No. 24-14257

In the United States Court of Appeals For the Eleventh Circuit

LEQUITA WHITFIELD, et al.,

Plaintiff-Appellant,

v.

SELENE FINANCE LP

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia
Case No. 5:24-cv-00153
(Hon. Tilman E. Self, III)

PLAINTIFF-APPELLANT'S REPLY BRIEF

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. Rules 26.1-1(a)(2), 26.1-2, and 26.1-3, Plaintiff-Appellant Lequita Whitfield, on behalf of herself and all those similarly situated, submits this certificate of interested persons and corporate disclosure statement and certifies that the following is a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that Plaintiff believes have an interest in the outcome of this particular appeal, including subsidiaries, conglomerates, affiliates, parent corporations:

Accardi, Sara Dunn

Balsam, Hugh

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Selene Finance LP

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Plaintiff is not aware of any publicly traded company or corporation that has an interest in the outcome of this appeal.

Date: July 7, 2025

Respectfully submitted,

/s/ *Lucia Goin*
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INTRODUCTION

Under binding law of this Circuit, Lequita Whitfield's emotional distress and lost time are sufficiently concrete to support Article III standing. Selene cannot escape liability by relying on meaningless boilerplate clauses or conditional language in its debt-collection letter or a contractual notice clause that expressly doesn't apply to servicers like Selene. Selene's arguments distort this Court's standing law, take a contrived reading of its own letter, and fail to offer any authority for the scope of any alleged assignment it holds as a loan servicer. This Court should reverse.

ARGUMENT

I. Ms. Whitfield Alleges Concrete Harms.

A. This Court Has Held That Ms. Whitfield's Harms are Cognizable.

Ms. Whitfield suffered concrete harm. She alleges the misrepresentations in Selene's letter caused her "anxiety, stress, anger, frustration, and mental anguish," App. 022 ¶ 71; she "felt anxious and terrified," like she "was going to have a heart attack," and she was "[s]cared that she would lose her home," *id.* 029 ¶¶ 112–13, 115. She also lost time in reliance on the misrepresentations in the letter: she "called

Selene," *id.* ¶ 114, and "borrowed money from her brother to be able to pay Selene," *id.* ¶ 115. In a host of recent decisions, this Court has concluded that emotional distress and lost time are each cognizable injuries-in-fact. *See Losch v. Nationstar Mortg.*, 995 F.3d 937 (11th Cir. 2021); *Walters v. Fast AC*, 60 F.4th 642 (11th Cir. 2023); *Toste v. Beach Club at Fontainebleau Park Condo. Ass'n*, 2022 WL 4091738 (11th Cir. Sept. 7, 2022); *Pinson v. JPMorgan Chase Bank,* 942 F.3d 1200 (11th Cir. 2019); *Pedro v. Equifax, Inc.*, 868 F.3d 1275 (11th Cir. 2017); *Rivas v. Midland Funding, LLC*, 842 F. App'x 483 (11th Cir. 2021). That should be the end of the inquiry.

Recognizing the consequences of this binding authority, Selene asks this Court to ignore any decision that "pre-dates" *Hunstein v. Preferred Collection Management*, 48 F.4th 1236 (11th Cir. 2022) (en banc), or *TransUnion v. Ramirez*, 594 U.S. 413 (2021), on the basis that such decisions are now "inapposite or superseded." Ans. Br. 19–22. Not so. *Hunstein* and *TransUnion* are predicated upon *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016), which concluded that determining whether an "intangible harm" is sufficiently concrete can involve "consider[ing] whether" the harm "has a close relationship to a harm that has

traditionally been regarded as providing a basis for a lawsuit." *Id.* at 341. As *Hunstein* recognized, *TransUnion* merely "reemphasized" *Spokeo*'s holding "that, for intangible harms, analogizing to longstanding torts is an important way to determine whether an alleged intangible injury meets the concreteness requirement." 48 F.4th at 1244; *id.* at 1243 (stating *TransUnion* "doubled down on its decision in *Spokeo*").

TransUnion and *Hunstein* applied *Spokeo*'s analysis in the context of a "pure statutory violation," *id.* at 1247, divorced from any other "downstream consequences" or "adverse effects," *TransUnion*, 594 U.S. at 442 (quotations omitted). But here, Ms. Whitfield suffered more than a bare statutory violation—she alleges she suffered emotional distress because of and expended time in reliance on Selene's misleading statements. For that reason, *TransUnion* and *Hunstein* don't alter the application of the *Spokeo* analysis here. This Court has held as much, reaffirming in a case citing both *Hunstein* and *TransUnion* that "emotional distress" and "wasted time" are "each" concrete injuries that confer Article III standing. *Walters*, 60 F.4th at 648.

Selene is also wrong to suggest that any post-*Spokeo* decision that doesn't engage in an explicit close-relationship analysis is not good law.

