UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROGELIO GONZALEZ, an individual, Plaintiff, vs. SPECIALIZED LOAN SERVICING, LLC, a Limited Liability Company; AFFINIA DEFAULT SERVICES, LLC, a Limited Liability Company; and DOES 1-50, inclusive, Defendants.	Case No. 2:23-cv-04119-MCS-RAO **ORDER RE: DEFENDANT'S MOTION TO DISMISS (ECF No. 19)**

Defendant Specialized Loan Servicing, LLC ("SLS") moves to dismiss Plaintiff Rogelio Gonzalez's first amended complaint ("FAC"). (Mot., ECF No. 19.) Plaintiff opposed the motion, (Opp'n, ECF No. 24), and Defendant replied, (Reply, ECF No. 26.) Defendant also filed a request for judicial notice, (RJN, ECF No. 20), to support the proposition that "Plaintiff filed a Chapter 7 bankruptcy in 2009 and received a discharge on September 17, 2009," (Mot. 7). Courts "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." *U.S. ex rel. Robinson Rancheria Citizens*

Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992) (internal quotation marks omitted); Fed. R. Evid. 201. The Court finds that the existence these documents are "not subject to reasonable dispute over [their] authenticity," *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001) (internal quotation marks omitted), and takes judicial notice of the fact that Plaintiff filed a Chapter 7 bankruptcy in 2009 and received a discharge on September 17, 2009. The Court does not take judicial notice of facts recited in these public records to the extent they are disputed. *Id.* The Court heard oral argument on July 31, 2023. (Mins., ECF No. 29.)

I. Background

This case involves what Plaintiff refers to as a "zombie mortgage." (Opp'n 11.) On January 25, 2007, Plaintiff obtained a second-position mortgage worth $92,500 at an interest rate 10.40% from Homecoming Financial, LLC and executed a deed of trust as security for the note. (FAC ¶ 12, ECF No. 9.) Plaintiff made payments on the loan until 2009, when he filed for Chapter 7 Bankruptcy. (*Id.* ¶¶ 13–14.) Because "Plaintiff's Second Position Loan was an existing debt at the time of filing for Bankruptcy," he "believed the obligation was extinguished" through the bankruptcy proceeding. (*Id.* ¶ 15.) "Plaintiff wholly stopped receiving monthly statements or any communication on the loan from HOMECOMING, SLS or any other party . . . from September 2009 to February 2023 when Plaintiff received a letter from Defendant SLS." (*Id.* ¶¶ 17–18.) At some unknown point during this period, Defendant assumed responsibility for servicing of the loan. (*Id.* ¶ 19.) Defendant's letter "attached a 'Notice of Default' [("NOD")] filed against Plaintiff's Property and stated that Plaintiff" was required to pay the "default amount of $158,263.00 or the Trustee Defendant AFFINIA would foreclose on the Property." (*Id.* ¶ 18.)

Plaintiff "reached out to Defendant SLS to try to resolve this informally." (*Id.* ¶ 23.) Plaintiff was told that resolution would require him to make "a down-payment of $47,417.31 by May 31, 2023." (*Id.*) Plaintiff was also informed that SLS had been "charging interest for every month since 2009 without sending monthly statements" and

that the loan had accrued more than $100,000 in interest during that time. (*Id.*) Plaintiff was told that he "now owe[d] $158,263.00 in principal and interest that accrued on the loan when no collection activity was occurring." (*Id.* ¶ 25.)

Plaintiff brings nine causes of action: 1) violation of Federal Truth in Lending Act ("TILA"), 15 U.S.C. § 1638, (*id.* ¶¶ 29–34); 2) breach of the implied covenant of good faith and fair dealing, (*id.* ¶¶ 35–40); 3) violation of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692e and 1692f, (*id.* ¶¶ 41–45); 4) violation of C.F.R. § 1024.39, (*id.* ¶¶ 46–48); 5) violation of 12 C.F.R. § 1024.41, (*id.* ¶¶ 49–52); 6) violation of 12 C.F.R. § 1024.33, (*id.* ¶¶ 53–56); 7) financial elder abuse, California Welfare and Institutions Code section 15610.30, (*id.* ¶¶ 57–65); 8) unfair competition under California Business and Professions Code section 17200 *et seq.*, (*id.* ¶¶ 66–71); and 9) declaratory relief, (*id.* ¶¶ 72–76).

