

ANDREW G. KALNOKI, KATHI KALNOKI, Plaintiffs,

v.

**FIRST AMERICAN LOANSTAR TRUSTEE SERVICES LLC, WELLS FARGO HOME MORTGAGE, FIRST AMERICAN TITLE INSURANCE COMPANY, U.S. BANK NATIONAL ASSOCIATION, AS GRANTOR TRUSTEE FOR THE HOLDERS OF BEAR STEARNS ARM TRUST, GRANTOR TRUST CERTIFICATES, SERIES 2005-2, AND DOES 1 THROUGH 10,^[1]
Defendants.**

No. 2:11-cv-02816-GEB-DAD.

United States District Court, E.D. California.

April 28, 2014.

ORDER DISMISSING SIXTH AMENDED COMPLAINT; AND DENYING MOTION FOR LEAVE TO AMEND

GARLAND E. BURRELL, Jr., District Judge.

Defendants **First American LoanStar Trustee Servicing, LLC** ("**LoanStar**") and **First American** Title Insurance Company ("**FATCO**") jointly move under Federal Rule of Civil Procedure ("**Rule**") 12(b)(6) for dismissal of Plaintiffs' Sixth Amended Complaint ("**SAC**") with prejudice. Defendants Wells Fargo Bank, N.A. d/b/a Wells Fargo Home Mortgage ("**Wells Fargo Bank, NA**") and U.S. Bank National Association, as grantor **Trustee** for the holders of Bear Stearns ARM Trust, Grantor Trust Certificates, Series 2005-2 ("**U.S. Bank, NA**") also jointly move under Rule 12(b)(6) for dismissal of the SAC with prejudice, and move to strike certain allegations in the SAC. The SAC only alleges claims under the Fair Debt Collection Practices Act ("**FDCPA**"). Plaintiffs oppose each motion.

Further, after the dismissal motions were filed, on February 21, 2014, Plaintiffs filed a motion for leave to amend the SAC, to which they attached a proposed Seventh Amended Complaint. In the proposed Seventh Amended Complaint, Plaintiffs allege the following claims: 1) violation of the FDCPA; 2) violation of section 17200 of the California Business and Professional Code; 3) conspiracy; 4) intentional infliction of emotional distress; 5) wrongful foreclosure; 6) quiet title; 7) slander of title; 8) violation of the Racketeer Influenced and Corrupt Organizations Act ("**RICO**"); and 9) fraudulent conversion of real property. Plaintiffs also name the following additional Defendants in the proposed Complaint: Freddie Mac; Wells Fargo Securities Corporation, Mortgage Pass Through Certificates, Series 2005-AR3; and The Bear Stearns Arm Grantor Trust Certificates Series 2005-2. Defendants **LoanStar**, **FATCO**, Wells Fargo Bank, NA, and U.S. Bank, NA oppose the motion to amend.

I. DISMISSAL MOTIONS

a. Factual Allegations

The dismissal motions concern the following factual allegations in the SAC. "On February 17, 2004, Plaintiffs obtained a consumer loan from Wells Fargo Home Mortgage, Inc., by refinancing their former home ["the Property"] . . ." (SAC ¶ 11.) "In December of 2009, . . . Plaintiffs fell behind on their mortgage payments." (Id. ¶ 12.) "On April 2, 2010, Wells Fargo Bank, NA, mailed to the Plaintiffs a Notice of Default package, and commenced an illegal debt collection, falsely labeled as a 2017non-judicial foreclosure' . . ." (Id. ¶ 13.)

"Wells Fargo Home Mortgage, Inc., who originally issued the loan to [Plaintiffs] . . . is not the same entity as Wells Fargo Bank, NA . . ." (Id. ¶ 95.) "Wells Fargo Bank, NA, was never the title-holder of the . . . Property in the land records, and had no connection whatsoever to [Plaintiffs'] loan and/or property, or any ownership and/or security interest therein." (Id. ¶ 87.) Rather, "[t]he owners/beneficiaries of the . . . Property at the time of the commencement of the illegal debt collection proceedings herein were, and now are, the holders of Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, series 2005-AR3, with Freddie Mac as their **Trustee**." (Id. ¶ 15.)

