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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ILIANA AGUILAR, on behalf of herself
and all other similarly situated individuals,

Plaintiff,

v.

GREENSPOON MARDER, P.A.,

Defendant.

Case No.: 17-CV-876 JLS (BGS)

**ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS**

(ECF No. 8)

Presently before the Court is Defendant Greenspoon Marder, P.A.’s Motion to Dismiss Plaintiff’s Complaint. (“MTD,” ECF No. 8.) Also before the Court are Plaintiff Iliana Aguilar’s Opposition to, (“Opp’n, ECF No. 9), and Defendant’s Reply in Support of, (“Reply,” ECF No. 10), Defendant’s Motion. The Court vacated the hearing on Defendant’s Motion to Dismiss and took the matter under submission without oral argument pursuant to Civil Local Rule 7.1(d)(1). (ECF No. 11.) Having considered the parties’ arguments and the law, the Court **GRANTS** Defendant’s Motion to Dismiss.

BACKGROUND

Sometime in 2006, Plaintiff incurred a debt to Westgate Flamingo Bay, LLC, which, allegedly, sold, transferred, or assigned the debt to Defendant, a law firm. (“Compl.,” ECF No. 1, ¶ 17.) On January 18, 2017, Defendant sent a letter to Plaintiff

1 generally referred to as a motion to dismiss. The Court evaluates whether a complaint
2 states a cognizable legal theory and sufficient facts in light of Federal Rule of Civil
3 Procedure 8(a), which requires a “short and plain statement of the claim showing that the
4 pleader is entitled to relief.” Although Rule 8 “does not require ‘detailed factual
5 allegations,’ . . . it demands more than an unadorned, the-defendant-unlawfully-harmed-
6 me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v.*
7 *Twombly*, 550 U.S. 544, 555 (2007)). In other words, “a plaintiff’s obligation to provide
8 the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions,
9 and a formulaic recitation of a cause of action’s elements will not do.” *Twombly*, 550
10 U.S. at 555 (alteration in original). “Nor does a complaint suffice if it tenders ‘naked
11 assertion[s]’ devoid of ‘further factual enhancement.’” *Iqbal*, 556 U.S. at 678 (alteration
12 in original) (quoting *Twombly*, 550 U.S. at 557).

13 “To survive a motion to dismiss, a complaint must contain sufficient factual
14 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.*
15 (quoting *Twombly*, 550 U.S. at 570); *see also* Fed. R. Civ. P. 12(b)(6). A claim is facially
16 plausible when the facts pled “allow[] the court to draw the reasonable inference that the
17 defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556).
18 That is not to say that the claim must be probable, but there must be “more than a sheer
19 possibility that a defendant has acted unlawfully.” *Id.* (citing *Twombly*, 550 U.S. at 556).
20 “[F]acts that are ‘merely consistent with’ a defendant’s liability” fall short of a plausible
21 entitlement to relief. *Id.* (quoting *Twombly*, 550 U.S. at 557). Further, the Court need not
22 accept as true “legal conclusions” contained in the complaint. *Id.* at 678–79 (citing
23 *Twombly*, 550 U.S. at 555). This review requires “context-specific” analysis involving
24 the Court’s “judicial experience and common sense.” *Id.* at 679. “[W]here the well-
25 pleaded facts do not permit the court to infer more than the mere possibility of
26 misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the pleader is
27 entitled to relief.’” *Id.* (quoting Fed. R. Civ. P. 8(a)(2)).

28 The Court will grant leave to amend unless it determines that no modified

1 contention “consistent with the challenged pleading . . . [will] cure the deficiency.”
2 *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) (quoting *Schriber*
3 *Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986)).

