17-1307

No.

In the Supreme Court of the United States

DENNIS OBDUSKEY, PETITIONER

v.

MCCARTHY & HOLTHUS LLP

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress passed the Fair Debt Collection Practices Act (FDCPA) to "eliminate abusive debt collection practices by debt collectors." 15 U.S.C. 1692(e). Under the FDCPA, the term "debt collector" is defined as "any person * * * who regularly collects or attempts to collect, directly or indirectly, debts owed or due * * * another." 15 U.S.C. 1692a(6).

This case presents a clear and entrenched conflict regarding whether the FDCPA applies in the foreclosure context. In the decision below, the Tenth Circuit, siding with the Ninth Circuit, held that non-judicial foreclosures are not covered by the FDCPA; in doing so, the panel acknowledged the issue has "divided the circuits," and it expressly rejected the "contrary position" of multiple courts of appeals and state high courts. This holding was the sole basis of the decision below, and it arises on the precise fact-pattern that has generated extensive "confusion" and hundreds of conflicting decisions. This case is the perfect vehicle for resolving the widespread disagreement over this important issue.

The question presented is:

Whether the FDCPA applies to non-judicial foreclosure proceedings.

PARTIES TO THE PROCEEDING BELOW

Petitioner is Dennis Obduskey, the appellant below and plaintiff in the district court.

Respondent is McCarthy & Holthus LLP, an appellee below and defendant in the district court.

Wells Fargo Bank, N.A., and Wells Fargo & Company were appellees below and defendants in the district court, but are not parties to the claims at issue in this petition.

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

PETITION FOR A WRIT OF CERTIORARI

Dennis Obduskey respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is reported at 879 F.3d 1216. The opinion of the district court (App., *infra*, 14a-32a) is unreported but available at 2016 WL 4091174.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 2018. 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*, 33a-37a).

INTRODUCTION

This case presents an important and recurring question of statutory construction that has squarely divided the lower courts. According to the Tenth Circuit, the FDCPA does not apply to non-judicial foreclosure proceedings. In so holding, the court sided with a split panel of the Ninth Circuit, and openly rejected the contrary decisions of multiple courts of appeals and two state supreme courts.

While the merits of this issue are hotly contested, there is no dispute about the existence of a clear and intractable conflict. All sides agree that this binary question of federal law has divided the circuits, and these courts have split after exhaustively considering each side of the debate. The confusion is extraordinary and entrenched: the question has generated over a hundred conflicting decisions and an acknowledged split among multiple appellate courts. There is 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.[1] In 2016 alone, nearly 400,000 homes were lost to foreclosure, including about 200,000 in non-judicial

[1] Federal Reserve Bank of New York, *Quarterly Report on Houshold Debt & Credit* (May 2017).

foreclosure States, and approximately 330,000 homes were in some stage of foreclosure at year's end.[2]

This threshold legal question determines whether homeowners may invoke the FDCPA's protections in this critical context. See Consumer Financial Protection Bureau, *Fair Debt Collection Practices Annual Report 2013* 27 (Mar. 20, 2013) (recognizing the issue's importance and the "divi[sion] among the courts"). Yet after dozens of decisions debating the question, the courts remain hopelessly deadlocked. This confusion will persist without this Court's intervention.

The Court denied review on this question earlier this Term, but in a case presenting a host of vehicle concerns. See Part C, *infra*. This case does not implicate a single one of those objections, and it is tailor-made for ending the overwhelming flood of cases on this issue. The present conflict is intolerable and it urgently needs an answer. Because this case presents an optimal vehicle for resolving this significant issue of federal law, the petition should be granted.

STATEMENT

1. a. Congress enacted the FDCPA in response to "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices." 15 U.S.C. 1692(a). It recognized this abuse as "a widespread and serious national problem," and it declared that a "primary" cause of the trouble was "the lack of meaningful legislation on the State level." S. Rep. No. 382, 95th Cong., 1st Sess. 2 (1977). Because "[e]xisting laws and procedures" proved "inadequate to protect consumers" (15 U.S.C. 1692(b)),

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

Congress sought to impose baseline, comprehensive protections against debt-collector misconduct. 15 U.S.C. 1692(e).

Those protections took the form of "open-ended prohibitions," together with non-exhaustive lists of specific forbidden practices. *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 587 (2010); cf. S. Rep. No. 95-382, at 4. The Act targeted everything from aggression and violence (*e.g.*, 15 U.S.C. 1692d(1), (2)), to the use of "false or misleading representations," including misstating the "character, amount, or legal status of the debt," employing "deceptive means to collect" a debt, or demanding amounts not "expressly authorized by the agreement creating the debt or permitted by law" (15 U.S.C. 1692e(2), (10), 1692f(1)). See, *e.g.*, *Heintz* v. *Jenkins*, 514 U.S. 291, 292 (1995) (explaining the general prohibitions). The FDCPA also mandated a process for debt collectors to provide consumers notice of their alleged debts; this process granted consumers a specific right to dispute those debts, and required debt collectors to "cease collection of the debt" pending validation. 15 U.S.C. 1692g.

b. The FDPCA regulates solely the conduct of professional "debt collectors." The Act broadly defines "debt collector" as "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." 15 U.S.C. 1692a(6).[3] Any person meeting

[3] The Act also broadly defines "debt": the term "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,

that definition is subject to the full panoply of the FDCPA's restrictions.

The Act further expands its coverage with an additional definition: "For purposes 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) (emphasis added). Section 1692f(6), in turn, regulates conduct typical of repossession agents (*i.e.*, the classic "repo men"):

> Taking or threatening to take any non-judicial 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.

15 U.S.C. 1692f(6). The Act does not textually exclude those qualifying under *both* definitions (the general and the additional) from the Act's general prohibitions.

This two-part definition of "debt collector" is followed by a list exempting six groups from the Act's coverage. See 15 U.S.C. 1692a(6)(A)-(F). That list does not include those pursuing foreclosures or enforcing other security interests.

2. In 2007, petitioner obtained a $329,940 home loan from Magnus Financial Corporation. App., *infra*, 2a. At

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family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C. 1692a(5).

some point, the loan was transferred to other entities, and Wells Fargo Bank, N.A., began servicing the loan. *Id.* at 15a. Wells Fargo has since "'claimed numerous different owners of the note.'" *Id.* at 15a, 19a.

Between 2008 and 2012, Wells Fargo offered petitioner a variety of loan modifications. App., *infra,* 15a. During that period, petitioner made 12 "trial payments" under three different modification offers. But rather than process the new loan modification, Wells Fargo "accepted the payments and applied them as 'late payments on the account and for other unspecified fees.'" *Ibid.* Petitioner received mixed communications from Wells Fargo throughout this time, including "'opposing messages [received] within days of each other.'" *Ibid.* Petitioner submitted complaints about Wells Fargo's conduct to the Federal Trade Commission. *Id.* at 15a-16a.

In 2009, petitioner defaulted on his loan, and Wells Fargo began non-judicial foreclosure proceedings. App., *infra,* 2a, 15a. Over the next six years, Wells Fargo initiated multiple foreclosure attempts, but none were completed. *Id.* at 2a, 15a. It eventually retained respondent, a law firm, to pursue a foreclosure of petitioner's property. *Id.* at 2a, 16a. Respondent sent petitioner an "undated" later in August 2014. *Id.* at 16a. It declared that respondent "may be considered a debt collector attempting to collect a debt," and "any information obtained will be used for that purpose." C.A. Supp. App. 127 (capitalization altered); App., *infra,* 2a, 20a-21a. It advised petitioner of its intent to seek a non-judicial foreclosure, announced "the total amount of the debt currently owed," explained that "interest, late charges, and other charges" may increase "the amount due on the day you pay," instructed that "[t]he current creditor to whom the debt/loan is owed is[] Wells Fargo Bank, N.A.," and declared that it would "assume this debt to be valid unless [petitioner] dispute[s] its validity, or any part of it, within 30 days after receiving this notice." C.A. Supp. App. 127; App., *infra*, 2a.

Petitioner responded to the letter with multiple objections. App., *infra*, 2a, 16a; C.A. Supp. App. 124-125. He contested the alleged amount of the debt, and invoked the FDCPA's debt-validation procedures, which required respondent to cease all collection activity until confirming the validity of the debt and providing the necessary documentation to petitioner. App., *infra*, 2a, 16a; see also 15 U.S.C. 1692g(a)-(b). Instead of validating the debt, respondent initiated a new foreclosure action in May 2015. App., *infra*, 2a. In response, petitioner filed a complaint with the Consumer Financial Protection Bureau objecting to respondent's conduct. *Id.* at 16a.

3. In August 2015, petitioner filed this suit against respondent and Wells Fargo, asserting claims under the FDCPA and Colorado state law. App., *infra*, 2a-3a, 16a. As relevant here, petitioner alleged that respondent was a debt collector, and its conduct violated multiple provisions of the FDCPA, including the debt-validation requirements of Section 1692g. *Id.* at 4a & n.2, 18a.

Respondent moved to dismiss, and the district court granted the motion. App., *infra*, 14a-32a. As the sole basis for dismissal, the district court found that "the FDCPA does not apply to non-judicial foreclosures." *Id.* at 20a-21a. The court noted that "[n]ot all courts have agreed" on the issue, but it declared that "the majority" have decided "foreclosure activities are outside the scope of the FDCPA." *Id.* at 20a. It accordingly rejected "cases outside of this district" reaching the opposite conclusion (*ibid.*), and dismissed the case against respondent. *Id.* at 21a, 32a.

4. A unanimous panel of the Tenth Circuit affirmed. App., *infra*, 1a-13a.

Like the district court, the court of appeals recognized the stark disagreement over the question presented. App., *infra*, 3a, 5a. In order to "settle this confusion," it requested "supplemental briefing on the issue," and ultimately "h[eld] that the FDCPA does not apply to non-judicial foreclosure proceedings." *Id.* at 3a, 5a-12a.

Before squarely addressing the dispositive issue, the court first cleared the path for a clean disposition. App., *infra*, 5a. It initially rejected respondent's argument that petitioner had "failed to adequately allege a claim against it under the FDCPA." *Ibid.* At a minimum, the court found, petitioner "has sufficiently pled that [respondent] failed to verify [petitioner's] debt after it was disputed, in violation of § 1692g." *Ibid.* It likewise rejected respondent's argument—"claimed for the first time in oral argument"—that petitioner had somehow "waived the FDCPA claim against it." *Ibid.* On the contrary, the court explained, petitioner "specifically argue[d] in his opening brief that [respondent] 'violated the FDCPA by ignoring [a] valid written request related to verification of the debt and continued to collect.'" *Ibid.*[4]

Turning to the key issue, the court noted that "[w]hether the FDCPA applies to non-judicial foreclosure proceedings has divided the circuits." App., *infra*, 5a. It

[4] The panel also affirmed the lower court's dismissal of petitioner's claims against Wells Fargo. As each court found, "[t]he FDCPA excludes 'any person collecting or attempting to collect any debt * * * which was not in default at the time it was obtained by such person.'" App., *infra*, 4a (quoting 15 U.S.C. 1692a(6)(F)); *id.* at 18a. According to the panel, while it was unclear when (or if) Wells Fargo acquired the loan itself, petitioner "admit[ted] that Wells Fargo began servicing the loan before he went into default." *Id.* at 4a-5a; see also *id.* at 19a. That pre-default activity excluded Wells Fargo as a "debt collector" under the FDCPA. *Id.* at 5a, 19a-20a. Petitioner is not challenging that determination here.

stated that the "Ninth Circuit, along with numerous district courts, has held that non-judicial foreclosure proceedings are not covered under the FDCPA" (*id.* at 5a), while "[t]he Fourth, Fifth, and Sixth Circuits, as well as the Colorado Supreme Court," have taken the opposite position. *Id.* at 5a-6a (citing *Wilson* v. *Draper & Goldberg, P.L.L.C.*, 443 F.3d 373 (4th Cir. 2006), *Kaltenbach* v. *Richards*, 464 F.3d 524 (5th Cir. 2006), *Glazer* v. *Chase Home Fin. LLC*, 704 F.3d 453 (6th Cir. 2013), and *Shapiro & Meinhold* v. *Zartman*, 823 P.2d 120 (Colo. 1992)). The panel also flagged conflicting decisions and "confusion" in the District of Colorado, emphasizing the need "to provide clarity in this circuit." *Id.* at 3a, 6a & n.3.

