No. 17-11131-BB

# United States Court of Appeals

*for the*

# Eleventh Circuit

LORIS B. RANGER and GEORGE GORDON,

*Plaintiffs-Appellants,*

– v. –

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

*Defendant-Appellee.*

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

## RESPONSE BRIEF FOR APPELLEE, WELLS FARGO BANK, N.A., d/b/a AMERICA'S SERVICING COMPANY

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*RANGER, et al. v. WELLS FARGO BANK, N.A.*
**CASE NO. 17-11131-BB**

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT**

Appellee submits this list, which includes the judge in the trial court and all attorneys, persons, associates of persons, firms, partnerships, or corporations having an interest in the outcome of this matter:

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

*RANGER, et al. v. WELLS FARGO BANK, N.A.*
**CASE NO. 17-11131-BB**

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (Continued)**

17. The Law Offices of Jeffrey N. Golant, P.A.

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

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

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, Appellee makes the following statement as to corporate ownership:

Appellee, Wells Fargo Bank, N.A. is a wholly owned subsidiary of Wells Fargo & Company (NYSE:WFC), a publicly held corporation. America's Servicing Company is a division of Wells Fargo Home Mortgage, which is a division of Wells Fargo Bank, N.A. Berkshire Hathaway Inc. (NYSE:BRKA) is a publicly traded corporation that owns 10% or more of Wells Fargo & Company's stock.

/s/ Kimberly S. Mello
Kimberly S. Mello

## STATEMENT REGARDING ORAL ARGUMENT

Because the issues raised by Appellants, Loris B. Ranger and George Gordon, can be addressed on the briefs, the record, and governing case law, Appellee, Wells Fargo Bank, N.A., submits that oral argument would not be of material benefit to the Court.

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## STATEMENT OF JURISDICTION

Appellants, Loris B. Ranger and George Gordon ("Mr. Gordon") (collectively, the "Appellants" or "Borrowers"), originally filed this action in state court alleging: (1) a federal claim arising under the Real Estate Settlement Procedures Act, 12 U.S.C. § 2605, ("RESPA"); and (2) state law claims for negligence *per se* and common law conversion.

Wells Fargo Bank, N.A. ("Wells Fargo") timely removed the action to the United States District Court for the Southern District of Florida (the "District Court") pursuant to 28 U.S.C. § 1441(a). The removal was proper because it was filed in the district embracing Broward County, Florida, where the state court action was pending.

The District Court had jurisdiction over the action pursuant to 28 U.S.C. § 1331 because Appellants raised federal claims under RESPA. In addition, the District Court had supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 allowing review from final orders entered by the District Court. Specifically, on February 6, 2017 the District Court entered an order dismissing Counts II-IV of Plaintiffs' Amended Complaint with prejudice. (Dkt. 68).[1] Two days later, Appellants filed a Motion for Reconsideration. (Dkt. 69). Subsequently, on March 10, 2017, the District Court entered an Order denying reconsideration, remanding Count I brought

[1] On February 9, 2017, the District Court entered an Amended Order removing an erroneously entered footnote. (Dkt. 70).

pursuant to Florida's Consumer Collection Practices Act ("FCCPA"), and directing the Clerk to close the case and deny any pending motions as moot. (Dkt. 77).

Appellants timely filed a notice of appeal on March 13, 2017. (Dkt. 79).

## STATEMENT OF THE ISSUES

1. Whether the District Court correctly dismissed Appellants' RESPA and negligence *per se* claims, with prejudice, where, as matter of law, Appellants cannot establish entitlement to actual damages under RESPA.

2. Whether the District Court correctly dismissed Appellants' common law conversion claim with prejudice, where Appellants failed to, and cannot, allege the elements necessary to sustain such a claim under Florida law.

## STATEMENT OF THE CASE

### I. COURSE OF PROCEEDINGS AND DISPOSITION BELOW.

On September 5, 2012, Wells Fargo filed a foreclosure action against Borrowers, which was involuntarily dismissed on April 12, 2015 following a non-jury trial (the "Foreclosure Action"). (Dkt. 44 at ¶ 12). The trial court subsequently entered an Agreed Order awarding Borrowers their attorneys' fees and costs incurred in defending the Foreclosure Action. (Dkt. 70 at 9).

On October 5, 2015, Wells Fargo sent Mr. Gordon an acceleration letter, informing Borrowers that their loan was delinquent ("Demand Letter"), which was required prior to filing a new foreclosure action. (Dkt. 47-3).

Shortly after receipt of the Demand Letter, Borrowers filed a Complaint in state court against Wells Fargo alleging causes of action for: (a) violation of Florida's Consumer Collection Practices Act ("FCCPA"), F.S. § 559.72"; (b) violation of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601; and (c) negligence *per se*. (Dkt. 1-1).

Wells Fargo timely removed the action on the basis of federal question jurisdiction, and filed an Answer and Affirmative Defenses. (Dkt. 1, 11). Borrowers later filed, with the District Court's permission, an Amended Complaint adding a claim for common law conversion. (Dkts. 29, 43, 44). Soon thereafter, Wells Fargo moved to dismiss the Amended Complaint in its entirety. (Dkt. 47).

The District Court entered an order dismissing, with prejudice, all but the Borrowers' FCCPA claim, and requiring Borrowers to show cause as to why the

District Court should exercise supplemental jurisdiction over Borrowers' only remaining claim. (Dkt. 68).

Borrowers moved for reconsideration of the dismissal of their Complaint, and Wells Fargo filed a response. (Dkts. 69, 75). The District Court subsequently denied Borrowers' request, and remanded their remaining FCCPA claim to state court. (Dkt. 77).

Borrowers timely filed a notice of appeal on March 13, 2017. (Dkt. 79).

## II. STATEMENT OF THE FACTS.

### A. Borrowers Send A Request For Information Under RESPA During The Pendency Of The Foreclosure Action, Which Is Later Involuntarily Dismissed.

On November 11, 2005, Mr. Gordon executed a Note in favor of Fremont Investment & Loan ("Fremont") in the principal amount of $550,000. To secure the indebtedness under the Note, Mr. Gordon, joined by Ms. Ranger, executed a Mortgage encumbering real property located at 3640 S.W. 195th Avenue, Miramar, Florida 33029. (Dkt. 44 at ¶ 4). Borrowers subsequently failed to make the payments due, defaulting on the Note and Mortgage.

As a result of Borrowers' default, on September 5, 2012, HSBC Bank USA, N.A., as Trustee for ACE Securities Corp. Home Equity Loan Trust, Series 2006-HE1, Asset Backed Pass-Through Certificates ("the Trustee"),[2] filed the Foreclosure Action seeking to foreclose on the Mortgage to recover the Borrowers'

[2] After the Note and Mortgage were executed, they were assigned to the Trustee. (Dkt 44 at ¶4; Dkt 47-2).

indebtedness under the Note, alleging a default date of January 1, 2012 and claiming an unpaid principal balance of $516,662.66. (*Id*. at ¶ 8; Dkt. 47 at 2).

Borrowers subsequently made payments to Wells Fargo, the servicer of the loan, which were placed in a suspense account. (Dkt. 44 at ¶¶ 46, 48). On or about December 31, 2013, Wells Fargo removed the funds placed in the suspense account and applied them as payments, thereby advancing the due date on the loan from January 1, 2012, which was the default date alleged in the Complaint, to February 1, 2013. (Dkt. 47 at 2).

