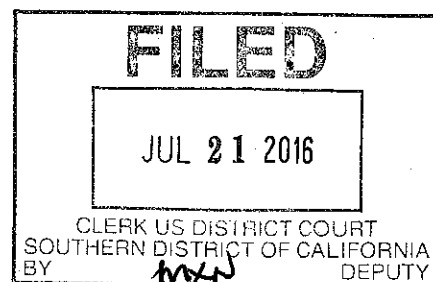


1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28



**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

VICTORIA A. AMELINA, and  
individual; and A.A., D.S., and B.S.  
each individuals and minors by and  
through their Guardian Ad Litem,  
Victoria A. Amelina,

Plaintiffs,

v.

MANUFACTURERS AND  
TRADERS TRUST COMPANY aka  
M&T BANK; SAFEGUARD  
PROPERTIES, LLC; and THE WOLF  
LAW FIRM, A Law Corporation,

Defendants.

CASE NO. 14cv1906-WQH-NLS  
ORDER

HAYES, Judge:

The matters before the Court are (1) the Motion to Dismiss Plaintiff's Third Amended Complaint (ECF No. 66) filed by Defendant The Wolf Law Firm ("Wolf"), (2) the Motion to Dismiss Plaintiff's Third Amended Complaint (ECF No. 67) filed by Defendant Safeguard Properties, LLC ("Safeguard"), and (3) the Motion to Dismiss Plaintiff's Third Amended Complaint (ECF No. 68) filed by Defendant Manufacturers and Traders Trust Company aka M&T Bank ("M&T").

**I. Background**

On August 13, 2014, Plaintiff Victoria Amelina and Plaintiffs A.A., D.S., and B.S., each minors by and through their Guardian Ad Litem, Victoria Amelina, initiated this action by filing a Complaint in this Court. (ECF No. 1). On October 30, 2014, the

1 Court issued an Order granting the joint motion for leave to file a First Amended  
2 Complaint, and the proposed First Amended Complaint ("FAC") (ECF No. 12) became  
3 the operative pleading. (ECF No. 13).

4 On March 12, 2015, the Court granted Defendants' motions to dismiss (ECF  
5 Nos. 18, 20, 28). (ECF No. 35). The Court concluded that Plaintiff's FAC failed to  
6 allege sufficient facts to state a claim under the Fair Debt Collection Practices Act  
7 ("FDCPA") against any of the Defendants.

8 On June 30, 2015, the Court issued an Order granting Plaintiffs' Motion for  
9 Leave to File a Second Amended Complaint. (ECF No. 46). On June 30, 2015,  
10 Plaintiffs filed a Second Amended Complaint ("SAC"). (ECF No. 47).

11 On November 17, 2015, the Court granted Defendants' motions to dismiss (ECF  
12 Nos. 48, 49, 50). (ECF No. 57). The Court concluded that Plaintiffs failed to allege  
13 facts to show that the activities of Defendant Wolf or Defendant Safeguard constituted  
14 debt collection under the FDCPA and therefore failed to state a federal claim against  
15 Defendant Wolf or Defendant Safeguard. The Court concluded that the SAC did not  
16 allege sufficient facts to establish that Defendant M&T's principal business purpose  
17 was debt collection or that M&T regularly collects debts owed to another entity and  
18 therefore failed to state a federal claim against M&T. The Court declined to exercise  
19 supplemental jurisdiction over Plaintiffs' state law claims.

20 On February 3, 2016, the Court issued an Order granting Plaintiffs' Motion for  
21 Leave to File a Third Amended Complaint. (ECF No. 64). On February 3, 2016,  
22 Plaintiffs filed the Third Amended Complaint ("TAC"), which is the operative pleading  
23 in this case. (ECF No. 65).

24 On February 17, 2016, Defendant Wolf filed a motion to dismiss the TAC. (ECF  
25 No. 66). On February 22, 2016, Defendant Safeguard filed a motion to dismiss the  
26 TAC. (ECF No. 67). On February 22, 2016, Defendant M&T filed a motion to dismiss  
27 the TAC (ECF No. 68). On March 7, 2016, Plaintiffs filed an opposition to Defendant  
28 Wolf's motion. (ECF No. 70). On March 14, 2016, Plaintiffs filed an opposition to

1 Defendant Safeguard's motion. (ECF No. 72). On March 14, 2016, Plaintiffs also filed  
2 an opposition to Defendant M&T's motion. (ECF No. 73). On March 14, 2016,  
3 Defendant Wolf filed a reply. (ECF No. 71). On March 18, 2016, Defendant  
4 Safeguard filed a reply. (ECF no. 74). On March 21, 2016, Defendant M&T filed a  
5 reply. (ECF No. 75).

## 6 **II. Allegations of the Complaint**

7 "Plaintiff Victoria Amelina entered into an Adjustable Rate Note ("Note") and  
8 Deed of Trust to purchase a home on April 23, 2010 with RPM Mortgage Company for  
9 Bank of America." *Id.* ¶ 66. "[O]n or about February 1, 2013, Victoria defaulted on  
10 the Note by failing to make payments . . . and continued to remain in default . . ." *Id.*  
11 ¶ 71. On April 19, 2013 (77 days after the loan went into default), Bank of America  
12 sent a Notice of Intent to Accelerate and Foreclose to Plaintiff Victoria . . ." *Id.* ¶ 73.  
13 [O]n July 5, 2013 . . . Bank of America informed Plaintiff Victoria that her loan was  
14 in default, stating, 'The loan is in serious default because the required payments have  
15 not been made.'" *Id.* ¶ 75.

16 On July 31, 2013 . . . the alleged debt was assigned, placed, or otherwise  
17 transferred, to Lakeview Loan Servicing who subsequently assigned,  
18 placed, or otherwise transferred the debt to M&T Bank for collection.  
Victoria's Note was transferred . . . along with approximately 24,000  
other defaulted loans in the last few days of July 2013.

19 *Id.* ¶ 76.

20 On or about July 25, 2013, M&T Bank mailed a letter to Victoria. . . . The  
21 letter expressed that "Bank of America will stop accepting payments on  
22 August 1, 2013"; and "[M&T Bank] will begin accepting payments from  
[Plaintiff] effective August 2, 2013. Please send all payments on or after  
that date to [M&T Bank]."

23 *Id.* ¶¶ 78-79. "On August 2, 2013, Defendant M&T Bank acquired Plaintiff Victoria's  
24 defaulted loan . . ." *Id.* ¶ 77.

25 "M&T Bank took on this defaulted residential mortgage in order to make a profit  
26 . . . . This loan was one of the thousands of loans that M&T Bank has acquired over the  
27 years." *Id.* ¶ 22. "In the recent past, Defendant M&T Bank has collected thousands,  
28 and perhaps hundreds of thousands, of these defaulted consumer loans." *Id.* ¶ 25. "The

1 volume of consumer loans collected by M&T Bank is enormous, with more than  
2 24,000 defaulted consumer loans originating in late July of 2013 alone from such banks  
3 as Bank of America.” *Id.* ¶ 26. “Defendant M&T Bank maintains an active collections  
4 department that routinely collects on defaulted mortgage accounts.” *Id.* ¶ 27.

5       Once defaulted loans are acquired . . . M&T Bank begins its efforts to  
6 collect on the defaulted loan by sending letters and initiating telephone  
7 calls on a monthly basis, if not daily. In nearly all correspondence from  
M&T Bank to Plaintiff Victoria, M&T Bank refers to itself as a debt  
collector and/or its efforts as an effort to collect on a debt . . . .

8 *Id.* ¶ 28. “Defendant M&T Bank accepted for service Plaintiff’s defaulted loan after  
9 it was 182 days in default as defined by the mortgage note . . . .” *Id.* ¶ 29. “M&T Bank  
10 . . . regularly and directly collect[s] or attempt[s] to collect debts asserted to be owed  
11 or due to another by purchasing and or accepting for collection defaulted residential  
12 loans in bulk and subsequently collecting on those loans in their effort to collect from  
13 their collection practices.” *Id.* ¶ 31. “[I]n its effort to collect from Plaintiff this  
14 defaulted personal loan for this California residential property, M&T Bank hired . . .  
15 Defendant Wolf Law Firm, because it specializes in such defaulted debts.” *Id.* ¶ 36.  
16 “Subsequently . . . Wolf hired another Company that specializes in assisting debt  
17 collection law firms like Wolf in the collection of these types of defaulted residential  
18 loans. This company is Defendant Safeguard Properties, LLC.” *Id.* ¶ 46.

