UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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JOHN SOKOLOSKI and GAIL SOKOLOSKI,

Plaintiffs,

v.

PNC MORTGAGE, a division of PNC BANK, NA and DOES 1 through 10, inclusive,

Defendant.

CIV. NO. 2:14-1374 WBS CKD

MEMORANDUM AND ORDER RE: MOTION TO DISMISS

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Plaintiffs John and Gail Sokoloski initiated this action in Yuba County Superior Court against defendant PNC Mortgage ("PNC"), bringing claims arising out of a disputed debt and the threatened foreclosure of their home. Presently before the court is PNC's motion to dismiss plaintiffs' First Amended Complaint ("FAC") for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

I. Factual and Procedural Background

Plaintiffs took out a loan secured by a deed of trust to purchase their home in Marysville, California. (FAC ¶¶ 1, 12.) Plaintiffs subsequently fell behind on their loan payments and filed for Chapter 13 bankruptcy in the Eastern District of California for the sole purpose of curing arrears on the loan. (Id. ¶ 14.)

In the bankruptcy proceedings, PNC, plaintiffs' creditor, asserted that plaintiffs owed a total balance of $4,601.27, which included $4,176.27 in arrears as well as $425 that had accrued in post-petition attorney's fees. (Id. ¶¶ 14-15.) The Chapter 13 plan called for sixty monthly payments in the amount of $1,707.00. (Id.) A portion of the monthly payment would cover a regular payment on the loan; the surplus would go toward paying off the arrears and fees. (Id. ¶ 16.)

Thereafter, plaintiffs began to make payments according to the plan. (Id.) In June 2013, PNC filed a "Notice of Mortgage Payment Change" in plaintiffs' bankruptcy, proposing a trial plan that would reduce plaintiffs' monthly loan payments from $1,410.05 to $554.20 per month. (Id. ¶¶ 17-18.) As a result, the bankruptcy trustee began paying the new monthly loan rate of $554.20 on July 1, 2013. Plaintiffs continued to make Chapter 13 plan payments in the amount of $1,707.00; however, plaintiffs allege that because the portion going toward the monthly loan payment was reduced under the modification, an even greater surplus went toward paying off the arrears, attorney's

fees, and administrative fees. (Id. ¶ 20.)[1] According to plaintiffs, because of this payment scheme, plaintiffs were able to pay off the $4,601.27 in arrears and fees earlier than previously anticipated, completing their Chapter 13 plan obligations. (Id.)

On January 30, 2014, staff counsel for the Chapter 13 bankruptcy executed a "Notice of Final Cure Payment" regarding plaintiffs' loan, which was sent to PNC. (Id. ¶ 21.) PNC failed to respond to this notice within the time prescribed by law or to make any objection to the trustee's final report and accounting. (Id.) Because plaintiffs had cured the arrears, the bankruptcy trustee instructed plaintiffs to start making regular payments on their loan directly to PNC beginning in January 2014. (Id.) Plaintiffs contacted PNC regarding the early termination of their bankruptcy and inquired how much they should pay monthly, now that their payments would go directly to the bank. (Id. ¶ 22.) PNC instructed plaintiffs to make monthly payments of their loan in the amount of $1,410.05 beginning in January 2014. (Id.) From January 2014 through April 2014, plaintiffs made regular monthly payments of $1,410.05 directly to PNC as instructed. (Id. ¶ 24.)

Although plaintiffs believed they were current on their payments and had paid of the arrears, on April 25, 2014, PNC informed plaintiffs that their loan was in default and was in the

[1] Plaintiffs do not specify how much of the $1,707 monthly payment went to the arrears and fees. However, it can reasonably be inferred that if the current monthly loan payments were in the amount of $554.20, the balance of $1,152.80 went toward the arrears, attorney's fees, and administrative fees.

foreclosure process. (Id. ¶ 25.) According to PNC, plaintiffs owed PNC $10,526.91 to bring their loan current, which included approximately $5,240.44 in foreclosure fees and costs. (Id. ¶ 26.) PNC told plaintiffs that the bankruptcy trustee had made a mistake by terminating the Chapter 13 plan. (Id. ¶ 29.) Plaintiffs spoke to the bankruptcy trustee, who nevertheless confirmed that their payments had been made according to the plan. (Id.)