Approximately eleven months later, on October 29, 2014, Borrowers, through counsel, sent Wells Fargo a Qualified Written Request Containing Both A Notice of Error and Request For Information (the "2014 QWR"), pursuant to RESPA, alleging violations of Regulation X. Specifically, Borrowers claimed that the representation in the verified complaint filed in the Foreclosure Action that "Loris B. Ranger and George Gordon failed to make the payment due January 12, 2012 and all subsequent payments due after that date" was "absolutely not true." (Dkt. 47-1 at 2). According to Borrowers, Wells Fargo's "serious [servicing] errors" resulted in the improper filing of the [Foreclosure Action] for a loan that was actually not in default." *Id.* at 3. Borrowers, thus, requested that Wells Fargo timely investigate and correct the error and timely provide the designated information regarding the loan. *Id.*

Wells Fargo timely responded to the 2014 QWR on December 9, 2014, and stated, *inter alia*, that at the time the Foreclosure Action was filed, the loan was due for the January 1, 2012 payment, and that the subsequent payments "were

"received however, they did not bring the loan current therefore foreclosure was not stopped." (Dkt. 47-2 at 2). It further advised that the loan is currently due for the February 1, 2013 through December 1, 2014 payments totaling $73,476.89. (*Id.*)

On April 21, 2015, a non-jury trial was held and the Foreclosure Action was involuntarily dismissed. (Dkt. 44 at ¶ 12). The trial court subsequently entered an Agreed Order on Borrowers' Motion for Attorney's Fees and Cost[s], which resulted in "full funds in full settlement of [Borrowers'] Motion for Attorney's Fees and Costs." (Dkt. 70 at 9).

### B. After Dismissal Of The Foreclosure Action, Wells Fargo Sends A Demand Letter And A Second Request for Information Under RESPA Is Sent To Wells Fargo.

Approximately six months after the Foreclosure Action was dismissed, on or about October 5, 2015, Wells Fargo sent Borrowers a Demand Letter, informing Borrowers that their loan is delinquent and that in order to bring the loan current, they must remit the sum of $104,997.39. (Dkt. 44 at ¶ 13; Dkt. 47-3).

Following receipt of the Demand Letter, Borrowers, through counsel, sent Wells Fargo a Qualified Written Request/Notice of Error ("the 2015 QWR") stating that Wells Fargo "failed to properly investigate and correct the error in response to [the 2014 QWR]." According to Borrowers, even though the Foreclosure Action was involuntarily dismissed, Wells Fargo sent a Demand Letter "asserting they owed $104,997.39, which appears to include all amounts claimed in the original failed foreclosure." (Dkt. 44 at ¶ 13-14; Dkt. 47 at 3-4). Requesting

this amount was "unacceptable" because the involuntary dismissal demonstrates that the "original foreclosure claim was not supported by the evidence." (*Id.*)

### C. Two Days After The Request For Information Under RESPA Is Sent, Borrowers File A Lawsuit Against Wells Fargo, Which Is Removed To Federal Court.

A mere two days after sending the 2015 QWR, and before Wells Fargo was provided with an opportunity to respond under the timeframes set forth in Regulation X, Borrowers filed a Complaint in state court against Wells Fargo claiming that they sustained damages related to 2014 and 2015 QWRs and asserted causes of actions for (a) violation of the FCCPA alleging that Wells Fargo is "attempting to collect a debt that it knows is not legitimate"; (b) violation of RESPA, alleging that Wells Fargo failed to properly investigate and correct errors specified in the QWRs and has demonstrated a "pattern or practice of non-compliance" with its obligations under RESPA; and (c) negligence *per se*, claiming that Wells Fargo breached its duties to Borrowers when it failed to conduct a reasonable investigation in response to the notices of error. (Dkt. 1-1).

The day after this action was filed, Wells Fargo received the 2015 QWR. (*See* Dkt. 1-1 and Dkt. 47-4). Wells Fargo's counsel subsequently responded stating that when the 2014 QWR was received "Wells Fargo conducted an investigation and determined that there were no errors" and that "[t]he loan is currently due for the February 1, 2013 payment." (Dkt. 50-1). No further assertions were made due to the pending litigation.

Wells Fargo timely removed the action to the District Court, and filed an Answer and Affirmative Defenses. (Dkts. 1, 11). Borrowers later sought, and

were granted leave to file an Amended Complaint adding a claim for common law conversion. (Dkts. 29, 43-44). Borrowers' claim for conversion alleged that, rather than immediately applying the purported payments made by Borrowers (subsequent to the foreclosure referral, and while the Foreclosure Action was pending), Wells Fargo violated 12 C.F.R. § 1026.36(c) by placing the Borrowers' payments in a suspense account. (Dkt. No. 44 ¶¶ 48-50). Borrowers further alleged that, "[a]t no time was [Wells Fargo] authorized by Borrowers to maintain possession and control over their funds in [] suspense without crediting those payments to their mortgage loan account." (*Id*. at ¶ 56). The remaining allegations in the Amended Complaint were unchanged from the original Complaint.

**D. Wells Fargo Requests Dismissal Of The Action.**

In response to the Amended Complaint, Wells Fargo sought dismissal ("Motion to Dismiss"), asserting, among other things, that (1) Borrowers failed to state a claim under RESPA because Borrowers could not establish that (a) Wells Fargo failed to respond adequately to the QWRs, and (b) they were entitled to actual or statutory damages as a result of the purported RESPA violations; (2) Borrowers failed to state a claim for negligence *per se* because there was no basis for such an action under RESPA; and (3) Borrowers failed to state a claim for common law conversion, because they could not establish, among other things, that there was a demand for return of the money and a refusal by Wells Fargo to do so. Wells Fargo also pointed out that "upon information and belief, [Borrowers] have already recovered their attorney's fees and costs, incurred in connection with defending the Foreclosure Action." (Dkt. 47 at 11). To support dismissal, Wells

Fargo attached copies of (a) the 2014 and 2015 QWR; (b) Wells Fargo's responses to the 2014 QWR; (c) the Demand Letter; and (d) the Mortgage, all of which were referenced in the allegations set forth in the Amended Complaint. (Dkt. 47-1 - 47-5).

Borrowers responded to the Motion to Dismiss ("Response to Motion to Dismiss") arguing, among other things, that: (1) their damages allegations were sufficient to state a claim under RESPA; (2) because RESPA is a consumer protection statute that protects borrowers, Wells Fargo's challenge to Borrowers' negligence *per se* claim fails; and (3) Borrowers were not required to allege a demand and refusal because Wells Fargo's holding their payments in suspense otherwise amounted to common law conversion under Florida law.[3] (Dkt. 50). Moreover, instead of acknowledging that they recovered their attorneys' fees in the Foreclosure Action, Borrowers argued that "[Wells Fargo's] counsel cannot properly contradict allegations of the operative complaint at the motion to dismiss stage . . . ." (*Id*. at 13).

