

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO.: 15-62511-CIV-DIMITROULEAS

**LOIS B. RANGER and
GEORGE GORDON,**

Plaintiffs,

v.

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

Defendant.

_____ /

AMENDED COMPLAINT FOR DAMAGES

Plaintiffs, Loris B. Ranger and George Gordon, by and through undersigned counsel, sue Defendant, Wells Fargo Bank /d/b/a America's Servicing Company, and allege as follows.

GENERAL ALLEGATIONS

1. Plaintiffs, Loris B. Ranger and George Gordon (hereinafter referred to as "Borrowers"), are natural persons, over the age of 21. They are citizens and residents of Broward County, Florida, and are otherwise *sui juris*.

2. Defendant, Wells Fargo Bank /d/b/a America's Servicing Company (hereinafter referred to as "ASC"), is a California Corporation with its principal place of business in the State of California. It engages in substantial business activities throughout the State of Florida. ASC is a division of Wells Fargo Bank, N.A. ASC services mortgage loans that were originated by other companies besides Wells Fargo Bank N.A. and its parents and subsidiaries, and that belong to investors other than Wells Fargo Bank N.A. and its parents and subsidiaries.

3. This is an action for damages in excess of \$75,000, exclusive of interest, attorney's fees, and costs.

4. Borrowers own a home located in Miramar, Florida. In order to purchase that home, Borrowers obtained a mortgage loan from Fremont Investment & Loan. That mortgage loan is currently serviced by ASC. However, HSBC Bank USA, N.A. as Trustee for ACE Securities Corp. Home Equity Loan Trust, Series 2006-HE1, Asset Backed Pass-Through Certificates (hereinafter referred to as "HSBC") asserts that it actually owns Borrowers' mortgage loan.

5. As with the vast majority of all residential mortgage loans, Borrowers' mortgage is evidenced by two documents - a promissory note and a mortgage. Nearly all promissory notes and mortgages used for these loans are written on standard forms published by the Federal National Mortgage Association often referred to as "Fannie Mae" or "FNMA. This entity will be referred to hereafter as "FNMA." Borrowers' mortgage and promissory note is written on a form published by FNMA.

6. As a mortgage servicer, ASC is engaged in handling accounting, customer service, collection, and virtually all other services related to managing the residential mortgage loans in its portfolio. For all practical purposes, ASC and the other mortgage servicers generally appear to the borrowers whose loan they service as the mortgagee or "lender." However, ASC has never loaned Borrowers any money, purchased their mortgage debt, nor engaged in any other activities that give rise to a debtor/creditor relationship. Rather, ASC simply services Borrowers' mortgage loan, and many other mortgage loans, as an independent contractor acting on behalf of the investors that actually own those debts. The vast majority of residential mortgage loans in the United States belong to investors and are serviced by mortgage servicers such as ASC and

approximately 30 other competitors. Most of these investors are mortgage securitization trusts, sometimes referred to as “Real Estate Mortgage Investment Conduits” (REMICs), Collateralized Debt Obligations (CDOs), Collateralized Mortgage Obligations (CMOs), or secondary market participants such as FNMA or the Federal Home Loan Mortgage Corporation (FHMLC or Freddie Mac).

7. Because ASC does not own Borrowers’ mortgage loan, ASC is not a party to the various contracts that give rise to the debt or security interest at issue in this case. Accordingly, ASC cannot enforce the contractual jury trial waiver provisions. Furthermore, ASC would not realize a financial loss if the subject mortgage loan was ultimately foreclosed and the collateral property sold for less than the balance of the loan. Instead, that loss would fall upon the investor that employs ASC as the loan servicer.

8. On or about September 5, 2012, ASC caused HSBC to initiate a mortgage foreclosure action by filing a “Verified Complaint to Foreclose Mortgage” in the 17th Judicial Circuit In and For Broward County, Florida. The Verified Complaint to Foreclose Mortgage is verified, under penalty of perjury, by Michelle Sanford, Vice President of Loan Documentation for ASC/Wells Fargo Bank, NA. Even though ASC/Wells Fargo Bank NA was not a party to the state court foreclosure litigation, its employee verified the foreclosure complaint on behalf of the mortgagee/investor.

9. The Verified Complaint to Foreclose Mortgage, which was verified by ASC, falsely alleges that Borrowers failed to make all their mortgage payments that came due since January 1, 2012.

10. While the foreclosure lawsuit was pending, on or about, October 29, 2014, the undersigned on behalf of the Borrowers, sent ASC a Qualified Written Request containing both a

“Notice of Error” and a “Request for Information” as those terms are defined by Regulation X (12 C.F.R. §1024). Borrowers’ letter alerted ASC that the allegations in the foreclosure lawsuit, that Borrowers’ failed to make payment due January 1, 2012, and all subsequent payments after this date, were absolutely not true as Borrowers’ continued to make payments throughout the year 2012 and well into 2013, and that the errors on Borrowers’ account led to the improper filing of the foreclosure lawsuit.

