

United States District Court  
Northern District of California

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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

**SUSAN AGUIAR and ROBERTO AGUIAR,**  
  
**Plaintiffs,**  
  
**vs.**  
  
**WELLS FARGO BANK, N.A. and REGIONAL  
SERVICE CORPORATION,**  
  
**Defendants.**

**Case No.: 12-CV-03653 YGR**  
  
**ORDER GRANTING MOTION OF DEFENDANTS  
WELLS FARGO BANK, N.A. AND REGIONAL  
SERVICE CORPORATION TO DISMISS WITH  
LEAVE TO AMEND**

Plaintiffs Susan and Roberto Aguiar filed a Verified Complaint for Equitable Relief to Set Aside Trustee Sale and Damages against Defendants Wells Fargo Bank, N.A. (“Wells Fargo”) and Regional Service Corporation (“Regional Service”) (collectively “Defendants”). Plaintiffs allege three claims: (1) Wrongful Trustee Sale against both Defendants; (2) Quiet Title against Wells Fargo; and (3) violation of the Federal Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. §§ 1692 *et seq.* against both Defendants. Fundamentally, they allege that Wells Fargo violated the National Housing Act (“NHA”), 12 U.S.C. §§ 1701 *et seq.* because it did not meet with Plaintiffs in-person to discuss alternatives to foreclosure or secure the approval of the Secretary of the Department of Housing and Urban Development prior to initiating foreclosure proceedings. Plaintiffs claim further that both Defendants violated the FDCPA because Regional Service failed to provide Plaintiffs with a Debt Validation Notice.

Wells Fargo has filed a Motion to Dismiss all three claims alleged in the Complaint on the grounds that judicially noticeable documents demonstrate that Wells Fargo had the right to conduct a non-judicial foreclosure and complied with the statutory requirements for non-judicial

1 foreclosures; the NHA does not apply to Plaintiffs' mortgage or create a private right of action; and  
2 Wells Fargo is exempt from the FDCPA. (*See* Dkt. No. 7.) Defendant Regional Services  
3 Corporation filed a joinder of Wells Fargo's motion. (*See* Dkt. No. 16.)

4 Having carefully considered the papers submitted and the pleadings in this action, for the  
5 reasons set forth below, the Court hereby **GRANTS** the Motion to Dismiss **WITH LEAVE TO**  
6 **AMEND.**<sup>1</sup>

7 **I. BACKGROUND**

8 In December 2010, Plaintiff Roberto Aguiar, who is Plaintiffs' sole source of income, was  
9 seriously injured at work. (Complaint ¶ 9.) He had back surgery in September 2011 but was  
10 unable to return to work until March 2012. (*Id.*) His claim for worker's compensation insurance  
11 was approved, but has not yet received money for the claim. (*Id.*) While Mr. Aguiar was unable to  
12 work, a notice of default and a notice of trustee's sale were filed, and three weeks before Mr.  
13 Aguiar returned to work, Defendants sold Plaintiffs' home in a trustee's sale. (*Id.*)

14 **A. NONJUDICIAL FORECLOSURE PROCEEDINGS**

15 On March 30, 2006, Plaintiffs executed an Adjustable Rate Note ("Note") in the amount of  
16 \$840,000, secured by a Deed of Trust against real property located at 50 Ranch Drive, Novato,  
17 California (the "Property"), in favor of Wells Fargo's predecessor in interest, World Savings Bank,  
18 FSB. (*Id.* ¶¶ 1, 3, 5.)

19 Plaintiffs defaulted on their loan payment in November 2010. (*Id.* ¶ 8.) On March 7, 2011,  
20 Regional Services filed a notice of default, which was recorded with the Marin County Recorder's  
21 Office. (RJN, Ex. F). A notice of trustee's sale was subsequently recorded on June 8, 2011. (RJN,  
22 Ex. G).

23 In June 2011, in order to save their home, Plaintiffs filed a Chapter 13 Bankruptcy Petition,  
24 Case No. 11-12441-AJ. (Pls.' Opp'n 7.) As part of a settlement in the bankruptcy case, Plaintiffs  
25 agreed to pay any prepetition amounts owing<sup>2</sup> over a period of several years, and pay \$500 each

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26 <sup>1</sup> Pursuant to Federal Rule of Civil Procedure 78(b) and Civil Local Rule 7-1(b), the Court finds this motion  
27 appropriate for decision without oral argument.

28 <sup>2</sup> According to the March 2011 Notice of Default, the amount owing was \$20,629.36 as of March 4, 2011.  
(*See* RJN, Ex. F.)