4 ANALYSIS

5 To state a claim for a FDCPA violation a plaintiff must demonstrate: (1) she is a
6 “consumer” under 15 U.S.C. § 1692a(3); (2) the debt arises out of a transaction entered
7 into for personal purposes; (3) the defendant is a “debt collector” under 15 U.S.C.
8 § 1692a(6); and (4) the defendant violated one of the provisions contained in 15 U.S.C.
9 §§ 1692a–1692o. *Wheeler v. Premiere Credit of N. Am., LLC*, 80 F. Supp. 3d 1108, 1112
10 (S.D. Cal. 2014) (citing *Turner v. Cook*, 362 F.3d 1219, 1226–27 (9th Cir. 2004)).
11 Defendant argues that Plaintiff fails to meet the third and fourth elements.

12 I. Debt Collection Activity vs. Enforcing Security Interest

13 The FDCPA defines “debt” as “any obligation or alleged obligation of a consumer
14 to pay money arising out of a transaction in which the money, property, insurance, or
15 services which are the subject of the transaction are primarily for personal, family, or
16 household purposes, whether or not such obligation has been reduced to judgment.” 15
17 U.S.C. § 1692a(5). A “debt collector” includes any person: (1) “who uses any
18 instrumentality of interstate commerce or the mails in any business the principal purpose
19 of which is the collection of any debts,” or (2) “who regularly collects or attempts to
20 collect, directly or indirectly, debts owed or due or asserted to be owed or due to
21 another.” § 1692a(6).

22 Defendant argues that the Letter did not seek the collection of a debt; instead, it
23 attempted to foreclose a security interest. (*See* MTD 3–4.) Therefore, Defendant argues
24 it does not meet the definition of debt collector under 15 U.S.C. § 1692a(6) and Ninth
25 Circuit precedent.

26 In *Vien-Phuong Thi Ho v. ReconTrust Co.*, 858 F.3d 568, 570 (9th Cir.), *cert.*
27 *denied*, 138 S. Ct. 504 (2017) (“*Ho*”), the Ninth Circuit defined when a trustee of a
28 California deed of trust qualifies as a debt collector under the FDCPA. There, the

1 plaintiff bought a house with a loan secured by a deed of trust. *Id.* After the plaintiff
2 missed several loan payments, the defendant initiated a non-judicial foreclosure by
3 recording a notice of default and sent the notice to the plaintiff along with warnings to
4 pay the outstanding balance on the loan or face non-judicial foreclosure and auctioning of
5 the property. *Id.*

6 The Ninth Circuit affirmed the holding of *Hulse v. Ocwen Federal Bank, FSB*, 195
7 F. Supp. 2d 1188, 1204 (D. Or. 2002), which held that “foreclosing on a trust deed is an
8 entirely different path than collecting funds from a debtor.” *Ho*, 858 F.3d at 572
9 (quotation marks omitted). The *Ho* court distinguished between a person attempting to
10 enforce his or her rights through a non-judicial foreclosure and attempting to collect
11 money. *Id.* at 571. In support of this conclusion, the court reasoned that the definition of
12 debt collector in section 1692a(6) distinguishes between entities that collect debts owed
13 and a narrower definition of debt collector, which “also includes” entities whose principal
14 business purpose is “the enforcement of security interests.” *See id.* at 572–73 (citing
15 §§ 1692a(6), 1692f(6)). Thus, “an entity does not become a general ‘debt collector’ if its
16 ‘only role in the debt collection process is the enforcement of a security interest.’” *Id.* at
17 573 (citing *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 378 (4th Cir. 2006);
18 and *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453, 464 (6th Cir. 2013)). In applying its
19 holding, the court decided that a non-judicial foreclosure was the enforcement of a
20 security interest and not the collection of a monetary debt. Therefore, the “right to
21 ‘enforce’ the security interest necessarily implies the right to send the required notices; to
22 hold otherwise would divorce the notices from their context.” *Id.*

23 **II. Plaintiff’s Arguments**

24 The question here is whether Defendant was involved in enforcing a security
25 interest. Plaintiff advances four arguments in support of her thesis that Defendant’s
26 Letter was not enforcing a security interest. The Court considers each in turn.

