Evans v. Select Portfolio Servicing, Inc. et al

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UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK ----------x BRET A. EVANS, JUAN A. BEHER, and JESSICA PEREZ, on behalf of themselves and all others similarly situated,

Plaintiffs, - against - SELECT PORTFOLIO SERVICING, INC.; U.S. BANK, N.A., as trustee for the J.P Morgan Acquisition Trust 2006-WMC4 Asset Backed Pass-Through Certificates, Series 2006-WMC4; BANK OF AMERICA, N.A.; and Doe Defendants 1 25,

Defendants. ----------x

MEMORANDUM & ORDER

18-CV-5985 (PKC) (SMG)

PAMELA K. CHEN, United States District Judge:

Plaintiffs Bret A. Evans, Juan A. Beher, and Jessica Perez bring this class action against Defendants Select Portfolio Servicing, Inc. , U.S. Bank, N.A. , Bank of America, N.A. , and Doe Defendants 1 25, alleging breach of contract, violation of the covenant of good faith and fair dealing, violation of the Fair Debt Collection Practices Act et seq., violation of the Real Estate Settlement Procedures Act et seq. §§ 1601 et seq., and Regulation Z thereunder, 12 C.F.R. § 226, violation of the New York General

Business Law § 349, N.Y. Gen. Bus. Law § 349, and violation of the California Unfair Competition Law , Cal. Bus. & Prof. §§ 17200 et seq. 1

Defendants SPS and U.S. Bank

1 Plaintiff Beher seeks to dismiss without prejudice all his claims against Defendant withdrawn. (Dkt. 41) and BANA (Dkt. 42) each move to dismiss For the reasons stated below, the s to

dismiss.

BACKGROUND I. Factual Allegations 2

A. Plaintiff Evans On September 28, 2006, Plaintiff Evans obtained an adjustable rate residential

mortgage loan from non-party WMC Mortgage Corp., which was later transferred to Defendant U.S. Bank, for a residential property located at 26 Cheviot Road, Southampton, NY ¶ 3, 17.) In 2009, the loan was accelerated with all amounts owed becoming due, and a foreclosure action was commenced against Plaintiff Evans by Defendant U.S. Bank in the New York Supreme Court, Suffolk County. (Id.) During the foreclosure action, Evans disputed the inclusion of improper fees, which he also challenges in this action. (Id. ¶ 3.) The state court judgment of foreclosure and sale on November 28, 2018. (Declaration of Ex.

2 The facts recited in this section are based on the allegations in the Amended Complaint, PLC typically limited to the four corners of the complaint, a court may also review, among certain other

categories, documents incorporated into the complaint by reference and documents integral to the , No. 13-CV-5410 (MKB) (RER), 2016 WL predicated on the mortgages, notes, and communications between Plaintiffs and Defendants, and the Amended Complaint cites to those documents extensively. The Court therefore considers those documents, which the parties have provided to the Court in connection with the Amended Complaint and their motion briefing, incorporated into and integral to the Amended Complaint. The Court also takes foreclosure proceeding. Nath v. JP Morgan Chase Bank, No. 15-CV-3937 (KMK), 2016 WL 5791193, at *1 (S.D.N.Y. Sept. 30, 2016) (collecting cases); see id. may . . . take judicial notice of the state- B, Dkt. 41-4, at ECF 3

2 6.) On June 1, 2013, while the foreclosure proceedings were pending, Defendant SPS became the servicing agent for Plaintiff Evan Am. Compl., Dkt. 24, ¶¶ 3, 17.)

1. Late Fees and Qualified Written Requests On April 12, 2018, Defendant SPS mailed to Plaintiff Evans a standard form mortgage statement stating [t]his account has been accelerated, which means that all outstanding amounts are [i]f payment is received after May 16, 2018, [a] $75.99 late fee will be 4

(Id. ¶ 20; Kim Decl. Ex. A, Dkt. 41-3, at ECF 8.) That mortgage statement indicated th (Am. Compl., Dkt. 24, ¶ 20; Kim Decl. Ex. A, Dkt. 41-3, at ECF 8.)

On April 30, 2018, Plaintiff Evans sent Defendant SPS a Qualified Written Request , requesting, inter alia, a detailed payment history, an accounting showing the total amount of late fees and other charges, and the default notice. (Am. Compl., Dkt. 24, ¶ 21; Kim Decl. Ex. C, Dkt. 41-5.) Defendant SPS responded to the QWR on May 14, 2018, stating, inter alia s] (Am. Compl., Dkt. 24, ¶ 22; Kim Decl. Ex. D, Dkt. 41-6, at ECF 5.)

On May 3, 2018, Defendant SPS mailed Plaintiff Evans a payoff statement representing Am. Compl., Dkt. 24, ¶ 25.) On May 15 and June 14,

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4 Because the foreclosure action initiated against Evans was still pending in April 2018, his loan continued to be serviced by SPS. (See Kim Decl. Ex. B, Dkt. 41-4, at ECF 2 6 (state court granting judgment of foreclosure and sale in November 2018).) 2018, Defendant SPS mailed similar standard form mortgage statements to Plaintiff Evans that threatened late fees. (Id. ¶¶ 26 27; Kim Decl. Ex. A, Dkt. 41-3, at ECF 11 16.)

On July 5, 2018, Plaintiff Evans sent Defendant SPS a second QWR, contesting the late fees. (Am. Compl., Dkt. 24, ¶ 29; Kim Decl. Ex. E, Dkt. 41-7.) On August 3, 2018, Defendant SPS wrote to Plaintiff Evans in response to his July 5, 2018 QWR, stating that have been addressed and resolved through our previous communications, . (Kim Decl. Ex. F, Dkt. 41-8, at ECF 4.)

2. Interest Rates According to the standard form adjustable rate mortgage agreement, Plaintiff Evans was

Dkt. 24, ¶ 36.) 2018, [Defendants] U.S. Bank and/or SPS charged Plaintiff Evans an interest rate of 8.5%, but

should have charged a lower interest rate of approximately 8.03% based on LIBOR and the terms of his standard form adjustable rate mor Id. ¶ 38.)

3. Inspection Fees On May 14, 2018, SPS stated to Plaintiff Evans that, incur fees or costs[] allowed under the terms of your Mortgage documents. These fees or servicer advances appear on

¶ 44.) Plaintiff s Id. ¶ 46.) mortgage stated that a property inspection fee would be charged only[] we can[] Id. ¶ 45.) Despite being in contact with Plaintiff Evans between June 14, 2013 and December 19, 2017, SPS charged him monthly inspection fees, totaling over $1,200, as reflected in some of the monthly statements provided by Defendants. (Id. ¶ 52; see, e.g., Kim Decl. Ex. A, Dkt. 41-3, at ECF 2, 5.) These inspection fees included twenty-nine separate charges on June 14, 2013, ranging in amounts of $14, $56, and $60. (Am. Compl., Dkt. 24, ¶ 52.)

B. Plaintiff Beher On December 12, 2006, Plaintiff Beher obtained an adjustable rate residential mortgage loan from BANA for a residential property located at 18731 Barnhart Avenue, Cupertino, CA

1, 2017, Defendant SPS became the servicing agent for Plaintiff mortgage loan. (Id.)

1. Interest Rates According to the standard form adjustable rate mortgage agreement, Plaintiff Beher was [BANA] and/or SPS charged Plaintiff

Beher an interest rate of 5.25%, but should have charged a lower interest rate of approximately Id. ¶ 37.)

C. Plaintiff Perez On or about October 5, 20 mortgage loan from Defendant BANA for a residential property located at 135 Nassau Parkway, Oceanside, NY 11572 Perez and placed Plaintiff Perez on the deed. (Am. Compl., Dkt. 24, ¶ 5.) In 2013, Angel Flores passed away and Plaintiff Perez became solely responsible for the loan. (Id.) Id.) On or about December 14, 2017, Defendant BANA assigned

its interest in the loan to Defendant U.S. Bank. (Id.)

In 2015, Plaintiff Perez missed two or three monthly mortgage payments. (Id. ¶ 32.) Once she was able to resume making the payments, she contacted Defendant SPS. (Id.) Defendant SPS instructed Plaintiff Perez to send a certified check for the full amount due to reinstate the loan as current. (Id.) However, when Plaintiff Perez did so, SPS returned the check and, upon further inquiry, informed her that it was too late to reinstate the loan because foreclosure proceedings had commenced. (Id.) In subsequent monthly mortgage statements, Defendant SPS represented that it had Id. ¶ 33.) Since then, it has refused to accept payments from Plaintiff Perez on the mortgage. (Id. ¶ 35.)

