No.

IN THE

Supreme Court of the United States

MARSHALL SPIEGAL, PETITIONER

v.

MICHAEL C. KIM

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

The Fair Debt Collection Practices Act ("FDCPA") covers debts "arising out of" certain transactions. Does "arising out of" require a "direct" connection to the transaction?

Similarly, is the conduct of a debtor relevant to whether the FDCPA applies?

If so, can a court take "judicial notice" of filings in other proceedings to establish facts relating to any alleged misconduct if the requirements of collateral estoppel are not met?

Here, the debt collector relied on a contract to seek a debt. However, the Seventh Circuit held the debt collector's allegations of debtor misconduct severed the "nexus" necessary for FDCPA coverage. Did the Seventh Circuit correctly interpret 'debt,' 'arise out of' and 'transaction' as written and intended by the FDCPA?

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The opinion of the Seventh Circuit Court of Appeals (No. 18-2449) is not reported (*Spiegel v. Kim*, No. 18-2449, March 6, 2020) The District Court Opinion is also not reported. App19a-23a (Opinion).

JURISDICTION

The Seventh Circuit denied the petition for rehearing on April 28, 2020. App.30a. This petition for writ of certiorari is filed within 90 days of the decision in accordance with Supreme Court Rule 13. This Honorable Court has jurisdiction pursuant to 28 U.S.C. §2101(c).

RELEVANT PROVISIONS INVOLVED

Fair Debt Collection Practices Act

15 U.S. C. §1692(a)(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.

15 U.S. C. §1692e

> A debt collector may not use any false, deceptive, or misleading representation or

means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.
(2) The false representation of--
(A) the character, amount, or legal status of any debt; or
(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.
(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.
(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.
(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.
(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to--
(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this subchapter.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.
(13) The false representation or implication that documents are legal process.
(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.
(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.
(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a(f) of this title.

STATEMENT

Attorney Michael Kim & Assoc. ("Kim") sued condominium resident Marshall Spiegel on behalf of the 1618 Sheridan Rd. Condo. Assoc ("Association"). App. 9a.

The Association is governed by a Declaration, a contract of covenants and restrictions that run with the land and the governing document for unit owners and the Association. Doc. 25. The Declaration required "Robert's Rules of Order" for its affairs.

Under *Roberts* (§47), then secretary Spiegel became board president when the Association's president resigned. Doc. 25. Attorney Kim had overbilled the Association for years. When Kim refused to turn over his billing records to acting president Spiegel, Kim was fired. Kim then sided with the remaining Board member. In State court, they had

the Association sue Spiegel, seeking a declaratory judgment and injunction claiming Spiegel was not acting President and was interfering with the Association. Doc. 25-2 (pp. 2-88).

The State court complaint claimed Spiegel engaged in "prior misconduct" as a director of the Association, such as firing Kim for overbilling, serving as acting president of the Association when the prior one resigned, and not cooperating with other directors. The complaint relied on the Declaration as the basis for the demand for attorney's fees, damages, and interest. Doc. 25. The complaint asked that they be charged to Spiegel's homeowner's assessments. Doc. 25-2, ¶51.

However, the Declaration did not provide attorney's fees for any of the State court complaint's allegations. Doc. 25-2 (p. 18, ¶50). Hence, Spiegel claimed this violated the Fair Debt Collection Practices Act ("FDCPA").

The District Court granted Kim's motion for judgment on the pleadings, finding Kim was not a debt collector. App. 23a. Even though Kim relied on the Declaration to seek fees, the Seventh Circuit found the 'debt' did not arise out of a 'consumer transaction' as defined by the FDCPA because the "nexus" was too remote as the State court complaint alleged misconduct. App. 5a-6a. The Court also found it could take judicial notice of filings in State court to establish the alleged "misconduct." App. 8a.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit Opinion conflicts with its own prior precedent, other Circuits, and would allow debt collectors to evade the FDCPA by alleging the debtor engaged in "misconduct." The Opinion also fails

to interpret 'debt,' 'arise out of' and 'transaction' as written and intended by the FDCPA.

I. FDCPA Broadly Covers Any Debts That 'Arise Out Of' a Transaction.

A covered FDCPA 'debt' is "any obligation or alleged obligation of a consumer to pay money arising out of a transaction" that is "primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C. § 1692a(5).

This "any obligation to pay" is "absolute language" and not a "limited set of obligations." *Bass v. Stolper*, 111 F.3d 1322, 1325 (7th Cir. 1997). The FDCPA covers "any legal action on a debt." 15 U.S.C. § 1692i(a)(venue).

Debt' includes any "alleged obligation to pay." 15 U.S.C. §1692(a)(5). Hence, a debt collector's claim a debtor "is obligated" to pay a disputed 'debt' suffices to "bring the obligation within the ambit of the FDCPA." *Brown v. Budget*, 119 F.3d 922, 924 (11th Cir. 1997).

'Debts' are not limited to "consensual" transactions. *Bass* at 1326 (*contra*). For example, an unconscious patient who receives emergency medical care that he would have refused to consent if conscious, is entitled to FDCPA protection if sued on the debt.

The Opinion (p.6) stated the debt must "directly" arise from the Declaration.

However, the "FDCPA definition of a 'debt' does not requires the "liability to arise directly out of a transaction." *Porras v. Vial*, 2015 WL 2449486, at *12 (D. Or. May 21, 2015). "'Arising out of' are words of much broader significance than 'caused by[,]'" much

less 'direct.' *Hamilton v. United*, 310 F.3d 385, 391 (5th Cir. 2002)(FDCPA).

'Arising out of' means "'originating from[,]' `having its origin in,' `growing out of' or `flowing from,' or in short, `incident to, or having connection with.'" *Id.*(quoting case). Only "some causal connection," is required, not "proximate cause in the legal sense." *Federal v. Tri-State*, 157 F.3d 800, 804 (10th Cir. 1998)(insurance case). Almost "any causal relation[,]" no matter how "minimal" suffices. 7 Am.Jur.2d Auto, Ins. §162.

