

1
2 UNITED STATES DISTRICT COURT
3 DISTRICT OF NEVADA

4 Tim Dahar,

5 Plaintiff

6 v.

7 Pennymac Loan Services, LLC,

8 Defendant

Case No.: 2:23-cv-01020-CDS-MDC

Order Granting Defendant's Motion to
Dismiss and Motion to Strike, and Denying
Motion to Seal

[ECF Nos. 7, 11, 15]

9
10 Pro se plaintiff Tim Dahar brings this lawsuit following a non-judicial foreclosure on his
11 property. ECF No. 1-1. Defendant Pennymac Loan Services, LLC moves to dismiss the complaint
12 (ECF No. 7) arguing that Dahar has failed to state a claim. Pennymac also moves to seal an
13 exhibit accompanying its reply (ECF No. 11), and to strike Dahar's surreply (ECF No. 15). For
14 the reasons set forth below, I grant Pennymac's motion to dismiss and motion to strike, and
15 deny its motion to seal.

16 **I. Background**

17 In April 2015, Dahar refinanced the real property located at 4540 San Rafael Ave in Las
18 Vegas, Nevada with All Western Mortgage, Inc. Deed of Trust, Def.'s Ex. A, ECF No. 8-1 at 3. In
19 February 2019, the deed of trust was assigned to Pennymac. Assignment of Deed of Trust, Def.'s
20 Ex. B, ECF No. 8-1 at 13. Dahar disputes the transfer of the loan to Pennymac, and the monthly
21 escrow amounts determined by Pennymac beginning in November of 2021. ECF No. 1-1 at 5, 7-8.
22 Pennymac asserts that Dahar's loan was referred to foreclosure in November of 2022. Def.'s Ex.
23 A; ECF No. 12-1 at 2. Dahar seeks to stop the non-judicial foreclosure. On May 22, 2023, Dahar
24 initiated this action in the Eighth Judicial District Court for Clark County, Nevada. ECF No. 1-1.
25 Pennymac removed his action to this court on June 30, 2023. ECF No. 1. Pennymac now moves
26 to dismiss this suit for failure to state a claim on which relief may be granted, or alternatively, for

1 failure to comply with Federal Rule of Civil Procedure 8(a). Mot. to Dismiss, ECF No. 7. For the
2 reasons discussed below, the motion to dismiss is granted.

3 **II. Legal standard**

4 The Federal Rules of Civil Procedure require a plaintiff to plead “a short and plain
5 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2).
6 Dismissal is appropriate under Fed. R. Civ. P. 12(b)(6) where a pleader fails to state a claim upon
7 which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555
8 (2007). A pleading must give fair notice of a legally cognizable claim and the grounds on which
9 it rests, and although a court must take all factual allegations as true, legal conclusions couched
10 as factual allegations are insufficient. *Twombly*, 550 U.S. at 555.

11 Accordingly, Fed. R. Civ. P. 12(b)(6) requires “more than labels and conclusions, and a
12 formulaic recitation of the elements of a cause of action will not do.” *Id.* To survive a motion to
13 dismiss, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to
14 relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*,
15 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual content that
16 allows the court to draw the reasonable inference that the defendant is liable for the misconduct
17 alleged.” *Id.* This standard “asks for more than a sheer possibility that a defendant has acted
18 unlawfully.” *Id.*

19 If the court grants a motion to dismiss for failure to state a claim, leave to amend should
20 be granted unless it is clear that the deficiencies of the complaint cannot be cured by
21 amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). Pursuant to Fed. R.
22 Civ. P. 15(a), a court should “freely” give leave to amend “when justice so requires,” and in the
23 absence of a reason such as “undue delay, bad faith or dilatory motive of the part of the movant,
24 repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the
25 opposing party by virtue of allowance of the amendment, futility of the amendment, etc.” *Foman*
26 *v. Davis*, 371 U.S. 178 (1962).