1. Late Fees Since 2015, SPS has represented in monthly mortgage statements sent to Plaintiff Perez is received after [a certain date], [a] $18.05 late fee will be charged, and has continued to make these representations as recently as April 12, 2019. (Id. ¶¶ 33, 34.)

2. Inspection Fees In at least two monthly mortgage statements dated April 13, 2017 and June 14, 2017, Defendant SPS charged Plaintiff Perez inspection fees in the amount of $15, despite being in constant contact with her since 2015. (Id. ¶ 53.) II. Procedural History Plaintiff Evans filed this action on October 25, 2018. (See generally Complaint , Dkt. 1.) Defendants SPS and U.S. Bank were served on October 31, 2018. (Summons Returns, Dkts. 8, 9.) On June 27, 2019, an Amended Complaint, inter alia, adding Plaintiffs Beher and Perez and Defendant BANA, was filed. (Dkt. 24.) Defendant BANA waived service on July 17, 2019. (Dkt. 32.) In the Amended Complaint, Plaintiffs asserted the following claims: (1) Violation of the FDCPA against Defendant SPS by Plaintiffs Evans and Perez for improperly assessed late fees and inspection fees; (2) Violation of the RESPA against Defendant SPS by Plaintiff Evans for failure to timely and adequately respond to his second QWR; (3) Violation of the TILA, and Regulation Z thereunder, against all Defendants by all Plaintiffs for failure to provide Plaintiffs with accurate information concerning the amounts due on their mortgages; (4) Violation of the New York GBL § 349 against all Defendants by Plaintiffs Evans and Perez for deceptive acts and practices, namely, representations that late fees could be charged post-acceleration and that inspection fees would be charged only as necessary; (5) Violation of the California UCL against all Defendants by Plaintiff Beher for the imposition of unreasonable inspection and late fees; (6) Breach of contract against all Defendants by all Plaintiffs for improperly assessed late fees, inspection fees, and interest rates; and (7) Breach of good faith and fair dealing against all Defendants by all Plaintiffs for improperly assessed late fees, inspection fees, and interest rates. (Am. Compl., Dkt. 24, ¶¶ 74 140.) All Defendants thereafter moved to dismiss all claims in the Amended Complaint; their motions were fully briefed on October 11, 2019. (Dkts. 41 48.)

LEGAL STANDARD To survive a motion to dismiss pursuant to Federal Rule of Civil Procedure

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly laim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is Id. (quoting Twombly standard is Id. (citing Twombly, 550 U.S. at 556).

-specific Id. at 679 (citation omitted). In addressing the sufficiency of a complaint, a court must accept the well-pleaded factual allegations contained within the comp conclusory statements unsupported by assertions of facts[,] or legal conclusions . . . presented as

factual allegations. See In re Livent, Inc. Noteholders Sec. Litig., 151 F. Supp. 2d 371, 404 (S.D.N.Y. 2001) (citing Papasan v. Allain, 478 U.S. 265, 286 (1986)). Additionally, a court need not feel constrained to accept as truth conflicting pleadings that make no sense, or that would render a claim incoherent, or that are contradicted either by statements in the complaint itself or by documents upon which its pleadings rely, or by facts of which the court may take judicial Id. at 405 06 (collecting cases). At the pleadings stage, a court must limit its inquiry to the facts alleged in the complaint, the documents attached to the complaint or incorporated therein Id. at 404

(citing Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 44 (2d Cir. 1991)).

DISCUSSION I. Collateral Estoppel and Res Judicata

and res judicata because the complaint alleges disputed and continues to dispute inclusion of the improper fees challenged in this action as a part (Defendants SPS and U.S. Bank Motion to Dismiss the First Amended Complaint SPS Br. , Dkt. 41, at 10 11 (quoting Am. Compl., Dkt. 24, ¶ 3).) The Court disagrees.

A. Collateral Estoppel

Blumatte v. Farthing, 320 F. Appx 68, 70 (2d Cir. 2009) (quoting Wight v. BankAmerica Corp., 219 F.3d 79, 87 88 (2d Cir. 2000)).

Under New York law, collateral estoppel bars relitigation of an issue when (1) the identical issue necessarily was decided in the prior action and is decisive of the present action, and (2) the party to be precluded from relitigating the issue had a full and fair opportunity to litigate the issue in the prior action. Charter Oak Fire Ins. Co. v. Electrolux Home Products, Inc., 882 F. Supp. 2d 396, 401 (E.D.N.Y. 2012) (quoting In re Hyman collateral estoppel bears the burden of proving the identity of the issues. Id. (quoting Khandhar

v. Elfenbein, 943 F.2d 244, 247 (2d Cir. 1991)).

In advancing this argument, Defendants rely solely on the allegation in the complaint that Plaintiff Evans contested the improper fees in the state court foreclosure action, and asserts that court Br., Dkt. 41, at 10.) However, the foreclosure action complaint, answer, and state court 5

order provided by Defendants do not contain any reference to improper fees or rates. (See Kim Decl. Ex. B, Dkt. 41-4.) Plaintiff Evans may well have contested the improper fees in his arguments in the foreclosure action, but there is no indication in the record currently before the Court that the state court reached a decision on any claims raised in, or issues relevant to, this case. Therefore, with respect to collateral estoppel, Defendants fail to carry their burden of proving that identical issues were decided in the state court foreclosure action. See Mercado v. Playa Realty Corp., No. 03-CV-3427 (JO), 2005 WL 1594306, at *6 (E.D.N.Y. July 7, 2005) (declining to apply collateral estoppel where violations

B. Res Judicata res judicata, bars the subsequent litigation of any Citigroup, Inc. v. Abu Dhabi Inv. Auth., 776 F.3d 126, 128 n.1 (2d Cir. 2015) (citing , 452 U.S. 394, 398 (1981)). The party asserting res judicata bears the burden of proving: previous action involved an adjudication on the merits; (2) the previous action involved the

plaintiffs or those in privity with them; [and] (3) the claims asserted in the subsequent action were, Bey v. City of New York 5 (2d Cir. 2011) (summary order) (t of Corr., 214 F.3d 275, 285 (2d Cir. 2000)) (citation omitted).

5 The state court order, dated November 28, 2018, resolved various motions filed by the parties during the foreclosure action and issued a judgment of foreclosure and sale in Defendant -4, at ECF 2 6.)

As explained supra, Blumatte,

(quoting Wight, 219 F.3d at 87 88). . . . doctrines Greenwich Life Settlements, Inc. v. ViaSource Funding Grp., LLC, 742 F. Supp. 2d 446, 452 53 (S.D.N.Y. 2010) (collecting cases New York uses [a] transactional approach to res judicata, meaning parties are prevented from raising in a subsequent proceeding any claim they could have raised in the prior one, where all of the claims arise from the same underlying transaction. , 566 F. Supp. 2d 283, 285 86 (S.D.N.Y. 2008) (emphasis added) (quoting Schulz v. Williams, 44 F.3d 48, 53 (2d Cir. 1994)). In determining whether two claims involve the same transaction, New York courts Id. at 286 (internal quotation and citation omitted).

[A] party is not free to remain silent in an action in which she is the defendant and then bring a second action seeking relief inconsistent with the judgment in the first action by asserting what is simply a new legal theory. Harris v. BNC Mortg., Inc. 2018) (summary order) (alteration and quotation omitted). However, counterclaim rule preserves the right of a party to bring a claim that it could have brought as a counterclaim in a prior action, as long as doing so would not impair the rights or

interests Guido v. Wells Fargo Bank, N.A., No. 16-CV-1568 (VSB), 2017 WL 5515859, at *3 (S.D.N.Y. Mar. 21, 2017) (internal quotation marks and citation omitted), ; see also N.Y. Civ. Prac. L. & R. § 3019(a). At the same time, the mere existence of a foreclosure judgment does not preclude all possible claims a mortgagor may raise in relation to his debt. See Utreras v. Chicago Title Ins. Co., No. 12-CV- district have found violations of federal predatory lending statutes to arise out of separate transactions than

omitted)); Schuh v. Druckman & Sinel, LLP, 602 F. Supp. 2d 454, 467 (S.D.N.Y. 2009) (finding an complain[ed] instead that the [collection] letter makes false statements about the judgment in

(emphasis omitted); Lopez v. Delta Funding Corp., No. 98-CV-7204 (CPS), 2000 WL 36688915, at *9 (E.D.N.Y. June 6, 2000) grant remedies that have no effect on the state court foreclosure judgment, such as statutory and punitive damages under TILA.