1 month. (*Id.*) Plaintiffs were able to make the July 2011 payment in an amount of \$3904.00 but  
2 could not make further payments.

3 In November 2011, Wells Fargo successfully moved to have the automatic stay lifted,  
4 which was lifted in January 2012. (Pls' RJN, Ex. B.) On February 21, 2012, a Trustee's Sale was  
5 held at which Wells Fargo purchased the Property as the highest bidder. (RJN, Ex. H at 2.) "Wells  
6 Fargo filed an unlawful detainer complaint against plaintiffs and took a default, default judgment,  
7 and obtained a writ of possession pursuant to the Judgment." (Complaint ¶ 9.) Plaintiffs moved to  
8 vacate the default on the basis that they were never served but their motion was denied. (*Id.*) A  
9 stay of eviction was scheduled to end on June 18, 2012. (*Id.*)

## 10 **B. PROCEDURAL BACKGROUND**

11 On June 18, 2012, Plaintiffs filed this action in the Superior Court for the County of Marin.  
12 Plaintiffs moved for a temporary restraining order to enjoin Defendants from evicting Plaintiffs  
13 from the Property. (*See* Notice of Removal, Ex. B.) A temporary restraining order was issued  
14 enjoining Defendants from evicting Plaintiffs. (*Id.*) A hearing on a preliminary injunction was  
15 scheduled in Superior Court for July 18, 2012. (*Id.*) On July 12, 2012, Defendants removed the  
16 action to this Court. It appears that subsequent to removal, Defendants evicted Plaintiffs from the  
17 Property.

## 18 **II. LEGAL STANDARD**

19 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims alleged in  
20 the complaint. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1199-1200 (9th Cir. 2003). All allegations of  
21 material fact are taken as true. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). However, legally  
22 conclusory statements, not supported by facts, need not be accepted. *See Ashcroft v. Iqbal*, 556  
23 U.S. 662, 678 (2009). Plaintiffs' obligation to provide the grounds of their entitlement to relief  
24 "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of  
25 action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations and  
26 quotations omitted). Rather, the allegations in the complaint "must be enough to raise a right to  
27 relief above the speculative level." *Id.*

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1 Review is generally limited to the contents of the complaint and documents attached  
2 thereto. *Allarcom Pay Television, Ltd. v. Gen. Instrument Corp.*, 69 F.3d 381, 385 (9th Cir. 1995).  
3 Additionally, the Court may consider matter that is properly the subject of judicial notice, such as  
4 court filings and other public records, without converting a motion to dismiss into one for summary  
5 judgment. *Lee v. Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001). The Court finds that the  
6 documents submitted by Wells Fargo and Plaintiffs are properly the subject of judicial notice. Fed.  
7 R. Evid. 201(b)(2). All of the documents are documents issued by a legislative or executive  
8 department of the United States, public records pertaining to the Property, or court filings. The  
9 Court will take judicial notice of the dates, parties, and legally operative language of these  
10 documents, but not the truth of various factual representations made in the documents.<sup>3</sup> *See Lee*,  
11 *supra*, 250 F.3d at 690.

### 12 **III. DISCUSSION**

13 Plaintiffs' first cause of action alleges Wrongful Trustee's Sale on the grounds that the  
14 trustee's sale was improperly held because Defendants failed to comply with the (a) National  
15 Housing Act and (b) Fair Debt Collection Practices Act before initiating foreclosure proceedings.  
16 Based on these same allegations, the second cause of action seeks to quiet title in the Property  
17 against Wells Fargo. The third cause of action realleges a violation of the FDCPA. Because the  
18 alleged violations of the FDCPA is also used to support the claim for Wrongful Trustee's Sale, the  
19 Court will address the FDCPA claim as an element of the Wrongful Trustee's Sale claim.

#### 20 **A. FIRST CAUSE OF ACTION: WRONGFUL TRUSTEE'S SALE**

21 A nonjudicial foreclosure sale is presumed to have been conducted regularly and fairly.  
22 *Nguyen v. Calhoun*, 105 Cal. App. 4th 428, 444 (Cal. Ct. App. 2003) ("Our analysis proceeds on  
23 the presumption of validity accorded the foreclosure sale"). To state a cause of action for a  
24 wrongful trustee's sale, the Plaintiffs must plead "(1) the trustee or mortgagee caused an illegal,

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26 <sup>3</sup> For example, a Declaration filed with the Notice of Default (RJN, Ex. F, at 3) declares under penalty of  
27 perjury that "Wells Fargo Bank, N.A., has tried with due diligence ... to contact the borrower." The Court  
28 can take judicial notice of the fact that this statement was made and the legally operative effect of a  
declaration under penalty of perjury, but not the truth of the matter asserted in the hearsay declaration. The  
Court uses this example because Wells Fargo argues that the Court can take judicial notice of the truth of the  
statements contained in the declaration because the declaration was made under penalty of perjury.



