No.

In the Supreme Court of the United States

VIEN-PHUONG THI HO, PETITIONER

v.

RECONTRUST COMPANY, N.A., COUNTRYWIDE HOME LOANS, INC., AND BANK OF AMERICA, N.A.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents a clear and undeniable conflict regarding whether the Fair Debt Collection Practices Act (FDCPA) applies to entities engaged in foreclosure-related activities. In a sharply divided opinion below, the Ninth Circuit held that the FDCPA does not cover these activities. As both the majority and dissent recognized, that holding creates a direct split with multiple courts of appeals and two state supreme courts.

The question presented is:

Whether entities conducting foreclosure-related activities, including notifying borrowers that their homes will be sold unless payment is made, are subject to the FDCPA's general restrictions on "debt collectors."

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PETITION FOR A WRIT OF CERTIORARI

Vien-Phuong Thi Ho respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-43a) is reported at 858 F.3d 568. The opinion of the district court (App., *infra*, 44a-60a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 2016. A petition for rehearing was denied on May 22, 2017 (App., *infra*, 62a-63a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692-1692p, are reproduced in the appendix to this petition (App., *infra*, 64a-69a).

INTRODUCTION

This case presents an important and recurring question of statutory construction that has squarely divided the lower courts. According to the split panel below, the FDCPA's general definition of "debt collector" excludes entities engaging solely in "foreclosure-related activities," even if that activity involves sending written notices that include fundamental misrepresentations about the consumer's debt. App., *infra*, 5a, 14a. As the panel acknowledged, that holding creates a direct, undeniable conflict with the decisions of multiple courts of appeals and two state supreme courts. Unlike the Ninth Circuit, those courts have squarely held that *all* mortgage foreclosure is debt collection, including notices required by the foreclosure process.[1]

While the merits were hotly contested below, there is no dispute about the existence of this deep conflict. Both the majority and dissent admitted that this binary question of federal law has divided the circuits, and those courts have split after exhaustively considering the arguments underlying each side of the debate. The confusion

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[1] See, *e.g.*, *Glazer* v. *Chase Home Fin. LLC*, 704 F.3d 453 (6th Cir. 2013); *Wilson* v. *Draper & Goldberg, P.L.L.C.*, 443 F.3d 373 (4th Cir. 2006); *Piper* v. *Portnoff Law Assocs., Ltd.*, 396 F.3d 227 (3d Cir. 2005); *Alaska Trustee, LLC* v. *Ambridge*, 372 P.3d 207 (Alaska 2016); *Shapiro & Meinhold* v. *Zartman*, 823 P.2d 120 (Colo. 1992).

is extraordinary and entrenched: there are over a hundred lower-court decisions, multiple circuit-level decisions, and no hope of the dispute dissipating on its own.

And the importance of the issue is difficult to overstate. Mortgage debt comprises roughly two-thirds of household debt in the United States, totaling over $8 trillion, and tens of thousands of foreclosures are initiated every month.[2] In 2016 alone, nearly 400,000 homes were lost to foreclosure, including about 200,000 in non-judicial foreclosure States, and approximately 330,000 homes were in some stage of foreclosure at year's end.[3]

This critical threshold question determines whether homeowners may invoke the FDCPA's protections in this critical context. See, *e.g.*, Consumer Financial Protection Bureau, *Fair Debt Collection Practices Annual Report 2013* 27 (Mar. 20, 2013) (recognizing the importance of the issue and the "divi[sion] among the courts"). Yet after many dozens of decisions debating the question, the courts remain hopelessly deadlocked. This confusion will persist without this Court's involvement. Because this case presents an optimal vehicle for resolving this significant issue of federal law, the petition should be granted.

STATEMENT

1. Congress enacted the FDCPA "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged,

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[2] Federal Reserve Bank of New York, *Quarterly Report on Household Debt & Credit* (May 2017) ("About 91,000 individuals had a new foreclosure notation added to their credit reports between January 1 and March 31st").

[3] See http://www.corelogic.com/research/foreclosure-report/national-foreclosure-report-december-2016.pdf.

and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. 1692(e). It recognized that debt-collector abuse was "a widespread and serious national problem" whose "primary" cause was "the lack of meaningful legislation on the State level." S. Rep. No. 382, 95th Cong., 1st Sess. 2 (1977); see 15 U.S.C. 1692(b) ("Existing laws and procedures for redressing these injuries are inadequate to protect consumers."). The Act "imposes open-ended prohibitions" on debt collectors' conduct, accompanied by non-exhaustive lists of abusive collection practices. *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 587 (2010); cf. S. Rep. No. 95-382, at 4. The enumerated prohibitions target both aggressive, intimidating tactics (*e.g.*, violence and abusive language, 15 U.S.C. 1692d(1), (2)) and more subtle efforts to harm the debtor, like falsely representing the "character, amount, or legal status of the debt"; using "deceptive means to collect or attempt to collect any debt"; and collecting an amount that is not "expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. 1692e(2), (10), 1692f(1). A successful plaintiff may recover actual and statutory damages. 15 U.S.C. 1692k(a).

The Act circumscribes only the conduct of professional "debt collectors." It defines "debt" as an obligation of a consumer "to pay money" for "personal, family, or household purposes." 15 U.S.C. 1692a(5). Then a "debt collector" is generally an entity that collects, "directly or indirectly," a "debt" owed to "another": "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or as-

serted to be owed or due another." 15 U.S.C. 1692a(6). Entities meeting that definition are subject to the full panoply of FDCPA restrictions.

But the third sentence of Section 1692a(6) also contains a narrower definition of debt collector that must comply only with the restrictions of 15 U.S.C. 1692f(6). "For the purpose of section 1692f(6) of this title, [the term 'debt collector'] also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests." 15 U.S.C. 1692a(6); see 15 U.S.C. 1692f(6) (generally prohibiting "[t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property"). Section 1692a(6) also explicitly exempts certain entities who would otherwise be "debt collectors." As relevant here, it carves out any entity whose debt-collection activities are "incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement." 15 U.S.C. 1692a(6)(F)(i).

2. To finance a home purchase in California, petitioner executed a promissory note in Countrywide Bank's favor and secured that note with a deed of trust. App., *infra*, 2a. A deed of trust "is inseparable from the note it secures," and "typically has three parties: the trustor (borrower), the beneficiary (lender), and the trustee." *Yvanova* v. *New Century Mortg. Corp.*, 62 Cal. 4th 919, 926-927 (2016). The trustee is an agent for the borrower and the lender, but is not a fiduciary. *Id.* at 927. If the borrower defaults on the note, the trustee may conduct a non-judicial foreclosure sale if—but only if—the lender so instructs. *Id.* at 927-928. The object of the non-judicial foreclosure system is "to provide the lender-beneficiary with an inexpensive and efficient remedy against a defaulting borrower, while protecting the borrower from wrongful loss of the property

and ensuring that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser." *Id.* at 926.

In California, the non-judicial foreclosure process has three steps: first, the trustee records a notice of default and election to sell; second, the trustee publishes and records a notice of sale; and finally, if the borrower has not exercised "her rights of reinstatement or redemption," the property is auctioned off. *Id.* at 927. A successful sale "extinguishes the borrower's debt." *Ibid.* The lender may not seek a deficiency against the borrower. *Ibid.*

Here Countrywide was the lender, petitioner was the borrower, and respondent ReconTrust was the trustee. App., *infra*, 2a. Respondent began the foreclosure process after petitioner began missing payments on the note. *Ibid.* Respondent first sent a notice of default and election to sell, which advised petitioner that "you may have the legal right to bring your account in good standing by paying" $22,782.68. *Id.* at 71a. The notice also stated that, on written request, "the beneficiary or mortgagee will give you a written itemization of the entire amount *you must pay*." *Ibid.* (emphasis added). It explained that "[y]ou may not have to pay the entire unpaid portion of your account, *even though full payment was demanded*, but *you must pay all amounts in default* at the time payment is made." *Ibid.* (emphases added). It told petitioner how "[t]o find out the amount you must pay, or to arrange for payment to stop the foreclosure." *Id.* at 72a. The notice concluded by stating that the beneficiary of petitioner's deed of trust (*i.e.*, the lender) "hereby declare[s] *all sums secured thereby immediately due and payable* and has elected and does hereby elect to cause the trust property to be sold to satisfy the obligations secured thereby." *Id.* at 74a.

After petitioner did not pay, respondent sent a notice of trustee's sale. This told petitioner that, "unless you take

action to protect your property, it may be sold at a public sale" on August 28, 2009, and provided the total "unpaid balance" as $592,419.88. App., *infra*, 75a-76a. The notice stated that respondent "is a debt collector attempting to collect a debt." *Id.* at 77a This did spur petitioner to act. The loan servicer approved a loan modification agreement contingent on petitioner paying $12,000. *Id.* at 3a, 26a.

3. a. Petitioner sued respondent for violating the FDCPA and asserted several other claims against respondent and other respondents not at issue here. She alleged that respondent's notices misrepresented the amount of debt she owed, and that the defendants "intimidat[ed] and harass[ed]" her by trespassing on her property, "banging on doors," and "posting false notices to let tenants on the premises know that" she was in default. App., *infra*, 3a, 33a. The district court dismissed her FDCPA claim, thinking that all the defendants were only "collecting in their own name" and that "mortgage lenders and servicers simply" are not subject to the FDCPA. *Id.* at 52a-53a. The court refused leave to amend.[4]

b. In a divided opinion that was amended after denial of a rehearing petition, the Ninth Circuit affirmed the dismissal of petitioner's FDCPA claim. App., *infra*, 1a-16a. Writing for the majority, Judge Kozinski acknowledged

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[4] The district court allowed leave to amend on other dismissed claims. Petitioner thus filed amended complaints, and also later moved for reconsideration of the FDCPA dismissal. When the court finally dismissed all claims, it found her motion for reconsideration moot. App., *infra*, 61a. The allegations about intimidation and harassment quoted by Judge Korman were in an amended complaint, but petitioner would have supplemented her FDCPA claim with those allegations had the district court not misinterpreted the scope of the FDCPA's applicability. In any event, the legal question presented here is identical under either set of facts.

that the "circuits [have] divide[d] as to whether foreclosure-related activities constitute debt collection" (*id.* at 14a), but offered four broad reasons for holding that the FDCPA did not apply to respondent.[5]

First, the majority argued that a non-judicial foreclosure does not attempt to collect a "debt." App., *infra*, 4a-6a. "[T]he word 'debt' is synonymous with money," yet a non-judicial foreclosure does not produce a deficiency judgment against the borrower; it aims only "to retake and resell the security, not to collect money from the borrower." *Id.* at 4a, 6a. Although foreclosure might "induce[]" the borrower "to pay off a debt," "that inducement exists by virtue of the lien, regardless of whether foreclosure proceedings actually commence." *Id.* at 5a, 10a. Likewise, respondent's notices merely "facilitat[ed]" the foreclosure, so they also cannot be debt collection. *Id.* at 5a.

The majority's understanding of the statute and non-judicial foreclosures "affirm[ed] the leading case of *Hulse v. Ocwen Federal Bank*, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002), which held that 'foreclosing on a trust deed is an entirely different path' than 'collecting funds from a debtor.'" App., *infra*, 5a. The panel acknowledged that the Fourth and Sixth Circuits "have declined to follow *Hulse*." *Id.* at 5a-6a (citing *Glazer*, 704 F.3d at 461; *Wilson*, 443 F.3d at 378-379). But, according to the court, "neither case concerned the nuances of California foreclosure law, and we find neither case persuasive here." *Id.* at 6a. The panel did not explain which "nuances of California foreclosure law" were material. Instead, it argued that the Fourth Circuit eschewed the FDCPA's text to close "what it viewed as a 'loophole in the Act.'" *Ibid.* (quoting *Wilson*, 443 F.3d at 376). The panel also disagreed with the Sixth

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[5] See App., *infra*, 14a & n.11 (citing decisions from the Third, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits).

Circuit's "premise that 'the ultimate purpose of foreclosure is the payment of money,'" because a foreclosure sale "collects money from the home's purchaser, not from the original borrower." *Ibid.* (quoting *Glazer*, 704 F.3d at 463).

Second, the panel reasoned that its interpretation of the general definition of "debt collector" was supported by Section 1692a(6)'s "narrower definition of 'debt collector'"—an entity "whose principal business purpose is 'the enforcement of security interests.'" *Id.* at 6a-7a. The panel reasoned that "[t]his provision would be superfluous if all entities that enforce security interests were already included in the definition of debt collector for purposes of the entire FDCPA." *Id.* at 7a. As such, "[t]he most plausible reading of the statute is that the foreclosure notices" fit only that narrower definition. *Id.* at 6a. The court thus "view[ed] all of [respondent's] activities as falling under the umbrella of 'enforcement of a security interest.'" *Id.* at 8a. After all, wrote the court, the notices were necessary prerequisites to execute the foreclosure sale. *Ibid.*

Although the court acknowledged that an entity could fit the broader definition of "debt collector" if it "did something *in addition* to the actions required to enforce a security interest," the court maintained that respondent's notices "didn't request payment from" petitioner but were merely part and parcel of the foreclosure process—respondent "could not conduct the trustee's sale until it sent the notice of default and the notice of sale." App., *infra*, 8a & n.5.

Here the majority again "diverge[d]" from *Wilson* and *Glazer*. App., *infra*, 8a. It stated that the Sixth Circuit "rejected this view" on the logic that the security-enforcement definition governs repossessors who need not communicate with the debtor. The majority found "this distinction unpersuasive" because even "repossessors will

communicate with debtors." *Id.* at 8a-9a. And the panel again declared that it was irrelevant that the notices may have "pressured [petitioner] to send money to Countrywide," for if that pressure "transform[ed] the enforcement of security interests into debt collection," it "would render meaningless the FDCPA's carefully drawn distinction between debt collectors and enforcers of security interests." *Id.* at 10a.

Third, in a cursory argument added on rehearing, the panel offered another reason that respondent was not a "debt collector": even if respondent might otherwise meet that definition, it fit into the exemption for "an entity whose activities are 'incidental to * * * a bona fide escrow arrangement.'" App., *infra*, 11a (quoting 15 U.S.C. 1692a(6)(F)) (alteration in original). This is the entirety of the majority's reasoning:

> A California mortgage trustee—which holds legal title on behalf of the borrower and lender—functions as an escrow. Even if ReconTrust's activities could be characterized as collection, they are "incidental to" the escrow arrangement because they are for the sole benefit of the lender. *See Rowe* v. *Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1034–35 (9th Cir. 2009) (construing "incidental to").

App., *infra*, 11a. The court did not cite any authority supporting its conclusions that a trustee is effectively an escrow and that foreclosure activities are merely incidental to the arrangement with a lender. (*Rowe* did not address foreclosure activities or escrows. It held that "[t]he 'incidental to' requirement means that the collection activity must not be 'central to' the fiduciary relationship." 559 F.3d at 1034.)

Finally, the majority confirmed its interpretation of "debt collector" with concerns that subjecting foreclosure-related activities to the FDCPA "would frustrate

[trustees'] ability to comply with the California statutes governing non-judicial foreclosure." App., *infra*, 11a. It offered a small handful of duties that it thought would conflict with the FDCPA's restrictions, and thus declined "to construe federal law in a manner that interferes with California's system for conducting non-judicial foreclosures." *Id.* at 11a-15a.

c. In a lengthy dissent, Judge Korman systematically responded to each of the majority's points, and concluded that "the only reasonable reading [of the FDCPA] is that a trustee pursuing a nonjudicial foreclosure proceeding is a debt collector," for foreclosure is "intended to obtain money by forcing the sale of the property being foreclosed upon." App., *infra*, 17a (citing decisions from the Third, Fourth, and Sixth Circuits, and the Alaska Supreme Court and Colorado Supreme Court).

First, the dissent explained that non-judicial foreclosure does seek to collect money from a consumer "in one of two alternative ways." App., *infra*, 23a. First, the foreclosure sale "*indirectly*" collects money by raising funds through "the elimination of the debtor's interest and equity in the property." *Id.* at 23a-24a. Second, money is also collected "*directly*" through the notices, which "may prompt" or "scare" the borrower into paying to prevent foreclosure. *Id.* at 24a. The dissent quoted parts of respondent's notices that told petitioner she could avoid foreclosure "by paying all of [her] past due payments" and said that respondent "is a debt collector attempting to collect a debt." *Id.* at 25a. Although the majority contended that respondent's self-identification as a debt collector does not make it so, the dissent countered that a borrower "cannot safely disregard it on that basis." *Ibid.* (citing decisions from the Second, Third, and Eleventh Circuits). Indeed, given the loan modification agreement conditioned on petitioner paying $12,000, "[t]he majority does

not, and cannot, deny the effect of the language in the notices sent to" petitioner, nor does the majority "even address the language of section 1692a(6) that defines 'debt collector' as one who attempts to collect 'indirectly' debts owed to another." *Id.* at 26a.

Second, the dissent addressed the majority's reliance on Section 1692a(6)'s narrow inclusion of security enforcers. The dissent explained that because respondent fits the general definition of debt collector, "it is irrelevant that" its activities "may have also constituted the enforcement of a security interest." App., *infra*, 27a. Moreover, nothing in the language of Section 1692a(6) suggests that the narrower definition represents an exclusion from the general definition, particularly where Section 1692a(6)(A)-(F) identifies six explicit exceptions. *Ibid.*

Nor was the majority correct that petitioner's interpretation renders the security-enforcer definition superfluous. App., *infra*, 28a-29a. The dissent explained that "[n]ot all entities that engage in the enforcement of security interests do so in the same way," so the restrictions in Section 1692f(6) cover those "entities that enforce security interests yet who do not typically engage in activity that would" meet the general definition of "debt collector." *Ibid.* This more limited definition—encompassing "dispossession or disablement of property"—chiefly pertains to personal property. *Id.* at 29a.

The dissent also argued that the FDCPA's venue clause confirms that foreclosure satisfies the general "debt collection" definition: "Any debt collector" suing "to enforce an interest in real property securing the consumer's obligation" must sue "only in a judicial district" where "such real property is located." 15 U.S.C. 1692i(a)(1). See App., *infra*, 30a. Congress thus "understood that a mortgage foreclosure proceeding * * * constitutes debt collection." *Ibid.* The majority responded that

this venue clause "offers no indication that an entity is a debt collector *because* it enforces a security interest." *Id.* at 7a n.4.

Regarding the majority's contention that respondent's notices do not constitute debt collection because they are part of the foreclosure process, the dissent asserted that the majority's argument "is another way of saying that California may override the protections afforded by the FDCPA by prescribing the steps necessary to commence a foreclosure proceeding, even if those steps would otherwise qualify ReconTrust as a debt collector." App., *infra*, 32a. What's more, California did not "script" respondent's notices or conduct—petitioner alleged that respondent misrepresented the amount of her debt and engaged in more "'intimidat[ing]'" and "'harass[ing]'" conduct like trespassing on petitioner's property and "'banging on doors in a gangster type fashion.'" *Id.* at 33a-34a. That California requires certain notices to proceed with a nonjudicial foreclosure does "not relieve the trustee from complying with the FDCPA." *Id.* at 34a.