"Wells Fargo Bank, NA, . . . substituted . . . **LoanStar** as the foreclosure **trustee**, [on April 1, 2010.]" (Id. ¶ 19; see id. ¶ 84.) "**LoanStar** was not substituted in by the Lender, since Wells Fargo Bank, NA . . . was not the Lender, and/or had any ownership or security interest in the . . . Property, [and] thus was without any authority whatsoever[] to substitute a **Trustee**." (Id. ¶ 21.) "Since **LoanStar** was not the properly substituted **Trustee**, all of the acts performed by **LoanStar** during the illegal debt collection herein were . . . in violation of [the FDCPA]." (Id. ¶ 23.)

"During the illegal debt collection herein, Wells Fargo Bank, NA, also . . . assigned the Deed of Trust and Promissory Note, neither of which it owned, to U.S. Bank, NA . . ." (Id. ¶ 27.) "[T]he foreclosure thereafter by U.S. Bank, NA, [was] wrongful, . . . in violation of [the FDCPA]." (Id. ¶ 111.)

"On February 22, 2011, during the illegal foreclosure sale, . . . U.S. Bank, NA, pursuant to a perjured **Trustee's** Deed Upon Sale, manufactured by **LoanStar**, and recorded by FATCO, became the fraudulent record owner of the . . . Property." (Id. ¶ 33.)²¹

b. Discussion

Each Defendant's dismissal motion is premised, inter alia, on the argument that it is not a "debt collector" within the meaning of the FDCPA; however, since no Defendant specifically argued that the SAC fails to contain sufficient factual allegations to raise a plausible claim that any Defendant is a "debt collector" within the meaning of 15 U.S.C. § 1692a (6), the court sua sponte granted leave to each party to file a supplemental brief on this issue. (Minute Order, ECF No. 121.) The Minute Order granting this leave also reversed the following ruling filed in this action on June 25, 2013, finding it was erroneous and therefore it was withdrawn: "[B]ecause [U.S. Bank] obtained the debt in the present case after it was already in default, the [Fourth Amended Complaint] sufficiently alleges that [U.S. Bank] qualifies as a debt collector under the FDCPA." *Kalnoki v. First Am. LoanStar Tr. Servs. LLC*, 2:11-CV-02816-GEB, 2013 WL 3242173, at *6 (E.D. Cal. June 25, 2013). (See Minute Order, ECF No. 121.)

Defendants Wells Fargo Bank, NA and U.S. Bank, NA jointly filed a supplemental brief on the sufficiency of pleading issue, in which they argue Plaintiffs failed to adequately allege they are debt collectors. Plaintiffs also filed a supplemental brief in which they argue in a conclusory manner that the SAC is "factually extensive," and "contain[s] all of the factual bases one can think of in support of the FDCPA violations." (Pls.' Supplemental Br. 2:5-7, 2:11-14, ECF No. 122.) However, Plaintiffs' conclusory allegations are insufficient to support drawing a plausible inference that any Defendant is a debt collector within the meaning of § 1692a(6).

§ 1692a(6) prescribes in pertinent part:

The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another For the purpose of section 1692f(6) . . . , such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests.

§ 1692a(6). "Because [§§ 1692d-1692f] apply only to 2017debt collector[s]' as defined by the FDCPA," to survive a dismissal motion, a "complaint [must] provide [a] factual basis from which [a court] could plausibly infer that the principal purpose of [the defendant's] business is debt collection" or that the defendant "regularly collects or attempts

to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." Schlegel v. Wells Fargo Bank, N.A., 720 F.3d 1204, 1208-09 (9th Cir. 2013).