1 duties allegedly breached vis-à-vis a mortgagee and mortgagor, rather it “govern[s] relations  
2 between the mortgagee and the government.” *Jara v. Aurora Loan Services LLC*, C-11-00419 LB,  
3 2011 WL 4536898, at \*4 (N.D. Cal. Sep. 30, 2011) (holding that plaintiff’s “attempt to amend his  
4 complaint to allege that Defendants failed to comply with the terms of the National Housing Act,  
5 then, is futile”) (quoting *Mitchell v. Chase Home Finance LLC*, Case No. 06-CV-2099-K, 2008 WL  
6 623395, at \*3 (N.D. Tex. Mar. 4, 2008)). Plaintiffs do not address this issue at all in their  
7 Opposition brief, which the Court takes as a concession that this claim lacks merit.

8 Based on the foregoing, the Court **GRANTS WITH PREJUDICE** the Motion to Dismiss  
9 Plaintiffs’ claim for wrongful trustee’s sale on this particular basis.

10 *b) Fair Debt Collection Practices Act.*

11 The FDCPA prohibits “debt collectors” from engaging in unfair, abusive, or  
12 deceptive practices “in connection with the collection of a debt.” 15 U.S.C. § 1692. Under the  
13 FDCPA, debt collectors are required to provide debtors with a Debt Validation Notice to notify  
14 debtors of their dispute rights shortly after communicating with them “in connection with the  
15 collection of a debt.” *Id.* § 1692g.

16 Plaintiffs allege that the Defendants failed to provide a Debt Validation Notice in  
17 connection with the collection of a debt in violation of the FDCPA. Specifically, Plaintiffs allege  
18 that Defendant Regional Service “was employed by Wells Fargo as a debt collector after plaintiffs  
19 defaulted on their loan payment. Regional Service failed to provide plaintiffs the Debt Validation  
20 Notice required by the FDCPA. Regional Service also engaged in unfair debt collection practices  
21 by proceeding to sell the subject property with actual knowledge that plaintiffs were being denied  
22 the protections of the law.” (Complaint ¶ 8.)

23 *i. FDCPA Analysis: Regional Service Corporation.*

24 Regional Service argues that it is exempt from the FDCPA because it  
25 is not a “debt collector” and that it was not engaging in debt collection services. Under the  
26 FDCPA, a “debt collector” is defined as “any person ... in any business the principal purpose of  
27 which is the collection of any debts, or who regularly collects or attempts to collect, directly or

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28 24 C.F.R. § 203.500.

1 indirectly, debts owed or due or asserted to be owed or due another.” 15 U.S.C. § 1692a. Here, the  
2 Complaint alleges as follows:

3 Regional Service Corporation is a debt collector as that term is defined in the FDCPA. In  
4 particular, the principal business of Regional Services is the collection of delinquent debts  
5 from borrowers such as plaintiffs. Regional Service began its debt collection activities after  
6 plaintiffs were in default. Also Regional Service used the US Mail to solicit money from  
7 plaintiffs after the default of plaintiffs.

8 (Complaint ¶ 9.) Regional Service disputes the truth of these allegations but does not otherwise  
9 challenge the legal sufficiency of these particular allegations. Given the procedural posture of this  
10 case, the Court must accept the allegations as true.

11 Regional Service next argues that it was not engaging in debt collection services because,  
12 under the FDCPA, the non-judicial foreclosure of real property secured by a deed of trust is not  
13 “debt collection activity.” Ample authority supports this position. *See, e.g., Odinma v. Aurora*  
14 *Loan Services*, C-09-4674 EDL, 2010 WL 2232169, at \*11 (N.D. Cal. June 3, 2010) (collecting  
15 cases that hold “foreclosure is not debt collection under the federal Fair Debt Collection Practices  
16 Act”). In opposition, Plaintiffs refer to a brief filed by the Consumer Financial Protection Bureau<sup>5</sup>  
17 in *Birster v. Am. Home Mortg. Servicing, Inc.*, 11-13574, 2012 WL 2913786 (11th Cir. July 18,  
18 2012), in which it argued that district courts have construed the statute too narrowly so as to  
19 eliminate categorically all debt collection services which may be related to a foreclosure. However,  
20 that case did involve more traditional attempts to collect on a debt. There, the defendant allegedly  
21 “engaged in a relentless assault of harassing phone calls and home inspections in an attempt to  
22 collect the mortgage debt.” *Id.* at \*1. Additionally, the defendant mailed a letter that stated “THIS

