

No. 25-1208

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**In the United States Court of Appeals  
For the Seventh Circuit**

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RAMONA MILAM, on behalf of herself and those  
similarly situated,

*Plaintiff-Appellant,*

v.

SELENE FINANCE LP

*Defendant-Appellee.*

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Appeal from the United States District Court  
for the Northern District of Illinois  
Case No. 1:24-cv-00317  
(Hon. Virginia M. Kendall)

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**PLAINTIFF-APPELLANT'S REPLY BRIEF**

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## INTRODUCTION

Selene’s response fails to remedy the fundamental flaws in the district court’s dismissal of Ms. Milam’s claims. First, though the district court’s theory for enforcing the notice-and-cure provision—which, on its face, does not apply to Selene—was based on Selene being an “assign” of the lender, Selene has pointed to no evidence that it was assigned *any* rights by the lender. And even if it could show that it was assigned some rights, it has not shown that the phrase “successors and assigns” in the Mortgage means it was intended to benefit anyone who is assigned any right, rather than the entity assigned ownership of the loan. Second, even if Selene could benefit from the notice-and-cure provision, this dispute does not fall within its scope because Ms. Milam’s claims are based on misrepresentations by Selene that neither breached the Mortgage nor were authorized by it. Third, as courts in this Circuit have found, the notice-and-cure provision would prevent Ms. Milam from vindicating her rights, unlike cases in which claims are merely heard in a different forum. Fourth, this Court should not reach a ground not addressed by the district court, but, if it does, it should reject Selene’s fallback argument that the letter it sent Ms. Milam is not misleading. As this Court’s case law demonstrates, Selene’s statement that it “may” accelerate and foreclose if Ms. Milam did not pay within 35 days is false, as there was no possibility that Selene would do so. Finally, Selene urges the court to find forfeited Ms. Milam’s time-value of money damages theory for her state law claims, but she alleged the lost use of money in her complaint and pointed to that allegation in the briefing below. And Selene does not argue that time-value of money is not a pecuniary loss under Illinois law. For those reasons, Selene’s efforts to defend

the decision below should be rejected, and the district court's order should be reversed.

## ARGUMENT

### I. Selene Has Failed to Show It Can Invoke the Lender's Rights under the Mortgage's Notice-And-Cure Provision.

Selene concedes that it is not a party to the Mortgage. Answering Br. at 27. And it concedes it is not mentioned in the Mortgage's notice-and-cure provision, which applies only to disputes between the "Borrower" and the "Lender." *Id.* at 17; A98 ¶ 20. Indeed, "Loan Servicer" is defined in the *same* section of the Mortgage that contains the notice-and-cure provision, yet the notice-and-cure provision is specifically limited to disputes with the "Lender," not the "Loan Servicer." A97-98 ¶ 20. That alone is sufficient to conclude that the notice-and-cure provision does not apply here. *See, e.g., Cruz v. Selene Finance, LP*, 2024 WL 5374001, at \*11 (S.D. Fla. Nov. 21, 2024) (rejecting application of identical provision to Selene because it "refers to disputes arising between the parties to the mortgage contract, not Loan Servicers"); *Schmidt v. Wells Fargo Home Mortg.*, 2011 WL 1597658, at \*3 (E.D. Va. Apr. 26, 2011) (concluding that virtually identical provision did not apply to dispute with servicer because it "bind[s] the borrower and the lender, not the borrower and the loan servicer"), *aff'd*, 482 F. App'x 868 (4th Cir. 2012); *see also* Opening Br. at 12-14.<sup>1</sup>

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<sup>1</sup> Selene does not address these cases, stating in a footnote the Court should ignore this argument because Selene "has never claimed to be the 'Lender'" and is instead an "assignee." Answering Br. at 21 n.3. That misses the point. Because the plain language of the notice-and-cure provision does not apply to Selene, Selene must show that it can somehow nonetheless invoke the provision. And these cases conclude, based on virtually identical mortgage language, that the loan servicer could not overcome the provision's limitation to claims against the lender.

According to Selene, the notice-and-cure provision applies to this dispute anyway because section 13 of the Mortgage states that “[t]he covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.” A96 ¶ 13; *see also* A11. Selene contends that when it began servicing Ms. Milam’s loan, it became an “assign” that could step into the shoes of the lender as to every “covenant[] and agreement” of the Mortgage, including the notice-and-cure provision. Answering Br. at 20-22. That is wrong. For one, Selene has not presented any evidence it was assigned rights from the lender. And to the extent there is a factual question about that, it should not be resolved on a motion to dismiss. For another, even if Selene was assigned some limited rights from the lender, that does not mean section 13 applies to it. Not only is Selene’s reading of section 13 not supported by the Mortgage’s text, it would lead to the absurd result of anyone delegated *any* single right under the Mortgage being able to act as the lender as to *every* provision of the Mortgage, taking away the lender’s ability to assign different rights to different entities.