A § 1692f(6) FDCPA claim survives a dismissal motion only if it contains sufficient factual allegations from which a court could reasonably infer that the "principal purpose" of a defendant's business is "the enforcement of security interests." § 1692a(6); see Schlegel, 720 F.3d at 1208 ("[T]he complaint must plead 'factual content that allows the court to draw the reasonable inference' that [Defendant] is a debt collector." (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009))).

i. U.S. Bank, NA

The SAC contains the following allegations concerning Plaintiffs' assertion that U.S. Bank, NA is a debt collector:

50. Creditors who take an assignment of the debt, while the debt is in default, as U.S. Bank, NA did in this matter, are subject to the Federal Fair Debt Collection Practices Act as debt collectors"

51. U.S. Bank, NA, albeit illegally, took the assignment of the Kalnokis' debt, well after Kalnokis defaulted, thus as a matter of law it was a debt collector.

189. U.S. Bank, NA, unequivocally was a debt collector since it acquired the Kalnokis' debt after default, and while their property was in a fraudulent non-judicial foreclosure, all in violation of the mandate of the FDCPA. . . .

(SAC ¶¶ 50-51, 189.)

Plaintiffs' allegations fail to support drawing a plausible inference that U.S. Bank, NA is a debt collector within the meaning of § 1692a(6). Therefore, the FDCPA claims against U.S. Bank, NA are dismissed. See Schlegel, 720 F.3d at 1208-09 (finding the allegation that "[Defendant] is in the business of collecting debts and uses instrumentalities of interstate commerce in that business" was insufficient to provide a factual basis from which the court could infer the "principal purpose" of Defendant's business is debt collection or that Defendant "regularly collects debts owed to someone other than" Defendant.)

ii. Wells Fargo Bank, NA

The SAC contains the following allegations concerning Plaintiffs' assertion that Wells Fargo Bank, NA is a "debt collector":

47. . . . Wells Fargo Bank, NA, is a debt collector, since Wells Fargo Bank, NA, was not the beneficiary, creditor and/or lender of the loan to the Kalnokis, but rather an unauthorized debt collector, who fraudulently misrepresented its authority, capacity, and the amount of the debt owed, and ultimately stole \$437,280.54 from the Plaintiffs. . . .

164. . . . Wells Fargo Bank, NA, is a fraudulent debt collector

191. Wells Fargo Bank, NA, was not collecting on its own debt as is fraudulently claimed, but rather it was collecting a debt on behalf of others

(SAC ¶¶ 47, 164, 191.)

Plaintiffs also allege in the SAC: "Wells Fargo Bank, NA, is a debt collector, since its letters so state. . . ." (SAC ¶ 90.) A letter from Wells Fargo Bank, NA, attached as an exhibit to the SAC states, in part: "Wells Fargo Bank, NA is required by the Fair Debt Collection Practices Act to inform you that if your loan is currently delinquent or in default, as

your loan servicer, we will be attempting to collect a debt and any information obtained will be used for that purpose." (SAC. Ex. F-1, ECF No. 103-2.)

However, Plaintiffs' allegations, including the referenced letter, fail to evince that Wells Fargo Bank, NA is a debt collector within the meaning of § 1692a(6). Therefore, Plaintiffs' FDCPA claims against Wells Fargo Bank, NA are dismissed. See Schlegel, 720 F.3d at 1208-09; cf. *Ines v. Countrywide Home Loans, Inc.*, 08-CV-1267-WQH-NLS, 2009 WL 690108, at *4 (S.D. Cal. Mar. 12, 2009)(noting that the allegation that Defendants' letter to Plaintiff stated "'Defendants may be a debt collector attempting to collect a debt,' . . . does not allege facts to support the allegation that Defendants are debt collectors [within the meaning of the FDCPA].")

iii. LoanStar

The SAC contains the following allegations concerning Plaintiffs' assertion that **LoanStar** is a "debt collector":

64. In [a] letter to the Plaintiffs, dated April 6, 2010, **First American LoanStar Services, LLC**, sent through the U.S. Mail, the following language can be found: "Please be advised that **First American LoanStar Trustee Services, LLC**, may be construed as a debt collector attempting to collect the above referenced debt. Any information obtained from you may be used for that purpose. . . ." The above quoted admission, coupled with the content of said letter, i.e. being the five day collection notice, in an attempt to comply with the mandate of 15 U.S.C. section 1692(g), shows, that **LoanStar** was a debt collector.

