**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

Civil Action Number 1:17-cv-03074-RBJ-KMT

Jason Eastman,

Plaintiff,

v.

NPL Capital, LLC,

Defendant.

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**DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT**

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Defendant, NPL Capital, LLC (NPL), through its attorneys, respectfully submits this Motion to Dismiss Plaintiff's Second Amended Complaint pursuant to Fed.R.Civ.P. 12(b)(6).

## I. INTRODUCTION

Sometimes declining an invitation to amend a complaint and letting go is the course of action that makes the most sense. This case provides a good example. Plaintiff sued NPL alleging violations of the Fair Debt Collection Practices Act (FDCPA or Act). Even though the Tenth Circuit decision in *Obduskey v. Wells Fargo,* 879 F.3d 1216 (10th Cir. 2018) was dispositive in NPL's favor that nonjudicial foreclosures are outside the purview of the Fair Debt Collection Practices Act (FDCPA) Plaintiff persisted in prosecuting his claims filing an amended complaint and then a proposed second amended complaint. Those efforts resulted in the Court granting NPL's motion to dismiss and denying Plaintiff's motion to amend the complaint. Nevertheless, the Court entered a stay on issuing a final judgment pending the Supreme Court's ruling in Obduskey. *See*

Order Granting Stay, ECF No. 57 (adopting Magistrate Judge Tafoya's report and recommendation, ECF. No. 51).

Although the Supreme Court unanimously affirmed the Tenth Circuit's holding in *Obduskey v. McCarthy & Holthus, LLP,* 139 S. Ct. 1029 (2019), this Court held the decision contemplated situations where the FDCPA may apply in nonjudicial foreclosure proceedings beyond what the Tenth Circuit characterized as "aggressive collection efforts." Order, ECF No. 64 at 4,5. The Supreme Court left for another day whether abusive or unnecessary conduct may "transform a security-interest enforcer into a debt collector subject to the main coverage of the Act." *Obduskey,* 139 S. Ct. at 1039. Furthermore, a security interest enforcer who has no meaningful intention of pursuing a foreclosure may also cross over the line into the realm of a debt collector subject to the entirety of the Act. *Id.* at 1041 (Justice Sotomayor, concurring).

For these reasons the Court gave Plaintiff new life to pursue his claims. The Court permitted Plaintiff "to amend his complaint to allege more specifically how actions undertaken by NPL were either abusive or unnecessary to the nonjudicial foreclosure process and on the issue of whether NPL ever showed a 'meaningful intention' of following through with nonjudicial foreclosure of [Plaintiff's] home." Order, ECF No. 64 at 5, 6. The Court also advised Plaintiff to amend the complaint to cure the deficient allegations on whether NPL is a debt collector under the "principal purpose" definition of the FDCPA. *Id.*

Even though Plaintiff took up the Court's offer, the Second Amended Complaint (SAC) doesn't make the cut in setting forth a plausible claim for relief. The SAC contains

a single claim for relief alleging violations of §1692c(b) – communications with third parties. Plaintiff alleges NPL communicated with his parents, in connection with the collection of his debt, without his prior consent. NPL denies these allegations. However, to get to this proposition Plaintiff must plausibly allege that NPL's conduct is governed by the FDPCA. It is here where Plaintiff fails to overcome the hurdle.

The SAC's allegations concerning NPL's conduct are a verbatim recitation of the allegations in a prior proposed Second Amended Complaint. ECF No. 39-1. The Court previously concluded these allegations do not amount to the "more aggressive collection efforts" that would constitute debt collection covered under the FDCPA. ECF No. 57 at 8. The questions now are as follows: 1) Is the identical conduct actionable as either abusive or unnecessary to the nonjudicial foreclosure process? It is not. 2) Is the identical conduct actionable because NPL did not show a "meaningful intention" of following through with the foreclosure on Plaintiff's home? It is not because NPL foreclosed. 3) Does the SAC overcome the deficiencies regarding whether NPL is a debt collector under the "principal purpose" definition? It does not because it contains the same conclusory allegations.

For these reasons the SAC fails to state a claim for relief under Rule 12(b)(6) and should be dismissed.