Wells Fargo replied, asserting that Borrowers' RESPA claim fails because Borrowers did not allege that their damages accrued following receipt of Wells Fargo's response to the 2014 QWR. (Dkt. 63 at 7). In fact, the Foreclosure Action was pending for two years prior to Wells Fargo's response to the 2014 QWR. (*Id*.) Additionally, Borrowers failed to state a claim for common law conversion

[3] Borrowers attached a copy of Wells Fargo's response to the 2015 QWR, sent to the Borrowers after this action was filed, to their response to Wells Fargo's Motion to Dismiss. (Dkt. 50-1).

because: (1) the Mortgage permitted Borrowers' payments to be held in suspense where Borrowers' loan was in default at the time the funds were placed in suspense, and (2) Borrowers failed to allege a demand for return of their payments and a refusal by Wells Fargo to do so. (*Id*. at 9-10).

### E. The District Court Grants Wells Fargo's Motion To Dismiss, In Part, Dismissing Counts II-IV With Prejudice For Failure To State A Claim, And Remands Borrowers' Remaining FCCPA Claim To State Court.

The District Court entered the Dismissal Order, dismissing, with prejudice, all but Borrowers' FCCPA claim. (Dkt. 70). First, the District Court dismissed the Borrowers' RESPA claim because Borrowers could not allege that they suffered actual or statutory damages. (*Id*.) The District Court reasoned that the Borrowers failed to allege

> 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 [Borrowers] attempt to convert a RESPA claim into a claim for attempted wrongful foreclosure, which is not a recognized cause of action in Florida.

(*Id*. at 8).

The District Court also, *sua sponte*, took judicial notice of the state court docket in the Foreclosure Action, and upon review, found that the state court entered an agreed order resulting in "full funds in full settlement" of the Borrowers' attorneys' fees and costs in the Foreclosure Action. (*Id*. at 9). The District Court found the Borrowers' attempt in this action to seek double recovery of attorneys' fees "troubling." (*Id.*)

Second, the District Court dismissed Borrowers' negligence *per se* claim with prejudice because it hinged on Borrowers' failed RESPA claim. (*Id*. at 9-10).

Third, the District Court dismissed Borrowers' common law conversion claim, with prejudice, because Borrowers did not allege a demand for return of the money paid to Wells Fargo and a refusal by Wells Fargo to do so. (*Id*. at 10-11). Borrowers also could not prove that a demand and refusal were unnecessary because they failed to adequately allege that holding funds in a suspense account otherwise amounted to conversion under the remaining three elements of a conversion claim. (*Id*.)

Finally, the District Court ordered that the Borrowers show cause why the court should exercise supplemental jurisdiction over Borrowers' FCCPA claim. (*Id*. at 11).

The Borrowers timely filed a Motion for Reconsideration of Order Partially Dismissing Complaint With Prejudice ("Motion for Reconsideration") asking the District Court to reconsider and vacate its Order of Dismissal based upon their contention that the District Court misapprehended the damages allegations. (Dkt. 69). According to Borrowers, reconsideration was warranted because (1) Borrowers incurred additional expenses in attempting to seek correction of the alleged errors in the 2015 QWR; (2) whether the attorneys' fees settlement in the Foreclosure Action was sufficient to fully reimburse Borrowers is a factual question not appropriately considered on a motion to dismiss; (3) Florida law cannot preclude Borrowers from recovering emotional distress damages where those damages are authorized by RESPA; and (4) Borrowers' allegations that

finance charges and interest improperly remained on their account were sufficient to satisfy the damages element of RESPA. (*Id.*)

Wells Fargo refuted these assertions, arguing that their request should be denied because (1) Borrowers are not entitled to attorneys' fees and costs for sending the 2015 QWR because the 2015 QWR was sent in response to the Demand Letter from Wells Fargo, not as the result of a deficiency in the response to the 2014 QWR; (2) Borrowers' own allegations demonstrate that the attorneys' fees and costs incurred in the foreclosure litigation and the purported emotional distress claim both arose from the foreclose litigation, not a purported RESPA violation; and (3) Borrowers did not allege a causal connection between any erroneous finance charges, interest, or late charges and any violation of RESPA. (*Id*. at 8-9; Dkt. 75 at 5-9).

On May 25, 2017, the District Court entered an Order Denying Motion for Reconsideration and Remanding Case to State Court ("Order on Reconsideration") finding that reconsideration was not warranted on any of the grounds raised by Borrowers, and that Borrowers' arguments were without merit under federal law. (Dkt. 77).

The Borrowers timely filed a notice of appeal on March 13, 2017. (Dkt. 79).

## STANDARD OF REVIEW

This Court reviews the dismissal of a complaint for failure to state a claim *de novo*. *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1335 (11th Cir. 2012) (citing *Cinotto v. Delta Air Lines, Inc.*, 674 F.3d 1285, 1291 (11th Cir. 2012)).

To survive a motion to dismiss, the Borrowers' Amended Complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007)). While the Court must give the Borrowers the benefit of reasonable factual inferences, "'unwarranted deductions of fact' are not admitted as true." *Aldana v. Del Monte Fresh Produce, N.A. Inc.*, 416 F.3d 1242, 1248 (11th Cir. 2005). Similarly, the Court is not required to accept conclusory allegations and legal conclusions as true. *See Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir. 2010); *see also White v. Bank of Am., NA*, 597 F. App'x 1015, 1018 (11th Cir. 2014) ("[C]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal.") (quoting *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002)).

## SUMMARY OF ARGUMENT

The District Court correctly concluded that the Borrowers failed to state claims for violations of RESPA, negligence *per se*, and common law conversion, requiring affirmance of the Dismissal Order.

To state a claim under RESPA for failure to properly respond to a request for information, Borrowers must allege, among other things, that he or she sustained actual or statutory damages. To meet this pleading standard, Borrowers must sufficiently demonstrate that (1) the actual damages were incurred as a result of the response to the Request for Information; and (2) there is a causal connection between the RESPA violation and alleged harm. Here, Borrowers' damages claim

is fatally deficient because their own factual allegations establish that, as a matter of law, they did not sustain recoverable damages under the Act.

First, the vast majority of the damages alleged by Borrowers including: (1) their attorneys' fees incurred in connection to (a) the Foreclosure Action, and (b) the preparation of the 2014 QWR; (2) their emotional distress; (3) finance charges, interest, and fees (4) damage to their credit ratings were incurred by Borrowers well before they received Wells Fargo's response to their first QWR. Thus, these damages are not recoverable as a matter of law.

Second, Borrowers are not entitled to recover the attorneys' fees incurred in the prior Foreclosure Action for two reasons. As an initial matter, any award of such fees would result in an impermissible double recovery. The undisputed facts demonstrate that Borrowers—based on the parties' agreement—were previously fully reimbursed for their attorneys' fees. Moreover, if Borrowers believed that they were not adequately compensated, the proper mechanism to seek relief was not to file a RESPA claim, but was instead to address any deficiencies in the state court proceeding. Even if this Court were to find that awarding attorneys' fees incurred in the Foreclosure Action would not constitute double recovery, the requisite causal connection cannot be established because the attorneys' fees were incurred two years before Wells Fargo's response to the first RESPA correspondence.

