

1 I. Factual and Procedural Background

2 Plaintiffs took out a loan secured by a deed of trust
3 to purchase their home in Marysville, California. (FAC ¶¶ 1,
4 12.) Plaintiffs subsequently fell behind on their loan payments
5 and filed for Chapter 13 bankruptcy in the Eastern District of
6 California for the sole purpose of curing arrears on the loan.
7 (Id. ¶ 14.)

8 In the bankruptcy proceedings, PNC, plaintiffs'
9 creditor, asserted that plaintiffs owed a total balance of
10 \$4,601.27, which included \$4,176.27 in arrears as well as \$425
11 that had accrued in post-petition attorney's fees. (Id. ¶¶ 14-
12 15.) The Chapter 13 plan called for sixty monthly payments in
13 the amount of \$1,707.00. (Id.) A portion of the monthly payment
14 would cover a regular payment on the loan; the surplus would go
15 toward paying off the arrears and fees. (Id. ¶ 16.)

16 Thereafter, plaintiffs began to make payments according
17 to the plan. (Id.) In June 2013, PNC filed a "Notice of
18 Mortgage Payment Change" in plaintiffs' bankruptcy, proposing a
19 trial plan that would reduce plaintiffs' monthly loan payments
20 from \$1,410.05 to \$554.20 per month. (Id. ¶¶ 17-18.) As a
21 result, the bankruptcy trustee began paying the new monthly loan
22 rate of \$554.20 on July 1, 2013. Plaintiffs continued to make
23 Chapter 13 plan payments in the amount of \$1,707.00; however,
24 plaintiffs allege that because the portion going toward the
25 monthly loan payment was reduced under the modification, an even
26 greater surplus went toward paying off the arrears, attorney's
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28

1 fees, and administrative fees. (Id. ¶ 20.)¹ According to
2 plaintiffs, because of this payment scheme, plaintiffs were able
3 to pay off the \$4,601.27 in arrears and fees earlier than
4 previously anticipated, completing their Chapter 13 plan
5 obligations. (Id.)

6 On January 30, 2014, staff counsel for the Chapter 13
7 bankruptcy executed a "Notice of Final Cure Payment" regarding
8 plaintiffs' loan, which was sent to PNC. (Id. ¶ 21.) PNC failed
9 to respond to this notice within the time prescribed by law or to
10 make any objection to the trustee's final report and accounting.
11 (Id.) Because plaintiffs had cured the arrears, the bankruptcy
12 trustee instructed plaintiffs to start making regular payments on
13 their loan directly to PNC beginning in January 2014. (Id.)
14 Plaintiffs contacted PNC regarding the early termination of their
15 bankruptcy and inquired how much they should pay monthly, now
16 that their payments would go directly to the bank. (Id. ¶ 22.)
17 PNC instructed plaintiffs to make monthly payments of their loan
18 in the amount of \$1,410.05 beginning in January 2014. (Id.)
19 From January 2014 through April 2014, plaintiffs made regular
20 monthly payments of \$1,410.05 directly to PNC as instructed.
21 (Id. ¶ 24.)

22 Although plaintiffs believed they were current on their
23 payments and had paid of the arrears, on April 25, 2014, PNC
24 informed plaintiffs that their loan was in default and was in the

25 ¹ Plaintiffs do not specify how much of the \$1,707
26 monthly payment went to the arrears and fees. However, it can
27 reasonably be inferred that if the current monthly loan payments
28 were in the amount of \$554.20, the balance of \$1,152.80 went
toward the arrears, attorney's fees, and administrative fees.

1 foreclosure process. (Id. ¶ 25.) According to PNC, plaintiffs
2 owed PNC \$10,526.91 to bring their loan current, which included
3 approximately \$5,240.44 in foreclosure fees and costs. (Id. ¶
4 26.) PNC told plaintiffs that the bankruptcy trustee had made a
5 mistake by terminating the Chapter 13 plan. (Id. ¶ 29.)
6 Plaintiffs spoke to the bankruptcy trustee, who nevertheless
7 confirmed that their payments had been made according to the
8 plan. (Id.)