## II. FACTUAL BACKGROUND

The Court is familiar with the facts of this case and NPL relies on the facts set forth in its Motion to Dismiss Plaintiffs' Amended Complaint (ECF No. 35),[1] Magistrate Judge

[1] Mr. Eastman's parents were initially Plaintiffs but were voluntarily dismissed, *See* ECF No. 52.

Tafoya's report and recommendation (ECT No. 51), and the Court's Order Staying Case (ECF No. 57). However, additional facts of public record have been developed that are relevant to this Motion. *See Grynberg v. Koch Gateway Pipeline Co.,* 390 F.3d 1276, 1278 n. 1 (10th Cir. 2004). (When considering a motion to dismiss under Rule 12(b)(6), the Court may take judicial notice of matters of public record, including records from proceedings in state court matters without converting the motion to dismiss into a motion for summary judgment.)

Plaintiff filed bankruptcy the day before a public trustee sale for the sale of his home was scheduled. As a result, the sale was subject to an automatic stay. On September 5, 2018 Plaintiff's bankruptcy petition was dismissed due to his failure to comply with a prior order of the Bankruptcy Court. *See* Order Dismissing Chapter 13 Case, attached as Exhibit A.

Once the bankruptcy case was dismissed the automatic stay was no longer in effect. On September 12, 2018 a public trustee sale was held and Plaintiff's home was sold to a third party for $104,500.00. *See* Return Approving Sale, attached as Exhibit B. The sale price exceeded NPL's bid of $72,098.22. *See* Bid, attached as Exhibit C. This resulted in a surplus of $32,401.78 all of which is payable to Plaintiff. *See* C.R.S. § 38-38-111(2). ("After payment to all lienors and the holder entitled to receive a portion of the overbid pursuant to this section, any remaining overbid shall be paid to the owner.").

Plaintiff initially brought claims asserting NPL violated subsections 15 U.S.C. § 1692c(b) – improper communication with third parties, 15 U.S.C. § 1692e(2) – false representations in connection with the collection of the debt, and 15 U.S.C. § 1692f(1) – unfair or unconscionable means to collect a debt. He also sought actual damages for

severe emotional distress pursuant to 15 U.S.C. § 1692k(a)(1), statutory damages under 15 U.S.C. § 1692k(a)(2), and attorney fees and costs in accordance with 15 U.S.C. § 1692k(a)(3). In the SAC Plaintiff withdraws his § 1692e(2) and § 1692f(1) claims and seeks relief based solely on an alleged violation of § 1692c(b).

## III. LEGAL ARGUMENT

### A. Standards governing dismissal under Fed.R.Civ.P. 12(b)(6).

To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain enough allegations of fact, taken as true, "to state a claim for relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007); *Khalik v. United Air Lines,* 671 F.3d 1188, 1190 (10th Cir. 2012). "A plaintiff must 'allege sufficient facts to establish th[e] elements' of his claim and 'advance [that] nudge [the] claims across the line from conceivable to plausible" in order to survive a motion to dismiss. *Id.* The Tenth Circuit has explained that plausibility refers "to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'" *Robbins v. Oklahoma,* 519 F.3d 1242, 1247 (10th Cir. 2008), quoting *Twombly,* 550 U.S. at 570. "The allegations must be enough that, if assumed to be true, the plaintiff plausibly (not just speculatively) has a claim for relief." *Id.* "[W]hile a plaintiff need not establish a prima facie case in the complaint, the elements of each alleged cause of action help to determine whether the plaintiff has set forth a plausible claim." *Niederquell v. Bank of America, N.A.,* 2012 WL 1578060, *4 (May 4, 2012 D. Colo. 2012) (citing *Khalik,* 671 F.3d at 1192).

### B. The SAC fails to allege facts that are sufficient and pervasive enough to push NPL into the realm of a debt collector.

The SAC fails to provide more detail from which the Court may plausibly infer that the communications between NPL and Plaintiff's parents were of the abusive nature that would transform NPL into a debt collector subject to the entirety of the FDCPA. An analysis of the SAC, the First Amended Complaint, ECF No. 34, and the prior proposed Second Amended Complaint, ECF No. 39-1, demonstrates that Plaintiff makes the identical allegations in verbatim fashion.