PNC maintains its threats to foreclose on the property and that plaintiffs owe it $10,526.91 to bring the loan up to date. (Id. ¶ 30.) Plaintiffs allege this amount is a misrepresentation of how much they actually owe, because they are current on their payments and have paid off the arrears. (Id. ¶ 26.) Plaintiffs bring state law claims for negligence and breach of the implied covenant of good faith and fair dealing. They also seek statutory damages, attorney's fees, and costs under the Rosenthal Fair Debt Collection Practices Act, Cal. Civ. Code §§ 1788-1788.32, and to enjoin PNC from engaging in unfair business practices pursuant to California's Unfair Competition Law ("UCL"), Bus. & Prof. Code § 17200, et seq. PNC now moves to dismiss all of plaintiffs' claims pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. (Def.'s Mot. (Docket No. 17).)

II. Judicial Notice

In general, a court may not consider items outside the complaint when deciding a motion to dismiss, but it may consider items of which it can take judicial notice. Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir. 1994). PNC requests that the court

take judicial notice of several exhibits, including the solicitation letter PNC sent plaintiffs in May 2013 offering a downward modification of their loan payment plan to $554.20 per month. (Req. for Judicial Notice (Docket No. 14-2).) Plaintiffs had attached Ex. 1, along with other materials, in support of the complaint they filed in state court, but omitted it from their FAC. (Def.'s Mot. at 6.) PNC attempts to use Exhibit 1 as a basis for contradicting plaintiffs' allegations regarding PNC's offer to reduce plaintiffs' monthly payments to $554.20. (Id. at 7.) Plaintiffs did not respond to PNC's request for judicial notice.

Through the "incorporation by reference" doctrine, the court may "take into account documents . . . alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading . . . even though the plaintiff does not explicitly allege the contents of that document in the complaint." Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005) (quotation marks and citations omitted). Plaintiffs allege the bankruptcy trustee made full, timely payments on plaintiffs' current loan with PNC, in accordance with a modified monthly payment plan initiated by PNC. (FAC ¶¶ 17, 20.) Because plaintiffs' FAC "incorporates" the modification plan, the court will take judicial notice of Exhibit 1, the "Streamlined Modification Trial Plan Notice."

Second, the court will take judicial notice of Exhibit 2, the "Order to Close Chapter 13 Case Without Discharge," as well as other filings in the Chapter 13 bankruptcy proceeding, because they are matters of public record related to legal

proceedings in the district court. See Rose v. Beverly Health and Rehab. Servs., Inc., 356 B.R. 18, 22 (E.D. Cal. 2006) (Ishii, J.) (taking judicial notice of filings in bankruptcy proceedings although they were outside pleadings because they were public records (citing Duke Energy Trading & Marketing, L.L.C. v. Davis, 267 F.3d 1042, 1048 n.3 (9th Cir. 2001) (taking judicial notice of filings made in a related bankruptcy proceeding)).

III. Analysis

On a Rule 12(b)(6) motion to dismiss, the court must accept the allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Davis v. Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). To survive a motion to dismiss, a plaintiff must plead "only enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). This "plausibility standard," however, "asks for more than a sheer possibility that a defendant has acted unlawfully," and where a plaintiff pleads facts that are "merely consistent with a defendant's liability," it "stops short of the line between possibility and plausibility." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 557).

As a preliminary matter, PNC argues that "plaintiffs' omission from their FAC of how their Chapter 13 plan concluded is fatal to their claims because the bankruptcy was closed but never discharged." (Def.'s Mot. at 5.) According to PNC, plaintiffs were not permitted to rely on the terms of their Chapter 13 plan because they never obtained a formal discharge from bankruptcy

court. In support, PNC cites the Bankruptcy code, which states,

> [A]s soon as practicable after completion by the debtor of all payments under the plan . . . after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of certification . . . have been paid, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan . . . .

11 U.S.C. § 1328(a). Contrary to PNC's interpretation, nothing in this provision suggests that, absent a formal discharge, plaintiffs were not permitted to "rely on the terms of the plan," (Def.'s Mot. at 5-6), in alleging that they paid off the arrears. This passage merely states that a debtor's eligibility for a court-ordered discharge is predicated on "completion by the debtor of all payments under the plan." See Ellett v. Stanislaus, 506 F.3d 774, 777 (9th Cir. 2007) ("A debtor who completes payments under a Chapter 13 plan is entitled to a broad discharge of all debts provided for by the plan . . . ." (internal quotation marks omitted)). The provision does not suggest that a chapter 13 plan is not considered completed or satisfied unless the debtor gets a formal discharge.