II. Legal Standard

Federal Rule of Civil Procedure 12(b)(6) allows an attack on the pleadings for "failure to state a claim upon which relief can be granted." "A complaint may be dismissed for failure to state a claim only when it fails to state a cognizable legal theory or fails to allege sufficient factual support for its legal theories." *Caltex Plastics, Inc. v. Lockheed Martin Corp.*, 824 F.3d 1156, 1159 (9th Cir. 2016). "To survive a motion to dismiss, a 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 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

The determination of whether a complaint satisfies the plausibility standard is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id*. at 679. Reviewing a motion to dismiss, a court must accept the factual allegations in the pleadings as true and view them in the light most favorable to the non-moving party. *Park v. Thompson*, 851 F.3d 910, 918 (9th

Cir. 2017). At the same time, a court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

III. Analysis

A. TILA and CFR 12 C.F.R. § 1026.41 Claims

1. *Plaintiff has Stated a Claim Under 15 U.S.C. § 1638(f)*

"TILA is a consumer protection statute that seeks to 'avoid the uninformed use of credit.'" *Amparan v. Plaza Home Mortg., Inc.*, 678 F. Supp. 2d 961, 967 (N.D. Cal. 2008) (quoting 15 U.S.C. § 1601(a)). "The Act requires disclosure of credit terms to consumers so that potential borrowers will be able to compare the available costs of credit." *Dixey v. Idaho First Nat'l Bank*, 677 F.2d 749, 751 (9th Cir. 1982). "In order to effectuate this purpose, the TILA has been liberally construed in this circuit" and "[e]ven technical or minor violations of the TILA impose liability" on the violator. *Jackson v. Grant*, 890 F.2d 118, 120 (9th Cir. 1989). "To insure that the consumer is protected[,] the TILA and accompanying regulations must be absolutely complied with and strictly enforced." *Id.* (cleaned up).

Plaintiff alleges Defendant violated 15 U.S.C. § 1638(f) by failing to send regular statements. (FAC ¶¶ 17, 22–23, 29–33.) § 1638(f) requires a "creditor, assignee, or servicer" of any "residential mortgage loan" to "transmit to the obligor, for each billing cycle, a statement setting forth" the amount of principal remaining under the mortgage, the current interest rate, the next date on which the interest rate may reset or adjust, the amount of any prepayment fee that may be charged, a description of any late fees, contact information for the obligor to obtain information about the mortgage, contact information for counseling agencies, and any information as the Bureau of Consumer Financial Protection may provide. 15 U.S.C. § 1638(f). Defendant argues that because "Plaintiff discharged any personal liability for the Loan in his bankruptcy," he is not an "obligor" as that term is used in the statute, and thus Defendant had no duty to send regular statements under § 1638(f). (Mot. 7.) Defendant argues this construction is

supported by "the language and history of its implementing regulation, 12 C.F.R. § 1026.41, which contains an exemption for borrowers who discharged their debts in bankruptcy." (*Id.*)

"Neither the statute nor the regulations define 'obligor,' so [courts] use the ordinary legal understanding in this context, one who is obligated to pay a debt." *Edwards v. Wells Fargo & Co.*, 606 F.3d 555, 557 (9th Cir. 2010) (citing Black's Law Dictionary (7th ed. 1999) (defining "obligor" as "[o]ne who has undertaken an obligation; a promisor or debtor")). "Given the remedial nature of TILA, Congress's intent to protect consumers, and the courts' mandate that TILA be liberally construed, the term 'obligor[s]' must necessarily be construed to include those whom the creditor claims are obligors, as well as individuals who are in fact obligors in the contract law sense." *Belmont v. Assocs. Nat'l Bank (Del.)*, 119 F. Supp. 2d 149, 164 (E.D.N.Y. 2000) (citation omitted) (alteration in original).

In its loan modification offer, Defendant stated it was "attempting to collect a debt" from Plaintiff. (FAC Ex. A ("Loan Modification Offer"), at 19.)[1] "'[T]his is an attempt to collect a debt' language . . . is not required by the TILA or its regulations." *Daniels v. Select Portfolio Servicing, Inc.*, 34 F.4th 1260, 1270 (11th Cir. 2022). Such language *may* be required under the FDCPA, but only when the defendant is a "debt collector" attempting to collect a debt. *See id.*; 15 U.S.C. § 1692e(11). In either case, given the TILA's protections should be applied broadly, *see Grant*, 890 F.2d at 120, Defendant's choice "to treat [Plainitff] as if he were an obligor," means Plaintiff should be construed as an "obligor" for the purposes of his TILA claim, *Belmont*, 119 F. Supp. 2d at 163.