19       “Plaintiff began receiving collection letters from M&T Bank.” *Id.* ¶ 80. An  
20 “August 14, 2013 letter, stated, in part: 1) M&T Bank was now servicing Victoria’s  
21 mortgage; 2) The amount of debt in connection with the mortgage was ‘\$236,704.14’;  
22 3) Pursuant to the FDCPA, Victoria had thirty days to dispute the amount of debt and  
23 request a verification of the alleged debt; and 4) The name of the creditor to whom the  
24 debt was owed to was a company called ‘Lakeview Loan Servicing.’ . . . .” *Id.* ¶ 82.

25       “Twenty-three days later, on September 9, 2013, Victoria disputed the debt, in  
26 writing, with M&T Bank . . . .” *Id.* ¶ 88. “M&T Bank was now required to cease  
27 collection of the debt until it obtained verification of the debt and produced that  
28 verification to Victoria, in writing.” *Id.* ¶ 89. “Notwithstanding this fact, M&T Bank

1 thereafter continued to collect on the alleged debt without verification.” *Id.* ¶ 90.  
2 “[F]rom September 17, 2013 through February 5, 2014, M&T Bank sent multiple  
3 collection letters to Victoria, each time demanding payment . . . .” *Id.* ¶ 91. “Some of  
4 these letters were dated the same date as each other and were delivered to Victoria all  
5 at once, the natural consequence of which was to harass, oppress, or abuse . . . .” *Id.*  
6 ¶ 93. “M&T Bank never provided Victoria with the notice required by Cal. Civ. Code  
7 § 1812.700 . . . .” *Id.* ¶ 94. “[E]ach of these collection letters demanded an amount in  
8 excess of what Plaintiff owed; set conflicting deadlines for payment; and threatened  
9 imminent foreclosure.” *Id.* ¶ 95. “M&T Bank initiated this onslaught of letters as to  
10 Plaintiff Victoria in an effort to abusively mislead and coerce her into paying more than  
11 was actually owed to M&T Bank.” *Id.* ¶ 97. “M&T refused to provide validation or  
12 fully explain who ‘Lakeview Loan Servicing’ was . . . .” *Id.* ¶ 98.

13 “Subsequently, at the instruction of M&T Bank, Safeguard Properties, LLC sent  
14 Victoria a pink postcard . . . .” *Id.* ¶ 99. “The purpose of this communication with  
15 Victoria was to convey information regarding a debt directly or indirectly to Victoria,  
16 specifically, the name and telephone number of M&T Bank to encourage Victoria to  
17 contact M&T Bank so that M&T Bank could collect the debt alleged to be owed . . .  
18 .” *Id.* ¶ 103. “Victoria was startled, confused, and embarrassed by this postcard.” *Id.*  
19 ¶ 111. “[I]nviting a mortgager to contact M&T Bank has nothing to do with securing  
20 the property. This is Safeguard’s attempt to facilitate communication between Victoria  
21 and M&T Bank to aid M&T Bank in collection of an alleged debt.” *Id.* ¶ 114.

22 “Safeguard advertises field services that it provides to its clients, and among  
23 these services are communicating with delinquent borrowers on behalf of mortgage  
24 companies, contacting mortgagors to request they call mortgage companies, and  
25 reporting back to mortgage companies whether it has made contact with mortgagers  
26 and regarding the condition of the mortgaged properties.” *Id.* ¶ 54. “Defendant  
27 Safeguard offers such services to its mortgage companies clients for the purpose of  
28 facilitating debt collection, directly and indirectly.” *Id.* ¶ 55. “Defendant Safeguard

1 . . . advertises to its customers that it has been involved in lobbying efforts in Congress  
2 to exempt companies like Safeguard from being regulated by the FDCPA, thereby  
3 acknowledging that it is a debt collector under the FDCPA.” *Id.* ¶ 56. “Defendant  
4 Safeguard, on its website, also offers its services to assist creditor and collectors such  
5 as M&T Bank to make personal visits in an attempt to facilitate the consumer to  
6 contact the creditor in an effort to get the consumer to pay on the alleged debt.” *Id.* ¶  
7 57. “Defendant Safeguard instructs its employees to not use language such as ‘debt’  
8 and ‘collection,’ in order to evade being characterized as a debt collector, despite  
9 facilitating and aiding its client with debt collection being the main objection of its  
10 operation.” *Id.* ¶ 58. “Defendant Safeguard routinely takes the actions alleged herein  
11 to collect alleged debt and enforce security interest from consumers across the United  
12 States.” *Id.* ¶ 62. “Defendant Safeguard, in its regular practice, intimidated and  
13 invaded Plaintiffs’ privacy in an attempt to secure property from Plaintiffs or in the  
14 alternative aid M&T Bank to collect money and property from Plaintiffs by facilitating  
15 communications between Plaintiffs and M&T Bank.” *Id.* ¶ 63.

16 “On January 4, 2014, Safeguard, at the instruction of M&T Bank, sent an agent  
17 to Plaintiffs’ home (hereinafter, ‘the intruder’).” *Id.* ¶ 115. “At the instruction of  
18 Safeguard and M&T Bank, the intruder attempted to physically enter the home of  
19 Victoria and her minor children.” *Id.* ¶ 116. “Victoria was not home . . . however, her  
20 children, A.A.; D.S.; and B.S., who were nine, twelve, and seventeen years of age,  
21 respectively, were at home.” *Id.* ¶ 117. “Because the intruder attempted to enter the  
22 home . . . without the authorization or permission of any occupants . . . attempting to  
23 forcibly enter the home through a locked door, A.A., Victoria’s nine year-old daughter  
24 became terrified.” *Id.* ¶ 119. “A.A., a child, refused to open the door to M&T Bank’s  
25 agent.” *Id.* ¶ 121. “The intruder then continued to batter on the door with more force  
26 and eventually told A.A. that if she did not open the door immediately, her parents  
27 would ‘be in big trouble.’” *Id.* ¶ 122. “B.S., who has a deep voice that people expect  
28 a very large imposing adult to possess, inquired as to the identity of the intruder.” *Id.*

1 ¶ 125. “If not for B.S. . . . the intruder would not have been deterred from his objective  
2 of entering the property and frightening the family.” *Id.* ¶ 126. “Victoria returned  
3 home shortly thereafter and found that the children were in shock due to the intruder’s  
4 actions.” *Id.* ¶ 127. “A.A. was particularly traumatized by this incident, and unable to  
5 speak.” *Id.* ¶ 128. “A.A. was also having difficulty breathing due to the anxiety and  
6 stress caused by the intruder.” *Id.* ¶ 129. “A.A. stated to Victoria that she feared for  
7 her safety, and the safety of her parents . . . .” *Id.* ¶ 130.

8 “Defendant Safeguard routinely takes actions above and beyond what would be  
9 reasonable behavior to secure property, by abusing and harassing alleged debtors like  
10 Plaintiffs in an effort to intimidate them into paying their debts.” *Id.* ¶ 134. “Through  
11 these actions, Defendant Safeguard at the instruction and assistance of M&T Bank,  
12 intended and took efforts to effect dispossession and disablement of Plaintiffs’ property  
13 . . . .” *Id.* ¶ 135.

14 “[O]n January 28, 2014, M&T Bank sent another letter to Victoria, in an attempt  
15 to collect a debt, still without verifying the alleged debt.” *Id.* ¶ 136. “Through this  
16 conduct, M&T Bank engaged in conduct the natural consequence of which was to  
17 harass, oppress, or abuse . . . .” *Id.* ¶ 137. “This letter stated, in part, that Victoria’s  
18 ‘mortgage documents have been forwarded to our attorney’s office for foreclosure  
19 proceedings’ and that ‘[a]ll communications concerning the mortgage must now be  
20 directed to:’ Wolf Law Firm . . . .” *Id.* ¶ 138.