9 PNC maintains its threats to foreclose on the property
10 and that plaintiffs owe it \$10,526.91 to bring the loan up to
11 date. (Id. ¶ 30.) Plaintiffs allege this amount is a
12 misrepresentation of how much they actually owe, because they are
13 current on their payments and have paid off the arrears. (Id. ¶
14 26.) Plaintiffs bring state law claims for negligence and breach
15 of the implied covenant of good faith and fair dealing. They
16 also seek statutory damages, attorney's fees, and costs under the
17 Rosenthal Fair Debt Collection Practices Act, Cal. Civ. Code §§
18 1788-1788.32, and to enjoin PNC from engaging in unfair business
19 practices pursuant to California's Unfair Competition Law
20 ("UCL"), Bus. & Prof. Code § 17200, et seq. PNC now moves to
21 dismiss all of plaintiffs' claims pursuant to Rule 12(b)(6) for
22 failure to state a claim upon which relief can be granted.
23 (Def.'s Mot. (Docket No. 17).)

24 II. Judicial Notice

25 In general, a court may not consider items outside the
26 complaint when deciding a motion to dismiss, but it may consider
27 items of which it can take judicial notice. Barron v. Reich, 13
28 F.3d 1370, 1377 (9th Cir. 1994). PNC requests that the court

1 take judicial notice of several exhibits, including the
2 solicitation letter PNC sent plaintiffs in May 2013 offering a
3 downward modification of their loan payment plan to \$554.20 per
4 month. (Req. for Judicial Notice (Docket No. 14-2).) Plaintiffs
5 had attached Ex. 1, along with other materials, in support of the
6 complaint they filed in state court, but omitted it from their
7 FAC. (Def.'s Mot. at 6.) PNC attempts to use Exhibit 1 as a
8 basis for contradicting plaintiffs' allegations regarding PNC's
9 offer to reduce plaintiffs' monthly payments to \$554.20. (Id. at
10 7.) Plaintiffs did not respond to PNC's request for judicial
11 notice.

12 Through the "incorporation by reference" doctrine, the
13 court may "take into account documents . . . alleged in a
14 complaint and whose authenticity no party questions, but which
15 are not physically attached to the [plaintiff's] pleading . . .
16 even though the plaintiff does not explicitly allege the contents
17 of that document in the complaint." Knieval v. ESPN, 393 F.3d
18 1068, 1076 (9th Cir. 2005) (quotation marks and citations
19 omitted). Plaintiffs allege the bankruptcy trustee made full,
20 timely payments on plaintiffs' current loan with PNC, in
21 accordance with a modified monthly payment plan initiated by PNC.
22 (FAC ¶¶ 17, 20.) Because plaintiffs' FAC "incorporates" the
23 modification plan, the court will take judicial notice of Exhibit
24 1, the "Streamlined Modification Trial Plan Notice."

25 Second, the court will take judicial notice of Exhibit
26 2, the "Order to Close Chapter 13 Case Without Discharge," as
27 well as other filings in the Chapter 13 bankruptcy proceeding,
28 because they are matters of public record related to legal

1 proceedings in the district court. See Rose v. Beverly Health
2 and Rehab. Servs., Inc., 356 B.R. 18, 22 (E.D. Cal. 2006) (Ishii,
3 J.) (taking judicial notice of filings in bankruptcy proceedings
4 although they were outside pleadings because they were public
5 records (citing Duke Energy Trading & Marketing, L.L.C. v. Davis,
6 267 F.3d 1042, 1048 n.3 (9th Cir. 2001) (taking judicial notice
7 of filings made in a related bankruptcy proceeding)).

8 III. Analysis

9 On a Rule 12(b)(6) motion to dismiss, the court must
10 accept the allegations in the complaint as true and draw all
11 reasonable inferences in favor of the plaintiff. See Scheuer v.
12 Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by
13 Davis v. Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S.
14 319, 322 (1972). To survive a motion to dismiss, a plaintiff
15 must plead "only enough facts to state a claim to relief that is
16 plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S.
17 544, 570 (2007). This "plausibility standard," however, "asks
18 for more than a sheer possibility that a defendant has acted
19 unlawfully," and where a plaintiff pleads facts that are "merely
20 consistent with a defendant's liability," it "stops short of the
21 line between possibility and plausibility." Ashcroft v. Iqbal,
22 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 557).