Ans. Br. 20–22. The Supreme Court described the close-relationship test as merely "instructive," *Spokeo*, 578 U.S. at 341, or serving as a "meaningful guide," to determining whether an intangible harm is justiciable, *TransUnion*, 594 U.S. at 424; it certainly does not require this Court to "overthink[]" the "simple" exercise of comparing harms, *Hunstein*, 48 F.4th at 1242, or impose an obligation to evaluate whether the plaintiff has established an independent common-law cause of action in each case asserting an intangible harm, *see id.* at 1241 (stating that "one way" to evaluate "alleged statutory harms" is by "comparing them to traditional common-law tort claims").

This case is controlled by this Court's decisions analyzing injuries beyond pure statutory violations and concluding that emotional distress and lost time are sufficient to confer standing. Op. Br. 17–20. And those cases remain good law. *See Walters*, 60 F.4th at 648 (relying on *Losch*, *Pedro*, and *Pinson*). That some of these decisions arise under consumer statues other than the FDCPA, *see* Ans. Br. 21–22, does not change their value to the standing inquiry because "standing in no way depends on the merits of the plaintiffs contention," *Chiles v. Thornburgh*, 865 F.2d

1197, 1202 (11th Cir. 1989) (quotations omitted). Under the weight of binding authority,[1] Ms. Whitfield alleges injuries-in-fact.

B. Ms. Whitfield's Injuries are Analogous to Traditionally Recognized Harms.

This Court could reverse solely on the basis that it has already held that the harms Ms. Whitfield alleges are Article III injuries. *See* Op. Br. 18–20; *supra* § I.A. But should this Court conduct the close-relationship analysis, it should conclude that Ms. Whitfield's harms are the type traditionally recognized at common law. Selene reads *Hunstein* to require plaintiffs to establish each element of a common-law tort in addition to their statutory claims, Ans. Br. 13–16, but *Hunstein* requires only a showing that the injury is analogous to *harm* traditionally recognized, 48 F.4th at 1242, and emotional distress and lost time constitute such harms.

[1] Selene cites a handful of out-of-circuit cases that it argues hold that "emotional distress is not a concrete injury that confers standing in the context of an FDCPA claim," Ans. Br. 18–19, but—even if those cases stand for that result—they conflict directly with analysis by this Court, and this Court should decline to follow them.

1. The "Close Relationship" Test Requires Consideration of the Nature of the Harm—Not Every Element of a Common-Law Tort.

Spokeo leaves a "simple instruction: see if a new harm is similar to an old harm." *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 931 (11th Cir. 2020) (en banc). That analysis is not, as Selene suggests, *see* Ans. Br. at 13–16, a requirement to match each element of a common-law tort to the statutory cause of action. *See Hunstein*, 48 F.4th at 1244 (explaining that this Court "do[es] not look at tort elements in a vacuum" but "with an eye toward evaluating commonalities *between the harms*" (emphasis added)). Instead, this Court and others focus their concreteness evaluations on the harm underlying the cause of action. *Id.* at 1245 (evaluating whether injury was similar to the "harm at the core" of a traditional tort); *Salazar v. Paramount Glob.*, 133 F.4th 642, 647 (6th Cir. 2025) (analyzing "whether the asserted harm is sufficiently analogous to a traditional harm recognized by law—not whether the plaintiff has pleaded an element-by-element match to a historical tort"); *Barclift v. Keystone Credit Servs., LLC*, 93 F.4th 136, 145 (3d Cir. 2024) ("[I]f the Court wanted us to compare elements, it would have simply said so."); *Bohnak v. Marsh & McLennan Cos.*, 79 F.4th 276, 286 (2d Cir. 2023)

(focusing inquiry on "core of the injury," rather than whether plaintiff "asserts a common law claim").

The facts of *Hunstein* illustrate this. Hunstein alleged that a creditor violated the FDCPA by sending personal information about his debt to a mail vendor, which he argued was analogous to common-law public disclosure. *See* 48 F.4th at 1240. This Court rejected his analogy on the basis that public disclosure, "at its core, requires either actual public disclosure or a substantial certainty that the disclosed information will reach the public at large," and Hunstein had failed to allege that "a single employee had even read or understood the information about his debt." *Id.* at 1248. In other words, the harm "at [the] core" of the tort—sensitive personal information becoming *public*—was missing. For that reason, the harm that Hunstein experienced was not at all similar to the "harm that has traditionally been regarded as providing a basis for a lawsuit" for public disclosure. *Spokeo*, 578 U.S. at 341. As *Hunstein* demonstrates, the close-relationship analysis requires consideration of the nature of the *harm*—not each element of a common-law tort.

2. Ms. Whitfield Alleges Harms Redressable at Common Law.

Ms. Whitfield's injuries bear a "close relationship" to "harm[s] at the core" of common-law torts. *Hunstein*, 48 F.4th at 1245. The harms she alleges—emotional distress and lost time—are sufficiently similar to harms that provide a basis for the torts of infliction of emotional distress, *see* Op. Br. 24, and fraudulent or negligent misrepresentation, *see id.* at 27, respectively.