Here, Defendants have failed to prove for the purposes of res judicata that the claims asserted by Plaintiff Evans were adjudicated in the foreclosure action, as his answer in the foreclosure action did not raise the claims asserted here at all. (See Kim Decla. Ex. B, Dkt. 41-4, at ECF 9 13.) Nor do Defendants argue that Plaintiff Evans could have raised these claims as counterclaims in the foreclosure action. In fact, even though Plaintiffs preemptively argue that Plaintiff Evans was not obligated to raise these claims in the foreclosure action permissive counterclaim rule in their opposition brief (see

S , Dkt. 43, at 32 34), Defendants fail to address the issue in their reply or res judicata (see Defendants SFS Reply in Support of their Motion to Dismiss SPS Reply , Dkt. 48, at 1 2). See Guido, 2017 WL 5515859, at *4 (declining to apply res judicata terclaim rule] or the legal authority Plaintiffs cite, [c]omplaint are impermissible in light of the fact that New York is a permissive counterclaim . 2017).

Furthermore, based on the incomplete state court record submitted by Defendants, the Court cannot determine whether the relief sought by Plaintiff Evans in this action would necessarily be inconsistent with the foreclosure judgment. The state complaint and answer were filed in 2009, predating the events that give rise to the present claims. (See Kim Decl. Ex. B, Dkt. 41-4, at ECF 6 13.) In its November 2018 order (see supra note 5), the state court declined to inter alia, lack of personal jurisdiction and lack of personal service, and granted the bank final judgment of foreclosure. (See id. at 1 5.) Because the order does not reflect whether or not the foreclosure judgment took into account the improper fees that arose after the state action complaint, the Court cannot determine whether granting the relief requested here would Guido, 2017 WL 5515859, at *3 (quoting Henry Modell & Co. v. Minister, Elders & Deacons of

Reformed Protestant Dutch Church of N.Y.C., 68 N.Y.2d 456, 462 n.2 (1986)); cf. Graham v. Select Portfolio Servicing, Inc., 156 F. Supp. 3d 491, 511 (S.D.N.Y. 2016) (findi claims precluded by res judicata because plaintiff challenged the amount due in the foreclosure judgment as improperly

calculated). Therefore, because Defendants do not show or even argue that the present action constitutes an attack on the foreclosure judgment, the Court finds that the claims are not barred by res judicata. See Harris Dolan v. Select Portfolio Servicing, Inc., No. 13-CV-1552 (PKC), 2014 WL 4662247, at *4 (E.D.N.Y. Sept. 18, 2014) cf. Lopez, 2000 im rule would [] save from the bar of res judicata those claims for separate or different relief that could have been but were not interposed 6 II. FDCPA Claims

Plaintiffs Evans and Perez assert FDCPA claims against Defendant SPS on the basis of various statements Defendant SPS made in the mortgage statements. (Am. Compl., Dkt. 24, ¶¶ 85 90.) In order to state an FDCPA claim, a plaintiff must plead that

(1) the plaintiff [is] a consumer who allegedly owes the debt or a person who has been the object of efforts to collect a consumer debt, [] (2) the defendant collecting the debt is [] [an] act or omission in violation of FDCPA requirements. Zirogiannis v. Seterus, Inc., 221 F. Supp. 3d 292, 302 (E.D.N.Y. 2016) (internal quotation and citation omitted), SPS raises several arguments in support of its motion to dismiss Plaintiffs Evans and Perez FDCPA claims pursuant to Rule 12(b)(6).

A. Statute of Limitations

(d).

Scott v. Greenberg, No. 15-CV-5527 (MKB), 2017 WL 1214441, at *5 (E.D.N.Y. Mar. 31, 2017) (ellipsis omitted) (quoting Benzemann v. Citibank N.A., 806 F.3d 98, 101 (2d Cir. 2015)). 6

Because the Court does not find that Defendants have satisfied their burden with respect to the third element of res judicata SPS was not involved in the foreclosure action or in privity with any party in that action. Puglisi v. Debt Recovery Sols., LLC, No. 08-CV-5024 (JFB) (WDW), 2010 WL 376628, at *3 (E.D.N.Y. Jan. 26, 2010) (citation and alteration omitted).

1. Late Fees Defendant SPS claims that because monthly statements containing the allegedly false information about late fees were sent to Plaintiffs Evans and Perez as early as, respectively, 2016 and 2015, i.e., outside the FDCPA -year limitations period, FDCPA claims in this case, which are based on 2018 and 2019 monthly statements, are time-

barred. (SPS Br., Dkt. 41, at 18 19.) The Court disagrees.

Here, although Plaintiffs Evans and Perez began receiving monthly statements containing the same allegedly false late-fee information before their respective one-year limitations periods, Defendant SPS continued to send these statements each month thereafter to Plaintiffs Evans and Perez until June 2018 (Evans) and April 2019 (Perez). (Am. Compl., Dkt. 24, ¶¶ 27, 33 34.) Thus, some of the false statements were sent within the statute of limitations period while some were sent outside of it. and

others occurring after the statute of limitations has expired, a court must determine if the non-

time- Scott, 2017 WL 1214441, at *5 (citations omitted). [SPS] may have committed multiple offenses by frequently threatening Plaintiffs does not mean that violations that would otherwise fall within the statute of limitations are time- Basile v. I.C. Sys., Inc., No. 08-CV-42(S) (WMS), 2011 WL 4368510, at *4 (W.D.N.Y. Sept. 19, 2011) [Defendant SPS] first made similar statements before the one-year period does not bar [P]laintiffs Ellis v. Gen. Revenue Corp., 274 F.R.D. 53, 58 (D. Conn. 2011). Ehrich v. RJM Acquisitions LLC, No. 09-CV-2696 (BMC) (RER), 2009 WL 4545179, at *2 n.4 (E.D.N.Y. Dec. 4, 2009) (citation omitted) -barred. See Puglisi were within the statute of limitations period to proceed but barring those that occurred outside the period).

Defendant SPS relies on a string of cases suggesting that FDCPA claims based on false representations cannot be revived with each new communication. This reliance is misguided. These cases exclusively concern s to restart the statute of limitations based on false representations made later in court proceedings, where the only acts that allegedly violated the FDCPA occurred outside of the limitations period. See, e.g., Scott, 2017 WL 1214441, at *5 (finding plaintiff cannot revive the time- a default judgment); Sierra v. Foster, 48 F. Supp. 2d 393, 395 (S.D.N.Y. 1999) (where defendants have sent a series of threatening letters, each of which violate the FDCPA and

only some of which are time-); Oliver v. U.S. Bancorp, No. 14-CV-8948 (PKC), 2015 WL 4111908, at *2 (S.D.N.Y. July 8, 2015) (llection suit is not a continuing violation under the FDCPA-if the same alleged misrepresentation is . Unlike these cases, each of the late-fee threats Defendant SPS sent to Plaintiffs Evans and Perez could form the basis of a separate FDCPA violation.

2. Inspection Fees Defendant SPS also argues fees is time-barred. (SPS Br., Dkt. 41, at 19.) Plaintiff Evans was the only named plaintiff in the original complaint filed on October 25, 2018, and the original complaint did not assert any claim based on inspection fees. (See generally Compl., Dkt. 1.) Plaintiff Perez was added as a plaintiff and brought her claims on June 27, 2019. (See generally Am. Compl., Dkt. 24.) She alleges that Defendant SPS charged her inspections fees in two monthly mortgage statements dated April 13, 2017 and June 14, 2017, both of which were made before the one-year limitations period. (Id. ¶ 53.) 7

Plaintiffs do not address this issue at all in their opposition brief. The Amended Complaint alleges merely (Am. Compl., Dkt. 24, ¶ 54.) addressed

whether FDCPA claims can be equitably tolled, [though] district courts have applied the equitable tolling doctrine in FDCPA cases. Scott, 2017 WL 1214441, at *7 (collecting cases); see also Benzemann v. Houslanger & Assocs., PLLC, 924 F.3d 73, 82 (2d Cir. 2019 cert. denied, 140 S. Ct.

82 (2019). Even assuming that equitable tolling applies, the Court finds that and conclusory allegation insufficient to toll the statute of limitations. See Singh v. Wells 2011) (summary order); see also id.

id. fraudulent concealment, a plaintiff must either plausibly allege that the defendant took affirmative

a nature as to be self- internal quotation and citation omitted)). Therefore, the Court inspection fees is time-barred.

