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

12 AKI T. OYA, SOUCHI OYA,
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14 Plaintiffs,
15 v.
16 WELLS FARGO BANK, N.A, et al.,
17 Defendants.

Case No.: 3:18-cv-01999-H-BGS

**ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS WITH
LEAVE TO AMEND**

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19 On August 27, 2018, Plaintiffs Aki T. Oya and Souichi Oya filed a complaint against
20 Defendants Wells Fargo Bank N.A., Select Portfolio Servicing, Inc., Magnum Property
21 Investments, LLC, and Strategic Acquisitions, Inc. (collectively, "Defendants"). (Doc. No.
22 1.) On September 6, 2018, Defendant Magnum Property Investments, LLC ("Magnum")
23 and Strategic Acquisitions, Inc. ("Strategic") filed a motion to dismiss Plaintiffs'
24 complaint. (Doc. No. 10-1.) On September 19, 2018, Defendants Select Portfolio
25 Servicing, Inc. ("Select") and Wells Fargo Bank N.A. ("Wells Fargo") filed a motion to
26 dismiss Plaintiffs' complaint. (Doc. No. 12.) Plaintiffs did not file a response to either
27 motion. The Court submitted the motions on the parties' papers. (Doc. Nos. 14–15.) For
28 the reasons below, the Court grants both motions to dismiss with leave to amend.

1 **Background**

2 The following facts are taken from the allegations in Plaintiffs’ complaint. (Doc.
3 No. 1.) Plaintiffs allege that Defendants wrongfully foreclosed on their home and then
4 subjected Plaintiffs to unlawful collections and credit reporting. (Id. ¶ 1.) Before the
5 foreclosure, Plaintiffs purchased their residence in Encinitas, California on November 2,
6 2001. (Id. ¶ 33.) On January 31, 2007, Plaintiffs encumbered their residence with a non-
7 recourse loan and first deed of trust. (Id. ¶ 34.) The loan and deed of trust were transferred
8 to Wells Fargo. (Id. ¶ 35.) Plaintiffs defaulted on the loan and a foreclosure date was set
9 for June 18, 2018. (Id. ¶ 36.)

10 On June 15, 2018, Plaintiff Aki T. Oya filed for bankruptcy protection. (Id. ¶ 36.)
11 Plaintiffs allege that Wells Fargo and Select had notice of Plaintiffs’ bankruptcy case. (Id.
12 ¶ 44.) In addition, Plaintiffs allege that it was the custom and practice of Magnum and
13 Strategic to confirm any bankruptcy stays before any foreclosure sales, and that Magnum
14 and Strategic confirmed that Plaintiffs’ residence was subject to a bankruptcy case that
15 prohibited a foreclosure sale. (Id. ¶¶ 52–53.) Wells Fargo and Select held the foreclosure
16 sale on June 18, 2018. (Id. ¶ 47.) Magnum was the highest bidder for the property and
17 purchased it, through Strategic, for \$931,300. (Id. ¶ 49.) According to Plaintiffs, on June
18 19, 2018, Select represented to Plaintiffs that the foreclosure sale was postponed. (Id. ¶
19 43.) In addition Plaintiffs allege that, on June 21, 2018, they received an email explaining
20 that the sale of the property was rescinded and the funds were returned to the purchaser.
21 (Id. ¶ 61.) On June 26, 2018, Magnum and Strategic filed a motion to retroactively annul
22 the stay with the bankruptcy court. (Id. ¶ 64.) On August 15, 2018, the bankruptcy court
23 granted the motion and validated the foreclosure sale. (Id. ¶ 70.)

24 Also on August 15, 2018, Wells Fargo and Select sent Plaintiffs billing statements
25 for past due mortgage statements. (Id. ¶ 86.) Plaintiffs allege that after the foreclosure
26 sale on June 18, 2018, Wells Fargo and Select falsely reported to credit reporting agencies
27 that Plaintiffs had \$763,986 of outstanding debt and \$96,740 past due. (Id. ¶¶ 83–84.)

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1 Discussion

2 **I. Legal Standards**

3 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal
4 sufficiency of the pleadings and allows a court to dismiss a complaint if the plaintiff has
5 failed to state a claim upon which relief can be granted. See Conservation Force v. Salazar,
6 646 F.3d 1240, 1241 (9th Cir. 2011). The Federal Rule of Civil Procedure 8(a)(2)'s
7 plausibility standard governs Plaintiff's claims. The Supreme Court has explained Rule
8 8(a)(2) as follows:

9 Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a short
10 and plain statement of the claim showing that the pleader is entitled to relief.
11 As the Court held in [Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007)],
12 the pleading standard Rule 8 announces does not require detailed factual
13 allegations, but it demands more than an unadorned, the-defendant-
unlawfully-harmed-me accusation. A pleading that offers labels and
conclusions or a formulaic recitation of the elements of a cause of action will
not do. Nor does a complaint suffice if it tenders naked assertions devoid of
further factual enhancement.

