous  
24 different abusive acts of debt collectors, *see* 15 U.S.C. § 1692, *et seq.*, and the simple fact of  
25 plaintiffs’ knowledge of Ocwen and Nationwide’s involvement does not mean *all* future  
26 communications from the defendants are protected from liability under the FDCPA. A cause of  
27 action for a violation of the FDCPA, however, arises at the time the violation occurs, not at the  
28 time the relationship begins. *See, e.g., Nelson v. Equifax Info. Servs., LLC*, 522 F. Supp. 2d 1222,  
1232 (C.D. Cal. 2007). The claim here is subject to dismissal because, as plaintiffs conceded at  
the hearing on the pending motion, it is based solely on the simple fact of Ocwen, *et al.*’s  
involvement with their debt.

1 FAC must be dismissed against defendant U.S. Bank National Association. *See Ashcroft v. Iqbal*,  
2 556 U.S. 662, 678–79 (2009).

3 2. *Plaintiff Fails to State a Cognizable Claim for Identity Theft*

4 Plaintiffs’ claims for “identity theft” are based on their allegation that, because defendants  
5 possess information not directly provided to them by plaintiffs, identity theft must have occurred.<sup>4</sup>  
6 Dismissal under Rule 12(b)(6) can be properly “based on the lack of a cognizable legal theory or  
7 the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacific*  
8 *Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). Plaintiffs have cited no authority in support of  
9 such a claim (*see* Doc. No. 10, at 21–44) and the court has found none. Because the facts alleged  
10 state no cognizable legal theory for recovery based upon identity theft, these claims must be  
11 dismissed.<sup>5</sup>

12 3. *Motion for Leave to Amend is Denied*

13 As mentioned previously, plaintiffs filed a second amended complaint (“SAC”) the day  
14 before the hearing on the motion to dismiss. (Doc. Nos. 19, 20.) As the court advised plaintiffs  
15 at the hearing on the pending motion, Rule 15(a)(1) of the Federal Rules of Civil Procedure  
16 allows for only one amended complaint as a matter of right, which plaintiffs have already been  
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18 <sup>4</sup> This position was the one adopted by plaintiffs at the hearing on this motion, though it runs  
19 somewhat counter to the allegation of the FAC, where plaintiffs alleged that defendants  
20 “threatened the plaintiffs with the taking their home [sic] and money unless they provided certain  
financial, personal, banking and identifying information to the defendant.” (Doc. No. 10, at 42.)

21 <sup>5</sup> To the extent these claims are attempting to allege some sort of fraud, they must be pled with  
22 greater particularity than plaintiffs have done here. *See* Fed. R. Civ. P. 9(b) (“In alleging fraud or  
23 mistake, a party must state with particularity the circumstances constituting fraud or mistake.”).  
24 In the RICO context, for instance, the Ninth Circuit Court of Appeals has noted a complaint must  
25 “state the time, place, and specific content of the false representations as well as the identities of  
26 the parties to the misrepresentation.” *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir.  
27 2004). Further, while a plaintiff’s complaint need not specifically identify false statements made  
28 by each and every defendant in an alleged fraudulent scheme, “Rule 9(b) does not allow a  
complaint to merely lump multiple defendants together but requires plaintiffs to differentiate their  
allegations when suing more than one defendant and inform each defendant separately of the  
allegations surrounding his alleged participation in the fraud.” *Swartz v. KPMG LLP*, 476 F.3d  
756, 764–65 (9th Cir. 2007). Here, the allegations of plaintiffs’ FAC are general and identical  
against each defendant, and do not differentiate how each of the named defendants participated in  
any purported fraud plaintiffs might be attempting to allege.

1 permitted. Further amendments require either the opposing party's written consent or the  
2 granting of leave by the court. Fed. R. Civ. Proc. 15(a)(2). Here, defendants have moved to  
3 dismiss with prejudice and have not consented to further amendment.

4 The undersigned has carefully considered whether plaintiffs may further amend their  
5 complaint to state a claim upon which relief can be granted. "Valid reasons for denying leave to  
6 amend include undue delay, bad faith, prejudice, and futility." *California Architectural Bldg.*  
7 *Prod. v. Franciscan Ceramics*, 818 F.2d 1466, 1472 (9th Cir. 1988). See also *Klamath-Lake*  
8 *Pharm. Ass'n v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1293 (9th Cir. 1983) (holding that  
9 while leave to amend shall be freely given, the court does not have to allow futile amendments).  
10 When evaluating the failure to state a claim, the complaint of pro se plaintiffs may be dismissed  
11 "only where 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his  
12 claim which would entitle him to relief.'" *Franklin v. Murphy*, 745 F.2d 1221, 1228 (9th Cir.  
13 1984) (quoting *Haines v. Kerner*, 404 U.S. 519, 521 (1972)). See also *Weilburg v. Shapiro*, 488  
14 F.3d 1202, 1205 (9th Cir. 2007). Similarly, "[a] motion for leave to amend may be denied if it  
15 appears to be futile or legally insufficient." *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th  
16 Cir. 1988). "[A] proposed amendment is futile only if no set of facts can be proved under the  
17 amendment to the pleadings that would constitute a valid and sufficient claim or defense." *Id.*