Third, the remaining purported "actual damages" for emotional distress, interest, finance, and late charges, and damage to their credit similarly lack the required causal connection. Borrowers' own allegations show that their purported

emotional distress arose from the Foreclosure Action and their failure to bring their loan current, not Wells Fargo's response to the QWRs. Moreover, Borrowers' request for damages related to purported erroneous interest, finance, and late charges fare no better. Borrowers' Amended Complaint expressly alleges that the "finance charges and interest [] flow from the failure to properly credit Borrowers' payments," not from a purported RESPA violation. Additionally, Borrowers' bare allegation of damage to their credit rating is wholly insufficient and their remaining allegations establish that any damage to their credit rating was the result of their failure to bring their loan current, not the purported RESPA violation.

Finally, Borrowers' attempt to seek attorneys' fees and related costs for sending the 2015 QWR is equally misplaced. The 2015 QWR was sent ten months after Borrowers received Wells Fargo's response to the 2014 QWR and was sent in response to Wells Fargo's Demand Letter, not as a result of a deficiency in the 2014 response sent by Wells Fargo. Importantly, Borrowers never gave Wells Fargo a chance to respond to the 2015 QWR before filing this lawsuit seeking damages for Wells Fargo's inadequate response to the same.

Fourth, because Borrowers' negligence *per se* claim is predicated on its failed RESPA claim, the District Court correctly found that it fails as a matter of law.

Finally, Wells Fargo's holding of Borrowers' payments in a suspense account, after the referral of their loan to foreclosure, does not, as a matter of law, constitute a claim for common law conversion. It is undisputed that Borrowers did not allege a demand for a return of their payments and a refusal by Wells Fargo to

do so. Moreover, this is not a case where such allegations were unnecessary. That is because Wells Fargo's holding of Borrowers' funds in a suspense account was authorized under the clear terms of the Mortgage.

For these reasons, this Court should affirm the Dismissal Order.

## ARGUMENT

### I. THE DISTRICT COURT CORRECTLY DETERMINED THAT BORROWERS FAILED TO ALLEGE ANY ACTUAL DAMAGES RESULTING FROM WELLS FARGO'S PURPORTED RESPA VIOLATIONS.

"Enacted as a consumer protection statute, RESPA provides a mechanism for regulating the real estate settlement process, placing requirements on entities or persons responsible for servicing federally related mortgage loans." *Bracco v. PNC Mortg.*, No. 8:16-cv-1640-T-33TBM, 2016 WL 4507925, at *2 (M.D. Fla. Aug. 29, 2016) (citing *McLean v. GMAC Mortg. Corp.*, 398 F. App'x 467, 471 (11th Cir. 2010)).

In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act created the Consumer Financial Protection Bureau ("CFPB"), "which was tasked with prescribing rules and regulations, as well as interpretations, 'as may be necessary to achieve' RESPA's purpose." *Sutton v. CitiMortgage, Inc.*, 228 F. Supp. 3d 254, 260 (S.D.N.Y. Jan. 12, 2017) (citing 12 U.S.C. § 2617(a); *Edwards v. First Am. Corp.*, 798 F.3d 1172, 1179 (9th Cir. 2015)). The CFPB subsequently promulgated Regulation X, which became effective on January 10, 2014. *Mortg. Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X)*, 78 FR 10696-99 (Feb. 14, 2013) (codified at 12 C.F.R. § 1024).

Section 2605 of RESPA makes clear that servicers must comply with Regulation X to fulfill their obligations under RESPA. Section 2605(k)(1)(E) specifically prohibits servicers from "fail[ing] to comply with any other obligation found by the Bureau of Consumer Financial Protection, by regulation, to be appropriate to carry out the consumer protection purposes of this chapter." 12 U.S.C. § 2605(k)(1)(E).

Borrowers' RESPA claim relates to purported violations of 12 C.F.R. § 1024.35(e), found in Regulation X, which states that a servicer must respond to a notice of error 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 borrower's 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.

To state a claim under RESPA for failure to respond properly to a request for information, "a plaintiff must allege: (1) the defendant is a loan servicer under the statute; (2) the plaintiff sent [the request] consistent with the requirements of the statute; (3) the defendant failed to respond adequately within the statutorily required days; and (4) the plaintiff has suffered actual or statutory damages."

*Correa v. BAC Home Loans Servicing LP*, No. 6:11-cv-1197-Orl-22DAB, 2012 WL 1176701, at *6 (M.D. Fla. Apr. 9, 2012) (citing *Frazile v. EMC Mortg. Corp.*, 382 F. App'x 833, 836 (11th Cir. 2010)).

"Actual damages" are not defined by RESPA. Courts, however, have interpreted the term to include certain pecuniary damages, such as out-of-pocket expenses, as well as, in some cases, non-pecuniary damages such as emotional distress. *McLean v. GMAC Mortg. Corp.*, 595 F. Supp. 2d 1360, 1366 (S.D. Fla. 2009). "Actual damages" are an "essential element in pleading a RESPA claim." *Renfroe v. Nationstar Mortg., LLC*, 822 F.3d 1241, 1246 (11th Cir. 2016). Here, Borrowers have summarily alleged that they suffered actual damages, including:

- attorneys' fees related to legal services rendered in connection with the failed foreclosure lawsuit and Borrowers' efforts to invoke the RESPA error resolution procedures (including sending a second Notice of Error to Wells Fargo);
- finance charges and interest that flow from the failure to properly credit Plaintiffs' 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.

(Dkt. No. 44 at ¶ 32).

Borrowers' claim of damages is fatally deficient because their own factual allegations—accepted as true as they must be at this stage of the proceeding—demonstrate that, as a matter of law, they did not sustain any of these recoverable damages under the Act. Instead, Borrowers have sought purported "actual

damages" notwithstanding the fact that: (1) most, if not all of their alleged damages were incurred prior to the 2014 QWR; (2) their request for attorneys' fees impermissibly seeks double recovery; and (3) there is no causal link between the RESPA violation and the alleged harm. *See McLean*, 595 F. Supp. 2d at 1368 ("a causal relationship must exist between the statutory violation and the alleged harm"); *see also Berene v. Nationstar Mortg., LLC*, Civil Action No. 14-61153-Civ-Scola, 2016 WL 3787558, at *4 (S.D. Fla. June 15, 2016).

Accordingly, as demonstrated below, the District Court's dismissal of their RESPA claim with prejudice must be affirmed.

### A. Any Alleged Damages Incurred Prior To Wells Fargo's Response To The 2014 QWR Are Not Recoverable As A Matter of Law.

As an initial matter, the majority of Borrowers' alleged damages are not recoverable as a matter of law because—as established by their own allegations—they were incurred prior to Wells Fargo's response to the 2014 QWR.

It is well settled that any expenses incurred before a loan servicer responds to a qualified written request cannot be recovered, because they are not incurred "as a result of" an inadequate response. *See Graham v. Ocwen Loan Servicing, LLC*, Case No. 16-80011-CIV-COHN/SELTZER, 2016 WL 1573177, at *3 (S.D. Fla. Apr. 19, 2016); *Long v. Residential Credit Sols., Inc.*, No. 9:15-CV-80590-ROSENBERG, 2015 WL 4983507, at *1 (S.D. Fla. Aug. 21, 2015) ("[C]osts incurred while preparing a qualified written request for information from a servicer cannot serve as a basis for damages because, at the time those expenses are incurred, there has been no RESPA violation.") (citing *Steele v. Quantum Serv.*

*Corp.*, 12-CV-2897, 2013 WL 3196544 (N.D. Tex. June 25, 2013)). "To hold otherwise would mean that every RESPA claim has damages built-in to the claim." *Zaychick v. Bank of Am., N.A.*, 146 F. Supp. 3d 1273, 1280 (S.D. Fla. 2015).

