



1 Exhibit A to Select's Request for Judicial Notice, Exhibit A. ECF No. 6-1.<sup>1</sup>

2 Plaintiff sues under the name Hakeim El Bey, apparently as a result of a "Name  
3 Declaration Correction" that changed his "wardship name," Howard James Redmond, to Hakeim  
4 El Bey, through a document filed in the Lawler County Georgia Superior Court on or about April  
5 26, 2016. Thus it is apparent that Hakeim El Bey is the "borrower" referred to in the Deed of  
6 Trust that underpins this action.

7 Plaintiff contends in his complaint that defendant is a "debt collector" and required to  
8 adhere to the federal statutes addressing debt collection practices, while Select claims that it is a  
9 mortgage servicer acting to enforce a deed of trust, not a debt collection enterprise. Further,  
10 Hollingsworth claims that he cannot be sued personally in this action as he is not the actor in this  
11 scenario, Select is. On these alleged facts defendants move to dismiss for failure to state a claim,  
12 F.R.Civ.P. 12(b)(6) and lack of personal jurisdiction (Hollingsworth). F.R.Civ.P. 12(b)(2). As it  
13 is apparent to the court that Select is, indeed a mortgage servicer, not a debt collector, and that  
14 Hollingsworth is not a proper defendant in this action, the court will recommend that the district  
15 court dismiss this action with prejudice.

#### 16 RULE 12(b)(6) STANDARDS

17 A motion to dismiss pursuant to Fed R. Civ. P. 12(b)(6) is a challenge to the sufficiency of  
18 the allegations set forth in the complaint. Fed. R. Civ. P. 12(b)(6) dismissal is proper where there  
19 is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a  
20 cognizable legal theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).  
21 In considering a motion to dismiss for failure to state a claim, the court generally accepts as true  
22 the allegations in the complaint, construes the pleading in the light most favorable to the party  
23 opposing the motion, and resolves all doubts in the pleader's favor. Lazy Y. Ranch LTD v.  
24 Behrens, 546 F.3d 580, 588 (9th Cir. 2008).

25 To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege "enough facts to  
26 state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544,

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27 <sup>1</sup> This document was recorded in the Sacramento County Recorder's Office on April 15, 2002  
28 and is therefore judicially noticeable under Federal Rule of Evidence 201(b)(2).

1 570, (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows  
2 the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”  
3 “Ashcroft v. Iqbal, 556 U.S. 662 (2009).” The plausibility standard is not akin to a ‘probability  
4 requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.  
5 Id. quoting Twombly, 550 U.S. at 556. “Where a complaint pleads facts that are ‘merely  
6 consistent with’ a defendant's liability, it stops short of the line between possibility and  
7 plausibility for entitlement to relief.” Id. quoting Twombly, 550 U.S. at 557.

8 “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed  
9 factual allegations, a plaintiff's obligation to provide the ‘grounds’ of his ‘entitlement to relief’  
10 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of  
11 action will not do.” Twombly, 550 U.S. at 555 (2007) (internal citations omitted). Thus, “bare  
12 assertions...amount[ing] to nothing more than a ‘formulaic recitation of the elements’ ...are not  
13 entitled to be assumed true.” Iqbal, 129 S. Ct. at 1951. A court is “free to ignore legal  
14 conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions  
15 cast in the form of factual allegations.” Farm Credit Services v. American State Bank, 339 F.3d  
16 764, 767 (8th Cir. 2003) (citation omitted). Moreover, a court “will dismiss any claim that, even  
17 when construed in the light most favorable to plaintiff, fails to plead sufficiently all required  
18 elements of a cause of action.” Student Loan Marketing Ass'n v. Hanes, 181 F.R.D. 629, 634  
19 (S.D. Cal. 1998). In practice, “a complaint . . . must contain either direct or inferential allegations  
20 respecting all the material elements necessary to sustain recovery under some viable legal  
21 theory.” Twombly, 550 U.S. at 562 quoting Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101,  
22 1106 (7th Cir. 1984). To the extent that the pleadings can be cured by the allegation of additional  
23 facts, the plaintiff should be afforded leave to amend. Cook, Perkiss and Liehe, Inc. v. Northern  
24 California Collection Serv. Inc., 911 F.2d 242, 247 (9th Cir. 1990) (citations omitted).

25 With these standards in mind, this Court turns to defendant's challenges to the allegations  
26 in plaintiff's complaint.