27 **A. Whether *Ho* Applies to Defendant**

28 The Court addresses Plaintiff’s first and second arguments together because both

1 arguments rely on *Vien-Phuong Thi Ho v. Recontrust Co.* First, Plaintiff argues that
2 Defendant does not fall under the *Ho* security interest exception because Defendant did
3 not record a notice of default, and only sought to collect the debt prior to pursuing any
4 foreclosure efforts. (Opp’n 11 (citing Ex. A).) The *Ho* court relied on California’s non-
5 judicial foreclosure statutes that requires a trustee to send to the borrower the notice of
6 default and notice of sale. (*Id.* (citing *Ho*, 858 F.3d at 570–73, 575).) Plaintiff
7 emphasizes that, in *Ho*, the recorded notice of default notified the borrower that the
8 foreclosure process had begun, explained the foreclosure timeline, appraised the borrower
9 of her rights, and stated the borrower could contact the creditor if she wished to make
10 payment. (*Id.* (quoting *Ho*, 858 F.3d at 573).) Plaintiff also points to elements in the
11 Letter that she characterizes as “additional FDCPA language.” (*Id.* at 12). This language
12 includes a thirty-five day payment demand, opportunity to dispute debt, and offer to
13 verify debt. (*See id.*) Plaintiff argues this language further supports her contention that
14 Defendant “engage[d] in activities that constitute debt collection.” (*Id.* (citing *Ho*, 858
15 F.3d at 573).)

16 Second, Plaintiff argues that *Ho*’s security interest exception applies only to
17 trustees and Defendant is not the trustee of Plaintiff’s Deed of Trust. (*Id.* at 13.) Instead,
18 Plaintiff states that Defendant is a law firm retained by the original creditor to collect on a
19 defaulted debt.² (*Id.*) Plaintiff also points out that the *Ho* court found it persuasive that
20 the borrower could cure by paying the creditor and not the defendant. Plaintiff
21 distinguishes this factor because she reads the Letter as requiring her to pay Defendant
22 directly. (*Id.* (“[I]f you pay the amount shown above, an adjustment may be necessary
23 after *we* receive your check or payment.” (quoting Ex. A, at 2)).)

24 Defendant counters that it represents the trustee, Westgate Flamingo Bay, LLC and
25

26 ² In her Complaint, Plaintiff alleges that Westgate Flamingo Bay sold, transferred, or assigned the debt
27 to Defendant. (Compl. ¶ 17.) Yet in her Opposition, Plaintiff contends Defendant is only a law firm
28 retained by the original creditor to collect on a defaulted debt. (Opp’n 13.) The distinction between
these two positions does not impact the Court’s analysis because, under the relevant Nevada statute,
Nevada law applied to the trustee or a law firm representing the trustee. *See infra* section II.A.2.

1 therefore *Ho* applies. (Reply 2–3.) Defendant also argues that Plaintiff seeks to
2 distinguish *Ho* based on California’s non-judicial foreclosure statute, but the property
3 here is in Nevada and Nevada law applies. (*Id.* at 4.)

4 The Court agrees with Defendant that Nevada law applies to the case at bar.
5 Plaintiff’s property is a timeshare in Las Vegas, Nevada. (*See* Ex. A, at 2.) Nevada
6 federal district courts follow the rule in *Hulse v. Ocwen*, which *Ho* explicitly approved.
7 *See, e.g., Garcia-Pena v. MTC Fin., Inc.*, No. 17-cv-319-RCJ-WCG, 2017 WL 4532194,
8 at *3 (D. Nev. Oct. 10, 2017); *Contreras v. Master Fin., Inc.*, No. 10-cv-477-LRH-VPC,
9 2010 WL 4608300, at *2 (D. Nev. Nov. 4, 2010). Thus, *Ho* is controlling to the extent
10 that it does not rely on California non-judicial foreclosure law.