23 As a preliminary matter, PNC argues that "plaintiffs'
24 omission from their FAC of how their Chapter 13 plan concluded is
25 fatal to their claims because the bankruptcy was closed but never
26 discharged." (Def.'s Mot. at 5.) According to PNC, plaintiffs
27 were not permitted to rely on the terms of their Chapter 13 plan
28 because they never obtained a formal discharge from bankruptcy

1 court. In support, PNC cites the Bankruptcy code, which states,

2
3 [A]s soon as practicable after completion by the
4 debtor of all payments under the plan . . . after such
5 debtor certifies that all amounts payable under such
6 order or such statute that are due on or before the
7 date of certification . . . have been paid, unless the
8 court approves a written waiver of discharge executed
9 by the debtor after the order for relief under this
10 chapter, the court shall grant the debtor a discharge
11 of all debts provided for by the plan

12 11 U.S.C. § 1328(a). Contrary to PNC's interpretation, nothing
13 in this provision suggests that, absent a formal discharge,
14 plaintiffs were not permitted to "rely on the terms of the plan,"
15 (Def.'s Mot. at 5-6), in alleging that they paid off the arrears.
16 This passage merely states that a debtor's eligibility for a
17 court-ordered discharge is predicated on "completion by the
18 debtor of all payments under the plan." See Ellett v.
19 Stanislaus, 506 F.3d 774, 777 (9th Cir. 2007) ("A debtor who
20 completes payments under a Chapter 13 plan is entitled to a broad
21 discharge of all debts provided for by the plan"
22 (internal quotation marks omitted)). The provision does not
23 suggest that a chapter 13 plan is not considered completed or
24 satisfied unless the debtor gets a formal discharge.

25 Plaintiffs allege that they cured their arrears
26 according to the terms of the plan, (FAC ¶ 19), and that
27 thereafter the trustee served a Notice of Final Cure Payment on
28 PNC, to which PNC failed to object, (id. ¶ 22). In the
plaintiffs' bankruptcy proceeding, the bankruptcy court issued an
order confirming the plaintiffs' payments were completed,
adopting the trustee's finding that the "amount of unsecured

1 claims discharged without payment" was zero and "the case was
2 completed on December 23, 2013." 2:12-bk-42019 (Bankr. E.D. Cal
3 2012) (Trustee's February 21, 2014 Final Report and Account
4 (Docket No. 23); March 28, 2014 Order Approving Final Report and
5 Discharging Trustee (Docket No. 27)). The Order to Close Chapter
6 13 Case Without Discharge indicates that the only reason
7 plaintiffs failed to obtain a formal discharge was because they
8 did not complete an instructional course concerning financial
9 management, and not because their payments were not completed.
10 2:12-bk-42019 (Bankr. E.D. Cal 2012) (March 31, 2014 Order to
11 Close Chapter 13 Case Without Discharge (Docket No. 28)).
12 Plaintiffs' failure to obtain a formal discharge therefore does
13 not contradict their allegations that they paid off their arrears
14 pursuant to the chapter 13 plan.

15 Additionally, PNC does not address how the lack of a
16 formal discharge is fatal to any of plaintiffs' claims.
17 Plaintiffs' claims arise from PNC's misleading business practices
18 and their violation of Bankruptcy Rule 3002.1. The court thus
19 finds PNC's allegation regarding the absence of a Chapter 13
20 formal discharge inapposite.

21 A. Implied Covenant of Good Faith and Fair Dealing

22 "The law implies in every contract . . . a covenant
23 of good faith and fair dealing. The implied promise requires
24 each contracting party to refrain from doing anything to injure
25 the right of the other to receive the agreement's benefits."
26 Wilson v. 21st Century Ins. Co., 42 Cal. 4th 713, 720 (2007).
27 Plaintiffs allege PNC entered into a contract with them for a
28 loan secured by their property. (FAC ¶ 48.) According to

1 plaintiffs, they have substantially performed pursuant to that
2 contract, (id. ¶ 49), having made timely payments of the full
3 amount owed, (id. ¶¶ 16, 24). Despite fully paying off the
4 arrears on their debt, (id. ¶ 20), in addition to keeping up with
5 their payment, PNC diverted plaintiffs' payments that should have
6 been applied to its loan balance to foreclosure fees and costs,
7 (id. ¶ 45).

8 PNC disputes that plaintiffs paid off the arrears and
9 argues that, for this reason, plaintiffs do not state a plausible
10 claim for breach of the implied covenant of good faith and fair
11 dealing. (Def.'s Reply at 4-5.) That is, because plaintiffs
12 "continued to be in arrears when their debt was not discharged in
13 bankruptcy," plaintiffs were in breach of contract and thus
14 cannot state a plausible claim for a breach of the covenant of
15 good faith and fair dealing. (Id.) On a motion to dismiss,
16 however, the court must accept plaintiffs' allegations as true.
17 See Scheuer, 416 U.S. at 236. The court must thus accept
18 plaintiffs' allegations that their arrears were paid in full and
19 that they had performed pursuant to their loan contract.