This conclusion is supported by the fact that Plaintiff remains bound by the terms of the deed of trust. A loan for real property "generally involves two documents, a

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[1] For ease of reference, pinpoint citations to the Loan Modification Offer refer to the pagination supplied by the CM/ECF system.

promissory note and a security instrument. The security instrument secures the promissory note. This instrument entitles the lender to reach some asset of the debtor if the note is not paid. In California, the security instrument is most commonly a deed of trust." *Nguyen v. Calhoun*, 105 Cal. App. 4th 428, 438 (2003) (internal quotation marks omitted). "A security interest cannot exist without an underlying obligation[.]" *All. Mortg. Co. v. Rothwell*, 10 Cal. 4th 1226, 1235 (1995). If the "security interest" in the underlying property has survived, as Defendant claims, then the "underlying obligation" must belong to someone. *Id.* When asked at the hearing, Defendant did not identify to whom the obligation belonged. Instead, Defendant contended it did not belong to Plaintiff because he discharged personal liability for the loan through bankruptcy. (*See* Mot. 7.)

Defendant's argument is fundamentally undermined by the Supreme Court's decision in *Johnson v. Home State Bank*, 501 U.S. 78 (1991). In *Johnson*, the Supreme Court recognized that when a debtor's personal obligations are wiped out following a bankruptcy proceeding, "the mortgage holder still retains a 'right to payment' in the form of its right to the proceeds from the sale of the debtor's property." *Id.* at 84. Federal law treats the obligation to satisfy the "right to repayment" as running to the debtor even when he has discharged his personal obligation because "a creditor who[] . . . has a claim enforceable only against the debtor's property nonetheless has a 'claim against the debtor.'" *Id.* at 85 (quoting 11 U.S.C. § 102(2)). Stated differently, "[e]ven after the debtor's personal obligations have been extinguished" the "surviving right to foreclose on the mortgage can be viewed as a 'right to an equitable remedy' for the debtor's default on the underlying obligation. Either way, there can be no doubt that the surviving mortgage interest corresponds to an 'enforceable obligation' of the debtor." *Id.* at 84.

This interpretation is not limited to bankruptcy proceedings. It was "Congress' intent . . . that § 102(2) extend to all interests having the relevant attributes of

nonrecourse obligations regardless of how these interests come into existence."[2] *Id.* at 87. "Insofar as the mortgage interest that passes through a Chapter 7 liquidation is enforceable only against the debtor's property, this interest has the same properties as a nonrecourse loan." *Id.* Given Defendant seeks to enforce a claim against Plaintiff's property even though his personal obligations were discharged in bankruptcy, the Court sees no reason to treat this as anything other than "a claim against the [Plaintiff]." *Id.* at 84 (quoting 11 U.S.C. § 102(2)). Thus, even without the loan modification offer, Plaintiff is still subject to an "enforceable obligation," making him an "obligor" under the TILA.

Defendant's final argument—that Plaintiff cannot sustain a TILA claim because the statute only allows for a claim against a "creditor" and "SLS is merely the loan servicer"—is similarly unavailing. (Opp'n 8.) By its very terms, 15 U.S.C. § 1638(f) applies to "creditor[s], assignee[s], *or* servicer[s]." 15 U.S.C. § 1638(f) (emphasis added). Because the statute's requirements apply to all three groups, Defendant's argument fails. *See Azure v. Morton,* 514 F.2d 897, 900 (9th Cir. 1975) ("As a general rule, the use of a disjunctive in a statute indicates alternatives and requires that they be treated separately.").

2. *Plaintiff has Stated a Claim Under 12 C.F.R. § 1026.41*

12 C.F.R. § 1026.41 is the federal regulation implementing the TILA. *Alphonso v. Real Time Resols., Inc.*, No. 23-cv-01488-JSC, 2023 WL 3794502, at *3 (N.D. Cal. June 2, 2023). Although § 1026.41 requires a "servicer" to provide "periodic statements" containing certain information, it uses the word "consumer" instead of "obligor." Why the regulation uses different language is anyone's guess, but the regulation defines a "consumer" as a "natural person to whom consumer credit is

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[2] A nonrecourse obligation is one in which the creditor cannot enforce the debt personally against the debtor but instead must enforce only the value of its lien against the property. *See Milkovich v. United States*, 28 F.4th 1, 4 (9th Cir. 2022) (citing *Johnson*, 501 U.S. at 84).

offered or extended." 12 C.F.R. § 1026.2(a)(11). "Consumer credit means credit offered or extended to a consumer primarily for personal, family, or household purposes." *Id.* § 1026.2(a)(12). Because Plaintiff is a "natural person" who was extended "consumer credit," Defendant is required to provide him regular statements pursuant to § 1026.41 unless an exception applies.