14 Ashcroft v. Iqbal, 556 U.S. 662, 677–78 (2009) (citations, quotation marks, and brackets
15 omitted).

16 In reviewing a Rule 12(b)(6) motion to dismiss, “[a] claim has facial plausibility
17 when the plaintiff pleads factual content that allows the court to draw the reasonable
18 inference that the defendant is liable for the misconduct alleged.” Iqbal, 556 U.S. at 678.
19 “Factual allegations must be enough to raise a right to relief above the speculative level.”
20 Twombly, 550 U.S. at 555 (citation omitted). In addition, a court need not accept legal
21 conclusions as true. Iqbal, 556 U.S. at 678. Further, it is improper for a court to assume
22 that the plaintiff “can prove facts which it has not alleged or that the defendants have
23 violated the . . . laws in ways that have not been alleged.” Assoc. Gen. Contractors of Cal.,
24 Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 526 (1983). Finally, a court may
25 consider documents incorporated into the complaint by reference and items that are proper
26 subjects of judicial notice. See Coto Settlement v. Eisenberg, 593 F.3d 1031, 1038 (9th
27 Cir. 2010).

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1 If the court dismisses a complaint for failure to state a claim, it must then determine
2 whether to grant leave to amend. See Doe v. United States, 58 F.3d 494, 497 (9th Cir.
3 1995). “A district court may deny a plaintiff leave to amend if it determines that allegation
4 of other facts consistent with the challenged pleading could not possibly cure the
5 deficiency, or if the plaintiff had several opportunities to amend its complaint and
6 repeatedly failed to cure deficiencies.” Telesaurus VPC, LLC v. Power, 623 F.3d 998,
7 1003 (9th Cir. 2010) (internal quotation marks and citations omitted).

8 **II. Analysis**

9 **A. First Claim: Violation of 11 U.S.C. § 362 and 11 U.S.C. § 1301**

10 Plaintiffs allege that Defendants violated the automatic stay provisions of 11 U.S.C.
11 § 362 and 11 U.S.C. § 1301 that were triggered when Plaintiff Aki T. Oya filed for
12 bankruptcy protection. (Doc. No. 1 ¶¶ 112–30.) Magnum and Strategic argue that the case
13 should be dismissed pursuant to General Order 312-E because the case arises under Title
14 11. (Doc. No. 10-1 at 8–10.) They also contend that they cannot be liable for violating the
15 stay given that the stay has been annulled by the bankruptcy court. (Id. at 10.) Finally,
16 Magnum and Strategic argue that they cannot be held liable for the foreclosure sale that
17 took place after the bankruptcy filing because they did not conduct the sale. (Id. at 10–12.)
18 Wells Fargo and Select argue that the case should be dismissed because the bankruptcy
19 court determined that there was no violation of the automatic stay. (Doc. No. 12-1 at 5.)
20 They also contend that bankruptcy court order renders Plaintiffs’ claim moot. (Id. at 5–6.)
21 Finally, they argue that Plaintiffs cannot demonstrate that they were harmed by the
22 foreclosure sale. (Id. at 6.)

23 The Court agrees with Defendants. “Pursuant to 11 U.S.C. § 362, a petition in
24 bankruptcy operates as a stay against acts that may affect property of the bankruptcy
25 estate.” In re Nat’l Envtl. Waste Corp., 129 F.3d 1052, 1054 (9th Cir. 1997). Automatic
26 stays serve “to protect debtors from all collection efforts while they attempt to regain their
27 financial footing.” In re Schwartz, 954 F.2d 569, 571 (9th Cir. 1992). Actions violating
28 an automatic stay are void. Id. at 571–72; In re Nat’l Envtl. Waste Corp., 129 F.3d at 1054.

1 “However, section 362(d) ‘gives the bankruptcy court wide latitude in crafting relief from
2 the automatic stay, including the power to grant retroactive relief from the stay.’” In re
3 Nat’l Envtl. Waste Corp., 129 F.3d at 1054 (quoting In re Schwartz, 954 F.2d at 572).

