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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MARY K. SCHERBAK,
Plaintiff,

v.

THE WOLF LAW FIRM, a
California partnership;
SELECT PORTFOLIO SERVICING, a
Utah corporation; WELLS FARGO
BANK, a nationally banking
association; BANK OF AMERICA,
a nationally banking
association; BLACK AND WHITE
INDIVIDUAL DOE DEFENDANTS 1-
10; BLACK AND WHITE CORPORATE
DOE DEFENDANTS 1-10,
Defendants.

No. 2:17-cv-01521-JAM-CKD

**ORDER GRANTING DEFENDANT SELECT
PORTFOLIO SERVICING INC. AND
WELLS FARGO BANK, N.A.'S MOTION
TO DISMISS**

This matter is before the Court on Defendants Select
Portfolio Servicing, Inc. and Wells Fargo Bank, N.A.'s
(collectively, "Defendants") Motion to Dismiss for failure to
state a claim upon which relief can be granted. Mot., ECF No.
29. Mary K. Scherbak ("Plaintiff") filed an opposition to
Defendants' motion, Opp'n, ECF No. 30, to which Defendants
replied, Reply, ECF No. 31. For the reasons discussed below

1 the Court grants Defendants' Motion to Dismiss.¹

2 I. BACKGROUND

3 On July 23, 2004, joint tenants William Scherbak and Mary K.
4 Scherbak ("Borrowers") borrowed \$255,000.00 from Argent Mortgage
5 Company, LLC ("Lender"), secured by the property at 403 Pleasant
6 Valley Road, Markleville, CA 96120 ("the Property"). Request for
7 Judicial Notice ("RJN"), Ex. 1, ECF No. 29-1, pp. 4-20. Lender
8 appointed Town and Country Title Services, LLC ("Trustee") as the
9 original trustee. Id. at 6. Under the Deed of Trust, Borrowers
10 "promised to pay this debt in regular Periodic Payments and to
11 pay the debt in full not later than August 1, 2034. Id. Lender
12 reserved the right to appoint a successor trustee to succeed all
13 title, powers, and duties conferred upon the original trustee.
14 Id. at 17. Lender transferred all beneficial interest in the
15 Deed of Trust to Ameriquist Mortgage Company on July 31, 2004.
16 RJN, Ex. 2, ECF No. 29-2, pp. 21-23. That same day, Ameriquist
17 transferred all beneficial interest in the Deed of Trust to Wells
18 Fargo Bank, N.A., as Trustee, for the Certificate Holders of
19 Asset-Backed Pass-Through Certificates, Series 2004-WCW2 ("the
20 Trust"), courtesy of Select Portfolio. RJN, Ex. 3, ECF No. 29-2,
21 pp. 24-27.

22 On May 26, 2016, an agent for the beneficiary filed and
23 recorded a Notice of Default and Election to Sell Under Deed of
24 Trust at the Alpine County Recorder's Office. RJN, Ex. 4, ECF
25 No. 29-2, pp. 28-43. Attached to the Notice of Default was a
26

27 ¹ This motion was determined to be suitable for decision without
28 oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled
for August 21, 2018.

1 California Declaration of Compliance signed by Select Portfolio
2 agent Toon Hobbs. Id. at 32.

3 Plaintiff filed a lawsuit in Alpine County on July 6, 2017,
4 seeking a temporary restraining order, as well as preliminary and
5 permanent injunctions against foreclosure. Notice of Removal,
6 Ex. A, ECF No. 1, pp. 5-25. Along with the complaint, Plaintiff
7 included a legal advertisement from Newport Law offering a free
8 consultation on foreclosure. Id. at 10-11. The letter was
9 titled "IMPORTANT INFORMATION REGARDING YOUR MORTGAGE WITH: The
10 Wolf Firm A Law Corporation" and stated that Newport Law was "not
11 an affiliated nor associated with the lender listed above or any
12 Government agency." Id. Based on that advertisement, Plaintiff
13 concluded her foreclosure had been suspended. Compl. at 3 ¶ 9.
14 Plaintiff's request for a restraining order was accompanied by
15 her unsigned declaration. Id. at 17-18. The Superior Court
16 judge granted Plaintiff a restraining order and scheduled a show
17 cause hearing for July 21, 2017. Id. at 13-14.

18 Defendants removed the case to the Eastern District of
19 California based on federal question jurisdiction on July 21,
20 2017. Notice of Removal. Plaintiff amended her complaint on
21 August 12, 2017, First Am. Compl., ECF No. 6, and again on
22 February 23, 2018. Second Am. Compl. ("SAC"), ECF No. 23.