The obligation to send a "consumer" regular statements does not apply if the "consumer" has discharged personal liability for the loan in bankruptcy *and*

> (1) The consumer requests in writing that the servicer cease providing a periodic statement or coupon book;
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> (2) The consumer's bankruptcy plan provides that the consumer will surrender the dwelling securing the mortgage loan, provides for the avoidance of the lien securing the mortgage loan, or otherwise does not provide for, as applicable, the payment of pre-bankruptcy arrearage or the maintenance of payments due under the mortgage loan;
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> (3) A court enters an order in the bankruptcy case providing for the avoidance of the lien securing the mortgage loan, lifting the automatic stay pursuant to 11 U.S.C. 362 with regard to the dwelling securing the mortgage loan, or requiring the servicer to cease providing a periodic statement or coupon book; or
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> (4) The consumer files with the court overseeing the bankruptcy case a statement of intention pursuant to 11 U.S.C. 521(a) identifying an intent to surrender the dwelling securing the mortgage loan and a consumer has not made any partial or periodic payment on the mortgage loan after the commencement of the consumer's bankruptcy case.

Id. § 1026.41I(5)(i)(B). Based on the FAC and the parties' briefing, there is no reason

to conclude exemptions 1, 3, or 4 are satisfied. With respect to exemption 2, it appears as if Defendant is attempting to collect the underlying debt through its loan modification offer, suggesting the bankruptcy plan did not wipe out "the lien securing the mortgage loan" or void "payment of pre-bankruptcy arrearage." *Id.* § 1026.41I(5)(i)(B)(2). Further, the fact that Defendant seeks to collect interest accrued on the loan suggests the bankruptcy plan may have provided for the "maintenance of payments due under the mortgage loan" in some form. *Id.* Because Defendant fails to explain how these conditions are satisfied, the Court cannot conclude the bankruptcy exception precludes liability.

A servicer is also excused from proving regular statements under § 1026.41 if the servicer "[h]as charged off the loan in accordance with loan-loss provisions and will not charge any additional fees or interest on the account" *and* if the server provides the "consumer" "a periodic statement, clearly and conspicuously labeled 'Suspension of Statements & Notice of Charge Off—Retain This Copy for Your Records.'" *Id.* § 1026.41I(6)(i). Defendant has continued to charge interest, and there is no indication that Defendant provided the required notice under § 1026.41I(6)(i)(B). Because Defendant has not shown these conditions are satisfied, the Court cannot conclude this exemption applies.

Finally, at the hearing in in its reply brief, Defendant argued this regulation is inapplicable because it was enacted several years after Plaintiff's bankruptcy proceedings. As an initial matter, Defendant fails to explain why it would not be liable for any failure to meet its regulatory obligations after the regulation was promulgated. *See Chandler v. Greenlight Fin. Servs.*, No. 2:20-cv-00217, 2021 WL 1202078, at *16 (S.D. W. Va. Mar. 30, 2021) (recognizing that SLS's obligations under § 1026.41 may have begun on "the date the current version of the regulation took effect."). Further, this argument was not raised in Defendant's motion so the Court declines to consider it for the purposes of this order. *See Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) ("The district court need not consider arguments raised for the first time in a reply

brief."); *Johnson v. Gruma Corp.*, 614 F.3d 1062, 1069 (9th Cir. 2010) (deeming contentions raised for the first time at oral argument as waived).

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Plaintiff has alleged sufficient facts giving rise to a plausible inference that Defendant failed to comply with 15 U.S.C. § 1638(f) and 12 C.F.R. § 1026.41. As a result, Defendant's motion to dismiss Plaintiff's first and fifth causes of action is DENIED.