Emotional distress. Ms. Whitfield's allegations regarding her emotional distress, including feeling like she was "going to have a heart attack" because she believed she was going to lose her home, is exactly the "kind of harm" that provides the basis of an emotional-distress tort. *Hunstein*, 48 F.4th at 1249; Restatement (Third) of Torts: Phys. & Emot. Harm § 45 (2012) (describing emotional harm as "including fright, fear, sadness, sorrow, despondency, anxiety, humiliation, depression," among others). The harm targeted by an emotional-distress tort, "at its core," *Hunstein*, 48 F.4th at 1248, is emotional harm, and Ms. Whitfield alleged that she suffered that long-redressable harm, Op. Br. 23–25.

Even if Selene is right—which it is not—that the court must look to *every* element of a common-law tort, not just the nature of the harm, those

elements are met here. *See* Restatement (Third) of Torts: Phys. & Emot. Harm §§ 46, 47 & cmt. f. (describing elements of intentional and negligent infliction of emotional distress). Selene (1) misrepresented the timing of acceleration and foreclosure, *see* App. 016–19 ¶¶ 42–58; (2) was, at least, negligent in the provision of that timeline, given that the represented timing conflicts with its own internal policies and federal law, *id.*; (3) is a loan servicer that frequently interacts with people who are indebted, *see id.* 012 ¶¶ 28–29, 028 ¶ 107, 033 ¶ 128, and—by virtue of that role—is in a position of authority and therefore has the potential to inflict emotional harm; and (4) caused Ms. Whitfield emotional distress through misrepresentations, *id.* 022 ¶ 71, 028–29 ¶¶ 111–13.

Selene incorrectly casts Ms. Whitfield's injuries as "fears related to possible future injuries," which have since "dissipated," Ans. Br. 22, 25. But Ms. Whitfield does not allege that her harms are ongoing, based on a fear that she "*would be* subjected to legal action," *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 865 (6th Cir. 2020) (quotations omitted); she alleges that she has already experienced acute distress due to the letter's misrepresentations. That harm has already occurred, and it is cognizable. *See, e.g.*, *Rivas*, 842 F. App'x at 486 ("loss of sleep and extreme

stress" in response to erroneous debt statements posted on a creditor's website were concrete injuries); *Losch*, 995 F.3d at 943.

Selene does not argue that emotional distress is not a harm at the core of emotional-distress torts; instead, it argues that "the relevant common-law comparator" for *all* claims arising under "section 1692e of the FDCPA" is "fraudulent or negligent misrepresentation." Ans. Br. 15. Not only does this position ignore that "[t]he focus of the analysis for Article III purposes is the harm, not the cause of action or the remedy," *Petris v. Sportsman's Warehouse, Inc.*, 736 F. Supp. 3d 260, 270 (W.D. Pa. 2024), but Selene provides no authority for the proposition that, to have a standing under a particular statute, a plaintiff can have only one type of injury. Federal remedial statutes like the FDCPA[2] seek to redress a multitude of harms: plaintiffs can recover damages for "emotional distress" or "'any actual damage sustained' as a result of a violation of the statute." *Minnifield v. Johnson & Freedman, LLC*, 448 F. App'x 914,

[2] Article III standing applies to state-law claims brought in federal court, *Wilding v. DNC Servs. Corp.*, 941 F.3d 1116, 1125 (11th Cir. 2019), and because Ms. Whitfield's injuries-in-fact are the same for her federal and state-law claims, the standing analysis is the same. Ms. Whitfield therefore agrees that the district court's opinion reflects a jurisdictional dismissal of the entire complaint. *See* Ans. Br. 7 n.7.

917 (11th Cir. 2011) (quoting 15 U.S.C. § 1692k(a)(1)). Adopting Selene's position would mean that no plaintiff could *ever* recover damages under the FDCPA for any harm that—like emotional distress—could not be properly analogized to a misrepresentation tort.[3] *See* Ans. Br 17; Op. Br. 28–29 (FDCPA was designed to address "suffering and anguish").

That result fails to "afford [the] "due respect" owed to Congress in the concrete-harm analysis, *TransUnion*, 594 U.S. at 425, and it departs from other courts that have recognized emotional-distress torts "may be [a] close common-law analogue[]" to FDCPA injuries. *Bassett v. Credit Bureau Servs., Inc.*, 60 F.4th 1132, 1136 & n.2 (8th Cir. 2023); *Calogero v. Shows, Cali & Walsh, LLP*, 95 F.4th 951, 958 (5th Cir. 2024) (recognizing emotional distress as a concrete injury in section 1692e claim).

Negligent or fraudulent misrepresentation. The time Ms. Whitfield spent resolving Selene's misrepresentations is closely related to the harm targeted by fraudulent or negligent misrepresentation: detrimental reliance. *See, e.g.*, Restatement (Third) of Torts: Liab. for

[3] In this discussion, Selene ignores that Ms. Whitfield's federal claims also arise under 15 U.S.C. § 1692f. *See* App. 036–38 ¶¶ 142–51.