**A. Selene Has Not Shown It Was Assigned the Lender’s Rights.**

Despite its entire argument hinging on the fact that it is an assignee of the lender, Selene has produced no evidence of such assignment. Instead, Selene relies on the allegation in the Second Amended Complaint (“Complaint”) that “Selene acquired the servicing rights” for Ms. Milam’s Mortgage, arguing that “is the only relevant factual predicate” necessary for Selene’s arguments. Answering Br. at 27. Not so. The Complaint alleges that Selene acquired servicing rights *from the previous servicer*. A26 ¶ 35; *see also* A125 (notice that the servicing of her loan was assigned to

Selene “from Select Portfolio Servicing, Inc.”). And it alleges that those servicing rights stem from the contract between the lender and the original servicer, not the Mortgage. A25 ¶ 31. Thus, the only assignment alleged here is the assignment of the previous servicer’s rights under its contract with the lender, not the lender’s rights under the Mortgage. That is not enough, as Illinois law requires at least *some* “proof” that the lender’s rights under the Mortgage were assigned to Selene. *Illinois Tool Works, Inc. v. Com. & Indus. Ins. Co.*, 962 N.E.2d 1042, 1048 (Ill. App. Ct. 2011).

For that reason, Selene’s reliance on *Giotta v. Ocwen Loan Servicing, LLC*, 706 F. App’x 421, 422 (9th Cir. 2017), is misplaced. There, the loan servicer *had* produced the contract between it and the lender, and the court concluded based on the specific language of that contract that the servicer was an “assign.” *Id.*; *see also Dominguez v. Selene Finance, LP*, 2024 WL 4504530, at \*5 (N.D. Cal. Oct. 15, 2024) (distinguishing *Giotta* and finding no assignment because “there is no evidence in the record of an assignment from the lender to Defendant”). Likewise, in *In re Ocwen Loan Servicing, LLC Mortgage Servicing Litigation*, this Court’s conclusion that a loan servicer was a “partial assign” was based on the factual finding that “the mortgagee in this case assigned some of the rights created by the mortgage contract” to Ocwen. 491 F.3d 638, 645 (7th Cir. 2007). Selene has pointed to no case holding, as the district court did here, that a loan servicer is an assign as a matter of law without proof of assignment.

Nor is it self-evident, as the district court concluded, that Selene is an assign because the Mortgage defines “Loan Servicer” as the entity that collects debts due

under the Mortgage. *See* A11, A4. Illinois law requires evidence of “the intent of the assignor to vest *ownership* of the subject matter in the assignee” that “describes the subject matter of the assignment with sufficient particularity to render it capable of identification.” *Cincinnati Ins. Co. v. Am. Hardware Mfrs. Ass’n*, 898 N.E.2d 216, 230 (Ill. App. Ct. 2008) (emphasis added). The definition of “Loan Servicer” does not clarify whether the lender intended to give Selene ownership of the debts or merely hire Selene to collect them, and neither does the letter notifying Ms. Milam of the change in servicers. *See Dominguez*, 2024 WL 4504530, at \*5 (concluding that letter stating Selene was authorized to collect debts on behalf of the lender did not mean as a matter of law that it was an “assign”). Moreover, even if the definition of “Loan Servicer” in the Mortgage *could* be evidence that Selene is an assign of the lender (and it is not), that at most creates a factual dispute with Ms. Milam’s allegation that Selene is not an assign, A27 ¶ 44, meaning that the “Rule 12(b)(6) motion must be denied.” *Mitchell v. Archibald & Kendall, Inc.*, 573 F.2d 429, 432 (7th Cir. 1978).

**B. Even As an Assign of Some Rights, Selene Cannot Automatically Benefit from All Provisions of the Mortgage.**

Even if it were true that the lender assigned the original servicer some rights under the Mortgage that were eventually assigned to Selene (and there is no evidence of that), it does not follow that Selene can automatically enforce the notice-and-cure provision. Selene argues that it is a third-party beneficiary of the Mortgage—though it does not use that term—because section 13 states that the lenders’ “successors or assigns” can “benefit” from all the “covenants and agreements” in the Mortgage. Answering Br. at 21-22. Under Illinois law, “[w]hether someone is a third-party

beneficiary depends on the intent of the contracting parties, as evidenced by the contract language.” *Martis v. Grinnell Mut. Reinsurance Co.*, 905 N.E.2d 920, 924 (Ill. App. Ct. 2009). Here, Selene assumes that, if it was assigned *any* right by the lender, it was intended to be included within the category “successors or assigns.” Answering Br. at 24. But, read as a whole, the language of the Mortgage indicates an intent to benefit new owners of the loan, not loan servicers like Selene.