20 PNC points to Exhibit 1, the May 2013 letter judicially
21 noticed by the court, to contradict plaintiffs' allegations that
22 they fully paid off the arrears. (Def.'s Reply at 4-5.) While
23 plaintiffs' allegations are taken as true and construed in the
24 light most favorable to them, "[t]he court need not . . . accept
25 as true allegations that contradict matters properly subject to
26 judicial notice or by exhibit." Sprewell v. Golden State
27 Warriors, 266 F.3d 979, 988 (9th Cir. 2001). PNC contends that
28 the May 2013 letter offering plaintiffs a reduced monthly payment

1 of \$554.20 was in fact only an offer of a three-month trial plan.
2 PNC asserts that after the three-month trial period had expired,
3 plaintiffs continued to make the \$554.20 monthly payment from
4 October through December 2013. "Accordingly, the Bankruptcy
5 Trustee was not paying what was actually owed on the loan for at
6 least the last three months of 2013. Therefore, plaintiffs were
7 still in arrears upon closing of the Chapter 13 plan even if all
8 allegations in the complaint are taken as true." (Def.'s Mot. at
9 7.)

10 However, from the May 2013 letter, it is not at all
11 clear that the reduced payment plan was really only meant to last
12 three months. In fact, the letter makes the "trial period" sound
13 like a prelude to a permanent modification. The letter states,
14 "Based on a careful review of your mortgage account, we are
15 offering you an opportunity to enter into a Trial Period Plan for
16 a mortgage modification" (Req. for Judicial Notice Ex.
17 1, at 3.) The letter then tells plaintiffs to read all of the
18 information "so that you completely understand the actions you
19 need to take to successfully complete the Trial Period Plan to
20 permanently modify your mortgage." (Id.) In reply to the
21 frequently asked question, "When will I know if my loan can be
22 modified permanently and how will the modified loan balance be
23 determined?" the letter states,

24
25 Once you make all of your trial period payments on
26 time and return to us the required copies of a
27 modification agreement with your signature, we will
28 sign one copy and send it back to you so that you will
have a fully executed modification agreement detailing
the terms of the modified loan. Any difference between
the amount of the trial period payments and your

1 regular mortgage payments will be added to the balance
2 of your loan along with any other past due amounts as
3 permitted by your loan documents. While this will
4 increase the total amount that you owe, it should not
significantly change the amount of your modified
mortgage payment."

5 (Req. for Judicial Notice Ex. 1 (emphasis added).) The language
6 of the May 2013 is thus susceptible to a reading that PNC
7 intended for the trial plan to transition into a permanent
8 modification to plaintiffs' loan. Plaintiffs allege they made
9 timely payments of the full amount due every month, \$554.20, and
10 would therefore be eligible for a permanent modification. The
11 May 2013 letter therefore does not contradict plaintiffs'
12 allegations that they made full, timely payments; that their loan
13 is current and the arrears are fully paid; and that \$10,526.91 is
14 a misleading representation of the character, amount, or legal
15 status of their debt. (FAC ¶¶ 26-27.)

16 Therefore, although the court takes judicial notice of
17 the letter, at PNC's request, the court finds the letter does not
18 assist PNC on its motion to dismiss. Plaintiffs plausibly allege
19 that PNC injured their rights to receive the benefits of their
20 loan contract by insisting that plaintiffs now owe \$10,526.91 in
21 arrears and fees despite plaintiffs' satisfaction of the arrears
22 pursuant to their Chapter 13 plan. By alleging PNC deprived them
23 of a fair accounting of their debt under the loan contract,
24 plaintiffs assert a plausible claim for breach of the implied
25 covenant of good faith and fair dealing. See Wilson, 42 Cal. 4th
26 at 720.