Econ. Harm § 5 cmt. i(3) (2020) (defining scope of liability in negligent misrepresentation as harm that "arises from the risks that made the negligent conduct a breach of duty"); *id.* §§ 9, 12 cmt. b; *Prindle v. Carrington Mortg. Servs., LLC*, 2016 WL 4369424, at *8 n.9 (M.D. Fla. Aug. 16, 2016) (noting that misrepresentation torts can be an analogue to abusive debt-collection practices, even in the absence of actual damages). As this Court's cases recognize, lost time is one way in which a party can act to their own detriment in reliance on another's misrepresentations. *See* Op. Br. 25–26; *Pinson*, 942 F.2d at 1207; *Pedro*, 868 F.3d at 1280; *Walters*, 60 F.4th at 648.

To the extent Ms. Whitfield needs to demonstrate similarity between the other elements of fraudulent or negligent misrepresentation and her FDCPA claim (which she does not), she has done so. Selene (1) misrepresented facts relating to the timing of acceleration and foreclosure, *see* App. 016–19 ¶¶ 42–58; (2) should have known that the represented timing was false, *id.*; (3) intended Ms. Whitfield and other class members to rely on the misrepresentations, *id.* 015 ¶ 40, 020 ¶ 61; and (4) caused Ms. Whitfield to spend time in reliance on the misrepresentations, *see id.* 029 ¶¶ 114–15. This Court should conclude

that the harm she alleges sufficiently approximates negligent or fraudulent misrepresentation.[4]

The district court's only holding is that it lacked jurisdiction over this action; any conclusions following that holding should be vacated as advisory opinions. *See* Op. Br. 30–32; *Friends of the Everglades v. EPA*, 699 F.3d 1280, 1288 (11th Cir. 2012) ("Hypothetical jurisdiction produces nothing more than a hypothetical judgment[.]") (quotations omitted). And because the court's only holding was based on a flawed analysis of standing, it should be reversed.

II. The Least Sophisticated Consumer Would be Misled by the Misrepresentations in Selene's Letter.

Should this Court reach the issue, it should conclude as a matter of law that the district court erred in concluding that Selene's letter is not deceptive and misleading in violation of the FDCPA and the FBPA. To the extent there is any ambiguity about that conclusion—i.e., if there are "two sets of reasonable inferences that can be drawn"—the panel should

[4] Ms. Whitfield's complaint supports the reasonable inference that the emotional distress she experienced and time she expended are directly traceable to the urgent thirty-five-day timeline represented in the letter rather than traceable to the debt that she owed the lender. *See* App. 250 n.7.

reverse and conclude that it is "appropriate" for a trier of fact to "decide which set of inferences to draw." *Kuehn v. Cadle Co.*, 335 F. App'x 827, 830 (11th Cir. 2009) (relying on *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1176 (11th Cir. 1985)).

The letter Ms. Whitfield received from Selene states, in part:

> If you have not cured the default within thirty-five (35) days of this notice, Selene may accelerate the maturity date of the Note and declare all outstanding amounts under the Note immediately due and payable, as permitted by applicable state and federal law. Your property that is collateral for the Note may then be scheduled for foreclosure sale in accordance with the terms of the Security Deed and applicable state laws.

App. 048. The letter's statements are deceptive because Selene does not accelerate and foreclose upon debtors before their debts are at least 120 days due, and federal law prohibits foreclosure before then. *See* 12 C.F.R. § 1024.41(f)(1)(i); App. 018 ¶ 53; Op. Br. 32–39. Selene rests on the letter's statements that it "may," rather than will, accelerate and foreclose within the promised timeline, *see* Ans. Br. 49, and on the letter's incorporation of generic clauses regarding applicable law, *see id.* 45–47. Neither prevents the letter from being misleading.

First, the conditional language—stating Selene "may" accelerate the maturity date of the note absent full payment within thirty-five days, and "may" then schedule the property for foreclosure—is false because Selene never accelerates loans before 120 days and is prohibited by law from foreclosing before that time. App. 007–9 ¶¶ 10–13, 016–17 ¶¶ 42–48.[5] Reading the letter, a "'naïve consumer[]' with a minimal understanding of personal finance and debt collection," *Pinson*, 942 F.3d at 1210, would mistakenly understand that Selene *could* accelerate and foreclose after thirty-five days, resulting in the sort of deceptive and unfair practice the FDCPA seeks to prevent. *Gonzales v. Arrow Fin. Servs., LLC*, 660 F.3d 1055, 1062 (9th Cir. 2011) (concluding "conditional language" ("*if* we are reporting the account") was misleading where defendant "had no intention of reporting…and was legally prohibited from so doing"); *Boucher v. Fin. Sys. of Green Bay, Inc.*, 880 F.3d 362, 367 (7th Cir. 2018) (advising consumer that the imposition of charges "may"

[5] Selene does not dispute that it does not accelerate loans before they reach 120 days of delinquency; it argues only that any argument to this effect is "undeveloped," or "waived," Ans. Br. 50, despite having been briefed and referenced across a large portion of the Opening Brief and in the district court. *See, e.g.*, Op. Br. 4, 10, 15, 32–35; App. 007 ¶¶ 8, 10, 015 ¶ 39–40, 137–140.

change amount due was misleading where debt collector could not legally impose such charges).