The Mortgage specifically defines “Loan Servicer” as the entity that “collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations.” A97 ¶ 20. Nowhere does it identify the Loan Servicer as an “assign” of the lender or use the two words synonymously. To the contrary, it repeatedly refers to “a change of the Loan Servicer,” not an assignment. A97 ¶ 20. In the same section, the Mortgage explains that “[t]he Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times.” A97 ¶ 20. Unlike the description of a Loan Servicer, that provision describes an assignment: vesting “ownership” of the loan in a new entity. *Cincinnati Ins. Co.*, 898 N.E.2d at 229-30. Indeed, the reference to the Note is consistent with the rule under Illinois law that the Note, not the Mortgage, can be assigned. *See Moore v. Lewis*, 366 N.E.2d 594, 599 (Ill. Ct. App. 1977). In other words, when the Mortgage references an “assign” of the lender, it means the assignee of the lender’s ownership interest in the Note, and along with it, the Mortgage, not the separately defined Loan Servicer, which merely carries out “loan servicing obligations” on behalf of the lender.

Had the parties intended all provisions of the Mortgage to benefit loan servicers, they could have used the defined term “Loan Servicer” to make that intention clear. Instead, they did the opposite, referencing the section defining “Loan Servicer” only as an *exception*. A96 ¶ 13. As explained in Ms. Milam’s opening brief (at 14-16), that express reference to section 20 can be read to exempt loan servicers, or it can be read to exempt the notice-and-cure provision, which is also found in section 20. But even if it is read as Selene contends to mean only that, when the Note and Mortgage are assigned, the new owner need not take on loan servicing obligations held by an existing servicer, Answering Br. at 22-23, that exception makes sense only if “assign” means the new owner of the loan, not the loan servicer. Moreover, if, as Selene contends, loan servicers take on all the obligations of the lender under the Mortgage, then the new owner of the loan and the loan servicer would have the *same* obligations, making the exception separating the obligations of the owner and the loan servicer unnecessary. But distinguishing loan servicers from “assigns” harmonizes the exception by allowing for ownership rights to transfer to a new entity (the “assign”) while the loan servicer retains only its limited servicing obligations. Thus, read together, sections 13 and 20 support the conclusion that the phrase “successors and assigns” was not intended to benefit loan servicers and instead meant to benefit only entities to whom ownership of the Note and Mortgage was transferred.

That reading is also consistent with common sense. If it is true, as Selene contends, that any loan servicer who is assigned *any* right from the lender is now in the same position as the lender as to *every* provision of the Mortgage, that would lead

to an absurd situation in which the lender would have no control over which rights and duties it delegated: as soon as it assigned one right, by operation of section 13 the loan servicer acquired them all. *See Vill. of Kirkland v. Kirkland Props. Holdings Co.*, 206 N.E.3d 283, 290 (Ill. Ct. App. 2022) (contract “should be reasonably interpreted to avoid absurd results”), *aff’d* 221 N.E.3d 200. Selene’s reading is rendered all the more absurd by the use of the identical phrase “successors and assigns” in the provision transferring the borrower’s property interest to the lender. A89. It cannot be the case that, as soon as the lender hires a loan servicer, the borrower’s interest in the property is conveyed to that servicer in addition to the lender.

Selene’s argument that it is bound by and can benefit from every provision of the Mortgage is also directly contrary to its argument in other cases, and the holdings in those cases, that loan servicers do not have obligations to the borrower. *See, e.g., Aube v. Selene Finance, LP*, 2019 WL 7282019, at \*7 (D.R.I. Dec. 27, 2019) (agreeing with Selene’s argument that as loan servicer, it was not a party to the mortgage and thus “owed no implied duties to Plaintiff arising out of the mortgage contract” (internal quotation omitted)), *report and recommendation adopted by* 2020 WL 759306 (D.R.I. Feb. 14, 2020), *aff’d in relevant part*, 56 F.4th 1, 9 (1st Cir. 2022); *Silvester v. Selene Finance, LP*, 2021 WL 861080, at \*8 (S.D.N.Y. Mar. 8, 2021) (dismissing breach-of-contract claim against Selene because it “was not a party to the Mortgage, and simply acting as the loan servicer is insufficient to create privity of contract between the parties”). Selene argues that these cases are consistent with its

position because it is not arguing that it is a “party,” just that it can benefit from and is bound by every provision of the Mortgage. Answering Br. at 26. But Selene does not explain how it can be “bound” by the provisions of the Mortgage while arguing it is not liable for breaching them.