B. Implied Covenant of Good Faith and Fair Dealing

Plaintiff alleges he was "in a contractual relationship with Defendant SLS under the Deed of Trust," (FAC ¶ 37), which Defendant does not dispute, (*see* Mot 8–9; Reply 4–5.) "Every contract contains an implied covenant on the part of each party not to prevent or hinder performance by the other party." *Tanner v. Title Ins. & Tr. Co.*, 20 Cal. 2d 814, 825 (1942). "This covenant not only imposes upon each contracting party the duty to refrain from doing anything which would render performance of the contract impossible by any act of his own, but also the duty to do everything that the contract presupposes that he will do to accomplish its purpose." *Harm v. Frasher*, 181 Cal. App. 2d 405, 417 (1960). It should hardly go without saying that the contract for the repayment of a debt presupposes that the party responsible for collecting the debt will take at least some reasonable steps to facilitate payment.

Plaintiff alleges that at some point, responsibility for servicing the loan was transferred to Defendant, (FAC ¶ 19), but that Defendant took no action to inform Plaintiff that it was responsible for servicing the loan. (*Id.* ¶ 18.) Plaintiff alleges that "[b]y failing to transmit a single monthly statement for almost 14 years and ceasing all collection activities until it recorded an NOD, Defendant SLS allowed Plaintiff to reasonably believe he no longer owed a debt." (*Id.* ¶ 39.) According to the FAC, it was this failure that "interfered with Plaintiff's ability to perform on the contract and thereby induced Plaintiff's breach." (*Id.*)

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Defendant unpersuasively argues that Plaintiff's claim must fail because he seeks "to use the implied covenant to create a substantive obligation – sending monthly statements – that does not exist in the contract." (Mot. 8 (citing *id.*).) Contrary to Defendant's assertions, Plaintiff does not seek to impose a substantive obligation on Defendant. The FAC does not allege the breach arose from Defendants failure to send *monthly* statements. Instead it claims that the covenant was breached when Defendant failed to "transmit a *single* monthly statement for almost 14 years *and* ceas[ed] all collection activities." (FAC ¶ 39 (emphasis added).) In essence, Plaintiff plausibly alleges that after taking over responsibility for servicing the mortgage without informing Plaintiff, and then doing *nothing* to facilitate payment or collect the underlying debt for 14 years, Defendant breached its "duty to do everything that the contract presupposes" it would do to ensure Plaintiff could remit payment. *Harm*, 181 Cal. App. 2d at 417. As a result, Defendant's argument is inapposite.

The Court notes that it does not believe that "in the name of good faith" California imposes a duty "to make every contract signatory his brother's keeper[.]" *Mkt. St. Assocs. Ltd. P'ship v. Frey*, 941 F.2d 588, 593 (7th Cir. 1991). However, assuming a contractual responsibility to collect a debt without informing the other party, taking no steps to facilitate payment for 14 years, while charging interest the entire time is at best the kind of "sharp dealings or unfair practices" that are impermissible between contracting partners. *Hischemoeller v. Nat'l Ice & Cold Storage Co. of Cal.*, 46 Cal. 2d 318, 328 (1956). At worst, this conduct is a form of outright deception. The Court echoes Judge Posner's observation that before parties enter into a contractual relationship, they "confront each other with a natural wariness. Neither expects the other to be particularly forthcoming, and therefore there is no deception when one is not." *Frey*, 941 F.2d at 594. Once the contract is formed, however, "the situation is different. The parties are now in a cooperative relationship the costs of which will be considerably reduced by a measure of trust. So each lowers his guard a bit, and now silence is more apt to be deceptive." *Id.* As alleged in this case, Defendant's 14-year

silence was deafening.

Ultimately, "[t]he parties to a contract are embarked on a cooperative venture, and a minimum of cooperativeness in the event unforeseen problems arise at the performance stage is required." *Frey*, 941 F.2d at 595 (internal quotation marks omitted). As a result, the FAC plausibly alleges that Defendant breached its "duty to do everything that the contract presupposes that [it would] do to accomplish its purpose," *Harm*, 181 Cal. App. 2d at 417, and Defendant's motion to dismiss Plaintiffs second cause of action is DENIED.