1 III. Discussion

2 A. Pennymac’s motion to dismiss is granted.

3 Dahar’s complaint does not explicitly enumerate the causes of action. Liberally
4 construing it, it appears that the complaint alleges violations of the (1) Fair Debt Collection
5 Practices Act (FDCPA); (2) Real Estate Settlement Procedures Act (RESPA); (3) Consumer
6 Credit Protection Act (CCPA); (4) a number of state laws; and (5) Nevada Homeowner Bill of
7 Rights (NHBR). Compl., ECF No. 1-1. Pennymac moves to dismiss the complaint, arguing that
8 the FDCPA claim should be dismissed because it fails as a matter of law as non-judicial
9 foreclosure by a loan servicer does not constitute debt collection. ECF No. 7 at 5. Pennymac
10 asserts that the RESPA claim should be dismissed because there is no private right of action for
11 that regulation. *Id.* at 6–7. Lastly, Pennymac contends that Dahar fails to state a claim of any
12 “material violation” under NHBR. *Id.* at 7.

13 ***1. Dahar’s Fair Debt Collection Practices Act (FDCPA) claims are***
14 ***dismissed without prejudice and with leave to amend.***

15 Dahar alleges that Pennymac violated provisions of the FDCPA by acting as a debt
16 collector. ECF No. 1-1 at 4. Pennymac counters that enforcement of a security interest through
17 non-judicial foreclosure does not constitute debt collection subject to most provisions of the
18 FDCPA. ECF No. 7 at 5. I agree.

19 Congress passed the FDCPA “to eliminate abusive debt collection practices by debt
20 collectors” while ensuring that “those debt collectors who refrain from using abusive debt
21 collection practices are not competitively disadvantaged.” 15 U.S.C. § 1692(e). The FDCPA
22 requires and prohibits certain activities by “debt collectors” that are done “in connection with
23 the collection of any debt.” 15 U.S.C. §§ 1692c (prohibiting certain communications), 1692d
24 (prohibiting harassment or abuse), 1692e (prohibiting false or misleading representations), 1692f
25 (prohibiting unfair practices), 1692g (requiring validation of debts). However, a business
26 engaged in no more than the kind of security interest enforcement at issue in nonjudicial

1 foreclosure proceedings falls outside of the purview of the FDCPA, except for the limited
2 purpose of §1692f(6). *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029, 1031 (2019); *Dowers v.*
3 *Nationstar Mortg., LLC*, 852 F.3d 964, 971 (9th Cir. 2017); *see also Gillespie v. Countrywide Bank FSB*,
4 2011 WL 3652603 at *2 (D. Nev. Aug. 19, 2011) (stating without elaboration that “activities
5 undertaken in connection with a nonjudicial foreclosure do not constitute debt collection under
6 the FDCPA.”). Section 1692f(6) prohibits taking or threatening to take any nonjudicial action to
7 effect dispossession or disablement of property if (1) there is no present right to possession of
8 the property claimed as collateral through an enforceable security interest; (2) there is no
9 present intention to take possession of the property; or (3) the property is exempt by law from
10 such dispossession or disablement. 15 U.S.C. §1692f(6).

11 Dahar’s complaint, however, does not allege a violation of this specific provision. Nor
12 does his complaint allege facts which, liberally construed, would plausibly assert any of the
13 three above-referenced prohibitions under Section 1692f(6). While Dahar complains that “[he]
14 had never heard of [Pennymac Loan Services LLC]” until they started sending him billing
15 statements (ECF No. 1-1 at 5), he does not allege that Pennymac had no enforceable security
16 interest under Nevada law; nor does he allege that Pennymac had no intention to take
17 possession of the property (the opposite), nor that his property was exempt from dispossession
18 or disablement under law. *See generally id.* These are insufficient. But because it is unclear if the
19 deficiencies can be cured by amending the complaint, I dismiss his FDCPA claim without
20 prejudice and with leave to amend.

21 ***2. Dahar’s Real Estate Settlement Procedures Act (RESPA) claims are***
22 ***dismissed without prejudice and with leave to amend.***

23 Dahar alleges that he did not consent to Pennymac servicing his loan. He further asserts
24 that he was overbilled due to Pennymac’s accounting errors. Resp., ECF No. 9 at 9–10.
25 Pennymac argues that there is no private right of action for the provisions of RESPA that Dahar
26 cites and even if there is, he does not allege a viable claim. Reply, ECF No. 10 at 3. Dahar lists the

1 following RESPA provisions in his complaint: 12 CFR § 1024.17, 12 CFR § 1024.35, 12 CFR §
2 1024.35A, 12 CFR § 1024.35B, 12 CFR § 1024.35H, 12 CFR § 1024.38A, 12 CFR § 1024.38B. ECF
3 No. 1-1 at 4.