**II. This Dispute Is Not Covered by The Notice-And-Cure Provision Because It Does Not Arise Out of Actions Taken Pursuant to the Mortgage.**

As Ms. Milam explained in her opening brief (at 19-26), the district court erred in holding that her claims<sup>2</sup> fall within the scope of the notice-and-cure provision, which applies only to a “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.” A98 ¶ 20. Before bringing an action, the party must provide notice of “such alleged breach and afford[] the other party . . . a reasonable period after the giving of such notice to take corrective action.” *Id.*

Selene focuses on whether this dispute “arises from the other party’s actions pursuant to” the Mortgage, arguing that, because it was required by the Mortgage to send notice of default, the misleading statements in its letter were “actions pursuant to” the Mortgage. Answering Br. at 28. This Court should reject that attempt to “truncate[]” the notice-and-cure provision “by isolating” that language. *Colon v.*

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<sup>2</sup> Contrary to Selene’s contention, Ms. Milam argued in her Opening Brief that *none* of her claims arise from actions taken pursuant to the Mortgage. *See* Answering Br. at 27. The factual circumstances giving rise to each of her claims is the same, and the analysis of whether Selene’s actions “arise from” the Mortgage is the same.

*Nationstar Mortg., LLC*, 2015 WL 7422598, at \*2 (S.D. Fla. Nov. 17, 2015).<sup>3</sup> In *Colon*, the court interpreted identical language to conclude that a notice-and-cure provision did not cover a statutory claim because it was “circumscribed to breaches of provisions, and duties owed, within the Mortgage itself.” *Id.* As *Colon* explained, when read as a whole, the provision requires notice of “breaches” of contractual duties as to which the other party can take “corrective action,” not statutory violations. A98 ¶ 20; *see Colon*, 2015 WL 7422598, at \*2. Thus, because Ms. Milam’s claims “exclusively relate to a violation of the [FCRA and state law] and not a concomitant breach of the Mortgage,” she is “not contractually obligated to comply with the notice-and-cure provision.” *Colon*, 2015 WL 7422598, at \*2. *Colon* is not an outlier. Numerous courts, including those in this Circuit, have held that identical notice-and-cure provisions do not apply to statutory claims that are not based on duties required by the Mortgage. *See, e.g., Harrington v. Fay Servicing, LLC*, 2019 WL 4750140, at \*5 (N.D. Ill. Sept. 30, 2019) (collecting cases); *see also* Opening Br. at 23-25.

Additionally, requiring the action to be based on duties under the Mortgage makes sense, as it makes the opportunity to cure meaningful, rather than futile. *Harrington*, 2019 WL 4750140, at \*5. Here, the violations alleged in the Complaint occurred when Ms. Milam received the letter from Selene and believed she was about to lose her home. Nothing Selene did later could have undone that, and Ms. Milam would have been able to sue for the violation regardless of what steps Selene took to try to cure it. Selene argues that this case involves “curable conduct” because, if it

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<sup>3</sup> Though Ms. Milam cited *Colon* in her Opening Brief (at 22), Selene did not address it in its response.

were provided notice, it “could have assured Plaintiff that any foreclosure would be conducted in compliance with the law, including the 120-day requirement,” or it could have reminded her of her payment options to avoid foreclosure. Answering Br. at 30. But like the defendant in *Harrington*, Selene “cannot unring the metaphorical bell,” and it would still be liable for sending a misleading missive even if it later told Ms. Milam that it would not be foreclosing on her home within 35 days. *Id.* That “gap between the supposed ‘cure’ and [Selene]’s conduct highlights why . . . Selene was not acting ‘pursuant to’ the mortgage agreement.” *Id.*

Selene contends that Ms. Milam’s reading renders the “arises from” clause superfluous because only breach-of-contract claims would be covered, and those claims are already covered by the second clause that applies to contractual breaches. Answering Br. at 29-30. Not so. The phrase “actions pursuant to the Mortgage” encompasses not only actions taken in breach of the Mortgage but also actions explicitly *authorized* by the Mortgage. And there are plenty of actions that are authorized by the Mortgage but could violate the law. For example, in *Rodriguez v. Rushmore Loan Management Services LLC*, 2019 WL 423375, at \*2 (N.D. Ill. Feb. 4, 2019), the plaintiff alleged that the defendant had threatened to impose late fees prohibited by law. But the Mortgage authorized the late fees, so the imposition of late fees was an action pursuant to the Mortgage to which the notice-and-cure provision’s “arise from” clause applied, making that clause not superfluous. *Id.* at \*3.

In *Harrington*, by contrast, FDCPA claims were not subject to the notice-and-cure provision because the unlawful debt collection tactics at issue were neither

authorized by the Mortgage nor in breach of it. 2019 WL 4750140, at \*4. *Harrington* acknowledged that the servicer would not be collecting the debt if the debtor had not defaulted on his obligations under the mortgage, but it found that the tactics the servicer used to collect that debt were nowhere specifically authorized by the mortgage. *Id.* Here, as in *Harrington*, the Mortgage did not authorize Selene’s debt collection tactic—misrepresenting the timeline for acceleration and foreclosure—even though it likely would not have used that tactic if Ms. Milam had not defaulted in the first place. Because the Mortgage authorized Selene only to provide notice of default and an opportunity to cure it, Ms. Milam’s claims for Selene’s misleading tactics do not arise out of its “actions pursuant to” the Mortgage.