C. FDCPA Claims

"The FDCPA is a consumer protection statute that prohibits certain abusive, deceptive, and unfair debt collection practices." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 374 n.1 (2013). "The FDCPA's private-enforcement provision, [15 U.S.C.] § 1692k, authorizes any aggrieved person to recover damages from 'any debt collector who fails to comply with any provision' of the FDCPA." *Id.* (quoting 15 U.S.C. § 1692k(a)). For the purposes of the FDCPA, it is irrelevant whether Plaintiff's personal obligation was discharged in bankruptcy, because it "is designed to protect consumers . . . regardless of whether a valid debt actually exists." *Baker v. G. C. Servs. Corp.*, 677 F.2d 775, 777 (9th Cir. 1982). Defendant argues that Plaintiff's FDCPA claims must fail because: 1) it is not a debt collector and therefore not subject to the act's terms, and 2) Plaintiff has not alleged a "wrongful act." (Mot. 9–11.)

1. Plaintiff Has Alleged Defendant is a Debt Collector

The FDCPA, "primarily defines a debt collector as someone who uses commerce to collect money debts owed to another." *Barnes v. Routh Crabtree Olsen PC*, 963 F.3d 993, 998 (9th Cir. 2020) (citing 15 U.S.C. § 1692a(6)). However, "the mere enforcement of a security interest" is insufficient "to establish that the defendants are acting as debt collectors subject to the FDCPA's broad code of conduct." *Id.* at 999. The Supreme Court has made clear "that, but for" conduct covered by 15 U.S.C. "§ 1692f(6), those who engage in *only* nonjudicial foreclosure proceedings are not debt

collectors within the meaning of the Act." *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029, 1038 (2019) (emphasis added).

Defendant wrongly claims that "Plaintiff merely alleges SLS has attempted to collect the debt through nonjudicial foreclosure." (Mot. 11.) The FAC alleges "Defendant SLS identifie[d] itself as a Debt Collector attempting to collect a debt" in the loan modification offer. (FAC ¶ 44.) Indeed, the loan modification offer unequivocally stated "Please be advised that we are attempting to collect a debt." (Loan Modification Offer 19.) Even assuming this statement is not dispositive, it is a strong indication that Defendant's conduct extended beyond "the mere enforcement of a security interest," *Barnes*, 963 F.3d at 998.

At the hearing, Defendant argued that the loan modification offer's "attempting to collect a debt" language was just a "mini-*Miranda*" warning that is often used out of an abundance of caution. "[I]n the initial written communication with the consumer," debt collectors are required to disclose that they are "attempting to collect a debt and that any information obtained will be used for that purpose." 15 U.S.C. § 1692e(11). Counsel argued that servicers include this language in correspondence even when they are not actually attempting to collect a debt to mitigate the possibility of FDCPA liability. Counsel analogized this practice to law enforcement officers who issue a *Miranda* warning even when one is not technically required.

While warnings may be given even when they are not required, Defendant's analogy misses the mark. The language in the loan modification offer was an unambiguous explanation of Defendant's actions; Defendant was extending the loan modification offer as an attempt to collect a debt from Plaintiff. Far from being a "mini-*Miranda*" warning informing the recipient of his rights, the loan modification offer's language was more akin to a police officer verbalizing their intent to place a suspect in custody by saying, "you're under arrest." At the motion to dismiss stage, when considering a party's unambiguous statement explaining their conduct, this Court believes the most prudent course of action is to take that party at their word.

Even if Defendant had not unequivocally stated it was attempting to collect a debt, Plaintiff adequately alleged that the loan modification offer was not "the mere enforcement of a security interest." *Barnes*, 963 F.3d at 999. "For the purposes of the FDCPA, the word 'debt' is synonymous with 'money.'" *Vien-Phuong Thi Ho v. ReconTrust Co., NA*, 858 F.3d 568, 571 (9th Cir. 2017). "The object of a non-judicial foreclosure is to retake and resell the security, not to collect money from the borrower." *Id.* Thus, while "actions taken to facilitate a non-judicial foreclosure, such as sending the notice of default and notice of sale, are not attempts to collect 'debt' as that term is defined by the FDCPA," actions intended "to collect money" may result in liability. *Id.* at 571–72. At the hearing, Defendant's counsel characterized the loan modification offer as: "Here's an offer you can pay, and we will not foreclose." As a result, Defendant took steps to collect money, and was therefore not simply engaged in "actions required to enforce a security interest."[3] *Barnes*, 963 F.3d at 999 (quoting *ReconTrust*, 858 F.3d at 573 n.5).

