UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 15-62511-CIV-DIMITROULEAS

LORIS B. RANGER and
GEORGE GORDON,

Plaintiffs,

v.

WELLS FARGO BANK, N.A. d/b/a
AMERICA'S SERVICING COMPANY
A Foreign Corporation,

Defendant.

_____/

AMENDED[1] ORDER GRANTING IN PART MOTION TO DISMISS; ORDER TO SHOW CAUSE

THIS CAUSE is before the Court upon Defendant's Motion to Dismiss Plaintiff's Complaint [DE 47] ("Motion"). The Court has considered the Motion, Plaintiff's Response [DE 50], Defendant's Reply [DE 63], and the record in this case, and is otherwise fully advised in the premises. For the reasons stated herein, the Court will grant the Motion in part, dismissing Counts II, III, and IV with prejudice. Defendants are ordered to show cause why this Court should exercise supplemental jurisdiction over the only remaining claim, Count I (FCCPA).

I. BACKGROUND

In this action, Plaintiffs Lois B. Ranger and George Gordon ("Plaintiffs") bring four claims against their mortgage loan servicer, Defendant Wells Fargo Bank, N.A. d/b/a America's

[1] This Order replaces [DE 69]; it is amended only to remove an erroneously entered footnote (previously footnote 7 from [DE 69]). In the Amended Complaint, Plaintiffs sought statutory damages under RESPA, and the Court found Plaintiffs had not adequately alleged damages, statutory or otherwise, to survive a motion to dismiss.

Servicing Company ("ACS"). *See* [DE 44][2]. Plaintiffs allege: Count I violations of the Florida Consumer Collection Practices Act ("FCCPA"); Count II violations of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601, *et seq.* ("RESPA"); Count III negligence per se; and Count IV conversion. *See* [DE 44].

Plaintiff's lender initiated a foreclosure action in state court on September 5, 2012 indicating that Plaintiffs had failed to make mortgage payments since January 1, 2012. ¶¶ 8–9. During the pendency of the foreclosure action, Plaintiffs made numerous payments on the loan, which were placed in a suspense account; those funds were not credited to the account as payments until December 31, 2013 (thereby advancing the loan due date from January 1, 2012 to February 1, 2013). ¶46,48. Also while the foreclosure action was pending, Plaintiffs, through counsel, prepared a Notice of Error/Qualified Written Request (the "First QWR")[3] about their loan pursuant to 12 C.F.R. § 1024 ("Regulation X"). [¶ 10; DE 47-1]. The First QWR alerted ASC that, contrary to the allegation in the foreclosure Complaint, Plaintiffs made payments throughout 2012 and well into 2013 and errors on the account led to the improper foreclosure action. *Id.*; [DE 47-1] ("[T]he verified complaint [in the foreclosure action] stated that [Plaintiffs] failed to make the payment due January 1st, 2012 and all subsequent payments after this date. However this is absolutely not true."). Defendant responded to the First RFI on December 9, 2014, and pursuant to Regulation X, Defendant was required to respond by either correcting the error or conducting a reasonable investigation. ¶¶ 26–27. Plaintiffs allege that

[2] Citations to the Amended Complaint [DE 44] in the Background Section are indicated hereafter as "¶ _".
[3] Plaintiffs do not attach the First or Second QWRs to the Amended Complaint. Defendant has attached these documents in their Motion to Dismiss. (First QWR [DE 47-1]) (Second QWR [DE 47-3]). The court's inquiry on a Rule 12(b)(6) motion is generally limited "to the pleadings and exhibits attached thereto." *Grossman v. Nationsbank, N.A.*, 225 F.3d 1228, 1231 (11th Cir. 2000)(quoting *GSW, Inc. v. Long Cty.*, 999 F.2d 1508, 1510 (11th Cir. 1993))(internal quotations omitted). However, "a document outside the four corners of the complaint may still be considered if it is central to the plaintiff's claims and is undisputed in terms of authenticity." *Maxcess, Inc. v. Lucent Techs., Inc.*, 433 F.3d 1337, 1340 n.3 (11th Cir. 2005) (citing *Horsley v. Feldt*, 304 F.3d 1125, 1135 (11th Cir. 2002)).

Defendant failed to conduct a reasonable investigation and failed to correct the errors, in violation of RESPA. *Id.*

On April 21, 2015, the foreclosure lawsuit was involuntarily dismissed. ¶ 12. On October 5, 2015, ACS sent a letter to Plaintiffs asserting that they were in default and owed $104,997.39, which includes amounts claimed in the unsuccessful foreclosure action. ¶ 13. Thereafter, on October 20, 2015, Counsel for Plaintiffs sent ASC a second Qualified Written Request/Notice of Error (the "Second QWR"). ¶ 14. Plaintiffs alerted ASC to errors on their account, provided ASC with updated information, and gave ASC a second opportunity to investigate and correct the existing errors. *Id.* at 15.