Third, the dissent turned to the FDCPA's exception for activities "incidental to" an escrow arrangement. It explained that the Fourth Circuit in *Wilson* squarely rejected the majority's interpretation of "incidental": "a trustee's actions to foreclose on a property pursuant to a deed of trust are not 'incidental' to its fiduciary obligation. Rather, they are central to it." 443 F.3d at 377; see App., *infra*, 35a. Although *Wilson* addressed a "bona fide fiduciary," not an escrow, the word "incidental" must mean the same thing for both groups, and the Fourth Circuit's analysis "applies with equal force to escrow agents." App., *infra*, 35a-36a. Indeed, the whole point of a deed of trust "is to facilitate the collection of a debt" by providing a "'more efficient and less costly'" alternative to judicial foreclosure. *Id.* at 36a (quoting Jesse Dukeminier &

James E. Krier, *Property* 590-591 (2d ed. 1988)). Non-judicial foreclosure is thus not remotely "'incidental to' a deed of trust.'" *Ibid.*

Finally, the dissent contended that the majority's concerns about interfering with California's non-judicial foreclosure scheme were overblown. The dissent pointed out that three circuits covering twelve states and two other state supreme courts have already held that the FDCPA covers foreclosure activities, yet neither respondent nor its *amici* "provided any evidence that these holdings have had any effect" on these states' foreclosure laws. App., *infra*, 37a-38a.

And the specific purported conflicts identified by the majority are illusory. App., *infra*, 38a-39a. Although the FDCPA prohibits, absent the debtor's consent, communicating with third parties and directly with the debtor if the debt collector knows that the debtor has an attorney, the dissent explained that the borrower in a deed-of-trust arrangement provides the required consent when she signs the deed—the deed expressly permits these types of communications. *Id.* at 39a-40a. And as to the problem that, to comply with both California law and the FDCPA, the debt collector would have only 10 days to verify the debt when a "consumer disputes his debt as soon as it is recorded," (*id.* at 12a), the dissent discussed how a debt collector can easily meet the low threshold for debt verification in that timeframe. *Id.* at 40a-41a. A sensible interpretation of the FDCPA and California law thus shows "how readily the California foreclosure system can function alongside the FDCPA." *Id.* at 38a.

In any event, the dissent explained, even were there some actual conflict between the FDCPA and state foreclosure laws, the FDCPA expressly preempts inconsistent state laws ("and then only to the extent of the in-

consistency"), 15 U.S.C. 1692n, precisely "to promote consistent State action to protect consumers against debt collection abuses," 15 U.S.C. 1692(e), not to allow states to "undermin[e] the minimum national standards that Congress has adopted." App., *infra*, 20a, 41a. Moreover, the FDCPA also provides recourse for any truly problematic preemption: Section 1692o empowers the CFPB to exempt "any class of debt collection practices within any State" if those practices are "subject to requirements substantially similar to those imposed by this subchapter," and "there is adequate provision for enforcement." *Id.* at 42a. That procedure should be used before "adopt[ing] an unnatural reading of the term 'debt collector.'" *Ibid.*

d. Petitioner sought rehearing, which was denied but prompted an amended opinion and dissent. App., *infra*, 62a-63a. The denial forbade petitioner from further seeking rehearing, despite the majority's inclusion of new a ground for its decision. *Id.* at 63a.

REASONS FOR GRANTING THE PETITION

A. There Is A Clear And Intractable Conflict Regarding Whether The FDCPA Covers Foreclosure-Related Activities

As the Ninth Circuit readily admits, the "circuits" are "divide[d] as to whether foreclosure-related activities constitute debt collection" under the FDCPA. App., *infra*, 14a. The court canvassed the dominant position adopted by multiple courts of appeals and highest state courts, but it deliberately went the opposite way. In doing so, the court created a deep and acknowledged conflict (App., *infra*, 14a & n.11), and it "reach[ed] a result that has been rejected by every circuit that has decided the issue in a published opinion" (*id.* at 19a (Korman, D.J., dissenting)). This straightforward, entrenched split warrants the Court's immediate review.

1. According to the panel, "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." App., *infra*, 5a. That holding creates a direct and undeniable conflict with multiple jurisdictions. Under settled law in the Third, Fourth, and Sixth Circuits, and the state supreme courts of Colorado and Alaska, "all 'mortgage foreclosure is debt collection' for the purposes of the FDCPA." *Id.* at 14a & n.11 (quoting *Glazer*, 704 F.3d at 461, and citing *Wilson*, 443 F.3d at 378-379, and *Piper*, 396 F.3d at 235-236); see also *Ambridge*, 372 P.3d at 222; *Shapiro*, 823 P.2d at 123-124. Unlike the holding below, that includes notices sent in conjunction with the foreclosure process, and it applies irrespective of whether the trustee pursues a deficiency judgment. See *Glazer*, 704 F.3d at 462 ("*any* type of mortgage foreclosure action, even one not seeking a money judgment on the unpaid debt, is debt collection under the Act"); *Wilson*, 443 F.3d at 376 (rejecting defendants' argument "that foreclosure by a trustee under a deed of trust is not the enforcement of an obligation to pay money or a 'debt,' but is a termination of the debtor's equity of redemption relating to the debtor's property"); *Piper*, 396 F.3d at 236 (holding that an entity pursuing a foreclosure may not "'avoid liability under the FDCPA simply by choosing to proceed *in rem* rather than *in personam*"); *Ambridge*, 372 P.3d at 213 ("we join those courts holding that mortgage foreclosure, whether judicial or nonjudicial, is debt collection covered by the Act."); *Shapiro*, 823 P.2d at 121 (holding that "attorneys who sought to enforce a power of sale contained in a deed of trust securing a note" are "debt collectors").

Under established law in these jurisdictions, the pursuit of foreclosure activities qualifies as "debt collection" under the Act. Petitioner thus would have prevailed had

this case arisen in Michigan, Maryland, Pennsylvania, or Alaska, but lost due to the happenstance that her suit arose in California. The conflict is both unambiguous and untenable, and it should be resolved by this Court.

a. The decision below is directly at odds with the law in the Fourth Circuit, which holds that trustees on a deed of trust "acting in connection with a foreclosure can be 'debt collectors.'" *Wilson*, 443 F.3d at 375; accord *McCray* v. *Fed. Home Loan Mortg. Corp.*, 839 F.3d 354, 361 (4th Cir. 2016). In *Wilson*, as here, the trustees of a deed of trust initiated foreclosure proceedings after the borrower failed to make payments, and sent her multiple letters pertaining to the foreclosure, including one that "provid[ed] the 'amount to reinstate the above account,' a balance of payments due, and instructions" on how to pay. 443 F.3d at 374-375.

The court first concluded that the trustees attempted to collect a "debt," explaining that payments on a home loan plainly meet Section 1692a(5)'s definition, and the trustees tried to collect those payments by telling the plaintiff "that her failure to make mortgage payments entitled [the lender] to immediate payment on the balance of her loan." *Id.* at 376-377.

Like the Ninth Circuit, the trustees quoted *Hulse* to argue that "'foreclosing on a deed of trust is an entirely different path [than collecting funds from a debtor]. Payment of funds is not the object of the foreclosure action. Rather, the lender is foreclosing its interest in the property.'" *Id.* at 376 (quoting *Hulse*, 195 F. Supp. 2d at 1204) (alteration in original). The Fourth Circuit "disagree[d]." *Ibid.* The foreclosure proceedings did not affect the character of the plaintiff's obligation, which "remained a 'debt.'" *Ibid.* And the fact that the trustee was "us[ing] foreclosure instead of other methods" to collect the debt did not justify creating "an exception to the Act." *Ibid.*

(citing *Piper*, 396 F.3d at 236). Indeed, as the court explained, doing so "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 were used." *Ibid.*

The Fourth Circuit also dismissed the trustee's reliance on Section 1692a(6)'s specific definition for security enforcers. The court explained that this provision applies to entities like repossessors, "whose *only* role in the debt collection process is the enforcement of a security interest." *Id.* at 378. It therefore "does not exclude those who enforce security interests but who also fall under the general definition." *Ibid.* (citing *Piper*, 396 F.3d at 236).

b. The Sixth Circuit followed *Wilson* in holding that the FDCPA applied to a law firm hired to foreclose on the plaintiff's property. *Glazer*, 704 F.3d at 459; see *Mellentine* v. *AmeriQuest Mortg. Co.*, 515 F. App'x 419, 423 (6th Cir. 2013). *Glazer* began by acknowledging *Hulse*'s view that foreclosure is not debt collection if no money judgment is sought against the borrower. *Id.* at 460 (citing *Hulse*, 195 F. Supp. 2d at 1204; *Rosado* v. *Taylor*, 324 F. Supp. 2d 917, 924 (N.D. Ind. 2004)). But "[d]espite its pervasiveness in the district courts," the Sixth Circuit found "this approach unpersuasive." *Ibid.*

Contrary to the Ninth Circuit, the court had little trouble concluding that foreclosure constitutes an attempt to collect a "debt": "There can be no serious doubt that the ultimate purpose of foreclosure is the payment of money." *Id.* at 463. That is because "*every* mortgage foreclosure, judicial or otherwise, is undertaken for the very purpose of obtaining payment on the underlying debt, either by persuasion (*i.e.*, forcing a settlement) or compulsion (*i.e.*, obtaining a judgment of foreclosure, selling the home at auction, and applying the proceeds from the sale to pay down the outstanding debt)." *Id.* at 461. Accordingly, even

a foreclosure action "not seeking a money judgment on the unpaid debt[] is debt collection under the Act." *Id.* at 462; see *id.* at 463 ("disagree[ing]" with *Hulse*'s conclusion that "'payment of funds is not the object of the foreclosure action'").[6]

The Sixth Circuit also disagreed that its interpretation would render the third sentence of Section 1692a(6) surplusage. *Id.* at 463-464 (citing *Wilson*, 443 F.3d at 378, *Piper*, 396 F.3d at 236, and *Shapiro*, 823 P.2d at 124). That sentence "operates to *include* certain persons under the Act (though for a limited purpose); it does not *exclude* from the Act's coverage a method commonly used to collect a debt." *Id.* at 463. This narrower definition concerns "the business of repossessors." *Id.* at 464; see *ibid.* ("Indeed, all of the cases we found where §§ 1692f(6) and 1692a(6)'s third sentence were held applicable involved *repossessors*."); see also *id.* at 462 (explaining that the FDCPA's venue provision Section 1692i(a)(1) "suggests that filing *any* type of mortgage foreclosure action, even one not seeking a money judgment on the unpaid debt, is debt collection under the Act").[7]

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[6] Although not pertinent to the court's categorical analysis, the firm emphasized that, like respondent here, it did not seek a deficiency judgment. See Br. of Defendants-Appellees Reimer, Arnovitz, Chernek & Jeffrey Co., L.P.A. at 28 n.5, 39, *Glazer* v. *Chase Home Finance LLC*, No. 10-3416 (6th Cir. Nov. 1, 2010).

[7] The Ninth Circuit acknowledged that its decision "diverge[s]" from *Wilson* and *Glazer*, which the panel found "[un]persuasive." App., *infra*, 5a-6a, 8a. Although the panel also noted its sister circuits did not confront "the nuances of California foreclosure law" (*id.* at 6a), the panel never identified any "nuance" that could conceivably make any difference. For example, that California does not permit deficiency judgments (*id.* at 4a) cannot distinguish those decisions, because no deficiency judgment was sought in either case—and, indeed, both courts made clear they rejected that reasoning in any event. Nor

c. Also directly contrary to the Ninth Circuit, the Third Circuit has held that "foreclosure-related activities constitute debt collection," even when a deficiency judgment is not sought against a borrower. App., *infra*, 14a n.11 (citing *Piper*, 396 F.3d at 235-236); see *Kaymark* v. *Bank of Am., N.A.*, 783 F.3d 168, 179 (3d Cir. 2015) (relying on *Wilson*, *Glazer*, and *Piper* to conclude that mortgage "foreclosure meets the broad definition of 'debt collection' under the FDCPA").[8]

Piper involved an *in rem* foreclosure to enforce a lien that arose due to unpaid water and sewer obligations. 396 F.3d at 229. The Third Circuit readily concluded that the defendants engaged in debt collection through demanding payment pursuant to enforcing the lien. *Id.* at 233-234. Like *Wilson* and *Glazer*, *Piper* found it immaterial that the defendant sought "to execute on the municipal lien rather than proceed *in personam* against the individuals." *Id.* at 231; see *id.* at 234 (communications "in the context of *in rem* litigation" remain debt collection). And for the same reasons as the Fourth and Sixth Circuits, the court rejected the defendants' reliance on Section 1692a(6)'s

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could it matter that respondent complied with California law (*id.* at 8a & n.5), because nothing in *Wilson* or *Glazer* suggested those defendants failed to comply with their respective States' laws—and, regardless, California surely did not require respondent below to "misrepresent[] the amount of debt [petitioner] owed" (*id.* at 3a). The true and obvious reason for the "divergence" is that the panel's holding—that "foreclosure-related activities" are *not* covered (*id.* at 14a)—is directly at odds with the contrary holding in other circuits, where "all 'mortgage foreclosure'" activities *are* covered. The panel was accordingly correct that the "circuits" are indeed "divide[d]" over this important issue. *Id.* at 14a.

[8] "Mortgage foreclosure in Pennsylvania is strictly an *in rem* or '*de terris*' proceeding. Its purpose is solely to effect a judicial sale of the mortgaged property." *Nicholas* v. *Hofmann*, 158 A.3d 675, 696 (Pa. Super. Ct. 2017).

narrow definition of security enforcers: "It is cast in terms of *inclusion*" and "make[s] clear that some persons who would be without the scope of the general definition are to be included where § 1692f(6) is concerned." *Id.* at 236.

The Third Circuit also dismissed the defendants' contention that the FDCPA does not apply because their efforts to "enforce [the] lien [were] in the manner dictated by state law." *Id.* at 234; see *id.* at 234-235. That rationale is again directly at odds with the core reasoning below. Compare App., *infra*, 8a-9a ("[t]he right to 'enforce' the security interest necessarily implies the right to send the required notices"; "[w]hen these communications are limited to the foreclosure process, they do not transform foreclosure into debt collection").

d. The Ninth Circuit's decision also created an intra-regional conflict with the Alaska Supreme Court, which reached the opposite conclusion on materially identical facts—a non-judicial foreclosure by a trustee on a deed of trust. See *Ambridge*, 372 P.3d at 213 (affirming "that an entity pursuing non-judicial foreclosure is a debt collector subject to the FDCPA"). The Alaska Supreme Court's comprehensive opinion acknowledged the "split" of authority on the issue, and "join[ed] those courts holding that mortgage foreclosure, whether judicial or nonjudicial, is debt collection covered by the Act." *Id.* at 212-213 & nn.14-15; contrast *id.* at 227-234 (Winfree, J., dissenting) (rejecting, *e.g.*, *Glazer*, in reaching the same conclusion as the Ninth Circuit).

Beginning with "the Act's broad language" defining "debt" and "debt collector," the court found *Wilson* and *Glazer* persuasive: "foreclosing on property, selling it, and applying the proceeds to the underlying indebtedness constitute one way of collecting a debt—if not directly at least indirectly." 372 P.3d at 213-216; see *id.* at 216 ("Whether through reinstatement or less directly through

foreclosure sale and recovery of the proceeds, '[t]here can be no serious doubt that the ultimate purpose of [this] foreclosure is the payment of money.'") (quoting *Glazer*, 704 F.3d at 463) (alterations in original). That conclusion was supported by the trustee's notices, which made clear that "the debtor can avoid the threatened [foreclosure] action only by paying the debt." *Id.* at 218.

The court, unlike the Ninth Circuit, rejected "the reasoning of" *Hulse* that "'[p]ayment of funds is not the object of the foreclosure action.'" *Id.* at 216 (citation omitted). On the contrary, "the real nature of a home mortgage foreclosure" is debt collection. *Id.* at 217. Moreover, the court reasoned, homeowners may "be particularly susceptible to abusive collection practices" because foreclosure on the home "is likely to be a devastating prospect." *Ibid.* And, again, "a reasonable consumer *would* read the notice as a demand for payment." *Id.* at 218.

Turning to the third sentence of Section 1692a(6), the court agreed with the Third, Fourth, and Sixth Circuits: "Th[e] general definition [of 'debt collector'] is explicitly *expanded*, not qualified, by the phrase" regarding security enforcement. *Id.* at 219; see *ibid.* (discussing repossessors); *id.* at 220. The trustee's notices to the debtor again showed that the trustee was not merely enforcing a security interest. While they "certainly serve notice purposes in the foreclosure process, [they] also plainly reflect attempts to collect a debt. They are replete with references to 'the debt,' 'the indebtedness,' and 'the obligation.'" *Id.* at 219.

Finally, in responding to the two-justice dissent, the court rejected two more of the precise arguments embraced by the Ninth Circuit. Addressing the position that the trustee cannot be liable because the notices were "statutorily required" by state law, the Alaska Supreme Court explained: "[T]hat a notice is required in order to

advance a state foreclosure proceeding does not mean it cannot at the same time be an attempt to collect a debt and thus subject to the FDCPA." *Id.* at 217-218 (discussing *Romea* v. *Heiberger & Assocs.*, 163 F.3d 111, 116 (2d Cir. 1998)). And refuting the contention that FDCPA liability would "wreak havoc" on Alaska's non-judicial foreclosure process, the majority explained the ease of the FDCPA's debt-validation process and flagged the FDCPA's outlet for a forecloser's communications: "the FDCPA specifically allows continued communication with a consumer 'where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy,' an exception that applies to the types of notice provided during nonjudicial foreclosure proceedings." *Id.* at 218 (quoting 15 U.S.C. 1692c(c)(3)).

e. The decision below also conflicts with the Colorado Supreme Court's holding that "debt collector" includes an attorney seeking "to enforce a power of sale contained in a deed of trust securing a note." *Shapiro*, 823 P.2d at 121; see App., *infra*, 17a (Korman, J., dissenting) (flagging conflict). The court concluded that these persons satisfy the general definition of "debt collector" and that the narrower definition for security enforcers does not exempt them. See, *e.g.*, 823 P.2d at 124 ("[s]ince a foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt, those who engage in such foreclosures are included within the definition of debt collectors"); *ibid.* ("The [third sentence] does not limit the definition of debt collectors, but rather enlarges the category of debt collectors for the purpose of section 1692f(6).").

f. Numerous district courts outside these jurisdictions have reached similar conclusions. See, *e.g.*, *Rinaldi* v. *Green Tree Servicing LLC*, No. 14-CV-8351(VB), 2015 WL 5474115, at *3 (S.D.N.Y. June 8, 2015); *Saccameno* v.