23 II. OPINION

24 A. Requests for Judicial Notice

25 Defendants' request that the Court take judicial notice of
26 the four documents related to the foreclosure of the Property.
27 RJN at 1-3. All four documents are publicly recorded with the
28 Alpine County Recorder: a July 23, 2004 Deed of Trust for the

1 Property, recorded August 19, 2004; two July 31, 2004
2 Corporation Assignments of the Deed of Trust, recorded on
3 February 10, 2016; and a May 26, 2016 Notice of Default and
4 Election to Sell Under the Deed of Trust, recorded on June 2,
5 2016. RJN, Exs. 1-4. Plaintiff objects to Defendants' request
6 for judicial notice, claiming it converts the motion to dismiss
7 into a motion for summary judgment and "disput[ing] the
8 truthfulness of the contents of all of the recorded documents."
9 Opp'n at 5, 12.

10 "Although, as a general rule, a district court may not
11 consider materials not originally included in the pleadings in
12 deciding a Rule 12 motion . . . it 'may take judicial notice of
13 matters of public record' and consider them without converting a
14 Rule 12 motion into one for summary judgment." United States v.
15 14.02 Acres of Land, 547 F.3d 943, 955 (9th Cir. 2008) (quoting
16 Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001)).

17 Federal courts apply the Federal Rules of Evidence and thus
18 Plaintiff's reliance on state law is unpersuasive. See Primiano
19 v. Cook, 598 F.3d 558, 563 (9th Cir. 2010), as amended (Apr. 27,
20 2010) (instructing that the Federal Rules of Evidence govern all
21 proceedings in the courts of the United States); Opp'n at 10-11
22 (citing to Herrera v. Deutsche National Bank, 196 Cal. App 4th
23 1366 (Ct. App. 2011)). To take judicial notice of a fact, the
24 fact must be either "generally known within the trial court's
25 territorial jurisdiction" or able to be "accurately and readily
26 determined from sources whose accuracy cannot reasonably be
27 questioned." Fed. R. Evid. 201. While courts may take judicial
28 notice of matters of public record, they may not take judicial

1 notice of "disputed facts stated in public records." See Lee,
2 250 F.3d at 690.

3 The Court grants Defendants' request for judicial notice in
4 part. The Court notices the existence of the four documents and
5 their recording with the Alpine County Recorder. The Court does
6 not take judicial notice of the disputed fact in the California
7 Declaration of Compliance of Exhibit 4, i.e., whether Toon Hobbs
8 made contact with Borrowers on September 16, 2015 regarding
9 their financial situation and explored options for the Borrowers
10 to avoid foreclosure. ECF No. 29-1, p. 32.

11 B. Defendants' Motion to Dismiss

12 1. Count I: Fair Debt Collection Practices Act (FDCPA)

13 Plaintiff brings her first claim under the FDCPA, 15 U.S.C.
14 § 1692c(a)(2), against Defendant Select Portfolio and former
15 Defendant Bank of America.² Sec. Am. Compl. ("SAC"), ECF No. 23,
16 p. 4. Defendants move to dismiss this claim for two reasons:
17 (1) Plaintiff's claim is barred by the statute of limitations
18 based on the date alleged; and (2) Plaintiff failed to allege
19 specific facts that Select Portfolio is a "debt collector."
20 Mot. at 5-7.

21 a. Statute of Limitations

22 FDCPA claims are subject to a one-year statute of
23 limitations. 15 U.S.C. § 1692k(d). It follows that any
24 violations preceding July 6, 2016—one year before Plaintiff
25 filed her Complaint—are time-barred. Plaintiff's Complaint does

26 ² Bank of America was dismissed per the parties' stipulation in
27 October 2017. See ECF Nos. 10, 13. Plaintiff filed her Second
28 Amended Complaint in February 2018, still naming Bank of America
as a Defendant in this claim. ECF No. 23.

1 not clearly state the dates when her allegations under 15 U.S.C.
2 § 1692c(2) (a) occurred, instead alleging merely that Defendant
3 was placed on notice that she had counsel in "early 2015" and
4 "[m]any of [the allegedly violative calls and letters] occurred
5 within 1 (one) year of filing this complaint." SAC at 3-4.
6 Plaintiff has not provided any argument or evidence that she was
7 unable to discover the alleged violations at the time they
8 occurred. Plaintiff could only pursue her FDCPA claim if there
9 were factual allegations of prohibited calls or correspondence
10 from Defendants in the period of July 6, 2016 to July 6, 2017.
11 No such allegations exist in Plaintiff's SAC.