On October 22, 2015, Plaintiffs initiated this lawsuit. [DE 1-1]. Following the deposition of Wells Fargo's Corporate Representative, Plaintiffs learned that ASC had a policy of placing all payments into a suspense account once a loan is referred to an attorney to file foreclosure; many payments by Plaintiffs were placed in a suspense account during the pendency of the foreclosure proceedings and not credited to the balance until December 31, 2013, advancing the due date on the loan from January 1, 2012 to February 1, 2013. ¶¶ 46,48. Based on this newly discovered information, Plaintiffs filed a Motion for Leave to File Amended Complaint [DE 29] to add a claim for conversion. On November 22, 2016, the Court granted the Motion to Amend Complaint [DE 43]. Defendant responded by filing the instant Motion, seeking the dismissal of all four of Plaintiffs' claims.

II. LEGAL STANDARD

A defendant may move to dismiss a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) if the plaintiff has failed to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). When considering a motion to dismiss, the court must accept all facts

set forth in the plaintiff's complaint as true, *Grossman v. Nationsbank, N.A.*, 225 F.3d 1228, 1231 (11th Cir. 2000) (quoting *GSW, Inc. v. Long Cty.*, 999 F.2d 1508, 1510 (11th Cir. 1993)), and draw all "reasonable inferences" in favor of the plaintiff, *St. George v. Pinellas Cty.*, 285 F.3d 1334, 1337 (11th Cir. 2002).

To survive a Rule 12(b)(6) motion to dismiss, the complaint "does not need detailed factual allegations"; however, the "plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level . . . ." *Id.* The plaintiff must plead enough facts to "state a claim that is plausible on its face." *Id.* at 570.

III. DISCUSSION

As a preliminary matter, the Court has considered the two QWRs attached as exhibits to Defendant's Motion. These documents are central to Plaintiffs' claims because Plaintiff would have to offer them to prove that Defendant's responses were inadequate. Plaintiffs have not contested the authenticity of these documents. The communications therefore may be properly considered in determining whether dismissal is warranted.[4]

A. Count I (FCCPA)

In relevant part, the FCCPA makes it unlawful for any person to, "[i]n collecting consumer debts . . . [c]laim, attempt, or threaten to enforce a debt when such person knows that the debt is not legitimate, or assert the existence of some other legal right when such person knows that the right does not exist." Fla. Stat. § 559.72. To establish a violation under section 559.72(9) of the FCCPA, "it must be shown that a legal right that did not exist was asserted and

[4] *See* footnote 2

that the person had actual knowledge that the right did not exist." *Bentley v. Bank of Am., N.A.*, 773 F. Supp. 2d 1367, 1372-73 (S.D. Fla. 2011) (quoting *Pollock v. Bay Area Credit Serv., LLC*, Case No. 08–61101–CIV, 2009 WL 2475167, at *9 (S.D.Fla. Aug. 13, 2009)).

Defendant argues that bringing a foreclosure action does not violate FCCPA because it does not qualify as collection of a debt.[5] For the following reasons, Count I is not subject to dismissal on this ground.[6]

1. Debt collection activity under FCCPA

To determine what is covered as debt collection activity under FCCPA, the Court looks to interpretations of the FDCPA. The Florida legislature requires courts to give "due consideration and great weight . . . to the interpretations of the Federal Trade Commission and the Federal Courts relating to the [FDCPA]." Fla. Stat. § 559.77(5).

Defendant is right that the foreclosure action, standing alone, would not be covered by the FCCPA. Several courts, including the Eleventh Circuit, have determined that mortgage foreclosure actions are not debt collection activity within the meaning of the FDCPA. *Warren v. Countrywide Home Loans, Inc.*, 342 F. App'x 461 (11th Cir. 2009) ("[F]oreclosing on a home is not debt collection for purposes of [FDCPA]."); *Gillis v. Deutsche Bank Trust Co. Americas*, No. 2:14-CV-418-FTM-38, 2015 WL 1345309, at *3 (M.D. Fla. Mar. 23, 2015) ("Plaintiff cannot assert violations of the FDCPA predicated upon only Defendants' actions in the state-court foreclosure proceedings."); *Ausar–El ex rel. Small, Jr. v. Bank of Am. Home Loans Servicing LP*, 448 Fed.Appx. 1, 2 (11th Cir.2011) ("[A]n enforcer of a security interest ... falls outside the

[5] Plaintiffs argue that since Defendant answered Counts I through III in the initial Complaint, the Motion to Dismiss is untimely pertaining to those counts. The Court disagrees. Defendant did not waive their right to challenge any portion of the Amended Complaint by filing an answer to the initial Complaint. *See FeldKamp v Long Bay Partners, LLC*, No. 2:09–cv–253–FtM–29SPC, 2010 WL 3610452, at *6–7 (M.D. Fla. Sept. 14, 2010)(holding that defendants answering a previously raised count does not preclude them from filing a motion to dismiss when the count is reasserted in an amended complaint).