Second, the letter's generic clauses providing that Selene will act "as permitted by applicable" law, do not undo the misleading nature of the letter. Those clauses directly contradict the letter's statements that Selene "may" accelerate and foreclose before a debt is 120 days due because federal law does not permit Selene to foreclose prior to that time. App. 016–19 ¶¶ 42–58. A threat to take an action "'to the extent permitted by law,'" implies that "under some set of circumstances and to some extent, the law actually permits that action to be taken." *Ruth v. Triumph P'ships*, 577 F.3d 790, 801–02 (7th Cir. 2009). But here, there are *no* set of circumstances in which Selene may foreclose on the represented timeline, making the inclusion of these clauses "*more* misleading, not less." *Id.* at 802.

Another portion of the letter advises Ms. Whitfield she "*must* pay [the amount listed] to cure the default" within thirty-five days, App. 048 (emphasis added), which—read in the context of the letter "as a whole," *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1195 (11th Cir. 2010)—misleadingly suggests that she must pay the total amount owed

within thirty-five days to avoid foreclosure. The letter's permissive "may" language "overshadows or contradicts" other language that purports to "inform[] consumers of their rights." *Id.* at 1195 n.18 (quotations omitted). Other courts have concluded that substantially similar letters violate the FDCPA. *See, e.g.*, *Koepplinger v. Seterus, Inc.*, 2018 WL 4055268, at *5 (M.D.N.C. Aug. 24, 2018); *Barilla v. Seterus, Inc.*, 2019 WL 6525945, at *3 (M.D. Fla. Dec. 4, 2019).

Moore v. Seterus, Inc., 711 F. App'x 575 (11th Cir. 2017), doesn't change this conclusion. There, the caveats in the letter prevented foreclosure "unless and until allowed by applicable law"—expressing that foreclosure might not actually be permitted by law at the time the letter was received—and the notice requirements that the letter misrepresented were clarified in the contract provided to the consumers. *Id.* at 578–80. Here, "as permitted" by law suggests foreclosure before 120 days is indeed permitted by law, and the letter requires the reader to independently investigate federal regulations and Selene's own internal practices to determine otherwise. If a sophisticated corporate entity regularly engaged in conduct regulated by the FDCPA finds the relevant regulations to be a "complex web of requirements," Ans. Br. 50, the "least

sophisticated consumer" certainly will, too. *Cf. Arias v. Gutman, Mintz, Baker & Sonnenfeldt LLP*, 875 F.3d 128, 135 (2d Cir. 2017) (observing that the least-sophisticated consumer is "naive about the law, but is rational and possesses a rudimentary amount of information about the world").

III. The Notice-and-Cure Provision Does Not Bar Ms. Whitfield's Claims.

A. Selene, as the Loan Servicer, Cannot Enforce the Notice-and-Cure Provision.

The district court also concluded Ms. Whitfield's claims should not proceed because she did not comply with a clause in her mortgage agreement irrelevant to this dispute. That clause requires her, as the "Borrower," to notify and provide her "Lender" with an opportunity to "take corrective action" prior to "commenc[ing], join[ing]" or being joined in "any judicial action…that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument[.]" App. 072 ¶ 20. Selene is not a signatory to the mortgage agreement, and the text of the notice-and-cure provision applies only between the "Borrower," and the "Lender"—not the borrower and the servicer. *Id.*; Op. Br. 41.

Unsurprisingly, courts have concluded that the "most natural reading of the plain language of the Notice Provision is that it is limited to disputes between the Borrower and the Lender[.]" *Cruz v. Selene Fin.*, 2024 WL 5374001, at *11 (S.D. Fla. Nov. 21, 2024); *Johnson v. Specialized Loan Serv., LLC*, 2017 WL 4877450, at *2 (M.D. Fla. Oct. 24, 2017); *Schmidt v. Wells Fargo Home Mortg.*, 2011 WL 1597658, at *3 (E.D. Va. Apr. 26, 2011); *Patrick v. Teays Valley Trustees, LLC*, 2012 WL 5993163, at *9 (N.D.W.V. Nov. 30, 2012).

To overcome this clear language, Selene must show that it has stepped into the shoes of the "Lender" such that it is entitled to notice from Ms. Whitfield. It attempts to do so based on two theories: that it is an assign of the Lender or that it is the Lender's attorney-in-fact. Both theories fail. Selene has not "met its burden of showing as a matter of law [that] it is the lender's assign[.]" *Dominguez v. Selene Fin.*, 2024 WL 4504530, at *4 (N.D. Cal. Oct. 15, 2024). Indeed, it can't even seem to decide whether it is a partial or a full assign: Selene states both that it has been given only "partial assignment of some of the benefits and obligations of the Security Deed"—without providing any description of the scope or limits of that assignment, Ans. Br. 38–39—and also states it

has been granted "the same rights" that the lender, "U.S. Bank maintains," *id.* at 35; *id.* at 34 (stating it is incorrect that Selene "does not fully stand in the lender's shoes"). If it's a partial assign, Selene has offered no reasoned explanation for which rights and obligations fall into that assignment and which not—and why the notice-and-cure provision falls within those that do.