Based on this law, there could be no violation of RESPA before Wells Fargo responded to the 2014 QWR on December 9, 2014. Nonetheless, most, if not all, of Borrowers' claimed damages arose well prior to this date. Indeed, the Foreclosure Action had been pending since September 5, 2012, over two years before Wells Fargo responded to the 2014 QWR. Thus, all alleged damages that arose prior to December 9, 2014 are not actual damages under RESPA,[4] and cannot be recovered as a matter of law.

### B. Borrowers Are Not Entitled To Recover Their Attorneys' Fees.

#### 1. Borrowers Have Impermissibly Sought Double Recovery Of The Attorneys' Fees Incurred In Connection With the Foreclosure Action.

A court "can and should preclude double recovery by an individual." *St. Luke's Cataract & Laser Inst., P.A. v. Sanderson*, 573 F.3d 1186, 1203 (11th Cir. 2009) (quoting *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 333, 100 S.Ct. 1698, 1708, 64 L.Ed.2d 319 (1980)). It is clear that "no duplicating recovery of damages for the same injury may be had." *White v. U.S.*, 507 F.2d 1101, 1103 (5th Cir. 1975); *see also Conway v. Icahn & Co., Inc.*, 16 F.3d 504, 511 (2d Cir. 1994) ("Where a plaintiff seeks recovery for the same damages under different legal theories, only a

[4] These would include attorneys' fees incurred in the Foreclosure Action, attorneys' fees incurred in preparing the 2014 QWR, damages related to emotional distress, finance charges, interest and late fees and damage to Borrowers' credit.

single recovery is allowed.").

It is undisputed that Borrowers entered into an Agreed Order in the Foreclosure Action which resulted in "full funds in full settlement of [their] Motion for Attorney's Fees and Costs." (Dkt. 70 at 9). Based on this fact, the District Court correctly found that Borrowers cannot recover, under the guise of a RESPA claim, attorneys' fees incurred in connection with the Foreclosure Action because they were already **fully** reimbursed in the state court proceedings.[5] (Dkt. 70 at 9); *see Maale v. Kirchgessner*, No. 08-80131-CIV, 2012 WL 2254083, at *2-*3 (S.D. Fla. May 29, 2012) (overruling magistrate judge's recommendation to impose an attorney's fee award as a sanction against the plaintiff in favor of the defendant because the defendant had previously been awarded attorney's fees and such sanction would constitute double recovery).

In an attempt to evade both the facts and law, Borrowers changed their story, claiming below, and now on appeal, that they are only seeking some speculative

[5] On appeal, Borrowers claim that "the district court took it upon itself to do independent factual investigation in effort to debunk [Borrowers'] allegations" as to their claim for attorneys' fees incurred in connection with the Foreclosure Action. (Initial Br. at 20). To the contrary, the District Court properly took judicial notice of the Foreclosure Action docket "for the limited purpose of recognizing the filings and judicial acts they represent." (Dkt. 70 at 9). Indeed, Borrowers have not contended on appeal that the District Court's judicial notice of the Foreclosure Action docket was reversible error. That is because it was not. *See 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); *Boyd v. Georgia*, 512 F. App'x 915, 917 (11th Cir. 2013) (holding district court did not abuse its discretion of taking judicial notice of state court proceedings).

amount of ***unreimbursed*** attorneys' fees from the Foreclosure Action. (Initial Br. at 21; Dkt. 69 at 4). Yet, in their Amended Complaint, Borrowers seek entitlement to "attorney's fees related to legal services rendered in connection with the failed foreclosure lawsuit…." (*See* Dkt. 44 ¶ 32). There is not single allegation regarding "unreimbursed fees," let alone facts that would demonstrate that despite the "full settlement" of the attorneys' fees incurred in the Foreclosure Action, they were somehow denied full recovery. Borrowers are simply playing games with the issue in an attempt to avoid dismissal. As recognized by the District Court, if the Borrowers were not satisfied with their attorneys' fees award in state court, 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." (Dkt. 77 at 5).

**2. There Is No Causal Link Between The Purported RESPA Violation And Claim For Attorneys' Fees And Expenses.**

First, even if Borrowers could somehow claim double recovery of their attorneys' fees, which they cannot, there is nothing in the Amended Complaint linking the Borrowers' attorneys' fees incurred in the Foreclosure Action, which commenced two years prior to Wells Fargo's response to the 2014 QWR, to any alleged violation of RESPA. Instead the attorneys' fees that Borrowers incurred in the Foreclosure Action are a result of their default and failure to cure, not any purported RESPA violation. Indeed, Borrowers' Amended Complaint makes no allegation that their loan—notwithstanding the payments made—was brought current.

Second, Borrowers' allegation that they are entitled to attorneys' fees and related expenses associated with sending the 2015 QWR, is flatly wrong. Borrowers' vigorously contend that the 2015 QWR was sent in a continued effort to obtain a response from Wells Fargo that complied with RESPA. (Initial Br. at 23-25). Yet, inexplicably, Wells Fargo was never afforded an opportunity to respond to the 2015 QWR, prior to the filing of this lawsuit, and Borrowers fail to allege how they suffered damages as a result of an insufficient response when the time for Wells Fargo to respond had not yet expired.

Additionally, the 2015 QWR was sent **more than 10 months** after they received Wells Fargo's response to their 2014 QWR, and **6 months after** the Foreclosure Action was dismissed. Nowhere in the 2015 QWR do Borrowers specifically identify inquiries in the 2014 QWR to which Wells Fargo failed to respond. Rather, the 2015 QWR acknowledges that Wells Fargo previously found that no error had occurred and expressly states that the "purpose of this Notice of Error is to provide updated information" as well as to give Wells Fargo a "second opportunity" to investigate and correct an error that Borrowers believe must have occurred based upon the dismissal of the Foreclosure Action. (Dkt. 47-4). Indeed, Borrowers admitted, in response to the Motion to Dismiss, that "**it was Wells Fargo's October 5th, 2015 demand letter that prompted [Borrowers'] second attempt to invoke the RESPA/Regulation X error resolution procedures a second time**" (Dkt. 50 at p. 14) (emphasis added). Thus, Borrowers' contention that they sent the 2015 QWR in response to Wells Fargo's purportedly inadequate response received 10 months earlier is belied by their own allegations.