4 Here, on June 15, 2018, Plaintiff Aki T. Oya filed for bankruptcy (Doc. No. 1 ¶ 36),
5 triggering an automatic stay with respect to Plaintiff Aki T. Oya pursuant to 11 U.S.C.
6 § 362. In addition, Plaintiff Souichi Oya was protected as a co-debtor pursuant to 11 U.S.C.
7 § 1301 (the codebtor stay).¹ On June 18, 2018, Wells Fargo and Select Portfolio held the
8 foreclosure sale and sold the property to Magnum, through Strategic. (Id. ¶¶ 47, 49.)
9 Magnum and Strategic filed a motion to retroactively annul the stay. (Id. ¶ 64.) The
10 bankruptcy court granted the motion and validated the foreclosure sale.² (Id. ¶ 70.) Given
11 that the bankruptcy court has the power to grant retroactive relief from a stay, and the
12 bankruptcy court granted retroactive relief by validating the foreclosure sale in this case,
13 Plaintiffs’ argument that Defendants violated 11 U.S.C. § 362 and 11 U.S.C. § 1301 by
14 holding the foreclosure sale is without merit.

15 Plaintiffs also argue that although the bankruptcy court’s order provides retroactive
16 relief from the stay as to Magnum and Strategic, it does not as to Wells Fargo or Select.
17 (Doc. No. 1 ¶ 77.) However, the bankruptcy court’s order annulled the stay and validated
18 the foreclosure sale. (Doc. No. 1-2 at 25.) In addition, the bankruptcy court noted that “the
19 foreclosure sale was properly conducted” and that “based on the totality of circumstances,
20 [Plaintiffs’] filing was in bad faith as part of a scheme to hinder and delay the foreclosure
21 sale.” (Id.) Under these circumstances, Plaintiffs’ argument that Wells Fargo or Select
22 violated 11 U.S.C. § 362 and 11 U.S.C. § 1301 by holding the foreclosure because they
23 were not specifically provided with retroactive relief is without merit. Accordingly, the
24 Court grants Defendants’ motion to dismiss and grants leave to amend.

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26 ¹ The codebtor stay provides that “a creditor may not act . . . to collect all or any part of a consumer
27 debt of the debtor from any individual that is liable on such debt with the debtor. . . .” 11 U.S.C. § 1301.

28 ² The Court takes judicial notice of the bankruptcy court’s “Order on Motion for Relief/Annulment of
Automatic Stay” filed by Plaintiff as its authenticity is not subject to reasonable dispute. (Doc. No. 1-2
at 25.) See Fed. R. Evid. 201(b)(2).

1 **B. Second Claim: Violation of Cal. Civ. Code §§ 1785.3 et. seq.**

2 Plaintiffs allege that Wells Fargo and Select violated Cal. Civ. Code § 1785.25(a),
3 which provides that “[a] person shall not furnish information on a specific transaction or
4 experience to any consumer credit reporting agency if the person knows or should know
5 the information is incomplete or inaccurate.” (Doc. No. 1 ¶ 132.) Plaintiffs argue that
6 based on this violation, they are entitled to damages pursuant to Cal. Civ. Code
7 § 1785.31(a)(2).³ Wells Fargo and Select argue that Plaintiffs’ claim is preempted by the
8 Fair Credit Reporting Act (“FRCA”), that Plaintiffs merely provide conclusory allegations,
9 and that Plaintiffs provides no facts demonstrating that they suffered harm. (Doc. No.
10 12-1 at 6–8.)

11 Contrary to Wells Fargo’s and Select’s contentions, Plaintiffs’ cause of action under
12 Cal. Civ. Code § 1785.31(a)(2) is not preempted by the FRCA. As Defendants correctly
13 note, Cal. Civ. Code § 1785.25(a) is saved from preemption by the FRCA. See 15 U.S.C.
14 § 1681t (b)(1)(F); Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147, 1169 (9th Cir.
15 2009). However, Wells Fargo and Select incorrectly argue that, because Cal. Civ. Code
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17 ³ Cal. Civ. Code § 1785.31 provides in relevant part:
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19 (a) Any consumer who suffers damages as a result of a violation of this title by any
20 person may bring an action in a court of appropriate jurisdiction against that person to
21 recover the following:

22 (1) In the case of a negligent violation, actual damages, including court costs, loss
23 of wages, attorney's fees and, when applicable, pain and suffering.

24 (2) In the case of a willful violation:

25 (A) Actual damages as set forth in paragraph (1) above:

26 (B) Punitive damages of not less than one hundred dollars (\$100) nor more
27 than five thousand dollars (\$5,000) for each violation as the court deems
28 proper;

 (C) Any other relief that the court deems proper.

