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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
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7 JACK A. DEMAY, et al.,

8 Plaintiffs,

9 v.

10 WELLS FARGO HOME MORTGAGE,
11 INC.,

12 Defendant.

Case No. [16-cv-04733-HSG](#)

**ORDER GRANTING MOTION TO
DISMISS WITH LEAVE TO AMEND**

Re: Dkt. No. 27

13 Pending before the Court is the motion to dismiss filed by Defendant Wells Fargo Home
14 Mortgage, Inc. Dkt. No. 27. For the reasons articulated below, the Court GRANTS the motion.

15 **I. BACKGROUND**

16 **A. Factual Background¹**

17 In 2006, Plaintiffs Jack and Nancy Demay obtained a mortgage loan for their home located
18 at 8985 W. Verde Way, in Las Vegas, Nevada. Dkt. No. 28 (“RJN”), Ex A.² Plaintiffs then filed
19 for Chapter 13 bankruptcy in November 2009. Dkt. No. 24 (“FAC”) ¶ 17. They included the
20 mortgage loan for their home on the bankruptcy schedule. Id. ¶ 18. In lieu of postpetition
21 payments, Plaintiffs’ final modified bankruptcy plan provided for the “surrender [of] the Property
22 to [Wells Fargo] in full satisfaction of the debt” Id. ¶ 21 (quotation omitted). Plaintiffs also
23 reserved the right to participate in the Nevada Foreclosure Mediation Program. Id. ¶ 22. Plaintiffs
24

25 ¹The Court accepts the following facts as true for purposes of this motion to dismiss. See
26 *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

27 ²Wells Fargo asks the Court to take judicial notice of a variety of documents. Dkt. No. 28.
28 Because the parties do not object, the Court GRANTS the request for judicial notice of Plaintiffs’
mortgage loan agreement and bankruptcy discharge order. See Fed. R. Evid. 201(b). Because the
Court does not rely on any of the other documents, Wells Fargo’s request for judicial notice is
otherwise DENIED AS MOOT.

1 allege that they then “performed all obligations required to carry out the effect of their intent to
2 surrender” the property to Wells Fargo. *Id.* ¶ 23. The bankruptcy court confirmed Plaintiffs’ final
3 Chapter 13 plan and entered a discharge order in August 2015 that discharged Plaintiffs’ debts that
4 were not otherwise subject to statutory exemption. *Id.*; RJN, Ex. H. The following month, in
5 September 2015, Wells Fargo obtained Plaintiffs’ consumer credit reports from Equifax. FAC
6 ¶ 29. According to Equifax, Wells Fargo requested the reports for “Account Review” purposes.
7 *Id.*

8 **B. Procedural History**

9 On August 17, 2016, Plaintiffs filed this putative class action against Wells Fargo, alleging
10 that it violated the Fair Credit Reporting Act (“FCRA” or the “Act”) by impermissibly obtaining
11 their consumer credit reports. Dkt. No. 1. Plaintiffs allege that Wells Fargo impermissibly pulled
12 their credit reports because Plaintiffs’ bankruptcy discharge terminated any relationship with the
13 bank. FAC ¶¶ 24, 31. On October 17, 2016, Wells Fargo moved to dismiss the complaint and
14 strike the class allegations. Dkt. Nos. 17, 18. Rather than oppose the motion, Plaintiffs amended
15 the complaint. Dkt. No. 24. Wells Fargo now moves to dismiss the amended complaint.
16 Dkt. No. 27.

17 **II. LEGAL STANDARD**

18 Under Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss a
19 complaint for failing to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).
20 To survive a Rule 12(b)(6) motion, a plaintiff must plead “enough facts to state a claim to relief
21 that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A plaintiff
22 must provide more than conclusory statements or “a formulaic recitation of the elements of a
23 cause of action” for the court to find a facially plausible claim. *Id.* at 555. Rather, the complaint
24 must present facts which allow “the reasonable inference” of a defendant’s liability for the alleged
25 misconduct. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In reviewing the plausibility of a
26 complaint, courts “accept factual allegations in the complaint as true and construe the pleadings in
27 the light most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*,
28 519 F.3d 1025, 1031 (9th Cir. 2008).

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III. ANALYSIS

The FCRA aims to “ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy.” *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007). In service of these goals, the Act imposes limitations on the use of consumer credit reports. See generally 15 U.S.C. §§ 1681b et seq. Specifically, the FCRA prohibits third parties from accessing consumer credit reports without a statutorily authorized (i.e., a “permissible”) purpose. *Id.* § 1681b(f)(1). The FCRA provides a private right of action for both willful and negligent violations. *Id.* §§ 1681n, 1681o.

To assert a claim against a party for requesting a consumer credit report without a permissible purpose, a plaintiff must establish: (1) the defendant obtained a consumer credit report from a Consumer Reporting Agency, (2) without a permissible purpose, and (3) the defendant acted willfully or negligently in requesting the report. See *VanDyke v. N Leasing Sys., Inc.*, No. CIV.S. 07-1877 FCD GGH PS, 2009 WL 3320464, at *3 (E.D. Cal. 2009).