The panel started its analysis with the "plain language of the FDCPA." App., *infra*, 5a-6a. Agreeing with the Ninth Circuit, the panel reasoned that "debt is synonymous with 'money,'" and the FDCPA applies "'only when an entity is attempting to collect' money." *Id.* at 7a (quoting *Ho* v. *ReconTrust Co., NA*, 858 F.3d 568, 571-572 (9th Cir. 2017)). Because non-judicial foreclosures do not obligate consumers "'to pay money,'" the panel reasoned, such foreclosures are "not covered under the FDCPA." *Ibid.*

In reaching this conclusion, the panel expressly rejected "the Sixth Circuit's decision in *Glazer*." App., *infra*, 8a (quoting *Glazer*'s "contrary" holding that "'*every* mortgage foreclosure' * * * is undertaken for the very purpose of obtaining payment on the underlying debt, either by persuasion * * * or compulsion'"). According to the panel, this "contrary position" fails because non-judicial foreclosure does not permit collection "'personally against the mortgagor.'" *Ibid.* While a creditor could "collect a deficiency" in a "separate action" after the "non-judicial foreclosure sale" (*id.* at 8a-9a (citing Colorado law)), the foreclosure itself "only allows 'the trustee to obtain proceeds from the sale of the foreclosed property, and no more'" (*id.* at 9a). The panel thus found that it did not qualify as a "direct[] or indirect[]" attempt (15 U.S.C. 1692a(6)) to collect a debt. *Id.* at 6a-9a.

Next, the panel rejected other courts' reliance on "§ 1692i—'Legal actions by debt collectors'—as evidence that Congress intended the FDCPA to apply to mortgage foreclosures." App., *infra*, 9a. That section regulates permissible venue for "action[s] to enforce an interest in real property securing the consumer's obligation." 15 U.S.C. 1692i(a)(1). Although other courts read this language as necessarily confirming that "debt collection" includes foreclosure actions (the subject of Section 1692i), the panel "disagree[d]." *Id.* at 10a. It reasserted its view that seeking non-judicial foreclosure falls outside Section 1692a(6), and it further noted that Section 1692i only covers "judicial proceeding[s]," whereas "*non-judicial*" foreclosures "plainly do[] not fall under this definition." *Ibid.*

Finally, the panel asserted that "policy considerations" support its holding. App., *infra*, 10a. It reasoned that applying the FDCPA in this context "would conflict with Colorado mortgage foreclosure law." *Id.* at 10a-11a (citing two examples where Colo. R. Civ. P. 120 requires "notice" arguably conflicting with the FDCPA). The panel stated that "mortgage foreclosure is 'an essential state interest,'" and found "no 'clear and manifest' intention on the part of Congress to supplant state non-judicial foreclosure law." *Id.* at 11a.[5] In doing so, the panel rejected

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[5] The panel earlier acknowledged commentary from the "Colorado Rule 120 Committee" recommending, in response to "'considerable debate'" over the FDCPA's applicability, that persons conducting non-judicial foreclosures "'comply'" with the FDCPA, "'notwithstanding any provision of this Rule.'" App., *infra*, 6a n.3.

other courts' "contrary conclusion" that Congress would not have intended to "immunize debt secured by real property where foreclosure was used to collect the debt." *Id.* at 12a (citing conflicting decisions from the Third and Fourth Circuits).[6]

The court accordingly "h[eld] that [respondent's] mere act of enforcing a security interest through a non-judicial foreclosure proceeding does not fall under the FDCPA." App., *infra*, 12a.[7]

REASONS FOR GRANTING THE PETITION

A. There Is A Clear And Intractable Conflict Regarding Whether The FDCPA Covers Non-Judicial Foreclosure Proceedings

The Tenth Circuit's decision deepens a preexisting "divi[sion]" over whether the FDCPA applies to non-judicial foreclosures. App., *infra*, 5a. That circuit conflict is both clear and undeniable, and it should be resolved by this Court.

1. a. The decision below directly conflicts with settled law in the Fourth Circuit. In *Wilson* v. *Draper & Goldberg, P.L.L.C.*, 443 F.3d 373 (4th Cir. 2006), as here, a creditor hired a law firm to "foreclose" after the plaintiff defaulted on a home loan. 443 F.3d at 374. After receiving the firm's initial notice, the plaintiff wrote "to dispute the

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[6] The panel "left for another day" the distinct question whether "more aggressive collection efforts leveraging the threat of foreclosure into the payment of money" would "constitute 'debt collection.'" App., *infra*, 12a. While both the Ninth and Tenth Circuits have raised that possibility, the core split among the circuits is whether non-judicial foreclosure *without* additional conduct qualifies as debt collection. *Id.* at 5a (acknowledging the conflict over this question). This is why the panel recognized its holding was necessary to resolve the rampant "confusion" in the lower courts. *Id.* at 3a, 6a & n.3.

[7] The court of appeals also disposed of petitioner's state-law claims, which are not at issue here. App., *infra*, 13a.

debt and to request that [the firm] verify it" with the creditor. *Id.* at 374-375. The firm instead "commenced foreclosure proceedings." *Id.* at 375. The plaintiff sued under the FDCPA, "alleging that [the firm] violated the Act by failing to verify the debt, [and] by continuing collection efforts after she had contested the debt." *Ibid.*

On appeal, the Fourth Circuit held that attorneys "acting in connection with a foreclosure can be 'debt collectors' under the Act." 473 F.3d at 375. It rejected the firm's argument that "'foreclosing on a deed of trust is an entirely different path [than collecting funds from a debtor],'" and instead found that "'foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt.'" *Id.* at 376 (further rejecting the notion that "'[p]ayment of funds is not the object of the foreclosure action'" and the lender is merely "'foreclosing its interest in the property'"); contra App., *infra*, 7a-9a. The court held that "foreclosure proceedings were used to collect the debt," and it refused to "create an enormous loophole in the Act" for "foreclosure proceedings." 443 F.3d at 376.

The Fourth Circuit also dismissed the firm's reliance on Section 1692a(6)'s additional definition for "'the enforcement of security interests.'" 443 F.3d at 378. 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." *Ibid.* The "provision is not an exception to the definition of debt collector, it is an inclusion to the term debt collector." *Ibid.* It therefore "does not exclude those who enforce security interests but who also fall under the general definition." *Ibid.* (citing *Piper* v. *Portnoff Law Assocs., Ltd.*, 396 F.3d 227, 236 (3d Cir. 2005)).

The court accordingly "h[eld] that [the firm's] foreclosure action was an attempt to collect a 'debt,'" and the firm "can still be 'debt collectors' even if they were also enforcing a security interest." 443 F.3d at 378-379.

The Fourth Circuit reaffirmed *Wilson* in *McCray* v. *Fed. Home Loan Mortg. Corp.*, 839 F.3d 354 (4th Cir. 2016). As here, "Wells Fargo retained" a law firm "to pursue foreclosure" after the plaintiff defaulted on a home loan. 839 F.3d at 357. The court held that foreclosure activities constitute 'debt collection': "in *Wilson*, we explicitly rejected the argument 'that foreclosure * * * is not the enforcement of an obligation to pay money or a "debt," but is [merely] a termination of the debtor's equity of redemption relating to the debtor's property.'" *Id.* at 360. On the contrary, the court found, "the whole reason that the [law firm was] retained by Wells Fargo was to attempt, *through the process of foreclosure*, to collect on the $66,500 loan in default." *Ibid.* (emphasis added). As the court concluded, the firm's "debt collection" was anticipated *via foreclosure*, and the firm acted as "debt collectors" for foreclosure activities despite never "'express[ly] demand[ing]'" payment. *Id.* at 359. That holding is irreconcilable with the Tenth Circuit's decision below. App., *infra*, 7a, 12a.

b. Also in direct conflict with the decision below, the Sixth Circuit likewise "hold[s] that mortgage foreclosure is debt collection under the Act." *Glazer* v. *Chase Home Fin. LLC*, 704 F.3d 453, 455 (6th Cir. 2013); see also, *e.g.*, *Mellentine* v. *AmeriQuest Mortg. Co.*, 515 F. App'x 419, 421, 423 (6th Cir. 2013) (following *Glazer* in holding a law firm was a "debt collector" under the FDCPA for "sen[ding] a letter to the [plaintiffs] notifying them of their default and informing them that Chase was beginning foreclosure proceedings").

In *Glazer*, Chase Bank hired a law firm to foreclose on a defaulted home loan. 704 F.3d at 456. The plaintiff alleged the firm violated the FDCPA by, among other things, including false statements in its foreclosure complaint and "refus[ing] to verify the debt upon request." *Id.* at 457.

The Sixth Circuit began by "declin[ing] to follow" the very position adopted below: that "mortgage foreclosure is not debt collection" unless "a money judgment is sought against the debtor in connection with the foreclosure." 704 F.3d at 460; contra App., *infra*, 7a-9a, 12a. On the contrary, the court held that "*any* type of mortgage foreclosure action, *even one not seeking a money judgment on the unpaid debt*, is debt collection under the Act." *Id.* at 462 (second emphasis added). As the court explained, "*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. In short, "[t]here can be no serious doubt that the ultimate purpose of foreclosure is the payment of money." *Id.* at 463.[8]

The Sixth Circuit supported its view with the FDCPA's "plain language" and a close analysis of its overall provisions, including Section 1692i's venue provision (showing that "filing *any* type of mortgage foreclosure action * * * is debt collection under the Act"). 704 F.3d at 460-462. It further disagreed that its interpretation would render Section 1692a(6)'s additional definition surplusage. *Id.* at 463-464. As the court explained, this additional definition concerns "the business of repossessors." *Id.* at 464. The sentence "operates to *include* certain persons

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[8] Although not pertinent to the court's categorical analysis, the firm in *Glazer* emphasized that it did not seek a deficiency judgment. C.A. Answering Br. 28 n.5, 39, No. 10-3416 (6th Cir. Nov. 1, 2010).

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. "Indeed," as the court concluded, "all of the cases we found where §§ 1692f(6) and 1692a(6)'s third sentence were held applicable involved *repossessors*." *Id.* at 464.

While the court recognized the "confusion" over the question and that "courts have taken varying approaches on the issue," it found the approach adopted below "unpersuasive" and instead declared that "mortgage foreclosure is debt collection under the Act." 704 F.3d at 460, 464.

c. The Tenth Circuit's decision is also directly at odds with law in the Third Circuit. As the Ninth Circuit recognized, the Third Circuit holds that "foreclosure-related activities constitute debt collection," even without a deficiency judgment. *Ho*, 858 F.3d at 576 & n.11 (citing *Piper*, 396 F.3d at 235-236).