Plaintiffs allege that they cured their arrears according to the terms of the plan, (FAC ¶ 19), and that thereafter the trustee served a Notice of Final Cure Payment on PNC, to which PNC failed to object, (id. ¶ 22). In the plaintiffs' bankruptcy proceeding, the bankruptcy court issued an order confirming the plaintiffs' payments were completed, adopting the trustee's finding that the "amount of unsecured

claims discharged without payment" was zero and "the case was completed on December 23, 2013." 2:12-bk-42019 (Bankr. E.D. Cal 2012) (Trustee's February 21, 2014 Final Report and Account (Docket No. 23); March 28, 2014 Order Approving Final Report and Discharging Trustee (Docket No. 27)). The Order to Close Chapter 13 Case Without Discharge indicates that the only reason plaintiffs failed to obtain a formal discharge was because they did not complete an instructional course concerning financial management, and not because their payments were not completed. 2:12-bk-42019 (Bankr. E.D. Cal 2012) (March 31, 2014 Order to Close Chapter 13 Case Without Discharge (Docket No. 28)). Plaintiffs' failure to obtain a formal discharge therefore does not contradict their allegations that they paid off their arrears pursuant to the chapter 13 plan.

Additionally, PNC does not address how the lack of a formal discharge is fatal to any of plaintiffs' claims. Plaintiffs' claims arise from PNC's misleading business practices and their violation of Bankruptcy Rule 3002.1. The court thus finds PNC's allegation regarding the absence of a Chapter 13 formal discharge inapposite.

A. Implied Covenant of Good Faith and Fair Dealing

"The law implies in every contract . . . a covenant of good faith and fair dealing. The implied promise requires each contracting party to refrain from doing anything to injure the right of the other to receive the agreement's benefits." Wilson v. 21st Century Ins. Co., 42 Cal. 4th 713, 720 (2007). Plaintiffs allege PNC entered into a contract with them for a loan secured by their property. (FAC ¶ 48.) According to

plaintiffs, they have substantially performed pursuant to that contract, (id. ¶ 49), having made timely payments of the full amount owed, (id. ¶¶ 16, 24). Despite fully paying off the arrears on their debt, (id. ¶ 20), in addition to keeping up with their payment, PNC diverted plaintiffs' payments that should have been applied to its loan balance to foreclosure fees and costs, (id. ¶ 45).

PNC disputes that plaintiffs paid off the arrears and argues that, for this reason, plaintiffs do not state a plausible claim for breach of the implied covenant of good faith and fair dealing. (Def.'s Reply at 4-5.) That is, because plaintiffs "continued to be in arrears when their debt was not discharged in bankruptcy," plaintiffs were in breach of contract and thus cannot state a plausible claim for a breach of the covenant of good faith and fair dealing. (Id.) On a motion to dismiss, however, the court must accept plaintiffs' allegations as true. See Scheuer, 416 U.S. at 236. The court must thus accept plaintiffs' allegations that their arrears were paid in full and that they had performed pursuant to their loan contract.

PNC points to Exhibit 1, the May 2013 letter judicially noticed by the court, to contradict plaintiffs' allegations that they fully paid off the arrears. (Def.'s Reply at 4-5.) While plaintiffs' allegations are taken as true and construed in the light most favorable to them, "[t]he court need not . . . accept as true allegations that contradict matters properly subject to judicial notice or by exhibit." Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). PNC contends that the May 2013 letter offering plaintiffs a reduced monthly payment

of $554.20 was in fact only an offer of a three-month trial plan. PNC asserts that after the three-month trial period had expired, plaintiffs continued to make the $554.20 monthly payment from October through December 2013. "Accordingly, the Bankruptcy Trustee was not paying what was actually owed on the loan for at least the last three months of 2013. Therefore, plaintiffs were still in arrears upon closing of the Chapter 13 plan even if all allegations in the complaint are taken as true." (Def.'s Mot. at 7.)