11 *1. Non-Judicial Foreclosure in Nevada*

12 Defendant argues that the Letter is a prerequisite to non-judicial foreclosure under
13 Nevada law. (Reply 4.) Specifically, the Letter contains information required for a
14 notice of breach and election to sell; therefore, Defendant contends it followed Nevada
15 non-judicial foreclosure law. (*See id.*) In *Ho*, the Ninth Circuit determined that an entity
16 that took the “statutorily required steps to conduct [a] trustee’s sale” was enforcing a
17 security interest under California non-judicial foreclosure law. 858 F.3d at 573. Thus,
18 the Court turns to Nevada non-judicial foreclosure law to determine whether Defendant
19 took statutorily required steps to enforce Westgate Flamingo Bay’s security interest.

20 In Nevada, “[w]hen a grantor defaults on [a promissory] note, the deed-of-trust
21 beneficiary can elect either judicial process for foreclosure . . . or may pursue ‘non-
22 judicial’ foreclosure-by-trustee’s sale procedure under Nevada Revised Statute Chapter
23 107.” *Edelstein v. Bank of N.Y. Mellon*, 286 P.3d 249, 254 (Nev. 2012) (citing *Nev. Land*
24 *& Mortg. v. Hidden Wells*, 435 P.2d 198, 200 (Nev. 1967)). To pursue non-judicial
25 foreclosure, “the trustee must give notice by recording a notice of default and election to
26 sell and serving the grantor with a copy of that notice.” *Id.* at 255 (citing Nev. Rev. Stat.

1 § 107.080(2)(c) (2012)).³ Next, the grantor has generally thirty-five days to cure the
2 deficiency. *Id.* (citing Nev. Rev. Stat. § 107.080(2)(a) & (b) (2012)). “After at least
3 three months have passed from the recording of the notice of default, the trustee must
4 give notice of the sale. *Id.* (citing Nev. Rev. Stat. § 107.080(4) (2012)). Finally, once the
5 sale is completed, title vests with the purchaser, but the sale may be voided if the process
6 does not substantially comply with the statutory requirements. *Id.* (citing Nev. Rev. Stat.
7 § 107.080(5) (2012)).

8 Here, Defendant argues that the Letter meets the requirements of the notice of
9 default and the election of sale—required by statute—and thus qualifies as enforcement
10 of a security interest. (Reply 4.) Defendant states that the notice of default must
11 specifically describe the deficiency in payment or performance and the owner has thirty-
12 five days from the date upon which the notice is recorded and mailed to cure the
13 deficiency. (*Id.* (citing Nev. Rev. Stat. § 107.080(3)).) Defendant argues that “[t]his is
14 precisely the information contained in the Letter at issue in the present case.” (*Id.*)

15 Defendant’s argument here is not convincing. If the Court were to accept that the
16 Letter was a notice of default then Defendant would have recorded a notice of default and
17 election to sell and then mailed “a *copy* of the notice of default and election to sell” to
18 Plaintiff. Nev. Rev. Stat. § 107.080(3) (emphasis added). Here, there are no copies of
19 the notice of default and election to sell. The Letter imitates some of the same
20 requirements as a notice of default and election to sell, but are not copies of documents
21 filed with the County Recorder. Thus, Defendant cannot rely on mailing the notice of
22 default and election of sale, as required by Nevada law, as evidence that it was enforcing
23 a security interest and not debt collector under the FDCPA.

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26 ³ The Nevada Legislature revised the non-judicial foreclosure statute in mid-2017. *See* 2017 Nevada
27 Stat., ch. 571, § 1.5 (S.B. 490). The revisions took effect June 12, 2017. *See id.* At the time Defendant
28 mailed the Letter at issue in this case, Nevada law explicitly required the notarized affidavit described in
section II.A.2. The Court reads the Nevada statute as it was at the time of the Letter only to determine
whether Defendant is a debt collector for the purposes of the FDCPA.