12 b. Sufficiency of the Allegations

13 The FDCPA prohibits "debt collectors" from communicating
14 with a consumer in connection with the collection of a debt if
15 the collector knows an attorney represents the consumer, unless
16 the attorney fails to respond within a reasonable period of time
17 or the attorney consents to communication with the consumer. 15
18 U.S.C. § 1692c(a) (2).

19 Defendants dispute whether Plaintiff alleged sufficient
20 facts to qualify Select Portfolio as a "debt collector," as
21 defined by the FDCPA. Mot. at 5-6; 15 U.S.C. § 1692a(6).
22 Plaintiff's SAC alleges that Select Portfolio is a debt
23 collector, citing two unpublished cases from other district
24 courts. See SAC at 2-3 (citing Reed v. Select Portfolio
25 Servicing, Inc., No. 1:16-CV-310, 2017 WL 663139 (E.D. Tenn.
26 Feb. 16, 2017); Wright v. Select Portfolio Servicing, Inc., No.
27 8:14-CV-2298-T-30TGW, 2015 WL 419618 (M.D. Fla. Feb. 2, 2015)).
28 Neither Reed nor Wright arose in California and applied Ninth

1 Circuit law. Accordingly, these cases have no precedential
2 value to the Court in adjudicating the matters in this case.

3 The factual allegations supporting Plaintiff's FDCPA claim
4 are as follows:

5 In early 2015 SPS was placed on notice that William D.
6 McCann, Esq., a licensed Nevada counsel was Plaintiff's
7 attorney of record. Nonetheless, during the years 2015-
8 2016 SPS attempted numerous contacts with Plaintiff
9 without notifying her counsel, made numerous harassing
10 telephone calls to Plaintiff without leaving contact
11 information where representatives could be reached, and
12 send her harassing correspondence all in violation of 15
13 U.S.C. 1692(c)(a)(2) [sic] and Rosenthal. Many of these
14 occurred within 1 (one) year of filing of this complaint.

15 SAC at 3-4. These allegations do not provide sufficient
16 information about the manner, method, and content of the notice
17 that McCann, an attorney whom Defendants contend is "delicensed"
18 to practice law in California,³ provided Select Portfolio to put
19 the servicer on notice regarding his representation of
20 Plaintiff.

21 ³ The Ninth Circuit has determined that the information
22 contained on the California State Bar website is subject to
23 judicial notice. White v. Martel, 601 F.3d 882, 885 (9th Cir.
24 2010). Here, attorney William D. McCann's California State Bar
25 records indicate that he was suspended in 2005 following a
26 conviction for filing a false tax return and tendered his
27 resignation from the California Bar in February 2007, with
28 disciplinary charges pending. See Attorney Search: William
29 Denis McCann-#51902, THE STATE BAR OF CALIFORNIA,
30 <http://members.calbar.ca.gov/fal/Licensee/Detail/51902> (last
31 visited August 22, 2018). The Property is located in
32 California and the state court complaint that initiated these
33 proceedings was filed in a California state court. See Compl.,
34 ECF No. 1. California prohibits individuals from practicing
35 law in state courts unless they are active members of the bar.
36 Cal. Bus. & Prof. Code § 6125; Birbrower, Montalbano, Condon &
37 Frank v. Superior Court, 949 P.2d 1, 5 (Cal. 1998), as modified
38 (Feb. 25, 1998) (interpreting what it means to "practice law in
39 California").

1 The allegations also fail to detail the subject of Select
2 Portfolio's calls. An entity is not a debt collector if its
3 "only role in the debt collection process is the enforcement of
4 a security interest" or if it was providing notice of the non-
5 judicial foreclosure of the mortgagor's property. Vien-Phuong
6 Thi Ho v. ReconTrust Co., NA, 858 F.3d 568, 572-74 (9th Cir.),
7 cert. denied sub nom. Ho v. ReconTrust Co., 138 S. Ct. 504
8 (2017) ("[A]ctions taken to facilitate a non-judicial
9 foreclosure . . . are not attempts to collect 'debt' as that
10 term is defined by the FDCPA."). Accordingly, Plaintiff has
11 failed to plead sufficient facts necessary to maintain an
12 actionable claim under the FDCPA.

13 In sum, Plaintiff has not provided the requisite
14 information to "give the defendant fair notice of what the
15 plaintiff's claim is and the grounds upon which it rests."
16 Echlin v. PeaceHealth, 887 F.3d 967, 977 (9th Cir. 2018) (citing
17 Fed. R. Civ. P. 8(a)(2)). The Court therefore dismisses
18 Plaintiff's FDCPA claim.