27 B. California's Unfair Competition Law ("UCL")
28

1 The California UCL “provides an equitable means through
2 which both public prosecutors and private individuals can bring
3 suit to prevent unfair business practices and restore money or
4 property to victims of these practices.” Yanting Zhang v.
5 Superior Court, 57 Cal. 4th 364, 370 (2013). The California
6 Business & Professions Code defines “unfair competition” to
7 include “any unlawful, unfair, or fraudulent business act or
8 practice.” Cal. Bus. & Prof. Code § 17200. “[The UCL]
9 establishes three varieties of unfair competition--acts or
10 practices which are unlawful, or unfair, or fraudulent.” Cal-
11 Tech Commc’ns, 24 Cal. 4th 163, 180 (1999) (quoting Podolsky v.
12 First Healthcare Corp., 50 Cal. App. 4th 632, 647 (2d Dist.
13 1996)). “Each prong of the UCL is a separate and distinct theory
14 of liability.” Kearns v. Ford Motor Co., 567 F.3d 1120, 1127
15 (9th Cir. 2009). PNC argues there is no statutory violation or
16 wrongful conduct upon which plaintiffs’ UCL claim can be based.
17 (Def.’s Mot. at 8.)

18 Plaintiffs attempt to premise their UCL claim on the
19 fact that PNC “failed to file any response pursuant to FRBP
20 3002.1(g) to the final cure notice.” (Pls.’ Opp’n at 8; see FAC
21 ¶ 21.) Rule 3002.1 requires that once a creditor is served with
22 a notice of final cure payment,” pursuant to 3002.1(f), a
23 creditor

24
25 shall serve on the debtor, debtor’s counsel, and the
26 trustee a statement indicating (1) whether it agrees
27 that the debtor has paid in full the amount required
28 to cure the default on the claim, and (2) whether the
debtor is otherwise current on payments consistent
with § 1322(b)(5) of the Code. The statement shall
itemize the required cure or postpetition amounts, if

1 any, that the holder contends remain unpaid as of the
2 date of the statement.
3 Fed. R. Bankruptcy 3002.1(g). The bankruptcy trustee executed a
4 "notice of final cure payment" pursuant to 3002.1(f), but PNC
5 failed to reply, as required by the rule, to confirm or deny that
6 plaintiffs paid in full their arrears and whether plaintiffs were
7 otherwise current on all payments. (Id. ¶ 21.)² Plaintiffs
8 allege this conduct caused their bankruptcy plan to close
9 prematurely in such a way that misled and damaged them. (Id. ¶
10 8.) In April 2014, PNC told plaintiffs their loan was in
11 default, insisting that plaintiffs were not current on their loan
12 payments and owed \$10,526.91. (Id. ¶ 25.)

13 PNC cites two reasons why plaintiffs do not allege a
14 plausible UCL claim premised on PNC's violation of U.S.
15 Bankruptcy Code. PNC argues that plaintiffs "have not pointed to
16 any violation by PNC of the Bankruptcy Code. Rather, they have
17 merely argued that PNC did not timely object to the confirmed
18 plan." (Def.'s Mot. at 8.) This is inaccurate, because
19 plaintiffs specifically plead a violation of Bankruptcy Rule
20 3002.1, (FAC ¶ 41), which requires a timely response to the

21 ² It should be noted that PNC had a duty not just to the
22 plaintiff but to this court to comply with 3002.1. The purpose
23 of 3002.1 was to assist with the administration of § 1322(b)(5),
24 which provides for the curing of a default within a reasonable
25 time and maintenance of payments while the case is pending. 11
26 U.S.C. § 1322(b)(5). "In order to be able to fulfill the
27 obligations of § 1322(b)(5), a debtor and the trustee have to be
28 informed of the exact amount needed to cure any prepetition
arrears . . . and the amount of the postpetition payment
obligations." Fed. R. Bankr. P. 3002.1 advisory committee's
note. A lender's failure to comply with the Rule has the
potential to not only mislead or injure parties but also to
interfere with bankruptcy procedure and the administration of
justice.

1 confirmed plan.³

2 "By proscribing 'any unlawful' business act or
3 practice, the UCL borrows rules set out in other laws and makes
4 violations of those rules independently actionable." Yanting
5 Zhang, 57 Cal. 4th at 370 (internal quotation marks and citation
6 omitted). The "unlawful" prong of the UCL encompasses "anything
7 that can properly be called a business practice and that at the
8 same time is forbidden by law." Rubin v. Green, 4 Cal. 4th 1187,
9 1201 (1993) (quoting Barquis v. Merchs. Collection Ass'n, 7 Cal.
10 3d 94, 114 (1972)).