[6] Defendant also argues that Count I is subject to dismissal under Florida's litigation privilege and that the claim as a whole asserts only conclusory allegations. The Court finds these arguments without merit.

ambit of the FDCPA for all purposes, except for the purposes of § 1692f(6)."); *Crespo v. Butler & Hosch, P.A.*, No. 13-60047-CIV, 2014 WL 11531360, at *4 (S.D. Fla. Mar. 21, 2014) ("[C]onduct undertaken with the sole purpose of enforcing a security interest does not constitute debt collection activity under any part of the FDCPA, with the exception of § 1692f(6)."). The Analysis, however, does not stop there regarding mortgage foreclosure actions and debt collection activity under the FCCPA.

In *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, the Eleventh Circuit considered whether, as a matter of law, the defendant's letter and enclosed documents—as sent to the plaintiff regarding a foreclosure on plaintiff's property—constituted debt collection activity under the FDCPA. 678 F.3d at 1211, 1217 (11th Cir. 2012). The Court stated that "[t]he fact that the letter and documents relate to the enforcement of a security interest does not prevent them from also relating to the collection of a debt within the meaning of [FDCPA]." *Id.* After examining the content of the letter/documents, the Court held that the defendant had engaged in debt collection activity, in part because the attached documents explicitly stated that the defendant "is acting as a debt collector attempting to collect a debt." *Id.* at 1217–18.

The 11th Circuit has found that '"when determining whether a communication is "in connection with the collection of any debt,' courts should look to the language of the letters in question, specifically to statements that demand payment, discuss additional fees if payment is not tendered, and disclose that the law firm was attempting to collect a debt and was acting as a debt collector." *Caceres v. McCalla Raymer, LLC*, 755 F.3d 1299, 1302 (11th Cir.2014); *see also Reese*, 678 F.3d at 1217. Further, a "communication can have more than one purpose, for example, providing information to a debtor as well collecting a debt". *Pinson v. Albertelli Law*

Partners LLC, 618 F. App'x 551, 553 (11th Cir. 2015) (citing *Caceres*, 755 F.3d at 1302); *see also Reese*, 678 F.3d at 1217.

Plaintiffs have alleged sufficient facts to survive a motion to dismiss. In particular, Plaintiffs allege in the Amended Complaint that "ACS sent a letter to Borrowers asserting that Borrowers' loan is in default and that they owe $104,997.39, which appears to include all amounts claimed in the original failed foreclosure lawsuit." [DE 44 ¶ 13]. The October 5, 2015 letter, attached to Defendant's Motion [DE 47-3], like in *Reese*, states explicitly that it is an attempt to collect a debt. The language of the letter is clear that it is a demand for payment. Therefore, this could be considered debt collection activity under the FCCPA. Further, Plaintiffs adequately allege that Defendant had knowledge that the amount claimed may be in error due to notice provided in the two QWRs and from the filed foreclosure lawsuit.[7]

B. Count II (RESPA)

The 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*, 148 F. Supp. 3d at 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.

[7] The Court does not convert this Motion to Dismiss into a Motion for Summary Judgment; the QWRs and the October 5, 2015 letter are considered only in finding that Plaintiffs' FCCPA claim is adequately plead.

An individual may bring a claim for "any actual damages to the borrower as a result of the failure" of the defendant to meet its obligations to the borrower under § 2605.[8] 12 U.S.C. § 2605(f)(1)(A). "This language suggests there must be a 'causal link' between the alleged violation and the damages." *Renfroe v. Nationstar Mortg., LLC*, 822 F.3d 1241, 1246 (11th Cir. 2016); *see also McLean v. GMAC Mortg. Corp.*, 595 F. Supp. 2d 1360, 1365 (S.D. Fla. 2009), aff'd, 398 F. App'x 467 (11th Cir. 2010) (explaining that plaintiff bears burden to prove that damages were "proximately caused" by loan servicer's failure to respond in accordance with RESPA requirements). Consequently, costs incurred after an incomplete or insufficient response are recoverable under RESPA, but costs incurred before the violation occurred, such as the expenses of preparing an initial QWR, cannot serve as the basis for actual damages. *See Miranda*, 148 F. Supp. 3d at 1355 (citations omitted).

