IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

NO. 17-11131-BB

LORIS B. RANGER AND GEORGE GORDON,
Plaintiffs/Appellants

v.

WELLS FARGO BANK, N.A.,
a foreign corporation, d.b.a. America's Servicing Company,
Defendant/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

APPELLANTS LORIS B. RANGER AND GEORGE GORDON'S INITIAL BRIEF

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to F.R.A.P. 26.1 and 11th Cir. R. 26.1-1, Appellants Loris B. Ranger and George Gordon by and through undersigned counsel, hereby disclose the following trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the appeal, including subsidiaries, conglomerates, affiliates, and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock:

1. America's Servicing Company (a division of Wells Fargo Home Mortgage, which is a division of Wells Fargo Bank, N.A.)
2. Berkshire Hathaway, Inc. (Stockholder of Defendant/Appellee) (NYSE: BRKA)
3. Diaz, Danielle M. (Attorney for Appellee)
4. Dimitrouleas, William P. (U.S. District Judge (S.D. Fla.))
5. Foo, Sean X. (Attorney for Appellant)
6. Golant, Jeffrey N. (Attorney for Appellant)
7. Gordon, George (Appellant)
8. Greenberg Traurig, P.A. (Law Firm for Appellee)
9. Matos Legal, PLLC
10. Matos, Rosalind J. (Attorney for Appellant)

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11. Mello, Kimberly S. (Attorney for Appellee)

12. Ranger, Loris B. (Appellant)

13. Rosenthal, Denise Michelle (Attorney for Appellee)

14. Singer, Jeremy Robert (Attorney for Appellee)

15. Snow, Lurana S. (U.S. Magistrate Judge (S.D. Fla.))

16. Stocker, Michele Leneve (Attorney for Appellee)

17. The Law Offices of Jeffrey N. Golant, P.A. (Law Firm for Appellants)

18. Wells Fargo & Company (Parent Company of Wells Fargo Bank, N.A.) (NYSE: WFC)

19. Wells Fargo Bank, N.A. (Appellee)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants Loris B. Ranger and George Gordon are natural persons and therefore are not required to file a corporate disclosure statement.

STATEMENT REGARDING ORAL ARGUMENT

Appellants request oral argument because they believe it will aid the Court in considering the nuanced issues in this case involving the nature of damages that are recoverable under the Real Estate Settlement Procedures Act ("RESPA"). RESPA was amended in 2010 and these amendments were implemented in 2014 after the administrative rule making process was completed. There is a limited amount of circuit court precedent addressing RESPA damages under the prior, or the amended, version of the statute.

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STATEMENT OF JURISDICTION

This case involves Appellants' claim arising under the Real Estate Settlement Procedures Act (12 U.S.C. § 2605), and related state-law claims for negligence and conversion. The district court had federal question jurisdiction over the RESPA claim under 28 U.S.C. § 1331. In addition, the related state-law claims arose from the same transaction and occurrence, involved citizens of different states, and presented an amount in controversy in excess of $75,000. Thus, the district court also had diversity jurisdiction to consider the state law claims under 28 U.S.C. § 1332, as well as supplemental jurisdiction over the state law claim pursuant to 28 U.S.C. § 1367.

This Court has jurisdiction under 28 U.S.C. § 1291 because this is an appeal from a final decision of the district court. The district court entered its order dismissing Counts II, III, and IV of Plaintiffs' Amended Complaint on February 6th, 2017. (Docket Entry 68). On February 8th, 2017, Appellants moved for reconsideration. (Docket Entry 69). The district court then amended its order dismissing Counts II, III, and IV with prejudice. (Docket Entry 70). On March 10th, 2017 the district court entered an order denying reconsideration and remanding Count I (the sole remaining count) to state court. (Docket Entry 77). Accordingly, there are no remaining claims in this matter still before the district court.

Appellants filed their timely Notice of Appeal on March 13th, 2017. (Docket Entry 79).

STATEMENT OF THE ISSUES

(I.) Whether the district court erred when it dismissed Appellants' RESPA, and related state law negligence claim, finding that they could not allege that they suffered any recoverable damages.

(II.) Whether the district court erred when it dismissed Appellants' conversion claim with prejudice, but without identifying any specific pleading defects.

PRELIMINARY STATEMENT

Plaintiffs/Appellants Loris R. Ranger and George Gordon will be referred to hereafter as "Appellants." Defendant/Appellee Wells Fargo Bank, N.A. will be referred to hereafter as "Wells Fargo."

STATEMENT OF THE CASE

1. Nature of The Case

Appellants' first relevant claim arose under the Real Estate Settlement Procedures Act ("RESPA") provisions found at 12 U.S.C. § 2605. Appellants also asserted a related Florida law negligence claim, as well as a Florida law conversion claim. The district court dismissed Appellants' Amended Complaint with prejudice concluding that they were unable to plead any recoverable damages. It also

dismissed the conversion claim with prejudice, but did not identify any pleading defects.

2. Course of Proceedings

Appellants originally brought this action in state court. On November 30th, 2015, Wells Fargo removed the action to the district court. (Docket Entry 1). Wells Fargo served its Answer and Affirmative Defense to the removed complaint on December 22nd, 2015. (Docket Entry 11). Appellants obtained leave of court to file an amended complaint on November 23rd, 2016. (Docket Entry 43). The operative Amended Complaint was filed on November 29th, 2016. (Docket Entry 44). Counts II, III, and IV of the operative Amended Complaint were dismissed with prejudice on February 6th 2017. (Docket Entry 68.)