In ¶¶ 3(f)(i-v), 4, 5 and 6 Plaintiff alleges the communications between NPL and Plaintiff's parents. The allegations are verbatim to the allegations contained in ¶¶ 3(f)(i-v), 8, and 9 of the prior proposed Second Amended Complaint.

Instead of providing more specific allegations Plaintiff alleges the identical facts that the Court has previously found do not constitute aggressive collection efforts. The Order Staying Case specifically held the proposed Second Amended Complaint does not allege the type of aggressive collection efforts the Tenth Circuit contemplated as falling under the coverage of the FDCPA. The summarized NPL's collection efforts as follows:

> "Plaintiff's allegations of NPL's debt collection efforts consists of a couple of e-mails and phone calls to the debtor's parents, and letters sent to Jason Eastman describing his (allegedly inflated) loan balance. In the Proposed Second Amended Complaint, plaintiffs would plead that Jason Eastman's home is in disrepair and subject to a first deed of trust with Wells Fargo to show that NPL has a strong motive to use foreclosure as a threat to collect money rather than actually foreclosing." ECF No. 57, at 8.

The issue is whether this conduct, that does not constitute aggressive collection efforts, falls within the wider category of conduct that is "related to, but not required for, enforcement of a security interest" that could place NPL into the coverage of the entire FDCPA. NPL asserts this is not the type of conduct the Supreme Court left for another

day to consider whether the FDCPA applies as a whole. There are no allegations of repetitive nighttime phone calls - *Obduskey,* 139 S. Ct. at 1039 - or disruptive dinnertime phone calls – *Henson v. Santander Consumer USA, Inc.,* 137 S. Ct. 1718, 1719 (2017). Nor does Plaintiff allege the type of conduct that is considered per se harassing or abusive under the FDCPA; use or threat of violence, use of obscene or profane language, publishing a list of consumers who allegedly refuse to pay their debts, advertising for sale of any debt to coerce payment, causing a telephone to ring repeatedly or continuously, or placing telephone calls without meaningful disclosure of the caller's identity. *See* § 1692d(1-6).

The SAC fails to allege with specificity how "a couple of emails and phone calls to [Plaintiff's] parents" – Order Granting Stay, ECF No. 57 at 8 - state a plausible claim for relief that NPL's conduct was abusive, or were not good-faith actions in pursuit of a nonjudicial foreclosure when NPL followed through with the foreclosure. The communications appear rather benign. The Court cannot plausibly infer that NPL was attempting to collect the debt from Plaintiff's parents or to pressure Plaintiff to pay. To the contrary the communications from NPL to Plaintiff's parents concern a May 12, 2017 email requesting authorization from Plaintiff "to share information on [his] account, ECF No. 65 at ¶ 3(f)(ii), a May 18, 2017 email asking whether Plaintiff's parents "were able to send back 'the authorization today?'" *Id.* at ¶ 3(f)(iii), a May 22, 2017 email stating a message was left with Ms. Eastman and how can NPL "assist you with this as I have not heard back," and "the account is moving into foreclosure." *Id.* at ¶ 3(f)(iv).

These communications fail to plausibly show that NPL threatened foreclosure without following through, particularly when the undisputed facts are to the contrary. Importantly, the SAC fails to show NPL's conduct is allegedly abusive or not good-faith actions in pursuit of foreclosure. It appears the communications were attempts to confirm NPL had Plaintiff's authorization to discuss the debt with his parents. Indeed, Plaintiff provided NPL with that authorization via facsimile. *See* Exhibit D.

The Court questioned whether "repeated phone calls and communications with a homeowner's parents are required to pursue a nonjudicial foreclosure under Colorado state law. Order at P. 5. NPL is not aware that any phone calls are *required* but phone calls are *permitted*. Section 38-38-102.5 is set forth as a "hotline" provision. Subsection 38-38-102.5(2)(b) requires a holder of a security instrument to provide "[t]he direct telephone number of the holder's loss mitigation representative or department." Even if other phone calls are not required it hardly makes sense that a holder of a security instrument would refuse to place or accept phone calls for fear of being labeled a debt collector.

