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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA

6 NICHOLAS ALFORD,
7 Plaintiff,
8 v.
9 JP MORGAN CHASE BANK, N.A.,
10 Defendant.
11

Case No. 16-cv-04723-HSG

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS**

Re: Dkt. No. 12

12 Pending before the Court is a motion to dismiss Plaintiff Nicholas Alford's complaint
13 brought by Defendant JP Morgan Chase Bank, N.A. ("Chase"). Dkt. No. 12. Having considered
14 Chase's motion, Plaintiff's opposition, and all related papers, the Court finds the matter
15 appropriate for decision without oral argument. See Civil L.R. 7-1(b). For the reasons below, the
16 Court GRANTS IN PART and DENIES IN PART the motion to dismiss.¹

17 Chase moves to dismiss the complaint for five main reasons: (1) each of Plaintiff's claims
18 fails because Plaintiff does not allege actual damages; (2) Plaintiff cannot state a claim under the
19 Real Estate Settlement Procedures Act ("RESPA") because Plaintiff's allegations demonstrate that
20 Chase complied with the requirements of RESPA; (3) Plaintiff's Rosenthal Fair Debt Collection
21 Practices Act ("RFDCPA") fails because Chase is not a "debt collector" and Chase was not
22 attempting to collect on a "debt" under the RFDCPA²; (4) Plaintiff does not allege unlawful,
23

24 ¹ On October 11, 2016, Chase requested that the Court take judicial notice of the deed of trust on
25 Plaintiff's property. Dkt. No. 13. The Court GRANTS Chase's request because the deed of trust
is a matter of public record not subject to reasonable dispute. See Fed. R. Evid. 201.

26 ² Chase's motion to dismiss incorrectly addresses Plaintiff's second claim as a claim under the
27 Fair Debt Collection Practices Act ("FDCPA") rather than under the RFDCPA. Compare Dkt.
28 No. 12 at 6-7 (addressing the FDCPA) with Dkt. No. 1 at 10-11 (asserting an RFDCPA claim).
However, in its reply, Chase's arguments in support of dismissing Plaintiff's RFDCPA claim are
substantively identical to the arguments Chase made in support of dismissing an FDCPA claim.
Compare Dkt. No. 12 at 6-7 with Dkt. No. 25 at 5-6. Accordingly, the Court construes Chase's
arguments in its motion to dismiss as purported bases for dismissing Plaintiff RFDCPA claims.

1 fraudulent, or unfair conduct by Chase to supports his UCL claim; and (5) Plaintiff cannot state a
2 claim for intentional infliction of emotional distress (“IIED”) because he does allege the requisite
3 level of “outrageous” and intentional conduct required.

4 1. Chase’s motion to dismiss Plaintiff’s entire complaint for failure to allege actual
5 damages is DENIED. Plaintiff alleges that as a result of Chase’s improper attempts to collect over
6 \$6,000 in delinquent taxes that Plaintiff did not owe and Chase’s subsequent credit to Plaintiff’s
7 escrow account, Plaintiff was forced “to pay an additional \$6,000.00 in income taxes.” Dkt. No. 1
8 (“Compl.”) ¶ 45. Chase fails to cite any authority in support of its argument that such damages are
9 “de minimis and overly speculative in nature.” See Dkt. No. 12 at 5 n. 6. Accordingly, the Court
10 finds that these allegations sufficiently allege actual damages for each of Plaintiff’s claims.

11 2. Chase’s motion to dismiss Plaintiff’s RESPA claim is DENIED. Even if Chase
12 eventually corrected the alleged error by crediting Plaintiff’s account, Plaintiff alleges that Chase
13 did not credit his escrow account until almost two years after he submitted his first notice of error.
14 See Compl. ¶¶ 12-15, 44. This length of time is far longer than the forty-five business days
15 RESPA permits loan servicers to correct any errors. See 12 C.F.R. § 1024.35(e) (1)(i)(A)).
16 Similarly, even if Chase researched Plaintiff’s complaint for months, the Court cannot determine
17 at this stage whether Chase conducted a “reasonable investigation” in response to Plaintiff’s notice
18 of error as alternatively required by RESPA. See 12 C.F.R. § 1024.35(e)(1)(i)(B). This is
19 especially true in light of Plaintiff’s allegations that Chase initially informed him that the
20 delinquent taxes were owed for the years 2007, 2008, and 2009, and later represented that the
21 delinquent taxes were for only the 2008 tax year. See Compl. ¶¶ 15, 21; see also Guccione v.
22 JPMorgan Chase Bank, N.A., No. 3:14-CV-04587 LB, 2015 WL 1968114, at *12 (N.D. Cal. May
23 1, 2015) (finding contradictory explanations sufficient to allege a violation of section
24 1024.35(e)(1)(i)(B)); Wilson v. Bank of Am., N.A., 48 F. Supp. 3d 787, 805 (E.D. Pa. 2014). The
25 Court finds that Plaintiff has adequately pled a RESPA violation at the pleading stage.