Because Wells Fargo does not dispute that it obtained Plaintiffs’ consumer credit report after their bankruptcy discharge, the Court need only analyze whether Plaintiffs adequately allege (1) that Wells Fargo acted without a permissible purpose, and (2) that such action was willful or negligent. The Court addresses each in turn.

A. Permissible Purpose

Plaintiffs have not adequately alleged that Wells Fargo acted without a permissible purpose in obtaining Plaintiffs’ credit reports. The FCRA provides that a creditor may access a consumer’s credit report under two discrete circumstances: (1) “in connection with a credit transaction . . . involving the extension of credit to, or review or collection of an account of, [that] consumer”; or (2) pursuant to a “legitimate business need” for the information. 15 U.S.C. § 1681b(a)(3). A legitimate business need, in turn, only exists for a business transaction initiated by the consumer or to review a consumer account “to determine whether the consumer continues to meet [its] terms” *Id.* § 1681b(a)(3)(F). The consumer carries the burden of establishing that the defendant’s actions fell outside these permissible purposes. See *Thomas v. U.S. Bank*,

1 N.A., 325 F. App'x 592, 593 (9th Cir. 2009);³ Thao Pham v. Solace Fin., LLC, No. 12-C-02413
2 RMW, 2012 WL 5471160 (N.D. Cal. 2012).

3 Plaintiffs allege that Wells Fargo lacked a permissible purpose for accessing their credit
4 reports after their bankruptcy discharge. FAC ¶ 31. According to Plaintiffs, the discharge
5 eliminated their mortgage debt and consequently severed any ongoing credit relationship with
6 Wells Fargo. Id. ¶¶ 24, 32.

7 Plaintiffs' argument disregards the limited scope of bankruptcy discharges under Chapter
8 13. Mortgage-related debts are generally non-dischargeable under Chapter 13 because Chapter 13
9 bankruptcy plans cannot modify any claims secured by a debtor's principal residence. See 11
10 U.S.C. § 1322(b)(2); In re Zimmer, 313 F.3d 1220, 1222 (9th Cir. 2002); In re Rodriguez, 421
11 B.R. 356, 364 (Bankr. S.D. Tex. 2009) (“[C]laims held by home mortgage lenders are not
12 discharged at the conclusion of a successful chapter 13 bankruptcy case.”). Although § 1322(b)(5)
13 provides an exception for the “curing of any default” and “maint[aning] of payments” on claims
14 due after the Chapter 13 proceeding, the scope of § 1322(b)(5) is still narrow. See In re
15 Rodriguez, 421 B.R. at 365. Section 1328(a)(1) explicitly states that modifications under
16 § 1322(b)(5) do not discharge the underlying debt. See id.; see also In re Dukes, No. 9:09-bk-
17 02778-FMD, 2015 WL 3856335, at *4 (Bankr. M.D. Fla. 2015). In light of this statutory
18 framework, numerous courts have concluded that debts secured by a principal residence survive a
19 Chapter 13 discharge. See, e.g., In re Rodriguez, 421 B.R. at 366 (finding that “no statutory basis
20 exists for discharging home mortgage debt”); In re Hunt, No. 14-02212-5-DMW, 2015 WL
21 128048, at *4 (Bankr. E.D. N.C. 2015) (holding that discharging home mortgage debt would be an
22 impermissible loan modification under § 1322(b)(2)); In re Wagner, No. 06-30919, 2011 WL
23 2636841, at *3 (Bankr. S.D. Tex. 2011) (“[T]he rights of a secured home mortgage lender are
24 generally unaffected by the discharge.”).

25 None of Plaintiffs' authorities address these limitations under Chapter 13. See, e.g.,
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27 ³ As an unpublished Ninth Circuit decision, Thomas is not precedent, but may be considered for its
28 persuasive value. See Fed. R. App. P. 32.1; CTA9 Rule 36-3.

1 Freedom v. Citifinancial, LLC, No. 15 C 10135, 2016 WL 4060510, at *8 (N.D. Ill. 2016);
2 Souvigny v. Wells Fargo Home Mortg., Inc., No., 15 C 07465, 2016 U.S. Dist. LEXIS 99875, at
3 *23 (N.D. Ill. 2016). Instead, they rely on Chapter 7 bankruptcy cases without acknowledging a
4 key distinction: under Chapter 7, debts secured by a principal residence may be discharged. See
5 11 U.S.C. § 727(a); see also Johnson v. Home State Bank, 501 U.S. 78 (1991) (“A defaulting
6 debtor can protect himself from personal liability [for mortgage debt] by obtaining a discharge in a
7 Chapter 7 liquidation.”). And Godby v. Wells Fargo Bank, N.A., 599 F. Supp. 2d 934, 942 (S.D.
8 Ohio 2008), is itself a Chapter 7 case.

9 Plaintiffs contend that their intended “surrender” nevertheless “effectively vested
10 Plaintiffs’ interests in the property with [Wells Fargo].” See Dkt. No. 30 at 4–5. Even if the Court
11 could construe Plaintiffs’ vague allegation of “intent to surrender” as actual surrender, a debtor’s
12 surrender of real property does not, in and of itself, terminate the debtor’s ownership or personal
13 liability for the property. See *In re Batali*, BAP No. WW-14-1557-KiFJu, 2015 WL 7758330, at
14 *9 (BAP 9th Cir. 2015). In *In re Batali*, the plaintiffs argued that surrendering their condominium
15 through a confirmed Chapter 13 plan and bankruptcy discharge extinguished their liability for
16 ongoing HOA fees. See *id.* at *3. The court rejected this argument and instead found that the
17 plaintiffs “had not divested themselves of their legal and equitable ownership interests in [the
18 condominium]” because they retained title to the property. *Id.* at *9. The court reasoned that a
19 confirmed Chapter 13 plan “[did] not substitute for a deed” as a means of conveying real property.
20 *Id.* Accordingly, the court held that plaintiffs would remain personally liable for the HOA fees
21 until either foreclosure or a transfer of deed. *Id.* at *8–*9; see also *In re Rosa*, 495 B.R. 522, 523
22 (Bankr. D. Haw. 2013) (“[S]urrender does not transfer ownership of the surrendered property.
23 Rather, ‘surrender’ means only that the debtor will make the collateral available so the secured
24 creditor can, if it chooses to do so, exercise its state law rights in the collateral.”); *Goudelock v.*
25 *Sixty-01 Ass’n of Apartment Owners*, No. C15-1413-MJP, 2016 WL 1365942, at *3 (W.D. Wash.
26 2016) (affirming that the plaintiff retained her legal interest in surrendered real property until
27 foreclosure).

28 Here, Plaintiffs do not allege that Wells Fargo foreclosed on the property, that Plaintiffs

1 transferred title, or even that they vacated the property prior to Wells Fargo obtaining their credit
2 reports. See FAC ¶¶ 21–26. To the contrary: Plaintiffs reserved the right to enroll in the Nevada
3 Foreclosure Mediation Program, indicating their continued interest in the property. See id. ¶ 22.
4 Because Plaintiffs’ mortgage debt is non-dischargeable and would remain unaffected by mere
5 surrender, the Court finds that Plaintiffs have not sufficiently alleged that Wells Fargo accessed
6 Plaintiffs’ consumer credit reports without a permissible purpose.

7 **B. Willfulness and Negligence**

8 Plaintiffs similarly fail to allege that Wells Fargo acted willfully or negligently in pulling
9 their credit reports. The FCRA provides a private right of action for willful or negligent
10 violations. 15 U.S.C. §§ 1681n, 1681o. To prove a willful violation, a plaintiff must show that a
11 defendant knowingly or recklessly violated the FCRA. *Safeco*, 551 U.S. at 57. “[A] violation is
12 only reckless (and therefore willful) where [a defendant] adopts a reading of the statute that runs a
13 risk of error ‘substantially greater than the risk associated with a reading that was merely
14 careless.’” *Syed v. M-I, LLC*, 853 F.3d 492, 504 (9th Cir. 2017) (quoting *Safeco*, 551 U.S. at 69)
15 (emphasis in original). To prove a negligent violation, a plaintiff must show that a defendant’s
16 negligent noncompliance resulted in actual damages. 15 U.S.C. §§ 1681n, 1681o; see also
17 *Guimond v. Trans Union Credit Info., Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995) (holding that a
18 claim of negligent noncompliance requires a plaintiff to plead actual damages).

19 Because the Court finds that Plaintiffs have failed to plead an FCRA violation, the Court
20 need not reach this issue. Nevertheless, the Court notes that Plaintiffs’ complaint contains only
21 conclusory allegations that Wells Fargo acted either willfully or negligently and does not contain
22 any allegation of actual damages. See, e.g., FAC ¶ 39 (Wells Fargo’s actions “were willful . . .
23 because Defendant was aware of the FCRA’s prohibitions on impermissibly pulling consumers’
24 credit reports”).

25 **IV. CONCLUSION**


26 For the foregoing reasons, the Court GRANTS Wells Fargo’s motion to dismiss with leave
27 to amend. Despite the deficiencies identified above, the Court cannot say at this stage that
28 amending the complaint would be futile. See *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir.

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2000). Accordingly, Plaintiffs may, consistent with their Rule 11 obligations, file an amended complaint within 21 days from the date of this Order.

IT IS SO ORDERED.

Dated: July 11, 2017


HAYWOOD S. GILLIAM, JR.
United States District Judge