Borrowers' reliance on *Miranda v. Ocwen Loan Servicing*, 148 F. Supp. 3d 1349 (S.D. Fla. 2015) to support their argument that they are entitled to damages related to sending the 2015 QWR is unavailing. In *Miranda*, the plaintiffs sent a subsequent letter after the defendant failed to adequately respond to the plaintiffs' first QWR. *Id*. at 1351. Unlike here, the court found that plaintiffs' subsequent letter "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." *Id*. at 1355. Therefore, the court found that the additional correspondence was due to defendant's alleged failure to respond. *Id*.[6] As detailed above, that is not the case here. Borrowers'

[6] Many of the other cases cited by Borrowers either provide little factual detail and, thus, fail to support reversal of the District Court's Dismissal Order, or are inapposite. *See Hernandez v. J.P. Morgan Chase Bank, N.A.*, Case No. 14-24254-CIV-GOODMAN, 2016 WL 2889037, at *6 (S.D. Fla. May 16, 2016) (alleged RESPA violation required the additional expense of sending a second notice of error); *Baez v. Specialized Loan Servicing, LLC*, Case No. 15-81676-CIV-MARRA, 2016 WL 1546445, at * 1-*2 (S.D. Fla. Apr. 15, 2016) (plaintiff alleged actual damages for attorneys' fees for review of insufficient RESPA response where defendant did not provide written acknowledgement of the request within the required time frame); *Rodriguez v. Seterus, Inc.*, No. 15-61253-CIV, 2015 WL 5677182, at * 3 (S.D. Fla. Sept. 28, 2015) (plaintiff alleged actual damages for follow-up response to RESPA request where defendant failed to respond); *Russell v. Nationstar Mortg., LLC*, No. 14-61977-CIV, 2015 WL 541893, at *1-*2 (S.D. Fla. Feb. 10, 2015) (plaintiffs adequately alleged damages for costs necessary to pursue compliance with RESPA request where defendant admittedly sent an incomplete response and plaintiffs had to send a follow-up letter approximately 3 weeks later); *Martinez v. Shellpoint Mortg. Servicing*, No. 16-60026-CIV-LENARD/GOODMAN, 2016 WL 6600437, at *3-4 (S.D. Fla. Nov. 8, 2016) (plaintiff entitled to seek damages sustained after defendant failed to timely respond to original RFIs and the Amended Complaint alleged "that multiple NOEs and RFIs were sent to defendant after plaintiff's original RFIs were sent because

actual allegations in the Amended Complaint and the RESPA correspondence demonstrate that there is no causal link between Borrowers' alleged attorneys' fees and costs in preparing the 2015 QWR and Wells Fargo's alleged failure to properly respond to the 2014 QWR, sent ten months earlier.

### C. There Is No Causal Link Between Wells Fargo's Purported RESPA Violation And The Borrowers' Alleged Emotional Distress.

In order to recover emotional damages under RESPA, a plaintiff must sufficiently state a causal link between the alleged violation of RESPA and the emotional harm suffered. *See McLean*, 398 F. App'x at 471. Conclusory statements of emotional harm are insufficient to demonstrate the causal relationship necessary to sustain a claim for emotional damages. *Id.*

Although Borrowers contend on appeal that "Wells Fargo's failure to appropriately respond to [Borrowers' QWRs] significantly prolonged the period of time during which [Borrowers] suffered emotional distress as a result of the wrongful foreclosure….", the Amended Complaint tells a different story and expressly seeks "emotional distress **arising from the unjustified collection activity, unjustified foreclosure lawsuit, and unjustified risk of losing their home**." (Initial Br. at 17; Dkt. 44 at ¶ 32) (emphasis added). Thus, Borrowers' own allegations show that their purported emotional distress arose from Wells

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the original RFIs were either ignored or improperly responded to."); *Walker v. Branch Banking & Tr. Co.*, No. 16-cv-62791-BLOOM/Valle, 2017 WL 747875, at *1, *5 (S.D. Fla. Feb. 23, 2017) (plaintiffs adequately alleged that they incurred fees in sending a "follow-up letter" "as a result of Defendant's failure to adequately respond to the RFI").

Fargo's collection efforts and the foreclosure litigation, which was pending for over two years before Wells Fargo responded to Borrowers' 2014 QWR, **not** a purported RESPA violation.

In addition, Borrowers' own allegations demonstrate that their purported emotional distress was proximately caused by their continued failure to cure and bring their loan current, not a RESPA violation. Wells Fargo's response to the 2014 QWR, sent on December 9, 2014, explained to Borrowers that their account was currently due for the February 1, 2013 through December 1, 2014 payments totaling $73,476.89. (Dkt. 47-2). There is no allegation that after receiving the response Borrowers (a) challenged or disagreed with the amount due and owing; (b) made any subsequent payments in an attempt to bring their loan current; or (c) demonstrated that their loan was current at that time. Therefore, any claimed emotional distress was due to their own default and failure to cure, not Wells Fargo's alleged inadequate responses to the 2014 and 2015 QWRs.[7] *See Thomas v. US Bank Nat'l Ass'n*, 675 F. App'x 892, 899-900 (11th Cir. 2017) (affirming dismissal of borrowers' RESPA claim, in part, because any injury that the borrowers suffered "is attributable to their 2011 default and failure to cure, which occurred years before [the borrowers] sent this . . . QWR letter in 2014"); *Rourk v. Bank of Am. Nat'l Ass'n*, 587 F. App'x 597, 600 (11th Cir. 2014) (holding borrower "had an obligation to continue making payments she knew she owed, and

[7] While the Borrowers allege that they made payments in 2012 and 2013, there is no allegation that their loan was, in fact, current when the Wells Fargo responded to the 2014 QWR. Indeed, Wells Fargo's response was to the contrary.

[her] nonpayment is fatal to her [RESPA claim] "as her 'alleged injury was solely attributable to [her] own acts or omissions'"); *Zaychick*, 146 F. Supp. 3d at 1280 (dismissing RESPA claim where plaintiff's emotional distress damages were not traceable to defendant's alleged RESPA violation but were instead traceable to the final state foreclosure judgment).

There simply is "nothing in the complaint to link any of these alleged [emotional distress] damages to [the] alleged violation of RESPA." *Hopson v. Chase Home Fin., LLC*, 14 F.Supp. 3d 774, 788 (S.D. Miss. 2014) ("[Borrowers] allege generally that they have sustained . . . the threat of foreclosure and mental and emotional distress damages. Yet there is nothing in the complaint to link any of these alleged damages to [the] alleged violation of RESPA."). Borrowers have thus left "unexplained … how the QWR failure itself is causally connected to [their] claimed distress" a fatal pleading defect requiring dismissal. *Lawther v. Onewest Bank*, No. C 10-0054 RS, 2010 WL 4936797, at *7 (N.D. Cal. Nov. 30, 2010) (dismissing borrower's RESPA claim because it "remain[ed] unexplained . . . how the QWR failure itself is causally connected to the claimed distress of [plaintiff] or his family.").

Borrowers' reliance on *Hammer v. Residential Credit Solutions, Inc.*, Case No. 13 C 6397, 2015 WL 7776807 (N.D. Ill. Dec. 3, 2015) to support their argument that they adequately pled a causal connection between a RESPA violation and their alleged emotional distress is misplaced. In *Hammer*, after a jury trial, the court found that the borrower

> showed she would not have been in default but for RCS's contractual breaches. Presumably, RCS would have realized she was not in default had it conducted a proper investigation. RCS then would have corrected Hammer's account, dismissed the second foreclosure action, and not sent the improper reinstatement letters.

*Id*. at *23. The borrower in *Hammer* consistently made payments pursuant to an enforceable loan modification agreement. *Id*. at *2. The servicer, however, breached the loan modification agreement by refusing to accept any of the borrower's payments. *Id*. If the payments had been accepted, the borrower would not have been in default. *Id*. at *23. In contrast, here, Borrowers never alleged that they were no longer in default as of December 2014, or that Wells Fargo should have realized that they were no longer in default after it investigated and responded the QWRs.