186. Defendant **LoanStar** was a debt collector, since its letters indicated that it was collecting debt.

(SAC ¶¶ 64, 186.)

Plaintiffs' allegations are insufficient to support drawing a plausible inference that **LoanStar** is a debt collector. Therefore, the FDCPA claims against **LoanStar** are dismissed. See Schlegel, 720 F.3d at 1208-09; cf. *Ines*, 2009 WL 690108, at *4.

iv. FATCO

The SAC contains the following allegation concerning Plaintiffs' assertion that FATCO is a "debt collector":

188. FATCO was a debt collector, since it manufactured fraudulent documents to accommodate the conspiracy herein, and mailed them with false information to the Plaintiffs and to the Sacramento County Recorder's Office to be recorded, which constitutes, among others but not limited to, mortgage fraud, and mail fraud, both felonies.

(SAC ¶ 188.)

This allegation fails to support drawing a plausible inference that FATCO is a debt collector. See Schlegel, 720 F.3d at 1208-09. Therefore, the FDCPA claims against FATCO are dismissed.

II. MOTION FOR LEAVE TO AMEND AND DECISION ON WHETHER DISMISSAL OF SIXTH AMENDED COMPLAINT IS WITH PREJUDICE

Each Defendant seeks to have the SAC dismissed with prejudice, and Plaintiffs seek leave to file a proposed Seventh Amended Complaint. Plaintiffs seek in their proposed amended complaint to sue three additional Defendants; add a RICO claim and seven state law claims; and to re-allege their FDCPA claims. Each Defendant opposes Plaintiffs' motion to amend.

a. Failure to Comply With Local Rule 220

Plaintiffs' proposed Seventh Amended Complaint does not comply with Local Rule 220. That Rule states, in pertinent part:

Unless prior approval to the contrary is obtained from the Court, every pleading to which an amendment or supplement . . . has been allowed by court order shall be retyped and filed so that it is complete in itself without reference to the prior or superseded pleading. No pleading shall be deemed amended or supplemented until this Rule has been complied with. All changed pleadings shall contain copies of all exhibits referred to in the changed pleading.

E.D. Cal. L.R. 220.

Plaintiffs' proposed Seventh Amended Complaint violates this local rule by incorporating by reference exhibits attached to Plaintiffs' SAC. (See e.g., Proposed Seventh Amended Complaint ¶¶ 11, 18, 19, 33, 45, 52, 55, 56, 71, 72, 74, 82, 84, ECF No. 112-1.) However, the merits of Plaintiffs' amendment motion will nevertheless be decided.

b. Whether Leave is Granted to Join Additional Defendants.

Plaintiffs seek to join the following additional parties in their proposed Seventh Amended Complaint: Freddie Mac; Wells Fargo Securities Corporation, Mortgage Pass Through Certificates, Series 2005-AR3; and the Bear Stearns Arm Grantor Trust Certificates Series 2005-2. However, the proposed Seventh Amended Complaint lacks non-conclusory allegations against any of these proposed Defendants.

Specifically, Plaintiffs' claims against Freddie Mac are premised on the allegation that Freddie Mac served as "Trustee" for the Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2005-AR3. (E.g., Proposed Seventh Amended Compl. ¶ 55.) Plaintiffs allege that Freddie Mac's status as "Trustee" "was conclusively established through the Collateral Term Sheet, Form 8-K filed with the SEC," which Plaintiffs attached as Exhibit B to the SAC. (Id.) However, the referenced exhibit does not contain information concerning Freddie Mac. Therefore, Plaintiffs have not shown that the allegations in the proposed Seventh Amended Complaint support drawing a plausible inference that Freddie Mac was Trustee for the referenced Mortgage Pass-Through Certificates. Furthermore, Plaintiffs' allegations that Freddie Mac orchestrated hundreds of "fraudulent" foreclosures on a nationwide scale, and that "Freddie Mac had a controlling interest to finance and reinvest the proceeds from its nationwide racketeering scheme, in furtherance of its criminal goals," are unsupported and conclusory. (Id. ¶¶ 313, 309.)