Likewise, 'transaction' is a "broad reference" that "does not connote any specific form of payment." *Bass* at 1325. 'Transaction' requires only some "exchange" or "activity involving two parties" that affect each other. *Merriam Webst. Dict.* Moreover, contract and torts do not encompass all 'transactions.' Statutes often differentiate between a "contract, agreement, or transaction." 7 U.S.C. §2(h)(i). Even "[a]n 'agreement' is broader than a contract." *Zabinsky v. Gelber*, 807 N.E.2d 666, 668 (Ill.App.Ct. 2004).

The FDCPA bars the "collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. § 1692f(1).

The FDCPA's ""ordinary meaning"" is ""clear and unrestricted." *Bass* at 1326. Even a "bounced check" may be covered. *Id.* Even if ambiguity exists, all the FDCPA terms should "be construed liberally in favor of the consumer." *John v. Riddle*, 305 F.3d 1107, 1117 (10th Cir. 2002).

II. Opinion Conflicts With Prior Seventh Circuit & Eleventh Circuit Precedent.

The Opinion conflicts with settled Seventh Circuit precedent (*Newman v. Boehm*, 119 F.3d 477, 481 (7th Cir. 1997)) and the numerous Circuits relying on its rationale.[1] The purchase of a condominium invariably obligates the person "to pay any assessments pursuant to the condominium ownership declaration." *Id.*

Because the FDCPA's "definition of a 'debt' focuses on the transaction creating the obligation to pay[,]" any "assessments" pursuant to a declaration qualify as obligations of "consumer to pay money arising out of a transaction." *Id.* Hence, any "assessments" allegedly owed to a homeowner's association "qualify as 'debts' under the FDCPA." *Id.* at 482.

The Opinion's claim "misconduct" removes FDCPA protection also conflicts with the Eleventh Circuit: "[E]ven if tort-like conduct triggered an obligation to pay," when the "obligation arose from a consumer contract – rather than solely by operation of law – the obligation is a debt under the FDCPA." *Agrelo v. Affinity*, 841 F.3d 944, 950 (11th Cir. 2016).

By agreeing to the association's governing documents, homeowners are contractually liable for a "fine" that is then "treated as an individual

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[1] *See, e.g.*, *Haddad v. Alexander*, 698 F.3d 290, 293 (6th Cir. 2012)("We adopt the analysis of the Seventh Circuit in *Newman*."); *McCullough v. Johnson*, 637 F.3d 939, 948 (9th Cir. 2011); *Kistner v. Margelefsky*, 518 F.3d 433, 438 (6th Cir. 2008); *Romea v. Heiberger*, 163 F.3d 111 (2nd Cir.1998); *Ladick v. Gemert*, 146 F.3d 1205 (10th Cir.1998).

assessment." *Id.* at 952. "The fact that the obligation may have been triggered by tort -like behavior does not take it out of the realm" of the FDCPA. *Id.*

III. Opinion Would Allow Debt Collectors to Evade the FDCPA.

The Opinion would remove FDCPA protection from many transactions and encourage debt collectors to include a charge of "misconduct" against the debtor when the seek to collect a debt.

However, the FDCPA focuses almost exclusively "on the conduct of debt collectors, not debtors." *Keele v. Wexler*, 149 F.3d 589, 596 (7th Cir. 1998). Courts have "repeatedly rebuffed debt collectors' attempts to raise defenses or exceptions based on the consumer's purported misconduct." *Francisco v. Midland*, 2019 WL 1227791, *2 (N.D. Ill. 2019).

For example, many persons "willfully refuse to pay just debts" or never intended to pay them to begin with, fraud. *Keele* at 596. Hence, "nearly any alleged willful breach of contract can be restated as a tort claim." *Allis-Chalmers v. Lueck*, 471 U.S. 202, 219 (1985). However, the FDCPA decided the 'serious and widespread abuses' of debt collectors "outweigh the necessity to carve out" exceptions. *Keele* at 596.

Moreover, whether a transaction is 'contractual' or 'tortious' is often "difficult to make." *Morrow v. Goldschmidt*, 112 Ill.2d 87, 96 (Ill. 1986). Contracts can even give rise to duties in tort. *Rozny v. Marnul*, 43 Ill.2d 54, 62 (Ill. 1969). For example, "[m]ost fiduciary relationships are established by contract." *Maksym v. Loesch*, 937 F.2d 1237, 1242 (7th Cir. 1991).

Similarly, a "complaint against a lawyer for professional malpractice may be couched in either contract or tort." *Collins v. Reynard*, 154 Ill.2d 48, 50 (Ill. 1992).

A "defendant may [even] engage in conduct that both breaches a contract and constitutes a separate and independent tort." *Kramer v. Insurance*, 174 Ill.2d 512, 523 (Ill. 1997).

The need for an objective test --- does the 'debt' arise from a 'transaction' --- is particularly high when a debt collector's "misconduct" or "tort" claims against a debtor are often "difficult to dispose of before trial." *Blue Chip v. Manor Drug*, 421 U.S. 723, 742-743 (1975).

This is also important for "repeat players[,]" such as debt collectors, who have "enhanced experience" and "financial strength" in litigation to seek to evade the FDCPA. *Why the 'Haves' Come out Ahead*, Marc Galanter, 9 Law & Soc. Rev. 95 (1974).

IV. Seventh Circuit Opinion Should Be Vacated.

Lawyers who sue for alleged "failure to pay homeowner association fees" in court filings are subject to the FDCPA. *McNair v. Maxwell*, 893 F.2d 680, 683 (9th Cir. 2018).

The Declaration did not allow attorney's fees for "misconduct. The Declaration only allowed attorney's fees: 1) to enforce a unit owner's failure to pay assessments after 30 days written notice, or 2) for a continued breach by a unit owner of the Declaration or rules for 30 days after written notice, which was inapplicable. Doc. 25-2 (p. 73 item 'g').

Similarly, the State court complaint only sought a declaratory judgment and injunction. Doc. 25-2 (pp. 13-19). However, a "declaratory judgment does not

enforce the contractual obligations but only declares rights." *Butler v. Ken*, 215 Ill.App.3d 680, 686 (Ill.App.Ct. 1991). Any "award of attorney's fees and costs is not proper under a contractual provision for such expenses incurred in enforcing obligations under the contract." *Id.*

Complaints also cannot initially seek "attorney's fees" as "sanctions" for a claim's underlying conduct. An "award of attorney's fees" can never ever be based solely on "prelitigation conduct." *Towerridge v. T.A.O.*, 111 F.3d 758, 765 (10th Cir. 1997). "[T]here can be no legal basis to request such sanctions in a complaint because the complaint begins the litigation: the defendant has not had the opportunity to engage in frivolous litigation conduct." *Samms v. Abrams*,163 F.Supp.3d 109, 114 (S.D.N.Y. 2016).