Consequently, the District Court correctly found that there is no causal connection between Wells Fargo's purported RESPA violation and the Borrowers' alleged emotional distress.

### D. There Is No Causal Link Between The Purported RESPA Violation And Alleged Finance Charges, Interest, And Fees.

Borrowers argue that their allegation of finance charges and interest stemming from the improper application of payments is sufficient to meet the damages requirement for a RESPA claim. Borrowers are incorrect, and their own allegations once again prove fatal to their argument. Borrowers' Amended Complaint expressly alleges that the "finance charges and interest [] flow **from the failure to properly credit Borrowers' payments**," **not** from a purported RESPA violation. (Dkt. 44 at ¶ 32) (emphasis added). Thus, Borrowers did not, and

cannot, allege the required causal connection between the alleged finance charges and interest and a purported RESPA violation.

In a thinly veiled effort to overcome this deficiency, Borrowers speculate that Wells Fargo's alleged failure to credit payments "would naturally result in an increase in the amount of both the principal balance and related interest charges." (Initial Br. at 26). Borrowers' actual RESPA correspondence, however, shows a much different story. The 2014 QWR makes no mention of any erroneous late charges and, instead, refers to purported payments that were not applied to their loan, the filing of a foreclosure lawsuit on a loan not in default, and "related finance charges associated with the wrongfully filed foreclosure lawsuit . . ." (Dkt. 47-1). Among other things, Wells Fargo's response advised that all referenced payments had been applied and provided a transaction history showing the "[d]ates fees and charges were assessed." (Dkt. 47-2).

Nevertheless, Borrowers' 2015 QWR did not identify any alleged late charges, finance charges, or interest. Indeed, Borrowers' second RESPA letter, sent well after Wells Fargo responded to the 2014 QWR, failed to make any reference whatsoever to any late charges, finance charges, or interest applied to the loan. (Dkt. 47-4). Instead, the 2015 QWR focused on the dismissal of the foreclosure litigation and sought Well Fargo's explanation as to why it intended to file a second foreclosure lawsuit. (*Id.*) Thus, Borrowers' allegations as to purportedly erroneous interest, finance, and late charges lack factual support and cannot establish any causal connection to any violation of RESPA stemming from an inadequate response to the QWRs.

Borrowers' reliance on this Court's opinion in *Renfroe* is unavailing. There, this Court held that the plaintiff sufficiently alleged actual damages by pleading that the servicer failed to refund her mortgage overpayments when it failed to respond properly to the notice of error indicating that it was overcharging the plaintiff, even when the overpayments were made before the plaintiff sent the notice of error. *Renfroe*, 822 F.3d. at 1245-47. *Renfroe* differs significantly from this case. In *Renfroe*, the plaintiff's QWR specifically "point[ed] out the increase in payment [and] [s]he requested . . . a 'detailed explanation' . . . and a refund if appropriate." *Id*. at 1242-43. Here, however, Borrowers' QWRs did not point to any alleged late charges or interest, but rather focused on the foreclosure litigation.

### E. There Is No Causal Link Between The Purported RESPA Violation And Any Alleged Damage To Borrowers' Credit.

Without any factual support, Borrowers identified "damage to their credit ratings" as another category of damages.[8] However, "negative reporting to [] credit agencies alone is insufficient to establish damages" under RESPA. *McLean*, 595 F. Supp. 2d at 1373 (citing *Johnston v. Bank of Am., N.A.*, 173 F. Supp. 2d 809, 817 (N.D. Ill. 2001) and *Hutchinson v. Delaware Savings Bank FSB*, 410 F. Supp. 2d 374, 383 (D.N.J. 2006)); *see also Patrick v. CitiFinancial Corp., LLC*,

[8] Borrowers erroneously state that the District Court did not address this category of damages. (Initial Br. at 27). While not specifically pointing to Borrowers' alleged damage to their credit, the District Court addressed all of Borrowers' alleged damages and held that Borrowers did not "allege[] a causal connection between the injury they allege, and [Wells Fargo's] allegedly inadequate response to the QWRs…." (Dkt. 70 at 8). This necessarily took into account Borrowers' allegations of damage to their credit ratings.

Case No. 3:15cv296-WHA 2015 WL 5236031, *6 (M.D. Ala. Sept. 8, 2015) ("[T]he mere fact that negative credit reporting occurred does not state a violation" of RESPA); *Crow v. Ocwen Loan Servicing, LLC*, Civil No. 15-00161 SOM/KJM, 2016 WL 3557008, at *8 (D. Haw. June 24, 2016) ("To constitute actual damages, the negative credit rating must itself cause damage to the plaintiff as evidenced by, for example, failing to qualify for a home mortgage.") (citations omitted). Here, Borrowers failed to allege exactly how they were damaged by any purported negative credit reporting.[9] Thus, Borrowers' conclusory allegation that they have sustained "damage to their credit ratings," without more, is insufficient to state actual damages under RESPA.

Importantly, the Foreclosure Action filed in 2012 and Borrowers' failure to bring the loan current undercuts any argument that Wells Fargo's alleged inadequate response to Borrowers' QWRs several years later in 2014 and 2015 caused damage to their credit. *See McLean*, 595 F. Supp. 2d at 1374 (plaintiffs were previously in bankruptcy and numerous other factors could have contributed to plaintiff's negative credit reporting and inability to refinance the mortgage); *Crow*, 2016 WL 3557008, at *8 ("If [borrower] had a negative credit report, it is

[9] Borrowers' reliance upon *Hammer* for the proposition that damage to the Borrowers' credit rating contributed to their emotional distress damages is misplaced. (Initial Br. at 27). In *Hammer*, the borrower presented lay and medical evidence at trial that she suffered emotional distress because of negative credit reporting. 2015 WL 7776807, at *24-*25. Plaintiffs' Amended Complaint, however, is devoid of any allegations that they suffered emotional distress due to negative credit reporting proximately caused by Wells Fargo's purported RESPA violations.

incumbent on him to show that it was a result of a RESPA violation, as opposed to a result of any pre-existing or continuing failure to make payments on his loan.").

## II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT BORROWERS FAILED TO STATE A CLAIM FOR NEGLIGENCE *PER SE*.

The District Court dismissed Count III, Borrowers' negligence *per se* claim, finding that because the claim hinged on Borrowers' failed RESPA claim, it must also be dismissed with prejudice. (Dkt. 70 at 9-10). As detailed in Section I *supra*, the District Court correctly held that Borrowers failed to state a claim under RESPA and Regulation X. Thus, because Borrowers' negligence *per se* claim is predicated on their failed RESPA claim, this Court should affirm the District Court's dismissal of Borrowers' negligence *per se* claim with prejudice. *See Lage v. Ocwen Loan Servicing, LLC*, 145 F. Supp. 3d 1172, 1197 (S.D. Fla. 2015) ("Because Ocwen is entitled to judgment on Plaintiff's claims under RESPA and Regulation X, Plaintiff's negligence claim fails.").

## III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT BORROWERS FAILED TO STATE A CLAIM FOR COMMON LAW CONVERSION.