Finally, the notice-and-cure provision should not be interpreted broadly because it refers to “any judicial action.” Answering Br. at 19. Though “any” can be interpreted expansively, it is accompanied by limiting phrases that must be interpreted according to their plain meaning. A98 ¶ 20. And, as described above, that plain meaning limits covered judicial actions to those for breaches of the agreement or based on actions authorized by the agreement. If anything, the notice-and-cure provision should be interpreted narrowly to avoid barring plaintiffs from exercising their statutory rights.

### **III. The Notice-And-Cure Provision Is an Unenforceable Waiver of Ms. Milam’s Statutory Rights.**

In response to Ms. Milam’s argument that the notice-and-cure provision is unenforceable because it waives her substantive statutory rights, Selene cites an arbitration case to argue that agreements that merely change the forum in which a

party vindicates their statutory rights are still enforceable. *See* Answering Br. at 31-32 (citing *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265-66 (2009)). That does not help its case. First, and most obviously, the notice-and-cure provision here does not require Ms. Milam to vindicate her statutory rights in a different forum; it prevents her from vindicating them at all. When a court enforces an arbitration provision, the plaintiff can still bring her substantive claims in a different forum. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). But here, if the Court enforces the notice-and-cure provision, Ms. Milam will be barred from bringing her claims altogether. When the effect of a contractual provision (including an arbitration provision) is to prevent a plaintiff from pursuing statutory rights, courts refuse to enforce it. *See, e.g., Am Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 235 (2013) (explaining that courts will invalidate “arbitration agreements that operate as a prospective waiver of a party’s *right to pursue* statutory remedies” (cleaned up) (emphasis in original)); *Smith v. Bd. of Dirs. of Triad Mfg., Inc.*, 13 F.4th 613, 621-22 (7th Cir. 2021) (invalidating arbitration agreement that acted as a “prospective waiver of a party’s right to pursue statutory remedies” under ERISA). As *Harrington* explained,

It is one thing to overlay contractual requirements that do not in effect extinguish a federal claim, such as agreeing to arbitrate an FDCPA or Title VII claim. It is quite another for a lender . . . to require that it be given a chance to “cure” a federal statutory violation before a suit’s filing.

*Harrington*, 2019 WL 4750140, at \*4 n.5; *see also Abercrombie v. Wells Fargo Bank, N.A.*, 417 F. Supp. 2d 1006, 1008 (N.D. Ill. 2006) (distinguishing arbitration cases

because “they do not concern the statute’s substantive requirements,” while notice-and-cure provision would bar substantive claims).

Moreover, the case law cited by Selene is from a unique context: interpreting and enforcing the Federal Arbitration Act (FAA), which mandates enforcement of arbitration agreements. In those cases, courts are weighing the FAA against the federal statute under which the plaintiff is suing and looking to harmonize them. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987). There is no analogous statutory provision requiring the enforcement of notice-and-cure provisions to balance against Congress’s well-reasoned judgment that consumers like Ms. Milam should be protected from abusive debt collection practices through the FDCPA. *See* 15 U.S.C. § 1692(e) (stating that the purpose of the FDCPA is to “eliminate abusive debt collection practices”). As a result, courts in this Circuit hold that notice-and-cure provisions cannot be enforced to bar plaintiffs from vindicating important consumer protections. *See Abercrombie*, 417 F. Supp. 2d at 1008; *Browning v. TransUnion LLC*, 2025 WL 524206, at \*4-5 (S.D. Ind. Feb. 18, 2025).

Selene also argues that the notice-and-cure provision should be enforced to bar Ms. Milam from vindicating her rights because “complying with the notice-and-cure provision is trivially easy for Plaintiff to do.” Answering Br. at 33. But that ignores that consumers are unlikely to be aware of the notice requirement, which is buried in the twentieth paragraph of the Mortgage. And even if a consumer did read the provision, it is far from clear that it requires notice in this situation. *See* sections I,

II, *supra*. The average consumer is simply not going to understand that a provision requiring notice to the “Lender” of suits against the “Lender” actually requires notice to the loan servicer of a suit against the loan servicer based on a strained interpretation of the phrase “successors and assigns” in a separate provision of the Mortgage. Nor would a consumer be able to assess whether a loan servicer was in fact an “assign” of the lender without access to the documents evidencing assignment. In Selene’s draconian view, if a consumer reasonably interprets the notice-and-cure provision to not require notice to the loan servicer, they are forever barred from vindicating their rights in court. That has no basis in the law.