Despite the Opinion's position, no "federal appellate authority" has approved attorney's fees based "solely upon a finding of bad faith as an element of the cause of action presented in the underlying suit." *Association v. Horizon*, 976 F.2d 541, 550 (9th Cir. 1992). Otherwise, this would "appear to justify an award of fees in every fraud case." *Id.*

V. Judicial Notice Cannot Be Taken of the Truth of State Court Filings.

The Opinion's taking judicial notice of findings in other proceedings would render collateral estoppel "superfluous." *G.E. v. Lease*, 128 F.3d 1074, 1083 (7th Cir. 1997).

Courts "cannot notice pleadings or testimony as true simply because these statements are filed with the court." 21B Wright & Miller, *Fed. Pract. and Proc.* §5106.4. The Opinion conflicts with other Circuits:

1. Documents may be judicially noticed to show "that a judicial proceeding occurred or that a document was filed in another court case." *Lozano v. Ashcroft*, 258 F.3d 1160, 1165 (10th Cir. 2001). "But a court may not take judicial notice of findings of facts from another case." *Id.*;
2. A court "may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings." *Liberty v. Rotches*, 969 F.2d 1384, 1388 (2nd Cir. 1992); and
3. "Judicial notice of another court's opinion takes notice of 'the existence of the opinion, which is not subject to reasonable dispute over its authenticity.'" *McIvor v. Credit*, 773 F.3d 909, 914 (8th Cir. 2014)(quoting case). But judicial notice cannot be taken "of the facts summarized in the opinion." *Id.*

"While judicial findings of fact may be more reliable than other facts found in the file, this does not make them indisputable." 21B Wright & Miller, *Fed. Prac. and Proc.* §5106.4.

CONCLUSION

Certiorari should be granted as the Seventh Circuit Opinion conflicts with its own prior precedent, other Circuits, and allow debt collectors to evade the FDCPA by alleging the debtor engaged in "misconduct." The Opinion also fails to interpret 'debt,'

'arise out of' and 'transaction' as written and intended by the FDCPA.

This case presents a proper vehicle for review as it comes to this Honorable Court on a motion for judgment on the pleadings. Hence, the facts are undisputed and present issues of law. Alternatively, Petitioner requests that this Honorable Court enter an Order reversing the Seventh Circuit Opinion and for any further and equitable relief as may be just.

Respectfully Submitted,

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United States Court of Appeals, Seventh Circuit.

Marshall SPIEGEL, Plaintiff-Appellant,

v.

Michael C. KIM, Defendant-Appellee.

No. 18-2449

Argued January 23, 2020Decided March 6, 2020Rehearing and Rehearing En Banc Denied April 28, 2020

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 1:16-cv-04809 — Sara L. Ellis, *Judge*.

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Before Rovner, Hamilton, and Scudder, Circuit Judges.

Opinion

Scudder, Circuit Judge.

For over four years, Marshall Spiegel and Michael Kim have been embroiled in a blazing and bitter dispute in the Circuit Court of Cook County, Illinois. Before us is one piece of this angry and protracted wrangle—one

that arose when Kim requested attorneys' fees in the state court litigation. Spiegel took to federal court to allege that this run-of-the-mill request violated the Fair Debt Collection Practices Act, a federal statute that prohibits misleading and unfair practices in the collection of consumer debts. The district court dismissed Spiegel's complaint, and we affirm.

I

A

Marshall Spiegel served as a director on the board of the 1618 Sheridan Road Condominium Association, a homeowners' association in Wilmette, Illinois, until the association's members voted to remove him in December 2015. The association then sued Spiegel in the Circuit Court of Cook County, alleging that he took several unauthorized actions leading to and following his removal, including falsely holding himself out as president, attempting to unilaterally terminate another board member, freezing the association's bank accounts, sending unapproved budgets to unit owners, and filing unwarranted lawsuits on behalf of the association. The association sought to enjoin Spiegel from interfering with board decisions or holding himself out as a director, and to recover damages, costs, and attorneys' fees for his misconduct. The complaint invoked a condominium association agreement called the "Restated Declaration," which Spiegel signed when he bought his unit. The Restated Declaration provided that condominium owners who violated the board's rules or obligations would pay any damages, costs, and attorneys' fees that the association incurred as a result.

Spiegel denied wrongdoing but did not stop there. He went on the offensive by filing a slew of his own complaints and motions against the association, its lawyers, and nearly every condominium resident at 1618 Sheridan—racking up 385 separate filings in the Cook County court. Spiegel did not prevail in these proceedings. Indeed, the Cook County court dismissed his claims with prejudice and enjoined him from interfering with the board's activities. The court found that Spiegel's filings had "no basis in law or fact," were riddled with "blatant lies," and amounted to "a pattern of abuse, committed for an improper purpose to harass, delay and increase the cost of litigation." Against these findings, the court ordered Spiegel to pay over $700,000 in fees and sanctions.

A more complete recounting of the Cook County litigation is not necessary. Suffice it to say that the parties were at each other's throats well before this appeal.

B

While the state court litigation was ongoing, Spiegel filed this federal suit against the association's counsel, Michael Kim. Spiegel viewed Kim's lawsuit requesting attorneys' fees in Cook County as a further declaration of war and took the battle to federal court to fire the next shot. Spiegel invoked sections 1692e and 1692f of the Fair Debt Collection Practices Act, alleging that Kim's application in state court for attorneys' fees constituted an unfair debt collection practice.

Kim answered and moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). After initially staying proceedings under *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), the district court determined it could decide Kim's motion without creating conflict with the state court litigation. It then granted Kim's motion, concluding that Spiegel failed to state a claim because the attorneys' fees Kim requested were not a "debt" within the meaning of the FDCPA. Spiegel moved to vacate the judgment and sought leave to amend his complaint, but the district court denied both motions. Spiegel now appeals.