However, from the May 2013 letter, it is not at all clear that the reduced payment plan was really only meant to last three months. In fact, the letter makes the "trial period" sound like a prelude to a permanent modification. The letter states, "Based on a careful review of your mortgage account, we are offering you an opportunity to enter into a Trial Period Plan for a mortgage modification . . . ." (Req. for Judicial Notice Ex. 1, at 3.) The letter then tells plaintiffs to read all of the information "so that you completely understand the actions you need to take to successfully complete the Trial Period Plan to permanently modify your mortgage." (Id.) In reply to the frequently asked question, "When will I know if my loan can be modified permanently and how will the modified loan balance be determined?" the letter states,

> Once you make all of your trial period payments on time and return to us the required copies of a modification agreement with your signature, we will sign one copy and send it back to you so that you will have a fully executed modification agreement detailing the terms of the modified loan. Any difference between the amount of the trial period payments and your

> regular mortgage payments will be added to the balance of your loan along with any other past due amounts as permitted by your loan documents. While this will increase the total amount that you owe, it should not significantly change the amount of your modified mortgage payment."

(Req. for Judicial Notice Ex. 1 (emphasis added).) The language of the May 2013 is thus susceptible to a reading that PNC intended for the trial plan to transition into a permanent modification to plaintiffs' loan. Plaintiffs allege they made timely payments of the full amount due every month, $554.20, and would therefore be eligible for a permanent modification. The May 2013 letter therefore does not contradict plaintiffs' allegations that they made full, timely payments; that their loan is current and the arrears are fully paid; and that $10,526.91 is a misleading representation of the character, amount, or legal status of their debt. (FAC ¶¶ 26-27.)

Therefore, although the court takes judicial notice of the letter, at PNC's request, the court finds the letter does not assist PNC on its motion to dismiss. Plaintiffs plausibly allege that PNC injured their rights to receive the benefits of their loan contract by insisting that plaintiffs now owe $10,526.91 in arrears and fees despite plaintiffs' satisfaction of the arrears pursuant to their Chapter 13 plan. By alleging PNC deprived them of a fair accounting of their debt under the loan contract, plaintiffs assert a plausible claim for breach of the implied covenant of good faith and fair dealing. See Wilson, 42 Cal. 4th at 720.

B. California's Unfair Competition Law ("UCL")

The California UCL "provides an equitable means through which both public prosecutors and private individuals can bring suit to prevent unfair business practices and restore money or property to victims of these practices." Yanting Zhang v. Superior Court, 57 Cal. 4th 364, 370 (2013). The California Business & Professions Code defines "unfair competition" to include "any unlawful, unfair, or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. "'[The UCL] establishes three varieties of unfair competition--acts or practices which are unlawful, or unfair, or fraudulent.'" Cal-Tech Commc'ns, 24 Cal. 4th 163, 180 (1999) (quoting Podolsky v. First Healthcare Corp., 50 Cal. App. 4th 632, 647 (2d Dist. 1996)). "Each prong of the UCL is a separate and distinct theory of liability." Kearns v. Ford Motor Co., 567 F.3d 1120, 1127 (9th Cir. 2009). PNC argues there is no statutory violation or wrongful conduct upon which plaintiffs' UCL claim can be based. (Def.'s Mot. at 8.)

Plaintiffs attempt to premise their UCL claim on the fact that PNC "failed to file any response pursuant to FRBP 3002.1(g) to the final cure notice." (Pls.' Opp'n at 8; see FAC ¶ 21.) Rule 3002.1 requires that once a creditor is served with a notice of final cure payment," pursuant to 3002.1(f), a creditor

> shall serve on the debtor, debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the debtor is otherwise current on payments consistent with § 1322(b)(5) of the Code. The statement shall itemize the required cure or postpetition amounts, if

> any, that the holder contends remain unpaid as of the date of the statement.

Fed. R. Bankruptcy 3002.1(g). The bankruptcy trustee executed a "notice of final cure payment" pursuant to 3002.1(f), but PNC failed to reply, as required by the rule, to confirm or deny that plaintiffs paid in full their arrears and whether plaintiffs were otherwise current on all payments. (Id. ¶ 21.)[2] Plaintiffs allege this conduct caused their bankruptcy plan to close prematurely in such a way that misled and damaged them. (Id. ¶ 8.) In April 2014, PNC told plaintiffs their loan was in default, insisting that plaintiffs were not current on their loan payments and owed $10,526.91. (Id. ¶ 25.)