In *Kaymark* v. *Bank of Am., N.A.*, 783 F.3d 168 (3d Cir. 2015), the court of appeals held that "foreclosure meets the broad definition of 'debt collection' under the FDCPA." 783 F.3d at 179 (relying on *Wilson*, *Glazer*, and *Piper*). That case, as here, involved a law firm retained to pursue a foreclosure after the plaintiff defaulted on a home loan. *Id.* at 171-172. The plaintiff alleged that the firm misstated the amounts due in the foreclosure complaint, and sued under the FDCPA. *Id.* at 173.[9]

The court of appeals held that foreclosure activities are subject to the FDCPA. *Id.* at 179. The court first set aside the firm's argument that "foreclosure actions cannot be the basis of FDCPA claims." *Id.* at 176, 178. As the

[9] "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).

court explained, "the statutory text, as well as the case law interpreting the text, renders this argument meritless." *Ibid.* It found that the firm "acted as a 'debt collector' when, by filing the Foreclosure Complaint, it 'attempt[ed] to collect' a debt on behalf of BOA." *Id.* at 176-177. Moreover, the court reasoned, "[n]owhere does the FDCPA exclude foreclosure actions from its reach." *Id.* at 179. "On the contrary," the court explained, "foreclosure meets the broad definition of 'debt collection' under the FDCPA": it qualifies as "'activity undertaken for the general purpose of inducing payment,'" and "it is even contemplated in various places in the statute." *Ibid.* (citing 15 U.S.C. 1692i).

As the court explained, the firm "would have us 'create an enormous loophole in the [FDCPA] [by] immunizing any debt from coverage if that debt happened to be secured by a real property interest and foreclosure proceedings were used to collect the debt.'" *Ibid.* (quoting *Wilson*, 443 F.3d at 376). The court refused the invitation: "'if a collector were able to avoid liability under the FDCPA simply by choosing to proceed *in rem* rather than *in personam*, it would undermine the purpose of the FDCPA." *Ibid.* (quoting *Piper*, 396 F.3d at 236). *Kaymark* is now irreconcilable with contrary precedent in the Ninth and Tenth Circuits.[10]

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[10] *Piper* is likewise out of step with the decision below. There, the creditor, as here, retained a law firm, which sought an *in rem* foreclosure to enforce a lien arising from unpaid water and sewer obligations. 396 F.3d at 229. In addition to finding that the firm demanded payment while enforcing the lien (*id.* at 233-234), the court rejected the firm's reliance on Section 1692a(6)'s additional definition of security enforcers: "The portion of § 1692a(6) upon which [the firm] relies is not among the six listed *exceptions* to the general definition. It is cast in terms of *inclusion*, and we believe it was intended to make 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 (citing, for example, "an automobile repossession business").

d. The Tenth Circuit's decision also directly conflicts with the decisions of two state high courts, including an intra-regional conflict with the Colorado Supreme Court.

First, in *Shapiro & Meinhold* v. *Zartman*, 823 P.2d 120 (Colo. 1992), the court reached the opposite conclusion on materially identical facts: whether the FDCPA covered attorneys hired to pursue a foreclosure on a defaulted home loan. *Id.* at 121. The Court held that the FDCPA applied:

> The section 1692a(6) definition of the term debt collector includes one who 'directly or indirectly' engages in debt collection activities on behalf of others. Since 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 if they otherwise fit the statutory definition.

Id. at 124.

The court further rejected the firm's argument that those enforcing security interests, including "foreclosures," are subject only to Section 1692f(6), not the Act's general requirements. 823 P.2d at 123 (relying on Section 1692a(6)'s additional definition). As the court explained, that additional definition "does not limit the definition of debt collectors, but rather enlarges the category of debt collectors for the purpose of section 1692f(6)." *Id.* at 124. "If Congress had intended to exempt from the FDCPA one whose principal business is the enforcement of security interests, it would have provided an exception in plain language." *Ibid.*

The decision below is thus particularly intolerable in Colorado, where the same federal law now means different things in state and federal court. That encourages the kind of unpalatable forum-shopping that this Court has studiously worked to avoid.

Second, the Alaska Supreme Court, again on indistinguishable facts, held that "an entity pursuing non-judicial foreclosure is a debt collector subject to the FDCPA." *Alaska Trustee, LLC* v. *Ambridge*, 372 P.3d 207, 213 (Alaska 2016); see also *id.* at 212-213 & nn.14-15 (acknowledging the "split" of authority, and "join[ing] those courts holding that mortgage foreclosure, whether judicial or nonjudicial, is debt collection"); contrast *id.* at 227-234 (Winfree, J., dissenting) (rejecting, *e.g.*, *Glazer*, in reaching the same conclusion as the Ninth and Tenth Circuits).

The court started with "the Act's broad language," and declared *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. As the court reasoned, "the real nature of a home mortgage foreclosure" is debt collection, and "a reasonable consumer *would* read the notice as a demand for payment." *Id.* at 217-218.

Addressing Section 1692a(6)'s additional definition, the court agreed with the Third, Fourth, and Sixth Circuits: "Th[e] general definition [of 'debt collector'] is explicitly *expanded*, not qualified," by the inclusive language targeting security interests. 372 P.3d at 219; see also *id.* at 219-220 (explaining how the additional definition is not redundant, as it covers "repossession agenc[ies]" that "may take automobiles off the street" without any communication).

Finally, the court rejected the proposition that the firm could escape liability because foreclosure notices were "statutorily required" by state law: "[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 it likewise refuted the contention that the FDCPA would "wreak havoc" on Alaska's non-judicial foreclosure process, given the ease of complying with the FDCPA's provisions. *Id.* at 218.

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); *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).

2. a. A divided panel of the Ninth Circuit reached the opposite conclusion in *Ho* v. *ReconTrust Co., NA*, 858 F.3d 568 (9th Cir.), cert. denied, 138 S. Ct. 504 (2017). The majority recognized that the "circuits [have] divide[d]" over the question presented (*id.* at 576), but it held that the FDCPA does not apply to non-judicial foreclosures. See 858 F.3d at 576 & n.11 (citing conflicting decisions from the Third, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits).[11]

First, the majority argued that a non-judicial foreclosure does not attempt to collect a "debt." 858 F.3d at 571-573. According to the majority, non-judicial foreclosures

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[11] As an independent ground, the court separately held that the original trustee was not a "debt collector" under the exception for activities "'incidental to * * * a bona fide escrow arrangement.'" 858 F.3d at 574-575 (quoting 15 U.S.C. 1692a(6)(F)) (alteration in original). That exception (which applies, if at all, to original trustees) is irrelevant here.

aim only "to retake and resell the security, not to collect money from the borrower." *Id.* at 571. As the majority explained, foreclosure might "induce[]" the borrower "to pay off a debt," but "that inducement exists by virtue of the lien, regardless of whether foreclosure proceedings actually commence." *Id.* at 572. In taking this position, the majority expressly "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.'" *Ibid.*

The court openly admitted that the Fourth and Sixth Circuits "have declined to follow *Hulse*." 858 F.3d at 572 (citing *Glazer*, 704 F.3d at 461; *Wilson*, 443 F.3d at 378-379). But the majority found "neither case persuasive." *Ibid.* It asserted 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). And it disagreed with the Sixth 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).

The majority next bolstered its conclusion with Section 1692a(6)'s "narrower definition of 'debt collector'"—an entity "whose principal business purpose is 'the enforcement of security interests.'" 858 F.3d at 572-573. 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 573. As such, the majority explained, "[t]he most plausible reading of the statute is that the foreclosure notices" fit only that narrower definition. *Id.* at 572.

Here the majority again "diverge[d]" from *Wilson* and *Glazer*. 858 F.3d at 573. 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. *Id.* at 573-574. The majority found "this distinction unpersuasive" because even "repossessors will communicate with debtors." *Id.* at 574. And the majority again declared it irrelevant that the notices may have "pressured [the debtor] to send money to Countrywide": 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." *Ibid.*[12]

Finally, the majority maintained that its view would avoid frustrating the "California statutes governing non-judicial foreclosure." 858 F.3d at 575. It offered a handful of state-law duties that might conflict with the FDCPA's requirements, and thus declined "to construe federal law in a manner that interferes with California's system for conducting non-judicial foreclosures." *Id.* at 575-577.[13]

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[12] The act of "selling the home at auction[] and applying the proceeds from the sale to pay down the outstanding debt" (*Glazer*, 704 F.3d at 461) occurs in *every* foreclosure. The Ninth Circuit (and now the Tenth Circuit) characterize that activity as enforcing a security interest; other circuits declare it "debt collection."

[13] The majority also asserted that its decision was tied to "the nuances of California foreclosure law" (858 F.3d at 572), but it never identified what those "nuances" were. None are apparent. Indeed, its "holding" "affirms" the "leading" decision of an *Oregon* district court applying *Oregon law. Ibid.* Its analysis turned on the general logic that foreclosure seeks to enforce a security interest, not to collect a debt, and payment comes "from the home's purchaser, not from the original borrower." *Id.* at 571-575. The court ultimately *rejected* (not *distinguished*) other circuits' views because the conflict is a *conflict*,

Judge Korman dissented. 858 F.3d at 577-590. In an extensive opinion, he addressed 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." *Id.* at 578 (citing decisions from the Third, Fourth, and Sixth Circuits, and the Alaska Supreme Court and Colorado Supreme Court).

As Judge Korman explained, foreclosure, at its irreducible core, is "intended to obtain money by forcing the sale of the property being foreclosed upon." 858 F.3d at 578. It either "*directly*" obtains money by "prompt[ing]" or "scar[ing]" the borrower into paying to prevent foreclosure, or "*indirectly*" obtains money by eliminating "the debtor's interest and equity in the property." *Id.* at 581. Indeed, as Judge Korman noted, the majority did not "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 582.

Judge Korman next refuted the majority's reliance on Section 1692a(6)'s additional definition for repossessors. 858 F.3d at 582-583. He explained that nothing in Section 1692a(6)'s language suggests that including the extra definition—which *expanded* the provision's reach—somehow

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not the product of disparate state-law schemes. *Id.* at 574 (declaring Fourth and Sixth Circuit precedent "[un]persuasive"). And the Ninth Circuit has since repeatedly applied *Ho* to cases arising outside California, and treated the holding as categorical. See, *e.g.*, *Hamilton* v. *Tiffany & Bosco PA*, No. 15-15473, 2018 WL 1042528, at *1 (9th Cir. Feb. 26, 2018) (applying *Ho* to Arizona case); *Greer* v. *Green Tree Serving LLC*, 708 F. App'x 371, 371 (9th Cir. 2017) (applying *Ho* to Washington case); *Dowers* v. *Nationstar Mortg., LLC*, 852 F.3d 964, 969-970 (9th Cir. 2017) (applying *Ho* to Nevada case). The court of appeals here was able to adopt *Ho* without citing "nuances" of Colorado law for an obvious reason: the circuit conflict turns on *federal* law, not the law of any particular State.

excludes those who also satisfy the general definition, especially when Section 1692a directly exempts other groups. *Id.* at 583 (citing 15 U.S.C. 1692a(6)(A)-(F)). As Judge Korman explained, this additional definition was designed to cover entities who enforce security interests without engaging in traditional collection activity—as is often the case when repo men "effect dispossession or disablement" of *personal* property. *Id.* at 583-584.

Judge Korman also argued (858 F.3d at 584) that the FDCPA's venue clause confirms that foreclosures satisfy 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). Congress thus "understood that a mortgage foreclosure proceeding * * * constitutes debt collection." 858 F.3d at 584.