21 “Wolf identifies itself as a debt collector in correspondence to consumers.” *Id.*  
22 ¶ 41. “Defendant Wolf advertises itself on its website as a collection firm and even  
23 maintains a separate contact fax and email address for the Collections Department.”  
24 *Id.* ¶ 42. “Wolf advertises itself as being a law firm that has, for over twenty-five years,  
25 regularly ‘provided . . . cradle-to-grave services’ that include ‘Collection,  
26 Replevin/Claim and Delivery,’ all regulated debt collection practices under the FDCPA  
27 and California’s Rosenthal Act.” *Id.* ¶ 43. “Defendant Wolf is a law firm who sought  
28 the collection of money and property from Plaintiffs . . . .” *Id.* 45.

1            “[O]n January 30, 2014, M&T Bank sent two more letters to Victoria, stating  
2 that the foreclosure process has begun but Victoria still had alternatives if she  
3 contacted M&T Bank, even though Victoria had previously been told not to contact  
4 M&T Bank but contact only Wolf Law Firm.” *Id.* ¶ 142. “In reality, M&T Bank had  
5 not begun foreclosure proceedings, and was using this false, deceptive, or misleading  
6 representations or means in connection with the collection of a debt to coerce payment  
7 from Victoria . . . .” *Id.* ¶ 143.

8            “On April 28, 2014, the Wolf Law Firm sent Victoria ten (10) identical packets,  
9 five (5) by certified mail, and five (5) by regular mail, each addressed to Plaintiff  
10 Victoria at her residential address. Victoria received all of these packets at once a few  
11 days later.” *Id.* ¶ 145. “Each of these packets included the following enclosures: 1)  
12 ‘NOTICE UNDER THE FAIR DEBT COLLECTION PRACTICES ACT,’ 2) a letter  
13 explaining that the non-judicial foreclosure process had begun, and 3) recorded Notice  
14 of Default and election to sell under deed of trust.” *Id.* ¶ 146. “The Notice under the  
15 FDCPA provided all of the required notices under the FDCPA for an initial  
16 communication and explained that a foreclosure could be stopped if the default has  
17 been cured.” *Id.* ¶ 147. “While the recorded documents were required to be sent as the  
18 trustee under California Foreclosure laws, the other two letters included in each of the  
19 ten (10) packets, were solely for the purpose of encouraging Plaintiff Victoria to pay  
20 the defaulted debt and outside the scope of a protected foreclosure trustee activities.”  
21 *Id.* ¶ 148. “In response, Victoria sent the Wolf Law Firm a request for validation  
22 within 30 days of receiving Wolf’s April 28, 2014 letters, just as she had previously  
23 done with M&T Bank.” *Id.* ¶ 152.

24            “[O]n or about July of 2014 Wolf . . . sent ten (10) more copies of another letter  
25 dated July 22, 2014 . . . .” *Id.* ¶ 153. “These letters failed to provide Victoria with  
26 validation of the debt in violation of the FDCPA and California’s Rosenthal Act.” *Id.*  
27 ¶ 156. “[O]nce Wolf recorded a Notice of Trustee Sale, Wolf mailed an additional  
28 twenty-two (22) copies to Plaintiff of the Notice . . . each addressed to Plaintiff Victoria



1 at her residential address.” *Id.* ¶ 158. Each of the letters sent by Defendant Wolf  
2 “urged Plaintiff Victoria Amelina to pay the alleged debt or suffer the consequences  
3 of foreclosure.” *Id.* ¶ 161. “The purpose of sending all of these letters from a law firm  
4 was to intimidate and embarrass Victoria and her family and to alert third parties that  
5 Victoria had legal problems.” *Id.* ¶ 157.

6 “On at least two other occasions, Plaintiffs and Plaintiffs’ family noticed  
7 strangers conducting surveillance on Plaintiff’s home, which included again trying to  
8 open Plaintiff’s entrance door, looking through windows, and taking pictures of the  
9 outside and inside of Plaintiff’s home (through the windows).” *Id.* ¶ 164. “[T]hese  
10 visits by Safeguard, at the instruction of M&T Bank, were intimidation attempts which  
11 Safeguard and M&T Bank try to justify by stating that the intrusions are simply efforts  
12 to secure the property.” *Id.* ¶ 166.

13 “Shortly thereafter, Victoria began noticing that M&T Bank was charging her  
14 for ‘Home Inspections’ on her monthly mortgage statements. The dates referenced for  
15 the ‘Home Inspection’ entries . . . were consistent with the dates when Plaintiffs and  
16 Plaintiffs’ family noticed strangers conducting surveillance . . . .” *Id.* ¶ 167. “By  
17 demanding payment for ‘Home Inspections,’ M&T Bank was collecting an amount .  
18 . . when such amount was not expressly authorized by the agreement creating the debt  
19 or permitted by law.” *Id.* ¶ 170.

20 “As a result of M&T Bank and Safeguard’s illegal behavior, Plaintiffs and  
21 Plaintiffs’ family have not felt safe in their home for months, and are in constant fear  
22 for their physical safety as well as having to endure the mental anguish that such  
23 conduct brings.” *Id.* ¶ 171. “Victoria is experiencing intense anxiety, and has  
24 difficulty sleeping at night, causing her to be drowsy and lethargic.” *Id.* ¶ 174. “As a  
25 result of M&T Bank and Safeguard’s relentless collection tactics Victoria has been  
26 diagnosed with severe depression an anxiety and has been prescribed anti-depressant  
27 medication.” *Id.* ¶ 176. “Moreover, Defendants have continued sending collection  
28 letters to Victoria, which aggravates Victoria’s stress, anxiety, and depression. To

1 mitigate these feelings, Victoria only checks her mail once a week, so as not to deal  
2 with Defendants' harassing letters on a daily basis." *Id.* ¶ 178.

3 Plaintiffs assert five claims, including (1) violation of the Fair Debt Collection  
4 Practices Act ("FDCPA"), 15 U.S.C. §§ 1692 et seq. against all Defendants; (2)  
5 violation of the Rosenthal Fair Debt Collection Practices Act, Cal. Civ. Code §§ 1788-  
6 1788.32 against all Defendants; (3) negligent infliction of emotional distress against  
7 Defendants M&T and Safeguard; (4) intentional infliction of emotional distress against  
8 Defendants M&T and Safeguard; and (5) invasion of privacy against Defendants M&T  
9 and Safeguard.

### 10 **III. Legal Standard**

11 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for "failure to state  
12 a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Federal Rule of  
13 Civil Procedure 8(a) provides that "[a] pleading that states a claim for relief must  
14 contain . . . a short and plain statement of the claim showing that the pleader is entitled  
15 to relief." Fed. R. Civ. P. 8(a)(2). Dismissal under Rule 12(b)(6) is appropriate where  
16 the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable  
17 legal theory. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

18 "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief'  
19 requires more than labels and conclusions, and a formulaic recitation of the elements  
20 of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)  
21 (quoting Fed. R. Civ. P. 8(a)). When considering a motion to dismiss, a court must  
22 accept as true all "well-pleaded factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662,  
23 679 (2009). However, a court is not "required to accept as true allegations that are  
24 merely conclusory, unwarranted deductions of fact, or unreasonable inferences."  
25 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). "In sum, for a  
26 complaint to survive a motion to dismiss, the non-conclusory factual content, and  
27 reasonable inferences from that content, must be plausibly suggestive of a claim  
28 entitling the plaintiff to relief." *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th

1 Cir. 2009) (internal quotation marks omitted).

## 2 **IV. Judicial Notice**

3 “As a general rule, a district court may not consider any material beyond the  
4 pleadings in ruling on a Rule 12(b)(6) motion.” *Lee v. City of Los Angeles*, 250 F.3d  
5 668, 688 (9th Cir. 2001). However, there are “two exceptions to the requirement that  
6 consideration of extrinsic evidence converts a 12(b)(6) motion to a summary judgment  
7 motion.” *Id.* First, Federal Rule of Evidence 201 provides that “[t]he court may  
8 judicially notice a fact that is not subject to reasonable dispute because it . . . is  
9 generally known within the trial court’s territorial jurisdiction; or . . . can be accurately  
10 and readily determined from sources whose accuracy cannot reasonably be  
11 questioned.” Fed R. Evid. 201(b). Second, under the doctrine of incorporation by  
12 reference, “[a] district court ruling on a motion to dismiss may consider documents  
13 whose contents are alleged in a complaint and whose authenticity no party questions,  
14 but which are not physically attached to the plaintiff’s pleadings.” *Parrino v. FHP,*  
15 *Inc.*, 146 F.3d 699, 705 (9th Cir. 1998) (internal quotation marks omitted).