3. Disposition Below

On February 6th, 2017 the district court entered an order dismissing Counts II, III, and IV of the Amended Complaint with prejudice. (Docket Entry 68). Appellants then moved for reconsideration on February 8th, 2017. (Docket Entry 69). The district court entered an amended order dismissing Counts II, III, and IV that was substantially the same as the prior order. (Docket Entry 70). Thereafter, on March 10th, 2017 the district court entered an order denying reconsideration and remanding Count I, the sole remaining count, to state court. (Docket Entry 77).

4. Statement of Facts

Appellants own a home in Broward County Florida. (Amended Complaint, Docket Entry 44, p.2 ¶.4). That home is subject to a mortgage serviced by Wells Fargo. (*Id.*). Although Wells Fargo services the loan, the debt actually belongs to another party. (*Id.*). That party will be referred to hereafter as the "mortgagee." On or about September 5th, 2012, the mortgagee commenced a mortgage foreclosure against Appellants in state court. (*Id.* ¶.8). As required by Florida Rule of Civil Procedure 1.115(e), the foreclosure complaint was verified under penalty of perjury. (*Id.*). The verification for the state court foreclosure complaint was executed by a Wells Fargo employee on behalf the mortgagee (*Id.*).

The verified mortgage foreclosure complaint alleges, under penalty of perjury, that Appellants failed to make all of their mortgage payments that came due since January 1st, 2012. (*Id.*). While the mortgage foreclosure lawsuit was pending, Appellants sent their first of two Notices of Error directly refuting the operative allegations of the foreclosure complaint. (*Id.* at p.4 ¶.10, p.6 ¶.25) (*See also* First Notice of Error Docket Entry 47-1, p. 2-3). Appellants' correspondence further explained that the errors impacting Appellants' account led to the improper filing of the foreclosure lawsuit. (*Id.*). Through that correspondence, Appellants invoked the RESPA/Regulation X error resolution procedures requiring Wells

Fargo to investigate and correct the errors that the Appellant/borrowers identified. (*Id.* at ¶.25) (See also Docket Entry 47-1, p.1).

Wells Fargo responded by letter dated December 9th, 2014 (Docket Entry. 47-2). In that response, Wells Fargo insists that "…the foreclosure is valid." (*Id.*). Nothing in the response indicates that Wells Fargo intended to make any corrections to Appellants' account. More than five months later, on April 21st, 2015, the foreclosure case proceeded to trial. After the close of the evidence, the state trial court involuntarily dismissed the foreclosure lawsuit finding that there was no evidence that Appellants actually defaulted on their mortgage.

Approximately six months *after* the trial, Wells Fargo sent Appellants a letter asserting that their loan was in default, and that they owed $104,997.39. (Docket Entry 44, p. 7, ¶.29). This amount appeared to represent all of the claimed charges in the original failed foreclosure. (*Id.*). In response, Appellants sent a second Notice of Error to Wells Fargo, through counsel, on or about October 20th, 2015. (*Id.* ¶.30)(See also Docket Entry 47-4). The Second Notice of Error refers to the outcome of the April 15th, 2015 trial as further evidence that a servicing error did occur and continued to impact Appellants' account. (Docket Entry 47-4, p.3).

Wells Fargo once again declined to make any corrections. (*Id.* ¶.31). Wells Fargo's response was sent by the same attorney who represented Wells Fargo in the district court litigation giving rise to this appeal. Wells Fargo's second Notice

of Error does not address the substance of Appellants' concerns stating simply "[s]ince this matter is in litigation, we refer you to address the legal issues asserted in your letter to [Wells Fargo's counsel] going forward." (Wells Fargo's Response to Second Notice of Error, Docket Entry 50-1).

Through discovery, Appellants learned that Wells Fargo had an express policy whereby it will place all payments that a borrower submits into a "suspense account" once it refers a loan to an attorney to file a foreclosure lawsuit. (Docket Entry, 44, p. 12 -13 ¶¶.46-47). A "suspense account" is a term used to describe an accounting procedure whereby a mortgage servicer collects payments from the borrower, but does not apply those payments to the loan. Mortgage servicers are permitted to invest—and retain the income from—suspense account funds. (*Id.* citing *In Re Stewart*, 391 B.R. 327, 336 (E.D. L.A. 2008) and 78 FR 10696-01 *10700). However, under 12 C.F.R. 1026.36(c), mortgage servicers are only permitted to maintain an amount in suspense that is less than a single scheduled monthly payment. (Docket Entry 44, p. 12 ¶.49).

The total amount of the payments that Appellants made since the asserted default far exceeded the amount of a single monthly payment and therefore the amount that Wells Fargo was permitted to hold in suspense. (*Id.* ¶.48). By placing these funds in the suspense account, Wells Fargo inflated the amount claimed in the foreclosure and caused great confusion. Although Wells Fargo negotiated

Appellants' checks, the debited funds were not credited to Appellants' mortgage debt. Wells Fargo insisted that Appellants had not paid their mortgage since January 1st, 2012 (even though they had) because Wells Fargo placed those payments into a suspense account instead of applying them to the mortgage (*Id.* ¶.53).