11 Rule 3002.1(g) provides that a creditor "shall serve"
12 on the debtor and trustee a statement in response to the
13 trustee's Notice of Final Cure payment. Another provision in
14 Rule 30002.1 permits the bankruptcy court to impose sanctions for
15 a lender's failure to comply with 3002.1(g), such as precluding
16 the creditor from presenting any omitted information as evidence
17 in any contested matter or adversary proceeding in the case, or
18 to award other appropriate relief, including reasonable expenses
19 and attorney's fees caused by the failure. Fed. R. Bankr. P.
20 3002.1(i). In fact, where a residential mortgage is at issue, a
21 debtor may be entitled to sanctions even after the case has
22 closed:

23
24 If, after the chapter 13 debtor has completed payments
25 under the plan and the case has been closed, the
holder of a claim secured by the debtor's principal

26 ³ Although the court in ruling on this motion accepts
27 plaintiffs' allegation as true, the court also notes that the
28 docket for plaintiffs' chapter 13 action confirms that PNC failed
to respond to the trustee's Notice as required by 3002.1(g).

1 residence seeks to recover amounts that should have
2 been but were not disclosed under the rule, the debtor
3 may move to have the case reopened in order to seek
sanctions against the holder of the claim

4 Fed. R. Bankr. P. 3002.1 advisory committee's note. PNC is thus
5 incorrect in their contention that their conduct was not
6 unlawful. The Bankruptcy Code clearly required PNC to file a
7 response to the Notice of Final Cure Payment, which PNC failed to
8 do. PNC's violation of Rule 3002.1(g) may not only serve as a
9 basis for a UCL claim, but also would have permitted plaintiffs
10 to reopen their chapter 13 case to seek sanctions.

11 PNC also argues plaintiffs lack standing to bring a
12 private cause of action under the UCL. (Def.'s Mot. at 8.)
13 Standing to bring a private action under the UCL "is limited to
14 any 'person who has suffered injury in fact and has lost money or
15 property as a result of unfair competition.'" Kwikset Corp. v.
16 Superior Court, 51 Cal. 4th 310, 321 (2011) (quoting § 17204).
17 The purpose of this provision is "to confine standing to those
18 actually injured by a defendant's business practices"
19 Id. Plaintiffs allege they suffered loss because PNC misapplied
20 plaintiffs' current loan balance payments to the alleged
21 foreclosure fees and costs, increasing the overall loan balance
22 and reducing the equity in the property. (FAC ¶ 45.) A loss of
23 equity is within the scope of "lost money or property"
24 contemplated by the California legislature. See Rufini v.
25 CitiMortgage, Inc., 227 Cal. App. 4th 299, 310-311 (1st Dist.
26 2014) (holding that plaintiff's allegation that the lender
27 deprived plaintiff of the opportunity to pursue other means of
28

1 avoiding foreclosure, leading to the loss of his home and the
2 equity he had in it, was sufficient to constitute "lost money or
3 property" under the UCL). Having sufficiently alleged injury,
4 plaintiffs have standing to bring a UCL claim against PNC based
5 on the bank's violation of the Bankruptcy Code.

6 C. Negligence

7 "The existence of a duty of care by a defendant to a
8 plaintiff is a prerequisite to establishing a claim for
9 negligence. Whether a legal duty exists in a given case is
10 primarily a question of law." Nymark v. Heart Fed. Savings &
11 Loan Ass'n, 231 Cal. App. 3d 1089, 1095 (3d Dist. 1991) (internal
12 quotation marks and citations omitted).

13 "[A]s a general rule, a financial institution owes no
14 duty of care to a borrower when the institution's involvement in
15 the loan transaction does not exceed the scope of its
16 conventional role as a mere lender of money." Nymark, 231 Cal.
17 App. 3d at 1096. But "Nymark and the cases cited therein do not
18 purport to state a legal principle that a lender can never be
19 held liable for negligence in its handling of a loan transaction
20 within its conventional role as a lender of money." Jolley v.
21 Chase Home Finance LLC, 213 Cal. App. 4th 872, 898 (1st Dist.
22 2013) (quoting Ottolini v. Bank of Am., Civ. No. 3:11-477 EMC,
23 2011 WL 3652501, at *6 (N.D. Cal. Aug. 19, 2011) (holding that
24 where there was an ongoing dispute about the lender's performance
25 of the loan contract, and where the lender made specific
26 representations as to the likelihood of a loan modification, "a
27 cause of action for negligence has been stated that cannot be
28 properly resolved based on lack of duty alone").

