APPENDIX

TABLE OF CONTENTS

Appendix A: Court of appeals opinion, Jan. 19, 2018 .... 1a
Appendix B: District court order, July 19, 2016 .... 14a
Appendix C: Statutory provisions 33a

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

[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

---

[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

[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. §

---

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

---

[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. <u>Wells Fargo's Motion to Dismiss Plaintiff's FDCPA Claim</u>

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. McCarthy's Motion to Dismiss

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.