1 2. *Notarized Affidavit Required to Support Notice of Default*

2 The Court's conclusion that Defendant's Letter is not a notice of default and
3 election to sell does not end the inquiry. At the time Defendant sent the Letter, Nevada
4 law required the beneficiary or trustee to submit to the County Recorder a notarized
5 affidavit along with the notice of breach and election of sale. *See* § 107.080(2)(c) (2017).
6 The affidavit must have included, amongst other items, a statement that the "beneficiary
7 or its successor in interest, the servicer of the obligation or debt secured by the deed of
8 trust or the trustee, or *an attorney representing any of those persons,*" sent the obligor or
9 the borrower a written statement. § 107.080(2)(c)(3) (emphasis added). That written
10 statement to the borrower must have included:

11 (I) The amount of payment required to make good the
12 deficiency in performance or payment, avoid the exercise of the
13 power of sale and reinstate the terms and conditions of the
14 underlying obligation or debt existing before the deficiency in
15 performance or payment, as of the date of the statement; (II)
16 The amount in default; (III) The principal amount of the
17 obligation or debt secured by the deed of trust; (IV) The amount
18 of accrued interest and late charges; (V) A good faith estimate
19 of all fees imposed in connection with the exercise of the power
20 of sale; and (VI) Contact information for obtaining the most
21 current amounts due and the local or toll-free telephone number
22 described in subparagraph (4).

23 *Id.* Thus, Nevada law required the trustee, or an attorney representing the trustee, to
24 contact the borrower *before* filing the notice of breach and election of sale with the
25 County Recorder.

26 Here, Defendant is an attorney representing Westgate Flamingo Bay, LLC and
27 Defendant states in its Reply brief that Westgate Flamingo Bay is the trustee of Plaintiff's
28 Deed of Trust. (Reply 3 (citing Ex. A, at 2).) Therefore, Defendant was not only
authorized but required to contact Plaintiff before it filed the notice of default and
election of sale with the County Recorder.

The next question is whether Defendant's Letter actually complied with section

1 107.080(2)(c)(3). The Letter meets the first and second requirements by stating that total
2 past due amount is \$14,059.16 and that Plaintiff could cure the default by paying that
3 same amount. (*See Ex. A, at 2.*) Defendant’s Letter also meets the sixth element because
4 it provided a toll-free number for obtaining the most current amounts due. (*Id.*)
5 However, there is no statement as to the principal amount of the obligation secured by the
6 deed of trust, no statement as to the amount of accrued interest and late charges, and no
7 good faith estimate of all fees imposed by the power of sale. (*See id.*) Because the Letter
8 only meets three out of six requirements, it was not in actual compliance with Nevada
9 statute.

10 The Court next considers whether Defendant’s Letter, if not in actual compliance,
11 can still be considered enforcing a security interest. In *Ho*, the Ninth Circuit stated:

12 Under California’s non-judicial foreclosure statutes, [the
13 defendant] could not conduct the trustee’s sale until it sent the
14 notice of default and the notice of sale. If [the defendant] can
15 administer a trustee’s sale without collecting a debt, it must be
16 able to maintain that status when it takes the statutorily required
17 steps to conduct the trustee’s sale. The right to “enforce” the
18 security interest necessarily implies the right to send the
19 required notices; to hold otherwise would divorce the notices
20 from their context.

21 858 F.3d at 573 (footnote omitted). The court went on to reason, “[e]nforcement of a
22 security interest will often involve communications between the forecloser and the
23 consumer. When these communications are limited to the foreclosure process, they do
24 not transform foreclosure into debt collection.” *Id.* at 574.

25 Here, under Nevada’s non-judicial foreclosure statute, Defendant could not record
26 the notice of default and election of sale until it sent notice to Plaintiff. Defendant’s
27 Letter falls within the statutorily required steps that motivated the above quoted language
28 in *Ho*. If the Court were to find Defendant was not enforcing a security interest such a
finding would contravene the reasoning in *Ho*. Defects in the Letter do not detract from
Defendant’s mandate to follow the Nevada statute to enforce Westgate Flamingo Bay’s

1 security interest.