"[C]onversion is an unauthorized act which deprives another of his property permanently or for an indefinite time." *Nat'l Union Fire Ins. Co. of Pa. v. Carib Aviation, Inc.*, 759 F. 2d 873, 878 (11th Cir. 1985) (quoting *Senfeld v. Bank of Nova Scotia Tr. Co. (Cayman), Ltd.*, 450 So. 2d 1157, 1160-61 (Fla. 3d DCA 1984)). "Conversion cannot arise from the defendant's exercise of a legal right over the property." *See Clifton v. Nationstar Mortg., LLC*, C/A No. 3:12-cv-

02074-MBS, 2015 WL 1549108, *2 (D.S.C. Apr. 6, 2015). "In order to establish a claim for conversion of money 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." *See U.S. v. Bailey*, 288 F. Supp. 2d 1261, 1264 (M.D. Fla. 2003), *aff'd*, 419 F.3d 1208 (11th Cir. 2005) (citations omitted); *IberiaBank v. Coconut 41, LLC*, 984 F. Supp. 2d 1283, 1306 (M.D. Fla. 2013); *Breig v. Wells Fargo Bank, N.A.*, No. 13-80215-CIV, 2014 WL 806854, *4 (S.D. Fla. Feb. 28, 2014).

### A. Borrowers Failed To And Cannot Allege A Demand For Return of Their Money, And A Refusal By Wells Fargo To Do So.

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 v. Turbeville*, 143 So. 3d 964, 969 (Fla. 1st DCA 2014). "Thus, the essence of conversion is not the possession of property by the wrongdoer, but rather such possession in conjunction with a present intent on the part of the wrongdoer to deprive the person entitled to possession of the property, which intent may be, but is not always, shown by demand and refusal." *Senfeld*, 450 So. 2d at 1161.

Here, it is undisputed that Borrowers failed to allege a demand for return of the money, and a refusal by Wells Fargo to do so. As found by the District Court, Borrowers cannot prove that a demand and refusal were unnecessary in this case, where they failed to adequately allege that Wells Fargo's holding of funds in a suspense account after a default and the initiation of foreclosure lawsuit otherwise amounted to conversion. (Dkt. 70 at 10-11).

### B. Borrowers Cannot Prove That A Demand And Refusal Were Unnecessary Because They Failed To Adequately Allege That Wells Fargo's Holding Funds In A Suspense Account After The Initiation Of A Foreclosure Action Amounted To Conversion Under The Remaining Elements Of The Claim.

Borrowers also failed to adequately allege that they were entitled to possess the payments sent to Wells Fargo and that Wells Fargo performed an unauthorized act, which deprived Borrowers of their payments. To the contrary, Paragraph 1 of the Mortgage, which forms the basis of the Foreclosure Action and this lawsuit, states:

> Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender **is not obligated to apply such payments at the time such payments are accepted . . . Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current.** If Borrower does not do so within a reasonable period of time, Lender shall either **apply such funds** or return them to Borrower.

(Dkt. 47-5, ¶1) (emphasis added). Here, Wells Fargo cannot be held liable for conversion because it placed said funds—which were less than the total amount due to reinstate—in a suspense account, even though Borrowers intended those

funds to be immediately applied to their account. That is because "Wells Fargo cannot convert funds that it is authorized to possess" resulting in their conversion claim failing as a matter of law. *See Clifton*, 2015 WL 1549108, at *3 (holding that "[b]ecause [Wells Fargo] cannot convert funds that it is authorized to possess, Plaintiff's claim for conversion fails as a matter of law"). Indeed, Wells Fargo's authority to do exactly that which it did is expressly set forth in the Mortgage. As one court stated in dismissing a conversion claim:

> Pursuant to the terms of the [Mortgage], [Bank of America] was within its right to [accept and retain partial payments]. Plaintiff's claim that [Bank of America] did not timely apply his payments and unlawfully held partial payments[] should be dismissed.

*Davis v. Bank of Am. Corp.*, Civil No. 1:10-cv-23-HSO-JMR, 2013 WL 141150, *5 (S.D. Miss. Jan. 11, 2013); *see also Kin Chun Chung v. JPMorgan Chase Bank, N.A.*, 975 F. Supp. 2d 1333, 1346-47 (N.D. Ga. 2013) (Mortgagee's alleged failure to apply home mortgagor's loan payments to mortgagor's account did not constitute conversion where mortgagee lawfully came into possession of the payments, and mortgagor did not allege that she asked mortgagee to return the money).[10]

[10] Borrowers look to 12 C.F.R. § 1026.36(c) for the proposition that the "maximum amount of money [Wells Fargo] could keep in a suspense account is less than a scheduled periodic payment." (Dkt. 50 at 18). Section 1026.36(c) reads: "No servicer shall fail to credit a periodic 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." (emphasis added). Borrowers' loan account was in default at the time the funds were placed in suspense. Further, the placement of the funds into a suspense account by Wells Fargo (acting as servicing agent for the Trustee and endowed with certain rights and obligations thereunder) after the Foreclosure

Additionally, "[a] mortgagor does not have a right to possess payments made under the loan." *See Bennett v. One West Bank*, No. 10cv1884-BTM(RBB), 2011 WL 2493699, at *7 (S.D. Cal. Jun. 23, 2011). Here, Borrowers were contractually obligated to make payments under the loan. *See* Dkt. 47-5; *see, generally*, *Jones v. Bank of Am. Corp*., No. 4:09cv162, 2010 WL 6605789, *6 (E.D. Va. Aug. 24, 2010) (Borrower does not have a right to the immediate possession of funds representing taxes and insurance, because she has a contractual obligation to pay those amounts); *Newgent v. Wells Fargo Bank, N.A.*, No. 09cv1525 WQH (WMC), 2010 WL 761236, at *6 (S.D. Cal. Mar. 2, 2010) ("Accepting payment a Plaintiff owes on a delinquent mortgage cannot be the basis of a conversion claim against a lender.").

Borrowers' reliance on *Masvidal v. Ochoa*, 505 So. 2d 555 (Fla. 3d DCA 1987) to support their assertion that their conversion claim was adequately pled is inapposite. In *Masvidal*, the court found that "[t]he evidence show[ed] a classic embezzlement by the defendant of an escrow fund set up under [a] subscription agreement between the parties." *Id*. at 556. No such allegations were presented in this case. To the contrary, as explained above, Wells Fargo exercised its legal right over Borrowers' payments.

Thus, the District Court properly dismissed Borrowers' common law conversion claim with prejudice. Borrowers' argument that they should have been

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Action had been initiated did not result in "any charge to the consumer" or "reporting of negative information," as the loan was already being reported as delinquent as a result of the Foreclosure Action.

given another opportunity to state a claim is unavailing. Although leave to amend should be freely given when justice so requires, "a district court may dismiss when such amendment would be futile." *Sibley v. Lando*, 437 F.3d 1067, 1073 (11th Cir. 2005) (citing *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001). Here, any amendment clearly would be futile where Wells Fargo's actions did not amount to conversion as a matter of law.

## CONCLUSION

For the foregoing reasons, Wells Fargo respectfully requests this Court to affirm the Dismissal Order in all respects.

Dated: August 21, 2017

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS**

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 9,711 words.

2. This document 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 document has been prepared in a proportionally spaced typeface using Microsoft® Word 2010, version 14, in Times New Roman 14-point typeface.

/s/ Kimberly S. Mello
Kimberly S. Mello

**CERTIFICATE OF SERVICE**

I certify that on August 21, 2017, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to counsel of record.

/s/ Kimberly S. Mello
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