5. Standard of Review

This Court applies a de novo standard of review on an appeal from a motion to dismiss. *See e.g., Renfroe v. Nationstar Mortg., LLC*, 822 F.3d 1241, 1243 (11th Cir. 2016) citing *Timson v. Sampson*, 518 F.3d 870, 872 (11th Cir. 2008)

SUMMARY OF THE ARGUMENT

There can be little doubt that a serious mortgage servicing error occurred in this case. After a full trial on the merits, the state trial court found that Wells Fargo wholly failed to produce any legally sufficient evidence that Appellants had defaulted on their mortgage obligations and involuntarily dismissed the foreclosure lawsuit against them.[1] Both before and after the trial, Appellants invoked the RESPA/Regulation X error resolution procedures in an attempt to notify Wells Fargo of the error. Both times, Wells Fargo refused to acknowledge that an error occurred or to make any corrections.

[1] Under Florida Rule of Civil Procedure 1.420(b), an involuntary dismissal entered during a non-jury trial is similar to a motion for directed verdict at a jury trial and constitutes an adjudication on the merits. *See e.g. Deutsche Bank Nat. Trust Co. v. Huber*, 137 So. 3d 562, 563–64 (Fla. 4th DCA 2014).

In their operative Amended Complaint, Appellants alleged that Wells Fargo's RESPA violation caused them to sustain five different categories of damages: 1. Emotional distress; 2. Attorney's fees related to the foreclosure litigation in state court; 3. Attorney's fees and related expenses incurred in connection with their second attempt to invoke the RESPA/Regulation X error resolution procedures; 4. Improper finance charges, interest, and fees, and 5. Damage to their credit rating. (Amended Complaint, Docket Entry, 44, ¶. 32).

The district court's orders dismissing the Amended Complaint and denying reconsideration only addressed Appellants' damage allegations relating to attorneys' fees incurred in the defense of the mortgage foreclosure lawsuit and emotional distress. The district court did not analyze Appellants' other contentions that they were also entitled to damages in the form of expenses incurred as a result of their s*econd* effort to invoke the RESPA/Regulation X error resolution proceedings, unwarranted charges for interest or attorneys' fees that were applied to the account on the basis of the asserted payment default that led to the failed foreclosure, or damage to their credit rating.

In rejecting Appellants' emotional distress claim, the district court found that "…it appears that Plaintiffs attempt to convert a RESPA claim into a claim for attempted wrongful foreclosure, which is not a recognized cause of action in Florida." (Docket Entry 68, p. 8; Docket Entry 70, p. 8). However, there is ample

authority finding that emotional distress damages are recoverable under RESPA. Because RESPA arises under federal law, the lack of a state law remedy is immaterial.

In considering the motion to dismiss the district court improperly took judicial notice that Appellants recovered prevailing party attorneys' fees in the foreclosure litigation. At the same time, the district court concluded that this award was necessarily sufficient to fully reimburse Appellants' legal expenditures, thereby failing to consider the possibility that this recovery was less than the total amount of attorneys fees and litigation costs incurred. In doing so, the district court improperly resolved disputed issues of fact, looked outside the four corners of the operative pleading, and drew factual inferences that were adverse to the Plaintiff/Appellants. Furthermore, while Appellants did recover *most* of their attorney fee expenditures under Florida law, a successful litigant is generally unable to recover *all* attorneys' fees reasonably expended. The district court effectively concluded that RESPA did not authorize recovery of attorney's fees that the borrower could not recover through fee shifting in the foreclosure litigation under state law, without analyzing the issue.

Moreover, Wells Fargo's continued collection activity and foreclosure threats required Appellants to retain counsel months *after* the foreclosure lawsuit was resolved in their favor, and to incur related expense in sending their *second*

Notice of Error. The district court does not explain why these expenses are not recoverable. As we discuss in greater detail below, there are at least six reported cases from the same district finding that these sorts of expenses *are* recoverable as damages under RESPA. One of those cases was cited in the district court's dismissal order as grounds for dismissal, even though it does not support that result.

This district court also did not address Appellants allegations that they were entitled to damages for interest and finance charges that flow from Wells Fargo's failure to appropriately credit their payments, or damage to their credit rating.

Importantly however, in *Renfroe v. Nationstar Mortg., LLC*, 822 F.3d 1241, 1246–47 (11th Cir. 2016) this Court explains that "[w]hen a plaintiff plausibly alleges that a servicer violated its statutory obligations and as a result the plaintiff did not receive a refund of erroneous charges, she has been cognizably harmed." In the case at bar, Appellants allege that they paid funds that were not credited to their mortgage loan, which necessarily resulted in increased interest payments. In addition, fees and finance charges arising from the wrongful foreclosure were assessed to their account. Nevertheless, Wells Fargo continually denied that any error occurred and declined to make any corrections. Just as in *Renfroe*, Appellants' allegations relating to finance charges and interest were sufficient,

standing alone, to prevent the conclusion that Appellants did not sustain any damages as a result of the RESPA violation.

The district court also dismissed Appellants' common law claims for negligence and conversion. The negligence claim arises from the same facts as the RESPA claim and should be reversed for the same reasons. The district court did not identify any pleading deficiencies when it dismissed the conversion claim with prejudice. Accordingly, dismissal of the conversion claim was not warranted, especially where that dismissal was with prejudice.