16 Defendant M&T and Defendant Wolf Law Firm request judicial notice of  
17 various documents related to the ownership and transfer of Plaintiff Victoria Amelina’s  
18 mortgage loan. Many of these documents have been attached to the TAC by Plaintiffs.  
19 Defendant Safeguard requests judicial notice of two court cases otherwise available to  
20 the Court. The Court denies the requests for judicial notice because the documents  
21 requested to be noticed are unnecessary for the resolution of the motions to dismiss.  
22 *See, e.g., Asvesta v. Petroutsas*, 580 F.3d 1000, 1010 n. 12 (9th Cir. 2009) (denying  
23 request for judicial notice where judicial notice would be “unnecessary”).

## 24 **V. Analysis**

### 25 **A. FDCPA**

26 The FDCPA prohibits debt collectors from engaging in abusive, deceptive, and  
27 unfair practices in the collection of consumer debts. *See* 15 U.S.C. § 1692. To state  
28 a claim under the FDCPA, a plaintiff must allege facts that establish that

1 (1) the plaintiff has been the object of collection activity arising from a  
2 consumer debt; (2) the defendant attempting to collect a debt qualifies as  
3 a 'debt collector' under the FDCPA; and (3) the defendant has engaged  
4 in a prohibited act or has failed to perform a requirement imposed by the  
5 FDCPA.

6 *Pratap v. Wells Fargo Bank, N.A.*, 63 F. Supp. 3d 1101, 1113 (N.D. Cal. 2014)  
7 (quoting *Gomez v. Wells Fargo Home Mortg.*, 2011 WL 5834949, at \*5 (N.D. Cal.  
8 Nov. 21, 2011)).

9 "The term 'debt collector' means any person who uses any instrumentality of  
10 interstate commerce or the mails in any business the principal purpose of which is the  
11 collection of any debts, or who regularly collects, or attempts to collect, directly or  
12 indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. §  
13 1692a(6). The complaint must plead "factual content that allows the court to draw the  
14 reasonable inference" that Defendants are "debt collectors." *Schlegel v. Wells Fargo*  
15 *Bank, N.A.*, 720 F.3d 1204, 1208 (9th Cir. 2013) (finding that the complaint "fails to  
16 provide any factual basis from which we could possibly infer that the principal purpose  
17 of Wells Fargo's business is the collection of debt. Rather, the complaint's factual  
18 matter, viewed in a light most favorable to the Schlegels, establishes only that debt  
19 collection is some part of Wells Fargo's business, which is insufficient to state a claim  
20 under the FDCPA.").

### 21 1. M&T

22 Defendant M&T contends that the Court should dismiss Plaintiffs' claims  
23 against M&T because the TAC continues to fail to make sufficient allegations that  
24 M&T qualifies as a "debt collector" under the FDCPA. M&T contends that it is not  
25 a "debt collector" because it is the servicer of the loan and its principal purpose of  
26 business is not debt collection. M&T contends that its actions did not constitute "debt  
27 collection" activities under the FDCPA. M&T contends that the minor Plaintiffs do not  
28 have standing to bring a claim under the FDCPA.

Plaintiffs contend that they have sufficiently alleged facts to show that M&T is  
a "debt collector" who regularly collects on defaulted debts after acquiring them in

1 default status. Plaintiffs contend that M&T Bank does not qualify as a loan servicer,  
2 exempted from the FDCPA definition of “debt collector,” because Plaintiff Victoria  
3 Amelina’s debt was in default for at least six months before it was acquired by  
4 Lakeview Loan Servicing or M&T Bank. Plaintiffs contend that the letters M&T Bank  
5 sent to Plaintiff Victoria Amelina constitute debt collection activity under the FDCPA  
6 because each letter notified Plaintiff that M&T Bank was a debt collector and because  
7 letters sent during the foreclosure process but not necessary to the foreclosure qualify  
8 as debt collection. Plaintiffs contend that all Plaintiffs have standing to bring FDCPA  
9 claims because M&T engaged in efforts to collect property from the family and in  
10 doing so, it engaged in conduct that harassed, oppressed, and/or abused all Plaintiffs.

11 **a. “Debt Collector” Under the FDCPA**

12 In order to fall within the definition of “debt collector,” Plaintiff’s TAC must  
13 provide a factual basis from which the Court could plausibly infer that (1) the principal  
14 purpose of Defendant M&T’s business is the collection of debt, or (2) that defendant  
15 M&T regularly collects debts owed or due another. *See Schlegel*, 720 F.3d at 1208.  
16 The “FDCPA’s definition of debt collector ‘does not include the consumer’s creditors,  
17 a mortgage servicing company, or any assignee of the debt, so long as the debt was not  
18 in default at the time it was assigned.’” *Nool v. HomeQ Servicing*, 653 F. Supp. 2d  
19 1047, 1052 (E.D. Cal. 2009) (quoting *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208  
20 (5th Cir. 1985)). “In applying the FDCPA, courts have repeatedly distinguished  
21 between a debt that is in default and debt that is merely outstanding, emphasizing that  
22 only after some period of time does an outstanding debt go into default.” *Alibrandi v.*  
23 *Financial Outsourcing Services, Inc.*, 333 F.3d 82, 86 (2d Cir. 2003) (internal citations  
24 and quotations omitted).

25 In the Order dismissing the SAC, the Court stated,

26 Whether Defendant M&T is outside the definition of debt collector under  
27 the FDCPA because of M&T’s status as a mortgage servicer depends on  
28 whether Plaintiff Victoria Amelina’s loan was in default at the time  
Lakeview Loan Servicing acquired the loan and hired M&T Bank to  
service it. . . . Plaintiffs provide no facts to support the allegation that  
Plaintiff’s mortgage was in “default” under the meaning of the FDCPA .

1 . . . Because the facts alleged in the SAC cannot support an inference that  
2 the debt was in default at the time M&T began servicing it, M&T  
3 qualifies as a mortgage servicer under the FDCPA. A mortgage servicer  
4 is not a debt collector under the FDCPA.

(ECF No. 57 at 12-13).

5 The TAC alleges that Plaintiff Victoria Amelina's loan had been in default for  
6 at least 180 days at the time it was acquired by Lakeview Loan Servicing and M&T  
7 Bank was hired to collect on the loan. Under the facts alleged in the TAC, Defendant  
8 M&T Bank does not qualify as a mortgage servicer under the FDCPA.

9 The TAC alleges that "Lakeview Loan Servicing purchased [Plaintiff Victoria  
10 Amelina's] defaulted home loan and quickly retained M&T Bank . . . for the purposes  
11 of collection . . . ." (TAC ¶ 21). The TAC alleges that "M&T Bank took on this  
12 defaulted residential mortgage in order to make a profit by collecting on this now  
13 defaulted loan. This loan was one of thousands of loans that M&T Bank has acquired  
14 over the years." *Id.* ¶ 22. The TAC alleges that "M&T Bank is in the business of  
15 regularly collecting on, among other things, defaulted residential loans, for profit." *Id.*  
16 ¶ 23. The TAC alleges that,

17 In the recent past, Defendant M&T Bank has collected thousands, and  
18 perhaps hundreds of thousands, of these defaulted consumer loans. The  
19 volume of consumer loans collected by M&T Bank is enormous, with  
20 more than 24,000 defaulted consumer loans originating in late July of  
21 2013 alone from such banks as Bank of America.

22 *Id.* ¶¶ 25-26. The TAC alleges that "Defendant M&T Bank maintains an active  
23 collections department that routinely collects on defaulted mortgage accounts." *Id.* ¶  
24 27. The TAC alleges that once M&T acquires the defaulted loans, it "begins its efforts  
25 to collect on the defaulted loan by sending letters and initiating telephone calls on a  
26 monthly basis" in which "M&T refers to itself as a debt collector and/or its efforts as  
27 an effort to collect on a debt." *Id.* ¶ 28. The TAC alleges that "M&T Bank is a creditor  
28 who demanded money and property from Plaintiffs . . . ." *Id.* ¶ 30. Plaintiffs have  
alleged sufficient allegations to support an inference that the principal business purpose  
of M&T Bank is the collection of debt. Plaintiffs have sufficiently alleged that M&T  
Bank is a debt collector under the FDCPA.