The FDCPA is a consumer protection statute that "prohibits 'debt collector[s]' from making false or misleading representations and from engaging in various abusive and unfair practices" in connection with the collection of a "debt." *Heintz v. Jenkins*, 514 U.S. 291, 292, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995); see also *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 577, 130 S.Ct. 1605, 176 L.Ed.2d 519 (2010) (describing the FDCPA's consumer protection objectives). Congress limited the definition of "debt" to consumer debt—specifically, to an obligation "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." 15 U.S.C. § 1692a(5); see also *Heintz*, 514 U.S. at 293, 115 S.Ct. 1489(emphasizing that Congress restricted the statutory definition of "debt" to consumer debt).

The FDCPA applies to Spiegel's claim only if what Kim sought to recover through his state court complaint constitutes a "debt" within the meaning of the statute. See *Gburek v. Litton Loan Servicing LP*, 614 F.3d 380, 384 (7th Cir. 2010) (interpreting 15 U.S.C. §§ 1692a(6), 1692c(a)–(b), 1692e, 1692g). The fit is not there on any fair reading of Kim's complaint.

The attorneys' fees that Kim sought did not "aris[e] out of" a consumer transaction as Congress employed that requirement in defining "debt." See 15 U.S.C. § 1692a(5). To be sure, Kim's complaint asked the state court to impose a financial obligation on Spiegel by requiring him to pay fees. But in determining whether Kim's demand qualifies as a "debt," "[t]he crucial question is the legal source of the obligation." *Franklin v. Parking Revenue Recovery Servs., Inc.*, 832 F.3d 741, 744–45 (7th Cir. 2016). By its terms, "the FDCPA limits its reach to those obligations to pay arising from *consensual* transactions, where parties negotiate or contract for *consumer-related goods or services*." *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1326 (7th Cir. 1997) (emphases added). That limitation explains why a thief's obligation to pay for stolen goods is not a debt under the FDCPA, see *id.*, nor is a municipal fine levied on a property owner, see *Gulley v. Markoff & Krasny*, 664 F.3d 1073, 1075 (7th Cir. 2011) (per curiam).

No doubt the attorneys' fees Kim demanded in state court fall outside the statute as well. Spiegel's obligation to pay attorneys' fees arose out of his alleged wrongdoings as a board member, not from a consensual

consumer transaction within the meaning of the FDCPA. Kim's invocation of the Restated Declaration in his state court lawsuit does not change the analysis. Nobody disputes that Spiegel signed that agreement as part of a consensual transaction—the purchase of his condominium. But the state court complaint sought to impose a financial obligation on Spiegel for one and only one reason—the way he conducted himself while serving on the association's board. There is no way to read Kim's state court complaint as seeking attorneys' fees for any reason connected to Spiegel's purchase of a condominium. Put most simply, any nexus between the financial demand lodged in the state court litigation and a consumer transaction is way too remote to satisfy what Congress required in the FDCPA for an obligation to qualify as "debt."

Spiegel sees things differently and urges a less exacting statutory analysis. His reasoning has several links but is not difficult to follow: he contends that but for his condominium purchase, he never would have served on the association board; but for his board service, he never would have become ensnared in state court litigation with the association; and but for that litigation, he never would have found himself on the receiving end of Kim's legal demand to pay attorneys' fees. Spiegel anchors his position in our decision in *Newman v. Boehm, Pearlstein & Bright, Ltd.*, where we held that assessments imposed by a homeowners' association on its members could create a debt under the statute. See 119 F.3d 477, 481 (7th Cir. 1997).

We read *Newman* in a very different way. The members in *Newman* came under obligations to pay assessments that arose *directly* from the association's declaration and bylaws, to which the members consented upon purchasing their condominiums. See *id.* Here, however, Spiegel's obligation to pay attorneys' fees arose from his actions as a board member. The mere fact that Spiegel can tell a story that starts with his condominium purchase (and thus the Restated Declaration), and many steps later ends with the Cook County litigation, does not bring the financial demand Kim pursued in state court within the FDCPA's reach. To show that Kim sought to collect a debt, Spiegel needed to more directly establish that the litigation demand for attorneys' fees "ar[ose] out of" a consumer transaction. See 15 U.S.C. § 1692a(5). Spiegel failed to do so. Any other conclusion would rid the FDCPA's limitations of what qualifies as a "debt" of their fair import. The district court was right to enter judgment for Kim.

Nor do we see any error in denying Spiegel's request to amend his complaint. Leave to amend need not be granted where the proposed amendment would not result in the plaintiff succeeding in stating a viable legal claim. See *Heng v. Heavner, Beyers & Mihlar, LLC*, 849 F.3d 348, 354 (7th Cir. 2017). The district court was right to see Spiegel's proposed amendment as futile. He does no more in his proposed amendment than repeat his contention that Kim improperly demanded attorneys' fees. Nowhere, however, does Spiegel explain how those fees constitute a "debt" under the

FDCPA's limited and consumer-protection-focused definition of that term.

III

A final issue deserves comment. This case came to our court at a red-hot temperature, only to climb to a boil during briefing. After the district court dismissed Spiegel's complaint, but before oral argument in our court, the state court issued several decisions pertinent to the parties' ongoing litigation. Kim attached those decisions to his brief. Among them were an entry of final judgment against Spiegel and three orders requiring him to pay fees and sanctions to the association and related parties, including Kim. Spiegel moved to strike these documents and to sanction Kim for even attaching them, contending that Kim improperly included information that the district court never considered.

We deny Spiegel's motions. A court may take judicial notice of public records such as the state court documents Kim attached. See *Tobey v. Chibucos*, 890 F.3d 634, 647–48 (7th Cir. 2018) (collecting cases). Nor did Kim need to request leave to attach them, as "[t]he right place to propose judicial notice, once a case is in a court of appeals, is in a brief." *Matter of Lisse*, 905 F.3d 495, 497 (7th Cir. 2018) (Easterbrook, J., in chambers). Having taken judicial notice of the orders, it is not lost on us that the state court rejected all of Spiegel's claims and reprimanded him for frivolous filings.

Spiegel's claim falls outside the ambit of the FDCPA, so we AFFIRM.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 16 C 4809

Judge Sara L. Ellis

Marshall SPIEGEL, Plaintiff

v.