7 Plaintiff Evans also asserts an FDCPA claim based on improperly imposed inspection -barred, presumably because, unlike Plaintiff Perez, Plaintiff Evans was charged inspection fees until December 2017. And unlike regarding the threats of late fees, Defendant SPS does not argue that the charging of inspection fees was a single continuing violation.

B. TILA Exemption Defendant SPS argues statement issued pursuant to the [TILA] cannot support a[n] FDCPA claim because the statement is not a debt collection communicat (SPS Br., Dkt. 41, at 19.) For support, SPS cites to several opinions, including one from the Second Circuit, finding that monthly mortgage statements sent in compliance with the TILA are not attempts to collect a debt and are therefore not subject to the FDCPA. See, e.g., Hill v. DLJ Mortg. Cap., Inc., No. 15-CV-3083 (SJF) (AYS), 2016 WL 5818540, at *8 (E.D.N.Y. Oct. 5, 2016), aff d, 689 F. Appx 97 (2d Cir. 2017); Wagoner v. EverHome Mortg. Inc., No. 17-CV-8081 (JLL), 2018 WL 2230553, at *4 (D.N.J. May 16, 2018); Green v. Specialized Loan Servicing LLC ; Brown v. Select Portfolio Servicing, Inc., No. 16-CV-62999 (WPD), 2017 WL 1157253, at *4 (S.D. Fla. Mar. 24, 2017). However, those cases did not foreclose the possibility that a monthly statement could also be a debt collection letter. See Hill v. DLJ Mortg. Cap., Inc. the statements at issue in this case

contain any similar debt- Brown, 2017 WL 1157253, at *3 ([P]eriodic statements required by TILA can constitute debt collection activity if the statement contains debt (internal quotation and citation omitted)); see also Green 784 (finding that m the Mortgage Statement, beyond what

is required by TILA, [] .

The mortgage statements at issue here contain explicit debt collection language. (See, e.g., Kim Decl. Ex. A, Dkt. 41-3, at EC . All .) In support of its argument, Defendant SPS cites to two Southern District of Florida decisions, Brown, 2017 WL 1157253, and Jones v. Select Portfolio Servicing, Inc., No. 18-CV-20389 (UU), 2018 WL 2316636 (S.D. Fla. May 2, 2018), involving substantively similar statements to those at issue here. Both the Brown and Jones courts found that the statements there were not debt collection letters. See Brown, 2017 WL 1157253, at *4; Jones, 2018 WL 2316636, at *4. The court in Jones specifically noted that other district courts have found language such as this is an attempt to collect a debt could convert a monthly statement into a debt collection communication in violation of the FDCPA a different approach, requiring debt collection language that is more demanding and severe. Jones, 2018 WL 2316636, at *4. However, that approach is inconsistent with the approach in this Circuit. For instance, the Second Circuit found in Carlin v. Davidson Fink LLP that a letter was connected to debt collection because, most notably, the letter states: PLEASE BE ADVISED THAT DAVIDSON FINK LLP IS A LAW FIRM ACTING AS A DEBT COLLECTOR.

THIS IS AN ATTEMPT TO COLLECT A DEBT. ANY INFORMATION OBTAINED FROM YOU WILL BE USED FOR THAT PURPOSE. 852 F.3d 207, 215 (2d Cir. 2017) (record citation omitted).

Therefore, based on the precedent in this Circuit, because the monthly statements that Defendant SPS sent to Plaintiffs contained explicit debt collection language, the Court finds that these statements may form the basis of an FDCPA claim. See Izmirligil v. Select Portfolio Servicing, Inc., No. 18-CV-7043 (PKC) (LB), 2020 WL 1941319, at *10 n.25 (E.D.N.Y. Apr. 22, may support an FDCPA claim); see also Nichols v. BAC Home

Loans Servicing LP, No. 13-CV-224, 2013 WL 5723072, at *8 (N.D.N.Y. Oct. 18, 2013) (construing defendant monthly mortgage statement as an attempt to collect a debt).

C. Debt Collector interstate commerce or the mails in any business the principal purpose of which is the collection

of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or Id. §

Zirogiannis, 221 F. Supp. 3d at 302 (citation tgage servicer obtains a loan that is not in default, it is not a Id. (collecting cases).

Defendant SPS argues that Plaintiff Perez has failed to allege that her mortgage was in default when SPS began servicing the debt and that Defendant SPS therefore was a debt collector with respect to her claim. (SPS Br., Dkt. 41, at 20 21.) The Court agrees.

The Amended Complaint alleges in only conclusory fashion that Defendant SPS was a debt collector, and does not present any fact that would make that allegation plausible with respect to collects defaulted debts for others and the debts are in default when SPS first becomes involved

o the contrary, the Amended Complaint suggests that, if anything, Plaintiff Id. ¶ 32 (noting that when Plaintiff Perez fell behind on the payments, she contacted SPS and later sent a certified check for the full amount due).) Because the Court is unable to conclude that the Amended Complaint contains enough facts to make it plausible that [SPS] began servicing [ ] only after [] default, Perez has failed to plead that Defendant SPS was a debt collector with respect to her FDCPA claims. See Weir v. Cenlar FSB, No. 16-CV-8650 (CS), 2018 WL 3443173, at *8 (S.D.N.Y. July 17, 2018) (internal quotation marks, alterations, and citation omitted) (dismissing the FDCPA claim where plaintiff made only conclusory allegations that defendant was a debt collector); Herrera v. Navient Corps., No. 19-CV-6583 (AMD) (VMS), 2020 WL 3960507, at *4 (E.D.N.Y. July 13, 2020) (dismissing the FDCPA claim because plaintiff failed to allege that the debt servicer acquired the loan after default and alleged only that [defendant] [was] a debt collector because it regularly attempts to collect third-party debts and

has engaged in debt collection activities related to outstanding and delinquent student loans on (internal quotations and record citation omitted)).

Plaintiff Perez argues that the allegation that Defendant SPS was a debt collector is sufficient to satisfy this element at the pleadings stage. Her only support for this argument is a case where the court found that such allegation was sufficient for a motion to amend under Rule 8(a) of the Federal Rules of Civil Procedure. See McCrobie v. Palisades Acquisition XVI, LLC, No. 15-CV-18 (LJV) (MJR), 2019 WL 4023367, at *4 (W.D.N.Y. Aug. 23, 2019). This argument ignores the fact that the Rule 8(a) pleading requirements for a motion to amend are more liberal than the Rule 12(b)(6) standard in connection with a motion to dismiss. See Obot v. Sallie Mae 844, 846 (2d Cir. 2015) (summary order). Therefore, the Court finds that Plaintiff Perez has failed to sufficiently allege that Defendant SPS was a debt collector as to her mortgage for purposes of her FDCPA claims. 8

D. Inspection Fees Defendant SPS asserts serve as the basis for [an FDCPA] claim because it was entitled to inspect the property

, and was required under the 2015

8 Because all of Plaintiff Pere fees. (See SPS Br., Dkt. 41, at 21.) Fannie Mae Servicing Guide to inspect a property where a 9

has not been established. (SPS Br., Dkt. 41, at 11 13.) Defendant SPS argues that a QRPC was not established between SPS and Plaintiffs, Plaintiffs ha[d] not made a commitment to resolv[ing] generally to the Amended Complaint without specifying any allegation therein. (Id. at 13 (citing Am. Compl., Dkt. 24).)

Contrary to Defendant representations, claim is based on the allegedly unreasonable manner in which SPS charged inspection fees. The mortgage reasonable or appropriate to protect [the] in original).) Plaintiff Evans alleges [him] monthly inspection fees, and sometimes charged multiple monthly inspection fees and multiple inspections on the same day, despite being in contact with [him] he argues was not reasonable or appropriate. (Id. ¶ 45.) Whether Defendant was objectively reasonable is a question of fact best reserved for the jury. See Pettitt v. Chiari &

Ilecki, LLP, 419 F. Supp. 3d 627, 636 (W.D.N.Y. 2019) (finding reasonableness under the FDCPA was a question of fact reserved for the jury). At the pleadings stage, Plaintiff Evans has sufficiently stated his FDCPA claim on the basis of unreasonable inspection fees.