Ocwen Loan Servicing, LLC, No. 15-C-1164, 2015 WL 7293530, at *5 (N.D. Ill. Nov. 19, 2015); *Huckfeldt* v. *BAC Home Loans Servicing, LP*, No. 10-cv-01072-MSK-CBS, 2011 WL 4502036, at *4-*5 (D. Colo. Sept. 29, 2011); *Castrillo* v. *Am. Home Mortgage Servicing, Inc.*, 670 F. Supp. 2d 516, 525 (E.D. La. 2009); *Bieber* v. *J. Peterman Legal Group Ltd.*, 104 F. Supp. 3d 972, 974-976 (E.D. Wisc. 2015); *Lara* v. *Specialized Loan Servicing, LLC*, No. 1:12-cv-24405-UU, 2013 WL 4768004, at *4 (S.D. Fla. Sept. 6, 2013); *Muldrow* v. *EMC Mortgage Corp.*, 657 F. Supp. 2d 171, 175-176 (D.D.C. 2009).[9]

2. The court below is the first circuit to hold that the FDCPA does not govern foreclosure-related activities.[10] Numerous district courts, however, have reached the same conclusion as the Ninth Circuit, and thus this side of the split has been fully ventilated. *E.g.*, *Glazer*, 704 F.3d at 460 (noting the "pervasiveness" of *Hulse*'s view); *Hahn*

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[9] Before the decision below, some district courts within the Ninth Circuit also had sided with this view over *Hulse*'s. See, *e.g.*, *Vargas* v. *HSBC Bank USA, N.A.*, No. 11-cv-2729 BEN, 2012 WL 3957994, at *5-*6 (S.D. Cal. Sept. 10, 2012); *Katz* v. *Aurora Loan Servs., LLC*, No. 11-cv-1806-IEG, 2012 WL 78399, at *3-*4 (S.D. Cal. Jan. 10, 2012); *Lang* v. *Ocwen Fin. Servs., Inc.*, No. CV-10-151-BLG-RFC-CSO, 2011 WL 1258346, at *1 (D. Mont. Apr. 1, 2011); *Carter* v. *Deutsche Bank Nat'l Trust Co.*, No. C09–3033, 2010 WL 1875718, at *1 (N.D. Cal. May 7, 2010).

[10] The panel suggested that the Fifth and Eleventh Circuits are on its side (App., *infra*, 14a n.11), but that is wrong. See Part A.3, *infra*. The panel correctly noted that the Tenth Circuit had raised the issue without resolving it. See *Burnett* v. *Mortg. Registration Sys., Inc.*, 706 F.3d 1231, 1239 (10th Cir. 2013) (declining to "decide whether filing a nonjudicial foreclosure constitutes collection of debt" but acknowledging "that the initiation of foreclosure proceedings may be intended to pressure the debtor to pay her debt," even though the foreclosure results only "'in the sale of property subject to a deed of trust'") (quoting *Maynard* v. *Cannon, P.C.*, 401 F. App'x 389, 394 (10th Cir. 2010)).

v. *Anselmo Linberg Oliver LLC*, No. 16-cv-8908, at *3-*4 (N.D. Ill. Mar. 31, 2017); *Iroh* v. *Bank of Am., N.A.*, No. 4:15-CV-1601, 2015 WL 9243826, at *4 (S.D. Tex. Dec. 17, 2015); *Delisfort* v. *U.S. Bank Trust, N.A.*, 2017 WL 1337620, at *3 (S.D. Fla. Feb. 7, 2017); *Beadle* v. *Haughey*, No. Civ.-04-272-SM, 2005 WL 300060, at *3 (D.N.H. Feb. 9, 2005); *Sylvia* v. *Bank of N.Y. Mellon*, No. 1:12-CV-02598-WSD-JFK, 2012 WL 12844769, at *8 (N.D. Ga. Oct. 25, 2012); *Fleming* v. *U.S. Nat'l Bank Ass'n*, No. 14-3446(DSD/JSM), 2015 WL 505758, at *2 (D. Minn. Feb. 6, 2015); *Speleos* v. *BAC Home Loans Servicing LP*, 824 F. Supp. 2d 226, 232-233 (D. Mass. 2011); *Williams* v. *Ocwen Loan Servicing*, No. 1:15-CV-3914-ELR-JSA, 2016 WL 5339359, at *11 (N.D. Ga. May 9, 2016).

3. The Ninth Circuit's decision also conflicts with decisions in the Eleventh Circuit and creates tension with decisions in the Fifth Circuit.

First, contrary to the panel's contention (App., *infra*, 14a n.11), the Eleventh Circuit does not support its position. Indeed, on these particular facts, the Eleventh Circuit has adopted precisely the *opposite* position: it has held that *foreclosure-related notices* may trigger FDCPA liability, even if the *actual foreclosure itself* cannot. *Reese* v. *Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1217-1218 (11th Cir. 2012).[11]

In *Reese*, the court confronted a non-judicial foreclosure in which the defendant notified the borrower that a foreclosure sale would be conducted unless the loan was satisfied in accordance with the lender's demand for full payment of all amounts due under the note. 678 F.3d at

[11] The Ninth Circuit cited an earlier, unpublished Eleventh Circuit decision holding that "foreclosing on a home is not debt collection" but only the enforcement of a security interest. App., *infra*, 14a n.11 (citing *Warren* v. *Countrywide Home Loans, Inc.*, 342 F. App'x 458, 460-461 (11th Cir. 2009)).

1214. The court rejected the argument that the notice only "inform[ed]" the borrower that the lender "intended to enforce its security deed through the process of non-judicial foreclosure"; instead, citing *Wilson* and *Piper*, the court held: "The fact that the letter and documents relate to the enforcement of a security interest does not prevent them from also relating to the collection of a debt within the meaning of § 1692e." *Id.* at 1217-1218. The court merely disclaimed that it was deciding "whether enforcing a security interest is itself debt-collection activity." *Id.* at 1218 n.3. Under the holding in *Reese*, petitioner's claim would have come out the other way.[12]

Second, although the Fifth Circuit has not squarely settled the question, it has rejected *Hulse* in a published opinion: "the entire FDCPA can apply to a party whose principal business is enforcing security interests but who

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[12] Although subsequent unpublished decisions are less clear, the current rule in the Eleventh Circuit reflects a middle ground—the foreclosure itself does not constitute debt collection, but communications pertaining to the foreclosure can trigger FDCPA liability. Compare, *e.g.*, *Birster* v. *Am. Home Mortg. Servicing, Inc.*, 481 F. App'x 579, 580, 583 (11th Cir. 2012) (explaining that the defendant "was both attempting to enforce a security interest *and* collect a debt" where it sent a letter advising the borrowers that it "would proceed with foreclosure unless [they] cured the default by paying" a specified sum), with, *e.g.*, *Dunavant* v. *Sirote & Permutt, P.C.*, 603 F. App'x 737, 740 (11th Cir. 2015) (holding that the publication of foreclosure notices was solely enforcement of a security interest); *Saint Vil* v. *Perimeter Mortg. Funding Corp.*, 630 F. App'x 928, 931 (11th Cir. 2015) (holding that foreclosure notices were not debt collection where they "did not state a money amount, request payment, or explain how the debt could be settled" and thus could not "be interpreted as trying to induce payment of the debt"); *Tharpe* v. *Nationstar Mortg.*, 632 F. App'x 586, 587 (11th Cir. 2016); *Hampton-Muhamed* v. *James B. Nutter & Co.*, No. 15-15504, 2017 WL 1906654, at *2 (11th Cir. May 9, 2017).

nevertheless fits § 1692a(6)'s definition of a debt collector." *Kaltenbach* v. *Richards*, 464 F.3d 524, 528-529 (5th Cir. 2006) (remanding for the district court to consider whether the defendant initiating the foreclosure satisfied that general definition). The circuit later interpreted *Kaltenbach* to "implicitly recogniz[e] that a foreclosure is *not per se* FDCPA debt collection." *Brown* v. *Morris*, 243 F. App'x 31, 35 (5th Cir. 2007). District courts within the Fifth Circuit have accordingly indicated that "whether the initiation of foreclosure proceedings qualifies as collecting a debt under the FDCPA remains an open question." *Fath* v. *BAC Home Loans*, No. 3:12-cv-1755, 2013 WL 3203092, at *12 (N.D. Tex. June 25, 2013).[13]

4. In a single paragraph, the Ninth Circuit also reasoned that respondent qualified under Section 1692a(6)(F)(i)'s exception for "incidental" activities. App., *infra*, 11a. This directly conflicts with the Fourth Circuit's decision in *Wilson*. *Wilson* rejected an identical argument that the trustees' foreclosure activities were "incidental to" their fiduciary obligation. *Id.* at 377 (citing 15 U.S.C. 1692a(6)(F)(i)). Although the court accepted that the trustees acted as a fiduciary, it held that the "actions to foreclose on a property pursuant to a deed of trust are not 'incidental' to [that] fiduciary obligation. Rather, they are

[13] See also, *e.g.*, *Green* v. *Brice, Vander Linden & Wernick, P.C.*, No. 3:11-cv-1498, 2015 WL 2167996, at *8 (N.D. Tex. May 7, 2015); *Brooks* v. *Flagstar Bank, FSB*, No. 11-67, 2011 WL 2710026, at *6 (E.D. La. July 12, 2011). The Fifth Circuit recently reaffirmed *Kaltenbach* without further addressing the issue. See *Mahmoud* v. *De Moss Owners Ass'n Inc.*, No. 15-20618, 2017 WL 3203537, at *5 (5th Cir. July 28, 2017). Judge Higginson's separate opinion suggests that the Ninth Circuit's decision is consistent with *Glazer*, *Wilson*, and *Piper* (*id.* at *10 & n.2)—*by endorsing the views of* Glazer, Wilson, *and* Piper. The panel below, obviously, did not understand its decision the same way.

central to it." *Ibid.* The court supported its decision with the Federal Trade Commission's guidance on this exception: "The exemption (i) for bona fide fiduciary obligations or escrow arrangements applies to entities such as trust departments of banks, and escrow companies. It does not include a party who is named as a debtor's trustee solely for the purpose of conducting a foreclosure sale (i.e., exercising a power of sale in the event of default on a loan)." FTC Official Staff Commentary On the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097, 50,103 (Fed. Trade Comm'n Dec. 13, 1988).[14]

Virtually every other court to consider this argument has adopted the same position as the Fourth Circuit. See, *e.g.*, *McCray*, 839 F.3d at 361; *Hooks* v. *Forman Holt Eliades & Ravin LLC*, No. 11-civ-2767(LAP), 2015 WL 5333513, at *13-*14 (S.D.N.Y. Sept. 14, 2015); *Townsend* v. *Fed. Nat'l Mortgage Ass'n*, 923 F. Supp. 2d 828, 837-838 (W.D. Va. 2013); *Patrick* v. *Teays Valley Trs., LLC*, No. 3:13-CV-39, 2012 WL 5993163, at *11 (N.D. W. Va. Nov. 30, 2012); *Frison* v. *Accredited Home Lenders, Inc.*, No. 10-CV-777-JM, 2011 WL 1103468, at *5-*6 (S.D. Cal. Mar. 25, 2011); *Memmott* v. *OneWest Bank, FSB*, No. 10-3042-CL, 2011 WL 1560985, at *8 (D. Ore. Feb. 9, 2011); *Thomson* v. *Prof'l Foreclosure Corp. of Wash.*, No. 98-CS-478, 2000 WL 34335866, at *7 (E.D. Wash. Sept. 25, 2000), *aff'd* 86 F. App'x 352 (9th Cir. 2004); *Goodrow* v. *Friedman & MacFadyen P.A.*, 788 F. Supp. 2d 464, 470 (E.D. Va. 2011).[15]

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[14] Judge Widener dissented on this point. 443 F.3d at 380.

[15] The lonely exception: an unpublished district-court decision dismissing claims by a pro se litigant whose pleadings were so compelling that the court sanctioned her as a vexatious litigant; the court offered no reasoning to support its conclusion on the "incidental" exception. See *Jenkins* v. *Deutsche Bank Nat'l Trust Co.*, No. 07-22463-CIV, 2009 WL 10667428, at *7, *9 (Sept. 28, 2009).

* * *

The conflict on the interpretation of "debt collector" is indisputable, mature, and entrenched. The debate has been fully exhausted in decisions from multiple circuits and over 100 district courts. The division among the panel below readily reflects the broader division in jurisdictions nationwide. The Ninth Circuit refused to reconsider its position before the full court, and there is no realistic prospect that *multiple* courts of appeals will suddenly abandon their own precedent—especially given that those decisions thoroughly addressed and refuted every point in the Ninth Circuit's analysis. Until this Court intervenes, the rampant confusion over this important threshold question will persist. The Court's review is urgently warranted.

B. The Question Presented Is Exceptionally Important And Frequently Recurring

The question presented is of exceptional legal and practical importance. Whether non-judicial foreclosures (and foreclosure-related activities) constitute debt collection is a dispositive threshold issue for these FDCPA claims. The sheer number of decisions from an overwhelming multitude of jurisdictions underscores its obvious significance. As it now stands, however, there is a square split over the meaning of a core provision in the FDCPA, and countless courts and parties will continue wasting time and resourcing sorting out a binary question that begs for a clear answer.

Nor is there any hope of the issue resolving itself. As the discussion above illustrates, courts are well aware of the competing sides of the argument; they have repeatedly picked those sides without a uniform consensus emerging, and the confusion only promises to worsen now that the divided panel below has weighed in. With tens of thousands of foreclosures initiated every month, and the

staggering magnitude of total household mortgage debt (exceeding *$8 trillion*), these issues will continue to confound lower courts until this Court resolves the question.

In the meantime, the decision below threatens to deprive consumers of the FDCPA's protections in an area that (literally) hits closest to home. Congress passed the Act precisely because other "[e]xisting laws and procedures for redressing these injuries are inadequate." 15 U.S.C. 1692(b). The CFPB has confirmed the risks to consumers imposed by the Ninth Circuit's approach. In its statutorily-required 2013 annual report (see 15 U.S.C. 1692m(a)), the Bureau noted that "FDCPA coverage in the foreclosure context" is "an important issue on which the federal district courts have been divided," remarking that "[t]hese decisions have left consumers vulnerable to harmful collection tactics as they fight to save their homes from foreclosure." CFPB Report, *supra*, at 27; see *ibid.* ("Some courts have unduly restricted the FDCPA's protections by rejecting challenges to harmful practices occurring in the context of foreclosure proceedings."). And borrowers are particularly vulnerable in the non-judicial foreclosure context, where no court directly oversees lender or trustee misconduct. See John Campbell, *Can We Trust Trustees? Proposals for Reducing Wrongful Foreclosures*, 63 Cath. U. L. Rev. 103 (2014). The FDCPA serves as a necessary backdrop to these (otherwise) useful procedures, just as Congress intended.

The decision below upsets that balance, creates a conflict at the circuit level, and deepens a broader conflict among lower courts. The issue has been treated from every conceivable angle, and this Court alone can provide a clear answer. Further review is plainly warranted.

C. This Case Is An Optimal Vehicle For Deciding The Question Presented

This case is the ideal vehicle to resolve the question presented. It arises on appeal from a motion to dismiss, so there are no factual disputes. Petitioner's pertinent allegations are straightforward and representative: she targeted notices sent during the foreclosure process (prototypical "foreclosure-related activities"), and further alleges a misrepresentation in those notices. This issue was outcome-determinative below, and there are no possible obstacles to review. And the mandate has been stayed below, so there is no risk of any further proceedings interfering with the Court's review.

The majority and dissent issued comprehensive opinions that built upon the vast body of law regarding the question presented, detailing every aspect of the debate. The arguments have been fully vetted and further percolation promises nothing but additional conflicts. The issue is ripe for review and cries out for a definitive resolution from this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2017

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-56884

VIEN-PHUONG THI HO, Plaintiff-Appellant

v.

RECONTRUST COMPANY, NA, subsidiaries of Bank of America, N.A.; COUNTRYWIDE HOME LOANS INC; BANK OF AMERICA, N.A., Defendants-Appellees

Appeal from the United States District Court
for the Central District of California

Filed: October 19, 2016
Amended: May 22, 2017

Before: Alex Kozinski and Consuelo M. Callahan, Circuit Judges, and Edward R. Korman,* Senior District Judge.

OPINION

KOZINSKI, Circuit Judge:

* The Honorable Edward R. Korman, Senior District Judge for the U.S. District Court for the Eastern District of New York, sitting by designation.

The principal question in this appeal is whether the trustee of a California deed of trust is a "debt collector" under the Fair Debt Collection Practices Act (FDCPA).

FACTS

Vien-Phuong Thi Ho bought a house in Long Beach using funds she borrowed from Countrywide Bank. The loan was secured by a deed of trust. A deed of trust involves three parties. *See Yvanova* v. *New Century Mortg. Corp.*, 62 Cal. 4th 919, 926–27 (Cal. 2016) (explaining California deeds of trust). The first party is the lender, who is the trust beneficiary. The second party is the borrower-trustor, who holds equitable title to the property. The third party is the trustee, an agent for both the lender and the borrower who holds legal title to the property and is authorized to sell the property if the debtor defaults. *Id.* at 927. In this case, the lender was Countrywide, the borrower was Ho and the trustee was ReconTrust.

After Ho began missing loan payments, ReconTrust initiated a non-judicial foreclosure. *See id.* at 926–27 (detailing California's complex statutory procedure governing non-judicial foreclosures). As the first step in this process, ReconTrust recorded a notice of default and mailed this notice to Ho. *See* Cal. Civ. Code § 2924(a)(1). The notice advised Ho that she owed more than $20,000 on her loan and that she "may have the legal right to bring [her] account in good standing by paying all of [her] past due payments" to Countrywide. The notice also advised Ho that her home "may be sold without any court action." Ho did not pay up. ReconTrust then took the second step in the process by recording and mailing a notice of sale. *See* Cal. Civ. Code §§ 2924(a)(3). This notice advised Ho that her home would be auctioned "unless [she took] action to

protect [her] property." Following the trustee's sale, ReconTrust would deliver the deed to the purchaser and the proceeds of the sale to Countrywide. *See* 5 Harry D. Miller & Marvin B. Starr, *Cal. Real Est.* § 13:1 (4th ed. 2015). Ho would then lose both possession of the house and her right of redemption. *Id.* §§ 13:266, 13:267.[1]

Ho filed this lawsuit alleging that ReconTrust violated the FDCPA by sending her notices that misrepresented the amount of debt she owed. *See* 15 U.S.C. § 1692e(2)(A). Ho also sought to rescind her mortgage transaction under the Truth in Lending Act (TILA) on the ground that the defendants had perpetrated fraud against her. *See* 15 U.S.C. § 1635(a). The district court twice dismissed Ho's rescission claim without prejudice, and Ho did not replead it. The district court then granted ReconTrust's motion to dismiss Ho's FDCPA claims.[2]

Ho appeals, arguing that ReconTrust is a "debt collector" because the notice of default and the notice of sale constitute attempts to collect debt. Because both notices threatened foreclosure unless Ho brought her account current, she reasonably viewed those documents as an in-

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[1] It's not clear from the record whether a trustee's sale ever occurred. The notice of sale advised Ho that her home would be sold on a certain date. However, Ho's loan servicer approved a modification of the loan a few days prior to that date. The parties say nothing further about the trustee's sale. For our purposes, it doesn't matter whether the sale took place. Sale of the house would not render the case moot because Ho is seeking damages.

[2] The district court also dismissed Ho's other claims under the FDCPA, the Racketeer Influenced and Corrupt Organizations Act and the Real Estate Settlement Procedures Act. We affirm these dismissals in a memorandum disposition filed concurrently herewith.

ducement to pay up. Ho also argues that her TILA rescission claim should be reinstated on appeal because our circuit clarified the requirements for such a claim between the district court's dismissal and this appeal. *See Merritt* v. *Countrywide Fin. Corp.*, 759 F.3d 1023, 1032–33 (9th Cir. 2014).