Michael C. KIM, Defendant

8/2/17

ORDER

The Court grants in part Defendant Michael Kim's motion for judgment on the pleadings or to abstain under the *Colorado River* doctrine [25] and orders this case stayed. See statement for further details.

STATEMENT

Plaintiff Marshall Spiegel alleges that attorney Michael Kim improperly sought attorneys' fees from Spiegel in a state court lawsuit related to Spiegel's condominium, violating the Fair Debt Collection Practices Act ("FDCPA") pursuant to 15 U.S.C. § 1692 *et seq*. Spiegel's amended complaint against Kim seeks damages and attorneys' fees and costs. The Court previously denied Kim's motion to dismiss the amended complaint [22]. Kim now moves for judgment on the pleadings under Federal Rule of Civil Procedure 12(c),

or in the alternative, for *Colorado River* abstention in this case, pending the resolution of the underlying state court lawsuit. Because this case involves parallel proceedings and multiple *Colorado River* doctrine factors weigh in favor of abstention, the Court grants the motion to abstain under *Colorado River*.

Spiegel, an Illinois citizen, is associated with an eight-unit condominium complex located at 1618 Sheridan Road in Wilmette, Illinois. Kim, also an Illinois citizen, is an attorney whose law firm, Michael C. Kim and Associates, represents the 1618 Sheridan Road Condominium Association (the "Association"). In 2015, on behalf of the Association, Kim and his firm filed a lawsuit in the Circuit Court of Cook County (the "State Court Lawsuit") seeking declaratory and injunctive relief against Spiegel and a related trust entity. In its complaint in the State Court Lawsuit, the Association included a prayer for relief asking that the Court require Spiegel to pay the Association's damages, court costs, and attorneys' fees incurred in connection with his prior misconduct and the legal proceedings.

The State Court Lawsuit alleges that Spiegel illegally usurped the function of the Association's Board of Directors (the "Board"). Between October and December 2015, Spiegel allegedly held himself out as the "Acting President" of the Association, without the authority to do so. In its complaint, the Association alleges that Spiegel attempted to terminate the Association's legal counsel and property manager and tried to freeze and change the authorized signatories on

its bank accounts. Spiegel also allegedly filed lawsuits purportedly on behalf of the Association before obtaining the Board's approval and refused to acknowledge the elected Board President and Secretary. The Association alleges that Spiegel also refused to abide by the Board's decisions, sent an unapproved budget to unit owners, and instructed unit owners to interact with a different management company and to not attend unit owner meetings. The Association filed the State Court Lawsuit against Spiegel on December 31, 2015 and sought a temporary restraining order ("TRO") against him on January 11, 2016. Cook County Judge Rita Novak granted the TRO on January 14, 2016 and found that the Association had demonstrated "a protectable right, immediate and irreparable [h]arm, no adequate remedy at law, likelihood of success on the merits and that the balance of hardships weigh in its favor." Doc. 25-5 at 2.

Spiegel then filed this federal lawsuit against Kim on April 29, 2016, alleging that the request for attorneys' fees in the State Court Lawsuit was not permitted by Illinois law and therefore violates the FDCPA.

"A motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure is governed by the same standards as a motion to dismiss for failure to state a claim under Rule 12(b)(6)." Adams v. City of Indianapolis, 742 F.3d 720, 727–28 (7th Cir. 2014). A motion to dismiss under Rule 12(b)(6) challenges the sufficiency of the complaint, not its merits. Fed. R. Civ. P. 12(b)(6); Gibson v. City of

Chicago, 910 F.2d 1510, 1520 (7th Cir. 1990). In considering a Rule 12(b)(6) motion to dismiss, the Court accepts as true all well-pleaded facts in the plaintiff's complaint and draws all reasonable inferences from those facts in the plaintiff's favor. AnchorBank, FSB v. Hofer, 649 F.3d 610, 614 (7th Cir. 2011). To survive a Rule 12(b)(6) motion, the complaint must not only provide the defendant with fair notice of a claim's basis but must also be facially plausible. Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); see also Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678.

Kim argues that he is entitled to judgment on the pleadings under Rule 12(c). In the alternative, Kim asks the Court to abstain from the case under the Colorado River doctrine. Spiegel concedes that it is within the Court's discretion to abstain in this case, but the parties dispute whether the 12(c) motion or the request for abstention should be addressed first by the Court. Abstention under the Colorado River doctrine is a discretionary, prudential doctrine used for judicial economy. Brunswick Corp. v. McNabola, No. 16 CV 11414, 2017 WL 3008279, at *7 n.4 (N.D. Ill. July 14, 2017) (citing Adkins v. VIM Recycling, Inc., 644 F.3d 483, 497–98 (7th Cir. 2011)); Thomas-Wise v. Nat'l City Mortg. Co., No. 14 C 3460, 2015 WL 641770, at *2 (N.D. Ill. Feb. 13, 2015). While the Court is not required to address abstention before reaching the merits of the

12(c) motion, it does so here in the interest of judicial economy.

Under Colorado River, a federal court has discretion to abstain from hearing a federal case when there is a concurrent state court proceeding if abstention would promote "wise judicial dministration." Freed v. J.P. Morgan Chase Bank, N.A., 756 F.3d 1013, 1018 (7th Cir. 2014) (citing Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817–18, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976)). "The primary purpose of the Colorado River doctrine is to conserve both state and federal judicial resources and prevent inconsistent results." Id. (citing Day v. Union Mines, 862 F.2d 652, 657 (7th Cir. 1988); Lumen Constr., Inc. v. Brant Constr. Co., Inc., 780 F.2d 691, 694 (7th Cir. 1985)).

Abstention under Colorado River is appropriate only if the state and federal proceedings are parallel. Freed, 756 F.3d at 1018 (citing Interstate Material Corp. v. City of Chicago, 847 F.2d 1285, 1287 (7th Cir. 1988)). If a court determines that the proceedings are parallel, it must then determine whether abstention is proper by weighing ten non-exclusive factors. Id. (citing AAR Int'l Inc. v. Nimelias Enters. S.A., 250 F.3d 510, 518 (7th Cir. 2001)).