The contacts with Plaintiff's parents must be viewed in context of whether they are abusive. Here, the only phone call alleged is that NPL left a voice mail message with Plaintiff's mother. *See* ¶ 3(f)(v). The remaining contacts were by email. It is readily apparent that Plaintiff's parents wanted to discuss the debt with NPL and NPL would not do so until it received Plaintiff's written authorization. The allegations do not reveal that NPL attempted to enlist Plaintiff's parents in its collection efforts. ECF No. 34 at ¶¶ 16-17. Instead, the allegations reveal that NPL followed up with Plaintiff's

parents regarding the authorization that would allow its representative to discuss Plaintiff's debt.

There is no dispute that Plaintiff was in default on his loan obligation. Communicating with Plaintiff's parents after obtaining consent could have prevented a foreclosure or resulted in a loan modification that would have undoubtedly worked to Plaintiff's benefit by allowing him to stay in the home, saving the time and expense associated with foreclosure, and a reduction in his credit score.

In response to NPL's motion for entry of judgment Plaintiff contends that NPL did not intend to enforce its security interest but instead, used foreclosure as a threat to collect a "long defaulted debt." ECF No. 62 at 2. However, the SCA proffers no supporting allegations. After all, how can Plaintiff make any such allegations when NPL followed through with the nonjudicial foreclosure of Plaintiff's home. The nonjudicial foreclosure shuts the door on any allegation that NPL did not act with a meaningful intention of enforcing its security interest.

The SAC adds nothing new to the equation. Plaintiff has failed to allege more specifically how NPL's conduct would constitute the other conduct that may transform NPL into a debt collector subject to the entirety of the FDCPA. Importantly, the Court previously found the identical facts fail to "provide any argument as to why the facts of [Plaintiff's] case are distinguishable from those in *Obduskey.*" ECF No. 57 at 8. Hence, the Court should dismiss Plaintiff's claims.

**C. The threat of foreclosure without showing any meaningful intention of ever following through has no application here because NPL actually foreclosed on Plaintiff's home.**

NPL submits the "meaningful intention" language in Justice Sotomayor's concurring opinion is applicable only in those situations where the holder of a security-interest threatened foreclosure without following through. That is the import of the stalking horse language. Conversely, if the actionable conduct is based on threatened behavior then the following through of the threat is, by definition, non-actionable.

Plaintiff cannot muster any plausible facts that NPL "threatened foreclosure without taking any steps toward such in order to collect a debt." *See* Order, ECF No. 64 at 3. The fact that Plaintiff continues to allege that NPL threatened foreclosure without doing so, not only belies his allegations in other pleadings, but is demonstrably false. *See* SAC, ¶¶ 3, 3(f)(v).

A threat of foreclosure implies that the foreclosure never occurred. However, NPL followed through and foreclosed on Plaintiff's residence. Paragraph 5 of the First Amended Complaint (ECF No. 34) states NPL attempted to collect Plaintiff's debt through "the institution of a non-judicial foreclosure." Paragraph 20 alleges "Plaintiff Jason Eastman asked the public trustee for a cure amount."

Paragraph 12 of the prior Second Amended Complaint (ECF No. 39-1) states "[NPL] then filed an NED claiming…" Paragraph 13 alleges "a hearing was held on a Rule 120 motion in state court. The state judge made it abundantly clear that he was allowing foreclosure based on payments missed…." In ¶ 14 Plaintiff reiterates that he "asked the public trustee for a cure amount."

Plaintiff filed for bankruptcy protection the day before his residence was scheduled for public trustee sale. One week after the bankruptcy case was dismissed NPL foreclosed on Plaintiff's residence. *See* Exhibit B. Not only did NPL foreclose but

a third party bid for more than the amount due. *See* Exhibit C. This resulted in a surplus of $32,401.78 that is payable to Plaintiff.