* * * In sum, the Court dismisses all of for failure to sufficiently allege that Defendant SPS was a debt collector with respect to her mortgage, and also her inspection-fees claim for being time-barred. However, against

9 According to Defendants, a QRPC communicating with the borrower, co- (SPS Br., Dkt. 41, at 12 (alteration in original); Kim Decl. Ex. J, Dkt. 41-12, at ECF 25.) Defendant SPS, based on improperly assessed late fees and inspection fees, will proceed to discovery. III. TILA Claims

Plaintiffs bring TILA claims against all Defendants for charging unnecessary late fees, inspection fees and inaccurate interest rates, and representing those false charges to Plaintiffs and Class members in the periodic monthly mortgage statements Defendants argue that these claims are time-barred. (SPS Br., Dkt. 41, at 31 32.)

ar from the Latouche v. Wells Fargo Home Mortg. Inc. 11, 12 13 (2d Cir. 2018) (summary order) (quoting 15 U.S.C. § 1640(e)). It is well-settled law that in closed-end credit transactions, 10

like the one[s] at issue [here], the date of the occurrence of violation is no later than the date the plaintiff enters the loan agreement or, possibly, when defendant performs by transmitting the funds to plaintiffs. Cardiello v. The Money Store, Inc., No. 00-CV-7332 (NRB), 2001 WL 604007, at *3 (S.D.N.Y. June 1, 2001) (footnote omitted) (collecting cases), aff d sub nom. Cardiello v. The Money Store, 29 F. Appx 780 (2d Cir. 2002).

Latouche v. Well[s] Fargo Home Mortg. Inc., No. 16-CV-1175 (ERK), 2017 WL 8776975, at *6 (E.D.N.Y. Aug. 25, 2017) (citation omitted),

10 -end credit transaction is one where the finance charge is divided into the term of the loan and incorporated into time payments, and includes a completed loan such as a mortgage Grimes v. Fremont Gen. Corp., 785 F. Supp. 2d 269, 286 (S.D.N.Y. 2011) (internal quotati -end credit transaction is one in which the creditor reasonably contemplates repeated transactions, and provides for a finance charge which may be computed from time to time on the outstanding unpaid balance, Id. (internal quotation, ellipses, and citation omitted). report and recommendation adopted (Nov. 9, 2017), Mortg. Inc.

circumstances prevented a party from timely performing a required act, and the party acted with

Latouche (internal quotation, ellipses, alterations, and citations omitted). a plaintiff must show that some extraordinary circumstance, such as fraudulent concealment of the

cause of action, stood in the way of bringing suit and that she had been pursuing her rights Id. (citing Ellul v. Congregation of Christian Bros., 774 F.3d 791, 801 (2d Cir. 2014)). is not enough

See McAnaney v. Astoria Fin. Corp., No. 04-CV-1101 (JFB) (WDW), 2007 WL 2702348, at *9 (E.D.N.Y. Sept. 12, 2007) (internal quotation, alteration, citation, and footnote omitted)).

Plaintiffs commenced this action on October 25, 2018, more than ten years after they entered into

their respective mortgage agreements. (Compare Compl., Dkt. 1, with Am. Compl., Dkt. 24, ¶¶ 3 5.) Because the mortgages are closed-end credit transactions, the statute of

limitations should be measured from the date each mortgage statement was made, relying on a Opp., Dkt. 43, at 25 (citing Schwartz v. HSBC Bank USA, N.A., 160 F. Supp. 3d 666, 679 81 (S.D.N.Y. 2016)).) That case is inapposite. -settled - - McAnaney, 2007 WL 2702348, at *6 (citations omitted). Therefore, date of the in this case was when each the statute of limitations for their TILA claims has thus expired. See Cardiello,

2001 WL 604007, at *3 (collecting cases); see also McAnaney, 2007 WL 2702348, at *6 limitations should be measured from when plaintiff entered into the loan agreement).

Plaintiffs also argue that the statute of limitations should be equitably tolled because of

to respond to consumers Opp., Dkt. 43, at 24.) Specifically, Plaintiffs rely on duct, including (1) about his challenge to the threat of

late fees, but failing to do so (Am. Compl., Dkt. 24, ¶ 30), and (2) instructing Plaintiff Perez to send a check for the full amount due, but then refusing to accept the check or any payment from her (id. ¶ 32). (See The Amended Complaint also alleges broadly that Defendants[] (Am. Compl., Dkt. 24, ¶ 54.)

First, t requests for and [] collection of the disputed fees [do] not constitute affirmative steps intended to

McAnaney, 2007 WL 2702348, at *10 (emphasis omitted). Second, umbled together the charges and fees (made for the first time in their motion responses) concealed the true nature of the fees do not show an act of concealment either. See Latouche, 752 conclusory allegations of non-disclosure, such as hidden costs in documents concerning purchase of the premises, do not amount to the sort of extraordinary (citation omitted)); Gorbaty v. Wells Fargo Bank, N.A. , No. 10-CV-3291 (NGG) (SMG), 2014 WL 4742509, at *12 (E.D.N.Y. Sept. 23, Lastly, failure to respond to inquiries and refusal to accept payments cannot be reasonably perceived as efforts to prevent Plaintiffs from suing in time. See McAnaney, 2007 WL 2702348, at *9 (stating that plaintiff must plead wrongdoing upon which the plaintiffs claim is founded, to prevent, by fraud or deception, the

(internal quotation and citation omitted)).

-barred and therefore dismissed. 11 IV. RESPA Claims

Plaintiff Evans brings a RESPA claim against Defendant SPS based on its alleged failure s second QWR. 12

Defendant SPS argues that its response was timely and adequate and that Evans failed to allege any damages. (SPS Br., Dkt. 41, at 28 29.) Assuming, without deciding, that Plaintiff Evans has adequately alleged Defendant

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12 To the exte response to the first QWR, the Court considers that claim abandoned since Plaintiffs failed to See SPS Br., Dkt. 41, at 26 27 (arguing that the first QWR cannot serve as a basis for a RESPA claim because it was sent to the wrong address).) See Robinson v. Fischer, No. 09-CV-8882 (LAK) (AJP), 2010 WL the discretion to deem a claim abandoned when a defendant moves to dismiss that claim and the plaintiff fails to address in their Div. 1181 Amalgamated Transit Union v. R & C Transit, Inc., No. 16-CV-2481 (ADS) (ARL), 2018 WL 794572, at *4 (E.D.N.Y. Feb. 7, 2018) (collecting cases). insufficient response to his QWR, the Court nonetheless finds that his RESPA claim fails because he has not alleged actual damages.

To survive a motion to dismiss, a plaintiff bringing a Section 2605 [RESPA] claim must,

actual damages that he or she sustained as a result of defendan Castro v. Bank of N.Y. Mellon for CWalt Inc., No. 17-CV-4375 (JS) (GRB), 2018 WL 4158344, at *5 (E.D.N.Y. Aug. 30, 2018) (internal quotation marks and citation omitted); Dolan v. Select Portfolio Servicing, No. 03-CV-3285 (PKC) (AKT), 2016 WL 4099109, at *5 6 (E.D.N.Y. Aug. 2, 2016). en the claim involves a failure to respond to a QWR, the complaint must offer Id. (internal quotation marks, alteration, and citation omitted). , No.

10-CV-3291 (NGG) (SMG), 2012 WL 1372260, at *5 (E.D.N.Y. Apr. 18, 2012) (internal quotation and citation omitted). . . . caused damages without specifying how those damages were caused[] is not enough to survive a

Bonadio v. PHH Mortg. Corp., No. 12-CV-3421 (VB), 2014 WL 522784, at *6 (S.D.N.Y. Jan. 31, 2014) (internal quotation marks, alteration, and citation omitted).

uncorrected late fees which have been charged to his mortgage account, incorrect interest rates,

(Am. Compl., Dkt. 24, ¶ 128.) The Court first notes that the monthly mortgage statements

submitted by Defendant SPS show that SPS did not assess any late fees during the time Evans sent his QWR and refused to pay Compare Kim Decl. Ex. A,

Dkt. 41-3, at ECF 8 (April 12, 2018 statement demanding $835.89 for unpaid late charges), with id. at ECF 11 (May 15, 2018 statement demanding the same amount for unpaid late charges), and id. at ECF 14 (June 14, 2018 statement demanding the same amount for unpaid late charges).) Therefore, Plaintiff Evans has not shown that he was charged any late fees as a result of failure to adequately

respond to his QWR. 13

Because Evans was not billed for more late fees, he cannot show actual damages on this basis. As for the allegedly incorrect interest rates, second QWR requested information related to late fees, payoff statements, and default notice, but

did not mention interest rates. Evans has not explained, and indeed does not defend in his briefing, any incorrect interest rate. (See Pl Opp., Dkt. 43, at 28 29.) Therefore, Plaintiff Evans has failed to show actual damages based on any charges he suffered untimely and inadequate response to the second QWR. Plaintiff Evans also argues that he incurred costs as a result of Defendant August 3, 2018 response to the second QWR the Amended Complaint (Am. Compl., Dkt. 28, ¶ 128). (, at 28.) incurred after an incomplete or insufficient response are recoverable under RESPA, but costs

incurred before the violation occurred, such as the expenses of preparing an initial request for