Two cases are parallel when "substantially the same parties are contemporaneously litigating substantially the same issues." Adkins, 644 F.3d at 498–99 (citing Tyrer v. City of S. Beloit, 456 F.3d 744, 752 (7th Cir. 2006)). The primary question for determining whether the state and federal cases are parallel for

purposes of Colorado River abstention is not whether the cases are "formally symmetrical, but whether there is a substantial likelihood" that the state case "will dispose of all claims presented in the federal case." AAR Int'l, 250 F.3d at 518 (citing Day v. Union Mines Inc., 862 F.2d 652, 656 (7th Cir. 1988)) (quotations omitted). The two cases "need not be identical to be parallel, and the mere presence of additional parties or issues in one of the cases will not necessarily preclude a finding that they are parallel." Id. (citing Caminiti & Iatarola, Ltd. v. Behnke Warehousing, Inc., 962 F.2d 698, 700–01 (7th Cir. 1992); Lumen Constr., 780 F.2d at 695). Where a plaintiff's federal lawsuit "relies significantly on the resolution of the primary legal issue under consideration" in the state court action, the cases are sufficiently parallel to support Colorado River abstention. Charles v. Bank of Am., No. 11 CV 8217, 2012 WL 6093903, at *4 (N.D. Ill. Dec. 5, 2012).

Here, the parties are not identical. Spiegel is the plaintiff in this case as well as the defendant in the State Court Litigation. Kim is the defendant in this case, and his law firm serves as counsel to the plaintiff in the State Court Litigation, the Association. The court may still find parallelism between the two cases because precise symmetry is not necessary, see AAR Int'l., 250 F.3d at 518, and Kim and the Association share similar litigation interests, see Proctor & Gamble Co. v. Alberto-Culver Co., No. 99 C 1158, 1999 WL 319224, at *4 (N.D. Ill. Apr. 28, 1999) (where the two cases involve different parties who share substantially similar litigation interests, parallelism may be found). In both cases, Kim and the Association assert that the

Association is permitted to seek attorneys' fees in the State Court Litigation. In addition, Kim is a defendant in the federal case only because of his acts in furtherance of his representation of the Association. See Smith v. Bank of Am., N.A., No. 14 C 1041, 2014 WL 3938547, at *3 (N.D. Ill. Aug. 12, 2014) (finding parallelism even though defendant in federal case was counsel to plaintiff and not a named party in state case). Furthermore, "if a party is named in a federal action but is not named in a state action, the inquiry regarding the parallelism of parties blends into the inquiry regarding the parallelism of issues." Proctor & Gamble Co., 1999 WL 319224, at *4.

This federal case and the State Court Litigation involve the same legal issue. Both cases must resolve whether, under Illinois law, the Association may seek attorneys' fees in the State Court Litigation. The state court must address this legal issue so that it can grant or deny the Association's request and this Court must address the legal issue to determine whether the request for attorneys' fees was impermissible and therefore in violation of the FDCPA. Because the resolution of this issue in the State Court Litigation could dispose of Spiegel's claim in this federal case, the cases are parallel for purposes of the Colorado River doctrine. See, e.g., Smith, 2014 WL 3938547, at *3 (finding that the federal case is parallel to the state case where judgment in the state case will dispose of the basis for the claims in the federal case); Charles, 2012 WL 6093903, at *4 (finding parallelism because federal action relied significantly on the resolution of the primary legal issue under consideration in the state

court action). To determine whether abstention is proper under Colorado River, the Court next must weigh ten nonexclusive factors: (1) whether the state has assumed jurisdiction over property; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which jurisdiction was obtained by the concurrent forums; (5) the source of governing law, state or federal; (6) the adequacy of state-court action to protect the federal plaintiff's rights; (7) the relative progress of state and federal proceedings; (8) the presence or absence of concurrent jurisdiction; (9) the availability of removal; and (10) the vexatious or contrived nature of the federal claim. Freed, 756 F.3d at 1018.

Kim argues that factors 1, 3, 4, 5, 6, 7, 8, and 10 weigh in favor of abstention under the Colorado River doctrine and Spiegel concedes that factors 1, 3, 4, 5, 6, 7, and 8 favor abstention. The first factor weighs in favor of abstention because, to the extent there is property at issue, the state court has assumed jurisdiction over it for more than a year since December 31, 2015. Doc. 25 at 14. The third factor also supports abstention because the State Court Litigation will determine a significant legal issue in the federal case. See Delaney v. Specialized Loan Servicing, LLC, No. 15 C 5260, 2015 WL 7776902, at *4 (N.D. Ill. Dec. 3, 2015) (where state action will dispose of majority of factual and legal issues in federal case, third factor regarding desirability of avoiding piecemeal litigation weighs in favor of abstention). Because the state court case was initiated before the federal case, the fourth factor also supports abstention. See id. (fourth factor favors abstention

where state action was filed before the federal action). In addition, the fifth factor favors abstention because the law governing the parallel issue in the state and federal case is Illinois law. See Smith, 2014 WL 3938547, at *3 (fifth factor favors abstention where claims in federal case are governed by state law). Because an FDCPA claim may be brought in state court, the sixth and eighth factors support abstention. See Delaney, 2015 WL 7776902, at *4 (state court is "fully capable" of protecting plaintiff's federal rights because concurrent jurisdiction allows plaintiff to bring FDCPA action in state court). The seventh factor also weighs in favor of abstention because the State Court Litigation has progressed further than this federal case. See id. (abstention supported where state court litigation has progressed further).

Because seven of the ten Colorado River factors clearly weigh in favor of abstention, the Court finds abstention is necessary. See, e.g., id. (abstaining under Colorado River where the state and federal cases are parallel and seven of the ten factors weigh in favor of abstention); Nieves v. Bank of Am., N.A., No. 14-cv-2300, 2015 WL 753977, at *7 (N.D. Ill. Feb. 20, 2015) (same). Kim argues that the Court should dismiss the case if it determines abstention is appropriate. However, the Seventh Circuit has held that "a stay, not a dismissal, is the appropriate procedural mechanism for a district court to employ in deferring to a parallel state court proceeding under the Colorado River doctrine." Selmon v. Portsmouth Drive Condo. Ass'n, 89 F.3d 406, 409 (7th Cir. 1996) (collecting cases). Accordingly, this case is stayed pending further order

of the Court. The Court strikes the status hearing set for August 3, 2017 and resets it to October 10, 2017 for the parties to report on the status of the State Court Litigation.