11. On or about, December 09, 2014, ASC sent a letter in response to Borrowers’ October 29th, 2014 letter that demonstrated that ASC did not properly investigated and corrected the errors specified in Borrowers’ Qualified Written Request.

12. Subsequently, on April 21, 2015, the foreclosure lawsuit proceeded to a non-jury trial, where the Court found that ASC failed to prove that it was entitled to foreclose and, therefore, involuntarily dismissed the foreclosure lawsuit.

13. On or about, October 5, 2015, ASC 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.

14. On or about, October 20, 2015, the undersigned on behalf of the Borrowers, sent ASC a second Qualified Written Request/“Notice of Error” as that term is defined by Regulation X (12 C.F.R. §1024).

15. Borrowers’ October 20, 2015 letter, once again alerted ASC to errors on Borrowers’ account, provided ASC updated information, and gave ASC a second opportunity to investigate and correct the existing errors.

COUNT I - VIOLATION OF THE
FLORIDA CONSUMER COLLECTION PRACTICES ACT

16. Borrowers re-allege and incorporate by reference the allegations in paragraphs 1 through 15.

17. This is an action for actual damages, statutory damages, punitive damages, attorneys' fees and litigation costs brought pursuant to the Florida Consumer Collection Practices Act (hereinafter referred to as "FCCPA"), section 559.72, Florida Statutes.

18. Section 559.72(9) of the FCCPA prohibits any person engaged in the collection of consumer debts from "claim[ing] attempt[ing] or threaten[ing] to enforce a debt when such person knows the debt is not legitimate or assert[ing] the existence of some other legal right when such person knows that the right does not exist."

19. Through their two Notices of Error, Borrowers placed ASC on express notice that ASC's allegations that Borrowers' failed to make payment due January 1, 2012, and all subsequent payments after this date, were absolutely not true as Borrowers' continued to make their mortgage payments throughout the year 2012 and well into 2013. However, ASC continues to attempt to collect the amount of their mortgage account balance including the charges placed in error. By doing so, ASC is attempting to collect a debt that it knows is not legitimate.

20. Section 559.77(2) authorizes the Court to award equitable relief prohibiting further violations of the FCCPA. This Court should enjoin ASC from continuing to assert the right to collect mortgage payments for the balance that includes the erroneous charges.

21. Borrowers have retained the undersigned to represent them in this action. Pursuant to the attorney fee shifting provisions of the FCCPA, Borrowers are entitled to an award of shifted attorneys' fees.

WHEREFORE, Borrowers demand trial by jury and respectfully request that this Honorable Court enter judgment in their favor and against ASC in the entire amount of their

damages, including punitive damages, together with an award of attorneys' fees and litigation costs. ASC's acts and omissions described above are intentional, or at the very least grossly negligent. Accordingly, an award of punitive damages is appropriate in order to deter ASC from continuing to engage in similar negligent acts and omissions in the future, and to punish it for its unlawful conduct.

**COUNT II - VIOLATION OF THE
REAL ESTATE SETTLEMENT PROCEDURES ACT**

22. Borrowers re-allege and incorporate by reference the allegations in Paragraphs 1 through 15 above.

23. This is an action for actual damages, statutory damages, attorney's fees and litigation costs brought pursuant to the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601.

24. The Consumer Financial Protection Bureau promulgates Regulation X under statutory authority arising from amendments to RESPA enacted through the 2010 Dodd Frank Wall Street Reform and Consumer Protection Act.

25. On or about, October 29, 2014, Borrowers, through counsel, sent ASC a letter specifically invoking the RESPA/Regulation X error resolution process identifying itself as a Qualified Written Request/Notice of Error. This letter was sent to ASC at its designated address. This first Notice of Error alerted ASC that the allegations in the foreclosure lawsuit asserting that Borrowers' failed to make payment due January 1, 2012, and all subsequent payments after this date, were absolutely not true as Borrowers' continued to make payments throughout the year 2012 and well into 2013, and that the errors on Borrowers' account led to the improper filing of the foreclosure lawsuit.

26. Regulation X (12 C.F.R § 1024.35 (e)) requires that upon receipt of a Notice of Error, the servicer must respond to the notice by either:

(A) Correcting the error or errors identified by the borrower and providing the borrower with a written notification of the correction, the effective date of the correction, and contact information, including a telephone number, for further assistance;

or

(B) Conducting a *reasonable* investigation and providing the borrower with a written notification that includes a statement that the servicer has determined that no error occurred, a statement of the reason or reasons for this determination, a statement of the Borrowers right to request documents relied upon by the servicer in reaching its determination, information regarding how the borrower can request such documents, and contact information, including a telephone number, for further assistance.