Finally, Judge Korman rejected the majority's concerns about interfering with California's non-judicial foreclosure scheme. 858 F.3d at 585-586, 587-590. He highlighted the lack of any trouble in the multiple jurisdictions where the FDCPA covers foreclosure activities, and he showed how the specific conflicts the majority identified were illusory: each could be accommodated with easy practical steps or a sensible reading of state or federal law. *Ibid.* (noting "how readily the California foreclosure system can function alongside the FDCPA").

In any event, Judge Korman concluded, even if an actual conflict existed, the FDCPA expressly preempts inconsistent state laws (15 U.S.C. 1692n), and has a mechanism for exempting certain collection practices (15 U.S.C. 1692o). 858 F.3d at 588-590. This "promote[s] consistent State action to protect consumers against debt collection abuses" (15 U.S.C. 1692(e)), and prevents States from "undermining the minimum national standards that Congress has adopted." *Id.* at 579. He declared the majority's concerns were insufficient to "adopt an unnatural reading of the term 'debt collector.'" *Id.* at 590.[14]

b. Like the Ninth and Tenth Circuits, numerous district courts have held that the FDCPA does not regulate foreclosure-related activities. This side of the split is thus also fully ventilated. *E.g.*, *Glazer*, 704 F.3d at 460 (noting the "pervasiveness" of *Hulse*'s view); *Hahn* 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 decision below also creates substantial tension with decisions in the Eleventh and Fifth Circuits, which themselves have adopted inconsistent positions.

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[14] See also, *e.g.*, *Piper*, 396 F.3d at 236 n.11 ("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.'") (quoting *Romea*, 163 F.3d at 115).

First, the prevailing rule in the Eleventh Circuit is opaque. While the Ninth Circuit suggested the Eleventh Circuit supported its interpretation (*Ho*, 858 F.3d at 577 n.11), the Eleventh Circuit adopted the *opposite* position on these facts: it 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).[15]

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. 678 F.3d at 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 arguably have come out the other way.

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.*,

[15] 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. *Warren* v. *Countrywide Home Loans, Inc.*, 342 F. App'x 458, 460-461 (11th Cir. 2009).

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" when 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 when 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). This middle position is in tension with the rule in the Third, Fourth, and Sixth Circuits that *any* attempt to foreclose (or to notify a consumer about a foreclosure) itself "directly or indirectly" attempts to collect debt; but the position is also at odds with the decision below, which requires, at a minimum, a "threat" or "demand [for] payment." App., *infra*, 12a.

Second, the confusion is equally pronounced in the Fifth Circuit. The court of appeals below counted the Fifth Circuit on the opposite side of the split (App., *infra*, 6a), but that circuit has not squarely settled the question. On the one hand, 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 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 foreclosure satisfied that general definition). On the other hand, 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 suggested 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).[16]

This wide disconnect only underscores the deep confusion this issue has produced, and the obvious need for this Court's immediate intervention.

* * *

The conflict on the interpretation of "debt collector" is indisputable, mature, and entrenched. The debate has been fully exhausted at the district and circuit level. The stark division among the courts of appeals readily reflects the broader division in jurisdictions nationwide. The decision below was unanimous, and the Ninth Circuit refused to reconsider its split position before the full court; there is no realistic prospect that *multiple* courts of appeals will suddenly abandon their own precedent—especially where

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[16] 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.*, 865 F.3d 322, 330 (5th Cir. 2017). Judge Higginson's separate opinion suggests that the Ninth Circuit's decision is consistent with *Glazer*, *Wilson*, and *Piper* (*id.* at 336 & n.2)—*by endorsing the views of* Glazer, Wilson, *and* Piper. The Ninth Circuit, however, did not understand its decision the same way. See *Ho*, 858 F.3d at 577 n.11 (counting those very cases on the opposite side of the split).

each side has thoroughly confronted, and rejected, the opposing analysis.

This question is binary: If petitioner is right, courts and parties are wasting substantial time litigating whether the FDCPA even applies, rather than resolving disputes on the merits. If respondent is right, plaintiffs are filing hundreds or thousands of lawsuits that should never be filed (and wrongly *winning* in multiple circuits and dozens of district courts). Until this Court intervenes, the rampant confusion over this important threshold question will persist. The Court's immediate review is warranted.

B. The Question Presented Is Exceptionally Important And Frequently Recurring

The question presented is of exceptional legal and practical importance. Whether the FDCPA covers non-judicial foreclosures is a dispositive threshold issue. It dictates whether the FDCPA's protections apply in thousands of foreclosures with potentially trillions of dollars at stake. The sheer number of decisions from a 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 resources 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 Tenth Circuit 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 hits (literally) 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 Tenth 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. And borrowers are particularly vulnerable in the non-judicial foreclosure context, where judicial oversight is limited. See John Campbell, *Can We Trust Trustees? Proposals for Reducing Wrongful Foreclosures*, 63 Cath. U. L. Rev. 103 (2014). The FDCPA, by design, serves as a necessary backstop to these (otherwise) beneficial state procedures.

The decision below upsets Congress's scheme, deepens a conflict at the circuit level, and eliminates essential protections for vulnerable consumers. The issue has been treated from every conceivable angle, and it is not going anywhere. Indeed, in the past months alone, this issue has generated dozens of additional decisions, and multiple courts have confirmed the obvious conflict. *E.g.*, *Lapan* v. *Greenspoon Marder P.A.*, No. 5:17-cv-130, 2018 WL 1033224, at *3 (D. Vt. Feb. 22, 2018) ("the circuits that have dealt with the question are divided"); *Strader* v. *U.S. Bank Nat'l Ass'n*, No. 2:17-cv-684, 2018 WL 741425, at

*11 (W.D. Pa. Feb. 7, 2018); *Arias* v. *Select Portfolio Servicing, Inc.*, No. 1:17-CV-01130, 2017 WL 6447890, at *6 & n.3 (E.D. Ca. Dec. 18, 2017); *Carbone* v. *Caliber Home Loans, Inc.*, No. 15-CV-5190, 2017 WL 4157265, at *2 (E.D.N.Y. Sept. 19, 2017); *Thompke* v. *Fabrizio & Brook, P.C.*, No. 17-10369, 2017 WL 3479529, at *9 (E.D. Mich. Aug. 14, 2017). This Court alone can provide a clear answer. Further review is plainly warranted.

C. This Case Is The Perfect Vehicle For Deciding The Question Presented

This case is the ideal vehicle for deciding this significant question. It arises on appeal from a motion to dismiss. App., *infra*, 1a-2a. It has no factual or procedural impediments. The question presented was subject to its own special round of briefing. *Id.* at 3a. The issue was outcome-determinative below: it was the sole basis for the dismissal, and the court of appeals expressly found that petitioner had otherwise stated a claim. *Id.* at 5a. Petitioner's pertinent allegations are straightforward and representative: he targeted a standard non-judicial foreclosure preceded by a standard foreclosure notice. *Id.* at 2a-3a. And Colorado's foreclosure scheme is typical of schemes nationwide; the decision turned on the panel's interpretation of the federal statute, not any "nuances" of state law. *Id.* at 5a-12a.

This case also avoids every single vehicle concern raised in *Ho*. See Br. in Opp. 9-21, *Ho* v. *ReconTrust Co., N.A.*, No. 17-278 (filed Oct. 23, 2017) (BIO).

*In *Ho*, the Ninth Circuit ultimately premised its holding on two *independent* grounds: (i) non-judicial foreclosure is not covered by the FDCPA; and (ii) the trustee was protected by the FDCPA's *exception* for activities "incidental to * * * a bona fide escrow arrangement." BIO 17-18. That latter, alternative ground is not present here.

The first question—which has squarely divided the circuits—is alone teed up for decision.

*In *Ho,* the original trustee also claimed it was protected by the same ground Wells Fargo (but not respondent) asserted below: the case concerned a debt that was not in default at the time it was obtained. (The trustee in *Ho* was appointed at the time the mortgage was originally executed.) See BIO 19. Here, by contrast, respondent was retained *after* the default. App., *infra,* 2a.

*In *Ho,* the trustee distinguished contrary circuit authority on the ground that each case involved law firms retained specifically to pursue the foreclosure, while *Ho* involved a "neutral trustee." BIO 9, 15-17. Here, again, the facts below map perfectly onto the facts of cases in other circuits: respondent, a law firm, was retained to pursue a non-judicial foreclosure. App., *infra,* 2a; BIO 16 ("each decision" involved "a law firm or lawyer working on behalf of a creditor").

*In *Ho,* California law strictly prohibited any deficiency judgment, and the trustee argued that this fact explained away the contrary rulings in other circuits. BIO 10-11. Here, by contrast, Colorado law permits a "separate action" to collect on the deficiency. App., *infra,* 8a-9a.[17]

*In *Ho,* the trustee emphasized the (supposedly) complex foreclosure scheme under California law. BIO 10. Here, the Tenth Circuit did not identify any unusual aspects of Colorado law that might cabin its decision. (There are none.)

*And, finally, in *Ho,* the Ninth Circuit remanded for further proceedings on a different federal claim, which the trustee argued might itself provide full relief and otherwise rendered the case interlocutory. BIO 21. Here, the

[17] The trustee was wrong, but this case avoids that dispute.

case is final, and the only mechanism for relief is reversing on the question presented.

At bottom, the Tenth Circuit issued a comprehensive opinion that built upon the vast body of law regarding the question presented, exploring every aspect of the debate. The question is ideally presented. The arguments have been fully vetted and further percolation promises nothing but additional conflicts and wasteful litigation. 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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MARCH 2018

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 16-1330

DENNIS OBDUSKEY,
Plaintiff-Appellant,

v.

WELLS FARGO; WELLS FARGO BANK;
WELLS FARGO & CO; WELLS FARGO BANK NA;
WELLS FARGO HOME MORTGAGE;
MCCARTHY AND HOLTHUS LLP,
Defendants-Appellees.

Filed: January 19, 2018

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:15-CV-01734-RBJ)

Before MORITZ, KELLY, and MURPHY,
Circuit Judges.

OPINION

KELLY, Circuit Judge.

Plaintiff-Appellant Dennis Obduskey appeals from the district court's order granting Defendants-Appellees Wells Fargo and McCarthy and Holthus, LLP's motion to dismiss numerous claims, including whether either party was liable as a "debt collector" under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p. Obduskey v. Fargo, No. 15-CV-01734-RBJ, 2016 WL 4091174 (D. Colo. July 19, 2016). Having jurisdiction under 28 U.S.C. § 1291, we affirm.

Background

In 2007, Mr. Obduskey obtained a $329,940 loan from Magnus Financial Corporation to buy a home. The loan was secured by his property and was serviced by Wells Fargo. Aplee. Supp. App. 107. Mr. Obduskey eventually defaulted on the loan in 2009. Id. at 109. Several foreclosure proceedings were initiated over the following six years, none of which were completed. Mr. Obduskey's loan remains in default.

In 2014, Wells Fargo hired McCarthy and Holthus, LLP (McCarthy), a law firm, to pursue a non-judicial foreclosure on Mr. Obduskey's home. McCarthy initially sent Mr. Obduskey an undated letter stating that McCarthy "MAY BE CONSIDERED A DEBT COLLECTOR ATTEMPTING TO COLLECT DEBT." Id. at 127. The letter explained that McCarthy was "instructed to commence foreclosure against" Mr. Obduskey's home. Id. It referenced the amount owed and noted the current creditor as Wells Fargo. Id. Mr. Obduskey apparently responded to the letter disputing the debt, id. at 124; however, instead of replying to his letter, McCarthy initiated a foreclosure action in May of 2015.[1] Mr. Obduskey then filed this action claiming (1) a violation of the Fair Debt

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[1] McCarthy apparently responded to the letter on August 4, 2015, almost one year after Mr. Obduskey's initial letter. Aplt. Reply Br. to Aplee. Jt. Supp. Br. Ex. 3.