23 <sup>5</sup> Plaintiffs argue that the Court *must* defer to the agency’s interpretation of a statute as reflected in the  
24 amicus brief. The cases to which they cite in support are not on point as the cases refer to a type of  
25 deference described as *Auer* deference, which requires courts defer to an agency’s interpretation of its own  
26 ambiguous regulations even if the interpretation is advanced in an amicus brief. *See Auer v. Robbins*, 519  
27 U.S. 452, 461-62 (1997). The amicus brief filed by the Consumer Financial Protection Bureau is  
28 interpreting the FDCPA, not the agency’s own regulations. An agency interpretation not embodied in any  
formal issuance from the agency, such as a regulation, guideline, policy statement, or administrative  
adjudication is entitled to little if any deference. *Bowen v Georgetown Univ. Hospital*, 488 U.S. 204, 212-13  
(1988); *see Bresgal v. Brock*, 843 F.2d 1163, 1168 (9th Cir. 1987) (“[The agency] did not construe [the  
statutory provision at issue] until the onset of this litigation. The Secretary’s construction is entitled to no  
more deference than is the interpretation of any party to the suit”).

1 IS AN ATTEMPT TO COLLECT A DEBT,” advising the homeowners that it would proceed with  
2 the foreclosure unless they cured the default. (*Id.*) In an unpublished decision, the Eleventh Circuit  
3 found this evidence insufficient to determine whether the defendant was a debt collector or was  
4 engaging in debt collection activity and reversed the summary judgment entered against the  
5 homeowners. *Id.* at \*4 (“an entity can both enforce a security interest *and* collect on a debt”) (citing  
6 *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1217 (11th Cir. 2012)) (“The fact that the letter and documents relate to the enforcement of a security interest does not  
7 prevent them from also relating to the collection of a debt within the meaning of § 1692e.”). By  
8 contrast, here, Plaintiffs allege that “Regional Service used the US Mail to solicit money from  
9 plaintiffs after the default of plaintiffs.” (Complaint ¶ 9.)

10  
11 Plaintiff has not pled sufficient facts for the Court to determine whether Regional Service’s  
12 conduct constituted debt collection services. The mere mailing of a Notice of Default will not  
13 suffice. *See Santoro v. CTC Foreclosure Serv.*, 12 Fed.App. 476, 480 (9th Cir. 2001). The Motion  
14 to Dismiss is **GRANTED WITH LEAVE TO AMEND**.

15 **ii. FDCPA Analysis: Wells Fargo.**

16 Wells Fargo also argues that it is exempt from the provisions of the  
17 FDCPA.<sup>6</sup> Plaintiffs do not contest that when Wells Fargo acts as a lender, it is exempt from the  
18 FDCPA, but argue that Wells Fargo is not exempt when it acts as a loan servicer. According to  
19 Plaintiffs, they are entitled to pursue their claims against America’s Servicing Company, the  
20 servicing division of Wells Fargo. America’s Servicing Company is not a defendant to this lawsuit  
21 and there are no allegations about it in the Complaint.

22 Based on the foregoing, the Court **GRANTS** the Motion to Dismiss the FDCPA cause of  
23 action against Wells Fargo to the extent it is based on its banking capacity. The Court does not  
24 give an advisory opinion regarding America’s Servicing Company. However, the Court **GRANTS**  
25 **LEAVE TO AMEND** to permit Plaintiffs to bring this claim against America’s Servicing Company.

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28 <sup>6</sup> Wells Fargo argues that even if the FDCPA did apply to it, Plaintiffs fail to allege that they provided a timely written dispute of the debt, as required by 15 U.S.C. § 1692g(b). There is no such pleading requirement.

1                   2.       *Second Element: Prejudice.*

2                   Irregularities in a nonjudicial foreclosure sale may be grounds for setting aside the  
3 sale if the irregularities are prejudicial to the party challenging the sale. *Lona, supra*, 202 Cal. App.  
4 4th at 104. Thus, the party attacking the sale must allege that they were prejudiced or harmed by  
5 the violation.