Date: August 2, 2017 /s/_Sara L. Ellis

4/24/18

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

No. 16 C 4809

Judge Sara L. Ellis

Marshall SPIEGEL, Plaintiff

v.

Michael C. KIM, Defendant

ORDER

The Court grants Defendant Michael C. Kim's motion for judgment on the pleadings [25]. The Court enters judgment in favor of Kim and terminates this civil case. See statement for further details.

STATEMENT

Over a year ago, Defendant Michael C. Kim moved for judgment on the pleadings and in the alternative for the Court to abstain in this matter pursuant to the *Colorado River* doctrine. The Court granted the motion to abstain, stayed the case, and did not reach the merits of the motion for judgment on the pleadings. However, now nearly nine months have passed since the Court issued its stay, and the parties report that the state court case is not materially closer to a resolution. Because, upon further review, the Court determines that it can rule on the motion for judgment

on the pleadings without risking an inconsistent result with any potential state court judgment, the Court lifts the stay and proceeds to ruling on Kim's motion for judgment on the pleadings. *See Freed v. J.P. Morgan Chase Bank, N.A.*, 756 F.3d 1013, 1018 (7th Cir. 2014) ("The primary purpose of the *Colorado River* doctrine is to conserve both state and federal judicial resources and prevent inconsistent results.").

The background of this case is as complicated as it is unnecessary to its disposition. The parties are no doubt intimately and painfully familiar with its details, such that it is sufficient to say that Kim, acting as the attorney for other people who live in Marshall Speigel's condominium building, filed a complaint in state court against Spiegel seeking, among other things, attorneys' fees from Spiegel arising from that and myriad other lawsuits between Spiegel, his condo association, and the other condo association members. Spiegel then filed this case claiming that Kim, in seeking these attorneys' fees, violated the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq*. Specifically, Spiegel asserts that Kim violated § 1692e(2)(A) and (B) of the FDCPA which prohibit the false representation of the character, amount, or legal status of any debt, and the false representation of compensation that may be lawfully received by any debt collector, respectively Spiegel's Amended Complaint in this case carefully avoided including the exact language of the alleged improper demand for attorneys' fees. Kim now provides the underlying complaint containing the demand for attorneys' fees as an exhibit to his motion and asks the Court to take judicial notice of the document for

purposes of deciding this motion. Because Spiegel refers to the state court complaint in the Amended Complaint in this case, is central to the claim being made, and the state court complaint is a public record, the Court may take judicial notice of it without converting this motion into one for summary judgment. See Venture Assocs. Corp. v. Zenith Data Sys. Corp., 987 F.2d 429, 431 (7th Cir. 1993) (a court may consider documents attached to a defendant's motion, where those documents "are referred to in the plaintiff's complaint and are central to [the plaintiff's] claim"). Therefore, the Court takes judicial notice of the state court complaint for purposes of deciding this motion.

In the relevant section, the state court complaint seeks a judgment:

> B. Requiring Spiegel to pay the Association's damages, court costs and attorneys' fees incurred in connection with his prior misconduct and with these proceedings.

Doc. 25-2 at 19.

Kim now moves for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). "A motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure is governed by the same standards as a motion to dismiss for failure to state a claim under Rule 12(b)(6)." Adams v. City of Indianapolis, 742 F.3d 720, 727–28 (7th Cir. 2014). A motion to dismiss under Rule 12(b)(6) challenges the sufficiency of the complaint, not its merits. Fed. R. Civ.

P. 12(b)(6); Gibson v. City of Chicago, 910 F.2d 1510, 1520 (7th Cir. 1990). In considering a Rule 12(b)(6) motion to dismiss, the Court accepts as true all wellpleaded facts in the plaintiff's complaint and draws all reasonable inferences from those facts in the plaintiff's favor. AnchorBank, FSB v. Hofer, 649 F.3d 610, 614 (7th Cir. 2011). To survive a Rule 12(b)(6) motion, the complaint must not only provide the defendant with fair notice of a claim's basis but must also be facially plausible. Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); see also Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678, 129 S. Ct. 1937.

To state a claim under the FDCPA, Spiegel must allege that (1) Kim qualifies as a "debt collector," as defined in § 1692a(6), (2) Kim acted "in connection with the collection of any debt," and (3) Kim's actions violated one of the FDCPA's substantive provisions. Gburek v. Litton Loan Servicing LP, 614 F.3d 380, 384 (7th Cir. 2010). Kim now argues that Spiegel cannot satisfy the first prong, because the attorneys' fees sought are not a debt as defined under the FDCPA and that even if they were such a debt, because the alleged debt at no point was in default, Kim's efforts to collect on it are not covered by the FDCPA.

The Court takes the second argument first. The FDCPA defines a debt collector as "[a]ny 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). It goes on to exclude "(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . (iii) concerns a debt which was not in default at the time it was obtained by such person." 15 U.S.C. § 1692a(6)(F)(iii); see also Johnson v. Carrington Mortg. Servs., 638 F. App'x 523, 525 (7th Cir. 2016) (holding that defendant was not a debt collector for FDCPA purposes because the plaintiff was not in default when the defendant became his loan servicer). There is no allegation that the alleged debt here is in default, therefore, Kim is not a debt collector as defined under the FDCPA.

Because Kim is not a debt collector as defined under the FDCPA, the Court grants his motion for judgment on the pleadings. Because this disposes of the case, the Court need not reach Kim's other argument and terminates this civil case.

Date: April 24, 2018

/s/_Sara L. Ellis

4/25/18

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

No. 16 C 4809

Judge Sara L. Ellis

Marshall SPIEGEL, Plaintiff

v.

Michael C. KIM, Defendant

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

in favor of defendant(s) Michael C Kim and against plaintiff(s) Marshall Spiegel

Defendant(s) shall recover costs from plaintiff(s)

decided by Judge Sara L. Ellis on a motion for judgment on pleadings

Date: 4/25/2018

Thomas G. Bruton, Clerk of Court

Amanda Scherer , Deputy Clerk

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

No. 16 C 4809

Judge Sara L. Ellis

Marshall SPIEGEL, Plaintiff

v.