1                                      **b. Debt Collection Activity and FDCPA Violation**

2                 The TAC alleges that the August 14, 2013 letter M&T mailed to Plaintiff  
3 Victoria Amelina informed her that M&T was servicing her loan, stated the amount of  
4 debt owed, gave her thirty days to dispute the debt or request verification, and informed  
5 her that the debt was owed to Lakeview Loan Servicing. (TAC ¶ 82). The TAC  
6 alleges that within thirty days of receiving the letter, Plaintiff Victoria Amelina  
7 disputed the debt in writing. *Id.* ¶ 88. Plaintiffs assert that M&T violated the FDCPA  
8 by continuing to send letters to Plaintiff Victoria Amelina to collect the debt without  
9 providing verification of the debt to Plaintiff Victoria Amelina.

10                Under 15 U.S.C. 1692g(b),

11                If the consumer notifies the debt collector in writing within the thirty-day  
12 period described in subsection (a) of this section that the debt, or any  
13 portion thereof, is disputed, or that the consumer requests the name and  
14 address of the original creditor, the debt collector shall cease collection  
15 of the debt, or any disputed portion thereof, until the debt collector  
obtains verification of the debt or a copy of a judgment, or the name and  
address of the original creditor, and a copy of such verification or  
judgment, or name and address of the original creditor is mailed to the  
consumer by the debt collector.

16                15 U.S.C. § 1692g(b).

17                The TAC alleges that M&T conducted non-foreclosure related debt collection  
18 activities that are subject to regulation under the FDCPA. *See* ECF No. 65-1. The  
19 TAC alleges sufficient facts to support an inference that Defendant M&T was engaged  
20 in debt collection activities and is subject to liability for failing to comply with the  
21 requirements of the FDCPA pursuant to 15 U.S.C. 1692g(b).

22                                      **c. Standing of Minor Plaintiffs**

23                Defendant M&T contends that the minor Plaintiffs do not have standing to bring  
24 a claim under the FDCPA because the FDCPA provides a private right of action only  
25 to those obligated to pay a debt, and here, only Plaintiff Victoria Amelina was  
26 obligated to pay the debt. Plaintiffs contend that all Plaintiffs have standing to bring  
27 claims under the FDCPA because each of the Plaintiffs were subjected to M&T Bank's  
28 efforts to collect money from Plaintiff Victoria Amelina and property from the family.

1 Plaintiffs contend that Defendant M&T sent agents to Plaintiffs' home to harass and  
2 induce Plaintiffs to pay or vacate the property.

3 The FDCPA provides that “[a] debt collector may not engage in any conduct the  
4 natural consequence of which is to harass, oppress, or abuse *any person* in connection  
5 with the collection of a debt.” 15 U.S.C. § 1692d (emphasis added). The FDCPA also  
6 provides that “any debt collector who fails to comply with any provision of this  
7 subchapter with respect to *any person* is liable to such person.” 15 U.S.C. § 1692k  
8 (emphasis added). Persons subjected to abusive debt collection by a debt collector who  
9 was attempting to collect a debt from another person may bring an action against the  
10 debt collector under sections of the FDCPA not specifically limited to consumers. *See*  
11 *Wright v. Finance Service of Norwalk, Inc.*, 22 F.3d 647, 649-50 (6th Cir. 1994)  
12 (“[A]bsent a limitation in the substantive provisions, the ordinary and common  
13 understanding of § 1692k is that any aggrieved party may bring an action under  
14 §1692e. . . . [T]he purpose of the FDCPA and the legislative history of the act also  
15 support this conclusion.”); *Eley v. Evans*, 476 F. Supp. 2d 531, 532-33 (E.D. Va. 2007)  
16 (finding that “any aggrieved party may bring an action under the FDCPA” and  
17 therefore the plaintiff who was not the consumer-debtor had standing to sue under 15  
18 U.S.C. §§ 1692d, 1692e, and 1692f). Many courts have found that “any person who  
19 comes in contact with the proscribed debt collection practices may bring a claim under  
20 certain sections of the FDCPA.” *Siberesky v. Borah, Goldstein, Altschuler & Schwartz*,  
21 P.C., No. 99 CIV. 3227 (JGK), 2000 WL 1448635, at \*4 (S.D.N.Y. Sept. 28, 2000).  
22 However, in order for a non-consumer to have standing under the FDCPA, the alleged  
23 debt collection activities must have been directed at the plaintiff. *See Mathis v.*  
24 *Omnium Worldwide*, No. Civ. 04-1614-AA, 2005 WL 3159663, at \*3 (D. Or. Nov. 27,  
25 2005) (the FDCPA “does not limit causes of actions to those brought by a ‘consumer,’  
26 so long as the alleged conduct was directed at the plaintiff”); *Dewey v. Assoc.*  
27 *Collectors, Inc.*, 927 F. Supp. 1172, 1174 (W.D. Wis. 1996) (Congress “did not intend  
28 to provide damages to those who did not experience any abusive behavior”).



1 Taking the allegations as true that Defendant M&T instructed Safeguard to send  
2 an agent to Plaintiffs' property and enter the Plaintiffs' home without knocking or  
3 introducing himself while minor Plaintiffs were inside, the Court finds that the TAC  
4 alleges sufficient facts to show that debt collection activities by Defendant M&T were  
5 directed at Plaintiffs A.A., B.S., and D.S. The Court concludes that based on the  
6 allegations of the TAC, all Plaintiffs have standing to bring an FDCPA claim against  
7 Defendant M&T. M&T's motion to dismiss the FDCPA claim is denied.

## 8 2. Safeguard

9 Safeguard contends that the TAC adds no substantive allegations against  
10 Safeguard and the Court has previously found the allegations to be insufficient to state  
11 an FDCPA claim against Safeguard. Safeguard contends that Plaintiffs have not  
12 alleged that the agent Safeguard sent to Plaintiffs' home made any mention of a debt.  
13 Safeguard contends that Safeguard's business includes verifying residential occupancy,  
14 not debt collection, and Plaintiffs have not added any factual allegations to support  
15 their claims that Safeguard engages in debt collection activity.

16 Plaintiffs contend that generalized allegations about Safeguard entering  
17 properties that are collateral for loans and physically intimidating the residents of the  
18 properties are sufficient to infer that Safeguard is regularly involved in debt collection.  
19 Plaintiffs contend that the only purpose of Safeguard mailing a postcard to Plaintiffs  
20 or sending an agent to Plaintiffs' residence was to harass and abuse Plaintiffs in an  
21 effort to coerce Plaintiff Victoria Amelina to pay or vacate the property.

22 The TAC alleges that "Safeguard Properties, LLC sent Victoria a pink postcard  
23 . . . for the purposes of conveying information regarding a debt directly or indirectly  
24 to Victoria, and was also for the purpose of collecting this alleged debt." (TAC ¶¶ 99,  
25 101). The TAC alleges that the postcard stated that "Safeguard Properties, LLC is  
26 conducting a monthly audit on behalf of M&T Bank in order to verify the occupancy  
27 of your property. Please contact our Special Operator . . . to confirm only that you are  
28 presently residing at this property." *Id.* ¶ 102. The postcard also informed Plaintiff

1 Victoria Amelina that she was “entitled to contact M&T Bank regarding a face to face  
2 interview at our Buffalo NY Office . . . .” *Id.* The TAC alleges that “The purpose of  
3 this communication . . . was to convey information regarding a debt directly or  
4 indirectly to Victoria, specifically, the name and telephone number of M&T Bank to  
5 encourage Victoria to contact M&T Bank so that M&T Bank could collect the debt  
6 alleged to be owed . . . .” *Id.* ¶ 103. The TAC alleges that “this postcard was intended  
7 to intimidate Victoria into payment of money to M&T Bank or vacate the property at  
8 which point Safeguard would then possess the property.” *Id.* ¶ 105. The TAC alleges  
9 that “Safeguard had no other purpose to leave such a postcard other than to facilitate  
10 M&T’s efforts to collect on the alleged debt.” *Id.* ¶ 106. The TAC alleges that  
11 Safeguard aids other debt collectors by entering properties of debtors in order to  
12 intimidate the residents into paying their debts and that Safeguard did this to Plaintiffs  
13 at the instruction of M&T Bank. The TAC alleges that “Safeguard, at the instruction  
14 of M&T Bank, sent an agent to Plaintiffs’ home” and “[a]t the instruction of Safeguard  
15 and M&T bank, the intruder attempted to physically enter the home of Victoria and her  
16 minor children.” *Id.* ¶¶ 115-16. The TAC alleges that Safeguard’s agent told Plaintiff  
17 A.A. “that if she did not open the door to the intruder, her parents would be in ‘big  
18 trouble.’” *Id.* ¶ 130. The TAC alleges that Safeguard conducted “surveillance on  
19 Plaintiff’s home, which included . . . trying to open Plaintiffs’ entrance door, looking  
20 through windows, and taking pictures of the outside and inside of Plaintiffs’ home  
21 (through the windows).” *Id.* ¶ 164.