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1 § 1785.31(a)(2) was not specifically saved from preemption in the FRCA, Plaintiffs have
2 no private right of action to enforce Cal. Civ. Code § 1785.25(a). Ninth Circuit precedent
3 demonstrates otherwise. In Gorman, the Ninth Circuit held that “the private right of action
4 to enforce California Civil Code section 1785.25(a) is not preempted by the FCRA.” 584
5 F.3d at 1173. Thus, Plaintiffs may bring a cause of action pursuant to Cal. Civ. Code §
6 1785.31(a)(2) for violation of Cal. Civ. Code § 1785.25(a).

7 However, Plaintiffs have not provided sufficient factual support to make a claim for
8 violation of Cal. Civ. Code § 1785.25(a). Plaintiffs allege that Wells Fargo and Select held
9 the foreclosure sale on June 18, 2018. (Id. ¶ 47.) Plaintiffs allege further that after the
10 foreclosure sale, on July 10, 2018, Wells Fargo and Select falsely reported to credit
11 reporting agencies six times that Plaintiffs had \$763,986 of outstanding debt and \$96,740
12 past due. (Id. ¶¶ 83–84, 134–36.) The gist of Plaintiff’s argument is that because the
13 foreclosure sale was complete, Plaintiffs owed no balance and were not past due on
14 payments. (Id. ¶ 134.) As a result, their argument continues, Wells Fargo’s and Select’s
15 alleged reports to credit agencies of Plaintiffs’ outstanding debt and past due payments
16 were in willful violation of Cal. Civ. Code § 1785.25(a) because Wells Fargo and Select
17 knew that the reports to the credit agencies were false.

18 However, Plaintiffs also allege that after the property was sold, they received an
19 email explaining that the sale of the property was rescinded and the funds returned to the
20 purchaser. (Id. ¶ 61.) Plaintiffs allege further that, on June 26, 2018, Magnum and
21 Strategic filed a motion to retroactively annul the stay, demonstrating that the foreclosure
22 sale was not complete on June 18, 2018. (Id. ¶ 64.) Not until August 15, 2018, after the
23 alleged violation of Cal. Civ. Code § 1785.25(a), did the bankruptcy court grant the motion
24 validating the foreclosure sale. (Id. ¶ 70.) On the one hand, Plaintiffs allege that the
25 foreclosure sale established that they had no outstanding debt or past due payments. On
26 the other hand, they allege that the foreclosure sale was rescinded and not validated by the
27 bankruptcy court until after the alleged July 10, 2018 reports to credits agencies.
28 Reviewing the complaint, Plaintiffs have not alleged that Wells Fargo and Select knew that

1 the foreclosure sale resolved Plaintiffs’ debts. Thus, Plaintiffs have failed to allege that
2 Wells Fargo and Select knowingly furnished inaccurate information to any consumer credit
3 reporting agency. As a result, the Court dismisses Plaintiffs’ claim for violation of Cal.
4 Civ. Code § 1785.25(a) with leave to amend.

5 **C. Third and Fourth Claims: Violation of 15 U.S.C. § 1692f(1) and 15 U.S.C.**
6 **§ 1692e(2)(A)**

7 Plaintiffs allege that Wells Fargo and Select violated the Fair Debt Collection
8 Practices Act (“FDCPA”) by sending a billing statement to Plaintiffs on August 15, 2018,
9 the day that the bankruptcy court retroactively validated the foreclosure sale. (Doc. No. 1
10 ¶¶ 141–151.) Wells Fargo and Select argue that they cannot be held liable under 15 U.S.C.
11 § 1692f(1) and 15 U.S.C. § 1692e(2)(A) of the FDCPA because they are not “debt
12 collectors” within the meaning of the statute. (Doc. No. 12-1 at 8, 10.) Wells Fargo and
13 Select also argue that actions taken in connection with a nonjudicial foreclosure do not
14 constitute debt collection within the meaning of the statute. (*Id.*)

15 The Court agrees with Defendants. To be liable for a violation of the FDCPA, a
16 defendant must be a “debt collector” within the meaning of the statute. *See* 15 U.S.C.
17 §§ 1692f(1), 1692e(2)(A), 1692a(6). Pursuant to 15 U.S.C. § 1692a(6), a “debt collector”
18 is “any person who uses any instrumentality of interstate commerce or the mails in any
19 business the principal purpose of which is the collection of any debts, or who regularly
20 collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be
21 owed or due another.” The term “debt collector” under the FDCPA “does not include the
22 consumer’s creditors, a mortgage servicing company, or any assignee of the debt, so long
23 as the debt was not in default at the time it was assigned.” *Monreal v. GMAC Mortg., LLC*,
24 948 F. Supp. 2d 1069, 1085 (S.D. Cal. 2013) (internal quotations, citation, and italics
25 omitted); *see also Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1031 (9th Cir. 2009)
26 (noting that “a ‘creditor’ is not a ‘debt collector’ under the FDCPA”); *Perry v. Stewart Title*
27 *Co.*, 756 F.2d 1197, 1208 (5th Cir.1985) (“The legislative history of section 1692a(6)
28 indicates conclusively that a debt collector does not include the consumer’s creditors, a