2. Plaintiff Has Not Adequately Alleged Defendant Violated the FDCPA

Plaintiff alleges Defendant violated the FDCPA by "by misstating the amount of Plaintiff's original loan and the amount that could legally be collected under the loan agreement, threatening to foreclose on Plaintiff's home pursuant to a Deed of Trust for a loan that has apparently been in longstanding default and attempting to collect amounts not permitted under the Deed of Trust." (FAC ¶ 43.) Specifically, Plaintiff alleges "the NOD overstate[d] the amount due because Defendants were not permitted to collect interest on this loan for over 14 years" and that Defendants "misstat[ed] the

[3] At the hearing, Defendant's counsel also stated that Defendant was under no obligation to extend "any type of loss mitigation or loan modification." As a result, the Court concludes that the loan modification offer was not an "antecedent step[] required under state law" that may be "deemed to fall under the umbrella of 'enforcement of a security interest.'" *Barnes*, 963 F.3d at 999 (internal quotation marks omitted).

amount owed because they considered the loan in default over 14 years ago but did not begin collection activities until now." (*Id.*)

As alleged in the FAC, it appears the NOD was an "action[] taken to facilitate a non-judicial foreclosure," *ReconTrust Co., NA*, 858 F.3d at 571. Plaintiff makes no arguments to the contrary. (*See generally* Opp'n.) As a result, allegations that Defendant violated the FDCPA arising from the NOD are not sufficient to state a claim.

With respect to the loan modification offer, Plaintiff alleges that it "unlawfully state[d] the Unpaid Principal Balance with unlawful accrued interest and late fees." (FAC ¶ 44.) Under the FDCPA, a debt collector may not make a "false representation" concerning "the character, amount, or legal status of any debt" or use "false representation or deceptive means to collect or attempt to collect any debt." 15 U.S.C. §§ 1692e(2)(A), (10). The FDCPA also prohibits "[t]he collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement." *Id.* § 1692f(1). Although the mortgage was subject to an interest rate of 10.4%, (FAC ¶ 12), Plaintiff claims that "Defendants were not permitted to collect interest on this loan for over 14 years," (*id.* ¶ 43), "because it charged accrued interest and late fees for a period in which the loan was charged-off," (Opp'n 13).

The Court agrees with Defendant that Plaintiff's argument is premised on "a misreading of 12 C.F.R. § 1026.41." (Mot. 10.) As stated above, § 1026.41 is the regulation promulgated under the TILA requiring servicers to send regular statements containing information about the status of the loan.[4] The obligation to send statements does not apply if the loan is "charged off." 12 C.F.R. § 1026.41(e)(6). Specifically, the regulation states that "[i]f a servicer fails at any time to treat a mortgage loan that is

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[4] Although the TILA and FDCPA are different statutes, violation of one could conceivably give rise to a cause of action under the other given they "reinforce each other, ensuring that consumers receive both regular and accurate information about their mortgage loan." *Lamirand v. Fay Servicing, LLC*, 38 F.4th 976, 980 (11th Cir. 2022).

exempt . . . as charged off or charges any additional fees or interest on the account, the obligation to provide a periodic statement pursuant to this section resumes." *Id.* § 1026.41(e)(6)(ii)(A).

Plaintiff argues that Defendant's failure to send regular statements shows it was treating the loan as charged off, and therefore could not have lawfully continued to charge interest during this period. (Opp'n 13.) However as written, § 1026.41(e)(6)(ii)(A) does not actually prohibit servicers from charging interest on charged off loans. Instead, it triggers the servicer's obligation to send monthly statement *if* they do charge interest. As Defendant persuasively argues, the "breach of an obligation to provide monthly statements does not somehow make the interest disallowed or unlawful." (Mot. 10.)

Plaintiff also unpersuasively argues that Defendant violated the FDCPA by "threatening to take action that cannot be legally taken." (FAC ¶ 42 (citing 15 U.S.C. § 1692e(5).) "Plaintiff alleges that Defendant SLS does not have a present right to collect under FDCPA," (Opp'n 13), because he was told by a third party that "the loan was forgiven and absorbed by the bankruptcy," (FAC ¶ 16 (internal quotation marks omitted)). Efforts to foreclose appear to encompass the exact kind of non-judicial foreclosure proceedings that are not subject to liability under the FDCPA. *See Obduskey*, 139 S. Ct. at 1038. What is more, even if a third party told Plaintiff that the loan had been forgiven, this is not sufficient to show "the loan was, in fact, forgiven." (Reply 5.) Finally, Plaintiff does not address Defendant's argument that "the *in rem* remedy rode through the bankruptcy unaffected" and "[t]hus, the deed of trust may still be foreclosed due to the default." (Mot. 9; *see generally* Opp'n.)