22 The Court has found that the allegations in the TAC are sufficient to show that  
23 Defendant M&T was a debt collector attempting to collect a debt from Plaintiff  
24 Victoria Amelina. The Court also finds that the TAC alleges sufficient facts to show  
25 that Safeguard was hired by M&T and was acting as an agent of Defendant M&T in  
26 furtherance of M&T’s attempt to collect a debt. Because the TAC alleges that  
27 Safeguard was acting as an agent of a debt collector in furtherance of M&T’s attempt  
28 to collect a debt from Plaintiff Victoria Amelina, Plaintiffs’ allegations that Safeguard,

1 at the instruction of M&T Bank, sent an intruder to Plaintiffs' property who attempted  
2 to enter Plaintiffs' home and took photographs of Plaintiffs' home outside and through  
3 the windows is sufficient to state a cause of action against Defendant Safeguard under  
4 the FDCPA. The Court has concluded that the TAC alleges sufficient facts to show  
5 that debt collection activities were directed at all Plaintiffs and all Plaintiffs have  
6 standing to sue under the FDCPA. Safeguard's motion to dismiss the FDCPA claim  
7 is denied.

### 8 **3. The Wolf Law Firm**

9 Defendant Wolf contends that the non-judicial foreclosure activities it engaged  
10 in do not qualify as debt collection under 15 U.S.C. § 1692a(6). Wolf contends that  
11 generic allegations that Wolf "is acting as a debt collector and attempting to collect a  
12 debt" are not sufficient to survive a motion to dismiss. Wolf contends that Plaintiffs  
13 fail to allege sufficient facts to support an inference that Wolf's principal business  
14 purpose is to conduct itself as a debt collector or that Wolf acted as a debt collector  
15 outside of its obligations as the foreclosure trustee.

16 Plaintiffs contend that Defendant Wolf's principal purpose is the collection of  
17 debts due to another and that Wolf regularly collects on defaulted consumer debts.  
18 Plaintiffs contend that the collection letters sent by Wolf during the foreclosure process  
19 but not necessary to the foreclosure qualify as debt collection activities. Plaintiffs  
20 contend that Wolf is liable for violating the FDCPA because it went beyond the  
21 statutorily mandated communications related to foreclosure by sending collection  
22 letters not related to foreclosure and by sending up to twenty-two copies of several  
23 letters.

24 In the Order dismissing the SAC, the Court stated,

25 To the extent that the SAC alleges that Defendant Wolf Law Firm sent  
26 copies of the Notice of Trustee Sale, activity related to nonjudicial  
27 foreclosure does not constitute debt collection under the FDCPA. *See*  
28 *Pratap*, 63 F. Supp. 3d at 1114 ("[T]he overwhelming majority of courts  
within the Ninth Circuit have concluded that nonjudicial foreclosures do  
not constitute debt collection under the FDCPA") . . . .

(ECF No. 57 at 19). Regarding the multiple copies of letters that Defendant Wolf

1 mailed to Plaintiffs, the Court stated,

2 Plaintiff . . . does not provide the content of the letters or allege facts to  
3 show that the letters outside the scope of nonjudicial foreclosure duties.  
4 Plaintiff has not alleged facts sufficient to show that these letters  
5 constituted debt collection under the FDCPA. *See Natividad v. Wells*  
6 *Fargo Bank, N.A.*, No. 3:12-cv-03646, 2013 WL 2299601, at \*9 (N.D.  
7 Cal. May 24, 2013) (“given the absence of any factual allegations beyond  
8 the conclusion that Defendants ‘sought to collect’ money and funds,  
9 Plaintiffs have failed to allege facts that suggest [Defendants] were  
10 collecting a debt or otherwise qualify as ‘debt collectors’ under the Act”).  
11 Plaintiff has not sufficiently alleged that sending multiple copies of letters  
12 and the Notice of Trustee Sale went beyond the statutorily required duties  
13 of a foreclosure trustee. *See id.* . . . Because the Plaintiff did not  
14 sufficiently allege facts to show that the activities of Defendant Wolf Law  
15 Firm constituted debt collection activity under the FDCPA, the Court  
16 finds that Plaintiff failed to state a claim under the FDCPA against  
17 Defendant Wolf Law Firm.

18 *Id.* at 20.

19 The TAC alleges that “M&T Bank retained . . . Wolf Law Firm, because it  
20 specializes in collecting on such defaulted debts.” (TAC ¶ 36). The TAC alleges that  
21 “Defendant Wolf identifies itself as a debt collector in correspondence to consumers.”  
22 *Id.* ¶ 41. The TAC alleges that “Wolf advertises itself on its website as a collection  
23 firm and even maintains a separate contact fax and email address for the Collections  
24 Department.” *Id.* ¶ 42. The TAC alleges that “Wolf is a law firm who sought the  
25 collection of money and property from Plaintiffs and is therefore a debt collector under  
26 the FDCPA . . . .” *Id.* ¶ 45. The TAC alleges that on April 28, 2014, Wolf sent  
27 Plaintiff Victoria Amelina a packet of forms containing the following: “1) NOTICE  
28 UNDER THE FAIR DEBT COLLECTION PRACTICES ACT”, 2) a letter explaining  
that the non-judicial foreclosure process had begun, and 3) recorded Notice of Default  
and election to sell under deed of trust.” *Id.* ¶ 146.

Attached to the TAC is the “Notice of Fair Debt Collection Practices Act” dated  
April 28, 2014 and sent to Plaintiff Victoria Amelina by the Wolf Law Firm. The  
Notice informed Plaintiff Victoria Amelina that “A foreclosure action has been  
commenced” and advised her of her rights to dispute the validity of the debt. (ECF No.  
65-7 at 2). The Notice includes the following statement: “The Wolf Firm, IS A DEBT  
COLLECTOR ATTEMPTING TO COLLECT A DEBT, ANY INFORMATION

1 OBTAINED WILL BE USED FOR THAT PURPOSE.” *Id.* The “Notice of Default  
2 and Election to Sell Under Deed of Trust” sent to Plaintiff Victoria Amelina by Wolf  
3 and attached to the TAC, includes the same disclaimer regarding Wolf’s status as a debt  
4 collector. *Id.* at 6.

5 The FDCPA does not apply to foreclosure activities. *See Lobato v. Acqura Loan*  
6 *Services*, No. 11cv2601-WQH-JMA, 2012 WL 607624, at \*5 (S.D. Cal. Feb. 23, 2012);  
7 *Walker v. Equity 1 Lenders Group*, No. 09cv325-WQH-AJB, 2009 WL 1364430, at \*7  
8 (S.D. Cal. May 14, 2009) (“The activity of foreclosing on a property pursuant to a deed  
9 of trust is not the collection of a debt within the meaning of the FDCPA or the  
10 RFDCPA.”) (internal quotations omitted).