Collection Practices Act; (2) a violation of the Colorado Consumer Protection Act; (3) defamation; (4) extreme and outrageous conduct—emotional distress; and (5) commencement of an unlawful collections action. Aplee. Supp. App. at 21–27.

Wells Fargo and McCarthy filed motions to dismiss, which the district court granted on all claims. Obduskey, 2016 WL 4091174, at *8. Regarding the FDCPA claim, the district court held that Wells Fargo was not liable because it began servicing the loan prior to default. Id., at *3. It also held that McCarthy was not a "debt collector" because "foreclosure proceedings are not a collection of a debt," but it noted that "not all courts have agreed" on whether foreclosure proceedings are covered under the FDCPA. Id. To settle this confusion, we asked both parties to provide supplemental briefing on the issue. We now hold that the FDCPA does not apply to non-judicial foreclosure proceedings in Colorado.

Discussion

We review the grant of a motion to dismiss de novo. Khalik v. United Air Lines, 671 F.3d 1188, 1190 (10th Cir. 2012). We begin with the FDCPA claim against Wells Fargo and McCarthy.

I. Fair Debt Collection Practices Act

The Fair Debt Collection Practices Act was enacted, in part, to "eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e) (2012). It prohibits "abusive, deceptive, and unfair debt collection practices," such as late-night phone calls or falsely representing to a consumer about the amount of debt owed. Id. §§ 1692(a), 1692c, 1692e. To prevail under the FDCPA, a plaintiff must prove that the defendant is a "debt collector" who is trying to collect a "debt" from the plaintiff in violation of some provision of the FDCPA. A "debt collector" is defined as "any person ... who regularly collects or attempts to collect, directly or indirectly, debts owed or due ... another." Id. § 1692a(6). "Debt" is further defined as "any obligation ... to pay money." Id. § 1692a(5).

On appeal, Mr. Obduskey claims numerous violations of the FDCPA including that Wells Fargo and McCarthy violated § 1692g by failing to "respond to a properly delivered notice requesting debt validation."[2] Aplt. Br. at 18–21.

A. Wells Fargo Is Not a Debt Collector

The district court held that Wells Fargo was not a debt collector because "Mr. Obduskey was not in default when ... Wells Fargo began servicing the loan or when it became the assignee of the debt." Obduskey, 2016 WL 4091174, at *3. We agree. The FDCPA excludes "any person collecting or attempting to collect any debt ... which was not in default at the time it was obtained by such person." 15 U.S.C. § 1692(a)(6)(F). Furthermore, the Senate Report notes that "the committee does not intend the definition [of debt collector] to cover ... mortgage service companies and others who service outstanding debts for others, so long as the debts were not in default when taken for servicing." S. Rep. No. 95-382, at 3–4 (1977). While Mr. Obduskey does allege that Wells Fargo sent him confusing information concerning whether Wells Fargo was the servicer of the loan or whether it actually owned the loan, Mr. Obduskey admits that Wells Fargo

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2 Mr. Obduskey also claims violations of §§ 1692c (communicating with third party), 1692d (harassment), 1692e (false or misleading representations), and 1692f (unfair practices). Aplt. Br. at 21.

began servicing the loan before he went into default and that it continued to do so after he defaulted. See Aplee. Supp. App. at 12, ¶ 5, at 14, ¶ 14. Therefore, Wells Fargo is not a "debt collector" under the FDCPA. See Perry v. Stewart Title Co., 756 F.2d 1197, 1208 (5th Cir. 1958).

B. McCarthy Is Not a Debt Collector

McCarthy argues that we should affirm the district court's dismissal because Mr. Obduskey has failed to adequately allege a claim against it under the FDCPA. While Mr. Obduskey's complaint is far from perfect, we find that he has sufficiently pled that McCarthy failed to verify Mr. Obduskey's debt after it was disputed, in violation of § 1692g. See Aplee. Supp. App. at 16, ¶¶ 21–23. McCarthy also claimed for the first time in oral argument that Mr. Obduskey had waived the FDCPA claim against it by failing to raise it in the opening brief. We disagree. Mr. Obduskey specifically argues in his opening brief that McCarthy "violated the FDCPA by ignoring [a] valid written request related to verification of the debt and continued to collect." Aplt. Br. at 18. Regardless, we hold that McCarthy is not a debt collector for purposes of the FDCPA.

1. The FDCPA Does Not Cover Non-Judicial Foreclosure Proceedings

Whether the FDCPA applies to non-judicial foreclosure proceedings has divided the circuits. The Ninth Circuit, along with numerous district courts, has held that non-judicial foreclosure proceedings are not covered under the FDCPA. Vien-Phuong Thi Ho v. ReconTrust Co., 858 F.3d 568 (9th Cir. 2016) (Ho). The Fourth, Fifth, and Sixth Circuits, as well as the Colorado Supreme Court, have held that they are covered. Wilson v. Draper & Goldberg, P.L.L.C., 443 F.3d 373 (4th Cir. 2006); Kaltenbach v. Richards, 464 F.3d 524 (5th Cir. 2006); Glazer v. Chase Home Fin. LLC, 704 F.3d 453 (6th Cir. 2013); Shapiro & Meinhold v. Zartman, 823 P.2d 120 (Colo. 1992) (en banc). The Tenth Circuit has been presented with this issue twice but has declined to address it because of pleading deficiencies in the complaint. See Burnett v. Mortg. Elec. Registration Sys., Inc., 706 F.3d 1231, 1239 (10th Cir. 2013); Maynard v. Cannon, 401 F. App'x 389, 395 (10th Cir. 2010). While there arguably may be some deficiencies in Mr. Obduskey's complaint, to provide clarity in this circuit, we address this issue.[3] Compare Huckfeldt v. BAC Home Loans Servicing, LP, 2011 WL 4502036, at *5 (D. Colo. Sept. 29, 2011) (finding that Colorado non-judicial foreclosure proceeding falls under the FDCPA), with Schwitzer v. Wells Fargo Bank, N.A., 2013 WL 607832, at *5 (D. Colo. Feb. 19, 2013) ("[T]he vast majority of courts, especially in this District, have found that foreclosure activities are outside the scope of the FDCPA.").

a. Plain Language of the Statute

"[I]t is our primary task in interpreting statutes to determine congressional intent, using traditional tools of

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[3] This confusion is also apparent in the Colorado Rule 120 Committee Comment: "There was considerable debate concerning whether the Federal 'Fair Debt Collection Practices Act' is applicable to a C.R.C.P. 120 proceeding. Rather than attempting to mandate compliance with that federal statute by specific rule provision, the Committee recommends that a person acting as a debt collector in a matter covered by the provisions of the Federal 'Fair Debt Collection Practices Act' be aware of the potential applicability of the Act and comply with it, notwithstanding any provision of this Rule." C.R.C.P. 120, Committee Comment to 1989 Amendment.

statutory construction." Coffey v. Freeport McMoran Copper & Gold, 581 F.3d 1240, 1245 (10th Cir. 2009) (quoting Russell v. United States, 551 F.3d 1174, 1178 (10th Cir. 2008)). Our first task is always to examine the language of the statute. Woods v. Standard Ins. Co., 771 F.3d 1257, 1265 (10th Cir. 2014). When that language is clear, we ordinarily end our analysis. Id. If, however, the language leaves us uncertain, we turn to the legislative history and policy of the statute to deduce Congress's intent. Id.

McCarthy argues that the plain language of the FDCPA dictates that it is not a "debt collector." Relying principally on the Ninth Circuit's decision in Vien-Phuong Thi Ho v. ReconTrust Co., 858 F.3d 568 (9th Cir. 2016), it argues that because debt is synonymous with "money," the FDCPA "imposes liability only when an entity is attempting to collect" money. 858 F.3d at 571. Because enforcing a security interest is not an attempt to collect money from the debtor, and the consumer has no "obligation . . . to pay money," non-judicial foreclosure is not covered under the FDCPA. Id. at 572 (quoting 15 U.S.C. § 1692a(5)). We have previously seemed to endorse such a view, see Burnett, 706 F.3d at 1239, and now endorse it fully. Entities engaged in non-judicial foreclosure actions in Colorado are not debt collectors under the FDCPA.[4]

[4] A casual reading of the definition of debt collector may lead some to conclude that those who enforce security interests are only covered under § 1692(f) of the act and nowhere else. See 15 U.S.C. § 1692(a)(6) ("For the purpose of section 1692f(6) of this title, such term also includes any person who[se] . . . business the principal purpose of which is the enforcement of security interests."). Upon closer examination,

Mr. Obduskey relies upon the Sixth Circuit's decision in Glazer v. Chase Home Fin. LLC, 704 F.3d 453 (6th Cir. 2013), in support of his contrary position. That court held that a non-judicial mortgage foreclosure was covered under the FDCPA because the "ultimate purpose of a foreclosure action is the payment of money," and "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)." 704 F.3d at 461, 463.

We disagree. There is an obvious and critical difference between judicial and non-judicial foreclosures—"[a] non-judicial foreclosure differs from a judicial foreclosure in that the sale does not preserve to the trustee the right to collect any deficiency in the loan amount personally against the mortgagor." Burnett, 706 F.3d at 1239 (emphasis added) (quoting Maynard, 401 F. App'x at 391–92). Colorado follows this general rule and allows a creditor to collect a deficiency only after the non-judicial foreclosure sale and through a separate action. See Colo. Rev. Stat. §

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however, § 1692f(6) prohibits "dispossession or disablement of property" when the security enforcer has no "present right to possession of the property," or when the enforcer has no "present intention to take possession of the property." A non-judicial foreclosure proceeding does not fit this bill—Wells Fargo has no present right to possession of the property nor could they take possession of the property. It is the public trustee who holds the deed of trust and sells the property. See Colo. Rev. Stat. §§ 38-38-101, -105. Therefore, because non-judicial foreclosure actions do not fall within this section, they also do not fall under this sub-definition in 1692a(6).

38-38-106(6) (2017); Bank of Am. v. Kosovich, 878 P.2d 65, 66 (Colo. App. 1994).

While judicial mortgage foreclosures may be covered under the FDCPA because of the underlying deficiency judgment, see Maynard, 401 F. App'x at 394, a non-judicial foreclosure proceeding is not covered because it only allows "the trustee to obtain proceeds from the sale of the foreclosed property, and no more." Burnett, 706 F.3d at 1239 (quoting Maynard, 401 F. App'x at 391–92). Had McCarthy attempted to induce Mr. Obduskey to pay money by threatening foreclosure, the FDCPA might apply. See Burnett, 706 F.3d at 1239 ("[T]he initiation of foreclosure proceedings may be intended to pressure the debtor to pay her debt."); Rousseau v. Bank of N.Y., 2009 WL 3162153, at *9 (D. Colo. Sept. 29, 2009); see also Ho, 858 F.3d at 573 ("If entities that enforce security interests engage in activities that constitute debt collection, they are debt collectors.").