Far from the "stalking horse" referenced by Justice Sotomayor, NPL went through with the foreclosure. For a home that was in "disrepair" – *See* SAC, ¶ 3(f)(v) Plaintiff lived in his former residence rent free for some period of time, which necessitated the foreclosure, and realized a gain of $32,401.78. Not only are the allegations that NPL used a threat of foreclosure in an attempt to collect a debt conclusory, they are nonexistent. Indeed, the fact that Plaintiff realized a significant surplus from the sale of his residence lays to waste his prior assertions "NPL threatened foreclosure in an attempt to collect an inflated debt balance." ECF No. 34 at ¶ 19. This hardly smacks of the category of conduct that concerned the Supreme Court that could place a security-interest enforcer into the purview of the main coverage of the FDCPA. *Obduskey,* 139 S. Ct. at 1039.

**D. The SAC fails to make a plausible showing that NPL is a debt collector under the principal purpose definition.**

In the Order Staying Case the Court found that the First Amended Complaint failed to allege facts "that establish that NPL's primary purpose is debt collection." ECF No. 57 at 6. Furthermore, the proposed Second Amended Complaint that alleged "companies buy portfolios of defaulted debt for pennies on the dollar" and "then try to realize some payment by calling the debtor on the phone asking the debtor to pay," along with a pacer search that NPL was involved in multiple bankruptcy cases was insufficient to plausibly allege NPL's principal purpose is debt collection. *Id.*

The SAC alleges virtually the identical facts. The first sentence of ¶ 3 is substantially identical to Plaintiff's prior pleadings in that it merely asserts the statutory

definition of debt collection. Paragraph 3(b) alleges in almost identical terms to prior pleadings that "Defendant tries to realize some payment by instituting communication with the debtor on the phone asking the debtor to pay, and in this case, contacted the Plaintiff's parents to enlist them to help collect, without first securing Plaintiff's permission." Paragraph 3(c) is almost identical to ¶ 3(c) of the proposed Second Amended Complaint, ECF No. 39-1. The allegations are nothing more than a completely conclusory statement that sets forth a generalized statement about "debt buyers" without any connection how NPL's actions in this case conformed or not to that blanket assertion. Finally, Paragraph 3(d) is an identical recitation of the bankruptcy cases in which NPL was involved.

These allegations taken together, were insufficient to "move the needle on the proportion of [NPL's] business that is debt collection." *Id.* So what has Plaintiff now alleged to cure the deficiencies outlined by the Court? NPL asserts not enough to move the needle.

The second sentence of ¶ 3 alleges that although NPL instituted a nonjudicial foreclosure in this case, it seldom does so and only when other debt collection efforts fail. Apparently, this is an attempt to allege that NPL threatens "foreclosure without showing any meaningful intention of ever following through." *Obduskey,* 139 S. Ct. at 1041. The problem is that in this case NPL followed through with foreclosure and foreclosed on Plaintiff's home. The remainder of the sentence is a conclusory allegation that wholly fails to provide a factual basis demonstrating that the principal purpose of NPL's business is debt collection. To the extent it is even relevant what

NPL may do in other cases there is no factual support for this proposition. Plaintiff must plead facts, not make broad statements or conclusory allegations.

Paragraph 3(a) alleges that NPL "purchased a portfolio of defaulted debt for pennies on the dollar" and that Plaintiff's loan was part of that portfolio where all the loans were in default at the time of purchase. The Court has already found that purchasing defaulted debt for pennies on the dollar "does not shed light" on how the principal purpose of NPL's business is debt collection. *Id.* The allegation that Plaintiff's loan was part of a portfolio in which all the loans were in default does not help. Whether all the loans in this one portfolio of an unknown number of loans were in default does not provide guidance in determining an entity's principal purpose. Relying on other cases, this Court found a court "should consider the proportion of a company's operation that involves debt collection activities." *Id.* (citations omitted). Plaintiff's proffer does not plausibly allege that NPL's *one* principal purpose is debt collection. *See Skinner v. LVNV Funding, LLC,* 2018 WL 319320 at *3 (N.D. Ill. January 8, 2018) ("[i]n analyzing a business' principal purpose, we consider… the entity's *one* principal purpose….").