DISCUSSION

I

The FDCPA subjects "debt collectors" to civil damages for engaging in certain abusive practices while attempting to collect debts. *See* §§ 1692d–f, 1692k. The statute's general definition of "debt collector" captures any entity that "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due [to] another." § 1692a(6). Debt is defined as an "obligation ... of a consumer to pay money." § 1692a(5).

The FDCPA imposes liability only when an entity is attempting to collect debt. 15 U.S.C. § 1692(e). For the purposes of the FDCPA, the word "debt" is synonymous with "money." 15 U.S.C. § 1692a(5). Thus, ReconTrust would only be liable if it attempted to collect money from Ho. And this it did not do, directly or otherwise. The object of a non-judicial foreclosure is to retake and resell the security, not to collect money from the borrower. California law does not allow for a deficiency judgment following non-judicial foreclosure. This means that the foreclosure extinguishes the entire debt even if it results in a recovery of less than the amount of the debt. Cal. Civ. Code § 580d(a); *see Burnett* v. *Mortg. Elec. Registration Sys.*, Inc., 706 F.3d 1231, 1239 (10th Cir. 2013) ("[A] non-judi-

cial foreclosure does not result in a mortgagor's obligation to *pay money*—it merely results in the sale of property subject to a deed of trust."); *Alaska Tr., LLC* v. *Ambridge*, 372 P.3d 207, 228 (Alaska 2016) (Winfree, J., dissenting) (noting that non-judicial foreclosure "does not in and of itself collect a debt, but rather calls for the vesting and divesting of title to real property according to the parties' prior agreement" (internal quotation marks omitted)). Thus, 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.

The prospect of having property repossessed may, of course, be an inducement to pay off a debt. But that inducement exists by virtue of the lien, regardless of whether foreclosure proceedings actually commence. The fear of having your car impounded may induce you to pay off a stack of accumulated parking tickets, but that doesn't make the guy with the tow truck a debt collector.

Our holding today affirms the leading case of *Hulse* v. *Ocwen Federal Bank*, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002), which held that "foreclosing on a trust deed is an entirely different path" than "collecting funds from a debtor."[3] We acknowledge that two circuits have declined

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[3] The dissent's effort to discount *Hulse*, dissent at 21, doesn't change the fact that *Hulse* is indeed the leading case for what other courts have recognized as the majority position. *See, e.g.*, *Aurora Loan Servs., LLC* v. *Kmiecik*, 992 N.E.2d 125, 134 (Ill. App. Ct. 2013) ("The minority view taken is that the act of foreclosing on a mortgage is the collection of a debt according to the FDCPA."). District courts across our circuit have approved of *Hulse* time and again. *See, e.g.*, *Castro* v. *Exec. Tr. Servs., LLC*, No. CV-08-2156-PHX-LOA, 2009 WL 438683, at *6 (D. Ariz. Feb. 23, 2009); *Izenberg* v. *ETS Servs.*, LLC, 589 F. Supp. 2d 1193, 1199 (C.D. Cal. 2008); *Ines* v. *Countrywide Home*

to follow *Hulse*. *Glazer* v. *Chase Home Fin. LLC*, 704 F.3d 453, 461 (6th Cir. 2013); *Wilson* v. *Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 378–79 (4th Cir. 2006). But neither case concerned the nuances of California foreclosure law, and we find neither case persuasive here. The Fourth Circuit in *Wilson* was more concerned with avoiding what it viewed as a "loophole in the Act" than with following the Act's text. 443 F.3d at 376. We rely on policy to help interpret statutory language; we don't make it ourselves. The Sixth Circuit's decision in *Glazer* rests entirely on the premise that "the ultimate purpose of foreclosure is the payment of money." 704 F.3d at 463. But the FDCPA defines debt as an "obligation of a *consumer* to pay money." 15 U.S.C. § 1692a(5) (emphasis added). Following a trustee's sale, the trustee collects money from the home's purchaser, not from the original borrower. Because the money collected from a trustee's sale is not money owed by a consumer, it isn't "debt" as defined by the FDCPA.

The most plausible reading of the statute is that the foreclosure notices were "the enforcement of [a] security interest[]" as contemplated by section 1692f(6) rather than "debt collection" as contemplated by section 1692a. The FDCPA's general definition of "debt collector," contained at section 1692a(6), applies to entities that "regularly collect[] or attempt[] to collect, directly or indirectly, debts owed or due or asserted to be owed or due [to] another." Entities that qualify as debt collectors under this general definition are debt collectors for purposes of the

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Loans, Inc., No. 08cv1267WQH(NLS), 2008 WL 4791863, at *2 (S.D. Cal. Nov. 3, 2008).

entire statute. However, the FDCPA also includes a narrower definition of "debt collector." This narrower definition of the term "also includes" entities whose principal business purpose is "the enforcement of security interests." 15 U.S.C. § 1692a(6). This provision would be superfluous if all entities that enforce security interests were already included in the definition of debt collector for purposes of the entire FDCPA. But the relationship between sections 1692a(6) and 1692f(6) makes sense if some security enforcers are debt collectors only for the limited purposes of section 1692f(6). All parties agree that ReconTrust is a debt collector under the narrow definition. Ordinarily, section 1692f(6) would protect a consumer against the abusive practices of a security enforcer who does not fit the broader definition of a debt collector. But that doesn't matter in our case because ReconTrust is not accused of conduct prohibited by section 1692f(6). The sole question here is whether ReconTrust is a debt collector under the general definition—that is, whether ReconTrust "regularly collects" debts.

We do *not* hold that the FDCPA intended to exclude all entities whose principal purpose is to enforce security interests. If entities that enforce security interests engage in activities that constitute debt collection, they are debt collectors. We hold only that the enforcement of security interests is not always debt collection. We agree with the dissent that the terms are not mutually exclusive. But they also aren't coextensive.[4]

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[4] The dissent's extensive reliance on the FDCPA's judicial venue clause, dissent at 32–35, fails for the same reason. The clause indeed contemplates that a security enforcer can be a debt collector, but it

We therefore agree with a central premise of *Wilson* and *Glazer*: An entity does not become a general "debt collector" if its "only role in the debt collection process is the enforcement of a security interest." *Wilson*, 443 F.3d at 378; *see Glazer*, 704 F.3d at 464. But from there our paths diverge. We view all of ReconTrust's activities as falling under the umbrella of "enforcement of a security interest." Under California's non-judicial foreclosure statutes, ReconTrust could not conduct the trustee's sale until it sent the notice of default and the notice of sale. If ReconTrust can administer a trustee's sale without collecting a debt, it must be able to maintain that status when it takes the statutorily required steps to conduct the trustee's sale. The right to "enforce" the security interest necessarily implies the right to send the required notices; to hold otherwise would divorce the notices from their context.[5]

The *Glazer* court rejected this view, noting that it couldn't think of anyone other than repossessors "whose only role in the collection process is the enforcement of security interests." 704 F.3d at 464. *Glazer* explained that a "lawyer principally engaged in mortgage foreclosure

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offers no indication that an entity is a debt collector *because* it enforces a security interest.

[5] Again, a trustee of a deed of trust might become a "debt collector" under the general definition if he did something *in addition* to the actions required to enforce a security interest. *See Derisme*, 880 F. Supp. 2d at 326; *see also Kaltenbach* v. *Richards*, 464 F.3d 524, 528–29 (5th Cir. 2006). Ho makes no argument that ReconTrust did more than what was required by California law to enforce the deed of trust. It recorded and mailed notices that were scripted by the California legislature. *See* Cal. Civ. Code § 2924. And, while these notices advised Ho that she could avoid foreclosure by paying up, that was required by California law in order to conduct the trustee's sale.

does not meet this criteria [sic], for he must communicate with the debtor regarding the debt during the foreclosure proceedings," but this is "not so for repossessors, who typically 'enforce' a security interest—i.e., repossess or disable property—when the debtor is not present, in order to keep the peace." 704 F.3d at 464. We find this distinction unpersuasive. The FDCPA itself recognizes that repossessors will communicate with debtors.[6] Enforcement of a security interest will often involve communications between the forecloser and the consumer. When these communications are limited to the foreclosure process, they do not transform foreclosure into debt collection.

The notices at issue in our case didn't request payment from Ho.[7] They merely informed Ho that the foreclosure process had begun, explained the foreclosure timeline, apprised her of her rights and stated that she

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[6] Section 1692a(6) provides that enforcers of security instruments are debt collectors only for the limited purposes of section 1692f. Section 1692f(6) prohibits "[t]aking or *threatening to take* any nonjudicial action to effect dispossession or disablement of property" (emphasis added). By referring to "threats" and not just actions, the statute contemplates that repossessors will communicate with debtors. The fact that Congress went out of its way to expose enforcers of security interests to liability for "threatening" debtors shows that such enforcers were expected to do more than merely repossess property in the middle of the night.

[7] The dissent makes much of the fact that the notice of trustee's sale included a disclaimer stating that ReconTrust "is a debt collector attempting to collect a debt." This disclaimer isn't sufficient to show that ReconTrust is a debt collector. *See Guerrero* v. *RJM Acquisitions LLC*, 499 F.3d 926, 932 (9th Cir. 2007) (per curiam); *see also Gburek* v. *Litton Loan Servicing LP*, 614 F.3d 380, 386 n.3 (7th Cir. 2010) (similar). "Debt collector" isn't an elective category. It's determined objectively, based on the activities of the entity in question.

could contact Countrywide (not ReconTrust) if she wished to make a payment. These notices were designed to *protect* the debtor. They are entirely different from the harassing communications that the FDCPA was meant to stamp out. Thus, we agree with the California Courts of Appeal that "giving notice of a foreclosure sale to a consumer as required by the [California] Civil Code does not constitute debt collection activity under the FDCPA." *Pfeifer* v. *Countrywide Home Loans, Inc.*, 150 Cal. Rptr. 3d 673, 684 (Cal. Ct. App. 2012); *see Fonteno v. Wells Fargo Bank, N.A.*, 176 Cal. Rptr. 3d 676, 690–92 (Cal. Ct. App. 2014).[8]

Even though the notices didn't explicitly request payment, Ho contends that they still qualify as debt collection because they pressured her to send money to Countrywide. *See Burnett*, 706 F.3d at 1239. But, as we've explained, the enforcement of a security interest often creates an incentive to pay the underlying debt. If this were sufficient to transform the enforcement of security interests into debt collection, then all security enforcers would be debt collectors. This would render meaningless the FDCPA's carefully drawn distinction between debt collectors and enforcers of security interests, and expand the scope of the FDCPA well past the boundary of clear congressional intent and common sense.

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[8] We find it significant that California expressly exempts trustees of deeds of trust from liability under the Rosenthal Act, the state analogue of the FDCPA. *See* Cal. Civ. Code. § 2924(b). The California legislature clearly views such trustees as materially different from debt collectors.

Moreover, even if an entity like ReconTrust did fall under the FDCPA's general definition of a "debt collector," it would still be exempt under one of the FDCPA's express exceptions to that definition. The FDCPA excludes from the term "debt collector" an entity whose activities are "incidental to . . . a bona fide escrow arrangement." 15 U.S.C. § 1692a(6)(F).[9] A California mortgage trustee—which holds legal title on behalf of the borrower and lender—functions as an escrow. Even if ReconTrust's activities could be characterized as collection, they are "incidental to" the escrow arrangement because they are for the sole benefit of the lender. *See Rowe* v. *Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1034–35 (9th Cir. 2009) (construing "incidental to").

A final consideration weighs in favor of ReconTrust: Holding trustees liable under the FDCPA would subject them to obligations that would frustrate their ability to comply with the California statutes governing non-judicial foreclosure. ReconTrust lists a half dozen conflicts between the FDCPA and California law. For example, the FDCPA prohibits debt collectors from communicating with third parties about the debt absent consent from the debtor. 15 U.S.C. § 1692c(b). But California law requires the trustee to announce all trustee's sales in a

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[9] The FDCPA also excludes from its definition of "debt collector" an entity that acts "incidental to a bona fide fiduciary obligation." 15 U.S.C. § 1692a(6)(F). But because California courts have consistently held that a trustee is not a fiduciary, we are reluctant to rely on this provision here. *See, e.g.*, *Hatch* v. *Collins*, 275 Cal. Rptr. 476, 480 (Ct. App. 1990) (holding that a trustee of a deed of trust "does not stand in a fiduciary relationship" to either the beneficiary or the creditor); *see also Stephens, Partain & Cunningham* v. *Hollis*, 242 Cal. Rptr. 251, 255 (Ct. App. 1987) ("Just as a panda is not an ordinary bear, a trustee of a deed of trust is not an ordinary trustee.").

newspaper and mail the notice of default to various third parties. *See* Cal. Civ. Code §§ 2924b(c)(1)–(2), 2924f(b). The FDCPA also prohibits debt collectors from directly communicating with debtors if the debt collector knows that the debtor is represented by counsel. 15 U.S.C. § 1692c(a)(2). California law requires the trustee to mail the notices of default and sale directly to the borrower, and makes no exception for borrowers who are represented by counsel. Cal. Civ. Code. §§ 2924b(b)(1), 2924f(c)(3). In both of these cases, a trustee could not comply with California law without violating the FDCPA.

Things would become even more complicated if the consumer elected to dispute the debt pursuant to the FDCPA. In such a case, a trustee would be required to "cease collection of the debt" until he obtained verification of that debt. 15 U.S.C. § 1692g(b). California law compels trustees to mail a copy of the notice of default within ten business days after recording it. Cal. Civ. Code § 2924b(b)(1). If the consumer disputes his debt as soon as it is recorded, the trustee would have to seek verification of the debt, and would be unable to mail the notice until the debt was verified. In the likely event that such verification took longer than ten days, the trustee would miss California's statutory deadline for mailing out the notice. And if verification requests or other hassles resulted in a delay of a year or longer, the trustee would be required to restart the foreclosure process. *See* § 2924g(c)(2).

ReconTrust's amici suggest that holding trustees liable as debt collectors would "literally prevent [California's foreclosure] system from functioning." Brief for United Trustee's Ass'n et al. as Amici Curiae Supporting Defendants-Appellees, *Ho* v. *ReconTrust* (No. 10-56884),

2015 WL 1020492, at *4. In an amicus brief filed in support of Ho, the Consumer Financial Protection Bureau conceded that "a conflict may exist between state and federal law." Brief for Consumer Financial Protection Bureau as Amicus Curiae Supporting Plaintiff-Appellant, *Ho* v. *ReconTrust* (No. 10-56884), 2015 WL 4735787, at *14.[10] There can be no doubt that labeling ReconTrust a debt collector under the broader definition of the FDCPA would create sustained friction between the federal statute and the state scheme.

Foreclosure is a traditional area of state concern. *See BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (characterizing the regulation of foreclosures as "an essential state interest"); *Rank* v. *Nimmo*, 677 F.2d 692, 697 (9th Cir. 1982) (noting that "mortgage foreclosure has traditionally been a matter for state courts and state law"). We are thus especially reluctant to accept an interpretation of a federal statute that would generate conflict between state and federal law. This reluctance flows naturally from the fact that, when Congress legislates "in a field which the States have traditionally occupied," federal courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*,

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[10] At our invitation, the agency filed an amicus brief arguing that all trustees of deeds of trust are debt collectors under section 1692a(6). The agency has not exercised its authority to promulgate a rule interpreting the term "debt collector." Thus, we accord deference to the agency's interpretation of that phrase only to the extent that we find that interpretation persuasive. *See United States* v. *Mead Corp.*, 533 U.S. 218, 226–29 (2001) (citing *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139–40 (1944)). We are unpersuaded by the agency's reading of the statute and therefore do not defer to it.

331 U.S. 218, 230 (1947). We find no such clear purpose here.

We also find no comfort in the dissent's suggestion that the conflicts between California law and the FDCPA can be mitigated by consent between the parties to a mortgage deal. Dissent at 41–43. The fact that parties may be able to draft their way around conflicts renders them conflicts no less. Relegating future parties to the uncertain process of adding contractual terms may itself upset a state's carefully drawn scheme of notice and disclosure; additional efforts or more complex terms are themselves costs of that conflict.

When one interpretation of an ambiguous federal statute would create a conflict with state foreclosure law and another interpretation would not, respect for our federal system counsels in favor of the latter. The statutory phrase "debt collector" is notoriously ambiguous, causing our sister circuits to divide as to whether foreclosure-related activities constitute debt collection.[11] Even courts holding that foreclosure is debt collection have recognized that the term "debt collector" is cryptic. *See, e.g.*,

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[11] *Compare Glazer*, 704 F.3d at 461 (holding that all "mortgage foreclosure is debt collection" for the purposes of the FDCPA); *Wilson*, 443 F.3d at 378–79 (similar); *and Piper* v. *Portnoff Law Assocs., Ltd.*, 396 F.3d at 235–36 (3d Cir. 2005) (similar), *with Burnett*, 706 F.3d at 1239 (suggesting that non-judicial foreclosure is not debt collection for purposes of the FDCPA, but refusing to so hold); *Warren* v. *Countrywide Home Loans, Inc.*, 342 F. App'x 458, 461 (11th Cir. 2009) (holding that "foreclosing on a home is not debt collection for purposes" of the FDCPA); *and Brown* v. *Morris*, 243 F. App'x 31, 35 (5th Cir. 2007) (holding that "foreclosure is *not per se* FDCPA debt collection").

Glazer, 704 F.3d at 460; *Ambridge*, 372 P.3d at 222 (observing that "the FDCPA could certainly be clearer on the question"). Given this ambiguity, we are hesitant to construe federal law in a manner that interferes with California's system for conducting non-judicial foreclosures. *Cf. Sheriff* v. *Gillie*, 136 S. Ct. 1594, 1601 (2016).

II

The district court twice dismissed Ho's TILA rescission claim without prejudice, and Ho didn't replead it in her third complaint. We have held that claims dismissed without prejudice and not repleaded are not preserved for appeal; they are instead considered "voluntarily dismissed." *See Lacey* v. *Maricopa Cty.*, 693 F.3d 896, 928 (9th Cir. 2012). Here, however, the district court didn't give Ho a free choice in whether to keep repleading the TILA rescission claim. Rather, the court said that if Ho wished to replead the claim she "would be required to allege that she is prepared and able to pay back the amount of her purchase price less any down-payment she contributed and any payments made since the time of her purchase." The judge concluded that if Ho "is not able to make that allegation in good faith, she should not continue to maintain a TILA rescission claim." It's unclear whether the judge meant this as benevolent advice or a stern command. But a reasonable litigant, particularly one proceeding pro se, could have construed this as a strict condition, one that might have precipitated the judge's ire or even invited a sanction if disobeyed. Ho could not or would not commit to pay back the loan, and dropped the claim in her third complaint.

The district court based its condition on *Yamamoto* v. *Bank of N.Y.*, which gave courts equitable discretion to

"impose conditions on rescission that assure that the borrower meets her obligations once the creditor has performed its obligations." 329 F.3d 1167, 1173 (9th Cir. 2003). But, after the district court dismissed Ho's claims, we held that a mortgagor need not allege the ability to repay the loan in order to state a rescission claim under TILA that can survive a motion to dismiss. *Merritt* v. *Countrywide Fin. Corp.*, 759 F.3d 1023, 1032–33 (9th Cir. 2014). Ho argues that her rescission claims were properly preserved for appeal and should be reinstated.