2 Additionally, if the Court were to find that Defendant’s Letter was not attempting
3 to enforce a security interest then such finding would undermine the purpose of Nevada’s
4 non-judicial foreclosure scheme. At the time of the Letter, Nevada required a substantial
5 compliance standard “with regard to a lender’s duty to provide a borrower with notice of
6 a loan’s default and the lender’s election to foreclose.” *Schleining v. Cap One, Inc.*, 326
7 P.3d 4, 8 (Nev. 2014) (citing Nev. Rev. Stat. § 107.080(5)). “In other words, the
8 Legislature specifically envisioned that the purposes behind NRS 107.080’s notice and
9 timing requirements could be achieved even if these requirements were not strictly
10 adhered to.” *Id.* (citing *Leyva v. Nat’l Default Servicing Corp.*, 255 P.3d 1275, 1278
11 (Nev. 2011)). The Nevada legislature explicitly required substantial compliance with the
12 non-judicial foreclosure scheme, rather than strict compliance. This consideration
13 militates in Defendant’s favor.

14 In sum, Defendant’s attempt to comply with the non-judicial foreclosure process,
15 even if actually defective, places Defendant in the realm of enforcing a security interest
16 rather than collecting a debt. Nevada statute required Defendant to take certain steps to
17 enforce Westgate Flamingo Bay’s security interest. Whether or not those steps actually
18 complied with Nevada law does not change the nature of Defendant’s activity, which was
19 enforcing a security interest.

20 ***B. Whether Defendant Admitted It Was a Debt Collector***

21 Plaintiff next argues that Defendant repeatedly admitted in the Letter that it is a
22 “Debt Collector.” (Opp’n 14.) Specifically, Defendant’s Letter included language such
23 as: “Pursuant to 15 U.S.C. § 1692g (the Fair Debt Collection Practice Act), the Debt
24 Collector hereby discloses the following information” and that “the undersigned [i.e.,
25 Defendant] is the Debt Collector.” (Ex. A, at 3.) Plaintiff contends the quoted language
26 and other similar disclosures further reinforce Defendant’s status as a debt collector.

27 Defendant responds that the language stating it was a debt collector is “boilerplate
28 FDCPA addendum” and “immaterial.” (Reply 4.) Further, Defendant argues that

1 inclusion of the language does not transform the issuance of notice under Nevada’s non-
2 judicial foreclosure process into debt collection. (*Id.* at 5.) Defendant also cites a federal
3 district court opinion that encountered similar FDCPA compliant disclaimers and that
4 court determined FDCPA disclaimers were not dispositive to the court’s analysis.
5 *Derisme v. Hunt Leibert Jacobson P.C.*, 880 F. Supp. 2d 339, 373 (D. Conn. 2012)
6 (collecting cases). Defendant urges a similar result here.

7 The Court agrees with other district courts that have encountered a similar issue.
8 Even though Defendant is not a debt collector for the broader definition of the FDCPA, it
9 is still subject to the provisions of 15 U.S.C. § 1692f(6), which applies to persons
10 enforcing a security interest. If Defendant did not include FDCPA notices then it would
11 subject itself to potential liability for failing to comply with section 1692f(6). *See*
12 *Stamper v. Wilson & Assocs., P.L.L.C.*, No. 9-cv-270, 2010 WL 1408585, at *9 (E.D.
13 Tenn. Mar. 31, 2010) (quoting *Chomilo v. Shapiro, Nordmeyer & Zielke, LLP*, No. 06-
14 3103 (RHK/AJB), 2007 WL 2695795, at *6 (D. Minn. Sept. 12, 2007)). Moreover, if a
15 creditor, or a law firm on the creditor’s behalf, included the FDCPA notices then a court
16 might find it was holding itself out as a debt collector—just the outcome Plaintiff urges.
17 But, if a creditor followed Plaintiff’s advice and a court determined the creditor was not
18 enforcing a security interest then the creditor would risk violating provisions of FDCPA
19 requiring the disclosures. No matter what path it chose, Defendant’s choice created
20 potential legal risk. The Court will not penalize Defendant for attempting to minimize its
21 liability. *See Chomilo*, 2007 WL 2695795, at *6 (arriving at same conclusion).