PNC cites two reasons why plaintiffs do not allege a plausible UCL claim premised on PNC's violation of U.S. Bankruptcy Code. PNC argues that plaintiffs "have not pointed to any violation by PNC of the Bankruptcy Code. Rather, they have merely argued that PNC did not timely object to the confirmed plan." (Def.'s Mot. at 8.) This is inaccurate, because plaintiffs specifically plead a violation of Bankruptcy Rule 3002.1, (FAC ¶ 41), which requires a timely response to the

[2] It should be noted that PNC had a duty not just to the plaintiff but to this court to comply with 3002.1. The purpose of 3002.1 was to assist with the administration of § 1322(b)(5), which provides for the curing of a default within a reasonable time and maintenance of payments while the case is pending. 11 U.S.C. § 1322(b)(5). "In order to be able to fulfill the obligations of § 1322(b)(5), a debtor and the trustee have to be informed of the exact amount needed to cure any prepetition arrearage . . . and the amount of the postpetition payment obligations." Fed. R. Bankr. P. 3002.1 advisory committee's note. A lender's failure to comply with the Rule has the potential to not only mislead or injure parties but also to interfere with bankruptcy procedure and the administration of justice.

confirmed plan.[3]

"By proscribing 'any unlawful' business act or practice, the UCL borrows rules set out in other laws and makes violations of those rules independently actionable." Yanting Zhang, 57 Cal. 4th at 370 (internal quotation marks and citation omitted). The "unlawful" prong of the UCL encompasses "anything that can properly be called a business practice and that at the same time is forbidden by law." Rubin v. Green, 4 Cal. 4th 1187, 1201 (1993) (quoting Barquis v. Merchs. Collection Ass'n, 7 Cal. 3d 94, 114 (1972)).

Rule 3002.1(g) provides that a creditor "shall serve" on the debtor and trustee a statement in response to the trustee's Notice of Final Cure payment. Another provision in Rule 30002.1 permits the bankruptcy court to impose sanctions for a lender's failure to comply with 3002.1(g), such as precluding the creditor from presenting any omitted information as evidence in any contested matter or adversary proceeding in the case, or to award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure. Fed. R. Bankr. P. 3002.1(i). In fact, where a residential mortgage is at issue, a debtor may be entitled to sanctions even after the case has closed:

> If, after the chapter 13 debtor has completed payments under the plan and the case has been closed, the holder of a claim secured by the debtor's principal

[3] Although the court in ruling on this motion accepts plaintiffs' allegation as true, the court also notes that the docket for plaintiffs' chapter 13 action confirms that PNC failed to respond to the trustee's Notice as required by 3002.1(g).

> residence seeks to recover amounts that should have been but were not disclosed under the rule, the debtor may move to have the case reopened in order to seek sanctions against the holder of the claim . . . .

Fed. R. Bankr. P. 3002.1 advisory committee's note. PNC is thus incorrect in their contention that their conduct was not unlawful. The Bankruptcy Code clearly required PNC to file a response to the Notice of Final Cure Payment, which PNC failed to do. PNC's violation of Rule 3002.1(g) may not only serve as a basis for a UCL claim, but also would have permitted plaintiffs to reopen their chapter 13 case to seek sanctions.

PNC also argues plaintiffs lack standing to bring a private cause of action under the UCL. (Def.'s Mot. at 8.) Standing to bring a private action under the UCL "is limited to any 'person who has suffered injury in fact and has lost money or property as a result of unfair competition.'" Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 321 (2011) (quoting § 17204). The purpose of this provision is "to confine standing to those actually injured by a defendant's business practices . . . ." Id. Plaintiffs allege they suffered loss because PNC misapplied plaintiffs' current loan balance payments to the alleged foreclosure fees and costs, increasing the overall loan balance and reducing the equity in the property. (FAC ¶ 45.) A loss of equity is within the scope of "lost money or property" contemplated by the California legislature. See Rufini v. CitiMortgage, Inc., 227 Cal. App. 4th 299, 310-311 (1st Dist. 2014) (holding that plaintiff's allegation that the lender deprived plaintiff of the opportunity to pursue other means of

avoiding foreclosure, leading to the loss of his home and the equity he had in it, was sufficient to constitute "lost money or property" under the UCL). Having sufficiently alleged injury, plaintiffs have standing to bring a UCL claim against PNC based on the bank's violation of the Bankruptcy Code.