Moreover, the proposed Complaint does not contain any specific allegations of wrongdoing committed by the Wells Fargo Securities Corporation, Mortgage Pass Through Certificates, Series 2005-AR3, and the Bear Stearns Arm Grantor Trust Certificates Series 2005-2.

Plaintiffs also mention a fourth new Defendant in the body of the proposed Complaint, "the holders of the Bear Stearns Arm Grantor Trust Certificates Series 2005-2," (Id. ¶ 3); however, the Complaint does not contain any allegations that the referenced "holders" engaged in wrongdoing.

Since leave to amend may be denied where "where [a proposed] amended complaint would . . . be subject to dismissal," this portion of Plaintiffs' motion is denied. Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1298 (9th Cir. 1998); see also Enriquez v. Aurora Loan Servs., LLC, 509 F. App'x 607, 608 (9th Cir. 2013) (affirming denial of leave to amend where, inter alia, "the proposed amended complaint did not state facts sufficient under the Iqbal and Twombly standard")

c. Whether Leave is Granted to Add the Proposed RICO Claim and the State Law Claims Alleged Against LoanStar, FATCO, Wells Fargo Bank, NA, and U.S. Bank, NA

The amendment Plaintiffs seek includes adding a RICO claim in this federal action, and the following six state law claims against Defendants **LoanStar**, FATCO, Wells Fargo Bank, NA, and U.S. Bank, NA: 1) conspiracy; 2) intentional infliction of emotional distress; 3) wrongful foreclosure; 4) quiet title; 5) slander of title; and 6) fraudulent conversion of real property. Plaintiffs also seek leave to file a claim against **LoanStar** and FATCO for violation of section 17200 of the California Business and Professional Code. Each Defendant opposes the motion, arguing it should be denied since Plaintiffs have unduly delayed in seeking leave to file these claims.

Delay in bringing a motion for leave to amend is a factor to consider when deciding whether to grant an amendment motion. Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990). In evaluating this delay factor, courts inquire whether "delay between the time of obtaining a relevant fact and seeking a leave to amend is unreasonable." AmerisourceBergen Corp. v. Dialysist W., Inc., 465 F.3d 946, 953 (9th Cir. 2006).

Defendants **LoanStar** and FATCO jointly argue in essence that the following documents, of which they seek to have judicial notice taken, evince that Plaintiffs have unduly delayed in seeking leave to amend, contending the facts upon which the Proposed Seventh Amended Complaint are based were known and sought to be litigated or actually litigated earlier in state court: 1) Plaintiffs' **First** Amended Complaint filed in Sacramento County Superior Court; 2) the Superior Court's Order sustaining **LoanStar** and FATCO's demurrers to the **First** Amended Complaint; 3) the Superior Court's Order sustaining **LoanStar** and FATCO's demurrers to Plaintiffs' Second Amended Complaint; and 4) the Superior Court's Judgment of Dismissal subsequently entered in favor of **LoanStar** and FATCO. (**LoanStar**/FATCO Request for Judicial Notice ("RJN"), 2:1-17, ECF No. 117.)