19 2. Count III: The Rosenthal Fair Debt Collection
20 Practices Act ("Rosenthal Act")⁴

21 Plaintiff's second claim arises under California's
22 Rosenthal Act, Cal. Civ. Code § 1788.14(c), against Defendants.
23 SAC at 4-5. Plaintiff's Rosenthal Act claim alleges Defendant
24 Select Portfolio contacted her after she retained counsel,
25 causing her "great emotional damage." Id. The claim makes the
26 conclusory assertion that both Defendants are debt collectors

27 ⁴ Plaintiff's SAC does not include a second cause of action,
28 going directly from "Count I" to "Count III."

1 under the Rosenthal Act. Id.

2 Defendants argue that this claim fails for similar reasons
3 to Plaintiff's first claim: that they do not qualify as debt
4 collectors under the Rosenthal Act. Mot. at 7-8. They cite to
5 Lal v. American Home Servicing, Inc. for the proposition that
6 California's Rosenthal Act mirrors the FDCPA. Mot. at 7 (citing
7 Lal, 680 F. Supp. 2d 1218, 1224 (E.D. Cal. 2010)). Plaintiff
8 counters that the California Court of Appeals recently held in
9 Davidson v. Seterus, Inc., that "the Rosenthal Act's definition
10 of 'debt collector' applies to a mortgage servicer who engages
11 in debt collection practices in attempting to obtain repayment
12 of mortgage debt[.]" 21 Cal. App. 5th 283, 304-05 (Ct. App.
13 2018), review denied (June 13, 2018).

14 Here, Plaintiff has not alleged specific facts
15 demonstrating that Defendants engaged in debt collection
16 practices in violation of the Rosenthal Act. She alleges only
17 the legal conclusion that Select Portfolio violated section
18 1788.14(c) of the Rosenthal Act, without stating any specific
19 instances or dates. Just as the Court found regarding her FDCPA
20 claim, Plaintiff's claim is too vague and conclusory to properly
21 put Defendants on notice of her Rosenthal Act claim.
22 Accordingly, the Court grants Defendants' Motion to Dismiss
23 Plaintiff's Rosenthal Act claim.

24 3. Count IV: 12 U.S.C. § 2605(K)

25 Plaintiff's third claim alleges a violation of the Real
26 Estate Settlement Procedures Act (RESPA), 12 U.S.C. 2605(k), for
27 Defendants' failure to respond to a Qualified Written Request for
28 information "[b]eginning in 2015." SAC at 5. She alleges that

1 she suffered "severe emotional injury" as a result of Defendants'
2 failure to respond to her requests within five business days and
3 is entitled to her attorneys' fees. Id.

4 Plaintiff brings this claim against former Defendant Bank of
5 America, as well as Select Portfolio and Wells Fargo. Id. The
6 plain language of the section, titled "Servicer prohibitions,"
7 make it abundantly clear that this section can only apply to
8 servicers. 12 U.S.C. § 2605(k)(1). Plaintiff cannot bring this
9 claim against a trustee, such as Wells Fargo, who is not alleged
10 to have been her mortgage servicer. (Similarly, she may not bring
11 it against the Defendant she previously dismissed from this
12 action, Bank of America.)

13 Plaintiff can only recover (1) "any actual damages"
14 resulting from Select Portfolio's failure to timely respond, and
15 (2) an amount not to exceed \$2,000 if Select Portfolio engaged in
16 a pattern or practice of noncompliance. 12 U.S.C. § 2605(k)(1).
17 Plaintiff's vague and conclusory allegation that she "suffered
18 severe emotional injury as a result of the violation" does not
19 contain sufficient facts to establish whether there was a causal
20 link between the servicer's noncompliance with RESPA and
21 Plaintiff's alleged damages. See, e.g., Marquette v. Bank of
22 Am., N.A., No. 13CV2719-WQH-JMA, 2015 WL 461852, at *14 (S.D. Cal.
23 Feb. 4, 2015) (allowing a claim of emotional damages resulting
24 from RESPA violation to go forward where the plaintiff detailed
25 how the violation caused his harm). This claim fails and is
26 dismissed as to Defendants.

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1 4. Count VI: Quiet Title⁵

2 Plaintiff's quiet title claim alleges that the "first deed of
3 trust burdening the PROPERTY is an illegal security interest for
4 the reasons set forth, supra," and "Plaintiff therefore requests
5 an order quieting her title in the subject property, and striking
6 the deed of trust from the recorded liens against the property."
7 SAC at 6.