1. Selene has not demonstrated that it is the lender's contractual assign.

Selene argues that its alleged status as an "assignee of the servicing rights under the Security Deed" is sufficient "under Georgia law to enforce the notice-and-cure provision," Ans. Br. 28, but ignores that it has not established that any contractual assignment includes that provision. Georgia law requires contractual assignments to be "in writing in order for the contractual right to be enforceable by the assignee," *Sanders v. TD Auto Fin., LLC*, 883 S.E.2d 53, 55 (Ga. Ct. App. 2023) (quotations omitted), and Selene has not provided evidence of any such written agreement or even asserted that such a document exists; it responds that the security instrument "anticipates the partial or complete assignment of its terms," Ans. Br. 29, but that the agreement anticipates assignment does not establish that Selene was, in fact, assigned a scope of rights that

includes the notice-and-cure provision here. Without any clear written delineation of the scope of its assignment, Selene cannot enforce the provision under Georgia law.

Meanwhile, the record suggests that the rights and obligations of the loan servicer remain detached from those of lender. "Lender" and "loan servicer" are each defined as separate entities, App. 065, 072 ¶ 20, and fulfill different roles, Op. Br. 42–46. The document notifying Ms. Whitfield that her former servicer was transferring the "servicing of [her] mortgage" to Selene, states that "[t]he assignment, sale, or transfer of the servicing" "*does not affect any term or condition of the mortgage instruments*, other than terms directly related to the servicing of your loan," App. 108, 110 (emphasis added). The notice-and-cure provision is not a term "directly related to the servicing" of Ms. Whitfield's loan, so Selene has not been given the right to enforce it. And the document indicates that Ms. Whitfield's previous servicer has assigned, sold, or transferred its obligations to Selene; it does not say anything about any scope of assignment from the lender. *See* App. 110.

Despite the limited scope of rights delegated to Selene, it argues that it can enforce the notice-and-cure provision based on Section 13 of

the agreement, which states that the "covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender." App. 071 ¶ 13; Ans. Br. 30. Selene reads the word "assigns" in this provision to mean anyone who was assigned any right under the agreement; if someone is assigned *one* of the lender's rights, Selene contends, they take on and can enforce *all* provisions of the agreement. But it is clear when reading the agreement as a whole that is not the case. Section 20 defines "Loan Servicer" and advises the borrower that the obligations of a loan owner and servicer are independent of each other. App. 072 ¶ 20 (stating that "mortgage loan servicing obligations to Borrower will remain with the Loan Servicer" and "are not assumed by the Note purchaser unless otherwise provided by the Note purchaser"). In other words, when the agreement means to reference the loan servicer, it uses that term, not the separate term "assign." And that is consistent with Section 13's parenthetical reference to Section 20, which further supports the conclusion that a loan servicer does not step into the shoes of the lender as to mortgage provisions unrelated to loan servicing.

Selene's reading of Sections 13 and 20 is internally inconsistent: Selene states that, as a "loan servicer," it is "bound to comply" with the "notice-and-cure provision," while also arguing that the parenthetical in Section 13 exempts the notice-and-cure provision from "bind[ing]" successors and assigns of the lender. Ans. Br. 32. That inconsistency underscores why the scope of Selene's rights as loan servicer should be determined by looking to any written assignment, not Section 13. And Selene's position that because the parenthetical modifies only "bind," it can still "benefit" from the notice-and-cure provision, reaches a result that is inconsistent with "reason and common sense," *Atlanta Dev. Auth. v. Clark Atlanta Univ., Inc.*, 784 S.E.2d 353, 358 (Ga. 2016), because it results in a contractual term that lacks "mutuality of engagement," making it unenforceable. *Pabian Outdoor-Aiken, Inc. v. Dockery*, 560 S.E.2d 280, 281 (Ga. Ct. App. 2002) (quotations omitted). If the notice-and-cure provision could "benefit" but not "bind" Selene, Selene would be entitled to notice from Ms. Whitfield, but Ms. Whitfield would not be entitled to notice from Selene. Reading the notice-and-cure provision to neither bind nor benefit Selene because it is a loan servicer, not an "assign" that takes on all the Lender's rights and obligations ensures that

the provision remains enforceable. *See also Moore v. Hughey*, 212 S.E.2d 503, 505 (Ga. Ct. App. 1975) (providing that where the interpretation of a contractual clause is ambiguous, Georgia courts interpret that clause in a way that "make[s] it valid or legal" (quotations omitted)).

In sum, Selene offers no reason why even a partial assignment allows it to benefit from a contractual provision that applies only to the lender and the borrower.