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1 DISCUSSION

2 A. Liability under the Fair Debt Collection Practices Act [“FDCPA”]

3 The FDCPA regulates only debt collectors. 15 U.S.C. §§ 1692(e)-(f). Under this statute a  
4 “debt collector” is defined as “any person who uses any instrumentality of interstate  
5 commerce or the mails in any business the principal purpose of which is the collection of  
6 any debts, or who regularly collects or attempts to collect, directly or indirectly, debts  
7 owed or due or asserted to be owed or due another.” § 1692a(6). This definition has been  
8 held not to “include the consumer’s creditors, a *mortgage servicing company*, or any  
9 assignee of the debt, so long as the debt was not in default at the time it was assigned.”  
10 Perry v. Stewart Title Co., 756 F.2d 1197, 1208 (5th Cir. 1985); Ho v. Reconrust Co., 840  
11 F.3d 618, 621 (9th Cir. 2016) (foreclosure action *per se* not subject to FDCPA)<sup>2</sup> In  
12 asserting that it is a mortgage servicing company, not a debt collector, Select refers to an  
13 attachment to plaintiff’s “Complaint,”<sup>3</sup> wherein it gave plaintiff notice that it had become  
14 the servicer on his mortgage at least as early as July 14, 2016, id. at 38, and in various of  
15 the documents referred to offered relief services offered to troubled borrowers, including  
16 the federal HAMP program, id. at 27, which is definitely not something a pure debt  
17 collector would have an interest in doing. Therefore, so long as Select became servicer on  
18 plaintiff’s loan *before* it went into default, the FDCPA does not encompass its activities.  
19 See 1692a(6)(F)(iii) & (ii); Perry, 756 F.2d at 1208; *cf* Morgan c. U.S. Bank Nat. Ass’n.,  
20 2012 WL 6096590 at \*6 (N.D.Cal. 12/7/12)(the issue of assignment pre- or post-default  
21 does not apply to servicer acquisition). Plaintiff does not allege, nor does it appear he  
22 could allege, that Select became a servicer solely for the purpose of collecting a debt after

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24  
25 <sup>2</sup> California’s version of the act contains the same definition and exception as does this federal  
26 version. See RFDCPA, Cal.Civ.Code § 1788, et seq. and explicitly exempts the acts of recording  
and servicing a required notice of default and notice of sale from the RDFCA’s scope.

27 <sup>3</sup> Plaintiff has filed an “Affidavit for Claim,” rather than a Complaint, that has numerous  
28 documents attached but only the one referred to above regarding plaintiff’s name change merits  
judicial notice. Nonetheless, the court will consider the attachment referred to since both plaintiff  
and defendants appear to rely upon it for one purpose or another.

1 property went into foreclosure. See Casault v. Federal Nat. Mortg. Ass'n, 915 F.Supp.  
2 1113, 1126 (C.D.Cal. 2012).

3 In order to properly frame a case under the FDCPA the plaintiff must allege specific facts  
4 to support his claim that the defendant is, indeed, a “debt collector.” In light of the foregoing this  
5 court finds that plaintiff has failed to allege a claim under the FDCPA and that any attempt to  
6 amend in order to do so would be futile.

7 **B. Liability Under the Fair Credit Reporting Act [FCRA]**

8 This court will not address the presence or absence of facts to show an FCRA violation as  
9 to do so would be futile. In fact, there is no private right of action available to address issues  
10 arising under this statute.

11 Plaintiff asserts that the defendants violated the FCRA by furnishing “information about  
12 claimant’s payment status to consumer reporting agencies when they knew or consciously  
13 avoided knowing that the information was inaccurate. . . .” ECF No. 1 at 10:26-28.<sup>4</sup> In so  
14 alleging he cites variously to sections of the FDCPA such as 15 U.S.C. sections 1692(a)(6)(4) and  
15 1681, neither of which are part of the FRCA which is codified in 15 U.S.C. section 1681.

16 Furnishers of information<sup>5</sup> are subject to two distinct duties under the FCRA. Rieger v.  
17 American Exp. Co., 2011 U.S. Dist. LEXIS 123468, 2011 WL 5080188, \*2 (N.D. Cal. Oct. 25,  
18 2011). First, under 15 U.S.C. § 1681s-2(a), furnishers have a duty to provide accurate  
19 information. Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147, 1153-54 (9th Cir. 2009). It  
20 is well-settled however, that there is no private right of action for violations of section 1681s-2(a).  
21 See 15 U.S.C. § 1681s-2(c) (stating that section 1681o, which confers a private right of action for  
22 the willful or negligent noncompliance with the FCRA, does “not apply to any violation of . . .

23  
24 <sup>4</sup> It does not appear from his filed documents, including attachments that are not part of his  
25 complaint, that plaintiff was complaining that reported information was inaccurate, but rather he  
26 complains that nothing should have been reported insofar as he contests the existence of a debt  
for which he can be held responsible to Select in the first instance.