Where, as here, the district court dismisses a claim and instructs the plaintiff not to refile the claim unless he includes certain additional allegations that the plaintiff is unable or unwilling to make, the dismissed claim is preserved for appeal even if not repleaded. A plaintiff is the master of his claim and shouldn't have to choose between defying the district court and making allegations that he is unable or unwilling to bring into court.

This rule is a natural extension of our holding in *Lacey*. The *Lacey* rule—which displaced our circuit's longstanding and notably harsh rule that all claims not repleaded in an amended complaint were considered waived—was motivated by two principal concerns: judicial economy and fairness to the parties. 693 F.3d at 925–28. Those concerns apply here. We see no point in forcing a plaintiff into a drawn-out contest of wills with the district court when, for whatever reason, the plaintiff chooses not to comply with a court-imposed condition for repleading. We remand to the district court for consideration of Ho's TILA rescission claim in light of *Merritt* v. *Countrywide Fin. Corp.*, 759 F.3d at 1032–33.

AFFIRMED in part, **VACATED** and **REMANDED** in part. No costs.

KORMAN, District Judge, dissenting in part and concurring in part:

The majority opinion opens with the principal question presented by this case: "[W]hether the trustee of a California deed of trust is a 'debt collector' under the Fair Debt Collection Practices Act (FDCPA)." Maj. Op. at 5. After a discussion of the issue, the majority concludes by observing that the phrase "debt collector" is "notoriously ambiguous" and that, given this ambiguity, we should refuse to construe it in a manner that interferes with California's arrangements for conducting nonjudicial foreclosures. Maj. Op. at 17–18.

My reading of the Fair Debt Collection Practices Act ("FDCPA"), consistent with the manner in which it has been construed by every other circuit that has addressed whether foreclosure procedures are debt collection subject to the FDCPA, suggests that the only reasonable reading is that a trustee pursuing a nonjudicial foreclosure proceeding is a debt collector. *See Kaymark v. Bank of Am., N.A.*, 783 F.3d 168, 179 (3d Cir. 2015), *cert. denied*, 136 S.Ct. 794 (2016); *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453, 461–63 (6th Cir. 2013); *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 376–77 (4th Cir. 2006); *see also Alaska Tr., LLC v. Ambridge*, 372 P.3d 207, 213–216 (Alaska 2016); *Shapiro & Meinhold v. Zartman*, 823 P.2d 120, 123–24 (Colo. 1992) (en banc). The same is true of a judicial foreclosure proceeding—an alternative available in California. *See Coker v. JPMorgan Chase Bank, N.A.*, 364 P.3d 176, 178 (Cal. 2016). Both are intended to obtain money by forcing the sale of the property being foreclosed upon.

The majority "affirms" what it characterizes as the "leading case" of *Hulse v. Ocwen Federal Bank, FSB*, 195

F. Supp. 2d 1188 (D. Or. 2002), which held that "foreclosing on a trust deed is an entirely different path" than "collecting funds from a debtor," because "[p]ayment of funds is not the object of the foreclosure action. Rather the lender is foreclosing its interest in the property." Id. at 1204. The reasoning in *Hulse*, if one could call it that, is contained in two short paragraphs, and it is the leading case only in the number of appellate cases that have by name rejected its reasoning. *See, e.g.*, *Glazer*, 704 F.3d at 460, 463; *Kaltenbach v. Richards*, 464 F.3d 524, 528 (5th Cir. 2006); *Wilson*, 443 F.3d at 376.

This is not surprising. The suggestion in *Hulse* that a foreclosure proceeding is one in which "the lender is foreclosing its interest in the property" is flatly wrong. A foreclosure proceeding is one in which the interest of the debtor (and not the creditor) is foreclosed in a proceeding conducted by a trustee who holds title to the property and who then uses the proceeds to retire all or part of the debt owed by the borrower. *See* Cal. Civ. Code § 2931; *Yvanova v. New Century Mortg. Corp.*, 365 P.3d 845, 850 (Cal. 2016). Any excess funds raised over the amount owed by the borrower (and costs associated with the foreclosure) are paid to the borrower. *See* Cal. Civ. Code § 2924k; *see also* Jesse Dukeminier & James E. Krier, *Property* 590 (2d ed. 1988). Thus, contrary to the holding in *Hulse*, "[t]here can be no serious doubt that the ultimate purpose of foreclosure is the payment of money." *Glazer*, 704 F.3d at 463. Nor, because the FDCPA defines a "debt collector" as one who collects or attempts to collect, "directly or indirectly," debts owed to another, 15 U.S.C. § 1692a(6), does it matter that the money collected at a foreclosure sale does not come directly from the debtor.

Because the majority makes *Hulse* the foundation of its analysis, it papers over *Hulse*'s irredeemably flawed analysis by suggesting that it comes close to being the seminal case in the area. Nevertheless, it can only do so by relying on an intermediate Illinois appellate court decision for the proposition that "*Hulse* is indeed the leading case for what other courts have recognized as the majority position." Maj. Op. at 8 n.3 (citing *Aurora Loan Servs., LLC v. Kmiecik*, 992 N.E.2d 125, 134 (Ill. App. Ct. 2013)). The Illinois appellate court decision did not do its own "head count." Instead it cited *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453, 464 (6th Cir. 2013), for the proposition that "[t]he minority view taken is that the act of foreclosing on a mortgage is the collection of a debt according to the FDCPA." *Aurora Loan Servs., LLC*, 992 N.E.2d at 134. *Glazer*, in turn, said no more than a contrary view has been "adopted by a majority of district courts." *Glazer*, 704 F.3d at 460. We do not decide cases on the basis of "head counts" of district court cases, although we should at least be concerned when we reach a result that has been rejected by every circuit that has decided the issue in a published opinion. *See* Maj. Op. at 17 n.11 (citing *Glazer*, 704 F.3d at 461; *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 378–79 (4th Cir. 2006); *Piper v. Portnoff Law Assocs., Ltd.*, 396 F.3d 227, 235–36 (3d Cir. 2005)).

After analyzing the majority's construction of the FDCPA, I discuss below each of the conflicts conjured by the majority and show that the FDCPA does not interfere with California's arrangement for conducting nonjudicial foreclosures in a way that would justify nullifying the protections that the FDCPA provides. More significantly,

the language of the FDCPA's preemption section provides ample room for the operation of California law without the need for exempting an entire category of debt collectors. Thus, it provides that the FDCPA "does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency." 15 U.S.C. § 1692n.

While this suggests a desire to interfere as little as possible "with the laws of any State," it gives effect to the concern that the "primary reason why debt collection abuse is so widespread is the lack of meaningful legislation on the State level." S. Rep. No. 95-382, at 2 (1977). "Congress enacted the FDCPA despite the fact that some states already had procedural requirements for debt collectors . . . in place, because it 'decided to protect consumers who owe money by adopting a different, and in part more stringent, set of requirements that would constitute minimum national standards for debt collection practices.'" *Piper*, 396 F.3d at 236 n.11 (quoting *Romea v. Heiberger & Assocs.*, 163 F.3d 111, 118 (2d Cir. 1998)). Indeed, one of the declared purposes of the FDCPA is "to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e).

This case affords no basis for undermining the minimum national standards that Congress has adopted. Nor does it justify ignoring the rule we have followed consistently that, as "a broad remedial statute," *Gonzales v. Arrow Fin. Servs., LLC*, 660 F.3d 1055, 1060 (9th Cir. 2011), the FDCPA must be liberally construed in favor of the consumer. *Hernandez v. Williams, Zinman & Parham*

PC, 829 F.3d 1068, 1078–79 (9th Cir. 2016); *see also Johnson v. Riddle*, 305 F.3d 1107, 1117 (10th Cir. 2002). Indeed, the foreclosure process conducted here was entirely consistent with both California law and the FDCPA. The complaint here does not derive from any conflict between these statutes. Instead, the complaint alleges that the trustee under the Deed of Trust, ReconTrust, sent the debtor, Ho, a notice that was misleading and false because it listed an inaccurate amount due. The cause of action that the FDCPA provides for this alleged misconduct does not conflict with California law. If California law does not provide such a remedy, the FDCPA cause of action simply supplements it, just as Congress intended.

I. The Definition of "Debt Collector"

I turn first to the arguments based on the definition of the phrase "debt collector." The FDCPA provides, in relevant part, that "[t]he term 'debt' means any obligation or alleged obligation of a consumer to pay money." 15 U.S.C. § 1692a(5). "The term 'consumer' means any natural person obligated or allegedly obligated to pay any debt." *Id.* § 1692a(3). There is no dispute that Ho is obligated under a promissory note to pay the lender the purchase price of her property. Section 1692a(6) defines the term "debt collector" to mean "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." There is no dispute that ReconTrust seeks to enforce Ho's obligation to pay

the money owed on the promissory note, and that it engages in such activities generally, with the degree of regularity described in section 1692a(6).

Nevertheless, the majority argues that, "[f]or the purposes of the FDCPA, the word 'debt' is synonymous with 'money.' Thus, ReconTrust would only be liable if it attempted to collect money from [the borrower] Ho." Maj. Op. at 7 (citing 15 U.S.C. § 1692a(5)). Because California law does not permit deficiency judgments in cases where there has been a nonjudicial foreclosure, no money will be collected directly from Ho. Consequently, "[t]he object of a non-judicial foreclosure is to retake and resell the security, not to collect money." *Id.* This suggestion cannot be right.

The object of a nonjudicial foreclosure is not to "retake and resell" the debtor's home. The only way real property that is foreclosed upon can be retaken by the creditor is to purchase it at a foreclosure sale. *See* Cal. Civ. Code § 2924g(a). Moreover, the purpose of a foreclosure proceeding *is* to collect money. Thus, a judicial decree of foreclosure directs "an officer of the court to sell the land at a public sale, pay the debt to the lender, and pay any amount exceeding the debt to the borrower. . . . Except for the power to foreclose privately, the deed of trust is treated in almost all significant respects as a mortgage." Dukeminier & Krier, *supra*, at 590–91; *see also Dikeman v. Jewel Gold Mining Co.*, 13 F.2d 118, 118 (9th Cir. 1926) ("Foreclosure is a remedy by which the property covered by the mortgage may be subjected to sale for the payment of the demand for which the mortgage stands as security . . . ." (quoting *Flanders v. Aumack*, 51 P. 447, 450 (Or. 1897))).

The nonjudicial foreclosure process in California is illustrative. "Nonjudicial foreclosure proceedings must be conducted by auction in a fair and open manner, with the property sold to the highest bidder." *Dreyfuss v. Union Bank of Cal.*, 11 P.3d 383, 390 (Cal. 2000); *see also* Cal. Civ. Code § 2924g(a). The object of the nonjudicial foreclosure procedure is to sell the real property pledged as security thus raising money to retire all or part of the debt owed by the borrower pursuant to the promissory note. *See* A. James Casner & W. Barton Leach, *Cases and Text on Property* 737 (2d ed. 1969) ("To whatever extent foreclosure puts value into [the mortgagee's] hands, the debt of [the mortgagor] to [the mortgagee] is discharged . . . ."). Indeed, any excess funds raised over the amount owed by the borrower (and costs associated with the foreclosure) are paid to the borrower. *See* Cal. Civ. Code § 2924k; *see also* Dukeminier & Krier, *supra*, at 590.

The argument that ReconTrust cannot be a debt collector because it may not collect money directly from the debtor overlooks the disjunctive language of the definition of debt collector, as well as the inchoate conduct included in that definition. Thus, a debt collector is one who "attempts to collect, directly or indirectly, debts . . . owed or due another." 15 U.S.C. § 1692a(6). The nonjudicial foreclosure procedure accomplishes this in one of two alternative ways.

First, the creditor, through the trustee, may collect money *indirectly* through a nonjudicial foreclosure sale. The same is true of a judicial foreclosure, although it is not conducted by a trustee. The fact that the money may not come directly from the borrower does not alter the fact that any funds raised would come as a result of the

elimination of the debtor's interest and equity in the property. This clearly constitutes the indirect collection of a debt, and the majority does not explain why it does not. Second, the money may be collected *directly*, because the language in the notices sent to the borrower may prompt her—perhaps the better word is scare her—to exercise her rights of reinstatement or redemption by paying the arrears on the promissory note at the risk losing the roof over her head. *See Yvanova*, 365 P.3d at 850 ("If . . . the borrower does not exercise his or her rights of reinstatement or redemption, the property is sold at auction to the highest bidder.").[12] Or, as the majority aptly puts it, the notices tell the debtor "that she could avoid [this fate] by paying up." Maj. Op. at 11 n.5. The same is true of a complaint seeking a judicial foreclosure.[13]

Thus, in this case, ReconTrust commenced the foreclosure proceeding, "as an agent of the Beneficiary [the creditor] under a Deed of Trust," by the filing of a notice of default served on Ho warning that she was in default

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[12] "The mortgagor's interest in the property is known as the 'equity,' a shortened form of 'equity of redemption' which also pays linguistic homage to the generations of chancellors who have been moved to protect debtors from overreaching moneylenders." Dukeminier & Krier, *supra*, at 589.

[13] The principal difference between a judicial and a nonjudicial foreclosure is that in the latter, with some exception, *see Bank of Kirkwood Plaza v. Mueller*, 294 N.W.2d 640, 642–43 (N.D. 1980), a deficiency judgment against the debtor may be obtained for the difference between the money collected at the foreclosure sale and the amount of the debt still owed on the promissory note. Such an effort against the debtor in a nonjudicial foreclosure is precluded because forgiveness of the remainder of the debt is a tradeoff in return for "an inexpensive and efficient remedy against a defaulting borrower." *See Yvanova*, 365 P.3d at 850.

on the payments due on the promissory note she signed on June 23, 2007, in the amount of $548,000. She was told that the amount of the default was $22,782.68 and would increase until her account became current, that she may be able "to bring [her] account in good standing [and avoid foreclosure] by paying all of [her] past due payments plus permitted costs and expenses," and that she would "have only the legal right to stop the sale of [her] property by paying the entire amount demanded by [her] creditor." She was also told that, "[w]hile [her] property [was] in foreclosure, [she] still must pay other obligations (such as insurance and taxes) required by [her] note and deed of trust or mortgage."

The notice of trustee's sale again told Ho that she was "IN DEFAULT" and advised her that, "UNLESS YOU TAKE ACTION TO PROTECT YOUR PROPERTY, IT MAY BE SOLD AT A PUBLIC SALE." The next paragraph told Ho that ReconTrust would "sell [her house] on 8/28/2009 at 01:00 PM, At the front entrance to the Pomona Superior Courts Building." Significantly, the notice of trustee's sale contained the following, in conformity with section 1692e(11): "RECONTRUST COMPANY, N.A. is a debt collector attempting to collect a debt. Any information obtained will be used for that purpose."

While the majority suggests that ReconTrust's description of itself does not necessarily establish that it was engaging in debt-collection activity, Maj. Op. at 12 n.7, the Second Circuit has held that a debtor receiving this letter cannot safely disregard it on that basis, *Hart v. FCI Lender Servs., Inc.*, 797 F.3d 219, 227 (2d Cir. 2015). Instead, "the Letter clearly announces itself an attempt to collect a debt, and its other text only emphasizes the plau-

sibility and gravity of that announcement. We see no reason why we should not take it at its word . . . ." *Id.*; *see also McLaughlin v. Phelan Hallinan & Schmieg, LLP*, 756 F.3d 240, 246 (3d Cir. 2014) (attaching significance to the fact that a law firm described itself as a debt collector in a letter to the debtor); *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1217 (11th Cir. 2012) (same). Indeed, in the present case, the notices may have succeeded in obtaining money from Ho directly because, as the majority observes, the loan service provider approved a loan modification agreement prior to the date of the foreclosure sale. Maj. Op. at 6 n.1. The modification, which would take effect upon the payment of $12,000, provided for a $36,000 increase in the amount of the mortgage and a reduction in the monthly interest payment.

The majority does not, and cannot, deny the effect of the language in the notices sent to Ho. Nor does it even address the language of section 1692a(6) that defines "debt collector" as one who attempts to collect "indirectly" debts owed to another. Instead, it makes a number of arguments predicated on the assumption that the mortgage foreclosure process involves the enforcement of a security interest. Thus, it begins its defense of ReconTrust's *in terrorem* communications by arguing that, if those communications succeed in obtaining the payment of a debt, it is akin to the simple fear of having your car impounded because you had accumulated parking tickets. This fear, the majority suggests, "doesn't make the guy with the tow truck a debt collector." Maj. Op. at 8. I leave it to the reader to evaluate whether the activities of a trustee of a deed of trust, which I have described above, can fairly be analogized to those of a tow truck

driver who simply pulls up to a car on the street and repossesses it.

Perhaps because the answer is obvious, the majority then argues that the FDCPA intended to exclude entities whose principal purpose is to enforce security interests, and because a nonjudicial foreclosure proceeding comes within the definition of enforcement of a security interest, ReconTrust is not a debt collector within the meaning of the FDCPA. Maj. Op. at 11–12. Moreover, for this reason, ReconTrust was entitled to engage in communications necessary to effectuate the enforcement of a security interest. *Id.* at 11. This argument fails for a number of reasons.

First, ReconTrust is a debt collector, because it directly or indirectly collects money owed by the debtor to the creditor. Under these circumstances, it is irrelevant that the nonjudicial process entailed in a mortgage foreclosure proceeding may have also constituted the enforcement of a security interest. *See Kaltenbach v. Richards*, 464 F.3d 524, 528–29 (5th Cir. 2006) ("[T]he entire FDCPA can apply to a party whose principal business is enforcing security interests but who nevertheless fits § 1629a(6)'s general definition of a debt collector."). Second, the FDCPA expressly contains six exclusions from its definition of "debt collector" but does not exclude entities who enforce security interests. 15 U.S.C. §§ 1692a(6)(A)–(F). Moreover, section 1692a(6), which contains the definition of "debt collector" and which I repeat here with the additional language upon which the majority relies, does not support the argument that one who enforces a security interest—and more particularly, the obligation of a debtor to pay money owed pursuant to a promissory note through a foreclosure proceeding—

does not come within the definition of debt collector. Specifically, section 1692a(6) provides that:

> [t]he term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. . . . *For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests.*

(Emphasis added). Section 1692f(6)—to which the last sentence, emphasized above, makes reference—proscribes "[t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest; (B) there is no present intention to take possession of the property; or (C) the property is exempt by law from such dispossession or disablement."

The majority argues that the last sentence of section 1692a(6), which subjects security enforcers to the foregoing proscriptions, "would be superfluous if all entities that enforce security interests were already included in the definition of debt collector for the purpose of the entire FDCPA." Maj. Op. at 10. In other words, what point would there be in saying that the term "debt collector" also includes enforcers of security interests if security enforcers were already included in the general definition? The answer is obvious. Not all entities that engage in the enforcement of security interests do so in the same way.