4 “A plaintiff may only bring a cause of action to enforce a federal law if the law provides a
5 private right of action.” *Nisqually Indian Tribe v. Gregoire*, 623 F.3d 923, 929 (9th Cir. 2010). There is
6 no private right of action for 12 C.F.R. § 1024.17 or 12 C.F.R. § 1024.38. *See, e.g., Herman v. Mr. Cooper*
7 *Grp. Inc.*, 2023 U.S. Dist. LEXIS 188891, at *5–6 (S.D.N.Y. Oct. 19, 2023)
8 (“[No] private right of action exists under Section 2609 of RESPA or its implementing
9 regulation, 12 C.F.R. § 1024.17.”) (citing *Dolan v. Fairbanks Cap. Corp.*, 930 F. Supp. 2d 396, 418
10 (E.D.N.Y. 2013) (collecting cases)); *In re Wells Fargo Forbearance Litig.*, 2023 U.S. Dist. LEXIS
11 76443, at *16 (N.D. Cal. May 2, 2023) (dismissing claim under 12 C.F.R. § 1024.38 with
12 prejudice because no private right of action). Consequently, these claims are thus dismissed
13 with prejudice.

14 But courts are split on whether there is a private right of action under 12 CFR § 1024.35.
15 *Compare Lage v. Ocwen Loan Servicing LLC*, 839 F.3d 1003, 1007 (11th Cir. 2016) (“If the servicer fails
16 to respond adequately to the borrower's notice of error, then the borrower has
17 a private right of action to sue the servicer under RESPA.”), and *Sutton v. CitiMortgage, Inc.*, 228 F.
18 Supp. 3d 254, 271 (S.D.N.Y. 2017) (assuming for the sake of the motion at issue that
19 a private right of action under 12 C.F.R. § 1024.35 exists), with *Watts v. Mortg. Bridge Sols., LLC*,
20 2016 WL 8188768, at *6 (E.D. Mich. Dec. 7, 2016) (“Under Regulation X, a borrower is only
21 permitted a private cause of action for a violation under § 1024.41, which specifically provides
22 that “[a] borrower may enforce the provisions of this section....””), *adopted by*, 2017 WL 438745
23 (E.D. Mich. Feb. 1, 2017), and *Miller v. HSBC Bank U.S.A., N.A.*, 2015 WL 585589, at *11 (S.D.N.Y. Feb.
24 11, 2015) (holding that § 1024.35 “does not provide a private right of action”), and *Willson v. Bank*
25 *of Am., N.A.*, 2016 WL 8793204, at *8 (S.D. Fla. May 2, 2016) (noting same).

26

1 Accordingly, I make no determination at this point as to whether 12 CFR § 1024.35
2 contains a private right of action because Dahar’s complaint fails to state any actionable claim
3 under any articulated provision of RESPA sufficient to give either the court or defendant fair
4 notice of the basis of the claim(s) upon which Dahar seeks relief. *Starr v. Baca*, 652 F.3d 1202, 1216
5 (9th Cir. 2011) (A complaint “must contain sufficient allegations of underlying facts to give fair
6 notice and to enable the opposing party to defend itself effectively.”); *see also* Fed. R. Civ. P. 8 (“A
7 pleading that states a claim for relief must contain: . . . a short and plain statement of the claim
8 showing that the pleader is entitled to relief”). Instead, I dismiss Dahar’s 12 CFR § 1024.35 claim
9 under Fed. R. Civ. P. 8(a) without prejudice and with leave to amend. If Dahar wishes to amend
10 his complaint to bring any future alleged violations of RESPA, he must state the specific RESPA
11 provision or provisions, containing a private right of action, and accompany that provision with
12 factual allegations which plausibly state the basis for the relief he seeks.