Although Plaintiff has adequately alleged that the loan modification offer rendered Defendant subject to the FDCPA, he has not alleged that Defendant's conduct actually violated the Act. As a result, Defendant's motion to dismiss Plaintiff's third cause of action is GRANTED.

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D. Plaintiff Abandoned His Claims Under 12 C.F.R. §§ 1024.39 and 1024.33

Plaintiff failed to respond to Defendant's arguments in his opposition and acknowledged at the hearing that he was abandoning his claims under 12 C.F.R. §§ 1026.39 and 1024.33. Consequently, Defendant's motion to dismiss Plaintiff's fourth and sixth cause of action is GRANTED.

E. Plaintiff Has Not Stated a Claim for Elder Abuse

A person may be liable for financial elder abuse if that person "[t]akes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both." Cal. Welf. & Inst. Code § 15610.30(1). As discussed above, Plaintiff has not adequately alleged that Defendants are unauthorized to foreclose on the property. Nor can the disclosure violations under the TILA or allegations that Defendant breached of its duty of good faith and fair dealing reasonably be interpreted as an attempt to take property. As a result, Defendant's motion to dismiss Plaintiff's seventh cause of action is GRANTED.

F. Plaintiff Has Stated a Claim for Unfair Competition

Plaintiff has adequately stated a claim for unfair competition. "California's unfair competition law (UCL) does not proscribe specific activities, but broadly prohibits any unlawful, unfair or fraudulent business act or practice." *Boschma v. Home Loan Ctr., Inc.*, 198 Cal. App. 4th 230, 251–52 (2011) (internal quotation marks omitted). "[A] practice is prohibited as 'unfair' or 'deceptive' even if not 'unlawful' and vice versa." *Id.* at 252. Violation of the TILA and breach of the covenant of good faith and fair dealing may give rise to liability under California's UCL. *See id.* at 254; *Pinel v. Aurora Loan Servs., LLC*, 814 F. Supp. 2d 930, 941–42 (N.D. Cal. 2011). Further, the Court sees no reason why the conduct described in the FAC would not be considered "unfair" or "deceptive" under California's UCL. *See Boschma*, 198 Cal. App. 4th at 252. As a result, Plaintiff has stated a claim for unfair competition, and Defendant's motion to dismiss the eighth cause of action is DENIED.

G. Plaintiff May Not Add a New Cause of Action in His Opposition Motion

In his opposition motion, Plaintiff states he "seeks a Motion to Amend to add a cause of action for a Violation of California Civil Code § 2954.5." (Opp'n 14.) Local Rule 6-1 requires that "every motion shall be presented by written notice of motion" which "shall be filed with the Clerk not later than twenty-eight (28) days before the date set for hearing." C.D. Cal R. 6-1. Plaintiff failed to comply with this requirement, and the request to amend the FAC is DENIED without prejudice.

IV. Conclusion

Defendant's motion is GRANTED in part and DENIED in part. Defendant's motion to dismiss Plaintiff's first, second, fifth, and eighth causes of action is DENIED. Defendant's motion to dismiss Plaintiff's third, fourth, sixth, and seventh causes of action is GRANTED.

Leave to amend a dismissed complaint should be freely granted unless it is clear the complaint could not be saved by any amendment. Fed. R. Civ. P. 15(a); *Manzarek v. St. Paul Fire & Marine Ins. Co*., 519 F.3d 1025, 1031 (9th Cir. 2008). The defects in the FAC appear readily curable. Given the Ninth Circuit policy of granting leave to amend with "extreme liberality," *Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 574 (9th Cir. 2020) (internal quotation marks omitted), Plaintiff's causes of action are dismissed with leave to amend.

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Plaintiff may file an amended complaint within 14 days—if he can do so consistent with Federal Rule of Civil Procedure 11(b) and this Order. **Plaintiff shall attach to the amended complaint a "redline" version showing all additions and deletions of material**. (Initial Standing Order § 13, ECF No. 7.) Failure to file a timely amended the complaint will waive the right to do so. Leave to add any new party or claims not included in the FAC must be sought by a separate properly noticed motion or by stipulation of the parties.

IT IS SO ORDERED.

Dated: September 13, 2023

Mark C. Scarsi

MARK C. SCARSI
UNITED STATES DISTRICT JUDGE