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. *See Bank of N.Y. Mellon v. Reyes*, 126 So. 3d 304, 309 n.4 (Fla 3d DCA 2013) ("while Florida recognizes a cause of action for wrongful foreclosure, no Florida court has yet recognized a cause of action for attempted wrongful foreclosure")). *See also In re Taylor, Bean, & Whitaker Mortg. Corp.*, 2011 WL 5245420, at *5 (Bankr. M.D. Fla. 2011) ("A claim for wrongful foreclosure requires that the property in question be sold at a foreclosure sale.").

Plaintiffs argue that they are entitled to "attorney's fees related to legal services rendered with the failed foreclosure lawsuit." [DE 44 ¶ 32]. Defendant correctly points out that "upon

[8] 12 U.S.C. § 2605(f)(1)(B) also allows individuals to recover statutory damages "in the case of a pattern or practice of noncompliance." However, Plaintiff has not sought statutory damages in this case.

information and belief, Plaintiffs have already recovered their attorneys' fees and costs, incurred in connection with defending the Foreclosure Action, therefore, they are not entitled to double recovery." [DE 47 at 11]. Plaintiffs respond by stating that "[b]ut of course, defense counsel cannot properly contradict allegations of the operative complaint at the motion to dismiss stage by making unsworn factual representations." [DE 50 at 13]. The Court may *sua sponte* take judicial notice of the state court docket in case number CACE12025007 in the foreclosure action, and upon review, on June 6, 2015, the state court entered an Agreed Order on Defendants' Loris Beverly Ranger a/k/a Loris B. Ranger and George Gordon, Motion for Attorney's Fees and Cost, which resulted in "full funds in full settlement of Defendants' Motion for Attorney's Fees and Costs." [9] The 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.

Plaintiffs are also unable to state a claim for statutory damages because their suggestion that their loan servicer has a "persistent failure to adequately respond to RESPA/Regulation X correspondence" amounting to a "pattern and practice of non-compliance with its related obligations under RESPA" is nothing more than a conclusory allegation that falls far short of applicable pleading requirements. [DE 44 ¶ 34]. Count II is dismissed with prejudice as amendment would be futile.

C. Count III (Negligence Per Se)

The elements of negligence per se are: "(1) violation of a regulation; (2) causing the type of harm that the regulation was intended to prevent; and (3) injury to a member of the class of persons intended to be protected by the regulation." *Marshall v. Isthmian Lines, Inc.*, 334 F.2d

[9] The court may take judicial notice of another court's docket entries and orders for the limited purpose of recognizing the filings and judicial acts they represent. *McDowell Bey v. Vega*, 588 F. App'x 923, 926–27 (11th Cir. 2014) (finding that district court properly took judicial notice of entries appearing on state court's docket sheet).

131, 134 (5th Cir.1964).[10] Plaintiffs hinge their Negligence Per Se claim on violation of RESPA, and the RESPA claim is dismissed with prejudice. Therefore, Plaintiffs do not have a claim for Negligence Per Se. Count III is dismissed with prejudice.

D. Count IV (Conversion)

"A conversion claim is based on a 'positive, overt act or acts of dominion or authority over the money or property inconsistent with and adverse to the rights of the true owner.'" *Columbia Bank v. Turbeville*, 143 So.3d 964, 969 (Fla. 1st DCA 2014) (quoting *S.S. Jacobs Co. v. Weyrick*, 164 So.2d 246, 250 (Fla. 1st DCA 1964)). "In 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." *Breig v. Wells Fargo Bank, N.A.*, 2014 WL 806854, * 4 (S.D. Fla. Feb. 28, 2014) (quoting *IberiaBank v. Coconut 41, LLC*, 2013 WL 6061883 (M.D. Fla. 2013). However, the "purpose of proving a demand for property by a plaintiff and a refusal by a defendant to return it in an action for conversion is to show the conversion. The 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." *Columbia Bank*, 143 So.3d at 969.

Plaintiffs cannot satisfy the fourth element of a common law claim for conversion, and they cannot 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,

[10] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981), the Eleventh Circuit adopted all cases decided by the Fifth Circuit Court of Appeals prior to the close of business on September 30, 1981, as binding precedent.

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. Since the Court grants the Motion to Dismiss regarding the claim for Conversion, the discovery deadline will not be extended. *See* [DE 59].

IV. CONCLUSION

In sum, Plaintiff has failed to state a claim under Counts II, III, and IV of the Amended Complaint.

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Defendant's Motion to Dismiss [DE 47] is **GRANTED IN PART**;
2. Counts II, III, and IV of Plaintiff's Amended Complaint [DE 44] are **DISMISSED WITH PREJUDICE;**
3. On or before **February 13, 2017**, Defendants shall show cause why this Court should exercise supplemental jurisdiction over Count I (FCCPA) the only remaining claim in the Amended Complaint; failure to respond to this show cause order will result in immediate remand.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 9th day of February, 2017.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies to:
All counsel of record.