22 Additionally, the Letter contains a bankruptcy notice at the bottom of the second
23 page that states:

24 This Letter is being sent to you on behalf of Westgate Flamingo
25 Bay, LLC to permit Westgate Flamingo Bay, LLC to pursue its
26 in rem rights only. Westgate Flamingo Bay, LLC is not seeking
27 the collection of any monies from you, and Westgate Flamingo
28 Bay, LLC is not seeking to obtain an in personam judgment,
deficiency judgment, or any other type of money judgment
against you. Any statements regarding any amounts due under

1 the subject note, or under the subject deed of trust securing
2 payment of the note, are being made to establish the amount
3 due to permit Westgate Flamingo Bay, LLC to pursue its in rem
rights against the subject property.

4 (Ex. A, at 3 (emphasis omitted).) The FDCPA disclosures cannot be read in isolation.
5 The bankruptcy notice states that Westgate Flamingo Bay did not seek recovery against
6 Plaintiff personally, but instead sought to pursue its in rem rights. *See Stamper*, 2010 WL
7 1408585, at *9 (“In addition, [the defendant] did not seek recovery against plaintiffs
8 personally.”). The language in the bankruptcy disclosure supports a finding that
9 Defendant was attempting to enforce a security interest. The Court finds that the FDCPA
10 disclosures in the Letter do not transform the underlying transaction from enforcement of
11 a security interest into a debt collection.

12 ***C. Whether Mashiri Applies***

13 Plaintiff urges the Court to find *Mashiri v. Esptein Grinnell & Howell*, 845 F.3d
14 984 (9th Cir. 2017), controlling. There, the plaintiff was a member of a homeowners’
15 association (“HOA”) and a law firm, on behalf of the HOA, sought to collect the
16 plaintiff’s overdue assessment fee. *Id.* at 986. The notice sent to the plaintiff “included a
17 warning that failure to pay the assessment fee would result in the HOA recording a lien
18 against [the plaintiff’s] property.” *Id.* The notice went on to state that it was “required
19 by section 5660 of the Davis-Stirling Common Interest Development Act, Cal. Civ. Code
20 § 4000 *et seq.*, which governs the collection of overdue homeowners’ association
21 assessments.” *Id.*

22 The defendant law firm argued that it was not a debt collector for purposes of the
23 broader definition of 15 U.S.C. § 1692a(6) and instead was only enforcing a security
24 interest and subject to § 1692f(6). *Id.* at 989. The *Mashiri* court determined that the
25 defendant was a debt collector and not enforcing a security interest because:

26 There was . . .no existing security interest for [the defendant] to
27 enforce at the time it sent the May Notice because a lien had yet
28 to be recorded against [the plaintiff’s] property. Rather than
seeking to enforce an existing security interest or lien, the May

1 Notice sought to collect [the plaintiff’s] overdue assessment fee
2 and to make necessary disclosures that would perfect the
3 HOA’s security interest and permit it to record a lien at a later
4 date.

4 *Id.* (citation omitted).

5 Here, Plaintiff argues that Defendant, like the *Mashiri* defendant, did not send a
6 recorded notice of default to Plaintiff. (Opp’n 16.) Plaintiff acknowledges that
7 California law would require Defendant to contact the borrower to satisfy the due
8 diligence requirements of California Civil Code § 2923.5.⁴ (*Id.*) However, Plaintiff
9 argues “‘perfect[ing] [a] security interest’ constitutes collection efforts, and no ‘security
10 interests’ exists until Defendant records a notice of default.” (*Id.* (citing *Mashiri*, 845
11 F.3d 989–90).)