Glazer and other courts have also relied on § 1692i—"Legal actions by debt collectors"—as evidence that Congress intended the FDCPA to apply to mortgage foreclosures. See 704 F.3d at 462. Section 1692i is a venue provision. It requires "[a]ny debt collector who brings any legal action on a debt against any consumer . . . to enforce an interest in real property securing the consumer's obligation" to file in the judicial district where the property is located. 15 U.S.C. § 1692i(a)(1). The Glazer court noted that while this section

> does not speak in terms of debt collection, it applies only to "debt collectors" as defined in the first sentence of the definition, id. § 1692a(6), which does speak in terms of debt collection. This 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.

704 F.3d at 462 (footnote omitted). We again disagree. Section 1692i by its very terms applies only to those who are originally debt collectors under § 1692a(6)—which McCarthy is not. It furthermore covers only "action[s] to enforce an interest in real property." 15 U.S.C. § 1692i(a)(1) (emphasis added). "Action" is generally understood to imply a "judicial proceeding," Action, Black's Law Dictionary (10th ed. 2014), and a non-judicial proceeding plainly does not fall under this definition.

b. Policy Considerations

While we find that the plain language of the statute dictates our decision, policy considerations further support it. If the FDCPA applied to non-judicial foreclosure proceedings in Colorado, it would conflict with Colorado mortgage foreclosure law. McCarthy suggests two such conflicts:

> [1.] C.R.C.P. 120(a) requires foreclosing entities to provide notice of the foreclosure to any party that may have acquired an interest in the property, which is inconsistent with the FDCPA's prohibition on communicating with third parties about the debt. See 15 U.S.C. § 1692c(b).
>
> [2.] [T]he FDCPA mandates that a debt collector must cease all direct communications with the borrower when the collector knows the borrower is represented by an attorney, see 15 U.S.C. § 1692c(a)(2), but C.R.C.P. 120(b) requires the foreclosing entity to post notice relating to the non-ju-

> dicial foreclosure on the door of the subject property and mail it directly to the mortgagor regardless of representation.

Aplee. Supp. Reply Br. at 7–8. McCarthy sums it up as follows: "If the FDCPA applies to these communications, then a foreclosing entity could not initiate non-judicial foreclosure in Colorado without violating federal law." Id. at 8.

We start with the assumptions that (1) "[i]n areas of traditional state regulation . . . a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest,'" Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005) (quoting N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995)), and (2) that mortgage foreclosure is "an essential state interest," BFP v. Resolution Tr. Corp., 511 U.S. 531, 544 (1994). Our reading of the plain language is bolstered by the fact that we find no "clear and manifest" intention on the part of Congress to supplant state non-judicial foreclosure law.[5] Indeed, many of the conflicts noted above are designed to protect the consumer, see Plymouth Capital Co. v. Dist. Court of Elbert County, 955 P.2d 1014, 1015 (Colo. 1998) ("Through creation of a public trustee's office, the General Assembly sought to ensure the protection of debtors while maintaining a speedy, efficient procedure for creditors."), and preempting them under the FDCPA would seem to both undermine their purpose as well as the pur-

[5] For example, the word "foreclosure" is not mentioned once in either the statute or the legislative history.

pose of the FDCPA. See 15 U.S.C. § 1692 (stating the purpose of the FDCPA is "to promote consistent State action to protect consumers against debt collection abuses").

Some courts (reaching a contrary conclusion) have expressed concern that if the FDCPA does not apply to non-judicial foreclosure proceedings, it would immunize debt secured by real property where foreclosure was used to collect the debt. See Wilson, 443 F.3d at 376; Piper v. Portnoff Law Assocs., Ltd., 396 F.3d 227, 236 (3d Cir. 2005).

This proves too much. First, our holding is limited to non-judicial foreclosure proceedings and does not include judicial foreclosure actions. Second, our holding is also limited to the facts of the case. Whether or not more aggressive collection efforts leveraging the threat of foreclosure into the payment of money constitute "debt collection" is left for another day. See Maynard, 401 F. App'x at 395; Gburek v. Litton Loan Servicing LP, 614 F.3d 280, 385 (7th Cir. 2010) ("[T]he absence of a demand for payment is just one of several factors that come into play in the commonsense inquiry of whether a communication from a debt collector is made in connection with the collection of any debt."). In this case, however, the answer is clear—McCarthy did not demand payment nor use foreclosure as a threat to elicit payment. It sent only one letter notifying Mr. Obduskey that it was hired to commence foreclosure proceedings. Mr. Obduskey is, of course, free to contest this foreclosure in a Rule 120 proceeding, see C.R.C.P. 120(d); however, we hold that McCarthy's mere act of enforcing a security interest through a non-judicial foreclosure proceeding does not fall under the FDCPA.

II. Remaining Claims

Mr. Obduskey's remaining claims warrant summary treatment. As noted by the district court, Mr. Obduskey failed to "allege any specific monetary loss" from the alleged defamatory statements. Obduskey, 2016 WL 4091174, at *5. As such, Mr. Obduskey's defamation claim must fail. See Lind v. O'Reilly, 636 P.2d 1319, 1320 (Colo. App. 1981). Concerning the extreme and outrageous conduct claim, Mr. Obduskey has not alleged any act on the part of Wells Fargo or McCarthy that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." Hewitt v. Pitkin Cty. Bank & Tr. Co., 931 P.2d 456, 459 (Colo. App. 1995).

Mr. Obduskey's limitations claim is also without merit. He claims that the mortgage foreclosure proceeding took place seven years after the note was accelerated and is barred by a six-year limitations period. But the applicable limitations period for foreclosure proceedings in Colorado is 15 years. Colo. Rev. Stat. § 38-39-205. Finally, because Mr. Obduskey's claim that Colorado's Rule 120 hearing is unconstitutional (because it does not provide a full and fair hearing and has no right of appeal) was not adequately pled in his complaint, he cannot raise it here.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-01734-RBJ

DENNIS OBDUSKEY, an individual,
Plaintiff,

v.

WELLS FARGO, WELLS FARGO BANK,
WELLS FARGO & CO., WELLS FARGO BANK NA,
WELLS FARGO HOME MORTGAGE, and
MCCARTHY AND HOLTHUS LLP,
Defendants.

Filed: July 19, 2016

ORDER

R. BROOKE JACKSON, Judge.

This matter is before the Court on two motions to dismiss [ECF Nos. 14, 18] and a request for a temporary restraining order or preliminary injunction [ECF No. 39]. For the reasons described below, the Court grants both motions to dismiss and denies the motion for a temporary restraining order or preliminary injunction.

FACTS

In 2007 plaintiff Dennis Obduskey obtained a loan from Magnus Financial Corporation. ECF No. 1-16. The loan was in the amount of $329,940, and it was secured by his property at 132 Wagon Tongue Road in Bailey, Colorado (the property). *Id.* At some point Freddie Mac acquired the loan. *See* ECF No. 1-12. Defendant Wells Fargo Bank, N.A. (Wells Fargo) services the loan.[1] *See* ECF Nos. 1; 1-5.

Between 2008 and 2012 Wells Fargo offered Mr. Obduskey multiple loan modifications. ECF No. 1 at 2 ¶ 5. During this four-year span, plaintiff made 12 "trial payments" pursuant to three different modification offers. Wells Fargo accepted the payments and applied them as "late payments on the account and for other unspecified fees." *Id.* In 2009 Wells Fargo encouraged Mr. Obduskey to apply for a Home Affordable Modification program (HAMP) Loan Trial Period. *Id.* at 2 ¶ 2. Throughout this time Wells Fargo sent documents to plaintiff with "opposing messages within days of each other." *Id.* at 3 ¶ 5. Wells Fargo has "claimed numerous different owners of the note." *Id.* at 5 ¶ 14.

In June 2009 plaintiff defaulted on the loan, and Wells Fargo began non-judicial foreclosure proceedings. *Id.* at 16 ¶ 38; *see* ECF No. 1-28. Over the following six years, multiple foreclosure proceedings were initiated but not completed. *Id.* at 9 ¶ 30. On June 30, 2009 Mr. Obduskey

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[1] Wells Fargo claims that plaintiff also improperly named it as "Wells Fargo," "Wells Fargo Bank," "Wells Fargo & Co.," and "Wells Fargo Home Mortgage." ECF No. 14 at 1. The Court will refer to these entities as "Wells Fargo."

informed the Federal Trade Commission (FTC) of his ongoing problems with Wells Fargo during a public comment phase. *Id.* at 2 ¶ 3. In 2011 Wells Fargo failed to reply to issues contained in a qualified written request. *Id.* at 3–4 ¶ 7. In 2013 Wells Fargo or "contracted employees" left "door hangers" at Mr. Obduskey's home, "urging him to contact his mortgage servicer." *Id.* at 8 ¶ 26. Plaintiff alleges that each communication violated the Fair Debt Collection Practices Act. *Id.*

In 2014 Wells Fargo retained defendant McCarthy & Holthus, LLP (McCarthy) to pursue foreclosure of the property. *Id.* at 4–5 ¶¶ 12–13. Mr. Obduskey alleges that McCarthy failed to follow the requirements of the Fair Debt Collection Practices Act. *Id.* Mr. Obduskey received "undated" mailings from McCarthy in August 2014 advising plaintiff that the firm was serving as a debt collector. *Id.* at 7 ¶ 21. Plaintiff did not receive any validation from McCarthy before it initiated a new foreclosure action in May 2015. *Id.* at 7 ¶ 22. On June 11, 2015 plaintiff filed a complaint with the Consumer Financial Protection Bureau because of McCarthy's failure "to respond to a verification request response[.]" *Id.* at 4–5 ¶ 13. Mr. Obduskey states both that the firm "failed to provide an appropriate response" to him, and that "a written response by the Firm lacked the basic information necessary within a validation response." *Id.* at 7 ¶¶ 21–24.

Plaintiff's loan remains in default. *See* ECF No. 1-14. On August 12, 2015 plaintiff filed this suit, asserting five claims: (1) violation of the Fair Debt Collection Practices Act; (2) violation of the Colorado Consumer Protection Act; (3) defamation; (4) extreme and outrageous conduct; and (5) "commencement of an unlawful collections action." ECF No. 1 at 12–18. On September 25, 2015 Wells

Fargo moved to dismiss all of plaintiff's claims. ECF No. 14. On November 2, 2015, McCarthy filed a motion to dismiss plaintiff's case in its entirety. ECF No. 18. Both motions have been fully briefed. On July 11, 2016 plaintiff moved for a temporary restraining order and preliminary injunction to enjoin the foreclosure sale set for July 20, 2016. ECF No. 39.

ANALYSIS

I. Standard of Review.

To survive To survive a 12(b)(6) motion to dismiss, the complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While the Court must accept the well-pleaded allegations of the complaint as true and construe them in the light most favorable to the plaintiff, *Robbins v. Wilkie*, 300 F.3d 1208, 1210 (10th Cir. 2002), purely conclusory allegations are not entitled to be presumed true. *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009). However, so long as the plaintiff offers sufficient factual allegations such that the right to relief is raised above the speculative level, he has met the threshold pleading standard. *See, e.g.*, *Twombly*, 550 U.S. at 556; *Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008). Importantly, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (internal quotation marks omitted); *accord Robbins v. Okla. ex. rel. Dep't of Human Servs.*, 519 F.3d 1242, 1247 (10th Cir. 2008). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999) (internal citation omitted).

II. Fair Debt Collection Practices Act.

Mr. Obduskey's first claim is for violations of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692. ECF No. 12–13. Plaintiff contends that Wells Fargo and McCarthy violated multiple provisions of the FDCPA, "including, but not limited to" the following: communications with third parties (§ 1692c); harassment or abuse (§ 1692d); false or misleading representations (§ 1692e); unfair practices (§ 1692f); and validation of debts (§ 1692). *Id.* at 12 ¶ 6. Both defendants move to dismiss this claim. ECF Nos. 14 at 3–6; 18 at 4–6.