In essence, Selene contends that through this convoluted contractual language, it can unilaterally add an element that Ms. Milam must prove to avoid dismissal. That is especially problematic in the class context, where each individual class member will be required to show they provided notice before they can “join, or be joined to any judicial action.” A98 ¶ 20; Opening Br. at 29-30. Selene asserts that this court should not consider the barriers that the notice-and-cure provision poses to class actions, as class certification merely “depends on the criteria in” Rule 23. Answering Br. at 34. But “the right to seek classwide redress is more than a mere procedural device.” *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 274 (Ill. 2006) (internal quotation omitted). Because “aggrieved persons may be without any effective redress unless they may employ the class action device,” it affects the vindication of substantive rights. *Id.* (quoting *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 339 (1980)).

Here, Selene’s use of the notice-and-cure provision turns the requirements of Rule 23 on their head, erecting a barrier to Ms. Milam and the class obtaining “effective redress” for their claims. Rule 23 provides for an opt-out class mechanism in which class members are notified for the first time *after* the class is certified. *See generally* Fed. R. Civ. P. 23. The notice-and-cure provision would undermine that fundamental feature of the Rule by excluding anyone from the class who did not *already* know about their claims and provide notice. Indeed, it is not clear from the provision how and when a class member is supposed to provide notice: before the named plaintiff files the case? Before a class is certified? And any notice after the suit is filed would be pointless because the complaint would have already notified Selene of the violation. Thus, the only effect of applying the notice-and-cure provision to class claims is to frustrate the vindication of statutory rights, undermining the FDCPA’s purpose to allow consumers to hold debt collectors accountable, including through class actions. *See* 15 U.S.C. § 1692k(a)(2)(B), (b).

Finally, Selene does not dispute that the FDCPA’s statute of limitations is “a non-waivable substantive right.” *Logan v. MGM Grand Detroit Casino*, 939 F.3d 824, 831 (6th Cir. 2021); *see* Answering Br. at 33-34. Instead, it argues that the notice-and-cure provision does not shorten the statute of limitations. Answering Br. at 33. It does. *See* Opening Br. at 28-29. Rather than the statutory one-year period, the notice-and-cure provision gives a consumer less than a year to learn of a violation and sue because they must leave time to send notice by mail and wait a “reasonable period,” whatever that means, for a response. A98 ¶ 20. Even if that process is

relatively short, it still means that some consumers will be prevented from filing claims that would be timely under the statute. Thus, the notice-and-cure provision acts as a waiver of consumers' substantive rights under the FDCPA.

**IV. The Court Should Reject Selene's Alternative Ground for Affirmance Because Ms. Milam Plausibly Alleged That the Letter from Selene Was Misleading.**

Selene next urges this Court to affirm the decision below on the alternative ground that its letter to Ms. Milam was not misleading as a matter of law. That request should be rejected. The district court did not rule on whether the letter is deceptive and, “[a]s a general rule,” this Court does “not consider issues not passed upon below.” *AAR Int’l, Inc. v. Nimelias Enters. S.A.*, 250 F.3d 510, 523 (7th Cir. 2001). That principle of respect for district-court decision-making is especially applicable here: There has yet to be any discovery that may bear directly on whether the letter is misleading, and in this Circuit, “complaints alleging misleading communications” under the FDCPA are “rarely subject to dismissal for failure to state a claim” because “whether a communication is false, deceptive, or misleading under the FDCPA is a question of fact.” *Johnson v. Enhanced Recovery Co., LLC*, 961 F.3d 975, 980 (7th Cir. 2020).

But if this Court reaches the alternative ground asserted by Selene, it should conclude that Ms. Milam has sufficiently pled the letter is deceptive. The letter, dated April 17, 2023, advises Ms. Milam that her mortgage loan is in default, provides a “total amount [she] must pay to cure [the] default” (\$3,692.58), and then states:

The total amount you must pay to cure the default stated above must be received by 05/22/2023. Failure to cure the default on or before the date specified may result in

acceleration of the sums secured by the Security Instrument, sale of the property and/or foreclosure by judicial proceeding and sale of the property.

If you have not cured the default within thirty-five (35) days of this notice, Selene, at its option, may require immediate payment in full of all sums secured by your Security Instrument without further demand or notice, and foreclose the Security Instrument by judicial proceeding and sale of the property and/or invoke the power of sale or any other remedies permitted by applicable law, and/or as provided within your Security Instrument.

...

If you send an amount less than the full amount due, Selene can apply the amount received to your account and proceed with the applicable foreclosure proceedings, without further notice to you.