18 Here, the court concludes that granting the plaintiffs further leave to amend would be  
19 futile. After defendants moved to dismiss the original complaint filed in this action, plaintiffs  
20 responded by filing an amended complaint. (Doc. Nos. 4 & 10.) Thus, plaintiffs have already  
21 had one opportunity to correct the deficiencies noted by defendants. Moreover, the court asked  
22 plaintiffs at the hearing on the pending motion to dismiss their first amended complaint what  
23 differed between their FAC and their proposed SAC. Plaintiff Donald Blair responded to the  
24 court's inquiry by stating that the SAC contained language explaining that defendant Ocwen has  
25 been accused of improprieties in other parts of the country. He also noted plaintiffs filed the SAC  
26 to try to be more specific in their allegations, in light of defendants' motion to dismiss. In their  
27 proposed SAC, plaintiffs changed the language of their allegations somewhat and do specifically  
28 identify some subsections of the FDCPA alleged to have been violated, albeit in a boilerplate



1 format for each defendant, without additional substantive factual support. However, the proposed  
2 SAC does not address the issue of the time bar raised by defendants Ocwen and Nationwide, nor  
3 does it state with any additional factual specificity how defendant U.S. Bank National Association  
4 allegedly violated the FDCPA. Further, the proposed SAC does not clarify the legal basis upon  
5 which plaintiffs allege a right to recover for “identity theft.” Finally, plaintiffs indicated at the  
6 hearing that through their SAC they continued to seek to challenge the simple fact of defendants’  
7 involvement in collecting their home mortgage debt and/or foreclosing on their home.

8 In short, the allegations plaintiffs have been able to level are insufficient to state a claim  
9 under the FDCPA. Their proposed SAC does nothing to resolve that insufficiency and no set of  
10 facts can be proved by plaintiffs under a further amendment to their pleadings that would  
11 constitute a valid and sufficient claim. Therefore, the court will dismiss plaintiffs’ first amended  
12 complaint with prejudice and deny further leave to amend.

13 4. *Defendant Deutsche Bank Not Properly Served*

14 Finally, the court must address plaintiffs’ claims against defendant Deutsche Bank, which  
15 has not appeared in this matter. Plaintiffs asserted at the hearing they believed they had properly  
16 served Deutsche Bank. However, no proof of service was submitted to the court by plaintiffs,<sup>6</sup> as  
17 required by Rule 4 of the Federal Rules of Civil Procedure and Local Rules of the Eastern  
18 District, Rule 210(b). Therefore the court will deem Deutsche Bank to not have been properly  
19 served. Dismissal of a party is appropriate where a plaintiff fails to show good cause for delays in  
20 service. *See Oyama v. Sheehan*, 253 F.3d 507, 512-13 (9th Cir. 2001); *Walker v. Sumner*, 14 F.3d  
21 1415, 1422 (9th Cir. 1994), *overruled on other grounds by Sandin v. Conner*, 515 U.S. 472  
22 (1995) (upholding a dismissal for failure to serve a defendant).<sup>7</sup> Accordingly, plaintiffs’ claims

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24 <sup>6</sup> The court notes a certificate of service is attached to the second amended complaint asserting  
25 that the attorney for each defendant (Jason Barbato, the former attorney for defendants Ocwen,  
26 Nationwide, and U.S. Bank) was served by mail. (Doc. No. 20, at 170.) Since no attorney has  
27 appeared for Deutsche Bank, it still does not appear defendant Deutsche Bank was served.

28 <sup>7</sup> If “the plaintiff shows good cause for the failure [to serve defendant within 90 days of the  
complaint’s filing], the court must extend the time for service for an appropriate period.” Fed. R.  
Civ. Proc. 4(m). Plaintiffs have not shown good cause for their failure to serve defendant  
Deutsche Bank, and therefore the court will not extend the time for service.

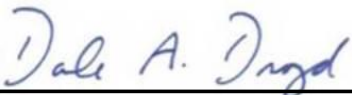
1 against Deutsche Bank are dismissed as well.<sup>8</sup>

2 For the reasons set forth above:

- 3 1. Defendants' motion to dismiss (Doc. No. 15) is GRANTED;
- 4 2. Plaintiffs' first amended complaint (Doc. No. 10) is DISMISSED WITH PREJUDICE;
- 5 3. Plaintiff's proposed second amended complaint (Doc. No. 20), construed as a motion
- 6 for leave to amend, is DENIED; and
- 7 4. The Clerk of Court is directed to CLOSE this case.

8 IT IS SO ORDERED.

9 Dated: March 3, 2016

  
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UNITED STATES DISTRICT JUDGE

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27 <sup>8</sup> Even if defendant Deutsche Bank been properly served and had appeared in this action,  
28 dismissal would be appropriate for all of the same reasons as set forth above with respect to the  
moving defendants. See *Seismic Reservoir 2020, Inc. v. Paulsson*, 785 F.3d 330, 335 (9th Cir.  
2015); *Omar v. Sea-Land Service, Inc.*, 813 F.2d 986, 991 (9th Cir. 1987).