C. Negligence

"The existence of a duty of care by a defendant to a plaintiff is a prerequisite to establishing a claim for negligence. Whether a legal duty exists in a given case is primarily a question of law." Nymark v. Heart Fed. Savings & Loan Ass'n, 231 Cal. App. 3d 1089, 1095 (3d Dist. 1991) (internal quotation marks and citations omitted).

"[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." Nymark, 231 Cal. App. 3d at 1096. But "Nymark and the cases cited therein do not purport to state a legal principle that a lender can never be held liable for negligence in its handling of a loan transaction within its conventional role as a lender of money." Jolley v. Chase Home Finance LLC, 213 Cal. App. 4th 872, 898 (1st Dist. 2013) (quoting Ottolini v. Bank of Am., Civ. No. 3:11-477 EMC, 2011 WL 3652501, at *6 (N.D. Cal. Aug. 19, 2011) (holding that where there was an ongoing dispute about the lender's performance of the loan contract, and where the lender made specific representations as to the likelihood of a loan modification, "a cause of action for negligence has been stated that cannot be properly resolved based on lack of duty alone").

Indeed, several courts have found the lender owed a debtor a duty of care where it offered the debtor a trial loan modification plan and then reneged, which appears to be similar to plaintiffs' allegations in this case. See Jolley, 213 Cal. App. 4th at 905 (citing Asanelli v. JP Morgan Chase Bank, N.A., Civ. No. 3:10-3892 WA, 2011 WL 1134451, at *8 (N.D. Cal. Mar. 28, 2011) (holding that where the defendant "went beyond its role as a silent lender and loan servicer to offer an opportunity to plaintiffs for loan modification and to engage with them concerning the trial plan," plaintiff's allegations constituted "sufficient active participation to create a duty of care to plaintiffs to support a claim for negligence"); Robinson v. Bank of Am., Civ. No. 5:12-494 RMW PSG, 2012 WL 1932842 (N.D. Cal. May 29, 2012) (finding a duty where the lender allegedly executed and breached the modification agreement, then engaged in a series of contradictory and somewhat misleading communications with plaintiff regarding the status of his loan)).

Here, similar to Asanelli and Robinson, plaintiffs allege that PNC offered them a loan modification and then reneged on March 12, 2014, well after plaintiff's obligations to make payments through the Chapter 13 plan had terminated. (FAC ¶ 23.) Because Jolley, Asanelli, and Robinson support finding that PNC owed plaintiffs a duty of care, the court rejects PNC's argument that it owed no such duty. Furthermore, plaintiffs sufficiently allege that PNC breached its duty by negligently filing payment changes in the plaintiffs' bankruptcy and by assessing erroneous fees and arrears. (Id. ¶ 55.)

D. Rosenthal Fair Debt Collection Practices Act

("RFDCPA")

The California legislature enacted the RFDCPA "to prohibit debt collectors from engaging in unfair or deceptive acts or practices in the collection of consumer debts and to require debtors to act fairly in entering into and honoring such debts . . . ." Cal. Civ. Code § 1788.1. The Act protects consumers from certain debt collection practices, including, inter alia, threats and unlawful conduct, § 1788.10; the use of obscene or profane language, § 1788.11; under certain circumstances, communications with the debtor's employer or family member other than a spouse, 1788.12; and misrepresentations in communications, § 1788.13.

PNC argues plaintiffs' RFDCPA claim fails as a matter of law because PNC is not a "debt collector" within the meaning of the statute. The RFDCPA defines "debt collector" as "any person who, in the ordinary course of business, regularly, on behalf of himself or herself or others, engages in debt collection." § 1788.2(c). Several district courts have held that the RFDCPA does not apply to lenders foreclosing on a mortgage. See Rosal v. First Fed. Bank of Cal., 671 F. Supp. 2d 1111, 1135 (N.D. Cal. 2009) ("[P]laintiff failed to plead that any defendant was 'collecting a debt' because foreclosing on a property pursuant to a deed of trust is not the collection of a debt within the meaning of the RFDCPA."); Ricon v. Recontrust Co., Civ No. 3:09-937 IEG JMA, 2009 WL 2407396, at *4 (S.D. Cal. Aug. 4, 2009) ("Plaintiff's Rosenthal Act claim fails because the Rosenthal Act does not apply to lenders foreclosing on a deed of trust."); Pittman v. Barclays Capital Real Estate, Inc., Civ. No.