A70-71; A20 ¶ 4. Read through the eyes of an “unsophisticated consumer”—an individual who is “uninformed, naïve, and trusting, but has rudimentary knowledge about the financial world”—the letter is misleading in violation of the FDCPA and state law. *O’Boyle v. Real Time Resols., Inc.*, 910 F.3d 338, 344 (7th Cir. 2018) (citation omitted). The letter informs Ms. Milam that she “must pay” the total amount within 35 days to avoid acceleration of her loan and foreclosure of her property, but Selene is barred by federal law and its own internal practices from foreclosing before a debt is at least 120 days delinquent, rendering false the letter’s representations regarding the timing of acceleration and foreclosure. *See* A20-22 ¶¶ 5-11.<sup>4</sup>

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<sup>4</sup> Selene argues that the Fannie Mae Servicing Guide cited by Ms. Milam is “irrelevant because Fannie Mae does not own Plaintiff’s mortgage.” Answering Br. at 41. But Selene does not dispute that it is subject to the federal regulation requiring the 120-day timeline. *See* 12 C.F.R. § 1024.41(f)(1)(i); A84:11-14. That regulation is promulgated under the Real Estate Settlement Procedures Act of 1974, which covers “federally related mortgage loans,” 12

In arguing that the letter is not deceptive, Selene points to its use of the word “may”: it “*may* require immediate payment . . . and foreclose the property” if the recipient does not pay the full amount within 35 days. A70-71 (emphasis added). But using a permissive “may” instead of a mandatory “will” doesn’t change that the statement is literally false: a company representative testified in a similar case that Selene’s practice is to *never* accelerate or begin foreclosure until the loan is at least 120 days past due, *see* A20-21 ¶¶ 6-8, and federal law prohibits it from foreclosing until the loan is at least 120 days delinquent, *see* A21-22 ¶ 9; A84:11-14. In other words, Selene may *not* foreclose if the borrower does not cure the default within thirty-five days, and if the borrower fails to meet the deadline represented in the letter, “nothing happens at all.” A64 ¶ 271. Someone of “modest education and limited commercial savvy” would conclude—at the very least—that Selene *could* accelerate their debt and foreclose if they failed to cure the default within 35 days of receiving the letter, resulting in exactly the type of deception the FDCPA seeks to avoid. *O’Boyle*, 910 F.3d at 344.

The falsity of the letter’s statements alone makes many of the cases upon which Selene relies inapposite because in those suits, the caveats at issue rendered the representations in each letter literally true. *See* Answering Br. 36-38 (citing *Dunbar v. Kohn Law Firm, SC*, 896 F.3d 762, 765 (7th Cir. 2018) (letter’s statement that a

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C.F.R. § 1024.5(a), including loans “intended to be sold by the originating lender to the Federal National Mortgage Association” (Fannie Mae), *id.* § 1024.2(b). Ms. Milam alleges “Selene services mortgages for residential housing loans owned, *backed*, or *controlled*” by Fannie Mae, “including the mortgage on Plaintiff’s home and the homes of putative class members,” A27 ¶ 47 (emphasis added).

settlement “may have tax consequences” was “literally true,” even though the plaintiff owed no taxes); *Taylor v. Cavalry Investment, LLC*, 365 F.3d 572, 574-75 (7th Cir. 2004) (letter stating “if applicable, your account may have or will accrue interest at a rate specified in your contractual agreement with the original creditor,” was still true even where creditors “did not add interest”); *Johnson*, 961 F.3d at 979-80, 983 (notice that a delinquent account “may” be reported, where the account had already been reported, accurately “convey[ed] a future possibility” of reporting)).

On the other hand, this Court has concluded that, in the context of the FDCPA, “it is impermissible for a creditor to make a ‘may’ statement about something that is illegal or impossible.” *Heredia v. Cap. Mgmt. Servs., L.P.*, 942 F.3d 811, 814-16 (7th Cir. 2019). For example, *Boucher v. Finance System of Green Bay, Inc.*, 880 F.3d 362 (7th Cir. 2018), held that advising a consumer that the imposition of charges “may” change the total amount due was misleading where the debt collector could not legally impose such charges. *Id.* at 367. A letter that “falsely implies a possible outcome” that “cannot legally come to pass,” this Court explained, is “misleading to an unsophisticated consumer because this is not the type of legal knowledge we can presume the general public has at its disposal.” *Id.* (cleaned up). Likewise, *Heredia* held that a statement that the creditor “may file a 1099C” tax form was misleading where the creditor had a policy of not filing the form if not required by the IRS, and it was not required for the debtors in that case. 942 F.3d at 816-17. This Court explained that whether a 1099C form would need to be filed was “information within the knowledge of the creditor,” while the debtor “may have a difficult time”

ascertaining whether the form would need to be filed. *Id.* at 815-16. Particularly given that imbalance of information, it was misleading for the creditor to say it “may” file the form “when it never would.” *Id.* at 816-17.

The same applies here: the letter requires a consumer to either know Selene’s internal policies or independently investigate the contours of mortgage regulations to discern the falsity of the timeline represented in the letter, making it deceptive to an unsophisticated consumer. *See also Lox v. CDA, Ltd.*, 689 F.3d 818, 823, 825-26 (7th Cir. 2012) (concluding that a letter that stated the creditor “could” eventually recover “costs and attorney fees” “if” the creditor filed suit violated the FDCPA where attorneys’ fees could not have been awarded).