ARGUMENT

I. APPELLANTS' DAMAGES ALLEGATIONS WERE SUFFICIENT TO SUSTAIN BOTH THEIR RESPA AND NEGLIGENCE PER SE CLAIM

Wells Fargo's unlawful failure to credit Appellants' payments and prolonged prosecution of the ultimately failed foreclosure lawsuit were serious servicing errors. Instead of correcting these errors, Wells Fargo pursued the wrongful foreclosure all the way to trial. Even after the trial resulted in a decision in Appellants' favor, Wells Fargo did not change course. Instead, it sent Appellants correspondence threatening to bring a *second* wrongful foreclosure. Both before and after the trial, Appellants invoked the RESPA/Regulation X error resolution procedures in a vain effort to notify Wells Fargo of the problem. Both times, Wells Fargo failed to substantively address their concerns. As a result, Appellants were

forced to successfully defend themselves from the wrongful foreclosure all the way through trial. Even after they prevailed, there were then forced to retain counsel once again several months later in an effort to avoid yet another threatened wrongful foreclosure. It simply cannot be said that Wells Fargo's breach of its RESPA obligations was harmless in this case. The damages that Appellants identified in the Amended Complaint are a natural and foreseeable consequence of the RESPA violation. Recent decisions from this Court, and from the Southern District of Florida, all recognize that the types of damages identified in Appellants' Amended Complaint are recoverable under RESPA.

When it dismissed Appellants' RESPA claim with prejudice, the district court stated:

> [t]he Court agrees with Defendant that Plaintiffs have failed to state a claim upon which relief may be granted. To state a RESPA claim for failure to respond to an QWR, a plaintiff must allege that: (1) the defendant is a loan servicer; (2) the plaintiff sent a written request to the defendant consistent with the requirements of the statute; (3) the defendant failed to respond adequately within the statutorily required timeframe; and (4) the plaintiff suffered actual or statutory damages. *See Miranda v. Ocwen Loan Servicing*, 148 F. Supp. 3d [1349], 1354 (citations omitted). Defendant challenges the Complaint on the grounds that Plaintiff has failed to plead sufficient facts to support the fourth and fifth requirements. The Court agrees that Plaintiffs cannot allege that they suffered actual or statutory damages, the fifth element of the claim, so Count II is dismissed with prejudice.
>
> (Docket Entry 70, p. 7; 68, p.7)

In their operative Amended Complaint, Appellants alleged that their damages:

> … include attorney's fees related to legal services rendered in connection with the failed foreclosure lawsuit and their efforts to invoke the RESPA error resolution procedures (including sending a second Notice of Error to Wells Fargo at its designated address informing Wells Fargo that the foreclosure action was dismissed thereby demonstrating that there were errors on their mortgage loan account) finance charges and interest that flow from the failure to properly credit Borrowers' payments, damage to their credit ratings and, emotional distress arising from the unjustified collection activity, unjustified foreclosure lawsuit, and unjustified risk of losing their home.
>
> (Docket Entry 44, p.8 ¶.32).

When considering a motion to dismiss, the district court is required to accept the allegations in the complaint as true, and construe them in the light most favorable to the plaintiff. *See e.g. Renfroe v. Nationstar Mortg., LLC,* 822 F.3d 1241, 1243 (11th Cir. 2016) citing *Timson v. Sampson*, 518 F.3d 870, 872 (11th Cir.2008).

In the case at bar, Appellants identified five different categories of recoverable damages that they sustained as a result of Wells Fargo's RESPA violation. Had the district accepted Appellants' allegations as true, it could not have concluded that Wells Fargo's RESPA violation was harmless. To the contrary, each of the five different categories of damages that Appellants identified

in the Amended Complaint were independently sufficient to overcome Wells Fargo's argument that its RESPA violation did not cause any damage.

A. Emotional Distress

In McLean v. GMAC Mortg. Corp., 398 F. App'x 467, 471 (11th Cir. 2010) this Court stated "[c]onstruing the term "actual damages" broadly, and based on the interpretations of 'actual damages' in other consumer-protection statutes that are remedial in nature, plaintiffs arguably may recover for non-pecuniary damages, such as emotional distress and pain and suffering, under RESPA." *Citing Banai v. Sec'y U.S. Dep't of Hous. & Urban Dev. ex rel. Times,* 102 F.3d 1203, 1207 (11th Cir.1997). In *Catalan v. GMAC Mortg. Corp.*, 629 F.3d 676, 696 (7th Cir. 2011), the 7th Circuit acknowledged that emotional distress damages were recoverable under RESPA.

Recently, in a factually similar RESPA case involving a wrongful attempted foreclosure, the Northern District of Illinois upheld a jury verdict including emotional distress damages observing:

> [w]hile it may be true that, in many RESPA cases, it is difficult for a plaintiff to adequately prove mental anguish or suffering caused by the defendant's RESPA violation, this case is different. It is clear that Hammer suffered greatly from RCS's (1) continued prosecution of the second foreclosure action, (2) sending of reinstatement letters that failed to reflect that any investigation had taken place, and (3) negative credit reporting. Hammer's mental and physical suffering was proven by credible lay and medical testimony.

> Accordingly, the Court holds the evidence was sufficient for the jury to have concluded that Hammer suffered emotional distress as a result of RCS's RESPA violations of failure to investigate and negative credit reporting during the prohibited time-period.
>
> *Hammer v. Residential Credit Sols., Inc.*, No. 13 C 6397, 2015 WL 7776807, at *25 (N.D. Ill. Dec. 3, 2015).