(Emphasis added).

27. Rather than comply with its obligations under RESPA and Regulation X, ASC sent a responsive letter dated December 09, 2014, that failed to demonstrate that ASC properly investigated and corrected the errors specified in Borrowers' Notice of Error.

28. Thereafter, on April 21, 2015, the foreclosure lawsuit proceeded to a non-jury trial, where the Court found that ASC failed to prove that it was entitled to foreclose and proceeded to involuntarily dismiss the foreclosure lawsuit.

29. Subsequently, on or about October 5, 2015, ASC 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 that was involuntarily dismissed by the Court.

30. On or about, October 20, 2015, the undersigned on behalf of the Borrowers, sent ASC a second Qualified Written Request/"Notice of Error," that once again alerted ASC to errors on Borrowers' account, provided ASC updated information, and gave ASC a second

opportunity to investigate and correct the existing errors. This response also points out that ASC's initial response was insufficient and did not comply with RESPA and Regulation X.

31. Instead of complying with its unambiguous obligation under RESPA and investigating and correcting the errors on Borrowers' account, ASC willfully refused to undertake any investigation or make any corrections, thereby violating its express obligations under 12 C.F.R § 1024.35 (e)), and the related provisions of the Real Estate Settlement Procedures Act.

32. As a result of ASC's violation of RESPA and 12 C.F.R § 1024.35 (e)), Borrowers have been damaged and therefore, are entitled to an award of actual damages, including statutory damages, attorneys' fees, and litigation costs. Borrowers' 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.

33. ASC's failure to comply with its obligations under RESPA is not an isolated incident, but the consequence of systemic deficiencies within ASC's mortgage servicing operations. These deficiencies are a consequence of ASC's failure to implement adequate policies and procedures, and employ a sufficient quantity of appropriately trained personnel within its business units engaged in operations related to RESPA and Regulation X compliance.

34. Given ASC's persistent failure to adequately respond to RESPA/Regulation X correspondence from Borrowers, and other similar situated borrowers who were either in default, or regarded by ASC as being in default, it is reasonable to infer that ASC has therefore engaged in a pattern and practice of non-compliance with its related obligations under RESPA.

WHEREFORE, Borrowers demand trial by jury and the entry of judgment in the entire amount of their damages, including statutory damages, together with an award of attorneys' fees and litigation costs.

COUNT III – NEGLIGENCE PER SE

35. Borrowers re-allege and incorporate by reference the allegations of Paragraphs 1 through 15 above.

36. As described in Paragraph 26 above, ASC, as a mortgage servicer, has an express duty pursuant to RESPA and Regulation X to reasonably investigate potential errors on the mortgage loans it services when the borrower brings those errors to ASC's attention.

37. In addition, ASC also has a duty to investigate potential errors on Borrowers' account, refrain from making derogatory credit reports, initiating foreclosure unless a mortgagor had failed to make their required mortgage payments, and properly handle and account for Borrowers' mortgage payments. These duties are imposed by RESPA, Regulation X, and the circumstances arising from the relationship between Borrowers and ASC. Borrowers had no choice in the selection of ASC, and has no recourse, other than a civil action, if they are dissatisfied with the manner in which ASC discharges its obligations. If an error is made on Borrowers' mortgage loan account, Borrowers are at risk of being charged additional fees and finance charges, sustaining damage to their credit rating, and even losing their home through a

foreclosure. Thus, ASC has a duty to make reasonable inquiry once it is alerted to a potential error affecting a loan that it services in order to protect Borrowers from this foreseeable harm.

38. ASC breached its duties owed to Borrowers when it failed to conduct a reasonable investigation in response to either of Borrowers' Notices of Error.

39. ASC not only failed, but willfully and repeatedly refused to investigate the errors that Borrowers brought to its attention through their two Notices of Error, despite having an express duty to do so imposed by RESPA and Regulation X, as well as a related duty that arises from the relevant circumstances.

40. ASC's failure to adequately investigate the issues raised in Borrowers' two Qualified Written Requests are not an isolated incident, but rather the consequence of systemic deficiencies within ASC's mortgage servicing operations, including a lack of reasonable policies, procedures, and appropriately trained and supervised employees.

41. ASC knows or should know about its systemic failures to comply with the RESPA/Regulation X error resolution procedures, or employ appropriately qualified personnel in order to rectify these deficiencies. ASC has consciously failed to implement reasonable policies, procedures, and employ appropriately trained personnel because in order to avoid increasing its operating costs and thereby maintain an unreasonably high profit margin. ASC's omissions are done with the knowledge that its failures to properly respond to notices of servicing errors present an unreasonable risk of injury to the borrowers whose loans it services. Accordingly, an award of punitive damage is appropriate in order to deter ASC from continuing to engage in similar negligent acts and omissions in the future and to punish it for its misconduct.