26 3. The motion to dismiss Plaintiff’s RFDCPA claim is DENIED. “As a number of
27 courts have recognized, the definition of ‘debt collector’ is broader under the [RFDCPA] than it is
28 under the FDCPA, as the latter excludes creditors collecting on their own debts.” Reyes v. Wells

1 Fargo Bank, N.A., No. C-10-01667 JCS, 2011 WL 30759, at *19 (N.D. Cal. Jan. 3, 2011)
2 (collecting cases). Plaintiff’s allegations plausibly support a finding that Chase was acting as a
3 “debt collector” under the RFDCPA, which broadly and unambiguously defines the term as “any
4 person who, in the ordinary course of business, regularly, on behalf of himself or herself or others,
5 engages in debt collection.” Cal. Civ.Code § 1788.2(c); see also Guccione, 2015 WL 1968114, at
6 *14 (N.D. Cal. May 1, 2015) (finding Chase a debt collector under the RFDCPA’s “broad
7 definitions”). Moreover, while courts in this district have found that “foreclosing on a property
8 pursuant to a deed of trust is not the collection of a debt within the meaning of the RFDCPA,”
9 *Rosal v. First Fed. Bank of California*, 671 F. Supp. 2d 1111, 1135 (N.D. Cal. 2009), at least one
10 court has distinguished between “improper billing and collection practices” and “foreclosure.”
11 See Guccione, 2015 WL 1968114, at *13 (N.D. Cal. May 1, 2015); see also Reyes, 2011 WL
12 30759, at *19 (N.D. Cal. Jan. 3, 2011) (recognizing that “[w]here the claim arises out of debt
13 collection activities ‘beyond the scope of the ordinary foreclosure process,’ however, a remedy
14 may be available under the Rosenthal Act”). Here, Plaintiff alleges that Chase engaged in
15 “improper billing and collection practices” when it attempted to collect over \$6,000 in allegedly
16 delinquent taxes that Plaintiff did not owe, not that Chase attempted to foreclose on Plaintiff’s
17 home. See generally Compl. As such, the Court finds that Plaintiff has adequately pled that
18 Chase acted as a “debt collector” collecting a “debt” under the RFDCPA.

19 4. Chase’s motion to dismiss Plaintiff’s UCL claim is DENIED. Because the Court
20 found above that Plaintiff’s RESPA and RFDCPA claims survive the pleading stage, Plaintiff has
21 sufficiently pled a claim under the UCL’s unlawful prong. *Chabner v. United Omaha Life Ins.*
22 *Co.*, 225 F.3d 1042, 1048 (9th Cir. 2000) (the unlawful prong of the UCL “borrows violations of
23 other laws and treats them as unlawful practices that the unfair competition law makes
24 independently actionable”); Guccione, 2015 WL 1968114, at *16 (N.D. Cal. May 1, 2015) (“[T]he
25 court already has ruled that Plaintiffs’ RESPA and RFDCPA claims survive, and this means that
26 Plaintiffs’ ‘unlawful’ UCL claim survives, too.”) Additionally, the Court finds Plaintiff’s
27 allegations that Chase improperly attempted to charge him over \$6,000 in delinquent property
28 taxes for almost two years, while sending Plaintiff inconsistent explanations and incorrect

1 documentation, states a claim under the UCL’s unfair prong. See Phipps v. Wells Fargo Bank,
2 N.A., No. CV F 10-2025 LJO SKO, 2011 WL 302803, at *16 (E.D. Cal. Jan. 27, 2011) (describing
3 California’s three tests under the UCL’s unfair prong). Accordingly, the Court finds that
4 Plaintiff’s UCL claim survives the pleading stage under both the unlawful and unfair prongs.³

5 5. The motion to dismiss Plaintiff’s IIED claim is GRANTED. Plaintiff does not
6 oppose Chase’s motion to dismiss his IIED claim. See generally Dkt. No. 24. Accordingly, the
7 Court interprets Plaintiff’s failure to oppose as a concession that his IIED claim should be
8 dismissed. See Marziano v. Cty. of Marin, No. C-10-2740 EMC, 2010 WL 3895528, at *4 (N.D.
9 Cal. Oct. 4, 2010) (failure to oppose motion to dismiss interpreted as a concession that claim at
10 issue should be dismissed); see also GN Resound A/S v. Callpod, Inc., No. C 11-04673 SBA, 2013
11 WL 1190651, at *5 (N.D. Cal. Mar. 21, 2013) (construing plaintiff’s failure to oppose defendant’s
12 argument as concession of said argument).


13 * * *

14 For the foregoing reasons, Chase’s motion to dismiss is GRANTED IN PART and
15 DENIED IN PART. Chase’s motion to dismiss Plaintiff’s IIED claim is GRANTED WITH
16 LEAVE TO AMEND. The remainder of Chase’s motion is DENIED.

17 To the extent Plaintiff is able to state an IIED claim that comports with the requirements of
18 Twombly and all other controlling legal standards, Plaintiff may file an amended complaint within
19 21 days of the date of this Order. The Court sets a case management conference for February 7,
20 2017 at 2:00pm. The parties shall file a joint case management statement by January 31, 2017.

21 **IT IS SO ORDERED.**

22 Dated: 12/22/2016

23 
24 HAYWOOD S. GILLIAM, JR.
25 United States District Judge
26

27 ³ In his opposition, Plaintiff does not argue that he states a claim under the UCL’s “fraudulent”
28 prong. See Dkt. No. 24 at 12-14. Thus, Plaintiff’s UCL claim is limited to theories under the
UCL’s “unlawful” and “unfair” prongs.