In the case at bar, the district court's discussion of emotional distress damages was limited to its statement that:

> Even taking Plaintiffs' facts as true, they have not alleged a causal connection between the injury they allege, including emotional damages, and the loan servicer's allegedly inadequate response to the QWRs; instead, it appears that Plaintiffs attempt to convert a RESPA claim into a claim for attempted wrongful foreclosure, which is not a recognized cause of action in Florida.
>
> (Docket Entry 70, p.8; Docket Entry 69,p.8). (Citations omitted).

While it may be true that Florida law does not provide a cause of action for wrongful attempted foreclosure, Appellants' relevant claim arises under RESPA, which is a federal law. "The elements of, and the defenses to, a federal cause of action are defined by federal law." *Howlett By & Through Howlett v. Rose,* 496 U.S. 356, 375–76, 110 S. Ct. 2430, 2442, 110 L. Ed. 2d 332 (1990) citing, *Monessen Southwestern R. Co. v. Morgan,* 486 *376 U.S. 330, 335, 108 S.Ct. 1837, 1842, 100 L.Ed.2d 349 (1988); *Chesapeake & Ohio R. Co. v. Kuhn,* 284 U.S. 44, 46–47, 52 S.Ct. 45, 45–46, 76 L.Ed. 157 (1931).

The district court's reference to Florida law was misplaced. Since RESPA provided Appellants with a remedy, it was immaterial whether Florida law would also provide a separate remedy. Furthermore, even if it does not provide a remedy to wrongful attempted foreclosure, Florida does not recognize any sort of privilege that would exempt otherwise actionable conduct simply because it involved a wrongful attempted foreclosure. But even if it did, state law defenses may not preclude a federal claim. *See generally Haywood v. Drown*, 556 U.S. 729, 763, 129 S. Ct. 2108, 2130, 173 L. Ed. 2d 920 (2009) citing *Martinez v. California*, 444 U.S. 277, 284, n. 8, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980).

Regardless, RESPA *does* provide a remedy where a mortgage servicer fails to appropriately correct servicing errors. In *Renfroe v. Nationstar Mortg., LLC*, 822 F.3d 1241, 1246 (11th Cir. 2016), this Court explains that 12 U.S.C. § 2605(e)(2) of RESPA, "… makes past errors current by requiring servicers to fix errors they find upon reasonable investigation, including by issuing refunds as necessary." As this Court explains, "Mrs. Renfroe alleged that Nationstar's failure to comply with RESPA—by not discovering and refunding her overpayments—resulted in actual damage to her. Accepting these allegations, if Nationstar had heeded its statutory duties, Mrs. Renfroe would've gotten a refund." *Id.* at 1246.

Similarly here, Wells Fargo erred by failing to credit Appellants' payments and pursuing a wrongful mortgage foreclosure against them. After Appellants'

prevailed in the foreclosure litigation, Wells Fargo threatened to repeat the process. But before the foreclosure went to trial, Appellants invoked the RESPA/Regulation X error resolution procedure. If Wells Fargo had heeded its statutory duties, it would have discontinued the foreclosure *before* the trial in the foreclosure litigation. By the same token, Wells Fargo would not have threatened Appellants with a second wrongful foreclosure if it had adequately investigated and corrected the underlying problem beforehand.

Appellants' RESPA claim accrued after Wells Fargo failed to appropriately respond to their first Notice of Error. At that time, the failed foreclosure lawsuit was still pending. Thus, Wells Fargo's failure to appropriately respond to Appellants' Notices of Error significantly prolonged the period of time during which Appellants' suffered emotional distress as a result of the wrongful foreclosure lawsuit.

Similarly, Wells Fargo's subsequent threats to bring *another* wrongful foreclosure caused further emotional distress. If Wells Fargo had adequately responded to their first Notice of Error by correcting the error, updating the account, and discontinuing the wrongful foreclosure and collection activity, Appellants would not have sustained emotional distress during the period of time that RESPA liability attached. But since no corrections were made, Wells Fargo's RESPA violation substantially exacerbated Appellants' emotional distress that was

initially caused by the original servicing error leading to the wrongful foreclosure lawsuit. Although RESPA would arguably not provide a remedy for any damages that predated Wells Fargo's deadline to respond to Appellants' first Notice of Error, Wells Fargo's actionable omissions took place *after* Appellants invoked the RESPA/Regulation X error resolution procedures, the deadline for it to correct the resulting errors passed, and the errors were still left unresolved. The unresolved errors continued to cause Appellants damage after their RESPA cause of action accrued.

B. Attorneys' Fees Related To The Foreclosure Litigation

As the district court noted, Wells Fargo argued in its motion to dismiss that Appellants were fully reimbursed by the award of prevailing party attorneys' fees in the foreclosure litigation. (Docket Entry 68, p.8-9, citing docket entry 47, p.11; Docket Entry 70, p.8-9, citing docket entry 47, p.11). The district court also noted that Appellants objected to defense counsel's attempt to "contradict the allegations of the operative complaint at the motion to dismiss stage by making unsworn factual representations." (Docket Entry 68, p.9 citing docket entry 50, p.13; Docket Entry 70, p.9 citing docket entry 50, p.13). The district court then took judicial notice of the fact that there was an Agreed Order in the state court docket addressing attorneys fees. (Docket Entry 68, p. 9; Docket Entry 70 p.9). The district court also stated that "[t]he Court finds Plaintiffs attempt to seek double

recovery troubling; the presumption of truth that Plaintiffs are entitled to upon a motion to dismiss does not somehow render 'truth' as subjective." (Docket Entry 68, p.9; Docket Entry 70 p.9).