See, e.g., *Glazer*, 704 F.3d at 464. There are entities that enforce security interests yet who do not typically engage in activity that would also come within the definition of "debt collection." The tow truck driver to which the majority alludes is one example. *See* Maj. Op. at 8. Moreover, if they "attempt to collect, directly or indirectly, debts . . . owed or due another"—in the manner ReconTrust did here—they do not do so with sufficient regularity to bring them within the definition of "debt collector." *See Pflueger v. Auto Finance Group, Inc.*, No. CV–97–9499 CAS(CTX), 1999 WL 33740813, at *4–6 (C.D. Cal. Apr. 26, 1999).

Significantly, the concept of "dispossession or disablement of property" does not easily fit a mortgage foreclosure proceeding, and is more commonly associated with the taking of personal property. Because nonjudicial foreclosure proceedings do not involve the dispossession or disabling of personal property, the proscriptions contained in section 1692f(6) do not apply to those proceedings. Thus, if the majority is correct, then it would follow that a trustee of a deed of trust could undertake any of the unfair and abusive conduct proscribed in the FDCPA, because it would not come within the definition of "debt collector," nor would it be a security enforcer dispossessing or disabling property.[14] Congress hardly could have intended such a result.

Indeed, another provision of the FDCPA provides compelling support for the proposition that mortgage

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[14] The definitional section of the FDCPA does not contain a definition of the term "security enforcer." *See* 15 U.S.C. § 1692a. The meaning must therefore be derived from the manner in which the term is used, namely, one who dispossesses or disables personal property.

foreclosures come within the definition of debt collection, even though they may involve security interests. Thus, the judicial venue clause, the purpose of which is to require that a foreclosure proceeding be filed in the place "most convenient and least expensive for the debtor," *Kaltenbach*, 464 F.3d at 528, provides that "[a]ny *debt collector* who brings any legal action on a debt against any consumer shall—(1) *in the case of an action to enforce an interest in real property securing the consumer's obligation*, bring such action only in a judicial district or similar legal entity in which such real property is located," 15 U.S.C. § 1692i(a)(1) (emphasis added).[15]

The clause is particularly significant for two reasons. First, Congress did not say, as one would expect it to have said under the analysis employed by the majority, that any security enforcer who brings a mortgage foreclosure proceeding must do so in the designated venue. Instead, its use of the term "any debt collector" demonstrates that Congress understood that a mortgage foreclosure proceeding—an action to enforce an interest in real property securing the debtor's obligation—constitutes debt collection within the meaning of the FDCPA. Indeed, if, as the majority suggests, mortgage foreclosure proceedings constitute the enforcement of a security interest and not debt collection, then the venue clause would be rendered

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[15] Section 1692i(a)(2), permits any other action, including an action for a deficiency judgment, to be filed in the district "(A) in which such consumer signed the contract sued upon; or (B) in which such consumer resides at the commencement of the action." Because the difference between the amount obtained at the foreclosure sale and the amount due on the promissory note cannot be known, an action for a deficiency judgment arising out of a judicial foreclosure proceeding cannot be commenced until after the foreclosure sale is over.

meaningless, because security enforcers seeking a judicial foreclosure would not be subject to the limitation on venue contained in section 1692i(a)(1).

The majority argues that the venue clause "contemplates that a security enforcer can be a debt collector, but it offers no indication that an entity is a debt collector *because* it enforces a security interest." Maj. Op. at 10–11 n.4. I agree that an entity may not be a debt collector merely because it enforces a security interest. *See Glazer*, 704 F.3d at 463–64; *Piper*, 396 F.3d at 236. I rely on the venue clause because it demonstrates that Congress understood that mortgage foreclosure proceeding constitutes a unique way to enforce a security interest, and supports the broader proposition that a foreclosure proceeding meets the definition of debt collection. *Kaymark*, 783 F.3d at 179. Thus, the Third Circuit has observed that "[n]owhere does the FDCPA exclude foreclosure actions from its reach. On the contrary, foreclosure meets the broad definition of 'debt collection' under the FDCPA, and it is even contemplated in various places in the statute." *Id.* (citing, inter alia, 15 U.S.C. § 1692i).

This interpretation is supported by the legislative history of the FDCPA. In particular, the Senate Report on the FDCPA noted that "the committee does not intend the definition to cover . . . *the collection of debts, such as mortgages and student loans, by persons who originated such loans.*" S. Rep. No. 95-382, at 3 (1977) (emphasis added). This language strongly suggests a mortgage or deed of trust can be a debt, and an entity like ReconTrust can be a debt collector because it did not originate the loan to Ho. While I share the late Justice Scalia's lack of confidence in such legislative history, *see* Hon. Antonin Scalia, *A Matter of Interpretation: Federal Courts and*

the Law 32–34 (Amy Gutmann ed., 1997), I cite it here only because it is consistent with the language and structure of the FDCPA that I have discussed above, and because, accepting the majority's suggestion that the definition of debt collector is ambiguous, our precedents resort to this legislative history, *see Hernandez*, 829 F.3d at 1073; *see also Int'l Ass'n of Machinists & Aerospace Workers, Local Lodge 964 v. BF Goodrich Aerostructures Grp.*, 387 F.3d 1046, 1051–52 (9th Cir. 2004).

I come now to the last part of the argument of the majority that proceeds on the assumption that ReconTrust is a security enforcer and, as such, "must be able to maintain that status" when it does communicate with the debtor by taking "the statutorily required steps to conduct the trustee's sale." Maj. Op. at 11. This is another way of saying that California may override the protections afforded by the FDCPA by prescribing the steps necessary to commence a foreclosure proceeding, even if those steps would otherwise qualify ReconTrust as a debt collector.

There is no support in the language of the FDCPA for this pronouncement. Indeed, we have held that a complaint served on a debtor is a communication subject to the FDCPA, *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1031–32 (9th Cir. 2010), and there are any number of cases that have held that communications necessary to commence foreclosure proceedings, judicial or nonjudicial, may come within the definition of debt collection, *see Kaymark*, 783 F.3d at 176–78 (holding that a foreclosure complaint is a communication subject to the FDCPA); *Alaska Tr.*, 372 P.3d at 217–18 (explaining that a notice required to initiate foreclosure proceedings could "at the same time be an attempt to collect a debt"); *see also*

Romea, 163 F.3d at 116 (holding that the fact that state law required a debt collector to send a letter to commence eviction proceedings was "wholly irrelevant to the requirements and applicability of the FDCPA").

Perhaps recognizing the force of the arguments in favor of holding that the FDCPA does apply to trustees of a deed of trust, the majority appears to acknowledge that a trustee could become a debt collector by doing something "*in addition* to the actions required to enforce a security interest." Maj. Op. at 11 n.5. The majority does not say what additional action a trustee of a deed of trust would have to take in order to make him a debt collector. Certainly, it could not mean additional egregious actions in which some debt collectors engage, such as banging on the debtor's door or calling her incessantly. Under the holding of the majority, a trustee engaged in conducting a nonjudicial foreclosure proceeding is not collecting a debt. Thus, the FDCPA would not prohibit it from engaging in these activities. Moreover, the third amended complaint alleges that "defendant and/or its agents unlawfully trespassed [Ho's] property . . . by dispatching agents who entered upon the subject property, banging on doors in a gangster type fashion, posting false notices to let tenants on the premises know that Plaintiff [was] in loan default and demanding that plaintiff should call BAC, with intent to scare, intimidate, and harass plaintiff, and plaintiff's tenants."

Of course, the conduct prohibited by the FDCPA includes conduct that is far less egregious than banging on doors and calling debtors incessantly. Nevertheless, Congress regarded them as sufficiently problematic to warrant including them in the list of activities that constitute harassment or abuse, *see* 15 U.S.C. § 1692d, or are "unfair

or unconscionable," *id.* § 1692f. Thus, among the activities that the FDCPA lists as abusive is "[t]he advertisement for sale of any debt to coerce payment of the debt." *Id.* § 1692d(4). And among the unfair or unconscionable means to attempt to collect the debt is "[c]ommunicating with a consumer regarding a debt by post card." *Id.* at § 1692f(7). As the Second Circuit has held, "that Congress cited the industry's worst practices when passing the FDCPA does not limit the statute's purview to those practices, when the text reaches well beyond. [The parties] provide[] no reason to believe that Congress did not intend the FDCPA to offer broad protection to debtors . . . ." *Hart*, 797 F.3d at 228.

Moreover, even if the service of the notices and their content were required by California law, the liability attached to ReconTrust's activity does not arise from either the service of the notices or their required script. Instead, it arises from the fact that the notices that "ReconTrust had sent [Ho] were misleading and false because the amounts listed on them" reflected inaccurate amounts due. California did not require ReconTrust to provide false and misleading notices. The mere fact that California requires an otherwise accurate notice to be sent to commence a nonjudicial foreclosure proceeding should not relieve the trustee from complying with the FDCPA.

Up to this point, the majority has spilled considerable ink in arguing that ReconTrust is not a debt collector because it does not directly collect any money from borrowers under a deed of trust and because it is an enforcer of security interests. Perhaps because the majority itself remains unconvinced, in the space of half a page it invokes and cursorily applies an additional and even less persuasive exception to the general definition of "debt collector."

See Maj. Op. at 13–14. Specifically, the majority argues that "even if an entity like ReconTrust did fall under the FDCPA's general definition of a 'debt collector,' it would still be exempt under" 15 U.S.C. § 1692a(6)(F)(i), which provides an exception for entities acting "incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement." Maj. Op. at 13–14. Putting aside the question whether a deed of trust qualifies as "a bona fide escrow arrangement," the critical issue is whether ReconTrust, as trustee under Ho's Deed of Trust, is acting "incidental to" the Deed of Trust by initiating a nonjudicial foreclosure on Ho's home. While the majority rejects the suggestion that ReconTrust was acting as a fiduciary, it does accept the suggestion that ReconTrust was acting as an escrow agent and that the same "incidental to" requirement applies here. *Id.* at 14 & n.9.

In *Wilson v. Draper & Goldberg*, 443 F.3d 373 (4th Cir. 2006), the Fourth Circuit held that "the critical inquiry" in determining whether a trustee under a deed of trust falls within the exception provided by 15 U.S.C. § 1692a(6)(F)(i) is whether the trustee's actions are "incidental to a bona fide fiduciary obligation." *Id.* at 377. In holding that the trustee did not meet the "incidental to" requirement, the Fourth Circuit observed that "a trustee's actions to foreclose on a property pursuant to a deed of trust are not 'incidental' to its fiduciary obligation. Rather, they are central to it. Thus, to the extent Defendants used the foreclosure process to collect [the plaintiff's] alleged debt, they cannot benefit from the exemption contained in 1692a(6)(F)(i)." *Id.*

The same analysis applies with equal force to escrow agents. The deed of trust was formulated precisely to allow for nonjudicial foreclosure proceedings. And those

proceedings, for the reasons I have discussed above, constitute the direct or indirect collection of a debt. Indeed, an analysis of the development of the deed of trust suggests that its primary purpose is to facilitate the collection of a debt, and that the trustee/escrowee arrangement is incidental to the collection of a debt, and not the reverse. I quote from Professor Jesse Dukeminier's history of the development of the deed of trust:

> [L]awyers for lenders cast about for a way to avoid judicial foreclosure (which requires a costly and time-consuming lawsuit) and the statutory right of redemption from foreclosure sale. They sought a way for the lender to sell the land and be paid soon after default. They found this in the form of a deed of trust . . . . Under a deed of trust, the borrower conveys title to the land to a person (who is usually a third person but may be the lender) to hold in trust to secure payment of the debt to the lender. In a deed of trust the trustee is given the power to sell the land without going to court if the borrower defaults. The power of sale foreclosure is more efficient and less costly than a judicial foreclosure, but courts and statutes regulate it by requiring notice and procedures that are fair to the borrower. Except for the power to foreclose privately, the deed of trust is treated in almost all significant respects as a mortgage.

Dukeminier & Krier, *supra*, at 590–91; *see also Yvanova*, 365 P.3d at 849–50. Thus, a trustee's initiation of a nonjudicial foreclosure cannot possibly be considered to be "incidental to" a deed of trust—rather, nonjudicial foreclosure is its animating purpose.

In sum, Congress has provided a definition of a debt collector. Once ReconTrust's activities brought it within that definition, it was a debt collector, as ReconTrust

acknowledged in the notice of sale it sent to Ho in which it characterized itself as a debt collector seeking to enforce a debt. *See* 15 U.S.C. § 1692a(6). This conclusion is also consistent with the opinion of the Consumer Financial Protection Bureau ("CFPB"), which we solicited and which the majority rejects, Maj. Op. at 16 n.10, "that entities satisfying the general definition of 'debt collector' are subject to the entire [FDCPA]," Brief of Amicus Curiae Consumer Financial Protection Bureau in Support of Appellant and Reversal at 18 n.8, 2015 WL 4735787, at *18 n.8.

II. The FDCPA Does Not Interfere with California's Arrangements for Nonjudicial Foreclosures

I turn now to the claim that, because the term "debt collector" is said to be ambiguous, it should not be construed in a manner that would frustrate ReconTrust's ability to comply with California's procedures for nonjudicial foreclosures. Maj. Op. at 14. Indeed, in this case, it is not disputed that ReconTrust complied in every respect with California law. Nevertheless, citing several alleged conflicts between the FDCPA and California foreclosure law, ReconTrust and its amici have warned that treating trustees as debt collectors would "literally prevent [California's foreclosure] system from functioning." Brief of Amici Curiae United Trustee's Ass'n et al. at 4, 2015 WL 1020492, at *4. This overwrought statement is simply false. Three circuits, covering twelve states, have held that foreclosure proceedings are debt collection under the FDCPA, *see Kaymark v. Bank of Am., N.A.*, 783 F.3d 168, 179 (3d Cir. 2015); *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453, 461–63 (6th Cir. 2013); *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 376–77 (4th Cir. 2006); *see also Piper v. Portnoff Law Assocs., Ltd.*,

396 F.3d 227, 234–36 (3d Cir. 2005), along with the Supreme Courts of Alaska and Colorado. *See Alaska Tr., LLC v. Ambridge*, 372 P.3d 207, 213–216 (Alaska 2016); *Shapiro & Meinhold v. Zartman*, 823 P.2d 120, 123–24 (Colo. 1992) (en banc). Neither ReconTrust nor its amici have provided any evidence that these holdings have had any effect—much less that the sky has fallen in—on the foreclosure laws of those states. Moreover, the argument ignores the fact that the FDCPA's preemption clause expressly leaves in place "the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of [the FDCPA], and then only to the extent of the inconsistency." 15 U.S.C. § 1692n. Indeed, it also contains a mechanism for the exemption of certain debt collection practices that do not precisely match those of the FDCPA. *See* 15 U.S.C. § 1692o.

I now proceed to address each of the provisions of the FDCPA that allegedly interfere with California's arrangements for conducting nonjudicial foreclosure proceedings. None of them have the effect that the majority attributes to them. Indeed, this case demonstrates how readily the California foreclosure system can function alongside the FDCPA. The majority does not dispute that the first two alleged conflicts between California law and the FDCPA may be avoided "by consent between the parties to a mortgage deal." Maj. Op. at 17. Such consent was procured here. Nevertheless, the majority argues that "[t]he fact that parties may be able to draft their way around conflicts renders them conflicts no less. Relegating future parties to the uncertain process of adding contractual terms may itself upset a state's carefully drawn scheme of notice and disclosure; additional efforts or

more complex terms are themselves costs of that conflict." *Id.* I do not understand to what the majority is referring when it speaks of an "uncertain process of adding contractual terms." The language of the Deed of Trust is not the result of the addition of terms to a bargained-for agreement. Instead, the Deed is a "take it or leave it" form to the terms of which the borrower must agree if he or she wants a loan. Thus, the pre-printed Deed of Trust, which is signed only by the borrower, describes itself as follows: "CALIFORNIA-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS."

Indeed, as I will show below, the alleged conflicts are, to borrow the Yiddish term, gornisht mit gornisht—nothing with nothing. In the two instances in which California law allegedly conflicts with the FDCPA, the net effect of the borrower's consent is to permit the foreclosure to go forward in the manner prescribed by California law. Thus, in the first instance, the debtor agrees to allow the trustee to announce the foreclosure sale in a newspaper, as well as mail the notices of default to various third parties, which is required by California law. Moreover, in the second instance, the debtor agrees to allow the trustee to mail the notices of default and sale directly to him or her, as required by California law. I provide some brief background detail in the discussion that follows.

1. While the FDCPA prohibits debt collectors from communicating with third parties without the debtor's consent, California law mandates that trustees announce any sale in a newspaper, as well as mail notices of default to various third parties. Maj. Op. at 14. As the majority acknowledges, debt collectors may communicate with

third parties once they have the debtor's consent. *Id.* (citing 15 U.S.C. § 1692c(b)). Here, Ho provided such consent by signing the Deed of Trust, which stated that, if the lender invoked its power of sale, the "Trustee shall cause this notice [of sale] to be recorded in each county in which any part of the Property is located. Lender or Trustee shall mail copies of the notice as prescribed by Applicable Law to Borrower and to the other persons prescribed by Applicable Law." The effect of this was to permit ReconTrust to comply with the California law mandating certain public disclosure of a foreclosure sale.

2. The majority also observes that, while the FDCPA prohibits debt collectors from communicating directly with debtors if the collector knows that the debtor has counsel, under California law, a trustee must mail the notices of default and sale to the borrower directly. Maj. Op. at 15. The FDCPA, however, allows consumers to consent to direct communication. 15 U.S.C. § 1692c(a). By signing the Deed of Trust, Ho consented to the "Lender or Trustee [mailing] copies of the notice as prescribed by [California] Law to Borrower."

3. I now proceed to the remaining conflict between California law and the FDCPA relied upon by the majority. The majority warns that, if a debtor decided to dispute the debt pursuant to the FDCPA, the trustee would have to cease any debt collection activities until it verified the debt. Maj. Op. at 15. If such verification took more than ten days, the trustee would miss the statutory deadline for mailing the notice of default. *Id.* Moreover, if the verification took over a year, the trustee would have to restart the foreclosure process. *Id.*

This scenario is entirely far-fetched, because a debt collector could easily satisfy this verification requirement

within ten days and thus avoid delaying the nonjudicial foreclosure process. Indeed, if it took longer, it would be the trustee's own fault. Specifically, we have "decline[d] to impose . . . a high threshold" on debt collectors attempting to verify disputed debts and have explained that, "[a]t the minimum, 'verification of a debt involves nothing more than the debt collector confirming in writing that the amount being demanded is what the creditor is claiming is owed.'" *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1173–74 (9th Cir. 2006) (quoting *Chaudhry v. Gallerizzo*, 174 F.3d 394, 406 (4th Cir. 1999)). Indeed, in an unpublished opinion, we recently affirmed a district court's ruling that a debt collector satisfied section 1692g(b) by sending a letter to the debtor that included the debtor's address, the date of the deed of trust, and the name and address of the original creditor. *Zhang v. Countrywide Home Loans, Inc.*, 601 F. App'x 567, 567 (9th Cir. 2015) (unpublished), *aff'g* No. 11-cv-3475 (NC), 2012 WL 1245682, at *11 (N.D. Cal. Apr. 13, 2012). So much for the conflicts that the majority conjures.