13 ***3. Dahar’s Consumer Credit Protection Act (CCPA) claim is dismissed***
14 ***without prejudice and with leave to amend.***

15 Alleged within the section entitled “Jurisdiction and Venue,” are violations of the
16 “Consumer Credit Protection Act chapter 4 sec. 161 and title VI sec. 602.” ECF No. 1-1 at 4.
17 However, Dahar merely cites the CCPA and does not provide any further allegations as to why
18 he has a cause of action under the CCPA. In order to proceed, Dahar must establish that
19 Pennymac did not have a permissible purpose for requesting his credit report. Here, Dahar fails
20 to state any factual allegations supporting a CCPA claim. Accordingly, these claims are
21 dismissed without prejudice under 12(b)(6) and with leave to amend for failing to state a claim
22 upon which relief can be granted.

1 **4. Dahar’s state law and Nevada Homeowner Bill of Rights (NHBR) claims**
2 **are dismissed without prejudice and with leave to amend.**

3 Dahar makes several references to Nevada state law in his complaint, including the
4 Nevada’s Homeowner Bill of Rights, Nevada Revised Statutes (NRS) 107.400 et seq., several
5 provisions to NRS Chapter 205. ECF No. 1-1 at 3–4. Liberally construed, his complaint may also
6 assert a quiet title or wrongful foreclosure claim under Nevada law. *Id.* at 5–14. But Dahar does
7 not articulate a claim for relief under any particular Nevada law—in part, because he fails to
8 specifically allege facts particular to any one specific provision or claim under Nevada law that
9 might entitle him to relief. As a result, Dahar’s state law claims are thus dismissed under Rule 8
10 and Rule 12(b)(6) for failure to state a claim. *Starr*, 652 F.3d at 1216 (A complaint “must contain
11 sufficient allegations of underlying facts to give fair notice and to enable the opposing party to
12 defend itself effectively.”); *see also* Fed. R. Civ. P. 8, 12(b)(6). Because it is unclear if amendment
13 can cure these pleading issues, I dismiss Dahar’s state law claims without prejudice and with
14 leave to amend. If Dahar wishes to amend his complaint to bring any future alleged violations of
15 Nevada state law, he must state the specific statute provision(s) or law(s) under which he states
16 a claim, and accompany that provision with factual allegations which plausibly state the basis
17 for the relief he seeks.

18 **IV. Pennymac’s motion to seal is denied.**

19 Pennymac seeks to seal an exhibit containing correspondence to Dahar and a breakdown
20 of loan payments and account history that contains account balance information in connection
21 with its motion to dismiss. ECF No. 12-1. Pennymac argues that the information within the
22 exhibit is “confidential and protected[.]” and the sensitive nature of its contents outweighs the
23 public interest in disclosure. ECF No. 11 at 3. Pennymac asserts that the public’s interest in these
24 records “does not promote the public’s understanding of the judicial process[.]” *Id.* And further
25 asserts that the information contained in the exhibit is designated nonpublic information under
26 15 U.S.C. § 6809(4)(A) and 12 C.F.R. §§ 1016.3(p)(1)(i); 1016.3(q)(2)(i). *Id.* at 2.

1 In the Ninth Circuit there is “a strong presumption in favor of access to court records.”
2 *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). To overcome this
3 presumption, a party must articulate “compelling reasons” justifying nondisclosure, such as use
4 of the record to gratify spite, permit public scandal, circulate libelous statements, or release
5 trade secrets. *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006). “The mere
6 fact that the production of records may lead to a litigant’s embarrassment, incrimination, or
7 exposure to further litigation will not, without more, compel the court to seal its records.” *Id.*
8 The public interest in full disclosure of documents is grounded upon “ensuring the ‘public’s
9 understanding of the judicial process and of significant public events.’” *Id.* (citations omitted).
10 The court has inherent power over its own records and files, and access may be denied where
11 the court determines that the documents may be used for improper purposes. *Id.*; *Nixon v. Warner*
12 *Comm’n, Inc.*, 435 U.S. 589, 598 (1978); *Hagestad v. Tragesser*, 49 F.3d 1430, 1433–34 (9th Cir. 1995).