13 The case Plaintiff Evans relies on is inapposite, because there the defendant misapplied ilure to correct the charges caused the plaintiff to be billed more than he owed. See Kapsis v. Am. Home Mortg. Servicing Inc., 923 F. Supp. 2d 430, 448 (E.D.N.Y. 2013). Tanasi v. CitiMortgage, Inc., 257 F. Supp. 3d 232, 271 (D. Conn. 2017) (internal quotation marks and citation omitted). Plaintiffs claim in their opposition brief that Evans suffere [-]up Opp., Dkt. 43, at 28.) Contrary to this representation, the Amended Complaint is devoid of any allegation that Evans prepared and mailed a follow-up letter. The two paragraphs in the Amended Complaint to which Plaintiff Evans seemingly cites for support are, in fact, unrelated to this issue. (See SPS Opp., Dkt. 43, at 28 (citing Am. Compl. ¶¶ 102, 106); Am. Compl., Dkt. 24, ¶¶ 102 (asserting actual harm resulting from GBL violation), 106 (asserting).) Therefore, Plaintiff Evans has not alleged actual damages incurred after Defendaallegedly insufficient response to the second QWR. To the extent that Evans asserts costs arising from this actual damages [because] [i]f such were the case, every RESPA suit would inherently have a claim

Gorbaty II, 2014 WL 4742509, at *6 (E.D.N.Y. Sept. 23, 2014) (internal quotation, citation, and alteration omitted); see also Jackson v. Caliber Home Loans, No. 18-CV-

fees were considered actual damages, it would render superfluous § 2605(f)(3), a provision

Accordingly, Plaintiff Evans has failed to show any actual damages resulting from and thus cannot state his RESPA claim. 14

14 of both actual and statutory damages, proof of actual damages is mandatory to recover on a § 2605(e) V. Breach of Contract

Plaintiffs assert breach of contract claims against all Defendants on the basis that Defendants charged impermissibly high interest rates, improper late fees, and/or inspection fees. (Am. Compl.,

Dkt. 24, ¶¶ 74 77.) Defendants raise several arguments in support of dismissing these claims. (SPS Br., Dkt. 41, at 5 7.)

Donnenfeld v. Petro, Inc., 333 F.

Supp. 3d 208, 218 (E.D.N.Y. 2018) (quoting Eternity Glob. Master Fund Ltd. v. Morgan Guar. Tr. Co. of N.Y., 375 F.3d 168, 177 (2d Cir. 2004)).

A. Nonperformance w, [a] [p]laintiff is required Harte II, 2016 WL 3647687, at *5 (collecting cases).

Defendants argue that Plaintiffs Evans and Perez cannot state a breach of contract claim because they failed to make mortgage payments and thus failed to perform under the mortgage agreements. (SPS Br., Dkt. 41, at 13 14.) Plaintiffs Evans and Perez concede that they failed to make certain payments, but argue that Defendants have waived the defense of non-performance. They rely on several out-of-circuit decisions for the proposition that a mortgagor may still bring a breach of contract claim after breaching the mortgage agreement if the lender elects to continue the agreement by commencing a foreclosure action. (Id. at 5 6.)

, No. 16-CV-246 (MAD) (CFH), 2017 WL 395120, at *8 (N.D.N.Y. Jan. 27, 2017) (internal quotation marks, alteration, and citation omitted). Thus, any demand for statutory damages does not save his RESPA claim. However, this position has not been adopted by New York courts and has, in fact, been rejected in this district. See Harte v. Ocwen Fin. Corp. , No. 13-CV-5410 (MKB) (RER), 2016 WL 11120941, at *8 (E.D.N.Y. Mar. 11, 2016), report and recommendation adopted in part, No. 13-CV-5410 (MKB) (RER), 2016 WL 1275045 (E.D.N.Y. Mar. 31, 2016), and report and recommendation adopted, No. 13-CV-5410 (MKB) (RER), 2016 WL 3647687 (E.D.N.Y. July 1, 2016); see also Harte II ith little guiding authority, the Court relies (footnote omitted)).

Additionally, as Defendants correctly point out, all of the out-of-circuit decisions on which Plaintiffs rely involved a different scenario than the present action, and analyzed whether, by force- placing insurance on the mortgaged to maintain insurance as a defense to breach of contract claims. (SPS Reply, Dkt. 48, at 3 n.1.)

The one case cited by Plaintiffs from this Circuit stands simply non-breaching party elects to continue the contract, he may not at a later time renounce his election

and seek to terminate based on the prior bre See , 862 F. Supp. 1188, 1196 (S.D.N.Y. 1994) (citations and alteration omitted). That case did not involve mortgage loans and did not hold that nonperformance may be excused when the lender commenced a foreclosure action. See id.

Therefore, Plaintiffs Evans and Perez have failed to allege that they performed under the agreement and cannot state a breach of contract claim. See Harte II, 2016 WL 3647687, at *5 for nonperformance

where the lender initiated a foreclosure action after the borrower failed to make payments); see also Nichols, 2013 WL for nonperformance where the servicer continued to impose fees after the borrower failed to make payments); Bravo v. MERSCORP, Inc., No. 12-CV-884 (ENV) (LB), 2013 WL 1652325, at *5 (E.D.N.Y. Apr. 16, by making mortgage payments] under the contract, plaintiff can

B. Damages Defendants argue that Plaintiffs have failed to allege damages because they do not allege that they paid any of the allegedly improper fees or interest. (SPS Br., Dkt. 41, at 14 15.) Because the Court has found that Plaintiffs Evans and Perez cannot state their breach of contract claims, the Court considers this argument only with respect to

show, on a motion to dismiss, that it actually sustained Kapsis, 923 F. Supp. 2d at 450 (internal quotation, alterations,

and citation omitted). 15

Unlike with respect to Plaintiffs Evans and Perez, the Amended Complaint does not state one way or the other whether Plaintiff Beher properly made mortgage payments pursuant to his loan agreement. Because Plaintiff Beher has pleaded that Defendants imposed

15 state law claims. Defendants cite only to New York cases, whereas Plaintiffs cite to New Jersey, though the Beher Property is located in California. (See Am. Compl., Dkt. 24, ¶ 4.) Plaintiff

law provision. (See Beher Note, Dkt. 24-2.) If California law applies, the Court would nonetheless reach the same result. Un Low v. LinkedIn Corp., 900 F. Supp. 2d 1010, 1028 (N.D. Cal. 2012) (citation omitted). However, at the pleadings stage, the plaintiff is not required to plead that he has paid the amounts incorrectly charged. See Newsom v. BAC Home Loans Servicing, LP, No. 09-CV-5288 (SBA), 2011 WL 2462315, at *2 (N.D. Cal. June 21, 2011) e damages where ha[d] not alleged that they actually paid these fees or had their accounts debited in order to pay them citation omitted)); Esquivel v. Bank of Am., N.A., No. 12-CV-2502 (GEB), 2013 WL 5781679, at *7 (E.D. Cal. Oct. 25, 2013) the defendant imposed fees not owed). improper interest rates, he has adequately pleaded the damages prong of his breach of contract claim. See id. (finding that plaintiff sufficiently pleaded damages where plaintiff alleged that defendant imposed sums that were not owed); see also Mendez v. Bank of Am. Home Loans Servicing, LP, 840 F. Supp. 2d 639, 651 53 (E.D.N.Y. 2012) (allowing a breach of contract claim where plaintiff pleaded the assessment of late fees and improper interest). 16

breach of contract claim will proceed to discovery. VI. Breach of Good Faith and Fair Dealing

Plaintiffs also assert claims of breach of good faith and fair dealing based on the same allegations they allege in support of their breach of contract claims. (Am. Compl., Dkt. 24, ¶¶ 78 84.)