Congress enacted the FDCPA in 1977 "to eliminate abusive debt collection practices[.]" § 1692. The FDCPA regulates interactions between consumer debtors and "debt collectors." *Johnson v. Riddle*, 305 F.3d 1107, 1117 (10th Cir. 2002). A defendant can only be held liable if it is a debt collector within the meaning of the FDCPA. *James v. Wadas*, 724 F.3d 1312, 1315–16 (10th Cir. 2013).

A. Wells Fargo's Motion to Dismiss Plaintiff's FDCPA Claim

Wells Fargo raises a number of arguments for why plaintiff fails to state an FDCPA claim. ECF No. 3–6. First, Wells Fargo contends that it is not a debt collector as defined by the statute. *Id.* at 3–4. I agree. The statute's definition of "debt collector" excludes "any person collecting or attempting to collect any debt . . . which was not in default at the time it was obtained by such person . . . ." § 1692(a)(6)(F); *see Perry v. Stewart Title Co.*, 756 F.2d

1197, 1208 (5th Cir. 1985) ("The legislative history of section 1692a(6) indicates conclusively that a debt collector does not include the consumer's creditors, a mortgage servicing company, or an assignee of a debt, as long as the debt was not in default at the time it was assigned."). Courts have consistently held that a mortgage servicing company is not a debt collector within the meaning of the statute if the entity acquired the servicing rights before the loan was in default. *Solomon v. HSBC Mortg. Corp.*, 395 F. App'x 494, 495, 2010 WL 3069699, at *1 (10th Cir. 2010) (unpublished) (citing *Perry*, 756 F.2d at 1208); *Sudduth v. Citimortgage, Inc.*, 79 F. Supp. 3d 1193, 1197 (D. Colo. 2015).

Mr. Obduskey's allegations treat Wells Fargo as the servicer of his loan, and he does not claim that he was in default when Wells Fargo acquired its servicing rights. To the contrary, Mr. Obduskey alleges that he began interacting with Wells Fargo as early as 2008 when defendant first offered him a loan modification. He did not default on his loan until 2009. ECF No. 1 at 3 ¶ 5. Mr. Obduskey also alleges that Wells Fargo "has claimed numerous different owners of the note." *Id.* at 5 ¶ 14. First, he claims that he was told that the holder was "an unidentified 'investor,' which morphed to assignment to Wells Fargo via a Mortgage Electronic Registration Systems (MERS) representative on May 3, 2011, allegedly backdated to the date the loan was signed on May 31, 2007." *Id.* He also claims that Wells Fargo clarified on June 30, 2015 that Freddie Mac has owned the note since June 18, 2007. *Id.* To the extent that Mr. Obduskey bases his claim on Wells Fargo's acting an assignee of the note, he alleges that the assignment was "backdated" to 2007, which is before plaintiff defaulted.

Therefore, because Mr. Obduskey was not in default when either Wells Fargo began servicing the loan or when it became the assignee of the debt, Wells Fargo does not qualify as a debt collector under the FDCPA. *See Garrett v. BNC Mortg., Inc.*, 929 F. Supp. 2d 1120, 1128 (D. Colo. 2013). Mr. Obduskey's FDCPA claim against Wells Fargo is dismissed.

B. <u>McCarthy's Motion to Dismiss</u>

McCarthy also moves to dismiss the FDCPA claim on multiple grounds. ECF No. 18 at 4–6. Specifically, McCarthy argues that the FDCPA does not apply to non-judicial foreclosures, and therefore plaintiff's claim must fail. *Id.* at 5. I agree.

Not all courts have agreed "on whether and when foreclosure activities are covered" by the FDCPA. *Yokomizo v. Deutsche Bank Securities, Inc.*, No. 11-cv-01630-CMA-KLM, 2011 WL 5024899, at *4 (D. Colo. Nov. 30, 2011). However, the majority of courts, including this one, have found that foreclosure activities are outside the scope of the FDCPA. *Schwitzer v. Wells Fargo Bank, N.A.*, No. 12-cv-01367-RBJ-MJW, 2013 WL 607832, at *5 (D. Colo. Feb. 19, 2013); *Sudduth*, 79 F. Supp. 3d at 1197. Mr. Obduskey relies on cases outside of this district to support his position that the FDCPA covers non-judicial foreclosure. ECF No. 31 at 7.

Here, plaintiff alleges only that McCarthy took actions related to the filing of the non-judicial foreclosure action, contending that McCarthy failed to respond to a request for validation of the debt, and that the firm initiated a new foreclosure proceeding in May 2015. He does not allege that the law firm took any action to obtain payment on a debt. Moreover, plaintiff's allegation that he received mailings from McCarthy advising him that the firm was serving as a debt collector is insufficient to state an FDCPA claim. "[T]he fact that an entity identifies itself as a debt collector, or tells a consumer that it is attempting to collect a debt, is not sufficient on its own to bring that entity within the purview of FDCPA." *Garrett*, 929 F. Supp. 2d at 1127 (citing *Maynard v. Cannon*, 401 Fed. App'x 389, 395, 2010 WL 4487113, at *5 (10th Cir. 2010) (unpublished) (a notice's language stating that it was "sent in an attempt to collect a debt" does not "inevitably lead to the conclusion that [defendant's] non-judicial foreclosure actions were FDCPA-covered debt collection activity."). In sum, the Court does not find any reason in plaintiff's complaint or briefs to support deviating from the majority view that foreclosure proceedings are not a collection of a debt. Mr. Obduskey's FDCPA against McCarthy is dismissed.

III. Colorado Consumer Protection Act.

Plaintiff's second claim is for a violation of the Colorado Consumer Protection Act (CCPA), C.R.S. § 6–1–101 *et seq.* In order to state a CCPA claim, a plaintiff must allege the following elements:

> (1) the defendant engaged in an unfair or deceptive trade practice; (2) the challenged practice occurred in the course of the defendant's business, vocation, or occupation; (3) the challenged practice significantly impacts the public as actual or potential consumers of the defendant's goods, services, or property; (4) the plaintiff suffered injury in fact to a legally protected interest; and (5) the challenged practice caused the plaintiff's injury.

Park Rise Homeowners Ass'n, Inc. v. Res. Const. Co., 155 P.3d 427, 434–35 (Colo. App. 2006).

Plaintiff claims that his allegations demonstrate "deceptive trade practices" in violation of the CCPA. ECF No. 1 at 14 ¶ 16. He further contends that defendants engaged "in these underhanded measures in an effort to increase revenues and obtain a competitive edge in the debt collection industry." *Id.* at 14 ¶ 17. Finally, he alleges that "numerous fees have been added to the original loan, but there is a complete failure" to explain such fees. *Id.* at 14 ¶ 18.

Among its many arguments for why plaintiff's CCPA claim should be dismissed, Wells Fargo contends that Mr. Obduskey does not satisfy the "public impact" requirement. ECF No. 14 at 6–7. I agree. In considering whether a challenged practice significantly impacts the public, courts consider the number of consumers directly affected, the "relative sophistication and bargaining power" of the affected consumers, and "evidence that the challenged practice has previously impacted other consumers or has the significant potential to do so in the future." *Id.*

Mr. Obduskey's complaint alleges private wrongs against him that only relate to his loan and his property. He fails to identify any public impact. *See Rhino Linings USA, Inc. v. Rocky Mountain Lining, Inc.*, 62 P.3d 142, 149 (Colo. 2003). Because plaintiff does not make any allegations, even bare conclusory ones, about how defendants' conduct has any public impact, the Court finds that his CCPA claim must fail. *See Owens v. Nationstar Mortgage LLC*, No. 14-cv-01434-PAB-KLM, 2015 WL 1345536, at *4 (D. Colo. March 23, 2015).

McCarthy moves to dismiss on similar grounds. ECF No. 18 at 6–7. Plaintiff's failure to allege a significant public impact remains fatal to his claim. Thus, Mr. Obduskey's CCPA claims are dismissed against both defendants.

IV. Defamation.

In Colorado, defamation is "a communication holding an individual up to contempt or ridicule that causes the individual to incur injury or damage." *Keohane v. Stewart*, 882 P.2d 1293 (Colo. 1994). In order to state a claim for defamation, a plaintiff must allege the following elements:

> (1) a defamatory statement concerning another; (2) published to a third party; (3) with fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special damages or the existence of special damages to the plaintiff caused by publication.

Lee v. Colorado Times, Inc., 222 P.3d 957, 961 (Colo. App. 2009) (internal citations omitted).

Plaintiff bases his defamation claim on two theories: (1) false credit reporting and (2) filing documents related to the foreclosure. ECF No. 1 at 14–15 ¶¶ 23–28. First, Mr. Obduskey alleges that Wells Fargo "caused derogatory information on Plaintiff's personal credit report." *Id.* at 15 ¶ 25. Plaintiff claims that Wells Fargo reported "'dispute resolved; customer disagrees,' when no dispute was ever resolved." *Id.* Second, plaintiff argues that Wells Fargo "directed their legal counsel to file a civil action for the foreclosure of a home which became a matter of public record." *Id.* at 15 ¶ 23. The foreclosure appeared in local publications. *Id.* at 15 ¶ 24.

Wells Fargo moves to dismiss, arguing that plaintiff's defamation claim is barred by the statute of limitations, and Mr. Obduskey fails to allege that Wells Fargo made a false statement of a defamatory nature. ECF No. 14 at 11.

Even if the Court were to assume that plaintiff's claim is timely, Mr. Obduskey's defamation claim cannot survive a motion to dismiss because he fails to allege special damages. A published statement can be "libelous per se if it is defamatory on its face such that no extrinsic evidence is necessary to show either its defamatory nature or that it is of and concerning the plaintiff." *Lind v. O'Reilly*, 636 P.2d 1319, 1320 (Colo. App. 1981) (internal citations omitted) declined to follow on other grounds by *Lee*, 222 P.3d. Here, plaintiff does not contend that the statements are libelous per se. See ECF No. 1 at 14 ¶ 21.

Therefore, the statements must, if they are defamatory at all, be "libelous per quod, and they are therefore actionable only if special damages are pleaded and can be proved." *Lind*, 636 P.2d at 1320. Special damages are "limited to specific monetary losses, if any, which a plaintiff incurs as the result of publication of statements[.]" *Id.* at 1321. Such damages "do not include injuries to a plaintiff's reputation or feelings which do not result in specific monetary loss." *Id.* Finally, the damages "'must result from the conduct of a person other than the defamer or the one defamed and must be legally caused by the defamation.'" *Id.* (quoting Restatement (Second) of Torts § 575, Comment b (1977)).

Mr. Obduskey alleges that Wells Fargo published the statements to "deliberately cause damage to Plaintiff's reputation," and he claims that he is entitled to recover "actual damages, his actual damages trebled, plus reasonable attorney's fees and costs." ECF No. 1 at 15 ¶¶ 27–28. However, Mr. Obduskey fails to allege any specific monetary loss.

McCarthy moves to dismiss on similar grounds. Additionally, McCarthy contends that plaintiff "cannot recover for defamation with respect to reports made to credit bureaus because such a claim is preempted pursuant to 15 U.S.C. § 1681h(e)." ECF No. 18 at 8–9. The Court need not consider this argument because as discussed above, plaintiff's failure to allege special damages is fatal to his defamation claim.