13 Pennymac does not demonstrate compelling reasons to seal the exhibit by citing the
14 Gramm-Leach Bliley Act. ECF No. 11 at 2. While Pennymac asserts that privacy interests
15 outweigh the public’s interest in accessing these documents (*see* ECF No. 15 at 3), “[s]imply
16 invoking a blanket claim, such as privacy . . . will not, without more, suffice to exempt a
17 document from the public’s right of access.” *Kamakana*, 447 F.3d. at 1185. Pennymac does not
18 explain how these documents could “become a vehicle for improper purposes” or how the
19 information within the exhibit will infringe on Dahar’s privacy interests if publicly available. *See*
20 *id.* at 1179, 1185. Indeed, Pennymac has already properly redacted the loan number on the exhibit
21 it seeks to seal. ECF No. 12-1. Pennymac contends that, “[t]he content of the correspondence
22 qualifies as [nonpublic information] if it includes personally identifiable financial information
23 such as the original principal balance, the borrower’s name, loan number, interest rate, and
24 repayment terms.” ECF No. 11 at 2. However, much of the information within the documents
25 that Pennymac seeks to seal, such as the correspondence, the borrower’s name, loan number,
26 loan amount, and payment history have already been made public in Dahar’s complaint, his

1 response to the motion to dismiss, and other filings. *See, e.g.*, ECF No. 1-1 at 12–5, 52–5; ECF No. 7
2 at 2; ECF No. 9 at 22–24. Moreover, the documents do not include any personal identifying
3 information such as the borrower’s social security number, date of birth, or financial account
4 numbers. Accordingly, Pennymac’s motion to file its exhibit under seal is denied.

5 **V. Pennymac’s motion to strike is granted.**

6 On August 9, 2023, Dahar filed a surreply to Pennymac’s motion to dismiss without leave
7 of the court. ECF No. 13. Pennymac filed a motion to strike the surreply, arguing that the filing
8 does not comply with the local rules and has unfairly prejudiced it. *See generally* ECF No. 15.

9 A surreply is an additional reply brief filed by the non-moving party after the underlying
10 motion has already been fully briefed. *Hammler v. Lyons*, 2023 WL 113764, at *1 (E.D. Cal. Jan. 5,
11 2023) (citations omitted). The Federal Rules of Civil Procedure do not expressly permit the
12 filing of a surreply, and this district’s local rules do not permit surreplies without first obtaining
13 the court’s leave. Instead, Local Rule 7-2(b) allows only for a motion, a response, and a reply. LR
14 7-2(b). That same rule explicitly states that “[s]urreplies are not permitted without leave of
15 court; motions for leave to file a surreply are discouraged.” *Id.* (emphasis added).

16 Because surreplies are discouraged, “[o]nly the most exceptional or extraordinary
17 circumstances warrant permitting a surreply to be filed.” *Stevens v. Prentice*, 2018 WL 3758577, at
18 *1 (D. Nev. Aug. 8, 2018) (citation omitted). I do not find any exceptional or extraordinary
19 circumstances here that would warrant the filing of a surreply. Accordingly, Pennymac’s motion
20 to strike the surreply is granted. The court will not consider the surreply, nor the substantive
21 responses contained in Pennymac’s motion to strike.

22 **VI. Conclusion**

23 IT IS THEREFORE ORDERED that Pennymac’s motion to dismiss [ECF No. 7] is
24 GRANTED. Dahar’s FDCPA claims are dismissed without prejudice and with leave to amend,
25 his RESPA claims are dismissed without prejudice and with leave to amend, and his state law
26 claims are dismissed without prejudice and with leave to amend.

1 If Dahar chooses to file an amended complaint, he must do so no later than February 23,
2 2024. The amended complaint must be titled "First Amended Complaint" and must be complete
3 in itself, meaning it cannot reference the previously filed complaint. The first amended
4 complaint must comply with Federal Rule of Civil Procedure 8 and contain a short and plain
5 statement describing the underlying facts sufficient to give defendant fair notice of the claims
6 against it upon which Dahar seeks relief. If Dahar does not file an amended complaint by that
7 date, this action will be dismissed without prejudice for failure to state a claim.

8 IT IS FURTHER ORDERED that Pennymac's motion to seal [ECF No. 11] is DENIED.
9 The Clerk of Court is kindly instructed to unseal exhibit A, ECF No. 12.

10 IT IS FURTHER ORDERED that Pennymac's motion to strike Dahar's surreply [ECF
11 No. 15] is GRANTED. The Clerk of Court is directed to strike Dahar's surreply (ECF No. 13)
12 from the docket.

13 Dated: February 1, 2024

14 
15 _____
16 Cristina D. Silva
17 United States District Judge
18
19
20
21
22
23
24
25
26