In sum, none of the conflicts identified would stop the California foreclosure system from functioning. On the contrary, the FDCPA's preemption clause expressly preserves State law and avoids excluding compliance with it "except to the extent that those laws are inconsistent with any provision of [the FDCPA], and then only to the extent of the inconsistency." 15 U.S.C. § 1692n.[16]

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[16] The CFBP does not concede, as the majority suggests, "a conflict may exist between state and federal law." Maj. Op. at 15. Instead, citing to the FDCPA's preemption clause, the CFPB explained, "[t]hat a conflict may exist between state and federal law is no basis for state law to trump or somehow excuse compliance with federal law." Brief

Moreover, the FDCPA provides a method for resolving conflicts with state law that the majority ignores. Section 1692o states that the CFPB "shall by regulation exempt from the requirements of this subchapter any class of debt collection practices within any State if the [CFPB] determines that under the law of that State that class of debt collection practices is subject to requirements substantially similar to those imposed by this subchapter, and that there is adequate provision for enforcement." The Second Circuit discussed section 1692o in *Romea*. There, a defendant law firm sent a form letter to a plaintiff-debtor pursuant to state law, demanding that she pay her back rent. *Romea*, 163 F.3d at 113. In finding that the defendant was a debt collector, the Second Circuit cited to an older version of section 1692o, which granted the Federal Trade Commission the authority to provide exemptions, to explain that, "if the protections afforded tenants under New York's Article 7 process do result in 'requirements substantially similar to those imposed by [the FDCPA],' then New York may petition the Federal Trade Commission to promulgate regulations that exempt § 711 notices from the FDCPA." *Id.* at 118 n. 11 (alteration in original); *see also* FTC Notice of Maine Exemption From The Fair Debt Collection Practices Act, 60 Fed. Reg. 66972, 66973 (Dec. 27, 1995) (granting Maine's request for an exemption from certain provisions of the FDCPA for certain debt collection practices because "the level of protection to consumers under the Maine Act is substantially equivalent to that provided in the FDCPA"). Rather than asking this Court to adopt an unnatural reading of the term "debt collector," ReconTrust

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of Amicus Curiae Consumer Financial Protection Bureau in Support of Appellant and Reversal at 14, 2015 WL 4735787, at *14.

and its amici should ask California to petition the CFPB for an exemption to the statute.

In sum, the position of the majority is that, because the phrase "debt collector" is ambiguous, we should refuse to construe it in a manner that conflicts with California's arrangements for conducting nonjudicial foreclosures. While my reading of the phrase differs from that of the majority, even if the majority is correct, the provisions of the FDCPA do not interfere with the operation of nonjudicial foreclosure proceedings in California. Because the majority applies California law in a way that overrides the arrangements that Congress has made for the protection of debtors, I respectfully dissent from the affirmance of the judgment dismissing the FDCPA claim. I concur in the remand to the district court for consideration of Ho's Truth in Lending Act rescission cause of action.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 10-741-GW(SSx)
USM No. 51568-379

VIEN-PHUONG THI HO

v.

COUNTYWIDE HOME LOANS, INC./BANK OF AMERICA HOME LOANS, ET AL.

Entered: April 1, 2010

CIVIL MINUTES – GENERAL

PROCEEDINGS: DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT (filed 02/26/10)

GEORGE H. WU, United States District Judge.

Hearing is held. The tentative circulated is hereby adopted as the Court's final ruling (attached). Defendants' Motion to Dismiss Plaintiff's Complaint is **granted with leave to amend.** Plaintiff Ho will have until May 3, 2010 to file an amended complaint.

Plaintiff's Motion for Judgment on the Pleadings and Plaintiff's Motion to Strike under Rule 12(f), filed on March 10, 2010 are deemed **moot** and **taken off calendar.**

A Scheduling Conference is set for **May 27, 2010 at 8:30 a.m.** Parties will file a Joint Rule 26(f) report by May 25, 2010.

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Initials of Preparer JG

Ho v. Countrywide Home Loans, Inc., et al., Case No. CV-10-0741

Tentative Ruling on Motion to Dismiss Plaintiff's Complaint

I. Background

Defendants Countrywide Home Loans, Inc., BAC Home Loans Servicing, LP (erroneously sued as Bank of America Home Loans) and ReconTrust Company, N.A. (collectively "Defendants") move to dismiss the Complaint filed by *pro se* plaintiff Vien-Phuong Thi Ho ("Plaintiff"), which appears to contain 21 claims for relief arising out of her mortgage and related activity concerning her home.

II. Analysis

Under Rule 12(b)(6), a court must (1) construe the complaint in the light most favorable to the plaintiff, and (2) accept all well-pleaded factual allegations as true, as well as all reasonable inferences to be drawn from them. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.), *amended on denial of reh'g*, 275 F.3d 1187 (9th Cir. 2001); *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998). The Court need not accept as true "legal conclusions merely because they are cast in the form of factual allegations." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). In its consideration of the motion, the court is limited to the allegations on the face of the complaint (including documents attached thereto), matters which are properly judicially noticeable and "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not

physically attached to the pleading."[1] *See Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001); *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir.), *cert. denied*, 512 U.S. 1219 (1994). Dismissal pursuant to Rule 12(b)(6) is proper only where there is either a "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990); *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008); *see also Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1968-69 (2007) (dismissal for failure to state a claim does not require the appearance, beyond a doubt, that the plaintiff can prove "no set of facts" in support of its claim that would entitle it to relief). However, a plaintiff must also "plead 'enough facts to state a claim to relief that is plausible on its face.'" *Johnson*, 534 F.3d at 1122 (quoting *Twombly*, 127 S.Ct. at 1974); *see also William O. Gilley Enters., Inc. v. Atlantic Richfield Co.*, 588 F.3d 659, 667 (9th Cir. 2009) (confirming that *Twombly* pleading requirements "apply in all civil cases").

"Dismissal of a *pro se* complaint without leave to amend is proper only if it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." *Weilburg v. Shapiro*, 488 F.3d 1202, 1205 (9th Cir. 2007) (quoting *Schucker v. Rockwood*, 846 F.2d 1202,

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[1] Defendants assert that the Court may consider Plaintiffs executed Notice of Right to Cancel under this rule. However, as Defendants themselves realize, Plaintiff alleges that she was never provided the 3-Day Notice of Rescission. *See* Complaint ¶ 30.2. She has, therefore, not alleged its contents (in fact, she has denied its existence), her claims do not depend on the contents (of what she alleges is a non-existent document), and it may not be considered on a Rule 12(b)(6) motion under the "incorporation by reference" doctrine.

1203-04 (9th Cir. 1988)); *see also Ramirez v. Galaza*, 334 F.3d 850, 861 (9th Cir. 2003) ("Leave to amend should be granted unless the pleading 'could not possibly be cured by the allegation of other facts and should be granted more liberally to pro se plaintiffs.'") (quoting *Lopez v. Smith*, 203 F.3d 1122, 1130-31 (9th Cir. 2000) (*en banc*)), *cert. denied*, 541 U.S. 1063 (2004). The Ninth Circuit has applied *Twombly* in connection with a pro se *inmate* litigant's pleadings and has indicated that the "less stringent standards" historically applied in those circumstances survive *Twombly*, even if such a plaintiff still must establish a "plausible" entitlement to relief. *See Alvarez v. Hill*, 518 F.3d 1152, 1157-59 (9th Cir. 2008).

A. Plaintiff's Opposition

Before addressing each of the claims Defendants' motion challenges, it should be noted that Plaintiffs only opposition to the motion is to emphasize her *pro se* status, to argue that a short and plain statement is all that is required for all of her claims (including her fraud claims), and to incorporate by reference the positions she takes in her motion to strike Defendants' motion to dismiss, which is set for hearing one week after the motion to dismiss. While, as noted above, *pro se* complaints are to be read somewhat liberally and given some leeway in connection with whether or not a court should dismiss them without leave to amend, that does not excuse a *pro se* plaintiff from pleading a plausible claim for relief in accordance with the elements required of the particular claims at issue. While a short and plain statement is all that is required for most claims (not fraud claims), that rule is tempered by the recognitions, set forth above, that the allegations must be fact-based, not conclusory, and must demonstrate a plau-

sible entitlement to relief. In light of her failure to substantively respond, the Court could consider her to have consented to the Court granting the motion as to all such claims. However, in line with *Weilburg*, the Court would only be able to dismiss claims without leave to amend where "it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." 488 F.3d at 1205.

Other than the general argument that Defendants' motion to dismiss is insufficient to require the dismissal of her Complaint, Plaintiffs motion to strike is based upon the argument that Defendants did not meet and confer with her and that Exhibit 1 to Defendants' motion is improper. However, Defendants' motion does indicate that the meet-and-confer took place on February 18, 2010,[2] and, as noted below, the Court would simply disregard Exhibit 1 to Defendants' motion. These are not, therefore, reasons to deny (or strike) Defendants' motion.[3]

B. Fraud and Negligent Misrepresentation

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[2] *See* Notice of Motion at 3:10-11; *see also* Declaration of Jordan Yu in Support of Reply to Motion to Dismiss and Defendants' Omnibus Opposition to Plaintiffs Motion for Judgment on the Pleadings and Motion to Strike ¶ 2.

[3] The Court will therefore preemptively deny Plaintiff's motion to strike set for April 8, 2010. It will also preemptively deny Plaintiff's motion for judgment on the pleadings, also set for hearing that day, as the pleadings are not yet closed in this matter. *See* Fed. R. Civ. P. 12(c) ('After the pleadings are closed . . . a party may move for judgment on the pleadings.") (emphasis added). In association with those preemptive rulings, the Court would indicate that it will decline to convert Plaintiff's motion for judgment on the pleadings into a motion for summary judgment.

The elements for pleading fraud under California law are a false representation or omission, knowledge of falsity, intent to defraud, justifiable reliance and damages. *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003). Those elements must be pled in conformance with the Federal Rules of Civil Procedures' requirement of particularity. *See* Fed. R. Civ. P. 9(b); *Vess*, 317 F.3d at 1103 (indicating that particularity requirement of Fed. R. Civ. P. 9(b) applies to state-law causes of action in federal court). Thus, Plaintiff must plead the who, what, when, where and how of the misconduct charged, in addition to what is false or misleading about the statement at issue, and why it is false. *See Vess*, 317 F.3d at 1106.

Plaintiff's fraud allegations are unquestionably somewhat confusing. At the same time, they are not subject to the particular shortcomings Defendants believe they have identified. Defendants argue that Plaintiff fails to tie any specific misrepresentation to any particular defendant, opting instead to indiscriminately lump all defendants together. On the contrary, Plaintiff identifies the defendant or defendants responsible for each allegedly fraudulent statement and, even if the allegations in this regard are imprecise, she has attached as exhibits to the Complaint the specific documents about which she complains. *See* Complaint ¶¶ 34(d), 36(d), 38(d) & Exhs. A-B. Defendants also argue that Plaintiff has failed to properly allege, with particularity, why the amounts listed on the allegedly fraudulent documents are false or misleading. Putting aside the questions of whether Plaintiff's allegations make much sense or whether she will be able to recover as a substantive matter, Plaintiff actually has pled about as much detail in this regard as could be reasonably expected of her at this pre-discovery stage. *See* Complaint ¶¶ 18-20,

34-34.3, 36-36.3. If Plaintiff is incorrect that these amounts are "fraudulent," Defendants should be able to demonstrate that without much difficulty.

However, if Plaintiff intends to allege that there are any fraudulent statements or omissions other than those alleged in paragraphs 18-20, she would have to amend her Complaint to make it clearer. Absent such an intent, the fraud claims are sufficiently pled at this stage.

C. Truth in Lending Act ("TILA")

Defendants argue that Plaintiff's TILA damages claim is time-barred by the one-year statute of limitations. *See* 15 U.S.C. § 1640(e). Indeed, Plaintiff signed her Deed of Trust in June 2007. *See* Defendants' Request for Judicial Notice, Exh. A. Substantively, Defendants argue that Plaintiff's TILA claim fails because she has not specified what disclosure Defendants failed to make, other than an allegation that they failed to provide her with the required 3-Day Notice of Rescission, and that Plaintiff's executed Truth in Lending Disclosure Statement (which she attached to her Complaint) creates a rebuttable presumption that she did in fact receive the required TILA disclosures. *See* Complaint ¶ 30.2.

Defendants argue Plaintiff's right to rescission under TILA is also barred because she only had that right for three days, considering her receipt of all TILA disclosures, including her TILDS and Notice of Right to Cancel. However, as noted *supra* Footnote 1, Plaintiff's executed Notice of Right to Cancel may not be considered on this motion. For that reason, therefore, the Court cannot conclude, based on the pleadings alone, that Plaintiff would be unable to enjoy the full 3-year term for rescission under 15 U.S.C. § 1635(f).

Defendants further argue that Plaintiff cannot obtain rescission (either under TILA or a common law right of rescission, Plaintiff's seventeenth claim for relief) because she has failed to allege tender or that she has the ability to tender. *See Yamamoto v. Bank of New York*, 329 F.3d 1167, 1172 (9th Cir. 2003), *cert. denied*, 540 U.S. 1149 (2004). Indeed, Plaintiff has thus far failed to allege any ability to tender.

For the above reasons, Plaintiff's TILA claim must be dismissed. She would be denied leave to amend on this claim only insofar as her claim for damages. Otherwise, she will be granted leave to amend so that she can further specify (for purposes of making her claim plausible) what required disclosure(s) was/were not made to her and whether she can satisfy the tender requirement (for purposes of both her TILA and "Rescission for Fraud" claims).[4]

D. Fair Debt Collection Practices Act ("FDCPA")

Defendants argue that Plaintiff's FDCPA claim is fatally flawed because they are not debt collectors, but are instead collecting in their own name. In addition, some courts have held that mortgage lenders and servicers simply do not fall under the rubric of the FDCP A. In fact, the majority of district courts within this Circuit that appear to have considered this issue have agreed with this

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[4] In their argument concerning Plaintiff's TILA claim, Defendants express understandable uncertainty as to whether Plaintiff is attempting to state a claim pursuant to the Real Estate Settlement Procedures Act ("RESP A"). If, indeed, Plaintiff is intending to state such a claim, *see* Complaint ¶¶ 31.1-31.2, she must make it more clear in any amended complaint (principally by designating it as a separate claim for relief, as she has with the 21 claims presently included in her Complaint).

position. *See, e.g.*, *Izenberg v. ETS Servs., LLC*, 589 F.Supp.2d 1193, 1199 (C.D. Cal. 2008); *Kuoha v. Equifirst Corp.*, No. 09cv1100 WQH (WMc), 2009 U.S. Dist. LEXIS 94699, *8-9 (S.D. Cal. Oct. 7, 2009); *Landayan v. Wash. Mut. Bank*, No. C-09-00916 RMW, 2009 U.S. Dist. LEXIS 93308, *6-7 (N.D. Cal. Sept. 18, 2009); *see also Allen v. United Fin. Mortg. Corp.*, No. 09-2507 SC, 2010 U.S. Dist. LEXIS 26503, *17-20 (N.D. Cal. Mar. 22, 2010) (listing cases, but refusing to decide the issue at that time, because of the plaintiff's citation to contrary authority and defendants' failure to substantively respond). Plaintiff has not addressed this claim or these arguments in her Opposition. Plaintiff's claim under the FDCPA is therefore foreclosed, and the motion to dismiss will be granted without leave to amend on that claim.

E. RICO & RICO Conspiracy

Defendants argue that Plaintiff's RICO claim is flawed in several respects. First, they contend that Plaintiff has not alleged the existence of an "enterprise." Defendants also point out that Plaintiff has failed to allege the existence of a pattern of racketeering activity, except by way of using buzzwords and legal conclusions. Plaintiff's "predicate act" allegation is also dependent upon legal conclusions absent facts. Finally, Defendants argue that Plaintiff has not alleged any injury apart from injury due to the commission of the alleged predicate acts.

Each subparagraph of 18 U.S.C. § 1962 requires a pattern of racketeering activity. *See Walter v. Drayson*, 538 F.3d 1244, 1247 (9th Cir. 2008); *United States v. Robertson*, 15 F.3d 862, 868 (9th Cir.1994), *rev'd on other grounds by United States v. Robertson*, 514 U.S. 669, 115 S.Ct. 1732, 131 L.Ed.2d 714 (1995); *Schreiber Distrib. Co. v. ServWell Furniture Co.*, 806 F.2d 1393, 1398 (9th Cir.

1986). Whatever else may be said about Plaintiff's RICO claim, apart from the fraud allegations (which are, at best, borderline sufficient), the Complaint does not provide even borderline plausible allegations of any other racketeering activity or predicate acts. *See* Complaint ¶ 59 (containing conclusory reference to "the fraud, embezzlement, extortion, mail fraud, and money laundering transactions as described herein"). If fraud is the only act Plaintiff can identify, she will have to specify how it falls within the definition of "racketeering activity" for purposes of this case. *See* 18 U.S.C. § 1961(1).

Plaintiff cannot maintain a RICO conspiracy claim if she has not even properly alleged a RICO claim. *See Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 619 n.1 (9th Cir. 2004). The Court will dismiss Plaintiff's RICO-based claims with leave to amend. Going forward, if Plaintiff intends to amend this claim and also intends to bring a claim under each of the different subsections of 18 U.S.C. § 1962, she should set out each different subsection as a separate claim for relief.

F. Civil Rights Claims

Plaintiff's Complaint contains claims for violation of 42 U.S.C. §§ 1981, 1983 and 1985, and 18 U.S.C. § 241. As Defendants point out, Plaintiff's section 1981, 1983 and 1985 claims are flawed if for no other reason than that she has failed to allege intentional discrimination on the basis of membership in a protected class. *See Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971). Indeed, Plaintiff's pleading of these claims falls well short of the pleading standard enunciated in *Twombly*. *But see Johnson v. Riverside Healthcare Sys.*, LP, 534 F.3d 1116, 1121-24 (9th Cir. 2008); *Maduka v. Sunrise Hosp.*, 375 F.3d 909, 912 (9th Cir. 2004); *Parks Sch. of Bus., Inc. v. Symington*,

51 F.3d 1480, 1487 (9th Cir. 1995) ("In order to withstand a motion to dismiss for failure to state a claim, a § 1981 cause of action need only allege 'that plaintiff suffered discrimination . . . on the basis of race.'") (quoting *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 625 (9th Cir. 1988)). Even under the relaxed standard applied in *Johnson*, *Maduka* and *Parks*, there are no facts alleged which evidence any discriminatory intent.[5]

Plaintiff's section 1983 claim is additionally flawed because of the absence of any allegation of state action. Generally speaking, private actors are not subject to section 1983 liability. While that rule is subject to certain exceptions, *see Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003), Plaintiff has not alleged the basis for such an exception here. *See Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835-36 (9th Cir. 1999); *see also Fidelity Fin. Corp. v. Federal Home Loan Bank*, 792 F.2d 1432, 1435-36 (9th Cir. 1986) (finding assertion of government action questionable relating to a bank's loan decision even though the bank was created by a federal agency to accomplish federal objectives, was subject to extensive regulations, and some of the bank's directors and managers were appointed by a federal bank board), *cert. denied*, 479 U.S. 1064 (1987); *cf. Parks*, 51 F.3d at 1485-86 (concluding

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[5] Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts," which includes "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 198l(a), (b). The section protects against even "nongovernmental discrimination" in this regard. 42 U.S.C. § l98l(c).

that private, non-profit loan guarantor was not state actor); *Mathis v. Pacific Gas & Elec. Co.*, 891 F.2d 1429, 1431 (9th Cir. 1989) (concluding that fact that defendant was "a public utility subject to extensive state regulation" was insufficient without more to demonstrate state action); *Freier v. New York Life Ins. Co.*, 679 F.2d 780, 783 (9th Cir. 1982) ("The mere fact that a business is regulated by state law or agency does not convert its dealings into acts 'under color of state law.'"); *Scott v. Eversole Mortuary*, 522 F.2d 1110, 1115 (9th Cir. 1975) ("Nondiscriminatory regulation does not transform the activities of a private party into state action.").