But as Appellants pointed out in their motion for reconsideration, they never denied that they recovered prevailing party attorneys' fees. (Docket Entry 69, p.4). Instead, Appellants simply pointed out that the question of whether the state court attorney fee settlement was sufficient to fully reimburse them is a factual question that was not appropriately considered on a motion to dismiss. *Id.*

Appellants further explained that it would be unusual for a prevailing party fee award in a Florida state court to fully compensate a litigant. Under Florida law, a litigant may recover time spent litigating entitlement to fees, but not the amount of fees to be awarded. *See e.g. State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830, 833 (Fla. 1993). *Palma* further note notes that federal courts do not recognize this distinction. *Id*. at 833.

Appellants also pointed out that, as Fourth District Court of Appeal Judge Farmer explains in *Citibank Fed. Sav. Bank v. Sandel*, 766 So. 2d 302, 305 (Fla. 4th DCA 2000), Florida's approach to fee shifting normally results in a situation where a successful litigant does not recover all the fees that they incurred. The concurring opinion in that case states:

> [i]t is undeniable that an exclusion of fees-for-fees often ends up, as the majority opinion hints, making the client

> pay for the dispute over that issue anyway. Unless the fee agreement specifically provides that the maximum fee due from the client for the entire representation is only what the court awards under the statute or contract and not a dime more, the client will ultimately pay the amount charged by the lawyer, less the sum awarded by the court under the statute. Making the client actually pay for litigating any part of the fees-for-fees issue, rather than the adverse party, hardly effectuates the statutory or contractual policy embodied in the provision for the adverse party to pay the client's legal fees.
>
> *Citibank Fed. Sav. Bank v. Sandel*, 766 So. 2d 302, 305 (Fla. 4th DCA 2000)(Farmer, J. concurring).

It is well settled that, when considering a motion to dismiss, courts accept the allegations of the complaint as true and construing them in the light most favorable to the plaintiff. *See e.g. Nunez v. J.P. Morgan Chase Bank, N.A.*, 648 F. App'x 905, 907 (11th Cir. 2016); *Ironworkers Local Union 68 v. AstraZeneca Pharm., LP*, 634 F.3d 1352, 1359 (11th Cir. 2011) (quotation omitted). Even when assertions in a complaint are arguably ambiguous, they should be construed in the light most favorable to the plaintiff. *Miccosukee Tribe of Indians of Fla. v. S. Everglades Restoration Alliance*, 304 F.3d 1076, 1083–84 (11th Cir. 2002).

Far from construing Appellants' allegations in the light most favorable to them, the district court took it upon itself to do independent factual investigation in an effort to debunk those allegations. It then went even further and asserted that Appellants been less than truthful, simply because they objected to defense counsel's procedurally improper factual representations.

In their motion for reconsideration, Appellants pointed out that the district court misunderstood their position regarding the attorney fee issue because Appellants sought only *unreimbursed* attorneys' fees. (Docket Entry 69, p.4). In its order denying reconsideration, the district court stated "If Plaintiffs' counsel was not adequately compensated by the state court award, the correct step is to appeal, not to file a RESPA claim in federal court and try to claim attorney's fees from the state-court action." (Docket Entry 77, p.5).

As discussed above, it is unlikely that an appeal would have changed the outcome. As Judge Farmer's concurring opinion in *Sandel* explains, Florida's approach to fee shifting does not allow for a successful litigant to be fully reimbursed. Furthermore, nothing in the original order, amended order, or order denying reconsideration explains why the district court believed that RESPA does not allow the recovery of unreimbursed attorneys fees where a borrower has prevailed in foreclosure litigation.

The plain language of 12 U.S.C. § 2605(f)(1)(a) provides that the a mortgage servicer that fails to comply with RESPA shall be liable to the borrower for "any actual damages to the borrower as a result of the failure." This language does not suggest that Congress intended for courts to consider state law limitations when evaluating the damages available to borrowers for RESPA violations.

Furthermore, "… as remedial consumer-protection statute, should be construed liberally in order to best serve Congress's intent." *Renfroe*, 922 F.3d at 1244 citing *Ellis v. Gen. Motors Acceptance Corp.*, 160 F.3d 703, 707 (11th Cir. 1998). In light of the plain language of the statute and the liberal construction required, it was error for the district court to conclude that the limitations on attorney fee recovery imposed by Florida law were relevant to the separate question of whether a successful borrower could recover unreimbursed attorneys fees incurred in connection with a wrongful mortgage foreclosure as damages flowing from a RESPA violation. [2]

In any event, at the motion to dismiss stage, Appellants were entitled to the reasonable inference that they had incurred at least some attorneys' fees that were not reimbursed as part of the prevailing party attorney fee settlement in the state court foreclosure litigation. The district court's initial misunderstanding that led it to believe Appellants were pursuing duplicative recovery underscores that the issue should not have been considered in the context of a motion to dismiss.