1 mortgage servicing company, or an assignee of a debt, as long as the debt was not in default
2 at the time it was assigned.”).

3 Plaintiffs allege that Wells Fargo and Select are both “debt collectors.” (Doc. No. 1
4 ¶¶ 16, 22.) Plaintiffs do not allege facts in support of these conclusory allegations. In
5 addition, Plaintiffs do not allege any facts to show the loan was in default when it was
6 assigned to Wells Fargo. Moreover, Plaintiffs also allege that Wells Fargo is a creditor as
7 defined by the bankruptcy statute, 11 U.S.C. § 101(10), and that Select is a mortgage
8 servicer. (Doc. No. 1 ¶¶ 12, 19.) As previously noted, the FDCPA’s definition of debt
9 collector “does not include the consumer’s creditors [or] a mortgage servicing company. .
10 . .” Monreal, 948 F. Supp. 2d at 1085 (internal quotations and citation omitted). As such,
11 Plaintiffs have failed to allege sufficiently that Wells Fargo and Select are “debt collectors”
12 within the meaning of the FDCPA. Accordingly, Plaintiffs’ claim that Wells Fargo and
13 Select violated 15 U.S.C. § 1692f(1) and 15 U.S.C. § 1692e(2)(A) is dismissed with leave
14 to amend.

15 **D. Fifth and Sixth Claims: Violation of Cal. Civ. Code § 1788.17**

16 Plaintiffs bring two claims against Wells Fargo and Select for violation of the
17 Rosenthal Fair Debt Collection Practices Act (“Rosenthal Act”), Cal. Civ. Code § 1788.17.
18 (Doc. No. 1 ¶¶ 152–69.) Plaintiffs base their Rosenthal Act claims on their previous claims
19 that Wells Fargo and Select violated the FDCPA. (Id.) Wells Fargo and Select argue that
20 Plaintiffs’ Rosenthal Act claims fail because those claims are based on their FDCPA
21 claims, which in turn fail because Wells Fargo and Select are not debt collectors within the
22 meaning of the FDCPA.

23 The Court agrees with Wells Fargo and Select. “The [Rosenthal Act] requires all
24 debt collectors attempting to collect a consumer debt to comply with the [FDCPA],
25 15 U.S.C. §§ 1692b through 1692j.” Langan v. United Servs. Auto. Assoc., 69 F. Supp.
26 3d 965, 981 (N.D. Cal. 2014) (citing Cal. Civ. Code § 1788.17). “[A] plaintiff may state a
27 claim for violation of the Rosenthal Act simply by showing that a defendant violated any
28 of several provisions of the FDCPA.” Id. Plaintiffs have offered no other theories of

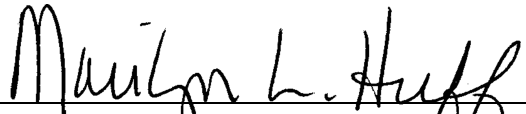
1 liability that would be valid under the Rosenthal Act but not the FDCPA. As such,
2 Plaintiffs' Rosenthal Act claims against Wells Fargo and Select rise and fall with their
3 FDCPA claims. Given that Plaintiffs have failed to allege their claims under the FDCPA,
4 their Rosenthal Act claims fail as well. The Court dismisses Plaintiffs' claims under Cal.
5 Civ. Code § 1788.17 with leave to amend.

6 **Conclusion**

7 For the foregoing reasons, the Court grants Defendants' motion to dismiss. The
8 Court will permit Plaintiffs to file an amended complaint that addresses the deficiencies
9 identified in this order. However, Plaintiffs should note that the Court will only grant future
10 opportunities to amend if Plaintiffs could "possibly cure the deficiency." See Telesaurus,
11 623 F.3d at 1003. The Court orders Plaintiffs to file an amended complaint on or before
12 **December 3, 2018.**

13 **IT IS SO ORDERED.**

14 DATED: November 2, 2018

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17 MARILYN L. HUFF, District Judge
18 UNITED STATES DISTRICT COURT
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