Wells Fargo Bank, NA and U.S. Bank, NA also include in their opposition a request that judicial notice be taken of the following documents, also contending these documents demonstrate that Plaintiffs' previously brought in state court or sought to bring the claims alleged in Plaintiffs' Proposed Seventh Amended Complaint: 1) the Superior Court's Order sustaining Wells Fargo Bank, NA and U.S. Bank, NA's demurrers to Plaintiffs' **First** Amended Complaint; 2) Plaintiffs' Motion for Leave to File a Second Amended Complaint and the attached proposed complaint, filed in Superior Court; 3) the Superior Court's Order denying Plaintiffs' Motion for Leave to File the Second Amended Complaint; 4) the Superior Court's Order sustaining Wells Fargo Bank, NA and U.S. Bank, NA's demurrers to Plaintiffs' Second Amended Complaint; and 5) the Superior Court's Judgment of Dismissal subsequently entered in favor of Wells Fargo Bank, NA and U.S. Bank, NA. (Wells Fargo Bank, NA/U.S. Bank, NA Opp'n to Pls.' Mot. to Amend, 10:5-14.)

These judicial notice requests are granted since courts "may take notice of proceedings in other courts . . . if those proceedings have a direct relation to matters at issue." U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992).

Plaintiffs' proposed Seventh Amended Complaint is premised on the following factual allegations: 1) Wells Fargo Home Mortgage, Inc. issued a loan to Plaintiffs; 2) Plaintiffs' loan was subsequently securitized; 3) after the loan was securitized, Wells Fargo, NA initiated foreclosure proceedings and substituted **LoanStar** as **Trustee** under the Deed of Trust; 4) Wells Fargo Bank, NA then assigned the Deed of Trust to U.S. Bank, NA, as the **Trustee** for the Bear Stearns ARM Trust, Grantor Trust Certificates, Series 2005-2; and 5) U.S. Bank, NA foreclosed on the property and became the record owner. However, in the **First** Amended Complaint, filed in state court on February 25, 2011, Plaintiffs alleged that Wells Fargo Home Mortgage issued a loan to Plaintiffs, and that Plaintiffs' loan was subsequently securitized. (See e.g., **LoanStar**/FATCO RJN Ex. A, ¶¶ 6, 9, 33, ECF No.117-1.) Further, in a proposed Second Amended Complaint, filed in state court on September 21, 2011, Plaintiffs alleged that Wells Fargo Bank, NA initiated foreclosure proceedings and substituted **LoanStar** as **Trustee**. (See e.g., Wells Fargo Bank, NA/U.S. Bank, NA RJN

Ex. 4, ¶¶ 15, 16, 20, 74, ECF No. 125-4.) Plaintiffs also alleged that Wells Fargo Bank, NA assigned the Deed of Trust to U.S. Bank, NA, and that U.S. Bank, NA foreclosed on the property and became the record owner. (Id. ¶ 88, 107).

Since Plaintiffs' **First** Amended Complaint and a proposed Second Amended Complaint filed in state court evince that Plaintiffs were aware of the new claims in their proposed Seventh Amended Complaint approximately two and one half years prior to filing their proposed Seventh Amended Complaint in this federal action, Plaintiffs unduly delayed in seeking leave to add the claims in that proposed amended complaint. AmerisourceBergen, 465 F.3d at 953 (stating "[the Ninth Circuit has] held that an eight month delay between the time of obtaining a relevant fact and seeking a leave to amend is unreasonable.")

LoanStar and FATCO further argue in their opposition that granting Plaintiffs' motion will prejudice them by "inject[ing] additional expense and delay into a litigation which is already unduly protracted and complex." (**LoanStar**/FATCO Opp'n to Pls.' Mot. to Amend 8:1-12.) Wells Fargo Bank, NA and U.S. Bank, NA also argue in their opposition that granting Plaintiffs' motion will prejudice them since "all state law claims which are sought to be asserted in the [proposed Seventh Amended Complaint] except for Fraudulent Conversion of Real Property were either asserted earlier in the State Court Action and dismissed, or were sought to be added in the State Court proceeding and leave [to amend] was denied by that Court." (Wells Fargo Bank, NA/U.S. Bank, NA Opp'n to Pls.' Mot. to Amend 9:3-5.)