[2] Very recently *in Alhassid v. Bank of America N.A. et al.*, 16-15834, 2017 WL 2179118, at *4 (11th Cir. May 16, 2017), this Court affirmed an order finding that attorneys fees incurred in the defense of a state court foreclosure lawsuit were recoverable damages in a cause of action brought under Florida's Unfair and Deceptive Trade Practices Act. This case had not been decided when the district court dismissed Appellants' claims.

C. Attorneys' Fees And Related Expenses Arising From Appellants' Second Attempt To Invoke The RESPA/Regulation X Error Resolution Procedures

Appellants alleged that they also incurred damages in the form of expenses related to their continued employment of counsel and efforts to invoke the RESPA/Regulation X error resolution procedures for the *second* time. The district court did not address this argument in either the original dismissal order or the order denying reconsideration. However, the district court did cite *Miranda v. Ocwen Loan Servicing*, 148 F. Supp. 3d 1349, 1354 (S.D. Fla 2015) in two different places. (Docket Entry 70, p.7, p.8; Docket Entry 69, p.7 – p.8). But *Miranda* states that:

> Plaintiffs may seek damages for the costs that they incurred after Defendant's allegedly inadequate response, and the Complaint provides sufficient facts to support a claim for such damages. Loan Lawyers, on behalf of Plaintiffs, clearly sent the March 6, 2015, letter after the thirty days in which Defendant was required to fully respond to the RFI. The letter also clearly arose out of Defendant's alleged failure to comply with its statutory obligations, because the letter identifies the specific inquiries contained in the RFI that Defendant allegedly had not answered by that time. *See* DE 1, Ex. C. Therefore, while Plaintiffs are not entitled to costs incurred in mailing the initial RFI, they may seek photocopying costs, postage costs, and reasonable attorney's fees incurred as a result of having to send additional correspondence due to Defendant's alleged failure to respond.
>
> *Id.* at 1355

Thus, *Miranda* finds that a borrower who was forced to send follow-up RESPA correspondence *after* the servicer failed to respond to the first was entitled to recover "photocopying costs, postage costs, and reasonable attorney's fees" incurred as a result of having to initiate further communication with the servicer as a result the servicer's initial failure to properly respond to the first. Since Appellants find themselves in the same situation as the borrower/plaintiffs in *Miranda*, that case does not support the dismissal with prejudice of the Amended Complaint in the case at bar. To the contrary, it supports the opposite result. *Miranda* is consistent with at least six other decisions from the same district. *See e.g. Hernandez v. J.P. Morgan Chase Bank N.A.*, 14-24254-CIV, 2016 WL 2889037, at *6 (S.D. Fla. 2016); *Baez v. Specialized Loan Servicing, LLC*, 15-81676-CIV, 2016 WL 1546445, at *2 (S.D. Fla. 2016); *Rodriguez v. Seterus, Inc.*, No. 15–61253–CIV, 2015 WL 5677182, at *2–3 (S.D.Fla. Sept. 28, 2015); *Russell v. Nationstar Mortg., LLC*, No. 4–61977–CIV, 2015 WL 541893, at *2 (S.D.Fla. Feb. 10, 2015); *Martinez v. Shellpoint Mortg. Servicing*, 2016 WL 6600437, at *3 (S.D. Fla. Nov. 8, 2016); *Walker v. Branch Banking & Trust Co.*, No. 16-CV-62791, 2017 WL 747875, at *5 (S.D. Fla. Feb. 23, 2017).

Recognizing the modest expenses incurred in connection with a borrowers' successive efforts to invoke their rights under RESPA as damages would be consistent with RESPA's plain language allowing recovery for "any actual

damages to the borrower." [3] There will be situations where a borrower's belief that there has been an error was mistaken. In those situations, the servicer is nevertheless required to provide the borrower with a "statement of the reason or reasons" behind its determination that no error occurred. *Renfroe,* 822 F.3d at, 1244 citing 12 C.F.R. § 1024.35(e)(1)(i).

Carving out an exception for expenses associated with a borrower's continued effort to obtain a response that RESPA requires would be both inconsistent with the plain language of the statute and the liberal construction that this Court has consistently required in RESPA cases. This is especially true where the borrower was forced to resort to litigation to seek redress after the servicer repeatedly failed to provide the borrower with a response that satisfied RESPA, but it was ultimately discovered through litigation that there was no error. In that situation, if the damages associated with the borrower's follow-up correspondence are not recognized, the servicer would likely be able to assert that its RESPA violation was harmless. This would serve only to reward non-compliant servicers while presenting a major obstacle to private enforcement of RESPA.

In *Renfroe,* this Court refused to construe RESPA as permitting a servicer to avoid liability when it denies that an error occurs, but nevertheless corrects the error. *Id.* at 1246. Similarly, the servicer should not be permitted to violate its

[3] 12 U.S.C. § 2605(f)(1)(a)

obligation to appropriately explain to the borrower why no error occurred, but nevertheless escape RESPA liability because it was ultimately established that there was no error. This is particularly true where the borrower attempts to communicate with the servicer about the error on more than one occasion.

D. Improper Finance Charges, Interest, and Fees

In the case at bar, Wells Fargo responded to both of Appellants' Notices of Error by denying that there was any error. This includes the Notice of Error that was sent after the state court found in favor of Appellants' at the foreclosure trial. Appellants are entitled to the reasonable inference that, since Wells Fargo determined that their loan was in default and brought a foreclosure lawsuit against them, that it also assessed late fees and the costs of the foreclosure litigation to their mortgage account. Similarly, Appellants alleged that Wells Fargo failed to credit their mortgage payments. It logically follows that the failure to credit the payments would naturally result in an increase in the amount both the principal balance and related interest charges.