11 Many courts have held that including language on letters sent to consumers  
12 indicating that the sender is “a debt collector attempting to collect a debt” does not  
13 raise an inference that the sender is a debt collector attempting to collect a debt under  
14 the FDCPA. *See Hernandez v. Green Tree Servicing LLC*, No. 2:14-cv-1438, 2014  
15 WL 2586932, at \*3 (C.D. Cal. June 9, 2014) (“Plaintiff responds that he has received  
16 a letter from Green Tree concerning his loan that included the disclaimer: “This  
17 communication is from a debt collector. It is an attempt to collect a debt’ . . . . This  
18 argument fails: whether Green Tree is a debt collector under the FDCPA does not turn  
19 on whether Green Tree holds itself out as a debt collector”); *Golliday v. Chase Home*  
20 *Finance, LLC*, 761 F. Supp. 2d 629, 636 (W.D. Mich. 2011) (“The fact that FDCPA  
21 disclaimers were sent in connection with a non-judicial foreclosure proceeding does  
22 not automatically transform the defendants into ‘debt collectors.’ . . . [T]he use of the  
23 disclaimer . . . is insufficient to raise a triable issue of fact on the question of the firm’s  
24 status as a debt collector.”); *Stamper v. Wilson & Assoc., P.L.L.C.*, No. 3:09-cv-270,  
25 2010 WL 1408585, at \*8-9 (E.D. Tenn. Mar. 312, 2010) (“it is perfectly reasonable for  
26 [defendant law firm] to err on the side of caution by including FDCPA disclaimers . .  
27 . . if they did not include FDCPA disclaimers, they would be opening themselves up  
28 to potential liability under 15 U.S.C. § 1692f(6)”); *Chomilo v. Shapiro, Nrodmeyer*

1 & Zielke, LLP, Civ. No. 06-3103, 2007 WL 2695795, at \*6 (D. Min. Sept. 12, 2007)  
2 (“If SNZ [the defendant law firm] includes FDCPA disclaimers in its notices then it  
3 may be seen as holding itself out as a debt collector under the FDCPA, but if it does  
4 not include such disclaimers then it subjects itself to potential liability for failing to  
5 comply with the FDCPA if a court were to determine that SNZ is a debt collector . . .  
6 . The Court will not penalize SNZ for having to make a Hobson’s choice . . . . SNZ was  
7 conducting nonjudicial mortgage foreclosure . . . It was reasonable for SNZ to err on  
8 the side of caution and include the FDCPA disclaimers in its communications to [the  
9 plaintiff].”). The “Notice Under Fair Debt Collection Practices Act” sent by Wolf to  
10 Plaintiff Victoria Amelina contains the FDCPA disclaimer that “The Wolf Firm is  
11 acting as a debt collector and is attempting to collect a debt.” However, the Notice, as  
12 well as the other communications included in the packet of forms accompanying the  
13 notice, discuss the commencement of a foreclosure action and therefore is considered  
14 a communication connected to the non-judicial foreclosure. Defendant Wolf’s  
15 inclusion of the disclaimer language does not transform it into a debt collector. The  
16 Court finds that the communication with Plaintiff makes it clear that Defendant Wolf  
17 was hired for the limited purpose of conducting the non-judicial foreclosure proceeding  
18 and was acting within that role.

19 The Court finds that the TAC does not allege sufficient facts to support a finding  
20 that Defendant Wolf’s actions went outside the scope of the non-judicial foreclosure  
21 proceeding. The TAC does not allege sufficient facts to show that Defendant Wolf was  
22 engaged in debt collection activities sufficient to support a cause of action under the  
23 FDCPA. Because the Court finds that the alleged conduct of Defendant Wolf does not  
24 constitute “debt collecting,” the Court need not determine whether Defendant Wolf is  
25 a “debt collector” under the FDCPA. *See Sontoro*, 12 Fed. Appx at 480. Plaintiffs  
26 have been given multiple opportunities to allege a claim against Defendant Wolf under  
27 the FDCPA and has not done so. The Court dismisses Plaintiffs’ FDCPA claim against  
28 Defendant Wolf under the FDCPA with prejudice.

1           **B. State Claims Asserted Against Defendant Wolf**

2           Plaintiffs assert four causes of action against Defendant Safeguard for violations  
3 of California state law. Plaintiffs assert one cause of action against Defendant Wolf  
4 for violations of California state law. Plaintiffs allege that this Court has supplemental  
5 jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367.

6           The federal supplemental jurisdiction statute provides: “in any civil action of  
7 which the district courts have original jurisdiction, the district courts shall have  
8 supplemental jurisdiction over all other claims that are so related to claims in the action  
9 within such original jurisdiction that they form part of the same case or controversy  
10 under Article III of the United States Constitution.” 28 U.S.C. § 1367(a). A district  
11 court may decline to exercise supplemental jurisdiction over a state law claim if “the  
12 district court has dismissed all claims over which it has original jurisdiction . . . .” 28  
13 U.S.C. § 1367(c). Having dismissed the federal claims asserted by Plaintiffs against  
14 the Defendants Safeguard and Wolf, the Court declines to exercise supplemental  
15 jurisdiction over the state law claims against Defendants Safeguard and Wolf pursuant  
16 to 28 U.S.C. § 1367(c). *See San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d  
17 470, 478 (9th Cir. 1998).

18           **C. Violation of the Rosenthal Act Against M&T and Safeguard**

19           California incorporated the FDCPA into the Rosenthal Act under section  
20 1788.17 of the California Civil Code. Cal. Civ. Code § 1788.17. Defendants M&T  
21 and Safeguard recognize that the Rosenthal Act mirrors the FDCPA. Because  
22 Plaintiffs have sufficiently alleged a claim against Defendants M&T and Safeguard  
23 under the FDCPA, the Court concludes that Plaintiffs have sufficiently alleged a claim  
24 against Defendants M&T and Safeguard under the Rosenthal Act, Cal. Civ. Code §§  
25 1788 *et seq.* M&T and Safeguard’s motions to dismiss Plaintiffs’ claims under the  
26 Rosenthal Act are denied.

27           **D. Negligent Infliction of Emotional Distress Against M&T**

28           Defendants M&T and Safeguard contend that California does not recognize the

1 claim of negligent infliction of emotional distress as an independent tort, but  
2 recognizes it as a claim for the tort of negligence. M&T and Safeguard contend that  
3 Plaintiffs do not state a valid claim for negligence against it because no duty exists  
4 between the Plaintiffs and M&T or Safeguard. M&T contends that it did not exceed  
5 the scope of its role as an ordinary lender because Safeguard, not M&T, is alleged to  
6 have sent someone to go to Plaintiffs' property.

7 Plaintiffs contend that California does recognize the claim of negligent infliction  
8 of emotional distress. Plaintiffs contend that M&T and Safeguard did owe a duty to  
9 Plaintiffs because Defendants M&T and Safeguard exceeded the scope of their  
10 conventional roles as loan servicers.

11 In California, "negligent causing of emotional distress is not an independent tort  
12 but the tort of negligence. . . . The traditional elements of duty, breach of duty,  
13 causation, and damages apply." *Marlene F. v. Affiliated Psychiatric Medical Clinic,*  
14 *Inc.*, 770 P.2d 278, 281 (Cal. 1989). "Whether a defendant owes a duty of care is a  
15 question of law. Its existence depends upon the foreseeability of the risk and upon a  
16 weighing of policy considerations for and against imposition of liability." *Id.* "As a  
17 general rule, a financial institution owes no duty of care to a borrower when the  
18 institution's involvement in the loan transaction does not exceed the scope of its  
19 conventional role as a mere lender of money." *Nymark v. Heart Fed. Sav. & Loan*  
20 *Assn.*, 283 Cal.Rptr. 53, 56 (Cal. App. 1991). "Liability to a borrower for negligence  
21 arises only when the lender 'actively participates' in the financed enterprise 'beyond  
22 the domain of the usual money lender.'" *Id.* at 57 (quoting *Connor v. Great Western*  
23 *Sav. & Loan Assn.*, 447 P.2d 609, 616 (Cal. 1968)).

24 In this case, the TAC alleges that M&T instructed Safeguard to send an agent to  
25 Plaintiffs' home and instructed "the intruder" to attempt to physically enter the  
26 Plaintiffs' home. (TAC ¶¶ 115-16). The TAC alleges that M&T Bank and Safeguard  
27 conducted home inspections "which included again trying to open Plaintiffs' entrance  
28 door, looking through windows, and taking pictures of the outside and inside of



1 Plaintiffs' home (through the windows). . . . [T]hese visits . . . were intimidation  
2 attempts . . . ." *Id.* ¶ 164, 166-67. The TAC sufficiently alleges that M&T and its  
3 agent, Safeguard, acted outside of the role of a conventional money lender. The  
4 allegations that M&T and its agent, Safeguard, acted outside the role of a usual money  
5 lender towards Plaintiff Victoria Amelina are sufficient to infer that M&T and  
6 Safeguard may owe a duty of care to Plaintiff Victoria Amelina which was breached  
7 by the home visits and inspections conducted by Defendants. The TAC alleges  
8 sufficient facts regarding duty, breach, causation, and damages to support Plaintiff  
9 Victoria Amelina's claim against M&T and Safeguard for negligent infliction of  
10 emotional distress.