3:09-241 JM AJB, 2009 WL 1108889, at *3 (S.D. Cal. Apr. 24, 2009) (holding plaintiff could not seek recovery under RFDCPA for the lender's alleged misrepresentations regarding whether it would foreclose "because a residential mortgage loan does not qualify as a 'debt' under the statute").[4]

However, where a plaintiff's claim "arises out of debt collection activities beyond the scope of the ordinary foreclosure process, a remedy may be available under the RFDCPA." Walters, 730 F. Supp. 2d at 1203 (holding the RFDCPA applied where "the gravamen of plaintiff's claim is that [the lender] engaged in a pattern of improper conduct in the course of servicing her loan, ultimately causing the wrongful foreclosure of the home"); see also Wilson v. Draper & Goldberg, P.L.L.C., 443 F.3d 373, 376 (4th Cir. 2006) (interpreting the Federal counterpart to the RFDCPA, noting that if the Federal Debt Collection Practices Act did not apply to loans secured by mortgages, that "would create an enormous loophole in the Act immunizing any debt from coverage if that debt happened to be secured by a real property interest and foreclosure proceedings

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[4] The statute defines "debt" as "money, property or their equivalent which is due or owning or alleged to be due or owing from a natural person to another person." § 1788.2(d). It defines "consumer debt," as "money, property or their equivalent, due or owing or alleged to be due or owing from a natural person to another person." § 1788.2(e). PNC argues separately that a residential mortgage loan is not a debt under the act. This is not truly a distinct argument, because the definition of "debt collector" incorporates the term "debt," and the cases holding that a lender foreclosing on a residential mortgage is not a "debt collector" do so on the basis that a residential mortgage is not a debt. See Ricon, 2009 WL 2407396, at *4 (holding a lender was not a debt collector based on the Act's definition of "consumer debts").

were used to collect the debt"). Like Walters, here plaintiffs' allegations arise from PNC's allegedly improper conduct in servicing their loan, outside of the foreclosure process, which ultimately led to the wrongful foreclosure of their property. (Id. ¶ 25.) PNC's "debt collection" would thus come under the purview of the RFDCPA.

PNC argues in the alternative that plaintiffs' RFDCPA claim fails because the FAC does not allege that PNC's conduct amounted to an unconscionable means to collect a debt. (Def.'s Mot. at 6.) The court agrees that plaintiffs offer no supporting factual allegations for such a conclusion regarding PNC's unconscionable debt collection practices. Moreover, plaintiffs allege PNC engaged in "multiple violations" of the RFDCPA, without further specifying which section of the Act.

Plaintiffs do plausibly allege that PNC's attempt to collect from plaintiff $10,526.91 is a "false or misleading representation of the character, amount or legal status of a debt." (FAC ¶ 26.) While the RFDCPA does not contain a provision prohibiting this conduct,[5] the RFDCPA incorporates by reference sections of the Fair Debt Collection Practices Act,[6]

[5] Section § 1788.13, "Misrepresentations in Communications," does not appear to address a "misleading representation of a debt."

[6] Cal. Civ. Code Section 1788.17 of the RFDCPA states that "every debt collector attempting to collect a consumer debt shall comply with the provisions of [FDCPA] Sections 1692b to 1692j . . . ." "Federal judicial interpretations of the FDCPA are incorporated into the Rosenthal Act by Civil Code § 1788.17 such that a plaintiff may state a claim for violation of the Rosenthal Act simply by showing that a defendant violated any of several provisions of the FDCPA." Masuda v. Citibank, N.A., Civ. No. 4:14-159 PJH, 2014 WL 1759580, at *2 (N.D. Cal. Apr. 29,

which prohibits "the false representation of the character, amount, or legal status of any debt." 15 U.S.C. § 1692e(2)(A). Because PNC insists plaintiffs are not current on their loan payments and continue to owe arrears, foreclosure fees and costs despite plaintiffs' timely monthly payments and PNC's failure to object to the Notice of Final Cure Payment issued by the bankruptcy trustee, the $10,526.91 can fairly be said to constitute a "false representation" of the "amount . . . of a debt." Therefore, plaintiffs have stated a claim under the RFDCPA as it incorporates § 1692e(2)(A) of the FDCPA.

IT IS THEREFORE ORDERED that defendant's motion to dismiss be, and the same hereby is, DENIED.

Dated: November 18, 2014

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

2014).