"Prejudice to the opposing party is the most important factor," in determining whether to grant a motion for leave to amend. Jackson v. Bank of Hawaii, 902 F.2d 1385, 1387 (9th Cir. 1990). The Ninth Circuit has found that granting leave to amend would prejudice a defendant where the proposed amendment would "unfairly impose[] potentially high, additional litigation costs. . . that could have easily been avoided had [Plaintiff] pursued its [claims] in its original complaint. . . ." AmerisourceBergen, 465 F.3d at 953.

Procedurally, Plaintiffs filed their **First** Amended Complaint in Sacramento County Superior Court on February 25, 2011, alleging, inter alia, a violation of section 17200, intentional infliction of emotion distress, and conspiracy — all of which concerned the foreclosure on Plaintiffs' property. On August 25, 2011, the Superior Court sustained Wells Fargo Bank, NA and U.S. Bank, NA's demurrers to the **First** Amended Complaint, and on September 9, 2011, the Superior Court sustained **LoanStar** and FATCO's demurrers. On September 21, 2011, Plaintiffs filed a motion in Superior Court for leave to file a proposed Second Amended Complaint. The proposed complaint contained, inter alia, claims for wrongful foreclosure, quiet title, and slander of title. The Superior Court denied that motion without prejudice in an order filed on September 29, 2011. A Second Amended Complaint was subsequently filed in the Superior Court on October 7, 2011, which contained, inter alia, a section 17200 claim, a conspiracy claim, and FDCPA claims — all of which again concerned the foreclosure on Plaintiffs' property. Defendants removed the case to this federal court on October 24, 2011. Subsequently, in an Order filed on April 4, 2012, the state law claims were found to predominate over the FDCPA claims and were remanded to state court under 28 U.S.C. § 1367(c)(2).

After the remand, the Superior Court ruled on **LoanStar** and FATCO's demurrers to the Second Amended Complaint in an Order filed on December 18, 2012, sustained the demurrers, and then entered judgment in their favor on January 25, 2013. The Superior Court also ruled on Wells Fargo Bank, NA and U.S. Bank, NA's demurrers to the Second Amended Complaint, sustained the demurrers, and entered judgment in their favor on February 19, 2013. Each Defendant states in its opposition brief to Plaintiffs' motion for leave to amend in this federal lawsuit that an appeal of the state court judgments is currently pending, and that in essence Plaintiffs seek to litigate in this federal action the same claims they lost in state court.

Defendants have shown that granting Plaintiffs' motion for leave to amend by adding the seven state law claims Plaintiffs seek to add would prejudice them by subjecting them to litigation in federal and state court on claims involving the same primary rights. Cf. Manufactured Home Communities Inc. v. City of San Jose, 420 F.3d 1022, 1031 (9th Cir. 2005) ("A party may bring only one cause of action to vindicate a primary right. Claims not raised in this single cause of action may not be raised at a later date." (footnote and citation omitted)); Jackson, 902 F.2d at 1388 (finding further amendment would prejudice Defendants where "permit[ting] the amended complaint would require [Defendants] to relitigate a portion of their state court action.") Moreover, granting leave to amend to add the RICO

claim would "greatly alter[] the nature of the litigation [in federal court] and . . . require[] defendants to . . . undertake[], at a late hour, . . . an entirely new course of defense." Morongo Band of Mission Indians, 893 F.2d at 1079. Putting Defendants "through the time and expense of continued litigation . . ., with the possibility of additional discovery," would cause undue prejudice." Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1161 (9th Cir. 1989) (quoting Troxel Manufacturing Co. v. Schwinn Bicycle Co., 489 F.2d 968, 971 (6th Cir. 1973)).

Therefore, this portion of Plaintiffs' motion for leave to amend is denied.

d. Whether Leave Is Granted to Amend the FDCPA Claims Alleged Against LoanStar, FATCO, Wells Fargo Bank, NA, and U.S. Bank, NA

Each Defendant argues in essence that Plaintiffs' motion to amend the FDCPA claims should be denied because dismissal of these claims should be with prejudice. Each Defendant contends that Plaintiffs have repeatedly failed to properly allege these claims, yet the claims are still deficiently pled in the proposed Seventh Amended Complaint, notwithstanding the several opportunities Plaintiffs have been given to allege viable claims.