2. Selene should be estopped from arguing that it benefits from contractual clauses in the mortgage agreement.

Selene has successfully argued in breach-of-contract actions that, as a loan servicer, it is not a party to mortgages like this one and does not have contractual privity with borrowers. *See* Ans. Br. 38. Selene now argues that these arguments are not inconsistent with its position here, *id.*, but ignores that it effectively seeks to stand in the shoes of the lender in order to enforce Ms. Whitfield's contractual obligations to the lender. *See* App. 072 ¶ 20 (requiring "part[ies]" to the agreement to provide pre-suit notice); *Allianz Life Ins. Co. of N. Am. v. Riedl*, 444 S.E.2d 736, 738 (Ga. 1994). Judicial estoppel applies where, as here, the party seeking to assert the inconsistent position would "derive an unfair advantage" from

doing so. *New Hampshire v. Maine*, 532 U.S. 742, 751 (2001). Having argued that, as a servicer, it does not assume the lender's contractual relationships with borrowers, Selene cannot now argue that it has a contractual relationship with Ms. Whitfield that entitles it to benefit from a clause in an agreement between her and her lender.

3. The limited power-of-attorney does not give Selene the authority to enforce the notice-and-cure provision.

The limited power-of-attorney does not allow Selene to "[i]ndependently" invoke the notice-and-cure provision. Ans. Br. 33. That power of attorney "authorizes [Selene] to do what [the lender] could do with respect to the recited subject matter," *Harris v. Peterson*, 734 S.E.2d 93, 94 (Ga. Ct. App. 2012) (quotations omitted); Op. Br. 46–47, and here, that subject matter is limited to servicing the loan: it allows Selene to "[d]emand, sue for, recover, collect, and receive" money owed, among other things. App. 237 ¶ 1. The power-of-attorney is "strictly construed and in view of the controlling purpose," *White v. Young*, 51 S.E. 28, 29 (Ga. 1905), and—although Selene has been delegated the authority to "sue for" debts owed—nothing in Selene's delineated obligations under the power-of-attorney authorize it to invoke contractual benefits that

apply as between the lender and the borrower. *See* Ans. Br. 33–35; App. 237–39. Any delegation authorized through a power-of-attorney allows the agent to act solely for the benefit of the principal, *Godwin v. Mizpah Farms, LLLP*, 766 S.E.2d 497, 507 (Ga. Ct. App. 2014), and here, Selene seeks to invoke the notice-and-cure provision for its own benefit in the present dispute, not for the benefit of the lender-principal. This Court should decline to conclude that its status as an attorney-in-fact allows Selene to invoke the notice-and-cure provision for its benefit here.

B. Ms. Whitfield's Claims Arise from Statutory Law, Not the Mortgage Agreement.

The notice-and-cure provision does not apply for another reason: Ms. Whitfield's claims do not "arise[] from" Selene's "actions pursuant to [the] Security Instrument[.]" App. 072 ¶ 20. Selene does not offer any limiting principle for its broad interpretation of the contractual provision, Ans. Br. 37, and this Court should decline to extend the provision to claims grounded in statutory law. Selene "could have engaged" in the misrepresentations underlying Ms. Whitfield's statutory claim "even in the absence" of the agreement's requirement that she be notified before acceleration or default, so her claims do not "arise out of" Selene's actions

pursuant to that requirement. *Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1219 (11th Cir. 2011).

The full paragraph containing the notice-and-cure provision illustrates that it covers contractual breaches—not independent statutory claims. The provision requires that a party intending to initiate judicial action "notif[y] the other party…of such alleged *breach*." App. 072 ¶ 20 (emphasis added). That language "circumscribe[s]" the provision "to *breaches* of provisions, and duties owed, within the Mortgage itself." *Colon v. Nationstar Mortg., LLC*, 2015 WL 7422598, at *2 (S.D. Fla. Nov. 17, 2015) (emphasis added); *Lynch v. Wells Fargo Bank, N.A.*, 2019 WL 13202780, at *6 (S.D. Fla. June 19, 2019).

The agreement also contemplates that notice will allow the other party to take "corrective action." App. 072 ¶ 20. But a past violation of federal law often cannot be cured with notice, demonstrating that the provision is not intended to apply to Ms. Whitfield's claims. She does not challenge "something like a misstatement or an unlawful finance charge," where the "harm can be addressed by simply deleting the error," *Harrington v. Fay Servicing, LLC*, 2019 WL 4750140, *5 (N.D. Ill. Sept. 30, 2019); she alleges Selene misrepresented information related to

acceleration and foreclosure, a tactic that "already happened," and "[i]t is unclear what an opportunity to cure would have accomplished in this case, aside from delaying [Ms. Whitfield] from suing to enforce [her] federal and state statutory rights[.]" *Id.*

C. Enforcement of The Provision Violates Public Policy.

Finally, enforcement of the notice-and-cure provision impermissibly interferes with Ms. Whitfield's rights by preventing her from pursuing her claims if she does not comply with a futile exhaustion process. Selene argues that a condition precedent to filing a suit has been long enforced in this Circuit, but the cases upon which it relies concern compliance with contractual notice provisions required before breach-of-contract or insurance actions, or statutory notice provisions. Ans. Br. 40–42. None addresses the situation presented here, where a contractual notice-and-cure provision is wielded to prevent vindication of statutory claims.