Perks v. TD Bank, N.A., 444 F. Supp. 3d 635, 641 (S.D.N.Y. 2020) (citing Fishoff v. Coty Inc., 634 F.3d

647, 653 (2d Cir. 2011)). dealing is breached where a party has complied with the literal terms of the contract, but has done

so in a way that undermines the purpose of the contract and deprives the other party of the benefit Bi-Econ. Mkt., Inc. v. Harleysville Ins. Co. of N.Y., 886 N.E.2d 127, 134 (N.Y. 2008) (internal citation omitted). for breach of the implied covenant will be dismissed as redundant where the conduct allegedly violating the implied covenant is also the

16 Defendants raise for the first time on reply that Plaintiffs Evans and Beher failed to allege why the interest rate should have been lower. (See SPS Reply, Dkt. 48, at 4 - Zirogiannis, 221 F. Supp. 3d at 298 (citation omitted), is the same ar Court rejects the argument for the same reasons stated infra. Perks, 444 F. Supp. 3d at 641 (internal quotation and citation omitted); see also Cruz v. FXDirectDealer, LLC,

for breach of the implied covenant of good faith and fair dealing when a breach of contract claim, . Echostar DBS Corp. v. Gemstar , No. 05-CV-8510

(DAB), 2007 WL 438088, at *7 (S.D.N.Y. Feb. 8, 2007). 17

s for breach of the implied covenant of good faith and fair dealing are redundant. (See SPS Br., Dkt. 41, at 15 breach of the implied covenant claim relies upon the same facts, i.e., the imposition of late fees,

inspection fees, and incorrect interest rates, as their breach of contract claim. (Compare Am. agreements by (i) charging interest rates higher than the rates permitted in the standard form

adjustable rate mortgage agreements; (ii) charging late fees after acceleration not permitted by the loan agreements; and/or (iii) charging inspection fees, despite occupancy, which is prohibited by the loan agreements and the Fannie Mae i with id. ¶ 83

17 Sullivan v. Barclays PLC, No. 13-CV-2811 (PKC), 2017 WL 685570, at *36 (S.D.N.Y. Feb. 21, 2017) (citation omitted); see Integrated Storage Consulting Servs., Inc. v. NetApp, Inc., No. 12-CV-6209 (EJD), 2013 WL 3974537, at *7 (N.D. Cal. July 31, be apply here, the Court does not separately analyze (Defendants breached the implied covenant of good faith and fair dealing . . . by, inter alia, 18

(a) charging . . . interest rates higher than those permitted by the standard form adjustable rate mortgage agreements; (b) charging and/or threatening to char[g]e late fees post-acceleration; and [(c)] charging . . . inspection fees once the loan was in default, despite their being in contact with [] Plaintiff Evans, Plaintiff Perez, and other Class members[,] and the occupancy of the property.).) same as any damages resulting from a breach of the implied covenant of good faith and fair i.e., the assessing of late fees, inspection fees, and additional charges as a result of incorrect interest rates. Mendez, 840 F. Supp. 2d at 653; see also id. damages for breach of the implied covenant of good faith

and fair dealing cannot be maintained where the alleged breach is intrinsically tied to the damages allegedly resulting from a breach of .

Plaintiffs argue that their claims for breach of the implied covenant are distinct from their breach of contract claims because the assessment of inspection fees 19

shows that Defendants exercised the discretion afforded by the contracts in bad faith. (Opp., Dkt. 43, at 7 8.) However, that Plaintiffs may have sufficiently pleaded the elements of breach of the implied covenants does not change the fact that the alleged conduct is also the basis for the breach of contract claims. Indeed, as Plaintiffs argue in support of their inspection fees claims, the Amended Complaint alleges that the standard form mortgage agreements have express terms that require the do and pay for whatever is

18 Although this language may suggest that other acts of Defendants breached the implied covenant, Plaintiffs do not allege other grounds for the breach.

19 Plaintiffs do not similarly assert that the imposition of late fees and incorrect interest rates demonstrates bad faith. (See 8.) reasonable or Dkt. 24, ¶¶ 46 47; see Opp., Dkt. 43, at 9

inspection fees in an unreasonable manner is a violation of the express terms of the contract, not the implied covenant. None of the cases cited by Plaintiffs support their argument that their claim for breach of good faith and fair dealing is separate and distinct from their breach of contract claim, simply because they explicitly allege bad faith. Indeed, courts routinely dismiss claims for breach of good faith and fair dealing as redundant, where plaintiffs have alleged bad faith. See, e.g., Ticheli v. Travelers Ins. Co., No. 14-CV-172 (TJM), 2014 WL 12587066, at *3 (N.D.N.Y. Dec.

faith and fair dealings when such an allegation is, as here, simply duplicative of a breach of contract internal quotation and citations omitted)); Transcience Corp. v. Big Time Toys, LLC, 50 F. Supp. 3d 441, 452 (S.D.N.Y. 2014) (dismissing claim for breach of good faith and fair dealing where plaintiffs alleged that defendants acted in bad faith); Doyle v. MasterCard Int l Inc., No. 15-CV-9360 (LTS), 2016 WL 9649874, at *2 (S.D.N.Y. Dec. 15, 2016) assertions of bad faith, unaccompanied by any factual predicate distinct from the breach of contract

claim, are insufficient to plead a plausible breach of the implied covenant of good faith and fair , aff d, 700 F. Appx 22 (2d Cir. 2017).

s for breach of good faith and fair dealing because they are redundant of their breach of contract claims. VII. New York GBL § 349

Plaintiffs Evans and Perez assert GBL § 349 claims based on representations that late fees could be charged post-acceleration and that inspection fees would be charged as necessary. 20

(Am. Compl., Dkt. 24, ¶¶ 91 104.) challenged act or practice was consumer-oriented; second, that it was misleading in a material

way; and third, that the plaintiff suffered injury as a Crawford v. Franklin Credit Mgmt. Corp., 758 F.3d 473, 490 (2d Cir. 2014) (citation omitted). on its face applies to virtually all economic activity, and its application has been correspondingly

McCrobie, 359 F. Supp. 3d at 254 (internal quotation, alterations, and citation omitted). Id. (internal quotation marks, alteration, and citation omitted).

As an initial matter, the Court rejects argument, citing Spagnola v. Chubb Corp., 574 F.3d 64 (2d Cir. 2009), that the loss alleged under GBL § 349 must be independent of the loss caused by the alleged breach of contract. (SPS Br., Dkt. 41, at 21 [I]n a recent case, Garage, Inc. v. Progressive Casualty Insurance Co., 875 F.3d 107 (2d Cir. 2017), the Second

Circuit emphasized that no such broad requirement [to state independent damages for a § 349

20 Even though the heading of the § 349 claims in the Amended Complaint refers to all Defendants, Plaintiffs make allegations and seek redress only against Defendant SPS for violating § 349. (See, e.g. of action . . . against SPS comprising all Class members whose properties subject to the mortgages serviced by SPS are located within the St id. id. against SPS for damages, statutory damages, treble damages, exemplary damages, injunctive

reli this cause of action, the Court deems Plaintiffs Evans and Perez as having asserted § 349 claims only against Defendant SPS. Donnenfeld, 333 F. Supp. 3d at 224. Where a plaintiff alleges

charged have incurred is is more akin to damages related to overpaying for an item as a result of a

defendants deceptive conduct, a type of injury that is sufficient to state a § 349 damages claim. Lussoro v. Ocean Fin. Fed. Credit Union, No. 18-CV-7400 (PKC) (ST), 2020 WL 1941236, at *10 (E.D.N.Y. Apr. 22, 2020) (citing Donnenfeld, 333 F. Supp. 3d at 223). Therefore, the Court does not find that Plaintiffs fail to sufficiently allege damages simply because the alleged damages are the same as those sought in their breach of contract claim.

A. Late Fees Defendant SPS argues that Plaintiffs Evans and Perez were not actually charged with any late fees and did not suffer any kind of injury. (SPS Br., Dkt. 41, at 22 23.) In response, Plaintiffs claim that they et expenses either in an attempt to pay for the fees, or [in] challeng[ing] the representations that the late fees could be charged post- Opp., Dkt. 43, at 14.)

o recover under the statute, though not necessarily -2, 419 F. Supp. 3d 668, 706 (S.D.N.Y. 2019) (citation and alteration harm which might be cognizable as a legal injury, such as physical,

emotional, pecuniary or

Id. (citations omitted).

As discussed supra, Plaintiffs have not shown that they were actually charged with any late fees. In addition, the Amended Complaint is devoid of any allegation that Plaintiff Perez incurred expenses while attempting to pay the late fees ose late fees. Nor has she alleged any other harm resulting from these efforts. Thus, the Court finds that Plaintiff Perez has not shown that she suffered any actual injury as a result of the threats of late fees. See Roth v. CitiMortgage Inc., No. 12-CV-2446 (SJF) (WDW), 2013 WL 5205775, at *12 (E.D.N.Y. , 756 F.3d 178 (2d Cir. 2014); Lane v.