8 Defendants assert that Plaintiff has failed to state a quiet
9 title claim. Mot. At 9. Under California law, to state a claim
10 for quiet title the plaintiff must include the following in a
11 verified complaint: (1) a description of the property, both legal
12 description and street address; (2) the title of the plaintiff,
13 and the basis for that title; (3) the adverse claims to the
14 plaintiff's title; (4) the date as of which the determination is
15 sought; and (5) a prayer for the determination of the plaintiff's
16 title against the adverse claims. Monreal v. GMAC Mortg., LLC,
17 948 F. Supp. 2d 1069, 1079 (S.D. Cal. 2013) (citing Cal. Civ.
18 Proc. Code § 761.020). "In addition, under California law, a
19 plaintiff seeking to quiet title in the face of a foreclosure
20 must allege tender or an offer of tender of the amount borrowed."
21 Mangindin v. Washington Mut. Bank, 637 F. Supp. 2d 700, 712 (N.D.
22 Cal. 2009).

23 Plaintiff argues that "[i]t does not take Cardozo-like legal
24 skills to plead a cause of action for quiet title." Opp'n at 14.
25 While that reasoning is correct, it does take more than

26 _____
27 ⁵ Plaintiff withdrew "Count V," alleging a claim for damages
28 pursuant to California Civil Code § 1750 against Defendants.
Mot. at 9.

1 "[t]hreadbare recitals of the elements of a cause of action,
2 supported by mere conclusory statements" to plead a cause of
3 action. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Plaintiff's
4 SAC falls short yet again.

5 Plaintiff concludes that she has properly asserted a quiet
6 title claim because she alleged that Defendants wrongfully
7 foreclosed upon the Property. Opp'n at 14. Such a conclusory
8 allegation is not sufficient to state a claim for quiet title and
9 this claim is dismissed.

10 5. Count VII: California Civil Code § 2920

11 In her final claim, Plaintiff alleges that Defendants
12 violated the California Civil Code providing the definition of
13 "mortgage." SAC at 6. She reiterates her allegations that an
14 advertisement for a free legal consultation, sent by an unrelated
15 third-party, led her to believe the foreclosure sale was
16 suspended.⁶ Id. at 7. The claim goes on to conclude, without
17 supporting factual allegations, that Defendants violated
18 "California Civil Code 2924.11(a)(b), 2923.7, or 2925B(2)e,
19 2924(11) a through g inclusive." As Defendants point out,
20 several of these code sections do not actually exist. Mot. at
21 11.

22 In her Opposition, Plaintiff reframes her final claim as
23

24 ⁶ Plaintiff alleges this advertisement was "purportedly from the
25 Wolf Law Firm" and similarly questions whether Wells Fargo sent
26 the advertisement. SAC at 7 ¶ 34. The clear and unambiguous
27 sender of this advertisement was a third-party law firm, as
28 stated explicitly within the advertisement. Compl., Ex. B.
("This information was obtained through public records. We are
not an [sic] affiliated nor associated with the lender listed
above or any Government agency.").

1 arising under California Civil Code § 2923.55, rather than what
2 she stated in the SAC. Compare Opp'n at 15 with SAC at 6-7.
3 This new theory appears to allege Select Portfolio committed
4 fraud. Allegations of fraud must be pled with the requisite
5 specificity the law requires. Plaintiff's allegations are
6 completely lacking in specificity and are legally insufficient.
7 For these reasons, the Court dismisses Plaintiff's "Civil Code
8 2920" claim.

9 C. Leave to Amend

10 Courts dismissing claims under Federal Rule of Civil
11 Procedure 12(b)(6) have discretion to permit amendment, and there
12 is a strong presumption in favor of leave to amend. Eminence
13 Cap., LLC v. Aspeon, Inc., 316 F.3d 1048, 1051-52 (9th Cir.
14 2003). "Dismissal with prejudice and without leave to amend is
15 not appropriate unless it is clear . . . that the complaint could
16 not be saved by amendment." Id. at 1052 (internal citation
17 omitted). Plaintiff has had multiple opportunities to properly
18 plead her claims against Defendants and this Court is convinced
19 that further amendment would be futile. Accordingly, Defendants'
20 Motion to Dismiss is granted with prejudice.

21 III. ORDER

22 For the reasons set forth above, the Court GRANTS WITHOUT
23 LEAVE TO AMEND Defendants' Motion to Dismiss.

24 IT IS SO ORDERED.

25 Dated: September 27, 2018

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27 
28 JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE