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

RONALD AND AVA MAJOR,  
  
vs.  
  
WELLS FARGO BANK, N.A.,  
  
Plaintiffs,  
  
Defendant.

CASE NO. 14-CV-998-LAB-RBB  
  
**ORDER DENYING MOTION TO  
REMAND AND GRANTING  
MOTION TO DISMISS**

This action arises out of the Majors’ default on their mortgage and the subsequent initiation of foreclosure proceedings by Wells Fargo. It was originally filed in state court, and Wells Fargo removed it on April 21, 2014. Now pending are the Majors’ motion to remand and Wells Fargo’s motion to dismiss.

**I. Majors’ Motion to Remand**

The Majors’ motion to remand is based on an alleged lack of subject matter jurisdiction. They argue that there is not complete diversity between the parties and that the amount in controversy requirement is not satisfied. See 28 U.S.C. § 1332(a)(1).

**A. Citizenship of Parties**

There is no doubt that the Majors are citizens of California, and that the citizenship of Ndex is not relevant because it is a nominal party with a nonmonetary role in this case. See *Navarro Sav. Ass’n v. Lee*, 446 U.S. 458, 460-61 (1980) (“[A] federal court must

1 disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real  
2 parties to the controversy.”). That means diversity turns on the citizenship of Wells Fargo.

3 Under 28 U.S.C. § 1348, “[a]ll national banking associations shall, for the  
4 purposes of all other actions by or against them, be deemed citizens of the States in  
5 which they are respectively located.” The critical word “located” is not defined by the  
6 statute and has been the source of considerable debate. *See Rouse v. Wachovia*  
7 *Mortgage, FSB*, 747 F.3d 707, 708 (9th Cir. 2014) (“The relevant statute is ambiguous,  
8 the courts are split on the question, and the Supreme Court has not squarely decided the  
9 issue.”).

10 The Majors propose that the Court follow a 2013 decision that held Wells Fargo to  
11 be a citizen of both California, where it has its principal place of business, and South  
12 Dakota, where its main office is located. *See Vargas v. Wells Fargo Bank N.A.*, 2013 WL  
13 6235575 at \*11 (N.D. Cal. Dec. 2, 2013). However, the Ninth Circuit held more recently  
14 in *Rouse* that “under § 1348, a national banking association is a citizen only of the state  
15 in which its main office is located. Accordingly, Wells Fargo is a citizen only of South  
16 Dakota . . .” *Rouse*, 747 F.3d 707 at 715. Following this more recent authority, the Court  
17 finds that Wells Fargo is solely a citizen of South Dakota, and that the parties are  
18 therefore diverse.

### 19 **B. Amount in Controversy**

20 Even though there is diversity of citizenship between the Majors and Wells Fargo,  
21 the Court would still lack jurisdiction if the amount in controversy does not exceed  
22 \$75,000. The Majors claim that “the entire loan amount is not in controversy” and that  
23 Wells Fargo therefore can’t prove the amount in controversy exceeds \$75,000. (Mot. to  
24 Remand at 12:12-13.) Be that as it may, in a case of this kind where injunctive relief is  
25 sought, “the amount in controversy is measured by the object of the litigation.” *Cohn v.*  
26 *Petsmart, Inc.*, 281 F.3d 837, 840 (9th Cir. 2002) (citing *Hunt v. Wash. State Apple*  
27 *Advertising Comm’n*, 432 U.S. 333, 347 (1977)). Indeed, in actions arising out of the  
28 foreclosure of a plaintiff’s home, the amount in controversy may be established by the  
value of the property *or* by the value of the loan. *See, e.g., Chapman v. Deutsche Bank*

1 *Nat'l Trust Co.*, 651 F.3d 1039, 1045 n. 2 (9th Cir. 2011) (“The object in litigation is the  
2 Property, which was assessed at a value of more than \$200,000, and therefore satisfies  
3 the amount-in-controversy requirement.”); *Ngoc Nguyen v. Wells Fargo Bank, N.A.*, 749  
4 F.Supp.2d 1022, 1028 (N.D. Cal. 2010) (“Numerous courts have held that, where a  
5 complaint seeks to invalidate a loan secured by a deed of trust, the amount in  
6 controversy is the loan amount.”).

7 In this case, the Deed of Trust indicates that the Majors borrowed \$548,000  
8 against their home, which far exceeds the \$75,000 required for diversity jurisdiction. (See  
9 Notice of Removal, Exh. A) Similarly, the Majors do not allege that the value of the home  
10 has dropped below \$75,000. Therefore, Wells Fargo has established by a  
11 preponderance of the evidence that the amount in controversy exceeds \$75,000. See  
12 *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir.1996).

13 The amount-in-controversy requirement is therefore satisfied. Removal of this  
14 case was proper, and the Majors’ motion to remand is **DENIED**.

## 15 **II. Wells Fargo’s Motion to Dismiss**

16 The Majors assert six causes of action in their complaint, primarily based on  
17 California’s Homeowner Bill of Rights (“HBOR”). These causes of action allege violations  
18 of at least eight individual statutes. Wells Fargo contests each one under Fed. R. Civ. P.  
19 12(b)(6).

### 20 **A. Legal Standard**

21 A 12(b)(6) motion to dismiss for failure to state a claim challenges the legal  
22 sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.2001). The Court  
23 must accept all factual allegations as true and construe them in the light most favorable  
24 to the Majors. *Cedars Sinai Med. Ctr. v. Nat'l League of Postmasters of U.S.*, 497 F.3d  
25 972, 975 (9th Cir.2007). To defeat Wells Fargo’s motion to dismiss, the Majors’ factual  
26 allegations need not be detailed, but they must be sufficient to “raise a right to relief  
27 above the speculative level...” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). That  
28 is, “some threshold of plausibility must be crossed at the outset” before a case can go  
forward. *Id.* at 558 (internal quotations omitted). A claim has “facial plausibility when the

1 plaintiff pleads factual content that allows the court to draw the reasonable inference that  
2 the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
3 (2009). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for  
4 more than a sheer possibility that a defendant has acted unlawfully.” *Id.*

5 While the Court must draw all reasonable inferences in the Majors’ favor, it need  
6 not “necessarily assume the truth of legal conclusions merely because they are cast in  
7 the form of factual allegations.” *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136,  
8 1139 (9th Cir.2003) (internal quotations omitted). In fact, the Court does not need to  
9 accept any legal conclusions as true. *Iqbal*, 556 U.S. at 664. A complaint does not suffice  
10 “if it tenders naked assertions devoid of further factual enhancement.” *Id.* (internal  
11 quotations omitted). Nor does it suffice if it contains a merely formulaic recitation of the  
12 elements of a cause of action. *Twombly*, 550 U.S. at 555.

13 **B. Violation of Cal. Civ. Code § 2923.5**

14 The Majors allege that Wells Fargo violated section 2923.5 by not contacting them  
15 as required under the statute to discuss their financial situation or options for avoiding  
16 foreclosure. (Compl. ¶ 27.) They also allege that “the boilerplate declaration in the [Notice  
17 of Default] that the requirements of California Civil Code Section 2923.5 were met is  
18 false.” (Compl. ¶ 28.)

19 Initially, as Wells Fargo points out, section 2923.5 is not applicable to it. The  
20 section applies “only to entities described in subdivision (b) of Section 2924.18,” namely  
21 lenders with fewer than 175 foreclosures in a reporting period. See Cal. Civ. Code §  
22 2923.5(g). Wells Fargo, by contrast, given its size, has 175 or more foreclosures in a  
23 reporting period and is therefore governed by California Civil Code section 2923.55. See  
24 Cal. Civ. Code § 2924.18(c).

25 Section 2923.55 requires a mortgage servicer to contact the borrower to assess  
26 the borrower’s financial situation and to explore options of avoiding foreclosure. See Cal.  
27 Civ. Code § 2923.55(b)(2). “A notice of default recorded pursuant to Section 2924 shall  
28 include a declaration that the mortgage servicer has contacted the borrower, has tried  
with due diligence to contact the borrower as required by this section, or that no contact  
was required because the individual did not meet the definition of ‘borrower’ pursuant to

1 subdivision (c) of Section 2920.5.” Cal. Civ. Code § 2923.55(c). Also, the only relief  
2 available for a violation of § 2923.55 is the postponement of a foreclosure sale until there  
3 has been compliance with the statute. See *Mabry v. Superior Court*, 185 Cal.App.4th  
4 208, 221, 235 (Cal. Ct. App. 2010).

5 The Majors claim that “[n]one of the Defendants has [sic] contacted the borrower,  
6 or attempted to contact the borrower . . . to discuss her [sic] financial situation or options  
7 for avoiding foreclosure,” and that “[i]n violation of [§ 2923.55] Defendants caused to be  
8 executed and recorded the [Notice of Default] even though the required contacts with  
9 Plaintiff [sic] had not been made. The boilerplate declaration in the [Notice of Default]  
10 that the requirements of California Civil Code section 2923.5 were met is false.” (Compl.  
11 ¶¶ 27-28.)

12 As the Court has noted, a complaint does not suffice “if it tenders naked assertions  
13 devoid of further factual enhancement.” *Iqbal*, 556 U.S. at 664. But that is just what the  
14 Majors’ section 2923.55 claim does. The allegation that Wells Fargo did not contact  
15 them prior to initiation of foreclosure proceedings is a formulaic recitation of the statutory  
16 requirements framed as a cause of action. See *Twombly*, 550 U.S. at 555. Additional  
17 facts need to be alleged, such as: (1) whether the Majors were purposefully avoiding  
18 corresponding with Wells Fargo; (2) whether Wells Fargo exercised due diligence in  
19 trying to reach the Majors; or (3) whether the Majors received any telephone calls or  
20 personal messages from Wells Fargo. See *Newman v. Bank of N.Y. Mellon*, 2013 WL  
21 1499490 at \*11 (E.D. Cal. Apr. 11, 2013).

22 Likewise, the Majors’ allegation that “[t]he boilerplate declaration in the [Notice of  
23 Default] . . . is false” is a conclusory allegation that merely asserts that Wells Fargo  
24 violated the law without any factual allegations for support. Other courts, in fact, have  
25 found such a declaration to be sufficient to establish that the lender complied with the  
26 statute at the motion to dismiss stage. See *Maguca v. Aurora Loan Servs.*, 2009 WL  
27 3467750 at \*2 (C.D. Cal. Oct. 28, 2009); *Juarez v. Wells Fargo Bank, N.A.*, 2009 WL  
28 3806325 at \*2 (C.D. Cal. Nov. 11, 2009). Because Wells Fargo delivered the declaration  
as required by law, signed it under penalty of perjury, and the Majors have asserted no

1 facts that, if proven, would prove the declaration false, the claim asserted under section  
2 2923.55 (or section 2923.5 as pled by the Majors) is **DISMISSED**.

3 **C. Violation of Cal. Civil Code § 2924.17**

4 California Civil Code section 2924.17 states that “[b]efore recording or filing any of  
5 the [foreclosure-related] documents described in subdivision (a), a mortgage servicer  
6 shall ensure that it has reviewed competent and reliable evidence to substantiate the  
7 borrower's default and the right to foreclose, including the borrower's loan status and loan  
8 information.” The intent of section 2924.17 is to prohibit “the practice of robo-signing, in  
9 which servicers sign foreclosure documents without determining the right to foreclose.”  
10 *Marquez v. Wells Fargo Bank, N.A.*, 2013 WL 5141689 at \*5 (N.D. Cal. Sept. 13, 2013).

11 The Majors allege that “the Defendants did not ensure that they had reviewed  
12 competent and reliable evidence to substantiate Plaintiff’s [sic] default and their right to  
13 foreclosure, including the loans status, the loan information, and whether any attempts to  
14 discuss the foreclosure prevention alternatives as mandated by [§ 2923.5] had been  
15 completed.” (Compl. ¶ 30.)

16 The Majors’ claim that Wells Fargo did not ensure that they had reviewed all the  
17 information required under section 2924.17 is an intelligible allegation, but as Wells  
18 Fargo argues it lacks materiality. The purpose of the statute is to make sure that lenders  
19 determine that they have a right to foreclose before initiating foreclosure proceedings.  
20 See *Marquez*, 2013 WL 5141689 at \*5. And yet the Majors don’t appear to dispute that  
21 they defaulted on their mortgage and that Wells Fargo has standing to foreclose. In light  
22 of this, it’s not clear what the injury is here, and, assuming there is one, what relief the  
23 Majors would be entitled to. Therefore, the Majors’ claims based on California Civil Code  
24 section 2924.17 are **DISMISSED**.

25 **D. Violation of Cal. Civ. Code § 2923.55**

26 California Civil Code section 2923.55, in addition to requiring that a lender contact  
27 the borrower prior to foreclosure, requires that a mortgage servicer send a written  
28 statement to the borrower to inform the borrower that they may request: (1) a copy of the  
borrower’s promissory note or other evidence of indebtedness; (2) a copy of the

1 borrower's deed of trust or mortgage; (3) a copy of any assignment required to  
2 demonstrate the right of the mortgage servicer to foreclose; and (4) a copy of the  
3 borrower's payment history since the borrower was last less than 60 days past due. See  
4 Cal. Civ. Code § 2923.55. The Majors allege that they requested these documents and  
5 did not receive them. (Compl. ¶ 35.)

6 The irony of the Majors' claim is that they attached a copy of the Deed of Trust,  
7 Substitution of Trustee, Notice of Default, and Notice of Trustee's sale to their complaint.  
8 (Compl., Exhs. A-D.) Thus, they have some of the very documents their section 2923.55  
9 claim alleges they weren't provided. In fairness, the Majors did not attach a copy of the  
10 payment history to their complaint, and may not have been provided one, but that's  
11 somewhat irrelevant because there are not allegations Wells Fargo did not properly credit  
12 the Majors' account.

13 Furthermore, the Majors merely allege that they requested the documents "after  
14 January 1, 2013." (Compl. ¶ 35.) That is not exact enough. They must allege when the  
15 request was made, who made the request, who received the request, and in what  
16 manner the alleged request was made. Without this additional information there is no  
17 way to determine whether Wells Fargo actually violated the statute, or whether the  
18 Majors are simply pleading a naked, formulaic claim. Because the Majors are clearly in  
19 possession of some of the relevant documents, and because they have failed to state  
20 with any specificity when, where or how Wells Fargo violated section 2923.55, the claim  
21 alleging a violation of section 2923.55 is **DISMISSED**.

#### 22 **E. Violation of Cal. Civ. Code § 2923.6**

23 The HBOR attempts to eliminate the practice, commonly known as "dual tracking,"  
24 whereby financial institutions continue to pursue foreclosure even while evaluating a  
25 borrower's loan modification application. *Rockridge Trust v. Wells Fargo, N.A.*, 2013 WL  
26 5428722 at \*3 (N.D.Cal. Sept. 25, 2013). To that end, California Civil Code § 2923.6  
27 provides: "(c) If a borrower submits a complete application for a first lien loan modification  
28 offered by, or through, the borrower's mortgage servicer, a mortgage servicer . . . shall  
not record a notice of default or notice of sale, or conduct a trustee's sale, while the

1 complete first lien loan modification application is pending.” Cal. Civ. Code § 2923.6(c).  
2 The section goes on to say that “the mortgage servicer shall not be obligated to evaluate  
3 applications from borrowers who have already been evaluated or afforded a fair  
4 opportunity to be evaluated for a first lien loan modification prior to January 1, 2013,”  
5 unless there has been a “material change in the borrower’s financial circumstances.” Cal.  
6 Civ. Code § 2923.6(g).

7 The Majors allege that “Defendants have not made a written determination that the  
8 Plaintiff [sic] is not eligible for a first lien loan modification, and are in violation of [Cal. Civ.  
9 Code § 2923.6].” (Compl. ¶ 39.)

10 The problem with this claim is that application of the statute is conditional on the  
11 borrower actually submitting a complete application for a first lien loan modification, or not  
12 being afforded a fair opportunity to be evaluated for a loan modification, and the Majors  
13 don’t make this allegation. Their claim based on California Civil Code section 2923.6 is  
14 therefore **DISMISSED**.

#### 15 **F. Violation of Cal. Civ. Code § 2923.7**

16 California Civil Code section 2923.7 states that “[u]pon request from a borrower  
17 who requests a foreclosure prevention alternative, the mortgage servicer shall promptly  
18 establish a single point of contact and provide to the borrower one or more direct means  
19 of communication with the single point of contact.” Cal. Civ. Code § 2923.7. The Majors  
20 allege that they have “not been provided with the name or information of their ‘Case  
21 manager” in violation of California Civil Code § 2923.7. (Compl. at ¶ 40.)

22 Here again, however, the Majors do not allege that they requested a “foreclosure  
23 prevention alternative,” and without that allegation presumably Wells Fargo’s obligation  
24 under section 2923.7 doesn’t kick in. Therefore, the Majors’ claim under California Civil  
25 Code section 2923.7 is **DISMISSED**.

#### 26 **G. Declaratory Relief Pursuant to Cal. Civ. Code § 2924.12**

27 The Majors allege that “Defendants are in material violation of Cal. Civ. Code  
28 section 2924.11, 2924.17, 2923.6, 2923.7 as alleged herein. Thus, Plaintiff [sic],  
borrower of the subject loan, is able to bring an action for injunction relief [sic] to enjoin



1 these violations.” (Compl. at ¶ 44.)

2 First, as Wells Fargo points out, injunctive relief is a remedy, not a cause of action  
3 unto itself. *Camp v. Board of Supervisors*, 123 Cal. App. 3d 334, 356 (Cal Ct. App. 1981)  
4 (“Injunctive relief is a remedy and not, in itself, a cause of action, and a cause of action  
5 must exist before injunctive relief may be granted.”). Second, section 2924.12 is a  
6 damages provision that outlines injunctive relief and financial damages for violations of  
7 various sections of the HBOR. See Cal. Civ. Code § 2924.12. But to the extent the  
8 Majors’ claims under the HBOR are legally deficient, as the Court has found, it follows  
9 that they can’t plead any damages. Therefore, the Majors’ claim based on section  
10 2924.12 is **DISMISSED**.

11 **H. Violation of Cal. Civ. Code §§ 2924, 2924.8, 2924(b), 2924(f)**

12 The Majors allege that Wells Fargo “failed to post a copy of the Notice of Trustee’s  
13 sale on the Plaintiff’s [sic] property pursuant to California Civil Code sections 2924,  
14 2924.8, in the manner prescribed under California Civil Code section 2924f.” (Compl. ¶  
15 50.) Similarly, the Majors allege that “Defendants did not provide notice of the Notice of  
16 Trustee’s sale pursuant to the requirements set out in California’s non-judicial statutory  
17 scheme codified in Cal. Civil Code section 2924.” (Compl. ¶ 53.)

18 As with the Majors’ preceding claims, for example their claim under section  
19 2923.55, these statements are conclusory allegations that merely restate the law as an  
20 independent cause of action. The claims are **DISMISSED**.

21 **I. Violation of Cal. Bus. & Prof. Code § 17200**

22 California Business and Professions Code section 17200 prohibits “unfair  
23 competition,” which encompasses “any unlawful, unfair or fraudulent” acts. Cal. Bus. &  
24 Prof. Code § 17200. Each “prong” provides a “separate and distinct theory of liability.”  
25 *Rubio v. Capital One Bank*, 613 F.3d 1195, 1203 (9th Cir.2010). Therefore the statute  
26 establishes three varieties of unfair competition: acts or practices that are unlawful,  
27 unfair, or fraudulent. *Podolsky v. First HealthCare Corp.*, 50 Cal.App.4th 632, 647 (Cal.  
28 Ct. App.1996). The Majors allege that “Defendants engaged in ‘unfair,’ ‘unlawful,’ and/or  
‘fraudulent’ business act or practice [sic]” by not complying with the various sections of

1 the HBOR as alleged in their complaint. (Compl. ¶¶ 57-59.)

2 First, to be “unlawful” under section 17200, the conduct must violate another  
3 “borrowed” law. *Cel-Tech Comms. Inc. v. L.A. Cellular Tel. Co.*, 20 Cal.4th 163, 180 (Cal.  
4 1999) (“[S]ection 17200 borrows violations of other laws and treats them as unlawful  
5 practices that the unfair competition law makes independently actionable.”) (internal  
6 quotation marks omitted). The Majors’ claim that Wells Fargo’s alleged violations of the  
7 HBOR are unlawful business practices fails because the Court has found each of those  
8 claims to be legally deficient.

9 The definition of an “unfair” business act is slightly more elusive. One definition is  
10 an act that “offends an established public policy” or that “is immoral, unethical,  
11 oppressive, unscrupulous or substantially injurious to customers.” *Paduano v. American*  
12 *Honda Motor Co., Inc.*, 169 Cal.App.4th 1453, 1469 (Cal. Ct. App. 2009). An unfair act  
13 may also be one in which “(1) the consumer injury is substantial; (2) the injury is not  
14 outweighed by any countervailing benefits to consumers or competition, and (3) the injury  
15 is one that consumers themselves could not reasonably have avoided.” *Morgan v. AT&T*  
16 *Wireless Servs., Inc.*, 177 Cal.App.4th 1235, 1255 (Cal. Ct. App. 2009). Unfortunately,  
17 the Majors plead no facts to match these definitions of an unfair business act.

18 Finally, a business practice is “fraudulent” under section 17200 if members of the  
19 public are likely to be deceived. *Puentes v. Wells Fargo Home Mortg., Inc.*, 160  
20 Cal.App.4th 638 (Cal. Ct. App. 2008). The challenged conduct “is judged by the effect it  
21 would have on a reasonable consumer.” *Id.* (internal citation and quotation marks  
22 omitted). The Majors have pled no facts that lead the Court to believe that a reasonable  
23 consumer would be misled by Wells Fargo’s actions. Therefore, the Majors’ allegations  
24 of “fraudulent” business acts fail as well.

25 Because the Majors have failed to adequately state a claim alleging that Wells  
26 Fargo committed any unlawful, unfair, or fraudulent business practices, their claims  
27 based on California Business and Professions Code section 17200 are **DISMISSED**.

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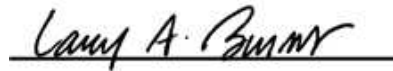
1 **III. Conclusion**

2 All of the Majors' claims are **DISMISSED**, but the dismissals are **WITHOUT**  
3 **PREJUDICE** in order that the Majors may amend them.. Rule 15 of the Federal Rules of  
4 Civil Procedure advises that "leave [to amend] shall be freely given when justice so  
5 requires." Fed.R.Civ.P. 15(a)(2). This policy is "to be applied with extreme liberality."  
6 *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir.2001)(quoting  
7 *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir.1990)).

8 The Majors are admonished, however, to heed the many arguments raised by  
9 Wells Fargo in its motion to dismiss and adopted by the Court in this Order. The Court  
10 well understands that the Majors are frustrated by the threat of losing their home to  
11 foreclosure proceedings. At the same time, their complaint is a transparent attempt to  
12 frustrate that process by pleading as many violations as possible in the hope that  
13 something might stick. That is not the right strategy. Their amended complaint must  
14 plead the facts with far greater specificity, and it should focus only on those legal claims  
15 that follow clearly from the facts alleged. Their amended complaint must be filed within  
16 two weeks of the date this Order is entered. The failure to file an amended complaint will  
17 result in the dismissal of this case *with* prejudice.

18 **IT IS SO ORDERED.**

19 DATED: August 15, 2014

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21 **HONORABLE LARRY ALAN BURNS**  
22 United States District Judge