42. As a result of ASC's negligence, Borrowers have been damaged. These damages include, but are not limited to damage to their reputation and access to credit, expenses

associated with their repeated efforts to invoke the RESPA/Regulation X error resolution procedures, and legal fees incurred in the defense of the wrongful foreclosure. Borrowers will likely incur additional expenses in the future in order to ensure that their errors to their mortgage loan account are appropriately corrected, and accordingly their damages are continuing and ongoing.

WHEREFORE, Borrowers demand trial by jury and the entry of judgment in the entire amount of their damages, including punitive damages, together with an award of attorneys' fees and litigation costs.

COUNT IV. – CONVERSION

43. Borrowers re-allege and incorporate by reference the allegations of Paragraphs 1 through 15 above.

44. This is an action for damages, including punitive damages, in excess of \$75,000, exclusive of interest, attorneys' fees, and costs.

45. ASC was under an obligation imposed by 12 C.F.R. 1026.36(c) to keep Borrower's payments intact and to deliver those payments to the mortgagee for application to Borrower's account.

46. Instead, ASC directed those payments to a "suspense account." 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 them to the loan. By placing Borrowers' payments into a suspense account, ASC generated profits for itself at Borrower's expense. As discussed in *In Re Stewart*, 391 B.R. 327, 336 (E.D. L.A. 2008), mortgage servicers, including ASC, have arrangements with the investors that own their mortgage loans that permit the servicer to invest borrower funds held in escrow and suspense accounts, and to keep the

income from these investments for themselves. Similarly, as the Consumer Financial Protection Bureau notes in its Final Rule and Official Interpretations implementing the 2014 amendments to Regulation X, mortgage servicers also receive income from “interest float on payment accounts between receipt and disbursement.” 78 FR 10696-01 *10700.

47. ASC has a policy whereby it places all payments that a borrower makes into a suspense account once a loan is referred to an attorney to file a foreclosure.

48. Borrowers made many payments equal to or greater than the required monthly payment subsequent to the foreclose referral and while the prior foreclosure matter was pending during the years 2012 and 2013.

49. During the time period that Plaintiff’s payments were placed in a suspense account, the prior version of 12 C.F.R. § 1026.36 was in effect. It provided:

- (1) In connection with a consumer credit transaction secured by a consumer’s principal dwelling, no servicer shall:
 - (i) Fail to credit a payment to the consumer’s loan account as of the date of receipt, except when a delay in crediting does not result in any charge to the consumer or in the reporting of negative information to a consumer reporting agency, or except as provided in paragraph (c)(2) of this section;

- (2) If a servicer specifies in writing requirements for the consumer to follow in making payments, but accepts a payment that does not conform to the requirements, the servicer shall credit the payment as of 5 days after receipt.

50. By applying Borrowers’ payments to the suspense account, ASC violated the requirements of 12 C.F.R. § 1026.36, because the funds were not credited to Borrower’s account while they were held in suspense.

51. As a consequence of the improper application of Borrowers' payment to a suspense account, Borrower's interest expense increased because the funds that they had tendered were not applied to reduce the principal balance on their loan.

52. In addition, Borrower's payments held in suspense were not applied to interest, thereby reducing the amount of the related tax deduction that Borrowers otherwise could have claimed.

53. Furthermore, the application of the suspense account caused ASC to inflate the amount of its claim in the foreclosure proceedings, and caused Borrowers a great deal of confusion as it effectively prevented them from understanding the factual basis of the foreclosure, requiring them to expend more time and money in the defense of the foreclosure.

54. Borrower's funds that ASC placed in a suspense account are a specific fund readily capable of identification.

55. By placing Borrowers' funds into a suspense account that provided a financial benefit to ASC in violation of 12 C.F.R. § 1026.36(c), ASC deprived Borrowers of the benefit of those funds, thereby causing them harm while enriching itself.

56. At no time was ASC authorized by Borrowers to maintain possession and control over their funds in a suspense without crediting those payments to their mortgage loan account.

57. ASC's development of a policy whereby it applies all borrower payments tendered after a foreclosure referral, notwithstanding the express requirements of 12 C.F.R. § 1026.36(c), constitutes intentional misconduct designed to unlawfully and unjust enrich ASC at the expense of Borrowers and others similarly situated.

58. In order to deter similar wrongful conduct in the future, and to punish ASC, an award of punitive damages is appropriate.

WHEREFORE, Borrowers demand trial by jury and respectfully request that this Honorable Court enter judgment in the entire amount of their damages, including punitive damages.

DEMAND FOR TRIAL BY JURY

Borrowers demand trial by jury on all claims so triable.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served upon the following counsel of record in this action by Notice of Electronic Filing generated by the CM/ECF system on November 28th, 2016.

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