Paragraph 3(e) alleges the initials "npl" are commonly known to mean "non-performing loans" and hence, is indicative that NPL's principal purpose is debt collection. However, the Colorado Secretary of State list 56 entities that contain the initials "NPL" in its database with companies ranging from a construction company, a media research company, and a paddle sports company. (Search conducted by Defendant's counsel, May 23, 2019). A simple Google search reveals 28 different names or uses for the initials "npl" none of which are related to debt collection. The initials have 40 text messaging

definitions, is an abbreviation for a medical term; "nurse progress log," optometry; "no perception of light," and an incredibly lurid definition according to the Urban Dictionary. (Search conducted by Defendant's counsel, May 23, 2019).

Even so, accepting Plaintiff's interpretation of "npl" along with the additional new allegations do not cure the deficiencies noted by the Court. Plaintiff still fails to plausibly allege that NPL acted as a debt collector in this case. These allegations cannot plausibly state a claim for relief that NPL is a debt collector because it did not engage in conduct more than enforcing its security interest and did not use the label of the holder of a security interest as a "stalking horse" for something else. *Obduskey,* 139 S. Ct. at 1039 and 1041.

**E. Assuming, without conceding, NPL is a debt collector and the FDCPA applies, Plaintiff's claims fail because none of the communications were made in connection with the collection of a debt.**

15 U.S.C. § 1692c(b) prohibits communications with third parties without the prior consent of the consumer "in connection with the collection of any debt." Therefore, as a threshold matter in order to state a claim for relief the communication must be "in connection with the collection of any debt." In order to succeed on this claim Plaintiff must allege that the communications alleged in the SAC were "in connection with the collection" of his debt.

Not all communications from a debt collector are in connection with the collection of a debt. *See Marx v. General Revenue Corp.,* 668 F.3d 1174 (10th Cir.2011). The Sixth, Seventh, and Eighth Circuit Courts of Appeal have adopted an "animating purpose" test in determining whether a communication runs afoul of the FDCPA. Under this test "an animating purpose of the communication must be to induce payment by the debtor" in

order to amount to a communication in connection with the collection of a debt. *See Grden v. Leikin Ingber & Winters, PC,* 643 F.3d 169 (6th Cir. 2011)*; Gburek v. Litton Loan Servicing LP,* 614 F.3d 380, 385 (7th Cir. 2010); *McIvor v. Credit Control Services, Inc.,* 773 F.3d 909 (8th Cir. 2014). The Tenth Circuit, relying on *Gburek,* stated the focus is whether "the true purpose of the [communication] was to collect the debt- whether through settlement or otherwise- by placing pressure on the consumer." *Maynard v. Cannon,* 401 F. App'x 389, 395 (10th Cir. 2010).

The SAC does not allege any facts that NPL discussed the debt with Plaintiff's parents without his consent. Plaintiff signed a written authorization dated May 12, 2017 giving his consent to NPL to discuss the debt with his parents. However, the authorization was not sent to NPL until May 27, 2017. *See* Exhibit A. The email exchanges between NPL and Plaintiff's parents concerned when can NPL expect to receive the signed authorization so it could discuss the debt. NPL did not engage in any communications "in connection with the collection" of Jason's debt until it received the authorization. Paragraph 3(f)(ii) states that a representative of NPL contacted Plaintiff's parents about a written authorization "so she could 'share information on [Jason's] account.'" Likewise, Paragraph 3(f)(iii) alleges that a follow up email was sent to Plaintiff's parents about whether they were able to send the written authorization. Hence, and regardless of whether the communications were unrelated to the non-judicial foreclosure proceeding Plaintiff has not alleged facts that are sufficient to support his § 1692c claims.

## IV. CONCLUSION

For all the reasons set forth above, NPL submits the Second Amended Complaint fails to state a plausible claim for relief. It should be dismissed with prejudice.

Respectfully submitted this 24th day of May, 2019.

s/ *Irvin Borenstein*
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**CERTIFICATE OF SERVICE**

I hereby certify on Motion to May 24, 2019 I served a true and correct copy of the above and foregoing Defendant's Motion to Dismiss on counsel through the ECF system, addressed as follows to:

Blair Drazic, Esq.
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*s/ Dana VanOutryve*
Dana VanOutryve – Legal Assistant