27 <sup>5</sup> The FCRA does not define the term “furnisher of information.” However, a plain reading of  
28 the statute suggests that the term refers to a person who provides information about a consumer to  
any consumer reporting agency. See 15 U.S.C. § 1681s-2; Gonzalez v. Ocwen Financial Services,  
Inc., 2003 U.S. Dist. LEXIS 28363, 2003 WL 23939563, at \*2 n.5 (N.D. Cal. Dec. 2, 2003).

1 subsection (a) of . . . section [1681s-2]”); see also Gorman, 584 F.3d at 1154 (“Duties imposed on  
2 furnishers under [15 U.S.C. § 1681s-2(a)] are enforceable only by federal or state agencies.”).  
3 Second, under 15 U.S.C. § 1681s-2(b), furnishers have a duty to undertake an investigation upon  
4 receipt of notice of dispute from a consumer reporting agency. Gorman, 584 F.3d at 1154.  
5 However, the duty to investigate is triggered “only after the furnisher receives notice of dispute  
6 from a [consumer reporting agency].” Id.; Matracia v. JP Morgan Chase Bank, NA, 2011 U.S.  
7 Dist. LEXIS 128227, 2011 WL 5374776, \*3 (E.D. Cal. Nov. 4, 2011).

8 Plaintiff further alleges that defendants violated the FCRA by “fail[ing] to timely and  
9 adequately acknowledge, investigate, and respond to claimant’s written requests for information  
10 about the servicing of an alleged loan and/or escrow account that he denies ever having had,”  
11 ECF 1 at 11:25-28, by reference to 15 U.S.C. section 1692a, a provision of the FDCPA, and 15  
12 U.S.C. section 6821, which is part of the Commerce and Trade addressing impermissible  
13 acquisition of customer information from a financial institution by false pretenses.<sup>6</sup> Plaintiff  
14 therefor fails to allege a subsection of the FCRA that would address this alleged violation, to the  
15 extent he is attempting to assert defendants are liable under 15 U.S.C. section 1681s-2(a) for  
16 failing to provide accurate information, there is no private right of action for violations of that  
17 section either. See Gorman, 584 F.3d at 1154. To the extent that plaintiff is attempting to allege  
18 a claim against defendants for failing to investigate disputed information upon receipt of a notice  
19 of dispute from a consumer reporting agency, plaintiff has failed to allege that defendant received  
20 notice form a consumer reporting agency or what procedures defendant failed to follow.  
21 Accordingly, the second cause of action fails to state a claim under the FCRA, 15 U.S.C. section  
22 1681s-2(b).

### 23 CONCLUSION

24 A less stringent examination is afforded pro se pleadings, Haines, 404 U.S. at 520, but  
25 simple reference to federal law does not create subject-matter jurisdiction. Avitts v. Amoco Prod.

26  
27 <sup>6</sup> Insofar as the court has concluded that the Select is a “servicer,” any information it acquires  
28 from the financial institution holding the Deed of Trust would be a necessary element of fulfilling  
its duty to that institution.

1 Co., 53 F.3d 690, 694 (5th Cir.1995). Subject-matter jurisdiction is created only by pleading a  
2 cause of action within the court’s original jurisdiction. Id. Defendant has alleged two claims but  
3 has failed to meet the criteria for a viable claim under the circumstances existing n this case.

4 The entirety of plaintiffs complaint relies on his erroneous conclusion that defendant  
5 Select is a “debt collector.” As demonstrated above, it is not a debt collector, it is a mortgage  
6 supervisor and the exchange of materials between the parties that both advert to in their  
7 Memoranda makes that conclusion inevitable.

8 District Courts need not provide opportunities for amendment, even under the less  
9 stringent standard applied to pro se pleadings when to do so would constitute a futile act. That is  
10 the case here – any attempt to amend to bring the cause of action at issue here into conformity  
11 with the law would be futile.

12 In light of the foregoing the Court recommends as follows: **The complaint be dismissed**  
13 **with prejudice.**

14 These findings and recommendations are submitted to the United States District Judge  
15 assigned to this case, pursuant to the provisions of 28 U.S.C. section 737(b)(1). Within thirty  
16 (30) days after service of this Order plaintiff ma file written objections. Such a document should  
17 be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” Plaintiff is  
18 advised that failure to file objections within the specified time may waive her right to appeal the  
19 District Court’s Order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

20 Dated: February 5, 2017

21 /s/ Gregory G. Hollows  
22 UNITED STATES MAGISTRATE JUDGE  
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