6                   Wells Fargo argues that even if Plaintiffs could allege a flaw in the foreclosure mechanics,  
7 “hyper-technical” defects are not a basis to challenge a trustee’s sale. Although Plaintiffs have  
8 alleged technical noncompliance with federal law, they have not explained how they were  
9 prejudiced by such noncompliance. Plaintiffs allege that they defaulted on the Note, which under  
10 the Deed of Trust, allowed the Trustee (or Beneficiary) to initiate foreclosure proceedings. If the  
11 Trustee (or Beneficiary) has the right to initiate foreclosure proceedings, then Plaintiffs must allege  
12 facts that show the violation of the statute itself, and not the foreclosure proceedings, caused their  
13 injury. Here, Plaintiffs allege that their injuries were caused by the foreclosure proceedings, and  
14 not by any statutory violation. Therefore, Plaintiffs fail to allege the prejudice necessary to state a  
15 claim for wrongful foreclosure.

16                   Based on the foregoing analysis, the Court **GRANTS** the Motion to Dismiss the claim for  
17 Wrongful Trustee’s Sale on the grounds that Plaintiffs fail to allege prejudice.

18                   3.       *Third Element: Tender.*

19                   Finally, in order to set aside a foreclosure, Plaintiffs must allege that they offered to  
20 tender the full amount of the secured indebtedness or that they should be excused from tendering  
21 the full amount. *See Abdallah v. United Savs. Bank*, 43 Cal. App. 4th 1101, 1109 (Cal. Ct. App.  
22 1996); *see also Guerrero v. Greenpoint Mortg. Funding, Inc.*, Case No. 10-15333, 2010 WL  
23 4117102, at \*1 (9th Cir. Oct. 20, 2010) (stating the plaintiffs “lacked standing to bring a claim for  
24 ‘wrongful foreclosure,’ because they failed to allege actual, full and unambiguous tender of the  
25 debt owed on the mortgage”). “This requirement is based on the theory that one who is relying  
26 upon equity in overcoming a voidable sale must show that he is able to perform his obligations  
27 under the contract so that equity will not have been employed for an idle purpose.” *Dimock v.*  
28 *Emerald Properties LLC*, 81 Cal. App. 4th 868, 878 (Cal. Ct. App. 2000) (*citing Karlsen v. Am.*

1 *Sav. & Loan Assn.*, 15 Cal. App. 3d 112, 118 (Cal. Ct. App. 1971)). Here, the Complaint lacks  
2 allegations of full tender or that tender should be excused.<sup>7</sup> Instead, the allegations are ambiguous  
3 as to what Plaintiffs are willing to tender. Thus: “Plaintiffs are ready, willing and able to make the  
4 payments required of them pursuant to the Deed of Trust” but request “an accounting to determine  
5 the amount due under the Deed of Trust, as wells [*sic*] as the appropriate payment schedule.”  
6 (Complaint ¶¶ 12, 15.) Similarly, in their opposition, Plaintiffs argue that “Plaintiffs are ready,  
7 willing and able to tender the post petition amounts due on the loan.” (Opp’n 14.) They also argue  
8 that it would be inequitable to require full tender because Mr. Aguiar was out of work when  
9 Defendants initiated the foreclosure proceedings. These allegations and arguments create  
10 ambiguity as to whether the Plaintiffs can tender the full amount and whether the amount they  
11 intend to tender is pre- or post- petition.

12 Based on this analysis, the Court **GRANTS** the Motion to Dismiss Plaintiffs’ claim for  
13 Wrongful Trustee’s Sale because the complaint fails to allege “full” tender.

14 **B. SECOND CAUSE OF ACTION: QUIET TITLE**

15 The claim for Quiet Title against Wells Fargo is predicated on the same acts underlying the  
16 claim for a Wrongful Trustee’s Sale. Accordingly, the Court **GRANTS** the Motion to Dismiss for  
17 the reasons set forth above.

18 **IV. CONCLUSION**

19 Based on the foregoing analysis, the Court **GRANTS** the Motion to Dismiss.

20 Plaintiffs’ Complaint is **DISMISSED WITH LEAVE TO AMEND** consistent with this Order.

21 By no later than 21 days after the date this Order is filed Plaintiffs shall file an amended  
22 complaint.

23 This Order Terminates Docket Number 7.

24 **IT IS SO ORDERED.**

25 **Date: November 26, 2012**

26   
27 **YVONNE GONZALEZ ROGERS**  
28 **UNITED STATES DISTRICT COURT JUDGE**

<sup>7</sup> Plaintiffs’ claim for Quiet Title seeks an accounting to set up a payment plan for late payments.