Michael C. KIM, Defendant

ORDER

The Court denies Plaintiff Marshall Spiegel's Motions to Vacate and Amend [54, 55]. See statement.

STATEMENT

On April 24, 2018, the Court granted Defendant Michael C. Kim's motion for judgment on the pleadings and entered judgment in his favor. Plaintiff Marshall Spiegel now files two substantively identical motions to vacate that judgment and to amend his complaint [54, 55]. For the reasons stated below, the Court denies these motions.

In its April 24, 2018, Order, the Court found that because the alleged debt was not in default, Kim did not qualify as a debt collector subject to the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq*. While this was an adequate basis to enter judgment in favor of Kim, the Court could have ruled in

Kim's favor as well on the basis that the alleged debt does not qualify as a debt under the FDCPA. The term "debt" is defined in the FDCPA as:

> 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.

15 U.S.C. § 1692a(5).

In the Amended Complaint, Spiegel does not allege the attorney's fees Kim seeks in the state court action arise out of a transaction of any kind, let alone 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." *Id.* To the contrary, Spiegel states that the underlying state case against Spiegel is not against him "in his capacity as a unit owner, but as a Board Member." Doc. 4 at 3. He further alleges that the dispute is "relate[d]" to his purchase of his condominium, but not that it arises from that purchase. In his proposed amended complaint Spiegel does not even include an allegation that the debt relates to the purchase of his condominium. Instead he states that the fees are sought "in connection with a transaction related to Mr. Spiegel's condominium." Doc. 55-1 at 1.

Fortunately the Court is not obliged to rely only upon the versions of Spiegel's claim to determine

whence the alleged debt arises. As noted in the Court's prior order, because the state court complaint is central to the claim being made, and it is a public record, the Court may take judicial notice of it. See Venture Assocs. Corp. v. Zenith Data Sys. Corp., 987 F.2d 429, 431 (7th Cir. 1993) (a court may consider documents attached to a defendant's motion, where those documents "are referred to in the plaintiff's complaint and are central to [the plaintiff's] claim"). Upon reviewing that complaint it is clear that the attorney's fees in question are expressly to compensate Spiegel's condo association for attorney's fees it incurred as a result of Spiegel's alleged misconduct in other proceedings between him and the condo association. See Doc. 25-2 at 19 ("Requiring Spiegel to pay the Association's damages, court costs and attorneys' fees incurred in connection with his prior misconduct and with these proceedings."). Therefore the obligation to pay these fees, if such an obligation should ever come to pass, arises from Spiegel's litigation conduct, not his purchase of his condo.

Furthermore, the connection between the actual purchase transaction and the condo association incurring attorney's fees in litigation unrelated to that transaction is far too attenuated for this Court to reasonably determine that these attorney's fees arose out of the purchase transaction. The fact that the fees are related to his ownership of his condo unit does not mean that they have anything to do with the purchase of the condo unit. This is distinguishable from Newman v. Boehm, Pearlstein & Bright, Ltd., 119 F.3d 477 (7th Cir. 1997), where the Seventh Circuit held that all that

is required for a debt to be covered by the FDCPA is that a transaction created the obligation to pay. Id. at 481. In the present case the alleged obligation to pay does not arise from the purchasing of the condo. It arises, if at all, from Spiegel's alleged misconduct in litigation. Therefore, because Spiegel has not alleged the existence of a debt covered by the FDCPA in any of the three complaints he has filed, his claim cannot go forward.

As to the Court's original basis for granting the motion for judgment on the pleadings—that the alleged debt was not in default—the Court is unpersuaded that it made a manifest error of law. Spiegel argues that the requirement that the debt be in default is only relevant in defining a debt collector if the debt does not originate with the one attempting collection on the debt. However, this argument is premised on a misunderstanding of the FDCPA. Those who do not acquire debts for collection from others are "creditors" under the FDCPA. See 15 U.S.C. § 1692a ("The term 'creditor' means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.). With limited exceptions, creditors are not subject to the FDCPA. See Schlosser v. Fairbanks Capital Corp., 323 F.3d 534, 536 (7th Cir. 2003) ("Creditors, 'who generally are restrained by the desire to protect their good will when collecting past due accounts, are not covered by the Act." (citations omitted)). Spiegel asserts in his motion that "Kim did

not 'obtain' the debt from another," Doc. 55 at 2, and that the suit Kim filed in state court is one "claiming he is owed money." Id. So, in arguing that Kim did not obtain the debt from another and is in fact collecting debt owed to him, Spiegel is conceding that Kim is a creditor as defined under the FDCPA and therefore not subject to its provisions. Therefore, even if the debt were in default, as Spiegel alleges in his proposed amended complaint, it would not change that fact that Spiegel has pleaded facts conclusively establishing Kim as a creditor not subject to the FDCPA in this case.

The deficiencies with Spiegel's claims are not mere technicalities. He has pleaded and argued facts that clearly show the underlying demand for attorney's fees is not covered by the FDCPA. His proposed amendment to include a bald assertion that the debt is in default does not address the fact that he is alleging that Kim is the original creditor and that he is attempting to collect the alleged debt on his own behalf. Additionally, he cannot escape the fact that the claim for attorney's fees does not arise from a consumer transaction. All of these issues are fatal to his complaint and further amendment, including the proposed amended complaint attached to these motions, cannot cure the deficiencies. Therefore, the Court denies the motion to vacate and amend the complaint.

Date: June 11, 2018

/s/Sara L. Ellis___

4/28/20

United States Court of Appeals, Seventh Circuit.

Marshall SPIEGEL, Plaintiff-Appellant,

v.

Michael C. KIM, Defendant-Appellee.

No. 18-2449

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 1:16-cv-04809 — **Sara L. Ellis**, *Judge*.

Before Rovner, Hamilton, and Scudder, Circuit Judges.

ORDER

Plaintiff-appellant filed a second amended petition for rehearing and rehearing en banc on April 7, 2020 and a third amended petition for rehearing and rehearing en banc on April 10, 2020. No judge in regular active service has requested a vote on the petitions for rehearing en banc, and all members of the original panel have voted to deny panel rehearing. The petitions for rehearing and rehearing en banc are therefore DENIED.