The letter’s generic clauses providing that Selene will act in accordance with “applicable” law further confuse the truth. Answering Br. at 42. That boilerplate directly contradicts 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 do so. A21 ¶ 9; A28 ¶ 51. 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; *see also Johnson v. Revenue Mgmt. Corp.*, 169 F.3d 1057, 1060 (7th Cir.1999) (concluding that the failure to explain an apparent contradiction can induce confusion).

Selene argues that Ms. Milam's position somehow requires it to affirmatively state its compliance with every FDCPA regulation that could possibly apply to the transaction at issue. Answering Br. at 43.<sup>5</sup> But Ms. Milam's claims are not based on deception by omission; they're based on affirmative misrepresentations regarding the timeline of acceleration and foreclosure. To avoid drafting a letter that violates the FDCPA and Illinois law, Selene could have accurately conveyed the applicable timeline for acceleration and foreclosure, or even simpler, notified her of the default without threatening foreclosure at all. Selene sent these letters to "intimidate borrowers into making payments to Selene" "beyond what is necessary to avoid acceleration and save their homes from foreclosure." A22 ¶ 11. Should this Court reach this ground, it should conclude that Ms. Milam has sufficiently pled that the false statements in Selene's letter render it deceptive in violation of the FDCPA and Illinois law.

**V. The Argument That Ms. Milam Suffered Actual Damages Because She Was Deprived of the Use of Her Money Is Not New and Is Supported by the Case Law.**

Selene contends that Ms. Milam forfeited the argument that she suffered pecuniary loss because she was forced to use money that she could have saved or spent on other things to pay Selene within 35 days, thus depriving her of the time-value of money. *See* Opening Br. at 32. But the Complaint alleges that, "[a]s a result of Selene's letter, Plaintiff paid money that would have gone to other sources towards

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<sup>5</sup> Selene's argument that its notice was "consistent with the mortgage," misses the point. Answering Br. at 39. That the Mortgage requires notice of default to the borrower, *see* A99 ¶ 22, doesn't authorize Selene to unlawfully misrepresent material information in that notification. *See also* section II, *supra*.

her balance with Selene.” A36 ¶ 102. And in her opposition to Selene’s Motion to Dismiss, she pointed to that paragraph of the Complaint and argued that was sufficient to allege actual damages under Illinois case law. *See* A142. There was no requirement that Ms. Milam use the exact phrase “time-value of money”: she preserved the argument that she lost the use of money that she was forced to pay toward her balance with Selene. *See United States v. Marrocco*, 578 F.3d 627, 637 n.13 (7th Cir. 2009) (holding that party did not forfeit argument even though it “failed to use the exact term”).

Not only does Selene admit there is no decision under Illinois law foreclosing time-value of money as a pecuniary loss, Answering Br. at 46, it does not even advance an argument for why it is *not* a pecuniary loss, *id.* That failure is telling: courts, including this one, routinely find that time-value of money is a pecuniary loss. *See, e.g., Diffenbach v. Barnes & Noble, Inc.*, 887 F.3d 826, 829 (7th Cir. 2018) (holding that lost use of money for three days was sufficient to show damage under California statute requiring showing of “economic injury”); *In re U.S. Off. of Pers. Mgmt. Data Sec. Breach Litig.*, 928 F.3d 42, 66 (D.C. Cir. 2019) (holding that “the foregone time value of [] money” was “an actual, tangible pecuniary injury” for the purposes of statute requiring proof of “actual damages”); *Kesten v. Ocwen Loan Serv., LLC*, 2012 WL 426933, at \*6 (N.D. Ill. Feb. 9, 2012) (holding that plaintiff had pleaded “actual damages” under Illinois law based on “the time-value of money” theory); *see also Habitat Educ. Ctr. v. U.S. Forest Serv.*, 607 F.3d 453, 457 (7th Cir. 2010) (“Every day that a sum of money is wrongfully withheld, its rightful owner loses the time value of

the money,” and thus suffers injury.). The district court therefore erred in dismissing these claims without considering the lost use of Ms. Milam’s money, particularly at the motion to dismiss stage when the damages allegations in the Complaint must be “construe[d] [] in the light most favorable to the nonmoving party.” *Sevugan v. Direct Energy Servs., LLC*, 931 F.3d 610, 612 (7th Cir. 2019).

### CONCLUSION

For the foregoing reasons, the Court should reverse the district court’s order dismissing Ms. Milam’s claims.

Dated: July 31, 2025

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

This document complies with the type-volume limit of Cir. Rule 32(c) because, excluding the parts exempted by Fed. R. App. P. 32(f), it contains 6,958 words. This document complies with the typeface and type-style requirements of Cir. Rule 32(b) and Fed. Rs. App. P. 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced type that is 12 points in the body of the brief and 11 points in footnotes, and it is set in a plain, roman style, excepting italics occasionally used for emphasis.

Dated: July 31, 2025

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