For the reasons discussed above, Mr. Obduskey's defamation claim against Wells Fargo and McCarthy is dismissed.

V. Extreme and Outrageous Conduct.

Under Colorado law an entity that engages in extreme and outrageous conduct either recklessly or with the intent of causing an individual severe emotional distress can be held liable for damages if the victim does experience severe emotional distress. *See Coors Brewing Co. v. Floyd*, 978 P.2d 663, 665 (Colo. 1999). "Although the question of whether conduct is outrageous is generally one of fact to be determined by a jury, it is first the responsibility of a court to determine whether reasonable persons could differ on the question." *Culpepper v. Pearl St. Bldg., Inc.*, 877 P.2d 877, 883 (Colo. 1994). Colorado courts have erected a high bar for alleging an outrageous conduct claim. *See Coors*, 979 P.2d at 665. The Colorado Supreme Court noted that

> "[l]iability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim 'outrageous!'"

Rugg v. McCarty, 476 P.2d 753 (Colo. 1970) (quoting the Restatement (Second) of Torts § 46 (1965)).

Plaintiff brings two theories about why defendants' conduct was "extreme and outrageous." First, Mr. Obduskey argues that he "has been forced to deal with three law firms regarding the debt," and that any "progress of stipulation and settlement has been lost." ECF No. 1 at 15 ¶ 32. Second, plaintiff contends that Wells Fargo "failed to provide accurate information pertaining to the current note holder." *Id.* at 16 ¶ 33. He concludes that "defendants engaged in the conduct recklessly or with the intent of causing Plaintiff [to] suffer distress." *Id.* at ¶ 34.

Wells Fargo contends that Obduskey fails to state a claim because he has not alleged any conduct that could be considered extreme or outrageous. ECF No. 14 at 12. Wells Fargo also argues that plaintiff's second theory regarding the holder of the note is "plainly false" based on Mr. Obduskey's supporting documents. *Id.*

The Court agrees that Mr. Obduskey's claim for extreme and outrageous conduct should be dismissed. Even when taking plaintiff's allegations as true and construing them in his favor, Mr. Obduskey fails to identify conduct that satisfies this tort's high bar. There is nothing "so outrageous in character, and so extreme in degree" about Wells Fargo's working with three law firms over the course of this matter or with the alleged failure to provide accurate information about the note holder. Plaintiff fails to allege an "extreme act, both in character and degree" or a series of actions indicating the "infliction of severe mental suffering was calculated or recklessly and callously inflicted." *Gard v. Teletronics Pacing Sys., Inc.*, 859 F. Supp. 1349, 1354 (D. Colo. 1994). Moreover, courts in Colorado frequently dismiss outrageous conduct claims by borrowers against mortgagees or servicers. *See, e.g., Hewitt v. Pitkin County Bank & Trust Co.*, 931 P.2d 456, 459 (Colo. App. 1995) (no outrageous conduct claim where plaintiff alleged that a bank "accepted loan payments from him and then reneged on its promise not to commence foreclosure proceedings against him, and instead commenced such proceedings the very next day[.]"); *Christenson v. Citimortgage, Inc.*, No. 12-cv-02600-CMA-KLM, 2013 WL 5291943, at **18–19 (D. Colo. June 17, 2013), *report and recommendation rejected in part on other grounds*, 2013 WL 5291947 (D. Colo. Sept. 18, 2013) (allegations do not rise to the level of extreme or outrageous conduct despite the "inconvenience, pain, and suffering the threat of losing their home may have caused.").

McCarthy moves to dismiss, arguing that Mr. Obduskey's complaint fails to "identify wrongful conduct on the part of the Firm." ECF No. 18 at 9. Additionally, McCarthy contends that plaintiff does not allege any actions "that could be deemed extreme or outrageous." *Id.* As discussed above, plaintiff's extreme and outrageous conduct claim is premised on having to "deal with three law firms regarding the debt" and Wells Fargo's providing inaccurate information about the note holder. Plaintiff does not allege that McCarthy did anything "extreme or outrageous" during its representation of Wells Fargo. Plaintiff claims only that McCarthy failed to respond to a request for validation of the debt, and that the firm initiated a new foreclosure proceeding in May 2015. Such allegations do not rise to the level of "extreme or outrageous" conduct. *See Mbaku v. Bank of America, N.A.*, No. 12-cv-00190-PAB-KLM, 2013 WL 425981, at *8 (D. Colo. Feb. 1, 2013) (holding that it was not extreme or outrageous to initiate foreclosure proceedings).

In sum, the Court finds that Mr. Obduskey fails to state a claim for extreme or outrageous conduct.

VI. Unlawful Collections Claim.

Plaintiff styles his fifth claim as "commencement of unlawful collections action." ECF No. 1 at 16. The Court is unaware of an "unlawful collections" tort under Colorado law. This appears to be a claim for wrongful foreclosure, which Colorado courts do not recognize. *See, e.g., Schwartz v. Bank of Am., N.A.*, No. 10-cv-01225-WYD-MJW, 2011 WL1135001, at **3–4 (D. Colo. Mar. 28, 2011) ("Colorado does not recognize a claim for damages based on 'wrongful foreclosure.'"). However, plaintiff's "unlawful collections" claim seems to rest on the notion that Wells Fargo's foreclosure action is time-barred and improper. ECF No. 1 at 16–18. The Court will consider his allegations related to these theories.

Plaintiff contends that Wells Fargo sent him a default letter on June 5, 2009. *Id.* at 16 ¶ 38. The foreclosure proceedings were initiated on May 12, 2015 when the Notice of Election and Demand (NED) was filed. *Id.* at 17 ¶ 44. Mr. Obduskey alleges that the foreclosure proceedings are untimely pursuant to the six-year statute of limitations under C.R.S. § 13–80–103.5. *Id.* at 17–18 ¶¶ 41, 45. Finally, Mr. Obduskey argues that defendants failed to properly commence a civil action because they did not file a complaint with a court. *Id.* at 17 ¶ 44.

Wells Fargo moves to dismiss, arguing that it timely and properly initiated its foreclosure action. ECF No. 14 at 14–15. Wells Fargo contends that the six-year statute of limitations in C.R.S. § 13–80–103.5 applies to the collection of a debt, and that the correct limitations period for foreclosure proceedings is 15 years pursuant to C.R.S. § 38–39–205. *Id.* at 14. Additionally, Wells Fargo argues that, even if the six-year limitations period applies, plaintiff tolled the statute of limitations by making voluntary payments during the HAMP trial periods. *Id.* Finally, Wells Fargo asserts that it properly initiated the foreclosure by filing and recording the NED, and that it did not have a responsibility to file a complaint. *Id.* at 14–15.

The Court agrees that plaintiff fails to allege that the foreclosure proceedings were untimely or improperly initiated. First, as Wells Fargo clarifies, it is not suing to enforce a promissory note, but rather is exercising its right to foreclose pursuant to a deed of trust. Therefore, the Court does not perceive any reason as to why the 15-year limitations period under § 38–39–205 would not apply. *See Mortgage Investments Corp. v. Battle Mountain Corp.*, 70 P.3d 1176, 1181 (Colo. 2003).

However, even if the general six-year limitations period did apply, the Court finds that plaintiff's voluntary payments tolled the statute of limitations. *Drake v. Tyner*, 914 P.2d 519, 522 (Colo. App. 1996) ("under certain circumstances, a new promise to pay a debt, an unqualified acknowledgment of a debt from which a promise to pay may be implied, or a part payment of a debt will start the limitations period running anew."). "In the case of a single debt not yet barred by the statute of limitations, partial payment alone tolls the statute of limitations." *Id.* (internal citations omitted). Here, plaintiff admits that he made 12 partial payments between 2008 and 2012. ECF No. 1 at 3 ¶ 5. He does not allege that the payments were involuntary. *See Drake*, 914 P.2d at 522 (partial payment is a "voluntary acknowledgment of the debt from which the law implies a new promise to pay the balance."). Therefore, each of the 12 payments restarted the clock, and the foreclosure action is timely by either measure.

The Court finds that plaintiff's second argument—that Wells Fargo failed to properly initiate its foreclosure proceedings because it failed to file a complaint—is without merit. Under Colorado law, foreclosures are initiated by the debt holder's filing of the NED. See C.R.S. §§ 38–38–101(1)(a). A court becomes involved later when the holder seeks an Order Authorizing Sale pursuant to Rule 120 of the Colorado Rules of Civil Procedure. *See* C.R.S. § 38–38–105(2)(a); C.R.C.P. 120(a), (d). Wells Fargo was not required to file a complaint in order to initiate the foreclosure proceedings.

McCarthy moves to dismiss on the same grounds. For the reasons just discussed, the Court concludes that the May 2015 foreclosure action was timely. In sum, the

Court finds that plaintiff's "wrongful collections action" fails.

VII. Plaintiff's Other Allegations.

Mr. Obduskey's complaint includes many other allegations that do not directly appear to support his five causes of action. For example, plaintiff alleges that Wells Fargo did not respond in a timely manner to his June 15, 2011 Qualified Written Response (QWR). ECF No. 1 at 3–4, ¶¶ 7–10. Even if the Court were to take this allegation as true, plaintiff does not bring a claim under the Real Estate Settlement Procedures Act (RESPA), which creates the obligation to respond to a QWR. Additionally, RESPA claims are subject to a three-year statute of limitations, so any claim would be untimely. 12 U.S.C. § 2614. Finally, plaintiff does not allege damages resulting from the failure to respond to the 2011 QWR. *See Henson v. Bank of Am.*, 935 F. Supp. 2d 1128, 1145–46 (D. Colo. 2013).

Additionally, Mr. Obduskey alleges that Wells Fargo "knew or should have known that the Colorado Rule 120 foreclosure process" deprives "consumers of due process." ECF No. 1 at 4 ¶ 10. Even if plaintiff had pled a constitutional claim, which he did not, neither defendant is a state actor against whom a constitutional claim can be brought. *See Lewis v. JP Morgan Chase Bank, N.A.*, No. 13-cv-01375-PAB-KLM, 2014 WL 1217948, at **3–6 (D. Colo. Mar. 24, 2014) (banks are not state actors when pursuing non-judicial foreclosures).

VIII. Motion for Temporary Restraining Order or Preliminary Injunction.

On July 11, 2016 plaintiff filed a motion seeking a temporary restraining order (TRO) or preliminary injunction to prevent the foreclosure of the property. ECF No. 39 at 1. The foreclosure sale is scheduled for July 20, 2016. *Id.* at 3. The Court denies both requests. Because the Court finds that plaintiff fails to state a claim on which relief could be granted, he is not entitled to a TRO or a preliminary injunction. *See Gen. Motors Corp. v. Urban Gorilla, LLC*, 500 F.3d 1222, 1226 (10th Cir. 2007) (to obtain a preliminary injunction, a movant must first establish that he has "a substantial likelihood of success on the merit[.]").

ORDER

For the reasons stated above, defendant Wells Fargo's motion to dismiss [ECF No. 14] and defendant McCarthy and Holthus LLP's motion to dismiss [ECF No. 18] are GRANTED. Plaintiff Dennis Obduskey's motion for a temporary restraining order or preliminary injunction [ECF No. 39] is DENIED. Plaintiff's claims are dismissed with prejudice.

DATED this 19th day of July, 2016.

BY THE COURT:

/s/ R. Brooke Jackson
R. Brooke Jackson
United States District Judge

APPENDIX C

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. * * *

* * * * *

3. 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.

* * * * *

4. 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 * * * .

* * * * *

5. 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.

6. 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.