Plaintiff's section 1985 claim is flawed because Plaintiff has not plausibly pled the existence of a conspiracy to interfere with Plaintiffs civil rights, *see* 42 U.S.C. § 1985(3), and a section 1985 claim may not survive without a viable section 1983 claim, *see Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 930 (9th Cir. 2004).

Section 241 is merely the criminal statute tracking some of the provisions present in section 1985. It does not provide for its own civil private right of action. *See Allen v. Gold Country Casino*, 464 F.3d 1044, 1048 (9th Cir. 2006), *cert. denied*, 549 U.S. 1231 (2007).

All of the above-mentioned claims will be dismissed with leave to amend, except the section 241 claim, which is dismissed without leave to amend.

G. Negligence

Defendants argue that Plaintiff has not sufficiently pled the existence of a duty because she has only alleged a lender-borrower relationship, citing *Nymark v. Heart Fed. Svs. & Loan Ass'n*, 231 Cal.App.3d 1089, 1095-96 (1991). Even as to the other elements of a negligence

claim, Defendants argue that Plaintiff's allegations cannot succeed under the Supreme Court's recent Rule 12(b)(6) jurisprudence. Plaintiff has not responded. To allow her to identify some other basis for a duty, the Court will dismiss the claim with leave to amend.

H. Breach of Contract and Implied Covenant

Defendants correctly argue that Plaintiff's breach of contract claim fails because she has not alleged the existence of a contract, or what terms of what contract were breached. Because Plaintiff has presently failed to allege the existence of any contract, she necessarily cannot state a claim for breach of the implied covenant of good faith and fair dealing. Although Defendants also argue that the type of relationship at issue here is simply not subject to an implied covenant claim, the Court need not reach that argument. The Court will dismiss these claims with leave to amend.

I. Tortious Interference with Business Contracts

Defendants point out that Plaintiff appears to be making a tortious interference claim arising from Defendants' alleged interference with their own contract with Plaintiff. *See* Complaint ¶ 94. That will not provide the basis for a tortious interference claim. *See Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 514 (1994). Plaintiff has not alleged the existence of any other contract. Nevertheless, the Court will give her one opportunity to amend in light of the fact that it is not "absolutely clear that the deficiencies of the complaint could not be cured by amendment." *Weilburg*, 488 F.3d at 1205.

J. Deceptive Trade Practices

Though Plaintiff appears to reference some statutory basis for her deceptive trade practices claim, *see* Complaint ¶¶ 81-82, she has not identified what statute that is. Without at least that minimum information, she may not proceed on this claim beyond a motion to dismiss. The claim will be dismissed with leave to amend.

K. Unjust Enrichment

Defendants argue that unjust enrichment is not a separate cause of action. *See Melchior v. New Line Productions, Inc.*, 106 Cal.App.4th 779, 793 (2003). While *Melchior* and other decisions have handled the issue in this way, others have not, recognizing it as an independent claim. *See, e.g.*, *Peterson v. Cellco P'ship*, 164 Cal.App.4th 1583, 1593 (2008) ("The elements of an unjust enrichment claim are the 'receipt of a benefit and [the] unjust retention of the benefit at the expense of another.") (quoting *Lectrodryer v. SeoulBank*, 77 Cal.App.4th 723, 726 (2000)). Citing *Jones v. Wells Fargo Bank*, 112 Cal.App.4th 1527, 1541 (2003), Defendants also argue that unjust enrichment cannot lie where the defendant has received that to which it was entitled pursuant to a contract between the parties. Yet, the nature of Plaintiff's claim is that she gave up more than she agreed to in order to receive the benefit of her bargain. The Court will deny Defendants' motion with respect to this claim.

L. Civil Conspiracy and Injunctive Relief

Defendants correctly point out that civil conspiracy and injunctive relief are not considered causes of action under California law. *See Entm't Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1228 (9th Cir. 1997), *cert. denied*, 523 U.S. 1021 (1998); *Roberts v. Los Angeles County Bar Ass'n*, 105 Cal.App.4th 604, 618

(2003). As this flaw cannot be cured, these claims are dismissed without leave to amend.

M. Trespass

Defendants observe that Plaintiff has not alleged what property Defendants allegedly trespassed upon, or the manner in which they committed such trespass(es). Among other things, a claim for trespass requires damage to the plaintiff's property. *See San Diego Gas & Elec. Co. v. Superior Court (Covalt)*, 13 Cal.4th 893, 937 (1996). In addition, Plaintiff has not pled that Defendants have entered onto her property. *See Civic. Western Corp. v. Zila Indus., Inc.*, 66 Cal.App.3d 1, 16 (1977) ("The essence of the cause of action for trespass is an 'unauthorized entry' onto the land of another."); *see also* 5 Witkin, Summary of California Law: Torts (10th ed.) § 693, at 1018 (indicating that invasion must by "physical"). For at least those reasons, Plaintiff's trespass claim is presently flawed. The Court therefore dismisses it with leave to amend.[6]

N. Declaratory Relief

Defendants assert that Plaintiff's declaratory relief claim should be dismissed because it is merely duplicative of other claims she maintains. Not knowing which claims, if any, will ultimately remain in this action, however, it would be premature to dismiss Plaintiffs' claim for declaratory relief at this time. Moreover, Federal Rule of Civil

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[6] To the extent Plaintiff attempted to set forth a quiet title claim in connection with or, for that matter, separate from, her trespass claim, Defendants correctly observe that Plaintiff has provided no supporting allegations in connection with such a claim. That claim, therefore, would also be dismissed with leave to amend, if it is indeed a claim Plaintiff intends to allege.

Procedure 57 indicates that "[t]he existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate." The Court would therefore deny the motion as to this claim, but without prejudice to renewing it — in connection with the pleadings — in a later motion.

III. Conclusion

For the reasons stated above, Defendants' motion to dismiss is: a) denied as to fraud, negligent misrepresentation, unjust enrichment and declaratory relief claims; b) granted with leave to amend as to the TILA and Rescission for Fraud claims, RICO/RICO Conspiracy claim, 42 U.S.C. §§ 1981, 1983 and 1985 claims, the negligence/gross negligence claim, breach of contract and breach of the implied covenant claims, deceptive trade practices claim, and trespass/quiet title claim; and c) granted without leave to amend as to the FDCPA claim, 18 U.S.C. § 241 claim, civil conspiracy and injunctive relief claims.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 10-741-GW(SSx)
USM No. 51568-379

VIEN-PHUONG THI HO

v.

COUNTYWIDE HOME LOANS, INC./BANK OF AMERICA HOME LOANS, ET AL.

Entered: Nov. 8, 2010

CIVIL MINUTES – GENERAL PROCEEDINGS: SCHEDULING CONFERENCE

GEORGE H. WU, United States District Judge.

The tentative ruling circulated on October 21, 2010 is hereby adopted as the Court's final ruling. Defendants' Motion to Dismiss Plaintiff's Third Amended Complaint is **granted without leave to amend.**

Plaintiff's Motion for Reconsideration Based on Court's Tentative Ruling on October 21, 2010, filed on November 1, 2010, and presently set for November 29, 2010, is deemed **moot.**

_____: 04

Initials of Preparer JG

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-56884

VIEN-PHUONG THI HO, Plaintiff-Appellant

v.

RECONTRUST COMPANY, NA, subsidiaries of Bank of America, N.A.; COUNTRYWIDE HOME LOANS INC.; BANK OF AMERICA, N.A., Defendants-Appellees

Appeal from the United States District Court
for the Central District of California

Filed: May 22, 2017

Before: KOZINSKI and CALLAHAN, Circuit Judges, and KORMAN,* District Judge.

ORDER

The opinion and partial dissent filed October 19, 2016, and appearing at 840 F.3d 618, are **AMENDED** as reflected in the attached amended opinion and partial dissent. The petition for rehearing or rehearing en banc is

* The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

DENIED. No further petitions for rehearing will be considered.

APPENDIX E

1. 15 U.S.C. 1692 provides:

Congressional findings and declaration of purpose

(a) Abusive practices

There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Inadequacy of laws

Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Available non-abusive collection methods

Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Interstate commerce

Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) Purposes

It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

2. 15 U.S.C. 1692a provides in pertinent part:

Definitions

As used in this subchapter--

* * * * *

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

* * * * *

(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the

collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include--

* * *

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

* * * * *

3. 15 U.S.C. 1692d provides in pertinent part:

Harassment or abuse

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section * * * .

* * * * *

4. 15 U.S.C. 1692e provides in pertinent part:

False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

* * * * *

(2) The false representation of—

(A) the character, amount, or legal status of any debt * * * .

* * * * *

5. 15 U.S.C. 1692f provides in pertinent part:

Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without

limiting the general application of the foregoing, the following conduct is a violation of this section:

* * * * *

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if--

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intention to take possession of the property; or

(C) the property is exempt by law from such dispossession or disablement.

* * * * *

6. 15 U.S.C. 1692i(a) provides in pertinent part:

Legal actions by debt collectors

(a) Venue

Any debt collector who brings any legal action on a debt against any consumer shall--

(1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located * * * .

* * * * *

7. 15 U.S.C. 1692n provides:

Relation to State laws

This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter.

8. 15 U.S.C. 1692o provides:

Exemption for State regulation

The Bureau shall by regulation exempt from the requirements of this subchapter any class of debt collection practices within any State if the Bureau determines that under the law of that State that class of debt collection practices is subject to requirements substantially similar to those imposed by this subchapter, and that there is adequate provision for enforcement.

APPENDIX F

RECORDING REQUESTED BY:	THE FOLLOWING COPY OF 'NOTICE', THE ORIGINAL OF
WHEN RECORDED MAIL TO:	WHICH WAS FILED FOR RECORD ON 03/27/2009 IN THE
RECONTRUST COMPANY, N.A.	OFFICE OF THE RECORDER OF Los
1800 Tapo Canyon Rd., CA6-914-01-94	Angeles COUNTY, CALIFORNIA SENT
SIMI VALLEY, CA 93063	TO YOU INASMUCH AS AN EXAMINATION OF THE TITLE TO SAIDTRUST
Attn: Ronald Montagna	PROPERTY SHOWS
TS No. 09-0040911	YOU MAY HAVE AN
Title Order No. 09-8-121401	INTEREST IN THE TRUSTEE'S SALES PROCEEDINGS

SPACE ABOVE THIS LINE FOR RECORDER'S USE

NOTICE OF DEFAULT AND ELECTION TO SELL UNDER DEED OF TRUST

IMPORTANT NOTICE

IF YOUR PROPERTY IS IN FORECLOSURE BECAUSE YOU ARE BEHIND IN YOUR

PAYMENTS, IT MAY BE SOLD WITHOUT ANY COURT ACTION,
and you may have the legal right to bring your account in good standing by paying all of your past due payments plus permitted costs and expenses within the time permitted by law for reinstatement of your account, which is normally five business days prior to the date set for the sale of your property. No sale date may be set until three months from the date this notice of default may be recorded (which date of recordation appears on this notice).

This amount is $22,782.68, as of 03/26/2009 and will increase until your account becomes current.

While your property is in foreclosure, you still must pay other obligations (such as insurance and taxes) required by your note and deed of trust or mortgage. If you fail to make future payments on the loan, pay taxes on the property, provide insurance on the property, or pay other obligations as required in the note and deed of trust or mortgage, the beneficiary or mortgagee may insist that you do so in order to reinstate your account in good standing. In addition, the beneficiary or mortgagee may require as a condition to reinstatement that you provide reliable written evidence that you paid all senior liens, property taxes, and hazard insurance premiums.

Upon your written request, the beneficiary or mortgagee will give you a written itemization of the entire amount you must pay. You may not have to pay the entire unpaid portion of your account, even though full payment was demanded, but you must pay all amounts in default at the time payment is made. However, you and your beneficiary or mortgagee may mutually agree in writing

prior to the time the notice of sale is posted (which may not be earlier than the end of the three month period stated above) to, among other things, (1) provide additional time in which to cure the default by transfer of the property or otherwise; or (2) establish a schedule of payments in order to cure your default; or both (1) and (2).

Following the expiration of the time period referred to in the first paragraph of this notice, unless the obligation being foreclosed upon or a separate written agreement between you and your creditor permits a longer period, you have only the legal right to stop the sale of your property by paying the entire amount demanded by your creditor.

To find out the amount you must pay, or to arrange for payment to stop the foreclosure, or if your property is in foreclosure for any other reason, contact:

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.
C/O Countrywide Home Loans, Inc
400 COUNTRYWIDE WAY SV-35
SIMI VALLEY, CA 93065
FORECLOSURE DEPARTMENT (800) 669-6650

If you have any questions, you should contact a lawyer or the governmental agency which may have insured your loan.

Notwithstanding the fact that your property is in foreclosure, you may offer your property for sale, provided the sale is concluded prior to the conclusion of the foreclosure. Remember,

YOU MAY LOSE LEGAL RIGHTS IF YOU DO NOT TAKE PROMPT ACTION.

NOTICE IS HEREBY GIVEN THAT: RECONTRUST COMPANY, N.A., is acting as an agent for the Beneficiary under a Deed of Trust dated 06/23/200, executed by VIEN-PHUONG THI HO, A MARRIED WOMAN AS HER SOLE AND SEPARATE PROPERTY as Trustor, to secure certain obligations in favor of MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. as beneficiary recorded 07/03/2007, as Instrument No. 60071586415 (or Book , Page) of Official Records in the Office of the County Recorder of Los Angeles County, California.

Said obligation including ONE NOTE FOR THE ORIGINAL sum of $548,000.00.

That a breach of, and default in, the obligations for which such Deed of Trust is security has occurred in that payment has not been made of: FAILURE TO PAY THE INSTALLMENT OF PRINCIPAL AND INTEREST WHICH BECAME DUE ON 10/01/2008 AND ALL SUBSEQUENT INSTALLMENTS OF PRINCIPAL AND INTEREST, TOGETHER WITH ALL LATE CHARGES; PLUS ADVANCES MADE AND COSTS INCURRED BY THE BENEFICIARY INCLUDING FORECLOSURE FEES AND COSTS AND/OR ATTORNEYS' FEES. IN ADDITION, THE ENTIRE PRINCIPAL AMOUNT WILL BECOME DUE ON 07/01/2037 AS A RESULT OF THE MATURITY OF THE OBLIGATION ON THAT DATE.

That by reason thereof, the present beneficiary under such deed of trust has executed and delivered to RECONTRUST COMPANY, N.A. a written Declaration of Default and Demand for sale, and has deposited with

RECONTRUST COMPANY, N.A. such deed of trust and all documents evidencing obligations secured thereby, and has declared and does hereby declare all sums secured thereby immediately due and payable and has elected and does hereby elect to cause the trust property to be sold to satisfy the obligations secured thereby. If required by the provisions of Section 2923.5 of the California Civil Code, the declaration from the mortgagee, beneficiary or authorized agent is attached to the Notice of Default duly recorded with the appropriate County Recorder's office.

Dated: March 26, 2009

RECONTRUST COMPANY, N.A., as agent for the Beneficiary

By LandSafe Title Corporation, as its Attorney in Fact

By /S/ Title Officer

Form mlgnod (09/01)

APPENDIX G

RECORDING REQUESTED BY:
RECONTRUST COMPANY
1800 Tapo Canyon Rd., CA6-914-01-94
SIMI VALLEY, CA 93063

WHEN RECORDED MAIL TO:
RECONTRUST COMPANY
1800 Tapo Canyon Rd., CA6-914-01-94
SIMI VALLEY, CA 93063
Attn:
TS No. 09-0040911

Title Order No. 09-8-121401

APN No.:7313-028-011

NOTICE OF TRUSTEE'S SALE

YOU ARE IN DEFAULT UNDER A DEED OF TRUST, DATED 06/23/2007. UNLESS YOU TAKE ACTION TO PROTECT YOUR PROPERTY, IT MAY BE SOLD AT A PUBLIC SALE. IF YOU NEED AN EXPLANATION OF THE NATURE OF THE PROCEEDING AGAINST YOU, YOU SHOULD CONTACT A LAWYER.

Notice is hereby given that RECONTRUST COMPANY, N.A., as duly appointed trustee pursuant to the Deed of Trust executed by VIEN-PHUONG THI HO, A MARRIED WOMAN AS HER SOLE AND SEPARATE PROPERTY, dated 06/23/2007 and recorded 07/03/2007, as Instrument No. 20071586415, in Book , Page ,), of Official Records in the office of the

County Recorder of LOS ANGELES County, State of California, will sell on 08/28/2009 at 01:00 PM, At the front entrance to the Pomona Superior Courts Building, 350 West Mission Blvd., Pomona

at public auction, to the highest bidder for cash or check as described below, payable in full at time of sale, all right, title, and interest conveyed to and now held by it under said Deed of Trust, in the property situated in said County and State and as more fully described in the above referenced Deed of Trust. The street address and other common designation, if any, of the real property described above is purported to be: 2620 FASHION AVENUE, LONG BEACH, CA 90810-3139. The undersigned Trustee disclaims any liability for any incorrectness of the street address and other common designation, if any, shown herein.

The total amount of the unpaid balance with interest thereon of the obligation secured by the property to be sold plus reasonable estimated costs, expenses and advances at the time of the initial publication of the Notice of Sale is $592,419.88. It is possible that at the time of sale the opening bid may be less than the total indebtedness due.

In addition to cash, the Trustee will accept cashier's checks drawn on a state or national bank, a check drawn by a state or federal credit union, or a check drawn by a state or federal savings and loan association, savings association, or savings bank specified in Section 5102 of the Financial Code and authorized to do business in this state.

Said sale will be made, in an "AS IS" condition, but without covenant or warranty, express or implied, regarding title, possession or encumbrances, to satisfy the indebtedness secured by said Deed of Trust, advances thereunder, with interest as provided, and the unpaid principal of the Note secured by said Deed of Trust with interest thereon as provided in said Note, plus fees, charges and expenses of the Trustee and of the trusts created by said Deed of Trust.
If required by the provisions of Section 2923.5 of the California Civil Code, the declaration from the mortgagee, beneficiary or authorized agent is attached to the Notice of Trustee's Sale duly recorded with the appropriate County Recorder's office.

RECONTRUST COMPANY, N.A.
1800 Tapo Canyon Rd., CA6-914-01-94
SIMI VALLEY, CA 93063
Phone/Sale Information: (800) 281-8219

By: /S/ Title Officer

RECONTRUST COMPANY, N.A. is a debt collector attempting to collect a debt. Any information obtained will be used for that purpose.

Form mlgnos (07/01)