12 Defendant argues that *Mashiri* does not control because there was no existing
13 security interest in *Mashiri*. (Reply 5 (citing *Mashiri*, 845 F.3d at 989).) But, in *Ho* the
14 trustee sought to enforce a secured loan. (*Id.* (citing *Mashiri*, 845 F.3d at 990).)
15 Defendant distinguishes the facts here because Westgate Flamingo Bay already had a
16 recorded lien—the Deed of Trust—whereas the *Mashiri* defendant did not have any
17 security interest and needed to send notice to perfect its security interest.

18 The Court agrees with Defendant that *Mashiri* is distinguishable because, there, the
19 HOA had not recorded a security interest or lien prior to sending the notice. The
20 association was taking the steps necessary, under California homeowners’ association
21 law, to perfect the security interest. Here, Westgate Flamingo Bay had an existing
22 security interest at the time the Letter was sent to Plaintiff. Defendant communicated on
23 behalf of the holder of the Deed of Trust, Westgate Flamingo Bay.

24 Moreover, the *Mashiri* court predicated its analysis on the notification
25

26 ⁴ California Civil Code section 2923.5 requires a mortgage servicer or authorized agent to contact a
27 borrower before recording a notice of default. This provision in some respects is similar to the Nevada
28 statute previously discussed, *see supra* section II.A.2. The Court acknowledges that Nevada law applies
to this case; however, both *Mashiri* and *Ho* dealt with California law and those cases are distinguishable
by California law.

1 requirements of the Davis-Stirling Act, which applies to homeowners' associations like
2 the HOA in *Mashiri*. See 845 F.3d at 989 (citing Cal. Civ. Code § 5660). The *Mashiri*
3 court did not rely on the California non-judicial foreclosure statutes in reaching its
4 decision. In contrast, the *Ho* court relied on the non-judicial foreclosure process outlined
5 in California Civil Code § 2924(a)(1) to determine when an entity was enforcing a
6 security interest. 858 F.3d at 570–71. *Mashiri* did not rely on California's non-judicial
7 foreclosure statutes.

8 This case fits squarely under *Ho*, not *Mashiri*. The critical distinction between
9 those cases was the underlying statutory scheme: homeowners' association vs. non-
10 judicial foreclosure as well as whether a security interest existed prior to sending notice.
11 Here, Defendant attempted to enforce an already existing security interest and did so
12 through the non-judicial foreclosure process. Indeed, Plaintiff identifies California Civil
13 Code § 2923.5, which is part of the California non-judicial foreclosure scheme and
14 includes similar notice provisions as its Nevada cousin, Nev. Rev. Stat. § 107.080. Both
15 statutes require contacting the borrower *before* recording notice of default. The question
16 here is not whether or not the security interest exists—Plaintiff does not dispute the
17 existence of Westgate Flamingo Bay's Deed of Trust. The question is whether Defendant
18 attempted to comply with the Nevada non-judicial foreclosure statute. The Court
19 answers this question in the affirmative.

20 In sum, the Court finds that Defendant's Letter was attempting to enforce a
21 security interest. Therefore, Defendant is not a debt collector under the broader
22 definition of the FDCPA, see 15 U.S.C. §1692a(6). Accordingly, Plaintiff's FDCPA
23 claim fails. Because the Court finds Defendant is not a debt collector, it does not reach
24 the argument whether Defendant's conduct violated the FDCPA.

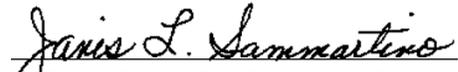
25 CONCLUSION

26 In light of the foregoing, the Court **GRANTS** Defendant's Motion to Dismiss,
27 (ECF No. 8), and **DISMISSES WITHOUT PREJUDICE** Plaintiff's Complaint, (ECF
28 No. 1). Plaintiff **MAY FILE** an amended complaint that addresses the deficiencies in

1 this Order within twenty-one (21) days of the date on which this Order is electronically
2 docketed. *Failure to file an amended complaint by this date may result in dismissal of*
3 *this action with prejudice.*

4 **IT IS SO ORDERED.**

5 Dated: March 9, 2018


6 Hon. Janis L. Sammartino
7 United States District Judge

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