11 Plaintiffs do not respond to M&T's contention that there is no relationship and  
12 no duty of care between M&T and Plaintiff Victoria Amelina's minor children. The  
13 Court finds that the TAC does not contain sufficient allegations to infer that M&T or  
14 Safeguard owe a duty of care to Plaintiffs A.A., D.S., and B.S. M&T and Safeguard's  
15 motions to dismiss the claims for negligent infliction of emotional distress are denied  
16 as to Plaintiff Victoria Amelina and granted as to Plaintiffs A.A., D.S., and B.S.

17 **E. Intentional Infliction of Emotional Distress Against M&T and Safeguard**

18 Defendants M&T and Safeguard contend that Plaintiffs' claims do not  
19 sufficiently plead that Defendants' conduct was extreme and outrageous to support a  
20 claim for intentional infliction of emotional distress. Plaintiffs contend that M&T and  
21 Safeguard's actions, including sending agents to enter Plaintiffs' property, attempt to  
22 force entry, lurk around the property, and peer into the windows of Plaintiffs' home,  
23 constitute extreme and outrageous behavior. Plaintiffs contend that whether  
24 Defendants' exact behavior was extreme or outrageous is an issue of fact.

25 "The elements of a cause of action for intentional infliction of emotional distress  
26 are (1) outrageous conduct by the defendant, (2) intention to cause or reckless disregard  
27 of the probability of causing emotional distress, (3) severe emotional suffering, and (4)  
28 actual and proximate causation of the emotional distress." *Molko v. Holy Spirit Assn.*,

1 762 P.2d 46, 61 (Cal. 1988), *superceded by statute on other grounds*. “To make out  
2 a claim for intentional infliction of emotional distress, a plaintiff must prove, among  
3 other things, that the defendant’s alleged conduct was ‘outrageous,’ which means  
4 conduct ‘so extreme and outrageous to go beyond all possible bounds of decency, and  
5 to be regarded as atrocious, and utterly intolerable in a civilized community.’” *Wong*  
6 *v. Tai Jing*, 189 Cal.App.4th 1354, 1379 n. 7 (2010) (citations and internal quotations  
7 omitted).

8 The TAC alleges that M&T and its agents, at M&T’s instruction,  
9 attempted to enter Plaintiffs’ home, demanded that Victoria’s nine year  
10 old daughter open the front door, . . . posted a misleading notice on  
11 Plaintiffs’ front door in an effort to scare and harass Victoria and her  
12 family. . . . conducted ‘surveillance’ on Plaintiffs’ home, which included  
13 taking pictures of the outside and inside of Plaintiffs’ home (through the  
14 windows), without Plaintiffs’ consent.

15 (TAC ¶¶ 202-203). The TAC alleges that M&T “communicated with Plaintiffs in a  
16 vicious and harassing manner” and “continued their behavior of abuse even after  
17 Plaintiffs were clearly emotionally distressed.” *Id.* ¶¶ 204-205. The TAC alleges that  
18 an agent of Defendants M&T and Safeguard attempted to gain entry into Plaintiffs’  
19 home through a locked door without knocking or introducing himself, instructing  
20 Plaintiff A.A. to open the door immediately or her parents would be in “big trouble.”  
21 TAC ¶¶ 119-20. The TAC alleges that Safeguard, at the instruction of M&T,  
22 “conduct[ed] surveillance on Plaintiffs’ home, which included again trying to open  
23 Plaintiffs’ entrance door, looking through windows, and taking pictures of the outside  
24 and inside of Plaintiffs’ home (through the windows).” TAC ¶¶ 164-66. Plaintiffs  
25 allege that M&T’s actions caused the Plaintiffs severe emotional suffering.

26 The TAC alleges sufficient facts regarding M&T and Safeguard’s visits to  
27 Plaintiffs’ home to support an inference that M&T and Safeguard acted in an extreme  
28 and outrageous manner with the intention required to state a claim for intentional  
infliction of emotional distress. Whether Defendants’ conduct was extreme and  
outrageous is a question of fact that will not be decided at this stage of the proceedings.  
The Court concludes that Plaintiffs have sufficiently alleged a claim against Defendants

1 M&T and Safeguard for intentional infliction of emotional distress. M&T and  
2 Safeguard's motions to dismiss Plaintiffs' claims for intentional infliction of emotional  
3 distress are denied.

#### 4 **F. Invasion of Privacy Against M&T and Safeguard**

5 Defendant M&T contends that Plaintiffs do not state a cause of action for  
6 invasion of privacy against it because M&T's actions were related to servicing the  
7 unpaid loan in default. Defendant M&T asserts that the allegations that an agent went  
8 to Plaintiffs' residence are made against another Defendant, not M&T. Defendant  
9 Safeguard contends that Plaintiffs do not allege any conduct by Safeguard that rises to  
10 the level of seriousness or offensiveness required to support an invasion of privacy  
11 claim. Plaintiffs assert that M&T and Safeguard ignore the allegations that M&T and  
12 Safeguard hired and instructed an agent to attempt to enter Plaintiffs' property and  
13 conduct surveillance. Plaintiffs contend that Defendants M&T and Safeguard violated  
14 their privacy prior by instructing an agent to attempt to force entry into Plaintiffs'  
15 residence and peer in the windows.

16 "[T]hree threshold elements . . . must be satisfied to advance a privacy claim: (1)  
17 identification of a specific, legally protected privacy interest; (2) a reasonable  
18 expectation of privacy; and (3) conduct by a defendant constituting a serious invasion  
19 of privacy." *Dept. of Fair Employment and Housing v. Superior Court*, 99 Cal.Rptr.2d  
20 615, 619 (Cal. App. 2002). The TAC alleges that "M&T and Safeguard intentionally  
21 intruded into [Plaintiffs'] expectation of privacy by coming onto, around, and  
22 attempting to come into Plaintiffs' private residence, without Plaintiffs' consent, in  
23 their efforts to harass and stalk Plaintiffs and their family." (TAC ¶ 218). The TAC  
24 alleges that M&T and Safeguard "attempt[ed to] conduct[] 'surveillance' on Plaintiffs'  
25 home, which included trying to open Plaintiffs' entrance door and taking pictures of  
26 the outside and inside of Plaintiffs' home (through the windows). *Id.* ¶ 220. The TAC  
27 alleges that Plaintiffs have a reasonable expectation of privacy in their home. *Id.* ¶ 219.  
28 The Court concludes that Plaintiffs have alleged sufficient facts to state a claim for

1 invasion of privacy against Defendants M&T and Safeguard. M&T and Safeguard's  
2 motions to dismiss Plaintiffs' claims for invasion of privacy are denied.

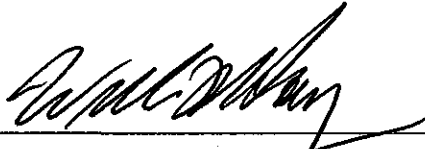
3 **VI. Conclusion**

4 IT IS HEREBY ORDERED that the motion to dismiss filed by Defendant M&T  
5 (ECF No. 68) is granted in part and denied in part. The motion to dismiss is granted  
6 as to the claims of Plaintiffs A.A., D.S., and B.S. for negligent infliction of emotional  
7 distress. The motion to dismiss is denied as to all other claims.

8 IT IS FURTHER ORDERED that the motion to dismiss filed by Defendant  
9 Safeguard (ECF No. 67) is granted in part and denied in part. The motion to dismiss  
10 is granted as to the claims of Plaintiffs A.A., D.S., and B.S. for negligent infliction of  
11 emotional distress. The motion to dismiss is denied as to all other claims.

12 IT IS FURTHER ORDERED that the motion to dismiss filed by Defendant Wolf  
13 Law Firm (ECF No. 66) is granted. The Third Amended Complaint is dismissed with  
14 prejudice as to Defendant Wolf Law Firm.

15  
16 DATED: 7/21/16

  
\_\_\_\_\_  
WILLIAM Q. HAYES  
United States District Judge

15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28