Fein, Such & Crane alleged no facts aside from their conclusion that they suffered emotional distress that show that

In contrast, Plaintiff Evans sent written requests to Defendant SPS, attempting to challenge the representation. (Am. Compl., Dkt. 24, ¶¶ 21 27.) The expenses Plaintiff Evans incurred in this process are recoverable. See McCrobie, 359 F. Supp. 3d at Abusive debt collection is a harm in itself, especially when misrepresentations place a consumer in immediate fear that he or she may be about to lose his home or her income. internal quotations citations omitted)).

Accordingly, the Court dismisses Pla GBL § 349 claim based on late fees, but GBL § 349 claim will proceed to discovery.

B. Inspection Fees Defendant SPS argues that the alleged misrepresentation that inspection fees would be charged only as necessary cannot serve as the basis for a GBL § 349 claim and that Plaintiffs Evans and Perez have failed to allege any fact showing that the alleged misrepresentation affected em injuries. (SPS Br., Dkt. 41, at 23.) Plaintiffs do not Opp., Dkt. 43, at 15 16.)

state or federal law and those that may be unreasonable under a contract in determining whether a Weir, 2018 WL 3443173, at *14 (citations omitted). ve under [] § 349 if there is no express limitation on the appropriate amount of default-related service Silvester v. Selene Fin., LP, No. 18- CV-2425 (NSR), 2019 WL 1316475, at *10 (S.D.N.Y. Mar. 21, 2019) (collecting cases). Here, as in Silvester, other than [that] and [P]laintiff[s] ha[ve] not successfully pled any other violation of state or federal law. Id.

must fail. VIII. California UCL

Plaintiff Beher asserts a claim based on Defendant SPSs application of incorrect interest rates under the California UCL. 21

(Am. Compl., Dkt. 24, ¶¶ 105 14.) A. Standing & Profs. Code § 17204.

a result of his transactions with the defendant, although the quantum of lost money or property

necessary to show standing is only so much as would suffice to establish [Article III] injury in Corp., 718 F.3d 1098, 1104 (9th Cir. 2013) (internal quotations and citation omitted), (July 8, 2013).

There are innumerable ways in which economic injury from unfair competition may be shown. For example, a plaintiff may (1) surrender in a transaction more, or acquire in a transaction less, than he or she otherwise would have; (2) have a present or future property interest diminished; (3) be deprived of money or property to which he or she has a cognizable claim; or (4) be required to enter into a transaction, 21 Plaintiff Beher, the only named plaintiff asserting claims under UCL, makes only allegations about

incorrect interest rates. (Compare Am. Compl., Dkt. 24, ¶ 108, with id. ¶¶ 36 37.) Therefore, the Court deems Plaintiff Beher as bringing his UCL claim only on the basis of miscalculated interest rates.

costing money or property, that would otherwise have been unnecessary. Further, ineligibility for restitution is not a basis for denying standing under the UCL. Robbins v. Hyundai Motor Am., No. 14-CV-5 (JLS), 2015 WL 304142, at *10 (C.D. Cal. Jan. 14, 2015) (internal quotations and citation omitted); see also In re NJOY, Inc. Consumer Class Action Litig. money we mean that he has parted, deliberately or otherwise, with some identifiable sum formerly

belonging to him or subject to his control; it has passed out of his hands by some means, such as

Here, Plaintiff Beher has sufficient standing to assert a UCL claim. Beher alleges that Defendants charged him incorrect interest rates, but does not allege that he paid any amount. (See Am. Compl., Dkt. 24, ¶ 37.) equity []he obtained in [his] home, and thus [he] is financially injured when [his] debt increases. The fact that Vega v. Ocwen Fin. Corp., No. 14-CV-4408 (ODW), 2015 WL 1383241, at *8 (C.D. Cal. Mar. 24, 2015). Courts have found that injury and lien upon his property sufficient to confer standing to assert a claim under the unfair

competitio Lane v. Wells Fargo Bank, N.A., No. 12-CV-4026, 2013 WL 3187410, at *11 (N.D. Cal. June 21, 2013); see also Rubio v. Cap. One Bank, 613 F.3d 1195, 1204 (9th Cir. 2010) tage rate] and thus alleged sufficient facts to confer standing in a California UCL claim based on Defendants

alleged miscalculation of interest rat . See Craig v. Cap. One, N.A., No. 17-CV- the alleged interest and fees were incurred or paid is an issue better reserved for discovery and, perhaps, a motion for summary judgment. Taking her factual allegations as true, however, Plaintiff

B. Failure to State a Claim Defendants also make several arguments regarding the substance of UCL claim. First, Defendants argue that s to assert the predicate breach of contract claim. (SPS Br., Dkt. 41, at 24 25.) Because, as explained above, the Court does not find that Plaintiff Beher has failed to

state damages for his breach of contract claim, his UCL claim does not fail for this reason.

Second, Defendants argue that, despite asserting this claim against all Defendants, Plaintiff Beher has not alleged that he suffered any injury as a result of Defendants U.S. Bank and BANA . (Id. at 25 26.) Beher does not defend this point in his resp Opp., Dkt. 43, at 18 19.) Defendants rely on cases where the UCL claim against all defendants

was dismissed on the basis that the them as one for the purposes of the UC Okada v. Bank of Am., N.A., No. 15-CV-981 (CJC), 2015 WL 5556937, at *5 (C.D. Cal. Sept. 16, 2015) (collecting cases). Here, rather than lump[ing all of Defendants together, the Amended Complaint identifies only conduct as violating the UCL. (See, e.g., Am. Compl., Dkt. 24, id. of miscalculating interest rates and

charging unreasonable inspection and late fees and/or miscellaneous unnecessary fees, is .) Thus, the Court deems Plaintiff Beher as having brought his UCL claim only against Defendant SPS and, to the extent that Plaintiff Beher asserts a UCL claim against Defendants U.S. Bank and BANA, those claims are dismissed. See Schulz v. Neovi Data Corp., 152 Cal. App. 4th 86, 92 (2007) (dismissing UCL claim against those defendants against whom plaintiff did not make any allegation of unfair competition).

Third, Defendants argue that Plaintiff Beher has failed to allege that SPS miscalculated interest rates. (SPS Br., Dkt. 41, at 26.) Plaintiff Beher alleges that, according to the standard form adjustable rate mortgage agreement, he should have been adjusted periodi that, in January 2018,

he was charged an interest rate of 5.25%, instead of 4.25% as determined by LIBOR. (Am. Compl., Dkt. 24, ¶¶ 36 37.) Citing no case law, Defendants argue that Plaintiff deficient because he failed to identify the provision of the mortgage contract that governs interest rates, how LIBOR should have affected the interest rate in January 2018, and how his calculation arrived at the rate of 4.25%. (SPS Br., Dkt. 41, at 26.) requirement that the contract be attached to the complaint or that the complaint quote each relevant

provisio United Specialty Ins. Co. v. Meridian Mgmt. Grp., Inc., No. 15-CV-1039 (HSG), 2015 WL 4718998, at *2 (N.D. Cal. Aug. 7, 2015) (collecting cases); see also Taboola, Inc. v. Ezoic Inc., No. 17-CV-9909 (OWS), 2019 WL 465003, at *9 (S.D.N.Y. Feb. 6, 2019)

(citation and alterations Claims involving contractual language are generally dismissed for want of detail only where the complaint fails to identify and describe the provisions on which the right to recovery is based. United Specialty Ins. Co., 2015 WL 4718998, at *2 (citation omitted). Here, Plaintiff Beher has adequately described the contractual provision he relies on and has sufficiently alleged the basis for his UCL claim. The issues Defendants contest are better reserved for discovery.

California UCL claim based on allegedly miscalculated interest rates, and it will proceed to discovery.

CONCLUSION

motions to dismiss. are dismissed, except for: (1) claims against Defendant SPS based on the imposition of late fees and inspection fees, and his GBL § 349 claim against Defendant SPS based on the imposition of late fees; and (2) Plaintiff claim and UCL claim, both based on the miscalculation of interest rates, against Defendant SPS. Because Plaintiff Perez and Defendants U.S. Bank and BANA have no remaining claims to which they are a party, they are terminated from this action. 22

The surviving claims shall proceed to discovery.

SO ORDERED.

/s/ Pamela K. Chen Pamela K. Chen United States District Judge Dated: September 30, 2020 Brooklyn, New York

22 For this reason, the Court does not address the additional arguments in Defendant See Dkt. 42-1.)