"Leave to amend may . . . be denied for repeated failure to cure deficiencies by previous amendment." Abagninin v. AMVAC Chem. Corp., 545 F.3d 733, 742 (9th Cir. 2008). Leave to amend may also be denied where "it is clear that the complaint could not be saved by any amendment." Sylvia Landfield Trust v. City of Los Angeles, 729 F.3d 1189, 1196 (9th Cir. 2013).

Plaintiffs have repeatedly failed to adequately allege that any Defendant is a debt collector within the meaning of the FDCPA and yet argue in a recently filed supplemental brief that their insufficiently pled SAC "contain[s] all of the factual bases one can think of in support of . . . FDCPA [claims]." (Pls.' Supplemental Br. 2:11-14.) However, the FDCPA claims in Plaintiffs' Second Amended Complaint were dismissed, inter alia, because they contained insufficient factual allegations from which is could plausibly be inferred that any Defendant was a debt collector. Further, the Order dismissing Plaintiffs' Fourth Amended Complaint ruled that the FDCPA claims contained insufficient factual allegations from which is could plausibly be inferred that Wells Fargo Bank, NA, **LoanStar**, and FATCO were debt collectors. Moreover, Plaintiffs' proposed Seventh Amended Complaint fails to contain sufficient factual allegations to support drawing a plausible inference that any Defendant is a debt collector.

Since Plaintiffs' opine that their insufficiently pled SAC "contain[s] all of the factual bases one can think of in support of the FDCPA [claims]," (Pls.' Supplemental Br. 2:11-14) and also insufficiently plead these claims in their proposed Seventh Amended Complaint, "it is clear that [Plaintiffs' FDCPA claims] could not be saved by" further amendment. Sylvia Landfield Trust, 729 F.3d at 1196. Therefore, this portion of Plaintiffs' motion is denied, and each Defendant's dismissal motion is granted with prejudice.

III. CONCLUSION

For the stated reasons, Plaintiffs' motion to amend is denied, and Plaintiffs' Sixth Amended Complaint is dismissed with prejudice. Judgment shall be entered in favor of Defendants **LoanStar**, FATCO, Wells Fargo Bank, NA, and U.S. Bank, NA on the FDCPA claims, and this action shall be closed.

[1] The above caption lists Defendant U.S. Bank National Association, as Grantor **Trustee** for the Holders of Bear Stearns ARM Trust, Grantor Trust Certificates, Series 2005-2 ("U.S. Bank, NA") even though Plaintiffs' Sixth Amended Complaint ("SAC") omits U.S. Bank, NA from its caption, since U.S. Bank, NA is alleged to be a Defendant in the body of the SAC and U.S. Bank moves for dismissal of the SAC. Further, the above caption omits Wells Fargo Home Equity ("WFHE"), even though this party is listed in SAC's caption, since Plaintiffs voluntarily dismissed WFHE on February 20, 2012, (ECF No. 32), and Plaintiffs subsequent complaints fail to contain any allegations against WFHE.

[2] In the body of the SAC, Plaintiffs name "the holders of the Bears Stearns Arm Grantor Trust Certificates, Series 2005-2," ("holders") as Defendants. (SAC ¶ 3.) Previously, in the Third, Fourth, and Fifth Amended Complaints, Plaintiffs also named the

holders as Defendants. However, Plaintiffs were never authorized to add these Defendants, since Plaintiffs did not name them in the Second Amended Complaint, and the Order dismissing the Second Amended Complaint granted Plaintiffs leave to amend "solely for the purpose of amending the[] FDCPA claims [alleged therein]." (Order Dismissing Second Amended Compl. 8:13-14, ECF No. 34.) Therefore the allegation in the SAC naming the holders as Defendants is stricken. See F.D.I.C. v. Koovomjian, 220 F.3d 10, 15 (1st Cir. 2000)(noting "the district court did not abuse its discretion by striking" claims which the Court never granted leave to add.)

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