And other courts have correctly noted that compliance with notice-and-cure provisions prior to enforcing a federal statutory right "substantially interfere[s]" with enforcement of that right. *See Wynkoop v. Wells Fargo Home Mortg., Inc.*, 2011 WL 2078005, at *2 (S.D. Fla. May

26, 2011); *Taub v. World Fin. Network Bank*, 950 F. Supp. 2d 698, 702–03 (S.D.N.Y. 2013); *cf. Parker v. DeKalb Chrysler Plymouth*, 673 F.2d 1178, 1181–82 (11th Cir. 1982) (declining to enforce waiver of "any and all claims" arising out of a car purchase because doing so would "greatly hamper[]" "the public interest in deterring inconsistent and undecipherable lending practices" under TILA); Ga. Code § 13-8-2(a)(1) (describing an unconscionable contract as one that "tend[s] to corrupt legislation"). The practical effects of the notice-and-cure provision—including the de facto shortening of the statutes of limitations, and the frustrations to bringing a class suit, *see* Op. Br. 58–60—illustrate the unenforceability of the provision. Requiring Ms. Whitfield to notify Selene and wait for a futile response *does* shorten the statute of limitations applying to her claims, Ans. Br. 41, and—as Selene recognizes—other courts have concluded that a contractual shortening of a statute-of-limitations prevents the effective vindication of those claims, *see id.* 41–42. This Court should decline to enforce the provision.

IV. The District Court Erred in Dismissing Ms. Whitfield's FBPA Claim on Independent Grounds.

Selene's argument that Ms. Whitfield forfeited any challenge to the district court's analysis of the FBPA claims is also flawed. *See* Ans. Br.

52–54. Ms. Whitfield argued in her Opening Brief that the district court erred in deciding anything—including the FBPA claims—after it concluded she lacked standing, and that therefore those conclusions should be vacated. Op. Br. 30–32. She was not required to then explain why each of the district court's individual advisory opinions was wrong to preserve the argument that the dismissal of those claims on independent grounds shouldn't stand.

In any event, to the extent this Court concludes that Ms. Whitfield was required to appeal from each advisory statement made by the district court, it should excuse any forfeiture because the district court's analysis of the FBPA claim flowed from its conclusion that Ms. Whitfield lacked standing because she "[did] not show detrimental reliance." App. 255. Thus, they are sufficiently intertwined with the jurisdictional dismissal that failure to consider the "pure question[s] of law" raised by the court on the FBPA claim would result in a "miscarriage of justice." *Raper v. Comm'r of Soc. Sec.*, 89 F.4th 1261, 1274 (11th Cir. 2024) (quotations omitted).

Both advisory opinions on the FBPA claims are wrong. First, when an FBPA claim is premised upon misrepresentation, the plaintiff must

allege "he was injured as the result of the reliance upon the alleged misrepresentation." *Zeeman v. Black*, 273 S.E.2d 910, 916 (Ga. Ct. App. 1980). And Ms. Whitfield's allegations establish that the letter's misrepresentations caused her "some actual injury," *Regency Nissan, Inc. v. Taylor*, 391 S.E.2d 467, 472 (Ga. Ct. App. 1990) (quotations omitted), because "[e]motional distress is an actual injury resulting in actual damages under Georgia law," *Shurley v. McNeil & Meyers Asset Mgmt. Grp. LLC*, 2018 WL 4053326, at *3 (M.D. Ga. Aug. 24, 2018); *Carlisle v. Nat'l Com. Servs., Inc.*, 722 F. App'x 864, 869 (11th Cir. 2018).

Second, the FBPA applies to claims like Ms. Whitfield's. App. 255–57. Her claim isn't premised on "mortgage transactions and foreclosure activities," Ans. Br. 53; it is based on deceptive practices. This Court has already concluded that a district court's dismissal of an FBPA claim—where that conduct also violates the FDCPA—is "contrary to well-settled Georgia law defining the scope of the FBPA." *Gilmore v. Acct. Mgmt., Inc.*, 357 F. App'x 218, 219–20 (11th Cir. 2009) (stating that conduct violating the FDCPA "necessarily violate[s] Georgia's FBPA"). And while the FBPA does not "encompass suits based on allegedly deceptive or unfair practices which occur in an essentially private transaction," *Zeeman*, 273

S.E.2d at 914, "[if] the public consumer interest would be served, one instance of an unfair or deceptive act or practice is a sufficient basis for a claim under the FBPA," *Gilmore*, 357 F. App'x at 219 (quotations omitted).

Should the Court conclude that Ms. Whitfield has standing, it should vacate and remand for the district court to reconsider its FBPA analysis.

CONCLUSION

For these reasons and those stated in the Opening Brief, this Court should reverse.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Dated: July 7, 2025

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