1 Indeed, several courts have found the lender owed a
2 debtor a duty of care where it offered the debtor a trial loan
3 modification plan and then reneged, which appears to be similar
4 to plaintiffs' allegations in this case. See Jolley, 213 Cal.
5 App. 4th at 905 (citing Asanelli v. JP Morgan Chase Bank, N.A.,
6 Civ. No. 3:10-3892 WA, 2011 WL 1134451, at *8 (N.D. Cal. Mar. 28,
7 2011) (holding that where the defendant "went beyond its role as
8 a silent lender and loan servicer to offer an opportunity to
9 plaintiffs for loan modification and to engage with them
10 concerning the trial plan," plaintiff's allegations constituted
11 "sufficient active participation to create a duty of care to
12 plaintiffs to support a claim for negligence"); Robinson v. Bank
13 of Am., Civ. No. 5:12-494 RMW PSG, 2012 WL 1932842 (N.D. Cal. May
14 29, 2012) (finding a duty where the lender allegedly executed and
15 breached the modification agreement, then engaged in a series of
16 contradictory and somewhat misleading communications with
17 plaintiff regarding the status of his loan)).

18 Here, similar to Asanelli and Robinson, plaintiffs
19 allege that PNC offered them a loan modification and then reneged
20 on March 12, 2014, well after plaintiff's obligations to make
21 payments through the Chapter 13 plan had terminated. (FAC ¶ 23.)
22 Because Jolley, Asanelli, and Robinson support finding that PNC
23 owed plaintiffs a duty of care, the court rejects PNC's argument
24 that it owed no such duty. Furthermore, plaintiffs sufficiently
25 allege that PNC breached its duty by negligently filing payment
26 changes in the plaintiffs' bankruptcy and by assessing erroneous
27 fees and arrears. (Id. ¶ 55.)

28 D. Rosenthal Fair Debt Collection Practices Act

1 ("RFDCPA")

2 The California legislature enacted the RFDCPA "to
3 prohibit debt collectors from engaging in unfair or deceptive
4 acts or practices in the collection of consumer debts and to
5 require debtors to act fairly in entering into and honoring such
6 debts" Cal. Civ. Code § 1788.1. The Act protects
7 consumers from certain debt collection practices, including,
8 inter alia, threats and unlawful conduct, § 1788.10; the use of
9 obscene or profane language, § 1788.11; under certain
10 circumstances, communications with the debtor's employer or
11 family member other than a spouse, 1788.12; and
12 misrepresentations in communications, § 1788.13.

13 PNC argues plaintiffs' RFDCPA claim fails as a matter
14 of law because PNC is not a "debt collector" within the meaning
15 of the statute. The RFDCPA defines "debt collector" as "any
16 person who, in the ordinary course of business, regularly, on
17 behalf of himself or herself or others, engages in debt
18 collection." § 1788.2(c). Several district courts have held
19 that the RFDCPA does not apply to lenders foreclosing on a
20 mortgage. See Rosal v. First Fed. Bank of Cal., 671 F. Supp. 2d
21 1111, 1135 (N.D. Cal. 2009) ("[P]laintiff failed to plead that
22 any defendant was 'collecting a debt' because foreclosing on a
23 property pursuant to a deed of trust is not the collection of a
24 debt within the meaning of the RFDCPA."); Ricon v. Recontrust
25 Co., Civ No. 3:09-937 IEG JMA, 2009 WL 2407396, at *4 (S.D. Cal.
26 Aug. 4, 2009) ("Plaintiff's Rosenthal Act claim fails because the
27 Rosenthal Act does not apply to lenders foreclosing on a deed of
28 trust."); Pittman v. Barclays Capital Real Estate, Inc., Civ. No.