As this Court explained in *Renfroe*, 822 F.3d at 1246–47 (11th Cir. 2016) "[w]hen a plaintiff plausibly alleges that a servicer violated its statutory obligations and as a result the plaintiff did not receive a refund of erroneous charges, she has been cognizably harmed." Just as in *Renfroe*, if Wells Fargo had appropriately responded to Appellants' Notices of Error, it would have removed these charges.

Under *Renfroe*, the unwarranted charges that Wells Fargo failed to remove were also sufficient, even standing alone, to prevent dismissal for want of damages. Once again, the district court did not address Appellants' argument that these inappropriate charges were sufficient to defeat dismissal on the basis that Appellants sustained no damages. (Docket Entry 44, p.8 ¶.32).

E. Damage to Credit

Appellants also identified "damage to their credit ratings" as another category of damages. (Docket Entry 44, p.8 ¶.32). Here again, the district court did not address this category of damages. However, in *Hammer*, the Court found that the damage to the borrowers' credit rating contributed to recoverable emotional distress damages. *Hammer*, 2015 WL 7776807, at *25 (N.D. Ill. Dec. 3, 2015) (N.D. Ill. Docket Number13 C 6397).

F. Negligence Per Se Claim

The district court dismissed Appellants negligence per se claim on the same grounds as the RESPA claim. (Docket Entry 70, p. 9-10). The same procedural issue was presented in *Nunez v. J.P. Morgan Chase Bank, N.A.*, 648 F. App'x 905, 910 (11th Cir. 2016), where this Court reversed an order dismissing a RESPA claim and a related negligence per se claim. Accordingly, if the Court reverses the RESPA dismissal, it should also reverse the dismissal of the negligence per se claim.

II. APPELLANTS' CONVERSION CLAIM WAS ADEQUATELY PLED

In the dismissal order, the district court stated that:

> [i]n order to establish a claim for conversion of funds under Florida law, a plaintiff must demonstrate, by a preponderance of the evidence: (1) specific and identifiable money; (2) possession or an immediate right to possess that money; (3) an unauthorized act which deprives plaintiff of that money; and (4) a demand for return of the money and a refusal to do so.
>
> (Docket Entry 70, p. 10; Docket Entry 68, p. 10) citing *Breig v. Wells Fargo Bank, N.A.*, 2014 WL 806854, * 4 (S.D. Fla. Feb. 28, 2014) (Internal citations omitted).

But the district court also noted "[t]he generally accepted rule is that demand and refusal are unnecessary where the act complained of amounts to a conversion regardless of whether a demand is made." *Id.* citing *Columbia Bank v. Turbeville*, 143 So.3d 964, 969 (Fla. 1st DCA 2014). The district court then stated that

> Plaintiffs cannot satisfy the fourth element of a common law claim for conversion, and could not prove that demand and refusal were unnecessary because they have failed to adequately allege that the act complained of—holding funds in suspense—amounts to conversion under the remaining three elements. Though Defendants cite case law indicating that some courts have allowed a claim for conversion to proceed against mortgage loan servicers. other courts have found the opposite. It is far from clear that a conversion occurred. Count IV is dismissed with prejudice as amendment would be futile.
>
> (Docket Entry 68, p. 10-11; Docket Entry 70, p. 10-11.)

The district court's order is thus unclear as to where Appellants allegations fell short. In *Misvidal v. Ochoa*, 505 So.2d 555, 556 (Fla. 3d DCA 1987), Florida's Third District Court of Appeal explained that:

> … the defendant lawfully obtained possession of the plaintiff's funds to set up the escrow fund and thereafter converted the funds for his own use. This being so, the defendant, by his actions, committed an embezzlement, a civil theft and a conversion as well as a breach of contract.
>
> *Id*. (Internal citations omitted).

Here, Appellants allege that Wells Fargo lawfully obtained the money they sent for their payments for purposes of delivering those payments to the mortgagee for application to their mortgage loan account. (Amended Complaint, Docket Entry 44, p. 11 ¶.45). But instead of handling Appellants funds in a manner that was consistent with its lawful purpose, Wells Fargo *unlawfully* directed those payments to a suspense account where they generated investment income for Wells Fargo's benefit. (*Id*. ¶. 46). Appellants respectfully submit that these allegations were sufficient to state a claim for conversion under Florida law. Alternatively, if these allegations were not sufficient, it was error to dismiss the Complaint with prejudice, especially since there had been no finding that any part of Appellants' prior complaint was insufficient.

CONCLUSION

For the reasons described above, Appellants Loris B. Ranger and George Gordon respectfully request that this Honorable Court reverse the dismissal with prejudice as to Counts II, III, and IV, and remand this matter for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,803 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

/s/ Jeffrey N. Golant
Jeffrey N. Golant

USCA Case No.: 17-11131-BB
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed on May 23rd, 2017 with the Clerk of Court using CM/ECF along with having served all counsel of record or pro se parties identified on the service list incorporated herein in the manner specified, either via transmission of Electronic filing generated by CM/ECF or in some other authorized manner for those counsel or parties not authorized to receive electronically Notice of Electronic Filing.

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