1 3:09-241 JM AJB, 2009 WL 1108889, at *3 (S.D. Cal. Apr. 24, 2009)
2 (holding plaintiff could not seek recovery under RFDCPA for the
3 lender's alleged misrepresentations regarding whether it would
4 foreclose "because a residential mortgage loan does not qualify
5 as a 'debt' under the statute").⁴

6 However, where a plaintiff's claim "arises out of debt
7 collection activities beyond the scope of the ordinary
8 foreclosure process, a remedy may be available under the RFDCPA."
9 Walters, 730 F. Supp. 2d at 1203 (holding the RFDCPA applied
10 where "the gravamen of plaintiff's claim is that [the lender]
11 engaged in a pattern of improper conduct in the course of
12 servicing her loan, ultimately causing the wrongful foreclosure
13 of the home"); see also Wilson v. Draper & Goldberg, P.L.L.C.,
14 443 F.3d 373, 376 (4th Cir. 2006) (interpreting the Federal
15 counterpart to the RFDCPA, noting that if the Federal Debt
16 Collection Practices Act did not apply to loans secured by
17 mortgages, that "would create an enormous loophole in the Act
18 immunizing any debt from coverage if that debt happened to be
19 secured by a real property interest and foreclosure proceedings

20
21 ⁴ The statute defines "debt" as "money, property or their
22 equivalent which is due or owing or alleged to be due or owing
23 from a natural person to another person." § 1788.2(d). It
24 defines "consumer debt," as "money, property or their equivalent,
25 due or owing or alleged to be due or owing from a natural person
26 to another person." § 1788.2(e). PNC argues separately that a
27 residential mortgage loan is not a debt under the act. This is
28 not truly a distinct argument, because the definition of "debt
collector" incorporates the term "debt," and the cases holding
that a lender foreclosing on a residential mortgage is not a
"debt collector" do so on the basis that a residential mortgage
is not a debt. See Ricon, 2009 WL 2407396, at *4 (holding a
lender was not a debt collector based on the Act's definition of
"consumer debts").

1 were used to collect the debt"). Like Walters, here plaintiffs'
2 allegations arise from PNC's allegedly improper conduct in
3 servicing their loan, outside of the foreclosure process, which
4 ultimately led to the wrongful foreclosure of their property.
5 (Id. ¶ 25.) PNC's "debt collection" would thus come under the
6 purview of the RFDCPA.

7 PNC argues in the alternative that plaintiffs' RFDCPA
8 claim fails because the FAC does not allege that PNC's conduct
9 amounted to an unconscionable means to collect a debt. (Def.'s
10 Mot. at 6.) The court agrees that plaintiffs offer no supporting
11 factual allegations for such a conclusion regarding PNC's
12 unconscionable debt collection practices. Moreover, plaintiffs
13 allege PNC engaged in "multiple violations" of the RFDCPA,
14 without further specifying which section of the Act.

15 Plaintiffs do plausibly allege that PNC's attempt to
16 collect from plaintiff \$10,526.91 is a "false or misleading
17 representation of the character, amount or legal status of a
18 debt." (FAC ¶ 26.) While the RFDCPA does not contain a
19 provision prohibiting this conduct,⁵ the RFDCPA incorporates by
20 reference sections of the Fair Debt Collection Practices Act,⁶

21 ⁵ Section § 1788.13, "Misrepresentations in
22 Communications," does not appear to address a "misleading
23 representation of a debt."

24 ⁶ Cal. Civ. Code Section 1788.17 of the RFDCPA states
25 that "every debt collector attempting to collect a consumer debt
26 shall comply with the provisions of [FDCPA] Sections 1692b to
27 1692j" "Federal judicial interpretations of the FDCPA
28 are incorporated into the Rosenthal Act by Civil Code § 1788.17
such that a plaintiff may state a claim for violation of the
Rosenthal Act simply by showing that a defendant violated any of
several provisions of the FDCPA." Masuda v. Citibank, N.A., Civ.
No. 4:14-159 PJH, 2014 WL 1759580, at *2 (N.D. Cal. Apr. 29,

1 which prohibits "the false representation of the character,
2 amount, or legal status of any debt." 15 U.S.C. § 1692e(2) (A).
3 Because PNC insists plaintiffs are not current on their loan
4 payments and continue to owe arrears, foreclosure fees and costs
5 despite plaintiffs' timely monthly payments and PNC's failure to
6 object to the Notice of Final Cure Payment issued by the
7 bankruptcy trustee, the \$10,526.91 can fairly be said to
8 constitute a "false representation" of the "amount . . . of a
9 debt." Therefore, plaintiffs have stated a claim under the
10 RFDCPA as it incorporates § 1692e(2) (A) of the FDCPA.

11 IT IS THEREFORE ORDERED that defendant's motion to
12 dismiss be, and the same hereby is, DENIED.

13 Dated: November 18, 2014

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15 **WILLIAM B. SHUBB**
16 **UNITED STATES DISTRICT JUDGE**

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